

NORMAN DLAMINI

Versus

MALAKI NKOMO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWYO 25 JANUARY 2018

Damages Claim

B. Masamvu, for the plaintiff
Defendant in default

MAKONESE J: It is trite that in a claim for damages, compensation may be awarded not only for actual physical pain but also for shock, discomfort, mental suffering, loss of amenities of life and disability.

Both common law and case law provide sufficient authority for the view 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. It goes without saying that psychological or mental harm is usually brought about by an assault through the causing of fear, stress and emotional shock.

On 30th August 2017 the plaintiff issued summons out of this court, claiming the sum of US\$15 000 as damages for an assault perpetrated upon him by the defendant. The summons was served on defendant on 14th September 2017. The *dies induciae* expired on 21st September 2017 and the defendant having failed to enter appearance to defend the suit, the plaintiff applied for default judgment. The matter was brought before me in motion court on the 25th January 2018. I awarded damages in the sum of US\$1 000 in favour of the plaintiff together with costs of suit on an attorney and client scale. I set out here under the reasons for my award.

The plaintiff's declaration discloses that on the 2nd of January 2017 and around 10:00 am in the morning, plaintiff was at Atherstone Farm, West Nicholson, when the defendant who is the

Member of the House of Assembly for the Insiza Constituency assaulted the plaintiff in the presence of two police officers. Defendant pushed the plaintiff violently on the chest following a misunderstanding. Plaintiff fell down and suffered bruises on both hands and on his back. Plaintiff made a police report on 22 March 2017 and defendant paid an admission of guilt fine in the sum of US\$20. Plaintiff averred that he suffered serious humiliation in that he was assaulted in full view of the police officers all of West Nicholson Police Station. Further plaintiff stated that he was assaulted in full glare of his employees. Also in attendance when the assault took place were plaintiff's fellow beneficiaries of the land reform programme at Atherstone Farm and other persons from the local community numbering about fifteen. Plaintiff averred that he suffered public humiliation in that he intends to contest the forthcoming primary elections to be held in the first half of the year 2018. The plaintiff further contends that he shall be contesting the primaries in his own political party against the defendant. As a result of the assault, he had not only suffered pain and suffering but had sustained psychological stress and mental shock. His dignity was greatly impaired amongst his workmates, colleagues and relatives. He suffered great embarrassment in his community. Plaintiff conceded that he did not seek medical treatment and did not produce a medical report. The plaintiff averred that defendant's conduct was wrongful and unlawful and that considering his status in society he was entitled to an award of damages in the sum of US15 000 against the defendant.

The issue of liability does not arise. The defendant had no lawful right to act in the manner he did. His admission of liability and payment of admission of guilt fine at the police station seals the issue of liability. In any event, section 31 (3) of the Civil Evidence Act (Chapter 8:01) provides as follows:

“Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown;

- (a) That he did all the acts necessary to constitute the offence;
- (b) Where the offence is constituted by an omission to do anything that he omitted to do that thing, as the case may be.”

In casu, it is common cause that the defendant assaulted the plaintiff and admitted that act by paying an admission of guilt fine.

Regarding the question of damages, I have not come up with any recent case where an award was made for assault damages in similar circumstances and for similar injuries. In *The Law of Delict* by Boberg (Vol 1) (1984) at page 516 the learned author, in commenting on pain suffering states as follows:

“Compensation may be awarded not only for actual physical pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and disability and loss of expectations of life. For convenience, we speak of “pain and suffering” but the concept embraces all these non-pecuniary misfortunes – past and future of an injured person. Nor is the list a closed one.”

In the case of *Chamangira v Tshabora* HH-15-17 CHITAKUNYE J stated at page 6 of the cyclostyled judgment as follows;

“It is a principle of our law that a trial court has a wide discretion in determining what it considers to be fair and adequate compensation to an injured person.”

The issue of assessment of damages is not any easy one. In *Aaron’s Whale Rock Trust v Murray & Roberts Ltd and Anor* 1992 (1) SA 652 (C) at p655H-656F the court had this to say:

“where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as in this case this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damages to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork, what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as fair approximation of his mathematically unquantifiable loss ...”

In *Chimangira v Tshabora (supra)*, the brief facts were that the court was dealing with an appeal against an award of damages granted by the Magistrates’ Court in respect of assault damages. The applicant had perpetrated an assault on the respondent at his business premises. The respondent sustained injuries on his body including the left eye. As a result of the assault the respondent had been hospitalized. At the conclusion of a trial, the magistrate had awarded

the respondent the sum of US\$3 000, for pain and suffering and US\$2 000,for future medical expenses. On appeal the court found that there was no basis for interfering with the award of the lower court.

The damages in the cited case were clearly more serious. In the present matter the plaintiff suffered bruises on both hands and injuries on the back. He suffered shock, pain and suffering but did not need hospitalization. Where the damages suffered are not serious the court should, in my view, make a nominal award. In that regard, the court must exercise its wide discretion and each case must be decided on its own facts and peculiarities.

In *Gweshe v Minister of Defence* HH-28-06, MAKARAU (J) (as she then was) made an award of Z\$50 million damages arising from an assault perpetrated upon a female adult by members of the Zimbabwe National Army. She sustained serious injuries and suffered a broken arm. The broken arm was set and placed in plaster of Paris for 3 weeks. It is clear that the injuries in that case were more serious than the case before me. The court will, therefore be required to exercise its discretion as no comparable cases for similar injuries may not always be found. In making an award I shall take into account that the nature of the injuries sustained is not serious. The plaintiff did not require medical attention. He did not receive any treatment. In any event, the defendant did not persist with the assault, and his admission of guilt indicates some measure of acceptance of responsibility for his conduct. The assault was executed swiftly and resulted in minimal inconvenience to the plaintiff who deemed it unnecessary to seek medical attention.

Regarding the issue of costs, it is my view that this was an unjustified attack on the plaintiff. The plaintiff must not be put out of pocket by bringing this suit against the defendant. The defendant should be ordered to pay nominal damages but must meet the full legal costs incurred by the plaintiff.

In the result, and in all the circumstances of the case, I conclude that a fair and reasonable award would be as follows:

- (a) Judgment be and is hereby granted in favour of the plaintiff in the sum of US\$1 000.
- (b) Defendant shall bear the costs of suit on an attorney and client scale.

Dube-Tachiona & Tsvangirai, plaintiff's legal practitioners