

KENNETH NCUBE
and
PRECIOUS NCUBE
and
NOMBULELO NCUBE
versus
SITHANDAZILE MPOFU
and
MELUSI SIBANDA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 1 AND 22 JUNE 2017 AND 27 JULY 2017

Civil Trial

Mrs N Mathumbu for the plaintiffs
K Ngwenya for the defendants

MOYO J: Plaintiffs issued summons in this matter claiming:

- a) payment of the sum of \$5000 with regard to the medical and funeral expenses in respect of the late Thabo Ncube, their son.
- b) payment of the sum of \$15000-00 being for general damages for pain and suffering.
- c) payment of the sum of \$5000-00 representing special damages suffered by 2nd and 3rd plaintiffs as a result of the medical and ancillary expenses incurred in relation to the injuries sustained in the road accident.
- d) interest on the total sum of \$25000-00 from the date of summons to the date of payment.

The facts of this matter are largely common cause. The claim arises from a road traffic accident that occurred on the 97km peg along the Bulawayo-Gwanda highway on 8 September 2012. The accident was caused solely by the negligence of the first defendant who did not only drive negligently but also had no driver's licence.

The particulars of the negligence are that on the date in question, first defendant drove

illegally, without due attention, failed to keep a proper lookout and drove at an excessive speed in the circumstances. As a result of the accident, the second plaintiff and third plaintiff as well as Thabo Ncube (the deceased) were injured on the side of the road. It is common case that Thabo Ncube later died as a result of the injuries sustained in the accident. He died later at Gwanda district hospital. It is common case that he was later laid to rest.

Whilst initially, the question of liability was also in dispute, as the defendants had denied any liability whatsoever for the accident in their plea, they later did not challenge the question of liability during the trial, that is both in their cross-examination of the plaintiffs and in their evidence in Chief. In fact in their evidence in chief they only challenged the amounts claimed and put plaintiff to the strict proof thereof. It is therefore only the question of quantum that this court should determine.

The defendants have challenged the amounts, as being unreasonable and excessive and also that they require documentary proof for all the claims as made by the plaintiffs. I will deal with the question of documentary proof first.

The question that this court has to answer first, which seemingly is the main challenge that the defendants have against the plaintiff's claims, is whether for a plaintiff to succeed in a claim for special damages they must provide documentary proof to sustain the claims they are making. The answer to this question in my view is a no for the following reasons:

In a civil claim (including a claim for special damages) a plaintiff will succeed upon proving its case on balance of probabilities. What is meant by the phrase proof on a balance of probabilities? The online legal dictionary defines this phrase as meaning that it is probable, it is more likely than not that it happened. How does the plaintiff show that it is more likely than not that a certain thing happened? He can do so by adducing evidence in court both *viva voce* and documentary (where such documentary evidence) is available. I do not hold the view that proof on a balance of probabilities in special damages claims only relates to documentary proof. I believe where *viva voce* evidence is given on costs that the plaintiff incurred and such costs are not unjustifiable or clearly inflated, plaintiff would have managed to proof his/her claim on a preponderance of probabilities.

Plaintiff in my view must adduce *viva voce* evidence which the defendant does not challenge or defeat as well as convincing the court through oral testimony that indeed the claims

are justified in the circumstances. I have already said that in this case the defendants did not challenge the sums as claimed by the plaintiff, *per se* but they only insisted that they would pay the “proved” amounts, referring to those claims that have documentary proof. I hold the view that a plaintiff is also entitled to be compensated even on those claiming where only oral evidence was given where even if they have no documentary evidence the court is satisfied that the plaintiff’s claims have been justified through *viva voce* evidence and as long as there are no specific reasons or issues apparent from the court record which would lead the court to disbelieve the plaintiff. I am vindicated in holding this view by the decisions of STRATFORD J the case of *Shapiro vs Hersman Co.* 1926 the TPD 367-80 wherein he stated thus:

“Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use of the evidence before it. There are cases where assessment by court is very little more than at estimate , but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages ---. It is not so bound in the case where evidence is available to the plaintiff which he has not produced, in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best available evidence has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still the best evidence available, the court must use it and arrive at a conclusion based upon it.”

The aforementioned case was quoted with approval by our own Supreme Court in the case of *Mbundire v Butress* SC 13/11, per GARWE JA.

Again in the case of *State v Tiethe* 1928 SWA 51 at pg 52 GRINDLEY-FERRIS AJ said the following:

“If there is evidence that some damages have been sustained, but it is difficult, or almost impossible to arrive at an exact estimate thereof, the court must endeavour, with such material as is available, to arrive at some amount, which in the opinion of the court will meet the justice of the case.”

Refer also to the cases of *Vellar v Moyo* HB 101/10 and the case of *Mdlongwa v Ngwenya* HB 54/13.

I thus hold the view that a plaintiff in a damages claim does not only discharge the onus on him/her by producing relevant receipts on the claims made, but even where receipts were never issued, or where plaintiff no longer has such receipts, where *viva voce* evidence has been led to justify the claims made then indeed the court must lean in favour of awarding the claim

except that the court should first be satisfied that the evidence led justifies the loss as well as the fact that the claim itself is not exaggerated but is a fair assessment of the loss suffered. Of course the court should do a careful assessment of both the plaintiff's case and that of the defence. If the defendants come up with cogent reasons for a finding that the plaintiff's claims are unreasonable or unjustifiable, the court should take into account such evidence in rebuttal so much so that if the defendants have proffered a strong case in the rebuttal of plaintiff's assertions, then the court may in such circumstances dismiss plaintiff's claim. However, where the defendants like in this case, plead lack of knowledge of plaintiff's claims but do not on the other hand dispute them save to submit that they would be convinced to pay only the proven amounts through documents, it cannot be held that the defendants have presented a strong case in rebuttal. The defendants' case is that they are willing to pay only those proven claims, and it is the finding of this court that even *viva voce* evidence can be proof of claims meaning that plaintiff's oral submissions in the court record stand out as unchallenged and therefore it cannot be held that plaintiffs has not proven their case on a balance of probabilities.

I then move to deal with each head of damages, as claimed and how much the plaintiffs would be entitled to in relation thereto.

The first claim of \$5000-00 in relation to funeral and medical costs on Thabo Ncube's injury and death.

The plaintiff adduced *viva voce* evidence on how he incurred costs in relation to the hospitalization and funeral expenses for Thabo Ncube. He tendered exhibit I which contains the list he prepared on funeral costs incurred. He has two columns, one with costs where he could produce receipts and one column with costs where no receipts were available. The total claims are \$3740-00 as per exhibit I page 2. There is mathematical error on the receipt for \$175-00 being for chickens which is an addition of \$105 and \$20 instead of a total of \$125, the receipt is written that the total is \$175-00. Of the total \$3740 claimed for Thabo Ncube's funeral expenses, I will knock out the \$50 error made on the total for chickens and award \$3690-00. I have taken plaintiff's assertions on the costs without receipts as I believe the plaintiff's testimony. It was not substantively challenged on the costs incurred for the funeral and I take it that ordinarily it costs transport, food, and undertakers' expenses to bury one's child and there is

nothing that has been shown to be outrageous about the plaintiff's claim. Ordinarily a man would incur costs as tabulated by plaintiff to bury a loved one and therefore I have no reason to doubt plaintiff's assertions. That he has no documentary proof in certain aspects of the claim is no defence in my view, a defence should be that plaintiff could not have reasonably incurred the costs as claimed for given reasons. He has already explained that he would not have all the receipts as certain items he purchased from where a receipt would not ordinarily be issued like at the vegetable market where he bought some cabbages. He has also told the court that certain receipts, whilst he had them, because they were till generated, with time their ink fades and they become invisible which is why he could not attach them. He has also explained that certain items like the beast he had to take out of his kraal, and that he places a value of \$750-00 on it which value has neither been challenged nor substantially rebutted. The plaintiff has in my view sufficiently, and on a balance of probabilities successfully proven that he suffered a loss of \$3690-00 in funeral and related expenses. I accordingly award him that amount on the first claim.

(b) The claim from \$15000-00 damages for pain and suffering and disfigurement occasioned by the accident

I would hasten to point out that plaintiff's claim in this respect is not properly crafted that plaintiffs seem to have lumped under one head damages for pain and suffering resulting from injury and damages for pain and suffering resulting from the loss caused by the accident.

I would comment that a properly drafted claim should have separated the two for easy quantification. All the three plaintiffs should have claimed damages for pain and suffering to all the three of them as a result of the loss of Thabo through death at a certain amount and the second and third plaintiff would then claim further damages for pain and suffering resulting from the injuries sustained in the accident. I will separate the two for easier assessment and quantification.

I will start by defining pain and suffering in damages claims. In the 3rd Edition of *Visser and Potgieter* "Law of damages" at page 1009 it is defined thus:

“By this is meant all pain, physical and mental suffering and discomfort caused by bodily injury, emotional shock, or the medical treatment necessitated by the injuries.

At page 110 of the same book it is stated thus:

“Shock (psychiatric injury)

Emotional shock is usually associated with pain and suffering, but it may also cause further recognized psychiatric consequences such as insomnia, anxiety, neuroses, hysteria, depression or other mental and physical conditions which are recognized as non-patrimonial loss”

Portgieter in volume 9 LAWSA paragraph 2 says:

“Emotional shock can be described as sudden, painful emotion or fright resulting from the realization or perception of an unwelcome or disturbing event, which involves an unpleasant mental condition such as fear, anxiety or grief.”

The defendants submitted in their closing submissions that plaintiff’s seen to be seeking punitive damages against them. I hold a different view. I think the plaintiffs are distraught rather than vindictive.

Both plaintiffs took us through a very saddening and emotional explanation of how the loss of Thabo has caused an emptiness, a permanent void in their lives and how certain daily experiences take them back to re-living the grief of Thabo’s loss. They also told us how Thabo’s sister, the third plaintiff’s life has been shattered by the loss of her brother. They told us how life would never be the same. How the emptiness of Thabo’s absence in their lives haunts them even today which is about 5 years since he died. They told the court how they miss him in their day to day experiences and how they have struggled to come to terms with his death. Second plaintiff even suffered from depression and post traumatic stress disorder and could not return back to work as desired at the appropriate time. She had to take further time off work and therefore the degree of emotional strife they have suffered and continue to suffer as a result is overwhelming and real. Their lives have significantly changed as a result of this loss and I believe a fair award would be that of \$4000-00 for each of the plaintiffs’ making a total award of \$12000-00 in this respect.

I hold the view that this family has indeed suffered and been traumatised emotionally by Thabo’s death. In fact it appears from submissions by defendants’ counsel that this is common cause. Plaintiff also told the court of the physical pain that she suffered as a result of the

accident. On the physical pain she suffered she told the court that she fell and bumped her chest which then became painful. She said after the accident she suffered from physical pain and had to seek medical assistance. The plaintiffs said their daughter the third plaintiff was injured on the leg but no precise details of the injuries were given. I hold the view that the physical pain and suffering has not been explained in detail for the second and third plaintiffs although that they did get injured and did suffer some pain is common cause. I would thus award second plaintiff \$5000-00 for physical pain and suffering since, the second plaintiff did not detail in great detail the physical aspects although the court does accept that it is common cause that pain was suffered by her, therefore a conservative award should suffice. As for the third plaintiff, the degree and nature of the injuries and the physical pain suffered is not tabulated in the court record, perhaps due to the fact that she is a minor and was represented by the first plaintiff in the proceedings.

I would therefore not award third plaintiff any damages related to the injuries sustained in accident to the extent that plaintiffs are awarded a total of \$12500-00 in this category.

The third claim of \$5000-00 for damages for special damages in relation to the costs related to second and third plaintiff's hospital bills.

In this regard plaintiff's only tabulated evidence before the court that sustains a sum of \$785-00. The evidence of the plaintiffs has not been rebutted by the defendants and whilst some of the claims have no documentary proof to sustain them, *viva voce* evidence was led in support of the claims save for the \$150-00 being for future anticipated expenses and the \$300-00 being for medical expenses related to Precious Ncube. I would accordingly knock out the sum of \$450-00 from the total of \$785-00 and award \$335-00 only in this respect.

I will accordingly order as follows:

- 1) first plaintiff is awarded the sum of \$3690-00 being funeral expenses incurred in the interment of the late Thabo Ncube.
- 2a) the three plaintiffs are awarded the sum of \$12000-00 in total being general damages for pain and suffering as a result of the loss of Thabo Ncube in the accident.

- b) the second plaintiff is awarded the sum of \$500-00 being general damages for pain and suffering as a result of bodily injury.
- 3) the first plaintiff is awarded \$335-00 as special damages in relation to medical expenses incurred for the treatment of second plaintiff.
- 4) Interest on the sums awarded herein at the prescribed rate with effect from the date of summons to date of payment.
- 5) Costs of suit.

Moyo and Nyoni, plaintiffs' legal practitioners

T J Mabikwa & Partners, defendants' legal practitioners