HH 133-03
HC 2580/20001
ALFRED JAIROS BANDA
versus
GAMEGONE (PRIVATE) LIMITED
and
WASHINGTON DONGONDA

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 16 June and 27 August, 2003

Mr *W Risiro* for plaintiff
Mr *J Samkange* for defendant

SMITH J: The plaintiff (hereinafter referred to as ("Banda") was driving his car, which is a Mercedes Benz, along Charter Road on 13 November, 2000. It was involved in an accident with a Toyota Hiace commuter omnibus that was being driven by the second defendant (hereinafter referred to as "Dongonda"). Banda's Mercedes was damaged. He got three quotations for the repairs that were necessary. The lowest quotation was one for $81 516.71. He alleges that Banda was at all material times a driver employed by the first defendant (hereinafter referred to as "Gamegone") and that Banda was driving the Mercedes in the normal course of his duties when the accident occurred. He therefore issued summons claiming from the defendants, jointly and severally, payment of $81 516.71 for the repairs to his vehicle.

The defendants filed a plea denying that they were negligent and consequently denying liability. Alternatively they pleaded that there was contributory negligence on the part of Banda and therefore his damages should be apportioned between the parties. Subsequently Gamegone substituted a plea in which it denied that Dongonda was its employee. It also denied that its Toyota had been involved in an accident and was being driven by Dongonda. It claimed that it had no knowledge of the accident.

Banda testified as follows. On l8 November 2000 he was driving his Mercedes along Charter Road at about 5 p.m. He was going home. There were three lanes for west-bound traffic. He was driving in the left hand lane and there was a commuter omnibus, being driving by Dongonda, in the middle lane, travelling in the same direction. There was a lorry in front of the commuter omnibus in the centre

lane. Dongonda decided that he wanted to overtake the lorry so he swerved to his left and bumped into the Mercedes, denting the driver's door. Both cars stopped. A policeman who was off duty happened to be at the scene and he took down the details relevant to the accident. Later, he and Dongonda went to the Harare Central Police Station and their statements were recorded. Dongonda said that the Toyota was owned by Gamegone. Dongonda was employed by Gamegone and was driving in the course of his duty at the time. He had visited three panelbeaters to get quotations for the repairs to his Mercedes. The highest was for $162 024,65 and the lowest was for $81 516,71. The Mercedes had been repaired and he had paid the amount quoted.

Under cross-examination Banda gave the following responses. He was travelling between 20 and 25 k.p.h. at the time of the accident. Dongonda was travelling at much the same speed. Just before the accident the lorry had slowed down and Dongonda speeded up and swerved to the left in an attempt to overtake the lorry. He had had no idea that Dongonda was going to try to overtake the lorry. The first he knew of the attempt was when he heard the bang when his car was hit. Although the Toyota hit into the driver's door, the impact also affected the front right fender and headlamp. Dongonda had told the police that he was an employee of Gamegone. When he visited the Gamegone offices he was told that the Toyota belonged to Gamegone. After a number of visits he was able to get the particulars about its insurance. Dongonda had paid an admission of guilt fine for driving without due care. He was satisfied that Dongonda had been at fault and had caused the accident.

The next witness was Assistant Inspector Gunduza of the ZRP who testified as follows. He was told to investigate the case of the accident in question. Banda had produced particulars of the registration and insurance of the Mercedes. He then went to the premises of Gamegone, which was a garage in Workington. There were a number of commuter omnibuses at the depot, some were old and broken down and others were new. Dongonda said that he was employed by Gamegone. When he visited the Gamegone offices he was told that the Toyota belonged to Gamegone. After a number of visits he was able to get the particulars about its insurance. Dongonda had paid an admission of guilt fine for driving without due care. He was satisfied that Dongonda had been at fault and had caused the accident.

Under cross-examination Gunduza made the following responses. Initially Dongonda had denied liability, but when the contradictions in his story were pointed out he admitted that he had been at fault. The registration book and insurance papers for the Toyota had been brought to the police station by an employee of Gamegone. When he first visited the depot an Indian employee there had admitted that Dongonda was employed by Gamegone and that the Toyota belonged to the company.

After Banda closed his case Emmanuel Chimwanda testified as follows. He is the Operations Director for Gamegone. After the accident Banda had telephoned him and told him what had happened. After the summons was issued his then legal

practitioners had filed a plea on behalf of both defendants. That had been done without the legal practitioner consulting him or confirming with him what he had done. He had then engaged another firm of legal practitioners which had filed the amended plea on behalf of Gamegone. In that plea it was denied that Dongonda was an employee of Gamegone. He had first heard of the accident when Banda had telephoned him and told him about it. Gamegone owns a number of commuter omnibuses, one of which is the Toyota in question. Every morning at around 4 a.m. or 5 a.m. a number of drivers would come to the depot. As each one comes he is allocated one of the vehicles. The drivers are all contract employees. They are hired for the day and paid a commission at the end of the day when they bring back the vehicles. The commission is calculated on the day's takings. If a driver comes too late, and all the vehicles have been taken, he will not get one. Gamegone does not pay contributions to NSSA or medical aid subscriptions in respect of the drivers or deduct PAYE for income tax purposes, because the drivers are not employees. They are independent contractors. The Toyota was insured at the time of the accident. Gamegone is not liable because Dongonda was not an employee.

Under cross-examination Chimwanda made the following responses. Every morning a manager of Gamegone is present when the vehicles are allocated. He records the name of each driver and the vehicle he is allocated. At the end of the day the manager would calculate the commission due to each driver and pay him accordingly. He did not agree with the manner in which the former legal practitioner was handling the case or with the plea he had filed, and that is why he changed legal practitioners. He did not deny that the Toyota had been involved in the accident with the Mercedes. However, the first he had heard of it was when Banda telephoned him. Dongonda had never told him about the accident.

The summons in this case was filed on 12 March 2001. On 17 May, 2001 the plea was filed on behalf of both defendants in which they denied being negligent in the manner alleged. Then on 3 June 2002, more than a year later, a notice of amendment was filed by the former legal practitioners of Gamegone. It stated that, failing consent, at the pre-trial conference application would be made to insert an alternative plea to aver that Dongonda was an independent contractor, not an employee of Gamegone, and as the Toyota had been hired out by Gamegone for a fee, calculated on a commission basis, Gamegone was not vicariously liable. In 6 June 2002 Banda's legal practitioners filed a request for further particulars concerning

proof that Dongonda had been an independent contractor. The response from the legal practitioners representing Gamegone, which was filed on 2 October, was that Dongonda was not known and had not been engaged as a driver. Gamegone had no record of having hired the services of Dongonda. On that same date the amended plea was filed on behalf of Gamegone. In that plea Gamegone denied that Dongonda was its employee and also that its vehicle was involved in an accident and was being driven by Dongonda.

The evidence clearly establishes that the Toyota that collided with Banda's Mercedes belonged to Gamegone. That being the case, Dongonda must have been allocated the Toyota by Gamegone. Mr Chimwanda admitted that Banda had telephoned him and told him about the accident, so he was well aware that the Toyota, which belonged to Gamegone, had been involved. It seems strange that Gamegone should deny, in its plea, that the Toyota had been involved in an accident, especially as Dongonda had signed an admission of guilt and paid a deposit fine.

Dongonda did not appear at the trial. The evidence led by Banda clearly establishes that there was an accident and that the Toyota that was being driven by Dongonda caused damage amounting to $81 516,71. Clearly Dongonda is liable therefore. The only issue outstanding is whether or not Gamegone is vicariously liable. To determine that question, it must be established whether Dongonda was an employee of Gamegone or an independent contractor.

In *Colonial Mutual Life Assurance Society* v *MacDonald* 1931 AD 412 it was held that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; a master must have the right to prescribe to the workman not only what work has to be done, but also the manner in which the work has to be done. At p 435 DE VILLIERS CJ said -

> "In *The Queen* v *Walker* (27 LJMC 207) BRAMWELL B., put it in this way:
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> > 'A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done'.
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> In *Yewens* v *Noakes* (1880, 6 QBD 530) the same learned Judge applied the same test. Pollock on *Torts* (12th ed., pp, 79, 80) draws the same distinction:
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> > 'A servant is a person subject to the command of his master as to the manner in which he shall do his work… An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand'.
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> So also does Salmond, *Law of Torts* (6th ed., p 96), in the following passage:
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> > 'What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of

> his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it - he is bound by his contract, but not by his employer's orders'.

He then proceeds to give the following illuminating illustrations:

> 'Thus, my coachman is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place; if an accident happens by his negligence he is responsible, and not I'".

The test enunciated in the *Colonial Mutual* case, *supra*, was described by GOLDIN AJA in *S* v *Lyons Brooke Bond* 1981 ZLR 384(S); 1981(4) SA 445 (Z) as the supervision and control test. At pp 390-391 he said:

> "The test adopted in South Africa is derived from English law and has been aptly described as the supervision and control test. In my view it is a practical and correct test and I will apply it to the facts of this case. The control and supervision need not be rigid or absolute. The fact that a person is allowed to exercise discretion or personal initiative does not necessarily take him out from the category of an employee and constitute him an independent contractor. It is essential to examine the facts of each case to determine the true nature and type of the relationship which has been created. In *R* v *A.M.C.A. Services Ltd and Another*, 1959 (4) SA 207 (AD) SCHREINER, JA, said (at page 213) that if the 'employer can control or at least has the right to control the detailed manner of the other's work', a contract of service is concluded. ROPER J, said in *Feun's* case, (*supra)* at page 61 that complete control in every respect is not essential and added that 'whether the control exercised is such as to lead to the inference that the engaged person is a servant is a matter of degree'. The position is in my respectful view usefully and correctly summarized in *Ready Mixed Concrete* v *Minister of Pensions (supra)* at page 440, where MACKENNA, J. said -
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> > 'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted'".

GOLDIN AJA found that the hawkers and vendors were not independent contractors because of the degree of control exercised by the appellant over the manner in which the work was to be performed, when it was to be performed and how

it was to be performed.

In *Southampton Assurance Company of Zimbabwe Ltd* v *Mutuma & Anor* 1990 (1) ZLR 12 (H) it was held that while the questions of control and supervision are important factors in determining the issue, they are not the sole criteria; all the circumstances surrounding the contract must be considered in order to determine the issue, and no single factor could be treated as the sole basis of determining the issue. The opinion was expressed therein that MARGO J in *Sasverbijl Beleggings & Verdiskonterings Maatskappy Bpk* v *Van Rhynsdorp Town Council & Anor* 1979 (2) SA 771 (W) at 776F succinctly expressed the proper legal position when he said -

> "It may be that under modern industrial conditions, where a person is employed to exercise skill or expertise according to his own judgment, the question of the right to control the method of doing the work is not always an essential characteristic of a master and servant relationship. *Cf R* v *AMCA Services Ltd & Anor* 1959 (4) SA 207 (A) *per* SCHREINER JA at 211, and the discussion there in *Short* v *Henderson Ltd* 1946 Sc LT 231. While the questions of control and the degree thereof are usually the most important considerations in testing whether the relationship of master and servant existed, they are not always decisive. There may be valid considerations pointing the other way. Each case must accordingly be decided to the light of its own particular circumstances".

In this case, the evidence of Mr Chimwanda has not been shaken. He said that every morning a number of drivers would appear at the Gamegone depot and then, on the basis of first come first served, each was allocated a commuter omnibus until the supply ran out. Once the driver got the car, it was up to him how many journeys he did each day. There was no supervision or control over his actions by Gamegone. There are no other factors before the court which could indicate that the drivers were employees and not independent contractors. That being the case, Gamegone cannot be held to be vicariously liable for the actions of Dongonda.

It is ordered that -

1. The claim against the first defendant is dismissed with costs;

2. The second defendant pay the plaintiff $81 516,71, with interest thereon at the prescribed rate from 13 November 2000 to the date of payment, and costs of suit.

V S Nyangula & Associates, plaintiff's legal practitioners
Byron Venturas & Partners, first defendant's legal practitioners