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IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1976/2008

In the matter between

ALSON MASINGA		**Applicant**
And		
TERENCE E. REILLY N.O.	**First**	**Defendant**
ELIZABETH REILLY N.O.	**Second**	**Defendant**
JAMES REILLY N.O.	**Third**	**Defendant**
PETROS MGCIBELO NGOMANE N.O	**Fourth**	**Defendant**
BIG GAME PARKS TRUST	**Fifth**	**Defendant**

Neutral Citation: ***Alson Masinga*** v ***Terence Evezard Reilly N. O. & 4 Others (1976/2008) [2014] SZSC391 (31st October 2014)***

Coram: **Dlamini J**

Heard: **25th September 2014**

Delivered: **31stOctober 2014**

Question of liability - plaintiff to discharge onus probandi – section 23 and 24 of Game Act No. 51 of 1953 – plaintiff to prove unlawfulness or unreasonable assault – where plaintiffs evidence is contrary to his pleading, court to reject his evidence- where plaintiff is found to be within the boundaries of reserve, element of unlawfulness not proved – where plaintiff found to be carrying weapon and within reserve, rangers entitled to presume plaintiff was in pursuit of game unless contrary is proved – where plaintiff asserts that he was not within the boundaries of reserve, no justification to find in his favour that carrying of weapon was not for poaching if evidence show that he was within the reserve –

Summary: Plaintiff's claim is for the sum of E750,000 in respect of damages arising from assault inflicted upon him by defendants' employees. The defendants deny liability on the basis that their employees were effecting lawful arrest upon plaintiff.

The Parties

[1] The particulars of claim reflects that the plaintiff is a Swazi male of Mambawini area, district of Lubombo. The first to forth defendants are trustees of fifth respondent.

Oral evidence

[2] The plaintiff gave evidence in his own case. He informed the court on oath that he was born in 1958 and that he was illiterate. He was married with seven children. On 12th August 2001, he went to cut logs near Mbuluzi river. He then left the logs. He returned to collect them. He was in the company of his nephew. While collecting the logs, two men pounced on them without greeting them. They further insulted them. They assaulted him with a bolt stick on the head. He became unconscious. He woke up and found himself being dragged. He stood up. They assaulted him on his shoulders. They continued to drag him towards the sugar cane fields. One of them then beat him with a bush knife on his right ear.

[3] When they were near the sugar cane field, one gave him a black bag to carry. This bag fell down. The one who had given him the black bag opened his trouser's zip and bit his penis. A motor vehicle arrived and conveyed him to Simunye Police station. He then learnt from the police that the people who assaulted him were game rangers from Big Game Park.

At the Police station, he had to be given a pen and paper to write his name as he could not speak.

[4] He was taken to Siteki Good-shepherd hospital by the police. He spent two days in that hospital. He was thereafter transferred to Mbabane Government hospital where he spent forty one days.

[5] As a result of the assault he sustained an injury on the head and the ear. His right ear and right arm are not functioning. He experienced pain in his penis whenever rolling the hay. He was attended by the doctor. He is no longer employed owing to the malfunctioning hand. He depends upon his wife for a living. Before then he was a sugar cane cutter and weeding sugar cane fields. He denied defendants' version that he was inside the game park and that he was carrying snares. He further stated that he did not resist any arrest. He admitted having carried a bush knife but did not use it to assault any person.

[6] He was later summoned to appear before the Magistrate. However, his case could not proceed because he could not speak. He is today unable to speak coherently, whereas it was not the case before.

[7] This witness was cross examined. I will refer to his cross examination later in this judgment. It was agreed between the parties that this witness stands down to be recalled for purposes of an inspection *in loco*. The next witness was plaintiff's wife, PW2.

[8] PW2 identified herself as Fikile Mpandza. On oath, she informed the court that the plaintiff was her husband. On 12th August 2001, plaintiff left home saying he was going to collect logs in the company of his nephew.

However, his nephew returned and informed her that plaintiff was assaulted by people. She then went to Simunye police station to report that her husband left home to collect logs but she later learnt that he was assaulted. The police informed her that rangers came to hand him over and that he was at Good-shepherd hospital. She enquired whether plaintiff was able to speak and the police advised her that he was unable.

[9] She proceeded to Good-shepherd hospital and was attended by nurses. She was informed that plaintiff would be transferred to Mbabane Government hospital as they were unable to identify his injuries. She noticed plaintiff's clothing were full of mucus. She boarded an ambulance with plaintiff to Mbabane Government hospital. She left the following day with plaintiff still unable to speak.

[10] Since the incident, plaintiff has difficulty in having sexual intercourse. His speech is blurred especially when hot or cold. She can hardly hear him when he speaks in the morning. His ear is deaf and he complains of headache in the mornings.

[11] Her cross-examination was brief. She was asked whether plaintiff still does farming which she replied in the negative. She stated that she is the one who does the farming since plaintiff was injured.

Inspection in loco

[12] The court then proceeded to do an *inspection in loco*. I shall revert to the findings thereof under adjudication. The plaintiff closed its case.

[13] The defendant arraigned two witnesses in rebuttal. Ndiphethe Mcemane Dlamini (DW1) gave *viva voce* evidence on behalf of defendant. On oath, he informed the court that he has been a game ranger, under the employ of fifth defendant for the past twenty years and was stationed at Hlane Game Reserve.

[14] DW1 informed the court that in 2001, he met plaintiff at Mahlanganeni Game Reserve. He reminded the court that he was one of the witnesses during the inspection in loco. During the inspection, he had pointed out to the court where he was on the day of the incident. On that spot, while patrolling, he saw two people, one of them being the plaintiff. It was his first time to see plaintiff and his companion. He was with Ngilozi Dlamini. He was carrying a bolt-nut stick while Ngilozi two knobkerries. They were both in uniform.

[15] The plaintiff and his companion were within the borders of the reserve. Plaintiff was carrying a bush knife and a black bag. They could not see what the other man was carrying. When they first set their eyes on the two, the two were approaching their direction. He tried to stop them. Plaintiff raised his bush-knife to a position of attack. He instructed plaintiff to throw down his bush-knife. Plaintiff declined. He instructed him to stop as they were game rangers and intended to arrest him for poaching. Plaintiff responded that he had come to collect his logs having left them the previous day. This was not true as when they asked plaintiff to show them the poles, he pointed at snares for trapping game. Plaintiff's friend ran away while plaintiff remained and demonstrated a fighting mood. Plaintiff then shouted at his companion, saying, "Come back my cousin so that we may fight them". Plaintiff then tried to hit DW1 with the bush knife while DW1 also attempted to hit him with the bolt-nut stick. However, his bolt-nut

stick fell on the ground. Plaintiff took it and assaulted him with it while carrying his bush knife with the other hand. It was his evidence that he was injured and had to attended to medical treatment. He then produced a medical report as evidence of same. He identified the injuries as permanent because he was still feeling numb.

[16] He then asked Ngilozi to give him one of the knobkerries. They both assaulted plaintiff with it until he succumbed to arrest. It was also his evidence that Ngilozi did not kick or push him. They then demanded a poaching permit. He said he did not have one. It was his further evidence that cutting of logs or wood also needed a permit.

[17] It was not true that they carried the black bag. Upon searching this bag, they discovered thirteen wire snares each of a diameter of half a metre and one metre long. They believed that plaintiff intended to use the snares for poaching as there is no other purpose for snares. Two snares were also found to have been set within a radius of twenty metres. The two set snares were pointed out by plaintiff after they had asked whether he had set any. All the snares and the bag were taken to the police station. They had called their supervisors through the radio communication who came and fetched them. Plaintiff was left at the police station. While on their way back to the reserve, police called them and informed them that plaintiff was unable to speak. They returned and they were detained. They were released the following day on the basis that plaintiff was able to speak.

[18] DW1 was cross examined by Counsel on behalf of plaintiff. He was asked whether they were carrying a radio and the purpose of the radio. He replied in the positive and that a radio was for reporting any wrong that they witnessed. He was quizzed as to whether he did receive training and he

replied that he did. It was suggested to him that in training, he was taught on how to arrest a person. He said that was so. It was said that his evidence showed that he was the first one to assault the plaintiff and that at the time plaintiff was carrying the bolt-nut stick and bush knife, plaintiff did not get the opportunity to use any. He replied in the positive. He was queried as to why, if the plaintiff paused as a threat to them, they failed to use the radio to call for a car. DW1 stated that by then plaintiff would have injured them. He was asked as to whether he did keep a safe distance from plaintiff and himself. DW1 said that they came closer to plaintiff in order to arrest him and to avoid his escape.

[19] He was quizzed on whether he was aware that plaintiff spent forty days in hospital while he did not spend any. He replied that he was not aware of the number of days plaintiff was hospitalized. He was asked to confirm that he was called back by the police as plaintiff could not speak and that he recorded a statement reflecting that plaintiff was accidentally assaulted. He confirmed the same. It was then put to this witness that he had no right in law to assault plaintiff and that the use of force against plaintiff was excessive. DW1 stated that such was not true. The plaintiff ended his cross examination and DW1 was not re-examined by defence Counsel.

[20] The second witness was Ngilozi Vusumuzi Dlamini (DW2). Having taken oath, he identified himself as a game ranger based at Hlane Game Reserve and that in 2001 he was already employed as such. He was together with DW1 patrolling in August 2001. They were at Mahlanganeni area within the boarders of the reserve. He was carrying two knobkerries while DW1 a bolt-nut stick. They were both in uniform. They met plaintiff who was carrying a black bag and was in the company of another person. DW1 ran to stop him but plaintiff raised up his bush knife and called his cousin to

come and assault them as they were not carrying any firearms. However, this cousin did not oblige. Plaintiff then raised his bush knife attempting to assault DW1. DW1 tried to stop him. The bush knife fell. He then came to assist DW1. The bolt-nut stick also fell from DW1. He hit plaintiff and gave his other knobkerrie to DW1. They then arrested plaintiff.

[21] Before the bolt-nut fell they had instructed the plaintiff to stop as they worked in the reserve, but he refused. They introduced themselves and charged plaintiff for carrying a bag with snares and for being within the game reserve. They also found thirteen snares. When they asked for a permit to be in the reserve, plaintiff did not respond or produce any. They discovered two snares which were set nearby. They took plaintiff to the police station.

[22] DW2 was briefly cross examined. It was asked whether it was correct that they introduced themselves to plaintiff after handcuffing him and DW2 confirmed. He was asked whether the handcuffs were put to him after he was assaulted to the ground with the knobkerrie and he again confirmed this. Cross examination of DW2 then ended and there was no re-examination.

Principles of law

[23] His Lordship **Davis AJA** in **Pillay v Krishna and Another 1946 AD 946** at 951 had this to say:

> "*Semper necesiras probandi incumbit illi qic agit" (D.22. 3. 21) – "If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it*."

Issue

[24] *In casu*, what is expected of plaintiff in order for the court to reach the conclusion that he has satisfied "*the court that he is entitled*" (as per **Pillay** *supra*) to the claim?

[25] Plaintiff correctly pleaded in his particulars of claim at paragraph 4:

> "*On or about 12th August 2001, at or near Hlane National Park Plaintiff was severely, wrongfully and unlawfully assaulted by game rangers employed by Big Game Parks."*

From the above, plaintiff had to prove therefore:

- unlawful
- assault

Or

- unreasonable
- assault

These ingredients are drawn from the backdrop of Section 23 (2) and 24 (3) of the Game Act No.51 of 1953 as amended which run as follows:

> *"23. (2) Any game ranger or person acting on the instructions of a game ranger shall have the powers and the right:*
>
> *(a) to carry and use firearms in the execution of his official duty provided such firearms are properly licenced;*
>
> *(b) to use firearms in self defence or if he has reason to believe that his life, or the life of any of his colleagues, is threatened or is in danger;*
>
> *(c) to arrest without a warrant any person suspected upon reasonable grounds of having contravened any of the provisions of this Act or regulations made thereunder;*

(d) to use reasonable force necessary to effect the arrest of or to overpower any person who resists arrest and who is suspected on reasonable grounds of having contravened any of the provisions of this Act;

(e) to carry out searches without a warrant under section 22 of this Act.

[26] It is upon satisfying the court on the above elements upon balance of probabilities that the court would then conclude that plaintiff has discharged the *onus probandi* and therefore find in his favour.

Adjudication

[27] The plaintiff attested:

"*On 12th August 2001 I went to cut logs for my hut at or near Mbuluzi river."*

The witness then proceeded to narrate what transpired upon his return to collect the said logs. It was then suggested to him by his Counsel that the defendants were alleging that when the incident occurred, he was in the game reserve. The plaintiff flatly denied this. He informed the court that he was outside the game reserve.

[28] His particulars of claim show:

"*On or about 12th August 2001, at or near Hlane National Park, plaintiff was severely, wrongfully and unlawfully assaulted by game rangers employed by Big Game Park Trust."*

[29] Under cross examination it was asked:

Mr. P. Kennedy:	*"And was it close to the sugar cane fields where this incident happened?"*
Plaintiff:	*"That is correct."*
Mr. P. Kennedy:	*"Was it inside the sugar cane fields or was it right next to it, how close was it to the sugar came fields?"*
Plaintiff:	*"It was next to the fields my lady where I placed my logs next to the Mbuluzi River."*

[30] Defence Counsel proceeded:

Mr. P. Kennedy:	*"Were you inside or outside the game park when they approached you, the rangers?"*
Plaintiff:	*"I was outside my lady because there is no fence where I was found."*
DC:	*"And how far away from the game park were you when the rangers confronted you?"*
PW1:	*"It is very far my lady because after the bush that I was talking about my lady there are sugar cane fields my lady, and then you walk a long way to the game park."*
DC:	*"The spot where you were, when the rangers confronted you, was it in the bush?"*
PW1:	*"It was in the bush my lady in between the Mbuluzi River and the sugar came fields."*
DC:	*"So that is not the farm land, the bush?"*
PW1:	*"It was not cultivated my lady, it is a very small land in between the river and the fields."*
DC:	*"And whose land is that?"*

PW1: *"On my own my lady I think it belongs to the Simunye Sugar Cane."*

DC: *"Are you sure that it is not part of the game reverse controlled by Big Game Parks?"*

PW1: *"It is not for Big Game Parks because there is no fence that I entered through my lady, and there is no fence that I see next to the place my lady."*

DC: *"So the game rangers would have no authority to be enforcing the law in the bush area where they confronted you?"*

PW1: *"I don't thing that they were doing something that was lawful my lady, if that was lawful they were supposed to arrest me. My lady I think they looked down upon me my lady because if it was in their area my lady, they were supposed to arrest me and not do what they have done to me my lady."*

DC: *"But you were not in their area, you were not in the game reserve at all, were you, according to your evidence?"*

PW1: *"I still maintain that my lady, I was not in their area and because there is no fence there."*

DC: *"What your lawyer has said in your court papers is that on that date, the 12th August 2001, at or near Hlane National Park you were assaulted by game rangers; and I put it to you that as per your evidence this morning is different from what your lawyer has said on your behalf; because they said the incident happened at or near the Hlane National Park, and your evidence today is that it was not at the Hlane National Park; in fact it was some considerable distance away from the game reserve?"*

PW1: *"My lady they found me in between the sugarcane fields and the Mbuluzi River."*

DC: *Is the Mbuluzi River, or does it not flow in a part of Hlane Game Reserve?"*

PW1: *"My lady the way I see it there is no reserve."*

[31] The lengthy cross examination centred mainly around the area where plaintiff was confronted by defendants' employees. The plaintiff stood his ground that the area was not within the defendants' reserve.

The defence then stated under cross:

Mr. P. Kennedy: *"Our evidence will be that the spot where you were confronted by the rangers was deep inside the bosh, many many hundreds of metres from the boundary of the Hlane Game Reserve and only outside way past that, were the sugar came fields cleared in the area.?"*

[32] From the aforegoing, it is clear that the plaintiff's case is that he was not within the boundaries of fifth defendant when he was attacked. This stands to establish the first element, *viz., unlawfulness.* On the other hand, the defendants, as can be ascertained from their two witnesses, insisted that the plaintiff was inside the reserve during the incident. What does the totality of the evidence presented before court tell us of the vicinity where the plaintiff was?

[33] An inspection *in loco* was conducted at the instance of both plaintiff and defendants. All recorded observations were agreed between plaintiff and defendants' Counsel. Concerning the area where plaintiff was found, both Counsel agreed on the following:

"17. The Defendants' team then proceeded to show the spot where they alleged the incident had occurred, where the Plaintiff was confronted by

the game rangers. One of the rangers, Ndiphethe Dlamini (referred to by the presiding Judge to be DW2 and placed under oath) took the group to a spot approximately 160 meters further into the bush, away from the spot where the Plaintiff had pointed out the place of the incident. Photo E shows the inspection group moving towards where DW 2 stood at the spot he said he was when he came across Plaintiff. This is depicted in Photo F. DW1 stands in the background. In the foreground, approximately 12 meters away, George Mbatha stands as if he were Plaintiff, to mark the spot where DW1 said the Plaintiff was when DW1 encountered the Plaintiff.

18. It was agreed that this spot was approximately 550 meters from the closest part of the fence which had at the time been the boundary of the game reserve."

[34] The conclusion of the inspection *in loco* as conceded by both counsel representing plaintiff and defendants were recorded as follows:

"19. It was further agreed that the spots pointed out by both the Plaintiff and the defendants' witnesses were inside part of the Hlane game reserve at the time of the incident."

[35] This evidence must be viewed together with the following observation, again agreed upon by both Counsel:

"*6. The route the Plaintiff pointed out reached a point where there was a group of trees, and below them the Black Mbuluzi river, which the Plaintiff said he had crossed. It was agreed that this point was approximately 2.5 km from the Plaintiff's home, travelling on foot.*

7. The Plaintiff pointed out the route he followed thereafter, crossing the White Mbuluzi River.

9. The white and Black Mbuluzi rivers converge on the right, and the fence cuts through the two rivers. There was dense bush and from where plaintiff pointed as scene of incident, we could not reach it due to the density of the bush.

16. The area where the Plaintiff pointed as being where the incident with the game rangers occurred was estimated to be 1 to 2 kms from the point

> *where he had crossed the Black Mbuluzi river below the trees as referred to in paragraph 6 above. This, it was agreed meant that the place where the Plaintiff alleges the incident occurred was a total of 3.5 kms from his homestead."*

[36] Plaintiff's attorney then informed the court that he had occasion to look at the map of the area and the spot where plaintiff was found and this was within the radius of fifth defendant. The element of unlawfulness fell away from that instant. In other words, the plaintiff failed to discharge the onus of proof in this regard.

[37] It is apposite to also state that the evidence of the spot where plaintiff was found having been demonstrated on *inspection in loco* and having been admitted by consent of both plaintiff's attorney whom I must commend for his professionalism, and defendants' counsel, goes to attack plaintiff's credibility. His credibility as a witness is now tainted by reason that both in chief and cross examination, plaintiff asserted that he was at all material times outside the perimeters of defendants.

[38] The next leg of enquiry was whether plaintiff had established or proved *unreasonable assault*. In chief plaintiff testified:

> "*They hit me with a bolt-nut stick on the head and I became unconscious. I woke up and found being tied and they were dragging me on the ground, I became conscious. I stood up. They beat me on the shoulders. As they were dragging me into the sugar cane, one beat me with a bush knife on my right ear."*

He proceeded:

> *"While next to the sugar cane fields one was carrying a black bag. He gave it to me to carry. I am now unable to use my right hand and I have difficulty hearing. This black bag fell down and the one who gave me the bag came to me, opened my trouser and bit me in my penis."*

On the injuries sustained, he stated:

> *"I was injured on my head as it was painful and my ear is not functioning. Even today this ear is not functioning. My right arm is not functioning. My penis is painful when I am passing urine or having sexual intercourse. The doctor did examine me and said there was a vein that was damaged."*

[39] On the evidence by the doctor, defence Counsel objected to it as being hearsay. The case of plaintiff having closed without the doctor being called to give evidence, the portion of evidence with reference to the doctor must be expunged as it is deemed as hearsay.

[40] He was extensively cross examined as follows on the assault:

DC: *Our evidence will be that each of the rangers had sticks, one of which was a bolt-stick and neither of them was carrying a bush-knife?*

PW1: *That is not correct my lady. What I saw my lady is that the one who was in the front was carrying a bolt-stick and a bag, and the one who was behind was carrying a bush-knife and a radio.*

DC: *You dispute that they each had sticks and neither of them had a bush-knife, do you dispute that?*

PW1: *I dispute that my lady.*

DC: *Mr. Masinga this is what your attorney has pleaded on your behalf.*

*"**The game rangers assaulted the plaintiff (that is yourself) by hitting him with sticks, iron-rods, bush-knifes, punched him with fists and kicked him with boots all over the body…"***

I am gonna take them one by one. Your attorney first said you were hit by the game rangers with sticks (plural), and yet your evidence is that you only saw one stick between the two rangers?

