REPORTABLE ZLR(1)

BERNARD VENGAI v (1) BENJAMIN CHUMA
(2) NEW DONNINGTON FARM (PVT) LTD

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, SEPTEMBER 25, 2012 & JANUARY 29, 2013

The appellant in person

F Mahere, for the respondents

OMERJEE AJA: This is an appeal against the judgment of the High Court in which the appellant's claim for the replacement value of a Mercedes Benz motor vehicle and damages, arising from a road traffic accident, was dismissed with costs.

The facts of this matter are that on 10 September 2008, at 7.30 p.m. the appellant was driving a Mercedes Benz E200 Compressor motor vehicle from Gweru to Harare. At the 49 kilometre peg, just before reaching Norton, he drove into the back of a trailer. The trailer was being towed by a tractor driven by the first respondent during the course and scope of his employment with the second respondent. Both the trailer and the tractor belonged to the second respondent.

The appellant issued summons against both respondents on 25 February 2009. He sought US$30 000.00 being the replacement value of the Mercedes Benz motor vehicle together with interest thereon at the rate of 30% *per annum* from the date of the accident to the date of payment in full and damages for hiring a vehicle for his use at the rate of US$2 000.00 a month from the date of the accident to the date of payment (sic). He further sought general damages for pain and suffering in the sum of US$10 000.00 together with interest at the rate of 30% *per annum* from the date of the accident to the date of payment in full.

In his declaration, the appellant averred that the accident was caused by the negligence of the first respondent and the unroadworthiness of both the tractor and the trailer. He particularised the negligence thus:

(a) The tractor driver was not licensed to drive

(a) The trailer which had 30 passengers had no rear lights despite the fact that it was around 7.30pm.

(b) The driver was driving in the middle of the road instead of the extreme left of the road.

(c) The driver drove without due care and attention and failed to avoid an accident when it was imminent.

(d) The rear lights of the tractor, even if they were on, would have been obstructed to trailing traffic by the width of the trailer, its height and overcrowded workers inside the trailer.

(e) The vehicles were not licensed to carry workers on public roads.

He further averred that the second respondent was negligent in using an unlicensed and under age driver to drive an unregistered and uninsured tractor and trailer to carry workers on a public highway and especially at night.

In their joint plea, the respondents denied liability and disputed the particulars of negligence that were raised against them. They averred that the accident was caused as a result of the negligence of the appellant who drove at an excessive speed, failed to keep a proper lookout and attempted to overtake the tractor and trailer when it was not safe for him to do so. While admitting that the trailer did not have rear lights they denied that this contributed to the accident in any way. They further stated that both the trailer and tractor were visible as the tractor's hazard indicator lights were flashing and the trailer had reflectors at the rear. The respondents further accepted that the first respondent was not licensed but denied that this was a contributory factor to the accident. They also put the extent and nature of the damages and loss suffered by the appellant to his person and vehicle in issue.

In his replication the appellant averred that he noticed the tractor drawn trailer when it was 10-15 metres in front of him because his head lamps were on low beam. He had just passed a vehicle travelling in the opposite direction and could not overtake as there was an oncoming vehicle. He further averred that the chevron reflectors on the trailer had been positioned at a height of one and a half metres from the ground instead of the statutory one metre and twenty centimetres.

Following a trial, the High Court dismissed the appellant's claim. Dissatisfied with such finding, the appellant has appealed to this Court.

The main question for determination is whether the court *a quo* erred or misdirected itself in reaching the conclusions that it did, on matters of fact, based on the evidence before it.

The court *a quo* found the respondents' version of events more credible. The learned judge stated as follows:

> "The plaintiff's version of how the accident occurred was not corroborated by the testimony of Shawn Munawa. Shawn was disoriented in the witness box. He had no recollection of what happened. This may have been due to the concussion that he sustained. He however intimated that the plaintiff only reduced speed when he saw the oncoming vehicle. There were disquieting features in the plaintiff's version….he calculated his speed from the distance that his vehicle stopped after the collision… applying his own method of calculation, he would have been travelling at double the speed he indicated. If his calculations are correct he would have been travelling at twice the speed he deposed to".

It was the appellant's testimony during the trial that he was travelling at 80 kilometres per hour, at the time when the accident occurred.

On this aspect the court *a quo* found that:

> "His speed would have been between 140km/h and 160km/h. More importantly, by relying on the distance travelled by the vehicles after impact to calculate his speed, he demonstrated that he was not paying attention to his speedometer and did not know the actual speed he was travelling at when the collision occurred. The tone of his version indicated that he commenced to overtake but returned to his lane because he had misjudged the distance of the approaching vehicle. His reasons for failing to see the tractor were unclear. He stated that the headlamps of the approaching vehicle were on full beam. In my view he ought to have noticed the presence of the tractor much earlier from the light cast by the oncoming vehicle. He did not explain why he kept his headlamps deflected in the face of the full beam".

On being questioned about this finding, appellant submitted before us, that he is an electrical engineer and that his reason for failing to see the tractor on time, and for opting to ram into it, was that he noticed electric pylons to his left which were 100metres apart and he calculated that if he chose to go to his extreme left, he would collide with an electricity pole and meet with instant death by electrocution.

It seems to me that if the appellant was alert enough to perceive electric poles to his extreme left, he ought to have been alert enough to see the tractor, which was in his direct line of vision. If he was travelling at 80 kilometres per hour, as he maintains, then he ought to have noticed the tractor earlier than he did. I detect no error in the finding by the court *a quo* that

the appellant commenced to overtake, but attempted to return to his lane because he had misjudged the distance of an approaching vehicle.

In our view, the court *a quo* correctly found that:

> "As he was on a straight stretch of the road the reasonable action for him to take would have been to flash his full beam at the approaching car to warn it to deflect its dazzling beam. Had he taken this precaution, on his version, he would have seen the trailer much earlier. The plaintiff's version that he braked when he was about 13 metres from the trailer was at variance with that of his witness who stated that he braked when he observed the oncoming vehicle as he was overtaking the trailer".

According to Cooper, "*Delictual Liability in Motor law"*, *Revised Ed. of Motor Law: Vol. Two – Principles of Liability*, at p 492, a vehicle travelling at a speed of 160 kilometres per hour would require a braking distance of 44,4 metres. I find this calculation consistent with the findings of the court *a quo* that the appellant was likely to have been travelling at around 160 kilometres per hour. The Traffic Accident Book (TAB) reveals that the appellant must have been travelling at an excessive speed. It also shows that the tractor travelled a distance of 81 metres from the point of impact and the car and trailer moved a distance of 19 metres. The gouge marks made by the tyres of the vehicles after impact indicate that the braking distance was too small to enable the appellant to brake safely and avoid colliding with the trailer. Instead, his vehicle was pulled along with the tractor and trailer following the impact. This is wholly consistent with the impact at considerable force caused by the speed at which the appellant must have been travelling when his vehicle collided with the rear of the trailer.

During his evidence-in-chief before the court *a quo*, the appellant testified that a vehicle drove past his vehicle from the opposite direction immediately before the accident. It was suggested to the appellant during the course of the hearing that if a vehicle went past him it would have had its lights on high beam and then dipped them when it went past. This should have enabled the appellant to see the tractor and trailer which was directly in his path. Appellant's submissions were unsatisfactory. He maintained that if the oncoming vehicle had dipped its lights he would only have seen the obstruction in the road at a distance of 13 metres before impact.

The author Cooper, in *Delictual Liability in Motor Law* (*op. cit*) at pp 147-148, states that:

> "The prudent motorist driving on a road that is commonly used by the public should foresee the possibility of encountering stationary, slow, or fast moving traffic, pedestrians, animals and obstructions generally, and of being confronted with a diversity of situations (both usual and unusual), which may create actual or potential emergencies. He should appreciate that other road users enjoy an equal right to use the road and that the law imposes reciprocal duties on all persons using the road. To ensure that he does not harm other road-users a motorist should drive at a speed at which he is able to stop within his range of vision…a driver of a vehicle which collides with a conspicuous obstruction is on the horns of a dilemma-either he was not keeping a proper lookout or, if he was keeping a proper lookout, he was travelling at a speed at which he was unable to stop his vehicle, i.e. at an excessive speed". See *Marine & Trade Ins v Van der Schyff 1972 (1) SA 26(A) 34B-C*

The appellant's submissions criticising the findings of the trial court were unfounded in regard to the evidence adduced by the defendant at the trial.

The court *a quo* found that:

> "The first defendant gave a straightforward account of what transpired. That account was confirmed by Ndodo and Kakorera. I am aware that by virtue of their employment with the second defendant, these witnesses could have colluded to give complementary evidence. It was, however, the duty of the plaintiff to expose their complicity under cross examination. Their evidence was consistent both in chief and under cross examination. They were honest on their shortcomings. Ndodo's version on the stage at which plaintiff braked was confirmed by the plaintiff's own witness Shawn Munawa. Their versions were unscathed by cross examination. The probabilities supported their testimonies. I believed them".

I am of the view that the court *a quo* did not make any error of fact, or of law, or fail to take into account relevant considerations or take into account irrelevant considerations, in its assessment of the witnesses' testimony.

I now proceed to determine the issue of liability in the light of the evidence led.

The question for consideration is whether the accident was caused either as a result of the negligence of the 1st defendant or the condition of the tractor and trailer, or by both. The court *a quo* found that:

> **"**The onus to prove that the collision was caused by the first defendant's manner of driving or by the use of an unroadworthy tractor and trailer lies on the plaintiff…the plaintiff failed to establish how the failure to hold a driver's licence or permit affected the manner in which the first defendant drove the tractor and the trailer that night…"

And that:

> "It was the first defendant and Ndodo's uncontroverted testimonies that two other vehicles had overtaken the tractor and the trailer while travelling in the middle lane without any mishap. It was apparent from the plaintiff's version that the tractor driver maintained a steady course. The plaintiff neither stated nor suggested that the second defendant meandered from his initial course into the plaintiff's path when he commenced to overtake.

Both the first defendant and Ndodo confirmed that the headlamps of the tractor were on as were the four hazard flashing lights on the big wheel of the tractor. The hazards were flashing as a warning to traffic that there was danger lurking on the road. That these lights were functioning was affirmed by the farm manager. The plaintiff did not explain satisfactorily why he failed to observe these flashing hazard indicators. He suggested that his view was obstructed by passengers who were seated inside the trailer. He failed to explain why he failed to observe the amber light waves that were cast by the flashing hazard indicators.

The trial court rejected his testimony that the hazard lights of the tractor were off. It is clear that the appellant saw the tractor in time and commenced to overtake. It was only while he was doing so that he realised that he had misjudged the distance of the oncoming vehicle. He decided to return to his lane. Given the speed at which he was travelling he rammed into the rear of the trailer. It is clear that the the accident was not caused by the unroadworthiness of the trailer, but by the excessive speed at which the appellant was travelling.

The position at law regarding what an appellate court may do and when it may interfere with findings of fact made by a trial court, is trite.

In *Aidan Beckford v Elizabeth Anne Beckford* SC 25/09 SANDURA JA at p 6 of the cyclostyled judgment, stated that:

> "It is quite clear that the learned judge made specific findings of fact with regard to the credibility of the parties and their witnesses. As has been stated in a number of cases, an appellate court would not readily interfere with such findings. This is so because the advantage enjoyed by the trial court of observing the manner and demeanour of witnesses is very great".

In *Hama v National Railways of Zimbabwe* 1996(1) ZLR 664 (S), 670C-D KORSAH JA said:

> "The general rule of law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion...".

I find that the court *a quo* did not make any mistake of fact which amount to a mistake in law. The grounds of appeal appear to be imputing irrationality to the decision of the court *a quo*. The appellant seems to be saying that the court *a quo* misdirected itself on the facts, to such an extent that it amounts to a misdirection of law. In other words, despite the cogency of the evidence before it, the court *a quo* nevertheless went on to reach conclusions that were not supported by the evidence before it. This Court is being called upon to decide whether, in the circumstances of this case, having regard to the evidence placed before the trial court, the findings complained of are so outrageous in their defiance of logic or of accepted moral

standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. see *PF ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985(1) ZLR 305(S) at p 326E-F.

A careful analysis of the findings of the court *a quo* reveals that this Court cannot arrive at such a conclusion. In my view the court *a quo* correctly and properly examined the evidence before it, and the credibility of the parties' witnesses. It believed the respondents' version. This Court cannot lightly interfere with the findings of fact of the lower court, which heard the evidence and found the appellant to be dishonest in his version of what transpired.

The judge *a quo* did not condone the statutory violations of the Vehicle Registration and Licensing Act [*Cap. 13:14*] as alleged by the appellant, but simply found that the cause of the accident was not the alleged defects, but the appellant's negligence.

The appeal is devoid of merit. In the result it is ordered as follows:

"The appeal is dismissed with costs".

ZIYAMBI JA: I agree

GARWE JA: I agree

Gollop & Blank, respondent's legal practitioners