IN THE SUPREME COURT OF ZAMBIA Appeal No. 5 of 1990

HOLDEN AT LUSAKA

B E T W E E N:

DAVID G. OMMENNEY

and

NATIONAL HOTELS DEVELOPMENT CORPORATION LIMITED

CORAM: Sakala, J.S., Chaila and Lawrence JJ.S.

15th May, 1990 & 14th February 1991

Mr. M. Lwatula, Ellis & Co. for the appellant

Mr. A.G. Kinariwala, Principal Corporation Counsel for the respondent

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J U D G M E N T

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Chaila, J.S. delivered the judgment of the court.

Case referred to:

(1). William v. Linnit [1951] 1 All ER 278

This is an appeal by the appellant against the High Court decision dismissing his claim for damages for loss of his motor vehicle, a Toyota Land Cruiser registration No. BD 3723.

Briefly the case was that on 30th September 1983, the appellant was a traveller and was received into the respondent's hotel together with his goods and the said land cruiser and he obtained sleeping accommodation at the respondent's hotel. While the appellant was staying at the respondent's hotel the land cruiser which was parked in the car park provided by the respondent's hotel got stolen and the said vehicle has never been recovered. A report was made to the Zambia Police and the Zambia Police never succeeded in recovering the vehicle. The High Court after hearing evidence from the parties came to the conclusion that the

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vehicle had not been stolen. The High Court based its decision on the fact that the general receipt given to him had been issued long after the date of the alleged theft of the vehicle on the premises and that the plaintiff did not explain or call evidence on the two dates and that the receipt left the trial court in some grave doubt.

The appellant put up one main ground of appeal. The ground was that the learned trial judge erred in law in holding that the land cruiser had not been stolen from the defendant's premises. Before proceeding with the appeal the respondent's advocates applied for leave to have the judgment varied so as to read that the notice exhibited in the car park completely relieved the respondent of its liability for the loss of the appellant's motor vehicle or alternatively limited its liability to the extent of K60.00 only. This variation was also the ground of the cross-appeal which the respondent filed. (The ground advanced in the cross-appeal is that the notice exhibited in the car park completely relieved the respondent of liability for the loss of the vehicle or alternatively limited its liability to the extent of K60 only. During the hearing of the appeal Mr. Kinariwala, counsel for the respondent made an application for leave to have the judgment varied.) In the course of the arguments in support of the application Mr. Kinariwala conceded that on the evidence before the trial court the judge should have come to the conclusion that the vehicle had been stolen. He conceded that the trial judge had looked at the date of the receipt document without getting clarification or calling for more evidence as to the date of the receipt, receipt No. M11445. By consent the application was granted and judgment amended as prayed; and the court granted Mr. Kinariwala leave to cross-appeal against the finding on liability in view of the fact that the respondent's hotel had put up a notice in the car park which notice completely relieved the respondent of liability for loss of the appellant's motor vehicle and in the alternative that the liability was limited to the

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extent of K60 only. Mr. Kinariwala submitted in support of ground in the cross-appeal that the notice which was displayed in the respondent's car park expressed limitation on the respondent's strict liability which the respondent was by law permitted to make in the case of a car park where there was an obvious risk of theft. He argued that the appellant did admit in the lower court that he read the notice in the car park and as such he had been put on his guard and that if the appellant, despite reading the notice displayed in the car park, decided to park, he did so at his own peril and risk of loss by theft and liability should fall on him and not on the respondent. The learned counsel relied on the dissenting judgment of Lord Denning in the case of William vs Linnit where at page 293, Lord Denning said:

