IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 20217/2014

In the matter between:

SANELA DLANJWA **Appellant**

and

THE MINISTER OF SAFETY AND SECURITY **Respondent**

Neutral citation: *Dlanjwa v The Minister of Safety and Security* (20217/2014) [2015] ZASCA 147 (01 October 2015)

Coram: Maya ADP, Bosielo, Leach, Tshiqi and Mbha JJA

Heard: 17 August 2015

Delivered: 01 October 2015

Summary: Delict – dependants' action for damages arising from loss of support – policeman injuring his wife and taking his own life with service firearm – probabilities that wife reported his violent conduct against her and his threats of suicide to the police – police negligent in failing to dispossess him of firearm – wrongfulness established.

ORDER

On appeal from: Eastern Cape Local Division, Mthatha: (Tshiki and Van Zyl JJ, Alkema J dissenting, sitting as a court of appeal)

1 The appeal is upheld with costs.
2 The decision of the Full Court is set aside and replaced with the following order:
'The appeal is dismissed with costs.'

JUDGMENT

Maya ADP (**Bosielo, Leach, Tshiqi and Mbha JJA concurring**):

[1] This is an appeal against the judgment of a full court of the Eastern Cape Local Division, Mthatha (Tshiki and Van Zyl JJ, Alkema J dissenting) (the High Court). The majority overturned a judgment of a single judge (Petse J) who had been called upon solely to decide the merits of the appellant's damages claim in the sum of R5 858 500 against the Minister of Safety and Security (the Minister) and his erstwhile co-defendant, the Station Commander of Ngangelizwe Police Station, Mthatha (the second defendant). The trial court had held the Minister and the second appellant liable. The full court overturned that order. The appeal is with this court's special leave.

[2] The litigation arises from a tragic domestic violence incident which occurred on 19 April 2006 and left the appellant with horrendous gunshot injuries inflicted by her

late husband, Sergeant Thandikhaya Dlanjwa (the deceased). The deceased was employed by the South African Police Service (SAPS) and was stationed at Central Police Station, Mthatha. After shooting the appellant with a service firearm (the firearm), the deceased turned the firearm on himself with fatal consequences. The appellant then sued the minister and the second defendant, in her personal capacity, for general damages, medical expenses, loss of earnings and loss of support arising from her injuries and the deceased's suicide. She also sued for loss of support on behalf of her infant triplets born of her marriage with the deceased.

[3] In her summons the appellant alleged that the shooting and commission of suicide by the deceased were caused by the negligence of the second defendant and/or certain police officials attached to his station. These police officers were negligent, so it was asserted, in that the deceased was granted permission to possess the firearm when not on duty without observance of the relevant official procedures. Furthermore, it was claimed, these police officers failed to (a) dispossess the deceased of the firearm, (b) initiate disciplinary steps against him and (c) have him criminally charged despite her previous requests and their knowledge that the deceased abused alcohol, had a violent temper and suicidal tendencies, had assaulted her, pointed a firearm at her and threatened to shoot her and thereafter kill himself, which led her to obtain a protection order against him. Thus, it was alleged, the police failed to take measures to protect the appellant from being injured by the deceased and prevent him from killing himself, which they should have foreseen, in breach of the legal duty they owed her.

[4] The action was defended and went to trial at which both sides adduced evidence. The gist of the appellant's testimony was that during 2005 her marriage to the deceased, whom she married in June 2004 after a brief courtship, had quickly soured. They squabbled mainly over her awkward working hours at a local Kentucky

Fried Chicken outlet. Her duties included night shifts ending at 22h00, after which she would struggle to get public transport, causing her to arrive home late. The deceased, a heavy drinker, suspected that she was cuckolding him and even questioned his paternity of her pregnancy with their triplets. He also had trouble at work, where he dealt with stolen vehicles, and had been under on-going investigation. As a result, he was occasionally arrested and once had the firearm confiscated although she subsequently saw it in his possession. The bickering soon graduated to physical assaults which she reported to his mother to no avail. He would also point the firearm at her and threaten to shoot her. She always forgave him however because he would promise to desist from his violent conduct and she was protecting him as she did not want him to be arrested.

[5] The appellant's account in relation to the events which occurred just before the shooting incident was inconsistent during her cross-examination regarding the dates when the deceased pointed the firearm at her for the first time, her initial approach to the police for assistance and the number of times he threatened her with the firearm. But she was unswerving on the substance of her clashes with the deceased. She narrated that in February 2006 she returned from work around midnight, accompanied by a friend who had fetched her from work when public transport did not arrive. The deceased was extremely angry. He would not accept her explanation for her late arrival and wanted to assault her. Out of fear that he might do so and use the firearm as he had previously threatened, she approached Ngangelizwe Police Station to request assistance and have him disarmed. The policeman who attended her told her that he knew the deceased and that he had a violent disposition. For that reason he did not want to be involved and instead dispatched two of his colleagues to see her home safely. These policemen drove her home in a police vehicle and managed to pacify the deceased who then allowed her back in the house without incident.

[6] There was a brief lull which, however, broke on 6 March 2006. She returned from work during the afternoon and found the deceased angry because her cellular phone, which she had left at home, was off when he called her earlier. He pointed the firearm at her and tried to assault her. She managed to escape and sought refuge from their landlady who then tried to reason with the deceased. Although he appeared to calm down she did not trust him and fled with her friend who was one of the triplet's nannies, Vuyokazi. They spent the night at a friend's house and the appellant reported the incident at the second defendant's station in the morning. She still did not wish to have the deceased arrested and merely wanted him disarmed. There she was advised to obtain a protection order. She promptly did so after presenting a statement written by her that '[the deceased] hit me and he promise (sic) to shoot both of us … I gave him the many (sic), he always want (sic) the money to buy beers, he hit me and hit my child [born out of wedlock] he always hit me and promise to kill himself and me (sic)'. The deceased was also ordered to vacate the common home although this was rescinded on the return day of the protection order on the basis of the deceased's plea that he could not afford alternative accommodation. The magistrate then ordered them to undergo counselling.

[7] Uneasy calm prevailed in the following two weeks until the cataclysmic events of 19 April. She knocked off duty in the afternoon and socialised with Vuyokazi and a few colleagues at a shebeen. She and Vuyokazi returned home late in the evening. She was playing with the babies in the nursery when the deceased, who carried a firearm, called her from the door. Sensing danger, she refused to go to him. He entered the room and struck her on the head with the firearm. As she fell, she heard a gunshot and lost consciousness and only came around the following day in hospital. She had

sustained gunshot wounds on her face, chest and leg and learnt that the deceased had killed himself.

[8] Various police officers testified for the defence. They included Warrant Officer Dyantyi who, as it turned out, had attended to her on her first visit to the police station, Warrant Officer Madyibi, one of the two officers dispatched by Dyantyi to take her home and Warrant Officer Dinwayo who claimed to have attended to the appellant together with a colleague, Seargent Zikolo, during the second visit. The essence of these officers' evidence was that although the appellant approached the police as she alleged, she never reported that the deceased had assaulted her and was in possession of the firearm which he was using to threaten and point at her. According to Madyibi and Dyantyi, on her first visit to the police station the appellant merely reported that the deceased refused to let her into their house because she had returned home in the wee hours of the morning. The incident was not recorded in the Occurrence Book (OB) because it was trifling. Regarding the second visit Dinwayo alleged that the appellant only reported that the deceased threatened to assault her, whereupon she was advised of her options to lay criminal charges or obtain a protection order against him. The appellant chose to seek a protection order only as she did not want him to be arrested. This incident was recorded in the station's OB.

[9] It was not disputed that the firearm, a Z88 9mm pistol, was recovered at the shooting scene and belonged to the State. But it was denied that it had been officially allocated to the deceased. Lieutenant-Colonel Ndzalela who was in charge of the compilation and maintenance of the assets inventories at the material time, and the deceased's supervisor, Captain Bhabha of the Vehicle Identification and Safeguarding Section, opined that he had obtained it unlawfully. Incidentally, it came to light at the trial that no inventory of the state firearms and ammunition allocated to the deceased's

police station had been conducted at its armoury for about five years. This was in breach of police regulations which required annual stock-taking of all state assets at police stations. As appears from the relevant records, which included a tattered Firearms Register, showed the firearm had not been allocated to the deceased at the material time. The last entry recorded that it was returned to the armoury by one of his colleagues on 30 October 2001. It was recorded as missing, together with 76 other firearms, only on 3 April 2007 when an inventory was conducted for purposes of handing over the command of the station to a new commissioner. According to Ndzalela, Inspector Nonjokovu who visited the shooting scene and recovered the firearm never reported its recovery to its source, the deceased's station.

[10] The trial court decided the case on this evidence. As the appellant had not adduced any testimony to prove that the firearm had been officially allocated to the deceased as alleged in her pleadings, the court properly accepted that no liability had arisen for the police to monitor the deceased's fitness to possess a firearm. The court thus focussed its inquiry on whether the appellant had reported the deceased's possession of the firearm to the police and that he used it to threaten her, to found a legal duty to protect her. In the court's view, the inconsistencies in the appellant's version did not detract from its credence. This was so, it found, because 'she was in the main consistent in her version and the central features of her version withstood intense gruelling … cross-examination' whereas the defence version of the events of 7 March 2006, given about five years later, was not supported by objective documentary evidence as no written statements had been taken from her. The court did not believe that the appellant would not tell the police that the deceased had assaulted and threatened to shoot her but report that to the magistrate, whom she approached on the suggestion of the police only a few hours later. The court concluded that the police were obliged to investigate the appellant's report and take requisite steps to protect her

from harm, notwithstanding her election to seek only a protection order. Their failure to do so was, therefore negligent and wrongful and the appellant had discharged the onus resting on her.

[11] The majority of the full court disagreed with all the findings made by the trial court. It found that the trial court's evaluation of the evidence was flawed because it weighed the probabilities of the case 'without also addressing the credibility and reliability of the evidence', thus entitling it to consider these issues afresh. It disagreed entirely with the trial court's credibility findings made in respect of the appellant. The appellant was found an untruthful and unreliable witness. Her explanation that she wanted to protect the deceased and did not want him to be arrested but merely disarmed of the firearm because he was the family's breadwinner, and that she reported him on Vuyokazi's advice, was held against her. Its view, this explanation was contradictory – she could not have reported his conduct to the police because had she done so he would have been arrested and charged at the risk of his job. The police who attended her on 7 March 2006 had no reason not to record that the deceased had threatened her with a firearm. And she muddled up the dates on which the deceased pointed the firearm at her, because she was lying. It found that it made no sense for her to report the deceased to the police in February 2006 simply because he was angry and not do so previously when he had actually pointed the firearm at her and threatened to shoot her. Her explanation for reporting the incident of the evening of 6 March 2006 only on the following morning was also discounted because she initially said there was no transport and later said she had no money.

[12] The majority of the full court held that the appellant would not have accepted the police's failure to disarm him and not take that up with 'the relevant senior authorities' if she had made that request and truly wanted to have him disarmed.

Moreover, when she applied for the protection order she had not completed the portion of the application form which requires the magistrate to order the police to seize any arms or dangerous weapons in the offender's possession. And acceding to the deceased's plea to the magistrate to return to the marital home, without insisting on an order that he should first be disarmed, and the absence of such an order by the magistrate, was further proof that she neither reported the deceased's possession of the firearm nor sought its seizure from the magistrate as well. Regarding the appellant's report to the magistrate which mentioned the assaults and shooting threats the full court said that the appellant 'could differentiate between the police and the magistrate's office and she was aware of what she could say to the magistrate's office officials as opposed to what she could tell the police …[so] the mere fact [that her statement] contains information about the firearm and threats by the deceased to shoot [her] and himself could not necessarily mean that the same information was relayed to the Ngangelizwe police'. In the circumstances, the probabilities overwhelmingly pointed to the conclusion that she never informed the police that the deceased pointed a firearm at her and threatened her as she alleged. Furthermore, the police became aware of the existence of the protection order, which was not served on them, only after the institution of her damages claim. Therefore, they had no legal obligation to prevent the harm caused by the deceased and the appellant failed to prove her case.

[13] On further appeal before us, the crisp issue was whether the appellant had informed the police that the deceased had assaulted her, pointed the firearm at her and threatened to shoot her.[1] Her counsel contended that the majority of the full court failed to deal with the flaws in the defence version, failed to attach due weight to the probabilities in the appellant's favour and unduly concerned itself with the irrelevant

[1] Indeed, her evidence that the deceased had always been in possession of a service firearm which he had pointed at her and that he threatened to shoot her was not gainsaid. And as was observed in the minority judgment, it would have been far-fetched and fanciful to suggest that the appellant fabricated the deceased's threats which he executed a mere six weeks after

incidents, which occurred in 2005, and discrepancies purportedly inherent therein instead of focussing on the events of February and March 2006 on which her cause of action was founded. Counsel for the defence, on the other hand, strenuously defended the full court's judgment which he contended properly assessed the evidence in its totality. In his submission, the appellant's version was correctly rejected as it was hopelessly contradictory whereas the police witnesses could not be impeached in any manner. He further slated the appellant for not calling Vuyokazi, whom she claimed had been present at all material times relating to the events of 7 March, as a witness and argued that an adverse inference should be drawn from that omission.

[14] As the majority judgment held, the appellant, who was a single witness, bore the onus to prove her claim on a balance of probabilities. And it is from those probabilities that the court would select a conclusion which seems to be the more natural or plausible (ie acceptable, credible, suitable) conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.[2] In light of the irreconcilable versions that emerged from the evidence, the choice or preference of one version over the other ought to have been preceded by an evaluation and assessment of the credibility of the relevant witnesses, their reliability and of course the probabilities.[3]

[15] Contrary to the majority's finding, the defence version is not without material flaws. The first difficulty arises from the failure by the police to take statements from the appellant during both her visits to the police station, in breach of the Standing

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she reported him to the authorities in precisely the same manner in which the appellant described.

[2] *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 263; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-D; *Jordaan v Bloemfontein Transitional Local Authority and another* [2003] ZASCA 127; 2004 (3) SA 371 (SCA).

[3] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-H; *Stellenbosch Farmer's Winery Ltd and Another v Martell et Cie and others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) paras 5-7; *Dreyer and another NNO v AXZS Industries (Pty) Ltd* [2005] ZASCA 88*;* 2006 (5) SA 548 (SCA) para 30.

Orders and Instructions which required the police to record all complaints and occurrences in the OB. The evidence of the relevant officers, who by their own admission worked at an extremely busy station, was therefore based solely on their free recall of the events which had occurred some five years ago. That fact alone renders their evidence unreliable.

[16] There are other problems. In my view, Dyantyi's evidence regarding the February incident cannot be given any credence whatsoever. By his own admission, he relied entirely on Madyibi's recollection of the events, which he considered trivial. In his words 'the incident happened long ago … [and I] had completely forgotten about it and … was caused to remember'. He insisted that she said nothing about a firearm because he would otherwise have recorded her complaint had she done so. He thus had no independent recall of the appellant's visit and his testimony amounted to no more than a hearsay account.

[17] But even if his account were admissible, it would remain unreliable. His explanation for his failure to record the complaint was most unsatisfactory. The awkward hour at which the appellant called at the police station in itself bore out her fear of the deceased which could not have been engendered by the mere threat of an assault she was alleged to have reported. Dyantyi's very response in dispatching two police officers to ensure the appellant's safe passage, bearing in mind that her evidence that he told her that he knew of the deceased's violent disposition was left unchallenged in her thorough cross-examination, clearly shows that he did not find the situation trifling. Madyibi was not present when the appellant consulted with Dyantyi and was merely asked to escort her home and placate the deceased. He had no knowledge of what she reported to Dyantyi so his unreliable account does not advance the defence version even if it was accepted.

[18] Only Dinwayo testified about the appellant's visit at the police station of 7 March 2006. Interestingly, the relevant entry in the station's OB made no reference to her and indicated that the appellant was attended only by Zikolo who had since died when the trial started. This evidence tallied with the admission made by the defence in the pre-trial process and no mention of Dinwayo's involvement had been made to the appellant during her cross-examination as well. The OB entry itself yielded no useful detail as it merely read 'Sanela Dlanjwa … was here complaining of domestic violence by her husband and the Act of domestic violence was explained and understood. She chose to apply for Protection Order'. One simply does not know what Zikolo meant by 'domestic violence' and the vague entry certainly cannot redound against the appellant's version as to the content of her report to him. It can safely be inferred from his response though that he considered her complaint serious enough to warrant the institution of a criminal charge or a protection order.

[19] As the trial court and the minority judgments properly acknowledged, the appellant's version was not without blemish and bore some inconsistencies. But, the proper test is not whether a witness is truthful or reliable in all that she says, but whether on a balance of probabilities the essential features of the story which she tells are true.[4] Importantly, the appellant did not deviate from her essential statement that she told the police about the deceased's violent conduct upon which her first request to the police was based and that she reported him again in March 2006 because he had pointed the firearm at her and threatened to shoot her.

[4] *Santam Bpk v Biddulph* [2004] ZASCA 11; 2004 (5) SA 586 (SCA) para 10.

[20] I agree with the trial court's finding, endorsed by the minority in the full court that, in any event, whilst the appellant may have contradicted herself on some aspects,

such contradictions, read in context, were more apparent than real. She was subjected to a long, drawn-out and often repetitive and confusing cross-examination. As indicated above, the contradictions related mainly to the dates on which she claimed the deceased first pointed the firearm at her and her reports thereof to the police. A question put to her that in her evidence in chief she alleged the deceased pointed the firearm at her for the first time in February 2006, which is not borne out by the record, seemingly spawned the confusion which ensued during lengthy questioning on the aspect.

[21] The fact however is that the appellant had indicated from the onset that she struggled to recall dates relating to the abuse and her injuries. She did indicate though that the physical assaults (which involved being struck with a belt even during her pregnancy), the shooting threats and pointing with a firearm had started 'in 2005 and rolling over to the following year' and that the deceased had pointed the firearm at her more than once before she approached the police. In reaction to relentless cross-examination on this aspect, the trial court intervened to point out that her testimony had been tentative about the dates. And indeed, I find her inability to recall the precise dates when she was threatened with the firearm quite understandable in the circumstances.

[22] In answer to dogged questioning as to why she had not immediately reported the deceased for pointing her with the firearm she replied that '[t]he problem is he would ask for forgiveness and … he was my husband and I would decide to forgive him and I would give myself that hope that this thing would … come to an end … I did not want him to be arrested my main aim was that when he said he was going to change I wanted him to change'. I have no difficulty at all accepting this guileless statement. Neither do I find anything untoward about her evidence that she wanted to protect him

which, to my mind, is actually compatible with this explanation. In my view, that she did not want the deceased to be arrested, about which she was candid, is in no way irreconcilable with her request for the confiscation of the firearm. If she wanted to hide the fact of her abuse at the hands of the deceased and was focussed on not getting him into trouble with the law, she would not have approached the police at all.

[23] Moreover, I find nothing improbable about her statement that she was unfamiliar with the relevant legal procedures which the defence argued was another indicator of her mendacity. She was a young (at 25 years of age), clearly unsophisticated woman (judging from the evidence especially her handwritten statement in the magistrate's court). Dinwayo's evidence and Zikolo's OB entry make clear that she knew nothing about her remedies under the Domestic Violence Act[5] until the police explained its provisions to her whereafter she made an election. And it must be said that her explanation that she approached the police on the advice and insistence of her friend, Vuyokazi.

[24] I fail to understand why the appellant must be indicted for not having complained to senior officers at the police station when the deceased was not disarmed as the defence counsel urged us to do. The duty lay squarely on the police to investigate her complaints once she reported that she feared for her safety. As the trial court pointed out, the Constitution, in s 12 (1*)(c)* which guarantees the right to freedom and security of the person, including the right to be free from all forms of violence, and the South African Police Service Act,[6] impose a positive obligation on the police to ensure the safety and security and protect the members of the public in general and women and children in particular from violent crime.[7] That the appellant did not seek

[5] 116 of 1998.
[6] 68 of 1995.
[7] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* [2002] ZASCA 132;

police help more aggressively and even her unwillingness to lay charges against the deceased did not detract from that obligation.

[25] The remarks of this court in an analogous case, *Minister of Safety and Security v Van Duivenboden*,[8] are instructive. There, the court said:[9]

'Simply from the events that occurred on 27 September 1994 [when the plaintiff approached the police and reported that she feared her husband but expressed an unwillingness to lay charges as to do so would jeopardize her marriage and merely asked them to confiscate his firearms] it was known to a number of police officers, more than a year before [the plaintiff] was shot, that while he was in a drunken state Brooks had threatened to shoot himself and any person who attempted to intervene, including the police. That by itself warranted Brooks being declared unfit to possess firearms for a period of not less than two years. All that was required for the requisite procedure to be commenced was for any one of the police officers to reduce that information to writing under oath and to forward the statement to the person responsible for holding such enquiries. There was no proper explanation in the evidence for why that was never done … [W]hy none of those police officers took any steps … to initiate any enquiry, was not explained. It is that omission that lies at the heart of the respondent's claim'.

Here, the police contented themselves, initially, simply with attempting to broker peace between the appellant and the deceased and, on the second occasion, merely advised her of her options without even bothering to take a proper statement from her, in clear dereliction of their duties.

[26] As mentioned above, one of the police witnesses, Warrant Officer Mnyatheli, testified that the police were unaware of the protection order (and its contents which would have told them the grounds upon which it was issued) until the institution of the action. Curiously though, the station's Domestic Violence Register, which formed part

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2003 (1) SA 389 (SCA) para 13; *Carmichele v Minister of Safety and Security and another (Center for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC) para 62.

[8] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA).

[9] At para 11.

of the bundle of documents admitted at the trial as truthful evidence of its contents in terms of the parties' agreement at the pre-trial conference, recorded that the protection order had been served at the police station on 9 March 2006, just a few days after she reported the incident and weeks before the shooting. Disturbingly, Mnyatheli admitted that he had tampered with the contents of the register by deleting and changing various items therein with erasing fluid, including the date on which the order was received at the station, and falsely recording that the 'issuing member' of the document was the sheriff who obviously was not a police official. These shenanigans naturally cast a long shadow over Mnyatheli's evidence. But, even if one accepts his version that the police were unaware of the protection order as true, this would not assist the defence case because according to the relevant entry in the register, the protection order was served at the police station ten days before the tragedy. The only inference to be drawn from that fact is that the police there became aware of the shooting threats before the tragedy and did nothing to stop it in breach of their statutory duty.

[27] I also find no merit in the argument that the absence of a request for the firearm's seizure in her application form for a protection order means that the appellant did not apply to have the deceased disarmed. As the trial court correctly pointed out, her evidence that the official who attended her at the magistrate's court told her which parts of the form to complete, and that the relevant portion was filled in by that officer, was borne out by the patently different handwriting on the document and could not be impeached. Therefore she cannot be blamed for the omission. This is particularly so having regard to the provisions of s 9 of the Domestic Violence Act which the magistrate clearly ignored in light of the appellant's statement. In terms of s 9(1) thereof

'The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of a respondent, if the court is satisfied on the

evidence placed before it, including any affidavits supporting an application referred to in section 4 (1), that –

(*a*) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or

(*b*) possession of such arm or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's –

(i) state of mind or mental condition;

(ii) inclination to violence; or

(iii) use of or dependence on intoxicating liquor or drugs.'

Clearly, these provisions enjoined the magistrate to order the seizure of the firearm allegedly used by the deceased to threaten the appellant whether or not she made that request.

[28] Another blow to the defence version, in my opinion, is the glaring improbability in the contention that the appellant did not mention the involvement of a firearm to the police and yet reported it to the magistrate whom she approached on the advice of the very police shortly thereafter. And this because she could differentiate between the two institutions and realised that there was no risk of the deceased's arrest from the magistrate as alluded to above. I do not understand the latter submission because the business of both the magistracy and the police service is law enforcement so the deceased was not safe from the reach of the law once reported to the magistrate. In any event, its basis is far from clear as the evidence certainly does not support it.

[29] Regarding the criticism levelled against the appellant's failure to call Vuyokazi to testify, it is so that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial court, this failure may lead to an

inference that she fears that such evidence will expose facts unfavourable to her.[10] But the inference will depend upon the facts peculiar to the case where the question arises and the strength or weakness of the case is a relevant factor for consideration.[11] Also, if it appears that the witness was equally available to both parties, that inference might be drawn against both parties.[12] It seems to me, for all the reasons stated above, that the probabilities strongly favour the appellant's version. In that case, there is no room to draw the inference sought on the respondent's behalf. Furthermore, the appellant's cause of action was founded also on the events of February 2006 which did not involve Vuyokazi.

[30] The requirements for a claim based on wrongful omissions of police officers are established. The plaintiff must prove that (a) the police owed her or him a legal duty to act; (b) they breached that duty and did so negligently; and (c) there was a causal connection between such negligent breach of the duty and the harm suffered by the plaintiff.[13] The existence of a legal duty was always common cause. The only issues that were in contention related to the requirements set out in (b) and (c). In my view, the appellant established them and both negligence and wrongfulness on the part of the police were proved. The appeal must therefore succeed.

[31] We were asked to award the appellant costs including the costs occasioned consequent to the employment of two counsel if the appeal succeeded. However, such

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[10] *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A).
[11] *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133E-F.
[12] *Webranchek v LK Jacobs & Co Ltd* 1948 (4) SA 671 (A) at 682; *Rand Cold Storage & Supply Co Ltd v Alligianes* 1968 (2) SA 122 (T) at 123, 124.
[13] *Carmichele*, fn 7, para 25.

an award is not warranted in the circumstances of this case even though the matter is obviously important to the parties. By the time the matter went on appeal both in the full court and before us, the issues had crystallised into the simple factual question described above ie whether the appellant told the police that the deceased had pointed the firearm at her and threatened to shoot her.

[32] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the Full Court is set aside and replaced with the following:

'The appeal is dismissed with costs.'

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M M L MAYA

Judge of Appeal

APPEARANCES

For the Appellant:	N Dukada SC (with MN Hinana) Instructed by: Fikile Ntayiya & Associates, Mthatha Rampai Attorneys, Bloemfontein
For the Respondent:	P H S Zilwa SC Instructed by: NS Nombambela Inc., Mthatha The State Attorney, Bloemfontein