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Judgment No. SC 9/12
Civil Appeal No. 19/08

THE COLD CHAIN (PRIVATE) LIMITED v ROBSON MAKONI

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, OCTOBER 5, 2010 & FEBRUARY 28 , 2012

A P de Bourbon SC, with him *J B Wood*, for the appellant

H Zhou, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which found that the appellant company was vicariously liable for the negligence of its driver in a road traffic accident and ordered it to pay damages to the respondent.

Before the appeal was heard, the appellant company ("the company") filed a court application in this Court seeking leave to adduce further evidence in the appeal. The allegation was that the further evidence would show that the evidence adduced by the respondent ("Makoni") in support of his claim for damages in the court *a quo* was fraudulent.

The background facts in this case are as follows. The company, which was in the business of selling fish, was based at Chitungwiza and employed Isaac Mulyata ("Isaac") as a driver. On 20 December 1999 the company instructed

Isaac to deliver a consignment of fish to its customers at Nyanga, using the company's Isuzu pick-up truck. After delivering the fish, Isaac was to return the truck to the company premises at Chitungwiza on that day. He left the company premises in the morning but did not return, because at 8 pm on that day he was involved in a head-on collision with a motor vehicle being driven by Makoni, at the twelve kilometre peg on the Rusape-Nyanga road. Both Isaac and Makoni were seriously injured and were taken to hospital. Isaac died a few hours after the accident, but Makoni survived. Makoni's motor vehicle was damaged beyond repair.

The police officer who arrived at the scene shortly after the accident observed that at the time of the collision Isaac was driving the truck towards Nyanga, and Makoni was driving his vehicle towards Rusape. From his observations he concluded that the collision had occurred due to Isaac's negligence, in that the truck being driven by Isaac had strayed into Makoni's lane. The police officer also observed that the truck was empty and had no fish.

Subsequently, Makoni instituted a civil action in the High Court against the company, claiming damages for, *inter alia*, personal injuries, lost income and for the loss of his vehicle. The High Court found that the company was vicariously liable for Isaac's negligence, and granted judgment in favour of Makoni. Aggrieved by that decision, the company appealed to this Court.

Three issues arise for determination in this appeal. The first is whether the application for leave to adduce further evidence on appeal ought to be granted. The second is whether the company was vicariously liable for the

negligence of its driver. And the third, which arises in the event that the company was vicariously liable, is the quantum of the damages payable to Makoni. I will deal with these issues in turn.

THE APPLICATION

The company alleges that the evidence sought to be adduced on appeal would establish the following –

1. That Makoni did not own the motor vehicle which he was driving at the time of the accident, and did not suffer any damages as a result of the loss of the vehicle, which damages he had claimed on the basis that he was the owner of the vehicle;

2. That after the accident Makoni did not hire a replacement vehicle from a Botswana company known as Agastat Marketing and Distributors (Pty) Ltd as he alleged, and should not have been awarded damages in respect of the hire charges when he had not incurred such charges; and

3. That Makoni returned to work only a few months after the accident, and was not incapacitated for the five-year period for which he was awarded damages for lost income.

The evidence sought to be adduced on appeal was allegedly unearthed by a Mr Maycock ("Maycock"), a private investigator who was hired by the company in May 2010, about nine years after Makoni had issued the summons commencing the action against the company, and about two years and four months after the judgment appealed against was handed down. The Court application for leave to adduce

further evidence on appeal was filed in this Court on 27 July 2010, i.e. about two-and-a-half years after the judgment appealed against was handed down.

The approach of this Court to an application of this nature was set out by McNALLY JA in *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (S) at 380G-381B as follows:

> "When a request is made to lead further evidence on appeal this Court will normally, unless the evidence is simple, straightforward and uncontested, remit the matter to the High Court so that the witness can be tested by cross-examination. But we will only do so where certain criteria are satisfied. These criteria were established, in this jurisdiction, in *Farmers Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 (FS). …
>
> The criteria are, briefly –
>
> 1. Could the evidence not, with reasonable diligence have been obtained in time for the trial?
>
> 2. Is the evidence apparently credible?
>
> 3. Would it probably have an important influence on the result of the case, although it need not be decisive?
>
> 4. Have the conditions changed since the trial so that the fresh evidence will prejudice the opposite party?"

In terms of the first criterion set out in the above case, an appellant seeking leave to adduce further evidence on appeal should satisfy this Court that the further evidence sought to be adduced on appeal could not, with reasonable diligence, have been obtained before the trial. Quite clearly, that requirement has not been satisfied in the present application, and no explanation has been given for the failure to satisfy the requirement. Had the company hired Maycock before the trial to investigate Makoni's claims, the evidence allegedly unearthed by Maycock would have been available at the trial.

In my view, the non-fulfilment of the first requirement set out in the *Warren-Codrington* case *supra* is fatal to this application. In any event, an appellant who seeks leave to lead fresh evidence on appeal seeks the indulgence of the Court. Undoubtedly, this Court has a discretion in this matter, but that discretion has to be exercised in the light of the principle that there should be finality in litigation. It is not in the interests of the administration of justice that issues of fact which have been judicially investigated and determined should lightly be re-opened and fresh evidence led.

In the circumstances, the application must be dismissed with costs.

VICARIOUS LIABILITY

The law on vicarious liability has been discussed in many cases. In *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 827 A-C KUMLEBEN JA stated the standard test for vicarious liability as follows:

> "The critical consideration is therefore whether the wrongdoer was engaged in the affairs or business of his employer. (I shall refer to it as the 'standard test' or 'general principle'.) It has been consistently recognised and applied, though – since it lacks exactitude – with difficulty when the facts are close to the borderline.
>
> The problem of application presents itself particularly in what have become known as 'deviation cases': instances in which an employee whilst in a general sense still engaged in his official duties deviates therefrom and commits a delict."

In *Feldman (Pty) Ltd v Mall* 1945 AD 733 the facts as set out in the headnote were as follows:

> "A servant of the defendant had been given custody of a motor van and a number of parcels, with instructions to drive the van and deliver the parcels to various customers in a town. Having delivered the parcels he was to return the van to a certain garage. It appeared that after delivering the parcels he had driven the van to a place some miles away on his own business, and there drank enough liquor to make him incapable of driving the van with safety. Shortly after his departure from such place on his way back to the garage, he negligently collided with and killed the father of two children."

The deviation in point of distance was about three-and-a-half miles (i.e. five kilometres), and the deviation in point of time was about three to four hours. In a split decision of 4 to 1 the court held that the employer was vicariously liable.

In our jurisdiction, the standard test for vicarious liability, as stated in the *Ngobo* case *supra* was applied in *Biti v Minister of State Security* 1999 (1) ZLR 165 (S). The headnote in that case reads as follows:

> "The driver of a Government vehicle was instructed to take three Government officers home after work and then keep the vehicle safely overnight. In the morning he was to pick up the same officers and drive them to their workplace. He was on call while not actively on duty.
>
> About two-and-a-half hours after he should have finished dropping the three officers, he rammed into a stationary taxi owned by the plaintiff, badly damaging the taxi and severely injuring the plaintiff. The accident occurred at a place which was about a 5 km deviation from the routes he would have had to have taken to drop off the Government officers. There was some evidence that the driver was heavily intoxicated and that he had his girlfriend in the car. The trial court held that the Ministry which employed the driver was not vicariously liable. On appeal
>
> *Held*, that the standard test for vicarious liability requires the court to decide whether the wrongdoer was engaged in the affairs or business of the employer when he committed the delict. In the present case, the business of the Government driver included not only the transporting of passengers to their homes, but also keeping the vehicle in safe overnight custody. Although the driver had deviated from his authorised route, the deviation, in terms of time and space, was not such as to convert it into 'a frolic of his own'. The improper mode of exercising his duty of keeping the vehicle safely overnight was still done within the course of his employment and the Ministry which employed him was vicariously liable."

I now turn to the facts of the present case. The driver was given custody of the company's truck and a consignment of fish, and was instructed to drive the truck, deliver the fish to the company's customers at Nyanga and return the truck to the company's premises at Chitungwiza by evening on that day. After delivering the fish, and at about 8 pm, the truck was involved in a head-on collision with a motor vehicle being driven by Makoni at a spot about twelve kilometres from Rusape. The collision occurred due to the negligence of the truck driver.

Applying the standard test for vicarious liability to those facts, the critical question is whether at the time of the collision the driver was engaged in the affairs or business of his employer. In answering that question, one should bear in mind that the affairs or business of the company included, not only the delivery of the fish to Nyanga, but also the custody of the truck and its return to the company's premises at Chitungwiza.

In my view, when the collision occurred the driver was engaged in the affairs or business of the company. He was in the course of carrying out the instruction to drive the truck and return it to the company's premises. There might have been deviations in terms of time and space, but such deviations would have been minor when compared to those in the *Feldman* case *supra* and in the *Biti* case *supra*, where the employers were held vicariously liable. In the *Feldman* case *supra* the deviation in terms of time was about three to four hours, and in the *Biti* case *supra* it was about one-and-a-half hours. In the *Feldman* case *supra* the deviation in terms of distance was about five kilometres, and in the *Biti* case *supra* it was about the same.

However, in the present case, when determining whether there was a deviation in terms of time, it is important to bear in mind that the driver was supposed to return the truck to the company's premises at Chitungwiza by evening, with no specific time having been given. It is, therefore, likely that when the collision occurred at about 8 pm there had not been any significant deviation in terms of time, as 8 pm could be regard as part of the evening.

With regard to the deviation in terms of space, it is important to bear in mind that the collision occurred whilst the driver was on the authorised route, although at the relevant time he was driving in the direction of Nyanga where he had come from. In reality, there was no deviation in terms of space similar to the deviation in the *Feldman* case *supra* and in the *Biti* case *supra*, where the driver left the authorised route altogether and drove the employer's vehicle to a place some kilometres away on private business. As already stated, the employers in those two cases were held vicariously liable for the delict committed by their drivers.

Accordingly, in the present case, the deviations in terms of time and space, if one can call them deviations, were not such as to justify the conclusion that when the collision occurred the driver was on a frolic of his own.

In the circumstances, the appeal against the finding that the company was vicariously liable for the delict committed by its driver must be dismissed.

QUANTUM OF DAMAGES

The company appealed against the granting of the following special damages –

(a) 63 750 Botswana Pula in respect of the replacement value of the damaged motor vehicle;

(b) 1 800 000 Botswana Pula for lost income; and

(c) 120 000 Botswana Pula for car hire charges.

I will deal with the three awards in turn.

(a) Motor Vehicle Replacement

The claim by Makoni for the value of a replacement motor vehicle was based on the allegation by him, which was not challenged in cross-examination, that his motor vehicle, a 1993 Mercedes Benz E200, had been damaged beyond repair.

In granting special damages of Botswana Pula 63 750 in respect of the replacement value of the damaged vehicle the learned Judge in the court *a quo* mainly relied upon a document which was produced at the trial as Exhibit 6. Makoni alleged that Exhibit 6 was the agreement of sale concluded on 4 December 1999 when he bought the vehicle in question.

The alleged sale agreement was handwritten on what appears to be a fax print-out dated 27 April 2000. The whole document reads as follows:

"27/04/00 12:10 FAX 213960 LIFELINX INS.
041299

Mr Makoni Robson
Passport No. ZIM ZA 899361
Tel. 213960, Fax 213960

One 1993 MERCEDES
200E CLASS
Registration B320 ACF
Chassis: 1240216B533139
Engine: 10296362029673
Colour: White

P63 750-

Seller:-

Thuso General Store (Pty) Ltd
P.O. Box 660
Serowe Tel. 431188

P63 750-".

Of great significance in this document is the fact that the sale agreement allegedly concluded on 4 December 1999 and dated 4 December 1999 was handwritten on a fax print-out dated 27 April 2000, which would not have been in existence on 4 December 1999. This discrepancy is not explained anywhere in the record of the proceedings. The authenticity of Exhibit 6 is, therefore, questionable.

In the circumstances, the learned Judge in the court *a quo* should not have relied upon Exhibit 6 in determining the replacement value of the vehicle. In my view, the more reliable value of Makoni's vehicle is the value which Makoni declared to the customs officials at the border post on 17 December 1999 when he brought the vehicle to Zimbabwe. He declared that the value of his vehicle was Botswana Pula 40 000. In his evidence Makoni alleged that he had under-valued his vehicle in order to reduce the amount of carbon tax payable. That evidence should

have been rejected, because no-one should be allowed to benefit from the perpetration of fraud by him.

In the circumstances, the special damages in respect of the vehicle should be reduced to Botswana Pula 40 000.

(b) Motor Vehicle Hire

The award in respect of motor vehicle hire charges was Botswana Pula 120 000. The award was erroneously indicated in the order of the court *a quo* as Botswana Pula 12 000 000. However, it is clear from the judgment that the amount awarded was Botswana Pula 120 000.

In my view, there was no basis for awarding Makoni Botswana Pula 120 000 in respect of motor vehicle hire charges. Makoni did not claim that sum at any stage.

Firstly, in his declaration, filed in the High Court on 30 April 2001, Makoni claimed Botswana Pula 18 000 in respect of motor vehicle hire charges.

Secondly, in the amendment to the declaration, filed in the High Court on 18 January 2006, the claim in respect of motor vehicle hire charges was re-stated as Botswana Pula 18 000.

Thirdly, in his evidence-in-chief Makoni stated that he had hired the motor vehicle for six months in terms of the motor vehicle hire agreement. Bearing

in mind that that agreement provided for payment of Botswana Pula 3 000 per month the total sum claimed by Makoni in respect of motor vehicle hire charges was Botswana Pula 18 000.

Fourthly, during cross-examination, Makoni made it quite clear that he was not claiming more than Botswana Pula 18 000 in respect of motor vehicle hire charges, as the following passage at the top of p 111 of the record shows:

> "Q. Now, the issue of car hiring … exhibit number 7 was the invoice dated June 2002 which claims a figure of P18 000 only? A. Yes, my lord.
>
> Q. Now, I am having here in my possession and I need to clarify this, another invoice generated on the 30th of November 2000 which claims another further figure of 15 000 (Pula). For the benefit of this court, are you confining your claim in relation to car hiring services only to the 18 000 (Pula) from January to June of 2000? Is that correct? A. Correct.
>
> Q. So there is no claim further for car hiring services from June 2000? A. Correct."

Finally, in the written submissions filed by Makoni's legal practitioner at the end of the trial, appearing on p 63 of the record of pleadings, the claim in respect of vehicle hire charges is stated as Botswana Pula 18 000.

There is, therefore, no doubt that by awarding Makoni Botswana Pula 120 000 in respect of motor vehicle hire charges the learned Judge in the court *a quo* erred.

However, that is not the end of the matter, because consideration ought to be given to whether Makoni should have been awarded Botswana Pula 18 000, the sum claimed by him in respect of motor vehicle hire charges.

In this regard, counsel for the appellant attacked the authenticity of Exhibit 8, the vehicle hire agreement. He pointed out certain curious features concerning Exhibit 8, and submitted that the overwhelming probability was that the claim in respect of motor vehicle hire charges was fabricated in order to inflate the claim for damages. I must admit that this submission has taxed my mind.

However, in view of the existence of Exhibit 14, a final reminder dated 30 November 2000, sent to Makoni by Agastat Marketing & Distributors, calling upon Makoni to pay vehicle hire charges, I am persuaded to accept that there was a vehicle hire agreement. The reminder reads as follows:

> "Dear Mr Makoni,
>
> Ref: Agreement Number 40529 – Car Hire Colt Registration Number B881 AFF
>
> The above refers.
>
> This note serves as a final reminder for you to settle the above account. We have now handed this matter to our attorneys for the full recovery of the total amount."

In awarding Makoni Botswana Pula 120 000 in respect of motor vehicle hire charges, the learned Judge said:

> "In assessing the quantum of hiring charges for the vehicle, I have deducted from the claim the pro rate (*sic*) charges for the period (the) plaintiff was bedridden and therefore did not require the services of a vehicle. The periods in question are those between 21st December 1999 and mid March 2000, and also the period he was bedridden in Francistown in 2000. In my assessment (the) plaintiff is entitled to rental charges for eight months out of the year he had claimed. In my considered view, (the) plaintiff is therefore entitled to hiring charges amounting (to) Botswana Pula 120 000."

It is quite clear from what the learned Judge said that he was labouring under two misapprehensions. The first was that Makoni had claimed motor vehicle hire charges for twelve months, when in fact the claim was for six months only. And the second misapprehension was that Makoni had claimed motor vehicle hire charges at the rate of Botswana Pula 15 000 per month, when Makoni's claim was at the rate of Botswana Pula 3 000 per month.

Since the learned Judge concluded that Makoni did not require a motor vehicle for four months during the relevant period, he should have deducted the four months, not from twelve months, but from six months. Had he done so, he would have come to the conclusion that during the relevant period, i.e. December 1999 to June 2000, Makoni required the motor vehicle for only two months, and would have awarded Makoni Botswana Pula 6 000 in respect of motor vehicle hire charges.

In the circumstances, the award in respect of motor vehicle hire charges should be reduced to Botswana Pula 6 000.

(c) Lost Income

Makoni's claim for lost income as originally formulated in April 2001 was for twenty-four months at Botswana Pula 40 000 per month, giving a total of Botswana Pula 960 000. However, on 18 January 2006, at the time of the trial, the period of twenty-four months was extended to sixty months, and the claim in respect of lost income was increased to Botswana Pula 2 400 000. At the end of the trial Makoni was awarded Botswana Pula 1 800 000 in respect of this claim, the learned

Judge having come to the conclusion that Makoni was entitled to claim lost income for sixty months at the rate of Botswana Pula 30 000 per month.

At the time of the road traffic accident Makoni had been employed by Medvest Brokers (Botswana) (Pty) Ltd ("Medvest") as an insurance agent for about five months, having joined Medvest on 21 July 1999.

In his evidence-in-chief Makoni stated that as an insurance agent he earned a commission of Botswana Pula 40 000 per month. However, he later testified that the figure of Botswana Pula 40 000 was one he had negotiated with his lawyer as being the basis of his claim, although it was a conservative figure.

To support his claim for loss of income, Makoni relied upon a letter purportedly written by Medvest and signed by Mr Du Plooy, a director of Medvest. The letter is dated 20 April 2000 and, in relevant part, reads as follows:

> "TO WHOM IT MAY CONCERN
>
> This letter serves to confirm that Mr R Makoni is an employee of this company on contract and has no basic salary but earns on a very high commission rate (± P40 000 per month gross)."

When Makoni was challenged about the signature on this letter, he stated that it was not the signature of Mr Du Plooy but that of Mr Du Plooy's secretary. It is pertinent to note that neither Mr Du Plooy nor his secretary gave evidence confirming the contents of the letter.

In my view, the letter clearly influenced the learned Judge in assessing Makoni's loss of earnings, because in his judgment he said:

> "Evidence at hand would tend to indicate that he was earning anything between BP40 000 and BP70 000 per month."

See p 136 of the record.

However, having said that, the learned Judge went on to say the following:

> "Considering the totality of the factors mentioned above, it is my opinion that it would meet the justice of this (case) to grant (the) plaintiff loss of income based on an average earning before injury
> at BP30 000 per month for a period of sixty months."

Quite clearly, the letter purportedly written by Medvest and signed by Mr Du Plooy was on the face of it admitted to be false, and the failure to call Mr Du Plooy as a witness was, accordingly, fatal to the claim of an average commission of Botswana Pula 40 000 per month based on that letter.

Apart from the said letter, Makoni relied upon three payment advices from Medvest to support his claim for lost income. The three were produced as Exhibits 3, 16 and 17.

Exhibit 3 was the payment advice for November 1999. This indicated that the gross commissions earned by Makoni for November 1999 totalled Botswana Pula 43 677, and that Makoni's net earnings for that month amounted to Botswana Pula 20 965.

Exhibit 16 was the payment advice for September 1999. This indicated that the gross commissions earned by Makoni for September 1999 totalled Botswana Pula 39 716, and that Makoni's net earnings for that month amounted to Botswana Pula 19 064.

Exhibit 17 was the payment advice for December 1999. This indicated that the gross commissions earned by Makoni for December 1999 totalled Botswana Pula 23 596, and that Makoni's net earnings for that month amounted to Botswana Pula 11 326.

No payment advices were produced by Makoni for July, August and October 1999, and no explanation was given for the failure to produce them. In my view, the probably chosen because they represented the highest amounts earned by Makoni during the five months he worked for Medvest before he was injured in the road traffic accident.

Nevertheless, the three payment advices are important because they indicate Makoni's net earnings, which total Botswana Pula 51 355. As Makoni did not produce any payment advices for July, August and October 1999, and gave no explanation for his failure to produce them, it must be assumed that he did not earn any commissions in July, August and October 1999, that his total net earnings over the five month period were Botswana Pula 51 355, and that his average net earnings per month were Botswana Pula 10 271.

In the circumstances, Makoni's lost income was Botswana Pula 10 271 per month. That is the figure which the learned Judge should have used in determining Makoni's loss of earnings over the period of sixty months, and not Botswana Pula 30 000, a figure which the learned Judge appears to have plucked out of the air. Makoni should, therefore, have been awarded Botswana Pula 616 260 for loss of earnings.

Finally, as far as the costs of the appeal are concerned, I think that there should be no order as to costs, because both parties have been successful to a certain extent.

ORDER

Accordingly, the following order is made –

1. The application for leave to adduce further evidence on appeal is dismissed with costs.

2. The appeal against the finding of vicarious liability is dismissed.

3. The appeals in respect of the value of the replacement motor vehicle, vehicle hire charges and lost income are allowed and the order of the court *a quo* is altered in the following respects –

   "(i) In paragraph (a) Botswana Pula 40 000 is substituted for BP63 750;

   (ii) In paragraph (c) Botswana Pula 616 260 is substituted for Botswana Pula 1 800 000; and

(iii) In paragraph (e) Botswana Pula 6 000 is substituted for Botswana Pula 12 000 000."

4. There will be no order as to costs of the appeal.

ZIYAMBI JA: I agree

GARWE JA: I agree

Atherstone & Cook, appellant's legal practitioners

Maganga & Company, respondent's legal practitioners