THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 115/12

In the matter between:

THE MINISTER OF DEFENCE **APPELLANT**

and

LEON MARIUS VON BENECKE **RESPONDENT**

Neutral citation: *Minister of Defence v Von Benecke* (115/12) [2012] ZASCA 158 (15 November 2012)

Coram: HEHER, MALAN, THERON, WALLIS JJA AND SALDULKER AJA

Heard: 2 November 2012

Delivered: 15 November 2012

Updated:

Summary: Employment law – vicarious liability – South African Defence Force – theft of armaments by employee employed to care for them – policy considerations – closeness of connection between conduct of employee and the duties of his employment – employer liable.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Tuchten J sitting as court of first instance):

'The appeal is dismissed with costs including the costs of two counsel.'

JUDGMENT

HEHER JA (MALAN, THERON, WALLIS JJA AND SALDULKER AJA concurring):

[1] This is an appeal with leave of the trial court (Tuchten J) against a finding that the appellant (the Minister) is liable to pay damages to the plaintiff arising from an armed robbery that took place on 7 March 2003 at Three Birches on the road between Groblersdal and Bronkhorstspruit.

[2] By agreement the issues of quantum and liability were separated under rule 33(4). The trial proceeded on the latter issue on the basis of a stated case. As will be seen the real dispute between the parties was whether the agreed facts justified the court in holding the Minister vicariously liable for the acts and omissions of its employee, Jacob Motaung. The learned judge concluded that they established 'a sufficient connection between the conduct of Motaung and the purposes and business of the defendant' to render the Minister liable. It is that conclusion which will be revisited in this appeal.

The agreed facts

[3] The Minister was cited as defendant in his official capacity as head of the Department of Defence.

[4] During the robbery to which I have referred in the first paragraph of this judgment one Mahlangu shot the plaintiff, a 42 year old man, several times with an R4

assault rifle consisting of the elements which are referred to in the succeeding paragraphs.

[5] The body of that rifle had been stolen from the TEK Base of the South African Defence Force at Pretoria before January 2002, by unknown employees of the defendant, or, due to the unlawful and negligent actions of unknown employees of the Force, the rifle was provided or sold to Mahlangu.

[6] Between January 2002 and March 2003 the aforesaid Motaung stole various R4 rifle parts, ammunition and magazines from the 4th South African Infantry Military Base at Middelburg where he was employed and responsible, inter alia, for the safekeeping and storage of various dangerous infantry weapons including those parts, ammunition and magazines. Motaung provided the stolen items to Mahlangu and they were used by him to render the aforementioned rifle operable.

[7] Motaung knew or ought to have known that Mahlangu planned to use and did use the stolen rifle, parts, ammunition and magazines to commit armed robberies.

[8] As a direct result of the actions of Mahlangu in the robbery the plaintiff suffered injuries and harm and will in future suffer damages.

[9] Mahlangu was later shot dead by the police and his co-robbers were arrested and convicted of the murder of the plaintiff's partner and the armed robbery. The R4 rifle was recovered.

The legal questions put to the trial court

[10] The trial court was asked to decide whether:

(a) the actions of Motaung or other employees of the defendant constituted dolus or culpa;

(b) the defendant could be held vicariously liable for the actions of Motaung or the other unknown employees of the defendant;

(c) the injuries and damage suffered by the plaintiff were causally related to the actions of Motaung or the said employees;

(d) the harm caused to the plaintiff was too remote to have been foreseen by Motaung or the said employees;

(e) there was a legal nexus between the conduct of Motaung or the said employees and the harm caused to the plaintiff.

[11] The learned judge expressly decided the second of the questions posed in favour of the plaintiff. He said nothing concerning the remaining questions although similar positive conclusions must be implied from his order that the defendant is liable for such damages as the plaintiff can prove in the second stage of the trial. In the view I take of the matter it is only necessary to rule on the issue of vicarious liability although I shall also refer briefly to the question of causation. No submissions were made to us concerning the other questions.

