

***Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* revisited: the possible vicarious liability of a holding company for the delicts caused by its nominee directors on the board of its subsidiary**

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1 *Introduction*

Employers are held vicariously liable for the delicts committed by their employees where such delicts caused loss/harm to a person. Vicarious liability is strict liability, *ie* there is no need to prove fault on the side of the employer.¹ Although the South African legal system is primarily based on Roman-Dutch law, English law has had a profound impact in various fields of the law. Vicarious liability is one of those fields, as is company law.

Generally speaking, employers are held liable for the harm caused by their employees during the course and scope of their employment duties for their employers. The aforementioned statement raises three questions for the purposes of this article: when is a person an employer, when is a person an employee and when did a person act in the course and scope of his/her duties of employment? The first two questions seek to determine whether an employment relationship existed, and within the context of this article, ask whether it would suffice to establish vicarious liability for the employer. The question of whether the person who is alleged to be an employee acted within the course and scope of his or her duty may or may not become relevant.

This article focuses on the scenario where a holding company appoints directors, who are employees of the holding company, on the board of its subsidiary company. These directors may breach their duty of care and skill to the subsidiary which causes loss to the subsidiary. The subsidiary may want to recover these losses but the directors would be out of pocket and the subsidiary would want to hold the holding company liable for the losses caused by the directors which the holding company appointed. The article will focus on South African law, but as will be seen, the South African law of vicarious liability has been heavily influenced by English and Canadian law, which in turn also influenced Australian and New Zealand law.

2 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*²

The basis for this article is the decision in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*, which was heard by the privy council on 21 May 1990. The case

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¹ Loubser and Midgley (eds) *The Law of Delict in South Africa* (2012) 383.

² 1990 3 WLR 297.

dealt with jurisdictional matters but also the possible vicarious liability of Kuwait Asia Bank. The facts were that the bank held 49.9 per cent of the shares in Australasia Investment Corporation Ltd (AICL). AICL held between 75 per cent and 81 per cent of the shares in AIC Corporation, which in turn held all the shares in AIC Securities Ltd (AICS). Although it was therefore not a holding company legally speaking, one could certainly see that the bank was a *de facto* holding company of AICS.

The business of AICS was that of a money broker, which among other things entailed the taking of deposits. To comply with New Zealand statutory regulations, National Mutual Life Nominees were appointed as trustees for the depositors. National Mutual Life Nominees bound themselves contractually to AICS to furnish it with monthly and quarterly certificates.

AICS went insolvent, was liquidated and its unsecured depositors were unable to recover their full deposits from AICS. A class action was brought against National Mutual Life Nominees for breach of trust – *ie* that they failed to perform their duties as trustees of the deposits with the necessary diligence and competence. National Mutual Life Nominees settled with the aggrieved depositors and then sought contributions from various parties, including Kuwait Asia Bank as well as the directors appointed by the bank. The case of National Mutual Life Nominees against Kuwait Asia Bank was that the bank was vicariously liable for the failure of the trustees appointed by the bank to perform their duties with the necessary diligence and competence. National Mutual Life Nominees based their claim on the allegation that this failure by these appointees was committed in the course of their employment and that the bank was therefore liable for those acts or omissions as the employer of these trustees. The bank appointed the two directors to the board of AICS and they acted according to the directions of the bank, it was alleged.

The privy council stated that in the absence of any fraud or bad faith, a shareholder or another person who controls the appointment of a director owes no duty to the creditors of the company to take reasonable care to ensure that the appointees comply with their duties of diligence and competence.³ The privy council stated:

“One shareholder may lock away his paid up shares and go to sleep. Another shareholder may take an active interest in the company, insist on detailed information and deluge the directors with advice. This active shareholder is no more liable than the sleeping shareholder.”⁴

The privy council further stated that shareholders could be confronted with unlimited liability if they were held liable for the conduct of the directors appointed by them. It is true that it would be in the interest of the shareholder to ensure that the appointed directors act with the necessary competence, but this interest stems from self-interest and not because of any duty that exists between the shareholder and the director. The fact that the directors who were appointed by the shareholder are employees of the shareholder makes no difference. The breach of duty of the directors *in casu* were as directors of AICS, as individuals and not as employees of the bank. Although the directors who were appointed by the bank fulfilled their responsibilities on the board of AICS during their working hours in the bank and at the bank’s expense, and although the directors fulfilled their duties in the interest of the bank, this would not render the bank liable for the breach of the two directors. As directors the two directors were supposed to ignore the interests and wishes of the bank. They could therefore not raise a defence that they acted upon the instructions

³ par 221.

⁴ par 221.

of the bank as a defence to the allegation that they were in breach of their duties.⁵ This would be a breach of the fiduciary duty not to fetter one's discretion.

The privy council further held that if the bank exploited its position as employer to obtain an improper advantage for the bank or to cause harm to National Mutual Life Nominees, it would be liable for its own misconduct. This was not the case in this matter. Although the bank may have had the opportunity to cause harm to AICS through its employees on the board of AICS, the council held that this would not lead to liability of the bank for the negligence of the two directors in the discharge of their duties.⁶

This case was decided in 1990 by the privy council. The question now is whether the law of vicarious liability has developed or changed in the intervening 28 years in a way that may lead to a different conclusion. To determine this the law of vicarious liability will be considered next.

3 *Vicarious liability*

As mentioned above, employers are held vicariously liable for any delicts which are committed by employees during the course and scope of their employment duties. Loubser *et al* refer to a number of theories which argue for this form of strict liability. Traditionally, the control test was used as justification, but in modern times this argument is less convincing because employers do not always exercise control over employees. Public policy and convenience are also held up as justification. Employers also have deeper pockets than the employee who wronged a person and furthermore they can absorb risk better than employees because they could take out insurance against the harm caused by employees more cost-effectively than employees. There is also the moral argument that it is only fair that the employer should be liable where the employee caused loss while pursuing a benefit for the employer. In light of the fact that the employer enjoys the benefit of the employee's service, the employer should conversely bear the consequences of the delicts of the employee. Ancillary to this argument is the "creation of risk" argument in terms of which employers create a risk that third parties may suffer loss during the course of the employee's service to promote the business of the employer. It would therefore only be fair that the employer should be held liable.⁷

Factual scenarios in case law dealing with vicarious liability have become more and more complex in light of the more traditional reasons justifying vicarious liability. In bygone eras employees were more prone to direct control of their employers. Employment has, however, changed significantly in the technological age and direct control is not easy to ascertain. A large number of recent international cases specifically deals with abuse, for example the abuse of schoolchildren by teachers or those employed to supervise children, priests abusing children while under their care and in South Africa delicts committed by the police force when on duty, which will be referred to below.

In *K v Minister of Safety and Security*⁸ K was raped by three on-duty uniformed policemen after she found herself stranded in the early morning hours following a row with her boyfriend, who refused to take her home from the bar where they were.

⁵ par 222.

⁶ par 222.

⁷ Loubser *et al* (n 1) 384.

⁸ 2005 6 SA 419 (CC).

She walked to a nearby petrol station to call her mother to fetch her. A police vehicle pulled up at the petrol station and the three policemen offered to take her home. The policemen proceeded to rape her on the way. K instituted civil action against the state. The state admitted that the policemen were on duty and that they had a duty to ensure the safety of members of the public. It was also accepted by all the parties that policemen may not transport unauthorised people in police vehicles. On appeal, the supreme court of appeal found that the principles of vicarious liability as they were then did not allow for liability for the state. The court held that there was such a deviation from what the employment of the policemen entails that there could not be any liability.

K appealed to the constitutional court and argued that the supreme court of appeal applied the common-law rule for vicarious liability incorrectly; in the alternative, if it did apply it correctly that the constitutional court should develop the common-law rule in light of the spirit, purport and objects of the constitution. The constitutional argument was based on the premise that if the state is not liable for K's damages in terms of the common-law rule, the rule should be developed in light of K's constitutional right to freedom and security, in particular the right to be free from all forms of violence from either public or private sources. The question firstly for the court was what was meant by development of the common law. In the end the court held that there was a constitutional principle involved, especially in light of the constitutional duty of the police to ensure the safety and security of all citizens and to prevent crime.

The constitutional court first considered the common-law principles of vicarious liability. The general principle, as mentioned above, is that the employer is liable for the wrongs committed by an employee during the course of employment. The court then looked at those cases where there is an intentional deviation from the normal employee duties. Furthermore, the court referred to the traditional test laid out in *Minister of Police v Rabie*,⁹ where an off-duty policeman in plain clothes made a wrongful arrest after identifying himself as a policeman and taking the victim to the police station, where the victim was detained and assaulted. The arrest and detention were purely in pursuance of the policeman's own interests. The question was whether the minister of police, as employer, was vicariously liable. The majority of the appellate division formulated the following test:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. ... The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.”¹⁰

The test is therefore a two-stage one. Even if the act was purely for the purposes of the employee, the second stage objectively enquires whether there is a sufficiently close link between the employee's acts for his own interest and the purposes and business of the employer.¹¹ The court then considered foreign law as enabled by the constitution despite protestations by the state that our law of delict, which is conceptually based, differs from the casuistic nature of the law of torts in common-law countries.

⁹ 1986 1 SA 117 (A).

¹⁰ 134C-E.

¹¹ the *K* case (n 8) par 32.

The constitutional court looked at the well-known cases of *Lister v Hesley Hall*,¹² *Bazley v Curry*¹³ and *Jacobi v Griffiths*.¹⁴ In the *Lister* case a warden sexually abused schoolboys. The school was held vicariously liable for the conduct of the warden even though there was a gross deviation from his employment duties. Lord Steyn established the test of whether the tort was so closely connected with the employment that it would be fair and just to hold the employer vicariously liable.

The two Canadian cases dealt with the liability of employers for the sexual assault of their employees on children who were in their care. In the *Bazley* case it concerned a non-profit organisation as employer. The supreme court held the employer liable. The court took cognisance of the fact that the business of the employer created and fostered the risk that led to the harm. The abuse was not just an accident of time and place, but the product of a special relationship of intimacy and respect the employer fostered as well as the special opportunities for exploitation of that relationship it furnished.¹⁵

In the *Jacobi* case, which also dealt with the sexual abuse of children, the employer was not liable on the facts. Here the employee abused children in his home away from the club where he was employed. Here the court held that there was not a sufficient connection between the employment and the wrongs. In the *Jacobi* case reliance was placed on the case of *Primeaux v United States*, where an off-duty policeman, who returned home from a work seminar in his government vehicle, offered a lift to a woman walking in the road, whereafter he raped her. In the *Primeaux* case the court held that the officer was unarmed, out of uniform and off-duty. The majority (six to five) held that the connection between the wrong and the employment duties was too remote and tenuous to be foreseeable for the employer. The minority of five focused on the fact that he was on his way back from a work seminar, received payment for fuel and a daily allowance and was authorised to drive an official vehicle. His red lights were on when he stopped to offer the lift, and it was part of his duties to offer stranded motorists a ride.

The constitutional court in the *K* case sees very close parallels between the *Rabie* test in South Africa and the United Kingdom test. The Canadian test is also an objective test as in the second leg of the enquiry according to the *Rabie* test. The constitutional court also looked at the argument that the policemen failed to protect K by raping her. The wrongful act by the policemen was simultaneously a commission (the rape) and an omission (the failure to protect K). The court agreed with this argument that an employee could simultaneously be committing a delict which was a deviation from his duties but it was also an omission to not perform his duties as a policeman. Ultimately a sufficiently close connection was established and the minister of police was held vicariously liable. It is important to bear in mind that in the *K* case the question was about whether the policemen acted “in the course of employment”. Whether or not they were employees was not in question.

In *F v Minister of Safety and Security*¹⁶ the constitutional court again had to deal with the rape by a policeman of a woman who was stranded. In this case the policeman was off-duty. The court found a sufficiently close link (the police vehicle facilitated the rape and the victim placed her trust in the policeman). Another judge concurred with the judgment but held that the state was directly liable and not

¹² 2002 1 AC 215 (HL).

¹³ 1999 2 SCR 534.

¹⁴ 1999 2 SCR 570.

¹⁵ the *Bazley* case (n 13) par 58.

¹⁶ 2012 1 SA 536 (CC).

vicariously liable because the actions of the policemen were in fact the actions of the state – the so called non-delegable duties. Again the question in this matter is not whether the policeman was an employee but whether he acted in the course of his employment.

Before I evaluate the *Kuwait Bank* case against these more recent cases of vicarious liability, two more South African cases will be discussed. These cases have not received any discussion from academics but they are in my opinion important for the evaluation later.

The first case is *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd*.¹⁷ In this case, Mrs Fey and Mr Lane were joint trustees in the insolvent estate of one Harksen. Fey was an employee of Coopers and Lybrand and Lane was an employee and director of Republic Trustees. Lane and Fey made defamatory statements about Van der Berg in civil proceedings. Van der Berg sought damages against Lane and Fey for these defamatory statements but also included Coopers and Lybrand and Republic Trustees in his claim for damages, basing his claim against them upon vicarious liability. Coopers and Lybrand accepted that they were vicariously liable but Republic Trustees opposed the action. The facts were that Lane and James were the directors of Republic Trustees. The directors and employees of Republic Trustees accepted appointments as trustees of insolvent estates and as liquidators of companies being wound up. It also provided administrative and secretarial support to their directors and employees in the performance of their duties as trustees and liquidators and the fees earned by the directors and employees in their capacities as trustees and liquidators were paid to Republic Trustees.

The argument of Republic was that when Lane acted as a trustee, he did not act subject to the control of his employer. The argument went further that even if Lane was an employee and not only a director, he performed statutory duties which were imposed on him personally by the Insolvency Act¹⁸ and that subsequently he acted under the control of the creditors of the insolvent estate and the master of the high court. Furthermore, the very nature of his statutory duties and functions meant that Republic Trustees could not exercise any control over his activities and that therefore he could not be regarded as their servant. The court referred to the long line of cases involving policemen but failed to refer to the *Rabie* case. Instead it referred to *Midway Two Engineering & Construction Services v Transnet Bpk*,¹⁹ where the court preferred a broader multi-faceted test that took into account all relevant factors, including questions of policy and fairness, to determine the question of vicarious liability. Such circumstances could be the nature of the work, the manner of payment, the manner of performing the work, the relationship between the parties and dependence, the power to give instructions, use of the employer's infrastructure and whether the person and the work form an integral part of the business.²⁰

In the *Van der Berg* case the relationship between Lane and Republic was contractual in nature. The court focused on the fact that his remuneration for his services was paid to Republic and that he used the infrastructure of Republic Trustees to enable him to fulfil his duties. The court held that Lane was not only carrying out his duties as a trustee but that he was also busy carrying out functions on behalf of Republic Trustees and for their benefit. There was an obligation on Republic Trustees to show that in the fulfilment of his duties as trustee, he was taken

¹⁷ 2001 2 SA 242 (SCA).

¹⁸ 24 of 1936.

¹⁹ 1998 3 SA 17 (SCA).

²⁰ Loubser *et al* (n 1) 385.

out of the realm as employee for the time being. This they failed to show. According to the court the delict (defamation) was committed within the course and scope of Lane's employment by Republic Trustees.

The second case is that of *Public Investment Corporation Ltd v Bodigelo*.²¹ The PIC appointed Bodigelo to serve as a non-executive director on a number of boards of companies in which it invested. The companies paid directors' fees and bonuses for the services rendered by non-executive services and in the case of Bodigelo it was paid to the PIC upon the instructions of the PIC. It is important to note that this case was decided under the Companies Act of 1973. In terms of the 2008 Companies Act, the memorandum of incorporation constitutes a contract between a director and the company. Under the 1973 act this was not the case. If the memorandum under the old act granted rights to a director, the director could not enforce these unless there was a separate agreement between the company and the director. There is, however, no indication in the case whether the payment of the fees and bonuses was in terms of the memorandum of incorporation. The PIC alleged that Bodigelo was not entitled to the payment because he performed his functions as a director in the relevant companies as a nominee and employee of the PIC. What is interesting in this case is not the fact that Bodigelo could not show a basis for his claim (he failed to show an underlying contract entitling him to the fees) but that the PIC was entitled to the payment. The court held that Bodigelo performed his duties as an employee of the PIC and could not show a basis for his claim to the fees. The judgment is alarming, because shareholders are not entitled to the fees of directors, but, more importantly, by stating that Bodigelo fulfilled his duties on the boards of the relevant companies as an employee of the PIC, the court opened up the possibility that should Bodigelo have wronged the relevant companies, that they would be able to hold the PIC vicariously liable for these wrongs.

4 Evaluation

The majority of decided cases on vicarious liability appear to be in the cases of abuse by persons in authority, and it would appear that courts are moving more towards direct liability in those cases – *ie* that the employer is held to be liable for his own delict instead of being liable for the delict of the employee. It would also appear that what constitutes “during the scope of employment” has evolved and has become a much more fluid concept, even extending to those cases where employees of independent contractors could be viewed as employees of the employer. Do these cases however have any value for the purposes of corporate law?

Loubser *et al* state that there are cases other than the employer-employee relationship which give rise to vicarious liability. They state that a partnership could be vicariously liable for a partner's delict depending on the capacity in which the partner acted. A principal could also be liable for the delicts of his agent if the agent acted within his authority or, where the agent is an employee, he acted within the course and scope of his employment.²² The other trite example is that of the owner of a motor vehicle who allows another to drive the vehicle. Wagener lists similar cases where other relationships may give rise to vicarious liability.²³ Wagener states that there are *de facto* employment relationships which gave rise to vicarious liability.

²¹ (128/2013) 2013 ZASCA 156 (22 Nov 2013).

²² Loubser *et al* (n 1) 385.

²³ Wagener “The relationship(s) giving rise to vicarious liability in South African Law” 2014 *SALJ* 178-204.

These include examples where the South African government could be held liable when a cabinet minister defamed a person as in *Mangope v Asmal*.²⁴ The court held that the minister was under the control of the government and his actions were in the furtherance of the interests of the government.²⁵ Schools and universities could also be held liable in some cases where prefects or students act as functionaries of the university.²⁶ In *Nathan v Dollars & Sense Ltd*²⁷ the New Zealand supreme court held a principal vicariously liable for the tort of the agent despite the absence of an employment relationship.

Morgan²⁸ discusses whether holding companies should be vicariously liable for the torts of a subsidiary. His argument is premised on the employment-like relationship between the holding company and the subsidiary. He refers to some of the abuse cases where there was no employment relationship but relationships similar to employment. Typically these would be the cases also highlighted by Wagener above²⁹ as well as those cases where a company contracts out certain services to an independent contractor whose employees then harm a third party. Although the independent contractor was the employer, in some cases the company was held liable. One should be mindful of these cases, though. In South Africa if liability is imposed on the company the courts have been more inclined to hold the company directly liable for the harm suffered by the third party and not based on vicarious liability.³⁰

Morgan uses the judgment in *Various Claimants v Catholic Child Welfare Society*³¹ for his argument. There the court held that an employment relationship was not required for vicarious liability but that a relationship similar to an employment relationship would suffice. Morgan focuses on the fact that the court in the case referred to insurance and loss-spreading, deep pockets, control and enterprise and risk creation as justification for an expanded view for vicarious liability.³² I am not going to dwell on his argument, because it is not necessarily what I am discussing. His theory also poses difficulty because a company can only act through natural persons, as he acknowledges. If the employee of the subsidiary commits a delict, it is the employer subsidiary that is vicariously liable and to then hold the holding company also vicariously liable would mean double vicarious liability. Morgan however argues that there are cases where the holding company assumes a duty of care towards a victim and the individual wrongdoer does not incur liability.³³ The problem with this argument is that the company is directly liable, not vicariously.

I do not think that the argument of Morgan should be easily dismissed. However, instead of looking at the delict of the subsidiary, my aim is rather to consider the delict committed by the director appointed by the holding company on the board of the subsidiary and which then causes loss. For this one has to look at the relationship

²⁴ 1997 4 SA 277 (T).

²⁵ Wagener (n 23) 184-185.

²⁶ See *Dowling v Diocesan College* 1999 3 SA 847 (C). See further *Gibbins v Williams, Muller, Wright and Mostert Ingelyf* 1987 2 SA 82 (T).

²⁷ 2008 2 NZLR 577. See further Watson and Noonan "The widening gyre of vicarious liability" 2009 *Torts Law Journal* 144.

²⁸ Morgan "Vicarious liability for group companies: the final frontier of vicarious liability?" 2015 *Journal of Professional Negligence* 276-299.

²⁹ n 26 above.

³⁰ See *Stein v Rising Tide Productions CC* 2002 5 SA 199 (C); *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A) 11; *Chartaprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA).

³¹ 2012 UKSC 56; 2013 2 AC 1.

³² Morgan (n 28) 289-294.

³³ 298.

that exists between the holding company and the director. In the chosen scenario, as in the *Kuwait Bank* case, the director is an employee of the holding company and that is therefore not in issue. The issue is whether the director when serving on the board of the subsidiary company, and is in breach of his duty of care, skill and diligence, acts in the course and scope of his employment by the holding company.

It is trite that companies have at least two distinct organs of power, the shareholders and the board of directors. At the inception of company law, power vested in the shareholders of the company. This however gradually changed as the board became more powerful due to practical reasons.³⁴ In larger public companies with a diverse group of shareholders, the distinction between management and control of a company became more apparent. In the Companies Act 71 of 2008, the board is vested with the default power³⁵ and shareholder power has been reduced to that of dismissing a director,³⁶ effecting amendments to the constitutional documents³⁷ of a company or voting on fundamental transactions.³⁸

Although it was not necessarily envisaged in the 1850s when company law effectively started, companies are entitled to hold shares in other companies – hence groups of companies.³⁹ As mentioned above, shareholders are entitled to appoint directors to the boards of companies in which they hold shares. A natural person shareholder who holds shares in multiple companies may not be able to serve on all the boards of the companies in which he holds shares. This is equally true for a company that holds shares in another, especially where it is a holding company. This is especially true where juristic persons are not allowed to be directors of a company as is the case in South African law, where the idea of a shadow director never really existed. Whether that company could be a *de facto* director is also a difficult argument to make, as I have expanded on elsewhere.⁴⁰ In order to exercise the necessary control over the subsidiary, a controlling juristic person will therefore have to appoint directors to the board of the subsidiary.

What is the relationship between shareholder and director, though? Before we look at that, it should be noted that shareholders are able to appoint proxies to attend shareholder meetings on their behalf and vote on their behalf, even sometimes using their discretion. The relationship between shareholder and proxy is clearly one of agency. Also, where a shareholder holds his shares through a nominee the relationship is purely that of agency. A director of a company is however not the agent of the appointing shareholder. The reason for this is that directors have duties to the company which trump any duty to a shareholder. The duty to exercise an unfettered discretion is well known, although this rule has been slightly tempered in Australia and New Zealand. The director of the subsidiary has to always exercise his discretion in an unfettered manner and as a general rule cannot contract with his appointer as to how he will vote.⁴¹ Such an agreement may be against public

³⁴ *Automatic Self-Cleansing Filter Syndicate v Cuninghame* 1906 2 Ch 34 (CA); *Gramophone Typewriter Ltd v Stanley* 1908 2 KB 89.

³⁵ s 66(1).

³⁶ s 71.

³⁷ s 16.

³⁸ s 112-115.

³⁹ Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (2011 dissertation US) 13; Muscat *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (1996) 1.

⁴⁰ Stevens “Liability within company groups” 2016 *TSAR* 709 715-716.

⁴¹ See Keay *Directors’ Duties* (2014) 184-185; *Thorby v Goldberg* 1964 112 CLR 597; *Fulham Football Club Ltd v Cabra Estates plc* 1994 1 BCLC 363; 1992 BCC 863.

policy and hence unenforceable. Simultaneously there would ordinarily be no claim for damages should a director vote contrary to the instructions of the shareholder who appointed him. As can be seen, this is neither a relationship of agency nor is there any relationship of mandate. In theory the director has no relationship with the appointing shareholder which one could argue gives rise to any legal duties between the two.

The other important question to ask is about policy. The whole point of investing in a company as a shareholder, whether juristic or natural, is limited liability. Shareholders are allowed by law to insulate their personal assets from the debts of the company in which they invest. There are arguments that limited liability should be less of a policy consideration in respect of delictual liability than contractual liability. There are a number of authors in the economics sphere who state that limited liability in the law of delict is not efficient.⁴² Since the inception of company law, however, limited liability is disregarded only in exceptional cases, *ie* the piercing of the veil cases. Morgan tries to argue that vicarious liability of a parent company in the context of a tort by a subsidiary does not violate the principle of limited liability.⁴³ His argument is not convincing, however, because the sole basis for this argument is that if a natural person or a juristic person can be held liable for the tort of a natural person, why can the same not be true where the wrongdoer is a juristic person?⁴⁴ The problem with this argument of course is that Morgan fails to take into consideration the relationship between the shareholder and the wrongdoer. He fails to recognise that there is a unique relationship between a shareholder and the company in which he invests. The shareholder is merely an investor.

This brings me to the question I posed above about the relationship between the holding company or any (controlling) shareholder who appoints a director to a board of a company. This is complicated where the holding company is simultaneously the employer of the director. When one compares the *Kuwait Bank* case with the two South African cases of *Van der Berg* and the *Public Investment Corporation*, it would at first blush appear that those two cases could open the door to vicarious liability, but is this so? It was important for the court in the *Van der Berg* case that Lane was a director and employee of Republic Trustees, his remuneration as trustee was paid to Republic Trustees, and he used their infrastructure to perform his duties as trustee. The court stated: “At all material times Lane was not only engaged in carrying out his duties as a trustee, he was also engaged in carrying out functions on behalf of Republic Trustees.”⁴⁵

The court therefore seemingly ignored the fact that his duties as trustee were statutory in nature and subject to creditor control. The court however emphasises the fact that while Lane was performing his duties as a trustee, he simultaneously carried out his duties to Republic Trustees.⁴⁶ The fact that Lane had a discretion as trustee was not sufficient to exempt the employer from liability.⁴⁷ The question of control was also important to the court. Republic Trustees failed to show that the exercise of his duties as trustee “took Lane out of the category of employee”.⁴⁸

⁴² See Hansmann and Kraakman “The essential role of organizational law” 2000 *The Yale Law Journal* 387 431. See further Halpern, Trebilcock and Turnbull “An economic analysis of limited liability in corporation law” 1980 *Toronto Law Journal* 117.

⁴³ Morgan (n 28) 297.

⁴⁴ Morgan (n 28) 297.

⁴⁵ par 42.

⁴⁶ par 42.

⁴⁷ par 42.

⁴⁸ par 43.

