

SHILLA CHIGUMBA
and
IAN CHIGUMBA
and
FAITH CHIGUMBA
versus
ZIMBABWE ELECTRICITY TRANSMISSION
& DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 11, 29 September 2017 and 22 November 2017

Civil Trial

E. Dzoro, for the plaintiff
V. Muza, for the defendant

DUBE J: The plaintiffs' claim is for damages suffered due to the destruction of their house by fire. The first plaintiff is the owner of No 10, 73rd Avenue Haig Park, Mabelreign, and (the house). The second and third plaintiffs were tenants in the house. The defendant is the authority responsible for the supply and maintenance of electrical power in the country. The plaintiff's house was connected to the defendant's electricity transmission at the time of the fire.

On 1 February 2016, the house was razed down by a fire. The second and third plaintiffs had their household property destroyed in a fire. The fire followed an electrical fault which the defendant's employees attended to. Barely two days later, had the house caught fire. The plaintiff claims that the defendant's employees caused the fire in that they acted negligently when they reconnected the electricity supply to the house and resumed transmission before some naked cables wires and corroded clamps were replaced. They maintained that the defendant is vicariously liable to restore the house to its normal state prior to its destruction, the cost of restoration of the household goods, clothes and artefacts destroyed in the sum of \$100 000-00 and \$500-00 per month in lost rentals from the date of destruction of the house to the date of restoration of the house.

The defendant denies that it caused the fire. Its standpoint is that its employees acted competently and acted terms of set standards while attending to the electrical fault. It denies that its employees acted negligently and caused the fire.

The following issues were referred to trial.

1. What caused the fire at No. 10-73rd Avenue Haig Park and was it the fault of the defendant?
2. If the defendant was at fault, should it pay damages and what is the quantum?

The plaintiff called three witnesses in support of its case. The first plaintiff is owner of the house. Her brother was a tenant in the house. She was in South Africa when the house caught fire. Her house will cost \$65 000-00 to restore it to its original position. The household goods destroyed are worth \$35 000-00. She claims \$500-00 being damages for lost rentals from 1 February 2016 to the date of restoration of the house to its previous condition. Her evidence was simply formal and hence there is no need to comment on her credibility.

The next witness is the plaintiff's electrician. He attended at the plaintiff's house after a fault. The wiring was sound. There were no earth leakages or short circuits. The distribution box and the metre box voltage were oscillating between 0 and 110 volts instead of a constant 220 volts. He switched off the electricity supply. He did a visual inspection of the wiring from the pole to the metre box and observed that the PG clamps at the pole were corroded, rusty and loose. The service cables from the pole to the pull on point were also corroded and bare and the insulation broken down and not protected by a weather deck .There was visible intermittent discharge every time the cables got into contact due to blowing winds. The line tapes at the pull on point were rusty and corroded. The area between the pole and the pull on point is under the control of the defendant and he is not permitted to do maintenance in that area. He recommended that the fault be reported to the defendant. He connected a generator and left the house.

He attended the scene after the fire. Corroded PG clamps and rusty line taps had not been replaced. The cables from the pole to the pull on point had got into contact with each other and caused a short circuit. The metre box was not burnt. He concluded that the fire was caused by naked lines which were coming into contact with each other. He formed the impression that the defendant did not exercise due diligence and caution in its work. He compiled a report. The witness disputed under cross examination that the defendant's workmen had replaced the PG lamps. He insisted that the fire was caused by cables going into the house from the defendant's line up to the top of the roof. He denied that the fire started at the DP Box. He saw burnt down

cables on the supplier side. He did not take any pictures. He denied that the fire started in the kitchen. He denied that he was the plaintiff's usual electrician. The witness did not prove to be an honest witness. Whilst he denied that he was an electrician for the plaintiffs, the owner of the house said he was and he admitted so himself under cross-examination. He appeared to be trying to distance himself from the fire. The plaintiff's former maid, Rachel Nyamukacha testified that after the fault, workmen from of the defendant attended to the fault. They went on top of the roof and reported that the cables were rusty and shook them. The generator was switched off and power switched on. After the workmen left, she observed that there was too much power flowing to the house. The workmen made remarks that the meter box was old and needed to be replaced and that the pull on point was rusty and needed to be tapped.

Ian Chigumba is brother to the first plaintiff and a tenant in the house. He asked Mr Mupombwa an electrician to attend to the fault. He told him that there was no problem with the wiring of the house to the distribution box and the meter box. The problem was on the defendant's side. Their PG clamps were corroded and cables rusty. The electrician recommended that a report be made to the defendant. The defendant's workmen attended to the fault and power was restored to the house. They switched off the generator. He was alerted to the fire by his child. He saw smoke and the fire was concentrated in the ceiling as he entered the kitchen. The house burnt down completely destroying all household goods, furniture and clothes.

Beatrice Radzire came and disconnected power at the pole after the fire. Radzire apologized to him and confessed that she did not follow protocol and that she should not have reconnected power to the house. The witness simply narrated what he was told about the state of the installations and the cause of the fire.

The defendant called Beauty Radzire a technician with the defendant. She was the lead artisan and attended the fault with an assistant. There was no power supply coming to the metre box. The fault was as a result of corroded PG clamps that connected the point between the pole and the cables that fed the pull on point. She replaced the corroded PG clamps, switched power on and checked the meter box and was satisfied that the power restoration was good. She complemented the move to remove the meter box from the inside of the house to outside done by the plaintiffs. She noted however that when doing so, the customer had not changed the VIR cable that conducts electricity from the pull on point to the metre box. She left instructions at the house that the VIR cable should be replaced with a PVC cable. The metre box and the responsibility for fixing that cable is that of the customer. There was no generator running when

they arrived at the house. She denied that she indicated that the voltage coming into the house was excessive or that the cables were rusty and needed shaking to remove the rust. The pull on point was in perfect order. What needed to be changed was the clamp. This could be observed from the ground and they never went up to the pull on point. The cables from the defendant's line were intact, she did not notice any sparks. When the PG clamp is corroded, there is no conductivity that takes places and that is the reason why there was no power at the house. She changed the PG clamps and did not keep them. The cables did not need changing. She denied that she told Mr Chigumba that she made a mistake and shouldn't have switched them on. She never spoke to Mr Chigumba. The fact that they had not changed the VIR cable was not a good reason to refuse to connect them. Other houses still use those cables.

After the fire she switched off power on the line and disconnected the clamps. If wires from the pull on point to the PG clamp had burnt, the fuse at the substation would have blown out to indicate a fault. Everyone around them had power and nothing happened to their fuse and grid. The meter box was intact but had fallen to the ground. If the fire had started between the clamp and the pull on point, the cables would have been burnt as well as the meter box. She formed the opinion that the house got burnt as a result of the shortcuts by the electrician who joined the VIR cables when he put the metre box outside the house. She saw the joint after the fire. The fire started at the distribution box which was in the kitchen which completely burnt down.

She insisted under cross examination that the joint on the VIR cables could have caused the fire as it was hazardous. She refuted that the cables were naked and uninsulated. The witness testified well. Although she was subjected to lengthy and rigorous cross-examination, she maintained her version of events

The defendant called Stephen Mbawavira an engineer who was head of the investigation team tasked to investigate the fire. His evidence is as follows. The defendant's infrastructure was untouched by fire. The cables that ran from the pull a point to the pole were intact. The metre box was untouched by fire as well as the defendant's installations. They noted that the fire had been concentrated in the kitchen between the distribution box and the pull on point. They noted that the 16 mm cable between the metre box and the distribution box had been joined with a 10 mm cable between the metre box and the DP box. The 10mm cable is not recommended. If there is a circuit overload, the 10 mm cable can result in a fire. He denied that the neutral and live cables between the pull on point and the pole came into contact. They have a distance of 15 to 20 metres and the chances of wind forcing them to come into contact

are impossible. On inspection, these cables were intact and only the parts close to the pull on point were affected by fire.

Mr Mupombwa and the plaintiffs were not co-operative when they sought to get their side of the story. They would have wanted to take into account the electrician's observations of the fault in their findings. They could not establish the cause of the fire and concluded that the fire was not caused by the defendant's faulty installations. Their cables were not rusty and uninsulated as alleged. The fire could also have been caused by an electrical appliance or an open fire. The witness' evidence was not challenged to any significant extent. He was called as an expert witness and I will not comment on his credibility.

The defendant conceded that it was not going to challenge the issue regarding quantum of damages in the event that the plaintiffs were successful in proving the first issue. This is an acquillian action. In order for the fault element to be proved, it must be shown that the defendant caused the harm either intentionally or negligently,

In *Metallon Corp Ltd v Stanmarker Mining (Pvt) Ltd* 2007 (1) ZLR 298 (S) the court set out the requirements of an acquillian action for patrimonial loss as follows,

“That the defendant committed a wrongful act;

- (i) That the plaintiff suffered patrimonial loss, viz, actual loss capable of pecuniary assessment;
- (ii) The defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
- (iii) The responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa negligencia*.”

Professor Geoff Feltoe in *A Guide to Zimbabwean Law of Delict* 2002 2 p 11 states as follows:

“It must be shown that the defendant caused the harm either intentionally or negligently”

In *United Marine Aggregates Ltd v GM Welding and Engineering Ltd and Anor* TCC 2 April 2012, ALL ER (D) 81 (April), a court in a case involving a fire, the court held that working out where the fire started or who started the fire may not be enough if you are to succeed in an action for damages. You need to know how the fire started.

A claimant claiming damages caused by a fire in an acquillian action is required to show that there was either a breach of duty or negligence which caused damage to his property. The focus in a matter involving a fire is fourfold. A claimant must establish the following,

1. The origins of the fire

2. The cause of the fire
3. How the fire started
4. Who caused the fire

The standard in investigating a fire is where, who, what, and how the fire started. Determining the cause of a fire is not always an easy task for the court especially in cases where there are many possible causes of the fire. The court must not be asked to rely on conjecture to determine the cause of the fire. In order to establish the cause of the fire, sufficient evidence must be led establishing that a particular cause is “ more likely than not” to have caused the fire. All other possible causes must be ruled out. Proof of the fire’s origin and cause requires expert evidence. It is not always easy to establish the cause of the fire, where it started and how it started in the absence of a forensic investigation of the scene carried out by a qualified fire investigators and where evidence has been destroyed. An investigator investigating a fire can answer all these questions by examining the scene, interviewing witnesses and looking at the burnt patterns. In the process of determining the origins of the fire, he is able to determine what caused the fire, how it started and ultimately who caused the fire. The fire investigator who sets out to investigate a fire is required to conduct a forensic analysis of the building. He must gather all information surrounding the fire and any material that may be found at the scene. The scene must be preserved and photographs of the scene taken. A thorough investigation is required to be carried out.

The Origins of the fire

The main thrust of an investigation of a fire is to establish the cause and origin of a fire. In a Sintra Engineering Inc newsletter titled “*Origin and Cause v Cause and Origin*”, Summer Edition, 2007 the article states that the order of what is to be determined first is important. The question that has to be resolved first is the area of origin of the fire. It is only after this exercise that one is able to meaningfully explore the possible causes of the fire. The article also states that the approach to take is to review the burnt patterns of a fire scene and use these to determine the origin of the fire before the cause of the fire is determined and that the origins of the fire is indicated by the place with the most intense burning.

The approach in investigation a fire therefore is to first determine the origins of a fire before a determination of the cause of the fire is made. Findings on the origins of a fire assist in giving insight into the cause of the fire. This is the same sequence the court is required to take in its determination of liability for a fire. If the origin of the fire is not correctly determined,

the correct cause of the fire may be incorrectly identified. Burnt are a useful tool in establishing the origins and cause of a fire.

Mr Chigumba told the court that there was a lot of smoke in the house when he woke up and the fire was concentrated in the kitchen. The suggestion is that the fire originated in the kitchen. The evidence of the plaintiff's witnesses did not pinpoint with clarity the exact point where the fire started. The fire was reportedly concentrated between the distribution box and the pull on point. Evidence led by the defendant indicates that the distribution box was completely burnt down. A useful tool in investigating fires is the analysis of burnt patterns and these give guidance to the origin of the fire. They also help to identify things that could have started the fire. The origins of a fire are usually indicated by its intensity. The burnt patterns indicate that the fire may have started at the distribution box which was in the kitchen. The distribution box was burnt down completely indicating that the fire was most intense at this point and most probably started there. This is the part of the house where the fire seems to have been most concentrated. The evidence points towards the origins of the fire as being at or around the distribution box in the kitchen. The burnt patterns do not show that the fire could have originated at the pull on point as suggested by the plaintiffs. There are no signs of burning at the pull on point.

