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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 453/2020

Matter heard on: 22 August 2022

Judgement delivered on: 20 September 2022

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED

In the matter between: -

L[....] R[....] M[....]

1ST PLAINTIFF

D[....] J[....] M[....]

2ND PLAINTIFF

M[....]2 M[....]

3RD PLAINTIFF

and

THE MNQUMA LOCAL MUNICIPALITY

1ST DEFENDANT

LUKHANYO TUKANI

2ND DEFENDANT

JUDGMENT

SMITH J:

Introduction

[1] The heartrending facts of this case evoke harrowing images from any parent's worst nightmare. At about 20h30 on Saturday, 2 December 2017, five-year-old N[....] M[....] was struck by a bullet while lying in bed, cradled in his mother's arms. It is common cause that the shot was fired from a neighbouring property, by Mr Lukhanyo Tukani (the second Defendant). N[....] suffered severe brain injury resulting in, amongst others, speech impediments and paralysis. It is also common cause that Mr Tukani was at all material times employed by the Mngquma Local Municipality (the first defendant) as a Close Protection Officer.

[2] N[....]'s father, Mr L[....] R[....] M[....] (the first plaintiff), his mother D[....] J[....] and elder sibling, M[....]2 (the second and third plaintiffs, respectively), instituted civil action against the municipality and Mr Tukani for damages arising from N[....]'s injuries. Mr M[....] sues in both his personal and representative capacities as N[....]'s father and natural guardian.

[3] Mrs M[....]'s and M[....]2's claims are based on the assertion that they suffered severe emotional shock and trauma as a result of the shooting incident and the injuries sustained by N[....]. The quantification of those damages are, however, a matter for another day since I have, on application by the parties, made an order separating the issues of liability and quantum.

The pleadings

[4] The plaintiffs' claims are founded on the following pleaded averments:

(a) at all material times Mr Tukani was acting within the course and scope of his employment with the municipality as a security officer;

(b) Mr Tukani had wrongfully and unlawfully fired a shot or shots, one of which struck N[....] where he was at home, in bed, at [....] R[....] Hills, Butterworth, Gcuwa;

(c) the municipality failed to ensure that the firearm furnished to Mr Tukani was retained and secured with it when Mr Tukani retired from work for the day; and

(d) the municipality failed to ensure that Mr Tukani was trained and experienced with the use and security requirements of a firearm.

[5] In its plea, the municipality has denied that Mr Tukani was acting within the course and scope of his employment. It averred that Mr Tukani was employed as a 'Close Protection Officer' and "expressly and specifically assigned" to the protection of its executive mayor. The firearm was issued to him for that purpose only. While admitting that Mr Tukani fired the shot that struck and injured N[...], the municipality averred that at the relevant time his actions were unrelated to his employment. It furthermore denied that it had a legal obligation to ensure that Mr Tukani returned his firearm when he was off duty.

The evidence

[6] Mr and Mrs M[...] described the events of that fateful night as follows. At about 20h30 that evening, Mr M[...] was busy in the kitchen preparing Sunday lunch when he was joined by N[...]. After enjoying his favourite treat, namely a muffin and custard, N[...] joined his mother in the bedroom. A few minutes later all hell broke loose. Mr M[...] heard several gunshots – he thought about four – in quick succession. His first concern was for his family and he shouted for them to join him in the passage. His wife came out of the bedroom clutching N[...] in her arms. He could immediately see that N[...] was bleeding profusely. They then laid N[...] in the passage and screamed for help. They were eventually assisted by neighbours, who took N[...] and Mrs M[...] to the hospital.

[7] Their residence is a pre-fabricated structure with hollow walls. The bullet penetrated just beneath their bedroom window, about a meter above the floor. Mr M[...] subsequently also noticed two other bullet holes in the roof sheeting. He did not hear any screaming or commotion outside before the shooting.

[8] Mrs M[...] said that after N[...] had joined her in the bedroom, he said his usual night-time prayer and the two of them recited the Our Father together. Seconds later she heard gunshots. It sounded to her as if something had struck the window. She heard her husband screaming from the kitchen and she immediately picked N[...] up and moved into the passage. It was only then that she noticed that N[...] was bleeding. She herself was also bleeding from a superficial wound on her cheek. She had also subsequently noticed the two holes in the roof sheeting.

[9] Mr Tukani was the municipality's only witness. At all material times he was employed by the latter as a Close Protection Officer and, according to him, his only function was to protect the mayor. He was an experienced security guard and had previously been employed in the security industry from 2007 to February 2016, whereafter he joined the municipality.

[10] He said that he was proficient in the safe handling and use of firearms. He completed a course prescribed in terms of the Firearm Control Act, 60 of 2000 (the Act), relating to the safe handling and use of a handgun for business purposes. He was also issued with a competency certificate by the South African Police in terms of Section 10 of the Act. The latter certificate evinces that he had successfully completed the prescribed training and practical tests on the safe and efficient handling of a firearm. He was also duly registered with the Private Security Industry Regulatory Authority, and has completed its advanced training courses in several grades, during 2007.

[11] He said that he was employed by the municipality as its executive mayor's body guard. The municipality issued him with a 9mm pistol for this purpose. Because he was on standby at all times and could be called out at any time to accompany the mayor to functions or meetings, he was allowed to retain the firearm even when he was off duty,

[12] On 2 December 2017, between 10 and 11pm, he was asleep at his home when he was woken up by his girlfriend. She told him that someone was calling out his name outside. He then also heard his friend Melikhaya calling him and imploring his help. When he opened his front door, he saw that Melikhaya had been pushed

against an Aloe bush next to his fence by an unknown assailant. The assailant was holding onto Melikhaya with his left hand and was clutching a knife in the other. He noticed blood on Melikhaya's left shoulder.

[13] He shouted at the assailant to release Melikhaya but he instead moved closer to the gate, still holding onto Melikhaya and wielding the knife in a threatening manner. The assailant then boldly moved towards the gate and tried to open it. At that stage he was about 7 paces away.

[14] Mr Tukani then ran into the house and fetched his firearm. When he returned outside, he saw that the assailant was still holding onto Melikhaya, but was now moving away from the gate. He then fired a warning shot into the air.

[15] After he had fired another warning shot, the assailant released Melikhaya and started moving farther in the direction of the gate. Mr Tukani then fired a third shot into the ground next to the assailant's left leg, causing him to flee. He said that he had fired the shot at an angle into the tarred road and had seen sparks fly from where the bullet had struck the tar. He therefore assumed that the bullet must have ricocheted and penetrated the M[....]'s residence.

[16] While attending to Melikhaya, he heard people screaming that a child in the M[....]'s residence had been struck by a bullet. He immediately ran to the M[....]'s residence where he assisted them to attend to the child. He then asked a neighbour to take the child to hospital. He returned to his house to get dressed and later went to the hospital to find out how the child was doing.

[17] During cross-examination, Mr *Louw*, who appeared for the plaintiffs, put to Mr Tukani that the job description in his personnel file contains a far more extensive description of his duties than merely the protection of the mayor. Mr Tukani insisted that his only duty was to guard the mayor and that he was unaware of the contents of the Job Description Form.

Vicarious liability

[18] The first issue that arises from the pleadings is whether Mr Tukani acted in the course and scope of his employment when he fired the shot that injured young N[...]. If I find that this basis for vicarious liability has not been established, then the question arises as to whether the shot was fired in circumstances sufficiently close to the municipality's business in order to found vicarious liability.

[19] It is established law that an employer is vicariously liable for delicts committed by its employee where the employee is acting within the course and scope of his or her duties as an employee. O'Regan J, in *K v Minister of Safety and Security*¹, explained that the rationale for this legal principle ['i]s to be found in a range of underlying principles. An important one is the desirability of affording claimants' efficacious remedies for harm suffered. Another is the need to use legal remedies to incite employers to take positive steps to prevent employees from harming members of the broader community'. The learned judge, however, cautioned that 'damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so'.

[20] The Constitutional Court also held that it is wrong to characterise the application of the common law principles of vicarious liability as 'a matter of fact untrammelled by any considerations of law or normative principles'. These are principles which are 'imbued with social policy and normative consent'².

[21] What then is the case where an employee acts outside his or her scope of employment and the delict is committed in the course of a deviation from his or her normal duties?

[22] In *Minister of Police v Rabie*³, Jansen JA explained the applicable legal principle as follows:

'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the

¹ 2005 (6) SA 419 at 43 para. 21

² *Ibid* at para. 22

³ 1986 (1) SA 117 (A) at 134 C-E

course or scope of his employment, and that in deciding whether an act by the servant does so fall, some references is to be made to the servant's intention (*cf Estate Van de Bail v Swanepoel* 1927 AD 141 at 150). The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.'

[23] As O'Regan J explained in *K v Minister of Safety and Security*⁴, this question must be answered by proper consideration of facts and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.

[24] In *Stallion Security (Pty) Ltd v Van Staden*⁵, the Supreme Court of Appeal held that '[A] convenient starting point is the principle that this link would not be established when the business of the employer furnished the mere opportunity to the employee to commit the wrong'. The enquiry must also not be reduced to the mere 'but for' causation analyses. The court held further that the creation of risk is not sufficient, of itself, to give rise to vicarious liability, but it is always likely to be an important element in the consideration of the facts that gave rise to such liability.

[25] In applying the abovementioned legal principles to the facts of this case, the first question that must be answered is: what exactly was the scope of Mr Tukani's duties when he fired the shot that injured young N[...]?

[26] Although Mr Tukani was adamant that he was employed solely to guard the mayor and has disavowed any knowledge of the contents of his job description, the implications of that documents cannot be so easily dismissed.

[27] The 'Job Description Form' included in Mr Tukani's personnel file relates in particular to the post title, 'Close Protection Officer', the position to which he had

⁴ Supra at para. 32

⁵ 2021 SA 64 (SCA), at para. 20

been appointed. His duties are described in that document as, 'activities/tasks associated with maintaining law, order, safety and security through application of laid down policing, protection, firefighting and rescue procedures and attending to processes aimed at compliance with laws, by-laws and regulations in order to ensure any action or situation threatening safety is identified and promptly attended to'.

[28] That document also sets out, with commendable detail, the related functions namely, amongst others: law enforcement functions; community policing and security operations; enforcing compliance and emergency control functions. It is common cause that those responsibilities had been approved and assigned by the municipality to the post of a 'Close Protection Officer'. Thus, even though Mr Tukani was specifically assigned the duty of guarding the mayor, there can be little doubt that it was open to the municipality, at any time, to require of him to perform any of the other tasks described in the Job Description Form.

[29] Viewed through this prism, there can, in my view, be little doubt that Mr Tukani's actions on the night in question fell squarely within the ambit of that job description. On his own version he was acting in defence of Melikhaya and taking steps to prevent the commission of serious crimes. Mr *Louw* has, in my view, correctly argued that Mr Tukani's own subjective view and understanding of his duties cannot change the objective purpose and intention of his employer.

[30] The municipality did not lead any evidence to gainsay the ineluctable inference that the Job Description Form was placed in Mr Tukani's file for the purpose of defining and recording his responsibilities vis-a-vis the municipality. The fact that Mr Tukani was remiss in not reading his job description cannot change the ambit and boundaries of his responsibilities as an employee. Therefore, even though Mr Tukani may have been assigned the task of protecting the mayor, the common cause facts established that when he reacted to Melikhaya's pleas for help, he was indeed acting within the course and scope of his duties as recorded in the Job Description Form.

[31] Even if I am wrong in this regard, then at the very least the plaintiffs have established that Mr Tukani's actions were sufficiently closely linked to the purposes

and business of the municipality. Contrary to what Mr *De La Harpe* SC, who appeared for the municipality, has argued, this conclusion is justified not merely by the application of the ‘but for’ test or because the municipality had created a danger by allowing Mr Tukani to retain the firearm at the end of his working day. As I have explained above, Mr Tukani’s actions were undoubtedly sufficiently closely linked to the purposes for which the municipality employed him. Those are comprehensively explained in his job description. I am accordingly of the view that the plaintiff has established on a balance of probabilities that the municipality is vicariously liable for Mr Tukani’s actions.

Unlawfulness

[32] I now turn to address the question of wrongfulness. In this regard I must apply the well-known test espoused in *Kruger v Coetzee*⁶, namely whether a reasonable person in the position of Mr Tukani would have foreseen, as a reasonable possibility, that by firing the shot in the manner which he did, he would injure another person, and would have taken reasonable steps to avoid the possibility of such harm.

[33] I am mindful though of the dangers inherent in applying the abovementioned test in an inflexible and rigid manner. In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd and Another*⁷ Scott JA cautioned against such ‘rigid adherence to what is in reality no more than a formula for determining negligence must inevitably open the way to injustice in unusual cases’. The learned judge further said that, ‘[w]hether one adopts a formula which is said to reflect the abstract theory of negligence or some other formula there must always be...a measure of flexibility to accommodate the “grey area” case’. Thus our courts have recognized that ‘while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable’. What is therefore ultimately required of me is to decide whether Mr Tukani’s conduct fell short of the standard of the reasonable person in the circumstances.

[34] In considering the issue of wrongfulness, it would be remiss of me not to say that Mr Tukani’s version of events is, to say the least, somewhat strange. According

⁶ 1966 (2) SA 428 (A)

⁷ 2000 (1) SA 827 (SCA), at para. 22)

to him, at some point, Melikhaya's assailant fearlessly approached him while dragging Melikhaya along. And even after Mr Tukani had fired warning shots and the assailant had released Melikhaya, he still continued to move towards the gate. One cannot help but wonder for what purpose the assailant proceeded towards the firearm-wielding Mr Tukani, brandishing only a knife. It was almost as if he was determined to provide Mr Tukani with the opportunity to shoot at him, literally bringing a knife to a gunfight. Nevertheless, there was no evidence to gainsay that version and I am consequently constrained to decide the case on the basis of this rather incongruous factual matrix.

[35] Mr *De La Harpe* submitted that it must be accepted that the third bullet had struck the tar and ricocheted. He argued that despite the inherent danger created by firing a shot, the possibility of harm was so slight that a reasonable person would not have foreseen it.

[36] I disagree with this submission. Mr Tukani claimed that he was a good shot. He has reasonably extensive training in the safe handling of a firearm. He was aware that the houses in that area were prefabricated structures with hollow walls, which could easily be penetrated by a projectile. He should therefore have foreseen the reasonable possibility of the bullet injuring another person. Given his training and experience with firearms, he should have foreseen the possibility of the bullet ricocheting, if he fires at an angle into a solid surface such as a tarred road. And given the fact that both Melikhaya and his assailant were relatively close to him – he estimated about 5 paces at the time he fired the third shot – it was reasonably possible for him to have fired the shot in a manner so as to avoid the bullet striking any of the neighbouring properties.

Findings and order

[37] I am accordingly of the view that Mr Tukani negligently discharged his firearm in circumstances where he reasonably ought to have foreseen that by firing a shot into the tarred road at an angle, he would injure another person. He also negligently failed to take any steps to avoid the possibility of such injury to other people. In doing so, he was at all material times acting within the course and scope of his

employment with the municipality, rendering the latter vicariously liable for his delict. Since it is common cause that N[...]’s injuries were caused by the gunshot fired by Mr Tukani, I am satisfied that both factual and legal causation has been established.

[38] In the light of these findings, it is unnecessary for me to consider the other issues relating to the municipality’s alleged unlawful actions. These were, in particular, the contended non-compliance with certain statues and regulations, and whether the municipality had acted unlawfully by failing to ensure that Mr Tukani returned the firearm when he was off duty and that he was trained and experienced in the use of a firearm.

[39] Regarding the issue of the onus, Mr *Louw*, while accepting that the plaintiffs bore the onus of proving that the municipality is vicariously liable for Mr Tukani’s actions, submitted that the municipality bore the onus of proving, on a balance of probabilities, that Mr Tukani’s conduct was not unlawful. In my view, the fact that my findings on both the issues of vicarious liability and unlawfulness were based on common cause facts, renders the question of the onus unimportant.

[40] Mr *Louw* has correctly submitted that although Mr Tukani asserted during his testimony that he was not a party to the proceedings, all the pleadings and notices had been duly served on him. He has, however, decided not to defend the action and is accordingly also liable for such damages as the plaintiffs may eventually prove.

[41] In the result I make the following order:

1. The defendants are declared jointly and severally liable to the plaintiffs for such damages as they may prove to have suffered arising from the gunshot injury suffered by the minor child, N[...], on 2 December 2017;
2. The defendant shall, jointly and severally, the one paying the other to be absolved, pay the plaintiffs’ party and party costs, together with interest thereon, calculated at the legal rate of interest from a date 14 days after allocatur to date of payment;
3. The plaintiffs’ costs shall include:

- 3.1. Costs of one inspection *in loco*;
- 3.2. Costs of photographs;
- 3.3. Costs of travelling for plaintiff's instructing attorneys.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

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