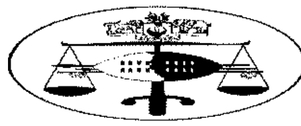

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIV. APPEAL CASE NO. 11/2019**

In the matter between:

THECOMMANDEROFTHEUMBUTFO
SWAZILAND DEFENCE FORCE 1st Appellant
THE ATTORNEY GENERAL 2nd Appellant

And

THEMBA MAZIYA Respondent

Neutral Citation: *The Commander of The Umbutfo Swaziland Defence Force and Another v Themba Maziya (11/2019) [2022] SZHC 14 (24 May 2022)*

CORAM: **M.J. DLAMINI JA**
S.M. MASUKU AJA
M.J. MANZINI AJA

DATE HEARD: **14 MARCH 2022**

DATE DELIVERED: **24 MAY 2022**

Summary: *An appeal noted against an award for general damages in the amount of E70 000-00 for pain and suffering. Costs of suit and interest at 9% per annum A tempora morae from date of summons to date of payment.*

Discussed: *Liability and quantum for awarding damages for contumelia associated with assault discussed. A causal link between the negligent conduct or wrongful act of the wrongdoer and damages must be established. The application of the current test for causality discussed.*

Discussed further: *The relationship between the alleged employer and employee must be established as one of employment in the pleadings and at trial. Requirements for a claim for vicarious liability discussed.*

Discussed further: *Factors and circumstances that influence the assessment and award of damages for contumelia associated with assault.*

Interest on illiquid sums to run from date of judgment and not date of summons.

Held: *That the appeal succeeds on both appeal grounds for liability and quantum.*

JUDGMENT

MASUKUAJA

[1] The Appellant ('The Commander of the Umbutfo Eswatini Defence Force UEDF') duly represented by the Attorney General noted an appeal against the judgment of the High Court that awarded the Respondent general damages for pain and suffering in the amount of E70 000-00 (Emalangeni Seventy Thousand) arising from an assault on the Respondent allegedly by officers of the Appellant. The Court a

quo had further awarded costs of suit to the Respondent and interest on the amount awarded in damages at a rate of 9% per annum a *tempora morae* with effect from date when the summons were served on the Appellant. Being dissatisfied with the judgment of the Court a *quo* the Appellant appealed the judgment in its entirety.

Grounds of Appeal

[2] The Appellant's grounds of appeal against the delictual liability and *quantum* of damages are summarized as follows: -

2.1 the Court a *quo* erred in law and in fact by concluding that the Respondent was assaulted by members of the Appellant when no such police record was found at the police station;

2.2 the Court a *quo* erred in law and in fact by concluding that the Respondent's assault was corroborated by Detective Sergeant Nkomonye and the police records when the Court refused to allow the cross-examination of the Sergeant;

2.3 the Court a *quo* erred in law and in fact to have concluded that the scarring sustained by the Respondent resulted from the

assault by the members of the Appellant when the Respondent had testified that he was assaulted by a mob of twenty.

[3] On the *quantum* of damages, the Appellant's grounds are summarized as follows: -

3.1 the Court a *quo* erred in law and in fact to have based its findings on a medical report (of the 27th September 2017) from Good Shepherd Hospital (GSH) without affording the appellants opportunity to scrutinize such report; and

3.2 that the Court a *quo* erred in law and in fact to have awarded general damages in the sum of E70 000-00 (Emalangeni Seventy Thousand) to the Respondent without evidence linking the assault of the Respondent by the Appellant's members (soldiers).

Material facts

[4] The material facts of the action leading up to the appeal are best captured as follows: -

4.1 On the 15th February 2005, the Respondent issued out a summons against the 1st Appellant duly represented by the 2nd Appellant (for convenience I will refer to the 1st Appellant as the "Appellant"). The Respondent's claim was for general damages in the amount of E2, 000 000-00 (Emalangeni Two Million) broken down as follows; pain and suffering (E1,000 000-00) Emalangeni One Million); permanent scarification *(sic)* E500, 000-00 (Emalangeni Five Hundred Thousand) and temporary loss of amenities of life E500, 000-00 (Emalangeni Five Hundred thousand).

4.2 The claimed damages allegedly arose on the 5th October 2003 from an assault of the Respondent by soldiers employed by the Appellant at Vuvulane. The soldiers are alleged to have kicked him with heavy boots, punched him with fists, immersed him in a water canal and thrashed him with an electric cable.

4.3 It was alleged that the soldiers were acting within the course and scope of their employment accusing the Respondent of robbing them of a motor vehicle that belonged to the Appellant.

4.4 It was further alleged that the Respondent was assaulted all over the body and the head. That the assault resulted in the Respondent suffering temporary memory loss, scarification *(sic)* all over the body and severe trauma.

4.5 The Appellant denied that its soldiers assaulted the Respondent and pleaded that he was instead assaulted by a mob of twenty attendants at a wedding party that actually identified him as one of some suspects who had taken a kombi at gun point the previous day.

4.6 The Appellant further denied that the Respondent's damages arose from the hands of his soldiers and put the Respondent to strict proof.

4.7 The Appellant averred further that he refused to pay the sums claimed because he was not liable to pay the sums.

[5) It is apparent *ex facie* the judgment of the Court a *quo* that the matter only got to be heard on dates in the year 2016, 2017 and 2018 and judgment was delivered on the 5th February 2019 when the summons was issued in the year 2005, for an incident that arose in the year

2003.

The passage of time had affected the evidence brought to trial, records had been destroyed, and witnesses' memories had been eroded in the ten to eleven years between the summons and the dates in which the matter finally came to Court. Nothing much was said about the cause of the unfortunate delay. Whatever the cause of the delay was, it gives a very cold comfort to would be litigants in our courts.

General Damages for *contumelia* associated with Assault

[6] It is settled by now in our jurisprudence that general damages are all non-patrimonial losses that fall under the heads of damages that were claimed by the Respondent in this matter. The pain and suffering, loss of amenities, disfigurement (scarring) to name the ones claimed by the Respondent in *casu*. We must take cognizance of the established principle that in order to recover general damages, evidence and expert testimony covering the different aspects of bodily injury and their consequences should be obtained, led and considered before a suitable award is arrived at.

See: **Sandler v Wholesale Coal Supplies Ltd. 1941 AD 194 at 199.**

[7] Assault contains a physical as well as a mental/psychological dimension. A plaintiff will be entitled to recover damages for all the detrimental consequences of an assault. The bodily and psychological consequences will be recovered by the action for pain and suffering and the invasion of a person's dignity by employing the *actio iniuriarum.* See: HB KLOPPER, on DAMAGES 2017 pg. 250.

Contention in the Notice of Appeal

[8] The Appellant's contention in his Notice of Appeal and arguments in Court is that the Court a *quo* erred in concluding that the Respondent was assaulted by the soldiers because there was no record found at the police station to prove this assertion.

[9] The Appellant submitted that the factors which were presented before the Court a *quo* were not sufficient to find that the Appellant was liable for acts of the "unknown" soldiers concerned. That the evidence before the Court a *quo* established no link between the alleged assault of the unknown employee soldiers and the Appellant.

[1OJ The Appellant submitted further that from a careful consideration of the plea the Appellant pertinently denied that the alleged wrongdoers were employees of the UEDF and called upon the Respondent to prove otherwise.

[11] In his analysis of the evidence in support of the contention above, Appellant submitted that although the Respondent in his evidence in chief testified that two days after the assault (on the 7th October 2003) when the assault occurred on the 5th October 2003), the police at Simunye police station brought three gentlemen in uniform that is used by the Appellant's soldiers and were identified by the Respondent as the men who assaulted him. The evidence it would seem, showed that the Respondent got to know their names prior to 15 February 2005 the date in which the summons were issued. The Appellant argues that it is surprising that the Respondent did not join the three (Thembinkosi Mavimbela, Mbongiseni Mavimbela and Jabulani Ndwandwe) to the action. The Appellant submitted that the Respondent did not recall the names in his particulars of claim but only recalled the names in the witness box when he testified that a mob assaulted him first for an hour

and the soldiers for two hours.

[12] The identity of the three men as the soldiers that assaulted the respondent is pertinent in establishing the "wrongful" action that caused the respondent's damages and that they so acted in the course and scope of their employer so as to impute vicarious liability on the Appellant.

[13] It is no doubt in my mind that the relationship between the alleged employer and employee must be established as one of employment in the pleadings and at trial. The difficulty *in casu* is that not only were the three soldiers not cited, they were not even brought to Court by any of the parties or brought by subpoena to assist the Court in establishing this critical employment relationship before vicarious liability could be imputed.

[14] The labour courts have utilized the "dominant impression test" to establish the employment relationship. The courts have also looked at the substance rather than form of the relationship and consider all the circumstances of the case in point. Peculiar attention has been given to three factors:-

(a) Did the alleged employer have a right of supervision and control over the alleged employee?

(b) Did the alleged employee form an integral part of the employer's organization?

(c) Was the alleged employee "economically dependent" upon the alleged employer?

See: **Denel (Pty) Ltd. v Gerber [2005] 26 ILJ 1256 (LAC)** and **SITA v CCMA & Others (2008) 29 ILJ 2234 (LAC).**

[15] One may ask, what is that to do with an action for damages for *contumelia* associated with assault? The answer is, it was necessary for the trial Court to determine whether an employment relationship existed first because the acts of an employee in the course of his employment attracts liability for the employer.

[16] The other reason for such is that the Court a *quo* held in its judgment that the Respondent had proved to the satisfaction of the Court that he

was assaulted by the soldiers who are employees of the Appellant thus it upheld the claim. See: paragraph [72] of the judgment:-

> *'[72] It is my finding therefore that the Plaintiff has proved to the satisfaction of the Court that the assault by the soldiers, employees of the Defence Force on his back and face as the medical report from Good Shepherd Hospital indicates. I uphold this claim.'*

[17] Regrettably, the Court a *quo* does not give its reasons for coming to such a conclusion when no evidence was led to establish that the three men identified as soldiers by the Respondent were employed by the Appellant. No one was called to bring evidence to that effect even though the alleged assault occurred in brought daylight (allegedly) by a mob of about twenty and (allegedly) by the soldiers. Neither the soldiers nor the Appellant were called to testify at the trial.

[18] There was no enquiry on the employment relationship at the trial at all. In cross-examination, for example, the Respondent claimed that it was the members of the defence force together with the mob of more than twenty people that assaulted him (paragraph 20 of the record). The line of cross-examination and answers given showed that the

Respondent was not sure where his claim lied i.e. either against the (unknown) three men or against the employer of the three men or the mob of twenty. I point out at this juncture that he was represented by Counsel when the summons and particulars of claim were drafted and during that part of the trial he ought to have been assisted to establish precisely whom his claim had to be directed.

[19] The Court itself lamented at the difficulties that the Respondent's attorney was faced with for his failure to lead his client in chief on the issues around the right party or parties suited.

[20] The Court a *quo* even went further to recognize that the Plaintiff's attorney had never said anything about employment of the three men as being employed by the Appellant in the pleadings and that he did not put it to the Respondent that the three men claimed that they were soldiers. The Judge a *quo* stated in her address to Plaintiff's attorney:-

> *'---It would have been better if we had been told in evidence in chief, even you should have asked the question he is asking. For example, how were you able to tell it was the soldiers and then he must say, do you know*

who are these soldiers, their personal identities because we are going there. If

he can't say who they are, there are a *lot of problems that arise in cross examination if you have not led your witness ...'*

[21] The Court a *quo* recognized the challenge of the non-joinder of the three soldiers but made no ruling on it. At paragraph 5 page 104 of the transcript the Court had had this to say to the Respondent:-

> '--- am *asking because you know about the names of the soldiers since 2003 and summons were only issued in 2005, why are they not cited in the Court papers? They are also not within the body of the Court papers that you were assaulted by members of the defence force, who kicked you and beat you and even thrashed you with electric cable, Bonginkhosi Mavimbela, Mbongiseni and who is the third one? This should appear in your papers. That* is *the problem right now---'*

[22] What evidence if any was led by the Respondent to prove on a balance of probabilities that the Appellant's soldiers assaulted him when no police record was found at the police station? This is another critical enquiry because it should form the claimant's required onus of proving on a balance of probabilities that the soldiers caused him the damage for the Appellant to be vicariously liable.

[23] Whether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action must be established on a balance of probabilities. Once the damage or loss is established a Court will do its best to quantify that loss even if it involves a degree of guess work (see: **Turstra Limited v Richards 1926 TPD 276 at 282-283).**

Evidence led at trial

[24] The Respondent testified in his evidence in chief that he had gone to check his girlfriend Thembi at her homestead. Shortly after their meeting he decided to leave because he had seen a lot of people at the Magagula's homestead where there had been a hijacking of a kombi. He said he did not feel comfortable. As he bid farewell to her girlfriend four men appeared, Mphile, Mpho, Nathi and Fridge. Whilst he was with the four he saw a lot of other people that were coming behind them. When they got to them they then removed the four men and he was left alone. The soldiers had not arrived at that time.

[25] The group was more than twenty in number, they asked him where

alcohol was being sold and he was pointing at the direction of where

the alcohol was sold then they started to attack him, kicked him and used sticks that they were carrying to assault him. He testified that he was assaulted for an hour by this group of people. The soldiers emerged, (although he had not identified them as such by that time) Mbongiseni, Thembinkosi and their brother in law. They took him, pulled him into the sugarcane field, he thought they were rescuing him from the mob. He was taken into a sedan and from the car they took out an axe and an electric cable about a metre long. They took him to a river, put him in the river, tied his hands assaulted him with the cable all over his body. The assault he said went on for two hours from (1400hrs to 1600hrs) until he was rescued by Simunye police who took him to hospital and was discharged the following day.

[26] When asked how he distinguished the people he called soldiers from the mob of twenty, he said after he was discharged from hospital, the police called him to the police station together with his father in the company of his brother. The station commander had also called his assailants who on that day (the 7th October 2003) they appeared clad in their uniform from the defence force. He said he was able to recognize them from that day that they were soldiers.

[27] I must pause and say it is rather unusual or surprising that no one else who saw the assault was called or willing to testify for the Respondent when the assault took place in day light, especially if we accept the Respondent's version on the number of the people, he alleged assaulted him.

[28] In cross-examination, he admitted that he was assaulted by a mob and soldiers on the 5th October 2003. That he only got to know that they were soldiers on the 7th October 2003 at the police station apparently in an "identification parade".

[29] The Respondent closed his case, there was no application for absolution from the instance from the defence and no ruling passed at that stage of the trial. The Court a *quo* issued an order to Simunye police station for the production of the police criminal docket that was opened after the Respondent had reported the assault case. It turned out that the investigating officer 3872 Constable Thwala had passed on (died) by the trial period. Detective Spt. Sibusiso Nkomonye second in charge desk officer was served with the order. He testified

that at

the time of the commission of the offence he was not at Simunye police station. He testified because he was the current crime manager in charge of crimes at Simunye police station. He traced the file and found it marked Registry of Crimes (File No. 100080/2003).

[30] His testimony was to the effect that the Respondent reported an assault case by a mob whilst at Vuvulane area, in the Lubombo Region at Simunye police station on the 5th October 2003. An investigation ensued but on the 29th June 2005 the criminal docket was closed because they could not establish any *prima facie* evidence. He testified that it was difficult for the investigating officers to have identified suspects because a mob was involved. The docket was destroyed after a period of five years.

