

MONICA KOMICHI
versus
DAVID EDWIN TANNER
and
EATON & YOUNG

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 11 and 23 November 2005

Civil Trial

Mr *Masendeke*, for the plaintiff
Mr *Mehta*, for 1st defendant

MAKARAU J: At the pre-trial conference of this matter, the parties agreed to proceed by way of a stated case as most of the facts giving rise to the suit are common cause.

On 6 December 2002, the plaintiff was driving her motor vehicle, Peugeot 405, with the registration number 698-058 H at the intersection of Samora Machel Avenue and Maiden Drive in Harare. The motor vehicle was involved in an accident with the first defendant's vehicle a Toyota Land Cruiser, registration number 799-714. The accident was caused solely through the negligence of the first defendant who accepted liability for the accident in full and without reservation.

The plaintiff's motor vehicle was extensively damaged in the accident. One garage quoted the plaintiff the sum of \$7 million to repair the accident damage. The motor vehicle was insured for \$3,5 million at the time and upon seeing the quotations for repairs, the plaintiff's insurers declared the motor vehicle a complete write off and paid out the full amount of the insurance cover. The plaintiff then surrendered the wreck to the insurer in accordance with the terms of the insurance agreement between her and her insurers. The defendant's insurers also paid out the sum of \$250 000-00 to the plaintiff. It was not disclosed to me what that payment was in respect of.

On 9 March 2004, the plaintiff issued summons out of this court, claiming payment of the sum of \$35 million together with interest thereon from the date of the accident to the date of payment. She also prayed for costs of suit.

Thus, the only issue referred to trial at the pre-trial conference of the matter was the quantum of damages payable to the plaintiff. It was further agreed that the measure of damages payable to the plaintiff is the diminution in value of the motor vehicle by reason of the damage sustained in the accident. Thus, the plaintiff had to prove the pre-accident value of the motor vehicle and its post-accident value, revealing the diminution thereof.

In support of her claim, the plaintiff led evidence. She confirmed the facts that are common cause between the parties. She had no evidence to adduce on the pre-accident value of the motor vehicle nor on its post-accident value as the quotations for repairs were sourced by her husband.

It was clear that the plaintiff should not have been called to testify and Mr *Mehta* had no questions for the witness.

Mr Nyika Komichi, the plaintiff's husband took the witness stand. He is an engineer by qualification, specializing in metallurgy and has no expertise in motor vehicles and motor vehicle repairs. He instructed the plaintiff's legal practitioners to sue for the sum of \$35 million as the replacement value of the motor vehicle as he had perused the local press and established that similar models of the vehicle were selling at between \$30 and \$40 million. The sum claimed thus represented the median of the range.

After the accident, he took the motor vehicle to Supreme Panel Beaters for a quotation on the repairs. They quoted the sum of \$7 million. He also took the vehicle to Frank's Bodyshop, which quoted the sum of \$5 million. In March 2004, he established by way of a proforma invoice that a similar model of the vehicle, manufactured in the same year, would cost \$12 650-00.

Under cross-examination, Mr Nyika conceded that there was some delay between the date of the accident and the date of the issuance of summons and attributed the delay to all the parties involved in the suit. He also conceded that the plaintiff had the option to have the motor vehicle repaired in December 2002 for \$6 million and that she failed to do so, as she did not have the requisite funds. Regarding the quotation from Frank's Bodyshop, which had been adduced into evidence by consent as exhibit "2", he readily agreed that it was non-sequential and should be disregarded by the court.

The witness gave his evidence well and impressed the court as a solid and honest person. He did not seek to exaggerate or to prevaricate in fielding questions under cross-

examination. Any weakness in the plaintiff's case is not attributable to his manner of testifying but to the content of such testimony, as I shall detail hereunder.

After the testimony of Mr Nyika, the plaintiff closed its case and the defendant declined to call any evidence.

As agreed between the parties, it is indeed the settled position that the measure of delictual damages in our law, also known as the "*negative interesse*", is the calculation of an amount of money which is necessary to place the plaintiff in the (hypothetical) financial position he would have enjoyed had the delict not been committed.¹ The measure of damages requires the plaintiff to establish the extent of her estate before the delict and a diminution to that estate as a result of the delict.

The issue that would have arisen for debate in this matter were it not for the wrong approach adopted by the plaintiff in assessing her damages, would have been the applicability of the traditional sum-formula approach in a inflationary environment where the face value of the plaintiff's estate after the delict, is higher than the pre-delict value. A straight application of the formula would not show a diminution in the estate but a nominal gain. It apparently cannot be argued that in such circumstances the plaintiff would have suffered no loss. The issue remains as to how that real damage suffered by the plaintiff in such circumstances should be computed. It may be necessary for a court properly seized with the issue to come up not only with the formula applicable in such an inflationary environment but maybe also to develop a concrete concept approach that will compensate the plaintiff for the real loss suffered.

In making the above suggestion, I am aware that this court has shunned the approach used by HOWIE J in *Everson v Allianz Insurance Ltd*² where the learned judge made an allowance to compensate the plaintiff before him for the lost buying power of the rand. In his words at page 175E:

"Plaintiff is therefore entitled, subject to a 10 % contingency deduction, to an award comprising the numerical rand value of his past loss of earnings and an upward adjustment of that value so as to express the loss in real terms."

¹ See *Union Government v Warnecke* 1911 AD; *Minister of Defence v Jackson* 1990 (2) ZLR 1 (S)

² 1989 (2) SA 173 (CPD),

A year later, the decision by HOWIE J was overruled by Appellate Division of the South African Courts in *SA Eagle Insurance Co Ltd v Hartley*³. In that judgement, it was held that currency nominalism is firmly entrenched in South African law.

In essence, the principle of currency nominalism holds that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of the currency. This places the risk of depreciation of the currency on the creditor and saddles the debtor with the risk of appreciation.

GROSSKOFF JA who delivered the judgment in the SA Eagle Insurance case was at pains to point out that any departure from currency nominalism in the assessment of damages in patrimonial loss suits would represent a revolutionary transformation of the entire legal system as it relates to the law of obligations. The net result of taking inflation on board would entail the court determining the true correct value of all obligations sounding in money.

In this jurisdiction the principle of currency nominalism was discussed by CHINHENGO J, in *Muzeyi v Marais and Another*.⁴ In that matter, the learned judge heavily relied on the SA Eagle Insurance case to express the view that it is correct to adopt the principle of capital nominalism when dealing with all obligations sounding in money. He also expressed the view that the unsatisfactory result reached in adopting currency nominalism could be resolved by the Minister of Justice Legal and Parliamentary Affairs aligning the Prescribed Rate of Interest Act [*Chapter 8.10*] to the inflation rate. I reiterate the recommendation to the Honourable Minister herein as the current prescribed rate of interest is woefully out of step with the inflation rate. It may be prudent for the Honourable Minister not to fix a specific rate of interest in the Act but possibly to relate to relate the legal rate of interest to some rate that rises and falls with inflation like the prime-lending rate of some financial institution. This will avoid the need on the part of the Honourable Minister to constantly amend the Act to change the rate in this volatile economic climate. Such a strategy will also cater for when the inflation rate eventually goes down.

³ 1990 (4) SA 833 (AD)

⁴ HH 80/04

Even if I were sufficiently moved to revolutionarily transform the law on the assessment of damages in this matter by taking into account the ravages of inflation on the plaintiff's claim, it is my view that in *casu*, the plaintiff has incorrectly perceived the measure of damages due to her.

In computing her damages, the applicant sought the replacement value of the motor vehicle at the time summons were issued. In this regard, she erred. She did not lose her vehicle as a direct result of the negligence of the first defendant. Her vehicle could have been repaired at a given cost and put back on the road. It is the cost of those repairs that constitute her loss or the extent to which her patrimony was diminished.

In my view, because she based her computation of the damages due to her on the wrong concept, she did not place evidence before this court as to the true value of the vehicle before the accident. She also did not place before this court the value of the vehicle after the accident. While it is common cause that the motor vehicle was declared a total loss by the insurer in terms of the insurance policy that the plaintiff had and in relation to the sum assured, as stated above, it is not correct that the "wreck" of the vehicle was without a value for the purposes of computing the damages due to the plaintiff under the *actio legis Aquilae*, which the plaintiff has invoked.

Thus, it is my specific finding that the net effect of the testimony adduced on behalf of the plaintiff does not assist me in computing the damages that are due to her, notwithstanding the defects in the quotations adduced into evidence by the plaintiff as highlighted by Mr *Mehta*.

In my view, the plaintiff had to establish the value of the vehicle prior to the accident and the value of the vehicle as at 6 December 2002, immediately after the accident. Having established the nominal value of her loss, she may then have requested the court to inflate that nominal value to shield her from the ravages of inflation. Whether or not this court would have taken inflation into account in assessing the amount of damages due to her will have to remain unanswered in this judgment.

On the basis of the foregoing, I am compelled to grant absolution from the instance in this matter.

In the result, I make the following order:

1. The first defendant is granted absolution from the instance.

2. The plaintiff shall bear the first defendant's costs of suit.

Chibune & Associates, plaintiff's legal practitioners

Atherstone & Cook, 1st defendant's legal practitioners