IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO.: 1649/2018

In the matter between:

OUDEHOUTKLOOF BOERDERY (PTY) LTD **First Plaintiff**

(Registration number 2012/216222/07)

PIETER JOHANNES VENTER

(Identity number 620328 5035 089) **Second Plaintiff**

CHRISTIAN KIRSTEN **Third Plaintiff**

(Identity number 810526 5028 083)

HERMAN SMITH **Fourth Plaintiff**

(Identity number 700331 5008 083)

FREDERICK COENRAAD BRUWER **Fifth Plaintiff**

(Identity number 850604 5257 084)

LLOYD BRUCE BENGSTON

Sixth Plaintiff

(Identity number 830805 5012 081)

RINO CHARLES GRICIA **Seventh Plaintiff**

(Identity number 611014 5050 085

and

JAN LOUIS VENTER **Defendant**

JUDGMENT

GOVINDJEE AJ

Background

[1] This matter concerns the question of whether the defendant is vicariously liable for the delicts committed by his late son and employee, Casper Venter.

[2] This action proceeded by way of an online hearing on 17 and 18 August 2021. The court exercised its discretion to allow evidence via affidavit in terms of Rule 38(2) of the Uniform Rules of Court. The parties submitted the following statement of agreed facts subsequent to exchange of affidavits. Written closing arguments followed.

Statement of agreed facts

[3] It is common cause that the plaintiffs entered into an oral agreement with Casper Venter in which he undertook to sell with specific restorations certain Toyota Land Cruisers to the plaintiffs.

[4] The material terms of the agreements, as stipulated in the particulars of claim and the affidavits by the plaintiffs, are conceded by the defendant. In particular:

i. It is common cause that the plaintiffs made certain payments as deposits in terms of the various agreements into a bank account for 'JLC Cruisers'.
ii. The defendant states that he is not the holder of this bank account and the plaintiffs are not in a position to prove the contrary.
iii. The amounts and dates of various payments made into this account is not in dispute.

[5] Neither Casper Venter nor the defendant performed in terms of these agreements. The breach of the agreement between the plaintiffs and Casper Venter is not disputed. The deposits made were never refunded.

[6] It is accepted that Casper Venter was at all material times an employee of the defendant. His duties involved marketing, engaging with prospective clients, facilitating agreements between parties for the sale and restoration of Toyota Land Cruisers and administrative duties, including collecting payments from clients and bookkeeping.

[7] All the plaintiffs dealt with Casper Venter and, in some instances, with one Celeste Atterbury. It is common cause that the email addresses used in various correspondence between the plaintiffs and Casper Venter was that of JLC Cruisers, as reflected on its webpage. The home address of the

Defendant is some 150 metres from his workshop. It is accepted that the third, fifth and sixth plaintiffs visited Casper Venter at this workshop.

[8] It is not in dispute that Casper Venter defrauded each of the plaintiffs and that his conduct amounted to a delict (or, more accurately, a series of delicts). It might be added that Casper Venter committed suicide on 17 July 2017. The defendant pleaded that the circumstances surrounding his death indicated that Casper Venter had defrauded numerous persons, without the knowledge of the defendant and to the defendant's detriment, and that he committed suicide the day before his fraud was about to be exposed to the defendant.[1]

The issue

[9] The parties identified the issue to be determined as follows:

> 'The Presiding Officer is burdened with the task to investigate and determine whether the delict committed by Casper Venter was in fact committed within his normal course and scope of his employment with the Defendant and whether the delict committed was sufficiently close to his course and scope of employment to give rise to vicarious liability' (sic).

The test for vicarious liability

[10] An employer is considered to be answerable for the delicts of an employee committed in the course of employment. The reason for this was explained by Innes JA, quoting Chief Justice Shaw, of Massachusetts, in *Mkize v Martens*:[2]

[1] Defendant's plea, at p 83 of the index.
[2] 1914 AD 382 at 390.

> 'I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.'

[11] One of the first formulations of the policy underlying vicarious liability may be found in *Hern v Nichols*,[3] as quoted by Waterman CJ in *Feldman (Pty) Ltd v Mall*,[4] and cited in the recent judgment of the Supreme Court of Appeal in *Stallion Security (Pty) Ltd v Van Staden*:[5]

> 'Holt CJ held the merchant answerable for the deceit of his factor…for it is more reason, that he, that puts a trust and confidence in the deceiver, should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict.'