> "The notice in such cases is not contractual. It is a limitation which the innkeeper is allowed to put on his strict liability, because of the obvious risk involved if the goods are put in that place. It takes the place, so that the innkeeper is not liable as and insurer in respect of it, but only for negligence. Apply the principles of those old cases to the present case. The car park at the Royal Red Gate Inn was at least as unsafe as any outer yard. It had the whole of one side open to the street for a distance of seventy-five feet and was more in the nature of a "good pull-in for carmen" than anything else. It was so laid out as to be a convenient place for guests to leave their cars, but palpably not a safe place. There was no attendant there, nor would you expect one at a small road-side inn like this. It was obviously no safer than a street parking place. In short, even if there was no notice up there, it was not place where anyone could reasonably suppose that the inn-keeper took full responsibility on himself for cars that were left there, especially during the hours of darkness. But there was, in fact, a notice. The innkeeper had put up a notice in a suitable and prominent place, quite plain for anyone to read if he chose to do so:
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> > "car Park. Patrons Only. Vehicles are admitted to this parking place on condition that the proprietor shall not be liable for loss of, or damage to, (a) any vehicle, (b) anything in, or on, or about any vehicle, however such loss or damage may be caused."
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> I think that, following the old cases, that notice was effective to protect the innkeeper from his strict liability. It is true that the notice did not operate as a contract - at any rate, not in the case of the plaintiff, who came by night and did not read it, but the plaintiff cannot make anything of that, because he never made a contract by which he put the car there. He never told the innkeeper it was there at all. If he had asked the innkeeper

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> if his car would be safe there, the innkeeper might well have said, just as the innkeeper did in Brand v. Glasse (15): "if you wish me to undertake the charge of your car, you should take it into one of the garages which I have at the back of the inn, or otherwise I shall not be responsible. There is a notice up there which says that I am not responsible for the car park."

Mr. Kinariwala argued that in the present case there is enough evidence to show that the defendant had displayed a distinct notice in the car park informing the clients at the hotel that he would not be responsible for thefts of the vehicles. The learned counsel urged the court to take judicial notice that in Zambia theft of motor vehicles is so rampant that a car is not safe if it is parked at one's own house. He submitted that in such circumstances one cannot expect a hotel to be responsible for car theft from its premises. Mr. Kinariwala further submitted that the defendant was relieved of liability by displaying the notice in the car park and he further argued that liability if any was restricted to K60 only.

Counsel for the appellant Mr. Lwatula abandoned other grounds of appeal in view of the fact that by consent judgment had been entered in favour of the appellant in respect of the theft of motor vehicle. He, however, submitted that the Hotels Act does not have provisions to allow the Hotels in Zambia to limit or exclude liability. He argued that the hotel regulations which were made under Hotels Act contravened Hotels Act in that the Minister who made the regulations did not have power to make such regulations by statutory Instrument. Mr. Lwatula argued that an innkeeper's liability was governed by common law. He relied on Halsbury Laws of England 4th Edition Vol. 24 on page 630 provides:

> "Conditions of innkeeper's liability. At common law an innkeeper was liable for the loss of goods brought to his inn by any traveller, even if he were only seeking temporary refreshment, but the strict liability of a hotel proprietor, as an innkeeper, is only towards those travellers for whom sleeping accommodation has been engaged. Without prejudice to any other liability incurred by him with respect to property to the hotel, the proprietor of a hotel is not liable as an innkeeper to make good to any traveller any loss or damage to that

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> property except where (1) at the time of the loss or damage sleeping accommodation at the hotel had been engaged for the traveller and (2) the loss or damage occurred during the period commencing with the midnight immediately preceding, and ending with the midnight immediately following, a period for which the traveller was a guest at the hotel and entitled to use the accommodation so engaged."

He further relied on the case of William vs Linnit already referred to.

On damages Mr. Lwatula submitted that the court should consider giving to the plaintiff the replacement value or in the alternative the court should award the plaintiff enough interest to compensate him.

The case of Williams vs Linnit (1) is a court of appeal decision. In that case the plaintiff was returning home in his motor vehicle, stopped at the defendant's inn and the plaintiff placed his car in the car park. He had drinks with friends. On leaving the inn an hour later he found that his car had been stolen. The car park consisted of an area in front contiguous to the inn with a sign bearing the name of the hotel on the side and the following notice:

> "Car Park. Patrons Only. Vehicles are admitted to this parking place on condition that the proprietor shall not be liable for loss of, or damage to, (a) any vehicle, (b) anything in, or on, or on, or about any vehicle, however such loss or damage may be caused. "R.W.L. Properietor.

In an action by the plaintiff against the proprietor of the inn for damages for the loss of the car it was held (i) in an action against an innkeeper for damages for the loss of goods of a guest the owner of the goods must prove that at the time of the loss he was a traveller; (ii) although the plaintiff was residing in the immediate neighbourhood of the inn and visited it merely to take a drink, he was, none the less, a traveller for the purpose of establishing the defendant's liability as an innkeeper at common law; (iii) the car park being contiguous to the inn and one in which a guest with a car was customarily invited to leave it, there being no evidence that any other accommodation for cars was provided by the inn, and it

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being part of the defendant's normal business to provide accommodation for the cars of guests, the car park was within the "hospitium" of the inn; (iv) the notice exhibited in the car park did not relieve the defendant's of his liability, and therefore, the plaintiff was entitled to recover. Lord Denning dissented from finding in (iv) above.

Mr. Lwatula, counsel for the plaintiff relied on the decision of the Court of Appeal, and whereas Mr. Kinariwala on behalf of the respondent urged the court to adopt the reasoning of Lord Denning who dissented from the judgment particularly on the question of notice. Mr. Kinariwala argued that on the authority of the Occupier's Liability Act the defendant could not be held liable.

We have considered Mr. Kinariwala's argument regarding the application of the Occupiers Liability Act, and we are of the view that the Act is not relevant to the present case. The facts of this case have brought the matter within the law relating to the innkeepers. Mr. Kinariwala further urged the court to take judicial notice that in Zambia theft of motor vehicle is so rampant that it would be unreasonable for hotels to be held responsible for parking by guests or travellers. We would only like to observe that the law has now been changed to completely protect innkeepers or hotel owners from such liability by Act No. 27 of 1987. Mr. Kinariwala's argument has therefore been taken care of by the the enactment; but this enactment came after this case had taken place. The Act does not operate retrospectively since there is no provision to that effect. At the time of action the Act in question was the Hotels Act Cap. 251 of the laws of Zambia. This Act did not limit or restrict liability of the Hotels. According to the decision in Williams and Linnit's (1) case the liability of the innkeepers was a strict one. Mr. Kinariwala urged the court to adopt Lord Denning's argument. We have considered Mr. Kinariwala's arguments and Mr. Lwatula's arguments and we have considered all the authorities relied upon by the learned counsel and we have come to a firm conclusion that at common law the

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liability of the innkeeper was an absolute one.

The facts in this case clearly showed that the car park in question was part of the hotel premises and formed part of the hospitium. The arguments put forward in Lord Denning's dissenting judgment cannot apply to this case since the facts are not similar. In the Williams vs Linnit's (1) case the plaintiff stopped only at the place, had some drinks and in strict sense the plaintiff was not a lodger or a resident of the hotel but the court of Appeal found that he was a traveller and found in his favour. In the present case the plaintiff was a resident of the hotel. He parked the car on the premises which formed part of the hotel. He was given a disc by the agents of the hotel. The security men were employed to guard or to man the gates. These facts clearly showed that the car park was part of the hotel premises. We cannot, with great respect, therefore in the present case agree with the sentiments expressed by Lord Denning or follow his argument about limitation of liability. There is nothing in the facts to make us decide otherwise from the established common law about innkeepers. We find therefore that the notice exhibited in the car park area did not relieve the respondent from this liability and we find for the plaintiff.

As regards damages Mr. Kinariwala submitted that damages were limited to K60 only. It appears Mr. Kinariwala relied on the provisions of the Occupiers Liability Act. This Act is not relevant to this case. We find the damages are not limited to K60. The evidence regarding the car was adduced in the lower court and the plaintiff spent about U.S. $12,000 to purchase the vehicle in issue. At that time that money was equivalent to K30,800. At the time of the trial the cost of the same car had risen to K147,000. Mr. Lwatula submitted that he be awarded a replacement value or alternatively enough interest to compensate him. We have considered these arguments and we have taken into account the cost of the car at the time of the trial. The plaintiff is therefore awarded a sum of K147,000 with

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interest from the date of judgment at 15% per annum. The plaintiff is also awarded costs both in the lower court and here. Costs shall be taxed in event of default.

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E.L. Sakala
SUPREME COURT JUDGE

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M.S. Chaila
SUPREME COURT JUDGE

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A.R. Lawrence
SUPREME COURT JUDGE