HB 55-18
HC 279/15

NDABEZINHLE MAZIBUKO
versus
BROADWAY SPAR EXPRESS

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 3 OCTOBER 2017 AND 15 MARCH 2018

Civil Trial

J Mugova for the plaintiff
C Dube-Banda with *S Sihwa* and *D Abraham* for the defendant

MOYO J: Plaintiff issued summons against the defendant in this matter claiming

(i) Payment of the sum of $25000-00 being general damages for *injuria*, shock, trauma, and loss of expectation of life suffered by the plaintiff as a result of defendant's gross negligence and wrongful breach of duty of care owed to plaintiff in selling to plaintiff a spar fruit juice beverage product containing a disgusting deleterious substance, which product was unsuspectingly consumed by plaintiff.

(ii) Payment of interests a *temporae morae* on the sum of $25000-00 or any other sum that may be awarded by the court, at the prescribed rate of interest calculated from the date of issue of summons to date of full payment.

(iii) costs of suit.

The facts of this matter are that plaintiff allegedly purchased fruit juice from the defendant supermarket. One of them, it is alleged contained an unknown substance which is referred to by plaintiff as being deleterious and disgusting. The box with the alleged substance was tendered in court. The alleged substance is no longer per its original looks as per plaintiff's own testimony.

Plaintiff tendered photographs that allegedly depict the substance as it was at the material time. However, the photos were enlarged per plaintiff's own testimony and were therefore not original.

Plaintiff also tendered the box that allegedly contained the juice being the subject matter of this case.

The defendant's counsel strenuously opposed the admissibility of the photographs and the physical object. He challenged the admissibility of the photographs as they were confirmed as not being original because they were magnified. He agreed that the physical substance itself is admissible but that it should not be of any probative value since its integrity has been compromised by the unknown conditions it was kept under and that with time it may well have changed in form colour and odour.

The defendant disputes that plaintiff purchased the alleged juice form its outlet.

The defendant also disputes that the alleged juice contained the substance as presented by the plaintiff. Consequently, defendant also disputes liability at all. Defendant also disputes that plaintiff suffered any damages at all.

The first issue for determination is the factual aspect of this case. What happened? Did plaintiff purchase the juice from the defendant as alleged? If he did, did the juice contain a deleterious and disgusting substance as claimed by plaintiff? This is an evidential enquiry that the court has to assess from the facts as presented before it. Matters can be proven in a court of law through either *viva voce* evidence or other tangible forms of evidence where they are available. Plaintiff led viva voce evidence and narrated that he purchased the juice being the subject matter of these proceedings from defendant's outlet. He says he no longer has the receipt as he naturally would not keep his daily supermarket receipts as he would have no future use for them. He also says that it was about four days after the purchase that he discovered this foul substance inside one of the juices. Defendant adduced no evidence to the contrary, save to assert that where a customer would have bought something from them, a receipt is the only form of connection between themselves and the item allegedly bought. As I have already stated, plaintiff gave unchallenged viva voce evidence, which had no shortcomings in so far as the rules of admissibility of oral evidence are concerned. He gave his testimony well and in the absence of any version to the contrary, the court has no option but to make a factual finding that plaintiff did purchase the alleged juice from defendant for why would plaintiff allege that he purchased the juice from this particular shop when he did not? It is common cause that this was a Spar brand drink and it is only sold at a Spar outlet. He then points at the defendant shop as the shop he bought the juice

from and there is no reason shown in his court account as to why he would want to exonerate a particular Spar shop and settle for the defendant shop. It is for these reasons that a factual finding is made that plaintiff indeed purchased the alleged juice from the defendant shop.

The second factual issue to resolve is the aspect of whether the juice did contain the substance as described by the plaintiff in his evidence. Of course, similarly plaintiff gave a narration of how he discovered this deleterious and disgusting substance inside one of the juices. Again, he discovered this substance in the comfort of his house, and the defendant was nowhere near there. It is only his evidence that is available as to what transpired. His *viva voce* evidence on this discovery and disgust certainly cannot be challenged by anyone as he is the only person that was there. Neither have I been shown through the cross examination of the plaintiff that he is fabricating this whole issue. Clearly, plaintiff did find a substance in the juice as alleged, in my view. What remains unknown is the nature of the substance and what precisely it was as it was never examined. Plaintiff also told the court of his numerous visits to the defendant's shop and indeed some interaction did occur after the alleged discovery of the substance. It is therefore the finding of this court that such substance did exist as alleged.

Of course as to the true nature of the substance, the photographs tendered before this court and the physical substance itself do not in any way compliment or give a clearer picture to the court for the simple reason that the photographs were interfered with when they were magnified and the circumstances under which the substance was kept where not proven to have kept it in similar form and nature and even plaintiff himself confirmed that with time it had changed in form and appearance. The photographs and the substance itself are therefore of no probative value in my view.

I now move on to deal with the law as it is applicable to the facts before me. The first point to determine on the law is the defendant's duty of care and its consequent liability to the plaintiff for goods it sells to members of the public. The defendant, clearly as a merchant owes its customers a duty of care in so far as the products it sells to the public are concerned. This duty of care in my view entails stocking its shop with goods from reputable manufacturers of goods. It also has a duty to check the labels and the packaging to ensure that it conforms with the accepted standards of safety. Having done that a question immediately arises as to whether defendant is also liable as to the nature of the contents in a sealed package which is properly

labelled and packaged. Does the defendant owe its customers a duty of care beyond the labels and the proper packaging from reputable manufacturers?

I believe not and here is why. The defendant clearly is not the manufacturer of the juice in question. It cannot vouch for the authenticity, cleanliness or propriety of the contents of a sealed juice. This court takes judicial notice of the fact that juices are sold in sealed packaging and the box that was tendered before this court is opaque, one cannot see through it to examine the contents. Only the customer breaks the seal on the packaging and the merchant cannot break same, check the contents and then re-seal as this would expose customers to improper handling of goods which is precisely the reason why the manufacturer seals with seals that only the customer after purchasing a product would break.

I am persuaded in this regard by the findings of the court in the case of *Donoghue* v *Stevenson* 1932 AC 562 p. The facts of this English case, which is persuasive in my view, are that the plaintiff purchased ginger beer manufactured by the defendant at a restaurant. As he shared the ginger beer with another party, they were pouring the ginger beer on a plate of ice cream. As they poured the remainder a snail fell out onto the ice-cream. The plaintiff therein claimed that she fell ill from the sight of the snail and complained of abdominal pain. She consulted a Doctor and was later hospitalized. The court in that case held that the manufacturer owed a duty of care towards the consumers of its product. In this instance, it was the manufacturer and not the merchant who was at fault. The bottle in the *Donoghue* case *(supra*) was opaque and there was no possibility of any intermediate inspection before the consumer used the contents. Again in the case of Grant v Australian knitting Mills 1936 AC 85 the plaintiff suffered from dermatitis after purchasing underwear from a shop. The court in that case held the factory (the manufacturer of the product) liable for the damages as they had manufactured the products.

Professor Feltoe in his *Guide to the Zimbabwean Law* of delict 2012 Edition at page 9 he explains the duty of care as "that a person is said to have breached the duty of care (i.e to have been negligent) when he fails to foresee and guard against harm which the reasonable person would have foreseen and guarded against." I believe this is where the crux of the matter is in this case. Defendant had a duty of care towards plaintiff as its customer and had to take reasonable steps to guard against any harm to the plaintiff. So how would defendant then exercise this duty

of care as a merchant, as certainly the juice was not manufactured by the defendant shop but by Spar Zimbabwe its main distributor? What are the reasonable steps that a merchant in defendant's shoes should take in the supply of fruit juice that is ordered sealed in opaque packaging? I believe defendant's duty of care ends with ensuring that the goods are from a reputable manufacturer, that the packaging is intact and that the shelf life is still current in other words that the goods are not past their sell by date. Beyond that I hold the view that the defendant cannot prophesy as to the cleanliness or propriety of the contents. That the defendant shop is a Spar franchise and that the juices are a spar brand, cannot in my view stretch the defendant's duty of care to be that equivalent to a manufacturers' as clearly defendant cannot be reasonably expected to know the contents of the juice bottle other than that it should be as per the packaging labels. I believe that is essentially the reason why the *Donoghue* case (*supra*) and the *Grant* case (*supra*) have the manufacturers as the defendants in my view. I believe the plaintiff should have either sued Spar Zimbabwe from the outset as the manufacturer in this case or even joined them later in light of the defence proffered by the defendant.

