

COSTXAM INVESTMENTS (PVT) LTD  
versus  
LARKON ENTERPRISES (PVT) LTD  
and  
WATYOKA AGGRIPPA

HIGH COURT OF ZIMBABWE  
BERE J  
HARARE 11, 12, 14 & 19 FEBRUARY 2013 & 21 AUGUST 2019

### **Civil Trial**

*C. Chikore* for the plaintiff  
*T. I. Gumbo*, for the appellants

BERE J: This is a civil action for consequential damages in the sum of US\$46 236,00 (forty six thousand two hundred and thirty six United State dollars) brought against the two defendants by the plaintiff.

The facts of this case which are basically not in dispute are as follows; On 28<sup>th</sup> day of July 2010, the second defendant, whilst in the course and scope of his employment and driving the first defendant's motor vehicle negligently hit and damaged the garage which the plaintiff was leasing. The accident in question resulted in the collapsing of the leased garage thereby affecting the plaintiff's business operations.

As a result of the defendants' conduct the plaintiff claimed in his summons to have suffered consequential damages as already stated.

At the pre-trial conference Mr *T. I. Gumbo* very wisely conceded the defendants' negligence resulting in the drawing up of a joint pre-trial conference minute which identified the

determination of the quantum for damages as the sole issue. The subsequent hearing proceedings were therefore exclusively devoted to dealing with this issue.

The plaintiff's case was largely based on the evidence of its Managing Director, Dennis Rutendo Mutseriwa and its assistant manager Susan Sekete. The plaintiff had intended to call its third witness who was alleged to have compiled the critical exhibits in this case, viz exhibit 1 and 2. For some reason that third witness was not called.

The defendants relied on the sole evidence of Maximiano Besa.

### **The Plaintiff's evidence**

First to give evidence was the plaintiff's Managing Director, Dennis Rutendo Mutseriwa. He testified that the consequential damages he sought to recover from the defendants comprised of rentals for the leased property and salaries that his company had to fork out to its employees for four months that their operations were severely curtailed as a result of the damaged filling station. The witness spoke to the operating challenges his company had to endure as a result of the accident. The witness also testified that as a result, his company was operating at a loss. In support of the plaintiff's claim the witness produced *inter alia*, exhibit 1 and 2 (which ironically he conceded he had not compiled himself). Both exhibits were produced through the first witness.

Exhibit 1 was produced as a summary of salary schedules for the sixteen employees of the plaintiff as well as the rentals and other related expenses. Exhibit two was produced to show the disparity in trading volumes before and after the accident. From the very inception, the defendant accepted the production of these exhibits but challenged the conclusive content of the exhibits.

For both exhibits, the Managing Director was challenged to produce the proper original documents to back up his claims. He was not able to do so. In fact, his explanation was that such information was available at their office.

In the witness' evidence in chief the following exchanges were recorded:

“Q - You are claiming US\$46 236,00. Explain what this claim is for?

A - when the service station was damaged we had employees whom we continued to pay and the monthly bill was about US\$6 500 or so, which if multiplied by 4 would come to about US\$26 000.

Q - were you part of the employees?

A - as Managing Director I was entitled to allowances per month. Gross profit was about US\$5 000 per month x 4 months which gives us US\$20 000,00.

Q - Was US\$5 000 a definite figure?

A - To me it was an actual figure I could have made more than that as business was picking up.

Q - Any other expenses

A - Rentals were US\$15 00 but after negotiations with Chevron (the lessor), it came to US\$1 000.”

These exchanges were then followed by the production of exhibit 1 and 2. The witness said that at the time of the accident they had eighteen employees. This was despite the fact that the schedule (exhibit 1) reflected that there were no more than fifteen employees at the time.

Under cross-examination, the witness was challenged to produce the original books of accounts including the salaries book and any other originals or source documents to support the plaintiff’s claim. The witness failed to do so.

Susan Sekete was called to corroborate the first witness’s evidence. She said she had been employed by the plaintiff for close to 20 years and that at the time she gave evidence she was the Assistant Manager. The witness confirmed the accident and the curtailment of business activities as a result of thereof.

The witness said around 20 employees were employed at the time of the accident and that after the accident other employees were asked to stay home although they remained on the pay roll and that their salaries were between US\$200 and US\$300 per month. She said the first witness was earning US\$800 per month. When the witness was asked in her evidence in chief to justify the claim of US\$46 236,00, all she could say was that the claim consisted of wages and other expenses.”

Under cross-examination she said that all in all there were 20 employees but after the accident 10 employees remained at work and 4 went home but continued to get wages between US\$100 and US\$150 as well as some 'goods'. The witness was specifically challenged to produce the wages book or pay slips for the employees and all she could say was, “I did not bring them.”

The witness was further asked :

“Q - you have documentary proof for the expenses such as rentals, water and rates.

A - I did not bring anything with me.”

Contrary to the Managing Director’s evidence that they ended up sourcing fuel from some other sources, she said that did not happen.

After the plaintiff’s case was closed, and on the strength of these two witnesses evidence, the defedants’ counsel moved that court grants absolution from the instance with no order as to costs. But because negligence had been admitted by the defendants the court felt that it was necessary to hear from the defendants first.

### **The Defendants’ evidence**

Maximioma Besa gave evidence for the defendants. In testifying the witness reaffirmed the defendants plea and repeatedly claimed that the plaintiff. had failed to produce any documentary evidence to support its claim and that the mere fact that the defendants had

accepted the production of the exhibits tendered by the plaintiff did not mean that they were admitting the contents of such documents. This was the witness' position even under cross-examination.

### **The legal position**

The parties, having unanimously agreed that the sole issue for determination at trial centred on quantum of the damages suffered by the plaintiff, the plaintiff was expected to lead sufficient evidence to justify the amount of claim.

In terms of section 51 of the Civil Evidence Act<sup>1</sup> the mere fact that the defendants had acceded to the production of exhibits 1 and 2 on its own was not conclusive evidence of the acceptance of the contents of such exhibits.

The authorities are clear that once quantum for damages has been put in issue, evidence must be tendered to establish same. See in *re Estate Kilbon*<sup>2</sup>. The courts have always maintained that in cases where damages are sought it is imperative that necessary evidence be gathered and presented to the court in order to assist the court in the quantification of such damages. The court must not be left to rely on conjecture in the assessment of damages. In *Klopper v Maziko*<sup>3</sup> TINDALL J admirably puts it this way:

“When a plaintiff is in a position to lead evidence which will enable the court to assess the figure he should do so and not leave the court to guess at the amounts.”

In *Hersman v Shapiro and Company*<sup>4</sup> the court had this to say:

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<sup>1</sup> Chapter 8:01

<sup>2</sup> 1964 (2) SA 641

<sup>3</sup> 1930 TPD 860

<sup>4</sup> 1926 TPD 367

“... In the case where evidence is available to the plaintiff which he has not produced, in these circumstances the court is justified in giving and does give, absolution from the instance.”

Talking of absolution from the instance BEADLE CJ in the much celebrated case of *Supreme Service Stations*<sup>5</sup> eloquently laid down the test in the following words:

“The test, therefore boils down to this, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any grader exactitude than by saying that it is the sort of mistake a reasonable court might make.” See also *Munhuwa v Mhukahuru Bus Service*.<sup>6</sup>

Coming back to the case before me, there was absolutely no doubt that the plaintiff presented a limping case for consequential damages. There was no effort made to collate and bring tangible evidence to justify the court in granting the amount of US\$46 236,00 or any amount at all for damages.

The plaintiff’s witnesses deliberately decided to leave critical evidence locked up in their drawers (if at all it was there) and presented figures compiled by a witness whom they failed to avail at court. This kind of approach is unacceptable.

What is even of great concern to the court is that according to the two witnesses this evidence was available but the two conspired not to bring it to court.

To compound the plaintiff’s case the two witnesses gave conflicting evidence on the number of employees on the plaintiff’s pay roll, not only that but even their monthly wages. It got worse when they could not even agree on the Managing Director’s allowance.

Damages are not proven by mere presentation of a bunch of papers to the court crying for substantiation. That is not the kind of proof contemplated by law. A plaintiff desiring damages

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<sup>5</sup> 1971 (1) RLR 1 (A) at p 6

<sup>6</sup> 1994 (2) ZLR 382 (H)

must do more to put his claim in the confidence of the court. This is particularly so where a defendant through his plea has denied liability and called upon the plaintiff to prove its claim.

There is absolutely no doubt in my mind that even the plaintiff's legal practitioner realized the inadequacies of the plaintiff's evidence when the second witness was stood down. It was because of the yawning gap in the evidence that counsel pleaded with the court to allow him to call a third witness whose summary was not even part of the summary presented to court during the preparation of this trial.

It was ironic that it was only when plaintiff counsel failed to locate this third witness (whom he initially said had prepared and compiled the exhibits), that he suddenly shifted goal posts and ascribed the compilation of the exhibits to the first witness. In the process he completely forgot that the first witness had himself distanced himself from compiling those exhibits. Why, if one may ask would a Managing Director sit down to complete such exhibits in a fairly big enterprise like that of the plaintiff?

In passing I wish to point out that liability of the defendants did not depend on how emotional or sympathetic the plaintiff's evidence was presented but on the quality of such evidence. The evidence was poorly given.

### **Disposition**

When the court is presented with a case like this, the best it can do is to grant absolution from the instance. With the benefit of hindsight this case ought not to have been allowed to go beyond the plaintiff's case.

The defendants, having accepted negligence, must be deprived of costs.

In the result, I order absolution from the instance with no order as to costs.

*Messrs C. Mutsahuri Chikore & Partners*, plaintiff's legal practitioners  
*Messrs Atherstone & Cook*, respondents' legal practitioners

