THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 519/2002

In the matter between

DRS PIERRE VAN DRIMMELEN & PARTNERS	**Appellant**

and

HAYLEY GOWAR	**First Respondent**
BEVERLEY ANNE AUCAMP	**Second Respondent**
THE ROAD ACCIDENT FUND	**Third Respondent**

CORAM: ZULMAN, FARLAM and HEHER JJA

HEARD: 11 NOVEMBER 2003

DELIVERED: 24 NOVEMBER 2003

Vicarious liability – employee intending to perform an act for his own

personal convenience which might ultimately have a bearing on his employer's business does not *per se* render his employer liable for a delict committed by the employee before and even after performing the act.

JUDGMENT

ZULMAN JA

[1] The sole issue in this appeal, which is brought with the leave of the court *a quo,* is whether the appellant is vicariously liable for the negligence of a Mr Du Randt.

[2] On 29 December 1994 at approximately 18h30 two collisions occurred on the south north section of the N1 Highway between Johannesburg and Pretoria at or near the Buccleuch interchange. In the first collision a motor vehicle driven by Du Randt in which the first respondent was a passenger collided with a bridge and/or concrete barrier. Shortly thereafter another vehicle driven by Mr P D Kumpf collided with the vehicle driven by Du Randt.

[3] The first respondent was a minor at the time of the collisions. The second respondent is the first respondent's mother. The second respondent, in a first action sued the appellant for damages arising from bodily injuries sustained by the first respondent in the collisions, alleging that the collisions were caused by the negligence of Du Randt. Du Randt was cited as the first defendant and appeared in person at the trial but is not a party in the appeal. It was also alleged that the appellant was liable to the first and second respondents on the basis that Du Randt was at all material times an employee of the appellant and acted within the course and scope of his employment with the appellant at the relevant time. In a second action against the third respondent the first and second respondents alleged that the second collision was caused by the joint negligence of Du

Randt and Kumpf, alternatively the sole negligence of Kumpf. Damages were claimed from the third respondent as a result of the bodily injuries sustained by the first respondent in the second collision. By agreement the two actions were consolidated. By consent of the parties the court *a quo* was only required to decide whether the appellant was vicariously liable for the damages sustained in the aforementioned collisions. The court *a quo* found that the appellant was indeed so liable.

[4] The principles applicable to vicarious liability have been debated and elaborated upon in numerous decisions of this court.[1] Although the principles are by now, in a large measure, plain, the difficulty often lies in their application to the particular facts of a case.[2] The basic formulation of the principle underlying vicarious responsibility was laid down as long ago as 1914 by Innes CJ in *Mkize v Martens*[3] in these terms:

> '… a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely <u>for his own interests and purposes</u>, and outside his authority, is not in the course of his employment, even though it may have been done during his employment.'
>
> (The emphasis is mine)

[5] Vicarious liability is imposed on innocent employers by a rule of law

[1] See for example *Mkize v Martens* 1914 AD 382, *Estate Van der Byl v Swanepoel* 1927 AD 141, *Feldman (Pty) Ltd v Mall* 1945 AD 733, *Minister of Police v Rabie* 1986 (1) SA 117 (AD) and more recently *Absa Bank Ltd v Bond Equipment (Pretoria)(Pty) Ltd* 2001 (1) SA 372 (SCA), *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA), *Messina Associated Carriers v Kleinhaus* 2001 (3) SA 868 (SCA), *Bezuidenhout NO v Eskom* 2003(3) SA 83 (SCA), *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA) and *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA).

[2] Cf *Mkize v Martens* (*supra*) at 391 and *Ilkiw and Others v Samuels and Others* [1963] 2 All ER 879 (CA) at 889 A-B.

[3] Supra at 390.

and what is required to be emphasised is that the rule and the reason for its existence must not be confused[4].

[6] In order to render a master liable the servant must have committed the delict 'while engaged upon the master's business'[5]. Ownership by the master, for example of a vehicle, through which the harm was done, may provide material for inference, but by itself is irrelevant. Accordingly the master will not be liable merely because he is the owner of the vehicle used by the servant with his permission and entrusted by him to the servant.[6]

[7] The answer to the question as to whether an employer is vicariously liable for the particular acts of an employee which are complained of will depend on a careful analysis of the facts of each case and also considerations of policy.[7] As recently stated by Heher JA in *Bezuidenhout NO v Eskom,*[8] 'the determination of whether an act falls within or without the scope of employment is a question of fact and often one of degree' and 'in determining the scope of employment one should not look narrowly at the particular act which causes the delict, but rather at the broader scope of which the particular act may represent only a part.'.

[8] If the act relied upon is one which is personal to the employee dependent upon the exercise of his own discretion and for his own convenience, even if the exercise of that personal act was subsequently to further the business or affairs of his employer, this would not *per se* mean that the servant was performing the act in the course and scope of his employment.[9] Indeed, and in any event, the act may, in certain circumstances, be merely 'peripheral' to the master's business.[10] If for example, as was the situation in *Carter's* case[11], a servant hurries from his own personal business in order that he may return with the least delay to perform his master's work, he is still about his own business alone.

[9] The facts in this matter which are either common cause, or not in dispute, or which, even if disputed, may for the purposes of deciding the

[4] See the remarks of Howie JA in *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Limited* (*supra*) at 1218 F para [7] to 1219 E para [10].

[5] *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (AD) at 207B – C.

[6] *Carter & Co (Pty) Ltd v McDonald* (*supra*) at 207 E – F.

[7] Cf *Messina Associated Carriers v Kleinhaus* (supra) at 875[para] 15 H – I.

[8] *Supra* at 94 C para [23] and 93 C para[21].

[9] Cf *Union Government (Minister of Justice) v Thorne* 1930 AD 47 at 51 and *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (AD) at 567 E-H.

[10] *Messina Associated Carriers v Kleinhaus* (supra) at 875 F-G para [14].

[11] *Carter & Co (Pty) Ltd v McDonald* (*supra*) at 209 F.

issue be resolved in favour of the respondents,[12] and having due regard to the factual findings of the court *a quo*, are as follows:

9.1 At all material times the first respondent was employed by the appellant as a switchboard operator at its laboratory at the Bosman Building in Johannesburg. The second respondent was also employed there by the appellant.

9.2 At the time of the collisions Du Randt, a Mr Pretorius and a Mr Snyman were employed as machine technicians by the appellant. Pretorius was the senior technician.

9.3 The appellant was the owner of the motor vehicle then being driven by Du Randt. Du Randt had the use of the vehicle for both business and private purposes. Du Randt was entitled to transport passengers in the vehicle. During working hours he was only entitled to transport business passengers, but after business hours he was entitled to transport social passengers.

9.4 On the day of the collisions Du Randt worked from approximately 08h00 in the morning until 17h00 in the afternoon.

9.5 After returning to the appellant's laboratory in Johannesburg from Pietersburg on the afternoon of the day in question, he was asked by Pretorius whether he was prepared to work in Snyman's place in Johannesburg to enable Snyman to accompany Pretorius to Cape Town over the forthcoming New Year's weekend. If he agreed to this Du Randt would get a week of his choice off from work. Du Randt told Pretorius that he would look at his 'skietprogram' in order to decide and that he would let Pretorius know of his decision 'daardie aand of vroeg die volgende oggend'.

9.6 The court *a* quo found that after leaving the appellants laboratory that afternoon Du Randt was either 'on call' or 'not on call'. Whether Du Randt was on call or not he was nevertheless entitled to go about his own private business in whatever manner he chose.

9.7 He chose to go to the first respondent's sister's residence to fetch the first respondent, who was his girlfriend. He intended thereafter to proceed with her to his home in Pretoria and having washed and changed he and the first respondent proposed to go dancing at a club in Pretoria

[12] Cf the approach to disputes of fact in motion proceedings for example in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 at 235 E – G.

(Club Topaz). After reaching his home in Pretoria and checking his 'skietprogram' or 'skietprogram' he also intended to communicate with Snyman and Pretorius to advise them of his decision. (Pretorius's home is opposite Du Randt's home and Snyman lived very nearby).

9.8 After fetching the first respondent at her sister's home, Du Randt, as a result of a request conveyed by the second respondent travelled with the first respondent to the Marymount Hospital to attend to a problem with a machine.

9.9 Thereafter Du Randt proceeded with the first respondent towards his home in Pretoria. Before reaching his home the collisions occurred.

9.10 According to the second respondent's evidence in chief, upon hearing of the collisions and the injury to the first respondent she telephoned Snyman 'om vir Mnr Snyman te sê dat Mnr du Randt en Hayley [first respondent] in 'n ongeluk is, hulle sou nie by die vergadering wees nie.'

[10] In my view upon a proper analysis of this evidence and the probabilities, at the time the collisions occurred Du Randt was about his own private business and personal interests, namely getting to his home.[13] What he intended to do at his home, is not directly relevant to the enquiry as to whether at the time that the collisions occurred he was acting in the course and scope of his employment which it is stressed, took place, before he got there. The decision that he proposed to make and convey to Pretorius after consulting his 'skietprogram' had a bearing on the appellant's business. Nevertheless, on a broad and realistic view of the matter, that was something which depended on his own personal convenience. Put

[13] Cf *Mkize v Martens* (supra) at 390, *Estate van der Byl v Swanepoel* (supra) at 150, *Minister of Police v Rabie* (supra) at 134 C – F and *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* (supra) at 1218 F – H (para [7]).

differently consulting his 'skietprogram' and thereafter conveying his decision was merely 'peripheral' to his employer's business. Upon getting to his home Du Randt might have decided simply to telephone his co-employees, or to walk to Pretorius's home and give the simple answer to the question of whether or not he would be prepared to work on the weekend in question. Du Randt's dominant purpose at the time that the collisions occurred was to get to his home to wash and change and consult his 'skietprogram' and thereafter to convey the first respondent and himself in the appellant's vehicle to Club Topaz.

[11] In all of the circumstances the evidence did not reveal that at the relevant time Du Randt was acting in the course and scope of his employment with the appellant. I would accordingly allow the appeal with costs.

[12]. The following order is made:

12.1 The orders made by the court *a quo* are set aside and replaced by the following:

12.1.1 It is declared that the first defendant was not acting within the course and scope of his employment with the second defendant at the time when the two collisions referred to in the actions occurred.

12.1.2 The first and second plaintiffs and the first and third defendants are ordered to pay the second defendant's costs jointly and severally the one paying the other to be absolved.

12.2 The first, second and third respondents are ordered to pay the appellant's costs of appeal jointly and severally the one paying

the other to be absolved.

R H ZULMAN
JUDGE OF APPEAL

FARLAM JA)
HEHER JA)CONCUR