REPORTABLE (20)

GREEN FUEL (PRIVATE) LIMITED t/a **GREEN FUEL**
v
(1) HESSIE MUPFURI (2) TAWANDA NJANJI

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 11 NOVEMBER 2022 & 1 MARCH 2024

B. Magogo, for the appellant

F. Chinwawadzimba, for the respondent

CHIWESHE JA: This is an appeal against part of the judgment of the High Court (the court *a quo*) sitting at Masvingo handed down on 1 June 2022 in which the court *a quo* granted the first respondent's claim for damages for loss of business and the replacement value of her commuter omnibus.

The order of the court *a quo* reads:

"IT IS ORDERED AS FOLLOWS:

(a) An order of absolution from the instance is hereby granted in respect of the claim for the payment of US$12 666 being the value of the damaged commuter omnibus.

(b) The claim for US$13 350 (or its equivalent in Zimbabwean dollars at the applicable interbank rate at the time of payment) succeeds being damages for loss of business from 2nd of December 2018 to the 28th February 2019.

(c) The claim for damages of US$150 per day (or its equivalent in Zimbabwe dollars at the applicable inter-bank rate at the time of payment) succeeds calculated from the 1st of March 2019 up to the full payment of the value of the omnibus.

(d) Interest on the sums referred to in (b) and (c) above at the prescribed rate from the date of summons to date of full payment.

(e) 2nd defendant to meet plaintiff's costs."

The appellant appeals against part of this order, namely, paras (b), (c), (d) and (e) thereof.

THE FACTS

The facts are common cause. On 2 December 2018, a commuter omnibus owned by the first respondent was travelling from Checheche towards Tanganda when it collided head on with a Howo truck driven by the second respondent and travelling in the opposite direction. The second respondent was an employee of the appellant who, at the time of the accident, was acting within the course and scope of his employment. As a result of the accident a number of people travelling on the commuter omnibus, including its driver, died on the spot and the commuter omnibus suffered extensive damage.

The first respondent contended that it was the second respondent's negligence that caused the accident and sued the appellant on the grounds that it was vicariously liable for the delict of its employee.

In her declaration, the first respondent attributed the accident to the sole negligence of the second respondent in that:

(a) He overtook when the road ahead of him was not clear due to the dust raised by the trucks travelling ahead of him:

(b) He travelled at an excessive speed in the circumstances:

(c) He failed to keep the truck under proper control:

(d) He overtook when it was not safe to do so, and that

(e) He failed to stop or act reasonably when the accident seemed imminent.

As fate would have it, the second respondent absconded in the aftermath of the deadly collision and, for that reason, was not available to give evidence at the trial held in the court *a quo*.

The claim was contested by the appellant who denied that the accident had occurred as a result of the negligence of its employee. It averred that the driver of the omnibus had encroached into the oncoming traffic lane thereby colliding with the Howo truck. It also averred that the omnibus was operating outside its authorised route. It also disputed the currency of the first respondent's claim arguing that the Reserve Bank of Zimbabwe (Legal Tender) Regulations, S.I. 142/2019 had abolished transacting in foreign currency. For that reason, it contended that it was not competent for the first respondent to claim damages in United States dollars.

PROCEEDINGS IN THE COURT *A QUO*

The first respondent and two other witnesses testified in support of the claim for damages. The first respondent told the court *a quo* that she had purchased the omnibus in South Africa a year before the date of the accident. She could not produce receipts of the purchase price but relied on quotations from three car dealers in Mussina, South Africa. The second witness was a passenger who had survived the accident. His evidence was that the accident occurred when the omnibus was parked at the bus stop. He attributed the cause of the accident to the negligence of the driver of the truck. The third witness was the police officer who attended the scene of accident. He told the court *a quo* that based on his observations at the scene of the accident he had drawn a sketch plan. As a result, he had come to the conclusion that the accident occurred as a result of the negligence of the truck driver.

On its part, the appellant called two of its employees, a legal officer and a loss control officer. The two employees did not challenge the claim for damages *per se*. Rather they sought to dispute the *quantum* of the damages claimed. The loss control officer told the court *a quo* that the wreckage could be repaired thereby rendering the claim for the value of the omnibus untenable. He insisted that the first respondent was entitled to sue only for the costs of repair of the omnibus. The legal officer submitted that it was not competent for the respondent to claim damages in United States dollars. Both witnesses conceded that they could not challenge the first respondent's contention as to the cause of the accident because their truck driver was at large following charges of culpable homicide raised against him.

