

ZIMBABWE UNITED PASSENGER COMPANY LTD
versus
CHRISTIAN VAN WYK

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 22, 23 January and 14 February 2018

Civil Trial

C. Mavhondo, for plaintiff
Z. C. Ncube, for defendant

MUSAKWA J: This is a delictual claim for damages arising from a collision between a bus belonging to the plaintiff and a tractor and trailer owned by the defendant.

The papers show that the defendant was jointly sued with his employee, Ndaba Jena. However, the employee did not file his plea. At the time of trial the plaintiff had not sought default judgment against the employee. Interestingly the plaintiff had sought the employee to testify in its case but at the time of trial the employee could not be located.

It is common cause that the accident occurred at about 3:50 a.m. on 17th May 2014 and at Shangani along the Bulawayo road. The plaintiff's bus was on its way from Mutare. On the other hand the defendant's tractor was carrying some ore. There is a dispute whether the tractor was in motion and more fundamentally, whether the tractor driver was acting in the scope of his employment.

Wilson Banda who used to be employed by the plaintiff as a conductor testified that it was misty around Shangani. He was seated next to the driver. Just before impact he saw a tractor. Then there was a bang and the breaking of glass. Sand from the tractor entered the bus through the broken windscreen.

Upon checking the tractor the driver could not be found. There were no reflectors on the tractor. The defendant soon arrived at the scene. The defendant volunteered to contact Police. He also assisted the injured by taking them to hospital.

According to this witness he could not tell whether the tractor had been moving at the time of impact. He only observed it from a few metres. The tractor was partly in the left lane.

According to Gift Tapfumaneyi Rukweza, the plaintiff's Khami depot manager the bus sustained damage to the left and front and other units. They managed to salvage the gear box and engine which were valued at \$22 000. The bus had only been in use for four months after its importation as new. He put the landed cost at \$86 643.20. As a result of the bus having been written off, the plaintiff is claiming damages amounting to \$64 643.20.

As justification for suing the defendant, Gift Tapfumaneyi Rukweza stated that their driver was exonerated by Police. On the other hand the defendant's driver paid an admission of guilt fine.

The third witness for the plaintiff was Etuell Mathe, the proprietor of Coachcraft (Pvt) Ltd. The company is involved in bus manufacturing, auto repairs and metal fabrication. Coachcraft (Pvt) Ltd was contracted by the plaintiff to provide a quotation for the repairs of its damaged bus. According to Etuell Mathe the bus had extensive damages on the left side from the front to the door. The rest of the body was twisted with some panels missing. The chassis was also twisted. The radiator was also damaged. The repair costs were put at \$70 000. Given the landed cost for the bus Coachcraft (Pvt) Ltd recommended that it be written off. Much issue was made of Coachcraft (Pvt) Ltd's charges for labour as they turned out to be the major cost in the quotation.

The defendant testified that he is a director in a company that is engaged in small scale mining. He confirmed that Ndaba Jena was in his employ as a tractor driver at the time of the accident. Ndaba Jena's job description was given as transportation of ore from the mine to the processing plant. When not engaged in driving duties Ndaba Jena also serviced machinery at the garage.

The defendant confirmed that Ndaba Jena was in charge of the tractor when the accident occurred. He however disputed liability on two grounds. Firstly, according to him there was a standing instruction against driving on public roads. Secondly, there was a standing instruction against driving after sunset and before sunrise. The hours of work were thus 7 a.m. to 3 p.m.

As regards the scene of accident the defendant explained that this was approximately some three kilometres from Shangani Mine turn off towards Gweru. It is between six and seven kilometres from the mine to the accident scene. He was alerted about the accident by a worker and he rushed to the scene.

The defendant also explained in detail how the driver was supposed to move from the mine to the processing plant. According to him the driver and loader were based at the mine. Once the tractor was loaded the driver proceeded along some private farm roads. He would

cross a public road and continue along a private road until he reached the plant. There were two such routes that could be used. In the present case the driver had left those routes and was moving away from where he was supposed to turn in order to go to the plant.

The defendant also explained the shift roster that the driver completed. It records the starting time, the nature of work done and the knock off time. It is signed by the employee and sometimes by the supervisor depending with the latter's availability. The defendant had no idea where the ore was being taken. It seems the defendant did not attempt to have this aspect established.

The defendant also stated that a month before the accident Ndaba Jena had been cautioned by Police officers for driving on a public road. The defendant had been alerted of this development on the very day and he also cautioned Ndaba Jena. For a while after the incident leading to the present proceedings Ndaba Jena is said to have stopped driving but subsequently resumed his duties. Ndaba Jena subsequently resigned on 19 February 2015. This was after he had gone away without leave of absence.

Concerning the tractor, the defendant stated that it was new. He had not registered it because he did not intend to use it on public roads. The tractor had lights but the trailer did not. Ndaba Jena was fined for not having rear lights and not displaying rear warning signs. As for the position of the trailer and tractor he established that they were partly on and off the road.

Onias Ncube a manager for Essential Trading also testified for the defendant. He reiterated the standing instructions regarding driving on public roads. He is the supervisor who signed Ndaba Jena's time sheets. He explained that the many gaps in which he did not sign the time sheets were attributable to the fact that he and Ndaba Jena would be at different sites. Concerning the times Ndaba Jena started work earlier than 7 a.m. he explained that this required his prior approval. When this happened it was to do with effecting repairs prior to commencing work. Workers were not paid for working overtime but they would be granted time off. However, on the day of the accident Ndaba Jena had not informed the witness that he was starting work early. Interestingly he stated that the loader who worked with Ndaba Jena was dismissed for theft of ore. He did not check with Ndaba Jena where he had obtained the ore he was carrying. Nonetheless he disputed that Ndaba Jena was carrying the defendant's ore. This is because Ndaba Jena had passed all the crossing points leading to the processing plant.

With the evidence summarised above, it is not in doubt that the plaintiff suffered patrimonial loss as a result of a collision involving the defendant's driver. To make matters

worse the defendant's driver admitted liability for driving a vehicle with no lights and warning signs. It is irrelevant to consider whether the tractor was moving or stationary.

Not much was done by the defendant to claim contributory negligence on the part of the plaintiff's driver. In the first place, the defendant's plea did not invoke such defence. Even during the course of the trial no evidence was led in that regard. In fact, both parties made a poor show in not leading evidence on the layout of the scene of accident. Such evidence should have been secured at the pre-trial conference stage. That Police compiled no comprehensive report is no excuse. The obligation lies on a party who seeks to make a claim as a result of the loss. Even the defendant could have done something if he wanted to avoid liability.

The defendant appears to also have been lax in the manner in which he defended the claim. During his testimony he seemed to suggest that Ndaba Jena was employed by a company in which he is a director. However, in his plea the defendant admitted to being the employer. Considering that the second defence witness also claimed to be employed by the company, one would have thought that the defendant would expect to being cited in his personal capacity. But all this is of no consequence as the defendant accepted to put his head on the block.

The standard test for vicarious liability is whether an employee was engaged in the affairs or business of the employer when the delict in issue occurred. In this regard see the case of *Biti v Minister of State Security* 1999 (1) ZLR 65 9SC). Where an employee commits the delict whilst pursuing his own interests the employer is not liable. See *David Sebastian Gwande v Tapiwa Matonhodze and Another* HH-123-12. However, even where an employee commits a delict whilst pursuing his own interests at the expense of those of the employer, the employer may still be vicariously liable. The determining factor is the degree of deviation from the employer's business. As authority for this see *Phillips Central Cellars (Pvt) Ltd v Director of Customs And Excise* 2000 (1) ZLR 353 (HC).

In *Wentworth-Wear v Zvipindu* 2000 (1) ZLR (SC) the respondent had dismissed his driver from employment a few days before the accident. Despite the dismissal the driver had subsequently taken the respondent's commuter omnibus without his express authority and was involved in an accident. Even though the Supreme Court recognised that the respondent had dismissed the driver summarily which was contrary to the law, the practical effect was that at the time the driver was involved in the accident he had no authority to drive the respondent's motor vehicle. The Supreme Court further discussed two scenarios that affect vicarious liability as in the present case and at 284-285 had this to say:

“In *Plumb v Cobden Flour Mills* [1914] AC 62 Lord Dunedin drew a distinction between two different types of prohibition in the relationship between employer and employee. He said at 67: G

"(There) are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

This distinction was applied by the *Privy Council in Canadian Pacific Railway Co v Lockhart* [1942] 2 All ER 464 A (PC) at 467 in fine - 468B, and was referred to with approval in the dissenting judgment of Greenberg JA in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 762-763. See also *Ngubetole v Administrator, Cape & Anor* 1975 (3) SA 1 (A) at 11A-C; *South African Railways and Harbours v Albers & Anor* 1977 (2) SA 341 (D) at 346 in fine - B 347B; and, in this jurisdiction, *Ngwenya v Bhebhe & Anor* HB-125-95 (unreported).

It is clear to me that in driving the commuter omnibus - albeit for the apparent benefit of the respondent and in the hope that by so doing the latter would be prepared to retract what must have been viewed as a lawful dismissal - Chigairo disregarded a prohibition which limited the sphere of his employment; and not one which dealt only with his conduct within the sphere of his employment. As he was thus not acting within the course of his employment at the time of the collision, the principles of vicarious responsibility for his negligence cannot be extended to embrace the respondent.”

In the present case the defendant’s driver had authority to drive the tractor. He actually kept the keys for the greater part of the week and only surrendered them on Fridays. The only limitation was not to drive along public roads.

That Ndaba Jena was on a frolic of his own is a special defence that cast an onus on the part of the defendant to discharge. In this respect see *Nyahondo v Hokonya* 1997 (2) ZLR 457 (SC). I do not see the defendant having satisfactorily proved that defence. The defendant and his manager were never keen to establish whose ore Ndaba Jena had been carrying. They were satisfied in claiming that the ore was not from the defendant’s mine. And yet within minutes of the accident being reported the defendant was at the scene. Nothing seems to have been done to establish Ndaba Jena’s whereabouts. In his testimony the defendant displayed a remarkable indifference to ownership of the ore that Ndaba Jena was transporting. If it had been stolen from him he made no issue of it. If at all Ndaba Jena made unauthorised use of the defendant’s tractor, again no issue was made of it. As if that was not enough, Ndaba Jena continued with his employment until he resigned on his own. No disciplinary charges were preferred against him despite the damage that was caused to his employer’s property and that of the plaintiff.

This does not accord with the conduct of an employee who had deviated materially from the course of his employment. Contrast this with the fact that the loader was dismissed for theft, although it is not clear if it is related to the same incident involving Ndaba Jena. I would therefore find that the defendant is vicariously liable for his former employee's conduct.

The purpose of delictual damages is to place the plaintiff in the position it would have been had the delict not occurred. In this respect see *Erasmus v David* 1969 (2) SA 1. As for the quantum of damages, the plaintiff led proof of the landed cost of the bus. It is not an area of dispute. It was also not disputed that the bus was fairly new at the time of accident. As for quotations for repairs, Gift Tapfumaneyi Rukweza stated that they got three and went for the cheapest one. Of course, the defendant's counsel took issue of the single quotation by Coachcraft (Pvt) Ltd during cross-examination of the witness. Again, this is an issue that could have been resolved at pre-trial conference stage. In any event, Gift Tapfumaneyi Rukweza testified that they salvaged the engine and gear box whose value was put at \$22 000.00.

Although the defendant questioned the valuation of the damage, he came up with a cursory valuation of his own. If he seriously contested the plaintiff's valuation I do not see what prevented him from conducting a proper valuation of his own. That is why I earlier on remarked on the nature of assessment of damages that could have been done prior to or at pre-trial conference stage. With the pre-collision value of the bus being readily ascertainable and the value of what was salvaged being put at \$22 000.00 it is not difficult to quantify the plaintiff's loss, which is the difference between the two figures.

Accordingly judgment is entered against the defendant as follows-

- a) Payment of the sum of US\$64 643.20.
- b) Interest on the sum of US\$64 643.20 at the prescribed rate from the date of judgment to the date of payment in full.
- c) Costs of suit.

Mhishi Legal Practice, plaintiff's legal practitioners
Ncube & Partners, defendant's legal practitioners