

BEAVEN NGARANDE
versus
YVONNE SIMUKELISO GUMEDE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 24 November 2015, 2 December 2015, 11 February 2016,
1 March 2016, 2 March 2016 and 10 March 2016 & 22 June 2016

Civil Trial

L T Nyama, for the plaintiff
T Dzvetero, for the respondent

FOROMA J: The plaintiff in this matter sued the defendant for damages arising from bodily injuries which the plaintiff claimed were deliberately and maliciously caused by the defendant who knocked the plaintiff down with her motor vehicle a WW Toureg in order to make good the plaintiff's wife's escape and shield her (plaintiff's wife's) acts of adultery. The said injuries were sustained on 11 March 2014 at Mutangadura Highway Stop Over along Mutare Road in the Ruwa area. Details of damages claimed were pleaded as follows:

- (i) Special damages in the sum of US\$15 595-00
- (ii) General damages in the sum of US \$20 000-00 for pain, suffering disablement disfigurement and shortened life expectancy
- (iii) Future medical expenses in the sum of \$7 000-00

The plaintiff also claimed interest at the prescribed rate from date of summons to date of full payment and costs of suit.

The defendant denied all of the plaintiff's claims putting in issue any injury to the plaintiff whether negligently caused or otherwise. Apart from denying causing the injuries suffered the defendant also put in issue whether in fact the plaintiff had suffered the alleged injuries. The defendant in the alternative pleaded that in the event that it was her vehicle which

caused the injuries (which she denied vehemently) such injuries were caused as a result of the plaintiff running towards the defendant's vehicle with an intention to destroy it and that for this reason the defendant cannot be liable for such injuries.

At the pre-trial conference the parties agreed on the following three issues to be referred for trial namely

- (1) whether or not the defendant caused grievous bodily harm to the plaintiff
- (2) whether or not the defendant is liable to pay the plaintiff the sum of \$42 500-00
- (3) whether or not the defendant was acting in self defence of her property and herself

at the scene at Mutangadura Highway Stop Over. It is significant to note that the parties also agreed that the onus to prove issues 1 and 2 were agreed to be on the plaintiff and the onus to prove issue 3 was on the defendant.

At the trial the plaintiff testified and called three witnesses. The plaintiff testified that he is employed as a truck driver by a company called Strauss and resides at 25481 Greensyke Ruwa. He had sued the defendant in order to recover hospital expenses and damages caused by the defendant who deliberately ran him over with her vehicle on 11 March 2014 at Mutangadura Highway Stop Over along Mutare Road. Mutangadura Highway Stop Over has also been referred to as Mutangadura Hide. Asked how he came to meet up with the injury the plaintiff explained that he had picked up a strong rumor that his wife was involved in an adulterous relationship with some man and that he had gone to Mutangadura Highway Stop Over with a view to catch the wife and boyfriend as they were believed to frequent that public drinking place and were going to be at that place that evening. The plaintiff claimed that the tip-off had been given by his wife's friend a Mrs Mutsata. When the plaintiff got to Mutangadura Highway Stop Over between 10:00am and 11:00am he parked his vehicle in a place where it could not easily be noticed and waited for his wife and boyfriend to arrive. Before long the defendant and Mrs Mutsata and his wife and a man whom he believed to be the boyfriend arrived at Mutangadura Highway Stop Over in the defendant's vehicle. He observed his wife and the man believed to be the wife's boyfriend disembark and approach what turned out to be the man's vehicle. As the two entered the alleged boyfriend's vehicle the plaintiff approached them and on realising the plaintiff was approaching them they locked up the doors of the vehicle. The plaintiff in a fit/or rage started smashing the vehicle windscreen and driver's side window. Both the plaintiff's wife

and her alleged boyfriend escaped from the vehicle using the passenger side door and the plaintiff's wife ran into the defendant's vehicle. The alleged boyfriend made good his escape presumably into the crowd or darkness and fled away. The plaintiff followed his wife who had entered the defendant's vehicle whose doors were now locked from inside and the defendant started moving the vehicle slowly. The plaintiff approached the defendant's vehicle demanding that his wife come out but because she would not the plaintiff approached the driver (the defendant) and asked her to drop his wife who was in the car. The defendant would not open the window or drop the plaintiff's wife. Believing that the defendant might get away with his wife and as the defendant was slowly maneuvering out of the parking lot the plaintiff went in front of the vehicle and demanded that the driver stop her car and drop his wife but the defendant still would not drop the plaintiff's wife. Meanwhile people had gathered around and the defendant suddenly accelerated her vehicle forward knocking down the plaintiff who was in front of her vehicle and ran him over and drove away. The plaintiff was then assisted by the patrons and one of them one Mazhaudze managed to take the plaintiff to Windsor 24 hour Medical Centre and he ended up at Parirenyatwa Hospital that night. Before taking the plaintiff to Parirenyatwa Hospital Mazhaudze went to report the matter at the police station at Ruwa and found the defendant and the plaintiff's wife and Mrs Mutsata and the alleged boyfriend at the charge office. The plaintiff was admitted at Parirenyatwa Hospital Ward C9 that night. He further testified that he paid his own medical bills. He underwent two major operations. The nature of the injuries he sustained were noted by Dr Muguti. The plaintiff testified that the initial operation entailed exposing his intestines and bowels in order to repair the pancreas and repair the colon which had been damaged. The second operation was to put back the intestines. After discharge from hospital the plaintiff sought to establish if police had located the defendant. He attended (as a complainant and witness) the criminal trial of the defendant. He confirmed that the defendant had been convicted of some offence arising from the events of 11 March 2014 at Mutangadura Highway Stop Over involving running the plaintiff over with her vehicle.

The plaintiff reiterated his claim for special damages general damages, and future medical expenses. He also testified that before the injury he was a truck driver who transported fuel from Mozambique to Zambia and Democratic Republic of Congo and that as a result of the

injury he was no longer able to drive long distances and was now being assigned work as a general hand.

The plaintiff testified that he used to earn between US\$800-00 – US\$1 200-00 per month. He further testified that he personally paid for his medical bills and was compelled to sell his house when he realised his resources had been exhausted before recovery. He referred to a bundle of receipts (copies) which he said confirmed that he paid for treatment for injuries caused him by the defendant and prayed that the court help him recover his medical bills and damages.

The plaintiff was cross-examined in some detail by the defendant's counsel. The plaintiff admitted having smashed the vehicle of the person he believed was his wife's boyfriend and indicated that he did that to prove that he had caught them together as they might later deny it. The plaintiff disputed that the defendant did not know that his wife was having illicit and immoral relationship and reasoned that if she did not desire to shield her (plaintiff smites) adulterous activity she would not have made a daring effort to flee with her from the scene despite his demand that she drop her.

When it was put to him that when his wife had run into the defendant's vehicle the defendant thought he was going to attack her he categorically disputed this and retorted that the defendant had no reason to fear anything as he had not attacked her. The plaintiff claimed that when the defendant started driving off he was still at the other vehicle. He followed her as she was moving slowly. It was impossible for her to speed off from the parking lot. She only sped off after she had left Mutangadura Highway Stop Over parking lot. She plaintiff believes that the reason the defendant sped away from Mutangadura Highway Stop Over was to run away with his wife.

The defendant's counsel put the following to the following to the plaintiff "when your wife ran into the defendant's vehicle she told the defendant that you were a violent person who had a history of five cases of violence against her" to which the plaintiff answered I can neither confirm or deny it. The defence counsel did not seriously challenge the plaintiff's evidence on special damages save to claim that the nature and extent of the injuries were disputed and that the documents he was relying on were concocted which the plaintiff disputed.

The next witness was Chrispin Mazhauze. He gave evidence under oath. He testified that he is employed at Country Harvest and that he is not related to the plaintiff. He witnessed

the defendant run the plaintiff over with her vehicle at Mutangadura Highway Stop Over. He had gone to watch soccer at the VIP lounge at Mutangadura Highway Stop Over. At about 11:30 am he came out of the lounge and found people gathered around a vehicle which was slowly coming out of a parking lot and someone was knocking on the vehicle. When the vehicle (which turned out to be the defendant's Tourag was now facing Mutare Road, the plaintiff went in front of it on the driver's side. The driver did not open the window or door. He heard the plaintiff calling out drop the person in the car. The defendant did not drop the person but instead drove her vehicle at high speed and knocked the plaintiff down and continued driving and drove him over his (plaintiff's) belly as it was facing Mutare Road. The defendant did not stop despite people present shouting stop, stop you have run over someone!

He and others approached the plaintiff who tried to get up but could not. After establishing that he was alone the witness obtained plaintiff's vehicle keys located his vehicle and got other people to assist him get into the vehicle and the witness drove off to Windsor 24 hour Service Clinic. At Windsor Clinic he was advised to obtain a police report before they could attend to the plaintiff in light of the explanation given on how injury had been sustained. He then rushed to the police station where he found the defendant, the plaintiff's wife and a man who turned out to be the alleged boyfriend and another woman. According to Mazhauze when he reported the incident of the plaintiff's injury police were surprised that the report that they had got from the defendant and those in her company had not made any reference to the injury to the plaintiff. He was allocated a police detail to take to Windsor Clinic for a statement to be recorded from the plaintiff. After interviewing the plaintiff Mazhauze got a police letter which enabled him to take the plaintiff to Parirenyatwa Hospital. He later contacted the plaintiff's relatives to enquire on the plaintiff's recovery and condition. He was called as a witness at the criminal trial of the defendant at the magistrates court.

