

REPORTABLE (74)

Judgment No S.C. 89\2002
Civil Appeal No 23\2001

NDANATSEYI MAGIDI v (1) STANLEY SIBANDA (2) GAUNTLET
SECURITY COMPANY (PRIVATE) LIMITED (3) AIG ZIMBABWE
INSURANCE COMPANY (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE MAY 28 & OCTOBER 21, 2002

T. P. Kawonde, for the appellant

G.S. Wernberg, for the respondents

CHEDA JA: The appellant's husband was knocked down and killed by a motor vehicle driven by the first respondent, Stanley Sibanda, whom I shall refer to as Sibanda.

The second respondent was the owner of the motor vehicle and employer of Sibanda. The third respondent was the insurer of the motor vehicle.

The appellant sued for damages following the death of her husband as a result of the accident. The High Court awarded her 20% of the claim against Sibanda, and recorded that the claims against the second and third respondents had

been withdrawn as it was common cause that Sibanda was not acting in the course of his employment.

In her Notice of Appeal the appellant complains against the finding that Sibanda was not acting in the course of his employment and that the claims against the second and third respondents were withdrawn.

I prefer to deal with these two points before I deal with the merits.

The summons was issued against the three respondents. All three entered appearance to defend. In their joint plea the respondents all denied liability and said the appellant is put to the proof thereof.

A Pre-trial Conference was arranged after the close of pleadings and issues were agreed.

Nothing was said at all about the liability of the second and third respondents.

At the trial evidence was led regarding Sibanda's role in the accident. Again, no mention at all was made regarding the second and third respondents. No evidence was led to prove any claims against them. The record does not show that the claims against the second and third respondents were withdrawn. The parties deny that the claims were withdrawn.

Where, in the pleadings, a claim is disputed, the claimant must lead evidence at the trial to prove the claim.

It cannot be said that because the respondents said nothing further they were admitting the claims. The appellant should have led evidence to establish the liability of the respondents.

The appellant argued that the question of Sibanda not acting in the course and scope of his employment with the second respondent was never in issue. I do not agree because in their pleadings both the second and third respondents denied liability and clearly stated that the appellant is put to the proof thereof. The appellant failed to lead any evidence on the claims against the respondents and so did not prove the claims. According to the record the claims were made. They were denied. That was the end. It follows that even if one goes by the understanding that they were not withdrawn, they were never proved.

Turning now to the merits of the case, the evidence for the appellant's case came from two witnesses, namely, John Zano, a private security guard, and Tonderayi, a police officer.

John Zano's evidence was that on the day in question he saw the deceased park his motor vehicle on the right side of Greentrees Road. The deceased walked out of his vehicle towards its back.

A Nissan vehicle driven by Sibanda came from the front, left its lane to go towards the deceased's vehicle, and struck the deceased then returned to the road. The deceased's vehicle was a Mazda and Sibanda's vehicle was a Nissan. He was about 50 metres from the Mazda when he watched the accident.

After striking the deceased Sibanda's vehicle went back into the road and stopped. He shouted at the person, telling him that the person had struck someone. Sibanda stopped his vehicle and came back to the scene. John Zano disagreed with Sibanda on the point of impact. He said the deceased was struck while behind his vehicle. He denied that he told the police of the deceased being struck while trying to cross the road.

Under cross-examination he said the deceased wanted to go around his vehicle to its back, but could not explain why he thought so. He accepted that the deceased had not yet gone to the back of the vehicle.

On visibility he told the court that there was still some light. Later he admitted that it was then pitch dark. He maintained that he had not changed his evidence and what he told the Police was the truth.

The trial court found that his evidence was not reliable and rejected it.

Police Officer Tonderayi said he got to the scene of the accident. He found the deceased inside a motor vehicle with a broken leg. Sibanda was arguing and trying to mislead the police officer about how the accident had occurred. He

behaved as if he wanted to fight the police officer. Sibanda was eventually taken for a blood test.

He wrote in the traffic accident book but did not complete it as he wanted to take the deceased to hospital. He called an ambulance to take the deceased to hospital.

The police officer's evidence did not take the case any further as he had not witnessed the accident.

It is clear why the evidence of John Zano could not be relied on. Where it differs from that of Sibanda, Sibanda's version sounds more probable. Sibanda's evidence is that the deceased was coming back to cross the road towards his car, and on seeing him, Sibanda swerved to the right to avoid the deceased but it was too late. John Zano's evidence is that Sibanda swerved to the right, struck the deceased who was behind or at the back of his vehicle, then swerved back to the road. Later he said Sibanda struck the deceased who was on the side of his vehicle without touching the deceased's vehicle at all. This sounds most improbable. No reason is given for Sibanda swerving to strike the deceased then return to the road as if this was deliberate.

John Zano indicated first a point behind the deceased's vehicle, then a point on the side of the deceased's vehicle, as the point of impact.

In comparison, Sibanda's version and the point of impact near the centre of the road seem more probable. The trial court was, therefore, correct in accepting Sibanda's version.

On the liability of the second and third respondents it was clear that Sibanda was no longer in the course of his employment. He had finished work. He was on his way home and had stopped on the way and drunk beer with a friend. His course of employment was over. See *Gwatiringa v Jaravaza & Anor* 2001 (1) ZLR 383.

The evidence also shows that Sibanda's vehicle had its lights on.

Accepting that the deceased was about to cross the road, he had a duty to see that he crossed when it was safe to do so.

The following head note from *Swanepoel v Parity Insurance Co Ltd* 1963 (3) SA 819 is very relevant:-

“A pedestrian wanting to cross a busy road has the primary duty to make sure that he chooses an opportune moment. Traffic on a main road need not be ready for any emergency created by people or vehicles who enter the road unexpectedly from the sides, though, where a driver has ample opportunity to see a pedestrian so entering the road and is unskillful in not swerving, he must bear a share of the blame, albeit a lesser share, if he collides with such pedestrian.”

Although in this case this was not a main road, the deceased should have seen the lights of an on-coming vehicle as it was then dark according to the evidence. He failed to avoid the vehicle that was coming with its lights on. He

clearly contributed to the accident. I therefore see no reason to interfere with the trial court's apportionment of blame. It seems quite appropriate.

For these reasons the appeal cannot succeed and it is dismissed with costs.

SANDURA JA: I agree

GWAUNZA AJA: I agree

Kawonde & Company, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners