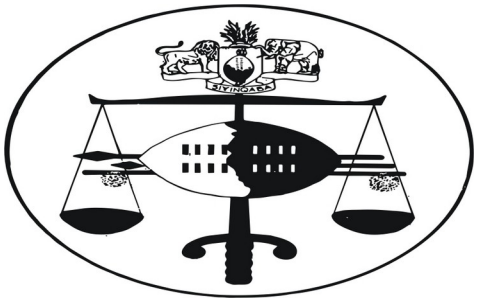

IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Case No. 42/2011

In the matter between:

ARMY COMMANDER AND ANOTHER **Appellant**

versus

BONGANI SHABANGU **Respondent**

Neutral citation : *Army Commander and Another v Bongani Shabangu (42/2011)[2012] SZSC 19 (31 May 2012)*

Coram :***A.M. EBRAHIM JA, M.C.B. MAPHALALA JA, E.A. AGIM JA***

Heard : **14th May 2012**
Delivered : **31st May 2012**

Summary : ***Appeal* − *Unchallenged finding of fact* − *subsisting and valid* − *appeal on credibility of witness* − *scope of power of Appellate Court in respect thereof* − *Rules 8 (1) and (3), Rule 12 and Rule 16 Court of Appeal Rules* − *notice of appeal filed out of time – extension of time to appeal and condonation* − *Records of Appeal* − *How to challenge correctness* − *Constitutional Law* − *prolonged Military detention with assault and forced labour violate S. 14 (2) S. 16 (1) and (3), S. 17 (3) and S. 18 of***

2005 constitution − <u>Civil Procedure</u> − Rule 22 High Court Rules − denial distinguished from non − admission − effect of failure to deny or state non − admission − Rule 21 High Court Rules − Further particulars or pleadings − Rule 36 High Court Rules − medical examination of claimant for damages for bodily injuries − <u>life expectancy</u> − How to determine same − <u>Evidence</u> − presumption of continuance to determine life expectancy − <u>unliquidated claim</u> − nature of − <u>interest on judgment</u> sum based on unliquidated claim − takes effect from the date of judgment − Appeal allowed on first ground, dismissed on all other grounds. Order of payment interest from date of issue of summons set aside − order that interest takes effect from date of judgment.

AGIM JA

[1] The respondent, an officer of the Umbutfo Swaziland Army Defence Force was arrested on the 8th of September 2005 by Military police officers of the Umbutfo Swaziland Defence Force who are under the Command of the 1st Appellant for negligently losing the service firearm in his possession while on duty. At the time of his arrest he was healthy, physically fit and without any injuries.

He was detained by the said Military Police officers at Umbutfo Army Barracks from 8th September 2005 to 12th January 2006.

Medical examination of the respondent on 9th January 2006 show that he had sustained severe injuries to his right ankle joint resulting in the degeneration of the ankle joint with pain attending any ankle movements. The respondent's case as upheld by the trial court is that the injuries were sustained by the respondent while in the detention or custody of the said Military Police officers at Umbutfo Army Barracks as a result of the said officers assaulting him on 8th September 2005, forcing him to scrub the floor of the guardroom daily through out the five months detention and detaining him in this condition for the five months without medical attention.

[2] For the injuries suffered by respondent due to his said assault by the said Military Police officers, the respondent in case No. 4223/2006 claimed for–

(i)	Medical costs	E 71, 400.00
(ii)	Pain and suffering	E 102, 000.00
(iii)	Loss of earnings	E306, 000.00
(iv)	Loss of amenities in life	E 50,600.00
(v)	Permanent disfigurement	E 70,000.00
Total		**E600,000.00**

In its judgment on the 9th of September 2011, the trial court, per Ota J, awarded to the respondent (E50,000.00) for pain and suffering, (E30,000.00) for permanent disfigurement and (E20,000.00) for loss of amenities of life which the court added together to constitute an award of general damages of (E100,000.00) The trial court also awarded the respondent (E61, 000.00) for medical expenses, interest on the above sums at the rate of 9% per annum, commencing from the date of issue of summons to date of payment and costs to follow the event. The court dismissed the claim for E306, 600 for loss of earnings.

[3] Dissatisfied with the said judgment, the appellants filed a notice of appeal commencing this appeal No. 42/2011. The notice of appeal contains the following grounds.:

(i) The court **a quo** erred in fact and in law in awarding the Respondent the sum of one hundred and sixty one thousand Emalangeni (El61 000.00) with interest of 9% from the date of issuing summons with costs, as the amount is illiquid.

(ii) the court **a quo** erred in fact and in law in finding that Respondent was assaulted and the injuries worsened by

the incidence of the cold water when ordered to scrub the floor.

(iii) the court **a quo** erred in fact and in law in awarding Respondent the sum of sixty-one thousand two hundred Emalangeni (E61 200-00) for future medical expenses as no evidence was led to prove that life expectancy will be sixty five years.

(iv) the court **a quo** erred in fact and in law in accepting the Doctor's report and stating that the Doctor's report was not disputed and that it was not necessary for the Doctor to give evidence before the Court.

(v) the court **a quo** erred in fact and in law in taking judicial notice of

the normal practice of doctors to make referrals.

[4] The respondent filed a notice of cross-appeal on 8th October 2011 containing one ground of appeal as follows –

> **"The Court a quo erred in fact and in law in dismissing the appellant's claim for loss of earnings on the basis that there was no**

evidence that the appellant was in permanent employment."

[5] The appellants filed their heads of argument on the 30th April 2012. The respondent filed his heads of argument on the 2nd May 2012. The appellants filed supplementary heads of argument on 11th May 2012.

[6] The issues that arise from the grounds of appeal and the arguments of both sides are as follows –

(i) whether the Trial Court was right to have held that the respondent was assaulted by the Military Police officer who arrested and detained him and whether the Trial Court was right to have held that the injuries suffered by the respondent worsened by the incidence of cold water getting in them when he scrubbed the floor daily for the five months of detention.

(ii) whether the Trial Court correctly relied on the medical report of Dr. Mathunjwa who did not testify in the trial as a witness.

(iii) whether the Trial Court was right to have ordered that the adjudged 9% interest per annum on the judgment sum of (E161,000.00) should take effect from the date of issuing the summons commencing the suit nisi prius.

(iv) whether the Trial Court correctly awarded the respondent the sum of (E61,200.00) for future medical expenses on the basis that life expectancy in Swaziland is sixty five years.

(v) Whether the Cross-Appeal is competent, and assuming it is, whether the Trial Court correctly dismissed the respondent's claim of (E306, 000.00) for loss of earnings.

I will deal with issues Nos. 1 and 2 together and the others in the sequence they appear above.

Let me start with issues Nos. 1 and 2. The Trial Court found as a fact that the respondent was assaulted on the 8th of September 2005 when he was arrested. The portion of the judgment states thus −

> **"The plaintiff testified that he was assaulted by DW3 and DW4 on the 8th September 2005, whilst waiting for the vehicle to convey them back to the base in search of the missing rifle. He said they continued to assault him by kicking him on the ankle with their service boots for the 45 minutes of waiting period even though he cried out with pain for the injury sustained.**
>
> **Even though DW3 and DW4 want the court to believe that the plaintiff is fabricating stories against them, there is however no reason urged why the plaintiff would fabricate such a story against them. I am therefore inclined to reject the evidence of DW3 on the issue of the assault, and uphold the plaintiffs case that he was handcuffed and made to do press ups and subsequently assaulted on the day in question by DW3 and DW4, whilst waiting for the vehicle to convey them back to the base. I find that to be a fact."**

[7] The argument of the appellant's at paragraphs 7.1 to 7.6 in support of their second ground of appeal attack this portion of the judgment of the Trial Court. Their argument against this finding of the Trial Court dwelt mainly on the case of the respondent at the Trial Court that he was assaulted daily from 8th September 2005 to 12th January 2006. The appellants appear to be more concerned with showing that the respondent was not assaulted for five months as alleged. This is clear from the

following submission at paragraph 7.3 of the appellants heads of argument thus –

> **"Respondent's assertion that he was assaulted for the five months contradicts his evidence that in certain instances he was taken to a number of traditional healers."**

This argument is unnecessary, irrelevant and not valid in this appeal, because the Trial Court had in its judgment held that this allegation of daily assault for 5 months was not proved. The Trial Court said, **"There is no doubt that the plaintiff failed to prove the allegation that he was assaulted every day of his detention from the 8th of September 2005 to the 12th of January 2006."** There is therefore no basis for the above argument in this appeal.

The Trial Court went further to hold that the respondent **"however demonstrated the alleged assault resulting in injury which he said occurred on the 8th September 2005. The only point of disparity, I see with his pleadings in this regard is the period that the alleged assault lasted and how the injury worsened."** So the allegation of assault which the Trial Court found as proved was the allegation that he was assaulted on the 8th September 2012. It is this finding of assault on the 8th of September 2005 that ought to be challenged and form the sole subject of the appellant's argument under the second ground of appeal concerning the fact of assault. The appellants did not argue against this finding of fact. There is no argument in their heads of argument contending that the finding is not correct for any reason. Clearly there is no valid argument in support of the second ground of appeal that the court **a quo**

erred in fact and in law in finding that the respondent was assaulted. There is no argument demonstrating how the Trial Court erred either in law or fact in finding as a fact that the respondent was assaulted on the 8th of September 2005. Since there is no ground of appeal against this finding by the Trial Court that the respondent was injured as a result of the said assault on the 8th of September 2005, the finding remains valid and binding. The appeal therefore fails on the first ground of appeal.

[8] The Trial Court also held that the injuries resulted from the assault of the respondent by the Military Police officer on 8th September 2005. There is no ground of appeal against this finding of fact. It remains valid and binding. The appellants in this appeal as part of their second ground of appeal only challenged the part of judgment that held that "the injuries were worsened by the incidence of the cold water which got in them and the lack of medical attention for same for the duration of the 5 months he spent in detention." Concerning how the water got into the injuries, the Trial Court said **"even though the plaintiff failed to prove the specific allegation as pleaded, that the MPs flooded the guard house with water and made him soak his injured feet in it thus worsening the injury, he has however to my mind been able to prove that cold water did get into his injuries by reason of the fact that he was made to scrub the floor of the guard house everyday. DW3 his room mate confirmed the fact that himself and the plaintiff did scrub the floor for the 5 months, even though he says they only cleaned their room with cold water and mop. The material fact as far**

as this case is concerned is that cold water did get into the injuries, as is alleged by the plaintiff."

At paragraph 7.5 of the appellants' heads of argument, Learned counsel for the appellants argues that **"respondent at page 142 of the book state that he was made to scrub the floor wearing his flops on his feet. It is common knowledge that when one is scribing the floor he uses his hands not his feet and the place he is scribing cannot be flooded with water to the extent that it would reach his ankles wearing flops. No evidence had been lead that before scribing the room it would be flooded with water and it's not possible to flood a room where you sleep and where your belongings are placed as he shared a room with Pte Dlamini."**

The Trial Court did not believe the testimony of the respondent in cross-examination that the guardroom was flooded. The argument of the Learned Counsel for the appellant that there is no evidence that the room was flooded and so water could not have gotten to the ankle of the respondent is unnecessary and irrelevant. The flooding of the room did not form the basis of the Trial Court's finding that water sipped into the injuries. It appears that Learned Counsel did not properly read and understand the record of the proceedings at the Trial Court before arguing this appeal. His argument under the second ground of this appeal does not show that he correctly understood the contents of the record. If he did then it would have been obvious to him what the Trial Court said.

[9] There is evidence on record that the respondent scrubbed the floor. In his evidence in examination in-chief the respondent said **“the guard house has over nine rooms and every morning I was forced to scrub the floor… barefooted which made my feet to become painful and I received no treatment. The water which I used to scrub the floors was cold. I did not receive any treatment for the 5 months after that I was discharged and taken to Court.”**

His argument above does not show how the Trial Court erred in law or fact in finding as a fact that the injuries of the respondent worsened because cold water got into the injuries by reason of the fact that he was made to scrub the floor of the guardroom everyday. It is clear from the foregoing that Learned Counsel has not advanced any valid arguments in support of the second ground of appeal. The appeal therefore also fails on this ground.

[10] The detention of the respondent for 5 months before being taken to court cannot escape some comment here. This court had during the hearing of this appeal drawn attention of Learned Counsel for the appellants to this kind of detention and requested to know if there is any law authorising such detention of the respondent by Military Police Officers in a Military Barracks or anywhere. Learned Counsel answered that he is not aware of any. The detention of the respondent by the Military Officers for 5 months without being taken to court cannot be justified by the fact that he is reasonably suspected of having committed a criminal offence under the laws of Swaziland, to wit, the inexplicable loss of the service rifle while on duty. Such a detention, violates the respondent’s fundamental right to personal liberty provided for in S. 16 (1) and (3) of the 2005

Constitution. Particular attention is drawn to S. 16 (3) which provides that " a person who is arrested or detained upon reasonable suspicion of that person having committed or being about to commit a criminal offence; shall , unless sooner released, be brought without undue delay before a Court." S.16 (4) of the same Constitution provides that " where a person arrested or detained pursuant to the provisions of subsection (3), is not brought before a court within forty-eight hours of the arrest or detention, the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance." So the Military Police officers had a mandatory obligation to take the respondent before a Court within 48 hours or release him. So the phrase "without undue delay" as used in S. 16 (3) (b) means within 48 hours. Therefore, 5 months delay in this case constitute an undue delay. .

In Beneby v C.O.P (1996) 1 CHRLD 28 the applicant was arrested on 5th February 1995 upon reasonable suspicion of committing various offences contrary to the Dangerous Drugs Act. Although there were several Courts open and sitting on 6 and 7th February 1995 to which he could have been taken, it was not until 8th February that he appeared before a magistrate. The Supreme (High) Court of Bahamas held that the applicant's right to be brought without undue delay before a Court following his arrest had been infringed.

The release contemplated in S.16(3) can be an unconditional or conditional release . By virtue of this provision the officers can release him conditionally, that is, on bail. Where it becomes obvious to an arresting, investigating or prosecuting officer that it is improbable to bring the person arrested before a court

without undue delay, the lawful course to take is to release the arrested person on bail pending his being brought to court. But it must be borne in mind that while on bail, the arrested person is still in custody of the law and so the process of taking a decision to bring the person to court should not take too long. The fact that investigation is ongoing should not prevent the suspect from being released on bail. In any case, it is a better practice to investigate to ensure that there is reasonable basis for suspecting that a person has committed a crime, before arresting. To arrest and or detain before investigating will render the pre- trial criminal process suspect.

[11] The assault of the respondent on the 8th of September 2005 during and after his arrest by the said Military Police officers is a violation of his fundamental right not to be subjected to torture, or inhuman or degrading treatment or punishment as provided for in S. 18 (2) of the 2005 Constitution. The respondent did not resist arrest. Assuming he did, there will still be no justification for the kind of assault inflicted on him. S.40 (1) of the Criminal Procedure and Evidence Act prescribes how an arrest is to be effected. It states that "in making an arrest the peace officer or other person authorised to arrest shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action." Implicit in this provision is that if there is no resistance to the arrest as in this case then there is no need to touch or confine the body of the person. Where there is resistance to arrest, it is trite law that the force applied to touch or confine the body of the person must be reasonably enough or necessary to subject him to such arrest in

the circumstances of the case. The Court in Beneby v COP (supra) held that "Persons awaiting trial should not be subjected to 'pre-trial punishment' as that would be tantamount to a reversal of the presumption of innocence. It had to be borne in mind that apart from his conviction in 1989, which was the subject of an appeal, the applicant was to be presumed innocent of all the offences with which he was presently charged."

[12] The subjection of the respondent to the forced scrubbing of the floor of the guardroom while in detention is a violation of his fundamental right to protection from forced labour as provided for in S. 17 (2) of the 2005 Constitution. A Police officer or any other law enforcement officer who arrests and or detains any person upon reasonable suspicion of having committed or being about to commit a criminal offence, has a duty in law not to subject such a person to forced labour in any form, unless as ordered by a court.

[13] To have subjected the respondent while under arrest and in detention to such forced labour in his injured condition amounted to a gross violation of his right to protection from inhuman or degrading treatment or punishment as provided for in S. 18 of the 2005 constitution.

The failure to observe the fundamental rights of a person arrested and or detained upon reasonable suspicion of having committed or about to commit a Criminal offence may render the fairness of the pre-trial and trial Criminal processes suspect. It is important that law enforcement agencies are sensitive to their constitutionally mandatory duty to strictly observe the fundamental rights of such persons at all stages of the Criminal

process. This duty is emphasised by S. 14 (2) of the 2005 Constitution stating that **"the fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, the Legislature and the Judiciary and other Organs or Agencies of Government and where applicable to them, by all national and legal persons in Swaziland, and shall be enforceable by the Courts as provided in this Constitution."**

It is noteworthy that the claim of the respondent at the Trial Court arose from these violations. However, it is an actio ex dilecto and was treated as such.

[14] I will now deal with issue No. 3. In addition to the **viva voce** testimony of the respondent in court, the Trial Court also relied on the medical Report of Dr. L.D. Mathunjwa to hold that the respondent sustained injuries. It said **"furthermore, I have been availed a detailed report dated the 9th of January 2006, on the history and present condition of the Plaintiff, which medical report was admitted in evidence as exhibit 1. I must say that exhibit I strengthens my findings on the fact of the said injuries. Exhibit 1 which emanated from the Manzini Health Care and is signed by one Dr. L.D. Mathunjwa, details that the Plaintiff sustained the following injuries which I set forth hereunder in extenso."** After due and a painstaking consideration of the arguments of Learned Counsel for the appellants not to admit the report, the Court ruled that **"I come to the inexorable conclusion that the medical report which is prima facie evidence of the fact of the alleged injuries, stands unimpeached in these proceedings, thus**

rendering the necessity of expert evidence from Dr. Mathunjwa otiose, contrary to the contentions of the defence. The evidence of Plaintiff as to the fact and extent of his injury, is supported in material respects by Ext 1, and I accept it."

[15] The fourth ground of appeal and the arguments at paragraph of 8-9 of the heads of argument in support challenge the Trial Court's reliance on the said medical report.

The first argument against the use of the report by the Trial Court is contained at paragraph 8.3 of appellants' heads of argument and states that the appellants "cannot be taken to have admitted that the respondent was examined by mere saying that they have no knowledge of contents of Paragraph 9 which was cited by her Lordship at page 84 of the book. The respondent was put into strict proof thereof."

I will start the consideration of this argument by looking at the state of the pleadings in paragraph 12 of the respondent's particulars of claim and the appellant's response thereto in paragraph 9 of their Defendant's plea.

Paragraph 12 of the respondent's particulars of claim state that "Due to the assault on him by the military police, the plaintiff's medical practitioner, Dr. L.D. Mathunjwa, noted early osteophytosis on the anterior of his ankle joint.

12.1. The medical practitioner also noted severe injuries on the plaintiff's right ankle joint; which are permanently and progressively degenerating and are to cause him pain for the rest of his life.

12.2. He further noted that plaintiff's walking; standing and running will be greatly affected due to pain.

12.3. He saw the need for plaintiff to be on analgesia or anti inflammatory drugs to manage the pain."

Paragraph 9 of the defendants (appellants) plea in response thereto state that **"save to deny that the plaintiff was assaulted, the Defendants have no knowledge of the rest of he contents herein and plaintiff is put into strict proof thereof."**

[16] In considering the relationship between the above two pleadings, the Trial Court held that–

> **"In their plea the defendants did not challenge the allegation that the Plaintiff sought medical help from Dr Mathunjwa at Manzini. All they responded to the facts pleaded by the Plaintiff in this regards in paragraph 12 of the particulars of claim, is as appears in paragraph 9 of the defendants plea to be found on page 11 of the book as follows:-**
>
> **AD PARAGRAPH 12**
> **Save to deny that the Plaintiff was assaulted, the Defendants have no knowledge of the rest of the contents herein and Plaintiff is put into strict proof thereof.**
>
> **It is beyond dispute that the foregoing averment is not a denial of the Plaintiff's express pleading in**

this regards to the effect that Dr Mathunjwa, his medical Doctor, made the prognosis as to the injury as set out in the pleadings. They did not deny the fact of any medical examinations or that the said prognosis were made. They contented themselves with the assertion that the allegations are unknown to them. It was only in evidence in court that the Defendants belatedly sought to distance themselves from these allegations. We must not lose sight of the fact that parties are bound by their pleadings. Having categorically pleaded that these allegations are not known to them, thus in effect saying that they are not in a position to comment on the allegations, I am of the view that the Defendants cannot now seek to resile from that plea by setting up a defence that the Plaintiff never sought medical help from Dr Mathunjwa on the 9th of January 2006, as they now seek to advance in their evidence."

Rule 22 (2) High Court Rules states that **"the defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of these facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."** The rules prescribe the consequence of a failure to deny or to state the non-admission of fact in the particulars of claim in Sub-rule 3 as follows – **"Every allegation of fact in the combined summons or declaration, which is not stated in the plea to be denied or to be not admitted, shall be deemed to be**

admitted, and if any explanations or qualification of any denial is necessary, it shall be stated in the plea." It is therefore clear that Rule 22 of the High Court Rules allows a defendant who can neither admit nor deny a fact to allege that he has no knowledge of that fact, does not admit it and puts the plaintiff to the proof of it. The plea of non–admission is not a substitute for a denial. As held in the South African Case of Wilson v Sarah (1981)(3)SA 1016 (C) at 1018 (F), it can only be pleaded if it is clear that the defendant has good reason for being not able to deny or admit or confess and avoid. The learned authors of Herbstein and Van Winsen in the Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, edited by Cilliers, Loots and Nel (5th Edition, 2009, Cape Town Pp 590-591) state that "when the defendant does not have knowledge of the material facts, it is open to him to state this in the plea." The distinction between denying and not admitting an allegation of fact is clearly stated in the South African Case of Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd 1985 (3) SA 410 © at 417A-1 that the distinction lay in the fact that a plaintiff faced with a positive denial must anticipate and prepare for the leading by the defendant of rebutting evidence that contradicts the allegations he has made, whereas a plaintiff faced with an non-admission need not even anticipate and prepare to meet contradictory evidence, indeed need not even anticipate a limited challenge by way of cross-examination of his witnesses. A contrary view is expressed in another South African Case of N. Goodwin Design (Pty) Ltd v Moscak 1992 (1) SA 154 (C) at 162F – 1631 that the distinction is simply a matter of emphasis, and that a defendant who pleads a non-admission is entitled to cross-examine the plaintiffs witnesses as he wishes, and may lead rebutting evidence if he considers it necessary.

