IN THE HIGH COURT OF SOUTH AFRICA
WITWATERSRAND LOCAL DIVISION

Case No. 7002/04

In the matter between:

THE MINISTER OF SAFETY AND SECURITY Applicant

and

HOWARD, MADELEIN Respondent

JUDGMENT

Horwitz AJ:

This application raises a rather novel issue. The applicant seeks a declaratory order that the South African Police Service, which falls under the control of the Ministry of Safety and Security, is entitled to claim compensation for the time that members of the Police spend investigating hoax reports to the Police, from persons responsible for causing such reports to be made. The respondent in the present matter is alleged to have been such a person, albeit that she did not make the report herself.

The applicant (to whom I will refer as "the Minister") was represented in the proceedings before me by Adv PF *Louw* SC and there was no appearance on behalf of the respondent. Adv GC *Pretorius* SC appeared as *amicus curiae* to present a counter-argument to that advanced on behalf of the Minister. Whilst I am indebted to both counsel for their invaluable assistance, I must express my special thanks to Mr *Pretorius* for the time and effort that he expended on the matter for no remuneration at all.

After the terror attacks in New York on 11 September 2001 (which in common parlance came to be known as "nine eleven"), when terrorists flew hijacked aeroplanes into the well-known World Trade Centre, a number of fatal anthrax poisonings occurred in the United States of America. According to the allegations in the founding affidavit, it became common knowledge that the medium through which the anthrax bacteria were spread was white powder into which the bacteria were mixed. The mixture was then placed in envelopes and when the envelopes were

handled, the handler then suffered anthrax poisoning. Over a period of time, there have been reports in South Africa of suspected anthrax poisoning having been caused but upon investigation by the Police the reports proved to have been false.

On 24 October 2001, the respondent placed an envelope containing white powder in a women's toilet located in the building where she was then employed. The deponent to the founding affidavit, one Charlene Britz, a senior legal official employed by the South African Police Service (and I interpolate to say that for present purposes all the allegations in the founding affidavit are accepted as true), states that the respondent's purpose in so doing was to cause panic amongst her colleagues, one of whom in fact discovered the envelope and, believing that she had been a victim of anthrax poisoning, suffered severe nervous shock.

Needless to say, the incident was reported to the Police and consonant with their duty to do so, they dispatched members of the Force to investigate the matter. Of course they discovered that this was all a hoax, but only after valuable time and effort had been wasted on the call. The deponent states further that the respondent must have realised that the Police would be called in; the fact that that is so should be pretty obvious, in the circumstances.

The deponent then proceeded to adumbrate details of all the time and effort that the Police spent in investigating the false complaint and the attendant costs. It is not necessary for me, for the purpose of this judgment, to embark upon an analysis of those allegations. The essence of this application is that the Minister now wants the Court to declare that the respondent is obliged to compensate the Police for all the time unnecessarily expended on investigating this hoax call.

Mr *Louw* cast the Minister's claim in a number of possible moulds. He submitted that the claim could be brought under the *lex aquilia* or the *actio iniuriarum*, both of which are regular delictual actions. In the alternative, he submitted that the claim could be one for breach of a statutory duty, of the nature of that considered in *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* [1]. Lastly, he submitted that the claim could constitute one for constitutional damages (as to which, see *Fose v*

[1] 1997 (4) SA 578 (W) at 580G *et seq*

Minister of Safety and Security[2]*)*. I do not intend investigating or offering any comment on the latter three. In my view there is no merit in any of them. The only claim that warrants attention is that based on the aquilian action.

(I interpose here to mention that Mr *Louw* did not like the use of the word "hoax". With reference to the Oxford Dictionary, he suggested that that word made light of the seriousness of what the respondent is alleged to have done. I do not intend to investigate the etymology of that word. I think that in common parlance it has come to embrace also the type of act in issue in this case and I will therefore use the word in its pejorative sense. There is sufficient authority for the proposition that that type of conduct, misleading the Police into believing that a crime has been committed well-knowing the opposite to be true, constitutes fraud. It could also constitute the statutory crime of contravening section 1 of the Intimidation Act, No. 72 of 1982 or, even more probably, a contravention of section 13(1) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004.[3] There should therefore be no mistaking the seriousness of the respondent's alleged conduct and my use of the word "hoax" to describe it.)

Mr *Pretorius's* opening gambit was that the Minister's argument was a novel one. I have already stated that to be the position. The obvious reason, however, that the Minister seeks the order which he does, is that the Police want to send a firm message to potential wrongdoers of the kind that the respondent is alleged to be, that hoaxes will be met not only with a criminal sanction but also with the possibility of liability for wasted expenses incurred by the Police in their investigation of the hoax allegations.

At first blush, the claim has all the makings of a valid delictual action. The respondent clearly acted unlawfully. She clearly foresaw that the Police would unnecessarily expend time and money because of her shenanigans. That was almost like pouring money down the drain. The question raised in this application is whether, in principle,

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[2] 1997 (3(SA 786 (CC) paras [61] to [75]

[3] The relevant part of sec 13 provides as follows: **"**(1) (a) Any person who, with the intention of inducing in a person anywhere in the world a false belief that a substance ……. is, or contains, or is likely to be, or contains (*sic* – should be "contain") a noxious substance …… -

(i) places that substance, ……. in any place;

…….

is guilty of an offence.**"**

a claim by the Minister for compensation for the loss allegedly suffered in this manner is sustainable in law. The gist of Mr *Pretorius's* argument was that the Police are there for the very purpose of investigating crime; in doing what they did in the present case they were merely fulfilling their function and doing the job that they were appointed to do and that South African law has not yet developed to the extent that it recognises a claim for compensation of the nature of that which the Minister asserts.

I must confess, upfront, that I am taken aback at the notion that persons responsible for hoax allegations which have the effect of stretching Police resources beyond the extent to which they are already stretched, should be able to get away with only a criminal sanction, where there is one, and not be accountable for damage caused by way of wasted costs incurred by the Police in investigating what ultimately turns out to be a hoax. I would imagine that all right-minded persons would be seriously affronted by such behaviour on the part of the respondent. I would imagine that their immediate reaction would be: of course she should be held accountable for the lost time and effort and that they would react with horror if told that someone could get away without having to lay out a cent to compensate the Police for having wasted their sparse resources and tax payers' money. I doubt that such persons would be content with the notion that such wrongdoers only incur criminal liability. It is no secret that Police resources are stretched to the limit and are not there to be squandered on this type of irresponsible behaviour. There can be no legitimate excuse for such behaviour.

I have referred to **"**a criminal sanction where there is one**"** because it must be borne in mind that whilst the commission of a criminal offence must be proved beyond reasonable doubt, with the result that the person alleged to be guilty of the hoax might be acquitted, the commission of a delict in a civil case need be proved only on a balance of probabilities. Therefore, whilst the criminal law might provide a remedy by way of punishment to deal with hoaxers, it does not cater for those cases in which the alleged hoaxer is acquitted but nevertheless found on a balance of probabilities to have been guilty of the act complained of. If that were the case, it would mean that a person who is shown on a balance of probabilities to have committed a crime by making a false report to the Police would receive from the Courts treatment different

from, and better than, others who are shown on a balance of probabilities to be liable to compensate another party for damages suffered by the latter.

Nevertheless, my personal indignation is insufficient for me to hold that a person in the position of the respondent is legally liable for damages of the nature claimed in the present case. Concomitantly, the potential for the alleged wrongdoer to be held criminally liable for the act complained of, should not deter me from holding in favour of civil liability.

In support of his argument in favour of liability on the part of the respondent, Mr *Louw* referred me to *Carmichele v Minister of Safety & Security & another* 2001 (4) SA 938 (CC),[4] and submitted that if I found the common law to be deficient, I should invoke sec 173 of the Constitution, which enjoins a court to develop the common law where necessary. For reasons which appear below, I do not believe that it is necessary to do so.

If I understood counsel correctly, they approached the matter on the basis that the Minister's claim was one for pure economic loss. Whilst it is clear that a claim of that nature is sustainable,[5] I am not sure that that terminology really fits the Minister's claim in the present instance. Patrimonial loss is probably a better turn of phrase for it. I do not believe, however, that it is necessary for me to attach a label to the claim. However one categorises it, the question remains: does the law recognise a claim for compensation in the circumstances of this case?

A good starting point is *Herschel v Mrupe* 1954 (3) SA 464 (A). The facts, briefly, were the following. The plaintiff had wanted to institute action against an insurance company under the provisions of the Motor Vehicle Insurance Act, No. 29 of 1942, to recover damages that she had suffered as a result of a motor collision in which her husband had died. Her attorney sought from the owner of the other motor vehicle involved in the collision ("X"), the name of the insurance company by which X's motor vehicle had been insured. X's attorney informed the plaintiff's attorney that the name was S. In due course, the plaintiff sued S but the information that X's attorney had supplied was incorrect: X's vehicle was not insured by S. The plaintiff then sued X for recovery of the plaintiff's wasted costs in suing S.

