FARAI KAZINGIZI

versus

JASPER MANHANGA

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 12 July 2012, 26 July 2012 & 26 September 2012

*B. Furidzo* for the plaintiff

*P. Hamunakwadi*, for the defendant

 MTSHIYA J: On 23 August 2010 the plaintiff issued summons against the defendant claiming:-

 (a) Payment of US$1500-00 being the replacement of his lost tooth.

 (b) Payment of US$ 1500-00 for pain, suffering and discomfort.

 (c) Payment of US$500-00 for loss of business

 (d) Interest on the above sums of money at the prescribed rate; and

(e) Costs

The background to the above claim(s) is that on 13 June 2010 the defendant assaulted the plaintiff. The plaintiff lost a tooth as a result of the assault. The defendant was arrested and later convicted in court for the offence of assault. He was fined $400 or 12 months imprisonment in case of failure to pay the fine. 4 months of the sentence were suspended for 5 years on condition the defendant did not, during the period of suspension, commit any offence warranting imprisonment without the option of a fine.

The defendant did not accept the plaintiff’s claim(s) and in the relevant parts of his plea, filed on 3 September 2010, the defendant offered the following defences: -

“2. **Ad Paragraph 3**

Denied. The plaintiff and the defendant fought each other. The copy of attached annexure ‘A’ does not show that the defendant caused injury. When the two fought, there was no evidence of the said injuries. The defendant only heard about the injuries when he was taken to court.

 3. **Ad Paragraph 4**

 Admitted

 4. **Ad Paragraph 5**

It is actually the defendant who was humiliated by the plaintiff as he was attacked when he was least expecting it. The fight did not occur in the face of the public and the defendant sustained injuries on his face and right hand.

 5. **Ad Paragraph 6**

What is surprising is that the plaintiff submitted in court that the replacement of his tooth would cost US$150 but now he is claiming it ten fold. The plaintiff seeks to turn this claim into some betting of some sort. The defendant denies ever causing the displacement of the plaintiff’s tooth.

The plaintiff does not explain how he arrives at US$1 500, which he calls pain, suffering and discomfort. If there was someone who suffered as a result of the incident it is the defendant. The fact that the defendant’s report at police station was denied on the basis that the plaintiff had already reported, does not suggest that he was not assaulted.

The US$500 for loss of business is clearly hoax, (*sic*) as the plaintiff does not state what business her (*sic*) carries nor what ‘forced leave’ was it for and the person who forced him to the purported ‘forced leave’. This is clearly a baseless claim without a foundation. There is nowhere in the averments which supports that claim.

In the circumstances, the defendant prays that the claim be dismissed with costs on a client attorney scale”

 On 7 February 2011 the parties field a joint Pre-Trial Conference Minute with the following issues for determination:

“(1) Whether the defendant assaulted the plaintiff.

1. If so, whether the plaintiff sustained injuries as a result of the assault.
2. How much, if any, is due to the plaintiff by the defendant by way of

 damages”.

 At the commencement of the trial the plaintiff abandoned his claim for loss of business.

 The trial commenced on 12 July 2012 with three witnesses giving evidence. The plaintiff and the doctor who attended to him gave evidence. The defendant also gave evidence. I then postponed the matter to 26 July 2012 for closing submissions.

 On 26 July 2012, Mr Hamunakwadi for the defendant submitted that liability was admitted and that the only issue the defendant wanted determined was the quantum of damages.

Given the evidence adjuced in court, which evidence it is no longer necessary for me to reproduce in full, except where necessary for the purpose of determining the issue of damages, I was not taken aback by the *defe*ndant’s concession. Although he reacted belatedly, I must still commend the defendant’s Legal Practitioner for his professional approach to the case. In the face of the evidence before the court, he correctly saw no point in denying liability and advised the court accordingly.

As requested, I shall therefore now proceed to deal with the issue of damages.

 As confirmed in his closing submissions, the plaintiff abandoned his claim for loss of business and thus leaving one claim for determination, namely the quantum of damages resulting from the assault and the injuries he sustained. This claim has two components to it; namely the replacement cost of the lost tooth (i.e. $1500-00) and compensation for pain, suffering and discomfort (i.e. $1500-00).

The medical report presented by Dr T.E. Katsukunya, who testified for the plaintiff, confirmed that the plaintiff indeed lost one upper front tooth. The report showed that although the injury was “not serious”, in medical terms, the plaintiff had permanently lost a tooth.

 Two quotations were submitted for the replacement of the lost tooth. Dr Katsukunya said the tooth replacement could either be a partial denture or a three bridge unit. Both quotations were sourced from Chitungwiza Central Hospital and prepared by Dr Katsukunya. It was, however, admitted that the same process (i.e three bridge unit) at South Medical Hospital, a private hospital, would cost US$1280-00.

There was no allegation that the private hospital offered sub-standard service. That being the case, my view is that it would be unreasonable to opt for higher costs without any justification. In the circumstances I regard the quotation from South Medical Hospital of US$1280-00 as reasonable. That, it was admitted, would be the cost of a three bridge unit recommended for the plaintiff.

 With respect to the claim for pain, suffering and discomfort, I shall quote extensively from Mavis Dandira v Minister of Home Affairs and 2 Ors (HH 247/12) where CHITAKUNYE J, in awarding damages of US$1 000 for severe injuries sustained from assaults by soldiers and the police, referred to The Law of Delict’ by PQR BOBERG Volume 1 1984 at p 516, where the author says:-

“Compensation may be awarded not only for the actual physical pain but also shock, discomfort and metal suffering, disfigurement, loss of amenities of life and disability, and loss of expectation of life. For convenience we speak simply of pain and suffering, but the concept embraces all these non-pecuniary misfortunes – past and future – of an injured person. Nor is the list a closed one”.

CHITAKUNYE J then went on to say”-

“It is not easy to measure pain and suffering in monetary terms. There is no hard and fast rule the various aspects constituting pain and suffering can be measured to come up with an exact figure. The pain and suffering experienced by each individual varies. No two persons can experience the same level of such pain and suffering. This makes it hard to rely on past cases with any certainty except as general guidelines. In Minister of Defence and Anor v Jackson 1990(2) ZLR 1 (SC) GUBBAY JA (as he then was) at p 7 stated that:-

‘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 of assessing damages for personal injury is one of the most perplexing duties a court has to discharge”.

 Indeed in Minister of Defence and Anor (supra) GUBBAY JA, as he then was, listed the following principles as guides in determining damages in matters of this nature:-

“1 General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrong-doer.

2. 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. See *Union Gvt* v *Warnecke* 1911 AD 651 at 665.

3. Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest general considerations. (See *Sandler* v *Wholesale Coal Suppliers Ltd*  1941 AD 194 at 199).

4. The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in future. (See *Sigournay* v *Gill Bank* 1960 (2) SA 552 (A) at 555H).

5. The fall in the value of money is a factor which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics as may lead to an unreasonable result, per SCHREINER JA in *Sigournay’s* case *supra*, at 556C. See also *Southern Insurance Association Ltd* v *Mafuka S* 18/89 not reported at p 8 of the cyclostyled copy.

6. 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 be a millionaire or a pauper. (See *Radebe* v *Hough* 1949(1) SA 380 (A) at 386.

7. Awards must reflect the state of economic development and current economic conditions of the country. See *Mairs* case *supra* at 29 H; *Sadomba* v *unity Insurance Co. Ltd & Anor* 1978 RLE 262 (G) at 270F; 1978 (3) SA 1094 at 1097C; *Minister of Home Affairs* v *Allen S* 76/86, at p 12 of the cyclostyled copy. They should tend towards conservation lest some injustice be done to the defendant. See *Bay Passenger Transport Ltd Franzem* 1975(1) 269 (A).

8. For that reason, reference to awards made by the English and South African courts may be an inappropriate guide since conditions in those jurisdictions, both political and economic are different”

 Being guided by the above principles CHITAKUNYE J, in Mavis Dandira, *supra*, awarded damages of US$1 000. In making the award, CHITAKUNYE J, made the following observations:-

“In *Gwiriri* v *Starafrica Corporation (Private) Limited t/a Highfield Bag (Pvt)*

*Ltd* 2010 ZLR 160 (H) the plaintiff went through excruciating pain as his right

hand was being rushed by a machine at work. As a consequence he effectively

lost the use of that hand due to that wok related accident. He claimed among

others things damages for pain and suffering. I awarded damages for pain and

suffering in the sum of USD3000.

In *Nyasha Gutsire* v *Mathew Makanyanga and Anor* HH 290/11 the plaintiff

was unlawfully arrested, assaulted and detained by members of a rival political

party. He sustained injuries that included ‘fracture of the fifth metatarsal bone

in the right foot’ an injury in one eye and some burns due to the fact that he

was forced to sit close to an open fire. He sued the defendants for shock, *pain*

and suffering, contumelia and unlawful arrest. For shock, pain and suffering

he was awarded damages in the sum of USD1500 (one thousand and five

hundred United States dollars).

In *Monday Bopoto Nyandoro* v *Minister of Home Affairs and Commissioner*

*of Police* HH 196/2010 the plaintiff was assaulted by police officers during a

demonstration. He suffered more excruciating pain and injuries than in the

present case. He was awarded USD1500-00 for shock, pain and suffering.”

I believe the decisions in the above three cases give clear guidelines in the determination of this case.

 For my part, I believe that, given the guiding principles enumerated above and the fact that it is not easy to measure pain, discomfort and suffering in monetary terms, courts would benefit a lot if specialists (Doctors) were also able to indicate the duration and degree of pain and suffering associated with a particular form of injury.

However, without minimising the pain, discomfort and suffering endured by the plaintiff *in casu,* I find the sum of $1500-00 to be on the high side. As demonstrated in the three cases referred to by CHITAKUNYE J, in Mavis Dandira, *supra*, I think a sum of $1000 would adequately compensate the plaintiff. It is true the plaintiff lost a tooth, but the medical report described the injury as ‘not serious’.

 I therefore order as follows:-

1. The defendant shall pay the plaintiff US$1280-00 for tooth replacement.
2. The defendant shall pay the plaintiff US$1000-00 for pain suffering and discomfort.
3. The defendant shall pay interest on the amounts referred to in 1 and 2 above at the prescribed rate from the date of this judgment to the date of payment in full; and
4. The defendant shall pay costs of suit on the ordinary scale.

*Kanokanga & Partners* plaintiff’s legal practitioners

*Mupindu & Mugiya Law Chambers*, defendant’s legal practitioners