77/92

CASE NO 15/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

E Z MACALA — Appellant

versus

TOWN COUNCIL OF MAOKENG — Respondent

CORAM: HOEXTER, VIVIER et GOLDSTONE JJA

DATE HEARD: 14 May 1992

DATE DELIVERED: 22 May 1992

J U D G M E N T

GOLDSTONE JA:

The appellant, Ephraim Zitha Macala, brought an action in the Orange Free State Provincial Division in which he claimed compensation from the respondent, the Town Council of Maokeng, and against Samuel Mthembu, a municipal policeman who was in the employ of the respondent. The claim arose out of injuries sustained by the appellant when he was shot in the stomach by Mthembu. By consent the learned Judge a quo (Malherbe J) made an order in terms of Rule 33(4) that the merits of the appellant's claim against each of the defendants should be determined first and that the question of damages should stand over for later determination.

The learned Judge a quo held that Mthembu had

unlawfully shot the appellant and was therefore liable to compensate him for the damages he had sustained. However, he held further that when he shot the appellant, Mthembu was not acting in the course and scope of his employment with the respondent, and that the latter was not jointly liable with Mthembu to compensate the appellant. With the leave of the Court a quo, the appellant appealed to this Court against that finding.

The learned Judge a quo accepted the version given by the appellant and his witnesses. That finding was not questioned in this Court and the appeal therefore must be determined on the basis thereof.

On the evening in question, 31 May 1986, Sarah Mohlokoane ("Sarah") resided in a room in the house of John Dinga ("Dinga"). Jacob Pitso ("Pitso") lived in a room in the back yard of the same premises. For some time there had been an intimate relationship between Pitso and Sarah. He usually slept with her in her room.

That night he went to Sarah's room. He took off his shoes and socks and whilst he was talking to Sarah two municipal policemen entered the room. One of them was Mthembu. At that time Mthembu was not on duty. His companion, however was on duty. Both were in uniform. They forcibly took him out of the room to a police vehicle. They drove to an isolated spot where the two policemen assaulted him. They left him there and drove away. He walked back to the home of Dinga. He went to Sarah's room to collect his shoes. After Pitso had knocked on the door and opened it he heard Sarah say to Mthembu that the latter should hit and shoot him. Mthembu hit him on the nose. He fell outside the room. Dinga's two sons, Petrus and Samuel, came out of the lounge and told Pitso to leave. He walked some distance in the direction of his room. He heard two shots. The second one hit him in the thigh.

That same evening the appellant was visiting

the two younger Dingas and their wives. At about 22h15 Pitso knocked on the lounge door and said someone was fighting with him and that all he wanted was to collect his shoes from Sarah's room. The Dinga boys went out and the appellant followed them intending to go to the toilet. As he walked out of the lounge door he was shot in the stomach by Mthembu.

According to Samuel Dinga, he and his brother heard someone scream outside the lounge door. They went to investigate and found Pitso. He appeared to have been assaulted. He told them he wanted his shoes. Petrus Dinga knocked on Sarah's door. It was opened and he saw Mthembu standing there with a firearm in his hand. He was wearing his uniform. Petrus Dinga told both Mthembu and Pitso to leave. Mthembu pushed the two Dingas aside and Sarah screamed "Skiet die honde". Samuel Dinga ran away. He heard two shots being fired and later found appellant and Pitso who had both been

wounded.

In the course of his able argument on behalf of the appellant, Mr Ploos Van Amstel submitted that there was really one continuous course of conduct by Mthembu on that evening. He argued that there was a probability that Sarah had arranged with Mthembu that he would rid her of the attentions of Pitso and that Mthembu did so, in the first place, by abducting and assaulting him and later by shooting him. In entering into that arrangement, so the submission continued, Sarah knew and took advantage of Mthembu's powers as a policeman and Mthembu in fact acted pursuant to those powers.

This approach to the facts was not suggested in the Court a quo and it was not put to Sarah. In any event it cannot assist the appellant. At the time he was shot, Pitso was already on his way to his own room. He was making no attempt to enter Sarah's room or in any way to interfere with her. Furthermore, it was the second

shot fired by Mthembu that hit Pitso. The first shot struck the appellant. Neither of those shots could have been fired pursuant to the terms of the suggested arrangement between Sarah and Mthembu.

Mr Ploos Van Amstel correctly conceded that when he shot the appellant, Mthembu was not acting in the course and scope of his employment with the respondent. Whether or not the shooting was pursuant to an arrangement between Sarah and Mthembu, Mr Ploos Van Amstel submitted that the respondent was liable to compensate the appellant because Mthembu's actions were the consequence of the risk created by the respondent in having appointed Mthembu as a municipal policeman and in providing him with a firearm and a uniform. In support of this approach counsel relied upon the majority judgment of Jansen JA in Minister of Police v Rabie 1986(1) SA 117(A). In particular we were referred to the following passage at 134 I - 135 B:

"By approaching the problem whether Van der Westhuizen's acts were done 'within the course or scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing Van der Westhuizen as a member of the Force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed."

I would make the following comments with regard to this passage:

1. The reference to "unjustified arrest, excess of force constituting assault and unfounded prosecution" related to the facts of the Rabie case. There, unlike the present case, the policeman announced that he was a policeman, that he was arresting Rabie and taking him to the police station.

2. In their context the words in the passage "to abuse or misuse those powers" could only have been a reference to powers exercised qua policeman, ie in relation to police work. That follows from an earlier passage in the judgment where Jansen JA stated (at 134 C-E):

> "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 course or scope of his employment, and that in

deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf Estate Van der Byl v Swanepoel 1927 AD 141 at 150). The test is in this regard 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."

In other words the cardinal question is always whether the policeman is acting in the course and scope of his employment as such and in order to find that he was so acting, his acts must have some connection with police work, whether subjectively or objectively viewed.

3. That the "powers" referred to by Jansen JA related to police powers also follows from the judgment of this Court in Minister of Police v

Mbilini 1983(3) SA 705 (A) at 710 H - 711 A where it was held that when a policeman commits a wrongful act while he is on duty it does not necessarily mean that he was acting in the course and scope of his employment; and no onus is cast upon the State to prove that the act was of a personal nature wholly outside the scope of his employment. That judgment was expressly followed by Jansen JA in the Rabie case (at 132 F-H).

4. It follows that the "creation of risk" principle is directly related to the enquiry as to whether the policeman was acting in the course and scope of his employment as such.

In the present case Mthembu said nothing at all when he shot at the plaintiff to the effect that he was acting as a policeman. There is no evidence to suggest

that in acting as he did he subjectively intended to exercise police powers. The only objective facts which could be relied upon by Mr Ploos van Amstel are that Mthembu was wearing a police uniform, and that he used an official firearm. It must be stressed that the involvement of the fellow policeman and the use of the police vehicle occurred prior to and was totally unrelated to the shooting of the appellant. In my judgment, in the circumstances of this case, the wearing of a police uniform and the use of an official firearm do not established that Mthembu, in shooting the plaintiff (or it may added, Pitso) was acting in the interests of or about the business of the respondent. His acts did not fall within the risk of harm created by the respondent in appointing him as a municipal policeman. Wherever the limits of liability based on the creation of risk in this context may be, I have no doubt that the acts of Mthembu do not fall within them. I have

reached this conclusion with regret as the plaintiff was an unfortunate and innocent victim who sustained substantial damages by reason of the unlawful act of the respondent's employee.

The appeal is dismissed with costs.

R J GOLDSTONE

JUDGE OF APPEAL

HOEXTER JA)

VIVIER JA) CONCUR