

**REPORTABLE:** (73)

CITY OF HARARE  
v  
EVARISTO MUNGATE

**SUPREME COURT OF ZIMBABWE  
GOWORA JA, MAKONI JA & BERE JA  
HARARE, 16 OCTOBER 2018**

*C. Kwaramba*, for the appellant

*T. Magwaliba*, for the respondent

**MAKONI JA:** After hearing counsel, in the matter, we dismissed the appeal Judgment No SC 86 /22 with costs and indicated that reasons would follow in due course. Below Appeal No 56/130/18 judgment.

This is an appeal against the whole judgment of the High Court upholding the respondent's claim for damages arising from the appellant's negligence.

### **THE BACKGROUND FACTS**

On 28 March 2014 at around 19:00 hours, near Lyon's Maid offices, along Simon Mazorodze Road, the respondent fell into appellant's uncovered drainage tunnel commonly referred to as a "catch pit." He was rushing to board a commuter omnibus which he had waved down. He broke his leg, sustaining a permanent limp. The catch pit is situated on a traffic island which is between Simon Mazorodze road and a pedestrian or foot path.

Subsequently, on 23 September 2014, the respondent issued summons against the appellant claiming damages amounting to US\$305 796, interest thereon and costs of suit.

The breakdown of the damages claimed by the respondent was as follows;

(a)	Shock pain and suffering	US \$50 000
(b)	Loss of amenities of life	US\$100 000
(c)	Disability	US\$100 000
(d)	Medical expenses	US \$5 796
(e)	<i>Contumelia</i>	US \$50 000

The respondent averred that the appellant was liable for the injuries he suffered and ensuing damages as it had failed to either cover or put up any cautionary signs to warn pedestrians of the existence of the uncovered catch pit.

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In its plea, the appellant denied liability in *toto* stating that it was not negligent in any way, nor was it liable for the respondent's injury, loss incurred and damages claimed. It put the respondent to the strict proof thereof. It further averred that the misfortune that befell the respondent was a result of the respondent's negligence since he failed to keep a proper lookout and acted without due care and attention. The appellant prayed for the dismissal of the respondent's claim.

#### **PROCEEDINGS IN THE COURT A QUO**

The following issues were referred to trial:

1. "Whether or not the defendant(s) are liable for injuries allegedly suffered by the plaintiff.
2. Whether the plaintiff's injuries were not a result of Plaintiff's own negligence and failure to keep a proper outlook.

3. Whether or not the defendant(s) are liable to pay any damages whatsoever
4. If the defendant(s) are liable what is the quantum thereof.”

The respondent was the sole witness in his case. He testified that he fell into a pit whilst running to catch a lift that he had waved down. He stated that several factors contributed to his fall. Firstly the area was unlit because of the absence of street lights. Secondly, the area surrounding the pit was covered with tall grass which obscured the pit. Thirdly, there was no cover over the catch pit. Fourthly, there was no warning sign to caution him of the existence of the pit. The respondent stated that under such circumstances, it was difficult for him to see the catch pit. He also stated that the appellant was liable since council’s employees had admitted the pit had been constructed and was under the maintenance of the appellant.

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The respondent also produced photographs showing the surrounding area and the pit which he had fallen into, the evidence of the medical expenses which he incurred as a result of the injuries sustained and a report by a medical doctor stating that he suffered a 15 percent permanent disability. The respondent substantiated his claim for damages stating that further to the injuries he sustained from the fall, he had been subjected to embarrassment, had suffered and continued to suffer pain and shock, had lost amenities of life in that he could not earn extra income as he used to, or attend festivals, run, jog or dance.

In its defence, the appellant led evidence through one George Munyonga, who is a Deputy Chief Engineer employed by the appellant, responsible for maintaining road infrastructure. He conceded that the catch pit belonged to the appellant and that from the evidence presented before the court, the catch pit was not covered by a steel grating.

However, he took issue with the alleged severity of the respondent's injuries and argued that the injuries sustained by the respondent were not consistent with a fall into a catch pit.

He also testified that even if it was established that the respondent had fallen into the appellant's pit and sustained injuries as claimed, these were as a result of the respondent's own negligence. He stated that the respondent had been negligent in crossing the road as he did since he was familiar with the road and would have known of the existence of the various catch pits along the road. He further stated that he must have known that there was a possibility of an accident. Further to that, the respondent ran across a traffic island instead of using the pedestrian path. He also sought to board a vehicle at an undesignated bus stop and he ought to have taken more care as the area was unlit. Issue was also raised in relation to the fact that there was a three month's delay between the occurrence of the accident and the time the respondent notified the appellant of the accident.

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Mr Munyonga conceded that a catch pit without a cover poses a hazard to humans and that it is the appellant's duty to carry out regular maintenance by carrying out inspections and repairs to catch pits every three months. He also conceded that if it was dark, the respondent could not have seen the catch pit, even with a proper lookout. He also affirmed that it was impossible for one to board transport from the pedestrian path without crossing over the island where the catch pit was located. He also stated that along the road in question several theft cases of stolen steel gratings covering the pits had been reported. He however stated that the process of replacing the steel covers required funding and since the appellant was going through a cash crunch, there were delays in procuring the necessary infrastructure.

## DETERMINATION OF THE COURT A QUO

After considering the parties' arguments and evidence placed before it, the court *a quo* found in favour of the respondent. It concluded that the respondent broke his leg as a result of falling into the appellant's catch pit. The court further held that the appellant was liable for the respondent's injuries and that the requirements of the standard test for negligence, as enunciated in *Kruger v Coetzee* 1966 (2) SA 428 at 430 E-G, had been met. The harm was reasonably foreseeable; a *diligens pater familias* would have taken reasonable steps to guard against such occurrence and no such steps were taken.

The court *a quo* further held that uncovered catch pits posed a deadly hazard to the public and the appellant had a legal duty to ensure that they were regularly inspected and properly covered. It was reasonably foreseeable that an uncovered catch pit could pose danger to the public. Further to this, the appellant was aware of such cases Judgment No. SC 86 of 22  
Civil Appeal No. SC 130 /18 such a nature had been reported to the appellant before. The appellant should have carried out regular inspections of the catch pits; replacing the missing lids; mowing the grass around the catch pits to ensure visibility; maintaining adequate street lighting to ensure visibility at night; erecting danger warning signs to warn members of public of the existence of open catch pits and erecting barriers to block public access to the catch pits. The appellant had failed to take these steps and thus failed to do its duty and could not be absolved from liability. It further held that the respondent's explanation for the delay was plausible considering the severity of the injuries he sustained.

The court *a quo* further found that the respondent may have been negligent by running in the dark when he could not properly see where he was stepping, as he was obscured by tall grass. The risk of tripping and falling even in the absence of a catch pit could

not be ruled out. The court, however concluded that the respondent's negligence was not the proximate cause of the fall. The proximate cause of the fall was the absence of the catch pit cover. The court stated that if the catch pit had been covered, even if the plaintiff had walked on the island where he was not supposed to or if he had run in the dark when he could not properly see, he would not have fallen into the catch pit. Accordingly, the court upheld the respondent' claim and awarded damages amounting to US\$9769.00. The computation was as follows:

1. US\$796.00 being damages for medical expenses.
2. US\$2000.00 being damages for shock, pain and suffering.
3. US\$1000.00 being damages for loss of amenities of life.
4. US\$1000.00 being damages for disability.

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The court however, dismissed the respondent's claim for damages for *contumelia* on the basis that he had failed to prove intention, on the part of the appellant, to humiliate him or cause embarrassment to him.

Regarding costs, the court awarded the respondent costs of suit since he had succeeded in his claim. However, it expressed displeasure at the respondent's ridiculously high and unrealistic claims for damages which, in its view, would have hindered chances of the matter being settled at pre-trial conference stage. It stated that damages are meant to compensate the injured party and not to punish the wrongdoer and further that damages should reflect the state of economic development and the current economic conditions of the country.

Aggrieved by this outcome, the appellant noted this present appeal based on the following grounds:

### **GROUNDS OF APPEAL**

- “1. The court *a quo* erred in coming to the conclusion that there was no contributory negligence by the respondent. It also erred in that it misapplied the ‘proximate cause’ principle leading to the incorrect conclusion that despite being negligent, Plaintiff did not contribute to the accident.
2. Furthermore, the court erred in its apportionment of damages as a consequence of its failure to apportion blame. It so erred in that an appropriate apportionment of blame would have reduced the amount of damages payable by the appellant at least by half.
3. In any event, the decision of the court *a quo* as it relates to the issue of contributory negligence is so outrageous in its defiance of logic that no reasonable person applying his mind to the question to be decided would have arrived at such a conclusion.
4. At any rate the court erred by ordering appellant to pay costs having found that the respondent was equally to blame for the litigation which could have been avoided.”

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### **SUBMISSIONS IN THIS COURT**

The appellant’s major contention was that some measure of liability must be attributed to the respondent as this was a classical case where the doctrine of contributory negligence was applicable. Mr *Kwaramba* submitted that the court *a quo* misapplied the ‘proximate cause’ principle in the sense that there was more than one proximate cause of the accident. He argued that there were multiple acts of negligence by both the appellant and respondent which contributed to the accident. Accordingly, damages should be apportioned in terms of s 4 of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*], reducing the damages payable by the appellant in half.

Pertaining to the issue of costs, Mr *Kwaramba* argued that each party ought to bear its own costs since the respondent was equally to blame for the accident and the litigation because of the unrealistic claims he made which militated against a possible settlement.

Mr *Magwaliba*, on the other hand, contended that the appellant should have specifically pleaded the defence of contributory negligence and the appropriate relief for apportionment of damages. It ought to have, at least, set out detailed grounds showing the respondent's negligence and how he contributed to the occurrence of the accident. The issue was not covered in the pleadings, as such, the court *a quo* could not have canvassed the issue in its judgment in the circumstances.

Mr *Magwaliba* further stated that the court *a quo* was correct in finding that whatever negligence attributable to the respondent, such negligence was not the cause of the loss. He averred that whatever negligence attributable to the respondent was "negligence in the air" as the respondent would not have been injured but for the existence of the uncovered catch-pit. The respondent also argued that the determinant factor before damages could be apportioned is that the respondent's negligence must have caused the loss. However the court *a quo* found, as a fact, that the appellant was the actual cause of the harm suffered by the respondent.

Regarding costs, Mr *Magwaliba* submitted that in the absence of a demonstration that the court *a quo* grossly erred in its exercise of discretion, there would be no basis for interfering with the court *a quo*'s order of costs. As for the damages, the respondent also argued that the appellant had not established a substantial variation or striking disparity



between the trial court's award and what the appellate court would have awarded neither had it been proved that the court *a quo* did not have a sound basis for awarding damages at that scale.

### **ISSUES FOR DETERMINATION**

The appeal raises the following issues for determination by this Court:

1. Whether or not the court *a quo* fell into error when it found that the respondent was negligent and then failing to find that there was contributory negligence thereby misapplying the proximate cause principle?
2. Whether the court *a quo* erred in ordering the appellant to pay the costs of suit

### **THE LAW**

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#### **Fault**

The case of *Kruger v Coetzee Supra* at 430E-G lays down the standard test for negligence which is:

- (i) Whether the harm was reasonably foreseeable;
- (ii) Whether the *diligens pater familias* would have taken reasonable steps to guard against such occurrence and
- (iii) Whether the defendant failed to take those steps.

In *United Bottlers (Private) Limited v 2002* (1) ZLR 341 (S) at 346 C-F this Court stated;

“It has been said that negligence is a question of fact and the *onus* of proving it is on the party alleging it. A person is negligent if he did not act as a reasonable man would have acted in the particular circumstances. He will be held liable for the actual consequences of his negligence which are reasonably foreseeable.”

In *Cape Town Municipality v Paine* 1923 AD 207 at 216- 7, INNES CJ said:

“It has repeatedly been laid down in this Court that accountability for unintentioned injury depends upon *culpa*, -the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law, -the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, - and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged.”

See also: *Lomagundi Sheetmetal & Engineering (Private) Limited v Basson* 1973 (1) RLR 356 (A) at 362-3, (4) SA (R AD) 523 at 524.

## CONTRIBUTORY NEGLIGENCE

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The defence of contributory negligence is provided for in s 4 of the Damages

(Apportionment and Assessment) Act [*Chapter 8:06*] (The Act). It provides;

- (1) “Where any person suffers damage which was caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages awarded in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the respective degrees of fault of the claimant and of such other person in so far as the fault of either of them contributed to the damage.”

The defence must be pleaded and the appropriate relief of an apportionment of damages must be claimed in the plea in the alternative.

In *Lewis v Mushangi & Anor* 1999(1) ZLR 506(H) the court stated that;

“The general rule is that the alternative defence of contributory negligence must be pleaded and the appropriate relief of an apportionment of damages must be claimed in the plea.”

In *Mugari v Machiri* 1987 (1) ZLR 164 (SC) at 167 B, this Court stated that,

“It may not be fatal to fail to allege apportionment (see Cooper and Bamford South African Motor Law at pages 287-8) but it is certainly highly desirable that a defendant should, in the alternative, set out the grounds on which he alleges that the plaintiff was negligent and thereby contributed to the occurrence of the accident.”

It is for the defendant to prove that the plaintiff was negligent and that his negligence was causally connected to the damages suffered by the plaintiff.

#### **APPLICATION OF THE LAW TO THE FACTS**

It is the appellant’s contention that the court *a quo* fell into error when it failed to make an order that damages be apportioned between the parties considering that the respondent had contributed to the damages he suffered.

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On the contrary the respondent contends that he was not negligent at all and that the appellant did not put in issue the contributory negligence of the respondent in its plea and therefore it should not have been canvassed in the judgement of the court *a quo*.

The starting point is to determine whether the respondent was negligent and if so whether his negligence was causally linked to the damages he suffered.

It is common cause that the appellant in its plea, in the court *a quo*, disputed the respondent’s claim in its totality and prayed that the respondent’s claim be dismissed with

costs. It did not, in the alternative, specifically plead contributory negligence and pray for an appropriate relief of apportionment of damages. Nor did it set out, in meaningful detail, the respects in which it was alleged that the plaintiff had been negligent.

In its plea, after denying all averments by the respondent, it stated the following;

“In any event, Plaintiff’s misfortune, if any, was a failure to keep a proper look out and acting without due care and attention.”

The issue of the alleged respondent’s contributory negligence then, somehow, came out, for the first time, in the joint Pre – Trial Conference minute. It was settled as one of the issues for trial. The case of *Mashonaland Tobacco Company (Private) Limited v Mahem Farms (Private) Limited and Anor S-152-20* at p 9, aptly sums the general principle regarding the necessity of pleading a cause of action:

“As a general rule, judgment cannot be granted on a cause of action that is not pleaded. **The pleadings must clearly set out the precise parameters of the issues contested between the parties.** Thus, in the Namibian case of *Courtney-Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm), at 698, it was explained that:  
‘.....**there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded**, alternatively there is no authority for ignoring the pleadings..... and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment.’”

During cross examination of the plaintiff, by the appellant’s counsel, various particulars of negligence were put to the respondent. These include that he waved down a commuter omnibus where there was no designated bus stop; he ran in the dark and could not see where he was stepping on; he could see that the grass was unkempt and long but still proceeded.

The learned author Isaacs in *Beck's Theory and Principles of Pleading in Civil Actions* 5<sup>th</sup> ed at p 34 para 19 makes some very pertinent observations regarding general rules as to pleading;

“It is the duty of defendant to set out his plea in such a manner as to enable the plaintiff to know the nature of the defence. If the defendant admits facts in the declaration it is not necessary for the plaintiff to prove these facts and thus those facts are not in issue in the trial. The plaintiff is entitled to know the limits of the defence in clear and concise manner.”

See also *Medlog Zimbabwe (Private) Limited v Cost Benefit Holdings (Private) Limited* 2018 (1) ZLR 449 (S) of 455 G – 457 G.

In *casu* the appellant, as the defendant in the court *a quo*, did not, in my view, set out its plea in such a manner as to enable the respondent to fully appreciate the nature of its defence.

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In *Keavney & Anor v Msabaeka Bus Services (Private) Limited* 1996 (1) ZLR 605 (S) at 608B-C the following point was made;

“A pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another”, as MILNE J (as he then was) put it in *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182 A.

The purpose of pleadings is to define the issues, and to enable the other party to know what case he has to meet” (per MULLINS J in *Niewoudt v Joubert* 1988 (3) SA 844 (C). See also *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) at 101F-G.”

Further down on the same page at D-E the following findings were made;

“The failure, in this case, to plead the real defence, suggests one or other of three possible explanations:

1. Sheer idleness and incompetence on the part of the pleader.
2. A deliberate and unconscionable attempt to avoid attracting an onus or “burden of adducing evidence”.

3. That the defence was an afterthought on the part of the defendant.  
The learned judge who heard the matter made no comment on all this.”

To compound matters the judge seized with the Pre- Trial Conference let in an issue which did not arise from the pleadings.

The court *a quo* made the following findings on the issue of Plaintiff’s negligence:

“It is not in dispute that when the plaintiff fell into the catch pit he was rushing to board a commuter omnibus which he had waved (*sic*) down at a place which is not a bus stop. Bus stops have been put in place by Council to stop members of the public from boarding transport at places which pose danger to them and to prevent commuters from having to run after vehicles as the plaintiff did on the fateful day. As correctly submitted by the defendant, Council put in place bus stops to minimize road accidents. From the pictures which were produced by the plaintiff it is clear that there is no bus stop near the catch pit he fell into. He had therefore stopped the commuter omnibus at an undesignated pick up point. This prompted him to run across the island where the catch pit was instead of walking along the pedestrian path provided after the island. The catch pit is strategically positioned on the side of the road to drain storm water. George Munyonga explained that as a safeguard measure catch pits are deliberately located on the island because people are not supposed to walk on the island but on the pedestrian path. He said that the island is not a walk way or run way. It is admitted that if the plaintiff had not walked on the island in the dark he would not have fallen into the catch pit. Pedestrians do not walk or board transport wherever they deem. Vehicles also do not stop to pick up passengers wherever they feel like. They should do so at designated pick up points. The plaintiff was running in the dark when he could not properly see where he was stepping. He could also see that the grass was unkempt and it was long. The motor vehicle had stopped for him. So there was no need for him to run especially considering that he could not see properly. The risk of tripping and falling even in the absence of a catch pit could not be ruled out in such circumstances.”

In making the above findings the court *a quo* relied on what was put to the respondent during cross-examination which issues did not arise from the pleadings. The judge *a quo* concluded that the respondent was negligent by not waiting for transport at designated bus stops. This was never the appellant’s defence and the court fell into error in

making that finding in the absence of evidence that there are designated stops along that road.

The claim for apportionment seems to emanate from that conclusion.

The court *a quo* further made the following observation;

**“Whilst I accept that the plaintiff can be said to have been negligent as I have described above, it is my considered view that his negligence was not the proximate cause of the fall. The proximate cause of the fall into the catch pit was the absence of the catch pit lid or cover. If the catch pit had been covered, even if the plaintiff had walked on the island where he was not supposed to walk, or even if he had run in the dark when he could not see properly, he would not have fallen into the catch pit. The proximate cause of the plaintiff’s fall was the uncovered catch pit. For this reason I will say there was no contributory negligence on part of the plaintiff.”**

The judge *a quo* uses the term “can be said to have been negligent”. She was not categorical. Mr *Magwaliba* describes it as negligence in the air. In my view this is what Lord Edmund-Davies described, in *Moorgate Mercantile Company Limited v Twitchings* [1977] AC 890 at 919H, which was quoted with approval in *Autorama (Private) Limited v Farm Equipment Auctions* 1984 (1) ZLR 162 (H) at 164H, in the following terms;

“In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort”

The respondent might have been careless but his conduct does not amount to a neglect of some duty warranting a finding of negligence on his part. As was stated in *Autorama supra* at 164E;

“It is an elementary proposition of the law that, to give a cause of action, negligence must be the neglect of some duty. A person cannot be held liable for negligence in the air.”

See also *United Bottlers supra*.

In any event, in view of the concessions made by the appellant's witness that I related to earlier on p 4 there was no basis for making a finding of contributory negligence on the part of the respondent.

The court *a quo* was therefore correct to make a finding that there was no contributory negligence on the part of the respondent, though for different reasons.

The first three grounds of appeal of the appellant, all being based on the question of contributory negligence, must accordingly fail.

## **COSTS**

It is trite that the award of costs is entirely in the discretion of the court and generally costs follow the result. The basis of the appellant's grievance with the order of costs is that the court *a quo* held that the respondent was partly to blame for the litigation because of the unrealistic claims he made which militated against any possible settlement. A close reading of the judgment reveals that the remarks made by the court *a quo* regarding the unrealistic claims made by the appellant, which could possibly militate against a possible settlement, were made *obiter*. This was after it had made a finding that the respondent was entitled to his costs as he had succeeded in the suit.

*Herbstein and van Winsen* in *The Civil Practice of the High Court Vol. 2 5th ed* at p 951, succinctly set out the purpose of an award of costs, as follows:

“... to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be.”



The appellant has not demonstrated that the court *a quo* grossly erred in its exercise of discretion in this regard. I see no reason to interfere with the award of costs against the appellant.

It is for the above reasons that we dismissed the appeal and made the following order:

^The appeal be and is hereby dismissed with costs.

**GOWORA JA** : **I agree**

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**BERE JA** : **(No longer in office)**

*Mbidzo Muchadehama & Makoni*, appellant's legal practitioners

*Zimbabwe Human Rights Ngo Forum*, respondent's legal practitioners.