REPORTABLE ZLR (8)

Judgment No. 13/11
Civil Appeal No. 114/09

MATTHEW MBUNDIRE v TYRONE SIM BUTTRESS

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & CHEDA AJA
HARARE, JUNE 22, 2010 & MAY 24, 2011

T Pasirayi, for the appellant
No appearance for the respondent

GARWE JA: At the conclusion of the hearing of this matter in the High Court, the court *inter alia* granted absolution from the instance in respect of the appellant's claim for general damages, future expenses and replacement value for his motor vehicle. It is only against that portion of the judgment that the appellant has appealed to this Court.

The facts of this case are as follows. On 23 July 2006, the appellant was involved in a serious road accident with the respondent at the intersection of Breach Road and Kingsmead Road in Borrowdale, Harare. As a result of the accident the appellant sustained serious injuries. He was conveyed to Parirenyatwa Hospital whilst in a coma. Thereafter he was detained in the High Dependency Unit for seventeen (17) days. He

spent seven-and-a-half (7½) months at St. Giles Rehabilitation Centre. He spent a total of about one-and-half (1½) years undergoing hospitalization.

It was accepted during the trial that prior to the accident the appellant had been active in sport and that he had been in charge of sport and discipline at St Johns College, Borrowdale. In particular he was in charge of rugby, swimming, hockey and athletics at the school.

The court *a quo* found on the evidence that the accident was the result of gross negligence on the part of the respondent. In considering the appellant's claim for general damages, the court *a quo* found as a fact that the appellant will require surgical operations, regular physiotherapy and medication for the rest of his life. The court also found that he experiences weaknesses of the forearm and arm on the left side and that he will suffer from pain for a very long time. A report prepared by Professor Kalangu stated that the lower plexus should show good improvement but did not indicate to what extent he was likely to improve. The court was of the view that in the absence of evidence from the two doctors who attended to the appellant, the extent of his disability was debatable. On that basis the court *a quo* granted absolution from the instance.

On the question of future medical attention, the court accepted that the appellant will require transport to attend physiotherapy and rehabilitation and that he will require future medical attention. However, the court reached the conclusion that the plaintiff had failed to show how many sessions he would be required to undertake to

enable the court to assess the future expenses that he was likely to incur. On that basis the court also granted absolution from the instance.

On the question of the replacement value of the motor vehicle, the court *a quo* came to the conclusion that since delictual damages are calculated as at the time of the delict, the appellant had failed to explain satisfactorily the delay between the time of issuance of the summons and the time when quotations were obtained. In particular the court was of the view that consideration of factors such as inflation in the calculation of delictual damages would amount to altering the quantum of the debt and would be in conflict with the principle of currency nominalism. As a result, the court *a quo* also granted absolution from the instances.

In his grounds of appeal, the appellant has attacked the decision of the court *a quo* on three bases. These are:

1. That the court *a quo* erred in failing to consider the evidence placed before it and thereafter to exercise its discretion to make an award for general damages in favour of the appellant.
2. The court *a quo* erred in failing to consider the evidence placed before it and thereafter in exercising its discretion to make an award for future medical expenses in favour of the appellant.
3. The court *a quo* erred in applying the principle of currency nominatism and in failing to exercise its discretion to make an award in favour of the appellant for the replacement value of his motor vehicle.

The appellant seeks an order that para 2 of the order of the court *a quo* be set aside and that the respondent be ordered to pay (a) the sum of US$50 000.00, being the equivalent of Z$1 billion as at the date of judgment, as general damages together with interest thereon at the rate prevailing in the United States of America from the date of judgment to date of payment in full; (b) the sum of US$5 000.00, being future medical expenses together with interest thereon at the rate prevailing in the United States from the date of judgment to the date of payment; and (c) the sum of US$8 000.00 being the replacement value of the appellant's motor vehicle.

It is appropriate at this stage to consider the approach that has been followed by the Courts in the assessment of damages in general, and special damages in particular. In *Hersman Shapiro & Co* 1926 TPD 367, 379-80 STRATFORD J observed:

> "… monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it …".

In *Ebrahim v Pittman N.O.*1995(1) ZLR 176H, 187C-D BARTLETT J quoted with approval the remarks of BERMAN J in *Aarons Whale Rock Trust v Murray & Roberts Ltd & Anor* 1992(1) SA 652(C), 655H-656F that:

"Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss." …

There must of course be sufficient evidence before the court for it to be in a position to make a proper assessment of damages, for

'… it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made':

per ROSE INNES AJ in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976(2) SA 111 (C) at 118E. See also *Mkwananzi v van der Merwe & Anor* 1970(1) SA 609(A) at 630.

