EDMORE MASENDEKE
versus
KUKURA KURERWA BUS SERVICE PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 16 November 2016, 16 January 2017, 15 February 2017

Civil Trial

Ms. N. R. Sai, for plaintiff
I. Nyariri, for defendant (self-actor)

CHIGUMBA J: The particulars of the plaintiff's claim are set out in detail in the judgment in which absolution from the instance was refused, HH598-16. The contents of that judgment are incorporated herein. The plaintiff's claim is for damages. He wants to be compensated for the violation of his freedom from discrimination which is protected by s 56 of the Constitution of Zimbabwe, in the sum of USD$100 000-00. He avers that his freedom from discrimination on the basis of disability as stated in par 5 of the summons was violated by the defendant's conductor. He claims to have suffered *contumelia,* and *injuria,* in terms of s 8 (3) of the *Disabled Persons Act [Chapter 17:01]*, in that he was denied transportation services from Kwekwe to Harare on the basis of his disability.

The issue which was referred to trial was that of whether the plaintiff is entitled to damages in the sum claimed or at all, from the defendant, for an alleged violation of his freedom from discrimination. Was the plaintiff denied transportation from Kwekwe to Harare on account of his disability? That is the simple question of fact which this court must resolve in order to find that there is a basis on which it can conclude that the plaintiff was discriminated against. Although it is indeed common cause that the plaintiff seeks to have the defendant found vicariously liable for the actions of one of its employees it is important at this point to set out the law that governs claims for vicarious liability.

"The law of vicarious liability is like other branches of the law, easy to state but difficult to apply". This was said by MCNALLY JA in ***Biti* v *Minister of State Security*[1].**

It was stated that:

> "The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business or doing the work of the employer. This is no doubt true, but it should not be overlooked that the affairs or business or work of the employer in question must relate to what the employee was generally employed or specifically instructed to do. Provided the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable."

The difficulty, of course, is that while the general approach to be adopted may be easy enough to formulate, its lack of exactitude is such that problems inevitably arise in its application. This is particularly so in the so-called 'deviation' cases. In ***Gorah* v *Mahona and Anor*** [2] the court had occasion to compare the various tests that have been applied in our law and he quoted with approval the test in *Ngubetole* v *Administrator, Cape and Anor* [3]1975 (3) SA 1 AD at 9 where Corbett JA said:

> "In the sphere of vicarious liability, the concept of "course of employment" is used as a yardstick for delimiting the master's liability for the wrongful (i.e. tortious or delictual) act of his servant which injures a third party. It is, as *Fleming, The Law of Torts 4 ed p322* points out-"an expansive concept which provides for policy decisions and, despite vast volumes of case law, has failed to acquire a high degree of precision. (See also *Prosser, Law of Torts 4 ed p 460,* where the learned author points out that the vagueness of the phrase has permitted "a desirable degree of flexibility of decisions".

The formula "in the course of his employment" or "in the scope of his employment" originated in English law but our courts have not followed English law in its development of this concept. A different formula to the one used in the English courts was used by our courts in;
Feldman (Pty) Ltd* v *Mall [4] the court expressed the principle of vicarious liability as follows:

[1] 1999 (1) ZLR 165 (SC) at 169 A

[2] 1984 ZLR 102 Beck JA

[3] 1975 (3) SA 1 AD at 9

[4] 1945 AD 788;Watermeyer CJ

> "a master is liable for harm caused to third parties by the wrongful acts of an agent if such an agent is a servant and if such acts are done in the exercise of the functions to which the servant has been appointed".

Our courts appear to have interpreted "course of employment" to be the same as "done in the exercise of the functions to which the servant was appointed". In my view, these are two different tests and they are not synonymous, or alternatively their application to the same set of circumstances may produce different results or lead to a different outcome.

A third test which was developed by our courts is "whether the instruction that the servant disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within that sphere (**per CORBETT JA in Ngubetole's Case supra at 10E**) It is clearly established in these aforementioned authorities cited with approval by BECK JA in ***Gorah* v *Mahona & Anor*,** that the onus lies throughout on the claimant to prove, on a balance of probabilities, that the servant acted in the course of his employment in inflicting the injury, and that at the time when the injury was inflicted the servant was on duty.

In ***Witham* v *Minister of Home Affairs* [5], the court** analysed the test to be applied to determine whether a servant is acting within the course or scope of his employment. He was guided by, and quoted with approval the following;

***HK Manufacturing Co (Pty) Ltd* v *Sadowitz* [6],** where the court stated that:

> "It is of course now a well-established principle in our law that a master is liable for harm caused by the negligence of his servant if such servant is acting within the course or scope of his employment-expressions which have been held to be synonymous….masters are liable for the delicts of their servants wherever they inflict injury or damage "in the duty or service…set them by their masters but the masters are not liable when the delict is committed 'outside of' (extra) their duty or service…*Pothier on Obligations p 453 viz (Evans Translation)*."

Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit **in the exercise of the functions to which he is appointed** (emphasis added)

[5] 1987 (2) ZLR 143 (H) Ebrahim J

[6] 1965 (3) SA 328 (c) at 332 C-E ;Tebbutt AJ (as he then was)

In ***Nel & Anor* v *Minister of Defence*** [7]**, the court** said the following;

The principle governing vicarious liability of a master for the negligence of a servant was summarised by Leon J in *South African Railways & Harbours* v *Albers & Anor* 1977 (2) SA 341 at 345 as follows;

> "It is important to bear in mind that an act outside the authority of the servant is not done in the scope or course of his employment even though it may have been done during his employment".
>
> A distinction has been drawn between three types of cases:

1. A master is liable for all acts actually authorised by him.
2. A master is liable even for acts which he has not authorised provided that they are so close to those acts which he authorised although there will have been improper modes, of doing them.
3. But if the unauthorised and wrongful act of the servant is not so connected with the authorised act to be a mode of doing it but an independent act, the master is not responsible.

It seems to me that the defendant would be liable for the actions of its conductor, which it had not authorized, if they were so connected to the acts which it authorized, that those actions might be regarded as modes, although improper modes of doing them. A conductor's job is to assist passengers to get on a bus, and to collect the bus fare and to direct the driver when passengers need to alight and disembark. Was the particular conductor in question authorized to eject passengers who refused to pay the requisite fee, in the manner that he did? That is the first question, it being common cause that the plaintiff refused to pay the bus fare as a protest against his alleged mistreatment and an endeavor to be supplied with the details of his alleged persecutors. Can the defendant be held vicariously liable for the alleged actions of its conductor when the plaintiff has not identified or named the said conductor, or shown the court which of the defendant's buses in particular he boarded on the fateful day? Let us be guided by the precedents of pleadings.

[7] 1978 RLR 455 (GD) at 457G-458A Goldin J (as he then was)

In *Amler's Precedent of Pleadings*[8], under vicarious liability, the following statement appears:

> "An employer is liable for damages occasioned by the delicts committed by his employee in the course and scope of his employment. The onus rests on the plaintiff to allege and prove that the person who committed the delict was;
>
> *Stadsraad van Pretoria v Pretoria Pools 1990 1 SA 1005)T)*
>
> (a) The servant of the defendant
>
> *Gibbins v Williams, Muller, Wright & Mostert Ingelyf 1987 (2) SA 82 (T)*
>
> (b) That he performed the act in the course and scope of his employment
>
> (c) What the servant's duties were or with what work he was entrusted at the relevant time
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> *Mkize v Martens 1914 AD 382*
>
> *Minister of Police V Mbilini 1983 (3) SA 705 (A)*
>
> *Nel v Minister of Defence 1979 (2) SA 246*

On p 321 the precedent for a claim against a master for a delict committed by a servant appears as follows:

1. At all material times one [name] was employed by defendant as a driver of defendant's motor vehicles.
2. On [date] the said [name] while driving defendant's motor vehicle [registration number] during the course of defendant's business and within the scope of his authority,…".

A comparison of the standard precedent and the plaintiff's summons in this case will immediately make it clear where the discrepancy lies in the plaintiff's pleadings. The summons and declaration appear at pages 8-10 of the record. The face of the summons gives the cause of action as being *injuria* and assault suffered by the plaintiff as a result of being denied provision of defendant's transport services on the grounds ***of his disability alone*** (my underlining for emphasis). The evidence before the court will show that this is simply not true. The plaintiff admitted that he deliberately and intentionally refused to pay the bus fare. Whatever

[8] P320-321

his motivation for doing do, the evidence before the court will show that the plaintiff was forcibly ejected from the bus, not because he was disabled, but because he had refused to pay the fare. The declaration to the summons does not plead the name of the defendant's conductor, or the registration number of the bus which the plaintiff boarded. The defendant has a fleet of buses. To enable it to plead, it was necessary that the name of the conductor, or the driver, or the registration number of the particular bus which the plaintiff boarded be specifically pleaded. Failure to do so rendered the summons and declaration excipiable, and fatally defective.

Only the conductor of the bus could have answered the charge that he did not offer the plaintiff a seat in a designated area on the bus for disabled persons. Only the conductor could have answered the charge of being verbally abusive to the plaintiff on account of his disability. The court accepts that the plaintiff was manhandled off a bus at Kadoma before reaching his destination in Harare. The question is by whom, and should the defendant be held liable for the alleged actions of an unnamed employee which took place on an unidentified bus? It is simply impermissible. The plaintiff's claim in clearly premised on vicarious liability. It ought to have been specifically pleaded in accordance with the standard pleading for claims of vicarious liability which is set out in Amler's. The plaintiff's claim fails for failure to discharge the onus of pleading and or leading evidence as to the identity of the alleged perpetrator employee of the defendant, and the failure to specifically plead and lead evidence as to the registration number of the particular bus belonging to the defendant which the plaintiff boarded. The court would go further and say that the plaintiff ought to have cited the employee of the defendant as a party to the proceedings because it was his actions which formed the basis of the claim by the plaintiff.

The plaintiff failed to prove all the essential requirements of a claim for vicarious liability, on a balance of probabilities. The defendant cannot be held liable to the actions of an unidentified employee, which took place on an unidentified vehicle. The onus was on the plaintiff to plead and lead this evidence. The plaintiff did so to the best of his ability. Unfortunately, the evidence was not enough to sustain a finding of liability on the part of the defendant, on a balance of probabilities. It is more probable than not, that events on the fateful day happened exactly as the plaintiff and his witnesses described them. Unfortunately for an employer to be held liable for the actions of its employee, the employee must not only be

specifically identified, the employee must be cited as a party to the proceedings and served with the summons in terms of the rules. Even though the plaintiff based his claim on provisions of the Disabled Person's Act [*Chapter 17:01*], in para 4.1 of his declaration he avers that the defendant is liable for assault and injuria on the basis of the doctrine of vicarious liability for the wrongful conduct of its employees within the course of their employment.

If only the employees had been specifically named. And cited as parties to the proceedings. They were not. The plaintiff's claim is defective, it is incomplete, it lacks the necessary averments to support a claim of liability on the basis of the doctrine of vicarious liability. The claim for negligence based on a duty of care to disabled persons to prevent employees from denying disabled person transport on the ground of their disability alone for any reason, must fail, for the same reasons. If the plaintiff had bought a ticket, it would have been easy for the bus that he boarded and the crew which was on duty that day on the Kwekwe to Harare route at that time, to be identified, even by the defendant. As it stands, the plaintiff himself was unable to identify any of the crew which was on duty on that route that day when the crew was presented to him, at the defendant's behest. Whether or not the defendant was treated in an unfairly discriminatory manner is a question of fact, which he ought to have been able to establish, from the pleadings and from evidence led on his behalf. The plaintiff simply failed to discharge the onus incumbent on him in a claim based on vicarious liability, from the get go, the summons and declaration.

In the result, for these reasons, the plaintiff's claim be and is hereby dismissed, with costs.

Mundia & Mudhara, plaintiff's legal practitioners
Defendant represented by Director