# Chabeli v Commissioner of Police and Another (C OF A (CIV) NO. 28 OF 2004 ) (NULL) [2005] LSHC 75 (20 April 2005);

C OF A (CIV) NO. 28 OF 2004
IN THE APPEAL COURT OF LESOTHO

In the matter between:

MOSA CHABELI APPELLANT
and
THE COMMISSIONER OF POLICE 1st RESPONDENT
ATTORNEY GENERAL 2nd RESPONDENT

Held at Maseru:

CORAM: Steyn, P
Ramodibedi, JA
Melunsky, JA

Heard: 13 April 2005 Delivered: 20 April 2005

Summary

Master and servant - Liability of master for acts of servants - Police officers engaged in various criminal acts resulting in the killing of a fellow police officer -Claim for damages - whether the killing committed in the course and scope of their employment. - Appellant's father and then a Major in the

JUDGMENT

RAMODIBEDI, JA

[1] This appeal unhappily recounts the tragic events of 31 October 1995 when the Appellant's father namely Karabo Chabeli ("the deceased"), then a Major in the Royal Lesotho Mounted Police, was shot and killed by his colleagues at Maseru Central Charge Office. In April 1997, and consequent upon this tragic event, the deceased's wife and Appellant's mother namely 'Mobotle Chabeli, issued summons against the Respondents jointly and severally, the one paying the other to be absolved for: -

1. M210, 545-02 damages;

2. Interest at the rate of 18% a tempora morae;

3. Costs of suit, and

4. Further and/or alternative relief.

[2] On an unspecified date thereafter, another tragedy struck the Chabeli's family when the Appellant's mother sadly passed away as well. This then necessitated substitution of the Appellant as plaintiff and this was duly granted by Hlajoane J on 17 March 2003.

1.

The Learned Acting Judge erred in admitting, using and being influenced by the criminal judgment in a civil matter.

2.

The Learned Acting Judge erred in attaching unnecessary weight to the "Codesa" unlawful acts.

3.

The Learned Acting Judge erred in concluding that "Codesa" actions were outside the control and supervision of the 1st Respondent.

4.

1st Respondent's disapproval of the police actions, particularly arrest, does not oust his control over the policemen concerned.

5.

An unlawful arrest per se does (sic) remove or exclude the policeman from the purview of his master's control.

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6.

The conclusion that the policemen concerned were acting on the personal mission is not supported by the facts of this case."

[4] Now it is clear that the second ground of appeal requires closer consideration. This is so because admittedly the learned Acting Judge a quo relied on the judgment of this Court in the Criminal case of Phakiso Robert Molise v Rex C of A (CRI) No.3 of 2001 for her findings in the civil dispute before her. She embraced that judgment in the following words:

> "In order to put the case in context a brief background of the facts, some of which the Court gleaned from the Court of Appeal Judgment in Phakiso Molise v Rex No. 3/2001 is that, sometime in 1994 a police strike had taken place....."

Although the learned Acting Judge uses the words "some of which", it is evident from her judgment that she relied entirely on the facts as found in the criminal appeal judgment in question. She makes no attempt to state what these other facts are.

[6] In their heads of argument, Counsel on both sides have given differing versions as to why the criminal appeal judgment in question was received by the court a quo in a civil case and what the intended purpose was. Whatever the dispute between the parties as to the precise purpose for which the judgment was handed in by agreement, such dispute is irrelevant. This is so because if the judgment had no evidential value the Appellant could not succeed, because that was the only evidence.

[7] I would add however that a close reading of Counsel's submissions above, leads me to an inescapable conclusion that the criminal appeal judgment in question was handed in by consent in order to enable the court a quo to rely on it in deciding on the issues before it. In my view, this amounts to admission of facts by consent. As correctly submitted by Mr. Putsoane, it cannot now lie in the mouth of Mr. Fosa to advance the argument, as he does, that the



court a quo erred in relying on evidence gleaned from the criminal appeal judgment in question. So the rule in Hollington v Hewthorn & Co. Ltd [1943] KB 587; [1943] 2 All ER 35 has no application in this case.

In his book: South African Cases and Statutes on Evidence : May. Fourth Edition, the learned author writes as follows on page 367 para 710 thereof:-

> "Where prior proceedings are put in by consent to be used as evidence, the court is entitled to use such depositions subject to its right to call any party (who had made a deposition) before it to give evidence viva voce - Nepgen v Van Dyke, 1940 E.D.L. 123."

This statement applies with equal force in this case and in my judgment it is correct.

[8] At this point I must turn to the relevant salient facts. As indicated previously, these are taken from the judgment of this Court in Phakiso Robert Molise v Rex (supra). The story commences much earlier than the fateful events of 31 October 1995. It starts sometime in 1994 when police went on strike. A committee referred to as "Codesa" was formed by junior officers to negotiate their grievances with the senior management of the police force. These junior officers included the killers of the deceased. Phakiso Robert Molise was the leader of Codesa.

up by a serious gunfire attack at PW1's home on 19 October 1995.

[10] In subsequent meetings by the senior management of the police force to resolve matters and reduce tensions, it became apparent that Codesa was acting in a co-coordinated manner and in various prongs. In this regard the following facts bear reference:-

[11] In the early hours of the fateful day in question namely, 31 October 1995, a number of police officers "dressed in operational uniform and heavily armed" occupied the Maseru Central Charge Office ("M.C.C.O."). It is common cause that these included members of Codesa and in particular the deceased's killers. The police officer who was in charge at the time (PW5 at the criminal trial) was ordered not to use the telephone to call her seniors. She was instructed not to get involved. PW13 at the trial was told by one of the killers, namely A3 at the trial, that whilst they did not want bloodshed they would effect arrests if necessary. Evidence (PW2 at the criminal trial) shows that A3 was heavily armed with a General Purpose Machine Gun (G.P.M.G.) "ready to shoot." He instructed members of the Robbery and Car Theft Squad (R.C.T.S.) to "lock up their firearms." They however gallantly refused to comply with the order.

[12] Meanwhile, the evidence of an Assistant Commissioner (PW7 at the criminal trial) shows that a number of senior police officers were herded into a conference hall at the Police Headquarters (P.H.Q.) and detained thereat under guard. He, himself was
confronted by two armed policemen in an attempt to direct him and his companions to the conference hall in question. He too gallantly ignored this instruction and ordered the police officers to return to their offices.

[13] It is necessary to point out at this stage that another prong of members of Codesa was apparently dispatched to confront both Col. Penane and PW1 early in the morning of the fateful day in question. The tactic was clear - isolate them from the other police officers. The Colonel had instructed PW1 to go to the M.C.C.O. to remove the keys to the armoury as he did not want them to end up in the wrong hands. PW1 was however confronted and stopped on the way at gunpoint by Codesa members who "kidnapped" him and forced him to drive to the police station at Ha Mabote. One such attacker, namely one Sgt. Lekhooe, who was killed in the ensuing skirmish that day, was pointing a M.16 rifle at PW1.

[14] At Mabote Police Station PW1 met the Codesa leader, Phakiso Robert Molise, who was carrying webbings and was heavily armed with two 9MM pistols on his side as well as a M.16 rifle. He was also

breaking down his cell door.

[15] To return to the events at the M.C.C.O., it is necessary to record that the Codesa members had not only "besieged" the charge office in question but had also "cut communications from its precincts with the outside world by taking control of the radio room."

[16] Evidence shows that a routine meeting was to be held at the M.C.C.O. It was due to be attended by senior officers including the deceased. Col. Penane arrived a little late and started to brief the meeting as to what happened at his home that morning. He was carrying an AK47 rifle and is described as having been very angry. One of his colleagues, however, took the AK47 rifle away from him and hid it behind the safe. Then Sgt. Lekhooe entered followed by

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A5 who is one of the killers. Sgt Lekhooe is described as having been in full webbing, and as will be recalled from paragraph [13] above, he was armed with a M.16 rifle with a large number of loaded spare magazines. He was also armed with a 7.65MM pistol.

[17] Sgt Lekhooe approached PW2 and said that they wanted Col. Penane. Asked by Col. Ngatane what they wanted Penane for, the deceased turned and faced in the direction of the wanted Colonel with his rifle "at the ready pointing at the Colonel." It was at this point that the Colonel asked "do you know that Penane you are looking for?" puling out his pistol from his waist as he asked. At this stage gunfire "erupted" resulting in the death of the deceased, Sgt Lekhooe and Col. Penane himself. Three other persons were seriously injured.

Thereafter, Major-General Makoaba (PW8 at the criminal trial) gave an order that all shooting should stop. He was addressing Phakiso Robert Molise who appeared to him to be in command of the Codesa "operation" in question. Molise was defiant and his response was

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that he would not stop until Sgt. Lekhooe had been released from PW2's office.

her employment or that it was committed outside the course and scope of such employee's employment as the case may be. In other cases, however, the evidence will not be so clear-cut. This is more so in cases commonly referred to as 'deviation' cases. Over the years, the courts have devised a 'standard test' by which employees' acts of deviation are tested to determine whether delicts committed by them fall outside the course and scope of their employment. In this regard, the remarks of Scott JA in the recent decision of the Supreme Court of Appeal of South Africa in Natasha Kern v The Minister of Safety and Security case No. 456/03 (unreported) appear to me to be singularly apposite. The learned Judge of Appeal said this:-

> "Where there is deviation the inquiry, in short, is whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or here employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee. (See eg Feldman (Pty) Ltd v Mall 1945 AD 733 at 774; Viljoen v Smith 1997 (1) SA 309 (A) 315D-317A; Minister of Safety and Security Services v Jordaan t/a Andre Jordaan Transport 2000 (4) SA 21 (SCA) para 5 and more recently Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors 2002 (5) SA 649 (SCA) paras 11-16 and Minister van Veiligheid en Sekuriteit v Phoebus Appollo Aviation BK 2002 (5) SA 475 (SCA) paras 8-18.) Notwithstanding the difficult questions of fact that frequently arise in the application of the test, it has been recognized by this court as serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent employer's point of view, the greater the deviation the less justification there can be for holding him or her liable."



[19] The facts in Natasha Kern's case show that the appellant Natasha Kern, a young woman in her early twenties, was raped by three policemen in uniform after they had offered to give her a lift home at night. This was at a certain filling station where the appellant was trying to phone her mother to come and fetch her after her male companion had refused to take her home following some disagreement between the two of them. Instead of taking the appellant home, the policemen in question drove to a spot where they took turns in raping her despite her resistance. After they had finished, they drove off leaving her to find her own way home. The appellant subsequently sued the Minister responsible for police for damages on the ground that he was vicariously liable for the conduct of the police rapists. The trial court (Flemming DPJ) granted absolution from the instance. In dismissing the appellant's appeal, the Supreme Court of Appeal held that the conduct of the rapists was wrongful and criminal and that they were

[20] In my view, the evidence in the instant matter admits of no doubt that members of Codesa including the deceased's killers were engaged in mutiny, inconsistent with the scope or course of their employment. In this connection the remarks of this Court in Phakiso Robert Molise v Rex (supra) merit quotation:-

> "The inaction of some of the senior officers in view of the mutinous conduct of the lower ranks, raises very real concerns about their loyalty to the State and commitment to maintaining order and discipline."

In my judgment, once this conclusion is reached, it follows that the Crown cannot be held vicariously liable for the unlawful and criminal acts of the deceased's killers. To do so would, in my opinion, amount to unduly imposing absolute liability on the Crown in circumstances where the delict of its servants clearly fall outside the course and scope of their employment or are inconsistent with their duties.

[21] In summary: the material facts show that members of Codesa and the deceased's killers in particular deviated from their normal police duties to such a degree that it cannot be said that in committing the unlawful acts in question they were still exercising the



functions to which they were appointed. Put differently, the facts show that the acts of the police officers in question took them out of the course and scope of their employment. These facts are the following:-

1. They were motivated by self interest in the teachers' strike which interest had nothing to do with their duties as police officers. Otherwise why would they challenge Col. Penane so vehemently in his approach to putting an end to the strike in question? Why would they eliminate him? Why would PW1 receive an anonymous letter shortly before the attack on him to desist working with the Government if not to advance their personal and private agenda outside their police duties?

2. They defied, through force of arms, orders by their seniors. In this regard it must be noted that the employer in this case can only control the police officers through their senior management officers.

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4. pointing firearms at a number of police officers, murdering the deceased, fatally shooting Col. Penane and unlawfully wounding three other police officers seriously as well as detaining their seniors at gun point.

5. They unlawfully engaged in mutiny.

6. They unlawfully besieged the M.C.C.O. and cut communication from its precincts with the outside world by unlawfully taking control of the radio room.

[22] As pointed out in paragraph [3] above, the learned Acting Judge was driven to conclude that members of Codesa and in particular the deceased's killers were engaged in functions which pro hac vice took them out of the category of the First Respondent's servants. That statement, with respect to the learned Acting Judge, appears to me to be incorrect. In my view it is not apposite to say that the unlawful acts in question took the police officers in question out of the category of the First Respondent's servants. After all, the Commissioner of Police (First Respondent) is not the employer. He is himself a servant or an employee like all police officers. He is merely in charge of the police, a duty which he discharges through

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the senior management of the police. The correct position is that by their actions, the police officers concerned were engaged in actions which pro hac vice took them out of the category of servants acting in the course and scope of their employment as public officers.

[23] But then Mr. Fosa submitted in the alternative that the First Respondent failed to exercise control over the police officers in question and that consequently he was guilty of negligence and thus liable. In my opinion, this contention can be disposed of summarily on two grounds:-

2. Section 7(1)(a) of the Police Order No. 26 of 1971 ( the Order ) which was in force at the material time in question provided as follows:-

V. (1) (a) The Force shall be employed in and throughout Lesotho for preserving the peace, for the prevention and detection of crime, and for the apprehension of offenders against the peace, and for the performance of such duties shall be entitled to carry arms".



The word "Force" is defined in Section 3 of the Order to mean the Lesotho Mounted Police.

The facts as fully set out above show beyond doubt that the police officers in question committed unlawful acts contrary to the provisions of Section 7(1)(a) of the Order in question. Accordingly Mr. Fosa's alternative submission must also fail.

[24] In all the circumstances, I am of the view that the appeal should be dismissed with costs and it is so ordered.

M.M. RAMODIBEDI
JUDGE OF APPEAL

I CONCUR:

J.H.STEYN PRESIDENT

I CONCUR:

L. MELUNSKY
JUDGE OF APPEAL

Delivered at Maseru this 20th day of April 2005.