REPORTABLE ZLR (74)

Judgment No. SC 86/05
Civil Appeal No. 198/05

MOBIL OIL ZIMBABWE (PRIVATE) LIMITED v

ALBERT MACHENGETE MASHOKO

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, NOVEMBER 24 2005 & FEBRUARY 27, 2006

R M Fitches, for the appellant

N Madya, for the respondent

GWAUNZA JA: This is an appeal against the judgment of the High Court, in terms of which the appellant's cancellation of a lease agreement between the parties, was set aside. In the same judgment, the court *a quo* also dismissed the appellant's counter application for an order confirming the cancellation of the lease agreement.

The facts of the matter are largely not in dispute. The appellant, which is a well known Oil Company in Zimbabwe, entered into a lease agreement with the respondent, in pursuance of which the latter leased a Service Station belonging to the appellant. It was a condition of the lease agreement that the respondent would acquire all its fuel, lubricants and related products from the appellant and sell only these, from the leased premises.

In an action that directly violated this condition, the respondent's senior employees clandestinely bought fuel from a third party and arranged for it to be delivered at the leased premises in question. There seems to be no dispute that their intention was to later sell it without the knowledge of either the appellant or the respondent. A representative of the appellant was alerted to this plan and literally caught the respondent's employees red-handed while they were taking delivery of the fuel in the middle of the night.

It is not in dispute that a deposit of $7 million dollars paid by the employees to the third party for the fuel, had been stolen from the respondent, in effect, taken from the day's takings at the service station.

The appellant took a dim view of the conduct of the respondent's employees, which it attributed to lack of control over them by the respondent, and purported to cancel the agreement of lease, prompting the respondent to have recourse to the High Court.

The appellant's main ground of appeal is that as the respondent had bound himself contractually to be wholly responsible for the control and conduct of all persons employed at the service station, the court *a quo* erred in allowing the application, especially since there was an admitted breach of an express and material term of the agreement *albeit* the respondent attributed it to his employees.

The appellant charges further that the court *a quo* misdirected itself in not having regard to the fact that at least two of the respondent's employees were

senior managers and that what they did was sufficiently closely linked to their employment so as to render the respondent liable.

It is clear from a reading of the appellant's papers that it imputed what it termed "vicarious liability" to the respondent, on the main ground that he had failed to exercise adequate control over the conduct of his employees, thereby making it possible for them to commit the offence in question. Since the respondent had contracted to be wholly responsible for the control and conduct of his employees, as specified in clause 18.5.2 of the Third Schedule to the lease agreement, it was the appellant's contention that he had breached a material term of the contract.

In my view, the use of the words "vicarious liability" by the appellant was misleading, in as much as it tended to disguise the true basis of the appellant's claim. It is no wonder that the thrust of the respondent's defense was his denial of any vicarious liability – in the sense that the term is usually understood within the area of delict – for actions taken by his employees behind his back. He made much of the theft from him of $7 million, the fact that the fuel clandestinely bought from the third party would have been sold ahead of his own fuel stored at the same premises, and that he had not authorized the conduct complained of. The respondent did not directly address his mind to the charge that he had been remiss in exercising control over the conduct of his employees, thus breaching a term of the agreement. His response to the charge was that the clause in question, that is 18.2.5, was of no force or effect since it made reference to a provision that did not exist in the contract. I will revert to this argument later.

Having, as I am persuaded he did, misread or misconstrued the basis of the appellant's charge, the respondent correctly contends that if he was to be held to have been in breach of the agreement, it would only be on some recognizable ground that "fixes" him with the responsibility of his employees conduct in the circumstances described.

My view is that such other "recognizable ground" did exist and was contained in clause 18.5.2 of the lease agreement.

In her judgment the learned trial judge, in my view, fell into the same error as the respondent. She noted that the issue that fell for determination in this matter was somewhat *res nova*, it being whether the doctrine of vicarious liability applied in contract law to terminate a valid contract on the basis that the breach complained of was occasioned by the employees of the respondent. As already indicated, the appellant's case against the respondent was not one of vicarious liability in contract, rather that he had failed to control the conduct of his employees as he had contracted to do, leading to the conduct complained of.

The failure by the learned trial judge and for that matter, the appellant's counsel, to find any authorities on the doctrine of vicarious liability in contract is hardly surprising. The fact that all the authorities cited by both the appellant and the learned trial judge, dealt with situations that appropriately fell

within the domain of delict law[1] is clear testimony that such authorities (on vicarious liability in contract) do not exist. The learned trial judge was therefore correct in concluding as follows in her judgment:

> "I would venture to hold that the doctrine of vicarious liability has no equal application in the law of contract (as in delict)".

Like the respondent, the learned trial judge proceeded on the basis that the appellant's case against the respondent was premised solely on the issue of vicarious liability in contract. She did not consider the appellant's argument that respondent's breach of the agreement was based on his violation of the clause requiring him to exercise control over the conduct of his employees. Since this argument was clear on the papers, I find that the court *a quo* clearly misdirected itself in this respect.

The clause of the contract relied on by the appellant in its first ground of appeal is contained in a section of the lease agreement entitled "Lessee's Obligations".

It reads as follows:

> "18.5.2To be wholly responsible for the control and conduct of all persons engaged and employed at the service station in terms of Clause 4.8.1 above and to bear all losses or expenses arising out of
>
> 18.5.3…….
> 18.5.4…….(not relevant)".

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[1] Among others; Goodman Bros (Pty) Limited v Rennies Group Limited 1997(4) SA 91 WLD;
Hotels, Inns & Resort SA v Underwriters at Lloyds 1998(4) SA &
Zimmerman's Law of Obligations at pages 1120, 397 - 399

The respondent argues that clause 18.5.2 is of no force or effect since the provision it makes reference to, i.e. 4.8.1 does not exist in the contract. I am not persuaded there is merit in this argument. Both the appellant and the respondent signed the agreement of lease. The service station was to be run as a business. It must have been understood between the parties that the respondent would employ a number of people to help him run that business. It is not unusual in any business to expect the employer to exercise control over the conduct of his employees, at the business. Consequently I find it unlikely that the parties' intention was for clause 18.5.2 to be entirely without application. Read in context, the clause refers to the employees that the respondent would employ to help him run the business. Reference in it to a non-existent provision does not and should not, in my view, nullify the whole clause. That reference can properly be expunged or ignored without doing harm to the parties' intention, which was to make the respondent responsible for the control and conduct of his employees at the premises. This is an interpretation which I am satisfied is in harmony with the section entitled "Lessee's Obligations". A contrary interpretation would suggest a situation where the respondent would engage the services of the various employees he needed to effectively run the business, and then leave such employees to do whatever they liked without any control from him. Since that would not make good business sense, it is unlikely to have been the parties' intention.

Having determined that the respondent did contract to be responsible for the control and conduct of his employees working at the premises concerned, the question to be determined is did he or did he not discharge this obligation?

The appellant's case is that he did not. It made this very clear in its letter dated 9 March 2004, where the appellant's Cluster Retail Manager, a Mr Goodmore Chatora, charged as follows:

> "This decision (to terminate the lease) has been taken in light of the fact that we hold you wholly responsible for the control and conduct of all persons engaged and employed at the service station (clause 18.5.2) …..
>
> Mobil is very concerned about the lapse in controls and accountability on your part leading ultimately to the alleged offenses by your employees."

The effect of these remarks is that the conduct in question, *albeit* carried out in the manner it was, by the respondent's employees, was a manifestation, or direct consequence, of the respondent's breach of clause 18.2.5 to wit, his failure to exercise control over their conduct.

In order to determine whether or not the respondent breached the lease agreement in such a manner as to warrant its cancellation by the appellant, a consideration of the nature and purpose of the contract is pertinent.

Clause 2.2 of the Agreement provides as follows:

> "2.2 The purpose for which this Lease is granted are to enable the Lessee as Principal and for the Lessee's own account to carry on upon the premises:
>
> 2.2.1 The business of selling (subject as hereinafter provided) Mobil's Motor fuel, lubricants and other petroleum products in accordance with the provisions of the Fifth Schedule hereto;
>
> 2.2.2 The business of rendering the supplying (subject as hereinafter provided) such services and commodities as

are commonly rendered and sold at petrol filing and service stations.

2.3 During the continuance of this Lease and subject to the provisions of paragraph 6 of the Fifth Schedule hereto Mobil shall supply or procure to be supplied to the Lessee and the Lessee shall purchase from Mobil the whole of the Lessee's requirements of motor spirits and automotive diesel fuel for sale at or from the premises."

The purpose of the contract was therefore clear. Only Mobil's products were to be sold at the service station. According to the definitions sections of the agreement the service station was to be operated day and night, that is, 24 hours a day. If the conduct of the respondent's employees is to be viewed against this background, it is evident that they brought onto the appellant's premises and into its fuel tanks, fuel that had been bought from a third party. Their intention was to then surreptitiously sell the fuel from the premises, during times that, according to the contract, they would have been required to sell products sourced from Mobil Oil. If it is to be accepted that the Service Station was to operate for 24 hours a day, it follows that the said employees took illicit delivery of the fuel during working hours.

The thrust of the appellant's case against the respondent is that had he exercised control over his employees, this action, which constituted a breach going to the root of the contract between the parties, would not have happened. There is merit in this argument. The very essence of the contract between the parties was that only the appellant's products were to be sold at the premises, 24 hours a day. It follows that the control that the respondent contracted to exercise over the conduct of his employees had to be continuous, day and night. Whatever measures the respondent might have put in place in this respect clearly were not adequate, as evidenced by the fact that, but for the appellant's intervention, the culprits would have made good on

their conduct. All in all, the conclusion that is difficult to escape is that there was an obvious laxity in whatever controls the respondent may have put in place to supervise the conduct of his employees. In other words, the respondent created the basic environment in which the conduct in question took place. That being the case, little doubt remains that the respondent's laxity constituted a breach of a very material term of the contract. I am satisfied the appellant was within its rights to cancel the lease agreement.

The appellant's main ground of appeal is accordingly upheld and the appeal must succeed. I do not consider it necessary after this to consider the appellant's other grounds of appeal.

The appellant sought costs on the higher scale. I am not persuaded a case has been made for such an order. The appellant, as has been observed above, must take part of the blame for using the term "vicarious liability" in the wrong context and to an extent misleading the respondent as to the case that he was facing. An ordinary order for costs would in my view, be appropriate.

It is in the result ordered as follows:

1. The appeal be and is hereby allowed.

2. The decision of the court *a quo* is set aside and substituted with the following:

"1. The application be and is hereby dismissed with costs.

2. The respondent's counter application be and is hereby granted."

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Wintertons, respondent's legal practitioners