

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: (I) 234/2016

In the matter between:

**MASSHIRE EQUIPMENT SERVICES (PTY) LTD t/a
COASTAL HIGH ONGWEDIVA**

PLAINTIFF

and

**MATHIAS SHIMBUNDU
CHINA STATE CONSTRUCTION ENGINEERING
CORPORATION (SOUTHERN AFRICA) (PTY) LTD
and KATA INVESTMENTS CC JOINT VENTURE
GONG SHUAI
ZHANG SHUANG SHUANG**

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

Neutral Citation: *Masshire Equipment Services v Shimbundu* ((I) 234/2016) [2023]
NAHCMD 150 (28 March 2023)

CORAM: UEITELE J

Heard: 8 -12 February 2021, 04 – 08 April 2022 and 28 July 2022

Delivered: 28 March 2023

Flynote: Civil – Action Proceedings – Vicarious liability – Legal principle – An employer responsible for the action of its employees even when the employee has committed an action that the employer would not approve of and where the employer has not committed any wrong itself – Principle founded on considerations of public policy

Summary: During February 2016, the plaintiff commenced proceedings out of this court by issuing summons against the four defendants in terms of which it claimed an amount of N\$1 903 513,25. The plaintiff is in the business of hiring out tools and equipment. The second defendant is in the construction business. During the year 2015, the second defendant had tendered to construct roads in the Northern part of Namibia. The second defendant, in the execution of its job, required construction tools and equipment. To that end, the second defendant approached Masshire during February 2015 and concluded a 'Facility Hire' agreement. In terms of this agreement, the second defendant, on credit, hired tools and equipment from Masshire.

Pursuant to the 'Facility Hire' agreement, Masshire leased a caterpillar 930K EYE 00486 front-end loader to the second defendant. On 12 July 2015, while the caterpillar was in the possession of the second defendant, it landed into an 'oshana', where it was submerged into water and was, as a result, allegedly damaged beyond economical repair. As a result of the damage to the caterpillar, the plaintiff approached this court seeking payment in the amount of N\$1 903 513,25 from the defendants.

Held that the court is satisfied, on a balance of probabilities that the second defendant is vicariously liable for the damages caused to the caterpillar.

ORDER

1. The second defendant must pay to the plaintiff the amount of N\$1 903 513, 25 plus interest at the rate of 20% per annum on the above amount reckoned from 29 March 2023 to date of payment.
2. The second defendant must pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.
3. The matter is finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction and background

[1] The plaintiff is, Masshire Pty (Ltd) trading as Coastal Hire Ondangwa, a private company with limited liability which is incorporated in this Republic. The company is in the business of hiring out tools and equipment. The first defendant is a certain Mr Mathias Shimbundu who, at the time when the events which gave rise to the plaintiff's claim arose, was employed by China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd and Kata Investments CC Joint Venture, which is the second defendant in this action.

[2] The third and fourth defendants are a certain Mr Gong Shuai and a Mr Zhang Shuang Shuang, respectively. They, like the first defendant, were employed by the joint venture company at the time when the events that gave rise to the plaintiff's claim arose. The third and fourth respondents are *peregrine* of this court and it appears that they relocated to China and although they filed witness statements, they did not participate at the trial of this matter.

[3] During February 2016, Masshire Pty (Ltd) commenced proceedings out of this court by issuing summons against the four defendants in terms of which it claimed an amount of N\$1 903 513,25. Some thirty months later, that is during August 2018, Coastal Hire Ondangwa also issued summons against Mr Mathias Shimbundu and China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd and Kata Investments CC Joint Venture, in terms of which it also claimed the amount of N\$1 903 513,25 from the two defendants.

[4] On 3 September 2018 this court ordered that the two cases be consolidated. After the matters were consolidated, the plaintiff remained as Masshire Pty (Ltd) trading as Coastal Hire Ondangwa and the defendants remained as I referred to them in paras 1 and 2 of this judgment. I will therefore, for ease of reference, refer to the plaintiff as Masshire, the first defendant as Mr Shimbundu, the second defendant as China State Corporation, the third defendant as Mr Gong and the fourth defendant as Mr Zhang. Where I have to refer to the four defendants collectively, I will simply refer to them as the defendants.

[5] The brief background facts which led to the plaintiff's claim are the following. As I indicated earlier, Masshire is in the business of hiring out tools and equipment. China State Corporation on the other hand is in the construction business. From the pleadings, it appears that during the year 2015 China State Construction had tendered to construct roads in the Northern part of Namibia. China State Corporation, in the execution of its job, required construction tools and equipment. To that end, China State Corporation approached Coastal Hire Ondangwa during February 2015 and concluded a 'Facility Hire' agreement. In terms of this agreement, China State Corporation could, on credit, hire tools and equipment from Masshire.

[6] Pursuant to the 'Facility Hire' agreement, Masshire leased a Caterpillar 930K EYE 00486 front-end loader (I will in this judgment for ease of reference refer to this caterpillar as Coastal's caterpillar or at times simply as the caterpillar) to China State Corporation. On 12 July 2015, while Coastal's caterpillar was in the possession of China

State Corporation, it landed into an 'oshana'¹, where it was submerged into water and was, as a result, allegedly damaged beyond economic repair. As a result of the damage to the caterpillar, Masshire, as I indicated earlier, approached this court, seeking payment in the amount of N\$1 903 513, 25 from the defendants.

[7] The defendants returned the fire, as it were, by not only defending the plaintiff's claim but by also filing a counterclaim for payment of N\$1 200 000 as damages allegedly sustained as a result of Masshire's failure to provide it with a substitute front-end loader after Coastal's caterpillar became inoperative. It is, however, worth mentioning that as the matter progressed the defendants withdrew their counterclaim against Masshire, I will therefore say nothing more about the counterclaim.

The pleadings

[8] In its particulars of claim (which were amended on more than one occasion), Masshire alleges that on 12 July 2015 at approximately 12h30 at a construction site near Onakalunga, Mr Shimbundu, whilst acting during the course and within the scope of his employment with China State Corporation and in the furtherance of the interests of China State Corporation, negligently allowed a certain Mr Simeon Ndeunyema to take possession of Coastal's caterpillar and to operate it, whilst he (Mr Simeon Ndeunyema) was neither employed by Masshire nor qualified to operate the caterpillar.

[9] Masshire further alleged that Mr Ndeunyema drove the caterpillar to a nearby *oshana* in order to clean its bucket. Whilst he was in the process of cleaning the caterpillar's bucket and whilst the caterpillar was unmanned, it moved into the *oshana* and as a result was covered in water. Masshire, furthermore alleged that the sole cause of the front-end loader moving into the *oshana* was the negligence of Mr Shimbundu in that he gave access and control of the caterpillar to an unqualified person not employed by Masshire.

¹ An oshana is a shallow, seasonally inundated depression filled with water.

[10] Masshire continued and alleged that as result of Mr Shimbundu's negligence, Coastal's caterpillar was damaged beyond economical repair and as a result, Masshire suffered damages in the amount of N\$1 903 513, 25, being the fair and reasonable value of the caterpillar immediately prior to it being submerged in water (N\$2 119 513, 25) less the fair and reasonable salvage value of the wreck (N\$216 000).

[11] Masshire's claim against China State Corporation is based on the contention that China State Corporation is vicariously liable, jointly and severally, with Mr Shimbundu for the payment of the amount of damages Masshire alleges it suffered. Masshire, in the first alternative, claims the amount of N\$1 903 513,25 from China State Corporation on the basis that China State Corporation, duly represented by Mr Zhang, allegedly had an arrangement with Mr Ndeunyema whereby Mr Ndeunyema, with permission and knowledge of China State Corporation, practiced on and operated Coastal's caterpillar from time to time, whilst he was neither employed by Masshire nor qualified to operate the caterpillar.

[12] As I indicated earlier, the defendants entered notices to defend Masshire's claim. In their plea, the defendants disavowed any knowledge of Masshire's ownership or *bona fide* possession of the caterpillar. China State Corporation pleaded that Masshire leased the caterpillar to it with an operator. It continued and pleaded that one of the terms of the lease was that Masshire would supply its own operator, who would be in control of the caterpillar and its keys and was as such at all relevant times in control and possession of the caterpillar.

[13] The defendants in their plea admitted that on 12 July 2015 at approximately 12h30 at the construction site near Onakalunga, Mr Ndeunyema drove the caterpillar to a nearby *oshana* in order to clean its bucket and while at the *oshana*, the caterpillar landed in the *oshana* and was submerged in water. The defendants, however, deny that the cause of the submergence of the caterpillar in water was the negligence of Mr Shimbundu. The defendants in turn contended that the employee of Masshire, who in his capacity as operator of the caterpillar, appointed by Masshire, was in control of the caterpillar, and negligently left the keys of the caterpillar in the caterpillar.

[14] The defendants continued and pleaded that Mr Ndeunyema, without the authority of anyone of the defendants or its employees, drove the caterpillar to the *oshana* where it was submerged in water. The defendants furthermore pleaded that the said Mr Ndeunyema was an employee of an engineering company known as VKE Engineering which was a subcontractor of China State Corporation on a project for the construction of a tar road east of Eenhana. The defendants thus contended that the person appointed by Masshire, to be in charge of the caterpillar, was negligent in allowing Mr Ndeunyema to take control of the caterpillar.

[15] The defendants further pleaded that the sole cause of the caterpillar moving into the *oshana* was the negligence of the operator who was an employee of Masshire and who was given the authority and control by his employer to look after and operate the caterpillar. He was negligent in leaving the keys of the caterpillar in the caterpillar and not looking after the caterpillar to ensure that no unauthorised person, such as Simeon Ndeunyema, got access to or got control of the caterpillar. The defendants further denied the existence of an arrangement whereby Mr Ndeunyema would practise on Coastal's caterpillar.

[16] After the parties exchanged pleadings they, as contemplated in rule 26, held a pretrial conference and filed a draft pretrial order which was made an order of court. In the pretrial report the parties, amongst other facts, agreed that the following aspects were not in dispute between them:

- a) That on the 12th of July 2015 at approximately 12h30, when the caterpillar was submerged in water, Mr Shimbundu was employed by China State Corporation;
- b) That Simeon Ndeunyema drove the front-end loader to a nearby *oshana* in order to clean its bucket.
- c) That on or about 25 February 2015 China State Corporation, represented by Mr Gong and Mr Zhang, duly authorized thereto, entered into an agreement, being a

submitted application for credit and hire facilities with Masshire, which agreement was tendered into evidence as exhibit "A".

- d) On 25 February 2015 and at Eenhana, Mr Gong and Mr Zhang, signed a guarantee in favour of China State Corporation in terms of which guarantee Mr Gong and Mr Zhang undertook to make payment of any amount due by China State Corporation to Masshire on or before the due date thereof. A copy of the guarantee signed by Mr Gong and Mr Zhang was tendered into evidenced as exhibit "B".
- e) Coastal's caterpillar was supplied by Masshire to China State Corporation with an operator, who was an employee of Masshire by the name of Willem Sheepo.

Issues to be resolved

[17] In view of the facts that are not in dispute between the parties, I make the following findings.

- a) Masshire and China State Corporation concluded an agreement in terms of which China State Corporation leased a caterpillar from Masshire on the following terms:
 - (i) The caterpillar was leased to China State Corporation together with an operator, a certain Mr Wilhelm Sheepo, who was an employee of Masshire.
 - (ii) It was a condition of the lease agreement that the caterpillar was at all times to be operated by Mr Sheepo.
 - (iii) The plaintiff's insurance cover on the said caterpillar would only cover damages occasioned to the caterpillar if it was operated or driven by Mr Sheepo. If the caterpillar were to be damaged while not driven or operated by Mr Sheepo then and in that event the client

(China State Corporation) would be liable for those damages and no claim by Masshire would be made against the insurer of the caterpillar.

- b) That, on the 12th of July 2015 at approximately 12h30, when the caterpillar was submerged in water, the caterpillar was not being driven or operated by Mr Sheepo.

[18] In light of the pleadings and the facts that are not in dispute between the parties, I am of the view that the question that is up for determination by this court is whether Mr Sheepo or Mr Shimbundu was negligent by allowing Mr Ndeunyema to operate or drive the caterpillar. In order to answer this question, one has to consider the evidence presented by the parties and the applicable legal principles. In considering the evidence, I will simply summarize the evidence which in my view is relevant to the resolution of the dispute between the parties.

The evidence

Evidence tendered on behalf of the plaintiff

[19] The plaintiff called six witnesses namely, Messrs Schumacher, van der Westhuizen, Ndeunyema, Sheepo, Smith and Meyer (an expert witness) to testify in support of its claim. The defendants called two witnesses namely, Messrs Shimbundu, Kemothebeng and Shikongo (as an expert witness) to testify in support of their opposition to the plaintiff's claim.

[20] Mr Marc Schumacher testified as regards his positions at Masshire and stated that he is the one who concluded the Facility Hire agreement with China State Corporation, which was represented by Mr Gong and Mr Zhang. He further testified that Masshire acquired the caterpillar under an instalment sale agreement with Wesbank².

² Wesbank is the vehicle and assets financing division of First National Bank of Namibia.

[21] The second witness, Mr van der Westhuizen, testified that during July 2015 he was employed by Masshire as its Regional Manager for the northern part of Namibia and was based in Ongwediva. He testified that the caterpillar was leased and delivered to China State Corporation with an operator, a certain Mr Wilhelm Sheepo, who was at the time in the employ of Masshire.

[22] Mr van der Westhuizen further testified that the agreement between Masshire and China State Corporation was that Mr Sheepo, would at all times be the person driving or operating the caterpillar and if for any reason China State Corporation, preferred a different operator to operate or drive the caterpillar he, as the representative of Masshire, must be informed in writing (e.g. by e-mail) to give approval for a different operator to operate or drive the caterpillar.

[23] Mr van der Westhuizen further testified that during March 2015 and at Eenhana he, representing Masshire, and Mr Gong, representing China State Corporation, orally amended the "Facility Hire" written agreement, to the effect that the defendants will only be covered by Masshire's insurance if the caterpillar was damaged while being driven or operated by Mr Sheepo and Mr Sheepo was at fault for the damages and, furthermore, only if the caterpillar was damaged during working hours (08h00 to 17h00) and on working days (Monday to Friday).

[24] Mr van der Westhuizen furthermore testified that in this particular case, China State Corporation never requested permission for a different operator to drive or operate the caterpillar. He furthermore testified that it was agreed that the keys of the caterpillar had to be kept secure on site, however, in this case and upon the specific request by management of China State Corporation, the keys of the caterpillar were left in the ignition system of the caterpillar because the management of China State Corporation stated that the caterpillar would always be parked in the yard of China State Corporation and would therefore be safe as there was always security at the yard.

[25] He also testified that it was only on Monday 13 July 2015 that Mr Sheepo informed him of the incident, in that the caterpillar was submerged in water. After being

so informed he, in the company of Mr Smith, visited the site where the caterpillar was submerged into water. He continued and further testified that on 1 September 2015 Mr Gong personally and in his and Mr Smith's presence, signed a letter which was admitted into evidence as exhibit "F", in terms of which China State Corporation accepted full responsibility for the damages to the caterpillar.

[26] Mr Smith testified that he was an estimator and insurance assessor employed as a Loss Adjuster for Specialised Investigation Consultant Services at Windhoek in the Republic of Namibia. He testified that he prepared a report for the insurance company with respect to the incident.

[27] Mr Ndeunyema testified that before the incident on 12 July 2015, he used to work for VKE Namibia Consulting Engineers, which was a subcontractor of China State Corporation, on a project to tar a road east of Eenhana. He was a surveyor assistant and started to work in September 2014 for VKE. He continued and testified that since he knew that his contract with VKE was a temporary contract, he approached Mr Zhang, the site manager for China State Corporation and asked him if he could be trained to operate a front-end loader. He testified that his intention was that after his employment contract with VKE came to an end he would apply for a position as a front-end loader operator with China State Corporation.

[28] Mr Ndeunyema testified that Mr Zhang and he agreed that he could, on Saturdays and Sundays from 12 noon after working for VKE and also against no compensation, practice on the Coastal's caterpillar. He further testified that he started to operate Coastal's caterpillar during either February 2015 or March 2015 on Saturdays after he 'knocked off' and also on Sundays. He further testified that he was trained by a certain Mr Kondo. He further testified that he was, over two weekends, trained by Mr Kondo to operate Coastal's caterpillar.

[29] Mr Ndeunyema furthermore testified that on Sunday, 12 July 2015 and whilst they were busy at the sandpit to mix bitumen and concrete with a new caterpillar, which was on site, a certain Madala (he testified that he does not know the real names of the

said Madala), who worked for China State Corporation, asked the site supervisor of China State Corporation, another Chinese person, if they could not use Coastal's caterpillar because the new caterpillar that they were using was allegedly slow. The site supervisor allegedly agreed that they could use Coastal's caterpillar.

[30] Mr Ndeunyema furthermore testified that whilst they were at the sandpit, a certain Mr Kondo came with Coastal's caterpillar and exchanged it for the new caterpillar. Mr Kondo went with the new caterpillar to work at another site of the sandpit. Mr Ndeunyema further testified that whilst he was busy mixing bitumen and concrete, another man, who he deduced was a Tswana speaking person and Namibian, who was taking samples and making up the components for the bitumen and concrete mixture, told him (Ndeunyema) that he could not merely use Coastal's caterpillar as the bucket of the caterpillar had to firstly be cleaned from any sand.

[31] Mr Ndeunyema continued and testified that the bucket (shovel) of Coastal's caterpillar was dirty and he accordingly drove the caterpillar to a nearby *oshana* for purposes of cleaning its bucket. When he got to the *oshana*, he put the caterpillar in neutral gear and engage its handbrake but did not switch the engine off as he simply had to clean the sand (mud) from the bucket (shovel) and continue with the mixing of the bitumen at the sandpit. He stated that he then disembarked from the caterpillar and started cleaning the bucket. Whilst he was busy cleaning the bucket he realized that the caterpillar started to slip into the *oshana*. He jumped into the cab but could not prevent the caterpillar from slipping further into the *oshana*.

[32] He continued and testified that when the caterpillar came to a standstill, he got out of the cab and stood on top of it. Mr Zhang and the Chinese site supervisor came over and the Chinese site supervisor swore at him and threatened to kill him. He even started throwing stones at him but was stopped by Mr Zhang. He then got out of the *oshana* and approached Mr Zhang to apologise but he (Mr Zhang) did not say anything. The Monday after the incident, Ndeunyema did not go to work. On Tuesday when he went to work, he was informed that he was no longer employed with VKE.

[33] Mr Sheepo testified that he was, during July 2015 and up to the time of the trial, employed by Masshire at its Ongwediva branch as an operator. He testified that he was the only operator allowed to operate or drive Coastal's caterpillar at the construction site of China State Corporation at Eenhana. He further testified that as of Thursday 9 July 2015 from 13h00 he started his off weekend and only had to return to site or work on Monday 13 July 2015. He further testified that on Thursday around lunchtime he parked the caterpillar at the camp where the other caterpillar front loaders were stored and removed the key and took the key with him for the weekend.

[34] He further testified that on his return to work on Monday 13 July 2015 he was informed by his colleagues, that someone from the China State Corporation used their own keys to start Coastal's caterpillar and operated the said caterpillar by driving and using it for work at another site. His colleagues further told him that there was an incident whereby the caterpillar ended up in an *oshana* and submerged in water. He testified that after he was so informed he went to the *oshana* in question but by the time he got there he found the caterpillar already removed from the *oshana*, but was no longer operational.

Evidence tendered on behalf of the defendants

[35] Mr Shimbundu testified that his nickname is Madala and that he does not have a certificate to operate a caterpillar front-end loader, but only has an ordinary driving license for standard or small vehicles. He further testified that during the year 2015 he worked for China State Corporation. As regards the weekend in question (that is, the weekend of Friday 10 February to Sunday 12 February 2015), he could not recall whether it was a Saturday or Sunday, but testified that he was working at the sandpit with China State Corporation's front-end loader, however it was a bit slow. His foreman, a certain Mr Wang (who also worked for China State Corporation) advised him to exchange the China State Corporation's front-end loader with Coastal's caterpillar.

[36] Mr Shimbundu further testified that Mr Ndeunyema was at the sandpit during the morning with him and his (Ndeunyema's) intention was to operate or drive a caterpillar

front-end loader because he (Ndeunyema) wanted to learn how to drive a caterpillar front-end loader. He further testified that he neither said to Mr Ndeunyema '*I will give you the front-end loader*' or '*I will not give you the front-end loader*'. He continued to testify that whilst he was at the sandpit, Mr Kondo brought him Coastal's caterpillar and took China State Corporation's front-end loader.

[37] Mr Shimbundu further testified that, as he was about to climb into Coastal's caterpillar, which Mr Kondo had brought to him, he saw Mr Kondo's phone in the cabin of the caterpillar. He picked up the phone and ran to Mr Kondo to give him the phone. He further testified that he does not know whether Mr Kondo had pulled the key out of the ignition system of the caterpillar or whether he left the key somewhere inside the cabin of the caterpillar. He further testified that when he reached Mr Kondo, the latter asked him (Mr Shimbundu) to explain to him (Mr Kondo) how to operate China State Corporation's front-end loader.

[38] Mr Shimbundu further testified that, while he was busy demonstrating to Mr Kondo how to operate China State Corporation's front-end loader, Mr Kondo told him to lookup. When Mr Shimbundu looked into the direction where Mr Kondo pointed, he saw Coastal's caterpillar, which Mr Kondo had brought to him and which he was supposed to be operating, moving towards the direction of the *oshana* until it moved into the *oshana*. He testified that at that point he was not sure as to who was driving the caterpillar. He was perplexed as to who could be driving the caterpillar because his foreman, Mr Wang, was no longer at the sandpit at the time that Mr Kondo had brought the caterpillar, to give anybody instructions to operate the caterpillar. It was only after the caterpillar was submerged under the water and when the person who was operating the caterpillar, emerged from the cabin of the caterpillar and stood on the roof of the caterpillar, that he recognised the person as Mr Ndeunyema.

[39] Mr Kemothebeng testified that his co-workers knew him as Kondo and he was employed by China State Corporation and that during July 2015 his duty station was at a road construction site near Eenhana. He further testified that he was a caterpillar front-end load operator. He furthermore testified that he was aware that China State

Corporation leased a caterpillar front-end loader from Masshire and that the caterpillar came with an operator, whose name he could not remember. He testified that the operator was the one who operated Coastal's caterpillar.

[40] Mr Kemothebeng testified that over weekends, Coastal's caterpillar was always parked at their (that is, China State Corporation's) workshop. He furthermore testified that during the weekend in question (that is, the weekend of Friday 10 February 2015 to Sunday 12 February 2015), he could not recall whether it was a Saturday or a Sunday, Mr Zhang, who was his boss and one of the managers of China State Corporation, instructed him to operate Coastal's caterpillar on the road. He furthermore testified that Mr Zhang also instructed him to take Coastal's caterpillar to the sandpit and exchange it with China State Corporation's caterpillar.

[41] Mr Kemothebeng further testified that he did as he was instructed and took Coastal's caterpillar to the sandpit where he exchanged it with China State Corporation's front-end loader, which was being operated by a Mr Shimbundu (in his testimony, he referred to Mr Shimbundu as Mathias). He testified that when he disembarked from Coastal's caterpillar at the sandpit, he kept the engine running. He testified that he must have forgotten his mobile phone in the cabin of the Coastal's caterpillar. When Mr Shimbundu saw the mobile telephone he (Shimbundu) took it and came running to Mr Kemothebeng to give him the mobile phone. At the time that Mr Shimbundu brought the mobile phone to him, he saw the caterpillar that he had just exchanged with Mr Shimbundu, being driven by someone. He however did not know who was driving the caterpillar. He testified that when he observed the caterpillar moving, he alerted Mr Shimbundu that the caterpillar was being driven and was moving into the direction of the water. He and Mr Shimbundu saw how the caterpillar was moving into the water and thereafter Mr Shimbundu started crying.

[42] Having briefly narrated the testimony given on behalf of the protagonist, I will now turn to consider the questions confronting me, namely, whose negligence resulted in the caterpillar being submerged in the water in the oshana.

Discussion

Negligence

[43] Masshire's claim in this case is founded upon an allegation of negligent conduct of Mr Shimbundu and Mr Ndeunyema during the month of July 2015, that is, upon wrongful acts complete and finished. The starting point for discussion is, in my view, to revisit some of the legal principles that have guided our courts in determining whether a party was or was not negligent.

[44] It is a well-established principle of our law that the plaintiff always bears the *onus* to, on a balance of probabilities, prove negligence on the part of the defendant³. This proposition must, however be clarified as stated by the Supreme Court in *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone*⁴, that even where there is no counterclaim but each party alleges negligence on the part of the other, each such party must prove what it alleges.

[45] It is commonly recognized that an actionable wrong or delict has five elements or requirements, namely; (a) the commission or omission of an act (*actus reus*), (b) which is unlawful or wrongful (wrongfulness), (c) committed negligently or with a particular intent (*culpa* or fault), (d) which results in or causes the harm (*causation*), and (e) the suffering of injury, loss or damage (harm). These are separate and distinct components of the same delict, each having its own requirements and test.

[46] As I indicated earlier, the case under consideration falls under delict and the five elements referred to above must be established by Masshire for it to succeed in its claim. In this matter, I am however only concerned with the requirement of wrongfulness and *culpa*. I will therefore firstly deal with the requirement of wrongfulness.

³ See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (AD) at 576G.

⁴ See the unreported judgment of *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (at 16 – 17, para 24) delivered on 09 February 2009.

[47] As our law does not recognize negligence ‘in the air’, it is well established that the issue of wrongfulness must be determined anterior to the question of fault⁵. The element of fault is only capable of being legally recognized if the act or omission can be termed as legally wrongful. In the absence of wrongfulness, the issue of fault does not even arise⁶. These are two separate and distinct elements of the same delict, each requiring its own test and approach, and not to be confused or conflated⁷.

[48] In the South African case of *Minister of Safety and Security v Van Duivenboden*⁸ Nugent JA formulated the principle as follows:

‘Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.

[49] *In Kruger v Coetzee*⁹ Holmes JA formulated the test for negligence as follows:

‘For the purposes of liability culpa arises if:

- (a) *A diligens paterfamilias* in the position of the defendant-
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.’

⁵ *Rose Lillian Judd v Nelson Mandela Bay Municipality* Case No. CA 149/2010.

⁶ *Administrateur, Transvaal v van der Merwe* 1994 (4) SA 347 (A) at 364.

⁷ *Ibid.*

⁸ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E - 442B (para 12).

⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 431.

[50] In *Sea Harvest Corporation*¹⁰ Scott JA stated that, dividing the issue of negligence into various stages, however useful, was no more than an aid or guideline in resolving the issue: in the final analysis the true criterion for determining negligence was whether in the particular circumstances the conduct complained of fell short of the standard of the reasonable person. There is no universally applicable formula which would prove to be appropriate in every case.

[51] After analysing the authorities on the question of wrongfulness, J R Midgley and J C van der Walt made the following observation:¹¹

‘When assessing negligence, the focus appears to have shifted from the foreseeability and preventability formulation of the test to the actual standard: conduct associated with a reasonable person. The *Kruger v Coetzee* test, or any modification thereof, has been relegated to a formula or guide that does not require strict adherence. It is merely a method for determining the reasonable person standard, which is why courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her.’

[52] In the present matter, both Messrs Van Zyl (who appeared on behalf of Masshire) and Vaatz (who appeared on behalf of Mr Shimbundu and China State Corporation) agree, and in my view correctly so, that the conduct of Mr Ndeunyema (by driving Coastal’s caterpillar into the *oshana*) was wrongful, in that Mr Ndeunyema ought to have reasonably foreseen that his driving of Coastal’s caterpillar may cause Masshire some harm, but he did not take the appropriate steps that were expected of him to prevent the caterpillar being submerged in water, which ultimately caused Masshire damage (harm) and was therefore negligent. They, however, do not agree on whether Mr Shimbundu was negligent.

¹⁰ *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA); [2000] 1 All SA 128 (A) para 21.

¹¹ 15 *Lawsa* 3 ed at 284 para 155.

[53] Masshire also pleaded its case in the alternative. It pleaded that if it is found that Mr Shimbundu was not negligent, then Mr Zhang, an employee of China State Corporation, permitted Mr Ndeunyema to operate Coastal's caterpillar while he was not an employee of China State Corporation and was not qualified to operate the caterpillar. It thus pleaded that China State Corporation was vicariously liable for the negligence of Mr Ndeunyema.

[54] I am of the view that, in view of the fact that Mr Ndeunyema's negligence has been established, the question of whether or not Mr Shimbundu was negligent is irrelevant and the question that needs to be answered is whether China State Corporation can be held to be vicariously liable for the negligence of Mr Ndeunyema.

Vicarious liability

[55] Vicarious liability is the legal principle that an employer can be responsible for the action of its employee, even when the employee has committed an action that the employer would not approve of, and where the employer has not committed any wrong itself.¹² In these cases, liability can be imputed onto the employer if certain conditions are met. The faultless liability of an employer originates from Roman law and is founded on considerations of public policy.¹³

[56] It is important to note that vicarious liability is secondary liability, that is to say that the employee has to have committed a legal wrong for which they are liable before the employer can be attributed with liability. In these situations, the employer is able to recover damages from the employee.

The test for vicarious liability

¹² *Blaauw v Pallais and Another* 2021 (1) NR 64 (HC) para 12.

¹³ *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 762.

[57] The test for vicarious liability comprises of two components. First component is, whether there is a relationship between the employer and the wrongdoer¹⁴, and secondly, the key question being “was it a wrongful act authorised by his employer or a wrongful and unauthorised mode of doing some act authorized?” In other words, was there sufficient connection between the wrong committed and the employee’s employment, role and duties such as to make it fair to hold the employer vicariously liable?¹⁵

Facts applied to the law

[58] In the present matter, Mr Vaatz (who appeared for the defendants) forcefully argued that Mr Ndeunyema was not employed by China State Corporation and was not ordered by anyone in authority of China State Corporation to operate or drive Coastal’s caterpillar and therefore the first portion for the test of vicarious liability is absent and China State Corporation cannot be held liable.

[59] It may be correct that Mr Ndeunyema was not employed by China Close Corporation, in my view, this is of no consequence because the entire evidence needs to be taken into consideration. The undisputed evidence is that Coastal’s caterpillar was leased to China State Corporation with an operator, Mr Sheepo. It was a condition of the lease that the caterpillar will only be operated by Mr Sheepo. Mr Sheepo testified that during the fateful weekend (that is, the weekend of Friday 10 February 2015 to Sunday 12 February 2015) he was off duty. He stated that before he departed his duty station, he parked the caterpillar at the camp where all the other caterpillars were parked and he took his key with him. That evidence has not been contradicted or challenged and I accept it.

[60] The other evidence before me is that of Mr Kemothebeng, who testified that on 12 February 2015, Mr Zhang, who was his boss and one of the managers of China State Corporation, instructed him to operate Coastal’s caterpillar. He furthermore

¹⁴ *Van der Merwe-Greeff Inc v Martin and Another* 2006 (1) NR 72 (HC).

¹⁵ *Nghihepavali v Ministry of Agriculture Water and Forestry* [2016] NAHCNLD 51 (I 26/2014; 30 June 2016).

testified that Mr Zhang also instructed him to take Coastal's caterpillar to the sandpit and exchange it with China State Corporation's caterpillar. It was during that exchange that Mr Ndeunyema got hold of the caterpillar and wrongfully drove it into the *oshana*. In my view, the cause of the harm that Masshire suffered was as a result of Mr Zhang's instruction to Kemothebeng to operate the caterpillar and his further instructions to Kemothebeng to exchange that caterpillar for China State Corporation's front-end loader. I am of the view that when Mr Zhang instructed Mr Kemothebeng to operate Coastal's caterpillar and to exchange that caterpillar with China State Corporation's front-end loader, he should have taken reasonable steps to ensure that Masshire does not suffer any harm. Mr Zhang, in my view, did not take any reasonable steps to prevent Masshire suffering harm.

[61] There is no dispute that:

- a) Mr Zhang was an employee of China State Corporation; and
- b) when he instructed Kemothebeng to operate Coastal's caterpillar, he was acting within the scope of his employment.

[62] I am therefore satisfied on a balance of probabilities that the driving of Coastal's caterpillar by Mr Ndeunyema at the time of it being submerged under water was sufficiently connected to the purpose of Mr Zhang's engagement and the scope of his employment in the service of China State Corporation. I am further satisfied that China State Corporation is vicariously liable for the delict of Mr Ndeunyema, even though Mr Ndeunyema was not employed by China State Corporation.

[63] There are no compelling reasons relating to social policy or the tenets of fairness militating against such liability. On the contrary, the circumstances are so compellingly in favour of the conclusion that Mr Zhang's instruction on that Sunday, 15 July 2015, is related to the purpose of his employment that, even if it is Mr Ndeunyema who ended up operating the caterpillar, Mr Zhang nevertheless continued to act in the interest of China State Corporation's business at the time.

Damages

[64] Masshire called a certain Mr Wietz Meyer (Meyer) to testify as an expert in respect of the actual damages it suffered. Mr Meyer testified that he is an adult male caterpillar earthmoving artisan, currently employed as a caterpillar certified sales professional employed at Barloworld Namibia (Pty) Limited, since 18 January 1993 until the date on which he testified. He further testified that he has more than 27 years of experience as an earthmoving artisan and has sufficient experience in assessing damages to machinery and equipment, including the model 930K front end loader Caterpillar (this is the model of Coastal's caterpillar).

[65] Mr Meyer testified that during his 27 years plus experience, he gained experience in assessing and inspecting damaged machinery components and equipment, assessing whether or not it is economical to repair the damaged machinery and equipment, assessing, with reference to costs of parts, the extent and value of the damage to the machinery and equipment, assessing the value of second-hand machinery and equipment by looking at market trends and available machines (in a damaged and undamaged condition) and assessing the value of machinery and equipment parts (in a new and second-hand condition).

[66] Mr Meyer further testified that during August 2015 and again on 23 October 2020, at Windhoek, he inspected a 930 KEYE 00486 front-end loader with registration number N 94404 W (there was no dispute that this was Coastal's caterpillar that was submerged in water). After his inspection he prepared a detailed report which was also handed in as exhibit "K1 to K11". In his report, he, amongst many other findings, found that:

- a) the cab roof lining of the caterpillar was filled with sand, white crystalline-like residue and water stains. It is therefore clear that the entire cabin of the caterpillar was submerged under water;
- b) the major electronic components of the caterpillar, such as the electronic control unit and other computers in the cabin were damaged by water;

- c) water and sand entered the gearbox when it was submerged and it settled at the bottom of the gearbox. The air filter contained muddy residue on the inside. Mud and water entered the turbocharger and damaged it. Water and sand also entered the diesel tank.

[67] Mr Meyer furthermore testified that after he assessed the caterpillar, he formed the view that the caterpillar was damaged beyond economical repair. He testified that his view was based on the fact that the reasonable estimate cost of repair for the caterpillar was a little more than N\$3 506 936,95, while the fair and reasonable market value of the caterpillar immediately prior to the accident was only N\$2 119 513,25. He further testified that the fair and reasonable salvage value of the wreck was N\$216 000. He thus concluded that as a result and in his expert opinion, the reasonable damages suffered by the plaintiff is the amount of N\$1 903 513,25 being the fair and reasonable value of the machine immediately before the collision (N\$2 119 513,25) less the fair and reasonable salvage value of the wreck (N\$216 000).

[68] The defendants called a certain Mr Lukas Iita Shilongo as an expert witness. The unfortunate part of Mr Shilongo's testimony is that he only inspected the caterpillar five years after the caterpillar was involved in the accident (submerged under water). During the five year period between the accident and his inspection of the caterpillar, the caterpillar was exposed to various weather conditions such as wind, rain, sun and the cold. I therefore have serious doubt about the reliability of his report. In addition, in his report and testimony, Mr Shilongo did not in any meaningful manner dispute the cost and prices of the damaged parts of the caterpillar as testified to by Mr Meyer. As a result, I find that Masshire suffered damages in the amount of N\$1 903 513, 25.

[69] This leaves me with the question of costs. The defendants did not advance any reason nor did I find any as to why I must deviate from the general principle that costs follow the result.

[70] In the result, I make the following orders:

1. The second defendant must, pay to the plaintiff the amount of N\$1 903 513, 25 plus interest at the rate of 20% per annum on the above amounts reckoned from 29 March 2023 to date of payment.
2. The second defendant must pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.
3. The matter is finalised and is removed from the roll.

SFI UEITELE

Judge

APPEARANCES:

PLAINTIFF:

C Van Zyl

Instructed by Francois Erasmus & Partners,
Windhoek

FIRST & SECOND DEFENDANTS:

A Vaatz

Of Andreas Vaatz & Partners, Windhoek

THIRD & FOURTH DEFENDANTS:

No Appearance