

**IN THE HIGH COURT OF SOUTH AFRICA**

**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO 8286/02**

In the matter between:

**NOOR MOGHAMAT ISAACS**

Plaintiff

and

**CENTRE GUARDS CC**  
**trading as *TOWN CENTRE SECURITY***

**Defendant**

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**JUDGMENT: DELIVERED 11 SEPTEMBER 2003**

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**GRIESEL J:**

1]In a shooting incident that occurred shortly after midnight on 19 June 2002 in Mitchell's Plain, the plaintiff suffered permanent damage to his spinal cord, resulting in complete paraplegia. The shot (or shots) in question came from a firearm, wielded at the time by a security guard employed by the defendant, one Lumaphi Maqazolo (*Maqazolo*). The circumstances under which the shot(s) came to be fired formed the sole factual dispute between the parties and I shall return to this aspect later in this judgment.<sup>1</sup>

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<sup>1</sup> See para below.

2]Based on these facts, the plaintiff alleges in his particulars of claim that he was unlawfully assaulted by Maqazolo, who was acting within the course and scope of his employment with the defendant. He accordingly claims damages from the defendant for loss flowing from his said injuries.

3]In the plea filed on behalf of the defendant, various alternative defences are raised. Most importantly, the defendant denies that Maqazolo was acting within the course and scope of his employment with the defendant. In the alternative, the defendant pleads as follows:

- '9.1     *Defendant is charged with providing security services to various stores conducting business from Mitchell's Plain Town Centre, including Diskom.*
- 2.       *Plaintiff burgled the Diskom store situate in the Mitchell's Plain Town Centre;*
- 3.       *Defendant's employee responded to the aforesaid burglary;*
- 4.       *Plaintiff fled the scene of the burglary;*
- 5.       *Defendant's employee pursued the plaintiff on foot;*
- 6.       *Plaintiff was apprehended by Defendant's employee whilst in possession of stolen goods;*

7. *Once apprehended, a scuffle ensued between the plaintiff and the defendant's employee during which scuffle a shot went off wounding the plaintiff.'*

4]In response to paragraph 9.7 of the plea, the plaintiff filed a replication, alleging that, if those facts are proved, then the defendant's employee was in any event negligent.

5]By agreement between the parties, the present stage of the proceedings was limited, in terms of Rule 33(4), to the merits of the claim only, the *quantum* standing over for later determination, if need be.

### ***Issues***

6]In order to establish vicarious liability on the part of the defendant, the plaintiff must prove that Maqazolo (a) was employed by the defendant; (b) committed a delict against the plaintiff; and (c) acted within the course and scope of his employment at the relevant time.<sup>2</sup>

7]As far as the first issue is concerned, it is common cause that Maqazolo was indeed employed by the defendant at the relevant time. With regard to the second issue, it is trite law that every infringement of the bodily integrity of another is *prima facie* unlawful. Once such infringement is proved, as

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<sup>2</sup> See e.g. Neethling Potgieter & Visser, *Law of Delict* 4<sup>th</sup> ed (Butterworths 2001) 374 – 9.

here, the *onus* shifts to the wrongdoer to prove some or other ground of justification.<sup>3</sup>

8]In the present case, the defendant, in the above-quoted para 9 of the plea, pleaded a variety of factual detail of which the legal relevance is doubtful. What the defendant did *not* do, was to plead any of the traditional grounds of justification (such as necessity, self-defence, statutory authority, and suchlike), so as to rebut the *prima facie* inference of unlawfulness arising from the actions of Maqazolo. Instead, the defence as pleaded, and as explained in evidence, appears to be that Maqazolo did not voluntarily discharge the firearm, but that the shot was fired accidentally during the course of the scuffle which ensued when the plaintiff tried to grab the firearm from Maqazolo's hand.

9]Apart from the fact that Maqazolo's version in this regard was disputed by the plaintiff, the explanation does not, of course, exonerate Maqazolo of all blame. Instead, it raises the further enquiry whether or not Maqazolo was in any event negligent in relation to the shooting of the plaintiff, as was alleged in the plaintiff's replication.

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<sup>3</sup> *Mabaso v Felix* 1981 (3) SA 865 (A) 873E – 874E; *Malahe and Others v Minister of Safety and Security and Others* 1999 (1) SA 528 (SCA) 533J – 534A, 540F – H.

10]The two main protagonists gave conflicting versions as to the events that preceded the shooting. The plaintiff testified that, on the night in question, he heard that someone had broken in at Diskom, a store in the Mitchell's Plain Town Centre, and that there were items to steal. He, together with a friend, one Du Preez, accordingly went to the scene of the burglary, intending to profit from this 'windfall'. Upon their arrival, they found two other persons on the scene, already in the process of helping themselves to the loot. The plaintiff and Du Preez proceeded to join in, the plaintiff standing guard outside. At some stage, the plaintiff saw the security guard, Maqazolo, approaching them. The plaintiff immediately sounded the alarm to his accomplices inside the shop and he then beat a retreat, running down the passage that can be seen on the photograph, Exhibit A1. Maqazolo pursued the plaintiff and fired three or four shots with his firearm, after which the plaintiff ran around the corner to the nearby Engen garage, where he collapsed and lost consciousness. He showed the court a mark to the front of his left shoulder, just below the clavicle, where one of the bullets apparently struck him. He claimed that there was also a further mark to his spine on his lower back, but it is not clear whether this was an entry or an exit bullet wound.

11]Maqazolo, on the other hand, testified that he was on duty at the relevant time, dressed in his '*usual uniform*'. He arrived on the scene of the burglary

at Diskom, saw two persons stealing items from the shop and instructed them to stand still. They disregarded his instruction and started running away. He drew his firearm and fired three warning shots. He called for assistance on his walkie-talkie radio and pursued the plaintiff, who turned around and threw a wheel spanner at him. He eventually apprehended the plaintiff at the Engen garage, where a struggle ensued. The plaintiff tried to hit the witness with a hammer, but missed. The plaintiff thereupon attempted to grab the firearm from the hand of Maqazolo, a shot went off, striking the plaintiff, who collapsed. Maqazolo was adamant that he did not pull the trigger.

12]Neither of the two witnesses made a particularly good impression on me in the witness box. Be that as it may, in the view I take of the matter, it is not necessary for me to resolve the factual disputes between them. I am satisfied that, on either version, the plaintiff has succeeded in establishing negligence on the part of Maqazolo. On his own version, Maqazolo was running around with a loaded firearm in his hand, with the safety catch disengaged. He became embroiled in a scuffle with the plaintiff, still holding the loaded firearm in his hand. He ought to have foreseen that a person in the position of the plaintiff might get injured in the process and ought to have taken steps in order to avoid such harm by, for example, putting away the firearm or disabling it by means of the safety catch. His failure to do so ineluctably leads to the conclusion that he was negligent and that such negligence caused the

plaintiff's injuries.

13]I conclude, therefore, that all the requirements for delictual liability on the part of Maqazolo have been established, thus clearing the way for a consideration of the third and final issue regarding vicariously liability, namely whether or not Maqazolo was acting within the course and scope of his employment when the plaintiff was injured.

***Course and Scope of Maqazolo's Employment***

14]The defendant's denial that Maqazolo acted within the course and scope of his employment is based on the facts that the delict in question was committed with a firearm (a) of which the defendant was not the owner; (b) which was not issued by the defendant to Maqazolo; and (c) which Maqazolo had in his possession without the knowledge and consent of the defendant.

15]In support of the defence as pleaded, the defendant relies on the terms of Maqazolo's written conditions of employment, as amplified by an addendum, signed by Maqazolo on 11 March 2002. In the said addendum Maqazolo acknowledged the following:

*16]'Under no circumstances will I or any other Town Centre Security personnel, be allowed to be in possession of, or use a company or*

*personal firearm whilst on duty at any site in the Mitchell's Plain Town Centre.'*

17]In this context, reference was also made to clause 7(B) of the conditions of employment, which reads as follows:

*18]'Assaulting of any suspects or persons is completely taboo in public, and it will not be tolerated of any reports (sic) that reaches (sic) this office of such instances, only minimum force are (sic) acceptable when necessary.'*

19]It was common cause that, after the incident in question, Maqazolo received a final warning in writing, based on *'unsatisfactory performance as a security officer in disobeying company policy and rules, which forbids being in possession of a privately owned firearm whilst on duty at a contracted site on 19/06/2002'*. It was common cause further that the firearm in question was indeed Maqazolo's personal property, which he had legally acquired some years ago for self-protection after an attack on him by some *'gangsters'*.

20]Against this background, the defendant's argument followed a simple line: the scope of Maqazolo's employment is defined by his employment contract. *In casu*, it is common cause that he was specifically prohibited in terms of his contract to be in possession of, or to use, a firearm whilst on duty. *Ergo*, Maqazolo acted outside the scope of his employment, with the result that the



defendant is not vicariously liable.

21]The question whether a particular employee was acting within the course and scope of his employment is often easier to pose than to answer, as is amply illustrated by the plethora of cases dealing with this problem.<sup>4</sup> As was stated by WATERMEYER CJ in the *locus classicus*, namely *Feldman (Pty) Ltd v Mall*,<sup>5</sup> after an exhaustive discussion of the relevant principles and authorities:

22]'It will be seen from what I have said that the dividing line which separates acts within the scope of a servant's employment from those without is one impossible to draw with certainty and in respect of it the words of ANDREWS J, used by him in relation to the subject of proximate cause in the famous **Palsgraf** case [**Palsgraf v Long Island RR**] (59 ALR [1253 at] 1262) are very much in point. "We draw", he said, "an uncertain and wavering line but draw it we must as best we can".' <sup>6</sup>

23]The 'standard test' or 'general principle' with regard to vicarious liability was authoritatively restated by KUMLEBEN JA in *Minister of Law and Order v Ngobo*,<sup>7</sup> where the learned Judge *inter alia* said the following:

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4 See e.g. Neethling *et al*, *op cit*, (n 2) 377 – 9; LAWSA First Reissue Vol 8(1), para 24 and the authorities referred to in both these works; and, more recently, *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bpk* 2002 (5) SA 475 (SCA); *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 (SCA); *Bezuidenhout NO v Eskom* 2003 (3) SA 83 (SCA); *Costa Da Oura Restaurant (Pty) Limited t/a Umdloti Bush Tavern v Reddy* [2003] JOL 10764 (SCA).

5 1945 AD 731 at 750.

6 Also quoted with approval by FARLAM JA in *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bpk* (n ) para [8] at 480H.

7 1992 (4) SA 822 (A) at 827B – C, see also at 833G – I. See also *Bezuidenhout NO v Eskom* (n ) para [19] at 92G – 93A.

24] *The critical consideration is therefore whether the wrongdoer was engaged in the affairs or business of his employer. (I shall refer to it as the “standard test” or “general principle”.) It has been consistently recognised and applied, though – since it lacks exactitude – with difficulty when the facts are close to the borderline.’*

25] In *Minister of Police v Rabie*<sup>8</sup> the court drew attention to subjective and objective approaches in applying the standard test:

26] *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, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. ... The test is in this regard subjective. On the other hand, 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. And it may be useful to add that according to the Salmond test (cited by GREENBERG JA in **Feldman (Pty) Ltd v Mall** 1945 AD 733 at 774):*

27] *“a master... is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them...”*<sup>9</sup>

28] There are many instances in our law reports where employers were held

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<sup>8</sup> 1986 (1) SA 117 (A) at 134D – E.

<sup>9</sup> Although *Rabie*'s case was overruled in *Ngobo*'s case (n ), this passage was subsequently quoted with approval by NIENABER JA in *Minister van Veiligheid en Sekuriteit v Japmoco BK* (n ) para [11] at 659B – G.

liable, even though the employee in question disobeyed instructions and performed forbidden acts.<sup>10</sup> It is no answer, therefore, simply to say – as the defendant seeks to do – that Maqazolo was forbidden to use a firearm on duty and therefore the defendant is not liable. The standard question remains: was the employee engaged in the affairs of the employer at the time the delict was committed?

29]In answering this question in the context of forbidden acts, an important distinction is drawn between a prohibition which limits the *sphere of employment*, on the one hand, and one which only deals with *conduct within the sphere of employment*, on the other.<sup>11</sup> The general rule is that an employee who disregards a prohibition which limits the sphere of his employment is not acting in the course of his employment, but an employee who disregards a prohibition which only deals with his conduct within the sphere of his employment is not acting outside the course of his employment. <sup>12</sup>

30]To conclude as far as this aspect is concerned, the position is neatly summarised by Neethling *et al* <sup>13</sup> as follows:

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<sup>10</sup> In *Japmoco's case* (n ) para [11] at 659A–B NIENABER JA described this principle as trite ('*gemeenplase en behoef dus geen bewysplase nie*'). See also *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Limited* 2001 (1) SA 372 (SCA) para [5] at 378D.

<sup>11</sup> *Ngubetole v Administrator, Cape and Another* 1975 (3) SA 1 (A) at 10E *et seq* and authorities referred to therein.

<sup>12</sup> *Plumb v Cobden Flour Mills Limited* 1914 AC 62 at 67; referred to with approval in *Feldman v Mall* (n ) at 762; *Ngubetole v Administrator, Cape and Another* (n ) at 11A – B.

<sup>13</sup> *Op cit*, (n 2) 377.

31] 'The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but, viewed objectively, has also completely disengaged himself from the duties of his contract of employment.'

### **Discussion**

32] Turning now to the facts of the matter at hand, the undisputed evidence shows that the work entrusted to Maqazolo by the defendant was to act as a security guard, protecting the premises of the defendant's clients in the Mitchell's Plain Town Centre. Maqazolo was dressed in the '*usual uniform*' issued to him by the defendant and he was actually on duty at the relevant time, doing what he was paid to do. This fact alone is ordinarily *prima facie* indicative of vicarious liability on the part of the employer.<sup>14</sup>

33] I am satisfied, moreover, that the prohibition against the use of a firearm on duty dealt only with Maqazolo's *conduct within the sphere* of his employment, and did not affect the *sphere of his employment* as such. His position may be compared with that of a driver who is prohibited from exceeding the speed limit or from drinking alcohol while on duty. Should the driver disobey such prohibition while on duty, there can be little doubt that his employer would be vicariously liable for delicts resulting from his conduct.<sup>15</sup>

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14 See Neethling *et al*, (n 2) *op cit*, 379 n 135; Neethling and Potgieter 'Risikoskepping by Middellike Aanspreeklikheid' 1993 *THRHR* 500 at 504.

15 Compare *Feldman v Mall*, (n ) at 741 – 2 and 763.

34]Objectively speaking, therefore, it appears on an overwhelming balance of probabilities that Maqozolo was indeed engaged in the affairs or business of his employer at the time when the delict was committed.

35]As far as the subjective test is concerned, it cannot, in my view, be argued – nor did the defendant’s counsel attempt to do so – that, in pursuing and apprehending the plaintiff, Maqozolo intended to do anything other than perform the work entrusted to him by his employer; in other words, he was not on some ‘*frolic of his own*’. Indeed, one may ask rhetorically, if he was not engaged as a servant upon his master’s business at the time of the delict, on whose business was he thus engaged?<sup>16</sup>

36]The fact that, in the present case, Maqazolo was actually on duty *and* was performing his employer’s work when the delict was committed, distinguishes the present case from other recent decisions where the employer was held not vicariously liable for the relevant employee’s delict.<sup>17</sup>

37]It follows, in my view, that the plaintiff has succeeded in establishing vicarious liability on the part of the defendant.

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<sup>16</sup> Compare *Ngubetole v Administrator, Cape and Another*, (n ) at 13A.

<sup>17</sup> See e.g. *Ngobo’s case* (n 7) at 826C; *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) 512F – H; *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) para [19] at 1221H; the *Phoebus Apollo Aviation* case (n4) para [10] at 481B; *Reddy’s case* (n 4).

***Order***

38]For the reasons set out above, it is ordered as follows:

- a) **It is declared that the defendant is liable to the plaintiff for such damages as the plaintiff may prove he has suffered as a result of the shooting incident giving rise to the claim.**
- b) **The defendant is directed to pay the plaintiff's costs of suit in relation to the merits of the claim.**

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**41]B M GRIESEL**