FIRST CLASS ENTERPRISES (PVT) LTD
versus
TRYMORE MUCHINGAMI & 2 OTHERS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 12 FEBRUARY AND 20 FEBRUARY 2013

Civil Trial

J. Dondo, for the plaintiff
V. Mapepa, for the 1st & 2nd defendants

MATHONSI J: On a bitterly cold winter night of 18 July 2009, the plaintiff's semi luxury coach, a scania registration number AAZ7875 driven by Albert Bendura which plies the Harare – Lusaka route, was on a routine return trip from Lusaka Zambia along the Harare / Chirundu road and had just taken off from Karoi, when it was involved in a collision with an AVM omnibus registration number AAF5935 belonging to the second defendant which was being driven by the first defendant.

The plaintiff is a public carrier operating a passenger service between Harare and Lusaka Zambia, while the second defendant is also a public carrier running a passenger service under the style Mutasa Bus Service between Harare and Hurungwe. The first defendant was employed by the second defendant as a driver.

As a result of the collision, the 2 motor vehicles sustained damage necessitating repairs. The plaintiff instituted proceedings for delictual damages in respect of costs of repairs to its vehicle in the sum of $4 200-00 and loss of business in the sum of US$5140.00. It alleged in its declaration that the collision was caused solely by the negligence of the first defendant in that he failed to keep a proper look out, drove without due care and attention, failed to avoid an accident when it was imminent, drove at an excessive speed in the circumstances and drove a defective vehicle in that it had no headlights.

The plaintiff averred further that the first and second defendants were jointly liable for its loss by virtue of the fact that at the time of the collision, the first defendant was acting within the course and scope of his employment by the second defendant. Although it had cited the third defendant alleging that it was also liable as the insurer of the second defendant, the plaintiff subsequently withdrew the claim against the third defendant.

The first and second defendant contested the action. In their joint plea they denied any wrong doing on the part of the first defendant stating that although he had paid an admission of guilt fine of US$20.00 at ZRP Karoi, he had done so " in a desperate bid to avoid protracted interrogations (sic) as would amount to harassment by the police officers involved." They averred that the collision had instead been caused by the negligence of the plaintiff's driver who drove without due care and attention, failed to keep a proper look out, drove at an excessive speed in the circumstances and failed to avoid an accident when it was imminent.

The second defendant went on to make a counter claim of US$16 000.00 against the plaintiff which he alleged was the cost of preparing his AVM bus and loss of business. I must say right away that the second defendant did not lead evidence to prove the counter claim except for the half – hearted, if not extremely brief testimony of the second defendant, relating to the daily takings of the bus in question. Indeed, in his closing submissions, *Mr Mapepa* for the first and second defendants stated that the second defendant was abandoning the counter claim. Therefore, nothing further should be said about the counter claim.

At the pretrial conference of the parties held before a Judge, the issues for trial were identified as;-

1. Whether the accident was caused by the second defendant's driver (the first defendant) or the plaintiff's driver.
2. The quantum of damages suffered

The plaintiff led evidence from 3 witnesses. The first to take the witness stand was Bernard Musekiwa who, at the time of the accident, was employed by the plaintiff as a bus inspector. He testified that on the night of the accident the Scania bus, which is a semi-luxury coach with 2 massive front windscreens and large side window panels, a typical modernized coach was being driven by Albert Bendura. He was petched at a vintage point in the cabin seat

next to the driver and therefore had a clear view of the road ahead. They were travelling from Lusaka in Zambia on a return trip to Harare where the bus is based and were carrying passengers.

Musekiwa stated that upon arrival in Karoi, the crew decided to take a health recess before proceeding on the journey to Harare , after 1900hrs. No sooner had taken off from Karoi, in fact the bus had only travelled just over a kilometre from Karoi and had not picked up speed cruising at approximately 60 to 70km per hour, than he beheld oncoming traffic which had only one headlight on the left side.

He stated that although it was dark on a cold night the weather condition was such that one could see the road clearly. Musekiwa said he warned his driver to be on the lookout as the oncoming vehicle had only one headlight and no lighting whatsoever on the right side. This prompted the driver to move further to the left side of the road out of caution. In his observation, the driver of the oncoming vehicle must have had his vision impaired by the defective lighting of his vehicle because suddenly that vehicle bumped onto the plaintiff's bus on the driver's side. He estimated the speed of the oncoming vehicle, which turned out to be the AVM bus belonging to the second defendant driven by the first defendant, at about 80km per hour since it was gaining speed on approaching Karoi on a slope.

Musekiwa went on to say that the plaintiff's vehicle was hit on the driver's side shattering the windscreen and the AVM went on to side swipe it on the right causing damage to the right side window panels and body. He stated that because the second defendant's AVM was of the old fashioned carrier Daf type which is robust and strong it sustained negligible damage as a result of the collision.

The witness observed that the collision was caused by the first defendant encroaching onto the right lane used by the plaintiff's vehicle. He denied that there was any contributory negligence on the part of the plaintiff's driver as he instead took evasive action by moving further to the left side of the road and still could not avoid the collision.

Next to testify on behalf of the plaintiff was Seargent Tarwirei Kamanura, a police officer of 14 years experience who is attached to ZRP Karoi traffic section and has been so attached for 7 years. Following a report of an accident which was received at 1920 hours on 18 July 2009, he attended the scene along with Constable Matashu.

Kamanura testified that upon arrival at the scene which was at the 200km peg on the Harare / Chirundu road, he interviewed the 2 drivers as to what had happened. They stated their versions which he recorded on the traffic accident book (TAB) and on the accident summary Form 76. He also made observations at the scene which showed him that the bus driven by the first defendant had encroached onto the lane of the plaintiff's bus driven by Albert Bendura. He drew that conclusion due to the presence of debris in the form of shattered glass spreading over a distance of 6 metres from the point of impact which was in the middle of the lane used by the plaintiff's bus.

This witness drew a sketch diagram of the scene of the accident from indications made by the 2 drivers as well as observations made. He produced the TAB in which that sketch was drawn. At the scene he inspected the vehicles and noted that the bus driven by the first defendant only had one headlight on the left which was working while the right headlight was not functional. Following his observations he concluded that the first defendant caused the accident as the point of impact was clearly on the lane of the plaintiff's vehicle.

He stated that the first defendant was later charged with driving without due care and attention in breach of section 50 (1) of the Road Traffic Act *[Cap 13:11]*. He admitted liability and paid an admission of guilt fine of US$20.00 on 7 August 2009. The officer denied that any undue influence was brought to bear upon the first defendant to admit guilt insisting that he had done so out of his free will having accepted he had been at a fault. He further denied confiscating the first defendant driver's licence maintaining that the first defendant only showed him the licence. The rest of the vehicle documents in the form of the registration book and insurance were produced at the station at a later stage.

In addition to corroborating the evidence of Musekiwa in material respects as well as the damage to the plaintiff's vehicle, Kamunura observed further that 8 sliding windows on the right side and the rear view mirror had been damaged. He was subjected to thorough cross examination but stuck to his story and was not shaken at all. He readily admitted that the first defendant's version of the accident was missing from the TAB and that when he looked for the original TAB at the station he could not find it attributing this to misfiling which may have occurred after the parties had requested the TAB from the police station for their own use.

The last witness for the plaintiff was Hillary Simbarashe, one of the directors of the plaintiff company, who testified on the repairs done to the vehicle after the accident and the loss of business suffered by the plaintiff. He produced 3 quotations from different panel beaters approached to repair the vehicle. *Accident Panel beaters* gave a quotation of US$12 017.50 while *Normaz Auto Body & Repairs* quoted US$9 490.00. The cheapest quote was from Deven *Engineering (Pvt) Ltd*, the specialists who specially built the plaintiff's bus. They quoted US$4 324.00.

Simbarashe testified that the plaintiff did not opt for any of the panel beaters but elected to repair the vehicle itself as a cost cutting measure as well as to mitigate its losses. This is because *Deven Engineering (Pvt) Ltd*, although competitive, had indicated that it would take a month or so to undertake the repairs when the plaintiff wanted the vehicle back on the road sooner than that. As it turns out the plaintiff was able to repair the vehicle in 14 days at a total cost of US$4200.00 during which period it was idle and off the road. The plaintiff therefore suffered loss of business for that 14 day period.

The witness testified that the Scania is a 66 seater bus engaged in cross border business. The fare is US15.00 per passenger meaning that a full load would gross US$990.00 (one way trip). Factoring in the expenses, including fuel, of US$350-00 would leave a net of US$640-00. He stated that instead of claiming that amount, the plaintiff acknowledged, in all fairness, that its not all the time that the bus would have a full load. For that reason the plaintiff opted for its average cashing per day of US$367-00 which when multiplied by the number of days the bus was off the road (14 days) gives US$5138-00 which was rounded off to the nearest unit of US$5140-00 claimed as loss of business.

The entire evidence of Simbarashe was not challenged at all and remains intact. Indeed this witness, like the other 2 witnesses who testified for the plaintiff, gave his evidence very well, clearly and was full of confidence. The evidence presented on behalf of the plaintiff was truthful and was not contested in any significant way. I have no hesitation in accepting it.

The 2 defendants also gave evidence. The first defendant ,Trymore Muchingami, had been driving since 2003 when the accident occurred in July 2009. He stated that on the night in question he was carrying passengers coming from Harare. He insisted that his lights were in

good working order as all the way he had been using them effectively, dipping them where necessary and without any difficulties.

Immediately before the collision, he saw the lights of an oncoming vehicle from a distance of about 500m. He dipped his lights to facilitate easy passage. As he drew closer he observed that the vehicle was driving straight against him on his own lane. This vehicle, which turned out to be the plaintiff's bus, tried to negotiate its way back to its left lane to avert an accident and appeared as if it was going off the road on the left side. When the driver tried to come back to the road, he failed to do so and came and collided with the first defendant's bus. The first defendant maintained that the collision took place on his side of the road and was caused by the excessive speed and the swerving of the plaintiff's driver who even failed to stop after the collision. As he stood by the road, he could see a distance of about 1½km down the road but the plaintiff's bus had disappeared and was nowhere to be seen. The witness stated that it was only after a while that it made a U-turn and returned to the scene stopping briefly before proceeding to the police station in Karoi.

The first defendant testified that when the police officers came Kamanura confronted him demanding to know why he was driving a bus without lights. He says his response was that the lights had not been defective at all but had became defective owing to the impact. When asked to demonstrate he had managed to flash the lights. It was only when put on dip that both lights were not working at all.

He said that Kamanura then, confiscated his driver's licence, insurance, registration book and licence disc. He only signed an admission of guilt a month after the accident because the police officers had intercepted him at a road block while he was driving the same bus to Hurungwe and told him that he had caused the accident by driving a vehicle without lights and that if he wanted the matter to go away he had to pay the fine. The officer refused to give his licence back until he paid the fine which forced him to do so only to get his driver's licence.

I find the first defendant's story about the driver's licence, quite weird and totally unbelievable. It is difficult to understand why the police would confiscate his licence in the first place while allowing him to proceed with his journey. What he would have the court believe is that he was driving a bus carrying passengers for a period of exactly 3 weeks without a driver's licence. He did not find it necessary to pass through the police station to claim his licence. For

someone who was protesting his innocence throughout, it is strange that he did not even seek advice on how to recover his licence.

I also find it unfathomable that the accident occurred in the manner described by the first defendant. From his version even as he saw the plaintiff's vehicle from a distance of 500m as it was bearing down upon him on his side of the road, he did not do anything whatsoever to avert the accident leaving everything to the plaintiff's driver. It is also bizarre to suggest that after a collision which completely shattered the drivers' side of the windscreen the plaintiff's driver disappeared down the road a distance of more than $1^{1/2}$ km before returning to the scene and then proceeding to the police station to make a report.

The first defendant did not make a good witness. He prevaricated a lot, and gave a story with no ring of truth. I reject his evidence.

The evidence of Walter Mutasa was legendary by its brevity. It is not clear why it was given. He confirmed that the first defendant was his driver. He was told about the accident by his wife as he does not normally reside in Harare. He did not say where he resides. After being told about it he did nothing until he received summons. He stated that his bus used to give him US$1000-00 or more per day and he was not sure for how long it was off the road although he thinks it was over a month. That is all he said.

We know of course from the evidence of the first defendant that it was on the road much earlier and that he was driving it to Hurungwe exactly 3 weeks after the accident when he was stopped at a roadblock. Nothing is gained from this testimony.

It is common cause that when the first defendant drove the second defendant's AVM Daf on the night of 18 July 2009 he was acting within the course and scope of his employment by the second defendant as a bus driver. For that reason the doctrine of vicarious liability sets in. A master is answerable for the delicts of his servant committed in the course of his employment *Mkhize*v *Martins* 1914 AD 382 at 390. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment. *Feldman (Pty) Ltd* v *Mall* 1945 AD 733 at 736. See also P.Q.R Boberg; The Law of Delict,Vol 1, *Juta & Co Ltd* pp 327-328.

I now turn to resolve the issues placed before me for trial in this matter. The first issue relates to the determination of which of the 2 drivers caused the accident. That question resolves

itself by reference to the evidence I have already set out. I have accepted as credible, the evidence led on behalf of the plaintiff that the first defendant drove a motor vehicle which had defective lights, that it, it only had one light on the left while the right light was completely off, on a dark night.

This detective lighting must have badly affected the first defendant's vision thereby forcing him to drive straight onto the plaintiff's bus which was lawfully being driven in the opposite direction on its side of the road. I have also accepted the evidence that the plaintiff's driver did everything humanly possible to avert the accident by moving to the left of the road. The same cannot be said of the first defendant who did absolutely nothing to avert the collision. This is a driver who does not even know if the plaintiff's driver dipped his lights when approaching him.

The credible evidence of the police officer, Sgt Kamanura, is to the effect that the first defendant encroached onto the lane of the oncoming vehicle belonging to the plaintiff resulting in a collision, the point of impact of which is squarely located on the lane used by the plaintiff's vehicle. He also observed debris strewn on that same lane. I therefore make a finding that the first defendant caused the accident by failing to keep a proper look out, driving without due care and attention, failing to take evasive or avoiding action when an accident was imminent and driving a defective vehicle.

The next issue relates to the quantum of damages. It has been established that as a result of the collision the plaintiff's bus was damaged necessitating repairs which kept it off the road for 14 days.

As state by the learned author Boberg, *op cit* at p 475:

> "To succeed in the Aquilian action the plaintiff must prove *damnum* – a calculable pecuniary loss or diminution of his patrimony (estate) resulting from the defendant's unlawful and culpable conduct".

According to BERMAN J in *Aaron's Whale Rock Trust* v *Murray & Roberts Ltd &Anor*1992(1) SA 652 (C) at 655;

> "Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement".

See also *Ebrahim*v *Pittman N.O*. 1995 (1) ZLR 176 at 187 C-G and *Gavaza*v *Shumba&Anor* HH 268/12 at p 5.

I have accepted the evidence of Simbarashe on the quantum of damages suffered by the plaintiff in repairing the vehicle after the accident. In my view the plaintiff's claim under that rubric is very generous indeed considering that it opted to repair the vehicle on its own at less than what had been quoted by other service providers. I have also accepted Simbarashe's evidence on the quantification of the loss of business which is not only done with mathematical precision but is also generous in that the plaintiff averaged its daily loss premised on its usual daily takings and not on the maximum carrying capacity of the bus.

In that regard the plaintiff must be commended for claiming the bare minimum of the damages claimable. I am therefore satisfied that the plaintiff had succeeded on a balance of probabilities, in proving its claim for damages for repairs and loss of business.

In the result I make the following order, that

1. Judgment be and is hereby granted to the plaintiff against the first and the second defendants jointly and severally, the one paying the other to be absolved in the sums of US4 200-00 and US$5140-00 being damages for vehicle repairs and loss of business respectively.
2. Interest on both sums at the rate of 5% per annum of 18 July 2009 to date of payment.
3. Costs of suit.

Messrs Chinamasa, Mudimu & Dondo, plaintiff's legal practitioners
Messrs Masawi & Partners, 1st and 2nd defendant's legal practitioners