TIMOTHY MUKANDI
versus
ELVIS NYAMWEDA (1)
and
SYLVESTER TAWANDA (2)
and
MARSHALL NYASHA CHAKUCHICHI (3)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 27 November & 2 January 2025

Civil trial – Absolution from the Instance

E. Dondo for the plaintiff
A. Masango, for the 1st defendant
T. S. Nyawo, for the 2nd and 3rd defendants

[1] DEMBURE J: This is an application for absolution from the instance made by the defendants at the close of the plaintiff's case in terms of rule 56(6) of the High Court Rules, 2021. The plaintiff opposed the application.

FACTUAL BACKGROUND

[2] On 30 April 2021, the first defendant driving a motor vehicle, a Toyota Runx registration number AEA 7540 was involved in a road traffic accident at 59km peg along Harare-Bulawayo Road at night. The first defendant hit a black stray cow with the vehicle which flee into the air and landed on its side. The plaintiff was one of the passengers in the motor vehicle when the accident occurred. He sustained serious injuries including a fractured right leg.

[3] The plaintiff averred that the first defendant caused the accident. It was alleged that the first defendant's conduct was wrongful and negligent in that he was overspeeding, he failed to exercise caution given that it was already at night and to keep a proper lookout and act reasonably in the circumstances. He further averred that the second and third defendants are the owners of the stray cow and their conduct was wrongful and negligent in that they

failed to tend for their cow leaving it roving in the roads thereby posing danger to the motorists.

[4] On 30 August 2022, the plaintiff issued a summons against the defendants. The plaintiff alleged that there was contributory negligence from the defendants in that if the second and third defendants kept their cow under control the accident could have been avoided while at the same time if the first defendant was not overspeeding and exercised caution the accident could have been avoided. He is claiming damages arising from the accident against the defendants jointly and severally the one paying the other to be absolved as follows:

(a) US$10,000.00 or its equivalent in local currency for permanent disability.

(b) US$10,000.00 or its equivalent in local currency for pain and suffering.

(c) US$2,020.00 or its equivalent in local currency for medical expenses already incurred.

(d) US$791.00 or its equivalent in local currency for future medical expenses.

[5] The first defendant opposed the claims. He contended that while he assisted the plaintiff in driving the motor vehicle upon his request as he was tired, he was not overspeeding or negligent in any way. He also averred that had the second and third defendants tended their stray cow the accident would not have occurred. He completely denied liability for the plaintiff's delictual claims. The second and third defendants also denied liability. They denied being the owners of the stray cow. The second defendant said he was only a herdman who penned the cow for the night. They also contended that the plaintiff voluntarily assumed the risk of an accident by allowing the first defendant to drive the motor vehicle. They further averred that the first defendant was negligent for driving at an excessive speed and failing to take evasive action when an accident seemed imminent.

[6] Before the commencement of the trial, I granted an application by the second and third defendants for the reinstatement of their defences with the consent of the plaintiff. They had failed to attend a case management meeting on 14 November 2024 which resulted in their plea being struck out.

[7] At the trial, the plaintiff gave evidence. He called one witness, Robert Mukondo. The plaintiff thereafter closed his case. The defendants then made this application for absolution

from the instance on the ground that the plaintiff had failed to establish a *prima facie* case. Parties filed written submissions in respect of the application and their counsels indicated that they would abide by their written submissions.

FIRST DEFENDANT'S APPLICATION

FIRST DEFENDANT'S SUBMISSIONS

[8] Although the application by the first defendant was erroneously titled "1ST DEFENDANT'S CLOSING SUBMISSIONS" it was in substance an application for absolution from the instance. It was submitted for the first defendant that the plaintiff had the onus to prove that the first defendant caused the accident and that he is liable to pay the damages and to justify the quantum of the damages. It was argued that the plaintiff dismally failed to prove his case and that the first defendant was entitled to absolution from the instance. It was further submitted that the plaintiff did not prove the essential elements of his claim that the first defendant was speeding. His evidence was exaggerated and was not corroborated by anyone.

[9] It also argued for the first defendant that the plaintiff failed to prove that the first defendant did not keep a proper look out as it was at night, on a curve, the cow in the road was black and the accident was a sudden emergency. It was further submitted that the plaintiff's own witness exonerated the first defendant on any negligence. The second witness did not corroborate his case. The issue of speeding needed evidence in the form of a reconstruction of the accident scene or evidence of the accident evaluator. The evidence of the evaluator was alluded to in cross-examination and was not seriously disputed and it exonerated the first defendant.

