46/97

# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

**CASE NO: 436/95**

In the matter between:

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| **CONSTABLE S P MASUKU** | **FIRST APPELLANT** |
| **THE MINISTER OF LAW AND ORDER** | **SECOND APPELLANT** |

and

| | |
|---|---|
| **D W MDLALOSE** | **FIRST RESPONDENT** |
| **KHOMBISILE MQADI N.O.** | **SECOND RESPONDENT** |
| **SHOGANI NDLOVU N.O.** | **THIRD RESPONDENT** |

**CORAM:** **SMALBERGER, NIENABER, OLIVIER, SCOTT JJA *et* STREICHER AJA**

**HEARD:** **27 FEBRUARY 1997**

**DELIVERED:** **23 MAY 1997**

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**JUDGMENT**

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**SMALBERGER JA. . .**

**SMALBERGER JA:**

The fundamental issue arising in this appeal is whether a policeman who acts "in the course and scope of his employment" as a servant of the State is invariably acting "in pursuance of" the Police Act 7 of 1958 ("the Act"). Differently put, are the two concepts necessarily co-extensive.

The background to the present appeal is as follows. The three respondents (as plaintiffs) instituted action against the two appellants (as defendants) on 13 August 1992 in the former Durban and Coast Local Division. For the sake of convenience I shall refer to the parties as in the court below. The plaintiffs sued for funeral expenses, and loss of support in respect of certain minor children, arising from the death of Sipho Ephraim Mdlalose ("the deceased"). In paragraphs 6 and 7 of

their Particulars of Claim the plaintiffs alleged:

> "6. On or about 14 February 1992, and at or near the Berea Road Railway Station, the First Defendant wrongfully, unlawfully and without any justification shot and killed the deceased.
>
> 7. In acting as described in paragraph 6 hereof, the First Defendant acted in his capacity and within the course and scope of his authority as a servant of the State in the employ of the Second Defendant."

After further setting out the grounds on which their claims were based, and the amount claimed by each of them, the plaintiffs proceeded to allege (in paragraph 13):

> "The First, Second and Third Plaintiffs have duly complied with the provisions of Section 32 of the Police Act No. 7 of 1958."

In addition to pleading to the plaintiffs' allegations on the merits the defendants filed a special plea. It reads as follows:

> "1. It is alleged that the deceased was shot and killed by the first defendant acting in the course and scope of his employment

by the second defendant.

2. The plaintiffs' cause of action therefore arose out of acts allegedly performed in pursuance of the provisions of the Police Act, 1958.

3. In the premises and by reason of the provisions of section 32 of the said Act, the plaintiffs were obliged to commence action within six months after the cause of action arose and to give notice in writing of the civil action and the cause thereof, one month at least before the commencement of the action.

4. The deceased was shot and killed on 14th February 1992 and the plaintiffs' cause of action accordingly arose on the said day.

5. Notice was given by registered letter dated 13th July 1992 and received by the second defendant on 21st July 1992.

6. A copy of the letter is annexed hereto, marked 'A'.

7. Action was commenced by issue of summons on 13th August 1992.

8. In the premises, the plaintiffs:-

(a) failed to give notice to the first defendant;

(b) failed to give notice one month at least before the commencement of the action.

9. The plaintiffs' claims have therefore become prescribed and unenforceable.

Wherefore the defendants pray that the plaintiffs' claims be dismissed with costs."

The plaintiffs did not file a replication. By agreement the action proceeded to trial on the special plea only. In this regard paragraphs 1, 2 and 3 of the pre-trial Minute read as follows:

> "1. It was agreed that the matter will proceed on the special plea alone at the trial set down for 19, 20 and 21 April 1995. In the event of the special plea being dismissed, it was agreed that the matter will be postponed *sine die* with costs to be costs in the cause, the Plaintiff's not being in a position to proceed with the issues of either liability or quantum. In the event of the special plea being upheld, the Plaintiffs' representatives indicated that they would then consider their position concerning the constitutionality of s 32 of Act 7/58.
>
> 2. The Plaintiffs' representatives exhibited:
>
> (a) a copy of a letter of demand addressed to the First Defendant dated 13 July 1992.
>
> (b) certificates of the posting of registered articles on 13 July 1992 at Qualbert addressed to the First and Second Defendants.
>
> 3. The Defendants' representatives made the admission that the respective letters dated 13 July 1992 addressed by the Plaintiffs' erstwhile attorneys to the Defendants were posted by registered mail on 13 July 1992 at Qualbert."

The matter came before Squires J and proceeded in respect of the special plea only. No evidence was led. Squires J dismissed the special plea and, in terms of the agreement between the parties, ordered the costs to be costs in the cause.

Section 32(1) of the Act provides:

> "Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

The section, in so far as it relates to a six month period within which action must be commenced, provides for an expiry period ("vervaltermyn"), and not a prescriptive period. A plaintiff who has failed to comply with its provisions is generally debarred from suing. Hitherto the only exception allowed is where compliance with the

section was at the relevant time impossible (*Minister of Safety and Security v Molutsi and Another* [1996] 4 All SA 535 (A) at 554 f - h). In principle the position must be the same where there has been a failure to give timeous notice. I shall accept for the purposes of the present appeal that had the plaintiffs' in their particulars of claim alleged that the act complained of was performed in pursuance of the Act, it would have been incumbent upon them to allege and prove compliance with section 32(1) (cf *Avex Air (Pty) Ltd v Borough of Vryheid (2)* 1972(4) SA 676 (N)).

