EDDIE MASUNGA
versus
BLESSING MUTEMA
and
FLORENCE L. SIGUDU

HIGH COURT OF ZIMBABWE
BHUNU J
15TH MARCH 2004 AND 12 MAY 2004

Mr *Chadyiwa*, for the plaintiff
Mr *Dhlakama*, for the 2nd defendant

BHUNU J: The plaintiff issued summons against both defendants claiming damages in the sum of $1 207 758.00 and $720 000.00 being loss of revenue arising from the damage to his motor vehicle in a road traffic accident.

The facts giving rise to the plaintiff's claim are to a large extent common cause. The facts which are not in dispute are that the 1st defendant is a business woman and owner of a Nissan Hard body pick-up truck registration number 727-028 X whereas the plaintiff an employee of Air Zimbabwe is the owner of an omnibus registration number 638-927 K.

The 2nd defendant at the material time employed the 1st defendant as her driver whereas the plaintiff employed one Boka as her driver. On the 2nd of July 2002 the two motor vehicles had a violent collision at the intersection of Harare Street and Samora Machel Avenue while being driven by their respective drivers.

Police attended the scene of the accident. The facts established that 1st defendant had failed to stop at a stop sign and hit into the back of plaintiff's motor vehicle causing it to overturn. The plaintiff's motor vehicle sustained extensive damages in the process. The police adjudged that the 1st defendant was at fault and charged him with driving without due care and attention. The first defendant admitted his guilty and paid a deposit fine of $250.00.

The 2nd defendant's insurers ZIMNAT LION INSURANCE COMPANY LIMITED accepted liability and paid the plaintiff $250 000.00. The 2nd defendant authorised payment thereby ratifying her agents acceptance of liability on her behalf. The insurers could not pay in full because the 2nd

defendant was under insured. Had she been fully insured the plaintiff would have been paid in full and that would have been the end of the matter.

It is trite and an established principle of the law of agency that, "he who does a thing through another does it himself." I therefore find as a fact proved that by authorising her insurers to accept liability and to effect payment on her behalf the 2nd defendant was in fact accepting liability and effecting payment on her own behalf.

Having accepted liability and effected partly payment in the sum of $250 000.00 it cannot be found in 2nd defendant's month to deny liability at this late hour.

Looked at differently, the 2nd defendant sought to deny liability on the basis that the 1st defendant was not driving in the course of duty at the material time when he got involved in the accident. She argued that he was on a floric of his own.

In her evidence she testified that the defendant had specific instructions to drive the motor vehicle from Milton Park to Chitungwiza via Warren Park and Highfield before proceeding to Hatfield where she runs a creche.

Under cross-examination she admitted that the route which the 1st defendant took was an alternative route to Warren Park where he was supposed to transact her business albeit slightly longer by about 4 kilometers.

The plaintiff's claim against 2nd defendant is based on vicarious liability. Generally speaking for vicarious liability to attach the employee must have been acting in the course of duty at the time the wrongful act forming the basis of the claim was committed.

In the words of R.G. Mc Kerson, The Law of Delict 7th Edition at page 95:

> "A master is liable for any wrongful act committed by his servant which he has authorised or ratified. A master is also liable for any wrongful act committed by his servant in the course of carrying out his instructions or whilst engaged in any activity reasonably incidental thereto."

The test as to whether or not the 1st defendant was acting in the

course of employment when he collided with plaintiff's motor vehicle was laid down way back in 1945 in the case of *Feldman (Pty) Ltd v Mall* 1945 AD 733. In that case the court determined that it was a question of degree. The court was to consider whether the deviation was so great that the employee could no longer be said to be in the employment of his employer.

In the words of TINDAL JA,

> "In my view the test to be applied is whether the circumstances of the particular case show that the servant's disgression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed, if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms. I can see no escape from the conclusion that ultimately the question resolves itself into one of degree."

Professor Feltoe in his Guide To The Law of Delict In Zimbabwe confirms at pages 67 to 68 that the law in Zimbabwe is as articulated above.

Now, applying the test to this case. The 1st defendant was employed to drive the 2nd defendant's motor vehicle to Chitungwiza, via Warren Park and Highfield.

He was supposed to use Princess Road which, is the shortest route to Warren Park from Milton Park. It is admitted that he merely used an alternative route albeit slightly longer than the one he was supposed to use. On those facts I am unable to conclude that he had abandoned his employer's job and was on a floric of his own. The facts clearly establish that despite the diversion the first defendant was still executing his employer's duties. The employer is therefore vicariously liable.

As regards quantum of damages and loss of earnings there was no serious challenge to the amounts claimed. The plaintiff was able to demonstrate that he suffered loss to the extent claimed owing to the 1st defendant's negligent conduct.

That being the case the plaintiff's claim can only succeed. It is accordingly ordered:

1) that the plaintiff's claim be and is hereby allowed with costs.
2) That the defendants be and are hereby ordered to pay the plaintiff damages in the sum of :-

a) $1 207 758.00 being damages arising from the damage to plaintiff's motor vehicle.

b) $720 000.00 being loss of revenue arising from the damage to plaintiff's motor vehicle.

Munangati and Associates, plaintiff's legal practitioners
Byron Venturas and Partners, 2nd defendant's legal practitioners