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

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 June 2016, 22 February, 6 April 2017, 19 July, 28 September 2021 and 28 April 2022.

Civil Trial

T Bhatasara, for the plaintiff
H Mutasa, for the defendant

TAGU J: The Plaintiff issued summons against the Defendant for the payment of the sum of US$51 982.93 being damages arising from injuries to Chidochashe Chiswanda (a minor) on the 15th of February 2015 at OK Mart, Hillside, Harare where Defendant's display shelf fell down injuring the minor child in an accident allegedly and solely caused by the negligence of the Defendant who at all material times, had a duty of care which it breached which damages despite demand, the Defendant failed, refused or neglected to pay to the Plaintiff, interest on the above amount at the prescribed rate from 1st April 2015 until date of payment in full and cost of suit. The defendant denied liability on the basis that the minor child concerned unsupervised as he went around doing his shopping, and appeared to have been fascinated by the balls that were being displayed on the shelf in question climbed on the Shelf causing the same to succumb to the minor's weight and collapsing.

The Plaintiff led evidence and closed his case. At the opening of the Defendant's case the Plaintiff applied in terms of Order 41 Rule 10 of the High Court Rules, to amend the claim to reflect that the amount claimed is in US$ payable in RTGS at the weighted Rate at the time of payment. This was necessitated by the fact that the claim expressed in United States Dollars prior to 22 February 2019 was now converted to Zimbabwean dollars by operation of the law, (Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS) Regulations 2019, S.I. 33 of 2019). This was elevated and reenacted into s 22 (1) (d) of the Finance Act No. 2 of 2019.

The total breakdown of the Plaintiff's claim is calculated as follows:

A. Special Damages

Past medical expenses- US$ 934.49

Disposable diapers- US$92.39

Past transport costs- US$101.25

B. General damages

For pain and suffering- US$30 000.00

Permanent disability and disfigurement- US$15 000.00

Loss of amenities of life-US$5 000.00

Future medical and transport expenses- US$810 and US$44.80 respectively.

THE LAW

This is an aquilian action which is based on the following allegations of negligence against the Defendant i.e. that the Defendant:-

1. Did not secure/mount the display shelf properly and safely to the ground;
2. Did not maintain or service the display shelf regularly;
3. Overloaded the display shelf leading to its collapse after some time, and
4. Used cheap and not durable materials for the legs of the display cabinet.

The requirements for this action are with no controversy and basically settled. See *DELTA BEVERAGES* (Cited as a division of Delta Corporation Limited) v *ONISMO RUTSITO SC* 42/13. These are they-

i. There must have been some conduct on Defendant's part (i.e. an act or omission) which the law of delict recognizes as being wrongful or unlawful –See *Nyaguse* v *Skinners* Auto Body Specialist & Anor HH-32/07.

ii. The conduct must have led to physical harm to a person or property and, thereby, to financial loss, or have caused pain and suffering;

iii. The Defendant must have inflicted the loss intentionally or negligently (the fault requirement) and

iv. There must be a causal link between Defendant's conduct and the loss (the causation requirement) - see *Muradzikwa* v *Minister of Home Affairs & Anor* 2000 (1) ZLR 405 (H).

At the Pre-Trial Conference stage, the parties agreed on what they wanted the Court to adjudicate on. The following are the issues for determination-

a) Whether or not the display shelf concerned collapsed because same had-

i. Not been properly and safely secured/mounted, or

ii. Not been regularly serviced or maintained,

iii. Been overloaded; or

iv. Weak legs made from cheap and not durable material, or

v. Given in to the weight of the child.

b. whether or not Defendant breached the legal duty of care to Plaintiff by failing to provide a safe environment for customers.

c. if the answer to all or any of one of the issues specified under Para 1.(i) (a) – (v) or a-b above is in the affirmative, whether or not the Defendant is liable for the damages arising from injuries suffered by the minor child Chidochashe Chiswanda following the collapse of the display shelf concerned.

d. if the answer to (c) above is in the affirmative, the quantum of the damages in question.

ANALYSIS OF THE EVIDENCE

The Plaintiff gave long and detailed evidence personally and also called as his witnesses his wife Rosemary Patience Masendeke [Masendeke] and Doctor M.F. Gova [DR. Gova]. The summary of Plaintiff's testimony is that on the 15th of February 2015 in the morning he attended at Defendant's OK Mart Shop in Hillside, Harare. He was in the company of Masendeke and his minor daughter. He was emphatic that at all times he was supervising his daughter who was within his sight and reach. He got to isle number 8 where he wanted to fetch Colgate toothpaste. He was candid that he momentarily faced away from the child. Whilst he was in the process of breaking

the carton box some 3m away, he heard a noise of the falling shelf. He turned and he could not see his daughter and heard a cry that he identified as one of his daughter. He saw the fallen shelf and rushed to lift the shelf to free the child who was trapped underneath. He described the shelf as being made of a steel frame and wire mesh. He further estimated its dimensions as 2.5-3 meters height, front side as 1.5-2 meters and width as 1 meter. He said some two men came and assisted him to lift the shelf off the minor child. Masendeke tried to lift up the child but was cautioned by a white man not to do so lest the child sustained back injuries. The plaintiff said he lifted the child and at that moment he did not notice any of the Defendant's workers who were wearing white uniforms and logos. The Plaintiff told the court that he took the child to the entrance of the shop, gave her to Masendeke and went to fetch a vehicle and took the child to hospital.

It was Plaintiff's further evidence that he returned to the Defendant's shop in the afternoon after leaving Masendeke and the child at Hospital. Upon his return he was introduced to some two gentlemen who described themselves as Section Managers. He recalled one of them as a Mr. Dube. With the two gentlemen they visited the scene and saw the steel shelf with a broken leg propped by a farm brick. Having failed to get an explanation he proceeded to make a report at Rhodesville Police Station and returned with a policeman. They visited the scene and noted the broken leg of the shelf which was evidently rusty and corroded.

Plaintiff testified regarding the special damages of past medical expenses, disposable diapers, past transport costs, pain and suffering, permanent disability, disfigurement, loss of amenities of life, future medical and transport costs all totaling US$ 51 982.93.

As to the particulars of negligence the Plaintiff testified to the effect that the shelf was not properly and safely secured/mounted to the ground. He said the shelf had 4 legs and not affixed to the floor and one could lift it or move it or pull it or push it. He described the material used to make it which broke the strongest bones in a human body (femora or thigh bones). According to him the shelf was not regularly serviced or maintained as evidenced by the fact that the broken leg of the shelf was rusty and corroded. He indicated that as a particular of negligence the Defendant failed to provide a safe environment for customers leading to the injury of the child. He produced exhibit 2, the alternative shelf that was then put by the Defendant after the accident that served the same purpose but without creating a dangerous environment. He was candid that he did not see how the shelf fell given to the fact of where he was when the accident occurred. But he denied the

suggestion that the child could have climbed onto the shelf due to the small holes of the mesh wire used to make the shelf and the tennis shoes the minor child was wearing. He conceded that the shelf was not overloaded and admitted under cross examination that the child might have had contact with the shelf before it fell as he momentarily lost sight of the child. It was never suggested to the Plaintiff that Sandra Tigere an employee of the Defendant lifted the shelf and that she would come and say that in court.

The second witness called by the Plaintiff was Masendeke, his wife whose evidence corroborated the Plaintiff's evidence in all material respects. Masendeke's evidence was that she was in another isle, some 7-8 meters away when she heard the noise of the falling shelf. When she turned, she saw a big white shelf lying in the isle/corridor. She did not see how the shelf fell. She was emphatic that when the Plaintiff was helped by two people to lift the shelf, she saw a flash of red which were the tights that her daughter was wearing. She testified as to how she was stopped from lifting the child. Her further evidence was that when she asked the child to stand up, she noted the child's legs were not in a natural position and she advised the Plaintiff that the child had been injured and they needed to rush her to hospital. She too corroborated the Plaintiff's evidence that apart from the two gentlemen who assisted the Plaintiff in lifting the Shelf off the child, there were no employees of the Defendant in sight. She describes the pain in which the child was as severe. She admitted that when the shelf fell onto the child she was not in the vicinity. However, she denied the suggestion during thorough cross examination that the child might have climbed onto the shelf because the child was wearing shoes that were very wide and rounded at the end and could not fit in the small holes of the mesh wire that made the shelf. Again, it was not suggested to this witness that Sandra Tigere an employee of the Defendant came to their assistance.

The last witness called by the Plaintiff was Doctor Gova. His evidence was clear and could be condensed as follows. That as an Orthopedic Surgeon he attended to the injured child and prepared a report that was produced in court as exhibit 7. He said the child suffered fractures on both femurs. He described the curative treatment he administered including drip, oxygen and strongest painkillers like pethidine and morphine because the injuries were serious. While conceding that there is no mathematical measure of pain, he classified the injury as severe. He further described the healing process and awarded 5% as the degree of disability level because of

what he called external rotation of limb which he said was permanent. The cross examination of Dr. Gova did not alter his evidence in any way as he stuck to his report.

On the other hand, the Defendant called two witnesses despite stating in its summary of evidence that it would call 3 witnesses. The first Defendant's witness was Sandra Tigere (Tigere) a merchandiser. Tigere's evidence was that she was 3-4 meters from where the shelf collapsed. She only heard the noise of the falling shelf and the cry of a child. She said she rushed to the scene and saw how the shelf and the child was lifted from the ground and how the child was taken away by a black man. She was led on video footage in the shop and expressed no knowledge of the same.

The second Defendant's witness was Sydney Mtetwa (Mtetwa) a Department Manager for the Sports Section where the fallen shelf was located. His brief evidence was that he was at isle number 10 when he heard a bang coming from between isles 7 and 8. He heard a child crying. He moved towards where the sounds came from and saw 2 men one black and another white lifting the shelf. He saw a third man he presumed to be the Plaintiff coming from isle 8 who took away the child. He assumed that the shelf succumbed to the weight of the child but did not see the child attempting to climb on the shelf. Mtetwa said he would leave the issue of whether or not the shelf was being serviced or maintained to the experts. However, there was contradictions between Mtetwa and Tigere on what they saw soon after hearing the noises suggesting they may have been couched on what to say.

From the above evidence it is clear that some issues became common cause during the trial. It is common cause that the Defendant's staffers did not engage the Plaintiff at the time of the incident and or at all. It is common cause that no one witnessed the minor child climbing the shelf or making contact with it before it fell. It is common cause that the minor child sustained injuries described in exhibit 7 on p 42 of the record as a result of the shelf falling on her. It is further common cause that the Defendant procured safer shelves as shown on exhibits (5a) and (b) on p 40 and 41 of the record after the incident of 15th of February 2015. I found it as undisputed that the Plaintiff was momentarily not looking at the minor child immediately before the shelf fell on her. In fact, Plaintiff was 2.5-3 meters away from the shelf when it fell down. The rest of the witnesses did not see how the shelf fell down on the child. The child who was a very minor did not testify as to what happened due to her tender age at the time. It is also not in dispute that the

child was not shopping on her own. She was in the company of her parents who both momentarily lost sight of the child.

The whole case is based on probabilities and circumstantial evidence. See A.A. *Onderlinge Assurance Associate Bkp* v *De Beer 1982* (2) SA 603(A). The probabilities are that the shelf may have fallen onto the child as the child was passing by or that the child got in touch with the upright shelf as it was fascinated by the balls that were stored in this tall shelf. The possibility that the shelf may have succumbed to the weight of the child who had climbed on it cannot be discounted although the Plaintiff and Masendeke disputed this possibility while the Defendant's witnesses said that was the reason for the fall of the upright shelf. This is more so because the shelf in question was not properly fixed to the ground and one of its legs was rusty and corroded and it broke. The possibility that child had climbed the shelf and fell with it from a position off the ground though a possibility is remote because she would have sustained back injuries. The fact that the minor had no back injuries is consistent with the shelf having fallen on the child whilst she was standing on the ground. The Defendant procured safer shelves to contain balls which are "basket" like after the incident as shown on the exhibits. This action on the part of the Defendant shows that the Defendant realized that it was not safe to store balls or dolls in a shelf of that nature, items which attract the attention of any child. As I said earlier in this judgment the shelf in question was not safely fixed/secured/mounted to the ground. It was just put up and could be easily moved, pushed, lifted by any customer in the process of taking the goods contained in its shelves whether over loaded or not.

The Plaintiff therefore proved all the requirements of an Acquillian action that incorporate harm which are that-

1. There must have been some conduct on Defendant's part (i.e. an act or omission) which the law of delict recognizes as being wrongful or unlawful- see *Nyaguse* v *Skinners Auto Body Specialist & Anor* HH-32-07. In the present matter the conduct took the form of a commission and an omission. The Defendant created a dangerous environment by displaying a monstrous shelf which was not mounted at all. Put differently, Defendant omitted to create a safe shopping environment which it could have done by putting a safe display shelf like the one in exhibit 4, 5(a) and (5b). The conduct of the Defendant therefore led to the physical harm to the minor child thereby to financial loss, and caused pain and

suffering. There is therefore a causal link between Defendant's conduct and the loss that Plaintiff suffered. See *Musadzikwa* v *Minister of Home Affairs & Anor* 2000 (1) ZLR 405 (H). The Supreme Court of Appeal (SCA) in *Kruger* v *Coetzee* 1966 (2) SA 428 (A) accepted the *canditio sine qua non*, or 'but for' test, as the one to be applied in. this has been accepted as the test applicable in Zimbabwe as well see *Local Authorities Pension Fund* v *Munyaradzi Nyakawa and Others* HH60/15. But for the conduct of Defendant, the Plaintiff would not have sustained the loss he did. That is the factual causation.

2. The legal causation deals with remoteness of damages. In this case there is no argument that the damages claimed by Plaintiff are not remote. They flow naturally and directly from the proximate conduct of Defendant –see the Quantum of Damages in Badily and Fatal Injury Cases, 3ed by Carbett, Buchanan and Gauntlet, at pp 51-2. The Defendant, therefore inflicted the loss negligently. The Defendant ought to be found liable as it failed to live up to reasonable man's test. This is so in that a *diligens paterfamilias*, that national epitome of reasonable prudence, in the position of Defendant would have foreseen the possibility of harm occurring to Plaintiff or any other person, and have taken steps to guard against its occurrence.
3. This brings me to the quantum of damages that the Defendant must pay to the Plaintiff. The Plaintiff's claim was expressed in United States Dollars prior to 22 February 2019. During the hearing of the matter, the Plaintiff sought and was granted an amendment of his Summons to procure that the sum of US$51 982.93 which is stated in its summons be payable in ZW$ at the official bank rate prevailing at the date of payment. The issue for determination is whether by operation of law the claim has been converted to RTGS? The Plaintiff's argument was that the answer to the above question is a no. The Plaintiff referred to s 22 (1) (d) of the Finance Act 2019 which replaced S.I. 33 of 2019 which provides that the law regarding conversion applies to liabilities to assets and liabilities valued in US$ before the effective date. The argument by the Defendant was that by operation of the law, the sum of US$51 983.93 in question was converted to ZWL at the rate of 1.1 and cannot be the subject of any further conversion, to do so would be incompetent.
4. In my view the first point is to decide when liability for Defendant arose. Liability and cause of action have to be distinguished. In this case cause of action is before the effective

date. But the liability of the Defendant had not yet been determined. Liability is determined when evidence has been adduced in court. The liability of the Defendant has been determined after the effective date.

5. In terms of the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS$)) Regulations 2019 – S.I. 33 of 2019, "for accounting and other purposes, all assets and liabilities, that were, immediately before the effective date, valued and expressed in United States Dollars (other than assets and liabilities referred to in s 44C (2) of the Principal Act) shall on and after the effective date be deemed to be values in RTGS$ at a rate of 1:1 to US$. See s 4 (1) (d). The above cited provision was elevated and reenacted into s 22 (1) (d) of the Finance Act No. 2 of 2019.

Subsequent to the enactment of the above stated provision, the Supreme Court of Zimbabwe made the following pronouncement: -

> "Section 4 (1) (d) of S.I. 33/19 is specific as to the type of assets and liabilities that are excluded from the reach of its provisions…What brings the assets or liability within the provisions of the statute is the fact that its value was expressed in United States Dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]…"

See *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R. Barber (Pvt) Ltd & Anor* SC 3/20 at p 9.

In the Zambezi Gas Zimbabwe (Pvt) Ltd case *supra*, the case involves a judgment debt that had been ordered by the court before the effective date. The Debtor in that case offered to pay on a rate of 1:1. This court made a ruling that orders of court were not affected by S.I. 33/19. The court ordered the Debtor to pay in US$. On appeal that decision was set aside and the *ratio decidendi* was that the court order was in existence and liability had been determined before the effective date and by operation of law payment was affected by S.I. 33/19. The Debtor was ordered to pay at a rate of 1:1 to the US$.

The Plaintiff in this case maintained that the claim is not affected by operation of the law. He cited the case of Loveness Chiriseri reported in HH450/20 that allowed judgment to be paid in US$. The Defendant submitted that in terms of s 22(1) (d) of the Finance Act 2019, all assets or liabilities expressed in USD shall be on or after the effective date be decided on a rate of 1:1. The Defendant further submitted that in the event that the

Plaintiff succeeds in proving the Defendant's liability for any damages (which it submitted he failed to do) the quantum of damages in the sum of ZWL 51 982.93 will not be contested.

In the present matter, the Plaintiff's claim was expressed in United States Dollars as at 26 March 2015, some (4) years before the effective date. The Defendant's liability has been established some (6) years after the effective date. On the date the Summons were amended it sounded in ZWL by operation of the law and cannot be the subject of any further conversion.

IT IS ORDERED THAT

1. The Defendant be and is hereby ordered to pay to the Plaintiff a total sum of US$ 51 982.93 at a rate of 1:1 as damages.
2. Interest on the above amount at the prescribed rate from 1 April 2015 to date of payment in full.
3. Costs of suit.

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