CIV/T/104/88
CIV/T/236/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

JOSHUA MASEKOANE MALUKE Plaintiff

V

PIONEER MOTORS (PTY) LTD. Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 29th day of November, 1989.

The plaintiff instituted an action against the defendant in the above matter. While pleadings were going on and before their completion the defendant instituted a counterclaim against the plaintiff.

It was agreed by the parties to the respective actions to consolidate these proceedings and retain the parties' designations as reflected in the principal action even when reference is made to the parties in the counter-claim. Consequently the parties will be referred to as the plaintiff and the defendant as appear in the principal action regardless of their reversed positions in the counter-claim.

The plaintiff sued out summons from the Registrar's office in February 1988, requiring from the defendant

(1) payment of M31,022.48 damages.
(2) interest at 11% per annum a tempora morae.
(3) costs of suit.
(4) Further and/or alternative relief.

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In paragraph 3 of his declaration the plaintiff sets out that at all relevant times prior to 27th November 1987 he was in the employ of the defendant as a salesman at the defendant's place of business where motor vehicles are sold.

The plaintiff states that he was employed on permanent terms earning a salary in the amount of M372.00 per month. He further states that he was entitled to fringe benefits in the form of M50 being petrol allowance. Furthermore he pointed out that he was entitled to one day's leave per month and a commission on the gross profit made in respect of sales of vehicles concluded by him calculated on a percentage formula laid down by the defendant.

The plaintiff complains that on 27th November 1987 he was unlawfully and wrongfully dismissed summarily by the defendant through its General Manager who, acting on the defendant's behalf did not afford the plaintiff an opportunity to be heard nor did the General Manager give the plaintiff any notice at all.

He further sets out in his declaration that during the period of his employmnet with the defendant he had to his credit unpaid commission on sales of vehicles he had effected for the defendant. Furthermore he had not yet exhuasted the balance of leave days he had already earned before termination of his employment.

It is on the basis of the above unlawful conduct by the defendant that the plaintiff states that he has suffered damages in the amount of a total sum of M31,022.48 made up as follows :-

(a)	(for) wrongful and unlawful dismissal	M30,000.00
(b)	Commission on vehicle sales	621.16
(c)	Cash in lieu of one month's notice	372.00
(d)	Cash in lieu of notice for 2 days' leave	29.32
	Total	31022.48

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In reply to defendant's request for further particulars the plaintiff denied any misconduct on his part that could warrant being summarily dismissed by the subsequent General Manager Mrs Motheba Lerotholi.

He further explains that this General Manager based herself for his dismissal on some misconduct alleged to have been manifested by the plaintiff during the term of office of her predecessor the then General Manager Mr Mokalanyane i.e. P.W.2. He pointed out that Mr. Mokalanyane during his term of office in exercise of his discretion found no reason to dismiss the plaintiff nor indeed even to take any disciplinary action against him. Thus the matter which precipitated the action embarked on by Mrs Lerotholi had already been closed during the term of her office as Mr Mokalanyane's successor.

Actually the matter which the plaintiff maintains was closed involved a motor vehicle which the defendant alleges disappeared in the plaintiff's hands and thus constituted negligence on his part.

In the further particulars that the plaintiff furnished to the defendant he disclosed that in re-opening the matter which had been closed, the defendant through its agent Mrs Lerotholi the subsequent General Manager did not afford the plaintiff an opportunity to make representations. He disclosed further that the dismissal was nothing but a retaliatory action by Mrs Lerotholi in response to an action instituted by the plaintiff against her in the Magistrate's Court Maseru numbered CC 1174/87 dated 26th November 1987. No copy of the summons in the Magistrate's Court has been attached to the papers constituting the plaintiff's action in this court but nonetheless the plaintiff has disclosed that he had made known to Mrs Lerotholi on 26th November, 1987 that he had lodged an action against her and so it seemed in response the following day i.e. 27th November 1987 the defendant's General Manager dismissed the plaintiff on the pretext that he had committed some

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act of misconduct relating to a matter that had long been abandoned and closed.

As no valid nor justifiable grounds existed for the dismissal the plaintiff ascribes mala fides to the defendant's conduct. He points out that in going about his dismissal the defendant had employed unprocedural methods and based its action on extraneous and irrelevant considerations.

In paragraph 2 ad para 2 of the request the plaintiff has indicated that in his capacity as a salesman entitled to commission chargeable against the defendant he had sold a variety of vehicles to five different customers in respect of which sales he is still expecting his commission calculated on a formula reflected in annexure "A" of his papers. Annexure "A" is what is termed New Commission Structure.

The defendant in its plea tendered after issues had been amplified by the plaintiff's further particulars stated that when the new General Manager took over from Mr Mokalanyane her predecessor in the defendant's company investigations into the plaintiff's misconduct were still pending.

The defendant's plea asserts further that the plaintiff's dismissal was justified on the grounds that in his own report made subsequent to the incident the plaintiff revealed that he had left the company car in the hands of a stranger contrary to the company's normal procedure and enabled that stranger masquerading as a customer to steal the company car as a result of which the company suffered a loss of M16,090 which constituted the value of the vehicle plus profit that would have accrued to the company if the sale had been concluded.

In paragraph 3 of the defendant's plea ad para 5 the defendant puts the plaintiff to proof of the commission claimed by the plaintiff as owing to him by the defendant.

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The defendant further indicates that the plaintiff was paid M14 being in respect of one day's leave which was the only balance of leave days outstanding to the plaintiff's credit. The defendant further shows that it had informed the plaintiff through his lawyer to follow the normal procedure in the event that any commission was owing to him by the defendant.

Thus the defendant denies liability to the plaintiff for damages set out in the plaintiff's summmons.

In his evidence the plaintiff said to this Court that he started working for defendant on 1st September 1986. He left the work when his employment was terminated by the defendant on 30th November 1987.

His employment was terminated through a letter that forced him to leave the job immediately. He told the court that the reason for this dismissal was an alleged negligence ascribed to him regarding a vehicle which either disappered or got stolen while in his possession.

When he got dismissed he says he was on permanent employment having completed the probation period of three months prior to the event that precipitated his dismissal.

He denies that the vehicle got stolen while in his possession during the term of his employment with the defendant.

The plaintiff said that on 14.7.87 one David Paliso arrived at the defendant's business premises saying that he wanted to buy the vehicle in question. He was served and he bought the vehicle.

The said David Paliso effected the purchase by filling "the offer to purchase" forms. This transaction was concluded upon the customer, the plaintiff, the sales manager and the general manager appending their signatures on it.

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The form was handed to the customer to go and pay at the accounts section. The customer came back from the accounts section and the plaintiff demanded to be shown an invoice by the customer. The customer complied and the plaintiff was satisfied on being shown the invoice that the customer had paid for the vehicle.

Then D.W.1 Mr Moshabesha the sales manager asked the plaintiff to go with the customer on a test-drive.

The test-drive was effected along the road spanning the defendant's premises and the road leading to Free Way Motors lying about 4 km from the defendant's premises. On the way back the plaintiff asked the alleged purchaser to drive him to Lesotho Electricity Corporation a place falling outside the mapped route for the test drive.

It was when the plaintiff tried to retrace his steps to the place outside the Electricity Corporation where the vehicle had remained parked by the alleged purchaser that the plaintiff discovered that the purchaser had left him behind. The plaintiff used th phone at Lesotho Electricity Corporation to ask the staff at the defendant's business whether the purchaser had not per chance gone back there. Replied in the negative by authorities at his employer's premises he complied when asked to go and report to the police the obvious act of theft committed by the purchaser who had left the plaintiff at the Lesotho Electricity Corporation.

In his statement to the police the plaintif did not reveal that the alleged purchaser had in fact paid for the vehicle he is alleged to have bought. Significantly the plaintiff when asked by the management of the defendant's company to make and submit a written report he did not include in it the fact that he had satisfied himself that the vehicle had been paid for.

Instead he said in his report that he and one Mochesane went to the South African Border police to report "about the car theft case, and from there .. to the Criminal

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Investigation Division Police of Lesotho to give them the same report."

In the light of the contents of his own report it seems that the plaintiff's pretence even at this stage that the vehicle in question had been paid for is not maintainable.

His own witness P.W.2 Mr Mokalanyane said as a matter of policy a test-drive is undertaken before any purchase has been effected thus enabling a prospective buyer to make up his mind whether to proceed with the purchase or not. P.W.2 further stated that he never expressly or by implication suggested that the plaintiff's report absolved him from liability to the defendant for the loss incurred through the plaintiff's negligence. He also said that a receipt and not an invoice is proof that a commodity has been paid for. In the light of this evidence by the plaintiff's own witness it is impossible for me to let the plaintiff make a merit of his pretended ignorance of the procedures relevant to purchases of vehicles in respect of which he was placed in a position of trust as a salesman by his employer.

The plaintiff cannot be allowed to water down his negligence on the grounds advanced by his counsel that because of his failure to live up to the required standard of care and performance the plaintiff was not confirmed at the expiry of his probation period, hence the management was in part to blame by letting him have a free hand in his involvement with the defendant's customers in the capacity he was employed as a salesman.

This argument tends to defeat the plaintiff's view that he in fact had been confirmed on permanent terms at the end of the probation period of three months hence should have not been dismissed without a hearing for he had legitimate expectation to benefits which accrue to permanent members of staff.

It is clear to me that if the plaintiff had been

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confirmed in his position as a member of the defendant's permanent staff he would have been made to know this in writing. He told me that his confirmation was effected orally. But the man who should have verified this i.e. the then General Manager Mr Mokalanyane said nothing of the sort.

I have no hesitation in taking the view that the plaintiff's relationship with the defendant was of master and servant type governable under the common law, thus imposing no obligation on the employer to afford his servant a hearing before dismissing him. Indeed in this case the fact that he was allowed to make representations to the employer by way of the report made and submitted by him about the disappearance of the vehicle in his hands served as an opportunity to have his side of the story aired.

In Langeni and Others vs Minister of Health and Welfare and Others 1984(4) SA at 99 to 100 Lord Wilberforce said

> "... in master and servant cases, one is normally in the field of the common law of contract inter partes, so that principles of administrative law including those of natural justice, have no part to play .... in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful: no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void."

In Judicial Review of Administrative Action 4th Ed. by De Smith at 227 it is stated

> "First in 'a pure case of master and servant,' dismissal was legally effective, although the servant had been given no prior opportunity to be heard, that the facts might show breach of contract entitling the servant to damages.....

The plaintiff said he had been allowed by D.W.1 to go on a test-drive. D.W.1 denied this. I heard D.W.1 and

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formed the opinion that he is an honest and truthful witness who even conceded that the point he raised namely that he learnt from the plaintiff that the customer was going to his Bankers who would finance the purchase on the basis of the invoice that was in the customer's hands, was in the nature of an afterthought. However the point had been put to the plaintiff during cross-examination that an invoice is not proof of payment; for only a receipt can furnish such proof to satisfy the court or anybody involved in sales that a marketable commodity has been paid for.EX."A" the letter of appointment dated 19-8-86 is a contract between the instant parties.

Clause six of this contract says

> "Your duties will entail ensuring effective prospecting in this department, a professional and ethical approach to the marketing of Toyota Vehicles in our trading area."

It is clear to me that the plaintiff breached this clause by leaving a total stranger with the car keys in the car which he had not paid for. He failed to ensure a professional and ethical approach to the marketing of his master's merchandise.

The contract does not outline the manner of its termination between the parties. In this event the court has resort to provisions of sections 13 and 15 of The Employment Act 22 of 1967 indicating that where the period of notice is not given then the mode of payment by way of salary should determine the length of notice required to be given by either party to the other in the event of termination of the contract if the amount of the salary is not surrendered in lieu of notice. See Act 14: the Employment Amendment Act section 13 of which re-casts the principal law. The question of termination falls under section 15(2) and (3).

Mr Hlaoli for the defendant submitted that for the maxim audi alteram partem rule to apply it should be noted

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that this rule cannot apply in every situation but in particular situations where the status reached by an employee entitles him to a hearing. See C. of A. (CIV) No. 6 of 1977 'Maseribane & 3 Others vs Kotsokoane & Another. (unreported).

He submitted that the plaintiff had not reached the necessary status because he had not yet been confirmed. The fact that the plaintiff had been undergoing a probationery period presupposes that he was not fully employed.

It was argued in the alternative that if at the end of the probationery period the court is justified in inferring that the plaintiff was entitled to regard himself as being on permanent employment regard should be had to the fact that he was given no ostensible status or authority over and above that which was obtaining when first he was appointed thus nothing could form a basis for him therefore thinking that he had a legitimate expectation for remaining in the company for a long time.

Mr Hlaoli urged the court to dismiss as unfounded the alleged condition precedent on the basis of which the plaintiff said the previous General Manager's view was departed from by his successor Mrs Lerotholi. He pointed out that P.W.2 who was supposed to have held this promise or whatever it was to the plaintiff denied that he ever caused the plaintiff to believe that the matter had been filed and forgotten. P.W.2 instead said that he felt this was a matter for the police and did not finalise it himself.

Mr Hlaoli submitted that because the plaintiff said as far as he was concerned the vehicle had been paid for by the stranger then it behoved the plaintiff to establish that payment had been effected.

