LIVARD PHILMON
versus
VUSUMUZI MOYO
and
ALFRED NTINI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 5 JULY 2018 AND 6 SEPTEMBER 2018

Civil Trial

R Ndlovu for the plaintiff
1st and 2nd defendants in person

MOYO J: In this matter plaintiff issued summons claiming as against both defendants

a) payment of the sum of $16624-25 being the total amount of damages suffered by plaintiff due to a motor vehicle accident negligently caused by first defendant broken down as follows:

i) $8000-00 being the pre-accident value of a motor vehicle namely a Nissan Datsun 1400 registration number 570-420W which was damaged beyond repair.

(ii) $8000-00 for the pain and suffering that plaintiff went through due to the accident

(iii) $624,25 being the total ambulance and hospital expenses incurred by plaintiff in obtaining treatment for injuries sustained in the accident.

b) Costs of suit at an attorney and client scale.

The facts of the matter are that the plaintiff and first defendant were involved in an accident at a robot controlled intersection namely at the corner of23rd Avenue and Matopos road in Bulawayo. Plaintiff was proceeding from Matopo headed towards town. First defendant was proceeding from town turning right into 23rd avenue.

The two motor vehicles collided as defendant turned and as plaintiff was proceeding straight. Plaintiff avers that defendant is liable for the accident in that he was negligent as he turned in front of plaintiff's oncoming vehicle and failed to stop when an accident was imminent. The declaration further states that the accident was solely caused by first defendant's negligence, in that he turned in front of plaintiff's oncoming motor vehicle thereby causing a collision.

In his evidence –in-chief the plaintiff stated that he was involved in an accident on 31 August 2010 whilst driving from Kezi into Bulawayo along Matopos road. At the intersection of 23rd Avenue and Matopos road the robots were green, and he had the right of way. First defendant did not yield to him the right of way and he turned in front of plaintiff causing a collision. Plaintiff's motor vehicle was hit on the driver's side. Plaintiff lost consciousness and later regained it while at the hospital. During cross examination by second defendant, it came out that first defendant had been charged but was later acquitted of the criminal charge.

Martin Rugara was plaintiff's witness. He had been a passenger in plaintiff's motor vehicle. A car turned in front of them and there was a collision, he woke up later in hospital. Asked which car had the right of way, he said that both cars had the right of way because the robot was green. He said according to him, the one who was wrong was the one who turned in front of oncoming traffic. He was questioned by the first defendant who put it to him that he had departed from the version he had given at the magistrate's court. He then said by then he was not a qualified driver so he could not answer that.

First defendant's version was that he got to the robot controlled intersecting where 23rd Avenue crosses Matopos road and that he was coming from the city centre along Matopos road, in the opposite direction to plaintiff's. At the intersection, he found the robot red. He intended to turn right into 23rd Avenue. The robot turned green, he drove into the intersection then stopped at the centre. The robot turned amber, after having slightly turned, he heard a collision. The first defendant's motor vehicle was hit on the left front wheel. He said that when he decided to turn right, plaintiff's motor vehicle was not yet there, there was instead a white van. He said the impact occurred after he had turned. He is of the view that plaintiff was speeding and failed to stop.

On the question of liability

The law applicable at robot controlled intersections as is applicable to the Zimbabwean context is given by Professor Feltoe in his book "*A Guide to the Zimbabwe Law of Delict* 2006 Edition where he quotes the case of *Hayness* v *Min of Defence and another* 1992 (2) ZLR 262 (H) wherein it was held that a person turning right at a robot controlled intersection should exercise care when the light is on amber.

He also refers to the case of *Mutendi* v *Maramba and another* 1994 (2) ZLR 1 (H) where a car turning right was hit by an oncoming emergency taxi when the robot was red for the taxi it was held that even if the robot was red, plaintiff was also foolish in proceeding when the taxi was approaching at high speed.

In the South African case of *Jacobs* v *The Road Accident* find 2011 ZAGPHC 121 it was held that a driver entering an intersection when the traffic light signal is green in his favour, has to regulate his speed and entry so as not to endanger the safety of traffic which entered the intersection lawfully and which may still be in the intersection.

It was also held in this case that a driver turning right at a robot controlled intersection has a greater duty towards both the traffic flowing as well as the traffic approaching from the opposite direction. It was further held in the case of *R v Conct* 1945 TPD 133 at 134 that a driver turning right should only turn once he had satisfied himself that there is room enough between his motor vehicle and the approaching vehicles to allow him to complete the manouvre safely.

Both the South African and Zimbabwean authorities seem to lay greater blame on the driver who is turning right in front of oncoming traffic although with the two Zimbabwean cases cited herein damages were apportioned as the driver proceeding straight was also held to be negligent to some degree.

From plaintiff's own version it does not appear as if he did exercise caution as he entered the robot controlled intersection despite the fact that the robot was green in his favour as he alleges. He simply shot through the intersection on the strength that he had the right of way. The first defendant's version creates problems for this court in that, his own case is that he found the robot red, waited for green, then went in waiting to execute his turn once the robot was amber. He then says he executed his turn when the robot was amber, resulting in the collision. Plaintiff

says the robot was green in his favour, first defendant says the robot was then amber. There is no independent witness that has been called to testify as to the status of the lights at the material time. I say so for the other witness was a passenger in plaintiff's car and under cross examination he admitted that what he had told the magistrate's court which acquitted the first defendant on criminal charges relating to the accident was different from what he was saying before this court. He thus cannot be found to be reliable on that account.

He explained the discrepancy by stating that he was not a driver then. During his testimony he also said both cars has the right of way.

In my view both parties were to some extent negligent. Plaintiff by failing to exercise caution when he approached a robot controlled intersection even if per his version it was green. First defendant by proceeding to turn right in front of oncoming traffic even if per his version the light was amber and there were no cars approaching. I will not try to resolve the issue of what the traffic lights were at the material time as I have no independent testimony in that regard. The finding of this court is that if plaintiff proceeded as alleged he was also negligent and that if first defendant also proceeded as alleged he was also negligent, more negligence of cause, attributable to the one who was turning for he is the one who ultimately was in the wrong place at the material time. I would then apportion blame at 80% for the first defendant and 20% for the plaintiff.

Vicarious liability of the second defendant

It is the finding of this court that no basis has been factually formulated to establish that first defendant was employed by the second defendant. First defendant himself said he would use second defendant's truck to ferry second defendant's cattle and that he would be entitled to use it in turn for his own benefit. Vicarious liability is a doctrine that lays down that an employer is vicariously liable for all the delicts committed by his or her employees (who are not independent contractors), when they are acting in the course and within the scope of their employment other than alleging that first defendant drove second defendant's motor vehicle, the aspect of employer-employee was not proven by the plaintiff in light of what the defendants said. I accordingly find that second defendant's liability by virtue of vicarious liability has not been fully established.

Special damages

Plaintiff is entitled to 80% of the special damages claimed being ambulance and hospital fees totaling $624-25 meaning plaintiff is entitled to be paid $499-40 by first defendant.

As for the damages for pain and suffering, a medical report, that reviewed plaintiff's records but did not seemingly examine the person of the plaintiff so that the degree of pain and relevant matters would be canvased, was produced. The medical report is inadequate in so far as the degree of pain which is what plaintiff's claim hinges on. Plaintiff for himself says he suffered excruciating pain. Plaintiff's counsel has not provided the court with case law where a plaintiff is awarded damages for pain and suffering only with no disability, and in this regard, the damages for pain and suffering are at the discretion of this court. There being no disability, this court holds the view that an amount of $1500-00 is adequate for the pain suffered by the plaintiff. Again, first defendant will bear 80% of this amount which translates to $1200-00.

As for the damages for the loss of the motor vehicle, this court holds the view that none were proven. The plaintiff provided three quotations to show that his motor vehicle was written off but plaintiff was also duty bound to provide quotations on the replacement value of the said motor vehicle. Garages are in a position to give a quote even for accident wrecked motor vehicles if they are made aware of the year, model etc. Plaintiff should have provided quotations in this regard and not just pluck a figure out of the air. The second defendant's quotation is not evidence tendered by the plaintiff. Plaintiff was not asked to verify same and establish his claim upon it. It was not tendered in support of plaintiff's case but as a challenge. It was not even an offer to pay that much by the second defendant. I have already found that second defendant is not vicariously liable in the circumstances. It is the finding of this court that the damages relating to the loss of the motor vehicle remain unproven before this court.

The plaintiff was duty bound to lay a proper foundation for the claim and since none was so laid that claim fails. It is for these reasons that I order as follows:

Plaintiff's claim succeeds as against the first defendant who is ordered to pay plaintiff the following sums:

a) The sum of $499-40 as special damages.

b) The sum of $1200-00 being damages for pain and suffering.

c) That first defendant is ordered to pay the costs of suit.

R Ndlovu and Company, plaintiff's legal practitioners