

VONNISSE

TO CONFRONT OR NOT TO CONFRONT: THE POLICE OFFICER'S DILEMMA *Minister of Safety and Security v Mohofe 2007 4 SA 215 (SCA)*

1 Introduction

The law reports of the recent past reflect a spate of judgments in which the Minister of Safety and Security was successfully sued for damages for the actions of police officers who had committed delicts in the course and scope of their employment. It is not far-fetched to say that, when reading any judgment nowadays in which this minister appears as the defendant, one rather expects to discover that the plaintiff was successful. (In none of the judgments recorded in *The South African law reports* during the previous year (since July 2006), in which the Minister of Safety and Security had been the defendant, did he emerge victorious: see *Mugwena v Minister of Safety and Security* 2006 4 SA 150 (SCA); *Seymour v Minister of Safety and Security* 2006 5 SA 495 (W); *Minister of Safety and Security v Seymour* 2006 6 SA 320 (SCA); *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA); 2007 2 SA 106 (CC); *Minister of Safety and Security v Glisson* 2007 3 SA 78 (E).) This state of affairs can *inter alia* be ascribed to the vigilance of our courts in giving effect to the tenets of the Constitution and the South African Police Service Act 68 of 1995, which give rise to a positive duty on the part of the police service to ensure the safety and security of all the people in the Republic of South Africa (see s 205(3) of the former and the preamble to the latter, as well as the discussion thereof in *K v Minister of Safety and Security* 2005 6 SA 419 (CC)).

The judgment presently under consideration breaks this steady pattern in favour of the minister. The court based its judgment solely on the lack of negligence on the part of the police officer concerned. In the course of its evaluation of the conduct of the policeman for which the minister stood to incur vicarious liability, the court applied the well-established principles of negligence in a way useful to practitioner and academic alike. Furthermore, seeing that the judgment of the court *a quo*, in which the plaintiff had been successful in obtaining an award of damages against the minister, was overturned by the Supreme Court of Appeal, one is again confronted by the fickleness of any process in which a court has to assess whether the defendant's conduct was negligent or not by applying the open-ended test of the *diligens paterfamilias*.

2 Facts and judgment

While patrolling the central business district of Johannesburg during the afternoon, Inspector Nemengaya, a police officer in plain clothes, spotted three suspects of a robbery emerging from a shop. Two of them were visibly armed.

He confronted them and shouted that he was a policeman, ordering them to stop. Two of the suspects ran away, but the third one, who was holding a firearm, turned and took a shot at the policeman. The latter was fortunate to escape injury and gave chase. About three blocks further Inspector Nemengaya fired a warning shot into the air and ordered the man who had shot at him to stop. As this order was ignored, the inspector shot the suspect in the leg, incapacitating him. Thereupon, with the help of a colleague, Inspector Nemengaya arrested the suspect, one Sibeko, and escorted him back to the scene of the robbery, where they found that a bystander, Mr Mohofe, had been wounded by Sibeko's shot. The latter died later that day and his mother subsequently instituted a delictual action against the police, claiming damages for the loss of support for herself and on behalf of the deceased's minor children. She based her action upon the alleged wrongful and negligent conduct of Inspector Nemengaya in alerting Sibeko to the fact that he was a policeman, which directly caused the latter to fire a shot into the late-afternoon crowd (217G–218C).

The trial court (per Schwarzman J in the Johannesburg High Court) handed down a judgment in favour of the plaintiff, finding the defendant vicariously liable on the basis that Inspector Nemengaya had not only acted wrongfully by breaching his duty of protection towards the deceased, but also negligently in causing the latter's death (218D).

In the judgment of the Supreme Court of Appeal Lewis JA assumed without further ado that there was a factual causal link between the police inspector's conduct in alerting the gunman of his presence and the death of the victim and that such conduct was wrongful (218E). The only remaining element of delict on which the court thus had to make a decision was fault, in the form of negligence, on the policeman's part. In this respect the court came to the conclusion that the policeman had not been negligent in shouting at the robber to stop. The appeal was thus upheld (222D).

3 Critical evaluation

3.1 Introductory remarks

The facts of this case could have elicited a judgment dealing, in the first place, with causation. This is clear from the fact that the policeman's relevant action in shouting at the robber to stop did not by itself cause the death of the deceased, but prompted the robber to pull off the fatal shot. One could imagine that these circumstances could have been utilised as a basis for a plea on behalf of the defendant that the act of the gunman had been a *novus actus interveniens* which broke the chain of legal causation between the policeman's conduct and its fatal factual result (see Neethling, Potgieter and Visser *Law of delict* (2006) 189–191; Van der Walt and Midgley *Principles of delict* (2005) 207). It is doubtful whether such a defence would have been successful at all, for it is generally accepted that if a reasonable person in the shoes of the defendant (or person for whose conduct the defendant is vicariously liable) would have foreseen the independent event, such will not be held to constitute a *novus actus interveniens* (see, *inter alia*, *Kruger v Van der Merwe* 1966 2 SA 266 (A) 273F–G; *S v Motau* 1968 4 SA 670 (A) 677A; *Road Accident Fund v Russell* 2001 2 SA 34 (SCA) 41H–I; see also case law referred to by Van der Walt and Midgley 207 fn 2 208 fn 8). Should the court have found that the policeman had in fact been negligent (which it did not), one could imagine that Lewis JA would have trodden the path

of an inquiry into legal causation (of course, depending upon whether a lack of a legal causal nexus had been pleaded at all as a long shot taken on behalf of the defendant – which is not to be determined from the judgment). It is suggested that this assumption finds support in the following *dictum* of Lewis JA (218E):

“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 so.”

Having disposed of the element of legal causation in this fashion, the court focused on the element of wrongfulness. Proceeding from the assumption just referred to, Lewis JA experienced no difficulties in concluding that the policeman’s act in question had also been unlawful, on the basis of the rule that a positive act which causes another’s injury or death is *prima facie* wrongful (218E). The judge’s reference to *Cape Town Municipality v Paine* 1923 AD 207 216–217 is rather perplexing as it does not support her statement of the law – that part of the well-known judgment deals exclusively with the foreseeability tier of the *diligens paterfamilias* test and does not touch upon the wrongfulness issue at all. Her references to *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 12 (441F) and *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 1 SA 515 (SCA) para 24 (528F) does indeed lend support to the rule she referred to: in both instances the Supreme Court of Appeal stressed the fundamental difference between establishing wrongfulness in the case of a positive act (*commissio*) and an omission by pointing out that the former is *prima facie* wrongful if it causes detriment, whereas the latter will only be regarded as such if, in addition to the causing of prejudice, a legal duty has been breached by the defendant. For the contention that a positive act causing an infringement of an interest is *prima facie* wrongful, see further *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 498H; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522A; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468D; Neethling “The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?” 2006 *SALJ* 204 210). This well-established rule logically proceeds from the assumption that there is a *factual* causal nexus between the positive act of the defendant (or the person for whose conduct the defendant is liable in law) and the plaintiff’s detriment. It is worthy of note that the additional positive act of an intermediary (*in casu* the robber whose shot had killed the victim) did not, in the eyes of the court, in any way affect the application of the rule pertaining to the *prima facie* wrongfulness of a positive act.

Furthermore, it would appear that the defendant did not enter a plea on the basis of the existence of a ground of justification to rebut the presumption of wrongfulness of his employee’s act. One could well imagine that official capacity could have been pleaded (see Neethling, Potgieter and Visser 98–99; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989 106–107), or even necessity (Neethling, Potgieter and Visser 80–84; Van der Walt and Midgley 127–128; Van der Merwe and Olivier 81–89) or, seeing that there is no *numerus clausus* of grounds of justification, that the defendant could have averred that the policeman’s action had not been contrary to the legal convictions of the community, in the process employing the *boni mores* test for wrongfulness as a supplementary criterion (Neethling, Potgieter and Visser 43–45; Van der Walt and Midgley 126). Should that have been the case and the court rejected that specific ground of justification or found that the police officer’s action had not conformed to the *boni mores* test, the additional plea of a lack of negligence

would still have been available. What happened in this case was that a “short cut” was simply taken to follow the latter course – possibly because this defence presented itself as the easier option: essentially the prognostic *diligens paterfamilias* test for negligence is more lenient than the diagnostic *boni mores* test for wrongfulness (cf Neethling, Potgieter and Visser 142).

3.2 The negligence issue

3.2.1 Application of general principles of negligence

Lewis JA proceeded (218G) from the classic formulation of the negligence test by Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F, a judgment that undoubtedly represents the high-water mark in our law on the definition of negligence:

“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.”

As recently pointed out (Scott case note on *Tsogo Sun Holdings (Pty) Ltd v Quing-He San* 2007 THRHR 501 505) this test is comprised of three questions. Only when these have yielded three positive answers, can one conclude that the defendant in question acted negligently. Lewis JA did not quote this well-known definition in full, but paraphrased it, in the process reiterating the fact that foreseeability of the harm in question did not necessarily imply that the wrongdoer had to take steps to prevent such harm occurring, by quoting Holmes JA to this effect (*Kruger v Coetzee* 430F–H; his remark in this context was prefaced by the statement that “[r]equirement (a)(ii) is sometimes overlooked”, which renders valuable assistance in understanding the full impact of the test of the reasonable person).

Lewis JA pointed out that the trial court had found the police officer to be negligent on the strength of the fact that he could have avoided the foreseeable harm to the victim (requirement (a)(i)) by simply refraining from calling out as he did (219A). Requirement (a)(ii) had thus in effect been answered in the affirmative by the lower court, which in turn led to an unavoidable affirmative answer to requirement (b): the trial court, having found three positive responses in its application of the negligence test, had no other option than finding the police officer “guilty of negligence” (per Lewis JA *loc cit*). This phraseology, which is commonly employed in judgments dealing with delict, has a criminal law ring to it: one can be guilty of a crime if all the requirements for liability have been met, but the term “guilt” or “guilty” has no theoretical place in the fibre of the law of delict. Furthermore, “negligence” as such is no crime (in contrast with “*negligent driving*”, for example). Finally, the closest equivalent term in the law of delict for the criminal law concept of “guilt” is “fault”. On the whole, it is suggested, one should avoid employing the phrase “guilty of negligence”.

After having stressed the fact that Inspector Nemengaya is an experienced police officer who had acted in accordance with his training (219B–C) and that he had been aware of the fact that his conduct could pose a risk to members of the public (219D–E), Lewis JA subjected him to the first tier of the negligence

test, namely asking whether “a reasonable police officer in the shoes of Nemengaya [would] 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” (219F). She had no difficulty in finding that the death of the victim had indeed been “an objectively reasonable possibility” (*ibid*). It is unremarkable that she substituted the *diligens paterfamilias* with the “reasonable police officer”, seeing that a police officer is to be treated as an expert as a result of his training. Such reasonable expert is in all respects identical to the *diligens paterfamilias*, “except that a reasonable measure of the relevant expertise is added” (Neethling, Potgieter and Visser 125. This more subjective approach can also be explained on the basis of the maxim “*imperitia culpa adnumeratur*”: see Scott “Die reël *imperitia culpa adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg” *Petere Fontes: LC Steyn-gedenkbundel* (1980) 124 for an exhaustive survey).

In approaching to subject the policeman’s conduct to the preventability tier of the negligence test, directly upon a finding that Inspector Nemengaya’s conduct conformed to the requirement of foreseeability, the court pointed out that a reasonable police officer could possibly also have foreseen different scenarios: that the fleeing suspects would heed a call to stop (219G), or even that the suspects could escape and pose a threat to the public safety at any stage of their flight (219H). Inspector Nemengaya had to make a decision on the spur of the moment and he opted for calling out to the robbers to stop. The crisp question that now confronted the court was whether a reasonable police officer in his shoes would have refrained from so calling out, or would have followed the same procedure as Inspector Nemengaya did. Here Lewis JA found in favour of the latter (219I 220C):

“[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 a 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 experience . . .

[12] Nemengaya discharged that duty [viz to protect the public] 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’ (apprehending at least one of the suspects).”

It is noteworthy that in the last paragraph quoted above two of the acknowledged four considerations that influence the reasonable person’s reaction in a situation posing a foreseeable risk of harm to others are weighed up against another, namely: (a) the gravity of the possible consequences if the risk materialises; and (b) the utility of the wrongdoer’s conduct (see Van der Walt and Midgley 179). The remaining considerations in this regard are: (c) the degree or extent of the risk created by the actor’s conduct; and (d) the cost and difficulty of eliminating the risk of harm (these last two are indirectly referred to by Lewis JA by her reference (220E–G) to what Schreiner JA “famously said” in *Herschel v Mrupe* 1954 3 SA 464 (A) 477A–C; as to the interrelationship between the four

considerations in general, see Van der Walt and Midgley 179 *et seq*; Boberg *The law of delict – Aquilian liability* (1984) 333–334).

Although, at first blush, it would appear that the circumstances warranted the court in according more importance to factor (b), closer inspection reveals that (a) was regarded as equally important. This follows logically from the judge's rider (220G) that "the reasonable person might not guard against the risk if the alternatives posed just as much risk". This, the court found, had precisely been the position in the case at hand (220H–223A): it could reasonably be expected by a reasonable police officer on the scene that the confronted suspect would: (i) either shoot (posing a danger to all and sundry); (ii) run away (in the process continuing to threaten the public); or (iii) even surrender (and cease to be a threat). It is clear that alternative (ii) swung the scales in favour of Inspector Nemengaya. This is also confirmed by the concluding remark of the court (222C):

"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."

Furthermore, the fact that he achieved his aim by arresting the culprit, evidenced compliance on the part of the police officer with the consideration of utility of conduct (consideration (b)).

Following upon this the court in effect reiterated (221B–F) the prognostic nature of the *diligens paterfamilias* test for negligence (which one must always contrast with the diagnostic nature of the *boni mores* test for wrongfulness: Neethling, Potgieter and Visser 142) by referring to a range of judgments in which warnings are issued against an armchair approach to the issue of determining the reasonable foreseeability and preventability of harm for purposes of determining negligence, namely *South African Railways v Symington* 1935 AD 37 45; *S v Mini* 1963 3 SA 188 (A) 196E–F; *S v Bochrus Investments (Pty) Ltd* 1988 1 SA 861 (A) 866J–867B and *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 325E–G. Lewis JA then tested the conduct of Inspector Nemengaya against this background and held that he had not failed to take the steps which a reasonable police officer would have taken (221F–H):

"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 . . . 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 while fleeing."

One last consideration, which deserves agreement on grounds of pure logic, that swayed the court in deciding that the police inspector had not fallen foul of the preventability tier of the negligence test, was the fact that to have expected him, as a police officer, to refrain from taking immediate action as he did, would have the unavoidable consequence that in every instance where a police officer is confronted by an armed criminal in a busy location, he would be powerless to take immediate, efficient action. The unacceptable result would then be that "criminals would hold sway in any busy place" (222B).

3 2 2 A classic example of sudden emergency?

In view of the fact that the policeman in the case under consideration was confronted by a situation of imminent peril, it may be an interesting exercise to

evaluate whether his conduct could not perhaps, in the alternative, have been excused, for purposes of a finding in respect of negligence, on the basis that it conformed to the requirements for a successful application of the “doctrine of sudden emergency”. Although Lewis JA quotes from *South African Railways v Symington supra* in her evaluation of the police officer’s compliance with the foreseeability tier of the negligence test, which judgment is generally accepted as a *locus classicus* founding the doctrine of sudden emergency in our law (see Van der Walt and Midgley 190; Van der Merwe and Olivier 132 fn 77; Boberg 335), she never mentioned this doctrine by name.

In terms of the doctrine, three requirements have to be satisfied for a wrongdoer’s conduct not to be regarded as negligent, when he is confronted by a situation of sudden emergency or imminent peril. Neethling, Potgieter and Visser (135) afford the most lucid description of these, to be summarised as follows: (a) The wrongdoer must have been faced by a situation of sudden emergency or peril. (b) The wrongdoer must not have caused his dilemma by his own negligent conduct. (This is more accurately stated than by Boberg (334) who states that “[n]or does it [the doctrine] apply to an emergency of one’s own making”. One will certainly always *factually cause* his own emergency, for instance by merely being present where the emergency occurs. (This is what the wide meaning of “one’s own making” may imply). It is more accurate to stress the lack of *blame-worthiness* (negligence) of the wrongdoer’s conduct in causing the dilemma he finds himself in; see also Van der Walt and Midgley 190.) (c) The wrongdoer should not have acted in a grossly unreasonable manner. Boberg (334) points out that the doctrine of sudden emergency “presupposes an *error of judgment*: it has no application where a party chose the best course in the circumstances”. However, making an error of judgment which a reasonable person could have made under the same circumstances, does not amount to losing one’s head.

It is suggested that if we subject the conduct of Inspector Nemengaya to these three requirements, we shall find that his conduct meets them, resulting in a conclusion that he did not act negligently. As regards requirement (a), the dilemma of a sudden emergency clearly presented itself. The policeman also conformed to requirement (b), as he could not be blamed for the fact that he stumbled upon the scene of a robbery in the course of his patrolling the area in question. He was, in fact, employed to be on the alert for occurrences of this nature. (One could even say that it would be unreasonable for a police officer to be so unwatchful as not to detect situations of this kind.) Finally, it is evident from the *ratio decidendi* pertaining to the preventability tier of the *diligens paterfamilias* test, in general, that Inspector Nemengaya met requirement (c) as well, in that he did not “lose his head or behave completely foolishly” (see Neethling, Potgieter and Visser 135). Although Lewis JA expressed reservations whether “he was guilty even of an error of judgment” (221F), which would in Boberg’s opinion rule out the application of the doctrine of sudden emergency in this case, one could argue that the judge refrained from saying in so many words that Inspector Nemengaya had in fact *not* made an error of judgment, which leaves the door open to employ this doctrine.

This brings us to an appreciation of the fact that the doctrine of sudden emergency is not a substantive doctrine, separate from the rules regulating the determination of a wrongdoer’s negligence. It presents at most an alternative, practical way to scrutinise and arrange the components of a defendant’s wrongful conduct for purposes of determining the presence or absence of negligence on

his part. This conclusion finds support amongst commentators on the subject. Boberg (334) points out:

“This so-called doctrine of sudden emergency is merely an application of the reasonableness criterion to the actor’s circumstances, for the reasonable man similarly placed may well have made the same error.”

In like approach Van der Merwe and Olivier (132–133) conclude:

“Benader ’n mens hierdie aangeleentheid onbevange, blyk spoedig dat daar geen sinistere ‘doctrine’ hier voorhande is nie . . . Die punt is juis dat die redelike man in ’n skielike gevaarsposisie ook ’n oordeelsfout kan begaan. Die dader se optrede verskil dus nie van dié van die redelike man nie en daarom, ooreenkomstig die gewone toets vir nalatigheid, word hy nie deur die verwynt getref nie.”

What then, could one ask, is the meaning of retaining the doctrine of sudden emergency as part of our law of delict? It is suggested that it could serve a useful purpose as a practical type of “preliminary evaluation” of a wrongdoer’s conduct for purposes of evaluating his blameworthiness. For instance, much time could be saved by refraining from applying the general negligence test to the facts at hand, if we have ascertained beforehand that the wrongdoer was negligent in bringing about the situation of imminent peril (non-compliance with requirement (b) mentioned above, which will afford a strong indication of negligent behaviour). The application of the doctrine could thus steer our focus to the most appropriate part of the wrongdoer’s conduct to be subjected to the general negligence test of the reasonable person. An evaluation of the facts of the present judgment did in fact not reveal any deviation from the requirements of the doctrine on the part of the police officer, which *prima facie* justified a conclusion that he had not acted negligently in contributing to the causing of the deceased’s death. This position is conclusively supported by the court’s application of the *diligens paterfamilias* test, which fortifies the preliminary finding on applying the doctrine, that the policeman did not lose his head (compliance with requirement (c)).

4 Conclusion

The outcome of this judgment is doubtlessly to be preferred to that of the trial court. To have rejected the minister’s appeal would have been to make the near impossible task of officers of the South African Police Service still more difficult. Furthermore, the fact that the court singled out the delictual element of negligence as the main basis on which the issue had to be decided, is perfectly acceptable (as pointed out under 3 1 above).

This judgment again drives home the old truism that a correct application of the principles determining the possible wrongfulness and negligence of an actor’s conduct can bring about that “a defendant may be said to have acted *unreasonably* for the purposes of *wrongfulness*, but *reasonably* (like the reasonable person) for the purposes of *negligence*” (Neethling, Potgieter and Visser 143), or, in the words of Van der Merwe and Olivier (133): “Kortom, die redelike man kan ook onredelik – onregmatig – optree.”

Finally, having scrutinised the court’s reasons for finding that Inspector Nengaya had not been negligent, one retains an uneasy feeling that the court came to a decision about the wrongful nature of the police officer’s conduct too easily. (As is pointed out under 3 1 above, the “short-cut” approach to the determination of negligence was probably the most practical way to resolve the problem of the defendant’s liability.) The *reasonable foreseeability* of harm

ensuing from a wrongdoer's conduct which is the crux of the first tier of the *diligens paterfamilias* test for negligence, is also a consideration in the determination of wrongfulness (*Premier of the Province of the Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA) 32D; *Government of the Republic of South Africa v Basdeo* 1996 1 SA355 (A) 368H–I) and the factors which play a role in the determination of the *reasonable preventability* of harm, as the second stage of the negligence test, are likewise sometimes taken into account in ascertaining wrongfulness (see eg *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361J–362A); Neethling 2006 *SALJ* 206 212–213; Neethling and Potgieter “Wrongfulness and negligence in the law of delict: a Babylonian confusion?” 2007 *THRHR* 120 123–124). Furthermore, constitutional values were also considered by Lewis JA in applying the second stage of the negligence test, namely in deciding whether the policeman should have guarded against the death of the deceased by refraining from actively apprehending him (219J–220A):

“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.”

Recent case law makes it abundantly clear that the application of constitutional principles, such as contained in section 205(3) and the preamble to the South African Police Service Act 68 of 1995, are particularly indicative of a search into the presence or absence of wrongfulness (see esp *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); *Minister of Safety and Security v Van Duivenboden supra*; *K v Minister of Safety and Security supra*; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 1 SA 389 (SCA); see also Carpenter “The *Carmichele* legacy – enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety and Security*; *Minister of Safety and Security v Van Duivenboden*; and *Van Eeden v Minister of Safety and Security*” 2003 *SAPL* 252). Remembering that the question to be answered in testing conduct for wrongfulness is “whether conduct is capable of attracting liability at all” and the inquiry in the case of testing for negligence is “whether it has indeed attracted liability in the particular case”, are distinct questions that call for distinct answers (Nugent “Yes, it is always a bad thing for the law: a reply to Professor Neethling” 2006 *SALJ* 557 562; Neethling Potgieter and Visser express the same notion by stating (142) that “[w]rongfulness is concerned with the determination of the *legal reprehensibility of the conduct* (wrongfulness thus qualifies *conduct*), whereas negligence is usually seen as the determination of the *legal blameworthiness of the defendant* for his wrongful conduct (negligence thus qualifies the *defendant* or wrongdoer”).) Although the court in this judgment in so many words evaluated the blameworthiness of Inspector Nemengaya, the general nature of some of the observations of Lewis JA tends towards a value judgment of the legal reprehensibility of the conduct in question: What is *acceptable behaviour* for a policeman under like circumstances? In finding in favour of the minister on this score, the court held that the policeman “acted in terms of standard police procedure” (222A), that no court wishes “that police officers should be supine in the face of criminal activity” (222B) and even, earlier, “that total inactivity to confront the suspects could have been indicative of a dereliction of duty” (221G–H). These phrases suggest that Inspector

Nemengayas's conduct was justified on policy grounds, which could technically mean that he had acted within the constraints of a ground of justification (if he had so pleaded), or that the *prima facie* wrongfulness of his act fell away due to the (objective) reasonableness of his conduct.

Particularly the last-mentioned *dictum* brings an interesting scenario to the fore as a possibility: If Inspector Nemengaya had indeed refrained from his confronting conduct, allowing the suspects to escape and one of them would have killed or injured a member of public during the ensuing flight, one can well imagine that if an action had been brought on the basis of such ensuing conduct, the same judge would have had no difficulty in finding that the good Inspector's omission was actionable: Seeing that an *omission* would then be the focus of an investigation into the presence or absence of wrongfulness, one would have to determine whether a failure to act, on the policeman's part, constituted a breach of a duty to act positively to avert harm from members of the public, or not. Taking into account the recent range of cases dealing with actionable omissions on the part of members of the South African Police Service (see cases cited under 1 above; the *Carmichele* judgment of the Constitutional Court and cases falling within the "*Carmichele* legacy", to employ the terminology of Carpenter), one gains the impression that the scales may tip in favour of a decision that such an omission is wrongful and thus actionable. This last (maybe somewhat tedious!) digression goes to show that in light of our present dispensation in the law of delict in respect of the different approaches to testing for wrongfulness and negligence, as well as to testing for wrongfulness in the event of omissions, in contrast with positive acts, one may sympathise with a police officer in the circumstances of Inspector Nemengaya as being in the classical "Catch 22" position, or, in more traditional terms, as being "between the devil and the deep blue sea"! Maybe the court was extremely wise, for pure practical reasons, to have avoided the pitfalls inherent in an investigation into the element of wrongfulness and to have judged the matter on the principles of negligence alone.