

ALPHA JAMES

versus

ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY
(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI- MANONGWA J
HARARE, 20 March & 14 June 2023

Civil Trial

R Zimvumi, for the Plaintiff

C Nhemwa, for the defendant

MUNANGATI MANONGWA J: The plaintiff Alpha James is the guardian and natural father of Israel James a minor child. Acting in that capacity the plaintiff issued summons claiming payment of Two Hundred and Fifty thousand United States Dollars ((US\$250 000) general damages for pain and suffering, physical deformity, shock and trauma due to electrocution by live wires that were negligently left lying on the ground by defendant's workers. It is the plaintiff's claim that the electrocution left his son with serious burns all over his body, leaving permanent deformity on his torso and back resulting in permanent injuries. He further claims fifty thousand United States Dollars (US\$ 50 000) special damages for medical expenses incurred and to be incurred in the future in the treatment and management of his son. The defendant is not denying liability, it is challenging the quantum of damages claimed. In that regard the parties have filled a statement of agreed facts and made submissions for the final determination on damages.

The parties agree on the following summary of the facts:

1. That sometime in November 2010 the plaintiff's 9 year old minor child Israel, suffered electrocution after electric poles fell after a rain storm. The poles were very old. The minor child had removed his shoes to preserve them as he walked from school. He was pulled by

an electric current from the live electricity cables which were laying on the ground and thrown into the air several times until he was rescued.

2. The defendant admitted liability as it failed to foresee and prevent harm to the public through routine maintenance of the electricity transmission infrastructure particularly poles.
3. The negligence of the defendant resulted in harm to the minor child which harm includes the following:
 - i) Serious burns which on the 26th September 2013 were estimated by Dr Shambare to cover approximately 16% of the minor child's total body surface.
 - ii) Pain and suffering, physical deformity, shock and trauma

It is not in dispute that apart from the burns the minor child also suffered a head injury when hit by a piece of a plate which holds cables together when the same exploded during the accident. It is not in dispute that the minor child was hospitalized from 10 November 2010 to 29 December 2010. He had to stay for a further year without going to school. He no longer has 100% use of his hands. From the pictures he has scars from the burns. He also had skin grafting done on his body. The plaintiff has maintained that the child's concentration and general performance at school has been greatly affected. He is now in a remedial special class at school after being downgraded to a lower class. He suffers nasal bleeds whenever the weather changes. He is irritable and quarrels with his classmates and suffers from seizure disorders. He no longer participates in physical activities at school. The plaintiff submitted that the child requires attention by specialist doctors to address his condition so as to get back to his normal self as before the electrocution.

In light of the fact that liability is not denied the court is faced with the task of quantifying damages which is not an easy task. As rightly stated by GUBBAY JA (as he then was in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 at p7 "it must be recognized that translating personal injuries into money is equating the incommensurable, money cannot replace a physical frame that has been permanently injured. The task of assessing damages for personal injury is one of the most perplexing a court has to discharge." This case immensely assists the court assessing damages in so far as it listed the considerations the court has to take into account in engaging in the task of assessing damages. The case identifies among other things certain broad principles that the court should take into account in assessing damages and these include the following:

- i) That general damages are not a penalty but compensation wherein an award is meant to compensate the victim and not punish the wrongdoer.
- ii) That in assessing compensation the aim is to place the injured party as far as possible in the position he/she would have occupied if the wrongful act causing him injury had not been committed.
- iii) As there are no scales by which pain and suffering can be measured the quantum of damages to be awarded can only be arrived at by employing broadest general considerations.
- iv) In exercising its discretion and value judgment the court must heed the effect its decision may have upon the course of awards in the future.
- v) The fall in the value of money is a factor which should be taken into account in terms of the purchasing power, “but not with such an adherence to mathematics as may lead to unreasonable result:” per SCHREINER JA in *Sigounay v Gillbanks* 1960 (2) 552 AT P555H.
- vi) No regard is to be had to the subjective value of the money to the injured person. This is because the award of damages for pain and suffering cannot depend upon or vary according to whether the claimant be a millionaire or a pauper.
- vii) Awards must reflect the state of economic development and current economic condition of the country. *Sadomba v UNITY Insurance Co. Ltd & Anor* 1978 RLR 262G at 270K, *Min of Home Affairs v Allan* 1986 ZLR 263 (S) at 272H
- viii) As political and economic conditions differ due to jurisdictions, reference to awards by English and South African courts may be inappropriate.

The plaintiff applied for damages in the sum of US\$250 000 for pain and suffering, physical deformity, shock and trauma. The plaintiff in his submissions contended that the child suffered shock and excruciating pain at the time of injury and that this was a near death experience. That he still experiences night mares. Equally that he suffered during hospitalization for close to two months. The plaintiff refers to other conditions which have arisen after the electrocution such as nose bleeds and seizures, and the child being temperamental. The plaintiff submitted that the child cannot participate in physical activities. The plaintiff submitted that the child has been downgraded to a lower class and attends a

special remedial class. The plaintiff submitted that the prospects of earning a better future through education was taken away from the child and nothing will come out of his educational endeavors. The plaintiff further submitted that one can earn a living through sports but again this avenue is no longer available to the child as he can no longer participate in physical activities both at home and at school. Reference was made to the fact that he finds clothing irritable on his skin, he is picky on foods and has to use special soaps and lotions which the child's parents cannot afford. The plaintiff maintained that due to the defendant's negligence the plaintiff's child has suffered loss of amenities of life and plaintiff's son who is expected by society to take care of his household should he decide to marry has those hopes dashed due to the effects of the injuries. The plaintiff urged the court to take into account the actual pain, shock, discomfort mental suffering, disfigurement, loss of amenities of life and disability and loss of expectation of life in assessing damages payable to plaintiff. The plaintiff submitted that an amount of US\$250 000 is justified when taking into consideration the listed headings that are all covered under pain and suffering.

The defendant submitted that whilst it acknowledges the injuries suffered by the child in issue and taking into consideration precedence a claim of US\$250 000 is exorbitant and way out of amounts that the courts have been granting even when considering the guiding principles. The defendant submitted that whilst the child's burns cover an estimated 16% of the body surface and the child was in hospital for close to two months and the burns caused deformities the child did not suffer any physical disability. The defendant submitted that the claim by the plaintiff as appears on the face of the summons is for pain and suffering, shock, trauma and physical deformities, thus the plaintiff cannot push for compensation that could have been claimed through other heads such as loss of earning capacity or disturbance to the boy's career. It urged the court not to be misled into considering other issues outside the summons.

Citing the case of *Pride Chinembiri & Ors v ZETDC & Other* HH 55/14 the defendants argued that *Pride Chinembiri* suffered deep electrical burns and had the burnt forearm amputated. Despite the degree of injury being pegged at 60% he was awarded US\$6000 for pain and suffering and us\$8000 for permanent disfigurement and loss of amenities. Reference was also made to the second defendant who had deep electrical burns,

amputation of a forearm with the degree of injury pegged at 90% who was awarded US\$6000 for pain and suffering. The defendant contended that the degree of injuries of plaintiff's son are comparable to those of 5th and 6th defendants in the Chinembiri case were the degree of injuries was pegged at 18% and 14% respectively. The 5th plaintiff got US\$5000 for pain and suffering and US\$2000 for permanent disfigurement. The 6th plaintiff Orchard Kanjando who suffered deep burns on both hands and on lower limbs and thighs was awarded US\$4000 for pain and suffering and US\$2000 for permanent disfigurement. The defendant referred to the case of *Mungate v City of Harare* 2018 (1) ZLR 182 where a 48-year-old man suffered a broken leg after falling into an uncovered catch pit belonging to the City of Harare. After considering the pain he went through the court awarded him US\$2000 for pain and suffering. The defendant submitted that the child *in casu's* injuries mirror that of 6th defendant in the Chinembiri case cited supra hence an award of damages in the region of US\$3000 for pain and suffering would not only be in line with case law but would meet the justice of the case.

The manner by which the child was injured involved the child being tossed into the air about three times and falling on the live cables. He experienced shock and suffered burns which resulted in excruciating pain. The medical report states that the burns were both superficial and deep in certain areas. The child had to undergo skin grafting. Pictures of the child's scarred upper body were presented to court in the bundle of documents. It has not been challenged that his mental capacity has been affected as well as he had to be downgraded to a lower class and he is now in a special class. The child's irritability is documented he can no longer relate to others well. He has been treated for seizures as well as per the medical records at hand. Of note is the case of *Chinembiri & Others v ZETDC & Other* HH 55/14 where MATANDA MOYO J held that:

“...in *The Law of Delict*, PQR Boberg Vol 1 1984 at p516, had this to say about the remedy of pain and suffering:

“compensation may be awarded not only for actual pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and disability and loss of expectation of life for convenience we speak simply of “pain and suffering” but the concept embraces all the non-pecuniary misfortunes – past and future for the injured person. Nor is the list a closed one.”

In essence, loss of amenities of life and disability is covered by the term pain and suffering where evidence point to such loss being experienced and disability having been

suffered. My understanding of the writer is that it is not necessary to specifically plead loss of amenities of life where a physically fit person gets disabled and is no longer able to perform physical or mental tasks synonymous with an average person of their age. This is because the writer states that “the concept embraces all the non-pecuniary misfortunes – past and future for the injured person.” The contention by the defendant that the court should not consider the evidence placed before it such as the disturbance of the child’s career simply because it has not been pleaded under a specific heading cannot be correct. The declaration specifically states that;

- i) The child was out of school for a full year as a result of the injuries
- ii) His general concentration and performance at school has been affected.
- iii) That due to the shock and trauma experienced as a result of the horrific incident the child continues to suffer convulsions in his sleep

The pleaded facts are certainly embraced under non pecuniary misfortunes and it is not disputed that these are effects of the accident for which the defendant is being held responsible. The child is now in a special class. He was downgraded to a lower grade. The doctor’s observation is that the child’s speech is now slurred and he has spells of forgetfulness. Further it is not in contention that the child no longer has 100% use of his arms. There is a report to the effect that he can no longer engage in physical activities like other children. In the absence of any evidence that the child was not fit prior to the accident the court will take it that the child was a normal child who could do all the physical activities that a normal child is able to do. Apart from the scarring of his body he is under some form of both mental and physical disability as depicted from the pleadings and the doctors and teacher’s reports placed before the court.

The child experienced great shock and trauma given the manner he was injured. There is evidence on record that he experiences night mares. The child’s character has changed as he cannot relate well with his peers. Upon an enquiry by a medical doctor as to why he behaves in that manner the child stated that he cannot control himself. He has become temperamental to the extent that the parents had to seek medical assistance as borne by the evidence on record. The parents when giving his history to a medical practitioner stated that

his behavior was good until after his electrocution. He suffers from seizures and records presented from 2014 to 2015 show that the child was being managed for seizure disorders which are said to have started after the accident. The medical records placed before the court show that the child has been receiving medical attention since 2010 for different conditions such as headaches nose bleeding removal of keloids, violent behavior and seizures.

The court finds that whilst the extent of the burns has been estimated to cover 16% of the body this only pertains to the physical injuries. No doubt the child's mental capacity was greatly affected as evidenced by the fact that he had to be placed in a lower grade and is now in a special class. The doctor states that the child suffers from spells of forgetfulness which is confirmed by a report from the school. That definitely affects his mental capacity or his educational career. This is part of the suffering he is experiencing. The seizures and temperamental behavior is certainly problematic hence the plaintiff has been seeking medical attention and it is documented. The inability to freely interact with his peers affects the child's development. The child complains of irritability of clothing on his scars and he has to use special soap and lotion which the parents cannot afford. Certainly the child's quality of life has been and continues to be affected by these medical conditions which arose as a result of the accident caused by the defendant's negligence. That he no longer has 100% usage of his scarred hands has to be taken into account. In essence the court finds that the child not only experienced excruciating pain the shock and trauma he suffered has had profound effect on his life. He not only suffered physical pain but mental pain and suffering as well and great discomfort spending nearly two months in a hospital and continuing to visit the hospital and receiving treatment post the accident. It is not in dispute that he experiences seizures and he has been affected psychologically as borne by the challenges he faces in interacting with other children and his low educational performance.

A claim of USD\$250 000 is not only exorbitant but is way out of the awards granted by the courts. The award of USD\$3000 proposed by the defendant is inappropriate given the extent of the injuries and extent of the pain and physical and mental suffering experienced by the child. The cases that the defendant referred to pertained to claims by adults. The claimant herein is a child who has experienced profound shock and excruciating pain and trauma which has extensively impacted upon his life. His mental capacity, his quality of life in general has

been affected. The effects would be carried into his adulthood. His body is scarred he cannot use his hand effectively he is temperamental, suffers from seizures and nightmares he has experienced pain and will continue to experience suffering whether physical or mental and discomfort. The court notes that the disfigurement is most around the shoulders and will not generally be visible to the extent as to affect the child's looks.

The court will however not stretch its imagination and consider as proposed by the plaintiff, that consideration should be made to the fact that complainant is a male child hence this will affect his ability to look after his family when he ultimately marries. This would amount to speculation which has no place in the legal realm. Further where damages for pain and suffering are concerned future repercussions on the person of the claimant may require to be substantiated by medical reports lest the courts blindly rely on unfounded claims by a litigant seeking to maximize on the culpability of the defendant. Damages are never meant to penalize the negligent party but to achieve justice and place the plaintiff in the position he would have been before the occurrence of the incident meanwhile being fair towards all the parties.

Both counsel referred me to cases decided between 2014 and 2018 being the *Chinembiri & Ors*, (cited supra) *Judith Nyoka v Nyamweda Bus Service & Another* HH148/15 and *Mungate v City of Harare* cited supra. Suffice that despite the fact that the claim is in United States Dollars the court cannot ignore the fact that there has been passage of time since these cases were determined. Certain economic and legal dynamics have been at play pertaining to the usage and value of the united states dollar as rated against the official currency currently dubbed RTGS. The current economic conditions in Zimbabwe where prices pegged in United states dollars are higher compared to yesteryears is one such consideration that the court will take into account in considering the appropriate award. Whilst the courts cannot totally overlook awards granted by other courts in similar or comparable instances each case has to be dealt with on its own merits.

Regard being made to the foregoing and taking into consideration the guiding principles in claims for pain and suffering the court finds that an award of US\$20000 general damages for pain and suffering, shock trauma and disfigurement of the minor child in issue meets the justice of the case.

The plaintiff claimed US\$50 000 as special damages in the form of past, current and future medical expenses. Special damages are compensation for expenses incurred due to an injury arising out of the negligent act of another. In *Mayiswa v Commesial Union Fire and General Insurance Co. Ltd and Another* 1984 (2) ZLR 181, SAMATTA J stated as follows at p191

“It is an elementary proposition of law that a claim for special damages must not only be specially alleged and claimed, but also be strictly proved.”

In essence where the plaintiff claims past and current medical expenses receipts and invoices must be placed before the court to prove such expenditure. Equally for future medical expenses there must be evidence of the amount required or expected to be paid for the continuation of treatment of the plaintiff. The defendant submitted that the plaintiff placed before the court receipts amounting to US\$117.70 only. It submitted that in the absence of documentary evidence the plaintiff must be awarded the amount of US\$117.70 only as special damages.

The plaintiff in his submissions simply submitted as follows in para 14 of plaintiff’s submissions:

‘*In casu* this honourable court is implored upon to take into account the condition of Israel James upon discharge from the hospital; and Doctor Shambare’s response to the question for future medical costs based on requirements for future medical attention. Reference is made to pages 36,37 and 38 of the record. Reference is also made to p42 to 66 of the record. It is therefore submitted that the claim for US\$50000 for special damages to cater for medical expenses incurred and to be incurred is justifiable in the circumstances.’

The court did not find this submission which was the only one made on special damages to be helpful. Dr Shambare’s report has not been useful as his comment on the issue of future medical attention and expenses was simply that the child needed to be re-examined. Such a re-examination seems not to have taken place as there is no other report from him. Of note is the fact that the report by Dr Shambare was done in 2010. It is imperative that legal practitioners guide litigants as regards what documents are required to effectively prosecute a claim. This matter was heard in March 2023 hence a medical report done 10 years ago could not suffice where information required pertained to future medical care and expenses. The idea is for the plaintiff to inform and advise the court in clear and certain terms with the accompaniment of figures the likely expenditure to be incurred by the plaintiff in seeking and accessing continuous medical care. In this case it is clear to court that the child concerned will require to

visit the hospital as records placed before the court show that long after discharge from hospital, the child still required medical attention. Medical cards placed before the court show that in the years 2014 and 2015 he visited the hospital a couple of times for review and treatment for seizures, headache and management of keloids arising from the electrocution accident.

A medical report accompanied by an estimation of future expected costs or expenses would be the best document to give the court foresight *vis* the medical attention the child will require in future and the cost thereof. The importance of this exercise is that the court is closing the matter and in deciding on an award for damages, evidence that forecasts future medical requirements have to be presented now or never as there has to be finality to litigation more particularly where the defendant has accepted liability. The plaintiff will be estopped from coming to court again and say due to oversight I failed to anticipate future expenses. That door will be closed.

A hefty claim of US \$50 000 ought to be accompanied by evidence which justifies that amount. The court has not been furnished with any evidence of a major medical procedure which would require a considerable amount of money. Neither has the court been furnished with evidence that the child will require specialist treatment and the frequency thereof. Without such evidence the court can justifiably assume from the history of the matter that the child will continue receiving treatment for seizures and the special creams which were earlier referred to alleviate the discomfort from the scars. Where it is accepted that the child will continue to experience pain and suffering requiring medical attention the court given the circumstances of the case may use its discretion using a robust approach to grant an award. The defendant appears to have paid the medical expences and the plaintiff only presented proof of payment of US\$177.70. Given the foregoing the court considers it just and proper to award the plaintiff US\$177.70 for past and present medical expences. An award for future medical expences is set at US\$500. The plaintiff has been successful in his claim and there is no reason to depart from the general principle that the successful party is entitled to costs.

In the result it is ordered as follows:

- i) The defendant shall pay the plaintiff US\$20000 general damages payable in Zimbabwean RTGS dollars calculated at the operative interbank rate on the date of payment.
- ii) The defendant to pay the plaintiff US\$177.70 special damages being money expended on treatment of plaintiff's child.
- iii) The plaintiff is awarded US\$500 for future medical expenses payable in Zimbabwean RTGS dollars calculated at the operative interbank rate on the date of payment.
- iv) Interest on the amount to be calculated at the rate of 5% from the date of summons to the date of payment all dates being inclusive.
- v) The defendant to pay the plaintiff's costs.

Ruth Zimvumi legal practice, applicant's legal practitioner
C. Nhemwa & Associates, respondent's legal practitioner