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It is indeed surprising that although the plaintiff agrees that when the stranger told him that he had liquor and other businesses at T.Y. and a residence at Lithabaneng it was with a view to cultivating the plaintiff as the sort of a person who could be useful to him in his designs on the vehicle which was entrusted to his care. The plaintiff admits that his customer was projecting himself as a man of substance for this dubious purpose but nonetheless maintains that the car had been paid for when told the stranger had not paid for it even though he himself discovered that the stranger had lied about the possessions he said he had in an endeavour to soften and ply him with lies calculated at letting the plaintiff give him the opportunity to remain alone in the car. Even if the stranger lied to the plaintiff about his financial strength the bottom line lies in the fact that the stranger did not hide from him the invoice which provided the plaintiff with knowledge of the amount that was chargeable against the stranger.

The plaintiff was thus placed in a position of knowing that the pretentious customer had not paid for the car, yet when he and the said customer went for a test-drive he left this unknown man in full control and possession of the car to which he had no lawful claim at all. Once left to his own devices the stranger wasted no time before letting the car take to itself wings. This could in wry humour be regarded as the price the plaintiff was made to pay by the stranger for deviating from the mapped route for the test-drive to the route leading to the Lesotho Electricity Corporation where, even assuming the plaintiff had been allowed to take the test-drive, on his own admission the Electricity Corporation fell out of the purported route

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for the test-drive. Thus the plaintiff can legitimately be said to have gone there on a frolic of his own. The management had not authorised him to go to the Electricity Corporation, for acts of that nature the law is very clear; the servant who commits a delict outside the scope of his mandate from his master takes full responsibility for his delictual acts.

It is surprising that when making his report the plaintiff never said the vehicle had been paid for.

In the plea to the counter-claim the plaintiff even though now adopting the stance that the vehicle had been paid for, said it had been lost.

His claim is for unlawful dismissal but the letter terminating his appointment summmarily shows that he was dismissed for misconduct and negligence. His own report is in line with the view that he was negligent. Because he owed a duty of care to his master's property in his hands in terms of the contract I find that his failure in that regard cannot free him from liability.

It was submitted for the plaintiff that nothing in the papers shows that D.W.1 was appearing in court with full authority granted him by his company. But in C of A (CIV) No. 6 of 87 Phoofolo vs Central Bank of Lesotho (unreported) at p. 12 it was held that there is no invariable rule requiring that a resolution should be furnished even where it can be gathered from the facts that an employee represents a juristic person.

At page 25 of The Law of Delict by R.G. Mckerron it is said

> "The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances. Considered as an objective fact, negligence may be defined as conduct which involves an unreasonable risk of harm to others. It is failure in given circumstances to exercise that degree

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> of care which the circumstances demand .....
> But negligence will not be a ground of civil liability unless there existed in the particular case a legal duty to use care. 'A man cannot be charged with negligence if he has no obligation to exercise deligence.'"

I may just add that it has often been said that negligence always has misfortune for a companion.

Referring to The Law of Delict by Boberg at 3 where reference is made to Pilkington Brothers (S.A.) (Pty) Ltd. vs Lillicarp Wassenaar & Partners 1983 (2) S.A. 157 Mr Hlaoli pointed out that the defendant relied on the skill that the plaintiff held himself out to possess when he was given the appointment much in the same way as

> "L had professed to have the necessary skill and expertise to do these things."

In the course of giving evidence the plaintiff stated that he was now abandoning a substantial portion of his claim falling under the first head, i.e. the claim for unlawful and wrongful dismissal. Under this head he is now claiming M12,097 instead of the original M30,000.

The defendant on its part was put to task to explain why it now claims M15,700 instead of the M16,090 allegedly suffered as a loss by the company as stated in paragraph 2 of the defendant's plea ad para 4.

I view with favour the suggestion by the plaintiff that better evidence by way of either witnesses knowledgeable in the business of motor sales or by production of auto digests which are not beyond the reach of the defendant should have been led, instead of an address on the issue delivered from the bar by defendant's counsel and based on no evidence at all. There is indeed danger in the absence of such evidence that an unscrupulous litigant eager to make quick money may make a highly inflated claim and later deflate it by a substantial amount which however does not reduce his claim to the level of loss actually suffered. The court is entitled therefore to be wary not to take the

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defendant's defence in this regard at face value when the possibility has not been excluded that the loss suffered by it may be far less than the M15,700 claimed without satisfactory proof by the defendant.

In conclusion I make the following order:
The plaintiff's claim in the principal action is dismissed with costs.

The plaintiff's defences in the Counter- claim are dismissed with costs reduced by 15% on account of the defendant's attorney's failure to supply me with heads of arguments and the fact that the value of the vehicle lost was not properly established.

J U D G E.
29th November, 1989.

For Plaintiff : Mr Ntlhoki
For Defendant : Mr Hlaoli.