[4] See paras [33] to [36]
[5] *Administrateur, Natal, v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A)

The plaintiff's claim was dismissed, the Court having found that X had not been negligent in providing the information and that the plaintiff had not suffered any foreseeable harm. The important point was that the claim was not dismissed for the reason that in principle, damages of that nature were not claimable. RUMPFF CJ, in *Administrateur, Natal, v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), at 830 *in fine* pertinently pointed this out, noting that the Appeal Court had not rejected such a claim but had rather recognised its existence. The learned Judge in the latter case then went on to hold that a claim for pure patrimonial loss was one recognised in South African law.[6]

At the other end of the spectrum is the case of *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A), in which the Court held that the rule of Roman Dutch Law that a master is entitled to claim from a wrongdoer compensation for injuries to his domestic servant which result in the loss of the servant's services, should not be extended so as to make the wrongdoer or his insurer liable to the employer of the injured party, where the latter is not a domestic servant. The Court held against the employer because the wrongdoer owed the employer no duty of care. I do not believe that it can be said that the facts in the present case remotely approximate to those in this last-mentioned case, which is therefore not authority against the proposition for which Mr *Louw* contends. In the present case, the wrong was not committed merely against an employee of the Police: it was committed against the Police as an entity.

As to whether the law recognises a claim for compensation in the circumstances of this case, the test postulated in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd*[7] appears clearly to be satisfied. In that case, Van Dijkhorst J, stated:

"I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion.

In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist *in vacuo*, the morals of the market place,

[6] See also *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 789
[7] 1981 (2) SA 173 (T) at 188H. See also *Shell & BP South African Petroeum Refineries (Pty) Ltd and others v Osborne Panama SA* 1980 (3) SA 653 (D) at 659; *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA378 (D) at 380G-J

the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.

Public policy as criterion for unlawfulness in delict is well-known in our law; it has the stamp of approval of our highest Court. In *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A the basis of liability was held to be that:

> "... die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word..."

In *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 403 it was stated that public policy is the norm used to determine whether *prima facie* defamatory words were published lawfully. See also the decision of this Division in *S v A and Another* 1971 (2) SA 293 (T) at 299C and *Universiteit van Pretoria v Tommy Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387. (On appeal in the last-mentioned case this aspect was not dealt with; *cf* 1979 (1) SA 441 (A).)

This norm for unlawfulness also has the support of a large body of legal writers in South Africa; cf, eg, W A Joubert in 1958 *Tydskrif Hedendaagse Romeins-Hollandse Reg* at 111 - 112 and 1960 *THRHR* at 43; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1976) at 60, 61; Neethling *Persoonlikheidsreg* at 69, 70; Van der Walt and Potgieter in 1978 *THRHR* at 79 - 80 and 330.

Public policy is not only an acceptable criterion for unlawfulness in delict in South Africa but as has been shown is also the norm applied in determining whether competition is unlawful in other countries.

The application of this criterion will accommodate a decision like that in the *Post Newspaper* case and those based on dishonesty with which it ostensibly is in conflict. It will also render the elasticity required if this branch of the law is to develop as needed. It encompasses the various manifestations of unlawful competition upon which issue has been joined in this case.

In coming to this conclusion I have kept in mind the words of LEARNED HAND J in *Spectator Motor Service Inc v Walsh* 139 F 2nd 809 at 823 (1944) (quoted in 1974 *South African Law Journal* 408):

> "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."

As I have indicated birth has been given without undue complications to a healthy infant.

The various actions of the defendants now have to be examined in the light of public policy.**"**

More extensive reference to the case of *Minister van Polisie v Ewels* 1975 (3) 590 (A) is called for. At 597A, RUMPFF CJ stated:

"Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is

dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike "nalatigheid" van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree.**"**

The logic in both those case, with due allowance for the difference in the facts, is in my view applicable to the present case.

But is that enough? If I have correctly understood the cases above, loss was not the issue. In all of them, the plaintiff had suffered loss. The question was whether the law recognised a cause of action to compensate the plaintiff for that loss. In the present case, we have what is really the converse. I have found, save for the question of loss or damage, that all the prerequisites for a valid delictual action are present. My finding would satisfy the element of wrongfulness. The question that I therefore now face is whether the Minister indeed suffered loss and, if so, is the Minister entitled to claim compensation for that loss?

