ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED v REDLINES HAULAGE LIMITED (1990 - 1992) Z.R. 170 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND LAWRENCE, JJ.S.
2ND JUNE, 1992 AND 16TH JULY, 1992
(S.C.Z .JUDGMENT NO. 10 OF 1992)

Flynote

Tort - Negligence - Defences of 'act of God' inevitable accident, latent defect, *res ipsa loquitur* - meaning of.
Evidence - Burden of proof - Defences of 'act of God,' inevitable accident, latent defect, *res ipsa loquitur* - Effect on burden.
Civil procedure - Pleadings - Defective pleadings - Failure to object to evidence of unpleaded issues - Effect of.

Headnote

A water tank belonging to the appellants became detached while proceeding along the Great East Road. In order to avoid the tank and because of traffic in the outer lane the respondent's driver swerved his truck and trailer to the right and collided with an oncoming bus. The trial Court found as a fact that the appellants had been negligent and were responsible for the collision and damages were awarded against them. On appeal, the appellants raised several defences which boiled down to a claim that the accident occurred in circumstances beyond their control.

Held:

(i) The facts of the case do not disclose nor were within the means of the defence of act of God, inevitable accident, latent defect and res ipsa loquitur.
(ii) Once the defences of act of God, inevitable accident, latent defect and *res ipsa*

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loquitur were raised, then the burden shifted to the appellants to produce proof thereof.
(ii) Failure to object to the admission of evidence of issues which were not pleaded may lead to consideration of such evidence.

Cases referred to:

(1) Kenmuir v Hatting (1974) Z.R. 162.
(2) Deutsch, Darling and Banda v Zambia Engineering and Construction Co. Ltd. (1969) Z.R. 161.
(3) Richie v Western Scottish Motor Traction Co Ltd (1935) S.L.T. 13.
(4) Henderson v Jenkins [1969] 1 All E.R. 401; reserved [1969] 3 All E.R. 756.
(5) Jere v Shamayuwa and Another (1978) Z.R. 204.

For the appellant: G.M. Zulu, ZESCO Legal Counsel.
For the respondent: L. Nyembele, Ellis and Co.

Judgment

LAWRENCE, J.S.: delivered the judgment of the Court.

This is an appeal against the decision of a High Court judge allowing the Redlines Haulage Ltd. claim for damages arising out of a motor vehicle accident. For convenience in this judgment we shall refer to the Zambia Electricity Supply Corporation Limited as the defendants and Redlines Haulage Limited as the plaintiffs which they were in the Court below.

The facts of the case were relatively simple. On 4th March, 1984 at about 18:30 hours the plaintiff's driver (PW1) was driving a truck and trailer, laden with maize, along the Great East Road from Chipata to Lusaka. As he approached the University of Zambia Great East Road Campus (UNZA) he was travelling along the inner lane of the road and immediately to his left was another truck going in the same direction. As it was dusk the lights of his truck were on but dimmed. Other vehicles also travelling from the opposite direction had their dim lights on. On approaching the UNZA junction he began to descent when he was suddenly confronted by a water tank on an unlit trailer moving towards him in the middle of the lane in which he was travelling. He attempted to brake but because of the load the truck could not stop within a short distance and, fearing a collision with the truck on his left and in order to avoid this sudden obstruction, he swerved to his right where he collided with an oncoming bus which had been travelling only on parking lights.

The evidence from the defendant's driver (DW1) was that he had been travelling along this same road going in the opposite direction when some distance past the UNZA junction another motorist indicated to him that the water tank had become detached from his truck. He looked back and saw the tank which was on a trailer with two wheels moving along behind him. He stopped and parked his truck about 150 m away near the Munali service station junction. When he looked back again he saw that there had been a collision between a truck and a bus. He said, under cross-examination, that he did not know what caused the collision between the two vehicles as he was concentrating on parking his truck.

On the evidence before him the judge found that the accident was caused by the presence of the water tank and its trailer on the road and further found that PW1 was in no way negligent when he swerved to his right to avoid the sudden obstruction in front of him.

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Mr *Zulu*, for the defendants, put forward length written arguments and also made verbal submissions. The gist of the first ground put forward was that the accident occurred not because of the presence of the tank on the road, but because PW1 was negligent in failing to stop or attempting to swerve to his left instead of swerving to the right as he did, when PW 1 must have known that there were oncoming vehicles. In support of this argument Mr *Zulu* referred to the evidence of DW1 who said that the plaintiff's driver had been driving very fast at the time of the collision. This evidence was, however, rightly not accepted by the trial Court for the very cogent reason that DW1, on his own admission, was concentrating on parking his vehicle after another motorist indicated to him that his water tank had detached from his truck. In these circumstances the trial Court was at liberty on a balance of probabilities to reject that evidence and to prefer the evidence of PW1.

Secondly, learned counsel for the defendants attacked the learned trial judge's findings on this issue of credibility on the basis that PW's evidence was contradictory and his evidence that the water tank was mobile at the time he saw it should not

have been accepted. This argument clearly cannot be sustained in view of PW's evidence that when he looked back he saw the water tank 'moving on its own'. In any event learned counsel did concede that the presence of the water tank caused the collision between the truck and the bus when PW1 swerved to his right to avoid the water tank which obstructed his path. The learned trial judge found that PW1 was not negligent in his driving as he swerved to avoid the tank and accepted that the reason PW1 swerved to his right was because of the presence of another truck to his immediate left. These were findings of fact with which this Court cannot interfere unless it is otherwise clearly shown that the trial judge had fallen into error - (See *Kenmuir v Hatting* [1]. We cannot find that this was the case here. This ground of appeal must, therefore, fail.

The third ground of appeal advanced by Mr *Zulu* was that the presence of the tank on the road was an 'act of God', and not due to the negligence of the defendant who had taken all precautions to secure the tank. We find this argument somewhat difficult to follow in the circumstances of this case. Jowitt's *Dictionary of English Law* 2nd ed. vol .1 defines 'act of God' as

> ''An event which happens independently of human action, such as death from natural causes, storm, earthquake etc. which no human foresight or skill could reasonably be expected to anticipate.''

This means an act of God is a catastrophe which could not be avoided by any precaution whatsoever and must be distinguished from the defence of 'inevitable accident' which is defined in Osborne's Concise Law Dictionary 7th ed as:

> ''An accident the consequences of which were not intended and could not have been foreseen by the exercise of reasonable care and skill.''

In the former defence the human element of reasonable care and skill is not contemplated whereas in the latter the defence can only succeed if it is shown that reasonable care and skill had been exercised to avoid the

accident. In any event a reliance on any of these defences places the burden of proof on the defendant and not on the plaintiff. They apply for instance when the plaintiff has shown that the mere fact that the accident occurred makes it more probable that the defendant was negligent; that is, when the doctrine of 'res ipsa loquitur' is evoked, a doctrine about which Magnus, J., in *Deutsch, Darling and Banda v Zambia Engineering and Construction Co. Ltd.* [2], a case where the defendant pleaded 'inevitable accident' claiming that a broken bolt on the steering column had caused the accident, said (quoting the authors of Clark and Lindsell on Torts 12th ed.):

> ''Clark and Lindsell say that it is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result.''

The plaintiff need only prove that the accident happened and that it would probably

not have happened if the defendant did not bring the obstruction onto the road. The onus then shifts to the defendant who must then rebut the probability. Magnus, J. went on to say:

> ''If that makes it more probable than not that the accident was caused by the negligence of the defendant the doctrine *res ipsa loquitur* is said to apply and the plaintiff will be entitled to succeed unless the defendant by his evidence rebuts the probability.''

The authors of *Clark and Lindsell* at page 796 also have this to say:

> ''The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows on a balance of probability that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on that evidence.''

In the present case PW1 was suddenly confronted by an unlit and uncontrollable mobile water tank in the middle of the road which caused him to swerve and collide with another vehicle. There was at the time no apparent reason for the water tank to be on road and it follows, as Magnus, J. said in *Deutsch* [2] above:

> ''. . . at that stage it certainly seems to me clear that the plaintiff is entitled to rely on the doctrine of *res ipsa loquitur.*''

The defendant's only explanation was that the tank became detached from the truck. No evidence was called to say why this was so. The *onus* to show that this was 'inevitable accident' remained on the defendants throughout. DW1's simple statement that the 'tank got cut off', no matter whether used in the context of 'breaking off' on becoming uncoupled from the truck, was totally inadequate to shift the burden back to plaintiffs. The Court cannot be expected to speculate as to what caused the break or the uncoupling.

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Mr *Zulu's* emphasis on the word 'got out of' seems to us to be an attempt to say that a latent defect in the chain or mechanism connecting the tank to the truck caused the chain or mechanism to break. Even if latent defect was the intended defence the *onus* was still on the defendant to show this by expert or other evidence. In *Richie v Western Scottish Motor Traction Co. Ltd.* [3] a case also referred to in *Deutsch, Darling and Banda* [2], Mackay had this to say:

> ''If latent defect is the nature of the defence, then it is inherent in the word ''latent'' that the defender prove by this evidence that the defect . . . was truly 'latent' - that is, not discoverable by reasonable care.''

To put it in the words of Sachs, J. in *Henderson v Jenkins* [4] (a case also referred to in Deutsch by Magnus, J.):

> ''This is one of those relatively rare cases where the incidence of burden of proof is of importance not only at the opening of the trial but also at the end of the day. For the ultimate decision falls to be made in the light of many facts, knowledge of which is solely vested in the defendant . . .''

In the event we find that on the issue of liability the defendant's appeal cannot succeed.

On the question of the plaintiff to plead negligence we agree with learned counsel for the defence that it is important for litigants to follow the rules of pleadings and in certain cases failure to do so may prove fatal to one's case. Mr *Nyembele* for the plaintiffs concedes this but argued that when evidence on negligence was being led by the plaintiff at first instance the defendants should have objected and that once the evidence was let in the judge was not precluded from considering that evidence. To support this argument Mr *Nyembele* referred us to the case of *Jere v Shamayuwa and Another* [5] where this Court held:

> ''Where a defence not pleaded is let in by evidence and not objected to by the other side, the Court is not precluded from considering it.''

We are in agreement with Mr *Nyembele*, for even in the face of these defective pleadings the issues here were never in doubt. However, this does not mean that we condone in any way shoddy and incomplete pleadings. For the above reasons this ground of appeal must also fail.

Lastly, Mr *Zulu* argued that the learned trial judge erred in law and fact in awarding damages of K360 000 for loss of business when this was not specifically pleaded and no details of the loss were given to enable the trial Court to consider what loss if any was suffered by the plaintiff. This argument is not altogether accurate. At paras. 7 and 8 of the statement of claim the plaintiff pleaded as follows:

''7. The plaintiff now claims the sum of K95 000 being the full value of the truck No. AAC 6231, K3 000 being the cost of damage caused to the plaintiff's trailer No. AAB 3547T, K1 500 being costs of damage to the diesel, K600 being cost of damage to the tarpaulin and rope, K1 011 being towing charges and K300 being the cost of removing cargo to another vehicle. The total cost being K101 411,00.

8. The plaintiff further claims for loss of business from the time of accident to date of settlement . . .''

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The plaintiffs called a Mr Agit Jashbai Patel (PW2) the managing director who, apart from giving evidence as to the damage, said:

> ''I also claim for loss of business up to the time we replaced the truck, per month we were grossing about K10 000 per month.''

This evidence was in no way challenged by the defence. The only inference that could reasonably be drawn from the defence's failure to do so was that the defence accepted the plaintiffs' estimate of the loss and in the circumstances this Court is reluctant to interfere. The result is that the appeal is dismissed with costs to the plaintiffs.

Appeal dismissed.