

JUDITH NYOKA
versus
NYAMWEDABUS SERVICE
and
ZIMNATLION INSURANCE

HIGH COURT OF ZIMBABWE
MUSAKWAJ
HARARE, 9 April 2014 and 18 February 2015

Application for default judgment

T.G. Mboko, for the plaintiff
Defendant in default

MUSAKWAJ: The plaintiff is seeking delictual damages for injuries arising from an accident that occurred when she was a passenger on a bus operated by the defendant.

In 2006 the plaintiff issued summons claiming delictual damages arising from an accident in which she was a passenger on a bus that was operated by the defendant. The defendant defaulted attending a pre-trial conference, hence the striking out of its defence.

The plaintiff abandoned the claim for loss of earnings in the sum of US\$50 400.00. She also abandoned the claim for medical expenses and future earnings due to the difficulty in formulating them as they were suffered in local currency. She has persisted in her claim for general damages under the following heads-

- (a) Shock, pain and suffering.
- (b) Permanent disability and loss of amenities of life.

In respect of pain and suffering the plaintiff claims US\$30 000.00. In her affidavit she explains that she continues to experience pain up to today. In respect of permanent disability and loss of amenities of life she claims US\$25 000.00. Under this head she claims she sustained permanent disfigurement.

The plaintiff was a fare paying passenger on the defendant's bus. On 15 May 2006 the bus was involved in an accident along the Gweru-Bulawayo road. The plaintiff sustained the

following injuries-

- (a) Fracture of the left radius.
- (b) Fracture of the distal left fibula.
- (c) Massive degloving of the left leg with bone, tibia exposed.

The plaintiff was hospitalised from 16 May 2006 to 19 July 2006 whilst she underwent treatment. Regarding pain she was reported to have been in severe pain during the first week. This necessitated the use of narcotic analgesia. Severe pain was experienced after every operation for forty eight hours. Further pain was experienced from bed sores on the left buttock. Permanent disability from ugly scarring of the left leg was put at thirty per cent.

The assessment of general damages is a difficult exercise. The amounts claimed by the plaintiff are not comparable to any decided cases. The case authorities cited by her counsel are not helpful at all.

A useful authority on the principles to apply in such claims is the case of *Minister of Defence and Another v Jackson* 1990 (2) ZLR 1 (SC). In that case Gubbay JA stated the following at pp 7 -8-

“it must be recognised that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge. This notwithstanding, certain broad principles have been laid down which govern the obligation. These are:

- (1) General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.
- (2) Compensation must be so assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing him the injury had not been committed. See *Union Government v Warnecke* 1911 AD 651 at 665
- (3) Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.
- (4) The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 555H.
- (5) The fall in the value of money is a factor which should be taken into account in terms of purchasing power, "but not with such an adherence to mathematics as may lead to an unreasonable result, per SCHREINER JA in *Sigournay's* case, supra, at 556C. See also *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 116B-D; *Ngwenya v Mafuka* S-18-89 (not reported) at p 8 of the cyclostyled copy.

- (6) No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he be a millionaire or a pauper. See *Radebe v Hough* 1949 (1) SA 380 (A) at 386. E
- (7) Awards must reflect the state of economic development and current economic conditions of the country. See *Mair's case*, supra, at 29H; *Sadomba v Unity Insurance Co Ltd & Anor* 1978 RLR 262 (G) at 270F; 1978 (3) SA 1094 (R) at 1097C. *Minister of Home Affairs v Allan S-76-86* (not yet reported) at p 12 of the cyclostyled copy. They should tend towards conservatism lest some injustice be done to the defendant. See *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274H.
- (8) For that reason, reference to awards made by the English and South African Courts may be an inappropriate guide, since conditions in those jurisdictions, both political and economic, are so different.”

In *Christopher Gwiriri v Star Africa Corporation (Pvt) Ltd t/a Highfield Bag (Pvt) Ltd* HH-20-10 the plaintiff was involved in a work related accident where he sustained permanent disability which was assessed at 65%. He was hospitalised for close to five months. He was subsequently discharged from employment on medical grounds. The court awarded US\$3 000.00 for pain and suffering and US\$10 000.00 for permanent disability.

In *Tambudzai Mafusire v Lewis Greyling* HH-173-10 the plaintiff and the first defendant were involved in a collision whilst driving their respective vehicles. The court found contributory negligence on the part of the plaintiff. It apportioned 40% negligence to the plaintiff and 60% to the first defendant. It awarded US\$3 600.00 for pain and suffering and future medical expenses to the plaintiff whilst it awarded us\$1 000.00 to the first defendant for similar damages.

Coming to the present matter, the medical report which the plaintiff relies on was compiled in 2006. The report noted that permanent disability from forearm fractures should be assessed after removal of hardware from the radius and ulna. It was recommended that the removal of hardware be done after twelve months. It was noted that the pain in the forearm might interfere with work or sporting activities.

Apart from the noted disabilities, the plaintiff claims that her performance of household duties has become unbearable. She claims she no longer walks properly and cannot fend for her family as she used to do. Prior to the accident she used to do cross-border trading. This latter assertion is related to loss of future earnings which the plaintiff abandoned.

In making the award I have taken into account that there is no additional medical report. In all probability the plaintiff may still experience pain the nature of which is not readily ascertainable. She may no longer be as active as she used to be. I will also take into

account that the first defendant's insurers indemnified the plaintiff although the quantum was not disclosed. I would therefore award US\$2 500.00 for pain and suffering and US\$8 000.00 permanent disability and loss of amenities of life.

In the result, it is ordered that-

- (a) The defendant pays the plaintiff US\$10 500.00.
- (b) The defendant pays the costs of suit.

Donsa-Nkomo & Mutangi Legal Practice, plaintiff's legal practitioners