HH 190-03
HC 9347/00

FELIX MUCHAZUNDIDA MAGOGE
versus
ZIMNAT LION INSURANCE COMPANY LIMITED
and
TIMOTHY CHIWARA

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 29 October, 2003

SMITH J: The second defendant (hereinafter referred to as "Chiwara") was driving a vehicle along Simon Mazorodze Road in Harare when he knocked into the car that the plaintiff (hereinafter referred to as "Magoge") was driving. It was what is known as a "hit and run". Subsequently Chiwara paid an admission of guilt fine on a charge of driving without due care and attention. The repairs to Magoge's car cost $27 168, which amount was paid by the first defendant (hereinafter referred to as "Zimnat"). Magoge was an insurance broker. He used his car for the purposes of his business. Due to the accident he was unable to use his car from the date of the accident, which was 9 December 2000, until it was repaired and returned to him on 4 April, 2001. He estimated that his loss of earnings during that period amounted to $406 931. He issued summons claiming that amount from the defendants.

The defendants requested further particulars which were supplied as follows. The drive shaft of Magoge's car was broken, so it was incapable of moving. Chiwara was driving a minibus. After the accident he just drove off without stopping. Magoge made a report at the head office of Kukura Kurerwa Buses that their driver had caused an accident, but Chiwara denied that he had been involved in the accident. It was only after Chiwara was informed that a forensic test would be conducted on Magoge's car and the minibus that Chiwara had been driving, that he admitted that the minibus had been involved in the accident. Chiwara then paid the admission of guilt fine. That was in March 2001. Zimnat effected payment for the repairs on 4 April 2001 and that was when the repairs were done. Magoge did not have the money to pay for the repairs and so he had to wait until Chiwara admitted liability, before he could give the go-ahead for the repairs to be done.

The defendants denied liability for the loss of income as Magoge had signed a release form on 3 April 2001 releasing the defendants from any further claims after the vehicle repairs and towing charges were paid. Alternatively, they averred that the claim was grossly exaggerated and that Magoge had not done enough to minimise his loss.

At the pre-trial conference it was agreed that there was no issue as to liability and that the parties should try to reach a settlement, failing which they could file written submissions and the matter would be determined as a stated case.

The submissions by Magoge were as follows. The delay of 4 months was caused by the defendants. He acted swiftly in reporting the accident to the police and

in notifying the defendants. However, the defendants did not accept liability until sometime in March. He tried to mitigate his loss by reporting the accident expeditiously. He tried to carry on his business as an insurance broker using public transport, but that started to destroy his market because his clientele did not look kindly on a broker who did not have his own car and had to use public transport. It would have cost him $433 200 a month to hire a car to use while his car was immobilized. He did not have the money to be able to pay for the repairs to his car.

Magoge filed an affidavit setting out how he had calculated his damages. He pointed out that he earned his income by way of commission, not salary. His earnings in a day or a month were spread over 24 months and he was credited with 85% for the first year and 15% for the second. His commission was a percentage of the premium the client paid to the insurance company each month. Therefore the business he procured each month showed a return of 85% over the first 12 months and 15% over the second 12 months. Consequently, any loss of business was reflected in a loss of earnings over the following 24 months. The cumulative loss he suffered because he could not obtain clients for 4 months amounted to $406 931. Because he did not procure any business for 4 months, he did not meet the targets set by the insurance company for which he was working for the two years following the accident. Because of that failure the company concerned had terminated his services.

In their submission the defendants did not dispute liability but disputed the quantum. They submitted that Magoge had a duty to mitigate his loss. He should have had his car repaired earlier. It took about one week for his car to be repaired. The fact that it was out of use for 4 months was because of his failure to have the repairs done expeditiously. Alternatively, he should have hired a car so that he could continue carrying on his business.

In *The Solhult*[1983] 1 Lloyd's Rep 605 (CA) at 608 SIR JOHN DONALDSON MR said -

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequences of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly… caused by the defendant's breach of duty".

McNALLY JA, in *Cargo Carriers (Pvt) Ltd*v *Nettlefold & Anor*1991(2) ZLR 139 (SC), cited the above and then went on to say at 142 F - 143 A -

> "Roman-Dutch authority is to the same effect: See generally Corbett and Buchanan *The Quantum and Damages in Bodily and Fatal Injury Cases*2 ed at p 10 para 8. There the point

> is made (relying on *Halsbury*) that there is a further duty on a plaintiff not to aggravate his damages by his own wanton or careless conduct: 'If he does so aggravate his loss, then he will not be entitled to recover damages in respect of the damage attributable to such conduct on his part. Again the *onus*of establishing such aggravation lies upon the defendant'. Broadly the same principles are enunciated in McKerron *The Law of Delict*7 ed at p 139.
>
> Finally it is clear that even where a plaintiff, in an attempt to mitigate his damages, actually aggravates them he can recover the greater amount if it can be shown that he acted reasonably. As Browne-Wilkinson LJ put it in *Metelmann, supra*at 634 col 2:
> 'If I am right in holding that the sale on the terminal market on Jan 21 was a reasonable attempt to mitigate the loss two months follow. First, any additional loss suffered by Metelmann as a result of such sale is recoverable from NBR. Therefore in addition to the basic damages Metelmann is entitled to be compensated for the additional damage flowing from the attempt to mitigate'".

In that case, a vehicle had been involved in an accident and needed repairs. Had the repairs been done expeditiously, they would have cost $60 000. However, the respondents had delayed in having the repairs done, with the result that the costs had increased to $70 000. The Court held that there was an onus on the respondents to justify the delay. As they had not discharged the onus, it could not be said that the delay was reasonable or, indeed, that it was in consequence of an intention to mitigate damages. Accordingly the Court ruled that the reasonable cost of the repairs was $60 000.

In the heads of argument submitted by both parties reference is made to "*Shrogg*v *Valentine*1949 (3) SA 1228 (T) at 123". Both purport to quote from the judgment saying -

> "A plaintiff must take all reasonable steps to mitigate his loss"

and in one set of heads there is added -

> "and any loss suffered by him as a result of his failure to mitigate is not recoverable as he only has himself to blame for having suffered so much".

It is curious that in both cases the plaintiff is spelt "Shrogg" and not "Shrog" and both refer to p "123" which is incorrect as the fourth digit is missing. I have read very carefully the judgment referred to and cannot find the extract that is cited in the heads. The only relevant statement I can find is at p 1237 where CLAYDEN J said -

> "The question to be decided here, in my opinion, is whether a person who has taken steps to mitigate his loss is bound to prove that those steps were reasonable before he can recover the expense thereof".

I can find no statement to the effect that a claimant for damages has a duty to mitigate his loss. The learned judge did refer to *Hayes*v *Transvaal & Delagoae Bay Investment Co Ltd*1939 AD 372 at 388

where STRATFORD CJ said that -

> "Both on principle and on precedent the burden of proving that the claimant for damages did not take reasonable steps to mitigate the damage which he actually suffered is upon the one who asserts that those reasonable steps were not taken".

However, before the words quoted above, STRATFORD CJ said -

> "This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence - neglect to do what a reasonable man would do if placed in the position of the person claiming damages. The defendant in such claim says 'admitting that in fact you suffered these damages, you have only yourself to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore, me'".

In **Joubert's**The Law of South Africa vol 7 para 31, dealing with Mitigation, the learned author says -

> "A plaintiff who fails to mitigate his damage may have his damages reduced. It is sometimes said that the plaintiff is under a 'duty' to mitigate his loss, but it is clear that the doctrine of mitigation does not rest upon any 'duty' towards the defendant. The mitigation rule is an application of the general principle that a plaintiff should not be the author of his own loss".

In *Da Silva & Anor*v *Coutinho*1971 SA (3) 123 (AD) at 145 C-E JANSEN JA said -

> "On the facts of this case the alleged negligence, here invoked by the respondent, relates to the principle that a plaintiff should not be the author of his own loss, a principle which also bears upon the so-called 'duty to mitigate damages'. As said by Mayne & McGregor on *Damages*, 12thed., para. 62:
>
> 'A plaintiff may have his damages cut down because his own conduct has constituted contributory negligence, has rendered some of the damage too remote, or has constituted a failure to mitigate the damage which may be defined as a failure on the part of the plaintiff to take reasonable steps either to reduce the original loss or to avert further loss. This covers the whole ground of contributory negligence and mitigation, but damage may be too remote from causes other than the plaintiff's conduct, whether acts of third parties, or natural events : this factor does of course distinguish remoteness from the other two, but since the difficulties to be discussed arise only with cases of remoteness stemming from the plaintiff's conduct, cases of remoteness beyond these are not included in the present context'.
>
> The distinction between contributory negligence in this sense and a failure to mitigate appears to be a fine one (*Mayne & McGregor,*para. 63-65, Glanville Williams, *Joint Torts and Contributory Negligence*, , 67 *et seq*.,) and the two concepts appear to have in common that they do not rest upon any 'duty' towards the defendant".

In this case, Magoge has quantified his damages. The defendants have not challenged the method used by Magoge to do so. They have relied on the defence that he had not attempted to mitigate his damages. In fact, there was no duty on his part to do so. Even if there were such a duty, Magoge has established that he could not effect the repairs sooner, because he could not afford to pay for them. Furthermore, if he had hired a car it would have been even more expensive.

It is ordered that the defendants jointly and severally, the one paying

the other to be absolved, pay the plaintiff -

(a) $406 931, with interest thereon at 30% per annum from 9 December 2000 to date of payment; and

(b) costs of suit.

Magoge Legal Practitioners, legal practitioners for plaintiff
Atherstone & Cook, legal practitioners for defendants