



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

19/06/2014. *M. Masipa*
DATE SIGNATURE

CASE NUMBER: 1944/12

19/6/2014

In the matter between

JOHAN WOLFAARDT

PLAINTIFF

And

MANDRE BELEGGINGS CC t/a ZENEX JEAN AVENUE

FIRST DEFENDANT

BETHUEL FOLEGANG MAKGATI

SECOND DEFENDANT

JUDGMENT

Masipa J

INTRODUCTION

- [1] The plaintiff instituted action against the defendants for damages suffered as a result of injuries sustained when he was assaulted by an employee (cited as the second defendant), of the first defendant, in the early hours of the morning of 8 April 2011.

- [2] The parties proceeded by way of a stated case. At the outset, the parties agreed that the question of vicarious liability be disposed of separately from the merits and the quantum. This court, therefore, ordered a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. As a result the only issue to be determined was the issue of vicarious liability while the remaining issues were postponed sine die.

STATEMENT OF CASE

[3] FACTS THAT ARE COMMON CAUSE BETWEEN THE PLAINTIFF AND THE FIRST DEFENDANT

- 3.1 The plaintiff was born on 10 December 1982 and resides at Flat 117 La Comres, Bernini Crescent, Centurion, Gauteng.
- 3.2 The first respondent is a close corporation which conducts business as a filling station at the corner of Gerhard and Jean Avenue, Centurion, Gauteng ("the premises"). The premises consists, inter alia, of a pumping area with fuel pumps and a convenience store which is open 24 hours a day.
- 3.3 The first defendant commenced business on 1 November 2000. From that day until 8 April 2011 there has never been any incident where an employee, whether on duty or off duty, was involved in a physical altercation with a customer.

The second defendant's employment with the first defendant

- 3.4 The second defendant was employed by the first defendant primarily as a cashier in the convenience store and secondary as a forecourt attendant on a permanent basis from 12 October 2006. The employment was subject to the first defendant's "SERVICE STATION RULES" (Annexure "C2") and "DISCIPLINARY CODE" (Annexure "C3") ("the code") until 1 August 2012, when the second defendant absconded. The first defendant does not have any details regarding the current whereabouts of the second defendant.
- 3.5 The second defendant did not have an implied or express authority to use force of whatsoever nature against any customer nor was the second defendant, as a consequence of his employment with the first defendant, entitled to use force of whatsoever nature against any customer.

3.6 In terms of Item 7 "STANDARD Establishing and maintaining working relationships with fellow employees" of the code:

3.6.1 It is an offence if an employee assaults, fights, abuses, insults or uses obscene language towards another employee;

3.6.2 If the offence is serious, a summary dismissal follows on the first offence.

3.6.3 If it is a minor offence, a written warning is given on the first offence, a final written warning is given on the second offence and summary dismissal follows the third offence.

3.6.4 Item 10 "STANDARD Employees shall treat customers patiently, diligently and courteously" of the code provides for summary dismissal when an employee assaults or fights with a customer.

3.6.5 Since the employment of the second defendant by the first defendant and until 8 April 2011, the second defendant has never been involved in any physical altercation with a customer.

The second defendant's assault on a fellow employee:

3.7 The second defendant paid an Acknowledgement of Guilt fine of R500.00 (SAPS 69c Criminal Record - Annexure "D1") in respect of an alleged assault on a female employee, Mavis Tsimba on 10 February 2011.

3.8 No disciplinary hearing was held by the first defendant following the alleged assault by the second defendant on Tsimba, firstly due to the lack of evidence, secondly because the first defendant received conflicting evidence from the parties and a third party, all of whom were involved in a love triangle and thirdly on the advice of the first defendant's labour representative, which representatives at all material times was Rueben Opperman Consult, who had fifteen years' experience as a labour consultant and which firm employs qualified attorneys who specialize in labour related matters.

3.9 The first defendant was not aware of the Acknowledgement of Guilt fine and only became aware thereof after the institution of this action.

THE INCIDENT WHICH GAVE RISE TO THE PLAINTIFF'S CLAIM:

- [4] On 8 April 2011 at approximately 02:30 the plaintiff arrived at the premises and entered the convenient store. In the convenient store two verbal altercations took place between the plaintiff and the second defendant. Pursuant to the altercations the second defendant took a pair of scissors, which was lying on his left hand on the counter and followed the plaintiff outside the convenient store. Outside the convenient store a further altercation took place between the plaintiff and the second defendant during which the second defendant stabbed the plaintiff twice with a pair of scissors on his chest.

THE ISSUE

- [5] As stated earlier the only issue that had to be determined in this action was whether the first defendant was vicariously liable for the actions of the second defendant.

THE CONTENTIONS OF THE PARTIES

- [6] The plaintiff contends that the actions and conduct of the second defendant when he assaulted the plaintiff were done in the course and scope of the second defendant's employment or that such actions and conduct were sufficiently closely connected with his duties as an employee of the first defendant to render the first defendant vicariously liable.

In support of this contention counsel for the plaintiff submitted the following:

- 6.1 The incident occurred whilst the second defendant was employed by the first defendant and was on duty; the second defendant was required and expected to serve the plaintiff; the second defendant was obliged to comply with his duties and the provisions of the code referred to above.
- 6.2 The plaintiff and the second defendant were on the premises of the first defendant when the incident happened.
- 6.3 The incident followed within a short space of time after the first altercation in the convenient store and immediately after the second altercation in the convenience store.
- 6.4 The incident arose because the second defendant felt provoked by the plaintiff whilst the second defendant was in the process of exercising his functions and executing his duties.

- 6.5 The second defendant failed to comply with the provisions of the code. The first defendant had to know that the second defendant, after having assaulted a fellow employee was capricious and easily provoked and could endanger members of the public frequenting the premises and the convenience store.
- 6.6 The first defendant's failure to hold a disciplinary inquiry after the second defendant's assault of another employee, was contra the provisions of the code and could have created an impression with the second defendant that the first defendant did not strictly enforce the code, did not comply with the provisions of the code itself and that the first defendant condoned the second defendant's actions and conduct during the assault on the other employee.
- 6.7 In time, space and nexus, the second defendant's actions and conduct were sufficiently closely connected with his duties as an employee of the first defendant to render the first defendant liable.
- 6.8 It would be artificial to break the events into separate compartments in terms of cause and effect, in circumstances where the incident followed shortly after the first altercation in the convenient store and immediately after the second altercation in the convenient store, whilst the second defendant was in the process of serving customers, and culminated shortly just after the first altercation and immediately after the second altercation and as a direct result of the first and the second altercations, on the premises.
- [7] On the other hand, the first defendant contends that it is not vicariously liable for the actions and conduct of the second defendant during the incident. This contention is based on the following:
- 7.1 The fact that the first defendant failed to take any steps against the second defendant after the incident is irrelevant and immaterial to the question whether or not the first defendant is vicariously liable for the incident. There was at no time any reason for the first defendant to believe that any of its employees, including the second defendant, would assault any customer.
- 7.2 The incident occurred in a heated argument between the second defendant and the plaintiff in the early hours of the morning. The second defendant's actions during the incident were a spontaneous act of retributive justice. It was an act out of aggression and personal vindictiveness, after the plaintiff clearly provoked the second defendant. The second defendant's actions and conduct during the incident was solely for his own interests and purposes; fell outside

his authority i.e. he was not expressly or tacitly authorized to use any force of whatsoever nature against a customer or entitled, as a consequence of his employment, to use force of whatsoever nature; the second defendant's action during the incident can be described as a "frolic of his own". By walking outside the convenient store, the second defendant abandoned his duties as employee of the first defendant.

- 7.3 The mere fact that the incident occurred as a result of an altercation which started while the second defendant was acting as an employee is, for purposes of determining vicarious liability, irrelevant. The personality or background of an employee cannot influence the question whether or not an employer should be held vicariously liable.
- 7.4 A contravention of the code is rather indicative of the fact that the first defendant is not vicariously liable. In any even the assault by the second defendant of an employee is irrelevant as the plaintiff's case is not that the first defendant breached a duty of care or acted negligently in any manner.
- 7.5 What occurred after the incident, with specific reference to the disciplinary hearing, cannot influence the question whether or not the first defendant is vicariously liable.

DISCUSSION

- [8] Vicarious liability in general terms may be defined as "the strict liability of one person for the delict of another". It is a well-established principle that vicarious liability can be imposed on an employer either firstly when an employee commits the delict while engaged in the employer's business (i.e. when he is acting in the course and scope of his employment) or secondly in so-called "deviation cases" (i.e. where the delict was committed whilst the employee was deviating from the business of the employer). (See **F v Minister of Safety and Security 2012 (1) SA 536, par [41] (CC) on 547**).

Accordingly the first question to be considered is whether the second defendant was going about the employer's business; i.e. whether the "standard test" is applicable.

STANDARD TEST

- [9] Counsel for the plaintiff submitted that at the time the second defendant stabbed the plaintiff he was acting in the course and scope of his employment. He substantiated his argument as follows: when the second defendant had the two verbal altercations with the plaintiff the interaction was related to the work

of the second defendant as a cashier. He was at work behind the counter when the altercations occurred. The stabbing of the plaintiff outside the convenient store was a consequence of the altercations that took place inside the convenience store. It was not possible to separate the events that led to the stabbing by placing them into different compartments. The standard test would, therefore, apply to the facts of the present case, it was argued.

[10] Counsel for the first defendant, on the other hand, submitted that the second defendant was, when he stabbed the plaintiff, acting outside the scope of his employment. The second defendant was clearly motivated by anger. He was upset, following the altercation he had had with the plaintiff. At the time he stabbed the plaintiff he was clearly settling a score and this had nothing to do with his employment with the first defendant as a cashier, it was argued.

[11] A master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment. The act causing damage must have been done by the servant in his capacity qua servant and not as an independent individual. (See, for example, **Feldman (Pty) Ltd v Mail** 1945 AD 733 at 742 and **HK Manufacturing Co (Pty) Ltd v Sadowitz** 1965 (3) SA 328 (C) at 336A).

[12] In **Mkize v Martins** 1914 AD 382 at 390 Inness JA (as he then was) formulated the basic principle underlying vicarious liability as follows:

"However that may be, we may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment even though it may have been done in his employment. Such an act cannot be said to have taken place 'in the exercise of the functions to which he (the servant) is appointed'."

[13] Counsel for the plaintiff submitted that even though it cannot be argued that the second defendant was employed to stab the plaintiff it was clear from the facts that at the time of the incident the second defendant was engaged in the affairs or business of his employer, the first defendant. The argument went thus:

The second defendant was, at the time of both altercations with the plaintiff, engaged in the affairs of the business of the first defendant. The plaintiff had specifically stopped at the first defendant's premises as a customer to buy a cigarette lighter or matches. He had to interact with the second defendant, employed at the time as a cashier, by the first defendant. The interaction between the two was not about private matters unrelated to the business of the first defendant. The incident commenced in the

convenience store after the plaintiff had requested credit for the purchase of a cigarette lighter or matches. During both verbal altercations the second defendant was at all times behind the counter in the convenience store engaged in the affairs of the first defendant. The second defendant left his post only briefly to follow the plaintiff during which period he stabbed him, returned to his post behind the counter, activated the armed response panic button and continued serving a customer. The stabbing took place on the premises of the first defendant.

- [14] Counsel for the plaintiff submitted that it was not possible to compartmentalize the different stages of the incident and to hold that the act of the second defendant to leave his post behind the counter for approximately 30 seconds was completely unrelated to the rest of the incident. Counsel for the plaintiff further submitted that it could not be said that, when the defendant stabbed the plaintiff, he acted 'on a frolic of his own' as the altercation both verbal and physical, was conduct incidental to the business of the first defendant and the second defendant was throughout the incident, engaged in the business of his employer.

- [15] In **Minister of Police v Rabie 1986(1) SA 117 (A) at 134 C-D** the court explained the standard test for vicarious liability thus:

"It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment. . ." The test in this regard is subjective.

- [16] What is clear from the cases is that the concept of vicarious liability implies that there must be some kind of a link between the relationship of master and servant and the wrongful act committed by the servant. Where this link is missing there cannot be vicarious liability.
- [17] In the present case I cannot see that there is any link in assaulting the plaintiff, and the duties of the second defendant as a cashier serving the interests of the first defendant. In my view the second defendant was not acting within the course and scope of his employment at the time of the incident. He stabbed the plaintiff not to advance any interest of the first defendant but to settle a score with the plaintiff who had upset him. That is what was on his mind at the time. The assault on the plaintiff by the second defendant was clearly an act done solely for his own interests and purposes and had nothing to do with his employment as a cashier.

- [18] In the alternative counsel for the plaintiff submitted that in the event of it being held that the second defendant was not engaged in the affairs or business of his employer during the stabbing, the first defendant may still be held vicariously liable in terms of the test for "deviation cases". In support of this submission plaintiff's counsel relied on the case of **F v Minister of Safety and Security** *supra* at 547H-550B where Mogoeng J, in the majority judgment, stated:

"[41] Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the 'standard test'. The other test finds application where wrong doing takes place outside the course and scope of employment. These are known as 'deviation cases'. The matter before us is a typical deviation case.

[42] Feldman (Pty) Ltd v Mall is a pivotal common-law authority on deviation cases. In that case an employee drove his employer's vehicle to deliver parcels as instructed by his employer. Thereafter, he attended to his personal matters. He then consumed alcohol, which significantly impaired his capacity to drive. On his way back to his employer's premises, he negligently collided with, and killed, a man who had two minor dependants. By majority, the Appellate Division held the employer liable for the minor children's claim."

- [19] The above is an illustration that even where an act was done outside the course and scope of the servant's employment if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.
- [20] Counsel for the plaintiff submitted that the facts in the matter showed that the present matter fell squarely within the deviation category. He argued that the subjective state of the second defendant's mind at the time of the first and second verbal altercations is just as relevant as his state of mind at the time of the stabbing. He reiterated that it was not possible to compartmentalize the different stages of the incident.
- [21] Counsel for the plaintiff submitted that even if it were to be found that the wrongful act comprising the un compartmentalised altercations was not committed solely for the purpose of the second defendant, then the first defendant should be held vicariously liable for the acts of the second defendant in accordance with the findings in **Minister of Safety and Security v Luiters 2006 (4) SA 160 (SCA)**. If, however, it was found that the incident can be compartmentalized and the wrongful act was committed solely for the purpose of the second defendant, the first defendant may still be held liable vicariously if

there was a sufficiently close connection between the employee's act in his or her own interest and the employer's business. Counsel for the plaintiff submitted that *in casu* there was such a sufficiently close connection. He argued that the close connection between the second defendant's act of stabbing the plaintiff in the context of the nature of his employment and the first defendant's business appear from the same facts and that the deviation was not great in respect of space and time.

- [22] A further submission was that the first defendant's failure to act against the second defendant in terms of its disciplinary code after the second defendant had assaulted a fellow employee two months prior to the incident is relevant. It may have left the second defendant with the impression that the first defendant condones such conduct as physical aggression. This would have led to uncertainty regarding the normative value of his employment.
- [23] Counsel for the first defendant submitted that, in determining the issue at hand, it was important to remember that the second defendant did not have implied or express authority to use force of whatsoever nature against any customer. On the contrary, in terms of the code, the second defendant was obliged to treat customers "patiently, diligently and courteously". In stabbing the plaintiff the second defendant was acting against instructions of his employer. The physical altercation with the plaintiff was in fact motivated by vindictiveness and had nothing to do with the business of the first defendant.
- [24] For his submission counsel for the first defendant relied on the matter of **Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy 2003 (4) SA 34 (SCA)**. In that matter the court had to decide whether a barman (Goldie), employed by the restaurant, acted inside or outside his scope of employment when he assaulted a patron (Reddy) outside the bar. Before the assault Reddy, who was in the company of his girlfriend in the bar, had made snide remarks about Goldie's efficiency as a barman when Goldie had ignored him and served other patrons. The remarks provoked Goldie and shortly before Reddy left the bar Goldie had gone out to wait for him outside the bar. There he waylaid him and attacked him. Reddy claimed damages from the restaurant on the ground of vicarious liability. The court *a quo* applied the degree of deviation test and held that Goldie's wrongful act was committed within the scope of employment and stated the following:

"It was not a grudge which Goldie harboured against the plaintiff independently of his work situation. It was a grudge which arose directly out of his work situation. The digression or deviation, if any, from what Goldie was employed to do, and what he in fact did was so close in terms of space and time that it can reasonably be held that he was still acting within the course and scope of his employment."

[25] This decision was, however, overturned on appeal. The Supreme Court of Appeal held that the restaurant was not vicariously liable for the Goldie's conduct as the assault had occurred after Goldie had abandoned his duties as a barman. The Court expressed itself thus:

"It was a personal act of aggression done, neither in furtherance of his employer's interest, nor as an incident to or in consequence of anything Goldie was employed to do. The reasons for and the circumstances leading up to the assault may have arisen from the fact that Goldie was employed by the restaurant as a barman, but personal vindictiveness leading to the assaults on patrons does not render the employer liable."

[26] Counsel for the first defendant argued that the first respondent could not be held vicariously responsible for the conduct of the second defendant for similar reasons set out in the matter above.

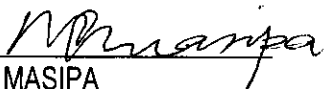
[27] However, counsel for the plaintiff sought to distinguish the facts of the Umdloti Bush Tavern matter from those of the present matter on several grounds, namely, That the assault in the Umdloti Bush Tavern occurred outside the employer's business premises while the assault in the present matter occurred on the first defendant's business premises; Goldie did not return to his post after the assault, but was found by his manager, downstairs, where he was summarily dismissed. The second defendant in the present case returned to his post behind the counter and immediately continued to serve customers; Goldie was at all times, during his interaction with Reddy on the evening of the assault (in any event as far as Reddy was concerned) not engaged in the business of his employer, but was following an agenda of his own; At no time did he serve Reddy but was aggressive towards him and as Reddy prepared to leave with his companion he left the bar to wait for them outside the premises where he assaulted him; In the present case the second defendant did not abandon his post or duties but was attending customers immediately prior to the incident, remained on the premises during the incident and returned to his post behind the counter in the convenience store immediately after the incident; Goldie did absolutely nothing incidental to or in furtherance of the business of his employer in his interaction with Reddy. On the contrary, in the present case, the second defendant was consistently engaged in the affairs of the first defendant.

[28] It is so that the facts in the Umdloti Bush Tavern matter are distinguishable from the facts in the present matter. Notwithstanding the distinctions, in my view, the close connection as described above is only one of the considerations. There are other equally important considerations such as the nature of the interests and purposes of the employee and the nature of deviation from the business of the employer. This is significant especially in cases where the employer has set out guidelines for the employees such as a Code of Conduct. In the present case an important consideration is that in terms of Item 10 of the

Disciplinary Code it was expected from the second defendant that he should treat customers patiently, diligently and courteously.

- [29] When the second defendant assaulted the plaintiff he deviated badly from the duties of a cashier when he contravened the Code. It is therefore not the degree of the deviation that is important, as argued by counsel for the plaintiff, but the nature of the wrongful conduct. It is so that the first defendant failed to discipline the second defendant accordingly when clearly such a step was warranted. In my view, however, such failure should have no bearing on the determination of whether the first defendant is vicariously liable.
- [30] The intention of the second defendant, when he armed himself with a pair of scissors and followed the plaintiff outside, certainly had nothing to do with his position as a cashier. It also had nothing to do with the business of the first defendant as owner of the convenient store. It did, however, have to do with his personal feelings. The verbal altercations obviously hurt his feelings and in his mind the best manner of dealing with the issue was to physically attack the person responsible. An important consideration is that the wrongful conduct was specifically prohibited in the Code. In my view this should be strong argument against vicarious liability. (See **SAR & H v Albers and Another 1977(2) SA 341 (D)**).
- [31] It is so that in certain instances the employer will be liable " . . . *Even for acts which he has not authorized provided that they are so connected with the acts which he has authorized that they may rightly be regarded as modes - although in proper modes - of doing them . . . On the other hand if the unauthorized and wrongful act is not so connected with the authorized act as to be a mode of doing it, but an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it.*" (See **Feldman (Pty) Ltd v Mall supra 747**).
- [32] In the present case it cannot be said that assaulting a customer is a mode of serving a customer. Rather it is an independent act, which is not only a criminal act, but was also expressly forbidden by the first defendant in its Disciplinary Code for its employees.
- [33] For the reasons above the deviation argument must also fail.
- [34] In the premises the first defendant cannot be held vicariously liable for the conduct of the second defendant.
- [35] In the result I grant the following order:

1. The plaintiff's claim is dismissed
2. The plaintiff is ordered to pay costs including costs of senior counsel.


TM MASIPA
JUDGE OF THE HIGH COURT

Counsel for the plaintiff: JFK Grobber
Instructed by FJ Jordaan

Counsel for the first defendant: D Price SC
Instructed by J Steyn

Date of hearing: 2 June 2014
Date of Judgment: 19 June 2014