MILDRED MAPINGURE
versus
MINISTER OF HOME AFFAIRS
and
MINISTER OF HEALTH AND CHILD WELFARE
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARYAFFAIRS

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 30 SEPTEMBER 2015 AND 4 NOVEMBER 2015

Unopposed Application

I Mureriwa, for the applicant
No appearance for the respondents

MUREMBA J: This is an application for quantification of general damages for pain and suffering following a decision by the Supreme Court on 25 March 2014 in judgment No. SC 22/14 that the first and second respondents are vicariously liable for the pain and suffering which was experienced by the applicant as a result of the failure by employees of the respondents to prevent her pregnancy. The third respondent was held not liable. As a result, any reference to the respondents in this judgment refers to the first and second respondents.

The history of the matter is as follows. On 4 April 2006 between 1 am and 4am the applicant was attacked by robbers at her residence at 978 Seignery Road, Chegutu. One of the robbers raped her and as a result of the rape the applicant fell pregnant. Consequently on 23 August 2007 the applicant issued summons in this court claiming *inter alia* damages for physical and mental pain and suffering and stress that she suffered. The claim was in Zimbabwean dollars. On 10 June 2010 the applicant amended her summons and declaration and claimed these damages in United States dollars in the sum of US$10 000-00.

The respondents filed an appearance to defend, but were later barred for failing to file a

plea. The applicant made an application for a default judgment against the respondents, but this court on considering the merits of the claim dismissed it with costs in judgment HH 452/12 on 12 December 2012. The applicant appealed against this decision to the Supreme Court. On appeal the Supreme Court made a finding that the police had failed in their duty to assist the applicant timeously in having her pregnancy prevented by the doctor. It was also held that the doctor had failed to carry out his professional duty to avert the pregnancy when it could have been reasonably prevented. It was held that these omissions took place within the course and scope of their employment with the respondents. Accordingly, the respondents were held vicariously liable to compensate the applicant in respect of the harm occasioned through the failure to prevent her pregnancy.

The applicant's basis for suing the respondents is that after having been raped, she made a prompt report of the alleged rape to the police on the same morning around 8am. She requested to the police to be taken to see a doctor immediately so that there could be medical intervention to prevent pregnancy and any possible sexually transmissible infections. The police failed to give her a report which would enable the doctor to give her the required assistance. One Doctor Kenzemba of Chegutu hospital insisted on a police report in order for him to render the required assistance. He said that in the absence of a police report he could not assist. At the same time he advised that if any action was to be taken to prevent pregnancy it was supposed to be done within 72 hours of the sexual intercourse. When the police report was eventually availed it was outside the 72 hours. The doctor advised that it was now too late to do anything to prevent pregnancy.

In claiming US$10 000 as general damages arising from her pregnancy the applicant averred that she went through physical and mental pain, anguish and stress. She averred that she had to endure a pregnancy, which was the result of rape, for nine months, followed by the labour pains of delivery. She said that she was stressed throughout the whole period of her pregnancy. The Supreme Court held that it cannot be doubted that the applicant did suffer harm as a result of the failure to prevent pregnancy by the respondents' employees. It was stated that it was clear to the respondents' employees that the applicant was vehemently averse to falling pregnant. It was stated that the applicant's claim for general damages is legally sustainable as she had to undergo the mental anguish of unwanted pregnancy.

The Supreme Court remitted the matter to this court in order that this court may assess

and determine the amount or quantify the damages, together with the issue of costs. The Supreme Court however, stated that in quantifying or assessing the applicant's entitlement to damages the chain of causation cannot be extended beyond the period of one month after the applicant was raped, i.e. when her pregnancy was confirmed. The basis for this is that the Supreme Court concluded that the responsibility for taking steps to terminate the pregnancy after it had been confirmed fell squarely on the applicant's shoulders. The Supreme Court therefore said that when the pregnancy was confirmed after 1 month of having been raped the applicant should have taken steps to have the pregnancy terminated. The Supreme Court held that on that basis, the respondents cannot be called to account for any subsequent pain and suffering endured by the applicant whether arising from her continued pregnancy after the pregnancy had been confirmed or from the delivery of her child or the period thereafter. On p 32 of the cyclostyled judgment the Supreme Court held;

> "It follows that the appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy."

