TENDAI MAZANHI
versus
DAISY MAROVANIDZE
and
CHEEZ HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 03 June 2009

Civil Trial

Mr. *Debwe*, for plaintiff
Ms Mupawaenda, for defendants

CHITAKUNYE J: The plaintiff is a self employed male adult.

The first defendant is employed by the second defendant as a Marketing Assistant.

The second defendant is a company duly incorporated with limited liability according to the laws of Zimbabwe.

At all material times the plaintiff was the owner of a Nissan Sunny FB15 motor vehicle registration no. AAP 1693.

The first defendant was authorized to drive second defendant's motor vehicle, viz; Nissan Hardbody registration no. AAG 1002.

On 28 July 2007, and at the intersection of Julius Nyerere Way and Nkwame Nkrumah Avenue, around 0300hours, a collision occurred between the plaintiff's aforesaid motor vehicle and second defendant's motor vehicle then and there driven by first defendant.

The two motor vehicles sustained damages. The plaintiff's motor vehicle was damaged beyond economical repair.

On 15 October 2007 plaintiff issued summons against the two defendants claiming the replacement value of the Nissan Sunny FB15 as at the time of judgment and interest thereon at the prescribed rate from the date of judgment to the date of final payment. At the time of issuance of the summons that replacement value was $7 billion. The plaintiff alleged that the collision was caused solely as a result of the negligent driving of first defendant. The particulars of negligence alleged were that:-

1. She failed to keep a proper look out.
2. She failed to give precedence to the plaintiff's motor vehicle.
3. She failed to apply her brakes timeously or at all.
4. She entered the main road at a time when it was unsafe to do so.

The first defendant admitted that indeed a collision occurred on the night in question between the aforementioned motor vehicles. She admitted that she was driving the second defendant's motor vehicle but this was not in the course of her employment. She denied that she was negligent in any way. She, on the other hand, contended that plaintiff was the sole cause of the accident in that:-

1. He was over speeding in the circumstances.
2. He drove without due care and attention.
3. He failed to take precautionary measures once he noticed the first defendant's vehicle emerging from the round about.

Alternatively to the above, that plaintiff contributed significantly to the occurrence of the collision by being negligent in the manner or manners averred above.

After the closure of pleadings plaintiff withdrew his claim against second defendant.

The issues for determination as between plaintiff and first defendant were identified as:-

1. Whether or not first defendant was the sole cause of the accident.
2. If so, the particulars thereof.
3. Whether or not the plaintiff contributed towards the collision.
4. If so, the extent thereof.
5. What is the quantum of damages suffered by plaintiff?

The plaintiff's case was testified to by plaintiff and Mr Benjamin Matambanadzo. The defendant gave evidence and called no other witness.

From the evidence adduced in court it is common cause that on the night in question a collision took place as alleged. Plaintiff was driving along Julius Nyerere Way from north to south whilst first defendant was driving along Nkwame Nkrumah Avenue from west to east. The collision occurred in the middle lane of the south bound lanes along Julius Nyerere Way.

The plaintiff gave evidence to the effect that on the night in question he was driving down Julius Nyerere Way when, as he approached its intersection with Nkwame Nkrumah Avenue, he suddenly saw first defendant's motor vehicle in front of him; i.e. driving across his path. The motor vehicle was so close that despite applying brakes he could not avoid hitting into it.

At this inter section there is a small round about on Nkwame Nkrumah Avenue, which does not encroach onto Julius Nyerere Way, and first defendant was supposed to give way to traffic on Julius Nyerere Way. The first defendant did not give way hence the collision. After the collision he approached first defendant and asked her what had happened. The first

defendant's response was to the effect that she was not aware that there was an oncoming motor vehicle. It was his evidence that first defendant was negligent in failing to give way as was expected of her at the intersection in question.

As regards damages sustained by his motor vehicle plaintiff indicated that his motor vehicle suffered extensive damages including the bursting of its air bags. After the collision second defendant's insurers assessed his motor vehicle and ruled that it was damaged beyond economical repair.

It was also his evidence that at the time of the collision he valued the pre accident value of the motor vehicle at $3 billion.

Under cross examination plaintiff maintained his stance. He denied that he was negligent in any way. As far as he was concerned first defendant entered the intersection without having ascertained that it was safe to do so.

On the first defendant's offer to have the motor vehicle repaired at her cost plaintiff said he had no problems with that save to say some of the damage like the air bags were not repairable. Those had to be fitted by the manufacturer.

On the replacement value he indicated that as at the time of trial the replacement value was $9, 6 trillion and that is the sum he was seeking. In that regard he tendered a quotation from DESMIC Motors dated 27 May 2008 for a similar Nissan Sunny Motor vehicle at a price of $9, 6 trillion. In my view the plaintiff gave his evidence well.

Mr Benjamin Matambanadzo gave evidence for the plaintiff. He is a panel beater by profession and owner of Imperial Motors. He did his apprenticeship with the City of Harare from 1989 to 1992. After 1992 he qualified as a panel beater. He worked as a panel beater from the time of apprenticeship to the present. His evidence was as an expert in motor vehicle repairs.

His evidence was to the effect that after examining the plaintiff's motor vehicle he concluded that it was damaged beyond economical repair. In his assessment he looked at two principal factors, namely; the total cost of repairs and the availability of the spares. In this he took the total cost of repairs and compared it with the cost of an accident free similar motor vehicle. He also considered the non availability of spares locally and considered the cost of importing such spares to come up with the total cost. It was after considering these two aspects that he concluded that the motor vehicle was damaged beyond economical repair.

His conclusion was in tandem with the assessment by second defendant's insurers' report tendered into evidence as exhibit 2. That report states that:

> "The vehicle was written off due to the fact that repair costs exceed 70% of the market value mainly brought about by the fact that spares are not readily available."

Mr Matambanadzo also alluded to the non availability of spares and the fact that air bags are not repairable. Under cross examination Mr Matambanadzo indicated that in his view the motor vehicle was for car breaking. The evidence by Mr Matambanadzo was not challenged in any meaningful way. The first defendant did not call any expert evidence to rebut the testimony by this witness.

The first defendant gave evidence to the effect that on the night in question she was driving along Nkwame Nkrumah Avenue due east. On approaching the intersection of Julius Nyerere Way and Nkwame Nkrumah Avenue she checked for traffic on her right hand side and there was none. She then proceeded to cross the three north bound lanes of Julius Nyerere Way and got to a small round about. Before crossing the south bound lanes she checked on her left hand side and observed that there was a motor vehicle coming down. She estimated that the motor vehicle was about 100 metres away. As she was crossing the lanes she checked on her left again and saw that that motor vehicle was near her. At that time she was in the middle lane. Her vehicle was there and then hit on the loading tray as she was in that lane. After the impact her motor vehicle swerved and faced the direction plaintiff had come. It was her evidence that in her opinion both plaintiff and herself were equally to blame for the accident. Plaintiff's blame was that he was over speeding as evident from the swerving of her motor vehicle on impact.

A careful analysis of the evidence adduced in court shows that defendant's case is fraught with inconsistencies. In paragraph 3 of her plea defendant alluded to the fact that once she had crossed the three north bound lanes along Julius Nyerere Way and got to an island/round about she could not have stopped in the middle of the round about and so she proceeded. She also said she proceeded after noticing that plaintiff's motor vehicle was a safe distance away. Further on, she said that there was no obligation on her to give way once she was in the round about. It is unclear whether she proceeded to cross Julius Nyerere Way because she was already in the round about or because she actually observed that plaintiff's motor vehicle was far away and she could cross safely. In fact by saying that she could not have stopped once she was in the round about and that she was not obliged to give way to

south bound traffic on Julius Nyerere Way defendant was impliedly admitting that she never gave way but just drove through without ascertaining that it was safe to do so. She drove as if she had the right of way as is ordinarily the case at a round about controlled inter section.

In her evidence in court the defendant seemed confused regarding the situation with the small round about at this intersection. Whilst initially she made effort to show that plaintiff should have given way since she was already in the round about, under cross examination she seemed to buckle down when she admitted that to her knowledge she had never seen motor vehicles driving along Julius Nyerere Way giving way to motor vehicles crossing along Nkwame Nkrumah Avenue. If any thing, motor vehicles in Nkwame Nkrumah Avenue give way to motor vehicles traveling along Julius Nyerere Way.

In her plea defendant had said that the plaintiff was the sole cause of the accident. In her evidence in court she did not maintain that. She instead said that they were both equally to blame. Clearly defendant was unsure of herself.

