

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 6834/07

In the matter between:-

<u>J S NEL</u>	First Plaintiff
<u>J F L NEL</u>	Second Plaintiff
<u>W CILLIERS</u>	Third Plaintiff
<u>J M BREDENKAMP</u>	Fourth Plaintiff
<u>E J J VAN RENSBURG</u>	Fifth Plaintiff

and

<u>THE NEW RECLAMATION GROUP (PTY) LTD</u> <u>t/a RECLAM</u>	Defendant
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<u>HEARD ON:</u>	25 AUGUST 2009
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<u>JUDGMENT BY:</u>	RAMPAI, J
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<u>DELIVERED ON:</u>	25 SEPTEMBER 2009
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[1] The five plaintiffs sue the defendant for the damages they allege they suffered as a result of the veldfire which they allege was caused by an employee of the defendant acting within the course and scope of his employment with the defendant during the execution of his duties as such. The action is defended.

- [2] The parties held a pre-trial conference in Bloemfontein on 8 July 2009 and agreed on the separate adjudication of the merits first and the quantum later – *vide* par. 5 of the minutes, p. 54 of the record.
- [3] The matter served before me on Tuesday 25 August 2009. Before the hearing started the parties reached another agreement which concerned the merits dimension only. As regards the merits the parties have identified four issues during the pre-trial conference – *vide* par. 12 of the minutes, p. 56 of the record. The agreement entailed that three of the issues be shelved for the time being and that only one issue be determined first.
- [4] The issue I was asked to decide first of all was phrased as follows:

“Vraagpunt vir Beslissing:

Of Verweerder middellik aanspreeklik is indien dit later bevind sou word dat die werker die skade van Eisers deur sy nalatigheid veroorsaak het.

Whether Defendant is vicariously liable should it be found later that the worker caused the damages of the Plaintiffs by his negligence.”

At the request of the parties I made the desired orders to give effect to the two agreements.

- [5] The version of the plaintiffs was narrated by two witnesses. The first witness was Mr. Jacobus Frederick Lombard Nel. He testified that he was a farmer of Verblyden farm, district Bultfontein in the Free State Province. He confirmed that he was the second plaintiff. He had an office in town at Bultfontein. On or about 21 March 2007 a certain Mr. Johan Coetzee approached him. The gentleman was a stranger to him. He did not say what company he represented. He assumed that the stranger worked for the defendant, because the stranger said Welkom Scrap Metals would pay him for the scrap. They met in his office. Coetzee was interested in his disused harvester. He agreed to sell the harvester to him. No specific price was agreed upon. The harvester was on a farm called Boschrand, district Bultfontein.

- [6] The next day he received a radio report while he was in town. He rushed to Boschrand and found the veldfire raging. He was not on the farm when the fire broke out. He had no idea of what caused the fire. He met a certain Mr. Mokeki who told him what happened. On his arrival Mr. Coetzee was not present. He never saw him again. The harvester was cut to pieces. However, it was never removed from the farm. He never received any compensation from the defendant, as Mr. Coetzee had promised.
- [7] The second witness for the plaintiffs was Mr. Johannes Mokeki. He testified that he was an employee of Welkom Scrap Metals. His job description was a cutter. He used a cutting torch and a gas flame to cut scrap metals into smaller sizes. He worked 14 years for the defendant. He lost his job in May 2009 as a result of an industrial action. On 22 March 2007 he was on duty. His foreman, Paul, instructed him to accompany Mr. Coetzee to a certain place. The tools were already loaded onto the van. The van belonged to Mr. Coetzee. The latter did not work for Reclam. Mr. Coetzee frequented Reclam to sell scrap metals. He often saw him there. It was for the first time that he went out with Mr.

Coetzee. Mr. Coetzee picked him up from his workplace at Reclam. From there they travelled together to a certain farm.

[8] They found the farm gate locked. Mr. Coetzee dropped him there. He offloaded the gasbottle and cutting torch from the van. From there Mr. Coetzee pointed out to him the harvester which he had to dismantle by cutting. Mr. Coetzee then drove away. Shortly thereafter a farm-worker arrived by a tractor and unlocked the gate. He, the witness, loaded his tools onto the tractor. From the gate to the harvester he proceeded by the tractor as a passenger. The farm-worker dropped him at the harvester and drove away.

[9] Mr. Coetzee rejoined him on the farm. The witness suggested to Mr. Coetzee that he needed water in order to put out the flames should the sparks set the grass alight. However, Mr. Coetzee did not deem it necessary to supply water for the purpose. He then started cutting the harvester from the top. As the sparks started flying around, the grass caught fire and Mr. Coetzee started putting the small flames out by trampling on them. He carried on cutting the harvester unaware that Mr. Coetzee was no longer there. He was working on the bottom part of the harvester. At a

later stage he was under the harvester when he saw a black cloud coming from the harvester. He reckoned that the sparks flew around from the cutting activity; that they landed on the small bush and caused the tiny flames which quickly developed into the veldfire.

- [10] The driver of the tractor was the first person on the scene after the veldfire had started. The defendant's truck arrived later to collect the scrapped harvester from the farm to Reclam. However, it ended up at the farm gate. He was later taken away from the farm to the police station where he made a statement. He testified that Reclam and not Mr. Coetzee was his employer contrary to what is stated in par. 2 of his police statement.

This completed the evidence of the plaintiffs on the reserved question.

- [11] The version of the defendant was narrated by one witness only, namely Mr. Henry William Laney. He testified that he was the branch manager of the defendant in Welkom. The defendant was also known as Welkom Scrap Metals. He knew Mr. Johannes Mokeki as an employee of the defendant. He was a cutter. He received training as a cutter

in Welkom. He further testified that he also knew Mr. Johan Coetzee as a customer of the defendant. Mr. Coetzee frequently sold scrap metals to the defendant. Besides the defendant he also sold scrap metals to a rival business enterprise called Mico Trading. Originally Coetzee traded in his personal name, but later formed a close corporation. He used his own motor vehicle to deliver scarp metals to the defendant. He did not have employees of his own.

[12] Mr. Coetzee informed him about the big scrap he had on a farm out at Bultfontein. The discussion took place on the premises of the defendant in Welkom on or about 21 or 22 March 2007. He needed a cutter, equipment and a truck. The load was too large for the light delivery van he had. He confirmed that he did not have any dealings with the owner of the harvester. He provided all the logistical support as requested by the customer on the understanding that the client would sell the scrap to the defendant and also bear the transport and labour costs.

[13] He learned that the veldfire originated from the spot on the farm where Mr. Coetzee was working. There was no arrangement that the defendant would directly pay the

second plaintiff for the supply of the scrap to Mr. Coetzee. The latter and not the defendant was liable to the owner of the harvester and responsible for the payment of the purchase price. Although Mr. Mokeki was an employee of the defendant, he was not under the control and supervision of the defendant at the time he was cutting on the farm. At all times while he was on the farm, he was working for Mr. Coetzee. He denied the claim that the defendant was liable for the actions of Mr. Coetzee.

- [14] The case of the plaintiffs, as pleaded, was that at the time the worker was cutting the harvester into pieces on the farm, he was an employee of the defendant acting within the course of his employment as such. The defendant denied in its plea that the worker was an employee of the defendant out on the business of the defendant at the time he was dismantling the harvester. The defendant pleaded that the worker at the relevant time was an employee of the vendor, a customer of the defendant and that he was acting within the course and scope of his employment by the vendor and not the defendant.

[15] The issue in the case is whether the worker had acted within the course and scope of his employment with the defendant at the time he was cutting the harvester into pieces on the farm far away from the defendant's industrial site.

[16] The plaintiff bears the onus of proving, on a balance of probabilities, *inter alia*, that the worker, who committed a delict, which aspect still has to be determined in the instant case, was a servant of the defendant and that at the time the worker performed the negligent act, he was acting in his capacity as an employee of the defendant within the course and scope of his employment with the defendant - **MASUKU AND ANOTHER v MDLALOSE AND OTHERS** 1998 (1) SA 1 (SCA).

[17] Mr. Zietsman, on behalf of the plaintiffs, relied on the following authorities, among others:

MIDWAY TWO ENGINEERING & CONSTRUCTION

SERVICES v TRANSNET BPK 1998 (3) SA 17 (SCA);

STEIN v RISING TIDE PRODUCTIONS CC 2002 (5) SA 199

(CPD);

K v MINISTER OF SAFETY AND SECURITY 2005 (6) SA

419 (CC).

[18] Mr. Loubser, on behalf of the defendant, relied on the following authorities:

STADSRAAD VAN PRETORIA v PRETORIA POOLS 1990

(1) SA 1005 (T);

GIBBINS v WILLIAMS, MULLER, WRIGHT & MOSTERT

INGELYF EN ANDERE 1987 (2) SA 82 (T);

MASUKU AND ANOTHER v MDLALOSE AND OTHERS

1998 (1) SA 1 (SCA);

NOCK v ROAD ACCIDENT FUND [2000] 2 ALL SA 436

(W);

MIDWAY TWO ENGINEERING & CONSTRUCTION

SERVICES v TRANSNET BPK 1998 (3) SA 17 (SCA).

[19] It is not necessary to review the authorities. In the instant case the defendant did not know the farm, the farmer or the harvester. The defendant was not involved in the negotiations which led to the dismantling of the disused harvester. The deal was exclusively a matter between the second plaintiff and the vendor. The farmer agreed to sell the harvester to the latter believing that the latter was a representative or agent of the defendant. In reality, however, the vendor was neither a representative nor an employee of

the defendant. The vendor's difficulty was that he had no skill and resources to cut and transport the huge scrap away from the farm.

[20] It was at this juncture that the defendant came into the picture. The vendor approached the defendant for help. The defendant had among its workers those who were trained as metal cutters. Mr. Mokeki was one of them. The defendant put the particular worker at the disposal of the vendor. The defendant also provided the vendor with some industrial equipment for use by the worker on the farm. The equipment was loaded onto the vendor's light delivery van. The vendor picked the cutter up from the defendant's industrial site or yard. The worker was instructed by the defendant via Paul, the foreman, to accompany the vendor. The witness did not recall the foreman's surname.

[21] It is important to stress that the worker travelled to Boschrand farm not only with the defendant's knowledge, but on the defendant's express order. He was dispatched to the farm on a specific business errand. The defendant knew as much as the vendor did precisely what the worker needed to do out there. He was well-equipped for the job. On their

arrival on the farm the vendor pointed the harvester out to the worker. He then started cutting the harvester with the equipment of the defendant. The activity of cutting metals was his daily routine. That he was sent out alone was indicative of his ability to work without supervision. He never went away from the harvester for purposes of his own. He remained on the site of the harvester for approximately an hour. During that period sparks caused by the cutting equipment were flying around. Initially he saw the vendor extinguishing the flames of the burning grass. Later on he was working on the harvester from underneath. He carried on cutting the harvester. The sparks continued to fly. He was not concerned, because he thought the vendor was still putting the flames out. It was not until he emerged that he saw a big black cloud of smoke. Only then did he realise that the vendor was nowhere to be seen.

- [22] There is no suggestion that the worker had disobeyed the defendant's instructions. Therefore, this is not the case of an unfaithful employee who instead of devoting his time to his employer's business followed a pursuit of his own. He did not abandon partially or entirely the business he set out to do. The work he performed on the farm was identical to the

work for which he was employed and trained by the defendant. I have to stress that he went over there on the specific instructions of his immediate supervisor, the foreman, himself an employee of the defendant. The work for which he was sent out to do, embraced the control of the cutting equipment owned by the defendant. There was no delinquent digression to pursue his own private interest. He did on the farm precisely what he would have done at his workplace had the defendant not instructed him to accompany the vendor to work outside instead of inside as usual.

[23] In my view, he was continuously on duty throughout the journey from the plant to the farm. He was also continuously under the authoritative control of the defendant during the entire process of cutting the harvester. While he was cutting the harvester his mind was occupied primarily by the business interests of his real employer, the defendant and not those of the vendor, the defendant's customer. He received no instructions, let alone radical instructions from the vendor, at any moment during the course of the cutting process, to dismantle the harvester in a manner that could have been objectively seen as a drastic departure from the

standard manner which the defendant had expected from him as a trained cutter. There is nothing to suggest that during the entire operation he ever temporarily abandoned the defendant and embraced the vendor as his temporary employer.

[24] It is so that in the ordinary course of the defendant's operations, the worker used to cut scrap metals on the defendant's industrial yard. On this occasion the worker was sent out to cut the scrap metal off the industrial yard. Usually it was the vendor's business' obligation to deliver scrap metals to the defendant. In this case, however, the vendor was unable to do so, but the defendant was able to do so. The defendant and the vendor agreed to have the harvester dismantled, loaded, transported, off-loaded by the defendant. According to the defendant the provision of the cutter, equipment and transport to the vendor was only service to a customer.

[25] Mr. Laney admitted during cross-examination that it was in the interest of the defendant to provide the cutter to a customer, because it ensured that the scrap would come to the defendant. He also agreed that it was precisely for the

same reason that the defendant had also provided its truck and equipment. The provision of the logistical support was service to a customer. It was intended to ease the burden. He also admitted that Mr. Coetzee did not instruct the employee as to how he should do the cutting, since the employee was a trained cutter able to do so on his own. He also conceded that the use of a flame cutting torch created a dangerous situation and that it was the duty of the defendant to guard against such dangers.