My view of the matter is that a defendant, who pleads non-admission of a fact, cannot lead rebutting evidence of facts not pleaded and cannot through cross-examination introduce a denial he did not plead. A defendant cannot introduce evidence of facts not pleaded by any means. The respondent was in detention by Military Police officers at a Barracks under the Command of the 1st Appellant. The appellants were therefore in a position to know if it was possible for the respondent who was in their custody to have sneaked out and undergo a medical examination or do any other thing. This is clearly demonstrated by the rebuttal evidence they led during trial to show that the circumstances of the detention in the Barracks were such that he was not in a position to sneak out. These are facts well within their knowledge at all material times. Yet they preferred to plead non admission. The Trial Court rightly refused to countenance such rebuttal evidence of facts not contained in any of the pleadings. As stated in Herbstein and Van Winson (5th edition) at page 591 relying on the decisions of the South African Courts in Heydennych v Frame (1905) 15 CTRI78, Croeser v African Realty Trust Ltd (1908) 25 SC 304 at 308 and Berkowitz's Trustee v Brewer and Segal 1908 36 NLR 560 at 563, when the defendant must in the nature of things be aware of the facts alleged in the combined summons or declaration, as the case may be, the defendant must admit, deny or confess and avoid. Since the appellants in paragraph 9 of their defendants' plea did not deny the allegation of the respondent in point of substance, they will be taken to have admitted the alleged fact that the respondent was able to sneak out of the guardroom and the Barracks to undergo a medical examination. This result is clearly stated in Rule 22 (3) of the High Court Rules.

[17] The contention of the appellants in paragraph 8.4 of their heads of argument that **“the Military Police which he claims allowed him to go to hospital was never mentioned, it only came on evidence”** is not valid. This is because, they had opportunity by virture of Rules 21 (1) High Court Rules to request that the respondent provide further particulars of the name and other identifying details of such Military Officer. Since they did not request for such particulars, the respondent was at liberty in law to lead evidence of such particulars including the name of the said Military Officer. The appellants who did not request for such further particulars cannot validly object to the respondent’s evidence in support of such allegation of fact. Further particulars or pleadings are details of the allegation made in pleadings or the case set up by the pleadings which more clearly define and delimit the issues to be tried. The further particulars are supplied for the benefit of the party against whom the pleading is filed. It is for that party to request by a letter to the pleader or apply to the court to order the pleader, to file further particulars of general or vague allegations in the said pleadings to avoid being taken by surprise at the trial and limit inquiry at the trial to matters set out in the particulars. Where a party omits to set out details which he ought to have given and his opponent does not apply for particulars, he is entitled to give evidence at the trial of any fact which supports the allegation. The opponent is not entitled and therefore cannot in law object to the admissibility of such evidence. See the English Cases of the Roy (1882) 24B 17 PD 117 at 121 and Woolley v Boad (1892) 24B 317 applying provisions in pari materia with our Rule 21 (1) of the High Court Rules.

[18] At paragraph 8.4 of the appellant's heads of argument it is argued that– **"Respondent at page 151 of the book stated that when he was released by the Military Police it was a weekend and other Military Officers had taken weekend off. The 9th of January 2006 was a Monday not a weekend."** This submission appears to contend that the testimony of the respondent that he was helped to sneak out of detention by a Military Officer is not believable. Such an argument cannot be validly made on the basis of the fourth ground of appeal. This is because the Trial Court believed the testimony of the respondent that he was helped to sneak out of detention by a Military Officer and got medically examined. There is no ground of appeal complaining that there was no basis for such belief. In any case, the question of the credibility of witnesses is a matter that is pre-eminently within the power of the Trial Court who heard, saw and observed the demeanor of the witnesses. An appellate Court cannot interfere with the view of the Trial Court on the credibility of a witness unless it is clear that the evidence does not support such a view or decision. In any case, even if the point had been correctly raised, it is clear from the evidence on record that the point lacks merit. I fail to see how the fact that certain Military Officers had taken a weekend off made it improbable that another Military Officer on duty allowed the respondent out of detention on the Monday following the weekend. The respondent had further testified that even if there were shifts the military police officer that released him that day was the one responsible for him.

[19] The respondent also contended concerning the medical report that–

(i) the medical doctor who examined the respondent should have made the medical report

(ii) the medical report alone is not proof of its contents without the viva voce evidence in court of the medical doctor who examined the respondent or who made the medical report.

Let me straight away state that the point need not be laboured that generally, the report of the medical examination of a person, whether made by the referral medical doctor from the written observation notes of the medical doctor who examined the person or by the medical doctor that actually examined such person, remains a **prima facie** evidence of its contents. I do not think that the arguments of the appellants in paragraphs 8.4 to 9 of their heads of argument have any merit for the following reasons.

Firstly, the appellants had the opportunity to demand that the respondent be medically re-examined during the proceedings of the Trial Court. The right to so demand is vested on the appellants by Rule 36 (1) of the High Court Rules which provide that –

> **"Subject to the provisions of this rule, any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed shall have the right to require any party claiming such damages or compensation, whose state of health is relevant for the determination thereof to submit to medical examination."**

[20] The appellants also had the option of invoking the provisions of Rule 36 (6) which provides that –

> **"Any party to such an action may at any time by notice in writing require any person claiming such damages to make available in so far as he is able to do so to such party within ten days any medical reports, hospital records, X-ray photographs, or other documentary information of a like nature relevant to the assessment of such damages, and to provide copies thereof upon request."**

The appellants did not exercise any of these rights. Secondly, the appellants were entitled to require the respondent by a letter to make available or apply to the court to summon the maker of the medical report or the medical doctor that examined the respondent to come to court to be cross-examined by the appellants on the contents of the report. **Exhibit 1,** the medical report shows the name of the medical doctor who prepared it as Dr. L.D. Mathunjwa and the address as Manzini Health Care, No1 Bishop Courts, and Car. Sandlane and Catharal Streets, Manzini. This shows that the maker of the report was available within Swaziland and could have been brought to court. The respondent had done all that is legally required of him to make available the witness for cross-examination by tendering in evidence exhibit 1 which contains names, address and other contact details of the medical doctor who mad the report. This is the position even in Criminal Proceedings in respect of which S. 221 (1) of the Criminal Procedure and Evidence Act expressly provide that –

(1) “In any criminal proceedings in which any facts are ascertained −

(a) by a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person; or

(b) by a veterinary practitioner in respect of any injury to, or the state or condition of the body of, any animal including the results of any forensic test or his opinion as to the cause of death of such animal,

Such facts may be proved by a written report signed and dated by such medical or veterinary practitioner, as the case may be, and that report shall be prima facie evidence of the matters stated therein:

Provided that the court may of its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report but such court shall not so require if −

(i) the whereabouts of he person are unknown; or

(ii) such person is outside Swaziland and, having regard to all the circumstances, the justice of the case will not be substantially prejudiced by his non-attendance.

(2) Where a person who has made a report under subsection (1) has died, or the court in accordance with the proviso to

subsection (1) does not order his attendance, such report shall be received by the court as evidence upon its mere production, notwithstanding that such report was made before the coming into operation of this Act."

[21] The appellants at paragraph 8.6 of their heads of argument contend that the report **"was handed in as an exhibit, applicant did not accept it however it's so unfortunate that in the record in such was not recorded"** see page 61 in the book." I understand this submission to mean that the Trial Court did not record that the appellants objected to the admissibility of the medical report. The appellants cannot validly make this submission at the hearing of this appeal on the record as it stands. A party to an appeal, who upon receipt and perusal of the record of appeal, discovers that the records do not include a certain part of the trial proceedings or that the Trial Court did not record such proceedings, should bring an application by motion on notice before the appellate court asking for any amendment of the record of appeal so that the omitted part of the trial proceedings can be included. The motion must be supported by an affidavit verifying the records and stating what actually happened at the trial. The other party may or may not oppose such application. If he or she chooses to do so, then he or she must file a counter- affidavit of facts stating the contrary. Until the court makes an order amending the records of appeal or allowing for supplementary records, the records as they stand remain sacrosanct and binding on all parties as well as the court in the appellate proceedings. All submissions and arguments in the appeal can only be validly made on the basis of the record as they stand.

In the light of the foregoing it is my view that the Trial Court rightly relied on **Exhibit 1** the medical report. The appeal therefore fails on the fourth ground.

[22] I will now determine the third issue concerning the award to the respondent of the sum of E61, 200 for medical expenses. This issue arose from the third ground of appeal. The only argument put forward in support of this ground is contained at paragraph 81.1 of the appellant's heads of argument as follows − "The court **a quo** should not rely on written submission of the respondent. In **Delisa Masina vs Umbotfo Swaziland Defence Force and another** Case No. 274/05, a Doctor testified that the average life expectancy for males in he Kingdom of Swaziland is 53 years and the court should have taken notice of this decision as the honourable judge referred to it at page 99 of the book."

[23] The medical report, **Exhibit 1** state the respondent's date of birth as 1963. This means that as at 9th September 2005 when the Trial Court delivered its judgment, the respondent was 48 years. There is no evidence in the record as to the average life expectancy of a male Swazi. Learned Counsel has argued that the Trial Court should have been guided by the testimony of a medical doctor in Delisa Masina v Umbutfo Swaziland Defence Force and Amos (Case No. 274/2005). I think that the Trial Court was persuaded by respondents Counsels Submission to presume that the respondent was likely to continue living up till 65 years.

[24] There is no established judicial approach to the determination of the life expectancy of a particular human person living in a particular locality. It is a notorious fact that the global average

life expectancy, at birth of a human person is 67.2 years (65.0 years for males and 69.5 years for female). This is according to the United Nations World Population, Prospects, 2006 Revision for the period 2005-2010. It is also a notorious fact that this average life expectancy varies from one country or locality to another according to the social, economic and political conditions existing in that country. The assumption is that, the better the living conditions in a community the higher the average life expectancy of persons in the place. The United Nations Organisation and its subsidiary, the World Health Organisation have, on the basis of its own guidelines for determining the average life expectancy of a country, developed a list indicating the average life expectancy of persons living in each country:

[25] I do not think that it is safe to rely on such general categorisation to deal with the particular circumstances of specific cases concerning the interest of specific individual human persons. Such generalisation may be appropriate in generally determining the average life of expectancy of persons in a country or a community of persons as a whole. The life expectancy per individual varies with individuals according to their biological, social and economic circumstances. In order to do justice in a case, a court should not concern itself with the average life expectancy of persons generally in a community but the life expectancy of the particular individual in the case before it. This is because experience has shown that even in countries regarded by the UN as countries with very low average life expectancy, many individuals experience life span of over 80 years. Assuming such a person is the plaintiff in a case such as this, it will occasion injustice against him or her to calculate the quantum of damages awardable to him or her or deal with him

or her on the basis of the general characterisation of persons in that country as not likely to live above 55 years. The injustice and absurdity of such reliance is clearly brought out by this case. The evidence here shows that at the date of judgment the respondent was 48 years of age. Yet the United Nations World Population Prospects 2006 Revision puts the average life expectancy of a male Swazis at birth at 31.62 years (see www.wikipedia.org/wik./ list of countries by life expectancy). This clearly shows that such hypothetical figures cannot be relied on to deal with live issues involving the rights and obligations of persons in the context of the peculiar circumstances in cases before courts. This position applies equally to all such hypothesis or forecasts whether from a medical doctor, a National Health Institution or an International Organisation. I do not, therefore, agree with the submission of learned Counsel for the appellant that the Trial could in determining the life expectancy of the respondent should have rather been guided by the expert opinion of the medical Doctor in Delisa Masina v Umbutfo Swaziland Defence Force and another (supra) that the average life expectancy of male Swazis is 53 years. Such a general characterization does not allow for the individualisation of the facts of the case which is the only sure way to do substantial justice in a case. The relevant life expectancy is therefore the life expectancy of the respondent and not the general average life expectancy of male Swazis. Each case must be decided on its own facts having regarded to the personal circumstances of the person whose life expectances in issue.

[26] The life expectancy of a person in a case is a matter for the court to decide on the basis of the facts which will include the personal circumstances, particularly the health condition of the person

whose life expectancy is an issue. The court can from the existing fact that the respondent was a normal and healthy male adult of 48 years as at 8th September 2005 presume he was likely to continue living till his ripe old age, which is generally known to be 65 years and above. That is what the Trial Court did without expressly saying so. This rule of common Law (both Roman Dutch and English) states that from the existence of a state of things at a given time, it may be inferred that the state of things continued to exist for a reasonable time thereafter according to the circumstances and the nature of the thing. This rule of evidence generally known as the presumption of continuance can be applied in this kind of case to presume that the person will continue living for a reasonable time. It has been applied in all kinds of situations. The Learned author of South African Law of Evidence (Durban Butterworths, 1970 Edition P 370) L-H Hoffman states one of those situations where this Common Law rule of evidence can be applied. He said where a normal person is known to have been alive upon a certain date and nothing further is known about him, it may be reasonable to infer that he was still alive at a reasonable time thereafter."

[27] In the English cases of R v Jones, 15 Cox 284 the Courts presumed from the evidence that a person was alive on a certain date, that he continued living 17 years after. The example of Hoffman and the decision in R v Jones illustrate that the courts can presume from the state of the facts before it the continuance of the life of a person up to a number of years. Having regard to the common course of natural events and the personal circumstances of the respondent, I think that the Trial Court was right in calculating the amount awardable for future medical expenses on the basis of a life expectancy of 65 years. In

Badelisile Mkhulisi v Rex (Crim. App. No 13/2010 delivered on 30-11-2011) this Court per Moore JA, for the purpose of determining the appropriate Sentence of imprisonment to impose, had regard to the personal circumstances of the appellant, particularly, that she was 64 years of age, in holding that she must be approaching the end of her natural life. This court went further say that "having regard to the life expectancy in Swaziland, a sentence of six years imprisonment (with 2 years suspended) was imposed." It appears the court presume that the appellant was likely to continue living up to the age of 70 years."

[28] I will now deal with the issue of award of interest of 9% per annum on the adjudged sums from the date the summons was issued. This issue derives from the first ground of appeal. Learned Counsel for the appellant has argued in paragraphs 6 to 6.3 of the appellants' heads of argument that the judgment sum of E161,200 was awarded by the Trial Court on the basis of a claim for an unliquidated sum. And as such interest thereon cannot be ordered to take effect from the date of the issue of the summons but from the date of judgment. The respondent's only reply to this argument is that the issue was never raised at the Trial and so cannot be raised for the first time on appeal and urged this Court to discountenance the above argument of the appellants.

[29] I will start the determination of this issue by finding out from the records if it is being raised for the first time on appeal. The records show that the issue was raised at the Trial in the pleadings. Infact both parties joined issues on this point. The respondent in paragraph 13 (b) of the particulars of claim claimed for interest thereon at the rate of 9% per annum

commencing from the date of issue of summons to the date of final payment. The appellants responded to the said averment in paragraph 10 of the defendant's plea by stating that − "The defendants deny liability to plaintiff for the amount claimed or any amount. They deny that plaintiff suffered damages in the sum of (E600,000.00) as alleged and the plaintiff is put to strict proof thereof" Although the appellant's did not expressly state their denial of the claim for interests, it is my view that the plea that "the defendants deny liability to plaintiff for the amount claimed or any amount" suffices as a denial of the claim for interest payable on the sum claimed. Once the claim for (E600,000.00) was denied, it follows that the claim for interest on it is denied. By this plea the appellants effectively joined issue with the respondent on every claim arising from and dependent on the claim for (E600,000.00) However it is a better and desirable practice to deny clearly all such incidental claims to avoid any question of whether issues were joined on such incidental claims. As it is there is no merit in the respondent's objection to the appellants' argument on this issue of the affective date of interest. I therefore dismiss the objection. The respondent raised no argument in reply to the merit of appellant's argument.

[30] The High Court Rules which prescribe and regulate the practice and procedure of the High Court in Civil proceedings is very silent on how the High Court should exercise its power to award interest on judgment sums and when such award of interest takes effect. It is therefore left for the Courts to determine this on the basis of the facts before it, common Law and case Law on the point. It is beyond argument that the sum claimed was an estimate of what the respondent expects. This certainly is

unliquidated. The general damages of (E100,000.00) and the (E61200) for future medical costs are all based on those estimates. The case of Ntombifuthi Magagula v Horney cited by Learned Counsel for appellants, clearly defines the nature of the claim and the award. The Swaziland Court of Appeal per Ramodibedi JA (as he then was) stated the law that "a finding on general damages comprising pain and suffering, disfigurement, permanent disability and loss amenities of life, as here, is essentially a matter of speculation and estimate."

[31] Since the claim of the respondent in the particulars of the claim is for an unliquadated sum, the judgment sum resulting therefrom can only attract interest from the 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 Mines Ltd AD 1 at 3 cited to us by Learned Counsel to the appellants. His Lordship correctly stated the law in the following statement–

> **"The civil law did not attribute to a debtor who did not know and could not ascertain the amount which had to pay. Non potest Improbus rederi, qui ignorat, quantum solvere debeat" Dig, 50, 17, 99). And that rule was adopted by the courts of Vriesland (See Sande, Dee… 3, 14, 9,). It has been followed in our own practice. No South African decision wa qu oted to us nor have I been able to find any on which before judgment has been awarded upon unliquidated damages. I do not**

think, therefore, that they can be given here. I do not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated the amount payable might have been ascertainable upon an enquiry which it was reasonable the debtor should have made. Such cases, should they occur, may be left open. But the present matter stands in a different position. It was not possible for the defendant to know or ascertain what damage its breach of contract had caused and it cannot therefore on the principles of our law be held liable for interest, prior to judgment upon the amount of damage."

Therefore I resolve this issue in favour of the appellants. The Order of the Trial Court that the interest of 9% per annum on the adjudged sums commence from the date of issue of summons to date of payment is hereby set aside to the extent that it orders commencement of such interest from the date of issue of the summons. It is hereby ordered that interest of 9% per annum on the Total sum of (E161, 200.00) shall commence from the date of judgment till final payment. This appeal therefore succeeds and is upheld on the first ground of appeal.

[32] Having determined the appeal of the appellants, I will now consider the cross-appeal by the respondent. The appellants contend in paragraph 10 of their heads of argument that the cross-appeal is incompetent and should be dismissed because it is filed out of time and no condonation has been sought for and obtained. The judgment of the Trial Court was delivered on the

9th of September 2011. The notice of cross-appeal dated 8th of October 2011 was filed on 8th October 2011.

Rule 8 (1) of the Court of Appeal Rules which prescribes the time for filing notice of appeal states that “The Notice of Appeal shall be filed within four weeks of the date of the judgment.” The Court of Appeal Rules do not prescribe how to compute the time prescribed by the rules for doing anything or taking any step in appeal proceedings before this Court. The High Court Rules provide for how the times prescribed therein for taking any step I n civil proceedings at the High Court shall be computed. It states in Rule 2 that “court day” means any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court”. There is no similar provision in the Court of Appeal Rules. So I am bound to compute the four weeks prescribed in Rule 8 (1) of the Court of Appeal Rules in accordance with S. 8 of the interpretation Act 1970. Which provides as follows −

> “In computing time for the purposes of a law, unless the contrary intention appears −
>
> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happened or the act or thing is done;
>
> (b) if the last day of the period is Sunday or a public holiday, which days are in this section referred to as

"excluded days," the period shall include the next following day not being an excluded day;

(c) when any at or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day , the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards not being an excluded day;

(d) when an act or proceedings is directed or allowed to be done or taken within any time not exceeding six days , excluded days shall not be reckoned in the computation of the time."

In the face of this provision this court cannot adopt any other method of computing the time prescribed by the Court of Appeal Rules. The computation of the four week period will exclude the date of judgment which is 8th October 2011 and commence from the 9th of October 2011. I take judicial notice of the fact that a week consists of 7 days. Therefore 4 weeks consist of 28 days. From 9th October 2011, 28 days expire on the 6th of October 2011. Therefore, the notice of Appeal was filed two days out of time.

[33] By virtue of Rule 8 (3) of the Court of Appeal Rules the Registrar of this Court should not have filed the notice of appeal when it was presented for filing by the respondent. It provides that "**the Registrar shall not file any notice of appeal which is**

presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained." The respondent did not obtain leave to appeal out of time. He is entitled to apply for such leave by virture of Rule 16 of the Court of Appeal Rules. He also had the option of applying for condonation by virtue of Rule 12 of the Court of Appeal Rules to permit him to depart from Rule 8 (1) Court of Appeal Rules in filing the notice of appeal. He did neither of this. The filing of the notice of appeal and the notice of appeal itself are incompetent and cannot sustain any valid determination of the grounds of appeal therein. The notice of appeal is the foundation of the appeal. It has to be valid to be able to sustain the appeal. If it is invalid, no valid appeal exists. The notice of cross-appeal is hereby dismissed. As if is there is no use considering the sole ground if appeal in the invalid notice of cross-appeal, for **ex nihilo nihil** fit.

[34] In the light of the foregoing, this appeal is allowed only on the first ground and dismissed on all other grounds with costs in favour of the respondent.

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E.A. AGIM

JUSTICE OF APPEAL

I agree :

_____

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree **:** _____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

For the Appellant **:** Mr. Dlamini (AG's Chambers)

For the Respondent **:** S.P. Mamba