

SOUTH AFRICA / JUDGMENT

Van Staden v Khumalo and Another (89921/15) [2017] ZAGPPHC 764 (24 October 2017) [2017] ZAGPPHC 764

COURT

North Gauteng High Court, Pretoria

BEFORE

Brand

CASE / FILE NUMBER

89921/15

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case number: 89921/15

Date: 24 October 2017
In

the matter between: VAN
STADEN, DALEEN
Plaintiff
and
OR
KHUMALO 1st
Defendant
STALLION SECURITY (PTY)
LTD 2nd
Defendant

JUDGMENT**BRAND AJ****Introduction**

[1] The Plaintiff, Ms Daleen van Staden claims from the Defendants damages in the form of loss of support consequent upon the murder of her husband, the late Mr Deon van Staden by the 1 Defendant, one Ronald Mkululi Khumalo (Khumalo). Khumalo had, on 3 November 2014, accosted her husband at his place of work, robbed him by forcing him at gunpoint to transfer money electronically into his

account, then kidnapped him and murdered him.

[2] Initially at trial the parties had no agreement on whether the matter should proceed on both the questions of liability and quantum or whether the issues should be separated. However, at the end of the trial the parties had reached agreement with respect to the quantum of damages to be awarded should I find in favour of the Plaintiff on liability. Accordingly, I need decide only the issue

of liability.

[3] By the time this matter served before me, the 1st Defendant, Khumalo, who was arrested, tried and convicted for the murder, but escaped from jail, was presumed deceased, so that the claim proceeded only against the 2nd Defendant.

[4] The claim against the 2nd Defendant - Stallion Security (Pty) Ltd (Stallion) is not based on any fault on its side. Instead, the Plaintiff proceeds against Stallion on grounds of vicarious liability, as Khumalo at the time of commission of the delict was employed by Stallion.

[5] At the close of the Plaintiff's case, Mr Stockwell SC for Stallion applied for absolution from the instance. I dismissed that application (my reasons for doing so follow briefly below). Stallion then closed its case without leading any evidence. Accordingly, I must decide this matter on the basis of the Plaintiff's version, as impugned (or not) under cross-examination. As it turned out, no material aspects of the Plaintiff's version were disputed under cross-examination by Mr Stockwell, so that the facts as I set them out below can be taken to be common cause between the parties.

The facts

[6] Mr Cilliers SC for the Plaintiff called two witnesses: Mr Hendrik Nicolaas Jacobus Harmse, a risk manager in the employ of Bidvest Panalpina Logistics (also Deon van Staden's employer), responsible inter alia for coordinating security at the building where Mr van Staden worked; and Warrant Officer M Nxumalo of the South African Police Service, who was present when Khumalo gave his first statement after being arrested for the murder of Deon van Staden. I also admitted into evidence as Exhibit 1 a video from the security

cameras at the building where Mr van Staden was murdered, showing parts of the events of that day.

[7] Mr Stockwell objected against WO Nxumalo's testimony on grounds that it was bound to be hearsay about what Khumalo had to say when his statement was taken. At the time I noted the objection and allowed the testimony to proceed, deciding that I will rule on the admissibility of his testimony later. In the event nothing turns on WO Nxumalo's testimony (except perhaps for one aspect that works in favour of Stallion), so that I make no ruling on the admissibility.

[8] From the testimony and the video material the following emerged:

[8.1] At the time of his death Deon van Staden worked as a financial manager for Bidvest Panalpina Logistics (Bidvest), with his place of work a building at 20 Wrench Road, Isando, Gauteng ('the Wrench Road building').

[8.2] At his place of work access control and security services were provided by the 2nd Defendant, Stallion, in terms of a contract of service with Bidvest.

[8.3] Khumalo was employed by Stallion first as a site supervisor, responsible for supervising the Stallion staff providing security at the Wrench Road Building. In 2013 he was promoted on the witness Harmse's recommendation to site manager, which meant that he managed the security services at the Wrench Road building and two other sites (Units 1 and 2). In both capacities he reported to Harmse, who was Bidvest's security manager for the Wrench Road building and two other warehouses.

[8.4] In both these capacities, Khumalo, as opposed to the ordinary guards reporting to him, had full access to the facilities at which he worked - at Wrench Road in particular he was registered on the biometric access system (an electronic fingerprint-based system that allowed access through fingerprint recognition) and had access to all floors of the building except for the 2nd, where the IT department was located. As security manager, he did not wear a uniform, and would have regular access to the buildings he managed, so that the staff working there would know him.

[8.5] Harmse testified that he had known Khumalo since 2012, when the latter was already working as site supervisor at Wrench Road. Khumalo was an excellent employee, so much so that Harmse recommended him for promotion to site manager. However, from around a month before the day of the murder, Harmse noticed a marked change: a growth had appeared on Khumalo's face and he was clearly suffering from some health problem. His appearance, which was prior to this always very neat, became slovenly and he regularly started to take time off from work.

[8.6] From a week before the date of the murder, Khumalo did not appear at work at all. This prompted Harmse to call Stallion and ask about his whereabouts. He was informed that Khumalo was ill and for that reason not at work. On Monday 3 November, Harmse had enough of Khumalo's absence. He again called Stallion and asked that Khumalo be removed as site manager and replaced by someone else.

[8.7] Early on the evening of 3 November (the time of Khumalo's entrance onto the first floor where Deon van Staden worked is shown on the security footage as 18:55), while not on duty and for all intents and purposes on sick leave, Khumalo gained entrance to the Wrench Road building through an emergency exit on the second floor. He then moved down to the first floor where Deon van Staden was working. Access to the office area where Van Staden's office was located is through a security door that opens only upon fingerprint recognition. Although Khumalo had fingerprint access through this door, he did not make use of his fingerprint to enter. Instead, he used a bypass key that he, and only he as security manager, had in order to be able to open the security doors. Upon being asked to speculate why he would do this, Harmse answered that it was probably in order to avoid later detection - the bypass key, unlike the fingerprint, leaves no record.

[8.8] Khumalo, who could by then on the video be seen carrying a revolver, paused for some time at the edge of an open plan office area where at least one person could at that time still be seen working, trying not to be seen. When a chance presented itself, he walked toward and entered Deon van Staden's office. Although there is no footage of what happened in the office, in his statement Khumalo indicated that he confronted Van Staden with his revolver and demanded cash from him. When Van Staden told him that he had no access to cash, he then forced him at gunpoint to transfer R30 000.00 from Van Staden's personal account to his own. They then exited the office, with Khumalo walking slightly behind Van Staden, still with the revolver in his hand.

[8.9] Khumalo and Van Staden proceeded to the second floor (Khumalo forcing Van Staden to open the door with his fingerprint) where they exited through a different emergency door adjacent to the parking lot. They got into Khumalo's car, with Van Staden driving and drove away undetected.

[8.10] Some distance away Khumalo ordered Van Staden to stop the car, whereupon he shot him.

Absolution from the instance

[9] As stated above, at the close of the Plaintiff's case on the merits, Mr Stockwell for Stallion applied for absolution from the instance, an application which I dismissed. My reasons for that dismissal follow.

- [10] As will become clear from the more detailed discussion below, in this matter, where Khumalo, although at the time employed by Stallion, did not commit the delict in the execution or performance of his duties, but was instead acting in pursuance of his own interests and purposes, in order to show vicarious liability the Plaintiff must establish that there nevertheless existed a sufficiently close connection between the murder and Khumalo's employment.
- [11] At the stage of absolution from the instance the Plaintiff needs only to have put up sufficient evidence that a reasonable court might find in its favour - it must, in practical terms, that is, simply have put up a *prima facie* case, one that requires rebuttal in order not to stand.[1]
- [12] That threshold the Plaintiff cleared with some room to spare. It had shown that Khumalo could not, but for his employment with Stallion, at all have committed the delict: his employment both created the opportunity for him (he knew Van Staden was the financial manager and often worked late) and made it possible for him to carry out his plans (he only had access to the Wrench Road building and Van Staden's floor and office because he worked for Stallion and he used equipment he got through his employment to gain access). It had also shown that Stallion, the employer, was under a contractual duty to apply access control to the Wrench Road Building,

with the purpose of protecting the property and employees of Bidvest there, a fact that increases the risk created by the employment, by creating a measure of trust in its employees.

- [13] To be sure, there are many possible rejoinders to the evidence put up by the Plaintiff and Mr Stockwell pressed some of them on me in his very useful heads of argument in support of absolution and in oral argument before me. Nevertheless; I cannot but find that, absent such rebuttals being substantiated through evidence led by the 2nd Defendant, any reasonable court might uphold the Plaintiffs claim.

The Plaintiff's case assessed on the evidence presented

- [14] The application for absolution from the instance having been dismissed, it remains for me to assess whether I should on the evidence presented find in favour of the Plaintiff. To do so I first set out the law relating to vicarious liability in cases such as these and then assess the Plaintiffs case in light of that law.

- [15] At the outset the obvious must be emphasised: Vicarious liability is a form of liability where one person is held liable for a delict

committed by another, without fault- that is, a form of strict liability.[2]

- [16] Ordinarily, an employer can without fault be held liable for a delict committed by its employee if all of three requirements are met:

[16.1] The employee must at the time of the commission of the delict, have been in the employ of the employer.

[16.2] The employee must have committed the delict (whether by commission or omission).

[16.3] The delict must have been committed while the employee was acting within the course and scope of his employment.

[17] If the last requirement is not met in the sense that the employee committed the delict while not engaged in the execution of his employment (eg where he acts only for his own interests and purposes, is on leave, or off duty), the employer might nevertheless be held liable if a sufficiently close connection between his employment and the commission of the delict can be established. As held in *Minister of Police v Rabie* 1986

(1) SA 117 (A) 568 this entails both a subjective and an objective test:

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 ... The test in this regard is 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.

[18] Such cases where an employee acted for his own interests or purposes or was in some other way removed from the actual execution of his employment are particularly difficult where the employee's wrongdoing is intentional. Intentional wrongdoing can be and has in the past very seldom been described as committed within the course and scope of employment - indeed, it seems 'the very antithesis of an act in the course and scope of employment'. [3]

[19] Nevertheless, in *K v Minister of Safety and Security*

[2005] ZACC 8; 2005

(6) SA 419. (CC) the Constitutional Court held that the state was vicariously liable for a rape of a young woman committed by three policemen. The court held that despite the fact that the three police men had committed the delict intentionally and had so removed themselves from the scope and course of their employment, the delict was nevertheless sufficiently closely linked to their employment. The

court was swayed by the fact that the policemen did something that they were in fact under a duty to prevent; [4] that they were under a statutory and constitutional duty to protect the public against crime; [5] the policemen had offered to help the young woman who had placed her trust in them because they were policemen; [6] and their conduct was at the same time a commission (committing the rape) and an omission (failing in their duty to protect). [7] This decision was subsequently followed in *F v Minister of Safety and Security* 2012

(1) SA 536 (CC).

[20] More recently, in *Minister of Defence v Von Benecke* 2013

(2) SA 361 (SCA) the state was held vicariously liable for the conduct of an employee who, while it was his duty to guard and protect firearms, stole them and sold them. Here the court emphasised again the fact that the employee by virtue of his employment was under a positive duty precisely to protect and care for the firearms in question and, importantly, the fact that 'the opportunity to make away with [the firearms] arose from the opportunity provided by the scope of his duties, without which he would have possessed neither access to them nor knowledge of the means to avoid such security controls as the defence force must have put in place'.^[8]

[21] The Von Benecke decision is in line with a number of other cases in which the extent to which the wrongdoer's employment with his employer creates the risk for commission of the delict is an important consideration in deciding whether or not the delict, although an intentional wrong, is nevertheless sufficiently closely connected to his employment.^[9]

[22] In this case the Plaintiff has clearly established the first two requirements for vicarious liability: Khumalo was at the time of the murder in Stallion's employ; and Khumalo committed the delict. Given both that Khumalo was at the time of the murder not on duty and in fact on sick leave; and that he clearly acted only to promote his own interests and purposes and acted intentionally

wrongfully at that, the ordinary third requirement does not apply. Instead, the Plaintiff has to establish that despite Khumalo having removed himself from the ordinary scope and course of his employment, there nevertheless exists a sufficiently close connection between the commission of the murder and Khumalo's employment with Stallion.

[23] In this, against the background of the case law outlined above, the Plaintiff to my mind succeeds. There are two aspects to this matter that persuade me that indeed Khumalo's murder of Van Staden was sufficiently closely connected to his employment to render his employer Stallion vicariously liable and these are, as will become clearer below, related.

[24] First, as was the case in both K and Von Benecke above, Stallion was under a legal duty to provide access control to Bidvest at the Wrench Road building, Ibeit here a contractual one. Mr Stockwell was at pains to point out on Mr Harmse's testimony that their contractual obligation was 'only' to provide access control. I am not sure what was sought to be established by this. Although Harmse clearly did indicate that Stallion's responsibility was access control, it is clear from the remainder of his testimony and follows logically in any event, that such access control was provided with the purpose of safeguarding the property and employees of Bidvest in its buildings. In addition to this, Khumalo's duties as an employee of Stallion was precisely to see to access control in order to safeguard the contents of the buildings.