If notice in terms of section 32(1) of the Act was required, such notice had to be "given" to the defendants on 13 July 1992 at the latest. The word "given" implies actual receipt of the notice, irrespective of the means of delivery. This would have imposed upon the plaintiffs the

duty to ensure that the defendants actually received the requisite notices not later than 13 July 1992 (*Haripersad v Minister of Police and Another* 1979(2) SA 1005 (N) at 1007 G). The mere posting of the notices on that date was not *per se* sufficient. As there was no admission, or proof, relating to the date of actual receipt by the defendants, and as receipt of the notices on 13 July 1992 cannot be inferred as a matter of probability, the plaintiffs, on whom the *onus* rested to establish compliance with the requirements of section 32(1), would have failed to discharge such *onus*. In the result they would have been barred from proceeding with their action, and the special plea would have had to be upheld.

What needs to be decided, however, is whether, having regard to the issues raised, notice was a pre-requisite to the plaintiffs' action. The

essential allegations are contained in paragraphs 6 and 7 of the particulars of claim. The wording of paragraph 7 - "in his capacity and within the course and scope of his authority" - in essence follows that of section 1 of the State Liability Act 20 of 1957. That section, *inter alia*, renders the State vicariously liable for the delicts of its servants committed in the course and scope of their employment. The wording of paragraph 7 is therefore appropriate to an action founded on the principles of vicarious liability. It should be read as an allegation that at the relevant time the first defendant acted in the course and scope of his employment as a servant of the State. The plaintiffs have chosen to limit themselves to such an allegation. Neither in paragraph 6 nor 7, nor for that matter anywhere else in the particulars of claim, is the allegation expressly made that the first defendant acted in pursuance of

the Act. Nor do the relevant paragraphs necessarily incorporate a tacit admission to that effect.

The matter is somewhat complicated by the fact that the plaintiffs chose, in paragraph 13 of their particulars of claim, to make the unqualified allegation that they had complied with the provisions of section 32 of the Act. Taken on its own, this paragraph is open to the construction that the plaintiffs were alleging that the first defendant was acting in pursuance of the Act. However, the particulars of claim must be considered as a whole. So viewed doubt arises as to whether the plaintiffs intended to make the unqualified allegation that they did. What they should have pleaded was that "To the extent that the provisions of section 32 of the Police Act 7 of 1959 are applicable, the plaintiffs have duly complied with them". Mr Jeffrey, for the

defendants, very fairly conceded that paragraph 13 should be read subject to such qualification.

At best for the defendants the particulars of claim are equivocal in regard to whether the plaintiffs were alleging that the conduct complained of constituted conduct in pursuance of the Act. It was open to the defendants, by appropriate means, to have sought greater clarity from the plaintiffs with regard to the precise nature of their allegations. I have in mind recourse by them to the provisions of Rule of Court 23. They took no such steps before filing their special plea. It was this equivocal state of affairs that led Squires J to dismiss the special plea. (Squires J also found that section 17 of the South African Police Service Rationalisation Proclamation R 5 dated 27 January 1995 was applicable to the present matter. In view of the decision in *Minister of Safety and*

*Security v Molutsi and Another (supra)* he erred in doing so. Nothing further turns on this point.)

As I understood Mr Jeffrey, the defendants accept that if there is a legitimate legal distinction to be drawn between the concepts acting "in the course and scope of his employment" and acting "in pursuance of" the Act, the special plea was correctly dismissed and the appeal must consequently fail. The thrust of Mr Jeffrey's argument was that the two concepts are completely co-extensive. Consequently, even if a plaintiff confined himself in an action such as the present to an allegation that a policeman was acting in the course and scope of his employment, he was obliged to allege and prove compliance with section 32 of the Act. I now proceed to examine this argument.

This Court has not previously been called upon to consider the

point argued by Mr Jeffrey. The matter has, however, from time to time over the years received attention in a number of Provincial decisions. Views in regard thereto have differed. I do not propose to review and analyse all the relevant decisions. To do so would unduly protract this judgment and ultimately not serve any useful purpose. Cases in which it has been accepted in principle that there may be acts done by a policeman *qua* policeman (i e in the course and scope of his employment) which do not amount to conduct in pursuance of the Act (or its predecessors) include *Thorne v Union Government* 1929 TPD 156 (at 159); *E Rosenberg (Pty) Ltd v Union Government (Minister of Justice)* 1945 TPD 225 (at 227/8); *Khoza v Minister of Justice* 1965(4) SA 286 (W); *Lopes v Co-Ministers of Justice and Law and Order and Others* 1979(2) SA 627 (R). See also *Dease v Minister of Justice*

1962(3) SA 215 (T) at 218 B - C.

A contrary view was expressed (with some measure of reserve) in *Masikane v Smit and Another* 1965(4) SA 293 (W) where Viljoen J sought to distinguish the decisions in *Thorne* and *E Rosenberg (Pty) Ltd (supra)*. At 298 A - C of the judgment he stated the following:

> "It is difficult to conceive of any duty normally assumed by the Police Force to be a policeman's duty which would fall outside the expression 'anything done in pursuance of the Act'. Sec. 32 of Act 7 of 1958 no longer contains the words 'or the regulations', as did sec. 30 of Act 14 of 1912. There is, therefore, no longer room for a distinction between anything done in terms of the Act or the regulations and something done in pursuance, for example, of the standing orders or any lawful directions received from a superior not dealt with by the Act or regulations."
>
> (My emphasis)

Later in his judgment (at 299 E - F) he went on to say:

> ".... I do not want it to be understood that I am deciding that the term 'in pursuance of the Act' is exactly co-extensive with the

term 'in the course and within the scope of his employment'. That this is so may very well be argued with conviction because it is the Act which lays down the duties and functions to be carried out be a policeman in the course of his employment, but it is not necessary for me to decide this in the present case. I shall merely content myself with remarking that, to my mind, the two notions certainly overlap."

*Masikane's* case was followed in *Malou and Others v Minister of Police and Others* 1981(2) SA 544 (E). See also *Magubane v Minister of Police* 1982(3) SA 542 (N).

The most recent judgment in point is that of *Mcangyangwa v Nzima* 1993(1) SA 706 (E). After referring to the relevant decisions, Kroon J remarked at 712 A - C:

".... I respectfully align myself with the view that, depending on the nature of the act in question or the place where it is performed, a policeman may act in the course and within the scope of his employment without necessarily doing something in pursuance of the Act. In my judgment the two concepts are not co-extensive and the former is of wider import than the latter;

> while the latter includes the former, the converse is not necessarily so."

The Court expressed the view that it was clearly the intention of the Legislature that the Act should not operate extra-territorially save for certain exceptions. It went on to hold (and I recite the headnote which accurately reflects the judgment) that there was nothing to preclude a South African policeman going about his business, *qua* policeman, in another State and that in so doing he would clearly be acting in the course and within the scope of his employment, but the fact that the operation of the Act was confined to the territory of the Republic precluded any act done beyond the borders of the country from being something done in pursuance of the Act, whatever the policeman's subjective state of mind. Before us the decision was criticised on the basis that the Court had failed to have proper regard to the provisions

of section 6(7) of the Act. If the policeman concerned had been acting under directions issued in terms of that section it may well be that he was acting in pursuance of the Act. On the other hand, had he acted without such directions, he would probably not have been so acting, yet might still have been acting *qua* policeman in the course and scope of his employment as such. However, it is not necessary for the purposes of this judgment to determine the validity of the criticism or the correctness of the judgment.

The concepts "in the course and scope of his employment" (or any of its equivalents) and "in pursuance of" the Act are notionally distinct from each other. They derive from different sources and deal with different incidents of liability. The former is primarily concerned with the common law principles of vicarious liability; the latter is of statutory

origin and its meaning and ambit stem from the provisions of the Act. Different policy considerations are at stake when dealing with the two concepts. The former favours a plaintiff by making a master liable for the wrongs of his servant thereby extending and establishing liability where otherwise it would not exist. It is thus expansive in both its purpose and effect. The latter enures for the benefit of a defendant. A finding that a policeman acted in pursuance of the Act could result in the barring of a plaintiff's action for want of notice or the effluxion of the relatively short period of time within which action is to be instituted. It is therefore restrictive in its effect and can assist a defendant to escape liability. As such it needs to be strictly construed (*Benning v Union Government* 1914 AD 180 at 185). These inherent differences justify the conclusion that the two concepts legally do not entirely correspond.

If the Legislature had in mind to apply the notice requirement and the limitation provision of section 32(1) to all actions against the State arising out of unlawful acts by a policeman acting *qua* policeman, it failed to state so in clear and unequivocal terms in section 32(1) as one might have expected bearing in mind that earlier cases like *Thorne* and *E Rosenberg (Pty) Ltd* (*supra*), which preceded the current Act, had alerted it to a distinction between the two concepts. Instead it deliberately chose to retain the wording "in pursuance of". To the extent that the wording of section 32(1) lends itself to a restrictive interpretation, and impliedly recognises that there may be instances where the conduct of a policeman can give rise to State liability beyond the provisions of the Act, it should be interpreted accordingly. (See in general the comments by the late P Q R Boberg in 1964 Annual Survey

of South African Law at 154-6, and 1965 Annual Survey of South African Law at 175-8.)

In a negative sense the two concepts have a feature in common. This relates to the eventuality where a policeman acts for his own personal ends or, as it is somewhat colloquially put, "on a frolic of his own". In that event he would be acting neither within the course and scope of his employment nor in pursuance of the Act. But it would not be legitimate to argue in reverse that because there is this degree of commonality the two concepts are otherwise necessarily co-extensive.

In my view one cannot determine the issue before us *in vacuo*. It is impossible to lay down precise rules governing the meaning of each of the concepts. Notionally they differ. Their application must inevitably depend upon the facts and circumstances of each particular

case, which in the nature of things can vary radically and cover a myriad of situations. Only once the relevant facts have been established will it be possible to determine, applying recognised principles, whether the acts complained of amount to conduct "within the course and scope of employment" or "in pursuance of" the Act, or both, or neither. While the concepts clearly overlap, one cannot predict with certainty that they will necessarily always be co-extensive.

In the result the particulars of claim were, at worst for the plaintiffs, equivocal. For the defendants to have succeeded in their special plea, which was in the nature of a special defence (see *Minister of Police and Another v Gasa* 1980 (3) SA 387 (N) at 388 G - H; *Gericke v Sack* 1978 (1) SA 821 (A) at 826 B *et seq.*), it was incumbent upon them to prove that the first defendant's conduct on which the

plaintiffs' action was founded, was in pursuance of the Act (cf *Matlou v Makhubedu* 1978 (1) SA 946 (A) at 955 E *et seq*). This they failed to do. The appeal accordingly cannot succeed.

In terms of the special plea Squires J was only called upon to decide whether the plaintiffs' claim had become unenforceable because of non-compliance with section 32(1) of the Act. In order to do so he had to decide, first, on the basis of the allegations in the plaintiffs' particulars of claim, whether the plaintiffs had to comply with the provisions of section 32(1) and, second, if they had to comply with those provisions, whether they did so. The parties elected not to lead any evidence but to have the matter decided on the facts agreed to at the pre-trial conference.

The court *a quo* decided that on the bare allegations in the plea (I

assume the special plea) the defendants had not shown that section 32(1) applied to the ensuing action and dismissed the defendants' special plea.

In *Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 583D-G Diemont JA said:

> "Dit volg dus na my mening dat die uitspraak van Regter Smuts die geskilpunte wat deur die spesiale pleit geopper is finaal besleg het. Die verligting wat eerste verweerder na aanleiding van die bewerings in sy spesiale pleit aangevra het, is hom geweier. Indien die verhoor voortgesit sou gewees het sou die Hof nie bevoeg gewees het om weer opnuut die vraag te oorweeg of die spesiale pleit gehandhaaf behoort te word, aldan nie. By die verdere verhoor en die daaropvolgende uitspraak sou slegs die geskilpunte betreffende die meriete van eiser se eis ter sprake gewees het. Die uitspraak waarteen eerste verweerder in hoër beroep is, is dus, wat betref die Hof wat die uitspraak gegee het, 'n finale en onherstelbare afhandeling van 'n selfstandige en afdoende verweer wat eerste verweerder geopper het as grondslag vir die regshulp wat hy in die spesiale pleit aangevra het."

The defendants in the present case, in their special plea, raised a "selfstandige en afdoende verweer", namely, non-compliance with

section 32(1) and asked for separate and distinct relief, namely, that the plaintiffs' action be dismissed with costs. By dismissing the special plea the court *a quo* finally, for the purposes of this action, decided the issues raised by the special plea. The judgment of the court *a quo* is therefore appealable (See *Constantia Insurance Co Ltd v Nohamba* 1986(3) SA 27(A) at 36 F-I and *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994(3) SA 407 (A) at 416 C-F). Neither party argued to the contrary.

In the result the appeal is dismissed with costs.

**J W SMALBERGER**

**NIENABER, JA )**
**SCOTT, JA )CONCUR**
**STREICHER, AJA )**

H6A/97

**REPORTABLE**

evdw/

Case no : 436/95

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

In the matter between :

| | |
|---|---|
| **Constable S P Masuku** | First Appellant |
| **The Minister of Law and Order** | Second Appellant |

and

| | |
|---|---|
| **D W Mdlalose** | First Respondent |
| **Khombisile Mqadi N.O.** | Second Respondent |
| **Shogani Ndlovu N.O.** | Third Respondent |

Court : Smalberger, Nienaber, Olivier, Scott JJA and Streicher AJA

Heard : 27 February 1997

Delivered : 23 May 1997

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JUDGMENT

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**OLIVIER, JA**

1. I have had the privilege of reading the judgment of my colleague, Smalberger JA, but respectfully disagree with the conclusion reached by him. Where necessary for purposes of my judgment I will also set out the relevant factual background.

2. The plaintiffs claimed damages from the first defendant ("Masuku") and the second defendant ("The Minister"). They alleged that one Sipho Ephraim Mdlalose had been wrongfully shot and killed by Masuku, a police captain employed by the KwaZulu Police Force acting, at the time of the shooting, ". . . in his capacity and within the course and scope of his authority as a servant of the state in the employ of the Minister."

3. By way of a special plea, the defendants raised the defence that the plaintiffs had failed to comply with the provisions of sec. 32(1) of

the Police Act 7 of 1958 ("the Act"). This section reads as follows:

> Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.

4. The crux of the special plea is that the required notice was not given one month at least before the commencement of the action. The alleged delict having been committed on 14 February 1992, the last day for serving the summons on the defendants in the proposed action was 13 August 1992. The required notice should have been received by the defendants at the very latest by 13 July 1992. It is common cause that the required notices were mailed on 13 July 1992, but they did not reach the defendants on that day. If sec. 32(1) of the Act is applicable, the notices were not given timeously, the

special plea should be upheld, and the action be dismissed.

5. The question whether sec. 32(1) of the Act applies in a particular case depends on whether the police officer in question acted ". . . in pursuance of this Act . . ." when the alleged delict was committed. This is a factual question. The issue in the present case, however, is rather one of semantics: The special plea says, in effect, that

(i) the plaintiffs themselves aver that Masuku acted in his capacity as a police officer and "within the course and scope of his authority" as a servant of the State in the employ of the Minister;

(ii) these allegations are tantamount to an averment that Masuku acted "in pursuance of this Act";

(iii) sec. 32(1) is therefore applicable on the plaintiff's own

allegations, which - as must be for the purpose of a special plea - are accepted as factually correct;

(iv) plaintiffs have failed to comply with sec. 32(1).

6. Plaintiffs deny the validity of the argument in para. (ii). They say that there is a legal difference between "acting within the course and scope of his authority as a police officer" and "acting in pursuance" of the Act. The conclusion in para. (iii) is, therefore, invalid.

7. Squires J, in the court *a quo,* upheld the plaintiffs' contention. With leave of the court *a quo* the matter is now before us.

8. The question whether these two allegations or concepts are co-extensive or not has been debated in a number of Provincial Court and Zimbabwean cases, since as early as *Thorne v Union Government* 1929 TPD 156 (see at 158), i.a. in *E. Rosenberg (Pty) Ltd v Union Government (Minister of Justice)* 1945 TPD 225 at 227;

*Mphelo v Bruwer* 1951(1) SA 433(T) at 436; *Weir-Mason v Minister of Justice* 1958(3) SA 299(N) at 305 A *et seq*; *Dease v Minister of Justice* 1962(3) SA 215(T) at 216 G *et seq*; *Dineka and Another v Van der Merwe and Others* 1962(3) SA 220(T) at 223 G *et seq*; *Ngubani v Divisional Commissioner, South African Police, Witwatersrand Division*, 1963(1) SA 316(W) at 321 F *et seq*; *Khoza v Minister of Justice* 1965(4) SA 286(W) at 288 A *et seq*; *Masikane v Smit and Another*, 1965(4) SA 293(W) at 296 D *et seq*; *Lopes v Co-Ministers of Justice and Law and Order and Others*, 1979(2) SA 627(R); *Malou and Others v Minister of Police and Others*, 1981(2) SA 544(E) at 550 C *et seq*; *Magubane v Minister of Police* 1982(3) SA 542(N) at 546 B *et seq*; *Badenhorst v Minister of Home Affairs* 1984(1) SA 300(ZHC) at 302 E *et seq* and *Mcangyangwa v Nzima* 1993(1) SA 706(E). The matter was also discussed in the

judgment of the Zimbabwe Supreme Court in *Minister of Home Affairs v Badenhorst* 1984(2) SA 13(ZS).

The general meaning of the words ". . . in pursuance of . . ." was also discussed in *Solomon v Visser and Another*, 1972(2) SA 327(C) at 339 E.

It appears from an analysis of these cases that there is no unanimity on this point.

9. In my view the question under consideration should be approached from a broad perspective, viz a comparison of, on the one hand, the basis of the liability of the state for the wrongful acts of its employees and in relation thereto the requirements of the Act, with, on the other hand, the basis of the ordinary private law vicarious liability.

10. Vicarious liability of an employer for the wrongful acts of an employee.

10.1 It is now settled that such liability developed, more or less along parallel lines, in Roman-Dutch and English law and forms part of our law by reception. (*Estate van der Byl v Swanepoel* 1927 AD 141 at 153; *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 762. See the useful overviews by T B Barlow in *The South African Law of Vicarious Liability* 1939:84 - 94 and W.E. Scott's *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 1983:1 - 12).

10.2 The liability of an employer for the wrongful acts of an employee was impliedly recognised as part of our law as early as 1845 in *Dreyer v Van Reenen* 3 M 375 and explicitly in 1874 in the important case of *Binda v. Colonial Government* 5 SC 284 esp. at 289. By the time the Union of South Africa was established, this form of vicarious liability was well

established in all four provinces (see Barlow 1939:85 footnote 1 for a list of pre-Union cases).

10.3 It is now generally accepted that the formula ". . . acting within the course and scope of his employment as an employee" denotes a reliance on private law vicarious liability. Other similar expressions such as ". . . in the exercise of the functions entrusted to the employee" or " . . . doing his master's work" have been used and discussed in cases such as *Mkize v Martens* 1914 AD 382 and *Feldman (Pty) Ltd v Mall* 1945 AD 733. A useful summary and discussion of the various expressions used and the basis of vicarious liability are to be found in J.A. van S. d'Oliveira's, *State Liability for the wrongful exercise of discretionary powers*, LLD dissertation 1976:404 *et seq*.

11. **State liability for the wrongful acts of civil servants.**

11.1 In *Binda v Colonial Government, supra,* it was held that the law relating to the liability of the State for the wrongful acts of civil servants must be sought, not in Roman-Dutch law, but in the English law. According to that system of law, ". . . the Crown cannot, in contemplation of law, command a wrongful act to be done, nor can the Crown be prejudiced by the laches or acts of omission of any of its officers." (at 290). De Villiers CJ viewed this state of the law as unsatisfactory and stated that a law establishing liability of the government for the tortious acts of its officials was urgently needed.

11.2 Signicantly, the very first statute of the Union Legislature responded to the abovementioned suggestion made 36 years earlier by De Villiers CJ. Act 1 of 1910, the Crown Liabilities

Act, established state liability for the wrongful acts of civil servants.

Sec. 2 of that Act provided:

> Any claim against His Majesty in His government of the Union which would, if that claim had arisen against a subject, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant. (My underlining).

11.3 It is not clear at all whether the legislation intended to introduce vicarious liability or direct liability of the government. It has been argued (esp. by J.A. van S. d'Oliveira, *op. cit.*, 1976:477 - 488) that civil servants are not, legally, in the same position as employees. They are

organs of the State. As such the state is directly, and not vicariously, liable for their acts. (The point is also clearly put by Scott 1983:200 - 203.)

11.4 In some of the early decided cases, the organ-approach was followed, with the result that a distinction was drawn between state liability for the wrongful acts of its "organs" and ordinary vicarious liability - see i.a. *Lawford v Minister of Justice and Schmidt* 1914 NPD 284. The decision of this court in *British South Africa Co. v Crickmore* 1921 AD 107 was unfortunately based on this perspective. Dealing with the question of state liability for a wrongful arrest carried out by a police officer, Solomon JA stated (at 111):

> Now, in a sense, no doubt the police are the servants of the Company, by whom they are appointed and paid, and by whom they may be discharged. But in respect of

> such an act as the arrest of a person for the commission of a crime they are performing a duty imposed upon them not by the Administration but by Statute. In the discharge of that duty the Administration has no control over them and has no power to interfere with them. When, therefore, a constable is effecting an arrest he is not acting as a servant of or on behalf of the Company, but is carrying out a duty entrusted to him by the Legislature.

On that basis, the government (and consequently the British South Africa Co) was absolved from liability.

12. In 1930 this court changed its approach dramatically in deciding, in *Union Government (Minister of Justice) v Thorne* 1930 AD 47, that the state was liable for the negligent acts of a police constable. The constable had been instructed by the officer to proceed by mule-drawn trolley to the scene of an accident and to bring the injured

person to the charge office. On his way to the scene of the accident, the constable negligently caused a collision between the trolley and a motor-cycle driven by the plaintiff. The plaintiff was awarded damages by the trial court, and an appeal to this Court was dismissed. It was held that the argument that, since all duties performed by a police officer are statutory ones, the Crown could not be said to be his master and therefore not liable for his acts, was untenable.

De Villiers CJ (at 51) stated :

> As was pointed out in the case of South African Railways & Harbours v Edwards [1930 AD 3], the Act placed the Crown upon the same footing as a subject, and makes it liable in tort for the wrongful acts of its servants committed within the scope of their employment. All members of the police force are *prima facie* servants of the Crown. When, therefore, the wrongful act is committed by a member of that force in the course of his duty, the Crown is *prima facie* liable. It is then for the latter to show that the nature of the

> duty upon which the police officer was engaged at the time is such that it takes him out of the category of servants for the time being. The mere fact that the duty is a statutory one is not enough. To take the case out of the Act there must be a lack of one or more of the essentials of the law relating to master and servant, such as that the police officer was performing a duty of a personal nature which made him independent of the control of the Crown *pro hac vice*. (My underlining).

And also (at 52 - 53):

> In our opinion it does not matter whether the duty be statutory or imposed by the common law. In either case the officer would be carrying out a duty imposed by law. That fact by itself, however, would not prevent him from being a servant of the Crown. It is only when that duty has the effect of depriving the Crown of the power to direct or control him in carrying out his duty that *pro hac vice* he cannot be regarded as the servant of the Crown. But to speak of him in such a case as the agent or the servant of the legislature or of the law hardly reflects the correct legal position.

(See also *Sibiya v Swart NO 1950(4) SA 515(A) at 520 C-D).*

13. The position was then that state liability for the wrongful acts

committed by a civil servant was placed on the same footing as that of a "private" employer for the delicts of an employee, i.e. the well-known common law liability. I am of the view that by 1957 (the year of the new State Liability Act) it can fairly be said that in principle the words in sec. 2 of the 1910 Crown Liabilities Act ". . . acting in his capacity and within the scope of his authority as such servant" denoted the basis and scope of the vicarious liability of the State and were treated as the equivalent of "acting within the course and scope of employment" of an ordinary employee.

**The position since 1957**

14. In 1957 the 1910 Crown Liabilities Act was replaced by the State Liability Act, 20 of 1957. Sec. 1 re-affirms State liability for ". . . any wrong committed by any servant of the State acting in his capacity and within the scope of his authority," words similar to

those of sec. 2 of the Crown Liabilities Act.

15. Despite various nuances in expression, the common law test of vicarious liability i.e. whether the employee in question was acting in the course and scope of his employment or, put differently, whether he was engaged in the affairs or business of the employer, has been applied consistently since 1958 to the liability of the State for the wrongful acts of police officers. See *African Guarantee & Indemnity Co v Minister of Justice* 1959(2) SA 437(A) at 445; *Mhlongo and Another NO v Minister of Police* 1978(2) SA 551(A) esp. at 567 par. (3); *Macala v Moakeng Town Council* 1993(1) SA 434(A); *Minister of Law and Order v Ngobo* 1992(4) SA 822(A) at 826 F - 828 A; *Tshabalala v Lekoa City Council* 1992(3) SA 21(A) at 28 B - 29 B; *Minister of Police v Rabie* 1986(1) SA 117(A) at 132 G - H, 134 D - 135 C; *Minister of Police v Mbilini* 1983(3) SA

705(A) esp at 710 B - 712 B. These cases, on analysis, all confirm that in order to establish the vicarious liability of the State, the plaintiff must prove that the person who did the wrong was (a) an employee of the State acting in that capacity, and (b) that he or she performed the wrongful act in the course or scope of his or her employment (see esp. Smuts AJA in *Minister of Police v Mblini, supra* at 711 H). What is more, the tests for State liability for the wrongful acts of police officers and the test for an employer's vicarious liability were stated explicitly to be the same in *Mhlongo and Another N.O. v Minister of Police* 1978(2) SA 551(A). Also the terms "within the scope of his authority" and "within the scope of employment" were treated as being synonymous. Reference was made at 567 C-D to the notional difference between the two last mentioned concepts that was mentioned, but not explained or used,

in *Feldman (Pty) Ltd v Mall supra* at 736, but doubt was expressed as to the tenability of this difference when Corbett JA stated at 567 D:

> Nevertheless, it has never been suggested that the State escapes liability for a wrongful act committed by a servant in his capacity as such simply because the act fell outside the "scope of his authority," when it was clearly within the "scope of his employment."

**The Police Acts**

16. I must now return to the year 1912, when the Police Act, 14 of 1912 was enacted. Two years had elapsed since the birth of the Crown Liabilities Act.

