

FLORENCE KUSEMAMURIWO
versus
LUCK GOORA

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 9 March & 13 July 2022

UNOPPOSED MATTER

Ms A Kambaranje, for the Plaintiff
No appearance for the Defendant

NDLOVU J The Plaintiff claims a default judgment for damages arising from an assault perpetrated by the Defendant on the her and consequential damages thereto totalling US\$ 35 948.50. The matter appeared on the unopposed motion roll on 9 March 2022.

The Plaintiff pleaded that on or about 1 July 2020 and at Matanda Shopping Centre at Shamva the Defendant unlawfully assaulted her by hitting her with bricks, fist and booted feet as well as some unknown blunt objects. The assault took place in public. Upon his arrest and trial the Defendant was convicted and sentenced to a non- custodial sentence.

Due to that unlawful assault the Plaintiff sustained moderate injuries on her face, chest and hand for which she had to seek medical attention. Medical evidence attached to her claim indicated that moderate force was applied in assaulting her and the possibility of permanent injury was unlikely and that she was managed on pain killers and an arm sling.

Her claim is for a total figure of US\$ 35 948.50 or its equivalent in RTGS\$ made up of the following components.

- a) Pain and suffering (past and future) US\$ 5000.00
- b) Hospital/ medical expenses US\$ 1200.00
- c) Future medical expenses US\$ 5000.00
- d) Consequential damages US\$ 24 248.50

plus interest calculated from the date of summons to the date of payment and costs of suit.

According to the contents of the Plaintiff's declaration and affidavit, she had to undergo medical treatment for trauma on her right hand and sprain on the right wrist. To this end she attached receipts relating to her treatment and states that she lost some of the relevant receipts. She further stated that she is still suffering from chest and wrist pain for which she is taking pain killers and other medicines and estimates medical costs will continue in the future. She suffered emotional and physical pain due to the assault. As a result of the assault she was unable to work for more than 2 weeks and people broke into her shop taking advantage of her absence and stole her money (US\$ 300.00) and stock totalling US\$24 248.50 in value.

In Zimbabwe, the applicable general principles in such a matter in respect of the assessment of damages for pain and suffering are laid out in the case of *Minister of Defence & Anor v Jackson 1990 (2) ZLR 1(SC)*

“The assessment of damages is one of the most perplexing tasks a court has to discharge.”

MAFUSIRE J in *Mbatha v Zizhou & Anor HH 675/21*

The aim is to compensate the victim and that compensation is to be assessed with the object being to place the victim as close as possible in the position they would be in but for the wrongful conduct occasioned on them.

It is important to note that because no scales exist by which pain suffered can be measured the compensation to be awarded should be determined by general considerations and precedent regardless of one's station in life and conservatism is one such consideration.

THE QUANTUM

I have hereabove summarised the Plaintiff's case as relates to the damages suffered by her as a result of her being unlawfully assaulted by the Defendant. I am bound to take into consideration what the Plaintiff has pleaded and the contents of the medical reports. The ultimate question remains being that, considering all that happened, all that the Plaintiff has gone through as a result thereof, what is the level of damages am I to award her that will pass the test of being proper, adequate, fair and reasonable in the circumstances of this case? It is a matter of discretion and the exercise of value judgment and the ultimate product must be judicious.

SPECIAL DAMAGES

These damages financially compensate a Plaintiff for losses suffered due to the wrong party's actions. Because they are out of pocket expenses, they can easily be quantifiable by adding up the Plaintiff's incurred expenses. Needless to say that they must be proven with specificity.

Mdlongwa v Ngwenya HB 733/12

The Plaintiff claims US\$ 1 200.00 for medical expenses/special damages. In motivation of her claim she furnished several receipts relating to hospital payments and purchase of medicine around the time immediately past her having been assaulted by the Defendant. I have noted with concern that Plaintiff for unexplained reasons has also filed 2 receipts that pre-date the assault occasioned upon her by almost 12 months. These 2 stands to be excluded from the computation. Plaintiff has also stated that she lost some of the relevant receipts and has however not stated how much they add up to specifically or approximately in order to assist the court in deciding whether or not those expenses are relevant and reasonable. On the basis of the acceptable receipts furnished by the Plaintiff the incurred medical expenses total US\$66-00 plus ZWL\$800.00.

I find the above monetary figures representing the acceptable, proven and reasonable medical expenses incurred by the Plaintiff as a result of the assault visited upon her by the Defendant.

FUTURE MEDICAL EXPENSES

A litigant seeking future medical expenses has to prove a possibility that he will have to incur them. The award can be based on expert medical evidence. The general approach is that it is desirable that the possibility of future medical expenses be expressed as a percentage in Plaintiff's medical reports. Expert medical opinion expressed in a medical report assists the court in that it deals with the future development of the Plaintiff's injuries, their consequences, treatment and costs required.

In casu, the medical reports attached do not deal with this critical aspect of the Plaintiff's claims. In a rather surprising move, the Plaintiff in her heads of argument stated in part in para 2:11 as follows: -

“.....she is still taking medication to minimize pain during cold weather as her injured hand and limbs are (sic) haven't healed. Applicant is now facing difficulties in carrying heavy objects as she used to and is now confined to light work.”

This submission is not only not supported by medical evidence filed of record but also nowhere in the summons, declaration or affidavit of evidence are such averments made. The medical evidence filed is that the Plaintiff was managed on pain killer. I find this kind of management reasonable and consistent with the other medical evidence indicating that Plaintiff suffered a “swollen face and a painful upper limb”, that moderate force was applied resulting in moderate injuries with permanent injury being unlikely.

I see no possibility that the Plaintiff will incur future medical expenses in the circumstances of her injuries. This claim has not in my view been proven. I dismiss the US\$ 5 000.00 claim as a result.

Ngandu v Chitate & Others HH 329/20

PAIN AND SUFFERING/ GENERAL DAMAGES

Both common and case law provide authority that every infringement of the body where the aspect of physical harm is paramount, whether or not accompanied by violence with or without pain, direct or indirect may give rise to a claim for damages.

Dlamini v Nkomo HB 15/18

A trial court has a wide discretion in determining what it considers to be fair and adequate compensation to an injured person.

Chamangira v Tsabora HH 151/2017

I have alluded to reliance on precedent in assessing an appropriate award in such matters. I have also alluded to the attendant difficulty in discharging this duty. *In casu* it admits to no argument that the Plaintiff is entitled to an award of damages for pain and suffering suffered and experienced as a result of the assault visited upon her by the Defendant.

The Plaintiff suffered a swollen face, painful right upper limb from an assault effected through several blows by a male person. This was done in public. Clearly the Plaintiff has tended to exaggerate her injuries, the bottom line however is that she was physically assaulted by the Defendant, and for that she must be compensated. The Plaintiff has claimed US\$ 5000.00 for pain and suffering.

In *Chamangira v Tsabora (supra)* the Plaintiff through a physical assault suffered an injury to the eye limiting his vision for the rest of his life and was awarded US\$3000.00. In *Dlamini v Nkomo (supra)* the Plaintiff was awarded damages in the sum of US\$1000.00 for having been pushed down and suffering bruises on both hands and on his back. In *Mdlongwa v Ngwenya (supra)* a matter almost on all fours with the matter *in casu* in which the Plaintiff

suffered injuries that were not very serious being a swollen face and shoulder injuries and was given pain killers, the Plaintiff was awarded US\$ 1500.00 as general damages for pain and suffering.

I entertain no doubt in my mind that a claim of US\$ 5000.00 in the circumstances of this matter is excessive if one considers the nature of the injuries suffered by the Plaintiff and the treatment proven in her papers.

I consider an award of US\$1 750.00 as being reasonable compensation in respect of general damages for pain and suffering.

CONSEQUENTIAL DAMAGES

Consequential damages refer to damages from an indirect result of an incident or event. The Plaintiff is claiming US\$24 248.50 being consequential damages. The Plaintiff claims that after the assault on her by the Defendant she could not attend to her shop for two weeks and people raided her shop and took away stock with a value of US\$ 23 948.50 and US\$ 300.00 cash.

The Plaintiff has not furnished any evidence that after the assault she was hospitalised or was confined to a bed rest. Neither has she furnished medical evidence proving that as a result of the assault she was incapacitated to go to her shop. As if that is not enough the Plaintiff has not provided any evidence that indeed people raided her shop. All there is, is her word, without evidence aliunde. On the evidence the Plaintiff has limited the court to, it cannot in my view, be concluded that the wrongfully assault by the Defendant on the Plaintiff caused people to steal the Plaintiff 's property in her shop. I therefore dismiss this claim.

In the result, I make the following order;

1. Defendant is ordered to pay the sum of US\$ 66.00 (sixty-six United States Dollars) or the equivalent thereof in local currency, convertible at the inter-market bank rate prevailing at the time of payment plus ZWL\$800.00 (Eight hundred Zimbabwe Dollars) as special damages.
2. Defendant is ordered to pay the sum of US\$1 750.00 (One thousand seven hundred and fifty United States Dollars) or the equivalent thereof in local currency convertible at the inter market bank rate prevailing at the time of payment as general damages for the pain and suffering.
3. Defendant is ordered to pay interest thereon at the prescribed rate from date of summons to date of payment

4. Costs of suit

Hungwe & Partners, Plaintiff 's legal practitioners