

DAVID ADDENBROOKE

Versus

NORMAN JAMES PATTISON

And

DAVID COLTART

And

JOSEPHAT TSHUMA

**(Trading together in partnership as Webb, Low & Barry
Incorporating Ben Baron & Partners Legal Practitioners)**

IN THE HIGH COURT OF ZIMBABWE

BERE J

BULAWAYO 11 & 12 OCTOBER 2016 AND 18 MAY 2018

Civil Trial

J. Sibanda, for the plaintiff

A.P. de Bourbon (SC), for the respondents

BERE J: I have not the slightest doubt in my mind that when the plaintiff approached and instructed the defendants' law firm via its duly appointed professional assistant, Ms N. Ncube, to represent him, he left the law firm fully convinced that the law firm would render him the expected professional services.

But alas! In the months that followed the depositing of his instructions with the defendants, the plaintiff's case took an unexpected turn, the whole case became a nightmare to him. The things that he could not have imagined when he visited the law firm happened – the narrative makes sad reading hence this litigation. It sounds better imagined than discussed as I am forced to do so in this judgment.

The background

The factual sequence of events as put forward by the plaintiff which the defendants through their counsel indicated they did not dispute are as follows:

On 12 August 2011, the plaintiff was involved in a road traffic accident in which one Ms Portia Mhere sustained injuries.

Subsequently the plaintiff was arraigned and brought before a criminal court, prosecuted and convicted for negligent driving. The plaintiff was fined \$400.

After the plaintiff's conviction and sentence Messrs Majoko and Majoko Legal Practitioners, Ms Portia Mhere's legal practitioners sent a letter to the plaintiff demanding payment of US\$15 000,00 being a claim for "compensation" for the injuries sustained by Ms Mhere in the accident.

The plaintiff took the letter of demand to the defendants' law firm to defend the claim made against him. The plaintiff specifically instructed a Ms Ncube, a professional assistant of the defendants to defend the action. Upon being given instructions to defend the action Ms Ncube did her research on the law and responded to the letter of demand by writing to Messrs Majoko and Majoko as follows:

"Dear Sir

Re: Portia Mhere vs David Addenbrooke:

We act for and on behalf of David Addenbrooke. Kindly note our interest.

Our client does not believe that he caused the accident in any way as such is not liable to pay yours any damages.

Our client duly assisted yours on a without prejudice basis out of human conscience. After recollecting facts, the accident was caused by your client who may have been standing on the centre of the road and stepped back into our client's path, leaving not much reaction distance which resulted in the collision.

Our client believes e has done all he could to assist your client in the circumstances. Should your client feel it is necessary to issue summons, take note that we have instructions to receive them.

Be guided accordingly.”

Consistent with established practice, this letter was copied to the plaintiff by the defendants’ law firm. Ms Ncube also favoured the plaintiff with the research that she had made which tended to give hope to the plaintiff in the threatened civil litigation.

These initial exchanges in correspondence were swiftly followed by the issuance of summons commencing action by Messrs Majoko and Majoko Legal Practitioners for Ms Mhere against the plaintiff and these summons were duly served on the defendants as per indication by Ms Ncube.

In these summons Messrs Majoko and Majoko Legal Practitioners sought to recover accident damages in the global amount of \$15 000,00 from the plaintiff. The plaintiff through the defendants’ law firm duly entered a notice of appearance to defend in time.

On 21 June 2013 the defendants’ law firm advised the plaintiff of the entry of appearance to defend and suggested to the plaintiff that Advocate Moyo be roped in to “draft the plea, so that we have an expert handling it” (sic) to which the plaintiff raised no objection.

Having duly instructed the defendants’ law firm to represent him in this civil suit the plaintiff was utterly surprised to learn that a default judgment had been granted against him. The plaintiff only got to know about this sad development at a time when his property was now being attached in execution of judgment against him in May 2014, that is, almost a year after he had instructed the defendants’ law firm to defend the action.

The subsequent developments that followed led to an abortive attempt to have the default judgment rescinded. Even the intervention in retrospect by a senior partner of the defendants was unable to salvage anything for the plaintiff.

The plaintiff, out of sheer desperation ended up engaging another law firm to try and salvage his case. Despite this, all was in vain. Substantial damage had already been caused to his case. The plaintiff was unable to prevent his property from being sold in execution of judgment against him which he believed only came about as a result of negligence on the part of the defendants in the handling of his case.

Having sought legal advice from his current legal practitioners the plaintiff issued process out of this court against the defendants on 11 November 2014 seeking damages to the tune of US\$15 007,00, interest and costs of suit.

The basis of the plaintiff's claim was that the professional assistant who was assigned to handle his case by the defendants' law firm was grossly negligent in the handling of his case and that the defendants, as partners were vicariously liable. When this matter was heard on 11 October 2016, the plaintiff's counsel amended the plaintiff's claim from US\$15 500 to US\$15 007,00.

Upon being served with the summons the three defendants denied liability and in their plea they denied that they were negligent in the manner the plaintiff was represented.

The defendants further alleged that the plaintiff had no *bona fide* defence on merits to the claim brought against him by Ms Mhere in that she sustained injuries as a direct consequence of the plaintiff, for which negligence the plaintiff was convicted and sentenced in the criminal trial held in the Magistrates' Court.

The defendants also alleged in their plea that the amount of both general damages and special damages claimed by Ms Mhere totaling US\$15 000,00 were fair and reasonable in the circumstances, and that in all probabilities would have been awarded to her had the matter proceeded to trial.

The defendants further alleged that the plaintiff suffered no loss at all as a result of the default judgment and the subsequent sale in execution of his property.

In fact the defendants denied any form of liability to the plaintiff.

The Evidence

As indicated, the narration of events as given by the plaintiff in this case is common cause. It is this narration which informed the background to this case.

Mr Job Sibanda for the plaintiff urged the court to make a finding that the events as narrated by the plaintiff and accepted by the defendants amounted to gross negligence and consequently that the defendants must be found liable.

On the other hand *Mr de Bourbon* for the defendants argued that it had not been demonstrated that the defendants were negligent and as such the plaintiff's case ought to be dismissed.

In his court address after the collation of all the evidence in this case, defendants' counsel argued that the plaintiff had not pleaded damages or patrimonial loss and sought to rely on the case of *Mbundire vs Buttress*.¹

I will deal with the contrasting positions of both counsel as I develop this judgment.

The negligence of the defendants

In dealing with the liability of an attorney I find the following remarks by MOKGOATHLENNING J in the case of *Elizabeth Mokgothu Ramonyi and L. P. Molope Attorneys* (a case referred to me, courtesy of plaintiff's counsel) to be apposite:

¹ 2011 (1) ZLR 501 (S)

“Professional negligence is the failure by an attorney to act with the competence reasonably expected of ordinary members of the attorney’s profession. An attorney must be meticulous, accountable, ... He or she must serve his client faithfully and diligently. An attorney who fails to explain, his or her precise instructions and lays possum invites an adverse inference against him or herself.

“... An attorney is liable for the consequence of gross negligence if he or she displays a lack of reasonable skill and diligence in the performance of his or her duties in matters within his or her field of practice, expertise or knowledge.”²

I find it quite significant that when the plaintiff took his case to the defendant for representation the duly appointed legal practitioner of the defendants’ law firm accepted the plaintiff’s instructions and offered to render him legal assistance in defending the action.

The fairly detailed research which the plaintiff was furnished with by his legal practitioner, Ms Ncube was reassuring to him that the case against him was capable of being defended, (see exhibit 3).

I also find it quite telling that the plaintiff did not himself instruct his legal practitioners to look for an advocate for him but that it was the legal practitioner who went out of her way to instruct Advocate Moyo “to draft the plea, so that we have an expert handling it.” (*sic*)

One gets the impression that the roping in of Advocate Moyo by Ms Ncube was meant to ensure that nothing would go wrong with the plaintiff’s case. However, sight must not be lost that in the eyes of the plaintiff, the defendants remained as his legal practitioners. It is not accidental that all the communication to the plaintiff that followed cemented the plaintiff’s perception that the defendants were indeed his legal practitioners. It clearly mattered not how his lawyers interacted with Advocate Moyo who together with her instructing lawyers were expected to know the law and to do the right thing for the benefit of the plaintiff.

It is clear that the plaintiff’s case went off rail when the plaintiff’s legal practitioners, the defendants were served with a notice of intention to bar on 28th June 2013. Instead of filing a

² 2010/293 10 RSA, High Court (Gauteng Local Division pages 6-7 (of the cyclostyled judgment),

plea, the defendants, through their Advocate fell into a grave error by purporting to file a request for further particulars contrary to the dictates of a clearly settled legal position as enunciated in the case of *Russell Noach (Pvt) Ltd v Midsec North (Pvt) Ltd*³. To compound the defendants' position this settled legal position was highlighted to them by Messrs Majoko and Majoko Legal Practitioners through their letter of 9 February 2013 (exhibit 15). Instead of swiftly moving to file a plea, the defendants through their Advocate kept on haggling over nothing until defaulted judgment was applied against the plaintiff almost two months after the defendants had been forewarned. It is extreme negligence for a legal practitioner to expend time haggling on a settled legal principle to the detriment of his client.

It must be the position in my view that an instructing attorney takes full responsibility of the conduct of his Advocate. This must be so because a legal practitioner is not a lay person. He is trained in the field of law and quite often, his or her knowledge of the law may not be different from that of an Advocate. A fully trained and practicing legal practitioner cannot allow an instructed attorney to grope in darkness as it were, with immunity. Were that to happen, it would amount to a serious dereliction of duty for which the legal practitioner must be held accountable. This is precisely the point in this case.

All these developments were coming against the backdrop of an undertaking by the respondents to effectively represent the plaintiff.

It gets worse if one considers that for some strange reason the plaintiff was never kept abreast of all these developments in his case until he had the misfortune of seeing his property attached in execution of a judgment which caught him completely unaware.

The accepted evidence suggests that by the time one of the defendants, *Mr Tshuma* sought to intervene in this matter, the plaintiff's case had been messed up beyond redemption. The belated intervention completely failed to assist the plaintiff as he lost his property.

³ 1999 (2) ZLR 8 (H)

I find the plea tendered by the defendants in this matter to be unsustainable. I find it to be very strange that after accepting the plaintiff's instructions and having favoured the plaintiff with a detailed research in support of the instructions given to them by the plaintiff, the defendants can suddenly turn around in their plea and start arguing that after all the plaintiff had no valid defence to the claim made against him. Why did the defendants accept plaintiff's instructions and even wrote to Ms Mhere's legal practitioners stating that her claim would be defended and stating that "Our client does not believe that he caused the accident in any way and as such is not liable to pay yours any damages."⁴

It is the elementary practice in litigation that if one's client has no defence to the claim one does not enter appearance to defend. Doing so in such a situation would be both unethical and unacceptable.

A larger portion of *Mr de Bourbon's* written submission to the court was devoted to the distinction between an Advocate and an instructing attorney. I entirely agree with the position of the law as highlighted in his submissions. However, I do not agree that what Advocate Moyo did would exonerate the defendants. I have already indicated that for all intents and purposes, the plaintiff regarded the defendants' law firm as his legal practitioners and that the roping in of Mrs Moyo was initiated by Ms Ncube to ensure that the case she was handling was properly handled.

I entirely agree with *Mr Sibanda*, for the plaintiff that the best the defendants could have done in this case upon being served with plaintiff's summons was to try and mitigate their situation by invoking the provisions of Order 14 Rule 93 by seeking the joinder of Advocate Moyo. In all the probabilities of this case I find that at every stage of the pleadings in this case the negligence of the defendants' law firm remains quite visible. It is not possible to ignore it. The plaintiff's criminal conviction bears no significance to the negligence of the defendants. The conduct of the defendants' professional assistant coupled with the conduct of Advocate

⁴ Letter of 11 March 2013 (Exhibit 2)

Moyo made the defendants vulnerable. They cannot escape liability. Perhaps this case is a clarion call to all law firms that it is a monumental risk for them to allow inexperienced young legal practitioners to represent clients on behalf of the law firm with little or no supervision at all as what seems to have been the situation in this case. Young and inexperienced lawyers must be kept on leash until such time that they are able to go about on their own to represent clients on behalf of the law firm.

Assessment of quantum

In his address to court at the conclusion of the trial, Mr de Bourbon who appeared for the defendants sought to argue that the plaintiff had not pleaded damages so he sought to lean on the ratio in *Mbundire v Buttress* where the head note reads as follows:

“Where evidence is available to a plaintiff to place before the court to assist it in quantifying damages, and this is not produced, so that it is impossible for the court to do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance.”⁵

I entirely agree that this is the position of our law. However, I do not think that the plaintiff’s pleadings can be fairly attacked for failing to satisfy this legal requirement. The plaintiff’s declaration, in my view, is reasonably detailed in explaining the circumstances of the conduct of the defendants’ law firm leading to this suit. I have no wish to repeat what the declaration says in this judgment. Suffice it to say that it sufficiently pleads the plaintiff’s cause of action.

⁵ *Mbundira vs Buttress (supra)* at p 501G-H

As observed in the *Mbundire* case (*supra*)

“The basic principle underlying an award of damages in the Aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have occupied had the wrongful act causing him injury not been committed ...”⁶

I have already dealt with the conduct of the defendants’ law firm in authoring the misfortune that befell the plaintiff.

In his uncontroverted evidence in court the plaintiff explained how he felt betrayed by the defendants’ law firm. The plaintiff could not have put it in any better way when the following exchanges were recorded between him and his counsel in evidence in chief.

“Q you are in your papers saying defendants are liable because they were negligent and they on the other hand dispute negligence and are not liable to you can you address that issue?

Plaintiff - I am not sure but to say that when the writ of execution was presented to me I was totally unprepared for this event. I was completely taken by surprise at the time. I did not fully understand why I had been found “guilty” without having had the opportunity to defend myself especially after instructing my lawyer to defend me and as the time passed following my illness I began to feel that there were considerable areas of dispute which left me feeling that I had not been told the truth nor properly advised.”

The plaintiff, led by his counsel proceeded to give the estimated values of his property which was sold in execution of judgment which was entered against him as a result of the negligence of the defendants’ law firm.

According to the plaintiff, his following property was sold in execution of the judgment:

- “(a) a Cressida motor vehicle whose value he estimated of \$6 000,00
- (b) a television set whose lower value he put at \$300,00
- (c) the leather couch suite whose lower value was put at \$1 500,00
- (d) a glass coated table with 6 chairs whose value he put at \$1 900,00

⁶ (*supra*) at page 502A-B

(e) refrigerator whose value was estimated at \$600.”

The defendants did not call any evidence to controvert the values given by the plaintiff and the court’s view is that the unchallenged values must be accepted as a fair value of the plaintiff’s property. But for the negligence of the defendants, the plaintiff’s property could not have been sold.

In support of his claim for the value of his car, the plaintiff called Mr Brian Craig Follwell who used to service the plaintiff’s Cressida motor vehicle. This witness confirmed the estimated value of the motor vehicle.

It became necessary for the plaintiff justify the claim of \$2 507,00 that he was alleging in his declaration that he paid another law firm in an effort to salvage his case. Mr Thandaza Masiye-Moyo of Hwalima-Moyo and Associates provided that missing evidence. The witness confirmed that upon being approached by the plaintiff he provided legal services to him and raised his fee note to the tune of \$2 507,00

It is quite clear that, but for the negligence of the defendants’ law firm, the plaintiff would not have sought assistance from *Mr Masiye-Moyo’s* law firm.

The cross-examination to which the three witnesses were subjected to did not have any negative impact on the plaintiff’s claim because the defendants did not lead any evidence to controvert it. I am more than satisfied that the plaintiff was able to establish the amount to which he is entitled to.

A simple addition would put the plaintiff’s global claim at \$10 300,00 for his sold property and \$2 507,00 in legal fees, he was forced to pay to another law firm.

Costs

The accepted position of our law when it comes to costs is that the award of costs and the scale thereof is largely the discretion of the court and that the discretion must not be abused. See *Kruger Brothers and Wasserman vs Ruskin*⁷

Counsel for the plaintiff has urged me to award costs at a higher scale given the status of the defendants – they are very senior members of the profession and that really, in this case they had no meaningful defence to proffer to the plaintiff's claim.

Mr de Bourbon for the defendants urged the court not to lose sight of the fact that the plaintiff's hands were not as clean as he had tried to project in the sense that his negligence had caused serious injuries to one Ms Mhere.

Having considered both submissions, I am more inclined to grant costs to the plaintiff as prayed for in the summons commencing action mainly because even in his instructions to Ms Ncube, he was partially admitting liability to the claim by Ms Mhere.

In the result I make the following order:

The defendants be and are hereby found liable jointly and severally, the one paying the others to be absolved in the following amounts:

- (a) The sum of \$10 300,00 being the proved cost of the plaintiff's sold goods.
- (b) The sum of \$2 507,00 being legal fees paid by the plaintiff to Messrs Hwalima-Moyo Legal Practitioners.
- (c) Interest on the amounts granted from date of summons to date of payment in full; and
- (d) Costs of suit.

⁷ 1918 AD 63 at p 69

Messrs Job Sibanda & Associates, plaintiff's legal practitioners
Messrs Webb, Low & Barry defendants' legal practitioners