

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

MAPALAMA PHIRI

PLAINTIFF

AND

**THE COMMANDER - L.D.F.
THE ATTORNEY GENERAL**

**1ST DEFENDANT
2ND DEFENDANT**

JUDGEMENT

**Delivered on the 26th day of March, 2002 by the
Honourable Mr. Justice G. N. Mofolo**

The plaintiff issued summons of this court suing first defendant being the Commander of Lesotho Defence Force and second defendant being the Attorney General for the sum of M64,400.00 being fair market value of a vehicle; interest thereon at 18.5% per annum *a tempore morae*, costs of suit and further and/or alternative relief.

The claim was defended.

According to plaintiff's declaration paragraph 5 thereof, during or about October, 1998 at or near Mafeteng in the district of Mafeteng officers of the first defendant acting within the scope of their employment and official duty unlawfully seized and disposed of Plaintiff's motor vehicle Toyota Hilux 2200 D/C 4 X 4 Registration number E 3828.

Paragraph 7 of the declaration reads:

Despite demand, the Defendants have refused, ignored and/or neglected to pay the money aforesaid.

At this juncture, I am to mention that despite diligent search by me, I have not been able to find the so-called 'demand' by plaintiff to defendants 'to pay the money aforesaid.' But as I have not been addressed by defendants' counsel in this respect I will allow the matter to rest.

P.W.1 Mapalama Phiri duly sworn had stated he lived at Malumeng,

Mafeteng district and he was the plaintiff and the Commander LDF and Attorney General were defendants. He owned motor vehicles including a Toyota Hilux 2200, 4 X 4 twin cab Registration No. E3828 which was in his name. He had bought the vehicle in Bloemfontein in 1997 for an amount of R79,000. He saw the registration certificate concerning E 3828 and he was handing it in as an exhibit (marked Exh. "A"). On or about October, 1998 and at Mohale's Hoek he had received a call from one 'Mathabo of I.E.C. to the effect that soldiers had seized his vehicle; he had responded to the call understanding the vehicle to be with Mafeteng police and he had not found the driver or the vehicle. He says the driver was Molefi Cornett who had gone to report the vehicle. The police had denied knowledge of the vehicle though they said he would be informed if the vehicle was found. His driver had said the vehicle was seized by soldiers and on asking him whether the soldiers were Lesotho or South African he had said they were together on roadblock and he had not been informed where it had been taken to. They had checked the vehicle saying he should stand aside and had left with him to Van Rooyen's gate crossing into South Africa and there Cornett had been dismissed leaving the vehicle at Van Rooyen's gate in South Africa. Going there he had been told

there was no such vehicle. He says owing to prevailing conditions he did not check at Van Rooyen's Gate. He says prevailing circumstances were that it was during civil disturbances, riots and burning of shops, looting and assemblage at the Palace when South African and Botswana military were invited into Lesotho. He says the Botswana and South African soldiers were scattered all over even at Malumeng along with members of the LDF. He says he has never recovered his vehicle and nobody has said why his vehicle was seized. He says he reported to Lesotho Police and they had said they would call him if found. He says nobody has come to him to report or return his vehicle. Further, he has ascertained the value of the vehicle from a garage and hands in the valuation from Maseru Toyota which is marked Exhibit "B". Plaintiff has asked the court to grant judgement in the sum of M64,400.00. The witness says it was on orders of the commander LDF to seize and inspect vehicles and it was at LDF command that soldiers acted as they did. He says other than the commander Mosakeng there was no other person heading LDF. According to him, the value of the vehicle is not being contested.

Cross-examined by Mr. Mapetla he says he did say he came from

Malumeng Ha Monyane, Mafeteng. He says Khobatha is the address and most of what he said was what his driver told him. He says he did say the Commander LDF must have issued operational orders, for then he was in charge. He was never where the vehicle was and can't say the vehicle was seized for he was not present and if vehicle seized at a roadblock it must have been the commander LDF who ordered the roadblock. He says his vehicle was seized at Mafeteng by Lesotho, South Africa and Botswana military and the vehicle driven in the direction of Van Rooyen's gate until it crossed the border. He says from Mafeteng to Van Rooyen's gate the vehicle was driven by his driver and in the vehicle were Lesotho, Botswana and South African military. The witness says the driver was not able to identify Lesotho soldiers though familiar with their faces and could point them out. He says their identity cards were not displayed. That such an operation was never commanded by the LDF and in particular to cease motor vehicles he says he does not believe foreign soldiers could come into the country and operate alone; he says even if foreign soldiers seized the vehicle on their own it is still LDF's fault irrespective of whether orders were issued or not issued for the commander LDF called for the intervention of foreign forces to bring the situation under control. He says

several road blocks were mounted and understands the wrong done to him being by those under the command of commander LDF.

No re-examination.

P.W.2 Molefi Cornett sworn had stated he is 35 years old and resided at Mohale's Hoek. During October, 1998 he was P.W.1's driver whose vehicle was engaged by I.E.C. (Independent Electoral Commission). He says the registration number of the vehicle was E 3828, being a Toyota twin cab 4 X 4. He says in October 1998 he was driving from Maseru to Mafeteng and a little distance from Golden Hotel there was a roadblock not far from LDA (Lesotho Development Authority) the roadblock was manned by armed forces of the Republic of South Africa, Botswana and Lesotho and three soldiers had come to him after stopping the vehicle; a white soldier and two black ones and uniforms were different. A white soldier had a rusty uniform being South African and another light green being Botswana one and a third one a dark green belonging to LDF; all the uniforms were military. He had opened the bonnet according to their instructions and had been ordered to twist the steering

wheel to the left. Having inspected the engine, right front wheel and chassis number he had been asked to park aside for a while. His vehicle was not the only one made to pull off. He had been ordered to drive to Van Rooyen's gate on a convoy with other vehicles and in front was a SADC vehicle; the convoy was made up of about 10 vehicles, other soldiers were in some other vehicles. Soldiers escorting the vehicles were mixed from Lesotho, South Africa and Botswana. At Van Rooyen's gate they had crossed into South Africa by military command and were told to stay put until released when after 3 hours they were released. The vehicle had been re-examined in South Africa; the others having left for Lesotho leaving their vehicle in the hands of South African police. Having examined the vehicle he had been asked to leave, leaving the vehicle behind. At Mafeteng he had gone to the police to report and had met P.W.1 at the police station and informed him of what had happened to the vehicle. He says he is certain there were members of Lesotho defence force on the road because he knows the local camouflage and further it was by command of a Mosotho soldier who said he was to open the vehicle speaking in local dialect and the uniform belonged to LDF.

He says he was born and grew up in Lesotho. He had done Form II at school. Other than by their uniform, he knew Lesotho soldiers because the man who said he was to open the bonnet he can point out if he sees him for he had seen him before in Maseru. He says though he hadn't seen the others before, he is certain they were wearing Lesotho soldiers uniform on the roadblock after all they were wearing Lesotho camouflage uniform and were present when the vehicle was driven to South Africa. He says this is the only roadblock he witnessed. He says the white and black uniform is Lesotho uniform and soldiers wearing the uniform belong to the LDF.

Cross-examined by Mr. Mapetla the witness says he did not identify Lesotho soldiers by their uniform only; he says they also spoke Sesotho in Sesotho dialect and facially they were Basotho. He says the soldiers were a mixed bag with rusty, light green and dark green uniform. Dark green represented Lesotho Military and he is familiar with it and the soldiers who spoke to him wore the uniform and he had concluded the men were from Lesotho defence force. Put to him there will be evidence that the LDF was not on the scene he disagrees, that in 1998 the LDF carried their identity tags on

their uniform he says he did not see them. Put to him P.W.1 had said on being driven to Van Rooyen's gate the witness had said to P.W.1 he was riding with some soldiers and yet in court he said he was alone in the vehicle, the witness says in the twin cab he was alone others riding at the back being two soldiers.

No-re-examination.

Plaintiff's case.

Mr. Mapetla says he intends calling a witness but because the witness is attending an important meeting he is not able to attend court. Mr. Phafane has expressed his discomfort on the inability of the witness to attend and the court has agreed on postponement to await the witness's explanation as to his inability to attend court.

D.W.1 Col. Lekate Lesitsi sworn has stated he received a message from his colleagues that a meeting would take place and he was leader of the meeting - the reason he was unable to attend court as he should have. The court being

satisfied with Col. Lesitsi's explanation as to his inability to attend court the witness has testified he is a member of the LDF and a colonel. He says he has been Colonel since October, 1997. He says in the LDF he is responsible to five components. The first being stores, then transport, catering and ordnance, which components fall under logistics. He says he worked in the operations office in March, 1998 as Director of Operations. He says operations entail command of the army in different operations. He says he was director of operations for 9 months being from March, 1998 - December, 1998 when he directed operations.

He says he is aware of what he has come to give evidence about. As for the operation and roadblock at Mafeteng in which plaintiff's vehicle was seized, he says he knows nothing about October, 1998 operations. In August, 1998 he had detached 1st battalion to be in Mafeteng town, Van Rooyen's gate and Mohale's Hoek. It was deployed to keep the peace. He says in October, 1998 SADC (Southern African Development Community) contingents were responsible for operations.

He says as for the operation that took place in Mafeteng he did not believe the forces participated for otherwise he would have known. As for the identity of Lesotho defence force apart from others, they were uniformed like him though Lesotho defence force were not on duty. He says the uniform is light-weight green with green cap. He says apart from the uniform LDF was identifiable by a badge on left with coat-of-arms embossed with LDF big letters decipherable at a distance. He says the letters were interwoven with the uniform. As for involvement of LDF in roadblocks, he says he has already said he knew nothing of the operation for whenever there are roadblocks the police invited the military for assistance for police to work jointly with the army at invitation of the Commissioner of Police.

Cross-examined by Mr. Phafane the witness says during or about September, 1998 there was exchange of fire between the police and army the effort being to disperse people gathered at the palace and police efforts were frustrated by some elements within the army. Generally speaking relations between police and the army were strained for the two were pulling in different directions. He says after the confusion the police and army were confronted and

they worked together. He agrees then there was no law and order for police and army were acting irresponsibly the reason operations that were expected to be done jointly by police and army were done separately and not in unison.

He says even after the SADC forces came in the situation was still out of control with some collaborating and others acting against SADC forces and going on a rampage though he cannot confirm for then he had left. He says he fled before SADC forces came in. He says he does not remember when but it was after SADC forces brought peace and calm in the country. He says he fled because members of junior ranks were looking for him. He says it took quite some time for SADC forces to bring peace and calm in the country. He agrees there was no law and order in September and October peace having been restored thereafter and during the period he was on the run and it was only in name that he was director of operations. He says he is aware he was director of operations in name. He says as he was away in exile, he cannot say whether he is able to assist the court and the court knows whether or not he is assisting it. He says as he was away in South Africa, he cannot say whether or not these operations were mounted. As for army sections in Mafeteng and Mohale's Hoek

the latter was headed by Lt. Sekoati and in Mafeteng it was Capt. Molapo. He says he had recalled the platoon before the disturbances. He says in his absence he knew nothing of command structures. He says he cannot verify whether or not the vehicle was seized so long as the vehicle has been identified. The witness says he is not good in colours but knows the uniform is green. As to who invited SADC forces to Lesotho, he did not know though Lesotho acknowledged them. He says he does not know whether SADC forces operated under the auspices of the LDF commander though as far as he knows, foreign forces cannot go around without being under the control of local commander. As to who was in command, he says he does not know because the commander of LDF was also in South Africa. He says he does not know whether then there was no military leader. That Col. Hatsly and others operated in Lesotho under Col. Hatsly's command, he says he cannot deny this. Put to him SADC forces carried out their duties on behalf of LDF he says he cannot deny for on their arrival with other officers and 28 in number, they had taken over their duties from SADC forces by duties being handed over to them by SADC forces meaning, as he said, that what SADC forces did in their absence was on behalf of Lesotho Government. He says forces in Lesotho were from South Africa and

Botswana. He says so long as soldiers were identified he has no quarrel with anything. Put to him if commander of LDF commanded South African, Lesotho and Botswana forces Lesotho government is answerable he says he cannot deny.

