MANGWIRO SIBANDA
versus
JANE H. CHIKUMBA
and
ALTFIN INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 22 November 2016 & 1 February 2017

Trial

Plaintiff if person
E Ncube, for the defendants

MATANDA-MOYO J: The plaintiff instituted proceedings against the defendants jointly and severally, the one paying the other to be absolved for the following relief;

1. Payment of the sum of $3 700,00 being costs of repairs to the plaintiff's sprinter vehicle registration number AAQ 5021 which was damaged due to a collision solely caused by the first defendant. The other vehicle involved which was being driven by the first defendant a Toyota land cruiser registration number AAX 3378 was comprehensive insured by the second defendant.
2. Payment of $9 750,00 being hiring costs incurred by the plaintiff during the period his vehicle was under repair.
3. Payment of interest on the sum total of $13 450,00 at the prescribed rate from date of summons to date of full payment.

The defendants whilst accepting liability for causing the accident, deny liability for the amounts claimed above. The first defendant pleaded that the vehicle involved was comprehensively insured by the second defendant. She did what was expected of her by referring the plaintiff to the second defendant. Her obligations ended there as she was not privy to what transpired between the plaintiff and the second defendant thereafter. She is at a loss why the plaintiff decided to join her in the proceedings. The second defendant on the other hand pleaded that it attended to repairs which were caused by the accident involving the first defendant. The plaintiff's vehicle had been involved in any earlier accident which the

second defendant is not liable for. Secondly the plaintiff signed a release form which had the effect of releasing the defendants from any further suits or claims arising from the said accident.

The defendants later offered the plaintiff without admitting liability the sum of $3 500.00 in exchange for the vehicle which offer was rejected by the plaintiff. The defendants denied the plaintiff's vehicle was valued at $6 500,00 before the accident. The defendants also denied liability for $9 750,00 being costs allegedly incurred by the defendant through hiring a replacement vehicle. They put in issue the figure claimed.

At Pre-trial Conference the parties agreed that the issues which fell for determination are;

1) Whether or not the plaintiff is entitled to a further disbursement, the same claim having been settled, if so in what amount.
2) Whether or not the plaintiff was entitled to hire a vehicle and if so the quantum thereof.

The defendants admitted that the first defendant negligently caused the accident on the day in question. The plaintiff admitted that his vehicle had been involved in another accident prior to the day in question.

The facts which are common cause are that the plaintiff's vehicle was involved in an accident with a vehicle driven by first defendant. The accident was solely caused by the first defendant's negligence. The first defendant has since paid an admission of guilt fine for driving without due care and attention. The parties agree that plaintiff's vehicle was taken to H and J for repairs. Such repairs were done. After repairs were done the parties engaged trying to resolve the dissatisfaction by the plaintiff over repairs done to his car. The second defendant offered the plaintiff without admitting liability the sum of $3 500-00 in exchange for the plaintiff's vehicle. The plaintiff rejected the offer.

The plaintiff led evidence in support of his claim. He testified that on 17 December 2011 he was involved in a traffic accident with a vehicle driven by the first defendant. The first defendant his since deposited an admission of guilty fine with the police for driving without due care and attention. The plaintiff did not state damages sustained by his vehicle. He however testified that the second defendant took over the matter. His vehicle was taken to H & J for repairs. He testified that the first defendant informed him that his vehicle would be ready for collection in two days. He testified that when the vehicle failed to come out in two days he advised the first defendant of his intention to hire a vehicle. He then entered into an

agreement with Jubilee Centre for the hiring of a vehicle for use. The vehicle was hired at $50 per day up to June 2012. The total costs of such hiring came to $9 750-00. He tried to produce an agreement before the court to show that daily rental for kms below 150 was $50 and for any kms exceeding 150 km a day $0.60 per kilometre. Such vehicle was rented for 6 months from 21 December 2011 to 30 June 2012. However such document was not discovered and no plausible explanation was given for failure to do so. The witness testified that when his vehicle was ready for collection he was made to sign a release form before he had inspected the vehicle. He was also made to sign a form before the car was released to him. He denied ever signing a satisfaction form but admitted to have signed for the collection of the car. As he drove the vehicle from H & J this witness observed that there were serious defects on the car. The gears were not engaging. He complained to H & J and also to the second defendant. He said he lodged a complaint to the second defendant on 22 June 2012. Despite his complaint he later found out that the second defendant had paid out repair costs to H and J on 24 June 2012. He however produced his complaint letter written to Altifin dated 23 January 2012 and stamped by Altifin on 30 January 2012. The vehicle was later assessed by the second defendant's assessors. The plaintiff was never shown the reports. He was advised by the second defendant that they were assessing the vehicle for purposes of paying off the plaintiff. Three valuations were done. Alliance Insurance valued the vehicle at $5 500,00 Mike Harris at $5 500,00 and the third at $6 300,00. An offer letter was sent to him for $3 500,00 which he turned down. He testified that after the accident his vehicle had been valued at $5000,00.

Under cross-examination the plaintiff maintained he hired the vehicle after advising the plaintiff. It became apparent he was not authorised to do so by the first defendant but was referred to the second defendant.

The first defendant testified that indeed she paid an admission of guilty with the police as she was to blame for causing the accident. The first defendant testified that at some point the plaintiff phoned her intending to hire a vehicle. The first defendant referred him to the second defendant as the vehicle was comprehensively insured. Thereafter she never involved herself in the matter until after receiving summons from the plaintiff. She testified that the matter should be between the plaintiff and the second defendant and must not involve her.

