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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2012/HP/1383

BETWEEN:

JOSEPH CHIPETA

PLAINTIFF

AND

DIVINE CARGO SERVICES LIMITED

DEFENDANT

Before the Hon. Mrs. Justice A.M. Banda-Bobo on the 2015.

For the Plaintiff:

For the Defendant:

RULING

Cases Referred to:

1. Myers V. N.J Sherrick (1974) IWLR 31
2. Marsh V Moores (1949) ZKB 208

Legislation and Other works referred to

Rules of the Supreme Court, 1999 Edition, White Book

This is a Ruling on an application for leave to issue Third Party Notice pursuant to Order 16(1)(c) of the Rules of the Supreme Court (RSC) by the Defendant herein for Edward Simwinga and David Mwinga to be joined to these proceedings as 2nd and 3rd Defendants. The gist of the application is that the Defendant has been sued by the Plaintiff claiming the sum of ZMK79,63,199 arising from the loss of a

motor vehicle which was allegedly customs cleared by the Defendant, plus interest and costs. The Defendant contends that the damage to the motor vehicle, the subject of the substantive claim was actually caused by one Edward Simwinga who was driving the motor vehicle at the time of the accident and who had never been an employee of the Defendant company. Consequently, the Defendant could not be vicariously liable for his acts. Further, that its employee Collins Simukoko connived with a David Simwinga to have the vehicle cleared as a private job and not that the company was involved, even though there is a document showing that clearance was done through the company. In support of its application, the Defendant provided "MTI", "MT2" as evidence to that effect.

David Mwinga opposed the application on grounds that he was only engaged by the Plaintiff to help him find a clearing agent, which he did by forwarding the documents of the motor vehicle to one Collins Simukoko, the Defendant's Branch Manager for purposes of the Defendant to clear the motor vehicle. He contended that it was the same Collins Simukoko who assigned an employee of the Defendant, Edward Simwinga to finalise the clearance of the motor vehicle after which he was supposed to hand it over to someone to deliver to the Plaintiff. It was Edward Simwinga who had an accident with the vehicle. In view of the above, he contended that he could not be joined as a third party to the proceedings as he did not play any role in the transaction.

Edward Simwinga opposed the application based on the grounds that he was an employee of the Defendant company from about 2008 to September, 2010, and that he had a uniform for use and a copy of an identity card issued by the Defendant.

Further, and as proof of employment, he tendered a register at exhibit ES2 showing that employees used to sign in and out of the company. He admitted driving the motor vehicle on the fateful day, but that he was driving the said motor vehicle under instruction of the Defendant by virtue of his employment. As a consequence, he could not be joined to the proceedings and asked that the application be dismissed.

The Plaintiff opposed the application basically on the same grounds as Edward Simwinga, to the effect that the said Edward Simwinga who admits to having been involved in the accident while driving the car was an employee of the Defendant at the material time. With regard to David Mwinga, it was contended that his role had been to find a clearing agent which he did through one called Collins Simukoko and his role ended at the point. It was contended that the intended third parties cannot be joined by law as they are distanced from the claim and the Defendant cannot be identified with them as one was an employee and the other did not drive the motor vehicle.

In reply, the Defendant stated that it only had two customs clearing officers with the necessary qualifications registered with Z.R.A at Nakonde Border at the time of the accident and the proposed 2nd Defendant was not one of them. Exhibit "BKK 1" & "BKK2" were filed in support for the period 2010 to 2013.

It was contended that even assuming that the 2nd proposed Defendant was an employee of the Defendant as alleged, from 2008 to 2010, the accident giving rise to this action occurred in 2012, when he was not an employee. Further, that the identity card exhibited as "ES1" was not issued by the Defendant as the same was

not signed by the authorising officer and the authorising officer's signature does not appear on the identity card.

The Defendant produced "BKK3" and "BKK4", a list of its employees registered with NAPSA for the period, and a copy of an ID duly issued by itself. On exhibit "ES2" the Defendant contends that the same was for the period while the 2nd Defendant was engaged as an independent agent. He also denied that there were employees by the name of Chuma Mhango and Derrick Simpamba as alleged by the 2nd intended Defendant.

With regard to David Mwiinga's affidavit in opposition, the Defendant replied that they never entered into an agreement as is customary with the proposed 3rd Defendant for purposes of clearing the motor vehicle. This is also confirmed, so they replied, by the fact that the communication of instructions and transaction was done on the private e-mail of the Defendant's employee and the proposed 3rd Defendant and that there is no such instruction on the official e-mail addresses used by the Defendant.

Further, that there was a private arrangement between the Defendant's employee Collins Simukoko, and the proposed 3rd Defendant to undertake the clearing of the car, albeit using the Defendant's platform without the Defendant's knowledge of the transaction. The Defendant contended that its receipt books and the contracts for the provision of services to clients for the period in question do not have any records for providing any service to the proposed 3rd Defendant in dealing and delivery of the car. Produced were exhibits "BKK6", "BKK7" and "BKK8" in support thereof, being copies of contracts signed by the Defendant in the period,

invoices issued and receipt of payments showing that the Defendant was never engaged by the proposed 3rd Defendant in the dealing and delivery of the car.

The Court was asked to grant the application and join the 3rd Defendant as he was the person contracted by the Plaintiff to deal with the motor vehicle and engaged the Defendant's employee in his personal capacity to assist with clearing of the said motor vehicle up until it got involved in the accident.

When the matter came up for hearing of the application, Defendant's Counsel relied on the affidavit in support and in reply, as the record will show.

Counsel for the Plaintiff also relied on the affidavits filed in opposition. To augment, he said a 3rd party notice cannot issue against an employee of a company that has been sued; the argument being that Edward Simwinga was at the material time an employee of the Defendant Company. Counsel argued that even David Simwinga had nothing to do with this matter and therefore joining both parties to the proceedings would be unfair on their part as they have nothing to do with the claim, and will only be subjected to unnecessary costs.

In reply, applicants Counsel repeated that Edward Simwiinga was not an employee of the Defendant, as confirmed by his own affidavit in paragraph 6 where he states that he was employed by the Defendant in the period 2008 to September, 2010 and that the Statement of Claim shows that the accident happened after the said Edward Simwinga had ceased, if at all he was employed by the Defendant, being their employee. He also pointed to the contents of exhibit "BKK1" and "BKK" on the names of its clearing officers at ZRA for the period 2010-2013 and that he does not appear thereon.

There was further reference to "BKK3" showing an identity card duly signed by the authorizing officer of the Defendant and not having merely a computer generated name on it. He basically went over the same issues he dealt with in the affidavit in reply, which I have already taken on board herewith.

I have carefully considered the affidavit evidence, exhibits and oral submissions herein. This application is premised on Order 16 rule 1, (c) of the Rules of the Supreme Court, of the White Book, 1999 Edition which reads:

"where in any action a Defendant who has given notice of intention to defend

(a)

(b)

(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the Plaintiff and the Defendant, but also as between either or both of them and a person not already a party to the action, the Defendant may issue a notice (in this order referred to as a third party notice), containing a statement of the nature of the claim made against him....."

A third party claim is meant to determine who should at the end of it all, bear the loss alleged to have been suffered by the Plaintiff. The Case of Myers V. N.J Sherrick (1974) IWL R 31¹ (as appear at p.276 RSC 1999 Edition) refers.

In cases of employment contracts, the employer would normally be liable for the wrongs of the employee. An employer can be vicariously liable for the acts or omissions of its employee.

However, this is only possible if it can be shown that the actions or omissions took place in the cause of their employment. Consequently, the key question will be whether the employee was acting in a personal capacity or in the course of employment for an employee's act to be considered to be within the course of employment. It must either be authorized or be so connected with an authorized act that it can be considered a mode, through an improper mode of performing it. See Marsh V Moores (1949) ZKB 208², per Judge Lynskey.

In the matter in casu, the Defendant has denied that Edward Simwinga, who caused the accident that led to this suit was its employee, such that it cannot in those circumstances be liable for his acts. In his affidavit in opposition, to the application for leave to issue third party notice, Edward Simwinga claims that he was an employee of the Defendant from 2008 to September, 2010 and that he had an identity card issued to him by the Defendant as well as a pair of uniforms. He also submitted in evidence, being a log-in sheet, showing the time he reported for work and when he left.

From the evidence on record and which has not been disputed, the accident herein happened on 8th September, 2012. According to Edward Simwinga, at paragraph 6 of his affidavit in opposition, he was an employee of the Defendant between 2008 and September, 2010. This means, and as the Defendant rightly points out he was not an employee of the Defendant as at September, 2012 when the accident occurred. I am further fortified in my belief that he was not an employee by exhibit "ES2" which shows that the loggings were for the month of May, 2010. If indeed he had been an employee in 2012 he would have submitted the logging sheet for that particular year and not that for two years prior to the accident.

