LOCAL AUTHORITIES PENSION FUND
versus
MUNYARADZI NYAKWAWA
and
JORAM ZIFUNZI
and
KINGSTON BUNGARE
and
EMMANUEL RAMUTSAMAYA
and
KINGDOM BANK LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 28 October 2014 and 28 January 2015

Opposed application - exception

Adv. T. Mpofu, for excipient (or fifth defendant)
Adv. E.T. Matinenga, for respondent (or plaintiff)

MAFUSIRE J: This was an exception. The facts are taken "as is" from the plaintiff's declaration.

There were two sets of employees. It was their nefarious activities that caused the plaintiff to clash with the fifth defendant, two parties that otherwise had no relationship between them. The one pair of employees was employed by the plaintiff (hereafter referred to as the "***pension fund***"). The other pair was employed by the fifth defendant (hereafter referred to as "***the bank***").

For more than three years the pair employed by the pension fund was stealing from their employer, the pension fund. For more than three years the pair employed by the bank was conniving with the pair from the pension fund to store the stolen funds in fictitious bank accounts opened by them with the bank. The *modus operandi* was this. The pension fund pair would identify pensioners to whom lump sum benefit payments were due. They would forward the details to the bank pair. The bank pair would "… *during the scope and course of their employment* …" with the bank, open "… *fraudulent bank accounts* …" in the names of the pensioners, at one of the banks' branches. The bank pair would then illicitly facilitate the storage of the stolen monies in those "… *fraudulent … accounts* …" Afterwards the pension

fund pair, with the assistance of the bank pair, would then withdraw the loot and share it amongst the four of them. The amount involved was US$926 392-72.

The pension fund's summons was against its own pair, as first and second defendants; the bank pair, as third and fourth defendants; and the bank, as fifth defendant. From the declaration the cause of action against the bank, as I understood it, was twofold. The first was based on vicarious liability. It was pleaded this way:

> "2.6 Fifth Defendant is liable vicariously for the mismanagement of its business by First and Second [Defendants] which resulted in Plaintiff being defrauded as particularised in Paragraphs 2.4 and 2.5 above."

The second cause of action, pleaded in the alternative, was based on negligence. It was put this way:

> "2.7 Alternatively, and in any event Fifth Defendant was negligent in that it failed to take requisite measures which include:
>
> a) verifying and/or ensuring the verification of the identity of its customers and the capacity in which its customers will (sic) be acting when they transact.
>
> b) establishing internal reporting structures to deal with suspicious acts of money laundering.
>
> c) having in place adequate policies and procedures and internal controls that promote high ethical and professional standards and prevent its institutions from being used, intentionally or unintentionally, by criminal elements.
>
> d) having in place a sound Know Your Customer ("KYC") policy and procedure."

The rest of the averments in the plaintiff's declaration seemed an amplification of the alternative cause of action, the one based on negligence. They were these:

> "2.8 Fifth Defendant is under a statutory duty and obligation to take measures to prevent its institutions or the services its institutions offer from being used to commit or facilitate financial crime.
>
> 2.9 Fifth Defendant at the time of the fraudulent activities, had poor internal standards, inadequate policies and procedures and internal controls that promote high ethical and professional standards and poor to non-existent KYC procedures all of which amount to negligence on the part of Fifth Defendant and a breach of statutory duty for which it is criminally and civilly liable.
>
> 2.10 First, Second, Third and Fourth Defendants jointly and severally, took advantage of the opportunity created by Fifth Defendant's negligence and

breach of statutory duty, to open and use fictitious accounts to defraud Plaintiff.

2.11 There exists a causal link between Fifth Defendant's negligence and First, Second, Third and Fourth Defendants' success in defrauding Plaintiff such that were it not for Fifth Defendant's negligence, the defrauding of Plaintiff would not have occurred.

2.12 Accordingly, the joint and concurrent wrongful, negligent and intentional actions of Defendants caused substantial patrimonial loss to Plaintiff."

The bank's exception was that the pension fund's claim against it disclosed no cause of action cognizable at law. The exception was pleaded as follows:

"a. No special duty of care is at law or on the pleaded facts owed by the fifth defendant to plaintiff.

b. No basis exists at law or on the alleged facts for concluding that the creation of irregular accounts by first and second defendants amounts to a delict on fifth defendant's part.

c. The criminal allegation raised against first and second defendants do not relate to the theft of goods stored with them as part of their employment duties and there is consequently no basis at law upon which vicarious liability for their thefts could be imputed upon fifth defendant.

d. There is no basis at law or on the alleged facts for the view that the storage of stolen funds renders the storing banking institution liable for such thefts."

I now consider the claim against the exception.

(a) <u>Is the bank vicariously liable to the pension fund for the theftuous actions of the employees concerned?</u>

An employer is liable for the wrongs done by his employee to another person in the course and scope of that employee's employment: *Mkize v Martens*[1]; *Feldman (Pty) Ltd v Mall*[2]; *South British Insurance Company v Du Toit*[3]; *Nott v Zimbabwe African National Union (Patriotic Front)*[4]; *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd*[5]; *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors*[6]; *Commissioner*

[1] 1914 AD 382
[2] 1945 AD 733
[3] 1952 SR 239; 1952 (4) SA 313
[4] 1983 (2) 208
[5] 1991(2) ZLR 291 (SC)

for the South African Revenue Service & Anor v TFN Diamond Cutting Works (Pty) Ltd[7]and *Minister of Finance & Ors v Gore NO*[8].

That an innocent employer should be liable for the wrongs committed by his employee during the course and scope of that employee's employment is a matter of public policy: *Commissioner for the South African Revenue Service & Anor v TFN Diamond Cutting Works (Pty) Ltd, supra*. The rationale is that the employer's work is done "by the hand of the employee". The employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee's improper or negligent conduct in carrying on his work: *Feldman's* case, *supra*, at p 741.

The employee's wrongful act can either be *culpa* (negligence), or *dolus* (intention), or both. In *TFN Diamond's* case PONNAN JA said:

> "Counsel for the defendant conceded that had Matshiva been negligent in safeguarding the contents of the safe there would have been no doubt that his employer would have been vicariously liable for any loss occasioned in consequence thereof. Negligence is but a form of fault. So, too, is intention. If liability were to attach to the defendant in consequence of Matshiva's negligent failure to safeguard the diamonds, why, it must be asked, would it escape liability if he acted intentionally?"

Thus the theftuous conduct of an employee can render the employer liable for the loss suffered by the victim of the theft. In *Fawcett* GUBBAY CJ said[9]:

> "It was formerly thought that an employer could not be held vicariously liable for a theft committed by his employee on the ground that the act of stealing necessarily took the employee out of the course of his employment. Dishonesty or fraud by the employee for his **own** benefit did not render the employer liable.
>
> This view of the law no longer prevails. It is now recognised and accepted that theft by an employee to whom the goods concerned have been entrusted is, in fact, an improper and dishonest mode of performing what he is employed to do, namely, to take care of the goods. In such circumstances, the employee is acting nonetheless in the course of his employment, and so the employer is vicariously liable for the loss of the goods."

There are several limitations to the scope of vicarious liability. The one relevant to this case is that stated by the learned Chief Justice in *Fawcett*. At p 295E – F he said:

---

[6] 2002 (5) SA 649 (SCA)
[7] 2005 (5) SA 113 (SCA)
[8] 2007 (1) SA 111 (SCA)
[9] At p 294C - E

> "Where an employee has committed a theft, the test to be applied is to enquire whether the goods stolen had been **entrusted** to his care by his employer. If they had not, the theft is outside the scope of his employment and the employer is not vicariously liable. The theft is the act of the employee pursuing his own selfish ends – something he has done entirely on his own account."

In my view, it will be ridiculous to stretch vicarious liability to the kind of theftuous actions disclosed in this case. It was not the bank's employees that were stealing from the pension fund. It was the pension fund's own employees. Understandably, the bank retorted that for more than three years the pension fund had failed to detect the theft in its own backyard by its own people and that instead of suing it, the pension fund was better advised suing its own auditors who had let it down. The pension fund retorted back saying it was none of the bank's business to advise it who to sue. But I guess if the pension fund is suing it then the bank may be justified in deflecting the blow elsewhere.

The basis of the pension fund wanting vicarious liability extended to the bank in the circumstances of this case was that but for the facilitation provided by the bank employees, the pension fund employees would not have been successful in their theftuous enterprise. I do not agree. The theft by the pension fund employees was *perfecta* by the time the loot was transferred and stored in the bank. Theft may be a continuing offence. And as already pointed out, an employer may be liable for the theft of goods by its own employees. But there is a world of difference between the circumstances under which an employer may be liable for the theft of someone's goods by his employees and the circumstances of this case. In *Fawcett*, it was stressed that the liability of the employer attaches where the goods had been **entrusted** (emphasis by the Chief Justice) to the thieving employee. This was not the case in this case. The bank pair neither stole monies entrusted to them nor stole from the pension fund at all. All they did was to provide storage facilities for the funds stolen by the pension fund's own employees. There can be no vicarious liability in such a situation.

In *Fawcett's* case, the victim of the theft was a supermarket. The culprit was a security guard employed by the security company that the supermarket had contracted to provide security services. The security guard not only stole from the supermarket himself, but he also allowed other people to steal from it. On vicarious liability, the Supreme Court held that it could not be said that the goods in the supermarket had been **entrusted** to the thieving guard. In order for an employer to be liable under such circumstances the goods must in some way or other have been **entrusted** into the possession or charge of the employee.

As was stated by SALMON LJ in *Morris v C W Martin & Sons Ltd*[10] (quoted by GUBBAY CJ in *Fawcett*)[11];

> "The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depredations."

In the circumstances, I find that there is no principle of law that extends the concept of vicarious liability to the bank in this matter.

(b) <u>Was the bank negligent in relation to the pension fund</u>?

Negligence is the failure, judged objectively, to exercise that degree of care expected in any given circumstances[12]. It involves a duty of care and a breach of that duty. To found a cause of action there must have been a duty of care owed to the plaintiff that the defendant ought reasonable to have guarded against. Negligence in the air does not suffice. This is illustrated by the remarkable facts of the well-known American case of *Palsgraf v Long Island RY, Co*.[13]. The English case of *Bourhill v Young*[14] and the South African case of *Workmen's Compensation Commissioner v De Villiers*[15] also do help illustrate the point.

In this case, it was common cause that the pension fund was not a customer of the bank. The plaintiff's declaration does not specify what kind of duty of care that was owed by the bank to the pension fund that the bank breached. If the bank was negligent in the manner that it ran its operations, then such negligence was classically negligence in the air. In the American case aforesaid, a railway employee tried to assist a passenger board a train. The employee negligently knocked down a package in the passenger's arms. The package contained fireworks. This was unknown to the employee. There was a violent explosion. A chain reaction followed. A weighing scale some considerable distance away was knocked over by the force of the explosion. As it fell, the scale injured the plaintiff, a woman passenger who intended to board another train. The New York Court of Appeal exonerated the railway company. It held that the conduct of the railway employee might have been a wrong in relation to that passenger from whom the package had been knocked, but not in relation to the plaintiff standing far away.

---

[10] [1965] All ER 725 (CA) @ p 740G - H
[11] At p 295B - C
[12] R G McKERRON *The Law of Delict*, 7th ed. pp 25 - 26
[13] (1928) 24 NY 339
[14] [1943] AC 62; [1942] 2 All ER 396 [HL]
[15] 1949 (1) SA 474 (C)

In the South African case of *Workmen's Compensation Commissioner* the defendant was the driver of a lorry. He drove his lorry into a municipal market. At the entrance he bumped the door of the market slightly. Unbeknown to him, there was a carpenter who was standing on a ladder that was propped up against the inside of that door. The carpenter was dislodged and injured. It was held that the defendant, the lorry driver, was not liable to the carpenter. The presence of that carpenter behind the door could not have been reasonably foreseeable. The lorry driver might have owed a duty of care to the municipality, but not to the carpenter.

In casu, even if the bank was somehow negligent in the manner it ran its operations in the branches, there is simply no nexus between such negligence and the misfortunes of the pension fund under the hands of its own employees. Such negligence would not be negligence in relation to the pension fund. In my view, the bank owed no duty of care to the pension fund.

In addition to the American and South African cases above, the English case of *Bourhill, supra,* also helps bring out the concept of duty of care. Admittedly, the facts in all these cases are far different from those of the present case. But the principle is the same. In the English case, the appellant, a fishwife, was unloading her fish basket from the off-side of a tram. She was pregnant. A motorcyclist who was travelling at an excessive speed sped past the tram and crashed into a motor-car several meters away. The cyclist was thrown onto the street. He sustained severe injuries from which he died. The fishwife did not see the accident. However, the sound of the collision gave her such a shock that a month later she suffered a miscarriage. But the House of Lords exonerated the estate of the cyclist. The cyclist might have been negligent in relation to the owner of the car, but not in relation to her.