The Police Act of 1912 consolidated and repealed previous provincial enactments dealing with the police force. Sec. 7(1) of the 1912 Act circumscribed the powers and duties of members of the force as follows:

> Every member of the force shall exercise such powers and perform such duties as are by law conferred or imposed on a police officer or constable but subject to the terms of such law, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the force.

17. In 1958 a new Police Act, 7 of 1958, ("the Act") was placed on the statute book.

Sec. 5 describes the functions of the S.A. Police as follows:

> The functions of the South African Police shall be, *inter alia* -
>
> (a) the preservation of the internal security of the Republic;
> (b) the maintenance of law and order;
> (c) the investigation of any offence or alleged offence; and
> (d) the prevention of crime.

Sec. 6 purports to set out a comprehensive list of powers and duties of members of the Force, but sec. 6(1) is of general nature and reads as follows:

> (1) A member of the Force shall exercise such powers and

> perform such duties as are by law conferred or imposed on a police officer or constable, but subject to the terms of such law, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the Force.

18. That a police officer is obliged to perform common law duties, *ex virtue officii*, and that it was not intended by sec. 7 of the 1912 Police Act to substitute mere statutory duties for the wider, common law, duties of the police, was already stated in *Thorne's* case (at 51 - 53) and clearly established in a seminal judgment by Rumpff J in *Wolpe and Another v Officer Commanding South African Police, Johannesburg* 1955(2) SA 87(W), a judgment which, according to Prof. B. Beinart, ". . . will find universal approval" (Butterworths South African Law Review 1955:157 at 162). In the course of his judgment Rumpff J stated (at 92 G - 93 F):

> In die Engelse reg ontstaan die pligte en

regte van die Polisie uit die Gemene reg en uit wetgewing wat van tyd tot tyd die lig sien.

In die algemeen is die Polisie as 'n siviele mag 'n baie ou instelling in die gemeenskap wat reeds in die Egiptiese, Griekse en Romeinse Reg gevind word.

Die vorm van die organisasie en die magte wat deur die Polisie uitgeoefen is, is nie iets wat deur die eeue dieselfde gebly het nie. Daar was periodes waarin die organisasie op losse voet gestaan het. By geleenthede is reorganisasie toegepas waarby magte en pligte duideliker omskryf is. Voorbeelde hiervan is die pogings van Augustus en later Karel die Grote.

Die geskiedenis toon dat in normale tye wanneer die Polisie nie deur persoonlike heersers misbruik is nie meeste pligte by verordening bepaal is, veral die pligte aangaande arrestasie en huissoeking sodat die regte van die individu wat ook mettertyd en beslis in die Romeins-Hollandse Reg erken is, nie onnodiglik of na willekeur versteur sou word nie.

Die basiese pligte van die Polisie is in Engeland dieselfde as op die Vasteland en die basiese pligte geld ook m.i. in die Unie van Suid-Afrika.

Dit is die plig van die Polisie, uit die aard van hulle amp, om die binnelandse veiligheid van

die Staat en die openbare vrede te bewaar en om misdaad te voorkom.

In die wye sin van die woord vind voorkoming van misdade plaas deur die inhegtenisneming van oortreders en deur bewaking. Daar rus egter ook 'n plig op die Polisie, ampshalwe, om stappe te doen om die pleeg van 'n misdaad te voorkom indien daar redelike gronde bestaan vir die vermoede dat 'n misdaad gepleeg gaan word.

Hierdie basiese pligte is opgesluit in die wese van die Polisie as 'n siviele mag in die Staat.

Namens applikante is aangevoer dat weens die bepalings van art. 7 van die Polisiewet gelees met die omskrywing van "wet" in die Interprestasie Wet van 1910 gemeenregtelike pligte van die Polisie wat daar mog bestaan het, weggeneem is. Art. 7 lui as volg:

"*Ieder lid van de dienstmacht oefent zulke bevoegdheden uit en vervult zulke plichten als aan een politie beampte of konstabel by de wet toegekend of opgedragen zyn met in achtneming echter, van de bepalingen van zodanige wet.*"

Na my mening was dit nie die bedoeling van die Wetgewer met genoemde art. 7 om die basiese pligte van die Polisie weg te neem en te vervang deur statutêre pligte nie.

Dis 'n artikel wat duidelik maak dat die

> basiese pligte uitgebrei of meer uitvoerig omskryf kan word deur wette, iets wat reeds vir eeue plaasgevind het, sowel in die Romeins-Hollandse as in die Engelse Reg.

Such liability was again emphasised in *Minister van Polisie v Ewels* 1975(3) SA 590(A) where Rumpff CJ stated (at 597 G-H):

> Die eiser is aangerand in die polisiekantoor onder beheer van die Polisie en ten aanskoue van 'n aantal polisiemanne van wie dit gesamentlik redelik moontlik, selfs maklik, was om die aanval op eiser te verhoed of te beëindig. Ook is dit in hierdie saak 'n bykomende faktor dat Wood, in die besondere omstandighede, as sersant gesag kon uitoefen oor Barnard. Dit dien egter opgemerk te word dat die posisie van die polisiemanne teenoor eiser in die onderhawige saak, in beginsel, dieselfde sou gewees het indien die aanrander van eiser nie 'n polisieman was nie. (My underlining).

19. Secs. 5 and 6(1) of the Act are of wide ambit. The Act now explicitly incorporates duties under the common law, other statutes or regulations, and lawful instructions. It covers everything that can come under the rubric of "scope of employment." In this sense all

police duties are now duties "in pursuance of this Act." "Any law" includes the common law (*R v Maharaj* 1950(3) SA 187(A) at 194 A-D).

