

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NO.: CCT 23/06
SUPREME COURT OF APPEAL CASE NO.: 213/05
CAPE HIGH COURT CASE NO.: 13079/96

In the matter between:

THE MINISTER OF SAFETY & SECURITY

Applicant

and

ALLISTER ROY LUITERS

Respondent

OPPOSING AFFIDAVIT

I, the undersigned,

GERHARD DE JONGH

hereby make oath and state as follows:

1. I am the attorney of record acting on behalf of the respondent. The respondent has become a tetraplegic as a result of the two shots fired by Constable Siljeur. I am duly authorised to depose to this affidavit in

opposition to the application for leave to appeal. The facts contained herein fall within my personal knowledge.

2. The respondent opposes the application on the grounds set out hereinunder.
3. This honourable court has set out the ambit and principles applicable regarding vicarious liability correctly, with respect, in **K v Minister of Safety & Security 2005 (6) SA 419 (CC)**.
4. The evidence of Captain Steenkamp was to the effect that a policeman is on duty for 24 hours a day. If a constable is off-duty and there is an attempt by robbers to rob him of his service pistol, he may place himself on duty to attempt to arrest the robbers.
5. It is settled law that irrespective of how negligent or reckless the constable might be in such an attempt it does not exonerate the Minister from liability.
6. There have been several flaws in the arguments on behalf of the Minister in the CPD and SCA.

- 6.1 Attempts have been made to go further than the evidence adduced before Thring, J.

The answer in this regard is clear. The evidence in the Regional Court cannot be used as evidence of the facts stated therein in the CPD, SCA or by this court.

The Minister elected not to call any of the witnesses involved. The availability of Siljeur was illustrated to the court *a quo*. It was recorded that he refused to consult with Respondent's counsel. He was made available to the Minister's counsel but she elected not to consult with him despite the Mhlongo-principles (vide Thring, J. on page 5 and 6 of that judgment).

The credibility finding in the Regional Court is thus irrelevant.

- 6.2 It was argued on behalf of the Minister that the evidence of Davidse constitutes inadmissible hearsay evidence.

The answer to this is twofold. Firstly, both the CPD and SCA correctly applied the Titus-principles (Thring, J., page 17). Secondly, this pointed was conceded by Applicant's counsel

namely that what was said by the constable with the “smoking gun” in his hand to Davidse constitutes an exception to the hearsay rule in view of the contemporaneousness and spontaneity thereof.

The constable enquired from Davidse whether he had not seen where the robbers had gone. He was looking for them. Davidse regarded this as police work that Siljeur was trying to apprehend robbers.

- 6.3 On behalf of the Minister attempts have been made to indicate that more than what is probable should be read into what the constable had in mind.

The answer to this is that what was said to Davidse, on probabilities, indicates that the constable was busy with the work of a policeman as an employee of the Applicant.

The normal yardsticks applicable in civil trials should be used namely credibility and probabilities.

Thring, J., found Davidse and Respondents credible and reliable witnesses (page 10 / 18).

Davidse was informed by the constable that he was looking for the persons that had attempted to rob him. He was busy with police work namely the search and arrest of criminals. At least *prima facie* the constable was busy with the work of his employer (Thring, J., page 11 / 9 e.s.)

7. From the abovementioned it is clear that if the subjective test is applied to what the constable said what he was busy with, the Applicant is liable vicariously.

The fact that the constable did not introduce himself to Davidse or did not ask assistance from strangers does not take Applicant's case much further.

8. If the objective test is applied, it is best illustrated by Davidse's evidence that he was told by Arries that Siljeur was a policeman and that Davidse was the opinion that he was busy with police work and that he was attempting to arrest the robbers.

9. Exactly when the constable realised that he had perhaps injured the innocent Respondent is irrelevant and amounts to speculation. The constable's subsequent conduct thus was correctly taken into consideration by the six judges involved in both the said courts.

10. At the end of the day it is thus not a constitutional matter. It is an evaluation of the evidence on well settled principles. This court and the SCA are now in harmony after Navsa, JA's judgment (paragraphs 14 and 19).

It is thus respectfully submitted by and on behalf of the Respondent that the application for leave to appeal should be refused with costs.

G DE JONGH

I certify that the Deponent acknowledged to me that he/she knows and understands the contents of this Declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his/her conscience. The Deponent thereafter uttered the words: "I swear that the contents of this Declaration are true, so help me God." The Deponent

signed this Declaration in my presence at
of

on this day

COMMISSIONER OF OATHS