ARVIND NAYER
versus
ROLLEM MOTORS (PVT) LTD
t/a KENSINGTON SERVICE STATION

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 9 March 2017 & 27 June 2018

Civil Appeal

Appellant in person
Respondent in default

NDEWERE J: On 17 September, 2013, the appellant bought 41.3 litres of petrol for $63 from the respondents, who were trading as Kensington Service Station for his Mazda 3 vehicle, registration number ABM 9742. Two days later, his motor vehicle started jerking and lost transmission. He called Hino Zimbabwe who towed the vehicle to their garage. On 28 September, 2013, they drained fuel from the car, cleaned the fuel tank, changed the fuel pump and fuel filter and put new fuel. After that, the car performed well.

The appellant approached the respondent thereafter and accused them of selling him contaminated fuel. He sought damages from them. The respondents disputed the claim and said their tanks had been checked by Total Zimbabwe and found to be clean so the contamination was not from fuel they dispensed from their tanks.

On 23 October, 2013, the appellant, as plaintiff in the court *a quo*, instituted a claim for $739 damages. He said the $739 was the total damages incurred as a result of buying contaminated fuel from the respondent. The respondent, as defendant in the court a quo, filed its plea on 11 November, 2013. It disputed the claim. The matter was referred to trial. At the conclusion of the trial, the court a quo dismissed the appellant's claim with costs on the ordinary scale on 24 February, 2014.

On 12 March, 2014, the appellant noted an appeal against the magistrate's decision. His grounds of appeal were as follows:

1. The learned magistrate erred and misdirected herself in granting the judgment in favour of the respondent by dismissing the appellant's claims for payment of damages that came as a result of contaminated fuel sold to the appellant by the respondent.
2. The learned magistrate also seriously misdirected herself in denying the warranty and service books and receipts brought by the appellant's witness from Hino Zimbabwe which confirmed that the appellant's motor vehicle was regularly serviced.
3. The court a quo also erred and seriously misdirected itself in not considering the fact that the respondent's tanks were only checked on the 11th of October, 2013 after the appellant had experienced problems with the contaminated fuel and that the respondent failed to produce a report confirming its averments that their tanks had been checked prior to 17 September, 2013, when appellant purchased the said contaminated fuel.
4. The learned magistrate also seriously misdirected herself in handling a matter which involved technical issues of motor vehicles when she was showing signs of failing to grasp the technical issues raised when she could have recused herself from the matter since it involved technical issues which the learned magistrate could not handle.
5. The learned magistrate also erred and seriously misdirected herself in ordering the appellant to pay for costs to the respondent yet it's appellant who has suffered great prejudice due to the contaminated fuel sold to him by the respondent.
6. The court a quo also erred and seriously misdirected itself in not considering the report produced by Hino Zimbabwe which confirmed that the fuel sold to the appellant was contaminated and that the said fuel was still kept at Hino Zimbabwe awaiting collection. The said contaminated fuel could easily have been part of the exhibits which would have gone a long way in confirming the appellant's claims and averments.

The appellant prayed for an order setting aside the whole judgment by the court a quo and that his claim be granted, with costs.

The background facts were common cause. It was common cause that the appellant bought fuel from the respondent on 17 September, 2013. It was not disputed that two days later

his car stopped. It was not disputed that the fuel which was drained from the motor vehicle on 28 September, 2013 was contaminated. It was not disputed that after the fuel pump and filter were changed and new fuel put in a cleaned up tank, the car was able to perform.

The point of dispute was whether appellant bought contaminated fuel from the respondent or whether it was the state of his fuel tank, pump and filter which contaminated the fuel. The evidence which was led during the trial showed that the fuel filter was clogged with dirt. The evidence was that clogging of a filter happens over a period of time as fuel passes through the filter. The court was told that if the filter is not changed for a period of about six years, it is likely to get contaminated. It was further stated that what determines the rate of contamination is the type of fuel. The plaintiff's own witness, Hino Zimbabwe, testified that they had not changed the plaintiff's filter before. The same witness also confirmed that there was no proof that the fuel which they found in plaintiff's tank was from the defendant's tanks. Plaintiff also produced a report from Hino Zimbabwe by one Kudzai Machanyangwa which stated the following in the last paragraph,

> "…. And we strongly suspect that the fuel was contaminated or incorrect as your vehicle should use unleaded petrol only."

In rebuttal of the claim against respondent, the defendant's witness in the court *a quo* told the court that they took appellant's complaint seriously and called their fuel supplier, Total Zimbabwe, who came and checked the respondent's underground tanks to see if they had been contaminated. Their investigation did not find any contaminants. Respondent's witness also testified that they sell about 60 000 litres of fuel in a week and if each customer is to buy 60 litres, that would mean they serve about 1 000 customers in a week. It was stated that despite such a huge customer base, the complaint about fuel contamination had come from the appellant only.

In assessing the evidence summarised above, the learned magistrate said some negligence had to be revealed on defendant's part. She said it had to be shown that defendant acted negligently by either selling fuel known or suspected to be contaminated. No negligence was established by the appellant. In fact, the evidence established that before fuel is offloaded, the fuel is checked for contaminants and a report is made. So the fuel which was sold was not suspected to have contaminants. The dip check on delivery ensured that only clean fuel was off-loaded into the respondent's underground tanks.

After the appellant's complaint, the respondent's tanks were checked for contaminants and they were found to be clean. So from the evidence led at the trial, the magistrate had no basis to find the respondent liable for the damages which were claimed.

As correctly pointed out by the trial magistrate, the evidence by both parties was to the effect that a vehicle filter by its nature filtered fuel and held back all sediments and it inevitably got clogged. The clogging is not a one day event, it is over a period of about a year, thereby necessitating a filter change at least once every year. Appellant's own witness's testimony was that before the breakdown of 19 September, 2013, they had not changed the filter to the appellant's motor vehicle. No other evidence was adduced to show that the filter had been changed or was clean before appellant purchased fuel on 17 September, 2013. The probability from the evidence led is that the filter was already contaminated when he purchased fuel from the respondent.

The magistrate also referred to plaintiff's own evidence, the Hino report of 3 October, 2013, which showed that as far as the garage was concerned, the contamination was either from contaminated fuel, or from using the wrong fuel. No evidence was led in rebuttal by plaintiff to show that he was using the right type of fuel for his motor vehicle in order to discount wrong fuel being the cause of the contamination.

Accordingly, it is clear from the above that the learned magistrate did not misdirect herself in any way. There was no proof that the fuel which appellant bought from defendant was contaminated when he bought it.

As regards ground two of appeal the documents which had not been discovered could not be produced in contravention of the rules of court order 18 Rule 1 (4). The magistrate was therefore correct when she upheld defendant's objection to the production of the undiscovered documents.

Regarding ground of appeal 3, although the fuel was purchased on 17 September, 2013, the motor vehicle itself got drained on 28 September, 2013, and the Hino Zimbabwe's conclusions were communicated to the appellant on 3 October, 2013. An investigation by Total Zimbabwe and a report by them just over a week later on 11 October, 2013 cannot be said to be unduly delayed. Dealing with a complaint is a process; it is not a one day event. This ground of appeal therefore has no merit.

On the issue of recusal mentioned in ground of appeal 4, there is no indication that the appellant ever asked the magistrate to recuse herself. He brought this issue for the first time in the notice of appeal. Such a request is not part of the appeal record. There is also nothing in the

record to suggest that the Magistrate should have recused herself. She understood the issues in the case and dealt with them appropriately. That ground also has no merit.

With regards to ground of appeal 5; costs follow the cause so if a plaintiff loses a case he pays the costs for having dragged the defendant to court unnecessarily. So it is no misdirection when a losing party is ordered to pay the costs of suit.

On ground of appeal 6; the issue of uncollected fuel was not relevant. There was no proof that the contaminated fuel which was drained out on 28 September, 2013, was the same fuel which the appellant bought from respondent. Neither was there proof that the fuel was already contaminated when appellant bought it. So having the drained fuel as an exhibit would not have assisted the appellant in any way.

The appeal having no merit whatsoever, it is hereby ordered that it be dismissed, with costs.

CHITAKUNYE J ***I concur*****:**……..