

# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE:

CASE NO.4719/2008

In the matter between:

**PETROS MTHETHWA**

**PLAINTIFF**

And

**OSCAR HANS STEFFEN**

**DEFENDANT**

**CORAM**

**OTA, J**

**For Applicant  
For Defendant**

**Mr. K. Motsa**

## **JUDGMENT**

The antecedents of this case is that the Plaintiff sued out Combined Summons against the Defendant, claiming *inter alia* ,the following reliefs:

1. Payment of the sum of E55,750-00
2. Costs of suit
3. Further and/or alternative relief.

It is on record that after delivering a Notice of Intention to Defend, the Defendant raised a special plea to the Plaintiffs claim in the following terms :-

1. The vehicle cited in paragraph 4 of Plaintiffs Particulars of Claim as ZN,CCZ0550053 SPK-X belongs to a company called Swazi Express (PTY) Limited as appears in a copy of a lease agreement annexed "MI"

2. Consequently, either Swazi Express (PTY) Limited or its liquidator, Mr. Paul Taylor should have been joined as a (sic) parties to the action as they have a direct and substantial interest in the matter, and hence action has to fail due to non-joinder of the above parties.

3. Secondly, Defendant was driving vehicle on (7<sup>th</sup> December 2006) in his capacity as an employee of Swazi Express (PTY) Limited and in cause of his duties.

Consequently, in law

3.1. Swazi Express (PTY) Limited should be a party and be held vicariously liable and

3.2. Hans Steffen cannot in law be held to be personally liable for such a civil wrong.

When this matter served before me for argument on the 22<sup>nd</sup> of March 2011, Mr. K. Motsa appeared for the Defendant. There was no representation for the Plaintiff.

Mr. Motsa informed the court that he had caused a Notice of Set Down to be served on Plaintiffs counsel. That he got a call from Plaintiffs counsel the previous day, intimating him that he will be travelling out of the country, but will send another counsel to represent him. However, no counsel showed up for the Plaintiff, in spite of the fact that the Notice of Set Down clearly stated that the matter was to proceed at 9.30 a.m. Mr. Motsa applied to proceed with the case. I proceeded with this case due to the fact that absolutely no reason served before me to warrant a postponement of same.

In his oral submissions in court, Mr. Motsa urged the court to uphold the special plea on the premises that the vehicle which was driven by the Defendant at the time of the accident subject matter of the Plaintiffs claim was leased to Swazi Express by the First National Bank (FNB), therefore, since the Defendant was driving the vehicle in the course of his employment with Swazi Express, Swazi Express is vicariously liable and should be joined as a Defendant in these proceedings.

In furtherance of this contention, Mr. Motsa called in aid a lease agreement dated the 13<sup>th</sup> of June 2003, which appears on page 13 of the book of pleadings.

It is clear from a close reading of the lease agreement, that by it FNB, leased the vehicle in question to Swazi Express Airways (Proprietary) Limited. This fact is not challenged or controverted throughout the tenure of these proceedings, it therefore stands established. Established in the same vein, is the contention of Mr. Motsa that the Defendant is employed for Swazi Express and

was driving the said vehicle in the course of the said employment when the accident occurred.

The question here is, do the mere existence of the foregoing facts warrant the joinder of Swazi Express (PTY) Ltd or its liquidator Mr. Paul Taylor, as a party to this proceedings? It is trite learning, that there are circumstances in which it is necessary to join a party because of the interest that he has in the matter. When such an interest becomes apparent, the court has no discretion and will not allow the matter to proceed without joinder.

The reason for the joinder of parties to action which has already begun is that the court is enabled to ensure that persons interested in the subject matter of the dispute, and whose rights may be affected by the judgment of the court are before the court, and this also enables the court to avoid wastage of costs. The possibility of such an interest is sufficient and it is not necessary for the court to establish that it in fact exists.

See **Amalgamated Engineering Union vs Minister of Labour 1949 (3) SA 637 (A), Herbstein and Van Win sen, Civil**

**Practice of the Supreme Court of South Africa (4<sup>th</sup> Edition)  
165 to 177.**

**Abrahamse & Others vs Cape Town City Council 1953 (3)  
SA 855 fC) at 859.**

In *casu*, the allegation is that the vehicle in question which was driven by the Defendant at the material time of the accident, was leased to Swazi Express (PTY) Ltd, and was driven by the Defendant at the material time of the accident, in the ordinary course of his employment with Swazi Express (PTY) Ltd. The foregoing facts to my mind raise the question of the vicarious liability of Swazi Express (PTY) Ltd for the acts of its employer, the Defendant. This question demonstrates that Swazi Express (PTY) Ltd, has a direct and substantial interest in the subject matter of the suit, due to the fact that it stands to be affected by the judgment of the court.

I say this because, the doctrine of vicarious liability is that a master is held liable for acts done by his servant within the course or scope of his employment. **Greenberg,JA** demonstrated

this position of the law in the case of **Feldman (PTY) Ltd vs Mall 1945 AD 733 at 774** in the following language,

"a master...is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes...although improper modes...of doing them..." Furthermore, in the same case of **Feldman (PTY) Ltd vs Mall (supra) at 741, Watermeyer, CJ** declared thus:-

"...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..."

See **The Minister of Police vs Rabie 1986 (1) SA 117 (A) at 134.**

It is by reason of the totality of the foregoing, that I find that the special plea has merits, it is accordingly upheld. The Plaintiff is at liberty to repair the irregularity in the process by joining the liquidator of Swazi Express (PTY) Limited, Mr. Paul Taylor, as a

Defendant in these proceedings and to deliver an amended process within fourteen (14) days hereof. Costs to the Defendant.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 25<sup>th</sup> DAY OF March 2011**

**OTA J.  
JUDGE OF THE HIGH COURT**