THE HIGH COURT OF SWAZILAND

MPHIKELELI MAMBA

Plaintiff

And

VUSIMANDLA DLAMINI

Defendant

Civil Case No. 2294/2003

Coram	S.B. MAPHALALA – J
For the Plaintiff	MR. SHABANGU
For the Defendant	MR. K. MOTSA

JUDGMENT (21/07/2004)

The Plaintiff instituted proceedings by way of summons against the Defendant for an order that the Defendant pay to the Plaintiff an amount in the sum of E8, 000-00 (eight thousand Emalangeni) being in respect of a loss that the Plaintiff sustained as a consequence of the plaintiff's alleged negligence.

On the 5th December 2003, an award of judgment by default was granted in the plaintiff's favour. Subsequently the Defendant successfully applied for a rescission of

the said judgment. In his Founding affidavit in support of the application for rescission the Defendant clearly stated that he performed the acts complained of his capacity as Branch Manager of Cargo Carriers and as such should be sued vicariously with Cargo Carriers. The Plaintiff did not oppose the application for rescission.

The issue before the court presently is a special plea based on the contention made by the Defendant that this action is totally defective for non-joinder of Cargo Carriers (Pty) Ltd as the Defendant performed the act complained of in his capacity as Branch Manager of Cargo Carriers (Pty) Ltd and which duties were within the course and scope of his employment.

In support of the special plea the court was referred to the legal authorities in the case of Mkhize vs Marten 1914 A.D. 382 to the proposition of the law that masters are liable in solidium for the delicts of their servants whenever they inflict injury or damage in the duty or service (in officio out minesterio) set them by their masters. The court was further referred to the case of Stadraad Van Pretoria vs Pretoria Pools 1990 (1) S.A. 1005 at 1007 in support of the Defendant's case in this regard.

On the aspect of non-joinder the court was referred to the celebrated South African case of Amalgamated Engineering Union vs Minister of Labour 1949 (3) S.A. 637 (A) and that of Abrahamse & others vs Cape Town City Council 1953 (3) S.A. 855 (c) at 859.

The Plaintiff on the other hand has taken the view that the Defendant is not entitled to demand the joinder of Cargo Carriers (Pty) Ltd as of right in these proceedings since the latter is not a necessary party in the proceedings but merely a party that Plaintiff is entitled to join. For this proposition I was again referred to the case of Amalgamated Engineering Union (supra) and that of Henri Viljoen (Pty) Ltd vs Awerbuch Brothers 1953 (2) S.A. 151 at 166 E).

It appears to me that the Defendant's main defence to the plaintiff's claim is that Cargo Carriers is vicariously liable as he performed such acts during the scope of employment. It has become common cause that this is so. It follows therefore that Cargo Carriers is a necessary party to the proceedings

and will have a direct and

substantial interest in any order that the court will make in this matter. According to the dictum in the case of Amalgamated Engineering Union (supra) if a third party has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such order cannot be sustained or carried into effect without prejudging that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined.

On the basis of the above reasons I have come to the conclusion that Cargo Carriers (Pty) Ltd is a necessary party to the proceedings and would therefore order that the proceedings be stayed until Cargo Carriers (Pty) Ltd has been joined in the plaintiff's action; and it is so ordered.

Costs to be costs in the cause

S.B.MAPHALALA

JUDGE