RITA MARQUE MBATHA
versus
FARAI BWATIKONA ZIZHOU
and
CONFEDERATION OF ZIMBABWE INDUSTRIES

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 October 2021

Date of written judgment: 1 December 2021

Unopposed application

Applicant in person

First respondent in default

No appearance for second defendant

MAFUSIRE J

[a] *Introduction*

[1] The plaintiff claims a default judgment for sexual harassment. She is unrepresented. The matter appeared on the unopposed motion roll on 20 October 2021. It was one of several such appearances. In the past the matter would be removed from the roll for one reason or other. The matter has had a long and turbulent history. The plaintiff says the wheels of justice have turned ever so slowly for her. There can be no denying that. She has been to this court. She has been to arbitration. She has been to the Supreme Court. She is back in this court. She strives for closure. Any lesser mortal would probably have given up. Plainly, the plaintiff is no lesser mortal. Her tenacity and fighting spirit have moved mountains. She is still fighting. This judgment only settles half the case. The other half still continues. I shall explain.

[b] *Nature of claim*

[2] The plaintiff has pleaded sexual harassment at the work place in 2002 to 2003. Then she was employed by the second defendant. She alleges that sexual harassment of female employees at the second defendant's work place was rampant. She says as against herself, the first defendant was the sole culprit. He was the Chief Executive Officer. She was his personal assistant. She says despite reporting him, the second defendant, through its President, was flippant, if not contemptuous.

[3] Her claim is for USD500 000 [five hundred thousand United States dollars]. It is against both defendants. Initially they both defended vigorously. But by and by she barred the first defendant in default of a plea. That did not just happen. It was after sweat and blood. The details emerge later. But having barred the first defendant she now seeks a default judgment as against him only. As against the second defendant the case continues. At the time of this judgment, it was poised for a pre-trial conference.

[c] *Details of the claim*

[4] The sexual harassment was over some nine months. It started when she was still on probation. She got employed by the second defendant in September 2002. She got fired in July 2003. It was an unfair dismissal. The first defendant engineered it all. He schemed it. She had reported him for the sexual harassment. He took revenge. The charges were trumped up.

[5] The sexual harassment took the following forms:

[5.1] inappropriate touching;

[5.2] unwelcome offensive jokes;

[5.3] invitation by innuendo to an inappropriate sexual relationship;

[5.4] receiving offensive telephone messages;

[5.5] receiving pornography on the computer;

[5.6] an attempt to kiss by force, causing an injury on the thigh in the process of resisting.

[6] On record, there are several electronic messages from the first defendant to her. One e-mail, in January 2003, at 12:16 hours, is worth reproducing. On it a deliberately misleading subject caption was used, "*Call from Mr Miller (Superior Holdings*)". The e-mail goes:

"Rita,

I have used the above caption just in case. Please delete completely immediately after reading. Look at the time I am sending this note – just to show you I could not sleep before writing this note to you.

Rita I love you very much and wish you could be mine.

When I am taking a bath with Clara I always pretend it's you the torture is unbearable. It hurts me that when I touch your lovely hand you cringe and ask me to stop. Do I repulse you? I desperately need to kiss you.

Shamwari if I do get dismissed, it will be because I would like to do whatever I can for the person I care for most, you. Right now I am under pressure to balance the budget of CZI. You have just completed your probation and according to CZI rules, you are not eligible for the general increase for permanent staff, but the small adjustment that is in your appointment letter. I am bending the rule – for you, please hold on tight to me – if we crash, we crash together. I am awarding you the same percentage increase as everybody else. I am defending it against the treasurer this morning. Doing so will cost CZI an extra $3 million in employment and other costs for the three people involved. The others are lucky to be associated with you. This will wipe out the surplus we were going to make after selling the Land Rover. The treasurer had made his recommendations following the rule and I have asked Venek! ai to make the change before he comes for the final meeting this morning.

I feel guilty as it is no right to expropriate you from your husband but unfortunately … Please God help me on this one as it has been giving me sleepless nights.

You are the love of my love. I will do <u>anything</u> for you."

[7] The plaintiff says when she reported the sexual harassment to the then President of the second respondent, the response was ambivalent. When she tried to follow up she was told off. The President is said to have retorted that as a married woman, she should be ashamed to say that she had been sexually harassed. That hurt, she says.

[d] *Litigation*

[8] Having faced a brick wall, the plaintiff turned to the law. She brought the matter on arbitration. The arbitration went on for years. There were several sittings. She says the defendants were employing delaying tactics. They would seek postponements. They would offer to talk an out of court settlement but would renege. They would miss some sittings. They would not file documents timeously, or at all. But she persisted. Eventually she got an award. Among other things, the arbitral tribunal found that she had been unfairly dismissed. It also found that she had been sexually harassed. That was in March 2014.

[9] In June 2014 she instituted the present proceedings. The defendants were barred for late noting of an appearance to defend. They applied for condonation. When granted, they took a special plea in bar. They alleged the plaintiff's claim had become prescribed. They calculated the period of prescription from 2002 when the sexual harassment occurred. As a result they came up with eleven years. Prescription for an ordinary debt is three years. This court agreed with the defendants. Under judgment No HH 93-16 it dismissed the plaintiff's claim. It said the cause of action had arisen in 2002 to 2003 when the sexual harassment had occurred. It upheld the special plea of prescription.

[10] The plaintiff appealed. Under Judgment No SC 69-18 the Supreme Court disagreed with the defendants. It premised its judgment on s 17 of the Prescription Act, [*Chapter 8:11*]. In terms of this provision, and in paraphrase, the period of prescription in respect of, among other things, a debt which is the subject matter of proceedings on arbitration, is extended for one year from the end of those proceedings. The Supreme Court allowed the plaintiff's appeal on the basis that her claim in this court had been instituted barely three months after the end of the arbitration, i.e. well before prescription had run the full course.

[11] After allowing the appeal, the Supreme Court gave the defendants ten days to plead over to the merits of the plaintiff's claim. The first defendant missed the deadline. He applied for condonation a record four times: two in this court and the other two in the Supreme Court. He completely botched it. Eventually condonation was firmly and finally refused by this court under Judgment No HH 592-20. The first defendant was permanently barred.

[12] The first defendant having been barred in default of a plea, the plaintiff made attempts to set the matter down for a default judgment against him. Early attempts were unsuccessful for one reason or other. One of them, as depicted by a judgment of this court under HH 392-21, was that her *causa* for seeking a default judgment had been incorrect. She had sought a default judgment on the basis of a failure to file an appearance to defend timeously. Yet the correct *causa* had been the failure to file a plea within the ten days prescribed by the Supreme Court. Eventually the plaintiff succeeded in setting the matter down on the unopposed motion roll. In the company of the newly appointed judges NDLOVU J, DEME J and KATIYO J who were on induction, I granted the relief sought but reserved judgment on quantum. Here now is the judgment on quantum.

[e] *Sexual harassment as an actionable wrong*

[13] The Labour Act [*Chapter 28:01*] provides for sexual harassment as an unfair labour practice by an employer or any other person. In terms of s 8(g) and (h) an employer commits an unfair labour practice if he, among other things:

[13.1] demands from an employee sexual favours as a condition of improving the remuneration or other conditions of employment of the employee;

[13.2] engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials at the workplace.

[14] This judgment is not concerned with whether or not an unfair labour practice was committed against the plaintiff. That enquiry was settled by the arbitration. It was confirmed by the Supreme Court. At any rate, in the absence of a plea, that enquiry is not before the court. The reference in this judgment to s 8 of the Labour Act is, *inter alia*, for the purposes of showing that sexual harassment is an actionable wrong in terms of our labour laws. So the one question is, if it is an actionable wrong under the labour laws, is it also an actionable wrong in delict? Is sexual harassment covered under the *lex Aquila*, that old Roman law that provided for compensation for injury caused by someone's fault? The other question is, if sexual harassment is covered under the *lex Aquila*, what would be the quantum of the damages? How are they assessed?

[f] *Sexual harassment as a species of non-patrimonial loss*

[15] Sexual harassment is an actionable wrong under the *lex Aquila*. For damages to be recoverable the plaintiff must have suffered some recognisable injury. Such injury is not confined to physical damage. Mental damage is also included. Under an ordinary delictual wrong causing bodily injury there is already recognisable a claim for pain, shock, suffering and loss of the amenities of life. Sexual harassment causes pain. It results in shock. It is a kind of injury to the victim's person. That injury can lead to loss. Such loss is non-patrimonial. Non-patrimonial loss is:

> "… the diminution, as the result of a damage-causing event, in the quality of the highly personal (or personality) interests of an individual in satisfying his or her legally recognized needs, but which does not affect his or her patrimony."
>
> VISSER & POTGIETER: *Law of Damages*, 3rd ed., Juta, p 103, para 5.1.

[16] The above authors classify emotional shock as psychiatric injury, p 110. Pain and suffering is part of the emotional shock. But emotional shock can also lead to further recognisable psychiatric conditions such as insomnia, anxiety, neuroses, hysteria, depression, and the like. Emotional shock of short duration is disregarded if it does

not have any real impact on the health of the plaintiff. The loss of the amenities of life is also part of the non-pecuniary damage. Loss of amenities refers to the loss of the ability or will to participate in the general or specific activities of life and to enjoy life as one did previously, p 510. Included in this kind of loss are adversities like sexual impotence, loss of marriage opportunities, loss of general health, change of personality, loss of intellectual function, the difficulty experienced in the exercise of one's profession, and so on.

[17] The English case of *White v Chief Constable of South Yorkshire* 1999 (2) AC 455 recognised the right to claim damages for psychiatric injury but of course, within certain limits. In the judgment by LORD STEYN is the following statement:

> "Courts of law must act on the best medical insight of the day. Nowadays courts accept that there is no rigid distinction between the body and mind. Courts accept that a recognizable psychiatric illness results from an impact on the central nervous system. In this sense therefore there is no qualitative difference between physical harm and psychiatric harm. Any psychiatric harm may be far debilitating than physical harm."

[18] I agree with those observations. In South Africa, KHAMPEPE J, writing the unanimous decision of the Constitutional Court in *McGregor v Public Health & Social Development Sectorial Bargaining Council & Ors* CCT 270-20 introduced the judgment as follows[1]:

> "Sexual harassment is the most heinous misconduct that plagues a workplace. Although prohibited under the labour laws of this country, it persists. Its persistence and prevalence 'pose a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms … and non-sexism'. Not only is it demeaning to the victim, but it undermines their dignity, integrity and self-worth, striking at the root of that person's being."

[19] I also agree. Section 51 of our Constitution guarantees the right to human dignity. It says every person has inherent dignity in their private and public life, and the right to have that dignity respected. It is axiomatic that sexual harassment, especially at the

[1] Page 2 – 3 of the cyclostyled judgment

workplace, strips the victim of his or her dignity. It degrades her[2]. It turns her into an object of sexual gratification. It strips her of her right to personal security as contemplated by s 52 and s 53 of the Constitution. Section 52 says every person has the right to bodily and psychological integrity, which includes, among others, the right to freedom from all forms of violence from public or private sources. Section 53 guarantees the freedom from, among other things, inhuman or degrading treatment. Therefore, a claim for damages for sexual harassment is an attempt to vindicate such of the constitutional and other rights as will have been frittered away by the defendant.

[g] *Assessment of damages for sexual harassment*

[20] To succeed in a claim for damages under the *lex Aquila* in general, the plaintiff must establish the following factors:

[20.1] that the defendant committed a wrongful act;

[20.2] that the plaintiff suffered patrimonial loss, which is actual loss capable of pecuniary assessment;

[20.3] that the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;

[20.4] that the responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa* (negligence):

see *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H), 298E-G

[21] The *lex Aquila* is extended to cover non-patrimonial loss. Compensation is designed to help the plaintiff overcome, as far as money can, the effects of his or her injuries. The court takes account of the general principles as well as any other relevant peculiarity of the case before it. It has a wide discretion to award what in the

[2] Most victims are female

particular circumstances should be fair, reasonable and adequate. In *White's* case above, LORD STEYN said:

> "In an ideal world all those who have suffered as a result of the negligence ought to be compensated. But we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration as well as to the heads of recoverable damages. This results, of course, in imperfect justice but it is by and large the best that the common law can do. The application of the requirement of reasonable foreseeability was sufficient for the disposal of the resulting claims for death and physical injury. But the common law regards reasonable foreseeability as an inadequate tool for the disposal of claims in respect of emotional injury."

[22] In our jurisdiction, the general principles laid out in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (SC) in respect of pain and suffering, loss of amenities and disfigurement should also apply to the assessment of damages for sexual harassment. Our Supreme Court said translating personal injuries into money is equating the incommensurable. The assessment of damages is one of the most perplexing task a court has to discharge. The broad principles that have been sampled from the several authorities here and abroad are:

[22.1] General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.

[22.2] 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 the injury had not been committed.

[22.3] 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.

[22.4] The court is entitled, and it has the duty, to heed the effect its decisions may have upon the course of awards in the future.

[22.5] The fall in the value of money is a factor which should be taken into account in terms of the purchasing power, but not with such adherence to mathematics as may lead to an unreasonable result.

[22.6] 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.

[22.7] Awards must reflect the state of economic development and current economic conditions of the country. They should tend towards conservatism lest some injustice be done to the defendant.

[22.8] 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.

[23] For sexual harassment in particular, I consider that some of the broad principles to be taken into account in the assessment of compensation should include:

[23.1] the nature, extent, duration and seriousness or intensity of the injury to feelings;

[23.2] the subjective circumstances and the gender of the victim and of the perpetrator;

[23.3 the power dynamics or power relations and socio-economic imbalances between the victim and the perpetrator;

[23.4] the age difference between the victim and the perpetrator;

[23.5] the pattern of behaviour or conduct of the perpetrator before or after the wrongful act;

[23.6] the prevalence of such misconduct and the general conditions of employment;

[23.7] the degree of the deprivation of the amenities of life as a result of the injury suffered[3].

[h] *The plaintiff's case*

[24] It being a claim for damages, the plaintiff has filed an affidavit of evidence in terms of r 60 of the old rules of this court, now r 25(1) of the new High Court Rules, 2021. She

[3] See generally VISSER & POTGIETER *Law of Damages*, 3rd ed., Juta, p 497. See also *McGregor v Public Health and Social Development Sectorial Bargaining Council & Ors* CCT 270-20

has suffered psychological damage. Amongst her pile of papers is a brief medical report from a general practitioner. There is also a more detailed one from a psychiatrist. The sum total of these reports is that as a result of the sexual harassment, the plaintiff suffered severe posttraumatic stress disorder. This condition manifested almost immediately after the abuse. She experienced recurrent involuntary and intrusive memories of the traumatic event. Her pain was acute, with chances of recovery rated as being very poor. Treatment would be extensive and indefinite. During treatment, which included counselling, the plaintiff would often meander and get distracted. She suffered physical and emotional pain, with scarcely suppressed anger. During the counselling sessions, she would lose track of her answers midway through and would ask that questions be repeated.

[25] The psychiatric report notes that the psychological damage is widespread. Her personality has changed significantly. Before the incident, she was engaging, outgoing, and loved reading. She had a good sense of humour. All that is gone. She experiences recurrent nightmares. Her sleep is broken most nights. That leaves her drained physically and mentally. She was pursuing a law degree. She has had to drop. She has lost all confidence in herself.

