Judgment No. S.C. 132/99
Civil Appeal No. 55/98

POWER COACH EXPRESS (PRIVATE) LIMITED vs

ABRAHAM LODEWIKUS VILJOEN

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, OCTOBER 26 & DECEMBER 16, 1999

E W W Morris, for the appellant

C Venturas, for the respondent

EBRAHIM JA: This is an appeal against the decision of the High Court sitting in Harare dismissing the appellant's claim with costs. The appellant claimed damages arising out of a traffic accident which occurred on 11 December 1994.

The collision took place at the 144 kilometre peg at the Angwa River Bridge on the main road between Chinhoyi and Karoi. The driver of the appellant's bus estimated the time of the collision as shortly after 7 pm. It was raining and dark. The cause of the collision appears to have been the movement of the tractor driven by the deceased tractor driver onto the tarred surface of the road from the dirt verge, either to cross a bridge or to avoid an obstacle such as the bridge. The front left of the bus collided with the trailer attached to the tractor, causing the bus to career to the right and off the road where it struck some trees, causing considerable damage to the

bus. There can be no doubt that the accident occurred because of the negligent driving of the deceased tractor driver.

It is apparent from the evidence that what the deceased did was to drive the tractor he had in his charge whilst committing a number of traffic offences. He drove the vehicle which had no lights, drove an unlicensed vehicle whilst he himself had no driver's licence, and in all probability drove the tractor after he had imbibed alcohol. He had been specifically instructed by the respondent. His evidence was that the deceased was to utilise the back road through the farm when he conveyed workers from the camp site at Shubhara Dam to work at the Podoro dam and was to cease in time for them to be back at the camp at 4.30 pm. The deceased was instructed to operate in a private area and the only time he was to encroach on the public road was when he was to cross it and enter the private area on the other side and even this he was to do during daylight and to do so following procedures laid down by his employer. These sanctions were not observed by the deceased driver.

The basis upon which the case was decided by the learned judge *a quo* was whether the deceased driver was acting within the course and scope of his employment at the time of the collision. The learned judge *a quo* found in favour of the respondent. It is the correctness of this finding which is the subject of this appeal. The learned judge in his judgment said:

> "In my view, the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be said that he was still exercising the functions to which he is appointed."

There are numerous cases which deal with the issue of vicarious liability which arose in this case - see *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 756; *Nott v ZANU (PF)* 1983 (2) ZLR 208 at 212i; *Gorah v Mahona & Anor* 1984 (2) ZLR 102i; *Witham v Minister of Home Affairs* 1987 (2) ZLR 143; *Boka Enterprises (Pvt) Ltd v Manatse & Anor* 1989 (2) ZLR 117 at 122; *Barclays Bank of Zimbabwe Ltd v Air Zimbabwe Corporation* 1992 (2) ZLR 377; *Music Room (Pvt) Ltd v ANZ Grindlays Bank (Zimbabwe) Ltd* 1995 (2) ZLR 167; *Mvumira v Ngoma & The Minister of Defence* HH-104-97; and, subsequent to the decision in the High Court in this matter, *Biti v Minister of State Security* S-19-99 (not yet reported).

It was *Gorah's* case *supra* in particular on which the appellant relied. In that case BECK JA at pp 108H-109A said:

> "In situations where disobedience by a servant of his master's instructions is causally linked with the injury delictually inflicted by the servant on a third party a useful test is whether the instruction that the servant disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within the sphere."

It was not disputed that on the facts of this case the disobedience by the deceased was substantial. He had driven on a public road and had done so after dark. He had probably deviated and delayed because of a detour to a beerhall. It was, however, the appellant's submission that the instruction which was disobeyed by the deceased did not limit the sphere of his employment. The submission was that the deceased's disobedience related to the way he carried out the respondent's orders; it did not impact on his sphere of his employment. In the result, it was argued, the respondent was vicariously liable for the resultant damage, notwithstanding the substantial nature of the deceased's disobedience.

