

GEORGINA DARARE
and
MEIKLES HOSPITALITY (PVT) LTD
versus
MIKE CHIYANGWA

HIGH COURT OF ZIMBABWE
MWAYERA & TSANGA JJ
HARARE, 4 October 2016 & 15 February 2017

Civil Appeal

R Jambo, for the applicant
Ms P Kashiri, for the respondent

MWAYERA J: The court *a quo* found in favour of the plaintiff (the respondent herein) and ordered the defendant's (the appellants herein) to pay accident related damages of \$10 000 together with interest from the date of issue of summons. The appellants, irked by the decision of the court *a quo*, lodged the present appeal against the entire judgment of the court *a quo*. The appellants raised the following grounds of appeal:

- “1. The learned magistrate erred by relying on the evidence of an uncorroborated witness being the second respondent. The second respondent had an obvious vested interest in the matter and his testimony was fraught with dishonesty and inconsistencies.
2. The learned magistrate erred in relying on the evidence of the second respondent's second witness which was largely hearsay and a clear reflection of shoddy policeman ship. His investigation and findings fell way short of what should be done by trained professionals in his position.
3. The learned magistrate erred by totally disregarding the evidence of the appellant's two eye witnesses whose testimonies were consistent, credible and corroborative of each other.
4. The learned magistrate erred by passing judgement in favour of the second respondent who failed completely to prove his damages when the quantum thereof was clearly an issue for determination at trial.
5. The learned magistrate completely failed to take into account the following crucial points relating to quantification of damages in a delictual claim for a motor vehicle.

- 5.1. None of the people who gave opinion as to the alleged replacement value of the vehicle through the 'quotations' and 'assessment report' tendered as evidence came to testify in court nor was their evidence at the very least reduced to affidavit form.
- 5.2. The learned magistrate completely ignored the fact that the second respondent made no attempt at all to evaluate the wreck which wreck to date is still in their possession. The wreck is of some value and such value must be deducted from the amount claimed if at all the second respondent was entitled to such amount claimed. In the circumstances, the second respondent has therefore been unjustly enriched by this judgment."

The brief background of the matter has to be put into perspective. On 27 August 2014, the set down date, the matter was postponed by consent in the magistrates' court to 1 October 2014. On 1 October 2014, the matter was further postponed by consent to 4 November 2014. The respondent did not turn up for hearing and the matter was removed from the roll. Subsequently the respondent enrolled the matter for 12 December 2014, wherein the respondent filed a claim for \$10 000-00 being the value of Mercedes Benz ML 320 which was burnt beyond repair as a result of a road accident which he claimed to have been caused by the first appellant. On the set down date, 12 December 2014, the respondent who was the plaintiff in the court *a quo* defaulted court and the appellants, who were the defendants in the court *a quo* applied for dismissal of the claim which application was granted. After the dismissal of the claim in default, the respondent resuscitated his claim by issuing a fresh summons for the claim for \$10 000-00 being value of the Mercedes Benz damaged or burnt beyond repair in a road accident.

The appellants raised points *in limine* namely *res judicata* and *lis pendens*.

I propose to deal with the plea of *res judicata* first. It is important to note that the claim in the court *a quo* under MC 7417/14 was dismissed for non-appearance by the claimant. Such a dismissal was not on merit and was not a final or definitive judgment. The dismissal for non-appearance by the plaintiff occasioned the resuscitation of the claim under MC 7872/15. The question that arose was whether or not by dismissal of the claim for no appearance the matter was *res judicata*.

It is trite that a matter is regarded as *res judicata* if the following requisites are met;

1. The previous matter was between the same parties or their privies.
2. The subject matter must have been the same.
3. The matter is founded on the same cause of action.
4. The earlier court must have given a final and definitive judgment on the matter.

See *Kawondera v Mandebvu* SC 12/06 and *Banda and Others v ZISCO* 1999 (1) ZLR 340 in which SANDURA JA quoted *Prestorious v Barkley east Divisional Council* 1914 AD 409 in outlining the essential ingredients of *res judicata*.

In this case the matter was dismissed for non-appearance by the respondent who was then the plaintiff. The re-set down of the matter was a recourse which was clearly open to the respondent in his capacity as the plaintiff. Had it been the appellants as the defendants who had been in default then their course of action would have been an application for rescission of judgment. The point *in limine res judicata* cannot be sustained in the circumstances of this case. The second point *in limine lis pendens* equally cannot be sustained because there was no pending case based on the same cause of action involving the same parties. The court *a quo* properly exercised its discretion.

The respondent's claim for \$10 000-00 being the value and damages occasioned by an accident with the first appellant, hinges on whether or not the appellant is liable for the damages occasioned. The court *a quo* assessed the evidence adduced before it and came to the conclusion that the appellant was liable for the damages occasioned to the respondent's vehicle. Clearly, from the diagram produced, the first appellant encroached onto the lane of the respondent. The evidence of Sergeant Nickson Chimumu who also attended the scene with the late officer who drew the diagram, was clear on the cause of the collision. The witness' evidence tallied with the respondent's evidence on how the accident occurred. The first appellant, to a great extent corroborated the respondent's version, moreso when one considers the first appellant's version that she was dazzled by the lights of a vehicle coming from the opposite direction. Further, that she did not know what happened. One can easily impute negligence where a party despite being dazzled continues to drive. The appellant's witness, Blessing Mupuni also confirmed that after being flashed by lights of a vehicle coming from the opposite direction, he was unable to recount what happened. The court *a quo*, faced with this evidence properly made a finding that the appellant was negligent when she drove encroaching into the lane of travel by the respondent thereby causing the accident. Given the clear evidence of how the collision occurred, liability on the part of the first appellant was established on a balance of probabilities.

The respondent's vehicle was damaged beyond repair. The issue is what is the appropriate quantum of damages. Damages must be proven by clear assessment of same. Also in the case of accident the value of the wreck is crucial in coming up with the appropriate quantum of damages.

CHIWESHE J as he then was in *Gudo v Mutemo and Another* HB 79-04 set out the law in relation to claim for damages for one's vehicle emanating from a road traffic accident. The Honourable Judge stated:

"It is clear that the plaintiff suffered damages as a result of this accident. The question that needs to be resolved is the quantum of such damages. It is trite that the quantum of damages must be proved even in matters in which the claim is unopposed.

I agree with submissions by the second defendant that the plaintiff has failed to prove the quantum of the damages claimed. Firstly, no attempt has been made to evaluate the wreck of the vehicle. The plaintiff agrees that the wreck is of some value. The value of the wreck must be set off against the total claimed if the plaintiff is to retain the wreck. Alternatively if the total claim is to be maintained then the wreck on its value must be tendered to the defendant, otherwise, the plaintiff will be unjustly enriched. Secondly, the persons who gave opinions as to the replacement value of the vehicle or the extent of its damages were not called to give evidence under oath, nor were their statements reduced to affidavit form. The plaintiff proceeded as if their evidence was common cause....."

See also the case of *Dururu Transport v Mutamuko* HH 95/2011. In the present case, it is apparent that the wreck was not evaluated neither was it tendered to the appellants. Given the nature of claim for damages, a proper valuation for the wreck ought to be done so as come up with quantum of damages which factors in the value of the wreck. Accordingly, the total amount claimed without factoring in the value of the wreckage would unjustly enrich the respondent at the expense of the appellant.

I am alive to the documentary evidence adduced on replacement value of the damaged ML 320 Mercedes Benz. The two quotations from car sales were the basis of the award. The lower quotation is what the respondent based his claim on. The Assessor's report was also relied on. The report just outlines the damages sustained during the accident. The narration did not allude to monetary terms but description of damages. The assessor was not called to testify in the court *a quo* and neither was his evidence reduced to affidavit form. As correctly observed in *Gudo case, supra*, the evidence of quantification of damage ought to be properly adduced as it is not common cause.

No concrete evidence was adduced elaborating how a figure of \$10 000-00 as damages was arrived at. The quantum of damages ought to be proved by evidence of proper assessment which among others would take into account tear and wear, the pre-accident and post-accident state of vehicle and the market value. These are crucial details. The quantum of damages would then be arrived at after a meticulous assessment inclusive of the value of the wreck. To this extent, the suck thumb figure of \$10 000-00 based on a claim as per quotation of replacement value is blind to a proper assessment and does not reflect consideration of the value of the salvageable wreck. The matter cries for want of evidence on the quantum of damages. The gap in evidence on quantum given the wreck is available can only be cured by remittal of the issue to the court *a quo* for adducement of evidence on damages.

Accordingly the appeal partly succeeds.

It is ordered that:

1. The appellant is liable for damages occasioned to the respondent's vehicle.
2. The matter is remitted to the court *a quo* for determination of the quantum of damages.
3. Each party is to bear its costs.

TSANGA J: agrees.....

Jambo Legal Practice, applicant's legal practitioners
Thondhlanga & Associates, respondent's legal practitioners