




**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU**

CASE NO: 611/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	28/01/16
	DATE
	
	SIGNATURE

In the matter between:

MARANDELA BEBANI

Plaintiff

And

MINISTER OF POLICE

First Defendant

MEC FOR SAFETY AND SECURITY

Second Defendant

NALEDZANI NORMAN

Third Defendant

JUDGMENT

Delivered on 28/01/2016

KGANYAGO AJ

- [1] The plaintiff has instituted an action for damages against the defendants arising out of an incident which happened on the 17th August 2012 at Mauluma Village, in the district of Dzanani Limpopo Province.
- [2] The plaintiff alleges that he was wrongfully and unlawfully shot by the third defendant who was acting within the course and scope of his employment. The plaintiff further alleges that as a result of been shot by the third defendant, he sustained injuries on her right leg, and has suffered damages for pain and suffering, discomfort, and had to undergo medical treatment.
- [3] The action is defended. The defendants are denying liability. At the commencement of the trial, the parties agreed to separate the issues of merits and quantum of damages of the plaintiff's claim. I ruled that the matter proceed on the issue of merits of the claim only.
- [4] The parties have agreed on a stated case, and have also agreed to dispose the case on arguments without leading any evidence.

FACTS AGREED UPON BETWEEN THE PARTIES

- [5] The plaintiff is the owner of Mavhunga Tshisa Nyama Butchery ("the butchery") situated at Ha-Mavhunga-Gondeni.
- [6] At or about 17th August 2012 at about 13H00, Mr Matamba Nngidi ("Matamba") arrived at the butchery driving his Toyota Corolla vehicle, and parked it in the premises of the butchery in order to buy food.
- [7] Shortly thereafter, the third defendant who has since committed suicide, arrived at the butchery driving his private vehicle. He parked his vehicle at the entrance of the butchery obstructing motor vehicles entering and/or exiting the butchery.
- [8] After alighting from his vehicle, the third defendant produced his service firearm, proceeded towards a shanty room which is inside the premises of the butchery and fired one shot in the air and shouted: "*Matamba, I want my money, I will kill you.*"
- [9] The third defendant and Matamba started quarrelling and a fight ensued. The parties started wresting over possession of the firearm, which subsequently fell on the ground.

- [10] Matamba called Constable Tendani Muhadi ("Muhadi") who was stationed at Modimolle SAPS but at that time was off duty, for assistance. Muhadi was at a car repair centre adjacent to the butchery. Muhadi proceeded to the butchery to offer assistance.
- [11] The plaintiff was informed about the fight by one of her employees. She went to the scene and attempted to stop the fight, but did not succeed. As she was going back to the butchery, a second shot went off and she was struck on the right leg.
- [12] The third defendant ought to have foreseen that by producing a firearm, and further acting in the manner that he did by quarrelling and/or wrestling and/or fighting with Matamba whilst holding a firearm, a shot could go off and injure someone, including the plaintiff.
- [13] The third defendant ought to have reasonably foreseen that any person who was in the butchery premises (including the plaintiff) might be harmed by a shot accidentally going off but failed to take reasonable measures to avoid the plaintiff from being injured, alternatively, the third defendant failed to take reasonable measures to avoid the plaintiff from being injured, alternatively, the third defendant failed to take reasonable measures to prevent the plaintiff from being harmed.
- [14] Accordingly, the third defendant was negligent in occasioning and/or causing harm to the plaintiff.
- [15] At the time of the shooting incident, the third defendant was in the employment of the first defendant as a police officer, but off duty and not wearing his uniform. The firearm that the third defendant used was his service firearm and belonging to the first defendant.

QUESTIONS OF LAW IN DISPUTE BETWEEN THE PARTIES

- [16] The question of law for determination by the court is whether or not, having regard to the agreed facts, the first defendant is vicariously liable for the delict committed by the third defendant.

CONTENTIONS OF THE PARTIES

- [17] The contention of the plaintiff is that the first defendant is liable for the delict committed by the third defendant because the firearm that was used belongs to the first defendant.
- [18] The first defendant contends that it is not vicariously liable for the conduct of the third defendant on the following basis:
- 18.1. The wrongful acts done by the third defendant was solely for the purposes of the third defendant; and
- 18.2. there is no sufficiently close link between the third defendant's acts for his own interests and the purposes and business of the first defendant.

ANALYSIS OF SUBMISSIONS AND ARGUMENTS

- [19] The general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. As long as the employee is acting within the course and scope of his or her duty or is engaged with the affairs of his master, that employer will be liable. There must also be a sufficiently close link between the servant's acts for own interest and purposes, and the business of his master for the master to be held liable.
- [20] In *K v Minister of Safety and Security 2005 (6) SA 419 (CC)* at 436 C-F the court stated:
- “ The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if he second question, and objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interest and the purposes and the business of the employer. This question does*

not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is sufficiently close to give vicarious liability. It is in answering this question that court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights. (See also F V Minister of Safety and Security 2012 (1) SA 536 (CC).

- [21] It is common cause that on the 17th August 2012, the third defendant was off duty. When the third defendant went to the plaintiff's premises, his intention was to demand money from Matamba. That has got nothing to do with the business of his employer. It cannot be said that he was furthering his employer's purpose or obligations. It can also not be said that he was acting on the instructions of his employer. He was pursuing his own interest which is not even related to his employer's business.
- [22] It is trite that there is a general duty of police officers to protect members of the public. Whether they are off or on duty is immaterial, they are still obliged to protect members of the public.
- [23] The plaintiff's interaction with the third defendant was when she tried to separate him and Matamba during their fight. When her efforts failed, she returned to the butchery. In the process of returning to the butchery, that is when she was hit by a stray bullet. The question is whether the plaintiff has put her trust in the third defendant when she left scene, and if so what trust. It is not even clear whether at the time of her interaction with the third defendant and Matamba, she was aware that the third defendant was a policeman. In my view, if she was not aware that the third defendant was a policeman, she could not have placed her trust in him.
- [24] Now what must be determined, is whether there is a sufficiently close link between the third defendant's acts for his own interest and purposes and his duties as a policeman. From the agreed stated of case, it does not appear that when the plaintiff tried to separate the third defendant and Matamba, she was aware that the third defendant was a policeman. At the time of the incident, there was nothing to show that the third defendant was a policeman. Even though it is not in dispute that the third defendant had used his service firearm, it is not clear

when the plaintiff became aware that the third defendant has used an official service firearm and how she became aware.

[25] Under the circumstances, I am unable to conclude that there is a sufficiently close link between the third Defendant's actions for his own interest and his duties as a policeman.

[26] In the result I make the following order:

26.1. The claim of the plaintiff is hereby dismissed with costs



MF KGANYAGO
ACTING JUDGE OF THE HIGH COURT