IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 115/2004
HOLDEN AT LUSAKA

B E T W E E N:

PETER MAYEMBE	1ST APPELLANT
MTV INVESTMENTS LIMITED	2ND APPELLANT

AND

DAVIS CHISENGA (as infant, by Gilbert Chisenga his father and next friend	1st RESPONDENT
ELIZABETH PHIRI	2ND RESPONDENT

CORAM: LEWANIKA, DCJ, CHITENGI, MUSHABATI, JJS
On 22nd November, 2005 and 26th September, 2006

For the Appellant: F. TEMBO of Frank Tembo & Partners
For the Respondent: No appearance

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the court.

AUTHORITIES REFERRED TO:

1. MARSH VS MOORES & ANOTHER, 1949, 2AER 27

At the hearing of this appeal there was no appearance by Counsel for the Respondent and as no reason had been given to us for his absence, we proceeded to hear the appeal in his absence.

This appeal is against the decision of a Judge of the High Court awarding damages for personal injuries suffered as a result of the negligent driving of a mini bus by the agent or servant of the 1st and 2nd Appellants.

The evidence on record, which is not in dispute, is that the 2nd Defendant in the court below was employed as a driver by the 1st and 2nd Appellants. On 28th May 2000 the 2nd Defendant drove a mini bus bearing registration No. AAR 1043 owned by the 1st and 2nd Appellants from Chawama Township to Mutendere Township in Lusaka. Initially he went to the market to have the door of the mini bus repaired. After the door was repaired he drove to a house within Mutendere to visit his sister in law. At this house he found his brother in law, the 1st Defendant in the court below, who asked him for the keys to the mini bus as he wanted to drive it. It was the evidence of the 2nd Defendant that he refused to give the keys to the 1st Defendant but somehow or other the 1st Defendant got the keys from the 2nd Defendant and drove away the mini bus and collided with the 1st and 2nd Respondent causing serious injuries to them. The evidence on record was that the 1st Defendant did not have a driving licence.

The only issue before the learned trial Judge was whether or not the Appellants were vicariously liable for the actions of the 1st Defendant. The

learned trial Judge found that they were liable hence the appeal now before us.

Counsel for the Appellants has filed two grounds of appeal namely:-

1. That the learned trial Judge misdirected himself in fact and law by finding vicarious liability in respect of the 1st Appellant without establishing whether there was a contract of employment between the tortfeaser and the 1st Appellant;

2. That the learned trial Judge misdirected himself in law and fact when he held that vicarious liability could be established even when the person driving was not authorized to drive and drove without the consent of the employee who was authorized to drive the employer's vehicle.

Arguing the first ground of appeal Counsel submitted that the 2nd Defendant was employed by Golden Breweries Limited of which the 1st Appellant is a company Chairman. That Golden Breweries Limited is a distinct and separate person from the 1st Appellant and that it follows therefore that vicarious liability totally fails as the 2nd Defendant was employed by a different person.

The short answer to this submission is that the 1st Appellant in paragraph 1 of its defence admitted that he employed the 2nd Defendant at the material time and that he was the owner of the motor vehicle that was involved in the collision. It is trite law that a party is bound by his pleadings and cannot resile from them. This ground of appeal is without merit and cannot succeed.

In arguing the second ground of appeal Counsel for the Appellants submitted that the case of **MARSH VS MOORES & ANOTHER** (1) on which the learned trial Judge relied is distinguishable from this case in that in that case the driver allowed his cousin to take the wheel under his directions. Whereas in the present case the learned trial Judge acknowledged that the driver of the motor vehicle was unauthorized by the substantive driver and referred us to page 7 lines 13 to 16 of the judgment. That under the circumstances the substantive driver of the mini bus cannot be said to have ***"retained the control and management of the car at the material time"*** and that therefore there can be no question of vicarious liability. We have perused the judgment of the learned trial Judge in that portion of the judgment referred to us by Counsel for Appellants the learned trial Judge was merely reciting the evidence of DW 2 and did not make any finding on it. On the other hand at page 9 of the judgment lines 1 to 4 the learned trial Judge found that, ***that principle could quite properly apply to the instant situation to the extent that 2nd Defendant employed by the 3rd and 4th Defendants allowed the 1st Defendant to drive the vehicle in unauthorized manner which has resulted in the accident."*** This was a finding of fact made by the learned trial Judge which he was entitled to

make based on the evidence adduced before him. The second ground of appeal is equally without merit and cannot succeed as well.

In the circumstances we find no merit in the appeal which we accordingly dismiss with costs. The costs are to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

P. Chitengi
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE