SHEPHERD MUSHONGA
versus
OPPAH ZINHUMWE

HIGH COURT OF ZIMBABWE
UCHENA J AND MWAYERA J
HARARE, 19 March 2015, 10 June 2015

Civil Appeal

S.M. Hashiti, for the appellant
F. Chimwa Murombe, for the respondent

MWAYERA J: This appeal challenges the court *a quo's* decision of absolution from the instance at the close of the plaintiff's case. The appellant sued the respondent for $9 059-00 being damages for vicarious liability occasioned by an accident between the appellant and respondents vehicles when it is alleged one Partson Mugadami caused the accident by driving in a grossly negligent manner.

The context in which the appellant frames his argument is as follows:

On 19 May 2013 at about 1930hours at corner Josiah Tongogara Road and Claxton Road Harare an accident occurred between a Land cruiser Saloon registration AC 02875 belonging to the appellant and Toyota Spacio registration number ABZ 2561 belonging to the respondent being driven by one Partson Mugadami with authorization from the respondent. The appellant argued that the respondent was vicariously liable for the damages occasioned by the negligence of Partson Mugadami. The appellant further argued that the court *a quo* erred when it granted absolution from the instate for it misinterpreted the law and gave a narrow interpretation of vicarious liability to only cover employer – employee relationships.

The grounds upon which the appeal is brought as discerned from the record are as follows:

2.1. The learned magistrate erred and misdirected herself in finding that there was no employer and employee relationship between the first defendant and the second defendant to justify a claim for vicarious liability on the part of the second defendant.

2.2. The learned magistrate erred in taking an arm chair approach to the issue of vicarious liability restricting it to the narrow confines of basic master and servant relationship.

2.3. The learned magistrate erred and misdirected herself in failing to appreciate that the first defendant was involved in an accident negligently whilst driving the second defendant's motor vehicle without any claim by the second defendant that the first defendant's driving of the motor vehicle was illegal, criminal and unauthorized by herself.

2.4. No criminal report or averment to that effect was ever made in pleadings and under cross examination of the plaintiff by the second defendant. In the absence of these averments the only logical inference and implication is that the first defendant was an authorized driver of the second defendant.

2.5. It is trite law that in a motor vehicle driven not by the owner but at the request and on behalf of the owner, the owner is vicariously liable for the delict committed by the authorized driver.

2.6. This is the principle of authorized driver who has tacit authority to assume the power and control over the second defendant's vehicle.

2.7. In an authorized driver scenario there is no need for a formal contract of employment, no need for any remuneration to be paid nor any need for any permanacy about the arrangement for a relationship giving rise to vicarious liability to arise. *Rodriques* v *Alves* 1978(4) SA 834(A) and *Boucher* v *DuToit* 1978 (3) SA 965

2.8. If a person drives a motor vehicle at the request and on behalf of the owner under circumstances in which the owner has a right of control over the manner in which the driver drives the vehicle the owner is vicariously liable for the delict committed by the driver. A mere sound interest as opposed to a proprietary interest of the owner in the driving of his vehicle should be sufficient to find vicarious liability.

3. Evidence given in plaintiff's case on the accident and repairs plus the default judgment against the first defendant to the third defendants were sufficient evidence on record to

put the second defendant on her defence and the trial magistrate erred in ignoring all that was on record and direct evidence led in court.

4. The second defendant had a duty to rebut the evidence on record that her authorized driver negligently caused an accident and caused damages to the appellant without relying on the master and servant relationship to find liability.

The appellant prays that:

1. The judgment by the trial magistrate on absolution from the instance be set aside.
2. In its place it be ordered that the respondent has a case to answer on vicarious liability to the appellant for the negligency of respondent's authorized driver.
3. The respondent is put to her defence on her liability to appellant and the matter is to continue into the defence case before the same magistrate.
4. Respondent is to bear the costs of the appeal.

The central question for determination is whether or not in the circumstances of this case the court *a quo* misdirected itself in granting absolution from the instance at the close of the plaintiff's (now appellant) case.

The test for absolution from the instance at the close of the plaintiff's case was lucidly laid down by Beadle CJ in the case *Supreme Service Station 1969 [Pvt] Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 RLR1 where he quoted with approval the test laid down in *Gascoyne* v *Paul and Hunter* 1917 TPD 170. The test was formulated

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is : Is there evidence upon which a reasonable court might find for the plaintiff?
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> The question therefore is at the close of the case for the plaintiff, was there a prima facie case against defendant ….. in other words, was there such evidence before the court upon which a reasonable court might, give judgment against the defendant."

See also *Lawrence* v *Rasa Dry Cleaners and DK Steam Laudry Pvt Ltd* 1984(2) ZLR 20 and *United Air Chaters* v *Jarman* 1994 (2) ZLR 341. The test applied can be viewed as *akin* to application for discharge of an accused at the close of the state case. In the present case the court *a quo* answered the question in the affirmative and ruled that at the close of the plaintiff's case there was no *prima facie* case established hence ordered absolution from the instance.

The reasons for judgment as laid out in the court *a quo* show that the basis for granting absolution was that at the close of the plaintiff's case no vicarious liability had been established since it was evident that the respondent and Partson Mugadami were not in employer-employee relationship. Further the respondent had just left his vehicle parked at a hotel and not authorized Partson Mugadami to drive her vehicle. It is common cause from the record that there was no relationship between the respondent and the said Partson Mugadami who drove the vehicle which was involved in an accident with the appellant's vehicle.

The law of vicarious liability has been discussed in many cases within and without this jurisdiction. What sticks out with slight variations is the common fact that the standard test for vicarious liability requires the court to decide whether the wrong doer was engaged in the affairs or business of the employer when he committed the delict. Put differently the consideration is whether or not the wrong doer was acting in the scope and course of employment. In the case of *Minister of Law and Order* v *Ngobo*1992 (4) GA 822 A at 827 A-C the learned Judge of Appeal Kumbleben rang warning bells of the wide interpretation of the relationship of employer employee coming into play depending with circumstances when the remarked as follows:

> "The critical consideration is therefore whether the wrong doer was engaged in the affairs or business of his employer, (I shall refer to it as the 'standard test' or 'general principle'). It has been consistently recognized and applied though since it lacks exactitude with difficulty when the facts are close to the borderline."

This remark resonates well with situations were an employee deviates completely from the employer's scope and mandate of business thus removing the casual link between the wrong doer's conduct and the employer to an extend that it would not only be superflous but fallacious to impute vicarious liability. This would be in situations where the deviation completely dissociates an nexus between the wrong doer and the business of the employer. The deviations being equated to complete severance like the separation of the umbilical code of a newly born from its mother for the new born to lead its own life. In the circumstances of the case before the court *a quo* the said driver was not in the employee of the respondent. He was employed at a hotel which has links with the appellant. The circumstances under which the hotel seconded him to drive the respondent's vehicle which was parked at the hotel were not blessed or sanctioned by the respondent. The only reason for placing liability on the respondent at the close of the plaintiff's case per record was that she was the owner of the vehicle. This imputation would not

only be unjust but illogically for it would cast the net too wide and dangerously to the extent were innocent owners of abused property would be held liable. Our law on vicarious liability is clear. The courts have given a wide interpretation of vicarious liability to exist where there is an employer employee relation and the employee is acting in the course of his employment. Where there is slight deviation in terms of distance and time and the employee was acting within the parameters of the scope of his employment. The employer has been held vicariously liable. In the case of *Cold Chain (Private) Limited* v *Robson Makoni* SC 9/12. Sandura JA (as he then was) in dismissing an appeal against a finding of vicarious liability by this court stated that the driver who was an employee was involved in an accident whilst on the authorised route. He was to return the vehicle to the company premises at Chitungwiza that evening and there was no deviation in terms of time and space which would remove the employer from liability.

In the *Cold Chain* (supra) case the learned judge of Appeal referred to the case of *Biti* v *Minister of State Security* 1999 (1) ZLR 165 (S) wherein the driver of a government vehicle which was involved in an accident at a place about 5km deviation from the routes he would have to drop government officers. The driver was charged not only with transporting of government officers to their homes but also with the keeping of the vehicles in safe overnight custody. It was held that although the driver had deviated from his authorised route, the deviating, in terms of time and space was not such as to convert it into "a frolic of his own." The improper mode of exercising his duty of keeping the vehicle safely overnight was still done within the course of his employment and the ministry which employed him was vicariously liable. (Underlining my emphasis)

What is proved from the cases referred to above is the nexus between the wrong doer and the employer. Once established the wrong doer was authorised and indeed acting within the scope of his employment or mandate then vicariously liability despite slight deviations which do not break the nexus cannot shield the employer from vicarious liability.

In deciding whether or not one is vicariously liable the rationale behind the doctrine of vicarious liability has to be put into perspective. In the case of *NSSA* v *Dobropoulus and Sons (Pvt) Ltd* 2002 (2) ZLR 617 the Supreme Court stated that the rationale behind holding employers vicariously liable for the acts of their employees, even where they have deviated from the strict course of their duty, is that it is right and proper, where one of two innocent parties has

suffered a loss arising from the misconduct of a third party, that the loss should fall on the one of two who could most easily have prevented the happening or recurrence of the mischief.

In the circumstances of the present case, it is not in dispute that the respondent is not the employer of the driver, Partson Mugadami who was involved in an accident occasioning damages on appellant's vehicle. The first rung of the standard test or principle of relationship of authorisation or employer employee has not been established. In the case of the respondent it was clear as perceived by the trial court that the driver Partson Mugadami was not an employee or agent acting in the scope and course of employment in the furtherance of the respondent's business. The facts of this case are clearly distinguishable from facts in the cases *Cold Chain (Pvt) Ltd* v *Robson Makoni* and *Biti* v *Mninster of State Security* cited above. In the cases referred unlike the case on hand the wrong doer although they deviated from the strict course of their duties they were employed by employers and were not only charged with driving but safe keeping the vehicles. The wrong doers, the drivers were authorised and the acts committed were connected with the authorised acts though improperly done. The nexus and close link between the conduct complained of and the wrong doer's duty have to be present for vicarious liability to be imputed.

The remarks by Weiner J in *Anderson* v *Hlongwane* 2012 2AGPJ HC 107 are quite appropriate in determining whether or not vicarious liability can be imputed. I subscribe fully with his sentiments when he held "vicarious liability is not limited to employment relationships." In *Messina Associated Carriers* v *Kleinhaus* (2001) 3 AH SA 285 (SCA) at (13) the court noted that:

> "The law will permit the recovery of damages from one person for a delict committed by another where the relationship between them and the interest of the one in conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or --- where "in the eye of the law" the one was in the position of the other's servant."

What sticks out here of interest is the fact that there has to be a nexus between the wrong doer's conduct and the owner of the thing. In the "eyes of the law" there has to be a relationship analogous or akin to that of employer employee. The owner ought to be shown to have authorised the use and ought to be shown to be capable of controlling the actions of the wrong doer. In other words it is not only ownership of the object which would establish vicarious liability. There has to be a link established by virtue of a relationship with the wrong doer. The

owner has a right to control his vehicle once he transfers same to another in situations where an accident occurs within the course and scope of furtherance of the interest then vicarious liability attaches. Clearly principles of vicarious liability do not include situations were a wrong doer without authorisation of the owner, without any links embarks on a frolic of his own and causes damages. Liability is anchored on authorisation and connection of the acts to those authorised. There has to be a relationship akin to master – servant, were the master is viewed as having control. In the case before the court *a quo* at the close of the plaintiff's case the only link was ownership of the vehicle. By parking her car at the hotel where Partsom Mugadami worked the respondent cannot be viewed as having engaged the said Partson Mugadami. The evidence before the trial court was clear that Partson Mugadami unrelated or connected in any manner to the appellant as an employee and without authorisation drove and was involved in an accident causing damages. Such a scenario does not reveal a basis for vicarious liability on the part of the respondent. It was against that back drop that the court *a quo* formulated an opinion, upon application that there was no evidence upon which a court directing its mind might find for the appellant. There was no *prima facie* case established at the close of the plaintiff's case hence the order of absolution from the instance. The appeal has no merit and must fail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed
2. The appellant shall pay the respondent's costs.

Mushonga, Mutsvairo & Associates, appellant's legal practitioners
Danziger and Partners, respondent's legal practitioners