Further, in his paragraph 8, he has submitted names of two people who he claims were his workmates. Out of these, only one name appears on exhibit "ES2", that of Chuma.

However, it must be remembered that this is a 2010 schedule. On the other hand, the Defendant has produced its list of employees as at the time of the accident and certainly none of the two names appear on that list. Exhibits "BKK1" to "BKK3" herein I think are self explanatory and are supportive of the Defendants assertion that the intended 3rd party was not at the time of the accident, its employee.

I have carefully compared exhibit "ES1" and "BKK4", and note that where the authorized signature is supposed to be on "ES1" there is only a name of a person and not the signature as required and as appear on "BKK4". The intended third party has not explained why there is a name instead of a signature. I want to agree with the Defendant when he said in the affidavit in reply that the identity card could not have been issued by the authorizing officer as it does not bear a signature as is the case with the exhibit they sent.

The Defendant contends that the 2nd intended Defendant (Edward Simwinga) was only engaged as an independent agent when there arose work to be done at the Z.R.A yard at the border post, and that because the Authority does not allow persons without proper identification to go into its yard, that is how he acquired the uniform in issue. I want to believe this version, and in any case the fact of having a uniform, without any thing further is not proof of employment. The intended 2nd Defendant did not lay any evidence, even in form of a pay slip to show that indeed he was an employee of the Defendant at the time of the accident and was therefore

acting in the course of his employment and at the behest or under instruction of the Defendant for the Defendant not to issue a third party notice against him.

I find on the basis of the evidence before me that the proposed 2nd Defendant Edward Simwiinga was not at the time of the accident an employee of the Defendant. Consequently, he ought to be joined to these proceedings as 2nd Defendant.

The proposed 3rd Defendant David Mwinga, claims that acting on instructions from the Plaintiff, he found the Defendant as clearing agents for him and sent the documents relating to the car to one Collins Simukoko, who agreed to clear the motor vehicle and this was done and that besides this, he never played any other role and could thus not be joined. He was joined in this position by Joseph Chipeta in his affidavit in opposition to the application for leave as appear at paragraph 9, 10 and 12.

The Plaintiff and even the proposed 3rd Defendant did not place any evidence before court that there indeed was formal communication to the Defendant that he wanted them to act as clearing and forwarding agents. There is no proof that any payment was made for this service.

The Defendant has rightly shown all receipts for the period in issue including contracts entered into with various clients for the purpose of clearing the vehicles or other goods. There is no aota of evidence that indeed this was a contract for the clearing of this car by the Defendant herein. The exhibit by the Defendant, "MT2" which is from David Mwinga, merely states that "Boi (boy) find attached documents for the mark x. Best regards. David Mwinga."

This can in no way in my view be considered to be a formal forwarding of documents for formal work to be undertaken by a company. In any case, he was merely forwarding the documents and not asking for anything to be done.

Further and as rightly stated, this document was sent to Mr. Collins Simukeko in his personal capacity and that is why he was even addressed as “boi”, a term that means “friend”. I cannot on the basis of this e-mail opine that there was official communication from the proposed 3rd Defendant to the Defendant. The Plaintiff contends that the proposed 3rd Defendant cannot be joined as he is distanced from the claim because he did not drive the motor vehicle. However, he is the one who claims that he contracted the Defendant to clear the vehicle so he cannot be distanced from the claim. He has to come and prove that indeed he contracted the Defendant to clear this vehicle.

Under paragraph 13 of the affidavit in opposition, the Plaintiff states that whether the Defendant was aware of the transaction or not, the act done by its employee for and on behalf of the Defendant in the course of his duties binds the Defendant and it cannot distance itself from that. While this is true, I believe this is a matter for proof at trial stage, as at this stage what needs to be determined is whether the two intended third parties ought to be joined to the action.

It is my considered opinion and on the basis of the evidence before me, that the two proposed Defendants ought to be joined to these proceedings. I, therefore grant the applicant leave to join Edward Simwinga and David Mwinga as 2nd and 3rd Defendants to this case.

Costs follow the cause to be taxed in default of agreement.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS.....DAY OF.....2015.



**MRS JUSTICE A.M. BANDA-BOBO
JUDGE**