Thus where evidence is available to a plaintiff to place before the court to assist it in quantifying damages, and this is not produced, so that it is impossible for the court to do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance…".

In *The Quantum of Damages in Bodily and Fatal Injury cases*, 3 ed by Corbett, Buchanan & Gauntlett, the learned authors state as follows at p 99:

"In the case of damages which are capable of exact mathematical computation, such as, for example, medical and hospital expenses, proper evidence establishing the loss and substantiating the precise amount of the claim must be tendered. Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then, provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in

> assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order, absolution from the instance."

The remarks made in the authorities cited above no doubt correctly reflect the law on the approach to damages in bodily and fatal injury cases both in this country and South Africa.

The first ground of appeal that falls for determination by this Court is whether the court *a quo* erred in failing to consider the available evidence and thereafter making an award for general damages in favour of the appellant. The amount claimed as general damages before the court *a quo* was the sum of Z$1 billion as at the date of judgment. The Z$1 billion claimed represented damages for pain and suffering, disability, bodily disfigurement, shock, discomfort, loss of amenities of life and shortened life expectancy. The court *a quo* delivered its judgment on 16 April 2009 and in respect of this particular claim granted absolution from the instance. The basis for that decision was that the remark by Dr Kalangu in his report that "lower plexus should show good improvement" was imprecise. The court *a quo* was of the view that it was not clear to what extent the improvement would affect the degree of disability. Further, although the report alluded to the need for a repeat study after six months, no such examination appears to have been undertaken. In view of the medical opinion that the appellant's condition could improve with rehabilitation and treatment, the court concluded that the extent of the disability was debatable and that therefore the appellant had not placed sufficient evidence before the court to enable it to make a proper assessment.

It is correct, as the court found, that no further tests were done to ascertain the degree to which the appellant was likely to recover. The fact that the appellant had sustained very serious injuries from which he could never fully recover was common cause. The court accepted that following the accident he had had to be hospitalized for about one-and-a-half years. The court accepted the report by Dr Kalangu that the appellant had sustained "complete paralysis of the left and complete paralysis of both lower limbs" (*sic*). The radiological investigations had revealed a fracture of the left clavicle, fracture of the spine in C5 and C6 and dislocation of the vertebra in C5-6 associated with spinal cord compression. Dr Kalangu estimated the percentage of disability at 60%. He further found that the appellant will have pain for a long time and he will require physiotherapy. The court also accepted the report by Professor Meikle of the Clinical Neurophysiology Laboratory, Harare Hospital, that the appellant had weakness of all the muscle groups in the left arm with no movement in the shoulder and elbow muscles. The Professor found the upper plexus to have been seriously injured with no sign of recovery "at present" but the lower plexus was expected to show good improvement. Although the Professor recommended repeat studies in six months, as already noted, nothing further appears to have happened after the preparation of that report.

The court *a quo* found that the accident had had a serious effect on the appellant who before the accident had been in charge of sport at St Johns College, Borrowdale, and had generally been active in short. His condition after the accident had

also affected his relationship with his daughter who, it appeared, simply could not understand why her father could no longer engage in the activities he used to.

The court *a quo* further accepted as fact that the appellant will for the rest of his life require medical attention, including operations, regular physiotherapy and medication.

It certainly would have helped had the appellant undergone further examination thereafter so that the exact degree of his injuries could have been ascertained. This notwithstanding, the evidence placed before the court in my view was sufficient to enable the court to make an award. As WATERMEYER JA aptly put it in *Sandler v Wholesale & Coal Supplies Ltd* 1941 AD 194, 199:

> "… it must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

The extent of the injuries sustained was substantiated. The doctors suggested that there was some possibility of improvement but this could only be determined if a repeat study was carried out at a later stage. During the trial, the appellant said nothing about such a repeat study. The court itself did not ask in order to clarify the situation. The failure to lead evidence on this should not have resulted in the appellant being non-suited. As stated in the *Quantum of Damages in Bodily and Fatal*

Injury Cases, *op cit*, at p 99, in a case such as the present, a Court does not grant absolution but may tend towards conservatism in assessing the damages. The learned authors state:

> "The general attitude of the court has been that if there if evidence upon which an estimate not unfair to the defendant can be made, it should not refuse to make an award merely on account of the deficiencies in the case presented upon the plaintiff's behalf. Nevertheless, the failure to adduce such evidence would normally operate to the disadvantage of the plaintiff in that, in its absence, the court would normally tend towards conservatism in computing the damages."

In my view, this is the approach that the court *a quo* should have adopted. I would agree with the appellant that the finding of absolution in these circumstances resulted in an injustice. It is not uncommon in claims for general damages for a plaintiff to claim, and a Court to award, individual damages for pain and suffering, disfigurement, loss of amenities of life and shortened life expectancy – see *The Quantum of Damages in Bodily and Fatal Injury cases*, *op cit*, at p 46. The finding of absolution must therefore be set aside.

The amount claimed as at the date of commencement of the trial in October 2008 was the sum of Z$1 billion. Judgment was given six months later in April 2009. At the time the country was gripped by a hyperinflation environment which quickly eroded the value of money. In February 2009, however, the multiple currency system was introduced. Whilst the Zimbabwean dollar remained legal tender, it is a fact that transactions in the local currency ceased effectively rendering the Zimbabwean dollar valueless. At the time that the court was asked to make its determination, the

appellant was seeking the sum of Z$1 billion. It is that claim that should have been considered by the court *a quo*.

In terms of s 6 of the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations S.I. 6/2009 financial institutions were instructed to accept between 2 February 2009 and 30 June 2009 Old Zimbabwean currency at the rate of one trillion dollars for one dollar of the new currency system. In terms of s 8 of the Regulations, debts incurred before 2 February 2009 were deemed to have been incurred, entered, created or transferred in terms of the old currency system and were to be settled, discharged or liquidated in terms of the old currency system provided, however, that on or after 1 July 2009 every debt was to be settled, discharged or liquidated in terms of the new currency system only. In the definition, section, "debt" includes anything which may be sued for or claimed by reason of any obligation arising from statute, contract, delict or otherwise.

By operation of the law therefore the claim by the appellant for general damages in the sum of Z$1 billion stood to be dealt with in terms of above regulations. The one billion dollars claimed under the old currency equated to a fraction of a cent under the new currency system.

Considering the extent of the injuries sustained by the appellant, the claim for damages in the sum of Z$1 billion may not have been an unreasonable sum at the time of commencement of the trial proceedings. However, the law, through Statutory

Instrument 6/09, has converted what would otherwise have been a substantial claim to a most trivial one.

The result is obviously a most unfair one and the appellant and the general public would be excused for thinking that there is something seriously wrong with the law or at least the way it works. The legislature should have been alive to the obvious injustices that were to follow especially because on 1 February 2009 the Government introduced the multiple currency system under which it became possible to enter into transactions denominated in other currencies – see s 17 of the Finance (No. 2) Act 2/09. That Act regularized the introduction of other foreign currencies as legal tender with effect from 1 February 2009.

In his notice of appeal the appellant has requested that his previous claim of Z$1 billion be substituted with the figure of US$50 000.00. The appellant in his heads of argument has argued that the amendment is justified, regard being had to the current economic conditions of the country where an award in Zimbabwean dollars would render such compensation meaningless. Alternatively, the appellant has argued that the Court, in the exercise of its discretion, can make an award based on the record using the current multiple currency system. No authority for that proposition has been cited. Whether or not such a proposition would violate the principle of currency nominalism has not been explored or commented upon. Whether or not the approach in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1989(3) SA 191(SC) can be extended to cover a situation such as the present has also not been explored. An action

for damages for bodily injury is derived not from Roman Law but from Teutonic Law but like the Aquilian Action it seeks to place the plaintiff as far as possible in the position he would have been had the wrongful act causing him injury not been committed. Such a result cannot be achieved by making an award of a fraction of the Zimbabwean cent in favour of the appellant.

In all the circumstances, I am satisfied that there is need for a full investigation into the question of the damages that ought to be awarded in this case. This Court has not had the benefit of argument on this very important issue. It seems to me that the most appropriate approach would be to remit the matter to the court *a quo* for consideration of the whole question of damages. In *Halwick Investments t/a Whelson Transport v Garai Stephen Nyamwanza* SC-48-09 this court clarified the circumstances under which a matter can be remitted to a trial court.

The second ground of appeal is that the court *a quo* erred in failing to exercise its discretion to make an award for future medical expenses in favour of the appellant. In its judgment the court *a quo* accepted that the plaintiff will require transport to attend physiotherapy and rehabilitation. However, the court found that it had not been shown how many sessions the appellant will be required to undertake although the appellant had proved that each session would cost $5.00. On that basis the court *a quo* granted the respondent absolution from the instance.

During oral submission before this Court, Mr *Pasirayi*, the appellant's legal practitioner, conceded that the evidence led was incomplete as it was not clear how long the appellant would require pain medication and physiotherapy. He accepted that had evidence been led on this aspect, the Court would have been in a position to properly assess the future medical expenses.

It is clear that the evidence led on future medical expenses was insufficient and that although the evidence was available, none was led to show for how long the appellant would require pain medication and physiotherapy sessions. In these circumstances the court, in my view, correctly granted absolution from the instance.

The third and last ground of appeal is that the court *a quo* erred in applying the principle of currency nominalism and in failing to exercise its discretion to make an award in favour of the appellant for the replacement value of his motor vehicle.

It is apparent from the record that when the appellant initially issued summons in July 2007, he sought damages for, *inter alia*, pecuniary loss of the motor vehicle that was damaged in the sum of Z$500,000,000.00 (old currency). This figure was, in the appellant's own opinion, the replacement value of the vehicle at the time. What then happened after that was that on 24 September 2008 – shortly before the commencement of the trial – the appellant obtained two quotations from Borrowdale Auto and Tandem Motors in respect of a similar vehicle i.e. a 1991 Nissan Sunny with 121 000 kilometres on the clock. Both gave quotations for US$8 000.00. The appellant

conceded during evidence that he obtained new quotations in US currency owing to inflation. The court *a quo* was of the view that the delay between the time when summons was issued and the quotations obtained had not been satisfactorily explained and that the explanation given that this had been done to take into account inflation would amount to altering the quantum of the debt and would be in conflict with the principle of currency nominalism.

It is correct, as the court *a quo* found, that in general terms damages should be assessed as at the time of the delict. The basic principle underlying an award of damages in the aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have occupied had the wrongful act causing him injury not been committed. It is also established that the fall in the value of money is to be taken into account in considering comparable awards. The allowance for inflation is a rough one and should incline towards conservation - *The Quantum of Damages in Bodily and Fatal Injury Cases, op cit*, at pp 7–8.

The amount initially claimed by the appellant as representing the replacement cost of the vehicle was the sum of Z$500 000 000.00. This was later amended to US$8 000.00 shortly before the trial. No authority has been cited for such an approach in a matter involving partrimonial loss. Had the respondent been called upon to pay shortly after the accident, he would have paid no more than Z$500 000 000.00 old currency. The suggestion that owing to inflation he must now pay US$8 000.00 is not based on any legal principle and would be in conflict with the principle of currency

nominalism – see the remarks of MAKARAU JP (as she then was) in *Edward Marume & Ellen Chamunorwa v Todd Muranganwa* HH-27-07. Bearing in mind that the appellant was obliged to prove his claim for damages for the damaged vehicle as at the date of the delict, the amended claim in US dollars made shortly before the trial has no basis in law. It is now established, certainly in South Africa, that a monetary debt has to be paid according to its nominal value and, to take into account inflation, interest is then added on that debt until payment is made in full. In this regard I can do no better than quote the remarks of E M GROSSKOPF JA in S*A Eagle Insurance Co. Ltd v Hartley* 1990 (4) SA 833, 841C-F that:

> "… non-economic loss is not susceptible of measurement in money. Any figure which is awarded cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncracies of the assessor, the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases' (Ward v James [1965] 1 All ER 563 (CA) at 576E). The need for even-handedness requires that, when comparing awards in comparable cases, regard must be had to the purchasing power of the currency at the time when such cases were decided, otherwise one would not be comparing comparables. This does not offend against the principle of currency nominalism. In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss. Such a valuation must obviously be made in terms of currency values as they are at the time of valuation, and not in terms of the values of an earlier time. In the same way, as it was put in argument, a valuer determining the present value of a farm would not use the currency values of the past. A monetary debt is not, however, subject to a similar type of valuation. It has to be paid according to its nominal value." (The emphasis is my own)

I am not persuaded therefore that the court *a quo* erred in coming to the conclusion that the appellant had failed to establish the claim for US$8 000.00. In any event, prior to the introduction of the multiple currency system in February 2009, it was

not competent, except in the instances outlined in the *Makwindi case supra*, to institute claims for amounts denominated in foreign currency.

In the result therefore the appeal succeeds only to the extent that the order granting absolution from the instance in respect of general damages must be set aside.

On the question of costs, I am of the view that as the appellant has only been partially successful on appeal, an order that each party pays its own costs would be most appropriate.

In the result I make the following order:

1. The appeal succeeds to the extent that the finding of absolution from the instance in respect of the claim for general damages is set aside.
2. The claim for general damages is remitted to the court *a quo* for determination.
3. Each party is to pay its own costs.

ZIYAMBI JA: I agree

CHEDA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners