

# **IN THE HIGH COURT OF SWAZILAND**

**CASE NO. 274/2005**

**In the matter between:**

**DELISA KENNETH MASINA**

**PLAINTIFF**

**AND**

**UMBUTFO SWAZILAND DEFENCE FORCE**

**1<sup>st</sup> DEFENDANT**

**ATTORNEY GENERAL**

**2<sup>nd</sup> DEFENDANT**

**CORAM: MAMBA J**

**FOR PLAINTIFF: MR B. ZWANE**

**FOR DEFENDANTS: MS MAPHALALA**

## **JUDGEMENT**

**14<sup>th</sup> November, 2008**

[1] On the 15<sup>th</sup> April, 2004 the plaintiff who was then about 29 years old was shot and wounded by a member of the Umbutfo Swaziland Defence Force, who was at the time acting during the course and within the scope of his employment and or as a servant of the Swaziland Government. This incident occurred at a cattle grazing area at Lugogo Mountain at Ezulwini.

[2] Apart from what is stated in the plaintiff's particulars of claim, no medical report has been filed detailing the nature and extent of the injuries suffered by the plaintiff as a result. The absence of a medical report has not been explained by the plaintiff and this is rather surprising in view of the fact that the plaintiff was examined by a medical doctor not long after the shooting incident. In his particulars of claim, the plaintiff states that he "received severe injuries and had to undergo medical treatment for :-

(a) A fractured skull

(b) Damaged eardrum

(c) Impaired eye vision [and]

(d) A twisted right arm" and as a result of such injuries suffered occasional spells of dizziness and was forced to abandon his job as a vegetable farmer. As a consequence of the above acts by the servants or agents of the Government, the plaintiff avers that he has suffered damages in the sum of E600.000-00 which is computed or made up as follows:

"(a) Hospital expenses E400.00

(b) Estimated future medical expenses E10 000-00

(c) Loss of earnings from date of Assault to date 7,000-00

(d) Estimated future loss of earnings 120,000-00

(e) General damages (pain and suffering, loss of amenities of life and permanent disability 349 200.00"

He has also applied for interest on the total amount claimed plus costs of suit.

[3] Whilst the Defendant did file a plea herein, it was submitted by Counsel for the Defendant that save to deny that the plaintiff was engaged in employment and suffered loss of earnings, and for the amounts claimed, the Defendant admits the averments contained in the plaintiff's particulars of claim, namely that;

(i) the plaintiff was shot and wounded by a member of the Umbutfo Swaziland Defence Force on the 15<sup>th</sup> April 2004

(ii) the said member of the Defence Force was acting during the course and within the scope of his employment as such

- (iii) the shooting was intentional, wrongful and unlawful
- (iv) It resulted in the injuries stated above and that
- (v) the Defendant is liable to the plaintiff for those injuries and consequences thereof.

The plea was therefore abandoned or not persisted in and the defendant did not lead any evidence.

[4] The plaintiff led evidence in proof of his damages and was cross examined by Counsel for the Defendant regarding the extent or quantum of such damages.

[5] The plaintiff testified that at the time he was injured as aforesaid he was self employed as a commercial vegetable farmer at his home which is situated at Ezulwini. His vegetable garden was on Swazi Nation land. He told the court that he sold most of his produce to members of his community and the rest was used for his own personal domestic consumption. His earnings from this project were estimated to be a sum of E7,000.00 per year, which translates to a sum of just about E600.00 per month. He submitted his bank statement to show that he operated a banking account at the material time and that he made regular deposits into this account.

[6] Just one sheet or page of his bank statement (exhibit B) was submitted to court. This statement records transactions for a period of one year, ending on the 28<sup>th</sup> January, 2004. The balance reflected on that date is a sum of E30.60. This statement was sourced from the Swaziland Building Society on the 3<sup>rd</sup> July 2008. One notes that inspite of the credit balance I have referred to above, there were debits and credits being made on the account prior to the 28<sup>th</sup> January 2004.

[7] The Defendant submitted that the plaintiff was at the material time a mere herdboy and had no income whatsoever and therefore suffered no

loss of earnings. It is, however, noted that whilst the credits into the plaintiff's account were not regular or consistent, this fact alone can not lead to the conclusion that he had no income at all. His evidence, it has to be remembered, is that he did not sell all his produce. Vegetables that were not sold were consumed within his household (naturally these would not be reflected in the Bank statement). The money realized from his sales was either reinvested in his gardening or used to purchase his other personal needs and would not necessarily be banked.

[8] From the above evidence, I am satisfied that he has, on a preponderance of probabilities proven that he had this income generating project going on and his earnings therefrom were as pleaded by him. The evidence led shows that all past medical and or hospital expenses were borne by the Defendant and therefore the plaintiff is not entitled to claim under this heading. However, with regards to future medical expenses, Dr E.T. Huamba, the Ear Nose and Throat specialist who examined the plaintiff on the 18<sup>th</sup> June 2008, concluded that;

"The right ear canal and right ear drum are both normal. The left external ear canal was blocked with a plug of wax which we removed.

On further [examination] the left external ear canal has healed with fibrosis and subsequent narrowing. ...The left ear drum has also healed and is now intact but thickened with fibrosis. ...There is normal hearing in the right ear. This kind of hearing loss [on left ear] is permanent. It could have resulted from both the explosive injury as well as from the fracture base of the skull sustained due to the gunshot. Since the right ear has normal hearing, all efforts should be aimed at preserving its function. Hence quarterly check-up and follow up by an ENT [EAR NOSE AND THROAT] specialist is vital."

Clearly, there is need for future medical provision. She estimated the costs for each of these check-ups to be around E10.00 at Government Health Centres. The plaintiff is 33 years old and taking into account the average life expectancy for a male in Swaziland to be 53 years - as testified by the

Doctor, - the plaintiff will have to undergo such medical check-ups for the next 20 years, four times each year at a cost of E40.00 per year. These costs or expenses will obviously increase or go up over the years to come and when inflation is also filtered through the whole equation, this amount will be progressively higher with the passage of time.

[9] The plaintiff has claimed a sum of E10 000.00 in respect of future medical expenses. That he does need to be examined by a Doctor in the future has been established. This has been shown by the evidence of the Doctor who testified that the plaintiff needs to have medical check-ups every three months. The plaintiff has, apart from what Doctor E.T. Huamba stated, not led any evidence to justify the sum of E10 000.00 that he claims in respect of future medical expenses. The Doctor said a sum of about E10.00 per visit is payable at a Government Hospital. However, Mr Zwane in his submissions stated that this court should take judicial notice of the fact, as he called it, that Doctors in the private sector charge a minimum of E250.00 per consultation with their clients and this is, the amount I should base an award of damages for future medical and hospital expenses on. There is no reason whatsoever why I should take judicial notice of this. The issue is not notorious enough for the court to do so. In any event, the plaintiff has not advanced any reason in his evidence why he should not be granted an award under this heading based on the current charges obtaining at government health centres. Mr Zwane was only able to submit that government health centres are notoriously constantly without specialized medical care or personnel that would deal with the medical condition of the plaintiff and whilst there is currently such a specialist at the Mbabane Government Hospital the court must again take judicial notice of the fact that this doctor will soon leave Government for greener pastures and she would not be replaced by Government. There is no shred of evidence to persuade or induce me to come to this rather speculative conclusion. I can not decide this issue based on conjecture and speculation.

[10] Taking into account all the evidence before me and based on current charges at Government Health Institutions plus the probable impact of inflation on our currency in the next 20 years, I am of the considered view that the plaintiff be awarded future medical and hospital expenses at the rate of E15.00 for each quarterly medical check-up. This translates to a sum of E60.00 per year. This shall endure for a period of 20 years by which time the plaintiff shall have reached the age of 53 years. However, that does not mean that he is entitled to be awarded damages in respect of loss of future earnings. He must first prove that he suffered a loss in his ability to generate income as a result of the gun shot injuries he suffered at the hands of the servants of the Defendant.

[11] *PJ Visser and JM Potgieter* in their **Book Law of Damages (1993 ed)** at Page 11 state that the general principles of our law governing damages are as follows :

"(a) interesse is defined in terms of the actual loss suffered.

(b) Liability for damages includes liability for loss of profits. The expectation of profits must, however, be certain in order to render the defendant liable.

(c) In the assessment of damages no account is taken of affective or sentimental loss. The assessment is based on a general objective standard of value.

(d) Adequate proof of loss should adduced. Although Voet accepts the award of a small sum of damages, this should not be confused with nominal damages from English law. The *actio legis Aquiliae* is only available when there is proof of actual damage.

(e) Since proof of damage may be difficult, the court should in doubtful cases where the plaintiff does not prove his damage with a high degree of certainty, favour the defendant by awarding law damages.

(f) The principle of Codex 7.47 in terms of which damages may not exceed double the value of the object in dispute, was accepted.

(g) Damages in terms of the *actio legis Aquiliae* have no (primary) penal function. This means that a defendant who has in a culpable manner cause damages is liable for more than the actual damage sustained. ...

(i) Damages may be awarded for the causing of pain and suffering as a result of bodily injuries." (footnotes have been omitted by me).

And at page 435-437 the learned authors state that

"A plaintiff has to prove on a balance of probabilities that he has suffered damage, the extent of such damage and what amount of compensation he should be awarded in

respect thereof. Damage and damages are determined through the appropriate measure of loss as well as the particular circumstances of each case. ...If a plaintiff has not proved his damage, he is not entitled to allege that, since the defendant is in possession of the necessary documentation an 'enquiry as to damages' should be held so that the damages which are to be found to be due to him may be paid. ...In cases [wherein damage and damages are capable of precise calculation or assessment], it is incumbent upon a plaintiff to produce sufficient evidence substantiating the exact amount of damage. Where a plaintiff has proved some patrimonial loss but there is insufficient evidence to enable (precise) assessment, the court may in some instances estimate damages on the best available evidence. However, where evidence was in a general sense available to the plaintiff but he has failed to produce it, the court will not attempt to assess his loss and will order absolution from the instance. It is not the task of the court to award an arbitrary amount of damages where a plaintiff has not produced the best evidence upon which a proper assessment of the loss could have been made."

See also the case of **NTOMBIFUTHI MAGAGULA v THE ATTORNEY GENERAL**, Appeal case 11/2006 (unreported) judgement delivered on 18/05/06) (in particular paragraph 20 thereof).

[12] In casu, the plaintiff has not alleged that or led evidence to prove that because of his injuries aforesaid, he is now unable to do his gardening or that his ability to work on his garden has been impaired, reduced or diminished in anyway. This court can not assume that because he was shot in the head and suffered permanent loss of hearing on his left ear and sometimes suffers dizzy spells, he has permanently and totally lost his ability to earn the E7,000-00 a year he got from his gardening project. He was examined by Doctors both in Swaziland and in the Republic of South Africa pertaining to his injuries. No medical report has, however, been filed by the plaintiff pertaining to this aspect of his claim. He has therefore not shown that he is entitled to anything in respect of loss of future earnings and nothing is awarded to him under this heading.

[13] The plaintiff testified that he was in a hospital in the Republic of South Africa for at least 6 weeks before being re-transferred to the local hospital. He has not told the court when he was actually discharged from hospital and whether he was certified unfit to resume his work. He testified, however, that after his discharge from hospital he was required to see a

medical doctor every two months for further examination and this occurred in 2004 and 2005. I shall assume in his favour that he was not able to go back to his work during this period as he was recuperating. I am of the considered view that he is entitled to loss of earnings for a period of 1 year in respect of this period, as pleaded by him in his particulars of claim.

[14] I now examine the issue of General damages for pain and suffering and loss of amenities of life and permanent disability. A Global figure of E349 200.00 has been claimed by the plaintiff in this regard. No effort whatsoever has been made to break it down into its component parts or justify it. The court has been virtually left in the dark to grope for an answer to this. Accepting that the actual quantum or amount that will be awarded in each case is discretionary, the court needs to be assisted in this regard by counsel. It serves no purpose at all for a plaintiff to claim an X amount in his summons only to say, 'I leave it in the capable hands of the court to determine what would be just in the circumstances.' Such stance is in my judgement unhelpful and unacceptable. Litigants, and I dare say counsel ought to do more than this. Cases and issues therein are decided not on sentiments or emotions, but on evidence.

[15] In **Magagula's case (supra)** @ paragraph 14 RAMODIBEDI JA had this to say:

"I turn now to that most difficult part of the case, namely the measure or general damages. Difficult in the sense that there are no scales by which pain and suffering can be measured in monetary terms. I commence this exercise by pointing out that the principles which would guide a court in the assessment of general damages are well established. Essentially the question of the assessment of such damages is a matter pre-eminently within the discretion of a trial court. ...a finding on general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life, as here, is essentially a matter of speculation and estimate."

In the present case, the plaintiff suffered a gun shot wound on the back of



his head. Immediately after being injured he lost consciousness and came to on the next day when he was being transferred to a clinic or hospital in Pretoria. Upon gaining consciousness, he realized that he was totally blind and remained in this state for a period of three weeks. The spent bullet was extracted from his head after four weeks. He was discharged from the Pretoria Clinic after 6 weeks and re-transferred to the Mbabane Government hospital for further treatment and observation. He had to be examined by a Doctor every two months for an unspecified period. He suffered severe headaches and dizzy spells. He suffered more than 80% hearing loss on his left ear and this is permanent. The base of his skull was fractured. For an unspecified period, his left ear emitted a watery blood-stained substance that had an unpleasant odour, which was, no doubt a source of grave embarrassment to him. The Ear Nose and Throat specialist has recommended that the plaintiff should be examined by a specialist in this field every three months in order to preserve the functioning of the plaintiff's right ear -so that the plaintiff is not rendered completely deaf.

[16] The plaintiff is a young man and was born in 1974. Although he completed his High school education in 1995, he still nursed the hopes of training to be a teacher one day. He said he had graduated from high school with 8 (eight) credits and therefore qualified to enroll as a student teacher in our teacher colleges. He, however, did not tell this court why he was unable to be enrolled as such for a period of close to ten years, until he was injured. In any event, there is nothing to indicate that his injuries herein have disqualified him to be enrolled at a teacher training institution.

[17] The plaintiff suffered severe injuries, pain and suffering both physically and emotionally. As stated above, he was totally blind for a period of three weeks and must have during that period suffered emotionally about the prospects of his sight being permanently lost. On a comparative note though, the injuries suffered by the plaintiff in this case are relatively less

severe than those suffered by the Appellant in the **Magagula case (supra)**.

In that case the court described them as "horrendous" and the pain "excruciating" and the Appellant's prospects of marriage had diminished and she had 'to live with the indignity of having to wear diapers". Further, the Appellant had lost control of her bowel movements and flatus and she still faced the prospects of a major operation to remedy her situation. She was awarded a sum of E200,000.00 for General damages. The plaintiff is, in my judgement entitled to an award significantly less than this. He is accordingly awarded a sum of E100,000.00 under this heading. (See also the case of **THABISO MASILELA v MABANDLA MOTSA**, case 2998/07 (unreported - judgement by Maphalala J delivered on 07<sup>th</sup> March 2008 where a sum of E30,000.00 was awarded for an assault that was admittedly less severe than the present).

[18] In summary therefore the action succeeds with costs and the plaintiff is awarded damages as follows:

- (i) E7000.00 (seven thousand Emalangeni) for loss of earnings (during recuperation)
- (ii) E1200.00 (twelve hundred Emalangeni) for future medical expenses (for the next 20 years calculated at 4 times a year at a cost of E15.00 per attendance or consultation).
- (iii) E100,000.00 (one hundred thousand Emalangeni) for General damages (for pain and suffering and permanent disability). The total award is a sum of E108,200.00 plus interest thereon at the rate of 9% per annum with effect from the 24<sup>th</sup> November, 2008 and costs of suit.

**MAMBA J**