



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 1839/2008

In the matter between:

DERRICK NKOSINAYE DLAMINI

Plaintiff

and

THE COMMISSIONER OF POLICE

Defendant

Neutral Citation: Derrick Nkosinaye Dlamini v The Commissioner of Police (1839/08) [2008] SZHC 149 (13 July 2012)

Coram: MABUZA J

Delivered: 13/7/2012

Summary: Police - Action for damages - Plaintiff shot with rubber bullet - Defendant denies liability - In the alternative pleads justification in the interest of public peace and order - Plaintiff proving liability - Defendant liable to compensate the Plaintiff - Quantum of damages to be agreed upon between the parties.

[1] The Plaintiff issued summons against the Defendant for payment of the sum of E550,000.00 (Five hundred and fifty thousand Emalangeni) in respect of damages suffered by him in the hands of the police on the 17th January 2008; interest at 9% from the date of service of summons to date of final payment and costs of suit. The computation of his claim is set out as follows:

(a)	Pain and suffering	E250,000.00
(b)	Medical expenses	E 30,000.00
(c)	Estimated future medical expenses	E 50,000.00
(d)	Shock and stress (post-traumatic)	E 86,000.00
(e)	Unlawful assault	E134,000.00

[2] The Defendant denies liability for the payment of the Plaintiff's claim.

[3] The cause of action arose on the 17th January 2008 at Matsapha opposite the University of Swaziland (Kwaluseni Campus). The Plaintiff alleges that he was visiting his friend Nkosibona Samuel Vilakati when police officers in the employ of the Defendant unlawfully, intentionally and without a just excuse assaulted him

with shields and batons. He alleges that the said police officers shot him using rubber bullets. A rubber bullet was removed from his stomach at Manzini Clinic where he was admitted from the 17th January 2008 until 23rd January 2008 after surgery had been performed on him.

[4] The Defendant in its plea denied that it unlawfully, intentionally and without a just excuse assaulted the Plaintiff and put the Plaintiff to strict proof thereof. The Defendant further pleaded that on the material day there was a confrontation between the police and the university students. The confrontation was caused by students disturbing public peace and who were vandalizing motor vehicles, blocking the road with stones and pelted the police with stones causing traffic to come to a standstill and making it impossible for pedestrians to move freely. It is the Defendant's further plea that in order to preserve peace and order, it used rubber bullets to disperse the students and their cohorts. Hence they argue that they acted within the course and scope of their employment.

[5] The Defendant in its plea has further denied that the Plaintiff suffered the damages he alleges that he suffered or any other damages at all and puts the Plaintiff to the strict proof thereof.

In the alternative the Defendant has pleaded that if the Plaintiff did suffer any damages these were not caused by the police but by his own unlawful conduct in disturbing public peace and security together within the students.

[6] At the trial hereof, the first witness for the Plaintiff was one Dr. Dejen Gelaye Managing Director who is a specialist in general surgery currently employed at the Manzini Clinic. The doctor testified that he examined the Plaintiff on the 17th January 2008 at 7:25 p.m. at the Manzini Clinic: it was an emergency case. The examination revealed that the Plaintiff had been shot.

[7] Upon examination the Plaintiff was found to be very sick and weak. He had a blood stained shirt and trousers. There was a stain of fresh blood oozing from the left lower part of his chest. After he had taken off his clothes, the doctor discovered a 30 cm diameter bruise on the left arm and a bullet wound 3 cms in diameter on the left lower lateral chest. The cartilage of the 10th rib was disrupted as well as the chest wall. On clinical examination the doctor found that his lower abdomen was extended and this necessitated a surgical intervention. An abdominal and chest X-ray was done. The abdominal X-ray showed that there was a rubber bullet lodged in the abdominal

cavity. The doctor performed an emergency operation and extracted the bullet. When the Plaintiff's abdominal cavity was opened the doctor found that there was one litre of blood, 3 x 6 cm left diaphragmatic perforation, the bullet had traveled through the diaphragm into the stomach where it caused a 3 cm perforation of the stomach.

All the internal damage was repaired and the bullet recovered and handed over to the police. The Plaintiff was discharged on the 23rd January 2008.

- [8] When he was cross-examined the doctor stated that even though there were no short term complications anticipated there would be long term complications because organs were injured. He stated these as adhesion or gluing together of the organs: of the stomach, duodenum and diaphragm. Some of these complications appear twenty years later and some may not appear. The ratio being 30 - 50%.

On further cross-examination to explain what was meant by disruption of the 10th rib cartilage, he stated that this meant that it was smashed and could not be patched back so it had to be cut off.

[9] Upon re-examination he was able to explain further that a bullet wound is different from a knife wound. The latter is fresh and clean cut. A bullet injury even after repair has a tendency to leak, gets infected or disrupts hence the need for the patient to remain in the hospital for close observation that this does not happen.

[10] The Plaintiff next gave evidence (PW2). He stated that on the 17th January 2008, he returned from Swaziland College of Technology in Mbabane (SCOT) where he was a student. He alighted at the Mahhala Shopping Complex at Matsapha and walked to his flat which was near the University, Kwaluseni Campus. Before he reached his flat, he heard some noise made by the University students. He decided to enter one of the flats that belonged to his cousin Nkosibona Vilakati (PW3). He asked PW3 what was happening. They were sitting on the stoep and could see police cars and students running down the dirt road which led to the flats where he was. The police were chasing the students. One of the police officers stopped and addressed the Plaintiff. The police officer addressed the Plaintiff as "Makhepisane" (meaning one wearing a cap) and that the Plaintiff was making his job difficult. After the police officer had

addressed them a second time, the Plaintiff and PW3 moved quickly towards the house. While doing so some police officers came into the flats area through a broken fence and some came in through the gate.

[11] The Plaintiff and PW3 went into the flat and when they tried to close the burglar door, the police pulled it open entered and pulled them outside. They pushed the Plaintiff against a wall and surrounded him. The police ordered the Plaintiff to continue marching as he had been doing earlier. The Plaintiff advised the police that he was a student at SCOT and not Kwaluseni and was not part of the Kwaluseni students' protest. One officer who was carrying a baton jabbed at the Plaintiff's stomach and caused him to double over in pain. After he had regained his composure he repeated that he was not a University student. PW3 came to his assistance by bringing one of his exercise books which reflected that he was indeed a SCOT student. The police let him go. As the police officers were leaving the premises, there was an altercation between PW3 and a female police officer who insulted PW3. PW3 retaliated by being scornful of how and where she had acquired her education.

[12] Upon hearing PW3's response the police officers turned back and accused PW3 and the Plaintiff of being arrogant. The Plaintiff and PW3 moved quickly towards the house but the police beat them to it and prevented them from closing the door. While fighting for the door the Plaintiff heard a sound like a gun shot. Thinking that it was teargas he and PW3 let go of the door and ran into different directions into the house.

[13] The Plaintiff recalls getting up from the floor in serious pain. He asked PW3 to organize transport to take him to the hospital. This was done and he was taken to Impilo Clinic now Manzini Clinic.

[14] Upon arrival at the Clinic he was taken for X-ray and given pain killers. He awoke up later in a ward having been operated upon with a tube that had been inserted in his nose. He remained in hospital for seven days before he was discharged. He stated that the bullet had grazed his left arm and went into his left ribcage. He showed the court some scars on his left arm and left ribcage.

[15] He testified that he was born on the 21st August 1982. That he was employed at Swaziland Breweries where he worked as

ferment attendant. He worked three sets of shifts. He attended lectures at SCOT part-time. He normally swapped his morning shifts so that he could attend classes. He was studying for an advanced mechanical diploma.

[16] He stated that he suffered great pain after he was shot. He suffered stress and shock and thought that he would die. He denied having participated in the students' protests.

[17] When the Plaintiff was cross-examined he admitted that even though he sympathized with the protesting students he was not involved. He denied being part of the students' demonstration. It was put to him that the police only dispersed rioters and did not enter private homes. The Plaintiff was adamant that the police entered the Simelane residence where he was. He further stated that he did not see when he was shot. He was asked if he had laid a charge against the police and his response was that he did not on the advice of his attorney. It was suggested to him that he did not lay any charge because he was one of the rioters. He denied this. He was informed that the police acted lawfully when dispersing the rioters by using reasonable force.

[18] PW3, Nkosibona Vilakati's evidence corroborated that of PW2. He testified that when PW2 returned from school he found PW3 sitting on the stoep, stood at the gate and they talked. They were disturbed by students who came running chased by police officers. He suggested to PW2 to come into the yard to avoid possible conflict. PW2 joined him on the stoep. The police came and stood outside the fence and believing that PW2 who wore a cap was a student called out to him. Realizing that they were not being heeded to, they stepped into the yard. PW2 and PW3 stood up and stepped into the house but PW2 was pulled out by the police who manhandled him and pushed him against a wall. The police were about seven (7) in number. The police let PW2 go once they were shown his school books by PW3's sister that confirmed that he was a SCOT student. As the police were leaving the police officers insulted PW2, PW3 and the latter's sister. The latter was insulted by a female officer and she insulted her back. The police officers turned back, broke a glass panel on the door, pointed a gun through the window and the witness heard a gun shot. PW2 got injured. The witness hired a car and took PW2 to Impilo Clinic in Manzini. The witness confirmed that PW2 was a student at SCOT and did not take part in the Kwaluseni students' protest.

[19] Cross-examination of this witness did not detract him from his story. Thereafter the Plaintiff closed his case.

[20] The defence case opened with the testimony of 2111 Inspector Thulane Maziya (DW1). He testified that during January 2008 he together with other police officers were at the University of Swaziland, Kwaluseni Campus as there was a lot of rioting by the students. The police had been stationed at the Kwaluseni Campus for a month before the current incident. On the 17th January 2008, the students went on the rampage and were pelting cars which were passing the University with stones. They also threw stones at the police. They blocked cars. When the police tried to remove the students from the road by pushing at them with police shields the students refused to move. Some students ran away across the road. Some of the students that had crossed the road and run further on continued to block the road.

[21] DW1 was in charge of the platoon controlling the road. The police approached a second group of students who had blocked the road, but these refused to move and began burning tyres. DW1 gave a riot gunner an order to spray the students with tear gas but the students placed wet towels over their mouths to

avoid inhaling the gas. He gave another order for an officer to shoot using rubber bullets. The practice is to shoot down on to the ground facing the rioters and not directly into the crowd. This the officer did. DW1 testified that he did not know PW2 and did not receive a report from anyone that PW2 had been assaulted and shot. He further testified that it would have been difficult to identify anyone person from the group of students and that the police had authority to disperse the rioting students as the police were there to look after University property and peoples' lives. He denied liability for payment of the amount claimed. He denied that the police had gone into people's homes as suggested by PW2 and PW3. He stated that the police remained on the road.

[22] Under cross-examination, DW1 disclosed that on that day he was in-charge of fourteen (14) police officers and that there were approximately about 300 students who took part in the riot. He further testified that when rubber bullets are used, the single casing that the gun discharges has three rubber bullets which are discharged simultaneously. When the gun shoots downwards the bullets strike the ground and bounce towards the target. The bullets lose momentum as they bounce towards the target. As the crowd of students was about 50 metres away any

student struck would not be seriously injured. DW1 stated that he could not deny that PW2 was shot but was not shot on the road. That if he had been shot on the road DW1 and his officers would have seen that he was injured and would have taken him to the hospital. He was positive that nobody was shot on the road where he instructed that the rubber bullets be shot as all the police were doing was to fire warning shots in order to disperse the students. He denied that any police officers went to the Simelane homestead.

