



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 593/2022

In the matter between:

HULISANI VICCEL SITHANGU

APPLICANT

and

CAPRICORN DISTRICT MUNICIPALITY

RESPONDENT

Neutral citation: *Hulisani Viccel Sithangu v Capricorn District Municipality* (593/2022)
[2023] ZASCA 151 (14 November 2023)

Coram: ZONDI, MAKGOKA, CARELSE, MOTHLE and HUGHES JJA

Heard: 4 September 2023

Delivered: 14 November 2023

Summary: Application for special leave referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 – whether special leave to appeal should be granted – interpretation of court order granting leave – full court misinterpreting court order and deciding the appeal on issues not before it – whether respondent’s employees responsible for applicant’s injuries – sufficiency of evidence – special leave to appeal granted but appeal dismissed.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP, Kganyago J and Naude-Odendaal AJ sitting as court of appeal):

- 1 The application for special leave to appeal is granted with no order as to costs.
 - 2 The appeal is dismissed with no order as to costs.
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JUDGMENT

Zondi JA (Makgoka, Carelse, Mothle and Hughes JJA concurring):

[1] This is an application for special leave to appeal against the judgment and order of the full court of the Limpopo Division of the High Court, Polokwane (the full court). The full court dismissed, with costs, the applicant's appeal against the judgment and order of the high court (the trial court). The trial court (per MG Phatudi J) found that Mr Hulisani Viccel Sithangu (the applicant), had sued the wrong party and dismissed his delictual claim against Capricorn District Municipality (the respondent).

[2] Aggrieved by the dismissal of his appeal by the full court, the applicant approached this Court for special leave to appeal against the judgment and order of the full court. The application before us was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act). The parties were informed that, if called upon to do so, they should be prepared to address this Court on the merits of the application.

[3] This matter has been bedevilled by two procedural missteps. The first one occurred in the trial court during the adjudication of a special plea, and the second, during the appeal before the full court. With regard to the first, the trial court heard arguments on a special plea of misjoinder, in which the respondent pleaded that it was not the correct party before court. The trial court reserved its ruling and proceeded to hear the evidence and arguments on the merits. Thereafter, it dismissed the special plea, and at the same

time, relied on the facts sustaining the special plea, to dismiss the action. As I demonstrate later, these orders are mutually exclusive. As to the misstep during the appeal, the full court misconstrued an order of this Court granting special leave to appeal, and as a result, dealt with the misjoinder defence – an issue that was not before it in terms of that order. A brief background is necessary to demonstrate how these procedural missteps occurred and how they impeded an expeditious adjudication of the proceedings.

[4] The applicant was involved in a motor vehicle accident on the road between Polokwane and Mankweng, when at about 21h00 and near Dalmada, a Toyota minibus (minibus) he was driving, collided with a cow. He got trapped in the wreckage of his minibus. Firefighters were called to the scene, and they used ‘the jaws of life’ tool to extricate the applicant from the wreckage. The J88 medico-legal report, completed by a doctor who first examined the applicant after the accident, shows that the applicant sustained multiple fractures on the lower part of his body involving both knees, left and right tibia and fibula, both ankles and an open fracture of the right heel fat pad.

[5] Subsequently, the applicant instituted a delictual claim against the respondent in the trial court claiming damages in the amount of R2 800 000. He alleged that the open fracture of his right heel fat pad was caused by the respondent’s firefighters when they accidentally cut his fat pad in the process of extricating him from the wreckage.

[6] The respondent defended the action and filed a special plea of misjoinder. It asserted that the place where the accident occurred, was not within its area of authority or operation, but fell under the Polokwane Local Municipality. Thus, it did not provide firefighting services in that area, and that the firefighters who attended the scene would therefore have been employees of the Polokwane Local Municipality. The respondent thus averred that the Polokwane Local Municipality should have been sued. Essentially, its defence was that the applicant had sued the wrong party.

[7] In due course, the matter served before the trial court. Before the trial commenced, the parties agreed in terms of rule 33(4) of the Uniform Rules of Court that the special

plea should be adjudicated upon first before the merits of the claim. The trial court made no formal ruling to that effect, but the trial nevertheless proceeded in accordance with the agreement. The trial court heard arguments on the special plea. During the argument, counsel for the respondent amplified the ambit of the respondent's special plea by relying on ss 84 and 85 read with s 83 of the Local Government: Municipal Structures Act (the Structures Act).¹ The respondent argued that, in terms of s 84 of the Structures Act, the Member of the Executive Council for Local Government (the MEC) had, on 7 March 2003, allocated the firefighting services responsibility to the Polokwane Local Municipality as

¹ Local Government: Municipal Structures Act 117 of 1998. Chapter 5 thereof deals with functions and powers of municipalities. Section 83 provides as follows:

'83 (1) A municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution.

(2) The functions and powers referred to in subsection (1) must be divided in the case of a district municipality and the local municipalities within the area of the district municipality, as set out in this Chapter.

(3) A district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by—

(a) ensuring integrated development planning for the district as a whole;

(b) promoting bulk infrastructural development and services for the district as a whole;

(c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and

(d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.'

Section 84 provides for the division of functions and powers between district and local municipalities. Section 84(1) enumerates functions and powers which are allocated to a district municipality. Section 84(2) and (3) provide:

'(2) A local municipality has the functions and powers referred to in section 83(1), excluding those functions and powers vested in terms of subsection (1) of this section in 45 the district municipality in whose area it falls.

(3) Subsection (2) does not prevent a local municipality from performing functions in its area and exercising powers in its area of the nature described in subsection (1).'

Section 85 deals with adjustment of division of functions and powers between district and local municipalities. It provides as follows:

'85 (1) The MEC for local government in a province may, subject to the other provisions of this section, adjust the division of functions and powers between a district and a local municipality as set out in section 84(1) or (2) by allocating, within a prescribed policy framework, any of those functions or powers vested—

(a) in the local municipality, to the district municipality; or

(b) in the district municipality (excluding a function or power referred to in section 84(1)(a), (o) or (p)), to the local municipality.

(2) An MEC may allocate a function or power in terms of subsection (1) only if—

(a) the municipality in which the function or power is vested lacks the capacity to perform that function or exercise that power; and

(b) the MEC has consulted the Demarcation Board and considered its assessment of the capacity of the municipality concerned.

(3) Subsection (2)(b) does not apply if the Demarcation Board omits to comply with subsection (4) within a reasonable period.'

the respondent – a district municipality – did not have staff and firefighting vehicles. This allocation, the respondent alleged, was published by the MEC in Provincial Gazette No. 878.

[8] The trial court reserved its ruling on the special plea to the end of the trial on the merits and proceeded to hear evidence. The applicant's evidence was that, after the collision, his minibus was extensively damaged, and his legs were trapped and this prevented him from getting out of the wreckage. He sustained multiple injuries because of the collision. The paramedics who arrived at the scene shortly after the accident were unsuccessful in their attempt to get him out of the wreckage to convey him to hospital.

[9] It was common cause that, among other injuries, the applicant sustained the injury to right heel fat pad and a deep laceration to his right foot. The question relates to what caused that injury. Was it sustained in the collision or was it caused by the firefighters? The applicant asserted that the injury was caused by the firefighters in the process of extricating him from the wreckage, whom he accused of accidentally cutting his right heel fat pad and causing a deep laceration to his foot.

[10] The applicant's evidence on this score is that, because of the collision, the brake booster – a part of the vehicle located next to the steering wheel mechanism, collapsed, and landed on his right leg. His leg got trapped and this impeded his ability to move. The applicant stated he could not open the door on the driver's side because it was damaged. He remained trapped in the wreckage for one and a half hours during which time, he was in terrible pain. At some point, he even lost sensation in his left leg. The applicant further testified that before the firefighters arrived, he asked the onlookers to take off his shoes because he had a burning sensation in his feet. He was unable to do it himself because he could not reach his feet as he was trapped and could not bend. His feet were, however, not trapped.

[11] The applicant could not say how his right heel fat pad was cut because during the rescue operation, the firefighters told him that he 'must not look at where they would be

working on [his] leg.’ Even though he had to look away, he testified that he warned them to be careful and not to touch the leg that was not numb, referring to the right leg. The moment they began touching his right leg, he asked them not to do so, since he felt that his right leg had not been injured. The next moment he heard one of the firefighters exclaiming: ‘Sh...t. Oh Sh...t.’ The applicant testified that he did not see the firefighters cut his right heel fat pad nor did he understand why the firefighter made those utterances. The firefighters quickly dressed his deeply lacerated right foot with a bandage. They placed him in an ambulance and the paramedics conveyed him to Polokwane Mediclinic. The applicant stated that he only noticed that his right heel was badly injured when the hospital staff removed the wound dressing.

[12] During cross-examination the applicant was asked, with reference to a J88 medico-legal report, to explain how the firefighters cut his right heel fat pad and the following exchange occurred between him and counsel for the respondent:

‘Now how did you come to a conclusion that the...[indistinct] was cut by the fire-fighter? --- Because when my leg was not numb I knew that it was trapped here and I was still wearing my shoes. And there was no, no wound whatsoever on my legs. And I even asked the people who were outside to assist me. That is why I am saying even the shoes that I am wearing I ended up giving them to my daughter, because they were not damaged. The shoes I was using whilst driving that day.

I want to understand you now. You are saying you were wearing the shoes that day? ---Yes.

And the shoes were not damaged? --- Yes

But later you discovered that your heel has been cut. --- Let me maybe explain it this way. When, whilst still trapped, because of the pain I was feeling I asked people to assist me to take off my shoes. And after my leg was cut they immediately bandaged my leg. And because it was numb I could not see that. I was immediately taken to the ambulance. I only realized that my leg was cut whilst I was at the hospital when they were removing the bandage that was put on by the fire-fighters.

Now I am now, I am now confused.

COURT: No. The way I understand is that after the accident has happened and upon arrival of what he calls the fire-fighters he still had his shoes on’.

[13] Mr Thabang Letanta (Mr Letanta), the head of the emergency management services at the respondent since 2007, testified for the respondent. He was responsible for fire and rescue services. Mr Letanta denied that the rescue team could possibly have cut the applicant's right heel fat pad off in the process of rescuing him. He explained how the rescue operation at the scene is carried out: A rescue team usually comprises two to five members, including a crew leader to assess the scene. This would involve securing the scene and stabilizing the vehicle involved, to prevent it from moving during the rescue operation and to cause further injuries to the occupants that should be rescued. Once that is done, the team then starts cutting the big posts of the vehicle using the cutter. The jaws of life tools are used to cut the wreckage and remove any piece of metal that may be in their way. A ram is also used during the operation to separate the different sections of the vehicle. It is this ram that enables the rescue crew to pull an occupant from the wreckage. Mr Letanta commented further that in his whole life he never had an experience where the rescue team 'are so reckless that [they] even touch the patient.'

[14] At the end of the trial, the trial court dismissed the respondent's special plea and the applicant's claim. It ordered each party to pay its own costs. The trial court's reasoning for dismissing the special plea appears from the following passages in the judgment:

'... [I]t was not crystallly pleaded in the special plea that the defendant is constrained by a statutory provision and that the basis of the facts upon which it would be entitled to invoke the particular legislative measure as a defense was not set forth.

The facts pleaded giving rise to the special plea did not raise among other things, the decentralization of firefighting services by the then MEC, Local Government and Housing in the Provincial Gazette No.5 dated 07 March 2003 from the defendant to PLM, a third party not cited in the present proceedings.

On a closer scrutiny of the special plea as formulated, the reasons for mis-joinder are not only obscure, but fail to disclose the legal or factual basis upon which PLM and not the defendant should be imputed with liability in this claim. Evidence would therefore be crucial to determine the merits and the issue of whether or not the defendant should be held liable in the circumstances.'

[15] In dismissing the applicant's claim, the trial court reasoned:

'In the instant case, the evidence of identity as adduced was, in my view, not sufficiently reliable. The plaintiff did not satisfy the threshold of proving the identity of the firemen who attended him on a balance of probabilities.'

[16] Court orders are required to be clear and unambiguous. The two orders of the trial court are mutually exclusive and confusing. It was not open to the trial court to non-suit the applicant based on the point on which it had earlier found in his favour. The ruling of the trial court on the special plea effectively meant that the correct defendant was before it, and from then onwards, the identity of the defendant was no longer in issue. The order dismissing the special plea was final in effect, and accordingly it was not competent for the trial court to revisit it when it considered the merits.² In relation to that issue, the trial court had become *functus officio* as its authority over the subject matter had ceased.

[17] As mentioned already, although the trial court had not formally made an order separating the special plea from the merits, the trial proceeded on the footing that the issues had been separated. The dismissal of the respondent's special plea meant that a separated issue (misjoinder) had been finally decided. This Court, in *Nu-World Industries (Pty) Ltd v Strix Limited*,³ held that:

'The purpose of separating the issue in a suit is to deal finally with a discrete part of it. This is because that issue might be dispositive of the entire matter. If it proves to be dispositive, the additional time and expense of dealing with other issues is saved. Other than on appeal, the judgment cannot be revisited. This is why such a judgment is appealable. It is final in effect, despite not having disposed of all of the issues in the action.'⁴

[18] In *Thobejane and Others v Premier of the Limpopo Province and Another*,⁵ this Court had occasion to consider a similar situation, incidentally also from the Limpopo Division of the High Court. There, the respondents had raised a preliminary point of non-

² *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365(A); 1993 (1) SA 523 (A) at 536B.

³ *Nu-World Industries (Pty) Ltd v Strix Ltd* [2020] ZASCA 28; 2020 BIP 329 (SCA).

⁴ *Ibid* para 16.

⁵ *Thobejane and Others v Premier of the Limpopo Province and Another* [2020] ZASCA 176.

joinder of the two parties who, according to the respondents, had a direct and substantial interest in the relief sought by the appellants. The judge before whom the matter served, heard arguments on the preliminary point referred to above, and dismissed it. The merits of the application were then argued, after which the judge reserved judgment. Subsequently, judgment was delivered in which the judge revisited the respondents' preliminary point of non-joinder referred to earlier and upheld the very same point which she had earlier dismissed. This Court held that it was not open for the high court to revisit the point it had dismissed earlier, as in relation thereto, it had become *functus officio* and that its second order undermined the principle of finality of litigation.⁶

[19] On the facts of this case, it was not desirable to separate the special plea from the merits. What the trial court could have done would have been to decline the invitation to separate issues. This is because the facts necessary to determine the special plea, and those necessary to determine the merits, were inextricably linked. But, having agreed to determine the special plea first, and having dismissed it, it was not open for the trial court to revisit the issue as to whether the respondent was the correct defendant before it.

[20] The applicant, not satisfied with the orders of the trial court, sought leave to appeal from that court. The trial court dismissed his application with costs. Thereafter, the applicant successfully petitioned this Court for leave to appeal. He was granted leave to appeal to the full court on a limited basis. The order that was granted by this Court on 27 July 2021 reads:

1. Leave to appeal is granted to the Full Court of the Limpopo Division of the High Court, Polokwane.

2. The costs order of the court *a quo* in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs.

3. The leave to appeal is limited to the following issues:

whether the plaintiff proved on a balance of probabilities that an employee/s of the defendant negligently cut into or removed his right heel fat pad. (Own emphasis.)

⁶ Ibid para 6.

It is important to emphasise at this point that the respondent did not seek and obtain leave to cross-appeal against the order of the trial court dismissing the special plea of misjoinder. Therefore, that order was not challenged.

[21] In due course, the appeal came before the full court. In the full court, there was a debate regarding the interpretation of the order of this Court granting leave to appeal. The applicant submitted that the leave to appeal was limited to the issues identified in the order, and that on a proper construction of the order, the full court did not have authority to go beyond the issues in respect of which leave to appeal was granted. The full court rejected the applicant's construction of the order. In paras 8 and 9 of the judgment it reasoned as follows:

'The appellant submitted that this court is limited to determine the issue of negligence only as per the Supreme Court of Appeal's order. This contention by the Appellant is however misplaced. It is clear from the reading of the order that this court has to determine the following issues if the order is broken down in to compartments, namely: -

- (a) Whether the plaintiff proved on a balance of probabilities;
- (b) that employees of the Defendant;
- (c) negligently cut into;
- (d) or removed his [right] heel fat pad.

Had it been the intention of the Supreme Court of Appeal to only limit the appeal to the determination of negligence, surely the order would have read to the effect that "The leave to appeal is limited to the following issues: The negligence of the Defendant". The argument and submissions made by the Appellant that this appeal should be limited to negligence only, should therefore be rejected.'

[22] Having rejected the applicant's construction of the order of this Court granting leave to appeal, the full court proceeded to consider the merits of the appeal. It dismissed the appeal and reasoned as follows:

'This court is in agreement with the court *a quo*'s view that the Appellant failed to prove the identity of the fire-fighters at the scene and by that also failed to prove that the fire-fighters at the scene were those in the employ of the Respondent. It should be reiterated that the onus of proof lies with the Appellant, not the Respondent.

It is clear that the basis of vicarious liability is an employer-employee relationship and that the employer is held liable for the wrongs committed by his or her employee in the course and scope of the employee's employment. Having said that, it is clear that the Appellant failed to prove that the person who committed the delict was an employee of the Respondent, the scope of the employee's duties at the relevant time and that the employee performed the delictual act in the course and scope of the employee's employment.

The Appellant therefore failed to prove its basis of its claim against the Respondent and the court *a quo* correctly found that the action should be dismissed. In the result the appeal stands to fail and should be dismissed.'

[23] The question is whether the full court's interpretation of the order of this Court granting leave to appeal, is correct. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order. The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules.⁷ As in the case of a document, the judgment or order and the court's reasons for giving it, must be read as a whole to ascertain its intention.⁸ It is now settled, that when interpreting a document including a court order, the point of departure should be the language in question, read in context while also having regard to the purpose of its provision and the background.⁹

[24] The language and the wording of para 3 of the order of this Court makes it clear that the issue that was before the full court was limited to the question of whether it was the respondent's employees who caused the applicant's injury to the right heel fat pad.

[25] The context in which this Court granted leave to appeal on a limited basis is that the special plea disputing the respondent as the correct defendant had been dismissed

⁷ *Firestone South Africa (Pty) Limited v Genticuro AG* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 304D-E.

⁸ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13.

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

by the trial court. All that remained was to determine whether it was the conduct of the respondent's employees that caused the applicant's injury. In other words, whether the cut to the applicant's heel fat pad was caused by the conduct of the employees of the respondent. It was thus no longer open to the full court on appeal to revisit the issue regarding the identity of the defendant. That issue was not on appeal before it.

[26] The full court's construction of the order of this Court granting leave to appeal, is therefore flawed. It not only failed to read the language of the court order contextually, but it also failed to have regard to its purpose. The full court accordingly misdirected itself in approaching the appeal in the manner that it did.

[27] Before this Court, the applicant advanced two grounds on which he relied for the contention that the application for special leave to appeal should be granted as his appeal has prospect of success. He submitted firstly, that the trial court having dismissed the respondent's special plea of misjoinder, it was no longer open to it to revisit that issue on appeal. Secondly, the applicant submitted that when an organ of state is sought to be held vicariously liable for the delict committed by its employees, the standard that is applicable is that of a reasonable organ of state. He argued that the full court ought to have found that, 'by going to [his] foot, where there was no eminent danger, the employees of the Respondent did not act in good faith in that they failed to take reasonable precautions to eliminate or minimise the risk of injury which their action may cause to [him]'.

[28] On the other hand, the respondent argued that the application for special leave should fail as the appeal has no prospect of success and no special circumstances justifying its grant have been demonstrated. It submitted that the onus was on the applicant to prove, on a balance of probabilities, that the injury he sustained on the right heel was caused by its firefighters. It argued that the evidence adduced by the applicant failed to establish that this injury was caused by its firefighters. It asserted that the probabilities are that the relevant injury was directly related to the accident and in support of this proposition it referred to the J88 medico-legal report which was completed by the

doctor who examined the applicant shortly after the accident. One of the many injuries recorded on the J88 report is the open fracture of the right heel. The respondent also referred to the statement the applicant made to the police, relating to the accident, in which he never mentioned that one of the injuries that he sustained was caused by the firefighters in the process of extricating him from the wreckage.

[29] I now consider whether the special leave of appeal should be granted, and if so, whether the appeal should succeed. The granting of leave to appeal is governed by s 17(1)(a) of the Act, which reads:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. . . .’

[30] With regard to special leave to appeal, the test is more stringent. In *Cook v Morrison and Another*, this Court held that:¹⁰

‘The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. This may include that the appeal raises the substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list’

[31] The full court misconstrued the order of this Court granting leave to appeal to it. In the absence of a cross-appeal, it was not open to the full court to revisit the special plea of misjoinder after the trial court had dismissed it. Like the trial court, the full court misdirected itself by revisiting the issue which the trial court had finally decided. On its proper construction, the order of this Court granting leave was clear that the misjoinder issue had been determined by the trial court and was not on appeal to it. The full court therefore erred in dismissing the appeal on the basis of an issue that was not before it,

¹⁰ *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) para 8.

and without having considered its merits. The application for special leave should therefore be granted.

[32] I then proceed to deal with the merits of the appeal. The sole basis on which it was sought, both on the pleadings and in argument to recover damages from the respondent, was that it was vicariously liable for the conduct of its firefighters. The conduct relied upon was the cutting of the applicant's right heel fat pad. The anterior question therefore, is whether the respondent's firefighters cut the applicant's right heel fat pad. Put differently, the question is whether the injury to the applicant's right heel fat pad was caused by the respondent's firefighters. The applicant bore the onus to allege and prove that the harm he sustained was caused by the respondent's firefighters acting within the course and scope of their employment.¹¹

[33] The J88 medico-legal report indicates that the applicant sustained multiple fractures on the lower part of his body involving both knees, left and right tibia and fibula, both ankles and open fracture of the right heel fat pad. Because of this, it is not unreasonable to assume that all the injuries sustained by the applicant that evening were as a result of the accident. On that assumption, the applicant bore an even higher burden to establish that the injuries to his right heel fat pad were not part of the injuries sustained in the accident. The applicant cannot say, as a matter of fact, that the firefighters cut his right heel fat pad as he did not witness it. He surmises that the cut to his right heel fat pad was caused by the firefighters because before they worked on the minibus and, prior to them doing this, he 'had no wounds on [his] legs.'

[34] The applicant's assumption cannot be correct, because the J88 medico-legal report clearly shows multiple injuries on his legs, ankles, and feet. Further, in the statement concerning the accident, which the applicant made to the police on 5 November 2014, he did not blame the firefighters for some of the injuries he sustained at the scene

¹¹ An employer is liable for damage caused by delicts committed by an employee in the course and scope of the employee's employment. See, for example, *K v Minister of Safety and Security* [2004] ZASCA 99; [2005] 3 All SA 519 (SCA); 2005 (3) SA 179 (SCA); (2005) 26 ILJ 681 (SCA) para 4.

on 17 October 2014. On the applicant's own version, he stated that his right leg was not numb. It is therefore improbable that the applicant would not become aware when the firefighters cut his right heel pad. Thus, in my view, the applicant failed to discharge the onus on him to prove that the injury to his right heel fat pad was caused by the respondent's firefighters, and not by the accident. In the light of all the evidence, the applicant's evidence that the injury to his right heel fat pad was caused by the firefighters, is improbable and his appeal should fail.

[35] The next issue to consider is costs. The full court dismissed the appeal with costs including the costs of the application for leave to appeal. The applicant submitted that the full court misdirected itself by making a costs order against him. This was a misdirection, proceeded the argument, which entitles this Court to interfere with the order by setting it aside. The basis for this submission was that, by bringing an action against the respondent, the applicant did not act vexatiously, and that the litigation is against an organ of state. The applicant contended that in his claim he was asserting his constitutional rights and that therefore, based on the *Biowatch* principle¹², as a private litigant litigating against a state organ, he should not be ordered to pay costs should this application for leave to appeal be dismissed.

[36] While I accept that the applicant should not be ordered to pay the costs of this application I, however, disagree that the costs liability in this matter should be decided on the basis of the *Biowatch* principle. In my view, the basis on which the issue of costs should be decided is the following. The full court misconstrued the order of this Court granting leave to appeal. It became necessary for the applicant to bring this application. Special leave to appeal had to be granted in order to correct the procedural misdirection committed by the full court. It was not the applicant's fault that the full court misconceived the order of this Court. Had the full court considered the appeal to it in accordance with the terms of the order of this Court granting leave, it would not have decided the matter on the issue that was not before it. Although it dismissed the appeal, it did so on the wrong

¹² *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) 14 paras 21 and 23.

basis. None of the parties was responsible for that. Viewed in this light, it is only fair that no order as to costs should be made.

[37] In the result the following order issues:

- 1 The application for special leave to appeal is granted with no order as to costs.
- 2 The appeal is dismissed with no order as to costs.

DH ZONDI
JUDGE OF APPEAL

Appearances

For the appellant:

S O Ravele

Instructed by:

S O Ravele Attorneys, Louis Trichardt-Makhado
Phatshoane Henney Attorneys, Bloemfontein

For the respondent:

M E Ngoetjana

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N J Morero Inc Attorneys, Polokwane
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