PATRICIA DENGEZI
versus
MUNYARADZI NYAMARURU (1)
and
XOLISANI MOYO (2)
and
CHAMPIONS INSURANCE COMPANY LIMITED (3)
and
THE COMMISSIONER GENERAL OF POLICE (4)
and
THE MINISTER OF HOME AFFAIRS (5)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 11, 12, 13 December 2024, 23 & 31 January 2025 & 14 February 2025.

Civil trial – Absolution from the Instance

T. Biti for the plaintiff
No appearance for the 1st & 2nd defendants
D. Ochieng, for the 3rd defendant
T. Tembo, for the 4th and 5th defendants

[1] DEMBURE J: This civil trial commenced on 11 December 2024. At the close of the plaintiff's case, the third, fourth and fifth defendants applied for absolution from the instance. The applications were made in terms of rule 56(6) of the High Court Rules, 2021 and were strenuously opposed by the plaintiff. The court permitted the defendants to file their applications in writing and set timelines for filing the relevant papers. Subsequently, the court heard oral arguments from the parties' legal practitioners on 23 January 2025 and reserved its judgment. At the hearing, the court struck out the fourth and fifth defendants' answering affidavit with the parties' consent following an objection made by the plaintiff's counsel that it was improperly before the court.

BACKGROUND FACTS

[2] On 17 April 2017, the first defendant, while driving a commuter omnibus, a Nissan Caravan registration number ACZ6652, was involved in an accident on a pavement along Chinhoyi Street in Harare resulting in injuries to the plaintiff and the death of her minor

child, Lesley Chitanda. The first defendant was employed as a driver by the second defendant at the material time. The second defendant owned the said commuter omnibus. The third defendant was a third-party insurer of the motor vehicle. It is common cause that the said motor vehicle driven by the first defendant hit the plaintiff and her one-year-old child who died on the spot.

[3] On 9 April 2018, the plaintiff had summons issued against the defendants claiming damages as follows:

> "1.1 Damages for pain, shock and suffering in her own injuries – US$50,000.00;
> 1.2 Damages for loss of consortium bereavement and loss of her minor child Leslie Chitanda – US$250,000.00;
> 1.3 Aggravated damages, for reckless behaviour as against the Zimbabwe Republic Police alone – US$50,000.00;
> 1.4 Special damages for loss of income from vending activities – US$100,000.00;
> 1.5 Special damages in respect of funeral expenses and other medical expenses – US$50,000.00;
> 1.6 As against the Zimbabwe Republic Police aggravated damages for reckless behaviour resulting in loss of a life – US$50,000.00.
> 2. As against Defendants jointly and severally each paying the other to be absolved interest on the above amounts, at the rate of 5% per annum with effect from the date of judgment.
> 3. Costs of suit."

[4] The plaintiff pleaded in her declaration that the accident was caused by the negligence of the first defendant and members of the Zimbabwe Republic police. For the alleged reckless and negligent conduct by the police officers involved, the plaintiff sued the Commissioner General of Police and the Minister of Home Affairs as the fourth and fifth defendants respectively being the authorities in charge of the police service and liable for the conduct of the members of the police force. The third defendant was sued as the insurer of the commuter omnibus owned by the second defendant and driven by the first defendant when the accident occurred allegedly in the course of his employment with the second defendant.

[5] The first and second defendants despite being served with the summons did not enter an appearance to defend and were accordingly barred in terms of the rules of court. The third defendant defended the action and denied having knowledge of the allegations giving rise to the claim. It only accepted that its limit of liability if the second defendant is found liable for the death is limited by law to US$2,000.00. The fourth and fifth defendants also opposed the claim and denied that the actions of the members of the Zimbabwe Republic

Police were unlawful or wrongful. It was contended in the plea that the police officers were enforcing compliance with the law and were not liable for the negligence of "a driver who drove against traffic in one way road causing the death of the minor".

[6] At the trial before me, the plaintiff gave evidence. She also tendered the affidavit of a medical practitioner, Anesu Isabel Chinoperekwei, a specialist psychiatrist, as part of her evidence. The said document was admitted with the consent of the defendants and marked Exhibit A. The plaintiff further called Sibongile Mazividza as her witness. The plaintiff thereafter closed her case.

THIRD DEFENDANT'S APPLICATION

FIRST DEFENDANT'S SUBMISSIONS

[7] It was submitted for the third defendant that at the material time, the third defendant was a third-party insurer of the motor vehicle belonging to the second defendant and can only be liable for damages caused by the use of the vehicle in question on a public road. The plaintiff's case against the third defendant rested on proving the culpability of the driver of the insured vehicle. Mr *Ochieng* also submitted that the synopsis of the plaintiff's own evidence established that the first defendant was a victim of the chaos that erupted and faced the fleeing commuter omnibuses and was forced to veer off the path onto the pavement.

[8] It was further submitted that according to the plaintiff's evidence, he drove at a 'normal' speed for passage on an urban thoroughfare. He acted in an emergency and had no option to avoid collision with the said fleeing vehicles on his path. This case gives rise to the application of the doctrine of sudden emergency. This is where a driver is confronted with a situation forcing the driver to drive in a way he would not have acted and that driver is not negligent. Those who were there said this. The absence of negligence on the first defendant has two consequences; firstly, it negates the wrongfulness of the first defendant's action and secondly, it obliges one to look for causation elsewhere. Both wrongfulness and causation were not established.

[9] Counsel further referred me to the authorities cited in the third defendant's application and this court's recent decision in *Mukandi v Nyamweda & Ors* HH 1/25 on the principles applicable in an application for absolution from the instance. Mr *Ochieng* also argued that

it would be inconsistent with the plaintiff's evidence for the first defendant to explain how he veered off the road. The plaintiff's evidence was that the first defendant was the one obstructed from the proper path, was moving in the correct way and was confronted by a sudden emergency. The doctrine of sudden emergency and the *res ipsa loquitur* are mutually exclusive. One applies where there is direct evidence. The *res ipsa loquitur* is applicable where there is no direct evidence of negligence. The *res ipsa loquitur* does not apply. The situation would have been different if the conduct of the driver had been unexplained. We have the actual cause of the accident being the reckless behaviour of drivers fleeing intervention by the police along a one-way street. He referred the court to the case of *Marine and Trade Insurance Co. Ltd v Mariamah* 1978 (3) SA 480 (AD) at 485 - 486 on the doctrine of sudden emergency. The facts are proved through evidence.

[10] It was also submitted that evidence had already been adduced and the evidence was different from what the declaration alleged that the first defendant was speeding. The evidence was that he was driving in a normal way. This is a classic case of sudden emergency and the plaintiff's evidence contains the answers. There are no matters that call for explanation by the first defendant. The plaintiff's case is compounded by the fact that one cannot claim special damages without evidence and for illegal activities. The law denies a party compensation for the loss of income from illegal activities. The principle of illegality triggers public policy considerations against the applicant to allow her to recover damages at all. The plaintiff has not placed anything for the first defendant to lead evidence.

[11] It was also submitted for the third defendant that the plaintiff has failed to establish a *prima facie* case against the third defendant worthy of reply and that absolution from the instance must be granted with costs.

PLAINTIFF'S SUBMISSIONS

[12] On the other hand, it was submitted for the plaintiff that the application is not *bona fide*. The test is whether there is a *prima facie* against the defendants or whether there is evidence that a court might make a reasonable mistake and find for the plaintiff. Mr *Biti* submitted that as against the third defendant, the third defendant stands or falls on the first defendant. The evidence against the first defendant does not arise from the testimonies of the plaintiff. It arose from the facts of the accident. The facts themselves are the explanation

for the accident. This calls for the application of the *res ipsa loquitur*. What happened on 17 April speaks for itself. The vehicle veered off the road, climbed upon a three-metre pavement and struck the plaintiff and her child. That was negligence. To rebut the *res ipsa loquitur* the defendant must plead in rebuttal. Sudden emergency does not arise. Where there is *res ipsa loquitur* the onus shifts to the defendant to explain why his motor vehicle was across the pavement. Reference was made to the cases cited in the plaintiff's response to the application.

[13] Mr *Biti* further argued that the third defendant had no leg to stand on. It did not plead anything on behalf of the first defendant. It had not pleaded the defence of sudden emergency. Only the first defendant can offer an explanation. The plaintiff gave an opinion on whether he could have turned the other side and only the first defendant can offer that explanation. The negligence was gross or reckless. The facts give rise to negligence and that shifts the burden to the defendant himself. The plaintiff prayed for the dismissal of the application with costs on a punitive scale.

FOURTH AND FIFTH DEFENDANTS' APPLICATION

FOURTH AND FIFTH DEFENDANTS' SUBMISSIONS

[14] It was submitted for the fourth and fifth defendants that the application was meritorious and was grounded on the following grounds. Firstly, at the close of the plaintiff's case, there was no evidence to support that the fourth and fifth defendants recklessly and unlawfully used spikes. Secondly, the officers of the ZRP were executing their constitutional mandate lawfully and cannot be liable and thirdly, there was no evidence adduced that the defendants were specifically liable for the events leading to the death of the minor.

[15] Ms *Tembo* submitted that most facts are common cause. In the plaintiff's papers, she averred that but for the conduct of the police, the accident would not have occurred. It was apparent that the plaintiff had not made a case against the fourth and fifth defendants. There is no cause of action established against the fourth and fifth defendants. Counsel further submitted that she stood by the written submissions and that the point to be motivated was the principle of causation.

[16] On factual causation, counsel argued that from the evidence adduced the police had not even confronted the commuter omnibus operators when they started the mayhem. The issue is that the police were seeking to address illegal activities. Before the police even put spikes, they had already started the havoc. The police could not look aside. The plaintiff was breaking the law by being where she was. The court should not condone unlawfulness. It cannot sanction an illegality. There was a concession by both witnesses when they were asked whether or not it was any of the police officers who was driving the commuter omnibus which veered off the road and hit the minor and they said it was not the police officers.

[17] Ms *Tembo* further submitted that there was also a concession that a law-abiding citizen should not run away from the police. It was not reasonably foreseeable for the commuter omnibus drivers to run away. They should have abided by the instructions of the police who were enforcing the law. On the legal causation, it was argued that the connection between the fourth and fifth defendants to the loss was very remote. Three things must be considered; firstly; was the conduct of the police lawful: yes, they were carrying out their constitutional mandate. Secondly; was what the commuter omnibus drivers did lawful; the answer is in the negative. Thirdly, was the conduct of the defendant responsible for the delict; the answer is in the negative. The *causa sine quo non* was inapplicable. The causation was very remote. It was not the actions of the police that led to the demise of the minor child. It was the unreasonable reactions of the commuter omnibus operators which caused the death. That is the *causa sine qua non* for the damages.

[18] Counsel also submitted that there was no reason to address the issue of the quantum. Reference was made to the case of *National Railways of Zimbabwe Contributory Pension Fund v Mugadza Trading & Transport t/a Chase Water Service* HB 182/18 for the principles applicable to an application of this nature. It was argued that you cannot base a claim on an illegality. The policy consideration is that the illegality should make her without a remedy. The plaintiff's testimonies were that the police were lawfully carrying out their mandate. No law outlawed the use of spikes. It is an internationally accepted tool of trade used by traffic police to stop fleeing offenders.

[19] It was also submitted for the fourth and fifth defendants that the commuter operators are "by nature fugitives who operate recklessly and negligently with a considerable temptation to evade arrest than risk it." Blaming the fourth and fifth defendants for their reckless behaviour would be unreasonable. It was also argued that the plaintiff dismally failed to make a case against the fourth and fifth defendants and they must be absolved from the instance with costs.

PLAINTIFF'S SUBMISSIONS

[20] In response, Mr *Biti* submitted that the plaintiff's action is one based on delict. There is no bar in the whole world on a claim arising out of an accident for the loss suffered. The legality is not alive. The legality only relates to the claim for income. The argument is illogical. The legality of the profession is not the legality of the cause of action. It was submitted for the plaintiff that the conduct of the three policemen in question caused the accident. The evidence was that three policemen moved from Total carrying spikes and baton sticks and moved over to about five or six commuter omnibuses parked across Chinhoyi Street. The first thing they did was to put spikes on the road to prevent them from moving towards the Machipisa end. They smashed a windscreen of the first commuter omnibus.

[21] Mr *Biti* further submitted that spikes are instruments of violence and no police manual sanction their use. They threw spikes and smashed the front windows of the vehicle. The police were not carrying out normal police work. These were rogue. It is unlawful conduct to smash the windscreen of the motor vehicle. The unlawful rogue behaviour of the police is the factual causation. They knew what they had done and by the time they got to the police station one had gone and the other one had to run away at the hospital. The test for legal causation is whether the accident was the approximate consequence of the defendant's actions. In other words, was it reasonably foreseeable that such harm could occur? You throw spikes in a crowded hour and this is why we asked for exemplary damages.

[22] Counsel further argued that the court does not want these applications. Reference to this point was made to the cases cited in the plaintiff's submissions at para 37 which include *MC Plumbing (Pvt) Ltd v Haulong Construction (Pvt) Ltd* 2015 (1) ZLR 138 (H);

Standard Chartered Finance Zimbabwe Ltd v Georgias 1998 (2) ZLR 547 (H) and the remarks by PATEL J (as he then was) *in Manyange v Mpofu & Ors* 2011 (2) ZLR 87 (H). Mr *Biti* also submitted that the plaintiff has made more than a *prima facie* case, the police must explain their conduct, and they have to explain why they have to use spikes and smash windscreens. The application must be dismissed with costs on an attorney-client scale.

THE LAW

[23] The test when an application for absolution from the instance is made at the close of the plaintiff's case is whether there is evidence upon which a court acting reasonably could or might find for the plaintiff. See *Supreme Service Station (1969) (Pvt) Ltd* v *Fox Goodridge (Pty) Ltd 1*971 (1) RLR 1 (A) at 5D – E, *Laurenoov Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (5) @158 B – E; *United Air Charters (Pvt) Ltd* v *Jarman 1*994 (2) ZLR 341 (S) 343 B-C.

[24] In other words, the test is whether a plaintiff has made out a *prima facie* case by adducing evidence to prove all the essential elements of the claim entitling the court to find for him at that stage. The enquiry is whether there is sufficient evidence upon which a court might make a reasonable mistake and give judgment for the plaintiff. At the close of the plaintiff's case, it is the defendant who bears the onus to show that the plaintiff failed to establish a *prima facie* case. As stated in *Mukandi v Nyamweda & Ors* supra:

> "The legal position relating to an application of this nature was remarkably outlined in *ZIMSCO (Pvt) Ltd v Tsvangirai & Ors* SC 12/20 where the court had this to say:
>
> > "It is trite that the court cannot *mero motu* consider whether absolution must be granted. It is an option which is available to the defendant, upon application. When an application for absolution from the instance is made at the end of the plaintiff's case the test is: what might a reasonable court do, that is, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case the test is: what ought a reasonable court do?
> > In deciding what a court may or may not do, it is implied that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence.
> > What flows from the above cases is that absolution from the instance will not be granted if there is sufficient evidence, which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."

ANALYSIS AND DETERMINATION

THE CASE AGAINST THE THIRD DEFENDANT

[25] Applying the above principles, the question that arises is whether or not the plaintiff proved a *prima facie* case against the third defendant. It is common cause that the third defendant was only a third-party insurer of the second defendant's commuter omnibus in question. The second defendant's vehicle was being driven by the first defendant at the time of the accident. The liability of the third defendant essentially depends on the establishment of the liability of the first defendant and ultimately the second defendant. If it is held that the first defendant was not liable for the loss alleged by the plaintiff the third defendant's liability automatically falls away. What constitutes the essential elements of the plaintiff's claim which is an Aquilian action for damages is settled law. See *Mukandi v Nyamweda & Ors supra.*

[26] In *casu,* it is common cause that there was an accident on 17 April 2017 along a pavement on Chinhoyi Street close to the intersection with Robert Mugabe in Harare at around five o'clock in the afternoon. The plaintiff and her child, the now deceased, Lesley Chitanda were hit by a commuter omnibus driven by the first defendant resulting in the plaintiff sustaining injuries and the minor child's loss of life. The issue was whether from the evidence the plaintiff established a *prima facie* case against the first defendant that he wrongfully and negligently caused the accident and the resultant loss. To examine this the court must first look at how the plaintiff's claim was pleaded. The law is settled that pleadings guide the parties as to the nature of their case and help the court identify the issues between the parties that require determination by the court. GARWE JA (as he then was) in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* SC 24/18 at p 13, after examining several authorities on the important purpose of pleadings concluded as follows:

> "[26] I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. **Therefore a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent."** [My emphasis]

[27] The case against the first defendant was pleaded in the Declaration as follows:

> "10. The aforesaid accident was caused by the first defendant and members of the Zimbabwe Republic Police.
> 11. The first defendant was negligent in that:
> (a) He drove with an excessive speed under the circumstances;
> (b) He failed to stop or act reasonably when an accident seemed imminent;
> (c) He failed to drive his vehicle reasonably, in a rowdy situation where the unlawful conduct of the police and indeed of other drivers was well known and common cause."

While the above paragraphs pleaded that the first defendant was negligent para 9 of the plaintiff's declaration is contradictory. It in fact brought to the fore the doctrine of sudden emergency. The plaintiff herself stated:

> "9. As a result of these unlawful actions by the Zimbabwe Republic Police a commuter omnibus travelling in the right but opposite direction being driven by the first defendant Munyaradzi Nyamaruru… owned by the second defendant <u>was forced to veer off the road into the pavement</u> where the same hit the plaintiff and smashed her one year old child Leslie Chitanda who immediately died on the spot."

[28] The averments in para(s) 9 and 11 of the plaintiff's declaration are mutually inconsistent. Paragraph 9 appears to absolve the first defendant from voluntary conduct by bringing in the doctrine of sudden emergency while para 11 avers that he was negligent. Litigants are bound to what they have pleaded or to the averments they have set out in their pleadings. Whatever evidence they lead must be consistent with what would have been pleaded.

[29] In any case, from the evidence, the plaintiff in her own testimony clearly absolved the first defendant. In her evidence in chief, the plaintiff admitted that there was nothing the driver or first defendant could have done to avoid the accident. She repeatedly said he panicked as the situation where he was faced with five or six commuter omnibuses speeding and travelling against one way and towards him was something he could not expect. She further said that the driver got scared and did not know what to do. When asked if the driver could have swerved to the other side to avoid getting onto the pavement, she reiterated that the driver was in the right lane and faced with the fleeing five or six vehicles speeding towards him he panicked and could not have moved to the other side. Again, when asked what caused the accident on 17 April the plaintiff in her testimony was very emphatic; she stated "It was the police officers who caused the accident." She also repeated this position under cross-examination that "I only know that the police officers are the ones

who caused the accident." And further that "if the police officers were not there, he would not have hit us". She also admitted under cross-examination that the first defendant was moving at a normal speed. When probed further, she again reinforced that the driver was using the normal speed one would use on the road disputing that he was speeding as had been put across by counsel for the fourth and fifth defendants under cross-examination.

[30] The plaintiff's own witness, Sibongile Mazividza, under cross-examination, also insisted that it was the police officers who caused the accident. She stated that if they had not come the commuter omnibuses would have loaded and gone away without any incident. She further accepted that the first defendant was innocent. When further probed under cross-examination as to how he could be innocent when he is on the run the witnesses said "I do not know". According to her, it was the police officers who caused the death of Lesley. She further stated that if they did not bring spikes "we could be having Lesley in Grade two now".

[31] What was clear from the plaintiff's testimony and that of her witness is that they admitted that the first defendant was not negligent. According to their evidence, he was a victim of the melee generated by the unlawful conduct of the police and the fleeing five or six commuters and as pleaded in para 9 he was forced off his normal path in circumstances where he had nowhere to go. The effect of the admissions is settled law. It is trite that once admissions are made it shall not be necessary or be required to prove any fact admitted or lead any evidence to contradict the admitted fact on record. See s 36 of the Civil Evidence Act [*Chapter 8:01*] which states:

> "**36. Admissions**
> **(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.**
> (2) …
> (3) **It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings**.
> (4) **It shall not be competent for any party to civil proceedings to disprove any fact admitted by him on the record of the proceedings**:
> Provided that this subsection shall not prevent any such admission being withdrawn with leave of the court, in which event the fact that the admission was made may be proved in evidence and the court may give such weight to the admission as the court considers appropriate, bearing in mind the circumstances in which it was made and withdrawn." [My emphasis]

[32] The effect of an admission was also restated in *Manyenga v Petrozim (Pvt) Ltd* SC 40/23 where the Supreme Court went to great lengths in articulating the effect of an admission by a party. The court held that:

> "32. The effect of an admission has been held to be the following in the case of *Potato Seed Production (Proprietary) Ltd v Princewood Enterprises (Pvt) Ltd & Ors* HH 45-17 at p 4;
>
> > "Indeed the effect of an admission is settled law. Once made it binds its maker with the attendant consequences see *Kettex Holdings P/L v S Kencor Management Services P/L* HH 236-15."
>
> 33. The consequences of making an admission which is not withdrawn is that it will not be necessary to prove the admitted fact(s): *Adler v Elliot* 1988 (2) ZLR 283 (S) at 288C. In addition, this Court, in the case of *Mashoko v Mashoko & Ors* SC 114-22, held that:
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> > "The law on admissions in pleadings and indeed in evidence, is also settled. A party to civil proceedings may not, without the leave of the court, withdraw an admission made, nor may it lead evidence to contradict any admission the party would have made. By equal measure, a party is not permitted to attempt to disprove admissions made."

[33] From the above-settled law, once the plaintiff has admitted that the first defendant did not cause the accident and that there was nothing he could do in the circumstances to avert harm, there is nothing for the first defendant and consequently, the third defendant to rebut or say in his own case. The court cannot allow any party to lead evidence or call for evidence to prove the facts that have been admitted. See also *Mining Industry Pension Fund v Dan Marketing (Pvt) Ltd* SC 25/02. The plaintiff is bound by those admissions she made in her evidence.

[34] Mr *Biti* argued that the *res ipsa loquitur* was applicable. I do not agree. That doctrine is applicable where there is no direct evidence to establish negligence. It is a principle where inferences can be drawn that the driver was negligent by looking at the circumstances of the incident. The inferences can only be drawn from established facts. The facts set out by the plaintiff and her witness clearly exonerated the first defendant or absolved him of any negligence. They also all confirmed that the police were responsible for the accident. This brings me to what this court said in *Lunga v Zimbabwe Electricty Transmission and Distribution Company* HH 267/16 that:

> *"Res ipsa loquitor* is really a matter of evidence than substantive law and it relates to proof of negligence. See G. Feltoe A Guide to the Zimbabwean Law of Delict 2 nd ed at p 5. **This is a doctrine which is raised in cases where there may be no direct evidence of**

> **negligence, but the nature of the circumstances in which the incident occurred would not normally happen if reasonable care had been exercised by the person in control of the object**. See G Feltoe *A Guide to the Zimbabwean Law of Delict* 2nd ed at p 5…" [My emphasis]

[35] In this case, there is no need for an inference of negligence as that is contrary to the facts which were established from the plaintiff's evidence. I agree with Mr *Ochieng* that the *res ipsa loquitur* is inapplicable in the circumstances of this case. The plaintiff and her witness absolved the first defendant from any negligence. The synopsis of her case was such that the doctrine of sudden emergency was established from her own testimony. The plaintiff herself highlighted facts consistent with the application of such doctrine, there is nothing, therefore, for the first or third defendant to rebut. As stated by W E Cooper, *Delictual Liability in Motor Law* (Juta & Co. Ltd, 1996) at p 274:

> "The effect of the doctrine is that a driver acting in the best way to avoid danger in a sudden emergency is not negligent."

[36] The plaintiff's case was that the first defendant was a victim of a chaotic situation created by the unlawful actions of the police and the fleeing drivers. In her own testimony, "there was nothing he could do". What was admitted need not be rebutted. It became common cause. The plaintiff's counsel cannot seek to reconstruct her case at this stage. The horse had bolted. The circumstances did not call for the application of the *res ipsa loquitur* as the plaintiff and her witness's evidence was that there was no wrongful and fault or negligence on the part of the first defendant for him to be liable for the plaintiff's loss. They were adamant that had it not been the unlawful conduct of the three police officers there would not have been an accident. The first defendant according to them was not negligent.

[37] I find, therefore, that the plaintiff failed to prove a *prima facie* case to warrant the third defendant being put to his defence. There is nothing upon which this court acting reasonably might make a mistake and find for the plaintiff. Absolution from the instance may be granted at the close of the plaintiff's case if the plaintiff has failed to establish an essential element of her claim. I cannot, therefore, adopt what this court stated in *Manyange v Mpofu & Ors* supra as this application is merited.

[38] In *casu*, given the admitted facts absolving the first defendant, there are no questions of fact left to decide. The third defendant cannot be put to his defence in the

circumstances. While litigants can spring surprises in certain matters by launching an application of this nature, however, in this case, absolution from the instances as prayed for is inescapable. Having found, that the elements of wrongfulness and negligence of the first defendant have not been proved on a *prima facie* basis, no liability can arise for the first defendant and consequently, the third defendant. The third defendant's application must succeed. Once no liability arises, it becomes academic for me to consider the argument on the quantum of the damages and whether or not the plaintiff was precluded on the ground of illegality from claiming damages arising from the fact that she was engaged in unlawful vending activities. That issue of illegality shall be considered under the application by the fourth and fifth defendants as the same point was raised by the other defendants. In respect of the third defendant's application, the exercise would simply be academic and I decline to venture into that academic debate.

THE CASE AGAINST THE FOURTH AND FIFTH DEFENDANTS

[39] As for the fourth and fifth defendants, their liability was based on vicarious liability. It is common cause that these defendants are responsible or liable for the delicts committed by members of the Zimbabwe Republic Police during the performance of their duties. There was no issue that the three police officers were on duty at the material time. The issue had been whether or not the said police officers unlawfully or wrongfully and negligently caused the harm or loss in question. The argument by the fourth and fifth defendants was that the police officers were not liable for the loss. Ms *Tembo*'s argument was that they were performing their constitutional mandate of enforcing traffic laws on the day. It was not denied that they used spikes but it was argued that these are lawful and internationally accepted tools of trade. The main questions that arise are whether the said police's conduct was unlawful and caused the accident and the subsequent loss to the plaintiff. The issue of causation became pertinent. I hasten to restate what this court emphasised in *Nobert Katerere v Standard Chartered Bank Zimbabwe Limited* HB 51-08, where it was held:

> "The court should be extremely chary of granting absolution at the close of the plaintiff's case. **The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence.** The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have

> to be established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim - *Claude neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403(A); *Marine & Trade Insurance Co Ltd* v *Van Der Schyff* 1972 (1) SA 26(A); *Sithole* v *PG Industries (Pvt) Ltd* HB 47-05" [My emphasis]

I must, therefore, treat the plaintiff's evidence at this stage to be generally true. The questions of facts may not be resolved at this stage without having the benefit of the evidence from the defendants.

[40] The plaintiff's evidence which was corroborated by her witness was that three police officers moved from the Total service station towards the place where about five or six commuter omnibuses were illegally parked along Chinhoyi Street close to the intersection with Robert Mugabe Way and were picking up passengers close to ZB Bank. This was the opposite side of Chinhoyi Street where the plaintiff was seated with her child on a pavement. It is common cause that Chinhoyi Street is a one-way road for traffic from Coppa Cabana commuter omnibuses rank towards Machipisa or Market Square rank.

[41] The evidence was further that the police officers had spikes and baton sticks. They first threw the spikes on the ground from the direction of the intersection with Robert Mugabe Way thereby blocking the illegally parked commuter omnibuses from proceeding in the normal way. It is common cause that these spikes are sharp metal objects which can damage motor vehicle tyres if one drives over them. The police officers are said to have proceeded to smash the windscreen of the first motor vehicle parked from where they were coming as the vehicles started to move. The commuter omnibus drivers had to turn and flee against the flow of traffic and the one-way speeding towards Coppa Cabana. The resultant melee and chaos culminated in the first defendant who was on his correct way and faced with an oncoming fleet of about five or six speeding commuter omnibuses being forced off his path and onto the pavement to the right where the plaintiff was seated resulting in her and her now late son being hit.

[42] The issue of causation arose from the proved facts. It is trite that causation is the legal link between a defendant's wrongful conduct and the harm suffered by the plaintiff, meaning that to establish liability, it must be proven that the defendant's actions directly caused the plaintiff's loss. A two-pronged test to analyse causation is applied; namely factual causation (the "but-for" test) and legal causation (whether the harm is sufficiently

connected to the defendant's conduct to justify liability). In *International Shipping Co. Ltd v Bentley* 1990 (1) SA 680 (A) the test for causation was formulated as follows:

> "As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise.
> On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation". (See generally *Minister of Police* v *Skosana* 1977 (1) SA 31 (A), at 34 E -35 A, 43 E - 44 B; *Standard Bank of South Africa Ltd* v *Coetsêe* 1981 (1) SA 1131 (A), at 1138 H - 1139 C; *S* v *Daniëls en 'n Ander* 1983 (3) SA 275 (A), at 331 B - 332 A; *Siman & Co (Pty) Ltd* v *Barclays National Bank Ltd* 1984 (2) SA 888 (A), at 914 F - 915 H*; Mokgethi en Andere* v *Die Staat*, a recent and hitherto unreported judgment of this Court, pp 18 - 24). Fleming, The Law of Torts, 7th ed at 173 sums up this second enquiry as follows:
>
> > "The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default."

