141/94

REPORTABLE
CASE NO. 246/93
EB

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MINISTER OF LAW AND ORDER — APPELLANT

and

A M KADIR — RESPONDENT

CORAM: HEFER, NESTADT, NIENABER, VAN DEN HEEVER *et* HARMS JJA

DATE OF HEARING: 20 SEPTEMBER 1994

DATE OF JUDGMENT: 29 SEPTEMBER

JUDGMENT

HEFER JA/....

HEFER JA:

I shall refer to the parties to the appeal by their titles in the Court a quo where the present respondent was the plaintiff and the present appellant the defendant. The appeal is against the dismissal of an exception taken by the defendant against the plaintiff's particulars of claim on the ground that it lacks averments which are necessary to sustain the action. The Court a quo's judgment has been reported sv Kadir v Minister of Law and Order in 1992 (3) SA 737 (C). A recital of the facts pleaded (together with the detailed grounds for the exception) appears at 738 B - 739 E of the report. For present purposes only a brief restatement is required.

The plaintiff is seeking to recover damages allegedly suffered on account of his inability to claim compensation for personal injuries from the Fund established by the *Multilateral Motor Vehicle Accidents Fund Act 93 of 1989*. The injuries were sustained when he lost control over his vehicle in swerving to avoid a collision with a bundle of clothing which had fallen from a vehicle travelling ahead of him. Since there was no contact between the

vehicles or with the bundle, a claim against the Fund could, in terms of the regulations promulgated under the Act, only be maintained if the driver or owner of the other vehicle could be identified. This was impossible because the policemen who "attended the scene" shortly after the incident and were "investigating the collision" when the driver returned in the vehicle to retrieve the bundle, failed to "take down the necessary information relating to the driver and the identity of the said vehicle." Their failure is alleged to have constituted a breach of a legal duty which they owed to the plaintiff.

The particulars of claim were plainly drafted on the basis of the judgment in Minister van Polisie v Ewels 1975 (3) SA 590 (A) in which Rumpff CJ, observed at 596 G - 597 A that the general rule against delictual liability arising from omissions had developed to the stage where it is accepted that cases may occur where there is a legal duty to prevent harm to others, that failure to comply with such a duty constitutes a wrongful (and thus actionable) omission, and that liability for such an omission is not limited to certain types of cases. The learned Chief Justice then proceeded to say at 597 A-C:

> "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."

This has since become the accepted norm for determining the wrongfulness of omissions in delictual actions for the recovery of economic loss. (Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A); Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and Others 1982 (4) SA 890 (A) at 900 fin - 901 A; Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 498 G-I; Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 570 E-F; Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A) at 796 E - 797 F; Arthur E Abrahams & Gross v Cohen and Others 1991 (2) SA 301

(C) at 307 I - 309 G.) In Administrateur, Natal v Trust Bank van Afrika Bpk supra Rumpff CJ, after indicating at 833 C-D that policy considerations are a feature common to both the South African concept of a legal duty and the English notion of a "duty of care" (in so far as the latter has a bearing on wrongfulness), quoted with approval inter alia from Fleming: The Law of Torts (4 ed) at 136. The relevant passage (which appears in truncated form at 128 of the 7th (1987) edition of Fleming's work) reads as follows:

> "In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes".

In the present case the defendant has placed the wrongfulness of the policemens' failure to record the relevant information in issue. Par (a), (b) and (c) of the grounds of exception read as follows:

"(a) The facts pleaded and grounds advanced by Plaintiff are insufficient to support the existence of the alleged legal duty to Plaintiff;

(b) Plaintiff relies merely on the alleged breach by Police Officers of a duty to investigate a crime, which breach simpliciter cannot in law give rise to the claim instituted against Defendant;

(c) In law, and as a matter of public policy, a potential civil litigant cannot and should not be permitted to hold Police Officers responsible or liable for failing to collect or preserve evidence which may be useful or necessary for the purposes of civil litigation, given inter alia that the functions of the South African Police are limited to the functions listed in section 5 of the Police Act, No. 7 of 1958;"

In considering whether the facts pleaded are sufficient to support the existence of a legal duty owed to the plaintiff it must be borne in mind that it is for the defendant to satisfy the Court that the conclusion of law for which the plaintiff contends, cannot be supported upon every interpretation which the particulars of claim can reasonably bear (cf Lewis v Oneanate (Pty) Ltd and Another 1992 (4) SA 811 (A) at 817 F-G). There is, moreover, a further hurdle which he has to cross.

