INTERMARKET STOCK BROKERS LIMITED
versus
AL FREEMAN
and
NORSK HYDRO ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 19 and 20 June 2006 and 1 November 2006

Civil trial

Advocate Fitches, for the plaintiff
Mr *Foroma,* for the 2nd defendant
No appearance for the 1st defendant

KUDYA J: On 23 February 2004 the plaintiff issued summons out of this court seeking the payment of $23 939 201.00 in damages arising out of a vehicle collision between its motor vehicle driven by April Boniswa Mhlanga and the 2nd defendant's vehicle driven by Al Freeman (the first defendant). It also sought interest at the prescribed rate from 11 October 2002 to the date of full payment and costs of suit.

The summons was served on the 2nd defendant only on 17 March 2004 who entered an appearance on 23 March 2004 and filed its plea on 28 July 2004. Mr *Foroma* for the 2nd defendant advised from the bar that the first defendant was late. The proceedings before me were therefore effectively between the plaintiff and the 2nd defendant. In its plea the 2nd defendant admitted that when the collision occurred, the 1st defendant was in the course and within the scope of his employment. While it admitted vicarious liability, it averred contributory negligence on the plaintiff's part and placed in issue the amount of damages claimed.

On 21 June 2005, the plaintiff gave notice of its intention to amend summons by substituting its claim of $15 957 301 for reasonable costs of effecting the necessary repairs with $100 417 216.20 . Notwithstanding Mr Foroma's opposition to the application for amendment, I granted it, as I could not possibly conceive of any attendant prejudice such an amendment would visit on the 2nd defendant.

The plaintiff called the evidence of the driver of its motor vehicle on the day in question, April, her father Geoffrey Senzo Mhlanga, and an estimator with Supreme Panel Beaters Venencia Siwadi. It also produced 3 documentary exhibits. These consisted of the

11 paged Exhibit '1' and 2 other separate documents. The 2nd defendant did not call any evidence.

It was common cause that the collision between the parties motor vehicles occurred at approximately 4 pm on 11 October 2002. The weather was fine. The description and topography of the intersection between Harare Drive ,Addington Drive and Gaydon Road incline down into Harare Drive. When one travels in the easterly direction along Harare Drive, Addington is to the right while Gaydon is to the left. The two are narrower roads whose entry into Harare Drive is controlled by a stop sign. Freeman was in Addington Drive. He had some 100 m before getting to the intersection passed a hump and s chevron warning markings of that hump.

April told the court that as she was approaching this intersection in the silver Peugeot 406 there were 2 vehicles in front of her which turned into Gaydon. When the one in front of her indicated its intention to turn into Gaydon, she reduced her speed from 60 km per hour to approximately 20 to 30 km per hour and disengaged from the travelling gear into the second gear. She also observed the second defendant's green 4 wheel drive Discovery stationary at the stop sign in Addington. The driver was showing eagerness to enter the intersection as the vehicle would move forwards and stop. After the vehicle infront of her had smoothly negotiated the turn, she entered the intersection. When she was in the intersection her vehicle was hit by the Discovery from the driver's door to the right front. The impact of the front part of the Discovery on her vehicle triggered a variety of reactions within and outside her vehicle. Both the passenger and drivers airbags were activated. The effect was that she was struck in the face by the airbag but its buoyancy together with the safety belt saved her from hitting into the steering wheel. The bigger Discovery pushed the smaller Peugeot 406 from its line of travel. It careered off the road and nose dived some 50-60 m away from the intersection into a ditch, where its wheels were stuck. She undid the safety belt, opened the door and came out of the vehicle. She did not sustain any lasting injuries. She suffered a few scratches on her face from the airbag, a whiplash and a soreback. A Mrs Sakala who was travelling behind her contacted her parents. The father arrived at between 4.30pm and 5pm to find the mother, the police and a small crowd in attendance. He observed that she was still in shock.

April testified that Freeman stood by the Discovery while some woman whom she believed was a maid came to check on her condition. She described the damage sustained on her car as extensive and mostly frontal . At the time she was in the Lower Sixth Form at

Arundel High School. She was clearly not technically disposed from the description she gave of the damage to the motor vehicle. She was taken to hospital where she was released that same day.

On a later date she visited Borrowdale Police Station with her father and discovered that Freeman had paid an admission of guilty fine.

She denied ever having contributed to the collision notwithstanding that she had only obtained her driver's licence in April of 2002. She averred that she had kept a proper lookout as she had seen the Discovery at the intersection behind the stop line which controlled its entry into the main road. She had also slowed down and disengaged from high into low gears. She had kept her vehicle under control until the impact and inertia caused by the bigger vehicle affected that control. In her estimation there was nothing she could possibly have done to avoid the collision.

Her father was able to describe the damage to the motor vehicle in greater detail. He made out that it was a new motor vehicle which had been purchased in March/April 2002. It had not yet been taken for its first service as it had not yet clocked 5 000 kms. It was an upmarket vehicle with modern conveniences like air conditioning, air bags, power steering, adjustable seats and electric windows. His view was that the front part of the Discovery hit the Peugeot 406 on the driver's side from the door to the headlamp. The force of the impact caused extensive damage which affected the light body materials which make the Peugeot. It affected both headlamps, the bumpers, radiator and many other parts listed in Exhibit '1'. The vehicle was towed to his home. He thus confirmed April's description of the topography at the scene of collision and the damage caused on the Peugeot 406.

Under cross-examination April denied that her relatively new driving experience as a licence holder affected her ability to drive on that day. She denied contributing to the collision. Her view was that while Freeman appeared under pressure to seize the earliest opportunity to enter the intersection he had stopped behind the stop line before she entered the intersection. She saw no reason to sound her horn at him as he had stopped. His entry into the intersection as she was driving past was unexpected and sudden. She denied hitting into Freeman's motor vehicle. She attributed the extensive frontal damage on her car to the impact, the respective sizes of the motor vehicles and the nosedive ditch landing.

In assessing her demeanour in the witness box, I was satisfied that she gave her evidence well. She was not shaken in cross-examination. She was the only percipient

witness who testified. She described what transpired in a candid and straightforward way. She was alive to her surroundings before the collision. She took prudent measures to control the speed of her motor vehicle as other drivers were turning into Gaydon. She saw Freeman in Addington. There was no evidence that she lost her concentration. The probabilities support her version as to how the collision occurred. The respective sizes of her vehicle and that of the 2nd defendant coupled with the gradient support her version on how the impact occurred. There was no other evidence to controvert her version. I believe her testimony.

The issue to be determined from her testimony is whether or not she contributed to the collision. The 2nd defendant accepted that Freeman's manner of driving was negligent. It was common case with reference to the Road and Road traffic (Traffic Signs) (Amendment) Regulations RGN133/75 that a stop sign is a regulatory sign which controlled Freeman to stop and only proceed when it was safe to do so. He did not obey it as he proceeded when it was unsafe to do so. He was clearly negligent in his driving conduct.

The 2nd defendant averred that April contributed to the collision. The onus to show on a balance of probabilities contributory negligence lies on the 2nd defendant. It did not lead any evidence to show contributory negligence. Mr *Foroma* sought to rely on circumstancial evidence. Any circumstantial evidence relied upon to show negligence must be such as would rule out any other plausible inference to satisfy me that April's conduct fell short of that expected of a prudent driver in her circumstances and the circumstances she found at this intersection. The circumstantial evidence relied upon does not meet the most plausible inference test.

Mr *Foroma* referred me to three South African cases in a bid to convince me that April was also negligent in her driving conduct. These were *Rondalla Assurance Corp of S.A. Ltd v Page and others* 1975 (1) S A 708 (AD), *Caldwell v Commercial Union Assurance Co. of SA Limited 1977* (1) SA 748 (AD) *and Barry v Mxaisa* 1977(4) 786 (OPD).

All these three cases are distinguishable on the facts. The admissions made in *Rondallas* case were not made by April in the present case. She at all times was alive to her surroundings. Unlike in *Caldwell's* case, she did not enter the intersection at an excessive speed nor did she like in *Barrys* case unconcernedly bore down on the intersection where another vehicle was in the process of crossing his path at a snails' pace.

Rather her actions compare with the dictum of HIEMSTRA J in *Swanpoel v Parity Insurance Co. Limited* 1963 (3) SA 819 at 820D. that "traffic on a main road need not be ready for any emergency created by people or vehicles who enter the road unexpectedly from the sides". In my view the suggestion by Mr *Foroma* that April should have stopped in the middle of the intersection to allow Freeman free passage was absurd. He suggested too that she should have sounded her horn. There was no need for her to do either of these acts for when she entered the intersection Freeman was still in Addington Drive and had not even encroached the lane of travel of vehicles coming from the direction opposite to where April was going. She was hit by Freeman as she passed through the intersection. Freeman's conduct was unexpected and irrational.

The 2nd defendant failed to discharge the onus on it to show that April's manner of driving contributed to the collision. It seems to me rather that the collision is attributable to the sole negligence of Freeman and through him vicariously to the 2nd defendant.

The next issue for determination revolves on the measure of damages that are due to the plaintiff from the 2nd defendant.

The plaintiff called the evidence of Geoffrey and Venancia in a bid to establish the amount due to it for the purpose of restoring the motor vehicle to its pre-accident condition. That condition was described by Geoffrey as brand new.

Geoffrey produced a bundle of documents consisting of 11 pages as Exhibit '1'. These related to the nature of damages and the assessed values attached thereto. These documents can be divided into two periods.

Pages 7,8 and 9 of Exhibit 1 cover the period November 2002 to June 2003. They are dated November 2002, 5 May 2003 and 27 June 2003. In this group should be included pages 5 and 6 of Exhibit '1' which is dated 30 July 2003. The second set covers the period 16 February to 2nd March 2005. Page 1 is dated 2 March 2005 while pages 10 and 11 relate to 16 February 2005.

The first group of documents pages 7,8 and 9 consists of Jock Smith Spraypainters quotations and letter. It was to this company that plaintiff took its motor vehicle for repairs. Page 7 is not very clear on the assessed costs of repair. Page 8 indicates as does page 7 that one M Smith did the assessment. Page 8 is however an invoice which indicates that there was need for payment upfront for spares. The total cost of the spares including increase in cost of spares was given as $13 862 151.28. To this figure was removed $3 904 850.00 which had already been paid by the plaintiff. That invoice requested for the payment of the

balance of the spares which had already been purchased but needed to be paid for in the sum of $9 957 301.78. Page 9 is the letter from Jock Smith Spraypainters (Private) Limited written to Geoffrey. The writer complained that he had left several messages for Geoffrey to contact him over the plaintiff's car. He wrote, " I am writing to inform you that as of today 27 June 2003, we will be charging interest at the current bankrate on the money outstanding for spares or else the spares can be reallocated to another job and then when payment is received, work will resume on your vehicle and the spares will have to be reordered which will result in them costing more."

Pages 5 and 6 consists of a letter written to the plaintiff but for Geoffrey's attention by Dawn Insurance Brokers (Private) Limited in which plaintiff was asked to accept $4 million in full and final settlement of the collision occasioned by Freeman's actions. The plaintiffs did not sign it, so the $4 million was never paid.

In his oral evidence Geoffrey stated that the Peugeot 406 was bought in March/April 2002 for $5 million. It was insured for that value. The plaintiff received $3 904 850 from its insurers and paid it to Jock Smith as reflected on page 8 of Exhibit '1'. He further stated Jock Smith was given the order to repair the motor vehicle, for which payment was to be made on completion. Jock Smith however did not fully repair it as it did not have the spare parts to do so. In November 2004 he eventually retrieved the motor vehicle and took it to Supreme Panel Beaters who eventually did most of the repairs for $100 417.70.

The second set of documents, that is, pages 1, 10 and 11 of Exhibit '1' were the plaintiff's attempts to justify the claim of $100 417.70. Geoffrey explained the quotation of 16 February 2005 on pages 10 and 11 of Exhibit '1'. It was done by Jock Smith to indicate the cost of repairs as at that date. These were estimated at $121 579 207.50. Page 1 of Exhibit 1 is a quotation by Supreme Panel Beaters which indicates that they would charge $100 417 261.70 for the same repairs. Geoffrey explained, and it was confirmed by Venancia, who compiled this quotation, that Venancia assessed the value of repairs due while the vehicle was still at Supreme Panel Beaters. It became clear to me that Geoffrey misled the court when he alleged that he removed the vehicle from Jock Smith in November 2004.

Geoffrey stated that the plaintiff paid $100 417 261.70 to Supreme Panel Beaters for the repairs. Venancia stated that it was her company's policy not to release the motor

vehicle under repair unless payment was done. She presumed that payment had been made. The plaintiff however did not produce proof of payment of that amount.

Geoffrey explained in his evidence in chief that the motor vehicle remained at Jock Smith for more than 2 years without repair because Jock Smith could not access some spare parts which required foreign currency for their importation. He also stated that the electronic control unit of the motor vehicle was damaged during this accident and had cost plaintiff $300 million to replace. He did not produce proof of payment nor did plaintiff claim for this figure.

Geoffrey was cross-examined over two days. He produced Exhibit 2, dated 16 December 2002 in which the plaintiff placed an order with Jock Smith for the repair of the Peugeot 406 in terms of a quotation which had been previously carried out. That quotation was produced during cross-examination as Exhibit 3. It was compiled by Jock Smith on 11 November 2002. It indicated an estimate preview value of repairs of $9 902 132.50 inclusive of spares and labour. Exhibit 3 is as detailed as pages 10 and 11 of Exhibit 1, also done 26 months later by Jock Smith.

He was asked to justify his explanation that Jock Smith had no spare parts to repair the motor vehicle in the light of the invoice dated 5 May 2003 which indicated that the spare parts were available but all Jock Smith required was payment upfront. He suggested that these two documents did not properly represent the true position at Jock Smith. The true position according to him, was that Jock Smith did not have the spare parts because it could not access them because of shortages of the foreign currency required to import them. When he realised that this answer was contrived, he cast the blame for the failure to repair not just on the dilatoriness of Jock Smith but also on the failure of the 2nd defendant to pay up for the damage. He now suggested that the plaintiff did not have local currency to meet the estimated bill.

Geoffrey gave his evidence well on the nature of the damage that was occasioned on the motor vehicle. The extent of the damage is captured in Exhibit '3' which was compiled on 11 November 2002, a month after the accident. It was repeated in Exhibit '1' on pages 1, 10 and 11. Venencia confirmed it too. I accept his testimony on the nature and extent of the damage on the motor vehicle..

He did not fare so well on the question of the delay in the repair of the motor vehicle. He was and still is the managing director of the plaintiff. I was not satisfied by

this explanation that Jock Smith did not repair the motor vehicle because it did not have the spare parts.

His own exhibits showed that Jock Smith had the spare parts. It was the plaintiff's duty to call Jock Smith to confirm that the invoice and letter which affirmed the presence of spare parts were in fact inaccurate. In a bid to extricate himself from this self created difficulty, Geoffrey laid the blame on the 2nd defendant's refusal to admit full liability for the accident. He suggested by that retort that the plaintiff had the money but did not pay up Jock Smith because it believed that was the 2nd defendant's duty. That in a nutshell is his explanation for the delay in the repair of the motor vehicle.

I accept that *Smit v Abrahams* 1994(4) SA 1 at 17D held that as a matter of policy the damages suffered by a party in the plaintiff's position should be met by the wrongdoer.

In *Cargo Carriers (Pvt) Ltd. V Nettlefold & another* 1991(2) ZLR `139(SC), MAcNALLY JA dealt with the position where the plaintiff had delayed in effecting repairs to a vehicle that was damaged in an accident. The cost of repairs was $70 000 of which $10 000 was due to the delay in commencing repairs.

He stated at page 142 C-F

> "I begin with the statement of Sir John Donaldson MR in The *Solbut* [1983] I Lloyds' Rep 605 (CA) at 608:
>
> 'A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly….caused by the defendants' breach of duty."

The same learned judge, in *Gebruder Metelmann & Co. v NBR (London) [1984]* I Lloyds Rep 614 (CA) at 631 said,

> "It is no doubt that the burden of proof lies on the defendant."
>
> Roman –Dutch authority is to the same effect: See generally Corbett and Buchanan; The quantum and Damages in Bodly and Fatal Injury Cases 2 ed at p10 para 8. There the point is made relying on Halsbury that there is a further duty on a plaintiff not to aggravate his own damages by his own wanton or careless conduct. If he does so aggravate his loss, then he will not be entitled to recover damages in respect of the damage attributable to such conduct on his post. Again the onus of establishing such aggravation lies upon the defendant. Broadly the same principles are enunciated in McKerron The Law of Delict 7ed at page 139."

McNALLY JA thus held that the onus is on the wrongdoer to establish delay and in the case before him held on the facts that wrongdoer had established that had the wronged authorised repairers to go ahead when they were ready to do so, those repairs would have cost $60 000 and not $70 000.00. Further, that the wronged party had not justified the delay.

In the present matter on 27 June 2003 Jock Smith indicated to the plaintiff that it had been ready to repair the motor vehicle for $13 862 151.78 if the balance of $9 957 301.78 was paid. The plaintiff would have authorised repair b y making the necessary payment of the sum requested by Jock Smith. The plaintiff did not show that failure to repair was due to the absence of spare parts nor did it establish that it did not have the local currency demanded by Jock Smith. It simply took the attitude that in its view the 2nd defendant was liable and should pay whatever the costs of repair tuned up to be at a later date when the repairs would be done. I therefore find this explanation of the delay unreasonable. Accordingly the plaintiff is not entitled to the sum claimed of $100 417 261.70.

The plaintiff abandoned the claim of $8 581 900 for loss of use of the motor vehicle. In its original claim it sought $15 957 301.00 as the reasonable cost of effecting the necessary repairs on its motor vehicle. The evidence produced showed that by 5 May 2003 when the motor vehicle could have been repaired it would have reasonably cost it $13 862 151.28. I find that the plaintiff has proved that amount.

On the question of costs, they must surely follow the event for the defendant did not at any time agree to the payment of any sum of money. The plaintiff was forced to come to court to obtain satisfaction.

In the premises, it is ordered that the defendant shall pay the plaintiff the sum of $13 862.15 (revalued) together with interest from 11 October 2002 to the date of full payment and costs of suit.

Atherstone and Cook, plaintiff's legal practitioners
Sawyer and Mkushi, Defendant's legal practitioners