

**NKOSITHABILE MDLONGWA**

**Versus**

**MLUNGISI NGWENYA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 16 MAY 2012 AND 7 MARCH 2013

*Mr Dube* for the plaintiff

Unopposed matter

**MAKONESE J:** On the 2<sup>nd</sup> of March 2012 the plaintiff issued summons against the defendant claiming the following relief:

- (a) payment of US\$10000 being general damages for pain and suffering
- (b) payment of US\$120 being special damages for medical expenses
- (c) payment of interest and costs of suit.

The defendant having been served with summons, failed to enter appearance to defend within the *dies induciae* and was duly barred. The plaintiff brought the matter on the unopposed roll and I directed that detailed Heads of Argument be filed to justify the claim for damages as set out in the summons and declaration.

This claim arises out of an assault inflicted upon the plaintiff by the defendant on the 2<sup>nd</sup> of September 2011. The plaintiff and defendant were both teachers at Inyathi High School at the relevant time. The plaintiff is a female adult and the defendant is a male adult person. A dispute arose between the parties over the occupation and use of a certain cottage at the aforesaid school. This resulted in the defendant assaulting the plaintiff all over the body with clenched fists. The defendant suffered a swollen face and bruises on the left shoulder. A medical report prepared by a Doctor revealed that the injuries were serious and the degree of force used in the assault was moderate. There was no possibility of permanent injury. The plaintiff alleges in her Heads of Argument that as a result of the assault she sought medical attention and was forced to purchase and wear spectacles because her vision was damaged

permanently as direct consequences of the assault. The plaintiff further complained that she now has permanent and recurrent migraine headaches which require her to constantly take medication in order to control them. The defendant has not apologised for his conduct.

The defendant paid an admission of guilt in the sum of US\$10 for contravening section 41(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] for conduct likely to provoke the breach of the peace. It is not clear why the defendant was not charged with the more serious offence of assault but that aspect is not relevant to the issues before the court.

There are only two issues for determination in this matter, viz,

- (a) the quantum of general damages for pain and suffering
- (b) the quantum for special damages

### **SPECIAL DAMAGES**

I propose to first deal with the issue of special damages because the issue is relatively straightforward. Special damages are those damages that have occurred and can be calculated with precision. The plaintiff contends that she spent money in order to attend to her eye sight problem which was caused directly by the assault. She claims that she should be compensated for those expenses. The plaintiff claims the sum of US\$120 being the cost of purchase of spectacles. In support of her claim she furnished a quotation from Premier Optometry Services dated 25<sup>th</sup> November 2011, which reflects the cost of the frames and lenses as US\$120-00. I must remark, however, that no direct medical evidence has been placed before me to establish that the purchase of spectacles is directly related to the assault. There is also no supporting evidence from the eye-specialist as to the cause of the eye-sight problem complained of by the plaintiff. Where no *viva voce* evidence is not led in court the assessment of damages can only be assessed on the basis of documentary evidence placed before the court. In the absence of a defence in rebuttal however, and where the amount being claimed appears reasonable, the court should in my view exercise its discretion. In case of *Mayisva v Commercial Union Fire and General Insurance Co. Ltd and another* 1984(2) ZLR 181, SAMATTA J, stated at page 191 as follows:

*“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 this matter I take the view that the amount being claimed for special damages is not unreasonable and conclude that plaintiff is entitled to the of US\$120 being the cost of the lenses and frames.

### **GENERAL DAMAGES FOR PAIN AND SUFFERING**

From the brief facts of this matter there can be no doubt that the plaintiff was subjected to pain and suffering and a measure of discomfort as a result of the assault by the defendant. The well established principle is that general damages are those that naturally flow from the wrong and are of a non-pecuniary nature such as pain and suffering, duration and intensity of pain caused by the intentional infliction of harm. The degree of force used in the assault, the nature and extent of injuries suffered by the plaintiff are all taken into consideration in the broadest of the general principle.

It is clear that the nature of the injuries suffered by the plaintiff are not very serious. A more detailed medical report by the examining Doctor would have assisted to properly describe the injuries and therefore the court is limited to those injuries reflected in the “Medical Affidavit” and “Clinical Notes.” The plaintiff essentially suffered a swollen face and shoulder. She was given some pain killers according to the “Clinical Notes.” The injuries suffered are consistent with an attack perpetrated by use of fists. Apart from the physical attack, the court is also entitled to have regard to the embarrassing nature of such an assault.

General damages for personal injuries are not meant to penalise the defendant but to achieve some form of compensation for the plaintiff. The court must ensure therefore that the damages awarded are reasonable fair and just. It is relevant to refer to the observations made by WATERMEYER JA in *Sandler vs Wholesale Coal Suppliers Ltd* 1941 Ad 194 at p 199:

*“--- it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet 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 the 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 certainly be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."*

The plaintiff has claimed general damages for pain and suffering in the sum of US\$10 000. I have no hesitation to find that the claim is excessive regard being had to the nature of injuries suffered by the plaintiff. The injuries do not in my view warrant a high award of damages. Whilst there are no scales with which the pain endured by the plaintiff can be ascertained, the damages I must award in this case ought to be commensurate with the nature of injuries suffered, which to my mind are not by any degree so serious as to justify the amount being claimed by the plaintiff.

I note that the plaintiff alleges that as a result of the assault she now suffers from permanent and recurrent migraine headaches. No evidence has been placed before the court to support these claims. The plaintiff also failed to indicate what medication, if any she is taking. It is not sufficient in such cases to allege matters involving medical conditions without adding any proof thereto. It should not have been difficult for the plaintiff to obtain such evidence in support of her claim for damages.

In all the circumstances of the case, I consider an award of US\$1500 as being reasonable compensation in respect of general damages for pain and suffering.

In the result, I make the following order:-

- (a) Defendant is ordered to pay the sum of US\$120 as special damages.
- (b) Defendant is ordered to pay the sum of US\$1500 as general damages for pain and suffering.
- (c) Defendant is ordered to pay interest thereon at the prescribed rate from date of summons to date of final payment.
- (d) Costs of suit.

*Messrs Cheda and partners, plaintiff's legal practitioners*