As the judgments in the cases referred to earlier demonstrate,

conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (per M M Corbett in a lecture reported sv The Role of Policy in the Evolution of the Common Law in 1987 SALJ at 67). What is in effect required, is that, not merely the interests of the parties inter se, but also the conflicting interests of the community be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (Corbett supra at 68; J C van der Walt: "Duty of care": Tendense in die Suid-Afrikaanse en Engelse regspraak 1993 THRHR at 563 - 564.) Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all the circumstances

of the case and of every other relevant factor. This would seem to indicate that the present matter should rather go to trial and not be disposed of on exception. On the other hand, it must be assumed - since the plaintiff will be debarred from presenting a stronger case to the trial Court than the one pleaded - that the facts alleged in support of the alleged legal duty represent the high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not prima facie support the legal duty contended for, there is no reason why the exception should not succeed. (Cf Indac Electronics (Pty) Ltd v Volkskas Bank Ltd supra at 801 A-D.) It remains however for the defendant to persuade us on this score.

The Court a quo (at 739 F-I of the reported judgment) rightly concluded that the assignment of the duty to investigate any offence or alleged offence to the South African Police in terms of sec 5 of the Police Act 7 of 1958 does not per se impose upon members of the force the legal duty contended for. In the Ewels case (at 596 E) the Court regarded the existence of the statutory duty to prevent crime as one of the factors to be taken into account and

eventually (at 597 F-H) attached considerable weight to it in view of the fact that the plaintiff in that case was assaulted by a policeman in a police station and indeed in the presence of other policemen on duty there who did nothing to prevent the attack while easily able to do so. In the present case the existence of the statutory duty to investigate is also a relevant consideration but, for reasons which will presently emerge, it cannot carry the same weight.

What weighed heavily with the Court a quo (as appears from 739 I - 740 F) was its perception that the community have come to expect that policemen perform a variety of non-statutory duties which they have taken upon themselves in seeking to promote public order and stability, particularly the self-imposed duties which they are accustomed to perform in connection with road accidents. According to the judgment at 740 E-F

> "[the] acts of police on accident scenes ... have created a reliance from which the defendant cannot escape by saying (even if it were true) that so much of what has been done in the past has been done extra-statutorily;"

and at 740 I-J

> "[if] the community would be so offended by a policeman's failure to live up to its expectations (which are based partly on statute and partly on what people see policemen doing every day) that it would demand compensation for a victim who suffered a loss because of such failure, then the policeman is liable."

These remarks leave one with the firm impression that the Court a quo based a duty to record information relating to an "offending vehicle" (743 H-I) and its driver largely on conduct of the police in the past. That a legal duty to act positively in order to avoid harm to another may arise from a party's prior conduct cannot be doubted. But, where specific prior conduct is invoked in support of the existence of a legal duty, such conduct must obviously be properly pleaded. In the present one there is no indication in the particulars of claim that the plaintiff is relying on any prior act - be it on the part of the policemen concerned or any other member of the police force. Moreover, none of the voluntary duties listed in the judgement relates to the collection of

evidence.

But, even if the prior conduct mentioned in the judgment were to be taken into account, I do not share the Court a quo's view of the degree of public indignation which would be aroused by a failure on the part of a policeman to perform one of the many tasks undertaken in connection with road accidents. Society would surely not condemn all omissions equally harshly and would not eg regard a failure to summon a tow truck in the same light as a failure to summon an ambulance or to render assistance to a victim trapped in the wreckage (to mention only some of the many examples used in the judgment). Moreover, in gauging the depth of popular disapproval of any particular omission, one should constantly bear in mind that the age-old problem of the distinction between morally reprehensible and legally actionable omissions is a lasting one which has not been solved by the mere recognition of societal attitudes and public and legal policy as determinants of the existence of a legal duty to prevent economic loss to others. It needs to be emphasized that such a duty arises, as appears from the dictum in the Ewels

case cited earlier, when the circumstances are such, not only that the omission evokes moral indignation, but also that the legal convictions of the community demand that it be regarded as wrongful and that the loss should be compensated by the person who failed to act positively. And, whilst I have little doubt that the community will morally condemn almost every dereliction of duty by a policeman, I think it may be stated with equal certainty that society's legal convictions do not demand every omission to be branded as wrongful and in effect that retribution be exacted from the wrongdoer by holding him personally liable for loss suffered.

Bearing this in mind I turn to examine the circumstances of the present case.

