



**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO.: 19439/05

In the matter between:

ZEDA FINANCING (PTY)

LTD t/a AVIS RENT A CAR

PLAINTIFF

And

NDWAMATO PHINIAS LAVHENGWA

DEFENDANT

JUDGMENT

MOLOPA J

The Plaintiff instituted an action for R153 443.00 against the Defendant as damages for the damage caused to its motor vehicle when a collision occurred on 09 November 2003, at or near the Resevior Road, Boksburg, between the motor vehicle with registration letters and number [.....] ("Plaintiffs motor vehicle") and a motor vehicle with registration letters and number [.....] which latter vehicle was there and then driven by one Ndwamato Phinias Lavhengwa ("the Defendant").

The Plaintiff avers in its Particulars of claim that the collision was caused by the sole negligence of the Defendant, who was negligent in one or more or all of the respects set out in paragraph 5 of the Particulars of claim. The Plaintiff seeks full liability from the Defendant.

The Defendant brought a counterclaim for R12 095.00 as damages for the damage to his motor vehicle, alleging that the collision was due to the sole negligence of the

driver of the Plaintiffs vehicle, who was negligent in one or more or all of the respects set out in paragraph 6 of the Defendant's counterclaim.

It is common cause that a collision occurred on 09 November 2003 at Reservoir Road, Boksburg, between the Plaintiffs vehicle and the Defendant's motor vehicle.

The issue for determination in this matter is whether the Defendant is 100% liable for the damages of the Plaintiff, and whether the Plaintiff is also liable for the Defendant's damages.

At the commencement of the trial the court was informed that since there are certain admissions made by both parties, which are dealt with infra, no viva voce evidence was going to be led by either part)', that the parties would merely argue their respective cases.

From the facts put before court it appears that at the time of the collision the Plaintiffs vehicle was, apparently being driven by a person who allegedly had rented the vehicle from the Plaintiff. The name of the person in question, (driver of the Plaintiffs vehicle at the time of the collision) is not mentioned anywhere in the papers, nor disclosed in anyway. I will refer to him or her hereinafter as ("The Plaintiffs driver"), [There are no particulars whatsoever of this driver in the papers before court].

The Plaintiffs driver had allegedly rented the Plaintiffs vehicle from AVIS/Plaintiff. It is a known fact that AVIS/Plaintiff is in the business of, amongst others, renting out motor vehicles to the public. The terms of the rental between the Plaintiff and its driver were never disclosed to the court, or whether he/she had taken out insurance or not in renting the motor vehicle in question. It is also a known fact that usually when people rent out motor vehicles from entities like the Plaintiff they are given options, (if not compulsory), to pay extra money stipulated in the standard rental agreements of such entities, in lieu of insurance for the period a "client" like the Plaintiffs driver is in possession of a rented vehicle. Counsel for the Plaintiff indicated that he was not sure and/or was not aware of whether Plaintiffs driver had taken out the insurance option or not, nor whether the insurance had paid out or not. It is, however, in my view, expected and/or accepted that an entity like the Plaintiff has insured the fleet of its motor vehicles, which are obviously exposed to risk at all times.

When the matter came before court for trial, the court was referred to a list of admissions by the Plaintiff and the Defendant, dated 20th August 2007, the terms of which are as follows:

“For the purpose of disposing of the above matter and on the pleadings as they currently stand, the parties make the following admissions:

- 1) Quantum of damages and locus standi of the parties (including the citation and the right to sue) is admitted reciprocally.
- 2) The quantum of damages is admitted as pleaded by the parties in the Particulars of Claim and Counterclaim;
- 3) The Plaintiff concedes that the driver of its motor vehicle was 90% to blame for the causation of the accident as pleaded;
- 4) The Defendant concedes that the driver of its motor vehicle was 10% to blame for causation of the accident as pleaded;
- 5) The Defendant abandons and does not persist with the allegation as set out in par 4.1 of its plea read together with paragraph 5 of its Particulars of Claim in relation to vicarious liability.

Counsel for the Plaintiff submitted that since the Defendant had admitted that he was 10% to blame for the accident in question, the Plaintiff did not intend to lead any viva voce evidence, but that Plaintiff would seek 100% damages from the Defendant on the basis that once Plaintiff has proved at least 1% negligence against the Defendant, as in the dependants' claims (where dependants only need to prove 1% negligence against the driver of the other vehicle involved in a collision with the parent/spouse of such dependants), it (Plaintiff) would thus be entitled to 100% damages from the Defendant..

Counsel for the Plaintiff further confirmed that the Plaintiff admits that Plaintiffs driver was 90% negligent to blame towards the collision, and submitted that since it was easy to recover from the Defendant.

Plaintiff decided to pursue its claim against the Defendant and not against the Plaintiffs driver. He did not disclose what would have made it difficult for the Plaintiff to have claimed damages against its driver (especially if he is allegedly not employed by the Plaintiff self) as opposed to the Defendant.

As already stated above, at a pre trial conference held on 20 August 2007 between the parties, certain admissions were recorded, inter alia:

- That the Plaintiff concedes that the driver of its motor vehicle was 90% to blame for the causation of the accident in question; and

- That the Defendant concedes that the driver of its motor vehicle was 10% to blame for the causation of the accident.

That being the case, it is highly questionable why the Plaintiff chose not to pursue the most blameworthy person, i.e. its driver, whose name, as already stated above, is not even disclosed before this court.

The basis upon which the Plaintiff seeks to claim 100% from a person (Defendant) who is only 10% to blame for the collision, leaving a person they have a contractual relationship with, albeit a car lease agreement, under circumstances that, it is expected that there could have been some sort of insurance arrangement between the Plaintiff and its driver smacks of abuse in my view.

The interests of justice dictates that where the Plaintiff self concedes that the Defendant is only 10% negligent in relation to the collision that caused the damage to its car, and that the driver who had allegedly rented the car in question from the Plaintiff was 90% negligent, and out of choice, the Plaintiff decides to pursue the Defendant who is only 10% to blame for the collision, for 100% of the damages whereas elected not to pursue the driver of Plaintiffs vehicle, who is 90% to blame for the collision, who, one assumes, had some contractual relationship with the Plaintiff in terms of which the Plaintiff rented out the motor vehicle in question to the driver aforesaid under certain conditions, the Defendant should be liable for 10% only of the Plaintiffs damages.

The Plaintiff chose not to disclose the terms of the rental agreement between itself and its driver, which in my view is material in the circumstances herein, nor what the liability of the driver aforesaid would be in cases like this, where the driver in question was to blame an/or largely to blame for a collision as in this case. As already mentioned above, it was submitted on behalf of the Plaintiff that since it was easy for the Plaintiff to recover 100% of its damages from the Defendant, even when it is clear and conceded by the Plaintiff that the Defendant was only 10% to blame/negligent for the collision, the Plaintiff chose to sue the Defendant as opposed to its driver.

In my view this is an abuse of the process of the law and it goes against all principles of justice, i.e. to sue a party who is much less to blame for damages simply because it is easy to recover full damages from such party. This in my view is unacceptable and does not accord with the principles and interests of justice and cannot be said to be fair and equitable.

In the result I find that the Defendant is only liable to pay 10% of the damages to the Plaintiffs vehicle. The Plaintiff cannot succeed in its claim as set out in its Particulars of Claim. The parties having agreed that damages to the Plaintiffs motor vehicle amount to R153 443.70 the Defendant is in the least only liable for 10% of the said amount, which is R15 344.37.

In so far as the Counterclaim by the Defendant against the Plaintiff is concerned, clearly the Defendant initially premised this claim on the basis that the driver of the Plaintiffs vehicle was employed by the Plaintiff and thus that the Plaintiff was vicariously liable for damages to his vehicle on this basis. From the list of admissions already set out above, the Defendant has abandoned the allegations set out in his pleadings relating to vicarious liability against the Plaintiff, since it has been accepted and conceded by the Defendant after being informed by the Plaintiff that the driver of the Plaintiffs vehicle was not employed by the Plaintiff but had merely rented out the vehicle in question from the Plaintiff.

It was submitted by counsel on behalf of the Defendant that since the Plaintiff had authorised its driver to drive its (Plaintiffs) motor vehicle, and since such driver was contributory negligent, then it followed that the Plaintiff was liable for 90% of the Defendant's claim. The Defendant clearly seeks to hold the Plaintiff "vicariously" liable in disguise.

In my view where the Defendant has accepted that the plaintiff's driver was not in the employ of the Plaintiff when he got involved in a collision with the Defendant, the basis upon which the Defendant's counterclaim was based, clearly the Defendant cannot claim damages from the Plaintiff in this regard. On the facts the counterclaim can thus not hold against the Plaintiff.

On all the facts before this court the Plaintiff cannot succeed in its claim as set out in the papers, neither can the Defendant succeed in its counterclaim.

In the result I make an order in the following terms:

1. The Defendant is to pay R15 344.37, being 10% of the damages to the Plaintiff.
2. The Defendant's Counterclaim is dismissed.
3. Each party is to pay its own costs.

Molopa J

JUDGE OF THE HIGH COURT