

IN THE HIGH COURT OF LESOTHO

In the matter between:-

W. KENTE Plaintiff

and

SECURITY LESOTHO (PTY) LTD. Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 8th day of March, 1991

On the 18th January, 1990 the plaintiff instituted these proceedings against the defendant claiming damages in the sum of M30,000-00 plus interest and costs of suit.

In his declaration the plaintiff states that on the 10th September, 1983 at Barclays Bank, Kingsway, Maseru a certain Corporal Moletsane unlawfully assaulted him by shooting him in the back and that as a result of that assault he has suffered damages in the amount stated above. The plaintiff states that at all material times the said Corporal Moletsane was acting within the course and scope of his employment with the defendant.

On the 19th February, 1990 the defendant's attorneys requested further particulars. Paragraph 1 of the request reads:

"If the allegations in this paragraph are intended to convey that in shooting the plaintiff the said Moletsane was acting within the course and scope of his employment with the defendant full particulars are required indicating that this is the position.

On the 29th March, 1990 the plaintiff's attorneys filed the further particulars requested and paragraph 1 reads:

"Plaintiff does not allege that the said Moletsane was acting within the course and scope of his employment with the Defendant when he was in the act of shooting the Plaintiff. What is alleged is that the said Moletsane was on duty in his capacity as an employee of Defendant as a security guard."

On the 6th April, 1990 the defendant's attorneys filed a Notice of Exception stating that the plaintiff's declaration as amplified by plaintiff's further particulars is disclosing no cause of action on the following ground:

"Defendant is not, in law, liable for its servants' delicts simply on the grounds that such delicts were committed when such servants were on duty."

It is common cause that at the relevant time Corporal Moletsane was employed by the defendant. Now the question is

whether the defendant is, in law, liable for the delicts which Corporal Moletsane committed while he was on duty on the 10th September, 1988. It is now ^{settled} law that a master is liable for the wrongs of his servants committed in the course of their employment, or, as it is commonly put, within the scope of their employment. In Mkize v. Martens 1914 A.D. 382 at p. 390 Innes, J.A. (as he then was) said:

"In effect it is identical with the English rule that a master is answerable for the torts of a servant committed in the course of his employment. The reason underlying this important exception to the maxim poena suos tenet auctores has been differently expressed by different writers. But perhaps the most satisfactory statement of it is that given by Pollock, Torts (8th ed., p. 78), founded upon 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." However, that may be, we may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment. Such an act cannot be said to have taken place "in the exercise of the functions to which he (the servant) is appointed." " (My underlining).

The facts of Mkize's Case were that the defendant, a transport driver, who employed two youths to assist him in his transport service and undertook to feed them on their journeys, was held liable for damage caused by a fire which they had lit while on a journey for the purpose of cooking their midday meal, and had negligently allowed to spread. The lighting of the fire by the boys to cook their meal was held to be an act necessary for the carrying out of their instructions, and therefore within the scope of their employment. It was held that the act of making fire in order to cook their midday meal was not only done in the course of their employment but it was an activity reasonably incidental to their employment.

Another example can be found in the case of Priestly v Dumeyer (1989) 15 S.C. 292 in which defendant's servant, who was employed to drive a cab plying for hire allowed a friend to drive. The defendant was held liable for an accident caused by the negligence of his servant's friend. He was held liable because the act of the servant in allowing an unauthorized person to drive the vehicle was a mode, although an improper one, of carrying out his employment. In the present case the employee of the defendant was on duty and that is the only reason why the plaintiff imputes blame or liability on the defendant. It seems to me that our law requires something more than the mere fact that the employee was on duty when he committed the delict. As Mckerron points out in his book entitled "The Law of Delict", 7th edition, at page 95:

"But the master's liability is not confined to acts done by the servant within the master's instruction or reasonable incidental thereto. It is now settled law, both in South Africa and in England, that the master's liability extends to all acts falling within the general scope of the servant's employment. Whether the act was within the scope of the servant's employment or not is a question of fact, depending upon the circumstances of the particular case. The test usually applied by our courts is: Did the servant do the act while about the business of his master, or did he do it while on his own business and for his own purpose?"

In the present case it is not alleged that in shooting the plaintiff Corporal Moletsane was acting while about the business of his master. There is no allegation that the act done by Corporal Moletsane was reasonably incidental to his master's employment. If the plaintiff was shot while trying to break into the bank or any building Mr. Moletsane was guarding then that would be an act committed in the course of his employment and within the scope of his employment. The plaintiff has not explained the circumstances under which he was shot but merely says that the defendant is liable because Mr. Moletsane was on duty when he shot him.

Mr. Snyman, attorney for the plaintiff, referred the Court to a number of cases which do not support his proposition that a master is liable for all delicts committed by the servant whilst on duty. In Witham v. Minister of Home Affairs 1989 (1) S.A. 116 the master was held liable for damages because there had been negligence on its part, acting through its servant, in permitting a member of the police, who was known to have alcohol related

psychiatric problems, to be armed with a rifle and ammunition and appointed to guard a Cabinet Minister's residence in a populated area: in such circumstances it was reasonably foreseeable that injury to a member of the public would result and the defendant failed to take any or reasonable steps to guard against such harm resulting.

In Hamman v. South West Africa People's Organisation and another 1991 S.A. 127 it was sought to hold second defendant liable on the basis that he had expressly or impliedly authorised and/or made possible by assisting and/or encouraged and/or instigated and/or thereafter ratified the conduct complained of by virtue of the fact of his membership and position within the first defendant, but this in itself was not sufficient to burden second defendant with liability.

In the result, I come to the conclusion that the plaintiff's declaration as amplified by further particulars does not disclose a cause of action. The exception is upheld and the plaintiff's claim is dismissed with costs.

J.L. KHEOLA

JUDGE

8th March, 1991.

For the Plaintiff - Mr Snyman
For the Defendant - Mr. Sello.