IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No: 102/2006

In the matter between:

AARON NGOMANE PLAINTIFF

And

THE SWAZILAND GOVERNMENT DEFENDANT

Neutral Citation : Aaron Ngomane v The Swaziland Government (102/2006) [2013] SZHC 79 (24th April 2013)

Coram : Annandale J

For the Plaintiff : Attorney B. J. Simelane
For the Defendant: Attorney N. Zwane

Heard : **28th March 2013**

Delivered : **24th April 2013**

Summary

Actio iniuriarum ─ *Contumelia* ─ Burden of proof ─ evidence *vis a vis* particulars of claim ─ Excessive quantum of damages claimed, based on exaggerated *facta probanda.*

JUDGMENT

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[1] The most unsavoury subject matter of this civil action is focussed upon human faeces, which the Plaintiff claims to have been forced to gather with his bare hands. The coercion to do so, he claims, came from the barrel of a rifle in the hands of a Swazi soldier stationed at the Lomahasha bordergate, which soldier is also said to have made him suffer unbearable physical exercise, threatened to shoot him, hurt him with the barrel of the rifle and told him to take his faeces to South Africa, even though the bordergate is adjacent to Mocambique. He now claims E350 000 from the Swazi Government.

[2] Even before referring to the particulars of claim and the evidence at the trial, it must be noted that the Plaintiff displayed a propensity towards over exaggeration. While it may be normal human nature to perceive injury and wrongdoing as close to never ending, the reduction thereof in pleadings to be presented in a Court of Law must by necessity be stripped of such subjective perceptions. Precise and accurate factual particulars of claim, to the point, are necessary. An inflated exaggeration of events could well have an adverse effect on litigants when the evidence contradicts stated claims of fact which are

embellished to hyperbolically overstate the actual facts. It might very well adversely backfire when the evidence does not match the claimed facts. Adverse credibility findings are just one consequence.

[3] The Plaintiff's action is against the Government of Swaziland, *qua* employer of the soldier stationed at Lomahasha bordergate. No claim lies against the Umbutfo Swaziland Defence Force (USDF) as such, or against the soldier, one Abedningo Nyampose, in person. No issue was made in this regard, nor in respect of the Statute of Limitations of actions against the Government. It is also not in issue whether the soldier acted in the course and scope of his employment, armed and dressed in uniform, with the incident occurring at Lomahasha on the 28th July 2005.

[4] The Plaintiff avers that with an intent to injure him in his personal dignity, the soldier forcefully ordered him to do "push ups" for "about three hours"; to collect his own faeces from Swaziland and carry it in a plastic bag to South Africa; threatened to shoot him when he failed to do the push ups and that he was hit with the rifle barrel when he failed to continue doing push ups. The Plaintiff claims to have been

humiliated and degraded by the soldier's actions suffering damages in the claimed amount of E350 000.

[5] Wikipedia defines "push ups" as:

> *"A push-up (British English: press up) is a common callisthenics exercise performed in a prone position by raising and lowering the body using the arms. Push-ups exercise the pectoral muscles, triceps, and anterior deltoids, with ancilliary benefits to the rest of the deltoids, serratus anterior, corachobrachialis and the midsection as a whole. Push-ups are a basic exercise used in civilian athletic training or physical education and commonly in military physical training. They are also a common form of punishment used in the military, school sport, or in some martial arts dojos."*

The evidence does not justify any other connotation of the term.

[6] Government pleads a denial of any wrongful or intentional injury to the personal dignity of Ngomane. It also denies that he was forced to do push-ups for three hours, but concedes that he was to have done

some, but freed to go when he failed to comply after his second attempt. It also denies a threat to shoot him or that he was hit with the barrel of a rifle. What is averred to the contrary is that the plaintiff was merely ordered to "dispose of his faeces from the area" because his act (of defecating in the open) was a health hazard and that he opted to remove the faeces using a plastic bag instead of covering the faeces. Apart from stating the obvious, that the plight of the Plaintiff was grossly overstated, Defendant admits some common ground in the matter. Firstly, that the identities of the *dramatis personae* can be accepted without further ado, and that the claim is laid before the correct door. The date and place of the incident is common cause and it is accepted that the soldier was armed, dressed in uniform and acting within the scope "and during" the course of his employment with the Defendant, vis-à-vis the USDF.

[7] Secondly, the pleadings establish a measure of acceptance, even if downplayed, that indeed the Plaintiff was ordered by the soldier to do push-ups, failing to do as many as was required of him. Further, that he was ordered to dispose of his faeces, which he did by using a plastic bag. It seems incongruous to state that he was ordered to

dispose of it, while on the other hand it is inferred that he could as well have merely covered it.

Any liability at all is disavowed, along with a denial of any wrongful or intentional injury to the Plaintiff's personal dignity.

[8] Stripped to the bone, the claim is essentially founded on the *actio injuriarum* (Voet 47.10.1; Matthews v Young, 922 A.D. 503) and *contumelia*, with damages to compensate and assuage the injured personal feelings of the plaintiff. The pillars to support this are punishment in the form of forced push-ups, gathering and disposal of his own faeces, and an assault with the barrel of a rifle.

[9] Redress conferred by the *actio injuriarum* is the delict or *injuria* in the wide sense, an unlawful or more often wrongful conduct by a person which infringes the legal rights of another person as to life, person, dignity, property, liberty or reputation and which entitles the latter to claim redress, generally in the shape of pecuniary compensation from the offender, or in the instant matter, vicariously from his employer. Such wrongful injury committed *animo injuriandi*, or intentionally,

entitles the aggrieved person to claim sentimental damages of a penal nature for the *contumelia* or insult without having to prove any pecuniarly loss. (See Grotius 3.23.3; 3.27.7; Matthews v Young *supra* at 503 and 505) and Wille's Principles of South African Law, 7th ed. by JTR Gibson, Juta, at 502 and 534 *et seq*).

[10] In order to determine whether the plaintiff made out a case that entitles him to damages *per se*, without regard to the quantum thereof, he has to persuade the court of this entitlement on a balance of the probabilities. *".. (T)here is no onus upon a defendant until the plaintiff has proved that a legal right of his has been infringed"* — (Matthews v Young *supra* at 492 and 507). The plaintiff must prove wrongdoing in the form of either intent or negligence and the extent of his damages or injury, generally, even if not to the extent of a monetary value.

[11] In the matter at hand, I do not deem it necessary to note a comprehensive summary of the evidence recorded at trial. It would merely serve to burden this judgment with unnecessary details and it

would mainly be in order to find justification for aspects which are not seriously in dispute anymore.

[12] Briefly, the two witnesses called by either side narrated their personal observations and recollections of the events, with the Plaintiff and the soldier obviously at odds. Overemphasis and dramatisation on the one hand and downplaying and avoidance on the other saturates their evidence throughout.

[13] As can be derived from the pleadings and amplified by the evidence of the witnesses, I hold a firm view that it cannot by any stretch of the imagination be found that the Plaintiff proved his claim as pleaded to the exaggerated extent of his stated but inflated ordeal.

[14] Of the triple actions complained of by the Plaintiff, he succeeded in the establishment of two, albeit to watered down versions. Firstly, he claimed to have been forced to do push-ups for some three hours. His evidence insofar as the duration of the incident goes is self contradictory and does not tally with reality. Even his initial evidence, that it occurred from seven in the morning until nine, falls

one hour short of his alleged three hour ordeal as pleaded in his particulars of claim.

[15] This is further dissipated by conceding that after all was said and done, including going to and fro between the place where he defecated and a truck in the vicinity, picking up of the faeces, taking medication and some other activities, they ended up at the police station between 08h30 and 09h00. He could not justify his estimation of the starting time of 07h00 either, contrary to the more acceptable evidence adduced by the Defendant that it was rather around 08h00, when a regular scheduled bus passed by.

[16] There are also reservations as to the acceptability of the Defendant's version that the push-ups were dispensed with in no more than five minutes. Apart from the duration of the push-up exercise, there is no credible and reliable evidence as to how many were done, or how many times the attempts to do so failed.

[17] However, this does not result in a justifiable finding that the contradictory evidence dispels the notion of forced push-ups imposed

on Ngomane. Nyampose, the soldier, concedes that he ordered it to be done, but not to the extent as claimed.

[18] Although the Plaintiff does not satisfy this court that the full extent of his evidence in this regard is true and correct on the probabilities, it does not follow that the mutually semi destructive versions render the opposite version to be held as entirely false and causing it to be rejected, as was the position in National Employer's General Insurance v Jagers 1984 (4) SA 437 at 440 per Eksteen AJP.

[19] This court cannot console itself in a "washing of hands attitude of reticence", closing its ears and mind to disregard established reality. The reality of the situation at Lomahasha in the morning hours of the fateful day, as is patently established by the somewhat flawed and distorted pleadings and evidence is that unquestionably, Nyampose confronted Ngomane about his ablutions in the open area near the bordergate. He was incited by what he saw and decided to take immediate action.

[20] Fact of the matter is that it resulted in at least two actions by the soldier in consequence of his observation, remedial and punitive. Taking it upon himself to chastise the truck driver, he ordered him to lie prone on the ground and perform a series of push-ups. As a soldier who knows from personal experience, this demands strong physical input and is quite exhaustive, especially for a person who has not been bodily conditioned in physical education programmes, an inherent part of basic training for military recruits. It is also a form of punishment in the armed forces, now sought to be juxtaposed on the errant civilian.

