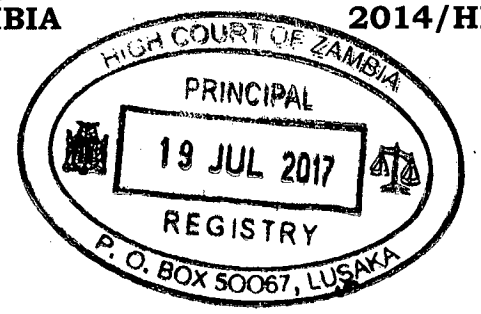
IN THE HIGH COURT FOR ZAMBIA **2014/HP/2020**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N:

REUBEN DAKA **PLAINTIFF**

AND

PENTECOSTAL HOLINESS CHURCH **DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 19th day of July, 2017

For the Plaintiff : *Mr. K. I. Mulenga, Messrs Kumasonde Chambers*
For the Defendant : *Mr. M. D. Lisimba, Messrs Mambwe, Siwila & Lisimba Advocates*

J U D G M E N T

Cases Referred to:

1. *Rose v Plenty (1976) 1 W.L.R. 141*
2. *Giogio Franschini and Motor Parts Industries (Copperbelt) v The Attorney General (1984) ZR 29*
3. *Lloyd v Grace, Smith and Company (1912)*
4. *Industrial Grass Luimited v Waray Transport Limited and Musaah Mogeehaid (1977) S.J. 6 (SC)*
5. *Household Fire and Carriage Accident Insurance Co. Limited v Grant (1879) 4 Ex D 216*
6. *Carlill v Carbolic Smoke Ball Company (1893) 1 QB 256*
7. *Kakoma v State Lotteries Board of Zambia (1981) Z.R 11*

By Writ of Summons and Statement of Claim, the Plaintiff seeks the following reliefs:

(i) *Compensation for the lost vehicle valued at K65,000.00 at the time it was stolen*
(ii) *Interest at short term bank deposit rate with effect from the date of the loss of vehicle to the date of judgment and final settlement.*
(iii) *Costs*
(iv) *Any other relief the Court may deem fit and appropriate.*

The particulars given in the Statement of claim are that on 6th May, 2014, at about 18.00 hours, the Plaintiff parked his Toyota Hiace Bus at the Defendant's car park. The bus had just been registered at the Road Transport and Safety Agency (RATSA). The Plaintiff surrendered his keys to the guard who was on duty, and indicated the date and time of parking in the Defendant's book. On 7th May, 2014, the Plaintiff went to collect his vehicle and discovered that it was missing. The keys had been taken with no record left in the Defendant's book.

The Plaintiff states that he reported the matter to Munali Police Station on the same date but his vehicle was never recovered. He avers that the Defendant is better placed to explain the circumstances of his missing vehicle, which was left in its care. The Plaintiff states that the Defendant breached its duty by failing to secure his vehicle.

The Plaintiff avers that his vehicle was valued at more than K65,000.00, which included the purchase price, shipment from Japan, custom duty, agency fees, fuel and other incidental costs. The Plaintiff states that he attempted to seek compensation from the Defendant with no success.

The Defence settled a defence and broadly denied the Plaintiff's allegations. It also denies that it owed the Plaintiff a duty of care to secure his vehicle. The Defendant denies that the Plaintiff has suffered loss as a result of its negligence, failure or omission. Further, that the Plaintiff is not entitled to any compensation.

At trial, **Reuben Daka** testified as **PW1**. His evidence was that on 6th May, 2014, at about 18.00 hours, he parked his Toyota Hiace bus at the Defendant's car park. He returned to collect his bus on 7th May, 2014, at about 04.00 hours and discovered that it was missing. PW1 stated that he asked the guard on duty for his bus and was told that four unknown men went away with it at about 02.00 hours. PW1 testified that when he received the information, he called the Defendant's Elder and narrated the events. He later lodged a complaint at Kaunda Square Police Post and that an

investigation ensued. The guard was not arrested and his bus was never recovered.

