IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No. A 1228/2003

In the matter between:

H MOHAMMED & ASSOCIATES **Appellant**

And

ADDERLEY NOMVUZO BUYEYE **Respondent**

JUDGMENT DELIVERED 10 SEPTEMBER 2004

DAVIS J.

Introduction:

The respondent instructed appellant, a firm of attorneys, to represent her in relation to a claim for damages flowing from injuries which she sustained in a motor accident which occurred on the N2 highway between Swellendam and Riviersonderend on the night of Thursday 2 June 1992. As a result of the injuries sustained, respondent was rendered paraplegic. At the time of the accident she was a passenger in a minibus taxi returning from the Transkei. The taxi collided with a bakkie driven by one J A Schoonwinkel.

Respondent's case was that appellant had conducted her affairs negligently and breached the mandate which had been given to it. The parties agreed that the issues relating to the nature and extent of the injuries suffered by the respondent and the quantum of her damages would stand over for later determination. The claim was formulated in an amount of R2,3m.

The issues that the court ***a quo*** was requested to determine were:

1. The precise terms of the mandate given by respondent to appellant;

2. Whether, had the respondent timeously pursued the claim filed with the appointed agent of the MMF based on the negligence of Schoonwinkel, that claim would, on a balance of probabilities, have succeeded;
3. Whether the respondent breached the mandate it had accepted by failing to institute action timeously against the driver of the minibus taxi in which the plaintiff was being conveyed, the driver being Mr Xegwana;
4. If the mandate had indeed been breached, the extent to which an action instituted against him would have effected a recovery;
5. Whether the taxi was owned by Mr R J Josephs at the relevant time;
6. Whether at the relevant time Mr R J Josephs was the employer of Mr Xegwana or a person otherwise vicariously liable for his actions;
7. Whether the respondent breached the mandate that it accepted by failing to institute action timeously against Mr R J Josephs;
8. If so, the extent to which an action instituted against him would have effected a recovery.

The court ***a quo,*** per **N C Erasmus J,** held that the appellant was mandated to pursue claims against the MMF, alternatively the driver of the taxi in which the respondent had travelled and, alternatively, the owner of the taxi. **Erasmus J** also held that Schoonwinkel, the driver of the other vehicle involved in the accident, was causally negligent in relation to the collision and therefore, if the appellant had pursued the claim against the MMF, it would have succeeded. Having so found, it became unnecessary for the court ***a quo*** to consider the further issues relating to possible claims against the driver of the taxi or its owner.

On appeal, Mr Mitchell, who appeared on behalf of the appellant, conceded that, if the claim against the MMF based on the negligence of Schoonwinkel was a viable claim, the mandate required the appellant to pursue it. The critical issue for determination on

appeal were the question of the negligence of Schoonwinkel and, alternatively, whether Mr R J Josephs was the person vicariously liable for the delicts of Mr Xegwana.

The negligence of Mr Schoonwinkel.

The evidence in relation to the collision consisted of the direct testimony of Mr Xegwana and evidence that the appellant placed before the court in the form of a transcript of evidence given by Schoonwinkel at the inquest of the death of one of the passengers of the taxi. Schoonwinkel died prior to the date of the trial. Accordingly the evidence sought to be adduced was hearsay evidence. The court admitted this evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988.

Mr Mitchell did not suggest in argument that the court erred in admitting the hearsay evidence.
Mr Xegwana testified that he was the driver of the minibus taxi which was on a journey from the Transkei to Cape Town. Immediately prior to the accident he was travelling on the road between Swellendam and Riviersonderend. Behind him was another taxi owned by Mr Joseph which was driven by Mr Buwa. Mr. Xegwana testified that the taxi was travelling at approximately 100 kph when he saw the bakkie engaging its right indicator. Shortly thereafter, it began to execute a gradual movement towards the right side of the road. Mr Xegwana testified that this created an opportunity for the taxi to pass on the left of the bakkie. He was convinced that it was turning right, given the nature of its movement as well as the fact that its right indicator had been engaged by the driver. While he was in the act of passing on the left of the bakkie, the latter unexpectedly began to execute a turn to the left, presumably in order to enter a gravel road which was on the left of the intersection. It was this unexpected manoeuvre by the bakkie which caused the collision between the trailer drawn by the taxi and the bakkie.

Schoonwinkel's evidence, which he gave during the inquest application, was to the effect that he was driving, at approximately 23h10 on 2 July 1992, in the direction of Riviersonderend along the N2 road. He slowed down to approximately 20 kph some 100-120 metres before an intersection to the left where a gravel road led to his farm. He then informed the court: 'Ongeveer 100 metres, 120 metres van die afdraai het ek na links beweeg langs die geelstreep en toe later in die geelstreep wat daar is, en my flikker lig aangesit vir links – om links te draai. Ek het gemerk op daardie stadium dat 'n voertuig wat ek reeds vantevore ver terug gemerk het, reeds redelik naby my, aan my is, agter my en voordat ek kon links draai het ek 'n geruis op die gruis gehoor en hy was besig om aan die linkerkant van my verby te kom en het toe gebots aan die linkerkant van my voertuig'.

He was then asked the following:
'Nou sal u net vir die hof kortliks verduidelik: u het aan die linkerkant van die pad, links van die geelstreep gery? -- Ja, nie links van die geelstreep nie, op die geel. Ek was op daardie stadium toe hulle my geraak het, was ek alreeds met die linkerkantse wiele binne in die geelstreep en die regterkantse wiele nou natuurlik buite'.

Erasmus J found that the probabilities in respect of the two versions of the collision were equally balanced. He then went on to conclude 'It would be improbable that Schoonwinkel would turn to the left towards his farm and indicate to the right. It is equally improbable that if Xegwana had seen the indicator to the left that he would take the suicidal step of overtaking on the left. In my view, however, on Schoonwinkel's own evidence he was aware of this vehicle following him. The collision was between the trailer drawn by the taxi and the bakkie. Nowhere in his evidence does he give an indication that he looked where the vehicle was before he turned it must have been very close to him, had he looked he would have seen the vehicle and would not have turned to the left or would have taken other evasive action. On this alone one can infer that his actions were at least to an extent negligent. (sic)' Although **Erasmus J** appeared to find that Xegwana was reckless, it was his view that Schoonwinkel could not be absolved 'simply because Xegwana was reckless. This is because Schoonwinkel must have been aware of the reckless conduct: he must have been aware of the fact that Xegwana was intending to pass him on the left before he executed the turn in light of the fact that Xegwana was so close behind him and the fact the Xegwana did not strike Schoonwinkel from the back.'

Mr Mitchell submitted that, if the evidence of Schoonwinkel was accepted no negligence could be attributed to him in relation to the cause of the accident. Mr Mitchell contended that the duty of a driver is to indicate his intention to turn his vehicle from its path of travel at the time when he is able to give adequate warning to vehicles travelling behind him. This had been done at a point between 100-120 metres from the intersection. Schoonwinkel testified that he moved towards the left of the road and switched on his indicator. At that stage, there was nothing to alert him to any need to take precautions nor to lead him to assume that his signal was not being recognized. Mr Mitchell further submitted that there was nothing to suggest that Xegwana would have behaved recklessly by seeking to overtake on the left. Before he turned, Schoonwinkel heard a noise on the gravel next to him as the taxi collided with the left hand side of his vehicle. In Mr Mitchell's view there were accordingly no grounds to suggest that he could at that time have taken steps to prevent the collision. Mr Mitchell also submitted that there was no evidence as to where the impact had occurred. He conceded that, if the bakkie had collided with the trailer, then there was a greater probability that Schoonwinkel had been negligent because the taxi would have traveled past the bakkie at the moment that Schoonwinkel attempted to turn to the left. However, according to Schoonwinkel's evidence, the taxi struck him from behind and the point of contact was with the left hand passengers' door.

Mr McClarty, who appeared on behalf of the respondent, emphasized the fact that it was only Xegwana's evidence which had been subjected to cross-examination. This evidence had a greater element of reliability than that of Schoonwinkel's testimony which was given at an inquest, and was not tested under cross-examination. Mr McClarty submitted further that Schoonwinkel's version was inherently improbable in that it was inexplicable that Xegwana would have sought to overtake on the left in circumstances where Schoonwinkel's left indicator was engaged and his vehicle was moving to the left. In Mr McClarty's view the inherent improbability of such outrageously reckless conduct on the part of Xegwana, compelled the rejection of Schoonwinkel's version of events. Mr McClarty emphasized the passage of Schoonwinkel's evidence where he said that his vehicle had moved alongside the yellow line and then crossed the yellow line as he attempted to turn. Schoonwinkel then stated 'Ek het gemerk op daardie stadium dat 'n voertuig wat ek reeds vantevore ver terug gemerk het, reeds redelik naby my, aan my is, agter my en voordat ek kon links draai het ek 'n geruis op die gruis gehoor en hy was besig om aan die linkerkant van my verby te kom….' According to Mr McClarty's interpretation of this passage, Schoonwinkel must have realized that Xegwana's vehicle was approximately alongside his bakkie when he executed the turn to the left, thereby causing the collision. In these circumstances, it was clear that he had been negligent in seeking to turn when he must have apprehended the real possibility that such a turn would result in a collision between the bakkie and the taxi.

In an evaluation of the competing versions of Xegwana and Schoonwinkel a court must confront the fact that neither version is without blemish. Schoonwinkel's evidence was given at the inquest proceedings. As Mr McClarty correctly observed he had a motive to colour his evidence in an attempt to exculpate himself from being held responsible for the death of the deceased. Furthermore he was not cross-examined during the proceedings. That he might well have used his left indicator does not entirely exclude the possibility that his vehicle moved to the right before executing a turn to the left. This movement would explain the attempt by Xegwana to attempt to pass the bakkie on its left hand side.

When Xegwana was cross-examined, it was put to him that Buwa, the driver of the other taxi owned by Joseph, had provided a statement to the effect that the bakkie's left hand indicator was on, albeit that the bakkie had begun to move to the right before it executed the turn to the left. This was denied by Xegwana. However he could never satisfactorily explain why Schoonwinkel would wish to turn to the right when it was the road on the left hand side of the N2 which led to his farm. Furthermore, as Mr Mitchell noted, when giving a statement to the police subsequent to the collision Xegwana had every reason to endeavour to exculpate himself. There was no reason for him to be aware of the fact that the road to the right lead only to a farm which Schoonwinkel did not own. He too would have been motivated to explain the accident to his best advantage by suggesting that the right indicator had been employed by Schoonwinkel.

Erasmus J found that the probabilities on both versions were equally 'balanced'. If a court is unable to come to any other conclusion than that the two versions are an

equipoise, it is extremely difficult to justify a conclusion, in a case such as the present dispute, that respondent would have discharged the onus, on a balance of probabilities, of proving that Schoonwinkel was negligent. Mr McClarty sought to circumvent this difficulty by submitting that the only reasonable inference to be drawn from the two versions was that Schoonwinkel's version was inherently improbable because it would have been so unreasonable for Xegwana to attempt to overtake on the left hand side in circumstances where the left hand indicator was operating and the vehicle was moving towards the intersection.

In **MaCleod v Rens** 1997 (3) SA 1039 (E) at 1049 B, **Erasmus J** adopted the second principle set out in **R v Blom** 1939 AD 188 at 202-203 to a civil case as follows: 'The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.' When the competing versions of Xegwana and Schoonwinkel are weighed up it is not possible to select one conclusion which appears to be the more natural or probable one from the alternatives to be gleaned from all the available evidence. Neither Xegwana's nor Schoonwinkel's version can be said to be a more probable explanation of the cause of the accident. Accordingly, the conclusion to which the trial court arrived, namely that, on the probabilities, Schoonwinkel was causally negligent cannot be justified.

Was Mr Josephs vicariously liable for the delict of Mr Xegwana.

Respondent alleged that at all material times Xegwana was an employee of R J Josephs and hence the accident had occurred in the course and scope of Xegwana's employment. Alternatively, respondent alleged that Xegwana drove the vehicle under the direct or indirect control and directions of Josephs and in furtherance of the latter's business. The accident occurred on 2 June 1992. According to Mr R J Josephs. 'The company R Josephs and Company (Pty) Ltd was the company which owned the transport business, the partnership does not include the ownership of the taxi.'

Mr Josephs' father died in 1990 and his mother inherited the shares of the company. Mr Josephs testified that he needed to run the business until approximately 1993, at which stage he wound up the business. At no time during this period did he own the shares of the company.

In order for the respondent to have shown that Mr Josephs was vicariously liable for the delicts of Mr Xegwana, she would have had to show that Josephs was Xegwana's employer or that he was the owner of the taxi and consequently liable for the negligent driving of his agent. The critical evidence in this regard was given by Mr Josephs. According to his evidence, he managed the taxi business after the death of his father including at the time of the collision. However, he made it clear that, while he managed the business, the employer of the taxi drivers, including Xegwana, was R Josephs and Company (Pty) Ltd. The shares of that company were initially owned by Joseph's father and later his mother. R J Joseph was only the manager. By 1993 that business had

effectively ceased to exist. At no time during the relevant period did Josephs own shares in the company.
Xegwana's evidence in this regard was that he was employed "by Josephs" for a few months. The latter operated this taxi business from Zennex Garage. He saw Mr Josephs at both the Zennex Garage and at a place called Mfuleni, where passengers were loaded into the taxis on a regular basis. Xegwana handed cash which he had earned from the driving of the taxis to Josephs. He was paid by Buwa, whom he described as "his senior driver", who in turn received the money from Josephs. He testified that he had obtained employment as a taxi driver through Mr Buwa who was employed by Josephs. He had only been in the employ of Josephs for a few months before the accident. In my view, it may be accepted, on the probabilities, that Xegwana was in an employment relationship and was driving in the course and scope of that employment relationship when he negligently caused the collision to happen. Furthermore, the respondent was a paying passenger.

The onus lay on the respondent to prove that Xegwana was employed by Josephs. In my view, the evidence does not establish, on the probabilities, that Xegwana was employed by Josephs in his personal capacity. It appears probable that Josephs was employed by the company.

In my view, the respondent failed to establish an employer/employee relationship between Josephs acting in his personal capacity and Xegwana. The evidence goes no further than to show that it is as probable that Josephs was merely managing the company and in such capacity employed Xegwana as it is that he employed him in his personal capacity and was running the business for his own account.

I turn to consider the alternative facts upon which respondent relies to prove a relationship which should give rise to vicarious liability. The first question that arises is whether the respondent has proved that Josephs was the owner of the taxi which Xegwana was driving at the time of the collision. In this regard, the evidence is again far from clear. It was Josephs' evidence that he inherited the taxis from his father. It does not appear as though the taxis were owned by the company. A printout from Santam which was put to Josephs during his cross-examination reflects that that particular taxi, amongst others, was insured for "Josephs R.T. estate late" as from the 30th of September 1992. This was his father's estate. The executors of the estate were Boland Bank. His mother had been married in community of property to his father and she had inherited all the vehicles. However, Josephs claimed that he had been given the "responsibility" by his mother who was the beneficiary of the estate. A vehicle registration form for 1994 reflects that Josephs was the owner of this particular taxi at that date.

In my view, although it would appear on the probabilities, that Josephs was given the relevant taxi by his mother and that it was subsequently registered in his name, it is by no means apparent in the evidence that this was the situation on the 2nd of June 1992 when the collision occurred. Accordingly it is not possible to find on the probabilities that

Josephs was the owner of the taxi. It would seem equally probable that Josephs was acting as his mother's agent or that of the executor in authorizing Xegwana to drive the taxi. The likelihood, on the evidence was that Josephs' father's estate was the owner of the taxi at the time of the accident.

This, however, is not the end of the enquiry. In the matter of **Van Blommenstein v Reynolds** 1934 CPD 265 at 269, it was held that the person who had the right of control of the car, although she was not the owner thereof, and who authorized a third person to drive the car was because of the particular facts of that matter, vicariously liable for the delict of thee driver whom she had authorized to drive it. In that matter, the person held to be vicariously liable had been in the motor vehicle at the time of the negligent act and in a position where she could directly control the driving thereof.

In **Messina Associated Carriers v Kleinhaus** 2001(3) SA 868 (SCA) **Scott JA** distinguished between vicarious and personal (direct) liability as follows:-

> "*The former of course, is not dependent on fault on the part of the person sought to be held liable. An employer who happens to be present in a vehicle may well incur personal liability if he exercises the right to control the manner in which his employee drives in such a way as to cause harm to another or if he fails to exercise it in order to prevent harm to another, for example if he were to instruct the driver to drive at a dangerous speed or if he were to sit back and allow the driver to continue to drive in a dangerous manner. The same would be true of an owner – passenger in circumstances where the driver was not his employee. But direct control or the power to control has never been a requirement of vicarious liability. ….The right to control, being an element of the employer/employee relationship, is regarded as an important factor in determining whether such a relationship exists, but once it is found to exist it is of no consequence that at the time the employee commits the delict, the employer is not present to exercise his right of control. In these circumstances there would seem in principal to be no*

reason why, in the case of an owner who is not the employer of the driver, the physical presence of the former and the power to control (as oppose to the right to control) should be introduced as an requirement for vicarious liability.

It is true that in many, if not all, reported cases in which an owner (in the absence of an employer/employee relationship) has been held vicariously liable, he has been a passenger in a vehicle when it was negligently driven. But that is no reason for requiring his presence in the vehicle as a rule of law. Such a requirement is not only difficult to justify on a rational basis but strikes me as likely to produce anomalous results. An owner who allows or instructs another to drive his motor vehicle undoubtedly has a right to give directions as to the manner in which it is to be driven…. Whether this right of control can always be equated with the right of control which an employer has need not be decided. But once it is accepted that he has such a right there is no reason why his added presence in the vehicle should be treated as a sine qua non for vicarious liability."

If it is accepted that the ownership of the vehicle is not the criterion for liability, but no more than one of the **indicia** which establishes the necessary relationship between himself and the driver, and that his liability arises from his right as owner to control the vehicle, logically, it must follow that if such a right is transferred to another that that might be sufficient to establish a relationship on which vicarious liability will arise. In the present case, the facts are distinguishable from those in **Van Blommenstein v**

Reynolds, **supra** in that the person held to be vicariously liable had the power and the right to control the vehicle. It should therefore, on the principles set out in **Messina, supra** correctly be regarded as a case of personal (direct) liability arising out of the power to control the driving of the vehicle in addition to the right to control it. It is equally probable in the present case, that in exercising the right to control the vehicle, Josephs was acting as agent to either the executor of his father's estate or his mother. The facts are not sufficiently clear as to the particular relationships to conclude that in law Josephs should be held vicariously liable for the negligent acts of Xegwana. It has not been shown that Josephs himself was anything more than an agent or employee. In my view, there is no basis by which the manager of a business, or the agent of an owner should be held vicariously liable for the delicts of a person to whom he gives instructions on behalf of the employer of that person or the owner of the vehicle.

For these reasons, respondent was not able to establish that R J Josephs was the person who in law, would have been liable for the delicts of Xegwana, being the employer of Xegwana. Thus appellant's failure to take any action against Josephs could not be classified as negligent conduct.

In my view, the evidence presented to the court ***a quo*** constitutes an insufficient basis for holding Schoonwinkel negligent in relation to the collision. Furthermore on the evidence, particularly that of Mr Josephs, there was no basis for finding that he was a person who was vicariously liable for the delicts of Xegwana.

In the particulars of claim, an amount of R25 000, was claimed by virtue of the negligence of the driver of vehicle CY 3900 in which respondent was a passenger at the time of the collision. This claim was not opposed and thus the amount of R25 000 stands to be awarded to respondent.

Accordingly, the appeal succeeds with costs and the judgment of the court ***a quo*** is

replaced thus:

1. Plaintiff is awarded R25 000 in damages.

2. First defendant is granted absolution from the instance in respect of the claim for R2 354 441.00. together with costs.

_____

DAVIS J

I agree

_____

HLOPHE JP

I agree

_____

KNOLL J