



**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No. 816/2004

MAVELA MKHWANAZI

Applicant

And

ARMY COMMANDER OF THE  
SWAZILAND UMBUTFO DEFENCE FORCE 1<sup>st</sup> Defendant

ATTORNEY GENERAL  
Coram

2<sup>nd</sup> Defendant  
S.B. MAPHALALA - J

For the Plaintiff

MR. O. NDZIMA

For the Defendant

MISS Z. MKHWANAZI

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**JUDGMENT**

27<sup>th</sup> February 2009

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[1] The Plaintiff Mavela Mkhwanazi, an adult male of Makhonza area, Nhlangano in the Shiselweni District has filed a combined summons against the Army Commander of the Swaziland Umbutfo Defence Force for a claim for

damages amounting to E2, 000,000-00 where Plaintiff was assaulted and shot by members of the Defence Force.

[2] According to the Plaintiff the afore-mentioned assault and shooting was without any reasonable or probable cause, and further the members of the Umbutfo Swaziland Defence Force did not have any reasonable cause for the shooting and assault of the Plaintiff.

[3] Alternatively, the incident of Plaintiff's assault and shooting by members of the Umbutfo Swaziland Defence Force was caused by negligence of the said members of the Defence Force who failed to take all and adequate precautions in the circumstances, failed to ascertain who Plaintiff was and where was he from and all other surrounding factors.

[4] As a result of the shooting and assault, Plaintiff suffered

damages in the sum of E2, 000,000-00 in that he had to undergo medical treatment, was unable to work and suffered loss of income and suffered *contumelia*.

(a)	pain and suffering	E1, 000, 000-00
(b)	discomfort	E 900, 000-00
(c)	contumelia	E 75, 000-00
(d)	attorneys costs	E 25, 000-00
	Total	<b><u>E2, 000, 000-00</u></b>

[5] The Defendant has filed a plea challenging the above-cited claims. The gravamen of the defence by the Defendant is that the Plaintiff was shot lawfully as he was resisting lawful arrest by members of the Defence Force. The Plaintiff was caught red handed smuggling stolen goods from the Swaziland side and taking them unlawfully into South Africa. I must mention at this stage that the Defendants admitted liability in this case after the court has heard the evidence of the Plaintiff and the matter then proceeded to the *quatum* stage of the proceedings.

[6] Both Counsel filed very comprehensive Heads of

Arguments on the *quatum* of damages in this case and I am grateful to Counsel for their professionalism and industry.

[7] At the close of argument an issue arose as to the evidence of the medical doctor one Dr. Makhungu of the Mbabane Government Hospital. During the hearing of the matter the medical report compiled by the said doctor was entered into the evidence by the consent of the parties. It emerged in arguments that there were certain issues in the report that needed further clarification by the doctor. I considered the matter and I came to the considered view that in order to do justice in this case the doctor was to be called. Indeed the doctor was called and has given evidence to the court.

[8] The evidence of the Plaintiff who was introduced as PW3 is that on or about 9<sup>th</sup> July 2003 at Thunzini area, he was unlawfully assaulted by members of the Umbutfo

Swaziland Defence Force.

[9] The Plaintiff led a number of witnesses and he also gave evidence under oath.

[10] The first witness called for the Plaintiff was his mother PW1 Josephine Mathobi Kunene. She told the court that when the Plaintiff was shot she was at home at Makhonza. Before he was shot he was at home as they stay together. On the day in question at about 5.00 pm the Plaintiff washed and went out for a visit. He told her that he was going to a Malinga homestead where his girlfriend resided. He did not come back home that night.

[11] It emerged in her evidence that when the Plaintiff came home she was not present at home but when she came back she found that the Plaintiff had been shot. There was blood everywhere. She tried to wake him up and she took him outside the room where she was. She then organized transport to take him to Nhlanguano Clinic. He was shot at

the back with blood all over the body. Blood was also coming through his nostrils. He was also bleeding from the mouth and he could not talk. He was never arrested by the police even after he was discharged from hospital he was never arrested.

[12] This witness was cross-examined briefly by Counsel for the Defendant where it was put to her that the Plaintiff was shot because he tried to resist arrest. However, the witness replied that she cannot comment on this as she was not present when the Plaintiff was arrested.

[13] The second witness for the Plaintiff was one Isaiah Malinga who was introduced as PW2. He told the court that he knew the Plaintiff who was a boyfriend of his sister. Before the Plaintiff was shot he saw the Plaintiff as they were together in the shops nearby. The Plaintiff later asked him to call his sister for him. He heard the following day that he

had been shot. However, he saw the place where the Plaintiff was shot by the soldiers. This was the extent of his testimony. He was cross-examined briefly and nothing of substance was revealed by his evidence.

[14] The evidence of the Plaintiff who was introduced as PW3 is that on about 9<sup>th</sup> July 2003 at Thunzini area he was unlawfully assaulted by members of the Ubutfo Swaziland Defence Force by shooting him on the stomach, and the bullet came through the back bone, and thereafter he was assaulted with various weapons until he was unconscious. Thereafter, he was left on the ground by the said members of the Ubutfo Swaziland Defence Force for whom the 1<sup>st</sup> Respondent is responsible.

[15] The Plaintiff testified that the assault and shooting was without any reasonable or probable cause, and further the members of the Ubutfo Swaziland Defence Force did not have any reasonable cause for the shooting and assault.

[16] The Plaintiff further averred, alternatively that the incident of the assault and shooting by members of the Ubutfo Swaziland Defence Force was caused by negligence

of the said members of the Defence Force who failed to take all and adequate precautions in the circumstances, failed to ascertain who Plaintiff was and where was he from and all other surrounding factors.

[17] The Plaintiff was cross-examined by the other side and I shall consider his replies later on as I progress with this judgment.

[18] At the close of the Plaintiff's case the Respondent then opened its case where a number of witnesses were called.

[19] The first witness for the Respondent was DW1 734295 Private Mphumelelo Dlamini who was stationed at a barrack nearby. On the 10<sup>th</sup> July 2003 he was stationed along the border at Macobeni at about 3.00pm he was with one Themba Ndzimandze. They were walking towards the fence using a private road they saw a car with its lights on. The



motor vehicle went through the fence to Swaziland. They saw the motor vehicle driving by the bushes and next to the fence there were homesteads. They saw the motor vehicle driving towards Nhlangano. It went towards their base. They then ran to the base to alert others.

[20] They woke up one Dumisa Dlamini in order to organize transport to chase after the motor vehicle. They then left with one Timothy Maziya and they followed the car to Makhonza where they overtook the motor vehicle. They then fired three warning shots and then went to the driver's side. The driver after he had alighted from the vehicle ran away. They chased him and after a while they caught him. He tried to take away his service pistol. There was a struggle and he fired to shot him. Themba tried to help him and he fell down. He sprained his shoulder and he could not do anything. The driver of that motor vehicle was injured and was lying down. Thereafter he was taken to hospital.

This is about the extent of his evidence.

[21] He was cross-examined searchingly by *Mr Ndzima* for the Plaintiff.

[22] The second witness for the Defendants was one Timothy Maziya. His evidence is similar to that of the 1<sup>st</sup> Defendant's testimony in all material respects. He was also cross-examined searchingly by *Mr. Ndzima* for the Plaintiff.

[23] On the 12<sup>th</sup> December 2006, Counsel for the Defendants conceded liability of Government in this matter and the issue of the *quatum* was left to the parties to be negotiated. However, these negotiations failed and the matter was again brought to court for decision on the *quatum* of damages. I proceed to determine the *quatum* of damages in the following paragraphs.

[24] In assessing damages this court is called upon to consider many factors including pain and suffering, discomfort, loss of earning capacity both past and future as well as prospective loss and *contumelia*.

[25] It has been mentioned in a number of cases that the amount to be allowed for damages for pain and suffering is always a difficult question. It is hardly an estimate, it is a guess in most cases. 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.

[26] Watermeyer JA in *Sandler vs Wholesale Coal Suppliers Ltd 1941 A.D. 194* at 199 expressed the following sentiments:

“But that does not mean that further uncertainty must be introduced

by taking into consideration the value of money to the person injured. A millionaire is not entitled to a higher award of damages for pain and suffering because money means very little to him, and conversely a pauper is not to be prejudiced by the fact that money means a great deal to him. What would be the position if the financial status of the millionaire or of the pauper changed in the interval between the suffering of the pain and the award of damages?"

[27] It is contended for the Plaintiff that having considered all the cases cited and a comparison being made in relation to the present case, this court is urged to award Plaintiff the amount of E2, 000,000-00 as prayed for in the summons. Plaintiff in the present case suffered severely in terms of pain and suffering. Plaintiff had to endure pain, suffering and discomfort from the moment the gunshot was fired, being assaulted thereafter left unattended. The bullet ripped through his abdomen entering one side and coming out on the other side. Plaintiff had to crawl from the spot of shooting to his homestead. He was bleeding profusely from the shot wound, eyes, nostrils and mouth.

[28] Moreover, Plaintiff had to undergo an operation and an object or tube was placed on his body to enable him to release waste. Plaintiff cannot properly hear as a result of the assault. Plaintiff cannot properly see as a normal human being, his right eye is partially blind.

[29] In addition, Plaintiff is now unemployable and cannot properly walk as a normal human being. He cannot be able to do the work he used to do before the assault by the 1<sup>st</sup> Defendant. As a result of the assault Plaintiff is unable to work and suffer loss of income from his work place. After being released from hospital, he could not continue to do the work which he used to do. In the circumstances an award for loss of future income is appropriate. In this regard the court was referred to the case of *Burger vs Union National South British Insurance Company Ltd 1975 (4) S.A. 72.*

[30] The Defendant have submitted that in assessing the proper measure of compensation the court ought to look at previous cases before this court and not be persuaded by South African decisions on the matter. In this regard the court was referred to the case of *Zakhele Gina vs Commissioner of Correctional Services - High Court Case No. 72/2005* by Mabuza AJ (as she then was) and the Appeal Court case of the same parties dated 15<sup>th</sup> November 2006 being Case No. 72/2006.

[31] It would appear to me that the two cases cited by the Crown as outlined above in para [28] of this judgment are clearly distinguishable from the present case. In those cases the cause of action appealed against was that of wrongful arrest and detention. In the present case the Plaintiff is seeking compensation for malicious and/or unlawful arrest as a result of which the Plaintiff was unlawfully assaulted by members of the Ubutfo Swaziland

Defence Force by shooting him on the stomach. The Plaintiff further alleges that he was thereafter assaulted with various weapons until he was unconscious and was then left on the ground by the members of the Defence Force to die.

[32] This case has taken a different sheen from the run of the mill cases of unlawful detention in *Zakhele Gina* cases (*supra*). In my considered view a different measure ought to attach to the facts of the present case. The Plaintiff was violently attacked by members of the armed forces such that he now suffers from life threatening ailments some of them highly embarrassing. Having considered the facts of the matter and the injuries on the Plaintiff I have come to the view that the amount sought of E2, 000,000-00 is far excessive on the facts of the matter.

[33] However, I would award damages in the present case as follows:

- |       |                    |              |
|-------|--------------------|--------------|
| (i)   | Pain and suffering | E200, 000-00 |
| (ii)  | Discomfort         | E 50, 000-00 |
| (iii) | Contumelia         | E 25, 000-00 |

(iv) Attorneys costs E 15, 000-00

**E290, 000-00**

[34] In the result, for the afore-going reasons damages are awarded for the sum of E290, 000-00 as stated above in para [33] of this judgment. The Defendants to pay costs of suit.

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