



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No.1952/2012

MFANUFIKILE DLAMINI

Plaintiff

And

SWAZILAND GOVERNMENT

Defendant

Neutral citation : ***Mfanufikile Dlamini v Swaziland Government (1952/12)
[2019] SZHC 140 (30th July, 2019)***

Coram : **M. Dlamini J**

Heard : **05th July, 2019**

Delivered : **30th July, 2019**

Civil claim : ***unlawful assault - shot wounds inflicted upon plaintiff - defendant pleading that plaintiff was running away from lawful arrest - position of wounds speaks volumes - defendant's witnesses testify that plaintiff was shot in front of knee - such circumstances inconsistent with a person fleeing - defendant liable - parties agreeing to decide on quantum and urging court to decide on liability only.***

Summary: The plaintiff demands the sum of E1,047,000 from the defendant as a result of shot wounds said to be inflicted upon him. Defendant does not dispute the shootout but submit that it was lawful in the circumstances.

The Parties

[1] The plaintiff is an adult male of Ecinisweni area, Manzini region. The defendant is the employer of the police officers who are said to have inflicted the wounds on plaintiff.

The parties' contentions

The Particulars of claim

[2] The plaintiff stated that on 23rd May, 2012 at about 0600hours:

“4.1 The Plaintiff was assaulted on the upper-calf muscle with a service rifle, whereas he was ripped with two live round of ammunition.”

[3] He then concluded:

“8. As a result of the assault and the injuries caused by the members of the Royal Swaziland Police, the Plaintiff sustained damages in the sum of E1, 047,000.00 (One Million Forty Seven Thousand Emalangeni) made up as follows:

<i>(a) Pain and suffering</i>	<i>E420,000.00</i>
<i>(b) Shock and stress(post traumatic)</i>	<i>E230,000.00</i>
<i>(c) Contumelia</i>	<i>E150,000.00</i>
<i>(d) Unlawful assault</i>	<i>E180,000.00</i>

<i>(e) Hospital & Medical expenses</i>	<i>E 12,000.00</i>
<i>(f) Estimated future medical expenses</i>	<i><u>E 30,000.00</u></i>
Total	<u>E1,047,000.00”</u>

Plea

[4] The defendant’s plea is concise as follows:

“5.1

Defendant avers that acting on a tip off that there was dagga within Plaintiff’s homestead, members of the Royal Swaziland Police proceeded to conduct a search of the aforesaid premises and upon introducing themselves as police officers who were in search of dagga the Plaintiff and his sister bolted out of the house they were occupying and headed for the nearby fields.

5.2

Defendant avers that upon realizing that the plaintiff and his sister were fleeing from the police in an attempt to escape arrest there was no other way plaintiff could have been arrested save for the shooting.”

[5] Defendant then pleaded:

“10.

The defendant admits receiving demand but disclaims liability to the plaintiff in the sum claimed or in any sum whatsoever and the plaintiff is put to strict proof thereof.”

Oral evidence

[6] The first witness on behalf of plaintiff was plaintiff himself. He testified that on 23rd May, 2012, he was inside his house preparing to bath in order to go to work. He heard a commotion outside. He went out to check. The time was about 0600 hours. He saw a police officer as he exited the door. This officer

shot at him, saying he should not run away. He fell on the ground. The officer shot him again.

[7] After he was shot, he was assaulted. He was then taken to the police van. They then informed him that they were police officers. They were searching for dagga. They took him to Raleigh Fitkin Memorial Hospital in Manzini, via Sidvokodvo police station. The witness handed photographs which were marked Exhibit A1 and A2 as evidence of the wounds he sustained as a result of the shooting. He also handed a medical report which was marked by consent as Exhibit B.

[8] From the hospital, they returned to Sidvokodvo police station for a court appearance the following day. He did attend to court. Charges were read to him. They asked him to plead. He pleaded not guilty. The weighing of the dagga was 25kg. In the dock, he was with his sister **Nonsikelelo Dlamini**. Before his injuries, he was working at a grocery shop and selling. Thereafter he was employed as Sales representative. He has to carry bags of cement and manure in his new employment.

[9] He has sustained permanent injuries on his leg. He cannot stand for a long time especially when it is cold. He experiences spasms, as a result of the sustained injuries. During his trial, the charge against him was withdrawn. His sister pleaded guilty. After that, he returned home. He searched for the cartridge and found one. He handed it to court and it was marked as Exhibit 1.

[10] On the day of his shooting he was not armed. He was not violent. He did not attempt to escape from the police. He refuted any warning shots before he

was shot. Under cross-examination, the version of the defendant was put to this witness. He disputed it. I shall refer to it later in this judgement.

[11] The next witness PW2 was **Nonsikelelo Dlamini**. He told the court that plaintiff was his brother. On 23rd May, 2012, while asleep in the morning, she heard some noise outside. While paying attention to it, she heard a gunshot from the direction of his brother's house. She left her room running to check what was happening. He found his brother with a group of people. He was injured. As she was shot, she took to her heels. The people pursued her. As she was running she heard a second gunshot. She thought it was directed to her.

[12] He was eventually caught by his pursuers. They grabbed her, shook her saying that they were police officers. One said that she should be shot while the other said that she should not as they had caught her. They took her to a police van to Sidvokodvo police station. She was then transferred to Manzini police station. She was then taken to Sigodvweni police station to spend the night. On the following day, she was taken to court. She was questioned about the dagga. She was given a fine after agreeing that it was hers. Her cross-examination was lengthy. It was put over to her several times that his brother was shot at while he was fleeing from the police with her. She stood her ground. The plaintiff closed his case.

[13] The defendant's first witness was **Detective Constable Mthandi Mhlungu**. In May, 2012, he was based at Manzini under Serious Crime department. During the year 2010 to 2013, there was a spate of assault with the intention to cause grievous bodily harm crimes around Sigcineni area. These matters were however, not reported. When the police enquired why the matters were not reported, they learnt that it was because they involved dagga. Reporting

them would attract the police to their fields. They decided to combat the crime by effecting raids.

[14] On 23rd May, 2012, they engaged Sigcineni – Ecinisweni areas. They were divided into small groups. In his group he was with **Constable Thulani Mtsetfwa, Thembinkosi Dlamini** and **Thulani Makhanya**. They were attracted by a dagga smell to the plaintiff's homestead. They approached the main entrance. They shouted, introducing themselves as police officers. They called upon whoever was present to attend to them. They entered while continuing shouting for attendance. They opened the first house where they found it full of dagga plants laid on the floor, on top of maize matts.

[15] The police then condoned the homestead. Adjacent to the dagga room, there was another which had shoes at the door step. He concluded that it had occupants. He peeped through its window. He saw more dagga but could not see any person. He asked his colleague to peep through the other window. As he did so, he heard the door clicking and scratching. He quickly turned towards it. He saw two people, a male and female bolting out. The lady was in front while the male behind. They headed towards the fields. They shouted, instructing them to stop as they were police officers. They never complied.

[16] They pursued them unsuccessful as the vegetation was thick in the fields. He fell down as they were pursuing them. In the fields, they decided to run in different directions. They continued to pursue them shouting that they should stop. This fell on deaf ears as the duo ran in different directions. He decided to concentrate on the male while the two colleagues pursued the female. The male outpaced him. He continued to shout that he should stop, but in vain.

He then fired warning shots. These were three. The gentleman refused to stop.

[17] It is then that he fired towards his suspect. He directed it with the intention to cause him to stop. The suspect fell. They called for transport to convey him to hospital. He was asked why he was running. He said that he feared arrest as he was having dagga. He was asked to produce a licence for possession of dagga. He could not as he had none. The lady was also apprehended. The gentleman was treated and discharged. They were both taken to court where the lady pleaded guilty and was sentenced to an option of a fine.

[18] DW1 was cross-examined at length. The first leg of cross-examination focused on irrelevant issue. It was that the police officers arrested the plaintiff without a warrant of arrest. It is not clear why plaintiff's counsel decided to raise arrest without a warrant when his claim was not based on unlawful arrest but on unlawful assault. I shall refer to the pertinent portion of his cross-examination later in this judgement.

[19] **Detective Constable Thulani Mtsetfwa** was the second witness for the plaintiff. He was part of the police trio that entered the homestead of the plaintiff on 23rd May, 2012. His evidence was along similar lines as DW1. He went to attend to the third house which was at far end of the homestead. He suddenly heard DW1 shouting saying, "*Stop. We are police officers.*" He heard some gun shots. He rushed to its direction. He found the suspect lying down in the fields. He ran to assist **Constable Dlamini** who was chasing a lady. They apprehended her.

