

LINAH NCUBE
versus
WANKIE COLLIERY COMPANY
and
SMART CHUMA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 13-14 February 2006 & 23 February 2007

Civil Matter

Mr Mwonzora, for the plaintiff
Ms Moyo, for the defendant

CHATUKUTA J: At the commencement of these proceedings, the plaintiff abandoned its claim against the 2nd defendant. There was no proof of service on the 2nd defendant. The plaintiff indicated that she would pursue the action without the 2nd defendant. The 1st defendant submitted that it would not suffer any prejudice and therefore did not object to the matter proceeding without the 2nd defendant.

The plaintiff issued summons in the High Court claiming damages in the sum of \$10 300 000 (old currency) for loss of support, interest *tempore more* at the prescribed rate from the date of summons to the date of payment and costs of suit. The plaintiff applied to amend her summons by the deletion of \$10 300 000 (old currency) and substitution thereof by \$1 500 000 000 (old currency). The application was not opposed by the defendant and was accordingly granted.

The following issues were referred to trial:

- “1. Whether Plaintiff was wholly dependant on the late Bushe Nyaze and whether the late Bushe Nyaze had any legal obligation to maintain Plaintiff and whether Plaintiff has a cause of action against 1st Defendant.
2. Whether 2nd Defendant drove 1st Defendant’s vehicle negligently and at excessive speed without due care and attention and whether 1st Defendant is vicariously liable under the circumstances.
3. Whether Plaintiff suffered damages
4. Whether or not the Estate of the late Bushe Nyaze was paid all the benefits and compensation due after the death of Bushe Nyaze.”

It is common cause that on 13 January 2002, Bushe Nyaze died in a car accident. The deceased was the plaintiff’s son. At the time of his

death deceased was employed by the 1st defendant as an artisan/motor mechanic. On the fateful day, the deceased was being driven home from work at about 0500hrs by the 2nd defendant, who was also employed by the 1st defendant. Bushe Nyaze's death arose in the course of his duty.

The plaintiff testified that the 2nd defendant was convicted of negligent driving by Hwange Magistrates Court. It was, however, clear from the record of proceedings, duly certified by the Clerk of Court, Hwange, that the 2nd defendant was convicted of culpable homicide. He was sentenced to a fine of \$2 000 and in default of payment to 6 months imprisonment. She stated that arising from this conviction, 1st defendant was vicariously responsible for the death of her son. It was her evidence that she was dependant on the deceased during his lifetime starting from when her husband died in 1998. The deceased provided for her upkeep and for school fees for his siblings. At the time of his death, the deceased was building a house for the plaintiff. Plaintiff testified that without the deceased's assistance, she could not make a decent living. As proof of her dependence, the plaintiff produced a document captioned "Expression of Wish" in relation to the Wankie Colliery Company Limited Group Life Assurance Scheme, in which the deceased expressed his wish that the benefits under that scheme be payable to the plaintiff.

The plaintiff produced pay slips reflecting deceased's for 2001 and 2002. According to the 2001 pay slip, the deceased had been earning \$28 186.08. However, the 2002 pay slip was not in the deceased's name and *Ms Moyo*, for the defendant, objected to its production. She undertook to and did produce a pay slip indicating how much the deceased would have earned in January 2006 had he not passed on.

Under cross examination, the plaintiff testified that she has never been employed in her entire life. Her husband had looked after her and on his death, her son the deceased, took over. Before her marriage she had been looked after by her parents. She was 53 years old and apart from suffering from high blood pressure, she was in general good health. She stated that she has attempted farming to sustain herself, but due to lack of resources her attempt failed. She was currently looking after 5 of her own children. She was paid benefits under the Wankie Colliery

Company Limited Group Life Assurance Scheme as the nominated beneficiary. In 1999 she got her husband's terminal benefits. The plaintiff thereafter closed her case.

The defendant applied for absolution from the instance on two grounds, namely:

1. The plaintiff did not establish a cause of action against 1st defendant in view of section 8 of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (Statutory Instrument 68 of 1990).
2. The plaintiff did not lead evidence to establish quantum of damages.

I am indebted to *Ms Moyo* for her comprehensive submissions. *Ms Moyo* submitted that the National Security Authority Act [*Chapter 17:04*] provides for compensation in the event of death of an employee. Every employer is obliged to join the National Security Scheme which provides for benefits and compensation to employees on injury or death. Section 8 of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (Statutory Instrument 68 of 1990) provides that no action can lie at common law against the defendant. It was further submitted that the although vicarious liability forms part of an exception as provided for in section 9 of the Notice, the 2nd defendant was not a person trusted with the management, charge, or the hiring and firing of workers as defined in the section. He was a mere driver. It was submitted that, in any event, the exception applies only where there is a claim for additional compensation and the plaintiff did not plead such a claim. *Ms Moyo*, further submitted that the plaintiff did not follow the procedure that is prescribed by the Notice before instituting a claim for additional damages. She submitted that section 10 of the Notice requires that notice be given to the general manager or employer of the intention to institute such proceedings

Mr Mwonzora, for the plaintiff submitted in response that the claim against the defendant is based on the doctrine of vicarious liability. Under this doctrine, the employer is individually liable to the acts of the employee committed while the employee is acting within the scope of his

employment. *Mr Mwonzora* submitted that the defendant therefore falls under the exception in section 9 of the Notice. He further submitted that the requirements under section 10 of the Notice apply only in relation to claim for additional compensation by the worker himself and not his dependant. He submitted that the definition of “worker” in the Notice does not include a dependant. He cited three formulas used in the calculation of damages

The second ground of the application was that the plaintiff had not led any evidence to prove the quantum of damages. *Ms Moyo* submitted that the plaintiff did not lead any evidence on how she arrived at the amount of \$1 500 000 000 that she claimed as damages. The formula that *Mr Mwonzora* gave from the bar would have assisted the deceased had he been alive and claimed for loss of earnings for himself. It was submitted that the deceased had, during his lifetime, been supporting seven people, that is, the plaintiff, his five siblings and himself. It was submitted that the plaintiff did not lead evidence on her life expectancy which has been established at law as an essential consideration in the assessment of loss of earnings.

Turning to the main basis upon which the defendant applied for absolution from the instance, the defendant submitted that the plaintiff did not establish a cause of action against 1st defendant in view of section 8 of the National Social Security Authority (Accident Prevention and Workers’ Compensation Scheme) Notice, 1990 (Statutory Instrument 68 of 1990) (herein referred to as “the Notice”).

Section 8 of the Notice provides

- “8. From and after the 1st January 1960-
- (a) no action at common law shall lie by a worker or any dependant of a worker against such worker’s employer to recover any damages in respect of any injury resulting in the disablement or death of such worker arising out of and in the course of his employment; and
 - (b) no liability for compensation shall arise save under and in accordance with this scheme in respect of such disablement or death;
 - (c)

Section 8 is preemptory. It has the effect of ousting the plaintiff's right to a remedy against the employer under common law. The rationale for the provision is better understood from the perspective that the employer is compelled in Part X of the Notice to contribute towards the Workers' Compensation Fund from which an employee or his/her dependant will benefit in the event of an injury to the employee or his/her death. The contributions are intended to provide for compensation in the event of injury to or death of an employee. The plaintiff admitted to have collected the benefits due under the Notice. This is because of the defendant's liability in respect of the plaintiff's son's death arising from the deceased's employment. The plaintiff testified that her son died during the course of his employment and as a result of the negligence of defendant's employee. This is an eventuality that is envisaged in the Notice. The plaintiff, having received compensation under the Notice, would therefore not be entitled to bring an action for compensation under common law as in this case.

However, there is an exception in section 9 of the Notice. Section 9 (1) provides-

"9. (1) Notwithstanding anything to the contrary contained in this Scheme if a worker meets with an accident which is due-

- (a) to the negligence-
 - (i) of his employer; or
 - (ii) of a person entrusted by his employer with the management or in charge of such employer's trade or business or any branch or department thereof; or
 - (iii) of a person having the right to engage or disengage workers on behalf of his employer;the worker or, in the case of his death as a result of such accident his representative, may within 3 years of such accident proceed by action in a court of law against the employer where the employer concerned is an employer individually liable or otherwise against the employer and the general manager jointly for **further compensation in addition** to the compensation ordinarily payable under this Scheme." (own emphasis.)

Firstly, *Ms Moyo*, submitted that the driver who caused the accident in which the plaintiff's son died, did not fall in the class of the persons so identified in section 9(1). *Mr Mwonzora* submitted that since the driver had been acting within the scope of his duty, the employer was

vicariously liable and therefore the driver would fall under section 9(1). I am inclined to agree with the submissions by *Ms Moyo*. Section 9(1) specifically identifies the negligent persons to be the employer, a person entrusted with the management or in charge of business and a person who has the right to engage or discharge workers on behalf of the employee. It is therefore clear that the persons identified are persons who control and run the affairs of the company. It is my further view that section 8 adequately provides for the liability of the defendant arising from the negligence of driver. That is why the compensation provided in section 9 is additional compensation to the compensation that the plaintiff would have received under the scheme from the defendant.

The second submission was that, assuming that the defendant would be liable vicariously in terms of section 9(1), (which it is not), the plaintiff was required in section 10(2) of the Notice to notify the general manager before instituting these proceedings. *Mr Mwonzora* submitted that section 10 applies only to workers and dependants. He did not read section 10(1)(b)(ii) provides that-

“in the case of a worker who had died the amount recoverable in terms of this paragraph shall not exceed the total amount of damages, if any, which, in the opinion of the court, but for this Scheme, would have been awarded to all the dependants of the worker notwithstanding that they may have had separate or distinct claims in respect of such damages.”

Most importantly, *Mr Mwonzora* did not read section 4(7) of the Notice. The section provides that:

“any reference in this Scheme to a worker who has been injured shall, then the worker is dead or is a person under disability, include a reference to his representative or his dependants or to any other person to whom or for whose benefit compensation is payable.”

This puts to spend the plaintiff's argument that section 10 does not apply to her.

The last issue which was raised by the defendant regarding the Notice was that the plaintiff never pleaded that its claim was for additional compensation under section 9(1) of the Notice. Indeed the plaintiff sued the defendant under the principle of vicarious responsibility.

Order 3 Rule 11 of the High Court Rules provides what should be contained in a summons and this includes a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action. Order 17 Rule 109 also requires that the declaration contain the same contents. This is intended to assist the defendant to identify the cause of action.

I am of the view that one of the issues for determination is whether or not the deceased had a legal obligation to maintain the plaintiff. G Feltoe **A Guide to the Zimbabwean Law of Delict** 2nd ed 1990 states at p 111 that in order for a plaintiff to be successful in a claim for loss of support, the plaintiff must prove that the deceased owed a legal duty of support to the plaintiff during deceased's lifetime. E. Spiro in the **Law of Parent and Child** 4th ed, 1985, states that-

“The requisites of the duty of children to support their parents are, *mutatis mutandis*, the same as those corresponding duty of the parents, namely the parent must be unable to support himself or herself, that is to say lack of means is not sufficient if the parents are able to maintain themselves by working. A parent who claims to be entitled to maintenance must show, it has been said, that he or she is in want of what should, considering his or her station of life, be regarded as coming under the law of necessities.....”(see *Oosthuizen v Stanley* 1938 AD 324 at 327-328.)

Therefore in order for the plaintiff to successfully sue for loss of support, she must prove that she could not support herself and was therefore dependant upon the support from the deceased child. The duty to support the plaintiff must have arisen during the deceased's lifetime. This is clearly stated in Corbett Buchanan & Gauntlett on **The Quantum of Damages in Bodily and Fatal Injury Cases**, 3rd ed. 1985. At p77, the authors state that :

“The foundation of all claims for damages for loss of support arising by reason of the death of a person is a legal duty to provide such support owed by the deceased during his life time.”

DAVIES J in *Manuel v African Guarantee & Indemnity Co. Ltd and Anor* 1967 RLR 45 at page 49C-G extends the requirements for a claimant to succeed in a claim for loss of support. He states-

“To summarise, I consider that, in order to succeed in her claim for general damages in this case, the plaintiff must establish, on a balance of probabilities, and not merely as a matter of speculation-

- (i) that, since the death of her son, she has been indigent, or that she is likely to become indigent, having regard not merely to her own position but also to her obligations towards her surviving children;
- (ii) that she has not been able to obtain support from her husband for herself or her children;
- (iii) that the deceased would have been in a position to support her at such time as she might require such support.”

However, DAVIES J, at p51H underscored that-

“It is not sufficient for the plaintiff to prove merely that the deceased would have supported her, she must also prove that he would have been under a legal obligation to support her, having regard to her own indigence. It is on this aspect of the case that the plaintiff has failed to satisfy me.”

In the *Manuel case* the plaintiff had also lost a son aged 14 years old in a car accident. The son had been working as a shop assistant. The plaintiff had been working and would have been able to continue working for a further period of 10 years. The sentiments by the judge were based on the plaintiff’s claim that the deceased had only been working for a year and would have continued to support her had he lived.

The plaintiff did not satisfy me that she was not able to maintain herself during the lifetime of the deceased and after death. The plaintiff did not testify on her incapacity to support herself during the deceased’s lifetime leading to the deceased supporting her. She testified that she has always been maintained throughout her life by the men in her life. Before she was married, she was maintained by her father. On marriage, her husband took over from her father with the deceased taking over on the death of her husband. Her husband died in 1998. According to her identification card, she was born on 10 October 1953 and was therefore 45 years old when her husband died. According to the letter from the defendants dated 13 February 2006, the deceased was appointed as an artisan only in 1999. Before then he had been undergoing apprenticeship training. The plaintiff did not testify as to who maintained her during that period. She did not indicate why she was not able to work then in order to fend for her and her other five children. The plaintiff did not state the ages of the children and what the children were doing for a living and

hence establish that she did require the assistance of the deceased during his lifetime to maintain his siblings.

The plaintiff testified that she received terminal benefits in 1999 following her husband's death. She did not indicate how much the benefits were and what she did with the benefits. This would have assisted in proving whether or not she needed support from the deceased and if so to what extent. In 2002 when her son died, the plaintiff was 49 years old and ordinarily would have been capable of looking after herself. The plaintiff testified that she attempted to farm but failed because of lack of resources. She did not testify on how she is currently, after her failed attempts at farming, fending for her 5 children whom she stated were not generating any income.

It should be noted that the only evidence led by the plaintiff related to her incapacity to earn a living after the death of her son. The legal obligation to support a parent cannot surely only arise at the time of the deceased's demise. The obligation must have existed during the deceased's lifetime. In support thereof, the plaintiff referred the court to the "Expression of Wish" which identified the plaintiff as a beneficiary to the Wankie Colliery Limited Group Life Assurance Scheme in the event of the deceased's death. As proof that the plaintiff was indeed the deceased's dependant, I assume the plaintiff relied on the following statement in the "Expression of Wish"-

"I, Bushe Nyaze do hereby acknowledge that the Employer shall make the final decision as to which of my dependants shall receive the benefits of the Scheme and I draw attention to the fact that I would wish these benefits to be paid to:

Full names.....LINA NCUBE"

I do not believe the reference in this document to the plaintiff as the deceased's dependant establishes that the deceased had a legal obligation to maintain the plaintiff. Such reference was intended specifically for the purposes of the Wankie Colliery Company Limited Group Life Assurance Scheme. In any event it does not assist in explaining why the plaintiff could not work for a living and depend on her son for sustenance. It is therefore my view that the plaintiff failed to

prove that she was owed a duty of support by the deceased during his lifetime.

The defendant submitted that he plaintiff did not prove the quantum of damages she seeks. I have not considered it necessary to determine the issue in view of my conclusions above.

The application by the defendant for absolution from the instance is granted with costs.

Mwonzora and Associates, plaintiff's legal practitioners
Coghlan Welsh & Guest, defendant's legal practitioners