

HH 45-03
HC 11624/00
CEPHAS KARAKADZAI SITHOLE
versus
TOENDEPI CHIMUTI
and
BIG SIX TRANSPORT (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
SMTIH J,
HARARE, 7 and 19 March, 2003

Mr Magwaliba for plaintiff
Mr Debwe for defendants

SMITH J: The plaintiff (hereinafter referred to as "Cephas") issued summons claiming from the defendants damages in the sum of \$79 314, being the cost of repairs to his Mazda B12 pick-up (hereinafter referred to as "the Mazda"). Cephas' son (hereinafter referred to as "Shepherd") was driving the Mazda along the Ngundu Tanganda road. Shepherd wanted to turn right to go into Checheche Township. The first defendant (hereinafter referred to as "Toendepi") was driving an International truck and trailer (hereinafter referred to as "the truck") behind Shepherd. He saw that the Mazda was going to turn right because the right-hand indicator light was blinking on and off. As the truck overtook the Mazda the two vehicles collided and both were damaged. Cephas claims that the accident was due to the negligence of Toendepi. The repairs to the Mazda cost \$79 314. In their plea the defendants denied that Toendepi had been negligent. They claimed that it was Shepherd who had caused the accident because, instead of turning right as he had indicated, he turned to the left. The cost of the repairs was not put in issue.

The first witness called was Shepherd, who testified as follows. On 27 July 2001 he was driving the Mazda on the Ngundu Tanganda road in the direction of Chipinge. As he neared the turn off to Checheche Growth Point he switched on the indicator to show that he was turning right. He saw the truck coming along behind him. When he first saw it in the rear view mirror it was about 100 metres behind him. As he was about to turn, before he crossed the centre line, the truck overtook him on the left side and scraped the side of the Mazda. The whole of the left side of the

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Mazda was damaged. The front windscreen was broken, as was the back window. The Mazda was a B16 pick-up and there was a canopy over the back part. The truck did not reduce speed as it approached the Mazda. The Mazda was pulled forward and then pushed off on the left side of the road. The road, being a main road, was tarred but there was not sufficient space for the truck to pass on the left-hand side. He intended to go into the township. He did not change his mind and turn left. After the collision the truck ended up on the left side of the road, facing in the direction from which it had come. The trailer it was pulling over-turned. Toendepi, the driver of the truck, was later prosecuted in the Chipinge Magistrates Court and was convicted of negligent driving and fined \$2 000.

Shepherd, in the course of his cross-examination, gave the following responses. He had got his drivers licence in 1995. He could not estimate the speed at which the truck had been travelling but, after the impact, he realised that it had been going too fast. The driver could have avoided the collision if he had been going at a slower speed. The trailer was loaded with sugar. There was no oncoming traffic. He had switched on his indicator when he was some distance from the turn-off and had not yet reached the turn-off when the truck overtook him. He had not turned to the left as he approached the turn-off. It was the trailer that had hit the Mazda and not the truck. He had three passengers, two were sitting in the front next to him and one was sitting in the back.

The next witness was Cephas, who produced the invoices showing what he had paid Top City Panel Beaters, the company which had effected the repairs. The total cost had been \$79 314, which was the amount claimed in the summons. However, he had been given a discount of \$3 137,10. Accordingly he reduced his claim to \$76 176,90. Before getting a quote from Top City Panel Beaters he had gone to the other panel-beating firm in Chiredzi, but the oral quotation he had received from the foreman of that firm had amounted to \$150 000. He could not afford to pay that much, so had gone to Top City. There was only two reputable panel-beating businesses in Chiredzi.

The defendants called two witnesses. The first was Toendepi, who testified as follows. He was driving the truck on the road from Chiredzi to Tanganda. As he approached the Checheche Business Centre, he saw the Mazda in front of him. The indicator was flashing to show a right turn. He reduced speed. There were no oncoming vehicles. As he was about to overtake the Mazda the driver suddenly turned to the left. As the Mazda swung to the left the two vehicles collided. The front right fender of the truck hit the Mazda on its left front fender over the wheel. There were passengers in the front and the back of the Mazda. When the driver turned left he did not see the truck. The passengers in the back of the Mazda started to scream when they realised that the driver of the Mazda had not seen the truck. To avoid running over the Mazda he swerved off the road to the left. As he started doing so the vehicles collided. The horse and trailer jack-knifed. When he saw that the Mazda was indicating that it was about to turn right he changed down the gears to reduce speed. The truck had a left-hand drive. It was the truck that hit the Mazda and not the trailer. At the time of the accident the truck was travelling at 25-35 k.p.h. Had the Mazda turned right, the truck would have been able to pass it safely on the left side. After the accident the driver of the Mazda came to him and apologised, saying that he had not noticed the truck behind him.

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Toendepi was subjected to a lengthy cross-examination, in the course of which he made the following responses. The Mazda was 30-50 metres in front of him when the indicator was switched on. It was about 5 metres from the turn-off. He had just come round a curve in the road when he saw the Mazda in front of him. The point of impact was just opposite the turn-off. The Mazda was travelling slowly. The Mazda was near to the centre-line in the road when he was about to overtake it. The truck was towing a 30-ton trailer loaded with sugar. At the time of the collision, the left wheels of the truck were off the tarred road, because he had swerved to try to avoid hitting the Mazda. Had he not done so he would have killed the passengers in the Mazda. At that point of the road there were no buildings on the left side. The built up area was the business centre on the right. He had changed gears and slowed down as he approached the Mazda, and then applied the emergency brakes when he saw the Mazda start to turn to the left. The application of the brakes caused the horse and trailer to jack-knife. The Mazda was damaged on the left side from the passenger door to the front. There was no damage caused to the back fender. Although he had been convicted of negligent driving he had noted an appeal.

The final witness was the Transport Manager for the second defendant. He confirmed that Toendepi was an employee and, at the time of the accident, was on duty. He queried why Cephas had obtained only one quotation for repairs to the Mazda when the normal practice was to get three.

The sole issue for determination by the Court is who was responsible for the accident. Was it Cephas or Toendepi? It is not disputed that Cephas wanted to turn right and switched on the indicator. Toendepi, driving up behind him, saw the indicator blinking. Shepherd maintained that he intended to turn off the road and go to the business centre. If the Court accepts his testimony, then clearly Toendepi was at fault. He approached the Mazda at too fast a speed and came up to it before it reached the turn-off and started to cross over the right hand lane for oncoming traffic. The left hand lane is not wide enough to accommodate both the Mazda and the truck. Toendepi misjudged the distance between the truck and the Mazda and the front right fender of the truck hit the Mazda and scraped along its side.

Toendepi's testimony is that Shepherd, instead of turning off to the business centre, changed his mind at the last minute and decided to move over to the left side of the road. If he is to be believed, then clearly Shepherd would have been at fault.

Neither party called any other witness who had been at the scene when the accident happened. The Court must make its finding on the evidence of Shepherd and Toendepi and the probabilities. On balance, I consider that Shepherd was the more credible witness and the probabilities support his version of the events. His intention was to go to the business centre. He is a reasonably experienced driver, having obtained his licence in 1995. It is highly improbable that if he did change his mind about going to the business centre, he would swing over to the other side of the road without first looking in his rear-view mirror to see if there were any vehicles coming up behind him. Moreover, when Toendepi appeared in the magistrates court on a charge of negligent driving, the magistrate obviously accepted Shepherd's evidence as being more probable and convicted Toendepi. Even though Toendepi has noted an appeal, some weight must be given to the magistrate's finding. I am sure that had Shepherd turned left across the path of the truck, the Mazda would have been much more seriously damaged. Toendepi's testimony that after the accident Shepherd came

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to him and apologised seems to be an afterthought, a last minute attempt to try to persuade the Court that Shepherd had been in the wrong. The apology was not mentioned in the defendant's plea. Toendepi conceded that he did not mention it at his trial in the magistrates court. Giving such testimony certainly affected his credibility. Furthermore the truck was damaged. If the defendants considered Shepherd to be at fault, why did the second defendant not try to recover its damages from him or Cephas?

Having given the matter very careful consideration, I am of the view that the accident happened as described by Shepherd. That means that Toendepi was at fault. He came up on the Mazda too quickly and tried to pass it before it had started turning. He was driving negligently and his negligence caused the accident. I consider that proof of the damages suffered is adequate.

It is ordered that the defendants jointly and severally, the one paying the other to be absolved, pay the plaintiff -

- a) \$76 176,90 with interest thereon at the rate of 30% per annum from 30

August, 2001 to the date of payment;

- b) costs of suit.

Matutu, Kwirira & Associates, legal practitioners for plaintiff

Muzenda & Partners, legal practitioners for defendants