

## VICARIOUS LIABILITY (Continued)

It is felt necessary to continue with the article on vicarious liability because space constraints could not allow us to cover everything that we intended to cover in the previous article. It is imperative to look at both aspects of vicarious liability.

In the fourth quarter 2017/18 (i.e. last quarter), Employee Relations produced an article on 'vicarious liability'. It was indicated in that article that vicarious liability is when a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct (**F v Minister of Safety and Security and Another (CCT 30/11) [2011] ZACC 37; 2012 910 SA 538 (CC); 2012 (3) BCLR 244 (CC); (2012) 33 ILJ 93 (CC); 2013 (2) SACR 20 (CC) (15 December 2011)**).

The prerequisite for vicarious liability is that there must be a particular relationship between those persons, such as employment relationship; a delict (negligent act or omission) committed by the employee; and the employee acting within the course and scope of his/her employment. As a general rule, an employer is vicariously liable for the wrongful act/s or omission/s of an employee committed within the course and scope of the said employee's employment, or whilst the employee was engaged in any activity reasonably incidental to it (**F v Minister of Safety and Security and Another (CCT 30/11) [2011] ZACC 37; 2012 910 SA 538 (CC); 2012 (3) BCLR 244 (CC); (2012) 33 ILJ 93 (CC); 2013 (2) SACR 20 (CC) (15 December 2011)**). This position is based on the fact that employees are extensions or hands of their employers (through which employers do their work).

In **Media 24 LTD & another v Grobler [2005] 7 BLLR 649 (SCA)** that was referred to in the last quarter article, for example, the employer was found to have not dealt with the reported case of sexual harassment despite the fact that it had been reported to the employer on numerous occasions. The employer's lack of action was regarded as having encouraged the perpetrator to continue engaging in the acts of sexually abusing the employee. In '**The Minister of Defence v Von Benecke (115/12) [2012] ZASCA**' which involved the weapons that had been stolen and used elsewhere in criminal activities, the learned Judge said "if the Minister were, for example, to have satisfied me that the defence force had taken all reasonable steps to prevent the theft of weapons by its responsible employee, appropriate to its constitutional responsibilities, I might have been persuaded that such was not a proper case for the extension of the remedy despite the closeness of the connection".

The two cases referred to above indicate that employers must always take precautionary measures to mitigate against or prevent any risk from happening; in which case they might escape vicarious liability for actions of their employees.

There are indeed situations/instances where, according to case law, an employer may not be held liable for the actions or omissions of their employee. Generally, the basic position is that the act or omission by an employee must have happened within the course and scope of his/her employment; at his/her capacity as the employee, not an independent contractor.

The Supreme Court of Appeal of South Africa, Case No. 115/12 (**Minister of Defence v Von Benecke 9115/12 [2012] ZASCA 158 (15 November 2012)**), for example, held that there is a clear distinction between a negligent performance of a task entrusted to an employee for which the employer must usually bear responsibility; and conduct which in itself is a negation of or disassociation from the employee / employer relationship. In the previous quarter article, we referred to **Fhedzisani and Unitrans Limited T/A Greyhound, case number: 18952/10**, where the bus driver who was standing outside the bus assaulted two passengers that had come to board the bus. His employer was held vicariously liable for the driver's actions despite the fact that the employer had taken disciplinary actions against the said driver. This was due

to the fact that there was a clear connection/link between the driver's act and the course and scope of his employment.

If, for example, the driver had abandoned the bus and went to a tavern and committed an act of assault there; he would have been said to have deviated from the course and scope of his employment. In **ABSA Bank limited and Bond Equipment (Pretoria) (Pty) Limited {Case number: 580/98}**, it was indicated that the employer will only escape liability if his employee had the subjective intention of promoting solely his own interests and that the employee, objectively speaking, completely dissociated himself from the affairs of his employer when committing the act. They further indicated that once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the employer will cease to be liable.

In this case, the employee who was responsible for depositing checks in the bank in terms of his appointment with his employer (**ABSA Bank limited**), had stolen the checks and instead deposited them into his own account. The **Bond Equipment (Pretoria) (Pty) Limited** took legal actions against ABSA, and it was held (at the court) that the employee was not acting in the course and scope of his employment (for which he was appointed by his employer) at the relevant time (i.e. when he committed the act). What he did was unauthorised and criminal, and as such, committing that act was not performing his duties at all; he had abandoned and completely disengaged himself from his employment. It was held that the employer cannot therefore be held vicariously liable for the employee's criminal acts.

SA Crime Quarterly Jan. /Mar. 2014 categorises vicarious liability at two extremes. At one extreme is the delict (i.e. civil violation of the law) committed by the employee while going about her employment in the ordinary course - which Strata-g, 2017 refers to as 'traditional vicarious liability'. At the other extreme is the delict committed by the employee going about her own business, unconnected to that of the employer, often referred to as the employee 'going on a frolic of her own' – which strata-g, 2017 refers to as 'deviation vicarious liability'.

In conclusion, it is imperative to note that there are instances where the employer cannot be held vicariously liable for the wrongful acts or omissions of his employee/s.

*(An opinion from the labour desk  
1<sup>st</sup> Quarter employee relations article for 2018/19 Financial Year)*