SPORROW HAULIERS (PRIVATE) LIMITED
t/a J & J TRANSPORT
versus
GILBERT MASVINGISE
and
FAXRIDGE (PRIVATE) LIMITED
t/a MUKAHIWA HAULAGE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE. 24 May and 3, 10, 11 and 30 June 2010

Civil Trial

M Mandevere, for the plaintiff
J Ndomene, for the defendants

KUDYA J: On 6 September 2008, at the 283 km peg along the Harare Chirundu road, an ERF vehicle registration number 811-031E driven by the first defendant during the course and scope of his employment with the second defendant collided with the plaintiff's vehicle, a Freightliner horse registration number AAZ 9473 and trailer registration number ABB 0565. Arising from that collision, the plaintiff issued summons on 18 June 2009 and sought the necessary costs of repairs to its horse in the sum of US$9 751-22, interest thereon and costs. The action is based on the purported negligence of the first defendant.

Seven particulars of negligence are listed in the declaration in these terms:

1. He encroached into the plaintiff's lane of travel resulting in the collision with the plaintiff's horse and trailer;
2. He was overtaking a motor vehicle in front of oncoming traffic and against prohibition road markings;
3. He failed to keep a proper look out;
4. He failed to take evasive action when the accident seemed imminent;
5. He drove his vehicle in a negligent manner resulting in a collision with the plaintiff's vehicle which was in its correct lane on a marked road;
6. He drove at a speed which was unsafe and excessive in the circumstances; and

7. He drove recklessly or without due care and attention.

The defendants admitted that the collision took place. They however disputed both liability and the measure of damages. On liability they averred that the plaintiff's driver was the one who drove its vehicle negligently in that he was driving downhill at a high and unsafe speed and failed to keep a proper look out. In the alternative, the defendants pleaded contributory negligence by the plaintiff's driver and prayed for an apportionment of the proved damages suffered by the plaintiff based on each party's degree of negligence.

At the pre-trial conference held on 24 March 2010, three issues were referred to trial. These were:

a) Whether the accident was caused by the first defendant's negligence or the plaintiff's driver's negligence?;
b) Whether the defendants are liable; and
c) What is the quantum of such damages.

In order to answer these questions, the plaintiff called the evidence of two witnesses and produced three documentary exhibits while the defendants called two witnesses and produced one documentary exhibit.

a) Who between the two drivers was negligent?

Standreck Tavirimirwa, who was driving the plaintiff's vehicle when the collision took place, testified to the following effect: He was driving a horse and drawing a 30 tonne trailer laden with sugar down the Makuti Hills at a speed of 45 km/hr in broad day light at around 1 pm. On his extreme left were steep and treacherous gorges. He was finishing negotiating a blind sharp curve when he saw some 20 meters away on the straight stretch of the road ahead two on coming trucks. The truck driven by the first defendant was in Tavirimirwa's lane and was overtaking the other truck, which belonged to Sabot, against double continuous prohibition lines marked in the center of the road. He reduced speed and moved to his extreme left pulling off the road to avoid the truck driven by the first defendant.

The two vehicles side swiped. The right front axle of his horse hit the diff axle and the all trailer axle of the truck driven by the first defendant. The damage to his horse was

extensive. The whole front suspension, that is, the axle, springs, and one of the tyres burst while the other was damaged; the bonnet, radiator and the right side tank were damaged.

He produced exh 2, the police report dated 22 May 2010 that indicated that the police preferred charges of negligent driving against the first defendant. The trial failed to commence because the first defendant failed to attend court and was on a warrant of arrest. He compiled exh 1, the J & J Transport Driver Accident Report Form two days later in which he wrote out how the accident happened and drew a sketch plan of the scene of the accident.

He was cross examined. He gave the following responses. The speed limit on the stretch of road was 60 km/hr. The Sabot truck was not stationary. The witness avoided a head on collision. The first defendant's horse was in the witness' lane of travel. The right front tyres and right diff tyres of the defendants' horse were damaged.

The defendants relied on the testimony of the first defendant on the manner of the collision. He stated that as he approached the scene of the collision he stopped some 10 metres behind a 22 m long stationary Sabot truck. The left side wheels of the Sabot truck were off the road while the right side wheels were on the road in his lane of travel. He stopped for two minutes in order to check if it was safe for him to proceed as he was on a steep incline and 50 to 60 metres ahead the road curved sharply to his right. Two small vehicles sped past both his and the Sabot truck. He followed the two small vehicles and was almost overtaking the stationary truck when he saw the plaintiff's truck some 40 metres away emerge from the sharp curve coming towards him in its correct lane of travel. He moved from its path but it struck the right rear wheels of his horse and the back wheels of his trailer. He estimated that the plaintiff's truck was going at 70km/hr while he was doing 10km/hr. He attributed the collision to the speed of the plaintiff's driver, which precluded him from stopping to avert the accident. The tyres of his truck were damaged and the springs were broken. He admitted that he overtook against the prohibition markings on the road. He conceded that he was negligent but attributed contributory negligence to the plaintiff's driver for traveling at an excessive speed and failing to stop when an accident seemed imminent. He also conceded that he had been charged with negligent driving arising from the collision but the trial was yet to commence.

He was cross examined on his version that the Sabot truck was stationary. He stated that the driver of the Sabot truck enquired whether anyone had been injured. When the two colliding drivers returned with the police an hour latter the Sabot truck was no longer at the scene. He maintained that the plaintiff's driver was negligent in that he failed to stop. He

conceded that the other driver reduced his speed by applying his brakes. He denied that he was negligent in any of the respects outlined by the plaintiff.

The driver of the plaintiff's truck gave his evidence well. His version on the manner of the collision was confirmed by the first defendant. In my view, he did all that a reasonably careful and skilful driver was expected to do in the circumstances. I believed him. In contrast, the first defendant was uneasy in the witness box. He was shaken under cross examination. If he stopped 10 m behind a 22 m long Sabot truck and the blind curve was 50 m to 60 m ahead, it meant that the Sabot truck was 20 m to 30 m away from the curve. And if he had overtaken the 8m long horse of the Sabot truck as he alleged, then the curve was at that stage some 10 to 20 m away. He thus untruthfully averred that he first saw the plaintiff's truck when it was 40 m away from him. The fact that the accident did not stop the smooth flow of traffic coupled with the failure by his counsel to question the plaintiff's driver on the part played by the Sabot driver after the accident and the disappearance of the Sabot truck from the scene of accident are all probabilities which demonstrate the lie in his version that the Sabot truck had broken down and was stationary. Rather they confirm the truth in the version of the plaintiff's driver that the first defendant overtook the slow moving Sabot truck at dangerous spot.

His version of events was untruthful. It also did not accord with the probabilities. I did not believe his version wherever it differed with that of the plaintiff's driver. Contrary to his plea, he admitted in his evidence in chief that he drove in a negligent manner. Under cross examination he denied driving negligently and blamed the plaintiff's driver for the accident. When pressed on his manner of driving during cross examination, he prevaricated between conceding to contributory negligence and outright denial of negligence.

His denials of negligence were incomprehensible in the face of his admissions that he disobeyed double continuous lines marked in the centre of the road by driving in the lane of on coming traffic and overtook the Sabot truck 20 m away from a blind curve. It is apparent that he increased speed to beat the blind curve ahead. The plaintiff's driver was driving at a safe speed oblivious of the danger that lurked beyond the curve. When he suddenly saw the first defendant in his lane, he reduced speed and moved as far as he could to the extreme left of his lane of travel. He was descending an incline and could not apply emergency brakes for fear of jackknifing his vehicle and overturning. He could not move to his extreme left beyond the distance he went to avoid falling into the deep gorges below the left shoulder of his lane of

travel. In my view the plaintiff's driver took all the avoiding action that any reasonable driver in his shoes could have taken.

Mr *Ndomene*, for the defendants, submitted that the first defendant was faced with a sudden emergency. The doctrine of sudden emergency was commented upon in *Thornton & Anor* v *Fismer* 1928 AD 398 at 412 in these words:

> "a man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger."

These sentiments were quoted with approval by ELS J in *Ntsala & Ors* v *Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 192C. At 192D the LEARNED JUDGE went on to state that:

> "a party to an action can only rely on the doctrine of sudden emergency if and when the sudden emergency in which he finds himself is not of his own doing. If his actions or neglect are the reason or cause of the sudden emergency, he can for that reason also be found to be negligent."

The defence of sudden emergency does not avail the defendants in the present matter as it was foolhardy of the first defendant to overtake the Sabot truck on an incline, against the prohibition markings on the road and 20 m from a blind and sharp curve.

I determine the first issue referred to trial in the plaintiff's favour.

b) Whether the defendants are liable

I do not find any contributory negligence on the part of the plaintiff's driver. I hold that the accident was caused by the sole negligence of the first defendant. *A fortiori*, as the first defendant was acting in the course and scope of his employment with the second defendant, both defendants are liable to make good the proven accident damages arising from the collision. The second issue is answered in the affirmative.

c) The quantum of damages

In a bid to prove its damages, the plaintiff called the evidence of its workshop manager Richard Vernon Kee Tui. He qualified as a diesel, petrol and tractor mechanic at the Bulawayo Technical College in 1983. Thereafter he worked for three companies before joining the

plaintiff. He has been a workshop manager for 15 years. He was responsible for validating all workshop work. He issued out job cards, checked and supervised staff. He observed the damage to the horse occasioned by the collision. The front axle was completely damaged and had to be replaced; the bonnet was damaged and had to be remolded, the belly housing made of aluminum had to be replaced, the rear diff was extensively damaged. The tyres were replaced. The horse was repaired using an assortment of parts listed in the job card exh 3. Panel beating and spray painting were carried out in his workshop. The assortment of parts, oils and paints are listed on pp 2 and 3 of exh 3. They cost the plaintiff US$ 1 350-00. These smaller items and their values were not challenged by the defendants. The bigger components utilized in replacing the front axle, the belly housing and the rear differential together with three rear suspension air bags, fuel filter housing, mudguard bracket and front shock bracket, valued at US$ 6 325-25, were cannibalized from a broken down truck that belonged to the plaintiff.

The labour costs for the whole repair job amounted to US$450-00. The total amount of US$9 751-25 was the aggregate of US$884-04 for panel beating and spray painting, US$7 241-98 for materials and US$1 625-20 for sundries and disbursements. He stated that the plaintiff, as a big transporter, stock piled large quantities of an assortment of second hand spare parts for its fleet that it imported from the United States and South Africa. It benefited from large discounts which came with these bulk purchases. At the time availability of spare parts was a problem. The plaintiff had a big workshop which employed mechanics, panel beaters and spray painters. It conducted in house repairs and out sourced machining functions only. It was cheaper to repair the horse in-house as opposed to outsourcing the job. He stated that the cost of repairs in exh 3 were necessary and reasonable. He believed that had the job been outsourced it would have cost the plaintiff in excess of US$10 000-00.

He was cross examined. The damaged horse had been in use for 4 years. He estimated its value at the time at between US$45 000-00 and US$55 000-00. The values that were challenged in exh 3 in cross examination were of the front axle, belly housing and rear diff. He estimated the cost of a new rear diff at US$3 000-00 and that of a good second hand at US$1 800-00. He was adamant that a used complete axle would cost US$3 500-00 instead of the sum of US$200-00 that was suggested by the defendants. He agreed with the defendants that a good second hand belly housing would cost US$425-00.

Mr Kee Tui gave his evidence well. He exhibited immense technical knowledge on the mechanics and dynamics of the collision and the resultant damage it wreaked on the plaintiff's horse. He was not shaken in cross examination. He was a credible witness.

The defendants challenged the values of the replacement parts of the three major components used by the plaintiff in the repair of the horse. They disputed the values of the front axle, belly housing and rear diff. They called the expert evidence of James Mwanaka, a qualified class 1 motor mechanic. He completed his journeyman in 2000. He worked for three reputable companies before joining his present employer, Country Petroleum, as a workshop manager. I am satisfied from his professional experience in general motor mechanics that he is an expert in his field. He indicated that good second hand front axles presently cost between US$900-00 and US$1 200-00; used belly housings in good working condition presently cost between US$300-00 and US$450-00. He estimated the cost of the rear diff similar to the one replaced by the plaintiff at between US$1 100-00 and US$1 300-00. He opined that the values that were supplied by the plaintiff were inflated.

He has been involved in repairing and rebuilding trucks similar to the plaintiff's. Used spare parts are sourced from such local suppliers as Zimapan Investments (Pvt) Ltd, Balance Sales and Sam Trucking, which companies were already operational at the time of the collision. These local suppliers import used parts from the United States. He produced a quotation sourced by the second defendant from Zimapan on 3 June 2010 as exh 4. He was not the author of the document. It indicates that one Freightliner complete front axle would cost US$900-00 while one engine bell housing would cost US$425-00 and one new crown and pinion for a diff costs US$1 200-00. The three major components in his opinion should have cost the plaintiff US$2 325-00. In his estimation labour would have cost between US$1 500-00 and US$1 600-00.

He was cross examined. He exhibited technical knowledge of Freightliners. He did not see the damages on either motor vehicle. He relied on the written documents availed him by the defendants on the cause of the accident and extent of the damages. His opinions of the cause of the accident and the resultant damages were coloured by the one sided version that he relied on. Although he was never in the employ of the second defendant, he identified himself with the defendants' cause and abandoned his earlier pretensions at impartiality. He was shown a quotation from Selected Motor Suppliers which indicated that a used front axle was selling for US$6 235-00 and a new one for US$11 132-00; while a used diff was selling for

US$1 800-00 and a new one for US$2 297-00. He averred that they were inflated as Selected Motor Suppliers was a new parts dealer who purchased used parts from cheaper dealers and sold them at a profit. He was adamant that a used horse such as the plaintiff's could be purchased for US$6 000-00. He also challenged the 90 hours allegedly spent on repairing the horse. He estimated that a total of 40 hours was all that was needed to complete the whole job. He also stated that at the time labour would have been paid in local as opposed to foreign currency. He averred that used spares were available at the time in local currency.

Mwanaka was not an impressive witness. He was a biased expert. He did not observe the damages on either truck yet he could with a straight face describe the collision as minor. He under priced the value of the belly housing at US$200-00 and misled the court that a used Freightliner horse in good working condition could be purchased for US$6 000-00. He did not produce any evidence to show the prices of the materials used by the plaintiff in repairing the horse at the time that the repairs were done. He did not provide any evidence to refute the assumption that in-house repairs done in September 2008 were cheaper than commercial repairs. See the remarks of MUBAKO J in *Minister of Defence* v *Chikumbirike* HH 61-95 at p 6 of the cyclostyled judgment.

The defendants did not challenge the value of the smaller parts used in the repairs amounting to US$1 350-77 that are reflected in the job card. The plaintiff claimed labour costs under the headings of labour and panel beating and spray painting in the sum of US$1 334-04. It failed to establish that it paid its employees in foreign currency at the time. In addition it failed to prove the claim in the sum of US$1 625-20 under the head sundries/disbursements on p 4 of the job card, exh 3. It, however, established that the materials it used in repairing the horse were purchased in foreign currency at the time of the repairs. The reasonable cost of repairs adduced by the plaintiff consisted of the aggregate figure of the undisputed cost of the smaller parts of US$1 350-77, the rear suspension air bags of US$150-00, fuel filter housing of US$100-00, the mudguard bracket and front shock bracket of US$25-25 and belly housing of US$425-00 and that of the disputed values of the complete front axle and rear differential. The reasonable cost of repairs proved by the plaintiff was in the sum of US$ 7 351-02

I am satisfied that the plaintiff has established that the reasonable cost of repairs of the horse was US$7 351-02.

Accordingly it is ordered that:

The first and second defendant shall jointly and severally the one paying the other to be absolved pay to the plaintiff:

a) The sum of US$ 7 351-02
b) Interest thereon at the rate of 5 % per annum from the date of the service of summons to the date of payment in full.
c) Costs of suit.

Mbidzo, Muchadehama & Makoni, plaintiff's legal practitioners
Thondhlanga & Associates, 1st and 2nd defendants' legal practitioners