

SOUTH AFRICA / JUDGMENT

Karibuni Security Services CC v Mec, Department of Health NC Province (2558/2017) [2020] ZANCHC 62 (26 June 2020) [2020] ZANCHC 62

COURT

Northern Cape High Court, Kimberley

BEFORE

Olivier, Mamosebo, Mayet

CASE / FILE NUMBER

2558/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

No: 2558/2017

Heard

on: 15/06/2020

Delivered

on: 26/06/2020

In

the matter between:

KARIBUNI

SECURITY SERVICES

CC

Appellant

and

THE

MEC, DEPARTMENT OF HEALTH NC PROVINCE

Respondent

Quorum:

Olivier J et Mamosebo J et Mayet AJ

JUDGMENT

ON APPEAL

OLIVIER J et MAMOSEBO J

[1] This is a Full Bench appeal with leave of the court a quo. The appeal pertains to the confirmation of the rule nisi granted by Snyders AJ on 14 November 2017 against the appellant. The appellant is represented by Adv WJ Coetzee SC while the respondent is represented by Adv JG Van Niekerk SC.

[2] The appeal is premised on the following grounds which issues stands to determine whether the court a quo erred:

2.1 In finding that it lacked jurisdiction to make a determination on the application or interpretation of s 198D of the Labour Relations

Act[1] (the LRA);

2.2 In finding that the appellant is an independent contractor and not a Temporary Employment Service (TES) as envisaged in s 198(1) of the LRA;

2.3 In finding that the employees claimed to have been employed by the department; and

2.4 In finding that the protestors were acting within the course and scope of their employment with the appellant.

[3] It is apposite to sketch the background to the appeal. The Department of Health (the Department), represented by Dr Deon Theys in his capacity as the Acting Head of the Department and the appellant, Karibuni Security Services CC (Karibuni), represented by Mr Motsamai Rantho, its Managing Member, entered into a written agreement on 31 January 2011 in terms of which Karibuni was to provide security services to the Northern Cape Department of Health for a period of three months. The commencement date of the contract was 01 January 2011.

[4] The contract was extended several times but since February 2017 the extensions were according to the Department on a month-to-month basis. Karibuni maintains that the extensions were for periods of three months at a time, we'll revert to this aspect later. During September of 2017 the Department awarded a tender for security services to a different company and out of courtesy, directed a letter to Karibuni, dated 27 September 2017, informing it of the termination of the contract with effect from 31 October 2017 since a new contractor was to take over from 01 November

2017. Karibuni was requested to vacate the Department's premises by 27 October 2017 to enable the new contractor to establish itself.

- [5] On 20 October 2017 there were certain unknown employees who presented at Mr Jonker's offices, as the head of the Department of Health, situated at Kimberley Hospital Complex, demanding an audience with him. That meeting did not materialise. According to him, the said employees wanted to address "their claim to be employed by the Department" with him. On Monday 23 October 2017 the employees gathered again at Mr Jonker's office and in reaction to the hospital personnel having locked the offices, they reportedly locked the gates to the hospital complex and administrative offices, denying members of the public and ambulances access to and from the hospital. They further, apparently resorted to violent means which necessitated intervention. The South African Police Services (the SAPS) was summoned but was seemingly not of much help.
- [6] The MEC approached Court on an urgent basis on 24 October 2017 seeking interim relief. Pakati J issued the rule nisi calling upon the respondent to show cause on 27 November 2017 why the rule could not be confirmed. The rule nisi interdicted employees of Karibuni from entering the Department's premises for any other purpose than medical treatment, from threatening or assaulting security personnel or other persons or inciting security personnel not to render security services and from interfering with access to the premises. The appellant anticipated the hearing to 02 November 2017, when Snyders AJ confirmed the rule and ordered Karibuni to pay the costs of the application. We now consider the grounds herein below. Only two grounds were argued before us.

Whether the Court had jurisdiction to make a determination (1st Ground of appeal)

- [7] The court a quo held that it lacked the necessary jurisdiction to make a determination on the application or interpretation of s 198A of the LRA. In as far as this ground is concerned, Mr Van Niekerk has conceded, correctly so in our view, that the court a quo misdirected itself in finding that it lacked the required jurisdiction to make a determination based on the provisions of s 198A of the LRA. There is therefore no need to consider this aspect any further.

We find, therefore, that the appellant was entitled to raise the defence and that the court a quo was enjoined to entertain it.

Employees claimed to have been employed by the Department (3rd ground of appeal)

- [8] Mr Van Niekerk conceded that this was a factual misdirection by the court a quo as the correct position was that the employees claimed to be employed in future by the Department. We also find it unnecessary to consider this ground any further. The remaining two grounds will now be considered.

Was the appellant an independent contractor or a Temporary Employment Service? (2nd ground of appeal)

[9] The appellant raised a special defence in limine that it was a "Temporary Employment Service" (TES) as contemplated in s 198(1) of the LRA. It is on that basis that it argued that it was misjoined in the interim relief as the employer. If Karibuni was no longer the employer of the protesting guards, it could also not be liable for their acts, so this would also have constituted a defence on the merits.

[10] The provisions of s 198A are applicable to employees procured or provided by a TES. The relevant provisions of s 198A read as follows:

"198A. Application of s 198 to employees earning below earnings threshold -

(1) In this section, a "temporary service" means work for a client

by an employee -

(a) For a period not exceeding three months;

(b) As a substitute for an employee of the client who is temporarily absent; or

(c) In a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

(2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of s 6(3) of the Basic Conditions of Employment Act.

(3) For the purposes of this Act, an employee-

(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or

(b) not performing such temporary service for the client is-

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of s 198B, employed on an indefinite basis by the client."

[11] The appellant contended that it was a TES and that the protesting guards were, at the time of these events, deemed employees of the Department as envisaged in s 198A(3)(b)(1) of the LRA. Mr Coetzee submitted further that clause 5.5 of the written contract, which provided that Karibuni had to "allocate personnel to a specific site" who shall be placed "only upon prior consent of the Security Manager of the Department", is a clear indication that Karibuni was not a private contractor. We do not agree with this submission and will revert to it below.

[12] In terms of s 198 of the LRA a TES would be someone:

(1) who procures for or provides to a client persons:

- (a) who render services or perform work for the client; and
 - (b) who are remunerated by the procurer/provider; and
 - (2) who does such procurement/provision for reward (presumably by the client).
- [13] Sec 198A deals with the application of s 198 to employees earning below the prescribed threshold. In this case, it is common cause that the security guards were earning less than the threshold and, if they had indeed been procured and provided by the appellant operating as a TES, the provisions of s 198A would therefore have been applicable to them. In such a scenario the question would then be whether, at the time of the incident, the guards were performing "temporary service" or not. If they were, they should in terms of s 198A(3)(b)(i) have been deemed to be employees of the Department. If they were however not performing "temporary service" they would, in terms of s 198A(3)(a), read with s 198(2), have remained the employees of the appellant, if it was a TES.
- [14] For purposes of this matter, and in terms of s 198A(1)(a), "work for a client by an employee for a period not exceeding three months" would have constituted "temporary service."
- [15] The court a quo found the appellant to be an independent contractor. It held, presumably on the basis of s 198(3) of the LRA that, if the appellant was an independent contractor, it could not be a TES.
- [16] Mr Coetzee submitted that the finding that because it was an independent contractor cannot be a TES, is wrong. Counsel further submitted that s 198(3) simply provides that an independent contractor cannot for the purposes of that section be the employee of a TES, nor can a TES be the employer of an independent contractor. It does not exclude an independent contractor from the definition of a TES itself. We agree with this submission.
- [17] Mr Coetzee went on to submit, apparently, that the guards "stayed in the job" for longer than the 3 month period referred to in s 198A(1)(a). This submission was apparently based on the fact that the initial contract was concluded in 2011, and on the assumption that the striking guards had since then been working on the premises of the Department. It was on this basis that he then submitted that the striking guards should, in terms of s 198A(3)(b)(i), have been deemed to have been the employees of the Department.
- [18] Mr Van Niekerk supports the finding of the court a quo that the appellant was not a TES, not on the basis that an independent contractor could not be a TES, but simply on the basis that, in terms of the 2011 contract, the relationship between the appellant and the Department was not a TES/Client relationship. He pointed out, with reference to numerous provisions of the contract, that what the appellant was providing was security services, and not security guards.
- [19]

The provisions of the contract that Mr Van Niekerk highlighted in paragraphs 13 to 18 of his heads of argument overwhelmingly points to a contractual relationship in which Karibuni would provide services and not employees. The contract is indeed replete with indications that Karibuni was providing security services to the MEC, by means of, among others, security guards in its employment. Mr Coetzee was constrained to concede that Karibuni also provided security equipment to its client, as opposed to personnel. Mr Van Niekerk correctly pointed out that the provisions of cl 5.5 should not be read in isolation, but rather in the context of the contract as a whole. We agree with this submission, and on a reading of the contract as a whole, it is clear that Karibuni was providing services, as opposed to simply employees, and that it therefore was not a TES.

[20] Insofar as the deeming provisions in s 198A(3)(b)(i) would only be applicable to workers provided to the Department, this finding would in itself be the end of the argument that the security guards should have been deemed to have been the employees of the Department.

[21] There is in any event and in our view another reason why this deeming provision could not have been applied to the security guards, and that is that they were not performing temporary service as defined in s 198A(1)(a). Mr Coetzee's submission that they "stayed in the job" for longer than three months must be closely examined.

[22]

Insofar as the submission may be based on the period since January 2011, there is no evidence that the guards involved in the strike or protest action, had since 2011 been performing security duties at the premises of the Department, and had not possibly been employed at some stage thereafter.

[23] Even if it could, however, be assumed that they had indeed been performing services there prior to the expiry of the contract, this would not in our view mean that they had, specifically for the purposes of s 198A(1), been performing services for the Department since then.

[24] It appears from clause 3.1 of the contract[2] that the 2011 written contract expired on 31 March 2011. It is common cause that the contract has since then been extended from time to time. The only dispute, as already pointed out, is whether the extensions were for a month at a time (Department's version), or for three months at a time (the appellant's version).

[25] In *Numsa v Assign Services and Others*[3] the Labour Appeal Court (LAC) considered the interpretation and effect of the deeming provision, s 198A (3)(b)(i). The court essentially held that the TES is the employer of the placed employee until the employee is deemed to be the employee of the client and that once the deeming provision kicks in after the three months period, the client becomes the statutory employer of the TES employee. The TES employees are deemed to be permanent employees of the client.

[26] It is necessary to understand the purpose of the deeming provision. It is not meant to transfer the contract of employment between the TES and the placed worker to the client but, as explained by the LAC, to create a statutory employment relationship between the client and the placed worker. The LAC went further to explain that the status of the said employees changes because they will now be fully integrated into the enterprise as employees of the client. Of importance is that while the operations of the TES have not been banned by the amendments to the LRA, they, however, restrict the TES' to genuine temporary employment arrangements in line with the purpose of the Act.[4]

[27] What is significant in the appellant's case is that Karibuni was responsible for the remuneration and all human resources liabilities of the employees, they never shifted to the Department. The Department never remunerated the employees directly. This assertion is supported by the averments in the replying affidavit at 2.2.5 and 2.2.6 referring to Karibuni had to "retrench its employees" and also that some of Karibuni's security guards had found employment with the new security company in confirming that they were not employed by the MEC.

[28] The LAC's remarks at para 43 of the Assign judgment are apposite:

"[43] .. It would make no sense to retain the TES in the employment equation for an indefinite period if the client has assumed all the responsibilities that the TES had before the expiration of the three- month period. The TES would be the employer only in theory and an unwarranted 'middle-man' adding no value to the employment relationship."

The MEC had not assumed all the responsibilities that the appellant exercised over the security guards.