[26] The worker had undergone the necessary training as a cutter. The training skilled him to perform the cutting work in a systematic and a specific manner. He was able to cut metals in such a way as to facilitate the processing thereof by the defendant.

[27] The cutting of the harvester by the worker was to the vendor's advantage in the sense that, first, the vendor had no employees to do the job, second, the worker was a trained metal cutter, third, the harvester was an unusually huge scrap and fourth, the cutting facilitated the transporting of the heavy scrap. All these promoted the vendor's business interest. Similarly, the worker's cutting activities on

the farm were to the defendant's advantage seeing that he was a trained metal cutter who knew and understood the defendant's industrial operations. Therefore, he was able to cut the harvester in a manner that would not only facilitate its transportation, but also expedite its processing later on.

[28] The defendant's chief industrial operations dependent on vendors such as Mr. Coetzee who supply it with scrap metals. It is not the defendant's standard practice to send a cutter out to do some field work by cutting scraps off the defendant's industrial yard. The metal cutting by means of a gas flame torch in the veld creates an inherently hazardous situation in that the universal safety measures usually in place at the defendant's industrial plant are compromised. The defendant did not take any steps to guard against the possible occurrence of such danger. The defendant merely supposed that the vendor would do so.

[29] It seems to me that such logistical support was more than just service to a customer. The defendant gave such logistical support in return for the scrap metal. This then was the quick pro quo of the deal. The defendant would probably not have given the vendor such logistical support if the

vendor had wanted the scrap metal delivered to the defendant's rival business enterprise such as Mico Trading. It appears, on the facts as a whole, that the entire operation was more of the defendant's business than the vendor's. When an employee is sent out on his employer's dominant business, which is closely linked to the collateral business of someone else, his simultaneous promotion of the third party's comparatively minor business interest, with the approval of the real employer, does not necessarily entail a temporary termination of his employment or an abandonment of his employer's primary business.

- [30] It may be true, as was argued by Mr. Loubser, that from the defendant's plant to the farm where the scrap was cut into pieces, the worker was under the control of the vendor. But even if that was indeed the position, he certainly did not exercise such control as his new employer. But even if it is assumed that the vendor had taken over control as the worker's employer for the duration of the trip and the cutting activity, the control test is no longer the decisive determinant of vicarious liability. It has been held as a general and broader criterion that what was required in order to determine vicarious liability, was a multifaceted test and not

simply the traditional criterion of control, that took into account all relevant factors in order to determine who, as a matter of policy and fairness, had been more closely associated with the act which created the risk - **MIDWAY TWO ENGINEERING & CONSTRUCTION SERVICES v TRANSNET BPK** 1998 (3) SA 17 (SCA).

- [31] Now the risk-creating act in this case was the dismantling of the harvester by means of the cutting torch and a gas-flame. The equipment used belonged to the defendant. The cutter was a permanent employee of the defendant. He was a trained and certified cutter. Apparently the defendant was responsible for the employee's training. Before he was sent out, the worker was never informed that he ceased to be an employee of the defendant and that by accompanying the vendor he thereby became the vendor's temporary employee. The worker was remunerated for the particular day by the defendant as usual. There was nothing deducted from his wages. The fact that the defendant charged or would have charged the vendor for the services rendered by the worker does not assist the defendant. On the contrary, it fortifies the conclusion that, notwithstanding his brief temporary absence from the yard, the worker remained an

employee of the defendant. The fact that the defendant never called upon the vendor to pay for the labour costs of the cutting activity in question bolsters my conclusion.

The scrapped harvester was destined for sale to the defendant. Besides driving the worker to the farm and pointing the harvester out to the worker, the vendor did not really supervise the worker's cutting activity in any significant manner. Although the worker travelled with the defendant's customer in the latter's motor vehicle, the defendant did not surrender control over him.

“Control is a wide concept. It includes *inter alia* the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him.”

SMIT v WORKMEN'S COMPENSATION COMMISSIONER

1979 (1) SA 51 (AD) at 60 H per Joubert JA.

- [32] In **STEIN v RISING TIDE PRODUCTIONS CC** 2002 (5) SA 199 (CPD) at p. 206 D Van Heerden J, as she then was, observed that although the question of control was an important factor in the enquiry as to the existence or non-

existence of an employment relationship, the crucial test, particularly in marginal cases, was whether or not the dominant impression of the relationship was that of a contract of employment.

[33] The foregoing principle of dominant impression was accepted in the case of **SMIT**, *supra*, at p. 63 A – B where it was held that the employer's right of control was not the sole determinative factor of the employment relationship and that regard must also be had to the other important indicia. In a later decision of **STEIN**, *supra*, at 206 I – 207 B a number of indicia, the cumulative impact of which may be decisive, were enumerated.

[34] The following factors are pertinent to the instant case: first, the employer's right of control. On the day in question the worker reported for duty, as the defendant's employee at his usual workplace. The defendant, as an employer, decided that the worker had to go to Boschrand farm on that day with the vendor to cut a harvester, as the worker had previously been trained to do. All those instructions, in my view, underscored the defendant's control over the worker.

[35] Second, the nature of the work as an important factor: The basic duty of the worker was to cut scrap metals. On the farm the worker did just that – cutting the metal. It was his daily routine at his workplace.

[36] Third, the existence of the right of supervision by the employer: The defendant did not go to the farm to inspect and direct the work being done by the worker. But that, in itself, did not preclude the defendant from exercising such a right. The fact of the matter is that the defendant had such a right. The question is not whether the defendant exercised it or not, but rather whether the defendant had it or not. Had the defendant later sent its foreman to the farm to inspect and to direct the worker, neither the worker nor the vendor would have objected. This is so because the work he did on the farm was merely a continuation of the work he would have done on the plant as the defendant's employee. This everybody knew. The defendant as the employer had interests in the training of the worker to ensure that the worker could perform his duties with minimal degree of supervision or none at all. Therefore, lack of actual supervision in this instant does not indicate that the

employment relationship between the worker and the defendant had ceased to exist.

[37] Fourth, the tools of trade or working facilities: The defendant was the owner of the cutting equipment. The worker was equipped by the defendant and not the vendor. The cutting torch and the gas-bottle were not were not provided by the vendor. The vendor merely provided the transport by means of which the worker was conveyed to the farm. If that van was involved in an accident on the way, the defendant would probably be held liable if the accident was occasioned by the vendor's negligence. Later on the defendant provided its own truck to go to the farm in order to carry the cargo from the farm to the industrial plant, owned by the defendant. This demonstrates the defendant's dominant business interests in the cutting activity. The fact that the cargo was never removed from the farm, is of no consequence. Again the defendant never demanded payment of the transport costs from the vendor.

[38] Five, the payment of remuneration: The worker was remunerated for the work he performed on the farm. He was on the defendant's payroll. At the end of the relevant pay-

cycle the defendant deducted nothing from his wages. The worker was treated as if he had worked on the harvester on the defendant's industrial workplace.

- [39] Six, the length of service: The worker was in the employ of the defendant for a period of 13 years. At the time of the fire incident on the farm, he had been the defendant's employee for over a decade. The dismantling of the harvester took about an hour, that is from 10:00 to 11:00. The vendor did not even spent that one hour with him on the farm. In **MIDWAY**-case, *supra*, Midway supplied Spoornet with about 40 qualified drivers to drive cargo trucks as replacements for the latter's drivers who were on a prolonged strike action. Simon was one of such drivers. It would appear that he had been driving for the respondent Transnet for approximately seven months when the accident, occasioned by his negligent driving, occurred. During that long period of service the appellant, in other words Midway, was not meaningfully involved in the manner in which Simon performed the task of driving. In the instant case the situation is entirely different. The extremely and comparatively short duration of service was characterised by the close involvement of the defendant.

[40] The foregoing multiple factors collectively create, as a matter of policy and fairness, a dominant impression that the defendant was indeed more closely associated with the critical act – to wit: the cutting of the harvester by the vendor. The defendant had done a whole lot more in this case. I am not convinced that all the defendant had done, was only to supply the customer with the services of a qualified cutter and that furthermore the defendant had had nothing to do with the manner in which the cutter performed the task for the customer. The defendant did not detach itself from the cutter and the activity which created the risk. I am not at all persuaded, on the facts, that the vendor ever became a temporary employer of the worker, whose actions are alleged to have precipitated the event complained of. The converse also holds true. The worker never became a temporary employee of the vendor, in my opinion.

[41] I find that the worker performed the services in question under the overall control of the defendant. This is corroborated by a variety of factors, among others, the worker performed at the instance of and to the primary advantage of the defendant. I would, therefore, hold the defendant vicariously liable for any delict proven to have

been committed by the said employee while performing his services in connection with the harvester. The reserved question must accordingly be answered in favour of the plaintiff.

[42] In the circumstances, the following order:

42.1 The reserved question is affirmatively answered in favour of the plaintiffs.

42.2 The defendant pays the costs relating to the reserved issue.

M.H. RAMPAL, J

On behalf of plaintiffs:

Adv. P. Zietsman
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of defendant:

Adv. P.J. Loubser
Instructed by:
Webbers
BLOEMFONTEIN