IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA , A.D.2014

CORAM: ANSAH, J.S.C. (PRESIDING)
OWUSU (MS), J.S.C.
DOTSE, J.S.C.
GBADEGBE, J.S.C.
AKAMBA, J.S.C.

CIVIL APPEAL
NO.J4/29/2014

16TH JULY 2014

ROM ENGINEERING LTD .... **PLAINTIFF/APPELLANT**
H/NO. TPD TCD6- 128 **/RESPONDENT /RESPONDENT**
OPP. NICK HOTEL 6. TEMA

VRS

NATIONAL INVESTMENT BANK .... **DEFENDANTS/RESPONDENTS**
37 KWAME NKRUMAH AVENUE **APPELLANTS/APPELLANTS**
ADABRAKA, ACCRA

WESTEC SECURITY
HEAD OFFICE RING ROAD CENTRE
OPP. BUS STOP NITE CLUB, ACCRA

JUDGMENT

GBADEGBE JSC:

This is an appeal from the judgment of the Court of Appeal that reversed in part the decision of the trial High Court in the matter herein. The facts on which this action has been contested in the various courts may be stated briefly as follows. The 1st defendant, a financial institution engaged in the business of banking on or about 2nd May 2008 obtained judgment against the plaintiff in suit number AB/56/2008 and subsequently enforced the said judgment by a writ of *fifa* directed at the property of the plaintiff situate at Kpone near Tema. The evidence proffered by the plaintiff is to the effect that its factory premises situate at Kpone was subsequently sealed off by officials from the High Court, Accra and its workers driven out of the premises. According to the plaintiff following the attachment, the 1stdefendant engaged the services of the 2nd defendant, a private security company to keep watch over the property. The evidence also reveals that on 27th October 2009, PW1, the Managing Director of the plaintiff company received word from an informant through the Chief security Officer of the plaintiff company that some people were seen removing certain items from the premises of the plaintiff company, which had earlier on been attached by a writ of fifa.

The plaintiff's representative testified that following the information he received from his head of security, he lodged a complaint with the police and that subsequently two persons were arrested in connection with the removal of the items from the factory premises. Unfortunately, so the evidence portrays, the two who were arrested were employees of the 2nd defendant, a company that was engaged to protect the factory premises by the 1st defendant and indeed, from the testimony of the police officer who was responsible for the investigations, one of them was actually engaged in escorting the purchaser of the items that were asported from the premises while the items were being taken away on a vehicle. It

was further alleged that based upon the investigations, there was a criminal case pending against the two security personnel employed by the 2nd defendant.

On these facts, the plaintiff company instructed its solicitors to take out the writ of summons herein against the defendants jointly and severally claiming:

(i) Order for the refund of the current cost of 1,708 pieces of various assorted items stolen and missing under the control and custody of the officials of Defendants from the attached factory of the Plaintiff at Tema valued at GH¢ 2, 280, 000.

(ii) Loss of earnings caused to plaintiff since July, 2009 to the present for six days a week from illegal and unlawful sealing of the factory of plaintiff at Tema thereby preventing them from carrying out their lawful activities.

(iii) General Damages.

(iv) Costs.

After a full scale trial of the action by the trial court, judgment was entered in favour of the plaintiff for general damages in the sum of GH¢ 300, 0000.00 with the other reliefs being dismissed by the learned trial judge for reasons that were contained in his judgment. This determination appeared not to have found favour with either the plaintiff or the defendants who lodged appeals to the Court of Appeal. The Court of Appeal in its judgment dated 20th December 2012 dismissed the appeal of the defendants in its entirety and allowed the plaintiff's appeal

in part by granting in its favour by way of loss of earnings as formulated in relief (1) of the indorsement to the writ of summons herein in a sum that was not computed but expressed by the utilisation of a multiplier in the sum of five thousand cedis from 29th July 2009 per day for six days in a week to date of judgment. The defendants claiming to have been aggrieved by the delivery of the Court of Appeal has further appealed to us seeking a variation on grounds contained the notice of appeal filed on 15th February 2013.

It seems to us after a careful consideration of the record of appeal and the respective written briefs of the parties that the questions we have to determine in the matter herein concern the award of damages for loss of earnings and that expressed by way of general damages. So stated, the questions posed for our decision substantially is whether in making these awards the learned justices of the Court of Appeal applied the right principles. And closely linked with that would be if the correct principles were applied, were the damages awarded under both heads appropriate? In regard to the task with which we are faced as outlined above, we commence with the loss of earnings.

In our view as the attachment was carried out at the instance of the Sheriff of the High Court, no liability attaches to either defendant by virtue only of the attachment. In their view, however, the leaned justices thought that the execution was directed bythe1stdefendant and not the Registrar of the Court of Appeal. The conduct of the 1st defendant did not add to or derogate from the responsibility of the Registrar at law and was not sufficient to ground liability in the 1st defendant on the mere ground that the 2nd defendant was brought on to the land by the 1stdefendant to keep other persons away from the property. With the attachment, the property was placed in custody of the law for the benefit