[21] From the evidence, it remains an impossibility to conclude with any measure of reliability or to make definite factual findings on either the duration of the ordeal or the number of attempted or executed push-ups. The far extreme of exaggerated duration is three hours, watered down to at least half of that when the evidence of the plaintiff is given regard to. The soldier has it at the opposite extreme, estimated by his counsel to be five minutes at the most. The Defendant's pleadings have it as two failed attempts.

[22] No absolution from the instance was sought, nor would it be judicious to do so at this stage. Neither of the two protagonists or their supporting witnesses have enabled this court to find anything more than just that the Plaintiff was compelled by the soldier to "perform some push-ups". Whether he actually succeeded to properly perform some, or failed to properly do so, remains in the misty realm of speculation and conjecture. The same goes for the duration of it.

[23] In the event, considering all of the available evidence and pleadings, the factual conclusion of this aspect could only be as stated above ─ that the soldier compelled the Plaintiff, against his will, to get face down on the ground, put his hands beneath his shoulders and to perform, or attempt to do so, push-up exercises of unknown number and duration.

[24] An ancilliary aspect is claimed to be that the soldier prodded his victim in his back with the barrel of his rifle while forcing him to do push ups. While I do not think it to be an absurd allegation, the evidence does not provide for such a finding, on the probabilities.

[25] The Plaintiff has a clearly demonstrated propensity for exaggeration and vivid over statement. The soldier does not fare all that much better, downplaying events as much as he can. He denies doing so, with the unconvincing rationale that his training precluded him from making physical contact with detainees. With the two versions being mutually destructive, regard may be had to evidence other than what is focussed on the alleged incident alone.

[26] The Defendant's attorney places much emphasis on the non production of certain photographs by the Plaintiff. In any event, even if it was produced at the trial, the evidence of Ngomane does not render credible support for a finding that he had visible injuries on his back which were photographed. He gave neither a reliable description of such injuries or of the severety thereof, or of how many wounds there were, if any. Furthermore, his claimed damages do not include any specifics in this regard either, or for medical costs towards treatment for same, or more specifically with regard to pain and suffering.

[27] He also did not adduce evidence of any persuasive sufficiency to overcome his evidentiary burden to prove on the probabilities that he was either assaulted with the rifle barrel without sustaining any visible injuries, or that he sustained injuries which were noted. Accordingly, this aspect of his claim cannot be credited with a factual finding in his favour.

[28] The last leg of his claim differs from this. Although the finer details differ, it is common cause that the plaintiff defecated in the open, in an area close to the international bordergate. It is also common cause that it was removed from the scene by the plaintiff and that it was done under constraint and due to the unrelenting orders of the soldier.

[29] Nyampose wants it to be believed that Ngomane did so of his own volition, but the totality of evidentiary material does not support this. On the contrary, the plaintiff was humiliated and coerced to do so. While he might not have behaved himself in an acceptable manner, to make use of toilet facilities even if it was situated outside his comfort zone, it does not give justification for the consequences that befell him.

[30] With the evidence as vague and contradictory as it is, it does not detract from the fact that he was compelled to remove his own faeces from the scene. This much is also admitted in the plea filed by the Defendant.

[31] Counsel spent considerable effort in argument pertaining to the mutations of this uncontroverted aspect. However, whether the man used his right or left hand to effect the removal, or whether he used or should have used a tool such as a convenient stick or stone to do so, it does not detract from the fact of the matter to sufficiently make it disappear. Whether his hand was visibly contaminated when he was presented at the Police Station or not, it remains a fact that he arrived there with the faeces in a plastic bag, the colour of which is non decisive.

[32] Again, the propensity of the Plaintiff to overstate his humiliation and suffering, coupled with his poor state of rendering plausible, factual and reliable evidence, impacts on the factual findings that can reliably be made. In this instance however, the adverse criticisms are of relatively little consequence.

[33] Contrary to his stated claim, this court does not find as fact that he was ordered to "collect his faeces from Swaziland and carry them (sic) in a plastic bag to South Africa". I have already commented about the geographic improbability of the allegation, with the borderpost being between Swaziland and Mozambique, not South Africa. Be that as it may, it remains an established fact that he did indeed place his faeces inside a plastic bag, by whichever means. I accept the destination to have been the local Police Station, as testified by the soldier and borne out by ancilliary evidence.

[34] What the court also finds and holds, is that the obligation placed upon the plaintiff was demeaning and grossly humiliating. In the process of forcing the man to act as he did, the soldier outstepped the boundaries of normal human decency, worsened by his position of authority and assumed superiority.

[35] His conduct disgraced his country and the USDF. No word of apology or remorse was forthcoming from him and it is unknown but doubtful whether any effective disciplinary steps have been taken

against Nyampose. That the Plaintiff also misconducted himself is obvious, but it did not justify the humiliating consequences.

[36] Contrary to the argument advanced by Government's Counsel, and despite the numerous shortcomings in this action, this court does not agree with the suggestion that the Plaintiff failed to prove his case to the extent that the action should be dismissed. When proper regard is given to this litigation in its totality, it is held that the Plaintiff is to succeed insofar as has been found above.

[37] Plaintiff's attorney, Mr. Simelane, wisely refrained from arguing that the claimed damages should be awarded in full. As already repeatedly stated herein, Ngomane grossly overstated his position in the particulars of claim, as well as in his evidence. Nevertheless, I do not hold the view that this should disenfranchise him.

[38] It is trite law that the assessment and award of appropriate damages falls within the discretion of the trial court, but that it cannot arbitrarily or capriciously determined. Mr. Simelane referred to

Protea Assurance Company Limited v Lambs 1971 (1) SA 530 AD at 534 – 535 A, where Potgieter J A said:

> *"It is settled law that the trial judge has a large discretion to award what in the circumstances he considers to be a fair and adequate compensation to the injured party. Further, this court will not interfere unless there is a substantial variation or as it is sometimes called a striking disparity between what the trial court awards and what this court considers ought to have been awarded"*.

[39] This position of law was confirmed by the South African Supreme Court of Appeal in Road Accident Fund v Marunga 2003 (5) SA 164 SCA. In Swaziland, the legal authorities are on the same footing. There is no magical formula to determine the quantum of damages in the present matter. Of course, previous awards in comparable cases are guidelines, but still each and every matter has its own uniqueness and circumstances.

[40] Indeed, the present award is unique, at least in so far as the degrading and humiliating conduct is concerned. No precedent with comparable content could be found. The calculation of the claimed amount of E350 000 seems to me to be excessive and no evidence or submissions from the bar was heard as to how this particular sum of money came into being. Also, it was claimed on the basis of much exaggerated and overstated averments in the particulars of claim.

[41] On behalf of the Plaintiff, Mr. Simelane referred to Ryan v Petros 2010 (1) SA 169 ( ) at 177E where relevant factors to be taken into account are listed. There include the nature, extent and gravity of the violation of Plaintiff's dignity, social standing and the absence of an apology.

[42] Apart from being a truck driver, there is just about no further information regarding the social standing of Mr. Ngomane, but a definite absence of remorse or apology. That his dignity has been grossly violated is obvious, and in Rudolph v Minister of Satety and Security 2009 (5) SA 94 (SCA) it was held that where the *injuria*

complained of involves humiliation and degradation, an upwards adjustment of damages is justified.

[43] Mr. Simelane also referred to Meshack Shabangu v Attorney General, unreported Civil Case No. 838/1995 where the High Court awarded E10 000 for *contumelia* arising from degrading and humiliating work that had to be performed by a prisoner. It included the washing of soiled nappies and washing the ageing parent of a prison official.

[44] Sexual harassment in the workplace attracted an award of E50 000 for *contumelia* in Ntsabo v Real Security CC (2003) 24 I L J 2341, another authority referred to by Mr. Simelane, though again very distinguishable from the matter at hand where no sexual innuendo features. The same applies to the further authorities he referred to, with none bearing a resemblance to the plight of Ngomane.

[45] He correctly conceded so, leaving it “in the hands of the court” to determine the quantum of damages, though suggesting an amount between E50 000 and E100 000.

[46] Defendant's Counsel was tacit on the aspect of quantum, with obvious reliance on an outright dismissal of the action.

[47] This court cannot lose sight of the constitutionally enshrined rights regarding the protection from inhuman or degrading treatment (Section 14 (1) (e)) and the inviolable dignity of every person to not be subjected such treatment or punishment (Section 18 (1) and (2)). Also, common decency wholly precludes conduct such as was demonstrated by the soldier, Nyampose. Such distasteful `and repugnant behaviour cannot be tolerated in any decent society.

[48] Having reflected on the relevant factors to be considered, giving regard to the circumstances of the *injuria* and *contumelia*, the evidence and submissions, this court has come to the conclusion that an award of E50 000 would be an appropriate amount for damages in the present matter.

[49] In the event, it is ordered that the Plaintiff succeeds in his claim, with E50 000 awarded for damages, plus interest at the rate of 9% *per annum* from date hereof until the date of payment, and costs of suit.

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JACOBUS P. ANNANDALE
JUDGE OF THE HIGH COURT, MBABANE