MANGWIRO SIBANDA
versus
JANE HAPPIAH CHIKUMBA
and
ALTFIN INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 6 February 2014 and 27 February 2014

Civil Trial

Plaintiff in person
Ms *P. Takawadii,* for the defendants

CHIGUMBA J: The plaintiff issued summons against the defendants, on 11 September 2012, claiming:

(a) Payment of the sum of US$3 700-00 being the cost of repairs to his Toyota sprinter motor vehicle registration number AAQ 5021 negligently damaged by the first defendant on 17 December 2011 who was at the time driving a Toyota Land Cruiser registration number AAX 3378 which vehicle at the material time was insured by the second defendant in terms of part (iv) of the Road Traffic Act [*Cap 13:11*]
(b) Payment of consequential damages in the sum of US$9 750-00 being the cost of hiring a replacement vehicle during the period 18 December 2011 to 30 June 2012 while plaintiff's vehicle was being repaired.
(c) Interest on the sum of US$13 450-00 at the prescribed rate from the date of summons to date of final payment.
(d) Costs of suit.

In his declaration, the plaintiff averred that, a road accident occurred along Alpes road, between Cambridge and Borrowdale West Harare, on 17 December 2011, between his vehicle and that belonging to the first defendant. He averred further, that the accident was caused solely by the first defendant's negligence, based on the fact that; she was driving at excessive speed,

she made a right turn in the face of oncoming traffic when it was dangerous to do so, she failed to keep a proper lookout, she drove too fast given the prevailing traffic conditions, she failed to apply brakes to her vehicle timeously or at all, she was driving without due care and attention, she failed to keep her vehicle under proper control. The plaintiff alleged that defendant paid an admission of guilt fine.

The plaintiff averred that, as a result of the accident, his motor vehicle sustained damage to the gear box, radiator, bonnet, headlamps and the windscreen. He averred further, that the vehicle was repaired by H & J panel beaters, of Bluff hill, Harare, at the second defendant's instance. When he took delivery of the vehicle, plaintiff was not satisfied with the repairs done to his vehicle. He then procured quotations for sums in excess of US$3 700-00 from different panel beaters, with a view to restoring his vehicle to the condition it had been in, prior to the accident with 1st defendant. He obtained a report from the Automobile Association of Zimbabwe Private Limited which confirmed that the repairs done to his motor vehicle were not satisfactory. The plaintiff alleged that, the second defendant subsequently advised him to surrender his vehicle in return for an amount of US$3 500-00 which it claimed was the market value of plaintiff's vehicle. The plaintiff disputed this, and insisted that the value of his vehicle was US$6 300-00.

The plaintiff averred that he expected his loss to be mitigated by June 2012, and because he was deprived of his car he rented a vehicle at US$50-00 per day from 18 December 2011 to 30 June 2012, when his vehicle was satisfactorily repaired. The defendants filed their plea to the plaintiff's claim on 18 October 2012. The first defendant admitted to driving without due care and attention but denied any form of negligence. Defendants put plaintiff to the proof of the damages allegedly incurred. The defendants averred that, on 20 January 2012, the plaintiff signed a satisfaction note on completion of the repairs, after signing a release form on 19 January 2012, in which he authorized the second defendant to pay directly to the panel beaters, for the cost of repairs. The defendants averred further, that on 19 January 2012, the plaintiff signed a release form in which he released the defendants from any further actions or suit emanating from the accident. On the issue of inadequate repairs to the plaintiff's vehicle, the defendants averred that the plaintiff's concerns had been noted, but due to the fact that his vehicle had sustained damage from a previous accident, he was asked to contribute to the repairs of his vehicle. The

defendants denied that plaintiff's motor vehicle was valued at US$6 300-00 and put him to the proof thereof.

In his replication to the defendants' plea dated 11 December 2012, the plaintiff denied each and every allegation of fact and of law and put the defendants to the proof thereof, and joined issue with the defendants. At the pre-trial conference, on 4 September 2013, the matter was referred to trial on the following issues:

1.Whether or not the plaintiff is entitled to disbursement, the same claim having been settled, and if so in what amount?

2.Whether or not the plaintiff was entitled to hire a vehicle and if so the quantum of the hire charges.

Admissions were made by both parties:

1. The Defendant admitted liability for the accident.
2. The Plaintiff admitted that his vehicle had been involved in another accident prior to the accident in question.

At the hearing of the matter, the plaintiff, a self actor, testified and told the court that: "his vehicle was taken to the panel beaters for repairs on the day of the accident, 17 December 2012, at the first defendant's instance, and a promise was made to him, that the vehicle would be repaired the same day. He told the first defendant that he needed his vehicle as a matter of urgency because he intended to travel, and she promised him that, because she knew the manager at H & J Panel Beaters, the vehicle would be repaired that very day. He arranged for cover quotations to be done with the assistance of the manager at the panel-beaters".

The plaintiff then referred to copies of the quotations which he wanted to show the court. Counsel for the defendants objected to the production of the quotations, on the basis that they had not been discovered in terms of the rules, and that the defendants were hearing of the quotations for the first time. The court sustained the defendants' objection, after referring to the schedule of documents discovered and explaining to the plaintiff, who was not legally represented, the reason why it could not admit his quotations into evidence. The plaintiff continued to testify. He told the court that: "After the cover quotations were done the vehicle was assessed by Mr. Chiunda, an assessor, who wrote a report indicating that plaintiff's vehicle was valued at US$5 000-00." The report was not tendered into evidence.

The plaintiff told the court that, two days after the accident, his vehicle had not been repaired, and that, on contacting the first defendant she referred him to the second defendant, the insurer of her vehicle. The plaintiff asked the court if he was allowed to show it text messages exchanged between him and the first defendant at the material time. He applied to have a printout of his phone admitted into evidence. The printout was admitted as exhibit 1. It was dated Friday December 23, 2011, 11:07 pm, from the first defendant to the plaintiff, and it read as follows:

> "I have no input on that one, Mr. Sibanda. Everything to do with your car is with the insurers and JMC"

The plaintiff told the court that he was aggrieved by the first defendant's attitude because she had previously assured him that his vehicle would be repaired in one day. He proceeded to hire a motor vehicle to use, and in his words, "...with the first defendant's knowledge and consent". The plaintiff told the court that his vehicle took a month to be repaired, and consequently extended the car hire period because he needed a car to go to his rural home that Christmas. After that, he signed some papers at second defendant's offices which were allegedly explained to him as documents to enable him to collect his motor vehicle from the panel-beaters'. He testified that he signed the documents provisionally, because he had not yet seen the car, and to demonstrate this, he alleged that the documents he signed were not witnessed, and therefore invalid, because he told the second defendant that he would come back after he got his vehicle for the witnessing of the documents.

The plaintiff collected his vehicle on 20 January 2013, and signed a release note at the panel-beaters. He took a ten minute video of the release process. Next morning, on his way to work, he discovered that the gearbox on his vehicle was not functioning properly, the windscreen wipers were not working, and that the vehicle had a lot of other defects. Around 22 January 2013, the plaintiff brought his complaints to the second defendant, where he was told that the panel-beaters had already been paid, on his instructions when he signed the form authorizing the defendant to pay. Plaintiff's letter of complaint to the second defendant, dated 23 January 2012, was admitted into evidence as exhibit 2. In the letter, he asked the second defendant to delay payment to H & J panel beaters until the matter was resolved.

The second defendant promised to have the vehicle assessed, and Mr. Chiunda assessed the vehicle but gave his report to the second defendant. The second defendant then indicated that the vehicle was a write off, and offered US$3 500-00 in full and final settlement. The plaintiff alleged that he refused this offer because he had valuation reports which showed that his vehicle was valued at US$6 300-00. No application was made to tender that alleged valuation reports into evidence. In the spirit of assisting an unrepresented litigant the court asked the plaintiff whether he wished to tender the valuation reports its evidence. The plaintiff replied that the reports had not been discovered. The plaintiff admitted that his vehicle had been damaged in a previous accident.

Under cross examination, the plaintiff told the court that his level of education was Ordinary level and that he is a self employed freelancer who analyses chemicals for a living. On being asked to provide proof that he communicated to the first defendant his intention to hire a vehicle to use at her expense, he replied that he had no proof, their communication was verbal. He denied that it a luxury on his part to hire the vehicle, and averred that a vehicle was essential to his business. The plaintiff admitted that his vehicle went to the panel beaters at 3pm on the day of the accident. On being questioned as to how the first defendant could assure him that the vehicle would be repaired the same day given the lateness of the hour, he told the court that although the damage to his vehicle was extensive, it was feasible that repairs could take a short period of time.

He admitted signing the form that authorized the second defendant to release payment to the panel beaters on 19 January 2013, but stated that the signature was provisional because it was not witnessed. He admitted that he had signed a clearance note in which he acknowledged receiving his vehicle in good condition order and repaired to his complete satisfaction, but stated that the form was subject to his findings after checking the vehicle. He reiterated that his vehicle was valued at US$6 300-00. Finally, he told the court that, to mitigate his loss, he hired the cheapest vehicle that was available at the time. He admitted that his letter of complaint, dated 23 January 2013, came three days after he authorized the second defendant to pay the panel beaters on 20 January 2013.

The plaintiff then closed his case. The defendants applied for absolution from the instance on the basis that plaintiff had failed to prove a *prima facie* case, and that, the plaintiff

had failed to prove its entitlement to payment of hire charges of a replacement vehicle, and that, after the second defendant had paid for the repairs, there was no continuing legal liability on it to advance more money to the plaintiff for further repairs or for any other reason.

The issues for determination at trial were whether the plaintiff was entitled to a further disbursement after the second defendant had paid for the repairs to his vehicle, and if so, in what sum, and whether the plaintiff was entitled to hire a vehicle, and if so whether he ought to be reimbursed for the cost of the car hire. The onus was on the plaintiff to prove his claim on all the trial issues, by adducing sufficient evidence to meet the standard of proof in civil cases, proof on a balance of probabilities. The question that the court must ask itself, in an application for absolution from the instance, in the circumstances of this case is this: Did the plaintiff place sufficient evidence before the court to show that he was entitled to be paid more money by the defendants after the cost of repairs to his vehicle were paid in full. Secondly, was the plaintiff entitled to hire a vehicle for his use from the date when he expected his vehicle to be repaired to the date when it was repaired?

After a party has closed its case, the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance. See Herbstein & Van Winsen, *The Civil practice of the Supreme Court of South Africa*, 4th ed p841. The term 'absolution from the instance' is used to describe the finding that may be made at either of two distinct phases of the trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant. At the close of the plaintiff's case, when both parties have had opportunity to present whatever they consider to be relevant, the defendant will be 'absolved from the instance, if upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. See Schwikkard Van Der Merwe *Principles of Evidence* 3rd ed p578.

In the case of *Machewane* v *Road Accident Fund* 2005 (6) SA 72(T), absolution from the instance was defined as follows:

"It means that the plaintiff has not proved her case against the defendant. It is not a bar to the plaintiff re-instituting the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution is the proper order when after all the evidence the plaintiff has failed to discharge the

normal burden of proof. Absolution from the instance, in effect brings the proceedings to an end at that stage because there is no prospect that the plaintiff's claim might succeed, and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim" In LH Hoffman, DT Zeffert *'The South African law of Evidence* 4th ed, p 507, it is stated that:

> "A decree of absolution from the instance is derived from Dutch law…It is the appropriate order when after all the evidence the plaintiff has not discharged the ordinary burden of proof. Its procedural advantage is that it enables the plaintiff to bring another action on the same facts, a privilege which is denied to the defendant if he fails in an action in which the burden of proof is on him. Its other use is an extension to civil actions of the rules for withdrawing a case. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution"

In *Gascoyne* v *Paul & Hunter* 1917 TPD 170 @ 173 the court stated that:

"The question therefore is, at the close of the case…was there a *prima facie* case against the defendant…in other words, and was there such evidence before the court upon which a reasonable man might, not should give judgment against Hunter?" In the case of *United Air Charters* v *Jarman* 1994 (2) ZLR 341(S*)* it was held that:

"The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought (o) find for him. See *Supreme S* v *Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco* v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E.

In more recent times, in this jurisdiction, in the case of *Delta Beverages* v *Onismo Rutsito,* SC42-2013, an appeal against a High Court judgment dismissing with costs an application for absolution from the instance, the respondent sued the appellant for damages in the sum of US$20 051-00 and costs of suit, on the basis that he had consumed a contaminated coca-cola beverage and that further inspection of the bottle had revealed a 'rusting iron nail and brackish foreign substances'. The appellant was the manufacturer of the beverage in question and the question for determination by the court a quo was 'whether the appellant owed the respondent a duty of care to ensure that the product is safe, clean, healthy and fit for human consumption', or alternatively, 'whether the appellant had negligently allowed the production

and selling of contaminated coke'. The court was satisfied that 'the respondent did not prove any damage such as would have founded a cause of action under the law of delict, and that, 'clearly, whatever distress or anxiety or nervous shock he may have experienced was transitory…and in the circumstances, the appellant had no case to answer, and that should have been the end of the matter and absolution from the instance ought to have been granted. At page12 of the judgment, on the alternative claim based on negligence the court said:

"I am satisfied that for the additional reason that negligence was not proved and a causal link shown between the beverage in question and the appellant, absolution should have been granted." See also *Mining Industry Pension Fund* v *DAB Marketing Private Limited SC 10-11.*

Could this court find for the plaintiff on the basis of the evidence which he led? The test established in terms of the numerous decided cases necessitates an analysis of the evidence led by the plaintiff before he closed his case, and a determination of whether, on the basis of that evidence, the court, could give judgment in favor of the plaintiff. In other words, was the evidence enough? Was it sufficient? Did it support the plaintiff's averments with sufficient clarity and particularity? The degree of proof required is 'proof on a preponderance of probability'.

The plaintiff told the court that his level of education was Ordinary level. From his testimony and his responses under cross examination, the court surmised that he was well aware of the legal implication of the documents that he signed on 19, and 20 January 2013 at the second defendant's offices. He authorized the second defendant to pay the panel beaters for the repairs He took delivery of his vehicle and indemnified the second defendants against any further claims. The plaintiff's averments that the documents were not witnessed therefore invalid were not believed by the court. The plaintiff reads and understands English very well. He is so proficient in English, that he conducted his own case before the court. He could have endorsed on the documents that he was signing conditionally. He chose not to, because the defence he is raising is an afterthought. The plaintiff signed release forms and indemnity forms before the second defendant with full knowledge of the implications.

The plaintiff's evidence that first defendant promised him that his vehicle would be repaired within a day after the accident was not believed by the court. He testified that the vehicle made it to the panel-beaters by 3 o'clock on the day of the accident. It is difficult to

believe, and not supported by the evidence, that the first defendant intended that plaintiff would have his vehicle, fully repaired by 3pm the next day after the accident. The plaintiff admitted that the damage to the vehicle was extensive. A reasonable man on the Mabvuku commuter omnibus would surely not believe that such an extensively damaged vehicle would be repaired within twenty four hours?

The tragedy in this matter is that the plaintiff's conduct of his own trial was a farce, and an exercise in futility. He clearly had no idea about the rules of evidence otherwise he would have tendered the necessary documentary evidence required to buttress his case, especially considering that he did not intend to call any witnesses other than himself. He testified that the vehicle was assessed, but in the absence of the assessment report, the court was unable to independently verify his claim as to the value of his vehicle. The assessment report, as well as the report allegedly done by the Automobile Association of Zimbabwe, were not discovered in terms of the rules. Plaintiff was hamstrung by his ignorance of the High Court rules. He failed to place the relevant evidence before the court, which was in his possession, but which he had not discovered in terms of the rules.

By 23 December 2011, according to exh 1, the first defendant had advised the plaintiff that the matter was being handled by the second defendant, her insurers. There is insufficient evidence before the court to support the plaintiff's averment that he hired a vehicle to use, with the first defendant's knowledge and consent. In any event it was not up to the first defendant to consent to such an arrangement once the second defendant became seized with the matter. 1st defendant was insured against accident and damage. She referred the plaintiff's claim to her insurers who were processing it. No evidence was led that plaintiff approached the second defendant and advised that if his car was not repaired immediately, he would hire a vehicle to use for business and to take his children to school. No evidence was led that the second defendant authorized the plaintiff to hire a vehicle for his use whilst his accident damaged vehicle was being repaired. Unfortunately, no evidence was placed before the court to support the plaintiff's claim about his vehicle being valued at US$6 300-0. Independent verification of this averment would have enabled the court to assess whether the second defendant's offer to pay the plaintiff US$ 3 500-00 and write off the vehicle is fair and reasonable in the circumstances.

There is insufficient evidence generally, on a balance of probabilities to establish a *prima facie* case in favor of the plaintiff, and against the defendants. The plaintiff failed to discharge the onus on him to prove his case. It follows that absolution from the instance is granted in favor of the two defendants. The plaintiff shall pay the defendants' costs.

In person, Plaintiff
P. Takawadii & Associates, Defendants' legal practitioners