In her evidence in chief and under cross examination she admitted that she paid an admission of guilty fine after admitting to driving without due care and attention. When quizzed why she paid the fine defendant initially said she did so as she was in shock. She later admitted that whereas the accident occurred on 28 July 2007 she went to the police to pay the fine several days after the accident. She could not explain how the shock continued to affect her when she had had several days to compose herself before paying the fine.

Equally exhibit 2 is an insurance report. On page 2 thereof the defendant's version of how the accident occurred is recorded. Though defendant said she is not the one who wrote it, she did not deny that that information came from her. In that report she stated that:

> "I was driving along Nkwame Nkrumah at the intersection with Julius Nyerere at a round about when I misjudged the speed of a Nissan Sunny Reg. no. AAP 1693 which appeared to be a distance only to realize that it was close thereby resulting in the Nissan Sunny hitting my left side of the loading tray and partly front."

Though denying the handwriting she admitted appending her signature to that statement as her statement. When she was asked further why she gave out such a version her response was to the effect that she did it because she wanted the speed finalization of the matter and for the insurance company to pay Tendai. If, as she said in her plea, plaintiff was the sole cause or, as she now said in her *viva voce* evidence, plaintiff and herself contributed equally why would she want plaintiff to be paid off speedily by the insurance company? In any case, it was not just because she wanted the insurance company to quickly pay off plaintiff but

as she stated in her evidence and under cross examination, she wanted to avoid being charged with the more serious offence of negligent driving. Such a charge was not preferred against her because of the offer made by her employer to pay plaintiff for the damage to his motor vehicle. Defendant clearly admitted that it was because of these negotiations that she was not charged with negligent driving.

Defendant also testified that as at the time of trial plaintiff had been paid $5million by her employer's insurance company and a second payment of $7 billion was made in April 2008 by herself and her employer towards plaintiff's claim. When asked why they paid the $7 billion she said it was because they had not been given a claim exceeding $7 billion. She was further asked that now that a claim of more than $7 billion was made what was her stance to which she said "I say that the motor vehicle was paid for."

I did not hear defendant to say that the payment was made on a without prejudice basis. It was clearly made because defendant accepted liability. She just could not be bold enough to admit so in her pleadings and in court.

On the question of liability for the accident I find that defendant was the sole cause of the accident. She clearly did not keep a proper lookout for other motorists , she did not give way to traffic on the main road as was required of her hence entering the main road when it was not safe to do so. As per her own words she "misjudged the speed of plaintiff's motor vehicle." The defendant was negligent in those circumstances.

The next issue is on the quantum of damages. The assessment of damages in accidents is not an easy one. The law has been espoused in a number of cases but it would appear parties still fail to comprehend what is expected of them.

In his book Motor Law, volume two, Juta 1987, at p.387 the learned author W E Cooper stated that:

> "An owner is entitled to a sum of money (damages) which will place him in the financial position he would have been in if his motor vehicle had not been damaged. The object of an award is to compensate the owner for material loss, not to improve his material prospects. In other words the owner is entitled to claim his negative interesse (interest).
> The plaintiff's loss must be assessed as at the time the motor vehicle was damaged."

This was also elucidated in *Erasmus v Davis* 1969 (2) S.A. 1 at page 9 A-B wherein POTIGIETER, A.R said that:-

> "The principle of assessment of damages in delict is that a plaintiff must by monetary compensation be placed in as good a position financially as he would have been in if the delict had not been committed (see *de Jager v. Grunder*, 1964 (1) S.A. 446 (A.D.) at p. 456). Generally speaking, payment to a plaintiff of a sum representing the diminution in value of his damaged property will place him in such a position. In order to prove such diminution in value a plaintiff would be entitled to establish the difference between the pre-collision and post-collision value of his damaged property."

This was also confirmed by Muller, WN A. R. in *Erasmus v. Davis* (*supra*) at p.17D when he said that:-

> "A litigant who sues in delict is entitled to recover from the wrong doer the amount by which his patrimony has been diminished as a result of the conduct of the latter."

He is thus not entitled to recover anything more.