Under cross examination she conceded her husband was the owner of the vehicle at the time of the accident. She later said the vehicle belonged to Interfin but was allocated for

use to her husband. The witness also said the plaintiff informed her that the vehicle had been involved in three accidents prior to that day's accident. She insisted that the plaintiff should not have sued her but should have proceeded against the insurers only.

It is common cause the first defendant negligently caused the accident in question and consequently caused the damages to the vehicle. The first defendant paid an admission of guilty fine for driving without due care and attention in that she failed to keep her vehicle under control. It is important to note that at the pre-trial conference the defendants admitted liability and the plaintiff admitted that his vehicle had been involved in an accident prior to this accident.

At the time of the trial the second defendant was under liquidation and no leave was sought to proceed against the second defendant. It was only the first defendant whom plaintiff proceeded against.

Form the evidence the issue of liability is not in contention. That explains why the plaintiff's vehicle was taken for repairs. From the evidence it is common cause after the initial repairs the plaintiff was not happy with the repairs resulting in assessments to ascertain the value of the motor vehicle. The second defendant is no longer before me so I shall endeavour to talk about the second defendant only as agents for the first defendant. The assessments were done and no agreement was reached between the plaintiff and the second defendant as the two parties disagreed on the value of the vehicle.

The first defendant pleaded that she was indemnified in and against all damage to plaintiff by virtue of the comprehensive insurance policy held with the second defendant. As such she argued that she was a wrong defendant before the court.

The contract of insurance is between the owner of the vehicle and the second defendant. There is no direct contractual relationship between the plaintiff and the second defendant. A contract of insurance is a contract for the benefit of a third party. As was quoted with approval in *Joel Melamed and Hurwittz* v *Cleveland Estates (Pvt) Ltd*, *Joel Melamed and Hurwittz* v *Vorner Investments (Pvt) Ltd* 1984 (3) SA 155 A at 172 B-C;

> "….in the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third person: it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two (Cf *Tankelow* v *Binder Gering and Co.* 1927 TPD 364) …. the typical contract in order that C may be enabled, by notifying A to become a party to a contract, between himself and A."

Whilst the plaintiff can choose to sue the insurance company, it is only sued on behalf of the insured. The second defendant could only be sued on behalf of the first defendant. That

in itself does not exonerate the first defendant from liability. In any case it is trite that even where the insurance assumes liability on behalf of the insured, it does not always cover every damage. The injured party is allowed in law to pursue the driver of the vehicle for the difference. The mere fact therefore that the first defendant was indemnified under the insurance policy dos not entail she is immune to suit. The evidence of the present case show that the vehicle was not repaired to the satisfaction of the plaintiff and there is nothing in law stopping the plaintiff from pursuing his claim against the first defendant.

However, the plaintiff must prove his damages in order to recover same from the first defendant. Whilst I am aware that the motor vehicle was not repaired to the plaintiff's satisfaction, I have not been told in what respect. The plaintiff only generalized that the wipers were not fitted properly and the gear box was damaged. The plaintiff did not go further to call expert evidence to prove his damages. The plaintiff also testified that he had hired a vehicle and had paid monies toward such hire but he failed to produce such receipts. In the case of *Standard Chartered Finance Zimbabwe Ltd* v *Georgiea and Another* 1998 (2) ZLR 547 the court at p 559 had this to say;

> "With regard to the question of proof of quantum, in *Mkwanazi* v *Van der Merwe and Another* 1970 (1) SA 609 (A) at 631, VAN WINSES JA referred with approval to *Herman* v *Shapiro & Co* 1926 TPD 367 at 379 where STRATFORD J said:
>
> 'Monetary 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 is available to the plaintiff which he has not produced; in these circumstances the court is justified in giving, and does give absolution from the instance."

Where the plaintiff is capable of leading evidence which will enable the court to arrive at some quantum, and the plaintiff does not the court can dismiss the matter. Litigants should never leave it to the court to guess damages suffered when they could have provided such information to court. Herein the plaintiff could have had an expert testify, on the damages caused to the car, the repairs done and the insufficiency of repairs carried out. The plaintiff had in his possession the contract between him and jubilee for the car hire, and receipts paid but decided to withhold such information from the court. The plaintiff only have himself to blame for failing to quantify his claim. As said in Visser and Portigieter *Law of Damages* p 437, D:

> "It is not the task of the court to award an arbitrary amount of damages where the plaintiff has not produced the best evidence upon which a proper assessment of the loss could have been made."

The plaintiff in the summons did not claim for value of the car. Otherwise it is trite that where a vehicle is damaged beyond repair the measure of damages is the value of the motor vehicle at the time of the accident. See *SA Eagle Insuarance Co Ltd* v *Hartley* 1990 (4) SA 833 (A) and Visser and Portigieter : *Law of Damages* at p 75. However that is not the plaintiff's case. The plaintiff's case is that he incurred additional costs of $3 700-00 for repairs to his vehicle after the first repairs done by H & J. The plaintiff however did not produce any evidence to show that he incurred such expenses. The plaintiff tried to rely on the initial value of the vehicle at the time of the accident. Such evidence does not assist the plaintiff in his claim.

Whilst I am of the view that the first defendant could have been found liable for the damages and hiring costs of the vehicle, the plaintiff has failed dismally to prove quantum of such damages and hiring costs.

Accordingly the claim is dismissed with costs.

Mabundu Law Chambers, 1st defendant's legal practitioners