

## **LIABILITY OF EMPLOYERS FOR UNLAWFUL CONDUCT OF EMPLOYEES**

Mr Moghamat was spotted at the scene of a burglary at a shopping centre. When a duty guard arrived, Moghamat fled. During the ensuing chase, he resisted arrest. In the struggle that followed, the guard drew a firearm and a shot went off, hitting Moghamat. The injury paralysed him. The guard claimed that Moghamat had attacked him with a spanner. Moghamat sued the guard's employer. He held the employer liable on the grounds of the tenet of vicarious liability.

As in all such cases, in order to establish liability of the employer, Moghamat had to prove that the guard was negligent, that the guard was an employee, and, if so, that the guard was acting in the course and scope of his duties.

The guard was indeed an employee of the security company. However, the employer denied that the guard had been negligent; the employer also claimed that, in any event, the guard was not acting in the course and scope of his duties because he had been expressly forbidden to carry a firearm, and he was in fact at the time on final warning for having done so previously.

In *Moghamat v Centre Guards CC* (Case no. 8286/2002 dated 11 September 2003, unreported) the Cape High Court found that the guard had indeed been negligent; he had failed to check that the firearm's safety catch was on before drawing it.

The guard was clearly acting in the course of his duties when he gave chase. But, said Centre Guards, he strayed beyond the scope of his duties when he drew his gun.

The issue here was: can an employer escape a claim based on vicarious liability if its employee breaches a workplace rule when performing his duties? The court accepted that the guard's contract of service clearly stipulated that he was not permitted to carry a firearm at the site in question, and that he was aware of that rule. However, said the court, it was not enough merely to claim that the guard was not acting in the course and scope of his employment because he had breached a term of his contract of employment; the question remained: was the employee engaged in the business of the employer at the time of the delict?

In answer, the court distinguished between prohibitions that limit the sphere of employment, and prohibitions that regulate conduct within the sphere of employment. A breach by an employee of the former category of rules normally means that the employee is not acting within the course and scope of his employment; a breach of a rule regulating conduct in the workplace does not mean that the employee has acted outside the scope of his employment. The ultimate test, said the court, is whether the employee has "disengaged" himself from the duties imposed by his contract of employment.

Turning to the facts, the court noted that the guard was required to protect the shopping centre. He was in uniform and on duty at the time. The prohibition on carrying firearms did not affect the sphere of the guard's employment. Nor could it be said that when attempting to arrest the accused the guard was embarking on a "frolic" of his own. Moghamat was accordingly entitled to such damages as he could prove.

This case shows that, if employers wish to escape liability for the wrongs of their employees, they must not only have rules to ensure that they behave properly; employers must also ensure that the employees actually comply with those rules.

Being an employer does not merely involve being subject to labour legislation, collective agreements, sectoral determinations and so on. Sight is often lost of the fact that employers may be held liable for the unlawful actions committed by their employees while in their employ. That is however the price to pay in exchange for the right to control the actions of employees. In fact, this right of control resulted in the development of the tenet of vicarious liability in our common law when slavery was abolished. It has also been incorporated in legislation since then, e.g. the Employment Equity Act. Among other things, this Act holds employers liable for sexual harassment by employees in the workplace, unless they have taken reasonable steps to prevent the harassment.

The scope of the tenet of vicarious liability is extremely wide. This essentially means that an employer may institute a claim, either separately or jointly with the employee, if the latter has caused damage or injuries to another in an unlawful and negligent or deliberate manner. This would include assault, sexual harassment, racism, theft, fraud, slander and the abuse of e-mail facilities (e.g. the spreading of computer viruses). Case law further shows that this liability may in certain circumstances also be extended to employees of temporary employment bureaus (labour brokers) while performing work for the employer-client.

Vicarious liability could cause considerable losses for employers because the courts may grant comprehensive claims for damages against employers in favour of persons who have been wronged by employees. There is no statutory limitation on the amount of damages that may be granted. The dilemma of the employer is that no matter what is being done internally to control the conduct of employees and to combat unlawful action, this is not necessarily valid towards outsiders. At the same time, failing to act internally could only serve to increase the employer's liability.

It is however possible to be pro-active by firstly setting up policies or codes of practice to eliminate or prohibit those types of conduct that may result in liability (such as sexual harassment and abuse of computer facilities). A second step would be by sensitising employees about the risks involved and to create an awareness of the consequences of certain types of actions for the employer and the employees themselves. Appropriate incentives and consistently applied sanctions (particularly disciplinary action) should be instituted in support of this effort. It would also be worth undertaking an audit to identify potential risk areas and to implement appropriate preventative measures. Naturally, sufficient short term insurance against relevant risks is also recommended.