How did the fire start?

There was no evidence led to suggest how the fire started. No one saw the fire starting. There is no direct evidence of the exact point where the fire originated, how the fire started and the direction the fire took was not established.

What caused the fire?

Three possible causes of the fire have emerged. The court will not accept mere conjecture regarding the cause of the fire but will try to establish the most probable cause of the fire. The plaintiff's electrician testified that the fire was caused by the plaintiff's corroded PG clamps and naked wires that were not insulated which caused the cables to short circuit causing the fire. He blamed the defendant for not using weather deck cables or repairing the naked cables. The plaintiff's electrician reported that the cables from the pull on point to the pole would come into contact when the wind blew and he had seen sparks of fire when he attended to the fault. The defendant's investigation team failed to establish the exact cause of the fire but suggested other possible causes of the fire, being a fire, appliances connected to the system or a short circuit caused by the joined VIR cables. It concluded that the cause of the fire was not on the supplier side of electrical installation because its equipment was still intact and

that the defendant did not cause the fire. The defendant's engineer refuted the possibility that the fire could have been started by corroded clamps or wires. He stated that the rusty clamps could not have caused the fire because a corroded PG clamp cannot cause a fire as it does not conduct electricity supply into the house whilst in that state. Further that if the wires from the pull on point to the PG clamp had burnt, the fuse at the substation would have blown out to indicate a fault. Supply of power would have switched off for the neighbours as well. The court was told that the pull on point is protected by concrete and that fire could not have passed easily into the house. It contended that if the fire had started there, the wires would have burnt down completely. The metre box which is part of the defendant's installations was also untouched.

The defendant's assertion that the supplier side of the installations was intact was not rebutted by the plaintiffs. The plaintiff's electrician did not take any pictures after the fire. The defendant's investigating team took photographs of the scene which support the assertion that the wires on the pull on point were intact. The wires that caught fire are in the inside of the house. The court was not asked to go for an *inspection in loco* to establish the condition on of the wires after the fire. The state of the wires on the supplier side needed verification. The way I see it is that the fire was not caused by the corroded clamp or wires. The wires seemed to be in good order. The possibility that the neutral and lives cables running between the pull-on point to the pole could have come into contact and caused a fire is unlikely when one considers that the cables are reportedly 15 to 20 metres apart. In any event the cables remained intact after the fire discounting any possibility of a fire having been caused by the wires and on the supplier side of installations. The pull on point itself was reportedly intact with damage of wires only being found inside the house. If as the plaintiffs contend, the PG clamps were not changed, then there is no explanation regarding how electricity supply reached the house enabling the defendant to switch them on. It seems probable that the PG clamps were the cause of the fault and were indeed changed. The fuse at the substation would have blown to indicate a fault on the supplier side if the fire had been caused by the supplier side of installations and the entire neighbourhood would have been affected. This did not happen. The supplier side of installations was unaffected by the fire. The absence of any damage to the wires and on the pull on point shows that the fire did not start at the pull on point. Evidence led does not support the assertion that the fire was caused by the corroded PG clamps or the wires running from the pole to the pull on point.

The defendant's investigating team could not establish what was connected to the circuits before the fire and suggested that the fire could have been caused by an electrical

appliance or an open fire. There was no evidence that the fire was caused by an electrical appliance. No one spoke about the appliances that had been in the house and if any had been switched on when the fire ensued. The defendant made indications that the plaintiffs' electrician had been uncooperative and had refused to be interviewed. The court was also told that the plaintiffs were not cooperative and that their legal practitioner would not permit the defendant's investigation team to interview them. Perhaps the issue of appliances could have been clarified if the occupants of the house had been interviewed. The possibility that the fire could have been caused by some appliance exists. The investigations carried out were not through.

The defendant led evidence that VIR cables of different sizes may have caused a short circuit resulting in a fire, raising the possibility that the fire could have been caused by faulty connections at the house. It contended that a circuit overload could possibly have resulted from a substandard connection where a 10 mm and 16 mm VIR cable were joined from the meter box to the DB box. This join could have caused a circuit overload resulting in the 10 mm cable melting and causing a fire. It was not denied that such a situation could have caused a short circuit leading to the fire. It is possible that the joined cables could have caused a short circuit and caused the fire. This explains why the DB box was completely burnt down. The DB box was in the kitchen where the fire originated and the DB box is where the fire was most intense. The place of origin of the fire suggests that the fire started in the kitchen, either at the DB box or elsewhere in the kitchen. It is possible that the cause of the fire was the VIR cables. The DB box is not on the supplier side of installations.

Who caused the fire

If the cause of the fire is the VIR cables, the defendant cannot be blamed for the fire as the cables are not on the supplier side of installations. It has not been shown that the defendant's workmen were negligent in the manner in which they attended to the fault. I do not view that the defendant's employees were in breach of their duty in taking any precautions that may have prevented a fire occurring. It was shown that the supplier side of installations was in order after the fault was attended to. Whatever had caused the fault had been adequately attended to. I have already found that if they had not changed the PG clamp, electricity would not have been conducted enabling the defendant's workmen to switch on electricity. I am satisfied that the defendant's workmen did indeed change the corroded PG clamp. The wires leading to the pull on point were reportedly still intact and seemed not to require any replacement. They were said to be the desired whether deck cables. The defendant's witnesses

were able to convince the court that it was not necessary to remove the cables running from the pole to the pull on point. It was not shown that the defendant's workmen committed any wrongful act or were negligent in the manner in which they attended to the fault.

The investigation of the fire.

I must make observations regarding the manner in which this matter was investigated. Expert forensic evidence was required to establish the origins and cause of a fire. Regrettably there was no proper investigation of this fire on both sides. It appears that fire investigation is not a fully developed science in this country. What the defendant ought to have done is to engage an independent and qualified fire investigator. The flaw with the defendant's investigation is that the scene was not preserved and the investigations by the defendant were carried out 7 weeks after the event.

There was no appropriately qualified fire investigation expert called by the plaintiffs. The plaintiff called an ordinary electrician who did not carry out a thorough investigation. He did not carry out a forensic investigation or take any photos of the scene of the fire. He does not state in his report that he interviewed anyone from the defendant and he did not cooperate with the defendant. The suggestion is that there is some information that did not for this reason emerge. The plaintiffs said nothing about the appliances that were in the house at the time of the fire. I did not get the impression from Mr Mpombwa's approach that he is an expert in fire investigation. The plaintiffs ought to have engaged the services of a qualified fire investigator to attend to the scene and carry out a proper investigation.

The investigations as carried out did not conclusively determine the following aspects, the origin, cause of the fire, how the fire started and who started the fire. A court dealing with a case involving a fire must be able to work out from the evidence led roughly these aspects. It must be shown that that the fire was caused by the defendant's wrongful act or negligence and this entails showing the origin of the fire and exactly how the fire was caused. Findings made in pursuance of these issues help the court determine whether there was a breach or negligence on the part of a defendant. Enquiries regarding foreseeability of the harm caused, actions taken to avert the danger only come into consideration after findings of wrongfulness have been made and the identity of the wrongdoer has been established. I am not going that far. It is imperative in a case involving a fire to call evidence of fire experts and independent experts for that matter. The conclusions of the expert must be based on onsite investigation of the fire and witness evidence. The investigations should be carried out soon after the fire and before the scene has been interfered with.

The plaintiffs have failed to satisfy the requirements of an acquillian action and have failed to establish that the defendants committed a wrongful act and further that its act or negligence caused their loss. The responsibility for the plaintiffs' loss cannot be imputed to the defendant. The plaintiffs have failed to show on a balance of probabilities that the defendant caused the fire.

In the result it is ordered as follows,

1. The plaintiffs' claim is dismissed.
2. Costs follow the event.

Dzoro and Partners, plaintiffs' legal practitioners
Muza & Nyapadi, defendant's legal practitioners