TENDAI MUNYUKWA
versus
FORTUNE MATUKA

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 24 March 2021 and 20 May 2021

Civil Appeal

Appellant in person
Respondent in person

MWAYERA J: This is an appeal against the determination of the Provincial Magistrate sitting at Rusape. The Provincial Magistrate ordered the appellant to deliver 33 bags of Lafarge PC cement or the equivalent in monetary terms as at date of delivery or payment to the respondent (then plaintiff).

Factual background.

The Respondent (plaintiff in court *a quo*) purchased 45 bags of 50kg PC 15 cement from N. Richards Rusape sometime in October 2017. The appellant who was employed at N. Richards agreed to look after the cement which the respondent was to collect later. The Respondent sent in One Nyakurima to collect some of the cement leaving a balance of 33 bags. Upon request to collect the outstanding cement the appellant was not forthcoming. The parties ended up convening a meeting with the manager of N. Richards Rusape. The appellant signed an acknowledgement of debt and committed to reimburse the respondent. The appellant reimbursed a few of the bags and upon further demand the respondent failed to make good what he owed. This then prompted the respondent to issue summons claiming the balance or reimbursement. The court *a quo* ruled in favour of the respondent much to the dissatisfaction of the appellant who then lodged the present appeal.

The appellant filed a notice of appeal and the following grounds of appeal

Grounds of Appeal

1. The learned Magistrate erred when he did not take note that the citation in this claim was improper in the circumstances when the appellant was merely an employee of a company and all transactions were between the company and its customer, the respondent.
2. It was evident that there was no proof of any personal dealing nor agreements between the parties to make appellant personally liable to respondent.
3. The issue of missing cement bags was a criminal matter, in the absence of the requested police investigation report or at last CCTV confirmation report from the company. To ink the appellant with these missing cement bags, the Magistrate erred by proceeding to hear this matter and therefore got misled in his ruling.
4. The learned Magistrate did not analyse and recognise that the company's operating systems and procedures were so clearly outlined that there was no link or jurisdiction at all for the appellant in connection with the allegedly submitted facts of this matter by respondent.

In an appeal of this matter the appellate court has to consider whether or not the decision made by the court *a quo* is wrong on facts and law. It is apparent from the record that the appellant was employed by N. Richards. He personally entered into an arrangement with the appellant for storage of the cement which the respondent had purchased and was to collect later. Both the appellant and respondent were known to each other prior to the request for storage. Basing on the evidence adduced which was buttressed by the acknowledgment of debt signed by the parties the court issued an order in favour of the respondent. It can clearly be deduced that out of the outstanding bags of cement the appellant reimbursed 3 bags per month pursuant to the acknowledgement date of 12 February 2019. The reimbursement of cement was direct from the appellant to Victor Nyakurima who was sent to collect cement on behalf of the respondent. There was no time that the claim was made to N. Richards as the storage arrangement was a private affair between the appellant and the respondent. The evidence of all the witnesses who testified on behalf of the respondent including the N. Richards branch Manager one Brian Mukwechwa was clear that after purchase of the cement the appellant and respondent entered into a private transaction of cement storage. Upon demand the appellant was unable to avail the cement leading to negotiations which culminated in the acknowledgement of owing. In partial compliance with the acknowledgement the appellant reimbursed the respondent leaving an outstanding 33 bags

which form the subject of the summons and subsequent order by the court *a quo*. The fact that the cement was bought from N.Richards does not mean that N. Richards should be held liable for transgression occasioned by its employee in a separate private arrangement. There is no basis for including N. Richards shop as a party to the proceedings. There is also no evidence to establish the seller N. Richards is vicariously liable for the private storage agreement by the appellant and respondent.

The first and second grounds of appeal speak to the same point of the non citation or inclusion of N. Richards as party to the proceedings clearly for the private arrangement between the appellant and respondent one cannot impute vicarious liability on the employer. The evidence is devoid of a link since when the appellant took control of the bags of cement he was not acting for and on behalf of his employer neither was he acting within the scope and course of his employer. The case referred to by the appellant *Gwatiringa* v *Jaravaza and Anor* ZLR 2001 (1) 383 clearly spells out that employers in appropriate cases are responsible for their employees' faults if the fault is committed in the course and within the scope of their employment. This is not the case in the present matter. The goods that is the cement was not entrusted to the appellant, the employee by N. Richards the employer, neither was appellant acting in favour of his employer's madate. It is apparent the appellant and respondent's arrangement was outside the scope of employment. The private arrangement was not sanctioned by the employer. The court *a quo* when it issued an order in favour of the respondent was conversant of the circumstances of storage and alive to the acknowledgment signed by the appellant. The first and second ground of appeal cannot be sustained in the circumstances.

The third ground of appeal which is to the effect that the Magistrate erred in dealing with a criminal matter as a civil matter equally crumbles considering the evidence adduced. The company N. Richards did not complain of theft of bags of cement from their shop. There was no need for them to resort to CCTV footage as no property had been stolen. The purchased cement was properly sold. What transpired between the appellant and respondent was a private arrangement. The respondent did not report theft of cement by the appellant because the parties reached an agreement. In fact the appellant partly made good what he owed by availing some bags of cement. It was only after the appellant abrogated from availing the cement per the acknowledgment document that respondent issued summons claiming for the outstanding bags of cement.

The last ground of appeal that the court did not analyse and recognise the company's operating systems and procedures is baseless and has no merit. It must fail because the court properly analysed all the evidence presented before it. It is clear from the records of the company N. Richards that it only sold cement to the respondent. What transpired after the sale between appellant and respondent is not company business. The court *a quo* basing on facts and evidence adduced properly ascribed liability to the appellant. The appellant undertook to pay back goods he had agreed to safe keep for the respondent in circumstances in which there was no undue influence exerted in him. He actually commenced partly reimbursing. The court *a quo* properly concluded that the appellant had no defence to the claim and thus ordered appellant to pay back to the respondent.

All the grounds of appeal cannot be sustained. As such the appeal must fail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall bear the costs.

MWAYERA J _____

MUZENDA J Agrees _____