HC 284/2001

MARTHA MUNGOFA
versus
OWEN MUDEREDE
and
WINGTON TRANSPORT (PRIVATE) LIMITED
and
ZIMNAT INSURANCE COMPANY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
NDOU J
HARARE, 15, 29 July, 26 August 2002 and 27 August 2003

Civil Trial

Adv. *H. Simpson,* for the plaintiff
Mr *Chibwe,* for the defendant

J: The plaintiff was, prior to the accident subject-matter of this trial, employed as Sales manager. On 11 May 2000 she was a fare paying passenger in a commuter omnibus registration No. 715-775Q. The omnibus was being driven by the first defendant and it was owned by the second defendant and insured by the third defendant. The said omnibus was *en route* from the city of Harare towards the suburb of Budiriro. Along Simon Mazorodze Road, opposite Auto City, the said omnibus was involved in an accident. It collided with a Hino lorry registration No. 411-594J belonging to Chikezenga Transport. As a result of the collision the plaintiff was seriously injured in that she suffered bilateral compound fractures of both legs and a fractured right facial cheek bone. The plaintiff endured a long period of hospitalisation as a result of the injuries and had to undergo several surgical operations to treat and remould the broken bones. The plaintiff ended up with a 45% percentage disability rating. The plaintiff, as a result of injuries sustained, suffered special damages amounting to $300 000,00 being ambulance fees, medical and surgical bills including physiotherapy and ambulance and wheelchair hire fees.

The plaintiff lost her job as a Sales Manager at the tender age of 40 years and with her retirement age being 65 years she, therefore, lost 25 years of productive income. There is arithmetical error in the plaintiff's

declaration as the difference between 65 and 40 was put as 15 instead of 25.

The plaintiff is now confined to crutches and or wheelchair and can no longer walk or perform her duties as a housewife and has lost her appetite for all sexual relations with her husband.

The plaintiff will need to continue with physiotherapy and rehabilitation and suffers headaches and swelling of her legs.

In the summons the plaintiff claimed a total of $2 188 200,00 with interest at the prescribed rate from the date of summons to date of payment in full plus costs of suit against the defendants jointly and severally. During the trial the figure was revised and calculated as follows:

> "1. At the date of the accident plaintiff was forty years of age. Without being injured she expected to be in employment to the age of sixty-five years (for the purpose of calculating she will lose her monthly income for a period of twenty-five years) (i.e. 65–40=25).
>
> 2. Plaintiff before the accident was earning a nett monthly salary of $8 194,00 (Exhibit 7 – her payslip refers) Plaintiff set pout the following calculation of her loss of future earnings -
>
> $8 194 x 12 x 25 = $2 188 200,00
>
> Total amount reduced by 20% for contingencies
>
> and accelerated payment of future earnings = $ 437 640,00
>
> $1 750 560,00

To this figure of $1 750 560,00 representing plaintiff's loss of future earnings plaintiff sets out her total claim as follows –

> "Pain, suffering and a payment 45% disability $ amount to be assessed by the Court
>
> Medical expenses $ amount to be assed by the Court
>
> Disfigurement and loss of amenities of life $ amount to be assessed by the Court
>
> Total $
>
> "

It is common cause that arising from this accident, the first defendant was charged with reckless driving in contravention of the Road Traffic Accident Act [*Chapter 13:*11]. He was convicted and sentenced to a fine of $2 000,00 or in default of payment 3 months imprisonment and in addition he was prohibited from driving for a period of six months.

At the pre-trial conference stage the second defendant was the only defendant still enjoying the right to be heard. The other two defendants were no longer participating. The first defendant did enter appearance to defend whereas the third defendant paid the plaintiff to insured amount.

At the pre-trial conference the parties agreed that the issues for determination at the trial were –

> "(a) Whether or not the First Defendant was the authorised driver of the motor vehicle in question, on the day and time of the accident.
>
> (b) Whether the plaintiff sustained any damages and the quantum thereof.
>
> (c) Whether Second Defendant is liable to the plaintiff in the sum claimed or in any sum."

The second defendant admitted that he was the owner of the commuter omnibus in question. The question of the first defendant's negligence was not in issue

I will consider evidence of each party in turn.

Plaintiff's Case

Martha Mungofa

She stated that she has three children. She also indicated that her husband was present in court to give her moral support. She confirmed that she was a paying passenger in the vehicle in question. The crew of this omnibus comprised a driver and a conductor. She does not know what happened after the accident. She testified that in December 2001 the third defendant paid her $20 000,00 in terms of its insurance obligations. She did not know the first defendant prior to the accident and did not see him after the accident. She was convinced that the first

defendant was an employee of the second defendant as he was driving the vehicle. As a result of the accident both her legs were broken, she had other injuries. She was hospitalised as a result of the accident, first at Harare Central Hospital and later as the Avenues Clinic. She was in the former for a day and at the latter for over a month. She could not walk and as result her husband hired a wheelchair. She was bedridden for about four to five months. She was now using crutches. She underwent a total of six operations. She was unable to look after her three children and had to hire the services of a maid. At the time she testified she still had problems in chewing food. Her food had to be overcooked. She stated that she still cannot stand for periods in excess of 10 minutes. She stated that the injuries are depriving her and her husband the enjoyment of their conjugal relationship. She, however, pointed out that her husband has fortunately been very supportive throughout. She stated that she still visits St Giles Medical Rehabilitation Centre. This was confirmed by Exhibit 6 being a letter from the Centre's physiotherapist, L. Ferrao. She stated that on account of the injuries she lost her employment where she was in receipt of a gross salary of $10 713,00 and nett salary of $8 194,94 as evinced by her payslip Exhibit 7. She stated that she cannot walk and she take two painkillers per day. She stated that she experienced pains each time the weather changes. She produced medical reports from the orthopaedic surgeon, Mr G.A.N. Vera. Mr Vera has been responsible for the treatment of the plaintiff. In a case of this nature I think it is important to quote verbatim the relevant parts of his report. He stated:

"Injuries sustained

- Comminuted compound fracture left libia
- Mid shaft fracture right libia
- Fractured maxilia
- Head injury

Treatment

She was admitted to hospital in severe pain and shock and required urgent resuscitation with intravenous fluids, plasma expanders, antibiotics, pain killers and antitetanus fluid. The right leg was manipulated and cast in P.O.P. The left leg was fixed with an intramedullary wired for six weeks necessitating only liquid diet. She was put on post-operative physiotherapy. The G.K. nail was

removed in March 2001 because of deep bone infection causing pains and rigors.

Current Condition

She walks with a painful waddling gait. The left leg has a deep pain and she sometimes experiences hot and cold spells suggestive of an ongoing bone infection. She has night pain and cannot walk more than a kilometre without experiencing pain. She is still using two crutches and is on analgesics. She cannot chew hard food and cannot enjoy a cob of roast mealies because of maxillary and jaw pain.

Future Treatment

Bone infection is very difficult to eradicate and it is likely that she will have an acute attack of infection needing surgical drainage in the near future. Such an operation cost $50 000. She is on long term antibiotic treatment at the moment costing $1 400 per week and she will continue for the next six weeks. The regular analgesia will be required for pain and this will continue for the foreseeable future.

Social and Employment

Mrs Mungofa has suffered depression and has had relapses requiring drug treatment. She is likely to be on anti-depressants for the foreseeable future. Her depression has affected her sex life and home adversely. She cannot run or play sport and cannot be employed in a largely sedentary job because prolonged standing causes leg swelling and pain.

Conclusion

Mrs Mungofa has a permanent forty-five percent disability (45%).”

She further testified that her erstwhile medical aid, CIMAS, met some of the expenses i.e. they paid $164 059,79 leaving a shortfall of $60 316,15. She has to pay the shortfall. She produced documentary proof of this in the form of a detailed statement from CIMAS.

As a result of these medical expenses and loss of income her children had to be withdrawn from boarding schools as her husband’s salary is now overstretched. She said her previous employers paid her salary up to June 2001. She stated that she retired on medical grounds and received $42 000. I am satisfied that this witness gave her evidence well. Notwithstanding the severity of injuries sustained she did not seek to give a biased account of the events and extent of her injuries. Overall I hold the view that her account is truthful.

Second Defendant's Case

Only one witness was called in support of the second defendant's case.

Tonderai Machochonore

He stated that on the morning of 11 May 2000, he was assigned to drive this omnibus registration No. 715-775Q. He drove this omnibus the whole morning and part of the afternoon. At around 1500 hours he was arrested by the Police and taken to Harare Central Police Station. He left the omnibus at the bus terminus with the ignition keys inside the vehicle. Before he was taken by the police he had a bus conductor in the omnibus whom he left in the vehicle. He, however, could not recall the name of the latter. He could not discount the fact that the said conductor gave Owen Muderede (first defendant) authority to drive the omnibus. His view was that the conductor would have no right to give such permission. When he was taken by the police the omnibus had passengers but was not full. The conductor was in the bus. He, however, indicated that if Owen made several trips in the omnibus he would be paid for his efforts. He indicated that it was usual for them to use Owen and other drivers at the terminus to drive extra trips and pay them although they were not on the second defendant's payroll. The proceeds of such trips of such trips by drivers in Owen's position would go to the coffers of the second respondent. He also testified that disciplinary measures were taken by the second defendant against him for allowing Owen to drive. He testified that at the time he was a senior driver with the second defendant with (five) 5 years experience. I am of the view that this witness is being candid about the relationship between first and second defendants. It is, however, clear to me that the first defendant drove this bus with the permission, express or implied, of this witness and or the conductor. The only issue for determination is whether there was sufficient relationship or proximity between the first defendant to create liability on the part of the second defendant for this claim. In other words, is the second defendant

liable (vicariously) for the delict committed by the first defendant? It is trite that an employer is vicariously liable for all delicts committed by his employees who are not independent contractors.

The credible pieces of evidence before me establish the following facts.

First, the plaintiff boarded this omnibus at a designated bus terminus. Second, there was a bus crew comprising of the first defendant as the driver and a conductor. Third, the driver was not in fulltime employment of the second defendant but the conductor was in full time employment of the second defendant. Fourth, the trip undertaken by the first defendant and the bus conductor, in which the plaintiff got injured, related to conduct within his sphere of employment. Fifth, the proceeds from the trip were destined to the second defendant. Sixth, it was usual for the second defendant to use other drivers at the terminus like the first defendant in the scope of their employment although it is not clear as to whether the second defendant was aware of this practice. The second defendant did not lead evidence to dispute this allegation. In any event this piece of evidence was adduced from the second defendant's own witness. I will, however, find in second defendant's that it may well have been unaware of the practice. There is no evidence that the second defendant authorised this practice of "keeping the ticket going" by using other drivers like the first defendant who were not employed by the former. The second defendant, in its wisdom, did not adduce evidence to show that the bus crew acted contrary to its specific instruction by embarking on the said practice. In any event I do not think such an instruction would have had any impact on the application of the principles of vicarious liability to the facts of this case. Even if it is accepted that the omnibus was taken in absence of its regular driver, the regular conductor was there carrying out his normal duties on the fateful trip. The regular driver left the ignition keys in the bus. He subscribed to the practice described above of "keeping the ticket going" by using the first defendant as a driver. This was not the first time that the crew used the first defendant. The destination of the proceeds of the fateful trip were the

second defendant. The bus crew were carrying out their employer's assignment. It is important to note that the evidence establishes that they were carrying out that assignment and none other. The bus crew allowed the first defendant to drive the bus in their execution of their employer's work. There is no evidence, in this case, that the bus crew abandoned their employer's work or interest in favour of their own affairs. They were not acting on a frolic of their own.

We are dealing here with the doctrine of vicarious liability. It is trite that in terms of the principles of vicarious liability, an employer is made liable for the wrongs (delicts) committed by his or her servant in the course and scope of the servant's employment – see *Hirsch Appliance Special v Shield Security Natal (Pty) Ltd* (2) SA 643 (D). Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. Thus liability applies where there is a particular relationship between two persons – see *Law of Delict* J Neethling, JM Potgieter and PJ Visser (2 ed) at pp 352-58. According to J Burchell in *Principles of Delict* p 215 –

> "The employer need not be personally at fault in any way but the wrong of the servant (for which the servant remains personally liable) is imputed or transferred to the employer who often has the 'deeper pocket' or 'broader financial shoulders' to compensate the person injured by the servant's negligence."

In *A Guide to the Zimbabwean Law of Delict* (3 ed 2001) p 67, G. Feltoe finds justification for the doctrine of vicarious liability on that –

- "By instructing employees to engage in activities, he creates the risk that the employees may cause harm to others. (He also has the capacity to control his workers' activities);
- The employer operates his business through his employees and makes profit.
- The employer is usually in a far better financial position to compensate the injured party than the employee who will often not have the financial resources to pay compensation and, as between the employer and the employee, it is therefore, unfair to expect the employee to pay compensation for a delict arising out of performing work in behalf of the employer;
- The employer which is often a sizeable enterprise rather than a single individual, can far better absorb losses of this description by taking out insurance and by way of distribution of costs to customers by increasing the price of products or services."

The doctrine is based on a social policy. The origin of this rule or doctrine was dealt with by BOOYSEN J, in *Hirsch Appliance Special v*

Shield Security Natal, supra, pp 647-8 in the following terms:

> "In general the law does not hold one liable for the wrongs of another but sometimes it does. So, for example, it holds one vicariously liable when one's servant commits a wrong in the course and scope of his employment. That this is so today is well settled."
>
> (See, for example, *Minister of Police v Mbilini* (3) SA 705 (A)) – although it seems clear that vicarious liability as a general principle was unknown to the Romans during the classical and post-classical periods. (Barlow - *The South African Law of Vicarious Liability* p 29; Scott - *Middellilce Aanspreaklikheid in die Suid-Afrikaanse Reg*at 1; Van der Merwe and Olivier - *Die Onregmatige Daad in die fuid-Afrikaanse Reg*, 6 ed, at 508).

By vicarious liability, I mean a person's liability for the wrong of another although he is himself free from fault or blameworthiness. Whether it was known to or part of Roman law and whether Barlow (*op cit* 82) is correct in saying that amongst Roman-Dutch writers *communis error facti jus* this regard is, and has for a long time been, not important. In 1894 KOTZE CJ in *Lewis v The Salisbury Gold Mining Company* (1894) 1 OR 1 at 20, after an analysis of Roman-Dutch law and the laws of other countries, stated:

> "The Roman-Dutch law recognised and adopts the principle, that a master or employer is liable for injuries caused by his servants or workmen, within the scope of their employment. This general principle is also the law in England, Scotland, the United States of America, France, Belgium, Holland, Italy, Denmark and Norway."

As to the 'true reason' of the rule, KOTZE CJ quoted a passage from the judgment of CHIEF JUSTICE SHAW delivered in 1842 in the Supreme Court of Massachusetts in *Farwell v The Boston Railway Co.* (1842) 4 Met 49:

> "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another, and if he does not, and another thereby sustains damage, he shall answer for it."

He said further:

> "It is therefore not surprising that this principle of a master's liability for the acts of his servants within the scope of their service – a development of the Roman law doctrine (Dig 44.7.1 paras 5 and 6)

> is recognised not merely in Great Britain and America, but also in the jurisprudence of most civilised countries, including our own State. Its general recognition is its best claim to being founded in sound policy and justice ….”

The basis for this rule has since been variously stated by The South African and our courts. For example, in *Fieldman (Pty) Ltd v Mall* AD 733 at 741, WATERMEYER CJ said:

> “A master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy … because he has created this risk for his own ends, he is under a duty to ensure that no-one is injured by the servant’s improper conduct or negligence in carrying out his work ….
>
> In *Minister of Police v Rabie* (1) SA 117 (A) at 134H-J, JANSEN JA also regarded ‘the risk created by the State’ as the basis for liability.”

See also *Boka Enterprises (Pvt) Ltd v Manatse* (3) SA 626 (ZH) ay 628-629 and *Ditchipe v Ikageng Town Council* (4) SA 748 (T) at 751. The learned Judge BOOYSEN, *supra*, at pages 648I to 649A referred the following passage -

> “Fleming *The Law of Tort,* ed states in this regard at 340:
>
> > ‘The modern doctrine of vicarious liability for misconduct committed by the servant in the course of his employment cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations. Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant who is apt to be a man of straw; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices.’
>
> One could perhaps comment that the interests of the employer should not be confined to economic interests as employers often have no economic interests.”

Although there is now no question but that vicarious liability attaches where an employee is acting within the course and scope of his employment, the application for this rule is often most difficult.

In casu, is no dispute that the accident of the omnibus was solely caused by the negligent driving of the first defendant. He was convicted and punished in the criminal court. He has not bothered to defend the plaintiff's claim.

The facts are distinguishable from those in *J. Paar v Fawcett Security* (2) SA 140 (ZS). In that case the Supreme Court decided there was not a sufficient relationship or proximity between the parties to create a duty to care.

What we have here is second defendant's employees, the bus crew, permitted the first defendant to drive the omnibus with fare paying passengers. This is the conduct that caused harm to the plaintiff. It was done within the general scope of the bus crew's employment. The bus crew member who allowed the first defendant to drive was obviously permitting him to drive the omnibus "doing his master's work in pursuing his master's ends" – *SA Railways & Harbours v Marais* (4) SA 610 AD at pp 620, 622-3. The fact that the bus crew member acts contrary to second defendant's instructions does not necessarily take the conduct out of the scope of his employment. The question is whether the instructions given to the employee limit the scope of his employment or merely relate to conduct within that sphere. It may be that the employee is carrying out his assignment in a manner which was contrary to his instructions, but he is nevertheless carrying out that assignment and none other – *Ngubetole v Administrator, Cape* (3) SA 1 (A). In the latter case the appellant had not been permitted to hand over driving to another. CORBETT JA held that the instruction which had been disobeyed when the appellant had allowed another to drive related to conduct within his sphere of employment. The appellant was therefore, carrying out his employment – see also *Beard v London General Omnibus Co* [1900] 2 QB 530 (CA) and *Francis Freres & Mason (Pty) Ltd v Public Utility Transport Corporation Ltd*1964 (3) SA 23 (D). In the latter case the driver of a bus delegated this function to a mechanic's assistant who was unskilled and incompetent to drive a bus. A delegation of authority to drive the bus to a regular driver was permitted, but not the delegation to an unskilled driver. CANEY J held the bus owner liable for an accident caused by the negligent driving of the unskilled driver since his driving the bus constituted an improper method or mode of carrying out the driver's functions. In *Felman (Pty) Ltd v Mall (supra*), F employed a delivery driver, and after completing his deliveries on Saturdays he was to park the van at a garage in Sauer Street, Johannesburg for the weekend. On his way to the garage he deviated to a party in Sophiatown, a deviation of some four (4) miles, occupying several hours and then crashed while on his way from Sophiatown to take the vehicle to Sauer Street. The Appellant Division held that the accident occurred in the course of the driver's employment. I have already cited the rationale for this decision *supra.*
Ilkiw v Samuels and Others, (1963) 2 All ER 879 bears a close factual

resemblance to the scenarios stated in the above cases. This concerned a lorry driver, one Waines, who has strict instructions from his employer not to allow the lorry to be driven by anyone else, and who, contrary thereto, allowed a stranger to move the lorry after it had loaded a quantity of sugar in a warehouse. As a result of the stranger's incompetent handling of the lorry an accident occurred causing physical injury to a workman in the warehouse. Waine's employer was held liable by the trial judge and this part of his decision was upheld on appeal. In delivering judgment on appeal DIPLOCK LJ, having referred to the distinction between the prohibitions limiting the sphere of employment and those dealing only with conduct within the sphere of employment stated:

> "In cases such as this, where there is an express prohibition, the decision into which of these two classes the prohibition falls seems to me to involve first determining what would have been the sphere, scope, course (all these nouns are used) of the servant's employment if the prohibition had not been imposed. As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: What was the job on which he was engaged for his employer? And answering that question as a jury would. In the present it appears to me that the job on which Waines was engaged for his employers was to collect a load of sugar at the sugar factory and transport it to its destination, using for that purpose his employer's lorry of which he was put in charge. The express prohibition was against permitting anyone else to drive the lorry in the course of performing this job. This, it seems to me, was a prohibition on the mode in which he was to do that which he was employed to do, a prohibition dealing with conduct within the sphere of employment."

- see also *Kay v I.T.W. Ltd* (1967) 3 All ER 22; *Ngubetole'*case *supra,* p 12 and *Juliet Chisamba v Ernest Kanyangarara and Lion Insurance Co* 168-01. *In casu,* was no express prohibition so at most we are dealing with implied prohibition. The use of first defendant was wholly in pursuance of the second defendant's interests. I hold the view that in the circumstances the second defendant is liable for the delict perpetrated by the first defendant on the plaintiff

The only issue left is that of the quantum of damages. My understanding is that the plaintiff is claiming damages on the basis of the once-and-for-all" rule. As CORBETT JA in *Evins v Shield Insurance Co. Ltd* (2) SA 814 (A) at 835 said:

> "The 'once and for all' rule … is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action …. This rule appears to have been introduced into our practice from English

Law ….”

In assessing the quantum of damages I stand guided by what McNALLY JA stated in *Biti v Minister of State Security* (1) ZLR 165 (S) at 171. The learned Judge of Appeal remarked –

> “Nowadays it is not safe to obtain guidance on quantum from other countries, given that our economies have changed so greatly and so differently.”

I also find the approach of MUNGWIRA J in *Joyce Karimazondo and Shupikai Karimazondo v Minister of Home Affairs* 191-01 instructive. On pp 11-12 of her cyclostyled judgment the learned judge remarked –

> “In Zimbabwe, I have been unable to go back further than 1990, because the consumer price index has been based on 1990 as 100. The figure for April 1997 was 490.9 (see *Quarterly Digest of Statistics,* Vol 3, for September 1997). So $35 00 in 1988 would have to be multiplied at least by 5 to obtain a compensation figure in April 1997. Dr Jackson’s award, had it been made in April 1997, would have been at least $175 000 and probably well over $200 000. In the circumstances, one cannot say that the claim in this case, for $100 000 is excessive.” (Dr Jackson is in the case *Minister of defence & Anor v Jackson* 1990 (2) ZLR 1 (S)).

I have to assess the damages in such a way that the objective of such litigation is achieved. The award must be realistic. The effect of inflation and major changes in the personal or financial predicament of the plaintiff during the relevant period has to be taken into account. The award for damages should adequately compensate the plaintiff without it being “a road to riches” – *Argus Printing & Printing Co. Ltd v Inkhata Freedom Party,* (3) SA 579 (A) at 590. This balance has to be carefully strike.

In casu, the plaintiff seeks to recover pecuniary loss which has already occurred – *damnum emergens,* loss which will occur in the future – *lucrum cessans.*

In full appreciation of the forgoing and having regard to all the circumstances of the case I propose to consider the awards carefully.

<u>*Lucrum Cessans* – Loss of Future Earnings</u>

The amount claimed is $1 750 560,00. I have highlighted how this figure was arrived at (*supra*). In light of her disability and medical

condition of the accident in this matter the plaintiff is unable to mitigate this loss by finding employment. The job market is not good for able bodied and healthy jobseekers it would be almost impossible for her to get a job. This amount was not seriously challenged by the second defendant. In claims for loss of earning capacity, damages must be discounted to the date of trial, not the date when the delict happened. This means that I can take account of inflation and other relevant factors arising out of the delict and which affect the plaintiff's loss – *General Accident Insurance Co. Ltd v Summers; Southern Versekerings Associasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* (3) SA 577 (A). Bearing in mind the present circumstances, the figure claimed is reasonable fair for loss of earning capacity.

General and Special Damages

The evidence establishes that the plaintiff's medical aid, CIMAS, met most of the expenses leaving a shortfall of $60 316,15. She was also paid $42 000,00 on her retirement on medical grounds. She requires a regular supply of anti-biotics and anti-depressants. She may still require further surgical drainage operation put at $50 000 in 2001. She has to use a wheelchair or clutches. She still needs to continue with physiotherapy and rehabilitation. The plaintiff is no longer able to engage in sexual activities with her spouse and has suffered loss of the amenities and the ordinary pleasures of living have been diminished. From the medical evidence she no longer enjoys all the facets which go to make up an enjoyable human life and in, particular, the full use of one's five senses. As CLAASEN J in *Reyneke v Mutual and Federal Insurance Co Ltd* (3) SA 412 (W) at 419C stated:

> "The amenities of life flow from the blessings of an unclouded mind, healthy body, sound limbs and the ability to conduct unaided the basic functions of life, such as running, eating, reading,. Dressing and controlling one's bladder and bowels." – see also *Administrator, South West Africa v Kriel* (3) SA 275 (A) at 288E-G.

In her summons the plaintiff claimed a total of $2,8 million. She, however, did not subtract what the medical aid met, what she received from her employer upon retirement on medical grounds and the $20 000 she received from the third defendant. I will reduce the total award by these amounts which total $226 059,00.

In the result my order is the following:

1. That the first and second defendant shall pay to the plaintiff jointly and severally one paying the other to be absolved the sum of $2 573 941,00 with interest thereon at the prescribed rate as follows:

   (a) on the sum of $2 473 941,00 being special damages and general damages for pain, suffering, loss of earning capacity, loss of amenities and disability, with effect from the date of summons to date of payment in full;

   (b) on the sum of $100 000,00, being future medical expenses, from the date of the handing down of this judgment to date of payment in full.

2. That the first and second defendants shall pay, jointly and severally one paying the other to be absolved the plaintiff's costs of suit.

Mushonga & Associates, plaintiff's legal practitioners
Messrs Stumbles & Rowe, defendant's legal practitioners