

OLLEYS MAZORODZE
versus
FRANK MATAMBANADZO
And
EMERSON NYANGANI

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE 9-12 November 2006 and 17 January 2007

Civil Trial

Manyurureni, for the plaintiff
Matsika for the defendants

KAMOCHA J: The plaintiff issued summons on 22 September 2005 claiming; (a) payment of the sum of \$3 912 125 000,00 by the defendants jointly and severally the one paying the other to be absolved, being accident damages negligently caused to him by 1st defendant; an employee of the 2nd defendant in the course and scope of his employment; (b) Interest on the principal amount at 30% per annum from date of accident to date of full payment; and (c) Costs of suit.

In his declaration plaintiff averred that on 23 July 2004 1st defendant was driving a commuter omnibus, a Toyota Hiace, registration number 720-836R belonging to the 2nd defendant along new Mazowe Road, coming from Harare and going to Bindura in the course and scope of his employment.

Plaintiff was a fare paying passenger occupying the front passenger seat of the said commuter.

On approaching the 25.5 kilometre peg, the 1st defendant rammed into a lorry which was stationary. The commuter's braking system was defective at the time it was being driven.

The accident was caused by the sole negligence of the 1st defendant who was negligent in any one or more of the following particulars:

- (i) He failed to keep a proper look out;

- (ii) He was travelling at an excessive speed in the circumstances;
- (iii) He failed to keep the vehicle under proper control;
- (iv) He failed to stop or take reasonable steps when an accident seemed imminent;
- (v) He used a defective vehicle to carry passengers.

As a result of his negligence, the plaintiff sustained the following serious injuries in the collision:-

- (a) Comminuted acetabular fracture of the left hip;
- (b) Comminuted fractures of the left radius and ulna;
- (c) Displaced webber A2 fracture of the right ankle; and
- (d) Subluxed metacarpophalangeal joint of the right big toe.

As a result of these injuries plaintiff alleged that he suffered and will suffer damages in the total sum of \$3 912 125 000,00 (old currency) which is \$3 912 125,00 (revalued). He particularised his damages thus:-

A. SPECIAL DAMAGES

Medical expenses	-	\$15 000 000,00
Loss of amenities	-	\$260 000 000,00

B. GENERAL DAMAGES

For pain and suffering and disablement	-	\$350 000 000,00
For future medical expenses	-	\$3 287 125 000,00

He averred that at the time of the collision he was an engineering contractor (boiler maker) retailer and merchandiser. The resultant disability had affected his business. Further, as a family man, he, as a result of the disability, had limitations of conjugal relationship since he would need total hip replacement for pain control.

The plaintiff maintained the above narration in his summary of evidence.

The defendants' plea was brief. They denied that their vehicle had defective brakes prior to the accident. They attributed the accident to the negligently parked lorry on the same lane as the 1st defendant at night without reflective warning triangle. They alleged that plaintiff had not suffered the injuries described by the doctor during this particular collision but that he had sustained them in a prior accident. They went on to allege that plaintiff was coming from undergoing a medical check up for the injuries on the day in question. It was also their plea that plaintiff was no longer carrying out any of his businesses at the time of the accident.

In their synopsis of evidence the defendants added a new dimension to the cause of the accident. They said the 1st defendant will say:

“That the accident occurred around 7.15p.m when as he was descending a slop along the Harare-Mazowe road he noticed an unmarked lorry parked in the middle of the road. He will explain that there was no indication of the lorry's existence on the road and when the accident seemed imminent he sworve (sic) to the right to avoid the lorry.

He will explain that there was an on coming vehicle and a passenger who was seated next to him thinking a head on collision was about to occur, the passenger pulled his steering to the left. In the ensuing struggle for proper control of the vehicle, 1st defendant did not manage to avoid the lorry and the accident occurred.

He will deny that he was negligent in his driving of the vehicle and actually had taken steps to avoid the accident had it not been for the passenger's conduct.

He will also testify that plaintiff suffered from injuries sustained prior to the incident and actually had walking aids to assist him.”

The 2nd defendant complained that he was being encumbered with injuries plaintiff suffered in a previous accident. He concluded his synopsis by asserting that plaintiff had ceased operating any business in Bindura and whatever he had been doing to source finance did not yield any results.

I pause here to make a very important observation that defendants make no mention in their plea of a passenger struggling with 1st defendant for control of the vehicle. This was a very important and material point in their defence. In fact their defence would have hinged on that pivotal point. Not only do the defendants fail to mention that defence in their

plea but the 1st defendant also failed to raise it in his extra curial statement to the police wherein he said this:-

“I do admit to have understood the caution but do not admit to the offence levelled against me. In these circumstances I could have avoided the accident but there was a broken down heavy vehicle which was going in the same direction. It was blocking my way and there was an oncoming vehicle and in the process my vehicle lost brakes leaving me with no option but I ended up ramming into the right side of the trailer of the broken down vehicle. That is all I can say.”

This time the defendants have introduced another defence of brake failure which was not pleaded and neither was it mentioned in their summary of evidence.

The police attended the accident and recorded their observations in the traffic accident report book which was produced by consent. A sketch plan contained therein depicts the 30 tonne lorry as being off the road. It also indicates that the point of impact was on the dirt verge not on the tarmac.

The parties attended a pre-trial conference whereat the issues for trial were formulated as follows:-

- “(i) Whether the vehicle 1st defendant was driving had defective brakes;
- (ii) Whether 1st defendant negligently caused the accident;
- (iii) Whether plaintiff had accident injuries prior or the said accident (sic);
- (iv) Whether plaintiff was coming from a medical check up for injuries sustained prior to the accident in issue;
- (v) Whether the defendants are liable to pay damages to the plaintiff either as alleged or at all
- (vi) Quantum of damages.”

Before dealing with the *viva voce* evidence I shall pause to observe that the previous accident, in which the plaintiff is said to have sustained the injuries for which damages are being encumbered on the defendant, occurred in 1996. As can be seen, that accident occurred 8 years prior to the one under review. The injuries that plaintiff had sustained had healed long back and there was no need for him to use crutches.

The following documents filed in the plaintiff's bundle of documents were produced as exhibits by consent:-

1. Quotation by Dr Bowers dated 23 May 2006 at page 37;

2. Quotation from St Annes Hospital dated 23 May 2006 on page 38;
3. Bundle of receipts for medical expenses from pages 39 to 63;
4. Traffic Accident Report book from pages 64 to 76;
5. First defendant's extra curial statement at page 77;
6. Bundle of receipts for transport costs at 78 *et sequel*.

The plaintiff gave evidence and called one witness. He told the court that he knew the 2nd defendant as a business man in Bindura but he only knew the 1st defendant in connection with this case. On 23 July 2004 he boarded the 1st defendant's commuter omnibus at the Rotten Row road rank. He sat in the left front passenger seat. There was another front passenger between him and the driver. He said he arrived at the rank at about 5pm.

Before the vehicle left the rank the 1st defendant went round it checking its tyres. Plaintiff gained the impression that defendant was checking the condition of the tyres and even asked him if the vehicle's tyres were alright and was told that they were.

The vehicle pulled out of the rank for its Bindura trip. Hardly 60 metres from the terminus it hit a pot-hole and a loud sound of loose metal came from the front wheel on the driver's side. The plaintiff said to the driver:-

"What has made a sound from your wheel?"

The 1st defendant replied-

"I suppose it is my brake pad which had not set in well because I fitted it 20 minutes ago."

They proceeded along Rotten Row road and by the time they went into King George road there was an incident in which the 1st defendant was following behind a vehicle too close and he suddenly swang to the right and over took it rather unsafely.

Plaintiff then suspected the condition of the brakes and suggested to the driver that since it was getting a bit dark he should stop at either Ashbrite Service Station or Golden

Stairs Service Station and check if the brakes had set well and ascertain the condition of his brake pads. The driver was agreeable and assured the plaintiff that he would do that. The 1st defendant did not keep his promise and drove past the two service stations. When asked by the plaintiff why he had not stopped the driver told him that he had tested the brakes and they were alright.

As they drove past Christon Bank and were about a kilometre from the scene of the accident the vehicle began to gather a rather unsafe speed of about 120km. Plaintiff is a very experienced licensed driver who has been driving for 32 years. He said as the vehicle began going down hill and was approaching dangerous curves it continued to gather momentum clocking between 130km to 135km per hour. It was obvious to the plaintiff that the vehicle was travelling at a very unsafe speed. He looked at the driver and noticed that he was desperate to control the vehicle. He rammmed his foot down the brake pedal several times but the vehicle continued to gather momentum as the road curved from left to right. The driver was in a state of fright as he tried to control the vehicle by ramming his foot onto the brake pedal.

After turning one of the curves there were two vehicles 40 metres away. One was a heavy duty 30 tonne truck with a trailer stationary at the extreme left side of the road flashing its hazard lights. It was facing the same direction as the 1st defendant's vehicle. The 2nd vehicle was a Mazda vehicle going in the same direction passing the stationary 30 tonne truck. A third vehicle was going in the opposite direction up hill. The Mazda vehicle in front of defendant's car was flashing its hazard lights at the same time signalling that it was unsafe to overtake because there was on coming vehicle.

The 1st defendant was in a desperate situation. He could not overtake the Mazda because of an oncoming vehicle. His vehicle could not be controlled because the brakes were defective. So it continued gathering dangerous speed. In a desperate effort, the defendant tried to squeeze his car between the stationary 30 tonne truck and the Mazda

vehicle. Consequently, he rammed into the right rear side of the trailer. The plaintiff said what the 1st defendant did was not a normal overtaking manoeuvre. It was a desperate move because there were four vehicles on that section of the road at that particular time. He said if defendant had overtaken on the correct side he would have had a head on collision with the on coming vehicle. So he must have felt it was better to squeeze between the Mazda and the parked truck. Unfortunately there was insufficient space to drive past, hence the collision.

It was plaintiff's evidence that the accident would have been avoided if the brakes had not been malfunctioning. The driver rammed on the brake pedal several times without any success. He said the suggestion that there was interference to the driver by one of the passengers who pulled the steering wheel to the other side was false. He concluded that the accident was caused by the fact that the 1st defendant was driving the vehicle which had defective brakes. That explains why it could not reduce speed when the driver rammed on the foot pedal several times. That also is the reason why the driver looked frightened as he tried to apply the defective brakes.

The plaintiff was removed from the scene by police who conveyed him to Concession Hospital from where he was transferred to Parirenyatwa Hospital that same night.

All in all he sustained 8 fractures. The major ones being the one to his left hand wrist followed by the pelvis socket, the right big toe and right ankle. An operation was done to his left hand wrist and fitted with 2 steel plates held by 8 screws to put back and hold the bones in position. These objects were still in the wrist at the time he gave evidence.

The thigh bone had been stuck in between the hip and hip socket. To pull it back in place he was subjected to traction for 3 months. The medical team drilled the lower portion of the thigh bone and put a chain and 12kg weights at the end. He was made to lie on his

back and remained in that position for 3 months. Plaster of Paris was put to his right leg from the shin to the foot for about 8 weeks.

He said the pain was unbearable and was coupled with stress which triggered other ailments such as high blood pressure. The pain triggered worse problems with his existing diabetic condition.

He was attended to by an orthopaedic surgeon known as Mr W T Mhishi who compiled his well documented report which was filed of record in the plaintiff's bundle of documents. I shall return to the orthopaedic surgeon's report when dealing with his evidence.

The plaintiff's medication had not yet ended as he still needs a hip replacement whose costs are astronomical as it entails a more than 7 hours operation. It involves the cutting of the head of the thigh bone and the cutting in of the socket. Cut out portions should be replaced by artificial ones called prosthesis. Such operations can only be performed in private hospitals such as St Annes Hospital. Government hospitals no longer have the capacity to perform such operations. Costs of such operation at a private hospital are beyond the plaintiff's means. He obtained quotations from the doctors concerned and another from St Annes Hospital for the removal of the pins.

The quotation for a total hip replacement was compiled by a specialist known as Mr A G Bowers on 23 May 2006.

“Quotation
Mr Olleys Mazorodze
Total hip replacement

Surgeon's fee	-	Z\$550 000 000,00
Assistant 1 fee	-	Z\$ 55 000 000,00
Assistant 1 fee	-	Z\$ 55 000 000,00
Anaesthetist fee	-	Z\$385 000 000,00
Sub Total	-	Z\$1 045 000 000,00
Prosthesis	-	+/--\$1 250 000 000,00
Total	-	Z\$2 295 000 000,00
Excludes St Anne Hospital	-	+/--Z\$800 000 000,00
Excludes physician	-	+/--Z\$75 000 000,00

Excludes physiotherapy	-	+/-Z\$50 000 000,00
Approximate total	-	+/-Z\$3 220 000 000,00

NB: Patient must access their foreign currency through the bank for part of the payment of the prosthesis – currently SAR23 194,00, which is subject to fluctuations in the exchange rate. All prices are approximate and are subject to change without notice.”

On the same day – 23 May 2006 St Annes Hospital advised plaintiff that he was required to pay a deposit of \$67 125 000,00 for removal of plate and screws.

He produced receipts for his medical expenses which added up to a figure of \$12 231 688,00 while transport costs to and from hospital amounted to \$2 040 000,00.

Plaintiff emphasized that he was not suffering from any injuries prior to the collision as the injuries he had suffered in the 1996 accident had healed long back. The suggestion that he was using crutches when he boarded the defendant’s vehicle was clearly false and so was the assertion that he had been coming from a medical check up for the injuries he had suffered in 1996. The position was that he had gone to the American Embassy in Harare as he was in the process of arranging to go to the diaspora. He also was making arrangement to go to the United Arab Emirates to do some contract work as a boiler maker. But as a result of the accident all that is no longer possible.

He is now in continuous pain for 24 hours and is dependent on drugs to reduce the pain. He has limitations with his bodily functions as he cannot fully utilise his left hand and leg. The hip injuries have completely affected his conjugal duties.

As a boiler maker he uses heavy duty materials which require him to be physically fit. His career has now been completely shuttered.

Under cross-examination he told the court that it was not only him who had told the defendant that he was driving dangerously but other passengers also were shouting that he was speeding but he appeared desperate as he could not control the vehicle. He also emphasized that when he looked at the driver’s face he appeared frightened.

The plaintiff got visibly angry when it was put to him that he was walking with the aid of crutches and that this accident merely worsened the injuries he had suffered in 1996. He was justified, in my view, because it does not make sense to suggest that the injuries described above were sustained in 1996. The orthopaedic surgeon was also of the view that the suggestion did not make sense at all. In my view the suggestion seems to show how spiteful towards the plaintiff the defendants were.

The plaintiff gave his evidence clearly and in a straight forward manner. He was not shaken under cross-examination. He was worth to be believed. His evidence was corroborated on all material points. For instance the police sketch plan supported his story that the 30 tonne truck was parked off the tarmac on the gravel verge.

Ms Cecilia Rameki who was also a passenger sitting in the seat just behind the driver described the defendant's manner of driving. She said he was speeding and she was one of those who complained that he was driving dangerously. She remembered seeing flashing lights from the stationary truck off the road and the Mazda vehicle which was passing the truck. As a result of the collision she fractured her right arm and left leg. She was also on traction for 3 months. She also said plaintiff had no crutches prior to the accident.

This witness also gave her evidence well and deserves to be believed.

The orthopaedic surgeon Mr Willie Tapera Mhishi attended to the plaintiff when he was hospitalised and compiled the report which is filed of record. He said plaintiff sustained multiple fractures contained in his report. He said the plaintiff was treated for current injuries not history. It was impossible for those injuries to have been sustained in 1996. The medical team did not even see any old fractures on plaintiff.

He told the court that plaintiff suffered severe pain during the first few days. According to the surgeon the plaintiff has 35% permanent disability to his left hip, 10% to his left radius and ulna and 1% to his right big toe.

The disability would affect his business as a boiler maker, retailer and merchandiser. It would also affect his conjugal relationships.

His future requirements are both medical and surgical. The surgeon said plaintiff would need analgesics for pain due to post traumatic osteo-arthritis. Finally, the surgeon opined that plaintiff would certainly require a total hip replacement later although he was not able to say how soon that would be.

Under cross-examination the surgeon told the court that since plaintiff developed post traumatic asteo-arthritis in the left hip it will get worse as time goes on since it is a pregressive disease. He also said the injury to the hip would not heal because the plaintiff has got to walk. Once it has started it can only get worse. He finally told the court that no hip replacement can be done in any of the government hospitals as they simply do not have the capacity to do that.

Both defendants gave evidence but they were both hopeless witnesses. The first defendant, in particular, was an unbridled liar whose evidence was confused and inconsistent. He prevaricated as to what caused the accident. In his plea, he said the accident was caused by a lorry which was unlit and stationary in the middle of the road. That of course, was false because the lorry was completely off the tarmac flashing its hazard lights.

In his summary of evidence, he talked of a passenger who struggled with him for the possession of the steering wheel resulting in the vehicle veering off its lane of travel into the stationary truck. That also was clearly false. The correct position is that he desperately attempted to squeeze his vehicle between the stationary lorry and the Mazda vehicle which was in front also flashing its hazard lights.

In his extra curial statement which he made two years later he, for the first time, blamed the accident on brake failure.

That also was false. The finding of the court is that he was driving the vehicle with defective brakes.

The 1st defendant was not worth to be believed and his evidence is accordingly rejected. Similarly the evidence of the 2nd defendant does not need any serious consideration as it does not take the defence case any further. It is rejected.

I accept the well given evidence of the plaintiff and his witnesses and find that the defendants are liable in damages to the plaintiff.

Plaintiff produced receipts to support his medical expenses and transport costs. He detailed his loss of amenities in his evidence supported by expert evidence of an orthopaedic surgeon. He is therefore entitled to his special damages when one takes into account the current hyper inflationary economic climate in the country.

Similarly, sufficient evidence was adduced to support his claim for pain and suffering and disablement. I finally hold that overwhelming evidence was adduced to entitle him to the future medical expenses claimed. In light of the hyper inflationary environment prevailing in the country his claim is very conservative.

In the result, I would issue the following order.

It is ordered that:-

- (a) Judgment be and is hereby granted in favour of the plaintiff against the 1st and 2nd defendants jointly and severally, the one paying the other to be absolved, in the total sum of \$3 912 125,00 (revalued);
- (b) Interest on the said amount at 30% per annum from the date of accident to the date of full payment; and
- (c) Costs of suit.