Short notes on:

**VICARIOUS LIABILITY OF EMPLOYERS**

**Introduction**

It is trite law in South Africa that an employer will be vicariously liable for the negligent act of his or her employee/employees or agent/agents, in the event of the employee/employees or agent/agents acting in a negligent manner during the course of his/her employment.

The question that arises from the above, is to what extent will an employer be held liable if his/her employee, at the time of committing the negligent act, attended thereto in his/her personal capacity whilst in the course of business of the employer?

**Test for determining vicarious liability**

There are three common law requirements to determine the vicarious liability of an employer in standard matters, namely:

1. An employer-employee relationship must be established;
2. A wrongful act must have been committed by an employee; and
3. The employee must have committed the wrongful act whilst acting within the course and scope of his/her employment.

The problem with the above test came when determining vicarious liability in cases which deviated from the norm, as the former created an easy method for the employer to prove that an employee was acting outside the scope of his/her employment. There was accordingly an uncertainty in the law regarding the test for vicarious liability when it cannot be determined by the common-law test.

**Case Law**

In *Minister of Police v Rabie*¹, the court created a test to be applied in cases which deviated from standard matters as set out above. This test provided that an employer may still be held liable even

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¹ 1986 (1) SA 117 (A)

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if the employee had abandoned his/her business/duties and committed a negligent act on his or her own, provided that there is a ‘sufficiently close connection’ between the actions of the employee and the business of the employer. This test created both a subjective and objective element, the subjective element explores the intentions of the employee when committing the act, and after the establishment of the subjective element, the objective element to the test has to be considered, i.e. to determine whether or not there is a sufficiently close link to the negligent conduct of the employee and the business of the employer.

In *Minister of Safety and Security v Morudu and Others*², the Supreme Court of Appeal (SCA) had the opportunity to re-apply the test as set out above.

In this matter, the employee had been employed in the fingerprint unit of the police. He attended the Respondent’s house in an unmarked police vehicle in civilian clothing whilst on duty, as he believed that the Respondent was having an affair with the deceased (who the officer killed), and accordingly the Respondent and deceased were unaware that the employee was a police officer. The SCA, after applying the test, held that the conduct of the employee was to further his own interest and that there was not a sufficiently close link between the conduct of the employee and the business of the employer and accordingly the conduct was deemed as a “radical deviation from the tasks incidental to his employment”.

In addition to the above, and to confirm their decision, the SCA in *Minister of Safety and Security v Booysen*³ was again presented with a matter where an employee (police officer) whilst on duty, in full uniform and carrying his firearm, attended the plaintiff’s home with whom he was in a relationship, to have dinner, where after, without reason, drew his pistol and shot the plaintiff in the face and then killed himself. The SCA held that there was no connection between the officer visiting the plaintiff and his duties as a police officer, the SCA concluded that there was no link between the act performed by the officer and his duties as an employee, even though he was there in police uniform and carried his firearm.

**Conclusion**

Although the underlying principles of vicarious liability is clear cut and simple, the different approaches by our courts increase the burden of proof on an employer to show that there was no

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² 2016 (1) SACR 68 (SCA)
³ (SCA) (unreported case no 35/2016, 9-12-2016)
sufficiently close link to an employee’s conduct and the business of the employer. To ensure that employers are safe-guarded, we at SchoemanLaw can assist in both the drafting of employment contracts, whilst clearly setting out the duties of employees and ensuring that preventative measures are in place in the event of breach of duties, and litigating a matter, in the event of misconduct by an employee whilst in the employ of the employer.