



**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Case No: 2973/2001

In the matter between:

**HOWARD PHOKWANE NKAMBULE**

**PLAINTIFF**

and

**ATTORNEY GENERAL**

**DEFENDANT**

Neutral Citation : Howard Phokwane Nkambule and The Attorney General  
(2973/2001) [2018] SZHC 49 (30 APRIL 2018)

Coram : MABUZA –PJ

Heard : 2016; 2017

Delivered : 30 APRIL 2018

## **SUMMARY**

**Civil Law – Plaintiff suing for damages arising from an injury – Action defended – Defendant liable to compensate the Plaintiff.**

## **JUDGMENT**

### **MABUZA -PJ**

[1] The Plaintiff on the 7<sup>th</sup> November 2001 issued a summons against the Attorney General of Swaziland (The Defendant) in which he claims payment of the sum of E1,428.000.00 (One million four hundred and twenty eight thousand Emalangeni) being in respect of damages; interest thereon at the rate of 9% per annum a *tempora morae*; costs of suit and further and alternative relief.

[2] The Attorney General is sued in his capacity as the Government legal advisor

and legal representative. The claim is directed at members of the Umbutfo Swaziland Defence Force (Defence Force) who are herein represented by the Attorney General. The claim is defended by the Attorney General.

[3] The cause of action arose on or about the 3<sup>rd</sup> February 1997 at Mvutjini, in the Hhohho District. It being alleged that the Plaintiff was wrongfully assaulted by members of the Defence Force whose full and further particulars are unknown to the Plaintiff and in the cause of the assault the Plaintiff was shot in the face.

[4] The Defendant in his plea denies the allegation by the Plaintiff in particular that the stated members of the Defence Force or any person or persons acting on their behalf assaulted or shot Plaintiff.

[5] It is stated in the particulars of claim that a result of the assault the Plaintiff sustained severe injuries and has become permanently disabled in the following respects:

- He has suffered permanent injury to his jaw and mouth;
- Experiences a poignant pain in his jaw;
- Has difficulty eating solid foods;
- Cannot run and participate in sport;
- And is unable to lift heavy objects.

The Defendant's response is that he has no knowledge of these allegations, denies them and puts the Plaintiff to the proof thereof.

[6] It is further stated that at the time of the assault the said members of the Defence Force were at all material times acting within the course and scope of their duties as they drove a Swaziland Government vehicle and some occupants were in Umbutfo Swaziland Defence Force Uniform.

The Defendant's response is denial that the Plaintiff was assaulted by the members of the Defence Force.

[7] As a result of the assault Plaintiff suffered damages in the amount of E1,428,000.00 (One million four hundred and twenty eight thousand Emalangeni) which is made up as follows:

Pain and suffering	E350,000.00
Permanent disability	E200,000.00
Loss of amenities to life	E400,000.00
Future medical expenses	E150,000.00
Loss of earnings to date	E328,000.00
	<hr/>
Total	<u>E1,428,000.00</u>

[8] In the premise set out above the Plaintiff states that the Defendant is liable to compensate him in the said amount.

[9] The response in respect of paragraph s 7 and 8 above is denial that the Defendant is liable to compensate the Plaintiff for the amount claimed or any other amount whatsoever. It is further denied that the Plaintiff suffered damages at the hands of the Defence Force or its agents and in the sum aforesaid.

[10] The Plaintiff further states that despite statutory demand, the Defendant has failed and or refused to compensate the Plaintiff as claimed. The Defendant admits that due statutory demand was made but denies any liability to pay the sum claimed or at all.

[11] The matter came before my erstwhile brother Masuku J on the 26<sup>th</sup> January 2010. Before him the Plaintiff led three witnesses. The Defendant did not lead any evidence in rebuttal, it simply closed its case. The cause of action according to the Plaintiff arose during the massive stay away during February 1997.

