

JONATHAN MUSHAWA
versus
MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 30 April 2014 & 17 June 2015

Unopposed Matter

T. Christmas, for the plaintiff
Defendant in default

MAKONI J: On 31 March 2003, and at around midnight the plaintiff, who was asleep, was woken up by members of the Zimbabwe National Army (ZNA) who had broken into and entered his house. He was ordered to lie on the ground and they took turns to assault him all over the body with sticks, batton sticks, sjamboks and boots. They indicated that they were assaulting him as he was a member of the opposition party.

As a result of the assault, the plaintiff sustained bruises on the back and buttocks, and a swelling above the left elbow. He suffered excruciating pain.

The assault also caused him great embarrassment as he was assaulted in full view of his family and neighbours.

He was attended to by a medical doctor who observed the injuries as outlined above. The doctor commented that several blows were delivered, that severe force had been used and that there was no likelihood of permanent injuries.

The plaintiff then instituted the present proceedings against the defendant on the basis of the principle of vicarious liability. He claimed the amount of \$3000-00 for shock, pain and suffering and \$1000-00 for *contumelia*. The defendant challenged the claim until pre-trial conference stage when he defaulted. His defence was struck out and the matter was referred to the unopposed roll for the plaintiff to prove the quantum of damages.

Shock, Pain and Suffering

In *Trevor Simbanegavi v Officer Jachi* HH 40/13 at p 4 of the cyclostyled judgment I observed:

“Assessment of damages in personal injury cases is one of the most daunting tasks that can confront a judicial officer. Gubbay JA (as he then was) summed it up in *Minister of Defence and Anor v Jackson* 1990(2) ZLR 708 (SC) when he stated:

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 therefore of assessing damages for personal injury is one of the most perplexing a court has to decide”.

Visser & Potgieter in *Law of Damages* 3rd ed at p 507 make following observations:

“In the assessment of fair compensation for pain and suffering the subjective experience of the plaintiff (which may be established through evidence by the plaintiff, the plaintiff’s family and medical staff) is of paramount importance, while awards in previous cases should also be taken into account. A plaintiff’s subjective experience is determined by the nature, duration and intensity of pain and suffering. The plaintiff’s actual experience is decisive and the fact that he or she is, for example, more sensitive to pain does not imply that his compensation has to be based on the pain which an average person in the plaintiff’s position would have experienced. Conversely, where a plaintiff is less sensitive to pain than the average person, his or her damages must also be calculated in respect of the plaintiff’s personal experience. Someone’s social or financial status or his race are irrelevant because it cannot give an indication of how much pain a person has suffered”.

G. Feltoe in *A Guide to the Zimbabwean Law of Delict* p 93 says the following on assessment of damages for pain and suffering:

“The plaintiff can claim for all pain, suffering and discomfort suffered, or to be suffered, by him as a result of the defendant’s wrongful act. Account must be taken not only of the pain and suffering occurring as a direct consequence of the infliction of the injuries, but also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries.

The *quantum* of damages in this regard is extremely difficult to assess and here particular regard should be had to comparable past cases as a guide to assessment. In making an assessment, the prime considerations are the *duration* and *intensity* of the pain. These factors will turn upon the nature of the injuries, the medical evidence and the general circumstances of the case. The test is a subjective one. The thin skull rule would apply here. If the plaintiff is abnormally sensitive to pain he is entitled to greater damages than the normal person. Conversely, if the plaintiff is abnormally insensitive to pain, he cannot enhance his claim by advancing evidence that the normal person would have suffered extreme pain”.

See also *Matthew Mbundire v Tryone Sim Buttress* SC 13/11 at p 4.

I have gone to some great length to quote the above authorities on what the court takes into account when assessing damages for pain and suffering in the hope that this will assist legal practitioners and litigants alike in drafting affidavits of evidence in motion proceedings or summaries of evidence in actions. More often than not, a judicial officer is confronted with an affidavit of evidence with minimal evidence from which evidence he is supposed to assess damages. The end result is that litigants are not awarded the damages they

deserve. My thinking is that a legal practitioner or litigant should not start by drafting the affidavit of evidence and then read on the law for purposes of preparing heads of arguments. It should be the other way round so that he or she captures the requirements for assessment of damages in the affidavit of evidence.

In *casu* I am confronted with the situation where the affidavit of evidence lacks details and particulars required for a proper assessment of damages. The evidence is captured in two paras as follows:

“In brief, the circumstances of my case are not on or about the 31st of March 2003, I was asleep when at around midnight I was awoken by some noise from outside. The members of ZNA then broke the door and entered my house. I was ordered to lie prone on the ground and they took turns to assault me all over the body with sticks.

As a result, I was seriously injured and suffered excruciating pain. This also caused me great embarrassment as I was assaulted in full view of my children, family and neighbours”.

It does not have much to go by in assessing the appropriate damages. In *Gwiriri v Highheld Bef (Pvt) Ltd* 2010(1) ZLR p 160(H) Chitakunye J awarded an amount of \$3000-00 to an employee who was injured on his hand in an accident at work. The plaintiff went through excruciating pain as his hand was crushed by some rollers. He was hospitalised from 20 April to 4 September 2006. The pain and discomfort continued after his discharge.

In *Nyandoro v Minister of Home Affairs & Anor* HH 196/10, Patel J awarded the sum of \$1500-00 to an activist who was attacked by members of the Zimbabwe Police with button sticks. The plaintiff suffered excruciating pain and underwent a surgical operation to correct the effects of a leg injury. He was hospitalised for a prolonged period. He is periodically prescribed pain killers to assuage the pain.

In *casu*, taking into account that the plaintiff was not hospitalised neither did he undergo surgical operations, an award of \$1000-00 will meet the justice of the case.

Contumelia

The authors Visser & Potgieter *supra* at p 551 say the following about what the court must take into account in assessing damages for *contumelia*:

“Allowance should be made for the nature and seriousness of the assault, the fear created in the plaintiff, the extent to which he or she was humiliated by the aggression to his or her personality, the motive of the attacker, the publicity accorded to the event, the status of the plaintiff, possible provocation by the plaintiff, an apology on the part of the defendant, previous awards in comparable cases (allowing for inflation) and any other relevant facts”.

As I have already alluded to, I am constrained in that the affidavit of evidence does not assist much.

In Nyandoro's case *supra* the plaintiff was assaulted in public in full view of his NCA colleagues and passers-by. The photograph of the assault was published by the Zimbabwean News for all its readers to see. He was awarded \$1500-00.

In *casu* the plaintiff was assaulted in the presence of his family and neighbours. An award of \$500-00 will meet the justice of the case.

In the result I make the following order.

1. The defendant shall pay the plaintiff the sum of:
 - (a) \$1 500-00 for pain and suffering.
 - (b) \$ 500-00 for *contumelia*
2. Costs of suit.

Zimbabwe Human Rights NGO Forum-Public Interest Unit, plaintiff's legal practitioners