REPORTABLE (10)

Judgment No S.C. 130\2001
Civil Appeal No 287\2000

UNITED BOTTLERS (PRIVATE) LIMITED v ZINDOGA MUNEMO SHAMBAWAMEDZA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE OCTOBER 25 2001 & APRIL 12, 2002

P. Nherere, for the appellant

H. Mazonde, for the respondent

MALABA JA: The respondent, to whom I shall refer as the plaintiff, sued the appellant, to whom I shall refer as the defendant, in the High Court for damages arising from bodily injuries under the following heads:-

SPECIAL DAMAGES

(a)	Medical and Hospital Expenses	$15 000
(b)	Costs of Replacing Burnt Stocks, Fixtures and Fittings	5 000
(c)	Future Medical and Hospital Expenses	420 000
(d)	Loss of Earnings	20 000

GENERAL DAMAGES

(e) Shock, Pain and Suffering and

Loss of Amenities 98 000

The plaintiff's case in the court *a quo* was that the sole cause of the bodily injuries and *ipso facto*, the damages he suffered was the negligence of the defendant's employee. The particulars of negligence were stated as being that in the course of carrying out repairs to a refrigerator used by the plaintiff in his tuck-shop, defendant's employee, one David Marange, omitted to wipe off paraffin he had spilled on the paraffin tank and in the reservoir and lit the burner from which heat ignited the spilled paraffin causing the fire which burnt the plaintiff. The defendant's defence was a complete denial. It put in issue the *quantum* of general damages and future medical and hospital expenses.

The court *a quo* found the defendant's employee guilty of negligence which partly caused the harm suffered by the plaintiff. It found that the defendant was liable for 80 per cent of the damages suffered by the plaintiff. The court found that the latter had proved general damages in the sum of $98 000 and future medical and hospital expenses in the amount of $300 000.

The plaintiff was found guilty of contributory negligence and liable for 20 per cent of the damages he suffered. Both parties have appealed against the judgment of the High Court. The defendant appeals against the finding of negligence and the assessment of general damages, future medical and hospital expenses. The plaintiff cross-appeals against the finding of contributory negligence against him.

I now consider the evidence adduced before the court *a quo*. The defendant is a bottling company involved in the business of manufacturing and distributing beverages throughout Zimbabwe. It owns paraffin powered refrigerators which it hires out to retailers of its products. The plaintiff is a businessman who ran a tuck-shop outside Chitungwiza General Hospital. He sold soft drinks from his tuck-shop.

On 20 March 1993 the plaintiff entered into an agreement with the defendant in terms of which he hired one of its paraffin powered refrigerators. It was a term of the agreement that the defendant would keep the refrigerator in a good state of repair and working order.

The refrigerator was 1 metre high and its base 30 cm above ground. At the back and underneath the freezer was a chamber which housed a paraffin tank. The tank which had an in-let for pouring paraffin was suspended over a reservoir by means of clips. Over the tank was a chimney through which heat from the burner was distributed quickly to the outside. A wick sucked paraffin from the tank to a burner with a solder. The burner was at the tip of the tank. When the top end of the wick in the burner was lit, the flame could be seen through the top of the chimney.

The burner had to be positioned in the centre of the chimney for the heat to be distributed to the outside. When the burner was correctly positioned under the chimney, a light blue flame emerged. When the burner was wrongly positioned a

yellowish flame emerged. A yellowish flame was evidence of the fact that heat was being congested in the burner.

There was a knob which, when turned clockwise, increased the size of the wick in the burner and therefore the flame. The flame was reduced by lowering the wick by turning the knob anti-clockwise. The tank was covered by a metal sheet. To access the knob used to increase or reduce the flame one had to lift the metal cover.

At the beginning of October 1996 the refrigerator stopped working. The plaintiff reported the problem to the defendant who did not send a mechanic to repair the refrigerator until after three weeks. On 24 October David Marange, a mechanic, arrived at the tuck-shop at 3 pm to repair the refrigerator. He examined the refrigerator in the presence of the plaintiff's daughter, Eugenia, who was the tuck-shop attendant. The examination revealed that the cause of the problem was a burnt out wick. The mechanic decided to remove the burnt out wick and put in a new one.

Eugenia Munemo was 15 years old at the time. Her evidence was to this effect. The mechanic removed the paraffin tank from underneath the refrigerator. He told her to go and buy three 750 ml containers of paraffin. She did as told. Mr Marange poured all the paraffin into the tank. He asked her to go back and buy two more 750 ml containers of paraffin. She brought the paraffin. Mr Marange filled the tank to the brim with paraffin. He lit the burner and put the tank underneath the chimney.

Mr Marange asked her to look into the chimney and advise him as to the colour of the flame. She did as told. The flame was yellowish in colour. On being advised, Mr Marange tried to correct the situation so that the flame assumed a light blue colour. When there was no change in the colour of the flame, Mr Marange left the tuck-shop saying he would return after attending to another refrigerator in the neighbourhood. He did not return.

She noticed that the flame was getting bigger. There was an unusually large amount of smoke coming out of the chimney. The roof of the tuck-shop was getting affected. As she went out of the tuck-shop intending to make a report to her father, she met him outside. Following her report to him, the plaintiff knelt at the back of the refrigerator. Suddenly the plaintiff was engulfed by a huge flame and smoke. She denied the allegation that she poured paraffin into the tank after Mr Marange left.

The plaintiff confirmed that he arrived at the tuck-shop at about 6 pm. Following the report made to him by Eugenia, he noticed that the refrigerator was producing an unusually large amount of smoke. He said he thought the wick had been turned too high. He decided to reduce the wick by turning the knob anti-clockwise. To access the knob, he had to lift the metal cover over the tank. He knelt near the refrigerator and lifted the metal cover. Fire burst out of the chamber and engulfed him. He lost consciousness. When he came to, he had been seriously burnt on the head, face, chest, hands and abdomen. He was hospitalised for three months.

An operation was carried out on the left arm which could not stretch. He needed plastic surgery on the lips and ears. He was in pain for 4½ years. Before the accident he used to drive a bus. He could not do so any more. He could no longer take walks which he enjoyed taking over long distances.

A report compiled by a plastic reconstruction surgeon who had attended to the plaintiff revealed that he had healed with contractures of axilla, ectropion of the angles of the mouth and loss of the external ears. His total disability was estimated at 50 per cent. He had developed keloids as well.

The surgeon said the plaintiff needed the following operations to be carried out in future:

(a) Ear reconstruction usually done in three stages;

(b) Correction of ectropion of the mouth;

(c) Release of contractures of the axilla in two stages;

(d) Management of keloids.

These involved surgery and radiotherapy as well as certain medicines or injections for long periods of up to 18 months if the keloids do not recur. They usually recur.

He estimated the cost of the above surgical and medical treatments to be about $350 000.

The plaintiff denied the allegation that he pulled the paraffin tank from underneath the refrigerator.

The defendant called three witnesses. David Marange had been a refrigerator mechanic for 22 years. On discovering that the old wick had burnt out, he removed the paraffin tank from underneath the refrigerator. There was very little paraffin in the tank. He drained it into a container and soaked the new wick for 20 minutes. After that he poured the paraffin back into the tank. He fitted the new wick in the burner and tank. After lighting the burner he put the tank in its proper position underneath the chimney. He asked the tuck-shop attendant to look into the chimney and advise him as to the colour of the flame. She said it was light blue. He said he was satisfied that the problem had been solved and left the tuck-shop. He said he told Eugenia, before he left, to pour paraffin into the tank the following day.

Arthur Matuku Mandaza was employed by the defendant as a foreman. He was also a refrigerator mechanic. After receiving a report of a fire from the refrigerator, he visited the plaintiff's tuck-shop on 25 October 1996. He said his observations revealed that the paraffin tank had not been damaged. The wick was not burnt. The burner was lying on the floor with the solder burnt and separated from it. The tank was half to three quarters full of paraffin. He concluded that the fire which burnt the plaintiff was started by the ignition of paraffin which was outside the tank. He said it appeared to him that someone had tried to pull the tank with the burner alight from underneath the refrigerator.

Clifford Guthrey was an expert witness. He was the Managing Director of a company which manufactured the type of refrigerator used by the plaintiff. On 26 October 1996 he visited the tuck-shop to carry out an inspection of the refrigerator at the request of the defendant. This inspection revealed that the paraffin tank was still in good condition. The burner was still in its position. It was not on the floor. He removed the burner and looked into the tank. The paraffin inside was clean. There was no damage or distortion to the tank. All this caused him to rule out the possibility of the fire having originated from inside the tank.

There was evidence of burning on the top of the tank, in the reservoir and front of the tank. The burner had lost some of the solder. The section of the burner that inserted into the tank was separated from the rest of the burner. He was of the opinion that the fire was caused by paraffin which had been spilled on the tank being ignited by heat from the melting solder.

Mr Guthrey said if the burner had not been centrally positioned under the chimney heat could not be distributed outside. The heat congested in the burner and melted the solder. If there was paraffin spilled on the tank and in the reservoir it would ignite causing fire. It was Mr Guthrey's evidence that a yellowish flame in the chimney would be evidence of the burner not having been centrally placed under the chimney.

After seeing and hearing the witnesses give evidence the learned judge found the plaintiff, his witness and Mr Guthrey to be honest and truthful witnesses. He found as proved the facts contained in their evidence. He was not so impressed

by the other two witnesses called by the defendant. The learned judge rejected their evidence where it was in conflict with the evidence of any of the other three witnesses.

The learned judge's finding on the credibility of the witnesses is, in my view, supported by the balance of probabilities: It is clear from the evidence of the expert witness that the fire which burnt the plaintiff was caused by paraffin spilled on the tank being ignited by heat from a melting solder. There was paraffin spilled in the reservoir which, in turn, must have caught fire. The evidence does not, however, rule out the possibility of paraffin having been spilled on the floor in front of the refrigerator. The fire which caused injury to the plaintiff was not the fire which burnt the name tag in front of the refrigerator.

The plaintiff said he received injuries from the fire that emanated from the chamber housing the tank at the time he lifted the metal cover. Mr Guthrey supported the plaintiff's case in that he said the fire could have been caused by the combustion of paraffin spilled on the tank. The proximity of the molten solder to the spot on the tank where the paraffin had been spilled suggested that the heat in the solder ignited the paraffin.

The fact that the burner and the molten solder together with the tank were still in the chamber when Mr Guthrey carried out the inspection corroborates the plaintiff's evidence that the fire which burnt him was caused by paraffin spilled on the tank and in the reservoir. The manner in which the defendant conducted its defence suggests that it accepted the fact that the fire which burnt the plaintiff was caused by

spilled paraffin. One is therefore unable to accept Mr *Nherere's* argument that the learned judge was wrong in finding as a fact that the fire was caused by spilled paraffin. Mr Guthrey's evidence leads to the only reasonable inference, namely, that heat from the melting solder ignited the paraffin spilled on the tank.

The next factual question was, who spilled the paraffin? The learned judge found that Mr Marange did. Mr *Nherere* invited us to hold that there was no evidence to support the finding by the learned judge. In my judgment the learned judge's finding of fact is correct. Mr Guthrey's evidence showed that paraffin was spilled on the tank before it was put in the position under the chimney. For the heat in the melting solder to ignite the paraffin on the tank the whole unit would have had to be underneath the chimney. It was when the heat could not be quickly distributed to the outside through the chimney that the solder could get molten.

Mr Guthrey's evidence put paid to the speculation by Mr Mandaza that the plaintiff could have pulled the tank from under the refrigerator and in the process spilled paraffin. The solder would have melted at the time the tank would have been pulled. The fire would have started without the plaintiff's involvement. The learned judge correctly rejected the speculation advanced on behalf of the defendant by Mr Mandaza.

The suggestion that the tuck-shop attendant could have spilled the paraffin was totally without foundation. There was no evidence of her having performed an act of pouring paraffin into the tank. Mr Marange's evidence which was rejected by the learned judge, was that he told her to pour paraffin into the tank

the following day. He did not deny direct evidence from her that he poured paraffin into the tank. He admitted the performance of that crucial act which would have caused paraffin to spill on the tank. Eugenia's evidence that Mr Marange poured paraffin into the tank before he put the unit underneath the chimney was correctly accepted by the learned judge. As Mr Marange was the only person shown to have performed the act which would have caused the spillage of paraffin on the tank and in the reservoir, the fact that he was the person who spilled the paraffin which caused the fire was correctly found proved.

The facts found proved for the purposes of establishing the factual causation of the harm sustained by the plaintiff, are these. The defendant's employee omitted to wipe off the paraffin he had spilled on the tank and in the reservoir. With the spilled paraffin unwiped, he lit the burner and placed the tank underneath the refrigerator. The burner was not properly positioned in the centre of the chimney. The heat generated was enclosed in the burner instead of being distributed to the outside. As a result the heat melted the solder. The heat which caused the solder to melt ignited the paraffin on the tank causing the fire. The paraffin in the reservoir also caught fire. The intense combustion was compressed underneath the metal cover. When the plaintiff opened the cover intending to have access to the knob, the fire burst out with severe force and burnt him on the front part of the body causing serious injuries.

The next question to be decided by the learned judge was one of fault. It was whether the defendant's employee negligently caused the damage suffered by the plaintiff. It has been said that negligence is a question of fact and the *onus* of

proving it is on the party alleging it. A person is negligent if he did not act as a reasonable man would have acted in the particular circumstances. He will be held liable for the actual consequences of his negligence which are reasonably foreseeable.

In *Cape Town Municipality v Paine* 1923 AD 207 at 217 INNES CJ said:-

> "It has repeatedly been laid down in this court that accountability for unintentional injury depends upon *culpa* - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law - the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have pre-seen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon considerations of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias* the duty to take care is established, and it only remains to ascertain whether it has been discharged."

See also: *Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson* 1973 (4) SA (R AD) 523 at 524.

The evidence established that it was negligent conduct on the part of the defendant's employee to incorrectly place the tank with a lit burner in the chamber underneath the chimney where heat would be generated, without having wiped off paraffin, which is a highly inflammable liquid, from the top of the tank and the reservoir where he had spilled it. Having introduced a new source of danger into the chamber in the form of spilled paraffin a reasonable man would have foreseen the possibility of heat generated in the burner melting the solder and igniting the paraffin causing fire. The risk of the spilled paraffin being ignited from a melting solder was very high.

The likelihood of the kind of harm suffered by a person in the position of the plaintiff occurring as a consequence of the negligence of the defendant's employee was reasonably foreseeable. A reasonable man would have taken precautions to guard against that kind of harm occurring. All that was required to be done, in the circumstances, was to wipe the spilled paraffin off the tank and reservoir.

I do not think that the act of lifting the metal cover by the plaintiff rendered the harm he sustained as a result of the fire unforeseeable. The act was done in response to the fire. It was one of the foreseeable consequences of the negligence of the defendant's employee. The harm to a person in the position of the plaintiff was foreseeable as a consequence of the negligence of the defendant's employee, in the context of him or her opening the metal cover. The act of the plaintiff was not, in my view, a *novus actus* affecting the chain of causation but was the kind of act which the defendant might reasonably have anticipated as likely to follow from its employee's act of negligence in leaving spilled paraffin on the tank and reservoir with a lit burner likely to generate a lot of heat if incorrectly positioned under the chimney: *S v De Waal* 1966 (2) PH.H 362 (GW); *Hyett v G.W.R. Co* [1947] 2 All ER 264 at 266F.

The learned judge was justified in holding the refrigerator mechanic and therefore the defendant liable to the plaintiff for negligence.

I turn to consider the question of *quantum* of damages put in issue during the trial. Mr *Nherere,* in the heads of argument, said that the plaintiff placed

insufficient evidence on the *quantum* of damages before the court. He said the court *a quo* should have granted absolution from the instance because it was impossible for it to assess the damages in financial terms on the evidence placed before it. See *Enslin v Meyer* 1960 (4) SA 520 (T) at 523-4; *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T) at 51; *Heath v Le Grange* 1974 (2) SA 262 (C); *GDC Hauliers (Pty) Ltd v Chirundu Valley Motel 1988 (Pvt) Ltd* 1998 (2) ZLR 449 (S).

Mr *Nherere* accepts that the evidence of future medical and hospital expenses that would be required to be met by the plaintiff for surgical operations was in the form of a report by a surgeon who is an expert in the field of plastic surgery. The report which was produced in court with the consent of the defendant set out clearly the parts of the plaintiff's body that required plastic surgery; the procedures to be undertaken and the estimated costs of the operations. The cost of the operation was estimated at $350 000.

Not only did the court have before it evidence proving that the surgical operation was necessary but it also had evidence from an expert to the effect that the estimated cost of the operation was reasonable. The case of *Malamba & Anor v Matambanadzo* S-3-94 relied upon by the defendant is clearly distinguishable on facts. In that case the evidence given by a lay plaintiff as to the amount of money he had expended upon repairs to different parts of his motor vehicle was not supported by invoices. The plaintiff did not call someone who was qualified as an expert in the trade to testify that the cost of repairing the items in question was reasonable. In this

case the learned judge, in the exercise of his discretion, considered that the amount of $300 000 would reasonably cover the plaintiff's future medical and hospital expenses.

In *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809 B-C JOUBERT JA said:-

> "It is settled law that a trial court has a wide discretion to award what it, in the particular circumstances, considers to be a fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*. It follows that this court will not, in the absence of any misdirection or irregularity, interfere with a trial court's award of damages unless there is a substantial variation or a striking disparity between the trial court's award and what this court considers ought to have been awarded or unless this court thinks that no sound basis exists for the award made by the trial court."

None of the grounds upon which this court can interfere with an award of damages by a trial court are present in this case.

I also do not think it can seriously be contended that an award of damages of $98 000 for pain and suffering and loss of amenities of life is excessive in light of the seriousness of the injuries sustained by the plaintiff, the period he remained in pain and the physical deformities he has suffered. I agree with what is said in the plaintiff's heads of argument that regard being had to the fall in the value of our currency and damages awarded in other cases, the amount awarded as damages for pain and suffering and loss of amenities of life in the present case is on the lenient side. *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) at 7G-8H.

It seems to me that the appeal must fail.

The matters raised by the cross-appeal are more difficult. In holding the plaintiff guilty of contributory negligence the learned judge said:-

> "Plaintiff by his conduct in attempting to investigate the incorrect functioning of the device as reported to him and attempting to regulate the flame, was the final link in the chain. A chain which either began or was created by the negligence of Marange. Plaintiff's intervention as described contributed to his injuries. I consider that it would be appropriate that there be an apportionment of liability."

The first question which the learned judge ought to have posed for himself but did not was whether there was evidence that the plaintiff was guilty of negligence contributing to the damages he suffered? The learned judge did not find the plaintiff guilty of negligence. Compliance with the provisions to section 4 (1) of the Damages Apportionment and Assessment Act [Chapter 8:06] requires that a court should first find as a fact fault on the part of the plaintiff before considering its causal link to the damage he has suffered: *Lewis v Mushangi & Anor* 1999 (1) ZLR 506 (H). A finding that the plaintiff's conduct of opening the metal cover to access the knob for the adjustment of the height of the wick in the burner was a contributory factor to the causation of his injuries did not necessarily mean that the plaintiff's conduct constituted negligence.

To find the plaintiff guilty of negligence it would have to be shown that in doing what he did he failed to take the reasonable care which a prudent man in the particular circumstances would have taken for his own safety. Where there is antecedent negligence by the defendant the evidence must show, on a balance of probabilities, that a reasonable man in the position of the plaintiff would have

foreseen the likelihood of injury to himself as a consequence of the defendant's negligence and taken precautions to avoid its occurrence.

In *Davies v Swan Motor Co Ltd* [1949] 1 ALL ER 620 at 623H-624A BUCKNILL LJ said to constitute contributory negligence:-

> "It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of LORD ATKIN in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 ALL ER 730 as follows:
>
> > 'The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances.'"

In *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615 DENNING LJ (as he then was) said:-

> "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless."

The *onus* was on the defendant to prove contributory negligence on the part of the plaintiff. The defendant did not plead plaintiff's contributory negligence as a defence. The facts on which the question whether the plaintiff was guilty of negligence is to be answered are contained in his own evidence. The facts show that the plaintiff approached the situation on the belief that the flame was from a wick

which had been raised too high. He was, of course, mistaken. But his mistake was not shown to have been unreasonable.

There was no information before the plaintiff from which he would have known of the nature and extent of the danger to which he was about to expose himself. A reasonable man in his position would not have known that the defendant's employee had omitted to wipe off the paraffin he had spilled from the tank. In other words the plaintiff, like an ordinary prudent man would not have foreseen that what lurked underneath the metal cover was a ferocious fire much bigger than a flame from a wick raised too high.

For a reasonable man to have taken steps to avoid the harm that befell the plaintiff in the circumstances he would have had to have foreseen the true nature and extent of the fire as a consequence of the negligence of the defendant's employee. No evidence was adduced to show that the opening of the metal cover to access the knob used to adjust the flame was a dangerous act. I come to the conclusion that the plaintiff was not guilty of contributory negligence. The cross-appeal must succeed.

In the result the appeal is dismissed with costs whilst the cross-appeal succeeds with costs. That part of the order of the court *a quo* apportioning the damages awarded to the plaintiff is set aside.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

Scanlen & Holderness, appellant's legal practitioners

Mutumbwa Mugabe & Partners, respondent's legal practitioners