

RAMBO TINASHE NGANDU
versus
BROADWELL CHITATE
and
FARAI CHINAMHORA
and
MILTON MUDARIKWA T/A MILLIE MOTORS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 January 2020

Trial

A. Muchandiona, for the applicant
A Mutiro, for the 2nd and 3rd defendant
No appearance 1st defendant

DUBE J:

[1] One fateful afternoon, the plaintiff, unaware of impending danger, sat on a pavement at a commuter omnibus rank, when all of a sudden, he was struck by a vehicle. He claims damages for injuries he sustained as a result of the accident.

[2] The plaintiff's case is that the accident was caused by the negligence of the first and second defendants who were negligent in that:

“The 2nd defendant instructed the 1st defendant to drive the commuter omnibus in the full knowledge that the latter was not a licensed driver.
The 1st defendant in the full knowledge that he was not licensed to drive and did not have the requisite knowledge and skills to do so, assumed the driving of the commuter omnibus at a place which was full of pedestrians and other vehicles
The 1st defendant failed to keep a proper lookout for other road users
The 1st defendant failed to keep the vehicle under proper control
The 1st defendant drove at an excessive speed and
The first defendant failed to act reasonably in the circumstances”

The third defendant is cited on the basis of vicarious liability.

[3] It is common cause that the second defendant was employed by the third defendant as a commuter omnibus driver. On 31 December 2017, he drove the commuter omnibus, [the kombi], from Kambuzuma to the commuter omnibus rank at the corner of Albion and

Chinhoyi Street, Harare. Whilst at the rank, the first defendant drove the vehicle which hit the second defendant and the plaintiff causing injuries to them. The second and third defendants refuted that the first defendant was employed by the third defendant as a conductor and deny liability for the accident.

[4] The issues referred to trial are as follows:

- “1. Whether the 1st /or 2nd defendant (s) negligently caused the accident in which the plaintiff was injured on 31 December 2017
2. Whether the 3rd defendant was the employer of the 1st and/or 2nd defendants at the time of the accident
3. Whether or not the 2nd and 3rd defendants are liable to pay damages to the plaintiff and, if so, the quantum of such damages”

[5] The plaintiff testified as follows. He was a conductor of a kombi driven by Spencer Chadyiwa, his brother. The first defendant was a conductor for the kombi owned by the third defendant that hit him. He used to see both the first and second defendants together as they operated in the area he operated from and at the rank. He did not know Pardon Trackim. On the fateful day, he was sitting on a pavement about five metres from the kombi that hit him. At the time of the accident Spencer Ngandu had gone to the service station to refuel his kombi. He observed the second defendant give the first defendant the kombi keys and instruct him to move the kombi forward so that they could load passengers. He thought that the kombi was going forward and suddenly the vehicle ran him over injuring him on the left leg. The second defendant was also hit as he tried to run away.

[6] The first defendant drove the kombi on the instructions of the second defendant. Both the first and second defendants caused the accident whilst in the course and scope of their employment with the third defendant, rendering the third defendant vicariously liable for the accident. The damages claimed were reduced from \$170 000.00 to US\$167 000.00 after the third defendant’s insurer paid Z\$3000.00 to the plaintiff resulting in the claim against it being withdrawn.

[7] Spencer Chadyiwa’s evidence may be summarised as follows. He was friends with the second defendant and knew the first defendant who once worked with him at a commuter omnibus company belonging to Beverly Muza. The first defendant was second defendant’s conductor. On the day in question, he left the plaintiff sitting on a pavement and went to refuel his kombi. When he came back, he found the plaintiff still seated on the pavement. He had just come back, parked and sat at the back of his kombi when the accident happened. His kombi was parked on the side of the second defendant’s kombi. He observed the second

defendant disembark from the vehicle and leave the vehicle idling. The first defendant opened the door for passengers to disembark and went back into the vehicle. The second defendant started touting for passengers whilst he stood near the pavement. The plaintiff was about 6 metres away from him. After the kombi ahead of the second defendant's had loaded passengers and left, the second defendant instructed the first defendant who was inside his vehicle to move it forward. When he did so, the vehicle jumped onto the pavement and hit and injured the plaintiff and the second defendant.

[8] Ernest Pasipanodya knew the first defendant as they both once worked as conductors for Muzawazi's company. He testified that the first defendant was employed by the third defendant as a conductor. He did not know Pardon Trackim. When the second defendant arrived at the rank, he disembarked from the kombi and left it idling. The kombi ahead of second defendant's was almost full when the second defendant instructed the first defendant to move the kombi so that they could load passengers. He moved the kombi which went out of control and hit the second defendant and the plaintiff.

[9] The second defendant's testimony is that the first defendant was a kombi driver for Beverly Muza for three years. Spencer Ngandu was an acquaintance. The kombi the first defendant used to drive was marked "for sale" so he does not know what happened after the sale. On the day in question, he gave the first defendant a lift into town from Kambuzuma. On arrival at the rank, he and his conductor, Pardon Trackim, disembarked from the vehicle and the first defendant remained seated in the vehicle after passengers had disembarked. Anyone can just sit in a commuter omnibus whiling away time.

[10] He left the keys in the ignition with the kombi idling and went to register it for loading of passengers. As he was coming back from there, the kombi took off at high speed and struck him on his left leg. It proceeded to hit the plaintiff who was seated on a pavement, causing injuries to him. The first defendant was in the front centre seat which means that he had stretched his leg to operate the vehicle. He did not work as his conductor and did not instruct him to move the vehicle. He reported him to the police for driving a vehicle without owner's consent.

[11] The third defendant refuted that first defendant was employed by him as a conductor. He has never met him. He produced a contract of employment entered into between him and the second defendant and maintained that there is no such contract with the first defendant because he was not employed by him. He insisted that the designated conductor of the said vehicle was Pardon Trackim. His drivers have no authority to assign their vehicles to any

other person or employ other employees. He has managers who check and supervise drivers at the ranks.

[12] There is no dispute that the first defendant was unlicensed, failed to control the vehicle and was negligent in his manner of driving. The issues to be determined are whether the first defendant was employed by the third defendant, was given an instruction to move the vehicle and whether the defendants are liable for the accident and the quantum of damages thereof, if any.

Whether first defendant was an employee of third defendant?

[13] The defendants in their plea denied that the first defendant was known to them. They gave out that they only learnt that the first defendant was a tout or rank marshal after the involvement of the police in this matter. They gave the impression that they did not know him before the accident. In an about turn, the second defendant, now says that he was known to the first defendant. He told the court that he used to be a kombi driver for another person. The defendants' position regarding the status of the first respondent is not convincing. The court was not convinced that the first defendant would have managed to remain in the kombi seated and manage to drive the vehicle. The third defendant's evidence was that there was a manager based at the rank who was to ensure that the vehicle was not given to any other person. The Court is not persuaded that the manager would have allowed a stranger to sit in the kombi just relaxing. It is baffling that the first defendant would end up driving the vehicle with no-one noticing him and without authority.

[14] The second defendant told the court that he had earlier on given first defendant a lift. If second defendant gave him a lift, he ought to have said so from the outset. The second defendant did not impress me as a truthful witness. Whilst the defendants maintained that the second defendant had a different conductor, the court was not favoured with an explanation regarding why the conductor was not called in support of the defendants' case if he indeed exists. What is also intriguing is that none of the other people working from this rank who testified know Pardon Trackim except the second defendant and yet these are all people who were supposed to know each other well. It was never suggested to the plaintiff's witnesses that they knew Pardon and that he was present at the rank on that day.

[15] The court was not told when Pardon was engaged by the third defendant. No reason was advanced for the failure to produce his contract of employment. The fact that the second defendant may have entered into a contract of employment with the third defendant and produced it does not discount the fact that the first defendant was the third defendant's

employee. The defendants failed to call the third defendant's manager and Pardon to support the assertion that Pardon was the conductor and that first defendant was not an employee of the third defendant. Pardon seems to be a creature of the defendants' imagination.

[16] It is not correct that Pasipanodya told the court that he was unsure that the first defendant was employed by anyone at the material time. The import of his evidence was that he was not sure if the first defendant was on duty on that day but that he used to move in the third defendant's kombi and was employed as a conductor. The plaintiff's witnesses left no doubt on the court's mind that the first defendant was third defendant's kombi conductor. They did not hide the fact that the first defendant had prior to joining the third defendant worked with them. The second defendant on the other hand did not impress as an honest and credible witness, having chosen to distance himself from the first defendant in the plea, only to admit knowing him at trial. The entire second defendant needed to have said from the outset is that he knew first defendant and had given him a lift on the day but he was surprised that he ended up on the steering wheel. The third defendant's version that he did not employ the first defendant was simply not convincing. Whilst no contract of employment was produced in support of the assertion that the first defendant was an employee of the third defendant, the evidence led reveals otherwise. The plaintiff and his witnesses gave clear and satisfactory evidence regarding the status of the first defendant and were not discredited. The court found the plaintiff's witnesses to be very honest witnesses. The probabilities of the case favour the finding that the first defendant was employed by the third defendant as a conductor.

Did the second defendant give the first defendant an instruction to move the vehicle forward?

[17] The plaintiff and his witnesses testified that they heard the second defendant give an instruction to move the vehicle. The plaintiff told the court that he saw the second defendant giving the vehicle keys to the first defendant, contrary to his summary of evidence where he stated that the second defendant left the keys in the ignition with the engine idling. He later clarified this point in re-examination and said that what he said in his summary of evidence is what happened. The plaintiff's explanation for the discrepancy is that the event happened a long time ago.

[18] The defendants took issue with the fact that the plaintiff failed to specifically plead as a particular of negligence the fact that second defendant was negligent in that he left the keys on the ignition with the kombi idling in his declaration. They contended that this evidence is

an afterthought and that the plaintiff cannot rely on this particular of negligence. In *Lewis v Mushangi & Anor* 1999 (1) ZLR 506 (HC), the court explored a defence of contributory negligence although a defendant had not pleaded it in his counterclaim as a particular of negligence. The court held that the general rule is that the alternative defence of contributory negligence must be pleaded and that the appropriate relief of an apportionment of damages must be claimed in the plea but that the decision of the court will depend upon the circumstances of each case.

[19] In a case where a particular of negligence is not pleaded in the declaration but where it is shown that despite the defect in the pleadings, the other party knew the case he was required to answer to and the issue is fully ventilated at trial, the evidence of the particular of negligence becomes admissible. This is particularly so in a case where the plaintiff's summary of evidence makes it clear that the particular of negligence challenged forms part of his case and where the particular of negligence is admitted by a defendant. The court may consider the evidence in coming up with an appropriate decision. The defendants became aware of the case they were required to answer to and the issues at stake before the trial.

[20] The discrepancy in the plaintiff's evidence is immaterial as the second defendant conceded that he left the keys in the ignition with the engine running. It is the second defendant's version that has issues that are difficult to surmount. He did not say in his plea that he left the keys in the ignition and that this is how the first defendant was able to move the vehicle, only to disclose this at the trial. In view of the second defendant's concession, the court is entitled to have regard to this evidence. I am satisfied that the evidence is not an afterthought.

[21] The defendants' version is highly improbable. The defendants did not suggest why the plaintiff and his witnesses would lie that they heard the second defendant give the instruction. They failed to call Pardon or the manager to refute the fact of an instruction to drive the vehicle was given and yet they were supposed to be present at the rank.

[22] It is inconsequential that the plaintiff did not mention that he was having lunch. The fact that the plaintiff saw the Kombi coming towards him and did not manage to run away, simply means that the accident happened in the heat of the moment and does not imply that he hadn't realised that the vehicle was parked at the rank before the accident. The plaintiff told the court that when he was hit, his brother had gone for refuelling, whilst his brother testified that he was actually present. One cannot expect the plaintiff to have been monitoring his brother's movements. What is clear is that he did not realise that his brother was back.

The defendants tried to make a meal out of the fact that the plaintiff's witnesses did not quite remember where the first defendant was seated and the second defendant standing. It would be too much to expect the plaintiff witnesses be able to account for everyone's exact whereabouts at the time of the accident. The plaintiff's witnesses were clear that first defendant moved the vehicle in response to an instruction. The plaintiff's version is more probable than that of the defendants. The plaintiff's version, despite minor inconsistencies, was confirmed by his witnesses. The probabilities of the case favour the plaintiff's version that the second defendant was outside the car when their turn to load the vehicle came and he asked his conductor who was already in the vehicle, to move the vehicle so that they could load passengers. I find therefore that the second defendant gave an instruction to the first defendant to move the vehicle.

[23] It is trite law that an owner of a vehicle is liable for the delicts committed by a person who he authorises to drive his vehicle whilst he is in the course and scope of his employment. The employee's conduct binds the employer because he is held to be his agent. Where the employee is found to be negligent, liability is imputed to the employer thereby binding him. Liability attaches to the employer by virtue of the employer-employee relationship.

[24] This position was succinctly expounded in *Guide to Zimbabwean Law of Delict*, G. Feltoe at p 97 where the author states;

- “(i) By instructing employees to engage in activities, he creates the risk that the employees may cause harm to others ...
- (ii) the employer is usually in a far better financial position to compensate the injured party than the employee who will often not have the financial resources to pay compensation and as between employer and the employee, it is therefore, unfair to expect the employee to pay for compensation for a delict arising out of performing work on behalf of the employer ...” See also *Mungofa v Muderere* HH 129/03.

[25] In *Biti v Minister of Security* 1999 (1) ZLR 165 (SC), the court said as follows regarding the liability of the employer,

“... The standard test for vicarious liability required the court to decide whether the wrongdoer was engaged in the affairs or business of the employer when he committed the delict”

An employee who commits a delict whilst he is acting on behalf of his employer binds him. In *Feldman Pty v Mall* 1945 AD p741 at 733, the court said that;

“A master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy...because he has created this risk for his own ends, he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying out his work...”

[26] The act of moving the vehicle by the first defendant was meant to further the third defendant's business. There is no dispute that the second defendant was acting in the course and scope of his employment when the accident occurred and there was wrongdoing on his part. The second defendant admitted that he was negligent in leaving the keys on the ignition. His act of leaving the keys in the ignition with the vehicle idling and instructing first defendant to move the vehicle constitutes negligence on his part. He knew that first defendant was just a conductor and was not licensed to drive and ought not to have instructed him to drive the kombi. In the case of *Kruger v Coetzee* 1966 (2) SA 428 the court said the following of *culpa*,

“For the purposes of liability culpa arises if;
(a) A diligent paterfamilias in the position of the defendant –
(1) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
(11) Would take reasonable steps to guard against such occurrence ‘and
(b) The defendant failed to take such steps,
...Whether a diligent paterfamilias in the position of the person concerned would take a guarding steps at all, if so, what steps would be reasonable, must always depend on the particular circumstances of each case? No hard and fact rule can be laid down.”

[27] The second defendant created a dangerous situation by giving an unlicensed driver an instruction to drive the kombi at a place which was full of vehicles and pedestrians. He foresaw danger ensuing. It was reasonably foreseeable that if the first defendant drove the vehicle being unlicensed, was likely to cause an accident. The second defendant ought to have disengaged the keys before leaving the vehicle and going to register his kombi. Instead of asking his conductor to move the vehicle forward, he ought to have done so himself. The second defendant did not plead that he had a faulty battery and sought use this at the trial as an excuse for leaving the vehicle idling. There is a casual connection between the conduct of the second defendant and the collision that occurred. The conduct of the second defendant was both the factual and legal cause of the accident and binds the third defendant.

[28] In assessing appropriate awards, the court will take into account the change in currencies and the rising inflationary rate; see *Sadomba v Unity Ins Co Ltd* 1978 RLR 262. The court is alive to the fact that an award made a year ago for similar injuries cannot be a correct example of an award that should be made today.

[29] The plaintiff is entitled to all medical expenses he reasonably incurred for the treatment of his bodily injuries. The defendants did not cross examine the plaintiff on the damages he claimed. The award the court makes is based on the tabulated medical and hospital expenses

amounting to Z\$7451.13 which were not challenged in evidence. The claim for transport expenses was not challenged. The court is alive to the fact that public transporters do not issue receipts. The medical receipts produced show that he travelled extensively for treatment. The court is certain that he incurred travel expenses when seeking medical attention and is bound to make an award of damages even though the resulting award is purely an estimate. He is awarded Z\$2000.00 for travel expenses.

[30] The plaintiff seeks US\$62.000.00 for future medical expenses. A claim for future medical expenses considers the cost of such medical expenses as at the time of trial. A litigant seeking future medical expenses has to prove a possibility that he will have to incur them, see *Wilson v Birt* 1963 (2) SA 508 (D). The possibility of future medical expenses may be expressed as a percentage and hence the award can be based on expert medical evidence. *Visser & Potgieter, Juta, Law of Damages, 3rd ed* p 459 states as follows:

“In respect of prospective medical expenses a plaintiff does not have to prove on a balance of probabilities that he or she will have to incur such expenses, since it suffices if the plaintiff merely proves a possibility (expressed as a percentage) that he or she will have to incur them.”

[31] The general approach is that it is desirable that the possibility of future medical expenses of the plaintiff be expressed as a percentage in his medical reports. A medical report has the advantage that it deals with future development of the plaintiff’s injuries, their consequences and the treatment and costs required. The approach of our courts was laid out in the case of *Mathew Mbundire v Tyrone Sim Buttress* SC 13/11, where the court remarked as follows;

“... monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it ...”.

[32] The defendants did not challenge the quantum of damages claimed. The plaintiff told the court that he remains on medication and will continue to need treatment and medication in the future. The court was not given exact details of the nature and extent of the treatment and medical expenses he will likely incur in the future. His medical report has no expression of his percentage disability, consequences of the injuries and likely costs. The court will not deprive the plaintiff of an award of damages for future medical expenses where the evidence reveals that he will need further treatment

and incur future expenses. The court will use the best evidence available to assess the award due to him even if it be an estimate.

[33] No doubt, the plaintiff has and will in the future incur medical expenses. The costs of medication are escalating. The court considers that an estimate of Z\$30 000.00 will suffice for future medical expenses. In assessing appropriate damages in this case, the court has considered that the claim was made in United States dollars. The comparable awards are in United States dollars and the awards it makes have and continue to be heavily eroded by inflation.

[34] The plaintiff claimed US\$70 000.00 for shock, pain and suffering. Pain and suffering is a wide term which includes feelings such as pain, physical, mental suffering and discomfort resulting from physical injuries and emotional shock. It covers pain and suffering occurring both in the past and that likely to occur in the future. The leading case on assessment of damages in our jurisdiction on personal injuries damages is *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (SC), where the court stated that general damages for personal injuries are not, and will never be a penalty. They are compensatory in nature and intended to place the injured party in the position he would have occupied had the wrongful act causing his or her injury not been committed. In the case of *Biti v Minister of Security* 1999 (1) ZLR 165 (SC) at 170-171 the court held that the objective of general damages is to enable a claimant to overcome his injuries not to penalize the defendant. The plaintiff must be put in a position he would have been had the injury not occurred, see *Mungate v City of Harare & Ors* HH 328/16. It must always be remembered that general damages cannot be quantified with precision and are measured by the broadest general considerations and there is no scale by which they can be measured, see *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194.

[35] The plaintiff, a 21 year old, sustained traumatic amputation of his left foot and fracture to the left tibia. He had a wound on his foot. His small toe was injured. The injuries were found to be severe and the possibility of permanent injury is likely. He has had some skin grafting done. He was hospitalised for about 3 months. He can no longer walk unaided and walks with a struggle. He still experiences pain which is likely to continue for a long time to come. He is awarded Z\$30 000, 00 for pain and suffering and disfigurement.

[36] The plaintiff claimed US\$30 000.00 for loss of amenities of life and permanent disfigurement. Loss of amenities refers to loss of ability to engage in activities one previously engaged in and loss of enjoyment of a normal life. Disfigurement refers to any disfigurement to the plaintiff's physical body. In *Gwiriri v Highfield Bag* 2010 (1) ZLR 160, a plaintiff

who lost use of his right hand was awarded US \$6000.00 for disfigurement and loss of amenities. Another case in point is *Mafusire v Greyling* 2010 (2) ZLR 198, where the plaintiff sustained injuries to her knee and ankle requiring surgery and was hospitalised for 4 days. She was awarded US\$1000.00 for pain and suffering and loss of amenities. Whilst the awards are in United States dollars, they serve to show how seriously our courts view the different categories of damages. The plaintiff sustained injuries to his leg and now has difficulty using his leg. He used to play soccer for an academy in Division one and can no longer play soccer as he used to. He was about to leave for South Africa to go and play soccer for his club and failed to embark on the trip due to his injuries. He has not been able to resume playing soccer for his team and is unlikely to play soccer again. The injuries sustained were serious and severe and there is a possibility of permanent injury thereby compromising his physical health. An award of Z\$20 000.00 will meet the justice of the case.

[37] At the time the claim was made, the currency in use was the United States dollar. The plaintiff' will be awarded damages in RTGS dollars, a currency with less monetary value, see *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber (Pvt) Ltd and Anor* SC 3/20.

[38] Accordingly, it is ordered as follows,

1. The 1st, 2nd and 3rd defendants jointly and severally, the one paying the others to be absolved shall pay to the plaintiff, the following,
 1. The 1st, 2nd and 3rd defendants jointly and severally, the one paying the others to be absolved shall pay to the plaintiff,
 - a) Z\$7451.13 for past medical expenses
 - b) Z\$30 .000.00 being future medical expenses
 - (c) Z\$2 000.00 for transport expenses
 - d) Z\$20 000 00 for loss of amenities and disfigurement.
 - d) Z\$30 000.00 for shock, pain and suffering.

Interest thereon at the prescribed rate of 5% *per annum* from 31 December 2017 to the date of payment.

2. Costs of suit.

Danzigar & Partners', plaintiff's legal practitioners
Rubaya & Chatambudza, 2nd & 3rd defendants' legal practitioners