Re-examined the witness says at some stage he was in the Republic of South Africa. He says they went to South Africa 2-3 days after 11 September, 1998 and returned after and would have spent about 3 weeks in September.

Mr. Phafane objects saying the witness is contradicting himself for he is estimating not being certain; the witness says however, he must have answered the question the way it was phrased. The witness says he has said that he knows and cannot mislead the court for he said they returned after SADC forces completed their mission.

Defence case.

From the evidence, it would appear facts of the case are that P.W.2 was P.W.1's driver driving the motor vehicle subject-matter of the inquiry. It was not stated when, at what time P.W.2 ran into a roadblock save that it was

sometime in October, 1998 a little distance from Golden Hotel when P.W.2 driving from Maseru ran into a roadblock not far from LDA (presumably Lesotho Development Authority offices). According to P.W.2 the roadblock was manned by armed forces of the Republic of South Africa, Botswana and Lesotho and three soldiers had come to him after stopping the vehicle. After undergoing search routine he had been ordered to drive to Van Rooyen's gate on a convoy with other vehicles spearheaded by SADC vehicle. According to P.W.2, his vehicle was not the only one made to pull off the road. Soldiers escorting the vehicles were mixed being from Lesotho, South Africa and Botswana. At Van Rooyen's gate they had crossed into South Africa by military command and had been made to stay put there when, after three hours or so they were released. The vehicle was re-examined in South Africa the while others from Lesotho had left for Lesotho leaving their vehicles in the hands of South African police; the vehicle had also been left behind. Returning from Van Rooyen's gate a report had been made to the police regarding the vehicle.

So far as P.W.1's evidence is concerned, there can be no doubt that he knows nothing of what happened to his vehicle save what he was told by P.W.2.

However P.w.2 confirmed he informed P.w.1, he had received a call from one 'Mathabo of I.E.C. that soldiers had seized his vehicle. This 'Mathabo is a necessary witness and had she been called would perhaps enlighten the court circumstances under which the vehicle was seized. According to P.W.1, he reported the seizure of this vehicle to the police in Mafeteng. The disappearance of the vehicle is a serious matter and if reported to police it can be expected that the police recorded the same in their registers. It was also incumbent on P.W.1 to have called the police to show that loss of such a vehicle was reported and the circumstances under which it was seized. There has been no explanation why this necessary witness(es) was not called. Apart from this the police if called would clarify whether indeed a roadblock was mounted as alleged and the circumstances pertaining thereto.

Concerning P.W.2's evidence, he has said that there were other vehicles other than his which formed the convoy to Van Rooyen's gate, vehicles which were also seized and left across the border at Van Rooyen's gate and that people in these vehicles had left the vehicles at Van Rooyen's gate returning home. There has been no explanation why some of these people were not called for

they were necessary witnesses with a chance of enlightening the court on some aspects of the case. As to P.W.2's inability to notice Lesotho military tags and confusion about military uniforms, it is expecting too much of P.W.2 to have scrutinised the soldiers given the circumstances of the time after all the military, given conditions of the period, could not be expected to deal civilly with members of the public.

According to D.W.1's evidence Col. Lekate Lesitsi, relations between the police and the army were strained the two pulling in different directions; the Col. has said there was no law and order with the police and army acting irresponsibly and operations expected to be done jointly by police and army being carried out separately. It is important to note that according to Col. Lesitsi he fled the country sometime in September, 1998 so that in October he was out of the country and when plaintiff's vehicle was allegedly seized, as Director of Operations, he was out of the country and could not personally be held responsible for what transpired then; by the same token, that roadblocks took place as alleged is a fact that has not been denied. The witness has also testified he cannot verify whether or not the vehicle was seized. He has also

testified as far as he knows foreign forces cannot go around the country without being under the control of Local Commander. He has also said as to who was in command he had no knowledge because commander of LDF was also in South Africa. He has also not denied that SADC forces operated in Lesotho on behalf of the LDF. Further, the witness has testified on arrival from exile they had taken over from SADC forces by SADC forces handing over duties exercised by SADC forces to them meaning, as he said, that what SADC did in their absence was on behalf of Lesotho government.

This was a fair witness doing nothing to shield respondents for responsibility of acts complained of. He has also established that acts of LDF at the material time were acts of joint forces of the Republic of South Africa and Botswana otherwise known as SADC forces. The only question remaining to be determined by this court is whether plaintiff's vehicle was in fact seized in circumstances described by P.W.2 and handed over to South African police across the border at Van Rooyen's gate.

Mr. Phafane for the plaintiff has submitted P.W.2's evidence was not gained for the defence witness being in exile in South Africa at the material time acknowledged he knew nothing of what transpired in his absence. Mr. Phafane has also said P.W.2 is a credible witness and there is no reason for the court not to believe him.

On the other hand, Mr. Mapetla for defendants has submitted the summons does not clearly spell out what plaintiff is asking for and from whom since if it was the intention of the plaintiff to settle Lesotho government with acts of SADC forces he should have clearly alleged this in his papers. He says the law regarding vicarious liability is clear for had it been intended to settle Lesotho government with liability, members of SADC and Botswana force would not be lumped together with the term Lesotho Defence Force. Mr. Mapetla has also submitted the army being in disarray with no command structure, was on a frolic of its own.

I have already answered Mr. Phafane for as I said above, P.W.2's evidence was not seriously contested. I do agree that P.W.2 is a credible witness

providing he has established or proved plaintiff's case on a balance of probability.

As for Mr. Mapetla's contention that the summons does not clearly spell out what the plaintiff is asking for and from whom since the SANDF and Botswana defence force cannot be lumped together under Lesotho Defence Force or as it were Commander LDF, evidence has clearly and categorically established what the plaintiff is asking for and against whom for at the time, the LDF being in disarray, SADC forces comprising the SANDF and Botswana defence force had been summoned to do for the LDF what the force was not able to do for itself. As far as this court is concerned, at the at the material time , no clear distinction could be drawn between the SANDF, Botswana Defence Force and Loyal elements of the LDF for these did not operate in isolation being inextricably bound up together under LDF umbrella and commanded by the Commander, LDF. It is immaterial that at the relevant time the commander, LDF was also away in exile in South Africa for military structure having not been disbanded still existed. The fact alone that the defence has admitted military structures of the LDF were still in place and moreover that to D.W.1

Col. Lesitsi's knowledge, 'foreign forces cannot go around the country without being under the control of local commander,' I do not agree that the LDF when it committed acts complained of was on a frolic of its own.

According to P.W.2, some of the military personnel involved in the operation were known to him and as he said if asked to point them out he would do so. Since there was no identification parade, the requirement of which would be rather dubious, I do not think it is fair to lump culprits together by simply saying they were elements of the LDF, SANDF and Botswana defence force. Culprits have to be positively identified for liability to arise. Apart from this, a degree of probability has to exist with sufficient weight to throw the onus on the defendant(s).

The civil standard of probability as expressed by Lord Denning is:

'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable that not', the burden is discharged, but if the probabilities are equal, it is not,'
- see **Piller vs. Minister of Pensions (1947) - ALLER 372 at 374;**

The formulation was adopted by Ogilvie Thompson JA in **Ocean Accident and Guarantee Corporation Ltd. v. Kock, 1963 SA 147 (A) at 157D**; see also **S. v Sikwane, 1980(4) SA 257(B) at 260 F-G** and **Selamolele v. Makhado, 1988 (2) SA 372(v) at 375I - 6A**.

In civil cases it is often said that courts are to approach the metaphor 'balance' of probabilities with care and not without cause for the impression might be if a party on whom onus lies produces slight evidence and the other no evidence at all, the former carries the day. It has been said this is misleading for on the contrary it may be found the contentions of the party who has produced no evidence are more probable, as for example, when slight evidence suggesting commission of a dishonest act is not enough to overcome the inherent improbability that the person complained of would have done such a thing. It has been said it is for this reason that courts have again and again cautioned that evidence does not have to be accepted merely because it is uncontradicted (see **Siffman v. Kriegl, 1909 TS 538**; **Shenker Brothers v. Bester, 1952(3) SA 664 (A) at 670**. Moreover as was said in **Selamolele v Machado, 1988 (2) SA 372 (v) at 375D - E**, what is being weighed in the

'balance' is not quantities of evidence but the probabilities arising from the evidence and all the circumstances of the case.

West Rand Estates Ltd. v. New Zealand Insurance Co. 1925 AD 245

is often seen as correcting some misconceptions where Kotze JA said at p.263;

'It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the onus on the other side to rebut it' see also **Maitland and Kensington Bus Co. (Pty) Ltd. v. Jennings, 1949 CPD 489 at 492.**

It has been said what the learned judge had in mind was that courts were not to be too ready to make findings of probability on insufficient evidence.

The inquiry in this case is whether probabilities are weighty enough to have thrown the onus on the defendant. According to P.W.2, at the roadblock and being made to pull off from the road, there were other vehicles which were made to pull off and the convoy had travelled to Van Rooyen's gate where these other vehicles were, like P.W.2's vehicle, searched and seized. These vehicles had also been seized and occupants allowed to return home. Also, according to P.W.1, a woman from the I.E.C. had telephoned P.W.1 to the effect that his

vehicle had been seized by the soldiers; it was also P.W.1 and P.W.2's evidence that the seizure of the vehicle had been reported to the police in Mafeteng. I must mention that the woman 'Mathabo of I.E.C. was a necessary witness and had she been called would shed light on the circumstances of how the vehicle was seized; also occupants of other vehicles seized forming the convoy to Van Rooyen's gate would also enlighten the court on seizure of the vehicle. As for the police, if a report was made to them and were called in evidence, they would most probably show that there was such a report and the circumstances under which it was made. No doubt they would also shed light on the alleged roadblock. Of importance is the fact that these were necessary witnesses and had they been called, they would elucidate circumstances surrounding seizure of the vehicle subject-matter of the claim. This court has not been informed why these necessary witnesses were not called. This court was referred to a number of cases which are authority for the proposition that if a witness is a necessary witness, is available and able to elucidate facts before the court, failure to call him 'leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him ----- See **Elgin Fireclays**

Limited vs. Webb, 1947 (4) SA 744 (A.D.) at pp. 749 - 50 and Wigmore secs. 285 and 286 quoted with authority by Kheola J. in **'Maseutloali Makhetha vs Samuel Makhetha & 3 others - CIV/APN/231/90.**

As to vicarious liability, the doctrine of vicarious liability is based on the relationship between employer and servant and proceeds to say that the servant's acts are those of the master if the servant acts in course of duty and within the scope of his employment. Also an employer by engaging a servant to carry out his or her interests creates a danger or risk for the community and the employer should bear financial loss if the risk materialises - see **W. E. Scott Middellike Haanspreeklikheid in die Suid Afrikaanse Reg. (1983) 30ff; Minister of Police v. Rabie, 1986(1) SA 117(A) and R. A. Johnson Crane Hire (Pty) Ltd. v. Groffo Steel Construction (Pty) Ltd, 1992 (3)SA 907(C) 908F-G.**

It would also seem the control test is an important factor in the inquiry. As I said above, there has been uncontroverted evidence that the LDF being out

of control and acting like loose cannon SADC forces consisting of SANDF and Botswana Defence Force had been called in and deployed in the country to do for the government what LDF was expected to do.

According to Col. Lesitsi (D.W.1) on his return from exile the SANDF and Botswana Defence Forces had handed over military power to officers returning from exile. There can be no doubt that during the period when P.W.1's vehicle was allegedly seized the SANDF and Botswana forces were then either servants or agents of the Lesotho government; moreover, as Col. Lesitsi (D.W.1) has testified, the SANDF and Botswana defence force were under the control and commander, LDF. I have already said it was immaterial whether at the relevant time the 1st respondent was outside the country on exile for the military structure having not been disbanded was in place. What SADC forces did was on behalf of Lesotho government and there can be no doubt that for any unlawful acts committed by the SADC forces Lesotho government is vicariously liable.

It is to be noted that the scope of vicarious liability is stretched and broadened when it comes to state liability. Thus in **Minister of Police v. Rabie**, above, a police Sgt. off duty assaulted and maliciously arrested a man preferring trumped up charges of housebreaking against him. The man had been acquitted of offences against him and on suing the Minister of Police for damages for assault, unlawful arrest and malicious prosecution he had succeeded. Delivering judgement for the majority of the Appellate Division, Jansen, JA had held at p. 134 F-G.

‘Our leading cases mostly deal with deviations by the servant from his duties at a time he is actually engaged on his master’s work, and the tests there applied do not seem whole apposite to the present type of case where the servant during the pursuit of his own affairs ostensibly embarked on his master’s business (by purporting to exercise his powers to arrest the plaintiff-----’).

The learned judge had proceeded further adding on the same page, that in his view a more apposite approach to the present case would proceed from the basis for vicarious liability mentioned by Watermeyer CJ. in **Feldman (Pty), Ltd. v. Mall, 1945 A.D. 733 at 741** where the learned Chief Justice said;

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

Undoubtedly the government's military personnel or some of them were, according to the evidence, either negligent or untrustworthy and the government was squarely responsible for their unlawful conduct for the government by hiring them created a risk for its own ends and it is up to government to ensure that no one is injured by the servant's improper conduct or negligence in carrying out government's work. This court has no doubt that in the military mounting roadblocks, at least if there is sufficient evidence to the effect, they did so at government behalf.

According to the judgement in **Minister of Police v. Rabie** above by approaching the problem whether (V's) acts were done 'within the course or scope or his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the state. It was also said by appointing (V) as a member of the force and clothing him with all the powers involved, he had the powers to arrest by virtue of his rank and the state had created a risk to others,


the risk that (V) could abuse or misuse powers to his own purpose.

Simon v. Administrator General, South-West Africa, 1992 (2) SA 347

(Nm HC) had to do with limitations of actions against the state in the light of S. 32 of the Police Act. This court has not been invited in this direction in the instant case. Suffice it to say that S du Toit, AJ in course of his judgement had said *inter alia* the absence of one element of information may be compensated by the insertion of another. For instance in the absence of a name of the particular policeman whose conduct is complained of, the omission is not fatal if the time, date and place of the assault is inserted. In the instant case the name of the soldier(s) responsible for the delict is not given, nor has time been given; there is no date except October, 1998 and the place where the roadblock was mounted is given. It was also said 'it cannot be expected of every member of the public to know the identity of the policeman who acted under the circumstances complained of' for if 'other information is given, the defendant would be able to ascertain who the policeman was whose conduct was complained of.'

I am of the view that time and date should have been given; not only this, the police to whom seizure of the vehicle was reported should have been called in evidence for had they been called, it is possible that they would be in a position to clarify and elucidate on the roadblock complained of and who, exactly, participated in the roadblock. Particulars as to the roadblock and who participated in it were so vague that defendant(s) could not issueably and constructively react on them.

I have said that this is a case hinging on probabilities. The court has found, however, that probabilities favour neither party but that they are equal. Accordingly, defendants are absolved from the instance. There will be no order as to costs


G. N. MOFOLO
JUDGE

For the Applicant : Mr. Mda Phafane
For the Respondents : Mr. Mapetla