IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 25/2013

In the matter between

THE SWAZILAND GOVERNMENT	**APPELLANT**
And	
AARON NGOMANE	**RESPONDENT**

Neutral citation:	**The Swaziland Government vs Aaron Ngomane 25/2013 [2013] SZSC 73 (29 November 2013)**
Coram:	**RAMODIBEDI CJ, MAPHALALA JA and OTA JA**
Heard	**19 NOVEMBER 2013**
Delivered:	**29 NOVEMBER 2013**
Summary:	**Civil procedure: damages in non-pecuniary loss cases; the Plaintiff defecated in the open near the International bordergate at Lomahasha; Plaintiff was ordered by a soldier who was patrolling the borderlines to pick up the faeces and remove it; the soldier also ordered the Plaintiff to do some push-ups; Plaintiff sued the government in the sum of E350,000 as damages for infringement of his dignity; the court *a quo* awarded E50,000 as damages for *injuria* and *contumelia*; on appeal held: material misdirection in the process of the award warranting interference with the award; the award of E50,000 set aside and replaced with an award of E30,000 as damages for the *injuria* and *contumelia.***

JUDGMENT

OTA. JA

[1] We live in an era of human rights. As **Justice Pikis**, President of the Supreme Court of Cyprus, rightly observed in the text **"The Constitutional Position and Role of the Judge in a Civil Society." Commonwealth Jud. J, December 2000 at 9.**

> **"The essence of human rights lies in the existence within the fabric of the law of a code of unalterable rules affecting the rights of the individual. Human rights have a universal dimension, they are perceived as inherent in man constituting the inborn attributes of human existence to be enjoyed at all times in all circumstances and at every place."**

[2] The substratum of all human rights is the right of dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole.

[3] It is universally recognized that human dignity is firstly the dignity of each human being as a human being. In this encapsulates the viewpoint that human dignity includes the equality of human beings. Discrimination infringes on a person's dignity. Human dignity is a person's freedom of will. This is the freedom of choice given to people to develop their personalities and determine their own fate. Human dignity is infringed if a person's life or physical and mental welfare is harmed. It is infringed when a person lives or is subjected to humiliating conditions which negate his humanity. It envisages a society predicated on the desire to protect the human dignity of each of its members.

[4] Even though this matter is not steeped in constitutional damages, it is important that we observe that human dignity is itself a right protected under the Constitution Act 2005, via section 18 as read with section 14 (1) (e) thereof.

[5] It follows from the totality of the aforegoing that the right of human dignity cannot be infringed upon without an appropriate procedure. It is precisely the complaint of such an unlawful infringement that formed the gravamen of the litigation *a quo,* which has translated into this appeal.

[6] This is an unsavoury tale. I say this because it is deeply rooted in human faeces. No matter from which angle it is viewed, this tale is distasteful and invokes a sense of revulsion. Our discipline as Judges however demands that we bear the full brunt of the aftermath of this saga.

[7] The kingpin of this story is the experience which the Respondent Aaron Ngomane had on the 28th of July 2005 at the Lomahasha Border Post, Lubombo District, Swaziland. The Respondent had the previous evening, driven a truck across the border apparently from Mozambique into Swaziland. His mission in our beautiful Kingdom was to deliver goods at a shop near the clinic at the Lomahasha border post. The shop was closed. This entailed that the Respondent slept in the truck until the following morning.

[8] When he woke up in the morning, and around 7 am, he felt the call of nature. In life, you can't cheat nature. The Respondent who is but a human being, is

susceptible to human frailities. Admittedly, this can be an irresistible urge as appears to be the position *in casu*. The Respondent promptly rushed into a bush or shrubbery whatever be the case, which is located near the International bordergate at Lomahasha, let down his pants and defecated.

[9] It appears from the Respondent's evidence *a quo* that it had been his practice over the years to defecate in the bushes near the International bordergate rather than use the toilet facilities located at the border, the nearby clinic, garage or police station. It appears that he had previously successfully executed this venture. However, his luck ran out on the day of this incident, as it were, the proverbial **"one day for the owner of the house".**

[10] This was a real misadventure. The beginning of the Respondent's ordeal. I say this because whilst still apparently stooped and defecating, the Respondent was accosted by Nandinyo Nyamposse who is a soldier with the Umbutfo Swaziland Defence Force. He is as such, a servant of the Appellant, the Swaziland Government. Nyamposse who was then in military regalia, complete with his service rifle, was in the ordinary course of his duties of patrolling the borderlines between Swaziland and other countries.

[11] Obviously affronted by the indignation, indecency or effrontery of the act of the defecating Respondent, Nyamposse ordered him to rise up and demanded to know whether the Respondent was not aware that he could not relieve himself there.

[12] Nyamposse was apparently, in my supposition, motivated by a sense of duty to defend his motherland from such desecration. Who wouldn't be? After all, it was the legendary Nigerian author **Chinua Achebe** in the universally read text **"Things Fall Apart",** page 140, who in depicting the fearless character **Okonkwo** intoned:-

> **"Let us not reason like cowards" said Okonkwo "if a man comes into my hut and defecates on the floor, what do I do? Do I shut my eyes? No! I take a stick and break his head. That is what a man does----"**

[13] This text goes to highlight the disenchantment with which the Plaintiff's act of profanity is viewed even in contemporary jurisdictions.

[14] Speaking for myself, I always feel a sense of outrage when I see members of the public urinating along the public roads, spitting all over the place and in whichever manner polluting the environment. In the process they deface our beautiful Kingdom. I can thus empathize with Nyamposse for taking umbrage at the defecating Respondent and quering him as he did. This would have been all well and good if the matter ended at this juncture, or at least directly thereafter with the arrest of the Respondent and a formal complaint of his injudiciousness lodged at the police station. However, this does not appear to be the case. What is apparent from the facts of this case is that Nyamposse literally **"took a stick and broke it on the Plaintiff's head"** as suggested in the text **Things Fall Apart**. This was the anticlimax of his otherwise noble law enforcement prowess.

[15] I say this because the upshot of this saga is the Respondent's allegation that Nyamposse not only ordered him to do push-ups at the scene of the incident

but also ordered him to pick up his faeces with his right hand and return it to South Africa. This command the Respondent alleged he obeyed under the threats of the service rifle which Nyamposse was then wielding. The Respondent alleged that he was consequently subjected to doing push-ups for three hours and also picked up his faeces with his bare hand and put it in a plastic bag.

[16] Suffice it to say that the aforegoing facts formed the crux of the action which the Respondent as Plaintiff instituted at the High Court, claiming *inter alia* the sum of E350,000=00, interest at the rate of 9% per annum *a tempore morae* and costs of suit.

[17] The peculiar phenomenon of this claim as detailed in para [4] of the particulars of claim is that on the day in question Nyamposse, who was fully armed did wrongfully and with intent to injure the Plaintiff in his personal dignity, do the following:-

> **" 4.1 Ordered Plaintiff to do push-ups for about three (3) hours.**
>
> **4.2 Ordered Plaintiff to collect his faeces from Swaziland, and carry (sic) them in a plastic to South Africa.**
>
> **4.3 Threatened to shoot Plaintiff when he was failing to do the push-ups.**
>
> **4.4 Hit Plaintiff with the barrel of the rifle when Plaintiff failed to continue doing the push-ups."**

[18] The Appellant as Defendant filed a plea to defend the suit. After a full blown trial wherein a total of four witnesses testified, the court *a quo* per **Annandale J**, pronounced judgment on the 24th of April 2013. In its judgment, the court awarded the sum of E50,000 to the Plaintiff as damages, plus interest at the

rate of 9% per annum from date of judgment to date of payment and costs of suit. This award was in respect of the injury alleged in paras 4.1 and 4.2 of the particulars of claim, that is for the push-ups and picking up of the faeces, the court having found that the Plaintiff failed to prove the claim as detailed in paras 4.3 and 4.4 respectively.

[19] Aggrieved, the Defendant as Appellant fired off the present appeal to this Court. The notice of appeal advances the following grounds of complaint.

> **"1. The learned Judge a quo erred in law and in fact in holding that it was common cause that the faeces was removed from the scene by the Plaintiff and that it was done under the constraint and due to the unrelenting orders of the Appellant.**
>
> **2. The learned Judge erred in law and in fact in holding that the Defendant had admitted in its plea that the Plaintiff was compelled to remove his own faeces.**
>
> **3. The learned Judge erred in law and in fact in awarding damages for the push-ups when the Plaintiff had not established and / or proved that the order to perform the push-ups was unlawful.**
>
> **4. The learned Judge a quo erred in law and in fact in holding that the Appellant committed an injuria and contumelia against the Respondent.**
>
> **5. The learned Judge erred in law and in fact in awarding the Respondent the damages in the sum of E50,000=00 (Fifty Thousand Emalangeni)."**

[20] Both parties filed respective heads of argument and tendered oral submissions when this appeal was heard. I have carefully considered the record of this appeal *vis a vis* the grounds of appeal as well as the submissions advanced.

[21] I find it convenient to deal with the issues raised by the grounds of appeal *ad seriatim.* Grounds 1 and 2 in my view can be conveniently disposed of together.

[22] These two grounds of appeal raise the following issue, to wit:-

1. **Whether or not the court a quo was correct to hold that Plaintiff was compelled to remove his own faeces and that the Plaintiff removed the faeces under the constraint and unrelenting order of the Defendant.**

   On this issue the court *a quo* held as follows:-

> **"[28] The last leg of his claim differs from this. Although the finer details differ, it is common cause that the Plaintiff defecated in the open, in an area close to the international bordergate. It is also common cause that it was removed from the scene by the Plaintiff and that it was done under the constraint and due to the unrelenting orders of the soldier.**
>
> **[29] Nyamposse wants it to be believed that Ngomane did so of his own volition, but the totality of evidentiary material does not support this. On the contrary, the Plaintiff was humiliated and coerced to do so. While he might not have behaved himself in an acceptable manner, to make use of toilet facilities even if it was situated outside his comfort zone, it does not give justification for the consequences that befell him.**
>
> **[30] With the evidence as vague and contradictory as it is, it does not detract from the fact that he was compelled to remove his own faeces from the scene. This much is also admitted in the plea filed by the Defendant."**

[23] In its heads of argument the Appellant attacked the above findings of fact. It drew the Court's attention to the Plaintiff's plea in this regard in para 4.2 of the pleading and of the reply thereto by the Defendant in paras 2 and 3 of the Defendant's plea. The Appellant contends that both paras 2 and 3 of the

Defendant's plea deny the contents of para 4 of Plaintiff's particulars of claim. This denial meant that the contents of para 4.2 were in issue.

[24] The Appellant further contended that the court *a quo* erred in holding that it was common cause that the faeces was removed from the scene by the Plaintiff under the constraint and orders of Nyamposse. That the trial in the court *a quo* proceeded on the footing that the Plaintiff had to prove that he was forced to pick up his faeces by the soldier. The Plaintiff led evidence to prove this fact. If this fact had not been in issue the Plaintiff would never have led evidence in proof of same, further contended the Appellant.

[25] The Appellant also submitted that the mode of cross-examination of both parties at the trial *nisi prius* shows that one of the issues before the court *a quo* was whether the Plaintiff was forced to pick up his faeces. This, the Appellant contends, is borne out of the fact that in pages 24 and 25 of the record of proceedings it was put to the Plaintiff that when he went to the bush to collect the faeces he was alone and the soldier was not there. It was also put to the Plaintiff that he offered to go and collect the faeces. For the aforegoing propositions the Appellant relied on **Herbstein and Van Winsen 1997**, **The Civil Practice of the Supreme Court of South Africa, 4th ed pp 464 & 664 and James Ncongwane v Swaziland Water Services Corporation [2012] SZSC 65 para [36].**

[26] It was contended *replicando* by the Respondent in his heads of argument, that the Appellant expressly admitted in para 3.3 of it's plea *a quo* that the Plaintiff

was ordered by Nyamposse to remove his faeces. Therefore, the Appellant is bound by this pleading and cannot seek to resile from it on appeal.

[27] Since this issue turns on the general principle that parties are bound by their pleadings, it is important that we detail the functions of pleadings in this regard which are two dimensional. This is to facilitate a proper resolution of this issue. These functions are as follows:-

1. Pleadings define with clarity and precision the issue or questions which are in dispute between the parties and fall to be decided by the court. If the Defendant admits in his statement of defence a fact which is alleged in the statement of claim, what is admitted ceases to be in controversy between the parties. It need not be proved at the trial by any of the parties but is taken as established. It is only those facts alleged in the statement of claim and denied in the statement of defence that will require trial. They constitute the facts on which the parties have joined issues. These alone call for trial. Evidence has to be addressed to prove them. Accordingly, it is at the close of the pleadings that the scope of the dispute can be determined.

[28] The only exception to the aforegoing general principle is that a court does not make declarations of right either on admission or in default of defence without hearing evidence. Therefore, where for instance the defence sought in a counter-claim is a declaratory judgment, and the Plaintiff fails to file a defence to the counter-claim, the Defendant still has to satisfy the court by evidence that he is entitled to the declaration sought. This principle, however, is limited to cases commenced by way of writ of summons which

call for pleadings and witnesses to testify on admissions by way of pleadings. The principle does not apply in declarations asked for in originating summons and motions which have affidavit evidence in support.

[29] 2. Pleadings serve as fair and proper notice to parties of the case they have to meet at the trial. This enables them to frame and prepare for their cases at the trial. In furtherance of this objective a party may ask for further and better particulars of the pleadings filed by his opponent. This arises where the facts pleaded are vague. In complying with the party's demand, the opponent then gives details of the general and vague assertions contained in his pleadings. Adumbrating on the rationale of this function of pleadings in the case of **George and Others v Dominion Flour Mills Ltd (1963) 1 All NLR 71, per Bairamain FJ,** the erstwhile Federal Supreme Court of Nigeria declared as follows:-

> **"The fairness of a trial can be tested by the maxim audi alteram partem. Either party must be given an opportunity of being heard, but a party cannot be expected to prepare for the unknown; and the aim of pleadings is to give notice of the case to be met; which enables either party to prepare his evidence and arguments upon the issues raised by the pleadings, and saves either side from being taken by surprise."**

[30] It follows from the above that parties are bound by their pleadings. A party is restricted at the trial to give evidence of only the facts alleged in his pleadings. This is to prevent the other party from being taken by surprise by evidence of new facts not pleaded, thus defeating this fundamental purpose of pleadings as notice of the case to be met at the trial. The cardinal rule therefore is that if the evidence preferred in proof of the facts alleged in the pleadings is at variance with the facts pleaded, such evidence, whether extracted in examination in chief or during cross-examination is inadmissible. It must be disallowed or

overlooked since it tends to prove matters not pleaded. In this event it makes no difference that the other party did not object to the evidence or that the Judge did not reject it.

[31] The aforegoing is the general rule save that once facts have been pleaded by the Plaintiff in his statement of claim, the Defendant need not plead such facts again before he can adduce evidence, comment or rely on them. But a Defendant is not entitled to rely upon a defence which is based upon facts not pleaded in the statement of claim unless, he alleges such facts specifically in his pleadings. In the same vein a Plaintiff may also lead evidence to prove a matter not pleaded by him but which is pleaded by the Defendant.

[32] From the combined effect of the two principles detailed ante emerges the cardinal rule that a party is not permitted to advance evidence on a matter that is not raised in his own pleadings nor in that of his opponent. Having specifically pleaded a fact a party is bound by the fact as pleaded and cannot seek to lead evidence at variance with it. The court is also bound by the pleadings. Its jurisdiction is circumscribed within the facts as pleaded by the parties.

[33] The question here is, did the Defendant admit the Plaintiff's claim as to the removal of the faeces or was there any part of the plea that needed to be tried?

[34] It is pertinent that I observe right at the nascent stage of this inquiry that there was substantial admission by the Defendant of the Plaintiff's claim in this

regard though the admission was qualified in some respects. When this appeal was heard, based on this substantial admission and the totality of evidentiary material on the record which supports the ultimate findings of the court *a quo* on this issue, we asked the parties not to belabour the point on liability but to concentrate on the quantum of damages. Let me now demonstrate our reason for adopting this posture.

[35] The Plaintiff's pleading concerning the faeces at the trial *nisi prius* which is contained in para 4 of the particulars of claim bears repetition at this juncture to wit:-

> **"4. On or about 28th July 2005 at or near Lomahasha in the Lubombo District , Nandinyo Nampose, a member of the Umbutfo Swaziland Defence Force and fully armed, did wrongfully and with the intent to injure Plaintiff in his personal dignity did the following**
>
> **4.2 Ordered Plaintiff to collect his faeces from Swaziland, and carry them (sic) in plastic bag to South Africa."**

[36] The Defendant's response to the aforegoing allegation of fact is found in paras 2 and 3 of the plea as follows:-

> **"** **2**
>
> **"<u>AD PARAGRAPH 4</u>**
>
> **The Defendant denies that the Plaintiff was wrongfully and intentionally injured (sic) his personal dignity. Plaintiff is put to the strict proof thereof.**
>
> **3**
>
> **<u>AD PARAGRAPH 4.1 – 4.4</u>**
>
> **The contents of these paragraphs are denied and Plaintiff is put to strict proof thereof.**

3.3 **<u>The Plaintiff was ordered to dispose of his faeces from the area because his act was a health hazard and the Plaintiff opted to remove the faeces using a plastic bag instead of covering the faeces."</u>** (underlining mine)

[37] It is indisputable that the combined effect of the averments in paras 3 and 3.3 of the Defendant's plea is not an express admission of the Plaintiff's claim. Though there is substantial admission by the Defendant that the Plaintiff was ordered to dispose of his faeces from the area, this admission is however accompanied by explanations and qualifications in accordance with the Rules. I say this because Rule 22 (2) of the High Court Rules provides that **"the Defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of these facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies".** Sub-rule 3 also states **"Every allegation of fact in the combined summons or declaration, which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted, and if any explanation or qualification of any denial is necessary, it shall be stated in the plea."**

[38] What the Plaintiff alleged is that Nyamposse asked him to collect his faeces from Swaziland and take it to South Africa. In this regard there are a whole lot of circumstances that will constitute the inhuman treatment and the Defendant did not admit all of it. All the Defendant admitted was ordering the Plaintiff to dispose of his faeces because it was a health hazard. This order for the Plaintiff to dispose of his faeces *per se* may not amount to an inhuman treatment depending on the circumstances. If the Plaintiff left faeces in a place that is considered to be publicly indecent or a nuisance or a hazard to public health as is alleged *in casu*, he may be required by competent authority to remove the

faeces. How he is asked to remove it and the circumstances of the removal is what will turn it into inhuman treatment. For instance, if he is asked to remove it with bare hands or if he is asked not to drop it anywhere in Swaziland but to take it to South Africa, may constitute a degrading treatment. The Defendant clearly denies this crucial aspect of the Plaintiff's claim that the soldier ordered him to collect his faeces, by it's plea to the effect that **"the Plaintiff opted to remove the faeces using a plastic bag instead of covering the faeces".** The plea is clearly a denial of this aspect of the claim. The court *a quo* therefore misdirected itself when it held that it is common cause that the Plaintiff was compelled to remove his own faeces from the scene and that this was also admitted in the plea filed by the Defendant.

[39] I should also add here that it was this state of the pleading's that elicited the controversial evidence *a quo* on the circumstances of the removal of the faeces. The Defendant contended that the Plaintiff of his own volition opted to remove the faeces in a plastic bag, while the Plaintiff contended that it was Nyamposse that ordered him to pick up the faeces with his right hand and put it in the plastic bag. Therefore, whilst it is common cause that the Plaintiff was ordered to remove and did remove the faeces from the scene, the court *a quo* however, in my view, misdirected itself in finding that it was also common cause that the mode of removal was under the constraint and due to the unrelenting orders of the soldier.

[40] The court *a quo* itself recognized this dispute by its own observation in para [29] of the impugned judgment to wit **"Nyamposse wants it to be believed that Ngomane did so of his own volition, but the totality of the evidentiary**

material does not support this. On the contrary, the Plaintiff was humiliated and coerced to do so."

[41] This is an indisputable acknowledgment of the existence of the dispute. Even though the court *a quo* made references to the totality of the evidentiary material not supporting Nyamposse's case, the court appears to have reached this conclusion without any weighing and balancing of the totality of the evidence led on this issue on the scale of probabilities. Such evaluation of the evidence does not appear *ex facie* the impugned judgment.

[42] There should have been an assessment of the totality of the evidence adduced by either side on this crucial issue of fact. This evidence was not at variance with the pleadings and ought to have been considered in the overall assessment of liability. It should be clear in the judgment that the court considered all the evidence at the trial on the issue and having placed them on an imaginary scale the balance of the admissible and credible evidence tilted towards the Plaintiff. This is not such a case.

[43] It is trite that an appellate court should not interfere with the findings of fact of a trial court unless the findings are perverse, or are not supported by the evidence on record or are made on a misapprehension of the facts. It thus becomes necessary for this Court to assess the evidence led *a quo* on this issue to demonstrate its conviction, which I have already alluded to earlier in this judgment, that the court *a quo* was correct to have found that the Plaintiff was compelled to remove his faeces from the scene under the constraint and due to the unrelenting orders of the soldier. Our only point of divergence is the route

via which the court *a quo* reached that conclusion, which is that court's finding that this issue is common cause. This is clearly not the case.

[44] Now, in proof of his case *a quo* the Plaintiff told the court that Nyamposse ordered him to do push-ups which he did. When he got tired, Nyamposse used his rifle to prod him to continue. It was further the Plaintiff's evidence that he offered the sum of R10 to the soldier to induce him to discontinue the ordeal, but the soldier remained unyielding. The Plaintiff also testified that he asked Nyamposse that he needed to take his medication which was in the truck as he was not very well. Nyamposse escorted the Plaintiff to the truck. The Plaintiff testified that Nyamposse was at all material times pointing his gun at him. It was further the Plaintiff's evidence that after taking his medication they went back to the spot where he had defecated and Nyamposse told him that he must pick up the faeces with his right hand. The Plaintiff further alleged that he took a yellow plastic which was at the scene and put the faeces inside it. He also uprooted some of the grass he had relieved himself on and also put it in the yellow plastic. Nyamposse then let him go back to the truck. It was then PW1 who was selling bananas by the truck told him that it is never done in Swaziland that one can pick up faeces by hand and that he should report the matter at the police station. Thereafter, the Plaintiff went to the police station and opened a docket.

[45] Under cross-examination it was put to the Plaintiff that when he went with Nyamposse to the truck he did not take any medication. The Plaintiff denied this. It was put to the Plaintiff that when he went to the truck with Nyamposse and before he went back to pick up the faeces, Nyamposse insisted on taking him to the police station to lay a charge against him. The Plaintiff denied this.

It was suggested to the Plaintiff that a defence witness will come and testify that when he went back to collect the faeces, he was alone, Nyamposse was not there. The Plaintiff also denied this. It was put to the Plaintiff that whilst by the truck he begged Nyamposse for forgiveness and offered to go and collect his faeces. The Plaintiff denied this. It was further put to the Plaintiff that Nyamposse will come to court and testify that the Plaintiff went to collect the faeces alone, Nyamposse was left behind next to the truck. The Plaintiff replied that when he picked up the faeces Nyamposse was standing next to him holding his gun. After he picked up his faeces Nyamposse said to him not to throw it anywhere in Swaziland but to go back to South Africa with it.

[46] PW1 Julia Mahlalela's evidence corroborated the evidence of the Plaintiff in material respects. She testified to seeing the Plaintiff being escorted by Nyamposse from the bushes to his truck. She said the soldier was walking behind the Plaintiff pointing his gun at him and was ordering him in a commanding tone. When they got to the truck the Plaintiff showed the soldier some papers which she believed were hospital papers. She told the court that the soldier looked at the papers and then said to the Plaintiff **"take them back and then return and fetch your thing"**. It was further PW1's evidence that after this the Plaintiff and the soldier went back to the bush. Thereafter, the Plaintiff came back with a yellow plastic bag containing the faeces. She then suggested to the Plaintiff to go to the police station so that they will help him solve the dispute.

[47] PW1 remained consistent in her evidence all through the trial even under cross-examination. She maintained that it was Nyamposse who ordered the Plaintiff to go and fetch his faeces and that Nyamposse followed the Plaintiff back to

the bush from the truck and thereafter the Plaintiff came back carrying the plastic bag with faeces and that the Plaintiff was crying. And this according to PW1 was done under the command of Nyamposse and at gunpoint. This evidence to my mind appears to support the Plaintiff's case.

[48] In his defence Nyamposse consciously strove to distance himself from the scene in the bush at the material point in time when the Plaintiff did the actual picking up of the faeces. He told the court that on the day in question near the International bordergate, the Plaintiff defecated not in the bush but in the open and right in the very glare of the public. The soldier testified that the spot of this sacrilege was just 15 feet away from where he was then standing with DW2 Mgocoza Mahlalela who had come to return to him his cell phone after charging it. It was further Nyamposse's evidence that at the sight of the defecating Plaintiff he promptly dismissed DW2 because he wanted to get down to his duties. Thereafter, he confronted the Plaintiff with the view to arresting him. The Plaintiff resisted arrest. Whereupon he instructed the Plaintiff to do some push-ups. He further testified that after doing a couple of the push-ups which he had ordered him to do, the Plaintiff requested to go to the truck and take his medication. He escorted the Plaintiff to the truck. He admitted that he was walking behind the Plaintiff holding his service rifle but he says he was carrying the rifle at low port position (i.e pointed to the ground).

[49] He told the court that when they got to the truck the Plaintiff did not find any medication in the truck. Nyamposse then decided to arrest the Plaintiff and take him to the police station. It was further Nyamposse's evidence that they walked together for about 15 meters from the truck when the Plaintiff stopped

him and asked him to forgive him and was apologizing. Nyamposse told the court that he then asked the Plaintiff what was going to happen to the faeces. The Plaintiff offered to go back and pick it up. He then told the Plaintiff to proceed to do what he had said. Nyamposse said that he stood by the truck and the Plaintiff went back to the bush. After about six minutes the Plaintiff came back with the faeces in a plastic bag. Nyamposse then told the Plaintiff to proceed with it and make sure he puts it in the proper place. Thereafter, he returned back to his duty post.

[50] Even though Nyamposse wants the court to believe that the Plaintiff voluntarily opted to pick up his faeces, I agree with the court *a quo* that the weight of evidentiary material does not support this position. This, I say because the defence failed to put this position to PW1 who was at the scene and witnessed the incident. PW1's evidence that Nyamposse commanded the Plaintiff to go back and fetch his thing was not disputed even though she reiterated this evidence several times both in examination in chief and under cross-examination. It was never put to her that it was the Plaintiff who offered to go back and pick up the faeces. It was never put to her that the Plaintiff went back to the forest alone to pick up the faeces whilst Nyamposse remained behind by the truck. Her evidence that Nyamposse was all along pointing his service rifle at the Plaintiff and ordering him to comply with his instructions was never disputed.

[51] It was never put to her that from the truck Nyamposse was arresting the Plaintiff and taking him to the police station when the Plaintiff begged him to please forgive him and offered to go and pick up his faeces. This, notwithstanding PW1's repeated evidence that right by the truck Nyamposse

ordered the Plaintiff to go and fetch his thing and the duo proceeded to the bush thereafter.

[52] To my mind the failure to put these crucial aspects of the defence to PW1 in view of the fact that the Plaintiff contested it, leaves only one inference to be drawn. This is that the defence changed its story in the intervening period by the introduction of these allegations. The learning is that a party is required to put to each opposing witness, so much of its case or defence as concerns that witness, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. See **Small v Smith 1945 (3) SA 434 (SWA) At page 438.** The defence was obviously attempting to perfect its case. See **R v Dominic Mngomezulu and Others Criminal Appeal No. 94/90 and S v P 1974 (1) SA 581 at 582 (Rhodesia AD).**

[53] I am afraid that the same inference must be drawn about the introduction of DW2 Mgocoza Mahlalela into this case as one of the people who were at the clinic and witnessed what transpired between the Plaintiff and Nyamposse when they came from the bush to the truck. This version of the defence was never put to the Plaintiff or PW1. Rather, what was suggested to them was that the people who witnessed the incident were those who were off loading the truck and some other unidentified people near the clinic.

[54] What I find very interesting is that Nyamposse never suggested either in his evidence in chief or cross-examination that DW2 was at the clinic near the truck and witnessed the incident there. This is notwithstanding the fact that DW2 testified that when Nyamposse was escorting the Plaintiff from the bush to the truck, he saw DW2 standing by the clinic and they actually exchanged a few words. The only evidence which Nyamposse led regarding DW2 was that after thanking DW2 for charging his cell phone, he ordered him to leave at the sight of the defecating Plaintiff because he wanted to do his work. It thus appears to me that the evidence led by DW2 to the effect that he was at the clinic and witnessed the Plaintiff go back to the bush to collect his faeces while Nyamposse remained at the truck is clearly an afterthought. A fabrication geared at perfecting the defence.

[55] In any case, even if I were to agree with the defence that Nyamposse remained by the truck whilst the Plaintiff went to collect the faeces, this does not derogate from the uncontroverted and unchallenged evidence of PW1, that it was Nyamposse that ordered the Plaintiff to go back and fetch his thing, meaning the faeces. The ordinary grammatical interpretation of the word **"fetch"** by **Webster's Comprehensive Dictionary of the English Language (deluxe encyclopedic ed) page 468** includes:-

> **"1. To go after and bring back .2. To cause to come; draw, bring ----"**

[56] It is inescapable that the totality of the aforegoing is in consonance with the Plaintiff's claim, that the soldier ordered him to collect his faeces from Swaziland.

[57] In these premises, I reject the defence that Plaintiff voluntarily offered to go and pick up his feaces. I accept the Plaintiff's version that Nyamposse ordered him to go and pick up the faeces. He obviously obeyed this instruction under duress and in full view of the service rifle which Nyamposse was then wielding. This is the more probable version of the two. This puts an end to the Defendant's plea that it was the Plaintiff that opted to remove the faeces using a plastic bag instead of covering it.

[58] The ineluctable conclusion from the above is that the findings of the court *a quo* in paragraph [28] of the assailed judgment, that the Plaintiff removed the faeces from the scene and that it was done under the constraint and due to the unrelenting orders of the soldier cannot be faulted. It is important that I also note here that the court *a quo* rejected the allegation that Nyamposse ordered the Plaintiff to return the faeces to South Africa, as geographically impossible. This, the court found is because Lomahasha bordergate is situated at the borderlines between Swaziland and Mozambique and not South Africa. Therefore, held the court, the most likely destination for the faeces was the police station located at the bordergate. The findings of fact remains binding on the parties as there is no cross-appeal against it.

ISSUE2: Whether or not the court *a quo* erred by awarding damages for the push-ups. This issue takes on ground 3 of the grounds of appeal.

[59] From the evidence *a quo* the Plaintiff proved that he was made to do push- ups by Nyamposse. This much was admitted by Nyamposse when he testified. It

was premised on this fact that the court *a quo*, correctly in my view, found that the Plaintiff was subjected to doing push-ups even though the duration of the push-ups, that is 3 hours, as the Plaintiff alleged in his claim, was found by the court to be exaggerated. In this regard the court *a quo* propounded as follows:-

> **"[21] From the evidence, it remains an impossibility to conclude with any measure of reliability or to make definite factual findings on either the duration of the ordeal or the number of the attempted or executed push-ups. The far extreme of the exaggerated duration is three hours, watered down to at least half of that when the evidence of the Plaintiff is given regard to. The soldier has it at the opposite extreme, estimated by his counsel to be five minutes at the most. The Defendant's pleadings have it at two failed attempts.**
>
> **[22] No absolution from the instance was sought nor would it be judicious to do so at this stage. Neither of the two protagonists or their supporting witnesses have enabled this Court to find anything more than just that the Plaintiff was compelled by the soldier to "perform some push-ups" whether he actually succeeded to properly perform same or failed to properly do so, remains in the misty realm of speculating and conjecture. The same goes for the duration of it.**
>
> **[23] In the event, considering all of the available evidence and pleadings, the factual conclusion of this aspect could only be as stated above that the soldier compelled the Plaintiff against his will, to get face down on the ground, put his hands beneath his shoulders and to perform, or attempt to do so, push-ups exercises of unknown number and duration."**

[60] I cannot on the record fault the above findings of fact. The contention of the Appellant that the court *a quo* erred in considering the push-ups in the award of damages to the Plaintiff because, firstly, the Plaintiff failed to prove as claimed in his pleading that he was subjected to the push-ups for 3 hours, and, secondly, that the unlawfulness of the push-ups was not in issue during the trial, is clearly misconceived. There is no doubt that the Plaintiff failed to prove that he was subjected to doing push-ups for 3 hours as he pleaded. It is however beyond dispute that he was made to do push-ups by Nyamposse. In

my view the court *a quo* was correct to make the findings in this regard and to consider the push-ups in the award of damages. See **Army Commander and Others v Bongani Shabangu Civil Appeal No. 42/2011.**

[61] The contention that the court *a quo* was wrong to have done so because the fact of the unlawfulness of the push-ups was not in issue at the trial is untenable. This proposition flies in the face of the Plaintiff's claim as detailed in para 4.1 thereof, which I have hereinbefore captured in para [17] ante, and the established evidence under cross-examination of Nyamposse as appears on pages 70 and 71 of the transcript of the proceedings *a quo*. The excerpt of the cross-examination in those pages demonstrate the following:-

"PA: Why Mr Nyamposse did you make the Plaintiff to do push-ups?

DW1: I was trying to humble him My Lord so that he could agree to go to the police station and state what he has done defecating before me.

PA: Was it within your authority to punish a person whom you find defecating?

PW1: My Lord I do have the authority that when a person that is unwell or is not wanting me to arrest him I must give that person a minimum force.

PA: And the minimum force in your view in this matter was to make him do push-ups.

DW1: Yes My Lord.

PA: By the way what law empowers you to punish people in that way?

DW1: I have been taught by the Border guide law which states also that if anybody doesn't want me to arrest them I must give them this minimum push-ups.

PA: Where (sic) such law to be found Mr Nyamposse so that His Lordship can look at that?

DW1: I was taught in the USDF by Sergeant Queenton Dlamini."

[62] The aforegoing line of cross-examination, as well as Plaintiff's claim clearly belie the contention that the Plaintiff did not dispute Nyamposse's authority to compel him to do the said push-ups. It must be noted that no law authorizing such, was ever urged *a quo*.