In *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR 1 (SC) at p 8 GUBBAY JA set out eight general principles which the courts will take into account in assessing general damages. In doing so he said,

> "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 therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge. This notwithstanding, certain broad principles have been laid down which govern the obligation. These are:
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> (1) General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.
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> (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 Government* v *Warnecke* 1911 AD 651 at 665
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> (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.
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> (4) The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *Sigournay* v *C Gillbanks* 1960 (2) SA 552 (A) at 555H.
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> (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 *Bailey* NO 1984 (1) SA 98 (A) at 116B-D; *Ngwenya* 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. E

(7) Awards must reflect the state of economic development and current economic conditions of the country. See Mair's case, supra, at 29H; *Sadomba* v *Unity Insurance Co Ltd & Anor* 1978 RLR 262 (G) at 270F; 1978 (3) SA 1094 (R) at 1097C. *Minister of Home Affairs* v *Allan* S-76-86 (not yet reported) at p 12 of the cyclostyled copy. They should tend towards conservatism lest some injustice be done to the defendant. See *Bay Passenger Transport Ltd* v *Franzen* 1975 (1) SA 269 (A) at 274H.

(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 so different."

Feltoe in *A Guide to the Zimbabwean Law of Delict*, ed 3 on p 130 states that damages for pain and suffering are extremely difficult to quantify and regard should be had to comparable past cases as a guide to assessment.

Mr *Mureriwa* submitted that there are no comparable cases within this jurisdiction to guide this court in awarding damages of this nature. He went on to cite cases from other jurisdictions like Spain, England, Australia, Italy and Scotland. The following are some of the cases.

In *Sentencia del Tribunal Supremo RJ 2006/6548* which is a Spanish case, the court awarded damages of PTA 10 000 000(approximately 60 000 Euros). This was a case of failed sterilisation and the claimant fell pregnant as a result. The damages included medical expenses as well as non-pecuniary damages.

In a similar English case of failed sterilisation, in the case of *Allan* v *Bloomsbury Health Authority* [1993] 1 ALL E.R 651 the plaintiff was awarded damages of £ 12 500-00 for pain and suffering and loss of amenities up to the birth of the child.

In the Italian case of *Corte di Cassazione* (Court of Cassation), 8 July 1994, no 6464 NGCC 1 1995 1 1107 the claimant was awarded damages of 7 500-00 Euros against the hospital and doctor following failure to terminate pregnancy. The damages were for hardship encountered due to the occurrence of the birth at a time of difficulty.

In the Scotland case of *MacFarlane and Another* v *Tayside Health Board* [2000] 2 AC 59 the House of Lords on appeal awarded damages of £ 15 000-00 for pecuniary and non-pecuniary effects of pregnancy and birth in a case of failed sterilisation.

An assessment of the above cited cases from other jurisdictions clearly shows that these cases are distinguishable from the present case. The above cases were *ex contractu* whereas in the present case there was no contract between the applicant and the respondents. In the present case the applicant was raped and the respondents' employees failed to take the necessary measures to prevent pregnancy. As correctly submitted by Mr *Mureriwa* this case is unique in its facts. In any case even if the facts were similar, it is not safe to obtain guidance from other countries given that our economies are so different. See *Biti* v *Minister of State Security* 1991 (1) ZLR 165 (S) and *Minister of Defence & Anor* v *Jackson* (*supra)*.

There being no comparable cases, I will consider the circumstances of this case in arriving at the appropriate amount of damages.

To begin with the fact that the applicant was raped traumatized her a great deal. To make matters worse the rapist raped her without wearing any protection. He ejaculated inside her vagina. She had finished her menstrual cycle on or about 19 March 2006. She was raped on 4 April 2006 which is 16 days later. Having been raped at around 4 am she proceeded to Chegutu police station to make a report. She made the report to a female police officer known as Constable Nhamo around 8am.

The applicant said that she narrated her ordeal to constable Nhamo and asked her to arrange for her to go and see a doctor immediately because she wanted to get medical intervention to prevent pregnancy and any possible transmission of sexually transmissible infections. Constable Nhamo told her that she was supposed to wait for a Mr Musarurwa a police officer who was mandated to attend to rape victims, but at that time Mr Musarurwa was not at the station. She was made to sit in the charge office until 12 midday as she waited for the arrival of Mr Musarurwa. She said during that time she made repeated pleas to Constable Nhamo to get her someone else to take her to hospital but Constable Nhamo insisted that she should wait for Mr Musarurwa. Constable Nhamo also told the applicant that even if she were to go to hospital the doctor was not going to attend to her in the absence of a police report. The applicant said that as the time went by she kept on making repeated pleas to Constable Nhamo but Constable Nhamo kept telling her to sit down and even showed that she was being irritated by the applicant's request.

The applicant says at midday she was told to go and sit outside the charge office by

Constable Nhamo who said her wound on the knee was bleeding and messing the charge office. Apparently, she had been hit by the rapist on the right knee with a slasher when she was fighting him in a bid to prevent him from raping her.

The applicant said that she was made to sit outside until 1600hrs when a female police officer one Assistant Inspector Sasa came to station and found her still seated outside in her bloodied pyjamas. Assistant Inspector Sasa arranged for her to go to hospital. She arrived at the hospital at around 4 30pm. Doctor Kenzemba cleaned her wound on the knee and dressed it. About the prevention of pregnancy Doctor Kenzemba said that he could only do it in the presence of the police and a police report. The doctor further said that to prevent pregnancy she was supposed to be attended to within 72 hours of the rape. He asked her to come back the following morning with the police. He did not do anything or give her anything to prevent pregnancy. He also did not administer post exposure prophylaxis treatment on her to prevent any possible transmission of sexually transmissible infections.

On 5 April 2006 by 7 am the applicant was at Chegutu police station. She presented herself to the investigating officer, Mr Masiiwa. She told him about the doctor's instructions, but he said that she was supposed to wait for Mr Musarurwa. He said that it was only Mr Musarurwa who could take her to the doctor. She said that out of desperation she went to see Dr Kenzemba alone but he refused to assist her in the absence of a police report. He cleaned her wound, dressed it and sent her away. Time was running out and the 72 hour time limit was drawing to an end.

From the doctor the applicant returned to the police station to check if Mr Musarurwa was now there. He was not yet there. She waited until 17 00hrs but he never came. The investigating officer Mr Masiiwa did not make any alternative arrangements in order for the applicant to be attended to by the doctor seeing that Mr Musarurwa was not turning up and that time was running out.

On 6 April 2006 at 7 am she was back at the Police Station. Again the investigating officer told her to wait for Mr Musarurwa. The applicant decided to go and see the doctor, but the doctor maintained that he could not do anything to assist her because the police had to do their investigations first. The doctor just dressed her knee wound and sent her away. She went home.

On 7 April 2006 by 7 am she was back at the police station. She found Mr Musarurwa

now there. He took her to Doctor Kenzemba who examined her and confirmed that she had been raped. However, he said that it was now too late to do anything to prevent pregnancy. Come 19 April 2006 she missed her menstrual period up to the end of that month. She said that she immediately suspected that she had fallen pregnant as a result of the rape. She stated that ever since the rape she had not had any sexual intercourse.

On 5 May 2006 she carried out a pregnancy test which came out positive. She informed the police about it on 6 May 2006.

The above ordeal is narrated by the applicant in her supplementary affidavit of evidence filed on 26 March 2012 from para 9 to 17. The narration clearly shows that the possibility of falling pregnant coupled with the risk of being infected with transmissible infections scared and traumatised the applicant immensely. From the time that she was raped on 4 April 2006 to 7 April 2006 she was restless. Her mind was preoccupied with nothing except the possibility of falling pregnant and being infected with transmissible infections. She literally spent those days at the police station and at the hospital. Her pleas to the police officers and the doctor fell on deaf ears. No one seemed keen to assist her. There was no explanation why some other police officer could not help her in the absence of Mr Musarurwa. There was also no explanation why the doctor was insisting on the need for a police report before preventative medication could be administered.

It is evident that the applicant made several trips to the police station and to the hospital. She made spirited efforts to obtain assistance and this reflects the trauma that she was going through. It shows that she was afraid, anxious and grief stricken. However, it is unfortunate that the applicant's counsel did not see it worthwhile for the applicant to file a further supplementary affidavit of evidence explaining her personal, social and economic circumstances after the Supreme Court had made a decision remitting the case to this court for quantification of damages. In remitting the case the Supreme Court stated that in assessing the appropriate amount this court should take into account the applicant's personal, social and economic circumstances. Pursuant to the remittal, the applicant's counsel simply filed heads of argument on 20 April 2015 wherein he indicated that the applicant was relying on her affidavit of evidence which was filed on 10 June 2010 and supplementary affidavit of evidence which was filed on 26 March 2012. As a result, this court has nothing to go on as far as the applicant's personal, social and economic

circumstances are concerned.

It is my considered view that the applicant ought to have filed a supplementary affidavit of evidence after the Supreme Court order detailing her personal, social and economic circumstances. In doing so she should also have fully explained in her own words the mental pain, anguish and stress that she went through during the relevant period. There can be no doubt that the applicant was devasted by what befell her. However, in the absence of an affidavit by the applicant explaining this, the court cannot fully appreciate the intensity of the pain and suffering that she experienced. Intensity of pain is one of the factors that are considered in assessing the quantum of damages and the test is a subjective one. In *Jeremiah Mugadzaweta* v *The Co-Ministers of Home Affairs & Others* HH 439/12 it was stated that,

> "The pain which is relevant is that actually suffered by the plaintiff and not what would be experienced by a reasonable person. The fact that the plaintiff is more or less sensitive than the *dilgens paterfamilias* is of no relevance in the assessment of the pain suffered."

Instead of having the applicant depose to an affidavit of evidence Mr *Mureriwa* sought to bring such evidence before the court through the heads of argument which is irregular. The following are extracts from his heads of argument.

In para 7 of the heads of argument it is stated that:

> "The applicant in her affidavit of evidence clearly detailed the extent of the physical pain, associated with early pregnancy that she suffered. This included morning sickness, vomiting, nausea, dizziness, fatigue and inability to work. She explains how tragic circumstances of her pregnancy exacerbated that physical pain. In her condition she had to walk up and about trying to follow up on her case and received little assistance. This exacerbated her physical pain particularly the dizziness and tiredness."

Nowhere in her affidavit of evidence does the applicant indicate that she experienced morning sickness, vomiting, nausea, dizziness, fatigue and inability to work, be it before confirmation of the pregnancy or after its confirmation.

In para 7:3 Mr *Mureriwa* says,

> "It is submitted that the applicant's suffering was not limited to physical pain. The applicant also narrated, in her affidavit of evidence, the emotional and mental trauma that she suffered after her pregnancy was confirmed. She narrated how difficult it is for a woman to accept that she was raped and all the more difficult it was for her to accept that she has become pregnant as a result. The applicant clearly detailed how becoming aware of the pregnancy and realising that the violence literally beat within her was a cruel reality."

Again there is nowhere in the affidavit of evidence that the applicant explains all this.

It must be noted that when the applicant amended her summons in 2010 she made a claim for US$10 000 for physical and mental pain and suffering that she experienced for the whole duration of 9 months of the pregnancy. The claim was not limited to the period before the confirmation of the pregnancy which is one month. With the Supreme Court having limited the period of liability of the respondents to the period before the confirmation of the pregnancy, it was therefore necessary for the applicant to explain and justify her original claim of US$10 000 in a supplementary affidavit of evidence.

In view of the above deficiencies and taking into account the principles outlined in the case of *Minister of Defence & Anor* v *Jackson* (*supra)* I will not award damages in the sum of $10 000-00 as claimed by the applicant. Considering the circumstances of this case I am inclined to award to the applicant slightly above half the amount of damages that she claimed. The applicant went through a horrific and traumatic experience. The respondents' employees should have done their best to ensure that she received the necessary assistance on time. They knew that time was of the essence and that this was a matter of life and death for the applicant, but they simply chose not to help her at all. They acted as if she was to blame for what had befallen her.

Accordingly, it be and is hereby ordered that the first and second respondents pay to the applicant jointly and severally, the one paying, the other to be absolved,

1. US$6 500-00 being damages for pain and suffering.
2. Interest on the amount in paragraph 1 at the prescribed rate from the date of judgement to the date of payment in full.
3. Costs of suit.

Scanlen and Holderness, plaintiff's legal practitioners
Civil Division of the Attorney-General's Office, defendants' legal practitioners