Mr *Venturas*, who represented the respondent in this Court, submitted that vicarious responsibility should not be too widely spread. He too relied on *Gorah's* case, in which it was held:

> "*Held*, further, that the courts will not adopt an approach to the facts of such cases which would tend towards too zealous a restriction of the principle of vicarious liability of a master for the delictual acts of his servant. The problem is to strike a balance between the opposing considerations of public policy and social justice, on the one hand, and, on the other, the inequity of visiting liability on a party who is not actually at fault in relation to the injury. In situations where disobedience by a servant of his master's instructions is causally linked with the injury delictually inflicted by the servant on a third party, a useful test is whether the instruction disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within that sphere. In this case, there were two distinct aspects of the first respondent's conduct -
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> (1) his bad driving; and
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> (2) his conduct in causing the appellant to be a passenger exposed to the risk of injury.
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> Unless both aspects could be said to be 'acts done in the exercise of the functions to which he was appointed', it must follow that he had not acted throughout as his master's servant in inflicting harm."

See also *Ngubeture v Administrator, Cape & Anor* 1975 (3) SA 1 (A) and *South African Railways and Harbours v Albers & Anor* 1977 (2) SA 341 (D & CLD).

It was the submission made by Mr *Venturas* that his client had taken specific precautions to ensure that his employee, the deceased tractor driver, knew the road he had to traverse, he had taken him to the road, and limited his driver's time to cross the road and in what manner he was to do so. What the deceased did was totally to disregard these instructions. He was reckless. Therefore his employer could not be held liable for his conduct. Mr *Venturas* relied on the observations of

SOMYALO J in *Maxalanga v Mpela & Anor* 1998 (3) SA 987 at 998G-999B where he said:

> "The correct approach, in my view, is to look at the legal principles as set out by our Courts, and then to proceed to look at the facts of the particular case and to consider, always keeping a proper balance between the protection of innocent third parties on the one hand and, on the other hand, the risk of conferring blanket liability on an employer for negligent acts of an employee committed during employment, whether or not the employee acted in the course and scope of his employment. At the time of the accident the first defendant was approximately one kilometre outside the area of operation of (the) second defendant and he was in the process of driving further away from such point of operation; 'every step he drove he drove away from his duty'; he was transporting passengers who had nothing to do with the business of the second defendant; such conveyance was not for the benefit nor in the interests of the second defendant; the conveyance was for the sole purpose and pleasure of (the) first defendant and his passengers.
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> (The) first defendant thus abandoned his master's work, and this abandonment did not merely amount to mismanagement of his duty, or negligence in its performance by an unfaithful employee; it was not a partial abandonment of his duties with the intention of resuming his duties, for I have found that there was no alarm call which had to be attended to at Ikwezi Ford or at Zingisa School.
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> (The) first defendant was therefore entirely on an activity of his own affairs unconnected with those of his master."

It seems to me that what the deceased did on the facts of this case was not just merely to vary the mode of his instructions. He expressly did something he was specifically told not to do. He drove an unlit vehicle at night, he was not a licensed driver, and he had imbibed alcohol. The case is distinguishable from *Biti supra* on two fundamental grounds:

1. The deceased had no authority whatever to drive on a public road. In fact he was specifically forbidden to do so;

2. The deceased was not given overnight custody of the vehicle. In fact he was required to park it before dark.

In my view, no reasonably prudent person in the position of the respondent could reasonably have foreseen that the deceased driver would have defied his instructions in the manner he did. It follows that it cannot be said that the deceased acted within the sphere of his employment.

In all the circumstances, I can find no fault with the conclusion reached by the learned judge *a quo*. Having reached that conclusion it is not necessary for this Court to determine whether the *quantum* of damages had been established by the appellant. It follows that the issue of contributory negligence also does not arise.

The appeal is dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

McNaught Wickwar, appellant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners