## G.D.C HAULIERS (Z) LIMITED AND TRANS-CARRIERS LIMITED

SUPREME COURT
NGULUBE, CJ, SAKALA AG. DCJ AND CHIBESAKUNDA, JS
6TH DECEMBER, 2000 AND 28TH MARCH, 2001.
SCZ JUDGMENT No. 7 OF 2001

### Flynote

Tort – Vicarious liability

### Headnote

In the court, the respondent was the plaintiff; the appellant was the first defendant while one Lewis Kayoyo was the second defendant. The defendant was found to be vicariously liable for the indisputable negligence of the second defendant who caused a road traffic accident on the Ndola-Kitwe dual carriageway. The second defendant was driving the first defendant's truck, a mechanical horse registered AAL 7257, when he swerved into the plaintiff's Mercedes truck and trailor traveling in the same direction in a botched attempt at overtaking. The first defendant sought to avoid all liability by pleading that the second defendant who was employed as a clerk was not authorized to drive the truck and was neither engaged on the business of the employer nor in the course of his employment when he got involved in the accident that night.

(i) It is not true that only a person specifically employed as a driver can attach vicarious liability from a driving incident in his course of employment or while engaged on the employer's business.

***Cases referred to:-***

1. Hilton –v- Thomas Burton (Rhodes) Limited and Another (1961) 1 ALL ER 74.

For the Appellant: J.P. Sangwa, of Simeza Sangwa and Company.

For the Respondent: C.M. Mwanakatwe, of JMM Consultants.

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### Judgment

**Ngulube, C.J., delivered the judgment of the Court.**

At the trial, the respondent was the plaintiff; the appellant was the first defendant while one Lewis Kayoyo was the second defendant. The first defendant was found to be vicariously liable for the indisputable negligence of the second defendant who caused a road traffic accident on 21st December, 1996, along the Ndola – Kitwe dual carriageway. The second defendant was driving the first defendant's truck, a mechanical horse registered number AAL 7257, when he swerved into the plaintiff's Mercedes truck and trailer traveling in the same direction in a botched attempt at overtaking. The first defendant sought to avoid all liability by pleading that the second defendant who was employed as a Clerk was not authorized to drive the truck and was neither engaged on the business of the employer nor in the course of his employment when he got involved in the accident that night.

After hearing the evidence on all sides, including that given by the second defendant, the learned trial Judge accepted that the Clerk – who had a variety of clerical, monitoring and

financial functions – had also obtained a driving licence for such trucks as he had alleged and was occasionally allowed to ferry fellow workers between Ndola and Kitwe. It was alleged by the second defendant that on the particular night, he had instructions to wait in Ndola for a fellow employee who was PW3 and who was to arrive from Kapiri Mposhi and to ferry him to Kitwe. PW3 supported the second defendant and the learned trial Judge believed them. She found that even though the second defendant was designated as a Clerk, he was a "general player" who handled petty cash; was involved in issuing diesel, tracking and dispatching trucks, liasing with Zambia Consolidated Copper Mines on copper haulage and "even ferrying workers to and from Kitwe."

The finding that the second defendant had a valid driving licence as he alleged gave rise to the first ground of appeal. It was contended that the failure to produce the licence at the trial – although no one seems to have asked for it – meant that it had not been established and there was no proof that the second defendant had a driving licence. The learned trial Judge heard evidence from the second defendant who was supported by PWs 2 and 3. He had previously received a written warning for driving a truck without a licence and without permission and in this he was supported by a document which was produced to the Court. He said it was his boss DW1 who advised him to get a licence; that he trained on a company truck and was given the money for his driving test by the same DW1. He said he would occasionally sit in for a sick driver and would also ferry the workers in a truck when the van was not available. In this, he was supported by PWs 2 and 3. They were his passengers on the ill – fated trip. We do not see that the learned trial Judge can be faulted for accepting such viva voce evidence. Indeed, there was a distinct ring of truth to the evidence of the second defendant and the since-dismissed fellow workers who testified for the plaintiff. There is no basis for upsetting the finding of fact which was based on credibility and which was complained of in the first ground of appeal.

The second ground of appeal attacked the finding that the second defendant was some sort of general player. The use of the term "general player" provoked spirited submissions which went on to attack the decision to disbelieve the first defendant's witnesses in preference for the evidence of the second defendant and PWs 2 and 3. Findings of credibility are not the witnesses at first hand. This we have borne in mind when considering the arguments under the second ground of appeal. It was argued that with the exception of ferrying workers to and from work, the rest of the assignments the second defendant was carrying out fitted the duties of a Clerk. It was said that because the documents before Court showed that the second defendant was a Clerk, oral evidence from him and from Pws 2 and 3 that he also used to drive should have been rejected. The learned trial Judge had in fact accepted that he was designated a Clerk; but there was also credible evidence that he performed the variety of functions previously mentioned, hence the description "general player". This was a description applied by the learned Judge after noting the varied tasks he performed; it was not a description which was used in any technical sense nor as a term of art. Having accepted the evidence as a matter of credibility, the learned trial Judge cannot be faulted, as the second ground sought to do. The Judge had before the depot manager's evidence denying he had ever authorized the second defendant to drive the trucks and evidence to the contrary from the second defendant and the two witnesses whose testimony supported the second defendant. It is not correct that she had wrongly resolved who to believe; certainly the argument that the depot manager who was said to have authorized the driving had left the company a year previously was incorrect. As Counsel for the plaintiff rightly pointed out, the evidence on record was that the depot manager left only five days prior to the accident. Furthermore, the issue before Court was not the construction of the second defendant's letter of appointment but the tasks he actually performed.

The third ground of appeal alleged a misdirection in the finding of vicarious liability. The submissions advanced a two – pronged attack, one was on the findings of fact that the second defendant was actually engaged on his employer's business at the time and second was on the law relating to what amounts to the course of employment. Several authorities were cited, including some of our own and some from England For instance it was argued that regard should have been had to what the Clerk was employed to do and whether what he did could be regarded as falling within the work or tasks normally done by the class of workers to which he belonged. The case of HILTON -v- THOMAS BURTON (RHODES) LIMITED AND ANOTHER (1) was relied upon for this submission. We accept the principles discussed in the previous cases and that some of the tests propounded do assist to resolve whether or not an employee was in the course of his employment when he was involved in the act or conduct which is called in question. However, when there is credible evidence that an employee was actually authorised to perform tasks – such as driving fellow workers - which would ordinarily not be associated with his designation or job title, such evidence cannot be ignored and it will support a finding of vicarious liability if the worker was engaged on his employer's business.

Here, the Court below accepted the evidence of the witnesses and the question of the label attaching to the position held by the second defendant becomes wholly immaterial. It is not true only a person specifically employed as a driver can attach vicarious liability from a driving incident in the course of employment or while engaged on the employer's business. We are prepared to take judicial notice that there are many people in this country who drive what are popularly called personal-to-holder and/or duty vehicles whos specific occupation is nottha of a driver but who can attach vicarious liability if the incident arises in the course of employment or while engaged on the employer's business. This is akin to the liability of the owner of a car who has lent it to a friend or relative for use on an errand which is to the benefit of the owner: See, for example, Clerk and Lindsell on Torts, 16th Edition, paragraphs 3-49 to 3-50. The third ground cannot succeed. Ultimately, on the issue whether the first defendant was properly found to have been vicariously liable, the whole question turned on the findings of fact made and on whether it could legitimately be said that the learned trial judge did not take proper advantage of having seen and heard the witnesses when she preferred the evidence of the second defendant and the other workers. The truth is that there are no reasons to overturn the Court below.

The fourth ground of appeal attacked the award of the sum of K45 million odd as the cost of repairs. The criticism was that this was just a quotation; but as counsel for the plaintiff countered, this was a quotation from the authorised dealers showing what it will cost to repair the truck and trailer in order to put the plaintiff in the position they would have been in had the wrong not been committed.

The whole of the appeal is unsuccessful; it is dismissed with costs to be taxed if not agreed.

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