I am mindful that in the passage in *Fawcett*, at p 295, part of which I have quoted above, the learned GUBBAY CJ went on to say this:

> "The employer may, of course, be liable on the ground of his negligence in selecting the employee, or because the theft was induced by his own negligence, or because of the negligence of some other employee to whom the charge of the stolen property had been committed."

Certainly, the Supreme Court did find the supermarket's claim based on the negligence of the security company **not** excipiable, even though it had been pleaded inelegantly. However, there is still a world of difference with the present case. In the *Fawcett* case there was a contractual relationship between the parties. The negligence sought to be

pleaded was contractual, not delictual as in the present case. It was the same situation in the English authorities considered by the Supreme Court in that case. A duty of care could arise in contract. In this case there was no contractual relationship or a relationship of any sort between the pension fund and the bank.

Evidently, appreciating the thin ice on which it was skating by relying on negligence, the pension fund tried to bolster its case by invoking the provisions of some unnamed statute. But the plaintiff's declaration in this regard would still be deficient. If reliance is placed on implied provisions of a statute, that fact as well as the contents of the implied provisions must be pleaded to clearly bring that issue to the notice of the court and the other parties so as to avoid vagueness and embarrassment: see *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer*[16] and *Arun Property Development (Edms) Bpk v Stad Kaapstad*[17].

It seems the failure by the pension fund to specify the statute on which it relied in paragraphs 2.8, 2.9 and 2.10 of its declaration, manifestly led counsel of both parties to shoot in the dark. The language used in those paragraphs and paragraph 2.7 as well, strongly resembled that of the Bank Use Promotion Act [*Chapter 24:24*], and the Money Laundering and Proceeds of Crime Act [*Chapter 9:13*].

In his heads of argument, filed in June 2014, Mr *Mpofu*, for the bank, evidently assumed that the reference to "… *financial crime* …" in the plaintiff's declaration was a reference to one of these Acts. He referred to what he termed "*Bank Use Promotion and Suppression of Money Laundering Act*", the old name by which the Bank Use Promotion Act was known before amendment in 2013. Mr *Mpofu* went on to quote *in extenso*, section 32 as one which created some criminal offences and penalties for a failure by a designated institution to *inter alia* comply with certain disclosure orders. But with all due respect to counsel, the whole of Part IV of the Bank Use Promotion Act, comprising sections 23 to 32 that dealt with the suppression of money laundering, was repealed in 2013 by the Money Laundering and Proceeds of Crime Act.

On his part, Mr *Matinenga*, for the pension fund, referred in his heads of argument, filed in July 2014, to the "*Bank Use and Suppression of Money Laundering Act [Chapter 24:24]*", again the same mistake. He referred to sections 24 to 28 of that Act and said they placed certain obligations on financial institutions and their employees, *inter alia*, to verify the identity of their customers; to keep a record of the transactions; to report any suspicious

[16] 1997 (1) SA 710 (A) @ p 725
[17] 2003 (6) SA 82 (C) @ p 90 - 92

conduct regarding any transaction, *et cetera*. Evidently, counsel must have meant the Money Laundering and Proceeds of Crime Act. It came into operation on 28 June 2013. It is the one with those provisions counsel alluded to.

The above confusion serves to emphasise the importance of elegance and precision in pleadings. The statutory provisions being relied upon for any cause of action have to be identified. But be that as it may, even if it was the pension fund's intention to rely on the Bank Use Promotion Act, or the Money Laundering and Proceeds of Crime Act, in my view, it still comes short. Even if it was meant to plead that the bank breached some of the provisions of those Acts and would therefore be liable to suffer criminal sanction, that breach would still not transform into civil liability to the pension fund. In my view, as with negligence in the air, this would be "criminality in the air" in relation to the pension fund. The causal link would be absent.

The question of causation, even though formulated by law, is one of fact: *Minister of Finance & Ors v Gore NO*, *supra*. CAMERON JA said in that case[18] the time-honoured way of formulating the question is in the form of the '**but for'** test. Can it be said that, **but for** the wrongful act complained of, the loss concerned would not have ensued? In the next paragraph, the learned judge of appeal, criticising some mathematical and the all-or-nothing approach that seemed to have crept into the test, said:

> "Application of the '**but for**' test is not based on the mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences."

Quoting from *Minister of Safety and Security v Duivenboden* (NUGENT JA), he said[19]:

> "A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics."

In *Gore NO* both the central government and the provincial government were held vicariously liable for the corrupt conduct of certain of their employees that had manipulated

[18] At p 125, para 32
[19] 2002 (6) SA 431 (SCA)

certain tenders in favour of one of the bidders who had bribed them and with whom they had eventually got employed.

