THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 570/2009

In the matter between:

THE MINISTER OF SAFETY AND SECURITY Appellant

and

PAUL JOHANNES VENTER First Respondent
CHRISTA VAN WYNGAARDT Second Respondent
CHRISTA VAN WYNGAARDT NO Third Respondent

Neutral citation: *Minister of Safety and Security v Venter* (570/09) [2011] ZASCA 42 (29 March 2011)

Coram: Mpati P, Cachalia and Majiedt JJA

Heard: 23 February 2011

Delivered: 29 March 2011

Summary: Delict – action for damages – failure of police to inform complainants of the provisions in the Domestic Violence Act – constituting negligence which caused complainants harm when they suffered an unlawful attack on them – complainants found to be contributorily negligent.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mynhardt J sitting as court of first instance).

(1) The appeal is dismissed except to the extent indicated in this order.

(2) The appellant is to pay the costs of the appeal including the costs of two counsel.

(3) The order of the court below is set aside and is replaced by the following:

'(a) It is declared that the defendant is liable to pay to the first and second plaintiffs 75 per cent of such damages as they are able to prove or as may be agreed upon.

(b) The defendant is ordered to pay the first and second plaintiffs' costs, including the costs consequent upon the employment of two counsel.

(c) The third plaintiff's claim is dismissed with costs.'

JUDGMENT

MAJIEDT JA (MPATI P, CACHALIA JA concur):

[1] This is an appeal against a judgment of Mynhardt J in the North Gauteng High Court holding the Minister of Safety and Security liable for damages suffered by the respondents because of the negligent failure by members of the South African Police Service (SAPS) to perform their statutory duties under the Domestic Violence Act 116 of 1998 (the Act). The appeal is with the leave of the court below.

[2] The incident giving rise to the cause of action occurred on 21 October 2002, when Mr Cornelius Whitey van Wyngaardt (Whitey) raped his erstwhile

wife, Ms Christa van Wyngaardt, the second respondent, (Christa) and then shot and injured Mr Paul Johannes Venter, the first respondent (Venter). Whitey was later arrested by the SAPS. He committed suicide whilst in police custody.

[3] The events preceding the incident are largely common cause. The second respondent was married to Whitey. Two children were born of their marriage. The first respondent and his wife were friends and frequent visitors to the Van Wyngaardt home. Both marriages ended and after Venter's wife left him, Christa moved into Venter's home with her children.

[4] Whitey initially had no difficulty with this arrangement; in fact he encouraged it. There was no suggestion at the time of any romantic connection between Christa and Venter. However, the nature of their relationship changed and became more intimate after she moved in with him. This caused Whitey to become jealous. Later his behaviour became compulsive. He made incessant telephone calls, sent abusive text messages to her and threatened to set their house on fire and kill them.

[5] As a result of Whitey's increasingly erratic and threatening behaviour Venter approached the Brakpan police station during June 2002 to seek advice on how he could deter Whitey from coming to his house. They told him that they could only act if Whitey physically tried to enter the house.

[6] At about the same time Venter, accompanied by Christa, also approached the Brakpan Magistrate's Court to find out how he could obtain an interdict to prevent Whitey from entering his property. He was informed that he had to obtain a case number from the police before he could take the matter further. The respondents did not, however, pursue this course. As will become apparent later in this judgment, the appellant contends that even had the SAPS advised the respondents of their remedies under the Act they would probably not have pursued any of these remedies – just as they had not done with the interdict.

[7] On 27 July 2002 Whitey arrived at the respondents' house. Venter telephoned the police for assistance. They arrived promptly. However, Whitey persuaded them that he had merely come to fetch his children, which he was entitled to do in terms of the divorce decree that granted him access to them. In these circumstances the police were constrained to permit him to take the children with him. This distressed the respondents. They felt that Whitey had manipulated the situation to his advantage.

[8] Whitey's conduct became even more threatening after this incident prompting Venter to approach the Brakpan police again on 20 August 2002. This time he had prepared a statement in Afrikaans with details of Whitey's threatening behaviour against Christa, the children and him personally. The statement contained a paragraph which, translated loosely, said that he did not wish the police to conduct any investigation against Whitey, but to prevent him from entering their property. However, the police officer who was on duty told him that the police could not assist him, and nothing came of this complaint.

[9] Whitey's conduct continued unabated. On 11 October 2002 he collected the children from the respondents' house and, shortly afterwards, he telephoned Christa. This time he threatened to kill the children and himself should she go to the police. He wanted her to return to him.

[10] In response to this threat the respondents hurried to the police for assistance. They reported to an Inspector de Koker who was sceptical that they had a case. He initially would not take a statement from them and relented only after Venter telephoned his attorney who spoke to De Koker and tried to persuade him to act on the complaint. This intervention, and that of a Captain Abrahams, caused De Koker to open a case docket. De Koker, however, remained reticent and only took down a brief unattested statement from Christa.

[11] It appears from the evidence that, pursuant to the complaint, Christa had a telephonic conversation with a Sergeant Naude the following day and

requested the latter not to contact Whitey on his telephone because the children were still with him. The following day, on 13 October, Whitey allowed the respondents to collect the children. They did so and later informed Naude that the children were home. In the days immediately following this incident nothing came of their complaint, despite Christa's request in her statement that the matter be investigated.

[12] This brings me to the events of 21 October 2001. Whitey arrived at the repondents' house unexpectedly. He had telephoned Christa the previous day and requested that they meet, but no date was set for this meeting. Christa was alone at home with their four year old child. She was hesitant to let him in but decided to open the door for him because she realised that he would have seen his daughter through the open windows and curtains. He entered and said ominously that it was 'elimination day'. She asked what he meant. He replied that she would soon find out. He told her to accompany him to his car. She did. He then took out a crossbow and a set of handcuffs from the boot. He told her that he was going to kill Venter with the crossbow when he returned and that he would use the handcuffs to handcuff her to the bed.

[13] They entered the house and he proceeded to use the crossbow to shoot at and damage several items in the house. While doing this he told her to go to the bedroom and undress. He threatened to cause even further damage if she did not obey. She complied. He followed her and began scratching around one of her wardrobes. He found Venter's firearm which is usually hidden in a safe but had been kept in the bedroom so that Christa could protect herself from her erstwhile husband. The discovery of the firearm seemed to spur on the intruder. He then raped her.

[14] Some time later they collected the other child from school on Whitey's insistence. They took both children to Christa's sister's home. Whitey did not want the children to be at home when Venter returned from work.

[15] They returned to the respondents' home and waited for Venter to return. According to Venter, he had received a telephone call from Christa's

mother earlier. She told him that she had phoned Christa and feared that something was wrong. He also tried to telephone Christa but there was no response. He then decided to go home to investigate. He arrived home at about 15h00 and saw Whitey's car parked outside. This heightened his anxiety. He walked to the front door and tried to open it, but was not able to because it was locked. He then walked to one of the side windows where he saw Christa. She began screaming while trying to warn him to run away.

[16] Fearing that both children were inside with Christa and Whitey he instinctively tried to gain entry through the front door by force. Whitey fired a shot through the door. The bullet struck him on his arm. He then tried to flee but Whitey pursued him by car and fired more shots at him. Fortunately he found a place to hide. The police arrived shortly afterwards and arrested Whitey. Two days later he apparently committed suicide in the police cells.

[17] The respondents sued the Minister of Safety and Security for damages based on the failure of the police to perform their legal duty to assist the respondents to take steps to protect themselves under the Act. The appellant does not dispute that the Act imposes a legal duty to take steps to protect the respondents in the circumstances of this case. Nor does he dispute that the police were negligent in failing to assist the respondents in accordance with the Act's provisions. It is however contended that the respondents failed to prove that such negligence caused their damages, because they would probably not have taken steps to protect themselves even if the police had assisted them or, at the very least, that their own negligence contributed to what happened.

