

ROBERT GOREJENA MATONGO  
versus  
CATESBURY TRADING COMPANY  
and  
TENDAI DANES CHIBANGUZA

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 17 January 2018 and 07 March 2018

### **Unopposed**

Plaintiff in person  
Defendant in default

MUSHORE J: The plaintiff is a self-actor. This is a claim for personal delictual damages which plaintiff suffered arising from a traffic accident. A default judgment had been entered against both defendants for their failure to file a plea; leading to the matter being referred to the unopposed roll for the assessment of damages.

The facts are that on the 10<sup>th</sup> October 2015, the plaintiff was driving his vehicle along Enterprise Road. The defendants' driver, one Reason Chizhou, was driving a pick-up truck, which was carrying an unsecured brick load on the back. As the defendant's driver drove past the plaintiff, some of the unsecured bricks flew off the back of the defendants' truck and landed on the plaintiff's car, impacting the windscreen with such force that they hit the fingers on plaintiff's right hand. As a result of the accident, plaintiff sustained a double fracture and an open wound on his right hand. The defendants' driver was arrested, charged and convicted of negligent driving. The plaintiff was admitted to hospital and underwent an operation on his right hand which has left him with a permanent disability of 27%.

The plaintiff is claiming special damages in the amount of \$2, 588-00 being his medical expenses incurred; and general damages for pain and suffering in the amount of \$5,000-00 and \$32,000-00 for permanent disability (loss of income present and future). The defendants filed an entry of appearance to defend but failed to respond to the notice of intention to bar. Accordingly they were barred from pleading.

The documentary evidence furnished by the plaintiff in this matter and pertaining to the accident confirms that the defendants' driver was solely responsible for the accident which resulted in plaintiff being injured. The plaintiff was also able to prove that the driver was employed by the defendants. The driver himself pointed to the defendants as being his employer. The second defendant was the Chairman of the first defendant and the vehicle driven by the driver is registered in the first defendant's name. The lawyer who filed a notice of entry of appearance to defend the action represented both defendants. Service for both defendants was done at a single address which the Sheriff deemed to be effective service for both of the defendants. I am satisfied that plaintiff has established that the driver was employed by the defendants and was carrying out his duties in their employ when the accident occurred. The plaintiff demonstrated adequately that the defendants' are vicariously liable for the damages he is claiming.

The orthopaedic and trauma specialist who attended to plaintiff, a Doctor A. S. Makoni described plaintiff's injuries as being severe. He confirmed that the injuries had been caused by a blunt object or a flying brick. He operated on the plaintiff's injuries which he described medically as being "*wrist metacarpophalangeal joints which were now permanently disabled and seen to be 27%*". I observed plaintiff closely when he appeared in court, and even from my layman's perspective, it was obvious that his medical injuries had significantly influenced the mobility in his right hand. The plaintiff relies on the proper functioning of his hands in carrying out his job.

Permanent disability- Loss of present income.

Loss of income and earning capacity is amply and simply defined by Professor Geoff Feltoe on p 95 of his book entitled "*A guide to the Zimbabwean Law of Delict 3<sup>rd</sup> Edition*" as follows:-

"If the plaintiff's injuries prevent him from working, he is entitled to damages for the income or wages he would have earned during the period of his incapacity".

When plaintiff first appeared before me, I stood the matter down for a week to enable plaintiff to furnish the court with proof of his employment. The plaintiff had already filed a series of short-term contracts with his papers, but I required that he show that his employers were committed to employing him. The plaintiff complied and furnished me with a letter from CAFOD (a Catholic NGO) who is his employer. The letter from them dated 23<sup>rd</sup> January 2018 reads:-

“Dear Sir

Re: Employment Contract of Robert Gorejena Matongo

This letter serves to confirm that Robert Gorejena Matongo is employed on contract by the above named organisation since 2006. During that period up to September 2015, he was working for ten or more days a month depending on how busy the organisation was. However as from October 2015 he was not called to work because of injuries sustained after road traffic accident.

