BRIGHTON NDLOVU
versus
DEBSHAN (PRIVATE) LIMITED
and
JUDAH MPOFU

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 14 June 2012, 5, 6, 15 and 16 November 2012 and 7 December 2012

Civil Action

A Moyo, for the plaintiff
T Mpofu, for the first defendant
The second defendant in default (his Defence having been struck out for Defaulting at the pre-trial conference)

MUTEMA J: This claim is steeped in delict. The allegations against the two defendants, jointly and severally, the one paying the other to be absolved, are that the second defendant (a farm guard), acting within the course and scope of his employment with the first defendant, "wrongfully and unlawfully pointed and discharged a firearm at the plaintiff" at Debshan Ranch, Gweru, on 26 April 2008. As a consequence of the second defendant's wrongful and unlawful conduct, the plaintiff sustained injuries, pain, shock and suffering, the nature and effect of which is detailed in the medical report that was attached to the summons and declaration. As a result the plaintiff suffered the following damages:

1. Medical/hospital expenses	-	US$ 8 000-00
2. Pain, shock and suffering-past, present and future	-	US$20 000-00
3. Anticipated future medical expenses and operations	-	US$50 000-00
Grand Total		US$78 000-00

The issues that were referred to trial as per the joint pre-trial conference minute are four, viz:

1. Whether or not the second defendant was acting within the course and scope of his employment with the first defendant.

2. Whether or not the second defendant acted wrongfully and unlawfully in discharging the firearm at the plaintiff.
3. What injuries were sustained by the plaintiff.
4. The quantum of damages.

The plaintiff's case is hinged on his sole evidence which was to the following effect: He is 42 years old, married with five children and resides at plot 7 Fairfield B farm in Gweru rural. He derives his sustenance from farming activities at his plot.

On 24 April, 2008 his children were guarding the fields when some baboons from Debshan Ranch came to his fields. Dogs chased the baboons away and the first defendant's employees shot the dogs dead.

On 26 April, 2008 a police officer, Munkuli, came in the company of six security guards, employees of the first defendant, three of whom were armed with guns. They found the villagers at a field day. The policeman read out the names of the people they were looking for, viz Fanwel, Trust, Frank and Peter. The villagers told him that they did not know those people. An old villager told the policeman that it was better to wait for the village chairman. Whilst they were seated, the second defendant stood up. He was armed. He cocked his firearm and said he could kill all the villagers and that they were mother fuckers. He uttered these words while pointing the firearm from side to side. He ("the plaintiff") then stood up intending to run behind a house and he felt that he had been shot. He fell unconscious and was taken to Gweru General Hospital. When he was eventually discharged from hospital he found out that the second defendant's charge had been withdrawn before plea as per exh 1 because the victim could not be located.

At the hospital he was admitted for one month two weeks. He was given a tetanus shot and since one of the doctors had died, his nephew brought a doctor from the army J Mombeyarara who examined him and had X-rays taken. The doctor later put him under and removed bullets from him as per his report marked exh 2 which Mr *Mpofu* indicated that the contents thereof are disputed. After the operation he spent another two months in hospital making it a total of three months two weeks.

He sustained injuries on his back which proved difficult to heal and continued to bleed. He suffered a lot of pain which he experiences even to date especially when it is cloudy when he will be unable to do any work. The doctor did another examination on him on 28 May, 2011 and compiled another report – exh 3 wherein it is indicated that 29 shrapnel

are still embedded in his body and that there is need for further surgery to remove them. On 15 October, 2012 he went for an x-ray which shows shrapnel on his left side as per exh 4 (whose authenticity Mr *Mpofu* disputes). Based on exh 4 the doctor compiled another report – exh 5 (whose truthfulness Mr *Mpofu* indicated would contest). In that report the doctor indicated that he still has 39 shrapnels in his left side of the chest and major surgery is required to remove them. Exhibit 6 is the quotation for US$14 050-00 required for the major operation to remove the remaining shrapnel.

The first claim in the sum of US$8 000-00 is for hospital expenses based on the first medical report exh 2. The second claim is for pain, shock and suffering – past, present and future. The pain was great because the shrapnel is still embedded in his body and had to be operated on. He still feels the pain and can no longer till the land as he used to. If he lifts a 10kg weight he feels pain. He takes pain killers especially at night when he is retiring and he needs US3 000-00 for the pain killers every month. The third claim represents future medical expenses and operations and is for US$50 000-00. Now plus US$14 050-00 stated in exh 6 he is not prepared to a reduction of the US$50 000-00. With that the plaintiff closed his case.

The first defendant led evidence from two witnesses. Fabion Munkuli told the court that he is a constable in the Zimbabwe Republic Police currently stationed at West Nicholson but at the relevant time he was under Fort Rixon Police Station stationed at Gwamanyanga police base when a report of assault was received. He was given the docket with instruction to attend the scene and arrest the suspects. One Maclean and his colleagues had allegedly been assaulted while dipping cattle at Debshan Ranch by Peter Moyo, Fanuel Moyo, Frank Sibanda and Trust Mazibuko who stay at Fair Field farm.

He requested for transport from Debshan to enable him to do the follow up. He was given transport that was being used for deployment change-over of Debshan's employees hence he went to Fairfield in uniform with Debshan staff. They found Peter Moyo present at his homestead. He introduced himself to Peter as a policeman from Fort Rixon and advised him of his mission. Peter said he was aware of the assault incident. Peter entered his house saying he wanted to put on his shoes so that they would go and meet the village chairman. A few minutes later he saw people coming towards where they were standing singing chimurenga songs armed with knobkerries and axes. The people surrounded them and said they wanted to disarm the Debshan staff and take the guns to one Musoja, accusing the Debshan staff of killing their dogs in their ranch. They also hurled vulgarities at them. He tried in vain to comfort the restive crowd. Brighton Ndlovu ("the plaintiff") then jumped

from the crowd and went to where Judah Mpofu was standing and the whole crowd followed suit and confusion reigned and he then heard a gunshot. He did not see how Brighton was shot. The crowd disappeared following the gun shot.

He returned to Debshan Ranch and raised his station to advise what had transpired. He said the mission to go and arrest the alleged assailants was his and not Debshan employees'. He did not ask Debshan employees to accompany him from the vehicle that was parked a few metres away to Peter Moyo's homestead – they just jumped out and followed but did not speak to Peter Moyo. There was no sign of any field day in progress. He produced exh 7 – his written report regarding the visit to Fairfield.

The other witness was Makhosi Khabo – a security guard with the first defendant. On 26 April, 2008 constable Munkuli came to their camp when they were about to go and change duty at the farm homestead. They boarded the vehicle in which Munkuli was and it took them first to Peter Moyo's homestead where Munkuli wanted to arrest some suspects. From Peter Moyo's homestead the vehicle was set to go to the farm homestead where guards were to knock off while others were to assume duty and thereafter the vehicle would take Munkuli to his station.

There was no gathering at Peter Moyo's homestead – only two people and children were present. After Munkuli had spoken to Peter, Peter asked to go and wear his shoes. He took time whilst in his house and they saw people converging at the homestead from all directions wielding knobkerries and axes. Those people started insulting them using vulgar language. Munkuli failed to calm them The people said they wanted to take the guards' guns to a certain soldier. They then tried to disarm the armed guards. Brighton went to disarm Judah Mpofu and he heard a gun-shot. After Brighton was shot he did not hear Judah saying he wanted to finish off the one he had shot. After the gun shot, people scurried for cover with some entering nearby houses and others running into the bush. The vulgar words uttered by the villagers were that police officers favoured Debshan and that the Debshan guards were white people's dogs who were being given tea.

After his evidence the first defendant closed its case.

That was the evidence adduced in this case upon which I must resolve the four issues alluded to above that were referred to trial. A reading of the four issues referred to trial, vis-à-vis the first defendant herein reveals that they are so inter woven that if for instance, the first issue of vicarious liability is resolved in the first defendant's favour, then the other three issues necessarily fall away. I will deal first with that first issue.

Whether or not the second defendant was acting within the course and scope of his employment with the first defendant

The rationale behind vicarious liability is expressed in the maxim *qui facit per alium facit per se* (he who does his work through the hand of another does it himself). Various authorities on the subject abound both locally and abroad. While it is impossible for the law to yield a mathematical formula for the test to be applied in the various factual scenarios in applying the test of vicarious liability, several such tests have been evolved.

In *HK Manufacturing Co* (*Pty*) *Ltd* v *Sadewitz* 1965 (3) SA 328 at 332 C, TEBBUTT AJ expressed the test in these words:

> "It is, of course, now a well-established principle in our law that an employer is liable for harm caused to third parties by the negligence of his employee if such employee was acting within the course or scope of his employment – expressions which have been held to be synonymous … Our courts have adopted the expressions of law by Voet 9.4.10 viz that the employers are liable in solidum for the delicts of their employees whenever they inflict injury or damage 'in the duty or service' (*in officio autministerio*) set them by their employers but that the employers are not liable when the delict is committed 'outside of' (extra) their duty or service."

In *Minister of Safety and Security* v *Jordaan* t/a *Andre Jordaan Transport* 2000 (4) SA 21 (CA) SCOTT JA at 24-25A held that:

> "The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business or doing the work of the employer."

In *Munengami* v *Minister of Defence* 2006 (1) ZLR 409 (H) PATEL J summarised the applicable principles in these words:

> "The principles of vicarious liability that I glean from the authorities that I have cited maybe 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 had not authorised but which are so connected with authorised acts so as to be regarded as improper or wrongful modes of doing them.
>
> 2. On the creation of risk approach, the employer can be held liable for his employee's negligence or inefficiency as well as his abuses or and excesses.

However, for liability to attach to the employer such conduct must still be within the scope of the employee's employment or closely connected therewith.

3. The fact that the employee uses equipment or material provided by the employer in carrying out his wrongful action is irrelevant. The critical enquiry is whether or not the employee 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 employee was acting for his own interests and purposes, the employer is not liable. But if there is a sufficiently close link between the employee's acts for his own interests and the business of the employer, the latter may yet be liable. This is so if the employee's acts are connected with the employer'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?"

In the instant case the second defendant was not assigned by his employer (the first defendant) to go and perform any duties at Fair field B farm. The former was employed as a game scout to operate within the boundaries of Debshan Ranch only. The shooting incident occurred outside the ranch. The second defendant and his fellow guards were at their camp within the ranch ready to go to the ranch homestead to change their shift when constable Munkuli arrived there in uniform in a motor vehicle that was supposed to ferry the guards back to the ranch homestead. The constable had hitched the transport so as to be taken to Fair field B farm to investigate an alleged assault by some Fair field villagers on some Debshan employees and from there the second defendant and other guards would be left at the ranch homestead while the vehicle would continue to go and leave the constable at his station with is arrestees, if any. Contrary to the plaintiff's contention that constable Munkuli's mission to Fair field was to investigate shooting of dogs/poaching, Munkuli refuted this in his evidence as well as via exh 7 – his report about the incident which he compiled in November, 2009. It is at Fair field farm where the shooting took place when the armed villagers wanted to disarm the second defendant and his workmates who had nothing to do with Munkuli's mission there.

Given the foregoing facts, can it be said that the second defendant was exercising the functions to which he was appointed and that there was a close link between his conduct and

his duties so as to found vicarious liability? Or did the second defendant's departure from the path of duty constitute such deviation from his prescribed task as to dissociate his wrong from the risk created by his employment and to exonerate his employer from liability?

On the foregoing authorities I am not persuaded that the injury that was inflicted on the plaintiff by the second defendant was caused in the duty or service set him by his employer despite the use of the employer's gun. There was a distinct break in the chain between his employer's calling and what he was doing at Fair field farm. The only link between the second defendant and his going to Fair field farm was transport which was taking Munkuli there to pursue his own police mission and thereafter to take the second defendant and other guards to Debshan Ranch to formerly knock off duty having already finished his tour of duty prior to going to Fair field. It cannot, by any stretch of the imagination, be said that the second defendant's presence at Fair field farm was in furtherance of his employer's cause. The cases of *Monday Bopoto Nyandoro* v Minister of *Home Affairs & Anor* HH 196-2010 and *Kerina Gweshe* v *Minister of Defence* HH 28-2006 sought to be relied upon by the plaintiff are distinguishable on the facts.

Having found that the first defendant is not vicariously liable for the second defendant's shooting of the plaintiff, it is not necessary to delve into the other three issues. In the event that I may be wrong in so holding, I am constrained to deal with the second issue viz:

Whether or not the second defendant acted wrongfully and unlawfully in discharging the firearm at the plaintiff

It is pertinent to state at this juncture that although the second defendant's defence (which hinged primarily on this issue) has been struck out on account of his defaulting the pre-trial conference, (a technicality), this issue, on the merits, should not affect the first defendant's defence. It is not the first defendant's fault that the second defendant's defence was struck out on that technicality. Rather, it was the plaintiff, in terms of Order 26 r 182 (ii) (a) and (b) who applied for the order to have the second defendant's defence struck out. It would have been clever had the plaintiff allowed the second defendant's defence to be heard on the merits instead of arguing in closing submissions that the second defendant's plea that the shooting was somehow accidental is no longer before the court. By dealing with this issue I am not trying to exonerate the second defendant who, in any event is already barred. Even if I were to find that the second defendant acted wrongfully and unlawfully, that finding would

not affect the first defendant because it has already been found not vicariously liable for the second defendant's actions.

The first defendant's witnesses had no eye witness testimony of how exactly the plaintiff got shot. However, both witnesses said there was no field day in progress at Fair field B farm when they arrived there. The villagers who included the plaintiff surrounded them from all directions singing "chimurenga" songs and were armed with axes and knobkerries and were bent on disarming the armed guards. The plaintiff was armed with a stick and jumped onto the second defendant in a bid to disarm him and the gun accidentally discharged thereby injuring the plaintiff. If this set of facts is probable then I find no wrongfulness or unlawfulness on the second defendant's part. I am constrained to find it so on a balance of probabilities for the following reasons:

A comparison of the first defendant's witnesses' version of events with the plaintiff's version leads only to one conclusion, namely that the former is more probable than the latter. The latter version is that Munkuli and the guards found them at a field day and Munkuli read out the names of the people they were looking for. The villagers told Munkuli that they did not know those people, (which was apparently a lie). An elderly villager remarked that they wait for the chairman. They were all seated. The second defendant suddenly stood up, cocked his gun and said he could kill all the villagers whom he called mother fuckers. He was pointing the gun from side to side. The plaintiff stood up intending to run behind a house and was then shot.

I find the plaintiff's version not only improbable but palpably false. The question that begs the answer is what would the second defendant's motive have been especially in the presence of a police officer? I have scouted high and low, far and wide for a possible motive on the second defendant's part without finding any.

I have said that the first defendant's witnesses' version is more probable. It is also buttressed by the following aspects: it is not known why the plaintiff failed to call even a single witness from the more than fifteen villagers who were present at the scene to corroborate his version. Why would only him stand up and run away amongst the horde of other villagers? Exist several inconsistencies by the plaintiff related to whether he was shot in the chest or back. In his evidence in chief, and under cross-examination, the plaintiff averred that he was shot at the back. He said the same in his first statement to the police dated 27 April, 2008 which he admitted signing under cross-examination. By averring that he was shot at the back the plaintiff wanted to insinuate that he was shot while fleeing as opposed to

while trying to disarm the second defendant. He, however, surprised the court when he distanced himself in re-examination from the signature appearing in the statement of 27 April, 2008. Exhibits 2, 3 and 5 (his doctor's letters to his legal practitioners) seem to insinuate that he must have been shot in the chest. He did not call the doctor to come and explain the ambiguity. It is again pertinent to note that in his statement to the police dated 27 April, 2008 – para(s) 6 and 7 – the plaintiff admitted that some villagers were armed with axes and knobkerries and he himself was armed with a stick respectively yet in court he denied being armed at all. Also, in the second statement to the police dated 27 July, 2010 in para 6 the plaintiff gave a totally different version of the events. He admitted in re-examination signing this statement. Therein he said Munkuli requested to see the chairman and it happened that the chairman was coming from his home. They all stood up showing Munkuli the chairman and he then heard the noise of a gun which was being cocked and discovered that the second defendant was standing a distance from the villagers who tried to run away and he was then shot on the right lower arm. In para 14 of his statement of 27 April, 2008, the plaintiff states that he did not know whether the second defendant shot him intentionally. This, again contradict the plaintiff's allegation that the second defendant remarked that he wanted to finish off the one he had shot.

In view of all these foregoing contradictions and ambiguities that were not explained away the conclusion is inescapable that the plaintiff, in this Aquilian action, has dismally failed to establish a wrongful act as well as fault in the form of intention or negligence.

In the event, since both vicarious liability and wrongfulness and fault have not been proven I find it not necessary to bother looking at the other two issues of the nature of the injuries sustained by the plaintiff and the quantum of damages. The plaintiff's claim against the first defendant is hereby dismissed with costs.

Kantor & Immerman ,plaintiff's legal practitioners
Gill, Godlonton & Gerrans, 1st defendant's legal practitioners