PW1 testified that he tried to settle the matter with the Defendant but was told that the K5.00 he paid as car park fees was insufficient to sustain his claim of K65,000. He also testified his bus was parked behind a number of vehicles and wondered how it was removed from the car park.

In **cross-examination**, PW1 testified that he had no evidence to show that he parked his bus at the Defendant's car park on 6th May, 2014. He however, insisted that he signed the Defendant's book and the guard on duty was Mathews Mkandawire. PW1 did not know if the guard reported the matter to the police. PW1 stated that he bought his vehicle form Japan through Be Forward Limited. PW1 did not have evidence to show that his vehicle was valued at K65,000. He stated that he used the Defendant's car park for a year and it was customary for all users to sign in its book.

In **re-examination**, PW1 stated that he left his car keys with Mathews Mkandawire who told him where to park his bus. He paid

the K5.00 parking fee and signed the Defendant's book. He never received a receipt for the payment.

The Defendant called two witnesses. The first was **Brian Mutale** who testified as **DW1**. His evidence was that on 7th May, 2014, he received a call from PW1 at about 03.00 hours who told him that the Defendant's caretaker was drunk and his bus had gone missing from the car park. At about 03.40 hours, DW1 testified that he went to the car park and found PW1 and the caretaker, Mathews Mkandawire. DW1 told the Court that the caretaker was sick and in a bad state. He was unable to converse with him due to his condition.

According to DW1, PW1 told him that thieves raided the car park and stole his bus. DW1 stated that he took the caretaker to Levy Mwanawasa General Hospital for treatment. However, before reaching the hospital and at PW1's instance, they drove to Munali Police Post to report the matter. DW1 testified that the police checked the condition of Mathews Mkandawire and advised them to take him to a hospital. DW1 testified that the medical practitioner

at the hospital told them that Mathews Mkandawire had suffered food poisoning.

DW1 testified that he was not personally acquainted with PW1 but knew that he was a car park user from the Defendant's records. DW1 stated that PW1 had not paid for the use of the car park and had accrued arrears since April, 2014. DW1 stated that PW1 was denied access to the car park for about 2 – 3 weeks because of the arrears. He was however allowed to park his vehicle by the caretaker after he paid K50.00 and never paid the remaining balance of K200.00 up to the time of the alleged theft. DW1 stated that he never saw PW1's bus, but was aware that he owned a Toyota Chaser.

In **cross-examination**, DW1 stated that he did not produce the record of PW1's arrears nor the receipt of the K50.00 paid by PW1. He allowed PW1 to use the car park because of the relationship the parties shared.

DW2 was **Mathews Mkandawire** who testified that on 7th May, 2014, PW1 parked his bus at about 17.00 hours, whilst he was on

duty. At the time, the car park was empty and PW1 parked his bus outside the premises on the understanding that DW2 would later park it near the entrance. According to DW2, PW1 told him that he had an early morning engagement and needed easy access to his bus.

DW2 testified that at about 20.00 hours, he was approached by an unknown man who paid him K5.00 for car park space. The man told him that he was waiting his Toyota Canter truck, which was offloading goods at Soweto market. The unknown man left the car park and returned on two subsequent occasions and on the fourth with three other unknown men.

DW2 testified that the men offered him a Fanta, which he drank at about 21.00 hours. He immediately fell ill but was able to notice a Toyota Corolla, which approached the car park. The unknown man asked him to open the gate for his vehicle. DW2 complied and was abruptly attacked by the unknown men. They grabbed the keys for some vehicles and drove away with them. DW2 recalled waking up at a hospital with no recollection of the

events after his ill-feeling. DW2 stated that PW1 never paid the car park fee on the material date.

