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TIZAI CHISWANDA (in his capacity as father and guardian of CHIDOCHASHE CHISWANDA)
v
OK ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & BERE JA
HARARE: JUNE 15, 2018 & JUNE 22, 2020

T. Bhatasara for the appellant

H. Mutasa for the respondent

GOWORA JA:

[1] When this matter was called Mr *Bhatasara*, counsel for the appellant, applied to amend the grounds of appeal. Mr *Mutasa*, who appeared for the respondent, was not averse to the application. The matter was stood down to allow counsel to confer on the proposed amendments. When the matter resumed the parties indicated that they had agreed on the amendments. The grounds were as a consequence amended by consent.

[2] The facts of this matter can only be described as tragic. On 15 February 2015, the appellant who was the plaintiff in the court *a quo*, proceeded to OK Mart in Hillside. He was accompanied by his wife and their daughter then aged 4 years 7 months. The family proceeded to shop. The child was within reach of her parents. At some stage during the shopping excursion a soccer ball display cabinet was observed to have fallen onto the floor. The minor child was underneath the cabinet. It is common cause that she sustained the following injuries as a result of the accident: fractured right femur; fractured left femur; tenderness and swelling of the pelvis and swelling of the ankle joints. As result of the injuries, she was hospitalized for more than a month whilst receiving treatment.

[3] Following upon the injuries, the appellant, as father and guardian of the minor child, instituted proceedings against OK Zimbabwe, the respondent in this case, for a total sum of USD 51 982.93 for shock pain and suffering, permanent disability and loss of amenities as well as past and future medical expenses. In its plea, OK Zimbabwe denied liability and the matter proceeded to trial.

[4] At the close of the appellant's case as plaintiff, OK Zimbabwe, applied for absolution from the instance which the court granted. The appeal before us is against the grant by the court *a quo* of the application for absolution. The grounds of appeal, as amended, are the following:

1. The court *a quo* erred in fact and in law in finding that the appellant failed to establish that the respondent OK Zimbabwe had been negligent.

2. The court *a quo* erred and misdirected itself by failing to consider documentary exhibits 2, 4, 5A and 5B which established that OK Zimbabwe had created an unsafe environment.
3. The court *a quo* misdirected itself in fact and in law by making the aspect of whether or not the minor child climbed the shelf decisive of the case.
4. The court *a quo* misdirected itself in making definitive factual findings that the area where the shelf was positioned was not covered by C.C.T.V. when in fact it was.
5. The court *a quo* erred in fact and in law in finding that it was unforeseeable that a child of about five (5) years would climb onto a display shelf where children's soccer balls of various colours were displayed.

[5] In submissions however Mr *Bhatasara* abandoned the fourth ground of appeal.

APPELLANT'S SUBMISSIONS ON THE MERITS.

[6] The argument presented by Mr *Bhatasara* went as follows. He commenced his argument by moving the last ground. He contended that the court was wrong to find, as it did, that it was unforeseeable that a child of five would shop on her own. He submitted that it was not correct that the child was shopping on her own.

[7] He suggested that, at all times, she was with her parents and that, at her age, it was foreseeable that she would be fascinated by the display of soccer balls. As a result of the colours a child would reach for the balls and, if not within reach, would try and climb the display shelf containing the balls.

[8] He argued that the court *a quo* further misdirected itself in making the question of whether or not the child climbed the shelf decisive of the case. He added that whether or not the child climbed the shelf did not absolve OK Zimbabwe of liability. He contended that OK Zimbabwe had created an unsafe environment and that the court was guilty of a grave misdirection in deciding the question of absolution on the premise that the child had climbed the shelf. He submitted that this was impossible as the shoes she was wearing did not enable her to do this.

[9] He submitted that one of the issues agreed during the pre-trial conference was whether or not OK Zimbabwe had breached a legal duty to provide a safe environment. He added that the documents tendered into evidence by the appellant proved that OK Zimbabwe breached its duty of care in this respect.

[10] He contended that the court *a quo* erred in finding that the appellant had not met the onus required at the close of his case. He submitted that the appellant established a *prima facie* case and that the evidence tendered at that stage met the required standard.

ARGUMENTS TENDERED ON BEHALF OF THE RESPONDENT

[11] Mr *Mutasa*, on behalf of OK Zimbabwe, countered the appellant's argument mainly on three bases. He contended that the abandonment by the appellant of the fourth ground was fatal to his cause. He said that this was because there was a concession in the abandonment of that ground that the child had tampered with the shelf. He suggested that once the

concession was made it destroyed the appellant's case which was premised on the allegation that the shelf had collapsed on its own accord.

[12] He challenged the contention by the appellant that the shelf had collapsed due to one of its legs being corroded with rust. He contended that the appellant had alleged specific grounds of negligence but had failed to lead evidence to substantiate them.

[13] He submitted that the appeal lacked merit and that the judgment of the court *a quo* granting absolution should be upheld.

[14] I turn now to the ratio *decidendi* by the court *a quo*.

THE COURT'S REASONING ON THE APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[15] The court was alive to the fact that the child was injured. She was undoubtedly injured by the shelf. It is common cause that the shelf collapsed. The missing evidence was how the shelf fell and injured the child. In disposing of the application moved by OK Zimbabwe for absolution from the instance the court reasoned:

> "What is critical in this case is that no one knows why the shelf fell at the material time. **It cannot be far-fetched to assume that the unsupervised child was fascinated by the balls that were being displayed on the shelf in question (and) climbed on the shelf causing the same to succumb to the minor's weight and collapsed.**

> **If the area in question had been covered by the CCTV this could have solved our problem. It cannot be said for sure that the shelf just fell on its own when the child was passing by or standing there.** While it is regrettable that the child was injured, the plaintiff did not, in my view manage to prove that the shelf fell due to the negligence of the defendant. **It was unforeseeable that a child of that age would shop on her own and a child of that age would climb the shelf.**" (the emphasis is mine.)

THE COURTS APPROACH TO APPLICATIONS FOR ABSOLTION FROM THE INSTANCE.

[16] There exists within this jurisdiction a plethora of authorities on how a court should consider an application for absolution from the instance at the close of the plaintiff's case.

[17] Crucially the test to be applied is not whether or not the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. The evidence required at this stage is whether or not the plaintiff has made out a *prima facie* case to prove the claim. The correct approach to an application for absolution from the instance was set out in *Gordon Lloyd Page & Associates v Rivera 2001(1) SA 88, at pp92-93 by HARMS JA.* He stated:

> "The test for absolution to be applied by a trial court at the end of a plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should), nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)).'
>
> This implies that a plaintiff has to make out a *prima facie* case-in the sense that there is evidence relating to all elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff *(Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-92) As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in

different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (Gascoyne (loc cit))-a test which has its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court.

Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice."

[18] At the end of the day the prime consideration in the exercise is whether or not there is sufficient evidence upon which a reasonable court might find for the plaintiff. But that is not all that the court hearing the application must consider. As stated by BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971(1) 1, at 5-6:*

"Before concluding my remarks of the law on this subject, I must stress that rules of procedure are made to ensure that there is justice between the parties, and, so far as is possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not be lightly deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. I might usefully quote here what was said by SUTTON J in *Erasmus v Boss* 1930 CPD 204at 207:

"In *Theron v Behr* 1918 CPD 443, JUTA J, at p451 states that according to the practice in this court in later years judges have become very loath to decide upon questions of fact without hearing all the evidence on both sides."

"We in this territory have always followed the practice of the Cape courts. In case of doubt at what a reasonable court might do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed." See also *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998(2) ZLR 547(H), at 552-553; *Bailey NO v Trinity Engineering (Pvt) Ltd & Ors* 2002(2) ZLR 484(H), at 487.

[19] In para 4 of the declaration the applelant alleged the following:

> "At all material times (the) plaintiff was supervising and monitoring the movements of the minor child. A soccer ball display cabinet fell on the minor child who was standing close to it and injured her."

[20] OK Zimbabwe did not file a bare denial to this allegation. It responded in a plea in which it made positive averments. The response, in para 2 of its plea reads:

> "The contents of this paragraph are denied and (the) plaintiff is put to strict proof of the same. Defendant avers that:
>
> 2.1 The plaintiff left the minor child concerned unsupervised as he went around doing his shopping. Consequently, the child who appears to have been fascinated by the balls that were being displayed on the shelf in question climbed on the shelf causing the same to succumb to the minor's weight and collapsing.
>
> 2.2 At all material times, the shelf concerned was properly mounted in accordance with its specifications.
>
> 2.3 Before the child climbed on the shelf as stated above, same was carrying less weight than that which its carrying capacity allows. It would have remained standing if the minor child had not climbed on it as stated above.
>
> 2.4 Not being the manufacturer of the shelf in question, the defendant is unaware of the allegation that the materials used to manufacture the same are cheap and not durable. Defendant does not accept that allegation and puts plaintiff to strict proof thereof."

[21] It seems to me that by pleading in the manner that it did, OK Zimbabwe alleged that it had knowledge of facts surrounding the collapse of the shelf. It pleaded that the child had climbed the shelf. It stated that the shelf collapsed due to the weight of the child. In my view it has offered a defence as to why the child got injured.

[22] The stance by OK Zimbabwe was that none of the witnesses called by the appellant saw what happened. That is correct. The declaration never suggested that appellant's witnesses

saw what happened. It was OK Zimbabwe who contended that the child had climbed the shelf causing the collapse.

[23] In determining the application for absolution from the instance, the court *a quo* stated that no one knew why the shelf fell at the material time that the child got injured. This statement by the court appears to contradict the defence as contained in the plea which places an on OK Zimbabwe to explain how the child got injured. OK Zimbabwe said that the child climbed the shelf causing it to fall and in the process injuring the child.

[24] Having said that no one knew why the shelf fell at the material time that the child also got injured, the court, in an apparent contradiction of the earlier statement, adopted the stance of OK Zimbabwe as set out in the plea. The learned judge then went on to state that the unsupervised child, fascinated by the display, climbed onto the shelf causing it to fall. There was no evidence before the court at that stage pointing to the child having climbed the shelf. This was a statement in the plea. The learned judge then, again in the absence of evidence to that effect, stated that if one of the legs of the shelf had broken, it did so due to either the sheer weight of the child or the fall. Again there was no evidence before the court to justify either of the scenarios so postulated.

[25] It is evident that, by making findings of fact which were not supported by any evidence, the court *a quo* was guilty of a gross misdirection on the facts. A court is permitted to reach an inference based on the evidence before it. The court did not undertake an analysis of the evidence and reach a conclusion based on inferences. At that stage OK Zimbabwe had not

yet adduced evidence. The court ignored the positive statement in the plea that the child had climbed the shelf and further that the collapse occurred as a result of the child's weight. In addition, completely ignoring the pleadings, it then surmised its conclusions of fact, based, not on any evidence, but on what had been pleaded by the OK Zimbabwe. In fact, it is fair to say that the court *a quo* went on a frolic of its own. It stated at p 6 of the cyclostyled judgment:

> "….The shelf from the evidence was not overloaded with balls since the father confirmed that some of the compartments were empty. If at all one of the legs of the shelf broke it could have broken due to either sheer weight of the child or the fall.
>
> ……..
> I agree with counsel for the defendant that this is not a strict liability case."

[26] It seems to me that the statement from the court was premised on the defence mounted by OK Zimbabwe in the plea. If OK Zimbabwe had evidence establishing that the child in fact climbed the shelf and caused it to collapse it should have been put on its defence to adduce such evidence. It is not for the court to reach a conclusion as to what happened based on an averment in a plea without calling the pleader to prove its allegations.

[27] If regard is had to the summary of evidence filed by OK Zimbabwe it records that three witnesses employed by it would testify and adduce evidence on how and why the shelf fell. It is alluded therein that the child who was unsupervised climbed onto the shelf causing it to fall on the child.

[28] It seems to me that, allowing an application for absolution from the instance to stand in circumstances such as these would lead to a grave injustice. It appears that the manner of

the collapse of the shelf was peculiarly within the knowledge of OK Zimbabwe and its employees. Justice can only be done if those witnesses testified as to the circumstances under which the child got injured.

[29] In my view the appeal has merit and the judgment of the court *a quo* warrants interference by this Court. In the premises the following order will issue.

IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and in its place is substituted the following: "The application for absolution from the instance is dismissed with costs."
3. The matter is remitted to the court *a quo* for continuation of trial.

GARWE JA **:** I agree

BERE JA **:** I agree

Mapuranga Bhatasara, Attorneys legal practitioners for the appellant

Gill, Godlonton & Gerrans, legal practitioners for the respondent