



Republic of Malawi
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
Civil Cause No. 164 of 2018

Between:-

STAFFORD BONDERA NYIRENDA.....CLAIMANT

-AND-

CARLSBERG MALAWI BREWERIES LIMITED.....DEFENDANT

CORAM

Brian Sambo, Assistant Registrar (Ag)

Mr. Evans Mbotwa and Miss Towera Chatupa, of counsel for the Claimant

Mr. Wanangwa Kalua, of counsel for the Defendant

Henry Kachingwe; Official Interpreter/Court Clerk

ASSESSMENT OF DAMAGES FOR PERSONAL INJURY

INTRODUCTION

This assessment follows the decision by Honourable Justice Ligowe in which the Plaintiff was awarded damages for pain and suffering, damages for psychological torture and shock, travel expenses, plus costs, on the 16th of March, 2018.

BRIEF FACTS OF THE MATTER

On or about the 20th of September, 2012, the Claimant bought a bottle of Cocopina, a beverage manufactured by the Defendant, from a bottle Store at Mzimba Boma. As he drunk, it tasted sour contrary to his usual experience with the drink. Moments after, he felt very nauseous and started vomiting. He had consumed half of the bottle. He took the rest home so that he could report the problem to the manufacturers. He did not eat anything else that evening. In the following night he developed sores in the mouth and throat area and had a severe

stomachache. He did not take his breakfast before he reported to the Defendant's depot at Mzimba the following morning where he was advised to seek medical help at the District Hospital. At the hospital, he was informed that the ailment was the result of the drink. He was treated as an out-patient for five months with various antibiotics and gut medicines but the problem persisted as he still had sores in his mouth. He tendered his health passport in proof of his evidence.

EVIDENCE ON ASSESSMENT

On Tuesday, June 12, 2018, I received evidence and heard the Claimant's submission on assessment of damages for pain and suffering, psychological shock, and special damages for costs of a Medical Report amounting to MK1, 000.00 and travel expenses amounting to MK100, 000.00.

During assessment, the Claimant testified that, after taking the Defendant's infested drink, he became myopic, he felt dizzy and his sexual affection almost died. He said he also experienced chronic stomachache to the extent that his doctor advised him not to take a lot of food, and he said this had negatively compromised his gastronomic tastes. He further testified that he had also developed stomach ulcers, and he felt feverish more often. He said, following the injuries, he lived on pain killers.

During cross examination, he testified that he did not have any medical report showing that, as a result of the infested drink, he had become myopic, dizzy, feverish and sexually inactive. He said he felt most of the drink's aftermaths after he had already seen his doctor.

During re-examination he said he did not return to the hospital to register and get treated for the emerging ailments because his doctor did not advise him to go back to the hospital. He said the degree of his permanent incapacity was assessed at 60%.

ISSUE

The hearing was conducted to assess the quantum of damages payable for pain and suffering, damages for psychological torture, expenses expenses, and costs of the action.

ANALYSIS OF FACTS AND DECISION

The basis of my assessment comes from the victim's own evidence, the tendered medical report, submissions by counsels be it written or oral, and skeleton arguments. I will be tackling all these quite in a moment. Before then, I would like to thank all counsels for the guidance given me through the submissions made. I noticed, at some point, especially during cross examination, this matter became quite passionate. I will try as much as possible to consider them in my assessment as far as the law disposes. I also want to thank the witness for his testimony. Such evidence, I believe, will help me to come up with an infallible assessment order.

The Claimant, basing on a South African case of **Smith v MEC for Health, Province of KwaZulu-Natal**, (3826/12) (2016) ZAKZPHC 68 (2 August, 2016) in which the court had awarded R340, 000.00 as damages for pain and discomfort, loss of amenities for life and her disability in being unable to lead a full and happy life, demands an equivalent sum MK19, 000,000.00 being damages covering all heads apart from special damages. Counsel for the Claimant did not bring any other comparative case law in support of this whooping sum of money. I think counsel needed not go to the Republic of South Africa, especially now that Malawi has fully developed its own jurisprudence on this particular legal matter. The High Court in Malawi has fully developed the law on assessment of damages for personal injury as a result of consuming bad beverages. If counsel today, still wants to go to India, Japan, South Africa, England, it should be for purposes of adding persuasive flavours to his or her submission, otherwise counsel can, ably stay home and succeed.

I perceived the defence provided only one 'case authority'; *Mataka v Chibuku*. I am referring to it as 'case authority' with caution because it was without citation. I am referring to it as a 'case authority' because counsel for the defence calls it so. I know that the only relaxed way for citing civil case authorities is to state the parties and the year it was decided. It is also true that even this manner of citation does not make any sense in Malawi in view of our poor reporting systems and poor case record management. Even if, having mentioned the parties, the case number and the year, there are more possibilities of finding the same or similar particularities elsewhere in Malawi, which is why parties in Malawi should proceed to even state the court and the setting of the case. It is even much better to name the judge who had so decided. Now, '*Mataka v Chibuku*', with due respect, is doubtfully a case authority, and as a court, I am not permitted to guess that 'it should be a case decided by so so judge'. I will, therefore, not consider it as legal authority in my assessment.

In the instant case, as I have already stated elsewhere in my assessment text, the Claimant seeks damages for pain and suffering, damages for psychological torture and shock, travel expenses and costs of the action. According to Ligowe, J in ***Adamson Msukwa v Carlsberg Malawi Limited***, Civil Cause No. 64 of 2012, in a case of personal injuries, pain and suffering is attributable to the plaintiff's injury or to any necessary surgical operations and mental anguish such as that suffered by a person who knows that his expectation of life has been reduced or who being severely incapacitated, realizes the condition to which he has been reduced. The Claimant in the present case suffered sores on his throat, mouth and abdominal pains. During his evidence, though not sufficiently supported by medical evidence, he stated that he still suffered the abdominal pains. I had time to look at the medical report; it supported all the ailments apart from the issues of myopia, sexual affection deterioration, fever and dizziness. I should state, at once, I will not consider these unsupported medical conditions. I personally, do not understand why the Claimant had to wait for his doctor to invite him for treatment for these heinous medical conditions. I know that people feel

differently, but conditions where someone is at the verge of losing his sight, losing the pleasure of enjoying sexual gratification, and feels dizzy are by no means insignificant medical afflictions. Without medical proof, I would be reduced to a chief's court if I consider them proved.

I know that for pain and suffering, the same cannot be quantified in monetary terms but use of mathematical formula. See the **Adamson Msukwa Case** above cited. Basically, it should be conventional sum which society would deem fair compensation for the injuries suffered. According to Ligowe, J in the **Msukwa Case**, this is arrived at by use of experience and guidance affordable by awards made in decided cases of a broadly similar nature taking into account devaluation of the currency since the awards were made. This approach allows for consistency and uniformity according to **City of Blantyre v Sagawa** [1993] 16(1) MLR 67 (MSCA).

In **Adamson Msukwa v Carlsberg Malawi Limited**, MK500, 000.00 was awarded as damages for pain and suffering. Adamson Msukwa, moments after drinking Sprite, he suffered shock and abdominal pains. He also lost appetite. Subsequently, he visited the hospital for check-ups as a result of taking the infested Sprite. In **Kunje v Southern Bottlers Co Ltd** (1996) MLR 154, the plaintiff was awarded MK15, 000.00. In the **Kunje Case**, the Plaintiff nauseated the whole night after drinking Sprite which had mucous like substance sticking to the bottom edge of the bottle and tasted so bad. He was left in considerable anxiety and fear as to his health. In **Edward Salima v Southern Bottlers** (2007) MLR 89, the plaintiff suffered from abdominal pains, opened bowels for three times and became weak after drinking Fanta which tasted bad and had a foreign body at the bottom of the bottle. The court awarded MK25, 000.00. That was in 2007. In **Chimaliro v Southern Bottlers Ltd**, Civil Cause No. 232 of 1997 (High Court, Lilongwe Registry), the plaintiff felt pain on both her tongue and throat upon drinking Fanta which was found to contain black substances, whose chemical composition was never ascertained. She was taken ill and had to go to

the casualty ward at the Kamuzu Central Hospital for treatment. The treatment involved a washout of the plaintiff's stomach (a procedure described as gastric lavage) and providing her with drugs to stop the stomachaches and diarrhea she was experiencing. She was still taking medication at the time of the assessment of her damages. Medical personnel had assessed her permanent incapacitation to be at 8%. The court awarded her MK700, 000.00 for pain and suffering.

In the present matter, the Claimant's Medical Report showed that he had developed sores in the mouth and the throat area, he also developed severe stomachache. Moments after consuming the said Cocopina, he felt nauseous and started vomiting. His injuries are similar to those in the case of **Chimaliro v Southern Bottlers** (above). The permanent degree of incapacity was assessed to be at 60% while in the **Chimaliro Case** it was 8%. The assessment of damages in **Chimaliro Case** took place in 2007 but she was awarded MK700, 000.00 being damages for pain and suffering. This simply entails that one ought to expect more in 2019. This is why I think MK2, 400,000.00 fairly compensates the Claimant for the injuries he suffered. That is what I award him as damages for pain and suffering.

As regards damages for psychological torture and shock, my view is that the same is part of pain and suffering in a personal injury claim, especially where they are not specifically proved as is the case in the matter before me. Apart from demanding them in word, the Claimant's evidence remains empty of proof for the same. It is my considered view that psychological torture and shock are medical conditions, and therefore they should be proved medically. The Claimant had fallen short of any proof to that effect. I will, therefore, not make any award with respect to the same.

SPECIAL DAMAGES

Generally, special damages are specifically pleaded and strictly proven. See **General Farming Limited v Chombo (1996) MLR 16**. It is also true that a claim for loss of expenses is a pecuniary damage which has to be proved, strictly. See

Adamson Msukwa v Carlsberg Malawi Limited (above). I have no problem with medical expenses but travel expenses. What I see is only a figure of MK100,000.00. Time for evidence ended, and I am yet to receive proof with regard to the figure above. It will be wrong for me, therefore, to accept it as gospel truth. It is also not clear whether these travel expenses relate to medical access travels or court access travels. I have to make my own deduction. Since the Claimant also claims costs of action, these expenses, definitely, have to do with medical trips that he had been making. The evidence before me, shows that the Claimant, since the incident, had been resident in Mzimba District and he was treated at Mzimba District Hospital. Much as judicial notice can be taken that Mzimba is the biggest district in Malawi, the proximity should not be, without backing, translated to MK100,000.00 considering the space and time that the Claimant had suffered the injuries herein. In my view, what is reasonable as travel expenses, in these circumstances is MK80,000.00. For the Medical Report, it remains MK1000.00. Therefore, the total award under special damages is MK81,000.00.

COSTS

It is a settled law that cost follow the event. The successful litigant is compensated for the troubles faced in commencing his or her case. Therefore, costs here and those awarded by the judge in his judgment on liability, unless already assessed, are for the Claimant.

CONCLUSION

In summary, the Claimant is awarded as follows:

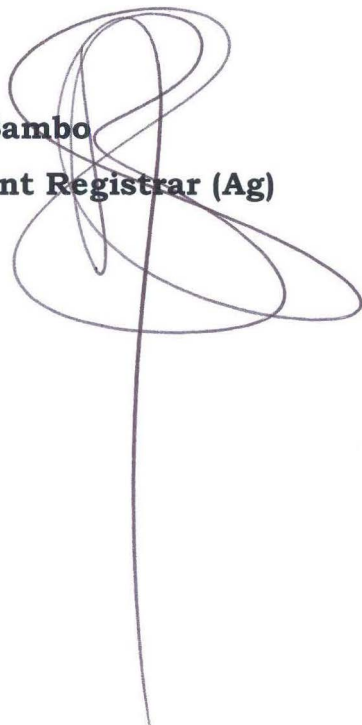
1. MK2,400,000.00 being damages for pain and suffering
- ii. MK81,000.00 are special damages

In total, the Defendants are required to pay MK2,481,000.00. The whole sum should be paid within 7 days from today.

Costs are for the Claimant, and shall be assessed, separately.

Made in chambers today the 24th of January, 2019.

Brian Sambo
Assistant Registrar (Ag)

A handwritten signature in dark ink, consisting of several overlapping loops and a long vertical tail extending downwards.