In our jurisdiction MAKARAU J P had occasion to restate the position in *Monic*a *Komichi v David Edwin Tanner and Eaton & Young* HH 104/05. At page 3 of the cyclostyled judgment the Hon. Judge President stated that:-

> "It is indeed the settled position that the measure of delictual damages in our law, also known as the "negative interesse" is the calculation of an amount of money which is necessary to place the plaintiff in the (hypothetical) financial position he would have enjoyed had the delict not been committed. The measure of damages requires the plaintiff to establish the extent of her estate before the delict and a diminution to that estate as a result of the delict."

In order to establish the diminution in value there are two methods a party can seek to employ. Namely (a) by proving the vehicle's pre-collision and post -collision value; or (b) by proving the cost of repairing it. (See Motor Law by W.E. COOPER (*supra*) at p387)

The onus rests on the plaintiff of proving, not only that he has suffered damages, but also the quantum thereof. To discharge such onus expert evidence is required to establish the pre -collision value and the post -collision value. The evidence must show what damages were suffered and what it would cost to put the motor vehicle to the state it was before the collision.

The plaintiff is thus required to prove the pre-accident value of the motor vehicle and its post accident value in order to reveal the diminution in value thereof. This is so because as pointed out above, the measure of damages payable to plaintiff is the diminution in value of the motor vehicle by reason of the damage sustained in the accident. Generally expert evidence will be required to establish the pre-collision and post-collision values. An expert would be

able to describe the nature and extent of the damage and the necessary repairs and cost there of.

In *casu* the plaintiff claimed for the replacement value as at the time of judgment. He seemed oblivious to the need to prove the pre-collision and post collision value. The expert witness he called was not called upon to testify on such values at all. Whilst not giving the post accident value Mr Matambanadzo said that the motor vehicle can only be for car breaking. That in my view confirmed that the motor vehicle still had value. The fact that the motor vehicle was deemed damaged beyond economical repair did not imply that it was valueless. In fact in answer to a request for further particulars plaintiff had said the salvage value was now about $75 000 000 000.00. (that is as at 26 March 2008). Unfortunately in his evidence such salvage value was not testified to at all. That value should have been ascertained as at the date of the accident and then used to ascertain the diminution in value of the motor vehicle. The evidence did not touch on the cost of repairs at all, again a factor necessary in such claims. Instead the plaintiff sought quotations of prices of similar motor vehicles. That in my view would not be the damages suffered in the collision. That price did not take into account the pre-collision value less the post-collision value. It is a price of a motor vehicle similar in make to plaintiff's motor vehicle and nothing more.

The plaintiff's prayer for quantum as at the time of judgment was without legal justification. I did not hear counsel to refer to any legal principal justifying quantum of damages as at the date of judgment in delictual claims. The plaintiff provided a quotation as at 27 May 2008, which was the date of commencement of trial and not the date of judgment. That sum was $ 9.6 trillion. It is that figure that plaintiff in his evidence sought to prove as the damages he suffered as a result of first defendant's conduct.

In his closing submissions plaintiff's counsel submitted that such a value (of $9.6trillion) "cannot now purchase a similar vehicle. In the premises, it is respectively submitted that it would only be just and equitable that first defendant be ordered to pay the replacement cost of plaintiffs vehicle as at the time of such payment to take into account the increase in value of the vehicle caused by hyper inflation. An amendment to plaintiff's prayer is therefore respectively sought in that regard."

As with the previous prayer for quantum as on the date of judgment, this new prayer for the quantum as at the date of payment was made without any legal justification. It was made with the desire to get the replacement value as at the date of payment yet as has been

stated above plaintiff is entitled to the damages suffered as a result of the delict by defendant and nothing more. Those damages are calculated taking into account the pre-collision value less post-collision value. For example if just before the collision the vehicle was worth A and after collision it is now worth B. the difference between the A and B would be the cost of repairing the motor vehicle to its pre collision state A. If C is that difference then that is the figure the defendant should be saddled with and not the cost of replacing the entire motor vehicle including B. If there are any arguments about inflation adjustments those in my view should be made vis a vis the damages C and not the whole motor vehicle.

In *casu* the plaintiff's approach on assessment of damages was wrong and did not prove the extent of the damages suffered.

Accordingly the defendant is granted an absolution from the instance.

Debwe & Partners, plaintiff's legal practitioners.
Mabulala & Motsi, defendant's legal practitioners.