

KENNEDY C. NDLOVU

PLAINTIFF

Versus

THANDANANI SIBANDA

1ST DEFENDANT

And

CHIEF GAMPU SITHOLE

2ND DEFENDANT

And

GAMPU TOURS (PVT) LTD

3RD DEFENDANT

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO 11, 12 SEPTEMBER & 15 NOVEMBER 2012

M. Ndllovu for the plaintiff
M. Ncube for the defendant

Judgment

CHEDA AJ: The plaintiff issued summons in this court against the three defendants seeking:-

1. Damages in the sum of US20 000,00 constituting both general and special damages that plaintiff suffered as a result of the defendant's negligence resulting in an accident on the 11th of May 2007.
2. Cost of suit on an attorney – client scale.

The summons was served on the 2nd and 3rd defendants only. The Deputy Sheriff's return of service indicates that the 1st defendant was not found as he was reported to have left the address given for service.

The plaintiff is now proceedings against the 2nd and 3rd defendant s only. The plaintiff's claim is based on an accident of the defendants' vehicle which was at the time driven by the 1st defendant. The accident occurred at some point on the road to Tsholotsho at the 38km peg from Bulawayo on the 11th May 2007.

The plaintiff avers that the vehicle was speeding and the driver did not take heed of the road signs and warnings by the passengers to reduce speed. The plaintiff suffered injuries as a

result of the accident. He had a loss of cervical lordosis and developed permanent disability of 11%. He said he was no longer able to do his work as a welder because of the injuries.

The 2nd defendant is the owner of Gampu Tours (Pvt) Ltd, which owns the motor vehicle concerned.

The defendant's plea is that the 1st defendant was employed by 2nd and 3rd defendants, but at the time of the accident 1st defendant was on a frolic of his own and not within the scope of his employment as he had stolen the 2nd and 3rd defendants' unregistered and unroadworthy vehicle.

The evidence of the plaintiff is that on the 11th May 2007 he boarded the vehicle belonging to the 2nd and 3rd defendants and proceeding to Tsholotsho. At the 38 kilometre peg the vehicle was involved in an accident as a result of which he was injured. He was hospitalized for a day. After 3 months he had pains and he went back to the hospital. He got some treatment for pain on the neck. He said at times the bones disturb the spinal cord and he gets paralyzed. He had bruises on the head and a loose tooth which has since been removed.

He said before the accident he earned his living by welding and farming. He cannot weld or farm now. It is not disputed that the vehicle in question was involved in an accident. It is not disputed that the plaintiff was a passenger in that vehicle and suffered some injuries. What is disputed is the liability of the defendants for the plaintiff's injuries.

During the trial, the plaintiff decided to abandon the claim for special damages and amended or reduced his claim to \$16 000 for general damages, a figure he had previously claimed in a letter written by his lawyers.

Plaintiff was the only witness in his case. After he closed his case the 2nd defendant gave evidence. He said he is Chief Gampu and is 46 years old. He ordinarily resides at Tsholotsho but also resides at 6110 Pelandaba Township in Bulawayo. The kombi vehicle in question is his and he had just bought it. He said on the 11th May 2008 he was at Tsholotsho and he left in the morning to go to Bulawayo. Before he left, a week earlier he had left the vehicle at his house in Bulawayo with instructions to his wife that the vehicle be taken to a mechanic for certain repairs. The 1st defendant who is one of his drivers was not there. He said he owned 2 kombi vehicles and 1st defendant used to drive one of them. There was another driver who was supposed to take the vehicle to a mechanic at Kelvin but he was not there.

He said he got to the scene of the accident at about 10am. He was with a magistrate from Tsholotsho, a Mr Ndebele, driving a Mazda B18. He found no people at the scene except the police guarding the vehicle. Ndebele pointed out the vehicle to him. The police informed him the vehicle was his. He went to see the injured people about 500 metres away at the hospital. The 1st defendant had been taken to Mpilo Hospital. He said from that date to the

date of the summons he met the plaintiff twice and had a discussion. The plaintiff came several times thereafter but could not find him. He said he wanted assistance on medication. He sat down with the plaintiff and the driver. He said in the discussion when he said the driver should buy medication plaintiff got up and said he did not want to talk to the driver and left saying he has brothers who are lawyers, he is a war-veteran and could fight with the defendant. He said the plaintiff wanted \$6 000 Zimbabwean Dollars. After the discussion in which he told 1st defendant he would have to pay for the vehicle 1st defendant absconded to South Africa. He offered to pay the plaintiff with cattle. He said it was 1st defendant who offered plaintiff a calf.

He said plaintiff said he heard that defendant had a lot of money so he would not talk to the driver. He said the plaintiff is able to work because his wife had found him working. He denied that the 1st defendant had been given authority to drive the vehicle. Under cross examination, when asked why his wife decided to go to Mpilo with the plaintiff he said she was trying to protect her marriage as the vehicle was left in her custody and had an accident at Nyamandlovu. Asked if he was in communication with his wife while at Tsholotsho he tried to limit this to just greeting each other. Asked if his wife did not advise him about plaintiff's claim he said she told him that he wanted so much money that even if he sold the house he could not meet the plaintiff's claim. He said the money they wanted to pay plaintiff was for medication and not liability.

He said the vehicle in question had recently been bought and had not started operating. 2nd defendant's wife gave evidence. She said she gave the 1st defendant the vehicle to take to a mechanic in Kelvin. She next got a call from 2nd defendant saying the vehicle had had an accident. She agreed that she had gone to the hospital, to the doctor and to an insurance company with the plaintiff about his injuries. She said 1st defendant came when the 2nd defendant was present and the matter was discussed. She admitted visiting the plaintiff at his home. She said when the kombi vehicle was bought it was on the road working. She said Ndebele visited their home in Pelandaba for the first time after the accident.

The plaintiff gave evidence for himself and did not call any other witness. The 2nd defendant gave evidence then called his wife. The evidence of the parties calls for a very close examination. The plaintiff said he boarded the vehicle at a terminus labeled for passengers going to Tsholotsho. When the vehicle left that terminus it headed for Tsholotsho, the route on which the other vehicles of the defendant operate. If this was being done without authority, a reasonable person would not have exposed himself to being seen by the other drivers of the 2nd defendant operating on that route. He would not have taken the risk to go to a place where the vehicles of 2nd defendant are well known as well as himself. He would not have taken the risk of being seen at Tsholotsho by the 2nd defendant since according to the 2nd defendant's wife this driver knew that the 2nd defendant was in Tsholotsho. There was nothing to show that the 2nd defendant reported to the police that the vehicle had been stolen despite the fact that it had been involved in such a serious accident. The 2nd defendant was very evasive under cross examination. He denied that he had authorised his wife and brother in law to assist the

plaintiff. He said his wife was helping the plaintiff to protect her marriage. He denied the many discussions held with the plaintiff and the offer he made for a beast as compensation. He says the offer was made by 1st defendant yet he says plaintiff said he did not want to speak to 1st defendant.

Asked about communicating with his wife he said it was for greetings only. Asked if 1st defendant offered a calf directly to the plaintiff he said they did not speak to each other. Asked why he did not report the 1st defendant to the police he said the police were not taking instructions. He suggested that he was not able to discuss with the 1st defendant after he absconded, yet his wife says 1st defendant came and they had a meeting over the issue.

At some stage it was necessary to ask him to listen to and reply to the questions put to him.

He could not explain how a kombi that was on the road at the time of its purchase would be off the road and needing repairs before had used it. This drives one to accept the evidence of the plaintiff to the effect that 2nd defendant's wife was rather apologetic and said they were using the vehicle to raise some money.

Despite the 2nd defendant's allegation that he wanted payment for his vehicle from the 1st defendant but 1st defendant absconded to South Africa, at the meeting when 1st defendant had come from South Africa no action was taken on that issue and no action was taken to advise the police that 1st defendant was available. 1st defendant was at the 2nd defendant's house as late as last year. It is not clear how he could be at the house of the 2nd defendant if he had absconded to avoid responsibility. The 2nd defendant's wife was also not a reliable witness. She could not be certain about certain aspects of her testimony. Having said the summons came after the meeting with the 1st defendant she later changed and said the summons was served in 2010 and the meeting was in 2011.

She had no proper explanation for not sending the vehicle for repairs soon after she was instructed to do so. She does not deny going with the plaintiff to Jupiter to establish what percentage the plaintiff could be paid for his injuries.

Asked how many times Ndebele visited their home and how he could be able to recognize the vehicle which had been used she said he visited once after the accident, yet he recognized the vehicle at the accident scene.

The vehicle had been on the road when it was purchased. The defendants clearly intended to use it. There is no reason why they would park it at the house for close to a month without using it. If it was not registered at the time and not being used I doubt if the 1st defendant could drive it to the kombi rank and be allowed to load passengers for Tsholotsho.

It is clear from the plaintiff's evidence that what stopped 2nd defendant from making immediate compensation was the issue of how much to pay. That is why the parties decided to approach an insurance company Jupiter.

If 1st defendant was admitting liability and promised to pay there is no reason why they did not call him to trial. This case depends mainly on the credibility of the witnesses. While the plaintiff had certain difficulties in dealing with his case, overall his evidence was more credible than that of the defendants. He referred to several meeting and visits which are not denied.

His visit with 2nd defendant's wife to seek guidance on the level of compensation is admitted by 2nd defendant's wife. His story about an offer of a beast and the reason why he declined it are quite credible.

The failure by the 2nd defendant to confront the 1st defendant or to report him to the police about the theft of the vehicle after such a serious accident and on the 1st defendant's visit from South Africa is not consistent with his allegation that 1st defendant was on a frolic of his own when the accident occurred. The defendants' defence is most improbable and is hereby rejected.

I come to the conclusion that the plaintiff has proved his case and is therefore entitled to judgment in his favour.

Order

1. The 2nd and 3rd defendants are ordered, one paying and the other absolved, to pay damages for the accident injuries to the plaintiff in the sum of sixteen thousand dollars (\$16 000,00).
2. The 2nd and 3rd defendants are to pay the cost of suit.

Mlweli Ndlovu & Associates, plaintiff's legal practitioners
Cheda & Partners 2nd and 3rd defendant's legal practitioners