

REPORTABLE (25)

(1) RITENOTE PRINTERS (PRIVATE) LIMITED (2) JOHN KANOKANGA
v
A. ADAM & COMPANY (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA et GUVAVA JA
HARARE, MARCH 13, 2015 & APRIL 6, 2016

T Mpofu, for the appellants

R Bwanali, for the respondent

GARWE JA:

[1] This is an appeal against the decision of the High Court, Harare, dismissing with costs a claim for delictual damages arising out of the unlawful eviction of the appellant from certain rented premises in Harare and attachment of its tools of trade. The High Court, whilst finding for the appellant on the question of wrongfulness, concluded that there was insufficient evidence on whether the respondent had acted negligently in causing the eviction of the appellant and consequently dismissed the claim.

FACTUAL BACKGROUND

- [2] A. Adam & Company (Private) Limited (“the respondent”) instituted two separate actions in the High Court for the eviction of Ritenote Printers (Private) Limited (“the first appellant”) from two premises it had rented out to the first appellant on the basis that the first appellant had breached the lease agreement in failing to pay rentals. The actions were subsequently withdrawn and re-instituted in the Magistrates’ Court. The Magistrates’ Court granted an order, *inter alia*, for the eviction of the first appellant from the two premises.
- [3] Dissatisfied with the outcome, the first appellant appealed against that order to the High Court. Believing that the noting of the appeal would not suspend the order of eviction, the first appellant accordingly filed an application for the stay of execution pending the determination of the appeal. The Magistrate, erroneously believing that the common law principle that the noting of an appeal automatically suspends the operation of the order appealed against, dismissed the application on the basis that the applicant could not apply for the stay of execution of an order which had already been stayed by the noting of the appeal.
- [4] Section 40 (3) of the Magistrates’ Court Act [*Chapter 7:10*] provides that where an appeal has been noted, the Court may direct either that the judgment shall be executed upon notwithstanding the appeal or that the execution thereof shall be suspended pending the determination of the appeal. The corollary to this provision is that a party that seeks to have the discretion exercised in its favour has to make an application justifying the grant of such discretion.

- [5] Contrary to the above provision, the respondent, through its legal practitioners, did not apply for leave to execute the judgment granted in its favour following the noting of the appeal. The respondent's legal practitioners simply instructed the Messenger of Court to proceed to evict the first appellant and attach its property, with which instruction the Messenger of Court complied.
- [6] Upon eviction, the first appellant applied to the High Court for an order setting aside the eviction and attachment of its property. The High Court, having noted that the Magistrates' Court was not a court of inherent jurisdiction, came to the incorrect conclusion that since the noting of the appeal did not suspend the judgment of the Magistrates' Court, the respondent was entitled to execute the judgment.
- [7] In a judgment between the parties handed down as SC 15/11, CHIDYAUSIKU CJ came to the conclusion that the High Court was wrong in the above regard and that the respondent was, in terms of the law, obliged to make an application to execute notwithstanding the noting of the appeal. Not having made such an application, the respondent was not entitled to execute. Consequently the learned Chief Justice made an order restoring the first appellant's occupation of the leased premises and directing the respondent not to sell any of the attached items pending the determination of the appeal.
- [8] On 6 July 2011, this Court allowed the appeal filed by the appellants with costs, set aside the judgment of the High Court and substituted the same with an order granting the provisional order sought. In August 2012, the appellants then instituted an action for payment of delictual damages before the High Court. The action was not successful and is the subject of the present appeal.

PROCEEDINGS BEFORE THE HIGH COURT

[9] Before the High Court, the appellants averred that the eviction of the first appellant from the leased premises was wrongful, unlawful and intentional. They further averred that, consequent upon such eviction and attachment of some of first appellant's tools of trade, the appellants had suffered certain patrimonial losses and, in respect of the second appellant, certain damages for *inuria*. They accordingly sought payment of various delictual damages by the respondent.

[10] In its plea, the respondent denied acting either intentionally or negligently. It further averred that it did not, in any event, foresee any harm being occasioned as it genuinely believed in the validity and competence of the order of the Magistrates' Court. The respondent also denied having been aware of the invalidity of the writ of ejectment issued at the instance of its legal practitioners.

[11] During the trial before the High Court, the respondent's director told the court that the respondent had been represented in the Magistrates' Court by a legal practitioner who had failed to appreciate the need to apply for leave to execute before instructing the Messenger of Court to proceed with the execution. He told the court that he did not himself handle the legal issues of the company but left this in the hands of their legal practitioner. As director of the respondent, he assumed that the practitioner was competent and consequently relied on his advice. At no stage did he or anyone else representing the respondent know that the grant of leave was a pre-requisite to the execution. Whatever was done was at the instance of the respondent's legal representative.