20. **The limitation clauses in the Police Acts**

A limitation of action clause appeared in sec. 30 of the 1912 Police Act:

> For the protection of persons acting in the execution of this Act every civil action against any person in respect of anything done in pursuance of this Act or the regulations, shall be commenced within four months after the cause of action has arisen, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof. (My underlining).

21. The limitation provisions of the sec. 30 of the 1912 Police Act are now contained in sec. 32(1) of the Act. It reads as follows:

> Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant

one month at least before the commencement thereof.

22. From the analysis endeavoured above and esp. secs. 5 and 6(1) of the Act, it follows that when a policeman is "acting within the course and scope of his employment," he is also "acting in pursuance of this Act;" and if he is acting "in pursuance of this Act," he is acting "within the course and scope of his employment." When one compares the requirement of acting " in pursuance of " the Act to acting "within the course and scope of employment," it appears that

1. a policeman who is on a frolic of his own and not pursuing his master's ends is neither acting "in pursuance of this Act" nor "within the course and scope of his employment."

2. a policeman who is acting "in pursuance of this Act," i.e. acting *pro hac vice* as servant of the State because the State

has the power to direct or control his actions, will necessarily also be acting "within the course and scope of his employment."

3. the converse of (2) must also be true.

4. it follows that, as far as the vicarious liability of the State for the acts of a police officer is concerned, the terms acting "in pursuance" of the Act is synonymous with acting "within the course and scope of his employment."

5. in ordinary cases, the employer's ends, i.e. what the employee must pursue, are set out in the contract of employment. In the case of a policeman, the employer's ends are set out in the Act, which incorporates other statutory and also common law duties. The expression "in pursuance of this Act" in sec. 32(1) of the Act is simply another way of saying "in

pursuance of his employer's ends" or "in the course and scope of his duties as employee."

23. In my view the decisions of *Weir-Mason v Minister of Justice* 1958(3) SA 299(N) at 302 H *et seq*; *Masikane v Smit and Another* 1965(4) SA 293(W) esp at 299 F; *Dease v Minister of Justice* 1962(3) SA 215(T) esp at 217 H *et seq*; *Dineka and Another v Van der Merwe and Others* 1962(3) SA 220(T) esp at 223 B *et seq*; *Malou and Others v Minister of Police and Others* 1981(2) SA 544(E) esp at 550 B *et seq*, and *Magubane v Minister of Police* 1982(3) SA 542(N) esp at 546 B *et seq*, were therefore correct.

*Thorne v Union Government* 1929 TPD 156, *E. Rosenberg (Pty) Ltd v Union Government (Minister of Justice)* 1945 TPD 225 and *Khoza v Minister of Justice* 1965(4) SA 286(W), expressing a different point of view, were not concerned pertinently with the

question now under consideration but with whether the expressions used in sec. 30 of the Police Act, 30 of 1912 and sec. 32(1) of the present Act, viz. "anything done in pursuance of this Act," would be applicable to something done on the instructions of a superior officer.

24. The decision in *Mcangyangwa v Nzima* 1993(1) SA 706(E) which came to the opposite conclusion than the one here expounded is, in my view, clearly wrong.

In that case it was held by Kroon J (Erasmus J concurring) that where a police officer had assaulted a person in a foreign country, he could not have been acting in pursuance of the Act, because the provisions of the Act did not have extra-territorial operation. Kroon J accepted, for the purposes of the declinatory plea, that the police officer in question had committed the alleged assault in the course of his investigations in the Ciskei of a crime committed in the RSA;

that the assault had not been perpetrated for the police officer's personal ends "but in the course of his business as a policeman" (at 711 A-C).

As explained above, a police officer who is acting ". . . in the course of his business as a policeman" will in all cases derive his authority to do so by virtue of the Act, esp. secs. 5 and 6(1). If he received his instructions from a superior officer, the validity of such instructions themselves derives from the Act. The point is even clearer if he had been acting in terms of regulations, the Act itself or in fulfilment of a common law duty. In all these cases he would be acting "in pursuance of this Act" but at the same time "within the course and scope of his employment" as a police officer. The conclusion reached by Kroon J is, in my view, incorrect.

25. To return to the question before us. There does not appear to be any

South African case where a distinction between acting in pursuance of the Act and acting within the course and scope of employment has been convincingly illustrated to exist. On the contrary, I am of the view that the conclusion appears to be correct that these two concepts are identical and that the differences are merely terminological and without any legal distinction.

26. In the case now under consideration, the plaintiffs

(i) described the first defendant as a policeman;

(ii) alleged that in shooting and killing the deceased, the first defendant acted in his capacity and within the course and scope of his authority as a servant of the State in the employ of the second defendant, the Minister of Law and Order;

(iii) alleged that they have duly complied with the provisions of sec. 32 of the Act.

Having alleged that first defendant was a policeman employed as such by the Minister of Law and Order and that he acted in that capacity and within the course and scope of his authority as a servant of the State and a policeman, the plaintiffs, in my view, at least tacitly, also averred that the first defendant had acted in pursuance of the Act.

It follows that a failure to give timeous notice as required by sec. 32 of the Act is fatal to their action.

In the result, the special plea should have been upheld. I would have made the following order:

1. The appeal is upheld with costs.

2. The judgment of the court *a quo* is set aside and replaced by the following order: The special plea is upheld with costs.

P.J. OLIVIER JA