MEC for Public Works, Eastern Cape v Faltein 2006 5 SA 532 (SCA)

Vicarious liability of employer for delict of employee – determination of ambit of requirement that employee should act in "course and scope of employment" – non-applicability of statutory indemnity

1 Introduction

It would appear that judgments dealing with the intricacies of employers' vicarious liability for the civil wrongs of their employees cannot fail to grace the pages of our law reports with monotonous regularity. On the one hand this seems inexplicable, seeing that the basic principles for such are well established and certain: There must be an employer-employee relationship at the relevant time; a delict must be committed by the employee; and, finally, the employee must act within the course and scope of employment when committing such wrong (Neethling, Potgieter and Visser *The Law of Delict* (2006) 339–343; see also Van der Walt and Midgley *Principles of Delict* (2005) 36–38). On the other hand, it has become patently evident that the interpretation of the last-mentioned requirement lends itself to major speculation and that the establishment of the absence or presence of this requirement is far from easy.

In view of the English basis of our rules on vicarious liability (see, eg, Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 11), one may note the growing tendency in the law of torts to cast the net of vicarious liability wider (see Scott 2000 *Acta Juridica* 265 276). This English development is an expression of the policy requirements of that community, developed over time, as the nature of business and the economy gradually changed. It has been remarked that "[b]oth "servant" and "master are . . . expanding categories and the policy which underlies the expansion

probably springs from a feeling that it is right that large institutions and enterprises should bear the losses incidental to their activities . . .” (James *Introduction to English Law* (1979) 373).

The present judgment affords a good example of the way in which our Supreme Court of Appeal expanded the category of employers (“masters”) to afford the plaintiff a claim based on vicarious liability.

2 Facts and Judgment

The plaintiff (respondent) instituted an action for damages against the defendant (appellant), in his capacity as the Member of the Executive Council responsible for Public Works in the Eastern Cape, for injuries sustained in a collision between the bus in which he had been a passenger and another vehicle. As the plaintiff could claim only a fraction of his damages from the Multilateral Motor Vehicle Accident Fund (533I), he instituted this action to claim the balance of R1.364 million from the defendant. The plaintiff averred that, at the time of the accident, the bus driver had been an employee of the defendant, acting in the course and scope of employment. In this case the Department of Public Works had made the bus available, as a gesture of goodwill towards its employees, to transport them to the funeral of a deceased fellow employee. A certain Mr Magadla had received written authority from the department to drive the bus on the fateful day and had in fact driven all the way to the funeral. However, as the passengers had expressed their dissatisfaction with Magadla, a certain Mr Belwana, one of the passengers, but also a driver in the employ of the defendant, then took over and drove back after the funeral had taken place. Subsequently Belwana negligently caused the collision in which the plaintiff was injured. The defendant denied being vicariously liable for Belwana’s delict, on the basis that the latter had not been authorised to drive the bus and had thus not been acting within the course and scope of his employment. In addition, the defendant relied on section 40 of the Public Service Act 103 of 1994 which imposes a limitation on state liability whenever someone is conveyed in or makes use of any state vehicle, aircraft or vessel, unless such person is conveyed in it or uses it “in, or in the interest of, the performance of the functions of the State”. According to the defendant the bus had been used for private purposes and the limitation of liability imposed by section 40 thus shielded the department from civil liability.

After White J had granted an order separating the issues of liability and *quantum* in the Bisho High Court, he handed down a judgment in the plaintiff’s favour on the issue of liability only (534C–D). The defendant appealed against this judgment.

The Supreme Court of Appeal upheld the judgment of the trial court by holding that Belwana had been acting within the scope of his employment at the time of the accident, although he had not been the driver specifically authorised to act in that capacity on that specific occasion. Mpati DP further decided that section 40 of the Public Service Act could not avail the defendant in any measure, as the activity in which the driver had been engaged at the relevant time had been “in the interest of the performance of the functions of the State”.

3 Critical Evaluation

3 1 *The Requirement that an Employee must Act "in the course and scope of employment"*

It was never contended that the conduct of the driver, Belwana, who had caused the accident, did not meet the requirements for delictual liability. The main issue before the Supreme Court of Appeal was whether Belwana had been acting in the course and scope of his employment with the department at the time of the commission of the delict which caused the plaintiff's injuries (534D). It would appear as if the facts of this specific case gave rise to some doubt as to the issue of whether Belwana had in fact acted in the course of his employment. One can thus understand why the largest portion of the judgment of Mpati DP is taken up by a thorough scrutiny of factual details.

It is important to note that it had been the policy of management of the department in various centres in the Eastern Cape to make a bus available to transport employees to and from the funeral of a fellow employee. This generous gesture even extended to accommodate the relatives and friends of the deceased employee. The understanding was that these passengers would nominate a driver from among their number to act as the driver of the bus. Such employee would then be issued with a written authority to act as such by management (534G–H). In the instant case it transpired that the officer authorised to issue the written authority had at first refused to do so, as a recent departmental circular had required that the "use of government-owned motor transport for funeral purposes by officials/employees be discontinued forthwith" (534J–535A). However, after the intervention of shop stewards who had given objections to such discontinuation, the director in charge issued the required authority to Magadla. The turn of events took place when this appointed driver was "voted out" as a driver by the passengers of the bus (over which the plaintiff – a shop steward – had control). The new driver, Belwana, who was in fact a driver in the department's employ, had no specific written authority to drive the bus in question that day. However, as a shop steward had allowed this switch of drivers to take place, it was contended by management that the new driver could not even be disciplined for his unauthorised driving (535B–536A). (It would appear that there were solid grounds for the previously mentioned discontinuation by the department of their lenient policy to accommodate funeral goers!)

Mpati DP stated, at the outset, that the issue of whether Belwana had been acting in the course and scope of his employment was dependent on establishing whether the first, authorised driver (Magadla) had been acting as such when he drove the bus on the day in question (536B). To my mind this need not necessarily be the position: There is no logical link between the fact of driving by Magadla and Belwana's driving. The sole question was whether Belwana was acting as an employee when he caused the collision. My evaluation of this point is strengthened by the fact that Mpati DP follows up his statement by declaring that "the critical consideration then is whether the *drivers, in particular, Belwana*, were engaged in the affairs or business of their employer" (536B–C); italics supplied). As

authority the court referred to the rather old case of *Estate van der Byl v Swanepoel* (1927 AD 141) and the very authoritative, more recent judgment in *Minister of Law and Order v Ngobo* (1992 4 SA 822 (A) 827B) where the court employs the terminology of "standard test", which has become usual when inquiring into the question of whether an employee acts within the scope of his employment (see Neethling, Potgieter and Visser 341; see also the recent judgment of the Constitutional Court in *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 443D–444B in which O'Regan J affords a classic example of the application of this test). It is strange that Mpati DP never refers *eo nomine* to this test, seeing that he does in actual fact employ it. The classic formulation of this test appears in *Minister of Police v Rabie* (1986 1 SA 117 (A) 134D–E) and has been utilised in most subsequent judgments of our courts dealing with this aspect of vicarious liability. Its impact has been most clearly paraphrased as follows by Neethling, Potgieter and Visser (341):

> "The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but, viewed objectively, has also completely disengaged himself from the duties of his contract of employment."

Essentially the inquiry by Mpati DP involves an application of the objective tier of the standard test: He does not busy himself with ascertaining the exact content of the drivers' subjective thoughts at the relevant time, but proceeds to dissect their actions in context of their driving activities (536G–538B). The court correctly rejected the argument on behalf of the appellant that the absence of payment to the two drivers indicated that they had not been acting within the course and scope of their employment (536J–537A; on the strength of *Rodriques and Others v Alves* (1978 4 SA 834 (A) 841D–E)), or that if it was accepted that Magadla had been paid for driving the bus that day, this ruled out the possibility that Belwana could have been driving the bus in the course of his employment (537B). The crux of the matter lay with the fact that Belwana had, in fact, been a permanent employee of the department. Part of his work was to convey workers to and from sites where they were to work; in that capacity he had a blanket authority to drive his employer's vehicles for a month at a time (537F). From these facts the court proceeded as follows (537G–538A):

> "Belwana was not driving the bus back from the funeral for his own purposes. He was doing exactly what Magadla had been instructed by management to do, ie convey the passengers back . . . after the funeral . . . In my view it cannot be said merely because Belwana had not been authorised to drive on that particular day, he was not acting in the course and scope of his employment with the appellant. Indeed, as has been mentioned above, Smit [their senior who had the power to make decisions concerning the driving of departmental vehicles] would have had no objection to Belwana's driving if something had happened to Magadla. And something did happen: The passengers did not want Magadla to drive back . . . It cannot be said that Belwana was the servant of the passengers for the time being; they had no right to control how he drove the bus. It follows that Belwana was acting in the course and scope of his employment with the appellant at the time of the collision."

These words afford a clear indication that application of the objective stage of the standard test established a clear link between the conduct of Belwana and his employer, for purposes of the latter's vicarious liability. One can only agree with Mpati DP that the specific authorization which had been given to the first driver, Magadla, was irrelevant as a factor which could exclude a finding that the second driver, Belwana, had been acting in his capacity as the appellant's employee. This view is strengthened by the finding in the judgment of *Minister of Police v Rabie* that "a master . . . is liable even for acts which he has not authorised provided that they are so connected with the acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them" (134E). Seeing that Belwana had not acted improperly in any way, this *dictum* can be said to apply *a fortiori* to the case at hand. It is submitted that the decision of Mpati DP is clearly correct and that he avoided stepping into the trap of regarding the existence of an express authority to drive as a *sine qua non* for finding that Belwana had acted within the course and scope of his employment on that fateful day.

Finally, it is noteworthy that the court regards the "right of control" which an employer has over the conduct of his employee as "the most important consideration" in establishing an employer-employee relationship. The court seemingly regarded this as a necessary step in deciding that Belwana had been an employee in the service of the department. However, it should be borne in mind that this rather antiquated test is as a rule applied in the process of distinguishing between an employee and an independent contractor, which distinction is of crucial importance, as the latter's delict does not found vicarious liability on the principal's part (Neethling, Potgieter and Visser 339; see also Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1976) 285). The facts of this case surely show that there had never been any confusion as to the fact that Belwana was an employee, and not an independent contractor. On this aspect the discussion of the "control" test is thus rather baffling. A second aspect of this part of the judgment merits some comment: The cases quoted in support of the "control" test as the *paramount criterion* for establishing whether someone is to be regarded as an employee are rather antiquated (*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412; *R v AMCA Services Ltd and Another* 1959 4 SA 207(A)). However, this test has in more recent times attracted criticism from the Supreme Court of Appeal itself as is apparent from the following *dictum* of Nienaber JA in *Midway Two Engineering and Construction Services v Transnet Bpk* (1998 3 SA 17 (SCA) 22D–F):

> "Die sogenaamde 'kontrole-toets' wat meermale aangewend is om tussen 'n werknemer (werkgewer aanspreeklik) en 'n onafhanklike aannemer (prinsipaal nie aanspreeklik nie) te onderskei, is al as verouderd, simplisties en selfs as 'n fiksie gediskrediteer . . . Al hoe meer word in die Engelse reg, wat in dié verband vir ons as model gedien het . . . van 'n heterogene toets gebruik gemaak om te probeer bepaal of een persoon verantwoordelik gehou moet word vir die delik van 'n ander persoon wat oënskynlik in sy diens is . . ."

The modern tendency would seem to favour this "multi faceted" test in which the "right of control" is merely one of the *indicia*, albeit a very

important one, in establishing the existence of an employer-employee relationship (see, eg, *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 2 SA 242 (SCA) 258C–D; see also Neethling, Potgieter and Visser 340; Van der Walt and Midgley 37; Fagan and Fagan 1998 *Annual Survey of South African Law* 278). To my mind the importance attached by Mpati DP to the control test will in no way affect the swing towards the more elastic multi-faceted test, because nothing that the court said can be construed as a *conscious* deviation from the new direction in favour of the more antiquated approach.

3 2 *The Indemnity Issue*

It was averred on the appellant's behalf that all personnel who made use of the free transport provided for the attendance of funerals had to sign an indemnity form before being allowed to travel. However, as the appellant who bore the *onus* to prove (see *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991D–G) that the respondent had indemnified the department against liability for any damage or loss suffered by the respondent, as a result of being conveyed on the bus, failed to prove that the respondent had signed such a form (the evidence in fact showing that he did *not* sign such form), this defence was unsuccessful.

The final question on which the court had to make a finding, was whether the statutory indemnity provided for by section 40 of the Public Service Act 103 of 1994 exempted the appellant from the payment of damages. This section, which, at first blush, seems to be the *deus ex machina* which could save the day for the appellant, reads as follows:

> "Whenever any person is conveyed in or makes use of any vehicle, aircraft or vessel which is the property of the State, the State or a person in the service of the State shall not be liable to such person or his spouse, parent, child or other dependant for any loss or damage resulting from any bodily injury, loss of life or loss of or damage to property caused by or arising out of or in any way connected with the conveyance in or the use of such vehicle, aircraft or vessel, unless such person is so conveyed or makes use thereof in, or in the interest of, the performance of the functions of the State . . ."

It took Mpati DP a mere 20 lines to dispose of this defence of the appellant. This he did on the strength of a concession "correctly made" by counsel for the appellant (539C) that the crucial phrase "in, or in the interest of, the performance of the functions of the State" must be read disjunctively (539B). The judge then clearly demonstrates that the compressed wording of this section could be reflected as follows: (i) In the performance of the functions of the State; *or* (ii) in the interest of the performance of the functions of the State (539B–C). The reference of this section under (i) is to a narrow performance of work by a passenger in the interest of the State, or, as the judge formulated it, "linked to the performance of State functions" (eg being transported to a building site to work there), whereas the reference under (ii) clearly pertains to a much wider scope of activity, as explained by Mpati DP as follows (539D–E):

> "The latter concept is wider than the former . . . The policy of making vehicles available to workers to attend funerals of deceased colleagues was clearly an industrial-relations exercise . . . In my view, it is in the interest of

> the performance of the functions of the State . . . that good relations prevail between management and workers."

It is suggested that this interpretation is clearly correct. No reference is made to the principles of statutory interpretation in coming to this conclusion. However, in applying one's mind to this issue, it is clear that the judge's interpretation is in conformity with well-known canons of statutory interpretation. The rule in question is that each word in a statute must be given a meaning (see, eg, Du Plessis *Re-Interpretation of Statutes* (2002) 212 *et seq*). De Ville (*Constitutional and Statutory Interpretation* (2000) 114) regards this precept of construction as a rule of grammatical interpretation (for which, see Du Plessis 197 *et seq*) or as a presumption of statutory interpretation (for which, see Du Plessis 149 *et seq*). The relevant presumption here would be that statute law is not invalid or purposeless (Du Plessis 187 *et seq*). (For our purposes it is irrelevant which theoretical explanation is to be given to this rule.) If the wording of the relevant phrase in section 40 would not have been read disjunctively, but would have been interpreted to connote merely the narrow meaning, it would imply that the words "or in the interest of" are devoid of any meaning. This would clearly fly in the face of the statutory rule of interpretation mentioned above.

4 Conclusion

Viewing this judgment superficially, one could gain the impression that equity as such played an overriding role in the final decision of the court, in particular in respect of the issue of the presence or absence of a statutory indemnity. However, it is quite clear that the decisions reached in regard to the two crucial aspects discussed above are in conformity with strict legal principles. This is indeed one of those cases which one can read and then conclude with satisfaction that *ius* and *iustia* coincided.

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