A résumé of the salient facts actually pleaded is that two constables arrived on the scene where the plaintiff had been injured shortly after the incident. While they were conducting an investigation (the nature of which is not disclosed) the offending driver returned to the scene in the vehicle from which the bundle had fallen. A witness to the incident informed the policemen

of the circumstances under which it had occurred and that the vehicle constituted a danger to other users of the road. They failed however to record its registration number or the identity of its driver. Had they done so the vehicle would have been identified and the plaintiff would have been able to claim compensation from the Fund. By virtue of the fact that they knew that the plaintiff had been seriously injured and that the incident was caused solely by the wrongful conduct of the driver of the unknown vehicle, the policemen should reasonably have foreseen that a failure to properly investigate the collision could and would cause the plaintiff to suffer damage.

Although I am by no means convinced of the correctness of such inferences I am prepared to infer from the facts pleaded, as plaintiff's counsel requested us to do, that the driver of the unknown vehicle returned to the scene while the policemen were present and that they received the information referred to from the witness at that stage. I am also prepared to infer that the plaintiff - on account of his injuries - was unable himself to identify either the driver or the vehicle.

Conspicuously lacking is a positive averment of negligence on the part of the policemen. All that is in effect alleged, is that they should reasonably have foreseen that the plaintiff could and would have suffered damage on account of their failure to conduct a proper investigation. Viewed merely as a matter of pleading negligence, these allegations may perhaps pass muster; whether they do or not is of no consequence. What is of importance is that, in relation to negligence, no further omissions are averred. The result is that the only omission relied on is the failure to record (par 12) the registration number and the identity of the driver of the vehicle, which constituted non-compliance with what is alleged in par 11 to be a legal duty "to take down the necessary information relating to the driver and the identity of the said vehicle".

This being the nature of the omission on which the plaintiff relies, there is a vast difference between the Ewels case and the present one. Ewels's complaint against the Minister of Police was that he was assaulted, as mentioned earlier, by a policeman in a police station in the presence of other

policemen who did nothing to prevent or stop the attack. The latters' omission related directly to their statutory duty under sec 5 (d) of the Police Act in connection with the prevention of crime and, as Rumpff CJ said at 597 G-H,

> "[wat] misdaad betref, is die polisieman nie net afskrikker of opspoorder nie, maar ook beskermer."

The lack of concern of the police witnesses to the assault and their failure to act were moreover so shocking that the highest degree of popular indignation would undoubtedly be aroused.

Compared to that, the omission in the present case pales into insignificance despite its consequences to the plaintiff. The complaint is not that the policemen failed to investigate the incident (in par 9 it is actually alleged that they were doing so when the vehicle returned) or to gather information about the offending driver and his vehicle: their only shortcoming was that they neglected to record it. Plaintiff's counsel argued that they should have conducted a proper investigation into an alleged traffic offence committed by the driver, but, assuming that they did not properly perform their duty to

investigate crimes in terms of the Police Act by failing to record relevant information, their omission did not constitute a breach of a duty owed under the Act to the plaintiff. The police force is first and foremost an agency employed by the State for the maintenance of law and order and the prevention, detection and investigation of crime with a view to bringing criminals to justice. In the course of the performance of their duties in this regard its members often collect information relevant to the issues in civil proceedings. But the aim of their investigations is obviously not to provide the parties to such proceedings with useful information; nor does a prospective litigant have the right to demand a police investigation for the sole purpose of providing him with evidence. The fact of the matter is simply that, whereas parties or prospective parties to civil litigation often make use of information gathered by the police, they must make do with whatever the police have available and cannot insist on anything better.

Can it in these circumstances be said that the policemen owed the plaintiff a legal duty to record the information relating to the identity of the

driver or his vehicle? In my view not. Viewing the matter objectively society will take account of the fact that the functions of the police relate in terms of the Act to criminal matters and were not designed for the purpose of assisting civil litigants. Members of the community will realize that services are rendered by the police in connection with road accidents in the course of what was described in Dease v Minister of Justice 1962 (3) SA 215 (T) at 218 B-C as "exceptional duties falling outside the meaning of the term 'Police duties' as ordinarily understood," and that these duties, largely self-imposed, may well be terminated or curtailed if the Courts penalise less than perfect performance. Bearing this in mind society will baulk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty.

In my view the facts alleged in the particulars of claim do not prima facie support the existence of a legal duty towards the plaintiff. The exception should have been allowed.

The appeal accordingly succeeds and the respondent is ordered to pay

the appellant's costs, including the costs of two counsel. The order of the Court a quo is altered to read:

> "The exception is upheld with costs. The plaintiff's particulars of claim are set aside and the plaintiff is given leave, if so advised, to file amended particulars of claim within one month."

J J F HEFER
JUDGE OF APPEAL

NESTADT, JA	)	
NIENABER, JA	)	
	)	AGREE
VAN DEN HEEVER, JA	)	
HARMS, JA	)	