As regards actual expenditure by the Police in attending to the call, there seems little scope to argue that such expenditure was not lost. The issue on which counsel mainly focused attention was the salaries of the individual Police officers involved in the investigation of the respondent's hoax: does the time that they spent on the cases constitute a loss?

Mr *Pretorius's* argument, as I understand it, is that the Police (whom the Minister represents) have suffered no loss or, if they have, the loss is not of a kind of which the law takes cognisance. I have already stated the gist of his argument, which is that in investigating the complaint, albeit that it might turn out to be a hoax, the Police are merely doing their job for which they are employed and for which they are in any event paid.

Whether that argument is correct or not (and I will comment more fully on it below) it does not address the question whether the Police are entitled to be compensated for patrimonial loss suffered in calling in other resources, wasting petrol in travelling expenses and the like. The Police would surely want their expenditure to be well-spent on activities which have the potential to yield a positive result, not on activities

which, from the outset, have no potential for success but are merely doomed to failure. Fortunately, it does not befall me to decide whether the present state of our law is such that the costs incurred by the Police in investigating a particular crime can be recovered from the perpetrator of a crime. As I have already demonstrated, this case concerns something different: the costs which the Minister wants to recover from the respondent are not the costs incurred by the Police in investigating the crime which she is alleged to have committed in triggering the hoax call and in bringing her to book: it is the wasted costs in investigating the hoax for which she was responsible.[8]

As regards actual expenditure by the Police, I confess that I have little difficulty in regarding this aspect of the matter resoluble in favour of the Minister.

Regarding the salaries of the policemen involved in unnecessarily investigating the hoax, this is a difficult one. It is not answered with reference to the "regsoortuiging van die gemeenskap", which determines the question of unlawfulness. This issue, I believe, is a factual one, answered (just as in the case of expenditure in the course of the investigation) with reference to those circumstances which strictly indicate whether the Police suffered patrimonial loss or not.

As a matter of principle, I do not believe that the mere fact that the State employs the Police and has to pay the salaries of members of the Force in any event, regardless whether they are physically occupied or not in carrying out their functions, is sufficient reason to disallow a claim for compensation. The Police are not employed because of a whim that it would be a good idea to have people on standby to regulate traffic or help unfortunate indigent individuals out of tight corners. The most significant reason for employing Police and having a Police Force is in order for its members to curb crime, wrongful and unlawful acts committed by people such as the respondent is. If there were no criminals there would be no need for a large body of policemen to deal with crime. To advance the argument that the State is in any event obliged to pay the salaries of the Police, irrespective whether or not the respondent

[8] I note, *en passant*, that if the cost of investigating what turns out to be hoax is recoverable from the perpetrator of the hoax (something which I have yet to decide) it would seem rather incongruous that the costs should be recoverable from that person in those circumstances, but if what is reported is indeed not a hoax but a genuine report, then nothing may be recovered from the person guilty of the crime which is the subject of the report. As I have said, this is something beyond the scope of this judgment.

and like-minded individuals had committed any crime, with the consequence that the commission of the crime adds nothing to the cost which the State incurs in paying their salaries, is to ignore why the Police were employed in the first place. The measure is pre-emptive. It is because of the need to curb the wrongful activities of criminals. Were a victim of a crime to employ a private investigator (for example) to recover stolen property, surely that would be a cost recoverable from the perpetrator? It is in some respects comparable to one taking out an insurance policy against some or other eventuality. That would not preclude the victim of a theft from claiming compensation from the thief for the value of the goods. I cannot see the logic in allowing a criminal to escape liability for similar costs, merely because the costs were incurred pre-emptively. The Police Force is there to protect society generally, not for the benefit of societal misfits who have created the need for there to be a Police Force.[9]

It is certainly correct to say that the Police would in any event have had to pay the salaries of the individual policemen who were charged with the investigation of the subject matter of the respondent's hoax, regardless whether the respondent had or had not performed the act of which she is guilty. The fact remains, however, that she did perform the act which resulted in the Police being called out and thereby committed a crime, which immediately justified the pre-emptive measure of having a Police Force in the first place. She caused the Police to expend (and waste) time and energy as a result thereof, separately from the cost incurred in investigating the crime that she committed. As I have indicated, I am not concerned with the costs incurred in investigating the crime which the respondent committed, after the Police discovered that she had perpetrated a hoax and was therefore guilty of a crime.

Both counsel referred me to the law in other jurisdictions, notably England, where the position is regulated by statute. For obvious reasons, those references, albeit interesting, are of no assistance in circumstances in which I have to determine the common law on the subject. Mr *Pretorius* also referred me to the position in Zimbabwe, where the legislature has created the statutory offence of making a false statement to the effect that an offence has been committed. For the same reason, I can

[9] The subject is quite extensively dealt with in LAWSA, Vol 7 (Second Edition) paras 41-43.

draw no assistance from that. He also referred me to *S v Bazzard* [10], in which it was held that causing the Police to waste time and energy does not constitute the crime of obstructing the Police in the exercise of their duties. That also does not assist me because it is conceded that the respondent's actions constitute the crime of fraud and also the other offences to which I have alluded above.

Whilst I recognise that a claim of the nature of that which confronts me is not in all respects akin to a claim for costs in a civil case, some limited reference to a case on costs might not be wholly inapposite. Thus, in *Bester & Grové v Benson* 1980 (1) SA 276 (C), a firm of attorneys had successfully sued the defendant in a magistrate's court for professional services rendered. In the bill of costs the attorneys had claimed amounts for taking instructions. The instructions were those given by a partner in the attorneys' firm to a professional assistant in the same firm who handled the matter and brought it to its final conclusion. The taxing master had disallowed the items on the ground that attorneys cannot charge for taking instructions from themselves where the firm was involved as a litigant. In an application by the attorneys to the Supreme Court for a review, the Court held that if the work had actually been done it could not be classed as unreal or fictitious and there was no valid reason why the attorneys' firm should not be remunerated for the time and effort expended by the professional assistant on the firm's behalf.[11] I imagine that but for taking those instructions, the professional assistant's salary would in any event have been paid. That, however, did not debar the claim for the costs. The same argument can conceivably be advanced (and I put it no higher than that) in respect of the salaries of the relevant Police officials involved in the investigation.

The deponent to the founding affidavit has provided details of what she contends is the value of the loss to the Police in investigating the hoax. The loss is made up of numerous items. The amount of time that the various Police officers spent on the case has been prorated to their salaries and the resultant amount is one such item. Fuel costs, motor vehicle wear and tear costs, consumables used in removing the offending envelope from the toilet, forensic costs in examining the content of the envelope and a number of other items make up the balance. The total claim is R11 531,14.

[10] 1992 (1) SACR 302 (NC)
[11] Compare, however, *Texas Co (S.A.) Ltd v Cape Town Municipality* 1926 AD 467 at 488-489. The case is distinguishable on the facts.

Aside from the declaratory order which the Minister seeks, he also wants judgment against the respondent for that amount. Although the respondent has not contested the claim, I do not believe that I should accede to the request for a monetary judgment. The claim is clearly one for damages and it is trite that such claims are not sustainable in motion proceedings. In any event, there is the question of the reasonableness of the amount claimed, as also the vexing question whether the Minister would be entitled to any amount in respect of the actual wages paid to the various Police officers whose time was wasted in investigating the hoax. The circumstances may be such that the Minister is entitled to compensation in respect thereof; on the other hand, he may not. It may be that the Police had to incur other expenses as a result of the unavailability of the particular Police officials to perform other tasks; likewise, that might not have been the case. I doubt that the actual wages of the relevant Police officials, without more, would validly be an item in the computation of the damages to which the Minister would be entitled, but without the expedient of evidence to clarify these issues, I fear that my making an award in these proceedings might constitute a dangerous precedent and I prefer not to express any firm view in this regard. I do not believe that in declining to do so, I will be causing the Minister an injustice because, as I understood Mr *Louw*, the Minister does not intend in this case actually enforcing any monetary award against the respondent. The Minister's real concern is the principle involved. For the same reason, the Minister does not seek an award of costs. In the circumstances, I believe that the following declaratory order will serve the purpose:

South African law recognises a claim at the instance of the Minister of Police against any individual (including the respondent in this case) who, by causing a false report to be made to the Police that a crime has been committed, causes the Police to suffer monetary loss as a result of its having to spend time, effort and resources in investigating the content of the false report in the belief that the report was a genuine one.

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A.J. Horwitz
Acting Judge of the High Court

Date of hearing : 21 November 2006

Date of judgment	:	24 April 2009
Applicant's counsel	:	Adv P.F. Louw SC
Instructed by	:	The State Attorney (Johannesburg)

No appearance for the respondent

Amicus Curiae	:	Adv G.C. Pretorius SC