

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 18952/10

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED:

In the matter between:

MASHUDU FHEDZISANI

Plaintiff

and

UNITRANS LIMITED T/A GREYHOUND

First Defendant

PETER WHITE

Second Defendant

Coram: WEPENER J

Heard: 8 August 2014

Delivered: 15 August 2014

**Summary: Employer - Vicarious liability – whilst performing his duties
employee assaulting member of the public – acts so closely connected to
duties that it was within the course and scope of his employment**

JUDGMENT

WEPENER J:

[1] The parties requested and I ordered a separation of issues pursuant to the provisions of Rule 33(4) of the Uniform Rules of Court in that I was called upon only to determine whether the defendant is vicariously liable for the acts of an employee.

[2] The plaintiff is claiming damages from the defendant due to an insult and assault perpetrated upon him by an employee of the defendant.

[3] The second defendant took no part in the proceeding nor was the summons served upon him.

[4] The brief evidence that was led shows that on 5 July 2009 the plaintiff and his brother approached a bus driven by an employee of the defendant in order for the plaintiff's brother to embark on the bus. Plaintiff and his brother were late and although the bus was idling, the driver (the defendant's employee), was standing outside the bus, dressed in his uniform. It is common cause that the bus driver was on duty and that the insults and assault was perpetrated upon the plaintiff by the bus driver whilst so on duty when the plaintiff and his brother arrived at the bus.

[5] It is the defendant's case that it is not vicariously liable for the actions of the bus driver by virtue of the applicable rules of employment which forbids conduct of this nature. To this end, the rules of conduct and terms of employment of the bus driver, forbids conduct of the nature complained of by the plaintiff and as such would not be in the scope of his authority

[6] In order to show how serious the defendant regarded the transgression of its rules in matters such as this, the defendant held a disciplinary enquiry into the conduct of this bus driver and dismissed him thereafter. But, can the prohibition of certain conduct be sufficient for an employer to claim that it is not vicariously liable for the actions on an employee? It is common cause that the bus driver was on duty and about the business of the defendant. Cases referred to where the employee was on a frolic of his own when he deviated from the business of his employer does therefore not assist in the determination of liability on the part of the defendant in this matter. The bus driver, whilst performing his duties, did not depart on a frolic of his own. He was at all times about the business of his employer, albeit that he committed acts expressly forbidden by his employer.

[7] A discussion of the law regarding vicarious liability of employers is found in *Squire v SASOL Mynbou (Edms) Bpk en Andere*¹, which passage I freely translate as follows:

‘A detailed discussion of the law regarding cases of vicarious liability of employers is found in the case in the Appellate Division case of *Feldman (Pty) Ltd v Mall* 1945 (AD) 733. Watermeyer CJ, who found that the principles of the English Law are the same as our law, clearly distinguished between the concepts “within the scope of his work” and “within the scope of his authority” in the case of an employee who causes damage. The two concepts must not be regarded as the same. I quote from page 36:

“But the expression “scope of employment” is apt to be misleading, unless one is alive to the fact that the words “scope of employment” are not equivalent to “scope of authority”. One is apt, when using the expression “scope of employment” in relation to the work of a servant, to picture to oneself a particular task or understanding or piece of work assigned to the servant, which is limited in scope by the express instructions of the master, and to think that all acts done by the servant outside of or contrary to his master’s instructions are outside the scope of his employment; but such a conception of the meaning of “scope of employment” is too narrow. Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his

¹ 1993 (3) SA 298 (T) at 303F-304F

master's work or pursuing his master's ends he is acting within the course and scope of his employment even if he disobeys his master's instruction as to manner of doing the work or as to the means by which the end is to be attained. A servant may even omit to do his master's work, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be legally responsible for such damage. Consequently a servant can act in disobedience of his master's instructions and yet render his master liable for his acts."

At 741 the learned Chief Justice said with reference to the reasons for vicarious liability:

"It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm."

The Chief Justice also referred with approval at p 743 to a passage in *Salmond on Torts*. It reads:

"A master as opposed to the employer of an independent contractor, is liable even for the acts which he has not authorised provided they are so connected with the acts which he has authorised that they may rightly be regarded as modes – though improper modes – of doing them... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act, a master is not responsible."

In *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437 (A) the State was held liable on this basis for damage flowing from a collision of a police vehicle which was driven by a constable who was specifically forbidden to drive the vehicle (see also *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134).'

[8] Counsel for the defendant relied on *Bezuidenhout N.O. v Eskom*² for support that an employee who acts outside the scope of his duties does not render the employer liable³.

[9] The passage specifically foresees that a pedestrian would not fall into the category of the person who voluntarily a lift against payment. The plaintiff in this matter, in my view, was in no other position than the pedestrian in the example given in *Bezuidenhout*. In any event, the plaintiff was not doing anything that was unauthorised.

[10] In *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK*⁴ it was decided⁵ on the basis, inter alia, that the policeman was not on duty at the time of the conduct complained of, that the employer was absolved from liability. In this matter it is common cause and readily apparent from the disciplinary enquiry that was held that the bus driver was on duty when the incident occurred, distinguishing this matter from the *Phoebus Apollo* matter.

[11] The bus driver, in my view, by furthering the employer's business and while dealing with passengers (and persons in their company) is very much exercising his duties when he apparently lost his temper and the incident ensued. He was objectively speaking, continuing with his duties and his employer's affairs.

² 2003 (3) SA 83 (SCA)

³ But *Bezuidenhout* dealt with a passenger who travelled with an employee of the employer against the express instruction of the employer that members of the public should not be offered lifts. The court held at para 22

'The dual capacity postulated by Lord Greene is, notwithstanding the scorn heaped on the idea by fine intellects, a true description of the employee's position in the circumstances. Take the following example raised in the course of argument in this Court: The driver of a tanker is prohibited by his conditions of employment from carrying passengers. He nevertheless stops his vehicle when he sees a friend hitchhiking. He says to the friend, "Despite my employer's ban on passengers I successfully operate this vehicle as a taxi when the opportunity arises. I am on my way to discharge my load at X. I will take you there for R10." The friend accepts the invitation. The driver's negligence causes an accident in which the friend and a pedestrian are injured. Can the passenger possibly be heard to say that he was injured by the conduct of the employee driving in the course and scope of the employer's business? The pedestrian, of course, has no such problem. Yet there was one act of negligent driving. That the same conduct may be lawful towards one person but unlawful towards another is accepted in our law: *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) at 367.'

⁴ 2002 (5) SA 475 (SCA)

⁵ At para 10

[12] In this matter, although not authorised, the actions of the bus driver were so closely connected with the acts which he was authorised to do that they can be regarded as an improper manner of executing his duties.

[13] I am consequently of the view and hold that the defendant is vicariously liable for the actions of the bus driver when he assaulted and insulted the plaintiff. The defendant is consequently liable for any damages suffered by the plaintiff.

[14] The defendant is ordered to pay the costs of this part of the hearing.

Wepener J

Counsel for Plaintiff: J. Campbell SC

Attorneys for Plaintiff: Paul T. Leisher & Associates

Counsel First Defendant: J.A. Kitching

Attorneys for First Defendant: Denga Incorporated