MIKE MANDISHAYIKA
versus
MARIA SITHOLE

HIGH COURT OF ZIMBABWE
MAKONI & CHITAKUNYE JJ
HARARE, 13 May 2014 and 15 October 2015

Civil Appeal

F. Malinga, for the appellant
Respondent in person

CHITAKUNYE J: The appellant at some time in the past had been a tenant at the respondent's house in Glen View, Harare. The appellant moved house but he still had some monetary issues to resolve with the respondent. Sometime in August 2011 the appellant visited the respondent's residence and a physical altercation arose. The physical altercation involved the appellant on the one side and the respondent and her two sons on the other side. As a consequence of the physical altercation, the respondent made a police report leading to the appellant paying an admission of guilt fine.

In December 2012 the respondent issued summons in the magistrates court claiming a total sum of USD10 000-00 from the appellant in respect of damages for pain and suffering, disability, embarrassment endured, medical expenses incurred and future medical expenses. She alleged that the appellant assaulted her with clenched fists and booted feet on 7August 2011 resulting in her suffering a ruptured eardrum.

The appellant denied the claim for damages contending that it was a fight whereby both parties suffered some injuries.

At the end of a contested trial the trial magistrate awarded respondent damages of USD 3 500-00 being USD 1 000-00 for past and future medical expenses and USD2 500-00 for pain and suffering.

The appellant appealed against that award. The appellant challenged the manner in which the trial magistrate arrived at the award and her failure to take into account that this

was a fight and he also suffered injuries. She also erred in accepting as proved the nature and extent of injuries suffered by respondent when there was no sufficient evidence.

After a careful perusal of the record of proceedings this court was of the view that the learned trial magistrate erred in accepting the medical affidavit when the document appears not to have been properly commissioned. The facts show that after the altercation the respondent reported to the police and later went to hospital for treatment. The respondent was only examined by a doctor on 17 August 2011. The medical affidavit that was supposed to provide the evidence and on which the trial magistrate relied upon for the nature and extent of injuries sustained was signed by the doctor on 28 August 2011 and was only commissioned by a commissioner of oaths on the on 10 June 2012.

An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously.

In *S* v *Hurle & Others (2*) 1998(2) ZLR 42 Gillespie J had this to say on what is expected in commissioning a document: -

> "A justice of the peace, or a commissioner of oaths, called upon to attest a document, has a duty, exemplified by the solemnity of the oath he is permitted to administer. He is obliged, without fail, to have the deponent appear before him. He has no excuse for not administering the oath, for not calling upon the deponent to swear that the deposition is, to the best of his knowledge true in every respect. A deponent's signature has to be affixed in the presence of the commissioner. The commissioner's own signature is an assurance that all these procedures have been complied with."

In *casu*, the deponent signed the deposition on a deferent date and the commissioner commissioned it several months after that. There is no assurance that the deponent signed in the presence of the commissioner or even that he ever took the requisite oath. Clearly the affidavit was not properly commissioned and so should not have been accepted as an affidavit. If at all reliance was to be placed on medical evidence the examining doctor ought to have testified on his findings. There is therefore no credible medical evidence.

Another aspect to note is on the assessment of damages for past and future medical expenses. The trial magistrate awarded a sum of $1 000-00 for what she termed past and future medical expenses without specifying how much she found proved in respect of each category of expenses. The trial magistrate ought to have separated the two claims and assessed each claim separately.

Past medical expenses are usually proved by the production of receipts for the expenses being claimed. The record of proceedings shows that the only proof of past medical expenses tendered were two medical receipts both dated 20 February 2013. There was no medical evidence linking the medical treatment of that date to the assault of 7 August 2011. It was imperative to produce or call medical evidence on the nature and extent of the injuries suffered and observed by a medical practitioner when respondent visited hospital soon after the assault and when she was examined. Such evidence would then need to be expertly linked to the treatment respondent received on 20 February 2013. Without such a linkage it was highly risky for the trial magistrate to accept that the treatment for that date was a result of the assault of about 2 years prior to that date.

It may also be noted that the receipts referred to are for a total sum of $33-00. Had the respondent proved the linkage that is what she would have been entitled to for past medical expenses.

On future medical expenses there was not much evidence other than the respondent's mere say so. This is again an issue that required medical opinion from a medical practitioner. There was no adequate evidence on future medical needs for the trial magistrate to have properly assessed the quantum of damages to award in this regard.

I thus find that the trial magistrate misdirected herself in arriving at $1 000-00 for past and future medical expenses.

Regarding the claim for pain and suffering the trial magistrate awarded a sum of $2 500-00. The trial magistrate indicated that in arriving at that sum court considered the duration and intensity of the pain from the plaintiff's testimony. The respondent's assertion that she now suffers from headache in the morning and when it is cold was also key to the assessment of the level of damages. It is unfortunate that like in the previous assessment the trial magistrate fell into the trap of relying on the respondent's mere say so without medical evidence in support thereof.

This category of claim requires clear evidence of the nature and extent of the injuries suffered and the resultant pain. It is also a category where court is expected to consider the level of awards in previous cases of a comparable nature. This was not done in this case. The trial magistrate seemed to have used gut feeling in arriving at the quantum of the award.

The award of $2 500-00 made for pain and suffering was not justified from respondent's evidence. Whilst the respondent may have suffered some injury and discomfort she lamentably failed to justify the amount awarded. This court is of the view that not enough evidence was tendered from which the trial magistrate could have made an appropriate assessment.

This is a case where the court *a quo* should have granted an absolution from the instance.

Accordingly, the appeal is hereby allowed and the judgement by the court *a quo* is hereby set aside and is substituted by the following:

An order for absolution from the instance is hereby granted.

Each party shall bear their own costs of this appeal.

MAKONI J: Agrees ……..

Nyikadzino, Simango and Associates, appellant's legal practitioners.