SUBMISSIONS BEFORE THE COURT *A QUO*

In its closing submissions, the first respondent identified two issues for determination by the court *a quo*, namely who caused the accident and the *quantum* of damages it suffered as a result. It submitted that the evidence adduced before the court *a quo* overwhelmingly showed that it was the appellant's driver's negligence that was the proximate cause of the accident. The appellant's driver having absconded, there was no evidence to controvert the first respondent's version of events. The first respondent further submitted that the appellant's driver was operating within the course and scope of his employment with the appellant rendering the appellant vicariously liable for its driver's negligence.

With regards the *quantum* of damages, the first respondent contended that in tendering quotations from South Africa, the best evidence available had been produced proving the value of the omnibus prior to the accident. At the time of the accident, the omnibus had been in service for only one year. The court *a quo* was urged on that basis to accept that the *quantum* of damages sought had been properly proved. In this regard, reliance was placed on the decision of this Court in *Mbundire v Buttress* SC 13/11. Reliance was also placed on the

following cases: *Hersman Shapiro* 1926 TPD 367, 379, *Ebrahim v Pittman* 1995 (1) ZLR 176 and *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S).

On the question of currency, the first respondent submitted that the omnibus had been sourced in South Africa, using foreign currency and that import duty was also paid in foreign currency. For that reason, it was argued that the court *a quo* should accept the claim sounding in foreign currency to enable the first respondent to source a similar vehicle outside this jurisdiction, namely from South Africa. It was further argued that it was in the first respondent's discretion as to where she would source the replacement vehicle and that the submission by the appellant that the vehicle be sourced locally was without merit. She also dismissed the appellant's claim that the omnibus was operating outside its authorised route as baseless since the accident occurred when the omnibus was on its authorised route as confirmed by the ZRP attending detail. The route authorised was from Chiredzi to Checheche.

The first respondent further argued that s 4 (1) (d) of S.I. 33/19 is not applicable since it only applies to assets and liabilities valued and expressed in United States dollars prior to February 2019. The first respondent had issued her summons on 4 March 2019, well after the cut-off date. For that reason, she submitted that her case was not covered by that statutory instrument. She was thus at liberty to sue in foreign currency.

In its closing submissions in the court *a quo*, the appellant submitted that the first respondent had not produced any evidence to show that its driver was properly licensed to drive the commuter omnibus. It also contended that the first respondent had failed to rebut the appellant's assertions that the omnibus was operating outside its stipulated route. For these reasons, the appellant sought to impute liability on the incompetency of the omnibus driver.

As regards the *quantum* of damages the appellant argued that the first respondent was entitled to a sum of money that would place her in the financial position she would have been in if her motor vehicle had not been damaged and that the *quantum* of such loss should be assessed as at the time the motor vehicle was damaged. It was improper for the first respondent to sue for the replacement value of the omnibus because the law of delict is concerned with compensation for the actual value of the omnibus at the time the delict is committed and not with the replacement costs. It was further submitted that in *casu* the first respondent should establish the value of the omnibus before the accident and the value of the omnibus after the accident. The difference between these two values is the quantum of damages the first respondent would be entitled to claim. The first respondent, it was alleged, failed to lead evidence on the pre-collision value and the post collision value of the omnibus. To do so, she would have needed to lead evidence from an expert witness specialising in motor vehicle evaluations. It was not enough for the first respondent to say her vehicle was damaged beyond repair. The term "beyond repair" simply means that it is not economic to repair the vehicle. It does not mean that the vehicle is valueless. It still has a residual value which is the post collision value. For these reasons it was contended that the first respondent used the wrong concept in calculating the replacement value. The court *a quo* was urged to grant the relief of absolution from the instance. In support of these submissions the appellant cited a number of authorities including *Minister of Defence v Jackson* 1990 (2) ZLR 1 (S) and *Erasmus v Davis* 1969 (2) SA 1 (A).

As for the claim of loss of business, the appellant submitted that the law requires that there be a revenue analysis supported by receipts, invoices and other documentary evidence. In *casu* the appellant contended that the invoices from South African dealers do not constitute proof of the first respondent's loss of business. For that reason, the first respondent had failed to prove her claim for loss of business. To succeed the first respondent needed to

adduce such accounting books, as would prove her daily earnings and expenses and therefore the financial position of her business.

The appellant also submitted in the court *a quo* that in terms of S.I. 33/19 the first respondent could not sue in foreign currency because all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date "shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one to one to the United States dollar."

Overally, the appellant was of the view that even if liability could be proved, the claim would not succeed because the first respondent failed to prove the *quantum* of the damages sought.

FINDINGS OF THE COURT *A QUO*

The court *a quo* identified the following to be the issues to be determined by it in light of the evidence:

(a) Whether the accident was caused by the negligence of the appellant's driver.

(b) If the answer to (a) is in the negative then "*cadit quaestio*", if the answer is in the affirmative, then there was need to determine:

  (i) Whether the first respondent is entitled to receive the full value of the loss of the commuter omnibus or only a portion thereof

  (ii) Whether payment of the loss of the commuter omnibus should be denominated in United States dollars or in local currency.

(c) Whether the respondent succeeded in establishing damages arising from loss of business earnings consequent to the loss of use of the commuter omnibus and, if so, the extent of such loss.

The court *a quo* determined that on the evidence before it the question of liability on the part of the appellant's driver had been established. It further noted that even the appellant's own witness (E. Nkomo, the loss control officer) had conceded liability. In any event, in the absence of the appellant's driver, no evidence could be adduced to challenge the evidence given by the first respondent's witnesses. It also noted that it was common cause that the appellant's driver had been acting within the course and scope of his employment thus rendering the appellant vicariously liable for its driver's misdeeds.

The court *a quo* concluded that contrary to the appellant's assertion, all indications from the first respondent's evidence and that of the attending police officer were that the first respondent's driver was properly licensed to drive this particular vehicle. It also dismissed the appellant's suggestion that the appellant's bus had deviated from its authorised route.

With regards the claim for loss of business, the court *a quo* accepted the first respondent's evidence that the daily receipts of the business were kept by the driver in the omnibus and that these were destroyed in the accident. In the circumstances, the court *a quo* held that the log book kept by the respondent provided acceptable evidence of the day- to- day state of the business. The log book detailed the sums received on a daily basis and the deductions made therefrom to cater for expenses such as food for the crew, fuel and other expenses. The court *a quo* was satisfied from the entries in the log book that the business made a daily profit of US$ 150-00, after deduction of expenses. The log book covered the period October 2018 to November 2018. It was on that basis that the court *a quo* granted the first respondent's claim for damages for loss of business in the sum of US$13 350.00.

Finally, the court *a quo* determined the issue of the currency in which the award of damages could be made. After a detailed examination of the authorities, it came to the

conclusion that the first respondent's claim could not be brought under the purview of S.I. 33/19 because, as at the effective date of 19 February 2019, the value of the first respondent's claim had not been determined. Only assets and obligations arising before the effective date and denominated in United States dollars were affected by the provisions of S.I. 33/19. For that reason, the court *a quo* found that the first respondent was entitled to sue in foreign currency, more so as at the time the United States dollar constituted legal tender as it was one of the currencies in the basket of currencies recognized for that purpose.

It was for these reasons that the court *a quo* granted the first respondent's claims in the form already indicated.

Dissatisfied with the judgment of the court *a quo*, the appellant noted the present appeal on three grounds.

GROUNDS OF APPEAL

1. The court *a quo* erred at law and misdirected itself grossly on the facts in awarding a claim for loss of business in the amount of US$ 150-00 per day arising from damages to the commuter omnibus in the absence of evidence of expenses concerning (a) employee remuneration (b) cost of wear and tear and (c) the cost of service or maintenance of the commuter omnibus which costs should have been deducted from the amount of loss of business per day.
2. The court *a quo* erred at law and misdirected itself on the facts in awarding damages for loss of business in the amount of US$ 150-00 per day without ordering a determination date upon which the last payment for loss of business per day would be made thereby making an order for loss of business in perpetuity.

3. The court *a quo* erred at law and misdirected itself on the facts in awarding damages for loss of business in the amount of US$ 150-00 per day without considering a reasonable period upon which the plaintiff would have been expected to have mitigated her loss or to have recovered her loss considering the depreciation of the vehicle and its remaining business lifespan.

The appellant seeks the following relief.

RELIEF SOUGHT

"1. That the instant appeal succeeds with costs.

2. That paragraphs (b), (c), (d) and (e) of the order of the court *a quo* be set aside and substituted with the following paragraphs:

(b) An order of absolution from the instance is hereby granted in respect of the claim for US$ 13350-00 being damages for loss of business from the 2nd of December 2018 to the 28th of February 2018.