Vicarious liability

[12] I accept, as did the trial judge, that the stated case was intended to mean that Motaung, while engaged in his employment with defendant which required him to safeguard the weapons under his care, stole the parts, ammunition and magazines that were later used by Mahlangu in combination with the body of the rifle.

[13] That being so, it seems to me that the (pre-constitutional) standard test for vicarious liability – designed to achieve a balance between imputing liability without fault, which runs contrary to legal principle, and the need to make amends to an injured person, who might not otherwise be compensated: *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 833G-H; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 21 – might not have provided a remedy in this case. Viewed from the subjective perspective of the employee Motaung he deliberately turned his back on his employment and its duties, pursuing instead his own interest and profit in stealing the components and ammunition for the rifle. Objectively considered, the theft and removal formed no part of his duties and there was no link between his own interests (as realised by the theft) and the business of his employer. In the standard terminology the conduct fell outside both the course and the scope of his employment; nor does the fact that Motaung was employed to safeguard the armoury provide the necessary connection – the submission of counsel being that the theft can be equated with a

culpable neglect of his duties while in the course of carrying them out. There is in my view a clear distinction between a negligent performance of a task entrusted to an employee, for which the employer must usually bear responsibility, and conduct which is in itself a negation of or disassociation from the employee / employer relationship. The theft committed by Motaung falls into the second category. I can find no reason to distinguish it from the facts and principles summarised by Harms JA in *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at 382I-383C.

[14] But, as O'Regan J made clear in *K v Minister of Safety and Security* paras 16 and 23 that cannot be the end of the matter in a deviation case, as this is: a court that finds that the standard test is not met is nevertheless bound to ask itself whether the rule does not require development and extension to accommodate the particular set of facts before it. In answering the question the normative values of the constitution direct the policy that must influence the decision and they do so in relation to the objective element of the test, ie the closeness in relationship between the conduct of the employee and the business of the employer: ibid para 44. It is no longer necessary, if the constitutional norms so dictate, to limit the proximity to those cases where the employee, although deviating from the course or scope of employment, is nevertheless acting in furtherance of the employer's business when the deviation occurs.

[15] In *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC) Mogoeng J (as he then was), after referring to the close connection test formulated in para 53 of *K's* case, continued (para 76):

'The establishment of this connection must be assessed by explicit recognition of the normative factors that point to vicarious liability including the constitutional mandate of the State, to establish a credible and efficient police service on which the public ought to be able to rely for protection from, and prevention of, crime. That should be a police service worthy of the trust of the public and one to which vulnerable members of the public ought to turn readily for protection in times of need.'

[16] The constitutional foundations of the defence force are similar to those of the police force although the duties and responsibilities of the force and its employees inter se and in relation to the public are not directly comparable. Nevertheless the emphasis

on constitutional norms and the appropriate relations with the citizenry of this country are matters common to the security services in question. In particular the introductory paragraphs applied to the State's constitutional obligations in para 53 of *F's* case are of equal weight in relation to the defence force, viz that

'The State has a general duty to protect members of the public from violations of their constitutional rights.'

The constitutional foundations of the defence force and their statutory embodiment.

[17] Both forces are constitutionally acknowledged in Chapter 11 of the constitution and their separate recognition is preceded by common 'governing principles' (s 198) the first of which is that

'(a) national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.'

Section 199 provides for the establishment, structuring and conduct of the security services. It is a specific requirement that

'(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law. . . .'

[18] Turning to the specific case of the defence force, s 200 of the constitution provides:

'(1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.'

[19] The defence force is structured and regulated by national legislation (as envisaged in s 199(4) of the constitution), the principal vehicle for this being the Defence Act 42 of 2002.

[20] The Act commences (in s 2) with a statement of principles to which all members of the defence force and its employees are required to have regard when exercising any power or performing any duty in terms of it. These principles include the following:

‘(b) The primary object of the Defence Force is to defend and protect the Republic, its people and its territorial integrity.’

and

‘(g) The Defence Force must respect the fundamental rights and dignity of its members and of all persons.’

[21] Section 50(1) of the Act provides that the rights of members or employees of the Force may be restricted in the manner and to the extent set out in ss (2) to (7) of that section. Particularly relevant to the duty to ensure that the armed resources at its disposal are properly secured, preserved and controlled is the following:

‘(2) To the extent necessary for purposes of military security . . . members and employees may from time to time be subjected to –

(a) searches and inspections;

(b) screening of their communications with people in or outside the Department;

(c) security clearances which probe into their private lives; . . .’

[22] In terms of s 82(1) of the Act

‘The Minister may, by notice in the Gazette, make regulations regarding –

. . . (z) the issue, care and disposal of arms, accoutrements, ammunition . . . and equipment of the Department’.

Our attention has not been directed to the content of such regulations (if any have been made) nor have I been able to locate them.

[23] The Military Discipline Code, established under s 104 of the Defence Act 44 of 1957, and still in operation, renders theft of property belonging to the defence force a criminal offence rendering the offender liable for imprisonment up to ten years (s 20(a)).

[24] The defence force is in this statutory context, a special kind of employer with a relationship towards its employees and the public which requires an approach to liability for the wrongful acts of those employees which is very different from that of an ordinary civilian employer. Its proper functioning requires it to possess quantities of dangerous weapons which cannot be permitted to escape into the hands of the public and, especially, the criminal element of the population, and it has the resources to

prevent that happening and the powers necessary to do so. It has the duty to educate its employees in the disciplines required to minimise that risk. It goes without saying that because of the enormous potential for public harm inherent in the inadequate preservation and control of arms the Department (through its responsible Minister) should not in general be able to avoid liability for wrongful acts of commission or omission of employees that it has appointed to carry out its duties to preserve and control its arms, save in cases where the court finds that those acts are not sufficiently closely connected with the employee's duties to warrant the imposition of liability on the Department.

[25] It appears that there was, on the facts of the stated case, an intimate connection between Motaung's delict and his employment. First, he abstracted the equipment and ammunition while under a positive duty to preserve and care for the items in question; second, it is the most probable inference that the opportunity to make away with them arose from the opportunity provided by the scope of his duties without which he would have possessed neither access to them nor knowledge of the means to avoid such security controls as the defence force must have put in place.[1]

[26] That the risk should fairly fall on its creator when the public is exposed to weaknesses in its systems or frailties in its personnel is merely a reciprocal to the powers that the defence force exercises: cf *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 741; and the duties that it bears to the public. It should however be made clear that I have reached this conclusion in the limited perspective of the agreed facts. If the Minister were, for example, to have satisfied me that the defence force had taken all reasonable steps to prevent the theft of weapons by its responsible employees, appropriate to its constitutional responsibilities, I might have been persuaded that such was not a proper case for the extension of the remedy despite the closeness of the connection.

[27] For the foregoing reasons the conclusion of the court a quo cannot be faulted.

1In this regard, the development of the law under the constitutional dispensation is shown by comparison with *Nel & Another v Minister of Defence* 1979 (2) SA 249 (R) at 248F-249C, where, in circumstances not dissimilar to those now under consideration, neither factor was regarded by Goldin J as relevant to a determination of the Minister's liability for thefts committed by his servants.

[28] Counsel for the Minister attempted to persuade us that no causal link was established by the agreed facts between the delict of Motaung and the attack on the respondent by the robbers. This is an untenable proposition. There is a direct and foreseeable connection. Motaung stole the parts and ammunition and provided them to Mahlangu with foresight that they could or would be used as they were indeed used thereafter. His conduct was 'linked to the harm sufficiently closely or directly for legal

liability to ensue': *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34G.

[29] The appeal is dismissed with costs including the costs of two counsel.

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

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