

IN THE HIGH COURT OF SWAZILAND

Civil case no. 1717/98

In the matter between:

SAKHI ZONDO PLAINTIFF

VS

CONSTABLE BHEKISISA KUNENE 1st DEFENDANT

CONSTABLE SONNBOY MABUZA 2nd DEFENDANT

CONSTABLE VUSI GAMEDZE 3rd DEFENDANT

2864 SERGEANT MASANGO 4th DEFENDANT

ATTORNEY GENERAL 5th DEFENDANT

CORAM : MATSEBULA J

FOR THE PLAINTIFF : MR. MDLULI

FOR THE 5th DEFENDANT : MR. FLYNN

JUDGEMENT 21/05/98

By a combined summons issued on 16th July 1996 Plaintiff sued the Defendants for the following relief:

- (a) Payment of the sum of E751, 300.00;
- (b) Interest thereon calculated at 9% per annum/tempore morae;
- (c) Costs of suit;
- (d) Any further and/or alternative relief

The cause of action arose from an alleged assault on Plaintiff by first, second, third and fourth Defendants on the 25th December 1994 at the Cuddle Puddle premises in the Ezulwini Valley area. First, second, third and fourth Defendants were at the relevant time, members of the Royal Swaziland Police.

In his paragraph 7.1 of the particulars of claim Plaintiff states the following:

7.1 Plaintiff was verbally abused and physically assaulted with claps and kicks all over the body.

7.2 "Defendant" was dragged. I presumed it was intended 'to refer to Plaintiff that some or all of the aforementioned police officers dragged Plaintiff on the ground and shot him with a firearm on the neck area.

8. As a result of the assault Plaintiff suffered the following disabilities:-8.2 His vision has been impaired.

9. The aforementioned members of the Royal Swaziland Police were acting in the course and within the scope of employment as servants of the Swaziland Government.

ALTERNATIVELY

First, second, third and fourth Defendants are personally liable for the injury suffered by Plaintiff jointly and severally.

10. Plaintiff has suffered the following damages from the aforesaid assault:-

- 10.1 Medical expenses E 500.00
- 10.2 Future medical expenses E 800.00
- 10.3 General damages for pain & suffering E750 000.00
- TOTAL E751 300.00

On the 31st July 1996 5th Defendant's attorneys filed a notice of intention to defend and on 21st August 1996, fifth Defendant filed a dilatory plea and raised two legal issues.

1. Lis pendes in that Plaintiff had instituted an action under case no. 1223/95 and that the cause of action and grounds of liability and relief sought was substantially the same.
2. That Plaintiff had not complied with the provisions of Section 2(1) of the LIMITATION OF PROCEEDINGS AGAINST THE GOVERNMENT ACT. Fifth Defendant prayed that the action be dismissed with costs.

On the 28th August 1996 fifth Defendant withdrew the above plea. Fifth Defendant filed its plea on 30th August 1996.

In its paragraph 3.1 fifth Defendant denied that first, second, third and fourth Defendant

2

acted in the course and within the scope of employment as servants of Swaziland Government and it averred that first, second, third and fourth Defendant acted in pursuance of their own frolic.

Fifth Defendant prayed that the Plaintiff's action be dismissed with costs.

Before I deal with the merits of this action, there is one observation that I should make and that is, the Attorney General can never be a party to these proceedings. The Plaintiff has specifically stated that the Attorney General was cited in its capacity as the legal representatives of the Swaziland Government but when one reads through the papers, it is very clear that both the Plaintiff and the representative of the Attorney General regarded the Attorney General as a party. Either the Commissioner of Police as head of the police department or the Government of Swaziland ought to have been cited and the papers served on the Attorney General as a legal representative of Government.

On the above basis alone, there is no way that the Plaintiffs claim would succeed even assuming the merits of the matter favoured him. The bottom line is Plaintiff has cited a wrong defendant in the person of fifth Defendant.

Turning to the merits of the case. At the commencement of the hearing Mr. Mdluli for the Plaintiff informed the court that he was not going to pursue prayers 10.2 i.e. future medical expenses in the amount of E800.00 and prayer 10.3 i.e. general damages for pain and suffering and disability in the amount of E750 000 00. Mr. Mdluli applied for an amendment in respect of prayer 10.3 to read E100 500 00 instead of E751 000 00.

Mr. Flynn did not oppose the application but indicated that he reserved the right to apply for an appropriate order as to costs. Mr. Flynn said his instructing attorney would not have deemed it fit to engage services of counsel had they known that the quantum of claim would be reduced drastically.

Mr. Mdluli then led the evidence of the Plaintiff Mr. Zondo only. Mr. Zondo told the court that he was also a member of the Royal Swaziland Police and was based at the Manzini Police Station. On the 25th December 1994 on Christmas Eve or rather the morning because it was already 3am, he and

others went to Cuddle Puddle in a red

3

kombi. There were more than ten of them. They paid the necessary entrance fees, and were about to jump into the pool when the proprietor approached and informed them that they should be careful of some broken pieces of glass left by some other patronisers who were involved in a fight. Plaintiff told the court that as he spoke to the proprietor a group of police officers arrived. At that stage he was in the pool. The policemen spoke to those who had not entered the pool accusing them of having been involved in a fight. Two of the police officers approached him one being Sergeant Masango and the other unknown to him. The two asked him why he was not coming out of the pool and he told them he was still talking to the owner of the premises. He said as he came out of the water, he accidentally splashed water on Sergeant Masango and the Sergeant struck him with his open hand accusing him of deliberately splashing him with water. Plaintiff told the court that he protested at the action of Sergeant Masango. He said other police officers also joined in the attack and caused him to roll on the ground and his group came and asked for an explanation why Plaintiff was being assaulted. The assault was in the form of open hands, fists and kicking, he said. His group intervened and Plaintiff moved towards the gate where the girls who were forming part of his group brought him clothes to dress as he was still wearing his swimming pants. He then decided to leave. As he was leaving he heard one of the Defendants' colleagues saying, "I suspect that these guys are being accompanied by our girlfriends." He started running and the police officers ran after him. He ran towards their kombi and found it locked. He went past still running and the police officers running after him. He said it was as he ran that he was shot at and he fell. He said his attackers had arrived in a police van a Toyota 4 x 4 and it belonged to a department called OSSU. They were wearing civilian clothes. Plaintiff was under the impression that Sergeant Masango had shot him but one of his companions told him that another person not Masango had shot him. His companion was Hlengiwe Dlodlu. Plaintiff was taken to hospital where he was detained for two days. He was operated on and the bullet that had lodged in his body was removed. His attackers never told him of any arrest. He had learned later from the proprietor that it was he the proprietor who had summoned the OSSU span.

The Plaintiff was cross-examined by Mr. Flynn for the fifth Defendant extensively. He said he was in company of some girls who knew some of the Defendants. One of the girls was his girlfriend. He said he had heard some of his attackers saying to his group "these guys have taken our girlfriends."

4

After his release from the hospital he had asked his girlfriend whether she was one of his attackers girlfriend. He said he had asked his girlfriend about her relationship with any of his attackers not because Constable Gamedze had asked him during the attack what he was doing with his (Gamedze's) girlfriend. He said what was reflected in the statement he made to the police was not true. He admitted that he had said in his statement that he had been shot because they suspected he was in love with his girlfriend. The statement clearly showed that the quarrel was centred on the girlfriend because he was the only one assaulted in the group who were in the kombi.

Plaintiff also called one Ntokozo Mamba who was one of the persons in his group on that morning. Mamba's evidence was to some extent corroborative of Plaintiff's but did not further Plaintiff's case in so far as his claim in the summons. There were certain contradictions which I did not consider material for the purposes of the Plaintiff's claim.

Mr. Mdluli also called Dr. Rosemary Mkasa. The doctor read and handed in RSP88. It was handed in as exhibit "A." Mr. Flynn submitted that:-

- (1) On the evidence presented there was no evidence that the Defendants acted in the cause of their employment;
- (2) He submitted that there was no proper case made out to enable court to consider any quantum in regard to the amount claimed.

Mr. Flynn indicated that he was representing the fifth Defendant and there was no case made against the fifth Defendant and Mr. Mdluli conceded that no case had been made against the fifth Defendant.

As indicated earlier in my judgement apart from anything else a completely wrong defendant in the person of the fifth Defendant had been cited. I, therefore granted the application by Mr. Flynn and dismissed the case by Plaintiff against the fifth Defendant with costs.

Mr. Flynn then addressed the court with regard to costs for counsel. Mr. Flynn argued that a claim for E750 000 00 had been brought initially and because of this exorbitant claim, the instructing attorneys deemed it necessary to brief counsel. This exorbitant

5

amount was reduced on the first day of hearing. The effect of this was that fifth Defendant was put to a great deal of preparing for a claim of a huge amount.

No evidence has been led to substantiate any of the amount alleged. All that Plaintiff says is that he could not sleep and could not eat solid food but drank liquids. As for the pain and suffering a passing reference is made. Mr. Flynn asks that costs of counsel be permitted in terms of Rule 68(2) of the High Court Rules and taxing master should not be bound by Rule 68(1).

Courts should discourage litigants from claiming excessive amounts, and abandoning such claims at first day of hearing. The court was referred to BENNETT VS MINISTER OF POLICE 1980(3) SA24 @37.

- (1) Costs should therefore be attorney and client scale.
- (2) Plaintiff be ordered to pay counsel fee in terms of Rule 68(2).

Mr. Mdluli on the other hand submitted that granting costs on attorney and own client would tend to discourage litigants from instituting claims.

Unfortunately, Mr. Mdluli has not been candid with the court. He has not furnished reasons for the abandoning of such a huge claim. He has not led any evidence to substantiate any of his claims as can be expected in claims of this nature. He has cited a wrong litigant and made no attempt to apply for an amendment and cite the correct litigant.

In the circumstances Mr. Flynn's argument is very persuasive and there is no reason why this Court should not accede to it.

The amendment or abandonment of the Plaintiffs claim although it did not prejudice fifth Defendant in terms of the proceedings, it had done so in terms of preparations and briefing counsel. Courts have discretion to grant or refuse amendments from commencement to before close of pleadings and after argument. See page 52 of HERBSTEIN AND VAN WINSEN - THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4th edition and cases cited there.

I would therefore grant costs:-

- (1) on attorney and client scale;
- (2) order Plaintiff to pay counsel fees in terms of Rule 68(2) and order that taxing master is not bound by Rule 68(1).

J. M. MATSEBULA

JUDGE