(c) An order for absolution from the instance is hereby granted in respect of the claim of damages of US$ 150-00 per day calculated from the 1st of March 2019 up to the time of full payment of the value of the commuter omnibus.

(d) The plaintiff shall pay the second defendant's costs of suit."

ISSUES FOR DETERMINATION

The grounds of appeal raise the following issues.

1. Whether the claim for loss of business should have been awarded in the absence of expenses relating to employee remuneration, cost of wear and tear and cost of service or maintenance.
2. Whether the award for loss of business in the sum of US$ 150-00 per day represents an order in perpetuity in the absence of a determinable date upon which the last payment for that loss should be made.

3. Whether the award for loss of business at the rate of US$ 150-00 per day was competent in the absence of a consideration of a reasonable period within which the first respondent would have been expected to have mitigated or recovered loss.

SUBMISSIONS BEFORE THIS COURT

With regards the first issue the appellant submitted that it was settled that a claim for loss of business or profit requires one to deduct the expenses incurred from the gross income. The difference between these two figures is what represents the profit. In other words, the expenses must be deducted to prove the profit made or lost. It was submitted that the log book that the first respondent relied upon to prove her claim did not indicate her expenses with regards wages to be paid to the employee or the cost of maintenance of the omnibus. That way her profit margins have been inflated. For that reason, the appellant submits that it ought to have been absolved from the instance.

As for the second ground of appeal, the appellant submitted that under para (a) of the order of the court *a quo* relating to the first respondent's claim for the replacement value of the commuter omnibus, the court *a quo* granted an order of absolution from the instance. However, the court *a quo*, under para (c) of the same order, granted damages for the replacement value of the same motor vehicle. The self-contradiction in the order of the court *a quo* is evident. Further, the appellant avers that this order under para (c) is an order in perpetuity in that no cut-off date for the daily payment of US$ 150-00 was determined.

With regards the third ground of appeal, the appellant submitted that the condition of the omnibus prior to the collision should have been established in order to determine its expected lifespan, a factor to be taken into account in determining the *quantum*

of damages for loss of business. It argues that no valid certificate of fitness had been produced to indicate the road worthiness of the vehicle prior to the collision.

On its part the first respondent's submissions before this Court were to the following effect. It is clear that the three grounds of appeal attack the findings of fact, made by the court *a quo.* It is trite that for a finding of fact to be upset on appeal, it must be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his or her mind to the question to be decided could have arrived at such a conclusion. In support of this proposition, the first respondent cited the well-known cases of *Hama v National Railways of Zimbabwe* 1961 (1) ZLR 64 (5) and *Zinwa v Mwoyounotsva* 2015 (1) ZLR 935 (5). The appellant has not, in its grounds of appeal or its heads of argument dealt with the essential question, namely, whether or not the findings of fact complained of are outrageous. It is further submitted that damages may be categorised into two categories i.e. those that can be assessed with exact mathematical precision and those that cannot be so assessed. In the absence of exact mathematical precision, a court is entitled to estimate an amount and make an arbitrary, global award according to what it deems fair and reasonable. Unless a party demonstrates manifest irrationality, an appeal court cannot substitute its own view of what is a fair and reasonable *quantum* of damages. In *casu*, the first respondent avers that all the findings of the court *a quo* are reasonable and cannot be impeached. In particular it was submitted that the court a *quo* correctly accepted the cash in log book as evidence of earnings of US$150.00 per day and properly quantified loss of business for two periods, namely 2 December 2018 to 28 February 2019 and 1 March 2019 to the time of the full payment of the value of the commuter omnibus. In other words, damages for loss of business would continue until such time as the replacement value of the vehicle had been paid.

ANALYSIS

The order of the court *a quo* is flawed in a number of respects. Under para (a) of that order the court *a quo* absolved the appellant from the first respondent's claim for the replacement value of the commuter omnibus in the sum of US$ 12 666.00. By dint of that order the court *a quo* absolved the appellant from the obligation to pay damages for the loss of the motor vehicle. That notwithstanding, the court *a quo* surprisingly under paras (b) and (c) of its order, directed that the appellant pays the sum of US$ 13 350.00 being damages for loss of business from 2 December 2018 to 28 February 2019 in instalments of US$ 150.00 per day and a further US$ 150 per day from 1 March 2019 up to the full payment of the value of the vehicle.

