

NYASHA KOROKA
versus
ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 26 October 2015, 9 & 10 November 2015 & 1 June 2016

Civil Trial - Delict-Accident Damages

W Chivaura, for the plaintiff
M Baera, for the defendant

MUSHORE J: The plaintiff sued the defendant for damages arising out of an accident which occurred whilst plaintiff was walking past a low hanging, high voltage cable belonging to the defendant. When the dangerously exposed cable made contact with the plaintiff's arm, she was electrocuted as a result of which she lost consciousness. She came to in a hospital bed. As a result of this accident the plaintiff's life as she knew it was adversely affected as one would imagine would be the case. Upon her discharge from hospital the plaintiff began the process of seeking compensation from the defendant.

The plaintiff's claim to be compensated by the defendant was initially met with resistance, and later procrastination. However the plaintiff remained resolute and after three years, the defendant agreed to settle her medical expenses and nothing more. The plaintiff then filed summons commencing action on 13 September 2013 and eventually the matter was placed before me for trial. When the roll was called the parties counsel advised me that they were trying to come to a settlement and the matter was postponed to allow them time to do so. However it eventuated at the next hearing that although the parties were resolved on liability, they remained unresolved on the *quantum* to be awarded to the plaintiff under the various heads of damages. It was then I directed the plaintiff to file her application for an award of damages and that thereafter both parties file written submissions for the adjudication of *quantum*. I have read the application and written submissions and the entire record for the plaintiff's main action and I now lay out my judgment.

The plaintiff's claim has been broken down under various heads of damages those being:-

- i. \$7,000-00 for pain and suffering
- ii. \$5,000-00 for loss of amenities of life
- iii. \$5,000-00 for future medical expenses
- iv. \$6,500-00 for a prosthetic limb
- v. \$10,000-00 for disfigurement
- vi. \$20,000-00 for loss of future earnings
- vii. Interest
- viii. Costs of suit.

Pain and suffering

The letter from the Parirenyatwa Hospital where the plaintiff was admitted best describes the plaintiff's injuries thus:-

“She was a referral from Chinhoyi Hospital after sustaining high voltage electrical burns. She was electrocuted after she handled sagging electric wire when she was crossing the ZESA line in Banket District on the 10th January 2010.

She sustained third degree burns involving the back of the trunk, lateral aspect of the left lower limb and left upper limb. The left upper limb was the entry point and the left hand was gangrenous up to the mid-forearm. These burns resulted in left below amputation of her left hand forearm. The exit point was the left lateral aspect of the head and there was a loss of consciousness.

Long term complications are: post-electrical burns which include cataracts, seizures and chronic pain. Left below elbow amputation will result in permanent disability, phantom limb pain.”

The injuries suffered are severe. So severe that I am disturbed at the attitude adopted by the defendant in handling its defence. The defendant has been obstructive; insensitive and dispassionate about the plaintiff's plight throughout the progress of this matter. I have noted that the defendant even avoided a round table conference which ought to have taken place. This case could have come to an earlier resolution had the defendant done what it ought to have done all along and that is at the very least to communicate with the plaintiff.

Counsels for both sides have referred to the various relevant cases on quantification of damages for pain and suffering which cases have been of assistance to me. The plaintiff seeks an award of US\$7,000-00 under this head. Both parties have made reference to the case of *Chinembiri and Others v ZETDC* HH 55/14 with the defendant drawing my attention to the

fact that one of the plaintiffs in that case suffered a 90% disability and was awarded the sum of US\$6,000-00. I have considered the submission made by the defendant that an award of \$7,000-00 is more punitive than it is compensatory, but the defendant hasn't placed due regard to inflation and the passage of time. The US\$1,000-00 which the plaintiff is claiming is not an excessive amount when compared to the award mentioned in the *Chinembiri* case given the obduracy of the defendant and the time it has taken the plaintiff to come to this point. I am also alive to the difficulties that the plaintiff has endured whilst seeking recompense. Further I taken into account the supporting affidavit filed by the plaintiff's daughter Diana Koroka (who was aged 16 when the accident happened) from which I gleaned much more of the pain and suffering that the plaintiff has endured since the accident and this is particularly with her state of mind after the accident where she has become depressed. This is what Diana Koroka said:-

“8. When I went home on holiday, I was overwhelmed by work as my mother could not perform many household chores and the burden fell on me as the eldest child. I therefore had almost no time to play with my friends and found myself assuming adult roles at a tender age. Because my mother cannot reach or wash her right side, I have to do that for her up to now.

9. I would also wash her bandages and this affected me emotionally as some of them had bits of flesh sticking from them. This would make me lose my appetite. My mother's disability affected me emotionally and continues to affect me. I had known her to be a very active woman and seeing her helpless with one hand is something that I can never get over.

