

FUNGAI KAMBALAME
versus
ZIMBABWE UNITED PASSENGER COMPANY
and
ATANASIO TAPERA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 1 MARCH 2017 AND 13 MARCH 2017

Civil Trial

M Dube for the plaintiff
C Daitai for the defendants

MOYO J: Plaintiff instituted proceedings against the defendants claiming:

- a) Payment of the sum of \$15000-00 USD being the quantum of damages for pain and suffering as a result of injuries suffered in an accident encountered during the course of plaintiff's duties whilst in the employ of first defendant.
- b) Payment of the sum of \$25000-00 being the quantum of damages for disfigurement as a result of injuries suffered in an accident encountered during the course of plaintiff's duties whilst in the employ of 1st defendant.
- c) Interest at the prescribed rate.
- d) Costs of suit

The facts of the matter are largely common cause. It is common cause that plaintiff on 14 February 2009, during the course of her duties, was travelling to Tsholotsho in first defendant's motor vehicle namely a Mazda BT 50 registration number ABD 2064. The motor vehicle was being driven by second defendant during his scope of employment with the first defendant. At the 3km peg they were involved in an accident which resulted in plaintiff suffering extensive injuries. The accident was allegedly caused by second defendant's negligence. The particulars of negligence are not specifically pleaded but second defendant paid an admission of guilt fine at Lupane magistrates court where he had pleaded guilty to and was convicted of negligent driving.

For this reason, I will not revisit the cause of the accident. It is common cause that plaintiff suffered injuries as a result. The issue for determination by this court is that of liability in view of the fact that this is an accident that occurred during the performance of duties by the plaintiff. Plaintiff's own pleadings show that the accident occurred while both plaintiff and 2nd Defendant were at work. It is also common cause that a claim was made with National Social Security Act [Chapter 17:04]. The National Social Security Act (*supra*) provides for an insurance scheme wherein both the employer and employee make monthly contributions to cover workplace injuries, and also under the common law of delict an injured employee like any other person can institute a claim for damages where it can be proven that the employer was negligent. SMITH J as he then was, aptly dealt with a similar claim in the case of *Sibanda v Independence Gold Mining Pvt Ltd and another* HH 139-03. The learned judge noted in that case that whilst the common law position is that a worker can sue his/her employer for workplace injuries based on negligence on the part of the employer, in our country the legislature has interfered with this common law position through the enactment of the National Social Security Act [Chapter 17:04] (hereinafter) referred to as the NSSA Act. Section 3 of the NSSA Act empowers the Minister to whom the administration of the Act has been assigned to establish social security schemes by way of a statutory instrument. As a result SI 68/90 was gazzetted, namely NSSA (Accident Prevention and Workers compensation Scheme, Notice). The scheme stipulates the compensation payable to a worker if he\she has an accident that results in death or disablement. The compensation so payable substitutes any other legal remedy. This is as per section 8 of the scheme which stipulates that:

“8. From and after the 1st of January 1960,

- a) no action at common law shall lie by a worker or any dependent of a worker against such workers' employer to recover any damages in respect of an injury resulting in the disablement or death of such worker arising out of and in the course of employment, and
- b) no liability for compensation shall arise save under and in accordance with this scheme in respect of such disablement or death.” (My emphasis).

One would quickly note that section 8 (b) specifically excludes liability otherwise than in terms of the scheme. Section 9 of the scheme provides for additional compensation if the accident was caused by negligence and it reads as follows:

“9 (1) Notwithstanding anything to the contrary contained in this scheme, if a worker meets with an accident which is due:-

a) To the negligence –

- i) Of a person entrusted by his/her employer with the management or in charge of such employer's trade or business or any branch or department thereof, or
- ii) Of a person having the right to engage or discharge workers on behalf of his employer--- the worker or, in the case of his death as a result of such accident his representative, may within 3 years of such accident proceed by action in a court of law against the employer where the employer concerned is individually liable, or otherwise against his employer and the general manager jointly for further compensation in addition to the compensation ordinarily payable under this scheme provided that in the case of an action in which the employer and the general manager are joined, nothing in this section shall be construed to mean that any compensation awarded under this section is payable by the employer.”

This section it appears specifically excludes vicarious liability except where the negligent employee is a managerial employee who can be held to be representing the employer at the material time. This section also seems to specifically exclude liability in every other instance unless the employer is individually liable, not where an employer's liability is based on vicarious liability.

The aforementioned provisions clearly provide that the liability or otherwise of the 1st defendant in this case should be in terms of the scheme.

Section 10 of the scheme provides that where an accident in respect of which compensation is payable in terms of the scheme is as a result of the negligence of a third party and therefore rendering that party liable to pay damages, then the worker may claim compensation from both the scheme and also institute action against the third party concerned. However, sub section (2) of section 9 of the scheme provides that before instituting such proceedings the worker must notify the General Manager of the scheme in writing, of his intention to do so. The subsection specifically prohibits proceedings in a court of law except where the General Manager has been notified. In so far a plaintiff's claim against the employer is concerned, it is specifically prohibited by the scheme as already shown herein (Section 8 (a) and (b) of the scheme quoted in this judgment.

Section 9(1) of the scheme provides that if the negligence is that of a person entrusted by his employer with the management or being in charge of the employer's trade or business the

plaintiff may proceed against the employer. In all other instances it would appear plaintiff can only proceed against the employer on the basis of negligence only where the employer is individually liable. I understand this to mean where the employer is personally liable. In this case, it can firstly not be held that the second defendant was entrusted with the management or was in charge in the manner required by section 9 as this has not been specifically pleaded, neither has evidence been led to establish this fact.

Without the formulation of a basis upon which 2nd defendant was sued in terms of the scheme, plaintiff had to proceed against the employer but she would still need to plead individual liability on the part of the employer.

I hold the view that the *Sibanda* case (*supra*) is on all fours with the matter at hand for a worker was seeking compensation from an employer after he had been injured at work as a result of his co-workers negligence.

In that case it was further held that where the co-worker could not be sued and be found liable for damages as section 9(2) provides for the notification of the General manager, at one's intention to do so. The import of this would be that if plaintiff was to succeed against the 2nd Defendant, the general manager of the NSSA scheme had to be notified and without such notification having been pleaded the claim against the second defendant also cannot succeed. In essence that means the general manager of NSSA had to be cited. The statutory instrument goes further to provide that even in such an instance it does not necessarily mean that the third party being sued and not NSSA would be ordered to pay. In other words once cited NSSA can be ordered to pay additional compensation in terms of the scheme.

In this matter not only did the plaintiff fail to lay a claim in the manner prescribed in the statutory instrument but she also failed to divulge what she was paid in terms of the scheme and how that fell short of the generally accepted amounts in such cases.

- It is a sad state of affairs that the erstwhile legal practitioners of the plaintiff did not read the provisions of SI 68/90 so that they bring plaintiff's claim within the ambit thereof. However, there is nothing that this court can do despite being sympathetic to the plaintiff's case, as clearly, it is demonstrated in the *Sibanda* case, that plaintiff's case cannot succeed as it fails to comply with or to meet the criteria laid down by the scheme. The requirements set out therein are

mandatory and emanate from a statute, a litigant in plaintiff's shoes can therefore succeed only where the claim has adhered to the provisions of section 8, 9 and 10 of the Statutory Instrument, outside the ambit of the provisions of those sections the plaintiff's case unfortunately must fail. I accordingly find that plaintiff's case is fatally defective for want of compliance with sections 8, 9 and 10 of the NSSA scheme.

I accordingly dismiss plaintiff's claim with costs.

Dube, Mguni and Dube, plaintiff's legal practitioners
Messrs Magwaliba & Kwirira, 1st & 2nd defendants' legal practitioners