[20] They took the plaintiff and his companion to the house they bolted from. They found sacks of dagga. They asked for a license from both suspects.

They could not produce any. He cautioned and charged them. As one of the suspect was injured, they went to Sidvokodvo police station to retrieve RSP 88 and took him to hospital. The injured suspect was treated and discharged on the same day. Like the rest of the witnesses, DW 2 was cross-examined. I shall consider some of the relevant questions later.

Adjudication

Issue

[21] Were the police officers justified in shooting the plaintiff?

Common cause

[22] It is common cause that the police set out to conduct an operation. The operation was to conduct searches in targeted areas and homesteads. It was to search for dagga in order to curb not only illegal possession of the prohibited substance but assault with the intention to cause grievous bodily harm in the Ecinisweni area. It is not in issue that in plaintiff's homestead dagga worth a significant weight of 25 kg was seized. In the process, plaintiff was shot at and he sustained injuries.

Determination

[23] The defendant testified that it was necessary to shoot at the plaintiff in order to effect arrest following that plaintiff was fleeing away despite a series of command for him to stop and three warning shots. The plaintiff disputed this. He testified that out of the blue the police decided to shoot him. He was inside his house (single room) preparing to go to work when he heard some commotion outside. He decided to go and check what was happening. He met up with two shot rounds which hit his leg and left him with permanent pain and suffering.

[24] In cases of where a suspect has sustained injuries by means of shooting, the injuries themselves speak volumes. There is evidence of, *inter alia*, the direction from which they were inflicted.

[25] In the case at hand, the matter is easily disposable by reason that photographs of the injuries were admitted by consent of the defendant. These were marked Exhibit A1 and A2. There is further the evidence of the doctor's report which was also admitted without any objection. It was marked Exhibit B.

[26] Describing the position from which plaintiff was shot from, he testified:

"I saw a police officer when I came out of the house. He shot me saying I should not run away. I fell down, he shot me again. He shot me right below my knee at the right leg."

[27] He then submitted the Exhibit A1 and A2 as evidence of the wounds he sustained. This witness was cross-examined with reference to DW1:

Mr. N.G. Dlamini : *"He fired once in the air?"*

Plaintiff : *"Not true."*

Mr. N.G. Dlamini : *"He fired in your direction below your waist?"*

Plaintiff : *"He hit me where I was"*

Mr. N.G. Dlamini : *"He hit you once below the knee?"*

Plaintiff : “He shot at me twice.”

[28] He was then referred to Exhibit A1 and A2:

Mr. N.G. Dlamini : “I see below your knee you have two wounds
on the side?”

Plaintiff : “Yes”

Mr. N.G. Dlamini : “To me they (Ex A1 and A2) appear to be the same photograph?”

Plaintiff : “The other is not.”

Mr. N.G. Dlamini : “Look at A2 which is clear. Are those not wounds from one gunshot showing the entry and exit?”

Plaintiff : “There are wounds showing the entry points of both bullets.”

Mr. N. G. Dlamini : “What about A1?”

Plaintiff : “It shows the exit points.”

[29] I must mention that the question that followed was withdrawn by the defence after the court enquired if indeed the defence was sure if the question it was posing to this witness would assist it in its case. The plaintiff’s counsel did not object to its withdrawal. However, to everyone’s shock the very same

question whose implication was damning to the defence was probed by Learned Council for the defendant when DW1 testified in chief. Having been handed Exhibit A1 by his Council, he was led in chief:

Mr. N.G. Dlamini : “Look at A1.”

DW1 : “I cannot be sure that these are the wounds.”

Mr. N.G. Dlamini : “Is it the front or the back?”

DW1 : “Is the front.”

Mr. N.G. Dlamini : “A 2?”

DW2 : “Is the side”

Mr. N.G. Dlamini : “Is it the same wounds?”

DW2 : “They look different. In A1 they are in line and A2 they are oblique.”

Mr. N.G. Dlamini : “Which is the point of entry?”

DW2 : “In A2 the upper wound and the lower wound is the exit. In A1, I cannot say anything.” (my emphasis)

[30] He then handed in the doctor's report which was admitted and marked by consent as Exhibit 1. DW2 was cross-examined on Exhibit A1 and A2:

Mr. N.G. Dlamini : “Which is the entry in A1?”

DW2 : “The entry is the smaller one in size i.e. upper while the bigger one is the exit.”

[32] He later answered under cross-examination with regard to A1:

“A1, the person who took the photograph was in front.”

Mr. N.E. Ginindza : “Your last analysis of the picture is that the plaintiff was shot **in front**?” (my emphasis)

DW2 : “**The plaintiff was shot in the front knee.** (emphasis)

[33] Now this answer which runs like a golden thread throughout the defence evidence is in support of the plaintiff's case. DW1 described A1 as the front of a knee. This evidence as I have demonstrated above, was tendered in chief by DW1. DW2 under cross-examination specifically expressed that the plaintiff was shot in front of the knee. The question is then how then can it be said that he was running away from the police in such circumstances? The answer is that the circumstances described by the defence are inconsistent with a person running away at the time of shooting.

[34] As demonstrated again, the defence by the defendant was inconsistent in a material respect. When plaintiff was cross-examined, it was said to him that there was one warning shot and one wound inflicted upon him “below the

knee.” However, when DW1 and DW2 testified they said that there were three warning shots and one shot directed to him. Which is which?

[35] The plaintiff’s evidence was consistent. It was corroborated by PW2 who said he heard two gun shots. The photographs reflected, as testified by DW2, two set of wounds. An entry and exit wound in A1 and an entry and exit wound in A2. If A1 reflects wounds in front of the knee as testified by both DW1 and DW2 and A2 wounds (i.e. entry and exit) at the side of the knee then the evidence of the plaintiff is consistent with the exhibits A1 and A2.

[36] Exhibit1, the medical report reads:

“Two wounds in the inner aspect of the proximal right leg (assumed to be entry and exit wounds).”

[37] On fractures it reflects: *“No fracture. Neurovascularly intact.”* The wounds observed by the doctor are consistent with those said to have been observed by DW1. When asked to comment on the wounds which DW1 and DW2 described as in the front knee, they both answered, *“There is nothing I can say about them.”*

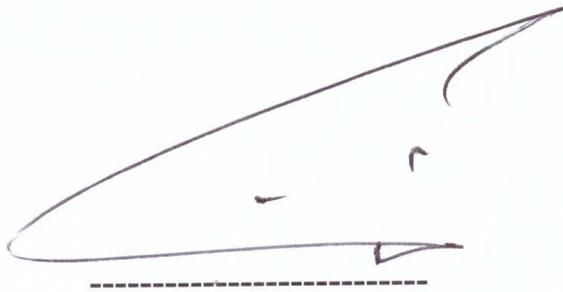
[38] In brief, they were not disputed by the defence. The plaintiff did explain about them. He stated that A1 as well is a reflection of the wounds he sustained on 23rd May, 2012 when he was shot by DW1. I have no reason to reject his evidence. When the defence was prompted to say something about these wounds, they opted to say that there was nothing to say about them.

[39] In the final analysis, I must find for the plaintiff. The court was requested to decide on liability only by both plaintiff and defendant. I feel duty bound to

state my observation that A1 reflects gunshot wounds captured from the back of the knee. DW1 and DW2 chose to corroborate PW1's version. They are the ones who were at the scene of shooting and know what happened and not the court. They came to court to tell the truth. Maybe they did, despite the evidence in A1. DW2 tried to change at the end by saying A1 was the back of the knee. However, it was too late. He did not change his evidence that the plaintiff was shot at the front knee.

[40] In the final result, I enter as follows:

- 40.1 Plaintiff's cause of action succeeds;
- 40.2 Parties to decide and agree on quantum;
- 40.3 Defendant is ordered to pay costs of suit.

A handwritten signature in dark ink, consisting of a large, sweeping loop on the left side that extends upwards and then curves back down to the right, ending in a small hook. There are a few smaller, less distinct marks below the main signature.

**M. DLAMINI
JUDGE**

For the Plaintiff : **N. E. Ginindza of N.E. Ginindza Attorneys**
For the Defendant : **N. G. Dlamini of the Attorney General**

