THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 526/2018

In the matter between:

STALLION SECURITY (PTY) LIMITED **APPELLANT**

and

DALEEN VAN STADEN **RESPONDENT**

Neutral citation: *Stallion Security v Van Staden* (526/2018) [2019] ZASCA 127 (27 September 2019)

Coram: Leach, Mbha, Dambuza and Van der Merwe JJA and Hughes AJA

Heard: 23 August 2019

Delivered: 27 September 2019

Summary: Delict – claim for loss of support – vicarious liability of employer – employee committed murder entirely for own purposes – test is whether the delict was nevertheless sufficiently closely linked to the business of the employer – development of the law to recognise that the creation of risk by the employer is a relevant consideration in determining the required link – employer liable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Brand AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Van der Merwe JA (Leach, Mbha and Dambuza JJA and Hughes AJA concurring)

[1] On Monday 3 November 2014, Mr Ronald Mkhululi Khumalo, an employee of the appellant, Stallion Security (Pty) Ltd (Stallion), murdered Mr Deon van Staden (the deceased), the husband of the respondent, Ms Daleen van Staden. The cardinal issue in the appeal is whether Stallion is vicariously liable for the resultant loss of support suffered by Ms van Staden. The Gauteng Division of the High Court, Pretoria (per Brand AJ) held that it was, but granted leave to appeal to this court.

The facts

[2] Stallion provides security services to its customers. For this purpose it employs security guards, supervisors and managers. Bidvest Panalpina Logistics (Pty) Ltd (Bidvest) contracted Stallion to provide security services at three of its premises, namely, two warehouses and its head office situated at 20 Wrench Road, Isando (the head office). The deceased was employed at the head office as a financial manager.

[3] The principal obligation of Stallion in terms of its contract with Bidvest was to provide access control to the premises. At the head office, five security guards were posted during the day and three were on duty for the night-shift. A site supervisor oversaw the security guards at the head office. A site manager, in turn, supervised the Stallion personnel and operations at all three premises. None of these officers were issued with firearms. Unlike the other officers, the site manager did not wear a uniform.

Bidvest employed a risk manager, who conveyed its requirements in respect of security services to the site manager.

[4] The Bidvest head office staff gained access to the office area at the premises by way of a biometric security system. This system provided access (which was recorded) upon recognition of a fingerprint placed against a pad. It did not allow the security guards to access the office area. The site supervisor and site manager were, however, registered on the biometric system and were thus enabled to access the office area.

[5] By 2012 Mr Khumalo served as Stallion's site supervisor at the head office. He performed well in that position, to the extent that the risk manager of Bidvest (Mr Harmse) recommended him for the position of the site manager of the three premises. At about the end of 2013, Stallion promoted Mr Khumalo to this position.

[6] As the site manager, Mr Khumalo's duties included the regular inspection of the security guards on duty. In doing so, he was also required to make unannounced visits to the premises after business hours. Mr Khumalo was, in addition, tasked with inspecting the interior of the building, particularly to ensure that the emergency exits were closed at night (they were opened during the day for ventilation purposes). Mr Khumalo was provided with a bypass or override key for this purpose. The override key allowed access to the office area without the use of the biometric system and therefore without record thereof. The override key was also intended to be used to gain access to the office area in the event of a power failure. Only Mr Khumalo was entrusted with this override key.

[7] A month or so prior to November 2014, Mr Khumalo started to appear unkempt. He often did not turn up for work, claiming that he had been ill. He did not report for duty on 30 October 2014 or on any day thereafter. Upon an enquiry by Mr Harmse, Stallion informed him that Mr Khumalo was ill. On the morning of 3 November 2014, Mr Harmse requested Stallion to remove Mr Khumalo from his position. By then, however, Mr Khumalo had effectively been placed on sick leave. In his subsequent statement to the police, Mr Khumalo said that he had borrowed money from certain persons and that, when he failed to repay the money, those persons 'started hurting [him]'. It appears that

this explained the change in Mr Khumalo's behaviour and had a significant influence on his decision to commit the unlawful acts that followed.

[8] Mr Khumalo knew the deceased often worked late. He had also heard that Bidvest kept a petty cash box in the office area. He decided to rob the deceased and to attempt to locate the petty cash box. For this purpose he 'hired' a firearm from a co-employee. This took place on Wednesday, 29 October 2014. He went to execute his plan both the next day and the day thereafter, but apparently did not have the heart to go through with it.

[9] On the fateful Monday Mr Khumalo went to the head office at about midday, armed with the firearm that I have mentioned. He observed that the deceased was at work. He waited until about 18h00, and then entered the head office building via an emergency exit on the second floor. He moved to the first floor, where the office of the deceased was situated. He gained access to the office area on the first floor with the use of the override key. He entered the office of the deceased and demanded cash from him at gunpoint. The deceased knew Mr Khumalo from work. The deceased asked Mr Khumalo why he was doing this. According to Mr Khumalo he related 'the whole story of me owing people money' to the deceased. Mr Khumalo said that he needed the amount of R50 000. The deceased said that he did not have the keys of the safe with him and indicated that he could only assist him with an amount of R35 000 that he had in his personal bank account. Mr Khumalo coerced the deceased to make an electronic transfer of that amount into his bank account.

[10] Thereafter Mr Khumalo escorted the deceased out of the building. He walked behind the deceased and, carrying the firearm, forced the deceased to open a door of the office area with the use of the biometric system. They exited the building through a different emergency exit and moved to where the deceased's car was parked. Upon the instruction of Mr Khumalo, the deceased drove to the vicinity of the Eastgate shopping complex.

[11] When the car came to a standstill near Eastgate, so Mr Khumalo said, 'it came to [his] mind that [the deceased] was going to call the police'. Mr Khumalo then shot and killed the deceased, got out of the car and ran away. He was apprehended shortly

afterwards, but later escaped from custody. Subsequent information caused him to be presumed dead.

[12] Ms Van Staden sued both Stallion and Mr Khumalo for delictual damages consisting of loss of support as a result of the death of the deceased. Her claim against Stallion was founded only on vicarious liability for the wrong committed by Mr Khumalo. For the reasons mentioned, the trial proceeded only against Stallion. Ms Van Staden presented the evidence of Mr Harmse and a police officer who introduced a detailed statement of Mr Khumalo into evidence. Video footage of parts of the incident obtained from the security cameras at the head office, was also admitted into evidence. Stallion closed its case without leading any evidence.

[13] The court a quo, quite correctly, held that the intentional wrongs of Mr Khumalo were committed entirely for his own purposes. Citing authority that I shall return to, it held that the killing of the deceased was nevertheless sufficiently linked to Mr Khumalo's employment with Stallion for it to be held vicariously liable for the loss suffered by Ms Van Staden. In this regard the court a quo essentially relied on the strong causal link between the employment of Mr Khumalo and the murder of the deceased, the risk of abuse created by his employment and the contractual duties that Stallion owed to Bidvest through Mr Khumalo. The quantum of damages having been agreed, the court a quo granted judgment in favour of Ms Van Staden in the amount of R1 680 000, interest thereon and costs of suit. The appeal lies against this order.

The law

[14] The general principle is that an employer is vicariously liable for a wrong committed by an employee during the course or scope of his or her employment. As Greenberg JA explained in *Feldman (Pty) Ltd v Mall*,[1] it makes no difference whether the words the 'course' or 'scope' (or even 'sphere') are used in this context.[2] The faultless liability of an employer originates from Roman law and is founded on considerations of public policy.[3] One of the first formulations of the policy underlying

[1] *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 762.
[2] See also *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 126E and 132G-H.
[3] See the judgment of Watermeyer CJ in *Feldman*, fn 1 above, at 737-740 and *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 21-23.

vicarious liability, is found in the early case of *Hern v Nichols,*[4] referred to by Watermeyer CJ in *Feldman.*[5] The remarkably concise report of this case reads:

'Case for a deceit; the plaintiff set forth, that he bought several parcels of silk for ----- silk, whereas it was another kind of silk, and that the defendant well knowing this deceit sold it him for ----- silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant, but in his factor beyond sea; the doubt was, if this deceit could charge the merchant.