In the case of *Delta Beverages Pvt Ltd* v *Onisimo Rutsito* SC 42/13, the Supreme Court held that it is now settled law that the liability of a beverage manufacturer, or brewery is not absolute. If the steps taken to avoid contamination were reasonable in the sense that nothing more could reasonably have been done, then it would not be liable because it would not have been negligent. The Supreme court referred in that case to the case of *Delta Operations Pvt Ltd t/a Natbrew* v *Charles Naraura* SC 106/99. From this proposition, it appears that even the manufacturer itself would escape liability where reasonable steps were taken in the production of the beverage. The question that immediately follows is, if the manufacturers liability is not absolute, can the plaintiff's submission that defendant is strictly liable as a distributor of products be sustained? I believe not. The rule that a manufacturer cannot be liable where reasonable steps have been taken to produce a beverage, should apply with equal force to a merchant who has also taken reasonable steps within its powers, to make sure that a product is proper for human consumption. To say the liability of the merchant goes beyond that would be folly in my view. I hold the view that the decision in *Locke* v *Nightman and Co Ltd* 1949 SR 216 has now been overtaken by the aforementioned Supreme Court cases in our jurisdiction. Our Supreme Court in looking at the principles of the Aquilian Action and the requirements therein as

enunciated in the legal texts and the fundamental principle that there can be no liability where reasonable steps within one's capabilities have been taken to ensure that a product is safe are the ones that are applicable. In other words there can be no liability without fault or negligence. I believe the reason why the Supreme Court has taken this stance is clearly founded on the known or and established principles of the law of delict which clearly stipulate that, for one to be liable, one should have fallen short of the reasonably accepted standard of care which I believe should have been the basis of the plaintiff's case rather than the mere fact that defendant sold the juice then it follows that it is liable. I believe such a stance in the absence of a statutory provision has no foundation in the principles of the law of delict under the Aquilian action.

The next question is, even if it had been held that the defendant did owe plaintiff a duty of care in the circumstances, has plaintiff proven any case for damages? The plaintiff submits that when he saw this substance, he felt sickened, he felt like throwing up, he was disgusted, it was not a nice feeling, he did not sleep properly, that thing kept on coming back in his mind. It had an impact emotionally and his tummy got upset. He went to the doctor and was given some pain killers and antibiotics just in case he had an infection of the stomach. He could hardly eat for several days thereafter. He could not drink any juice soon thereafter. He could not eat properly. He however, still went to work the following day as he argued a matter before the Supreme Court after driving all the way from Bulawayo to Harare. The plaintiff did not produce any medical evidence to support his claim. It is trite that to sustain a claim for damages which are medically motivated, a medical report should be submitted as medicine is an area of expertise and only a doctor can confirm an illness, is extent and its effects on a patient. No such evidence was adduced. Neither was the sum of $25000-00 shown to be the appropriate remedy in terms of the quantum of damages payable.

GARWE JA stated in the case of *Delta Beverages Ltd* v *Onisimo* SC 42/13 at page 8 of the cyclostyled judgment at paragraph 3 on that page that:

> "The position may therefore be accepted that it is not every complaint that warrants an award of damages. The complaint must lead to a recognized medical condition which would require treatment before such damage can be cognizable in terms of the law."

In the same case the learned judge stated thus at page 9 paragraph 3 therein,

> "In the result therefore, I am satisfied that the respondent did not prove any damage such as would have founded a cause of action under the law of delict. Clearly whatever distress or anxiety or nervous shock he may have experienced was transitory and no psychiatric or other medical condition requiring treatment eventuated."

It was the view of the Supreme court in that case that medical evidence had to be adduced to sustain the claim for damages. Clearly in this matter, no medical evidence was tabled by the plaintiff and consequently no medical facts exist for the formulation of a basis for a claim for damages. Lack of proof on medical evidence was also held in the case of *Baikepi* v *Kgalagadi Breweries* 2005 (2) BLR 32 (HC) to mean failure to prove any damages on plaintiff's part.

My conclusion is therefore as follows:

1) That plaintiff has failed to prove any injury that leads to compensation under the aquilian action as no basis whatsoever for the claim was laid in terms of medical evidence.
2) That plaintiff has failed to prove defendant's liability as a result of defendant's failure in its duty of care towards it customers.
3) That plaintiff has failed to sustain the amount of $25000-00 as damages that he suffered since there is no medical evidence to show that plaintiff did suffer any injury as alleged or at all, or that if he did suffer injury, to what extent such injury was suffered.

It is for these reasons that plaintiff's claim fails. Accordingly, plaintiff's claim is dismissed with costs.

Dube-Banda, Nzarayapenga and Partners, defendant's legal practitioners
Calderwood, Bryce-Hendrie and Partners, plaintiff's legal practitioners