CHRISTIE MUDUWA
versus
JEREMIAH ZHEKE
and
POWER COACH EXPRESS (PVT) LIMITED

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 9, 10, 12 May & 22 June 2016

Civil Trial

Ms *G. Wagoneka*, for the plaintiff
B Chidziva, for the defendants

CHAREWA J: The plaintiff issued summons against the defendants, jointly and severally, the one paying the other to be absolved, for damages amounting to $19 000 for the replacement value of his motor vehicle and $24 500 for loss of business arising from his being unable to use his damaged vehicle for his normal business, arising out of a road traffic accident. The second defendant was sued vicariously as the first defendant was driving in the course of his employment with, and on or about the second defendant's business.

The facts

The facts of the case were that on 16 June 2014 and at the 41 km peg along the Harare-Chirundu highway, the first defendant, who was driving the second defendant's freightliner truck, collided with the plaintiff's vehicle. Plaintiff's driver was driving from Harare, while the first defendant was travelling to Harare. The accident occurred on plaintiff's driver's side of the road. The first defendant paid an admission of guilt fine on 27 June 2014, 11 days after the accident.

The plaintiff's case

The plaintiff led evidence on his own behalf and with the supporting testimony of his driver.

It was the plaintiff's case that the first defendant encroached on his driver's lane of travel as he overtook two stationery vehicles, in his own lane of travel, one of which was broken down, and the other of which had its hazard lights on. The first defendant did this in front of the plaintiff's oncoming vehicle, which, upon observing the vehicles with hazard

lights on in the first defendant's lane of travel, the plaintiff's driver had actually moved off the road to its left and stopped. The plaintiff therefore averred that the first defendant was solely responsible for the accident as he drove without due care and attention, failed to keep a proper lookout, travelled at an excessive speed in the circumstances and failed to stop when an accident was imminent.

The plaintiff further led evidence that his vehicle was declared a write off and was valued by the defendant's own insurers' independent assessor at $26 000. The insurer then paid the plaintiff $2 000, as the second defendant only had 3rd party insurance, leaving a balance of $24 000, which the insurer advised the plaintiff to claim from the second defendant. The second defendant having disputed its insurer's valuation, the vehicle was revalued on the second defendant's instructions and through its insurance brokers. Three different assessments amounting to $$26 000, $22 000 and $15 000 were made. The second defendant having failed or neglected to compensate for the loss of his vehicle, the plaintiff then issued summons for $19 000. This, he testified, was predicated on the average from the three quotations which the second defendant's insurance brokers had commissioned on behalf of the second defendant, which average amounted to $21 000, less $2 000 paid by the plaintiff's insurers.

In proof of his case, the plaintiff produced the following documents which were entered into the record as Exh(s) 1-5.

a. Exh 1: Admission of guilt form by the first respondent at p 48 of the trial bundle
b. Exh 2: Letter from Heritage Insurance, the defendant's insurers dated 14 July 2014 and at p 51 of the trial bundle, advising that an independent assessor had valued the vehicle at $26 000 and tendering $2 000, and that the balance of $24 000 would be to the respondents account.
c. Exh 3 -5:Pictures of the accident scene at p.73-75 of the trial bundle.

At the close of the plaintiff's case, the defendants applied for absolution from the instance on the basis that the damages had not been proved. The defendants did not seek absolution from the instance on the issue of liability.

Defendants' submissions on absolution

The defendants' application for absolution was made on the basis that, firstly, plaintiff's claim for damages for his wrecked vehicle ought to have been premised "on the difference between the pre-accident and the post-accident values of the motor vehicle", not the average of the assessed current market values by the insurers as he did. Therefore since

the plaintiff failed to call an expert to lead evidence on the pre and post collision value of his motor vehicle, his claim was bad in law.

Secondly, the defendants submitted that, save for his oral averments, and the averments of his witness, who on redirect, professed his ignorance of the plaintiff's financial dealings, the plaintiff had not proved his claim for loss of business as he did not produce into evidence his receipts and trip sheets.

The defendants contended that regardless of whether or not liability was proved, failure to prove the damages alleged entitled them to apply for absolution from the instance. (See *Seti Lucas Shumba* v *Imbayago & Glens Removal Storage (Pvt) Ltd* HH 14-05).

Plaintiff's submissions

In response, the plaintiff averred that as a matter of policy, damages suffered by a party must be met by the wrong doer. He argued that he had proved his damages by his testimony and by the documents he produced. Therefore he must be placed in as good a position as he would have been if the delict had not been committed. Moreover as his vehicle had been declared not economically repairable because the cost of repair exceeded 70% of the market value, the issue of repairs fell off. He claimed, in his evidence in chief, that he bought the vehicle for $24 0000, and since the defendant's insurers had had its value assessed at $15 000, $22 000 and $26 000, the average of $21 000 which he claimed, (less $2000 which he had been paid by the insurers) was the current market value which he was entitled to. He thus denied failing to prove the pre-collision value and the post collision value of his vehicle, arguing that he led the evidence available to him which was sufficient in the circumstances to enable the court to quantify his damages. Calling an expert to lead evidence was in his view unnecessary.

As regards damages for loss of business, the plaintiff argued that the fact that he discovered his trip sheets, receipts and invoices which he filed of record at pp 61-72 of the trial record was adequate proof.

The law

It is trite that upon appropriate proof thereof, damages suffered by a party must be borne by the wrongdoer. Failure to prove that one has suffered damages, and their quantum, leaves one open to an application for absolution or dismissal of one's claim.

The test for absolution is whether, on the evidence led by the plaintiff, the court might or could give judgment for him. (See *Lourenco* v *Raja Dry Cleaners & Steam laundry (Pvt) Ltd* 1984(2) ZLR151(S)). Thus the question to consider is whether there is sufficient evidence

upon which a reasonable man **might** find for the plaintiff. In other words, is there a *prima facie* case against the defendant? (See also *Astra Steel & Engineering Supplies (Pvt) Ltd* v *PM Manufacturing (Pvt) Ltd* HH 112/12 and *United Air Charters* v *Jarman* 1994 (2) ZLR 341(S)), *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge* (Pvt) Ltd 1971 (1) RLR 1 (A) @.5D-E, *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (SC) @ 343).

Therefore, the issue that I must resolve is whether the plaintiff in this case has adduced sufficient evidence in proof of his claim for damages to require the defendant to be put on his defence.

It is true that an owner of a vehicle is entitled to a sum of money, as damages that will put him in the position he would have been had his vehicle not been damaged, and that the assessment of such amount of damages must be as at the time the vehicle was damaged. The effect of such damages would be to compensate the plaintiff for the diminution in value of his damaged property. (See *Mazanhi* v *Marovanidze and Anor* 2009 ZWHHC 60, *Tambudzai Mafusire* v *Lewis Greyling and Elgrey Investments (Pvt) Ltd* HH 173/10, *Madombwe* v *Rimbi & Anor* HH 354-15).

Case law has established that the measure for diminution in value is the **difference** between the market values of the vehicle **immediately before** and **after** the wrong was committed. Alternatively, it is possible to take as a measure, the cost of restoring the vehicle to its original condition as long as such cost does not exceed the diminution in value of the vehicle. *Ergo*, a plaintiff must prove both values in order to establish a *prima facie* claim to the quantum of his damages. However, the cost of repairs will not serve as a measure of the damages due to the plaintiff where they exceed the pre-accident market value, or they exceed the diminution in value or they do not actually restore a vehicle's pre-accident market value. (See *Enslin* v *Meyer* 1960(4) SA 520(T), *Erasmus* v *Davis* 1969(2) SA 1 @ p 9 A-B, *Leighton* v *Eagle Insurance Co (Pvt) Ltd & Ors* 2002 (2) ZLR 592(H), *Monica Komichi v David Edwin Tanner and Eaton & Young HH* 104/05).

With regard to the claim for loss of business, our jurisprudence has established that there must be a revenue analysis supported by invoices and receipts, or other documentary evidence. (See *Dururu Transport (Pvt) Ltd* v *Mutamuko & Anor* HH 95-11).

In either case, the plaintiff must "adduce" and "produce" sufficient evidence to meet the minimum requirement of proof necessary that a reasonable man might find in his favour. (See *Ebrahim* v *Pittman N.O.* 1995(1) ZLR 176 H @187C-D, and *Mbundire* v *Buttress* 2011 ZWSC 13).

Application of the law

The plaintiff testified that he valued his vehicle at $21 000. He personally arrived at this figure after conducting his own research and averaging the assessments of $26 000, $22 000 and $15 000 which he picked from an email communication between the defendants insurance brokers and insurers, which was an internal communication not copied to him. There was no explanation of how he came into possession of this email nor were any submissions made as to its veracity. On the objection of the defendant, I declined to allow the email into evidence as no basis for doing so had been established.

He did not produce the three assessments aforesaid, nor call the assessors who valued his vehicle to confirm their assessments. Neither did he produce any objective assessment of the value of $21 000 or call any expert to validate such assessment.

The plaintiff further attested that after deducting $2 000 which he received from Heritage Insurance, he therefore issued summons for the balance of $19 000.

He retained the wreck of his vehicle, but also did not have it valued. It was only in cross examination when he hazarded a guess that the residual value of the vehicle was between $3 000 and $3 500. This would of course, have reduced his actual loss from $19 000 to $15 500, were I inclined to accept an "average" figure as the value of his patrimonial loss.

There was thus no indication of the diminution of plaintiff's patrimony from its pre-accident level to the post-accident level as no evidence was led as to the market value of the vehicle immediately before the accident and its market value after the accident. He even contradicted himself as to the purchase price of the vehicle, stating in cross-examination, that the purchase price of the vehicle was $9 280 (BP5 800), rather than the $24 000 he mentioned in his evidence in chief.

I note that the purchase price of $ 9 280 is way less than the cost of repairs or the assessed value, putting into question the claimed diminution of patrimony of $21 000.

The purpose of damages for material loss is not to improve a plaintiff's patrimonial prospects but to compensate him for his negative *interesse*, Therefore, at best, based on his oral testimony, the plaintiff would only have been entitled to $3 780 (Purchase price of $9 280 less $2 00 paid by the insurers and the value of the wreck of +-$3 500). However, even these figures were not proven by the plaintiff as no invoices for the purchase price, or independent assessment of the wreck were tendered.

Even were I to accept the claimed purchase price of $24 000 as the market value of his vehicle, his patrimonial loss would have been $18 500 ($24 000 less $2 000 and $3 500).

While the plaintiff had discovered documents on the status of his vehicle as being beyond economic repair, as well as its replacement value, and therefore his loss, he failed to produce them into evidence. Hence I cannot even use the cost of repair to assess his loss.

Because of the contradictions in plaintiff's testimony and the shortcomings in his evidentiary proof, there is uncertainty in the values of his loss, which is exacerbated by his resort to an average rather than actual value of his vehicle prior to and after the accident. This makes it difficult for me to establish whether the cost of repairs exceeds the pre-accident market value as that value is not proven. Neither can I ascertain whether the cost of repairs exceed the diminution in value which could only be established by the difference between the pre and post-accident values, which plaintiff failed to adduce.

In my view therefore, the proof of the plaintiff's damages fell far short of the minimum required so that I could put the defendant on his defence.

With regard to the claim for loss of income, it is trite that invoices and receipts are adequate documentary evidence in proof of damages.

The plaintiff testified as to the income he was making per month with his truck, to justify his claim for loss of business. Relying on his trip sheets and receipts, which he had also discovered, he estimated that his loss of business ranged between 4 100 – 4500 per month, hence his claim for $24 500 as at the date of summons.

He had properly discovered and relied on his trip sheets and receipts to prove his earnings. However he also failed to produce them into evidence.

The upshot of this failure was that, apart from his uncorroborated oral evidence as to his income (on redirect, his witness professed his ignorance as to the financial dealings and status of the plaintiff's business), there was no evidence produced on which I could reasonably find that the plaintiff suffered the damages claimed.

The record will show that defendants and the court drew to the plaintiff's attention the need to produce his documents into evidence for both claims.

However, I understood the plaintiff's position to be that since his documentary evidence in support of his claim for damages had been discovered and is on the trial bundle, it was not necessary for him to produce it into evidence at the trial. Clearly this was an error on plaintiff's part as discovery and production of documents into evidence are entirely different processes for different purposes. Discovery is intended to show the basis of one's claim.

Production of documents into evidence is intended to prove one's claim. Documents that have been discovered may not necessarily be required to be produced into evidence.

In the premises, I find that the plaintiff has failed to adduce and produce such evidence as to prevent me from granting absolution.

DISPOSITION

Consequently, I make the following order:
The defendant's application for absolution from the instance is granted with costs.

Tadiwa & Associates, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners