TIZAI CHISWANDA
(In his capacity as father and guardian of Chidochashe Chiswanda)
versus
OK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 June 2016, 22 February 2017, 6 April 2017 & 19 July 2017

Application for absolution from the instance at the close of plaintiff's case

T Bhatasara, for plaintiff
H Mutasa, for defendant

TAGU J: In this case the defendant applied for absolution from the instance and dismissal of the plaintiff's case.

The plaintiff issued summons claims from the defendant for (1). payment of an amount of US$51 982.93 being damages arising from injuries to Chidochashe Chiswanda on 15th February 2015 at OK Mart, Hillside, Harare where defendant's display shelf fell down injuring the minor child in an accident allegedly solely caused by the negligence of the defendant who at all material times had a duty of care which it breached which damages despite demand the defendant has failed, refused or neglected to pay to the plaintiff, (2). Interest on the above amount at the prescribed rate from 1st April 2015 until date of payment in full, and (3). Costs of suit.

In his declaration the plaintiff stated that on or about 15th February 2015 around 1000hrs at one of the shops operated by defendant called OK Mart Hillside , Harare the plaintiff was inside the shop looking at merchandise in the company of his five (5) year old daughter Chidochashe Chiswanda and his wife Patience Masendeke.

At all material times plaintiff was supervising and monitoring the movements of the minor child. A soccer ball display cabinet fell on the minor child who was standing close to it and injured her. The plaintiff said the accident was solely caused by the negligence of the defendant in that (i) it did not secure/mount the display shelf properly and safely, (ii) it did not maintain or service the display shelf regularly, (iii) it overloaded the display shelf leading

to its collapse after some time and (iv) it used cheap and not durable materials for the "legs" of the cabinet. He therefore said the defendant owed the plaintiff a legal duty of care that plaintiff and the minor child would be safe and free from harm from any item, instrument, display shelf, merchandise accessible to the public in defendant's shop. He said as a result of the said negligence and accident aforesaid the plaintiff's minor child was knocked down with severe force and sustained serious injuries as follows:

1. Fractured right femur
2. Fractured left femur
3. Tenderness and swelling of pelvis and
4. Swelling of ankle joints and was confined to a hospital bed for more than a month receiving necessary medical treatment.

In his particulars of claim the plaintiff set out a breakdown of the amount of $51 982.93 as follows:

A. <u>Special Damages</u>

Past medical expenses: $934.49
Disposable diapers: $92.39
Past transport costs: $ 101.25

B. <u>General damages</u>

For pain and suffering: $ 30 000.00
Permanent disability and disfigurement: $15 000.00
Loss of amenities of life: $5 000.00
Future medical expenses and future transport expenses: $810 plus $44.80.

In its plea the defendant denied the allegations and stated among other things that the plaintiff left the minor child concerned unsupervised as he went around doing his shopping. Consequently, the child who appears to have been fascinated by the balls that were being displayed on the shelf in question climbed on the shelf causing the same to succumb to the minor's weight and collapsing. It said the shelf in question collapsed solely because the minor child, who had been unsupervised at the time climbed on it thereby exerting far more weight than that which the shelf is designed to carry. The defendant vehemently denied that it was negligent in any way and put the plaintiff to strict proof of that allegation.

PLAINTIFF'S CASE

The plaintiff led evidence from three witnesses that is the plaintiff TIZAI CHISWANDA, his wife PATIENCE ROSEMARY MASENDEKE and Doctor MAXMAN KUNDAI GOVA.

Tizai Chiswanda's evidence was to the effect that the child in question was a girl aged about 5 years old. That on the day and time in question the child's mother was pushing a trolley ahead of them. The child was close to him but he was not holding her. He momentarily lost sight of the child as he was picking up some tooth paste. While his vision was away from the child he heard the sound of a falling object. He checked and the fallen shelf was about 3 metres away from him. He could not see the child. He later heard the child screaming under the shell. It was only after he was assisted by two other men to lift the shelf that he realised that the child was under the fallen shelf. He estimated the shelf's height to be 2,5 to 3m high, the face was 1,5 to 2m and the side was about 1m or so. It was made of steel bars that made the frames and there was mesh wire that housed it into compartments some of which were empty and some had some balls. After the child had been taken to hospital he returned to the shop and found that one of the legs of the shelf had been broken due to rust and was now supported by a farm brick. He could not have a video footage of what happened because the cameras were facing away from the area in question. He had to take his own photographs of what he saw.

He denied the suggestion that the shelf collapsed because it gave in to the weight of the child who climbed to get the balls. His reason for denying being that the girl was pitting on tennis shoes and could not have managed to climb without bare feet due to the mesh wire. He outlined the injuries sustained by the child and the expenses he was now claiming.

During cross examination by the counsel for the defendant he admitted that at the material time he was not holding the child. He admitted that his wife was ahead and had turned into the next isle at the time the accident happened. He further admitted that he momentarily lost sight of the child as he was picking some toothpaste. Other concessions were that he did not know the position the child was standing when the shelf fell. He did not know whether the child held the shelf before it fell or not and conceded that the child might have had contact with the shelf though he did not know the degree of the contact. He could not confirm nor deny that the child climbed onto the shelf before it succumbed and fell because he was looking the other way. He finally conceded that the shelf had been standing

there for ages without interference. He however, blamed the fall on poor materials used to make the shelf as well as the fact that it was not being maintained.

PATIENCE ROSEMARY MASENDEKE

Her evidence was to the effect that at the material time she was pushing a trolley and the child was between her and the plaintiff. She then turned a curve into another isle leaving the child with the plaintiff some 2 to 5 metres away. While she was behind the isle she heard a noise of a falling item. She then turned and saw a big white shelf lying on the floor some 7 to 8m away. It was not apparent that her child was under it. She later saw a flash of red tights when the shelf was lifted and that is when she realised her daughter was under it. The child then started crying. In her evidence in chief she denied that the shelf fell because it gave in to the weight of the child who was 17 to 18 kgs at the time who had climbed on it. She further denied that the child climbed onto the shelf causing it to fall though she quickly admitted that she did not see the child climbing it. Under cross examination she conceded that she did not know where the child and his husband were after she turned into another isle. She further admitted that at the time of the accident she had lost sight and control of the child. She finally admitted that it was unforeseeable and unreasonable to expect a 3 or 4 year old child to shop on her own without supervision. She too narrated the injuries and the treatment given to the child.

DOCTOR MAXMAN KUNDAI GOVA

The Doctor's evidence was to corroborate the injuries sustained by the minor child and the treatment that was administered at Avenues Clinic. It was his evidence that the child sustained fractures on both femora (femurs) and was among other things treated by way of traction and administering of pain killers. He rated the child's disability at 5%. According to him the child has sufficiently recovered and is able to walk again.

In casu both parties agreed on the test to be applied in an application for absolution from the instance. This test is well settled in our jurisdiction. The test can best be summarised as follows "If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution." This test was enunciated and followed in a number of cases such as *Gascoyne* v *Paul & Hunter* 1917 TPD 171, *Oosthuizen* v *Standard General Veerserkeringsmaatskappy* Bpk 1981, *Walker* v *Industrial Equity* LTD 1995 (1) ZLR 87 and *United Air Charters (PVT) LTD* v *Jarman* 1994

(2) ZLR 341 (S). In short the enquiry is the same as the one applied at the close of the State case whether the plaintiff has established a prima facie case.

At this stage I need not concern my- self with the credibility or otherwise of the evidence of the plaintiff, unless, of course, it is demonstrably clear that the plaintiff and or his witnesses palpably broke down under cross examination. See *Ruto Flour Mills (Pty) Ltd* v *Adelson* (2) 1958 (4) SA 307 (T) at 309D. The plaintiff needed to prove that the said accident was solely caused by the negligence of the defendant in that it did not secure /mount the display shelf properly and safely, that it did not maintain or service the display shelf regularly, that it overloaded the display shelf leading to its collapse after some time and that it used cheap and not durable materials for the legs of the cabinet.

In its application the defendant submitted that it was not enough for the plaintiff to list particulars of negligence, but that the plaintiff was supposed to lead evidence to the effect that it was the defendant's negligence that caused the harm. The plaintiff was supposed to establish causation. See *Local Authorities Pension Fund* v *Munyaradzi Nyakwawa and Others* HH-60-15.

Mr *Mutasa* analysed the evidence of the witnesses and concluded that none of the witnesses saw what happened at the time the display shelf fell. None of the witnesses discounted the fact that the shelf could have fallen when it gave in to the weight of the unattended child who climbed the display shelf to get some balls. In his view this is not a strict liability case and the plaintiff failed to prove that the shelf fell on it's own due to the negligence of the plaintiff.

On the other hand the plaintiff's counsel submitted that at a general level courts are loath to decide questions of facts without having all the evidence. See *Efrolou (Pvt) Ltd* v *Mrs Muringani* HH-122-2013, *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 920 ZLR 484.

He further submitted that the plaintiff managed to prove negligence, harm, fault and causation. He said the case of *Local Authorities Pensions Fund* v *Munyaradzi Nyakwawa & others supra* referred to by the defendant is distinguishable in this case since there is no "but for" the shelf that fell on the child. The loss arose from physical harm that arose from shelf that fell on the child. He summed up his argument by saying that the defendant still faces a challenge in terms of the law in that a child under the age of 7 years is deemed to lack criminal capacity and cannot be found to have been guilty of contributory negligence. See

Ralph Muchechetere and Happison Muchechetere v *Ireen Boka and Heritage insurance Company of Zimbabwe* (Pvt) Ltd HH- 148/89.

The court found as a fact that on the day in question the child was in the company of its parents. The child was under the supervision of the parents. However, at the material time both parents momentarily lost sight and control of the child. No one really saw what happened at the time the shelf fell. The mother conceded that it was unreasonable to expect a child of that age to shop on her own. Both parents further conceded that the shelf in question must have been standing on its own for some time before the accident occurred. The plaintiff indeed proved that the child was injured and managed to prove the extent of the injury.

What is critical in this case is that no one knows why the shelf fell at the material time. It cannot be far -fetched to assume that the unsupervised child was fascinated by the balls that were being displayed on the shelf in question climbed on the shelf causing the same to succumb to the minor's weight and collapsed. The shelf from the evidence was not overloaded with balls since the father confirmed that some of the compartments of the shelf were empty. If at all one of the legs of the shelf broke it could have broken due to either sheer weight of the child and or the fall. If the area in question had been covered by the CCTV this could have solved our problem. It cannot be said for sure that the shelf just fell on its own when the child was passing by or standing there. While it is regrettable that the child was injured, the plaintiff did not, in my view manage to prove that the shelf fell due to the negligence of the defendant. It was unforeseeable that a child of that age would shop on her own and that a child of that age would climb the shelf. I agree with the counsel for the defendant that this is not a strict liability case. The plaintiff therefore failed to prove a *prima facie* case that the shelf fell as a result of the defendant's negligence. For these reasons the following order is made.

It is ordered that-

1. The application for absolution from the instance is granted.
2. No order as to costs.

Mupanga Bhatasara Attorneys, plaintiff's legal practitioners
Gill Godlondon & Gerrans, defendant's legal practitioners