Holt C.J. held the merchant answerable for the deceit of his factor, tho' not criminaliter, yet civiliter; for it is more reason, that he, that puts a trust and confidence in the deceiver, should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict.'

Because it is underpinned by public policy, the law in respect of vicarious liability of employers did not remain stagnant and has substantially developed over time.

[15] In cases where the employee commits a delict whilst solely or partially about the business of the employer, the application of the principle of vicarious liability generally presents no problem. Thus, the employer would ordinarily be liable for damages caused by, for instance, the negligent driving of a delivery man whilst on a private detour on the way back to work after having made the delivery instructed by the employer, or an assault committed by a bouncer whilst removing a troublesome patron from his employer's pub. Difficulties arise when the employee commits an intentional wrong entirely for his or her own purposes.

[16] In his majority judgment in *Rabie,*[6] Jansen JA formulated the following test for determination of these difficult 'deviation' matters:

'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 (cf *Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard 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.'

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[4] *Hern v Nichols* 90 ER 1154.
[5] At 740.
[6] Fn 2 above at 134C-F.

[17] This test was not met with universal approval in subsequent decisions of this court.[7] However, in *K*[8] the Constitutional Court had occasion to consider this area of the law. O'Regan J extensively reviewed the leading South African and foreign judgments on the subject. In respect of the latter reference was, inter alia, made to the judgments of the Canadian Supreme Court in *Bazley v Curry*[9] and *Jacobi v Griffiths*[10] delivered on the same day, as well as the subsequent judgment of the House of Lords in *Lister v Hesley Hall Ltd.*[11] Incidentally all three of these cases dealt with vicarious liability for the sexual abuse of children by their caretakers.

[18] Having had regard to s 39(2) of the Constitution, O'Regan J developed the law upon the foundation provided in the majority judgment in *Rabie*, in these terms:

'[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.

Application to facts of this case

[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

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[7] See *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 830D-832D; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) para 5; *Ess Kay Electronics Pte Ltd & another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) paras 7-10. See, however, *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (HHA) at 659B-G.

[8] Fn 3 above.

[9] *Bazley v Curry* [1999] 2 SCR 534.

[10] *Jacobi v Griffiths* [1999] 2 SCR 570.

[11] *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (HL); 2001 (2) All ER 769.

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.'

[19] It bears emphasising that a sufficiently close link must exist between the wrongful act of the employee on the one hand and the *business* or *enterprise* of the employer on the other. This supple concept accords with the objective nature of the second part of the test. The purpose of the development of the law in *Rabie* and *K* was to provide redress to a victim against an employer even though the wrongful act did not in any manner constitute the exercise of the duties or authorised acts of the employee, if it was objectively sufficiently linked to the business or enterprise of the employer. Thus, references to a link with the duties, authorised acts or employment of the employee should in this context be avoided.

[20] But when would a sufficiently close link with the business of the employer be established in matters of this kind? A convenient starting point is the principle that this link would not be established when the business of the employer furnished the mere opportunity to the employee to commit the wrong.[12] The enquiry may not be reduced to a mere 'but for' causation analysis.[13] If, for example, an employee assaults a co-employee or customer whilst on duty and at the workplace over an entirely private matter, the employer would in the absence of any other consideration not be vicariously liable.

[21] Something more than a mere opportunity or 'but for' causal link is required. What that is, would depend on the factual circumstances and normative considerations relevant to each case and on whether, in the light thereof, the rule should be further developed. This brings me to a consideration of the role that should be played by the creation of the risk of harm by the business of the employer.

Development of the law

[22] In an oft-quoted passage in the judgment in *Feldman,*[14] Watermeyer CJ said the following:

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[12] See *Bazley*, fn 9 above, at 558-559; *Lister*, fn 11 above, paras 25, 45 and 81-82.
[13] See *Jacobi*, fn 10 above, at 581.
[14] At 741.

‘I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master’s legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant’s improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty.’

[23] Briefly, the facts in *Rabie* were that a mechanic (Van der Westhuizen) employed by the Minister of Police, whilst in plain clothes and not on duty, unlawfully arrested the plaintiff, assaulted him and caused him to be unlawfully detained. The court accepted that Van der Westhuizen’s actions were actuated by malice and ‘totally self-serving and *mala fide*’. After formulating the test quoted in para 16 above Jansen JA observed that the leading cases at the time mostly dealt with deviations by the employee from his or her duties at a time that he or she was actually engaged in the employer’s work. He added that the tests applied in these cases did not seem to be ‘wholly apposite’ to the type of case before the court. He expressed the view that a more apposite approach to the case would be to proceed from the basis of vicarious liability mentioned by Watermeyer CJ in *Feldman*, quoted above.

[24] Jansen JA proceeded as follows:

‘By approaching the problem whether Van der Westhuizen's acts were done "within the course or scope of his employment" from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing Van der Westhuizen as a member of the Force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise,by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed.

It is not necessary in the present case to define the limits of liability based on the creation of risk in this context. Suffice it to say that in the particular circumstances of the present case and

in the light of the aforegoing the State, in view of the risk it created, should be held liable for Van der Westhuizen's wrongs.'

[25] In *Ngobo,*[15] however, the following was said, amongst other things, about the reasoning of the majority in *Rabie*:

'Put another way, having regard to Van der Westhuizen's intention and the facts proved, "approaching the problem . . . from the angle of risk" would appear to be the only basis on which vicarious liability could be said to arise from Van der Westhuizen's misconduct. But what is regarded as an underlying *reason* – perhaps the main one – for attaching vicarious liability to the employer, namely, the creation of risk (also known as "risk liability"), has hitherto never been regarded in our law as the consideration which determines whether such liability is proved.'

[26] I respectfully disagree with this *dictum*. First, as I have explained, Jansen JA formulated a broad two-stage test for vicarious liability of employers in deviation cases. The second stage entails the objective establishment of a sufficiently close link between the wrong and the business of the employer. In applying the test to the facts of the particular case, the court employed the creation of risk by the employer's business as a criterion, albeit a decisive one, to determine whether the required link existed. *Rabie* did not hold that the creation of risk was the only consideration in this analysis nor did it propound so-called 'risk liability'.

[27] Second, although it is no doubt correct that the reason for a rule is not the same as the rule itself, I can conceive of no reason why the creation of the risk that produced the harm could in these circumstances not constitute both a policy reason for the rule and a criterion for the application thereof.[16] As I shall show, this is accepted by the highest courts in Canada and the United Kingdom.

[28] The principles for determining whether an employer is vicariously liable for an employee's unauthorised intentional wrong, laid down in the ground-breaking unanimous judgment in *Bazley* (per McLachlin J), were reproduced in *K*[17] as follows:

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[15] Fn 7 above at 831D-F.

[16] See Professor Anton Fagan's article 'The Confusions of *K*', published in *Undoing Delict: The South African Law of Delict under the Constitution* (2018) at 77-78, where he explains that the assertion that the rules of vicarious liability are not to be confused with the reasons for them, does not entail endorsement of a rule that when applying the rules of vicarious liability, a court may not consider the reasons for those rules.

[17] Paragraph 38.

'"[C]ourts should be guided by the following principles:

(1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.

(2) The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability.

Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement* of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice.

. . . .

(3) In determining the sufficiency of the connection between *the employer's creation or enhancement of the risk* and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power." (Emphasis in original.)'

[29] In *Lister*, the House of Lords reversed previous authority and adopted the 'close connection' test. All five members of the court delivered speeches in the matter. In *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of Christian Schools and others,*[18] the United Kingdom Supreme Court dealt with yet another case of vicarious liability for sexual abuse of children by their caretakers. Lord Phillips, writing for the court, analysed the speeches in *Lister* and concluded:[19]

[18] *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of Christian Schools and others* [2012] UKSC 56.

[19] Paragraph 74.

'It is not easy to deduce from *Lister* the precise criteria that will give rise to vicarious liability for sexual abuse. The test of "close connection" approved by all tells one nothing about the nature of the connection.'

[30] Lord Phillips also referred to subsequent English cases. He had extensive regard to *Bazley, Jacobi* and the subsequent judgment of the Supreme Court of Canada in *John Doe v Bennet*[20] and concluded:

'86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

87. These are the criteria that establish the necessary "close connection" between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.'

[31] These judgments show that it is now firmly established in Canada and the United Kingdom that the creation of a risk that eventuated, is an important consideration in determining vicarious liability of an employer under the 'close connection' test. The reasoning in these judgments is compelling and provides valuable guidance for the development of our similar law on the subject.[21] Leading South African academic commentators also support this proposition.[22]

[32] For these reasons our law as developed in *Rabie* and *K*, should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised, must be determined objectively.

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[20] *John Doe v Bennet* [2004] 1 SCR 436.
[21] See *K*, fn 3 above, para 35.
[22] See J Neethling *Neethling-Potgieter-Visser Law of Delict* 7 ed (2015) at 396-397.

Application of the law to the facts

[33] As I have said, Mr Khumalo caused the death of the deceased entirely for his own purposes. The question is whether, on the particular facts and circumstances of this case, the murder of the deceased was nevertheless sufficiently closely linked to Stallion's enterprise.

[34] The temporal and spatial factors that Mr Khumalo was on sick leave at the time and did not commit the murder at his workplace, tend to diminish the link between Stallion's enterprise and the death of the deceased. Also, the evidence did not establish a connection between Stallion's business and the possession of the firearm by Mr Khumalo.

[35] I should mention at this point that Stallion did not contend that it was of significance that Mr Khumalo formed the subjective intention to kill only after the robbery and after he had left the Bidvest premises. In my view this stance is correct. The sufficiency of the link must be established objectively and the murder was objectively inextricably linked to the robbery committed at the head office.

[36] On the other hand, Stallion furnished Mr Khumalo with much more than a mere opportunity to commit the wrongs in question. It enabled him to enter into and exit from the office area without detection or concern on the part of Bidvest. He was so enabled by: the intimate knowledge of the layout and the security services at the premises; the instruction to make unannounced visits to the premises at any time; the knowledge that the deceased would be working late; and, most importantly, the possession of the override key to the office area. This special position created a material risk that Mr Khumalo might abuse his powers. This risk rendered the deceased vulnerable and produced the robbery and consequently the murder.

[37] In addition, Stallion undertook the contractual duty to provide 24-hour access control services at the premises. There can be no doubt that the purpose of these services was to protect the Bidvest staff and property from harm. Thus, Stallion was contractually burdened with the responsibility to protect the constitutional rights to personal safety of the employees of Bidvest, including the deceased, whilst at their workplace. Stallion placed Mr Khumalo in charge of discharging this responsibility.

This factor provides a significant normative link between Stallion's business and the harm suffered by Ms Van Staden.

[38] Although the matter is by no means free of difficulty, I am not persuaded that the court a quo erred in holding that a sufficiently close link had been established between the business of Stallion and the death of the deceased. It follows that the appeal cannot succeed. Ms Van Staden did not ask for the costs of two counsel.

[39] The appeal is dismissed with costs.

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C H G van der Merwe

Judge of Appeal

APPEARANCES

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