

**THE HIGH COURT OF SWAZILAND**

**PHUMZILE MAVIMBELA**

Plaintiff

**And**

**THE ATTORNEY GENERAL**

Defendant

Civil Case No. 2965/200U

Coram: S.B. MAPHALALA – J

For the Plaintiff: Advocate P. FLYNN (Instructed by Maseko, Dlamini and Associates)

For the Defendant: MR. T.L. DLAMINI (Attached to the Attorney General's Chambers)

**JUDGMENT**

(On the *quantum* of damages)

(11<sup>th</sup> April 2006)

[1] On 15 ' July 2005, this court granted an order that the Plaintiff has discharged her *onus* of proving on the evidence presented that she was indeed assaulted in the manner alleged by her on a balance of probabilities. In the result, the matter was to stand over for a final determination of the *quantum* of damages and the matter was referred to the Registrar of the Court for allocation of a trial date for that purpose. Indeed the court has heard submissions on the *quantum* of damages. [2] It was contended on behalf of the Plaintiff that she was entitled to damages as reflected in her Particulars of Claim. The court was further directed to the evidence showing how Plaintiff was assaulted by the police.

[3] *Per contra* arguments for the Defendant, were that Plaintiff is precluded by the provisions of Section 2 (1) of the Limitation of Legal Proceedings Against Government Act of 1972 from suing for the amount as set out in her Particulars of Claim because a demand was only made for the total sum of E32, 000-00. No demand was made as required by the provisions of the Act for any debt in the amount of E150, 000-00. Defendant contends in this regard that the Plaintiff ought to have applied for leave to amend, if she so wished. Its claim must accordingly be limited to the total sum of E32, 000-00 as the due debt in terms of the

statutory demand that was made by the Plaintiff to the Attorney General.

[4] On the *quantum* of damages Defendant acknowledged that the court is faced with a difficult task because there is no common denominator between pain and money. In this regard the court's attention was drawn to the case of *Souder vs Wholesale Coal Suppliers Ltd 1941 A.D. 194 at 199 per Watermeyer JA* where the following was said:

"There are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty".

[5] The court was further referred to what is said by author *Boberg, The Law of Delict*, at page 533 to the legal proposition that the trial Judge has a wide discretion to determine an amount fair to both parties - neither denying the Plaintiff just compensation nor pouring out "largesse from the horn of plenty at the Defendant's expense" (*per Holmes J in Pitt vs Economic Insurance Co. Ltd 1957 (3) S.A. 284 (D) at 287*).

J

[6] The Plaintiff bears the *onus* of proving both the fact and the *quantum* (see *Edwards vs Hyde 1903 T.S. 381 at 355 - 6* and that of *Anthony vs Cape Town Municipality 1967 (4j S.A. 445 at 446)*). In this regard *Mr. Dlamini* for the Defendant submitted facts in paragraph 5 of his Heads of Arguments showing that Plaintiff has not discharged the said *onus*.

[7] The first issue I intend to address in this case is whether or not Plaintiff is precluded by the provisions of Section 2 (1) of the Limitation of Legal Proceedings Against Government Act of 1972 because a demand was only made for the total sum of E32, 000-00 not the amount of E150, 000-00 which is now being sought as damages. Section 2(1) of the said Act reads as follows:

- (1) **Subject to Section 3 no legal proceedings shall be instituted against the Government in respect of any debt:**
- a) **Unless a written demand, claiming payment of the alleged debt and setting out the particulars of such debt and cause of action from which it arose, has been served on the Attorney General by delivery or by registered post;**  
**Provided that in the case of a debt arising from a delict such demand shall be served within ninety days from the day on which the debt became due;**
  - b) **Before the expiry of ninety days from the day on which such demand was served on the Attorney General unless the Government has in writing denied liability for such debt before the expiry of such period;**

- c) **After the lapse of a period of twenty-four months as from the day on which the debt became due.**

[8] It would appear to me that the Defendant's contention on the basis of the above Section of the Act cannot assist him in view of what is contained in the pleadings before court. In paragraphs 6 and 7 of the Plaintiffs amended Particulars of Claim she avers in paragraph 7 that **"despite the demand having been made in terms of Act No. 21 of 1972, the Defendant has failed to pay the Plaintiff the amounts claimed"** the Defendant in his plea to the amended Particulars of Claim replies to paragraphs 6 and 7 of the Plaintiffs amended Particulars of Claim that **"Defendant admits that only demand was made but denies liability of any form to the Plaintiff for all the heads of claim mentioned in these paragraphs, however, Plaintiff is but to strict proof thereof.** In both the amended Particulars of Claim and Defendant's plea thereto the amount of damages is in the sum of E150, 000-00. It is my considered view that the Defendant's argument that Plaintiff can only be entitled to damages of E32, 000-00 is without merit.

[9] I now turn to the issue of the *quantum* of damages in this case. I have considered the legal authorities cited by both parties in this case. The object of awarding damages is to place the Plaintiff, as far as money payment can, in the position in which he would have been had the delict not been committed. Since the aim is "to compensate [the Plaintiff] for material loss, not to improve [his] material prospects" (see the case of *Hulley vs Cox 1923 A.D. 234 at 244*).

[10] On the facts of the present case and the legal authorities cited by both Counsel in this case including the very useful case cited by *Mr. Flynn* that of *Ramakulusha vs Commander, Venda National Force 1989 (2) S.A. 813* where Van Per Spuy AJ remarked that, in his researches of the law on the *quantum* of damages in cases involving the infringement of personality rights, it had noted with some surprise the comparatively low and sometimes almost insignificant awards made in Southern African Courts for infringement of personal safety, dignity, honour, self-esteem and reputation. The court commented that it was of the opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual. It is my considered view that damages be fixed as follows: In respect of pain and suffering I would award a sum of E30, 000-00. The Plaintiff was subjected to severe pain and suffering where she appeared before male officers and was even forced to strip off her clothes. In respect of *contumelia* I would award a sum of E30, 000-00 thereto. In respect of general damages I would award a sum of E30, 000-00 in view of the circumstances of this case.

[11] In the result, for the afore-going reasons the following order is accordingly recorded:

- i) For pain and suffering Defendant to pay a sum of E30, 000-00;
- ii) For *contumelia* a sum of E30, 000-00;
- iii) For general damages a sum of E30. 000-00;
- iv) Interest on the sum of E90, 000-00 at the rate of 9% per annum fro date of judgment to date of final settlement;
- v) Plaintiff awarded costs of suit.

**S.B. MAPHALALA**  
**JUDGE**