VONNISSE

DELICTUAL LIABILITY OF THE POLICE FLOWING FROM NON-COMPLIANCE WITH THE DOMESTIC VIOLENCE ACT

***Minister of Safety and Security v Venter* 2011 2 SACR 67 (SCA)**

1 Introduction

This judgment again shows that those who take an interest in the law of delict and fail to consult the *South African Criminal Law Reports* on a regular basis, do so at their peril. The present judgment in fact deals exclusively with the law of delict (like so many judgments reported in this series that concern unlawful arrest, which is essentially also a topic from the field of delict: See Scott "Wrongful arrest: A brief survey of the impact of the Constitution in recent case law" 2009 *Obiter* 724 726–727).

Majiedt JA (Mpati P and Cachalia JA concurring) was confronted in this case with the interesting question whether a failure by police officers to perform their duties prescribed in specific legislation could give rise to delictual liability on the part of the state (the Minister of Safety and Security), where one of the parties entitled to their assistance suffered harm after being shot by a person whose actions could possibly have been influenced, had the officers in question acted in accordance with the statutory measures concerned. Although the question whether omissions flowing from a breach of a duty imposed by law is normally, and correctly so, regarded as falling under the heading of wrongfulness as one of the recognised "elements" of delict (see eg Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2010) 54 *et seq*; Van der Walt and Midgley *Principles of delict* (2005) 78 *et seq*; Loubser, Midgley *et al The law of delict in South Africa* (2010) 143 *et seq*), the court in the present instance hardly touched upon the wrongfulness issue, opting instead to determine the question of liability by focusing on principles of the element of causation (factual and legal) to the facts at hand. Although this in itself raised the perplexing question whether it is at all possible to apply the well-established *conditio sine qua non* or "but for" test for factual causation to determine whether an omission caused a specific infringement of an individual interest (as to which, see Neethling and Potgieter 184–185; Van der Walt and Midgley 199–200), the court seemed oblivious to this fact and proceeded to "apply" this test without taking note of the necessary logical adjustments to the thought processes involved in determining whether negative conduct (an omission) caused a specific result.

The judgment ultimately focused on the issue of the plaintiffs' (respondents') contributory fault, in respect of which the well-known notion of contributory negligence was applied to the facts, without any profound analysis of the legal principles involved.

Like so many recent judgments involving claims against the Minister of Safety and Security, the present one represents yet another black mark against the state which was held to be vicariously liable for the conduct of its police officers. However, unlike the most notable of these cases in which the Supreme Court of Appeal displayed marked conservatism by finding for the Minister of Safety and Security against plaintiffs who had suffered harm in consequence of the wrongful and intentional acts of police officers (see eg *Minister of Safety and Security v Carmichele* 2001 1 SA 489 (SCA); *K v Minister of Safety and Security* 2005 3 SA 179 (SCA); and *Minister of Safety and Security v F* 2011 3 SA 487 (SCA)), some of which have subsequently been overturned by the Constitutional Court who seemed more sympathetically inclined towards members of public whose constitutional rights were infringed by rogue police officers (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); and *K v Minister of Safety and Security* 2005 6 SA 419 (CC)), the court's present judgment in favour of the respondent is the very antithesis of its earlier over-cautious and conservative approach in cases involving the police. The question now remains: has this judgment not perhaps been too lenient in accommodating the respondents or, couched in other terms, is one not perhaps confronted here by a typical example of a hard case that made bad law?

2 Facts and judgment

The second respondent, Ms Christa van Wyngaardt (henceforth referred to as R2) had been married to Mr Whitey van Wyngaardt (referred to as W) whose actions gave rise to the present litigation. Two children were born of their marriage. The first respondent, Mr Petrus Johannes Venter (referred to as R1) and his wife were friends of the first-mentioned couple and visited their home frequently. After both these marriages had ended in divorce, R2 and her children moved in with R1. W had initially approved of this arrangement, but later became jealous when an intimate relationship started to develop between R1 and R2. As time went by, W's behaviour became impulsive: he made incessant telephone calls, sent abusive text messages to R2 and even threatened to kill them all by setting their house on fire (69e–i).

These events prompted R1 and R2 to take certain steps: (a) R1 approached the Brakpan Police Station to gain advice on which steps he could take to prevent W from approaching his house (69j–70a). (b) At about the same time R1 and R2 went to the Brakpan Magistrate's Court to find out how they could obtain an interdict to prevent W from entering the property where they lived. Although they learnt that a case number had to be obtained as a first step in such proceedings, they abandoned this course of action (70b). (c) A month after this, W made an unannounced appearance at R1's home, which prompted the latter to call the police. Although the latter responded immediately and rushed to the aid of the distressed R1 and R2, W persuaded them that he had only come to collect his children to visit him in terms of an arrangement embodied in the relevant divorce decree (70d). (d) A month later, W's increasingly threatening attitude caused R1 to seek advice from the Brakpan Police Station again, armed with a written statement containing an account of W's threatening behaviour and a request that the police should prevent W from entering their property. The police officer who received their complaint informed them that the police could not take any steps to assist them in any way (70f). (e) About two months later, after W had

collected his children for a visit, he telephoned R2 and threatened to kill their children and commit suicide if she were to contact the police again. Thereupon R1 and R2 rushed to the police station where the inspector who attended to their complaint was sceptical whether they had a case at all. He at long last reluctantly took a brief, unattested statement from them after R1's attorney telephoned and urged him to act on the complaint and a colleague – a police captain – advised him to do the same (70h). (f) The next day R2 was in contact with a police sergeant to request that the police should not contact W, out of fear for the safety of her children who was at that stage still with W. After having subsequently informed the sergeant that the children were returned safely, the matter was not pursued any further by the police, despite R2's insistence that it should be investigated (70j–71a).