Since January 2017 the organisation reduced working days to 4 or 5 days per month because of hi health condition.

Your co-operation....

Signed”

Before the accident, the plaintiff was earning \$50-00 *per* day for driving plus an allowance of \$35-00. He worked for ten days (or more a month), although he has limited his claim to 10 days *per* month. He was unable to work as a result of the accident from October 2015 to December 2016; a 15 month period. Thus he lost full earnings in the amount of \$850-00 x 15= \$12,750. For the whole of 2017, his work load was reduced to 5 days *per* month because of his disability. His income was thus lower for the year 2017, and he suffered a loss of income of \$5,100-00 (which is 5 x \$85-00 x 12 months). The loss of income which he has suffered as a result of the accident to date is in the amount of \$17,850-00.

Future loss of income is difficult to award without plaintiff having furnished the court with evidence that he has security of tenure. According to Professor Feltoe, “*To calculate the present value of future income without the disability, the courts have to determine the period over which the plaintiff would normally have continued to work and earn his living, but for the accident*”.

In the present matter however, I am of the view that the fact that because plaintiff is a contract employee and therefore does not have a permanent contract of employment presents an uncertainty with regards to plaintiff’s future contracts of employment with the organisation. I am sure that CAFOD has good intentions toward plaintiff; however the court required more of an assurance by way of actual evidence confirming that plaintiff’s employment is guaranteed for an extended period of time. I am inclined not to make an award on this Head of damages.

Pain and suffering

The plaintiff has not disclosed the degree of pain he experienced during and after the accident, or the degree of pain, if any, he continues to suffer. However it is obvious when looking at the evidence that he must have undergone severe pain as a result of the operation and the medical procedures he underwent.

In *Abel Mkhwananzi v Tirivani Totameirepi* HB 118/16, MAKONESE J awarded the plaintiff damages for pain and suffering in the amount of \$2,500-00 for a fractured hip and leg which resulted in several operations and a permanent disability of 37%. In that case plaintiff underwent operative procedures for many years and to seek medical attention in and outside Zimbabwe. He was no longer able to do ordinary chores and relied on a walker for mobility.

In *Mafusire v Greyling & Anor* 2010 (1) ZLR 160, CHITAKUNYE J awarded the plaintiff \$1000-00 for pain and suffering for a permanent disability of 15%. The plaintiff suffered a bruised right knee and lost cap, with plaintiff requiring future knee replacement surgery. The plaintiff's every day functioning became hindered as a result of the accident.

In *Judith Nyoka v Nyamweda Bus Service Anor* HH 148-15, the plaintiff was awarded \$2,500-00 for pain and suffering. The plaintiff suffered forearm fractures, dislodging of the leg bone, underwent a 48 hour operation; was hospitalised for 3 months; and suffered bed sores whilst hospitalised. The plaintiff lost mobility as a result of the injuries sustained by her and a 34 % disability. She could no longer carry out her trade as a cross-border trader or look after her household.

Arriving at a figure for pain and suffering is a subjective one with the thin skull rule applying. I have no specific guidance as to the degree of pain suffered by the plaintiff in the present matter. I have however found the above-mentioned cases of good value in arriving at an amount which would be appropriate compensation for pain and suffering. I am of the view that plaintiff's compensatory damages for pain and suffering be made in the amount of \$1,000-00.

Accordingly I order as follows:-

1. Both defendants are ordered to pay plaintiff, jointly and severally, the one paying, the other to be absolved:-
  - (a) the sum of US\$ 21,438-00 broken down as follows:-
    - (i) Special damages for medical expenses 2,588-00

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|-------|--|-----------|
| (ii)  | General damages for 27% permanent disability<br>present loss of income | 17,850-00 |
| (iii) | General damages for pain and suffering                                 | 1,000-00  |
- (b) Interest on the sum of US\$21,438-00 calculated at the prescribed rate of 5% *per annum*, from the date when summons was filed to the date of payment in full.
2. Plaintiff's costs of suit.