

IN THE SUBORDINATE COURT OF THE FIRST

2016/CRMP/0493

CLASS FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ARTHUR TEMBO

PLAINTIFF

AND

JAMES KASAMANDA

FIRST DEFENDANT

GIFT KALONGA

SECOND DEFENDANT

Before the Honourable Magistrate Mr. Humphrey Matuta Chitalu in open court at 09 00 hours this 29th day of June, 2017.

For the plaintiff: In person

For the defendants: In person

JUDGMENT

LEGISLATION REFERRED TO:

- 1. SUBORDINATE COURT RULES, CHAPTER 28 OF THE LAWS OF ZAMBIA, ORDERS 6, 31**

CASES REFERRED TO:

- 1. RE ATLAS TRANSPORT LTD** (1977) ZR 155 (HC)
- 2. DONOGHUE V. STEVENSON** (1932) A.C. 562
- 3. ACROPOLIS BAKERY LTD v. ZCCM LTD** (1985) Z.R. 232 (S.C.)

The plaintiff commenced this action by way of writ of summons filed on 25th April, 2016 pursuant to Order 6 of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia. On the 27th June, 2016 the plaintiff filed an amended writ of summons. The plaintiff claims:-

1. Replacement of the engine which was damaged due to the defendants' negligence when the plaintiff's vehicle was taken to the defendants' car wash for engine wash or alternatively a payment of cash equivalent to the cost of replacement of damaged engine;
2. Damages for the inconvenience caused by the defendants' negligence when the plaintiff's car was taken to the defendant's car wash for engine wash which led to the engine being damaged;
3. Compensation for loss of business due to defendants' action;
4. Costs of and incidental to these proceedings; and
5. Any other relief the court may deem fit.

The plaintiff was at all material time a business man operating a Toyota Ipsum registration number ABV 2215 as taxi. The first defendant was at all material time a business man trading as Cairo Car Wash offering car cleaning services. The second defendant was at all material time an employee or servant working at the first defendant's car wash. On or about the 24th April, 2016 Joseph Tembo, plaintiff's driver took the motor vehicle at the first defendant's car wash seeking cleaning services. Joseph Tembo requested the second defendant to perform engine wash on the motor vehicle. The second defendant in the course of performing his duty applied water to the engine whilst it was raving and running thereby damaging the engine beyond repair. The damaged engine was completely removed and replaced with another at the total cost of K15, 000.

The defendants at the stage of defence abandoned these proceedings.

These are the facts in brief.

The issues raised by the facts on the record as I see them are as follows:

1. Whether court court can proceed to render judgment in the absence of the defendants' defence;
2. Whether the action by the second defendant amount to negligence; and
3. Whether the first defendant can be held liable for the second defendant's wrongful or negligent performance of his duty in the course of employment.

Regarding the first issue, I was guided by **Order 31 of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia** which is written in the following terms:

“O.31 if the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons, proceed to hear the cause or matter and give judgment on the evidence adduced by the plaintiff”.

In the case of **RE ATLAS TRANSPORT LTD** (1977) ZR 155 (HC) the High Court held that:

“It should be noted that the plaintiff must adduce evidence and judgment cannot be entered simply on the non-appearance of the defendant.”

In light of that guidance, I come to the second issue of whether the second defendant's conduct amount to negligence which in my view is a question of law and fact. In law, negligence as a tort consists of three elements: a legal duty to take care; breach of that duty and damage suffered as a consequence of the breach. The case of **DONOGHUE V. STEVENSON** (1932) A.C. 562 is a landmark decision that lucidly espoused the elements constituting the tort of

negligence. The second defendant was under a duty to take reasonable care to avoid damaging the engine of the motor vehicle he was asked to wash. When the engine got damaged as a result of his improper work, the second defendant was in breach of that duty. As a consequence the plaintiff suffered a damage costing him K15, 000 in replacement of the damaged engine. In my view the conduct of the second defendant *prima facie* was wrongfully negligent.

Having made that finding, I now carefully consider the third issue in the light of the evidence on record in order to make an assessment as to whether the plaintiff has proved his claims. In the case of **ACROPOLIS BAKERY LTD V. ZCCM LTD** (1985) Z.R. 232 (S.C.), the Supreme Court stated that:

“One of the considerations for attaching vicarious liability these days is that the employer is better able to make good the plaintiff's loss and to bear the cost of the damages inflicted by the employees' wrongful conduct. But even on this rationale there must be a proper foundation and an arguable connection between the conduct complained of and the employment.”

It would appear two principles can be filtered out from the Supreme Court's decision cited above: that before vicarious liability is imposed on the defendant there must be two conditions which must be met: there must be an employer-employee relationship; and the second condition which must exist before an employer will be held liable for an employee's tort is that it must be committed when the employee is acting in the course of employment.

In the case at hand, it is not in dispute that the second defendant was employed by the first defendant to wash cars at the said car wash and that the second defendant damaged the plaintiff's engine in the course of performance of employment.

I do not have the evidence or basis upon which I can make an assessment as to damages for inconvenience or compensation for the plaintiff's loss of business.

However, I do have receipts on the record showing the cost of replacing the damaged engine. With those remarks I hold the first defendant liable for the costs of replacement of the damaged engine in the sum of K15, 000.

I award costs of this action to the plaintiff to be agreed and in default to be assessed by the clerk of court.

Delivered in open court this 29th day of June, 2017.



Humphrey M. Chitalu
RESIDENT MAGISTRATE