[12] An employer has, however, not been held to be responsible for the acts performed by an employee solely for his own interests and purposes and outside his authority. Such acts are not considered to be 'in the course of his employment', even though they may have occurred during his employment.[6] Solomon JA put it as follows in *Mkize*:[7]

> 'If, however, the act which caused the injury was something outside of his master's work, something which he was doing entirely on his own account, for his own pleasure or in his own interest, the master would not be responsible…the difficulty in all cases like the present is to determine whether the act which caused the injury was done "in" or "outside of" the master's service, in the course of the employment or not. That is essentially a question of fact to be decided upon the

[3] 90 ER 1154.
[4] 1945 AD 733 at 740.
[5] 2020 (1) SA 64 (SCA) at para 14.
[6] *Ibid*.
[7] *Mkize supra* at 394.

circumstances of the particular case, and it is a question which is often very far from easy to answer.'

[13] The application of the principle of vicarious liability generally presents no problem in cases where an employee commits a delict whilst solely or partially about the business of the employer.[8] Difficulties arise, however, when the employee commits an intentional wrong entirely for his or her own purposes, as appears to be the case in the present instance.

[14] The modern test for vicarious liability in cases of 'deviation' from authorised duties is based on the majority judgment of Jansen JA in *Rabie*.[9]

a. If an employee is seeking, albeit improperly, to advance his or her employer's interests, the employer may be vicariously liable. This is a subjective test. On the subjective test there would be no vicarious liability if the employee were acting solely in his or her own interests.
b. Even if there is no vicarious liability on the subjective test, the employer may still be liable if objectively there is a sufficiently close link between the employee's acts for his own interests and the purposes and business of the employer.

[8] *Stallion Security supra* at para 15, citing the examples of the negligent driving of a delivery man whilst on a private detour on the way back to work after having made the delivery instructed by the employer, and assault committed by a bouncer whilst removing a troublesome patron from his employer's pub.

[9] *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134C-F. See *Pehlani v Minister of Police* (2014) 35 *ILJ* 3316 (WCC) at para 23. It might be added that 'deviation cases', strictly speaking, involve instances in which an employee, whilst in a general sense still engaged in his official duties, deviates therefrom an commits a delict (for example, when a train driver permits a passenger to travel in the locomotive contrary to an instruction: see *Minister of Law and Order v Ngobo* 1992 (4) SA 882 (A) at 827B-D). Harms JA distinguished between (true) deviation cases (or cases involving a 'frolicsome coachman') and cases involving dishonest employees in *Bond Equipment supra*: at para 5. In *Stallion Security supra*, an intentional wrong committed for the employee's own purpose was nevertheless equated with the notion of 'deviation', which was referenced in inverted commas to indicate its special nature: at para 16, and with reference to *Rabie supra*.

[15] The test has subsequently been considered by the Constitutional Court in a number of judgments.[10] Having regard to s 39(2) of the Constitution and comparative law, O'Regan J developed the law upon the foundation provided by *Rabie*, in *K v Minister of Safety and Security*, as follows:[11]

> 'From this comparative review, we can see that the test set in *Rabie*, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.'

Developments through the cases

[16] Various cases have confirmed an employer's liability to a third party for the act of an employee considered to be 'in the course of employment', even though the act itself is unlawful or prohibited.[12] Courts have confirmed that the application of the general principle does not entail that

[10] See, in particular, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC).
[11] *K supra* at para 44. See *Stallion Security supra* at para 18.
[12] See, for example, *Estate van der Byl v Swanepoel* 1927 AD 141.

every act of an employee committed during the time of employment, in the advancement of his personal interests or the achievement of his own goals, necessarily falls outside the course and scope of his employment.[13]

[17] It has also been held that whether an employee had indeed abandoned his employment was a factual question which had to be decided on the probabilities mainly, if not exclusively, on the degree of digression.[14] In answering this question, a court must have regard to all matters relevant to the question.[15] Ultimately, a sufficiently close link must exist between the wrongful act of the employee, on the one hand, and the business or enterprise of the employer, on the other.[16] Importantly, reference to a link with the duties, authorised acts or employment of the employee should, in this context, be avoided. This is because the purpose of the development of the law in *Rabie* and *K* was to provide redress to a victim against an employer 'even though the wrongful act did not in any manner constitute the exercise of the duties or authorised acts of the employee, if it was objectively sufficiently linked to the business or enterprise of the employer.'[17]

[18] In *Stallion Security*, the principle that a 'sufficiently close' link would not be established when the business of the employer furnished the 'mere opportunity to the employee to commit the wrong' was considered to be a convenient place to start.[18] The example provided in that case explains

[13] *Viljoen v Smith* 1997 (1) SA 309 (A) at 315E-G. Also see *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA).
[14] *Viljoen supra* at 316J-317B.
[15] *Bezuidenhout NO v Eskom* 2003 (3) SA 83 (SCA) at para 23.
[16] *Stallion Security supra* at para 19.
[17] *Ibid*.
[18] *Stallion Security supra* at para 20. Also see *Bazley supra* at para 40.

the point: if, for example, an employee assaults a co-employee or customer whilst on duty and at the workplace over an entirely private matter, the employer would in the absence of any other consideration not be vicariously liable.[19] As a result, something more than a mere opportunity or 'but for' causal link is required. This 'something more' depends on the factual circumstances and normative considerations relevant to each case and on whether, in the light thereof, the rule should be further developed.[20]

[19] *Stallion Security* reconsidered, as part of the enquiry, the role that should be played by the creation of the risk of harm by the business of the employer. The Court reverted to the following comments from *Feldman* in this regard:[21]

> '…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 and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty.'

[20] The Court in *Stallion Security* considered the creation of a risk by the employer's business to be a decisive criterion, but not the only

[19] Also see the nature of the examples where employers will not be vicariously liable cited in *Bazley supra* at para 35, including the harm caused by a security guard who decides to commit arson for his or her own amusement.
[20] *Stallion Security supra* at para 21.
[21] At 741. See *Ess Kay Electronics (Pty) Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) paras 7 and 8 on the relationship between public policy and the imposition of vicarious liability in terms of a rule of the law of delict.

consideration, to determine whether the required link existed in *Rabie*.[22] Relying on principles accepted by the highest courts in Canada and the United Kingdom, Van der Merwe JA held that the creation of the risk that produced the harm could, in the circumstances of that case, constitute both a policy reason for the rule and a criterion for the application thereof.

[21] In *K*, the Constitutional Court reproduced the following important principles for determining whether an employer is vicariously liable for an employee's unauthorised intentional wrong, relying on the unanimous judgment in *Bazley*:[23]

> 'Courts should be guided by the following principles:
>
> (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
>
> (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability.
>
> Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires.

[22] *Stallion Security supra* at para 26. *Cf Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A).

[23] [1999] 2 SCR 534. It might be added that the court in *Bazley* indicated specifically that the principles enunciated were appropriate for application in instances where precedent was inconclusive (at p 535), and that in such cases the next step would be to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability (at para 15). While that case went on to apply the factors identified to the instances of sexual abuse applicable in that matter, these factors were specifically considered to be 'general considerations' applicable to 'intentional torts': at p 536.

Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power.' [Emphasis in original.]

[22] The Court in *Stallion Security*, having analysed various foreign authorities, concluded that '…the creation of a risk that eventuated is an important consideration in determining vicarious liability of an employer under the "close connection" test. The reasoning in these judgments is compelling and provides valuable guidance for the development of our similar law on the subject.'[24] South African law, as developed in *Rabie*, *K* and *Stallion*

[24] *Stallion Security supra* at para 31.

Security, effectively now recognises that the creation of risk of harm caused by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer.[25] Whether the employer had created the risk of the harm that materialised must be determined objectively.[26]

[23] In *Minister of Safety and Security v Japmoco BK t/a Status Motors*,[27] policemen had intentionally issued false motor vehicle clearance certificates, knowing that innocent third parties could be misled to their detriment thereby. Subjectively speaking, their prime objective was to serve their own pockets. Objectively speaking, however, the Supreme Court of Appeal held that each of them was performing the exact task assigned to them. It could not be said that they had totally distanced themselves from their assigned duties.[28] There was a close connection between the employees' actions for their own interests and purposes and the business of the employer, so that the appellant was, in principle, responsible for its employees' actions.[29]

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[25] Given the arguments advanced by defendant's counsel, it bears highlighting that *Stallion Security* involved a private sector employer.

[26] *Stallion Security supra* at para 32. It should be noted that the enquiry as to whether the employer's enterprise created or materially enhanced the risk of the wrongful act is distinct from whether a reasonable employer should have foreseen the harm in the traditional negligence sense, making it liable for its own negligence. That is not the focus of cases such as these; the inquiry is directed at foreseeability of the broad risks incident to a whole enterprise: *Bazley supra* at para 39.

[27] 2002 (5) SA 649 (SCA).

[28] At para 12. *Cf* the remarks of Malan J in *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) at 512H-I, cited with approval in *Bond Equipment supra* at para 6.

[29] At para 16, 17.

[24] As the SCA noted in *Gore*, the distinction drawn in *Japmoco*,[30] is a fine one. The facts in *Gore* were found to fall within the line of liability drawn in *Japmoco*, finding closeness of purpose, planning and effect in the fraudulent actions of the employees, which resembled what they were employed to do.[31] On this basis, the policy reasons for requiring the employer to bear the burden of its employees' wrongdoing found application in the absence of any countervailing (policy) considerations, so that the defendants could not escape vicarious liability.[32]

Application of the law

[25] Imposition of vicarious liability on an employer for an employee's deliberate wrongdoing creates special difficulties, both in relation to a conceptual basis for liability and the policy justifications underlying this.[33] This is a clear case of a deliberately dishonest employee.[34] It may be accepted that Casper Venter's conduct was unauthorised and criminal and that he misused his position and defrauded his employer, who happened to be his father, and the plaintiffs. When doing so, he had only his own interests in mind so that it is clear that the defendant cannot be held vicariously liable on the subjective deviation test.

[26] Applying the pre-constitutional standard test for vicarious liability might have also resulted in this conclusion in respect of the objective dimension

[30] '(D)ie polisieverklarings mag *vals* gewees het maar hulle was nie *vervals* nie'), translated as 'false, but not forged': *Gore* at para 30.
[31] *Gore supra* at para 30.
[32] *Ibid*.
[33] *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at para 27.
[34] See *Bond Equipment supra* at para 5, drawing a distinction between two distinct lines of authority: 'that of the frolicsome coachman and that of the dishonest servant.'

of the test. As the Supreme Court of Appeal held in *Minister of Defence v Von Benecke*:[35]

> 'Viewed from the subjective perspective of the employee Motaung: he deliberately turned his back on his employment and its duties, pursuing instead his own interest and profit in stealing the components and ammunition for the rifle. Objectively considered, the theft and removal formed no part of his duties and there was no link between his own interests (as realised by the theft) and the business of his employer. In the standard terminology the conduct fell outside both the course and the scope of his employment; nor does the fact that Motaung was employed to safeguard the armoury provide the necessary connection…There is in my view 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 is in itself a negation of or disassociation from the employee / employer relationship. The theft committed by Motaung falls into the second category. I can find no reason to distinguish it from the facts and principles summarised by Harms JA in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*…'

[27] But, as the court in *Von Benecke* pointed out, this cannot be the end of the matter and the employee's intentional conduct might nevertheless fall within the scope of employment for purposes of considering vicarious liability.[36] A court that finds that the standard test is not met is nevertheless bound to ask itself whether the rule does not require development and extension to accommodate the particular set of facts

[35] 2013 (2) SA 361 (SCA) at para 13.

[36] *Von Benecke supra* at para 14. Minister *van Veiligheid en Sekuriteit v Japmoco BK t/a Status Motors* 2002 (5) SA 649 (SCA). See *Gore supra* at para 27, and at footnote 9, for various illustrations of such liability. On the application of vicarious liability in cases involving intention, as a form of fault, see *Commissioner, South African Revenue Service and Another v TFN Diamond Cutting Works (Pty) Ltd* 2005 (5) SA 113 (SCA) at para 9.

before it.[37] While *Von Benecke* appeared to link this development exclusively to constitutional norms (motivating defendant's counsel to argue that such development was inappropriate in the present matter, given that the defendant was an 'ordinary' employer) the test is clearly flexible enough to incorporate other norms, and private employers, as well.[38] To repeat O' Regan J's comments in *K v Minister of Safety and Security*:[39]

> 'The objective element of the test…is sufficiently flexible to incorporate not only constitutional norms, but other norms as well…'

The learned Judge added as follows:

> '[22] …If one looks at vicarious liability through the prism of s 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order. This is not to say that there are no circumstances where rules may be applied without consideration of their normative content or social impact. Such circumstances may exist. What is clear, however, is that as a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and

[37] *Von Benecke supra* at para 14.
[38] *K supra* at para 44.
[39] *Supra* at paras 44, 22. Also see *PE v Ikwezi Municipality & Another* (2016) 37 *ILJ* 1799 (ECG) at para 56 and *Pehlani supra* at para 34, holding that trust, as a factor in a broader sense, cannot be discounted.

> normative content. Their application will always be difficult and will require what may be troublesome lines to be drawn by courts applying them.'

[28] Counsel for the defendant relied heavily on the decision of the Supreme Court of Appeal in *ABSA Bank Limited v Bond Equipment (Pretoria) (Pty) Limited*.[40] It was specifically suggested that the *Rabie* test should be applied as it stood prior to its development in *K* and *F*, and that further development of the common law was inappropriate in this instance because the defendant was a 'civilian employer'. It was argued that factors such as the position of power and responsibility of the wrongdoer, and the need to foster trust, were inapplicable in the context of 'ordinary' employers, who did not have special positions of power and responsibility *vis-à-vis* members of the public. This would, so the argument goes, differentiate cases such as *Bond Equipment* from the types of cases involving, for example, a government minister as employer.

[29] It must be noted, however, that *Bond Equipment* dealt with an employee of the plaintiff who had stolen cheques that had come into his possession. The Bank's defence was that this resulted in the *plaintiff* being vicariously 'liable' for its employee's intentional wrongful act, whereas the Bank's employees were merely negligent in collecting the cheques on behalf the employee.[41] The real question, in other words, was whether the plaintiff was answerable or responsible for the theft by its employee, and whether his (intentional) wrongdoing could be taken into account in reducing or

[40] [2000] ZASCA 59.

[41] Judgment of Harms JA, para 3. To put it differently, at issue was whether a plaintiff who acts with *dolus* (albeit through an employee) could claim damages from a negligent defendant.

expunging the liability of a concurrent wrongdoer (the Bank).[42] Unsurprisingly, the Court concluded that a plaintiff can never be 'liable' to another for a delict committed against him and that the theft was not a delict *vis-à-vis* the Bank so that vicarious liability on the part of the *plaintiff* could not arise. In any event, considering the cases surveyed and, in particular, *Stallion Security*, which involved a company, I am satisfied that there is no basis for holding that the development of the common law is unwarranted in all vicarious liability cases merely because the employer is engaged in business in the private as opposed to the public sector.

[30] In the final analysis, is there a sufficiently close link between Casper Venter's acts for his own interests and the purposes and business of the defendant's enterprise? As the judgment of *Stallion Security* explains, the fact that Casper Venter's conduct was wrongful and unauthorised takes that core issue no further. It is the defendant's business activities that created some form of risk for potential customers. Its senior employee, Casper Venter, unbeknown to the defendant, was untrustworthy. Unfortunately for the defendant, the roles performed by Casper Venter in the defendant's business afforded him scope to abuse his power to the detriment of the plaintiffs. The source of that power was the defendant himself, who effectively distanced himself from large swathes of his own business in 'implicitly trusting' his son with so much of the running of his sole proprietorship.[43] It is unnecessary to speculate as to the kinds of

[42] Judgment of Harms JA, para 4.

[43] As the defendant's affidavit confirms (at paras 19, 20), "…as a qualified boilermaker my work has always been in a workshop environment, where I work primarily with machines and materials. As such I have no flair for business and marketing. In light of this Casper increasingly took to the role of marketing my business, setting up a website presence, and dealing with clients on my behalf, while my focus was on the actual restoration work itself. Casper eventually handled all my administrative work, including collecting payments from clients, and attending to bookkeeping. I trusted Casper implicitly in this regard and had no reason to doubt that he would

checks and balances that may have prevented the harm suffered, or the extent to which the defendant may have safeguarded the business and its customers from an unscrupulous senior employee. In *Bazley*, the Canadian Supreme Court held that fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect, and that employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision.[44] It stated as follows:[45]

> 'Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of the employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.'

The consequence of the manner in which the business was operated was that customers, in particular the plaintiffs, were left vulnerable to becoming victims of the wrongful exercise of Casper Venter's workplace power.

[31] As the decision in *Bazley* elucidates, these are the kinds of factors that demonstrate a significant connection between the (employer's) creation or enhancement of a risk and the (employee's) wrongful conduct, even

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deal in good faith with both my clients and myself.' On instances where an employer places an employee in a special position of trust, and the responsibility on the employer to ensure that the employee is capable of trust so that a causal link was forged between the employer and the wrongful act, see *Ikwezi Municipality supra* at para 77.

[44] *Bazley supra* at para 32.

[45] *Bazley supra* at para 33.

though the outcome was clearly unrelated to the defendant desires.[46] The incidents of fraud occurred by virtue of the employee purportedly rendering the service for which he was employed by the defendant. The workplace was, for the most part, the site for what transpired, and the plaintiffs contacted Casper Venter there by email, telephone or by visiting the premises. I am satisfied that the employment relationship in this instance went beyond creating a 'mere opportunity' for what followed, but actually facilitated the employee's actions, so that there is a sufficiently close causal link with the wrongful actions for purposes of establishing vicarious liability. In coming to this conclusion, the reality that the defendant has lost his son through suicide, seemingly directly linked to the affairs which have resulted in this action, and that he was himself a victim of his employee's fraudulent conduct, have been considered as factors against a finding of vicarious liability.[47]

[32] A finding in favour of vicarious liability serves the policy considerations of the provision of an adequate and just remedy and of deterrence.[48] It also finds additional support when one considers the vexed question of which of two innocent parties should bear the loss occasioned by Casper Venter's conduct. As Wessels JA held in *Estate van der Byl*,[49] almost a century ago, with reference to *Coupé Co v Maddick*:[50]

[46] *Bazley supra* at p 536.
[47] See the judgment of Lord De Villiers CJ in *Mkize supra* at 386: '…according to *Justinian's Institutes* (4, 8, 2) it was considered unjust, when a slave had done a wrongful act, to make the master liable to lose anything more than the slave himself.'
[48] *Pehlani supra* at para 22; Also see *Bazley supra* at para 34.
[49] *Estate van der Byl supra* at 150-151.
[50] (1891) LR.2.Q.B.D. at 417.

> 'And it is right and proper that the employer should be liable "where one of two innocent parties has to suffer a loss arising from the misconduct of a third party it is for the public advantage that the loss should fall…on that one of the two who could most easily have prevented the happening or the recurrence of the mischief." It is within the master's power to select trustworthy servants who will exercise due care towards the public and carry out his instructions. The third party has no choice in the matter…'

Conclusion

[33] The facts at hand appear to be distinct, and certainly not on all fours, with any set of facts previously adjudicated. The business concerned is a sole proprietorship, and the familial link between the defendant and the employee, together with the latter's suicide related to the events in question, add unique dimensions to the matter. To the extent that the common-law rules in respect of vicarious liability require further development to encompass this particular factual situation, I am satisfied that the ambit of the rule must be extended accordingly.[51] Such a development, in my view, furthers the Constitution's promise to establish a society based on social justice, and the inherent dignity of people in the position of the plaintiffs.

[51] S 39(2) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' See *K supra* at para 16. Also see the remarks of Ponnan JA in *City of Cape Town v SA National Roads Authority Ltd* 2015 (3) SA 396 (SCA) at para 29, as cited in *Ikwezi Municipality supra* at para 71, in respect of the dangers of overzealous judicial reform.

[34] The plaintiffs have discharged the onus of proving that the delicts committed by Casper Venter were committed within the course and scope of his employment with the defendant. The defendant is vicariously liable on the basis of the establishment of a sufficiently close link between Casper Venter's wrongful acts and the defendant's business.

Order

[35] I make the following order:

1. The defendant is ordered to pay the plaintiffs' damages as follows:

   Claim A – payment in the amount of R120 000,00;
   Claim B – payment in the amount of R170 000,00;
   Claim C – payment in the amount of R85 000,00;
   Claim D – payment in the amount of R20 000,00;
   Claim E – payment in the amount of R61 800,00;
   Claim F – payment in the amount of R185 900,00;
   Claim G – payment in the amount of R60 000,00.

2. The defendant is ordered to pay interest on the aforesaid amounts at the prescribed rate from the date of judgment to the date of payment.

3. The defendant is ordered to pay the plaintiffs' costs of suit.

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A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff	:	Adv C Myburgh
Instructed by	:	Roeme van der Merwe Attorneys
For the Defendant	:	Adv D Horn
Instructed by	:	O' Brien Attorneys
Heard on	:	17, 18 August 2021
Delivered on	:	16 September 2021