TIRAN TRANSPORT (PVT) LTD
and
RESERVE BANK OF ZIMBABWE
and
JORAM MAKONDE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 7 June 2016 & 12 October 2016

Civil continuous roll

T Mpofu, for the plaintiff
V Mukwachari, for the defendants

MATANDA-MOYO J: On 27 August 2008 at about 14:30 hours at the 28km peg along the Harare-Masvingo road, an accident occurred between plaintiff's motor vehicle and the defendant's vehicle driven by the second defendant. The plaintiff's vehicle was damaged and the costs for repairs amounted to $33 552.50. The plaintiff claims the above sum from the defendants jointly and severally on the basis of causal negligence.

Whilst accepting causing the accident, the defendants opposed the action and defended the claim on the basis that second defendant was not negligent. They pleaded that a sudden emergency had arisen due to a tyre bust without any fault of the second defendant. The defendants pleaded further that the second defendant took all measures to avoid a head on collision resulting in first defendant's vehicle hitting the body of the plaintiff's vehicle. Alternatively the defendants attempted to plead contributory negligence on the part of the plaintiff's driver. However contributory negligence was not properly pleaded by the defendants.

At the Pre-Trial conference the following issues were referred to trial.

1. Whether or not the summons disclosed a cause of action against the first defendant?
2. Whether or not the truck driven by the second defendant had a tyre burst before the collision?

3. Whether or not the second defendant was negligent as alleged in the declaration?
4. Whether there was contributory negligence on the part of the plaintiff's driver and apportionment.
5. Whether or not the plaintiff is entitled to damages in the sum of $33 552.50?

On the onset of the trial the defendants consented to the amendments sought to the plaintiff's declaration which amendment disposed of the first issue referred for trial. The parties also agreed to the following facts as common cause;

a) That the point of impact was in the plaintiff's driver's lane of travel and
b) That the quantum of damages is unchallenged at $33 552.50. The only issue remaining is whether or not the defendants are liable for the damages caused.

As I have already reiterated above the defendants failed to properly plead contributory negligence. In the plea of contributory negligence three key ingredients must come out;

1. the fault of the plaintiff
2. if so, how this fault was the causative of damages and
3. if so, the extent it would be just and equitable to reduce damages see *Boothman* v *British Northrop Ltd* (1972) 13 KIR 112 (CA), *Sahib Foods Ltd* v *Paskin Kyriakides Sands* (A Form) [2003] EWCA CIV 1832; [2004] PWLR 22. The defendants must plead the particulars and extent of contributory negligence. Herein the defendant failed to properly plead contributory negligence. I proceeded to deal with the matter on the basis that no contributor negligence was pleaded.

Francis Kahuni testified that he was the driver of the plaintiff's vehicle on the fateful day. He testified that as he approached the 28km peg at around 2pm on 27th August 2008, he observed a Mitsubishi Canter driven by the second defendant suddenly leaving its lane of travel straight into his lane. It was in the afternoon with clear visibility. This witness did not observe any tyre burst or loss off control of vehicle by the second defendant. He testified that after impact the second's defendant's vehicle was pushed some 30m. His explanation was that this was due to the fact that his vehicle was a heavy vehicle. He disputes the second defendant's version that the accident was caused by a tyre burst. He also testified that the second defendant was carrying two passengers in his vehicle one of whom was a police officer. He described the injuries sustained by the police officer. Upon disembarking this witness heard the police officer complaining of how the second defendant had been sleeping whilst driving along the way. He heard the police officer saying the accident was caused by the second defendant who was sleeping and thereby entering the plaintiff's lane of travel.

This witness testified that the second defendant was travelling fast such that this witness had no ample time to do anything to avoid the accident. Though he tried to go to the extreme left, it saved no purpose as the second defendant's vehicle had already collided with his vehicle. He testified that the accident was solely caused by the second defendant's negligence. He maintained that the tyre burst only occurred on collision. Upon collision the front tyres of his vehicle burst and it became difficult for him to control the vehicle.

This witness gave his evidence well and was not shaken under cross-examination. He stuck to his story that the tyre burst occurred during impact. He also maintained that there was a police officer in the second defendant's vehicle.

Mugove Musarurwa testified that he was a passenger in the plaintiff's vehicle on that day. He explained that the plaintiff's vehicle is a left hand drive. He was seated on the right seat and had clear view of what happened. He testified that he as the second defendant's vehicle entering into their line of travel. He shouted to the first witness to go to the left. Before he could finish the instruction the accident had occurred. He also maintained there was a police officer and described injuries sustained by the officer. He also gave his evidence well and was not shaken under cross-examination. He also heard the police officer complaining that the second defendant had been sleeping along the journey and nearly had them killed before. He admitted he did not take the police officer's name but insisted that what the officer said was consistent with the way the accident occurred. He could clearly observe the vehicle. The vehicle had no burst tyre before the collision. He refuted the police findings that the accident was caused by a tyre burst. He insisted the second defendant was sleeping and negligently caused the accident.

The defendants called three witnesses. The first was Joram Makonde, the second defendant. He testified that he was driving the second defendant's vehicle on that day. He confirmed he was travelling from Zvishavane where they had delivered fuel at Zvishavane Police Station for a programme run by the first defendant. He testified that they had travelled to Zvishavane the previous day and put up at Driefontain Lodges. They had left Driefontein Lodges at 0800hrs on the day of the accident proceeding to Harare. They would stop along the way in search of scarce commodities at the time. At the 28km peg before Harare at around 14:30 hours his vehicle had a tyre burst, he lost control of the vehicle resulting in the vehicle entering plaintiff's lane of travel and colliding with the plaintiff's vehicle. He testified that he managed to avoid a head on collision. His vehicle was hit on the side. He

confirmed that someone accused him of sleeping on the wheel. He said that person came from the plaintiff's vehicle. He denied that there was a police officer in his vehicle.

The above witness testified that the police attended the scene of accident and concluded that the accident was as a result of a tyre burst. No criminal charges were laid against either party. He denied that he was sleeping whilst driving. He testified that he was well-rested after putting up at Driefontein lodges. They had arrived at the lodges at around 2000hrs the previous day and only left at 0800 that morning. Under cross-examination he admitted it was his vehicle which entered the plaintiff's lane of travel thereby causing an accident. He failed to explain why he failed to get expert evidence to prove that the tyre burst occurred the accident. He admitted he knew that the plaintiff was disputing the fact that his vehicle had a tyre burst before the accident. At one stage he also admitted that the tyre burst could have happened after collision. He also admitted that he had failed to avail the service history of the vehicle upon request by the plaintiff. He also did not have the vehicle log book which could have shown what time they left Harare for Zvishavane and what time they left Zvishavane. His explanation was that he left the log book in the vehicle after the accident. He also failed to answer on the conditions of the tyres at the time. The witness did not fair very well under cross-examination. He also omitted to produce crucial evidence in the form of log book, service history of vehicle and condition of tyres, which evidence could have greatly assisted the court in determining the matter. He failed to properly answer the suggestion put to him under cross-examination that he withheld that evidence as it contradicted his oral evidence in court.

Samson Shayachimwe testified on behalf of the defendants. He was a passenger in second defendant's vehicle on that day. He is employed by the first defendant as a fuel attendant. He testified that they had travelled to Zvishavane the previous day where they delivered fuel at Zvishavane Police Station. They put up at Driefontain Lodges and left for Harare that morning at 0800 hours. Along the way they would stop to buy scarce commodities. At the 28 km peg before Harare he heard a sound and realised they had had an accident. He testified that he was the only passenger in the vehicle. He denied there was a police officer in their vehicle. This witness parroted the last witness on how they travelled. However he could not corroborate the last witness on how the accident occurred. This witness did not observe any loss of control of the vehicle by the last witness. All he heard was a bang, the collision. No receipts were tendered to show that they had put up at Driefontain Lodges.

This witness testified under cross examination that he was added to the list of witnesses on 30 May 2016. Before then he was not a witness. He admitted that in his summary of evidence he did not say anything about the police officer.

Charles Muendamberi was the last witness for the defence. He is employed by the first defendant as a transport manager. He has been in that department since 2008. He testified that the vehicle driven by the second defendant on that day was purchased in 2007. It was used for ferrying BACOSSI fuel to various parts of the country. This witness testified that he could not find the records for this particular vehicle. He testified that before travel certain documents were filed in like authority to travel and daily log sheets for movement timings. He was not present when the accident occurred. Under cross examination he admitted he had no documentations to prove his evidence.

This witness's evidence was not useful to the court as he was not present at the time of the accident. He also failed to produce any documents relating to the vehicle.

From the above evidence I am of the view that the plaintiff has discharged the onus on it to show that the second defendant's vehicle negligently left its lane of travel, entered plaintiff's driver's lane of travel thereby colliding with the plaintiff's vehicle. The two witnesses for the plaintiff gave evidence well that there was a police officer in the second defendant's vehicle. They were not shaken under cross examination. I am inclined to agree with their evidence that indeed there was a police officer in the second defendant's vehicle. The significance of the presence of the police officer is the words attributed to him. The two plaintiff's witnesses testified that they heard the police officer saying the second defendant had been sleeping whilst driving along the way. The second defendant confirmed hearing such words on the day of the accident but went on to say the words were spoken by a person who disembarked from plaintiff's vehicle. The plaintiff's second witness admitted during evidence in chief of charging towards the second defendant asking him why he would drive whilst sleeping. He testified that he was repeating the police officer's words.

It is our law that direct evidence carries great evidential weight moreso when coming from credible witness. However our law also allows the admission of first hearsay evidence as provided for under s 27 of the Civil Evidence Act.

Section 27 of the Civil Evidence Act [*Chapter 8:01*] provides;

> "27. First hand hearsay evidence
> (1) Subject to this section evidence of a statement made by any person whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact

mentioned or described in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings.

(2) ……..

(3) If a statement referred to in subsection 1

(a) Is not contained in a document, no evidence of the statement shall be admissible unless it is given by a person who saw, heard or otherwise perceived the statement being made;

(b) …….

(4) In estimating the weight if any, to be given to evidence of a statement that has been admitted in terms of subsection (1), the court shall have regard to all the circumstances affecting its accuracy or otherwise and in particular, to-

(a) Whether or not the statement was made at a time when the facts contained in it were or may reasonably be supposed to have been fresh in the mind of the person who made the statement and

(b) Whether or not the person who made the statement had any incentive, or might have been affected by the circumstance, to conceal or misrepresent any fact."

I am satisfied that the said words were spoken by the police officer immediately after the accident. The police officer had no motive to lie against a driver who had assisted him with transport to Harare. The circumstances of the accident seem to confirm the police officer's version of events. There was no tyre burst and the only other reasonable explanation of the car veering into oncoming traffic lane of travel, especially in the face of an oncoming vehicle confirms the words of the police officer. Even the second defendant accepted that such words were spoken immediately after the accident.

Once the plaintiff had discharged the onus on him that the accident was negligently caused by the second defendant, the onus shifted to the defendant to prove on a balance of probabilities that indeed there was a tyre burst before the accident. The defendants failed to so prove. No expert evidence was called to try and prove that.

Negligence in the form of culpa has been defined as failure to exercise due care that a reasonable person would have exercised in the circumstances – see *Kruger* v *Coetzee* 1996 (2) SA 428 A, *Mukheiber* v *Raath and Another* 1999 (3) SA 1065 (SCA).

The second defendant failed to exercise such due care. He should have parked his vehicle and slept. Continuing to drive whilst constantly falling asleep on the wheel was an act of negligent by the second defendant. A reasonable person would pull off the road and rest for a while. I am thus satisfied that the plaintiff has shown that the accident was solely caused by the second defendant's negligence.

The conduct of the defendants of withholding evidence was also not very helpful to them. All documents which were in their possession which could have assisted the court in determining the days of travel were not produced. No logbooks were produced, no receipts

showing the second defendant had put up at Driefontain Lodges, no service history of the vehicle were produced. I ended up drawing a negative inference that these documents were not produced as they contradicted the defendant's story. Ultimately I decided not to believe their story. Resultantly, I am of the view that the plaintiff managed to prove its case.

Since the issue of vicarious liability is admitted I need not go into details. Equally the quantum of damages is accepted.

In the result judgment is entered in favor of the plaintiff in the following;

That the first and second defendants jointly and severally, the one paying the other to be absolved pay the plaintiff:

1) The sum of $35 552.50 for damages caused to the plaintiff's vehicle
2) Interest on the above sum at the rate of 5% per annum from date of judgment to date of final payment and
3) Costs of suit.

Coglan, Welsh & Guest, plaintiff's legal practitioners
T. H. Chitapi & Associates, 1st & 2nd defendant's legal practitioners