THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 63/04
Reportable

In the matter between :

THE MINISTER OF SAFETY AND SECURITY APPELLANT

and

PEDRO SOUZA DE LIMA RESPONDENT

CORAM : ZULMAN, MTHIYANE, CONRADIE, CLOETE JJA, MAYA AJA

HEARD : 17 FEBRUARY 2005

DELIVERED : 3 MARCH 2005

Summary: **Negligence — police — charge of assault withdrawn against applicant for firearm licence — police negligent in not investigating circumstances of assault and its withdrawal — licence granted — thereafter applicant shot plaintiff — Minister of Safety and Security liable to compensate plaintiff in damages.**

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] On 6 March 1996 and at Goodwood the respondent was shot with a revolver by Jose Andrade Dos Santos and he is in consequence a paraplegic. Dos Santos came into possession of the firearm by virtue of a licence for which he had applied at the Parow police station on 14 November 1994, which was issued by servants of the appellant, the Minister of Safety and Security, on 27 June 1995 and which was handed over to him at the Parow police station on 3 November 1995. The respondent sued the appellant in the Cape Town High Court for damages. The trial proceeded on the merits only and the learned trial judge, Veldhuizen J, found that the police had been negligent in recommending that a firearm licence be issued and in issuing such a licence to Dos Santos, and that this negligence was a direct cause of the respondent's injury. The appeal is with the leave of this court.

[2] The sole question on appeal is whether the police were negligent as found by the learned trial judge. The statutory framework within which applications for firearm licences are made and considered, the duties imposed on the police in this regard and the circumstances in which non-compliance with the prescribed procedure will constitute negligence,

have been discussed in detail in the recent decision of this court in *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA). The forms used to process Dos Santos's application were those discussed in that case. The regulations and form SAP271 had already been amended by Government Notice R787 in *GG* 15652 of 22 April 1994, but for the purposes of the question to be answered in this appeal I find it unnecessary to discuss the differences. It suffices to set out the following provisions.

[3] Section 3(1) of the Arms and Ammunition Act 75 of 1969 provides:

'On application in the prescribed manner and payment of the prescribed licence fee in the said manner by any person other than a person under the age of 16 years or a disqualified person, the Commissioner may, in his discretion but subject to the provisions of subsections (3), (4) and (6) and sections 7 and 33(2), issue to such person a licence to possess the arm described in such licence.'

Regulation 2(1) of the regulations provides to the extent relevant:

'Applications for licences in respect of the possession or acquisition of arms shall in the following cases be submitted to a policeman on duty at a police station on form SAP271 (set out in Schedule A), completed as far as is applicable in black ink, and on receipt of which the application shall be noted by a policeman in register SAP86 with a corresponding reference number on form SAP271:

(a) where the applicant is a natural person, at the police station in the area wherein the

applicant resides or works…'.

Special Force Order (General) 19B, issued on 24 September 1979 by the then Commissioner of the South African Police (pursuant to the provisions of reg 6 of the Regulations for the South African Police, 1964, made in terms of s 33 of the Police Act 7 of 1958 and published in Government Notice R203 in *GG* 719 of 14 February 1964), which gave rise to form SAP286 referred to below, requires (in paragraph 15; only the Afrikaans is available):

'FAKTORE WAT IN AANMERKING GENEEM MOET WORD WANNEER AANBEVELINGS GEDOEN WORD

(1) Geskiktheid van applikant

Streng beheer oor die uitreiking van lisensies om wapens te besit, is met die oog op landsveiligheid van die allergrootste belang en dit is noodsaaklik dat 'n bevelvoerder wat 'n aansoek om 'n lisensie aanbeveel, tevrede moet wees dat die applikant in alle opsigte 'n bevoegde en geskikte persoon is om die wapen te besit. Sonder uitsondering moet die applikant aan twee basiese vereistes voldoen, te wete (i) hy moet 'n geskikte en bevoegde persoon wees, en (ii) daar moet 'n noodsaaklikheid bestaan om 'n wapen te besit.

(a) By geskiktheid word bedoel dat die applikant fisies en geestelik geskik geag moet word om 'n vuurwapen te kan besit; dit wil sê, het hy vorige veroordelings en wat is die aard daarvan; kan hy en weet hy hoe en wanneer om 'n vuurwapen te gebruik en mag gebruik (*sic*), en is hy *temperamenteel geskik — is hy nie opvlieënd van*

geaardheid, geneig tot geweld of losbandig nie…'. (Emphasis added.)

The parties were agreed that the Special Force Order was applicable between the time that Dos Santos made his application for a firearm licence and the time that he received the licence from the Parow police station.

[4] Dos Santos was interviewed at the Parow police station by Lance Sergeant Basson, who completed form SAP271(E) which is headed 'Application for a Licence to Possess an Arm', whilst he interviewed Dos Santos. That form contained the question:

'4. Have you ever been convicted of an offence or offences as a result of which your fingerprints were taken? If so, furnish full particulars of each offence, stating the date and place.'

Basson recorded Dos Santos's answer to the question as follows:

'Yes 1994 assault common at Elsies River (case was withdrawn).'

Basson could not remember interviewing Dos Santos, but explained the answer in his evidence in chief as follows:

'In hierdie geval … hoef ek net te geskryf het "nee", want die applikant het geen skuldigbevindings nie of klagtes waarvan hy skuldig bevind is nie. Maar uit volledigheid … wat ek doen is, by hierdie punt waarsku ek die applikant dat as hy vir my gaan lieg oor oortredings en hy noem dit nie, gaan ek hom krimineel aankla. En gewoonlik daarna, want hy teken twee plekke daarvoor. As die applikant na die eerste

keer bly hy nog steeds stil, maar as ek dit ‘n tweede keer noem, dan noem hulle vir my oortredings waaraan hulle skuldig bevind is. Soos in hierdie geval, ek hoef dit nie neer te geskryf het nie, want hy is nie skuldig bevind nie, maar nog steeds deur net bewus te maak en om dit volledig te hou, noem ek dit wel aan Sentraal Vuurwapenregister. Dit is hoekom ek geskryf het, die saak was teruggetrek in hakies, dat die Sentrale Vuurwapenregister weet dat ek definitief gekommunikeer het met die applikant daaroor. Ek sou definitief vir hom vrae gevra het daaroor: wat was die omstandighede, waar het dit plaasgevind, wanneer het dit plaasgevind; dan ook dat dit teruggetrek was. Want op die ou einde van die dag, kan ek dit nie teen die applikant hou nie, want hy was nooit skuldig bevind aan ‘n misdaad nie.’

It is apparent from this evidence that Basson did not fully appreciate the parameters of the duty he was called upon to perform. The essential question was not whether Dos Santos had been convicted of a crime. It was whether Dos Santos was a suitable person to possess a firearm and in considering that question, the circumstances under which Dos Santos came to be charged, and the circumstances under which the charge came to be withdrawn, obviously required clarification.

[5] So far as the charge is concerned, it was submitted on behalf of the appellant that Basson had acted reasonably inasmuch as only common assault was allegedly committed by Dos Santos. This argument misses the point. Of course a charge of, for example, murder would require more

detailed enquiries. But the circumstances under which even a relatively minor assault was allegedly committed could very well indicate that the person concerned had a short temper, was easily provoked and quickly resorted to violence. So far as the withdrawal of the charge is concerned, it was emphasised by the appellant's counsel that the form only requires details of previous convictions. That is so, and had Dos Santos simply answered 'no' to the question without volunteering further information then Basson could not, without more, have been expected to have taken the matter further with him. But where, in the course of an interview of an applicant for a firearm licence, information comes to the attention of the police officer conducting the interview which could indicate that the applicant is unfit to possess a firearm, and which should reasonably lead to further enquiries being made, it is negligent not to make such enquiries. It is no answer to say that the form did not require this information to be given. In addition the fact that the charge was withdrawn should not have ended the enquiry. Any policeman should know that a charge can be withdrawn in circumstances which do not indicate that the person charged is innocent (for example, pending further investigation or where the complainant has died or become untraceable).

[6] It was submitted on behalf of the appellant that it would place too

heavy a burden on the police to require Basson to have made the enquiries to which I have referred. I disagree. This court held in *Hamilton* that there was a duty on the police to take reasonable steps to verify information provided to them by an applicant for a firearm licence. The present is an *a fortiori* case: What was required was not enquiries of third persons, but a proper interview with the applicant in the first place.

[7] Had Basson conducted a proper interview with Dos Santos and asked him how the charge came to be withdrawn then, particularly in view of the warnings given by Basson and the fact that Dos Santos had even volunteered information not strictly in answer to the question, the probabilities are that Dos Santos would have told him the truth — namely, that it had been withdrawn by the senior public prosecutor, Goodwood, on the strength of written representations made to him by Dos Santos with the assistance of his attorney. Had this information come to Basson's attention it would not have been necessary for Basson to have done anything more than to require Dos Santos to furnish him with a copy of those representations. It must be borne in mind that it is the applicant who must satisfy the police that he or she is a fit and proper person to possess a firearm. An applicant would, to this end, be obliged to comply with any reasonable request by the police to provide information relevant to the

performance of their task. Had Dos Santos not provided Basson with a copy of the representations, his application should have been deferred until he did. Had Dos Santos indeed provided Basson with a copy, the following information would have come to his attention.

[8] The representations made to the senior public prosecutor, Goodwood, read in part:

'I have been charged with common assault in that it is alleged that on the 10th of March 1994, and on the Elsies River railway station, I assaulted Sias Hugo, thereby causing him certain wounds and injuries.

My personal circumstances are as follows: I am 24 years of age, and I am single and my highest education qualification is standard 9.

The incident occurred at our family mobile kiosk, which is situated on the Elsies River railway station. On the stated day on the charge sheet and at approximately 1h00pm whilst I was serving customers from inside the kiosk, I noticed a person at the back door of the kiosk. I noticed the person who happens to be the complainant, move from the front to the back of the kiosk and start fidgeting with the back door of the kiosk. I then opened the back door and asked him what he wanted and he told me that he was looking for a match stick. He started using abusive language towards me and I became extremely annoyed and picked up a piece of wood which I used to keep the inner door of the kiosk ajar, and chased him. The complainant then ran to the entrance of the Elsies River railway station and ran in the direction of the turnstiles. At the turnstiles the complainant then confronted me and I remember hitting the turnstiles

with the piece of wood.

I can honestly and truthfully not remember actually striking the complainant with this stick, but on the other hand I must confess that I may have done so, as I was in an extremely angry state.

…

I have no history whatsoever of any criminal activity and I do not have an aggressive personality, but sometimes and due to the pressures as I have mentioned before, I lose control.'

It is quite clear from the passages I have quoted that Dos Santos had a tendency to lose control of himself and on the day in question, did so completely in the face of what appears not to have been particularly severe provocation.

[9] If the representations to the senior public prosecutor, Goodwood, had come to the attention of Basson, he could not in all honesty have said in form SAP286 (which is headed 'Report on Application to Possess an Arm') in response to the question 'opmerkings met betrekking tot die applikant se verlede, karakter, liggaamlike en temperamentele geskiktheid, kennis van wapens, ensovoorts', the following: 'Applikant is van goeie stand geestelik en temperamenteel geskik om wapens te besit'. Indeed, he ought to have recommended that the licence should not be issued.

[10] I have therefore come to the conclusion that Basson was negligent in not making further enquiries before recommending that Dos Santos's application for a firearm licence be granted. Captain Du Preez, Basson's superior at the Goodwood police station who supported the recommendation in form SAP286 and who was required to comply with the provisions of paragraph 15 of the Special Force Order (quoted above) in doing so, was also negligent in not ensuring that Basson had made the necessary enquiries (with the result that his own recommendation was not properly motivated); and Superintendent Van Niekerk, who ultimately granted the licence, was also negligent because she merely required confirmation that the charge against Dos Santos had indeed been withdrawn.

[11] There is one other matter which must be dealt with. The respondent brought an application in terms of s 22 of the Supreme Court Act 59 of 1959 to place further evidence before this court. The application was opposed. In the event, it is not necessary to decide it. Minimal time was taken up during argument in dealing with the application and it pales into insignificance when considered against the volume of the record on appeal (over 2300 pages). It suffices to say that the application was not

obviously without merit and that justice would be done if the costs of the application were to be made costs in the cause.

[12] I make the following order:

1. The costs of the respondent's application in terms of s 22 of the Supreme Court Act are made costs in the cause.

2. The appeal is dismissed with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Zulman JA
Mthiyane JA
Conradie JA
Maya AJA