

SAKUNDA ENERGY
versus
DAKARAI MAPURANGA
and
REGAL INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 October 2015 & 16 December 2015

Civil Trial

T.G. Mboko, for the plaintiff
Ms V. R Muzembi, for the 1st defendant

MUREMBA J: On 14 January 2012 the plaintiff's motor vehicle a BMW X 5 registration no. ABE 4282 which was being driven by Smiling Manyara was involved in a collision with the first defendant's Porsche, registration number ACF 0263 at the intersection of Herbert Chitepo Avenue and 7th Street, Harare. The first defendant went through a red robot resulting in the two vehicles colliding. The plaintiff's motor vehicle was extensively damaged and was assessed to be beyond economic repair.

The first defendant disputed liability in his plea. However, at the pretrial conference the issue of liability was resolved. He accepted that he was liable.

The second defendant in its plea stated that the first defendant's motor vehicle was insured by it under the third party policy in terms of which it (the second defendant) can only pay the plaintiff a maximum of US\$2 000-00 subject to compliance with all its requirements. The second defendant said that the accident was never reported to it and as such it did not facilitate any payment. The second defendant defaulted at the Pre-trial conference resulting in its plea being struck out. When trial commenced on 12 October 2015, the plaintiff's counsel, Mr *Mboko* submitted that the plaintiff was yet to set the matter down on the unopposed roll against the second defendant and claim US\$2 000-00 damages.

At the pre-trial conference the plaintiff and the first defendant agreed that there were only two issues for trial, firstly, the quantum of damages payable to the plaintiff and secondly, whether or not the first defendant must pay costs on an attorney and client scale.

The quantum of damages payable to the plaintiff

In its summons the plaintiff claimed damages in the sum of US\$38 000-00 stating that it is the lowest value obtained from valuation reports which will replace its vehicle. Whilst the first defendant was willing to replace the plaintiff's motor vehicle, he was disputing the amount of US\$38 000-00 saying that it is ridiculously high. He was arguing that the motor vehicle can be replaced at a much lesser value not exceeding \$14 000-00. The first defendant was willing to replace the motor vehicle by importing a similar model upon receiving the damaged motor vehicle. The plaintiff was agreeable to the first defendant taking the damaged motor vehicle.

The plaintiff's evidence

To justify the claim of US\$38 000-00 the plaintiff led evidence from two witnesses: Smiling Manyara and Mutizwa Muchetu. Smiling Manyara's evidence was as follows. He was working for the plaintiff as the Retail and Operations Director at the time material to this case. He is the one who was driving the motor vehicle in question on the day of the accident. He described the motor vehicle as a BMW X5 3.D, silver in colour with an extended glass roof. It had done a mileage of 96 000-00 km. He said that it was a 2006 model which was still in mint condition at the time of the accident in 2012. He said that the motor vehicle had been purchased from South Africa.

Smiling Manyara said that with US\$14 000-00 it is not possible to replace the motor vehicle. He justified US\$38 000-0 by saying that he did a search on the internet both in South Africa and Japan and the values that came up made him come up with a claim of US\$38 000-00. He said that he is averse to importing a motor vehicle from the United Kingdom because rust affects motor vehicles that are imported from there. He went on to produce quotations that he downloaded from the internet which quotations were marked as exh 1 and 2.

Exhibit 1 is a quotation obtained from Tradecarview, Japan. The motor vehicle's free on board (FOB) price is US\$23 150-00. Its registration year and month is October 2006. It has a mileage of 90 000 km. It is a diesel engine. It is described as a 2006 BMW X 5 3.od sport 5 drive Auto.

Exhibit 2 is another quotation downloaded from Tradecarview, Japan. The motor vehicle's FOB price is US\$15 379-00. Its registration year is 2006 with a mileage of 92 000 km. It is a petrol engine with the following description, 2006 BMW X 5 Epotabo. Smiling Manyara explained that the difference between exh 1 and exh 2 vehicles is that the first one is a diesel engine while the second one is a petrol engine. He said that a diesel engine is more expensive than a petrol engine. He said that looking at exh 1 and 2 it is not possible to replace the plaintiff's motor vehicle at a cost of US\$14 000-00 because the values on exh 1 and 2 are minus freight, duty and surtax charges.

Smiling Manyara also said that he got a third quotation from a local clearing agent called Southern Business Services here in Harare. The quotation was produced as exh 3 and it shows a total cost of US\$54 070-26 for a BMW X5. He said that in arriving at US\$38 000-00 he had used the law of average from the quotations that he had obtained.

During cross examination Smiling Manyara said that a motor vehicle with an FOB price of US\$ 9 079-00 cannot land in Harare at a cost of less than \$14 000-00 if proper ZIMRA procedures are followed and the motor vehicle is duly cleared. When Ms *Muzembi* was cross examining Smiling Manyara she calculated freight charges, port charges and duty on a motor vehicle with an FOB price of US\$9 079-00 and arrived at a total cost of US\$19 119-00 for such a motor vehicle to land in Harare. Mr Smiling Manyara said that that showed that a replacement cost of US\$14 000-00 which the first defendant was offering was not sufficient. Asked why he would not accept \$19 119-00 as the replacement cost, Smiling Manyara said that it is because the motor vehicle with that quotation is not of the same specifications as that of the plaintiff in that it is a petrol engine with a mileage of 105 000km.

Mutizwa Muchetu's evidence was as follows. He works for Linkway Motors, Harare as the sales manager. He has a diploma in marketing. His duties involve selling and marketing motor vehicles for individuals and companies and he has been in that business since 2005. He is a sub-dealer for Toyota Zimbabwe and Nissan. He also sells motor vehicles which he source from Japan, the United Kingdom and South Africa. He said that the distinction between Japan and United Kingdom motor vehicles is that people in the United Kingdom take about 10 years driving one car because of shortage of space. He said that because of snow the people there put salt on the motor vehicles and that affects the suspension of the motor vehicle. He said that

explains why motor vehicles which come from there have rust problems. He said that in Japan a person can own 1 to 6 motor vehicles and the Japanese generally do not like to drive. They prefer using electric trains and as such their motor vehicles do not get old quickly. He said that there is no snow, so the motor vehicles from there do not have rust problems. He said that motor vehicles from the United Kingdom are generally cheaper than Japanese cars because of the rust problems and mileage. He said that the problem with South African motor vehicles is that some of the persons who advertise are thieves, although the cars will be cheap.

Mutizwa Muchetu said that petrol engines are cheaper than diesel engines because petrol engines consume more fuel. When he was asked by the plaintiff's counsel how much it costs to buy a BMW X5 2006 Model, diesel engine, he said that FOB price is US\$9 500. US\$1500 - \$2000-00 is needed for shipping to Durban. US\$500.00 - \$1000.00 is needed for port charges at Durban. US\$400.00 - \$500.00 is needed for carrier charges from Durban to Beitbridge. He said that duty is 96%. When he was asked if the value will change if the motor vehicle has extras such as leather interior; extended roof and a mileage of 96 000km, he said in that case it will have an extra cost.

Mr *Mboko* showed Mr Mucheto exh 1 and 2 and asked him to comment on the FOB prices thereon. He said that FOB prices of US\$23 150-00 for a diesel engine and \$15 379-00 for a petrol engine are fair prices. He made calculations of the landing costs for the two motor vehicles and arrived at \$46 814-00 and \$31 582-84 respectively. In making the calculations he added the shipping cost of \$1 500-00 to the FOB prices and then multiplied the figure by 96% for the duty. He said that it is not possible to import the cheapest BMW X5 for US\$14 000-00. He said that regardless of specifications, it costs between \$25 000-00 and \$27 000-00 to import a BMW X5 into Zimbabwe. He did his calculations and said that a BMW X5 of \$9 079-00 FOB price has a landing price of \$21 176-00.

Mutizwa Muchetu said that while an FOB price of \$23 150-00 for a BMW X5 is a fair price, generally the range of prices for BMW X5 motor vehicles is between US\$25 000-00 and US\$27 000-00. He said that basically what determines the prices of motor vehicles are the extras; the condition of the motor vehicle and its service record.

He said that most Japanese BMW X5 are petrol engines and they are the ones which cost between \$25 000-00 and \$27 000-00 to land here in Zimbabwe. He said that it is difficult to get a diesel BMW X5 from Japan and if you get it, it will be costing more.

The first defendant's evidence

The first defendant led evidence from himself and from one Alexio Masakadza. The first defendant in his evidence said that at the pre-trial conference stage they reached a deadlock because they failed to reach a compromise on the source of the motor vehicle as the plaintiff refused to accept an import from the United Kingdom and insisted on an ex-Japanese car. He said that they also failed to agree on the value of the motor vehicle. The deadlock resulted in the present trial.

Dakarai Mapuranga said that he downloaded some quotations from the United Kingdom and South Africa on the internet. He said that he also got a quotation from a second hand car dealer here in Harare. He said that these quotations made him realise that he could import the motor vehicle for less than half the amount the plaintiff is asking for. He produced a quotation from Autotrader, South Africa which was marked as exh 4. On that exhibit the motor vehicle is described as a 2006 BMW X5 3.0d auto. It is silver in colour with a SUV body type. It is a diesel engine being sold for R109 990-00. It has a full service history and a panoramic roof. It is described as immaculate. He said that the motor vehicle in question lands in Harare at a cost of between US\$18 000-00 and US\$19 000-00 depending on the exchange rate.

Dakarai Mapuranga produced a second quotation for a BMW X5 3 litre diesel, silver in colour, 2006 model, automatic with a mileage of 108 000km with extras. Its cost is £5 795 which he said translates to about US\$ 9272-00. He said that the motor vehicle lands in Zimbabwe at a cost of US\$21 309-12. The quotation was marked as exh 5. He went on to produce another quotation from Kastodale Car Sales, Harare as exh 6. It says the total cost for a BMW X5, 2006 model here in Zimbabwe is US\$13 040-00. He said that this is inclusive of FOB price, freight charges, duty and taxes. He went on to produce exh 7 which document gives the residual value of the plaintiff's damaged motor vehicle as US\$4 000-00. It was evaluated by Kastodale Car Sales. Dakarai Mapuranga made a concession that the plaintiff's motor vehicle cannot be replaced at a cost of US\$14 000-00. He went on to say that when he offered \$14 000-00 he had taken into account the residual value of the wreck which is \$4 000-00. The first defendant

disputed that petrol engines are more expensive than diesel engines. He said that what determines the value of a motor vehicle are the specifications of its engine and engine size e.g V6; V8 etc.

Alexio Masakadza testified to the effect that he is in the business of importing and selling motor vehicles and has been in that business for 18 years. He is the owner of Kastodale Car Sales. He said that he is the author of exh 6, a quotation for a BMW X5 2006 going for US\$13 040-00. He said that that quotation pertained to a bank repossessed motor vehicle. He said that the car was going for R65 000-00 in South Africa and its duty was around US\$6 500-00. He said that personally he had never imported such a motor vehicle. He did his calculations and said that for a motor vehicle on exhibit 4 going for R109 990-00 the total cost of importing it into Zimbabwe is US\$17 181-00.

He said that it is possible to import the plaintiff's type of motor vehicle for less than US\$38 000-00 because motor vehicles vary in prices depending on various factors such as the person who is selling the motor vehicle, its year of manufacture, mileage and its condition. He said that he is the one who authored exh 7 which gives the residual value of the wreck of the plaintiff's motor vehicle as US\$ 4000-00. He said that in arriving at that amount he had considered the damage to the motor vehicle and what can be sold on it after the accident. He said that in assessing the value of the plaintiff's damaged motor vehicle he just used the general knowledge that he has in dealing in motor vehicles. He said that he holds no special training in carrying out such assessments.

The law

The present case is an aquilian action in terms of which the plaintiff is seeking general damages for its motor vehicle which was damaged by the first defendant in a road accident. The object of aquilian damages is to place that plaintiff in the position he would have been had the delict not been committed by the defendant. In *Komichi v Tanner & Anor* 2005 (2) ZLR 358 (H) Makarau JP said:

“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”. See also the *Minister of Defence v Jackson* 1990 (2) ZLR (S).

In *Motor Law*, Volume 2, Juta 1987 at p 387 W.E Cooper says:

“An owner is entitled to a sum of money (damages) which will place him in the financial position he would have been 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”. (my emphasis)

In *Erasmus v Davis* 1969 (2) SA 1 at p 17D it was said that in order to prove diminution in value the plaintiff is supposed to establish the difference between the pre-collision and post-collision value of his damaged property. The court further said:

“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”.

In *Komichi v Tanner and Anor (supra)* the plaintiff was claiming the replacement value of her motor vehicle which had been damaged in a road accident. Like in the present case the plaintiff’s claim for the replacement value was based on quotations obtained from the local press, for similar models of her damaged motor vehicle. Makarau JP stated that the plaintiff had adopted the wrong approach in assessing her damages. At p 361 she said:

“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 *casu*, the plaintiff’s motor vehicle having been damaged beyond economic repair, the plaintiff is claiming a replacement cost of US \$38 000-00 based on the quotations downloaded from the website of Tradecarview, Japan. The quotations relate to importing a motor vehicle similar to the plaintiff’s damaged one. It is necessary to look at what is meant by the term ‘replacement cost’ or ‘replacement value.’ It refers to the amount that is needed to replace an asset according to its current worth. It does not take into account the decrease in value due to wear and tear or age. This is different from the actual value or actual cost of the item which is the amount that is needed to replace an asset according to its current worth, but taking into account a deduction of depreciation. Put differently, replacement cost is what you would pay for an item at today’s cost, whereas actual value is what you would pay for a similar item at today’s cost minus depreciation.

Application of the law to the facts

Considering the above legal authorities I would say that the law of delict is concerned with compensation for the actual value of the item at the time the delict is committed and not with the replacement cost or the cost of buying a similar item at today's cost. It is therefore improper for an owner whose property has been damaged to sue for replacement cost or value. Rather he should sue for damages for the loss caused by the delict. This therefore means that in order for the plaintiff to arrive at damages for its loss it should have established the value of its motor vehicle before the accident (pre-collision value) and the value of the motor vehicle after the accident (post-collision value). Alternatively the plaintiff could have led evidence proving or establishing the cost of repairing it. See *Mazanhi v Marovanidze and Anor* HH 60-2009.

No evidence was led by the plaintiff whatsoever on the pre-collision value and post-collision value of the motor vehicle. The pre-accident value should be as at the time before the accident happened on 14 January 2012. The post-collision value is the value attached to the wreck after the accident. There was need for such evidence from somebody with expertise in carrying out valuations of motor vehicles. The term 'beyond economic repair' means that it is not economical to repair a damaged motor vehicle' but it does not mean that the motor vehicle is valueless. It simply means that it does not make economic sense to repair the motor vehicle when the cost of repair is related to the value of the motor vehicle. What this therefore means is that if a motor vehicle is damaged it might still have some value and can be repaired although it might not be economical to do so. It is that residual value which is the post-collision value.

Claiming replacement value in the manner that the plaintiff did is not consistent with the object of the law of delict which is not to improve the material prospects of the owner of damaged property, but to compensate him for material loss suffered. The plaintiff bought the motor vehicle from South Africa but it now insists on getting a replacement motor vehicle from Japan. Mr. Smiling Manyara said that he does not like motor vehicles from South Africa because most of them are sold by thieves. This averment is self-defeating because the motor vehicle that was damaged in the accident was bought by the plaintiff from South Africa.

In light of the above legal authorities it is apparent that the plaintiff used the wrong concept in calculating its damages. On the other hand, in disputing the plaintiff's claim, the first defendant equally used the same wrong concept which was used by the plaintiff. I therefore

make a finding that the plaintiff did not prove its damages on a balance of probabilities. In the result I am compelled to grant absolution from the instance.

It is therefore ordered as follows.

1. The first defendant is granted absolution from the instance.
2. The plaintiff shall bear the first defendant's costs of suit.

Donsa-Nkomo & Mutangi, Legal Practice, applicants' legal practitioners
Motsi & Associates, 1st defendant's legal practitioners