

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 1498/2016

In the matter between:

**SIPHESIHLE NTANJANA**

**Plaintiff**

**And**

**MINISTER OF POLICE**

**1<sup>ST</sup> Defendant**

**CONSTABLE LOFTUS NHLAPO**

**2<sup>nd</sup> Defendant**

**JUDGMENT**

**DJAJE J**

[1] The Plaintiff instituted a claim for damages against the two Defendants in the amount of R3 000 000.00 (three million rand). The claim is for damages suffered due to the alleged negligence of the second Defendant who was acting in his capacity as a member of the South African Police Services in the employ of the first Defendant. In the particulars of claim the Plaintiff alleges as follows:

“14. Constable Nhlapo as a member of the Defendant owed Plaintiff a duty of care to ensure that she was safe and not exposed to any known danger.

15. Constable Nhlapo was negligent in the following was:

15.1 a reasonable man in the position of Constable Nhlapo

- 15.2 *would foresee the reasonable possibility of his conduct injuring another (the Plaintiff) in his person or property and causing her patrimonial loss; and*
  - 15.3 *would take reasonable steps to guard against such occurrence; and*
  - 15.4 *the defendant has failed to take such steps.*
- 16. *Due to Constable Nhlapo's conduct, Defendant is vicariously liable for the damages suffered by the Plaintiff.*
- 17. *As a result of the facts and circumstances described in the preceding paragraph;*
  - 17.1 *Plaintiff was injured both mentally and physically;*
  - 17.2 *Plaintiff suffered rape trauma syndrome;*
  - 17.3 *Plaintiff's personality rights, and in particular her right to dignity were impaired;*
  - 17.4 *Plaintiff was admitted to hospital on the 17 August 2014;*
  - 17.5 *Plaintiff experienced pain, suffering and shock and will continue experiencing same;*
  - 17.6 *Plaintiff suffered loss of amenities of life and will continue suffering same;*
  - 17.7 *Plaintiff has been traumatised and will require specialist counselling in future;*
  - 17.8 *Plaintiff suffers from depression and fear of being alone;*
  - 17.9 *Plaintiff has lost interest in sexual related activities;*
  - 17.10 *Plaintiff is not able to socialize as she used to;*
  - 17.11 *Plaintiff has received medical treatment in the past and will do so in future;*
- 18 *As a result of the fact and circumstances set out in the paragraphs above, Plaintiff has suffered damages in the amount of R3 000 000 (Three Million Rand)*

18.1 *Future medical and related expenses*

*(This is an estimate of the total amount which will be incurred in this regard)* 1 000 000.00

18.2 *Loss of earning capacity* 1 000 000.00

*(This sum represents an estimate of the damages sustained by the Plaintiff in respect of loss of earning capacity as a result of the abovementioned events).*

18.3 *General Damages for pain, suffering and shock, loss of amenities of life, impairment of dignity, mentally tranquillity, trauma, post-traumatic stress, anxiety and depression*  
1 000 000.00.”

[2] The matter proceeded only on merits as parties agreed to a separation.

**Evidence for the Plaintiff**

[3] On **6 January 2015** the Plaintiff was from Eastern Cape travelling in a taxi to Klerksdorp. The taxi arrived in Klerksdorp around 23h00 and as it was very late she requested the driver to drop her off at the Klerksdorp police station in the interest of her personal safety. Her intention was to call her uncle to fetch her from the police station. However, her cell phone battery died before she could call her uncle. She met the second Defendant outside the police station and he informed her that she was not allowed to wait inside the police station as members of the public were no longer allowed to do so. She reported to the second Defendant her predicament and the second Defendant offered to call her uncle using his cell phone but the uncle did not answer the phone. The second Defendant then waited with her outside the police station for almost an hour.

[4] The Plaintiff testified that whilst waiting with the second Defendant, a navy Toyota Corolla stopped in front of the police station and there were three black males inside. The driver opened the window and asked if there was

anyone going to Jouberton township (Klerksdorp). The Plaintiff did not respond as she did not feel safe travelling with unknown male persons and the second Defendant did not respond as well. The driver repeatedly kept asking for anyone going to Jouberton and the Plaintiff eventually responded that she was in fact going to Jouberton. The driver further asked her if she had any money and she answered positively. When the driver alighted from the motor vehicle, he was instantly recognised by the second Defendant as Jomo.

[5] The second Defendant subsequently had a short conversation with the said Jomo, asked the Plaintiff to provide him with the registration numbers of the said vehicle and she complied. Plaintiff testified that she then decided to get into the said vehicle as she realised that she could not sleep or wait at the police station and she was desperate to get home. After she got into the vehicle, the second Defendant then told Jomo to take the Plaintiff home as he knew that he (Jomo) was “stout” (naughty). Though Jomo acceded to second Defendant’s directives, he did not take the Plaintiff home. The Plaintiff was raped and assaulted by the occupants of the navy Toyota Corolla. She got home the following day and was taken to the hospital due to injuries sustained from the rape and assault. During cross examination, the Plaintiff stated that the second Defendant never told her to board the Toyota Corolla.

[6] Mr Lenox January, the Plaintiff’s uncle, testified that he was expecting the Plaintiff on **6 January 2015** from the Eastern Cape. He received a message from his sister that the Plaintiff would be at the police station, but did not specify which one. He went to Jouberton police station but could not find the Plaintiff. The following day, he received a call that the Plaintiff was assaulted and raped. According to Mr January, he was previously allowed to overnight at the Jouberton police station when he was travelling from the Eastern Cape as it was too late to get home. He was surprised to learn that the Plaintiff was not allowed to overnight or wait at the police station. He further testified that whilst at the hospital ward with the Plaintiff, the second Defendant arrived and apologised for what had happened to the Plaintiff indicating that he blamed

himself for having asked for a lift from those males for the Plaintiff. The second Defendant also informed them that he once arrested Jomo and that he did warn him to take the Plaintiff home. The Plaintiff's aunt also confirmed that second Defendant indicated that he blamed himself for what happened to the Plaintiff.

### **Evidence for the Defendant**

- [7] The second Defendant testified that in **January 2015** he was in the service and employ of the South African Police Service as a Captain and stationed at Klerksdorp police station. On the 6 January 2019, he did meet the Plaintiff outside the police station asking to rest and wait inside the police station as it was very late around 22h30. He advised the Plaintiff and other people there that there was a standing order providing that members of the public were not allowed to rest inside the police station due to previous incidents of robberies and violence in the police station which resulted in some people dying. The Plaintiff told him that her cell phone was off and requested him to call her uncle to come fetch her. He did assist but the phone was not answered. After a while, a navy blue vehicle arrived and the driver called out for people going to Jouberton three times. Ultimately the Plaintiff responded and went to the vehicle. He noticed that the registration of the vehicle was GP and asked the Plaintiff to take them down and give them to him. At that time, the driver of the vehicle alighted and said "*Captain it's me Jomo*". He recognised him as one of the local taxi drivers and he previously used his taxi to get to work. The Plaintiff boarded the vehicle and it drove off.
- [8] The following day, the second Defendant, learned that the Plaintiff was raped and assaulted on the night of 6 January 2015. He immediately went to the hospital and the Plaintiff informed him that she was raped by the males in that Toyota Corolla she boarded. He contacted the detectives to go look for Jomo and could not find him at his place. He then promised the Plaintiff and her family that he will arrest Jomo himself as he was known to him. He denied that he blamed himself for what happened to the Plaintiff or that he warned

Jomo to take the Plaintiff home as he was “stout” (naughty). He also denied ever telling the Plaintiff’s uncle that he once arrested Jomo.

- [9] During cross examination, the second Defendant explained that the standing order that he referred to when explaining to the Plaintiff is applicable to all police stations in the country but could not provide details thereof as well as its effective date.
- [10] The issue to be determined is whether the Defendants can be held liable for the damages suffered by the Plaintiff as a result of the assault and rape perpetrated on her by the occupants of the vehicle she boarded at the police station.

### **Submissions**

- [11] Counsel for the Plaintiff argued that the police, including the second Defendant, have a legal duty to provide protection to the community as provided for in the South African Police Service Act 68 of 1995. The Plaintiff in this matter had an expectation that the second Defendant would allow her to wait at the police station for her uncle to come for her but that was not the case. According to the Plaintiff, the second Defendant is referring to standing orders which are unfounded and do not exist as they were not discovered or presented in court. It was argued that the Plaintiff was seventeen years at the time of the incident and being a female person, she was very vulnerable at that time of the night. Further that she expected her predicament to be addressed by the police and provide her refuge but unfortunately she was turned away. The submission made was that the Plaintiff only decided to board the vehicle as she was not allowed to wait at the police station.
- [12] In contention, counsel for the Defendants argued that the Plaintiff has failed to establish a causal connection between the conduct of the second Defendant and the alleged damages suffered by her as a result of being raped and assaulted. As such, there can be no liability on the Defendants for the

Plaintiff's damages. It was further argued that the Plaintiff on the day of the incident was at the police station for the sole reason of waiting for her uncle to fetch her and had no business at the police station. Therefore, the police had no obligation to protect her unless if there was any harm that befell her whilst at the police station. It is the Defendant's case that section 13(1) of the South African Police Service Act provides that a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official. However, the Defendants argued that the section does not refer or contemplate a situation where there would be unauthorised visitors in the police station like the Plaintiff on the night in question who do not have official business with the police. Further that it cannot be expected of the police to escort every member of the public home who comes to the police station.

[13] According to the Defendants, the Plaintiff was not forced to board the vehicle that night and could have spent the night outside the police station as there were other people who were sitting outside the police station until the next morning. It is the argument of the Defendant that the second Defendant could not have foreseen that the Plaintiff would be raped and assaulted after leaving the police station and therefore there can be no connection between the rape, assault and the conduct of the second Defendant refusing the Plaintiff access into the police station to wait for her uncle.

[14] The classic test for negligence was formulated by Holmes JA, in **Kruger v Coetzee 1966(2) SA 428 (AD)** at 430 E-G:

*"For the purposes of liability culpa arises if –*

*a) a diligens paterfamilias in the position of the Defendant –*

*(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*

(ii) would take reasonable steps to guard against such occurrence; and

b) the defendant failed to take such steps.

*This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a 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.”*

[15] When dealing with negligence the issue of foreseeability arises. The question is whether the second Defendant could reasonably foresee that harm could arise and whether he would have taken steps to prevent such harm. In **Flanagan v Minister of Safety and Security (497/2017) [2018] ZASCA 96 (1 June 2018)** at par 25 the following was stated: “*To determine the reasonableness of guarding against the risk of harm, a number of considerations are relevant. These include the degree or extent of the risk created by the conduct in question; the gravity of the consequences if the harm occurs; and the burden of eliminating the risk of harm. See: Ngubane v South African Transport Services 1991 (1) SA 756 (A) at 776H-I.*”

[16] As far as causation is concerned the general principle thereof were reinstated in the case of **International Shipping Co Pty Ltd v Bentley 1990 (1) SA 680 (A)** at 700 E– I, as follows:

*“As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant’s wrongful act was a cause of the plaintiff’s loss. This has been referred to as ‘factual causation’. The enquiry as to factual causation is generally conducted by applying the so-called ‘but for’ test, which is designed to determine*



*whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss, aliter, if it would not so ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."*

[17] Section 13(1) of the South African Police Service Act provides that:

**"13 Members**

*(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official."*

[18] The second Defendant, as a member of the South African Police Service, is inescapably bound by the provisions of section 13(1) of the Act. Similarly the Plaintiff in terms of section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 has the right to equal protection and benefit of the law. In terms of both the Constitution and the South African Police Service Act the Plaintiff was entitled to protection by the police. The police had a duty to

afford her an opportunity to wait for her family inside the police station. The second Defendant argued that there was a standing order preventing members of the public from waiting inside the police station unless they were reporting a crime or being assisted by the police. No details of the said standing order were provided except to mention that the said standing order operates throughout the country. Failure to produce the standing order during these proceedings is fatal to the Defendant's case as a question to its existence arise.

[19] The Plaintiff at the time of the incident was seventeen years old and vulnerable. It was late at night around 23h00. She knew that she would be safe at the police station and hence she requested the taxi driver to drop her off there. Both her uncle and aunt expected her to be safe at the police station. This expectation by the Plaintiff and her family members cannot be misplaced as the South African Police Service Act does provide that the police must ensure the safety and security of all persons and property in the national territory. The Plaintiff as a person in the country is entitled to the protection by the members of the police service. She was however informed that she was not allowed to wait at the police station irrespective of what her predicament was. She had the option of either sleeping outside the police station exposed to all the elements of the night in the street or get a lift home. She did get a lift which unfortunate for her was not a lift.

[20] The second Defendant did not instruct the Plaintiff to board the vehicle but the refusal to allow her to wait at the police station was the reason for her to board the vehicle with the hope of getting home. According to her testimony, she stated that she realised that if she does not take the lift, she would be forced to sleep outside the police station in the street where she would not be safe. The reason for the Plaintiff to board the vehicle was solely because she was not allowed in the police station. In this matter the risk, created by the second Defendant acting within his scope of employment with the first Defendant, was by not allowing a seventeen year old female late at night to wait for her uncle at the police station. The risk could have been eliminated by

either allowing her to wait at the police station or requesting a patrol vehicle to go to her home and inform them about her presence at the police station. The second Defendant failed to take those steps and it was such a failure that led the Plaintiff to board a vehicle where she was assaulted and raped. The second Defendant acted negligently.

[21] The negligence by the second Defendant directly contributed to the harm suffered by the Plaintiff. It was the conduct of the second Defendant that led the Plaintiff to end up in the vehicle that caused her to be assaulted and raped. If the Plaintiff was allowed to wait for her family at the police station, the need to look for a lift at that time of the night would not have arisen and she would not have met with her attackers. In my view, the conduct of the second Defendant was the cause of the harm suffered by the Plaintiff and as such liability arises against the Defendants.

### **Costs**

[22] It is trite that costs should follow the result and I have not been persuaded why I should depart from this rule.

### **Order**

[23] Consequently, I make the following order:

1. The Defendants are held liable for damages suffered by the Plaintiff;
2. The Defendant is ordered to pay costs.

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**J T DJAJE**  
**JUDGE OF THE HIGH COURT**  
**NORTH WEST DIVISION, MAHIKENG**

**APPEARANCES:**

DATE OF HEARING: 19 JANUARY 2020

DATE OF JUDGMENT: 30 JANUARY 2020

COUNSEL FOR THE PLAINTIFF: MR L. GODLA

COUNSEL FOR THE DEFENDANTS: ADV M. MMOLAWA

ATTORNEYS FOR THE PLAINTIFF: GODLA & PARTNERS INC.  
c/o Maree & Maree Attorneys

ATTORNEYS FOR THE DEFENDANTS: THE STATE ATTORNEY