HH 19-03
HC 2465/2000
MAXWELL MUNDOZI
versus
PINIWL KISSMORE CHAMUSI
and
ZIMNAT LION INSURANCE COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MATIKA J,
HARARE, 14 to 18 October, 2002 and 5 February, 2003

Mr *N Maredza*for applicant
Mr *B R G Gwati*for 1st respondent
Mr *Mapondera*for 2nd respondent

MATIKA J: This is an action for damages arising out of an accident. The plaintiff in his amended summons, claimed an amount of $662 000,00 broken down as follows:-

General damages in respect of pain and suffering	$100 000,00
Medical expenses	$ 60 000,00
Future medical expenses	$400 000,00
Cost of medical reports	$ 2 000,00
Physical permanent disability	$100 000,00
Interest and costs	

The accident in question is alleged to have occurred along Darwendale Road, near Norton on the 5 April, 1998. The plaintiff alleges that the vehicle he and his colleagues were using, which was stationary and parked off the road was hit into on its rear by the vehicle driven by the first defendant. The impact of the collision between the first defendant's vehicle and the stationary vehicle caused the stationary vehicle to hit the plaintiff who was in front of the stationary vehicle together with its owner trying to fix it. The plaintiff alleges that the owner of the stationary vehicle and himself had opened the bonnet of the said vehicle in order to try to ascertain why its was not starting. As a result of the said collision, the plaintiff alleges that he sustained a broken leg. Plaintiff alleges that the collision was caused solely by the negligence of the first defendant in that he was travelling at an excessive speed in the circumstances, that he failed to keep a proper look out and that he failed to act reasonably when a collision or accident seemed imminent.

The first defendant while admitting that the vehicle he was driving collided with the back of the stationary vehicle denied that he was negligent either as alleged or at all. The first defendant alleged that the stationary vehicle was parked in the centre of the road without any warning lights on it or any sign that it had broken down. First defendant alleges that the owner of the stationary vehicle which the plaintiff wanted to board contributed 70% to the cause of the accident.

The second defendant was the insurer of the vehicle driven by the first defendant. The second defendant was claiming an indemnity against the first defendant on the basis that the first defendant did not report the accident to it within the stipulated period.

The plaintiff gave evidence and called another witness who corroborated his evidence. The essence of the plaintiff's evidence was that he and his colleagues had gone to

Darwendale Dam for fishing. This was around 8.00 a.m. They parked the vehicle they were using along the Darwendale Road, off the road, and in fact off the yellow line. At the end of the day, around 17.40 p.m. they came back from fishing and tried to start this vehicle. The vehicle would not start and plaintiff and the owner of the vehicle in question opened the bonnet of the car to try to ascertain why the vehicle was not starting. Whilst doing so, the vehicle driven by first defendant came and hit into the rear of the stationery vehicle, thereby pushing the stationary vehicle forward which then in turn injured the plaintiff. The plaintiff alleged that visibility was clear, that there was still light and that the road was clear. Plaintiff attributed the cause of the collision to first defendant's speed and his failure to keep a proper look out. As a result of the collision, plaintiff was hospitalized for 4 days and was operated on his leg and a metal plate was installed on his broken leg. The metal plate has not yet been removed. The plaintiff alleged that he will require another operation to remove the metal plate from his leg. He will also require a total knee replacement in 15 - 20 years time.

Plaintiff alleged that he suffered a lot of pain and he is not able to attend to duties he used to do before the accident.

Plaintiff called a witness by the name of Ernest Mambira. As aforesaid, this witness corroborated the plaintiff's evidence in the main respect. Unlike the plaintiff who was in front of the broken down vehicle, this witness who was part of the fishing expedition to Darwendale Dam, was at the back of the stationary vehicle. This witness said he was seated at the back of the stationary vehicle. He heard the sound of car which was approaching at high speed. He alerted his colleagues to move out of the road. He and some of his colleagues got out of the stationary car and went to the side of the road. He then saw the approaching car. It came at high speed and rammed into the back of the stationary vehicle. This witness observed the collision. Four people who were in first defendant's vehicle were killed. He assisted the injured, including the plaintiff. The witness said the accident occurred around 6.00 p.m. and that the sun was about to set. Visibility was still good. He said the stationary car before the accident was off the road. It was parked off the yellow line, on the grass. The stationary vehicle had its parking lights switched on. It was this witness' evidence that the accident was caused by the negligence of the first defendant. He estimated that the first defendant must have been travelling at a speed of between 140-160 kms/hr. He stated that the stationary vehicle was parked off the yellow line. The witness maintained his evidence under cross-examination. As aforesaid, he was an eye witless to the accident.

The first defendant gave evidence on his own behalf. He contends that the vehicle he was driving collided with the rear of the stationary vehicle. He alleged that he did not see the stationary vehicle until he was about 10 to 15 metres away from it. He alleged that there was a lorry which was parked next to the stationary vehicle facing the direction the first defendant was coming from. This lorry allegedly had its lights on full beam. The lights of the lorry allegedly dazzled him and he was unable to see the stationary vehicle until it was too late to take any avoiding action. The first defendant tried to pass in between the stationary vehicle and the lorry and in the process, he collided with the left rear side of the stationary vehicle, which he alleged did not have any parking lights or reflectors.

The first defendant was charged with culpable homicide for the deaths of 4 people who were in his vehicle. He pleaded guilty to the charge months after the accident and was convicted and sentenced. His explanation as to why he pleaded guilty to the charge of culpable homicide is not convincing and is an insult to the court's intelligence. It is accordingly dismissed out of hand.

By pleading guilty to a charge of culpable homicide, the first defendant was admitting that he negligently caused the accident in question. This Court conducted an inspection in loco at the scene of the accident and it established that although there was no yellow line at the edges of the road, the road was clear from the cliff near the Zipam Offices to the scene of the accident for a distance of 600 metres. There is absolutely no obstruction on either side of this road for a distance of 600 metres. The Court rejects outright the first defendant's claim that he only saw the stationary vehicle when he was only about 10 - 15 metres from it. As aforesaid, that stretch of the road is clear. Even if the stationary vehicle was parked in the middle of the road, first defendant should have seen it from a distance of at least 600 metres from it. The Court accepts the plaintiff and his witness' evidence that the accident occurred around 17.40 p.m. and that visibility was good, and the sun was just about to set. The Police corroborate this.
The Court finds that the cause of the accident was the first defendant' negligence. He must have been travelling at a very excessive speed and he must not have kept a proper lookout. He had some passengers in his vehicle, of which four of them needlessly lost their lives because of the first defendant's negligence. The Court finds that the first defendant's negligence was gross and rejects his defence outright.

The plaintiff's said witness testified that two beer bottles which were broken were found stuck to the body of one of the deceased's stomach. The first defendant's party must have been drinking. The Courts cannot over-emphasise the utmost need for drivers to exercise extreme caution whilst driving on our roads. The degree of negligence shown by the first defendant was totally unacceptable. His defence of contributory negligence on the part of the driver of the stationary vehicle is equally rejected. The first defendant on his own admission could not brake, because to do so would have landed his vehicle in the ditch. It was his speed which was excessive and the fact that he did not keep a proper lookout at all. The Court finds that the first defendant was negligent and is liable to the plaintiff for damages.

Plaintiff in his amended claim sought damages in the sum of $662 000,00. This will be dealt with seriatim -

1. General damages for pain and suffering in the sum of $100 000,00. These are awarded to the plaintiff.
2. Medical expenses in the sum of $60 000,00, these have not been proved and no award will be made in this regard.
3. Further medical expenses in the sum of $400 000,00 these are awarded to

the plaintiff. The plaintiff satisfied the court that he will require another operation on his leg to remove the metal plate and pins on his leg and a total knee replacement within 15 - 20 years. His claim for future medical expenses is in fact on the low side and even if one is on medical aid, there are bound to be shortfalls payable by a member of the medical aid to the medical society.

4. Costs of medical reports in the sum of $2 000,00, this has not been proved.

5. Physical permanent disability in the sum of $100 000,00. This is awarded to the plaintiff.

All in all, plaintiff is awarded damages in the sum of $600 000,00 together with interests at the prescribed rate from the 31 January, 2000, being the date summons was issued, to the date of payment in full and costs of suit.

The liability of the defendants' is joint and several, the one paying the other to be absolved.

The Court finds that the defence of an alleged indemnity raised by the second defendant has not been proved. The onus was on the Second defendant to prove its alleged defence. It chose not to call any witnesses nor to lead any evidence at all. The rule relied upon by the Second defendant, namely, Rule 98 of the High Court Rules is inapplicable. Second defendant's defence is therefore rejected. Plaintiff is therefore awarded damages in the sum of $600 000,00.

Honey & Blanckenberg, plaintiff's legal practitioners
Madanhi & Associates, second defendant's legal practitioners
Gwati & Partners, first defendant's legal practitioners