

EDGAR MAFEMERA  
versus  
ZAC CHIDAVAENZI  
and  
THE MINISTER OF HOME AFFAIRS N.O

HIGH COURT OF ZIMBABWE  
BERE J  
HARARE, 24 November 2009 and  
30 November 2011, and 5 March 2012

### **Default Judgment**

*E Jori*, for the plaintiff  
No appearance for the defendants

BERE J: On 30 November 2011, and after hearing *viva voce* evidence from the plaintiff and considering the fairly detailed submissions made by the plaintiff's counsel I granted the following order:

“It is ordered that:

1. The default judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in the sum of US\$30 000-00 being general damages with interest thereon calculated at the prescribed rate from February 2009 to date of full payment.
2. The default judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in the sum of US\$2 475-00 being special damages with interest thereon calculated at the prescribed rate from February 2009 to date of full payment.
3. The default judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in the sum of US\$7 000-00 for future medical expenses with interest thereon calculated at the prescribed rate from 30 November 2011 to date of full payment in full.

4. The defendants pay the various amounts and costs of suit jointly and severally the one paying to absolve the other.”

I did indicate then that my reasons would follow. Here they are:

### **The Background**

The plaintiff's case as derived from his declaration is that the first defendant is a member of the Zimbabwe Republic Police who at the material time was stationed at Harare Central Police station. On 13 July 2002 at approximately 1600 hours the plaintiff was driving his Mazda 323 Sedan motor vehicle along Leopold Takawira Street, in Harare. Whilst he was in a stationary position, the first defendant acting in and during the scope of his duties as a policeman with the Zimbabwe Republic Police emerged near the plaintiff's motor vehicle. Without warning the first defendant proceeded to discharge eight rounds of ammunition into the plaintiff's vehicle at close range causing serious injuries to the plaintiff. The plaintiff was not armed and showed no signs of resistance.

The plaintiff was rushed to the Avenues Clinic in Harare for medical attention. It was established that his right arm had been shot resulting in bone muscle and nerve damage and had to undergo surgical treatment which required the arm to be kept in plaster for a considerable length of time. In addition, it was also established that he had suffered serious abdominal injuries.

The plaintiff has been in and out of hospital ever since he was so seriously injured. The medical report by the orthopaedic surgeon, BB Bhagat shows the following detailed injuries suffered by the plaintiff as a result of the gunshots; the plaintiff is no longer able to use his right wrist and hand for any functional activities of writing or working because of the weakness of the radical nerve recovery. The fracture on the hand continues to bother the plaintiff in the sense that in cold weather it aches. The plaintiff was no longer able to attend to his occupational duties using his right hand because of radical nerve paralysis.

On abdominal injuries, it was established that the soft tissue in the abdominal muscle was damaged because of the bullet fragments in the abdomen wall.

The operation which the plaintiff had to undergo has left permanent surgical scars which in themselves are irritable and the plaintiff will never be the same person again. The final medical examination quantified the plaintiff's permanent disability at 50%.

For all what the plaintiff went through he issued out summons against the defendants seeking the following:

- a) General damages for pain and suffering, loss of amenities and permanent disfigurement and loss of bodily functions - US\$30 000-00
- b) Special damages - US\$10 000-00
- c) Future medical expenses - US\$10 000-00
- d) Costs of suit.

On the day this matter was scheduled to be heard the defendants were in default hence this matter had to be dealt with by way of a default judgment.

The plaintiff gave evidence in support of his claim. The narration of the events leading to his serious injuries was no more than a confirmation of the story as summarised in his declaration.

The plaintiff's testimony was to the effect that on 13 July 2002 he drove his Mazda 323 into the City of Harare carrying two passengers. Having dropped the passengers the plaintiff drove his car to Leopold Takawira Street and parked his motor vehicle with the intention of disembarking. He said as he was preparing to disembark from the motor vehicle he looked to his right and saw a stranger pointing a gun at him. In his panic – stricken state the plaintiff attempted to lock his doors from inside. The result was random firing by this stranger who later turned out to be the first defendant. Several shots were fired, some of which went through the stomach and exited. One of the shots fractured the plaintiff's right hand in the humerus.

In a desperate attempt to draw the attention of other passers-by the plaintiff started the vehicle and using his left hand tried to pull the vehicle out of the parking bay. The first defendant's response to all these desperate manoeuvres by the plaintiff was to shoot the wheels of the plaintiff's vehicle with the result that the plaintiff lost control of the vehicle and rammed into a parked truck.

The plaintiff who was badly injured and now in a pool of blood, was taken to Harare Central Police Station and it was there that a decision was made to convey the plaintiff to Parirenyatwa Hospital in a City of Harare ambulance. The plaintiff found himself in the special intensive care unit where his condition had to be monitored every minute.

It was the plaintiff's evidence that he did undergo an operation on the stomach and the hand to see the extent of the injuries. This operation was carried out by Dr Mungami (a specialist surgeon) and Doctor Bhagat (a specialist for bones). The plaintiff said he had to undergo three operations on 13, 15, and 27 July 2002.

The plaintiff said ever since he had been in and out of hospital and that he is supposed to undergo further operations. The detailed medical reports by Dr B Bhagat confirmed this.

The plaintiff took us through the medical expenses incurred in the whole exercise including anticipated future medical expenses.

As for the medical expenses incurred the plaintiff produced invoices and receipts which totalled US\$2 475-00.

As for future medical expenses the plaintiff produced estimates from his specialist surgeon which amounted to \$7 000-00.

It is imperative at this stage to try as much as I can to lay down the legal approach that the courts have followed in the assessment of damages. I must confess; the process of quantifying damages is not an easy walk. It does not follow a mathematical formula but it invariably requires properly anchored estimations largely guided by the best evidence presented.

The principles which the court must consider are well documented though not exhaustive. One of the leading decisions on the subject is the case of *Minister of Defence & Anor v Jackson*<sup>1</sup> where the court attempted to lay down broad guidelines in the assessment of damages by stating the following:

“It must be recognized that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge. This notwithstanding, certain broad principles have been laid down which govern the obligation. These are:

- (1) General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.
- (2) Compensation must be so assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing him injury had not been committed. See *Union Government v Warnecke* 1911 AD 651 at 665.

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<sup>1</sup> 1990 (2) ZLR 1 (SC) at pp 7-8

- (3) Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.
- (4) The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *Sigournay v Gillbanks* 1960 (2) SA522 (A) at 555 H.
- (5) The fall in the value of money is a factor which should be taken into account in terms of purchasing power, “but not with such an adherence to mathematics as may lead to an unreasonable result, per SCHREINER JA in *Sigournay’s* case, *supra*, at 556 C. See also *Southern Insurance Association Limited v Bailey* NO 1964 (1) SA 98 (A) at 116 B-D; *Ngwenya v Mafuka* S-18-89 (not reported) at p 8 of the cyclostyled copy.
- (6) No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he be a millionaire or a pauper. See *Radebe v Hough* 1949 (1) SA 380 (A) at 386.
- (7) Award must reflect the state of economic development and current economic conditions of the country. See *Mair’s* case, *supra*, at 29 H; *Sadomba v Unity Insurance Company Ltd & Anor* 1978 RLR 262 (G) at 270 F; 1978 (3) SA 1094 (R) at 1097 C. *Minister of Home Affairs v Allan* S-76-86 (not yet reported) at p 12 of the cyclostyled copy. They should tend towards conservatism lest some injustice be done to the defendant. See *Bay Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274 H.
- (8) For that reason, reference to awards made by the English and South African courts may be an inappropriate guide, since conditions in those jurisdictions, both political and economic, are so different.”

It has been stated on times without number that the quantification of damages as an exercise is not just like a walk in a park – it is not an easy exercise but at the end of the day one must endeavour to award a figure of compensation “which is fair in the eyes of society” given the peculiar circumstances of the case.

In *casu*, by absenting themselves from court on the day of the hearing, the defendants must have fully realised the futility of the nature of their defence to the plaintiff’s clear case. In the court’s view, this is one case which demonstrates unimaginable brutality and unacceptable overzealousness on the part of the first defendant. To pump out several shots into the body of an unarmed civilian who is suspecting nothing from the police except the usual protection is to be extremely reckless and that conduct is highly reprehensible.

Reasonable suspicion of one's possible involvement in some criminal conduct must not just be grounded in air but there must be some basis for it, otherwise police officers would involve themselves in serious omissions with impunity.

In the instant case, even if one were to give the first defendant some benefit of doubt on his motive in shooting the plaintiff (which position I am extremely constrained from adopting) a reasonable police officer does not just start by recklessly pumping bullets into the body of a suspect. There is certainly a more civilized way of confronting a criminal suspect.

What was demonstrated by the first defendant was typical of a war situation. But the plaintiff was not at war with the first defendant, but an innocent citizen going about his own business. The swift and ruthless action by the police completely surprised the plaintiff.

The result of the brutal action of the first defendant is that the plaintiff will never have his body intact and in its original frame. Prior to his injury he commanded a decent job as an accountant. The plaintiff, has been forced to leave this job because he was no longer able to fully discharge his functions in his injured state.

It was for these reasons that on 30 November 2011 I granted the order in question.

*Wintertons*, plaintiff's legal practitioners