IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 6948/2018

In the matter between:

FUNDISWA FIONA RALARALA obo SONWABILE RALARALA Plaintiff

and

THE MINISTER OF POLICE Defendant

JUDGMENT

DE WET, AJ

INTRODUCTION:

[1] Plaintiff claims damages on behalf of her son Sonwabile Ralarala ('Sonwabile') in delict from defendant as a consequence of him being shot by a member of the South African Police Service ('SAPS') with a police issue firearm which resulted in his permanent paralysis.

[2] The parties agreed to separate the issue of merits and quantum and at the commencement of the hearing an order was granted in terms of rule 33(4).

[3] It is plaintiff's pleaded case that by virtue of the provisions of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), defendant and its employees owed Sonwabile a duty of care and were obliged to protect his dignity and life, his freedom and security of person and his right to bodily and psychological integrity. It was further pleaded that defendant's employees owed Sonwabile a duty of care by virtue of the South African Police Services Act 68 of 1998 and the issuing of a firearm by defendant to the particular member was in breach of such duty as he was not proficient in the use of such firearm; he had not met the requirements of Standing Order 48 and did not have the necessary permission to be in possession of a police issue firearm.

[4] It is defendant's pleaded case that the particular member was granted permission by him after an application by the member to possess the firearm in question whilst off duty as from 14 April 2017 (sic), defendant did not owe Sonwabile a duty of care and further that the member was not acting in the course and scope of his employment with defendant when he shot Sonwabile and another member of the public.

[5] Accordingly, the issue for determination is whether defendant was negligent in issuing a firearm to the particular member of the SAPS responsible for shooting and injuring Sonwabile whether on the basis of direct liability or vicarious liability.

[6] By virtue of the formal admissions which were formulated and placed on record by agreement between the parties, the proceedings were significantly curtailed. The evidence which

was led by plaintiff was also mostly uncontested. A brief summary of the facts will therefore suffice:

6.1. Constable Mandla Mahlanza ("Mahlanza"), was employed by the SAPS on 14 January 2008.

6.2 On the evening of 22 July 2017 and just after 20h00 there was an altercation between Mahlanza and a Mr Mathole, which culminated in Mahlanza drawing his firearm in the presence of many innocent bystanders outside a tavern known as Mtotywa's tavern in Khayalitsha, and shooting 6 to 7 shots in Mr Mathole's general direction.

6.3 The firearm (a Z88 pistol with serial number Q061689) was issued to Mahlanza pursuant to a so-called SAPS 543, being a temporary permit to possess an official firearm for the period 14 July 2017 to 27 July 2017 (a 13-day period).[1] The document/permit did not contain a serial number and was only signed by Warrant Officer Stemmet who held the rank of Sergeant at the time. Mahlanza was also issued with 30 rounds of ammunition.

6.4 Mr Mathole was shot in the neck and knee, but luckily only sustained flesh wounds.

6.5 At the time of the incident Mahlanza was off-duty, dressed in civilian clothes, drinking with friends and according to Mr Mathole he was drunk. He had his

[1] See trial bundle page 61

police issue firearm with him and had threatened to shoot Mr Mathole a bit earlier on the same evening.

6.6 At the time of the shooting incident Sonwabile, who was only 15 years old at the time, was walking home after he had his hair cut. He stopped to buy meat at a stand opposite the aforesaid tavern and saw Mahlanza, whom he knew was a police officer living in the area, emerge from the tavern, drawing a firearm which he pointed in Sonwabile's general direction and fired a shot. Sonwabile was struck in the neck and remembers falling to the ground where after he lost consciousness.

6.7 As a result of the shot, Sonwabile is now wheel-chair bound and permanently disabled.

6.8 As a result of Mahlanza shooting Sonwabile and Mr Mathole, he was arrested on 23 July 2017 on two counts of attempted murder under case number Khayelitsha CAS 688/07/2017. In his warning statement dated 24 July 2017 he stated under oath as follows "*I acted in self-defence* (sic) *as my life was in danger*".

6.9 The criminal proceedings were ultimately struck from the roll on 13 June 2018 after many appearances and as a result of witnesses not being at Court.

6.10 Mahlanza was subjected to a disciplinary hearing by the SAPS which commenced on 5 June 2018 and was only finalised on 9 December 2019. He was found guilty of recklessly discharging his service issue firearm and more particularly

contravention of sections 120(3)(b) and (c) and section 120 (6)(a) of the Firearms Control Act. It was further found that he conducted himself in an improper, disgraceful and unacceptable manner. He was dismissed from the SAPS on 9 December 2019. It would appear from the documents made available during the trial that he still reported for duty in the interim and was again issued with a firearm and ammunition shortly after the incident.[2]

6.11 At the disciplinary hearing, Mahlanza, under oath and despite his witness statement on 24 July 2017, denied firing any shot on the evening of 22 July 2017 and stated that he merely tried to defuse a situation involving Mr Mathole.

6.12 For purposes of this matter, defendant on 23 November 2020 formally admitted that Mahlanza fired a shot on 22 July 2017 using his police issue firearm resulting in Sonwabile being struck by the bullet.

6.13 It was further admitted that Mahlanza was booked off from duty on the evening of 19 July 2017 and was scheduled to report back for duty on 23 July 2021 at Kensington SAPS, where he was stationed at the time.

6.14 At the time of the incident Mahlanza had a track record in respect of maintenance shooting which revealed that for a number of years preceding the shooting he had regularly failed his maintenance shooting in that:

[2] See trial bundle pages 141 to 147: The Occurrence Book at Kensington SAPS shows that on 31 July 2017, 9 days after the incident, and on 1 and 2 August 2017 he was again issued with a fire-arm and ammunition

6.14.1 On 8 May 2015 he failed his maintenance shooting with a handgun at Faure Provincial Training facility, Western Cape.

6.14.2 On 9 June 2015 he failed his maintenance shooting with a handgun at Faure Provincial Training facility, Western Cape.

6.14.3 On 28 September 2015 he failed his maintenance shooting with a handgun at Faure Provincial Training facility, Western Cape.

6.14.4 On 14 April 2016 he failed his maintenance shooting with a handgun at Faure Provincial Training facility, Western Cape.

6.14.5 On 24 March 2017 he failed his maintenance shooting with a handgun at Faure Provincial Training facility, Western Cape.

6.14.6 On 8 May 2017 he failed his maintenance shooting with a handgun at Faure Provincial Training facility, Western Cape.

6.15 Shortly prior to the shooting, on 27 June 2017, he had passed a remedial maintenance shooting course.

6.16 After the incident he continued to prove himself incompetent with a firearm when tested. By the time the disciplinary proceedings were heard he had again failed his maintenance shooting. In November 2019 he yet again failed his maintenance shooting with a handgun at Faure Provincial Training Facility, Western Cape

6.17 Mahlanza's disciplinary record showed that:

6.17.1 On 11 April 2011 he faced a charge of misconduct in terms of regulation 20(a) in that he allegedly caused damage and loss to State property related to reckless and negligent driving of a police vehicle. He received a final written warning on 28 March 2011 which remained valid for six months.

6.17.2 In regard to a complaint on 9 April 2013 of a contravention of regulation 20(2) it was alleged that Mahlanza had committed a common law or statutory offence in regard to the possession of prohibited substances, namely dagga and ecstasy. Defendant's response was that this complaint did not proceed beyond the enquiry stage.

6.17.3 A complaint on 8 October 2014 was that Mahlanza had contravened regulation 20 of the disciplinary regulations in that he had allegedly conducted himself in an improper, disgraceful and unacceptable manner and had committed a common law or a statutory offence in that it was alleged that he had pushed, struck a complainant in the face and had thrown the complainant in the back of a police van. Defendant's response was that the complaint did not proceed beyond the enquiry stage.

6.17.4 A complaint on 1 March 2015 was a charge of contravening regulation 20 of SAPS disciplinary regulations it being alleged that Mahlanza had conducted himself in an improper, disgraceful and unacceptable manner and had committed a common law or statutory offence, the allegation

being that he had assaulted a complainant and her son by pushing and striking them. Defendant's response was that this complaint did not proceed beyond the enquiry stage.

6.17.5 A complaint on 27 June 2015 was that he failed to comply with regulation 20 in that he allegedly failed to hand in a medical certificate within five days after his first day of absence. Defendant admitted that it applied remedial steps and provided counselling to him with reference to how medical certificates should be dealt with in the future.

6.17.6 A complaint on 12 July 2016 was in regard to an allegation of misconduct in terms of regulation 8(1) relating to police exhibits. Defendant's response was that the matter did not proceed beyond the enquiry stage.

6.17.7 A complaint on 6 June 2017 was a contravention of regulation 5 in that he allegedly performed an act with the intention not to comply with his duties or responsibilities in regard to registering a false complaint and false entries in the occurrence book. Defendant admitted that Mahlanza was found to have contravened the regulation for which he was issued a final written warning.

6.17.8 A complaint on 4 November 2017 was a contravention of regulation 5(3)(k) of SAPS disciplinary regulations 2016. Defendant admitted that Mahlanza was found to have absented himself without permission and was given a written warning.

6.17.9 A complaint on 9 June 2019 was a charge of conducting himself in an improper, disgraceful and unacceptable manner when he was arrested at a roadblock for allegedly driving under the influence of alcohol with a blood alcohol level of 0.81g/100ml. Defendant admitted to being aware of the incident but bears no knowledge of the outcome of the charge against Mahlanza.

[7] It was argued on behalf of plaintiff that the aforesaid common cause facts as set out above establishes that Mahlanza had a track record of being consistently incompetent, over a number of years, in the use of a handgun and was either not lawfully issued with a firearm alternatively, was issued with a firearm in circumstances where he was not competent. It was further argued that Mahlanza was not a fit and proper person to issue a firearm to.

LEGAL FRAMEWORK:

[8] In the background section of "The Firearm Permit System and Firearm Training" issued by the SAPS through National Instruction 4 of 2016 (hereinafter referred to as "the National Instruction") it is pointed out to members, quoting from the decision in *Shozi and others v Minister of Safety and Security and another* [2016] JOL 34975 (KZD) "that by issuing a service pistol to a member that is not fit and adequately trained in its use, the Service acted negligently and that there is a legal duty on the Service to dispossess a member from such service pistol if he or she is not adequately trained in its use."

[9] In para 4(1) of the same document the following is stipulated:

"4(1) Before a permit may be issued to a member, the commander[3] must determine if the member can be declared competent to possess a firearm. In order to determine whether the member may receive a competency declaration, the commander of the member must ascertain whether the member –

(a) received the required training as determined by the National Commissioner; and

(b) can be regarded as a fit and proper person to possess a firearm in terms of section 9(2)(d) to (p) of the Act."

[10] Paragraph (4)(8) stipulates that "if a member has been found unfit to possess a firearm, an endorsement to this effect must be made on the competency declaration of the member which is filed in the personal file of the member".

[11] I shall revert to the issue of record keeping again later herein.

[12] The National Instruction further directs that before a permit may be issued to a member, the commander of the member must determine if the member can be declared competent to possess a firearm. In this regard it is common cause that:

12.1 In terms of para 4(2) of the National Instruction, if the commander of the member is satisfied that the member is competent to possess an official firearm, he or she must issue a competency declaration using the Firearms Permit System ('FPS'). The FPS is defined as the computerised system used by the service for the issuing

[3] This must be the Station Commander: Record Smith Page 157 line 20 to 158 line 5

of firearms permits, booking on and off duty by all officials and the management of competency declarations.

12.2 Paragraph 4(3) makes specific provision that if the FPS is not available for the issuing of the competency declaration a manual competency declaration may be issued to the member until the FPS is operational and a competency declaration can be issued from the FPS.

12.3 Paragraph 4(4) provides that the competency declaration must be completed in duplicate. Section 4(6) provides that both copies of the competency declaration must be signed by the member and his or her commander in order for the declaration to be valid. Further that one copy must be provided to the member and the other copy placed on the member's personal file under sub-folder.[4]

12.4 Paragraph 4(7) provides that if for any reason a member is no longer deemed competent to possess a firearm the competency status on the FPS must be revoked by his or her commander to prevent the issuing of a firearm to the member. Upon completion of an enquiry into the fitness of the member to possess a firearm, whether in respect of s 102 or s 103, the result must be forwarded to the relevant commander of the member.

12.5 In terms of para 3(3) of the National Instruction the head of an official institution may only issue a permit if an employee is a fit and proper person to possess a

[4] Record Page 27 line 18 and Page 28

firearm and has successfully completed the prescribed training and test for the safe use of a firearm.

12.6 Paragraph 5(6) of the National Instruction requires that all station commanders must ensure, *inter alia*, that (a) members receive the prescribed training, (b) that members are trained to use the FPS, (c) that permits are only issued to fit and proper members who successfully completed the prescribed training, and (d) that all members, officials and firearms under their command are registered in the FPS.

12.7 Further, para 6(3)(a) requires that before a commander of a member may issue a permit to possess an official firearm on the FPS, he or she must first confirm that (i) the member is registered on the FPS; (ii) the member has received a competency declaration; (iii) the member is an 'Authorised Firearm Recipient' on the FPS and (iv) the firearm is registered on the FPS.

12.8 Paragraph 6(3)(b) provides that if a GPA firearm (Government Property Administration firearm) is issued to a member, a temporary permit to possess an official firearm (SAPS 543(a)) must be issued by the commander[5] to the member for the duration of the member's official duty[6]. On return of the firearm the permit for that firearm must be returned and filed. Paragraph 6(3)(f) refers to the issue of a manual SAPS 543 from the SAPS 543 register.

[5] The Station Commander
[6] In other words, not for "off-duty"

12.9 Reference is made in para 6(3)(g) to registers that are kept for that purpose which have a serial number which controls the issue of such temporary permits.

12.10 Provision is also made in terms of para 6(3)(l) for the permit to be returned for filing on expiry of the permit or return of the firearm. Reference is made in para 6(3)(m) to the file, under reference 27/5/3/1/45, for the filing of all returned permits. Provision is also made for the returned permits on file to be kept for a period of 10 years.

12.11 Paragraph 7(1) of the National Instruction provides that if a member is not a fit and proper person to possess a firearm he or she may not be issued with a permit. Further that there is a legal duty on the commander to dispossess him or her from such firearm if he or she is not fit to possess it or not adequately trained in its use.

12.12 In terms of para 7(3) members who fail the competency training must be provided with two remedial training sessions within 30 days of the initial assessment. Further that if the operational member continuously fails the training or shooting practice, he or she must be dealt with in terms of the prevailing Human Resource policies. In practice that means that he or she does clerical duties.

[13] Colonel Nodume confirmed the procedures relating to competency testing, and the application process in terms of which a firearm may be issued to a member of the force, which are closely regulated by, *inter alia*, the following:

13.1 National instruction 4 of 2016 relating to the firearm permit system, firearm training and competency declaration.[7]

13.2 Standing order (STORES) 48 relating to official firearms and ammunition.[8]

13.3 Standing order (general) 251.[9]

13.4 The Firearms Control Act 60 of 2000;

13.5 The Firearms Control Regulations of 2004.[10]

[14] In his evidence Colonel Nodumee explained the processes in terms of which a member is required to be found to be competent and to be issued with a competency certificate, where after he or she is then required to apply to be issued with a firearm.

[15] He further explained (and it was not disputed) that a member who wishes to be in possession of a firearm after hours, would need to apply for such permission and this process would include the completion of annexures A, B, C and D to the Firearms Control Regulations 2004.[11]

[16] He also referred to the various administrative processes which were prescribed in terms of record-keeping, both on the personnel file of the member concerned, in an SAP 543 register,

[7] Record page 26 line 7
[8] Record page 26 line 6
[9] Record page 29 line 10
[10] Record page 30 line 7
[11] Record page 32 line 22

in a registry file (with reference SAPS 27/5/3/1/45) in respect of each firearm and on a centralised computer database on which the same information would be stored.[12]

NON-COMPLIANCE:

[17] The evidence presented disclosed that the above provisions were to a large degree not complied with in respect of Mahlanza. Following compelled discovery, Mahlanza's personnel files were made available, but no competency certificate could be found. This raises perhaps the greatest concern in this matter: Despite a competency certificate or declaration being a prerequisite in terms of para 4 of the National Instruction referred to above for the issue of a firearm to a member, defendant was unable to produce any competency certificate in respect of Mahlanza.

[18] The circumstances under which the firearm was allegedly issued became even more perplexing when defendant's own witness, Warrant Officer Stemmet, testified that he was not provided with a competency certificate before issuing the SAPS 543.[13]

[19] Defendant had further problems in this regard:

19.1. Warrant Officer Stemmet, who signed the temporary permit was not the Station Commander, but held the rank of sergeant at the time;

19.2. He relied on information provided by one Mr Smith, a civilian in charge of the safe to provide information which confirmed that proper procedures were not followed when Mahlanza failed his training in 2015, 2016 and 2017;

[12] Record page 27 line 18; page 37 line 14
[13] Record Page 278 lines 2 – 9

19.3. The handgun was issued to Mahlanza for a period when he would have been off duty.[14]

[20] It is common cause that none of the essential documentation to substantiate a motivated application, alleged competence or alleged lawful possession of a firearm by Mahlanza could be found in his personnel file or in any of the other control sources referred to above. All defendant was able to adduce in this regard was a 'questionable' SAPS 543 which allegedly rendered Mahlanza's possession of the firearm lawful.

[21] I agree with plaintiff that had the missing essential evidential material been in existence it could have been obtained from a number of different sources, including the controls (files, registers, computer database) where the same documentation would have been filed in different places within the administrative record-keeping of the SAPS. The clerk called by defendant, Mr Smith, even made reference to emailed communications which he inferred would have contained the necessary applications.[15] This material was not sourced, discovered or produced in evidence as would have been expected given that emails are readily retrievable from a database, even years after the event.

[22] It is of note that Warrant Officer Stemmet, who testified that he had issued the SAPS 543, in response to a question from the Court said that he had based his decision to issue the SAPS

[14] In this regard section 6(1) of the Standing Order (Stores) 48 – Official firearms and ammunition ("Stores") is important. It states that "[A] member is not entitled to be issued with an official firearm on his or her personal inventory for use in his or her private capacity when off duty".
[15] Record page 168 line 2

543 on nothing other than a copy of a computerised printout (SAPS 96) which had conveyed to him that the member had passed a remedial shooting session on 27 June 2017.[16]

[23] Therefore, on the defendant's own case, had this questionable SAPS 543 been issued, it had not been issued with the required administrative processes having been complied with prior to the issue of the firearm. The necessary competency certificate, application to possess a firearm and application to possess a firearm after hours were not in place.

[24] Colonel Nodume was clear in his evidence that in the normal course a person who has a s 108 firearm is issued with a SAPS 543 for a period of 12 months which is the duration that his competency certificate would cover.[17] In respect of a s 107 firearm (a firearm issued to a member who comes on duty for a shift and who hands back the firearm at the end of the shift), a SAPS 543 would be issued in the normal course for the duration of that shift only.[18] Further that the recordal of such issue and return would be done in a SAPS 543 register, or the loose leaf version of the SAPS 543, and would be retained on a file once the firearm was handed back at the end of the shift. This evidence was unchallenged.

[25] In my view, having had regard to the evidence and having had the benefit of a typed record, I am of the view that there was a lamentable state of affairs at Kensington SAPS as none of the police officers fully understood the procedure involved regarding dangerous weapons. I am further at a loss as to why none of the witnesses fully comprehended the system that should safeguard them, their members and the public. On the evidence, in my view, the system should work as follows:

[16] Record page 277 line 19 to 278 line 11
[17] Record page 34 line 19
[18] Record page 73 line 1

25.1. The departure point of Stores (see paragraphs 17.18.3 and paragraphs 19.2) is that "a member is not entitled to be issued with an official firearm … when off duty". It is, in other words, a right, which has to be earned.

25.2. No doubt, after many years of experience, and having passed the maintenance test annually, many officers would qualify for a "108" permit, meaning that they, as of right, can take their firearm home with them.

25.3. Younger officers and recruits obviously have to still prove themselves in firearm competency, but are allowed to carry a weapon on a daily basis in terms of a "107" permit, whilst on patrol, should they have passed the necessary competency test.

25.4. These "107" permits are issued on the following basis:

25.4.1. The commander confirms, at the morning parade, that the member had passed his competency test; and

25.4.2. The commander then (as a second check), after satisfying him/herself that the member is of sound mind and not under the influence of alcohol/drugs, either manually, or through a computer printout, issues the member with a SAPS 543 for the day.

[26] As a result of such prudence, a delinquent candidate like Mahlanza, would be excluded from the "108 permit members" and would scarcely qualify for "107 permit membership".

[27] Colonel Nodume testified that in the event of a SAPS 543 not falling into any of the above categories, and it being required for a different duration, the member would be required, in writing, to motivate the need for the said SAPS 543.[19] This motivation would be included in his personnel file[20] and be found amongst the SAPS 543 records. This evidence was from a senior member of the SAPS and was also unchallenged.

[28] Colonel Nodume described the SAPS 543 *in casu* to be questionable as it did not follow the usual s 107 or s 108 format.[21]

[29] The SAPS 543 was for a 13-day duration and no written motivation for that period could be produced. Significantly, in the personnel file of Mahlanza internal correspondence was found, in the context of the disciplinary proceedings against him in the instant matter, where the question is asked as to why it had been necessary for him to have a firearm after hours and the remark is made that the SAPS 543, supposedly issued in the circumstances, was 'questionable'.[22]

[30] The evidence of Mr Smith had been that in respect of a s 108 firearm there would be no reason to issue a SAPS 543 because members who had a s 108 firearm had a card and were entitled to take the firearm home.[23] It was members who had a s 107 firearm that were issued for the duration of a shift that required a SAPS 543 for the duration of that shift. Given his evidence that Mahlanza was issued with a 108 firearm (which should have been dispossessed) the SAPS 543 issued becomes even more inexplicable.

[19] Record page 99 line 13
[20] Record page 100 line 2
[21] Record page 77 line 10, 94 line 15 and 96 line 14
[22] Trial bundle page 132
[23] Record page 199 line 19 to 200 line 4

[31] After hearing the evidence of Warrant Officer Stemmet, who was unable to explain who had given the instruction for the so-called two-week issue of a SAPS 543; was unable to say for how long this arrangement had been in place and was unable to say that he had issued anything more than ten such unusual SAPS 543's[24], I was left with even more concerns regarding the circumstances where under defendant had dealt with the issuing of firearms. Warrant Officer Stemmet's evidence was unpersuasive and in conflict with the normal procedures testified to by Colonel Nodume. Despite putting it Colonel Nodume that Colonal Scanlan would come to testify about the issuing of 2 week permits, he was not called.

FAILURE TO PRODUCE DOCUMENTS/EVIDENCE

[32] Plaintiff's representatives, in an endeavour to access the record-keeping in the SAPS 543 register, or files in which a loose-leaf version would be kept, filed a discovery notice in terms of rule 35(3) calling upon defendant to produce such registers and/or files in respect of Mahlanza specifically and in respect of the entire Kensington Police Station generally for an extended period.

[33] The response of defendant, under oath, to the rule 35(3) notice was to indicate that such registers and files could not be found despite a diligent search.

[34] This is a startling response given that both the witnesses called by defendant, Mr Smith and Warrant Officer Stemmet, were clear in their evidence that a seamless record of SAPS 543s was available at Kensington SAPS, either in the form of a file on which the loose-leaf versions of the documents were kept, alternatively in the form of a register where details relating to the issue

[24] Record page 258 line 5 – 11, page 260 line 17

and return of firearms were noted. In fact, given all the regulations and checks and balances that had been put in place, I would have expected these documents to have been readily available.

[35] Both of these witnesses stated, unambiguously, that those records were to be found at the Kensington Police Station.[25]

[36] The failure to produce the documentation sought in terms of rule 35(3) in these circumstances leads me to the conclusion that defendant was evasive and unwilling to make available this objective documentation which would have served to crucially cast light on the practices at the relevant time in issuing SAPS 543 certificates, to members in general, and to Mahlanza in particular.

[37] I cannot but draw an adverse inference from this conduct. It appears that defendant has sought to conceal these records and prevent plaintiff from making use of these records in the court proceedings. Documents that should be kept for a period of 10 years had apparently suddenly and inexplicably disappeared. I am not convinced that this is in fact the case.

[38] Astonishingly, from the limited documents belatedly made available, it appears that shortly after the incident Mahlanza reported back for duty and was again issued with a firearm and ammunition.

[39] Plaintiff's counsel argued that I should take cognizance of the fact that defendant failed to call key witnesses who would have been able to cast light on the events in question. The first of which, he argued, is Mahlanza who would have been in a position to explain, *inter alia*, the circumstances under which he had been issued with the firearm. He was not called and no

[25] Record page 190 line 17 and page 266 line 25

explanation was given for the failure to call him to testify. The second important witness for defendant to have called was the Station Commander of SAPS Kensington who would have been in a position to take the court through the regulatory processes and record-keeping involved in the issuing of firearms in general and, more specifically, in regard to the issuing of the firearm to Mahlanza.

[40] Instead, defendant called an administrative clerk from SAPS Kensington, Mr Smith, who controlled the strongroom and the occurrence book relating to the movement of firearms in and out of the strongroom. Shockingly, the evidence of Mr Smith revealed that on the various occasions during 2015, 2016 and 2017 when Mahlanza had failed his maintenance shooting, his firearm had, save for once, not been withdrawn and placed in the strongroom as ought to have been done. It appears from the evidence that Mahlanza had from 2015 to 27 June 2017, failed all handgun maintenance shooting sessions and could no longer have held a valid or lawfully issued 108 permit. Mr Smith had little knowledge of the other administrative processes involved in the issue of firearms. The focus of his job was narrow and related primarily to the strongroom.

[41] Warrant Officer Stemmet could cast little further light on the process save for his limited involvement in the alleged issue of the SAPS 543 where the basis for the issue had not been substantiated. The evidence of Warrant Officer Stemmet, that he had issued the SAPS 543 simply on the basis of the SAPS 96 and nothing else, even were it to be accepted, demonstrates a shocking lack of control in the process of the issue of firearms. Especially so as the issue of the

firearm had been to a member who had the track record Mahlanza had and where no competency certificate had been issued or made available to Warrant Officer Stemmet.[26]

[42] I may still have understood why Mahlanza was not called, as he had been dismissed from the service and would probably have been difficult to find and, if he had been found, he would probably have been unwilling to co-operate. However, I unfortunately cannot understand why the Station Commander at the time of the incident was not called by defendant to shed some light, particularly in respect of the important missing documentation.

DIRECT LIABILITY:

[43] In the matter of *Telematrix (Pty) Ltd t/a Matrix Cechicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) the first principle in claims relating to delictual damages was expressed as follows:

> "[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and lead to the absorption of the English law tort of negligence into our law, thereby distorting it."

[26] Record page 278 line 13

[44] Holmes JA in the matter of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E- G set out the well-known test for establishing negligence as follows:

> "(a) A diligence paterfamilias in the position of the defendant –
>
> (i) Would foresee the reasonable possibility of this conduct injuring another in his personal property and causing him patrimonial loss; and
>
> (ii) Would take reasonable steps to guard against such occurrence; and;
>
> (iii) The defendant failed to take such steps.
>
> This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Where a diligence paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case."

[45] On the question of wrongfulness Brand JA in the matter of *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA) at 90I to 91A stated as follows:

> "The principles regarding wrongful omissions have been formulated by this Court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a

legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefor actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages (see EG Telematrix (Pty) supra para 14; Local Transitional Council of Delmas supra paras 19 to 20; Gouda Boerdery Bk v Transnet 2005 (5) SA 490 (SCA))"

[46] On the issue of a legal duty he held that:

"The imposition of this legal duty is a matter for judicial determination, involving criteria of the legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefor actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages"

[47] Further and in order for a plaintiff to hold a defendant delictually liable a *causal nexus* between a defendant's conduct and the damages is required. Brand JA in dealing with the element of causation in *ZA v Smith* 2015 (4) SA 574 (SCA) at 589D-G stated the following:

"The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, e.g., by Corbett CJ in International Shipping CO (Pty) Ltd v Bentley 1990 (1) SA 680 (A). What it essentially lays down is the enquiry- in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, that plaintiff's loss would not have ensued. In this regard this Court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying the

> common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty."

[48] Plaintiff's counsel referred me to *Shozi and Others v Minister of Safety and Security and Another* [2016] JOL 34975 (KZD). This judgment, as aforesaid, is pertinently referred to in the National Instruction 4 of 2016. In paragraph 1(1) of the National Instruction, it is stated that the purpose of the instruction is to regulate the issuing of competency declarations and firearm permits to members of the force who are (a) fit and proper, and (b) have successfully completed the prescribed training and the prescribed test for the safe use of a firearm in terms of the provisions of s 98 of the Firearms Control Act 60 of 2000 and regulation 79 of the Firearms Control Regulations.

[49] In the aforesaid matter the Court upheld the plaintiffs' contention that by issuing a service pistol to second defendant, who was not fit and adequately trained in its use, the first defendant (the Minister) had acted negligently in the light of the State's Constitutional duty to protect its citizens and the defendant was held delictually liable for plaintiffs' injuries. In this regard Mokgohloa J at para 32 stated that:

> '...In my view, the first defendant issued Makhathini with a firearm when he was either not fit or not adequately trained in the use and in the safety standards to be observed in regard to the handling of a firearm. This conduct placed the members of the public at risk because Makhathini used his firearm negligently when he shot the plaintiffs whilst under the influence of alcohol. I find that it was indeed reasonably foreseeable that by arming an incompetent and untrained police

officer with a firearm, innocent persons could be harmed. This wrongful conduct attracts liability.'

[50] In regard to such liability and in *Minister of Safety and Security v Booysen* (35/2016) [2016] ZASCA 201 (9 December 2016) Makgoka AJA pointed out that liability based on the mere fact that the SAPS issued a firearm to a police officer, would amount to the imposition of strict liability, which is impermissible. In para 17 the court pointed out that for liability to arise under such circumstances "…there must be evidence that the police officer in question was, for one reason or the other, known to be likely to endanger other people's lives by being placed in possession of a firearm, and despite this, he or she was nevertheless issued with the firearm or permitted to continue possessing it. Such was the situation in *F*, where the police officer was retained in the employ of the SAPS as a detective despite previous criminal convictions. See also the facts in Ramushi v Minister of Safety and Security (6859/2002) ZAGPPHC 175 (18 August 2021)."

[51] As aforesaid and in regard to whether a defendant's conduct, if considered in the context of being an omission, amounted to wrongful conduct, a legal duty must be established. In this regard in the matter of *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA) in paras 37 and 38 the Court unanimously held that:

"[37] … With reference to decisions of this court dealing with omissions to take precautionary steps to prevent harm, the High Court had regard to the fundamental principle that allegedly negligent conduct in the form of an omission is not prima facie wrongful. Wrongfulness depended on the existence of a legal duty. The High Court had regard to the following dictum from this court's decision in Hawekwa Youth Camp v Byrne. (See reference above)

> [48] In Gouda and Hawekwa this court pointed out that, depending on the circumstances, it might be appropriate to enquire first into the question of wrongfulness and for that purpose to assume negligence. Of course, in the event of the absence of negligence – in some cases that might be clear – the question of wrongfulness does not arise."

[52] As in the aforesaid matter, the parties in this matter also erroneously referred to "a duty of care" in the court a quo whilst in fact the inquiry is whether defendant had a "legal duty" towards Sonwabile. As explained in the aforesaid matter a legal duty pertains to wrongfulness whilst a duty of care derives from English Law and is associated there with the question of negligence.[27]

[53] Recently and in the matter of *Nandi Jacobs v Minister of Justice and Correctional Services* (431/2020) [2021] ZASCA 151 (27 October 2021), it was plaintiff's case that a certain Mr Botha had *inter alia* attacked and attempted to rape and assault her. Her claim against the Minister was based on the fact that given Mr Botha's criminal record and the information that served before the Parole Board, he should not have been released on parole and that Mr Botha had violated his parole conditions, but was not returned to prison. As a result of the aforesaid he was left at large to attack Ms Jacobs.

[54] Whilst dealing with the question of whether the evidence led at a trial could sustain a claim against the Minister the Court held that:

> "[29] In my view, on the documentary evidence placed before the high court, a court could find that the Parole Board acted wrongfully and negligently in releasing Mr Botha on parole.

[27] See p 368 para 50 of the Judgment read with Hawekwa supra p1 para 21

> Convicted of three sexual offences, the superficial commentary offered in the social worker's report, the vagueness of what was said by the case management committee, and the lack of a psychologist's report, make out a case on the basis of which it could be said that the Parole Board decided to release Mr Botha on parole when there was significant risk attached to their decision. Until such time as those who made the parole decision come to give evidence and explain what they did, there is sufficient evidence that could permit of a finding that the Parole Board acted wrongfully and negligently. Once that is so, the evidence could also suffice to establish causation, since a proper appreciation of the risk could have led to a denial of parole and the continued imprisonment of Mr Botha."

[55] Finally, and in the matter of *Pehlani v Minister of Police* (9105/2011) [2014] ZAWCHC 146, the difference between matters concerning direct liability and vicarious liability was aptly dealt with by Rogers J when he explained in para 32 as follows:

> "The normative values underlying the imposition of vicarious liability would be served by acknowledging the risk created for members of the public when police officials are placed in possession of dangerous weapons and by encouraging strict official control over the issuing of firearms to police officials. This does not mean, of course, that vicarious liability is dependant on whether or not the Minister or his officials were negligent in issuing the firearm to the particular official; <u>if such negligence were shown, SAPS would be held liable on account of such negligence and it would not be necessary to determine whether the Minister was vicariously liable for the intentional wrongdoing of the shooter. What vicarious liability achieves is to contribute to a culture of strict control of a risk-creating activity</u>." (my emphasis)

DISCUSSION:

[56] On application of the aforesaid principles and in the circumstances, I find that defendant is directly liable for the damages suffered in the instant matter in that:

56.1 Mahlanza had not been issued with a competency declaration at the relevant time, or at all, and had consistently demonstrated himself to be incompetent in the use of a firearm over a number of years prior to the shooting incident, as well as after the shooting incident to the knowledge of defendant. The fact that shortly before the incident he had passed a remedial training course does not, in the bigger picture, render him a suitable candidate to be issued with a firearm or justify the issue of a competency declaration. In any event, no competency declaration, as contemplated in para 4 of the National Instruction, was ever produced and on defendant's own version, no competency certificate had been presented to Warrant Officer Stemmet before he allegedly issued the questionable SAPS 543.

56.2 Mahlanza had a poor disciplinary record, which included complaints relating to a range of issues including violent conduct on his part, as set out above. This fact, together with his dismal maintenance shooting record, should have been carefully considered and investigated by defendant before Mahlanza was placed in possession of a fire-arm and ammunition.

56.3 None of the appropriate procedures or protocols had been adhered to in regard to the issue of the firearm to Mahlanza. It follows that at the time the incident occurred he had been placed in possession of a police issue firearm in

circumstances where he was not lawfully authorised to be in possession thereof. That lack of lawful authority was directly attributable to negligent practices and improper controls on the part of defendant.

56.4 A reasonable person in the position of defendant would have foreseen that issuing Mahlanza with a firearm in circumstances where none of the statutory safeguards were complied with could cause a danger to the public and that harm was imminent. In the current circumstances there can be no doubt that there is factual causation. Had defendant not placed Mahlanza in possession of the police issue firearm, Sonwabile would not have been shot on 22 July 2017.

56.5 The manner in which Mahlanza conducted himself on 22 July 2017 demonstrates without question that he was not a fit and proper person to be placed in possession of a firearm and that he was decidedly incompetent in the use of a firearm.

[57] I agree with plaintiff's counsel that it is unsurprising that a blameless boy such as Sonwabile suffered a bullet wound and a tragic life-changing injury given the reckless and irresponsible conduct of Mahlanza. Mr Mathole, who had seemingly been the intended victim of the shooting, was fortunate to survive the ordeal with only two flesh wounds, despite 6 or 7 shots having been fired in his general direction. Ironically, it would appear that Mr Mathole survived this incident as a result of Mahlanza incompetence with a handgun. As noted before, it appears Mahlanza was issued with 30 rounds of ammunition. He discharged several shots during the incident, yet returned 29 rounds together with his firearm after the incident. The inescapable conclusion is that Mahlanza, given the lack of controls and practises at Kensington Police Station, was further in possession of unlawful ammunition.

[58] In addition to liability based on defendant's wrongful issuing of a firearm to Mahlanza, (commission) there is no doubt that defendant's members, by simply issuing a temporary permit to Mahlanza despite his poor record, also negligently omitted to apply the prescribed procedures and protocols. Warrant Officer Stemmet, on his own version, exercised no reasonable care in issuing the temporary 543 permit. He did not investigate, consider nor did he confirm whether Mahlanza in fact obtained a competency certificate in terms of the National Orders.

[59] As in the matter of *Minister of Safely and Security v Hamilton* 2004 (2) SA 216 (SCA) defendant's members, if they had executed their legal duties properly, would have come to the conclusion that Mahlanza was not fit to possess a firearm and that by issuing one to him is such circumstances would, applying the considerations of reasonableness, fairness and legal policy, attract liability.

[60] In light of the findings set out above I need not make any finding regarding vicarious liability herein.

[65] In the circumstances the following order is made:

65.1 Plaintiff's claim on the question of liability is upheld with costs.

65.2 Defendant is ordered to compensate plaintiff for such damages as may be proven.

A De Wet

Acting Judge of the High Court

Coram:	De Wet AJ
Date of Hearing:	20 April 2021, 21 April 2021, 22 April 2021, 28 April 2021, 20 May 2021 and receipt of written submissions.
Date of Judgment:	4 November 2021
Counsel for Plaintiff:	Adv Craig Webster SC
Attorneys for Plaintiff:	Lowe & Petersen Attorneys
Counsel for Defendant:	Adv Alton Samuels & Adv Jerome van der Schyff
Attorneys for Defendant:	State Attorney