

MAVIS KUFAZVINEI

And

MUTEMO MANGWIRO

Versus

SUSAN MANGOZA

And

MCLEAN RUSAKANIKO

And

MPILO HOSPITAL

And

MINISTER OF HEALTH AND CHILD WELFARE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 16 JUNE 2022 & 14 JULY 2022

Unopposed matter

L. Mcijo for the plaintiffs

DUBE-BANDA J:

Introduction

1. This matter was set down on the unopposed motion court and was being postponed to enable plaintiffs' counsel to file supplementary heads in support of the order sought. The matter was finally heard by me on 16 June 2022. After hearing submissions in support of the order sought by the plaintiffs I reserved judgment.
2. Plaintiffs sought an order in terms of the amended draft couched as follows:
 - i. Defendants shall pay to the plaintiffs damages in the sum of USD100 000.00 or the equivalent at the prevailing rate (*sic*) at the time of execution of this order for

shock, pain and suffering, jointly and severally with one paying the other to be absolved.

- ii. Defendants to pay interest charged at the rate of 5% from the date of issuance of summons to the date of full and final settlement.
- iii. Defendants shall pay costs of suit at an attorney and client scale.

3. The background facts of this matter are that on the 11th December 2018, plaintiffs sued out a summons against the defendants claiming general and special damages. The relief sought was worded as follows:

- i. General damages in the sum of \$100 000.00 for shock, pain and suffering as a result of the negligent death of their biological son the late Darlington Takunda Mangwiro.
- ii. General damages in the sum of \$100 000.00 for loss of consortium arising from the negligent death of their biological son the late Darlington Takunda Mangwiro.
- iii. Special damages in the sum of \$50 000. 00 for loss of financial support arising from the biological son the late Darlington Takunda Mangwiro.
- iv. Interest at the rate of 5% from the date of issue of summons to the date of full and final payment.
- v. Costs of suit at an attorney and client scale.

4. On the 10th January 2019, defendant filed a notice of appearance to defend. In their plea filed on the 24 January 2019, defendants denied liability. It was averred that the death of Darlington Takunda Mangwiro (deceased) was not as a result of negligence and that the 1st and 2nd defendants had the requisite experience for the procedure they were performing.

5. At a pre-trial conference held before a judge the matter was referred to trial. The trial was set-down for the 24th November 2021, and the defendants were in default. The court made an order couched as follows:

- i. The defendants are in default.

- ii. The defendant's defence is hereby struck out.
 - iii. The plaintiffs are hereby granted leave to set this matter on the unopposed roll for finalisation without recourse to the defendants.
 - iv. Plaintiff to file an affidavit of evidence and written submissions on the law to sustain their claim.
6. The plaintiffs are the mother and father respectively of the now deceased, who died at the age of twenty-three years. At the time of his death he was a geology student at the School of Mines. He was asthmatic and had developed a nasal blockage which caused him to lose his sense of smell. On the 24th April 2015, he was at Mpilo Hospital and he was taken to theatre. In preparation for surgery he was attended to by the 1st and 2nd defendants who administered anaesthetic on him. He died while undergoing a medical procedure called bilateral polypectomy. He died on the same day at approximately 0930 hours.
7. In support of the claim plaintiffs filed an affidavit of evidence, heads of argument, supplementary heads of argument and an amended draft order. The claim is based on shock, pain and suffering arising from the negligence of the 1st and 2nd defendants, and the vicarious liability of the 3rd and 4th defendants in causing the death of plaintiffs' son. The amended draft order shows that the plaintiffs have abandoned other claims and persisted with a claim for general damages of shock, pain and suffering. Like in *Lopez v Minister of Health and Social Service* (HC-MD-CIV-ACT-DEL-2017/02346) [2019] NAHCMD 367(24 September 2019) I do not think any person can be unmoved by the death of plaintiffs' son. However at law plaintiffs must establish that they are entitled to the damages claimed.
8. Plaintiffs aver that the death of their son was caused by the sole negligence of the 1st and 2nd defendants, who were negligent in one or more of the following respects: that 1st and 2nd defendants had little experience in the field of anaesthetic, in that 1st defendant had one year experience while 2nd defendant had four months experience. They continued to administer drugs on the now deceased without assessing their side effects on his asthmatic condition. Did not check if the now deceased had any gastric contents in his stomach before administering anaesthetic drugs. Administered

anaesthetic drugs without supervision from senior doctors and they did not timeously call for help from senior doctors when the now deceased's chest was not moving but instead they continued to administer drugs which drugs eventually caused his death.

9. The first issue for determination is whether the death of the plaintiffs' son was caused by the negligence of the defendants. The second, assuming an affirmative answer to the first, is whether the plaintiffs suffered any actionable harm as a result of such negligence and, if so, whether the defendants are liable to the plaintiffs in damages for shock, pain and suffering.
10. On the uncontroverted facts and evidence before me I accept that the death of the plaintiffs' son was caused by the negligence of the defendants. I turn now and consider whether the plaintiffs suffered any actionable harm as a result of such negligence.
11. Plaintiffs contend that as parents of the deceased they went through the greatest anguish one can ever experience. He was their first born child, and had just completed his geology studies at the School of Mines. They looked upon him to inspire his siblings. They contend that the pain and suffering they went through and continue to endure cannot be measured in monetary terms. Losing their son has left a huge hole in their hearts. Plaintiffs are claiming damages in the sum of USD100 000.00 for shock, pain and suffering arising from the death of their son caused by the negligence of the defendants.
12. Mr *Mcijo* submitted that he failed to find an authority in this jurisdiction for claim of damages arising from the death of another, where the claim was not based on loss of support. I could not find any myself. Counsel then relied on the Namibian case of *Lopez v Minister of Health and Social Service* (HC-MD-CIV-ACT-DEL-2017/02346) [2019] NAHCMD 367(24 September 2019). In that case the plaintiff was the mother of the patient who died after delivery of a still born baby. The patient was left unattended after delivery and she bleed profusely. The doctor on call was called to assist a Supervising Sister to resuscitate the baby. The doctor certified the death of baby but failed to assess situation of the mother. Patient's condition deteriorated dangerously and the doctor after five hours made attempts to stabilize her after

stopping the bleeding from after-birth laceration. Patient could not regain consciousness after leaving theatre and she died. Patient's mother sued the Minister (in his official capacity) for breach of legal duty, in the first alternative negligence, and in the second alternative breach of constitutional right to found a family. Court found medical personnel liable on the basis of their breach of legal duty and awarded fair and reasonable damages to the mother of the plaintiff.

13. This matter is distinguishable from the *Lopez v Minister of Health and Social Service* in many fronts. In the *Lopez* case the court had before it specialist evidence. In this case the only evidence before court is the affidavit deposed to by the 2nd plaintiff. There was expert evidence that plaintiff suffered emotional shock as a result of the death of her daughter, and she required psychological counselling. Further she consulted a psychotherapist and certain psychotropic medication was prescribed for her. She paid fees to specialist doctors and paid for the medication. This showed that the emotional shock she affected her health. This is in sync with what was said in *Bester v Commercial Union Versekeringsmaatskappyy van Suid-Afrika Bpk* 1973 (1) SA 769 (A) that according to the Roman-Dutch law the plaintiff is entitled to recover damages for nervous shock caused by the defendant's negligence, where the nervous shock has directly impaired and injured his bodily health and strength; in other words, where it has affected his physical organism.
14. In *casu* there is no evidence of what the shock did to the plaintiffs. The only evidence before court is the affidavit of the 2nd plaintiff. It does not speak to what the shock did to his bodily health and strength; in other words, whether it affected his physical organism. There is no evidence that he sought medical treatment and medication for the shock he suffered, and what he paid thereat and would continue to pay. In fact the whole affidavit does not speak to this critical aspect of the case. There is no evidence from the 1st plaintiff. Evidence was necessary from the 1st plaintiff to show the shock she suffered and how it affected health and whether she sought medical treatment for it, the type of treatment and the cost thereof. There is no such evidence.
15. Further in the *Lopez* case there was documentary evidence which was placed before court to prove funeral expenses plaintiff incurred as a result of the death of her

daughter and that of her granddaughter. All in all the court in *Lopez* had evidence in which it could connect the emotional shock suffered by the plaintiff to the harm to her health and the cost thereof. There is no such evidence in this matter.

16. I have not been referred to any authority nor have I seen one which allowed damages to be awarded for shock unaccompanied by physical injury or illness (to the plaintiff) in an action founded on negligence. In *casu* there is no evidence the shock was caused by the sight of their son in his last moments. The reading of the papers indicate that the shock was caused by the reading of the post mortem report and the facts given during the Inquest proceedings. I have not been referred to any authority nor have I seen one where the shock so produced could give ground for an action. There is no evidence that the plaintiffs suffered personal injury to themselves caused by the defendants' negligence, nor that the shock has directly impaired and injured their health. There is no medical evidence that the plaintiffs' were treated for the shock they say they suffered. My view is that in such a case the damages would be too remote to be actionable, and plaintiffs' claim based on shock must fail.
17. Plaintiffs' claim is also based on pain and suffering. Pain and suffering is a form of non-patrimonial loss closely associated with a party's personal bodily injuries. It is an umbrella concept which incorporates not only physical pain which is experienced, but also shock. To be actionable, however, pain and suffering must be associated with the plaintiff's personal injury: "there is no redress for grief and distress at the suffering or death of another." See: Boberg *The Law of Delict* 516; Der Walt & Midgley *Principles of Delict* (3rd ed. LexisNexis) p. 47; *Collins v Administrator, Cape* 1995 4 SA 73 (C) 94. There is no evidence of the plaintiffs' personal injury in this case and the claim based on pain and suffering must also fail. The grief and distress standing alone arising from the death of their son is not actionable. What is conspicuous is that in their heads of argument plaintiff cited a plethora of authorities dealing with damages arising from personal injuries, but they do not provide evidence of personal injury in this case.
18. I have come to the conclusion that the plaintiffs are not entitled to damages for shock, pain and suffering. There is just no evidence that the shock directly impaired and

injured their bodily health, strength and affected their physical organism to be actionable at law. I conclude that the plaintiffs did not suffer any actionable harm as a result of the negligence of the defendants.

19. In conclusion, I need to comment on the contention taken in the plaintiffs' supplementary heads of argument filed on the 22 June 2022 that this court must develop the common law because it is discriminatory against elderly people who are denied an opportunity to claim damages in the event of losing a loved one. I do not agree with this submission. The court has an obligation to develop the common law where it deviates from the spirit, purport and objects of the Bill of Rights by removing the deviation. See: *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC). In *casu* there is no deviation at all, what is missing is evidence to make the shock plaintiffs' suffered an actionable harm. The missing link here is not the deviation of the common law, but the absence evidence.
20. Furthermore, the need to develop the common law is not pleaded. It cannot be raised for the first time in the heads of argument. What is clear in this case is that the summons was sued out without any researched having been carried out, research was done after the matter was referred to the unopposed roll and plaintiffs were asked to provide legal authority in support of their claim. Research must precede the issuance of summons and not the other way round.
21. The answer to the second issue whether the plaintiffs suffered any actionable harm as a result of the defendants' negligence is answered in the negative, i.e. plaintiffs did not suffer any actionable harm. It is for the above reasons that plaintiffs' case must fail.

In the result, I order as follows:

That plaintiffs' claim be and is hereby dismissed with no order as to costs.

Liberty Mcijo & Associates plaintiffs' legal practitioners