

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE NO: 269/11
Date Heard: 8 November 2013
Date Delivered: 21 November 2013

In the matter between

PROTEA COIN SECURITY COMPANY (PTY) LTD Appellant

and

CHRISTINA NOMKHOSI MPAKA Respondent

GALACOM DISTRIBUTORS CC First Third Party

CASPER CORNELIUS HEYNEKE Second Third Party

CHARLES DOUGLAS HEYNEKE Third Third Party

BARTHOLOMEUS RUDOLPH JACOBUS HEYNEKE Fourth Third Party

MARK PAUL BARNARD Fifth Third Party

JUDGMENT

GOOSEN, J:

- [1] This is an appeal against the judgment of the trial court which held the appellant vicariously liable for damages suffered by the respondent in consequence of the shooting of her minor daughter.

- [2] The respondent instituted action against the appellant claiming payment of damages in the amount of R1,815,000.00 allegedly suffered by the plaintiff's minor daughter when she was shot in the leg on 1 December 2005. The respondent's cause of action was founded upon the allegation that on the said day her minor daughter was walking along the pavement near a supermarket in Mount Frere when she was shot by an unknown employee of the appellant. It was alleged that the said unknown employee of the appellant acted negligently in discharging his firearm thereby causing injury and consequent loss suffered by the respondent's minor daughter.
- [3] The respondent sought to hold the appellant vicariously liable for the actions of the unknown employee on the grounds that he had acted within the course and scope of his employment with the appellant. The appellant denied that it was vicariously liable; denied that the injuries allegedly suffered by the respondent's minor daughter were caused by an employee of the appellant and placed the respondent to the proof of the allegations founding the appellant's alleged vicarious liability.

[4] The appellant further caused a Third Party Notice to be issued to the third parties cited herein¹. Therein the appellant alleged that it had conducted its business as a provider of security services, in the collection and transfer of assets, by way of franchise agreements. In terms of the franchise agreements a franchisee was granted rights to conduct and operate such business for its own account within certain designated areas. It was further pleaded that at the time of the alleged incident giving rise to the respondent's claim a franchise agreement was in existence between the appellant itself and the first third party; that the appellant was not conducting business within the Mount Frere area at all and that, insofar as the conduct giving rise to the respondent's claim may be established at the trial, the third parties, pursuant to the franchise agreement, owed to the appellant an indemnity in respect of any claims arising against the appellant.

[5] The trial court found that the respondent had established that the unknown person responsible for shooting the respondent's daughter was indeed an employee of the appellant and accordingly held the appellant vicariously liable for the injuries and damages sustained by the respondent. It is against this finding that the appellant appeals.

¹ The Second to Fifth Third Party are shareholders of the First Third Party and entered into suretyship agreements pursuant to the franchise agreement concluded between the Appellant and the First Third Party.

[6] The facts giving rise to the claim may briefly be stated as follows. On 1 December 2005 the respondent's daughter proceeded into Mount Frere. When walking along the main road and in the vicinity of First National Bank she noticed a vehicle which bore the insignia of the appellant. She proceeded past the vehicle and a short while later the vehicle came to a stop near her when she was in the vicinity of a supermarket. She noticed armed guards who were wearing a black uniform and on the chest area had the insignia of the appellant. These guards apparently warned hawkers in the area that they should be careful lest they be injured as a result of the accidental discharge of a firearm. According to the respondent's daughter she heard a gunshot go off and felt pain in her leg and realised that she had been shot. She was transported to hospital where she received treatment. At the trial the question as to the liability of the appellant had been separated from consideration of the quantum of the respondent's damages.

[7] Before dealing with the basis of the trial court's finding and the submissions advanced on appeal it is appropriate to record the evidence adduced by the appellant at trial. Mr Marais testified that during 2001 the appellant, which then operated under the name Coin Security Group Pty Ltd, entered into a franchise agreement with the first Third Party in terms of which the First Third Party was licensed to operate the business of assets collection and transfer utilising the intellectual property of the

appellant, including its name, insignia and business systems, within designated areas determined by the agreement. It was his evidence that at the time of the alleged incident the appellant was not conducting business operations in that area. It was further his testimony that the person allegedly responsible for the unlawful shooting of the respondent's minor daughter was not an employee of the appellant. In so far as it was established that the person responsible for the alleged shooting was a security guard operating the business of Coin Security Group, that person would have been an employee of the third party, acting in terms of the franchise agreement concluded between the appellant and the third party. It was Mr Marais' evidence that prior to 2007 the appellant's business was operated under the name Coin Security Group Pty Ltd. In 2007 the company underwent a name change to reflect its present name in consequence of the takeover of the business of another company.

[8] The trial court found that the respondent had proved that the appellant was vicariously liable for the actions of the unknown person who had caused the respondent's loss. It based this finding upon the following considerations namely:

- (a) that the appellants pleadings did not set out the nature of its defence, namely, that there was no employment relationship between the appellant and the alleged wrongdoer;

- (b) that the franchise agreement did not provide the protection claimed by the appellant; and
- (c) that upon the application of the “dominant impression” test an employer-employee relationship was established between the appellant and the wrongdoer.

