

PHINIAS MUNORWEI  
versus  
JEREMIAH MUZA  
and  
NYASHA MURASIKWA  
and  
MR NDAGURWA

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 27 & 28 July 2015; 4 & 13 August 2015; 14 October 2015

### **Civil trial**

The plaintiff in person  
*T. Nyahuma* and *T. Mudambanuki*, for the defendant

MAFUSIRE J: The plaintiff, a self-actor, initially claimed from all three defendants, jointly and severally, damages in the sum of US\$32 484-00, being the estimated cost of repairs to his Mercedes Benz motor vehicle (“*the Mercedes*”) that was damaged in an accident involving himself and a commuter omnibus being driven by the second defendant. Even though a self-actor, it was evident the plaintiff had legal assistance in the background. But the claim lacked precision. By the time of the pre-trial conference, the claim against the third defendant had been withdrawn. As it later turned out, this was a mistake. Evidently, the plaintiff had been ill-advised. The third defendant, not the first defendant, was undoubtedly the man the plaintiff had wanted on vicarious liability. The details shall emerge later.

In spite of the imprecision of the claim and of the defence, most facts were common cause. They were these. On the day in question, the second defendant was driving a commuter omnibus, a Toyota Hiace minibus (“*the commuter omnibus*” or “*the minibus*”), along Harare Street in Harare. His minibus collided with the plaintiff’s Mercedes as he tried to cross Herbert Chitepo Avenue from south to north. The plaintiff was driving along Herbert Chitepo Avenue from west to east. At that area the major road was Herbert Chitepo Avenue. It was a dual carriageway on both sides.

There was a dispute whether there was a give way sign facing Harare Street or not. The plaintiff maintained there was. The second defendant at first agreed. Later on he changed to deny that there was such a sign, but merely a cycle track sign. Whichever way, both parties accepted that the plaintiff had the right of way.

When the cars collided, the impact forced the commuter omnibus to spin 180° to end up facing the direction it had come from.

The second defendant was charged in the magistrate's court. After a full trial he was convicted of negligent driving in terms of s 52(2) of the Road Traffic Act, [*Chapter 13: 11*]. He was fined US\$100-00, or in default, 20 days imprisonment.

The second defendant was also charged and convicted of failure to display a valid defensive driving certificate and a valid medical certificate, in contravention of s 6 of the Road Traffic (Public Service Vehicles Drivers) Regulations 2006, SI 168/2006. He was fined US\$50-00, or in default, 10 days imprisonment. In addition his licence was endorsed.

The plaintiff's Mercedes was damaged on the front. Three firms of panel beaters declared it uneconomic to repair. The estimates were US\$30 000-00, US\$ 32 484-00 and US\$35 000-00.

It was not quite clear from the pleadings what exactly the basis of the plaintiff's claim against the first and third defendants was. Evidently, someone had told him of something called vicarious liability. But this was badly pleaded. At first it was not even pleaded at all. Subsequently, an amendment was sought. Despite, the bad draftsmanship, I accepted what was presented as a claim for vicarious liability.

The defendants' pleadings were equally bad. They seemed to be excepting to the plaintiff's claim. Later on, in response to the plaintiff's notice of amendment, the defendants also amended their plea. Among other things, both liability and quantum were denied.

It seems at first the plaintiff had gathered that the third defendant was the owner of the commuter omnibus business and that the second defendant was his employee/driver. However, following his further investigations the plaintiff concluded that the first defendant, and not the third defendant, was the proprietor and operator of the commuter omnibus. Plaintiff's proof that the first defendant was the owner and operator of the commuter omnibus was the inscription of the first defendant's name and address on the omnibus. This was visible from the photographs taken of the vehicles at the scene of the accident. Furthermore, the plaintiff said he had confirmed with the central vehicle registry ("*CVR*") that the minibus

was registered in the name of first defendant. On that basis he proceeded against the first defendant on vicarious liability and dropped the third defendant from the suit.

In summary, the plaintiff's case was that on the day in question, he having been driving along the major road, had the right of way. The second defendant, having been driving along a minor road, had failed to give way. He had disobeyed a give way sign. He had been driving very fast. His omnibus had suddenly appeared in front of him. It had overtaken two other vehicles. There had been no time for him, the plaintiff, to do anything to avoid the accident. He could not remember having applied brakes. Just before the impact, he had impulsively shut his eyes in anticipation of death. The second defendant had been solely responsible for the accident. For that, he had been convicted in the magistrate's court.

On the other hand, the second defendant's case was that the plaintiff had been solely responsible for the accident. He said the time of the accident, around 07:40 hours, was morning peak time or rush hour. The plaintiff was rushing to drop off his wife, a policewoman, at her work station at the police general headquarters further up north. Traffic congestion had been most severe.

The second defendant conceded that traffic travelling along Harare Street, being the minor road, had to give way to traffic travelling along Herbert Chitepo Avenue, the major road. However, he said that at peak times, there was an understanding amongst motorists. Traffic along Herbert Chitepo Avenue would sometimes concede the right of way to allow traffic along Harare Street to filter through. Otherwise, a motorist on Harare Street could spend two hours or more waiting for a chance to cross.

The second defendant further said that traffic travelling along Herbert Chitepo Avenue, firstly from east to west, i.e. approaching the intersection from his right, and from the plaintiff's opposite direction of travel, had conceded the right of way to allow traffic along Harare Street, including his minibus, to cross. The second defendant said he had then slowly and cautiously manoeuvred his omnibus onto the centre of Herbert Chitepo Avenue after crossing the first two lanes. Traffic from west to east along Herbert Chitepo Avenue, i.e. from his left and from the same direction of travel as the plaintiff's, then also yielded the right of way. But not the plaintiff. He was coming very fast. He was in the outer lane. The second defendant said he stopped his commuter omnibus somewhere slightly in the middle of Herbert Chitepo Avenue. According to him, there was enough space in front of him for the plaintiff's Mercedes to pass through safely. But the Mercedes had smashed into the front left

of his commuter omnibus. The impact had forced the commuter omnibus to spin and face the direction it had been coming from.

After the collision, the plaintiff's wife had come out screaming and shouting. She was saying she had been remonstrating with the plaintiff not to drive too fast. She was also lamenting the loss of their Mercedes.

It was the second defendant's further evidence that because the plaintiff's wife was a police officer, she had easily facilitated the attendance of other police details to the accident scene. However, it was because of her status as such that he, and not the plaintiff, had ended up being charged with negligent driving. He admitted the convictions in the magistrate's court. However, he denied that he had been the one negligent in the accident. He had not appealed against the convictions on account of lack of resources.

On quantum, the second defendant said it was wrong for the plaintiff to claim expensive repair costs when the Mercedes had been declared a write-off. The plaintiff ought to have sought the cost of a replacement vehicle which would be far cheaper. For a similar make and model the replacement would cost no more than US\$8 000-00.

On the status of his employment, the second defendant said he did not know the first defendant. His employer had been one Otis Ndagurwa. It was Otis Ndagurwa who had recruited him. In the commuter omnibus industry employment was by word of mouth. There are no written contracts. Otis Ndagurwa paid him his wages. It was to Otis Ndagurwa that he reported daily takings and any operational problems.

The first defendant also gave evidence. He said he did not understand why the plaintiff had ever dragged him into the case. He was an accountant. He was based in South Africa since 2006. He had bought the commuter omnibus in question from South Africa for his childhood friend, Otis Ndagurwa, who had fallen on hard times. Otis Ndagurwa had appealed to him for assistance to help feed his family. The first defendant had obliged by importing the minibus for him to run a commuter omnibus business. The vehicle had been imported in the first defendant's name. It had been registered in his name. It had been inscribed with his name. His agreement with Otis Ndagurwa had been some kind of a lease-hire. The minibus would remain registered in his name and would maintain his identity particulars until he had been paid the last instalment. That was his security for the deal. Thereafter, he would transfer ownership to Otis Ndagurwa. Unfortunately, the accident had happened before the period of the agreement had concluded.

The first defendant denied that he had had anything to do with the commuter omnibus business. He was far too involved with his professional commitments in South Africa as to be unable to operate a commuter omnibus business back home. He had nothing to do with the second defendant. He only got to know him after the accident and when he was being dragged in the case.

On quantum, the first defendant said he had surfed the internet and researched on the replacement value of a Mercedes Benz vehicle similar to the plaintiff's. The plaintiff's Mercedes had been an import from the United Kingdom. The landed cost for a similar one and from the same market would be no more than US\$8 000-00. The first defendant wondered why the plaintiff had opted to claim repair costs instead of just importing a similar one at far cheaper a price.

That was the case before me.

In my assessment, what was abundantly clear and inescapable was that the accident was caused by the contributory negligence of both the plaintiff and the second defendant. This had also emerged quite clearly from the criminal trial in the magistrate's court. Only that contributory negligence was not a defence. The record of proceedings in the magistrate's court had been placed before me as part of the defendants' evidence.

In my view, the second defendant had no business entering the intersection in question unless he had been absolutely certain that it was safe to do so. There was a conflict between the parties regarding the volume of traffic. The second defendant said it was peak time and that congestion was thick. The plaintiff was unsure. But he denied the congestion. He said traffic was light. He said that explained how the second defendant could have been able to drive that fast. In the magistrate's court the plaintiff had claimed the second defendant had been "*flying*".

However, the evidence on the volume of traffic does not decide the matter. It seems to me from the totality of the evidence that both parties were driving at excessive speeds in the circumstances. The second defendant assumed that all traffic from Herbert Chitepo Avenue was going to give him way. As it happened, the plaintiff did not. The alleged understanding among motorists at busy intersections and at peak times was apparently not shared by the plaintiff. But he, the second defendant, ignored a traffic sign. That he could have spent two hours or more for a chance to cross Herbert Chitepo Avenue, did not give him the right to disobey traffic rules.

On his part, the plaintiff was also negligent in that, apart from the excessive speed, the right of way did not entail proceeding through an intersection when it was unsafe to do so. If he had been keeping a proper look-out, he should have realised that the second defendant's minibus was not going to stop. In answers to questions by myself, and also in cross-examination, the plaintiff conceded that he had concentrated solely on traffic in front of him. He had not seen traffic on the other lanes, let alone, that from Harare Street. That was negligence. A motorist should be alert at all times that he is on the road. He must have 360° vision and consciousness of the road or the surroundings. What he may not detect directly should be picked up by the rear view mirrors. The second defendant was not even coming from the so-called blind spot.

The plaintiff was also negligent in failing to take any avoiding action when the accident seemed imminent. The least he could have done was to apply brakes. Instead, he shut his eyes in anticipation of death. Furthermore, the plaintiff did not controvert the second defendant's evidence that after he had stopped his minibus in the middle of Herbert Chitepo Avenue, there had been sufficient space for his Mercedes to drive through. Probably all that the plaintiff had needed to do, was to swerve slightly to his left. On this particular point, the parties were in conflict as to which particular lane the plaintiff had been travelling along. The second defendant said the plaintiff had been travelling along the outer lane. The plaintiff said he had been on the inner lane. But whichever way, the plaintiff, even if he had been on the inner lane as he said, did not say there was traffic in the outer lane that might have impeded him from swerving his Mercedes to avoid smashing into the second defendant's minibus.

The plaintiff further conceded that it was his Mercedes that had rammed into the front side of the minibus. The Mercedes had suffered frontal damage. The minibus had suffered minimal damage at the bottom of the front left door and the left fender. Comparatively, the Mercedes had come worse off. The second defendant explained that it was because the Mercedes had smashed onto the rim of his minibus. A rim is a very hard surface compared to the grille, the bonnet and the headlamps of the Mercedes that seemed to have borne the brunt of the impact. But the point is, the Mercedes, hitting with its softer parts, had forced the minibus to spin 180°. To me that infers considerable speed by the plaintiff.

Having found that the accident was caused by the contributory negligence of both parties, what remains is to assess the respective degrees of negligence. There are no scales by which to weigh negligence. That then calls for a value judgment. In my view, a judicial officer called upon to give a value judgment is guided by his own notions of justice and fair

play. He is guided by the general norms and sense of values generally prevailing in society. He makes an objective assessment: see generally *S v Chidodo & Anor*<sup>1</sup>.

In my view, the second defendant was largely more negligent than the plaintiff. The failure to obey the give way sign tilts the scales somewhat more heavily against him. But in his favour, is the fact that, at least after realising that the accident was imminent, he took some avoiding action, even though ultimately it proved inadequate. But having created the dangerous situation himself, he must bear a larger responsibility for what happened afterwards.

As for the plaintiff, it was disturbing that nothing could move him from the notion that just because he had the right of way, he had to proceed through the intersection regardless of whether or not it was safe to do so. That had also been his attitude in the criminal case. That tends to tilt the scales back towards the equilibrium.

In the final analysis, I consider that in percentage terms, the respective degrees of negligence of the parties were 75% for the second defendant and 25% for the plaintiff.

As against the first defendant, the plaintiff clearly pursued the wrong party. The first defendant's evidence, and that of the second defendant, that he had nothing to do with the commuter omnibus business or with the second defendant as an employee, was quite robust. The plaintiff failed to dislodge them from that position. The plaintiff's only evidence that the first defendant was the operator of the commuter omnibus was the inscription of his name and address on the omnibus and the fact that it was still registered in his name. But that did not make the first defendant the owner of the commuter omnibus business. That did not make him the second defendant's employer. Therefore, there was no question of vicarious liability on the part of the first defendant. Therefore, the plaintiff's claim against the first defendant is dismissed with costs. However, such costs shall be confined to the cost of employing one counsel. I have found no justification for the defendants' decision to employ two counsel.

There remains the question of quantum. The plaintiff's case was that although his Mercedes had been declared uneconomic to repair, it could still be repaired. He sourced three quotations on the cost of repairs from reputable motor dealers. One of them was Isoquant Investments (Private) Limited whose trade name is ZIMOCO. It is a well-known dealer in Mercedes Benz vehicles in this country. Its estimate was US\$32 484-00. That was the basis of the plaintiff's claim.

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<sup>1</sup> 1988 (1) ZLR 299 (H)

The other estimates were from Swiss Motors Panel Beaters and Spray Painters at US\$35 000-00. The last was from G & M Panel Beaters (Private) Limited at US\$30 000.

Against the plaintiff's evidence, the defendants produced a print-out from the CVR. But all it had was a list of the particulars of the plaintiff's Mercedes. The first defendant said from his search of the internet, he had discovered that a Mercedes vehicle similar in make and model to the plaintiff's would cost no more than US\$8 000-00 to import. On that basis the defendants argued that the plaintiff ought to have claimed the cost of a replacement vehicle rather than those expensive repair costs.

The purpose of delictual damages is to place the injured party, as far as money can do, in the same position he was in had the delict not occurred. It is not the purpose of damages to enrich him. The damages may not be established with mathematical exactitude or precision. In *Esso Standard SA (Pty) Ltd v Katz*<sup>2</sup> it was noted that in some types of cases damages are difficult to estimate, but that just because they cannot be assessed with certainty or precision will not relieve the wrong doer of the obligation to pay for his breach. The plaintiff is entitled and required to adduce the best evidence reasonably available to him. In *Hersman v Shapiro & Co* 1926 TPD 367 STRATFORD J stated as follows<sup>3</sup>:

“... [M]onetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does permit of a mathematical calculation of the damages suffered, still, it is the best evidence available, the Court must use it and arrive at a conclusion based upon it ...”

The defendants had no tangible evidence that it would cost far less for the plaintiff to import a replacement vehicle similar to the plaintiff's Mercedes. The print-out from the CVR was unhelpful. Other than their say so, nothing else was placed before me on the results of their alleged search on the internet. Under such circumstances, and given that the plaintiff was a self-actor, albeit with some discernible legal help in the background, and given that he had at least placed the best evidence available to him before the court, and given that at the end of the day it is again a question of value judgment, I have decided to award the plaintiff what I have considered to be fair and reasonable compensation for his loss. My assessment

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<sup>2</sup> 1981 (1) SA 964 (AD)

<sup>3</sup> At p 379 - 80

takes into account the defendants' argument that the repair costs as presented by the plaintiff are far too expensive. Incidentally, the plaintiff completely refrained from disclosing the price at which he had bought his Mercedes. It was a C230 make and a 2002 model. At the time of the accident in 2012 it had done roughly 10 years.

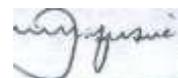
In my view, the defendants' argument that it was probably cheaper just to seek a replacement vehicle than to insist on repairs was reasonable. In my view a replacement vehicle would, at the time of the accident, probably have cost not more than US\$10 000-00. In the circumstances, I consider that a fair assessment of the plaintiff's loss was no more than US\$10 000-00. However, having found the plaintiff to have been 25% negligent in the accident, the second defendant's liability, at 75% contributory negligence, is US\$7 500-00.

### **DISPOSITION**

I the final analysis I make the following order:

- 1 The plaintiff's claim against the first defendant is hereby dismissed with costs. However, such costs shall be restricted to the employment of one counsel.
- 2 The accident in question was caused by the joint and contributory negligence of the plaintiff and the second defendant.
- 3 The degree of negligence of the plaintiff in causing the accident was 25% and that of the second defendant was 75%.
- 4 The fair and reasonable amount of damages suffered by the plaintiff as a result of the accident was in the sum of US\$10 000-00.
- 5 Given the respective degrees of negligence aforesaid, the second defendant shall pay the plaintiff the sum of US\$7 500-00, together with interest thereon at the rate of 5% per annum from the date of this judgment to the date of payment.
- 5 The second defendant shall pay 75% of the plaintiff's costs of suit.

14 October 2015



*P. Takawadiyi & Associates*, defendants' legal practitioners