

J AND J TRANSPORTERS LDA
versus
ERNEST PORUSINGANI

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 23 November 2018 & 23 January 2019

Civil Trial

S Mangwengwende, for the plaintiff
H.B.R Tanaya, for the defendant

CHIKOWERO J: But for the parties' election to file a written application for absolution from the instance at the close of the plaintiff's case and response thereto rather than accepting my invitation to go oral, I was inclined to dispose of this matter on 23 November 2018.

The parties' written submissions have served to fortify my inclination to absolve the defendant from the instance with costs on the higher scale.

Plaintiff is a company duly registered as such in terms of the laws of the Republic of Mozambique.

Defendant is an adult male Zimbabwean national.

On 6 March 2014 plaintiff issued summons against defendant.

Damages in the sum of US\$10 258.47, interest and costs were claimed.

The damages were alleged to be the cost of repair of plaintiff's vehicle arising out of an accident involving the defendant's vehicle.

Although negligence was solely attributed to the defendant, the summons and declaration did not set out the particulars of such negligence.

It was only well over three years later, on 6 November 2017, that the particulars of negligence were furnished.

This was in response to defendant's request for further particulars for the purposes of trial.

It is useful that I set out such further particulars:

"1. AD PARAGRAPH I

The collision was caused by the sole negligence of the defendant who was negligent in one or more of the following respects:

- i) He failed to give way and keep the vehicle under proper control in the circumstances by failing to stop behind the truck that was driving in front of him and forcing his way onto the narrow bridge which was not wide enough to accommodate two vehicles which resulted in the collision with the plaintiff's truck; and or
- ii) He failed to keep a proper look out in the circumstances by encroaching (sic) the right lane which forced the plaintiff's driver off the road; or
- iii) He drove too fast under the prevailing traffic conditions by failing to reduce his speed on a narrow bridge; and or
- iv) He failed to stop or act reasonably when a collision was imminent; and or
- v) He failed to comply with the Road Rules by driving without due care and attention or reasonable consideration; and or
- vi) *Res ipsa loquitur* – the accident could have only occurred if the defendant was driving negligently because he was driving on the wrong side of the road which would have inevitably resulted in a collision with any oncoming traffic as it did in this case."

In his plea, defendant denied both liability and quantum, putting the plaintiff to the proof of the same.

The matter was therefore referred to trial on those two issues.

THE LAW ON AN APPLICATION FOR ABSOLUTION AT THE INSTANCE AT THE CLOSE OF THE PLAINTIFF'S CASE

I have chosen not to spoil the wisdom in the law on this aspect.

The legal position is well settled.

It is neater that I restrict myself to well-known passages in this regard. In *Gascoyne v Paul & Hunter* 1917 TPD 170 the test was couched thus:

"At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff?...

The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant... in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against (the defendant)?"

In *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 at 4A – 5D BEADLE CJ said:

"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?"

It was in this light, that GUBBAY CJ in *United Air Charters v Jarman* 1994 (2) ZLR 341

(S) said at 347 G:

“The issue to be decided is whether there was evidence upon which a court, applying its mind reasonably, could or might find that, in the special circumstances attending the conclusion of the contract I have set out, Mrs Brooks and the defendant actually or presumptively contemplated that the nature of the loss subsequently sued for would probably result from the breach.”

It is with these pronouncements in mind that I now examine the evidence to ascertain whether a *prima facie* case was made out by the plaintiff. I start with the issue of liability.

LIABILITY

Defendant was not prosecuted in a criminal court for negligent driving. At the very least, plaintiff neither suggested nor tendered evidence to the contrary.

Similarly, the Zimbabwe Republic Police, despite timeously attending the accident scene, neither preferred any charges against nor made the defendant to pay an admission of guilty fine.

All that there is in the Police Accident Report produced as exh “2”, is that:

“B. CRIMINAL ACTION IS BEING CONTEMPLATED AGAINST 2ND PARTY WHO IS TO PAY DEPOSIT FINE”

No evidence was adduced on what became of that contemplation. Contemplation is the opposite of action. I merely highlight that 2nd party is the defendant. In the circumstances, therefore, exh “2” was completely unhelpful to the plaintiff’s case.

Both in his evidence in chief as well as under cross examination, Sylvester Mudimu, who was plaintiff’s driver at the time of the accident, exonerated the defendant of any wrongdoing. He clearly stated that he had nothing but praise for the defendant’s manner of driving. The reason was this. In a bid to avoid ramming into a vehicle ferrying school children which was in front of him, the defendant had no option but to veer into Mudimu’s lane. Had defendant not done so, Mudimu testified, defendant would have killed those children.

