IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 3134/09

In the matter between:

NHLANHLA NKAMBULE **PLAINTIFF**

And

THE NATIONAL COMMISSIONER OF POLICE **1ST DEFENDANT**

THE ATTORNEY GENERAL **2ND DEFENDANT**

Neutral Citation: *Nhlanhla Nkambule vs The National Commissioner of Police and Another (3134/09) [2020] SZHC (99) 26th May 2020*

Coram: **MLANGENI J.**

Last Heard: **30/03/2020**

Delivered: **26/05/2020**

Summary:	*Law of Delict – Plaintiff shot at and injured by Police acting in the course of and within the scope of their duties as Police Officers – Plaintiff sustained serious bodily injury and rendered unable to continue working – Police claiming justification on the basis of their own defence as well as defence of property.*
Held:	*At the time and place where the violent conflict started the Police were justified in their robust response by releasing teargas and firing rubber bullets.*
Held, further:	*At the time and place where the plaintiff was shot at and injured, some 330 metres away from the place where the conflict started, there was no longer any real threat of injury to them or to property as the rioters had dispersed, hence the injury upon the plaintiff was unlawful.*
	Plaintiff granted general damages for pain and suffering
	Absolution from the instance granted in respect of the rest of the heads under which the plaintiff claimed.

JUDGMENT

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[1] In this action the plaintiff claims damages against the defendants under the following heads:-

a)	Loss of income, past and future	=	E200, 000.00
b)	Pain and suffering	=	E270, 000.00
c)	Emotional shock	=	E180, 000.00
d)	Medical expenses, past and future	=	E150, 000.00
	TOTAL	**=**	**E800, 000.00**

[2] The claim emanates from personal injury that was sustained by the plaintiff at the hands of servants of the Crown who were Police Officers acting in the course of and within the scope of their employment by the State. I mention, in passing, that in terms of The Government Liabilities Act 1967 there was no need for the plaintiff to cite the Commissioner of Police as a defendant in the matter. Section 3 of the Act provides as follows:-

> **"In any action or other proceedings which are instituted by virtue of Section 2, the plaintiff, the applicant or the petitioner…….may make the Attorney-General the nominal defendant or respondent and in any action or other legal proceedings by the Government or any minister, the Attorney-General may be cited as the nominal plaintiff or applicant, as the case may be."**

The effect of the provision is clearly that it is proper and adequate to cite the Attorney-General only, as defendant, in such matters.

[3] The facts of the matter are set out immediately below. There was a workers' strike at Matsapha Industrial Estate which commenced on the 23rd March 2008. For purposes of these proceedings the industrial action involved textile workers at a factory known as Master Garments where the plaintiff was employed as a machinist. It is common cause that the pickets by the workers were peaceful until the 14th March 2008. On this date the strike action turned violent. According to the plaintiff some workers, including himself, were playing cards under a tree within the factory compound when a group of about 6-8 police officers advanced towards them from

the direction of Matsapha Police Station, which is commonly known as Sigodvweni Police Station. He stated in his evidence in chief that **"while we were playing cards we saw police coming where we were. When they got closer they shot at us. We ran in different directions, not understanding what was going on. As we ran away I ran into a yard next to Police College, one policeman caught up with me and shot at me."**

[4] He further stated that there were many people at the scene, some of them were on the road that passes between factories in the estate. According to the plaintiff the attack was unprovoked. From the factory premises where the confrontation started the police pursued the plaintiff and other workers a distance of about two hundred (200) metres to the main road that links Mathangeni and the police academy. From this intersection the plaintiff and other co-workers ran in the direction of the Police Academy and as they did so they were confronted by a reinforcement of police officers who were approaching in the opposite direction. His further evidence is that **"then there was nowhere to go, hence I went into a certain yard where I got shot at".** He was injured on the right knee, on the inside part of it.

[5] The distance that the plaintiff claims to have run from the scene where the conflict started to where he was shot at and injured is significantly long. It appeared to be necessary for me to conduct an inspection of the scene for a better understanding of what transpired. An inspection in *loco* was undertaken on the 16th August 2018, while the plaintiff was still '**on the stand'**. My observation at the inspection were read into the record on the 18th September 2018 and were confirmed by both sides as an accurate account of what was observed. The inspection revealed that from where the

conflict started the plaintiff and other workers were pursued by the police a distance of about two hundred (200) metres to the main road that links Mathangeni and the Police Academy. From that intersection they again ran a further distance of about one hundred and thirty (130) metres, still being pursued by the police, to the point where him and another worker were injured by their pursuers. In my summary of observations at the inspection I made the conclusion that I quote below:-

> **"Before the plaintiff was shot at and injured he was pursued over a distance of about 330 metres. From the point where he was injured he ran a further distance of about 70-80 metres, became weak and was taken in a police motor vehicle to RFM hospital."**

[6] The defendants do not deny the shooting, neither do they deny the distance over which the police officers pursued the plaintiff. It is common cause that a rubber bullet was use. The Plaintiff was admitted and treated at RFM hospital. Because he did not recover fully he was later referred to Mbabane Government Hospital for further treatment. At this hospital he was informed that the reason he was not healing was that the bullet lodged inside the knee. He was experiencing severe pain and at a certain point in time the injury formed puss. By letter dated 3rd February 2009 his doctor discontinued him from work, and since that time he is unable to provide for himself and his family.

[7] In its cross-examination of the plaintiff the defendants sought to establish that on the 14th March 2008 the striking workers, plaintiff included, became violent, harassing the workers who were not on strike or who had abandoned the strike and assaulting members of

the public and the police with stones, and that the situation was so severe that the riot squad was called for back-up. The plaintiff denied this. He doggedly denied everything that suggested that the police were provoked and that they acted in defence of property and members of the public as well as the workers who were working. When it was put to him that the situation was so severe that the riot squad was called for back-up his response was that he did not see that, that there was no riot or mayhem where he was. He also denied that the platoon commander, using a loud hailer, called upon the rioters to disperse. So much for denial! The plaintiff wanted the court to believe that a strike that had proceeded peacefully for about eleven (11) days suddenly became violent for no reason whatsoever, that the police suddenly went into aggressive mode and fired at peaceful and unarmed workers for no reason.

[8] On the factual circumstances of the incident the plaintiff led the evidence of one witness only, himself, who testified as PW1. It is on the basis of this evidence, as well as that of the defence, that I will determine the question of liability.

[9] In their plea, as well as their oral evidence the defendants' case is that on the 14th March 2008 the striking workers, who had hitherto been peaceful, became violent towards the police officers who were deployed there to monitor the strike; they were harassing the workers who were not on strike, property was vandalized and members of the public were endangered. DW1 was one Michael Mpini Mangwe who, at the time, was Station Operations Officer at Manzini Police Station. He was in charge of the Police team which was deployed at the garment factory. His evidence was that on the 14th March 2008 the striking workers were hostile, throwing stones

to the police and the workers **"who were already working…… those who were working were inside (the factory) and stones were thrown inside the factory. A nearby factory, Fashion International, was also affected."** He further stated that the situation was so bad that police officers ran away as they were outnumbered by the striking workers. He then called for reinforcement and additional police officers immediately came from the Operational Services Support Unit (OSSU). There was firing of teargas and the situation was calmed down. There were a lot of people at the scene, about 200. He denied that the plaintiff and other workers were playing cards at the factory before the confrontation took place. He further stated that the shooting of rubber bullets occurred after OSSU had arrived. He continued in the following:-

> **"The workers stoned the factory. I saw the gate falling down and police ran for their lives."**

[10] Under cross-examination DW1 said that it was sometimes difficult to differentiate between workers who were rioting and those who were working, but the rioters were singing on the road. He stated that at Garment Factory no worker was shot but he was unable to see what was happening further up the thoroughfare that led towards the road linking Mathangeni and the Police Academy. It was put to him that the police shot at a street vendor along the thoroughfare that was connecting different factories and the main road to police academy and his response was that he can neither admit nor deny that.

[11] The defence then led the evidence of Wilfred Musa Msibi who testified as DW2. He is a retired police officer who served for 33 years and on the 14th March 2008 he was a member of a Regional Platoon that was assigned to the textile factory at Matsapha to restore order. They were armed with rubber bullets, tear gas canisters and shields, and their brief was to provide back-up to the general duty officers who were on the ground. The platoon was led by one Inspector Sigudla who has since passed on. He testified that upon arrival at the scene they found workers toyi-toying and throwing stones to the officers who were on the ground as well as blocking the road. I understood the **"road"** to be in reference to the road that runs parallel with the main road linking Mathangeni and the Police Academy, and which connects the Matsapha Police station to the industrial estate.

[12] This witness further testified that Inspector Sigudla, through a loud hailer, ordered the workers to disperse but they did not. They hurled insults at the officers and continued throwing stones and in response the platoon commander ordered that the rioters be dispersed with teargas and rubber bullets. It is only then that the workers dispersed in various directions and the officers removed the stones from the road. After dispersing the workers the platoon returned to the police station. Upon being asked a question by defence counsel the witness stated that it was impossible for anyone to be playing a game of cards in the situation that was prevailing there. I am minded, however, to treat part of his testimony with caution because the platoon came to the scene after the conflict had started. At the scene of combat the witness did not see the plaintiff being injured with a rubber bullet or anything, but he nonetheless surmised that the plaintiff must have been shot at the scene where the conflict started. This is obviously speculative,

and if it is an inference it fails the test because it does not exclude other possibilities.[1]

[13] The defendant's third witness on the factual circumstances of the incident was 3576 Inspector Mandla Dlamini. He is one of the officers who were on general duty and deployed at the textile factories. To a large extent his evidence corroborated that of DW1, Michael Mpini Mangwe. Both officers were in the team that was on guard at the textile factories from the 4th March 2008, a day after the strike started. The difference between their evidence is that DW3's account of events is more detailed and more coherent. He testified, for instance, that the striking workers attempted to proceed towards the police station but were blocked and they retreated to the gate at Garment International. He also stated that at the height of the conflict the police threw hand grenades. Significantly, this witness categorically denied that some striking workers were pursued up the thoroughfare and shot at, adding that **"you do not just shoot without an order to do so."** I mention that this witness is the police officer who was badly injured during the conflict, to the point of being unconscious, and although his overall evidence did not have any apparent tinge of bias or vengeance his lone denial that the plaintiff was pursued up the thoroughfare and shot at some distance away does not persuade me and it reflects adversely upon him as a witness.

[14] It is common cause that the strike action commenced on the 3rd March 2008, and until the 14th March 2008 it was peaceful and effectively monitored by the general duty officers. So clearly, something changed on the 14th. The version of the defence is that the workers became hostile and violent towards the police officers

[1] An Inference must exclude every reasonable inference save the one drawn. See R v Blom, 1939 AD 288

and the workers who had resumed work. In his evidence DW1 made reference to **"the workers who were already working"** inside the factory and that stones were thrown inside the factory. It appears to me to be quite clear that those who were continuing with the strike were irked by those that had resumed work – a feeling of betrayal, so to speak. When the factory was attacked the police officers were duty bound to intervene in order to safeguard property and protect those who were working inside the factory. DW1 said that there were about two hundred people at the scene, that stones were being thrown and the road was blocked. This clearly conjures the image of mayhem which was well beyond the capacity of the eight or so police officers who were doing general duty at the scene and it clearly justified the call for back up.

[15] On the basis of the above I find as a fact that it is the striking workers that embarked on violent action and the police officers dutifully responded in a manner that was intended to protect those that were working and to safeguard property. In this I am fortified, in part, by the evidence of DW2 who testified that one police officer, Seargent Dlamini, was hit with a stone on the head and that it **"was so severe that he was admitted at Mbabane Government Hospital."** Sgt Dlamini's evidence is that he lost consciousness, and from Mbabane Government hospital he was transferred to Casternhof Private Hospital in Midrand, South Africa. I also find, on the basis of the evidence of the Plaintiff and DW1 and DW2, that the plaintiff was not injured at the scene where the conflict started or anywhere around it. According to the plaintiff he was injured about 330 metres away from the factory where the conflict started. The distance is quite significant, and the plaintiff says that he and other workers were pursued by armed police officers all the way.

[16] Accepting, as I do, that the robust reaction of the police at the scene was justified, I still need to ponder on whether this justification does or does not extend to the point where the plaintiff was shot at, some 330 metres away, and bearing in mind that the crowd had dispersed, with the result that the threat if any, against the police and property, was then much less than at the factory where the conflict started.

[17] I note, for the avoidance of doubt, that the defendants have not convincingly denied that the plaintiff was pursued a distance of about 330 metres before he was shot at and injured, neither have they challenged his evidence regarding the spot where he was injured, which he showed to the court at the inspection in *loco*, next to where the Gallery Hotel now stands. Dw2 stated, without much gusto, that an injured person who was hurt at that site of combat might be able to run for about 200 metres before they seek and get help. Well, this would obviously depend on the nature, seriousness and location of the injury. It is my view that a rubber bullet that had lodged in the knee is likely to weaken the injured person immediately, and I accept the plaintiff's account that after being shot at and injured he moved for a distance of only 70-80 metres in the direction of the main entrance to the Police Academy.

