REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 486 / 01

In the matter between

COSTA DA OURA RESTAURANT (PROPRIETARY) LIMITED t/a UMDLOTI BUSH TAVERN
Appellant

and

ANTHONY REDDY
Respondent

Composition of the Court : **OLIVIER, SCOTT, ZULMAN, CAMERON and NAVSA JJA**

Date of hearing : **21 FEBRUARY 2003**

Date of delivery : **7 MARCH 2003**

SUMMARY

Delict - vicarious liability of employer for assault perpetrated by employee barman on customer. Usefulness of agreed statement of facts after trial for purposes of appeal highlighted.

J U D G M E N T

P J J OLIVIER JA

[1] During November 1999 the respondent instituted action in the Durban and Coast Local Division of the High Court against the Appellant for payment of the amount of R122 536,00. The respondent alleged that he, accompanied by his girlfriend, were patrons at the defendant's tavern, comprising a restaurant and bar, during the early evening of 31 October 1997. He further alleged that he was then unlawfully assaulted by one Goldie, who was employed by the appellant as a part time barman. He suffered injuries and alleged that the appellant, is vicariously liable for the latter's conduct.

[2] A trial on the merits took place before Pillay J. On 20 July 2001 the learned judge ruled in favour of the respondent, declaring that the appellant was liable to the respondent for payment of such damages as may be proved or agreed upon. It was also ordered that the appellant was liable for the respondent's costs. Pillay J later granted leave to the appellant to appeal to this Court.

[3] Pending the appeal, the parties had agreed on a statement of

facts which would replace the record of the trial proceedings and serve as the exclusive basis on which the appeal should be adjudicated. This was a commendable course of action agreed upon by the legal representatives of both parties. It made the task of this Court much easier, and also contributed to the hearing of this matter in this Court taking place a mere seven months after the lodging of the appeal record. It is a course of action that should be followed in more cases.

[4] The agreed facts are the following:

'THE FACTS:

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(a) The Respondent is a 38 year old computer network technician.

(b) The Appellant is a duly registered company with limited liability, which conducts business as the Umdloti Bush Tavern.

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The Umdloti Bush Tavern is a family restaurant and bar. It is situated on the first floor of a building situated in Umdloti. Entrance to the building is gained on the ground floor, as demonstrated by photo 1 of the photographs annexed hereto. Steps lead from the ground floor entrance into a corridor shown in photo 3. The first floor entrance to the Umdloti Beach Tavern is shown in photographs 5 and 6.

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The Umdloti Bush Tavern consists of a restaurant area and a bar area shaped in a horseshoe with seating available around the bar.

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Seating for about 200 people is available.

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The Umdloti Bush Tavern employed five managers, twelve kitchen staff members and about twenty waiters and barmen.

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It is frequented by people of all races, ages and gender. It stays open until late at night.

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Periodically people abuse alcohol in circumstances which could lead to confrontation. When that happens, the management members endeavour to identify potential problems in advance and try to resolve them.

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The Umdloti Bush Tavern does not employ bouncers. In terms of its policy, staff members involved in situations of potential conflict are required to obtain the assistance of management, on the basis that a manager will attend to the problem.

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At all times material the Umdloti Bush Tavern had a training programme in place, in terms of which it informally trained its employees *inter alia* on how to treat customers.

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At the time of the incident Goldie had been employed at the Umdloti Bush Tavern for about a year. He was employed as a casual hourly paid barman. (No written contract was concluded.)

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Goldie's duties in terms of his employment, included the following:

(a) he was specifically required to treat customers with courtesy;

(b) he had to serve drinks or food (from behind the bar), as the case may be, stock the bar (when required) and offer help where required;

(c) he was instructed not to get involved in any incidents and, in the event of a potential situation developing, required to report the matter to management;
(d) where possible, he had to serve customers without keeping them waiting;
(e) he had to refrain from engaging in any situation that could result in an altercation.

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On the evening of 31st October 1997 the Respondent and his girlfriend went to the Umdloti Bush Tavern and seated themselves at the horseshoe shaped bar.

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Goldie was on duty from 18h00 until 03h00 the following morning.

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Upon the arrival of the Respondent and his girlfriend, Goldie was stationed behind the bar.

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The Respondent and his girlfriend waited at the bar for service. It appeared to them that Goldie was serving everyone else besides the Respondent and his girlfriend.

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After some time the Respondent was served by another barman. While he was being served, the Respondent mentioned to the other barman that Goldie could take a few lessons from him on how to serve customers.

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This was stated within earshot of Goldie, who, in response, glared at the Respondent.

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Thereafter Goldie came over to the Respondent and, from behind

the bar, beckoned him to come closer with his right forefinger.

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The Respondent responded by saying words to the effect that he "*did not come for people like that*".

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This agitated Goldie who, thereafter, occasionally glared at the Respondent and appeared to be aggressive. He was visibly upset and, whilst glaring at the Respondent, nodded his head as if to convey something.

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Goldie resented being criticised for lack of service in circumstances where, in his view, he tried to serve everyone as quickly as possible. He agreed that he was upset but denied that he intended to intimidate the Respondent.

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At some stage Goldie reported the incident to a member of management, who told him not to get involved with the Respondent and to allow another barman to served the Respondent.

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When the Respondent and his girlfriend decided to leave, the Respondent generously tipped the other barman.

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Goldie noticed this.

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As they were about to leave, Goldie left the bar area and quickly exited through the main entrance to the premises.

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The Respondent and his girlfriend met up with Goldie in the corridor immediately outside of the glass door on the premises, as shown on photographs 2, 5, 6, 7 and 8.

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There Goldie immediately commenced punching the Respondent and, when he fell to the ground, repeatedly kicked him with booted feet, in particular, on his right leg. As a result of the attack the Respondent sustained injuries including the fractures referred to *supra*.

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During the attack Goldie did not say anything. Goldie then left the area.

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The attack took place in the immediate vicinity of the bar and within a minute of the Respondent and his girlfriend leaving the bar.

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Immediately after the incident the manager of the Umdloti Bush Tavern found Goldie downstairs, summarily dismissed Goldie because he had broken the rules that regulated how he should perform his basic duties. Under cross-examination the manager made the following concession:

> '*I think it must follow, Mr Connor, that that is why you fired him, because in the course of his work he didn't comply with the basic duties that you expected him to comply with, hence you were well within your rights to terminate his employment. Doesn't that follow?*
>
> *It would appear so.*'

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The diagram and photographs incorporated in the appeal record correctly reflect the layout of the premises and the corridor immediately outside of the door giving entrance to the Umdloti Bush Tavern.

THE LEGAL ISSUE:

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It is agreed, against this background, that the only issue for determination by the above Honourable Court is whether the Appellant is vicariously liable for the actions of Goldie.

THE CONTENTIONS OF THE PARTIES:

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The Respondent contends that, for the reasons which follow, the actions of Goldie were sufficiently closely connected with his duties to render the Appellant liable:

(a) the incident occurred whilst:

(i) Goldie was employed by the Appellant;

(ii) Goldie was on duty;

(ii) Goldie was required to serve the Respondent;

(iv) Goldie was obliged to comply with his duties and the abovementioned instructions regulating the treatment of customers;

(v) the Respondent and Goldie were upon or within the immediate vicinity of the premises of the Appellant;

(b) The attack followed within a short space of time after the incident in the bar;

(c) the attack arose because Goldie felt provoked by the Respondent whilst he was in the process of exercising his functions;

(d) Goldie failed to comply with the instructions of his employer;

(e) in time, space and nexus, Goldie's actions were sufficiently closely connected with his duties, to render the Appellant liable;

(f) it would be artificial to break the events into separate compartments in terms of cause and effect, in circumstances where the incident commenced at the bar, whilst Goldie was in the process of serving customers, and culminated shortly thereafter, and as a direct result thereof, immediately outside the premises.

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The Appellant contends that it is not vicariously liable for the actions of Goldie, on the basis that:

(a) the incident occurred after the Respondent and his girlfriend had left the restaurant, after consuming two or three drinks;

(b) Goldie's actions arose from an act of personal vengeance;

(c) instead of devoting his time to the Appellant's business, Goldie, acting in pursuit of his own, abandoned the Appellant's premises in order to pursue his act of assault.

(d) the act was a deliberate one put into operation by Goldie after he had abandoned his duties with the Appellant;

(e) it cannot be said that, at the time of the assault, Goldie was still exercising any function to which he was appointed, nor can it be suggested that Goldie was acting in the furtherance of the interests of the Appellant.

CONCLUSION:

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In the event of the above honourable court finding in favour of the Appellant, the appeal should be upheld, with costs and the finding of the Court *a quo* should be set aside and replaced with a finding dismissing the Respondent's action, with costs.

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In the event of the above Honourable Court finding in favour of the Respondent, the appeal should be dismissed, with costs, and the matter referred tot he Court *a quo* for the determination of quantum.'