[31] In cross-examination the Respondent had put it to Detective Sergeant Nkomonye that although he concealed that a mob assaulted him, that Thembinkosi Mavimbela, Jabulani Ndwandwe, Mbongiseni Magagula who were soldiers based at Nkoyoyo army barracks assaulted him. Sergeant Nkomonye's response was that the

police investigation was

unable to get any names of the people involved not even the names of soldiers.

[32] The Court a *quo mero motu,* called 3638 Constable Phika Dlamini who recorded the Respondent's statement when he reported the assault case. Constable Dlamini preambled his testimony by informing the Court that he was sick and his illness has affected his memory to recall things that happened. He however recalled the Respondent coming to the charge office to report the matter.

[33] He testified that the Respondent alleged that he had been assaulted by some members of the defence force. A docket was opened and given to the late 3872 Constable Thwala for investigation. The docket was then closed. It was put to him by the Court a *quo* that the Respondent had testified that he had been called into the police station to identify his assailants, he got there and found some men that had been brought by the police at the station. They were in Umbutfo Defence Force uniform and he identified them as the ones who had assaulted him. The Constable confirmed that they were soldiers.

[34] The Court a *quo* discharged Constable Dlamini after indicating that he had been called to confirm what the Respondent told the Court. The defense did not cross-examine Constable Dlamini and the Court a *quo* did not give the defense an opportunity for Constable Dlamini to be cross-examined. There are no apparent reasons for the non-cross examination in the record of appeal and in the judgment.

[35] In its judgment the Court a *quo* imputed liability on the Appellant. It held that the fact that the Respondent was assaulted by the soldiers was corroborated by evidence of Detective Sibusiso Nkomonye and the police records as well as the report from Good Shepherd Hospital. Further, that the Respondent's evidence that he was called by the police to the police station on the 7th October 2003 where he identified his assailants who were in the defence force uniform was not challenged. Further that Constable Phila Dlamini corroborated the Respondent's evidence that he was assaulted by soldiers. The soldiers were at the police station and he identified them.

The law applicable for the Plaintiff to establish liability.

[36] The concept of liability in our law incorporates both negligence (wrongful act) and causality, put differently, causality is a factor of liability and not of quantum. It is not enough to only establish the negligence on the conduct of the Appellant without evidence of causal link to the damage occasioned by the assault. See: **Guardian National Ins. Co. Ltd. v Saal 1993 (2) SA 161 (C) 163.**

[37] To complete the enquiry the Court a *quo* ought to have called for the application of the current text for causality (at least the position of the formulation is now firmly established in South Africa). In the past, tests, such as the "last opportunity" and "proximate cause" were applied. These tests are no longer valid. (as has clearly been pronounced in the South African text law and case law) See: **Neethling and Potgieter Delict 1967.** See: **Cooper Motor Law II 203; Frodsham v Aetra Ins. Co. Ltd. [1959] 2 ALL SA 407 (A), 1959 (2) SA 274 (A); South British Ins. Co. Ltd v Smit [1962] 3 ALL SA 548 (A), 1962 (3) SA 826 (A)** also cited by **HB Klapper, Damages 2017, page 358. Fn 9** where **HB Klapper** states that only when a sufficient causal link

between the conduct of the wrongdoer and the damage is established can the wrongdoer be held liable **(Fn 9).**

[38] The damage must be the consequence of a wrongful and negligent act. **Klapper** *(supra)* says. Previous, tests such as the *conditio sine qua non* (factual causation) were used either separately or in conjunction with each other. The *sine qua non* test implies that if a conduct is subtracted and the consequence disappears, there is sufficient causal link between the conduct and the damage. *In casu* and in accordance with this test the enquiry would be if evidence identifying the soldiers as the assailants is quashed and the consequences (injuries) disappears then there is sufficient causal link between the soldiers' conduct and the damage (injuries). But where the evidence identifying the soldiers as assailants is quashed and the consequences (injuries) are still sustained, there is no sufficient causal link between the soldiers' conduct and the damage (injuries). The mob's hand in the assault in the latter scenario becomes an even stronger probability as the cause of the injuries or damage *in casu.*

[39] Professor **HB Klopper** *(supra)* states that the legal causation test enquires whether the consequences were reasonably and generally foreseeable by the wrongdoer. If not, it is said that the damage is too remote and cannot be imputed to the wrongdoer. The test currently favoured by courts (at least as pronounced by the South African Courts) is whether there is a sufficiently close relationship between the conduct of a wrongdoer and the consequences of such conduct in order that such consequences may be legally imputed to the wrongdoer, having due regard to policy consideration based on reasonableness, fairness and justice. That in applying this flexible tests, existing legal criteria for causation such as direct consequences and legal consequences are used as auxiliary tests. See: **S v Mokgethi [1990] 1 ALL SA 320 A, 1990 (1) SA 32 (A) 76.**

[40] It is my considered view that although the Respondent's evidence was that he identified the three men as his assailants when they were brought to the police station on the 7th October 2003 in the Appellant's army uniform, no evidence was led to prove as a matter of fact and on a balance of probability that they were the alleged wrongdoers that caused the Respondent's injuries save by reason of the uniform that

they wore on the day they were identified at the police station. The mere fact that the Respondent testified that he knew they were soldiers because soldiers are on duty 24 hours around the clock (whether in uniform or not) is not sufficient to establish that they were the wrongdoers that caused the Respondent's injuries.

[41] It is further my view that the Respondent's evidence identifying the three as his assailants ought not be looked at in isolation from his further evidence that a mob of twenty or more also assaulted him. Thus, the *sine quo* non test implies that if we were to remove the evidence identifying the three men soldiers as his assailants and the injuries disappear then the soldiers were responsible but if the evidence identifying the soldiers as assailants were to be removed and the injuries are still sustained, the soldiers would not be responsible as there would be no causal link between their conduct the consequences. It would be more probable than not that the mob was the cause of the injuries or damage.

[42] For avoidance of any possible misconstruction of this Court's conclusion that although, ordinarily it would be acceptable that persons identified wearing the Appellant's uniform are assumed to be soldiers who serve in the army and employed by the Appellant and therefore were the Respondent's assailants. In *casu*, the enquiry was not to end there for reasons that; the Appellant had pertinently denied in his Plea and evidence (placing it in issue) that the Respondent was assaulted by certain members of the **U.E.D.F.** The Respondent's evidence that he identified the soldiers that assaulted him, could not be treated in isolation with his evidence that a mob also assaulted him. That none of the Respondent's many assailants were called to testify for the Court when the assault took place in broad daylight. None of the three soldiers identified were called to testify about their involvement. For all the above factors would have assisted in proving on a balance of probabilities that the injuries or damage that the Respondent complained of were imputed to the soldiers or even exclusively to the soldiers.

[43] The Respondent failed to prove and the trial Court erred in finding that the Appellant's members contributed causally to his injuries.

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preponderance of probability could not be explored in the absence of the alleged assailants' testimony (i.e. the soldiers' testimony and/or any of the members of the mob's testimony). The failure to allow the cross-examination of Constable Phika Dlamini and perhaps the failure to stage a proper identification parade of the three men soldiers leaves the evidence adduced without the probative value required to conclude on a balance of probabilities that the assault by the soldiers is causally linked to the damage the Respondent complained of.

Vicarious liability

[44] The Appellant submitted in its heads of argument in Court that the Appellant ought not be held vicariously liable for the actions of the unknown employees. He argued further that it was not established at trial that the soldiers acted in the course and scope of their employment with the Appellant. Appellant denies that vicarious liability was established in the circumstances of the case.

[45] The Court a *quo* held (in paragraph [72]) of the judgment that the

Respondent proved to the satisfaction of the Court that he was

why were they not charged? Curiously, how did the investigator come to identify the three as the assailants?

[48] The question is pertinent to establish vicarious liability of the Appellant as an employer. Where it has been established that the wrongdoer is an employee of the Appellant, it is only then that the acts of an employee in the course of his employment attracts liability for the employer.

[49] The Appellant pertinently denied in the "strongest possible terms" in its Plea that the Respondent was assaulted by certain members of the Umbutfo Defence Force. The Appellant also denied that the three soldiers were indeed the assailants on duty acting in the course and scope of their employment and placed the Respondent to strict proof thereof.

[50] The Appellants argued that for the vicarious liability to arise, there must be a connection or *nexus* between the employment enterprise and the wrong to justify vicarious liability on the employer. This

principle it was

submitted was illustrated in the case of **Albertina Mthupha N.O. and 4 Other v Phineas Malinga and 5 Others, High Court Case No. 4437/08 at para 13,** Masuku J illustrated the legal position on vicarious liability as follows:-

> '... *In essence, it is being alleged that the 1st Defendant was vicariously liable for its aforesaid servant's negligence. For a claim such as the present to hold against an employer, it is necessary that clear and proper averments are made. According to the Learned author and Judge Harms,* ***AMLER'S PRECEDENTS OF PLEADINGS*** *6TH* ***ED, LEXIS NEXIS, 2003 at p 248,*** *a*
> *claim for damages for vicarious liability must allege and prove that the person who committed the delict was (i) and employee of the defendant; (ii) he performed the delictual act in the course and scope of his her employment; and (iii) what the employee's duties were at the relevant time.'*

[51] In this instance the Respondent bore the onus throughout. The Appellant clearly placed the relationship in issue in its Plea. In the South African, Eastern Cape Local Division, Mthatha, the case of **Protea Coin Security Company (Pty) Ltd. and Christina Nomkhosi Mpaka & Others Case No. 269/11,** where the respondent in that case sought to hold the appellant vicariously liable for the actions of the unknown employee on the grounds that he had acted within the course and scope of his employment with the Appellant. The

Appellant denied that it was vicariously liable; denied that the injuries allegedly suffered

by the respondent's minor daughter were caused by an employee of the appellant and placed the respondent to the strict proof of the allegations. In that case the respondent's cause of action was founded upon the allegation that her minor daughter was walking along the pavement near a supermarket in Mount Frere when she was shot by an unknown employee of the appellant. It was alleged that the said unknown employee of the appellant acted negligently in discharging his firearm thereby causing injury and consequent loss suffered by the respondent's minor daughter.

[52] The respondent's daughter had testified that when walking along the main road and in the vicinity of First National Bank she noticed a vehicle which bore the insignia of the appellant... she had noticed armed guards who were wearing a black uniform and on the chest area had an insignia of the appellant. This is how she had identified guards as employees of the security company who operated under the name of Coin Security Group who were responsible for her unlawful shooting.

[53] Goosen J (supra) held that the respondent did not discharge the onus to establish the requisite elements for vicarious liability on the part of the appellant; at paragraph 12 of the judgment, he illustrated the position as follows: -

> *'In this instance the respondent bore the onus throughout. The appellant clearly and unambiguously placed the existence of an employment relationship in issue. Its evidence, which was uncontradicted* ... *the effect of this evidence was to establish on the balance of probabilities that the alleged wrongdoer was not an employee of the appellant. The trial Court found that the "impression" that would have been created in the mind of the member of the public was that the alleged wrongdoer was an employee of the appellant, by reason of the insignia on the vehicle and uniforms. That is not sufficient to establish as a matter of fact that the wrongdoer was an employee. In the circumstances the trial Court's finding that the wrongdoer was an employee of the appellant cannot be sustained. It follows that the respondent did not discharge the onus to establish the requisite elements for vicarious liability on the interest or in the intended performance of the contract of employment.* "(underlining added)

[54] The Appellant *in casu* submitted that the assault proceeded from a private spite on the Respondent or from other cause quite unconnected with occupants or employment with the defence force. Further that the assault was done neither in furtherance of the master's interest nor

under his express or implied authority nor an incident to or in consequence of anything were the purported soldiers employed to do.

[55] The Appellant referred this Court to the case of **Aliki Enterprises (Pty) Ltd. v Punky Mhlongo (1983/10) [2012] SZHC 82** where Ota J stated as follows at paragraph 61 and 62: -

> *'[61] It is trite that a master is liable only for his servant or agent for tortious act performed in the course of his employment. This means for instance, that when the servant is on a frolic of his own, his misfeasance cannot in law be imputed to the master.*
>
> *[62] Now, even though there is uncontroverted evidence that the 1st Defendant is an employee of the 2nd Defendant, first lnternational Investments, however, the evidence tendered by the Plaintiff fell short of establishing that the 1st Defendant was in the course of her employment, when the collision occurred. It was not enough for the Plaintiff to allege vicarious liability in his pleading. The Plaintiff was mandatorily required by law to adduce cogent and convincing evidence in proof of the facts pleaded. He has failed to do so. The plaintiff thus failed to prove that the 2nd Defendant is vicariously liable for the negligence of the 1st Defendant.'*

[56] I found little or (even) no persuasive submission that was made for the Respondent on appeal as a convincing counter on this point. Counsel simply stated that the Appellant was vicariously liable

because the

assault was "during" the course and scope of employment. We were referred to the judgment of the Court a *quo* in support of that contention and little or none on the evidence led.

[57] The Respondent submitted further that his evidence of identifying his assailants at the police station dressed in their defence force uniform proved that they were employees of the Appellant and that when they assaulted the Respondent, they were acting in the course and scope of their employee and were pursuing their employer's mandate.

[58] The Court a *quo* also relied on the evidence of the Respondent that pointed out the soldiers on the 7th October 2003. It also relied on the Respondent's statement that in his (the respondent's) knowledge soldiers were on duty 24 hours around the clock. This evidence, the Court said had been supported by police officer 3638 Dlamini.

[59] *In casu,* it can only be reasonable for this Court to conclude that;

53.1 Firstly, the identification of the three men in uniform as soldiers who assaulted the Respondent is not sufficient to establish as a matter of fact that the three men were soldiers in the employ of the Appellant;

53.2 Secondly, there is no cogent evidence that was led to show that the three men were exercising the mandate of the Appellant direct or indirectly when they assaulted the Respondent to attract vicarious liability;

53.3 Lastly, there is no cogent evidence that was led to show that they were in furtherance of their master's interest or under the express or implied authority of the Appellant when they assaulted the Respondent. The utterances of his assailants about the stolen sneakers claiming it belonged to them and the questions about his involvement in the alleged hijacked soldiers' kombi throws further confusion on the motive or intent of the assailants. It justifies the narrative that in the absence of any evidence on their mandate or extent of their mandate, they were on the frolic of their own and their misfeasance cannot in law be imputed to their master.

[60] In the circumstances the trial Court's finding that the three men soldiers were in the employment of the Appellant and that they assaulted the Respondent in the course and scope of their employment in furtherance of their master's interest cannot be sustained. If follows that the Respondent did not discharge the *onus* to establish the requisite elements for vicarious liability on the part of the Appellant.

[61] One must guard against being influenced by the result (the damage) into automatically assuming liability. In as much as we would naturally be sympathetic with the Respondent's predicament of being humiliated and the barbaric attack by his assailants, we should be steadfast primarily in the Court's functions to serve justice. Inherent in this notion is the operation of fair play.

[62] In the English case of **Roe v Ministry of Health and Others, Woolley v Ministry of Health and Others [1954] 2 ALL ER 131 (CA)** Lord Denning'.s remarks are apposite at page 139: -

> *'One final word. These two men have suffered terrible consequences that there is natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong* ... '

I therefore find that the appeal on liability as challenged by the Appellant should succeed.

[63] The conclusion I have come to, that the appeal succeeds on the liability as challenged should naturally mean that there should not be any need for this Court to consider the appeal grounds on the *quantum.* I am, however, of the view that the question of *quantum* requires some comments.

[64] The *quantum* of damage is a consequent upon the harm in question. *Quantum* is the Latin term, stands for amount. In the South African jurisdictional context for claims on personal injury, their Rule 33 (4) (High Court Rules) separate liability from *quantum* at trial. The rule starts with the issue of liability and postpone quantum for later determination if the plaintiff succeeds on liability. Our High Court rules

do not have such a rule but our Courts have established the practice in a number of cases that have graced the High Court. See: **Bambelela Boyce v Commissioner of the Royal Swaziland Police, Civil Case No. 2097/2002; Thembile Kunene v Swaziland Development and Savings Bank & Another (1521/14) [2019] SZHC 239 (5 December 2019); Elliot Khumalo v African Echo (Pty) Ltd.** & **2 Others (962/2016) [2019] SZHC 242 (6 December 2019)** to name but a few.

[65] The record of appeal reveals that on the 17th November 2016 the Court *mero muto* ordered (i) that the medical examination of the Respondent be made in view of the alleged heard injury, (ii) the release of his medical record by Good Shepherd Hospital and (iii) the release of the assault inquiry file by the Simunye police.

[66] The Respondent refused to undergo the medical examination and assessment with regard to the head injuries and its possible effect on his mental faculties. Further attempts were made a year later (11th July 2018) whilst the trial was still proceeding. The Registrar of the

Court

wrote a letter that accompanied the Respondent and his sister to the Psychiatric centre. The Psychiatric hospital sent back a report on the 1st August 2018 to the Court. The letter was simply filed in Court and accepted at face value by the Court a *quo* without being exposed to the rigorous procedures of admitting medical reports as evidence in Court. The parties were not given any opportunity to comment on the report as an investigating process. In any event despite another call by the Court that Dr. Violet Mnjwala of the psychiatric hospital to revisit his report that there were no head injuries that had caused the Respondent's mental illness, the doctor's response on the 22 December 2018 was that the mental illness complained of by the Respondent was not caused by the assault. The Court a *quo* accepted that there was no proof of the mental illness being caused by the alleged assault. I do take judicial notice that at that time of the trial the Respondent represented himself.

[67] The Good Shepherd Hospital also complied with the order of Court and filed its report dated 29th September 2003 which was purportedly reproduced by the doctor compiling the report and dated it the 27th September 2017. The report as we read from the judgment was

accompanied by an in-patient information sheet number 7493/03. The Court a *quo* wrote in the judgment that the information sheet contained the Respondent's personal particulars which were followed by a detailed report about his admission date, notes about his bodily condition, medical treatment and discharge; as reflected in the report dated 29th September 2003.

[68] The transcript filed on appeal of the proceeding on the 2nd May 2019 simply reflects that only the Psychiatric report was discussed when the matter resumed that day. The Good Shepherd Hospital report was not introduced in Court by Dr. Kasky the senior medical officer who reproduced it. He was not called in to speak to its contents, the parties were not invited to question or examine the report in Court for the record. The Court a *quo* concluded that the Respondent was assaulted by the soldiers on his back and face on the medical report from Good Shepherd Hospital indicates.

[69] On the basis of the *dicta* of Ramodibedi JA (as he then was) in the case of **Ntombifuthi Magagula v the Attorney General, Appeal**

Case No. 1112006 the Court a *quo* awarded the sum of E70 000-00 (Emalangeni Seventy Thousand). The Court a *quo* supported its finding by quoting paragraph 20 of that judgment and mainly that "a *finding on general damages comprising pain and suffering* ... *is essentially* a *matter of* *speculation and estimate"* (underlining our own).

[70] The Appellant challenges the way the Respondent's damages were assessed. The Appellant submitted that the Court a *quo* misdirected itself and did not follow decided cases to determine the quantum. The Respondent's Counsel on the other hand urged this Court to review and increase the award and take into account heads of damages that were not for the asking by the Respondent. Counsel prayed for example that we include future medical expenses and damages for permanent mental disability *(sic).*

[71] In as much as we appreciate that the Respondent was not represented in the later part of the trial there was no justification for the Court a *quo* to skip the critical law of evidence procedures pertaining the

admissibility of medical records which may otherwise be hearsay if not proven.

[72] The first challenge faced with the approach taken by the Court a *quo* in admitting and relying on the hospital records is that a document let alone an expert document cannot just be accepted on face value.

[73] Hospital records (or entries in hospital record and information) can be falsified, or selectively copied, so there is a practical reason for requiring the parties to either agree on their admittance or the party who relies on the records to prove it, before reference can be made to the hospital records as being hospital records. See for authority Rule 35 (a), Rule 35 (10) and Rule 36 of the High Court Rules. Also **Howard and Decker v De Sousa 1971 (3) SA 937 (T)** and **Knowels v Administrateur, Kaap 1981 (1) SA 544 (C) 551.**

[74] Hospital records may look like they are hospital records but they are not the hospital records unless and until proven to be the hospital records or agreed to be hospital records by the parties. The other

part

is that whilst the proof of the authenticity of the record is critical to be relied on as a matter of fact that a nurse or a doctor made the entries in question, relying on the correctness of that entry is a matter of hearsay, the admissibility or otherwise of that hearsay evidence needs to be tested.

[75] The manner in which the medical reports were admitted and relied upon ignored the processes as set out above by the Rules of the High Court and the authorities we have cited.

The award of E70 000-00 as damages.

[76] The award of E70 000-00 (Emalangeni Seventy Thousand) was also based on a ... *"matter of speculation and estimate".* The speculation and estimation was guided by the case of **Nonhlanhla Simelane v the Commissioner of Police and Another Case No. 2351/03 (unreported).** The Court *a quo* says as much at paragraph 81 of the judgment.

[77] It is seemingly quite attractive to fall into the trap of reading too much in the literal sense the dicta of Justice Ramodibedi JA (as he then was) in the **Ntombifuthi Magagula case** *(supra).* I don't think that his Lordship's pronouncement is to be taken to suggest that the *"speculation and estimate"* must be done in isolation or exclusive of the medical reports, the extent of the injuries and/or beyond what would be considered as fair and reasonable. Though the presiding officer exercises a wide discretion, he or she is called upon to base an award on factors and circumstances he/she considered important. He/she should also provide reasoned basis for arriving at his/her conclusion. See: **Road Accident Fund v Maruga 2003 (5) SA 164 (SCA) 172.**

[78] **Professor HB Klapper,** Damages, 2017 at page 251 *(supra)* ventured the following factors that influence an award for damages for *contumelia* associated with assault: the motive of the attacker, nature and seriousness of the assault, fear experienced by the plaintiff, degree of humiliation caused by the assault, impact of the assault on dignity or reputation, possible provocation by the plaintiff, apology by the defendant, other relevant factors; and prior comparable awards.

[79] We need not however go into the re-assessment of the quantum in *casu* given our earlier confirmation that the appeal on liability succeeds. There is also no need to enter the debate of the circumstances under which this Court would be permitted to interfere with the judgment on the Court *a quo* on *quantum.*

Interest

[80] We shall comment on the issue of interest in passing. The Court *a quo* awarded the E70 000-00 damages together with interest at the rate of 9% per annum a *tempora morae* with effect from the date when the combined summons were served on the Appellant. The Appellant argue that interest on unliquidated claims cannot be ordered to take effect from the date of issue of summons but from date of judgment.

[81] The Court *a quo* that interest should run from the date of the summons is with respect, not correct. The nature of the claim from the Respondent's summons was for an illiquidated sums and the award

was essentially for those an illiquidated sums.

[82] This Court has pronounced itself on this question in the appeal case of the **Army Commander and Another v Bongani Shabangu SZSC 19 (31 May 2012),** Justice Agim JA [concurring, A.M. Ebrahim JA and M.C.B. Maphalala JA (as he then was)] when the Court stated at paragraph [31] that:

> *'[31] Since the claim of the respondentin the particulars of claim is for an unliquidated sum, the judgment sum resulting therefrom can only attract interest from date of judgment. The order of the trial Court that interest should run from the date of the issue of the summons is in my view not correct. I* am *persuaded* to *take this position by the decision of the South African Court of Appeal per Innes CJ in Victoria Falls Transvaal Power LTD v Consolidated Langlaangte Mine LTD AD.. .'*

[83] I conclude that there is no reason to justify a departure from the *dicta* above and confirm it as the principle as we know and that it should be applied in *casu.*

[84] Finally, this Court has been "taxed" heavily by the Appellant who for some reasons prepared and filed the evidence transcript from pages

113-187 in its Siswati version, untranslated to the English language. In as much as we understand that there are two official languages in Eswatini, i.e. Siswati and English, the Court's decorum demands that the Court record be in the English language.

[85] Rules 60 and 61 of the High Court Rules make provision for translation of documents and interpretation of evidence. We are sufficiently conversant with our Siswati language but it is quite expedient to read evidence that is at times technical when interpreted into English by a competent and impartial interpreter, sworn to interpret faithfully to the best of his/her ability. Issues of costs for the services of the interpreter employed are to be costs in the cause (should costs be an issue) per Rule 61 (3) of the High Court Rules. The record after all emanates from the High Court.

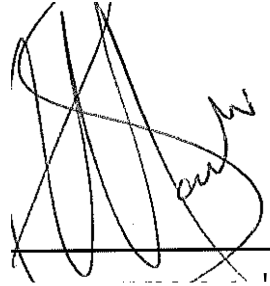
[86] In light of the foregoing the following order is made: -

(1) The appeal succeeds both on the issue of liability and *quantum.*

(2) The award made by the Court a quo in the sum of E70 000-00 (Emalangeni Seventy Thousand) for pain and suffering to the

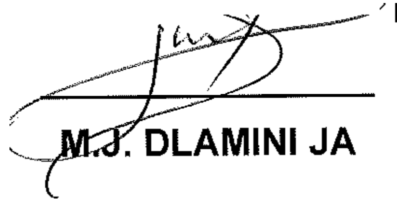
Respondent together with the interest at the rate of 9% per annum a *tempora morae* from date of summons is set aside.

(3) Costs of the appeal are awarded to the Appellant.



S.M. ASU U''AJ A

I agree



M.J. DLAMINI JA

I also agree

M.J. MANZINI AJA

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FOR THE RESPONDENT: Mr. Leo **N.** Dlamini Practicing with **S.A.** Nkosi Attorneys