FLORENCE MOYO
**versus**
MZANSI EXPRESS (PVT) LTD
and
ISAAC MABHANTI NCUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 11 OCTOBER 2017 AND 19 OCTOBER 2017

**Civil Trial**

*Z C Ncube* for the plaintiff
*Ms P Mvundla* for the 1st and 2nd defendants

**MATHONSI J:** The trip from Bulawayo to Musina on the night of 25 February 2014 on board a Mzansi Express (Pvt) L td omnibus driven by the second defendant, then a 69 year old class one driver with many other driving qualifications and 34 years experience of driving omnibuses, was an eventful and indeed tragic one. The witnesses speak of a bus which was speeding the moment it took off from Bulawayo, overtaking even lighter vehicles, swerving precariously most of the time causing passengers to scream and taking off from where it had stopped in Gwanda briefly leaving some of its passengers before being stopped to re-take them on board.

Unfortunately that trip was not completed. It is said that at the 259 kilometre peg along the Bulawayo Beitbridge road the Volvo Omnibus with South African registration number MKM 344GP which was drawing a trailer registration number FKL387GP veered off the road to the right, cannoned off a railway-line ridge and overturned but still managed to land on its wheels. The plaintiff was one of the cross-border traders on board. She sustained injuries as a result of the accident and sued the first defendant, the incorporation operating the business of a public carrier which owned the ill-fated Volvo Omnibus and the second defendant, the mature and indeed experienced driver who was at the controls that night.

The plaintiff averred in her declaration that the accident was caused solely by the negligence of the second defendant acting within the scope and course of his employment by the first defendant who was negligent in any one of the following respects; driving at a speed which was excessive in the circumstances, failing to stop or act reasonably when an accident was imminent; failing to keep a proper look out in the circumstances. Alternatively, the plaintiff averred that the accident occurred as a result of the first defendant's failure to service or maintain the vehicle to keep it roadworthy.

The plaintiff further averred that as a result she sustained bodily injuries, deep lacerations caused by broken glass, injury to the mouth with loose teeth, had a double fracture on the right ankle; fractured ribs and damages to her spinal code. She sought special damages of $6000-00 and general damages for pain and suffering, loss of amenities of life and permanent disfigurement in the sum of $80 000-00.

The defendants contested the action. In their joint plea they denied that the second defendant exceeded the specified speed limit on the road, asserting that the omnibus was travelling at a speed permitted by the law, and that the second defendant had acted in a reasonable manner in all circumstances. They denied that the omnibus was not properly serviced and maintained.

The issues for determination at the trial as agreed by the parties at their pre-trial conference and set out in their joint pre-trial conference minute are;

1. Whether the accident was caused by the negligence of the second defendant.

2. Whether the second defendant was acting within the scope of his authority.

3. Whether the plaintiff suffered any damages as a result of the accident and if so whether she is entitled to special damages of $6000-000 and general damages of $80 000-00

4. Whether the first defendant is liable for any damages suffered by the plaintiff.

The plaintiff lined up three witnesses including herself to testify in support of her claim. Others who testified on the plaintiff's behalf are Nonceba Mzamo and Thobekile Ndlela. According to the plaintiff she was a fare-paying passenger having paid $22-00 and was on her way to Musina in South Africa where she intended to order goods for resale in Zimbabwe. She

is a cross-border trader and was carrying cash in the sum of R12 000-00 and $150-00 for the purpose of ordering goods. The bus was supposed to depart from Bulawayo at 1800 hours although it delayed a bit and did not leave at the exact time prescribed for departure. On the way she observed that the bus was speeding because, herself and her friend were seated at the back seat and were able to hear the sound of its trailer which was swerving.

She had dosed off as they approached Mazunga when suddenly she woke up feeling that the bus had been lifted and things were flying through the windows she was also thrown out of the bus and passed out. The plaintiff insisted that the accident occurred due to overspeeding especially as throughout the journey the trailer had been hitting against the rear of the bus and also dancing right and left as the bus sped on. Apart from that there was the general feel of discomfort which occurs when a vehicle is moving at an excessive speed. It was suggested to her that the noise and movement of the trailer could have been caused by the fact that it was empty but she was adamant that speed was the issue.

The appellant went on to say that she remained lying where the bus had thrown her for 3 hours before being ferried by ambulance to hospital. During that period of incapacity she lost her cellphone worth $500-00. She also lost all her belongings including the R12 000-00 and $150-00 cash, which she says she should be reimbursed by the defendants and spectacles worth $300-00. She was detained at Beitbridge General Hospital overnight before being transferred to Mater Dei Hospital in Bulawayo where she was admitted for about three weeks while receiving treatment.

On the bodily injuries that she suffered the plaintiff narrated, making reference to photographs taken of her while she was in hospital that she sustained a double fracture on the right ankle and could not move for quite sometime. She was sent to the Diagnostics X-ray Centre in Bulawayo where a scan was conducted. She referred to a report in her bundle of documents dated 27 February 2014 which concluded that she had no skull fracture but;

> "----there is a minimally depressed fracture of the anterior wall of the left maxillary antrum, with an air-fluid level seen within the maxillary antrum."

The scan to the cervical spine found that;

> "There is mild scdioses concave to the right. Alignment is preserved. There is loss of lordosis suggesting paraspinal muscle spasm."

Further, it was established that there was "an undisplaced fracture of the tip right L2 transverse process" on the lumbar spine.

The plaintiff also visited a number of health institutions while still in Zimbabwe where she was made to pay consultation fees and other charges included in her claim for special damages. She produced receipts in respect of those expenses including the dental expenses arising from the injuries to the mouth and loose teeth. She justified that claim by producing receipts and a report from a dentist Dr Musiya.

According to the plaintiff when she ran out of funds for local medical treatment her children who live in Australia invited her to that country in order for her to receive specialised medical treatment. Once in the country of the kangaroo she was attended to by several doctors including an optician as her eyes were damaged during the accident. In short she has incurred more expenses on medical treatment that the sum of $4000-00 she had put down in her claim as representing future medical expenses. It was because of the medical attention she received in Australia that she is now able to walk and has generally improved.

Apart from the suggestion by counsel for the defendants during cross-examination that her optical frailties may have been occasioned by an underlying diabetes problem, which she disputed maintaining that she developed diabetes several months after the accident, the plaintiff's testimony on the injuries she sustained, the treatment she has received and the expenses incurred was generally unchallenged.

Regarding the money that she lost during the accident and the replacement cost of her cellphone the plaintiff was taken to task but she defended her claim. Surprisingly the defendants did not even begin to testify about that claim when both Cabangani Dylan Mangena and the second defendant took to the witness stand. They only focused on their alleged negligence and no more.

Nonceba Mzamo also testified on behalf of the plaintiff. She was travelling with the plaintiff to South Africa on the fateful day as she also wanted to replenish goods for for flea market stand. She also asserted that the driver of the bus was overspeeding on the night in question. She even remarked to the plaintiff as they sat at the back seat that the bus was speeding. Soon thereafter she hit against the side of the bus both on the left and right and as a driver herself she was sure the bus was overspeeding especially after Gwanda.

Mzamo is unsure what caused the accident although she suspects that overspeeding caused the driver to lose control of the vehicle. She denied that any rain had fallen which could have caused any pothole to be filled with water. She was also thrown out of the bus when the accident occurred and found herself in the grass having sustained injuries requiring treatment at hospital. She added that the plaintiff would have been carrying R5000-00 but was carrying R12000-00 because she had been given an order for a refridgerator by a customer.

Thobekile Ndlela was also a passenger in the bus on the ill-fated trip and was sitting somewhere in the middle of the bus. According to her the bus was over speeding because the moment it left Bulawayo it was overtaking lighter vehicles. It would regularly swerve to the side causing passengers to scream. When the bus stopped in Gwanda the driver was in such a hurry that he took off leaving some passengers who had alighted to refresh. The driver had to be stopped by other passengers managing to stop at Gwanda Hotel.

This witness could not tell if the bus hit a pothole before it careered off the road. All she heard was a noise before the bus veered off to the right and got off the road. That completed the evidence for the plaintiff.

The second defendant also gave evidence. He is the holder of a class 1 driver's licence, has a defensive driving licence, an international driver's licence and used to undergo annual medical examination to ascertain his fitness to drive buses. At the time of the accident he had 34 years driving experience under his belt. On the day of the accident he had been driving in exactly the same way that he had driven the 34 years, using the same driving skills. The second defendant denied that he had been overspeeding immediately before the accident. In fact according to him, he had been driving at a safe speed of between 65 and 75 kilometres per hour when the general speed limit is 80 kilometres per hour. This is because the employer does not allow drivers to exceed the general limit. He emphasized that he was very familiar with the Bulawayo – Beitbridge road because he had been driving along it uninterrupted since 1999, an impressive period of 15 years. He could not overspeed at night because the road is dangerous, infested as it is by both wild animals and livestock.

He denied that his bus was overtaking lighter vehicles or that it was swerving. On the dancing trailer, his version was that the trailer would ordinarily make noise and swerve because it was empty on the way to South Africa. He stated that between Gwanda and the scene of the

accident it had rained. He did not see the pothole and had been munching peanuts while conversing with his colleagues when he heard loud noise. Thinking that it was a burst tyre he tried to control the vehicle but failed. His version is that the accident was caused by the pothole. Although he says it was not a huge pothole (he says it was shallow) it was covered by water.

The second defendant stated that after the accident he had visited the Vehicle Inspection Department in Beitbridge where he was informed by an inspector there that their examination of the vehicle had revealed that a leaf spring had broken presumably when the vehicle hit the pothole.

He suggested that he may have panicked when he heard the noise. When the spring broke it may have forced the right wheel to come into contact with the body and then bind. As a result the wheel pulled the bus to the right where there was a water drainage. When the front bumper hit the drainage it forced the bus to overturn. All that happened the moment the vehicle hit the pothole was not through any fault of his.

The second defendant's story is however not convincing at all. It is within human experience that if the vehicle was traveling at a safe speed in the circumstances even if it had hit a pothole, he would have succeeded in keeping it under control and stopping it within a reasonable time before it cannoned off the road and overturned. We also have the criminal court record from the Beitbridge magistrates' court where the second defendant was discharged at the close of the state case on a charge of negligent driving. There was, at that court, the uncontroverted evidence of one Shakemore Chitate, an accident evaluator at Zimbabwe Republic Police (ZRP), who attended the scene the morning following the accident.

Chitate observed that the pothole in question was "very shallow" and could not have caused serious damage. He observed some skid marks which were about 69 metres long which were going off the road ending at the point of contact were the vehicle rested. He observed further that the bus had stopped 138 metres from where it hit a pothole. The bus was extensively damaged and the trailer, which had disengaged from the bus, was extremely deformed. That witness concluded that;

> "From my observations I concluded that the accused person was speeding at the circumstances and that he failed to control the bus after hitting a shallow pothole which caused the bus to swerve to the right. The driver should have managed to control the bus by stopping. I can also conclude that the accused was tired or sleeping causing him not to

> react promptly causing the bus to stop at a distance of about 138 metres. I think the main cause of the accident is fatigue. If the spring was broken and caused the accident I would have expected to see some friction between the tryes and the body. The spring could have broken when the bus overturned. The pothole is very shallow and it cannot cause such damage."

Compared with the second defendant's version that is a more plausible analysis of the circumstances of the accident. In fact even the second defendant corrobated that evidence to a certain extent when he confirmed that the pothole itself was not big. I therefore reject the explanation given by the second defendant and conclude that it was his negligence which caused the accident. In their defence the defendants did not even suggest contributory negligence by any third party. It is therefore not necessary for me to consider what was not relied upon. To the question whether the accident was caused by the negligence of the second defendant, I answer in the affirmative.

Cabangani Dylan Mangena is the director of the first defendant company. His evidence was to the effect that if the court finds that the driver was over-speeding, it means he would have breached the law. Given that their drivers, including the second defendant, are under instruction to drive within the general regulatory speed limits, if the second defendant was speeding he would not be acting within the scope of his employment. The first defendant would not be vicariously liable.

I have very serious difficulties with that kind of defence. For a start it is speculative. Other than what the second defendant says, that he was driving between 65 and 75 km per hour, it has not been established that he exceeded the general limit of 80km per hour. However even a speed of 71km per hour which the second defendant mentioned at some stage, may not have been reasonable in the circumstances while within the general speed limit.

We have the evidence of Mxazi Maseko the investigating officer in the criminal prosecution of the second defendant to the effect that at that point of the road the road is bumpy and characterized by potholes. Surely if the second defendant was driving on that road for 15 years, and at the time he was doing a shift which required him to drive to Musina twice a week, and therefore four times past that area every week, he should be taken to have been aware of the condition of the road. Upon approaching that area he should have slowed down and exercised

extreme caution in order to avoid losing control. Therefore his conduct fell short of the required standard of care.

In order to trigger, vicarious liability the plaintiff must establish that the employee was acting within the course of his employment or that he was going about the business, of his master. The employer's liability for the negligence of the employee depends in the final analysis on whether the damage or loss to the third party flows directly from employment. See *Feldman (Pty) Ltd* v *Mall* 1945 AD 733 at 740. It is however important to appreciate the principle behind holding the employer liable. The point is made by CHATIKOBO J in *Gwatiringa* v *Jaravaza and Another* 2001 (1) ZLR 320 (H) at 386 B-D that;

> "There is a compelling social policy behind the concept of vicarious liability. There are many reasons for the rule that a master can be held liable for the delicts of his servant. A large part of the affairs of the world is conducted by corporations or large employers, so that of necessity the operations are performed by employees. That being the case, it is inevitable that the employer must, in an appropriate case, answer for the defaults of his employees, as long as they are committed in the course of and within the scope of the employment. Otherwise the injured party would be left without a remedy. See McKerron *The Law of Delict* 7 ed p90 and *Feldman's* case *supra* at 741. There is however a limit beyond which, policy considerations notwithstanding, an employer cannot be held liable for the delicts of an employee who acts in pursuit of personal interest."

In the present matter the first defendant cannot escape liability by saying that the employee acted outside the law. It is that conduct of acting outside the law which constitutes a delict. It is a delict which was committed while the employee was about the business of the employer. He was not on a frolic of his own and neither was he in pursuit of personal interest. I therefore answer the second question for trial, whether the conduct of the driver was within the scope of his authority, again in the affirmative. The employer is therefore vicariously liable.

I now turn to consider the quantum of damages sustained by the plaintiff. I have said that the plaintiff's claim for special damages relating to the medical expenses that she has had to incur as a result of injuries sustained in the accident has not been challenged in any meaningful way. So is her claim for the replacement of her spectacles and cellphone. They will be granted. The plaintiff's claim for the cash that she lost in the accident in the sums of R12000-00 and US $150-00 has been contested.

Regarding the US$150-00 that she says she lost, it is not pleaded at all but only pops up during the presentation of her evidence. She cannot be awarded that which was not claimed in the summons. In her pleadings she claimed R12150-00 as the amount of cash she had in her possession but in her testimony he stated that she had a sum of R12000-00. It is that amount which was also confirmed by Mzamo as consisting of about R5000-00 she would have otherwise carried and an extra amount for the purchase of a refrigerator. The explanation given for possession of that money is reasonable and has not been shown to be false at all. I therefore find that the plaintiff has established on a balance of probabilities that she suffered that loss.

Regarding the general damages for pain and suffering loss of amenities of life and permanent disfigurement there can be no doubt that the claim is inflated. The plaintiff was in hospital for about three weeks. She is a cross border trader aged 60 who says she now has difficulties lifting heavy objects, has impaired eye sight and loose teeth. She sustained a double fracture on her right ankle which now requires an ankle-guard for support for her to move properly. There is no medical report on that ankle and any prospect of permanent disability has not be assessed and quantified.

The starting point in attempting the difficult task of quantifying compensation for pain and suffering is what was stated in *Minister of Defence and Another* v *Jackson* 1990 (2) ZLR (S) at 7G-H, 8A-G that general damages are not a penalty but compensation. The award compensates the victim but does not punish the wrong doer. Compensation places the injured party as far as possible in the position she would have occupied if the wrongful act had not occurred. The assessment of compensation is by the broadest general considerations.

While referring to a number of authorities in his closing submissions *Mr Ncube* for the plaintiff did not suggest an appropriate figure for this case electing instead to leave it to the discretion of the court. In *Gwiriri* v *Highfield Bag (Pvt) Ltd* 2010 (1) ZLR 16 (H) $3000-00 was awarded for pain and suffering and $6000-00 for permanent disfigurement and loss of amenities of life to a plaintiff who had effectively lost the use of his right hand. In *Mafusire* v *Greyling and Another* 2010 (2) ZLR 198 (H), a plaintiff who had been involved in a motor vehicle accident resulting in 20% disability was awarded $1000-00 for pain and suffering and $5000-00 for future expenses after the court found contributory negligence of 40%.

In *Chidamajaya* v *Gomba and Another* HH 211-13, $6000-00 was awarded for pain and suffering and loss of amenities of life to a lady who had sustained an ankle injury resulting in 30% disability while aboard an omnibus coming from South Africa was awarded $6000-00.

It occurs to me that taking into account the trend set by the authorities where the courts have generally been conservative and that the disability, if any, of the plaintiff has not been assessed, this is a case in which when everything has been taken into account, the plaintiff should be awarded the sum of $4000-00 for pain and suffering and loss of amenities of life.

In the result it is ordered that;

1. Judgment be and is hereby entered against the first and second defendants jointly and severally the one paying the other to be absolved in the sums of:

(a) ZAR 12 000-00

(b) US$4 822-00

(c) US$4000-00

2. Interest on all sums at the prescribed rate from 9 September 2014 to date of payment.

3. Costs of suit.

*Ncube and Partners*, plaintiff's legal practitioners
*Mutuso, Taruvinga and Mhiribidi*, defendant's legal practitioners