Ten days later things came to a head when W unexpectedly arrived at the home of R1 and R2. He informed R2, who was alone, that it was "elimination day", that he was going to kill R1 with a crossbow which he had brought along and that he was going to handcuff her to their bed. After having wrecked several items in the house, W ordered her to undress and followed her into the bedroom, where he discovered R1's firearm in a wardrobe. After he had raped her, they left the house and returned only later to await the arrival of R1. The latter had in the meantime become concerned because he could not contact R2 by telephone and returned home. There the drama continued, when R1 tried to force open the locked front door after realising that W was in the house. Eventually W wounded R1 in the arm with the firearm he had found in the bedroom. Fortunately R1 managed to escape and the police subsequently arrived to arrest W, who committed suicide in the police cells two days later (71b–i).

R1 and R2 subsequently instituted an action for damages against the Minister of Safety and Security on the basis of the breach of their statutory duty by the police to inform them of their remedies in terms of sections 2 and 7 of the Domestic Violence Act 116 of 1998 which, amongst others, essentially require that a member of the South African Police Service must explain to complainants in cases of domestic violence what their remedies under the Act are, in particular the procedure for obtaining a so-called protection order in terms of which a perpetrator of domestic violence can be prohibited from entering a complainant's place of residence and committing certain threatening acts (72f–74a). In the North Gauteng High Court Mynhardt J found that the evidence had established that the police's failure to advise R1 and R2 of their remedies under the Domestic Violence Act "was the critical cause why they had not pursued this course" (of obtaining a protection order: 75e) which had as its purpose the prevention of future misconduct (74a). Although the rather detailed reference to Mynhardt J's *ratio decidendi* (75e–76c) arguably concerned only the aspect of wrongfulness on the part of the police, one has to conclude that that had seemingly been the only issue in dispute and that the other elements of delict had in all probability been conceded. Both R1 and R2 succeeded in convincing the court *a quo* that the omissions of the police had in fact constituted delicts for which the Minister would be vicariously liable.

The appeal of the Minister of Safety and Security was dismissed by the Supreme Court of Appeal, although that court held that R1 and R2 had been contributorily negligent in not obtaining a normal interdict against W. This omission on their part was regarded by the court as sufficient to reduce their claims by 25%, which caused the court to make an order that "the defendant is liable to pay

to the first and second plaintiffs [R1 and R2] 75% of such damages as they are able to prove, or as may be agreed upon" (78f; see also 76f–77h).

A claim instituted by R2 on behalf of her two dependants – minor children – on account of trauma allegedly suffered by them as a result of W's abusive conduct was found to be without merit due to a lack of crucial evidence and the court declared that "her action in her representative capacity should therefore have been dismissed with costs" (78e). No comment will be offered in respect of this aspect, which does not raise any interesting questions of law.

3 Critical evaluation

3 1 Introduction

The greatest part of the judgment of Majiedt JA dealt with the failure by the police to perform their duties under the Domestic Violence Act and the National Instructions on Domestic Violence (published in *GG* 20778 of 30 December 1999). Here the court rendered a rather detailed account of the content of the relevant legislative measures (71j–75b). Only a small part of the judgment touched upon the crucial question whether a causal nexus had been established between the omission on the part of the police and the injuries sustained by R1 and R2 (75c–76c). Barely a page deals with the aspect of contributory negligence (76d–77h), while the part of the judgment relating to the question of R2's action in her representative capacity on behalf of her two minor children was ultimately dispensed with in one paragraph (para [36], 77i–78e).

Viewed from the perspective that the claims instituted by R1 and R2 are delictual in nature, and in the light of the commonly accepted fact that a delict consists of five elements, namely, human conduct, wrongfulness, fault (in the form of intent or negligence), causation and damage, it appears rather unusual that the court failed to address the questions whether the conduct of the police officials concerned complied with the requirements of each of these elements, in a more direct fashion. Although the greatest part of the judgment to my mind dealt with the question of wrongfulness, this element was, strangely, never mentioned in so many words. Considering that the conduct of the police officers consisted of their repeated failures (omissions) to offer assistance in terms of specific legislation, one can understand that the element of conduct was not addressed *eo nomine*, because the problems that beset liability for omissions are generally viewed as problems in the sphere of wrongfulness, because a person who omits to prevent harm to another generally does not act wrongfully, unless he or she simultaneously breaches a legal duty to act positively; omission cases thus deal essentially with determining whether a breach of a legal duty occurred, which places it squarely within the confines of the wrongfulness issue (cf Neethling and Potgieter 57; Loubser, Midgley *et al* 215 *et seq*). A further puzzling aspect of the judgment is that the element of fault (negligence) on the part of the errant police officers was never pertinently investigated, nor was the foreseeability and preventability of their conduct tested against the yardstick of the *diligens paterfamilias* by employing the well-known prognostic test enunciated in judgments like *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F, that deal with the general foreseeability and preventability test for establishing negligence. The court simply appeared to have "deduced" that the employees of the appellant had been negligent, by finding that R1 and R2 had been contributorily negligent. The appeal plainly dealt only with the merits of the case, and not the quantum, which

explains why it is silent on the element of damage. Finally, the only "traditional" approach followed by the court, is reflected by the fact that the requirement of causation (factual as well as legal) was expressly posed and evaluated.

3 2 Wrongfulness

As has been pointed out earlier, the greatest part of this judgment essentially deals with the delictual element of wrongfulness, where the court scrutinised the inaction of the police officers who had been approached by the plaintiffs. Their failure, on several occasions, to render assistance to the distressed R1 and R2 who had been continuously harassed by W (see the summary of events ((a)–(f) provided under § 2 *ante*), had, according to the court, constituted a breach of the duties imposed on them by legislation. Majiedt JA approached the issue as follows (72c–e):

> "[18] It is important to understand the ambit of the legal duty that the police owed to the respondents. The Act [viz the Domestic Violence Act] and the National Instructions on Domestic Violence [issued by the National Commissioner of the South African Police Service and published in *GG* 20778 of 30 December 1999] require the police to advise persons of their rights and to assist them in asserting these rights, where necessary.
>
> [19] The Act contains a panoply of rights and remedies available to victims of domestic violence that is derived from the constitutional duty imposed on the State by s 12(1) of the Constitution to protect the right of everyone to be free from private or domestic violence [par (c)]. The preamble to the Act declares that its objective is to 'afford the victims of domestic violence the *maximum protection from domestic abuse that the law can provide*' (own emphasis). To this end Parliament introduced measures to ensure that the relevant organs of State (including the SAPS) give full effect to the provisions of the Act."

He then continued to quote the entire text of section 2 of the Domestic Violence Act (72f–h) to illustrate the duty of the police to assist and inform complainants of their rights under the Act, of which the last two paragraphs for example determine that

> "Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported –
>
> (b) if it is reasonably possible to do so, hand a notice containing information as prescribed [viz relating to the legal remedies available to a complainant of domestic violence] to the complainant in the official language of the complainant's choice; and
>
> (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, *including the remedies at his or her disposal in terms of the Act and the right to lodge a criminal complaint, if applicable* (italics supplied)."

In addition the court referred to the important remedy in terms of section 7 of the Domestic Violence Act and the applicable paragraphs of the National Instructions on Domestic Violence, namely to obtain a protection order in terms of which a magistrates' court or family court has the power to restrain a respondent from acting in various ways which could threaten or intimidate a complainant, for example entering a complainant's place of residence, or to prohibit any emotional, verbal and psychological abuse, intimidation, harassment or stalking of the complainant (72h–73a; see in general Bonthuys *et al* "Gender" 10(2) *LAWSA* (2005) 345–349). The breach of a protection order by the respondent is an offence for which a fine or a period of imprisonment can be imposed (73b).

After explaining the duties of police officers in terms of this legislation in some detail, Majiedt JA came to the following conclusion in respect of the relevance of the statutory measures involved (74h–75b):

> "It is abundantly evident that the Act and Instructions afford complainants wide-ranging remedies and impose extensive duties on SAPS members to assist complainants in accessing these remedies. The Act and its predecessor, the Family Violence Act [133 of 1993], were specifically enacted to deal effectively with family violence, since the criminal justice system was palpably unable to do so. This legislation is similar to that in other parts of the world. The extensive protection available under the Act would be meaningless if those responsible for enforcing it, namely SAPS members, fail to render the assistance required of them under the Act and the Instructions. The legislature clearly identified the need for a bold new strategy to meet the rampant threat of ever increasing incidences of domestic violence. Its efforts would come to naught if the police, as first point of contact in giving effect to these rights and remedies, remain distant and aloof to them, as the facts of this case appear to suggest."

As will be pointed out in more detail below (see § 4 *post*), the irritation expressed by the court with the unenthusiastic way in which the police officials concerned had viewed their duties in terms of the relevant legislation is widely reflected in other sources as well. Our immediate concern at this stage is whether their non-compliance with the statutory measures involved is to be regarded as wrongful for purposes of establishing delictual liability on their part (and concomitant vicarious liability on the part of the State, represented by the Minister of Safety and Security). In the course of his finding that a factual and legal causal link in fact existed between the omissions of the police who on several occasions received complaints from R1 and R2 concerning W's behaviour, Majiedt JA referred in some detail to the judgment of the trial judge who had, *inter alia*, expressed himself as follows (76a–c):

> "'n Mens hoef slegs die Wet te lees, en die nasionale instruksies, om te sien dat daar 'n hele infrastruktuur volgens die bedoeling van die wetgewer daargestel moes word om mense soos veral die tweede eiseres in die onderhawige geval, by te staan in omstandighede soos waarin sy haar bevind het . . . Die feit dat dit nie gedoen is nie, is na my oordeel feitlik alleenstaande daarvoor verantwoordelik en dien as regverdiging dat bevind behoort te word op die feite van die onderhawige saak dat die nalate van die Polisiediens *onregmatig* was (italics supplied)."

Majiedt JA expressed his full agreement with these sentiments, but overlooked the fact that Mynhardt J was expressing an opinion on the wrongfulness of the omissions of the police, by holding that "[i]t follows that the respondents established factual causation" (76d).

The issue which now arises, is whether delictual wrongfulness can be established by merely proving that someone who had been subject to a duty in terms of a rule of law (like a statutory measure) failed to act in accordance with the legal (statutory) duty concerned, giving rise to a situation where a third party could cause harm to a plaintiff in a direct way. Formulated differently, the issue is whether the causing of pure economic (and personal) loss is wrongful if the person subject to a legal (statutory) duty failed to observe such duty, which failure contributed to the loss suffered by the plaintiff as a result of a third party's actions. Essentially this entails nothing more than an application of the well-known two-tier test for delictual wrongfulness, namely whether the act (or omission, as in the present case) infringed a recognised individual interest and, secondly, whether the prejudice caused by such infringement occurred in a

legally reprehensible or unreasonable way (Neethling and Potgieter 33) or, as it is also formulated, in a way that militates against the legal convictions of the community, viz which is *contra bonos mores* (cf *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A–B; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 395H; Loubser, Midgley *et al* 140–142).

In view of the fact that the court was of the opinion that the omissions on the part of the police had been causally linked to the harm suffered by the plaintiffs (76d), it is abundantly clear that application of the first tier of the test for wrongfulness shows that the police in fact infringed the interests of R1 and R2. As Knobel convincingly points out ("Die samehang tussen onregmatigheid en skade" 2005 *THRHR* 645 648), this does not signify that the delictual elements of damage and causation are "built into" the element of wrongfulness, but merely that conduct, damage and causation are prerequisites for wrongfulness on the part of an actor. (The same line of thought is encapsulated in the expression: "There cannot be wrongfulness in the air" cf Lewis JA in *Premier, Western Cape v Faircape Property Development (Pty) Ltd* 2003 6 SA 13 (SCA) 31I–32A, which in effect neutralises the notion that delictual wrongfulness need not be coupled with ensuing harm, such as expressed by Coetzee "Onregmatigheid in die afwesigheid van belange-aantasting" 2004 *THRHR* 661 670.) The effective decision by the court that the omissions of the police conformed to the first tier of the wrongfulness test, opened the opportunity for enquiring into the issue of whether the omissions in question were legally reprehensible in respect of the harm suffered. This is fundamentally a question of legal policy (cf Loubser, Midgley *et al* 139), in which some guidelines have been established over time to assist one in reaching a decision whether a specific omission is to be viewed as *contra bonos mores*. These guidelines include the fact that the omission in question was preceded by a positive act (*omissio per commissionem*), that the defendant was in control of a dangerous object, that his/her omission breached certain rules of law (as in the case under discussion), that a special relationship existed between the parties and that the defendant occupied a particular office (see eg Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 29–48; Neethling and Potgieter 57–75; Van der Walt and Midgley 84–87).

One would have expected the court to consider this aspect in detail, which it failed to do altogether, probably because Majiedt JA, as pointed out, considered the words of the trial judge in which the latter had concluded that the relevant omissions were wrongful, to refer to the aspect of factual causation (76d). To my mind this oversight constitutes a grave omission in the judgment of Majiedt JA, seeing that this specific aspect of delictual wrongfulness – namely, where an omission to perform some duty in terms of legislation, and especially in terms of the Constitution, was a contributing factor to harm suffered by an individual – has over the years received the close attention of our courts, due to the inherent difficulties associated with it. In their treatment, under the heading of the wrongfulness of omissions, of certain instances in which the law (either the common law or statute) places a person under an obligation to perform certain acts and it then has to be determined whether governmental bodies and state institutions are thereby placed under a legal duty to prevent damage, Neethling and Potgieter (66–68 fn 495–200) provide an extensive review of case law in this regard.

Although a detailed discussion of all relevant case law dealing with the determination of wrongfulness falls beyond the aim of this note, reference may be had to a few cases to illustrate the general approach of our courts to the relevance of a failure to comply with a statutory duty. In *Minister van Polisie v Ewels*, in which police failed to render assistance to a member of public who was being assaulted in their presence, Rumpff CJ stated that a failure by a police officer to prevent a crime, as prescribed by section 5 of the erstwhile Police Act 7 of 1958 in which the general tasks of the police were prescribed, did not in itself create a statutory civil liability on the part of the police (596C), but that it was *one of the factors* to be considered when determining if a legal duty rested upon a policeman to act positively (596E). The same idea was lucidly formulated as follows in the judgment of *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (E) 34J–35A:

> "Non-compliance with the provisions of s 5 [of the Police Act 7 of 1958] by a policeman will not necessarily constitute a basis for civil liability. The intention of s 5 is to indicate in broad terms what the functions of the police are and it does not appear from the Act that it was ever the intention that the mere failure by a policeman to prevent the commission of a crime would give rise to delictual liability. *However, such failure may, depending on the facts of the case, be a factor to be taken into consideration in determining whether or not delictual liability exists in a particular case*" (italics supplied).

In *Kadir v Minister of Law and Order* 1992 3 SA 737 (C) 740J Conradie J correctly pointed out that the "private-law duty in *Ewels*'s case . . . lay partly in the statutory duty to prevent crime, a duty which is not shared by the ordinary citizen, and partly in extra-statutory expectations". This accords with the statement that a statutory provision on its own does not necessarily suffice to ensure the existence of a legal duty in the delictual context "and is usually considered in interaction with other factors to determine the wrongfulness or otherwise of an omission in a given case" (Neethling and Potgieter 66). Other supplementary factors in this context have been found to be the fact that the defendant occupied a specific office (eg that of a policeman, as in *Ewels*'s case) and a special relationship existed between the official in question and the plaintiff (eg in the well-known case of *Carmichele*, where the relationship between the relevant officials (police officers and public prosecutor) and the plaintiff was emphasised). In addition, the broad *boni mores* criterion has played an ever increasing role "since the idea that legal duties in the delictual field are created by the conceptions prevailing in a particular community at a particular time was planted by Steyn JA in a minority judgment in *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) at 264-5" (*Kadir v Minister of Law and Order* 740F). However, in an appeal against Conradie J's ruling in *Kadir*'s case the erstwhile Appellate Division of the Supreme Court in effect warned against finding too easily that a breach of a statutory duty imposed upon a police officer should be construed as being delictually wrongful (*Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 321H–322A, per Hefer JA):

> "[S]ociety will take account of the fact that the functions of the police relate in terms of the Act [viz the former Police Act 7 of 1958] to criminal matters and were not designed for the purpose of assisting civil litigants . . . Bearing this in mind society will baulk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty."

In spite of the fact that the *Kadir* case dealt with a relative insignificant matter in comparison with the case under discussion, the academic comment which followed after the Appellate Division had allowed the Minister's appeal was highly

critical and in favour of the finding of the court *a quo* which had established that the relative insignificant dereliction of duty by the police officers concerned could be regarded as delictually wrongful (see eg Burchell "The role of the police: public protector or criminal investigator?" 1995 *SALJ* 211; Scott "Die regsplig by 'n late en die veroorsaking van suiwer ekonomiese verlies" 1995 *De Jure* 158; Neethling and Potgieter "Regsplig van polisie om suiwer ekonomiese verlies te voorkom?" 1996 *THRHR* 333).

It is suggested that the larger part of the *ratio* of Majiedt JA for his finding that the respondents had succeeded in establishing causation in fact relates to a finding that the omissions by the police had been wrongful. Of course, this conclusion is premised upon the opinion that the court was correct to hold that the omissions of the police in failing to fulfil their duties in terms of the Domestic Violence Act and the National Instructions on Family Violence were causally linked to the respondents' harm. As has been pointed out above, such a factual causal link between the conduct of the police and the damage suffered by the respondents in fact represents the application of the first tier of the general test for delictual wrongfulness. However, as will next be argued, serious doubt can be cast on the correctness of the court's decision in respect of causation.

3 3 Causation

Majiedt JA prefaced his *ratio decidendi* on the causation aspect by merely giving an account of the well-known rules in this respect (75c–d):

> "This court has in a long line of cases laid down the test for causation in delict, which consists of two legs, namely factual and legal causation. Factual causation is to be determined by application of the 'but for' test. The evidential hurdle to be crossed by a plaintiff is not required to be established with certainty – a plaintiff need only establish that the wrongful conduct was *probably* the cause of the loss (italics supplied)."

The source quoted for the last sentence is *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 449E–F in which Nugent JA opined that the determination of factual causation "calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics". Despite the wording that could maybe mislead the unwary to think that the question of establishing factual causation lies on the verge of dabbing in metaphysics – for why would the court warn against such a notion? – it is suggested that these words simply convey the familiar rule of the law of evidence in civil matters, namely that he who asserts, must prove his case on a balance of probabilities. (The other references in n 17, namely, to *Minister of Police v Skosana* 1977 1 SA 31 (A) 34 and *International Shipping Company (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700E–701F, were merely quoted as authority for the proposition that the law distinguishes between factual and legal causation and are not of specific value in resolving the issues at hand.)

Majiedt JA then proceeded to point out that the judge in the court *a quo* had found "that the evidence had established that the police's failure to advise the respondents of their remedies under the act was the critical cause of why they had not pursued this course [viz utilised the remedies under the Domestic Violence Act]" (75e). After then quoting *in extenso* from the Judgment of Mynhardt J, in which that judge had explained – as pointed out above – why he regarded the omissions in question as *wrongful* – Majiedt JA came to the following conclusion (76d): "In my view, the learned judge's reasoning cannot be faulted. It follows that the respondents established factual causation."

It is suggested that this conclusion cannot be substantiated by the passages quoted from the judgment of the trial court. What the trial judge decided at most, was that a causal nexus had been established between the various omissions of the police to inform the respondents of their rights in terms of the Family Violence Act, on the one hand, and the respondents' failure to obtain a protection order, on the other. The finding that a causal nexus existed between the relevant omissions and the harm suffered by the respondents, necessitates a further finding that the obtaining of a protection order would have prevented W from shooting R1 and raping R2. It is evident that the court simply accepted that the obtaining of such remedy would effectively bar such abusive conduct on the part of a respondent against whom an order had been obtained. This is not in line with the way in which our courts have in the past established the existence of a causal link between an omission and harm.

The way in which the courts have consistently applied the *conditio sine qua non* or "but for" test for causation in the case of an omission, is to supplement the facts to be evaluated with positive conduct on the part of the person whose omission is the subject of evaluation. Van Oosten refers to this variant of the "but for" test as "*conditio cum qua non*". Referring to *S v Van As* 1967 4 SA 594 (A), Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek" 1982 *De Jure* 239 257 expressed himself as follows:

> "Dit beteken dat hier geen voorwaarde *weggedink* is om vas te stel of die gevolg *daarsonder* sou wegval nie, maar dat 'n voorwaarde inderdaad *bygedink* is om vas te stel of die gevolg *daarmee* sou wegval. In dié sin is die toets vir oorsaaklikheid wat hier aangewend is streng gesproke nie *conditio sine qua non* nie, maar wel *conditio cum qua non*."

In *Van As* police failed to conduct a search for children who had run off into a cold winter's night after the police had arrested an adult person in whose presence the children had been travelling. The children subsequently died of exposure and the question arose whether the failure to mount a search party factually contributed to their death. Steyn CJ inquired whether a reasonable search would have prevented the children from dying and concluded that the state could not prove beyond reasonable doubt that such a hypothetical course of action would probably have saved the lives of the children. Here the court substituted reasonable steps in the form of *searching for the children* for the relevant omission. (In parenthesis it could be remarked that the burden of proof in this case was, of course, heavier than it would have been in a civil case where the *onus* has to be discharged on a balance of probabilities. None of the textbooks or other academic sources consulted alludes to this point, but one can in all probability accept that the State would even have failed if it had to prove factual causation on a balance of probabilities.)

This precise line of reasoning was followed in several other judgments dealing with the issue of establishing a causal link between an omission and damage. In *Minister of Police v Skosana* 1977 1 SA 31 (A) (the first decided case which Majiedt JA referred to) police officials failed to take an injured person whom they had arrested for a medical inspection, after he had complained of pain caused by injuries sustained in a car accident. Corbett JA applied the *conditio sine qua non* test as follows (36H):

> "The vital question, thus, is whether, as a matter of probability [viz in this civil matter] the deceased would have survived if the operation had been performed … I am satisfied that there is sufficient expert evidence on record for a positive answer to be given to it."

(This case is quoted in the standard text books as a sterling example of an instance where a court established a causal *nexus* in the case of an omission by applying the *conditio sine qua non* test: See eg Van der Merwe and Olivier 225; Neethling and Potgieter 177 n 14; Van der Walt and Midgley 199–200; Loubser, Midgley *et al* 69–70. However, it is an interesting fact that the court was split (3:2) on the question whether causation had been established: both Jansen JA and Viljoen AJA were of the opinion that causation had not been established. See also *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A); *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) 116 118A–B; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 1 SA 515 (SCA); Botha *v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T); *Minister of Safety and Security v WH* 2009 4 SA 213 (E).)

A further issue which one encounters when confronted with the replacement of an omission by hypothetical positive conduct, relates to whether such positive conduct should be ascertained objectively (eg by asking what a reasonable person in the shoes of the wrongdoer would have done), or subjectively (viz what the relevant person whose conduct is under scrutiny) would have done. Although the Constitutional Court preferred the former approach (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 969D–E), the Supreme Court of Appeal preferred an approach accommodating both an objective and a subjective approach. Neethling and Potgieter (179) convincingly argue in favour of such more subjective approach on the basis that the application of any objective criterion would constitute a normative approach. This would ultimately tend to confound the delictual elements of negligence and factual causation. (See also Loubser, Midgley *et al* 70–72.)

This theory now has to be applied to the facts of the present case. Majiedt JA sketched the position as follows (74b):

> "[25] The respondents contend that, had they been aware of and understood their rights under the Act – in particular their right to apply for a protection order – they would have taken the appropriate steps to protect themselves. As I have mentioned earlier, the appellant's response is that they have not established that they would have. *This is the nub of the matter*" (italics supplied).

The question which arises immediately, is what the court meant by "appropriate steps to protect themselves". One could come to no other conclusion that the most effective step they could have taken, would have been to obtain a protection order or an ordinary interdict to prohibit the respondent to the application (W) from, *inter alia*, entering their residential premises. It could thus be argued that the effect of substituting the omissions of the police officers at various occasions with (reasonable) conduct complying with the Domestic Violence Act and the National Instructions would at most have resulted in the respondents obtaining a protection order – no more, and no less. It is self-evident that a protection order as such cannot "protect" the successful complainant from further harassment, or even from physical abuse by the respondent. If that were indeed the case, it would imply that such an order has magical qualities, like a sorcerer's fairytale charm by which evil could be physically prevented. What indeed happens when the respondent would breach a protection order, is that he or she commits the crime of contempt of court (s 8(4) of the Domestic Violence Act). When a court grants a protection order to a complainant, it simultaneously issues a suspended warrant of arrest which will come into effect when the respondent violates the order (s 8(1)). In the final analysis, the incarceration of the errant respondent seems to be the ultimate form of protection that can be granted

to a complainant in terms of the law as it stands at this moment. Had R1 and R2 thus in fact obtained a protection order, nothing could really have protected them from a physical attack by W, unless he had indeed been restrained from doing so by being in custody for a former breach of the order in question.

It is suggested that the court committed an error of reasoning in this respect: the arguments proffered by Majiedt JA relate to the establishment of a causal nexus between the police's omissions and the respondents obtaining of relief in terms of the Act (viz a protection order). There is absolutely no merit, on grounds of logic, for the conclusion that the "delictual omission [by the police] … was causally linked to the harm they suffered" (77b). My conclusion in this respect can best be illustrated by an example taken from the game of rugby (which is apposite in a year when a World Cup tournament takes place): Suppose that the referee fails to award a penalty, 45 metres from the goal posts, while a fair breeze is blowing, to one of the teams for an obvious violation of the rules committed by the other team. The team who committed the violation subsequently wins by two points. Can one say that there is a factual causal link between the referee's failure to grant that penalty, and the defeat of the team who was denied the penalty? Applying the reasoning of the court, it is suggested that a positive answer would be forthcoming. The court's argument, adapted to this example, would run as follows: had the hypothetical positive conduct been inserted in the form of the awarding of a penalty (had the police furnished the relevant information), the losing team would have tried to score three points by kicking at the goal-posts (the respondents would have obtained a protection order) *and would have succeeded, thus winning by one point*. However, even a relative novice to the game of rugby knows that a 45 metre kick in windy conditions will not necessarily be successful and that the kick could miss the goal-posts (the respondent of a protection order could still harm the complainant, despite the existence of a protection order). Common sense dictates that a factual causal nexus could not be established between the referee's omission to grant a penalty and the two-point defeat suffered by the team who was denied the penalty. Applied to the facts of the case under discussion, the fallacy of the court's argument is represented by the italicised conclusion to the third sentence immediately above. No more need be said to take the argument further.

Other matters mentioned by the court, for example that the plaintiffs (respondents) had in fact initiated steps to obtain a common-law interdict against W but later abandoned it for fear of pushing W "over the edge" (74e), in so far as it pertains to the aspect of factual causation, clearly only touches on the establishment of a factual causal nexus between the omissions of the police and the obtaining of relief in terms of the Domestic Violence Act, and not between those omissions and the ultimate damage that ensued, pursuant to the attacks by W (as has just been explained). One interesting aspect that has a bearing on this more restricted causal nexus, is that the court on the one hand rejected the plea on behalf of the Minister that R1 and R2 had failed to obtain an interdict against W (although they had already commenced with proceedings in that direction), because a protection order would have been a better remedy (74g). However, a mere three pages later the court expresses the opinion that "[a] common-law interdict may well have stopped Whitey [W] from embarking on his destructive course of action" (77d). It is suggested that this means that in all probability the omission on the part of R1 and R2 in this regard was an intervening cause which had broken the factual causal link between the initial omissions of the police and

the harm suffered by R1 and R2. It is noteworthy that, in this last quotation, Majiedt JA referred specifically to the damage suffered, and not to the obtaining of a protection order, which strengthens the conclusion that the failure by R1 and R2 to proceed with their efforts to obtain an interdict broke the chain of factual causation.

A further aspect dealing with the causation aspect, concerns Majiedt JA's reference to the fact that R1, who had at some stage employed the services of an attorney, "may well have been advised that he could obtain a protection order under the Act" (74f). Unfortunately the judge leaves this possibility (or even "probability", if one were to give the phrase "may well have been advised" its literal meaning) hanging in thin air. One could now justifiably pose the question: if the parties had already known what their remedies in terms of the Domestic Violence Act were, what would they have gained by being informed thereof by the police? The simple answer is: nothing. And this in itself would render the omissions in question on the part of the police officers irrelevant for purposes of establishing factual causation. A further aspect in this respect that escaped the court's attention, is that R1, being an ex-policeman, would in any event probably have been aware of their legal position, placing him (them) in the same position as a person who received legal advice on the matter. (The court in fact took cognisance of the fact that R1 "was, on his own version, knowledgeable about this type of remedy [viz an interdict], albeit only in broad detail" (77c). One could argue that if an ex-policeman had a vague idea about a purely civil remedy like an interdict, that it could be accepted, *a fortiori*, that he would have had a better understanding of a remedy like a protection order, with which police officers are constantly concerned in performing their daily tasks.)

It is suggested that the court's treatment of the aspect of factual causation leaves much to be desired, mainly as a result of the jump in logic performed in equating the hypothetical granting of a protection order to R1 and R2 to the avoidance of the harm suffered by them as a result of W's actions.

In respect of legal causation, Majiedt JA did not waste much ink to conclude that such a causal link had also been established. He simply pointed out that the appellant had failed to advance any grounds to suggest the presence of any policy considerations that stood in the way of a finding that legal causation had been established (76d): "Our courts have in the recent past consistently held the police liable for failure to perform their statutory duty to protect citizens resulting in harm being suffered through such failure."

The authorities cited for this proposition are the well-known judgments of *Carmichele* (where the issue of factual causation was ascertainable with a great measure of probability) and *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA); 2007 2 SA 106 (CC) (which differed from the case under discussion, as it dealt with vicarious liability for a positive act of an employee). It is suggested that the court should have accorded more importance to the question whether the legal causal nexus had not perhaps been broken by a *novus actus interveniens* (as to which, see Van der Walt and Midgley 207; Neethling and Potgieter 206–208; Loubser, Midgley *et al* 95–96). It could well, for instance, be argued that the fact that R1 left his firearm in the bedroom where R2 was raped, where W could lay his hands on it, constituted a new, intervening cause which could have affected the imputability of harm inflicted by the gunshot wound to R1.

3 4 Negligence and contributory negligence

A strange feature of this judgment is that Majiedt JA commenced to evaluate the reasonableness of the plaintiffs' (respondents') conduct for purposes of establishing their possible contributory negligence in respect of their damage, without first having made a finding relating to the negligence of the police officials concerned. It is a well-established feature of delictual liability in our law that causal negligence should be proved on the part of the wrongdoer, which notion is reflected in the aphorism "negligence in the air will not do" (McKerron *The law of delict* (1970) 26; see in particular *Minister of Police v Skosana* 34E). Without entering the debate whether wrongfulness is a prerequisite for a finding of negligence in our law of delict, it will suffice to refer to the established *diligens paterfamilias* test which falls to be applied to determine negligence, namely whether a reasonable person would have foreseen the harm as a reasonable possibility and, in the event of a positive answer, whether such person would have taken reasonable steps to prevent the harm, which steps the wrongdoer had failed to take (*Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F). On the basis of the judge's finding that causation was established (as well as wrongfulness, in effect, as pointed out under 3 2 above), it would appear that the court simply accepted that the harm suffered by R1 and R2 had been foreseeable and preventable to a reasonable person (police officer) in the position of the policemen involved.

The defence of contributory negligence was raised in three respects: *First*, it was contended that R1 and R2 had been negligent in failing to obtain an ordinary interdict against W; *secondly*, that R1 had been negligent in leaving his firearm in an unlocked wardrobe; *thirdly*, that R1 endeavoured to gain entry to the house while it would have been more prudent to contact the police; and, *fourthly*, that R2 had been negligent in permitting W to enter the house. Majiedt JA dispensed with the second, third and fourth grounds for contributory negligence summarily, by simply declaring the relevant conduct to be reasonable under the circumstances (76f–h). The first ground had, however, stuck (77c): "After careful consideration, I have come to the conclusion that the respondents were negligent in failing to obtain the interdict, and that this contributed to their harm." The court then reduced (apportioned) the amount of damages by apportioning blame in the ratio 25%:75%, thus reducing the claims by 25%. It is noteworthy that Majiedt JA opted as follows for the approach to the construction of section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 (although he never referred to this basis of reducing damages) followed in *Jones, NO v Santam Bpk* 1965 2 SA 542 (A) 555E–H (77h):

> "A finding of 25% against the respondents requires, next, an evaluation of the degree of negligence on the part of the appellant. It does not follow automatically that the percentage is 75% – a determination of the degree of deviation of the appellant's omission from the reasonable man standard is required. In my assessment the appellant's degree of fault is indeed three times that of the respondents, i e 75%."

This "more mathematical approach" (Van der Walt and Midgley 243) can be contrasted with the older method of apportionment in terms of which the determination of the plaintiff's degree of negligence would automatically determine that of the defendant (*South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 836A–D; see also *AA Mutual Assurance Association Ltd v Nomeka* 1976 3 SA 45 (A) 55H–56A), a second approach in terms of which the measure of the plaintiff's fault is to be regarded as only one of the factors that a court may take

into account to enable it to apportion the amount of damages (*General Accident Versekeringsmaatskappy SA Bpk v Uys* 1993 4 SA 228 (A) 235E; see Scott "Die kriterium vir berekening van bydraende nalatigheid – enkele gedagtes" 1995 *TSAR* 127; Neethling and Potgieter 166; Loubser, Midgley *et al* 423) and a final approach which is found in many cases where the courts apportioned damages by simply stating a percentage by which the claim is to be reduced (in conformity with a "gut feeling": Loubser, Midgley *et al* 440). One can only express unequivocal approval for the court's adherence to the method of apportionment established in *Jones*.

The court's finding that R1's leaving his firearm in an unlocked wardrobe was not in the least negligent (76g), can seriously be doubted. Anyone who owns a firearm has to be acquainted with the very strict statutory rules applicable to the control of firearms. Since 2000 the Firearms Control Act 60 of 2000 has created a new, ultra strict regime in respect of the ownership and control of all firearms in South Africa. It is generally forbidden for anyone to possess a firearm unless he or she has been issued with a licence or permit for such a firearm (s 3) and a certificate of competency (s 9). Furthermore, a licence holder is guilty of an offence not only if he or she fails to keep his or her firearm in a prescribed gun-safe when not in possession or direct control of it (s 120(8)(a)), but also when such licence holder provides a firearm to someone else who is not authorised to possess or control that firearm (s 120(10)(a)). The *ratio* for these strict measures is self-evident: to control a firearm without the necessary training, which is a prerequisite for the issuing of a firearm licence and competency certificate, puts the public at large at risk and it is even a well-known fact in firearm circles that a loaded firearm in the possession of an untrained person usually poses a greater risk to such person than to any potential attacker. In view of the facts, one can readily assume that R2 had neither a licence for the firearm in question, nor a competency certificate issued in terms of the Act. The mere non-compliance with these measures provides evidence that R1's conduct in this respect was negligent, despite the fact that there is some uncertainty as to whether the breach of a statutory provision under like circumstances is *per* se negligent (Neethling and Potgieter 151): R1, as a former police officer, must or should have realised the danger of his conduct even more than the ordinary reasonable person would have done. In assessing his contributory negligence, it is suggested that his own background would qualify him as an expert in the field, triggering the *imperitia culpae adnumeratur* rule that would entail that one would have to test the presence or absence of negligence on his part by employing the standard of a reasonable person with practical and theoretical training in the use of firearms (see eg Neethling and Potgieter 139–141; Scott "Die reël *imperitia culpae adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg" *Petere Fontes: LC Steyn-gedenkbundel* (1980) 124). In respect of the gunshot wound that he received, it is suggested that his own contributory negligence in fact outweighed that of any of the police officers whose conduct formed the basis of this action (if they had been negligent at all). It is suggested that R1's breach of these statutory measures could only be excused if he had acted in a situation of sudden emergency, but the facts do not suit a defence in terms of the so-called "doctrine of sudden emergency" (for which, see Neethling and Potgieter 149, particularly the sources quoted in n 156), because the person employing the doctrine must *inter alia* be facing a situation of imminent peril himself and should not have caused the perilous situation by his own imprudence. It is

evident that R1's conduct did not conform to these rules – a fact which was totally overlooked by the court.

4 Conclusion

Without doubt, this judgment will be greeted with enthusiasm by those who are frustrated with the problems that are experienced with the implementation of the Domestic Violence Act, which has been described as "symptomatic of the law's limited ability to transform the unequal gender power inherent in a patriarchal society" (Bonthuys *et al* 347). Bonthuys *et al* (347–348, with copious references to literature and case studies in this regard) provide an overview of reasons why there are difficulties with implementing this important piece of legislation. The following are some of these that relate to the type of situation encountered in this case: (a) Approaching the law for assistance may cause a further deterioration of the relationship and increase the risk of retaliatory violence. (b) The withdrawal of domestic violence cases and the ambivalence of complaints may cause police and court personnel to become irritated and there seems to be a propensity to sympathise with a respondent, which "can be partly attributed to patriarchal attitudes to women and sexist stereotypes which limit their ability to understand the dynamics of domestic violence" (348). Due to the crucial role that the police play in the implementation of the Domestic Violence Act (cf Majiedt JA's words at 74h–75b quoted under § 3 2 above), the authors point to the following additional reasons involving the police in particular: (c) Police are quite often simply reluctant or inefficient to perform their statutory duties, which is evident from the following reasons. (d) Police generally regard family violence problems as "private family matters" and do not want to become involved. (e) There is even a tendency to blame the victims of domestic violence. (f) The reasons furnished under (d) and (e) are contributing factors why women, in particular, are reluctant to take steps in terms of the Act. (g) It would seem that it is quite normal for police to fail in performing their statutory duties of informing complainants of the possibility of obtaining a protection order or of laying a criminal charge. To these one may add the opinion shared by many practising attorneys, namely (h) that a general tendency to abuse the remedies presented in terms of the Domestic Violence Act, for instance out of plain spitefulness or to prevent a former spouse from gaining access to his children, plays a definite role in making police officers less enthusiastic to perform their duties under the Act.

With the court's granting of a delictual claim in the present case, it could appear that the door is now wide open for such claims, specifically where police officers fail to inform complainants of their rights in term of the Domestic Violence Act (reason (g) above). This could indeed signify a deluge of further claims, as the floodgates have now evidently been rammed open. Bonthuys *et al* 349 fn 11, for instance, refers to a study in which it was found that no less than 44% of abused women who approached the police were not informed of their right to obtain an interdict (protection order) and only 56% were informed of their right to lay a criminal charge. This implies that dozens, if not hundreds of these cases could be heading for court in the near future. However, as pointed out in this note, it would appear that the court's reasoning in establishing factual causation in this case was fatally flawed and that no such causation had in reality existed between the police officers' omissions and the harm suffered by R1 and R2, who bore the brunt of W's abusive behaviour. If I am correct in my analysis that Majiedt JA's judgment in this respect was *per incuriam*, this also dispenses

with the delictual elements of wrongfulness, negligence and legal causation and would quell fears of a sudden spate in litigation of this nature.

It cannot be denied that the present dispensation concerning the prevention and combating of domestic violence is far from satisfactory. Whether the passing of the Domestic Violence Act has created a much better dispensation than its predecessor, the Prevention of Family Violence Act 133 of 1993, is open to serious doubt if one considers the problems that beset the previous act (for an appraisal of which, see Fedler "Lawyering domestic violence through the Prevention of Family Violence Act 1993 – an evaluation after a year" 1995 *SALJ* 231.) As pointed out above, the only effective way of ensuring someone's safety in the face of threats of domestic violence would be to incarcerate the abusive party – which, for obvious reasons, is out of the question in the vast majority of cases. However, as the Domestic Violence Act and the National Instructions are the main legislative tools presently applied to combat this scourge, it is evident that those who are burdened with its administration should go about their tasks as diligently as possible. It is suggested that the only practical way in which the implementation of these statutory instruments can be improved, is two-fold: In the first place, police officials should receive better training in order to sensitise them to the nature of the inherent problems underlying domestic violence. Secondly, where they fail to perform their basic duties in this regard, they should be sanctioned in terms of their conditions of service and the regulations applicable to dereliction of duty and, in flagrant cases of such dereliction, be dismissed from the South African Police Service. To my mind the court's application of the remedy of a delictual claim in the present case was in effect an abortive attempt to muster the rules of private law to remedy a malaise falling beyond the scope of private law, and indeed presents an example of a hard case that made bad law.

JOHAN SCOTT
University of Pretoria