[12] Howard Nkambule (PW1) testified that on the 8<sup>th</sup> February 1997 he was at Mvutjini waiting for public transport. When the transport arrived the bus was full and he decided to hitch hike. While hitch hiking a motor vehicle stopped and he went to that motor vehicle and asked for a lift to Mbabane. A man inside the vehicle responded that they do not give lifts. He says that the vehicle was a white or cream twin cam van. He could not remember the registration number however it began with an SG. (depicting Swaziland Government).

[13] There were four (4) occupants in the vehicle. They all sat in front. He says that the driver wore a Defence Force uniform and he did not notice what the others wore.

[14] After they said they did not give lifts he asked them why they had stopped. They responded that they were waiting for Pudemo.

[15] Apparently the Plaintiff jumped onto the bakkie but the driver alighted from the vehicle told him to get off the vehicle. The Plaintiff got off the vehicle. Thereafter one of the occupants a male alighted from the vehicle.

[16] He says that a scuffle ensued and he fell off the vehicle. He asked them why they were assaulting him. He says that they had their guns with them. One of them shot him on the jaw and mouth. He says that the driver gave the other man a gun. He says the first bullet went wild and the second one shot him. After which they left him to fend for himself and did not lift a finger to assist him.

[17] He was taken to the Mbabane Government Hospital from where he was transferred to Garankua Hospital in South Africa. He handed in a medical report which was entered into evidence by consent and marked Exhibit A.

[18] He stated that at the time he was shot he was employed by a construction firm and earned E750.00 (Seven hundred and fifty Emalangeni) per month. That he went as far as Form V which he completed.

[19] He told the Court that he could not chew hard food and when the wound was inflamed he became hot and sweated profusely. He could not perform many duties. That he used to play soccer but could no longer do so.

[20] With regard to his being employed, he said that he was on a contract which he began in 2006 and that he was not able to continue in employment after the injury.

[21] He was cross-examined by Mr. Kunene. He was asked at what time he was shot and he replied around 6.00 pm. while waiting for the 5.30 pm. bus. When asked what condition he was in, he responded that he was drunk. That after the occupants of the car hit him, he fell but got up and went back to them to ask why they were hitting him.

[22] Unfortunately, there is no transcript with respect to the rest of the cross-examination. I am informed by the respective learned Counsel that a second witness, Mbuso Dlamini (PW1) testified next. He is the Plaintiff's brother. His evidence I am told corroborated that of the Plaintiff. The available transcript does not include his evidence.

[23] Dr. Samuel Vusi Magagula (PW3) testified that he was a doctor of dental surgery. He attended to the Plaintiff during 1997 at the Mbabane Government hospital where he was based at the time. He stated that he treated the Plaintiff. The Plaintiff reported with an injury on the right half of

the face and because that was PW3's area of expertise he was called to treat the Plaintiff. He said that the Plaintiff had a laceration on his right jaw, just about the angle of the right mandible and another one at the back of his neck just about the same area, that was extra oral. (outside the mouth)

[24] Intra orally, that is inside the mouth just about the angle of the right mandible was a blue swelling, a typical hematoma like swelling and the Plaintiff's teeth could not come into occlusion, that is, the teeth were not meeting properly as the right side was hanging down and the floor of the mouth was also skewed and down.

[25] PW3 stated that after the initial treatment, he saw the Plaintiff again during 2006 when he came for review. Subsequent to the latter examination, PW3 prepared a medical report which he handed into Court as an exhibit after identifying his signature thereon (Exhibit A).

[26] He testified that the injuries on the Plaintiff were caused by a high velocity object that must have passed through the Plaintiff's right jaw. He stated that during the investigation following the examination, radiologically there was an opaque piece of metal that was lodged just behind the jaw of the angle of

the mandible on the right. And there were several pieces of opaque looking substances, much smaller than the big one, clustered around the angle of the wound.

[27] Upon exploratory surgery and under general anesthesia of the Plaintiff, PW3 removed a piece of metal which was about 1 x 1x 1cm. There were several other smaller pieces which he debrided and removed in the soft tissues just behind the angle of the right mandible.

[28] PW3 re-iterated that the injury on the Plaintiff was consisted with being struck with a high velocity piece of metal on the right side of the face. That there was an entry wound and an exit wound. There was the piece of metal that led him to conclude that at least two (2) pieces of high velocity metal must have passed through his right mandible (jaw). He stated that even though he was not a ballistic expert but the wounds looked similar to gun shot wounds.

[29] The area from where he removed the piece of metal showed signs of sepsis which he cleaned. After removing the piece of metal he dressed the wound with Eusol solution which had to be changed daily for at least three days.

He put the Plaintiff into inter maxillary fixation (IMF) in order to make him comfortable as the jaw was just hanging on the right. The Plaintiff was reviewed twice a day just to clean the wound and to make sure that the sepsis was reversed. The Plaintiff was put on antibiotics and on the 4<sup>th</sup> day was discharged to be seen as an outpatient.

[30] He testified that the Plaintiff actually needed specialist treatment in the form of maxilla-facial surgery which Swaziland did not have. He confirmed that when he examined the Plaintiff in 2006, the Plaintiff had not had any specialist treatment and was now looking deformed. The Plaintiff walked in such a way that shielded the injury and he looked shrunken and smaller than before. There was evident asymmetry on his face and scarring corresponding to the laceration PW3 had seen in 1997 and his right temple mandible joint was not working.

[31] On palpitation of the area that he was examining there crinkpitations felt on the right angle of the mandible which was also tender in that he reacted in pain. PW3 stated that the temple mandible joint on the right was not functioning in that it would not respond to his opening of the mouth, there was no longer any communication between the upper side of the jaw and the

lower side. This was caused by the fracture through the angle of the right mandible with bone loss. The two parts of the mandible were no longer together as they should be.

[32] PW3 confirmed that the Plaintiff had permanent injury because the jaw could not be re-united after the loss of over a centimeter thickness of bone.

[33] Asked how the injury had affected the Plaintiff's life expectancy, PW3 responded that the Plaintiff had lost the ability to chew any hard food. That had grossly affected his life expectancy because the tendency will be for him to choose soft foods which may not be balanced which resulted in the condition he was looking when he saw him again in 2006. Soft food was expensive for any ordinary Swazi person so that one ended up eating food which was not balanced and this would have a negative effect on life expectancy.

[34] With regard to pain, PW3 testified that the Plaintiff was experiencing a lot of pain caused by the hanging jaw which was moving in all sorts of direction upon palpitation, injuring soft tissue. That if he remained untreated, the pain would remain a permanent feature of his life as the hanging jaw was

unsupported. He stated that if the Plaintiff could be treated as suggested above the pain would recede, and that would involve fixing the jaw.

[35] PW3 was asked how the injury had affected the Plaintiff's lifestyle. He said that the Plaintiff would not be able to play any hard sport because of the pain nor carry out any hard physical exertion. PW 3 said that the injury would also affect the Plaintiff's earning income because he could not do any physical work like any normal being. The only work that would be suitable would be clerical work.

[36] Asked what the procedure would cost, he responded that it would cost no less than E300,000.00 (Three hundred thousand Emalangeni) even though he had written E250,000.00 in the report the price had since gone up. The procedure would involve more than just one specialist because of the bone loss the treatment would involve grafting of bone from another part of his body to try and fill in that gap and would involve a minimum of three to four different surgeons. After surgery there would be a maintenance phase whereby the Plaintiff would need to visit his specialist for review at least twice before the treatment could be said to be complete.

[37] Thereafter PW3 handed in his report as Exhibit A.

[38] Mr. Kunene cross-examined PW3 who admitted that he had prepared the report on the 18<sup>th</sup> October 2006 at the request of the Plaintiff's attorney. To prepare the report he had access to the medical notes pertaining to the Plaintiff including those of 1997. He says that when he saw the Plaintiff the first time he was able to talk and was able to answer questions put to him. After the evidence of PW3, the Plaintiff closed his case.

[39] The defence case opened with 2149 Detective Inspector Vusi Mabuza (DW1). He testified that during February 1997 he was a desk officer at Lobamba police station. That on the 9<sup>th</sup> February 1997 when he reported for duty he received a report that the Plaintiff had been shot at Mvutjini. He started investigations together with 1711 Detective Constable Ndzimandze. He went to Mbabane Government Hospital where he found the Plaintiff who had been shot in his right cheek but was still able to talk though with some difficulty.

[40] DW1 says that the Plaintiff told him that he had been shot and DW1 recorded the statement. That the Plaintiff had a very good recollection of the

events leading to the shooting. The Plaintiff mentioned that he was at a bus stop at Mvutjini with one Mbuso Dlamini and the late Bheki Dlamini. There were other people including a woman. It was during the afternoon and the Plaintiff and his companions were hitch hiking towards Nkanini.

[41] A vehicle which was a double cam van approached and stopped. The Plaintiff went straight to the vehicle and asked for a lift but the occupants did not pay him any attention. They gave the woman a lift. The Plaintiff asked them why they were not lifting him and his companions and an argument ensued and he was shot. After being shot, he fell and the vehicle sped off while the Plaintiff fell into a donga. After that he was taken by an ambulance from the Fire Services to the Mbabane Government Hospital.

[42] The Plaintiff described the people who shot him to have been wearing a uniform which looked like the Swaziland Ubutfo Defence Uniform. He was shot by the passenger.

[43] After recording the Plaintiff's evidence, DW1 went to Nkanini to interview Mbuso Nkambule a brother to the Plaintiff who recorded the same story as

the Plaintiff. Thereafter he interviewed Bheki Dlamini who also told the same story as the Plaintiff and Mbuso Nkambule.

[44] DW1 thereafter proceeded to the Central Administration because the witnesses had told him that the vehicle was a Swaziland Government vehicle and that its registration was SG 048 NR or something similar. They searched the records but could not find a vehicle with that registration.

[45] DW1 also went to the Army Headquarters at Matsapha trying to trace the men that had shot the Plaintiff. His search was unsuccessful. Equally Mbuso and Bheki said that they could not identify the people who had shot the Plaintiff because they had run away during the argument.

[46] DW1 stated that he was never able to find the person who shot the Plaintiff and that the case was still pending at Lobamba under Case no. 164/1997.

[47] DW1 was cross-examined by Mr. Rodrigues. He stated that the reason why he went to the Army Headquarters was because the witnesses had told him that the people who had shot the Plaintiff wore a uniform similar to that of Umbutfo Swaziland Defence Force uniform. He also went there to

investigate the vehicle because during those days there was a mass stay away in Swaziland and he wanted to find out if there were any army personnel who were using the vehicle. He was shown a list of the vehicles that had been borrowed from the Government but there was no vehicle with that registration. The vehicles were used for patrol purposes during the mass stay away.

[48] He stated that he had gone to CTA to find out which vehicles were issued to the Defence Force and found that the vehicles were issued to the police who distributed them to the Defence Force and Correctional Services. He was shown a list of the distribution. He did not take the list.

[49] He stated that the “NR” on the vehicle meant that it came from the Ministry of Natural Resources and the SG for Swaziland Government. He says that he did not ask for the list of firearms that was issued to army personnel at that point in time and was not able to determine whether any of the army personnel had discharged any of their firearms on the material day.

[50] He informed the Court that Detective Constable Ndzimandze recovered some cartridges from the scene which were sent to South Africa for forensic

report. They had not been returned when he gave evidence on the 14<sup>th</sup> July 2010.

[51] He informed the Court that when an officer from the security services having been issued a pistol uses it, an entry or a report is made to the effect that some rounds of ammunition have been discharged from that weapon. The person responsible for the discharge has to give reasons as to why that has been done. He says he made enquiries in this regard but his enquiries were unsuccessful.

[52] When I took over the case learned counsel did not wish to start the matter *de novo* and suggested that I work with the material that was available.

[53] In order to take the matter forward I issued an order in the following terms:

**“The commissioner of Police and/or Detective Inspector Vusi Mabuza 2149 to produce before Court the following:**

**TO BRING with you and then file and produce to the Court the several documents specified in the list hereunder:**

- 1. The inquiry file pertaining to the shooting incident whereupon the Plaintiff was shot on the 8<sup>th</sup> February 1997.**

2. The ballistic report pertaining to the bullets/cartridges sent to South Africa for forensic examination.
3. To produce the actual bullet/cartridges pertaining to the aforesaid incident.

**AND THE REGISTRAR OF THE CENTRAL MOTOR VEHICLES to produce:**

2. Details of vehicle registration number SG 048 NR for an or about the period 1997.
3. The Distribution List of all Government vehicles in use by various Government departments for the period in or about 8<sup>th</sup> February 1997.

**AND THE SWAZILAND UMBUTFO DEFENCE FORCE to produce:**

4. A report of all service pistols that discharged bullets and/or fired on or about the 3<sup>rd</sup> February 1997”.

[54] I requested that the bullet and its segments that were extracted from the Plaintiff by Dr. Magagula be handed over to the police ballistic expert, 3337 Inspector Harry Madonsela to examine it in order to determine what firearm had discharged it. He was requested by the Court to prepare and present his findings.

[55] Inspector Madonsela (witness for the Court) testified that on the 11<sup>th</sup> July 2016 he received a container with a bullet which was a 6.35 mm. caliber. He told the Court that the bullet was designed to be fired by a centre firearm. A center firearm is where the firing bin is at the centre of the firearm. He stated that he came to the conclusion that the bullet was fired by a pistol made in the USSR which fell under the Warsaw Pact and not under the North Atlantic Treaty Organisation (NATO).

[56] He stated that the significance of this is that there are countries that are under Warsaw and others under NATO. When they procure or buy their firearms they have to follow certain agreements. Swaziland is under NATO and among those under Warsaw was Mozambique and Russia.

[57] He went on to say that such firearms (the one under discussion) are for Civilians even though it was a semi-automatic pistol.

[58] He testified that he went to the Defence Force to check their records and found that their issue started from 9 mm caliber, 7.62 mm and 5.56 mm. These are the ones issued when the personnel go on operations.

[59] He told the Court that he could state with certainty that the bullet did not come from the issue of the Defence Force. He received the bullet from the Attorney General per Mr. Kunene, under Inquiry file No. 90/1997. He handed the bullet and his report into Court as exhibits.. These were marked Exhibit 1 and Exhibit A respectively.

[60] He stated that he did not check the Royal Swaziland Police and the Correctional Services records.

[61] Inspector Madonsela was cross-examined by both Counsel and he maintained his position that the Defence Force did not have this type of firearm.

[62] PW1 was recalled by the Court and on the 2<sup>nd</sup> August 2017 he testified that since his last testimony there were new developments with regard to his health. After Masuku J had ordered that he be taken for further medical attendance, he approached Phalala Fund on the recommendation of Dr. Magagula (PW3). During 2010 he was taken to Louis Pasteur Hospital in the Republic of South Africa (RSA) where he was hospitalized for a long time.

[63] During the first operation, plates were fixed to his right jaw and a bone inserted in his jaw. After about his six or seven weeks he returned to RSA to remove the plates. After they were removed a Doctor Mahomed who was attending him suggested that he go for another operation as the bone had not fused with his jaw.

[64] The second operation he had was to enable the doctor to fit a wire in his mouth in order to put his jaws together. His jaws were wired together to prevent him eating solid food. He was placed on a liquid diet. The wire gave him no problems and PW1 suggested that it be removed and the plate be returned. He testified that he was still using the plate. The bone graft used in his jaw was extracted from his ribs.

[65] He testified that he had been fine until December 2016 when he began experiencing complications whereupon he returned to the Mbabane Government Hospital. He had developed a hole under his tongue which gets impacted with food and has to be cleaned out which was done at the hospital.

[66] He stated that he has to have his tongue cleaned out every six months and that Dr. Dube does the cleaning out. He has to be injected first to make the area numb before it is cleaned out.

[67] He had ten (10) operations all together.

[68] He testified that his life had improved since the operations and he could now work. That he was currently employed by Tisuka Taka Ngwane where he cleans offices. That before he was treated his jaw was loose and he could not eat properly as his jaw was mobile and seemed to have a life of its own.

[69] He was now able to eat properly as he was much better even though he experiences pain which will not go away.

[70] Likewise 2149 Assistant Superintendent Vusi Mabuza (DW1) was also recalled by the Court on the 2<sup>nd</sup> August 2017.

[71] He was asked what happened to the report with regard to the cartridge he had collected at the scene. His response was that as the investigator in this case he had taken it to the RSA for forensic evidence. Unfortunately, the

cartridge and report did not return. He told the Court that means were done to try and get the report but the efforts were not successful.

[72] He told the Court that when he was advised that the report was required per my order of 28<sup>th</sup> November 2016, he made a follow up to the lab in Pretoria and he was advised that they could not trace the cartridge as this was an old 1997 matter.

[73] With regard to details pertaining to the vehicle SG 048 NR, he said that he did his best to investigate the motor vehicle at the central registry office. He was not successful there either. He was advised that the aforesaid vehicles were loaned to the Correctional Services, Defence Force and the Royal Swaziland Police during the mass stay away but were not sure which vehicle was deployed to which security service. He went to the Defence Force but did not find anything.

[74] With regard to the Distribution list of all Government vehicles in use by various Government departments for the period in or about 8<sup>th</sup> February 1997, he drew a blank. Indeed the distribution list filed does not reflect any vehicle with the registration SG 048 NR.

[75] With regard to reports of all service firearms that discharged bullets on or about February 1997, he did not find any.

[76] As mentioned earlier the Defendant opposed the matter and denied that it was members of the Defence Force that shot the Plaintiff.

[77] The Defendant did not lead anyone from the Defence Force but led Inspector Mabuza from the Royal Swazi Police who investigated the matter. The crucial features of the evidence of Inspector Mabuza forming the basis of the Defendant's case is namely:

- (a) **That the Plaintiff was unable to identify the shooter and that during the skirmish, Mbuso and Boy stayed away from the scene and also were unable to identify the shooter or anyone else in the motor vehicle.**
  
- (b) **That the Plaintiff and his witnesses were unable to remember the complete registration number of the vehicle other than that it was an SG ending with an NR. That in his investigation Inspector Mabuza was unable to locate a Nissan Twin Cab vehicle with an SG 048 NR even at CTA where all Government vehicles are registered or even among the Defence Force vehicles allocated for the mass stay away of 1997. And that the unavailability of the registration numbers**

**between the SG and NR made it difficult for the investigating officer to locate the vehicle.**

**(c) During the shooting, there was a mass stay away in Swaziland. Evidence was led by Inspector Mabuza that in such situations armed forces disperse at 1700 hours when businesses they are to protect are closed and when people have gone to their homesteads. The shooting occurred at around 1830 hours when the armed forces have long been dispersed and fire arms surrendered.**

**(d) That the evidence of the Ballistic expert, Harry Vusi Madonsela, shows that whoever shot the Plaintiff used a civilian weapon and not a military weapon.**

[78] That the Plaintiff failed to prove liability on the part of the army because the firearm that was used to shoot the Plaintiff did not belong to the Army and that the motor vehicle that was used by the assailants was not allocated to the army on that day.

[79] The Defendant has submitted that the onus to prove that the Plaintiff was indeed shot by a member of the Defence Force is on the Plaintiff and he has failed to discharge that onus.

[80] And has supported his arguments by citing the following authorities:

**“According to Boberg, The Law of Delict Vol. 1 at page 377, the onus is on the Plaintiff to prove in a civil case upon a preponderance of probabilities that the Defendant was negligent. Defendant submit that the Plaintiff failed to discharge that onus.**

**And McKerron The Law of Delict 7<sup>th</sup> ed at page 40, that the burden of proving negligence rested on the Plaintiff. The Plaintiff must prove not only that the Defendant was guilty of negligence, but also that the harm complained of was attributable to that negligence. If at the conclusion of the case the evidence is evenly balanced, he cannot claim a verdict for he will not have discharged the onus resting upon”.**

[81] In conclusion the Defendant prays that the Plaintiffs action be dismissed with costs.

[82] The Plaintiff on the other hand contends that he has established on a balance of probabilities that the shooter was a member of the Defence Force at the time acting within the scope and course of his duty.

[83] He bases that claim on the fact that he and his brother identified this person as an army member by virtue of the following:

- (a) This person was a member of a party travelling in a vehicle with an SG  
i.e. Government registration number.**

- (b) The party was armed with fire-arms.**
- (c) The driver was wearing an army uniform and gave his gun to the person who shot the Plaintiff.**
- (d) The persons said they do not give lifts to civilians there inference is that they were not civilians.**
- (e) It was at a time of political unrest, strike action and employees in the Kingdom of Swaziland, hence the high presence of security forces and personnel in the country**
- (f) The brazen conduct of the Plaintiff's assailants to openly brandish a firearm in the public in the presence of members at bus stop, thereafter openly shoot the Plaintiff and drive off without regard to their actions.**

[84] The Plaintiff finally contends that he has established on a balance of probabilities that the shooter was an army member, at the time acting within the scope and course of his duty.

[85] I accept the Plaintiff's version of events as they unfolded on the material day. The evidence shows that the shooting was deliberate and therefore grossly negligent.

[86] When I listened to Inspector Mabuza outline to the Court what he did during his investigations, I concluded that either he was not willing to rock the boat as far as the investigation of the Defence Force was concerned because he drew a blank everywhere or that he was protecting the Defence Force or even afraid of them.

[87] He even failed to follow up on the cartridge that he had sent to Pretoria until I requested him to do so indicating to me that there was no political will to investigate members of the Defence Force or to get them into trouble by charging any of them with the attempted murder of the Plaintiff which carries a heavy penalty and custodial sentence if convicted.

[88] The Court tried to have what was left of the bullet that was retrieved from the Plaintiff examined and matched to the relevant firearm by Madonsela. That effort drew a blank. I need not regurgitate the evidence of Madonsela because it speaks for itself. I got the impression that he too was afraid to rock the boat as far as members of the defence force were concerned.

[89] The conclusion that I drew after listening to Inspector Mabuza and Inspector Madonsela was that the security forces were closing ranks and that any outsider (being the Plaintiff) was perceived to be the enemy.

[90] The random shooting and injury of the Plaintiff was carried out by a trigger happy member of the Defence Force on a civilian, virtually a child at that time, as the Plaintiff was only 17 years old. Soldiers are trained for war and not to control civilians, unlike the police. And where they are called upon to assist the police as was the case then, and they cross the line they are expected to take responsibility

[91] Ending impunity for the armed forces is critical in a constitutional state for the rule of law to be maintained. They cannot simply act with impunity by shooting unarmed civilians.

[92] If impunity is the order of the day then not only the rule of law but also democracy would be in grave danger.

[93] Not only did the member shoot the Plaintiff, he was left there writhing in pain and unattended. He could have died and the member would have

retreated into the safety of the army barracks. That is not only tragic but sad, giving the country a bad reputation.

[94] This matter ought to have been properly investigated by the police and the perpetrator charged with attempted murder and brought before a court of law for the member to face the injurious consequences of his actions.

[95] But it would therefore appear from the evidence, that there was no concerted effort to either investigate the shooting of the Plaintiff despite the incident occurring in a public place (bus stop) with numerous people present other than the Plaintiff and his companions. Furthermore the failure of the Defendant to produce any reports forensic or otherwise pertaining to the cartridges found at the scene of the shooting cannot be ignored and neither can the failure of the Defendant to produce any evidence of the use and distribution list of firearms and the use thereof, including any report pertaining to the discharge of weapons indicates probable collusion and concealment of the identity of Plaintiff's assailant.

[96] The amounts claimed by the Plaintiff are justified and commensurate with the following:

- (a) **The Plaintiff was only approximately 17 years of age at the time with his whole life ahead of him.**
- (b) **Plaintiff has endured extreme pain and suffering, and the resultant loss of amenities to life since the day (8/2/1997) of shooting until he obtained further comprehensive treatment thirteen 13 years later to better his condition, the treatment which involved a bone graft and numerous operations numbering at least ten (10).**
- (c) **Notwithstanding the treatment as aforementioned, which admittedly has improved Plaintiff's health and general well-being, his injuries are nevertheless permanent and remain severe and are still causing the Plaintiff pain and suffering, likely to become more pronounced with age and in cold conditions. Recurrent infection will and does re-occur, the most recent being on December 2016 requiring surgical procedures to be performed.**
- (d) **The injuries caused disfiguration in the sense the Plaintiff's jaw is now lopsided.**
- (e) **The Plaintiff is unable to chew properly and is deprived of certain nutrients as a consequence, which further adversely affects his health.**
- (f) **Even though the Plaintiff obtained assistance and aid through the Phalala Fund and this has mitigated his estimated medical costs of E250,000.00, nevertheless the Plaintiff is confined to the mercy of Government**

(g) **The Plaintiff further cannot perform any physical exerting job.**

[97] I agree with Mr. Rodrigues that in view of the above, the Plaintiff's quality of life has been significantly and adversely affected as a direct consequence of the shooting and it is fitting that this Court awards him some measure of damages.

[98] In doing so I am guided by the authorities cited by Mamba J in *Delisa Kenneth Masina v Umbufto Swaziland Defence force and Another* Case no. 274/2005 (unreported).

[99] 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 be 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 him by awarding lawful 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.
- (h) Damages may be awarded for the causing of pain and suffering as a result of bodily injuries. (footnotes omitted)

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. ...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.”

[100] In the case of **Ntombifuthi Magagula v The Attorney General**, Appeal Case 11/2006 unreported at 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.”

[101] The Plaintiff has not proved loss of earnings to date and cannot be awarded anything under that head. However, the injuries that he suffered were very severe and bearing that in mind, I award to him the following:

Pain and suffering	E350,000.00
Permanent disability	E200,000.00

Loss of amenities to life	E400,000.00
Future medical expenses	E150,000.00
	<hr/>
<b>Total</b>	<b><u>E1100,000.00</u></b>

[102] In the event the action succeeds and the Plaintiff is awarded damages in the sum of E1,100,000.00 (One million one hundred thousand Emalangeni) together with interest and costs. Interest on the amount awarded at the rate of

9% per annum a *tempora morae* with effect from 14<sup>th</sup> November 2001 when combined summons and particulars of claim were served upon the Defendant.

TMBABANE

Crim. Case No.



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**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Plaintiff : Mr. Rodrigues  
For the Defendant : Mr. V. Kunene