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Case no 487/82
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THE MINISTER OF POLICE

and

ANDRé RABIE

JANSEN JA.

Case no 487/82
mc

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE MINISTER OF POLICE ..... Appellant

- and -

ANDRé RABIE ..... Respondent

Coram: JANSEN, JOUBERT, CILLIé, VAN HEERDEN JJA et VIVIER AJA.

Heard: 3 September 1984.

Delivered: 27 September 1985.

J U D G M E N T

JANSEN JA:-

I have had the benefit of reading the judgment of VAN HEERDEN JA but I find myself in respectful disagree=ment with the conclusion at which he arrives. The facts appear from his judgment as well as from the judgment of the Court a quo (reported at 1984(1) SA 786) and they need not be repeated in extenso.

In view of the decisions in Minister van Polisie en 'n Ander v Gamble en 'n Ander (1979(4) SA 759(A)) and Minister of Police v Mbilini (1983(3) SA 705(A)) the cardinal question is whether the respondent has proved that Van der Westhuizen was acting "in the course or scope of his employment" as a servant of the State, i.e. whether he was doing the State's work, viz police work, when he committed the wrongs in question. In this regard the State is in no better position than any other employer. (It would seem that instances of a policeman momentarily ceasing to be a servant pro hac vice because of e.g. an exercise of discretion, if they do occur at all, are now exceptional.)

Two facets of the inquiry may be identified :

(a) What was the scope of Van der Westhuizen's employment, and (b) what was the relation of the acts done by Van der Westhuizen to the functions he had to carry out.

According to the statement of admitted facts Van der Westhuizen was during the period 31 December 1980 to July 1981 employed in the South African Police Force :-

> " (i) as a policeman in the mechanical section of the South African Police at Boksburg,
>
> (ii) his duties were that of a mechanic, i e to repair police vehicles,
>
> (iii) ..... he worked office hours and went off duty on 31st December 1980 at 16h15."

It seems a fair inference that his work was usually done at particular premises. However, his appointment as a policeman (with the rank of sergeant) also makes sec 6(1) of the Police Act, 1958 (No 7) applicable to him: "A member of the Force shall exercise such

powers and perform such duties as are by law conferred or imposed on a police officer or constable ....."

The functions of the Police are defined in sec 5 to be inter alia :

> "(a) the preservation of the internal security of the Republic;
>
> (b) the maintenance of law and order;
>
> (c) the investigation of any offence or alleged offence; and
>
> (d) the prevention of crime."

These functions include the making of an arrest (Mhlongo v Minister of Police 1978(2) SA 551 (A), at 569H - 570) and, in my view, also the taking of the arrested person to the charge office (cf sec 50 of Act 51 of 1977) and charging him with an alleged offence. Preliminary questioning of a suspect before arrest would also fall within the purview of these functions, and in certain circumstances the use of force in making an arrest and in bringing the arrested person to the charge office.

Whereas Van der Westhuizen's work as a mechanic was limited as to time and place his work as a policeman was not so circumscribed. In the absence of specific instructions to the contrary (and none have been brought to our attention) he could obviously at any time and at any place embark on the discharge of his police functions. In certain circumstances it might even have been his duty to do so (cf Mazeka v Minister of Justice 1956(1) SA 312(A) at 317 F-G) but in others it would have been a matter of discretion.

This disposes of the first facet of the inquiry, viz the scope of the work entrusted to Van der Westhuizen. The second facet bearing on the relation of the acts done by Van der Westhuizen to the functions he had to carry out, may now be proceeded with.

It is true that at the time and place in question Van der Westhuizen was dressed in private

clothing , in his private vehicle in Malvern and on the scene in pursuance of private interests. However, these circumstances do not per se exclude the possibility of his having then embarked upon police work. As has been pointed out above, he could at any time decide to proceed as a policeman if the circumstances so required. Van der Westhuizen certainly professed at the material time to act as a policeman: he identified himself to the respondent as a policeman, by stating that he was a policeman and that he was arresting the respondent and taking him to the police station. It also seems a fair inference that he intended throughout

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to act as a policeman, in the sense of intending to exercise his authority as a policeman. He also later told the Divisional Commissioner of Police that he had considered himself as being on duty at the time of the assault.

Questioning of a suspect, arresting him, taking him to the police station and charging him would normally be categorized as police work. However, it is contended by the appellant that Van der Westhuizen at no stage acted in terms of the Police Act, that his conduct was unrelated to his employment and that in reality he was engaged upon a private and personal action that had nothing to do with police work, but flowed from malice and the furthering of his own interests. In view of the analysis by VAN HEERDEN JA I am prepared to accept in favour of the appellant that on the stated case and the evidence of the respondent the probabilities are that Van der Westhuizen, in committing the delicts in question, was totally self-serving and mala fide, and that he knew from the very beginning that the respondent was innocent and that

there were no grounds for using his powers as a policeman. Moreover, that Van der Westhuizen was actuated by malice, is clearly evident from the nature of the assaults upon the respondent and the laying of a false charge. It follows that Van der Westhuizen, whatever his ostensible conduct, was not in reality performing any of the functions set out in sec 5 of the Police Act. The contention by the appellant therefore raises the question whether in these circum= stances the wrongs committed by Van der Westhuizen could at all be said to have been done "in the course or scope" of his employment.

It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the

course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf Estate van der Byl v Swanepoel, 1927 AD 141, 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the Salmond test (cited by GREENBERG JA in Feldman (Pty) Ltd v Mall 1945 AD 733 at 774) "a master ..... is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them ....."

Our leading cases mostly deal with deviations

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by the servant from his duties at a time when he is actually engaged on his master's work, and the tests there applied do not seem wholly apposite to the present type of case where the servant during the pursuit of his own private affairs ostensibly embarked on his master's business. Nor do I understand the judgments of e g WATERMEYER CJ and TINDALL JA in Mall or that of RAMSBOTTOM JA in African Guarantee & Indemnity Co v Minister of Justice (1959(2) SA 437 at 447) necessarily to go beyond the deviation cases and to prescribe rules for all circumstances.

In my view a more apposite approach to the present case would proceed from the basis for vicarious liability mentioned by WATERMEYER CJ in Feldman at 741:-

> "..... a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to

> be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work ....."

By approaching the problem whether Van der Westhuizen's acts were done "within the course or scope of his employment" from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing Van der Westhuizen as a member of the Force, and thus clothing him with all the ~~xxxxxxxxx~~ powers involved, the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse these powers for his own purposes or otherwise, by way of unjustified

arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed.

It is not necessary in the present case to define the limits of liability based on the creation of risk in this context. Suffice it to say that in the particular circumstances of the present case and in the light of the aforegoing the State, in view of the risk it created, should be held liable for Van der Westhuizen's wrongs. I may add in regard to the malicious prosecution that I agree with the Court a quo that the chain of causation was not broken.

The appeal is dismissed with costs.

E.L. JANSEN JA.

JOUBERT JA)
CILLIé JA) Concurred
VIVIER AJA)