MEMORY MUZVIDZWA
versus
GEDION RINGSON CHIRONGWE
and
CMED PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 5-6 December 2016, 8 February 2017

Civil Trial

A. Masango, for the plaintiff
S. Gula-Ndebele, for the defendant

CHIGUMBA J: On 6 October 2010, the plaintiff issued summons against the defendants for payment of damages arising from injuries sustained during a road accident, being future medical expenses, loss of earnings, pain and suffering, disfigurement, loss of amenities, plus interest and costs of suit. The plaintiff was a passenger on a bus which was owned by the second defendant who employed the first defendant as its driver at the time. The issue that arises for determination is that of the cause of the accident, whether it was human error, or an act of God, as in a sudden rain shower that is alleged to have caused the road to become slippery, the brakes to slip and fail to engage. The plaintiff admits that the second defendant made reasonable effort to ensure her full medical recovery. She is aggrieved that the first defendant, in her estimation was over speeding, in an area that was clearly dangerous because of the terrain, and that, this was the sole cause of the accident. She wants the court to hold him to account.

According to the plaintiff's declaration, the second defendant is a government parastatal and the first defendant's employer. On 21 January 2010 a road accident occurred along the 301 metre peg along the Harare-Chirundu road while the first defendant was driving the second defendant's bus, during the course and scope of his employment with the second defendant. The plaintiff was injured when the bus collided with a haulage truck. The plaintiff was injured when the collision occurred. The collision was caused by the sole negligence of the first defendant

who;-drove at an excessive speed, drove recklessly without regard to other road users both motorists and pedestrians, and his recklessness. The plaintiff suffered a compound fracture of the right tibia and fibula. A medical report is attached to the summons to prove those injuries.

The plaintiff was a cross border trader before the accident who now cannot ply her trade as her right leg is in a cast and she is bedridden. The damages that she is claiming comprise; USD$3000-00 future medical expenses, USD$5 400-00 loss of earnings, USD$11 600-00 general damages for pain and suffering. The defendants entered appearance to defend on 21 October 2010. The first defendant filed a plea on 6 November 2010, in which he denies that he caused the accident because of negligence or recklessness. He attributed the accident to sudden emergency. He challenged the plaintiff to provide proof of her income prior to the accident. The matter was referred to trial to establish whether the first defendant was negligent as alleged, whether the plaintiff is entitled to damages, and the quantum of damages.

At the hearing of the matter, the plaintiff testified that she was a passenger on the second defendant's bus when it was involved in an accident due to the negligence of the first defendant who rammed the bus into a stationary lorry. She indicated that it was drizzling but insisted that the showers were very light. She said that the first defendant ignored the road signs that urged motorists to engage low gears and to reduce speed. She said that the first defendant was racing against a ZUPCO bus. She suffered bodily injuries and was rushed to hospital at Mtendere Mission where she was hospitalized from 21 January to 16 February 2010. She lost her earning capacity as a result of the accident and is no longer a cross border trader who operates several flea market stalls. She requires ongoing medical attention to the tune of USD$500-00 a year.

Under cross examination the plaintiff was not shaken in her assertion that the first defendant was over speeding, despite admitting that she did not see the speedometre from where she was sitting. She felt the hard braking when the bus began to swerve. She denied that there was a sudden downpour. She said it had been drizzling for a considerable period so the first defendant ought to have proceeded with caution. She admitted that the first defendant often drove along that route and that he had previously driven well. She maintained her claim that she was entitled to USD$20 000-00 for damages. The plaintiff then closed its case. The first defendant gave evidence in his defence and told the court that on the day of the accident he was ferrying between 18 and 19 passengers. After Makuti, at the 10 kilometre peg, there was a steep

slope. A sudden cloud appeared and it began to drizzle. He was travelling at a speed of 45-50 kilometres per hour so when he tried to brake the brakes started binding. The bus began to swerve because the road was slippery. He could not change down the gears or reduce speed. A truck which was approaching from the opposite direction realized that his bus was in distress and stopped in the middle of the road. Its driver jumped out. He was faced with a choice of ramming into the truck or swerving to the opposite direction and plunging into a gorge. He decided that he could save the lives of the passengers by ramming into the stationary truck as opposed to plunging into the deep gorge. He denied being negligent an alleged or at all, and maintained that he did his best to avoid the accident and that the carnage could have been worse if he had plunged into the gorge.

During cross examination the first defendant maintained that he knew that road like the back of his hand, having driven the second defendants buses over that route more than 200 times. He was travelling at 60 kilometres per hour in 6th gear and was unable to change down the gears to reduce speed. It is trite that a claim of this nature is for delictual damages, and that the claim against the second defendant is vicarious. It is common cause that the plaintiff was injured as a result of an accident which occurred when the second defendant's bus was being driven by the first defendant during the course and scope of his employment by the second defendant. It is common cause that the plaintiff seeks compensation for her injuries, her disfigurement, pain and suffering and loss of amenities. Clearly the issue for determination is the first defendant's negligence or fault. Once this has been established the court must determine the quantum of damages, if any.

Negligence, as a legal concept, depends on the reasonable rule test. See *CGU Insurance Zimbabwe Ltd* v *Kirby.*[1] It is trite that in claims based on negligence the plaintiff must allege and prove that the defendant was negligent. It is not sufficient to allege negligence without detailing the particular grounds of negligence relied upon. The onus rests with the plaintiff to establish that a reasonable person in the same position as the defendant:

[1] HH 180-03

(a) Would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another person or property and cause that person patrimonial loss

(b) Would take reasonable steps to guard against such occurrence; and

(c) That the defendant failed to take such reasonable steps. This is the reasonable rule test.

It has been said that:

> "Conduct is negligent if the actor does not observe that degree of care which the law of delict requires. The standard of care which the law demands is ordinarily that which a reasonable man (*diligens paterfamilias)* would exercise in the same situation. The infinite variety of circumstances which may arise makes it undesirable, if not impossible, to formulate in advance concrete standards of conduct for all conceivable situations…'The criterion of the reasonable man is the embodiment of an external, abstract and objective standard of care. The law requires adherence to a generally uniform and objective degree of care…The objective standard of care implies that legal fault and moral blameworthiness do not necessarily coincide."

See *Delict: Principles and Cases*[2]

The issue that arises for determination in this matter is whether the accident was caused by the first defendant's negligence. The onus is on the plaintiff to establish this. The plaintiff conceded that the first defendant was ordinarily a good driver who had driven well on previous trips on the same bus, on the same route. It is common cause that the plaintiff was seated at the back of the bus and that she did not see the speedometer. However, the plaintiff is a seasoned driver herself, albeit of class four vehicles, not buses. She would have been able to tell whether the bus was speeding, especially in that terrain, and on that stretch of the road, which she was familiar with, just as the first defendant was familiar with it. It is more probable than not that the 1st defendant was indeed racing against a ZUPCO bus and competing for passengers along this route. It is more probable than not that the first defendant failed to exercise the degree of care required on that stretch of the road, because of the competition to pick up more passengers.

The court finds that if the first defendant was driving at 45-55 kilometres per hour, in accordance with his testimony, then his braking distance ought to have been relatively near. For the bus to begin to swerve implies a sharp application of brakes and an attempt to force the bus to brake sharply and stop, when its braking distance, given the speed that it was travelling at,

[2] J. C. Van der Walt p 65

ought to have been longer. The court finds that indeed the first defendant failed to ignore road signs or to observe the stipulated speed limit. The question for determination then becomes one of contributory negligence based on the presence of a steep gorge on the left, a stationary truck in the middle of the road, and the light drizzle which the court accepts made the road slippery in conjunction with oils deposited by haulage trucks on the tarmac. We have four factors which contributed to the accident. Human error (1st defendants negligence), Oil slicks, slippery tarmac because of the drizzle, and the steep slope and stationary vehicle.

It has been said that:

> "A driver who-'finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid danger'. Situations which may give rise to a sudden emergency are unlimited". See *Motor Law Vol1*[3].

The question is whether, in the case under consideration, the danger was not imminent when the first road sign appeared urging motorists to reduce speed and engage lower gear. The question that arises for determination is whether the first defendant, a veteran good driver who knew this route like the back of his hand, ignored the road signs and the terrain, until he was forced to change down gears by a combination of a sudden light shower coupled with oil spills that made that stretch of the road slippery. The court accepts the guidance which emanates from the following dicta:

> "…a man may not do the right thing, may even do the wrong thing and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position due allowance should be made for this". See *S v Mauwa*[4]

The court accepts that the first defendant probably saved lives when he chose to plough into the stationary vehicle as opposed to plummeting into the deep gorge on the other side of the road. No reasonable man could have done better in the circumstances. His degree of negligence is estimated at 25%, as in being one of four factors which contributed to the accident. The next issue that arises for determination is the quantum of damages. Liability is always dependent on the question of fault, on the part of the defendant. The onus, or burden of proof, of proving all

[3] W. E. Cooper p521

[4] 1990 (1) ZLR 235 (SC) @p240

aspect of the element of this fault, lies with the plaintiff. See *The Quantum of Damages*[5]. The court has assessed the defendant's degree of fault as being a 25% contributory factor to the accident. The court accepts that the defence raised, that of sudden emergency, constituted a 50% contributory factor to the accident, that of a sudden light shower coupled with oil spills which made the road slippery. The presence of a stationary vehicle in the middle of the road was a 25% contributory factor to the accident, for the reason that, if there had been no stationary truck to plough into the 1st defendant's efforts to engage the brakes and change down gear could have eventually borne fruit and the bus could have possibly righted itself from its swerving and juddering.

The court finds that the first defendant contributed to the accident by 25%. He is vicariously liable for the plaintiff's damages to that extent. The court is guided by the following line of cases in the exercise of assessing damages;- 'the assessment of general damages is a difficult exercise'. See *Nyoka* v *Nyamweda Bus Service & Anor*[6], *Minister of Defence & Anor* v *Jackson* [7], *Christopher Gwirir & Star Africa Corporation Private Limited t/a Highfield Bag*[8], *Tambudza Mafusire* v *Lweis Greyling* [9]. The court accepts the evidence in the medical report which places plaintiff's permanent disability at 55% and stipulates that she will require continual treatment. The court finds that the plaintiff has adduced sufficient evidence to justify her claim for future medical expenses. Her claim for loss of earnings is reduced to USD$2500-00 because that is what the evidence shows. The claim for loss pain suffering, loss of amenities and disfigurement is reduced to USD$5000-00. The plaintiff's claim is allowed in the total sum of USD$10 500-00. The first defendant is liable to pay 25% of this figure which is USD$2 722-22.

In the result, it be and is hereby ordered that, the defendants pay the sum of USD$2 722-22 to the plaintiff, the one paying the other to be absolved, together with interest thereon at the

---

[5] M.M. Corbet, J.L. Buchanan 3rd ed p98

[6] HH148-15

[7] 1990 (2) ZLR (1) SC

[8] HH20-10

[9] HH 173-10

prescribed rate calculated from the date of judgment to the date of payment in full, plus costs of suit.

Messrs Musunga & Associates, plaintiff's legal practitioners
Messrs Gula-Ndebele & Partners, defendants' legal practitioners