Further, Mudimu states defendant could not veer to the right because there was a ditch there which could have resulted in defendant’s international Horse registration number 770-856E falling thereinto.

Unfortunately for the plaintiff, defendant’s vehicle was apparently not tested by the Vehicle Inspection Department after the accident to verify the suggestion by Mudimu that the brakes of defendant’s vehicle failed at the crucial movement.

To demonstrate these concessions, it is necessary that I set out only some of Mudimu's pieces of evidence in chief:

"I was also satisfied that he could not have gone his right side since there was a ditch he could have fallen into...."

Q Why couldn't defendant have continued going straight?

A. If he was to continue going straight he was going to kill all those children. Also his brakes failed.

W. What led to defendant to try to hit his brakes or to swerve?

A. I was satisfied that by the failing of his brakes he had just to swerve as he did to avoid colliding with the vehicle in front of him."

Besides having been mentioned for the first time only under cross-examination it remained a bare allegation that defendant was speeding. No evidence was tendered *vis-a-vis* the distance between the point of impact and the final resting place of defendant's vehicle. The speed at which defendant was travelling remains unknown. Mudimu was completely unable to assist the court in this regard. Crucially, the police officer who attended the accident scene never testified. Finally no other eye witness testified.

I wonder why the plaintiff even bothered to put Phillip Mutenha into the witness box at all. Clearly, Phillip's testimony was completely irrelevant.

He was more interested in relating the drama of finding himself under plaintiff's vehicle and how he got out of there. That was not the issue. He did not see the accident occurring. He was honest enough to make that admission.

In this vein, the following transpired while he was being led to give evidence in chief:

"Q. Besides you being under the JJ car did you see anything else?

A. What I only saw was a vehicle coming and I only found myself under the vehicle."

I commend Phillip for sticking to his guns even under cross-examination. Regrettably for the plaintiff, such a stance did not help the plaintiff's case at all. For illustration purposes only, I highlight the significant portion:

"Q. You were run over by a heavy truck?

A. What I tell you before God is this other vehicle came and as I ran away I don't know what happened. I only remember coming from under the vehicle."

It is unnecessary that I go into any depth in analysing the evidence of the last witness on the question of liability. It suffices that I observe that the witness in question, Francis Sekerere,

was not at the accident scene at the material time. In the circumstances, he could not better Mudimu on how the accident happened.

In light of all the foregoing, I grant the defendant absolution from the instance on the basis of liability not having been established *prima facie*.

Lest I am wrong in this regard, I now turn to determine the application on the issue of damages.

DAMAGES

First, the law.

The headnote in *GDC Hauliers (Pvt) Ltd v Chirundu Valley Motel 1988 (Pvt) Ltd 1998 (2)* ZLR 449(S) states at 449D-E:

“Held, that where a person claims damages arising out of repairs following damage caused by another’s negligence, he must show that the repairs were necessary and that the cost of the repairs was fair and reasonable. The repairs must also be shown to be necessary to bring the article back to its pre-accident condition. It is not enough for the plaintiff merely to produce an account from the repairer. Without such evidence, the damages cannot be proved.”

In *Ebrahim v Pittman N.O 1995 (1)* ZLR 176 at 187C-G BARTLET J quoted with approval the words of BERMAN J in *Aaron’s Whale Rock Trust v Murray and Roberts Ltd and Another 1992 (1)* SA 652 (C) at 655H – 656 F:

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss... Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but, even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced. In those circumstances the court is justified in giving, and does give, absolution from the instance....” [underlining is mine for emphasis]

In *Mabaire v Jailosi and Another 2010 (1)* ZLR 407 (H) KUDYA J disposed of a claim where insufficient evidence was led. This is what His Lordship said at 417 G – H:

“The claim for the cost of repairs for the gate, intercom and wall was reduced to US\$2 970. The lowest quotation that was supplied was in the sum of US\$2 280. By the time the plaintiff issued summons, the gate, intercom and wall had long been repaired in Zimbabwean dollars. She did not produce the cost of such repairs. It is not possible in the absence of that evidence to determine the value of the repairs at the time in United States dollars. The plaintiff has failed to prove the

measure of her damages for these repairs. I would grant the defendants absolution from the instance on this claim.”