In **cross-examination**, DW2 testified that he parked PW1's vehicle in the car park. A number of vehicles went missing from the car park after the keys were grabbed from his pockets. DW2 stated that PW1's Toyota Hiace Bus had no number plate. He also stated that the car park management never issued receipts but asked its clients to sign in the Defendant's book, which was not before the Court.

In re-examination, DW2 stated that PW1 did not sign the Defendant's book for almost a year.

Only Learned Counsel for the Plaintiff filed written submissions for which I am grateful. He submitted that the Defendant was vicariously liable for the wrong done by its employee in the course of his employment. He cited the cases of **Rose v Plenty**[1] **and Giogio Franschini and Motor Parts Industries Copperbelt) v The Attorney General**[2] where it was held in the latter that:

> **"The true test whether or not a servant is acting in the course of his employment can be expressed in these words: was the servant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent or fraud or contrary to express orders, then the master is liable."**

Counsel further cited the cases of **Lloyd v Grace, Smith and Company**[3] **and Industrial Grass Limited v Waray Transport Limited and Musaah Mogeehaid**[4] *where it was held in the latter, that as long as the wrong is committed by the employee in the cause of his employment, the general rule is that the employer will be vicariously liable.*

I have anxiously considered the pleadings, evidence adduced and the submissions of the Plaintiff. In my considered view, the issue that arises for determination is whether the Defendant is vicariously liable for the Plaintiff's missing vehicle?

It is common cause that the Plaintiff parked his unregistered Toyota Hiace bus at the Defendant's car park on 6th May, 2014. The bus went missing on 7th May, 2014, between 02.00 – 04.00 hours after the keys were grabbed from DW2 by unknown men.

The matter was reported to Munali Police Post and after investigations, the bus was never recovered.

The Plaintiff contends that the Defendant is vicariously liable for his missing bus, which was left in the custody of DW2 at the car park. The Defendant argues that it did not owe the Plaintiff a duty to secure his vehicle as no formal relationship was established between the parties.

It is a well settled principle of contract law that in order for a contract or an agreement to be valid and binding, both parties have to be of one mind as to the nature of the agreement. In other words there must be mutual agreement or common understanding of the contractual relationship the parties intend to be bound by.

In the case of **Household Fire and Carriage Accident Insurance Co. Limited v Grant**[5] the Court stated that:

> **"Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is**

> **addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment... But on the other hand it is a principle of law, as well as established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication."**

In the seminal case of **Carlill v Carbolic Smoke Ball Company**[6] the principle of meeting of minds was reiterated as a fundamental element of a contractual relationship, when Lord Bowen L J held that:

> **"One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law."**

The effect of the principle of meeting of the minds is that the parties to the contract must all be actively aware of the existence of a contract and its terms, so much that, in the absence of meeting of minds, the purported contract can be said to be non-existent.

It is trite law that for a contract to be valid, or agreement to exist, there has to be an intention by both parties to create legal relations. In the case of **Kakoma v State Lotteries Board of Zambia**[7] Sakala J, as he then was, declined to enforce a contract by

reason of the fact that the contract failed to prove that the parties intended to create legal relations when he held that:

> **"...but one thing is common in both clauses, namely, the transaction was never intended to create any legal relationship but binding in honour only."**

A closer examination of the evidence adduced leads me to conclude that there was no binding agreement between the parties. There was no offer made by PW1 to the Defendant to park his vehicle at its car park and no evidence of acceptance by the Defendant. There was no consideration paid by PW1 for the use of the car park on the material date. DW1 testified that PW1 had accrued car park arrears from April, 2014. DW2 further testified that PW1 never signed in the Defendant's book for close to a year. PW1 never challenged that evidence.

In view of the foregoing, I find that PW1 parked his bus at the Defendant's car park at his own peril and no contractual relationship was ever created between the parties through which the Defendant could be held vicariously liable.

In the result, I find no merit in the Plaintiff's case and accordingly dismiss it. Costs are awarded to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 19th day of July, 2017

M. Mapani-Kawimbe
HIGH COURT JUDGE