CIV\T\436\91

IN THE HIGH COURT OF LESOTHO

In the matter of :

TEBOHO KITLELI Plaintiff

vs

FRANSISCO MATSINHE Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 1st day of August, 1995

This is a civil suit wherein the plaintiff sues the defendant by way of summons sued out of the Registrar's office for :

1. Payment of the sum of M11,609-67 reasonable cost of repairs to Plaintiff's car;
2. Interest thereon at the rate of 12% from date of issue of demand;
3. Costs of suit;
4. Further and\or alternative relief.

The defendant contests the above claim. It falls to the plaintiff therefore to prove the defendant's liability to him.

After the closure of usual pleadings the Court heard

oral evidence from the parties and just one other witness each for the respective sides. I may just point out that DW2 Gabriel Banze for the defence was an exceptionally good witness who highly impressed the Court with his credibility.

In his declaration the plaintiff states that he and the defendant entered into a verbal agreement in terms of which the defendant would effect panel beating repairs to the plaintiff's car, a cressida registration F1383 at a cost of M300-00.

In his plea at paragraph 2 ad para 4 and 5 the defendant does not admit the plaintiff's statements and puts him to proof thereof. The contents of the plaintiff's statement in paragraph 5 were to the effect that the plaintiff had forwarded and entrusted his car in the custody of the defendant who duly accepted and kept the said car in his custody.

To the plaintiff's assertion in paragraph 6 that the car got damaged to the extent reflected in Annexure "A" whilst in the defendant's custody the defendant's response is that the car was not damaged by the defendant but by a thief called Sekhonyana Kapoka which fact he says is in plaintiff's knowledge. Thus the defendant seeks, in my view, to indicate that the plaintiff's assertion that he subsequently discovered that his car was damaged without saying by whom, is a mere charade or pretence.

In a similar vein the defendant has sought to dispose

of the plaintiff's assertion in paragraph 8 that the plaintiff had not authorised the defendant or the latter's agents to use, or misuse the said car whilst in the custody of the defendant.

As indicated above the defendant denies liability for the repair costs of M11,609-67 to the plaintiff's car set out in the plaintiff's declaration at paragraph 8.

The plaintiff testified under oath that he is a Civil Servant employed as the Chief of Protocol at the Ministry of Foreign Affairs.

The plaintiff knows the defendant. He knows him as a Panel beater operating next to Qoaling.

The plaintiff's story is that he recalls the date 6th August, 1991 when he took his car to the defendant for panel beating. The oral agreement between the parties was that the repairs would cost M300-00.

Two days afterwards the plaintiff went back to the defendant's workshop. Surprisingly he couldn't find his car there. When he enquired from the defendant about the whereabouts of the car the plaintiff says he was informed that the car was in police custody.

Thereupon the plaintiff proceeded to the Police Station and saw his car which was badly damaged. In short the car had

sustained new damage far in excess of the original in respect of which there had been agreement to have it repaired for M300-00.

The parties discussed about this new damage whereupon the defendant asked the plaintiff to furnish him with a quotation which was duly supplied. The quotation originated from EN-BEE motors operating from the Industrial Area Maseru. The extent of damage was assessed by that organisatkon at M11,609-67.

The quotation was handed in marked Exhibit "A" relating to the plaintiff's car Cressida Registration F1383.

The plaintiff states that on seeing this quotation the defendant refused to co-operate. Thus there was no agreement that the defendant should meet the amount required for the new damage. It was the plaintiff's wish to have his car restored to the condition it was in when brought to the defendant for panel beating and if need be to its original condition that was free from damage.

It would seem therefore that because of the defendant's attitude the original agreement fell through on account of this new damage.

The plaintiff thus complains tht the defendant refused to accept liability despite that the plaintiff's car was not in the present condition when he left it with the defendant. The plaintiff charges that on 6-8-91 when he left his car with the

defendant he didn't authorise him, his employees or relatives to drive the car; hence the reason for the suit in the amount stated and percentage rate plus costs set out in the summons.

Despite the plaintiff's initial insistence that he brought his car to the workshop on the day he discovered its disappearance, cross-examination revealed that these two events took place on two separate days. Hence the plaintiff's insistence that he wished to refresh his memory by reference to his notes. This question was complicated by the fact that the date i.e. 6-8-91 was suggested by the plaintiff's counsel as the one on which the plaintiff took the car to the defendant's workshop. It is for this reason that the plaintiff is not persuaded that it would be strange that the quotation for the new damage was prepared the same day he brought the vehicle to the workshop of the defendant.

His attitude manifests appalling stiff-neckedness as reflected in the following text :

> "Don't you find it strange that the quotation before court was prepared on the same day....? Not at all.
>
> I find it strange because you said you learnt your car was damaged two days after it had been brought to the defendant.....? You are entitled to your views.
>
> You say you don't find it strange that the quotation was on the same day as you brought car to defendant....? I said earlier on about two days. So there is nothing strange".

Were the case to turn solely on the above question I

have no doubt that the plaintiff's version would be rejected with dire consequences to his side.

However when the defendant's version was put to the plaintiff that the car was brought to the defendant's workshop on 5th August, 1991 the plaintiff accepts this with relish and harks back unnecessarily to what amounts to self-satisfaction in the virtue of his self-esteemed cleverness expressed in the phrases :

> "I appreciate your cooperation for I said one or two days. So calculating from 6th it makes a day to 5th".

However when told that on 5-8-91 the defendant told the plaintiff to bring the car the following day i.e. 6-8-91 plus the M300-00 deposit which he acknowledges hearing about from the defendant, he denies that any date was agreed upon and explains that the defendant said the plaintiff could bring the car at his convenience.

The plaintiff said the defendant did not inform him that it would not be safe to leave the car at the workshop. He nonetheless concedes that he was bold enough to leave his car with the defendant despite his description of the latter as a backyard panel beater. To the suggestion that he was told that if he brought his car in the morning then the work on it could be completed in the evening he said that was just a presupposition that bore no guarantee. All he learnt from the defendant was the defendant's acceptance of the plaintiff's

question whether it would take a day or two. He butresses his contention by asserting that the defendant's reaction to this question was that "he was not sure for he didn't have paint or necessary parts" readily available.

He denied as false the assertion that the defendant said to him that he didn't want the plaintiff's car to be left at the workshop overnight because it wouldn't be safe. He further denies the defendant's version that the car was brought to the workshop in the defendant's absence.

Under re-examination the plaintiff stated that the quotation bearing the date 6-8-91 was not prepared by him but by the owner of the garage EN-BEE Motors. He didn't know why the owner of the garage inserted that date.

The plaintiff's witness Nocholas Brummer PW2 gave sworn evidence in which he indicated that he is a panel beater and owns a panel beating shop situated between Lesotho Freight Services and Lesotho Bus Corp garage. He has been a panel beater since 1985. He is not a certified panel beater though. He acquired his skills under his father. He thinks he is proficient in this job and that his experience is adequate for what he came to testify on.

He said he prepared the quotation Exhibit "A", on the request of the plaintiff. It is his testimony that the M11,609-67 reflected in Exhibit "A" is a reasonable amount necessary in

1991 to put right what was wrong with the Toyota Cressida Registration F1383. He further stated that the quotation was subject to price increases and valid for thirty days, further that this quotation does not include unforseen damage. He stated that the price he came to is not inflated; and was quick to inform the Court that his garage is the cheapest in Town.

Under cross-examination he stated that he saw the plaintiff's car at the charge office and was the one who towed it to his workshop.

He acceded to the question that he might have inserted a wrong date in the quotation. His reason for this he said was the fact that he handles many quotations of vehicles in a day. To the suggestion that he possibly was not telling the truth when he said he inserted the date on the day he was preparing the quotation he said he couldn't remember because he dealt with that quotation more than a year before today.

The defendant Fransisco Matsinhe gave sworn testimony which was marked by extreme caution coupled with what seemed to be great uncertainty as to whether the entire scenario in Court was not calculated at trapping him at every step. He treated almost each question as if it was a stalking-horse behind which danger would leap at him at the drop of a hat. The fact that for his benefit a Portuguese speaking interpreter had to be rendered available did not improve the situation because the interpreter found himself devoting much of the time conversing with the

defendant in Portuguese - which is not intelligible to the Court - before the text could be conveyed in English to the Court.

Contrary though to what appears in his plea he did manage to say clearly that "I know Mr. Kitleli the plaintiff in this case. He brought a car to me for repairs". This stands in sharp contrast to the question put to the plaintiff on his behalf that the plaintiff brought this car to the garage in his absence.

Anyway the defendant testified that Kitleli brought his vehicle late in the afternoon at around 5 p.m. The agreed price for repairs was M300-00.

He indicated that the car was not brought on 6-8-91 but rather on 29-4-91. He reverted to the version that the car was left at the workshop in his absence. He enjoys the support of the truthful witness PW2 on this point.

He indicated that the car was delivered to his employee one Aupa. He stated that he and the plaintiff agreed that the vehicle when brought should come with M360-00 and that it be repaired the same day to the finish in the afternoon. The reason for finishing it the same day being that there is no security there. He stated that all vehicles in his yard were not mobile. Only that of the plaintiff was. He said though that he has a security guard.

The defendant said he did the panel beating and

completed it. He waited for the plaintiff who was alleged to have gone to the Bank to fetch the money for completing the job and for buying material.

He stated that the plantiff did not return that day but only the following day. The car was no longer there when he and the plaintiff arrived simultaneously at the workshop the following day.

The defendant said he didn't know what had happened because the security guard was not there either at the time. It was impossible to enter the yard because the guard had gone away with the keys.

On this point alone, despite the defendant's fear that security was lacking at his workshop it seems to me that the fact that without keys it was impossible to enter that place, then coupled with the fact that the defendant had hired a security guard, the place was reasonably secure or else his fears are rather exaggerated.

He stated that the car was found near a dam at Ha Ntsi. It appeared to have been involved in a collision. The car was towed by the Government Break Down Service Truck and remained in police custody three days after its disappearance. The security goard was still not there.

The car had been brought down by the police because the

defendant had reported it missing. The thief was arrested and is serving time in jail.

The defendant stated that Kitleli knew of this for he was called together with the defendant to the CID office when the thief had been arrested. The two were referred to the Traffic Court. The keys and Blue Card were handed to Kitleli.

The defendant said he had not allowed the thief Kapoko to drive that car.

Under cross-examination the text went :

"You said the plaintiff brought his vehicle on 29-4-91 and that you are certain of that.....? Yes.

This was when you were giving your evidence-in-chief.....? Yes.

When Mr.Kitleli was being cross-examined by your counsel you were in Court....? Yes.

Do you recall your counsel ever putting this particular question to Kitleli.....? I do.

Are you sure you still remember.....? Yes.

I recall your counsel saying you would say Kitleli came on 5-8-91 and that Kitleli wanted his car to be repaired. Do you remember your counsel putting that question.....? I heard him put that question.

I say it was suggested that when you came to the box you would say Kitleli came to you on 5-8-91 and not on 29-4-91.....? I don't recall Kitleli being asked that question by my lawyer. I recall what I told my lawyer.

You said you recalled your counsel putting this question to Kitleli.....? I don't understand whether it is the day what is

being asked. I was present that day.

> (The original question was repeated as to what the defendant's counsel suggested the defendant would say. The answer was a garbled mixture of evasiveness and manifestation of pretended ignorance) namely :- .....? On that day there was no Portuguese interpreter. So I don't know if such question was asked.
>
> Meaning you didn't mean what you said that you remember Kitleli being asked that question.....? I don't know but I was present when questions were asked but I don't understand what was asked.
>
> Are you resiling from your answer that you heard your counsel put that question .....? I hear but the car was brought....."

As it appeared that there would be no end to the pointlessness in the defendant's answers the Court ordered the recording machine to be played back for the defendant's benefit so that he could reconcile himself with the essence of the text demanded of him; but if success was achieved in that regard it was to very little avail.

This is how the ordeal in trying to follow the defendant's responses went :

> "You heard yourself in the machine.....? Yes.
>
> You agree you had said you had heard your counsel put the same question to Mr. Kitleli.....? Yes.
>
> Later on you tell the Court you had not said so .....? Yes.
>
> Hence my question whether you were resiling from the former position.....? I am not resiling.

> Surely you will agree with me these versions are not the same: Listen carefully; one version is you recall this question being put to Kitleli, the other being you don't recall that question being put to Kitleli. These are not the same.....? It is said I shouldn't talk too much but answer questions.
>
> Answer my question then.....? Which?

The question was put that the two versions were not the same and the defendant ultimately conceded but not without giving a lingering doubt whether he conceded fully because his answer was 'That may be so'. Even when this question was asked two or more times in an endeavour to clear this doubt his answer was persistently 'that may be so'. Thus is was asked:-

> "Which is which.....? Kitleli brought the vehicle on 29-4-91.
>
> You agree 29-4-91 differs from 5-8-91.....? Yes.
>
> Say then where would your counsel have obtained the date 5-8-91.....? It could happen for Kitleli is the one who gave that date.
>
> I listened to Kitleli who gave the date 6-8-91.....? Our agreement did not materialise on agreed day"

The answer appearing above typically shows the facile manner with which the defendant seizes on irrelevance as a way of escape from answering questions direct.

Mr. Nthethe patiently tried to bring to the defendant's attention occasions where he deliberately told untruths or chose to evade questions in these proceedings.

The text went thus -

"The question is where could your counsel have got this date. You said it might have been from Kitleli for he talked about that day. But I say Kitleli says this occurred on 6-8-91 or on or about that day. But he referred to 6-8-91.....? These dates were mentioned by Kitleli may be for agreement did not occur on date of agreement.

But your counsel said you would tell the Court that Kitleli came on 5-8-91 at your place of work.....? I had not agreed with Kitleli. I think my lawyer got date from Kitleli.

Ct. Do you recall an inquiry being made whether you would understand proceedings conducted in English and Sesotho on the 1st day this matter was heard.....? I do.

CC: You tell the Court that you told it that you wouldn't understand this proceeding in English and Sesotho.....? I said so though I did not know those languages well.

Do I understand you properly that at the beginning of this proceeding you indicated to Court that you would not understand proceedings if conducted in English or Sesotho.....? I said I would not understand.

So I heard you properly .....? Yes.

Is that what you said in open Court.....? Yes.

You were surprised that the Court allowed the proceeding to continue (regardless).....? I think so for what I requested is here today.

I'll tell you when it became clear you required an interpreter. But answer my question.....? Please explain.

You were surprised that the court allowed proceedings to go on despite your appeal that you couldn't follow the proceedings in English and Sesotho.....? On the first occasion Kitleli was asked to go on in Court and when I asked I said.....

(Question repeated).....? I am surprised.

(Question repeated).....? I was surprised at the first occasion.

In other words when PW1 was giving evidence you did not understand him.....? I heard here and there for I don't understand English and Sesotho.

The same goes for PW2.....? Who is PW2.

Nocholas Johannes Brummer.....? I don't know him. I just saw him here.

I ask you if you heard his evidence here and there.....? I heard here and there; not everything.

Did you bring this to the attention of your counsel.....? I don't know him hence my not saying anything to my lawyer.

I wonder if we shall finish.....?

Ct: Di you go to school.....? Yes.

Up to where.....? Standard VII.

CC: You said of PW1's evidence that you could hear here and there.....? Yes.

By token of the same rule when PW2 was giving evidence you could catch here there....? Yes.

Did you bring to your counsel this fact .....? I tried to tell my lawyer and explain that I didn't know the man who was giving evidence.

Did you understand my question.....? No.

What were you answering then.....? What was being said.

Ct: Which is what.....? (puzzled).

Did you tell your lawyer you could only follow PW2's evidence here and there....? I think I did .

CC: Did your lawyer do anything about that.....? We talked but did not come to any conclusion.

The main thing is your not understanding total evidence of two witnesses.....? I did not hear.

Question repeated).....? I told my lawyer about the two witnesses whose evidence I did not understand.

What did he do then. Did he ignore you.....? We decided to come back here where we are now.

I ask you in relation to your report to him.....? He didn't tell me anything.

Did he do anything to assist you.....? We concluded by going to contact the thief.

(Question repeated).....? He did nothing.

I tell you as I promised when it was that you raised the language problem. You raised the language probem after the close of the plaintiff's case. Do you remember that.....? I recall that.

This was even so for your counsel said you wanted to give your evidence fluently.....? Yes.

This was the very first time (ever) that you brought to the notice of everyone that you would need an interpreter.....? Yes.

that's why this Court did all it could to enable you to give your evidence with the aid of an interpreter.....?Yes.

By the same token had you raised this requirement of interpreter at any time during these proceedings I am sure it would have been pursued.....? I am thankful though it was not my turn to speak.

I am saying this to show either that you are deliberately telling untruths or that you forgot the trend of events.....? I thank you but I did get the story as I get it now.

It is clear at the beginning you didn't say you needed Portuguese interpreter.....? First time I said I didn't understand two languages except following here and there.

You are not telling the truth. I say initially you never asked for Portuguese

interpreter. Is it so or not.....? I think never.

(Question repeated).....? It is not true.

Did you ask for interpreter initially....? Yes.

And this Court didn't give you any.....? No.

That cannot be true. It cannot by any standards hence, my saying you are not telling the truth.....? I ask for pardon. I have not been to Court before.

You will recall you never asked for interpreter initially.....? I have evidence I asked for interpreter first day, I asked for pardon in respect of my manner of answering questions.

Had you requested an interpreter initially this Court would not have proceeded without one. Do you understand.....? Yes.

Hence today when you requested it you have been given one.....? Yes.

That's why I say it is not true that you initially asked for an interpreter.....? Through Mr. Nthethe's pressure I agree but thats not how we settled this with my lawyer.

I am not trying to push you against the wall. Understand.....? Yes.

You ask for an interpreter you get it. If you asked for it earlier why wouldn't you be given one....? I understand but it relates to what was answered earlier.

What was your answer that you didn't earlier ask for an interpreter and didn't get it but subsequently you asked for one and got it.....? At beginning I asked for food but didn't get one but subsequently I got it.

You didn't ask for interpreter earlier for had you done so the Court would have given you one.....? I couldn't at the time of the proceedings.

Question repeated)....? I now see I should

have had an interpreter as I have one now.

So you didn't request assistance at first stage.....? It is so. I agree at the time I was going to instruct my lawyer there should have been some one to interpret for him and me.

I am only interested in stage proceedings went on in this court. Understand....? I understand.

I say you didn't ask for an interpreter at start of proceedings in this Court.....? I agree for I didn't know regulations of this Court.

You agree it was not correct for you to allege that you initially asked for interpreter.....? I agree for I didn't know the law"

At long last Mr. Nthethe's patience paid off.

I need not go at length in demonstrating the next front where Mr. Nthethe managed to illustrate that the defendant was bent on trying to mislead this Court by pretending that he was not able to follow proceedings in this Court.

This went as follows :

"Do you know dates of the month.....? Yes.

Whats today's date.....? I don't remember.

If I said it is 7-4-1993 would you understand in English....? Yes.

The same way as when I said 5th August 1991.....? I would understand five and not fifth.

I want to prove to you you understand English and Sesotho. When your evidence was read back to you by Court it was in English. You understood that.....? Here and there.

In what language was it translated to you.....? It was in Sesotho.

You understood that.....? I heard but could not repeat the matter.

Remember you stopped the Portuguese interpreter for you were hearing well in Sesotho.....? I agree but I required the assistance of a Portunguese interpreter.

Ct: But there was one sitting next to you.....? I understood what was read to me for I had rendered it.

CC: That shows you understood the language.....? I don't understand it fully.

You understand the one being referred to.....? Sesotho"

Suffice it to say then regarding the merits the defendant conceded that he had hired a security guard for the yard surrounding his workshop. Further that this security guard had been four months in the defendant's employ when the incident referred to took place. It is also a fact that the defendant had not authorised the security guard to drive away the car from the yard. Furthermore the defendant had had this car in his custody. Another significant factor is that on the day work was started on this car it was not completed the same day. In any case the plaintiff denied that there was any agreement that he should collect the car the same day he had brought it to the workshop for repairs. The upshot of this denial puts a lie to the suggestion that on the day work started on the car the agreement was that the plaintiff was to collect it whether finished or not finished. The defendant conceded when asked by the Court that he was aware that this question was put to the plaintiff and the plaintiff denied it as false.

The defendant admitted that once this car was in his custody it was his responsibility to see to its safety. By way of giving effect to his sense of responsibility in this regard he self-righteously stated that he reported the incident of its disappearance immediately he discovered this unfortunate occurrence.

The defendant albeit after fencing with the question as usual, acknowledged that he felt obliged to inform the plaintiff about the disappearance of his car. He ultimately also appreciated the distinction between two positions with regard to his obligation to inform the plaintiff. The first position being if the disappearance occurred while car was in his custody and the next being if the car disappeared in the street where it is not in his custody. In the latter position it dawned on him that he would not have had the obligation to explain to the owner. Surprisingly however he stated that now that the car disappeared in his premises it would not be his responsibility to explain to the owner of the car. This answer is in direct conflict with what the defendant is entitled to a big credit for doing as the facts above reveal that in deferrence to its dictates re gave an explanation to the plaintiff regarding the disappearance of the latter's car.

The defendant stated that he has an advertisement board at his premises on which is written M.C. MECHANICAL.

He was asked if he gave the plaintiff any paper or

document bringing to the latter's attention that M.C. MECHANICAL accepted no responsibility for loss or damage of property brought to the premises. His answer was again garbled. But the upshot of it was that he did not give the plaintiff any such document. This is butressed by the straight-forward response from DW2 who categorically stated that although inside the workshop there was such a board displayed for the benefit of customers that "we don't take responsibility for any damage" the design and painting of this board had not been completed as at the time Kitleli left his car at the defendant's workshop.

DW2's straigh-forward evidence was that he was employed by DW1 around the period surrounding the incident. This evidence is in conflict with the defendant's attempt to avoid a simple question found in the text :-

> You recall plaintiff denies seeing any board there. In his words he said he merely took his vehicle to a backyard panel beater.....? Hence my saying he denies everything.
>
> (Question repeated).....? He talked about it.
>
> According to you when Plaintiff got there you were not there. Hence you are not in a position to say if he saw a board or not.....? It is true I didn't show him for I never met him.

It is to be wondered then in the light of the last answer how the plaintiff could have talked with the defendant about the board as reflected in the defendant's penultimate reply above.

To hark back to DW2's stimulating story. This witness indicated that in fact the board on which was written "We don't take responsibility for any damage" was displayed long after the plaintiff's car had been stolen. The text :

> "Could it have been a matter of weeks or months.....? It could be months not weeks.
>
> In relation to the premises where was it displayed.....? It was displayed on the wall of the garage and was facing towards the road.
>
> What was written on it.....? F.C. Workshop.
>
> What else was there. Was there any other.....? What was written was another board inside the workshop saying "we don't take responsibility for any damage".
>
> Where was this board displayed.....? It was displayed on the wall of the workshop opposite where work was received.
>
> The two boards were almost displayed at the same time.....? Possibly yes. It could be so.
>
> Even this 2nd board you are sure it was not displayed before plaintiff's vehicle disappeared.....? It was not there.

DW2 stated that he and the defendant worked on the plaintiff's car but did not have all the material they needed. He further indicated that for some material they needed money to go and buy. The upshot of the matter is that the required material never came to hand. He clearly indicated that when he knocked off the car had not been finished.

He stated that the following day when it was discovered that the vehicle had gone missing he was there when the plaintiff

arrived. The defendant was already there at the time.

DW2 heard part of their conversation which lasted about five minutes wherein the plaintiff angrily asked about the whereabouts of his car; and left in a huff and would not listen to explanations proferred by the defendant. DW2 felt disturbed himself by the fact that the car had gone missing and on this score thought that the plaintiff's reaction was undertandable if not justified.

He readily admitted that the vehicle had been in the custody of the defendant when it disappeared and therefore that the defendant was consequently charged with the responsibility of keeping it safe.

He admitted that the thief who stole the car did so during the time he was on duty and within the scope of his official duties. The thief was a security guard for the premises from which the car was stolen by him.

Under re-examination he candidly gave his unequivocal answer which is reflected in the text as follows :

> "Mr. Banze a question was put to you in respect of the nightwatchman as to whether this nightwatchman when he stole he was acting within the scope of his employment. All I want to know is 'do you really appreciate that question'.....? I was asked when that person did that thing was he still on duty. Thats why I say yes.
>
> When does this man normally knock off.....? When one of us arrived.

> Who arrived first that day between you and defendant and small boy.....? Which day.
>
> The day when the vehicle disappeared.....? The boy arrived and thereafter I arrived with the defendant".

Clearly DW2 had understood the question put to him under cross-examination and appreciated that it was not part of the night watchman's duty to steal as the question in re-examination suggests but rather that it was during the course of his duty and while acting within the scope thereof that he deviated from that scope and resorted to stealing property entrusted to his care.

In this posture of events it remains then to see what legal authorities have to say.

The Editorial Board members B. Beirnert, Wouter De Vos and J.D. Thomas in Acta Juridica 1973 at p.223 under the heading Vicarious Liability have this to say :

> "Where the owner of the vehicle is also the driver, there are less complications than if the vehicle was being driven by some other person. The owner is liable to pay the injured party if the driver was his servant in the sense that the owner as employer retained control of the actual performance of the driver's work or at least the employee was an integral part of the organisation or business of the employer".

For owner above read principal.

At page 224 the learned members of the Editorial Board say :

> "It must be noted that the mere fact of ownership is some evidence against the owner that he permitted the car to be driven by his servant in the course of his employment or by his agent within the scope of his authority"

For ownership read custody and for owner principal.

Mr. Klass for the defendant submitted that the onus rests on the plaintiff to prove that the person who committed the delict was the servant of the defendant as stated in Gibbins vs William Muller Wright and Another 1987(2) SA 82 (T); and that the servant performed the act in the course of his employment, and to spell out what the servant's duties were or what work the servant was entrusted with at the relevant time as pointed out in Nel and Another vs Minister of Defence 1972(2) SA 246(R) and in Minister of Police vs Mbilini 1983(3) SA 705(A).

Mr. Klass relied on Minister of Police vs Mbilini above for the proposition that the fact that the act complained of took place while the servant was on duty does not provide prima facie proof that it was committed in the scope and course of his duties.

Learned counsel charged that the plaintiff neither alleged nor proved these essential elements. Even if for argument sake the position is as stated by Mr. Klass, the fact remains that the cross-examiner of the defence witnesses was able to elicit this information from the defence witnesses, a factor that this Court cannot lightly ignore.

Mr. Klaas relied on the disputed incident that the defendant said he informed the plaintiff that the workshop was infested with thieves and therefore it would not be advisable for the plaintiff to leave his car there overnight.

He went on to rely on a variety of cases namely Essa vs Divaris 1947(1) SA 753(A); Strelitz Pty Ltd and Another vs Siegers 1959(3) SA 917(E); Silhouette Chemicals(Pty) Ltd vs Steyn's Garage Brooklyn (Pty)Ltd 1967(3) SA 564(T) in support of the proposition that the plaintiff seems to have based his claim wholeheartedly on Bailment. He elaborated that in its proper meaning this proposition entails the fact that the delivery of goods into the charge of another upon a contract importing a condition express or implied that the object or purpose of the trust upon which they are delivered shall be conformed to and that after their fulfilment they shall be restored to the bailor. On top of the rest the duty of the bailee is one of care in keeping the article bailed and the onus of proving the absence of negligence is on the bailee.

He accordingly submitted that there is nothing to suggest that the defendant was negligent. So because the car was stolen by the person who was guarding it, it cannot have been within the defendant's ability to control the thief, therefore the plaintiff's claim must fail.

However Mr. Nthethe for the plaintiff relying on Fawcet Security Operations Pty Ltd vs Omar Enterprises Pty Ltd 1991(2)

SA 441 submitted that the law relating to the tests to be applied in determining whether an employer is vicariously liable for the delictual acts perpetrated by his employee are as set out below.

(a) The test is whether in all circumstances it is a fact that the employee acted in the course of and within the scope of his employment.

(b) The test may be satisfied and vicarious liability accrue despite lack of blame or fault on the part of the employer.

(c) Such is the case even where an act of the employee is specifically prohibited by the employer or by terms of employment contract, provided that the act in question is so connected with the employer's business that it constitutes a mode, - even though an improper mode - of carrying out such business.

(d) An employee who steals goods which his employer is contractually obliged to guard and who has been delegated the contractual obligation renders the employer vicariously liable to the owner of goods who suffers the loss through the employee's theft.

(e) Where such owner pleads, against the employer, that the latter was contractually obliged to prevent such loss and that such loss was caused by the latter's negligence in employing a thief, dishonest or unreliable guard, the issue raised is that of negligence of the employer, which issue is not determinable on the basis of vicarious liability.

Thus it would seem the defendant's denial of liability on the grounds that the damage was caused by his employee who is a thief, should go by the board.

In Morris vs C W Martin & Sons Ltd (1966) 1 B D 716 at 728 Denning MR said :

> "From all these instances we may deduce the general proposition that, when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent steals them or makes away with them".

See also Coleman vs Riches (1855) 16 Q B 104 at 121 where the principle is succinctly expressed in brief terms to show that a defendant upon whom circumstances impose a duty is liable even if that duty has not been breached by him personally.

Thus Mr Nthethe's argument has merit that whilst the employee is guarding the premises in question he is undoubtedly doing his master's business. He is performing an act specifically authorised by his employer. In this sense, the employer must be regarded as having extended the security aspect of the business to provide its protective umbrella, as it were, over the client's property on the premises.

The premises are therefore protected - against theft - by the employer who is contractually bound to do so. It is the employer who elects to discharge this contractual obligation by way of hiring "an apology for" a guard. The resultant scenario makes no real difference. The guard is about his employer's business and performing authorised acts in respect of property which the employer is contractually obliged to safeguard. In such circumstances, when the guard steals, he is perpetrating an

unauthorised act which is so connected with authorised acts that they may rightly re regarded as modes, although improper modes of doing so. C\F Canadian Pacific Railway Co. vs Lockhart 1942 AC 591 (1942)1 All ER 464 (PC) at 599.

With regard to the question of implied authorisation in this field the case Estate van der Byl vs Swanepoel 1927 AD at 141 is indeed instructive. It is to the effect that :

> "A master is liable to a third party for the act of his servant so long as the latter is about the business of his master and does the act in the course of his employment, even though the act is an unlawful act such as a trespass, or a criminal act such as an assault, or an act which the master specially prohibited the servant from doing".

General Tyre & Rubber Co (SA) Ltd vs Kleynhans and Another 1963(1) SA 533 also highlights the principle governing liability of a master for the acts of a servant even where the servant acted in disobedience of the master's instructions in circumstances where the servant was acting in the course and scope of his employment. This suit arose -

> "in an action for R1098-59 damages alleged to have been caused to plaintiff's vehicle as the result of negligence of the first defendant's tractor driver (and) the first defendant denied that the driver was driving in the course of his employment".

This denial is much parallel to the denial in the instant case. It is sobering to observe that such denial was rejected by Harcourt J in the case just cited.

In Barker vs Venter 1953(3) SA 771 the defendant was held liable for the damage caused to a neighbouring farm through the negligent act of a servant who during the course of employment and while on duty sat down to smoke and caused a fire to be set to dry grass in strong wind when he threw a lighted match into that grass.

See also Sauer N.O. vs Duursema 1951(2) SA 222 where even just assuming that the postman who drove his master's van was unauthorised to do so, it was held

> "that the unauthorised driving was directly connected with the act of delivery of the mail which the postman was authorised to perform at most constituted a deviation from the authorised manner or method of performance of an act within the scope of his employment. Appeal accordingly dismissed"

In Zungu vs The Administrator, Natal and Another 1971(1) SA 284

> "The security guard at the gate of a hospital whose duties extended to preventing unauthorised persons from entering the premises by it, had refused plaintiff permission to enter. Thereafter he had struck plaintiff on the head with a stick and then chased him for about ten paces into the road, striking at him as he fled. This had caused him to run blindly into the road and into the path of a car, with the result that he collided with it. In an action for damages for the injuries sustained in the collision, plaintiff sought to recover damages from the guard's employer, as first defendant. First defendant contended that the guard's duty to guard the hospital premises did not extend to any actions performed off the premises".

It was held -

(1) "that the pursuit had followed immediately upon the striking on the head to prevent plaintiff from entering the hospital and was really an extension of the same act, done with the same purpose.

(2) therefore, that the guard was still performing the duties assigned to him when he chased the plaintiff, although his performance of them was highly improper and irregular,

(3) therefore, that first defendant was jointly and severally liable with the guard for damages".

See also African Guarantee and Indemnity Co. vs Minister of Justice 1959(2) SA 437 at 445 where Ramsbotton JA said at A to E (where a servant had gone on a frolic of his own :

> "It is not necessary to review the authorities. The principles to be applied in this class of case were clearly stated by Watermeyer CJ, and Tindall JA in Feldman Pty Ltd vs Mall 1945 AD 733. In that case a servant had been put in control of a motor van. His duty was to deliver parcels and collect money, to hand over the money to a superior, and then to return the van to a certain garage. In breach of his duty, having finished his work of delivering the parcels and having handed over the money, he did not take the van to the garage but drove it to Sophiatown, a native township, for purposes of his own. He remained there for over three hours, consumed liquor, and then set off in the van intending to drive it to the garage. He drove negligently and his negligence caused an accident. By going on his visit he drove the van more than five miles further than he would have done had he driven it straight to the garage, and he was in control of the van for some three and half hours longer than he would have been if he had obeyed his instructions. The trial Judge (Schreiner, J) held that although when he went to Sophiatown for his own purposes he temporarily abandoned his duties to his master, he resumed those duties when he left

Sophiatown to take the van to the garage. He held that the servant was again about his master's business when the accident happened, and he held the master liable. This Court, by a majority, confirmed that judgment, but on different grounds".

In South African Railways and Harbours vs Alberts and Another 1977(2) SA 341 different results were obtained from those observed in the immediate foregoing authorities.

In this case it is said that -

"Plaintiff instituted action against the first defendant, as the employer of the second defendant, for damages arising out of a collision between a motor vehicle driven by a servant of the plaintiff and a motor vehicle driven by second defendant. Plaintiff averred that the collision was caused by the negligence of the second defendant who was driving in the course of his employment as a servant of the first defendant. It was also averred that first defendant himself was negligent in permitting an incompetent and inexperienced person, the second defendant to drive the vehicle and in failing to keep control of and remain in charge of the vehicle's ignition keys. From the evidence it appeared that the first defendant, the owner of a motor garage business, left the business in the charge of the second defendant whilst he was out. In the event of any call for the breakdown service, second defendant was to communicate with one E to perform service. Second defendant was not permitted to drive the garage vehicles as he did not have the necessary licences and was too old. Whilst first defendant was out, a call for the brakdown was received and second defendant, in defiance of his instructions, drove the breakdown truck and was involved in the collision in question"

It was held -

(1) "that the instructions issued by first defendant to second defendant prevented the latter from performing any part of that aspect of the business concerned with

> accidents and breakdown for he was expressly required to refer all such enquiries to E" the instructions given to second defendant defined the actual scope of his employment,
>
> (2) further, that what the second defendant did was different in kind from anything he was required to or expected to do and had been put outside the range of his service by a genuine prohibition,
>
> (3) accordingly, that, when the second defendant drove the first defendant's breakdown truck, he was not acting in the course of his employment as a servant of the first defendant,
>
> (4) further, on the evidence, that first defendant himself was not negligent as averred and that the plaintiff's claim had to be dismissed".

It is when faced with the kind of scenario observed in the consideration of all cases looked into above that one readily appreciates the anxiety of the Editorial Board Members on Acta Juridica 1973 expressed at page 226 in the following words:

> "It will be evident from the examples discussed that the application of the rules relating to the subject of vicarious liability is difficult and may easily result in hardship not only to owners of vehicles, but what is worse, to innocent users of the highway.
>
> One cannot do better than sum up this part of the paper with the comment of Ehrenzweig.
>
> > 'We must finally recognise and acknowledge that when we compel litigants in "negligence" cases to prove and disprove guilt and innocence as causes of what in truth are inevitable incidents of our harzardous society, we are repeating a procedure not greatly superior to the trial by battle or the ordeal by water and fire' ".

But the summary of the words of Watermeyer CJ, though truly based on different facts strike an attractive note in Feldman(Pty)Ltd vs Mall 1945 AD at 733 where it is stated :

> "A servant to whom a master has entrusted the driving and control of a vehicle may still be exercising the functions to which he has been appointed notwithstanding the fact that after taking out the vehicle on his master's business he has driven it for his own purposes on a separate journey. Whether in driving the vehicle for his own purposes he is still exercising such functions, resulting in his master being liable for his negligent driving of the vehicle, depends upon the circumstances of the case".

But the principle enunciated in Fawcet Security Operations (Pty) Ltd vs Omar Enterprises (Pty)Ltd 1991(2) SA 441 above is most compelling that the principal is vicariously liable for delictual acts of his servant in circumstances such as obtaining in the instant case.

I am satisfied that in the instant case both the evidence and the law are in full support of the plaintiff.

Judgment is therefore entered in the plaintiff's favour

(1) in the sum of M11,609-67

(2) plus interest at the rate of 12% calculable from date of taxation to date of payment.

(3) and costs.

J U D G E
1st August, 1995

For Plaitiff: Mr. Nthethe
For Defendant:Mr. Klass