[18] In its submission the defence made much out of the fact that the plaintiff has solely relied on his own evidence in respect of the factual circumstances of the injury by the police, and that since he did not call an **'independent'** witness an adverse inference has to be drawn against him on that basis[2]. Firstly, the plaintiff was not called upon to explain why he did not have any other witnesses to corroborate that part of his case and he had no obligation to explain

[2] Thabiso Mabaso v Commissioner of Police and Another [2016] SZHC 68

that. The incident happened in 2008, more than ten years ago. There could well be a challenge in tracing witnesses. To the contrary, witnesses for the state, in a case such as this one, are easily traceable even if they are no longer in service. And those who are in service are, in a way, in captivity and readily available. It would certainly be unfair to make an adverse inference against the plaintiff as urged by the defence. Moreover, the probative value of evidence is not just about numbers. It is about a number of things, including credibility[3]. As a matter of fact it is not irrational to think that an employee who testifies on behalf of his or her employer is likely to be biased in favour of his employer, either latently or blatantly[4].

[19] If the plaintiff had been injured at the factory or around it, he would certainly have a bad case. This is because, in my finding, the police officers were faced with a formidable situation. They were under attack and significantly outnumbered. One of them was seriously hurt in the process. Their response through teargas and rubber bullets was certainly justified in the circumstances. I have no doubt, however, that once the rioters had dispersed in different directions the need to use teargas, rubber bullets and hand grenades ceased to exist. Pursuing the plaintiff and other workers a distance of about 330 metres transcends the bounds of reasonableness and does, in those particular circumstances, smack of vengeance, especially given that one of their own was badly injured. The pursuing police officers became the aggressor, and plaintiff the victim.

[20] Because in my view the evidence that decides the issue of liability is fairly straightforward and effectively undisputed, I am not required

[3] Neinaber J.A. in Stellenbosch Farmers Winery Group Limited and Others v Martel & CIE SA and Others 2003 (1) SA 11

[4] See Note 3 above.

to make any findings on credibility. I did, however, mention above that the plaintiff was far from successful in his attempt to convince the court that robust reaction by the police was completely unprovoked. For the defendants' part, DW2 sounded like one playing out a movie script when he said that those who carry firearms and ammunition do not shoot unless and until the commander touches them on the shoulder, and that this procedure was followed on this particular occasion. In a situation of intense conflict where would the commander find time and opportunity to touch each one of his men on the shoulder, and how on earth would they afford the luxury of waiting for the touch? Of course theory, even good theory, is one thing and the reality in combat situations could well be another thing. In short, I am illustrating that both sides had their bad moments in the witness box but this has not made me see the matter in a different light than I otherwise would have.

[21] On the basis of the aforegoing I have come to the conclusion that the injury of the plaintiff by the police on the 14th March 2008 was unlawful. He is therefore entitled to compensation by the defendants, to the extent that his evidence establishes.

[22] Because of my conclusion on liability, I now proceed to deal with compensation. It is trite that the onus is upon the plaintiff to prove his losses, present and future. The onus applies equally to general damages. At the beginning of this judgment I mentioned that the plaintiff claims damages under four heads. In now deal with the heads in the order they appear in the particulars of claim.

LOSS OF INCOME, PAST AND PRESENT

[23] The plaintiff's evidence is that by letter dated 3rd February 2009 his doctor informed him that he **"should stop working."** According to Dr. T. Tembe, who testified as PW3, the letter referred to by PW1, dated 3rd February 2009, was actually written to the Plaintiff's employer informing that the plaintiff had become unable to work as a result of the injury. The plaintiff testified that since then he has been unable to provide for himself and his family. The court was not told whether he plaintiff was on pay up to that date, neither was it told how much he was earning prior to termination. The result of this is that the court is not in a position to calculate the extent of loss up to this stage, neither does it have the evidence or material upon which to calculate the plaintiff's loss of earning capacity in the future.

PAIN AND SUFFERING

[24] The plaintiff's evidence does not eloquently disclose the extent of pain and suffering. After some visits at RFM the plaintiff did not recover and he was then referred to Mbabane Government hospital where he spent a long period of time. It is at Mbabane Government hospital that he was informed that he would not recover fully because the bullet lodged in his body. He says that the pain **"was severe".** He testified that although the wound healed his legs are both numb. Under cross-examination the plaintiff said that at Mbabane Government Hospital he was informed that he would continue to experience pain in future.

[25] PW2, Dr Berhanu, is one of the doctors that attended to the plaintiff at RFM hospital. This witness stated that the plaintiff was complaining of **"too much pain"** and he was referred to Mbabane Government hospital because the pain was not resolved. This witness also mentioned that according to medical records available

to him in respect of the plaintiff's injury, one Dr Petros Manyumwa observed that the injury had **"degenerated in nature"** and this was expected to continue **"for the rest of his life."** A further observation was that the plaintiff would have episodes of stiffness of his joints.

[26] Subsequent to giving oral evidence, and upon request by defence counsel Mr. Vilakati, Dr T. Tembe made a written summary of his evidence. The written summary is in line with his oral testimony. After commenting on the written report, Dr Tembe was asked some questions by Attorney Mr. O. Nzima and he stated, among other things, that the pain tends to be more severe in cold and windy weather, and that no medication can heal this condition.

[27] The totality of the evidence establishes on a balance of probabilities that the plaintiff has undergone and will continue to undergo pain and suffering, for the rest of his life. He was born on the 15th August 1975. In August 2020 he will be 45 years old, and all things being equal he has a good many years ahead.

[28] Damages for pain and suffering are general in nature, and therefore at the discretion of the court, which discretion is to be exercised judicially. For purposes of guidance the defence referred to the case of KENNETH DELISA MASINA v UMBUTFO SWAZILAND DEFENCE FORCE[5] in which damages for pain and suffering and permanent disability were awarded at E100, 000.00. The plaintiff in that case was shot at with a live round of ammunition such that he suffered temporary blindness and a significant loss of hearing in his left ear. I am persuaded that the quantum awarded in Kenneth Delisa Masina

[5] [2008] SZHC 217.

may have been a little bit on the conservative side, but of particular importance is that it was awarded about 12 years ago. Under this head I am awarding the plaintiff E165, 000.00.

EMOTIONAL SHOCK

[29] Other than the plaintiffs own evidence that **“this experience traumatised me”**, the court was given nothing in proof of this aspect of the claim. The defendants rightly point out that for the plaintiff to succeed under this head they must prove a detectable psychiatric injury[6], and this would require expert evidence over and above his own testimony. The plaintiff has hardly made an attempt to prove this aspect of his claim.

MEDICAL EXPENSES, PAST AND FUTURE

[30] It is clear that the plaintiff has permanent disability. PW3, Dr Thandolwakhe Edmund Tembe made reference to the findings of Dr Petros Manyumwa and said the following:-

> **“(He) has a bone illness, degenerated in nature, which is expected to continue for the rest of his life as a consequence of the gunshot injury …….,”**

which would manifest itself in pain and stiffness of his joints. During cross examination of Dr Tembe, it came out that the treatment of the plaintiff was mainly in the form of antibiotics and painkillers. These are the things that the plaintiff would be expected to have led evidence on but he did not. He did not lead any evidence of hospital and medical expenses that he incurred in the past, neither did he lead any evidence on medical expenses to be incurred in the future.

[6] Road Accident Fund v Sands 2002 (2) SA 55.

[31] The only evidence that gives an idea of the plaintiff's future medical needs came from the defence, through DW4 – Dr Sibusiso Mkhize. This witness stated that for the management of pain the plaintiff would require pain medication obtainable **"over the counter and even prescription, as well as anti-depressants and anti-epileptic medication."** He further stated that these drugs are available in public institutions **"but may not be due to lack of resources."** The doctor did not say that in public institutions the drugs are available free of charge, so it is fair to assume that some payment would probably be required when the medication is available.

[32] The insurmountable difficulty that the court is faced with is that no figures have been presented for consideration. Medical expenses are in the form of special damages which must be based on actual or estimated figures. It is not a case where thumb-sucking can do.

[33] I therefore make the following orders:-

33.1 Defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay to the plaintiff –

i) An amount of E165, 000.00 in respect of general damages for pain and suffering.

ii) Interest thereon at 9% per annum calculated from date of judgment to date of final payment.

iii) Costs of suit at ordinary scale.

32.2 Defendants are granted absolution from the instance in respect of the following claims: Loss of income, past and future; Emotional shock; and medical expenses, past and future.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Plaintiff: **Attorney Mr. O.S. Nzima**

For the Defendants: **Attorney Mr. M. Vilakati**