[10] On the quantum of damages, it was submitted that the plaintiff failed to discharge the onus to prove his case. He did not lead any expert evidence to prove his claim that he was permanently disabled to justify the claim for US$10,000.00 for permanent disability. Such medical evidence was necessary in terms of s 22 of the Civil Evidence Act [*Chapter 8:01*]. It was further argued that he did not lead evidence of his employment and his earnings and the extent to which the accident and the injuries affected his working ability. It was finally submitted for the first defendant that the plaintiff deliberately lied about the overspeeding as the evaluator exonerated the first defendant and his story must be discarded. Reference

was made to the cases of *Learder Tread Zimbabwe (Pvt) Ltd v Smith HH* 131/03 and *Centra (Pvt) Ltd v Pralene Moyas & Anor* HH 57/12.

PLAINTIFF'S SUBMISSIONS IN REPLY

[11] In response, it was submitted for the plaintiff that the first defendant should not have attempted to file the present application. That he was charged and convicted of negligent driving after a full criminal trial. This conviction arose from the same accident that is subject to these civil proceedings. His liability was established by the law. What only remains so far as the first defendant is concerned is just the assessment of the quantum of damages. The question as to whether or not first defendant is liable is settled by s 31 of the Civil Evidence Act.

[12] It was further argued that the burden of proof in criminal proceedings is far more heavy than in civil proceedings. The conviction is sufficient proof of liability in subsequent civil proceedings. The following cases were cited in support of this submission: *French & Smith t/a Customs Services v Cache & Anor* HH 603/23 and *Chamangira v Tsabora* HH 15/17. It was also submitted that s 31 of the Civil Evidence Act enjoins the court to take into account the criminal conviction as sufficient evidence that proves liability. He was negligent. The plaintiff testified that he was speeding against the background that it was already during the night. Towards the scene, he overtook three motor vehicles.

[13] On the quantum of damages, it was submitted that the plaintiff proved that he is entitled to US$2,020.00 for medical expenses already incurred and US$791 for future medical expenses. He tendered receipts that were not challenged. With regards to damages for pain and suffering the plaintiff gave a detailed account of the harrowing and painful experience he suffered from the time of the accident. He further explained that he now has a permanent condition of pus generation and excretion which he says results in excruciating pain. With pain and suffering damages the plaintiff need not tender any receipt or come up with any mathematical formula. The court must simply be convinced that the plaintiff indeed suffered pain and injury. The discretion remained with the trial court. Several cases were cited including the case *of Aaron's Whale Rock Trust v Murray and Roberts & Anor* 1992 (1) SA 655 where it was held that general damages are not mathematically quantifiable. The court will award what it thinks to be fair and reasonable depending on the

circumstances. It was also submitted that this application by the first defendant is just a matter of trying his luck and taking chances and it must fail.

SECOND AND THIRD DEFENDANTS' APPLICATION

SECOND AND THIRD DEFENDANT'S SUBMISSIONS

[13] It was submitted for the second and third defendants that this application was warranted by the admission made by the plaintiff and on the basis of those concessions they should not be put on the stand to explain away the plaintiff's case. It was argued that the plaintiff has failed to make out any case at all, in fact, and law. The plaintiff's claim in para(s) 5.7 to 6.3 alleges that the beast which was run over by the first defendant belonged to the second defendant. The plaintiff testified that the second defendant paid an admission of guilty fine.

[14] It was also submitted that in his evidence in chief, the plaintiff further stated that he was advised by the third defendant's mother that the beast belonged to the third defendant's father and that the third defendant was now in charge following his father's demise. Under cross-examination by Mr *Masango* the plaintiff stated that the third defendant was placed in charge pending the registration of his late father's estate. He also admitted that he did not witness the second defendant deposit a fine. On his own testimony the plaintiff admitted that the third defendant was not the owner of the beast, his father was. Consequently, the second defendant cannot be vicariously liable to the plaintiff as there is no employer-employee relationship between him and the third defendant. His employer at the material time is not before the court.

[15] It was further argued that the facts as established are that the beast was owned by the third defendant's father and following his demise, ownership passed to his estate of which the third defendant is just a beneficiary. It was submitted that an admission once made is binding on its maker. Reference was made to s 36 of the Civil Evidence Act and the cases of *inter alia Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (SC), *Mining Industry Pension Fund v Dab Marketing (Pvt) Ltd* SC 25/12 and *DD Transport P-L v Abbot* 1998 (2) ZLR 92 (SC). The formal admissions by the plaintiff, therefore, are conclusive of the facts admitted therein. No evidence is necessary to prove admitted facts. It is incompetent for a party who made admissions to adduce evidence to contradict the admitted facts.

