FRANCIS MOTSI t/a CHABVUTA HOLDINGS
versus
FARM AND CITY HOLDINGS (PVT) LTD
and
GLADMORE CHINYERE
and
NICOZ DIAMOND INSURANCE LIMITED

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 2 November and 14 November 2018

Civil Trial

T. A Bvekwa, for the plaintiff
T. Makanda, for the 1st and 2nd defendants
S.E Manyangaderwa, for the 3rd defendant

CHIKOWERO J: On June 8th 2011 plaintiff issued summons against the first and second defendants claiming US$21 033.00 for loss of income, interest and costs, with liability to pay being joint and several the one paying the other to be absolved.

The declaration states that the latter defendant is an employee of the former, and was at the material time driving first defendant's vehicle during the course and within the scope of such employment.

Consequently, vicarious liability is pleaded as the basis of first defendant's liability.

The precise allegation is that on the 2nd February 2011, at Mbare street near Mutare rank, Harare the plaintiff's vehicle being a bus registration number ABB 4781 was involved in an accident with first defendant's lorry registration number AAD 8515. The lorry was being driven by the second defendant.

Plaintiff alleged in paragraph 6 of the declaration that the accident was caused by the sole negligence of the second defendant in one or both of the following respects. He was driving without due care and attention. He failed to avoid an accident which was imminent.

For reasons which will become clear when l come to deal with third defendant's liability, it is necessary that l quote paragraph 7 of the declaration in full.

This is how it reads:

> "7. As a result of the accident, plaintiff's bus was damaged. The defendant's [should have read "1st defendant's] insurers repaired the bus but did not pay for lost business because the 1st defendant's insurance did not cover that" [the underlining is mine].

Plaintiff claimed damages in the sum of US$21 033.00 being loss of income for the period of 57 days that it alleged the bus was being repaired. The loss was attributed to the accident.

The declaration put the average daily income at US$369.00, being the amount realised during the period the bus, as a public transport vehicle, was on the road.

On the 14th August 2014 the plaintiff filed a document titled:

"NOTICE OF AMENDMENT TO SUMMONS AND DECLARATION"

The relevant part thereof reads:

> "TAKE NOTICE THAT, the plaintiff hereby amends his summons and declaration as hereunder.
> 1. ON the heading by adding the name NICOZ DIAMOND as the 3rd defendant.
> 2. After paragraph 3 of the declaration by adding paragraph 3 (a) as follows.
> "3(a) The 3rd defendant is NICOZ DIAMOND an insurance firm which at the material time was the insurer of the 1st defendant and is liable as such."

The Notice of Appearance to defend filed on 16 December 2014 by the third defendant reflects that the summons was served on it on 24 November 2014.

The cause of action against the third defendant, if any, had by 24 November 2014 clearly prescribed. This is so because the accident occurred on 2 February 2011.

But I will not decide the plaintiff's claim against the third defendant on the basis of prescription. The third defendant never raised the special plea of prescription.

All the parties treated the third defendant as having been properly joined to this matter. No application for joiner was made. No order joining NICOZ Diamond as the third defendant to these proceedings was ever granted.

It is clear that the matter proceeded on the basis that the "NOTICE OF AMENDMENT TO SUMMONS AND DECLARATION" had joined NICOZ Diamond as third defendant. That obviously was incorrect.

A person is not joined to litigation via an amendment. A proper application for joinder has to be made. Alternatively, the court can also order that a person with a direct and substantial interest in proceedings be joined as a party.

Only after being joined as a party could the plaintiff then have sought to amend the contents of the summons and declaration, by consent, by the addition of para 3 (a). Failing such consent, an application had to be made to the court for the pleadings to be amended: *ZFC* v

Taylor 1999(1) ZLR 308 (H); *Midlands State University* v *Galaxy Engineering Design Consultants (Pvt) Ltd* HH 425/18.

At the end of it all, however, I proceed on the basis that the third defendant was properly before me. The third defendant itself, as did the rest of the litigants, was prepared to proceed likewise. It is to the merits of the matter that the parties relied on for resolution of the matter. And so the matter went into trial.

B. ISSUES FOR TRIAL

The matter was referred to trial on only two issues. That appears on the Joint Pre-Trial Conference Minute duly signed and issued on 29 May 2018.

These were:

1. Whether 1st defendant's insurance contract with the 3rd defendant covered indemnity for loss of business for third parties.
2. If so, what is the quantum of damages payable to plaintiff, how much is payable.

I turn now to decide these issues.

WHETHER 1ST DEFENDANT'S INSURANCE CONTRACT WITH 3RD DEFENDANT COVERED INDEMNITY FOR LOSS OF BUSINESS FOR 3RD PARTIES

Section 2 of the insurance contract in question resolves this issue.

It reads:

> "2. SECTION 11LIABILITY TO THIRD PARTIES
> Defined Events
> Any accident caused by or through or in connection with any motor vehicle described in the schedule hereto or trailer attached thereto (including any vehicle referred to in s III hereof in respect of which the insured shall become legally liable to pay all sums, including claimant's costs and expenses in respect of:
> (i) Death of or bodily injury to any person not being a member of the same household as the insured nor being conveyed in the trailer referred to above but excluding death or bodily injury to any person in the employment of the insured arising out of and in the course of such employment
> (ii) damage to property other than property belonging to the insured or held in trust by or in the custody of the insured.
> Provided always that the indemnity with respect to s II (ii) shall be limited to the amount stated in the schedule of the policy in respect of any one accident or series of accidents due to or arising out of any one event or occurrence."

As explained by Grace Dube, who gave evidence for third defendant, this insurance contract is a full third party policy. The cited clause means it covers damage to property belonging to a third party, where the insured is legally liable, as well as compensation for death

or injury to the third party. It does not cover loss of business for either the insured or the third party.

The plaintiff was unable to dispute this evidence. In fact, he agreed that this was a correct interpretation of the insurance contract.

The underlined portion of para 7 of plaintiff's own declaration, already cited in this judgment, is to the same effect. In fact, that is the reason why plaintiff had not sued Nicoz Diamond in the first place. Paragraph 7 of the declaration was never amended. Plaintiff cannot seek to impute liability to third defendant when its own pleadings exonerates the very same third defendant.

The offers to settle the matter made by third defendant, are not a substitute to the insurance contract. In any event, those offers were rejected by the plaintiff.

Having been sued simply on the basis of it being first defendant's insurer, albeit one who is not liable under such policy according to the plaintiff himself, I am left bemused as to why third defendant was sued at all. It should never have been.

My finding is third defendant is not liable to the plaintiff at all. By citing the third defendant, plaintiff has only succeeded in unnecessarily putting the third defendant out of pocket. I shall revert to the scale of costs *vis-à-vis* plaintiff and third defendant in due course.

THE QUANTUM OF DAMAGES DUE TO PLAINTIFF BY FIRST AND SECOND DEFENDANTS

Liability was not in issue. Only quantum was.

In computing delictual damages, the aim is, as far as possible, to place the injured party in the position he would have been in if the wrongful act causing the injury had not been committed. See *Minister of Defence and Another* v *Jackson 1990* (2) ZLR 1 (S).

Although said in the context of quantification of contractual damages, the position holds true in computing delictual damages that a plaintiff be compensated for its net loss only. In this regard, SANDURA JA, delivering the judgment of the court, said in *Guardian Security Services (Private) Limited* v *Zimbabwe Broadcasting Corporation* 2002 (1) ZLR 1 at p 10H:

> "it is clear that Guardian is entitled to its net loss only, otherwise it would be over-compensated"

To the same effect is *Primrose Kamvura and Samuel Kamvura* v *City of Harare* HH 365/16

In my view, Plaintiff led sufficient evidence to enable this court to assess the quantum of damages due to it. That is the benchmark triggering computation of the loss suffered. See

Ebrahim v *Pittman NO* 1995 (1) ZLR 176 (H); H.E.M *Graniteside Industries (Private) Limited* v (1) *Guiseppe Carlo Dal Col* (2) *Stone Enterprises Private) Limited* SC 92/2002.

The evidence is in the form of exhibit 5 being the log sheets reflecting daily gross as well as net income earned through plaintiff's use of the bus in question for the period January 2nd 2011 to February 1st 2011.

Different drivers and conductors used the bus during this period. The respective amounts deducted towards diesel, allowances, rank fees, loaders, the police and, among others, toll gate fees are reflected on each log sheet, so is the gross and net income.

My calculation reveals that the total net income for this period is US$12 549. I have divided that by 31 days. The average daily net income is therefore US$404.18.

I multiplied US$404.81 by 57 as the bus was as is common cause, off the road for 57 days. This gives me US$23 074-17.

The plaintiff used the sum of US$369-00 as the average daily income. He justified this by resorting to use of US$369, the net earnings of 2nd February 2011, as the daily average.

He therefore multiplied US$369 by 31 days to come up with the US$21 033-00 claimed as total loss of earnings for the 57 days.

The difference between his claim of US$21 033-00 and my figure of US$23 074-17 is US$2 041-17.

It immediately is clear that his claim is not inflated. But he did not factor in contingencies. He also did not take account of costs for, among other things, insurance as well as maintenance and servicing of the bus. In my judgment, the sum of US$2 047-17 is a fair provision for these items, per month.

Exhibit 5 was produced by consent. It was not discredited under cross-examination at all. Considering that the first and second defendants, in their plea, put the plaintiff to proof of the quantum I would have expected them to test the accuracy of the figures contained in the log sheets through cross-examination. As it turned out, not a single question was put to the plaintiff, under cross-examination, relating to the log sheets. In the circumstances, I have no reason not to accept the plaintiff's evidence on quantum, which is actually US$2 041-17 less than the real average net income going by the log sheets. This is of course subject to what I have said relating to unfactored deductions.

It was common cause that the bus was assessed for repairs 47 days after the accident. The cost of repair, being US$3000-00, was paid ten days thereafter. That was on 31 March 2011. In total, this is the period of 57 days covered by the claim.

I accept the plaintiff's documented and oral evidence that he mitigated the damages by doing all that was in his power to ensure the compensation for repairs to the bus was paid sooner to alleviate accrual of lost earnings. The fault lay with the first defendant who did not timeously submit the claim documents to the third defendant to enable expeditious processing of compensation for damage to the bus. In fact, in terms of the insurance policy, the third defendant could have legally rejected the claim as it was submitted outside the 31 days contractual period.

I am satisfied that the plaintiff proved that it is entitled to payment in the sum of US$21 033-00 for lost income. The payment is due from the first and second defendants jointly and severally the one paying the other to be absolved.

COSTS

As the successful party, the plaintiff is entitled to recover his legal costs from these two defendants.

However, going by his own pleadings, he should not have sued the third defendant at all. He must pay the third defendant's costs.

The only reason why I did not order such costs on a higher scale is this. In its plea, the third defendant asked for costs on the ordinary scale. In the exercise of my discretion, I did not think it fair that, without amending its plea to pray for costs on a higher scale, and therefore without warning, the third defendant could properly pray for costs on a higher scale for the first time only in its written closing submissions.

Apart from the physical papers constituting the pleadings in this matter, the plaintiff clearly had no claim, in the mould of a cause of action, against the third defendant. The third defendant could have saved itself unnecessary costs by either excepting to the claim or raising the special plea of prescription. It could also have made an oral application for absolution from the instance at the close of the plaintiff's case.

DISPOSITION

In the result, therefore, judgment is granted as follows:

'1. The 1st and 2nd defendants shall jointly and severally the one paying the other to be absolved pay the plaintiff:

(a) US$21 033-00 plus interest thereon at the prescribed rate from 2 February 2011 to the date of full payment.

(b) Costs of suit.

2. The plaintiff's claim against 3rd defendant is dismissed with costs.

Bvekwa Legal Practice, plaintiff's legal practitioners
Kantor and Immerman, 1st and 2nd defendants' legal practitioners
P Takawadiyi and Associates, 3rd defendant's legal practitioners