

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2022/01191

In the matter between:

DLAMINI DAVID MASOKELA

PLAINTIFF

and

HELMSMAN GROUP HOLDING PTY (LTD)

FIRST DEFENDANT

ANDREAS HIDISHANGE

SECOND DEFENDANT

Neutral citation: *Masokela v Helmsman Group Holding Pty (Ltd)* (HC-MD-CIV-ACT-DEL-2022/01191) [2023] NAHCMD 399 (13 July 2023)

Coram: USIKU J

Heard: 13 March 2023

Delivered: 13 July 2023

Flynote: Delict – Vicarious liability – Motor vehicle collision – Liability of employer for delictual acts of employee – Two stage common law test focusing on subjective question as to the state of mind of employee and objective question as to whether there is sufficient link between conduct of employee and employer’s enterprise – Court finding that the employer is not liable for the delictual acts of employee.

Summary: The plaintiff sues the first and second defendants jointly and severally for damages arising from a motor vehicle collision between plaintiff’s motor vehicle

and a motor vehicle owned by the first defendant. The first defendant denies liability on the basis that the driver of its motor vehicle, namely the second defendant, was not acting within the course and scope of his employment at the time of the collision. The court found that second defendant was not acting within the course and scope of his employment and therefore, the first defendant is not liable for the delictual acts of the second defendant.

ORDER

1. The plaintiff's claim against the first defendant is dismissed.
2. The plaintiff is ordered to pay the costs of suit of the first defendant.
3. Judgment is granted in favour of the plaintiff against the second defendant in the following terms:
 - (a) payment in the amount of N\$53 775;
 - (b) interest on the aforesaid amount at the rate of 20% per annum calculated from the date of judgment to the date of final payment;
 - (c) costs of suit.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

USIKU J:

Introduction

[1] The plaintiff sues the first and second defendants, jointly and severally, for damages he sustained as a result of a motor vehicle collision between his motor vehicle and a motor vehicle owned by the first defendant.

Background

[2] The first defendant is a company engaged in the hospitality industry. The second defendant is an employee of the first defendant.

[3] It is common cause that on 31 January 2022, at around 16h07, on the Hosea Kutako Drive, Windhoek-North, in Windhoek, a collision occurred between the plaintiff's motor vehicle, then driven by the plaintiff and the first defendant's motor vehicle, then driven by the second defendant.

[4] The plaintiff alleges that the said collision was solely caused by the negligence of the second defendant. The plaintiff further alleges that at the time of the collision the second defendant was acting within the course and scope of his employment with the first defendant and was engaged in carrying out the function for which he was employed or was furthering first defendant's business, with the consent and to the benefit of the first defendant and was performing an activity reasonably incidental thereto.

[5] The first defendant admits that the second defendant was, and is still, employed by it. However, the first defendant denies that the second defendant was acting within the course and scope of this employment or was engaged or was furthering its business or had its consent or was performing an activity reasonably incidental thereto.

[6] The first defendant alleges that the second defendant stole its motor vehicle and was, at the time of the collision, acting for his own interest and purposes. The first defendant therefore, denies liability.

[7] In its replication, the plaintiff alleges that the second defendant customarily drives the first defendant's motor vehicle when a need arises and that on that particular day the first defendant was hosting guests. There was shortage of wines and that the second defendant drove the defendant's motor vehicle for the purposes of purchasing wines for the guests as there was no designated driver.

[8] The second defendant did not enter appearance to defend and therefore, did not take part in the proceedings.

[9] At trial, the plaintiff gave evidence and called two witnesses, namely Addmore Nyandoro ('Mr Nyandoro') and expert witness Andries Tseitseimou ('Mr Tseitseimou').

[10] The first defendant called one witness, namely Christiaan Shivolo ('Mr Shivolo').

The plaintiff's case

[11] The evidence adduced by the plaintiff is, to a large extent, uncontested. The following summary is drawn from his testimony.

[12] The collision took place on Hosea Kutako Drive, at or near the intersection of Hosea Kutako Drive and Harvey Street.

[13] Hosea Kutako Drive has three lanes, thus, three motor vehicles are able to travel on the lanes at the same time, next to each other facing the same direction.

[14] At the time of the collision the plaintiff was driving in the middle lane towards the southerly direction. As he was gradually reducing speed approaching the traffic lights at the intersection, he observed in his rear-view mirror the second defendant's vehicle on the right lane moving in the same direction as he was.

[15] Before the plaintiff entered into the intersection, he observed the second defendant's vehicle changing its lane, towards the middle lane and then suddenly collided with the plaintiff's vehicle on the left rear-side. The plaintiff's vehicle spun and faced in the direction he was driving from, as a consequence of the collision.

[16] The plaintiff alighted from his vehicle and observed that the second defendant's vehicle had also collided with another vehicle which was travelling on the left lane.

[17] The plaintiff further observed that his vehicle was badly damaged on the left rear-side as a result of the collision.

[18] He approached the second defendant and asked him why he was in a rush. The second defendant replied that he was rushing to work.

