IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) 6/08

In the matter between:

MOKRAFS (PTY) LTD **APPELLANT**

And

LETSOSA HANYANE **RESPONDENT**

CORAM: **RAMODIBEDI, P**
HOWIE, AJA
TEELE, AJA

Heard : 8 October 2008
Delivered : 17 October 2008

JUDGMENT

SUMMARY

Damages claim – negligence – vicarious liability – quantum.

First defendant's truck colliding with business premises leased by plaintiff – whether second defendant (first defendant's employee) in allowing third defendant (a stranger to first defendant) to drive amounted to negligence on the part of second defendant - whether vicarious liability proved.

Evidence – admission by first defendant's manageress –whether binding on first defendant.
Held – Second defendant negligent but vicarious liability not proved, nor any binding admission.

HOWIE AJA

[1] This is an appeal against an award of damages by Monapathi J in the High Court. For convenience I shall refer to the parties as they were at the trial.

[2] The first defendant's truck collided with a building in Mokhotlong Township which the plaintiff leased and in which he conducted the business of a butchery and café. As a result the plaintiff sustained damages. He instituted a claim to recover his damages, citing the third defendant as the driver of the truck, the second defendant as the first defendant's employee who negligently permitted the third defendant to drive, and first defendant as the party vicariously liable for such negligence. The first defendant company is the sole appellant. It carries on business at Mokhotlong as Lesotho Cash and Carry and employed the second defendant as a driver.

[3] The salient allegation in the declaration is this:

> '4.
>
> On or about the 20th November 1994 and at Mokhotlong Township 2nd Defendant negligently and in breach of the duty of care that he owes to 1st Defendant under the employment

contract, permitted 3rd Defendant to drive the said 1st defendant's vehicle knowing that he had no authority to do so.'

[4] The plea by the first and second defendants contains the following paragraph in answer to the plaintiff's paragraph 4:

'4.

4.1 Save to admit that on or about 20 November 1994 and at Mokhotlong Township, Third Defendant in fact drove the vehicle . . . Defendants deny each and every averment contained in this paragraph.

4.2 Alternatively, and in the event of the above Honourable Court finding that Second Defendant permitted Third Defendant to drive the said vehicle First Defendant avers as follows:

4.2.1 Second Defendant had no authority to do so;

4.2.2 Second Defendant, in doing so, conducted a frolic of his own;

4.2.3 Second Defendant, in doing so, was not acting in the course and scope of his employment with First Defendant, alternatively was not

> acting under the control of First Defendant, alternatively was not engaged upon First Defendant's business, alternatively was not doing First Defendant's work or pursuing First Defendant's aims'.

[5] The allegations in paragraph 4.2 of the plea seem to me to invite the question whether it was proper for the same legal representatives to appear for both the first and second defendants. The potential for a conflict of interest appears self – evident. Because the question did not arise at any stage of the litigation it requires no further attention in this judgment.

[6] Another preliminary observation is this. The declaration alleges a negligent breach of the second defendant's employment contract. That, of course, is a basis for possible liability of the second defendant to the first. It is not a basis for the first defendant's being liable to the plaintiff. The first and second defendants did not except to the claim but conceivably an appropriate amendment of the declaration would have followed.

[7] At the trial the plaintiff testified and called Police Officer Ramoholi, who was stationed at Mokhotlong. The third defendant took no part in the proceedings. The first and second defendants closed their case without leading evidence.

[8] The plaintiff testified that he was at the scene of the collision when Ramoholi arrived with the second and third defendants. While the policeman took measurements the second defendant went to call the person Ramoholi referred to as the first defendant's manager. (The evidence shows clearly enough that the manager was a woman and I shall hereafter refer to 'the manageress'). The manageress arrived. The plaintiff's evidence then reads:

> 'Then when he came he asked me to release the truck because it was still on duty. And we agreed that I could assess the damage and send it to her office'.

Later in his evidence this passage appears:

> 'PC: And you said you agreed with the Manager to asses the damage?
>
> PW: To release the truck, and to assess the damage and sent it to her officer for payment.
>
> PC: The Manager of Mokrafs was agreeing to pay for the damage?

PW1: Yes.

PC: Did they pay?

Pw1: They did not pay.

PC: What happened?

PW1: At the later stage they said they had referred the matter to their Insurance and the Insurance was not willing to pay so they couldn't pay.

PC: Yes.

PW1: And because I had already withdrawn the case from the police I decided to sue them civilly.

PC: Why did you withdraw the case from the police?

PW1: Because they were agreeing to pay'.

Under cross-examination the plaintiff said:

'I was asking the policeman to confiscate the vehicle until things have been settled. And in the presence of the policeman we agreed that she will pay.'

[9] In Ramoholi's evidence -in- chief he said that the second and third defendants were at the scene. The report to him was that the second defendant had lent the truck to the third defendant. The witness observed that the third defendant's right arm had been amputated above the elbow. When the first defendant's manageress arrived the plaintiff suggested that the lorry be impounded at the police station. His evidence then reads:

'PC: And what was the response of the manager of Mokgrafs?

PW2: He said to the plaintiff that he should make an estimation of the damages . . .

PC: And then?

PW2: And that after making those estimations he should submit then to Mokrafs . . .

PC: What for?

PW2: So that they could pay him . . And that he should not impound his truck and should release …

. . .

PC: And when she spoke . . . according to your observation in what capacity was she saying all that?

PW2: She was saying that in her capacity as a Manager and she was the person who was responsible.

. . .

PC: In your presence Mokrafs through [the manageress] did it address itself to the conduct of [the second and third defendants] as far as driving this vehicle was concerned?

PW2: She said about the matter concerning the driving of the truck that was between (the second and third defendants) that would be dealt at the business place.

