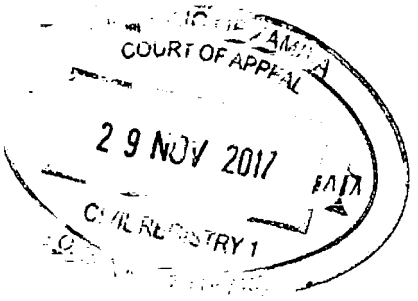
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 50/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

YUSUF VALLY **1ST APPELLANT**
ISMAIL GHEEWALA **2ND APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram: Chisanga, JP, Chashi and Mulongoti, JJA
On 1st August, 2017 and 29th November, 2017.

For the Appellant: *Mr. K. Wishimanga of A.M Wood & Company*
For the Respondent: *Major C. Hara – Deputy Chief State Advocate*

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court*

Cases referred to:

1. ***Lister v. Hesley Hall (2002) 1 AC 215***
2. ***Rose v. Plenty (1976) 1 WLR 141***
3. ***Bugge v. Brown (1919) 26 CLR 110***
4. ***London City Council v. Cattermoles (Garage) Limited (1953) 1 WLR 997***
5. ***Hilton v. Thomas Burton (Rhodes) Limited (1961) 1 ALL ER 74, 707***
6. ***GiogioFraschini and Motor Parts v. Attorney General (SCZ Judgment No. 12 of 1984)***

7. *Rees v. Thomas (1899) 1 QB 1015*
8. *Harrison v Michelin Tyre Co Ltd (1985)1 ALL ER 918*
9. *Dubai Aluminium Co Ltd v Salaam and Others (2002) UKHL 48 / (2003) 2 AC 366*
10. *Nkhata and Others v. Attorney General (1996) ZR 123 (SC)*
11. *William Masautso Zulu v. Avondale (1982) ZR 172 (SC)*
12. *Attorney General v. Marcus Achiume (1982) ZR 1 (SC)*
13. *Shell and B.P. Zambia Limited v. Conidaris and Others (1975) Z.R. 174 (S.C.)*

Legislation referred to:

1. *The Defence Act Cap 106 of the Laws of Zambia*

Works referred to:

1. *Clerk and Lindsell On Torts, 20th edition, 2010, Thomson Reuters, Sweet & Maxwell*
2. *Halsbury's Laws of England, 5th edition, Vol. 97, 2015, Lexis Nexis, Buterrworths.*

The appellants who were plaintiffs in the court below have appealed to this Court against the judgment of the High Court which decided that they failed to prove, on a balance of probabilities that the defendant who is respondent to this appeal, was vicariously liable for disrupting the plaintiffs development of their property situated in Chongwe near the Zambia Air Force (ZAF) base. The trial Judge found that the plaintiffs failed to prove that the ZAF officers were acting in the course of their employment when they stopped them from developing the said property.

At this stage, it is necessary to say a little about the background of the matter. The appellants purchased property known as Stand No. 1249, Chongwe at $300,000.00 from the Zambia Association of Evangelical Chaplains in 2008. The property was later registered in the appellants'

names. The appellants alleged that before they acquired the land, the Zambia Association of Evangelical Chaplains had obtained permission from the Department of Civil Aviation to develop the property since it is located within the safeguarded area of the Lusaka International Airport, very near the ZAF base.

However, on various occasions, some unknown ZAF officers wrongfully entered the property alleging that the property belonged to ZAF. The officers prevented the appellants from entering and developing the property claiming that the property was in a sensitive area and it belonged to ZAF. This prompted the appellants to commence an action in the High Court against the respondent claiming that the respondent was vicariously liable for the actions of the ZAF officers. The appellants sought to recover possession, and damages for trespass and intimidation.

At the trial, only the appellants gave oral evidence in line with their pleadings. After evaluating the evidence the trial Judge opined that there was a possibility that the individuals who approached the appellants and asked them to stop developing the property could be ZAF officers. However, the failure by the appellants to identify the officers that approached them and the capacity in which they visited them made it impossible to determine in what capacity the officers visited the property. The Judge took the view that the officers could have been acting in pursuance of their own private agenda, in which case the respondent could not be held vicariously liable. Consequently, the appellants' case was dismissed with costs to the respondent.

