DR. EMMANUEL LUNGA
versus
ZIMBABWE ELECTRICITY TRANSMISSION
AND DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 – 26 February 2016, 4 March 2016,
18 March 2016 & 27 April 2016

Civil Trial – Absolution from the Instance

T Zhuwarara, for the plaintiff
F Girach, for the defendant

MUREMBA J: The plaintiff issued summons on 24 June 2014 for payment of

"(a) US$150 000-00 being costs of repairs for damages suffered by plaintiff arising from defendant's wrongful and negligent conduct.
(b) US$1 500 per month being loss of income from May 2014 to the date the house is restored.
(c) US$1 800-00 per month being the costs incurred for hiring 24 hour security guards from May 2014 to the date the house is restored.
(d) Interest on the sum referred to in (a) at the prescribed rate from date of judgment to the date of payment in full.
(e) Costs of suit."

The defendant entered an appearance to defend and the matter progressed to trial stage. From the pleadings and the evidence led by the plaintiff the facts of the matter are largely common cause. The defendant was the lessee of a certain property belonging to the plaintiff known as 9 Bargate Road, Northwood, Mount Pleasant, Harare ("the premises"). The premises were leased from 1 October 2012 at a monthly rental of US$1 500-00. The lease agreement was due to expire on 30 April 2014. The defendant entered into this lease agreement for the benefit of its employee, so its employee one Mr. Tawona is the one who took occupation of the premises.

On 4 July 2013 a fire occurred at the premises at night, around 9 pm. The property was extensively damaged. The plaintiff attributes the fire to the defendant's employee who was in occupation of the property. In his declaration the plaintiff averred that the fire was caused by the wrongful and negligent conduct of the defendant's employee and as a result he (the plaintiff)

suffered patrimonial loss. Consequently, he wants the defendant to pay him US$150 000-00 being the cost of repairs; US$1 500-00 per month being loss of income from May 2014 to the date the house is restored and US$ 1 800-00 per month for hiring security guards to look after the vacant property from 14 May 2014 until it is repaired.

After the plaintiff had closed his case the defendant applied for absolution from the instance on the ground that whilst the plaintiff in his declaration had alleged negligence on the part of the defendant's employee, he (the plaintiff) had failed to prove the alleged negligence in his evidence against the defendant.

The Law

An application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the end of the state case in a criminal case. See *Munhuwa* v *Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (HC) at 382. The test is: is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? See *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at p 5. A plaintiff must make out a *prima facie* case in the sense that he must adduce evidence relating to all the essential elements of his claim on the strength of which the court could or might find for him. See *Roslyn Mining and Plant Hire (Pty) Ltd* v *Alexkor Ltd* [2012] 1 ALL 317 (SCA).

The Evidence Led by the Plaintiff

The plaintiff led evidence from himself and his gardener, Gift Karise. It is common cause that at the material time the plaintiff was not residing at the property where the fire occurred, but Gift Karise was residing there at the servants' quarters and was mainly tasked to do maintenance of the property.

From the evidence given by the two witnesses it is clear that none of them witnessed the fire commence. The plaintiff was at the place where he resides whilst Gift Karise was sleeping at the servants' quarters. However, Mr. Tawona's family was sleeping in the house. When the fire broke out Gift Karise was the first to be phoned to the scene by Mr. Tawona's maid, Sibongile. Gift Karise in turn phoned the plaintiff. So when the plaintiff got to the scene, Gift Karise was

already there. At this juncture it is pertinent for me to indicate that in suing the defendant, the plaintiff heavily relied on the information that he got from his gardener, Gift Karise concerning the cause of the fire.

It was Gift Karise's evidence that on the day of the fire he wished to borrow a CD from Mrs. Tawona. At around 6 pm he went to the house, but did not enter the house. He said that he waited by the kitchen door whilst the CD was being located. He said that a power cut was experienced at that very time and as such he did not get the CD he was after. He said that he went back to his quarters at the back of the house. He said that he later went to sleep only to be awakened during the night by a call from Sibongile, the maid at the main house saying that the house was on fire. He said that he dashed out to the main house. He said that the fire was raging such that he was not able to get close to the house. He said that when he got there he could go no more than 8m from the house. He said that by the time he got there, Mr. Tawona who had not been at home had awakened the occupants, three adults and four children and had forced their way out of the house by forcing the burglar bar out of position and causing them to climb out of a window in a bedroom. Gift Karise said that in the lounge he observed that 2 sofas were on fire. He said that as a result he concluded that the fire had been caused by a heater which was normally kept between the 2 sofas. It was Gift Karise's evidence that whilst at the scene he then phoned the plaintiff telling him about the fire.

It was the plaintiff's evidence that when he got to the scene that night the fire was raging. He said that the fire brigade attended the scene, did an examination thereof, but refused to furnish him with the report saying that they were going to give the report to the defendant.

The plaintiff also said that a few days after the fire, the defendant through its employees, Mr. Mhasho and Mrs. Moyo, admitted liability saying that it was its employee, Mr. Tawona who had been negligent and caused the fire. He said that the defendant had however indicated that it was going to send its engineers to do an examination of the scene which thing was later done. He said that even after the engineers had examined the scene the defendant maintained that its employee was at fault for causing the fire and intimated that he was going to face a disciplinary hearing for his negligence. The plaintiff said that however, despite this admission by the defendant he was not paid anything for the damage to his property. He said that after that, the defendant engaged a forensic scientist who conducted a belated forensic examination of the

scene sometime in January 2014. He said that the results thereof were only communicated to him in April 2014. He said that is when the defendant made an about turn and started disputing liability saying that the fire had started in the ceiling due to an electrical fault according to the forensic report. He said that according to that forensic report which is part of the plaintiff's bundle of documents, the expert was not able to find any evidence which showed that the fire had been started negligently.

The plaintiff said that it is then that he decided to do his own forensic examination of the scene since he has extensive experience in laboratory work since 1974 as a medical practitioner. He however, admitted that he neither has qualifications in forensic analysis in respect of buildings gutted by fire nor does have any electrical qualifications. He also admitted that he had never investigated a case of fire before, this was his first. He said that in carrying out the examination he wanted to prove that the defendant's forensic report was untrue. The plaintiff said that he carried out the examination of the scene with the assistance of his gardener, Gift Karise.

Both witnesses said that upon investigating the scene of the fire they found remnants of a plug in a burnt out socket in the rubble near the place where the heater used to be kept in the lounge and from that they concluded that the heater was the cause of the fire. Gift Karise said that from what he knew, these tenants would use the heater to warm themselves in the lounge. He said that there were times he would go to the main house to watch soccer with Mr. Tawona. He said that, that is when he would see the heater on. He said that it was on this basis that he concluded that before the power cut on the fateful night, the heater had been on and when there was a power cut the heater was neither switched off nor unplugged from the wall socket, so when the electricity came on, the heater came on and then caused the fire.

What is pertinent is that Gift Karise's theory is based on pure speculation and nothing more. First and foremost, Gift Karise did not enter the house on the fateful evening. He therefore did not see the heater on. His theory is based on what he had seen on the days he went into the house to watch soccer in the lounge and found the heater on. He was unable to tell for a fact if the heater was on at the time the power cut occurred on the fateful night. Even when the electricity came back on he was asleep at his quarters. He was speculating that the heater had not been turned off and that it is the one which caused the fire.

In opposing the application for absolution the plaintiff stated that he was relying on an inference that it was the negligence of the defendants' employee or invitees that triggered the fire. Citing the case of *Gordon Lloyd Page & Associates* v *Rivera & Another* 2001 (1) SA 88 (SCA) Mr. *Zhuwarara* argued that the plaintiff's theory or inference need not be conclusive or impugnable, but must simply be a reasonable one. He submitted that even then it (the inference) need not be the only reasonable one. I would define an inference as the process or act of deriving logical conclusions from known facts or evidence. In *casu,* the conclusion that it is the heater which caused the fire is not derived from known facts or evidence. It is not known whether or not the heater was on when electricity was interrupted. If it was, it is not known whether or not it was then not switched off when electricity was interrupted. It is also not known whether or not the heater was unplugged from the socket when electricity was interrupted. Since the inference is based on unknown facts or evidence it cannot be said to be reasonable one. The inference is based purely on speculation. The speculation is based on what Gift Karise had seen on the days that he entered the lounge to watch soccer. I am in total agreement with *Mr. Girach* that such speculation or assumption by Gift Karise does not constitute *prima facie* proof of negligence on the part of the tenants or occupants.

In its plea the defendant denied negligence on the part of the occupants and averred that the fire was caused by an electrical fault. In order to controvert the defendant's defence the plaintiff ought to have led evidence from a fire expert establishing the cause of the fire. Neither the plaintiff nor his gardener, Gift Karise is an expert in this area. If an expert had inspected the scene and concluded that the heater was the cause of the fire then the assumptions made by Gift Karise based on his previous observations would have corroborated the expert's evidence and helped strengthen the plaintiff's case. In the absence of expert evidence on what caused the fire there is no way of telling if indeed the fire was caused by the heater. It may well be that the heater was on when electricity was interrupted and even when it came back, but it was not the cause of the fire. For all we know the fire could have started elsewhere due to an electrical fault. From the defendant's forensic report which is part of plaintiff's bundle of documents on p 47 it is indicated that the fire happened due to an electrical fault in the roof. The forensic scientist is an expert and as such there was need for evidence from a fellow expert to rebut the defendant's forensic scientist's evidence. Inferences that are based on pure speculation or assumptions are

not enough. The plaintiff not being an expert himself ought to have had an expert examine the scene to establish the cause of the fire.

The plaintiff submitted that the defendant ought to be put on his defence in order to offer its own theory absolving it of any culpability. Citing the case of *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H), Mr. *Zhuwarara* argued that an application for absolution from the instance cannot succeed where the defendant has information peculiarly in its knowledge in regards to the matter at hand. He argued that a defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. He said that in the present matter there is information which is in the exclusive purview of the defendant which information can shed light as to the cause of the fire. His basis for saying this was that, the property which was damaged was in the exclusive control of the defendant's employee; the fire brigade attended the scene and compiled a report which has vital information in regards to the cause of the fire, but it refused to give it to the plaintiff saying that it would give it to the defendant; and it is the defendant's engineer who investigated the fire and must have appraised it as to what caused the fire.

In order for the plaintiff to succeed in his claim he has the onus to prove liability on the part of the defendant. In *casu* since he alleges negligence by the defendant's employee, he has the onus to prove that negligence. Mr. *Girach* correctly submitted that if the plaintiff wanted to be furnished with the report of the fire brigade he should have compelled discovery of the report or he should have led evidence from the fire brigade. The plaintiff's evidence shows that no such attempts were ever made. In any case nothing barred the plaintiff from engaging his own experts to establish the cause of the fire. The plaintiff is the one who is alleging negligence and as such the onus is on him to prove it. He who alleges must prove, so he must have gathered enough information or evidence to prove his allegations of negligence before he instituted these proceedings. The defendant cannot be put on his defence to controvert assumptions or speculations that have been advanced by the plaintiff. At the same time the plaintiff cannot expect the defendant to go into the witness box to tell him and the court what caused the fire. It is not for this court to make an investigation or enquiry into what caused the fire. Like Mr. *Girach* said, this court is not sitting as a commission of inquiry trying to establish what caused the fire, but to find out if the defendant is liable for the plaintiff's loss. For the defendant to be put in the

witness box the plaintiff ought to have established a *prima facie* case first against it. The defendant's purpose will then be to rebut that *prima facie* case. If no *prima facie* case has been established by the plaintiff there is no need for the defendant to be put on its defence since there is nothing to defend. As correctly submitted by Mr. *Girach* even if the defendant is put on its defence and gives a theory which is incorrect that will not make the plaintiff's theory correct in the absence of expert evidence.

The case of *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H) which Mr. *Zhuwarara* sought to rely on is not applicable in the present case because in the present case if the plaintiff had been diligent enough he would have, on his own, gathered evidence establishing the cause of the fire from independent experts. The defendant on its side engaged its own engineers and a forensic scientist. Apart from engaging experts the plaintiff should have compelled discovery of the fire brigade report before trial commenced. However, he sat on his laurels. Therefore, he cannot now seek to have the defendant put on its defence in order for the defendant to adduce evidence which the plaintiff could have adduced himself during his case if he had been diligent enough. Nothing and no one stopped him from getting the evidence that he wanted. Clearly, the evidence that the plaintiff wants the defendant to adduce is not within the exclusive domain of the defendant. It is evidence that the plaintiff could have gathered or acquired if he had wanted.

The plaintiff has established no *prima facie* case against the defendant because he has failed to adduce evidence relating to negligence which is an essential element of his claim. The speculation as to the cause of the fire which has been advanced by the plaintiff cannot, at this stage, lead this court into making a reasonable mistake and finding for him. I am fortified in my finding by the case of *Mazarura* v *Beselemu* HH 150/13 wherein Mafusire J also granted absolution from the instance, though after a full trial. In that case the plaintiff was claiming damages against the defendant in respect of his shop which was gutted by fire at midnight. At all material times the defendant was renting the shop. The grounds of the plaintiff's claim were that the defendant's employees had been negligent in that on the night in question they had neglected to switch off power to the electrical appliances in the shop, especially the chip fryer, resulting in the cooking oil in that appliance overheating to boiling levels leading to an explosion that ignited the shop.

The defendant disputed the claim contending that his employees had not been negligent in the manner alleged, or at all. He contended that it was their company's policy that every night after shut down the power supplies to the heavy duty equipment would be switched off. During trial the evidence which was led suggested that the power supply had been switched off when the fire occurred. In granting absolution from the instance Mafusire J said that negligence on the part of the defendant had not been proven, but was largely speculative. He said that the real cause of the fire was never properly investigated and established. Likewise in *casu*, the plaintiff never had the real cause of the fire investigated and established by fire experts. There was need for evidence from a fire expert ruling out an electrical fault.

The plaintiff's counsel also argued that the maxim of *res ipsa loquitor* which means that the occurrence speaks for itself must be applied in the present matter. He said that for this maxim to apply it must be shown that injury was caused to a thing which is under the control of the defendant and that the nature of the occurrence was such to justify an inference of negligence. He said that in *casu* something started the fire that destroyed the plaintiff's property because sofas do not suddenly self-combust and burn a house down. He said that there must have been a cause and such cause can only be traced back to the conduct or omission of the defendant's employee or his invitees. He said that once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story. In arguing this point Mr. *Zhuwarara* referred to the case of *Arthur* v *Bezuidenhout and Mieny* 1962 (2) SA 566 (A). Mr. *Zhuwarara* argued that proof by the plaintiff of the fire coupled with the exclusive control of the defendant's employee of the property give rise to the operation of the maxim. He said that the fact that it is only the plaintiff' house that got burnt on the day tells a story which justified an inference of negligence against the defendant. He said that the defendant is enjoined to explain that inference away and as such the matter should proceed to the defendant's case.

Mr. *Girach* submitted that the plaintiff cannot seek to rely on the doctrine of *re ipsa loquitor* now when he never pleaded it in his declaration. *Res ipsa loquitor* is really a matter of evidence than substantive law and it relates to proof of negligence. See G. Feltoe *A Guide to the Zimbabwean Law of Delict* 2nd ed at p 5. This is a doctrine which is raised in cases where there may be no direct evidence of negligence, but the nature of the circumstances in which the

incident occurred would not normally happen if reasonable care had been exercised by the person in control of the object. See G Feltoe *A Guide to the Zimbabwen Law of Delicit* 2nd ed at p 5. Since the maxim of *res ipsa loquitor* is a matter of evidence than substantive law it cannot be pleaded. The plaintiff was right in not pleading it. However, I do not believe that the present case is one case where the doctrine is applicable looking at the nature of the circumstances of the case. This is one case where there is need for evidence to be adduced by the plaintiff to prove the negligence of the defendant. This is because it is possible for a house which is electrified to burn down through no fault of the occupants, but due to an electrical fault. Therefore it is wrong to say that simply because the house burnt down whilst under the control of the defendant's employee, then there must have been a cause which can only be traced back to the conduct or omission of the occupants. The proof of the occurrence of the fire alone by the plaintiff is not enough to give rise to an inference of negligence on the part of the defendant warranting the latter to adduce evidence to the contrary. The manner of the negligence must be proven by the plaintiff first before the defendant can be put on its defence to rebut the plaintiff's evidence.

In the result, it is ordered that:-

1) Absolution from the instance is granted
2) The plaintiff pays the costs of suit.

Scanlen & Holderness, Plaintiff's legal practitioners
Dube Manikai & Hwacha, defendant's legal practitioners