

GORDON TUNDURE

Versus

NKOSIKHONA NCUBE

And

D. MOYO

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 29 SEPTEMBER 2010

N. Mazibuko for plaintiff

M. Dube for defendants

Defendants' Exception and Special Plea

KAMOCHA J: On 23 July 2007 Nkosikhona Ncube who was driving a commuter omnibus knocked down the plaintiff who was standing by the road side fracturing his right tibia and fibula resulting in a 25% disability. The cause of action therefore arose on 23 July 2007.

The first defendant who was served with summons on 2 August 2010 was served when prescription had already begun to run. The claim against him had been prescribed.

However, when service was effected on the second defendant on 23 July 2010 prescription had not begun to run. The service was accordingly valid.

But was he vicariously liable for the accident caused by the negligence of the first defendant? The second defendant was employed by Martin Senda. He was an employee just like the first defendant albeit at higher level of manager. One employee cannot be vicariously liable for the delicts of another employee. It is only an employer who is vicariously liable for the delicts of his employee committed during the scope of his employment. The second defendant was, in the result wrongly cited.

The exception and special plea in bar succeeds. There is, however, no basis for awarding the defendants costs on the punitive scale.

It is accordingly ordered that the applicant claim be and is hereby dismissed with costs on the ordinary scale.

Judgment No. HB 115/10
Case No. HC 1413/10

Messrs Calderwood, Bryce Hendrie and Partners, plaintiff's legal practitioners
Bulawayo Legal Project Centre, 1st and 2nd defendant's legal practitioners