The order of the court *a quo* is self-contradictory in that para (c) cannot exist in the absence of a finding that the appellant is liable to pay for the loss of the vehicle in the first place. Once the appellant is absolved in that respect the order to pay US $ 150 per day till the replacement value of the vehicle is paid up is meaningless since the appellant has been absolved from liability to pay that replacement value.

The order for the appellant to pay US 150.00 per day for loss of business from 2 December 2018 to 28 February 2019 cannot stand because in her claim for loss of business, the first respondent omitted to deduct from the anticipated profit certain expenses which are incurred directly in the operation of her business. These relate to wages for the bus crew and service or maintenance of the omnibus. The cash in log book does not provide information as to the *quantum* of these expenses which must be deducted from the earnings of US $150.00 per day. Whilst the log book reflects expenses relating to food for the crew, it is silent as to the wages of the same crew. The figures pertaining to these expenses must be presumed to be within the first respondent's knowledge. She did not disclose them. Her profit margin of US $150.00 per day is therefore inflated as it does not exclude these expenses.

In the South African case of *Esson Standard SA (Pvt) Ltd v Katz* 1981 (1) SA 964 (A) at 970 E it was held that the court was not bound to award damages where evidence that is available to the plaintiff has not been produced. In such circumstances the court is justified to give absolution from the instance. See also *Ebrahim v Pittman NO* 1995 (1) ZLR 176H, *Aaron's Whale Rock Trust v Murray* and *Roberts Ltd & Anor* 1992 (1) SA 652 (C), *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd* SC 25/2012 and *Mazanhi v Marovanidze & Anor* HH 60/2009.

It is clear from the authorities that where evidence is available in an *aquilian* action, a litigant should put the evidence before the court to enable it to properly assess the *quantum* of damages to be awarded.

On the evidence placed before the court *a quo* an order of absolution from the instance with regards the replacement value of the motor vehicle was warranted. This is so because the first respondent failed to prove the pre-collision and post collision value of the motor vehicle. The first respondent has not challenged the propriety of that order by way of a cross appeal. The order must stand.

The first respondent's contention that the court *a quo`s* decisions were predicated on findings of fact which cannot be challenged in the absence of proof that such were grossly irrational is ill conceived. The basis of the appellant`s appeal is twofold. Firstly, it attacks the court *a quo`s* decision to grant the first respondent`s prayer for the replacement value of the vehicle under circumstances where it had, in para (a) of its order, determined that absolution from the instance be the fate of such claim.

Secondly, with regards the claim for loss of business, the appellant`s thrust is that certain facts had not been placed before the court *a quo* for its consideration, which facts were relevant to the determination of the *quantum* of such damages for loss of business. These were the expenses relating to the remuneration or wages of the bus crew, the cost of service or maintenance and depreciation of the lifespan of the bus through wear and tear. Thus, the allegation is not that the court *a quo`s* findings on the facts was irrational but, rather, that certain facts relevant to the inquiry at hand had not been put before it for its consideration.

DISPOSITION

The appeal has merit. It must succeed. The appellant has shown that there being no order in favour of the first respondent for payment by the appellant of the replacement value of the omnibus, it was not competent for it to order such payment in instalments in para (c) of its order. The court *a quo* had in fact, under para (a) of its order, granted absolution from the instance with regards that claim.

The appellant further proved that the figures presented by the first respondent as proof of its earnings or profit did not include, for deduction from such earnings or profit, expenses relating to the wages of the bus crew, service or maintenance of the bus as well as wear and tear. For that reason, the resultant figure for loss of business in the sum of US $150.00 per day was inflated to the prejudice of the appellant.

Cost shall follow the cause.

Accordingly, it is ordered as follows:

1. The appeal succeeds with costs.
2. Paragraphs (b), (c), (d) and (e) of the order of the court *a quo* be and are hereby set aside and substituted with the following :

"(b) An order of absolution from the instance is hereby granted in respect of the claim for US$ 13350-00 being damages for loss of business from the 2nd of December 2018 to the 28th of February 2018.

(c) An order for absolution from the instance is hereby granted in respect of the claim of damages of US$ 150-00 per day calculated from the 1st of March 2019 up to the time of full payment of the value of the commuter omnibus.

(d) The plaintiff shall pay the costs of suit."

UCHENA JA : I agree

CHATUKUTA JA : I agree

Ahmed & Ziyambi, appellant's legal practitioners

Ndlovu & Hwacha, respondent's legal practitioners