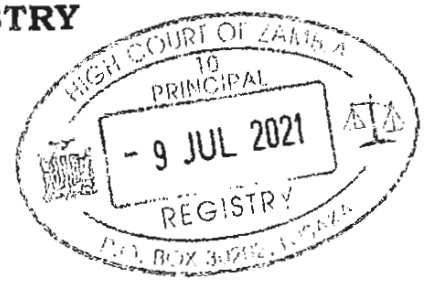
IN THE HIGH COURT FOR ZAMBIA **2017/HP/0834**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA



(Civil Jurisdiction)

BETWEEN:

MULUTI CHIKUBA **PLAINTIFF**

AND

MATHEWS McNAB **DEFENDANT**

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN OPEN COURT, ON 9TH JULY, 2021.

For the Plaintiff: *Mr. C. Nkhata – Messrs. Paul Norah Advocates.*

For the Defendant: *No Appearance.*

JUDGMENT

CASES REFERRED TO

1. *Masauso Zulu vs Avondale Housing Project Limited, (1982) Z.R. 172;*
2. *Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138; and*
3. *Philip Mhango vs Dorothy Ngulube and others (1983) Z.R. 61.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia; and*

2. *Phipson on Evidence, 17th Edition, (Thomson Reuters Legal Limited, 2010).*

1 INTRODUCTION

1.1 The delay in delivering this Judgment is regretted and is due to the fact that the Court was indisposed during the early part of this year.

1.2 This Judgment is in respect of a claim by the Plaintiff arising out of a car accident between the Plaintiff and Defendant, in which the Defendant undertook to repair the Plaintiff's motor vehicle, but allegedly failed to honour his undertaking.

1.3 Accordingly, the Plaintiff launched this suit by way of Writ of Summons, accompanied by Statement of Claim on 23rd May, 2017, against the Defendant, claiming the following reliefs: -

i) Immediate payment of the sum of ZMW 19, 200.00 being the total amount spent on repairing the Plaintiff's vehicle;

ii) Damages for the hire of motor vehicle at ZMW 1,000.00 per day for 26 days;

iii) Interest on the amount owed;

iv) Costs of an incidental to these proceedings;

v) Any other relief that the Court may deem fit.

2 PLEADINGS

2.1 By the Plaintiff's Statement of Claim, the Plaintiff averred *inter alia* that on 10th March, 2016, the Defendant while driving his Toyota Hilux registration number AJD 9857 hit into the Plaintiff's motor vehicle, namely a Toyota Avensis, registration number AJD 5807. Following the said incident, the Defendant did not deny liability and undertook to repair the damage that he had caused to the Plaintiff's motor vehicle. The Defendant requested to have the Plaintiff's vehicle released to him, in order to have it fixed and further assured the Plaintiff that the vehicle would be fixed to his expectations.

2.2 The Defendant returned the vehicle a week later and assured the Plaintiff that the work done to the vehicle was temporal and that he had ordered a new car door from the United Kingdom. Later, the Plaintiff made a follow up with the Defendant regarding the purchase of the car door and informed the Defendant that there was a garage in Lusaka that would fix the Plaintiff's car as opposed to purchasing a door from the United Kingdom. Despite the Plaintiff informing the Defendant of this fact and obtaining a quotation from the said garage, the Defendant neglected to release money to pay for the said works and insisted that he would work on the vehicle but the damage was only made worse.

2.3 Accordingly, the Plaintiff proceeded to fix the said vehicle using his own funds at a total cost of K19,200.00

and requested for a refund from the Defendant which he refused and/or neglected to reimburse the Plaintiff.

2.4 By the Defendant's Defence filed on 20th February, 2018, the Defendant averred *inter alia* that in trying to avoid hitting the Plaintiff's vehicle, the vehicle that he was driving slid and scratched the passenger door on the right rear end of the Plaintiff's vehicle. It was stated that the vehicle that the Defendant was driving belonged to Target Security Solutions; was insured; and road worthy, in all respects. The Defendant further stated that at the incident he offered to repair the Plaintiff's vehicle through his insurance and informed the Plaintiff that for that to take place, the Defendant needed to report the case to the Police in order to obtain a Police Report. The Plaintiff who informed the Defendant that his car was not insured, had no fitness and no road tax, pleaded that the Defendant carries on the repairs without involving the police or the insurance company.

2.5 The Defendant took the Plaintiff's vehicle to the company garage and hired some panel beaters to work on the Plaintiff's vehicle. Further, the Defendant installed a new fuel pump on the vehicle and took it for wheel balancing and alignment. The Defendant spent a total of K1,000.00 on fixing the Plaintiff's vehicle. When this was done, the Defendant in the company of the panel beaters took the Plaintiff's vehicle to the Central Police Station in Livingstone where the Plaintiff who was

the Deputy Chief Investigating Officer, inspected the vehicle, expressed satisfaction with the panel beating and painting done on his vehicle. Thereafter, the Plaintiff received the vehicle from the Defendant.

2.6 A few days later, the Plaintiff sent come police officers to the Defendant's work place and demanded K5,000.00, which the Defendant did not owe the Plaintiff. The Defendant further asserted that if the Plaintiff fixed the vehicle at the cost of K19,200.00, the repairs done could not have been with respect to the scratch that the Defendant had earlier alluded to and fixed to the Plaintiff's satisfaction. The Defendant denied liability in causing damage to the Plaintiff's vehicle and avers that it was the muddy and slippery ground that caused the Defendant's vehicle to slide and scratch the Plaintiff's vehicle.

2.7 The Defendant averred that it was out of his generosity and respect for the Plaintiff that he offered to repair the scratch, bought the fuel pump, paid for the wheel balancing and alignment to the Plaintiff's vehicle. It was the Defendant's further assertion that if the Plaintiff's vehicle was licensed and all was okay, the insurers of the company whose motor vehicle he was driving would have repaired the vehicle.

3 EVIDENCE AT TRIAL

3.1 When the matter came up for trial on 28th October, 2020, the Plaintiff, Muluti Chikuba was PW1 and he

testified that when he was in Livingstone, whilst driving his motor vehicle, Toyota Avensis registration No. AJD 5807, it got stuck in some mud. Whilst PW1 was waiting for help, the Defendant who was driving a Toyota Hilux skidded towards PW1's vehicle and stopped. The Defendant reversed and made a second attempt to by-pass PW1's vehicle to which PW1 warned the Defendant that if he continued to do so, he would hit PW1's car. The Defendant made three attempts to by-pass PW1's vehicle and on the 4th attempt he rammed into PW1's car thereby damaging the right rear door. PW1 referred to page 5 and page 6 of the Plaintiff's Bundle of Documents which consists of pictures of the damaged car door, in support of his assertions.

3.2 It was PW1's further testimony that after the Defendant rammed into his car, he apologised, took responsibility for accident and said he would repair the damage to the car. The Defendant towed PW1's motor-vehicle and took it to his garage. After a week PW1 checked on his motor vehicle and the Defendant told him that he was not able to find another door to replace the damaged one. He further told PW1 that he intended to procure one from the United Kingdom where the motor vehicle was purchased from. Furthermore, the Defendant informed PW1 that he could make tentative repairs to enable PW1 use the vehicle whilst the Defendant made arrangements to procure the door from the United Kingdom. The Defendant carried out the works on

PW1's motor vehicle and it was later brought to PW1. When PW1 inspected the works that were done to his car door, he discovered that the works which were done were substandard. At this point the Defendant confirmed that he would bring the car door after procuring it from the United Kingdom and PW1 received the vehicle from the Defendant.

3.3 After some months had elapsed, PW1 went to meet the Defendant to find out how far he had gone with the purchase of the car door. Further, PW1 told the Defendant that he could take the vehicle to a better garage which was able to do a good job at a price cheaper than the cost of purchasing a new door. When the quotation prepared by the said garage for the works to be done on the vehicle door was given to the Defendant, he refused to pay and since then there has been no cooperation from the Defendant.

3.4 PW1 testified that he proceeded to pay for the repairs himself and referred the Court to page 1 of the Plaintiff's Bundle of Documents which contained an invoice issued for the sum of K19,200.00 that was given to the Defendant following the repairs to the vehicle. PW1 testified that after the repairs were done to his car, he went back to the Defendant to seek a refund, but the Defendant did not cooperate.

3.5 Upon completion of the examination in chief, Counsel for the Defendant sought an adjournment on the basis

that he had not obtained instructions from the Defendant on whether or not to defend this matter as efforts to get in touch with him for over eight (8) months had proved futile. However, as the notice of hearing was issued on 30th March, 2020, giving the parties ample time of seven (7) months to prepare for the trial, I found that the reasons advanced by Counsel for the Defendant were not compelling enough to warrant an adjournment. Accordingly, I ordered the trial to proceed. The Defendant's Counsel then sought an application to withdraw from representing the Defendant and there being no objection from the Plaintiff, I granted it.

3.6 Therefore, PW1 was not cross-examined due to the none appearance of the Defendant and the subsequent withdrawal of the Defendant's Advocates from representing the Defendant. This marked the close of the Plaintiff's case. None of the parties filed submissions despite being given ample opportunity to do so.

4 DECISION OF THE COURT

4.1 I have considered the pleadings and evidence adduced before this Court. The Plaintiff claims, *inter alia*, for the immediate payment of the sum of ZMW19,200.00, being the total amount spent on repairing his vehicle; damages for the hire of motor vehicle at ZMW1,000.00 per day for 26 days; and interest on the amount owed.

Having analysed the Plaintiff's claims, I find that the points for determination in this case are as follows: -

1. Whether the Plaintiff has proved on a balance of probability that the Defendant owes him the sum of K19, 200.00 being the total amount spent by the Plaintiff in repairing his vehicle; and

2. Whether the Plaintiff has proved on a balance of probability that the Defendant owes him the cost of hiring a motor vehicle at a rate of K1,000.00 per day for 26 days.

4.2 I shall begin by addressing the first point outlined above. I warn myself from the onset that the burden of proof in a civil matter rests upon the Plaintiff to prove his claims on a preponderance of probability. The learned authors of ***Phipson on Evidence***[2] state the following regarding the burden of proof in civil cases: -

> ***"so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantively asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons."***

4.3 According to the Plaintiff's testimony at trial, the Defendant who was driving a Toyota Hilux Surf Registration number AJD 9857 in an attempt to by-pass

the Plaintiff's vehicle that was stuck in some mud, rammed into the right rear door of the Plaintiff's vehicle. The Defendant accepted responsibility for the damage caused to the Plaintiff's vehicle and assured him that he would fix it. It was the Plaintiff's further testimony that the Defendant made tentative repairs to the vehicle to enable the Plaintiff to use it during the period that the Defendant was making arrangements to procure a door from the United Kingdom. When the vehicle was returned to the Plaintiff, he found that the works done where substandard. When the Plaintiff informed the Defendant of this, he received further assurance from him that a car door would be procured from the United Kingdom to replace the damaged one.

4.4 It was the Plaintiff's further testimony that when months elapsed and the car door was not delivered by the Defendant, the Plaintiff offered the Defendant an alternative option of taking his vehicle to a better garage which was able to do a good job at a cheaper price, but the Defendant did not cooperate. The Plaintiff proceeded to personally pay for the repairs to be done to his car at the cost of K19,200. 00 and requested a refund from the Defendant who has not cooperated or delivered the car door to date.

4.5 As earlier stated, the burden of proving allegations raised lies with the Plaintiff. This position is fortified by

the case of ***Masauso Zulu v Avondale Housing Project Limited***[1] where the Supreme Court held as follows: -

> ***"...where a plaintiff makes any allegation, it is generally for him to prove the allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."***

4.6 Additionally, in the case of ***Mazoka and Others v Mwanawasa and Others***[2], the Supreme Court held as follows: -

> ***"As regards burden of proof the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."***

4.7 On the strength of the foregoing authorities and my analysis of the evidence adduced by the Plaintiff, I find that the Plaintiff has proved on a balance of probability that the Defendant accepted responsibility for the accident and the damage that was caused to the right rear door of his motor vehicle. The basis of my finding is the fact that the Defendant took the Plaintiff's motor vehicle to a garage where it was worked on, which is confirmed in paragraph 7 of the Defendant's Defence. This position is further supported by page 2 of the Defendant's Bundle of Documents wherein the Defendant exhibited a copy of the receipt of payment for panel beating and spray painting of the Plaintiff's car door at a cost of K500.00. This is an indication that the car door required beating into shape and painting

following the accident. It is also sufficient evidence that the Defendant accepted responsibility for the damage he caused to the car and subsequently entered an agreement with the Plaintiff that he would repair the said damage.

4.8 The Plaintiff contends that the repairs done by the Defendant to his vehicle were substandard and that the Defendant assured him that the works were temporal as he would procure a door from the United Kingdom to replace the damaged door. In my view, the Plaintiff at trial did not lead sufficient evidence to prove on a balance of probability that the repairs conducted by the Defendant following the accident were substandard and that the Plaintiff assured him that he would replace the car door.

4.9 On my visual inspection of the images of the car door produced at pages 5 and 6 of the Plaintiff's Bundle of Documents, I find that the images do not depict a car door that had been rammed into by another vehicle as alleged by the Plaintiff, nor do they indicate substandard repairs that were made to the car door by the Defendant. Therefore, the said images in my view, do not assist this Court in determining the extent of the damage to the Plaintiff's car door or the standard of the repairs made by the Defendant to the Plaintiff's car door. The Plaintiff ought to have led further evidence, such as a mechanics report or the testimony of an expert to

demonstrate that the Defendant's repairs to the vehicle door were substandard and that the said door required replacement.