[5] As was to be expected, appellant's counsel described the

assaults perpetrated by Goldie on the respondent as occurring during a frolic of his own, for which the appellant is not liable. It is perhaps necessary to repeat what Watermeyer CJ said in *Feldman (Pty) Ltd v Mall* 1945 AD 731 at 743 - 744:

> 'Another form in which the law is sometimes stated is that a master is liable for those wrongful acts of a servant which are done while he is on his master's business but not for those which are done while he is on a frolic of his own. This statement of the principle is misleading. The question is not whether the servant was on a frolic of his own at the time when the wrongful act was done but whether the act causing damage was an act done by the servant in his capacity as servant and not as an independent individual. The phrase "frolic of his own" comes from the judgment of Baron Parke in *Joel v Morrison* (6 C. & P., at p. 503), but Baron Parke carefully qualified the phrase. He said: "If he be going on a frolic of his own *without being at all on his master's business* the master will not be liable." This qualification is necessary because the servant, while on his frolic may at the same time be doing his master's work and also because a servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage.'

This qualification was repeated, *inter alia*, in *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 827 B, where Kumleben JA stated:

> 'The critical consideration is therefore whether the wrongdoer was engaged in the affairs of business of his employer. (I shall refer to it as the 'standard test' or 'general principle?) It has been

> consistently recognised and applied, though - since it lacks exactitude - *with difficulty when the facts are close to the borderline.*' (My emphasis)

In the court *a quo* Pillay J referred to a number of reported cases, in particular to the judgment by Schreiner J of *Moosa v Duma and the Vereeniging Municipality* 1944 TPD 30, and quoted from p 39 of the report as follows:

> 'I have had considerable difficulty in deciding whether in the circumstances of this case the incidents were part of the performance by the first respondent of his function of explanation, or whether, though the quarrel arose out of the work he was employed to do, his tortious acts were merely personal and capricious, so as not to fix the municipality with liability. Where a servant having had a quarrel with a member of the public as a result of an interview arising out of the servant's work assaults or defames the other party as a distinct act - doing it perhaps, elsewhere than at his place of employment or after a considerable interval, one would not be disposed to hold the employer liable simply because the quarrel arose out of a matter falling within the servant's functions. *But where the quarrel arises at once out of the servant's performance of his work and is followed there and then by the tortious act it seems to me that the proper interpretation of the servant's behaviour is that he is improperly carrying out what he was employed to do and not that he was acting out of personal malice or caprice*.' (My emphasis)

Pillay J continued:

> '*In casu*, it was not a grudge which Goldie harboured against the Plaintiff independently of his work situation. It was a grudge which arose directly out of Goldie's performance of his duties as a barman. The digression or deviation, if any, from what Goldie was employed to do, and what he in fact did was so close in terms of space and time that it can reasonably be held that he was still acting within the course and scope of his employment.'

[6] I disagree with the conclusion reached by PillayJ. There are many cases illustrating the application of the principle of vicarious liability, here and overseas. The case that I find particularly instructive is *Deatons (Pty) Ltd v Flew* which was heard by the High Court of Australia. The judgment is reported in (1949) 79 Commonwealth Law Reports 370. The facts were that the plaintiff went into a public bar. He was under the influence of liquor. While making his way through the customers at the bar, he upset a number of glasses of beer. The barmaid then asked him to leave. He then used bad language and struck her on the side of her face. She responded by throwing the glass of beer that she was holding into his face, but the glass slipped out of her hand and struck his face, as a result of which he lost an eye. The High Court held that on these findings the defendant, the owner of the bar, could not be held vicariously liable for the delict committed by the barmaid.

Dixon J encapsulated his conclusion as follows at 381 - 382 of the report:

> 'The truth is that it was an act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid.'

[7] If one applies the basic principles of our law relating to the vicarious liability of an employer for the wrongs committed by an employee (see *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bpk* 2002 (5) SA 475 (SCA) for an overview of the latest decisions), the conclusion so elegantly worded by Dixon J in *Deaton*'s case, is also particularly applicable to the appeal now under consideration. The assault by Goldie on the respondent outside the tavern occurred after he had abandoned his duties. It was a personal act of aggression done neither in furtherance of his employer's interests, nor under his express or implied authority, nor as an incident to or in consequence of anything Goldie was employed to do. The reasons for and the circumstances leading up to the assault may have arisen from the fact that Goldie was employed by

the appellant as a barman, but personal vindictiveness leading to the assaults on patrons does not render the employer liable.

[8] In the result the appeal succeeds with costs. The order of the court *a quo* is set aside and replaced by the following order:

'The plaintiff's claim is dismissed with costs.'

P J J OLIVIER JA

CONCURRING:

SCOTT JA
ZULMAN JA
CAMERON JA
NAVSA JA