IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 838/95

IN THE MATTER BETWEEN

MESHACK SHABANGU	PLAINTIFF
VS	
ATTORNEY GENERAL	DEFENDANT
CORAM	S.B. MAPHALALA - J
FOR PLAINTIFF	MR P. DUNSEITH
FOR DEFENDANT	MISS DUMA

JUDGEMENT

(15/09/98)

Before court is an action brought by way of summons by the plaintiff who claims that during or about 1992 to 1994 he was serving a sentence of imprisonment at Mbabane Prison, Sidvwashini where he was subjected to unlawful assault, was detained in solitary confinement for a period of 31 (thirty one days), without any prior disciplinary enquiry and was forced to perform menial and degrading work at the private house of the officer-in-charge of the Mbabane Prison. As a result of these acts he now claims damages to the value of E60,000-00 including costs of this suit.

According to his particulars of claim bis claim against the defendant is three-pronged.

On claim 1 he alleges that on or about the 3rd August, 1992, and whilst he was a prisoner in the custody of the prisons department under the Ministry of Justice in the Swaziland Government, a group of prison warders led by one sergeant Msibi unlawfully assaulted him by hitting him with sticks, chains and a plank, and by kicking and punching him. As a result of the unlawful assault he was also humiliated and degraded during the said unlawful assault, by being forced to strip naked and run around a prison building whilst being beaten by prison warders. As a result of these injuries and humiliation he sustained damages as follows:

General damages for pain and suffering, loss of	
Amenities	E25,000-00
Damages for indignitas	E 5,000-00
	E30,000-00

On claim 2 the plaintiff alleges that in about October, 1993 whilst in prison custody he was unlawfully detained in solitary confinement for a period of 31 (thirty-one) days, without any prior disciplinary enquiry. During such detention, he was deprived of all clothing, deprived of washing facilities, and required to sleep on the concrete floor. As a result of his unlawful detention he suffered damages as follows:

Damages for deprivation of liberty pain and suffering,

Hardship, humiliation and degration E15,000-00

On claim 3 he alleges that from about February 1993 and for about 9 months thereafter, whilst in prison custody he was forced to perform menial and degrading work at the private house of officer in charge of Mbabane Prison, including:

- Cleaning the house.
- Washing the clothes of the family of the officer in charge.
- Taking care of the baby of the officer in charge, including feeding it and changing its nappy.
- Bathing the father of the officer in charge, and treating his skin disease and leg wounds.

As a result of this demeaning and humiliating treatment he suffered additional hardships and punishment, missed his prison meals, and was degraded in the esteem of others and himself. He sustained damages arising from his treatment in the sum of E1 5,000-00, notwithstanding statutory demand. The defendant failed or refused to pay the plaintiff's claims.

The defendant opposes the plaintiff's claims and duly filed its plea where allegations in respect of claim 1 of assault in paragraph 4 is admitted but the nature of weapons used is disputed. The rest of the paragraphs in the plaintiff's particulars of claim are disputed and as plaintiff is put to strict prove thereof.

The matter came before court for evidence on the 21st July, 1998 where the plaintiff gave a lengthy account on the sequence of events leading to the various acts which are the subject matter of his claim. The plaintiff was cross-examined by the crown as represented by Miss Duma and it was suggested to him that it was not true that the officers assaulted him with planks, baton and chains. However, he maintained his evidence-in-chief. It was also put to him that it is not true that he was placed in solitary confinement for 31 (thirty one) days but he maintained that he was. He was cross-examined on claim 3 as to the hours he worked at the officer-in-charge's house.

The plaintiff then called Dr Khanya who submitted to the court exhibit "F" which is a medical report he compiled after he had examined the plaintiff in 1994. He stated that according to his observations the injuries sustained by the plaintiff were consistent with trauma. What he observed was that the injuries on the person of the plaintiff were caused by a previous assault on him.

The plaintiff then closed its case whereupon the government called the evidence of Dr. Khanyam who was the Chief Prison Medical Officer in 1992. He deposed that during that time about 6 (six) years ago he saw the plaintiff on the 19th January 1993 and that he had not treated the plaintiff prior to this date. He received a letter from a lawyer and then searched for the record. The plaintiff was complaining from cough for two years and he referred him to the Mbabane Hospital for x-rays of the chest. The doctor deposed that he never treated the plaintiff for any physical injuries. The doctor was cross-examined by Mr. Dunseith where he told the court that when the accused was taken into custody he was fit and did not have any injuries. Further it appeared during cross-examination that the doctor was referring to notes he had made and when asked about this he told the court he compiled these notes on the 10th August, 1993 and he cannot recall who had asked him to compile these notes. He agreed with Mr. Dunseith that in terms of the Prison Act he was enjoined to keep a book where he is to put all entries concerning the inmates he saw for medical reasons. That such a book would have been better than the notes he had compiled.

The government at this stage called DW2 Oscar Msibi who was a prison warder in Mbabane Prison in 1992. He told the court that he knows the plaintiff who was a prisoner there at the time. He told the court

that he does not recall assaulting the plaintiff. What he recalls is that the plaintiff was asked a few questions. He was asked by one William Magwaza, Daniel Dlamini and Absalom Simelane. They asked him why he replied a matter between other prisoners which did not concern him. He replied in an insolent manner. He then called him to come to him but he refused and he started shouting. DW2 then ordered that he be taken to the punishment cell. There he was ordered to do some exercises and thereafter he was told to wash and go back to his cell. It is not true that the prison warders assaulted him with an assortment of weapons. He was never assaulted according to DW2.

Thereafter, there was a commission of enquiry about an alleged assault of the plaintiff. DW2 told the court that after the exercise he id not see any injuries on the person of the plaintiff. The commission of enquiry was set up after a day of the exercise. The plaintiff never asked to be taken to hospital. It was not true that he asked and was refused to be taken to hospital. DW2 told the court that he was no longer at the prison in October, 1993 and would not know if he was taken to solitary confinement as alleged in claim 2. He was not also aware that he was taken to work for the officer-in-charge as alleged in claim3. This witness was cross-examined at length by Mr. Dunseith where he told the court that as a result of a commission of enquiry launched by the then Commissioner of Correctional Services Mr. Edgar Hillary. He was charged with others for an offence of assault on the plaintiff. He was found guilty and was fined.

The government then called DW3 William Vusi Magwaza who told the court that he recalled the alleged assault on the plaintiff. On the date in question the prisoners where having breakfast. He then saw a certain prisoner who had a bad haircut. He asked him who have shaved him in that fashion. He said he was shaved by one Lucky Dlamini. The plaintiff then intervened and insulted all the warders. Sergeant Msibi then called him and cautioned him because the previous day he had warned him not to talk in this manner. However, the plaintiff proceeded to shout and issuing insults at them. It is then Sergeant Msibi ordered that he be taken to the punishment cell. He was striped after he had run around the punishment block. DW3 testified that it was not true that the plaintiff was assaulted with an assortment of weapons that he got injuries and was bleeding profusely.

DW3 further told the court that there was no incident when the plaintiff was taken for solitary confinement for 31 days. If that took place it would appear in his record. DW3 also told the court that he recalled plaintiff working at the officer-in-charge's house. He was only doing gardening and sweeping the premises. This did not include cooking because the officer-in-charge had his own servants.

The government then called DW4 Steven Jabulane Mabuza who was the officer-in-charge of the prison at the material time. He denies that the plaintiff was made to do menial work in his house as alleged in claim 3. He deposed that the plaintiff only helped in cleaning the outside of the house. DW4 gave a lengthy account on how the plaintiff was associated with him. That after he was released from prison because they had developed a good relationship plaintiff used to pay him informal visits. He came to visit on a number of occasions and at one time he confided in him that he was once arrested in South Africa and on the advise of Prince Khuzulwandle he laid a claim against the South African Government for unlawful detention. However, he did not get enough compensation. His desire was to get money so that he can buy a kombi to transport people to Johannesburg as prior to his arrest he used to drive kombies for Prince Khuzulwandle to Johannesburg. DW4 deposed that he developed such a good relationship with the plaintiff that plaintiff used to go with his wife who is a hawker to Johannesburg to show her where she could buy merchandise cheaper. DW4 also told the court that the plaintiff was never put to solitary confinement at all. This witness gave the court the impression that plaintiff is making all this up in order to claim money from government.

The government then closed its case. The court then heard submissions.

Mr. Dunseith on claim 1 directed the court's attention to page 6 of the Book of Pleadings, to wit the defendant's plea where defendant agrees that on the date in question the warders unlawfully assaulted the plaintiff. The only fact that is denied are the weapons used. Defendant admits that there was an assault. However, the defence witnesses who gave evidence denied that there was an assault. There is a

contradiction. The defendant has not led evidence to show the nature of the assault. Plaintiff on the other hand has given the court a graphic picture on how the assault was carried out by the warders. The

5

version given by the plaintiff has a ring of truth whereas defendant's version is contradictory as it contradicts the plea. As the plaintiff was confined in jail it is difficult for plaintiff to get corroborative evidence. This happened in the solitary building out of view of the other prisoners. Mr. Dunseith submitted that on a balance of probabilities the court will find that the plaintiff was assaulted.

On the question of the nature of injuries, the court should accept that he was assaulted with batons, chains and planks as these are consistent with the injuries on the plaintiff. These injuries are confirmed by the medical report of Dr. Khanya. On the other hand defendant called Dr. Khayam defendant has decided not to produce any of the statutory books in terms of the Prisons Act. The defendant did not discover those documents upon request. There was a failure to produce those documents. The defendant has something to hide. The evidence that Dr. Khayam looked at the books and then made notes is inadmissible. To this effect Mr. Dunseith directed the court's attention to Hoffmann and Zeffertt on the South African Law of Evidence at page 276 and 277 where the learned authors stated the law that no evidence is ordinarily admissible to prove the contents of a document except the original document itself (see Standard Merchant Bank Ltd vs Creser 1982 (4) S.A. 671 (w) at page 674 b). Mr. Dunseith contended that where the original document is present it has to be produced. Dr Khayam said he could not remember the plaintiff. The evidence of the doctor is of no assistance to the defendant.

On the question of the quatum of damages Mr. Dunseith referred the court to R.G. McKerrow on The Law of Delict. The plaintiff can claim general damages. The court has to look at similar cases to assess an appropriate quantum of damages. Mr. Dunseith referred the court to The Quatum of Damages of Bodily Injuries (Vol 1) but readily conceded that the cases are too old to give the court proper guidance. He cited the cases of Hlapho vs Minister of Justice decided in 1963 and the case of Mbango Matsenjwa vs Dumisa Civil Case No. 759/89 that in the latter case the assault was more serious than in the present case. All in all Mr. Dunseith submitted that the sum of E30,000-00 was reasonable in the present case.

On claim 2 the plaintiff alleges that he was in solitary confinement for 31 days. Mr. Dunseith argued that this is not an afterthought on the part of the plaintiff as evidenced by the letter of demand he wrote through his attorneys to the office of the Attorney General upon his release. The court was not given the evidence of the Punishment Record Book. The court is left with the evidence of the plaintiff on the balance of probabilities the court is to rule in his favour. DW1 could not assist as he was not present. DW2 and DW3 both denied that plaintiff was in solitary confinement. The books were not produced to the court so that the court can check if there were any entries. On the quatum of damages Mr. Dunseith referred the court to the case of Charles Twala vs Swaziland Government Civil Case No. 973/93.

On claim 3 Mr. Dunseith contends that for about 9 (nine) months the plaintiff was made to do menial work for the officer-in-charge. The evidence of the officer-in-charge was not put to the plaintiff when he testified. The evidence that plaintiff worked in the house was not challenged. The only thing that was challenged were the hours in which he

6

worked. Plaintiff testimony was in a large measure not tested in cross-examination by the defendant.

The defendant as represented by Miss Duma then responded to Mr. Dunseith submissions.

On claim 1 Miss Duma agrees with the plaintiff that there was an assault on the person of the plaintiff. However, plaintiff's story is rather exaggerated. That plaintiff provoked the assault on himself. She cited The Law of Delict (supra) at page 154 on the proposition that provocation is a ground for mitigation of damages, so much so that the court may, on proof of provocation, refuse to assist the plaintiff, and hold that by reason of having provoked the assault he is not entitled to any damages (see Thomson vs

Harding 1914 C. P. D. 32). Miss Duma contends that the evidence show that the plaintiff was insolent contrary to Regulation No. 55 of the Prison Act.

On claim 2 it is the governments view that the plaintiff should have called someone to come and corroborate his story that he was in solitary confinement for 31 days. In any event, if the court finds that he was in solitary confinement it is the government's view that such confinement was in conformity with the Prison Act to wit, Regulation 51 (1) and Regulation 62 (1) of the said Act.

On claim 3 the crown's view is that it is denied that plaintiff was a slave at DW3 's house. We only have the uncorroborated evidence of the plaintiff.

On points of law in reply Mr. Dunseith submitted that on claim 1 provocation was not pleaded in the defendant's plea. He cited R.G. McKerrow (supra) at page 154 where the learned author states, thus:

"It is therefore competent for the defendant to plead provocation, not only in reduction, but also in extinction of the plaintiff's claim (see Powell vs Jonker 1959 (4) S.A. 443 (j)) "

He directed the court's attention to Regulation 32 (3) of the Prison Act which provides a statutory duty that plaintiff be examined at the time of the injury. The defendant took the risks for not having the plaintiff medically examined at the proper time.

These are the issues before me. I will deal with the plaintiff's claims in seriatim.

On claim 1 it appears to be common ground that on the day in question there was an unlawful assault on the person of the plaintiff. The only point of divergence between the parties is what was used in the assault and the nature of the injuries sustained by the plaintiff. The plaintiff's version is that he was assaulted by batons, chains and planks. The defendant in its plea admits the assault but does not say what was the nature of the assault on the plaintiff. The defence witnesses deny that the plaintiff was assaulted in direct contradiction to the government's plea which forms part of these proceedings. To me it appears that the government is attempting to conceal evidence in this case. Why

would a Commissioner of Correctional Services intervene on behalf of the plaintiff and order that a commission of enquiry be set up if the case was so insignificant as the government witnesses would like the court to believe. One witness told the court under cross-examination that as a result of the enquiry he was found guilty and fined. I do not believe the story that the plaintiff was merely made to run around the punishment cell and thereafter told to shower and ordered back to his cell. The evidence of Dr. Khanya is significant in this regard. The injuries he observed on the plaintiff immediately upon release are consistent with the description given by the plaintiff's viva voce description of the assault. On the other hand the government is not forthcoming with evidence. The Prison Act prescribes that a prison medical officer is to keep a medical report where he enters all medical entries pertaining to inmates who come before him. In this instance the government refuses to discover this document which would have been vital to the defendant's case. It would have easily explained the nature of the injuries sustained by the plaintiff. Dr. Khayam who state that he saw the plaintiff at the material time does not advance the defendant's case any further. He tells the court that he does not recall seeing the plaintiff. He refers to notes he had made extracted from the medical book kept by the prison in terms of the Prison Act. I am in full agreement with Mr. Dunseith that his evidence is inadmissible. The law is that no evidence is ordinarily admissible to prove the contents of a document except the document itself (see Standard Merchant Bank Ltd case (supra). It was the easiest thing for the defendant to do and produce the original document to dispel any suspicious of underhandness on the part of the defendant. In the circumstances I have no alternative but to accept the plaintiff's version of events on the manner in which the assault was carried out and on the nature of the injuries he sustained as a result of the assault.

Now I come to the quantum of damages to be awarded to the plaintiff. I have looked at the cases referred to by the plaintiff and agree that they are pretty old decisions to give an accurate guide in a case such as

this. Before proceeding any further I agree with Mr. Dunseith that the defendant cannot at this stage plead provocation. The law requires the defendant to allege provocation in its plea, (see KG. McKerrow at page 154 (supra). It appears to me, on the circumstances of the case that a reasonable award of damages would be E15,000-00 to cover for general damages for pain and suffering, loss of amenities of life and permanent disability and E5,000-00 for damages for indignitas.

On claim2 of the plaintiff's claim that he was placed in solitary confinement for 31 days I again agree with Mr. Dunseith that the defendant refused to discover the Punishment Record Book which might have placed the matter at rest. Defendant's submission that such confinement was in conformity with the Prison Act more particularly Regulation 51 (1) and Regulation 62 (1) does not hold much water Why was the document not produced? This document might have shed more light on the reason why the plaintiff was so confined. On all probabilities the story by the plaintiff stands unchallenged. It is my considered view that a sum of E10,000-00 would be reasonable for damages for deprivation of liberty, pain and suffering, hardship, humiliation and degradation.

On claim3 which is the allegation that plaintiff whilst in prison custody he was forced to perform menial and degrading work at the private house of the officer-in-charge of

Mbabane Prison. The plaintiff gave a graphic account on the nature of work he was made to perform at the officer in charge's house. This evidence was by and large not challenged by the defendant and remains uncontroverted. The authors Hoffmann and Zeffertt in their South African Law of Evidence (4th Ed) at page 461 stated that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts which intends to prove in contradiction, so as to give the witness an opportunity for explanation similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters which it will be alleged make his evidence unworthy of credit. In Small vs Smith 1945 (3) S.A. 434 (SWA) at page 438, Classen J. said:

"It is, in my opinion, elementary and standard practice for a party to put each opposing witness so much of his own case or defence as concerns that witness and in need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved".

Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness's evidence. In the instant case the plaintiff was briefly cross-examined and the story by DW4 was never put to him it came as a surprise at the tail-end of the defendant's case. On a balance of probabilities one is forced to accept the plaintiff's version no matter how inpalatable it may be. The crown failed dismissally to construct its case in an orderly fashion. DW4 does not seem to have been interviewed by defence counsel prior to him giving evidence. DW4 came out of the blue. For these reasons I hold that the plaintiff has proved his case in respect of claim3. It is also my considered view that a reasonable quantum of damages under this claim would be E10,000-00.

In the result, I rule as follows:

1. For claim 1 plaintiff is granted damages of the sum of E20,000-00;

2. For claim 2 plaintiff is granted damages of the sum of E10,000-00;

3. For claim 3 plaintiff is granted damages of the sum of E10,000-00;

4. Costs of this suit.

S.B. MAPHALALA

JUDGE