4.10 This brings me to the consideration of whether the Plaintiff has proved on a balance of probability that the Defendant owes him the sum of K19,200.00 that he spent on repairing his motor vehicle. In the case of ***Philip Mhango v Dorothy Ngulube***[3], the Supreme Court held as follows: -

> ***"It is, of course, for any party claiming special loss to prove that loss, to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule any shortcomings in the proof of a special loss should react against the claimant."***

4.11 Based on the foregoing authority, it is clear that for the Plaintiff to succeed in his claim for K19,200.00 from the Defendant, he must adduce evidence that will make it possible for this Court to determine the value of the loss with a fair amount of certainty.

4.12 At trial, the Plaintiff alleged that when the Defendant failed to deliver the car door from the United Kingdom as agreed and refused to pay for further repairs to the car door to be done at another garage, the Plaintiff proceeded to pay the sum of K19,200.00 to the said garage for repairs to be done to his car. The Plaintiff further alleged that the said sum was the total cost of

replacing the damaged car door, the front left fender, the right fender, paint, material and labour charges. A copy of the invoice for the payment of the aforesaid sum of K19,200.00, dated 10th November, 2016, was produced at page 1 of the Plaintiff's Bundle of Documents.

4.13 On my analysis of the evidence before me, I find that the fact that the Plaintiff replaced the car door following the Defendant's repairs, does not prove that the initial repairs done to the door of Plaintiff's vehicle by the Defendant were substandard, especially considering that the said invoice was issued approximately eight months from the date that the Defendant paid for the repairs to the Plaintiff's car door. As stated above, the Plaintiff ought to have led expert evidence to demonstrate to this Court that the Defendant's repairs to the Plaintiff's car door were substandard and that the car door still required to be replaced following the Defendant's initial repairs.

4.14 The foregoing finding is further supported by the fact that the said invoice indicates that the Plaintiff replaced the front right and the front left fenders of his vehicle, which facts at trial the Plaintiff did not make mention of or lead evidence that would demonstrate that the Defendant was responsible for the damage to the said fenders. This raises the question as to whether the Plaintiff's vehicle may have been involved in another

accident following the Defendant's repairs to the car door.

4.15 The Plaintiff's claim for the refund of the amount spent on replacing of the fenders was only alluded to in the Plaintiff's letter of demand to the Defendant dated 14th November, 2016 and produced at page 3 of the Plaintiff's Bundle of Documents which, as already stated above, the Plaintiff did not make mention of at trial. In the said letter, the Plaintiff alleges that he returned his vehicle to the Defendant for a return job but instead the Defendant caused more damage by deforming both the right and left front fenders of the Plaintiff's vehicle. In my view, the foregoing statement in the Plaintiff's demand letter does not prove on a balance of probability that the Defendant caused the damage to the front left and front right fenders of the Plaintiff's vehicle. The Plaintiff ought to have addressed the claim for the refund of the fenders at trial and should have led evidence to demonstrate that the Defendant was responsible for the damage to the fenders of his vehicle.

4.16 Accordingly, I find that due to the Plaintiff's inability to lead evidence to show that the Defendant's repairs to the car door were substandard, requiring the replacement of the car door and the lack of sufficient evidence to demonstrate that the Defendant was responsible for the damage to the fenders of the Plaintiff's vehicle, the Plaintiff has failed to prove on a

balance of probability that the Defendant is liable to refund him the sum of K19,200.00 spent on repairing his vehicle.

4.17 I will now turn to consider whether the Plaintiff has proved to the required standard that he is entitled to claim damages for the hiring of motor vehicle at ZMW1,000.00 per day for 26 days. On my analysis of the Plaintiff's evidence, I find that the Plaintiff at trial did not lead any oral or documentary evidence to support this claim. Accordingly, this claim is dismissed.

5 CONCLUSION

5.1 The Plaintiff having failed to prove on a balance of probability that the Defendant's repairs to the Plaintiff's car door where substandard requiring the replacement of the car door and the lack of evidence to demonstrate that the Defendant was responsible for the damage to the fenders of the Plaintiff's vehicle, the Plaintiff's claim for the refund sum of K19, 200.00 is dismissed.

5.2 Further, the Plaintiff's claim for motor vehicle hiring charges that he alleged to have incurred at a rate of K1,000.00 per day for 26 days is also dismissed for failure by the Plaintiff to lead any evidence in support thereof. It follows therefore, that the Plaintiff's claim for interest on the amount owed is also dismissed.

5.3 Given the circumstances of this case I order that each party bears its own costs.

5.4 Leave to Appeal is granted.

Signed, Sealed and Delivered at Lusaka, this 9th day of July, 2021.

P. K. YANGAILO
HIGH COURT JUDGE