

THE HIGH COURT OF SWAZILAND

ANDILE NKOSI

Plaintiff

V

ATTORNEY GENERAL

Defendant

Civ. Case No. 264/97

Coram

Sapire, CJ

For Plaintiff

Mr. L. Mamba

For Defendant

Mr. P. Simelane

JUDGMENT

(08/10/99)

The present is an action in which originally two plaintiffs sought damages from the Government arising out of the death of a person "No Name Ngomane" who had been killed in a Police ambush at the Why Not entertainment centre

At the commencement of the trial Mr. Mamba who appeared for the plaintiffs announced that the proceedings would only be continued in respect of one of the plaintiffs, namely Andile Nkosi, who claimed to be the guardian of a minor child alleged to have been fathered by the deceased. This I understood, and I consider that nothing else could be understood, to mean that the second plaintiff, Thandi Tzabetse, mother of the deceased was withdrawing her action. The trial proceeded with only the first plaintiff's claim

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I first heard evidence on what may be called the merits of the claim, to determine whether there was any liability on the defendant to make payment of any damages. This involved an enquiry into the circumstances of the death of the deceased. After hearing evidence I ruled in a judgment given previously that the defendant had not justified the killing and that the Government would be liable for such damages as may later on be agreed or proved.

The matter was then enrolled for further hearing on the question of damages.

Prior to the hearing Mr. Poet Simelane of the Attorney General's office and Mr. Mamba called on me in my Chambers in order to discuss the trial. I was informed that actuaries had been consulted and that these persons had made reports copies of which were handed to me at that time. I was also informed that the parties had agreed that where there were differences, which of the reports was to be preferred. I examined the reports and found them to be gravely deficient in many respects. It is significant that no provision is made for contingencies. The basis of the calculations and the assumptions made in respect thereof require proof

When the matter was called counsel rose to inform me that they had agreed on the basis of the calculation and as to which of the reports I was to use to make an award. The Plaintiff did not, it was clear, intend to lead evidence to establish a factual basis for the assumptions on which the calculations were said to be based, and no evidence was tendered.

I made it quite clear that I was not prepared to make calculations and awards in vacuo on the basis of actuarial calculations or assessments the parameters and data of which were not proved in evidence. I stressed and that I required full proof of damages if any order was to be made, unless the parties were to agree on the ultimate figures of the award.

I also enquired as to why the First Plaintiffs claim was dealt with by the actuaries in view of her earlier withdrawal as announced at the commencement of the trial. Mr. Mamba did not give a satisfactory explanation.

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As far as the minor's claim was concerned I made it clear that the amount of any award would have to be paid into a registered commercial bank to be administered in trust on terms to be settled by me, Mr. Mamba seemed to concede that this would be the correct procedure, as the guardian did not seem to be a person who had the ability to handle a large capital amount on behalf of the minor.

The matter stood down and after the luncheon interval the attorneys returned to Court to present the results of farther discussion between themselves

During the luncheon interval I was informed that a high ranking Police Officer wished to speak to me. Until he came into my chambers I did not know what the purpose of his visit was. He soon disclosed to me that he had come to inform me that Mr. Simelane who appeared for the Attorney General and Mr. Mamba had reached an agreement which they had reduced to writing but that the Commissioner of Police had not been consulted and that he was not in agreement therewith. I informed the high ranking officer that it was better that he should have said this in court and that he should present himself at court when the sitting resumed.

Immediately the sitting resumed Mr. Mamba handed to me the deed of settlement which was signed by him and Mr. Simelane. I thereupon informed the parties of what had transpired and called the Police Officer to the witness stand to repeat under oath what he had said to me in Chambers. I gave both attorneys an opportunity of challenging what he said. Neither availed himself of this opportunity

When I asked Mr. Simelane if it is true that he had signed the agreement without the authority of his client, he shamefacedly admitted that this was so.

I immediately informed the parties that I was not prepared to make the agreement an order of court as requested by Mr. Mamba. Mr. Simelane who was clearly most embarrassed asked for a postponement to have the matter of damages tried. In view of the alleged settlement this application was obviously misconceived.

It seems that the provisions of rule 41(5) are applicable. This rule reads: -

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Unless such proceedings have been withdrawn, (sic) any party to a settlement which has been reduced to writing and signed by the parties or their counsel but which has not been carried out, may apply for judgment in terms thereof on giving at least five days notice to all interested parties".

The position therefore is that if the plaintiff wants to enforce payment of the settlement the provisions of rule must be followed.

The agreement of settlement deals not only with the claim of the minor child but also with the claim of the plaintiff who had, as we have seen at the outset of the case, withdrawn. The rule specifically excludes her claim from the provisions thereof.

As far as the minor's claim is concerned, I have already indicated to Mr. Mamba that if any award is to be made, the amount is to be paid to a commercial bank to be administered in trust for the minor on conditions which are to be determined. The possibility of the appointment of joint trustees one of whom would be an attorney a family member of the minor was inconclusively discussed. Any agreement of settlement, which does not provide for the money to be held in trust by a commercial bank on terms to be settled and approved by this court will be unacceptable. The agreement of settlement does not comply with this requirement

S. W. SAPIRE, CJ