

**International (Private) Limited
Versus
Grant Kembo
And
Post And Telecommunications Corporation**

HIGH COURT OF ZIMBABWE
KAMOCHA J,
HARARE, 7, 9, 16 October, 12 November and 26 November, 2003

Mr *R Y Phillips* for the plaintiff
Mrs *Zindi* for the defendants

KAMOCHA J: In this matter the plaintiff was claiming payment of the sum of \$204 384,89 being the damages suffered by it as a result of the damage caused to its Peugeot 306 sedan in a collision with the second defendant's Mazda T35 on 17 March 2001 along Harare Drive, near the Marlborough Shopping Centre, which was caused by the negligent driving of the first defendant, acting in the course and within the scope of his employment with the second defendant.

Plaintiff also claimed interest at the prescribed rate from 17 March 2001 to the date of final payment and costs of suit.

The court was presented with two irreconcilable versions of how the accident occurred. The version of the plaintiff was given by Mrs Gladys Changa. Her story was that on the day in question she had come from the Marlborough Shopping Centre and was driving along Harare Drive, slowly, conscious of the petrol queue encroaching in the lane for oncoming traffic. As she was driving she then saw, through her rear view mirror, a PTC Mazda T35 vehicle which was travelling at a faster speed than hers coming from behind. It attempted to overtake her but failed to do so safely. She felt a double impact. The PTC vehicle hit her vehicle on the right rear fender and boot, as well as the right side on both doors, she was unable to tell how the double impact ensued. But it must be remembered that that took place in split of a second making it difficult for her to exactly know how it happened. She told the court that the driver should not have tried to overtake at that point because there was insufficient room to do so

particularly for a Mazda 3 tonne truck. The traffic flow was impeded by the petrol queue.

After the accident police went to attend the scene. Both parties went to the police station where statements were recorded from them. The police did not see it fit to invite her to pay a deposit fine for any offence.

Mr Grant Kembo ("Kembo") gave evidence for the defendants. His evidence was that he was driving the PTC Mazda 3 tonne vehicle along Harare Drive when he saw Mrs Changa's car parked off the road. As he approached it, it suddenly moved onto the road. He braked, skidded and moved to the right lane to avoid it. However, his efforts were all in vain because Mrs Changa allegedly swerved to avoid a pothole, thereby moving even further to her right. As a result Kembo could not then avoid a collision. It was his evidence that but for Mrs Changa's acts of negligence the collision would not have occurred. He said that the petrol queue vehicles had left such a big space that two vehicles could have gone past without any problem. According to him his statement to the police was in the same vein. But surprisingly the police told him to pay a fine for driving without due care and attention and he did. It is surprising because Kembo's story contains no element of negligence on his part, but two serious acts of negligence by Mrs Changa

Under cross-examination Kembo wanted the court to believe that he did not know why he was paying a deposit fine. He was clearly being untruthful. He knew very well why he was doing so. He pretended to be semi-literate and further pretended that he did not quite understand what was meant by the phrase "admission of guilt". He said he took the form to his workmates to find out what it was all about. After consulting his colleagues he nevertheless went ahead and paid the fine. This is incredible. There was no reason why he should have paid the fine if he had told his colleagues the story that he told this court. His colleagues would in fact have advised him against admitting that he was guilty. Kembo was being untruthful when he suggested that he was semi-literate

and did not quite understand what "admission of guilt" meant. He is a technician with the PTC. Under cross-examination it was clear that he understood and spoke good English. That then explained how he was able to refer to manuals during the course of his work.

Not only was Kembo untruthful in the above respects but he was also untruthful about when he went to pay the deposit fine. He wanted the court to believe that he went there the next day. Papers filed of record belie his story and indicate that he went to pay the fine some six days later. Even his own synopsis of evidence reflects that he was called to the police station sometime later and was told to pay a fine of \$200 for driving without due care and attention. It does not say it was the next day. So he had a lot of time to reflect before he went to pay the fine.

Similarly, he was untruthful by suggesting that the point of impact was in the lane for traffic going in the opposite direction. This does not feature in his summary of evidence. Secondly, it was not put to Mrs Changa that the collision took place in the suggested lane. All that his synopsis of evidence says is that the vehicles stopped in the middle of the road. Thus they never went beyond the middle of the road to the lane for traffic going in the opposite direction.

Kembo was an untruthful witness who is not worth to be believed. Like him his evidence is not worth to be believed and must be rejected. I accept the evidence of Mrs Changa which was given in a clear and straightforward manner. I therefore find that Kembo took a chance and tried to overtake when there was insufficient room to do so due to the vehicles in the petrol queue. In the result I have no hesitation in finding that liability rests in the first and second defendants.

To prove that the damages claimed were fair and reasonable the plaintiff called a Mr Alberto Da Silva Moreira of High Tech Panel Beaters. He has 12 years experience. He prepared the quotation that was filed of record and considered it to be fair and reasonable at that particular time. His company is one of the top panel beaters in the country.

The defendants took issue with the fact that plaintiff did not produce three quotations but Mrs Changa told the court that the other two quotations were similar. I accept her evidence. I therefore find that the evidence led in Court clearly establishes that the damages claimed were fair and reasonable.

Plaintiff claimed interest at the prescribed rate to run from date of the collision to the date of final payment. I do not accede to that and would grant interest to run from the date of service of summons on the defendants. That, in my view, would be a reasonable date from which interest should run.

In the light of the foregoing I would issue the following order -

IT IS ORDERED that defendants pay:-

1. to the plaintiff's, jointly and severally one paying the other to be absolved the sum of \$204 384,59; being the damages suffered by the plaintiff as a result of the damage done to its Peugeot 306 sedan in a collision with the second defendant's Mazda T 35;
2. interest at the prescribed rate from 7 March 2002 to the date of final payment; and
3. costs of suit.

Atherstone & Cook, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners