

MKANDLA TOURS AND TRANSPORT

PLAINTIFF

Versus

UNIQUP (PVT) LTD

1ST DEFENDANT

And

TAWANDAPUCHE

2ND DEFENDANT

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO8 & 9 NOVEMBER 2012 & 21 FEBRUARY 2013

N. Ndlovu for the plaintiff

N. Mazibuko for 1st defendant

Civil Trial

CHEDA AJ: The plaintiff issued summons against the defendant claiming damages totaling ZAR587 500.00 arising from a traffic accident in which he said the defendant's vehicle collided with, and caused damage to his vehicle.

He said the accident was due to the negligence of the 1st defendant's driver who is the 2nd defendant. The summons was served on the 1st defendant only. The 2nd defendant could not be located. However, an appearance to defend was filed for both defendants by their legal practitioner. They requested particulars which were supplied. In his plea, 1st defendant pleaded that the 2nd defendant was on a frolic of his own at the time of the accident and denied liability and putting plaintiff to proof thereof concerning the claim and other averments.

The 2nd defendant said in his plea that he was driving the 1st defendant's vehicle as that is his employer. He said that he was not acting within the course of his employment with the 1st defendant at the time of the accident but in any case he denied liability and put the plaintiff to proof thereof.

In preparation for trial the plaintiff filed a synopsis of evidence in which he said he would lead evidence to show that on the 13th day of July 2010, at the intersection of 3rd Avenue and Herbert Chitepo Street, in Bulawayo, 1st defendant's haulage truck rammed into the plaintiff's vehicle and that the accident was due to the negligence of the 2nd defendant. He particularized the negligence of the 2nd defendant. He said his vehicle was damaged beyond repair and he suffered loss of income. He was claiming ZAR587 500,00.

When the trial commenced the plaintiff's driver was called first. He narrated how the accident occurred at the intersection of Herbert Chitepo and 3rd Avenue. He said the defendant's vehicle approached from his right side, ignored a Give Way sign and rammed into the plaintiff's vehicle which he was driving. In answer to questions put to him he said as an

employee he was not in a position to give details about the correct identity of the plaintiff in the papers whether it is a company or an individual.

He said he did not know about the value of the vehicle or the possible costs of its repair. He was therefore unable to answer any questions concerning the value of the damages claimed by the plaintiff.

This gap in the evidence of plaintiff's case required the direct evidence of the plaintiff. Order 46, Rule 408 of the High Court Rules provides that in the absence of any agreement in writing, between the legal practitioners of all the parties, and subject to these rules, the witnesses at the trial of any action shall be examined *viva voce* and in open court, but the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court may think reasonable, or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner.

In this case no such arrangement was made, and no explanation was given for not calling the plaintiff. In addition to calling evidence the plaintiff in a claim for damages has to prove the damages. He cannot leave it to the court to work out damages for him. Only the plaintiff could give evidence as to the value of the vehicle when it was purchased, the value of the vehicle at the time of the accident, or what it would cost him to repair it.

The plaintiff's legal practitioner called 2 expert witnesses to testify on the reasons why the vehicle could not be repaired. Their evidence concerned the damage to the vehicle and that trying to prepare it for subsequent use as a public service vehicle would render it dangerous to passengers. None of these witnesses could give evidence as to the value of the vehicle prior to the accident and the loss suffered by the plaintiff for the loss of its use. All they could do was to estimate the cost of similar vehicles, evidence which remained unsatisfactory. This evidence could not be relied on as proof of the damages suffered by the plaintiff.

After this evidence plaintiff's case was closed.

Other documents filed in this case showed that the vehicle was registered in the name of Teddy Mkandla. On seeking the correct identity of the plaintiff counsel for the defendants was unable to get any clarification in the absence of the plaintiff.

When the plaintiff's case was closed the matter could have ended there. However, defendants submitted that instead of absolution from the instance they preferred to lead their evidence so that the matter is brought to finality. Evidence of the defendant was then led and 1st defendant persisted in his denial of liability.

At the end of the hearing it was clear that the plaintiff, who had undertaken in his synopsis of evidence filed, to lead evidence to prove his damages, had not led such evidence.

No reason was given for not calling him. Plaintiff therefore failed to prosecute his claim as required by the Rules of Court which require that he give *viva voce* evidence and be cross-examined.

He was not present even to explain the query about the correct ownership of the

damaged vehicle.

The law requires that a party who is claiming damages must prove his damages in court. A party cannot send documents to court and leave it to the court to determine the claim for him. What he stated in the summons must be substantiated in open court by his *viva voce* evidence.

In this case the case ended without the plaintiff's evidence, and as such the plaintiff has not proved his case.

The end result is that the plaintiff's case is dismissed with costs.

Messrs Cheda & Partners, plaintiff's legal practitioners

Messrs Calderwood, Bryce Hendrie & Partners, 1st defendant's legal practitioners