HH 159-03
HC 9867/96
KALISTO GWANETSA
versus
GREEN MOTOR SERVICES (PRIVATE) LIMITED
and
VEHICLE DELIVERY SERVICES (ZIMBABWE) (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 24 January, 2002 and 8 October, 2003

Mr *A Mugandiwa* for plaintiff

Mr *Masendeke* for 1st defendant

Adv *R Phillips* for 2nd defendant

HUNGWE J: This is a claim for damages arising out of a motor vehicle accident against Green Motor Services (Pvt) Ltd ("GMS") and Vehicle Delivery Services ("VDS") claiming ;

a) Payment in the sum of $66 068,00 being for repairs effected on the motor vehicle;

b) Payment in the sum of $170 800,00 being for loss of earnings from the use of the motor vehicle from 25 August, 2994 to 29 October, 1995;

c) Interest *a tempore morae* in the sum of $30 000,00 with effect from 6 February, 1995;

d) Interest *a tempora morae* in the sum of $36 068,00 with effect from 29 September, 1995, being the date plaintiff made full payment for the repairs;

e) Interest *a tempore morae* in the amount of $170 800,00 with effect from the date of judgment;

f) Costs of suit.

The circumstances leading to the claim were described by plaintiff in Court as follows -

Sometime in June 1994 he approached Chris Donald the managing director of GMS. He knew GMS as the only reputable customs clearing and freight company in Mutare. He had purchased two motor vehicle in Japan, a Toyota Hilux pick-up truck and a Toyota Hiace minibus. He instructed Chris Donald to bring in his two motor vehicles to Mutare from Durban. In order for GMS to deliver the vehicles Chris Donald indicated that proof of purchase and the bill of lading was all they required to set in motion the process of importation of the motor vehicles. He told the court that it was agreed that GMS would take all necessary steps required of them to deliver the two motor vehicles to Mutare including making all necessary payments of any charges that may be required of them to effectively carry out the task. As he had paid for and insured the motor vehicles from the port of embarkation, on the high seas up to Durban he specifically mentioned that the motor vehicles would have to be insured from that point to Mutare.
Chris Donald on his part and on behalf of GMS assured him that this was a task he could execute once armed with the relevant documentation. His attention was never drawn to any terms and conditions applicable to the contract they had just concluded. He did not see any notices in the office in which this discussion took place. He made no payment at that stage nor was he asked to pay for insurance at that point in time. The arrangement was that he would be invoiced when the motor vehicles are delivered.
The next time he spoke to Chris Donald was after a month or so when the former advised him that the motor vehicles were now at Beitbridge and that in three days time, they would be in Mutare. He was to then prepare to make payment. He approached GMS offices on 23 August, 1994 and paid $56 828,20 for only one motor vehicle. He was given Exhibit 1 the invoice dated 23 August, 1994. At that stage he was advised that the Hiace was somewhere between Masvingo and Mutare and would arrive the same day, He drove the Hilux home.

The Hiace did not arrive the same day. When he made inquiries on subsequent days he was not advised of the fact that the other vehicle had in fact been involved in an accident until after five days. Even then he was not given any details as to how, where, when or by whom the accident was occasioned. It took a further two weeks of pestering Chris Donald for him to learn that in fact first defendant had subcontracted 2nd defendant whose driver had been involved in the accident occasioned by negligent driving. He also learnt then that the two motor

vehicles had left Masvingo on the same day which was a day prior to the payment of invoice dated 23 August, 1994.

His efforts to get more information met with resistance as Chris Donald avoided him each time he made enquiries regarding this motor vehicle. He resorted to contacting VDS who referred the inquiries back to GMS. No-one was prepared to tell him where his motor vehicle was, who was driving it, or where or when the accident occurred.

As a result of Chris Donald being evasive it took him close to three months to establish that the motor vehicle was with Skinners' Panel Beaters. Both GMS and VDS denied liability. He ended up footing the repair and storage charges. He now seeks payment for these expenses.

He explained that he had asked for a quotation but was never given one. The first document he got from GMS was Exhibit 1. He had advised GMS that he intended to go into the commuter omnibus business well before they had agreed to GMS clearing the vehicles. In fact according to him Donald knew that the Hiace was a business venture vehicle. He had not authorised GMS to subcontract but understood that GMS would execute the contract itself.

Under cross-examination he conceded that he may have approached Chris Donald in July rather than in June 1994.

He mentioned that his discussion with Chris Donald centred on the cost of the full package i.e. to deliver from Durban to Mutare and payment for that service. The only time he learnt that GMS had subcontracted others was when he was given Exhibit 1 reflecting names of companies whom disbursements had been made. By then the Hilux was outside GMS offices. He had appointed GMS his agent for the job.

Plaintiff gave his evidence well. He remained unshaken under cross-examination. His answers to questions flowed and accorded with probabilities. He impressed this Court as an honest, candid and thus truthful witness. He did not display any obvious desire to gilt the lily so to speak. He narrated events as he recalled them. Where he was not clear or unsure he said so. Bearing mind the time

that passed between the time of the accident and his appearance in court to give evidence, I am satisfied that events occurred in the sequence he gave.

In contrast was the evidence of Robert Christopher Donald, GMS's Managing Director. He painted a picture of an environment in which standard procedures were meticulously adhered to without fail. He gave the impression that the plaintiff had a choice, an informed choice, to either insure his two vehicles or not to and deliberately chose not to do so as he only paid for all other services except insurance.

In demonstration of that fact he relied on the invoice Exhibit 1 dated 23 August 1994 which he said was the date the contract was entered into. He also gave the impression that there was disclosure of all the agents who were to be subcontracted in the execution of the contract as shown in the quotations obtained from VDS etc.

Quite clearly this witness was being less than honest with the court. He hoped to convince the court to find that this contract was concluded when one of the motor vehicles was outside his offices. I dismiss that contention out of hand. The evidence before me was that according to the plaintiff, Exhibit 1 was a receipt he was given in acknowledgement of the payment he had made from services rendered by that date. As this was a receipt of money its terms could not possibly be the terms and conditions upon which the contract was concluded.

Further he claims that he contracted with 2nd defendant as plaintiff's agent. The evidence was that he did not disclose 2nd defendant's involvement in the contract to plaintiff.

The effect of his non disclosure of 2nddefendant o plaintiff is that 2nd defendant is his agent not plaintiff's agent. He is liable for the delict of a subagent appointed, without the principal's authority.

The general rule is that an agent may not depute another person to do that which he has himself undertaken to do. There is no privity of contract between the sub-agent and the principal - see *Kennedy* v *Loyne* (1909) 26 SC 271 at 279 where LORD DE VILLIERS CJ held that -

> "The rule is that where an agent has employed another person to perform the duty entrusted to him, no action accrues to the principal against the sub-agent; but he

must sue the agent, who, on his part, must sue the sub-agent".

See also *Denys* v *Elay* 1965(1) RLR 45.

I am satisfied that the first defendants, were given a full package i.e. to import the motor vehicle for a fee. The first defendant negligently carried out that mandate - by failing to ensure that the two motor vehicles were adequately insured for their journey from Durban to Mutare.
Whatever relationship, first defendant created or established with second defendant I am satisfied that plaintiff could not successfully claim damages from it. He has no contract with third defendant. He had contracted first defendant from who he ought to look to for satisfaction of his damages. If anything, it is for second defendant to seek damages from second defendant if so advised.

Plaintiff has demonstrated that it suffered loss of income for the period indicated.

I am satisfied that it is first defendant who must make good that loss of income.

In the premises there will be judgment against first defendant only as prayed in the summons.

***Wintertons* , plaintiff's legal practitioners**
***Henning, Lock Donagher & Winter* , first defendant's legal practitioners**
c/o *Honey & Blanckenberg*,
***Atherstone & Cook* , second defendant's legal practitioners**