In *TFN Diamond*, the collector of revenue and the government were held vicariously liable for the theft of diamonds by an employee of the collector of revenue to whom the plaintiff had been obliged to entrust those diamonds as he travelled abroad.

In *Japmoco BK* the government was found liable for the criminal conduct of a policeman who connived with a car thieving syndicate to which he provided false vehicle clearance certificates for a fee which would then be used to register stolen vehicles and sell them.

Although these cases were on vicarious liability, which I have already dealt with, they are also relevant on the question of causation. In my view, the cases are distinguishable. In them the loss that befell the victims was the direct and proximate cause of the wrongful actions of the employees. Not in this case. The pension fund's loss was caused by the acts of its own employees. That the bank's employees participated in the storage and distribution of the spoils was not the direct cause of such loss. Therefore, even accepting that the bank breached the provisions of the aforesaid anti-money laundering statutes in the manner alleged, that would not render it liable to the pension fund. On the facts as pleaded, it was the pension fund pair that supplied the details of the pensioners in whose names the accounts with the bank would be opened. It was the pension fund pair that hived off the money from the pension fund pool and transmitted it to the bank. It was the pension fund pair that withdrew the proceeds, albeit with the facilitation of the bank pair. I do not see how any breach of the provisions of the statutes in the manner alleged would be a wrong in relation to the pension fund. In other words, it cannot be said that **but for** the actions of the bank pair the pension fund pair would not have stolen from their employer.

Mr *Matinenga* argued that it would be premature at this stage to shut out the pension fund's claim against the bank when evidence at the trial might well establish the complaint and the bank's culpability. Among other things, he said that whether or not the obligations imposed in terms of the Acts were met was a matter of evidence. Upholding the exception would be tantamount to deciding the matter on speculation.

What then is an exception, and what is its purpose?

(c) <u>Exception and its purpose</u>

An exception is a legal objection to a pleading. It complains of a defect inherent in the pleading[20]. For the purposes of an exception the facts pleaded must be accepted as correct[21]. The main purpose of an exception is to obtain a speedy decision **<u>upon a point of law apparent on the face of the pleading attacked</u>** so as to settle the dispute in the most economical manner by having the faulty pleading set aside[22] (my emphasis).

In *Barclay's National Bank Ltd v Thompson*[23] and *Dharumpal Transport (Pty) Ltd v Dharumpal*[24] it was accepted that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial. In *McKelvey v Cowan NO*[25] it was held that in dealing with matters of exception, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

Cause of action, as per SMITH J in *Dube v Banana*[26], means the combination of facts that are material for the plaintiff to prove in order to succeed in his action. The facts must enable the court to reach a conclusion regarding unlawfulness, fault and damages: see also *Controller of Customs v Guiffre*[27] and *Patel v Controller of Customs & Excise*[28].

As I have already demonstrated, evidence that the bank might have breached the statutory provisions alluded to would still not establish the pension fund's claim as against the bank. It will be irrelevant.

In my conclusion, the pension fund's declaration, in its entirety, does not disclose a cause of action against the bank. There is simply nothing that the evidence on any aspect of the claim as pleaded, if led, will establish the claim. There was no vicarious liability on the part of the bank on the facts pleaded. There was also no wrongful action on the part of the bank in relation to the pension fund.

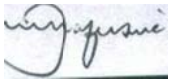
---

[20] H J ERASMUS *Superior Court Practice*, p B1 - 151
[21] *Marney v Watson & Another* 1978 (4) SA 140 @ p 144F - G
[22] *City of Harare v D & P Investments (Pvt) Ltd & Anor* 1992 (2) ZLR 254 (S) @ p 257
[23] 1989 (1) SA 547 (A)
[24] 1956 (1) SA 700 (A)
[25] 1980 (4) SA 525 (Z)
[26] 1998 (2) ZLR (HC), @ p 95
[27] 1971 (2) SA 81 (R) @ p 84A
[28] 1982 (2) ZLR 82 (H) @ p 85

DISPOSITION

In the circumstances, the exception is upheld. The plaintiff's claim against the fifth defendant is hereby dismissed with costs.

28 January 2015



Atherstone & Cook, legal practitioners for the excipient (or fifth defendant)
Dube, Manikai & Hwacha, legal practitioners for the plaintiff (or respondent)
James Makiya Legal Practitioners, legal practitioners for first and second defendants