ALBERT MACHENGETE MASHOKO
vs
MOBIL OIL ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 7 March and 15 June 2005

Opposed Application

Advocate *E Matinenga* for applicant
Advocate *R M Fitches* for respondent

MAKARAU J: The issue that falls for determination in this application is somewhat *res nova.* It is whether the doctrine of vicarious liability applies in contract law to terminate a valid contract on the basis that the breach complained of was occasioned by the employees of the second party.

The facts forming the backdrop to the above issue are largely common cause or are not seriously disputed. I summarize them as follows:

The respondent is a well-known company in Zimbabwe, carrying on the business of supplying fuel and motor oils. It has a number of service stations in the country. These are operated under agreements with third parties. The applicant is one such third party. He leased from the applicant a service station in the southern part of the City of Harare. It is a specific term of the agreement between the parties that the applicant shall faithfully procure from and sell fuel and lubricants belonging to the respondent.

On 13 February 2004, the applicant's employees procured fuel from a company bearing the unlikely name for a fuel company, of Lard Oil. One Brian Mudungwe, an employee of the respondent, received word of the delivery. He turned up at the applicant's station and witnessed the applicant's employees receiving the delivery from Lard Oil at the ungodly hour of 1.30a.m.

Holding the applicant vicariously liable for the acts of his employees, the respondent wrote to the applicant terminating the lease agreement between the parties. The applicant protested at the termination of his lease by pointing out that the employees concerned were acting outside the scope of their respective authorities and intended to sell the fuel for their own benefit without the applicant's knowledge. The respondent dug

in its heels resulting in the applicant filing this application. The respondent not only opposed the application but also filed a counter application, seeking the eviction of the applicant from the leased premises.

It is in my view necessary that I detail the alleged conduct of the applicant' s employees that led to this litigation as it is on the basis of such conduct that the respondent argues that the applicant is vicariously in breach of the contract between the parties. This is what the employees did.

On 13 February 2004, the three employees contacted Lard Oil and sourced 10 000 litres of diesel. This was on a Friday. Delivery of the fuel was made around midnight on the Friday. A deposit of $7 million dollars was paid to Lard Oil. This money was stolen from the applicant. It represented takings from the Service Station for the day. Records were subsequently falsified to cover up the theft. The employees were subsequently arrested and charged with the theft and other offences.

The above conduct by the applicant's employees, although not specifically admitted by the respondent, is not seriously disputed as the respondent maintains in its opposing affidavits that it has no knowledge of the actual role played by the applicant in procuring the foreign fuel. The respondent simply holds the applicant accountable for the conduct of his employees whether or not he knew what his employees were up to.

The doctrine of vicarious liability holds an employer liable for all the delicts of his employee when certain conditions are met. It is essentially a doctrine that was born out of the social policy of pillorying the employer with liability, as the ultimate beneficiary of the activities of the employee, to make good any loss occasioned by such employee. The doctrine also seeks to protect the injured party from going without redress in the case that the employee is without means. Culpa remains the basis of the liability as in a way, the employer is being held responsible for employing a "negligent" employee even in cases where no fault is attributable to the employer. The doctrine, based as it is primarily on the dual grounds of culpa and social policy, is peculiarly born and bred of the law of delict. Due to its origins and development, it is not surprising that the authorities on the doctrine are all in the law of delict.

I would venture to hold that the doctrine of vicarious liability has no equal application in the law of contract.

It is trite that a contract may be validly concluded or effectively terminated through the actions of another, (an agent), who may be the contracting party's employee. Thus, in my view, it stands unassailable that a failure by one party to comply with the terms of the agreement through the conduct of his employees may amount to breach of the contract in appropriate circumstances. It is my further view that the law applicable in such a situation to found liability is based on the principles of agency and not those on vicarious liability.

One such instance where the actions of the employee resulted in the employer being held in breach of its contract is illustrated by the facts in the case of *Hotels, Inns and Resorts SA v Underwriters at Lloyds* 1998 (4) SA 466 (CPD). In that matter, the Cape Provincial Division held that the act of an employee in deliberately setting fires in a building he was guarding led to the employer breaching his agreement with the plaintiff. In coming to this conclusion, the trial judge rejected as lacking merit the submission by the defence that the act of the employee was not binding on the employer as the act complained of was not within the course and scope of his employment as he was not employed to start fires. Instead, the court was of the view that:

> "FEND contracted to "minimise" the risk of loss or damage by fire. The *Conscise Oxford Dictionary* defines "minimise" to mean "reduce to… smallest possible amount or degree. If "minimise" is given its ordinary grammatical meaning, the parties could hardly have intended that FEND would be exonerated from liability if it failed to perform its contractual obligation at all or if it committed a breach going to the root of the contract, such as deliberately starting fires as G did in *casu*", per Hlope J (as he then was) at page 476 C.

Further, at D on the same page, the learned Judge had this to say:

> "With reference to FEND, both parties must have intended that FEND would provide security services and security personnel in order to minimise the risk of loss or damage by fire. It is most unlikely, in my view, that they contemplated that FEND would be excused from the consequences of a fundamental breach of contract, such as deliberately causing the fire."

It appears to me that the Learned Judge viewed the acts of G as the acts of FEND in discharging its contractual obligations to the plaintiff. The Learned Judge did not at any stage of his reasoning invoke the principles of vicarious liability. He appeared to be in no doubt that he was considering the actions of FEND itself and not that of G, the employee. I gain this impression from the following passage where the Learned Judge had this to say at 477 A:

> "If one has regard to the agreement as a whole, clearly FEND undertook to minimise the risk of loss or damage by fire. Surely, someone who deliberately starts fires can hardly be said to be minimising loss or damage by fire. Such a person deliberately causes loss or damage, contrary to the contractual obligation to minimise same. I agree with Mr MacWilliam that it is difficult to imagine a more flagrant breach of contract by FEND than the one that happened in this case."

It is my view that the learned judge was invoking the principles of agency although he did not specifically articulate this as his basis for holding that the deliberate acts of G were the acts of the company FEND. G was employed to carry out those functions that FEND had contracted to do. FEND was a company that could only render those services through its employees, G included. G was literally the arm through which FEND purported to carry out its obligations to the plaintiff. That arm of FEND deliberately set fires in violation of its agreement with the plaintiff. It is thus not difficult to envisage why the learned judge did not see it fit to articulate the law of agency as the basis of his decision in the circumstances of the matter although he appears to have clearly based his decision on such principles.

I have further considered whether there is any other legal principle in the law of landlord and tenant that imposes vicarious liability on tenants, similar to the one imposed on employers in the law of delict. I was not referred to any by counsel and my own searches have not yielded any. I am however aware that generally, a tenant is liable for the destruction of or damage to the leased premises caused by members of his household and those residing in the house with his consent. This duty, which is not based on vicarious liability, arises partly from the tenant's duty of care towards the landlord to return the property in the condition he received it and on his contractual obligation, usually expressed in the contract, to return the property in good condition. (See *Mavros v*

Venturas 1950 SR 180 and *Brand v Kotze* 1948 (3) SA 769 (C)). In the case *of Daly v Chisholm & Company Limited* 1916 CPD 562, JUTA JP held the leasee liable for damage that was negligently caused by his servant to the leased premise. In his reasoning, it was clear that the Learned Judge held the conduct of the servant as that of the leasee's agent and therefore binding on the principal.

In *casu,* the respondent has not alleged agency but sought to proceed in both defending itself in the main application and in presenting its counter-application, on the basis of vicarious liability. It is my view that it is incompetent for the respondent to so proceed. Even if the respondent had not specifically alleged and argued its case on the basis of agency, I would have considered the matter on such a basis had the respondent proved that the applicant's employees were duly mandated to act as they did or that on some other recognised basis, their acts were the acts of the applicant. This, the respondent has in my view, failed to do. The applicant's employees were not performing any of the applicant's obligations under his agreement with the respondent when they sourced fuel from Lard Oil. They did not have his express mandate to do so nor can such a mandate be implied from the circumstances of the matter.

On the basis of the foregoing, the main application must succeed and the counter-application must fail.

In the result, I make the following order:

1. The purported cancellation of the lease agreement between applicant and respondent is declared null and void.
2. The counter-application by the respondent is dismissed
3. The respondent pays the applicant's costs.

Wintertons, applicant's legal practitioners.

Honey & Blankernberg, respondent's legal practitioners.