

CHERRYL-LEIGH KHAN
and
CORRINA VAAN GOPAL
and
MELVIN PAUL VANN GOPAL
versus
GROUP JAMBO SPRL
and
SESELE LEON

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 8 March & 27 September 2017

Civil trial

D. Ochieng, for plaintiffs
T. Zhuwarara, for 1st defendant
No appearance for 2nd defendant

TAGU J: On the 24th of July 2012 one Mubarak Aete Khan (now deceased) was driving the third plaintiff's Toyota Land Cruiser Motor Vehicle registration number AAN 8105 along the Harare-Gweru road with the first and second plaintiffs in the same motor vehicle. The deceased was the first plaintiff's husband. At the 272 kilometre peg there occurred a head on collision between the first defendant's FLB Freightliner Motor Vehicle registration number RLM693 GP trailer number ZMP 061 GP being driven by the second defendant and the vehicle driven by the now deceased. The collision was caused by the negligence of the second defendant in that he failed to keep a proper lookout and changed lanes when it was unsafe to do so. The accident occurred whilst the second defendant was acting within the course and scope of his employment with the first defendant. As a result of the accident Mubarak Aete Khan died and the first and second plaintiffs sustained severe injuries. The second defendant was convicted of culpable homicide as a result of the death of Mubarak Aete Khan by the Magistrates Court sitting at Gweru in the Midlands Province under case number CRB 1422/12 on the 3rd of August 2012.

The plaintiffs issued summons against the defendants claiming jointly and severally, the one paying the other to be absolved-

- a) Payment of the sum of USD 44 156.46 in special damages for medical expenses incurred by the first and second plaintiffs;
- b) Payment of the sum of USD 4000.00 in general damages for future medical expenses required by the second plaintiff;
- c) Payment of the sum of USD 1000.00 being special damages for loss of earnings suffered by the second plaintiff;
- d) Payment of the sum of USD 200 000.00 in general damages for pain and suffering, disfigurement and disablement suffered by the first plaintiff;
- e) Payment of the sum of USD 200 000.00 in general damages for pain and suffering, disablement and disfigurement suffered by the second plaintiff;
- f) Payment to the first plaintiff of the sum of USD 342 200.00 being general damages for loss of support as a result of the death of Mubarak Aeke Khan who was her husband;
- g) Payment to the first plaintiff in the sum of USD 20 000.00 as general damages for loss of amenities of life;
- h) Payment to the second plaintiff in the sum of USD 20 000.00 as general damages for loss of amenities of life;
- i) Payment of the sum of USD 20 000.00 as damages for the damage to the third plaintiff's motor vehicle;
- j) Interest on the above sums calculated at the prescribed rate of 5% per annum as of date of summons to date of full and final payment; and
- k) Costs of suit.

At the joint pre-trial conference the following were agreed as issues for trial in this matter. The issues where-

1. Whether or not the first and second plaintiffs are entitled to the sum of USD 44 154.46 in special damages?
2. Whether or not the second plaintiff is entitled to damages for future medical expenses, and if so, the quantum thereof?
3. Whether or not the second plaintiff is entitled to the payment of damages for the loss of earnings, and if so, the quantum thereof?
4. Whether or not the first and second plaintiff are entitled to general damages for pain, suffering and disfigurement, and if so, the quantum thereof for each plaintiff?
5. Whether or not the first plaintiff is entitled to general damages for loss of support as a result of the death of Mubarak Aete Khan, and if so, the quantum thereof?

6. Whether or not the first and second plaintiffs are entitled to general damages for the loss of amenities of life, and if so, the quantum thereof for each of them? and
7. Whether or not the third plaintiff is entitled to damages for the damage to his motor vehicle, if so, the quantum thereof?

It is pertinent to mention that during the trial of this matter the second defendant did not present any evidence as he was barred. At the commencement of the trial it was made clear that liability of the first defendant was not in issue since the accident occurred within the scope and course of the second defendant's employment with the first defendant, hence the first defendant was vicariously liable. The first defendant conceded to the claim of USD 1000.00 under para "c" of the summons being special damages for loss of earnings suffered by the second plaintiff. It further consented to the payment of USD 5 460.00 in respect of the first plaintiff's claim for medical expenses. The first plaintiff accepted this and did not seek to prove any further damages under those heads. The first defendant then consented to only a portion of the second plaintiff's claim for medical expenses. The second plaintiff accordingly had to lead evidence to prove the full extent of her loss. Each plaintiff testified with third plaintiff testifying both with regard to his claim concerning the vehicle and the first plaintiff's claim for loss of support. They also produced a number of documentary exhibits. On the other hand the first defendant opened and closed its case without leading any evidence. The first plaintiff submitted that in spite of the concessions made by the plaintiff's counsel the claim in casu remained excessive, speculative, unwarranted and palpably divorced from the awards usually granted in this jurisdiction.

Given that liability was admitted, and it is common cause that a collision occurred between third plaintiff's car and first respondent's car, and that the collision was caused by the negligence of second defendant who was working in the course and scope of first defendant, and that first defendant is vicariously liable, what remains is for the court to determine is the quantum of damages under the remaining heads.

ASSESSMENT OF DAMAGES

- a. CHERRYL-LEIGH KHAN
 1. She had claimed the sum of USD 44 156.46 in special damages for medical expenses she incurred as a result of the accident. However, a look at the receipts that she paid for medical treatment revealed that she actually spent about USD 5 460.00. The first defendant consented to the payment of USD 5 460.00 and tendered costs in respect of these claims at the commencement of the trial. The first plaintiff accepted the offer and

did not seek to prove otherwise. The court will duly award the first plaintiff an amount of USD 5 460.00 in special damages for medical expenses.

2. The first plaintiff claimed the sum of USD 200 000.00 in general damages for pain and suffering, disablement and disfigurement suffered. After explaining the pain she endured, she produced her medical report compiled by Doctor G. Vera an orthopaedic surgeon showing the nature and extent of the injuries the first plaintiff sustained. The medical report showed that she sustained-

- . fracture of the right femur;
- . fracture of the right tibia and
- . fracture of the left wrist.

The Doctor indicated that internal fixation was done for all fractures. She was confined to a wheelchair for more than three months. She also developed a pressure sore on the right heel and a haematoma on the right thigh. As a result she cannot run or play sport and cannot do heavy manual work. Further she suffered weather pains and still has loss of sensation over the heel. Her permanent disability was rated at 32%. However, the fractures are in advanced state of healing although she still walks with a limp and takes painkillers.

In my view she must have experienced excruciating pain. That she has a 32% disability cannot be doubted. Indeed I saw her when she came to testify and I noted that she was now walking with a limp. Be that as it may I still feel that an amount of USD 200 000.00 is excessive. Going by recent awards in the cases of *Christopher Gwiriri v Africa Corporation (Pvt) Ltd t/a High field Bag (Pvt)* HH-20-10, *Abel Mkhwanzi v Tirivavi Totamirepi & Ministry of Social Welfare* HB-118-16 and *Judith Nyoka v Nyamweda Bus Service & Zimnat Lion Insurance* HH-148-15 the first respondent offered to pay an amount of USD 2 500.00 for pain and suffering to the first plaintiff. The counsel for the first plaintiff conceded that the sum of USD 200 000.00 is unduly ambitious. However, the counsel for the first plaintiff suggested an award of USD 30 000.00 basing on the authority of *Tigere & Anor v NICOZ Diamonds Insurance Co. Ltd & Anor* HH-390-13 where one of the plaintiffs in that case suffered serious damage to his right hip and suffered severe pain for 3 months. In that case the court awarded him \$30 000.00 for pain and suffering.

In this case while the first plaintiff had more serious injuries than those sustained by the plaintiff in the case of *Tigere & Anor supra*, and while each case has to be decided on its own facts I am of the view that an amount in the region of USD 30 000.00 is reasonable. I will

therefore award the first plaintiff USD 30 000.00 as damages for pain and suffering, disablement and disfigurement suffered.

