VAN DER MERWE-GREEF INC. v SHIMI S. MARTIN AND ANOTHER
CASE NO. (P) I 1515/2003

2005/06/27

Maritz, J.

LAW OF MASTER AND SERVANT

Vicarious liability of employer for delict of servant – history and rationale underlying principle – evolution of concept not guided by legal principles but by dictates of fairness in changing social and economic circumstances – in future development Court will be required to navigate between competing interests of imputing liability without fault to employer and of person injured by delict of servant to receive compensation – "standard test" in context of "deviation cases" discussed and applied – employees conduct not falling outside limitation on scope of employment but merely non-compliance with instruction as to manner of performing master's business – taxi driver driving taxi outside working hours – carried insignia of authority in operation – public not privy to contract stipulating hour of operation – distinction between "scope of authority" and "scope of employment" – prima facie inference that driver was acting in furtherance of master's business not rebutted – employer liable

CASE NO. (P) I 1515/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VAN DER MERWE-GREEFF INCORPORATED

PLAINTIFF

and

SHIIMI S MARTIN **FIRST**

DEFENDANT

THEOFILUS KEELOJENE **SECOND**

DEFENDANT

CORAM: MARITZ, J.

Heard on: 2004.04.06-07

Delivered on: 2005.06.27

JUDGMENT

MARITZ, J: The central issue in this case, as in so many other cases over centuries, relates to the extent of an employer's vicarious liability for a delict committed by an employee acting in the course and scope of his or her employment. The roots of an employer's liability in our law, some authorities suggest, are anchored in Roman Law and found expression in the *Corpus Juris Civilis*. The principle was later assimilated by and evolved - not always harmoniously – in Roman Dutch Law through the writings of a number of common law authorities, most notably Grotius, Groenewegen, Van Leeuwen, Voet and Van Der Keesel (c.f. *Mkize v Martens*, 1914 AD 382 at 386 – 387 and 389 – 390; Estate *Van Der Bijl v Swanepoel*, 1927 AD 141 at 153-154). Others contend that it is a principle which evolved in English Law and which was introduced by South African Courts into contemporary practice (see: Cooper, *Delictual Liability in Motor Law* at 376 and the authorities cited there). In the context of this judgement, no real purpose would be served to embark upon a discussion of the controversy. Fleming, *The Law of Torts*, is perhaps correct when he remarks that "(v)icarious liability is a familiar feature of most systems of primitive law…." Just as the Roman *paterfamilias* was responsible for the wrongs committed by members of his family and slaves, "the responsibility

placed upon the head of the household for the conduct of his familia was also the genesis of the master's liability for the torts of his servants" in English Law. Whatever the origin of the principle of vicarious liability and however limited the legal concept of holding one person liable for the delict committed by another person might have been, the exigencies of social and economic development over ages brought about an evolution of the principle and the scope of the liability covered thereunder. According to De Villiers JA in *Estate Van Der Bijl v Swanepoel, supra,* at 151, the principle referred to by Voet 9.4.10 that "(t)he master is only liable for the torts of his servant committed *in officio aut ministerio cui a domino fuit praepositus*. The master is liable to third parties if the tort was committed in the affairs or the business of the master to which the servant had been appointed" is also "what is meant by the English Courts when it is said that the act complained of must be within the scope of the agent's authority or must have been committed in the course of the agent's employment". What is clear from the history of the principle is that it is not a static one by any means and that, whatever the origin of the principle might have been, its scope and application in contemporary Namibian common law has been substantially influenced by developments in England and other Commonwealth Countries.

The rationale underlying the principle is also not without controversy. According to Wessels JA (*Estate Van Der Bijl v Swanepoel, supra,* at 151) liability for the servant's delict attaches to his master because –

> "it is within the master's power to select trustworthy servants who will exercise due care towards the public and carry out his instructions. The third party has no choice in the matter and if the injury done to the third party by the servant is a natural or likely result from the employment of the servant then it is the master who must suffer rather than the third party".

This premise was dismissed by Watermeyer, CJ in *Veldman (Pty) Limited v Mall,* 1945 AD 733 at 738 and the following basis proposed (at 741):

> "... 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. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party, the master is responsible for that harm."

The "creation of a risk" to the employer by the appointment of the employee as the rationale for vicarious accountability is also not satisfactory and has been finally rejected in *Minister of Law and*

Order v Ngobo, 1992(4) SA 822 (A) at 832C (see also: *Carter & Co (Pty) Limited v MacDonald*, 1955(1) SA 202 (A) at 211H). In discussing the various theories underlying the existence of the principle, Gleeson CJ quoted Dean Prosser and Prof. Keeton in a judgment handed down by him in the Australian High Court in the case of *Hollis v Vabu (Pty) Limited* [2001] 207 (CLR) 21 (referred to and quoted in *Grobler v Naspers Bpk en 'n Ander*, 2004(4) SA 220 (C) at 291I – 292B.)

> "35. A fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law. *Dean Prosser* and Professor *Keeton* observe:
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> > 'A multitude of very ingenuous reasons had been offered for the vicarious liability of a master: he has a more or less fictitious *control* over the behaviour of the servant; he has *set the whole thing in motion,* and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrong, rather then an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it – or, more frankly and cynically, *in hard fact, the [real] reason for employers' liability is [-] the damages are taken from a deep pocket.'*
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> Each of these particular reasons is persuasive to some degree but, given the diversity of conduct involved, probably none can be accepted, by itself, as completely satisfactory for all cases."

After reference to excerpts from the opinions of several Judges in the United States of America, Canada, the United Kingdom, Australia and New Zealand, Nel J in *Grobler v Naspers Bpk en 'n Ander, supra,* concludes (at 296G-H) that the scope of the principle was adapted

over ages not to conform with legal principles but rather to the dictates of fairness in ever-changing social and economic circumstances. He quoted the remarks of Kirby J in *New South Wales v Lepore*; *Samin v Queensland; Rich v Queensland,* [2003] HCA 4:

> "301 Vicarious liability in the law of torts is, above all, a subject fashioned by Judges at different times, holding different ideas about its justification and social purposes, 'or no idea at all' . That is not to say that the law of vicarious liability is totally lacking in coherency or that it is susceptible to expansion or contraction at nothing more than judicial whim. In *Hollis* McHugh J said, rightly in my view:
>
> > 'If the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships. But any such development or applications must be done consistently with the principles that have shaped the development of vicarious liability and the rationales of those principles. They should also be done in way that has the least impact on the settled expectations of employers and those with whom they contract.' '"

In drawing the lines of vicarious liability according to, what Heher AJA refers to in *Bezuidenhout NO v Escom,* 2003(3) SA 83 (SCA) at 92G) as, "social policy" in a manner which is consistent with the considerations underlying the principle, the Courts will have to negotiate the difficult course between the Scylla of imputing liability without fault to the employer and the Charybdis of the need to make amends to a person injured by the delictual wrong of a servant who

may not otherwise receive compensation. Whatever other judicial precedents and policies may be used to navigate by, the compass is likely to remain the "standard test", i.e. whether the delict in question was committed by an employee whilst acting in the course and scope of his or her employment (see: *Minister of Safety and Security v Jordaan t/a André Jordaan Transport,* 2000(4) SA 21 (SCA) at 24H; *Ess Kay Electronics PTE Limited & Another v First National Bank of Southern Africa Limited*, 1998(4) SA 1102(W) at 1107B.

Kumleben JA recognised in *Minister of Law and Order v Ngobo*, 1992(4 SA 822 (A) at 827B-C that in borderline cases the "standard test" lacks exactitude, particularly when Courts are called upon to apply it to the so-called "deviation cases": i.e. "instances in which an employee whilst in a general sense still engaged in his official duties deviates therefrom and commits a delict." Discussing the standard test in *ABSA Bank Limited v Bond Equipment (Pretoria) (Pty) Limited*, 2001(1) SA 372 (SCA) at 378C-G, Zulman JA said:

> "[5] The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer ... It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in an activity reasonably necessary to

> achieve either objective, the employer will be liable, even where the employee acts contrary to expressed instructions ... It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or achievement or his own goals which falls short of the course and scope of his employment (*Viljoen v Smith*, 1997(1) SA 309(A) at 315F-G). A master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant and not as an independent individual. (see, for example, *Feldman (Pty) Limited v Mall*, 1945 AD 733 at 742 and *H K Manufacturing Co. (Pty) Limited v Sadowitz*, 1965(3) SA 328(C) at 336A)."

I have embarked on this rather extensive introduction to the principle of vicarious liability as a legal principle in contemporary common law because the policies and the precedents I have referred to must also be employed to address the difficulties arising from the facts of this case.

It was about 23h34 on 22 June 2002 at the robot-controlled intersection of Independence Avenue and Sam Nujoma Drive in Windhoek that a collision occurred between the first defendant's motor vehicle and a motor vehicle of which the plaintiff was the *bona fide* possessor and in respect of which it carried the risk of damage ("the plaintiff's vehicle"). It is common cause that the plaintiff's vehicle was damaged as result of the collision and that the

fair, reasonable and necessary costs of repair thereto amounted to N$33 673-91. The plaintiff's vehicle was driven by Mr J S Steyn and the collision was witnessed by Ms J E Cam. Both of them testified that the driver of the first defendant's vehicle (the second defendant) entered the intersection against a red traffic light whilst the plaintiff's vehicle was crossing the intersection diagonally in front of it. This evidence was not disputed and it is safe for the Court to conclude that the collision was occasioned by the exclusive negligence of the driver of the fist defendant's vehicle. It is also not in dispute that the second defendant, Mr Theofilus Keelojene, had been employed by the first defendant to drive the vehicle which was utilised in the course of the latter's taxi-business.

The only real issue which eventually remains for this Court to adjudicate is whether the second defendant was driving the first defendant's motor vehicle at the time of the collision whilst acting "within the course and scope of his employment with the first defendant, alternatively within the ambit of risk created by such employment, in the further alternative, in the furtherance of the first defendant's interest." This assertion made by the plaintiff was specifically denied in the first defendant's plea. In amplification of that denial he pleaded that the second defendant "was acting contrary to clear and written instructions from (him) that (his) vehicle is not to be driven after 20h00" and that the second

defendant had “disengaged himself from the employment of the (first) defendant” and had been “acting solely for his own purpose or interest”.

In support of his defence the first defendant testified during the trial that he had employed the second defendant as a driver for the taxi business he had been operating. The second defendant and he agreed to the rules applying to the employment relationship. Those rules, he testified, had been recorded in writing and had been signed by the second defendant. The relevant paragraphs thereof, which I shall quote *verbatim*, read as follows:

“Rules to the taxi driver

1. Working hours start at 5h30 and parking time 20h30.
2. Any damage caused by negligence driving is the domain of the driver.
3. Any damage caused by violating traffic lights and 4 way stop or T- Junction by my taxi driver repair work is the domain of the driver.
5. Damage caused by the driver or the driver of the other vehicle, repair work is the domain of the driver.
4. Damage caused after working hours or during unauthorised hours or trip outside Windhoek municipality area repair work is the domain of the driver ...

Good luck.”

The first defendant testified that the second defendant called on him at 20h00 on 22 June 2002 to hand over the day’s takings. In terms of the employment contract he (the first defendant) was entitled to 70% of the takings and the balance of 30% constituted the second defendant’s remuneration. He then told the driver to go and park the taxi at the Wanaheda Police Station about 800 metres away. He maintained in evidence that the second defendant had not been working for him after 20h00 that day.

Under cross-examination he conceded that the higher the takings would be, the more he would profit by the second defendant’s work; that he had not put any measures in place to see to it that all the fares received from passengers would be paid over to him and that, although the second defendant should have returned to hand over the keys of the taxi to him and to collect N$5-00 with which to take another taxi home, it did not happen that evening. He also admitted that he did not lay any complaint with the Namibian Police for the alleged unlawful use of his motor vehicle by the second defendant. He rather lamely explained that he had been waiting for the police to complete their investigation and to furnish him with a report. He also conceded that the “Rules to the taxi driver” presented to Court was a document typed by his wife on a friend’s computer about a

year after the collision. The document which had been signed by the second defendant, he maintained, had been lost.

