THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 217/03

In the matter between:

THE MEC FOR DEPARTMENT OF PUBLIC WORKS (EASTERN CAPE) Appellant

and

THAMSANQA FALTEIN Respondent

CORAM: **MPATI DP, ZULMAN, BRAND, CLOETE and HEHER JJA**

HEARD: **7 MAY 2004**

DELIVERED: **28 MAY 2004**

Summary: Vicarious liability – driver employed as such but not authorised to drive on specific journey – whether acting in course and scope of his employment when taking over from authorised driver and negligently causing accident – whether employer indemnified from liability by s 40 - of Public Service Act, 1994.

JUDGMENT

MPATI DP:

[1] The respondent was an employee of the Department of Public Works in the Eastern Cape (the department) stationed at Grahamstown. On 16 November 1996 he sustained serious injuries in a collision near Whittlesea between a bus owned by the department and another motor vehicle. The respondent was a passenger in the bus together with other employees of the department and other persons. He sued the appellant, in his capacity as the Member of the Executive Council responsible for Public Works in the Eastern Cape Province, for payment of the sum of R1 364 000, alleged to be the difference between the damages actually suffered and an amount of R25 000 recoverable from the Multilateral Motor Vehicle Accident Fund in terms of Article 46(1)(a)(i) of the Agreement promulgated in accordance with Section 6 of the Multilateral Motor Vehicle Fund Act, 93 of 1989. It was alleged in the particulars of claim that the collision was caused solely by the negligent driving of Mr Owen Belwana, who was also an employee of the department, while acting in the course and scope of his employment as such.

[2] The appellant denied liability and pleaded that at the time of the collision the bus was being operated by the passengers, including the respondent, in the course of a private contract of loan concluded between

them and the department. He accordingly denied that Belwana was acting in the course and scope of his employment at the time of the collision.

[3] At the commencement of the trial the court *a quo* (White J) granted an order by agreement separating the issues of liability and quantum. The trial proceeded on the issue of liability only. At the conclusion of the trial White J found in favour of the respondent. This appeal is with his leave.

[4] In this court the finding of the court *a quo* that the accident was due to the negligence of the driver, Belwana, was not challenged. The main issue in this appeal therefore is whether at the time of the accident Belwana was acting in the course and scope of his employment with the appellant. A related issue is the nature of the agreement concluded between the appellant and the passengers in the bus. If the main issue is determined in favour of the respondent, then two further issues arise for consideration, viz:

1. Whether the respondent had entered into an agreement with the appellant in terms of which he indemnified the appellant against injury or loss that he might suffer as a result of his conveyance on the bus; and
2. Whether the respondent is precluded by the provisions of Section 40

of the Public Service Act 1994 from claiming compensation from the appellant.

[5] It was common cause at the trial that it had been the policy of management, not only in Grahamstown but also at two other depots of the department in Graaff-Reinet and Lusikisiki, that in the event of the death of an employee a bus would be available by the department to convey employees, who so wished, to attend the funeral of such deceased employee. The deceased's relatives and friends were also permitted to travel on the bus. The understanding was that the employees who would attend the funeral would appoint, from amongst their number, a person who was employed by the department as a driver to drive the bus. He would then be given a written authority to do so by management.

[6] In November 1996 the employees at the Grahamstown depot wished to attend the funeral of a colleague who was to be buried at Cala. The funeral was scheduled to take place on 16 November 1996. The workers approached the resident engineer in charge of the depot at the time, Mr Jan van Zyl Smit (Smit) and asked him to make a bus available to them. Smit agreed. However, remembering that there had been a change of policy, he called for and received a circular from the Lusikisiki depot, which

required, inter alia, that ‘use of Government-owned motor transport for funeral purposes by officials/employees be discontinued forthwith’. When the shop stewards were informed about the change in policy they did not accept the decision. They claimed that management had acted unilaterally without consultation. Smit consequently telephoned the director of the department, Mr Cocks, who, after discussing the matter with Smit and the respondent, who was also a shop steward, authorised the use of the bus. After further discussion it was agreed between Smit and the workers that the bus, which would be made available with a full tank of fuel, was to be returned in the same condition, ie with a full fuel tank, a responsibility that the workers accepted. They were then asked to prepare a list of those who wished to attend the funeral. Mr Gladman Magadla (Magadla) was nominated as the driver of the bus and he was accordingly given the necessary written authority.

