

IDAH NYABADZA

Versus

THEODORA MAKUNI

And

PRISCA MADIMBA

And

PELAGIA MADIMBA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 FEBRUARY AND 2 MARCH 2006

G Nyathi for the applicant
No appearance for the respondents

Judgment

NDOU J: This is an application for default judgment. The applicant issued summons against the respondents jointly and severally claiming a total of \$100 000 000,00 being damages arising from an incident in which she was assaulted and insulted by the three respondents. The respondents were properly served by the Deputy Sheriff for Bulawayo. Nothing turns on the service.

The respondents chose not to defend the claims and the only issue is that of the quantum of damages. The salient facts of this matter are the following. The applicant is a married woman with children, some of whom are majors. The respondents are sisters. The applicant and the respondents all reside in Mpopoma suburb, Bulawayo although they stay in different blocks. On 28 December

2004, the three respondents

HB

12/06

approached the applicant at or about 1800 hours in a public street in the said suburb. The applicant was close to her residence when approached. The respondents accused the applicant of being a “whore” and alleged that she was having an extra-marital affair with their father. The respondents assaulted the applicant all over her body with clenched fists and booted feet. All this took place in full view of the general public, neighbours and the applicant’s own children and grand children. She was examined by a medical doctor at Mpilo Hospital on 30 December 2004 i.e. on the second day after the incident. The doctor observed swellings and injuries on the right forearm. The doctor opined that the degree of force used was slight, the injuries were not serious, the injuries were not potentially life threatening and that there is no possibility of permanent disability. The first and second respondents paid admission of guilt fines for the said assault on the applicant. The third respondent did not. She was tried before a Western Commonage magistrate and was acquitted. She nevertheless, chose not to defend the claims against her. The \$100 000 000,00 claimed is made up of two claims i.e. one for \$50 000 000,00 for general damages for assault and injury to feelings [humiliation and degradation] and another for \$50 000 000,00 for defamation. I will consider these claims in turn.

Assault

It is not easy to quantify the level of damages in such cases – *Guruva v Chabawa* HB-12-98. In this case the defendant struck the plaintiff three times with a wheel spanner on the forehead, on the wrist, sat on him after

HB 12/06

he fell to the ground and tried to strangle him with the wheel spanner. Plaintiff lost consciousness only to regain it at the hospital. He was hospitalised for around two weeks. Two molar teeth had to be removed. Plaintiff suffered facial deformity. He was awarded \$14 000,00 damages. In *Hodges v Watson* HB-46-89 the plaintiff was slashed on the face by a broken bottle. He suffered pain for three months and had a permanent scar from the mouth to the face. He was awarded \$2 500,00 for general damages. In *Ndlovu v Negasha* HB-106-90 the plaintiff was assaulted by her husband. She suffered a cut on the upper lip, a cut on the forehead and another on the side of the head. She was in pain for twenty days and remained with scars on the affected parts. She was awarded damages in the tune of \$7 000,00. In *Manyemba v Muzukwa* SC-163-90 for bruises, an inflamed eye and a loose tooth resulting from a Christmas party brawl, damages of \$200,00 were awarded.

In *Chadwick v Chand* HH-262-91 the plaintiff had a fractured jaw and teeth after he was punched and knocked to the ground. He suffered loss of dignity as well. He was awarded general damages of \$5 000,00 for pain and suffering, disfigurement and *contumelia*.

In *Mkiza v Gumede* HB-110-91 the plaintiff was struck on the head with a hard object and suffered severe pain and shock. He had permanent disfigurement on his head in the form of a depression at the front of his skull. He suffered paralysis of the left arm and fingers. He would not be able to work. He was awarded \$20 000,00 on a default judgment.

HB

12/06

In *Garikai v Kwenda & Anor* HH-194-91 the plaintiff was awarded \$5 000,00 for shock, pain and suffering, loss of amenities and disfigurement. His nose required fourteen stitches and removal of some cartilage.

In *Moyo v Abraham* HH-467-84 the defendant (a woman) poked a pregnant plaintiff on the forehead with her finger and challenged her to a fight. Plaintiff was awarded \$100 damages. In *Ziyeresa v Fleming* HH-92-84 the plaintiff was shot by the defendant resulting in loss of leg below the knee. Plaintiff was awarded general damages of \$3 500,00. In *Hunt v Ndangana* HH-138-84 the defendant bit the plaintiff's ear lobe plus inflicted other minor injuries. Plaintiff was awarded general damages of \$1 000,00.

In *Dube v Marimo* HB-44-89 the plaintiff was attacked causing cuts and resulting in amputation of the ring finger on one hand. The other hand was already disabled from polio. Plaintiff was awarded \$3 000,00 general damages. When assessing damages in this

matter I will use the above as an instructive guideline in the exercise of my discretion. However, I will not lose sight of what SMITH J said in the *Garikai v Kwenda* case –

“Reference to comparable cases though never decisive, is instructive but requires a study of the full judgment and the pain and loss of amenities involved not simply the injuries. The theoretical desirability of achieving some measure of uniformity of awards in similar cases must not fetter the trial court’s discretion. Some awards will have to be increased significantly over awards in earlier comparable cases because of the recent marked diminution of the purchasing power of the Zimbabwe dollar.”

I agree with the learned judge. I will take the awards in the above matters into account as a starting point in the exercise of my discretion. I

HB 12/06

will also take into account the major decline in the value of Zimbabwe dollar by around six hundred per cent – *Chimutepa v Gwenzi* 2001(2) ZLR 222(HC). The injuries here were not of a serious nature and did not result in permanent disability or disfigurement. The plaintiff was not hospitalised. Compared to most of the injuries in the above cases, the injuries here are less serious. From the facts, however, the plaintiff suffered loss of dignity in the manner and locality of the assault. In the circumstances, I award the plaintiff the sum of \$10 000 000,00.

Defamation

The defamatory words are that the applicant is a whore. I have already alluded to the persons to whom the statements were published. Calling a married woman, a grandmother a whore in

front of her house within the hearing of the neighbours, her children and grand children is a serious form of defamation. As the respondents have not defended the claim it is implied that they made the defamatory utterances and that such utterances have no basis.

In *Khan v Khan* 1971(1) RLR 134 (A) the defendant called the plaintiff woman a prostitute and the latter was awarded 150 pounds damages. See also *Moyo v Abraham, supra*. The alleged applicant's infidelity or sexual impropriety was not proven and I will regard the allegations as being false. In *Bikwa v Ndlovu* HB-18-92 false allegations attracted damages of \$5 500,00. I feel that the applicant has proved defamation damages in the tune of \$15 000 000,00.

HB

12/06

Accordingly, I order that default judgment be and is hereby granted to the applicant against the first, second and third respondents jointly and severally the one paying the others to be absolved in the following terms:

1. First, second and third respondents pay the applicant the sum of \$10 000 000,00 (ten million dollars) general damages for assault and injury to feelings.
2. First, second and third respondents pay applicant the sum of \$15 000 000,00 (fifteen million dollars) in

damages for defamation of character.

3. First, second and third respondents pay interest on the total sum of \$25 000 000,00 (twenty five million dollars) at the prescribed rate from 18 October 2005 to date of payment in full.

Sansole & Senda, applicant's legal practitioners