CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/02

PHOEBUS APOLLO AVIATION CC Appellant

versus

THE MINISTER OF SAFETY AND SECURITY Respondent

Heard on : 5 November 2002

Decided on : 28 November 2002

JUDGMENT

KRIEGLER J:

[1] The High Court in Pretoria awarded the appellant damages against the respondent. The Supreme Court of Appeal (the SCA)[1] reversed the order and the appellant now wants to have the original award restored, alleging constitutional grounds for interference. The basic question is whether the respondent is vicariously liable to the appellant for the conduct of three dishonest policemen.

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[1] The judgment is reported as *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA).

[2] The appellant corporation was robbed of a large sum of money one night in November 1998 when an armed gang gained access to the home of the appellant's controlling member in Midrand. In mid-January 1999 the investigating officer traced part of the spoils to the home of the father of two of the robbers near Tzaneen. Accompanied by an informer the investigating officer went there – only to find that the money had gone. He had been forestalled by the three dishonest police officers who had taken the money the previous day. Although they had nothing to do with the investigation of the robbery and were indeed not even stationed at Midrand[2], they had got wind of the whereabouts of the money and decided to steal it. On the pretext of being about police business they drove to Tzaneen in a police car. There they induced the father under colour of their authority as police officers to hand over his sons' cache. None of this money they stole was ever recovered, hence the action against the respondent.

[3] Leave to appeal to this Court against the decision of the SCA was granted to the appellant on the strength of the contention on its behalf that there was a constitutional substratum to the envisaged case. More specifically the application for leave to appeal suggested that the case involved an infringement of the appellant's right to be protected in its property[3] and might well involve developing the common law relating to the vicarious liability of the state for delicts committed by police officers. The

[2] One was stationed at Alexandra and the other two at Rosebank.

[3] As to which, see section 25 of the Constitution.

appellant also raised the special obligations imposed on the South African Police Service by the Constitution.[4] Section 39(2) of the Constitution[5] does indeed command all courts to promote the spirit, purport and objects of the Bill of Rights in developing the common law; and section 167 of the Constitution does vest the ultimate responsibility to ensure compliance with this prescript of section 39(2) in the Constitutional Court. It is also correct, as the appellant contended, that this jurisdiction was exercised in the case of *Carmichele*.[6] The Court there analysed the constitutional obligation resting on the state, acting through the agency of the police and the prosecution service, to protect women against foreseeable harm at the hands of known sexual offenders, and did develop the common law accordingly.

[4] Upon closer examination, however, it is clear that none of these contentions advanced on behalf of the appellant is valid. The appellant's property rights under the Constitution are not engaged; the duties imposed on the police by the Constitution carry the matter no further; and the reliance on the judgment in *Carmichele* is misplaced. The appellant's constitutional right to be protected in the enjoyment of its property was not in issue. The constitutional foundation for this property claim

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[4] Section 205(3) of the Constitution provides as follows:

> "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[5] The subsection reads as follows:

> "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."

advanced by counsel for the appellant, must be sought in the provisions of section 25(1) of the Constitution.[7] It is clear, however, that these provisions are inapposite here. They are aimed at protecting private property rights against governmental action and are quite irrelevant here where the appellant was originally deprived of its property by robbers and recovery of part of it was later frustrated by the three thieves.

[5] The judgment of this Court in *Carmichele* is also not analogous. That case was concerned with the issue of wrongfulness. The present case is not concerned with wrongfulness but with liability for what were admittedly wrongful acts.

[6] It was also contended in argument that the respondent should be held liable for the wrongful acts of the policemen whether they were acting in the course of their employment or not. No convincing argument was, however, advanced to sustain this submission, or to show why the common law should be developed so as to impose an absolute liability on the state for the conduct of its employees committed dishonestly and in pursuit of their own selfish interest. The appellant contended that the policemen concerned were under a duty to inform the investigating officer of the

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[6] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC).

[7] Section 25(1) and (2) of the Constitution read as follows:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application-
> (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

information that they had obtained concerning the whereabouts of the money and that their failure to do so was a breach of their duties for which the respondent could be held liable. This contention, however, lacked the necessary factual basis. There is no evidence on the record to show how the three policemen came by this knowledge and nothing to support a finding, albeit by inference, that they did so in the course of their duties. In the final analysis the appellant's complaint is that the respondent should be held vicariously liable for the loss suffered in consequence of the misappropriation simply because the thieves were policemen. It was not denied that the police service was under a constitutional duty "to protect and secure the inhabitants of the Republic and their property" and was accordingly obliged to hand back to the appellant any of the stolen money that it managed to recover. The point at issue was, however, whether these duties were breached when the rogue policemen went to Tzaneen and stole the appellant's money: were they acting as policemen or were they pursuing their own interests?

[7] The question whether the respondent should have to answer for the misdeeds of the three policemen is an intriguing one. Indeed, questions of this kind are often extremely difficult to resolve and the law reports are replete with fascinating examples of the infinite variety and complexity of the kinds of cases that have engaged the courts for many years. The distinctions are subtle and the dividing lines are often feint – and debatable – as the judgment of Farlam JA in the instant case and the authorities

cited illustrate.[8] Cases such as the present one, where employees deliberately set about creating a smoke-screen of routine performance of their duties while actually pursuing their own different interests, often require nuanced weighing up of the wrongdoer's subjective intention against the objective manifestations of his or her carrying out official duties.

[8] In this particular instance the enquiry was not assisted by the way in which the appellant's cause of action was set out in its pleadings. The hypothesis on which the case was launched was that the rogues were the investigating officers who had recovered the money in Tzaneen while acting in the course of their employment and within the scope of their duties towards the respondent. In these official capacities they were allegedly obliged to have taken custody of the money found and ensured that it was returned to the appellant. On the finding of the SCA, that is not at all what happened. The rogues were at no stage officially involved in the investigation of the robbery or the recovery of its proceeds. In relation to the appellant's affairs they were on the SCA's finding never about the business of the South African Police Service: from start to finish they were engaged in their own nefarious scheme and their ostensible exercise of police powers and performance of police duties were intended solely as camouflage. On the crucial question of vicarious liability Farlam JA

[8] See for example *Minister of Police v Rabie* 1986 (1) SA 102 (AD); *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (AD); *Feldman (Pty) Ltd v Mall* 1945 AD 733; *ABSA Bank Ltd v Bond Equipment (Pretoria)(Pty) Ltd* 2001 (1) SA 372 (SCA); *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA); *Minister Van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA).

accordingly concluded that the taking of the money was not conduct for which the respondent had to answer.

[9] It is not suggested that in determining the question of vicarious liability the SCA applied any principle which is inconsistent with the Constitution. Nor is there any suggestion that any such principle needs to be adapted or evolved to bring it into harmony with the spirit, purport or objects of the Bill of Rights. On the contrary, counsel for the appellant expressly conceded that the common law test for vicarious liability, as it stands, is consistent with the Constitution. It has long been accepted that the application of this test to the facts of a particular case is not a question of law but one of fact, pure and simple.[9] The thrust of the argument presented on behalf of the appellant was essentially that though the SCA has set the correct test, it had applied that test incorrectly – which is of course not ordinarily a constitutional issue. This Court's jurisdiction is confined to constitutional matters and issues connected with decisions on constitutional matters.[10] It is not for it to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common law test to the facts of the present case. As was made plain in *Boesak*'s case:[11]

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[9] This is made plain in the cases cited in n 8 above.

[10] See section 167(3) of the Constitution, which provides as follows:

> "The Constitutional Court–
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[11] *S v Boesak* 2001 (1) BCLR 36 (CC) para 15; 2001 (1) SA 912 (CC).

> "A challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter. . . Unless there is some separate constitutional issue raised. . . no constitutional right is engaged when an appellant merely disputes the findings of fact made by the Supreme Court of Appeal."

[10] It follows that this Court has no jurisdiction to entertain the appellant's complaint. One must however sympathise with the appellant. The criminal justice system has certainly let it down badly and repeatedly. The robbery was in the first place only made possible by the treachery of two security guards. Their involvement must have been apparent from the outset, yet it took some two months before the investigation got around to visiting their parental home. Even worse, at the trial there was unchallenged evidence that the police shortly after the robbery actually searched the room where the security guards had hidden their share of the spoils but somehow failed to find it hidden under the mattress. The three scoundrels were moreover policemen who used police facilities and police authority to perfect their crime. When they were caught the prosecution case was fecklessly pursued and no effective steps were at any stage instituted by the police to force its own rotten apples to disgorge their ill-gotten gains.

[11] All in all, therefore, although the appeal falls to be dismissed, there is no warrant for penalising the appellant regarding costs.

The order

[12] The appeal is dismissed. There is no order as to costs.

Chaskalson CJ, Langa DCJ, Goldstone J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Kriegler J.

For the appellant:	B Pretorius and PE Jooste instructed by Thys Cronje Inc, Pretoria.
For the respondent:	W. Trengove SC instructed by the State Attorney, Pretoria.