TSITSI MASUNDA
and
VICTOR MASUNDA
versus
ALEC NYANHEWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 19 September 2018 & 11 October 2018

Civil Trial

G T Nyamayi with *A F Bimha* for the plaintiffs
I Chiwara with *W Vudzijena* for the defendant

MANZUNZU J: The first and second plaintiffs are wife and husband. On 22 November 2013 along Enterprises Road in Harare occurred a motor vehicle accident. The collision was between a motor vehicle driven by the first plaintiff, which belonged to the second plaintiff, and the other driven by the defendant. The defendant was at fault. He paid an admission of guilty fine with the Police for driving without due care and attention.

As a result of this accident the first plaintiff was injured and some damage was also caused to the motor vehicle she was driving. It is as a result of this accident that the plaintiffs filed a delictual action against the defendant seeking the following as per their declaration:

> "For the 1st plaintiff:
>
> (a) Payment in the sum of US$5 585-00 for past medical costs together with interest thereon at the prescribed rate calculated from the date of judgment until date of full payment;
>
> (b) Payment in the sum of US$3 000-00 being the estimated cost for future medical expenses;
>
> (c) Payment in the sum of $2000-00 for pain and suffering together with interest thereon at the prescribed rate calculated from the date of judgment until date of full payment;
>
> (d) Payment in the sum of US$4 000-00 for loss of the amenities of life together with interest at the prescribed rate calculated from the date of judgment until date of full payment;
>
> For the 2nd Plaintiff

(e) Payment in the sum of US$2 096-50 being the total unrecovered loss from the damage to 2nd plaintiff's vehicle including interest at the prescribed rate calculated from 29 January 2014 until date of full payment;

For Both Plaintiffs

(f) Costs of suit."

The parties exchanged pleadings and at the joint pre-trial conference the parties agreed on only two issues for trial which are:

"A. ISSUES

1. In what amount is Defendant liable to Plaintiffs?

2. Who shall bear costs of suit?

This means liability is no longer in issue. The trial commenced and was concluded on 19 September 2018 to deal with the issue of quantum.

The plaintiffs' case was supported by the evidence of the doctor and the plaintiffs themselves. The defendant relied on his own evidence.

Admissions

The defendant admitted liability to pay an amount of $5 585-00 which he said in his evidence includes medical expenses and the cost of repairing the vehicle. I will deal with the evidence in more detail when I consider the evidence in support of each claim.

Claim for $5 585 for past medical expenses

The evidence by Dr Bekithemba Alexander Vimba Ncube and first plaintiff was not controverted when they said that the first plaintiff suffered a right tibia/ankle fracture in the accident. The two witnesses also confirmed that she was operated on during which process a plate and screws were inserted. This was necessary, according to the doctor's evidence, to stabilize the fractures. The issue of how much was paid for medical expenses was more dependent upon the first plaintiff. In her evidence she referred the court to documents in her bundle from page 3 to 10. The documents she referred to comprise of receipts and invoices. She however admitted during cross-examination that an invoice was not proof of payment. Proof of payment was represented by a receipt. The total sum of these receipts is $2 611. 03 Asked during examination in chief as to how the figure of $5 585 was arrived at she said she had other subsequent visits to the doctor. Her further strength was that the defendant had acknowledged his indebtedness to the tune of $5 585 for medical costs.

The defendant, while admitting that he acknowledged to pay $5 585, said this was an amount inclusive the cost of repairing the vehicle. The parties differed on the interpretation of the document under the heading "payment contract," the contents of which I will reproduce hereunder for the purposes of clarity.

> "I, Alec Nyanhehwe ID NO: 63-1189945B75, agree to make payment (in respect of hospital bills incurred by Mrs T Masunda) on the specified dates and the agreed amounts stated on the payment scheduled below to Mr V Masunda. All payments are to be made in 2014.
>
> Total amount owed (beginning balance) $5 585
>
> | Payment date | Payment Amount | Balance |
> |---|---|---|
> | 31st January | $2 000 | $3 520 |
> | 14th February | $1 000 | $2 520 |
> | 28th February | $1 000 | $1 520 |
> | 31st March | $1 585 | NIL |
>
> Thus done this 29th day of January 2014.
>
> ……. ……
>
> Alec Nyanhehwe Mr V Masunda
>
> 2 Yellowwood lane kambanji 2241 Mashoko Crescent New Marlborough
>
> *** payment of the balance on the repair of Motor vehicle ACR 7601"

The second plaintiff's evidence was that the amount of $5 585 was in respect of bills and not charges to the repair of the motor vehicle. A reading of the document as amended and the exchange of the email communication is very clear as to the intentions of the parties at the time.

The document has been signed in two parts by both the second plaintiff and defendant. The first part is clear that the amount of $5 585 broken down in proposed instalment payment plan is "in respect of hospital bills incurred by Mrs T Masunda". This requires no further interpretation. In addition to this the defendant admitted to "payment of the balance on the repair of motor vehicle ACR 7601." This makes more sense in that the Insurance was not going to meet the total cost of repairing the vehicle. There were bound to be shortfalls which defendant was undertaking to pay.

The payment agreement was signed on 29 January 2014. Prior communication between the parties is more clearer as to their intention. In an email dated 17 January 2014 by the defendant to the second plaintiff, he said "I was thinking since the <u>total medical bill is $5520</u> I could break down the payments as follows……." (my underlining). This was before the response by the

second plaintiff on 23 January 2014 saying, "have added 65 I incurred for the removal of plaster and xrays." This explains why the figure in the payment agreement stands at $5585 which again is explained as "hospital bills".

The defendant's evidence is improbable that he would agree to pay on unascertained figure within the $5585 towards the repair of the vehicle. The defendant could not say of the $5585 how much was for medical bills and how much was for the repair of the vehicle. The only probable explanation, given the evidence available, is that he admitted to pay $5585 towards medical bills only and over and above that any shortfalls to the repair costs of the motor vehicle. The mere fact that the first plaintiff produced receipts which do not add up to $5585 is neither here nor there. The defendant chose to admit to his indebtedness to that level. He must be held against his signature and must be bound by it.

Claim for $3000 for future medical expenses

In her declaration to the summons the first plaintiff claimed for $5 585 being future medical expenses but in her prayer she said $3000. In her evidence which only came out during re-examination she said she wanted $5585 for future medical expenses. She said she still has to go through surgery for the removal of the screws and the plate. She said her activities were restricted because of this injury. She cannot stand for a long time. She suffered pain from time to time especially during winter. She referred to a letter by her doctor when asked for the quotation for the operation to remove screws and plate. She said it will cost $6 000 which in fact was incorrect. The figure of $6000 was an estimated cost for a fusion operation if it became necessary. The estimated costs for the removal of the screws and plate was put at $2000 according to the letter.

Dr *Ncube* in his evidence outlined in general terms the circumstances under which one may undergo an operation for a replacement or fusion. These are medical terms which I do not intend to go into detail with but which can be understood in simple terms as to the results of each. If a replacement procedure is done to an ankle there is something which is added between the two bones but the ankle will still be flexible but within limited degrees. If the ankle is fused the flexibility of the joint is more restricted.

In relation to the first plaintiff, he said there was need to operate her and remove the screws and plate but the choice was hers. She may choose not to have them removed.

This is a procedure which may cost up to $2000 but it depends as to which hospital she will use. In some instances she may pay $1500 for the hospital and $800 for the operation which amounts to $2300. The witness said he has not yet done an assessment on the first

plaintiff as to whether or not she may require fusion. Replacement or fusion assessment only comes if the patient's pain is uncontrollable. No evidence was lead to show that this was the state in which the first plaintiff was.

In the case of a replacement there is recurrence of operation as it will usually collapse after 5 years. The witness did not say the first plaintiff was as of now recommended for replacement or fusion. But it was clear from the evidence of the two witnesses that she would require future medical attention for removal of screws and plate and control of pain. The cost of the operation is estimated between $2000 and $2300. It is only reasonable to allow an amount of $2300 which includes the cost of control of pain for future medical expenses. In his evidence in chief the defendant did not lead any evidence to show that the first plaintiff does not require future medical expenses.

Claim for $2000 for pain and suffering

Describing the pain which she suffered as a result of this accident the first plaintiff said the injury was very painful to the extent that she had to do with a plaster for 4 months during which period she walked with the aid of crutches. She still experiences pain though not to the same level.

No evidence was adduced from the defendant that she could not be compensated to the level of her claim for pain and suffering. Dr Ncube said the first plaintiff suffered a lot of pain because of the broken bone. He said she will not be completely pain free. Rating her pain against the scale of 1 to 10 he said her pain was at 10. I have further considered the authorities cited in written submissions by both parties on pain and suffering and loss of amenities. I see no reason to deny her the amount she has claimed.

Claim for $4 000 for loss of amenities

Loss of amenities involves a diminution in one's everyday normal activities. It means one can no longer do certain things which one used to do before the injury.

In support of this claim Dr Ncube who was plaintiff's first witness said that first plaintiff suffered 20% disability of a joint. He said that she has lost flexibility of the joint which under normal circumstances must have a movement range of 10% upwards and 20% downwards. Furthermore, she will not be able to engage in her normal activities. In her evidence first plaintiff says she cannot stand for a long time neither can she drive for long distances. An amount of $4 000 cannot be said to fall outside the reasonable range of compensation for this level of disability. I am inclined to grant it more so when the defendant has not controverted it.

Claim for $2 096.50 towards repair of motor vehicle

The undisputed facts are that there were damages to the second plaintiff's motor vehicle. There was a quotation by some panel beaters to the tune of $9 096.50. This figure was amended to $8 924 following the intervention by the Insurance assessors. In support of this claim was the evidence of the second plaintiff. He said he received a total of $3 000 from the defendant's insurers and thereafter decided to sell the wreck for $4 000. This is why he is claiming $2 096.50 being the difference of the total in the quotation which is $9 096.50 less $7 000 (comprised of $3 000 received from the Insurance and $4 000 from sale of the wreck). The fact of the matter is that this motor vehicle was not repaired. The question is, is this the correct computation of damages due to second plaintiff.

The second plaintiff disposed of the motor vehicle whose value is unknown. The correct computation should have been to get the value of the vehicle less the benefit received.

The balance would have shown the amount of loss suffered. Since the vehicle was not repaired going by the second plaintiff's method of calculation one is to remove VAT and labour in order to ascertain what otherwise remains as the damages to which he is entitled. Vat and labour total $1 564 which amount must be deducted from $8924. This will leave a balance of $7360. Since second plaintiff has already benefitted from the insurance pay out and sale of the wreck to the tune of $7000; second plaintiff can only be entitled to $360 which is the difference between $7360 and $7000.

In the result the plaintiffs succeed to the following extent.

IT IS ORDERED THAT:

Defendant shall pay first plaintiff the following amounts:

1. $5 585 for past medical expenses
2. $2 300 for future medical expenses
3. $2 000 for pain and suffering
4. $4 000 for loss of amenities.
5. Defendant to pay second plaintiff the sum of $360 for damages to the vehicle.
6. Defendant to pay costs of suit.

Honey & Blanckenberg, plaintiffs' legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners