

**POTHIER, THE STRAYING MULE
AND THE UNRULY BARMAN**

**Costa Da Oura Restaurant (Pty) Ltd
t/a Umdlotti Bush Tavern v Reddy
2003 4 SA 34 (SCA)**

1 Introduction

On the evening of 31 October 1997, the respondent and his girlfriend visited the Umdlotti Bush Tavern. A person by the name of Goldie was stationed behind the bar serving the customers. It appeared to the respondent that Goldie served everyone but him and his girlfriend. When another barman approached him, the respondent remarked that Goldie could take a few lessons regarding service from the second barman. Goldie heard this remark, became agitated and glared at the respondent. He further beckoned the respondent to come closer. The respondent reacted by saying words to the effect that he "did not come for people like that" (*Costa Da Oura Restaurant (Pty) Ltd T/A Umdlotti Bush Tavern v Reddy* 2003 4 SA 34 (SCA) par 30). This further agitated Goldie and he occasionally stared at the respondent and appeared to be aggressive. When the respondent and his girlfriend were about to leave, the respondent generously tipped the barman who had served them. Goldie saw this and quickly exited the bar. When the respondent reached the corridor in the immediate vicinity of the bar, Goldie assaulted him, causing injuries which were reasonably serious. Immediately after the incident the manager of the Umdlotti Bush Tavern summarily dismissed Goldie "because he had broken the rules that regulated how he should perform his basic duties" (par 41).

The simple question to be decided was whether the appellant was vicariously liable under the circumstances. The crux of the respondent's contentions was that the incident was sufficiently connected with the scope of employment of the appellant's employee to establish vicarious liability, while the appellant contended that Goldie had acted for personal vengeance, on his own, against instructions and after he had abandoned his duties as a barman. The Durban and Coast Local Division in *Reddy v Costa da Oura Restaurant (Pty) Ltd t/a Umdlotti Bush Tavern (supra)* found the appellant vicariously liable for damages resulting from the incident. On appeal the decision was reversed.

The purpose of this discussion is to analyse the finding of the Supreme Court of Appeal and to ascertain whether the employer, in the circumstances of this case, should have been held liable. In the process of doing so, the

background to the ruling will be explained and the legal policy implications of the decision assessed.

2 The principle of vicarious liability

On 27 July 1913 one Martens left his wagon with two employees near Xupu Drift and went off to look for a straying mule. He found the mule at a neighbouring kraal where he also found some beer. He partook in the hospitality of the kraal inmates until midday when he was informed that the countryside was in flames. The court found that the fire was started by Martens' employees. In *Mkize v Martens* (1914 AD 382 390) Innes JA, with regard to the above facts, referred to a principle expressed by Pothier as follows: "Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of his functions to which he is appointed." He explained that the principle is identical to the English rule that a master is answerable for the torts committed by his servant in the course of his employment. Innes JA then went on to say:

"[P]erhaps the most satisfying statement of it (the underlying reason for this liability) is that given by Pollock, *Torts* (8th ed., p. 78) founded on a pronouncement of Chief Justice Shaw, of Massachusetts: 'I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.' ... The most difficult part of the enquiry remains, namely, the application of the law to the facts" (390-391).

From the above it is clear that it has been trite for a long time that an employer is liable for the wrongs of his employee committed in the course of his employment (see also Neethling, Potgieter and Visser *Law of Delict* (2001) 373).

Although the basis of this liability is not without controversy and the applicability of the law to the facts remains as difficult today as it was in 1914, it is generally accepted that the risk theory forms the basis or *rationale* for the employer's liability (see for instance Neethling, Potgieter and Visser 364). However, irrespective of the actual basis of the rule, Jansen JA stressed in *Minister of Police v Rabie* (1986 1 SA 117 (A)) that the cardinal question will every time be whether it can be proved that the employee was acting "in the course and scope of his employment" (132G).

3 The concept of "course or scope of employment"

To determine whether an employee was acting in the course and scope of his employment is a difficult question to answer and most cases dealing with this matter are so-called "deviation cases", that is cases where it is not clear that the employee was acting within the course of his or her employment. In this regard Jansen JA, in *Minister of Police v Rabie* (*supra*), on the basis of the risk theory, outlined a two-pronged approach:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant’s intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the Salmond test (cited by Greenberg JA in *Feldman (Pty) Ltd v Mall* 1945 AD 774):

‘[A] master ... is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them ...’ (134C-E).

However, in *Minister of Law and Order v Ngobo* (1992 4 SA 822 (A)) the court seemed to refuse to accept the risk principle as an extension of the grounds for vicarious liability. After discussing *Rabie* in detail, Kumleben JA held as follows:

“[W]hatever direct liability may in certain circumstances attach to an employer as a result of a risk created by him, this consideration in my opinion is not a relevant one to be taken into account when the standard test is to be applied in order to decide whether the master is vicariously liable” (832 C-D).

The apparent conflict between these two decisions was to some extent clarified in *Ess Kay Electronics PTE Ltd v First National Bank of Southern Africa Ltd* (2001 1 SA 1214 (SCA)). Howie JA stated the following:

“[T]he reason for the rule is often stated to be public policy ... And an underlying reason for that policy has been held in *Feldman (Pty) Ltd v Mall* 1945 AD 733, in a passage at 741, to be the consideration that because an employer’s work is done ‘by the hand’ of an employee, the employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee’s improper or negligent conduct ‘in carrying on his work’... (par 8H-I)

What seems to require continual emphasis ... is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content” (par 10C-D).

In the process of determining whether the employee acted in the course or scope of his or her employment, it has been proposed as a general guideline that “the fact that the employee was *on duty* when the delict was committed, should be *prima facie* indicative of liability” (Neethling *et al* 379 fn 135). And, as Zulman JA pointed out in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (2001 1 SA 372 (SCA) par 5B-D):

“[A]n employer will only escape liability if his employee had the subjective intention of promoting solely his own interests and that the employee, objectively speaking, completely disassociated himself from the affairs of his employer when committing the act. The nature and extent of the deviation is a critical factor. Once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of fact”.

An overview of recent case law sheds some light on what our courts understand as the demands of reasonableness, fairness and justice when it comes to ascertaining whether there is a sufficiently close link between the employee's acts for his or her own interests and purposes, and the business of his or her employer.

In *Seniors Service (Pvt) Ltd v Nyoni* (1987 2 SA 762 (ZS)) the court held that the unauthorised collecting of a deposit by the employee for his own interest was sufficiently close to the employee's authorised work as a property negotiator to render the employer liable (770C-D).

In *Witham v Minister of Home Affairs* (1989 1 SA 116 (ZH)), the court held that the policeman concerned, while on duty, had been so far removed geographically from his appointed place of duty (700-800 m) and there was such a chasm between his conduct (shooting at innocent civilians) and his duties (guarding the premises of a government minister) that there was no sufficiently close link between his actions and his employer's business (125I-126B).

In *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* (1991 2 SA 441 (ZH)), the court held that, when the employee stole goods that he was employed to guard (442H), he perpetrated "an unauthorised act which is so connected with authorised acts that 'they may rightly be regarded as modes - although improper modes - of doing them'" (448D).

In *Minister of Law and Order v Ngobo* (*supra*), two off-duty police officers were involved in a street altercation during which they drew their service pistols and fired shots, one of which killed the deceased. Both were in plain clothes and at no stage did they announce or otherwise disclose the fact that they were policemen, nor did they attempt to effect an arrest or purport to be acting in their official capacity (826C). The court held that the appellant was not vicariously liable because the constables "were not on duty and they did not at any stage purport to be carrying out any police function. They unnecessarily resorted to the use of fire arms in the course of an equally unnecessary altercation with strangers and were in no sense engaged in the affairs of the appellant. The only connection between their conduct and their employment being their use of the revolvers they were authorised to retain" (828B-C).

In *Romansrivier Kooperatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd* (1993 2 SA 358 (C)), a truck guard released a truck brake but failed to stop the truck in time resulting in it colliding with a filter plant causing severe damage to it (362B). The truck guard was not employed to drive the truck and he did not have a heavy vehicle driver's licence. His duties comprised mainly the loading and off-loading of trucks (361C). The court held that the guard's action could not be regarded as an abandonment of his prescribed task or such a deviation therefrom as to exonerate the defendant from liability: his conduct was part of the risk created by his employment (366H-I).

In *Viljoen v Smith* (1997 1 SA 309 (A)), the employee climbed through a fence and relieved himself in bushes on a neighbouring farm contrary to a prohibition of his employer. Whilst on the neighbouring farm he attempted to light a cigarette but the match caused a fire on that farm (311C-D). The court

held that the fact that the place where the employee relieved himself and attempted to light a cigarette was approximately 300 metres from the place in the vineyard where he worked did not constitute such a material digression that it can be said that he temporarily abandoned his employment or that he did not act in the course and scope of his employment during his excursion (311E).

In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* (1998 4 SA 466 (C)), the employee set a number of fires in a hotel (par 2), the risk of which his employer had been specifically contracted to minimise (par 4). In this case, although the argument was raised that the employee did not act within the scope and course of his employment (par 6), the issue was not pronounced upon, Hlope J holding the employer to be liable itself for breach of contract (par 25-33).

In *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (*supra*), the bank's employee stole cheques drawn on the bank, deposited the cheques for collection and unlawfully appropriated the proceeds thereof (par 3). The court held that it is "beyond doubt that it would not be sound social policy to hold an innocent master liable or responsible to a third party, where his dishonest servant steals the master's own property, as is the situation in this case. This is especially so where there is no suggestion that the master was in any way negligent in the selection of" the servant (par 6).

In *Ess Kay Electronics PTE Ltd v First National Bank of Southern Africa Ltd* (*supra*), a bank employee forged banker's drafts with the result that one of the bank's clients was defrauded. Dealing with whether the bank was vicariously liable for the acts of its employee, Howie JA concluded that "[f]airness and reasonableness do not require ... that an employer should, in effect, be an insurer for the employee's wrongs in a situation such as the present" (par 18).

In *Minister van Veiligheid en Sekuriteit v Japmoko BK h/a Status Motor* (2002 5 SA 649 (SCA)), members of the SA Police Service vehicle theft unit intentionally and for private gain, co-operated with a syndicate of car thieves and made it possible for the latter to sell cars stolen by its members by preparing and issuing motor vehicle clearance certificates, without which the vehicles could not be registered and resold (par 2-4). The court held that the employees' actions were in conflict with the prescriptions of their employer; that, subjectively speaking, their prime objective was not to serve the interests of their employer but to favour their own pockets; and that, on the other hand, each of them was, objectively speaking, performing the exact task assigned to them. This was accordingly not a matter where the employees, in the manner in which they performed the task, had totally distanced themselves from their assigned duties (par 12). The court also took into account that, while the clearance certificates were false, they were not forged. There was therefore a close connection between the employees' actions for their own interests and purposes and the business of the employer (par 16).

In *Bezuidenhout NO v Eskom* (2003 3 SA 83 (SCA)), the employee transported a passenger in his employer's vehicle contrary to express instructions not to transport passengers. The passenger was injured while so

transported, and claimed compensation from the employer. The court considered itself bound by *South African Railways and Harbours v Marais* (1950 4 SA 610 (A)) and held that the employer was not vicariously liable on the grounds that “the passenger, even if unaware of the prohibition, had no reason to believe that he was in the vehicle with the consent of the owner or to expect that the owner owed him any duty in the circumstances” (par 23); the driver knew perfectly well that he was prohibited from transporting passengers; he had no intention of furthering his employer’s affairs by doing so; and the passenger’s presence added nothing to the interest of his employer in the proper performance of his duties (par 24).

In *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bpk* (2002 5 SA 475 (SCA)), the Supreme Court of Appeal found that

“In this case, the three dishonest police officers can neither subjectively nor objectively be considered to have acted within the scope and course of their duties. They embarked on an unauthorised trick for their own advantage and with the aim of stealing from their own employer the money that they had obtained for him in the first place” (par 16, own translation).

The Constitutional Court confirmed in *Phoebus Apollo Aviation CC v Minister of Safety and Security* (2003 2 SA 34 (CC)) that “the common-law test for vicarious liability, as it stands, is consistent with the Constitution” and that “[i]t has long been accepted that the application of this test to the facts of a particular case is not a question of law but one of fact, pure and simple” (par 9). This is not to deny that “questions of this kind are often extremely difficult to resolve and the law reports are replete with fascinating examples of the infinite variety and complexity of the kinds of cases that have engaged the Courts for many years. The distinctions are subtle and the dividing lines are often faint – and debatable – as the judgment of Farlam JA in the instant case and the authorities cited illustrate” (par 7).

In the light of the above decisions one can now attempt to apply the law to the facts of the case under discussion to ascertain whether the assault was committed in the “course and scope” of Goldie’s employment.

4 Application to the case under discussion

4 1 The application of the *Rabie* subjective and objective tests to the facts of the case under discussion appears to produce the following results:

In determining whether the employer is liable one must take the intention or motive of the employee into account. Goldie’s actions, although occasioned by his employment, were clearly “solely for his own interests and purposes”.

This does preclude any vicarious liability of Goldie’s employer unless there is a sufficiently close link between the employee’s acts for his or her own interests and purposes, and the business of his or her employer. The issue is therefore whether such a sufficiently close link exists.

4 2 In terms of *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (*supra*), in order to successfully argue that a sufficiently close link does

not exist, the court must be convinced that “it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer”.

Quite clearly, Goldie was not carrying out an instruction of his employer when he assaulted the customer. The issue is therefore whether Goldie was still exercising the functions to which he was appointed at the time of the assault.

Olivier JA found that “[t]he 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” (par 7). This statement appears far too cursory and is challengeable for two reasons.

Firstly, one of the facts agreed upon by the parties is that Goldie was fired immediately after the incident “because in the course of his work he didn't comply with the basic duties that [his employer] expected him to comply with” (par 4). This is something that appears to be conceded by the court when it states that “[t]he 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” (par 7).

Secondly, as was held in *Viljoen v Smith (supra)*, whether an employee had indeed abandoned his employment was a factual question which had in any particular case to be decided mainly, if not exclusively, on the basis of the degree of digression (316J-317B). The court held further that the degree of digression must be determined objectively and not on the basis of the intention of the employee concerned (317G). *In casu*, the court considered a digression of 400 metres lasting a few minutes not to be material (318A-B and 318E-F). *A fortiori* the fact that “[t]he attack took place in the immediate vicinity of the bar and within a minute of the respondent and his girlfriend leaving the bar” (par 4) cannot be considered as a material degree of digression.

- 4 3 What appears to be the determining factor that led the court to exclude the vicarious liability of the employer in the case under discussion is the “personal vindictiveness” of the employee (par 7). This interpretation is supported by the court's reference to *Deatons (Pty) Ltd v Flew* (1949 79 Commonwealth LR 370) where the employee assaulted a customer inside the bar where she was employed in “a spontaneous act of retributive justice” (381-382). It can be argued that such a reliance on the employee's intention is a mistaken confusion of the subjective and objective tests distinguished in *Rabie*, and does not adequately settle the issue of whether a sufficiently close link exists between the employee's acts and the business of his employer.
- 4 4 It is in fact far from obvious that personal vindictiveness automatically severs the link between a barman's acts and his employer's business. It is to be expected that where alcohol is consumed the risk of altercations between patrons and staff is likely to develop. It is precisely for this

reason that extensive measures were taken *in casu* to address such situations and that employees were forbidden to become involved in altercations with customers (par 4). Such prohibition in itself does not mean that an employee who does get involved is acting outside the scope of his duties.

5 Conclusion

In *Midway Two Engineering & Construction Services v Transnet Bpk* (1998 3 SA 17 (SCA) 22B-D), Nienaber AJ observed that:

“It has been stated repeatedly that, neither in this country nor abroad, has a uniform and universal formula yet been found to appropriately clarify and describe the phenomenon of vicarious liability and satisfactorily resolve all the problems associated with it (see Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (passim); Atiyah *Vicarious Liability in the Law of Torts* chapter 2). What Lord Pearce in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685 stated with regard to English law, also applies in this country, namely that the doctrine of vicarious liability ‘has not grown from any very clear, logical or legal principle, but from social convenience and rough justice’. Or, as Corbett JA stated in *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) at 567H, ‘in the ultimate analysis such vicarious responsibility was based upon considerations of social policy’ (our emphasis). (See *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 D at 430; *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) at 647G-649B.) It is hardly surprising that a doctrine that developed by fits and starts and that is based on ‘rough justice’ and ‘social policy’ does not provide a precise criterion to establish liability” (own translation).

Perhaps the “(s)ocial convenience and rough justice” of the English law referred to in *Midway Two Engineering* can be translated, if applied properly (and without the roughness), as the *boni mores* which runs like a golden thread through our law of delict in determining whether public policy dictates that liability should arise in a given case.

In the light of the above decisions it is clear that, though the test for vicarious liability may be well-defined and trite since *Feldman v Mall* (*supra*), the application of the law to the facts cannot always be separated from public policy and the risk principle. Although it is true that our courts do not want to extend vicarious liability because of its nature (*ie*, holding someone liable, even in the absence of fault on his part), the fact still remains that it is sometimes necessary, *in the light of public policy*, to hold an employer liable in cases where he has created the risk of damage by employing a specific person in a specific position.

The answer to this question will of necessity be influenced by the fact that the requirements of vicarious liability are “expressions of a community’s legal convictions” (Midgley “Mandate, Agency and Vicarious Liability: Conflicting Principles” 1991 *SALJ* 419 421).

It is submitted that the court did not give enough weight to important policy considerations in the case under discussion. While one must agree that “the rule and the reason for its existence must not be confused” (*Ess Kay supra*), it is submitted that one cannot altogether exclude policy considerations from

the test of vicarious liability. Policy considerations ought to intervene in the process of applying the law to the facts when assessing whether there is a sufficiently close link between the employee's acts for his or her own interests and purposes, and the business of his or her employer. To rely only on the motives of the employee, in the application of the law to the facts, is to confuse the subjective and objective tests distinguished in *Rabie*. *In casu* it also deprives consumers of catering services specifically, and tourism services more generally, of a potentially powerful tool. At a time when one of the major challenges of the tourism industry in this country is the improvement of service levels, such a result may hardly be seen as congruent with public policy. In view of the facts of this case, it is also doubtful whether its outcome is an adequate expression of the South African community's legal convictions.

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