

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

In the matter between

**THE MINISTER OF SAFETY
AND SECURITY**

APPELLANT

and

ANDRÉ JORDAAN

RESPONDENT

CORAM : VIVIER, SCOTT JJA *et* MTHIYANE AJA

HEARD : 8 MAY 2000

DELIVERED : 26 MAY 2000

Motor collision - whether policeman driving in the course and scope of his employment.

J U D G M E N T

SCOTT JA/....**SCOTT JA:**

[1] The respondent sued the appellant for damages in the Cape of Good Hope Provincial Division arising out of a motor collision which occurred at about 8.35 pm on Sunday, 5 February 1995, near Kraaifontein on the N1 highway between Cape Town and Paarl. One of the vehicles involved in the collision was owned by the appellant and was being driven at the time by detective sergeant Madden who was employed by the appellant. It appears that the appellant's vehicle, which was travelling from north to south, i e in the direction from Paarl to Cape Town, suddenly crossed over the island separating the north- and southbound carriageways and collided with a vehicle in which the respondent had an interest and which was then travelling in the opposite direction. Both Madden and the sole passenger in his vehicle were killed in the collision. In its particulars of claim the

respondent alleged that at the time Madden “was acting within the course and scope of his employment with [the appellant], alternatively, ... was acting as an agent of and was furthering the aims and interest of [the appellant]”. The allegation was denied by the appellant. At a pre-trial conference it was agreed between the parties that this issue be decided first and an appropriate order was made in terms of Rule 33(4). After hearing evidence Ngcobo J found in favour of the respondent and ruled that Madden was acting within the course and scope of his employment with the appellant at the time of the collision. Leave to appeal was refused by the Court *a quo* but subsequently granted by this Court.

[2] The events preceding the collision are largely common cause. Madden was stationed at Fish Hoek. On the day in question, Sunday 5 February 1995, he was on what was known as “stand-by” duty. This had begun at 7.30 pm on Friday, 3 February, and was due to end at 7.30 am on Monday, 6 February. It meant that he, together with a fellow detective, warrant officer Pamplin, had to be

available to deal with all in-coming cases during that period. It appears that previously in about September 1994 Madden had been entrusted with the investigation of a death by drowning. The victim's body was discovered on the west coast of the Cape Peninsula near Kommetjie by Dr Haywood who lived and practised at Franschhoek. In order to complete the investigation a formal statement was required from Dr Haywood. According to captain Smit, who was in charge of the detective branch at Fish Hoek, some difficulty had been experienced in obtaining a statement from Dr Haywood "telephonically", by which he meant presumably by telefax. On 18 January 1995 he accordingly instructed Madden to go to Franschhoek to obtain the statement. This instruction was recorded in the investigation diary. By 27 January, Madden had not yet done so and Smit requested him to expedite the matter. The investigation diary records that on 31 January Madden undertook to go to Franschhoek to obtain the statement while he was on stand-by duty on the 4th or 5th February. On Friday morning, 3 February,

Pamplin, too, spoke to Madden about the outstanding statement. Pamplin was Madden's superior and one of his duties was to check the progress being made in the investigations carried out by detectives under his control. Madden undertook to obtain the statement in the course of the forthcoming weekend. On Sunday morning, 5 February, Madden asked Pamplin, who was also on stand-by duty, to "cover" for him between 6 and 8 pm that afternoon while he went to Franschhoek to obtain the statement from Dr Haywood. The arrangement which Pamplin and Madden had previously made was that the former would handle the cases coming in from Ocean View while the latter would deal with the Fish Hoek and Simon's Town cases.

[3] At the time a constable stationed at Fish Hoek, one Theron, was attending a detective training course at a police college in Paarl. Transport to and from Paarl was provided for trainees at the beginning and end of the course but they were not provided with transport to enable them to go home for weekends

during the course unless the trip was specifically authorised by a policeman of appropriate rank. Madden must have known that Theron was coming home for the weekend commencing Friday, 3 February, because during the preceding week he asked Smit for permission to give Theron a lift back to the college on Sunday afternoon when he, Madden, went to Franschhoek. Paarl and Franschhoek are relatively close by and driving to Franschhoek via Paarl would not have involved many additional kilometres. Smit thought there would be no problem and telephoned the district commissioner for confirmation. The latter unexpectedly refused to grant permission. As anticipated, Theron came home to Fish Hoek for the weekend. He brought with him a fellow trainee from Natal. They had been driven to Fish Hoek in a police vehicle with the necessary permission. That night Madden visited Theron at his house. According to Theron he asked Madden if he could arrange to have him and his colleague transported back to Paarl in time for their evening meal at 5 pm. Madden did not commit himself but indicated that it

may be possible. Nonetheless, he arrived at about 3 pm on Sunday, 5 February, at Theron's house in a police vehicle and conveyed Theron and his fellow trainee back to Paarl, arriving there shortly before 5 pm. He explained that he was, in any event, going in that direction in order to investigate a case. A member of Madden's family, who presumably came for the ride, travelled with them. According to Theron this was not permitted.

[4] What happened between 5 pm and 8.35 pm when the accident occurred, is unknown. Madden did not see Dr Haywood. The latter testified that he had been telephoned the previous day, Saturday 4 February, by Madden who had asked him to write his own statement, obtaining assistance at the local police station if required, and then telefax the statement to Madden that same day. He said he had undertaken to telefax the statement that day but in fact had not done so. He testified further that although Madden did not know his address in Franschhoek, as a general practitioner in Franschhoek he was well known in the village and Madden

would have had no difficulty in finding him.

[5] The standard test for vicarious liability is of course whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business or doing the work of the employer (see for eg *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 827 B; *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 132 G). This is no doubt true, but it should not be overlooked that the affairs or business or work of the employer in question must relate to what the employee was generally employed or specifically instructed to do. Provided the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable (see *Estate Van der Byl v Swanepoel* 1927 AD 141 at 145 - 146, 151 - 152). The difficulty of course is that while the general approach to be adopted may be easy enough to formulate, its lack of exactitude is such that problems inevitably arise in its

application. This is particularly so in the so-called “deviation” cases. What is clear is that not every act of an employee committed during the time of his employment which is in the advancement of his personal interests or for the achievement of his own goals necessarily falls outside the course and scope of his employment.

(*Viljoen v Smith* 1997 (1) SA 309 (A) at 315 F - G.) In each case, whether the employer is to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of degree. (See *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 756 - 7; *Union Government v Hawkins* 1944 AD 556 at 563; *Viljoen v Smith, supra*, at 316 E - 317 A.) The answer in each case will depend upon a close consideration of the facts. The same is true of the inquiry as to whether the deviation has ceased and the employee has resumed the business of

his employer.

[6] Against this background, I turn to the only question in issue, namely whether on the facts set out above the Court *a quo* was correct in concluding that at the time of the accident Madden was driving the vehicle in question in the course and scope of his employment. Counsel for the appellant submitted that the correct inference to be drawn was that the sole purpose of the journey was to deliver Theron and his fellow trainee to Paarl and that this fell beyond the scope of Madden's employment.

[7] Had this indeed been the sole purpose of the journey I am satisfied that the appellant would not be vicariously liable for any damage that the respondent may have suffered. It is true that in conveying the trainees to their college in Paarl Madden was in a sense engaged in the affairs of the appellant. But Madden was employed as a detective; not as a driver. He had no instructions to take the trainees to Paarl. On the contrary, his request for permission to do so had been expressly

refused. Had this been the sole object of the journey Madden would therefore not have been acting in the course and scope of his employment.

[8] In support of his submission that Madden's sole objective had been to take the trainees to Paarl, counsel for the appellant relied essentially on two facts which emerged from the evidence: the first was Madden's telephone conversation with Dr Haywood on the previous day, Saturday 4 May 1995; the second was Madden's failure to make contact with Dr Haywood on the Sunday evening. These facts, he argued, indicated that prior to setting out for Paarl Madden had already abandoned any notion of travelling to Franschhoek to obtain the statement from Dr Haywood.

[9] In seeking to draw the proper inference from the facts it goes without saying that the telephone conversation and Madden's failure to make contact with Dr Haywood must be considered against the background of what had passed before. Initially it had been sought to obtain the statement from Dr Haywood by

telefax. Only when this proved unsuccessful was Madden instructed to travel to Franschhoek and obtain it himself. Madden's superiors were obviously anxious to see the investigation completed and he was urged to expedite the matter. The statement was, however, something of a formality. In these circumstances it is not surprising that before travelling all the way to Franschhoek Madden should have made one last attempt to procure it by telefax. This he did on the Saturday by telephoning Dr Haywood. He had, of course, given the undertaking to his superiors that he would obtain the statement by not later than the weekend. What is significant is that in the course of the telephone conversation he requested Dr Haywood to telefax the statement that same day. Once Dr Haywood failed to do so Madden would really have had no option but to go and take the statement himself. The telephone call does not therefore justify the inference that Madden had abandoned any intention of going to Franschhoek; it is merely indicative of an intention to avoid the trip if at all possible. It is true of course that during the preceding week

Madden had sought permission to take Theron to Paarl in the event of him going to Franschhoek, but what is of significance is that on Friday evening Madden was not prepared to finally commit himself to taking Theron to Paarl. It was only on Sunday morning, by which time it was apparent that Dr Haywood had not telefaxed the statement as agreed, that Madden confirmed with Pamplin that he would indeed be going to Franschhoek that afternoon and requested Pamplin to “cover” for him in his absence. That afternoon Madden collected Theron and his fellow trainee at the former’s house. Madden mentioned to Theron that there was no problem with giving them a lift as, in any event, he had to go to someplace in the vicinity of Paarl to investigate a case. In these circumstances the most natural or acceptable inference (cf *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 A - D; *A A Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614 *in fine* - 615B) is that Madden set out with the object of going to Franschhoek to collect the statement and dropping off the trainees at Paarl on the way. The deviation to Paarl

was, of course, contrary to instructions but by the time the accident had occurred the deviation had long since been completed.

[10] In arriving at this conclusion I have not overlooked the fact that in the event Madden did not see Dr Haywood to take the statement from him. Why he did not do so, one simply does not know. But anything could have happened. He may, for example, have had a mechanical break-down. The most likely inference is that something untoward must have occurred. Madden was a detective sergeant with nine years' experience in the police service. There is nothing to suggest that he was an irresponsible policeman. It is true that he did not have permission to drop off the trainees at Paarl, but having regard to the minimal extra distance involved, even Smit was surprised that permission had been refused. Once having reached Paarl it would have been the easiest thing to go to Franschhoek to collect the statement even if he had been intent on going for a joyride or on some "frolic" of his own. Having regard to what had gone before, his failure to produce the statement, in the

absence of some good reason, would have caused him considerable embarrassment, if not landed him in trouble with his superiors.

Indeed, Pamplin was doing Madden's work so that the latter could collect the statement. But even if after dropping off the trainees Madden had decided to abandon his earlier intention of obtaining the statement and had embarked upon some activity in pursuance of his own interests (which would seem unlikely) the probabilities are that by the time the accident occurred he would have completed whatever it was he had been doing in the intervening period and would have been driving back to the police station to continue his stand-by duty. In these circumstances he would by then have resumed driving within the course and scope of his employment. Indeed, counsel for the appellant did not contend the contrary.

[11] It follows that in my view the respondent succeeded in discharging the onus of proving that at the time of the accident the appellant was acting within the course and scope of his employment.

[12] The appeal is accordingly dismissed with costs.

D G SCOTT JA

Concur:

VIVIER JA
MTHIYANE AJA