CARGO CARRIERS INTERNATIONAL
HAULIERS (PVT) LTD
versus
EDSON SHERENI
and
ALBERT MUSIWENYU

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 22 November 2014 and 1 December 2014

I. *Ahmed*, for the plaintiff
Adv B. Hashiti, for the defendants

MATANDA-MOYO J: The plaintiff instituted summons against the defendants jointly and severally, the one paying the other to be absolved, for the sum of $8 751-50 representing costs of repairs to the plaintiff's vehicle damaged as a result of an accident negligently caused by the first defendant in the scope and course of his employment with the second defendant. The defendants denied liability and denied that the accident was caused by the negligence of the first defendant. The defendants alleged that it was the plaintiff's driver's negligence that caused the accident. Alternatively the defendants pleaded contributory negligence on the part of the plaintiff's driver. The issues referred to trial in terms of a joint pre-trial conference minute filed of record are as follows:-

1. Whether the defendants are liable for the plaintiff's claim and
2. If so, the quantum of damages.

The plaintiff called one witness to testify, Mr da Silva Muneira. His testimony was simple and straight forward. On 2 May 2013 this witness was travelling along Kenneth Kaunda road due west. At the intersection of Kenneth Kaunda and Orr Street a combi vehicle which was driven by the second defendant suddenly made a u-turn from the extreme left and collided with his vehicle. This witness testified that it was solely the negligence of the second defendant which caused the accident. The second defendant fled the scene of the accident and the police later advised that the second defendant had paid an admission of guilty fine. As a result of the accident the plaintiff's vehicle sustained frontal damages as exhibited by photographs produced during the trial. The defendant's vehicle suffered damages on the right side and front. The plaintiff testified that its vehicle was repaired for $8 751.50. Three

quotations were produced from M.P. Panel Beaters, P and P Panel Beaters and Swiss Motors. The plaintiff's vehicle was at the time insured by Eagle Insurance.

Under cross-examination the witness maintained his version that it was only the second defendant's negligence that caused the accident. On being questioned on the quantum this witness insisted that the figure was agreed upon and assessed by an independent assessor. The defendants also cross-examined, this witness on salvaged parts to which he had no idea. It was his testimony that the plaintiff has since settled the repair bills. The plaintiff closed its case after the testimony of this witness.

At the close of the plaintiff's case the defendants applied for absolution from the instance on the following:-

1. *LOCUS STANDI*

The defendants submitted that from the evidence led from the plaintiff, it became apparent that the plaintiff's vehicle was insured by Eagle Insurance Company Limited. The plaintiffs in their pleadings had omitted to mention that point. It is upon that basis that the defendants objected to the plaintiff's *locus standi* on the basis of the law of subrogation. The defendants submitted that it is not clear whether the plaintiff would in future also make a claim as against the Insurance Company. The law of subrogation is meant to avoid being doubly compensated for the same act. The defendants submitted that by failing to place before the court evidence that the plaintiff's vehicle was insured, and by failing to place before the court the insurance policy and a letter from the insurance company that they would not compensate the plaintiff for such damages, the plaintiff had no authority to bring such a claim.

I understand the law of subrogation to mean, in relationship to this matter, the right of an insurer to pursue a third party that caused an insurance loss to the insured. This is done as a means of recovering the amount of the claim paid to the insured for the loss. Lee R. Russ *Couch on Insurance* s 222 .2 @ 222-14 (3rd ed 2000) defines subrogation as:-

> "…. the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy" (my own underlining).

For the principle of subrogation to succeed there must be proof that the insured received money from the insurers. In the present case the plaintiff only accepted that its vehicle was insured but did not receive any payment from the insurance company. Without

any evidence of the plaintiff having received any compensation from the insurers no basis has been laid for subrogation. It only arises when the insurer has paid monies to the insured.

It is my finding therefore that the plaintiff has *locus standi* to bring the action. The case of *Tsozai* v *Mageza and Anor* 2011 (2) 160 (H) relied upon by the defendants for this proposition is distinguishable from the present case. In that case the plaintiff had been adequately compensated by his insurers and had no right to make another claim against the defendants without proof that he was going to surrender the amount claimed to the insurance company. In that matter the judge on p 166 A said:-

> "…. all this was calculated to endure that the plaintiff would quietly enjoy a double benefit over a single loss, knowing fully well that his insurer, Altfin Insurance, had adequately indemnified him. There is nothing on paper or in his evidence that his actions were meant to benefit the insurer".

The law of subrogation is meant to protect the public from being vexed more than once by what is in reality a single claim. There is no reasonable apprehension established that Eagle Insurance may sue the defendants for the same claim. I know of no law which prohibits the persons of the plaintiff from pursuing wrongdoers to recover their loss simply because they are holders of Insurance Policies. That preliminary point is without merit and is dismissed.

2. LACK OF EVIDENCE TO SUBSTANTIATE NEGLIGENCE

The defendants argued that the plaintiff had failed to establish the particulars of negligence. Counsel for the defendant argued that from the evidence adduced by the plaintiff, the only reasonable conclusion that could be drawn was that the plaintiff was trying to overtake and in the process rammed into the second defendant's vehicle.

The defendants also submitted that failure to call witnesses from the garages which repaired the plaintiff's vehicle was fatal to the plaintiff's case. The quantum of damages have not been proved.

It is settled that the counts should strive as much as possible to determine matters on the merits. The courts should not be abused by the defendants who are afraid to stand trial to cause an injustice. See *Dube* v *Dube* 2008(1) ZLR 326. In the case *in casu* it is common cause that the second defendant deposited an admission of guilt fine with the police immediately after the accident. This in itself should seal the issue of liability at this stage. The second defendant has not explained why he would want to revoke his admission of guilt presently. The defendants opted to abuse the application for absolution from the instance

procedure. At this stage the plaintiff should not have proven its case on a balance of probability, but the plaintiff, should only have proffered a *prima facie* case. As said by BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd* v *Fox and Goodindge (Pvt) Ltd* 1971 (1) RLR (1) (A) at 5D;-

> "The test, therefore, boils down to this: is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?...."

The plaintiff explained that the second defendant suddenly made a u-turn from the extreme left of Kenneth Kaunda into Orr Street.

I am of the view that the raising of the application was a waste of the court's time as it lacked any merits. Accordingly I dismissed the application and put the defendants on their defence.

The defendants first called the second defendant to the witness stand. He was driving the combi which collided with the plaintiff's car at the corner of Kenneth Kaunda and Orr Street. He testified that he was driving the combi vehicle due west along Kenneth Kaunda road. His vehicle was in the inner lane. On approaching Orr Street he indicated to turn right into Orr Street. In front of him was no oncoming traffic. He then started his turn into Orr Street. Suddenly he was hit by the plaintiff's vehicle which was trying to overtake him. Because the plaintiff's vehicle was travelling at an excessive speed, the impact caused this witness' vehicle to travel a few metres, hitting into a construction site and finally hitting into the wall of Mohammed Mussa Building. He explained the damages sustained by the combi vehicle. Its headlamp was damaged when the combi hit a plank. And so did the indicator light. The damages in the middle of the car were caused by the plaintiff's vehicle hitting into the combi. This witness admitted to paying a deposit of guilt fine to the police. He explained he did so on the advice of the police. He admitted to driving without due care and attention.

This witness explained that he ran away from the scene for fear of being attacked by the mob.

Under cross-examination this witness accepted that his version of events differed with the version in the summary of evidence. He was evasive and argumentative under cross-examination. He initially said he left the scene and went to the police, but later changed his story and said he did not immediately proceed to the police.

Under cross-examination this witness revealed that he had dropped off passengers at the corner of Kenneth Kaunda and Second Street. He pulled to the extreme left. He failed to

explain how he ended up travelling in the inner lane after driving off from the drop off point. He also confirmed that the vehicle which he said was behind him noticed he intended to turn into Orr Street. This version corroborates, the plaintiff's version that the second defendant came from the extreme left and suddenly made a u-turn in front of him. The second defendant failed to give a coherent version of how the accident occurred. He testified that he never saw the plaintiff's vehicle until he was hit.

The first defendant also testified. He was not present when the accident occurred. He arrived at the scene of the accident. He confirmed the plaintiff's vehicle was still stationery along Kenneth Kaunda blocking a section of oncoming lane. The defendants vehicle had stopped by the Mohammed Mussa Building. He explained the damages to the vehicles. The combi's middle right side was smashed. It had left frontal damages.

He testified that he got quotations from the plaintiff and based on those quotations he sought another quotation from Toyota. Such quotation was for $3 703.00. Under cross-examination he admitted Toyota does not provide panel beating services. I am satisfied that the plaintiff managed to prove the defendant's liability on a balance of probabilities. The mere fact that the second defendant paid a fine with the Police is testimony that he was negligent. The second defendant admitted to driving without due care and attention.

Let me come to the issue of contributory negligence. The defendants averred that the plaintiff's driver contributed to the accident in that he was travelling at an excessive speed in the circumstances, failed to keep a proper look out and overtook a vehicle turning right. The plaintiff's driver denied that he was traveling at an excessive speed in the circumstances. He testified that he was travelling in the inner lane proceeding west along Kenneth Kaunda road. When the combi driven by the second defendant suddenly made a U-turn from the extreme left, he tried to apply brakes to no avail. The accident was sudden. The plaintiff's vehicle stopped immediately after the impact but the second defendant's vehicle travelled some 10-15 metres from the point of impact. From the vehicles positions after the accident it is most probable that the second defendant's vehicle was travelling fast in the circumstances. The second defendant was trying to move fast from the extreme left into Orr Street. The combi which was traveling in the outer lane had slowed down to give way to the second defendant's vehicle, and, unfortunately the plaintiff's driver who was travelling in the inner lane did not notice the second defendant's vehicle before it appeared in front of him. I do not believe there was any contributory negligence on the part of the plaintiff's driver.

That brings me to the issue of quantification.

In the present case it is not in dispute the plaintiff's vehicle a Toyota Hilux motor vehicle Reg No. [ACO 5126] was damaged as a result of the accident. The plaintiff effected repairs to the damaged vehicle. The plaintiff produced three quotations and showed that it accepted the lowest of the three quotations for the purpose of the repairs. The figure of US$8 751.50 claimed by the plaintiff is correspondent to the quotation of the lowest value. Further the plaintiff produced the receipt to prove that it had paid the amount via an internet bank transfer to MP Panel Beaters for the amount of US$8 751.50.

It is trite law that where there has been proof of damages the court must make an assessment of the quantum of damages on the material placed before it, even if on that evidence it is not possible to compute the amount of damages precisely. See *Nissan Zimbabwe P/L* v *Hoppit Pvt Ltd* 1997 (1) ZLR 569 at 573 E.

The plaintiff proved on a balance of probabilities that it paid US$8 751.50 for repairs. As such it will be just and fair for them as the injured party to restore their status *quo ante* before the accident. This is the essence for an award of delictual damages see *National Bank of South Africa* v *Duvenhage* 2006 (5) SA 319 (SCA) at 324 H-1.

In the circumstances I will order as follows:

1. The first and second defendants jointly and severally pay the plaintiff the sum of USD$8 751.50 with interest thereon at the prescribed rate from the date of service of summons to the date of final payment.
2. The defendants are to pay costs of suit.

Ahmed & Ziyambi, Plaintiff's Legal Practitioners
Gill Godlonton & Gerrans, 1st & 2nd Defendant's Legal Practitioners