[25] In this respect Mr Cillers - in an attempt to render this matter on all fours with K and Von Benecke - urged me to find that there rests an indirect constitutional duty on all private citizens, including Stallion, to protect the safety of others. Given the existence of the contractual duty referred to above, I find it unnecessary to express myself on that.

[26] Second, in line with Von Benecke, the nature of Khumalo's employment with Stallion was such that it created, in a very direct and absolute manner, the risk for the commission of the murder. Here I must be clear - in saying so, I do not suggest that any level of fault whatsoever can be attributed to Stallion on this basis in the sense that it reasonably should have been aware of the risk for murder that its employment of Khumalo in the manner that he was employed creates and should have acted to prevent that risk. Rather, Khumalo's employment with

Stallion simply created the risk for the murder to be committed in the sense that, but for his employment and the manner of it, he would not at all have been able to commit the murder. As stated above with respect to absolution from the instance, this is so first because his employment created for him the opportunity (he knew Van Staden, knew that he was the financial manager and knew that he often worked late, after 5:00); but also because he used the fact of his employment and what it afforded him to commit the offense (he could gain access without fear of being called out if seen, as people knew him; he knew the inside of the building and how to get in unseen; he had an override key with which to gain access undetected; he knew where to exit that would be close to his car so that he could get away unseen). Also, and finally, the fact of Stallion's contractual duty to provide access control and with that Khumalo's employment duty to do so, meant that people in the building would trust him, making it so much the easier for him to gain access.

[27] Mr Stockwell pointed out in this respect that even were it so that the nature of Khumalo's employment was a *conditio sine qua non*, so to speak, for commission of the delict, the nature of his employment that made the murder possible was determined not by Stallion, but by Bidvest through Harmse. So, for example, the fact of access for a security manager to the whole building, with an override key was created at the instance of Bidvest. This submission seems to me to confuse the issue of fault with the question of a sufficiently close link to the employment. The question in other words is not whose fault it was that Khumalo had the access that he had. Instead it is simply that, were he not employed by Stallion, he would not have had the access that enabled the murder.

[28] The final arrow to Mr Stockwell's bow saw him pointing out that in distinction to K, F and Von Benecke, Khumalo was not on duty when the delict was committed. On the facts, this is of course correct. However, I read none of the cases referred to as authority for the proposition that the conduct of an employee not on duty or on leave can never be sufficiently closely related to his employment to render vicarious liability. In all the cases the conduct was of such a nature that, even with the employees on duty, it removed them during the commission of the delict from the scope and course of their employment. In a sense then, it becomes a matter of degree. In that light, it is the absolute nature of the causal

link between Khumalo's employment and the commission of the delict that persuades me that, despite him having been off duty, there is still a sufficiently close link between the murder and his employment with Stallion.

[29] For these reasons I find that Stallion is to be held vicariously liable for the damages in the form of loss of support resulting from the murder committed by its employee at the time, Khumalo.

[30] On the last day of trial, counsel informed me from the bar that the parties had agreed that, should I hold Stallion liable, the quantum for loss of support to be awarded should be R1 680 000.00. This amount is reflected in my order below.

[31] I order as follows.

1. Judgment is granted in favour of the Plaintiff against the 2nd Defendant for the amount of R1 680 000.00 (One Million Six Hundred and Eighty Thousand Rand).
2. Payment of the capital amount shall be made within 60 days of the date of this order.
3. Should the 2nd Defendant fail to effect payment of the capital amount within 60 days of the date of this order, the 2nd Defendant shall become liable for interest *a tempore morae* on the capital amount at a rate of 10.5% per annum from 14 days from the date of this order to date of final payment.
4. The 2nd Defendant is to pay costs of suit.

JFD Brand

Acting Judge of the High Court

[1] Gordon Lloyd Page and Associates v Rivera and Another 2001

(1) SA 88 (SCA) 92E - 938.

[2] Stein v Rising Tide Productions CC 2002

(5) SA 199 (C) 205.

[3] Neethling, Potgieter and Visser Law of delict (7th edition

2015) 395.

[4] Para [48].

[5] Para [51].

[6] Para

[51] – [52].

- [7] Para [53].
- [8] Para [25]. See also here *F v Minister of Safety and Security* 2010
- (1) SA 606 (WCC) 620.
- [9] *Rabie* (above) 134; *Grobler v Naspers Bpk* 2004
- (4) SA 220 (C) 297.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/764.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-staden-v-khumalo-and-others-unknown-topic-agpphc-2017--6a3ea51e3b1caa91298148b7>

Prepared on 11 October 2026 · Esheria