IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

24/11/11.

CASE NO: 50105/2009

In the matter between:

LM VON BENEKE Plaintiff

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

22/11/11
DATE

SIGNATURE

MINISTER OF DEFENCE Defendant

JUDGMENT

Tuchten J:

1 This is an action for damages sustained in an armed robbery which occurred on or about 7 March 2003 at the Three Birches on the road between Groblersdal and Bronkhorstspruit during which one Vusi Mahlangu shot the plaintiff several times with an R4 assault rifle and the plaintiff's partner was shot dead.

2 The parties have placed before me a stated case pursuant to the provisions of rule 33(1) . I am called upon to rule on the liability of the defendant, the quantum of damages to be decided on another day. I was not specifically asked to make an order in terms of rule 33(4). For the sake of good order, I direct *mero motu* that the question of the liability of the defendant arising from the facts set out in the stated case be determined separately from any other question arising in the case and order that all further proceedings be stayed until such question has been disposed of. When I refer to the facts in this judgment, they are as drawn from the stated case.

3 The carcase of the R4 was stolen from the SA National Defence Force at TEK base, Pretoria at some time before January 2002 by unknown employees of the Defendant or due to the unlawful and negligent actions of unknown employees of the defendant. During the period January 2002 to March 2003 one Jacob Matidikile Motaung (SANDF number 98005648PF) was responsible for the safekeeping of various dangerous infantry weapons, of which the R4 assault rifle is one example, at the 4th SA Infantry base at Middelburg. Motaung supplied R4 rifle parts, ammunition and magazines to Mahlangu. Using these parts, Mahlangu rendered the R4 stolen from the TEK base operable.

4 Vusi Mahlangu was not in the employ of the defendant. As the plaintiff's case was presented in argument before me, the plaintiff seeks to hold the defendant liable on two grounds:

4.1 firstly, on the ground of the unlawful conduct of the defendant's employees when the carcase was stolen at the TEK base;

4.2 secondly, on the ground that the defendant is vicariously liable for the unlawful conduct of Motaung at the 4th SAI base.

5 In regard to the first ground relied upon by the plaintiff, there is no indication in the stated case of the status or duties of the employees who were party to the theft of the carcase of the R4; there is no basis on which to find that the defendant was through any employee or representative directly liable for the consequences of the theft of the carcase; there is no suggestion that the unknown employees were acting during the course or within the scope of their employment with the defendant. I turn to consider the second ground relied upon by the plaintiff.

6 Paragraph 1.9 of the stated case reads:

> At all material times, ... Motaung acted in the course and scope of his duties and within his sphere of authority.

Senior counsel for the plaintiff was at pains to point out that this paragraph must not be read to imply a concession by the defendant that Motaung was for present purposes acting within the scope of his authority. Indeed I do not read it that way. The issue whether the defendant is vicariously liable for the delicts committed by Motaung is at the heart of the present case. What is common cause, however, is that Motaung was on duty at the relevant time or times, in charge of preserving the infantry weapons and ammunition at the base, and handed to Mahlangu over the parts and ammunition necessary to convert the R4 carcase into a lethal weapon.

7 Paragraph 1.11 of the stated case reads:

> At all material times, ... Motaung knew or ought to have known, that ... Mahlangu planned to use, and in fact did use, the stolen R4 rifle parts, ammunition and magazines to commit armed robberies.

8 It further appears from the stated case that Mahlangu was subsequent to the attack upon the plaintiff shot dead by the police and his co-robbers were arrested and convicted of the murder of the plaintiff's partner, the attempted murder of the plaintiff and the armed robbery during the course of which these atrocities were committed.

9 It is common cause on the stated case that as a direct result of the actions of Mahlangu during the robbery, the plaintiff sustained damages and suffered harm.

10 Counsel for the plaintiff submitted that the plaintiff's case fell within the ambit of the principles established in *Feldman v Mall*,[1] as interpreted in such cases as *Carmichelle v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,[2] *Van Eeden v Minister of Safety and Security (Women's Legal Trust, as amicus curiae)*,[3] *Minister of Safety and Security v Van Duivenboden*,[4] and, particularly, *K v Minister of Safety and Security*.[5] Counsel further referred me to, and sought to distinguish, *Minister of Safety and Security v F*.[6]

11 Counsel for the defendant argued that the case ought to be determined on the basis that Motaung was an accomplice of Mahlangu who had well known that the articles handed over, illicitly, to Mahlangu, were to be used in criminal conduct of some type. That

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1 1945 AD 733

2 2001 4 SA 938 CC

3 2003 1 SA 389 SCA

4 [2002] 3 All SA 741 SCA

5 2005 6 SA 419 CC

6 2011 3SA 487 SCA

being so, the argument proceeded, the defendant could not be held liable for the conduct of Motaung because what Motaung did was so far removed from his duties as to constitute a *frolic of his own* as that phrase is used in *Feldman v Mall*. Counsel accepted that the strange consequence of his submission was that the defendant would have been liable if the plaintiff had established negligence on the part of Motaung but should escape liability if the case is evaluated on the footing that Motaung's fault constituted *dolus*. This, argued counsel, is because the circumstances in which the plaintiff sustained damages are too remote from the intentional conduct of Motaung to fix the defendant with liability. Counsel's submission is therefore that foreseeability arises twice in the present context; firstly when Motaung's conduct is evaluated to determine whether Motaung would have been liable to the plaintiff and secondly when the issue of vicarious liability is evaluated.

12 It is implicit in the submission of counsel for the defendant that Motaung himself would have been liable to the plaintiff both on the basis of *culpa* and of *dolus* and thus that the harm which the plaintiff suffered was foreseeable to Motaung. I agree. In South Africa, the predominant, if not the only, motive for the illicit acquisition of assault rifles such as the R4, is the commission of criminal acts, amongst which armed robberies are prominent.

13 I do not agree that the issue of foreseeability arises again in the present context. As was pointed out in *Feldman v Mall* at 741, vicarious liability is founded upon the public policy consideration that if the servant is about the affairs of the master, then *by that fact* the employer is bound to see that his affairs are conducted with due regard for the safety of others. It follows that once the employee is fixed with liability, then if the test for vicarious liability is satisfied, the liability of the employer will follow, regardless of whether the master could have anticipated the nature of the harm that befell the plaintiff.

14 Section 200(2) of the Constitution provides:

> 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.

This provision is replicated in s 2(b) of the Defence Act, 42 of 2002. Section 2(g) of the Defence Act provides that the Defence Force must respect the fundamental rights and dignity of its members and the public. One of the important fundamental rights engaged by s 2(g) of the Defence Act is the right of everyone, enshrined in s 12(1)(c) of the Constitution, to be free of all forms of violence from either public or private sources. Section 2 of the Defence Act provides that the

Minister of Defence, any organ of State as defined in s 239 of the Constitution, as well as all members of the Defence Force and any auxiliary service and employees must in exercising any power or performing any duty in terms of the Defence Act have regard to the principles articulated in the section.

15 The business[7] of the defendant is not merely to wage war when duly called upon to do so. No less it is the constitutionally mandated business of the defendant to see to it that the members of the Defence Force do not use their training and access to weapons against their own people and to see to it that its engines of destruction are used only for constitutional purposes. It thus follows, in my view, that at the factual level it was certainly foreseeable by the defendant that the people of South Africa could suffer harm arising if the weapons of the Defence Force at the 4th SA Infantry base at Middelburg were not properly preserved or deliberately placed in the hands of criminals. To the extent that public policy plays any part in the present enquiry, I respectfully adopt the reasoning in *Van Eeden* at paragraph 19: in circumstances such as the present, there is no other practical and effective remedy available to the victim of violent crime. So even if foreseeability is an issue at this context, its existence has been established.

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[7] As that term is used in *K v Minister of Safety and Security* para 49

16 This is a case in which the defendant is sought to be held liable for the wrongful act of one of her on duty officials. That fact distinguishes the present case from *Minister of Safety and Security v F*. But as was found in that case, the test to be applied is as laid down in *K v Minister of Safety and Security*. *K's* case (at paragraph 47) is authority for the proposition that the fact that an employee's conduct was *purely in the interests of the business of the employee is not sufficient to ensure that the employer will not be liable. A further question will need to be considered and that is whether in pursuing his or her own interests, the employee will be neglecting the tasks required by the employer.*

17 As I understand the law as laid down in *K's case*, if the indulgence of the employee in a frolic embodies a neglect to perform the employer's work properly, the employer will be vicariously liable. The simultaneous omission and commission which constituted the act of Motaung in providing the articles to Mahlangu would not only be relevant to wrongfulness (which is not on the arguments presented to me an issue in this case) but may also be relevant to determining the question of vicarious liability in general and, in particular, the question whether there is a sufficiently close connection between the wrongful conduct and the purposes and business of the employer.

18 In the present case the relevant omission of Motaung is that he failed to perform his duty to preserve the weapons and equipment of the Defence Force from being used for purposes other than those sanctioned by law, as he was obliged to do pursuant to the lawful orders given to him and the principles in s 2 of the Defence Act, which are expressly made binding upon persons in Motaung's position. The safekeeping of these weapons and equipment is at the core of the duty undertaken by Motaung.

19 This being so, I conclude that there is a sufficient connection between the conduct of Motaung and the purposes and business of the defendant to render the defendant vicariously liable to the plaintiff for the conduct of Motaung which caused the plaintiff to suffer damages. There was some suggestion in argument that the cases do not go as far as holding an employer liable where the perpetrator of the act which immediately led to the harm (in the present case the armed robber Mahlangu himself) was not in the employ of the defendant. I do not think that this can be correct. In *Van Eeden*, the Minister of Safety and Security was held liable to a person, who was sexually assaulted, raped and robbed, for damages arising from the negligent conduct of the police in negligently allowing a known dangerous criminal and serial rapist to escape from custody; in *Van Duivenboden*, the Minister of Safety and Security was held liable for the negligent conduct of the

police in failing to take all reasonable steps to deprive of his firearm a person who was known to the police to be unfit to possess such a weapon and who subsequently used that weapon to murder or harm several innocent people.

20 I accordingly make the following order:

1 It is declared that the conduct of Motaung as described in the stated case was wrongful and that the defendant is liable to the plaintiff for such damages as the plaintiff may be able to prove arising from the armed robbery on 7 March 2003 at the Three Birches on the road between Groblersdal and Bronkhorstspruit.

2 The issue of quantum of damages is postponed *sine die*.

3 The defendant must pay the plaintiff's costs, including the costs consequent upon the employment of senior and junior counsel.

NB Tuchten
Judge of the High Court
22 November 2011

For the plaintiff:
Adv P de Jager SC
Adv R Strydom
Instructed by DP du Plessis Inc, Pretoria

For the defendant:
Adv M Mohlamonyane
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