[18] It is important to understand the ambit of the legal duty that the police owed to the respondents. The Act and the National Instructions on Domestic Violence[1] (the Instructions) require the police to advise persons of their rights and to assist them in asserting these rights, where necessary.

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[1]Issued by the National Commissioner of SAPS and published in *GG* 20778 30 December 1999.

[19] The Act contains a panoply of rights and remedies available to victims of domestic violence that is derived from the constitutional duty imposed on the State by s 12(1) of the Constitution to protect the right of everyone to be free from private or domestic violence.[2] The preamble to the Act declares that its objective is to 'afford the victims of domestic violence the *maximum protection from domestic abuse that the law can provide'* (italics added). To this end Parliament introduced measures to ensure that the relevant organs of State (including the SAPS) give full effect to the provisions of the Act.

[20] Section 2 imposes a duty to assist and inform complainants of their rights under the Act. It reads as follows:

'2. Duty to assist and inform complainant of rights – Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported–

(a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;

(b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and

(c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.'

[21] Section 7 sets out the procedure for obtaining a protection order and the wide-ranging powers that a court has to issue one. Of relevance to this case is the power to restrain a respondent from entering a complainant's place of residence,[3] or prohibit any emotional, verbal and psychological abuse, intimidation, harassment and stalking.[4] A court may also refuse a respondent contact with a child or permit it subject to suitable conditions.[5]

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[2] *S v Baloyi (Minister of Justice & another intervening)* 2000 (2) SA 425 (CC), 2000 (1) SACR 81; 2000 (1) BCLR 86 para 11. See also: *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust as amicus curiae)* 2003 (1) SA 389 (SCA); [2002] 4 All SA 346 para 13.

[3] Section 7(1)(e).

[4] Section 7(6).

[5] Section 7(1)(a).

[22] A breach of a protection order is an offence, which carries a penalty of a fine or period of imprisonment for a period not exceeding five years or both such fine and imprisonment.[6] Where threats of death or injury have been made and where a respondent's state of mind or mental condition warrants it, a court *must* order seizure of any arm or dangerous weapon in the possession of or under the control of a respondent.[7]

[23] The Instructions provide guidelines to members of the SAPS on how to respond to complaints. Paragraph 3(5) requires station commissioners to ensure that copies of the Act, the Regulations, the Instructions, station orders issued by the station commissioner[8] and a list of relevant role players[9] are available at all times at a police station. Paragraph 3(6) requires a station commissioner to issue orders to members on how to assist complainants to access services provided by these role players or any other aspect concerning domestic violence.

[24] On receipt of a domestic violence complaint wide-ranging duties are imposed on both the station commander[10] and the member receiving the complaint.[11] These include the duty to investigate a complaint and to collate all information in connection with it.[12] Paragraph 7 sets out the various duties imposed on members. There is also a duty to render general assistance to a complainant. Specific assistance that must be provided includes, inter alia, the responsibility imposed on a member to open a docket and to register it for investigation where a complaint is made and, where no complaint is made, to assist a complainant to make such a complaint. This assistance must be recorded in the occurrence book and in the member's pocketbook. A Notice, attached as Form 1 to the Regulations, must be handed to a complainant in the language of his or her choice.[13] That Notice details a complainant's right to lay a charge or to apply for a protection order or to do both. The complainant

[6]Section 17.
[7]Sections 9(1)(a) and (b).
[8]Para 36(6).
[9]As set out in para 3(1).
[10]Para 4.
[11]Para 5.
[12]Para 5(2)(d).
[13]Para 10.

must be informed that it is not necessary to lay a charge before applying for a protection order. The difference between the remedies must be explained. A charge is aimed at securing a conviction of an accused whereas the purpose of a protection order is to prevent future misconduct.

[25] The respondents contend that had they been aware of and understood their rights under the Act – in particular their right to apply for a protection order – they would have taken the appropriate steps to protect themselves. As I have mentioned earlier the appellant's response is that they have not established that they would have. This is the nub of the dispute.

[26] In support of its contention the appellant points to the respondents' failure to pursue their remedy to obtain a common law interdict against Whitey in the magistrate's court. It will be recalled that Venter was advised that he needed to obtain a case number before he could get the interdict. But he and Christa did not do anything further. In this regard what also counts against them is that in their further particulars they denied that they had approached any court to obtain a common law interdict and had to recant during cross-examination. They were subjected to extensive cross-examination on this issue. One of the reasons that they did not pursue the common law remedy was because they were afraid that this could 'push him over the edge' as Christa put it. Another reason advanced was that their subsequent visits to the police – particularly their encounter with De Koker – led them to believe that it was futile to try to do anything about Whitey's conduct. They were however driven to concede that they could have applied for an interdict. To this I should add that Venter had previously relied on the services of an attorney when he had problems in trying to convince De Koker to act on his complaint. If he had consulted his attorney he may well have been advised that he could obtain a protection order under the Act. A common law interdict would conceivably have afforded them some relief, namely to prohibit Whitey from access to their property. A protection order would, as set out above, have afforded them more wide ranging relief.

[27] It is abundantly evident that the Act and Instructions afford complainants wide ranging remedies and impose extensive duties on SAPS members to assist complainants in accessing these remedies. The Act and its predecessor, the Prevention of Family Violence Act,[14] were specifically enacted to deal effectively with family violence, since the criminal justice system was palpably unable to do so.[15] This legislation is similar to that in other parts of the world.[16] The extensive protection available under the Act would be meaningless if those responsible for enforcing it, namely SAPS members, fail to render the assistance required of them under the Act and the Instructions. The legislature clearly identified the need for a bold, new strategy to meet the rampant threat of ever increasing incidences of domestic violence. Its efforts would come to nought if the police, as first point of contact in giving effect to these rights and remedies, remain distant and aloof to them, as the facts of this case appear to suggest.

[28] This court has in a long line of cases laid down the test for causation in delict, which consists of two legs, namely factual and legal causation.[17] Factual causation is to be determined by application of the 'but for' test. The evidential hurdle to be crossed by a plaintiff is not required to be established with certainty ─ a plaintiff need only establish that the wrongful conduct was probably a cause of the loss. This, said Nugent JA in *Minister of Safety and Security v Van Duivenboden*, 'calls for a sensible retrospective analysis of, what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics'.[18]

[29] In the high court the learned judge found that the evidence had established that the police's failure to advise the respondents of their

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[14]133 of 1993.
[15]*Omar v Government of the Republic of South Africa & others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC) para 14.
[16]See, for instance, the Domestic Violence Act of 1995 of New Zealand; the Family Law Act, 1996 of the UK; the Domestic Violence Act of 1996 of Ireland and the Domestic Violence Protection Act of 2000 of Ontario.
[17]See, for example, *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34, *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-701F; *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 22.
[18]Para 24.

remedies under the Act was the critical cause for why they had not pursued this course. He reasoned thus:

‘Ek is daarvan oortuig op die getuienis dat die gebrek aan inligting ‘n wesenlike, indien nie ‘n deurslaggewende, rol gespeel het in die besluit om nie hierdie aangeleentheid verder te voer nie. Ek het pertinent verwys na die wye bevoegdhede wat die Wet verleen aan ‘n hof om ‘n gesinsinterdik te verleen en wat die inhoud daarvan kan wees. Veral na die gebeure van 11 Oktober 2002, meen ek dat op die waarskynlikhede, as die eisers geweet het dat Whitey se regte miskien ingekort kan word, wat kontak met die kinders betref, dat dit vir hulle moontlik ‘n uitkoms ook sou kon daargestel het en dat hulle dan positiewe optrede sou geneem het in ‘n poging om daardie hulpmiddel te bekom.

Ek meen dat op die getuienis en die waarskynlikhede, die feit dat hulle nie daardie inligting gehad het nie, ‘n belangrike, indien nie deurslaggewende, rol gespeel het dat hulle dit nie weer verder self opgevolg het nie.

Mnr Van der Merwe se betoog was dat vir die redes deur hulle aangevoer hulle besluit het om nie daardie hulpmiddel te probeer bekom nie. Met verwysing na die onvoorspelbaarheid van Whitey se optrede het hy aangevoer dat niks eintlik daarom draai dat die polisie nooit die eisers ingelig het van wat tot hulle beskikking is ingevolge die Wet op Gesinsgeweld nie.

Ek stem nie daarmee saam nie. ‘n Mens hoef slegs die Wet te lees, en die nasionale instruksies, om te sien dat daar ‘n hele infrastruktuur volgens die bedoeling van die wetgewer daargestel moes word om mense soos veral die tweede eiseres in die onderhawige geval, by te staan in omstandighede soos waarin sy haar bevind het.

Die vrees wat hulle gehad het, of die gedagte wat hulle gehad het dat Whitey dalk oor die afgrond gestoot kon gewees het, kon bes moontlik besweer gewees het indien daar kontak was tussen die eisers en professionele persone wat berading aan hulle kon verskaf en leiding aan hulle kon verskaf.

Die feit dat dit nie gedoen is nie, is na my oordeel feitlik alleenstaande daarvoor verantwoordelik en dien as regverdiging dat bevind behoort te word op die feite van die onderhawige saak dat die nalate van die Polisiediens onregmatig was.’

[30] In my view, the learned judge's reasoning cannot be faulted. It follows that the respondents established factual causation. Concerning legal causation the appellant did not advance any grounds to suggest that there were any policy considerations that stood in the way of a finding against the appellant. Our courts have in the recent past consistently held the police liable

for failure to perform their statutory duty to protect citizens resulting in harm being suffered through such failure.[19] Legal causation was clearly established in this case.

[31] What remains is the question whether the respondents were contributorily negligent. The appellant's main contention is that they were negligent in two main respects. First, by failing to obtain the common law interdict. Second, that Venter acted unreasonably by leaving his firearm in the wardrobe instead of in a locked safe and also by attempting to gain entry to the house when contacting the police would have been the more prudent course of action. In Christa's case it is contended that she was additionally negligent in permitting Whitey to enter the house. The second ground can be disposed of immediately. I do not think it was unreasonable for Venter to have left his firearm in the bedroom for Christa's protection, or to have attempted to gain entry to the house when he perceived that Christa and, possibly the children, who he thought were at home, were in danger. Christa explained that she let Whitey into the house because she believed that it would antagonise him if she did not. Her conduct in this regard was in my view not unreasonable.

[32] Before considering whether they were negligent in failing to obtain the common law interdict it is well to remind oneself of two well-known important considerations in assessing contributory negligence. The first is that reasonable conduct cannot be judged with the benefit of hindsight and one must guard against the drawing of conclusions from *ex post facto* knowledge.[20] Secondly, care must be taken not to conflate separate elements of a delictual action such as causation and negligence. I say this because, having found earlier that the police's failure to inform Venter and Christa of their rights and remedies under the Act constituted a delictual omission which was causally linked to the harm they suffered, it does not follow that the respondents' failure to obtain a common law interdict cannot in law constitute

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[19] *Carmichele v Minister of Safety Security & another* 2004 (3) SA 305 (SCA); *Minister of Safety & Security v Luiters* 2006 (4) SA 160 (SCA), 2007 (2) SA 106 (CC).
[20] *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA), [2000] 1 All SA 128 para 27.

a degree of negligence on their part. There are no degrees of causation in our law, but there are degrees of negligence.

[33] After careful consideration I have come to the conclusion that the respondents were negligent in failing to obtain the interdict and that this contributed to the harm. Venter, an ex-policeman, was on his own version knowledgeable about this type of remedy, albeit only in broad detail. He explained to Christa its existence and how it operates. They approached the Brakpan Magistrate's Court and sought to obtain an interdict. They were told they need a case number. They conceded in cross-examination that they were able to obtain one by laying a criminal charge of trespassing or intimidation against the deceased. Moreover, they had access to a case number on the case docket opened on 11 October 2002. A common law interdict may well have stopped Whitey from embarking on his destructive course of action.

[34] In determining which party should bear what portion of the damages, their respective degrees of negligence must be compared. This is determined by their respective deviation from the norm of the reasonable person expressed as a percentage. It is plain that the negligence of the appellant is far greater than that of the respondents. The SAPS had clear guidelines in the Act and the Instructions which they failed to adhere to. Over and above this they have a constitutional duty to protect citizens.[21] The respondents' degree of culpability is much less ─ I would put it at 25 per cent, which would be fair and equitable in the circumstances. The repeated rebuffs, inaction and slothfulness to do what the Constitution, the Act and the Instructions unequivocally demand of SAPS members warrants a far larger apportionment of blame.

[35] A finding of an apportionment of 25 per cent against the respondents requires next an evaluation of the degree of negligence on the part of the appellant. It does not follow automatically that the percentage is 75 per cent

[21] *Minister of Safety & Security v Van Duivenboden* para 22.

— a determination of the degree of deviation of the appellant's omission from the reasonable man standard is required.[22] In my assessment the appellant's degree of fault is indeed three times that of the respondents, ie 75 per cent.

[36] The last aspect for consideration on the merits is the claim on behalf of the dependants, the two minor children, brought by Christa in her representative capacity as the third plaintiff. In the particulars of claim it was alleged that Whitey had traumatised the little girl (without specifying any detail of such traumatisation) and it was alleged further that Venter arrived home while the deceased was still detaining Christa and the little girl. These allegations were denied in the plea. No mention at all was made of any trauma suffered by the boy. Christa's evidence was that the girl was present when Whitey fetched the crossbow from his car. She testified further that at some stage Whitey handed the handcuffs to the girl to play with in the lounge which she did. There was no evidence that the girl was present when Whitey damaged items in the house with the crossbow. The evidence is clear that the girl was not present in the bedroom when her mother was raped. The evidence further indicated that the boy was at school during these events. He was later fetched from school by Whitey and Christa and he and his sister were dropped off at their aunt's house in Germiston. There is thus no evidence of any trauma suffered by the children. The court below did not deal with this aspect al all. When questioned on this, counsel for the respondents submitted that this was a matter to be left for the trial court when the matter is remitted on the issue of the quantum of damages. I disagree. Christa sought a declarator against the defendant holding him liable for the trauma suffered by her children. In the absence of any evidence proving that such trauma was in fact suffered, her action in her representative capacity should therefore have been dismissed with costs.

[37] The following order is made:

[22] *Jones v Santam Bpk* 1965 (2) SA 542 (A) at 555.

(1) The appeal is dismissed except to the extent indicated in this order.

(2) The appellant is to pay the costs of the appeal including the costs of two counsel.

(3) The order of the court below is set aside and is replaced by the following:

'(a) It is declared that the defendant is liable to pay to the first and second plaintiffs 75 per cent of such damages as they are able to prove or as may be agreed upon.

(b) The defendant is ordered to pay the first and second plaintiffs' costs, including the costs consequent upon the employment of two counsel.

(c) The third plaintiff's claim is dismissed with costs.'

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

For Appellant	:	M P Van Der Merwe
Instructed by	:	The State Attorney, Pretoria
		The State Attorney, Bloemfontein
For Respondent	:	J G Cilliers SC
		M van Rooyen
Instructed by	:	P G de Jager Attorney, Pretoria
		Van Deventer & Thoabala Inc, Bloemfontein