RUTENDO MUNENGAMI
versus
MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 14 to 18 February 2005 and 6 April 02006

Civil Trial

Mr *Nkomo*, for the plaintiff
Mrs *Gatsi*, for the defendant

PATEL J: The plaintiff in this matter claims payment in the sum of $8,150,000.00 by way of damages sustained by her arising from an assault allegedly perpetrated by members of the Zimbabwe National Army on the 4th of June 2003 in Glenview, Harare. The plaintiff avers that the soldiers in question were at the relevant time acting within the course and scope of their employment and that the defendant is therefore vicariously liable for their actions.

The defendant denies that plaintiff was assaulted by soldiers of the Zimbabwe National Army. The defendant further denies vicarious liability on the ground that, although soldiers were deployed in the area at the relevant time, they were operating under the control of the Zimbabwe Republic Police and that therefore it is the Minister of Home Affairs who should have been sued in this matter. Alternatively, the defendant avers that, if defendant had in fact been assaulted as alleged, she was probably attacked by impostors and deserters masquerading as members of the Zimbabwe National Army.

It is necessary to note that at the end of the trial both counsel were directed to file Heads of Argument on specific points of law relating to vicarious liability. Defendant's counsel duly filed her Heads on the 24th of March 2005. However, plaintiff's counsel only filed his Heads on the 12th of October 2005, after several reminders to do so.

The delay in delivering this judgement is therefore largely attributable to plaintiff's counsel.

Evidence at the Trial

The relevant evidence presented by and for the parties at the trial of this matter was as follows.

Rutendo Munengami (the plaintiff)

At approximately 1.00 a.m. on the 4th of June 2003, about 20 armed soldiers forcibly broke into the plaintiff's home and demanded to see her husband. Her husband was at that time a Councillor for Ward 30 Glen View and was a member of the Movement for Democratic Change (MDC). The soldiers were dressed in camouflage uniform and wore red or green berets. They were armed with rifles and batons. They were not accompanied by any policemen.

When she stated that her husband was not in they began assaulting her with batons. She was holding her 9 month old baby at the time. The soldiers also destroyed her belongings and robbed her of some blankets, clothing and money that they found within the premises. She was unable to identify any of her assailants.

Thereafter, she was taken outside into a white Mazda 323 and driven to the residence of one Councillor Dehwa who was also an MDC Councillor. There were two other vehicles involved, namely, a Puma lorry and a pick-up truck. At Dehwa's residence, the soldiers jumped over the gate and broke into the premises. She heard sounds of things being broken and the cries of people being assaulted. She then saw Mrs. Dehwa and members of her family running out of the house whilst being assaulted.

She was asked to disembark and her baby was taken from her arms. She was then held upside down and severely assaulted again on

her arms, thighs and back. At that point she became unconscious and regained consciousness some 16 hours later at Dandaro Hospital at approximately 6.00 p.m.

Prior to her regaining consciousness, she was initially taken to the Avenues Casualty Unit for examination and treatment [Exhibits 6A & 6B]. She was then admitted to Dandaro Hospital on the 4th of June 2003 [Exhibit 2] and discharged on the 12th of June 2003 [Exhibit 3].

When she awoke at the hospital, she was confused and traumatised. She was examined by a Dr. Coric and told that she had a fractured arm and fingers. Dr. Coric's affidavit [Exhibit 1] was produced indicating the nature and extent of the injuries that she had sustained.

Her arm was subsequently plastered and healed in due course. Her right hand was operated upon by Dr. Coric at St. Anne's Hospital in February 2004. She produced 2 X-ray negatives [Exhibit 4] and a discharge form [Exhibit 5] from the hospital but no written report relating to the operation itself.

Despite the operation, her right thumb is permanently damaged and lacks total mobility. She is presently under medication for stiffness in her hand. Until she was injured, she was right-handed and she is presently unable to work. She also suffered psychological stress and is currently being counselled by a Mr. Kajau at the Amani Trust. The Trust undertook to pay for her medical examinations, treatment and the operation in February 2004.

Kerina Gweshe (Mrs. Dehwa)

At about 2.00 a.m. on the 4th of June 2003, the witness was awoken by the sound of motor vehicles outside her house. She was in the house with her husband and children as well as 6 MDC supporters. She looked out and observed 2 vehicles and a group of about 24

soldiers. They were all in camouflage uniform, with red or green berets, and were armed with rifles and batons.

After a few moments, 4 soldiers jumped over the fence and broke down the front door to gain entry into the house. They took the keys to the front gate and subsequently opened the gate.

The soldiers then began to assault the occupants of the house with their batons and booted feet. They demanded money and her husband's books of account. They also took 28 bags of food which belonged to the MDC and was being stored at the house.

During the assault, all the occupants ran out of the house. They were ordered to lie down outside the gate whilst the assault continued. She was beaten by the soldiers till she was almost numb.

When she was outside, she observed that there was a military lorry, a pick-up truck as well as a Mazda 323. The plaintiff was brought out of the Mazda and the witness was asked to hold the plaintiff's child. The plaintiff was then held upside down and beaten by the soldiers with their batons.

Soon thereafter, the witness ran into the house and collapsed. She awoke at Dandaro Hospital at approximately 8.00 p.m. in a room next to the plaintiff's.

As a result of the attack, her right hand was severely injured. It was plastered for 3 months and has not fully healed. The plaintiff's arm was also plastered at Dandaro Hospital. Both the witness and the plaintiff were at Dandaro Hospital for almost 12 days.

Captain Munyengerwi

In June 2003, the witness was in command of the "C" Company Para-duty Regiment, comprising 106 soldiers, based at Nkomo Barracks. At that time, there were political demonstrations in the urban

areas aimed at ousting the Head of State. The witness was part of the National Reaction Force (NRF) constituted to maintain peace and order.

He was instructed by the Officer Commanding the NRF to assist the Zimbabwe Republic Police in maintaining law and order. His regiment left from Nkomo Barracks on the 29th of May 2003 and was stationed at Southerton Police Station. They were encamped in 3 barracks and pitched tents at the Station.

Their function was to escort the police on their patrols and at road-blocks and to protect and assist them in the event that they were overpowered. In the event of any disorder, they were required to normalise the situation. They were assigned to cover the suburbs of Glen Norah, Glenview, Highfields, Budiriro and Southerton.

Whilst they were based at Southerton Police Station, they commenced their duties at 6.00 a.m. and finished at 6.00 p.m. They were never asked to operate beyond 6.00 p.m.

He had under his control a total of 10 armoured vehicles which are akin but not identical to the Puma armoured vehicle. He kept the keys to these vehicles as well as a log-book to record any deployment of the vehicles. The weaponry used by his regiment consisted of AK-47 rifles and ammunition. The soldiers of the regiment wore camouflage uniform, maroon berets and black boots.

On the 2nd of June 2003, some unrest and disorder was encountered within the locality. The crowds were dispersed and the situation was eventually normalised by 11.00 a.m. on that same day. On the 3rd of June 2003, there was no unusual occurrence. On the evening of that day, his regiment was resting at Southerton Police Station.

As commander of the regiment responsible for the Glenview area, he did not receive any official or unofficial report as to the alleged assaults during the early hours of the 4th of June 2003. All of

the men in his regiment were asleep at that time. It would have been impossible for any group of soldiers to leave without being detected by the night guards on duty. It would also not have been possible for any other regiment or group of soldiers to operate in the Glenview area without his knowledge. Moreover, none of the vehicles under his control was used during the evening of the 3rd of June and the morning of the 4th of June.

The witness's regiment departed from Southern Police Station at 6.00 p.m. on the 4th of June 2006 and returned to Nkomo Barracks.

Lieutenant-Colonel Tsatsi

The witness has been a member of the Zimbabwe National Army for 25 years. Between March and June 2003 his function was to receive instructions from the Army Commander in respect of all deployments of the Army. At that time the MDC and other opposition groups had called for the so-called Final Push. The Zimbabwe Republic Police requested the Army to assist in containing the political demonstrations that were anticipated at that time. This request was made at the end of May 2003.

The procedure that is followed is for the Commissioner of Police to initiate such requests for assistance through the Minister of Home Affairs. The Minister of Defence would then authorise the Commander of the Zimbabwe Defence Forces who in turn would instruct the Army Commander to proceed with the necessary assistance to the police. However, the witness was not aware of the requisite correspondence relating to this particular occasion.

In the present case, the Army was deployed to assist the police from the 30th of May 2003 to the 9th of June 2003. For the purposes of these operations, the soldiers of the Army are deployed in terms of the

Public Order and Security Act. They are under the control of the Commissioner of Police and the Minister of Home Affairs.

Ordinarily, soldiers would not be deployed in residential areas except in order to assist the police. On deployment, the soldiers would be equipped with boots, camouflage shirts and trousers, camouflage caps or red berets and AK-47 rifles.

On the night of the 3rd of June 2003, the witness was at home. He did not receive any reports of violence or assault during that night or in respect of the following day.

The regiment stationed at Southern Police Station was withdrawn on the 4th of June 2003. The soldiers deployed in other parts of Greater Harare were withdrawn on the 9th of June 2003.

The witness confirmed that between March and June 2003 there was a problem of impostors and deserters who roamed the high density suburbs of Harare masquerading as Army soldiers and who engaged in assaulting and robbing innocent civilians. However, he was also quite clear that they would not have been able to access any Army vehicles or weaponry.

At that time, the Military Police were deployed to apprehend the impostors and deserters in question. However, nothing was done to warn the general public against the threat posed by these criminal elements.

The deserters concerned were still liable to military discipline as members of the Army. In this respect, the witness produced in evidence a report compiled by the Army Directorate of Prosecutions, dated the 11th of September 2003 [Exhibit 7]. This report covers a total of 60 cases in which members of the Army were convicted of military offences, predominantly involving desertion and absence without leave. The report does not indicate the dates when the offences were committed but reflects the dates when the offenders were sentenced,

ranging from the 2nd of June 2003 to the 1st of September 2003. According to the witness, the military courts did not deal with the attendant assaults, thefts and robberies. These were referred to the police for prosecution through the civil courts.

The Issues

The issues for determination in this matter are as follows:-

1. Was the plaintiff assaulted on the night in question and, if so, what was the nature and extent of the assault?
2. Was the assault in question perpetrated by soldiers of the Zimbabwe National Army?
3. If the assault was committed by soldiers, were the assailants soldiers under command or were they deserters?
4. Whether the plaintiff has sued the wrong defendant.
5. Whether the defendant is vicariously liable for the conduct of the soldiers or deserters concerned.
6. If the defendant is vicariously liable, what is the quantum of special and general damages due to the plaintiff?

Assault and Extent thereof

The evidence given to the Court by the both the plaintiff and Kerina Gweshe was generally clear and credible. Their evidence betrayed a few discrepancies, particularly as regards the nature and timing of their treatment at various medical institutions. However, looking at their testimony as a whole, I am more than satisfied that the plaintiff was violently assaulted several times during the early hours of the 4th of June 2003 in Glenview, Harare.

I am also satisfied, having regard to the documentary evidence before the Court [Exhibits 1 to 6], that the injuries sustained by the plaintiff in consequence of the assaults upon her were not only very

serious but also necessitated her prolonged detention for treatment as well as a surgical operation on her hand several months later. Indeed, counsel for the defendant quite correctly conceded this point in her submissions to the Court. Additionally, there is clear and uncontested evidence that the plaintiff was deeply traumatised by her ordeal and that she has had to receive psychological counselling in that regard.

Identity of Assailants

Both the plaintiff and Kerina Gweshe testified as to the identity of their assailants. They described the military uniforms worn by their assailants, the batons and firearms that they wielded and the military vehicle that they used on their excursion on the night in question. Their descriptions were consistent with what was described by Captain Munyengerwi and Lieutenant-Colonel Tsatsi as being the attire and accoutrements ordinarily worn and carried by members of the Zimbabwe National Army.

It is common cause that the Army was in fact deployed in the Greater Harare area in order to assist the police over the period in question. In my view, it seems highly improbable, if not impossible, that anyone other than Army soldiers would have been able to access and utilise the uniforms, weaponry and military vehicle that were positively identified by the plaintiff and Karina Gweshe. Their clear evidence in this respect was not critically challenged. Accordingly, the Court finds that the plaintiff has discharged the onus of proving on a balance of probabilities that she was assaulted on the night in question by persons who were members of the Zimbabwe National Army.

Soldiers or Deserters

For the defendant, Captain Munyengerwi and Lieutenant-Colonel Tsatsi gave evidence as to the deployment of Army soldiers to assist

the police from the 30th of May 2003 to the 9th of June 2003. Their testimony was to the effect that several Army regiments were deployed within the Greater Harare area and that each regiment was assigned to specific suburbs in that area. The "C" Company Para-duty Regiment under the command of Captain Munyengerwi was stationed at Southerton Police Station and was assigned to cover the suburbs of Glen Norah, Glenview, Highfields, Budiriro and Southerton.

Captain Munyengerwi testified that he did not receive any official or unofficial report as to the assaults that took place on the 4th of June 2003. All of the men in his regiment were asleep at that time and it would have been impossible for any group of soldiers to depart from their Southerton camp without being detected. It would also not have been possible for any other regiment or group of soldiers to operate in the Glenview area without his knowledge. He also stated that none of the vehicles under his control was used during the night in question. His evidence in these respects was clear and credible and not materially shaken.

In his plea, the defendant admits that between March and June 2003 there were impostors and deserters who went about masquerading as soldiers and assaulting and robbing civilians. The defendant further concedes that it was probably these impostors and deserters who might have assaulted the plaintiff. This admission and concession were amplified by the evidence of Lieutenant-Colonel Tsatsi as well as the contents of the report compiled by the Army Directorate of Prosecutions in September 2003 [Exhibit 7]. This report confirms that 60 members of the Army were convicted of military offences involving desertion and absence without leave. The assaults, thefts and robberies perpetrated by the deserters were not dealt with by the military courts but were referred for prosecution through the civil courts.

From the foregoing evidence, it seems reasonably clear that the assailants *in casu* were not specifically authorised or permitted by their superiors to perpetrate the assaults and robberies in question. Indeed, no evidence in that regard was placed before the Court and the plaintiff's claim, as I understand it, does not hinge on any averment or proof to that effect. It is also fairly clear that the assailants were not members of the "C" Company Para-duty Regiment which was encamped at Southerton Police Station and which was assigned to cover the Glenview area. They plaintiff's assailants obviously originated from some other regiment or regiments stationed elsewhere.

What is not clear is whether the assailants *in casu* were soldiers under command but acting beyond their assigned mandate or renegade deserters operating independently and outside the military hierarchy. The plaintiff's case is that the former is the true position, while the defendant denies this but concedes that the latter might in fact be correct. The difficulty with accepting the latter is that the soldiers identified by the plaintiff and Kerina Gweshe were all in full military garb and equipped with firearms and a military vehicle. According to Lieutenant-Colonel Tsatsi's testimony, it would not have been possible for deserters to access any firearms or vehicles that were in the custody of the Army. That being so, it seems quite improbable that the plaintiff's assailants were deserters or impostors. In the event, having regard to all of the evidence adduced, the only inference that can and must be drawn is that the assailants *in casu* were members of the Army who were under command but who were pursuing their own personal inclinations and objectives beyond their assigned mandate.

Proper Defendant

It was argued for the defendant that the plaintiff has sued the wrong party in this matter and should have instead proceeded against the Minister of Home Affairs and the Commissioner of Police. The basis of this argument is that members of the Zimbabwe National Army were deployed during the relevant period to assist the Zimbabwe Republic Police in order to deal with anticipated civil disturbances. At that time and for that purpose, so the argument goes, they were acting in terms of section 37 of the Public Order and Security Act [*Chapter 11:17*] and, therefore, they were under the command and control of the police authorities as opposed to the military hierarchy. Although the Army was responsible for paying and equipping the soldiers, they were under the effective control and direction of the Police as to the manner in which they carried out their duties. Consequently, any claim for vicarious liability pertaining to their conduct must attach to the latter and not the former.

The defendant's argument is not entirely unattractive, even though it begs the question as to the extent to which soldiers deployed in situations of civil commotion where police control is ineffective can really be said to be under the control and direction of the police. More significantly, however, the argument is fundamentally flawed for the simple reason that the soldiers who attacked the plaintiff on the night in question were not at that time carrying out their assigned duty of containing civil disturbances under police direction. The uncontested evidence before the Court is that no police officer was present when the soldiers perpetrated their assaults upon the plaintiff. By no stretch of the imagination can it be said that they were performing their function of escorting the police on their patrols or at road-blocks and protecting and assisting the police in maintaining law and order at

public demonstrations. The defendant's argument is quite untenable and is accordingly rejected as being without any factual foundation.

Vicarious Liability

The essence of the doctrine of vicarious liability is to hold the employer liable for the wrongful conduct of his employee within the course or scope of his employment. The principle to be applied was succinctly expounded by Tebbutt AJ in *HK Manufacturing Co (Pty) Ltd v Sadowitz* 1965 (3) SA 328 (C) at 332C-E as follows:

> "It is, of course, now a well-established principle in our law that a master is liable for harm caused to third parties by the negligence of his servant if such servant was acting within the course or scope of his employment — expressions which have been held to be synonymous (see *Estate van der Byl v Swanepoel* 1927 AD 141 at 151; *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 741). Our Courts have adopted the expressions of the law by *Voet* 9.4.10, viz. that masters are liable *in solidum* for the delicts of their servants whenever they inflict injury or damage 'in the duty or service' (*in officio aut ministerio*) set them by their masters but that the masters are not liable when the delict is committed 'outside of' (*extra*) their duty or service, and by *Pothier on Obligations*, s.453, viz. — 'Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed'."

According to the Salmond test, cited by GREENBERG JA in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 774:

> "A master . . . is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes — although improper modes — of doing them . . ."

The more extensive approach to vicarious liability is that enunciated by WATERMEYER CJ in *Feldman's* case, *supra*, at 741, to the effect that:

> "a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work. . ."

Adopting this approach in *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134-135, JANSEN JA held that:

> "By approaching the problem whether van der Westhuizen's acts were done 'within the course or scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing van der Westhuizen as a member of the Force, and thus clothing him with the powers involved, the State created a risk of harm to others, viz. the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events, it is evident that his appointment was conducive to the wrongs he committed".

Even on this broader approach, however, the fact that the servant uses equipment or material provided by his employer, either during the course of his delictual conduct or in order to carry out his wrongful act, does not necessarily import vicarious liability as against the employer. As observed by TEBBUTT AJ in the *HK Manufacturing Co* case, *supra*, at 337:

> ". . . the fact that the servant was using property or 'apparatus' supplied by or belonging to the employer is really irrelevant. The enquiry still is: was such use in the exercise of his functions to which he was appointed?"

Whatever approach is applied, the primary consideration is to ascertain whether or not the servant was engaged in his master's business, viz. was he exercising the functions to which he was

appointed and was there a sufficiently close link between his conduct and his duties. As explained by JANSEN JA in *Rabie's* case, *supra*, at 134:

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf. *Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."

In this context, I fully concur with GOLDSTONE JA in *Macala v Maokeng Town Council* 1993 (1) SA 434 (A) at 440-1, where with specific reference to the performance of police work he stated that:

> "… the cardinal question is always whether the policeman is acting in the course and scope of his employment as such and, in order to find that he was so acting, his acts must have some connection with police work, whether subjectively or objectively viewed."

Following this approach in *Smit v Minister van Polisie* 1997 (4) SA 893 (T), the court held that the policeman whose conduct was in question was busy with his own interests and activities, which were not related to those of his employer, and therefore his employer was not liable.

The position in South Africa was aptly summarised by VAN DEVENTER J in *Romansrivier Koop Wynkelder v Chemserve Manufacturing* (Pty) Ltd 1993 (2) SA 358 (C) at 366, as follows:

> "The test of a master's liability for a wrong committed by his servant in the course of unauthorised activity is not whether it occurred while the servant was engaged in his master's affairs. The question to be considered in the light of the facts in each case is whether the wrong was committed in the course of the servant's employment.

> The course or scope of a servant's employment is an expansive concept, that encompasses such unauthorised acts as can be regarded as wrongful or unauthorised modes of performing an authorised task. In this respect, a subjective test may be appropriate, though not necessarily conclusive, for, if there is, objectively tested, a sufficiently close link between the servant's act for his own interests and purposes and his master's business, the latter may nevertheless be liable.
>
> The question ultimately resolves itself into one of degree. What has to be considered in the final analysis is whether the servant's departure from the path of duty constituted such an abandonment of or deviation from his prescribed task as to disassociate his wrong from the risk created by his employment and exonerate his master from liability.
>
> In each case a matter of degree will determine whether the servant can be said to have ceased to perform the functions to which he was appointed … or whether his unauthorised acts can be regarded as wrongful or unauthorised modes of performing his prescribed task.
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> It stands to reason that the less precisely the scope of the servant's duties is defined, the more likely it becomes that a deviation from his prescribed duties will be regarded as merely an unauthorised mode of performing his authorised tasks."

In Zimbabwe, the approach of our courts to the proper parameters of vicarious liability has been generally *ad idem* with that adopted by the South African courts. See *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1990 (2) ZLR 108 (H), *Rose NO v Fawcett Security Operstions (Pvt) Ltd* 1998 (2) ZLR 114 (H), and *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H).

In *Witham v Minister of Home Affairs* 1987 (2) ZLR 143 (H), a policeman, despite a known history of alcohol-related psychiatric problems, had been detailed to guard the residence of a government minister in a Harare suburb. He had been issued with a rifle and ammunition. He had deserted his post during the night and gone an a

shooting spree, ending up in the servant's quarters at the plaintiff's house, which was not far away in the same suburb. The plaintiff and his wife, unaware that the policeman was in their servant's quarters, went out to the quarters early in the morning when their servant failed to appear at the arranged time. The policeman fired at the couple, killing the plaintiff's wife and severely injuring the plaintiff. The policeman was himself later shot and killed by other police details. The plaintiff sued for damages on the basis that the defendant Minister was liable because the policeman was acting in the course of his employment; alternatively, he was negligent in allowing the policeman, who was known to have psychiatric problems, to be armed and assigned to guard duties; alternatively, he was liable for the negligence of his servants, members of the police, who, although aware that the deceased gunman was at large in the area, failed to take steps to warn the local residents or apprehend the gunman. On these facts, it was held by EBRAHIM J, at 156, that:

> "… whilst it is common cause that the shootings occurred during the time Constable Mhembere was on duty it cannot be disputed that they did not occur at a place where he was supposed to be on duty. He was appointed to guard the premises of a government minister. For this purpose he was issued with an FN rifle. The minister's house is a distance of 700 to 800 metres away from where the plaintiff and his wife lived. I cannot find fault with Mr O'Meara's contention that Constable Mhembere's digression from his appointed duty was so great in respect of space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed. I agree with Mr O'Meara's submissions that Constable Mhembere's digression was a complete relinquishment or abandonment of his master's business in favour of some activity of his own."

As regards the submission that the Minister had created a risk in assigning the policeman to carry out his appointed functions, the learned Judge held, at 158:

> "I am satisfied that had Constable Mhembere fired accidentally at the premises he was meant to be guarding or in trying to

> prevent an intrusion, even in error, then such would have been within the risk created. The view I take of the matter, however, is that this was not the case for the reasons I have already indicated above."

Accordingly, it was held in *Witham's case* that the defendant Minister was not vicariously liable for the aberrant policeman's wrongful conduct. However, the Court went on to hold the Minister liable on the alternative grounds of negligence that were averred and proved against him.

In *Biti v Minister of State Security* 1999 (1) ZLR 165 (S), the driver of a government vehicle was instructed to take three government officers home after work and then keep the vehicle safely overnight. In the morning he was to pick up the same officers and drive them to their work place. He was on call while not actively on duty. About two and a half hours after he should have finished dropping the three officers, he rammed into a stationary taxi owned by the plaintiff, badly damaging the taxi and severely injuring the plaintiff. The accident occurred at a place which was about a 5 kilometre deviation from the routes he would have had to have taken to drop off the government officers. There was some evidence that the driver was heavily intoxicated and that he had his girlfriend in the car. The trial court had held that the Ministry which employed the driver was not vicariously liable. On appeal, McNALLY JA observed, at 169, as follows:

> "In the present case, it seems to me that to entrust a motor vehicle to a relatively low level employee overnight is to place an enormous temptation in his way. He probably has no car of his own; there is probably no way of checking the next day whether or not he has exceeded a reasonable mileage in carrying out his duty. The employer is taking a risk which is easily foreseeable. If the risk materialises, the consequences are properly for his account."

However, the learned Judge of Appeal was somewhat wary of relying on the "risk" consideration, being conscious of the criticism of that approach by GOLDSTONE JA in *Macala's* case, *supra*, at 440-1, and by KUMLEBEN JA in *Minister of Law & Order v Ngobo* 1992 (4) SA 822 (A). He therefore accepted that the "creation of risk" approach is not one which has found favour with the courts. Rather, he was inclined to follow the so-called "standard test" of vicarious liability, viz. whether the wrongdoer was engaged in the affairs or business of his employer. On the facts before him, he accordingly held, at 170:

> "… it is relevant to bear in mind that that business included not only the delivery of the passengers to their homes, but also the overnight custody of the vehicle. In my view, in the circumstances of this case, and by close analogy with *Feldman, supra*, the deviation from his route was not too far removed, in time and space, from the driver's authorised mission, to convert it to what is called 'a frolic of his own'. It is properly to be seen, in the context of this case, as an improper mode of exercising his duty of overnight custody of the vehicle."

The principles of vicarious liability that I glean from the authorities that I have cited may be summarised as follows:-

1. An employer is clearly liable for those acts of his employee that have been authorised by the employer. The employer is also liable for those acts which he has not authorised but which are so connected with authorised acts as to be regarded as improper or wrongful modes of doing them.
2. On the creation of risk approach, the master can be held liable for his servant's negligence or inefficiency as well as his abuses and excesses. However, for liability to attach to the master such conduct must still be within the scope of the servant's employment or closely connected therewith.
3. The fact that the servant uses equipment or material provided by the master in carrying out his wrongful action is irrelevant.

The critical enquiry is whether or not the servant was exercising the functions to which he was appointed and whether there was a close link between his conduct and his duties.

4. If the servant was acting for his own interests and purposes, the master is not liable. But if there is a sufficiently close link between the servant's acts for his own interests and the business of the master, the latter may yet be liable. This is so if the servant's acts are connected with the master's business, whether subjectively or objectively viewed.
5. In the final analysis, the question resolves itself into one of degree. Was the employee's digression from his appointed duty so great in space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed? To put it differently, did the employee's departure from the path of duty constitute such an abandonment or deviation from his prescribed task as to dissociate his wrong from the risk created by his employment and to exonerate his employer from liability?

The Present Case

The normal peace time function of the Army, as I understand it, would be to constitute a disciplined force which is prepared and ready to defend national borders against external armed threats and, when necessary, to supplement other State authorities in the maintenance of internal security. Within the purview of the latter, the Army may be called upon to assist the police in times of civil disorder for the purpose of maintaining law and order. In the context of the present case, it is the latter function that the Army was invited to perform at the time when the events giving rise to the plaintiff's claim took occurred.

Turning to the facts *in casu*, there is, as I have already stated, no evidence to suggest that the soldiers who gratuitously assaulted, robbed and abducted the plaintiff were authorised to do so by their superiors. By the same token, there is nothing to indicate that what they did was simply an improper or wrongful mode of doing what they were authorised to do.

On the evidence adduced, it seems clear that the plaintiff's assailants were attired in military garb and equipped with the kind of weaponry that is ordinarily utilised by the Army. However, it certainly cannot be said that they were exercising the functions to which they were appointed. Nor can it be said that their conduct was closely linked to their employer's business or to the performance of their duties, whether subjectively or objectively viewed.

In my view, the soldiers' actions *in casu* had nothing to do with the business of the Army or the Ministry of Defence. By no stretch of the imagination can it be said that they were involved in defending the nation or assisting the police in maintaining law and order. What they did was not calculated to advance their employer's interests but purely to further their own nefarious designs. As I see it, their digression was so great in space and time that it cannot reasonably be held that they were exercising their appointed functions within the course and scope of their employment at the time that they assaulted the plaintiff. Even if I were to apply the creation of risk approach, on the basis that the soldiers in question were undoubtedly appointed and equipped by the Army for military purposes, their conduct *in casu* constituted a complete abdication of their prescribed task so as to dissociate their wrongful conduct from the risk created by their employment.

On these premises, it must be concluded that the defendant is not vicariously liable and must be absolved from liability for the injuries sustained by the plaintiff.

On the facts before me, a different result might conceivably have been possible had the plaintiff averred negligence on the part of the defendant, insofar as it can be said that the Army owes a duty of care to the public to avert the reasonably foreseeable possibility of harmful conduct eventuating from the stationing and deployment of military personnel within civilian areas. However, any such negligence has neither been pleaded nor proven in the present case. The plaintiff has confined her claim to one predicated on vicarious liability and has been unable to successfully establish that claim.

On the question of costs, it is trite that they should ordinarily follow the cause. However, applying the ordinary approach *in casu* would, I believe, entail the inequity of penalising a plaintiff who was undoubtedly injured, both physically and mentally, and who was sufficiently aggrieved to warrant the institution of legal proceedings. I am therefore inclined to depart from the ordinary disposition of costs in this matter.

In the result, the plaintiff's claim is dismissed with no order as to costs.

Legal Resources Foundation (Public Interest Unit), plaintiff's legal practitioners
Civil Division of the Attorney-General's Office, defendant's legal practitioners