Although the first defendant had seen the second defendant earlier the morning of the day on which the trial commenced, he did not call him as a witness. His failure to do so is not without significance. The first defendant's car displayed the insignia of a taxi and the sign-written particulars of the first defendant's identity and address as owner of the enterprise on the side thereof. The second defendant had two passengers with him in the car when the collision occurred. Mr Steyn could not say whether they had been fare-paying passengers but, when he enquired from the second defendant who would be paying for the damage and the second defendant said that "his boss" would. At the request of Steyn, the second defendant produced the taxi licence identifying the first defendant as owner of the business. These facts, even if I were to ignore those constituting hearsay, at the very least called for an answer as the second defendant's subjective state of mind as to whether he was serving the interests of the first defendant at the time. More so, if one considers the common cause facts that the first defendant was operating a taxi business; that the first defendant's vehicle was used as a taxi in the operation of that business and that the second defendant was engaged to drive the first defendant's taxi. They establish a *prima facie* case that the second defendant

was acting in the course and scope of his employment as a taxi driver employed by the first defendant for that purpose – compare G*avin v Seebrun and Another*, 1935 NPD 235 where Carlisle AJ concluded, merely on the basis of evidence that the taxi was carrying passengers at the time of the collision that it could be fairly inferred that the taxi was being used by the driver in the course of his employment.

I am mindful that, in order to hold the first defendant vicariously liable for the second defendant's negligence, the plaintiff bears the overall *onus* to prove on a balance of probabilities that the second defendant was - (a) in the employment of the first defendant, and (b) acting in the course and scope of such employment at the time of the collision (see: *Mkize v Martens*, *supra*, at 391.) In deciding whether the plaintiff has discharged that onus, I must consider the evidence adduced in its totality and with due regard to the credibility and reliability of the witnesses and the inferences to be drawn from their evidence.

I have serious reservations about the truth of the first defendant's claim that the second defendant had acted in breach of the employment agreement or an expressed instruction of the first defendant when he had driven the taxi that night. The first defendant did not impress me as a witness. He appeared distinctly

uncomfortable under cross-examination and I do not have much confidence in the truth of his evidence. The document titled “Rules to the taxi driver” received in evidence as an exhibit was a print generated after the event. It was not the one which had been signed by the second defendant. If such a signed document existed prior to the collision, one would have expected the first defendant to keep it - in particular because of its importance in the defence raised. It will also be noticed that the “parking time” of 20h30 referred to in the “Rules” does not correspond with the instructions given to his legal representative at the time he was require to plead: in the plea it is alleged that the second defendant acted contrary to “clear and written instructions” that the vehicle should not be driven after 20:00. Although the plea purports to refer to an annexure in support of the averment, the document was not annexed – probably because it was not yet generated by means of a computer at that stage.

The evidence that the first defendant instructed the second defendant the particular evening to go and park the vehicle at the Wanaheda Police Station is equally suspect. Admittedly, no arrangement had been made with any person or police officer to park the vehicle there. Moreover, it was not the first day that the second defendant had been in the first defendant’s employment and one would have expected him to go about the parking of the vehicle

as he would normally do. Why then the need to give him a specific instruction to park the vehicle a particular place? The improbability of this arrangement becomes even more patent if one considers his lack of response to the second defendant's failure to return the key shortly afterwards and is highlighted by the fact that, even after the collision, the first defendant did not lay a complaint with the Namibian police against the second defendant's unlawful use of the motor vehicle.

The balance of probabilities, in my view, favours the conclusion that, although the second defendant had to account to the first defendant once every day and the second defendant was expected to work for a minimum number of hours per day, he was at liberty to work longer hours thereby generating a higher income both for his and the first defendant's benefit. The working hours appearing in the "Rules" were clearly not inserted to comply with the maximum number of hours employees may be engaged to work during any week in terms of the Labour Act, 1992 – they are double the maximum number of hours allowed - and there is no other reason which the first defendant advanced for the existence of a strict prohibition to operate the taxi between 20H30 the evening and 5H30 the next morning. Whilst one may understand the rules limiting to the area of operation (probably because of the conditions attached by the competent authorising authority to the issuing of

the license), by violating traffic signs (because of the penal provisions contained in the applicable traffic regulations), etc., these does not appear to be any reason for the prohibition against “after hours” work.

But even if I accept the first defendant’s evidence that the “Rules” had been incorporated as part of the employment agreement entered into with the second defendant, I nevertheless hold the view that the first respondent is vicariously liable for the delict of the second defendant. In this context too, the first defendant’s failure to call the second defendant as a witness remains relevant: He was driving a motor vehicle identifiable to all prospective passengers and road users as a taxi; he had two passengers with him when the collision occurred and was in possession of the taxi licence which he presented. One could well ask why he would have presented the licence if his journey had nothing to do with the first respondent’s business? As Heher, AJA pointed out in *Bezuidenhout NO v Escom, supra*, at 94F-G, the application of the “standard test” requires an inquiry into “the subjective state of mind of the employee, and the objective test of a sufficiently close link between the servant’s acts in his own interest and for his own purposes and the business of the master” (Compare also *Minister of Police v Rabie*, 1986(1) SA 117 (A) at 134D-E.)

In the absence of any evidence by the second defendant, the Court can at best only infer from the proven facts what his subjective state of mind was. Those are, essentially the same facts the Court will have to consider in deciding whether he was acting in the course and scope of his employment.

Mr Ueitele, appearing on behalf of the first defendant, relied heavily on *Bezuidenhout NO v Escom, supra*, for his contention that the second defendant acted contrary to an instruction by the first defendant and therefore outside the scope of his employment. In that case Escom successfully avoided liability on the basis that the driver of its vehicle had been conveying the claimant's son in the face of an express instruction against offering lifts to members of the public. Those circumstances distinguish themselves from the facts under consideration. The reasoning in that case confirmed the approach earlier adopted in *South Africa Railways & Harbours v Marais*, 1950(4) SA 610 (A) to the effect that the employment of the driver required "(a) that the employee did not operate his vehicle while carrying unauthorised passengers, and (b) that he drove his vehicle without negligence." The court reasoned that "(i)nasmuch as none of the drivers complied with the first requirement and <u>because that requirement placed a limitation on the scope of employment and was not merely an instruction as to the manner of performing the master's business</u>, the conclusion that the negligent driving of a

vehicle carrying a passenger exceeded the bounds of the driver's employment was and is unavoidable." (*Emphasis added*).

Even if I accept that the "Rules" had been agreed upon between the first and second defendants, those rules do not, in my view, place a "limitation on the scope of employment" of the second defendant but were rather instructions "as to the manner of performing the master's business." It must not be overlooked that the second defendant was engaged by the first defendant as a taxi driver with the specific purpose of driving the first defendant's marked as a taxi. As far as the driver of the plaintiff's vehicle and all other road users were concerned, the second defendant was operating a taxi. Whether, by private agreement with the first defendant, the second defendant was restricted to certain hours of operation or to a certain area or to a certain timetable were matters to which they had not been privy to.

If the two passengers were indeed fare-paying passengers who had hailed the taxi because of the insignia being displayed thereon, they would have been entitled to expect that it was available at that hour as a mode of public conveyance with all the legal consequences and protection afforded to them as passengers by law in event of injury resulting from a collision. Such conveyance would, on the face thereof, appear to be in the economic interest of the first defendant.

In such a case, the first defendant would clearly not be allowed to set up a defence of a secret arrangement between him and the second defendant as to the latter's hours of employment. In the words of Gardiner, JP in *Imperial Cold Storage v Yeo*, 1927 CPD 432 at 436 the servant was left "as far as the public is concerned, with all the insignia of a general authority to carry on the kind of business for which he is employed. 'The law is not so futile as to allow the master by giving secret instructions to a servant, to set aside his liability.' ". See also the remarks of Wessels JA in *Estate Van Der Bijl v Swanepoel, supra*, at 151.

A further example may even better illustrate the lack of merit in the first respondent's contentions: The second respondent picks up a fare paying passenger at 20h25 (5 minutes before "parking time") and 15 minutes later, on his way to the passenger's destination causes a collision through his negligence damaging the other vehicle and injuring the passenger and the occupants of the other car. Will it legally be sustainable to contend that the second respondent ceased to operate the car as a taxi in the course and scope of his employment at 20h30 just because the "Rules" requires of him to park the car by 20h30? And what if the collision takes place on the journey to park the car? Or on a deviation from that journey? Or the one after that? And the one an hour later? I think not.

The first defendant's instruction to the second defendant as regards the area of operation and the time of operation do not, in my view, constitute limitations on the scope of the second defendant's employment but merely dictates the "*modus* or manner in which he is to carry out that duty." A case in point is that of *Estate Van Der Bijl v Swanepoel*, *supra*. The Appellate Division of the Supreme Court of South Africa held that, although the taxi driver had conveyed passengers beyond the area within which he had been instructed to operate, he was still engaged in the business of the appellant and was acting for the latter's benefit. In my view, the first defendant had the duty to rebut the *prima facie* inference that the second defendant had conveyed the two passengers whilst engaged in the first defendants business and for in their joint economic interest but failed to call the second defendant to gainsay that.

But there is also a further reason. In *Feldman (Pty) Limited v Mall*, 1945 AD 733, Watermeyer CJ dealt with the meaning of the expression in "within the scope of his employment" and pointed out that the expression might be misleading unless one is alive to the fact that the expression is not equivalent to "scope of authority". He continues:

> "One is apt, when using the expression 'scope of employment' in relation to the work of a servant, to picture oneself a particular task or undertaking or piece of work assigned to a servant, which is limited in scope by the express instructions of the master, and to

> think that all acts done by the servant outside of or contrary to his master's instructions, are outside the scope of his employment; but such a conception of the meaning of 'scope of employment' is too narrow. Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided that the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained."

In that case, the employee, after he had delivered parcels of his employer to customers in Johannesburg, drove to Sophiatown on his own business to consume liquor instead of returning the vehicle immediately after the completion of deliveries to his employer's garage in Sauer Street, Johannesburg. As he later embarked upon the journey to do so in a state of intoxication, he caused a collision. The Court held that if a servant "does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs."

Applying that reasoning to the facts of the case Watermeyer, CJ held that the servant had not abandoned his master's work entirely. One of the duties he had, was to return the vehicle to the Sauer Street garage of the employer. Having failed to do so immediately, "he was still retaining custody and control of the van on behalf of his master, both at the time when he became intoxicated and at the time when the accident occurred, for the ultimate purpose of delivering it at the Sauer Street garage in accordance with his master's instructions. He probably hoped that his escapade would remain undetected. In these circumstances, in my opinion, he was driving the van not solely for his own purposes but also for his master in his capacity as a servant, and the harm which was caused must be attributed, in part, to a negligent performance of his work as a servant, and his master is therefore legally responsible for it."

There is no evidence that the second defendant parked the vehicle at the police station. It is apparent that he did not return the keys thereof to the first defendant when he should have and it justifies the inference that he kept possession of the vehicle. The collision apparently occurred whilst he still possessed the vehicle with the intention to park it later at the police station. By parity of reasoning, the conclusion is justified that even if he had conveyed the passengers for his own benefit or whilst on an excursion of his own,

he still had possession of the vehicle in his master's interest, i.e. to park it later at the police station.

In conclusion, I am satisfied on a balance of probabilities that the driving of the first defendant's vehicle by the second defendant at the time of the collision was sufficiently connected the to purpose of the second respondent's engagement and the scope of his employment in the service of the first defendant that the latter is vicariously liable for the delict of the second defendant. There are no compelling reasons relating to social policy or the tenets of fairness militating against such liability. On the contrary, the circumstances are so compellingly in favour of the conclusion that the second defendant's conduct the evening generally related to the purpose of his employment that, even if he had deviated from the agreed hours of operation, he nevertheless continued to act in the interest of the first defendant's business at the time he committed the delict.

In the result the first and second defendants, jointly and severally, the one paying the other to be absolved, are ordered-

1. to pay the amount of N$33 673-91 to plaintiff and

2. interest calculated at the rate of 20% per annum on the amount of N$33 673-91 from date of judgment to date of payment and

3. cost of suit.

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MARITZ, J.