Commenting on the need for a plaintiff to place adequate evidence before the court BERE J (as he then was) said on page 2 paragraph 3 of the cyclostyled judgment in *Prime Real Estate v Knight Frank, S Masuku and Olshevik Investments (Pvt) Ltd* HH 89/13:

“A party desiring to claim damages must strive to put before the court conclusive evidence that is aimed at sustaining such a claim. A claim for damages is not just like a walk in a park and that claim is not supportable by conjecture and speculative evidence.”

I hasten to point out that it is with the sentiments expressed in the second sentence of His Lordship’s utterance that I am presently concerned with, for obvious reasons.

The Honourable Judge went on to associate himself with the words of ROSE INNES AJ in *Monumental Art and Company v Kenston Pharmacy (Pvt) Ltd* 1976 (2) SA 111 (C) at 118E:

“It is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis, in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could be made.”

To this list I would only add the matter of *Primrose Kamvura and Samuel Kamvura v City of Harare* HH 365/16.

Where does this all leave me?

The last witness made several admissions. I highlight only a few. He did not repair Plaintiff’s accident damaged truck. The team of repairers did. All are still in plaintiff’s employ. None of them testified. He could not tell all the spare parts, on the job card, used to repair the truck. The job card itself, produced as exhibit “4”, did not indicate the currency under which the sum of 10 258.47 was allegedly expended towards the repair costs. It remains unknown whether the costs, if any, were incurred in United States dollars, kwacha or bond notes.

Shemu Mafara, the stores controller who allegedly drew the spare parts from stores for purposes of the repairs, did not testify. That he left the employ of the plaintiff is no reason for his non-appearance in Court. In any event, Mudimu testified for Plaintiff despite having retired from plaintiff’s employ.

It also is unknown whether all the parts reflected on the job card were new and were drawn out of stores, if at all, as a result of the accident.

In a nutshell, it was abundantly clear that the last witness was virtually unable to testify on the contents of the job card. He was not the author thereof.

He enumerated the external damage to the plaintiff's truck. Through him, exhibit 3 was produced. It is a photograph speaking to the external damage to the truck. But no report of an expert detailing the entirety of the damage was produced. Neither was it shown that the repairs, if any, were necessitated by the accident and, if so, were fair and reasonable. I agree with Mr Tanaya for the defendant that the standard procedure is to obtain at least three quotations of the repair cost to show the necessity, fairness and reasonableness of the costs of repair. Here the Court was asked to be content with a single job card from the plaintiff, an interested party.

I did not hear a single word in evidence about insurance and whether the insurer had met none, part or all of the repair costs.

Despite a photograph of plaintiff's damaged truck having been produced in evidence, no photograph of the truck after it had been repaired was produced. It would in the circumstances be remiss of me to find, *prima facie*, that the truck was repaired. That would be speculation. It would be conjecture.

It is evident that this matter, on the aspect of the issue of damage to the truck and the costs of repair is screaming "insufficient evidence!"

On this ground too, I absolve the defendant.

COSTS

I agree with defendant's counsel that this action was ill-conceived. It is frivolous and vexatious.

It was hopeless. The very first witness dealt the plaintiff's case a mortal blow.

The second and final witnesses were in reality not witnesses at all.

It was clear right from the word go that the plaintiff simply did not have the evidence to justify the matter proceeding into trial.

This is a matter which, failing an out of Court settlement, should simply have been withdrawn.

Even the handling of the matter itself left a lot to be desired. Damages claims require of necessity that practitioners carefully gather the evidence before issuing summons.

If the matter has been badly handled before a legal practitioner is instructed, with the result that the evidence is simply not there the client should be told the truth. In the event that the prospective plaintiff insists on instituting court proceedings, the proper thing to do is to politely but firmly advise the client to take its instructions elsewhere.

In all the circumstances, the defendant was unnecessarily put out of pocket in defending a matter which should never have been brought to court in the first place. An order of costs on the higher scale is fully justified. See *Matamisa v Mutare City Council* (Attorney General Intervening) 1998 (2) ZLR 439 (S);

Sheila Greenland v Zimbabwe Community Health Intervention Research Project HH 93/13 and *Rantenbach v Symington* 1995 (4) SA 583.

Finally, nothing was claimed in evidence. No relief was asked for. The relief remained stuck in the pleadings, Pleadings are not evidence. For this reason also, absolution is granted.

DISPOSITION

I therefore order that:

1. Defendant is absolved from the instance
2. Plaintiff shall pay the defendant's costs of suit on the legal practitioner and client scale

Phillips Law, plaintiff's legal practitioners
Tanaya Law Firm, defendant's legal practitioners