CONSTITUTIONAL COURT OF SOUTH AFRICA

Elsa Booysen v Minister of Safety and Security

CCT 25/17

Date of hearing: 22 August 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 22 August 2017 at 10h00, the Constitutional Court will hear an application by Ms Elsa Booysen (the applicant) for leave to appeal against an order of the Supreme Court of Appeal (SCA), which set aside a decision of the Eastern Cape Division of the High Court, Grahamstown (High Court). The SCA held that the Minister of Safety and Security (the Minister) is not vicariously liable for the damages suffered by the applicant after being shot and wounded by an on duty reservist with the rank of constable (the deceased) on 22 March 2013. The deceased was also the applicant's romantic partner.

The deceased, dressed in full police uniform and carrying his service pistol, was on night shift duty when the incident occurred. He was dropped off at the applicant's home by a marked police vehicle to take a break and have dinner, as was their routine when he was on night shift duty on a Friday and Saturday. The police vehicle would return later to collect him in order to resume his duties. After dinner, the deceased and the applicant went to sit outside. Suddenly, the deceased drew his service pistol and shot the applicant in the face, before turning the gun on himself and committing suicide. The applicant contended that the deceased had committed the offence during the course and scope of his employment with the Minister. As a result, she instituted action in the High Court against the Minister for damages.

The High Court upheld the applicant's claim. In coming to this conclusion, the Court relied on previous cases decided by this Court in which the Minister was found to be vicariously liable because the police officers had used police vehicles to indirectly facilitate the commission of their crimes. The High Court found that the fact that the deceased had used a police-issue service pistol to wound the victim was decisive. It held

that the primary underlying purpose of the doctrine of vicarious liability is the risk of harm the employer creates by acting through its employees. The High Court concluded that employers should be responsible for any harm caused by their employees. According to the High Court, this purpose would be best served by acknowledging the risk created for members of the public when police officers are issued dangerous weapons and by encouraging stricter official control over the issuance of firearms to police officers. The High Court therefore held that the respondent was vicariously liable for the delict committed by the deceased against the applicant.

Aggrieved by the decision, the Minister appealed to the SCA. The majority upheld the appeal and set aside the order of the High Court. In coming to its conclusion, the majority applied the two-pronged test set out by this Court in so-called "deviation" cases, in which an employee has departed from his or her duties. The SCA held that, in previous cases in which the Minister was found to be vicariously liable for the conduct of police officers, the fact that the victims placed trust in the police officers by virtue of their status as such, was an essential element in establishing that a "sufficient link" existed between the wrongful acts of the police officers and their employment by the South African Police Service. This satisfied the second prong of the test, which asks whether there is a sufficient link between an employee's wrongful acts and his employment. On this basis, the SCA held that the Minister could not be vicariously liable in the present case because, when the shooting took place, the applicant and the deceased were not relating to one another as police officer and citizen but as lovers in a domestic setting. The SCA majority held that, to the extent to which the High Court imposed liability on the respondent on the basis that the act was committed using a police issued firearm, its decision was incorrect. According to the SCA majority, for liability to arise in such circumstances, it would have to have been known that the police officer in question was likely to endanger the lives of others if permitted to possess a firearm, based on his or her history.

The SCA minority, on the other hand, found that the Minister should be held vicariously liable. It held that this is so because public trust in the police service is essential for a credible and efficient police service and that police play an important part in society in combating crime and protecting society. Police therefore, enjoy a special place in the psyche of members of the public. As a result, the sight of a police officer clad in full police uniform, armed with a state-issued firearm and using a visibly marked police vehicle, would without fail, instinctively evoke a feeling of comfort and trust in most, if not all members of society.

In this Court, the applicant seeks leave to appeal against the majority decision of the SCA. The applicant submits that the Constitutional Court has jurisdiction to hear this matter as it concerns the constitutional issue of what policy considerations should be taken into account when determining whether the State should be held "vicariously" liable for the wrongful actions of its employees.

Moreover, the applicant argues that the SCA's interpretation of judicial precedent in relation to vicarious liability was incorrect. The applicant argues that there is a

sufficiently close link between the deceased's conduct and his employment as a police officer because he was on duty, in uniform, he used a police-issue firearm to shoot the applicant and because the Minister is under a constitutional duty to protect citizens from violence. The Minister argues that a sufficiently close link does not exist between the acts of the deceased and the business of SAPS, and that the SCA decision that vicarious liability cannot be imposed should stand.