BRIAN TAKURA MOYO
and
EDGE WATER FARM (PVT) LTD
versus
METHODIST CHURCH (GREENDALE)

IN THE HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 9 March 2018 & 28 March 2018

Civil Trial

B, Hatinahama, for the plaintiff
O. Matizanadzo, for the defendant

DUBE J: This is an application for absolution from the instance. On the 25th of September 2015, there was a fire at number 9 Kennedy Road, Greendale, [hereinafter referred to as the property]. The plaintiffs claim that the defendant through its emissaries in particular, Mr David Takavarasha Moto wrongfully, unlawfully and negligently caused a fire at number 11 Mitchell Road, Greendale, which uncontrollably spread to the plaintiffs' property destroying listed property and a fowl run. The property destroyed comprises mainly irrigation equipment that was in transit to the second plaintiff's farm where the equipment was supposed to be used for irrigation purposes and other personal property of the first plaintiff. The property destroyed is valued at $16 010.25.The second plaintiff claims that it suffered loss in the sum of $87 299 .70 as a result of failure to use its irrigation equipment at the farm.

The defendant defends the claim. In its plea, it averred that the plaintiffs have not set out the basis of their cause of action against the defendant. It challenged the first plaintiff's *locus standi* to institute proceedings for recovery of damages caused to a property that did not belong to him. On the merits, it denied that it unlawfully, negligently and wrongfully caused a fire which spread to the plaintiff's property. It denies that the plaintiffs suffered the damages claimed and that the loss claimed was not caused by the defendant's negligence and is therefore not recoverable from it.

The issues referred to trial are, the issue concerning the plaintiff's *locus standi* to bring these proceedings, whether the loss suffered is attributable to the defendant's wrongful, unlawful and negligent conduct and the quantum of damages.

The plaintiffs led evidence from four witnesses which may be summarised as follows. The first plaintiff testified that the property in question was ceded to him by his in laws. He was not present when the fire started. The second plaintiff's farm equipment was housed in the fowl run and got burnt as a result of the fire. Mr Takavarasha and other church members admitted liability for the damage caused to his property and apologised for the fire. Mr Manjenwa is the first witness' brother in law. He was in the house when the fire started. He was alerted to the fire by cracking sounds and found the fowl run on fire. He did not go to the defendant's property. The defendant's representatives apologised for causing the fire. Tinos Jevinas is the first plaintiff's gardener. He was on his way to Mitchell Road, when he saw David Takavarasha who had just started a fire in the defendant's yard and briefly chatted with him. He went on his way. About ten minutes later, he was alerted to a fire by a thick cloud of black smoke. He turned back and found the fowl run in flames .He did not go into the defendant's property. Mr Chinwadzimba is from the Fire Brigade. He attended to the scene of the fire and put the fire out. He conducted the process of dumping down. He is not a fire investigator and did not investigate the cause of the fire.

The evidence led discloses that the first plaintiff is not the registered owner of the property which is registered in the names of his in-laws. The position of Mr Takavarasha with the defendant was not established. All the plaintiffs' witnesses could say is that the fire occurred. They were not present when the fire started and were alerted to the fire after it started and found the fowl run already on fire. They do not know how the fire started. They did not visit the defendant's property to establish what caused the fire and how it spread. None of the witnesses categorically said that the fire spread from the defendant's premises. No fire investigation expert was called to investigate the scene of the fire. Mr Chinwadzimba is not a fire investigation expert as he does not have the requisite qualifications and experience. He put out the fire and did not carry out an investigation of the fire. He told the court that he did not investigate the fire and does not know the cause of the fire. There is no authoritative evidence of the cause and origins of the fire. None of the witnesses attributed the spread of the fire to the negligence of the defendant and Mr Takavarasha.

At the close of the plaintiff's case, the defendant applied for absolution from the instance. The defendant maintained that the plaintiffs have not set out a cause of action against the defendant. It took issue with the fact that the plaintiffs impute negligence on the part of the defendant on the basis that the defendant through its emissaries and in particular Mr Takavarasha caused that fire and yet it has not cited him as a party to the proceedings. The defendant challenged the *locus standi* of the first plaintiff to bring proceedings arising from the destruction of the fowl run because he is not the owner of the property. It contended that the first plaintiff has not shown that the property was ceded to him by his in-laws who are the registered owners of the property . It refuted that the defendant accepted liability for the fire but sought to try and resolve the dispute in a Christian-like manner. On the merits, it submitted that the plaintiffs failed to adduce evidence showing that,

''The defendant unlawfully , negligently and wrongfully caused a fire to be started at its property'' and further that **''the defendant failed to control the fire which spread through to the first plaintiff's property''** in terms of paragraphs 4, 5 and 9 of the declaration.

The test for determining applications of this nature was discussed in *United Air Charter* v *Jarman 1*994 (2) ZLR 341 (S) 343 B – C where the court stated the following,

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Service Station (1969) (Pvt) Ltd* v *Fox Goodridge (Pty) Ltd 1*971 (1) RLR 1 (A) at 5D – E, *Laurenoov Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (5) @158 B – E".

` See also *Claudio Neon Lights* v *Daniel 1*974 (4) 5A 409 (A). In the *Supreme Service Station case* the court pointed out that the test for absolution from the instance boils down to whether there is sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff. The court stated that what a reasonable mistake is, is a question of fact.

The purpose of an application for absolution from the instance is to afford justice to a defendant where no *prima facie* case has been established by a plaintiff. The application for absolution from the instance is likened to an application for discharge at the close of the state case in a criminal trial. The test is whether a plaintiff has made out a *prima facie* case and adduced evidence to prove all the essential elements of the claim entitling the court to find for him at that stage of proceedings. The enquiry is whether there is sufficient evidence upon which a court might make a reasonable mistake and find for the plaintiff. A defendant who brings an application for absolution from the instance must show that the plaintiff has failed to adduce

evidence relating to the essential elements of the claim and failed to make out a *prima facie* case.

Locus standi is the standing to bring proceedings in a court of law. In *Makarudze & Anor* v *Bungu and Ors* HH 8/15 the court remarked as follows regarding the concept of *locus standi;*

> "*locus standi* in *judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the subject matter of the action which could be prejudicially affected by the judgment of the court."

See also *Anabas Services (Pvt) Ltd* v *Min of Health and 2 Ors* HB 21/03.

It is trite law that registration of rights in an immovable property is done in terms of the Deeds Registries Act, *[Chapter 20:05*] and conveys real rights upon those in whose name the property is registered. See *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (5) 105 H @ 106A. See also *Agro Chemicals Dealers (Pvt) Ltd* v *Gomo and Ors* HH 71/09. *The Sheriff of the High Court* v *Nomvuyo Hilary Madziro* and Ors HH 670/15.

An owner of a property is the person in whose name the property is registered. Where a fire occurs and guts down a property, it is only the owner of the property who at law has *locus standi* to sue for damages to the property. Where movable property kept in a property belonging to another person, the owner of the movable property has a direct and substantial interest in the property. Where the property is burnt as a result of a fire, the owner is at law entitled to bring proceedings to recover the value of the property burnt. He may not seek to recover damages for the value of property he does not own. The first plaintiff did not produce proof that the house was ceded to him by his in-laws or that it is registered in his name. He is not the owner of number 9 Kennedy Road. He may not bring a claim for the recovery of the value of the fowl run which does not belong to him. The first plaintiff had personal items in the fowl run whilst the second defendant owned the irrigation equipment . The plaintiffs have a direct and substantial interest in the property stored in the fowl run and are entitled to bring a claim for the burnt property and losses arising from.

Vicarious liability is a common law principle that makes a person or entity liable for damages arising out of the acts and omissions of another to an injured party. The liability is imposed by reason of the existence of some relationship between the parties, usually an agent -principal relationship. The result of the application of this concept is that liability is imposed on a person irrespective of the fact that he did not participate in the delict committed by another person and is not individually at fault. It is some form of strict liability. It has to be shown that

the person who committed the delict did so during the scope and course of his employment with the principal and whilst he performed the principal's duties. He is not considered to be individually liable. Vicarious liability is often associated with employer -employee relationships. An employer is liable for damages occasioned by the acts or omissions of his employee done in the course and scope of his employment .A litigant seeking to rely on strict liability to found liability against an employer is required to satisfy the following elements on the part of the employee,

a) that there was an employee –employer relationship with the defendant
b) that he committed the act of negligence
c) whilst in the course and scope of his employment with the defendant .
d) there must be a connection between the delict and the duties and work he was entrusted with at the time.See *Minister of Police* v *Mbilini* 1983 (3) SA705(A),*Gibbins v Muller , Wright & Mostert Ingelyf* 1987(2) SA 82(T).

A summons based on vicarious liability is required to specify the name of the employee who committed the delict and the capacity under which he was employed. There must be an averment that he committed the delict whilst he was within the scope of his authority. There must also be an averment of negligence. The employee is required to be cited as a party and ought to be served with the summons commencing action. See *Amler's Precedents of Pleadings 7th Ed p* 390 to 392.

Where a party brings proceedings on the basis of vicarious liability the onus is on him to allege and prove that the person who committed the delict was either an employee or agent of the defendant. See *Stradsrood Van Pretoria* v *Pretoria Pools 1990 (1) SA 1005*(T). The relationship between the defendants should be specially pleaded and the basis for vicarious liability clearly outlined in the declaration. A failure to plead the relationship between the principal and the party committing the delict, the duties the person who allegedly caused the delict was required to do and an indication that he committed the act or omission whilst he was in the course and scope of his employment renders a summons and declaration fatally defective and excipiable. A litigant who brings a claim based on vicarious liability on the basis of negligence of a known employee is required to join the employer and employee to the suit. He may not cite the employer in the absence of the employee because the allegations of negligence centre on the employee. The dilemma is that the employer cited without his employee may not be able to answer to the allegations of negligence and hence it is difficult in such circumstances

for a plaintiff to prove negligence against the employer. The evidence of the employee must be tested to establish negligence on his part and hence the need to cite him. Where a duty of care is imposed on an employer has been broken, but the claimant cannot identify the employee who breached it, it is permissible to bring a suit on the basis of vicarious liability against the employer alone.

The plaintiffs seem to have wanted to bring this action on the basis of vicarious liability. They however do not make reference to any acts or omissions of an employee or agent of the defendant resulting in negligence in their declaration. It is only in their further particulars that they state that the fire was caused by the defendant's emissary. An emissary is a representative, ambassador, messenger or agent. It was not shown how Takavarasha was an emissary of the defendant. No factual or legal basis was shown for that conclusion. The onus was on the plaintiffs to allege and prove that Takavarasha was an emissary of the defendant and that he committed a delict whilst in the course of his employment. The basis for the supposed vicarious liability was not pleaded nor established by evidence. The first plaintiff alluded to the fact that Takavarasha was an employee of the defendant in his testimony. No one knows what he was employed to do. It was not pleaded that Takavarasha caused the fire whilst he was in the course and scope of his employment or duties. What further complicates this matter is that the evidence led did not establish that the fire was caused by Takavarasha when he was in the course and scope of his employment. The work he was supposed to be doing at the time of the fire is not known .The failure to cite the employee or emissary in this case and to make averments related to vicarious liability is fatal to the proceedings entitling the defendant to absolution from the instance.

Even assuming that I am wrong in this view, I am still not satisfied that the plaintiffs have adduced evidence that establishes their cause of action. A claimant who sues for negligent, unlawful and wrongful cause of a fire is required to first lead evidence regarding the origins and cause of a fire. A determination of the cause and origins of a fire helps to determine liability for a fire, See *Sheila Chigumba and Ors* v *ZETDC* HH 780/17. The approach to be adopted in investigating and determining the cause and origins of a fire was articulated in this case. The courts have always emphasised on the need to call expert evidence on the cause of the fire. A thorough investigation of the scene of the fire must be carried out by a forensic fire investigator who must determine, the origins and cause of the fire. The court must not be asked to speculate on the cause of a fire. In *Mrewa Rural District Council* v *Stella Chakanyuka*, HH 835/15 the

court discounted a fire fighter as an appropriate expert in cases involving fires. Our Fire Brigade does not ordinarily concern itself with the cause and origins of the fire. Unless and until it takes a different focus to its approach to fires , the Fire Brigade is not the appropriate authority to give expert opinion evidence on the cause and origins of a fire . There is no substitute to a proper site investigation conducted by a qualified expert. The exercise of determining the cause and origins of a fire requires a forensic site investigation by a qualified fire investigation expert and any available witness evidence.

The court in a case involving a fire should not be asked to infer or make assumptions on the cause of a fire. The court requires to know where the fire started, who caused the fire, what caused the fire and how the fire started. It should not be made to speculate on those aspects of the fire. Where expert opinion evidence has been led from a forensic fire investigator, the court will be properly guided and equipped to answer these questions. In the case of *Dr Emmanuel Lunga v ZETDC* HH 267/16 the court declined to find for a plaintiff on the basis that there was speculation as regards the cause of the fire. The court also found that the plaintiff had failed to adduce evidence relating to negligence.

In the celebrated case of *United Marine Aggregates* v *GM Welding &Engineering Co Ltd*,212TCC 2 April 2012, ALL ER (D) 81 the court dealt with a fire investigation case and emphasized that working out where the fire started or who started it may not be enough, a plaintiff ought to show how the fire started. The approach therefore is to establish the origins and cause of the fire, who, when and where it started. After establishing the cause of a fire, the investigation does not end there. In the *Lunga case* , the court held as follows,

> "the proof of the occurrence of the fire alone by the plaintiff is not enough to give rise to an inference of negligence on the part of the defendant warranting the latter to adduce evidence to the contrary."

It is not sufficient to just show where the fire started, its cause, by whom and when it started it is important to establish how the fire started. The fact of a fire does not translate into a finding of negligence. Proof of causation of a fire is not a substitute for proof of negligence on the part of a defendant. Negligence is a question of fact. It has to be shown that the person who started the fire was negligent. The court is still interested to know how the fire started. The plaintiff has to lead evidence to show how the fire occurred and how the fire was caused by the defendant's negligence. It must be shown that the defendant did not exercise reasonable care and that the lack of it caused the fire.

The plaintiff's claim is premised on an allegation that the defendant unlawfully , negligently and wrongfully caused a fire and that the defendant failed to control the fire which spread to the property of the first plaintiff. All the witnesses called by the plaintiffs were able to tell the court is that there was a fire at the plaintiff's premises. They were unable to say how the fire started and spread to the plaintiffs' yard. The plaintiffs were required to engage the services of a fire expert to investigate the cause and origins of the fire and make findings of the fire incident and conduct of the defendant. Negligence in a fire can only be imputed from the conduct or lack of it of the defendant.

The first plaintiff testified that he does not know how the fire started and indicated that he was going to call someone from the Fire Brigade to give evidence on the cause of the fire. The man from the Fire Brigade, Mr Chinwadzimba did not live up to expectation. He was no fire investigation expert witness. His training and experience is in putting out fires and rescuing people and animals in a fire . He has no training or experience in dealing with forensic investigation of fires. His mandate on that day was to put out the fire and prevent harm to humans and animals. He was unable to say how the fire started or if the defendant had been negligent. He testified under cross examination that he has no requisite skills to conduct a forensic fire investigation and is not a fire investigator. A sub officer from the fire brigade who is trained to put out fires and rescue animals and humans from fires is a fire fighter and is not qualified to carry out a forensic fire investigation. Counsel for the defendant was ill-advised to call Chimwadzima as an expert fire investigator. He neither has the requisite qualifications or experience to carry out a fire investigation nor is he qualified to determine the cause or origins of a fire. He did not carry out an investigation to establish the cause of the fire and does not know the origins and cause of the fire. The report relied on by the plaintiffs is a routine report compiled after the Fire Brigade has attended to a fire scene and not a forensic investigation report. It is based on assumed causes of a fire and not the actual cause. Ultimately there were no findings from a properly qualified person relating to the origins and cause of the fire. It is not known how the fire started and spread.

The defendant submitted that no precautionary measures were taken when the fire was started by Mr Takavarasha. It submitted that S.I 7 of 2007 prohibits open fires between 31 July and 31 October and insists on fire guards. Plaintiffs contended that Mr Takavarasha did not put up a fire guard before the fire was started. It was also suggested that no advice was sought from the City of Harare on the appropriateness of starting a fire during that season. No one

knows that Mr Chinwadzimba spoke of re-ignition which he explained by saying that sometimes a person may think that he has extinguished a fire but the fire may reignite because of wind. This is the reason why he did dumping down of the fire. The witness did not suggest that the fire was put out and reignited at a later stage and that this is what caused the fire. This is mere speculation. The plaintiffs do not have a theory regarding how the fire started and spread. The man from the Fire Brigade told the court that the fire was controlled, although he did not say how. If the fire was controlled, there's clearly no basis for a finding of negligence. The fact that Mr Takavarasha was convicted at the criminal courts for negligently causing of a fire does not bind this court. Each case will be determined on its own circumstances.

This case was poorly prosecuted and presented. The plaintiffs have not established a *prima facie* case against the defendant. It was incumbent on the plaintiffs to lead evidence showing that the defendant through Mr Takavarasha or any other person unlawfully , wrongfully and negligently caused a fire which they failed to control resulting in the fire spreading and causing damage to the plaintiffs' property. The flaw in the plaintiff's case is that they did not lead evidence of the conduct of the defendant's emissary. All that the evidence discloses is that the fire occurred. The occurrence of a fire is not sufficient to impute negligence on a defendant. It was not shown that the fire that started at the defendant's premises spread to the property and that the defendant was negligent resulting in the fire spreading to the property. The court does not have evidence of how the fire spread. No evidence was led to show that Takavarasha was negligent and how he had been negligent. The court does not have evidence regarding the conduct of the defendant which might lead the court to conclude that the defendant was negligent. The plaintiffs have not established that the negligence of the defendant was the probable cause of the fire that burnt the fowl run. The evidence of negligence ought to have been led in the plaintiff's case. It was incumbent on the plaintiffs to lead evidence that the defendant itself or Mr Takavarasha negligently and wrongly caused the fire. This court has not been told that the defendant failed to exercise reasonable care and that the lack of it caused the fire. Negligence is an essential requirement of the plaintiff's cause of action. It was required that the plaintiffs lead evidence to substantiate allegations of negligence.

The plaintiffs have not laid out a basis for putting the defendant on its defence. The fact that the defendant and its members admitted liability or apologised for the fire does not constitute a finding of negligence. The discussions between the parties were on a without prejudice basis. The disputed admissions do not discharge the onus on the plaintiffs to show a

prima facie case. Plaintiffs were required to show negligence on the part of the defendant. The court cannot allow the case to proceed to the defendant's case in order to establish the defendant's negligence as to do so would amount to bolstering the plaintiffs' case. A defendant cannot be put on his defence on speculative inferences. It will not be necessary to analyse the evidence on quantum of damages as the plaintiffs were unable to show that the defendant negligently caused the fire.

Consequently it is ordered as follows,

1. Absolution from the instance is granted
2. The plaintiffs are to pay the defendant's costs.

Hove Legal Practice, plaintiff's legal practitioners
Matizanadzo & Warhurst, defendant's legal practitioners