RADIUS NAKWERE
versus
ABREC ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 2-4 November 2015

Trial

Ms *P. Kashiri,* for the plaintiff
S.A. Tawona, for the respondent

CHAREWA J: The plaintiff claims for $100 000-00 particularised in the summons as comprising damages for pain shock and suffering in the amount of $40 000-00, future pain shock and suffering in the amount of $35 000-00 and loss of support in the amount of $25 000-00.

The claim arose out of the death of the plaintiff's son, Leon Nakwere, in a workplace accident. It is common cause that the deceased was at the time of his death employed by the defendant as a general hand, being an 18 year old ordinary level school leaver with no other qualifications. He was earning a salary of $292-00 a month. It is also common cause that the deceased was on a three month fixed term contract, commencing April 2013, which had, however, been tacitly extended as he died on 1 October 2013.

On the day of his death, deceased was working about 9.2 m off the ground, as an assistant to a rigger, erecting the middle truss on the eastern-side of the defendant's boiler house shed. The roof had been removed to make space for the erection of a new chimney for a new boiler. Deceased's task was to assist a competent and qualified rigger to secure the truss by tying it to a girder purlin by a rope. The only skill that was required of him was to tie the rope by a particular knot for which he had been trained. It is not contested that by some mishap, the deceased and his colleague whom he was assisting, one Tonderayi Muchadenyika, fell to the ground. While Tonderai survived, the deceased succumbed to his injuries.

The issues for trial were articulated as follows:

1. Whether or not plaintiff's deceased son died due to an accident caused by the defendant;
2. Whether or not there was contributory negligence on the part of the plaintiff's deceased son; and
3. Whether or not the claim for $100 000-00 is justified.

WHETHER OR NOT THE PLAINTIFF'S DECEASED SON DIED DUE TO AN ACCIDENT CAUSED BY THE DEFENDANT

In his testimony, the plaintiff alleged fault and wrongfulness on the defendant's part, *inter alia,* that:

- It did not provide deceased with protective clothing, or ensure his safety;
- It forced him, through threats and intimidation, to undertake work for which he was not qualified or trained; and
- Was therefore negligent or careless about deceased's safety.
- The plaintiff further testified that further proof of the defendant's lack of care was that it ferried deceased to hospital in an inappropriate vehicle, to wit a commuter omnibus.

Reliance, to found fault on the defendant's part, was also placed on the uncontroverted evidence of the expert report from the National Social Security Authority (NSSA), which was admitted into evidence by consent and marked exh 1. The investigation details, at para 5, show that:

> "It was realised that the truss could not be properly positioned into its place since the crane was showing signs of instability. Lister Mutakati then decided that the truss was to be temporarily secured at the top so that the crane could be moved to a stable position. He instructed Leon Nakwere and Tonderayi to go and tie the top of the truss to the centre purlin at the top of the roof. After the truss had been tied at the top, Thomas Nyamupinga went up the column on which the truss rested to insert bolts, only to find there were no bolt holes. He came down. Lister then instructed the crane operator to lower the boom, retract the boom and move forward to enable the rear wheel to go on a level ground in line with the other three wheels. Just as the crane got to level ground, the chain unwound once from the hook and the chain slid in the hook without control as the truss fell on the untied end to the ground. In the process, it pulled the purlin to which it was tied out of position. The purlin was the one supporting the roof sheet on which Leon and Tonderayi were lying. As the purlin was pulled away from the sheet, the sheet folded down due to the two workers' weight and they fell for about 10m to the concrete floor of the boiler house."

The onus of proving whether or not the defendant was liable for the deceased's death lay upon the plaintiff in line with the long established principle of law that he who alleges must prove. This being a delictual claim:

1. It is trite that the degree of proof required was on a balance of probabilities;

2. It was necessary to prove fault as well as wrongfulness; (See *Nyaguse* v *Skinners Auto Body Specialists & Anor* 2007(1) ZLR 296.
3. The plaintiff must have suffered patrimonial loss capable of pecuniary assessment;
4. The loss must have been occasioned by defendant's intentional or negligent act which was not too remote from the act complained of.

(See also *Mettalon Corp Ltd* v *Stanmarker Mining (Pvt) Ltd* 2007(1) ZLR 298(S).

It was not disputed that deceased died due to a workplace accident. However the defendant denied that it was at fault at all for the death, or if it was, it claimed that deceased contributed to his own death.

In cross examination, the plaintiff conceded that he had no personal knowledge of what transpired before he arrived at the hospital and so could not confirm that deceased was not issued with, or was not wearing protective clothing at the time of the accident. Nor could he proffer proof of threats or intimidation as alleged. On the contrary, his own witness, Tonderayi Muchadenyika, testified, and his testimony was substantially corroborated by the defence witnesses, that though he could not recall whether deceased was wearing safety shoes, he was indeed wearing protective clothing in the form of a helmet, overalls and safety belt.

The term "safety belt" was used by most of the witnesses to refer to what, from the description of the contraption made during the trial, was in effect a safety harness. The witness, who himself was a rigger, asserted that though he could not confirm deceased's qualifications for the job, the deceased was working as his assistant.

Further, uncontroverted evidence by the defendant was that deceased's task was to secure the truss to the girder purlin by tying a rope between the two, the only skill required being the ability to tie a certain knot for which deceased had been trained. There was therefore no proof that deceased was made to perform work for which he was not qualified or trained.

In addition the plaintiff's witness denied any allegation of threats or intimidation to carry out the work. In fact he explained, in cross examination, that the crew had the discretion to vacate the work site without the supervisor's prior approval should they perceive any danger, which they did not do. While the defendant admitted that deceased was conveyed to hospital in a commuter omnibus, no evidence was led to suggest that such conveyance caused or contributed to deceased's death.

However, it is clear from the narration in the investigation report by NSSA that many errors, attributable to negligence by the defendant, were committed prior to the accident as detailed in para 6 of the findings of the report as follows:

"i) The crane hook that was suspending the truss had no safety latch.
ii) The load was secured by winding a chain twice on the hook.
iii) The mobile crane was not inspected by a competent person before use.
iv) The crane operator and riggers had not received adequate training.
v) The steel column erected at the centre of the boiler house had no bolt holes at the top.
vi) The crane was positioned on an uneven ground with its rear wheel on a ramp before the accident.
vii) The crane was moved to even ground whilst carrying a load."

I find, from the details of the investigations at para 5, and from the findings at para 6 of the NSSA report, that negligence or a lack of proper care has been established.

It seems to me that my findings fall within the ambit of the comments of Innes CJ in *Capetown Municipality* v *Paine* 1923 AD 207 at 216-217 when he stated that:

> *"*It has repeatedly been laid down…..that accountability for unintentional injury depends upon culpa – the failure to observe that degree of care a reasonable man would have observed. The question whether in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligent paterfamilias, the duty to take care is established and it only remains to ascertain whether it has been discharged."

At the very least, I am convinced that a diligent paterfamilias would have foreseen the danger in operating a crane without a safety hook, in a situation where the operator had inadequate training, and in circumstances where the crane is positioned on uneven ground and subsequently moved while carrying its load which was improperly secured. For these reasons I am inclined to agree with the plaintiff that the deceased death was caused due to the defendant's fault.

WHETHER OR NOT THERE WAS CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF'S DECEASED SON

The defendant submitted that the provisions of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] ought to apply in that there was contributory negligence on the part of the deceased, firstly, because he was instructed to vacate the roof and failed to do so. Secondly, the defendant alleged that deceased contributed to his own death by not properly deploying his safety harness. The plaintiff of course, vehemently asserted that his son died entirely due to the negligence of the defendant.

Malaba J, in *United Bottlers (Pvt) Ltd* v *Shambawamedza* 2002 (1) RLR 341 (S) at 349 A-B stated the law thus:

> "Compliance with the provisions to s 4(1) of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] requires that a court should first find as a fact fault on the part of plaintiff before considering its causal link to the damage he has suffered".

Therefore, in order to find that the deceased contributed to his own death, there must be factual evidence that he was guilty of negligence. More particularly, it must be shown that,

> "he failed to take the reasonable care which a prudent man in the particular circumstances would have taken for his own safety." (United Bottlers (Pvt) Ltd *supra* at 349 C).

Further, contributory negligence, depending as it does on foreseeability rather than duty of care, it must be evident that a reasonable man in deceased's position ought reasonably to have foreseen the likelihood of death or injury to himself as a consequence of his own negligence. Where two causes are operating at the same time: a breach of duty by defendant and deceased's own omission to use ordinary care for his own protection,

> "a person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonably prudent man, he might hurt himself; and in his reckonings, he must take into account the possibility of others being careless*"* **(**See *Denning LJ in Jones* v *Livox Quarries Ltd* (1952) 2 QB 608 at 615.

With regard to the defendant's first submission that deceased ignored an instruction to vacate the roof, I find it strange that the defendant did not mention this during the investigations by NSSA. It seems to me that if deceased had disobeyed a clear instruction, even the strict liability conferred by the Factories and Works Act [*Chapter14:08*] and regulations thereunder would have been discharged.

Much was made of the fact that there was a lot of noise in the vicinity which probably made the instruction inaudible, but the defendant's own witnesses contradict each other: the main witness claiming that there was no noise at all, and the other asserting the opposite.

In any event, when Lister Mutakati sent Thomas Nyamupinga up the column to attempt to fit the bolts to the truss and purlin, he could have told him to inform deceased and Tonderayi to come down, which he apparently did not do. Nor was any evidence led that when Thomas Nyamupinga came down, Lister Mutakati sought verification that deceased and Tonderayi had indeed vacated the roof as allegedly instructed. I am not convinced that this was not an afterthought by the defendant's Lister Mutakati, more so since none of the other witnesses, (for both sides) heard this instruction or saw any signs that such instruction was being communicated.

However, all the eye witnesses to the accident are agreed that deceased was wearing his safety harness at the time of the accident, and that there was no defect or problem with it as it was intact. All the witnesses further agreed that the harness was designed to bear the weight of a man and arrest his fall if properly attached to a solid structure. Unlike the crane hook, which had no safety latch, the safety harness had a safety latch which could only be manually unclasped.

None of the witnesses was however able to confirm that they checked and saw that deceased had properly deployed his safety harness as procedurally required. In fact the NSSA report asserts that the deceased was lying on a roof sheet which failed to bear his weight and he thus fell to the floor, suggesting that deceased had not secured himself to a solid structure.

Consequently, the averment that deceased contributed to his own death in that he did not properly deploy his safety harness appears to be well grounded. It seems to me that deceased's death was a consequence of his safety harness not being secured to a solid structure. Therefore, in this respect, there was contributory negligence on the part of the deceased in that he ought to have reasonably foreseen that there could be danger to his person in the event of a fall if he did not properly deploy his safety harness by attaching it to a solid structure. It is my view that, even in the face of the defendant's lack of duty of care which I have found, deceased did not use the ordinary care to protect himself that a reasonable man in his situation would have done.

In apportioning deceased's contribution to his own death I am mindful of the fact that he was a general hand of merely 18 years of age, with barely 6 months experience. Further, I am of the view that the rigger he was assisting, and certainly the supervisor, ought to have checked, or at least reminded him of the safety precautions to take, particularly that he should secure his safety harness to a solid structure. For this reason I am inclined to apportion his culpability at 20%, and that of the defendant at 80%.

ARE DAMAGES OF $100,000.00 JUSTIFIED?

In order to assess the amount of damages, if any, due to the plaintiff at the rate of 80% aforesaid, I will deal with his claims from the starting point that case law has settled that claims for general damages are not a penalty but compensation, aimed at trying to place the plaintiff in the position he would have occupied had the wrongful act not occurred. See *Mafusire* v *Greyling & Anor* 2010(2) ZLR198 (H) at 203 (F).

Pain shock and suffering $40, 000-00 and future pain shock and suffering $35,000-00

The plaintiff failed to testify at all as to the quantum of his damages for pain shock and suffering.

Since it is well settled that the onus is on the plaintiff to prove his claim on a balance of probabilities (See *Tigere* v *NicozDiamond* HC 390/13 at p 6), the plaintiff ought to have lead evidence as to quantum. See also *Simbanegavi* v *Jachi* HC 40/13, and *Tshuma* v *Minister of Home Affairs* HC 194/13. As stated by Chitakunye J in *Tendai Mahachi* v *Daisy Marovanidze and Cheez Holdings Private Limited*, HH 60/2009 at p.7:

> "The onus rests on plaintiff of proving, not only that he has suffered damages, but the quantum thereof".

Since the plaintiff appeared to abandon his claims for pain shock and suffering, as he led no evidence to prove that he suffered damages and the amount thereof, I therefore find that there is no basis to award damages for pain shock and suffering.

Loss of support $25, 000.00

The plaintiff testified that he was dependent on the deceased and therefore suffered a great loss. He expected that deceased would not die at work, but that he would have lived and worked upwards of 40 years. In that time, the plaintiff expected deceased to progress and improve himself to get an even better job to continue supporting the plaintiff. He particularised his monthly needs as a) rentals $50.00 b) electricity $60.00 and c) food $120.00. He could not particularise medical expenses as he asserted that these varied.

In a claim for patrimonial damages, the general principle is that the plaintiff must be able to prove the diminution in his estate as the damages he is entitled to. This is clearly articulated by Makarau JP in *Monica Komichi* **v** *David Edwin Tanner and Eaton and Young* HH 104/05 at p 3 when she stated:

> "The measure of damages requires the plaintiff to establish the extent of her estate before the delict and a diminution to that estate as a result of the delict".

It was my view that in determining the claim for loss of support, it was vital to address the legal principle, "whether or not the deceased owed a legal duty to support the plaintiff". Therefore, in terms of r 4C, the parties were directed to address the issue in detail in their closing addresses.

Where a claim is made for loss of support, I cannot do better than to quote Chatukuta J in *Ncube* v *Wankie Colliery Co & Anor* 2007 (1) ZLR 95 (H) at 101 G when she stated that in order for a parent to succeed on a claim for loss of support from a child, the plaintiff

> "must prove that she could not support herself and was therefore dependent upon support from the deceased child. The duty to support the plaintiff must have arisen during deceased' lifetime".

This follows upon the premise that the deceased must have owed a legal duty of support to the plaintiff during the deceased's lifetime. It is not enough that the parent may have lacked the means to support himself/herself, but that he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities and could not support himself/herself and was therefore dependant on the deceased. (See G. Feltoe, *A Guide to the Zimbabwean Law of Delict* 2 ed (1990) at 111**,** E Spiro, *The Law of Parent and Child* 4 ed (1985) and Corbett Buchanan & Gauntlet, *The Quantum of Damages in Bodily and Fatal Injury Cases* 3 ed (1985).

Under cross examination, the plaintiff conceded that he owned his own house, making the claim for $50-00 for rentals unsustainable. Out of his proven total expenses of $180-00, he claimed that he earned $60-00 from peace jobs and receives $20-00 in support from his 4 older children, leaving a shortfall of $100-00 on his monthly requirements.

The plaintiff was not candid with the court with regard to his income from his wife's vegetable market.

He claimed that deceased used to support him with about $400-00 every month. However, the plaintiff was only able to show that deceased earned a salary of $292-00 per month and made about $40-00 a month from music and repairing phones, thus earning a total income of $332-00 a month for the 6 months immediately preceding his death.

The plaintiff also conceded that deceased was a fixed short term contract employee, thereby dispelling the expectation of regular and continued support. The plaintiff further conceded that, before his employment with the defendant, deceased used to earn around $100-00 a month from his activities as a cross border trader, which activities stopped upon deceased obtaining formal employment. He therefore confirmed that deceased only earned more money after employment by the defendant.

The plaintiff made the further concession that, though he is a pensioner without formal employment, he does carry out "piece jobs", owns his own seven roomed house and could let out some of the rooms to earn income in addition to whatever income would be earned from his wife's vegetable market.

I have not lost sight of the fact that deceased was merely an 18 year old, ordinary level school leaver who had only been employed as a general hand for six months. I also note

that, it is unlikely that deceased's support to the plaintiff would have remained high for up to 40 years, as, the plaintiff conceded that, like his siblings, he could also marry and prioritize his family. Further, I am not convinced that the plaintiff was being truthful when he claimed that he only received $20-00 from his older children, in view of the fact that he testified that he also looks after his second daughter's children at her or her husband's cost.

In light of the concessions made, the plaintiff's claim that deceased supported him in the amount of $400-00 per month appear farfetched. I am of the firm view that the plaintiff exaggerated the level of support deceased rendered to him. In my opinion, therefore, the evidence led did not make it clear what the measure of the plaintiff's estate was during deceased's lifetime, and what the extent of its diminution was after deceased's death.

In any event, I believe that calculating deceased's future earnings on the basis of his employment history would be fallacious in view of the nature and status of his employment contract. I also note that the chances of his obtaining a better paying job in view of his qualifications were rather slim. It is my view that there are too many variables affecting the plaintiff's claim for loss of support from deceased. Further, it seems to me that the concessions made by the plaintiff suggest that he did not consider the deceased to be under any legal obligation to support him, particularly that the plaintiff would let part of his house to support himself should deceased fail to do so.

To borrow from the legal position as summarised by Davies J in *Manuel* v *African Guarantee and Indemnity Co Ltd & Anor* 1967 RLR 45 (G) at 49C-G**,** it is my view that in order to succeed, the plaintiff ought to have established, on a balance of probabilities, that:

i. Since the death of his son, he has been indigent or is likely to become indigent having regard to his position;
ii. That he has not been able to obtain support from his wife or his other children:
iii. That the deceased would have been in a position to support him at such time as he might require such support; and finally
iv. That the deceased would have been under a legal obligation to support him, having regard to his own indigence.

The plaintiff has not satisfied me on all counts of the above test that his estate was entitled to the support claimed, and was thus diminished by the absence of such support. In fact, he stated under cross examination that deceased was not the only person supporting him, but that he merely assisted with additional support. In particular, he was not able to satisfy me as to his incapacity to support himself in view of the fact that he admitted that he carried out "piece jobs", owned his own house with seven rooms some of which he could let to earn

income, and obtained support from his wife's vegetable market in addition to what his other children provided. In fact, the plaintiff conceded that in the event that deceased married, he would have let out part of his house to support himself and his wife. It seems therefore that the plaintiff was not dependant on deceased for the necessities of life.

Consequently, I conclude that the plaintiff has not made a case that deceased owed him a legal duty of support and is therefore entitled to damages for loss of support. Having come to this conclusion, I do not find it necessary to consider the effect, on the assessment of damages due to the plaintiff, of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] or even the National Social Security (Accident Prevention and Workers Compensation Scheme), 1990 (S.I. 68 of 1990).

In passing, I note that, as already observed with regard to the apparent abandonment of the claim for pain shock and suffering, the plaintiff did not seek to amend his claim for loss of support to increase it to the overall damages figure of $100 000-00, but merely proceeded as if such amendment had already been done.

COSTS

With regard to costs, I am of the view that this is a case where, at the conclusion of the plaintiff's case, the defendant ought to have applied for absolution from the instance. The evidence led did not establish a legal duty for the deceased to support the plaintiff, or at the very least, absolution should have been sought with respect to the claims for pain, shock and suffering for which no evidence was led at all, thus curtailing the trial. Therefore, while the plaintiff was successful in proving fault on the defendant's part, and ordinarily, costs would follow the result, it is my view that this is a case where each party should bear their own costs.

DISPOSITION

In the event, it is ordered that:

1. The plaintiff's claim for damages for pain shock and suffering, future pain shock and suffering and loss of support be and is hereby dismissed.

2. Each party shall bear its own costs.

Thondhlanga & Associates, plaintiff's legal practitioners
Mutuso, Taruvinga & Mhiribidi Attorneys, defendant's legal practitioners