[29] The Constitutional Court in *Assign Services (Pty) Ltd v Numsa and Others*[5] dismissed Assign's appeal and upheld the LAC decision. The Concourt held that s 198A must be contextualised within the right to fair labour practices in s 23 of the Constitution and the purpose of the Labour Relations Act as a whole.

[30] The Constitutional Court summarised the Labour Appeal Court's finding in the Assign

judgment

by remarking as follows[6]:

"[28] The Labour Appeal Court held that the sole employer interpretation best protected the rights of the employees, and promoted the purpose and objects of the LRA and the 2014 amendments. It considered the definition of "temporary service" in section 198A(1) and held that only persons performing a truly temporary service should be employed by a TES. A placed employee who has worked for a period in excess of three months is no longer performing a temporary service and the client

becomes the sole employer by virtue of s 198A(3)(b)."

- [31] The initial "contracting" of the security guards for service in terms of the written contract came to an end at the end of March
2011. Their "contracting" in terms of the extensions thereafter ended with each such extended period. At the time of these events they had therefore, at best for the appellant, been "contracted"[7] for a three month period, and were therefore not rendering "temporary services".
- [32] The appellant in fact admitted at para 7.1 of its answering affidavit that what it was providing to the MEC in terms of the written contract concluded on 31 January 2011, was "security services" at various sites controlled by the Department. This means it did not provide "persons", as required by the definition of a TES in s 198(1).
- [33] What further supports the submission that the appellant supplied services as against persons per se, is the fact that it had to be registered with the Private Security Industry Regulatory Authority (PSIRA), in order to be able to provide a service as opposed to merely providing "other persons" to the Department. Mr Van Niekerk pointed out that registration in terms of PSIRA is only required if a person intends rendering security services for remuneration.
- [34] If one closely examines the provisions of the LRA and the clauses in the contract, it is our view that the deeming provision in s198A(3)(b)(i) does not find any application in the case before us. We find that Karibuni was not a TES and that, even if it was, the protesting guards were not rendering "temporary service".

Whether the protestors were acting within the course and scope of their employment with the appellant(4th ground of appeal)

- [35] The protestors attended the office of the Head of Department on 20 and 23 October 2017. The court a quo found that the protestors were acting in the course and scope of their employment.
- [36] The following pose difficulty in the said finding by the court a quo: first, the relief sought in the Notice of Motion was prohibitory orders directed at the employees, who were not joined or in any way given notice. Other than the costs order, no relief (for example an order that the appellant comply with the contractual obligations in terms of clause 10.1) was sought against the appellant itself. The question is whether Karibuni was only joined as a way to get costs occasioned by the actions of its employees. Be that as it may, the cause of action against Karibuni made out in the founding affidavit was based on clause 10.1 which reads:

"The contractor shall at all times be responsible for the acts and omissions of its employees providing any service in the Department in terms of this agreement and acting within the course and scope of their duties and employment."

- [37] For Karibuni to have been responsible for the acts of the employees:-

37.1 The employees had to have been providing services to the Department in terms of the contract, in other words, security services; and

37.2 The acts had to have been committed by those employees while "acting within the course and scope of their duties and employment."

[38] The founding affidavit contained no express allegations to this effect, nor did it contain a shred of evidence that could justify such a finding or inference. It was only addressed in the answering affidavit, and then in the replying affidavit.

[39] This failure to make out a case against the appellant in the founding affidavit should in itself have been fatal to the application. There was, for example, no allegation that the protesting guards were on duty. It appears that there were other employees of Karibuni on the premises who were on duty as guards, and the allegation was made that they were incited to leave their posts. No allegation was made that those guards then partook in the protest.

[40] In the answering affidavit it was stated that the protesters were in fact off duty on the dates of the events and that the security guards on the premises who were on duty, were at their posts.

[41] In the replying affidavit it was not denied that the security guards who were protesting, were off duty. In fact, it could be argued to have been admitted in paragraph 11.4 of the replying affidavit. The only factual dispute that arose from the replying affidavit in this regard, is that it was disputed that all of the guards who were at the time on duty there, had been at their posts. It was not, however, alleged that those who had left their posts because of the incitement, had then joined the protestors or that they had in any way been part of the conduct complained of by the MEC.

[42] The appellant's version that the protestors were not on duty, was therefore not really disputed, and even if it could be said to have been, the MEC was on the anticipated return date seeking final relief, which would mean that the appellant's version on this should have been accepted. It was never suggested that the allegation that the protestors were off duty was far-fetched or that it was for any other reason untenable[8]

[43] It follows that, in our view, the protesting employees of the appellant were not at the relevant times providing services to the MEC as required by Clause 10.1. We will nevertheless proceed to consider the question whether the protestors had at the time acted in the course and scope of their duties and employment with the appellant. Mr Van Niekerk referred to the test confirmed, albeit in a delictual context, in *K v Minister of Safety and Security*[9] and *F v*

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Minister of Safety and Security and Another[10] He correctly pointed out that the enquiry should involve two questions, namely:

43.1 was the wrongful act committed "solely for the purposes of the employee"; and

43.2 in any event, and even if it was, whether there was "nevertheless a sufficiently close link between the employee's acts for his own interests and purpose and the business of the employer".

[44] Mr Van Niekerk went on to submit that the court a quo was "clearly not in a position to evaluate" the first question, because it would have involved a subjective test. There was of course no affidavit by a protesting security guard about the reason for and the aim of the protest, and there was accordingly no direct link established in this regard. There was, however, no reason why the court a quo would not have been entitled to draw inferences from the objective evidence in considering what the aims and intentions of the protestors were[11].

[45] The objective and undisputed evidence was that the aim and demand of the protestors was to be appointed as employees of the MEC, and it really follows logically that they were therefore acting solely in their own interests. Quite understandably Mr Van Niekerk did not argue that the protestors had in some way been acting with any other interest or purpose in mind.

[46] Mr Van Niekerk argued, however, that there was in any event a sufficiently close link between the conduct of the protestors, on the one hand, and the purpose and business of their employer, Karibuni, on the other. He based this on three submissions, namely:

46.1 that it was the fact that they were employees of the appellant that enabled the protestors to enter the MEC's premises;

46.2 that their unlawful acts were the result of the fact that the appellant's contract with the MEC was coming to an end; and

46.3 that the appellant "still had control over their conduct".

It is not discernible on the MEC's papers, neither could Mr Van Niekerk refer us to an averment that access to the MEC's premises was controlled on the day of the protest, and that it was the fact that they were in the employment of Karibuni that enabled the protestors to access the premises. He could only point to a clause in the contract which confirmed that access control was one of the security guard's duties.

[47] It is incorrect to say that the ability of the protestors to access the premises was the "direct result" of their employment with Karibuni. In his heads of argument Mr Van Niekerk referred to paragraph 18 of the answering affidavit in substantiation of this submission, but in that paragraph the deponent in fact stated that the public had "free access" to the premises. No case at all. was made out by the MEC that access to the premises was controlled or restricted and that the protestors had been allowed in because of the fact that there were security guards in the employment of the appellant.

- [48] That the protestors may have regarded the contract between Karibuni and the MEC to have been cancelled, would not in some way have linked their actions to the purpose and business of Karibuni. The protesting employees were there to obtain other employment, with a different employer, and not to fight the perceived cancellation of the contract between the MEC and their employer. Their demand was not that the contract with Karibuni, and their employment with Karibuni, had to continue.
- [49] Their demand therefore had absolutely nothing to do with Karibuni's business, or with its purpose, namely to provide security services.
- [50] Mr Van Niekerk's submission that Karibuni still had control over the protesting security guards, is based on the statement by Mr Mogorosi, deponent for the appellant, that he had, on the one day, requested the protestors to leave, and that they then indeed left.
- [51] The request and the protestors leaving the premises must not, however, be seen in isolation. It is clear that the protestors were on that occasion accompanied by Ms Sitholo, a representative of COSATU, and that it was only after Mr Mogorosi had, to the knowledge of the protestors, consulted Ms Sitholo, that the request was made. There is no indication that the protestors would have left if Mr Mogorosi had not consulted the representative of their trade union.
- [52] The court a quo found that the fact that the protesting security guards had demanded a meeting with the HOD of the Department "could be interpreted to mean that the employees who requested the meeting were on duty, alternatively, if they were off duty, their request falls within the course and scope of their employment".
- [53] It is not discernible how their demanding a meeting with someone not even in the employment of their employer, could justify the inference that the security guards were on duty. For the same reason we cannot agree that the demand for such a meeting was made in the course and scope of their employment. It is difficult to fathom conduct further removed from an employee's duties with an employer than he or she demanding a meeting with another employer with a view to leaving his or her employer and becoming employed by the other employer.
- [54] Our view is that the protestors were clearly on a frolic of their own when they went to the MEC's premises. Regard being had to the remarks by the Constitutional Court in *K v Minister of Safety and Security*[12] the following extract is relevant:
- "[44] From this comparative review, we can see that the test set in *Rabie*, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently

flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order."

- [55] It was only in reply that the provisions of clause 6.6 of the contract was raised as a basis for holding the appellant accountable for the actions of the security guards. This was apparently in response to the statement in the answering affidavit that the protesting security guards were not on duty, a fact which the deponent for the applicant would on all indications have been aware of.
- [56] In terms of clause 6.6 Karibuni would "be responsible for the discipline of its personnel" and would take "disciplinary measures" when the Department notified it of "any breach, failure or dereliction" by its personnel.
- [57] The actions of the protesting security guards could clearly not be seen as a "breach, failure, or dereliction" of their duties, and the provisions of clause 6.6 did not assist the MEC.
- [58] The court a quo found that, in terms of clause 6.6, Karibuni had "a contractual responsibility to control the employees", but it did not go on to consider whether the unlawful acts of the protesting security guards amounted to a "breach, failure or dereliction" of their duties, as envisaged in clause 6.6.
- [59] The court a quo also did apparently not consider the implications of clause 6.6 not having been relied upon in founding. Interestingly, Mr Van Niekerk did not even argue this aspect, except for the point when responding to a question put to him in this regard. We conclude, therefore, that the protestors were not acting within the course and scope of their employment with the appellant.

Costs

- [60] We are now left with the question of costs. The appellant has been substantially successful in its appeal. It is trite that the costs of an appeal are in the discretion of the Court hearing the appeal. Generally, the appellant who has been substantially successful on appeal should be awarded his costs. See *Norwich Union Fire Insurance Society Ltd v Tutt*[13]. There is no reason why the costs should not follow the result.
- [61] We have had the opportunity to look at our sister's, Mayet AJ's, judgment and we respectfully disagree with it. An agreement to provide security services could, in our view, not in itself have created the risk that personnel who were, not even in terms of that agreement, supposed to be at the premises where security services are provided, might go there for purposes of their own and commit unlawful acts there. The question then is whether there is, in the Karibuni case nevertheless, reason to say that Karibuni created a risk that something like this could happen.

[62] Mayet AJ relies on the case of Stallion Security (Pty) Ltd v Van Staden, 2020

(1) SA 64 (SCA) to substantiate her view. The Stallion case is, in our view clearly distinguishable. In that case the offending guard had free access to the premises, undetected, by means of a biometric system (fingerprint) and an override key. He had these privileges,

and used them to gain access, because he had been appointed as site supervisor, and in fact, as the person in charge of the provision of security services at the premises. In our view there is a further reason why Stallion had indeed created that risk, viz when it appeared that Mr Khumalo had psychological problems and was unstable, and when he was in fact on sick leave because of that, they did not take away his access privileges.

[63] No case has in any event been made out that the Karibuni protestors were admitted to the premises by colleagues, or that their colleagues would have removed them had they not been their colleagues. To say this, would amount to conjecture. In fact, the protesting guards neutralised any such possibility by inciting on- duty guards to leave their posts.

[64] Clause 6.6 and clause 10.1 are unrelated, as clause 6.6 would at best have constituted a completely different cause of action, not made out in founding. Leave was never sought in the replying affidavit, to introduce new evidence and an additional cause of action, and no allegation was made that clause 6.6 had, as a result of time constraints, not been relied upon in founding.

[65] As a result the following orders are made:

1. The appeal is upheld.
2. The order granted by the court a quo is set aside and substituted with the following: "The rule nisi is discharged and the application is dismissed with costs."
3. The respondent is ordered to pay the costs of the appeal, which costs include the costs of the application for leave to appeal.

CJ OLIVIER

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I concur.

MC MAMOSEBO

JUDGE OF THE HIGH COURT NORTHERN CAPE DIVISION

MAYET, AJ (Dissenting)

[66] I have had the privilege of reading the majority judgment prepared in this matter by Olivier and Mamosebo JJ. For consistency, I adopt the same nomenclature as in the majority judgment. I agree with the account of facts, the history of the litigation and the issues that

are raised before this court. I agree that this court has jurisdiction to make a determination based on the provisions of section 198A of the LRA and that the security services provided by Karibuni do not fall within the deeming provision in section 198A(3)(b)(i). Indeed, I differ in only one material aspect. That difference, however, means that I cannot concur and respectfully dissent for the reasons explained hereunder.

- [67] My diversion stems from the decision in *Stallion Security (Pty) Ltd v Van Staden*[14] where the Supreme Court of Appeal included the risk of harm as a material consideration in the test for vicarious liability.[15] The court found Stallion liable for the actions of an off-duty security guard who committed a murder at premises protected by Stallion security. In reaching this conclusion, Van der Merwe JA included the risk of harm as an additional requirement to the test as set out in *K v Minister of Safety and Security*[16] and found liability on the basis that the risk of harm caused by the provision of security services is a sufficiently close link between the action of the employee and the business of the employer. The risk of harm criterion accords with the approach in *Minister of Police v Rabie*[17] where Jansen JA stated "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." [18]
- [68] In light of the aforesaid, it is necessary to go a step further after applying the test in *K v Minister of Safety and Security*, supra, to objectively evaluate the creation of the risk of harm by the business of Karibuni in providing security services.
- [69] Before I delve into the risk of harm, I pause to mention that the cause of action in the founding affidavit was based on the contract and directed at Karibuni's responsibilities for the acts and omissions of its employees. In so doing, specific reference was made to clause 10.1 of the contract. In the answering affidavit, Karibuni contended that clause 10.1 did not include conduct that was outside of working hours or when its employees were off-duty. It was in order to rebut this contention that the Department referred to clause 6.6 of the contract.
- [70] Given that this matter commenced as an urgent application, in my view, the Department did not make a fresh case in reply but simply made reference to clause 6.6 in order to demonstrate Karibuni's responsibility for employees conduct in the event of any breach, failure or dereliction of duty insofar as discipline is concerned.[19] do not take issue with this approach.
- [71] An evaluation of the creation of the risk of harm must commence with the contract. It is evident from the preamble that the contract is to ensure that the Department's health facilities are secured, safely guarded and protected[20] through the provision of security services.[21] The inherent purpose of the contract is focused on ensuring the safety and security of employees, property and patients attending and visiting facilities of the Northern Cape Department of Health.

[72] From the objective facts, Karibuni was under a contractual duty to provide 24-hour access-control services to the Department. As a result, Karibuni placed its employees as security guards to discharge this responsibility. This special position created a material risk that the security guards might abuse their position.

[73] The Department provides health services and it is important that the correct atmosphere is created on the premises. It is not contested

that staff felt threatened by the protest actions of the security guards. It is not disputed that Galeshewe Day Hospital was set alight on 24 October 2017.[22]

[74] The majority judgment concludes that the protesting security guards were off-duty, were not providing services as required in terms of clause 10.1 of the contract and not acting in the course and scope of their employment. However, the test is incomplete at this juncture without an evaluation of the risk of harm. In situations where the business of the employer creates a risk of harm then it matters not that the protesting employees were off-duty and not providing services in the course and scope of their employ as there is a sufficiently close link to create liability for the wrongful acts of the employees and the business of the employer.[23]

[75] In providing security services, Karibuni furnished its employees with the opportunity to commit the wrongs in question by clothing them with the powers and access necessary for the rendering of security services. There is no doubt that members of the public who accessed the Department's premises for purposes of protesting would have been removed by Karibuni security guards employed specifically for such purposes. It is therefore precisely because of the nature of the business in providing security services which enabled Karibuni's off-duty security guards to enter and remain on the Department's premises without adverse action from Karibuni's

security guards who were on duty. This is exacerbated by the fact that the on-duty guards were incited by the protesting guards. This explains the approach adopted by the Department in repeatedly requesting Karibuni for assistance with its employees. I also point out that, when the protest commenced on 20 October, Karibuni did not remove access, leading to further protest action on 23 and 24 October which necessitated the interim interdict.

[76] With regard to the finding that the protesting employees were not providing services in terms of the contract and that such employees were off-duty and did not act within the course and scope of their employ and were on a frolic of their own, I am mindful of the remarks in *ADT Security (Pty) Ltd v National Security & Unqualified Workers Union & others*[24] that "The duty of good faith extends even outside normal working hours. Accordingly, it cannot be an excuse to say workers were merely picketing during their lunch hour which they had sacrificed. There can be no doubt that picketing at the employer's head office even during their lunch hour could impact on the employer's goodwill and reputation."

[77] Be that as it may, objectively, such employees were only able to act in the manner in which they did because of the creation of the risk of harm as a result of their employment with Karibuni in the provision of security services.

[78] I am constrained to take the view that Karibuni was contractually burdened with the responsibility to protect the Department and this creates a normative link between Karibuni's business and the harm suffered by the Department. I am not persuaded that the court a quo erred when confirming the rule nisi.

[79] For the reasons set out above, and in my view, the appeal should be dismissed.

N MAYET

ACTING JUDGE OF THE HIGH COURT NORTHERN CAPE DIVISION

For the appellant: Adv WJ Coetzee SC

Instructed by: Adrian B Horwitz & Associates

For the respondent: Adv JG Van Niekerk SC

Instructed by: Haarhoffs Inc

[1] 66 of 1995 as amended

[2] Commencement and duration This agreement shall, notwithstanding the date of signature, commence on 01st of January 2011 (hereinafter

referred to as the effective date). And shall continue until 31st March 2011 unless terminated earlier as provided for in this

agreement.

[3] (JA96/15); [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC); [2017] 10 BLLR1008 (LAC) (10 July 2017)

[4] Paras 40, 42 and 43 of the LAC Assign judgment

[5]

[2018] JOL 40113 (CC); [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC)

[6] Ibid, para [28]

[7] Ibid, para [1]

[8] Compare Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC 2020 (2) SA 419 (SCA) para [23]

[9] 2005 (6) SA419 (CC) at para 32

[10] 2012 (1) SA 536 (CC) at para 49 and 50

- [11] Compare *Prollius v Minister of Home Affairs and Immigration* 2018 JDR 0024 (Nm) para [67]
- [12] At 441 para 44
- [13] 1960 (4) SA 851 (A) at 854
- [14] 2020 (1) SA 64 (SCA)
- [15] *supra*, para 32
- [16]
- [2005] ZACC 8; 2005 (6) SA 419 (CC) para 28
- [17] 1986 (1) SA 117 (A)
- [18]
- [19] *KwaZulu Natal Bookmakers Society and another v Phumela Gaming and Leisure Ltd* [2019] 4 All SA 652 (SCA) at para 50
- [20] Record Agreement pp16 para 2
- [21] Record Agreement pp 16 para 1
- [22] Record pp 94
- [23] *Stallion Security (Pty) Ltd v Van Staden*, *supra*, para 26
- [24]
- (2015) 36 ILJ 152 (LAC) para 31

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