



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 2393/2010

In the matter between:

**LOGIYELA SIBANDZE**

**Plaintiff**

**And**

**THE TRUSTEES OF BIG GAME PARK**

**1<sup>st</sup> Defendant**

**TERRENCE EVEZARD REILLY**

**2<sup>nd</sup> Defendant**

**ELIZABETH REILLY N. O.**

**3<sup>rd</sup> Defendant**

**PETROS MGCIBELO NGOMANE N.O**

**4<sup>th</sup> Defendant**

**Neutral citation:** *Logiyela Sibandze v Big Game Park & 3 Others (2393/2010)*  
*[2013] SZHC223 (9<sup>th</sup> October 2013)*

**Coram:** **M. Dlamini J.**

**Heard:** **9<sup>th</sup> July, 2013**

**Delivered:** **9<sup>th</sup> October, 2013**

*Action proceedings – two irreconcilable version – duty of court to examine credibility of witnesses, their reliability and probabilities.*

Summary: By means of an action proceedings, the plaintiff claims for damages to the tune of E360,000 as a result of injury inflicted upon him by employees of defendant.

### **The Parties**

[1] The plaintiff is a resident of Siphofaneni area. 1<sup>st</sup> Defendant is a trust, engaged in the business of game. 2<sup>nd</sup> and 3<sup>rd</sup> defendants are trustees of 1<sup>st</sup> defendant while 4<sup>th</sup> defendant is one of the supervisors of 1<sup>st</sup> defendant.

### **The Plaintiff's claim**

[2] **The plaintiff claims as follows:**

“9. *At the time the Plaintiff was shot he was outside of the Mkhaya Game Reserve boundaries.*

10. *As a result of the assault the Plaintiff sustained gunshot wounds to his right foot and right thigh. The Plaintiff had to undergo medical treatment at the Raleigh Fitkin Memorial Hospital where the bullet was extracted. The one on the right foot has still not been extracted and caused great pain and discomfort to Plaintiff.*

11. *As a result of the assault plaintiff's right leg has been permanently disfigured.*

12. *As a result of the assault and injuries caused by the rangers of Mkhaya Game Reserve, the Plaintiff suffered damages in the sum of E360,000.00 (Three Hundred and Sixty Thousand Emalangeni) made as follows:*

<i>Medical expenses</i>	<i>E10,000.00</i>
<i>Discomfort</i>	<i>E50,000.00</i>
<i>Shock, pain and suffering</i>	<i>E200,000.00</i>
<i>Disfigurement</i>	<i>E50,000.00</i>

**Evidence**

- [3] The plaintiff arraigned two witnesses including himself.
- [4] Plaintiff informed the court under oath that in the morning of 1<sup>st</sup> March 2010, his mother commissioned him together with Sikelela Themba Sibandze (PW2) to go and search for a missing cow. They commenced their search until sunset when they decided to walk along the banks of Umtimphofu River returning home. While still walking, it became dark. They suddenly heard sound of gunshots. They then ran across the river. As he was running across the river, he realised that he had been shot. He fell facing upward. The person who had shot him, drew closer to him and shot him again on his thigh. He enquired as to the reason he was shooting him. The man informed him that it was because he was poaching. He enquired as to what he was using as he had no dogs. The man informed him that he heard dogs barking. By this time he was bleeding profusely. He does not know what followed as he woke up at the Raleigh Fitkin Memorial (R.F.M.) Hospital in Manzini. He was treated for the gunshot injuries and released after a period of about three to four weeks.
- [5] It was his evidence further that the bullet which shot him in his foot was not removed. It was still embedded in his foot. It is this foot injury that is responsible for his ill-health as the one on the thigh was completely healed. Under cross examination, PW1 stated that he was shot around 7.00 p.m. and by then there was the moonlight. He was also cross examined on the statement he recorded with the police. I will revert to the cross examination later in this judgment.

[6] Sikelela Themba Sibandze on oath informed the court that he accompanied PW1 to look for the missing cow. They travelled for the whole day in search for it. They decided to return home using the bank of the river. At around seven to eight in the evening, he heard gun shots. He ran towards home. He reached home and although he realized that PW1 also ran upon hearing the gun shots, he did not know what eventually happened to him. He told the court that he then called the police, reporting the shooting out. He ended his evidence by informing the court that he heard that a boy accompanied by dogs was shot at.

[7] It was his evidence on cross examination that when he heard the gun shots he was walking together with PW1 across the game reserve. Like PW1, this witness denied poaching, carrying of weapons and cornering a wild pig as it was put to him by Counsel for defendants.

[8] The plaintiff closed his case. Defendant led three witnesses in rebuttal.

[9] The first witness on behalf of defendant was one Mr. Norman Sibanyoni Magongo who identified himself as the employee of 1<sup>st</sup> defendant on oath. His supervisors were Mr. Robert Nkonjo Vilane and Mr. George Mbatha.

[10] On the day in question, he was asleep in 1<sup>st</sup> defendant's camp, named ka-Khoza. At around 11.50 p.m. one Mr. Sibusiso Mavuso, his colleague, DW2, knocked at his door. DW2 requested him to assist him with listening to the sound of dogs barking in order to ascertain whether they were barking from their side and whether they were barking at an animal. He went outside and began to listen attentively. He heard more than ten dogs barking from their side. He also concluded that the dogs were attacking an animal. With the aid of a radio they immediately woke up Mr. Vilane, their supervisor who instructed them to proceed to the scene for investigations.

[11] He took along a firearm, R5 and torches. It was his evidence that there was moonlight on that day. His colleague DW2 did not carry any firearm. Having proceeded to the scene, they found a swarm of wild pigs running inwards from the river bank of Umtimphofu river. Narrating on the boundaries of 1<sup>st</sup> defendant, he informed the court that in essence, the boundary fence ought to be inside the river. For reasons that it would be washed away, it was fixed few paces from the river bank.

[12] While studying the scene for the number of persons present they heard someone silencing the dogs. The voice came from inside the forest. They decided to take cover in order to watch further this man. Suddenly a man in the company of three dogs came running across the river carrying a shining object. He was to assist the man in the forest. He ran towards their direction. As he was about ten to fifteen metres this witness shouted at him to stop. However, this man turned back crossed the river, leaving 1<sup>st</sup> defendant's boundary. While his attention was drawn towards the running man, he heard DW2 shouting for help. He then saw a man pursuing DW2 who was running towards him. He decided to shoot between the man and DW2. The ten perks of dogs were also running with the man. When he shot, the dogs disappeared. He shot again shouting at DW2 to lie on the ground. He fired a third shot towards the man for purposes of arresting him. The man disappeared into a forest across the river from 1<sup>st</sup> defendant's boundary. When the commotion had subsided, he went to the direction of where the man finally ran to. He found him inside a thick bush. He shouted at him not to move. The man responded by saying that he could not move as he had already been injured through a gun shot. The man asked to be removed into an open space. They inspected him and discovered a shot wound on his thigh, below his buttocks. The man was eventually taken to hospital after police indicated that their motor vehicle

was not available to ferry him to hospital. The witness identified the captured man as PW1.

[13] Police arrived the following day and at a distance of about three to four metres where PW1 was captured, they found a spear. They followed the tracks of the other man who ran away and seized a bush knife.

[14] Under cross examination, DW1 explained that when they found plaintiff cornering the wild pig, he was not within the fence of 1<sup>st</sup> defendant but was nevertheless within the boundaries of 1<sup>st</sup> defendant. He further informed the court that the period of March when plaintiff was found with his perk of dogs, was not the hunting season. He was quizzed on the reason for his failure to shoot the dogs and kill them. This witness responded that at that time they were concerned with the owners of the dogs. He was asked on how they failed to discover the spear around the scene. He informed the court that after capturing plaintiff, they did not want to contaminate the scene by moving around. It was his evidence that demarcation of 1<sup>st</sup> defendant boundaries was done with the involvement of Chiefs and the community members.

[15] The next witness on behalf of defendant was Sibusiso Mukalile Mavuso, DW2. He gave evidence under oath. He essentially corroborated the evidence by DW1 at great length. He noticed an injury on plaintiff upon his arrest. The injury was on the thigh. There was no injury on his ankle or foot. He, like DW1 identified photographs presented before court of a spear and bush knife as items found at the scene.

[16] The third witness for the defendants was Mr. Robert Mnkotjo Vilane who on oath identified DW1 and DW2 as his subordinates. He testified that he received through the radio a report that the duo heard dogs barking. The

time was about 11.45 p.m. He instructed them to proceed to the scene and investigate. He later heard gun shots. He tried to raise the duo through the radio but they were off line. He decided to inform his superior, Mr. Jubela Reilly. After a while the two reported to him that plaintiff was injured. He proceeded to the scene. He found plaintiff lying down with over ten dogs next to him. He approached plaintiff and enquired as to what he wanted from the scene at such odd hours of the night. Plaintiff did not reply but asked this witness for water to drink. Plaintiff further informed him that he had been injured below his buttocks. This witness confirmed the injury which was on plaintiff's right upper thigh. He then searched for plaintiff's entire body for further injuries and found none. He disputed plaintiff's evidence in chief that he also sustained an injury on his foot. He then carried plaintiff on his shoulders into his motor vehicle and conveyed him to the police station. They did not find a car at the police station but met one at Gilgal where they handed him over. He was then conveyed to hospital. By now, the time was about 4.00 a.m. When it was now day time, they returned to the scene together with police. They recovered a spear at the vicinity where plaintiff had fallen. They also found a spear where plaintiff's companion was. It was his evidence that from the scene to plaintiff's home, the distance was about three kilometers.

[17] Cross examination bothered on whether there were dogs at plaintiff's home. The witness confirmed that there were dogs as they were once set against him. He was also asked as to the evidence of the 1<sup>st</sup> defendant's boundaries and this witness responded by informing the court that the residents know the boundaries of 1<sup>st</sup> defendant. The defendants then closed their defence.

## **Adjudication**

### Common cause

- [18] The following are matters of common cause between the parties:
- The plaintiff was shot by 1<sup>st</sup> defendant's employee;
  - He was shot while on the other side of the river Umtimphofu;
  - He was shot in March 2010;
  - He was taken to hospital and was attended by a medical practitioner;
  - The period at which plaintiff was injured was a close season.

### **Issues**

[19] The question before me is whether the plaintiff has established his cause of action on a balance of probabilities? In ascertaining this position, there are pertinent questions which must be established. These are mainly whether the plaintiff has shown that the assault inflicted upon him was unlawful.

[20] The defendant in discharging its mandate to protect game in the country is regulated by the Game Act No.51 of 1953 as amended.

[21] Section 23 (2) (d) of the Game Act reads:

*“to use reasonable force necessary to effect the arrest of or to over-power any person who resists arrest and who is suspected on reasonable grounds of having contravened any of the provisions of this Act.”*

[22] From the evidence of plaintiff and PW2, they deny that they were in contravention of the Act, i.e., that they were poaching on the said date.



They informed the court that they were returning home after a long day search of their parent's lost cow. They decided to use a shorter route and at the same time took opportunity to see if the cow would not be amongst cattle that would go to the river to drink as it was sunset. Their evidence corroborated each other. The defence put its entire story upon the plaintiff and his witness. They maintained their ground. They flatly denied ever poaching the bush pig and having a large perk of dogs. They denied ever being warned by defence witnesses. They maintained that the time was just after sunset when they were shot.

[23] On the other hand, the defendants' witnesses corroborated each other on the defence as put to plaintiff and his witnesses. They maintained that the time was around midnight and that they were attracted to the scene by the sound of dogs barking. They shot three times and the plaintiff sustained an injury on the right upper thigh. They shot at him in order to arrest him. The plaintiff ran towards them, in an endeavour to attack them and later when they fired the shots, he ran away from 1<sup>st</sup> defendant's boundaries.

[24] This is the evidence I am called upon to put on the imaginary scales of justice by the parties. However, I am alive that it is only the *facta probanda* that I have to put on the scales of justice. I am therefore duty bound to swift the evidence of any *facta probacta*.

[25] From the above summaries of the evidence presented on behalf of plaintiff and defendant, it is clear that this court is now faced with two irreconcilable versions of the events of 1<sup>st</sup> March 2010. My duty in such circumstance was well defined by the Honourable **Nienaber JA** in **S.F.W. Group Ltd & Another v Martell et. cie. & Others 2003 (1) S. A. 11** at page 14 para 5 as follows:

*“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”*

[26] I intend to apply this proposition by his Lordship **Nienaber JA** *in casu*.

[27] I now revert to cross the examination of the plaintiff. The plaintiff was asked whether he recorded a statement with the police. He answered to the affirmative. He recorded the following with the Police.

- ‘3. *I do recall very well that on 01/3/2010 at about 1200 hrs while I was at home with Sikelela Sibandze and my mother Buyile Dlamini when she (Buyile) said that we must go and search for a cow which was bought from Phonjwane area and was almost a week since it was lost.*
4. *Together with Sikelela we searched from Duze to Phonjwane areas until it was late at about 1900 hrs and as it was too far using the main road going home since we had not found the cow, we then opted to walk along Mtimphofu River just next to the water pump engine, we saw people coming towards us and ordered us to stop, because it was already dark such that we could not see who they were, we started to run to different directions.*
5. *I was then shot once on the right thigh and the other on the right ankle and I fell down, all I can remember is that they pulled me where I fell into their premises and later I found myself at Manzini RFM Hospital where I was admitted.”*

[28] From the statement, the plaintiff informed the police that the people who approached them informed them to stop. Under cross examination plaintiff informed the court that he was never warned to stop. His evidence in chief runs:

*“while approaching home and about to reach home by the rocks, while making noise as we were speaking we heard sounds of guns. We ran and as I crossed the river, I discovered that I was shot by the foot. I fell facing*

*upward and the person approached who had shot me and he shot me on the thigh.”*

[29] This is at variance with the statement recorded at the police. It was not explained why his statement and his evidence in chief differed in terms of the manner in which the injuries were sustained. I say this much alive to **Oliver Schreiner’s Memorial Lecture** delivered by **H. C. Nicholas J.** where he wrote:

*“A witness is proved to be in error where his statements are contradicted by the proved facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that in common with the rest of mankind the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief.”*

[30] As pointed out that it was common cause that the plaintiff was taken to the hospital where he was attended by the doctor. Plaintiff was cross examined on the report prepared by the doctor who attended to him. This report reflected that the plaintiff was diagnosed for “*gunshot injury (R) thigh*”. No other injury was observed by the medical practitioner who attended to plaintiff. This evidence is in contrast with that of plaintiff who informed the court that he sustained two gunshot injuries, on his right thigh and ankle. It is corroborative of defendants’ evidence that they all observed the right thigh injury. They add further that plaintiff himself complained of the right thigh injury.

[31] I draw leaf from the following observation by **Oliver Schreiner J.** (*supra*)

*“The question is not whether a witness is wholly truthful in all that he says but whether a court is satisfied, beyond a reasonable doubt in a criminal case, or on a balance of probabilities in a civil matter, that the story which the witness tells is true in its essential features”*

(See **Mlifi v Klingenberg 1999 (2) S. A. 674** at 698)

[32] After careful consideration of evidence and arguments, I say of plaintiff’s evidence, it is more improbable than not.

[33] What compounds plaintiff’s cause of action further is his evidence that the right thigh injury completely healed. His claim for the sum at hand is based on the injury he sustained on the ankle. It is this injury that has led to his ill health and which needs medical attention. He says a bullet is imbedded in the ankle. However, there is no support for the existence of this injury. The doctor did not diagnose such injury. His witness, PW2, could not tell the court how and where he was shot as he ran away when he heard the gun shots according to his evidence.

[34] In the totality of the above, plaintiff has failed to establish his cause of action. I therefore enter the following orders:

1. Plaintiff’s cause of action is dismissed.
2. Plaintiff is ordered to pay costs including costs of Senior Counsel in terms of the Rules of this Court.

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**M. DLAMINI**

**JUDGE**

**For Plaintiff : X. Mthethwa**

**For Defendants : P. N. Kennedy S. C. instructed by Robinson Bertram**