

TREVOR SIMBANEGAVI
versus
OFFICER JACHI

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 29 August 2012 & 20 February 2013

T. Christmas, for the plaintiff
Defendant in default

Unopposed Application

MAKONI J: On 8 December 2010 at around 1700 hours and in Avonlea Drive, the plaintiff was approached by the defendant who was in company of other officers of the Criminal Investigation Department. The defendant ordered the plaintiff to disembark from the motor vehicle where he was sitting. He ordered the plaintiff to lie on the ground on his back.

The defendant accused the plaintiff of having stolen the motor vehicle he was in. The plaintiff protested his innocence. The defendant who was standing directly above the plaintiff, fired several shots aimed at the plaintiff's legs. He proceeded to handcuff the complainant and drove around with him for several hours before dropping him off at Harare hospital. He did not remove the handcuffs. The defendant did not take the plaintiff to any police station for charges to be laid against him.

A total of six bullets were fired into the plaintiff's legs. As a result, he sustained numerous injuries from which he;

- (a) Endured and still experiences excruciating pain,
- (b) Had to have four steel plates surgically inserted in his right leg,
- (c) Had to have an above the three amputation of his left leg,
- (d) Suffered *contumelia* as he was subjected to cruel, inhuman and degrading treatment.

The plaintiff incurred medical expenses in relation to the knee amputation, insertion of steel plates to reinforce the injured leg, analgesics and other medical procedures. Due to the nature of the injuries and associated complications, the disability percentage was assessed at 63%.

The plaintiff then instituted action proceedings against the defendant claiming:-

- (a) \$50 000-00 being damages for shock, pain and suffering
- (b) \$100 000-00 being damages for loss of amenities of life
- (c) \$50 00-00 being damages for *contumelia*
- (d) \$11 367-00 being special damages for medical expenses.
- (e) Interest on the total sum of \$211 367-00 at the prescribed rate for the date of summons to date of trial payment
- (f) Costs of suit.

The defendant was served with the summons and did not enter appearance to defend. The matter was set down on the unopposed roll for the plaintiff to establish his claim.

In his affidavit of evidence, the plaintiff detailed how he was shot, the injuries he sustained, some of the procedures he under-went and the medical expenses he incurred in respect of the procedures.

He then concluded in affidavit with a statement that he is entitled to the damages in the summons and declaration as the shooting was unjustified and unprovoked.

He did not give evidence at all to establish a basis for awarding him damages for *contumelia* and loss of amenities of life. Some attempt was made in the Heads of Argument to establish how the plaintiff suffered damages for the *contumelia* and loss amenities.

The case of *Matthew Mbundire v Tryone Sim Buttress* SC 13/11 is very instructive. GARWE JA considered the approach that has been followed by the courts in the assessment of damages in general and special damages in particular. He looked at a number of authorities and I will quote in extenso from p 4 of the judgment:-

“In *Hersman Shapiro & Co* 1926 TPD 367, 379-80 STRATFORD J observed:

‘.... Monetary damage having been suffered, it is necessary or the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it....

In *Ebrahim v Pittman* N.O. 1995(1) ZLR 176H, 187C-D BARTLETT J quoted with approval the remarks of BERMAN J in *Aarons Whale Rock Trust v Murray & Roberts Ltd & Anor* 1992(1) SA 652(C), 655-656F that:

‘Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss.’ ...

There must of course be sufficient evidence before the court for it to be in a position to make a proper assessment of damages, for
‘.. it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made’:

Per ROSE INNES AJ in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976(2) SA 111(C) at 118E. See also *Mkwananzi v van der Merwe & Anor* 1970(1) SA 609(A) at 630.

Thus where evidence is available to a plaintiff to place before the court to assist it in quantifying damages, and this is not produced, so that it is impossible for the court to do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance.....’.

In *The Quantum of Damages in Bodily and Fatal Injury* cases 3 ed by Corbert, Buchanan & Gauntlett, the learned authors state as follows at p 99:

In the case of damages which are capable of exact mathematical computation, such as for example medical and hospital expenses, proper evidence establishing the loss and substantiating the precise amount of the claim must be tendered. Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order absolution from the instance”

What is coming out of the above authorities as quoted by GARWE JA in Matthew Mbandire *supra* is that a plaintiff must provide a factual basis, in evidence, that he suffered pecuniary damage. Once that is established, the court can then estimate the amount

of damages as best as it can on the evidence available. When he has not done so, the court is justified in ordering absolution from the instance. This is the situation that the plaintiff finds himself *in casu*. Evidence is led through the plaintiff either *viva voce* or through an affidavit. It cannot be canvassed in the Heads of Argument. In the result the defendant must be absolved from the instance regarding the claims of *contumelia* and loss of amenities.

Special Damages

These are damages that have already been incurred and can be precisely calculated at the date of trial. Under this head, the plaintiff has managed to establish that the incurred medical expenses to the tune of \$11 367-00. I would however comment that a plaintiff must, in his or her affidavit of evidence clearly tabulate his/her medical expenses. In *casu* the plaintiff simply referred the court to the annexures which are the receipts he received upon payment. He then expected the court to add up the invoices to come up with the total figure claimed. The tabulation was then done in the Heads of Argument. As already stated, a litigant does not lead evidence in the Heads of Argument.

Shock, Pain and Suffering

Assessment of damages in personal injury cases is one of the most daunting tasks that can confront a judicial officer. GUBBAY JA (as he then was) summed it up in *Minister of Defence and Anor v Jackson* 1990(2) ZLR 708 (SC) when he stated:-

“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 decide”.

Again, unfortunately, I do not have much to go by in assessing the damages for pain and suffering. The plaintiff must have been admitted into hospital at one point judging by the receipts attached as annexures. One cannot make out for how long he was hospitalised.

The plaintiff states that he suffered numerous injuries but do not give details. All he says is that as a result of the injuries he had to have an above the knee amputation of the left leg and four steel plates inserted in his right leg. He endured and still experiences excruciating pain. He was taken to hospital several hours after the shooting.

There is no doubt that the plaintiff suffered severe injuries and he under- went much pain and suffering. He had to under-go various operation procedures.

In coming up with an award, it is my view that I must take into account that the plaintiff can still proceed to claim damages for loss of amenities. I take guidance from the

Minister of Defence & Anor *supra* where the claims for pain and suffering, loss of amenities and disfigurement were considered under one head. I will therefore award the plaintiff the sum of \$10 000-00 for shock pain and suffering.

I will therefore make the following order:-

- (1) The defendant is ordered to pay the plaintiff the sum of:-
 - (a) \$11 367-00 being special damages.
 - (b) \$10 000-00 being general damages for pain and suffering.
 - (c) The defendant to pay interest on the above amounts at the prescribed date from date of summons to date of payment in full.
 - (d) The defendant is absolved from the instance in respect of the claims for *contumelia* and loss of amenities.
 - (e) The defendant to pay the plaintiff's costs of suit.

Zimbabwe Human Rights NGO Forum (Public Interest Unit, plaintiff's legal practitioners