IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NO: /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

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## APPLICANT'S FOUNDING AFFIDAVIT

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I, the undersigned,

**JOHAN TRUTER**

do hereby make oath and say:

1. I am an adult male Legal Administration Officer based at the office of the Provincial Commissioner of the South African Police Service (*"the SAPS"*) : Western Cape, of CPA Building, 25 Alfred Street, Green Point, Western Cape and am duly authorised by the applicant to depose to this affidavit in support of the application for leave to appeal to the Constitutional Court.

2. The facts herein contained are within my personal knowledge and belief, unless the contrary appears from the text, and are true and correct.

3. The applicant is the Minister of Safety and Security of care of the State Attorney, 10th Floor, North State Building, cnr Market and Kruis Streets, Johannesburg, Gauteng.

4. The respondent is Allister Roy Luiters, an adult male born on 25 November 1954 of 8 Ketch Close, Devon Park, Eersterivier, Western Cape.

5. This is an application for leave to appeal to the above honourable court against the judgment and order of the Supreme Court of Appeal under case no. 213/05 delivered on 17 March 2006. A copy of the SCA's judgment and signed order are annexed hereto, marked "A". The judgment was forwarded to the State Attorney's office in electronic format and at the time of deposing to this affidavit the signed copy was not in possession of the applicant's attorneys. The signed judgment will be substituted with the unsigned copy forming part of annexure "A" as soon as it becomes available to the applicant.

6. This matter has its origin in a shooting incident which occurred on the evening of 14 October 1995 in Jakaranda Street, Eerste River, Western

Cape when Lionel SIljeur (*"Siljeur"*) attempted to murder nine people, the respondent being one of them.

7. The respondent sustained two gunshot injuries, one of which rendered him a quadriplegic. In consequence of the aforegoing, the respondent instituted an action for damages in the Cape High Court on 14 October 1996 against the applicant and Siljeur, who were cited as the first and second defendants respectively.

8. Siljeur was criminally charged and prosecuted in the Parow Regional Court on nine (9) counts of attempted murder, alternatively contravening section 39(1)(b) of the Arms and Ammunition Act, 75 of 1969. He was also charged on an unrelated count of assault with intent to do grievous bodily harm which occurred on 17 August 1997, to which he pleaded guilty and he was duly convicted.

9. As regards the nine (9) counts of attempted murder which occurred on 14 October 1995, Siljeur pleaded not guilty and claimed to have acted in self-defence at the time. He also placed identity in issue. Siljeur's defence was rejected by the Regional Magistrate and a conviction of attempted murder returned on eight (8) counts on 24 August 1998. The judgment on conviction is annexed hereto, marked "B".

10. Siljeur was sentenced to an effective period of 11 years' imprisonment on the attempted murder charges, as appears from the judgment on sentence, annexed hereto, marked "C".

11. The civil trial commenced in the Cape High Court in October 2004, by which time Siljeur had been released from prison and respondent secured his presence in court under subpoena.

12. The respondent's case against the applicant is that the latter is vicariously liable for Siljeur's conduct who, at all material times, acted within the course and scope of his employment with the applicant. The applicant joins issue with this allegation.

13. Siljeur was sued in the alternative, lest the court finds that he was not acting within the course and scope of his employment at the time of the shooting.

14. *Apropos* the shooting incident on 14 October 1995, a number of facts are common cause between the parties, including:

    14.1 That Siljeur was a member of the South African Police Service (*"SAPS"*);

    14.2 That he had been issued with the firearm used to shoot respondent;

14.3 That he was not on duty at the time.

15. The respondent was requested to state, pursuant to questions formulated under rule 37 of the rules of court, on what grounds exactly it is contended that Siljeur acted within the course and scope of his employment with the applicant at the time of the shooting. The response to this question is reproduced hereunder. The parties are referred to by their appellation in the court *a quo:*

*"1.1 Dit is Eiser se saak dat Tweede Verweerder ("die polisiebeampte") betrokke was in sake of besigheid van Eerste Verweerder ("die werkgewer") toe die skote deur die polisiebeampte gevuur is wat onder andere vir Eiser getref het.*

*1.2 Die polisiebeampte, alhoewel hy van diens af was tydens die vuur van die skote, was steeds in diens van die werkgewer en besig met die uitvoer van polisiefunksies soos omskryf deur die Polisiewet, No. 7 van 1958.*

*1.3 Persone het die betrokke aand gepoog om die polisiebeampte te beroof ("die rowers") van sy uitgereikte vuurwapen deur sy werkgewer. Die polisiebeampte het gepoog om die rowers te*

*arresteer, alternatiewelik het die polisiebeampte Eiser verkeerdelik en nalatiglik aangesien as een van die rowers.*

*1.4 Die polisiebeampte het nalatiglik en roekeloos die werk wat aan hom opgedra is kragtens gemelde wet en toevertrou is deur sy werkgewer aan hom, uitgevoer in die handhawing van wet en orde.*

*1.5 Die polisiebeampte het werk verrig waarvoor hy in diens van die werkgewer was en derhalwe 'n polisiefunksie verrig.*

*1.6 Op 'n subjektiewe of objektiewe toetsing van die polisiebeampte se werk het hy binne die perke van sy diensbetrekking gehandel. Dit is nie 'n polisiebeampte se plig om arrestasies uit te voer of in belang van wet en orde op te tree slegs wanneer hy aan diens is nie."*

16. At the commencement of the trial:

16.1 The court, by agreement, ordered that merits and quantum be separated.

16.2 The respondent's counsel indicated that the action against Siljeur would be withdrawn.

16.3 Siljeur was requested to remain present until excused by the court.

17. In the result, the principal issue for determination in both the High Court and the Supreme Court of Appeal was whether Siljeur acted within the course and scope of his employment with the applicant when he shot the respondent. Both courts determined this issue in respondent's favour and it is against this finding that the applicant seeks leave to appeal to the Constitutional Court.

18. Before dealing with the merits of this application it is appropriate to briefly sketch the legislative framework relevant to police functions as at 14 October 1995:

18.1 In terms of section 215 of the Constitution of the Republic of South Africa, 1993, Act 200 of 1993 (*"the interim Constitution"*) the powers and functions of the Service are:

(a) The prevention of crime;

(b) The investigation of any offence or alleged offence;

(c) The maintenance of law and order;

(d) The preservation of the internal security of the Republic.

18.2 Proclamation R5 published in Government Gazette No 16239 of 27 January 1995 (*"the Proclamation"*) was in force at the time. Several statutes were repealed in terms of section 12(1) thereof read with annexure "A" thereto, including the Police Act 7 of 1958.

18.3 The South African Police Service Act 68 of 1995 commenced on the day after the shooting, viz 15 October 1995 and is accordingly not applicable.

18.4 The police are accorded a number of powers in terms of the Criminal Procedure Act 51 of 1977 (*"the Criminal Procedure Act"*), including the use of force in effecting an arrest. Section 49 of the Criminal Procedure Act as it read on 14 October 1995 is reproduced in **Du Toit, De Jager, Paizes, Skeen & Van der Merwe : Commentary on the Criminal Procedure Act, Act 5 – 25** (Service Issue 31, 2004).

19. The record of Siljeur's criminal trial was admitted as an exhibit by agreement between the parties. The respondent's consent to the admission of the criminal record in the civil trial rendered it unnecessary for the applicant to prove the trial and conviction of Siljeur in terms of section 17 of the Civil Proceedings Evidence Act, no. 25 of 1965. This section provides that the trial and conviction or acquittal of any person may be proved by the production of a document certified … by the clerk of the court or other officer

having the custody of the records of the court where such conviction or acquittal took place, … to be a copy of the record of the charge and of the trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof. In view of the agreement reached by the parties regarding the status of the criminal record ***"its evidential value is only to prove that the witnesses said what they are recorded to have said … (and) cannot be used as evidence of the facts stated."***

**Hoffmann & Zeffertt : The South African Law of Evidence, Fourth Edition at 152**

20. The judgment on conviction is telling. There is no suggestion whatsoever that when Siljeur discharged his firearm, he attempted to arrest anyone. He claimed to have acted in self-defence.

21. Mr William Richard Davidse (*"Davidse"*) was called as a witness by respondent and respondent also testified.

22. The evidence adduced in the civil trial, rather than cementing the dichotomy between the case pleaded and the defence in the criminal trial, instead points unequivocally to the conclusion that Siljeur was engaged in a frolic of his own not remotely connected to any police duties. This is borne out by the salient aspects of the evidence which are recounted hereunder:

22.1 Davidse

22.1.1 Davidse was the driver of a Toyota motor-vehicle. He was accompanied by two passengers and a dog. Warren Geldenhuys (*"Geldenhuys"*) occupied the front passenger seat. Lionel Arries (*"Arries"*) sat in the back of the motor-vehicle next to the dog. Arries was an instructor in the Navy.

22.1.2 Davidse turned into Jakaranda Street (this street and others referred to herein are depicted on annexure "D" hereto) at between 21h00 and 22h00 on 14 October 1995 and observed the respondent lying immobile in the roadway. He also saw Siljeur running with a firearm in his hand waving it around in the air. According to Davidse, Siljeur was looking for someone (*"op soek is na iemand"*).

22.1.3 Davidse brought his motor-vehicle to a standstill in Jakaranda Street close to the Stratford Avenue intersection and switched off the vehicle's lights. Siljeur approached Davidse who enquired what was the matter. Siljeur thereupon responded: *"… iemand of mense het hom geroof of beroof en … of ek nie gesien het wie of waarnatoe het die mense gehardloop nie."*

22.1.4 Siljeur pointed a firearm at Davidse's head which he refused to lower despite repeated requests by Davidse that he does so.

22.1.5 Davidse attempted to calm Siljeur whom the witness described as *"effens verbouereerd"*.

22.1.6 Davidse gave evidence in chief on the duration of the discussion between himself and Siljeur. He testified that it felt as though it was almost half an hour *"maar ek dink dit is miskien 5 of 10 minute gewees"* but he could not be certain thereof.

22.1.7 Davidse was questioned about whether Siljeur disclosed details of the robbery such as the number of robbers and what he had been robbed of. Siljeur had not furnished these details.

22.1.8 According to Davidse, Siljeur only dropped his firearm towards the end of their conversation.

22.1.9 Davidse succeeded in persuading Siljeur that they were not the people that he was looking for and encouraged him to rather go home.

22.1.10 Siljeur moved away from the motor-vehicle. Davidse thereupon switched on his motor-vehicle and proceeded down Jakaranda Street in the direction of Stormkaap Road. His passengers persuaded him to stop the motor-vehicle close to where the respondent was lying in the roadway, since they wanted to render assistance. Siljeur heard a woman shouting *"Allister"*. The next moment he heard gunfire from behind. He did not look behind him. His passengers who had alighted from the motor-vehicle ran down Jakaranda Street. Davidse drove to Pen Duick Street where he executed a u-turn and returned to what he termed *"die gevaar zone"*. This took a few seconds. He observed Siljeur walking down the road gun in hand and shooting at them. Geldenhuys and Arries who had fled on foot to find shelter were armed and returned fire. As Davidse neared Siljeur, he ran away. Davidse remained at the scene until the police arrived. He did not see Siljeur again.

22.2 The following issues arising from Davidse's evidence in chief and under cross-examination are emphasised:

22.2.1 The respondent was shot and injured before Davidse and his two passengers arrived in Jakaranda Street. The time between the shooting of the respondent and Davidse's arrival in Jakaranda Street is not known.

22.2.2 There is no evidence on record as to the time period which elapsed after Davidse brought his motor-vehicle to a standstill and Siljeur coming to speak to him.

22.2.3 The only people in Jakaranda Street from the time Davidse and his passengers arrived until Siljeur fled, were Davidse, his two passengers, Siljeur and the respondent. An unidentified woman was seen inside the grounds of a property while Davidse's car was stationary near the respondent who was lying in the roadway. She was the one who called *"Allister"*.

22.2.4 Davidse did not witness any robbery or see robbers, nor did he see anyone robbing or attempting to rob Siljeur.

22.2.5 Siljeur never disclosed that he was a policeman;

22.2.6 Siljeur did not ask for any assistance in the form of a lift from the scene or for help in finding the robbers, nor did he request Davidse to summon the police;

22.2.7 One would not expect a police officer to conduct himself in the manner in which Siljeur did;

22.2.8 Neither Davidse nor his passengers gave Siljeur any reason to shoot at them;

22.2.9 Although Siljeur said *"hy soek hulle"* he (Siljeur) made no mention of looking for them with the intention of apprehending or arresting them;

22.2.10 Save for the time that Siljeur shot at Davidse and his two passengers and the latter returned fire, Davidse did not see or hear any shots being fired in Jakaranda Street;

22.2.11 Siljeur did not come across as being scared nor did he appear to be looking for shelter, but the witness did perceive him to be nervous;

22.2.12 Siljeur did not accuse Davidse and his passengers of being the robbers and the enquiry directed at Davidse led him to believe that Siljeur did not view him and his passengers as the robbers;

22.2.13 Davidse shed no light whatsoever on the circumstances under which the respondent was shot;

22.2.14 When Arries' evidence given during the criminal trial was put to Davidse concerning State employees being issued with Beretta firearms, the witness conceded that Arries may have said that Siljeur was a State official (as opposed to a policeman), although he could not be certain.

22.3 <u>The respondent</u>

22.3.1 He and two women entered Jakaranda Street from Pen Duick Street at about 21h50 on 14 October 1995. While walking in

Jakaranda Street between Stormkaap Road and Stratford Avenue, the women told him to run. They (the women) ran into premises in Jakaranda Street. The respondent ran in the roadway in the direction of Stratford Avenue. While doing so, he was shot twice from behind, sustaining a gunshot wound to his leg and one to his neck. He did not hear any gunshots nor did he witness a robbery.

22.3.2 He did not see Siljeur and could not give an explanation as to why he had been shot. Neither the respondent nor the two females gave anyone any reason to shoot them.

22.3.3 He did not hear any words uttered to the effect: *"stop, ek is 'n polisieman"*.

22.3.4 The respondent confirmed that he resided with Magrieta Cloete at the time of the shooting and identified the other female as Christine Eland.

22.4 On the respondent's version, he was unaware of Siljeur or any robbery and neither he nor the two females gave Siljeur any reason to attempt to murder them.

23. At the conclusion of the respondent's testimony, he closed his case. An application for absolution was refused with costs and the applicant thereupon called Steenkamp as a witness.

24. Steenkamp

24.1 Steenkamp testified that he joined the police force in 1987. He was stationed at the Kuils River Police Station on 14 October 1995. He received a report that a shooting had occurred at Jakaranda Street and proceeded to the scene which is approximately 10 minutes from the Kuils River Police Station. He observed the respondent lying in Jakaranda Street and another person who had been shot in the ankle at premises further down the road.

24.2 He was at the scene for an hour or more where he, *inter alia*, gathered information and recovered several 9mm shells. He was advised that the person responsible for the shooting was possibly a policeman but no-one could assist him with a name or address.

24.3 The next morning an informant gave Steenkamp the name and the address of the suspect (Siljeur). He went to the address in Jakaranda Street and encountered three males at the premises. He asked for Siljeur and the occupants denied that there was a Siljeur in

the house. They also denied that they were policemen. Steenkamp had recorded the particulars of the informant. He went to the informant's premises which was in close proximity to Siljeur's home and obtained a description of the suspect. He returned to Siljeur's premises in less than 10 minutes and confronted Siljeur who then admitted that he was Siljeur, the policeman involved in the shooting the night before. No explanation was given for the shooting. Steenkamp asked Siljeur for the firearm. Siljeur at first said that he did not have it with him but later retrieved it from a cupboard at his home. Siljeur was arrested by Steenkamp.

24.4 According to Steenkamp, Siljeur breached the police standing orders handed in as exhibit "C" in the high court by failing to have immediately reported the shooting incident as required by paragraph 251.15.1 of the standing orders.

24.5 Steenkamp explained the importance of a shooting incident being reported immediately since this would allow, *inter alia*, for an expeditious investigation.

25. Steenkamp's evidence concerning Siljeur's failure to have reported the matter as required by the standing orders, Siljeur's lies about his identity and the fact that he was a policeman and his initial refusal to hand over

the firearm is destructive of the notion that Siljeur executed police duties at the time of the shooting.

26. Davidse's testimony regarding Siljeur's statements to him on 14 October 1995 constitutes uncorroborated hearsay evidence. The respondent had secured Siljeur's attendance in court and he was only released from further attendance on 26 October 2004 (after Davidse had given hearsay evidence which was not objected to because the respondent intended calling Siljeur). There was nothing which prevented the respondent from calling Siljeur to confirm Davidse's evidence that Siljeur has been robbed or people attempted to rob him. It is furthermore pointed out that the evidence is inconsistent when one compares Davidse's testimony in 1998 in the criminal trial with that adduced during the civil trial as to whether Siljeur had been robbed or whether there was an attempt to do so.

27. Siljeur also appears to have had little confidence in the robbery story, hence its abandonment on the night of 14 October 1995. Had he been involved in policing on that night he would undoubtedly have complied with the standing orders, logged the complaint in the SAPS occurrence book, caused a police docket to be opened, ensured that the respondent was arrested and detained, etc. The fact that none of the above occurred, his disappearance after the shooting and his conduct on the day of his arrest, essentially puts paid to the fabricated robbery story.

28. The respondent, relying on **Titus v Shield Insurance Co Ltd 1980 (3) SA 119 (AD)** sought to and succeeded in having unconfirmed hearsay evidence of a single witness admitted on the basis that it forms part of the *res gestae*. This is not permissible since the requirements for admissibility have not been met. It is manifestly clear from the evidence adduced during the trial that Siljeur had time to contrive a story and this runs contrary to the contemporaneous and spontaneous requirements for admissibility as part of the *res gestae*.

See:

**Zeffertt, Paizes, Skeen : The South African Law of Evidence at pp 411 – 416 (particularly at 416)**

**Schmidt and Rademeyer : The Law of Evidence, pp 18 – 19 to 18 – 21, para 18 5 5 2**.

29. Notwithstanding the inadmissibility of Siljeur's utterance to Davidse concerning "rowers", the Supreme Court of Appeal was requested to determine the matter on the basis that it was admissible.

30. Davidse testified as to Siljeur's condition which vacillated from *"effens verbouereerd", "verbouereerd"*, *"senuweeagtig"* to *"verbouereerd"* and *"senuweeagtig*". It comes as no surprise that Siljeur may have presented as

nervous and/or flustered, if one takes into account his attempt to murder 6 people before Davidse's arrival in Jakaranda Street. It is, with respect, wrong to attribute his condition to a robbery or attempted robbery (which, it is submitted, did not occur) when it is more compatible with a man having shot at six innocent people for no apparent reason. The robbery story is furthermore belied by Davidse's account of how he and his passengers were shot. Siljeur knew and accepted that they were not the robbers. This notwithstanding, he had no hesitation in firing upon them repeatedly without provocation and/or justification.

31. It is significant to note that no evidence was adduced during the trial concerning the robbery, other than Davidse's hearsay. Significantly, neither the respondent nor Davidse witnessed a robbery nor did they see any robbers. The magistrate convicted Siljeur on the basis of the evidence adduced by the State witnesses (including Davidse and the respondent who were complainants in the criminal trial), and in the process rejected Siljeur's version. Siljeur had already jettisoned the robbery story on the night of the shooting, and refrained from resurrecting it when he stood trial on the criminal charges in 1998. These are further indications that the robbery was contrived *ex post facto,* that Siljeur knew and appreciated that it would not pass muster and accordingly tried to justify his conduct on the basis of self-defence.

32. The respondent was at liberty to call several other witnesses. He declined to do so. This raises the inference that their testimony would have been inimical to the respondent's case that Siljeur acted within the course and scope of his employment with the applicant when respondent was shot. This is borne out by the judgment on conviction (annexure "B" hereto).

33. The applicant had no objection in the Supreme Court of Appeal to the matter being determined on the basis that Davidse's hearsay testimony is admissible, since it takes the matter no further. The fact that Siljeur said that he was looking for robbers does not mean that he was doing so in furtherance of his police duties. There is no evidence as to what Siljeur was doing when he shot at six people (respondent included) before Davidse's arrival. Davidse testified that neither he nor his passengers gave Siljeur any reason to shoot at them, yet Siljeur did so. Consequently, and if Siljeur was looking for robbers, it cannot be inferred that this was for purposes connected to his employment, particularly when one has regard to the unlawful and wanton shooting frenzy which occurred before Davidse's arrival in Jakaranda Street and, indeed, after Davidse's arrival. The aforegoing and Steenkamp's evidence show that Siljeur's conduct on the night in question was wholly inconsistent with one acting within the course and scope of his employment.

34. This case concerns an intertwine of facts, common law and constitutional issues. The Constitutional Court emphasized in **K v Minister of Safety and Security 2005 (6) SA 419 (CC) at p 432, para 22** that *"If one looks at the principle of vicarious liability through the prism of s 39(2) of the Constitution, one realizes that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilize the common-law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order."*

35. The Constitutional Court in the **K**-case quoted above recognised the need to develop the common law insofar as vicarious liability is concerned. The court expressly refrained from making any findings on strict liability as contended for in that case.

36. The SCA, while it appears to have approached the matter from a vicarious liability perspective, in finding for respondent is, in effect, imposing strict liability upon the applicant. The **K**-case does not serve as authority for imposing strict liability and this is not the case which the SCA was required to determine. The decision of the SCA is out of kilter with the Constitutional

Court's approach in the **K**-case and it has blurred the clearly defined lines between strict and vicarious liability.

37. Although the SCA's judgment refers to the facts of the matter (as did the court of first instance, as appears from the judgment annexed hereto, marked "E"), the inference which the SCA draws is not supported by the evidence (compare paragraphs 23 and 24 of the SCA judgment and Davidse's account delineated above).

38. In short, both the CPD and the SCA have ignored Siljeur's plea of self-defence which was rejected by the regional court and found that the fact that he was looking for "rowers" brought him within the ambit of police functions. The criminal judgment (annexure "B" hereto) shows that Siljeur was not about any police business at the time and the evidence adduced during the civil trial does nothing to dispel this.

39. This case does not begin to approximate the so-called "deviation cases". On the facts of this matter (which cannot be viewed in isolation without recourse to the common law and the Constitution), it is illusory to find that Siljeur acted in pursuit of police functions when he shot the respondent. Such a finding is tantamount to imposing strict liability upon the applicant.

40. While it is accepted that the respondent has the rights accorded in the Bill of Rights, the applicant also has constitutional rights, including the right to equal protection of the law and the right to have the common law applied and developed in a manner which promotes the spirit, purport and objects of the Bill of Rights and not in a manner inimical thereto.

41. On the test for vicarious liability postulated in the **K**-case, there is no basis for holding the applicant vicariously liable and the SCA erred and misdirected itself in so doing.

42. This case raises important constitutional principles for the applicant, has reasonable prospects of success on appeal and it is in the interests of justice that the applicant be granted leave to appeal to the Constitutional Court in this matter.

43. The applicant accordingly prays for an order in terms of the accompanying notice of motion.

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**J TRUTER**

I certify that the Deponent acknowledged to me that he 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 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 CAPE TOWN on this 6th day of APRIL 2006.

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**COMMISSIONER OF OATHS**