DURURU TRANSPORT (PRIVATE) LIMITED
versus
MICHELLE RUTENDO MUTAMUKO
(Executrix Testamentary in the Estate of Tatenda Calvin Mutamuko)
and
PREMIER BANKING CORPORATION LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 23 to 25 November 2010 and 31 May 2011

J. Dondo, for the plaintiff
V. Nyemba, for the 1st defendant
A. Moyo, for the 2nd defendant

PATEL J: This matter arises from a collision that occurred on 20 July 2009 between the plaintiff's truck and a motor vehicle driven by the 1st defendant's deceased husband. The plaintiff claims the replacement value of its vehicle, damages for loss of income and goods, together with interest and costs of suit.

The claim against the 2nd defendant was founded on its admitted ownership of the vehicle driven by the deceased who, at the time of the accident, was employed by the 2nd defendant. During the trial, however, it became apparent that the deceased was not driving the vehicle in the scope and course of his employment. In the event, the plaintiff formally withdrew its claim against the 2nd defendant by consent, with no order being made as to costs.

Consequently, the primary issue for determination herein is whether it was the plaintiff's driver or the deceased who caused the accident. If it was the latter, the secondary issues relate to the replacement value of the plaintiff's truck and the quantum of damages that it claims.

The Evidence

Tinashe Masviba has been employed as the plaintiff's driver since August 2007. He obtained his driver's licence in 2002 and

started driving trucks in 2003. His evidence was as follows. He drove the plaintiff's truck-cum-trailer on the day in question. He began his journey in Mtoko at 6.00 p.m. and stopped to refuel in Glenara (Harare) at 8.00 p.m. before resuming his journey a few minutes before midnight. He was driving along Churchill Avenue West (in Harare) at a speed of 40 to 50 km per hour. He saw an approaching vehicle, dipped his lights and applied his jack-brake to slow down. He did not apply his foot-brakes. The other vehicle then encroached into his lane and, although he moved to the extreme left, the vehicles collided head-on in the left lane. He lost control of the truck after impact and continued along the left, crashing through the durawall of a house and eventually stopping in a swimming pool beyond the durawall. The distance from the point of impact to the durawall was about 16 to 20 metres, with a further 4 metres to the swimming pool. The other vehicle, an Isuzu twin-cab, remained on the road and another vehicle stopped behind the Isuzu. A man called Shingi alighted from it and said that the driver of the Isuzu was drunk and had been told not to drive that night. The damage to the truck was extensive and about 3 to 4 tons of the 30 tons of maize in the trailer fell open or into the swimming pool. The Isuzu was also severely damaged. The road in question was bumpy and had no street lights. There was no centre-line marked on the road. It was not too narrow for a truck to be driven along it. His truck was 1 metre away from the centre-line when the collision occurred. The truck-cum-trailer weighed 18 tons and their combined length was 16 metres. The front width of the truck was about 2.5 metres. The truck was manufactured in 1994 and was in good condition before the accident. He was not driving at an excessive speed and could not have done anything else to avoid the collision. He made indications to the police the following morning and told them that the deceased was drunk.

Isaac Dururu is the Managing Director of the plaintiff. His evidence was that Tinashe Masviba has been driving long haulage

trucks for the plaintiff for over 5 years. During that period, he has not had any accident or committed any traffic violation. The witness was at the scene of the accident within 10 to 15 minutes of its occurrence. When he arrived, the truck was in the swimming pool and the Isuzu was almost in the middle of the road. He observed drag marks on the road, showing that the Isuzu had been dragged backwards from the point of impact, which was about one metre or more towards the left lane. This tallies with Sketch Plan A prepared by the attending police detail soon after the accident. The road in question is 9 metres wide at the point of impact. He visited the site of the accident the following morning and took several photographs which he produced in court. In March 2010, he obtained a traffic accident report from Avondale Police Station and passed it on to the plaintiff's insurer. According to this report, the deceased was found to be negligent and to have caused the accident. At the time of the collision, the truck was carrying 30 tons of maize for Delta Corporation. The latter accepted 30 tons and rejected 5 tons as being either soiled or wet. The plaintiff's claim in this respect is for the loss of 5 tons of maize at US$300 per ton, amounting to US$1500. The truck itself is a Freightliner 1994 model which was in good condition and used for regional transport, with an annual certificate of fitness issued on 2 May 2009. The truck was declared to be beyond economical repair by three different panel beaters. The value of a similar 1999 model is US$46000 according to an invoice from a local truck dealer. The accident assessor's report, dated 5 October 2009, places the market value of the truck at US$45000. The amount claimed for the truck is US$33250, being US$40250 less the sum of US$2000 (paid out by the 2nd defendant's insurer) and US$5000 (the residual value of the wreckage). The average net income from the truck from January to July 2009 was US$5600 per month. In this regard, the plaintiff claims an amount of US$22760 for the period from July to October 2009 and the sum of

US$189.67 per day thereafter to the date of payment of the replacement value of the truck.

Michelle Rutendo Mutamuko is the widow of the deceased and the executrix of his estate. She had been married to him for 8 years. She testified that the deceased was the Head of Treasury with the 2nd defendant and would often meet clients or other bankers after work. He used to drink at Premier Belgravia Sports Club on Fridays and Saturdays but never during the week. The policy of patrons at the Club was to be driven back by non-drinking drivers. The deceased died as a result of the collision on 20 July 2009, which was a Monday. He was driving from his office at the time. There was no inquest or other court proceedings relating to his death. She has never seen the traffic accident report produced by Isaac Dururu. She could not say whether it was the deceased or the other driver who was negligent and was not in a position to respond to any of the plaintiff's claims.

Inspector Joel Muchirawatu is the Officer-in-Charge of investigations at Harare Traffic Section. He has been with that Section for over 10 years and has two certificates in the analysis, evaluation and drawing of accident plans. His evidence was that he visited the site of the accident for evaluation three days after the collision. Scale Plan A was drawn up by Sgt. Chaparika soon after the accident. The witness himself prepared Scale Plan B soon after he visited the site, with indications provided by Tinashe Masviba and Sgt. Chaparika. The debris had already been cleared but the chalk marks made by the latter were still visible. He observed gouge marks starting from the left lane towards the centre and extending into the right lane. The point of impact was 2 metres from the edge of the left lane and 2.5 metres from the centre of the road. The road is 9 metres in width and in good repair. It is open to all motor vehicles and not subject to any tonnage prohibition. The speed limit on the road is 70 km per hour. There was a sharp curve in the road at Point B on the scale plan. The collision was caused by the Isuzu

encroaching into the left lane. The distance from the point of impact to Point C (where the Isuzu eventually ended after the collision) was 24.4 metres. This deflection distance was proportional to the amount of force at the point of impact. The Isuzu was punched backwards, as opposed to being dragged, from the point of impact to Point C. There were no skid marks from either vehicle before the point of impact. After the collision, the truck veered forward to a distance of 52 metres. It was therefore possible that the truck was travelling at an excessive speed. Following his visit to the site, the witness inspected the Isuzu but not the truck. The Isuzu was extensively damaged by a head-on collision. The traffic accident report (dated 11 March 2010) was compiled by Avondale Traffic Section following an inquest and verdict of the Harare Magistrates Court. No witnesses were called to the inquest hearing. He was not aware of the court procedure pertaining to sudden death dockets and inquests.

Who Caused the Accident

Mr. *Dondo* invokes the principle of *res ipsa loquitur* in support of the plaintiff's case. More specifically, he relies upon the expert evidence of Inspector Muchirawetu as showing that the deceased was driving on the wrong side of the road at an excessive speed at the time of the collision. He submits that this evidence corroborates and complements that of Dururu and Masviba and demonstrates on a balance of probabilities that the collision was caused by the sole negligence of the deceased. He did not pursue the allegedly drunken condition of the deceased at the time, presumably because the evidence in that regard was obviously hearsay. Ms. *Nyemba* counters these submissions by pointing to the inconsistent and inconclusive evidence that emerged at the trial pertaining to the physical evidence on the ground after the collision.

As was aptly cautioned by McNally JA in *Ramotale* v *The State* SC 249/92, credibility in collision cases cannot be measured by

demeanour, but only by comparing the testimony against the real evidence. To put it differently, the testimony of the witnesses must be tested against the real or extrinsic evidence available, *i.e.* the sketch plan of the scene of the accident, the damage occasioned to the motor vehicles involved, and the facts recorded in the Traffic Accident Book. Similarly, as was further observed by McNally JA in *Matambo* v *Mutsago* SC 19/96, where a witness makes an assertion that is mechanically impossible, one cannot judge his veracity by reference to his demeanour, but by applying the laws of physics.

Turning to the physical evidence, according to the sketch plan which was drawn by Sgt. Chaparika soon after the collision (Plan A), the point of impact appears to be close to the centre of the road, while the resultant glass debris is shown as being in the middle of the road. Inspector Muchirawetu's sketch plan (Plan B) indicates the point of impact as being further left. However, it is important to note that this plan was drawn up three days after the accident, when the debris had already been cleared. It also seems highly unlikely that the chalk marks made on the road immediately after the accident would still be visible three days later.

According to the testimony of Masviba and Dururu, there were drag marks on the road showing that the Isuzu had been dragged backwards for about 24 metres after the collision. This appears to tally with the gouge marks drawn on Plan B. However, it does not tally with Inspector Muchirawetu's evidence that the Isuzu was punched backwards, as opposed to being dragged, from the point of impact to where it eventually ended after impact. It is therefore not at all clear whether the Isuzu was punched or dragged 24 metres backwards. More curiously, Plan B shows that the truck veered to the extreme left from the point of impact, away from the Isuzu. But, if the gouge marks are anything to go by, logic would suggest that the Isusu was dragged backwards by the truck in the same direction (up to Point C) before the truck continued its journey.

What the evidence from all accounts does demonstrate is this. The truck driven by Masviba continued leftward after impact, crossed the verge adjoining the road, crashed through the durawall surrounding a house, and eventually terminated its journey in a swimming pool beyond the durawall, traversing a distance of 52 metres from the point of impact. This graphic scenario of devastation clearly contradicts Masviba's evidence that he reduced his speed upon sighting the approaching vehicle. To my mind, his evidence makes a mockery of the laws of physics. If anything, the physical evidence as to what transpired immediately after impact, in particular, the eventual resting places of the truck and the Isuzu, suggests that it was Masviba rather than the deceased who was driving at an excessive speed, and that it was Masviba who failed to take evasive action when the accident seemed imminent. It is highly possible that Masviba did not anticipate any other traffic on the road at that time of the night and might have been over-speeding in order to quickly complete his arduous overnight journey to his eventual destination in Chinhoyi.

Having regard to the totality of the evidence before the Court, it is not possible to determine with any measure of certainty whether it was Masviba or the deceased who caused the accident in question. The police investigation and evaluation of the accident were patently deficient. The overall probabilities suggest that both drivers might have contributed to the collision, in which event questions of contributory negligence and reciprocal liabilities may arise. However, these are not issues that are presently before the Court. What is clear on the inconclusive forensic evidence available is that *res non ipsa loquitur in casu* and that, on a balance of probabilities, the plaintiff has failed to substantiate its case against the 1st defendant.

Quantum of Damages

In view of my finding on the question of liability, it seems unnecessary to address the issues relating to the quantum of damages claimed by the plaintiff. Nevertheless, it may be pertinent and instructive to make some general observations on the evidence tendered by the plaintiff in that regard.

It is trite that an award of damages seeks to attain the financial equivalent of restitution in kind insofar as this is possible. The courts are not obliged to adopt any specific method of calculation but should endeavour to assess an amount that is fair towards all of the parties concerned. Each case will obviously depend on its own facts. See *Jacobs* v *Cape Town Municipality* 1935 CPD 474; *Roberts* v *London Assurance Co Ltd* 1948 (2) SA 841 (W); *Erasmus* v *Davis* 1969 (2) SA 1 (A) at 17; *General Accident Insurance Co SA Ltd* v *Summers* 1987 (3) SA 577 (A) at 608. The basic objective is to place the plaintiff, as far as may be possible, in the position he would have occupied had the wrongful act causing the injury not been committed. The level of compensation that is assessed must take into account not only the positive loss suffered by the plaintiff but also the negative loss in the form of gains which the plaintiff was prevented from making in consequence of the defendant's wrongful act. See McKerron: *The Law of Delict* (7th ed.) at p. 106; *Union Government* v *Warneke* 1911 AD 657 at 664-665. As a general rule, the party claiming damages must lead all the evidence which it is possible for him to lead. See *Appliance Repairs & Maintenance Services (Pvt) Ltd* v *Little* 1973 (2) RLR 318 (AD) at 325. In the specific case of damage to a motor vehicle, the measure of damages is the sum which would in fact be required to give the plaintiff complete reparation. This must equate to an amount that is not only necessary but also fair and reasonable. In this regard, it does not invariably suffice simply to produce a quotation or statement of account from a reputable firm. See *De Witt* v *Heneck* 1947 (2) SA 423 (C) at 426-427.

In the instant case, the plaintiff claims damages under three separate heads, to wit, the replacement value of the damaged truck, damages for loss of income from the usage of the truck, and damages for loss of the maize that was conveyed by the truck at the time of the accident. As regards the first head, all that was produced was a *pro forma* invoice from a truck dealer for an equivalent 1999 model and the accident assessor's estimate of market value. The dealer's invoice is clearly unhelpful vis-à-vis the plaintiff's truck, which is a 1994 model; and the assessors' estimate is inadequate *per se* because, apart from being terse and unsupported by any explanation, it appears to have been produced for the benefit of the plaintiff's insurer (and not the 2nd defendant's insurer as is contended by Mr. *Dondo*). Turning to the damages for loss of income, the plaintiff's claim is founded on a revenue analysis prepared by its own transport manager. However, no oral evidence was lead from the manager himself and there was no documentary evidence in the form of invoices and receipts to support the revenue analysis. Finally, with respect to the claim for the damaged maize, no documentation was produced to show that the customer in question had in fact rejected 5 tons of maize. In short, the overall evidence adduced by the plaintiff in support of its various claims is inadequate for the purpose of computing a relatively accurate measure of the damages allegedly sustained.

In the result, consequent upon the above findings as to liability and damages, the plaintiff's action is dismissed with costs.

Chinamasa, Mudimu & Dondo, plaintiff's legal practitioners
V. Nyemba & Associates, 1st defendant's legal practitioners
Kantor & Immerman, 2nd defendant's legal practitioners