Employer’s Vicarious Liability For Criminal Conduct Of An Employee

Vicarious liability is ordinarily understood to be that an employer is liable for the wrong committed by an employee during the course and scope of his or her employment. Therefore, an employer is liable even if the employer actually did nothing wrong, as the conduct of the employee is imputed to the employer.

As liability is limited to instances of an employee acting in the course and scope of employment, the public generally expects that an employer would not be liable when the wrong is committed by the employee outside of the course and scope of his or her employment; however, this is not necessarily the case. Instances of liability where the employee is acting outside of his or her “normal duties” are known as deviation cases.

In deviation cases, an employer may be held vicariously liable for the wrongful acts of an employee where there is a “sufficiently close link” between the wrongful act on the one hand and the business of the employer on the other. The fundamental question to be answered here is ‘whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability;” the facts of each case will obviously be decisive.

In the matter of *Stallion Security (Pty) Ltd v Van Staden 2020 (1) SA 64 (SCA)*, a security guard who was employed to guard certain premises killed the plaintiff’s husband whilst he was attempting to rob the premises that he was supposed to guard. The plaintiff instituted a claim for loss of support against the employer and she was ultimately successful as the court found that the employment enabled the security guard to enter and exit areas of the building without detection and also afforded intimate knowledge of the layout and security at the premises.

As such, employers are potentially at risk of being held liable for the wrongful, even criminal, conduct of employees. However, the recent matter of *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd [2023] ZACC 20*, illustrates the potential liability can be excluded by contract. In this matter, Fujitsu had an agreement with Schenker in terms whereof the latter would assist in the receipt and collection of electronic equipment. One of Schenke’s employees

stole some of the imported electronic equipment and disappeared. Fujitsu sued Schenke on the basis that it was vicariously liable for the wrongful conduct of the employee who committed the theft and Schenke relied on an exemption clause which exempted it from liability for losses suffered in relation to the electronic equipment. The Constitutional Court held that the exemption clause, in the circumstances, was not contrary to public policy and that Schenker's liability was contractually excluded.

Whilst exemption clauses do not necessarily serve a "catch-all" function, especially if the Consumer Protection Act is applicable, they do afford additional protection to employers. It is therefore suggested that employers include exemption clauses in their agreements with their clients and customers.

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