DW2, 4825 Detective Constable Vilakati testified that he too was at the Kwaluseni Campus on the 17th January, 2008. He testified that the platoon commander (DW1) ordered the students to stop rioting but they did not. He then instructed the platoon to use their shields and batons but these proved futile. He ordered that the students be sprayed with teargas but the students placed wet towels over their noses and mouths. Finally he ordered the firing of rubber bullets on the ground near the students. This worked as the students ran away. DW2 corroborated DW1 that no police officer went to any surrounding homes, and that they remained on the road. DW2 denied any assault by the police on PW2. It was his evidence that if there was such a shooting then it was lawful. Under cross-examination he disclosed that two

officers carried the 12 bore guns which had rubber bullets and that he was one of the officers and that he issued the instruction to shoot.

[23] DW3, 5318 Sergeant Philisiwe Mngometulu testified that she too was at the Kwaluseni University Campus on the 17th January 2008. She was a recorder. Her duty was to record everything that occurred during the riot. She did just that. She confirms the evidence DW1 and DW2 that the rioting was out of control and that ultimately the police had to fire rubber bullets onto the ground and not directly into the crowd. When this was done the students dispersed and the police were able to remove the stones on the road.

She did not record that PW2 had been shot because she did not know about it. There was no such report made to the police on that day. She stated that had there been such an incident she would have witnessed it. She too stated that no police officer went to the Simelane homestead. The rubber bullets discharged on the road did not injure anyone and that the order to do so was lawful as it was meant to disperse the students.

[24] When she was cross-examined, DW3 stuck to her story.

[25] It is common cause that PW2 sustained injuries that were caused by a rubber bullet. It has not been denied that only the police used rubber bullets on the 17th January 2008. There has been no suggestion that the rubber bullet that stuck PW2 was from a gun that was used by a member of the public.

[26] The police admitted that they used rubber bullets in order to disperse the students. There were two police officers who carried the twelve bore guns with rubber bullets but only one gun was fired by DW2 in response to one order. One shot discharged three bullets on to the road. Had anyone been shot on the road the police would have known about it and would have conveyed the victim to hospital. All three police witnesses deny having gone to the Simelane homestead where PW2 alleges that he was shot.

[27] The police did not lead any ballistic evidence with regard to the gun DW2 used nor the second gun used by the second officer. The court does not have such evidence which would have been of some help.

[28] DW1, DW2 and DW3 corroborated one another that no person was shot or injured on the road that they were manning otherwise they would have recorded the incident and rendered help to the victim. They also corroborated one another that no police officer went into any private homesteads in the surrounding areas.

[29] The Plaintiff was shot with a rubber bullet. The police are the only ones who had rubber bullets and this fact is not denied. They used the rubber bullets to disperse the students and thereby preserved law and order.

[30] The Plaintiff on the other hand says that he was shot by the police in a room in the Simelane homestead. He is corroborated by PW1 and PW3. PW3 was present when the police shot into the room where PW2 was. PW3 witnessed the shooting and he and his sister took PW2 to hospital. PW1 operated on PW2 and extracted a rubber bullet from him which had caused some serious injuries to PW2. Having testified that nobody was injured by them on the road, the inescapable conclusion is that some police officers went to the Simelane homestead and discharged their bullets into the room where the Plaintiff was. The police lied. The fact that there was no ballistic report presented to

court with regard to the use of both rubber bullet guns fortifies my suspicion that they lied and tried to hide the truth. Their defence cannot in my view avail them unless PW2 had been shot on the road.

[31] I accept the evidence of the Plaintiff that he was manhandled by the police when they held him against a wall and prodded him with a baton. He was not injured by this police action which in my view hardly amounts to common assault.

[32] I find therefore that the shooting of the Defendant was unlawful and that the Defendants are liable to compensate the Plaintiff in respect of pain and suffering, shock and post-traumatic stress which he was able to prove.

[33] The Plaintiff was unable to prove medical expenses, estimated future medical expenses, and unlawful assault. Unlawful assault ought not to have been claimed as a separate item. It is the unlawful assault that gives rise to general and special damages. That being the case I find that the Defendant not liable in respect of medical expenses, estimated future medical expenses and unlawful assault.

[34] The parties agreed that once liability had been established they would engage one another in respect of the quantum of damages; costs of suit and interest; it is so ordered.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant

Mr. M. Mabila

For the Respondent

Mr. S. Khumalo