

HH 24-03
HC 10387/2000
MOSES MBERI
versus
FAWCETT SECURITY OPERATIONS (PVT)
and
INNOCENT MTETWA

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 5 October, 2001 and 26 February, 2003

Mr A A Makoni for plaintiff
Mr E Morris for defendants

HUNGWE J: The plaintiff contracted with the first defendant for security services to be carried out at plaintiff's residence during his absence between 26th and 27th February, 2000. First defendant in turn appointed and instructed the second defendant, its employee to execute its mandate on its behalf. The contract was for the provision of a 24 hour guard service at the plaintiff's residence. During the course of his duties, the second defendant broke into the plaintiff's house and stole property valued at \$99 793,00. Second defendant left first defendant's uniforms and other guards paraphernalia at plaintiff's residence.

Plaintiff sued both first and second defendants for the payment of \$99 793,00 being the value of the goods stolen. The plaintiff's case is that it was the defendants' employee, acting within the terms and scope of his employment with the defendant, who stole and damaged his property, and that the defendant is therefore liable to him in law for this theft. In the alternative the plaintiff claims that the defendant owed him a duty of care to employ honest personnel in its business and to ensure that its personnel carried out their duties honestly. The theft occurred because the plaintiff was in breach of that duty.

The first defendant does not deny that second defendant was his employee or that he broke into and stole from plaintiff's residence. It does not dispute the quantum of the plaintiff's claim. First defendant however denies that second defendant, when he stole was acting within the terms and scope of his employment when he stole and therefore denies that it is liable for the theft. It further denies that it was in breach of any duty of care towards the plaintiff. It says it took all reasonable care to employ honest persons and to ensure that they acted honestly. It

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says the theft occurred because the second defendant, in pursuance of his own personal avaricious pursuits, abandoned his duties and turned thief. As such it could not be held liable and prayed for the dismissal of the plaintiff's claims.

The principle that an employer is liable for the wrongful acts or omissions of his employees acting at the time in the course of and within the scope of their employment is well established in our law. The first defendant here employed the thief. His action was admittedly wrongful. The issue is whether, in the circumstances of this case, the second defendant can be said to have been acting within the terms and scope of his employment with the defendant.

It is not claimed by the plaintiff that second defendant was acting on the instructions of the first defendant. The evidence led establishes that first defendant instructed second defendant to go to plaintiff's residence for the purpose of guarding and safekeeping the property at his residence. When he committed the theft the guard was clearly acting in breach of his instructions from the first defendant. It was an act contrary to express instructions given by first defendant. He acted on his own and in his own interest. It was an act that benefited only himself and not the first defendant.

In *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991(2) ZLR 271 it was held by the Supreme Court that although "it was formerly thought that an employer could not be held vicariously liable for a theft committed by his employee on the ground that the act of stealing necessarily took the employee out of the house of his employment, this view no longer prevails".

As was pointed out by GUBBAY CJ (as he then was) at p 296 D-F in the *Fawcetts* case *supra*, it is however an -

"essential element of liability ... that the employer ... entrusted possession of the item stolen to its employee --- where an employee has committed a theft, the test to be applied is whether the goods stolen had been entrusted to his care by his employer. If they had not, the theft is outside the scope of his employment and the employer is not vicariously liable. The theft is the act of the employee pursuing his own selfish ends - something he has done entirely on his own account".

In *Rose NO v Fawcett Security Operations (Pvt) Ltd* 1998 (2) ZLR 114 at p 119

dealing with this aspect BLACKIE J said -

"From the context in which they appear, the words 'the employer --- entrusted the (goods stolen) to his employee' and 'the goods stolen had been entrusted to his care by his employer' are not taken in the strict and literal meaning that the goods must be physically entrusted by his employer to the employee. The words carry the wider meaning that the employer has entrusted the receipt and care of the goods on his behalf".

In the present case evidence was led from the plaintiff and the first defendant's representatives. That evidence established the factual allegations that

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form the basis of the plaintiff's claim. To a large extent therefore the facts are common cause. These may be set out as follows.

Plaintiff approached the first defendant on 25 February, 2000 and requested for a 24 hours security guard. The defendant agreed to provide day and night security guard services at his residential premises for the duration of his absence. Second defendant was posted to perform the guard duties at the residence. He turned out to be a thief.

It was argued for the defendant that for liability to attach there must be a fiduciary duty such as would be in bailment or deposition.

The issue as I pointed out, is whether first defendant was entrusted with the plaintiff's property.

Mr *Sibanda* who gave evidence for the first defendant virtually confirmed the plaintiff's case, that it was a term of the contract that plaintiff's property will be taken care of until his return to it. It was however argued by Mr *Morris* that as the first defendant had no access into the house, by breaking in, the second defendant was now acting outside his scope of employment.

I disagree. It was part of the first defendant's duty to ensure that the house and its contents were safe. To do so first defendant posted second defendant inside the perimeter fence of the premises as a measure to comply with its contractual obligations. The person employed to carry out these duties then stole the property he was employed to guard.

By posting the second defendant, the first defendant entrusted the care of the plaintiff to its employee. It is on that basis I am satisfied that the first defendant is liable for the loss suffered by the plaintiff at the hands of the second defendant who stole the plaintiff's property.

In the result there will be judgment for the plaintiff as prayed in the summons as amended and interest at the prescribed rate and costs.

Chihambakwe Mutizwa & Partners plaintiff's legal practitioners
Webb Low & Barry defendant's legal practitioners