DAVID SEBASTAIN GWANDE
versus
TAPIWA MATONHODZE
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE 8 March 2012 & 14 March 2012

CIVIL TRIAL

S. Machiridza for the plaintiff
J. Mumbengegwi & Z . Makwanya for the 2nd defendant

MATHONSI J: When the plaintiff drove his BMW 528i series motor vehicle, registration number AAG 6022 to Kuwadzana Police Station and parked it at the police car park on the night of 14 November 2009 he did not know that he was driving the said vehicle for the last time. He had been involved in an accident with a pedestrian somewhere along Harare – Bulawayo road and as is the norm, the police impounded the vehicle for further investigations and demanded that he drove it to the police station.

What transpired thereafter, if it had not been extremely serious and with far – reaching prejudicial consequences, it would have been comic. At about 20:45 hours on the night of 18 November 2009, Beat 1 leader Constable Tapiwa Matonhodze, the first defendant in this matter, received station property on behalf of the Sergeant In Charge of his shift in a hand over take-over process performed with the Officer In Charge of a shift which was knocking off from duty. The first defendant and his group were taking over the station as a shift coming on duty at that time.

The station property the first defendant took over and signed for included the keys of and the BMW motor vehicle belonging to the plaintiff which was still detained at the police station ostensibly for further investigations. Later during that night, the first defendant drove the motor vehicle while going on patrol with his Beat 1 crew, which had been depleted as one of its members had gone home. While on patrol in the plaintiff's motor vehicle, the first defendant met Constable Kachuta, the leader of Beat 2, who was in the company of Constable Towindo on their way to the station.

Perched behind the wheel and in the controls of the vehicle, the first defendant instructed Constable Kachuta and his colleague to get into the vehicle and accompany him and his team on "a grade A call". They complied but no sooner had the vehicle taken off than it was involved in an accident. The driver lost control at an intersection, the vehicle careered off the road and landed in a ditch. It was so extensively damaged that it was declared beyond economic repair.

The plaintiff instituted proceedings against the two defendants seeking damages in the sum of US$10 100-00 together with interest and costs of suit. In his declaration, the plaintiff averred that when he drove the BMW motor vehicle, the first defendant was acting within the course and scope of his employment by the second defendant and as such the second defendant was vicariously liable for the actions of his employee. As the first defendant wrongfully, unlawfully and negligently drove the said vehicle, both defendants are jointly and severally liable for the loss that he sustained.

The second defendant vehemently contested the claim and in his plea he raised the defence that when the first defendant drove the vehicle, he;-

"was on a frolic of his own thus he should be sued in his personal capacity."

In saying this, the second defendant relied on reports made by police officers based at Kuwadzana Police Station which were attached to the plea.

According to the report of Assistant Inspector Cahrin when he inspected the plaintiff's vehicle on 15 November 2009 before the first defendant drove it, he observed that it had a broken right indicator and a shattered windscreen on top of the driver's side. Seargeant Grasium Chidemo was the Officer In Charge of the evening shift which had the first defendant on 18 November 2009. He reported that;-

> " Constable Matonhodze stole the keys when he took over the duty as he reported earlier to work. While out to patrol, he stole this vehicle which was parked in the outside car park ……While out on patrol with the stolen vehicle, Constable Matonhodze was involved in an accident……..".

The plaintiff gave evidence. He was involved in an accident along Harare – Bulawayo road on 14 November 2009 and directed to drive his BMW motor vehicle to Kuwadzana Police Station as it had been impounded for further investigations. At the station, he surrendered the vehicle as instructed. A few days later he was telephoned by the Officer In Charge who informed him that his vehicle had been involved in an accident while being driven by a certain Police Officer on duty.

The plaintiff stated that he was invited to the Police Station and taken to the scene of the accident where he beheld his motor vehicle in a ditch badly damaged. The police advised him that they had no capacity to remove the vehicle and suggested that he made his own arrangements to tow it from the scene which he did. He was then advised by the police that the culprit was in police custody and that he should negotiate with him on the damage caused to his vehicle. He refused to do so as he saw no reason to as the culprit had been on duty when he committed the delict and his employers were liable.

He sought redress from the office of the Commissioner General of police and although he was assured the matter would receive attention, nothing came out of that. Meanwhile, he sought and obtained quotations. The plaintiff produced the 4 quotations

from Savo's Panel Beaters (Pvt) Ltd, Vals Panel Beaters (Pvt) Ltd; Quest Motor Corporation and Ontime Assessors. The general view from these experts was that the vehicle was beyond economic repair. The plaintiff also produced an assessment report compiled by Ontime Assessors to the effect that the pre accident value of the vehicle was US$12 000-00.

He testified that in order to mitigate his loss, he was forced to auction the salvage and realised only US$1 900-00. For that reason he claims the difference of US$10 100 from the defendants.

Constable Elliot Paradzai Kashuta gave evidence on behalf of the second defendant. He is an attested member of ZRP based at Kuwadzana Police Station. On 18 November 2009 he witnessed the 1st defendant conduct a hand over take over of station property with the Sergeant In Charge of an outgoing shift at about 8:45 pm as they were reporting for duty. The Sergeant In Charge of their PM shift was then not available although he was the one supposed to perform that exercise.

The station property which the first defendant took over included the keys to the BMW motor vehicle which was parked at the car park. These keys were kept together with other valuables of detained persons in a safe kept at the charge office. He did not witness the first defendant handing over to the Sergeant in charge the station property.

The first defendant and himself held the same rank with the former being the leader of his team known as Beat 1, comprising of 3 members while the witness was the leader of his team known as Beat 2 which also had 3 members. He had seen the first defendant driving a number of motor vehicles in the past but not a BMW motor vehicle. Much later that night, the witness and Constable Towindo were coming from Kuwadzana 2 shopping centre heading towards the station, when they met the first defendant driving the BMW motor vehicle. He had Constable Kupara seated on the front passenger seat.

Constable Kachuta stated that the first defendant instructed them to get into the vehicle and accompany them to attend a grade A call which he described as a scene where there is either a danger to life or where violence is being used or threatened or where there has been a accident and vehicles are blocking other motorists. Once inside the vehicle, the first defendant drove for about a minute before failing to negotiate a bend. He lost control of the vehicle and it plunged into a ditch sustaining serious damage.

In Kachuta's view, the first defendant had lied to them that there was a grade A call as he just wanted them to accompany him on a patrol in order to beef up manpower. According to this witness the first defendant had taken custody of station property by signing for it and there was nothing amiss with that as a constable can take over station property if he is the most senior person available at the time. He added that on the particular day, the sergeant in charge of the shift had not been " careful" in the discharge of his duties which allowed the first defendant to retain the keys and drive the vehicle going on patrol.

That the plaintiff suffered loss in the amount claimed has been established by evidence. The uncontroverted evidence is that the vehicle had a pre-accident value of US$12 000-00. It sustained minor damages in the form of a shattered windscreen and a broken indicator light as a result of hitting a pedestrian while being driven by the plaintiff. In my view that damage was negligible and could not materially alter its value as assessed by the assessors in the sum of US$12 000-00 which assessment has not been contested.

Having regard to the amount of US$1900-00 realised from the sale of the salvage, I am satisfied that the quantum of damages suffered by the plaintiff is US$10100-00. The second defendant did not, either in his plea or in the evidence led in court, bother to question that part of the plaintiff's claim. It is trite that what is not disputed is admitted.

That the first defendant acted unlawfully, wrongfully and indeed negligently when he drove the plaintiff's motor vehicle has not been disputed either. Clearly the plaintiff did not authorize him to drive his vehicle and there is no way a police officer can lawfully drive a motor vehicle held at a police station either as an exhibit or pending further investigations while on patrol duties. Such vehicle is not a patrol vehicle and should be kept in custody only for the purpose for which it was impounded.

The requirements for a claim under the lex Aquilia were aptly captured by PATEL J in *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H) at 298 E-G where the learned Judge said:-

> " It is now well-established in our law that the plaintiff in an Aquilian action for patrimonial loss must establish that:-
> (i) the defendant committed a wrongful act;
> (ii) the plaintiff suffered patrimonial loss, viz, actual loss capable of pecuniary assessment;
> (iii) the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
> (iv) responsibility for the plaintiff's loss is imputable to the fault of the defendant; either in the form of dolus (intention) or culpa (negligence)"

I am satisfied that the plaintiff has established all the requirements set out above in the present case. As already pointed out, the first defendant committed a wrongful act by driving the plaintiff's vehicle without authority and negligently causing an accident. As a result of that wrongful act, the plaintiff sustained loss in the sum of US$10 100-00 which loss does not suffer from remoteness of damages and indeed the responsibility for the plaintiff's loss is imputed to the fault of the first defendant. Indeed the first defendant's

conduct was unbelievably unreasonable, irresponsible, childish and reprehensible in the extreme.

The question which remains is whether the first defendant was acting within the course and scope of his employment as a police officer which he damaged the plaintiff's motor vehicle as to make the second defendant vicariously liable for his actions. The position of our law is that an employer is liable for the delicts of his employee committed in the course of their duty or service unless if the employee, in committing the delict, was pursuing his or her own interests.

As stated by the learned author P.Q.R. BOBCRG; *The lawful Delict, Vol 1,Juta & Company Limited* at P327, quoting Mkhize v Martins 1914 AD 382 at 390;

> "We may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interest and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment."

The learned author went on at p328 quoting Feldman (Pty) Ltd v Mall 1945 AD 733 at 736 to state:-

> " Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained."

In casu, it cannot be denied that the first defendant was doing his masters work when he received the station property on the night of 18 November 2009 which included the keys and the motor vehicle belonging to the plaintiff. He was still about his master's business when he went on patrol that night. However he clearly had no authority of the

master to use the plaintiff's motor vehicle when going on patrol. It can be said that he disobeyed his master's instructions as to how he was to perform his duties.

The above authorities suggest that he was still acting within the scope of his employment even though the manner in which he went about his work was perverted.

To hold that a Police Officer who is on patrol and therefore pursuing his employer's ends is not acting within the course of his employment merely because he used a vehicle he was not supposed to use would lead to an absurdity. This is a classic case in which the officer used the wrong means to attain his employer's ends leaving him firmly within the scope of his employment.

I therefore come to the conclusion that the second defendant is vicariously liable for the wrongs of the first defendant because such wrongs were committed while he was in the scope of his employment as a Police Officer.

Accordingly it is ordered as follows;-

1. The first and second defendants should, jointly and severally, the one paying the other to be absolved, pay to the plaintiff damages in the sum of US$10 100-00 together with interest thereon at the prescribed rate of 5% per annum from 18 November 2009 to date of payment.

2. The first and second defendants should, jointly and severally the one paying the other to be absolved, pay the costs of suit.

Muzangaza Mandaza & Tomana legal practitioners for the plaintiff
Civil Division of The Attorney General's Office 2nd defendant's legal practitioners