[7] It is not in dispute that on the day of the funeral Magadla drove the bus to Cala, but that after the funeral and when he boarded the bus with the intention of driving it back to Grahamstown, he found Belwana sitting behind the steering wheel. In his testimony Magadla denied that he allowed Belwana to drive the bus. He said that when he saw Belwana sitting behind

the steering wheel he did not want to cause an argument by insisting that he (Magadla) was the one authorised to drive the bus. He testified, however, that when he asked the people in the bus whether Belwana could drive back to Grahamstown they made it clear that they did not want him (Magadla) to drive again.

[8] It was common cause at the trial that a shop steward was appointed, by those attending a funeral, to be in control on the bus. The respondent bore that responsibility on the day in question. He testified that the person in charge had to ensure that discipline prevailed during the journey and that the agreement between management and the workers was complied with. He said, however, that drivers were appointed by management and that the person in charge had no authority over them. He accordingly could not forbid Belwana to drive the bus.

[9] In substantiation of the appellant's case that neither Magadla nor Belwana was not acting in the course and scope of his employment when each drove the bus, Smit testified that the workers were not on duty over weekends and thus attended the funerals of deceased colleagues in their own time. The department, as said, made busses available to its workers as a goodwill gesture and the drivers were never paid by the department

for driving on these occasions. They drove on a voluntary basis (save where a driver transported a deceased worker's belongings, in which case he would be paid). Smit conceded, however, that drivers had to adhere to certain rules and regulations of the department governing the way in which they drove. They were subject to the instructions of management as to where they could and could not go. They would drive the busses to the funerals as if it was a normal day at work. With regard to the instant case, he said that the people in the bus had no authority to change the driver. However, because Belwana was allowed by the shop stewards to take over from Magadla, this was out of management's control and management could not discipline Belwana, although he drove without management's consent.

[10] The issue whether at the time of the collision Belwana was acting in the course and scope of his employment with the appellant necessarily involves an enquiry into whether Magadla, the 'authorised driver', was acting in the course and scope of his employment when he drove the bus on the day in question. The critical consideration, then, is whether the drivers, in particular Belwana, were engaged in the affairs or business of their employer. *Estate Van der Byl v Swanepoel* 1927 AD 141; *Minister of*

Law and Order v Ngobo 1992 (4) SA 822 (A) at 827B. A master is liable for damage caused to a third party by the negligence of his servant when the servant is clearly acting wholly within the scope of his authority, or in other words, when the servant is doing exactly what his master told him to do. *Van der Byl v Swanepoel*, supra, at 145. And what is generally regarded as the most important consideration for the purpose of deciding whether a person is a servant at common law, is whether the employee 'has the right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed' *R v AMCA Services and another* 1959 (4) SA 207 (A) at 212H. In *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 De Villiers CJ expressed the test as follows:

'But while it may sometimes be a matter of extreme delicacy to decide whether the control reserved to the employer under the contract is of such a kind as to constitute the employer the master of the workmen, one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workmen under the contract; in other words unless the master not only has the right to prescribe to the workmen what work has to be done, but also the manner in which that work has to be done.'

(At 434 *in fin* and 435.)

[11] Magadla testified that he was paid by the department when he drove to a funeral. He was corroborated in this regard by Mr Temba Mfengwana, who was at the time employed by the department at the Grahamstown depot as a laboratory assistant. The latter was, during cross-examination, referred to a copy of the minutes of a meeting that was held on 12 June 1996, between management and shop stewards at which he was present, in which is recorded that 'only a qualified driver on a voluntary basis will drive a bus' conveying workers to a funeral. The witness agreed with the contents of the document and agreed that drivers volunteered to drive. The trial court made no finding on the issue, bearing in mind that Smit denied that the drivers were paid for driving to and from a deceased worker's funeral. The trial court also made no credibility findings and merely said that all the witnesses 'appeared to be striving to be honest'.

[12] Although proof of the allegation that drivers were paid would have placed the issue of course and scope beyond doubt, absence of payment would not, by itself, have constituted proof that the drivers were not acting within the course and scope of their employment when driving to and from a deceased employee's funeral. *Rodrigues and others v Alves and others* 1978 (4) SA 834 (A). Accordingly, counsel's argument that if Magadla's

evidence that he was paid for driving on the trip is accepted, then he was the person employed by the appellant for the purpose of driving the bus and that that excluded any possibility that Belwana could also have been driving the bus in the course and scope of his employment with the appellant, cannot be upheld.

[13] It is clear that on the day in question control of the bus was entrusted, by management, to Magadla for the purpose of conveying employees and other persons to Cala and back to Grahamstown. In this regard he was given written authority, albeit that the purpose of the written authority was to ensure that he would not be arrested for unauthorised use of one of the department's vehicles. Even though Magadla was nominated by the employees who were to attend the funeral to be the driver, he still had to receive instructions from management to drive the bus to and from Cala. He could not, for example, do whatever he pleased thereafter with the bus, nor could the passengers instruct him to convey them to some place other than the funeral. He was bound to adhere to management's instructions. In my view Magadla, was under the control of management when he drove the bus on the day in question.

[14] Belwana was employed by the department as a driver. Part of his

work was to convey workers to and from sites where they were to do duty. Smit testified that drivers at the depot had a blanket authority to drive the department's vehicles for a month at a time. And because of this, he said, 'if there was a problem with Mr Magadla I as management had no reason why Mr Belwana could not drive the bus'. It is for that reason, he said, that no action was taken against the two drivers. (He had testified that by allowing Belwana to take over from him, Magadla was also not without blame.)

[15] 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 to convey the passengers back to Grahamstown after the funeral. *Cf Rodriques v Alves*, supra. In that case an ex partner in a farming operation had lit a fire on the farm which had negligently been permitted to spread to a neighbouring farm causing damages. He was not employed on the farm but through boredom busied himself on it by supervising the labour force and washing vegetables, wearing working clothes and had a vegetable carrying sack. He was not remunerated. It was held that when he set fire to the grass he was clearly about the business of the appellants (his former partners). 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 would have had no objection to Belwana driving if something had happened to Magadla. And something did happen: the passengers did not want Magadla to drive back to Grahamstown. 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. Counsel for the appellant conceded, correctly in my view, that this finding disposes of the ancillary issue of the nature of the agreement concluded between management and the passengers who were conveyed on the bus.

The Indemnity

[16] Smit testified that when a departmental bus was used for attending a funeral, passengers had to sign a form in which they indemnified the appellant against any damage or loss suffered as a result of being conveyed on the bus. He said that on this occasion he had spoken to the shop stewards and it was agreed that such forms were to be signed. Temba Mfengwana, however, testified that the only persons who were

required to sign indemnity forms were relatives or friends of the deceased who wished to travel on the bus. Magadla's evidence was that the occasion at issue was the first where indemnities had to be given and only by non-workers. The respondent testified that Mr Calitz, the chief administration clerk, had asked him whether family members of the deceased were also going to travel on the bus and when he (the respondent) answered in the affirmative, Calitz gave him indemnity forms which he said should be signed by such family members. He handed the forms to another person – not an employee of the department – with instructions to get non-employers to complete the forms. It appears, however, that certain employees also signed the forms.

[17] It is unclear on the evidence whether only non-workers or also employees of the department had to sign indemnity forms. Although Smit testified at first that he had spoken to the shop stewards and that it was agreed that indemnity forms were to be signed, he could not recall whether or not he told them who had to sign the forms. Calitz was unavailable at the trial as he had resigned from the department in 1996. His whereabouts were unknown. The respondent did not sign an indemnity form. The appellant was obliged to establish, in answer to the respondent's claim in

delict, that the respondent had indemnified him against any damage or loss he might have suffered as a result of the collision. *Durban's Water Wonderland (Pty) Ltd v Botha and another* 1999 (1) SA 982 (SCA) at 991 D-G. He has failed to do so.

Indemnity in terms of Section 40 of the Public Service Act 1994

[18] This section reads:

'40 Limitation of liability

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: Provided that the provisions of this section shall not affect the liability of a person in the service of the State who in fully causes the said loss or damage.'

At the commencement of his argument in this court counsel for the appellant conceded that the words 'in, or in the interest of, the performance of the functions of the State' (the Afrikaans version is 'by, of in belang van, die verrigting van die werksaamhede van die Staat') must be read disjunctively, so that the exception applies not only to a person who is

conveyed in the performance of the functions of the State (‘by die verrigting van die werksaamhede van die Staat’), but also to a person who is conveyed in the interest of the performance of the functions of the State(‘in belang van die verrigting van die werksaamhede van die Staat’). In my view this concession was correctly made. The latter concept is wider than the former. The former would be limited to conveyance linked to the performance of State functions, which the present is not.

[19] The policy of making vehicles available to workers to attend funerals of deceased colleagues was clearly an industrial relations exercise. Smit said that it was done as a gesture of goodwill, obviously aimed at keeping the workforce happy. In my view, it is in the interest of the performance of the functions of the State (‘in belang van die verrigting van die werksaamhede van die Staat’) that good relations prevail between management and workers.

[20] It follows that the appeal must fail. The following order is made:

The appeal is dismissed with costs.

L MPATI

DP

CONCUR:

ZULMAN JA

BRAND JA

CLOETE JA

HEHER JA