MARIAN TIGERE
and
BENJAMIN MWAKONYA TSANGANYIDZO
versus
NICOZ DIAMOND INSURANCE COMPANY LTD
and
ANTONIA IBRAHIM JIVA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 October and 6 November 2013

Civil Trial

T. Mpofu, for the plaintiffs
First defendant: In default
D.P. Drury, for the 2nd defendant

MATHONSI J: The 2 plaintiffs instituted summons action against the first and the second defendants jointly and severally the one paying the other to be absolved for US$125 000-00 in respect of the first plaintiff and US$190 000-00 in respect of the second plaintiff as damages for bodily injury sustained in a motor vehicle accident. The plaintiffs were, at the time of the accident, employed by the Reserve Bank of Zimbabwe as inspectors in the anti-money laundering division.

In their declaration, the plaintiffs averred that at the material time, the first defendant was the insurer of the second defendant in respect of any liability which might be incurred by him arising from the use on a road of a Toyota Landcruiser motor vehicle registration number AAB 8137. On 21 October 2008 that motor vehicle was being driven by the second defendant when, after Mutare River bridge and at the 235,5km peg along the Harare-Mutare road, it collided with a Toyota Camry motor vehicle, registration number ABF 9500 which was being driven by the second plaintiff and had the first plaintiff as a passenger.

The plaintiff further averred that the accident was caused solely by the negligence of the second defendant who overtook another vehicle when it was not safe to do so and overtaking was prohibited at that part of the road thereby causing a collision. As a result of the collision, the first plaintiff sustained head injuries, a left clavicle fracture and multiple

body and limbs contusions. The second plaintiff sustained a fracture of the right acetabulum, a fracture of the right ischium bone and multiple body and limbs contusions.

The first plaintiff also lost her Nokia 2600 cellphone, a netone sim card and gold earrings all valued at US$175-00 which she claimed.

Although both defendants entered appearance and filed pleas to the plaintiffs' claim, the matter is now proceeding unopposed. This is because the first defendant defaulted at the trial despite being served with the notice of set down through its legal practitioners Messrs P. Takawira & Associates on 10 September 2013. Mr *Mpofu* who appeared for the plaintiffs made an application for the first defendant's defence to be struck out by reason of the default, which application I granted.

In respect of the second defendant, Mr *Drury* who appeared for him submitted that the plaintiffs and the second defendant had reached some understanding namely that the second defendant would withdraw his defence in regard to negligence, that the plaintiffs would not seek legal costs against the second defendant in recognition of his qualified withdrawal and that whatever quantum would be awarded would be dealt with by the parties outside court. Whatever that means. For that reason, Mr *Drury* did not find it necessary to contest the evidence led by the plaintiffs in respect of the quantum of damages.

The first plaintiff gave evidence as to the quantum of damages she is seeking. She stated that she is a former senior police officer who, at retirement, was seconded to the Reserve Bank of Zimbabwe ("RBZ") where she was employed a Chief Inspector in the intelligence unit and she earned a salary of $150-00 per month. She was expected to work until she attained the age of 75 and as she was 61 years old at the time of the accident she has lost years of employment because she was retired in 2010 owing to the injuries she suffered as a result of the accident. Considering that at the time that she lost her employment in 2010, she was 63 years old, she has lost 12 years of employment.

The first plaintiff went on to say that as a result of the collision she lost consciousness and only came round at Mutare Hospital after a period of about 2 hours. Upon regaining consciousness she discovered that she had lost her Nokia cellphone worth $100-00, together with its sim card which is now valueless and her gold earrings valued at $65-00.

As a result of the collision, which she described as horrific given that they were driving a small car which was struck by a much bigger vehicle namely a Toyota Landcruiser, she sustained injuries which are set out in the medical report of Orthopaedic Surgeon, Milos Coric, dated 11 March 2011. In that report, which was produced as exh D, the doctor stated:-

"RE: MEDICAL REPORT ON MRS MARIAN TIGERE, 62 YEARS

The above named was injured in an RTA on the 21st October 2008, whilst at work. She sustained multiple injuries:

1. Head injury
2. Left clavicle fracture
3. Multiple body and limbs contusions

Her CT scan head showed diffuse oedema –swelling but no haemorrhage – she has good recovery from her head injury using pain killers NSAIDS and Prednisolone.

She was in severe pain for a 2 (two) weeks (*sic)* - she was on strong opiate painkillers. She was in moderate pain for a 6(six) weeks (*sic*).

She had surgical fixation of her left clavicle at St Annes Hospital. Postoperative course was uneventful. She was taken to theatre again in February 2010 for removal of screw from her left clavicle.

Her injuries did not affect her life expectancy. Her injuries affected her professional activities – she was on sick leave until 31st January 2009 and again from 17th February 2010 until 5th March 2010. She will experience some headache and some pain and discomfort in future especially during cold and cloudy season. This will require occasional painkillers. I estimate her expenses for a painkillers (*sic*) at US$240-00 per annum.

She has terminally limited range of motion of her left shoulder. Her permanent disability from her left clavicle injury is 10% (ten per cent)

I recommend one final medical report on Mrs Marian Tigere's head injury to be obtained from one specialist neuro surgeon

Yours sincerely
Mr M. Coric Orthopaedic surgeon".

The first plaintiff added that she was hospitalised for 1 week while receiving treatment and has had to undergo 2 operations, the last one being in February 2010. She was in serious pain and for 1 year 2 months she could only sleep on one side as the injured side could not take any weight. She has had to give up her small scale farming. She is unable to perform her household chores, cannot driver for long periods and right up to the time her husband died, she was having difficulties engaging in sexual activity. Prior to the accident she was an ardent tennis player who boasts of a number of medals she won during her time in the police force. She is no longer unable to engage in any sporting activity and to worship God by raising and clapping hands in accordance with her church habits.

The first plaintiff testified that she has been unable to obtain a report from a neuro surgeon as recommended by Dr Coric because the surgeon requires a fee of $400-00 which she is unable to raise. That is a future expense she is entitled to.

The second plaintiff also gave evidence. At the time of the accident he was aged 62 and employed by RBZ as a chief inspector in the intelligence division earning $150-00 per month. He was expected to work until the aged 75 and having stopped working in 2010 due to the injuries he sustained in the accident, he has lost 11 years of employment. The injuries he sustained have not affected his other businesses, a butchery, a bottle store and a grinding mill.

As a result of the accident, the second plaintiff sustained injuries described in the medical report of Orthopaedic Surgeon Milos Coric dated 9 March 2011 which reads in relevant part thus:

> "RE: MEDCIAL REPORT ON MR BENJAMIN MWAKONYA TSANGANYIDZO, 63 YEARS
>
> The above named was injured in an RTA on the 21st October 2008 whilst at work. He sustained multiple injuries:
>
> 1. Fracture right acetabulum
> 2. Fracture right ischium bone
> 3. Multiple body and limbs contusions
>
> He had treatment at Avenues Clinic, Harare; traction, painkillers, NSAIDS physiotherapy and crutches. He was in severe pain for a next 3 (three) months (*sic*). His injuries did not affect his life expectancy but they affected his professional activities – on sick leave until 31st January 2009. His hip injury affects his future recreation and sport activities.
>
> He can walk without any aid at the moment but he has a slight limp. He has limited range of motion of his right hip. He has clinical and X Rays signs of one early post traumatic osteoarthritis damage of joint cartilage due to injury of his right hip. This will cause some considerable pain and discomfort in his right hip in future especially during cold and cloudy days. It will require some painkillers and NSAIDS in future. I estimate his expenses for his medication to be US$360-00 per annum.
>
> His permanent disability from his right hip injury is 30% (thirty per cent). I would like to stress his post traumatic osteoarthritis is progressive condition which will certainly lead to severe osteoarthritis. The final treatment will be THR/total hip replacement – artificial hip joint. With time his permanent disability as osteoarthritis progresses, will increase.
> I recommend his disability re-assessment in 2 years time.
> THR operation costs US$16 500-00 at the moment.

Yours sincerely

Mr M. Coric
Orthopaedic Surgeon"

The second plaintiff stated that he was hospitalised for 2 weeks and experienced severe pain. He was on 2 crutches for 3 months but was not operated on as the bones rejoined on their own. He underwent physiotherapy for 21 days. He is no longer able to enjoy sexual activity and cannot satisfy his dear wife. He cannot even lie on the right side. Prior to the accident he was a good darts player but is no longer able to play. He used to jog in the morning but is unable to do that now. He was thoroughly embarrassed during treatment days because he could not move on his own to the toilet and at one stage he soiled himself in the presence of nursing staff.

Mr *Mpofu* conceded that the plaintiffs' claims for future medical expenses have not been proved. For instance the second plaintiff's claim of $40 000-00 in future medical expenses was only proved to the extent of $16 500-00. He submitted that the claims for pain, suffering and loss of amenities are a question of impression. He did not cite any authorities justifying the claims made by the plaintiffs electing to strongly argue that our courts should now depart from the stingy awards which define decisions in Roman Dutch jurisdictions in favour of the hefty awards being granted under English law.

I have no difficulties with the plaintiffs' claims for future medical expenses and loss of earnings because they are entitled to what they have proved. The first plaintiff requires $240-00 per annum for painkillers to sooth her pain and discomfort. The doctor does not say for how long this will be. Mr *Mpofu* suggested 15 years without authority. I intend to award the first plaintiff those expenses for a period of 12 years which is informed by the years she would have spent in employment. That means that she is entitled to $240-00 x 12 which equals $2 880-00. She also has to pay $400-00 to a neuro-surgeon bringing the total under that head to $3 280-00.

Regarding her claim for loss of earnings, she has established that she would have earned $150-00 per month for 12 years. She is therefore entitled to $150-00 x 12 = $21 600-00. I have not factored in any deductions because no evidence was led on those, the defendants having elected not to contest the claim.

In respect of loss of amenities, I am mindful of the fact that both the plaintiffs are senior citizens in the twilight of their lives. Not much is expected of them at the moment, as

they should be taking life slowly. The first plaintiff's sporting activities were limited to the past when she was in the police force. I recognise that she suffered inhibitions in her sexual life until her husband passed away. Again without the benefit of authorities the award would be a matter of impression both under this head under the head of pain and suffering.

I must state that I am also mindful of the broad principles governing the awards for personal injuries set out in *Minister of Defence & Anor* v *Jackson* 1990(2) ZLR (S) 7G-H and 8A-G. In particular, it must always be remembered that general damages are not a penalty but compensation. See also *Gwiriri* v *Highfield Bag (Pvt) Ltd* 2010(1) ZLR 160(H); *Mafusire* v *Greyling & Anor* 2010(2) ZLR 198 (H); *Chidamajaya* v *Gomba & Anor* HH 211/13.

Taking into account the foregoing authorities and the fact that in making an award the court must bear in mind that we live in a dollarized economy and that I am bound to heed the effect of my award on future awards, I am of the view that an award of $5 000-00 for the first plaintiff's loss of amenities and $10 000-00 for pain and suffering will be fair in the eyes of society. She has a 10% permanent disability. In total the first plaintiff is entitled to damages of $39 880-00 as well as $165-00 for her lost property.

Turning now to the second plaintiff, he has establish that he is entitled to $16 500-00 for future medical operation and $360-00 per annum for his medication. Applying the formula I have adopted in respect of the first plaintiff, that means $360 x 11 years equals $3 960-00. In respect of his loss of earnings he is entitled to $150-00 x 12 x 11 = $19 800-00.

In respect of loss of amenities and pain and suffering, the second plaintiff has a permanent disability of 30%. I would therefore award him $15 000-00 for loss of amenities and $30 000-00 for pain and suffering. In total he is entitled to damages of $85 260-00.

I must say that these awards would have been significantly different if the court had had the benefit of opposition. As it is no meaningful interrogation was made as to the quantum of damages the defendants having capitulated at the 11th hour.

In the result, I make the following order, that:

1. Judgment with costs be and is hereby entered against the first and second defendants jointly and severally, the one paying the other to be absolved in the sum of $39 880-00 in favour of the first plaintiff and in the sum of $85 260-00 in favour of the second plaintiff together with interest thereon at the prescribed rate from 21 October 2008 to date of payment.
2. As against the second defendant only, he shall pay to the first plaintiff the sum of $165-00 together with interest from 21 October 2008 to date of payment.

Coghlan, Welsh & Guest plaintiff's legal practitioners
Honey & Blackenberg, 2nd defendant's legal practitioners