Dissatisfied with the judgment, the appellants raised three grounds of appeal as follows:

(i) The learned trial Judge misdirected himself in law and fact when he found that the appellants failed to establish whether or not the ZAF officers were acting within their course of duty when they disrupted the appellants development activities, despite having found that ZAF officers did disrupt the appellants;

(ii) The learned trial Judge misdirected himself in law and in fact when he found that the respondent's liability for the appellants' claims for damages for trespass and intimidation are dependent on the appellants proving that the ZAF officers were acting in the course of duty; and

(iii) The learned trial Judge misdirected himself in law and fact when he dismissed the appellants' entire claims.

The appellants' counsel also filed heads of argument. All the three grounds were argued together. It is contended that the trial Judge erred in law and fact by holding that the appellants failed to prove that the officers who accosted them were acting in the course of their duty. None of the officers that approached Moshin Musa (PW3), in the usual ZAF uniform, even claimed that the property belonged to them personally. They all said that the property was a sensitive area belonging to ZAF, which, according to counsel, presupposes that the officers were acting within the course of their duty. The situation would have been different if the officers were advancing their own interests over the property.

Reliance was placed on the case of **Lister v. Hesley Hall**[1], which held that:

> **"a wrongful act is deemed to be done by a servant in the course of his employment if it is either 1) a wrongful act authorised by the master 2) a**

wrongful act and unauthorised mode of doing some act authorised by the master."

Furthermore, that:

"a master is liable even for acts which he has not authorised, that they may rightly be regarded as modes, although improper modes of doing them."

The Court's attention was also drawn to the cases of **Rose v. Plenty**[2], **Bugge v. Brown**[3], **London County Council v. Cattermoles (Garage) Limited**[4] and **Hilton v. Thomas Burton (Rhodes) Limited**[5] wherein Lord Diplock J at page 707 stated:

"I think the true test can be expressed in these words: was the servant doing something that he was employed to do? If so, however, improper the manner in which he was doing it, whether negligent or fraudulent or contrary to express orders, the master is liable"

Thus, it is contended, an employer is vicariously liable for injuries to a third party caused by the employee's negligence, even though the employee engaged in an act which is expressly prohibited by the employer. It is submitted that the test to be applied is whether the employee was doing something that they were employed to do however, improper the manner of doing it, the employer is liable whether the employee was negligent or fraudulent or acting contrary to express orders.

Counsel argued that the ZAF officers in this case were all acting during the course of duty as they constantly referred to the fact that the property belonged to ZAF as it was in a sensitive area. These sentiments by the

junior officers were repeated by the Station Master. Thus, the only inference that can be drawn is that the ZAF officers were acting in the course of their duty.

Section 34 (5) and (6) of the Defence Act was cited, which according to counsel clearly provides that reference to a person on duty, includes officers ordered to patrol for the purpose of protecting property, among other things. It is contended that the ZAF officers that approached the appellants prevented them from carrying on the works on the property. The officers represented themselves as ZAF officers and were dressed in ZAF uniform which points to the fact that they were acting within the course of duty as persons ordered to patrol ZAF property. This is more so that the property is near the ZAF base. Counsel relied on Clerk and Lindsell 'On Torts' at paragraph 6-47 and argued that where an employee is exercising a discretion bestowed upon him, he may be held to be acting within the course of his duty.

Learned counsel cited the case of **Giogio Fraschini and Motor Parts v. Attorney General**[6], in which the Supreme Court followed the English case of Staton v National Coal Boards per Finnemore J, that:

> **"the employer is only absolved form liability if the course of employment had ceased. The chain must be broken for the employer not to be liable."**

Accordingly, that the chain linking ZAF to the conduct of the officers was not broken. During cross examination of the appellant's witnesses, the questions posed were related to whether the persons who approached the

appellants were ZAF officers and not whether they were acting in the course of their duty. The ZAF officers were acting in the interest of the employer and thus within the scope of their duty. Counsel placed reliance on the case of **Rees v. Thomas,**[7] in aid of this argument.

In conclusion, counsel contends that the trial Judge misconstrued the facts before him and erred in arriving at the decision he made. We are urged to reverse the findings of the trial Judge and to award the appellants damages for trespass and intimidation.

The respondent's counsel filed the respondent's heads of argument in response.

In arguing ground one, Counsel equally relied on the case of **Hilton v. Thomas Burton (Rhodes) Limited**[5], that the test for vicarious liability is whether the servant was doing something they were employed to do, if so, however improper the manner of doing it, whether negligent or fraudulent or contrary to express orders, the master is liable. It is submitted that the fact that the officers were dressed in ZAF uniforms and stated that the property is a sensitive area does not establish that the officers were actually in the course of their duty. The appellants failed to adduce any evidence to identify the officers in question and establish that those officers were actually tasked to safeguard the property in question.

It is the further submission of counsel that the appellants failed to prove whether the officers were acting within the course of employment when

the tort occurred. Counsel also referred to **Salmond and Heuston 'On The Law of Torts'** at page 443 that an employer will usually be liable for wrongful acts which are actually authorised by him as well as acts which consist of wrongful ways of doing something authorised even if the acts themselves are expressly forbidden. Since the appellants have failed to show that the ZAF officers were authorised to deprive them entry and develop the property or that they were authorised to deprive the appellants but they did it wrongly, the respondent cannot be held liable.

Counsel submits that section 34 (5) and (6) of the Defence Act Cap 106 is of no relevance to the present case and has been misapplied by the appellant.

Regarding grounds two and three, it is argued that the trial Judge rightly pointed out that the appellants' claims for damages for trespass and intimidation are dependent on the appellants proving that ZAF officers were acting in the course of duty. As a result, the failure to prove vicarious liability automatically defeated these claims.

At the hearing of the appeal, Mr. Wishimanga, who appeared for the appellants relied on the heads of argument and list of authorities. Major Hara, who appeared for the respondent also relied on the heads of argument in response.

In response to some questions posed by the Court, Major Hara stated that it was not established that the persons found on the property were ZAF

employees. He however, conceded that they wore ZAF uniforms. According to him, the sentiments by those officers that the property is a sensitive area should be regarded as mere opinions of strangers as the appellants ought to have ascertained the identity of those persons in order to establish whether they were acting in the course of the respondent's employment.

We have considered the arguments and submissions by counsel including the Judgment of the High Court. We shall deal with all the three grounds of appeal simultaneously as they are interlinked.

The cardinal issue that this appeal raises is whether the ZAF officers who stopped and prevented the appellants from entering the property and developing it were acting in the course of employment in order for the respondent to be held vicariously liable.

We perused the cases cited by both counsel. It is clear that it is not easy to determine whether a wrongful act of an employee is within the course of employment. The learned authors of Halsbury's Laws of England, 5th edition, at paragraph 780 state that there is no definitive test of when a tort is committed by the employee tortfeasor in the course of his employment. Courts have employed various concepts to express the applicable test. The editors of Clerk and Lindsell 'On Torts' at paragraph 6-29, state that it is a mixed question of law and fact. Generally, that the test is whether the tort is so closely connected to the employee's employment, that is, what the employee is authorised or expected to do.

In other words, there must be a close link between the conduct of the employee and the employer's business.

Thus, there are differences in approaches within the case law as to the applicable test and factors to apply to determine what is within the course and scope of employment. In the case of **Harrison v. Michelin Tyre Co Ltd**[8], the plaintiff was injured at work while standing on a duckboard of his machine talking to a fellow employee. Another employee while pushing a truck in front of Harrison decided, as a joke, to turn the truck two inches outside the chalked lines of the passageway and push the edge of it under Harrison's duckboard. The duckboard tipped up and Harrison fell suffering injury. The Queen's Bench said that the test for determining vicarious liability was whether an employee's act was incidental to their employment, even though it may have been unauthorised or prohibited or alternatively so far removed from their employment as to be plainly alien to it. The Court found that the employer was vicariously liable and that the employee was acting in the course of their employment.

The speech of Lord Steyn in **Lister v. Hesley Hall**[1], as developed by Lord Nicholls in **Dubai Aluminium Co Ltd v. Salaam and Others**[9] is instructive in determining whether acts of an employee were within the course of employment. It enunciated that:

> **"the wrongful conduct must be so closely connected with acts the ... employee was authorised to do that, for the purpose of the liability of the ... employer to third parties, the wrongful conduct may fairly and properly be regarded as done ... while acting in the ordinary course of ... the employee's employment."**

While the exact nature and scope of the mainstream close connection test that determines for which of an employee's acts, the employer is liable for, seems uncertain, it has been useful in determining numerous cases of vicarious liability. In the **Lister v. Hesley Hall**[1] case, it was held that, rather than the employment merely providing an opportunity to commit the tort, the connection between the employment and the torts was very strong as the tort committed was inextricably interwoven with the duties the employee was employed to do.

The appellants contend that the trial Judge misconstrued the facts in arriving at the decision that they had failed to prove their case. In essence they are asking us to interfere with the findings of the trial Court. There are a plethora of authorities as to when an appellate Court can interfere with the findings of fact made by a trial Court. In **Nkhata and others v. Attorney General**[10], the Supreme Court stated as follows:

> **"A trial Judge sitting alone without a jury can only be reversed on questions of fact if (i) the Judge erred in accepting evidence, or (ii) the Judge erred in assessing the evidence taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the Judge did not take proper advantage of having seen and heard the witnesses, (iv) external evidence demonstrated that the Judge erred in assessing the manner and demeanor of witnesses."**

This principle was followed in **William Masautso Zulu v. Avondale Housing Project Ltd**[11]and **Attorney General v. Marcus Achiume**[12]. The evidence before the trial Judge was that Ishmael Guham Mohamed Gheewala (PW1), Ishmael Vally (PW2) and Moshin Musa (PW3) all testified

that they were stopped from doing any work on the property by ZAF officers. It was a common thread in their testimonies that the ZAF officers who approached them were in uniform. On one occasion, the ZAF officers went to the property in a ZAF motor vehicle. These officers explained to the appellants that the property was a sensitive property and belonged to ZAF. The appellants, in our view, had reason to believe them because the property is located in the safeguarded area of the Lusaka International Airport located very close to the ZAF base.

The witnesses further testified, in particular PW1, that they asked the officer who first approached them if he was from ZAF and he affirmed. The respondent did not bother to attend trial to counter the appellants' testimonies. As submitted by Mr. Wishimanga, the officers constantly stated that the property belonged to ZAF and it was in a sensitive area. None of the officers claimed that the property belonged to them personally. PW3 testified that initially a junior officer in a sky blue uniform approached him. Then later a senior officer accosted him. The senior officer had badges and came in a ZAF vehicle and the door was opened for him. He too asked PW3 to leave the area as it was sensitive.

We therefore, find merit in the appellants' argument that the trial Judge misapprehended the facts. He erred in assessing the evidence by taking into account some matter he should have ignored and failing to take into account something which he should have when he held that ***"the plaintiffs' failure to identify the concerned officers makes it impossible to determine the circumstances and the capacity in which the men visited their property".*** In addition that the plaintiffs did

not indicate that after the meeting at ZAF, there was any admission by ZAF that the offending officers visited the property in question in the course of their duty. Following the case of **Nkhata and others v Attorney General**[10], we are inclined to interfere with the findings of fact that the plaintiffs failed to prove that the ZAF officers were acting in the course of duty. We find, on the totality of the evidence, that the ZAF officers in this case were acting in the course of duty. The act of protecting the respondent's property is not so far removed from their employment. We are fortified by the cases cited herein such as **Lister v. Hesley Hall**[1] **and Harrison v. Michelin Tyre Co Ltd**[8].

We are of the considered view therefore that the appellants proved their case on a balance of probabilities. From the facts, a reasonable inference could be made that the officers were acting in the course of duty. They told the appellants that the land was a sensitive area being near the ZAF base, which is a fact and they constantly visited the site in uniform and a ZAF vehicle. The appellants even went a step further and reported to the Ministry of Defence as testified by PW1. They met with the ZAF Legal Department to resolve the issue and their efforts yielded nothing.

The argument by Major Hara that the sentiments that the property was in a sensitive area and belonged to ZAF were mere opinions of strangers is untenable. Although the individual officers are unidentified, it is clear that these officers were in ZAF uniforms and a ZAF vehicle and consistently approached the appellants in an area very near the ZAF base to warn and prevent them from entering or developing the property. They were clearly acting in the preservation of their employer's interest or property. As the

learned authors of **Halsbury's Laws of England** have put it, at paragraph 780:

> **"liability may arise where the act is one which, if lawful, would have fallen within the scope of the employee's employment as being in the discharge of his duties or the preservation of the employer's interests or property, or otherwise incidental to the purposes of his employment."**

Given the circumstances of this case, we find that the wrongful entry by the ZAF officers onto the appellants' property and the act of preventing the appellants from developing, were acts which may fairly be regarded as being done in the ordinary course of their employment. The respondent is therefore, vicariously liable for the acts of its officers.

Coming to the appellants claim for an order for possession of the property, upon perusal of the record we note that the property has since been re-entered. The trial Judge observed that the appellants did not adduce any evidence to the effect that they were out of possession of the property. The trial Judge was therefore on firm ground when he held as he did. We cannot fault him.

Regarding the claim for damages for trespass and intimidation, the trial Judge declined to grant the reliefs because they were dependent on the appellants proving that the respondent was vicariously liable for the conduct of the ZAF officers. Having found that the respondent is

vicariously liable, we are inclined to interfere with this portion of the Judgment as well.

According to **Clerk and Lindsell 'On Torts'** at paragraph 19-01, trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. This definition is the approach which the Supreme Court adopted regarding trespass to land in the case of **Shell and B.P. Zambia Limited v. Conidaris and others**[13]. Further at paragraph 19-06, the authors state that it is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary.

The tort of intimidation has been well illustrated by the authors of **Clerk and Lindsell** at paragraph 24-57. Thus,

> **"A commits a tort if he delivers a threat to B that he will commit an act, or use means, unlawful against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either of himself or to C".**

The threat must put pressure and coerce another person to do or refrain from doing something they are entitled to do and it must be capable of being effective.

In the present case, the land was in the possession of the appellants who were the registered proprietors as found by the trial Judge. The ZAF officers entered the appellants' land to warn them that the property was a

sensitive area, belonging to ZAF. The respondent throughout the proceedings did not dispute that the ZAF officers entered the appellants' land. The respondent hoped to escape liability by denying that the ZAF officers were not acting in the course of employment but possibly advancing their personal interest.

Liability, in the strict sense, for trespass to land and intimidation, is not denied. The ZAF officers entered the appellants' property and intimidated them. The appellants stopped developing the property and stayed away as a result of the threats by the ZAF officers. Clearly, the officers also trespassed on the property.

Having found earlier in the Judgment that the ZAF officers were acting in the course of duty, the respondent is therefore, liable for the torts of trespass and intimidation committed against the appellants.

We accordingly award the appellants damages for trespass and intimidation, to be assessed by the Deputy Registrar.

In the net result, the appeal is successful. Costs to the appellants both in this Court and below, to be taxed in default of agreement.

Delivered at Lusaka the 29th day of November, 2017

F.M CHISANGA
JUDGE PRESIDENT

J. CHASHI
COURT OF APPEAL JUDGE

J.Z MULONGOTI
COURT OF APPEAL JUDGE