

SOUTH AFRICA / JUDGMENT

Afrisix (Pty) Ltd v Economic Freedom Fighters (21/23502) [2021] ZAGPJHC 845 (25 June 2021)

[2021] ZAGPJHC 845

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

21/23502

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 21/23502

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

25

June 2021

In

the matter between:

AFRISIX

(PTY) LTD

Applicant

And

ECONOMIC

FREEDOM FIGHTERS

Respondent

Delivery:

Transmitted by email to the parties'

legal representatives. The judgment is deemed to have been delivered

on 25 June 2021

Summary: An application interdicting the respondent from harassing, intimidating and interfering with a contractual relationship with its customers. Issue- whether the respondent was vicariously for the wrongful conduct of its member.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This matter served before this court as an urgent application in terms of which the applicant, Afrisix (Pty) Ltd t/a Afri Services, sought to interdict the respondent, the Economic Freedom Fighters ("the EFF"), from harassing, intimidating and interfering with its contractual relationship with the Highland Mew, Shopping Mall in Emalahleni.

[2] The fundamental issue raised in the matter was whether the EFF could be held liable for the alleged wrongs committed by Mr Sello Hlopu, a member of the EFF.

[3] On 10 June 2012, I made the following order:

"1. The matter is treated as one of urgency and thus the forms and services provided for in the Uniform Rules of the High Court is

dispensed with in terms of Uniform Rule 6(12) and any non-compliance with the Rules is condoned.

2. Pending the finalisation of the application under case number: 205058/2021 ("the main application"), the following interim relief is granted *pendente lite*:

2.1 The respondent is interdicted and restraint from intimidating and threatening any of the applicant's employees;

2.2 The respondent is interdicted and restraint from intimidating and threatening any of the applicant's customers' employees, where the applicant renders security- and/or cleaning services;

2.3 The respondent is interdicted and restraint from interfering with the contractual relationship between the applicant and its employees;

2.4 The respondent is interdicted and restraint from interfering with the contractual relationship between the applicant and its customers;

2.5 The respondent is interdicted and restraint from uttering and/or publishing any statement that says or implies that that the Applicant acted criminally and/or stole any money of the applicant's employees.

3. Respondent is ordered to pay the costs of the application on the party and party scale.

4. The reasons shall be furnished in due course."

[4]The reasons for the above order are set out below.

The Parties

[5]The applicant is a registered company in terms of the company laws of South Africa and is involved in the business of providing cleaning and security services.

[6]The respondent, the EFF, is a registered political party represented at national, provincial and local governments in the Republic of South Africa.

Background

Facts

[7]The applicant sought an interim interdict pending the outcome of another application (the main application) brought by the same applicant against the EFF in the ordinary course. The main application was launched on 26 April 2021. It is, in essence, based on a similar cause of action as that in the present application. The final interdict sought in the main application relates to the following allegations made by the applicant against the EFF.

[8]The applicant asserts that in November 2020, the EFF defamed the applicant, interfered with the contractual relationship between the applicant and its customers, interfered with the employment contract between the applicant and its employees, and intimidated the applicant's customers. In this respect, the applicant alleges that the EFF contacted the applicant and informed it that it would contact its customers and advise them to terminate their contracts.

[9]During January 2021, members of the EFF approached several of the applicant's customers, intimidated and made threats questioning their relationship with the applicant. On 6 January 2021 the EFF published on its Labour Desk on the internet information alleging that the applicant stole money from both its employees and its customers.

[10]The EFF has opposed the main application. In the present application, the above order was consequent to the alleged threats and intimidation made by Mr Hlopu, a member of the EFF, to the applicant and its employees.

[11]The alleged threat and intimidation are set out in the applicant's founding affidavit, where the background facts are set out and can be summarised as follows. On 1 May 2021, Mr Hlopu telephonically contacted Mr Horn, an employee of the applicant, and accused the applicant of failing to comply with the regulatory requirements of registering as an employer with the security services regulatory body – the Private Security Industry Regulatory Authority. He then demanded a meeting with the applicant, at which point he was advised to contact the head office in that regard. He did not like what he was told and accordingly threatened and intimidated the applicant's employees.

[12]On the same day, 1 May 2021, Mr Hlopu send Mr Horn two WhatsApp voice messages. The two voice messages have been transcribed and attached to the applicant's papers. The first message reads as follows:

"Man just go to Checkers and Pick 'n Pay and find out what I did to those malls after they shown me an arrogance. I'll come there and instruct the mall to fire your company with immediate effect because you don't want to organise a meeting so we can engage fairly so. We will come with the members of EFF so we can stop that. I am a member of EFF and I am an activist actually. So then we dealing with this malls all the malls (to) find out how many malls think they are paying the guards even the Checkers itself and Pick 'n Pay the guys that are paid. You will have to refund because you are stealing the money from our community you are stealing the money from the disadvantage."

[13]The second message reads as follows:

"If you guys don't listen I will cause an anarchy because I am only trying to engage to find the common ground with you guys. If you do not understand we will cause anarchy there I will come. . . I am close by very close I can even now. I will make the nightshift doesn't even come in. If you have. . ."

[14]On 4 May 2021, Mr Hlopu arrived with another person at the mall and accused Ms Casamiro, an employee of the applicant, of being a thief and a liar. He aggressively pushed her chair and pointed her with a finger. He continued with his conduct despite attempts by other employees to calm him down. He told Ms Casimiro that she would not be able to walk freely in the mall. He also pushed the food he was eating into her face.

[15]On the 4 May 2021, the applicant addressed a letter to the respondent's attorneys demanding a written undertaking from the EFF to instruct its members to stop:

- (a) Intimidating and harassing the applicant and its employees.
- (b) Interfering with the applicant's contractual relationship with its clients and employees.
- (c) Spreading false allegations about the applicant.

[16]The EFF failed to take any step or make any undertaking, but instead, what happened subsequently was that Mr Hlopu arrived on the same day with another man and as stated above threatened a female employee of the applicant, Ms Casimiro.

The case of the respondent

[17]The EFF disputes that Mr Hlopu is its member and further states that even if he was, it could not be held liable for his conduct. It argued that the wrongs he committed did not occur in the context of a gathering as envisaged in section 11(1) of the Regulation of Gatherings Act 205 of 1993.

[18]The EFF further contends in the answering affidavit that it has no knowledge of the conduct complained of by the applicant and thus there is no basis upon which it had to make any undertaking to the applicant.

[19]The EFF argues that only its President and Commander in Chief can in terms of clause 13 (6) of its constitution, make pronouncement for and on behalf of the EFF. The decision of the party and pronouncements are communicated by the Secretary-General and the Commander in Chief.

[20]It was further argued that the membership of a political party, such as EFF, does not automatically attract liability for the conduct of its members as they are not its agents. It is in this respect argued in the heads of argument that:

"4.1. Mr Hlupo is not a representative of the respondent and has not been authorised to represent the respondent;

4.2. Neither the Respondent nor the local Labour Desk has internal record of registering the dispute against the applicant at the Highlands Mews Mall;

4.3 The Labour Desk is a sub-structure of the EFF and falls under the leadership of its National Chairperson and Provincial leadership. The Labour Desk is not empowered to embark on unauthorised activities. When the Labour Desk receives a complaint from any employee, and before any action may be taken on behalf of that employee, the relevant Desk must submit various reports and a request to intervene on behalf of the employee, to the upper leadership structures of the respondent and only when authority to intervene has been granted by the upper leadership structures, is the dispute registered and may the relevant Labour Desk."

[21]In contending that Mr Hlupo did not have authority to represent the party, the EFF relied on the decision in the in *Makate v Vodacom (Pty) Ltd*,^[1] where the Constitutional Court held that:

"45 Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent had authority, the principal is precluded from denying that the agent had authority.

46 The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct."

The legal principles

[22]The application, as alluded to earlier, was launched on an urgent basis, and thus the applicant had to satisfy the requirements of an urgent interim interdict which entails having to show the following:

- (a) A right that is clear, or if not clear, it is prima facie established, though open to some;
- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and he or she succeeds in establishing the right;
- (c) The balance of convenience favours the granting of the interim relief; and
- (d) There is no other satisfactory remedy.

[23]The EFF did not dispute the urgency of the relief sought by the applicant. It also conceded that the applicant had a prima facie right not to be intimidated and regarded the conduct of Mr Hlopu as being unacceptable, particularly in that it involved violence directed at a woman, Ms Casimiro.

[24]As alluded to earlier, it was argued on behalf of the EFF that Mr Hlopu was not a member. On the other hand, the applicant argued that that information of membership fell within the exclusive knowledge of the EFF and that all other facts point to the fact that he is a member.

[25]In *Strydom v Engen Petroleum Ltd*,^[2] the court held that:

"Where matters are within the exclusive knowledge of one party, less evidence is required to be adduced by the other party to discharge the onus of proof on a point. And sometimes, the silence of a witness on a vital point within that person's knowledge is as telling as anything that may be said from the other side."

[26]Similarly, in *Attorneys Fidelity Fund Board of Control v Intibane Mediates and Others*^[3], the court held that:

"The commission fell within the exclusive knowledge of the seller and the buyer would be entitled to the frank disclosure thereof in accordance with the legal convictions of the community. . ."

[27]In my view, the denial of Mr Hlopu's membership of the EFF is unconvincing on the facts and the circumstances of this matter. The EFF needed, in the context of the it being a registered political party to have done more than simply deny that Mr Hlopu was a member. The facts as they stand support the conclusion that he is a member. On arrival at the premises, he was wearing EFF regalia, he informed the applicant that he is a member of the EFF. He repeated that same position in his WhatsApp message.

The principles of vicarious liability.

[28]The common law principles of vicarious liability are well established in our law. Their historical development is rooted mainly in the employment relationship where an employer is often held liable for the delicts of its employees though the employer may not be at fault. In *NK v Minister of Safety and Security*,^[4] the court held that the principles of vicarious liability find meaning in the statement, "that there is a deep-seated sense of justice that is served by the notion that in certain circumstances a person in authority will be held liable to a third party for injuries caused by a person falling under his or her authority." It has also been recognised that the principles are founded in various policy considerations.^[5] It is for this reason that the doctrine of vicarious liability is flexible in its nature which has resulted in the courts developing various tests for determining whether:

". . . a particular act, or course of conduct, on the part of the servant falls within or without the course of his employment. Some of these tests are of broad, general application, others are more suited to the particular situations for which they were devised."^[6]

[29]The tests that have been applied in determining an employer's vicarious liability for the misconduct of an employee are the standard and risk tests. The standards test was formulated in the context of the employment relationship which, in my view, would find application in the context of a political party and its members, and was formulated as follows in *Absa Bank Ltd v Bond Equipment (Pretoria) Pty Ltd*:^[7]

"The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer... It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do."

[30]I pause to indicate that the relationship between the political party and its members is akin to that of an employment relationship. In *Ramakatsa v Magashule*,^[8] the court held that:

"At common law, a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute. The ANC's constitution, together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members. Thus the relationship between the party and its members is contractual. It is taken to be a unique contract."

[31]Reverting to the broad principles of vicarious liability, the court in *Minister of Police v Rabie*,^[9] the court held that: "a master... is liable even for acts which he has not authorised provided that they are connected with with acts which he has authorized that they may rightly be regarded as modes– although improper modes – of doing them..."

[32]In *NK v Minister of Safety and Security* (supra) in the Constitutional Court in dealing with the test for vicarious per O'Regan J observed:

"45 The common-law test for vicarious liability in deviation cases as developed in Rabie's case and further developed earlier in this judgment needs to be applied to new sets of facts in each case in the light of the spirit, purport and objects of our Constitution. As courts determine whether employers are liable in each set of factual circumstances, the rule will be developed. The test is one which contains both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as a consideration which raises a question of mixed fact and law, the objective question of whether the delict committed is 'sufficiently connected to the business of the employer' to render the employer liable."

[33]In an article on the liability risk test, author Whitcher Benita,[10] states that the issue is whether, "in fairness, the [master] ... could be said to have assumed the specific risk that materialised."

[34]In *National Party v Jamie N.O. and Another*,[11] an Electoral Appeal Tribunal, per Ackermann J, held that a political party could be held vicariously liable for its members' acts

supporters in terms of the common law. The court further stated that:

"A member or supporter of a political party is by virtue of the provisions of s 69(1)(b) of the Electoral Act 202 of 1993 bound by the Electoral Code of Conduct contained in Schedule 2 to the Act and, if he or she had infringed the Code of Conduct, is liable to have proceedings instituted against him or her personally in terms of s 70 of the Electoral Act read with the Electoral Regulations. (At 494B-C). There is no provision in the Code of Conduct or the Electoral Act for holding a political party vicariously liable for acts committed by persons merely because such persons happen to be members or supporters of the political party in question. It would be necessary to allege and prove facts which, at common law, would give rise to vicarious liability on the part of the political party if it were sought to hold the political party liable for acts committed by its members or supporters." (my emphasis).

[35]In summary, a political party, similar to an employer, can be held liable for the wrongs committed by its members and supporters on innocent third parties. The underlying consideration for this is that a political party recruits members and supporters to promote and advance its political goals and put them out to interact with communities at large. In doing this it puts community members and other entities at the risk of harm or wrong doing by such members. The recruitment of membership is put in motion by the political party and thus there is no reason why in fairness the political party should not be held vicariously liable for wrongs committed by its members on third parties. Of course a political party should be held liable for the conduct of its members when it is fair in the circumstances to do so. This underlying principle is to ensure that the public is not put at the risk by lack of discipline on members who fail to uphold the ideals and values of the Republic's Constitution.

[36]Based on the above analysis, I concluded that the applicant had firstly made out a prima facie case for granting the interim relief prayed for in the notice of motion. I further found that the EFF in recruiting Mr Hlopu as a member provided the opportunity to him to abuse the membership power. In the circumstances, Mr Hlopu's membership has created a sufficient link between the harm caused by him as a member of the EFF, justifying vicarious liability on his part.
[12]

[37]It was accordingly on the basis of the above reasons that I made the order quoted above.

E Molahlehi

Judge of the High Court

Gauteng Local Division,

Johannesburg.

Appearances

For the Applicant: Adv WF Wannenburg

Instructed by: Esthe Muller Incorporated Attorneys

For the respondent: Adv. Tshidiso Ramogale

Instructed by: Ian Levitt Attorneys

Hearing : 01 June 2021

Order: 6 June 2021

Reasons:

25 June 2021

[1] 2016

(4) SA 121 (CC) at paras 42 —49.

[2] 2013

(2) SA 187 (SCA).

[3] 2016

(6) SA 415 (GP).

[4] (2005) 26 ILJ 1205 (CC) at para [24].

[4] (2005) 26 ILJ 1205 (CC)

at para [24].

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- [5] See Loots, Barbara E. Sexual Harassment and Vicarious Liability: A Warning to Political Parties – Stellenbosch LR 2008 19(1) page 146.
- [6] Ngubetole v Administrator, Cape and Another 1975
- (3) SA 1 (A) at page 9.
- [7] 2001
- [1] SA 372 (SCA) at paragraph [5].
- [8] 2012 JDR 2203 (CC).
- [9] 1986
- [1] SA 117 [A].
- [10] Whitcher, B. Two Roads to an employer's Vicarious Liability for Sexual Harassment: S Grobler v Naspers Bpk en'n Ander and Ntsabo v Real Security CC Indus. LJ 1924 25 .
- [11] 1994 3 SA 483 (EWC) at 485 D-E.
- [12] See Stallion Security v van Staden (2019) 40 ILJ 2695 (SCA)..
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