

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5483/2005

In matter between:

BEN ROJER JACOBS

Applicant

and

MAHLOMOLA ABRAHAM DIKHOELE

Defendant

HEARD ON: 13 FEBRUARY 2007

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 16 FEBRUARY 2007

[1] On 2 December 2003 in the crossing of the N8 and the Albert Moroka High School at Thaba Nchu a collision occurred between the defendant's motor vehicle with registration number BKR 494 FS driven by Mr M Z Lebusa and a vehicle with registration number NU 6673 driven by Mr R Zulu. The plaintiff was seriously injured during the

collision.

[2] The plaintiff's claim against the Road Accident Fund (RAF) is limited to R25 000.00 in terms of section 18 of the Road Accident Fund Act 56 of 1996 (the Act). He successfully claimed the R25 000.00 from the RAF. His damages however exceeds the ceiling set by the Act and he instituted action against the defendant in order to recover the rest of his damages. It was agreed that the adjudication of the merits should be separated from the quantum.

[3] The parties agreed that the following facts are not in dispute.

3.1 That the defendant was the owner of the taxi motor vehicle that was driven by Mr MZ Lebuza.

3.2 That the plaintiff was a paying passenger in the said taxi.

3.3 That the plaintiff was injured in the collision.

3.4 That the defendant admits that there was negligence on the part of Lebuza.

[4] The defendant denied that Lebuza was in his employ or that he acted in the cause and scope of his employment. The only issue that has to be decided is whether the defendant

was vicariously liable for Lebuza's acts.

[5] The plaintiff called only one witness, Mr Bizo Erice Mbotho an inspector in the South African Police Service. He attended the scene on 2 December 2002 and completed the Officer's Accident Report – which was handed in as Exhibit A. At the scene he spoke to Lebuza who gave him two addresses. One being his residential address and the other being his business address. He stated that the latter is his employer's address.

[6] Mr Mahlomola Abraham Dikhoele, the defendant, of 139 Zone 1 Selosesha, Thaba Nchu, testified that his son Buti Thomas Dikhoele (Buti) drove the taxi on his behalf. He employed Buti to drive the taxi for seven days a week. On Mondays – the 2nd December 2002 was a Monday – Buti does not give him any takings and keeps whatever money he has generated for the day as his remuneration for the week. He did not give Lebuza permission to drive his vehicle neither did he authorise Buti to give the car to Lebuza or any

other person to drive. Lebuza used to work for him during 2000 to 2001 as a taxi driver but was dismissed because he was negligent with money. When he was confronted with the contents of exhibit A, specifically the fact that Lebuza indicated that his business address is 139 Zone 1, Thaba Nchu. Dikhoele stated that he can only speculate that Lebuza gave his (Dikhoele's) particulars because he knew it from his stint as an employee of Dikhoele. He denied emphatically that Lebuza was in his employ.

- [7] Buti Thomas Dikhoele confirmed employ by his father as well as the remuneration arrangement. His testimony is that Lebuza used to work for his father until 2001. Lebuza was a freelance taxi driver on 2 December 2002. He used to sit at the taxi rank and when someone needed a driver he would be used. On 2 December 2002 whilst his taxi was in front of the queue he received a call from his girlfriend. He asked Lebuza to taxi his passengers to Bloemfontein contrary to the defendant's instructions. Lebuza would have given him the money for the load of passengers and he would have paid

Lebuza in return. The defendant knew nothing about this arrangement. He (Buti) later heard about the collision. He has not spoken to his father about the collision but has spoken to his sister and his mother about it. His father is cross with him they were not on speaking terms.

[8] Mr Grobler, on behalf of the plaintiff, argued that Lebuza was employed by the defendant at the relevant time and that the defendant is therefore vicariously liable for Lebuza's acts. In the alternative he argued that the defendant as the owner of the vehicle was liable for the acts of the driver thereof. Mr Fischer, on behalf of the defendant, argued that Buti was working for himself on Mondays and was furthering his own interest and not that of the defendant.

[9] It is admitted by the defendant that Lebuza committed a delict. In order to succeed with a claim based on vicarious liability based on an employee – employer relationship the plaintiff in addition to that bears the onus to prove that Lebuza was an employee of the defendant. That Lebuza committed the delict in the cause and scope of his employment and what Lebuza's duties were at the relevant time. **Masuku v Mdlalose** 1998 (1) SA 1 (SCA); **Van der Berg v Coopers & Lybrand Trust (Pty) Ltd** 2001 (2) SA 242 (SCA); **Gibbins v Williams, Miller, Wright & Mostert**

Ingelyf 1987 (2) SA 82 (T).

- [10] Mr Grobler argued on the strength of the principle enunciated in **Voortrekker Apteek (Edms) Bpk v Serfontein** 1979 (3) SA 906 (O) at 912 that the ownership of the vehicle justifies the inference that the driver of the vehicle was at a specific time in the employ of the owner thereof and that he acted in the cause and scope of his duties. This inference can however be rebutted by the owner because the relevant facts are patent to him. In **Venter v Bophuthatswana Transport Holdings (Edms) Bpk** 1997 (3) SA 374 (SCA) at 388 D – E the following was said in qualification of the principle:

“Die feit dat die genoemde beginsel slegs ‘n afleiding is moet steeds voor oë gehou word. Die afleiding verander nie die bewyslas nie. Waar ‘n verhoor sy volle verloop verneem het, bly die eindvraag steeds of die bewysdraar hom van die bewyslas gekwyt het, alle relevante faktore in ag genome...”

- [11] In my view the inference must of necessity dissipate in the face of plausible and credible direct evidence to the contrary.

The direct evidence of both the defendant and his son is that Lebuzo was not in the employ of the defendant. There is no other evidence to gainsay this. Mr Grobler wanted to make a meal of the fact that Lebuzo intimated to Inspector Mbotho that his business address is his employer's address. It must be remembered that Lebuzo did not testify. Even if I accept that is what he said to Mbotho that does not make him an employee. The defendant testified in no uncertain terms, and his son corroborated him, that Lebuzo was not in his employ at the relevant time. Obviously Mbotho does not know what the correct state of affairs is because he only recorded what was told to him. The explanation tendered by the defendant that Lebuzo might have given his address because he knew that the vehicle belonged to him because he used to work for him and that he knew his address is not far fetched or improbable. In fact I find it probable. There is another reason why Lebuzo could have done it and that is that he genuinely thought that he was driving the motor vehicle on behalf of the defendant because the defendant's son asked him to drive the vehicle. So for the trip to

Bloemfontein he was – according to him – in the employ of the owner of the car. The correctness of the entry in the report is dependent on Lebuzo's intention and understanding of his position. He did not testify. I have no reason to reject the evidence of the defendant and his son.

- [12] Mr Grobler also requested me to reject the evidence of the defendant and his son because it is improbable that the accident happened on a Monday – the day on which the son works for himself – and because it is improbable that father and son would not speak about the accident for a period of four years thereafter whilst the son is still employed by the defendant. In my view nothing much turns on this. The fact that the collision occurred on a day that the driver worked for his remuneration does not mean that he became an independent contractor or did not drive the vehicle in the cause and scope of his employment. The fact that he worked for his remuneration is in the interest of the employer – who has a duty to remunerate him for services rendered. Therefore the fact that he worked on Mondays for his own

account is at best a red herring. On the issue of his relationship with his father after the incident, Buti testified that his father was not happy about the fact that he acted contrary to his clear instructions. They were not on speaking terms. He used his mother and his sister as a conduit to his father. I do not find this to be so improbable as to say that their version is implausible and improbable.

- [13] Mr Grobler also argued that although the defendant said he keeps documents the defendant did not produce any documents relating to Lebuzo's dismissal. Firstly he never testified about documents relating to Lebuzo's dismissal. Secondly he never testified from when he kept documents. Thirdly he was never asked to discover documents relating to Mr Lebuzo or his relationship with Mr Lebuzo. Lastly it has always been the defendant's contention that Lebuzo was not in his employ at the relevant time, the plaintiff did not ask sufficient further particulars in order to discern what the true relationship between the two was, if any, at the relevant time. The plaintiff endeavours to project its failures and minimalist

approach on the defendant. In my view the defendant clearly showed that he was not Lebuzo's employer at the relevant time. The plaintiff therefore did not succeed in discharging its onus to prove on a balance of probabilities that Lebuzo was employed by the defendant at the relevant time and that he was acting in the case and scope of his employment.

[14] The question that must be considered in this matter – which was raised quite half heartedly by Mr Grobler – is what is the position where an employee, employed to drive a motor vehicle or taxi on behalf of his employer, delegates, in breach of his clear instructions to the contrary, the driving of his employer's vehicle to another.

[15] As stated above the fact that Buti drove the vehicle on Mondays and pocketed the takings is neither here nor there. He was still employed by the defendant and he was still acting within the scope of his employment. The arrangement in relation to Mondays was just a convenient way to structure the manner in which he would be remunerated. The defendant still had total control over the vehicle on Mondays. Buti had to fetch the car from his yard and take it back there in the evenings. Buti did not have authorization to give the car to anyone to drive on his behalf on Mondays. Although

he pocketed all the takings he did so as part of his conditions of employment. This obviously obviated him being paid by the defendant for his labour.

[16] The fact that he was not permitted or allowed to give the car to any other person does not alter the situation. His core function was to drive the vehicle as a taxi on behalf of his employer. The fact that he asked, without authorization, Lebuzo to drive the vehicle is an improper mode that he employed in order to achieve his core function. In **Francis Freres and Mason (Pty) Ltd v Public Utility Transport Corporation Ltd** 1964 (3) SA 23 (D) at 30 H Caney J said the following:

“... the employer is responsible for the consequences of the collision provided his employee was acting within the scope of his employment in doing what he did. That what he did was unauthorised or even forbidden does not necessarily take it out of the scope of his employment; if it was a method or mode, though improper, of doing what he was authorised to do, it was within the scope of his employment, for the employer is

responsible not merely for what he authorised his employee to do, but also for the way in which he does it...”

See also **Ngubetole v Administrator, Cape and Another**

1975 (3) SA 1 (AD) at 10 E – 12 D. Clearly when Buti delegated his functions to Lebuzo, albeit unauthorization, he acted within the cause and scope of his employment.

[17] This, without more, however does not make the employer vicariously liable. It must still be determined whether Buti acted negligently in giving Lebuzo the car and whether his negligence was the cause of the collision. In **Francis Freres & Mason** *supra* Caney puts it thus at 30 F – G:

“when an employee whose function it is to drive a vehicle for his employer delegates the driving of it to another person (or permits another or puts it in another’s power to drive it) and as a consequences of negligent driving by that other a collision occurs, it is a question of fact whether the employee acted negligently in doing what he did and if so whether his negligence was a cause of the collision...”

[18] In casu Buti allowed Lebuzo to drive the car. He knew Lebuzo. Lebuzo used to work for his father as a taxi driver. There is no indication that Lebuzo was not fit to drive a motor vehicle or a taxi on that particular day. Lebuzo does freelance work as a taxi driver and other taxi owners or drivers use his services. There is no indication that he was in the habit of driving negligently or recklessly. There is no indication that Buti was negligent in allowing him to drive the taxi. Lebuzo's competence as a taxi driver was not in issue. The fact that he misappropriated funds does not mean that he is a bad or incompetent driver. On the facts of this case it has not been shown that Buti acted negligently by allowing a licensed and competent driver to drive the taxi. We are not dealing with a unlicensed, unskilled and incompetent driver. See **Weir Investments LTD v Paramount Motor Transport** 1962 (4) SA 589 (D & C.L.D) **Gumede en Andere v SA Eagle Versekeringsmaatskappy Bpk** 1989 (3) SA 741 (T) at 749. On this ground too the claim ought to fail.

[19] Mr Grobler also argued that the defendant should be held liable as the owner of the vehicle. In **South African General Investment & Trust Co. Ltd v Mavaneni** 1963 (4) SA 89 (D) at 91 E – G Fannin J captured the requirements for vicarious liability of the owner of a vehicle as follows:

“In South Africa the owner of a motor car is liable for the negligent driving of it by another person authorised by him to drive it if:

- a) the vehicle is being driven on behalf of the owner, and
- b) the relationship between the owner and the driver is such that the former retains the right to control the manner in which the car shall be driven.”

The requirements stated in the Mavaneni case were discussed and analysed in **Messina Associated Carriers v Kleynhaus** 2001 (3) SA 868 (SCA) and at 875 H – J paragraph 15 Scott JA came to the following conclusion:

“As important as the requirements identified in the Mavaneni case may be, they are, I think no more than indicia and should

be recognised as such. Ultimately the true inquiry is whether the relationship between the owner and the driver and the interest of the former in the driving of the latter is sufficiently analogous to the case of an employee driving in the course and scope his employment to justify the negligence of the driver being attributed to the owner. The answer will depend not only on a careful analysis of the facts of each case but also on considerations of policy”

[20] On the facts of this matter it is clear that Lebuzo was not authorised by the defendant to drive the motor vehicle. As stated above, the vehicle was indeed driven, albeit indirectly, on the owner’s behalf without his authorisation. There was no agreement between the defendant as owner and Lebuzo as driver. The owner retained the right to control the manner in which the car was driven viz a viz Buti. When Buti allowed Lebuzo to drive the vehicle without the defendant’s knowledge and authorisation, he and not the defendant had the right to control the manner in which the car shall be driven. If Buti had the right to delegate to Lebuzo then maybe the defendant could be said to have retained the right

to control the manner in which the car shall be driven. The defendant's evidence in this matter is clearly that he would have requested Lebuzo to stop the vehicle and he would have driven the vehicle himself if needs be. He would not have allowed Lebuzo under any circumstances to drive his car. It seems to me that the only connection between the defendant and Lebuso was that Lebuso was driving a car that belonged to the defendant. Sympathetic as I am towards the plaintiff, I do not think that public policy requires that the ambit of vicarious liability of an owner of a vehicle should be extended under circumstances such as these under consideration in the present case.

[21] Accordingly I make the following order.

(a) The claim is dismissed with costs.

C.J. MUSI, R

On behalf of the Plaintiff:

Adv. S. Grobler

Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the Defendant:

Adv. P.U. Fischer
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