PC: Whose business place?

PW2: That of Mokrafs'.

Ramoholi concluded by saying that following on the plaintiff and the manageress' agreement he allowed the truck to be removed.

[10] Under cross-examination the following passage appears in Ramoholi's evidence:

> 'DC :I am putting it to you that it is not correct that the second defendant had allowed the third defendant to drive this vehicle?
>
> PW2 :I disagree because this was said in his presence and he never denied that'.

(On a close study of the evidence, this answer indicates that the report to him was made by the third defendant in the second defendant's presence and the latter did not deny it). Later in cross-examination it was put to Ramoholi that the manageress had not undertaken to pay for the damage, she said she would refer the damage estimate to her employer's insurer. He said insurance was never mentioned.

[11] The foregoing resumé of the evidence shows that a substantial amount of attention was given at the trial to the alleged admission by the manageress

that the first defendant would pay the plaintiff's damages. The plaintiff's counsel sought to rely on the evidence in that regard as well as on the evidence that the second respondent tacitly admitted having allowed third defendant to drive.

[12] The third defendant's having been the driver at the time of the collision was admitted on the pleadings. Nothing in the evidence suggests that he stole the truck. He can only have got possession from the second defendant. Accordingly the alleged admission by the latter rings entirely true. He gave no evidence in response.

[13] To allow a man with one functioning arm to drive the truck was, absent any other considerations, negligence on the second defendant's part. Again, his absence from the witness box serves to strengthen the plaintiff's case on that point.

[14] The crucial issue, therefore, is whether the second defendant's negligence, assuming it was causative, saddles the first defendant with liability for such damages as the plaintiff suffered.

[15] The denial in the plea of facts which, if proved, would tend to establish vicarious liability attracted no onus to the defendants. It remained for the plaintiff to prove that element of his case. Nor did it assist the plaintiff that no defendant testified. Scraps of evidence appear on record to the effect, for example, that the collision occurred before lunchtime on a Saturday and that the vehicle was being used in the first defendant's service ('on duty') that day. However, it was the second defendant who was employed to drive it and nothing in the evidence lays the slightest foundation for the inference that permitting the third defendant to drive was within the course and scope of the second defendant's work as the first defendant's employee. That the first defendant would have approved of the third defendant being allowed to drive the truck is wholly improbable. Not surprisingly the plaintiff himself alleges in the claim that the second defendant had no authority to allow it.

[16] Faced with all these difficulties the plaintiff was driven to fall back on the argument that the first defendant's manageress in effect admitted her employer's liability.

[17] That argument has its own crop of difficulties. The contention amounts to saying that even if vicarious liability was not shown by way of evidence as to the second defendant's duties and as to how they could or could not be carried out and how it came about that he let the third defendant drive, the first defendant's liability was in any event admitted by its manageress. That alternative line of attack should have been pleaded. Had it been, it would have been for the plaintiff to allege and prove the manageress' authority to make such an admission, either generally or in the particular circumstances. No such allegation was pleaded and no witness was subpoenaed to prove the scope of her powers and duties.

[18] Assuming that the manageress did have authority to make admissions relating to her duties, that is a far cry from making admissions with serious financial implications without sufficient knowledge of the relevant facts. The evidence of Ramoholi was that she indicated that the matter of who was driving the truck would be sorted out at the office and that her prime concern was the release of the truck. To ensure that result, she asked that the damage estimate be sent to her. There seems to be a considerable subjective overlay in the evidence of both the plaintiff and Ramoholi as to what she meant. Both appeared zealous to give her words the interpretation most favourable

to the plaintiff's case. It is inherently unlikely that she meant more than that the estimate would be considered in due course. Why would she have undertaken in advance, to pay an amount that was merely an estimate and without having seen or studied it?

[19] Ramoholi denied that insurance was mentioned at the scene but the plaintiff says it was raised at a stage when, subsequently, the first defendant declined to pay. If the defendant indeed had insurance cover it is even more unlikely that an outright undertaking to pay was given.

[20] What to my mind counts even more strongly against the plantiff is that if, as Ramoholi said, the manageress had still to sort out the question how the third defendant came to be driving, she obviously had no such knowledge as enabled her to give an informed undertaking. If the third defendant was driving without the second defendant's permission there was no basis at all for conceding liability. And even if the second defendant had permitted him to drive she could not yet have known the circumstances in which that occurred.

[21] Finally, it seems to me that the real reason why the manageress agreed at all to say that the plaintiff should submit his estimate of the damage was that the truck was on the point of being impounded and she wanted to prevent that happening so that it could continue in service that day. That is the real thrust of what the evidence reveals.

[22] The plaintiff accordingly failed to prove that the first defendant was vicariously liable for the second defendant's negligence. Therefore it is unnecessary to express any view as to the other elements of the claim. The appeal must accordingly succeed.

[23] It remains to say that the plaintiff's heads of argument were filed extremely late. An application was made for condonation but it was not supported by an affidavit. We know that the pressures of practice sometimes induce errors but this was an elementary one which one does not expect from experienced practitioners. We permitted the heads to be used and the litigant did not sustain disadvantage as regards the presentation of his case. The costs of the application are to be paid by the plaintiff.

[24] The Court's order is as follows:

1. The appeal succeeds, with costs.

2. The order of the High Court is set aside and substituted for it is the following –

   'The claim is dismissed, with costs'.

3. The respondent is ordered to pay the costs of the application for condonation of the late filing of his heads of argument.

_____
C. T. HOWIE
ACTING JUSTICE OF APPEAL

I agree: _____
M. M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree: _____
M. E. TEELE
ACTING JUSTICE OF APPEAL

For the Appellant : Adv. S. Malebanye
For the Respondent : Adv. J. T. Molefi