PW1: *I did not say I saw one stick my lady, but I said I saw a bolt stick that was used when they beat me.*

DC: *You saw between then, all that you saw by way of sticks is one bolt-stick?*

PW1: *I saw the bolt stick my lady.*

DC: *And no other type of stick?*

DC: *So there was only one stick, namely a bolt-stick, which was used in assaulting you, is that your version?*

PW1: *My lady what I know is that they assaulted me with the bolt-stick. What followed after that my lady I do not know, and I did not see because I was already down by that time my lady.*

DC: *You were down when you fainted, is that correct?*

PW1: *My lady they assaulted me many times with the bolt-stick, I fainted my lady and I woke up when they dragged me down with those iron they bound me with my hands.*

DC: *You mean handcuffs?*

PW1: *Yes my lady.*

DC: *So you woke up when you saw yourself in handcuffs?*

PW1: *I woke up when they were dragging me down my lady.*

DC: *So when they were dragging you down in handcuffs you woke up, did you stay awake then or did you faint again?*

PW1: *I don't recall very well what happened my lady, I do not know how I reach Siteki Good-shepherd Hospital my lady when I was in the police van.*

DC: *You see, some of the things you say you can't remember at all, and others you say you can remember things very well?*

PW1: *Some of the things my lady I saw them as I stated before this court, that as they were dragging me I woke up my lady, and one of them assaulted me with the bush knife on my right ear.*

DC: *And the two rangers when they confronted you we have heard you saw the iron bolt, you saw a bush-knife, you saw a bag and you saw a radio. Were any of them not carrying knobkerries?*

PW1: *I did not see any knobkerrie my lady, but what I saw my lady is the bolt-stick my lady, the radio and the bag.*

DC: *Let me tell you what your lawyers have said obviously on your instructions in your pleadings. My lady again book of pleadings bundle A, paragraph 4.1- "**the game rangers assaulted plaintiff by hitting by hitting him with sticks (plural), bush-knives (plural), and iron rods (plural) and knobkerries…"***

So now we have heard that they were using to hit you, these 2 rangers, with sticks more than one, at least two sticks, bush-knives, at least two of those, as well as iron rods in addition to the sticks and bush-knives, another two at least, and knobkerries again to these. You now tell us that you never even saw them with the knobkerrie and then you never saw them with any stick other than one bolt-stick.

PW1: *That is correct my lady, I only saw the bolt-stick and the bush knife*

DC: ***So your lawyer is wrong here when he says that it was with a number of sticks, plus a number of bush-knives, plus a number of iron-rods and plus a number of knobkerries – is that wrong?***

PW1: ***My lady even if they were carrying those sticks and knobkerries I did not see them my lady.***

DC: *And your lawyers were not present on the day of the incident, not so?*

PW1: *They were not present my lad.*

DC: *The papers that your attorneys have put into court on your behalf including the statement of case, your particulars of claim, obviously they got the information from you, is that so?*

PW1: *That is correct my lady, they got that information from me.*

DC: *And that is what we need to know what you recall and what you saw, and you saw only that day on your version, hit by one bolt-stick and that they slapped you, is that correct?*

PW1: *My lady I only recall that they assaulted me with the bolt-stick and the open hand my lady and they also used the bush-knife my lady, but I do not know or saw what they used to beat me in the body because I had many bruises.*

DC: *So are you saying that when you woke up in the hospital you thought, "oh I have got plenty more injuries than just my head, and so it must have been some other things that they hit me with…" but you don't recall seeing that actually happening."*

PW1: *That is correct, my lady, I did not know what they used or I could not see what they used."*

[41] Firstly, from the above, it is clear that the plaintiff's pleadings and his evidence in chief were at variance as to what exactly was used to assault him. It is an established principle of our law that where a party's pleading vary from his evidence, his evidence stands to be rejected. Secondly, at the inception of the trial, plaintiffs Counsel intended to call the doctor. However, as the record bears out, no expert witness evidence was discovered. The court was prepared to grant plaintiff a postponement later for purposes discovering the expert evidence. However, as the debate proceeded, plaintiff's Counsel submitted:

"PC: *My lady, I think there is a possible way out, I would apply to your Ladyship that we proceed with the none expert witness and then I will then apply for an adjournment and if Counsel will insist on wasted costs for tomorrow, I will tender them."*

Defence Counsel then submitted:

"DC: *No my lady, I just want to add something that I should have mentioned earlier and that is the agreement in the pre-trial is that what will be dealt in this hearing is only the question of liability and not the question of damages, I don't know if perhaps will cause any light ….**inaudible**, but we are only dealing with the merits."*

[42] At the close of the plaintiff's case, plaintiff submitted that it would not call the expert witness but would do so with the assistance of the court only in establishing the *quantum*. This indicated that plaintiff's case was not based on unreasonable force or assault. If plaintiff's case was based on unreasonable force, it was vital that an expert be brought in to shed some light on the nature and extent of plaintiff's stated injuries in order to enable the court to ascertain whether force inflicted was *unreasonable* as per the Act.

[43] This was more so in light of the evidence given by plaintiff which showed to be shaky under cross-examination. I must pause here to demonstrate the basis upon which I find that the plaintiff's evidence on the force inflicted was unstable. Plaintiff testified as follows:

> *PW1: My lady they beat me on the head using a bolt-stick. I do not know what happened my lady. I fainted and when I woke up I found myself being tied up and they were dragging me my lady. As they were dragging me down my lady, I woke up and I stand by feet my lady and they continued beating me even on my shoulders. As they were dragging me my lady towards the sugar cane fields, one of them placed a bush-knife next to my ear my lady. My lady when we were just next to the sugarcane fields one of them was carrying a black bag and handed it over to me to carry it, my lady. Even my hands are not working now and I am no longer able to speak very well. My lady as he was giving me the bag it fell down and the other one that gave me the bagcame close to me, opened my trouser my lady and bite me on my private part."*

On cross-examination however he then states:

> *PW1: That is correct my lady, they got that information from me.*

DC: *And that is what we need to know what you recall and what you saw, and you saw only that day on your version, hit by one bolt-stick and that they slapped you, is that correct?*

PW1: *My lady I only recall that they assaulted me with the bolt-stick and the open hand my lady and they also used the bush-knife my*

[44] From the above, it is obvious that plaintiff could not stand his ground on how he sustained the injuries. He gave the impression that he assumed that the defendants' employees inflicted the injuries. I must hasten to point out that there is nothing wrong with this assumption *per se*. However, by reason that he did not state so in his evidence in chief and on the contrary, he informed the court that he was fully aware of how he sustained the injuries or pain in his body. His evidence stand to be rejected by reason of contradiction.

[45] I appreciate that PW2 took the witness stand to corroborate plaintiff. However, for the assertion that plaintiff was attended by doctors from Goodshepherd and Mbabane Government hospitals, one expects that a medical expert be called to testify. At any rate, the line of examination in chief adopted at the instance of plaintiff did not give one the impression that plaintiff's case was based on "*unreasonable force*" in order to controvert Section 23 (2) (d) of the Act.

[46] It is apposite to mention that it was not in issue that when the plaintiff was found within the game reserve, he was armed with a bush-knife. Section 24(3) reads:

24. (3) *For the purposes of section 21, any person found at any time on land having in his possession a firearm, trap, snare or other apparatus capable of being used to hunt game shall be presumed*

to be upon the land in pursuit of or in search of game unless the contrary is proved."

[47] The question to be posed is whether plaintiff has proved to the contrary. Plaintiff has explained that the bush-knife was for cutting ropes in order to bind the logs. Should the court accept this version? I do not think so in the light of the circumstance of this case. Plaintiff, having profusely denied that he was within the boundaries of the fifth defendant, in other words, that he was not "*in the land*" as envisaged by the Act, he cannot therefore benefit from this section. On the contrary, the section ought to be interpreted in favour of the defendants that the employees having found plaintiff within the reserve and armed with a bush-knife, they were entitled in the circumstance to *presume* that the plaintiff was *upon the land in pursuit of or in search of game.* In other words, there is no justification for the court to find in favour of plaintiff where he alleged that he was not within the reserve when the evidence presented shows otherwise.

[48] In the totality of the above, plaintiff has failed to discharge *onus probandi*.

I therefore enter the following orders:

1. Plaintiff's cause of action is dismissed.
2. Plaintiff is ordered to pay costs.

M. DLAMINI
JUDGE

For the Plaintiff : S. Gamedze of V. Z. Dlamini Attorneys

For the Defendant : P. Kennedy instructed by Robinson Bertram Attorneys