In cross examination Mazhauze conceded that he had not witnessed much of what had happened prior to the plaintiff being run over. In filling in the witness with the background counsel is recorded as having asked "Had you witnessed what had happened? The witness answered No. Counsel went on to say – I will tell you – the plaintiff had been violent. Witness then answered; I cannot dispute him damaging some vehicle. Counsel went on to say "She (defendant) witnessed the violence – witness - I cannot dispute that. Counsel then put that "He(the

defendant) had smashed someone's vehicle because the vehicle had the plaintiff's wife and an alleged boyfriend and the wife had run into the defendant's vehicle and had advised that the violent man was her husband who was of violent disposition – the defendant having been told that she was filled with fear.” The witness answered I cannot dispute that”

When counsel sought to suggest to the witness that the defendant tried to leave the chaotic situation the witness disputed it and asked a rhetoric question – “Why would she drive away after knocking down a person with her vehicle. It is important at this point to not that the witness said he saw people who were gathered around watching what was happening. The witness was adamant that the defendant saw that she had knocked down the plaintiff with her vehicle. The defence counsel then suggested that the reason the defendant left the place in a hurry was that the defendant feared the plaintiff's wife might be killed in the chaotic situation. It is important to note that the defendant did not fear for herself or her property but feared for another's life. The witness also testified that he saw the plaintiff's intestines out when he visited the plaintiff after his return from hospital (after being run over). This witness was firm and was not shaken during cross – examination. The plaintiff called as his next witness one Tafara Madzvamutse who also testified under oath. He testified that he was not related to the plaintiff and was at Mutangadura High Way Stop Over on the day that the plaintiff was run over by a vehicle. He did not remember the date but at the time he was employed at Mutangadura Highway Stop Over as a security guard. Before the incident (plaintiff being run over) plaintiff had met him and told him that he wanted to catch a man who was having an adulterous affair with his wife as they were coming to the place that evening. He promised to alert plaintiff when his wife and alleged boyfriend arrived. Before long a Grey VW Toureg Vehicle arrived at Mutangadura Highway Stop Over and he thought that was the vehicle with the plaintiff's wife and her boyfriend. The vehicle stopped next to some white pick-up truck. Although the witness thought these arrivals were the people the plaintiff was after he could not be certain as he did not know the plaintiff's wife and had not obtained details of the clothing she was wearing that evening. Neither did he know the alleged boyfriend. He then decided to go back to the plaintiff to establish leads on how to identify the plaintiff's wife but he could not find the plaintiff. He then went about his duties. Before long he approached the V W Toureg which he found slowly moving towards the Mutare Highway leaving the parking lot. He observed the plaintiff walking

on the right side of the vehicle tapping the rear passenger door, then the driver's door before moving in front of the vehicle on the driver's side waving down the driver not to proceed. The vehicle did not stop but increased its speed and knocked down the plaintiff whom it ran over in the process and drove away without stopping. When he observed that the vehicle did not stop he ran after it shouting to the driver to stop as vehicle had run over someone but the vehicle did not stop. When he returned to where the plaintiff was plaintiff produced his car keys and asked that someone take him to the hospital. The witness also testified that about three months after the incident he was called to court to give evidence at the trial of the defendant who was facing trial for an offence arising from running over the plaintiff at Mutangadura Highway Stop Over. The witness did not witness the smashing of a vehicle by the plaintiff before the plaintiff was knocked down.

During cross examination defense counsel put it to Tafara Madzvamutse that the defendant denied running over the plaintiff and his response was that she was lying as he was saying what he had witnessed. It was also put to him that even if it was the defendant whose vehicle knocked the plaintiff down that this was accidental and he answered that he could not dispute it.

The next witness called by the plaintiff was Dr Edwin Muguti a medical practitioner and a surgeon who attended to the plaintiff after the plaintiff sustained the injuries as a result of being run over by the defendant. He only attended on plaintiff more than a week after the incident.

His evidence was that the plaintiff became his patient about two weeks after sustaining the injuries. The plaintiff was ill and needed an emergency operation to investigate an abdominal injury. He made reference to an affidavit which he prepared and which was part of documents in bundle A produced through him on behalf of the plaintiff. His affidavit indicates that he performed an emergency abdominal surgery to drain abscess and remove a perforated colon and fashion a colostomy. He described the injuries as severe and described the possibility of permanent injury as likely. The injuries according to the doctor were life threatening and but for his intervention the plaintiff could have died as a result of those injuries.

In detail and during his oral evidence the doctor described the injuries as a ruptured large bowel and the colon which was leaking faecal matter into the abdomen. He undertook two surgeries the first of which was lifesaving. The first operation involved exposing or taking out

the intestines in order to remove the damaged colon. As a consequence the bowel is no longer complete. He considered that the plaintiff was likely to experience and suffer abdominal pain or episodes of bowel obstruction including disturbed bowel function which was likely to be more frequent. He also considered that the plaintiff was at risk of further surgical operations. The recovery process resulted in scarring both internally and externally. Asked to explain the type of treatment the plaintiff required after sustaining the injuries Dr Muguti explained that the patient's injuries were not properly managed at the time the plaintiff initially sought medical treatment after the injuries were sustained as he was initially discharged before he consulted him. The effect of scarring is that the scarred tissue could cause pain from the tear on the skin and due to change of weather. Regarding medical expenses the doctor testified that there were expenses directly associated with his involvement (the operations and various hospital visits and reviews and consultations and costs related to other service providers such as the hospital and anesthetist and prescriptions written which the patient had to purchase. The doctor's evidence as an expert was not seriously challenged. The defense counsel however took issue with the doctor's description that injury had deliberately been caused as he described the cause of injury in the affidavit when he was not at the scene of incident and yet it was clear that such was borrowed from the history either as given by the patient or those in the company of the patient at the initial consultation. The doctor indicated that the two surgical operations were about 6 – 8 weeks in between and in the meanwhile the plaintiffs' bowels and intestines were exposed. The second operation was done after observing the healing process and to put the bowels and intestines back in place. The plaintiff's case was closed at the end of Doctor Muguti's testimony.

The defendant opened her case by taking to the witness stand.

Consistent with her plea the defendant denied that she had knocked down the plaintiff. She testified that on 11 March 2014 she visited a Mrs Mutsata a friend of hers at her residence in Ruwa where she met the plaintiff's wife for the first time and the plaintiff's wife narrated her turbulent marital relationship with her husband which caused them to separate and that because of the husband's leaving the matrimonial home with most of the property she had decided to go back to her parents in Chipinge and had come to bid Mrs Mutsata good bye.

The defendant indicated that, that day in the evening Mrs Mutsata invited her and plaintiff's wife to go to Mutangadura Highway Stop Over to buy some food for her (the defendant) as Mrs Mutsata had already cooked before the defendant arrived.

While at Mutangadura Highway Stop Over the defendant witnessed the plaintiff damaging a vehicle (smashing its windscreen and windows) and this caused the two women (the plaintiff's wife and Mrs Mutsata) to take fright. The plaintiff's wife who was in the defendant's motor vehicle started screaming and sked the defendant to drive away from the place before the plaintiff came to attack her (plaintiff's wife). The defendant claims she then took self - defense measures by driving away from the premises when he saw the plaintiff approaching her vehicle. She emphatically denied knocking down the plaintiff or causing him the injuries alleged. The defendant sought to emphasize that she could not have injured the plaintiff with her vehicle as she did not know him and had no reason to injure or hurt him. The defendant also testified that after escaping from the plaintiff at Mutangadura Highway Stop Over she drove to the police station where the plaintiff's wife reported breach of a peace order against the plaintiff by the plaintiff. Defendant regarded her prosecution for knocking the plaintiff with her vehicle as frivolous and vexatious. She was not aware of any incident involving the plaintiff (around the period in question) where the plaintiff could have sustained the life threatening injuries the subject of this action. She also sought to argue that had she been the one who had been involved in an accident with the plaintiff she would not have run away as she has a clean driver's licence. She also testified that the occupants of her vehicle (the two women) were all in a state of panic after seeing the plaintiff damage (through smashing) the vehicle at Mutangadura Highway Stop Over. She claimed that the plaintiff charged towards their vehicle. The defendant called Caroline Sibanda (the plaintiff's wife) as her only witness. Caroline Sibanda essentially gave similar evidence to that given by the defendant. She testified that she went to Mutangadura Highway Stop Over in the company of Mrs Mutsatsa and the defendant in the evening on the invitation of the other two women. Whilst at Mutangadura Highway Stop Over she observed the plaintiff smashing the windscreen of their neighbour's vehicle. According to the witness this neighbour was one of the people that the plaintiff suspected to be having an illicit (adulterous) relationship with her. When she saw him smashing the vehicle windscreen and window she called out to him to stop what he was doing. When the plaintiff heard her calling his name he then advanced

