

MISHECK VELLAH

Versus

JEALOUS MOYO (alias) MUSHONA

And

MIKA MOYO

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 29 JULY AND 9 SEPTEMBER 2010

S S Mlaudzi, for the applicant

Unopposed Matter

NDOU J: The plaintiff aged 67, is a retired pastor in the Evangelical Lutheran Church of Zimbabwe. He is a farmer at Jonsyl Farm, West Nicholson. The 1st defendant is also a farmer and neighbour of the plaintiff. The 2nd defendant is also a farmer resident at Dwala Resettlement area in West Nicholson.

On 3 May 2008 the two defendants together with other persons unknown to the plaintiff approached the plaintiff. They accused him of being a member of the Movement for Democratic Change (“MDC”) political party. For allegedly being a member of MDC, the defendants and others severely assaulted the plaintiff with sticks and logs on the buttocks. The assault caused the plaintiff pain and suffering. As a result of the assault, the plaintiff was unable to walk from the scene of the assault. The plaintiff was conveyed from his farm in West Nicholson to Bulawayo by his brother. He was taken to Galen House Casualty Unit and at the health institution he was attended by Dr J G M Ferguson who observed and opined as follows:

“...when first seen the left buttocks demonstrated very severe bruising. Over a period of days the condition continued to deteriorate and it became evident that sloughing process was setting in and the skin was becoming gangrenous.

Mr Mlotshwa, a consultant surgeon was called in and the patient taken to Lancet Theatre for de-sloughing under general anesthesia. He then underwent a period of days while the injury site was treated in preparation for skin grafting. During this time he was confined to bed in the Mater Dei Hospital and still in considerable pain.

Eventually, the injury was considered suitable for skin grafting and he was taken to theatre, when [sic] an extensive graft was taken from his thigh and transferred to the injury site. There following a period of immobility when he had to be confined to the bed in hospital, to allow the graft to establish itself to the new site.

He was thought fit for discharge from hospital and very limited activity on the 26th June a period of fifty three days following the assault. The graft has now taken well and is gradually becoming robust, which is a necessary development as sitting on it is traumatic and further damage can be sustained.

The Reverend Vela had undergone a period of great suffering as a result of this very serious assault. He is gradually being restored to activity and to health but he will never be fit for the physical activity which he was able to indulge in prior o being injured. He will continue to suffer pain in the region for a long time to come.

It is fortunate that this man is emotionally very strong and has come through his ordeal in a most admirable way.

Dr Gary Ferguson 6/11/2008”

The plaintiff amended his claim to

- (a) ZAR3 000,00 for the loss of two cows
- (b) ZAR15 000 for transport to and from hospital, and
- (c) Damages for pain and suffering in the sum of ZAR500 000,00.

I will now consider these claims in turn.

Loss of two cows:

The information is scant in the pleadings. All that can be gleaned is that two cows died during the period that the applicant was hospitalized. The applicant does not link the death with his absence from the farm in a meaningful way. It is not clear how his presence on the farm would have prevented the death of the cows. There is no casual link between the assault (and the resultant hospitalization) and the death/loss of the two cows.

Transport between West Nicholson and Bulawayo

There are serious flaws in this particular prayer. In the summons, there are three prayers for transport. It is easy if I quote therefrom:

“Wherefore plaintiff claims:

- (a) (i) ...
- (ii) ...
- (iii) an equivalent of R15 000,00 being for transport
- (b) ...
- (c) A sum equivalent to R4 000,00 for transport of plaintiff from Jonsyl Farm to Bulawayo
- (d) A sum equivalent to R2 000,00 being for transport to and from hospital ...”

These expenses are not explained in the pleadings or the applicant’s affidavit of evidence. What can be discerned from his scant affidavit is that after the attack, his brother Aarot Vellah transported him from West Nicholson to Bulawayo and he is claiming R2 000,00 for that trip. There is no explanation for the R15 000,00 and R4 000 at all. This claim is in essence one for special damages. Special damages are those damages which have already occurred and be precisely calculated at the date of the trial. These special damages (also known as extrinsic damage) usually mean damage which is not presumed to be the consequence of a damage – causing event and must be specially pleaded and proved – *Shatz Investments (Pty) Ltd v Kalovyrrnas* 1976 (2) SA 545 (A) at 550 and *Law of Damages* – P J Visser and J M Potgieter at 56,; *A Guide to the Zimbabwean Law of Delict* G Feltoe at page 105; *The Quantum of Damages* (4th Ed) by J J Gauntlett at 2-3 and *Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A) at 64. The onus is upon the applicant to establish the special damages claimed by it – *Caxton Ltd & Ors v Reeva Forman (Pty) Ltd & Anor* 1990 (3) SA 547 (A) at 573. The fact that the applicant has failed to quantify with precision, the transport damages does not mean that his claim should be dismissed altogether. This incident took place during the troubled times of hyper-inflation when quantifying damages was extremely difficult.

In my view, this is the type of case where the court must do the best it can on the material available – *Esso Standard SA (Pvt) Ltd v Katz* 1981 (1) SA 964 (A) at 969H-970H. In the nature of things the court’s assessment of the loss here cannot be more than a rough estimate – *Caxton* case, *supra*, at 573 and *Law of Damages Through the Cases* – P J Visser and J M Potgieter at 427-8. The distance between Bulawayo and West Nicholson is about 180 kilometres. Soon after the assault, the applicant’s brother transported him for this distance. It is unlikely that even during the days of hyper-inflation this trip would have cost as much as ZAR4 000. Fuel at that time was about ZAR10 per litre and would unlikely have cost more than ZAR1 000 per trip even for a tank of 100 litres. Unfortunately all these important pointers of damages were not pleaded. The applicant was hospitalized for 4 months and went back. It is not clear how many, if any, trips he undertook for review by the doctor in Bulawayo. I would roughly estimate the travel expenses at ZAR5 000,00 for the initial transportation and subsequent visits for review.

General Damages for Pain and Suffering

The applicant claimed ZAR500 000. I have quoted from the doctor's report on the kind of pain and suffering. We are dealing here with the applicant who is in afternoon of his life i.e. aged 67. The injuries necessitated a long period of hospitalization. The injury required skin grafting. Admittedly there is no permanent disability, but this is a serious assault. I have through similar cases referred to by MUNGWIRA J in detail in *Ndawana v Nasho & Ors* 2000 (1) ZLR 23 (H) and also *Minister of Defence and Anor v Jackson* 1990 (2) ZLR 1 (SC) and arrive at a decision that ZAR500 000 is very high for the kind of assault. Accordingly, I feel that general damages in the sum of ZAR50 000 meet the justices of this case.

It is accordingly ordered that judgment with costs be and is hereby granted in favour of the applicant (plaintiff) against the respondents (defendants) jointly and severally as follows:

1. General damages in the sum of ZAR50 000 and special damages in the sum of ZAR5 000,00 together with interest on these sums at the prescribed rate from the date of judgment to date of payment in full.
2. The respondents (defendants) shall bear costs of suit on the ordinary scale.

Samp Mlaudzi & Partners, applicant's legal practitioners