[16] There were also extensive submissions on the principle of vicarious liability with the argument being that the plaintiff cannot claim that the actions of the second defendant were committed in the course and scope of his employment with the third defendant. That the plaintiff's evidence was that the second defendant is the owner of the beast or alternatively, that he was employed by the third defendant's father at the material time.

[17] It was further argued that the plaintiff did not establish a *prima facie* case that the third defendant was the owner of the beast in question. The second and third defendants do not need to highlight to the court whether or not they acted negligently in causing the accident. It was also argued that the plaintiff acted in wilful violation of the law and could not seek relief from the court. The plaintiff admitted travelling contrary to the travel restrictions imposed by SI 62 of 2021. He cannot seek to benefit from his own wrong. Reference was made to the case of *Standard Chartered Bank of Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (SC).

PLAINTIFF'S SUBMISSIONS IN REPLY

[18] In reply, it was submitted for the plaintiff that the second and third defendants were simply trying their luck by making this application. It was argued that it was not in dispute that the bovine that was hit by the first defendant was left unattended and wandering on the highway. There was a meeting at the third defendant's residence in which the third defendant, his wife, mother and the second defendant, the herdsman were present. At that meeting the plaintiff was advised that the third defendant's father died on the same day the accident occurred but it was now the third defendant as the eldest son who was now in charge. It was further argued that the plaintiff stated that at the meeting the third defendant agreed to pay some money but later reneged having been advised by the first defendant that the plaintiff was supposed to get compensation from insurance. It was also submitted that this evidence was not challenged.

[19] It was further argued that the bovine that caused the accident belonged to the third defendant. The second defendant was a herdsman and is vicariously liable. An exhibit was tendered from the police that showed that the owner of the bovine paid an admission of guilty fine of US$500.00. The second and third defendants' liability arises from the fact that they did not tend their bovine. They left it wandering on the highway thereby posing a

significant risk to the motorists. They cannot deny liability and their application must be dismissed with costs.

THE APPLICABLE LAW

[20] It is settled law that an application for absolution from the instance may be made at the close of the plaintiff's case. The test for determining an application for absolution from the instance was restated in *United Air Charters (Pvt) Ltd* v *Jarman 1*994 (2) ZLR 341 (S) 343 B-C as follows:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Service Station (1969) (Pvt) Ltd* v *Fox Goodridge (Pty) Ltd 1*971 (1) RLR 1 (A) at 5D – E, *Laurenoov Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (5) @158 B – E"

[25] The legal position relating to an application of this nature was remarkably outlined in *ZIMSCO v Tsvangirai & Ors* SC 12/20 where the court had this to say:

> "It is trite that the court cannot *mero motu* consider whether absolution must be granted. It is an option which is available to the defendant, upon application. When an application for absolution from the instance is made at the end of the plaintiff's case the test is: what might a reasonable court do, that is, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case the test is: what ought a reasonable court do?
> In deciding what a court may or may not do, it is implied that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence.
> In the case of *Nobert Katerere v Standard Chartered Bank Zimbabwe Limited* HB 51-08, it was stated thus:
>
> "The court should be extremely chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim - *Claude neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403(A); *Marine & Trade Insurance Co Ltd* v *Van Der Schyff* 1972 (1) SA 26(A); *Sithole* v *PG Industries (Pvt) Ltd* HB 47-05"
>
> What flows from the above cases is that absolution from the instance will not be granted if there is sufficient evidence, which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."

[26] In respect to a claim for damages, the plaintiff is required to adduce evidence to establish the loss and to justify the quantum claimed. With special damages, there must be evidence to specially prove the precise amount as the award cannot be based on speculation. There must also be evidence to assist the court to make a judicious assessment of the general damages. Thus, in *NRZ v Stuart* SC 70/21 at p 14-15 the court aptly distinguished these damages as follows:

> "Special damages are those damages that have occurred or have been incurred and can be calculated with precision. One way in which special damages are proved is by the production of invoices or receipts showing the expenses that were incurred. These are damages capable of precise proof as they are what the plaintiff will have incurred which is calculable.
> General damages on the other hand are those damages that naturally flow from the wrong and are of a non-pecuniary nature such as pain and suffering, duration and intensity of pain caused by the intentional infliction of harm. A court when determining the quantum for general damages is exercising a broad general discretion when considering what fair and adequate compensation would be.
> In considering such damages the court considers the facts and circumstances of the case and the injuries suffered by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life. In the process, the court considers the trend of awards in similar cases including the economic environment affecting such awards. Though these damages are not capable of precise calculation a plaintiff is still expected to speak to the quantum of the claim. The court is not expected to speculate on the quantum of damages to award where no quantum has been testified to"

[27] The above authorities are clear that in an application for absolution from the instance the test is, whether a plaintiff has made out a *prima facie* case and adduced evidence to prove all the essential elements of the claim entitling the court to find for him at that stage. The enquiry is whether there is sufficient evidence upon which a court might make a reasonable mistake and find for the plaintiff. It is the defendant who brings an application for absolution from the instance who must, therefore, show that the plaintiff has failed to adduce evidence relating to the essential elements of the claim and failed to make out a *prima facie* case.

THE ANALYSIS

WHETHER OR NOT A *PRIMA FACIE* CASE HAS BEEN MADE FOR THE PLAINTIFF

[28] The question that arises for determination is whether or not the plaintiff managed to prove a *prima facie* case against the defendants. In other words, the plaintiff must establish the essential elements of his claim.

THE CASE AGAINST THE FIRST DEFENDANT

[29] It is common cause that the plaintiff's case against the first defendant is an Aquilian action for damages. The Aquilian action was described as the cornerstone of our law of delict by G. Feltoe, *A Guide to the Zimbabwean Law of Delict*, 2012. At p 9 the requirements for an Aquilian action are set out as follows:

> "(i) There must have been some conduct on the defendant's part (i.e. an act on omission) which the law of delict recognizes as being wrongful on unlawful. (The wrongfulness requirements).
> (ii) The conduct must have led either to physical harm to person or property and, thereby to financial loss, or have caused purely financial loss which does not stem from any physical harm to person or property. (The so called patrimonial loss requirement, one's patrimony being one's property and finances);
> (iii) The defendant must have inflicted the patrimonial loss intentionally or negligently. (The fault requirement)
> (iv) There must be a casual link between the defendant's conduct and the loss (the causation requirement)."

[30] The contentious issue in *casu* is firstly the fault element. The issue is whether or not the accident was caused by the negligence of the first defendant. If fault is established then the issue of damages becomes the second issue which must be proved and quantified. The test for negligence is an objective one and is anchored on the standard of a reasonable person. Negligence is then the failure to display the same degree of care in avoiding the infliction of harm which a reasonable person would have displayed in the circumstances. See *S v Burger* 1975 (4) SA 877 (A) at 879 D-E.

[31] In this case, the plaintiff had the onus to prove that the first defendant was negligent resulting in the accident thereby inflicting harm on him. It is trite law that one who alleges must prove and that unsubstantiated or bald assertions are not sufficient to establish even a *prima facie* case. In *ZIMASCO (Pvt) Ltd supra* the court stated as follows:

> "It is trite that "he who alleges must prove". The maxim was applied in the cases of *Circle Tracking v Mahachi* SC 4/07 and *Goliath v Member of the Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA). In the absence of such evidence, the court as the adjudicating authority cannot make its determination."

[32] The plaintiff testified in his own case. His evidence was to the effect that the plaintiff was overspeeding and at one time he overtook three motor vehicles. The plaintiff also tendered as part of his evidence to prove negligence the court extract showing that the first defendant was convicted by the Magistrates Court for negligent driving arising from the said accident.

The said court extract was tendered as exhibit 1 and it was not challenged by the first defendant. It was, therefore, common cause that the first defendant was on 30 November 2022 convicted at Norton Magistrates Court for contravening s 52(2) of the Road Traffic Act (that is "negligent driving"). He was sentenced to pay a fine of RTGS$40,000.00. In default of payment 3 months imprisonment and in addition, 3 months imprisonment wholly suspended for five years on the usual condition of good behaviour.

[33] The first defendant did not make any submissions in relating to the effect of this conviction on the plaintiff's case. The provisions of s 31 of the Civil Evidence Act come into play to assist the plaintiff in proving his case. The relevant s 31 reads:

> **"31. Proof of previous criminal conviction**
> (1) …
> (2) …
> (3) Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown—(a) that he did all acts necessary to constitute the offence; or
> (b) where the offence is constituted by an omission to do anything, that he omitted to do that thing; as the case may be.
> (4) Evidence of a criminal conviction—
> (a) shall not be adduced for the purposes of this section if the conviction is the subject of an appeal in terms of any law, until the appeal has been finally determined or has lapsed or been withdrawn or abandoned;
> (b) may be adduced for the purposes of this section even if the convicted person has subsequently been pardoned.
> (5) For the purposes of proving in civil proceedings that a person was convicted of a criminal offence, a document which—
> (a) purports to be a copy of the record of the criminal proceedings concerned or a copy of any part of the record which shows that the person was convicted of the offence; and
> (b) is proved to be a true copy of the original record or part thereof or purports to be signed and certified as a true copy by the official having custody of the original record; shall be admissible on its production by any person as *prima facie* proof that the person concerned was convicted of that offence:
> Provided that this subsection shall not preclude the admission of any other evidence to prove that the person committed the offence." [My emphasis]

[34] The criminal conviction has not been denied in this case and no appeal is pending in the criminal courts over the first defendant's conviction. Section 31(3), therefore, applies. It was submitted for the plaintiff that the evidence of a criminal conviction is conclusive proof of liability in civil proceedings as the standard of proof is lower in civil claims. I was referred to the case of *French and Smith T/A Customs Services v Cache & Anor supra* but

that case does not support the plaintiff's submissions that the conviction makes the issue of whether or not the first defendant was negligent a non-issue. The provisions of s 31(3) do not support that argument. It is not correct that the conviction in a criminal matter makes this court rubberstamp that decision on liability. The evidence of a criminal conviction is not conclusive but as shown in subsection 3 it leads to a presumption that the first defendant was negligent. That being a presumption, it can be rebutted by the first defendant's evidence to the contrary that he was not negligent. To rebut that presumption the first defendant must give his evidence.

[36] CHIRAWU-MUGOMBA J in *French and Smith T/A Customs Services supra* correctly observed:

> "In *casu*, the criminal conviction has not been denied. No appeal is pending in the criminal courts and it is surprising that Mr *Tembani* chose to challenge the conviction in this forum. The conviction and the sentence has been proved by the criminal record book extract. Therefore, the presumption in s 31(3)(a) above applies." [My emphasis]

[37] Accordingly, the evidence of the criminal conviction raises a presumption that the first defendant is liable. It is, therefore, used as part of the plaintiff's evidence. The defendant has to prove by contrary evidence that he did not commit the acts alleged which resulted in that conviction. The evidence will then be properly assessed together with the plaintiff's evidence for the court to make a definite finding on whether or not the defendant negligently caused the accident. I, therefore, adopt the remarks in the *Nobert Katerere* case cited in *ZIMASCO supra* that:

> "The court should be extremely chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence…"

[38] In the submissions for the plaintiff, the case of *Chimangira v Tsabora supra* was also cited. It is clear from that case that the appeal court endorsed the trial magistrate's findings that the respondent's version was more probable than the appellant's version. This means that the evidence of a criminal conviction remains part of the plaintiff's evidence needed to prove his case in civil proceedings. It is not necessarily the end in itself as the defendant is permitted to show that he did not commit the act or omitted to act as alleged and the court would still be called to evaluate on a balance of probabilities as to whether the plaintiff has

finally proved its case entitling it to judgment on its claim. Thus, in *Chimangira supra* the court aptly stated:

> "In *casu*, it is common cause that the appellant and his co-defendant were convicted of the offence of assaulting the respondent, they did not appeal against that conviction. In terms of the above section [s 31(3) of the Civil Evidence Act] 'it shall be presumed, unless the contrary is shown that he did all the acts constituting the offence' of assault on the person of the respondent. It was thus upon the defendant to rebut that presumption." [My emphasis]

[39] Applying the above principles arising from s 31(3) the first defendant, because of his conviction for negligent driving, must rebut the presumption by showing that he did not do the acts in question. In these premises, the application for absolution by the first defendant cannot succeed. The plaintiff managed to prove a *prima facie* case against him to warrant that he be put to his own defence.

[40] As for the quantum of damages, the first defendant only directed his application and submissions to the claim for damages for permanent disability. He did not show that the plaintiff failed to prove a *prima facie* case concerning the other damages claimed by the plaintiff. It is trite that it is the defendant who brings an application for absolution from the instance who must show that the plaintiff failed to make out a *prima facie* case. See *Moyo & Anor v Methodist Church (Greendale)* HH 181/18 at p 3-4.

[41] On the claim for permanent disability, the plaintiff claimed US$ 10,000.00 in damages. G. Feltoe, *A Guide to the Zimbabwean Law of Delict*, *supra* at p 148 outlined the position of the law on these general damages as follows:

> "A disability may be temporary or permanent. Where the disability has disappeared by the time of the trial, the claim would normally be merged with the claims for pain and suffering and loss of earnings. Where the disability is permanent or is likely to extend beyond the date of the trial, P will claim additionally for diminution in earning capacity and impairment or loss of amenities of life. Where P is alleging permanent disability he must show that he has no reasonable prospects of recovering. If he is alleging temporary disability he must show that there is no reasonable prospect of recovering prior to the date upon which he alleges the disability will cease. Sometimes P will seek to prove that a disability is likely to supervene, although at the date of the trial, it has not yet come about."

[42] While it was common cause that the plaintiff's right leg was badly fractured following the accident and that he still walked with the aid of clutches, whether or not there was permanent disability was not established. The plaintiff was required to prove a *prima facie* case of permanent disability and the extent of the loss arising therefrom. The fact that he

was still receiving treatment was not challenged but he was required to have led evidence from a medical expert to establish that his disability is now permanent or that there is no reasonable prospect of recovery and the extent or degree of the disability, normally given in percentages. The primary evidence required is medical in nature and, therefore, expert evidence in that regard could not be dispensed with.

[43] The plaintiff failed to produce any medical proof establishing the disability and the degree of the permanent disability or to call for any expert witnesses to prove his claim for such damages. He simply made bald assertions. He also told the court that the doctors had recommended that his leg should be amputated. This, however, remained his bald assertion as no substantive evidence was led or produced to show that this was the corrective remedy recommended by the medical doctors.

[44] I also agree with the submissions for the first defendant that there was no proof of his employment before the accident and no proof of the loss of earnings. As stated by G. Feltoe *supra*, where the claim is for permanent disability the diminution in earning capacity and loss or impairment of amenities of life would additionally be claimed as they also assist the court in quantifying the damages for permanent disability. I also fully associate myself with the remarks by LOWE J in *Prince v Road Accident Fund* [2018] ZAECGHC 20 who stated as follows:

> "[9] Again as pointed out by Corbett [*The Quantum of Damages*, Volume 1: Corbett Fourth Edition]:
> "Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant's wrongful act..."
> In this regard the question that must first be answered in the assessment of damages and what must be determined is:
> "…disability which is likely to impair the injured person's earning capacity or to cause a loss of the amenities of life. Such disability may be temporary or permanent. Where it is temporary and has in fact disappeared at the time of trial, it is not normally of great importance as an independent factor.… On the other hand, where it is permanent or where, though temporary, it extends beyond the time of the trial, then it may cause prospective losses, such as a diminution in the injured person's earning capacity or an impairment of the amenities of life, for which compensation should be made by the award of damages. Moreover, a permanent disability may be present at the time of the trial or it may be one which will only manifest itself at some future date."
> [10] I accept, that the Plaintiff must always (on a balance of probabilities) establish the nature and extent of the disability and that if it is alleged to be permanent that there is no reasonable prospect of recovering. If a future disability, the Plaintiff must show that it is

> reasonably probable that the disability will supervene in the future. In my view, however, the correct approach, as set out in Corbett, is to make a contingency allowance for certain forms of loss where the basis therefore has been laid in the evidence.
> [11] The disability may be physical or mental or both. Good examples of mental incapacity are anxiety neurosis, personality changes, and disturbance of an injured person's emotional balance."

[45] There must be evidence for the court to be able at the end of the day to quantify such damages. The plaintiff must speak to those damages and lead or produce evidence establishing the permanent disability and the degree thereof. In *Dziva v Magaisa & Anor* HH 93/17, it was shown that such damages are assessed based on the evidence not simply wild speculation and conjecture. The court cannot pluck figures from the air even though general damages are by their nature not assessed with any mathematical formula. The court went on to state as follows:

> "Evidence led by the plaintiff and Dr Paketh shows that he will need a total hip replacement. For that dislocation, the doctors pegged the degree of permanent disability at 30 %... Mr. Gova is a qualified specialist in that field of medicine which deals with the treatment of disorders and injuries of bones. Dr Paketh explained that after he examined the plaintiff he briefed Mr. Gova who also looked at the clinical notes of the plaintiff and pegged the degree of permanent disability at 30 %. I find no fault in the assessment that was made by Mr. Gova… The defendant did not therefore launch any meaningful challenge to the extent of permanent disability which was assessed to be 30 %."

[46] In *Arendse v Maher 1936 TPD 162 at 165* the court had this to say about the paucity of evidence in the assessment of damages:

> "It remains, therefore, for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the Court should suffer..."

In *casu*, without the evidence to support the claim for permanent disability, it is unnecessary for the first defendant to continue to defend that claim. That was the only claim for damages the first defendant challenged in his application. This is a court of law which can only act on evidence, not mere conjecture. Absolution must be granted on the claim for permanent disability.

THE CASE AGAINST THE SECOND AND THIRD DEFENDANTS

[47] It is pertinent that I first have to set out how the claim against the second and third defendants was pleaded. In para 5.6 of the declaration, the plaintiff pleaded that the first

defendant was involved in an accident after hitting a stray cow. Then para 5.7 of the declaration stated: "*The stray cow belonged to the second and third defendants and the same was not being tended."* In para 6.5 it was further pleaded that: "*It was apparent to the second and third defendants that their conduct in allowing their cow to move around unattended would pose hazards to the motorists… If they had acted with due care, the accident could not have occurred.*" [My emphasis]

[48] What is apparent from the plaintiff's declaration is that he pleaded his claim solely on the ground that the second and third defendants are the owners of the bovine in question and they failed in their duty of care. The liability of the owner in such circumstances was laid down in *Moubray v Syfret* 1935 AD 199 where WESSELS CJ said as follows:

> "*Prima facie* the owner of a farm is entitled to allow his cattle to roam over his farm, so that at times they may be found straying on the public road. In a country where cattle ranching is an important industry we must see that we do not make it intolerable for the owner by imposing upon him unnecessarily onerous conditions, and we must assume that persons, who use public roads running through cattle farms, are acquainted with the ordinary conditions appertaining to such farms. In other words, that a person who uses a public road passing over a cattle farm will know that he may encounter cattle on the road ……..and if he is a motorist he must act prudently and not disregard the obvious customs and habits of the country. On the other hand, the owner of cattle which are apt to stray on a public road must use reasonable care to see that he does not on his farm expose the travelling public to dangers from his cattle which he ought both to foresee and to avoid."

[49] In *casu*, the plaintiff's claim is simply that the second and third defendants are the owners of the stray cow that was hit in an accident. He did not plead in the alternative to say that they were in control of the animal. There is also no vicarious liability that was pleaded. The second and third defendants made extensive submissions on the principle of vicarious liability but in my view, it is inapplicable. A claim based on vicarious liability must be properly pleaded by making averments which touch on the requirements of such an action that the person who committed the delict was an employee acting within the course and scope of his employment. A summons based on vicarious liability must specify the name of the employee who committed the delict and the capacity under which he was employed. The necessary averments for vicarious liability must be set out in the summons and declaration. See *Moyo v Edge Waterfarm (Pvt) Ltd* HH 181/18. This was not the case in this matter. The plaintiff did not allege or make any averments to establish a claim for vicarious liability. He cannot find any refuge in such a claim without having pleaded a case

for vicarious liability. I, therefore, find the submissions by the second and third defendants and the plaintiff in reply on vicarious liability to be off the mark and, therefore, irrelevant to this case.

[50] Having pleaded that the said defendants were the owners of the stray cow, the plaintiff restricted himself to that pleading. He never sought to amend his pleadings at any stage. It is trite that pleadings guide the parties as to the nature of their case and help the court identify the issues that separate the two litigants. The purposes of pleadings were outlined remarkably well in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* SC 24/18 at pp 10-13 where GARWE JA (as he then was) had this to say:

> *"THE IMPORTANT PURPOSE OF PLEADINGS*
> [25] The manner in which the respondent has handled its case both *a quo* and in this Court brings to the fore the question as to what the purpose of pleadings is. In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.
> 25.1 In *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) the court remarked:-
>
> > "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed."
>
> 25.2 Harwood BA in his text *Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice* (16th edn, Stevens & Sons Ltd, London, 1957) states at page 72:-
>
> > "The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision."
>
> 25.3 In *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182, the court remarked:
>
> > "The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another."
>
> 25.4 In *Courtney–Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm), the court remarked at page 698:-
>
> > "In any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings … and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment."

25.5 In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94(A), 108, the court cited with approval the case of *Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 where at page 198 it was stated as follows:-

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

25.6 In *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 898 the court cited with approval the following remarks by the authors Jacob and Goldrein in their text *Pleadings: Principles and Practice* at p 8-9:

> "As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings … For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation. … Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither *party can complain if the agenda is strictly adhered to.*" (my emphasis)

25.7 The authors Cilliers AC, Loots C and Nel HC in their text *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa* (5th edn, Juta and Co. Ltd, Cape Town 2009) quote the following passage from Halsbury's *Laws of England*, 4th edn (Reissue), Vol 36 para 1 in which the function of pleadings is said to be,

> "… to give a fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at the close if they are not subsequently amended." (at page 558)

25.8 In *Farrell v Secretary of State for Defence* (1980) 1 All ER 166 at page 173, Lord Edmund-Davies stated as follows,

> "It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been … a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trial with a jury. To shrug off criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it."

…

[26] I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent."

[51] Applying the above principles, the plaintiff had to prove the case he pleaded. He had to establish that the second and third defendants owned the bovine. The plaintiff admitted under cross-examination that the second defendant was the herdsman. I agree with the second and third defendants' submission that once a fact is admitted the maker becomes bound and he cannot lead any evidence to contradict what he admitted. See *Fawcett Security Operations supra.* In *casu,* while he produced a police report marked exhibit 3 where the second defendant was alleged to have paid a fine for the owner of the cow, the plaintiff under cross-examination admitted that the second defendant was a herdsman and that this information also came out of the discussions he had in the presence of the third defendant, his mother and wife and the second defendant. At para 38 of the plaintiff's submissions he sought to attempt to claim that as the herdsman he was vicariously liable but as already stated above, he did not plead any case for vicarious liability. The plaintiff also confirmed under cross-examination, that the owner of the cattle was the third defendant's father who died on the day of the accident and that his estate was not yet finalised at the time. That sealed the fate of his claim against the second defendant. It collapsed on that basis.

[52] As for the third defendant, the plaintiff under cross-examination, admitted that the owner of the bovine was the third defendant's father. He further stated that he was informed that he had died on the day of the accident and at the time he held discussions with the family his estate had not been registered or finalised. He, however, claimed that the third defendant's mother had said that the third defendant was in charge. It is trite law that a deceased estate is an aggregate of the assets and liabilities of the deceased person. The totality of the rights and obligations and powers of dealing with the assets and liabilities vests in the executor so that he alone can deal with them. The executor sues or is sued in any proceedings concerning the deceased's estate. See *Nyandoro v Nyandoro & Ors* 2008 (2) ZLR 219 (H) 222 (H) at 223C; *Chiangwa v Katerere* SC 61/21.

[53] The third defendant could only be sued for the harm caused by the said cattle on the basis that he was the owner if it was proved that he was the executor of the deceased's estate or at least when the estate was finalised and as a beneficiary, he was awarded the cattle in question. Simply saying he was the one in charge does not establish that he was the owner. There was no evidence to prove ownership or that the third defendant owned the bovine. The averments in the plaintiff's declaration that he was the owner remained a bald allegation and contrary to the plaintiff's evidence before me. I fully associate myself with the remarks expressed in *Sheriff for Zimbabwe v Mahachi and Leomarch Engineering* HMA 34/18 where the court stated as follows:

> "There are no hard and fast rules on how they may go about proving such ownership. Every case depends on its own facts. The claimant may have to produce some evidence, such as receipts or other documents, if available, to prove ownership. A bald assertion that they are the owner is not enough."

In any event, the admissions made by the plaintiff in cross-examination made the averment that the second and the third defendants owned the bovine untenable.

[55] In the premises, the plaintiff failed to establish a *prima facie* case against both the second and third defendants. It was, therefore, unnecessary for me to consider the effect of the violation of the COVID-19 travel restrictions imposed by SI 62 of 2021 on the plaintiff's claim, a point argued in the submissions made for the second and third defendants.

DISPOSITION

[56] The application for absolution from the instance by the first defendant must fail save for the claim for damages for permanent disability. The costs shall remain in the cause. As for the second and third defendants, the application must succeed. The said defendants sought costs on a higher scale. I did not find any justification for such punitive costs. It is trite that costs on a legal practitioner and client scale are only awarded in exceptional circumstances. Costs must follow the event and the lower scale costs are justifiable.

[57] Consequently, it is ordered as follows:

1. The first defendant's application partially succeeds and the following order is made:
    a) Absolution from the instance be and is hereby granted on the plaintiff's first claim for damages for permanent disability.
    b) The matter shall proceed in respect of the plaintiff's second, third and fourth claims.
    c) Costs shall be in the cause.
2. The second and third defendants' application for absolution from the instance be and is hereby granted with costs.

DEMBURE J: ……

Saunyama Dondo, the plaintiff's legal practitioners
Malinga Masango Legal Practice, 1st defendant's legal practitioners
Nyawo Ruzive Attorneys at Law, 2nd and 3rd defendants' legal practitioners