[19] The police officers arrived later, and the plaintiff heard the second defendant telling them that he was not the owner of the vehicle he was driving and that the vehicle belonged to the first defendant. The second defendant further told the officers that he is an employee of the first defendant and that he does not hold a driver's licence.

[20] Later, the plaintiff, the second defendant and the driver of the other vehicle which was also damaged by the second defendant, went to the police station and completed accident report forms. Thereafter, the three parties exchanged contact details and agreed to meet at the second defendant's workplace the next day, to discuss the collision with the first defendant.

[21] After two unsuccessful attempts to meet with the first defendant, the plaintiff and the owner of the other vehicle, managed to meet with a representative of the first defendant, about a week after the collision. However, the representative of the first defendant denied liability for the motor vehicle collision on account that the second defendant allegedly stole the first defendant's vehicle.

[22] The plaintiff contends that the first defendant should be held liable for the collision because:

- (a) the second defendant is an employee of the first defendant;
- (b) the second defendant holds a position as Acting General Manager and had free access to the keys of the motor vehicle;
- (c) the second defendant was acting within the course and scope of his employment and was engaged in carrying out a function for which he was employed and was furthering the business of the first defendant; and that,
- (d) there is no evidence that the case of theft of motor vehicle was reported to the police before the collision occurred. The theft case was reported on 1 February 2022, a day after the collision. The defence that the second defendant stole the vehicle was simply made for the sole purpose of avoiding vicarious liability.

[23] The testimony of Mr Nyandoro, to a large extent, corroborates that of the plaintiff. Mr Nyandoro is the owner and was driving the other motor vehicle which was also hit by the second defendant's vehicle.

[24] After the collision, Mr Nyandoro approached the second defendant and asked him why he was driving in the manner he was. According to him, the second defendant responded that he was in a rush and was driving back to work.

[25] Mr Nyandoro confirmed the plaintiff's testimony that the two of them later met with the representative of the first defendant, who denied liability on account that the second defendant stole the motor vehicle.

[26] The testimony of Mr Tseitseimou is to the effect that he is an estimator and assessor and has experience in assessing damages to motor vehicles, to express an expert opinion on the costs of repair of such damages and the reasonable market values of the vehicles prior to and after the collision.

[27] On 19 July 2022, Mr Tseitseimou inspected the plaintiff's motor vehicle at the premises of the plaintiff, after it was involved in the accident. Having assessed the damage to the motor vehicle, he is of the opinion that it was damaged beyond economical repair.

[28] According to him, the pre-collision value of the motor vehicle is N\$71 700. The salvage value is N\$17 925. Therefore, the reasonable pre-collision value, less the salvage value amounts to N\$53 775. The actual damages suffered by the plaintiff is N\$53 775.

The defendant's case

[29] For the first defendant, Mr Shivolo testified that he was a Director in the first defendant. He confirms that the second defendant is employed by the first defendant and that the vehicle he was driving at the time of the collision is owned by the first defendant. The second defendant does not hold a driver's licence.

[30] The second defendant holds a position as an Acting General Manager and is part of the management staff of the first defendant. As Acting General Manager, the second defendant is responsible for, among other things, taking control of food and beverages, house-keeping, cleaning and making-up of beds.

[31] The first defendant has an established practice that:

- (a) no employee is allowed to drive any company vehicle without express permission or authorization;
- (b) no unlicensed employee is permitted to drive the company's vehicle;
- (c) only the designated drivers for the company are exempted from seeking authorization; and that,
- (d) certain company vehicles (luxury vehicles such as the one which was involved in the collision) may be driven by three members of the management (namely C Shivolo, B Lee and S Wu).

[32] Mr Shivolo avers that the second defendant acted in defiance of the express instruction of the first defendant and outside the course and scope of his duties. He discounted the version put forth by the plaintiff that the second defendant drove the motor vehicle for the purposes of buying wines for the guest of the first defendant. He contends there were no wines discovered in the vehicle at the time of the collision.

[33] Mr Shivolo also testified that the first defendant only discovered that the second defendant had stolen the motor vehicle after it was involved in the collision. Subsequently, the first defendant laid a criminal case for theft, alternatively, for use of a motor vehicle without the consent of the first defendant, against the second defendant under Criminal Case No. CR 32/02/2022.

[34] Mr Shivolo, therefore, submits that the first defendant cannot be held liable for a deliberate and dishonest use of its motor vehicle by the second defendant outside the course and scope of his employment and for his own interest.

Analysis

[35] It is common cause that the plaintiff seeks to hold the first defendant vicariously liable for the negligence of the second defendant. The general rule is that, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of his employment or while the employee was engaged in any activity reasonably incidental to it.

[36] The essential elements to establish vicarious liability are:

- (a) an employer-employee relationship;
- (b) the employee having committed a delict; and,
- (c) the delict was committed while the employee was acting within the course and scope of his employment.¹

[37] There are two tests applicable to the determination of vicarious liability. The first test applies when an employee commits the delict while going about the employer's business ('standard test'). The second test finds application when the delict is committed outside the course and scope of the employee's employment ('the deviation cases').²

[38] Insofar as 'deviation cases' are concerned, in determining whether an employer is vicariously liable for damages arising from a delictual act, two questions are to be asked, namely:

- (a) firstly, whether the wrongful acts (delict) were done solely for the purposes of the employee, ('the subjective test'). Even if this question is answered in the affirmative, the employer may still be vicariously liable if the second question is answered in the affirmative; and,
- (b) secondly, whether, even though the acts have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and business of the employer ('the objective test').³

¹ *Kamduze v Shilimela Advanced Security Service CC* HC-MD-CIV-ACT-DEL-2020/03938 [2021] NAHCMD 90 (2 March 2021) para 23.

² *F v Minister of Safety and Security* 2012 (1) SA 536 at 547 G-H.

³ *K v Minister of Safety and Security* 2005 (6) SA 419 at 436 C-E.

[39] In the present matter, the first issue for determination is whether the collision was solely caused by the negligence of the second defendant.

[40] On the aspect of negligence, the evidence led by the plaintiff to the effect that that the collision was solely caused by the negligence of the second defendant, has not been contested. In addition, the explanation given by the second defendant, as appears on the Road Accident Form, is to the effect that the collision arose as a result of him driving the motor vehicle with the sun-roof open, then it started raining and raindrops were falling through the open sun-roof. As he tried to close the sun-roof, he lost control of the vehicle, resulting in the collision. From the aforesaid version by the second defendant, it is also clear that the collision was solely caused by the negligent conduct on the part of the second defendant.

[41] The second issue for determination is whether the first defendant is to be held vicariously liable for the wrongful conduct of the second defendant.

[42] The first defendant adduced evidence to rebut the plaintiff's assertion that the second defendant was acting within the course and scope of his employment. It also presented evidence that it has registered a criminal case for theft, alternatively, for use of motor vehicle without owner's consent, against the second defendant. There is no evidence to the effect that the alleged theft did not take place, or that the aforesaid criminal case was not laid in good faith.

[43] On the evidence on record, I am of the view that there is sufficient evidence showing that the second defendant drove the motor vehicle without the consent of the first defendant. According to the evidence, the first defendant has employed three designated drivers. The driving of the motor vehicles was not part of the second defendant's job description. I am therefore, of the opinion that, on the evidence presented, the second defendant was not acting within the course and scope of his employment, nor was he furthering the interest of the first defendant, at the time of the collision.

[44] The next issue for consideration is whether, even though the second defendant was not acting within the course and scope of his employment, the first

defendant should still be held vicariously liable, in that there is a connection between the conduct complained of and the business of first defendant.

[45] The second defendant did not enter appearance to defend, and neither of the parties called him as a witness. There is, thus, no evidence as to his subjective state of mind. The plaintiff avers that the second defendant was acting in furtherance of the interest of the business of the first defendant. The first defendant avers that the second defendant stole the motor vehicle and was thus, furthering his personal interest.

[46] Having weighed the evidence on record, I am of the opinion that the version of the first defendant is to be preferred to that of the plaintiff. The probabilities point in the direction that the second defendant drove the motor vehicle without the authority of the first defendant. In the first instance the second defendant does not hold a driver's licence. Secondly, he was not employed as a driver. Thirdly, there is no evidence that there were wines in the motor vehicle, which he allegedly said he went to purchase. I am therefore, of the opinion that the second defendant was most probably engaged in the frolic of his own at the time of the collision, and I do so find.

[47] Having reached the foregoing conclusion, I am of the view that the first defendant cannot, in those circumstances, be held vicariously liable for the negligence of the second defendant.

[48] In regard to the quantum of damages, the evidence presented by Mr Tseitseimou has not been challenged and I accept it as establishing the quantum of the damages suffered by the plaintiff, in the amount of N\$53 775.

[49] I should add that Mr Tseitseimou also testified to the effect that, in the event of the plaintiff not retaining the salvage (the wreck), then the damages suffered by the plaintiff would be N\$71 700. On this issue I am of the opinion that the salvage is the property of the plaintiff. The issue of the plaintiff not retaining the salvage is not applicable in the present circumstances. If the plaintiff does not want to retain the salvage, that is his own business, but the salvage remains his property.

[50] In regard to the issue of costs, the general rule is that the successful party is entitled to its costs. There is no reason to not grant costs to the successful party in the present case and I shall grant an order to that effect.

[51] In the result, I make the following order:

1. The plaintiff's claim against the first defendant is dismissed.
2. The plaintiff is ordered to pay the costs of suit of the first defendant.
3. Judgment is granted in favour of the plaintiff against the second defendant in the following terms:
 - (a) payment in the amount of N\$53 775;
 - (b) interest on the aforesaid amount at the rate of 20% per annum calculated from the date of judgment to the date of final payment;
 - (c) costs of suit.
4. The matter is removed from the roll and is regarded finalised.

B USIKU
Judge

APPEARANCES

PLAINTIFF: T Nanhapo
Of Brockerhoff & Associates Legal Practitioners, Windhoek

1ST DEFENDANT: G Kasper
Of Murorua Kurtz Kasper Incorporated, Windhoek

2ND DEFENDANT: No-appearance