

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 41665/2021

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
SIGNATURE	DATE <u>13/9/2024</u>

In the matter between:

DISAWARE (PTY) LTD t/a WATERKLOOF SPAR

PLAINTIFF

and

THE ACADEMIC AND PROFESSIONAL
STAFF ASSOCIATE

DEFENDANT

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 13 September 2024.

JUDGMENT

Mali J

- [1] This is a claim based on vicarious liability. The plaintiff sues the defendant for the damages it suffered because of the closure of its grocery store by the members of the defendant, who were involved in picketing and unlawful gatherings. The closure occurred on 1 April 2020, 12 June 2020 and on 19 June 2020. Due to the closures the plaintiff did not make sales as a result it suffered financial losses.
- [2] The plaintiff is the holding company of Waterkloof Spar, a grocery store situated at Waterkloof Corner Shopping Centre in Waterkloof, Pretoria ("store"). The defendant is a trade union registered within the laws of the Republic. The members of the defendant were the employees of the plaintiff.
- [3] It is common cause that the store had entered into a union recognition agreement with the defendant. Ms Lindiwe Methula (Ms Methula) was elected as shop steward for the store's employees who were members of the defendant.
- [4] *'Vicarious liability' is a form of liability which is imposed upon one person for the wrongful and unlawful conduct of another. It is, in essence, a strict liability, that is, liability which arises through no fault on the part of the person held liable. It is imposed by law on the basis of the nature of the relationship between the actual wrongdoer and the person held liable.*¹ [own emphasis]
- [5] In *Minister of Safety and Security v F Nugent* JA said, *'Vicarious liability has a long but uncertain pedigree. In essence, it may be described as the liability that one person incurs for a delict that is committed by another, by virtue of the relationship that exists between them. There are two features of vicarious liability*

¹ *Minister of Safety and Security and Others v Van der Walt and Another* [2014] ZASCA 174 (SCA), [2015] 1 All SA 658 (SCA) at par 23.

in its traditional form that are trite, but they bear repetition. The first is that vicarious liability arises by reason of a relationship between the parties and no more – it calls for no duty to be owed by the person who is sought to be held liable nor for fault on his part. The second feature is that it is secondary liability – it arises only if there is a wrongdoer who is primarily liable for the particular act or omission.² [own emphasis]

MERITS

- [6] From the evidence of Mr Botterill, it transpired that on 1 April 2020 members of the defendant and or employees of the plaintiff closed the store for a period of two hours. Ms Methula the shop steward who is also an employee of the plaintiff ordered other employees to stop working. They had a complaint about the store not providing them with Personal Protective Equipment (PPEs). They complied with her instructions despite the warning by the store manager (Mr Erlank) that in the event they left their posts or shifts they would be committing an offence.
- [7] The employees left their posts and proceeded to physically close the doors of the store. They were assisted by a gentleman who was identified as the African National Congress (ANC) youth league member who was not the store's employee. The gentleman was later arrested when the police were called.
- [8] The events of 1 April 2020 are collaborated by the evidence from the video footages which were played in court and admitted as evidence. On behalf of the defendants, the events of 1 April 2020 are not seriously challenged. The argument is placed on the fact that Ms Methula is not an employee of the defendant, therefore at no point in time does an employment relationship arise between a shop steward and a union.
- [9] The facts are telling, Ms Methula exercised her authority as a shop steward, a position attached to her being a member of the defendant to exert pressure or influence her co- members to close the store. Furthermore, the pleadings of the

²Minister of Safety and Security v F (592/09) [2011] ZASCA 3; 2011 (3) SA 487 (SCA); [2011] 3 All SA 149 (SCA); (2011) 32 ILJ 1856 (SCA) (22 February 2011).

plaintiff are clear that the claim is a result of the conduct of the members of the defendant. There is no suggestion that the plaintiff refers to Ms Methula as an employee of the defendant. In fact, the law is clear that vicarious liability is based on the nature of the relationship. It is not limited to the employment relationship.

- [10] Pertaining to the events of 12 June 2020 Mr Sam Mphuti the official and the union organiser of the defendant arrived at the store to deal with an alleged racial incident by Mr Erlank. Upon his arrival he instructed the employees/ members of the defendant to stop working. They complied; the store was closed for an hour.

- [11] Regarding the events of 19 June 2020 Mr Mphuti again attended to the store as an observer in a disciplinary matter against Mr Erlank who was charged for calling one of the members of the defendant a "K" word and a monkey on 12 June 2020. Mr Mphuti caused ruction leading to the closure of the store, for a period of an hour. It is not in dispute that there were also members of the Economic Freedom Fighters (EFF) who assisted in closing the store. Of importance, Mr Mphuti is the one who had an employment relationship with the defendant. The EFF members were not even identified.

- [12] The evidence tendered on behalf of the defendant by its witness Mr Senokoane in respect of 12 and 19 June 2020 is that strike actions took place without him authorising the same. The members of the defendant did not adhere to the set procedures. Since the members of the defendant had embarked on illegal strikes, the defendant cannot be held liable. Furthermore, that Mr Mphuti was given a verbal warning and later the defendant terminated its relationship with Mr Mphuti due to his behaviour.

- [13] Mr Senokoane emphasized that the defendant became aware of the events after the fact and that since they accepted the letter of de-recognition there was nothing further to do. This is because the relationship between the store and the defendant existed through the defendant's members who were no longer the store's employees. He also stated that the store did not inform him about any of the actions of Mr Mphuti and the members of the defendant who were the store's employees.

- [14] In the present case all what the plaintiff needs to prove is the relationship between the defendant and its members and also its employee, Mr Mphuti. Whether the defendant had knowledge of the wrongdoing by its members and or employee is irrelevant.
- [15] There was a relationship between the employees of the plaintiff and the defendant, by virtue of the workplace/ trade union recognition agreement. Furthermore, at the time of the incidents Mr Mphuti was the employee of the defendant. The plaintiff is not required to attribute any fault or duty upon the defendant except to stake its claim based on the legal principle of vicarious liability. In the result the plaintiff's claim on merits must succeed.

QUANTUM

- [16] The claim consists of three headings as follows:

- 16.1 Decrease in profit in the amount of R 39 807-00 for 1 April, 12 June and 19 June 2020;
- 16.2 Cost of increased security for the three dates as above and legal costs in the amount of R134 795-00;
- 16.3 Costs of CCMA hearing in the amount of R261 020-00;

The total amount of the claim is the amount of R 435 622-00.

- [17] In *Dippenaar v Shield Insurance*³, the court held that “...the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate.”

³ 1979 (2) SA 904 (A).

- [18] Mr A.C. Strydom, an Actuary testified in respect of quantum. He testified that he was instructed to consider three different loss parameters; the losses that were incurred on the day of the alleged incidents. The second was the security and legal cost associated with litigation against the employees of the plaintiff. The third was business interruption that was experienced 14 days subsequent to each event.
- [19] He was instructed to calculate the loss of income over those periods as well. He testified that the decrease in gross profits for the alleged incidents and for the 14 days subsequent to the incidents was R39 806. The cost associated with the increased security and legal fees was R134 795. In respect of the security costs, he referred to the three invoices provided by the plaintiff. He referred to his actuarial report which he compiled based on supporting documents including financial statements of the plaintiff.
- [20] He testified that he omitted to state in his report that he had regard to the invoices for legal fees. He further stated that he accepted the calculations for the financial statements of the plaintiff and used them as such. Upon cross-examination reference was made to the financial statements, that he did not factor Covid19 lockdown implications. He did not dispute that the sales would have been affected during the period of hard lockdown and the incidents occurred during that period. When he was asked whether he had regard to September, October and November 2020 comparison he stated that he was not provided with that information which would have indicated to increased sales because of eased Covid19 lockdown.
- [21] It appeared that the calculation for loss of sales in respect of all the incidents, the 14-day post incident/s factor was used. As to the reason why he specifically factored a period of 14 days subsequent to all the incidents, he testified that he was not sure, the question should be directed to the instructing attorney. He conceded that if regard was given to his report at paragraph 17, the estimated losses, the figure for gross sales and taking into account the loss for 1 April, 12

June and 19 June 2020 the calculations would amount to R13 291.00 as opposed to the amount of R39 807.00.

- [22] In respect of the legal costs, he testified that he did not have regard to a court order or a CCMA award, he only had regard to tax invoices by an attorney and advocate of the plaintiff. With regards to security costs, he conceded that the invoice he used to calculate the costs was a quotation dated 23 July 2020, post the incidents. There is no evidence that the plaintiff engaged security services related to the dates of incident. From the above, it is apparent that the calculations were not handled with the deserving prudence.
- [23] The plaintiff has succeeded in proving one head of damages, i.e. the lesser amount of R13 291.00 relating to the loss of sales for 1 April, 12 June and 19 June 2020. Therefore, the plaintiff's claim is partially successful. Having regard to the fact that the plaintiff did not prove all the heads of claims, the cost will be awarded accordingly.

ORDER

1. The defendant is ordered to pay the plaintiff the amount of R13 291.00.
2. The defendant is ordered to pay 70% (percent) of the plaintiff's costs at a magistrate's court scale.


N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES:

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Date of final Heads of Arguments: 17 June 2024