

IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 54703/2008

DATE: 04 JUNE 2010

DELETES WHICHEVER IS NOT APPLICABLE
(1) RETORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
4/6/2010

IN THE MATTER BETWEEN:

SIBONGILE BRENDA JIYANE

PLAINTIFF

AND

MR MONYASWA JONAS MSIZA

DEFENDANT

JUDGMENT

KOLLAPEN, AJ

Introduction

1. This is an action for damages brought by the plaintiff in her capacity as mother and natural guardian of Sizakele Charlord Mahlangu for injuries sustained by the said Charlord Mahlangu in a collision which occurred on 1 May 2004 at Thabane. The plaintiff and her minor daughter were at the time of the collision passengers in motor vehicle registration number NBZ060 GP owned by the defendant and driven at the time by one Lucky Mahlangu.

2. The basis of the plaintiff's claim against the defendant is that Mahlangu was at the time of the collision acting in the course and scope of his employment with the defendant and that the defendant was accordingly vicariously liable for the loss sustained by the plaintiff.
3. The plaintiff submitted a claim in terms of the Road Accident Fund Act which was a limited claim and settled in the amount of R25 000,00.

The issues

4. At the commencement of the trial the parties requested that the merits and the *quantum* be separated and the court granted a separation in terms of rule 33(4) of the Rules of the High Court.

Issues in dispute were:

5.
 - (a) whether Mahlangu was acting in the course and scope of his employment with the defendant at the time of the collision; and
 - (b) whether the plaintiff and her minor child were passengers for reward at the relevant time.

Issues not in dispute

- 6.

- (i) It was not disputed that Mahlangu was the driver of motor vehicle NBZ060 GP at the time of the collision.
- (ii) It was common cause that the sole cause of the collision was the negligent driving of Mahlangu.
- (iii) It was common cause that at the time of the collision Lucky Mahlangu was in the formal employ of the defendant.

The facts

- 7. Lucky Mahlangu was employed by the defendant as a taxi driver since or about 2002. He worked on the basis of a commission earned on passengers conveyed for reward. During the week-end of 1 May 2004 he sought permission from the defendant to attend a private funeral in Siyabuswa. He was given permission by the defendant to use the vehicle for the duration of the week-end.
- 8. While the permission that was sought and granted was expressly for the purpose of attending a funeral the defendant did contemplate that Mahlangu would transport persons attending the funeral. In addition the defendant contemplated the further private use of the vehicle that week-end by Mahlangu. While there were no express prohibitions placed on Mahlangu the defendant did not expect that the vehicle would be used for the conveyance of passengers for gain.
- 9. On the morning of 1 May Lucky Mahlangu attended a funeral and later that afternoon drove to the home of Elizabeth Mthimonyune at which home a wedding

was taking place. Shortly after his arrival at the bridal home he was asked to convey approximately fifteen passengers to a photo shoot following the conclusion of the wedding. On the way to the photo shoot the vehicle he was driving was involved in a collision in which collision the plaintiff's daughter was injured and other passengers fatally injured.

10. The wedding in question commenced at approximately 10:00 and Mahlangu arrived there some time after 15:00. While he was not invited to the wedding he claimed to have travelled there in order to meet with the brother of the bride, one Alpheus, who was a co-worker in the business of the defendant. It was clear from his evidence that he did not attend any of the matrimonial proceedings as shortly after his arrival there he undertook the task of transporting the fifteen passengers on their eventful journey.

11. The plaintiff as well as other members of the village attended the same wedding and their testimony was that after the conclusion of the formal proceedings they were advised by the bride's mother that if they wished to attend the photo shoot there was a taxi outside that was paid for and that could be used.

12. Plaintiff, her minor daughter and some thirteen other persons who attended the wedding then made their way into the vehicle. It was their belief at the time that the taxi that was transporting them and driven by the defendant was paid for and that they were entitled to use it.

13. The bride's mother was not called as a witness and the parties were in agreement that the evidence of the plaintiff's discussion with the mother of the bride relative to the issue of whether the taxi was paid for was hearsay to the extent that it was tendered to prove that the taxi had been hired, alternatively paid for.
14. The plaintiff argued that such evidence be admitted in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988 on the basis that it would be in the interest of justice to do so. After hearing argument the court declined to admit the evidence and indicated then that reasons for such decision would be furnished later. Those reasons follow hereunder.
15. The Law of Evidence Amendment Act gives the court a general discretion to admit hearsay evidence after having regard to a number of factors including-
- (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence.
16. In this regard it was clear that the hearsay evidence was of a very general nature. If admitted it would hardly have contributed to the determination of the issue as to whether the vehicle was hired or not. In this regard there was no suggestion that the person making the statement was indeed responsible for the hiring arrangements of the vehicle and at best the evidence would only suggest that the

bride's mother believed the vehicle to have been hired. It could not from that be deduced that she had personal knowledge of or was involved in the negotiations for the hire of the vehicle.

17. Accordingly the probative value of such evidence would be very limited and it was hardly likely to assist the court in any substantial way in making a determination as to whether or not the vehicle had in fact been hired. Weighed against the prejudice that would be suffered by the defendant upon the admission of such evidence and in particular the defendant not having the opportunity to test this evidence (as insubstantial as it was), it would not have been in the interests of justice to admit such evidence and application for its admission was accordingly refused.

Discussion on the merits

18. The testimony of the defendant was that he had given the vehicle to Mahlangu for private use, that he was not aware of any money paid to Mahlangu and that he had no interest in the activities Mahlangu would be involved in during that week-end. There was not much by way of difference in the nature of the evidence that was offered by the parties and the core issue that had to be determined on the facts available was whether Mahlangu could be said to be acting in the course and scope of his employment with the defendant at the time of the collision.

19. The principles of vicarious liability attaches liability to an employer for the delicts committed by an employee provided of course that they are committed during the course and scope of the employment. While ordinarily speaking many situations are reasonably straight-forward difficulties do arise, however, in determining whether a particular action that falls within the course and scope of an employee's duty.
20. These difficulties present themselves more acutely in what is being described as the deviation cases ie, when the employee deviates from his or her duties. **In *K v Minister of Safety & Security* 2005 6 SA 419 (CC) O'REAGAN, J** citing with approval the *dicta* of JANSSEN, JA in *Minister of Police v Rabie* 1986 1 SA 117 (AD) as follows:

"It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by a servant does so fall some reference is made to the servant's intention. The test in this regard is subjective. On the other hand if there is nevertheless a sufficiently close link between the servant's acts for his own interest and purposes and the business of his master the master may yet be liable. This is an objective test."
21. O'REAGAN, J goes on to deal with the issue of what is a sufficiently close connection which would give rise to vicarious liability and in this regard points out that the court should consider the need to give effect to the spirit, purport and

objects of the Bill of Rights. O'REAGAN, J, however, pointed out that such an approach did not necessarily mean that an employer will be saddled with damages simply because injuries might be horrendous. Rather, she said, it implies that the courts bearing in mind the values the Constitution seeks to promote will decide whether the case before it is of the kind which in principle should render the employer liable.

22. After considering the development of the principles of vicarious liability , it was suggested that the enquiry revolved around two questions . The first was whether the wrongful acts were done solely for the purposes of the employee. This is a subjective enquiry and is purely a factual question. However, even if that question was answered in the affirmative the employer may nevertheless be vicariously liable if the second question which is an objective one is answered in the affirmative. The second question is whether even though the acts done have been solely for the purpose of the employee there is nevertheless a sufficiently close link between the employee's acts for his own interest and the purposes and the business of the employer.
23. Thus following the reasoning of the court even if it proven that the employee acted solely for his own purposes an employer may still be liable if there was sufficiently close connection between the acts which gave rise to the delict and the purposes and the business of the employer.

The application to the facts of this case

24. The evidence before the court was that Mahlangu was given a taxi by the defendant for his private use over the weekend of the 1 May 2004. While the activities he would be involved over that weekend, namely the conveyance of passengers closely resembled the work of his employer it was distinguishable in that it would not be for reward and it was in a geographical area not covered by the Road Transportation License issued in respect of the vehicle.
25. It was clearly in the contemplation of the defendant that beyond the funeral that Mahlangu would attend at which funeral he was expected to assist the people by conveying them in the taxi, Mahlangu would also attend other events during the course of that week-end and may well have been involved in the conveyance of passengers (even though not for reward).
26. Clearly on the face of it there appears to be a very close connection between what Mahlangu did during that week-end and the ordinary business of the defendant. Whether the connection is close enough to attach liability to the defendant is another matter.
27. The evidence of Mahlangu in regard to the circumstances that led to the transportation of the plaintiff, her minor daughter and the other passengers strongly suggest that the sole and exclusive purpose of him attending this wedding

was to transport passengers. He was not invited to the wedding but on his own evidence indicated that he had gone there to meet his friend who was the bride's brother.

28. Notwithstanding this there was no attempt on his part upon his arrival at the bridal home to seek out his friend or indeed to enter the bridal home to announce his arrival and his presence. On the contrary what he does immediately upon his arrival there is to facilitate the transportation of fifteen people to a bridal shoot at which he, Mahlangu, would seemingly have no role or no business. It is indeed difficult to avoid the conclusion that Mahlangu had attended this wedding for the purpose of conveying passengers for reward. The only outward manifestation of his attendance at the wedding is his conveyance of people he did not know to a photo shoot.
29. Even though there was no direct evidence that Mahlangu was paid for his services the inference that he was acting for reward is indeed difficult to resist. For reasons that will follow it does not matter whether such a finding is made and even if such a finding were made it would not in any decisive way affect the question of liability of the defendant.
30. If it was proved that Mahlangu was paid this would not automatically render the defendant liable and conversely if there was no evidence that Mahlangu was paid it would not automatically absolve the defendant from liability on the basis of the

principles of vicarious liability set out in **K vs Minister of Safety and Security (supra)**.

31. I now proceed to deal with whether on the basis of the sufficiently close connection between the activities of Mahlangu during the weekend of the 1st May 2004 and the ordinary business of the defendant, vicarious liability should attach to the defendant .
32. Even though objectively speaking there is a close link, it is distinguishable in material respects and in particular that the use of the vehicle would be for private purposes and that no reward would be paid by those using it. While Mahlangu may well have acted outside the scope of this authority during his conveyance of the Plaintiff and her daughter, to visit the defendant with the liability for these actions would constitute an unnecessary and unreasonable extension of the principles of vicarious liability. It would in effect render the defendant the insurer of the vehicle in the absence of the statutory insurer.
33. While one must obviously have considerable sympathy for the Plaintiff and her minor child, those considerations cannot have the consequence of attaching liability to the defendant. Accordingly it could not be said that Mahlangu was acting in the course and scope of his employment with the Defendant at the time of the collision.

For these reasons the Plaintiff's claim must fail.

34. On the question of costs, the parties requested notwithstanding the judgment on the merits in this matter that each party should be responsible for its own costs. I am of the view that such stance is both responsible and equitable.

I accordingly make the following order: -

1. The Plaintiff's claim is dismissed.
2. Each party is to bear its own costs.