[43] In our own jurisdiction, the Supreme Court also restated the legal position stated above in *Mapingure v Minister of Home Affairs & Ors* SC 22/14 where the court relying on the case of *Minister of Police* v *Skosana* 1977 (1) SA 31 (A) quoted with approval what Corbett JA, delivering the majority judgment, set out the governing principles, at 34E-35D as follows:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to …….. the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part. ……..
> The test is thus whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred. The test is otherwise known as that of the *causa (conditio) sine qua non* and I agree with my Brother Viljoen that generally speaking …….. no act, condition or omission can be regarded as a cause in fact unless it passes this test."

[44] Arising from the above authorities is that if the defendant's wrongful act is not shown to be the factual cause of the harm then that is the end of the enquiry. The court will proceed to the second stage of the enquiry of legal causation once it is established that the defendant's wrongful conduct was the factual cause of the plaintiff's loss.

[45] In *casu*, the plaintiff's evidence was that the police threw spikes along Robert Mugabe Way to block the commuter omnibuses from moving along the normal way on Chinhoyi Street. The issue of the use of spikes was contentious and it is one that can be fully ventilated upon hearing evidence from the defendants who defend their use as lawful and internationally accepted tools of trade while on the other hand, the plaintiff maintained that their use was unlawful and they are instruments of violence. At this stage, all that the plaintiff had to establish was a *prima facie* case. I accept that the plaintiff set out a *prima facie* case that the use of the spikes was unlawful and wrongful, particularly in the circumstances of this case. Viewed in the context of this being deep in the busy portion of the CBD at peak period it was reckless to employ them as they did. Coupled with the violent smashing of the windscreen of the commuter omnibus in question, the throwing of the spikes triggered the chaotic scene, culminating in the accident. The harm occasioned was not too remote. There had been no *novus actus interveniens* in this case. The police must be put to their defence case to explain their conduct and rebut the position established by the plaintiff that the police conduct in the circumstances was lawful or wrongful and gross negligent or reckless. The defence's position that the use of spikes in the circumstances was lawful and that they are internationally accepted tools of trade for the police to stop fleeing suspects is what must come out from the defence's case.

[46] It was the plaintiff's evidence that in addition to the unlawful throwing of the spikes, the police officers unlawfully smashed the windscreen of the first commuter omnibus with baton sticks. I do not doubt at this stage that the plaintiff has established on a *prima facie* basis that it was not lawful policing or enforcement of traffic regulations. The law in particular s 42 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allows arresting police officers to use reasonable, justifiable and proportionate force (or minimum force) to overcome resistance upon arrest or fleeing suspects. The plaintiff's position is that the law does not permit them to smash windscreens of public or private motor vehicles or destroy the property of suspects in the name of enforcing traffic laws. They further contended that such violent and unlawful conduct cannot be part of the diary of a lawful constitutional mandate of the police of law enforcement. I accept that the conduct of the police in smashing the windscreen of one of the commuter omnibuses can be regarded as unlawful and given the presence of many civilians at peak hour and passengers aboard the commuter omnibus would also be considered reckless. The police must justify their conduct in this regard.

[47] It is common cause that the said commuter omnibuses were picking up passengers at undesignated points. That unlawful act does not justify the use of unlawful means to contain and bring suspects to book. Coupled with the use of spikes in public places and during pick hour when the volume of traffic and innocent civilians is at its peak it would be difficult to justify the police actions under those circumstances. At this stage, I am satisfied that the conduct of the police was unlawful or wrongful and negligent. The plaintiff's evidence, therefore, established that it was the wrongful conduct of the police in throwing spikes and smashing the windscreen of one of the commuter omnibuses which generated the events leading to the plaintiff's loss. But for their conduct, the accident would not have happened. They were shown to be the factual cause of the harm. The plaintiff and her witness stated that the commuter omnibuses would pick up passengers and go without any incident but on this particular day, the police's unlawful conduct of throwing spikes thereby blocking them from moving their normal way and made them turn and drive against traffic and the smashing of the windscreen of one of the computer omnibuses can rightly be said to be the *causa sine qua non* of the plaintiff's loss.

[48] About five or six commuter omnibuses sped off against one way and the police's wrongful conduct created the pandemonium and chaotic scene that ensued. Under cross-examination, the plaintiff confirmed that the act of the commuter omnibus drivers avoiding arrest by fleeing from the police was happening every day and the police officers were coming every day. Their behaviour had, therefore, become predictable and the police should have realised the dangers their actions would pose to the public. The police have to explain their conduct and that no reasonable commuter omnibus driver in such circumstances should not have behaved the way they did.

[49] Having established the factual causation, I also accept that the accident was the appropriate cause of the accident and the plaintiff's loss. In other words, it was reasonably foreseeable that the violent confrontational approach taken by the police would result in the melee that ensued and given that it was peak-hour time there was a reasonable possibility that other vehicles moving in the correct direction might be caught up by the sea of rowdy five or six commuter omnibuses coming their way. The first defendant, as admitted by the plaintiff, could only be forced off his path in a situation of sudden emergency resulting in the accident and the injury to the plaintiff and the loss of her son. From the plaintiff's evidence, she established that the police conduct was grossly negligent or reckless. The accident was reasonably foreseeable given the chaos that had erupted all stemming from the police's wrongful actions. I do not accept Ms *Tembo*'s argument at this stage that the plaintiff's loss was too remote. The police did not have to drive the vehicle in question for liability to arise.

[50] In the premises, the plaintiff established a *prima facie* case against the fourth and fifth defendants, save for the claim for loss of income which is affected by the doctrine of illegality under public policy considerations.

[51] The fourth and fifth defendants raised an issue of illegality that the plaintiff was engaged in unlawful activities while unlawfully blocking traffic on the pavement and should, therefore, not be assisted by the court. The argument was that the plaintiff's case was based on an illegal act and should not be entertained. Reference was made to the sentiments made by LORD MANSFIELD in *Holman v Johnson* [1775] 1 Crown 341 that:

> "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".

I do not agree that the principle applies to the plaintiff's cause of action. I agree with Mr *Biti* that the illegality of the profession is not the illegality of the cause of action in this case. The cause of action in this case is not the illegal vending activities but the accident itself. It was not the participation in the illegal vending business per se that resulted in the delict claimed. The loss connected to her injury arose from the accident and the loss of the minor child cannot be, therefore, defeated by the principle of illegality. The plaintiff is not seeking damages founded on an immoral or illegal act save for the loss of income from the illegal vending business. Of course, she cannot recover the loss of income from her illegal vending. The principle of public policy was further explained by Feltoe, *A Guide to the Zimbabwean Law of Delict*, 2012 at p 127 where he stated:

> "Where P suffered damage **as a result of his participation in an illegal enterprise the court may** hold that it is contrary to public policy to allow him to recover damages from a fellow criminal who caused him loss. In *Murphy v Tengende* 1983 (2) ZLR 292 (H) P was defrauded of money whilst attempting to purchase foreign currency illegally. The court held that it was contrary to public policy to allow him to recover damages." [My emphasis]

[52] The plaintiff's cause of action in this case is not founded on the illegal trade but on the accident. Her delictual claim arises from the harm caused by the police to herself and the loss of her only child. I cannot invoke the principle of illegality to bar her from claiming the loss entirely in the circumstances. I, however, accept that the claim for damages for loss of income would be the claim affected by this principle. The court cannot certainly allow the plaintiff to recover damages for loss of income from illegal vending. She admitted under cross-examination that her vending business was unlicensed and, therefore, unlawful. This fact was also confirmed by her witness. Mr *Biti*, in his submissions, accepted the fate of these damages for loss of income to be defeated by the principle of illegality. In my view, such a claim is legally unsustainable in view of the public policy considerations of illegality. It is only in respect of that claim that I must absolve the fourth and fifth defendants at this stage. They cannot continue to defend that claim.

[53] The submissions made for the fourth and fifth defendants did not touch on the quantum of the damages claimed. The application was entirely centred on liability. The onus was on the fourth and fifth defendants to show that the plaintiff failed to prove a *prima*

facie case in respect of the quantum of the damages. Ms *Tembo* conceded that her application was only challenging the plaintiff's case in respect of the liability of the defendants. I cannot, therefore, decide the issue of the quantum of the damages at this stage.

DISPOSITION

[54] In the premises, I am not satisfied that the plaintiff established a *prima facie* against the third defendant. The application for absolution from the instance by the third defendant ought to succeed as it is merited. I found no reason to depart from the general rule that costs should follow the cause. In respect of the application for absolution from the instance filed by the fourth and fifth defendants, I am satisfied that a *prima facie* case has been established save for the claim for damages for loss of income from vending activities which is not legally sustainable on the public policy ground of illegality. The costs in respect of the application by the fourth and fifth defendants shall remain in the cause.

[55] In the result, it is ordered as follows:

1. The third defendant's application for absolution from the instance be and is hereby granted with costs.
2. The fourth and fifth defendants' application for absolution from the instance partially succeeds and the following order is made:
    a) Absolution from the instance be and is hereby granted on the plaintiff's fourth claim for special damages for loss of income from vending activities.
    b) The matter shall proceed in respect of the plaintiff's other claims.
    c) Costs shall be in the cause.

DEMBURE J: ……

Tendai Biti Law, plaintiff's legal practitioners
Madzima, Chidyausiku & Museta, 3rd defendant's legal practitioners
Civil Division of the Attorney-General's Office, 4th and 5th defendants' legal practitioners