

PRINCE CHINEMBIRI
and
PARADZI MUPANDENYAMA
and
ALEXIO TEMBO
and
KUDAKWASHE PFUNDE
and
CLEMENCE SHAMU
and
ORCHARD KANJADO
versus
CHANCE NCUBE
and
DANIUS RUNGANO
and
ZETDC

IN THE HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 20 January 2014 and 11 February 2014

Civil trial

Z.B. Kajokoto, for the plaintiffs
No appearance for defendants

MATANDA-MOYO J: Plaintiffs issued summons against the defendants for damages arising out of electrocution caused by holding of naked wires, whilst assisting first and second defendants in erecting some electricity poles at Chiwaridzo Farm in Bindura. The defendants have since accepted liability during a Pre-Trial Conference. This matter was referred to trial only for purposes of ascertaining damages payable. At the date of hearing the defendants were in default and I directed that plaintiff's counsel submit affidavits of evidence and heads of argument justifying the amounts claimed.

The present claim is for damages arising from bodily injuries and patrimonial loss due to the negligence by the defendants. The facts herein are common cause. The plaintiffs are farmers in Bindura area. There was an electric fault which affected their farming operations. First and second defendants attended to the fault in the course and scope of their employment with the

third defendant. The first and second defendants then requested the plaintiffs to help them uplift some poles. The second defendant was the controller and had issued a work permit in terms of ZESA regulations for the repairs to be carried out. The line was switched off to allow the repairs to be carried out. During the course of the repairs second defendant switched on the 33KV line resulting in the electrocution of the plaintiffs. The plaintiffs sustained the following injuries;

Prince Chinembiri: suffered deep electrical burns of the left forearm and such left forearm was amputated.(see medical report by Dr L. Hlatshwayo of Bindura hospital of the 11th of October 2011). The doctor put the degrees or percentage of injury at 60%.

Paradzai Mupandenyama: suffered extensive deep electrical burns. He was amputated the right forearm from below the elbow. He also suffered contracture of the left hand and damaged tendon. The doctor who examined him observed that the injuries suffered were serious and permanent. The doctor put the degree of injury at 90%.

Alexio Tembo: suffered deep electrical burns on the right hand and on both legs. He was amputated the right index finger. He lost flexion of the right wrist thus losing function of the right hand. He sustained serious and permanent injuries. The doctor put the degree of injury at 75%.

Kudakwashe Pfunde: suffered superficial electrical burns resulting in contracture and stiffness of the left shoulder. The doctor put the percentage of injury at 40%.

Clemence Shawu: suffered deep electrical burns on the right foot, thigh, left leg and on both hands. His percentage of injuries was put at 18%.

Orchard Kanjando: suffered deep burns on both hands and on lower limbs and thighs. Degree of injuries was placed at 14%.

Quantum of Damages

The first plaintiff's claim for damages is under four headings, namely

- | | | |
|------|-------------------------|----------|
| i. | Shock and trauma | \$10 000 |
| ii. | Pain and suffering | \$10 000 |
| iii. | Permanent disfigurement | \$65 000 |
| iv. | Loss of amenities | \$30 000 |

In considering these four heads I will palliate i and ii, that is, shock and trauma and pain and suffering as one then iii and iv.

1) Pain and suffering.

In the *Law of Delict* PQR Boberg Vol 1984 at p 516, the learned author had this to say about the remedy of pain and suffering

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

The pain and suffering experienced by a person varies. No two individuals can experience the same level of pain and suffering. Hence its difficult to rely on past cases except as general guidelines.

In *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 GUBBAY JA (as he then was) had this to say at p7

“It must be recognized that translating personal injuries into money is equating the incommensurable, money cannot replace a physical frame that has been permanently injured. The task of assessing damages for personal injury is one of the most perplexing a court has to discharge.”

The learned Judge went on to highlight eight broad principles that should guide a court in assessing such damages. These include that:

1. General damages are not a penalty but compensation. The award is designed to compensate the victim and not punish the wrong doer.
2. Compensation must be so assessed as to place the injured party as far as possible in the position he would have occupied if the wrongful act causing him the injury had not been committed. See *Union Govt v Warreck* 1911 AD 651 p665.
3. Since no scales exist by which pain and suffering can be measured the quantum of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at p 199.
4. The court is entitled and it has the duty to heed the effect its decision may have upon the course of awards in the future. See *Sigairnay v Gillbanks* 1960 (2) SA552 at p 555H.
5. The fall in the value of money is a factor which should be taken into account in terms of purchasing power, “but not with such an adherence to mathematics as may lead to an unreasonable result: per SCHREINER JA in *Sigournay’s case supra* at 556C see

also *Southern Insurance Association Ltd v Bailey NO* 1984 SA 98 at 116 B-D, *Ngwenya v Mafuka S-18-89* at p8 of the cyclostyled copy.

6. No regard is to be had to the subjective value of the money to the injured person, for the award of damages for pain and suffering cannot depend upon or vary according to whether he be a millionaire or a pauper: See *Radebe v Haugh* 1949 (1) SA380 at 386.
7. Awards must reflect the state of economic development and current economic conditions of the country. *Sadomba v Unity Insurance Co Ltd and Anor* 1978 RLR262 G at 270K, *Min of Home Affairs v Allan* 1986, ZLR 263 (S) at 272. They should tend towards conservatism lest some injustice be done to the defendant see *Bay Passenger Transport Ltd v Franzer* 1975 SA 269 at 274 H.
8. For that reason reference to awards made by the English and South African courts may be an inappropriate guide since conditions in the jurisdictions both political and economic are so different.

In casu the first plaintiff Prince Chinembiri went through shock and excruciating pain as he was being electrocuted to an extent that he and his colleagues who were assisting passed out. That was a near death experience. Thereafter the first plaintiff was hospitalized for three months. Whilst in hospital he was in pain and had to undergo major surgeries that is skin grafting and amputation of the right arm. For all this pain and suffering the plaintiff claimed a sum of USD 20 000.

In *Muzenga v Marais and Anor* HH80/2004 CHINHENGO J set out at pp2 and 3 of the cyclostyled judgment the nature and extent of injuries he observed at p 2 of the cyclostyled judgment that

“the child is 100% disabled and the prognosis of her future extremely poor she will be uneducatable and never be employable and her life expectancy will be limited”

He awarded the plaintiff \$9 million for the pain and suffering and loss of amenities. At the time the cross rate between the Zimbabwean Dollars was \$5 730 to US\$1.00. The award was equivalent to US\$1 570.

In *Minister of Defence and Anor*1990 (2) ZLR 1. The plaintiff was a 26 year old medical doctor who suffered a shortened leg, loss of smell, double vision, memory loss, labored speech and emotional instability. He was awarded \$35 000, Zim dollars, for pain and suffering loss of amenities and disfigurement.

In *Gwiriri v Highfield Bag Pvt Ltd* 2010 (1) ZLR 160 H. A plaintiff whose hand was crushed by rollers of a machine he was working on was granted USD3000 for pain and suffering.

Going by the above awards it should be apparent that US\$20 000 dollars for pain and suffering is rather high. The award should be not be punitive but compensatory for pain and suffering.

It is not in dispute that the plaintiff suffered pain as he was being electrocuted and when his hand was being amputated. The pain continued, even after discharge from hospital. I am of the view that a sum of US\$6 000 would be adequate compensation for pain and suffering.

Permanent disfigurement and loss of amenities would be combined into one heading. Under this heading the plaintiff's total claim is US\$95 000.

The disability the plaintiff suffered is the loss of his right arm as it was amputated. This is a disability he will have to live with for the rest of his life.

The concept of loss of amenities of life has been tersely but aptly defined by LORD DEVLIN in *H West and Son Ltd v Shepherd* 1963 (2) ALLER 625 HL at 636 G - H as 'a diminution in the full pleasure of living'.

Factors that can influence the amount to be awarded include the age and sex of the injured person and the disfigurement and its influence on the plaintiff's personal and professional life. For instance how many of the activities he was able to do or participate in is he still able to do or has he been incapacitated for and what did those activities mean in his life?

The first plaintiff Prince Chinembiri indicated that he is contractured in both legs and suffered tendon damage. The first plaintiff's affidavit of evidence is contradictory as to the arm which was amputated. Para 11 of the same talks of right arm para 24 (a) talks of left arm whichever way there was an amputation of an arm. Plaintiff further indicated that he cannot hold or pick anything with the remaining hand, cannot write, can no longer drive.

The disfigurement is visible and he will have to live with that discomfort. The disfigurement whilst prominent does not appear to be as serious as that in *Ministry of Defence and Anor v Jackson supra* as already alluded to in that case a 26 year old doctor suffered injuries that affected the said functioning of his faculties of smell, vision, speech, emotional instability and a shortened leg. In that case an award of \$35 000 Zimbabwean dollars was made.

In *Gwiriri v Highfield Bag Ltd supra*. Plaintiff claimed US\$60 000 for disability and loss of amenities, the facts have already been alluded to and was granted \$6 000.

I am of the view that an appropriate award would be in the sum of US\$ 8 000.

Accordingly judgment is hereby entered for the first plaintiff and against the defendant as follows:

1. USD\$ 6000 for pain and suffering
2. USD \$8000 being damages for permanent disfigurement and loss of amenities of life.
3. Costs of suit.

The second plaintiff Paradzai Mupandenyama. This plaintiff's claim for damages is under five headings

1. Trauma and shock	US\$ 80 000
2. Pain and suffering	US\$ 100 000
3. Permanent disfigurement	US\$ 400 000
4. Loss of essential body parts	US\$ 250 000
5. Loss of amenities	<u>US\$ 800 000</u>
	US\$ 1 630 000-00

Pain and suffering, I will palliate trauma and shock, pain and suffering into one claim of US\$180 000.

The same considerations for plaintiff one apply here hence an award of US\$6 000 will be awarded for pain and suffering considering point no 6 in the guideline of damages assessment enunciated in *Minister of Defence and Anor v Jackson supra*.

Permanent disfigurement, loss of essential body parts and loss of amenities would be palliated into one. Plaintiff claimed US\$1 450 000 as per his affidavit of evidence filed of record.

The same considerations as with the first plaintiff apply and an award of US\$10 000 is hereby granted for loss of amenities and permanent disfigurement.

Loss of earnings; plaintiff claimed US\$70 122-00. Second plaintiff based his claim on the fact that he operates three General dealer shops and butcheries and claims he was earning an average of;

- from Shops +/- \$2 000 per day per shop
- from Butcheries +/- \$500 per day per shop

and that he lost one hectare of potatoes and nothing was recovered lost US \$+/- \$15 000. Finally he had 3 220 pigs of which 102 of them died due to neglect and plaintiff lost US\$11 220-00 as a result.

The assessment of an appropriate award for loss of earnings/profit is not as easy as just multiplying figures. There are several contingencies that must be taken into account. Where there is insufficient evidence on the exact figures to use the court is still enjoined to make an award. In *Santam Insurance Co Ltd v Paget* 1981 ZLR 73 A the court held that “A court should make some award in cases where damages are claimed for loss of future earning capacity if it is satisfied that the plaintiff has suffered such a loss, even where there is insufficient information to assess the loss accurately and the court has to pluck a figure out of the air”.

I make the above averment because the evidence led by the second plaintiff did not state the sales at the relevant time when he was in hospital, further the books produced by the second plaintiff are not books of accounts hence I did not place much reliance on them.

In assessing loss of earnings there are certain considerations to be taken into account.

In casu the plaintiff was not rendered vegetative or useless. His mental functions are fully functional. He can delegate duties and be an effective manager for his businesses.

As for the potato field which was lost amounting to US\$15 000 and US\$11 220 for the 102 pigs which were lost, such special damages are regarded in law as being too remote to be recoverable, see the case of *Holdene Brick Works (Pvt) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) at 687 D-E.

The second plaintiff lost both arms and there will be limits to the nature and extent of activities he can engage in, I will award that loss in a progressive manner. An award of US\$ 10 000 will meet the justice of the case.

3. Alexio Tembo

Third plaintiff's claim for damages is under headings

- | | |
|---------------------------------|----------|
| 1. Shock and trauma | \$15 000 |
| 2. Pain and suffering | \$15 000 |
| 3. Permanent disfigurement | \$40 000 |
| 4. Loss of essential body parts | \$10 000 |
| 5. Loss of amenities | \$40 000 |
| 6. Cost of suit | |

4. Kudakwashe Kapfunde

Fourth plaintiff claim for damages is under headings

- | | |
|----------------------------|----------|
| 1. Shock and trauma | \$15 000 |
| 2. Pain and suffering | \$35 000 |
| 3. Permanent disfigurement | \$35 000 |
| 4. Loss of amenities | \$20 000 |

5. Clemence Shawu

This plaintiff claimed damages under the headings

- | | |
|----------------------------|----------|
| 1. Shock and trauma | \$15 000 |
| 2. Pain and suffering | \$10 000 |
| 3. Permanent disfigurement | \$20 000 |
| 4. Loss of amenities | \$40 000 |

6. Orchard Kanjado

Claimed damages under the headings

- | | |
|----------------------------|----------|
| 1. Shock and trauma | \$5 000 |
| 2. Pain and suffering | \$10 000 |
| 3. Permanent disfigurement | \$15 000 |
| 4. Loss of amenities | \$10 000 |

In applying the same principles above I make the following awards. Judgment is entered in favour of plaintiffs as follows:

1. First plaintiff:

To be paid;

- i. \$6 000-00 for pain and suffering.
- ii. \$ 8 000-00 being damages for permanent disfigurement and loss of amenities for life
- iii. Costs of suit.

2. Second plaintiff

- i. \$6 000- 00 for pain and suffering.
- ii. \$ 10 000 - 00 damages for permanent disfigurement and loss of amenities.
- iii. \$10 000 - 00 being damages for loss of profit and earnings
- iv. Costs of suit

3. Third plaintiff;

- i. \$6 000 - 00 for pain and suffering
- ii. \$9 000- 00 for permanent disfigurement and loss of amenities
- iii. Costs of suit

4. Fourth Plaintiff

- i. \$6 000-00 for pain and suffering
- ii. \$7 000-00 for permanent disfigurement and loss of amenities
- iii. Costs of suit

5. Fifth plaintiff

- i. \$5 000-00 for pain and suffering
- ii. \$3 000-00 for permanent disfigurement and loss of amenities
- iii. Costs of suit

6. Sixth plaintiff

- i. \$4 000-00 for pain and suffering
- ii. \$2 000-00 for permanent disfigurement and loss of amenities and
- iii. Costs of suit

Interest shall be payable at the prescribed rate from date of judgment to date of final payment for all the six plaintiffs.

Kajokoto and Company, plaintiffs' legal practitioners