

REPORTABLE ZLR(46)

ELIZABETH NDAVA

VS

(1) TENDAI CHIVIZHE TAKARUWA (2) ELIZABETH ARTZINGER

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GOWORA JA
HARARE, JUNE 17 & DECEMBER 5, 2013**

A Muchandiona, for the appellant

R H Goba, for the respondents

MALABA DCJ: This is an appeal against the judgment of the High Court dated 25 October 2012 by which a claim for damages amounting to US\$36 475.00 in respect of injuries received in a car accident was dismissed with costs.

The facts of the case are these. On 12 February 2010 at about midnight the appellant was a passenger in a 25 seater minibus belonging to the second respondent and driven by the first respondent within the scope and course of his employment, from Beitbridge to Harare plying the Harare-Masvingo highway. At the 45km peg the minibus was involved in a collision with the rear right side of a trailer being pulled by a Malawian registered horse truck. As a result of the collision the minibus overturned and lay on its right side in the lane for on-coming traffic. The appellant, who had fallen asleep, woke up to find herself trapped under the back seat where she had been sitting. She sustained severe injuries to the right forearm in respect of which she later received treatment in the form of debridement and skin grafting.

On 10 September 2010, the appellant issued summons against the first and the second respondent, claiming damages for the injuries sustained in the sum of US\$71 050.00

with interest at the prescribed rate of 5% per annum with effect from February 2010 and costs of suit. The amount of damages was later reduced to US\$36 475.00. The appellant alleged in the declaration that the cause of the injuries she sustained was the negligence of the first respondent. She gave the particulars of negligence as being the following:

- “1. He was not a holder of a class one driver’s licence which is a requirement for one to drive the 25 seater commuter omnibus which he was driving;
2. He was following too close to the Toyota Dyna motor vehicle which was travelling in front of him in the same direction along the Beitbridge-Masvingo road;
3. He failed to keep a proper lookout in the circumstances;
4. He was travelling at an excessive speed in the circumstances;
5. He failed to keep his vehicle under proper control; and
6. He failed to stop or act reasonably when the accident seemed imminent.”

The first and the second respondents denied liability particularly that the first respondent was negligent in any way in the manner he drove the vehicle or as alleged by the appellant. They pleaded that the omnibus was hit by a passing motor vehicle with a Malawian registration number. In their summary of evidence the first respondent repeated the allegation that his motor vehicle was hit by a trailer with a Malawian registration number. He suggested that the motor vehicle was involved in a side swiping collision.

The evidence before the court *a quo* was, briefly, as follows: Liah Mugonapanja, the first witness to testify for the appellant, said she was seated on the front seat by the window behind the driver’s seat. She said she saw the trailer which was ahead of them. The first respondent had been driving fast and had not seen that the trailer was stationary. She said she drew the attention of the driver to the fact that he was about to collide with it. He swerved to the right to avoid colliding with the trailer. The omnibus

overturned and lay on its right side in the lane for oncoming traffic. She said the first respondent did not apply brakes and indicated that the road where the accident took place was straight.

The second witness for the appellant was Cedon Moyo. He said that on 11 February 2010 he boarded a minibus in Harare going to South Africa. In that minibus the first respondent was a conductor since he was collecting the tickets. When Cedon Moyo boarded the same minibus around midnight at Beitbridge back to Harare he noticed that the first respondent was now the driver of the vehicle. He was sitting in the front seat between the wheels on the left side of the vehicle. He said that at the 45km peg he saw the trailer which appeared to have stopped in front of the vehicle. The first respondent had been travelling at an excessive speed. As he was sitting next to the left front door he was able to see what was happening. When his attention was drawn to the presence of the trailer the first respondent panicked and swerved to the right without applying brakes. The vehicle hit the trailer and overturned and rested on its right side. He said it appeared as if the first respondent had fallen asleep and had not kept a safe distance between his car and the vehicle ahead of him.

The appellant produced a report which showed that the minibus was damaged on the front grill, the head lamps and park lights and the windscreen.

In what was a clear procedural irregularity, the respondent's legal practitioner called a witness to give evidence in support of the respondent's case before any of the respondents gave evidence. It is not clear from the record why the learned judge allowed this to happen notwithstanding the objections by the appellant's legal practitioner. The witness, one Elina Ruvengo said she was sitting in the front seat on the right by the aisle. At the 45km peg she saw the trailer which was being pulled ahead of them. The first respondent wanted to

overtake the trailer which was in front of them. As he moved to the lane for oncoming traffic to prepare to overtake, the trailer uncoupled from the horse and moved to its incorrect side of the road thereby partially blocking their way. The minibus hit the trailer with its left side and fell on its right side on the lane for oncoming traffic.

The first respondent then gave evidence. He said he was driving behind the trailer until he was 80 metres from it. He said he indicated his intention to overtake. As he was preparing to overtake the trailer unhooked and moved towards the left side of his vehicle. He applied brakes as people screamed. As he held on to the steering wheel while applying brakes, the right rear side of the trailer hit the front left side of his vehicle. He said that the impact was from the front left side of his vehicle towards the left door. As a result of the force of the impact, his vehicle overturned and lay on its right side on the lane of oncoming traffic. He said he was driving at a safe speed of 60km per hour and blamed the accident on the trailer that he alleged uncoupled from the horse. He admitted that he held a class two driver's licence. He did not have a class one driver's licence to drive the minibus in question.

The court *a quo* made a finding that appellant's witnesses were not credible because of contradictions in their versions of what they said happened. The contradictions related to the fact that Cedon Moyo said the minibus collided with the trailer while Liah Mugonapanja did not mention any collision. The court also found that their evidence of the trailer having become stationary in front of the minibus was contrary to the evidence of Elina and the first respondent who said the trailer was in motion. It was also put to Liah in cross examination by the respondent's legal practitioner that a statement by the driver of the vehicle with a Malawian registration number plate which was pulling the trailer was to the effect that the trailer was moving slowly.

Although the court *a quo* found the defendant and his witness credible it clearly misdirected itself on the evidence on the basis of which it made the assessment. The learned judge summarised the evidence of Elina Ruvengo as follows:

“She first noticed the truck about a kilometre before the scene of the accident. There were no reflectors on the trailer but it visible (*sic*). The driver was travelling at a slow speed or average speed. The accident was caused by a pickup truck which was travelling in front of the bus. The driver of the bus tried to overtake the truck pulling the trailer and at that moment, the trailer unhooked from the truck and the trailer encroached onto the side of the minibus. When this happened the minibus was about 20 metres from the trailer. The trailer was moving backwards towards the minibus. The driver moved from left to right and the trailer followed him. She told the court that the driver braked and tried to avoid the trailer. The passengers screamed when the driver applied brakes and that it is at this moment that the minibus collided with the trailer and the bus fell on its right side and began to slide on the tarmac. The trailer remained in the middle of the road. After the accident the driver of the truck parked his vehicle and came to where the minibus was. The witness was consistent in her story and gave a clear and straight forward story. She maintained under cross-examination that the cause of the accident was the trailer that disengaged from the truck and collided with the minibus.”

It is clear that the events as described by the learned judge relating to the behaviour of the trailer just before the collision of the minibus is not supported by the evidence of Elina. There is nowhere in her evidence that mention is made of the “trailer moving backwards towards the minibus” and the driver moving from left to right with the trailer following him.

In respect of the first respondent the learned judge said:

“The driver did not see the other vehicle or trailer at the last moment but had been following the other vehicle and seeing it. I am satisfied that the defendant kept a proper lookout. He insisted that when he was faced with an accident, he swerved to the right in order to avoid the accident and applied brakes to control the vehicle. That in my view shows that the driver acted reasonably to avoid an accident when one seemed imminent.”

After referring to the case of *S v Mauwa 1990(1) ZLR 235(S)* on the test of a reaction by a reasonable driver faced with an emergency, the learned judge said:

“The first defendant was placed into danger by the wrongful act of the Malawian driver ahead of him or the disengaging of the trailer from the truck. Looking at the reaction and conduct of the first defendant, it is clear that what he did in response to the accident that was imminent is something which a reasonable person ought to have done. He applied his brakes and swerved to the right in order to avoid the accident. I am satisfied that the first defendant exercised such care as was expected of him when an accident seemed imminent. He took evasive action by swerving to the right. The evidence of the plaintiff’s witnesses does not support a finding of negligence on the grounds relied upon.”

The finding by the learned judge that the first respondent swerved to the right to avoid the collision is clearly not supported by his evidence. He never said he swerved to the right. The evidence was that he held on to the steering wheel, with his foot on the brakes, until the rear part of the trailer hit the left rear side of his vehicle causing it to overturn.

It was therefore on the evidence adduced by the witness that the learned judge made a wrong finding on the credibility of the witnesses. The court is at large.

What is clear from the evidence is that the first respondent was driving his motor vehicle following the motor vehicle that was pulling the trailer. The evidence also shows that he came up to the trailer, whether it was stationary or moving slowly, without having had enough time to ensure that the two vehicles continued to drive on safely. The evidence of Liah and Elina was to the effect that people screamed before the collision. Elina’s evidence was at first that there were screams followed by the braking, and the attempt to overtake immediately and then the collision. It was only after being asked a leading question by the first respondent’s legal practitioner that she changed the sequence of the events to say that the braking came first followed by the screaming, the attempt to overtake and then the collision.

The evidence of the screaming coming first supports the testimony by Liah to the effect that she alerted the first respondent to the presence of the trailer in front of them.

That evidence of the first respondent having been driving without keeping a proper lookout of what was happening in front of him is supported by Cedon who said the first respondent panicked suggesting that he had momentarily fallen asleep. All the witnesses who gave evidence of the trailer and of the collision show that the minibus hit the trailer. That evidence is from both Cedon and Elina. The evidence of Cedon supports that of Liah to the effect that the first respondent executed a swerve to the right before colliding with the rear right part of the trailer. Whilst Liah's evidence does not make reference to a collision it clearly refers to a swerve to the right which was not completed because the motor vehicle overturned.

The incomplete swerve to the right which Liah refers to was clearly a result of the collision between the minibus and the rear right side of the trailer. Even Elina said that when the minibus hit the trailer the latter had moved to occupy a portion of the road in front of the minibus. The evidence of the first respondent himself is to the effect that the minibus hit the trailer. He said that the impact between the right rear side of the trailer and the left front side of the minibus was from the front going backwards towards the left front door. That, clearly, is not descriptive of an impact caused by a trailer moving towards the minibus which had already started the overtaking manoeuvre. If the minibus was hit by the trailer while it already had a portion of its left side parallel to the right rear side of the trailer then the direction of the force of the impact would have been from the door to the front.

The evidence that the trailer was hit by the minibus while it was in front of it is supported by the location of the damages to the minibus. The evidence shows that the damage was concentrated on the front part of the minibus. The story of the minibus having been hit by the trailer whilst in the process of overtaking it is a fabrication. The respondents did not mention that the minibus was overtaking the trailer at the time it collided with it in their plea. They knew that the appellant was alleging that the minibus had hit the rear part of

the trailer as a result of the negligent driving of the first respondent as particularised. Instead of alleging that the collision took place when the minibus was overtaking the trailer they instead alleged that the minibus was hit by a passing motor vehicle. There was no mention at all of overtaking. The first respondent paid the driver of the motor vehicle that was pulling the trailer US\$1 500.00 as compensation for the damage caused to the trailer. He could not have paid that amount if he believed that the trailer was the cause of the accident.

The first respondent admitted that he was driving the motor vehicle in question when he was not a holder of a class one driver's licence. The evidence of Cedon that the first respondent was a conductor on the minibus the previous day supports the finding that he was not licenced to drive the motor vehicle. Whilst driving a motor vehicle without the requisite licence is not on its own sufficient evidence of negligence when considered in light of all the circumstances of the case, driving requires a special skill and experience commensurate with the standard of due care which a driver owes to his passengers as well as other road users. Where a person has no driver's licence for the vehicle in question, there is a presumption that his manner of driving which forms part of the particulars of negligence was as a result of lack of the requisite skill and experience expected of a reasonable driver in possession of an appropriate driver's licence.

In this case, not only was it shown that the first respondent drove the motor vehicle in the manner alleged in the particulars of negligence, it must be assumed that he did so because he lacked the skill of a reasonable driver possessed of a licence to drive the class of the vehicle in question.

It is clear from the evidence that the appellant succeeded in establishing on a balance of probability that the damages she suffered were a result of the negligent driving by the first respondent in the course and within the scope of his employment with the second

respondent. In *Hirsch Appliance Special v Shield Security Natal (Pty) Ltd* 1992 (2) SA 643 (D), pp 647-648t is stated that:

”In general the law does not hold one liable for the wrongs of another but sometimes it does. So, for example, it holds one vicariously liable when one’s servant commits a wrong in the course and scope of his employment. That this is so today is well settled.”

The court *a quo* ought therefore to have awarded the appellant the damages she claimed.

The appeal is allowed with costs. The judgment of the court *a quo* is set aside and substituted with the following:

- “1. The claim is granted with costs.
2. The defendants shall pay the plaintiff the sum of US\$36 475.00 with interest thereon at the prescribed rate from 12 February 2010, the one paying the other to be absolved.”

ZIYAMBI JA: I agree

GOWORA JA: I agree

Danziger & Partners, appellant’s legal practitioners

Venturas & Samkange, respondents’ legal practitioners