REPORTABLE (35)

DELTA BEVERAGES
(Cited as a division of Delta Corporation Limited)
v
ONISMO RUTSITO

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, SEPTEMBER 24, 2012 & SEPTEMBER 26, 2013

T Mpofu, for the appellant
B Pesanai, for the respondent

GARWE JA: This is an appeal against the judgment of the High Court sitting at Harare dismissing with costs an application for absolution from the instance.

BACKGROUND

The respondent, who was plaintiff in the court *a quo*, issued summons claiming payment of damages in the sum of US$20 051 and costs of suit. The basis of his claim was that he had consumed a contaminated coca-cola beverage and that further inspection of the bottle had revealed "a rusting iron nail and blackish foreign substances." In his declaration he alleged that the appellant as the manufacturer of the beverage in question owed him and the general public "a duty of care to ensure that the product is safe, clean, health (*sic*) and fit for human consumption" and that the appellant had breached that duty by producing the contaminated coke. In the alternative the respondent alleged that the appellant had "negligently allowed the production and selling of contaminated coke" which he

consumed. In the result he sought damages in the sum mentioned for what he termed "distress and anxiety."

In its plea before the court *a quo*, the appellant denied that any harmful foreign particle of any nature was found in the unopened bottle of coke and, in the event that it was, that it was inserted by the appellant before, during, or after the manufacturing process. The appellant further pleaded that its manufacturing process was in line with international standards of quality and that in any event the cleaning, manufacturing and bottling process made it impossible to produce a beverage that contained a nail. In short the appellant denied producing contaminated coca-cola or any negligence in the production of the beverage.

THE EVIDENCE

During cross-examination in the court *a quo* the respondent appeared to accept that he had not suffered any nervous shock. The following exchange captures the evidence that came out during cross examination on this aspect:

> "Q. Did you suffer any nervous shock as a result of consuming the contents? A. Yes at that time. To my surprise it came to my attention, I thought what if I had consumed the nail, wondered what could have been the outcome.
>
> "Q. Let us not waste time on that that does not constitute nervous shock does it? A. Yes I was actually shocked in that manner.
>
> "Q. The question is does that constitute nervous shock? A. No, I was actually shocked. Surprised and shocked at the same time in seeing the iron nail in the bottle.
>
> "Q. You agree with me that no psychiatric condition developed as a result of the incident in you? A. No, nothing of that sort.
>
> "Q. As recorded in exhibit that we have placed before the court you similarly confirm that you did not develop any medical conditions? A. No, I did not develop any medical condition.
>
> "Q. If in fact your personality was not in any way altered by the event that you described? A. My personality as after consuming the iron nail, there was a slight

change when I was about to *(sic)* another bottle during since coke was my favourite drink, I would observe more and look forward in seeing whether there is any substance inside or not.

"Q. You are simply saying you became more careful, you are not saying there was a change in personality. Is that not so? A. When you say personality what do you exactly mean? Can you define personality in change?

"Q. Ok, I will not define what personality is but you accept that there has not been any change in you as a result of the incident that you described?

BERE J. He has become more cautious? A. That is what I would say."

Questioned further, he had the following to say:-

"Q. Your claim is that you suffered anxiety and distress as a result of the incident. Is that so? A. Yes it is.

"Q. And, you allerge *(sic)* you also had fear for the worst? A. Yes I did have fear for the worst.

"Q. And, this is all that this claim is about, anxiety and distress? A. Yes and also the manner in which my case was handled which I thought could have been handled in a better manner."

"Q. You say you could have been affected if you consumed the iron nail but you did not consume it and you were not affected? A. I repeat, my human body would have been affected if I had consumed the iron nail."

On the question whether the appellant's processes involved in the production of beverages fell below the standard expected of a reasonable beverage manufacturer, the following exchange took place:

"Q. The basis of your claim is that defendant was negligent in manufacturing the product that you are talking about and you indicated in your evidence in chief that you were offered the opportunity to tour its facilities and you confirm now that you did not take that offer. Yes or no? A. No I did not take that offer. As I had explained before for the banking of the site in which I was managing and at that time actually had not done the banking, so, I was in a hurry in doing so.

"Q. Did you subsequently take up your offer in order to be satisfied that defendants process *(sic)* are below the standards expectant *(sic)* of a reasonable manufacturer? A. No, I did not take up the offer because it indicated to me during that meeting that they just wanted me to visit the plant in showing me that I placed the iron nail myself.

"Q. Do you agree with me that there is nothing that you can put before the court concerning the payment process? A. Sorry I did not get the last word?

"Q. You agree with me that there is nothing that you can put before the court concerning defendant's process on the basis upon which the court can find that defendant did not take necessary precautions or does not take necessary precautions in manufacturing its products? A. No, there is no evidence. You said is there evidence that I have?

"Q. Yes that was the question and your answer is that there is no such evidence. Now, had there been any deficiencies, any defects in the defendant's processes. You agree with me that if you told the blunt you probably would have seen those? A. No, I would not know of any defectives because I do not know how the machinery is operated but what I do know in any manufacturing process there is always room for human error."

On the question as to which manufacturer of coca-cola beverages in the country was responsible for the production of the beverage in question, the following exchange took place:-

"Q. Are you aware that there are two entities that manufacture, packaged and distribute the product that we are talking about? A. No, I do not know anything about the processes.

"Q. If I told you about Mutare Bottlers will that instill your memory? A. Yes I am aware.

"Q. The relevant bottle that we are talking about who had manufactured, packaged and distributed it? A. No, I would not know but what I do know is the deliveries that we do place and orders come from the DELTA depot along Seke road."

During further cross examination the respondent stated as follows:-

ADV MPOFU. Q. But you accept that the delivery is notwithstanding. It is important to establish the origins of the bottle because you do not know the interparty arrangements between the manufacturers? A. I did not take in mind that the bottle

came from different stock holds that is why I did not bother to identify where the bottle had come from."

At the close of the respondent's case (plaintiff in the court *a quo*) the appellant applied for absolution from the instance. Whilst acknowledging that the appellant was disputing that the drink in question had emanated from its plant, the court *a quo* reached the conclusion that the evidence tended to show that all was not well in the appellants' manufacturing processes. The court further reasoned that, although issue had been taken with the propriety of a claim for distress and anxiety, this was a legal issue to be dealt with at the end of the trial. Accordingly the court *a quo* reached the conclusion that the appellant should be placed on its defence to rebut the plaintiff's allegations. It is against that order that the appellant has now appealed to this Court.

GROUNDS OF APPEAL

In its grounds of appeal the appellant has attacked the decision of the court on the following grounds:

1. That the court *a quo* erred in placing appellant on its defence against a claim for stress and anxiety which claim is not cognisable at law and despite there not having been any evidence to support the claim made.

2. The court *a quo* also erred in postulating (without invitation) that a claim for stress and anxiety might fall under the head of pain and suffering notwithstanding that such was never plaintiff's position and plaintiff had specifically abandoned a claim for stress and anxiety in favour of a claim for nervous shock.

3. The court *a quo* further erred in coming to the conclusion that appellant could be put on its defence notwithstanding that no negligence had been alleged against it as required by law and superior court authority brought to the court's attention. It so erred in seeking to place reliance upon evidence of alleged negligence that had nothing to do with the claim placed before it.

4. The court *a quo* erred in placing appellant on its defence notwithstanding that plaintiff had not claimed that he had suffered any harm cognisable under the Aquilian action.

5. The court *a quo* erred in coming to the conclusion that appellant should be put on its defence to defend the
   $51-00 claim for medical expenses notwithstanding that it was accepted by plaintiff that he had been offered medical assistance and freely decided not to take it despite not taking issue with either its nature or quality."

From my reading of the above grounds of appeal and the oral submissions made before this Court, it seems to me that there are in fact two main issues that arise for consideration. These are firstly whether the respondent's claim before the court *a quo* disclosed a proper cause of action and in particular whether he was entitled to damages for anxiety and distress or, as submitted by his counsel during submissions made before the court *a quo*, nervous shock. The second is whether negligence had been alleged and proved.

THE CLAIM FOR DISTRESS AND ANXIETY

The respondent's claim in the court *a quo* was for damages for distress and anxiety. Although during argument the respondent's counsel submitted that the claim for general damages is based on the fact that the respondent suffered nervous shock, the respondent's claim was never amended to reflect such a claim. His claim on the pleadings remained one for distress and anxiety.

It is the appellant's submission that no cause of action can be founded on a claim for distress and anxiety in our law and that even if it were to be accepted for a moment that the respondent's claim was one for nervous shock, such a condition was transient and did not result in a condition requiring treatment.

There would appear to be substance in this submission. It is not every form of harm which constitutes damage.

The position is settled that:

> "A claim for damages in respect of pain and suffering strictly constitutes more than a head in a general Aquilian action; it is in origin a separate remedy. It aims at compensating the victim for all pain, suffering, shock and discomfort suffered by him as a result of the wrongful act. It includes both physical and mental pain and suffering and both past and future pain and suffering. Moreover account must be taken not only of the pain and suffering suffered as a direct consequence of the infliction of the injuries but also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries...."

See the *Quantum of Damages in Bodily and Fatal Injury Cases*, 3 ed by *Corbett, Buchanan* and *Gauntlett*, at pp 51-2.

Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law. The concept of damage is not unlimited in scope. It does not include every form of harm whatsoever and indeed some forms of harm are excluded. In this context, the learned authors, Neethling Potgieter Visser in *The Law of Delicit*, 6 ed, state at p 212:

> "the concept of damage does, of course, include more than harm for which compensation is recoverable, since *satisfaction* may be awarded for some forms of damage. As indicated by the definition above, only harm in respect of legally recognised patrimonial and non-patrimonial interests of a person qualifies as damage. This may be the reason why losses and harm such as inconvenience, disappointment, fear or frustration are not compensable in terms of the Aquilian action, or why a husband may not claim for the loss of the comfort and society of his wife who has been killed, or why the frustration of an expectation of inheriting something does not constitute damage. One may, of course, also argue that the losses referred to are damage but that the law refuses compensation for policy reasons. Reinecke's argument that the frustration of income from an unlawful activity does not amount to damage in the legal sense appears to be correct, although it has been subjected to criticism"

In *The Law of Delict* 2 ed by Neethling Potgieter & Visser, the authors cite with approval remarks by Boberg, *The Law of Delict* that;

> "Mere mental distress,injured feelings, inconvenience or annoyance cannot support an award of Aquilian damages" (at page 224)

Professor G Feltoe in *A Guide to the Zimbabwean Law of Delict* also states:-

> "whereas damages can be claimed for pain and suffering, damages cannot be claimed for transient nervous distress which does not lead on to a recognised psychiatric complaint requiring treatment."

The position may therefore be accepted as settled that it is not every complaint that warrants an award of damages. The complaint must lead to a recognised medical condition which would require treatment before such damage can be cognizable in terms of the law.

In the present matter, the respondent agreed during cross examination in the court *a quo* that no psychiatric condition resulted. The medical report produced before the court showed that there were no pathogens in the sample that was analysed. No harm requiring medical treatment was proved. Indeed no medical evidence was called to confirm whether he had suffered any nervous shock as suggested. It was his legal practitioner, Mr *Musimbe* who sought to lead such evidence from the bar when he stated:

> "....it is my respectful submission that in terms of the evidence led by the plaintiff his character changed every time he will get a coke bottle, he examines it and my Lord, he was shocked to see an iron nail in his coke bottle...."

In his heads of argument before this Court, Mr *Musimbe* further states:-

> "It is further submitted that the respondent suffered a medical and psychiatric harm. After suffering from the shock of finding a nail in a coke bottle, Respondent had to go

> to a doctor to be examined and the doctor then prescribed antibiotics and milk of magnesia. Further the psychiatric harm is revealed by his change of character where now every time he gets a coke bottle he examines it and this always gives him shocking memories and can be equated to post traumatic disorder, a direct result of finding a nail in the coke bottle. It is respectfully submitted that Respondent suffered harm which is recognised under the Aquilian Action."

The fact of the matter is that this submission does not disclose what, if any, medical condition developed and the treatment that became necessary. In the absence of medical evidence, no real reliance can be placed on these remarks by the legal practitioner who clearly is not qualified to express an expert opinion on this matter. Indeed Mr *Musimbe* conceded before this Court that medical evidence should have been adduced to confirm whether the respondent had developed a medical condition following his consumption of the beverage.

In the result therefore, I am satisfied that the respondent did not prove any damage such as would have founded a cause of action under our law of delict. Clearly whatever distress or anxiety or nervous shock he may have experienced was transitory and no psychiatric or other medical condition requiring treatment eventuated.

In the circumstances, the appellant had no case to answer. That should have been the end of the matter and absolution from the instance ought to have been granted.

WHETHER NEGLIGENCE PROVED

There can be no doubt that the respondent's claim in the court *a quo* was based on the Aquilian action. The respondent specifically pleaded that the appellant owed the general public a duty of care to ensure that its products are safe, clean, healthy and fit for

human consumption. In the alternative the respondent alleged that the appellant negligently allowed the production and sale of a contaminated coca-cola beverage.

The expression 'duty of care' is used in two separate and distinct senses. The first sense in which it is used is in connection with negligence. A person is said to have breached the duty of care (i.e. to have been negligent) when he fails to foresee and guard against harm which the reasonable person would have foreseen and guarded against. The second connotation of this phrase is in connection with wrongfulness. When it is used to denote wrongfulness, it will be used in this sort of way; although the reasonable man would have foreseen and guarded against harm, the defendant is not liable in the circumstances as the law does not recognise any duty of care to avoid causing that sort of harm (i.e. the conduct was not wrongful or to put it another way, there was no recognised legal duty to avoid causing harm by negligent conduct)-See *A Guide to The Zimbabwean Law of Delicit, Third Edition 2001* by G Feltoe at p 9.

In other words in determining whether or not a person was negligent, there is need to determine whether harm was reasonably foreseeable and if so whether the reasonable person would have guarded against such harm. As stated by G Feltoe in *The Guide to the Zimbabwean Law of Delict* (op cit):-

> "....there are some situations where, despite the fact that harm was reasonable, the reasonable person might not necessarily have taken any steps at all to prevent that particular harm or he might only have taken certain limited precautions. Therefore in addition to reasonable foreseability, the question of what steps if any, the reasonable person would have taken has to be investigated..." at p 37.

Attention is also drawn to similar remarks by the learned author, Boberg in *The Law Delict*, at p 194.

In his heads of argument Mr *Mpofu*, for the appellant, argued that as no particulars of the negligence alleged were set out or proved, there was no basis upon which the appellant could have been placed on its defence. I am inclined to agree with this submission.

In an Aquilian action in which a plaintiff claims damages whether for patrimonial or non-patrimonial loss, it is, I believe, incumbent upon such plaintiff to plead negligence on the part of the defendant and to set out the particulars of such negligence. Where such particulars are not set out, the defendant is embarrassed in his defence as he cannot know the basis on which liability is claimed. It is not enough to allege negligence and fail to give particulars of such negligence. It is now well established that a defendant is entitled to know the outline of the case that a plaintiff will try to make against him. *Border Timbers Ltd v Zimbabwe Revenue Authority* 2009 (1) ZLR 131 (H), p 139 D-E. Also *Honikman v Alexandra Palace Hotels (Pty) Ltd 1962* (2) SA 404, 407 A-B.

On the facts of this case no particulars of negligence were alleged or proved. Such failure assumes an important dimension when regard is had to the fact that the appellant is a beverage manufacturer. It is now settled that the liability of a beverage manufacturer or brewery is not absolute. If the steps it took to avoid contamination were reasonable, in the sense that nothing more could reasonably have been done, then it would not be liable because it would not have been negligent. *Delta Operations* (*Pvt) Ltd t/a National Breweries v Charles Naraura* SC 106/99 at p 5 of the cyclostyled judgment.

I would agree that at the end of the plaintiff's case before the court *a quo*, there was no evidence before the court on the state or condition of the bottling equipment

used by the appellant. There was no evidence that there was anything amiss with either the equipment or the procedures adopted during the manufacturing process. There was no evidence that the appellant had failed to take necessary precautions in the manufacturing process. In a situation such as this, failure could have been not because of negligence but human error. There was therefore no evidence which could be tested against the objective standards of a reasonable beverage manufacturer. Evidence could indeed have been led from a neutral institution such as the Standards Association of Zimbabwe. It was for the respondent to prove that the manufacturing processes of the appellant were deficient in particular respects. Only then could the appellant have been placed on its defence.

Moreover it was common cause that there are two separate companies involved in the manufacturing of coca-cola beverages. Whether the beverage forming the subject of this case was manufactured by the appellant or by Mutare Bottlers was never determined.

DISPOSITION

I am satisfied that for the additional reason that negligence was not proved and a causal link shown between the beverage in question and the appellant, absolution should have been granted.

The appeal must therefore succeed.

In the circumstances the following order is made:

(1) The appeal succeeds with costs.

(2) The order of the court *a quo* is set aside and in its place the following substituted:-

"the application for absolution from the instance be and is hereby granted with costs."

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Dube Manukai & Hwacha, appellant's legal practitioners

IEG Musimbe & Partners, respondent's legal practitioners.