

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 58/2023

BETWEEN:

ANNA ANTHONY MROSS

APPELLANT

AND

BHM ENTERPRISES LIMITED

RESPONDENT



CORAM: Ngulube, Muzenga and Chembe, JJA
On April 2023 and 11th June 2024

For the Appellant: Mr. R Nkhata, Messrs Nyirongo & Co

For the Respondent: Mr. I. K. Mulenga, Messrs Iven Levy Legal Practitioners

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. The Attorney-General v D. G. Mpundu (1984) ZR 6 (SC)**
- 2. Andrew Tony Mutale v Crushed Stone Sales Limited (1994) SJ 98 (SC)**
- 3. Khalid Mohamed v The Attorney-General (1982) ZR 49 (SC)**
- 4. A Van Der Walt Transport (Namibia) Limited v Dar Farms and Transport Limited – Supreme Court Appeal No. 187/2015**

Other works referred to:

1. Halsbury's Laws of England.

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of Mbuzi, J, delivered on 23rd June 2022 in which the lower court found the appellant liable for negligence and awarded damages to the respondent as claimed.

2.0 BACKGROUND

2.1 By writ of summons dated 16th September 2021, the respondent commenced this action against the appellant claiming an order for the replacement of the respondent's ZHONGTONG Bus or payment of the equivalent sum of \$240,000 damages for negligently causing an accident, special damages, legal costs and interest.

2.2 The particulars of the appellant's negligence were that the respondent's bus registration No. AIC 61 ZM was involved in a fatal road traffic accident in Shiwang'andu District en route to Nakonde owing to the negligence of the appellant's servants or agents when he hit the respondent's vehicle on the front right corner of the bus near

the driver's side causing the bus driver to lose control, careering off the road and overturning, killing six people, loss of goods aboard and damage to the bus.

2.3 The respondent tabulated particulars of negligence as follows:

- a) **Driving at an excessively high speed without due regard for other road users;**
- b) **Failure to maintain his/her left lane to avoid colliding with oncoming vehicles, in this case the plaintiff's vehicle;**
- c) **Failure to calculate and maintain a reasonable distance on his/her left lane to avoid hitting or colliding with oncoming vehicles, in this case the respondent's vehicle;**
- d) **Failure to take care and ensure that he/she maintained a safe distance from the respondent's vehicle by keeping to his/her lane to avoid hitting the respondent's vehicle;**
- e) **Failure to notice that he/she had left his/her lane or failure to maintain his/her lane;**
- f) **Failure to take reasonable care to avoid hitting the plaintiff's bus.**

2.4 The appellant filed a defence admitting the fact that the bus was involved in a road traffic accident but denied being the causer of the

said accident alleging that it was caused by the negligence of the plaintiff. The appellant particularised the negligence as follows:

a) Failure to calculate and maintain a reasonable distance on his left lane to avoid hitting the appellant's trailer.

b) Driving at a high speed which diminished the bus driver's control of the respondent's bus, thus causing it to hit the appellant's trailer and subsequently to career off the road and overturn.

2.5 The appellant further denied causing the injuries, loss and damage, and further averred that if the negligence was caused by its driver, then the parties' insurance companies are liable to make good of the said injuries, loss and damage.

3.0 DECISION OF THE COURT BELOW

3.1 The trial court considered the evidence and found that the appellant's driver failed to keep to his near side after finishing negotiating a curve thus acting below the standard expected of a reasonable and prudent driver when he failed to keep a proper lookout for other road users thereby colliding with the bus.

3.2 After finding that the driver of the truck was negligent, the trial court went further to find that the respondent's driver's omission to stop, swerve, or in any other way to so manage or control the bus, equally

contributed to the occurrence of the accident. The trial court assessed the contribution to the accident of the two parties at 10% for the respondent and 90% for the appellant and referred for assessment before the District Registrar.

4.0 GROUNDS OF APPEAL

4.1 Unsettled by the decision of the court below, the appellant has launched before this Court the appeal on the following grounds:

- 1. The learned trial court erred in law and fact when it awarded special damages to the respondent when in fact the same was not proved at trial.**
- 2. The trial court erred in law and fact when it held that the appellant made a bare denial of the damages when in fact she specifically denied by giving a position concerning the plaintiff's allegation which she denied.**
- 3. The trial court erred in law and fact in apportioning contributory negligence at 10% for the respondent when in fact the acts of the respondent's driver were relatively important in the occurrence of the accident.**

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant argued grounds one and two together as they raised a common issue. The gist of the appellant's arguments was that the trial court awarded special damages to the respondent following the wrong

principles of the law. According to the appellant's counsel, the trial court found that special damages were proved following the finding of liability of negligence on the part of the appellant and that there was a bare denial by the appellant to the allegations of damages.

- 5.2 It was contended that the rationale of proving special damages, is that special damages are not presumed to follow the consequence of the acts, instead, they must be claimed in the writ of summons and strictly proved at trial. We were referred to the case of **The Attorney-General v D. G. Mpundu**¹ where it was held that:

"Special damage, on the other hand, is such loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct."

- 5.3 It was contended further that it is trite that for one to prove special damages, there must be documentary evidence speaking to the said damages. It was submitted that a perusal of the record of appeal reveals that no documents or testimonies from witnesses speak to the expenses incurred by the respondent in towing the bus and funeral

expenses. We were referred to the case of **Andrew Tony Mutale v Crushed Stone Sales Limited**² where it was held that there is a need for satisfactory proof to be provided before special damages can be awarded by the court.

5.4 In conclusion, it was submitted that even though the appellant's defence may have been a bare denial of the allegations of special damages, the respondent was still under the evidential obligation to prove special damages as was held by the Supreme Court in the case of **Khalid Mohamed v The Attorney-General**³, that **"a plaintiff cannot automatically succeed whenever a defence has failed, he must prove his case."**

5.5 We were urged to allow grounds one and two.

5.6 The gist of the appellant's arguments in support of the third ground of appeal is given the fact that the trial court found negligence on both parties, the respondent's negligence was more to warrant apportionment of 10%. According to learned counsel for the appellant, in the circumstances of the case, the apportionment of negligence should be 50% for each party.

5.7 We were urged to allow this appeal as it has merit.

6.0 THE HEARING

6.1 At the hearing of the appeal, learned counsel for the appellant placed full reliance on the documents filed. The learned counsel for the respondent was present but did not file their arguments and as such, we declined to hear him nor grant them leave to file arguments on the spot.

7.0 DECISION OF THE COURT

7.1 We have earnestly considered the record of appeal together with the accompanying arguments. We shall consider grounds one and two together as they are related.

7.2 We note that ground one and two addresses the question of special damages. Special damages can simply be defined as damages that are specifically identifiable and quantifiable, and are typically awarded in addition to general damages in a legal claim. Special damages are intended to compensate the claimant for specific financial losses or expenses incurred as a result of the defendant's actions or negligence.

7.3 We agree with the submission by learned counsel for the appellant that to claim special damages, the claimant must provide documentation and evidence to support the amount claimed such as receipts, invoices,

and records of lost income. In the case of **The Attorney-General v**

D. G. Mpundu *supra*, it was held that:

“Special damage, on the other hand, is such loss as the law will not presume to be the consequence of the defendant’s act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant’s conduct.”

- 7.4 We have perused the record of appeal and we note that no evidence was adduced in support of the claims for special damages. It is trite that evidence of the expenses incurred must be tabulated to prove special damages. We are certain that had the trial court properly directed its mind on legal principles surrounding special damages, it could have arrived at a different decision. We find merit in grounds one and two.
- 7.5 Coming to the last ground of appeal, it is our understanding that the appellant quarrels with the manner the trial court apportioned liability. It is clear from the facts that each party played a role in the accident. We note that the respondent’s driver was in a position to avoid the accident had he stopped the bus at the point when he saw the

oncoming truck. What therefore needs to be addressed is the extent of liability which each party should bear for the accident as this was a case of contributory negligence.

7.6 In the case of **A Van Der Walt Transport (Namibia) Limited v Dar Farms and Transport Limited**⁴, the Supreme Court, in considering the issue of apportionment of contribution stated that:

"Paragraph 76 of Volume 34 Halsbury's Laws of England offers the following guidance on apportionment:

"Apportionment. In a case of contributory negligence the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The court has regard both to the blameworthiness of each party and the relative importance of the acts in causing the damage (often called causative potency). An appellate court will be very reluctant to interfere with the apportionment of blame or damages by the trial judge, but it will do so if the trial judge has erred in principle, misapprehended the facts or made a clearly erroneous apportionment. A partially successful plaintiff is entitled to full costs on the usual rule that costs follow the event."

Although the judge found the respondent liable for contributory negligence, she concluded that the major cause of the collision was the appellant's driver's negligent driving. We agree with her, but she should have gone further and applied the principle of apportionment as set out above instead of simply awarding the respondent the sum of K100,000.00 as damages and dismissing the counterclaim on account of

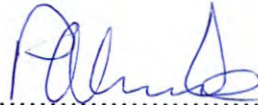
the appellant's negligent driving. We are of the view that when all the facts are considered, the apportionment of liability should have been 70% for the appellant and 30% for respondent."

- 7.7 We note that the trial judge found the respondent liable for contributory negligence, and concluded that the major cause of the accident was the appellant's driver's negligent driving. We agree with the trial judge only to the extent of finding that there was contributory negligence. We hold the view that, had the trial court gone further and applied the principle of apportionment in line with the level of contribution as set out above, it could have reached a different decision.
- 7.8 The respondent's driver could equally have prevented the accident had he slowed down or stopped having noticed the truck. His contribution to the accident is not 50% as argued by the appellant but certainly above the 10% which the lower court found. We find merit in ground three. We accordingly set aside the 10% and 90% apportionment of liability and substitute it with 30% to the respondent and 70% to the appellant. The damages so awarded will be assessed by the Registrar of the High Court.

7.9 Interest is to run at the short-term deposit rate from the date of the writ to the date of judgment and thereafter at the average lending rate as determined by the Bank of Zambia up to the date of payment.

8.0 CONCLUSION

- 8.1 Having found merit in all the grounds of appeal, we allow the appeal. The Registrar of the High Court will assess the damages so awarded and apportion the same by the percentages found in this judgment.
- 8.2 Each party to bear their own costs arising from this appeal.



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P. C. M. NGULUBE
COURT OF APPEAL JUDGE



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K. MUZENGA
COURT OF APPEAL JUDGE



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Y. CHEMBE
COURT OF APPEAL JUDGE