[26] There was another kind of collateral damage. She says her marriage broke up, largely because of the change in her personality. Furthermore, being out of employment and therefore without a steady income, she had to sell her immovable property to finance medical bills, legal costs and the general upkeep of her family. All this was in the psychiatric report. She says she lost another immovable property that she had been buying. She says the situation was further compounded by the defendants' conduct after her unfair dismissal. She could not secure alternative employment thanks to the defendants' negative testimonials to her potential prospective employers. The plaintiff's case seems such a textbook case. Manifestly, no amount of money seems adequate enough to compensate her loss.

[i] *The quantum*

[27] Principles are easy to set out. They are not so easy to apply to the nuts and bolts of any given case. Considering all that the plaintiff has gone through, what is the level of damages that is fair, adequate, proper and reasonable? At the end of it all, it boils down to the exercise of a value judgment by the court. It is a matter of discretion. A fair balance between the principles on the assessment of damages and the peculiar circumstances of the case should ensure that the exercise of that discretion is judicious, not capricious or whimsical. As said by the court in the *Jackson's* case above, the court must take heed of the effect of its decision upon future awards. But at the same time, the court must not be seen to be paying lip service to values espoused in the Constitution on human dignity and integrity. Compensation must be tangible.

[28] In this case, that the sexual harassment happened and must be compensated for the harm it has caused is the one aspect. But there are some other aspects of the case that have to be taken into account in arriving at the quantum. The sexual harassment was persistent. There has never been an apology. One thinks it would have been quite salutary and a measure of atonement for the injured brain. At the arbitration, the first defendant sought to dismiss his reprehensible conduct as mere jokes. He was callous. He engineered the plaintiff's dismissal from employment. After the incident and the dismissal, she was not treated with sensitivity. Even discounting what the second defendant's President is alleged to have said to her [because that aspect is still to be decided], the person to negotiate an out of court settlement with the plaintiff, was none other than the first defendant himself. He was non-committal. Inevitably, an out of court settlement was still born.

[29] The power balance and socio-economic dynamics between the plaintiff and the first defendant were skewed. He was the Chief Executive Officer. She was his personal assistant. He had immense power over her. When litigation commenced, it was intentionally stalled. It is now almost two decades since the incident happened. It is only thanks to her tenacity that the case has remained alive in the legal system.

Undoubtedly, a measure of punitive damages is warranted. But unfortunately, none of all this tells the court how much to award.

[30] The plaintiff wants a globular USD500 000. This level of quantum has no precedence. But again, damages for sexual harassment have no precedence at all in this jurisdiction, at least to one's knowledge. However, there is a salient detail that has contributed to the decision on quantum. In 2010, during without prejudice negotiations for an out of court settlement when she was still legally represented, the plaintiff's monetary proposals for mutual termination of employment were $60 000-00 after tax, $100 000-00 for sexual harassment and $8 500-00 for legal fees.

[31] Taking all factors into account, it is considered that the proper level of damages for the sexual harassment perpetrated by the first defendant upon the plaintiff during the period of the plaintiff's employment with the second defendant from September 2002 to June 2003 is USD180 000-00 [one hundred and eighty thousand United States dollars]. Therefore, the following order is hereby made:

i/ The first defendant shall pay the plaintiff the sum of USD180 000-00 [one hundred and eighty thousand United States dollars], or the equivalent thereof in local currency, convertible at the inter-market bank rate at the time of payment.

ii/ The first defendant shall pay the plaintiff the amount aforesaid together with interest at the prescribed rate from the date of this judgment to the date of payment.

iii/ The first defendant shall pay the plaintiff's costs of suit.

iv/ The first defendant's liability in terms hereof is joint and several with the liability of any other person as may be found liable to the plaintiff in respect of the sexual harassment which is the subject of this judgment.

1 December 2021