

WITNESS DZIVA  
versus  
LINET MAGAISA  
and  
NICOZ DIAMOND

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 13 June, 22 July, 22 November 2016 & 8 February 2017

### **Civil Trial**

*Ms P Muchemwa*, for the plaintiff  
*B Machengete*, for the 1<sup>st</sup> defendant

MUREMBA J: The plaintiff was involved in an accident abode a Toyota Hiace registration number ACE 1025 on 25 September 2011. The motor vehicle was being driven by the first defendant who is the owner of the said motor vehicle. The plaintiff sustained injuries in the accident. He consequently issued summons claiming the following damages.

- “(a) Medical expenses incurred- \$3, 583.32
- (b) Transport costs incurred \$150. 00
- (c) Future medical expenses \$20, 000.00
- (d) Permanent disability, pain and suffering \$20, 000.00.
- (e) Loss of amenities of life \$5 000.00”

The first defendant entered an appearance to defend and disputed liability and the quantum of damages. However, at the pre-trial conference she admitted liability and the only issue that was referred for trial is the issue of the quantum of damages that the plaintiff is entitled to. The plaintiff and the first defendant also agreed that the second defendant was no longer a party to these proceedings.

In his declaration the plaintiff averred that in the accident he suffered a hip dislocation and a head injury. He spent more than 2 months in hospital and endured chronic pain on his left hip. From the time he was in hospital and after his discharge he has endured seizures. He has suffered 30% permanent hip dislocation and a permanent head injury which will see him experience complicated seizures for the rest of his life. He needs a total hip replacement which has been quoted at US\$18 000.00. He used to be self-employed but because of the

permanent head injury and hip dislocation he can no longer continue with his job. His social networking and sexual rights have been heavily impaired. He incurred US\$3 538.32 in medical expenses and US\$150 in transport costs. He is now on pain killers and constant medical check-up for the head seizures and will require US\$20 000.00 to cover the costs.

#### Plaintiff's evidence

The plaintiff's testimony was as follows. In the accident he suffered a head injury and a hip injury. The medical report which confirms these injuries was produced as exh 1. It states the injuries as posterior left hip dislocation and head injury. He said that before the head injury he had no fits but he now suffers from convulsions and dizziness.

During the evidence of the plaintiff the parties went through the receipts the plaintiff had for the medical expenses he incurred and agreed that the first defendant should pay him US\$2 700 for medical expenses incurred and \$100.00 for transport costs incurred. I will grant these as agreed.

The plaintiff said that he no longer has sexual feelings and is no longer having sexual intercourse with his wife. He now suffers from loss of memory as he is now very forgetful. He used to be self-employed dealing in potatoes but now he is no longer able to do that. He used to play soccer, now he can no longer play. He said that he wants US\$20 000 for future medical expenses because he needs a total hip replacement. He said that he went to some hospital where he was told that US \$18 000.00 is what is required for the hip replacement. He said that at Westview Medical Centre he was told by the doctor that he should go for review and further examination by way of a scan for the head injury. He said that he was told that that costs around \$600.00. He said that at the same hospital he was told that he needed about \$16 000.00 for the hip replacement. He said that he could no longer remember if these expenses were put in writing or he was told verbally. Asked why then he was claiming US\$20 000.00 for future medical expenses he said that it was because of the pain he was experiencing. He did not explain the discrepancy between his claim for US\$20 000 and the US \$16 000 which the doctors at Westview said is needed for the hip replacement.

The plaintiff said that he needs US\$20 000 for permanent disability, pain and suffering because he can no longer do anything. He used to deal in potatoes in that he would buy potatoes and supply supermarkets like O.K. but he can no longer do that now. He said that doctors have not yet told him whether or not he is going to recover because he has not gone back for further examination because of lack of money. He said that he has fists all the time and the dislocated hip is painful all the time. He experiences fits or convulsions about 2-

3 times a week. He now uses crutches for support because the injured leg is now shorter than the other.

For loss of amenities of life he said that he wants \$5000.00 because he can no longer play soccer, he can no longer stand, run and do many other things. He can no longer fend for his family and all he does is sit.

During cross examination he admitted that he did not have documents to prove the US\$20 000.00 he is claiming for future medical expenses. He said that he can no longer go to hospital for medical treatment because he no longer has money yet he feels pain all the time. The witness was referred to a letter which was written by Dr J. Marisa of Westview Medical Centre in 2014 which is on p 2 of the plaintiff's bundle of documents but which the plaintiff did not produce as an exhibit. In that letter Dr J Marisa gave his opinion that a C.T brain scan which the plaintiff needed to undergo would cost between \$450 and \$600.00. He further said that the total hip replacement costs around US\$16 000.00. The plaintiff confirmed having been given this letter by Dr J. Marisa. He further said that he went to a different institution where he was told that it costs US\$18 000.00 for the hip replacement. However, he said he had no proof of this quotation although it had been given to his wife.

The plaintiff said that he was admitted in hospital for 2 months, but he had no recollection of the dates due to loss of memory. The medical report which he produced as exh 1 states that he was in hospital from 5 January 2011 to 9 December 2013, which is a period of 2 years. It was put to him that the defendant was offering him \$500.00 for permanent disability, pain and suffering and \$250.00 for loss of amenities. He turned down the offers. He said that whilst in hospital he was not aware of what was happening. He only got his memory back after his discharge from hospital but it took him some time to recall his surroundings and some things.

Dr Brian Paketh who examined the plaintiff at Parirenyatwa hospital and compiled the medical report which was produced as exh 1 testified as follows. He has 8 years of experience in the medical field and is currently studying to be a specialist in orthopaedics. He is currently employed by the Ministry of Health and stationed at Parirenyatwa hospital under the consultancy of Mr. M.F. Gova.

Dr Paketh said that in compiling the medical report he was assisted by his consultant, Mr. Gova. He said that the plaintiff was in hospital from 5 October 2011 to 9 December 2011 but he made a clerical error and endorsed 9 December 2013. He compiled the report on 18 June 2013. About the hip injury he said that because of the dislocation, the blood supply to

the head of the femur which moved out of the joint was cut. It no longer gets nourishment and as such it died and because of that the plaintiff can no longer have normal movement of the hip joint. He said that to correct that there is need to replace the head of the femur by inserting a metal liner. This is what is called total hip replacement. He said that although it is now 5 years since the plaintiff was injured, it is still possible for him to undergo a hip replacement procedure. He said that he does not know the cost of the process because where he is based they do not offer that procedure.

Dr Paketh said that the plaintiff suffered a bleed in the brain and the effects thereof are that the plaintiff may have occasional seizures and episodes of memory loss. He said that doctors in the neuro-surgeon department stated that non-operative management as a form of treatment for the plaintiff was ideal. He said that this means that the area of the brain which was affected will be left to heal on its own with time, but that time cannot be quantified. It is not known when it will heal. He said that in the case of the plaintiff it will require a neuro-surgeon to state whether or not the plaintiff will indeed heal over time.

The witness said that 30% permanent disability was awarded for the hip dislocation. He said that what was considered is what the plaintiff can still do after the injury in comparison with what should or can be done by a person of his age. This also involves taking images or x-rays of the hip and comparing it with the hip of a normal person of the plaintiff's age. The witness said that he compiled this report in consultation with Mr. Gova and this explains why after he had affixed his signature he wrote 'PP Mr. M. F. Gova' below.

During cross examination the doctor said that he examined the plaintiff on 18 June 2013. In so doing he examined the plaintiff physically from head to toe. He also looked at the preceding notes (the history of the patient). He said that this was his first time to interact with the plaintiff. He said that the hip dislocation caused the shortening of the leg which is obvious to the naked eye. He said that since he is not a neuro-surgeon he cannot tell the extent of the head injury. He said that the 30% permanent disability for the hip dislocation was inserted by Mr. Gova on the medical report. Mr. Gova is a qualified orthopaedic surgeon. He said that Mr. Gova inserted this annotation after he (the witness) had examined the plaintiff and informed Mr. Gova of the plaintiff's medical condition. Mr. Gova did not examine the plaintiff himself because he is the teacher. The witness said that because of the hip dislocation, sitting, standing, walking and lying down gives the plaintiff unbearable excruciating pain.

He said that although he was not yet qualified as an orthopaedic surgeon he is qualified to compile medical reports because compiling medical reports is part of training.

#### Defendant's evidence

The defendant who is a police officer in the Zimbabwe Republic Police testified as follows. The plaintiff is a person that she just gave a lift on the fateful day as she was coming from Chivhu to Harare. They were strangers to each other. She did not know the type of work he was involved in. She did not know the type of injuries the plaintiff suffered or for how long he was in hospital. She said that the plaintiff was not telling the truth when he said that he can no longer work for his family because she sees him every day when coming from work along Glen Eagles road opposite Southerton Post Office selling potatoes. She said that he will be walking without crutches. She said that the medical evidence led by the plaintiff failed to show that he needs a hip replacement. She also said that there was no evidence led before the court to prove that the plaintiff needs to regularly visit doctors for medical check-ups, so the claim for US\$20 000-00 for future medical expenses is not justified. The defendant also said that the doctor failed to prove that the plaintiff suffered any permanent disability. She said that the plaintiff cannot claim US\$5 000-00 for loss of amenities of life because he is still able to work for himself.

During cross-examination the defendant said that although she had seen the plaintiff selling potatoes and walking without crutches she had not taken any pictures of him to adduce as evidence. She said that if the plaintiff is able to work it means that he is able to enjoy his social life. She said that she cannot afford the damages the plaintiff is claiming on the basis of her salary which is US\$400-00 per month as a police officer, economic hardships in the country and the fact that she is a widow looking after her son and siblings. She said that when she offered the plaintiff a lift she was coming from the memorial service of her late husband.

#### Quantum of Damages

It must be noted that the fact that the defendant is a widow with dependants to look after and that she earns as little as US\$400-00 per month as a police officer is not a ground for awarding less damages to the plaintiff as the objective of the law of damages in delict is to place the plaintiff in a position he would have been in if the wrongful act causing him the injury had not been committed. See G Feltoe *A Guide to Zimbabwean Law of Delict 3<sup>rd</sup> ed p 21*. In

the same breadth, by doing this the intention will not be to punish the wrong doer – see G Feltoe *A Guide to Zimbabwean Law of Delict 3<sup>rd</sup> ed* p 18. Let me point out that in arriving at the quantum of damages that I will award I have considered the case authorities that both counsels have referred me to which form part of the record of proceedings.

#### Medical expenses and transport costs incurred.

Parties agreed on the amount of US\$2 700-00 being awarded to the plaintiff for the medical expenses he incurred. They also agreed on the amount of \$100-00 being awarded to the plaintiff for the transport costs he incurred. I will thus award those amounts as agreed.

#### Future medical expenses

From the evidence that was given by the plaintiff and Doctor Paketh it is without doubt that the plaintiff will need a total hip replacement. The plaintiff also needs to undergo a C.T scan for the head injury he suffered. However, it is disheartening to note that the plaintiff presented no evidence to support his claim for US\$20 000-00 for these future medical expenses. He admitted that he presented no quotations to this effect. All there is the opinion of a Doctor Marisa who stated in a letter which is not a quotation that the hip replacement procedure costs around US\$16 000-00 and said that the plaintiff needed to consult an orthopaedic surgeon for that procedure. It remains a mystery why from the time the summons was issued on 18 September 2013 up to the time the trial was completed in November 2016 the plaintiff's legal practitioners, the Legal resources Foundation never bothered to look for quotations for these procedures. Not a single quotation was presented for these procedures. The lack of diligence by the plaintiff's lawyers should be condemned in the strongest sense. The plaintiff sustained very severe injuries yet his lawyers did him a disfavour by not looking for the required proof for future medical expenses. There is no doubt that these procedures are very expensive, but in absence of proof of the amount claimed I cannot award anything to the plaintiff. I will grant absolution from the instance for this claim.

#### Permanent disability, pain and suffering

For these, the plaintiff is claiming US\$20 000-00. In the closing submissions the plaintiff's counsel submitted that \$6 000-00 be awarded for disability and \$8 000-00 be awarded for pain and suffering.

In awarding these damages I will be guided by the case of *Minister of Defence and Another v Jackson* 1990 (2) ZLR (1) SC which sets out the principles which govern the award of general damages which the plaintiff's counsel referred me to. The principles are that general damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer. 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. Since there are no scales by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest considerations. No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he is a millionaire or a pauper. Awards must reflect the state of economic development and current economic conditions of the country. For that reason awards made by other jurisdictions may be an inappropriate guide since conditions in those jurisdictions, both political and economic are so different.

I will deal with damages for permanent disability separately from damages for pain and suffering. For permanent disability, it is a fact that the plaintiff suffered a hip dislocation. Evidence led by the plaintiff and Dr Paketh shows that he will need a total hip replacement. For that dislocation the doctors pegged the degree of permanent disability at 30 %. Mr *Machengete* challenged the assessment which was made by Mr. Gova the consultant who was training Dr Paketh on the basis that Mr. Gova is not the one who examined the plaintiff. Dr Paketh explained in great detail that he was still a student under training in orthopaedics and Mr. Gova was his consultant or trainer. Mr. Gova is a qualified specialist in that field of medicine which deals with the treatment of disorders and injuries of bones. Dr Paketh explained that after he examined the plaintiff he briefed Mr. Gova who also looked at the clinical notes of the plaintiff and pegged the degree of permanent disability at 30 %. I find no fault in the assessment that was made by Mr. Gova. It is neither here nor there that Mr. Gova inserted the degree of permanent disability on the medical report which was compiled by his student, Dr Paketh. Although Mr. Gova did not testify, Dr Paketh testified that it was Mr Gova who inserted the degree of permanent disability on the report. I have no reason to doubt Dr Paketh on that aspect of his evidence. The defendant did not therefore launch any meaningful challenge to the extent of permanent disability which was assessed to be 30 %. In her testimony the defendant said that the plaintiff did not suffer any hip dislocation because contrary to what he said, he does not walk with the aid of crutches and he actually sells

potatoes along the road. She said that she sees him every day when she is coming from work. Despite this averment the defendant provided no proof that the plaintiff can actually walk without the aid of crutches. She could have taken pictures of the plaintiff, but she did not and she had no explanation for this. She could have confronted the plaintiff about it, but she never did and she gave no explanation for it. In the absence of proof to the contrary, this court cannot buy the defendant's story that the plaintiff can walk without the aid of crutches. Besides, on all the occasions the plaintiff was coming to court, he was walking with the aid of crutches. The court saw that for itself. In that regard I am persuaded by Ms *Muchemwa's* prayer for damages in the sum of US\$4 000-00 for permanent disability.

For pain and suffering, the plaintiff has endured severe and intense pain from the day of the accident on 25 September 2011 to date. He suffered a head injury and a hip dislocation. He was hospitalized for 2 months. The doctor explained that he suffered some bleeding in the brain. From the time of the accident the plaintiff now suffers from seizures or convulsions. He said that he experiences that about twice a week and the defendant was unable to challenge it. This court also recalls that on one of the trial days the plaintiff suffered some convulsions. The plaintiff now suffers from amnesia. The medical report states that the injury on the head is now permanent. Although Dr Paketh said that it was said that the injury was to heal on its own, it is not known when that will be. At the time of giving evidence in June 2016 almost 5 years after the accident the plaintiff was still experiencing severe pain from both the head injury and the hip injury. The medical report states that the plaintiff will have chronic hip pain and seizures from the head injury. The plaintiff said that he is always taking pain killers for the pain. When Doctor Paketh testified he said that the hip dislocation will cause the plaintiff discomfort whether he is standing, sitting or sleeping. It is clear that the duration of the pain that the plaintiff has endured has been long and it still continues. If the hip is not replaced he will continue to endure pain. If he is going to undergo surgery for the hip replacement he is still going to endure pain. The doctor indicated that the plaintiff will still experience chronic hip pain. In awarding damages for pain and suffering courts take into account the duration and intensity of the pain – G Feltoe *A Guide to Zimbabwean Law of Delict 3<sup>rd</sup> ed* at p 130. Courts also take into account pain and suffering occurring as a direct result or consequence of the infliction of the injuries and also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries G Feltoe *A Guide to Zimbabwean Law of Delict 3<sup>rd</sup> ed* p 130. In the circumstances of the present case I am persuaded to award damages in the sum of \$4 000-00.



For loss of amenities of life the plaintiff explained that he has since lost the desire to have sexual intercourse yet he is a married man who was born in 1959. He can no longer engage in sport yet he used to play social soccer for Hunyani soccer team. He can no longer walk without the aid of crutches. This means that he can no longer run. He can no longer work for his family as he used to do. The plaintiff no longer enjoys a healthy body and sound limbs. All he does now is sit around. Even when he is sitting he is not comfortable because of the hip injury. The head injury has resulted in him suffering from loss of memory and convulsions. So the body and the mind have both been affected. In awarding these damages the courts consider how many of the activities the plaintiff was able to do or participate in before the injury he is still able to do. What these activities meant in his life is also considered. – See *Gwiriri v Highfield Bag (Pvt) Ltd* 2010 (1) ZLR 160 (H).

In *casu* from a claim for \$5 000-00 I will award the plaintiff \$2 500-00.

In the result, I order that the defendant pays to the plaintiff:

- A1. US\$2 700-00 for medical expenses incurred.
  2. US\$100-00 for transport costs incurred.
  3. US\$4 000-00 for permanent disability.
  4. US\$4 000-00 for pain and suffering.
  5. US\$2 500-00 for loss of amenities of life.
  6. Costs of suit.
- B1. For the claim for future medical expenses I hereby grant absolution from the instance.

*Legal Resources Foundation*, plaintiff's legal practitioners  
*Rubaya and Chatambudza*, 1<sup>st</sup> defendant's legal practitioners