[12] In its judgment, the court *a quo* accepted that the respondent had left all issues legal in the hands of its legal practitioner and that the eviction was the result of a lack of

appreciation, on the part of the legal practitioner, of the requirement to seek leave to execute first before such execution was effected. The court further found that it was wrongful of the respondent to evict the first appellant in these circumstances, notwithstanding that such wrongful conduct was based on ignorance of the law and reliance on the advice of its legal practitioner. On the fault requirement, the court was of the view that this was neither specifically pleaded nor proved. No averment of intention or negligence had been made. No evidence had been led to show deliberate infliction of harm with full knowledge that the eviction would result in harm. Consequently, the court *a quo* reached the conclusion that the summons and declaration did not disclose a cause of action cognisable at law and accordingly dismissed the claim with costs. Hence this appeal.

GROUND OF APPEAL

[13] In their grounds of appeal, the appellants allege that the court *a quo* erred in four respects. Firstly, it misdirected itself in concluding that the appellants had not pleaded and proven fault when the appellant had in fact pleaded and proved intention, which is an element of fault. Secondly, it erred in failing to come to the conclusion that the unlawful eviction of the first appellant was deliberate and therefore intentional. Thirdly, it erred in failing to appreciate that the respondent had acted through its legal practitioner and therefore could not be absolved from the consequences of the actions of the legal practitioner. Lastly, it erred in failing to appreciate that there was an evident distinction between the claim brought by the first appellant and that brought by the second appellant.

APPELLANTS' SUBMISSIONS ON APPEAL

[14] In submissions before this Court, the appellants have argued that there are two issues that fall for determination. The first is whether fault was alleged and proved in the court *a quo*. The second is whether the actions of the legal practitioner of the respondent are attributable to the respondent itself. They have submitted that the declaration clearly states that the respondent wrongfully, unlawfully and intentionally procured the eviction of the first appellant. Since the respondent is liable for its legal practitioner's conduct in effecting an unlawful eviction, the court *a quo* was therefore wrong in separating the actions of the respondent from those of its legal practitioner when the relationship between the two was one of principal and agent. The appellants further submitted that, in terms of the law, the respondent is liable for the conduct of its lawyer. It is the legal practitioner who proceeded to flout laid down procedures in executing a decision which had been appealed against without the leave of the Court.

RESPONDENT'S SUBMISSIONS ON APPEAL

[15] In its submissions before us, the respondent has accepted that the court *a quo* was wrong in stating that the element of fault was neither specifically pleaded nor proved. Fault in the form of intention was indeed pleaded in respect of the claim under the Aquilian action but not in respect of the claim under the *actio injuriarum*, which lacked the level of particularity required by the law. The respondent further submitted that it was not proper for the appellant to allege both intention and negligence, as one excludes the other. In its pleadings, the first appellant based its claim on intention as a fault factor but in evidence relied on negligence.

[16] The respondent has also argued that the court was fettered from making a finding of fault based on either negligence or intention on the part of the respondent's legal practitioner because the latter was not party to the suit. Such misjoinder was therefore fatal.

[17] Lastly the respondent drew the attention of the court to the fact that the appellants had conceded that the eviction had emanated from the advice of its legal practitioner. However, fault on the part of respondent's legal practitioner or the respondent itself was not pleaded or proved. Moreover the relationship between the respondent and its lawyers was not simply one of principal and agent but rather one of mandate.

ISSUES FOR DETERMINATION

[18] There are two central issues that fall for determination in this appeal. The issues are, firstly, whether the respondent is delictually liable for the misconduct of its legal practitioner and secondly, whether the appellants pleaded and proved the two important elements under the Aquilian action, namely, wrongfulness and fault. Before considering these issues however, it is necessary to restate the relevant facts of this case, to the extent that such facts are either common cause or not seriously in dispute.

THE AGREED FACTS

[19] In the court *a quo*, as before this Court, the parties were agreed that the action instituted by the appellants arose out of the improper issue, by the respondent's legal practitioner, of a writ of ejectment and attachment against the first appellant. Indeed, before the court *a quo*, it was common cause that, in order to execute upon the judgment granted in its favour but which had been appealed against, the respondent required the leave of the court to execute that judgment. This the respondent's legal

practitioner had not applied for, apparently out of a lack of appreciation of the correct legal position in the circumstances.

- [20] It was common cause that the respondent had left its affairs in the hands of its legal practitioner, believing that he would professionally handle those affairs. The fault in not applying for leave and thereafter in instructing the Messenger of Court to proceed to evict the first appellant and attach its property was that of the legal practitioner. The respondent was not involved in the making of this decision nor was it aware of the fact that the eviction and attachment were unlawful. In short the respondent had not done anything beyond instructing its legal practitioner to represent it in the ensuing litigation.

WHETHER A PARTY IS LIABLE FOR ITS LEGAL PRACTITIONER'S DELICTS

- [21] In my view, this question is central. What is the relationship between the respondent and its legal practitioner in terms of our law of delict? Is it simply one of principal and agent as submitted by the appellant?

- [22] The position in English law is clear. A legal practitioner is his client's agent. What he does or does not do binds his client. The act of the legal practitioner is the act of the client. This is the position both in contract or delict.

- [23] The above position has been stated and restated in various English cases. In *Collett v Foster* 1857 2 H + N 356, 157 ER 147 the court stated at p 150:-

“I have always understood that, where a party employs an attorney, and judgment is obtained and execution issued, and that execution set aside on the ground of irregularity, then the client is liable for any act of trespass under that process. The writ is a justification to the officer but not to the party. The attorney who has gone beyond his duty becomes responsible with his client. An attorney is a peculiar kind of agent; in the Court he is put in the place and stead of the client, and is authorized to take proceedings on his behalf, but the client, who rarely knows what proceedings the attorney takes, is responsible.

This principle has been so long settled and laid down in the books that I do not wish it to be understood that I entertain the slightest doubt upon this subject..... But the general rule in the case of attorney and client is, that when legal process issues, and a trespass is committed, and the writ is afterwards set aside, the principal becomes liable. The contest generally is, not whether the client, but whether the attorney is liable.”

[24] In Roman-Dutch law, within the field of contract, the position is not different. *Contractual* liability depends on the presence of privity which exists in most cases. In such cases the client’s liability for a legal practitioner’s conduct is the same as if the client had performed the service himself. For this reason, in proceedings before the Court, the conduct of the lawyer binds the client – see, for example, the remarks of my sister judge ZIYAMBI JA in *Machaya v Muyambi* SC 4/05.

[25] The position in delict is however different. A situation where a client instructs a lawyer to handle his affairs and leaves everything to his discretion and the legal practitioner then commits a delict cannot be determined by reference to the employer – employee relationship because the lawyer is not an employee of the client. He is a professional who has tendered his services for a fee. Such an agreement is one of *mandatum* or *lastgeving*. In such a contract, a legal practitioner, as mandatary (*mandatarius*), undertakes to perform legal work on behalf of the client, who is the mandator (*mandator*).

[26] Commenting on the nature of this relationship, J.R. Midgley states in his text, *Lawyers Professional Liability*, at p 192:-

“... one of the features of a lawyer’s mandate is that the obligation to obey instructions is varied and the lawyer is granted sufficient independence to fall outside the client’s control. As Atiyah points out “*prima facie* it is clear that a solicitor in private practice is an independent contractor in his relationship with his clients, and it might therefore have been assumed that a client could not be vicariously liable for anything done by his solicitor, even though it be done in his name and on his behalf.”

- [27] However, there have been conflicting opinions, both in academic and judicial circles, as to whether or not, in principle, a mandator is vicariously liable for his mandatary's delicts – J. R Midgley, *op cit*, at p 189.
- [28] In *Eksteen v Van Schalkwyk en'n Ander* 1991 (2) S.A 39 (T), the court confirmed that an attorney – client relationship is based on mandate. Following a thorough review of Roman and Roman-Dutch law, the court was unable to find any instance in which a mandator was held vicariously liable for the delict committed by a mandatary. Under Roman law, a mandatary was not the agent of the mandator. See *Totalisator Agency Board, OFS v Livanos* 1987 (3) SA 192 W, 201.
- [29] However in *Barclays National Bank Ltd v Traub, Barclays National Bank Ltd v Kalk* 1981 (4) S.A 291 (W) the mandator was held liable for the delict committed by an agent on the basis that the agent's knowledge could be imputed to the principal. This case followed English and American law where clients have been held liable for the improper institution and conduct of legal proceedings – J.R Midgley, *op cit*, p 191.
- [30] In *Eksteen v Van Schalkwyk en'n Ander*, (*supra*), the court accepted the position to be that, where a client had not instructed an attorney to commit a delict or where he was not able to foresee that the attorney would commit the delict, the client would not be liable.
- [31] Neethling.Potgieter.Visser in their book *Law of Delict*, 7th ed, also argue that the mandator is only liable for damage caused by the mandatary if the former himself also committed a delict (at p 391).
- [32] J. R Midgley, *op cit*, concurs. The learned author states at pp 190-191:-

“Roman-Dutch law indicates that the mandator could be liable in delict, but only if he were a party to the conduct or where the mandator himself were at fault in that he should reasonably have foreseen the mandatary’s conduct. South African law reflects this position ...”

[33] The learned author further opines:-

“... outside an employment relationship, the crucial question is whether or not the person who committed the delict is subject to another’s right of control. If he is not, the position is similar to that which obtains when an independent contractor commits a delict.”

[34] In *Tendere v Municipality of Harare* 2004 (1) ZLR 495 (S), a full bench decision, this Court has held that a judgment creditor is not vicariously liable for the actions of the Messenger of Court and that it is only where the judgment creditor or his attorney plays an active role in the unlawful attachment of the property by the Messenger of Court and makes the messenger’s actions his own that he or his attorney can be held delictually liable on the same basis as the messenger.

[35] J. R Midgley, *op cit*, at p 192, has further stated:-

“... common sense surely dictates that a client should not be held liable for a lawyer’s delicts. Whatever the rationale for vicarious liability – be it the benefit, the identification, the solvency or the risk theory, or social convenience and rough justice – justifications applicable to employment relationships do not apply with equal force in cases where persons obtain professional services. In most instances the rationale for vicarious liability is to provide the injured plaintiff an opportunity to sue someone who is not a person of straw: the defendant, instead of being an individual, is a business enterprise which is capable of distributing its losses over all its customers. The converse occurs where professional services are involved: the person who is in the position to spread the risk is the mandatary, not the mandator. Also, one usually engages a professional because one wishes to avoid doing things incorrectly. One relies upon the skilled person to avert loss to another. To hold the client liable for the conduct of the professional is contrary to one’s sense of fair play. It is neither equitable nor reasonable to distribute the loss in such a manner, which accounts for the reluctance of English courts to hold clients liable and Atiyah’s view that such vicarious liability is questionable.”

[36] The learned author further comments at p 192:-

“... the legal convictions of the community would not favour vicarious liability in lawyer and client cases. A client should therefore not be held liable for a lawyer’s delicts.”

[37] I am inclined to agree entirely with the above sentiments which are, at any rate, consistent with South African case law and, to a large extent, our own. The position then must be that a client is not liable for the delict committed by his legal practitioner, unless he makes common cause with such lawyer or otherwise instructs him to proceed notwithstanding an obvious irregularity in the papers.

[38] In the particular circumstances of this case therefore, the *onus* was on the appellants to plead and prove wrongfulness in the sense that the respondent had conducted itself in a morally blameworthy way or otherwise made itself party to the delict.

THE APPELLANT’S CLAIM A QUO WAS BASED ON THE LEX AQUILIA AND ACTIO INJURIARUM

[39] The appellant’s claim in the court *a quo* was for payment of various amounts in damages for unlawful eviction. It is clear that the first appellant’s claim was based on the *lex Aquilia* whilst the second appellant’s claim was based on both the *lex Aquilia* and the *actio injuriarum*.

[40] The requirements for the Aquilian action are well established. They are:

- Voluntary conduct which is
- unlawful or wrongful (wrongfulness)
- Capacity

- the conduct must have led to physical harm to person or property and thereby to financial loss or have caused purely financial loss which does not stem from any physical harm to person(Loss)
- the loss must have been inflicted intentionally or negligently (fault or culpa), and
- there must be a casual link between the conduct and the loss (causation).

[41] Under the *actio injuriarum* the plaintiff must plead and prove an intentional infringement of a personality right. *Inuriae* which occur regularly have come to be known by specific names, such as defamation, wrongful attachment of property, abuse of legal proceedings, etc, but essentially remain species of the *genus inuria*. Both intention and wrongfulness must also be pleaded.

THE BASIS OF THE APPELLANTS' CLAIM

[42] The appellants' claim in the court *a quo* was predicated on the common cause fact that the writ of ejectment and attachment was null and void. In the declaration and further particulars supplied, the appellants alleged that the respondent had “wrongfully, unlawfully and intentionally procured the eviction of the first plaintiff from certain premises” and that, as a result, both plaintiffs had suffered certain losses. The eviction was said to be “a wrongful, deliberate and intentional affront” to the second appellant and therefore constituted an *inuria*.

[43] Although it was common cause that it was the respondent's legal practitioner who had been at fault in failing to appreciate the provisions of the law before instructing the Messenger of Court to evict the first appellant, no basis was pleaded upon which the respondent would be said to have been delictually liable for the conduct of its legal practitioner in these circumstances. There was no suggestion that the respondent, well

knowing or realising that there was need for leave to execute to be sought and granted first before the eviction of the first appellant, nevertheless directed its legal practitioners to proceed in the absence of such leave. There was also no suggestion that the respondent, aware that the writ of ejection and attachment was irregular, nevertheless directed its legal practitioners to proceed and instruct the Messenger of Court to evict the first appellant.

[44] It is also apparent from the papers filed in the court *a quo* that both appellants sought to claim the damages jointly. No attempt was made to separate the first appellant's claim from that of the second appellant. For example the claim for losses suffered by reason of the failure to trade are claimed by both appellants. So too is the claim for payment of the sum of \$450 000 being the diminution in the value of the first appellant's business.

[45] The position is now settled that a plaintiff claiming delictual damages under the *lex Aquilia* must not only allege but prove, *inter alia*, *culpa*. In alleging such *culpa*, the party must give sufficient particulars of the mental status of the offending party so that the latter knows what case he has to meet. Failure to allege *culpa* or to provide particulars of such *culpa* is fatal as the claim would not disclose the plaintiff's cause of action – *Border Timbers Ltd v Zimbabwe Revenue Authority* 2009 (1) ZLR 298 (S) 131 (H), 139 D-E; *Metallon Corp Ltd v Stanmaker Mining (Pvt) Ltd* 2007 (1) ZLR 298 (S), 299 E-G.

WHETHER WRONGFULNESS AND CULPA WERE ALLEGED AND PROVED

[46] I agree with the respondent that the appellants alleged, in the declaration, that the respondent had wrongfully, unlawfully and intentionally procured their eviction. However, no particulars of such wrongfulness or intention were provided. The

eviction was further said to have been a deliberate, wrongful and intentional affront to the person of the second appellant and that it constituted an inuria. Again, no particulars were provided in this regard and the specific inuria allegedly committed by the respondent was neither pleaded nor identified.

[47] Clearly the bald averments made on behalf of the appellants were not sufficient to inform the respondent of the case that he was being called upon to meet.

[48] Taking into account the current position of our law on the liability of a client for delicts committed by a legal practitioner, it was incumbent on the appellant to allege how, in the circumstances of this case, the respondent's conduct had both been wrongful and intentional. The conduct of the respondent would have been wrongful if its state of mind had been legally blameworthy or reprehensible. For this purpose, wrongfulness is determined by reference to public policy or the legal convictions of the community whilst *culpa* or fault is determined by reference to whether it intended that result or foresaw the possibility of harm and whether it should have taken steps to prevent the occurrence of such harm.

[49] The declaration filed by the appellant in the court *a quo* did not indicate how, having left all its affairs in the hands of its legal practitioner and, not having interfered with the legal practitioner's use of discretion in any way, the respondent's conduct would have been considered wrongful. Nor was there any indication in the papers as to how, in these circumstances, the respondent's conduct could be said to have been intentional or even negligent.

[50] From the facts of this case, it is clear that the appellants were labouring under the misapprehension that, once the fact was established that the legal practitioner was

acting on behalf of the respondent and the legal practitioner had unlawfully instructed the Messenger of Court to evict the appellants, then the appellants did not need to prove anything else. In this they were clearly wrong. Whilst, as already noted earlier in this judgment, a legal practitioner provides professional legal services on behalf of a client, the client is not, in our law, liable in delict for any wrongs committed by the legal practitioner in the course of providing such services, unless the client himself also commits a delict in the process.

[51] Indeed the court *a quo* was at pains to point out that “proof of fault would have required evidence of more than wrongfulness or unlawfulness ...” and that “there was no evidence before the court that proceeding to evict the first plaintiff on the back of two court orders was an unreasonable manner to proceed on the part of the defendant.”

[52] In the absence of an averment and evidence that the respondent had done more than just brief its legal practitioner, neither wrongfulness nor *culpa* were alleged or proved. In short, in the absence of such averment the appellants had no cause of action.

DISPOSITION

[53] It is clear that the appellants had no cause of action against the respondent, in the absence of an allegation and proof that the respondent had done more that instruct its legal practitioners to handle its affairs. The respondent’s conduct in enlisting the services of its legal practitioner to secure the eviction of the first appellant was not wrongful.

[54] In the circumstances, the appeal must fail.

[55] It is accordingly ordered as follows:-

“The appeal be and is hereby dismissed with costs.”

HLATSHWAYO JA: I agree

GUVAVA JA: I agree

Messrs Hamunakwadi, Nyandor & Nyambuya, appellant’s legal practitioners

Messrs Venturas & Samkange, respondent’s legal practitioners