10. At school I failed to concentrate on my work as a result of the emotional trauma, and managed to pass four subjects. I am certain that I would have passed all my subjects had it not been for my mother's injury, as I managed to obtain Ds in the four other subjects. The school allowed me to proceed to 'A' level notwithstanding my four passes but I could not do so as my mother could not afford the fees and I felt an obligation to look after her. I have mainly been responsible for her welfare to date, together with my sister Dione.

11. At school I felt very uneasy when my mother came to visit me. Visiting times are normally a time when I should have been excited to see her, but I felt very conflicted as I did not want my friends to see her in that state.

12.

13.....

14. I do not have any current plans to move on with life because doing so will only cause more emotional problems for me. I know my mother has suffered over the years and she cannot live on her own. Should I move away, I will never get over the psychological strain.”

The child makes a plea for family counselling in the last paragraph of her affidavit.

The plaintiff's husband and the father of her children is late. The plaintiff is the sole bread-winner and her inability to provide for the family out of this tragedy has made her a shadow of her former self.

In *Minister of Defence & Anor v Jackson* 1990 (@) ZLR 1, Gubbay JA had this to say:-

“What is essential is for a trial court to draw on its own experience in making an assessment of damages- an exercise which is necessarily dependent upon some degree of surmise; conjecture and imagination, for general damages are not capable of exact and arithmetical calculation”

That being so and when applying the broadest possible considerations I do not find an award of US\$7,000-00 to be punitive. Even whilst the defendant suggests that \$7,000-00 is excessive, it does not pay any attention whatsoever to inflation and the passage of time.

I consider such an award to be compensatory and certainly not punitive in the circumstances I have highlighted above.

Loss of amenities of life and disfigurement.

I have had reference to Professor Feltoe's book “*A Guide to the Zimbabwean Law of Delict*”. In the third edition of his book at p 94, Professor Feltoe describes disfigurement thus:-

“Strictly speaking, damages for disfigurement should be merged into damages for loss of amenities. Disfigurement includes bodily disfigurement such as scars, loss of limbs, facial and bodily distortion etc. “

The professor describes Loss of Amenities as follows:-

“Loss of amenities of life

Limitations of amenities of life caused by permanent or temporary disabilities include impairment or loss of ability or desire to engage in sport, recreation, social commitments or other normal activities. Loss of or impairment of, amenities would include such things as sexual impotence, sterility, loss of marriage possibilities, loss of general health, change of personality, nervous insomnia and the general handicap of disability.

Loss of amenities can also include loss of general health and shortened expectation of life”.

Lord Devlin QC in *H. West & Son Ltd v Shephard* [1963] 2 ALLER 625 (HL) PP 636 G-H defined the concept of loss of amenities to life thus:-

“A diminution in the full pleasure of living.

The amenities of life may be further described, I consider, as those satisfactions in one's everyday day existence which flow from the blessings of an unclouded mind, a healthy body

and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to work and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent".

The plaintiff's counsel provided the court with the areas for assessment to which I have applied my mind in coming to an award of loss of amenities and disability. In para 12 of the plaintiff's heads of arguments the plaintiff's circumstances are set out as follows:

"Paragraph 12

- (a) She was 36 years at the time of the incident, which is a fairly young age given the life expectancy of 56 years.
- (b) She is a single mother with 3 children who were all young at the time.
- (c) She survived through farming, and her capacity to produce for her family and for sale was severely diminished by the disability
- (d) Further, her chances of remarriage are almost nil given her disability, injuries and her inability to sustain a household without external assistance
- (e) She has had to rely on support from her then teenage daughters, including being bathed by them, which is a humiliating experience
- (f) Her children have been affected by the disability as they have had to stay at home and look after her, thereby suspending their self-actualisation
- (g) She has undergone emotional trauma for nearly 6 years as result of the disability
- (h) She has also endured the unethical manoeuvrings of the defendant which has stalled her quest for damages, and compelled her to undertake litigation in order to get compensation due to her inability to support herself
- (i) She has been terminated from the job which she has found in the meantime and this has resulted in her sinking into deeper poverty. Her chances of getting another job are almost nil"

The plaintiff has three teenage daughters and is now permanently disabled. As their mother she is responsible for their well-being both physical and mental. She has to endure watching their lives being affected by her inability to function properly as a mother. She suffers the humiliation of having to be bathed and clothed by her children. She is depressed as are her children. The children's father is deceased. Her prospects for a marriage and a escaping the life of sole breadwinner have been severely diminished. She will need a great deal of courage to continue looking after her children and providing for them and making up to them for all the time that has been taken from their young lives whilst they have been parenting her. Because she is solely responsible for her family, an award under this head of US\$15,000-00 is justified and hopefully it will be of some assistance in aiding her to seek psychological counselling for her and her children.

Loss of past and future earnings

Past earnings

Professor Feltoe explains the reasons for this award 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 incapacity”

Before the accident, the plaintiff was earning US\$3,500-00 *per annum* as a small scale tobacco farmer and after the accident she started growing maize with her children doing labour for her as she is now unable to undertake manual labour. Her injuries have thus prevented her from working in her usual occupation and her income from maize production was severely diminished. She assumed a job as a paraprofessional at a primary school earning an allowance of US\$75-00 per month and unfortunately her employment was terminated in August 2015. She has been out of formal employment since then and her income is derived from two of her siblings who assist her to look after her children. In effect therefore her earning capacity past and future has been affected to such an extent that she ought to be awarded a sum of money under this Head.

Professor Feltoe states:-

“For any award for loss of earnings, current inflationary trends must be considered to make sure money is still worth the same amount as at the end of the period for which the award was made”

The plaintiff mitigated her damages by attempting to continue farming and when that became too onerous she secured temporary employment to the best of her prospects. At the time that her declaration was filed, she was still employed as an infant teacher and the income she was realising up until 2015 meant that her loss of earnings from before the accident was US\$1,000-00 *per year*.

Since 2015 she has had no steady income and has had to rely on the kindness of her siblings. Had the accident not occurred she would have realised earnings of at least \$3,500-00 per year. She is now 36. Apparently her life expectancy based on societal actuarial estimates is 56.

The principle governing the type of dilemma in which the court is placed in the present matter where there is no actual hard evidence of the loss of income is explained by Professor Feltoe at p 96:-

“In a case where there is pecuniary loss but the court has no evidence on the basis of which an actuarial assessment can be made, the court must nonetheless still make an award of an amount that seems to be fair and reasonable in the circumstances.”

It is clear that the plaintiff's farming days are over and that she can only hope and expect to be employed in jobs which do not pay a very large amount of money. Her chances of securing a partner or husband to be the breadwinner for herself and her children are not assured. Her lack of education places her at a distinct disadvantage in securing employment from which she could expect to earn US\$3,500-00 per month. The plaintiff mentioned that whilst she was working as an infant teacher, the shortfall in her income was approximately US\$1,000-00 per annum. I am of the view that her prospects of securing employment which will narrow the gap between her pre accident income and future income is poor. I am of the view that it is fair and reasonable to make an award based upon such a difference and applying the shortfall, which is reasonably estimated to be in the region of US\$1,000-00 *per annum*, and multiplying the shortfall figure by number of years from the date of the accident to the plaintiff's life expectancy date to arrive at an award for past and future loss of income.

Future medical costs

The plaintiff has furnished documentation which satisfactorily illustrates the nature and extent of her future medical expenses. I am also satisfied that these amounts are reasonable. The plaintiff will require a prosthetic limb which is estimated to cost US\$6,500-00. She and will have to undergo cataract surgery at some point in the future which will cost US\$2,050-00 per eye. In addition she requires US\$1,310-00 for her chronic pain treatment. I deem plaintiff to be entitled to an award of the sums so stated.

Interest

On the question as to when interest is to begin to run, I am persuaded that the defendant was aware that it owed plaintiff recompense as far back as 17 July 2013 when it made its initial offer. Even though the letter scribed by the defendant describes its offer as being a compassionate gesture, I am not satisfied that the defendant truly believed that to be the case. Added to that the defendant has made the plaintiff's attempts to prosecute this claim hellishly frustrating. I intend therefore to allow interest on the award for general damages and medical expenses to run from the date of summons. However as the date of judgment is determinate on the award for future earnings and the adjudication that the plaintiff has

satisfactorily mitigated her loss, the interest under that head will run from the date of this judgment. Costs will go with the award.

In the result I order as follows:-

The defendant is to pay the plaintiff the following amounts:

1. US\$5,000-00 for pain and suffering;
2. US\$15,000-00 for loss of amenities of life and disfigurement;
3. US\$11,910-00 for future medical expenses.
4. US\$20,000-00 for loss of past and future earnings
5. Interest (calculated at the prescribed rate) on the conglomerate award under 1,2, and 3 to run from the 13th September 2013 up until the amount is paid in full.
6. Interest (calculated at the prescribed rate) on loss of earnings to run from the date of judgment to the date of payment in full
7. Costs of suit

Maunga Maanda & Associates, plaintiff's legal practitioners
Baera & Company, defendant's legal practitioners