

AFESI MKHWELI  
**versus**  
SHINGIRAI MARUFU  
and  
POSTAL AND REGULATORY AUTHORITY  
OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 12 MARCH 2019 AND 11 APRIL 2019

### **Civil Trial**

*V Majoko* for the plaintiff  
*G Nyoni* for the 1<sup>st</sup> defendant  
*L Nkomo* for the 2<sup>nd</sup> defendant

**MOYO J:** In this matter plaintiff issued summons claiming;

- a) payment in the sum of \$42 448,78, for damages suffered arising from a motor vehicle accident which occurred on the 31<sup>st</sup> of December 2016, when 1<sup>st</sup> defendant, an employee of the 2<sup>nd</sup> defendant drove a motor vehicle negligently thereby causing plaintiff injuries and losses in respect of which plaintiff sues defendants jointly and severally.
- b) Interest at the prescribed rate from the date of demand (19 March 2018) to date of payment.
- c) Costs of suit.

In the declaration, the claim is amplified in paragraph 12 thereof where it is broken down as follows:

- a) Shock, pain and suffering \$2500-00
- b) Past medical expenses \$1230-38
- c) Future medical expenses \$3750-00
- d) Past loss of earnings \$1890-60

- e) Future loss of earnings \$24557-80.
- f) Permanent disability and loss of amenities \$8500-00.

The particulars of negligence pleaded are that:

- i) 1<sup>st</sup> defendant drove recklessly without regard to the safety of other road users.
- ii) He drove at an excessive speed in the circumstances.
- iii) He failed to keep the vehicle under proper control.
- iv) He failed to avoid a collision when by exercise of due diligence and skill he could have avoided it.

The plaintiff took to the witness stand and told the court that on the fateful day he rode a commuter omnibus and was seated next to the driver in front. He further told the court that the oncoming vehicle (the 1<sup>st</sup> defendant's motor vehicle) then encroached on the lane of the commuter omnibus that he was in, resulting in a collision. He also told the court that where the accident occurred motor vehicles bypassing each other should move to their extreme left in order to share the road. He said first defendant's motor vehicle seemed to be speeding as it was shaking. He said the first defendant's motor vehicle veered into their lane and hit their motor vehicle. He said the commuter omnibus driver did not do anything to avoid the accident and that the first defendant's motor vehicle landed on their side of the road, crossing the road. He said as a result of the accident, he sustained a fracture on his right leg. He said he was admitted in hospital for some four months. He said he continued receiving treatment for a whole year. He said the Doctor said he sustained 40% disability, he tendered the medical report which was marked Exhibit 1.

He said the accident was caused by the first defendant who drove at a high speed. He said that he had been employed before and that he could not go back to work after the accident and was then stopped from working. He said that his Doctor wrote a letter to his employer that he should stop working. He also tendered his payslip for the time before he was retired and it was marked Exhibit 2. He said he could no longer use the leg in the same manner as he could not walk properly. He said he expected to spend no less than \$5000-00 in future medical costs.

During cross examination by the first defendant's counsel, the following pertinent issues were raised.

Q: What did the driver of the commuter omnibus do?

A: I remember that it remained on its rightful lane.

Q: Did he try to move to the side of the road?

A: I did not notice that.

Q: And yet you said when motor vehicles pass each other, they should move to the extreme left.

A: True

Q: So this kombi driver ought to have done that?

A: I would not dispute that

Further, still during cross examination by first defendant's counsel plaintiff was asked

Q: His car skidded because of the clay on the road?

A: I would not deny that

Q: And that he did take off his left wheels off the road and the right wheels remained on the tar.

A: I agree to that.

Q: And that is what a driver should do where the road is narrow.

A; Yes

Q: First defendant will state that the commuter omnibus remained largely on the road, instead of moving to the side.

A: I would not dispute that.

Q: And that just as you were about to pass each other, he noticed that the commuter would not move off the road, he then moved further to the left.

A: I would not dispute that.

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Q: If first defendant says while he tried to move further to the left, his car skidded towards the commuter omnibus.

A: I would not deny that.

During cross examination by second defendant's counsel plaintiff admitted that the proof of discharge from employment on medical grounds was not tendered before the court.

Plaintiff also admitted during cross examination that he did not lead evidence on all the sums as claimed in the summary to justify them.

Plaintiff called a witness one Makhosini Ndlovu a police officer who was one of the police details that attended to the accident being the subject matter of these proceedings. He arrived at the scene after the accident had already occurred. He basically complimented plaintiff's assertions. He said that he used the skid marks to determine the land cruiser's speed which made him believe it was speeding.

At the close of plaintiff's case the defendants applied for absolution from the instance on many grounds including the ground that first defendant's liability had been negated by plaintiff's concessions to the first defendant's case during cross examination. Also, on the ground that no evidence had been led to verify the amounts claimed including the aspect of loss of employment. (see paragraphs 28, 32, and 35) of second defendant's application for absolution together with paragraphs 4.4, 4.5 and 4.8 of the first defendant's application for absolution.

In his response to the application, plaintiff's counsel at pages 6-8 addresses the part that the defendants base their application on concessions made by the plaintiff during cross examination and that however plaintiff maintained that first defendant was speeding and that this was complimented by Makhosini Ndlovu.

I then turn to look at the issues before me with a view to resolving them. In dealing with such an application, this court should be guided by the principle enunciated in the case of *Supreme Service Station Pvt Ltd (1969) v Fax and Goodridge* 1971 (4) SA 90 (RA). At page 92C-E BEADLE J as he then was stated thus:

"The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the *Old Transvaal* case of *Gas Coyne v Paul and Hunter* 1971 TPD 170 where it was stated that such an application stands much on the same footing as an application for discharge at the close of evidence by the prosecution."

He went on at page 93C to state that:

"The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?"

In this case plaintiff is claiming damages for personal injury. The elements of the law of delict pertaining to plaintiff's claim are as follows:

- 1) There must be harm suffered by plaintiff.
- 2) There must be wrongful conduct on the part of the defendant
- 3) There must be a causal link between the defendant's conduct and the plaintiff's harm.

This is as per *JC Vander Walt & Rob Midgley 2005* at paragraph 2. It is only after these three points have been satisfied that the court will then proceed to look at whether plaintiff has sufficiently laid a *prima facie* case for the quantum of damages themselves which also need to be justified and proven.

In this case the court has to make a finding on the cause of the accident itself. If a *prima facie* foundation has been made against the first defendant as having been the cause of the accident then the defendants have a case to answer. If a finding cannot be made, *prima facie* that first defendant's conduct was the cause of the accident then absolution must and should be granted as the second element provided for in *Vander Walt (supra)* would not have been satisfied.

The plaintiff gave evidence to the effect that first defendant was the cause of the accident in that he encroached into the lane of the commuter omnibus resulting in the collision. That he was also speeding. This would have otherwise laid a proper foundation for the plaintiff's case on the aspect of liability. The problem however, arose during cross examination in my view. During cross examination as already quoted herein plaintiff admitted to certain aspects of the accident as presented by both counsels, that tended to vitiate his claim. I say so for the following reasons.

For plaintiff to succeed, it is an essential element of his claim that first defendant's actions were wrongful (negligent or reckless as pleaded in the summons). In other words, plaintiff's case rests on recklessness, negligence, excessive speed and failure to keep a motor vehicle under proper control. For plaintiff to succeed in this respect, he should have led evidence that shows that the accident was as a result of first defendant's conduct in one or many ways that would entail wrongfulness. It was then self-defeating, and killing his own case, for plaintiff to concede to the defences being tabled during cross examination.

I consider the following concessions fatal to the plaintiff's case and I will further explain why I say so. Their effect in my view is to render the plaintiff's case hollow.

- 1) That the commuter omnibus driver did not move to the far left as is the norm on this stretch of the road since two motor vehicles could not safely by pass each other without doing so.

This concession in my view, shows that the first defendant was not the cause of the accident but that the commuter omnibus driver was.

- 2) The concession that the first defendant did move to the extreme left as is the norm shows that the first defendant did what was expected of him in the circumstances, so where would be his wrongful conduct?
- 3) Plaintiff also conceded that the first defendant's car skidded because of the clay on the road. The moment one concedes that road conditions caused the first defendant's motor vehicle to skid how would you then impute wrongfulness on the 1<sup>st</sup> defendant?
- 4) Plaintiff also conceded that first defendant's motor vehicle skidded to the wrong side of the road as a result of his attempt to move further to the left to avoid the commuter omnibus.

The moment the plaintiff concedes to the first defendant's defence, the matter should end there in my view. What would be left for the defendants to answer in such a case in which plaintiff has agreed that it was not because of wrongfulness on their part but because of an attempt to avoid the commuter omnibus which in itself did not drive per the norm on that stretch of the road on the day in question?

Defendants should be put to answer plaintiff's case where wrongfulness has been established (albeit, *prima facie*) on their part. I consider that plaintiff's concession in fact absolved the first defendant and accepted his defence on how the accident happened.

Plaintiff's counsel submits that plaintiff maintained that first defendant drove at an excessive speed on the day in question and that this establishes a *prima facie* case against the defendants.

The problem I have with making a finding that plaintiff's sentiments that first defendant drove at an excessive speed lay the basis for plaintiff's case are that the issue of speed is not properly canvassed as it is firstly, not substantiated by plaintiff, he merely used his eyes to

deduct speed and even if one were to give him the benefit of the doubt, and take it that Makhosini Ndlovu tried to substantiate such a claim, his assertions on speed are then destroyed by his concessions to first defendant's defence that the commuter omnibus driver drove in an improper manner and did not move off the road to allow the two motor vehicles to bypass each other and that plaintiff accepted that first defendant's motor vehicle skidded on the mud while trying to move further off the road to avoid the commuter omnibus. Plaintiff's case is that first defendant acted wrongfully on the day in question, that he drove negligently, recklessly, failed to control the motor vehicle and also drove at an excessive speed. This, and first defendant's defence that in fact it is the commuter omnibus driver who did not share the road properly as was the norm, causing him to move further left and thus skidding on the mud resulting in the accident, are in fact mutually exclusive. It is either first defendant caused the accident or the commuter omnibus driver caused the accident. Plaintiff cannot on one hand agree with first defendant on the aspect of his defence that shows that he did not commit any wrongful acts but that the commuter omnibus driver did, and on the other, insist that first defendant caused the accident due to speed.

In other words, plaintiff's concessions during cross-examination discredit plaintiff's claim as against the defendants on the aspect of wrongfulness. It means the element of wrongfulness on the part of the defendants have not been established by the plaintiff. The aspect of wrongfulness, being an essential element formulating the basis for plaintiff's claims against the defendants, if it has been destroyed during cross-examination, what evidence then remains against the defendants, evidence upon which a court may make a reasonable mistake and find for the plaintiff? I hold the view that there is none, because defendant's defence has been accepted, plaintiff's case is doomed and the defendants cannot be held to have a case to answer in my view. In the cases cited by the plaintiff's counsel I have not seen one where the plaintiff therein, accepted the defendant's defence, thereby conceding that it has no case, but nonetheless the court found that the defendants must answer the discredited case. There is also a problem with the lack of evidence to support some of the heads of damages claimed but I will not deal with that as I am of the view that that is only relevant where wrongfulness (liability) has been established which I hold is not the position in this case.

I accordingly hold that plaintiff has failed to establish an essential element of his claim, and that is, the defendant's wrongful conduct on the day in question. Once plaintiff conceded to the first defendant's account, which exonerates him from any wrongdoing the plaintiff's case was shattered at that stage in my view.

It is for these reasons that I hold that there is no case established by plaintiff upon which a burden has been cast on the defendants to respond.

I accordingly grant defendants' application for absolution from the instance, with plaintiff being ordered to pay the costs.

*Majoko and Majoko*, plaintiff's legal practitioners  
*Messrs, Moyo and Nyoni*, 1<sup>st</sup> defendant's legal practitioners  
*C Kuhuni Attorneys*, 2<sup>nd</sup> defendant's legal practitioners