[63] In any case, my view on this subject matter is that once it is established that Nyamposse compelled the Plaintiff to do push-ups in these circumstances, the court *a quo* was well within its right to consider the fact of the push-ups in its award of damages in consonance with the plea *a quo*. This is because push-ups are a common form of punishment. This much was acknowledged by the court *a quo* in paragraph (5) of the assailed decision in the following words:-

> **"Wikipedia defines "push-ups" as:-**
>
> > **'A push-up (British English: press up) is a common callisthenic exercise performed in a prone position by raising and lowering the body using the arms. Push-ups exercise the pectoral muscles, triceps, and anterior deltoids, with ancillary benefits to the rest of the deltoids, serratus anterior, corachobrachidis and the midsection as a whole. Push-ups are a basic exercise used in civilian athletic training or physical education and commonly in military physical training. <u>They are also a common form of punishment used in the military, school sport, or in some martial arts dojos."</u>** (emphasis mine)

[64] The learning is that a person arrested or awaiting trial should not be subjected to pre-trial punishment as that would equate to a reversal of the presumption of innocence. Therefore, harming a person without first granting a hearing infringes upon human dignity. Many rights of the accused derive from his dignity as a human being. The presumption that every person is innocent until proven guilty by law is part of human dignity; the right of the accused to a fair trial is part of human dignity; the right of the accused to a speedy trial is part of human dignity; the right of a person to know the charges against him or

why he has been arrested and his ability to defend effectively against those charges, are part of human dignity. It follows that the push-ups which Nyamposse compelled the Plaintiff to do in the circumstances of this case is a violation of his inalienable right of human dignity.

[65] The contention by Nyamposse that the push-ups were necessary to humble the Plaintiff into submitting to arrest is clearly inconceivable. This Court had the occasion to deal with a similar situation in the case of **Army Commander and Others v Bongani Shabangu (Supra)**. In that case the Respondent a military officer had been assaulted during and after his arrest by the Military police officers, for losing his service rifle. The court *a quo* awarded him damages for this assault as well as other injuries and losses occasioned by reason of his detention. The government appealed against the decision. In its decision affirming the award and quantum of damages, this Court per **Agim JA** made the following apposite remarks:-

> **" [11] The assault of the Respondent on the 8th of September 2005 during and after his arrest by the said Military police officers is a violation of his fundamental right not to be subjected to torture, or inhuman or degrading treatment or punishment as provided for in section 8 (2) of the 2005 Constitution. The Respondent did not resist arrest. Assuming he did, there will still be no justification for the kind of assault inflicted on him. S. 40 (1) of the Criminal Procedure and Evidence Act prescribes how an arrest is to be effected. It states that 'in making an arrest the peace officer or other person authorized to arrest shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action'. Implicit in this provision is that if there is no resistance to the arrest as in this case then there is no need to touch or confine the body of the person. Where there is resistance to arrest, it is trite law that the force applied to touch or confine the body of the person must be reasonable enough or necessary to subject him to such arrest in the circumstances of the case. The Court in Beneby v COP (Supra) held that 'persons awaiting trial should not be subjected to 'pre-trial punishment' as that would be tantamount to a reversal of the presumption of innocence. It had to be borne in mind that apart from his conviction in 1989, which was the subject of an appeal, the applicant was to be presumed innocent of all the offences with which he was presently charged.'"** (underlining mine)

See **Beneby v COP (1996) ICHRLD 28.**

[66] It is inexorably apparent from the aforegoing that the only option open to Nyamposse in the face of the allegation that the Plaintiff was resisting arrest was to use reasonable or necessary force to effect the arrest by way of touching or confining the Plaintiff's body. It was not open to him to subject the Plaintiff to push-ups or any other form of punishment. The fact of the push-ups which the Plaintiff was compelled to do is a violation of his right of dignity and was thus unlawful. The court *a quo* was correct to consider the push-ups in the award of damages in these circumstances.

[67] **ISSUE 3: Whether or not the court *a quo* erred in law and in fact in holding that the Appellant committed an *injuria* and *contumelia* against the Respondent. This issue emerges from grounds 4 of the grounds of appeal.**

[68] Without the necessity of over burdening this judgment, let me say straightaway that on the record I cannot fault the findings of the court *a quo* on this issue. The fact of the push-ups which the Plaintiff was compelled to do by Nyamposse and the fact of the faeces which the Plaintiff was compelled to pick up with his hand, underscore this view point.

[69] This is because the concept of *iniuria* as a general delict encompasses the protection of personality rights in non-physical interest such as good name, dignity, feelings of chastity, privacy, liberty, life, property or reputation. *Actio*

iniuriarum or *injuria* as a delict accords redress to a person whose legal rights in these respects have been intentionally infringed by another. Such intentional and wrongful injury entitles the victim thereof to claim sentimental damages of a penal nature for the *contumelia* or insult without having to prove any pecuniary loss. See **Willies Principles of South African Law, 7th ed by JTR Gibson, Juta at 502 and 534.**

[70] Adumbrating on the common law position of this delict in **R v Umfaan 1908 TS 62, Innes CJ** stated with reference to voet that an *iniuria*

> **"Is a wrongful act designedly done in contempt of another, which infringes his dignity, his person and his reputation. If we look at the essentials of injuria we find ..... that they are three. The act complained of must be wrongful; it must be intentional, it must violate one or other of those real rights, those rights in rem, related to personality, which every free man is entitled to enjoy".**

[71] There is no iota of doubt from the above that an *iniuria* is the wrongful intentional infringement of or contempt for a person's *corpus, fama* or *dignitas.* For present purposes only the last of these concepts requires discussion. Generally the courts identify, recognize and protect *corpus* (physical integrity) and *fama* (good name) as separate interests of personality. However, the view of jurisprudence as to the meaning to be accorded to the concept of *dignitas* is considerably divergent.

[72] The most prominent view across jurisdictions is, however, the common law view. One of the leading proponents of this view is **Watermeyer AJ** who in the celebrated case of **O'keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C)** propounded that *actio iniuriarum* is available for:-

> **"An intentional wrongful act which constitutes an aggression upon [a Plaintiff's] person's dignity or reputation. Since in this case there was no question of the**

infringement of the Plaintiff's 'person' or 'reputation' the only question was whether there was infringement of 'dignity' or 'those rights relating to --- dignity."

[73] The aforegoing decision extended the meaning of *dignitas* so wide that it encapsulated all aspects of legally protected personality except *fama* and *corpus. Dignitas* is thus a collective term for all rights or interests of personality save for the right to good name and to physical integrity. See **Law of Delict (5th ed) Lexis Nexis, by Neethling et al, pages 11 – 14.**

[74] What therefore stands out in its stark enormity is that the act of degrading, humiliating or ignominious treatment of the Plaintiff, by being compelled by Nyamposse to do push-ups without due process and to pick up his faeces with his hand, infringes upon the Plaintiff's right of human dignity. There is no doubt that the Plaintiff's act of profanity in defecating in the open and in public glare near the International bordergate, is conduct which should attract swift disapprobation by the law enforcement agencies of this country. Their duty in this respect would include to arrest the Plaintiff, investigate the crime and prosecute him for any relative offence.

[75] This is however not such a case. The soldier's subsequent conduct was in my view certainly unbecoming of the law enforcement agency. He became lawless in his own conduct. You cannot fight lawlessness with lawlessness, otherwise, anarchy will be enthroned. I agree with the court *a quo* that the soldier outstepped his boundaries and disgraced his country.

[76] It remains for me to emphasise, that the functions of law enforcement agencies in a democratic society have corresponding responsibilities, duties and obligations. This is to secure the public interest, public safety, public peace, public order, public morality and public health. The soldier's lawless conduct is therefore not reasonably justifiable in a democratic society. It constitutes an *injuria*. The court *a quo* cannot thus be faulted when it declared as follows:-

> **"[34] What the court also finds and holds is that the obligation placed upon the Plaintiff was demeaning and grossly humiliating. In the process of forcing the man to act as he did, the soldier outstepped the boundaries of normal human decency, worsened by his position of authority and assumed superiority.**
>
> **[35] His conduct disgraced his country and the USDF. No word of apology or remorse was forthcoming from him and it is unknown but doubtful whether any effective disciplinary steps have been taken against Nyamposse. That the Plaintiff also misconducted himself is obvious, but it did not justify the humiliating consequences".**

[77] On the whole issue 3 is resolved in favour of the Respondent.

[78] **ISSUE 4** **Whether or not the court *a quo* erred in awarding the Respondent damages in the sum of E50,000=00 (Fifty Thousand Emalangeni). This issue addresses ground 5 of the grounds of appeal.**

[79] Having disposed of the issue of liability let us now consider the quantum of damages as flows from the issue raised.

[80] The award of damages is a discretion vested in the trial court. The appellate court is not at liberty merely to substitute its own exercise of discretion for the

discretion already exercised by the trial court. However, a discretion is not a power to be exercised arbitrarily or capriciously. In certain circumstances an appellate court may reverse a discretionary decision if it is not judicial and judicious in the sense that it exhibits a material misdirection. These circumstances have been identified by case law to include but are not limited to the following:-

(a) Where the trial court exercised its discretion wrongly in that no weight or sufficient weight was given to relevant factors.

(b) Where the decision is wrong in law or will result in injustice being done.

(c) Where the trial court:-

(i) acted under a mistake of law;

(ii) in disregard of principles;

(iii) under a misapprehension of the facts; or

(iv) took into account irrelevant considerations. See **Saffeidine v Commissioner of Police (1965) 1 All NLR 54, Solanke v Ajibola (1969) 1 NMLR 25.3**

(d) Where there is a striking disparity between the amount that the trial court awarded and what the appellate Court considers ought to have been awarded. See **Protea Assurance Company Ltd v Lambs 1971 (1) SA 530 AD at 534 – 535 A.**

(e) The reason or reasons given by the Judge for exercising a discretion in a particular way often provide the basis for challenging such exercise. They show what he considered and the general ground for his decision.

[81] This is a meet juncture for me to also indicate that the assessment of damages in non-pecuniary loss cases is a difficult and challenging task. Jurisprudence has, however, over the years endeavoured to articulate some parameters which should serve as useful guides in the award of this school of damages to ensure a judicial and judicious process. In this regard, **Lord Diplock** in the case of **Wright v British Railway Board (1983) AC 733 at pg 777C** declared as follows:-

> **"Non-economic loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even handed instead of depending on idiosyncrasies of the assessor, whether jury or Judge, the figure must be basically a conventional figure derived from experience and from awards in comparable cases"**

[82] It follows from the above that one of the parameters for a judicious award of damages in non-pecuniary loss cases is consideration of awards in comparable cases. It is imperative that I also observe here that since this matter turns on injury to the Plaintiff's dignity, the Plaintiff's social standing is of paramountcy in the award of appropriate damages. Also to be weighed in the equation is any lack of apology as well as the nature, extent and gravity of the violation of the Plaintiff's dignity. See **Ryan v Petros 2010 (1) SA 169 at 1774.** The amount awarded must also be a conventional sum which would in the Swazi society be deemed to be reasonable. Each case must invariably be treated according to its own peculiar facts and circumstances

[83] Let us now test the award of the court *a quo* against the rigors of the aforegoing principles to ascertain if there was a material misdirection that would entitle this Court to interfere.

[84] How the trial court arrived at the award of E50,000 as damages for the *injuria* and *contumelia* appears in para [40] to [48] of the assailed decision as follows:-

> **"40 Indeed, the present award is unique at least in so far as the degrading and humiliating conduct is concerned. No precedent with comparable content could be found. The calculation of the claimed amount of E350,000 seems to me to be excessive and no evidence or submissions from the bar was heard as to how this particular sum of money came into being. Also, it was claimed on the basis of much exaggerated and overstated averments in the particulars of claim.**
>
> **41 On behalf of the Plaintiff, Mr Simelane referred to Ryan v Petros 2010 (1) SA 169 at 177E where relevant factors to be taken into account are listed. There (sic) include the nature, extent and gravity of the violation of Plaintiff's dignity, social standing and the absence of an apology.**
>
> **42 Apart from being a truck driver, there is just about no further information regarding the social standing of Mr. Ngomane, but a definite absence of remorse or apology. That his dignity has been grossly violated is obvious, and in Rudolph v Minister of Safety and Security 2009 (5) SA 94 (SCA) it was held that where the *injuria* complained of involves humiliation and degradation, an upwards adjustment of damages is justified.**
>
> **43 Mr Simelane also referred to Meshack Shabangu v Attorney General, unreported Civil Case No. 838/1995 where the High Court awarded E10000 for *contumelia* arising from degrading and humiliating work that had to be performed by a prisoner. It included the washing of soiled nappies and washing the ageing parent of a prison official.**
>
> **44 Sexual harassment in the workplace attracted an award of E50 000 for *Contumelia i*n Ntsabo v Real Security CC (2003) 24 ILJ 2341, another authority referred to by Mr. Simelane, though again very distinguishable from the matter at hand where no sexual *innuendo* features. The same applies to the further authorities he referred to, with none bearing a resemblance to the plight of Ngomane.**
>
> **45 He correctly conceded so, leaving it "in the hands of the Court" to determine the quantum of damages, though suggesting an amount between E50 000 and 100 000.**
>
> **46 Defendant's Counsel was tacit on the aspect of quantum, with obvious reliance on an outright dismissal of the action.**

47 The court cannot lose sight of the constitutionally enshrined rights regarding the protection from inhuman or degrading treatment (Section 14 (1) (e) and the inviolable dignity of every person to not be subjected (sic) such treatment or punishment (Section 18 (1) and (2)). Also, common decency wholly precludes conduct such as was demonstrated by the soldier, Nyamposse. Such distasteful and repugnant behaviour cannot be tolerated in any decent society.

48 Having reflected on the relevant factors to be considered, giving regard to the circumstances of the *injuria* and *contumelia*, the evidence and submissions, this Court has come to the conclusion that an award of E50 000 would be an appropriate amount for damages in the present matter." (emphasis added)

[85] When this appeal was heard Mr Zwane who appeared for the Appellant criticised this process of the award as failing to consider the relevant factors which ought to have been considered. He contended that apart from making a cursory reference to the case of **Meshack Shabangu v Attorney General (Supra),** there is no indication in the award process that the court *a quo* compared the facts of that case with the instant one in arriving at the amount awarded. There is also nothing to show that the court considered the evidence led *a quo,* which includes that the Plaintiff defecated in the open near the International bordergate which engendered the soldier's reaction. This, Mr Zwane says is a material misdirection which should entitle this Court to interfere.

[86] For his part, when pressed by the Court, learned counsel for the Respondent Mr Simelane, graciously and gallantly conceded that it was imperative that the court *a quo* considered the evidence led and the factors attendant to this kind of damages before reaching the conclusion in para [48] recited above. Failure do this counsel agreed, denotes a material misdirection.

[87] I agree with both counsel that notwithstanding the declaration of the trial court in para [48] of its decision to the effect that it had reflected on the relevant factors, giving regard to the circumstances of the *injuria* and *contumelia*, the evidence and submissions, this was not actually done. The award of E50,000 was not motivated as there was no assessment of the evidence *vis a vis* the relevant factors incidental to such an award in coming to that quantum. The award was precisely the minimum amount suggested by Respondent's Counsel, as acknowledged by the court in para [45] of the assailed decision. It thus appears to me, but with respect, that the amount was apparently only arbitrarily arrived at with no rational basis for it.

[88] Inasmuch as the trial Judge accepted it without assessing the relevant factors concomitant thereto, I find that it was so erroneous to be wrong in principle.

[89] It is also my considered view that the trial court misdirected itself by failing to do a comparable analysis of the antecedent of this case with the case of **Meshack Shabangu v Attorney General (Supra).** This misdirection obviously stemmed from the court's view expressed in para [40] of it's decision that **"the present award is unique, at least in so far as the degrading and humiliating conduct is concerned. No precedent with comparable content could be found"**. It is my considered view that **Meshack Shabangu v Attorney General (Supra),** is a bench mark for this sort of award in Swaziland.

[90] In light of the totality of the foregoing misdirections we are at large in this appeal to revisit the quantum of damages awarded by the court *a quo*.

[91] Now, in the case of **Meshack Shabangu v Attorney General (Supra),** the Plaintiff alleged in claim 3 of his particulars of claim that for about nine (9) months while serving a sentence of imprisonment at the Mbabane Prison, Sidwashini, between 1992 to 1994, he was forced to perform menial and degrading work at the private house of the officer-in-charge of the Mbabane Prison. The particulars of the alleged degrading work included:-

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

[92] The Plaintiff alleged that as a result of this demeaning and humiliating treatment he suffered additional hardships and punishment, missed his prison meals, and was degraded in the esteem of others and himself. He therefore claimed the sum of E15,000=00 as damages arising from the injury.

[93] In respect of this claim the court awarded the Plaintiff damages in the sum of E10,000=00. This was 13 years ago in 1998.

[94] It cannot be gainsaid that the degradation and humiliation of Meschack Shabangu was more egregious than the antecedents of this case. The degrading treatment recorded *in casu* is that the Plaintiff was made to execute some push-ups of an indeterminate number. He was also made to pick up his own faeces and put it in a plastic bag. Whilst it is incontrovertible that the act of picking up

the faeces is in itself dehumanizing, we cannot, however, lose sight of the fact that the faeces in question belong to the Plaintiff himself. This fact to my mind should somewhat take some of the bitter sting off the unpleasantness of the experience which was ephemeral. It lasted for just about 6 minutes going by the Defendant's evidence *a quo*. This, I say in juxtaposition with the case of Meshack Shabangu who was made to change and wash soiled napkins belonging to another human being for a period of 9 months. There is also the fact that Meshack Shabangu was made to bath the father of the officer in charge and treat his skin diseases and leg wounds, a distasteful task indeed. He was also made to clean the house and wash the clothes of the officer in charge and his family. In the process he missed his prison meals and endured additional hardship. All these factors to my mind conspire to escalate the gravity of the degradation and humiliation recorded by Meshack Shabangu far beyond the situation of the Plaintiff.

[95] Admittedly, and as correctly contended by Mr Simelane, Meshack Shabangu was a convicted felon as at the time of his ordeal. The question is, does this make him of a lower social standing than the Plaintiff? I think not. I say this because apart from being a truck driver, a fact in respect of which no direct evidence was led but which can be easily extrapolated from the totality of the evidentiary material before Court, there is nothing else recorded about the Plaintiff's status in life.

[96] Rather, what sticks out from the record of this appeal like a sore thumb, is conduct which impinges on the Plaintiff's dignity and status showing him up as a man of low esteem. A man of straw. This is a man who shunned the toilet facilities at the border, clinic, garage and police station all located around the

international bordergate and chose to defecate in the open near the bordergate. This was not a one off occurrence, but the Plaintiff's culture by his own showing, borne out of his evidence to the effect that he had always previously defecated in the bushes near the International bordergate rather than utilize the toilet facilities located thereat. A very barbaric and primitive culture if I may put it in mild terms. The contention that the toilet located at the garage was always occupied and the one at the clinic was always scant of running water, serves no justification for this appalling conduct.

[97] This low class conduct is further exacerbated by the fact that this apostasy was orchestrated in the near open and in obvious public glare. The debate that it was carried out under the camouflage of some bushes is robbed of its efficacy in the face of the fact that it occurred in full view of both Nyamposse and DW2, just about 15 feet away from where the duo were standing. This is the indignant sight that infuriated and naturally provoked the soldier, and which in my view, should serve to mitigate the quantum of damages awarded, irrespective of the fact that there seems to have been no apology tendered to the Plaintiff.

[98] Then, there is the criminal conduct of the Plaintiff when he offered the soldier an obvious bribe in the sum of R10. This was to appease the soldier to let him off the hook, giving him a leeway of escape from his gross imprudence. How then is the Plaintiff's status better than that of Meshack Shabangu a convicted felon? This question begs the answer.

[99] CONCLUSION

In conclusion, I have brought my empirical mind to bear on the totality of the foregoing, not losing sight of the fact that the Plaintiff's story was published in the local media and he has since stopped coming to Swaziland. This factor to my mind is ameliorated by the fact that the Plaintiff is not from Swaziland and is therefore not known in this country, save for one uncle Madonsela whom Plaintiff alleges works at the border and who read the publication. I have also considered the rate of inflation in the 13 years between the decision in Meshack Shabangu and this case, which in my view is countered by the egregiousness of the degradation in Meshack Shabangu's case. I also take cognizance of the present financial and economic peril of Swaziland, which is still far from revamped.

[100] Having carefully weighed all the relevant factors in the balance, I arrive at the conclusion that an award of the sum of E30,000 as damages for the *injuria* and *contumelia in casu*, is reasonable in the circumstances.

[101] ORDER

In these premises, I make the following order:-

[1] The award of E50,000 for damages by the court *a quo* be and is hereby set aside.

[2] The amount of E30,000 be and is hereby awarded as such damages.

[3] The order in para [49] of the assailed decision to wit:-

"[49] In the event, it is ordered that the Plaintiff succeeds in his claim, with E50,000 awarded for damages, plus interest at the rate of 9% per annum from date hereof until the date of payment, and costs of suit"

be and is hereby accordingly modified to read as follows:-

"[49] In the event, it is ordered that the Plaintiff succeeds in his claim, with E30,000 awarded for damages, plus interest at the rate of 9% per annum from date hereof until the date of payment, and costs of suit.

[4] Costs of this appeal go to the Respondent.

_____

E.A. OTA

JUSTICE OF APPEAL

_____

I agree **M.M. RAMODIBEDI**

CHIEF JUSTICE

_____

I agree **M.C.B. MAPHALALA**

JUSTICE OF APPEAL

For Appellant	**N. Zwane** **(Crown Counsel)**
For Respondent:	**B.J. Simelane**