INDUSTRIAL GASES LIMITED v WARAF TRANSPORT LIMITED AND MUSSAH MOGEEHAID (1997) S.J. 6 (S.C.)

SUPREME COURT
M. M. S. W. NGULUBE, C. J., MUZYAMBA AND LEWANIKA, JJ.S.
4TH DECEMBER, 1996 AND 4TH MARCH, 1997
(S.C.Z. JUDGMENT NO.2 OF 1997)
APPEAL NO. 77 OF 1996

Flynote
Damages - Motor vehicle accident - Liability.
Damages - Quantum.
Liability - Vicarious - Seeking to avoid on grounds of fraud of driver.

Headnote
Damages caused to respondent's truck, trailer and contents. Appellant sought to avoid liability on grounds that its driver, who was negligent in relation to the accident, falsely pretended to possess a valid driver's licence, and such vitiated his employment and he should be regarded as not having been an employee. Resulting from a mistake, the High Court awarded damages for loss of total consignment of freight destroyed in the collision, whereas a reduced quantity only was lost. The value thereof was disputed on grounds that the freight was a donation and the respondents had lost nothing. Insufficient evidence was produced as to the cost of repair and replacement, but the court estimated and awarded damages.

Held:
(i) As long as the wrong is committed by the employee in the course of his employment, the general rule is that the employer will be vicariously liable
(ii) An appellant court will not interfere with the lower court's award of damages unless the award is so high as to be utterly unreasonable or is upon a wrong is principle or a manifest error

Cases referred to:
1. Rose v Plenty: [1976] 1 W.L.R. 141
2. Llyod v Grace Smith and Company [1912] A.C. 716
3. Mhango v Ngulube [1983] Z.R. 61

For the Appellant: Mr. S. Malama of Jaques and Partners
For the Respondent: Mr. I. Chali of Chali Chama and Company

Judgment

NGULUBE, C.J.: delivered judgment of the court.

This is an appeal on the question of liability as well as on the amounts awarded as damages. There was a collision between a truck and trailer belonging to the appellants. The accident was found to have been caused wholly by the negligent driving of the appellants' driver. There is no dispute and no ground of appeal concerning this finding. In the accident, damage was caused to the truck and trailer of the second respondent as well as to the maize being carried.

The learned trial judge awarded K493,200.00 for the loss of 248 bags of maize, K120,000.00

towing charges; K4 Million for loss of use of the truck and trailer at K1 Million per month over a four month period; K950,000.00 for repairs to the trailer, and K20 Million as the value of the truck (the mechanical horse in fact) which had been damaged beyond economic repair.

The first ground of appeal on the question of liability was an unusual one. It had transpired in the court below that the appellants' own driver did not have a valid driving licence, a fact discovered only after the accident when it became necessary to show it to their insurance company who, there upon, refused to entertain the claim. The appellants sought to disclaim any vicarious liability by pleading and arguing that, as the driver had obtained employment by falsely pretending that he had a licence, the deception practised by the driver vitiated his employment and he should be regarded as never having been an employer of the appellants. The learned trial judge would have none of that and the ground of appeal before us is that, the appellants' driver having obtained his employment by deceit or fraud he could not have been an employee of her appellant and upon discovery of the deception, any purported employment of that driver by the appellant was void ab initio. It was argued that the court below was therefore in error in holding that the appellant was vicariously liable. Mr. Malama argued that because the appellant's driver had no driving licence and had breached a condition precedent to his employment, he should be regarded as having never been employed; the respondents should look to the driver for the damages or, at worst, the loss should fall and be borne by the respondents even though they are the innocent parties. On behalf of the respondents, Mr. Chali, argued that it is up to every lawyer to ascertain the background of the employees; that it would be grossly unjust to visit the consequences of the accident in this case on the respondent; and that, since the driver was in fact the appellant's employee and he was acting in the course of his employment, this court should not go further than this.

We have considered the arguments and submissions and have little difficulty in rejecting this ground of appeal. whatever may be said about the consequences of the driver not having had a valid licence as far as his employment or his relationship with his employer was concerned, it would be an unforgivable fiction to hold that this driver did not commit this tort in the course of his employment and while going about his employer's business. the liability of the employer has long been accepted as being based on a requirement of public policy that he be responsible for the wrongs done by his employees in the course of their employment: see, for example, *Rose v Plenty* (1) Mr. Chali was, therefore, on firm ground when he submitted to the effect that it was not necessary for us to go beyond the basic fact that the driver was in the course of his employment.. It is not necessary to consider if the appellants can be regarded as being just as innocent as the respondents, but if it was, there is ample authority that on principle the employer would be the most suitable one to bear the loss arising from exposing innocent third parties to contract with their wrong-doing employee. The principle is well illustrated by the fraudulent employee cases, such as *Lloyd v Grace, Smith and Company* (2) As ong as the wrong is committed by the employee in the course of his employment, the general rule is that the employer will be vicariously liable…

The ground of appeal against liability because the appellant's own driver had a fake driving licence or none is clearly untenable.

The second ground of appeal alleged an error of fact in the finding that 248 bags of maize were destroyed. Mr.Chali quite properly conceded that the court below had made a mistake. It is on record that there was an amendment to the statement of claim and it was in evidence that only 12 bags of maize out of the larger total consignment had been destroyed in the accident. The 12 bags were worth K238644.40 which we substitute in place of the K493,200.00 which was awarded. We are alive to Mr. Malama's submission that the maize had no economic value because it was a donation and that nothing should be awarded.However, as Mr. Chali countered, even a donation has value and in this case there was evidence that the owners of the maize had effected a deduction from the payments due in respect of the lost maize. We

uphold this ground of appeal only to the extent of reducing the award for the lost maize from K49333,200.00 to K23,864.40.

Grounds three, four and five were argued together and complained about the lack of proper or adequate evidence to establish the amount of loss and expense awarded.. the awards were K950,000.00 for repairs to the trailer, K120,000.00 for towing charges and K4 Million for loss of profit over a four month period. In the pleadings, the claimant alleged that the repair works cost K3,065,000.00 and exhibited two quotations for K2.6 Million and for K3,065,000.00. However, in the evidence, the second respondent disclosed that he had carried out his own repairs and used second hand spares. The learned trial judge found the claim for over K3 Million to have been exaggerated and awarded K950,000. the towing charges were pleaded as having cost K120,000.00. The towing charges were pleaded as having cost K120,000.00. However, no evidence was led but the learned trial judge awarded the amount. In respect of loss of profits, the respondent pleaded that he had lost K2 Million per month. In the evidence, the second respondent claimed to have been making a profit of K3 Million per month. The learned trial judge observed that no documentary evidence was tendered and no details of his operational expenses were given. In the circumstances, only K1 Million per month was awarded. Mr. Malama argued – on the basis of our decision in *Mhango v Ngulube* (3) – that the level of proof required for the claimant to succeed in a claim for special damages is evidence which brings certainty in order for the court to arrive at a fair assessment. He submitted that the court should only consider doing its best on any unsatisfactory evidence tendered if such evidence was unchallenged. Where it is challenged, the argument and submission was that a court applying the rule of doing its best should only award nominal damages. Thus, Mr. Malama proposed K10,000.00 in place of K950,000.00 for repairs to the trailer where quotations using new spare parts were obtained and little else offered by way of evidence as to how much it cost the second respondent to carry out the repairs himself old parts. He proposed K1,000.00 for towing charges instead of K120,000.00 which was accepted without any supporting evidence, and he proposed loss of profits of K10,000 per month as a nominal award because the second respondent did not bring any evidence – apart from his bold assertion which was rejected – to support his loss of profits.

Mr. Chali's response to all these arguments and submissions was that the learned trial judge was fully alive to the unsatisfactory evidence as well as the challenge from the opponent. On such evidence, the judge decided to do the best he could in the circumstances and made the awards complained of. Mr. Chaili argued that injustice would result if the courts insisted on documentary evidence in every case and that, in any case, this court should not interfere unless the award is grossly exaggerated or if a wrong principle was used.

We have considered the arguments. We are aware that in *Mhango* (3) we propounded the general rule regarding the sufficiency of proof to support an award in respect of special losses. At the same time, we accepted that in an effort to do justice, trial judges have been driven into making intelligent and inspired guesses on very meagre evidence. We also still upheld the principles of not interfering unless the result was so high as to be utterly unreasonable. This is on the basis that the trial judge had a first hand feel of the case and was better placed that an appellant court which only has the record to go by to make an assessment. Accordingly, what a trial judge has done will not be interfered with lightly; unless upon the grounds of a wrong principle or a manifest error. In this regard, there can be no question of simply substituting what this court feels it would have awarded had it tried the case nor this court itself simply doing its best in place of the trial court's effort.

In the premises, we do not consider the learned trial judge's estimate of K950,000.00 for repairs to the trailer (which might have cost a lot of more at a garage) as unrealistic or unreasonable in an effort by the trial court to do the best it could for a litigant who had actually carried out some repairs. the truck and trailer must have been towed and we do not consider that K120,000.00 for towing a large vehicle from the Kitwe/Chingola road to Ndola

was a gross exaggeration. With regard to the loss of profits, again there was so high as to be unreasonable. We are unable to interfere with the fore going awards.

The sixth ground of appeal alleged error in the assessment of the value of the second respondent's mechanical horse. In the pleadings, the respondent claimed U.S dollars 73,600 as the replacement value of his truck to replace the one that was damaged beyond repair. In the evidence, it transpired that these dollars were the price of a new truck while the respondent's truck was at least eighteen years old. The second respondent placed its value at K3 Million which was an amount suggested by Incar Zambia Limited, the dealers in the type of truck. The appellants placed the value at K15 Million which is what Mr Malama urged this court to adopt in place of the K20 million awarded by the learned trial judge. The learned trial judge observed that the evidence in respect of the value of the truck was deficient and he was not prepared to accept a value of K30 Million. However, taking inflation into account, the learned judge assessed the value at K20, Million. He then awarded interest at 30% from the date of the writ no doubt to the date of the judgment below on the total of all the awards. the submission by Mr. Malama was that only K15 Million should have been awarded for the loss of the truck. Mr Chali submitted that the assessment was not wholly erroneous or unreasonable so as to entitle this court to interfere. We noted that, whether by design or fortuitously, the K20 Million represented a compromise between the appellant's value of K15 Million and the respondent's value of K30 Million. As it turned out, therefore, the award of K20 Million was quite Solomonic and there is no occasion for interfering.

Finally, there was a submission that it was wrong to take account of "galloping inflation' and then to go on to award 30% interest on top of it all. Interest is, of course, in the discretion of the court. We are alive (from information obtainable from the Central Bank and which this court did obtain in the recent past in order to equip itself with knowledge of the trends in this area) that the period in question was characterised by very high interest rates. A figure of 30% was not so out of place that we should interfere.

In sum, the appeal succeeds on the ground concerning the lost maize. It is unsuccessful on the other grounds. In the circumstances, it is only fair that there be no order as to costs.

Appeal allowed on one ground