[9] The trial court was critical of the appellant’s pleadings and came to the conclusion that the defence pleaded did not sufficiently foreshadow its reliance upon the franchise agreement. The trial court also found that the manner in which the appellant had pleaded its case contained an implied admission of the employer-employee relationship between it and the alleged wrongdoer. Whilst the trial court’s criticism of the pleadings is to some extent justified, the conclusion reached appears to be based upon a misdirection as to the nature and effect of the plea.

[10] In this regard it is apparent from a careful reading of the plea and the appellant’s reply to a request for trial particulars that the appellant pertinently denied that the alleged wrongdoer was an employee of the appellant. In this respect the respondent was put to the proof of that element of its cause of action. The evidence tendered by the appellant was consistent with its pleaded case, namely that the appellant was not conducting business in Mount Frere at the time and that the alleged wrongdoer was not an employee of the appellant. Significantly, this

evidence was not challenged by either the respondent or by the third party at trial. It therefore stands un-contradicted and must be accepted. Inasmuch as the trial court did not so accept the evidence it misdirected itself as to the proven facts. The trial court also erred in finding that the respondent had discharged the onus which rests upon the respondent.

[11] It is a well recognised principle of law that in order to establish vicarious liability of a party for the negligent conduct of another, two elements must be proved namely (a) a relationship of employment and (b) that the employee acted in the course and scope of his or her employment. Absent proof on a balance of probabilities of either or both of these elements a plaintiff's claim must fail.

[12] In this instance the respondent bore the onus throughout. The appellant clearly and unambiguously placed the existence of an employment relationship in issue. Its evidence, which was un-contradicted, was to the effect that it was not operating in Mount Frere at the time of the incident and that there was in existence a franchise agreement which regulated the operation of its business and that the third party was then, pursuant to that franchise agreement, operating under licence in that area. The effect of this evidence was to establish on the probabilities that the alleged wrongdoer was not an employee of the appellant. The trial court found that the "impression" that would have been created in the mind of

a member of the public was that the alleged wrongdoer was an employee of the appellant, by reason of the insignia on the vehicle and uniforms. That is not sufficient to establish as a matter of fact that the wrongdoer was an employee. In the circumstances the trial court's finding that the wrongdoer was an employee of the appellant cannot be sustained. It follows from this that the respondent did not discharge the onus to establish the requisite elements for vicarious liability on the part of the appellant.

[13] It is, in our view, not necessary to consider whether the 'dominant impression test' in respect of the employer-employee relationship finds application in the circumstances of this matter. It is also unnecessary to canvass the terms of the franchise agreement in respect of the question of an indemnity operative in favour of the appellant. The former issue does not arise because of the established facts. The latter issue only arises in the event that it is established that the appellant is liable to the respondent.

[14] The only remaining question is that of costs. The question of the appellant's trial costs and those on appeal must, in the ordinary course, necessarily follow the result. Mr Boot, for the appellant, put up a spirited argument that the third party should be ordered to pay its own costs in the light of the un-meritorious defence put up by it and the fact that the

third party actively joined the liss in the dispute between the appellant and the respondent at trial. The argument, unfortunately, does not take into consideration the fact that the third party was compelled to present a defence, however un-meritorious it may have been, by reason of having been joined by the appellant. In this respect the third party is in no different a position to a defendant who, notwithstanding a spurious defence, is successful on account of a fundamental defect in the plaintiff's case. Mr Boot could point to no authority which supports a finding that the defendant (for which read third party in the circumstances) should be penalised in costs even if successful simply because the defence concerned is without merit. Mr Boot was constrained to rely upon the exercise of this court's discretion in regard to costs in this respect. In our view there is no compelling reason to depart from the well-established principle that the unsuccessful party should bear the costs of the successful party. In this instance, as between the appellant and the third party, the third party has succeeded – both at trial and on appeal – albeit on the basis that the appellant has succeeded in its defence of the claim against the respondent.

[15] In the result I would make the following order:

- (a) The appeal succeeds.
- (b) The order of the trial court is altered to read:

- (i) The plaintiff's claim is dismissed with costs; and
- (ii) The defendant is ordered to pay the costs of the third party.
- (c) The respondent is ordered to pay the appellant's costs on appeal;
and
- (d) The appellant is ordered to pay the costs of the third parties on
appeal.

G. GOOSEN
JUDGE OF THE HIGH COURT

EKSTEEN, J.

I concur.

J. W. EKSTEEN
JUDGE OF THE HIGH COURT

PAKADE, ADJP.

I concur. It is so ordered.

L. P. PAKADE
ACTING DEPUTY JUDGE PRESIDENT

Appearances:

For the Appellant

Mr. Boot

Instructed by Smith Tabata Incorporated

For the Respondent

Mr Ntayiya

Instructed by Fikile Ntayiya & Associates

For the Third Party

Mr. Heunis

Instructed by Heunis & Associates