The *PIC* case is also peculiar. The statement of that court that the employee who served as non-executive director on the boards of companies in which the PIC invested did so as an employee of the PIC cannot be correct. Unless the constitutional documents of those companies provided for persons other than shareholders to appoint directors, only shareholders could appoint directors. When the PIC therefore placed Bodigelo on the boards of those companies, it did so as shareholder of those companies and not because of any other capacity to make those appointments. The fact that the PIC received the non-executive directors' fees is also peculiar, because shareholders are not remunerated for services rendered by their appointee directors.

However, one should probably be mindful to compare the *Kuwait Bank* to the *PIC* case. In the *PIC* case it was the business of the PIC to invest in companies. Where it therefore deploys directors to companies, those directors do advance the interests of the PIC. This raises the question whether the business of the holding company/ employer is relevant to determine vicarious liability. Let us imagine two situations. In situation A we have a holding company that holds shares in a company that is in a totally different business from the business of the holding company. In situation B the holding company's business is either an investment of shares business or the business is similar to / the same as the business of the subsidiary. In both cases the holding company appoints directors to the board of the subsidiary, which directors are employees of the holding company. These directors fulfil their duties on the board of the subsidiary during the working hours of the holding company. In both cases the decisions by these directors constitute breaches of their duty of care and skill and diligence to the subsidiary and the subsidiary wants to hold the holding company vicariously liable. Should it matter that the holding company controls the director, that the holding company is the entity that has the deep pockets and that the director furthers the interest of the holding company during work time? Should it also be relevant that in situation A the holding company employer is only an investor in the subsidiary, whereas in situation B the business of the holding company employer is that of investment or that its business of and that of its subsidiary are closely aligned?

The traditional answer to the above question in both situations would in my opinion be the same, *ie* that the director exercised an independent duty. Even if the director followed the instructions of the holding company, he is in breach of an additional fiduciary duty to the subsidiary company. The holding company does not have a duty to the subsidiary as shareholder and is therefore not in breach of any duty. The fact remains that the holding company employer appointed the directors to the board of the subsidiary because it cannot itself serve on the subsidiary board. It did not make this appointment because of any right contained in the constitutional documents of the subsidiary but due to the right as shareholder in the subsidiary. The fact that it is the employer of the director is irrelevant, because the director of the company does not act as an employee of the holding company when he exercises his duties on the board of the subsidiary, even in situation B. There is no employment relationship in this context and not even a relationship akin to employment. The fact that the director is under the control of the holding company is neither here nor there. That would be the case in any appointment of a director. Even if the holding company appoints one of its non-executive directors to the board of the subsidiary, *ie* a person who is not an employee of the holding company but where there is some form of contractual nexus between the holding company and the non-executive director, there is still a form of control over that non-executive director in that the director can be dismissed by the shareholder at any time.

Returning now to the *ratio* in the *Kuwait Bank* case, the court emphasised the fact that there was no agency relationship between the bank and the directors whom it

appointed to the subsidiary. The court stated that there could not be any vicarious liability, because this would have “serious consequences” for commercial affairs.⁴⁹ It would appear that there is some tension between the principles of labour law and the principles of company law. In terms of labour law, the director who is appointed by the holding company/employer to the board of the subsidiary exercises control over the employee. The holding company also benefits from the decisions of the appointee director but also suffers should the subsidiary suffer losses. These benefits or losses, however, follow from the fact that the holding company employer is the shareholder of the subsidiary, not because of any employment relationship between the holding company and the subsidiary nor because of a relationship akin to employment. It is purely a relationship of shareholder in a company and the inability to itself serve on the board of the subsidiary. The court made much of the question of control in the *Republic Trustees* case. The aspect of control is however a question of labour law, not company law. Is this relevant?

From a company law perspective a shareholder is entitled to appoint directors to the board of a company. The Companies Act⁵⁰ provides that at least 50 per cent of directors of a profit company have to be elected by the shareholders.⁵¹ It follows therefore that the holding company, as controlling shareholder, would be able to elect the majority/all of the directors of the subsidiary with its majority vote. As illustrated in the *Kuwait Bank* case, this does not constitute a relationship of agency, especially when one considers that the holding company, as a juristic person, is disqualified from being a director of a company, in this case its subsidiary company.⁵² It is trite that the director has to exercise an unfettered discretion, otherwise he is in breach of his fiduciary duty towards the (subsidiary) company. When the director breaches his duty of care, skill and diligence to the subsidiary, this is *prima facie* his own delict as a director: it is not a delict as an agent of the holding company/employer, nor is it a delict during the course and scope of his employment with the holding company. It is a delict of an independent person who is exercising his discretion as a director of the subsidiary company.

5 Conclusion

It is trite that in some jurisdictions a person can have two employers. This fact does not mean that the person is in the employ of both at the same time. The mere fact that a person who is an employee of the holding company and who simultaneously serves on the board of the subsidiary, even during the working hours of the holding company, does not mean that the person acts as an employee of the holding company during that time. This is also true when the person is subject to the control of the holding company during that time. This is, however, control of the holding company as shareholder, not control as employer. The same control would exist where the holding company appointed a non-employee to the board of the subsidiary.

It would appear that the court in the *Republic Trustees* case made much of the control factor and that the onus was on *Republic Trustees* to show that there was no control to take Lane out of the realm of employment when he exercised his functions as trustee. It is submitted that this approach should be incorrect in view of the arguments of this article. The *PIC* case also focused on the fact that Bodigelo was an

⁴⁹ the *Kuwait Bank* case (n 2) par 195.

⁵⁰ 71 of 2008.

⁵¹ s 66(4)(b) of the Companies Act.

⁵² s 69(7)(a) of the Companies Act.

employee of the PIC. A court should bear in mind the two different fields of law, *ie* labour law and company law, to determine the question of vicarious liability which falls under the law of delict. It would appear that the courts in both the *Republic Trustees* and the *PIC* cases focused on the labour law aspects of control to come to the conclusion that there was an employment relationship, whereas the court in the *Kuwait Bank* case focused on the company law aspects to come to the conclusion that there could be no vicarious liability.

It is a difficult question to answer whether the *Kuwait Bank* case would still be decided similarly today, especially in light of the *Republic Trustees* and the *PIC* cases. It is submitted that policy reasons should dictate whether vicarious liability should be imposed on the holding company. The policy reasons should however be a balance between the labour law aspects of control versus the company law aspects such as the fact that a corporate shareholder cannot serve on the board of its subsidiary and may/has to appoint a natural person to that board. This commercial and legal reality has to be borne in mind. The question of possible vicarious liability of the holding company that appoints one of its employees as a director on the board of the subsidiary, and which director then commits a delict which harms the subsidiary, cannot be answered purely from a labour law perspective. The question of whether the person was an employee and/or acted in the scope of his duties of employment should also be viewed from the company law perspective and it should be acknowledged that the employer in this context is the shareholder and not the employer.

SAMEVATTING

**KUWAIT ASIA BANK EC v NATIONAL MUTUAL LIFE NOMINEES LTD
HERBESOEK: DIE MOONTLIKE MIDDELLIKE AANSPREEKLIKHEID VAN 'N
HOERMAATSKAPPY VIR DELIKTE VAN SY GENOMINEERDE DIREKTEUR OP DIE
DIREKSIE VAN 'N FILIAAL VAN DIE HOER**

In *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* is beslis dat 'n houermaatskappy nie middellik aanspreeklik gehou kan word vir die deliktuele skade, wat sy genomineerde direkteur (wat 'n werknemer van die houer is) op die direksie van sy filiaal vir die filiaal veroorsaak nie. Die outeur ondersoek of hierdie saak nog hedendaags dieselfde beslis sal word.

In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* skeep die hoogste hof van appèl die indruk dat daar wel sodanige aanspreeklikheid in die gegewe konteks mag wees. Die outeur toon dat die hof in hierdie geval slegs die arbeidsregtelike verhouding tussen die houer/werkgewer en die direkteur/werknemer oorweeg het om die vraag van middellike aanspreeklikheid te oorweeg sonder om die impak van ander regsnorme te oorweeg. In *Public Investment Corporation Ltd v Bodigelo* noem die hof dat 'n direkteur in sy hoedanigheid as werknemer deur die aandeelhouer aangestel is en skeep dus ook die indruk dat sou sodanige direkteur skade vir die maatskappy, waar hy as direkteur dien, veroorsaak, die aanstellende maatskappy middellik aanspreeklik sou wees.

Die gevolgtrekking wat gemaak word, is dat 'n hof nie die vraag van middellike aanspreeklikheid bloot op grond van die diensverhouding tussen die houer en die direkteur kan beantwoord nie. 'n Hof behoort ook, soos in die *Kuwait Bank*-saak, die maatskappyregtelike werklikheid, naamlik dat die houer nie 'n direkteur van die filiaal mag wees nie en dus genoep is om 'n natuurlike persoon as direkteur aan te stel, te oorweeg. Die verhouding is egter dan nie een van werkgewer/werknemer nie, maar die unieke verhouding tussen 'n aandeelhouer en 'n direkteur wat deur die aandeelhouders verkies word. Die toets vir middellike aanspreeklikheid kan dus nie net vanuit 'n arbeidsregtelike oogpunt beskou word nie, maar ook vanuit 'n maatskappyregtelike oogpunt soos in die *Kuwait Bank*-saak.