of those entitled thereto with a special property to the goods being in the sheriff; a right that enables him to maintain an action for trespass or conversion against any person who takes them away . See: (1)**Union Bank of London** v **Lennanton** (1878) 3 CPD 243.(2) **Wilbraham** v **Snow** (1670) 2 Wms Saund 47. From the judgment on appeal to us in these proceedings, the learned justices of the Court of Appeal thought otherwise and concluded that by assuming responsibility for the security of the property the 1st defendant was interfering with the work of the Registrar. Accordingly, the wrongdoing of its agent the 2nd defendant being the cause of action in the matter herein must be attributed to it. But at law, the position arising from the attachment continued to be as stated a little while ago and cannot be transformed in a manner that will have legal consequences such as to fix it with vicarious liability for the wrong of the 2nd defendant. This aside, we think that although the 1st defendant had engaged the 2nd defendant to keep watch over the attached property that did not create a liability in it for any wrong occasioned by the tort of the security company. The authorities are settled that the mere engagement by one person of another to render services for him without more is not sufficient to make him vicariously liable for his tortious acts. In determining whether an employer should be fixed with vicariously liability for the acts of an employee, the court should not only look at the question whether the wrongdoer is an employee of the other but take into account other relevant factors as was correctly expounded by Wood JA (as she then was) in the unreported judgment of the Court of Appeal of 30th May 2002 in Civil Appeal Number 193/2000 entitled: **Bernard Kojo Mensah &Another v Bilton Bogoso Gold Limited**. The approach outlined in that decision is preferable to the approach by the court below that seemed to look simply at the outward trapping of the relationship between the parties and we are of the opinion that if the learned justices had correctly

approached the matter, they would have come to a different conclusion regarding the liability of the 1st defendant for the acts of the 2nd defendant.

Further, we think that from the admitted evidence, the 2nddefendant cannot be said to be a servant of the 1stdefendant but was an independent contractor engaged to provide services to the latter. It being so, on the authorities, the 1st defendant cannot be vicariously liable for wrongs committed by the Security Company and or its employees. See: **Tinseltine v Robert, Davies, Derbyshire County Council, Welsh Assembly Government [2011]** EWHC 1199. This is not to say that the 2nd defendant for that matter is liable for the loss of earnings. As said earlier, the seizure was an act of the Sheriff for which at law none of the defendants is legally answerable. We have accordingly come to the view that on this head of damage, the award was in error and proceed to set it aside.

We observe generally regarding the claim to loss of earnings that after having accepted the seizure of the factory premises without making any effort to seek relief from it or to have the processes of execution suspended on any ground, the plaintiff cannot be heard saying that by the attachment he had suffered loss of earnings. See: **Lewis v Gompertz** (1837 Will & Woll& Dav 592); 21 Digest (Repl) 552. Indeed, if the position were to be as contended by the plaintiff the remedy of attachment would never have been a creature of the law. On the contrary, it serves the purpose of ensuring that those who obtain judgment from our courts in cases that demand payment of money are able to realise the fruits of their judgments and renders the judgment effective.

Then there remains the award of general damages. In the Court of Appeal, the said head of damages was allowed in respect of the evidence that tended to show that the factory premises was broken into while under attachment by persons with the connivance of two employees of the 2nd defendant. The claim for the value of items alleged to have been removed following the said act having been found by the trial court to be unreliable and not worthy of credit, that award was made to cater for general damages. This was contested on appeal by the defendants who argued that having regard to the circumstances, it should be nominal in nature but the learned justices of the Court of Appeal rejected that view and came to the opinion that the award was justifiable having regard to the value of the items that was indorsed in relief 1 of the indorsement to the writ of summons herein. In reaching their decision, the learned justices relied on the decision of this court **in Delmas Agency Ghana Limited v Food Distribution International Limited** [2007-2008] 2SCGLR 748 by which the plaintiff's claim for special damages (substantial damages) in the sum of US$200,000 was rejected a nominal award in the sum of US$25, 000 or its equivalent in cedis was made. While it is correct to say that in the said case nominal damages representing one-eighth of the amount claimed as special damages was by the Supreme Court that decision standing alone cannot be an authority for the proposition that in all cases where special damages fails an award of general damages that look not nominal in nature is justified. On the contrary, the learning is that the award of damages though regulated by settled principles like all acts of judicial discretion must be applied on case by case basis.

Examining the evidence in the case before us, it is clear that the plaintiff exaggerated the extent of items removed from the factory premises and presented the court with a version that was unreliable as was found of its

exhibit B. We think that on the whole in the absence of cogent evidence of the materials taken by those who broke into the factory premises such as reference to inventory, which to be good cannot be limited only to that of July 2009 as there must be credible evidence of the machinery holding of the company over a period to establish the reasonable probability that in the light of those inventories, as at the date of the attachment the extent of loss claimed to have been suffered by the plaintiff was more likely to be true. We think this is the burden that the plaintiff assumed having regard to the pleadings filed on its behalf; a burden which unfortunately was undischarged at the end of the trial. In the circumstances, we are of the view that the items alleged to be missing or removed were exaggerated and accordingly scale the award of GH¢300, 000.00 down to an amount of GH¢100, 000.00.As said earlier of the consequence of the 2nd defendant's conduct, the 1st defendant cannot be fixed with vicarious liability for the said wrong. The said wrong is personal to those who unlawfully entered the property to which notwithstanding the subsistence of the attachment, the execution debtor (judgment debtor) has a general property in the goods. See: **Re Clarke** [1898] 1 Ch 336 Clark, 339. In the premises, the award made in favour of the plaintiff against the defendants by the High Court that was affirmed by the Court of Appeal was wrong and properly belongs only to the 2nd defendant. We do not think that on the established facts, a security company that is engaged to keep surveillance over property for reward can have the employer saddled with tortious liability for deliberate acts of theft by persons who are engaged to protect the very property that they broke into. To fix the 1st defendant with liability will be to relieve the 2nd defendant from the performance of its fundamental obligation under the contract to provide security services.

For these reasons, the appeal of the defendants succeeds in part only by setting aside the award of damages for loss of earnings made jointly and severally against them by the Court of Appeal and also by the substitution of an award of GH¢ 100, 000.00 in place of GH¢300, 000.00 against the 2nd defendant only for general damages.

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL

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