THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 200/06

Reportable

In the matter between

MINISTER OF SAFETY AND SECURITY **Appellant**

and

MATHUME MOHOFE **Respondent**

Coram**:** **HOWIE P, FARLAM, NUGENT, LEWIS, JAFTA JJA**
Heard: 23 FEBRUARY 2007
Delivered: 23 MARCH 2007

Summary: A police officer who announces his presence and orders armed and fleeing robbery suspects to stop is not guilty of negligence merely by reason of that fact where a suspect, in response to the order, shoots at him but the shot hits an innocent bystander who is killed.

Neutral citation: This case may be cited as *MINISTER OF SAFETY AND SECURITY v MOHOFE* [2007] SCA 21 (RSA)

LEWIS JA

[1] At about 16h00 on 12 March 2001, near the corner of Bree and Rissik Streets, Johannesburg, Inspector Gerson Nemengaya, a police officer in plain clothes on patrol in the area, saw three men emerge from a shop that he suspected had been robbed. Two of the men, at least, were armed. They had tucked their firearms in the waistbands of their trousers on leaving the shop. The men fled the area: he approached them, shouting that he was a policeman. He ordered them to stop. Two continued running. The third, identified later as Mr Banyana Sibeko, whom Nemengaya had seen in the shop holding a firearm, stopped and fired a shot at him. Nemengaya dived to the ground. The shot missed him. He chased after them, and about three blocks from the scene of the shooting, Nemengaya fired a warning shot into the air, ordered Sibeko to stop, and, when Sibeko ignored him, shot him in the leg. Nemengaya and another police officer, with whom he was on duty, arrested Sibeko and took him back to the scene of the robbery. There they found Mr Johannes Mohofe, who had been shot, lying on the ground. He was taken to hospital but died the same day.

[2] The respondent was the mother of Mohofe, and, arising out of his death, claims damages from the appellant for loss of support for herself and on behalf of the minor children of Mohofe. The issue in this appeal is whether the appellant (the State) is delictually liable for the conduct of Nemengaya, as the respondent alleges. She claims from the State on the basis that it is vicariously liable for the wrongful and negligent conduct of Nemengaya in causing the death of Mohofe. Although it was found that Mohofe had actually been shot by Sibeko when he opened fired on Nemengaya, the claim is based on the alleged negligent and wrongful conduct of Nemengaya in alerting Sibeko to the fact that he was a policeman, thus causing Sibeko to shoot into a crowd of innocent bystanders. (The respondent had originally alleged that her son had been shot by Nemengaya. The trial court found that this was not the case, and accepted that Mohofe had been struck and killed by the shot fired by Sibeko. This finding is not in issue on appeal.)

[3] The trial court (Schwartzman J in the Johannesburg High Court) found for the respondent: it held that Nemengaya owed a legal duty to protect Mohofe,

that he had acted in breach of that duty (wrongfully) and had negligently caused the death of Mohofe. The State was thus held to be vicariously liable. The appeal against the decision lies with the leave of Schwartzman J.

[4] In the view I take, it is not necessary to decide whether or not Nemengaya's conduct in calling out to Sibeko can properly be said to have been the cause of Mohofe's death but I shall assume that it was. An act that causes injury to another, or death, is prima facie wrongful.[1] I assume also that there are no other matters of policy that should operate against that principle in this case. The only issue to be determined, therefore, is whether Nemengaya's conduct was negligent.

[5] The trial court concluded that Nemengaya was guilty of negligence. The classic test for negligence set out in *Kruger v Coetzee*,[2] cited by the learned trial judge, requires a court to ask whether the reasonable person in the position of the defendant would have foreseen the reasonable possibility of his conduct injuring another and causing him patrimonial loss; and, if so, whether the reasonable person would have taken *reasonable steps* to guard against the occurrence of harm. The fact that harm is reasonably foreseeable does not necessarily mean that the defendant was required to act to prevent it occurring. As Holmes JA said in *Kruger v Coetzee*:[3]

'Whether the *diligens 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.'

[6] The trial court concluded that Nemengaya was guilty of negligence because he foresaw the possibility of his conduct causing injury and thus patrimonial loss, but he failed to guard against the injury in calling out as he did. He could have guarded against the injury by not calling out. It is these findings that are open to question.

---

[1] *Cape Town Municipality v Paine* 1923 AD 207 at 216-217; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12 and *Minister van Veiligheid en SekuriteIt v Geldenhuys* 2004 (1) SA 515 (SCA) para 24.
[2] 1966 (2) SA 428 (A) at 430E-F.
[3] Above at 430F-H.

[7] Nemengaya had been a police officer for some nine years before the shooting occurred. He was patrolling around Bree Street with a colleague, and was armed with his service pistol. He had seen the three men emerge from the shop with firearms. At that time his colleague was not on the scene. Nemengaya did what he said he had been trained to do as a policeman: he announced his presence and ordered the suspects to stop. He had been instructed not simply to chase after fleeing suspects, but to warn them first that he was a police officer, and order them to stop. That is standard procedure. His opinion was that in most cases suspects would then surrender.

[8] Nemengaya admitted that the area where the shop had been robbed was crowded with pedestrians. People were on their way home from work. He also conceded that an armed suspect, alerted to the fact that he was a police officer, might fire at him and hit someone else. But he refused to concede that he should have run after the suspects until they reached a place where there were no bystanders and only then have shouted a warning. 'It does not work like that', he said. You cannot just 'follow him until he comes to the area where it is clean because my aim is to protect the public and to arrest the person who do wrong'.

[9] The test for negligence is objective. Would the reasonable police officer in the position of Nemengaya have foreseen that if he alerted the suspects to his presence one of them might shoot at him and injure or kill a bystander in the process? It seems to me to have been an objectively reasonable possibility. But there are other possibilities that the reasonable police officer might foresee too. He might reasonably foresee that if he called out that he was a policeman and ordered the fleeing suspects to stop they might do so. And as I have said, Nemengaya's testimony, uncontradicted by other evidence, was that fleeing suspects 'must surrender' when alerted to the presence of the police. Another reasonably foreseeable possibility was that the armed suspects might continue fleeing and not only escape being apprehended but also constitute a further danger to the public at any stage in their flight If the crowds had become denser further on they might have panicked and resorted to shooting to ensure escape.

[10] In the same circumstances a reasonable police officer in the position of Nemengaya would have to make a choice as to the best steps to take to fulfil

the duty to protect the public and apprehend criminals. He could not stand by and do nothing. That would be in dereliction of his duty. And his choice as to the steps to be taken would inevitably be made on the basis of his training and his experience.

[11] Nemengaya believed, correctly, that he had a duty to protect the public. This is a duty that flows from the Constitution: s 205(3) provides that 'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.' The duty is imposed also under the South African Police Service Act[4] the preamble of which affirms that it is the duty of police officers to ensure the safety and security of all people in the country.[5] His duty was owed both to the members of the public around him and also to those with whom the suspects might come into contact in their attempted escape.

[12] Nemengaya discharged that duty by doing what he had been trained to do. There is nothing to suggest that he behaved in a manner different from the way in which the hypothetical reasonable police officer would behave in the circumstances. If the reasonable police officer would foresee the possibility that an innocent bystander might be injured or killed by an armed suspect, what steps would he take to avert this while nevertheless doing his duty? In determining whether the second test in *Kruger v Coetzee* has been met, one must weigh the 'gravity of the risk' (a bystander being shot) with the 'utility of his conduct',[6] apprehending at least one of the suspects. In *Herschel v Mrupe*[7] Schreiner JA famously said:

'No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of

[4] Act 68 of 1995.
[5] See the discussion of these duties in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 18 and 19.
[6] *Crown Chickens (Pty) Ltd v Rieck* [2006] SCA 127 (RSA) para 14.
[7] 1954 (3) SA 464 (A) at 477A-C.

taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial.'

To this should be added the rider that the reasonable person might not guard against the risk if the alternatives posed just as much risk.

[13] Thus when the reasonable police officer foresees the possibility that a fleeing suspect might, when confronted by a policeman, shoot at him and hit a bystander instead, he would also weigh the likelihood of this happening against the possibility that the suspects might escape, and continue to be a danger to the public if he did nothing. He would also take into account the likelihood of the suspects surrendering, even if this was not great. The risk of allowing the suspects to escape had to be weighed against all that. By shouting out that he was a policeman, and chasing after Sibeko, Nemengaya managed to apprehend him. That, at least in part, was the result he sought to achieve.

[14] In determining whether the driver of a train was negligent Wessels CJ in *South African Railways v Symington*[8] said that a court should take great care

'lest we stigmatize a person as guilty of *culpa* when in fact he did all that could be expected of him under the particular circumstances of the case. This involves a correct appreciation not only of the surrounding circumstances but also of human nature, so as to be able to judge correctly what a particular person ought or ought not to have done in the circumstances. One man may react very quickly to what he sees and takes in, whilst another man may be slower. We must consider what an ordinary reasonable man would have done. *Culpa* is not to be imputed to a man merely because another person would have realized more promptly and acted more quickly. Where men have to make up their minds how to act in a second or a fraction of a second, one may think this course the better whilst another might prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for *culpa*.'

And in *S v Bochris Investments (Pty) Ltd*[9] this court cautioned against being influenced by 'the insidious subconscious influence of *ex post facto* knowledge'

[8] 1935 AD 37 at 45.

(a phrase used by Williamson JA in *S v Mini*[10]). The cautionary note is repeated in *Minister of Safety and Security v Carmichele*.[11]

[15] Nemengaya was caught up in a situation where he had to act quickly and protect the public from three fleeing robbery suspects. He acted as he had been trained to do. It is not clear to me that he was guilty even of an error of judgment. What other action could Nemengaya have taken to stop and apprehend armed men whom he suspected of having committed a robbery? No answer is suggested by the appellant other than that he should not have alerted the suspects to his presence but should rather have chased them to a place where there were no bystanders. With hindsight it is possible that he may have avoided the death of Mohofe. But equally, he may well have been derelict in his duty in doing so, for all the fleeing suspects, at least two of whom were armed, might easily have disappeared or harmed others when fleeing.

[16] Nemengaya did no more than alert the suspects to the fact that he was a policeman and call on them to stop. He acted in terms of standard police procedures that have not been demonstrated to be ineffective or inappropriate. The logical consequence of the appellant's argument, on the other hand, is that whenever police officers are confronted by armed and thus dangerous people who flee from the scene of a crime, they must remain silent and do no more than covertly chase after the suspects until they reach a place where there are no bystanders. If this were so, criminals would hold sway in any busy place. No court should be understood to suggest that police officers should be supine in the face of criminal activity. Some action was required. On the evidence it cannot be said that the reasonable police officer would have viewed the risk attendant on calling out as greater than the risk of the suspects shooting a member of the public in the immediately ensuing stage of their getaway.

[17] In the circumstances Nemengaya did not act negligently. The claim should have been dismissed.

---

[9] 1988 (1) SA 861 (A) at 866-867.
[10] 1963 (3) SA 188 (A) at 196E-F. See also *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) paras 21 and 22.
[11] 2004 (3) SA 305 (SCA) para 45.

[18] The appeal is upheld with costs. The order of the court below is replaced with:

‘The plaintiff’s claim is dismissed with costs.’

C H Lewis
Judge of Appeal

Concur:
Howie P
Farlam JA
Nugent JA
Jafta JA