towards the defendant's vehicle in which she, the defendant and Mrs Mutsata were seated and this caused her to take flight and she then started screaming and asked the defendant to drive away otherwise the plaintiff could cause harm to her. She did not witness the defendant knock the plaintiff down with her vehicle as she left the Mutangadura Highway Stop Over. She opined that if defendant had run over plaintiff she would have felt it. After escaping (from the plaintiff) they went to the police to report what the plaintiff had done to the neighbour's vehicle and also that he had breached the conditions of the peace order against him to observe peace with her. She also testified that that morning the plaintiff had had a scuffle with her over the issue of a mobile cell phone during which plaintiff had threatened her.

Ms Caroline Sibanda denied that the defendant had caused any injuries to the plaintiff.

In light of the defence testimony the question arises - Who caused the plaintiff the injuries that the plaintiff and Doctor Muguta testified to?

The plaintiff and his witnesses testified to the defendant having knocked down the plaintiff and run him over as she made a get away from Mutangadura Highway Stop Over on Mutare Road on the night of the incident.

Both parties testify to having visited Mutangadura Highway Stop Over on the night in question and that plaintiff smashed the vehicle windscreen and windows of a vehicle he believed to belong to his wife's paramour. The defendant did not dispute the injuries found to have been caused to the plaintiff. At Mutangadura Highway Stop Over the defendant witnessed a commotion involving the plaintiff who was chasing another man and the one chasing was holding something in his hand which she thought was a baseball bat. The man who had been chasing the other came back and started smashing the lights and windscreen of the vehicle which happened to be that of the plaintiff's neighbour according to Caroline Sibanda in her evidence. This much is common cause.

It is important to note that plaintiff additionally testified that before attacking the neighbour as aforesaid he had been at Mutangadura Highway Stop Over earlier that evening anticipating the arrival of his wife and her alleged boyfriend. The wife and the man believed to be her boyfriend arrived in due course and the plaintiff saw Caroline Sibanda (his wife) come out of the defendant's vehicle with the man (neighbour) and get into the neighbour's vehicle.

The plaintiff then approached (the two love birds) who on realising they had been caught together they ran into the neighbour's car which they locked from inside and the plaintiff started smashing the vehicles glass surfaces the two escaped through the passenger door. The plaintiff was obviously enraged as he had just confirmed that his neighbour was indeed improperly associating with his wife. Caroline and her male friend (the neighbour) managed to leave the vehicle without the plaintiff catching either of them. Caroline ran back into the defendant's vehicle and her male friend temporarily disappeared although being chased by the plaintiff who opted to go for his wife in order to secure some evidence. When the plaintiff got to the defendant's vehicle he demanded that Caroline come out of the defendant's vehicle which had been locked from inside. When Caroline Sibanda refused to come out the plaintiff demanded that the defendant drop her. As the defendant did not co-operate and continued to move her vehicle obviously in order to make a quick a get-away with defendant the plaintiff went in front of the defendant' vehicle and waived the defendant down demanding that the defendant drop his wife which demand was not heeded. It was while the plaintiff was in front of the defendant's vehicle that defendant accelerated her vehicle knocking down the plaintiff running him over in her get-away bid. After realising the seriousness of what she had done the defendant decided not to stop at the scene and proceeded straight to the police station and made a report giving an edited version of what had actually happened. On her way to the police station (the defendant Caroline Sibanda and Mrs Mutsata) must have linked up with the neighbour who had escaped from the plaintiff's attack. Much of the detailed events as summarised above was not challenged by the defendant save the knocking down and running over of the plaintiff by the defendant. It is important that the above version of events were accepted by the defence and this much is clear from defence counsel's line of questioning of the plaintiff's second witness quoted above and repeated herein below for easy illustration-

“DC - You do not know what happened before plaintiff being run over. Had you witnessed what had happened-

Answer - NO

DC - I will tell you- the plaintiff had been violent-

Answer- I cannot dispute him damaging some vehicle-

DC - She (Defendant) witnessed the violence

Answer – I cannot dispute that

DC – Plaintiff smashed vehicle because vehicle had plaintiff's wife and an alleged boyfriend and the wife had run into defendant's vehicle and advised defendant that the violent man was

her husband who was of a violent disposition and defendant having been told that she was filled with fear.

Answer – I cannot dispute that.”

The portion of evidence quoted above is of the following significance –

- (i) It contradicts the defence testimony that when she (defendant) left Mrs Mutsata’s residence she was in the company of 2 women only i.e Mrs Mutsata and Caroline Sibanda.
- (ii) Caroline Sibanda and the defendant’s testimony that the plaintiff never saw Caroline in the company of Mambare (the neighbour) was untrue. During cross examination although Caroline Sibanda had denied knowledge that Mambare had been sued by the plaintiff for adultery damages such denial was dishonest. In fact plaintiff’s counsel got her to concede during cross-examination that she was falsely denying this court suit against Mambare as in fact she had been called by Mambare as a witness at the trial of the said adultery damages claim against Mambare instituted by the plaintiff.

It is clear that the defendant and her witness rehearsed their evidence and tried to do a good job of it as they were relatively consistent. However this court does not accept their evidence as truthful as the probabilities are clearly telling against them. Both the defendant and her witness could not suggest how the plaintiff had sustained the injuries found on him by the doctor and as testified by the plaintiff.

It is highly unlikely that the plaintiff would have just attacked Mambare’s vehicle without being provoked especially that it was parked at a public drinking place. Clearly the plaintiff was provoked when he saw his wife in Mambare’s company at Mutangadura Highway Stop Over. The fact that the defendant and those in her company did not report to Police that the defendant had knocked the plaintiff down at Mutangadura High Way Stop Over betrays an attempt to cover up the incident.

Clearly the defendant’s conduct was consistent with that of a person eager to shield Caroline Sibanda whom she knew was improperly associating with Mambare after the two lovebirds had been caught red-handed by Caroline’s husband. It is not surprising that the defendant herself was frightened by the plaintiff’s violent reaction to finding his wife in company of Mambare and would naturally have entertained the possibility of being attacked by

the plaintiff who had seen his wife take refuge in her car and it was the same vehicle that had brought the love birds to Mutangadura Highway Stop Over that evening. She must have assumed that the plaintiff had observed Mambare and Caroline Sibanda leave her vehicle when they arrived at Mutangadura Highway Stop Over.

Clearly the desire to get away from the scene became paramount to the defendant and the suggestion that she ran the plaintiff over in self-defence is a lame and futile attempt to explain a reckless decision to escape the consequences of her association with Caroline and her boyfriend who had been caught red handed.

The court rejects the defence version of the events of the 11 March 2014 wherever it contradicts with that of the plaintiff's. The defendant was not attacked by the plaintiff and the suggestion of self-defence is rejected outright. Clearly the defendant deliberately drove her vehicle recklessly and knocked the plaintiff to the ground and ran him over causing the plaintiff the injuries described – this she did in an effort to shield the acts of improper association or adultery between the plaintiff's wife and Mambare which she was clearly aware of.

Quantification of damages

The plaintiff claimed under 3 heads of damages namely:

- (i) \$15 595-00 in respect of special damages
- (ii) General damages in the sum of \$20 000-00 and
- (iii) Future medical expenses in the of \$7 000-00.

Re: Special damages

Immediately on being injured as a result of being knocked down by the defendant the plaintiff was taken to Parirenyatwa Hospital where he received medical attention and remained hospitalised for about a week. The plaintiff was discharged from Parirenyatwa Hospital but had to be attended to by Dr Edwin Muguti a consulting surgeon shortly thereafter as his condition had deteriorated. Dr Muguti testified that the plaintiff became his patient on 20 March 2014 and he found him quite ill and he required an emergency abdominal surgery. He performed two surgeries on him and diagnosed a ruptured large bowel from a vehicle incident. The first surgery was lifesaving it involved bringing out the bowel and intestines. The first surgery entailed addressing severe injury to the colon which was leaking faecal matter into the abdomen. He described the injury as severe abdominal injury to depict that the injury was life threatening. But

for the medical intervention by Dr Muguti the plaintiff could have died. Dr Muguti said he had removed the damaged colon and fashioned a colostomy with the result that the bowel is no longer complete. He did the second surgery in order to put back the abdominal contents after observing the healing process. It would seem that the initial medical attention at Parirenyatwa Hospital did not reveal the true extent of the injuries sustained by the plaintiff. According to Doctor Muguti the delay in detecting the extent of injuries caused further complications and by the time he did the first operation on the plaintiff there was puss in the abdomen. Dr Muguti indicated that in his performance of the two surgical operations he needed assistance of various service providers like the anesthetist, CT Scan and X-ray. It will be observed from the plaintiff's bundle of documents marked A produced by the plaintiff consisting of a medical report and medical bills and receipts that the plaintiff made various payments associated with his treatment of the injuries sustained. These payments constitute the bulk of plaintiff's claim for special damages. Amongst the expenses incurred and paid for are Doctor Muguti for colostomy closure (see p 2 of the Annexure A) where under invoice No. 1204 a total charge of US\$3 039-00 is charged. It will be noted too that the plaintiff incurred medical bills for services rendered by the following institutions.

Lancet Laboratories on p 3 where he paid \$51-00 and an anesthetist.

The following is a summary of the expenses incurred and paid by the plaintiff to the various institutions as indicated in bundle A: which constitute the plaintiff's special damages claim.

Institution	Page in Bundle	Amount
Dr Muguti, Assistant & Visible Anesthetics	1	\$3 039.00
Lancet Laboratories	3	\$ 51.00
Lancet Laboratories	4	\$ 51.00
Parirenyatwa Group of Hospitals	5	\$ 20.00
Parirenyatwa Group of Hospitals	6	\$300.00
Parirenyatwa Group of Hospitals	7	\$116.00
Dr V.T. Rabvukwa & National Blood Zimbabwe Service	8	\$1444.00

Medical Centre 52 Bains Ave	9	\$319.00
Bains Imaging Group	10	\$400.00
Dr Muguti	10	\$490.00
Dr Muguti	11	\$160.00
Dr Muguti	12	\$2 980.00
Dr Muguti	13	\$1 660.00
Bains Imaging Group	13	\$ 300.00
Parirenyatwa Group Hospitals	14	\$ 44.50
Parirenyatwa Group Hospitals	15	\$ 240.00
Parirenyatwa Group Hospitals	15	\$ 120.00
Suburban Medical Centre	17	\$ 20.00
Greenwood Pharmacy	18	\$ 15.20
Subburban Medical Centre	18	\$ 3.00
Bontique Pharmacy	19	\$ 49.00
Trinity Pharmacy	19	
Oncestop Pharmacy	19	\$ 49.00
Parirenyatwa Group Hospitals	20	\$ 31.00
\Lancet Laboratories	21	\$ 65.00
Lancet Laboratories	23	\$ 14.00
Lancet Laboratories	24	\$ 14.00
Parirenyatwa Hosipital	25	\$ 31.00
Lancet Clinical Laboratories	27	\$ 51.00
Lancet Clinical Laboratories	28	\$ 25.00
Parirenyatwa Group Hospitals	29	\$ 58.00
Parirenyatwa Group Hospitals	30	\$507.00
Parirenyatwa Group Hospitals	31	\$111.00
Parirenyatwa Group Hospitals	32	\$170.00
Parchede Pharmacy	33	\$ 62.00
Parirenyatwa Group of Hospitals	34	\$720.00
Parirenyatwa Group of Hospitals	35	\$166.00

Parirenyatwa Group of Hospitals	37	\$ 18.40
Plaza Pharmacy	39	<u>\$ 3.90</u>
TOTAL		<u>\$13 918-00</u>

The defendant did not challenge these claims as detailed and was content to challenge only the claim of \$16-00 on p 13 in respect of the Messenger of Court and Kamusasa & Musindo Legal Practitioners receipt on p 9 of Bundle A.

In the circumstances the court finds that the plaintiff has adequately proved his special damages claim in the sum of \$13 918-00.

Re: General damages

The injuries sustained by the plaintiff were very severe. As described by the Doctor Muguti they were life-threatening. For a period up to 6 - 8 weeks the plaintiff's bowels and intestines were exposed (outside his belly as part of what the doctor described as an emergency abdominal surgery to drain abscess and remove perforated colon and fashion colostomy). Two surgical operations were necessary. Regrettably the plaintiff did not get the medical doctor to deal with the degree of pain and suffering endured by the plaintiff from time the plaintiff sustained the injuries up to and including recovery after the second operation. Considering the nature of the injuries there can be no doubt that the plaintiff experienced considerable pain in the treatment and recovery process. The plaintiff testified that he has suffered permanent disability in that his ruptured bowel is no longer complete and his damaged colon had to be removed and replaced with a fashioned one. The plaintiff suffered both external and internal scarring and that there is a risk of further surgical operations. Doctor Muguti testified that the plaintiff will in future experience pain on account of scarring which will be experienced when whether changes occur. He also indicated that the plaintiff is likely to suffer from disturbed bowel function such as more frequent stool. The plaintiff testified that he is a long distance truck driver who as a result of the injuries sustained is no longer able to drive long distances which he used to (from Mozambique to Democratic Republic of Congo).

General damages are compensation intended to place the injured party in the position he would have occupied had the wrongful act causing the injury not been committed. The damages are never perceived to be a penalty as the penal aspect attaching to the wrongful conduct is

usually addressed through the prosecution of the guilty party. See *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (SC). There is always the overriding need to ensure as far as that can be done that awards are not substantially at variance with previous awards in broadly similar cases.

The plaintiff's counsel referred the court to the case of *Union Government v Warnecke* 1911 AD 651 at 665.

The task of a judge in assessing an appropriate award of general damages is not made easy by the fact that there is no known formulae for equating pain suffered to a quantum of compensation.

In the case of *Sandler v Wholesale Coal Suppliers Ltd* 1941 SA at 199 WaterMayer JA had the following to say:

“There are no scales by which pain and suffering can be measured and there is no relationship between pain and money which makes it possible to express one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending on the judge's view of what is fair in all the circumstances”

Some of the considerations to be taken into account are the following:

- (i) The court's duty to maintain some semblance of uniformity in the course of future awards – *Sigournay v Gillbounds* 1960 (2) SA 552 (A) at SSSR.
- (ii) The fall in value of money (purchasing power) which should be taken into account without paying regard to a mathematical computation as that could lead to an unreasonable result. – *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 A at 116B-d.
- (iii) The economic conditions prevailing in the country. Given the facts of this matter in particular that the plaintiff went through more than 2 months of treatment and that he has sustained some permanent disabilities and that by reason of the nature of recovery (residual scarring and that the plaintiff is not able to perform the same kind of employment tasks thus reducing his earning capacity it is considered that general damages in the sum of \$5000-00 would be reasonable and adequate compensation to the plaintiff.

The plaintiff also claimed the sum of \$7 000-00 as and by way of future medical expenses. Although Doctor Muguti testified that the plaintiff has a risk of future surgical operation as a result of the nature of recovery he was not asked to address the likely cost of such

future medical expenses. The court is to a large extent left to guess on what to provide for in respect of future medical expenses which the court should not do. It is also important to note that no evidence was led by the plaintiff on the nature of rigorous recreational activities that he is now unable to perform e.g. any sporting activity on account of the injury. In the plaintiff's declaration the plaintiff averred that some of the injuries he sustained were multiple rib fractures but no evidence was led to substantiate these injuries.

The defendant in its closing submissions has sought to raise the partial defence of contributory negligence on the part of the plaintiff –defendant's argument being that the plaintiff threw himself in front of a moving vehicle thus contributing to his injury. In its plea the defendant did not plead contributory negligence on the plaintiff's part in the alternative. It will be observed that the plaintiff was compelled to go in front of the defendant's motor vehicle as a result of the defendant not agreeing to drop the plaintiff's wife who had jumped into her vehicle. The plaintiff's was an act of desperation having been anxious to not to lose the evidence that his wife was at Mutangadura Highway Stop Over with Mambare (that night) who had run away. He did not jump in front of the vehicle as suggested. He must have believed that his action of going in front of the defendant's vehicle which was moving slowly would force the defendant not to escape with his wife already in her vehicle especially since people had gathered around the defendant's vehicle.

Considering that the defendant had not been attacked by the plaintiff the claim of self-defence pleaded by the defendant cannot possibly justify contributory negligence as hers was a deliberate and intentional knocking down of the plaintiff. Defence counsel cited the authority of :

- (i) *Mabaso v Felix* 1981 (3) 865 A and
- (ii) *Minister Van Wet & Orde and Anor v Ntzame* 1993 (1) SA 560 (A)

in support of the proposition that before there can be an apportionment of damages between joint wrong doers in terms of the South African equivalent of s 4 (1) of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] the fault of the joint wrong doer must be the same form of fault. Counsel further submitted as follows:

“Thus, where the fault of the one joint wrong doer consists of negligence while the fault of the other amounts to intentional wrongdoing, there can be no apportionment of damages between them.”

This court having found that the defendant intentionally knocked down the plaintiff it is clear that there can be no apportionment of damages *in casu* based as it would be on the plaintiff's alleged contributory negligence.

I accordingly order as follows:

IT IS ORDERED THAT:

- (1) The defendant pay the plaintiff general damages for pain and suffering disablement and disfigurement and loss of life expectancy in the sum of \$5 000-00.
- (2) Special damages in the sum of \$13 918-00.
- (3) The defendant is to pay interest at the legally prescribed rate from the date of service of summons to date of payment.
- (4) Absolution from the instance be and is hereby granted in respect of the plaintiff's claim for future medical expenses.
- (5) The defendant pay the costs of suit.

Nyama Law Chambers, plaintiff's legal practitioners
Antonio & Dzvettero, respondent's legal practitioners