

ENNOCENT CHIDAWANYIKA
versus
TATENDA CHINYOWA
and
ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 5 AND 22 MARCH, 20 MAY, 26 JUNE, 25 JULY AND 16 OCTOBER, 2013

T. Tandi, for the plaintiff
V. Muza, for the 1st and 2nd defendants

MTSHIYA J: On 25 March 2011 the plaintiff issued summons against the defendants in which he claimed:

- “(a) Payment of the sum of **USD14 850.00** due to the plaintiff, arising from damages which are a result of a collision between plaintiff and 1st defendant. Which collision was occasioned by 1st defendant’s negligent driving, whilst in the course of his work and scope of his authority with the 2nd defendant. The sum represents the damages plaintiff suffered.
- (b) Interest thereon at the rate of 5% per annum from the date of issue of summons up to the date of full payment.
- (c) Costs of suit.”

On 30 March 2011, the 2nd defendant entered a notice of appearance to defend. The 1st defendant never entered any appearance to defend and on 15 May 2011 the plaintiff obtained default judgment against him.

The background to the plaintiff’s claim is that on 5 January 2011, whilst driving his motor vehicle, A BMW X 5 registration number ABI 4597, he was hit by a motor vehicle, an Isuzu KB registration number ABA 8349, which was being driven by the 1st defendant, an employee of 2nd defendant. The accident happened at the corner of Maiden Drive and Cecil Rhodes in Harare. The Isuzu KB belonged to the 2nd defendant. The 1st defendant, who was on

2nd defendant's business, admitted to having been negligent in his driving and was fined for the offence.

In order to remain mobile, while his motor vehicle was undergoing repairs, the plaintiff hired a Mercedes Benz from Glory Car Hire for a period of 45 days. He then paid Glory Car Hire US\$14 850,00 for the use of their Mercedes Benz (C 200K CDI ABK 3575). The payment was reflected in a tax invoice – endorsed with the word 'PAID'. The tax invoice was dated 16 February 2011.

The 2nd defendant refused to accept the endorsed tax invoice as proof of payment and demanded for a proper receipt. This action is a result of the 2nd defendant's refusal to reimburse the plaintiff with the sum of US\$14 850.00, being the cost of hiring the Mercedes Benz and leading to the immobilization of his own car due to the accident attributed to the 1st defendant, an employee of the 2nd defendant.

The Joint Pre-trial Conference Minute, signed by the parties' legal practitioners' on 10 October 2011, lists the issues for determination as:-

- “1.1. whether or not plaintiff hired a motor vehicle pending repairs to his motor vehicle, which repairs were occasioned by the 1st and 2nd defendant's negligence.
- 1.2. whether or not plaintiff paid the sum of US\$ 14 850 for the hired vehicle.
- 1.3. how much 2nd defendant is to pay plaintiff”.

In addition to the above issues, the 2nd defendant accepted liability for the accident. On 15 May 2011 the plaintiff obtained default judgment for the whole amount claimed against 1st defendant. Given the acceptance of liability by the 2nd defendant, there was, in the circumstances, no debate on the issue of vicarious liability.

During the trial, and as later confirmed by the 2nd defendant, it became clear that the only issue for determination was 1.2. above and all that the 2nd defendant needed was credible proof of payment, preferably in the form of a receipt or an affidavit confirming same. In view of that development, it will only be necessary to briefly narrate the evidence of both parties which relates specifically to the issue regarding proof of payment.

Both parties produced bundles of documents – with the plaintiff's bundle of documents being admitted as exhibit 1 and the 2nd defendant's bundle as exhibit 2.

The plaintiff gave evidence which confirmed that he indeed hired a motor vehicle when his was still under repairs. As indicated at pages 7 (the invoice from Glory Car Hire) and 14

(letter from P Chiyangwa, Chairman of Glory Car Hire dated 22 March 2013), of exhibit 1, he confirmed that he paid the sum of US\$14 850.00 for the Mercedes Benz he had hired from Glory Car Hire. The letter from Glory Car Hire read as follows;

- “1. We refer to the above matter and Mr Chidawanyika’s request for a written confirmation.
2. Please be advised that:
 - 2.1. Mr Ennocent Chidawanyika hired a Mercedes Benz C200 K motor vehicle from Glory Care Hire;
 - 2.2. Pursuant to the car hire he was charged **USD 10 227.00** for 30 days, but due to excess mileage the Bill became **USD 15 283.30**
 - 2.3. However due to the fact that Mr Chidawanyika paid in cash the bill was discounted and reduced to **USD 14 850.**
3. We confirm that Mr Chidawanyika hired the motor vehicle, we also confirm that Mr Chidawanyika paid the sum **USD14 850.**
4. For the avoidance of doubt we put it on record that Glory Car Hire had a contract with Mr Chidawanyika and not any other third party, further Mr Chidawanyika and not any third party paid **USD 14 850** in cash”.

I must hasten to point out that the letter from Glory Car Hire was at the request of the 2nd defendant who indicated before me at the second hearing of this matter on 22 March 2013, that once that letter, confirming payment, was received, the matter would be settled. I duly postponed the matter to allow for the production of that letter. However, the letter did not lead to a settlement of the matter and so the trial proceeded.

At the close of the plaintiff’s case, the 2nd defendant applied for absolution from the instance. I asked the parties to prepare heads of argument and on 26 June 2013, after hearing the parties, I dismissed the 2nd defendant’s application. I believed that the plaintiff had established a *prima facie* case.

Notwithstanding the fact that it was clear from the issues for determination that the dispute was on whether or not the plaintiff had indeed paid Glory Car Hire the amount claimed, the 2nd defendant, despite having already pleaded to the summons, argued that the claim in the summons was different from the facts presented in the declaration. I did not find merit in the 2nd defendant’s submission because I believed the plaintiff’s claim was clear (i.e. vehicle hire costs incurred as a result of the accident for which the 2nd defendant had already admitted liability).

With respect to the principles to be considered in an application for absolution from the instance, in *United Air Charters v Jarman 1994 (2) ZLR 341 (S) GUBBAY CJ* stated:-

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him”.

In casu liability was admitted and the only issue was proof of payment. The plaintiff’s evidence was on that point.

I also agreed with the plaintiff’s submission that, if indeed the 2nd defendant was serious, it should have excepted to the summons and declaration in terms of the rules. Furthermore, there was, in my view, no need to back-track when liability had been admitted.

Upon the dismissal of its application, the 2nd defendant called one witness, Princess Razaro, (Razaro), a legal officer in the employ of the 2nd defendant. I must say I found her to be an honest witness. Her evidence, in my view, was totally truthful and unbiased. Indeed, as summarized by plaintiff’s counsel in the Heads of Argument, the import of her evidence was:-

“It is common cause that there was an accident involving Mr Chidawanyika and an employee of ZETDC. It is also common cause that we never disputed paying for damages to plaintiff’s car which we have already done. Only issue for dispute is for damages for an alleged car hire and that is also not in dispute, the payment of the care hire is not in dispute but payment or proof that plaintiff has paid.”

She went further to state that the 2nd defendant’s Internal Auditors were not willing to accept the endorsement of “paid” on the tax invoice as proof of payment. They would instead, she said, have accepted a proper receipt or an affidavit from Glory Car Hire.

In determining this matter, I must say I am grateful to both legal practitioners who represented the parties. They provided well researched heads of arguments in both the application for absolution from the instance and in closing submissions. I found, to a large extent, that, considered together with Razaro’s evidence, the 2nd defendant’s closing submissions seemingly supported the plaintiff’s case. In its introduction, in the closing submissions, the 2nd defendant states:-

- “1. The issue for determination in this matter is narrow, simple and quite straight forward, and this is the issue captured as number 2 in the parties Joint Pre-Trial Conference Minute being:
‘Whether or not plaintiff paid the sum of USD14 850.00 for the hired vehicle’

2. Issue no 1 naturally fell away after 2nd defendant's main witness made certain concessions, and issue no 3 is dependent on the finding to be made about issue No. 2." (My own underlining)

I fully agree with the above submission and as such there is no point at all in delving into matters already admitted. The 2nd respondent, however, goes on to say:

"The 2nd defendant's witness Ms Princess Razaro was able to highlight to the honourable court the sole paramount reason why the proof of payment furnished did not meet the satisfaction of 2nd defendant's Finance Department. She indicated to the honourable court that plaintiff's initial proof of payment, namely the invoice was not credible because it was just an invoice issued out for the purpose of confirming how much would be required from him. The 2nd proof of payment namely, Mr Philip Chiyangwa's letter was also not credible because it was not a document made under oath." (my own underlining)

My assessment of the 2nd defendant's position is that, whilst it accepts that payment was made, its Internal Audit Department has its own specific requirements or demands. As already stated, there is no dispute relating to the accident and what happened thereafter, except proof of payment. However, my finding is that through the tax invoice endorsed "paid" and confirmed by P Chiyangwa's letter of 22 March, 2013, written at the 2nd defendant's request, the plaintiff has produced enough documentary evidence to support his claim. I do not read the position of the 2nd defendant's Internal Audit Department as saying the plaintiff did not pay

It is interesting to note that, right up to the time the 2nd defendant closed its case, it was still saying; "If P. Chiyangwa's letter was in the form of an affidavit, we would have accepted same as proof of payment." Surely that cannot be allowed to stand in the way of the plaintiff's claim. The 2nd defendant had ample time from the time of being served with the letter to ask for an affidavit. It was the 2nd defendant that had initially requested for a letter. That ample time continued to exist from the time the trial commenced up to the time closing submissions were made. One sees no reason why P. Chiyangwa would have refused to depose to an affidavit in support of his letter of 22 March 2013 in order to satisfy the 2nd defendant's Internal Audit Department. The 2nd defendant's conduct, or attitude, clearly confirms that, it is, without justification, merely refusing to face its accepted liability. It has no defence to the claim.

In view of the foregoing, my finding is that the plaintiff paid Glory Car Hire the sum of US\$14 850.00. The plaintiff's claim should therefore succeed.

I therefore order as follows:-

IT IS ORDERED THAT:

1. The 2nd defendant shall pay the plaintiff the sum of US\$14 850.00, with interest at the prescribed rate per annum from 25 March 2011; and
2. The 2nd defendant shall pay costs of suit.

Messrs Kantor and Immerman, plaintiff's legal practitioners
Messrs Muza & Nyapadi. 1st and 2nd defendant's legal practitioners