3. For payment of general damages for loss of support as a result of the death of Mubarak Aete Khan who was her husband and breadwinner the first plaintiff claimed an amount of USD 342 200.00. The first plaintiff was married to the now deceased in terms of the Marriage Act [Chapter 5:11.] They had one child. The now deceased was earning a gross salary of USD 400.00 and a net salary of 345.00. This money was being kept in the wardrobe and would be used by the couple as and when they needed it. To her his loss is a complete one. She submitted that he had prospects of working up to the retirement age of 65 years and that there were prospects of him improving academically and economically. At the time of death he was only 30 years old. Assuming he was to attain the age of 65 years on the same job and same net salary he was to earn a total of USD 12 075.00. However, chances are that he could have been promoted and earned more or demoted and earned less or worse still could have been fired. In my view a figure of USD 15 000.00 factoring the issue of overtime is a reasonable amount to award the first plaintiff as damages for loss of support as a result of the death of Mubarak Aete Khan.
4. Lastly, for general damages for loss of amenities of life the first plaintiff claimed a sum of USD 20 000.00. My feeling is that this claimed is adequately catered under the award I granted for pain and suffering, disfigurement and disablement. In the result it would be unfair to award her more under this head. Accordingly I feel that the first plaintiff has been adequately compensated.

b) CORINA VANN GOPAL

1. The second plaintiff had claimed an amount of USD 44 156.46 in special damages for medical expenses incurred by her as a result of the accident. I agree with the counsel for the first respondent that the receipts that bore the second plaintiff's names amounted to USD 14 712.00. This is the amount the first defendant is prepared to pay to the second plaintiff in special damages for medical expenses incurred by the second plaintiff as a result of the accident. However, in reality and going by the receipts produced in court the amount that was paid and to be paid was far more than the USD 14 712. I say so because there are arrears to be paid and some of the claims she was not sure whether they were paid for or not.

Two issues came up for decision on the claim raised by the second plaintiff. The court noted that some invoices were produced which she claimed acted as both an invoice and a

receipt. These were disputed by the first respondent. In reality it is common cause that some suppliers of services issue invoices that act as both an invoice and or a receipt. I found no reason to dispute the evidence of the second plaintiff when she said such invoices were paid for. Where she was not sure or where balances were to be paid she was candid with the court to say those amounts had not been paid and or she was not sure whether they had been paid for. The court therefore found out that the amount paid in special damages for medical expenses amounted to USD 15 240.00. The second issue raised by the first defendant was that some of the receipts bore the names of Mr M Vann Gopal and another bore the names of Ashley Vann Gopal hence second defendant is disqualified from claiming on those receipts. My assessment of those receipts clearly indicated that the payments on those receipts were made by the second plaintiff's relatives for the purposes of having the second plaintiff to be treated. In my view the mere fact that a payment was made by her relative for her benefit cannot be a reason to disqualify her from claiming a refund. Had it not been for the accident those payments would not have been made.

For these reasons I will grant the second plaintiff USD 15 240.00 in special damages for medical expenses incurred by her as a result of the accident. The counsel for the second plaintiff conceded that a claim of USD 44 154.46 was not sustainable. Although they claimed that more was due and payable no proof was given that they were indeed later paid for. I will award her what has been proved by way of receipts.

2. The second plaintiff claimed USD 4000.00 in general damages for future medical expenses required. To substantiate her claim the second plaintiff produced a medical report by Doctor Vera an orthopaedic surgeon which reads among other things as follows-

“She will require removal of the metal in the leg after two years at a cost of \$4 000.00.”

Without saying more I am satisfied that the second plaintiff managed to prove this head on a balance of probabilities and I will award an amount of USD 4 000.00 as claimed.

3. For loss of earnings the second plaintiff had claimed USD 1000.00. As already indicated above the first plaintiff consented to the payment and no further evidence was led by the second plaintiff on this head. This amount is duly awarded to the second plaintiff. I will proceed to deal with the next claim.

4. The next claim by the second plaintiff was a payment of USD 200 000.00 in general damages for pain and suffering, disablement and disfigurement she suffered. As stated above the counsel for the second plaintiff conceded that the figure was speculative and unsustainable. However, they proposed a figure of USD 40 000.00.in view of the fact that she sustained more

injuries than the first plaintiff. The first defendant, as in the claim by the first defendant offered to pay USD 2 500.00. This amount was rejected by the second plaintiff. To prove her claim the second plaintiff produced a medical report compiled by Doctor Vera which showed that the second plaintiff suffered the following injuries-

- fracture of the right femur;
- fracture of the left clavicle;
- head injury;
- multiple fracture of the ribs; and
- bilateral haemothoraces

The doctor further stated that this lady was very sick on admission and was in danger of losing her life. She was treated by fixation of the right femur and bilateral chest drains. She was in a wheelchair for three months and started walking at the end of October 2012. The right leg has a slight inward bowing. She has pain in the right leg especially in cold wet weather and may need to take painkillers. She cannot run or play sport and has been recommended a raised shoe on the right. She can hardly lift heavy objects with her side because of pain in the shoulder and clavicle. She suffered from chest pains especially related to weather and complains of shortness of breath. She sustained a permanent thirty-eight percent (38%) disability. However, at the time of the compilation of the report on the 24th April 2013 the fractures had healed although there is some shortening on the right leg.

Doctor Matthew C. Wazara a specialist surgeon also examined the same patient and noted-

- a right sided pneumothorax (punctured lung);
- fracture of the right femur;
- blunt abdominal trauma and laceration of the liver;
- fracture of both angles the mandible or jaw bone and
- multiple superficial bruises and wounds

Fractures of facial bones involving the mandible and maxilla were also noted by Doctor Leonard Mahomva as well as other injuries detected at Baines Imaging Group JV Avenues Clinic through the CT scan of the brain.

Indeed I had sight of her as she was testifying. She was lucky to be alive. I noted some of the features stated by the doctors as well as the fact that she was injured more than the first plaintiff. For these reasons she deserves more in terms of damages for pain and suffering, disfigurement and disablement. I do not hesitate to award her USD 45 000.00.

5. Lastly, the second plaintiff claimed USD 20 000.00 as general damages for the loss of amenities of life. I again feel that this head has been adequately catered for under the head for pain and suffering, disablement and disfigurement. I will not award her anything under this head.

c) MELVIN PAUL VANN GOPAL

1. The third plaintiff claimed USD 20 000.00 as damages for the damage to his motor vehicle. He produced photographs of the wreckage as well as the valuation report from Keneg Risk & Loss Consultancy (Pvt) Ltd which gave the value of the vehicle as USD 23 000.00 before the accident. Renown Panel Beaters, United Panel Beaters & Spray Painter (Pvt) Ltd as well as Southern Vehicle Electrics, Panel Beaters and Spray Painters who examined the vehicle all indicated that the car was a right off. He however, told the court that he received USD 3 000.00 from ICZ Insurance Council of Zimbabwe. Hence the third plaintiff claimed only USD 20 000.00 as damages to his vehicle.

The claimed has been on a balance of probabilities been proved, though it was ideal to have a valuation report before the accident for comparison purposes. In this case no one anticipated that the vehicle would be involved in an accident hence no valuation was done prior to the accident.

In the result I will make the following orders.

IT IS ORDERED THAT

- a) The defendants (jointly and severally, the one paying the other to be absolved) shall pay the first plaintiff the following sums:
 - i) \$5 460.00 being the agreed contribution towards medical expense incurred by the first plaintiff;
 - ii) \$ 30 000.00 being damages for pain and suffering;
 - iii) \$ 15 000.00 being damages for loss of support on account of the death of the late Mubarak Aete Khan.
- b) The defendants (jointly and severally, the one paying the other to be absolved) shall pay the second plaintiff the following sums:
 - i) \$ 15 240.00, being medical expenses incurred by the second plaintiff;
 - ii) \$ 45 000.00, being damages for pain and suffering,
 - iii) \$ 1000.00, being damages for loss of earnings incurred by the second plaintiff; and
 - iv) \$ 4000.00 being damages for future medical expenses.

- c) The defendants (jointly and severally, the one paying, the other to be absolved) shall pay the third plaintiff the sum of \$ 20 000.00 being damages for the destruction of the third plaintiff's motor vehicle;
- d) The third plaintiff shall deliver the wreck of his erstwhile motor vehicle registration number AAN 8105 against payment of the sum provided for in paragraph (c).
- e) The defendants (jointly and severally, the one paying the other to be absolved,) shall pay the plaintiffs' costs of suit.

Coghlan, Welsh & Guest, plaintiffs' legal practitioners
Mawere Sibanda, first defendant's legal practitioners