

IT

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2023/HP/1541



BETWEEN:

SWISSCO CONSTRUCTION LIMITED

PLAINTIFF

AND

COSMAS JAPHET BOTHA

DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 27TH MARCH 2024 - IN CHAMBERS**

For the Plaintiff : Mr. E.S. Lilanda & Ms. C.N Mwango – Messrs. Mulenga
Mundashi Legal Practitioners
For the Defendant : In Person

JUDGMENT

CASES REFERRED TO:

1. *Kapansa Mwansa v Zambian Breweries PLC Appeal No. 82/2006*
2. *Donoghue V Stevenson 1932 UKHL 100*
3. *Madison General Insurance Company Limited V Avрил Cornhill and Michael Kakoma Appeal No. 19 of 2017*
4. *Zulu V Avondale Housing Project (1982) ZR 172*
5. *Mhango v Ngulube (1983) Z.R.6*
6. *Savenda Management Services V Stanbic Bank Zambia Limited appeal 37 of 2018 ZMSC 413*
7. *Blyth V Birmingham Waterworks (1856) 11 Ex Ch 781*
8. *Hay Cor Bournhill V Young (1943) AC 92*
9. *King V Philips (1953) 1 ALL ER 617 and in particular at page 623*
10. *January Gringo Nakalanga V The People (1980) ZR quoting Cullinan JS at page 255*
11. *Elijah Bob Litana v Bernard Chimba and The Attorney General (1987) ZLR 26*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Clerk and Lindell on Torts 7th Edition, Sweet and Maxwell on page 427*

This matter was filed on 5th September, 2023 by way of writ of summons and statement of claim. The Plaintiff a company incorporated in Zambia pursuant to the Company Act Number 10 of 2017 having its registered office plot number 37872, Kafue Road, Lusaka is claiming from the defendant the following:

1. *Damages for negligence;*
2. *Special damages in the sum of K1, 692, 905.00;*
3. *Interest;*
4. *Cost incidental to this action; and*
5. *Any other relief that the court may deem fit.*

The claim arises from the following that on 6th October, 2022, Mr. Boyd Sokoloko a driver and employee of the Plaintiff was driving Benz tipper truck whose registration was a ALX 7997 belonging to the plaintiff along Leopards Hill Road at a moderate speed of 40 to 50 km/h.

That around 16:20 hours on the material day, the Defendant drove across the lane that the truck driver was driving in without any warning. That this resulted in a road traffic accident which caused damage to the truck belonging to the Plaintiff. The Plaintiff reported the accident to the police where the Defendant was found to be at fault and accordingly paid the admission of guilt fee.

The particulars of negligence were given as follows:

1. *At a speed which was too excessive in the circumstances;*
2. *Failing to see the plaintiff in sufficient time to avoid the collusion;*
3. *The defendant failed to control his car for the defendant failed to maintain his lane; and*
4. *The defendant subsequently hit into the truck and caused damage to the truck and injury to the truck driver.*

The particulars of the injury sustained by the driver were a cut on the forehead and general body pain. The Plaintiff is said to have incurred medical expenses for the treatment of the truck driver. The Plaintiff pointed out that they incurred costs of repairing the truck invoiced at \$40,000.00 however, the Defendant's insurance company only paid the sum of K240,000.00 from the claimed sum and the insurance company assessed the truck as a write off.

The truck was said to be a material asset of the Plaintiff's business and as a result of the accident the truck could not be used in the Plaintiff's business. That the Plaintiff had to hire alternative trucks to continue its business. The Plaintiff gave the particulars of special damages that is the cost of the new truck which was pegged at K1,371,225.00, hiring costs of various tipper trucks for the period between 31st October, 2022 to April, 2023 at a cost of K321,680.00.

That by reason of the foregoing the Plaintiff has suffered damage and loss and the Plaintiff now claims damages for negligence;

special damages in the sum of K1,692,905; interest; costs incidental to this action; and any other relief that the court may deem fit.

According to the record ex parte summons for leave to serve court process by substituted service by way of advertisement in the Zambia daily mail newspaper or any print media of wide circulation in Zambia pursuant to **Order rule three of the High Court Rules, Chapter 27 of the Laws of Zambia** plus affidavit support filed on 15th September, 2023 was filed. The order was granted on 6th November, 2023.

Upon being satisfied that proper service have been effected, the court went ahead to issue a date for trial this being on 27th March, 2024. On that date Counsel for the Plaintiff and the Plaintiff were present in court. The court proceeded to hear the Plaintiff. It's important to state that the Defendant did not file their defence despite receiving the demand letter as well as service being effected.

Mr. Joseph Ngosa gave evidence on behalf of the Plaintiff. It was his evidence that he was employed as an accountant in the Plaintiff company. He identified the witness statement that he submitted in support of the Plaintiff claim.

It was his evidence that on 6th October, 2022 around 16:20 hours the Plaintiff driver, Mr. Boyd Sokoloko was driving the Plaintiff vehicle namely Mercedes-Benz tipper truck whose registration number was a LAX 7997 along leopards Hill Road. That he was informed by the driver that he was involved in an accident with the

defendant along leopards hill road. The witness relied on the police report containing the details of the accident. It was his testimony that the vehicle involved in the accident was a Toyota Runx registration number was BAV 3378 which cut across the lane where the truck was without giving any warning resulting in the accident. The court was referred to pages 2 and 3 of the Plaintiff's bundle of documents. The document at page 2 is the Zambia Police Service traffic accident report which continues at page 3.

It was further his evidence that the Zambia Police who were called to the scene of the accident, charged the Defendant with the offence of dangerous driving and the Defendant signed an admission of guilt form and paid the corresponding fee. The court was referred to page 3 of the Plaintiff's bundle of documents. At page 3 is a Zambia Police Service traffic accident report in which the details of the vehicles involved in the accident, the damage caused the insurance numbers as well as the injuries sustained were given.

It was his testimony that the truck had a damage to its left bumper indicator lens, headlamp fender, passenger door, windscreen and both front tires as a result of the accident. The court was informed that the Plaintiff desired to repair the truck and obtained three quotations from three different workshops for the purpose of repairing the truck. The Plaintiff then proceeded to demand for the sum of \$40,000.00 from the Defendant for repairing the truck. The court was referred to pages 15 to 17 of the Plaintiff's bundle of

documents a demand letter written to the advocates for the Plaintiff to the Defendant Mr. Cosmas Japhet Botha.

The demand letter was for the full settlement of the sum of \$40,000.00 being repayment costs plus loss of business resulting from the road traffic accident on 6th October, 2022. **PW1** states that the Defendant engaged the Defendants insurance company Nico Insurance Company to pay for the cost of repair. That the insurance company only paid the Plaintiff the sum of K240,000.00 from the initial claim of \$40,000.00. The insurance company advised the Plaintiff that the truck was a complete right off as it was extensively damaged and was no longer fit for purpose. The court was referred to page 13 of the Plaintiff's bundle of document.

The exhibit at page 13 was an email sent by an employee of the defendant's insurance company addressed to the Defendant where he was informed that the insurance company was proceeding to write off the vehicle and came up with two options.

It was brought to the court's attention that the Plaintiff was involved in the business of construction and used the truck that was involved in the accident to transport building materials. That to mitigate the financial loss that the company suffered the Plaintiff hired a tipper truck at a cost of K1,500.00 per load which charge was included in the cost of materials purchased. The court was referred to pages 19 to 50 of the Plaintiff's bundle of document as proof. These pages were of invoices and payment vouchers which

include among other things the amounts paid by the Plaintiff's company to their suppliers.

The period stated for the hire of the trucks was 31st October, 2022 to the 11th of April, 2023. The costs incurred were said to be K321,680.00 for the hiring of the tipper trucks. Further that upon realizing that the hire of Tipper trucks by the Plaintiff was costly for its business, the Plaintiff resorted to entering into a vehicle and finance loan with First National Bank for the purpose of purchasing a new tipper truck as a way of mitigating its business losses. The loan facility was for the total sum of US\$62,416.80. The court was referred to pages 7 to 9 of the Plaintiff's bundle of documents as proof.

That the Plaintiff has attempted to contact the defendant on numerous occasions through phone calls, text messages and letters however, the Defendant in certain instances did not respond to the plaintiff. Further that the times that the Defendant responded meeting times to meet with the Plaintiff's management were set up however, the Defendant did not show up for any of the meetings.

The Plaintiff filed their final submissions on 19th April, 2024. After giving a brief background of what transpired as per evidence of **PW1** the court was asked to consider whether the defendant acted negligently in causing the accident which resulted in total damage to the Plaintiff's truck and consequential injury to the Plaintiff's driver.

It was pointed out that the law governing negligence action is well settled to be a subject of controversy. That in establishing an action for negligence against the Defendant, they shall begin by highlighting the elements that make up the tort of negligence. That they will demonstrate how the elements of negligence fall on all fours with the facts at hand.

The court was referred to what the Learned authors of **Clerk and Lindell on Torts 7th Edition, Sweet and Maxwell on page 427** opined:

“That in order for a claim of negligence to succeed it is necessary for the plaintiff to show that the defendant owed a duty of care to the plaintiff, that the defendant breached this duty and that the plaintiff has suffered loss or damage as a result of the breach”

The court was referred to the case of **Kapansa Mwansa v Zambian Breweries PLC Appeal No. 82/2006¹**, where the Supreme Court, citing the English authority of **Donoghue V Stevenson 1932 UKHL 100²** and held that:

“For an action in negligence to succeed, it must be shown that the defendant owed a duty of care to the plaintiff; that the duty had been breached; and that the plaintiff had suffered damage by that breach.”

The court was asked to consider the fact that the Plaintiff was equally a road user, that the Defendant owed the Plaintiff a duty to take all reasonable acts to ensure that the Plaintiff did not suffer

injury or damages as a direct consequence of the Defendant's actions.

Secondly, that it is not in doubt that the Defendant breached its duty of care to the Plaintiff. The court was referred to the case of **Donoghue and Stevenson supra** where the famous neighbour principle was established. In that case, it was stated as follows:

“You must take reason care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

That in the case at hand, the Defendant breached his duty of care when he veered across the road, that the Plaintiff driver was travelling on without following the proper traffic rules. That put differently the Defendant breached his duty by driving above the speed limit prescribed below and not to the required standard of care when attempting to overtake.

It was submitted that the duty of care expected of drivers on the highway is high the basis of their position is found in **Clerk and Lindsell on page 517** where the learned authors state as follows:

“It has been pointed out that, in pursuance of its policy preventing harm, courts do insist on stricter standards of care being observed. This is especially true in highway cases where the accident rate causes concern. Here, more than

anywhere else, it is folly not to anticipate folly in others. Accordingly, it may be said that a very high standard of care is expected of highway users, and there are various statutory regulations on special matters. Apart from these, the principles upon which the law proceeds are those of ordinary negligence cases”.

On whether the Plaintiff is entitled to special damages for loss incurred for the duration that the truck was not in use and for hiring alternative tipper trucks the Plaintiff submitted that having established that the Defendant was negligent in the way he conducted himself the Plaintiff is entitled to a claim for special damages as a result of the loss incurred for the duration that the truck was not in use and for hiring alternative tipper trucks.

It was submitted that the law on special damages has been pronounced by various courts in Zambia. These must be proved by adducing cogent evidence. That the basis of their position is the case of **Madison General Insurance Company Limited V Avrill Cornhill and Michael Kakoma Appeal No. 19 of 2017**³ where the Supreme Court held as follows:

*“7.36 A claim for special damages such as loss of use must be proved through cogent evidence. This has been the consistent position of the law as restated in cases such as **Zulu V Avondale Housing Project**⁴. In **Mhango v Ngulube**⁵, we stated the position that:*

It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of the loss with a fair amount of certainty.

7.37 later in the same judgment we observed and stated as follows:

“The result is that the evidence presented to the court was unsatisfactory and, in our opinion, the learned trial Judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the Judges’ duty to establish for them what their loss is”.

7.38 Special damages for financial outlay or loss in terms of earnings or profits are awarded in one basic principle - the imperative to properly plead, particularize and prove damages. And this is universal. It even applies where, as in this case, the loss is allegedly on-going”.

I was referred to the case of ***Savenda Management Services V Stanbic Bank Zambia Limited appeal 37 of 2018 ZMSC 413***⁶ where the Supreme Court stated that:

“Special damages must be specifically pleaded and particularized”.

It was submitted that the Plaintiff herein has satisfied the requirements for claiming special damages.

Counsel for the Plaintiff turned to demonstrating how these requirements have been satisfied by the Plaintiff. To start with that the record shows that the Plaintiff in its statement of claim has pleaded for special damages in the sum of K1,692,905.00. The Plaintiff has also particularized the special damages in its statement of claim by showing that the sum claimed consists of K1,371,225.00 being the cost of a new truck and the sum of K321,680.00 being the cost incurred because of hiring a tipper truck for the period between 31st October ,2022 and April, 2023.

It was submitted that the Plaintiff had adduced sufficient evidence to justify an award for special damages. That this evidence appears at pages 19 to 50 of the Plaintiff's bundle of documents. This evidence is in form of various invoices for hiring alternative trucks after the accident. Further that when hiring the tipper trucks by the Plaintiff became costly for the business, the plaintiff resorted to entering into a vehicle and asset finance loan with First National Bank for purposes of purchasing a new tipper truck as a way of mitigating its business losses.

That the Plaintiff has sufficiently discharged its burden justifying an award for special damages, in addition to pleading, particularizing the special loss. The Court was urged to grant the Plaintiff the reliefs accordingly. Further to grant costs against the defendant to be taxed in default of agreement.

1. Damages for negligence

The Plaintiff's claim for damages is supported by the case of ***Blyth V Birmingham Waterworks (1856) 11 Ex Ch 781***⁷ it was stated that:

"Negligence is the omission to do something which a reasonable man, guided upon these considerations, which ordinarily regulate the conduct of human affairs, would do or doing something, which a prudent and reasonable man would not do. The standard demanded is thus not of perfection but of reasonableness. It is an objective standard...."

I was referred to the case of ***Kapansa Mwansa V Zambian Breweries PLC Appeal No. 82/2006*** where the Supreme Court cited the English authority of ***Donoghue V Stevenson 1932 UK 100***. The holding of the Court is at page J8 of this judgment.

The issue that arises out of the above decision is whether or not it has been proven that the Defendant owed a duty of care to the Plaintiff; that the duty had been breached resulting in the Plaintiff suffering damage by that breach. The action of negligence is founded on the principle of a person's conduct in doing or omitting to do something that he should have done and the said action or omission results into loss and injuries to another person.

Drivers are required to use reasonable care and skill to avoid causing harm to other road users. Drivers have a duty to drive conservatively, keeping a proper look out. The driver in this case failed to observe these standards and therefore the driver was negligent.

In the case of ***Hay (or Bournhill) V Young (1943) AC 92^s*** and in particular the opinion of Lord Macmillan at page 104 of the judgment he stated that:

"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting of which may have its reasonable and provable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed".

In yet another case of *King V Philips (1953) 1 ALL ER 617 and in particular at page 623*⁹ Lord Denning in espousing the duty which drivers owe had this to say:

“Every driver can and should foresee that if he drives negligently, he may injure somebody in the vicinity in some way or another, and he must be responsible for all the injuries which he does in fact come by his negligence to anyone in the vicinity, whether they are wounds or shocks unless they are too remote in law to be reversed”.

The real issue is whether the Plaintiff has proved that the accident was caused by the negligence of the Defendant.

In the absence of the Defendant who decided not to be part of these proceedings despite being made aware of this matter before me my decision is based purely on the evidence of the Plaintiff.

It is trite that even in criminal trials where the standard of proof is higher the court can convict on the evidence of a single creditable witness. Corroboration does not just mean evidence of a single witnesses is suspect (*Sammy Kabmilima Ngati, Mumba Chishimba Edward and Davy Musonda Chanda V The People SCZ Judgment No. 14 of 2003, Shawaza Fawarz and Prosper Chelelwa V The people (1995) SJ (SC)*).

In this case the evidence of the Plaintiff is supported by the exhibits filed. These exhibits are corroborative enough. In particular that the driver was involved in an accident is confirmed by the Zambia Police Service Traffic Accident Report at page 2 of the Plaintiff's bundle of documents.

The report contains the date of the accident 6th October, 2022, the time of the accident (16:00 hours). It contains the name of the person who made the report Boyd Sokoloko the driver of the Plaintiff's company. Further it contains the Make as well as the registration of the vehicle are stated. The report also contains the damage to the Plaintiff's vehicle as well as the injuries sustained by the driver.

According to this report relied on by the Plaintiff as proof of the Defendant's negligence, the extract from the police report was as follows:

“Accident occurred when the motor vehicle III driver failed to give way to motor vehicle 1, vehicle was hit into and it hit into a moving vehicle II causing damages”.

Further that the scene was visited by the police, male Japhet Cosmas Botha was charged for the offence of **Careless Driving** contrary to section 154(i) of Act No. 11 of 2002 of the Laws of Zambia and he paid a fine.

There is nowhere in the report that the police indicated that the Defendant was driving at a speed which was too excessive. However, in the particulars of Negligence the Plaintiff claims that the Defendant was driving at a speed which was too excessive in the circumstances. If indeed it is proven the excessive speed flies in the

teeth of what is recommended for the proper use of public road users.

In this respect I find the case of *January Gringo Nakalanga V The People (1980) ZR* quoting *Cullinan JS at page 255*¹⁰ useful. He stated as follows:

“In view of the provisions of section 275(5) of the Roads and Road Traffic Act, failure to observe the highway code is of course no more than evidential in its effect in these proceedings. In failing to observe the code, however, that is to say, in driving at such speed at such a distance from the vehicle in front that the Appellant was unable to safely slow down or stop but was forced to swerve across the centre line of the road, his standard of the reasonable prudent driver”.

My take from the above case are the consequences of driving at a speed which is said to be excessive and the standard of a reasonable prudent driver driving on a road used by other road users.

Although the scene of the accident was visited and a report prepared there is nowhere in the report that the police state that the Defendant was driving at a speed which was too excessive. In the case of *Elijah Bob Litana v Bernard Chimba and The Attorney General (1987) ZLR 26*¹¹ the Supreme Court held in part as follows:

“In the absence of expert evidence as to the estimated speed of the Appellant it is not competent for a trial Court to come to a conclusion about the speed of the vehicle”.

In this case the learned trial Commissioner found that the Appellant must have been driving too fast because he was unable to stop or swerve around the vehicle with which he collided.

It is probable that the accident was caused by the negligence of the Defendant having failed to see the Plaintiff's truck in sufficient time to avoid the collision, to maintain his lane and as a result hit into the truck and caused damage to the truck injury to the truck driver.

The Plaintiff has satisfied the Court on a balance of probabilities that on the 6th October, 2022. Mr. Boyd Sokoloko a driver of the Plaintiff company was driving a Benz tipper truck whose registration was ALX 7997 and that the Defendant drove across the lane that the truck driver was driving in. That this was done without any warning and resulted a road traffic accident which caused damage to the truck belonging to the Plaintiff.

That in doing so although it has not been proven that he was driving at excessive speed he did so negligently. That the Plaintiff has shown that the Defendant owed a duty of care to the Plaintiff. There is a mutuality of duty of care of all road users towards other road users. The duty to take care would have been the duty not to drive across the lane that the truck driver was driving in without warning.

The Defendant breached his duty of care to the Plaintiff. The Defendant could have or ought to have foreseen that by driving negligently, he would injure somebody in the vicinity in some way

or another. The result of his action on that fateful day resulted in the Plaintiff suffering loss or damage as a result of the breach. The Courts as stated earlier do insist on stricter standards of care being observed especially on roads where the accident rate causes concern.

A claim for special damages for the loss of the Plaintiff's truck and use of the same has been proved through cogent evidence. The Plaintiff's evidence that the company was involved in the construction business is not disputed. That the truck which was damaged was a material asset of the business is without doubt.

There is proof that the Plaintiff hired alternative trucks in order to carry on its business. Evidence has been provided for the hiring costs of various tipper trucks for the period between 1st October, 2022 to April, 2023 by way of receipts and payment vouchers.

The evidence before me was sufficient for this Court to determine the value of the loss suffered by the Plaintiff with a fair amount of certainty.

As guided in the case of **Madison General Insurance Company Limited V Avrill Cornhill and Michael Kakoma** in consistent with the position of the law as stated in the cases of **Zulu V Avondale Housing Project and Mhango V Ngulube**. I am satisfied that the Plaintiff has satisfied the requirements to claim special damages for the financial outlay or

loss in terms of earnings or profits. That special damages were specifically pleaded and particularized.


Upon being satisfied that special damages have been specifically pleaded and particularized damages awarded are as follows:

The sum of K1,371,225.00 being the costs of a new truck. The sum of K321,680.00 being the cost incurred for the hiring of tipper trucks for the period between 31st October, 2022 and April, 2023. Further special damages are awarded in the sum of K1,692,905.00 to the Plaintiff for suffering damage and loss plus interest at short term deposit rate from date of writ to date of judgment and thereafter at current bank rate till payment in full.

Plus, costs incidental to this action to be taxed in default of agreement. The amount to be paid will be less any payment made by the Defendant or his insurers.

Leave to appeal is granted.

DELIVERED AT LUSAKA ON THIS 13TH DAY OF MARCH, 2025.


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G.C. CHAWATAMA
HIGH COURT JUDGE