IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 43/2021**

In the matter between:

NDABEZITHA JAMES THWALA o.b.o.

NQOBIZWE THWALA **Appellant**

and

THE TEACHING SERVICE COMMISSION **1st Respondent**

MINISTRY OF EDUCATION AND TRAINING **2nd Respondent**

THE GOVERNMENT OF ESWATINI **3rd Respondent**

THE ATTORNEY GENERAL **4th Respondent**

Neutral Citation: *Ndabezitha James Thwala o.b.o. Nqobizwe Thwala vs The Teaching Service Commission and 3 Others* (43/2021) [2022] *SZSC* 26 (13/07/2022)

Coram: **J.M. CURRIE AJA, S.M. MASUKU AJA AND M.J. MANZINI AJA.**

Date Heard: 05 May, 2022.

Date Delivered: 13 July, 2022.

SUMMARY : *Delict – Vicarious liability – High Court dismissing claim for damages on the basis that Plaintiff failed to prove that Defendants (Respondents) were vicariously liable as there was no formal contract of employment – Plaintiff (Appellant) contending that relationship between wrong-doer (student teacher) and Respondents analogous to that of employer-employee – High Court failing to consider whether relationship is sufficiently analogous to employer-employee relationship – Held that on the agreed facts relationship is sufficiently analogous to employer-employee relationship – Held further that matter be remitted to High Court for quantification of damages.*

JUDGMENT

M.J. MANZINI, AJA:

[1] This is an appeal against a Judgment of the High Court (per T.L. Dlamini AJ) handed down on the 5th August, 2021 in respect of a Stated Case submitted for his determination in terms of Rule 33 of the High Court Rules.

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[2] The Appellant is the biological parent of a minor learner who sustained an injury to his eye whilst in class at Ekuphakameni Community School, a public school.

[3] The Respondents are the Teaching Service Commission, an entity established in terms of the Teaching Service Act, 1982 which administers the teaching service in the Kingdom; the Ministry of Education and Training and the Government of the Kingdom of Eswatini; all represented by the office of the Attorney General who was cited as the 4th Respondent.

[4] The facts giving rise to the dispute between the parties can be summarized as follows:

4.1 On the 21st September, 2017 the Appellant's minor son was attending classes at Ekuphakameni Community School;

4.2 Whilst in class the wrongdoer, Thami Shongwe, administered corporal punishment to another learner. In the act of doing so a piece or

splinter of the stick or cane that he was using broke off and poked the Appellant's son (Nqobizwe Thwala) in his right eye;

4.3 His eye raptured a globe, and was eventually surgically removed;

4.4 The Appellant instituted an action for damages against the Respondents claiming payment of the sum of E1, 855,000.00 (One million eight hundred and fifty five thousand Emalangeni);

4.5 The action was defended by the Respondents, who subsequently filed a Plea. In their Plea the Respondents denied liability and further put in issue the cause of the injury. They further denied that the wrongdoer was an employee of the Respondents, and contended that he was a student teacher who was at the time of the incident undergoing his teaching practice as a student of AMADI College. It was further contended that even if it were to be found that he was a teacher in the employ of the Respondents, his conduct fell outside the scope of his employment as corporal punishment was abolished in public schools in the Kingdom of Eswatini. The Respondents further denied that they were vicariously liable, or in any other form, to the Plaintiff;

4.6 The parties subsequently exchanged discovery affidavits, held a pre-trial conference and requested a trial date in accordance with Rule 55 of the High Court Rules;

4.7 Thereafter, the parties agreed to submit a Stated Case in terms of Rule 33. The salient facts agreed to were that the injury was a result of the wooden particle which broke off while Thami Shongwe who was a student teacher at the school was meting out punishment to the claimant's classmate using a stick during a class session, and that the *"damaged eye was eventually removed and thus resulting into a partial visual loss to the claimant."*

4.8 The parties agreed that the issue for determination was *"whether the said student teacher was acting within the course and scope of his employment with the Defendant."*

4.9 In terms of the Stated Case the Appellant contended that the said *"Thami Shongwe was acting within the course and scope of his employment with the Defendants"*, whilst on the other hand the Respondents contended that the said *"Thami Shongwe was acting in furtherance of his personal interests and there was no sufficiently*

close link between Thami Shongwe's interest and the business of the Defendants."

4.10 Lastly, the parties agreed that the issue of quantum be dealt with separately from that of liability as is the developing trend in our jurisdiction in such claims. See **Umbutfo Swaziland Defence Force and Another v Maziya (11 of 2019) [2022] SZSC 14 (24 May 2022)** at page 36 – 37 and the cases cited therein.

[5] Pursuant to submitting the Stated Case, the parties filed written legal submissions. The Appellant's main submission was that *"the rule that there must be an employer-employee relationship to find liability under vicarious liability principle is not an inflexible one"*. The Appellant further submitted that *"the existence of an employer-employee relationship may be determined by the employer's right to control the person who commits the delict. In casu, it is submitted that the Defendant had the right to control the wrongdoer. The right emanates firstly from the fact that the wrongdoer was assigned at the school by the Defendants acting through the school administration. The wrongdoer was not an intruder at the school. His presence and rendering of academic lessons to the claimant and his*

classmates was controlled and/or supervised by the Defendants acting through the school administration. The Court is again implored to take judicial notice to the fact that student teachers should always be under the supervision of substantive teachers and administration of the Defendants to ensure that they perform their practicals to the expected standard. That equals to the right of control over the wrongdoer."

[6] The Appellant further submitted that *"the fact that the wrongdoer was not formally employed by the Defendants does not exonerate the Defendants from liability for his negligent conduct under the strict liability principle".*

[7] The Appellant further contended that the said Thami Shongwe was acting within the course and scope of his employment when the delict was committed, and not acting in furtherance of his personal interest. The Appellant contended that *"there existed a link between the conduct of the wrongdoer and his engagement by the Defendants as a student teacher. This link existed in the sense that whilst the injury was sustained during a class session whilst the wrongdoer was meting out the corporal punishment to the claimant's classmates, which eventually resulted into the injury to*

claimant's eye, the wrongdoer was in the process of furthering his business of teaching the students. It is noteworthy that the injuries sustained by the claimant was not as a result of a personal fight between the wrongdoer and the students."

[8] Lastly, the Appellant submitted that *"even if it were to be contended that the wrongdoer deviated from his instructions to teach the claimant and his fellow classmates when meting out the corporal punishment the Defendants are still vicariously liable because by his mere presence in the class where the injuries occurred the wrongdoer was furthering the interest, purposes and business of the Defendants. Furthermore the school, under the administration of the Defendants did not deploy the wrongdoer to the claimant's class on that day, the incident would not have occurred."*

[9] The thrust of the Respondents' submissions was a denial of vicarious liability. The Respondents submitted that *"when the incident occurred there was no employment relationship between Thami Shongwe and the Defendants. There is no contract of employment between Thami Shongwe and the Defendants. Also Thami Shongwe is neither salaried by the*

Defendants. Teachers in the employ of the Defendants are issued with a letter of appointment by the Teaching Service Commission who then allocates a Teaching Service Number. They are employed both on permanent and temporal basis."

[10] The Respondents further submitted that *"Thami Shongwe was a full time student of AMADI College whatever delicts which he may have committed must be borne by AMADI College because his presence in the Defendant's school was at the instance of the College and he was the responsibility of AMADI in the furtherance of his curriculum at the College."* The Respondents submitted that Thami Shongwe did not have a mandate from them.

[11] The Respondents further submitted that in terms of the Education Rules of 1977 *"only the school principal can meteor (sic) out corporal punishment. In this case the said student teacher did it on his own. If there is any liability it should be for his personal capacity."*

[12] Lastly, the Respondents submitted that the case at hand was *"one of deviation and intentional commission of a wrong"*, and that *"an intentional deviation from duty does not automatically mean that the employer escapes liability."*

[13] In his brief Judgment His Lordship T.L. Dlamini AJ correctly identified the issue calling for his determination. He prefaced his analysis by reference to the definition of an employee in terms of Section 2 of the Industrial Relations Act 2000 (as amended), which provides that an employee means – *"A person, whether or not the person is an employee at common law who works for pay or other remuneration under a contract of service or under any arrangement involving control by, or sustained dependence for the provision of work upon another person"*. He further referred to an unspecified provision of the same Act which he stated that it defined an employer as – *"A person who employs another person as an employee or any other person acting on behalf of an employer."*

[14] He then considered the common law attributes or elements of an employer and employee relationship, and also those of the agent and principal relationship.

[15] Having done so he proceeded to enquire as to whether *"it can be said that the student teacher, Thami Shongwe, was an employee or an Agent of the Defendant?"* The Learned Judge answered the above question as follows:

> ***"The said Thami Shongwe was a trainee teacher and student under the control of Amadi College. The Defendants did not have a contract of employment with the said Thami Shongwe and did not exercise an element of control over him. Therefore there is no link of the conduct of the said Thami Shongwe to the Defendants."***

[16] The Learned Judge went on to say that:

> ***"I am also fortified that the said Thami Shongwe was not acting under mandate from the Defendant. The agreed facts do not show that there existed an Agency relationship between him and the***

Defendant, so much as to say he acted under a mandate from the Defendants."

[17] Based on the above, the Court *a quo* concluded the Respondents were not vicariously liable to the Appellant, and he dismissed the claim.

[18] The first ground of appeal is directed at the Court *a quo*'s rejection of the claim on the basis there was no employment contract between the wrong-doer and the Respondents. It is argued that the Court *a quo* failed to appreciate that vicarious liability extends to situations analogous to that of employer-employee relationship, and does not apply strictly to that relationship. It was further argued that the Appellant's cause of action was premised on the engagement and/or the mandate given to the wrong-doer by the Respondents.

[19] In the second ground the Appellant contended that the Court *a quo* erred in finding that the wrong-doer was not acting under a mandate from Respondents. It was contended that this finding was inconsistent with the

common cause fact that at all material times during the occurrence of the delict the wrong-doer was discharging his duties or obligations to the Respondents, that of teaching the learners attending his class.

[20] In the third ground the Appellant contended that the Court *a quo* erred in finding that there was no link between the conduct of the wrong-doer and the Respondents. It was contended that this finding was inconsiderate of the fact that the wrong-doer was not an intruder at the school, and that he attended the classroom at the instance and mandate from the Respondents to discharge the obligation of the Respondents.

[21] It was further contended that the Court *a quo* failed to consider that the Appellant on behalf of his child has a contract of pupilage with the Respondents and not the said Thami Shongwe or AMADI College. Lastly, it was contended that the Court *a quo* failed to consider that at common law the Respondents as educators stood in *loco parentis* relationship with the Appellant's child whilst at the school and therefore endowed the duty of care over him. It was argued that this duty was breached, which imputes liability to the Respondents.

Analysis of Submissions by the Parties and Applicable Law.

[22] On appeal the submissions made by the parties were essentially the same as those submitted together with the Stated Case. I therefore find it unnecessary to regurgitate them for purposes of this Judgment. Save to highlight that in the Appellant's Heads of Argument it was suggested that this Court, in the event that the appeal is upheld, should proceed to quantify damages. This is an invitation which we declined. Quantification of damages is generally the function of the trial Court. Litigants must have the option of appealing against an award of damages, an exercise which would not be possible if damages are quantified for the first and last time by an appellate Court.

[23] The first issue of determination in this appeal is whether the Court *a quo* was correct in its finding that the Respondents could not be held vicariously liable because *"the Defendants did not have a contract of employment with the said Thami Shongwe and did not exercise an element of control over him."*

[24] As is apparent from the Judgment, the Learned Judge's conclusion that there could be no vicarious liability was premised on the fact that there was no contract of employment between the wrongdoer and the Respondents. This conclusion begs the question – is vicarious liability limited to cases where there is in existence a contract of employment, whether verbal or written?

[25] The preponderance of legal authority supports the proposition that vicarious liability is not limited to employment relationships. In **Messina Associated Carriers v Kleinhaus 2001 (3) SA 868 (SCA)** at 871 paragraph [10] Scott JA summarized the legal position as follows:

> ***"It is trite law that an employer is liable for the delicts of an employee committed in the course and scope of the latter's employment. The rule is based on 'considerations of social policy' (per Corbett CJ in Mhlongo and Another NO v Minister of Police 1978 (2) SA 551 (A) at 567H). Its origin has no doubt in the need to provide the victim of a delict with a defendant of substance able to pay damages. But even in the absence of an actual employer-employee relationship the law will permit the recovery of damages***

from one person for a delict committed by another where the relationship between them and the interest of the other in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, as Watermeyer J put it in Van Blommenstein v Reynolds 1934 CPD 26S at 269, where in the eye of the law the one was in the position of the other's servant. In such a situation one is really dealing with an analogous extension based on policy considerations of the employer's liability for the wrongful conduct of an employee."

[26] According to **LAWSA Volume 8 Part 1 paragraph 29**:

"Courts have thus far considered three broad categories of relationships to be sufficiently analogous to satisfy the creation of the necessary link: employment; mandate; and that between an owner and driver of a motor vehicle. This list is not closed, however, but if one seeks to add to it, a relationship similar to an employment relationship needs to be present. For example, the relationship between government and a cabinet minister has also been held to be

sufficiently akin to an employment relationship so as to render the government responsible for minister's delicts, and this might also explain why school(s) and universities could be held liable for the conduct of prefects or house-committee members." (own underlining for emphasis)

[27] I am in agreement with the authorities cited above. Vicarious liability cannot be limited to formal employment relationships. It must be extended to situations which are sufficiently analogous to an employer-employee relationship. Each case must be considered on its own peculiar facts in order to establish whether there exists a relationship which is sufficiently analogous to an employer-employee relationship for purposes of imposing vicarious liability. He or she who alleges the existence of the analogous relationship bears the onus of proof on a balance of probabilities.

[28] Against the above background I now revert to the facts. Although the wrong-doer (Thami Shongwe) was a student (teacher) enrolled at AMADI College at the time of the *delict* he was dispensing duties assigned to him by Ekuphakameni Community Primary School. I find it inconceivable that he

could have entered the classroom and gave lessons to learners, including the Appellant's son, without the knowledge and consent of the school authorities. He was deployed to that classroom not by AMADI College but by the authorities of the school. As such, when in that classroom he was under the control of the authorities of the said school, albeit being a student of AMADI College. On the facts of this matter it is not necessary that he should have been armed with a letter of appointment or having been allocated a teaching service number by the 1st Respondent (Teaching Service Commission), as now claimed by the Respondents. He was permitted by the Respondents through the medium of the school authorities to teach learners without a letter of appointment or teaching service number – the Respondents cannot have it both ways.

[29] On the basis of the above facts there is sufficient evidence to prove a relationship which is sufficiently analogous to that of employer-employee. The Learned Judge's narrow focus on the existence or non-existence of a formal employment relationship precluded him from considering whether there was a relationship sufficiently analogous to that of employer-employee, thus coming to a wrong conclusion of the law. His erroneous conclusion warrants interference by this Court, and it is therefore set aside.

[30] I now turn to deal with the second leg of the inquiry, that is, to establish whether or not the delict was committed during the course and scope of the wrong-doer's employment, or relationship which is analogous to that of employer-employee, as the case may be. When is a delict committed during the course and scope of employment, or a relationship sufficiently akin to an employer-employee relationship? The authorities do not seem to be unanimous on a single test to determine whether a delict was committed during the course and scope of employment, or what is analogous to an employer-employee relationship.

[31] Citing several decided cases LAWSA summaries the approach to be adopted as follows:

> ***"The central issue is whether the employee was performing a task for which he or she had been employed and in doing so was furthering the employer's business; or whether the employee, even with the employer's consent was on a frolic of his or her own, or engaged in conduct which was peripheral to the employer's business. The issue is one of fact and often of degree. For example, employers will not be held responsible for employees' personal acts***

of aggression, or those dependent upon the exercise of his own discretion and for his own convenience. But that does not necessarily exclude liability in all instances: an employer could still be liable where an employee temporarily deviates from the employer's business to follow personal pursuits, unless one can conclude that the employee had totally abandoned the employer's business. The test is whether the employee's digression is so great in respect of time and space that it cannot be said that the functions to which he or she was appointed are still being exercised. To determine this, Courts follow a two-tier approach: an employer will escape liability only if the employee subjectively intended to promote solely his or her own interest; and in addition, if objectively speaking, the employee completely disassociated him or herself from the affairs of the employer when committing the wrong. In some instances, the objective elements may override the subjective factors."

[32] The extract referred to above clearly demonstrates that there is no one size fits all test in determining whether a delict was committed within the course

and scope of employment, or a relationship analogous to that of employer-employee. Each case must be dealt with on its own peculiar facts.

[33] The preponderance of authority is that disobeying the employer's instructions or performing a prohibited act, on its own, does not constitute a defence. The standard question remains, was the employee engaged in the affairs of the employer at the time the delict was committed? The authorities postulate that a distinction is to be drawn between a prohibition which limits the sphere of employment, on the one hand, and one which only deals with conduct within the sphere of employment, on the other. The general rule is that an employee who disregards a prohibition which limits the sphere of his employment is not acting in the course of his employment, but an employee who disregards a prohibition which only deals with his conduct within the sphere of his employment is not acting outside the course of his employment. See: **Moghamat v Centre Guards CC [2004] 1 A11 SA 221 (C) paragraph 23**; **Ngubetole v Administrator, Cape and Another 1975 (3) SA 1 (A).**

[34] On the facts of this matter I do not agree that the wrong-doer was solely pursuing his personal interests or that the Respondents did not stand to benefit from his teaching of learners attending the class he was in at the relevant time. The primary interest of the Respondents was to teach the learners in attendance. This could be done by a permanent teacher, a temporary teacher, a student teacher, or even the school principal – it makes no difference. Somebody had to be given the task of teaching the learners, and this was the responsibility of the school administration. That the wrong-doer happened to be a student teacher does not detract from the fact that it was in the primary interest of the school administration to teach the learners congregated in the classroom where the Appellant's son was at the time the *delict* was committed.

[35] Neither do I agree that the Education Rules of 1977 offer the Respondents any refuge. On a closer analysis the Rules do not prohibit corporal punishment outright, they prescribe how it is to be administered and by whom. Rule 11 (1) provides that *"corporal punishment shall be administered to boys by the headmaster or by a member of the staff specifically so authorized by such headmaster."* The Rules, therefore, do not limit the sphere of employment. Rather, they lay down conduct within the

sphere of employment. On the above basis I find that the wrong-doer's infliction of corporal punishment on the day in question did not fall outside the course and scope of his relationship with the Respondents, which is analogous to that of employer and employee.

[36] In the result, the High Court Order dismissing the Appellant's claim purely on the basis that there was no formal contract of employment between the wrongdoer and the Respondents stands to be set aside. On the basis of the agreed facts the High Court ought to have found that the relationship between the wrong-doer and the Respondents was sufficiently analogous to that of employer and employee, and that the delict was committed within the course and scope of such a relationship.

[37] The parties having agreed on causation the only issue to be determined is the quantum of damages. For this, the matter will be referred to the trial Court.

[38] Costs of the appeal should follow the event.

ORDER

[39] The Court hereby issues the following Order:

1. The appeal is upheld.

2. The High Court Order dismissing the action against the Respondents is hereby set aside and replaced with the following:

   (a) On the agreed facts the Plaintiff's action succeeds. The 1st, 2nd, and 3rd Defendants, jointly and severally (one paying the other to be absolved), are held vicariously liable for the injury sustained by the Plaintiff's minor child.

   (b) The matter is referred to the Registrar of the High Court to allocate a date for hearing on the quantum of damages payable by the Defendants.

3. Costs of the appeal are awarded to the Appellant.

M.J. MANZINI

ACTING JUSTICE OF APPEAL

I agree

J.M. CURRIE

ACTING JUSTICE OF APPEAL

I agree

S.M. MASUKU

ACTING JUSTICE OF APPEAL

For the Appellant: MR. LUCKY MANYATSI

For the Respondents: ATTORNEY GENERAL