



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE
In the matter between:

Appeal Case No. 29/2018

THE ATTORNEY GENERAL

Appellant

and

HOWARD PHOKWANE NKAMBULE

Respondent

Neutral Citation : *The Attorney General vs Howard Phokwane
Nkambule (29/2018) [2019] SZSC 1 (01/03/2019)*

Coram : M.J. DLAMINI JA, R.J. CLOETE JA AND
J.P. ANNANDALE JA

Heard : 11 FEBRUARY 2019

Delivered : 01 MARCH 2019

SUMMARY : *Appeal – Onus on Claimant to prove assault perpetrated by purported Defence Force member – That the person was acting in course and scope of employment of Defence Force – No evidence of any nature that the person who fired the shot was a member of the Force – No evidence that the weapon used was issued by the Defence Force – No direct evidence linking the Defence Force at all – Appeal upheld – No order as to costs.*

JUDGMENT

CLOETE – JA

- [1] The Respondent (Plaintiff in the action in the Court *a quo*) instituted proceedings against the Appellant (the Defendant in the action in the Court *a quo*) in High Court Case No. 2973/2001, the Appellant being cited in its representative capacity as the Legal Representative of the Government of Swaziland (as it was then).
- [2] The Respondent alleged in his summons that on or about the 8th February 1997 and at Mvutjini, he was assaulted and shot by unknown members of the Umbutfo Defence Force (“UDF”) as a result of which he suffered various injuries including a bullet wound and as a consequence suffered various damages.

[3] It was further alleged that since the unknown assailants were members of UDF, they were acting in the course and scope of their employment with that entity, imputing vicarious liability, as appears at Paragraph 5 of the Particulars of Claim appearing at Page 4 of the Record as follows;

“At the time of the assault the said members of armed forces 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” (my underlining).

[4] The Appellant duly filed a Plea and therein and consistently thereafter denied that any person employed by the UDF assaulted and shot the Respondent and as such denied any liability of any nature and put the Respondent to the strict proof thereof.

[5] At the close of pleadings and other formalities, the matter came on trial before Justice T. Masuku during January 2010 but the said Judge Masuku was unable to complete the matter. The matter was subsequently dealt with by her Ladyship Q. Mabuza in the Court *a quo* during 2016 and 2017, culminating in a written Judgment handed down by her dated 30 April 2018 in terms of which she granted Judgment in favour of the Respondent in the

sum of E1,100,000.00 (One Million One Hundred Thousand Emalangeni) together with interest and costs. Interest on the capital sum was to bear interest with effect from the date of service of the Combined Summons.

[6] That Judgment is the basis of this Appeal. For the reasons which will follow in this Judgment, it is not necessary to deal with all of the grounds of appeal, the main ground of appeal being that there was no evidence before the Court *a quo* with a causal link to members of UDF and as such that no claim lay against UDF.

[7] Both parties filed well constructed Heads of Argument.

[8] Before dealing with the arguments of both parties, it is perhaps apposite to deal in some detail with the evidence before the Court *a quo* as set out in the Record filed by the Appellant and certified by the Registrar of this Court and what was set out in the Judgment of the Court *a quo*.

[9] At the hearing before Masuku J. it is apparent that the Respondent gave evidence in person as did his “brother”, one Mbuso Dlamini. A second “brother” one Boy Dlamini, had already sadly passed away by then. The third witness for the Respondent was Doctor S. V. Magagula.

[10] Regrettably only the evidence of the Respondent in person was transcribed and as such placed before the Court *a quo*. This is most unfortunate and I am not sure that the parties used all of the means at their disposal to obtain information or details of what was purportedly said by Mbuso Dlamini in his evidence.

[11] I say this because at Page 39 of the Record, and whilst the Respondent was giving evidence, Masuku J. on two separate occasions said the following;

“JUDGE- Sorry! Sorry Sir, I have to record the answers, so I will indicate to you when you can give the answers.
Yes?

JUDGE- I will let you know Sir. I know you have been waiting for 10 years to give evidence but we have to record everything that you say, it is very important. Yes?”
(my underlining)

[12] Given the words of Masuku J., I would have thought that his notes would have recorded not only the evidence given by the Respondent but also his witness Mbuso Dlamini.

[13] So what was the actual evidence given by the Respondent in person relating to the identity of his alleged assailants given before Masuku J.? The following excerpts appear at various places at Pages 37, 38, 39, 40, 41, 42 and 47 of the Record;

“ATTORNEY RODRIGUES- **What about Mbuso (Interpreter says Nkambule as Attorney inaudible)**

PLAINTIFF- **He is also (Interpreter inaudible)**

JUDGE- **Yes?**

ATTORNEY RODRIGUES- **Mr Nkambule you say you then approached the vehicle. Tell the Court what then transpired**

PLAINTIFF- **When I got next to the car which I had stopped, I begged for a lift to Mbabane. The man who answered me inside the behicle told me that they don't give lifts to (inaudible)**

JUDGE- **(Inaudible)**

ATTORNEY RODRIGUES- **How?**

JUDGE- **Sorry! Yes?**

ATTORNEY RODRIGUES- **Now what type of vehicle was this?**

PLAINTIFF- It was a white, a cream white twin cab Your Lordship (Interpreter inaudible)

ATTORNEY RODRIGUES- Do you remember the registration number of this vehicle?

PLAINTIFF- I can't remember the registration number Your Lordship

JUDGE- Yes?

ATTORNEY RODRIGUES- Is there anything (inaudible)

PLAINTIFF- There is Your Lordship

JUDGE- Yes?

ATTORNEY RODRIGUES- Tell the Court

PLAINTIFF- The number plate Your Lordship started with an SG and (interpreter inaudible) NR Your Lordship

JUDGE- Yes?

ATTORNEY RODRIGUES- How many occupants were in this vehicle?

PLAINTIFF- There were 4 occupants Your Lordship

JUDGE- Yes?

ATTORNEY RODRIGUES-

Can you tell His Lordship where they were seated?

PLAINTIFF-

They were seated at the front in the cab (?) of the vehicle Your Lordship

ATTORNEY RODRIGUES-

Now how were the occupants dressed? (taken from SiSwati)

PLAINTIFF-

Some of them Your Lordship (Interpreter inaudible)

JUDGE-

Sorry?

PLAINTIFF-

One of them Your Lordship was putting on a uniform of a (interpreter inaudible) (my underlining)

JUDGE-

Yes?

ATTORNEY RODRIGUES-

Which one was that?

PLAINTIFF-

He was the one driving the vehicle Your Lordship (my underlining)

JUDGE-

Yes?

ATTORNEY RODRIGUES-

Was he the only one who was wearing a uniform? (Taken from SiSwati) (my underlining)

PLAINTIFF-

I only noticed him (my underlining)

JUDGE-

Yes?

PLAINTIFF-

I asked them, I asked why they stopped Your Lordship, and they told me that they were waiting for Pudemo (?) (Interpreter totally inaudible)....

PLAINTIFF-

The driver told me to get off the vehicle....

PLAINTIFF-

When we were fighting Your Lordship, I (inaudible) and I fell Your Lordship and I got up, went back to them to ask (inaudible)

JUDGE-

Yes?

ATTORNEY RODRIGUES-

What happened next?

PLAINTIFF-

I asked them why they were beating me and they told me that (inaudible). **They had their guns with them** (inaudible) during that time (inaudible) the guns (inaudible) (my underlining)

JUDGE-

Yes?

ATTORNEY RODRIGUES- Now, who was carrying the gun out of these people?

JUDGE- Yes?

ATTORNEY RODRIGUES- And what happened?

PLAINTIFF- They shot me Your Lordship

JUDGE- Sorry, I mean, I think you must be clear. You are talking about 2 men, if you say “they shot me” it means you were shot by 2 people

PLAINTIFF- One of them shot me (my underlining)

JUDGE- Yes?

ATTORNEY RODRIGUES- Which one of them?

PLAINTIFF- The driver gave the gun to the (interpreter inaudible) (my underlining)

CROWN- What condition were you in when you were hitch hiking?

PLAINTIFF- I was drunk Your Lordship”

[14] For the record, that was the only evidence given before Masuku J. which was transcribed.

[15] The matter then came before Mabuza J. on or about 28 November 2016 and the Learned Judge, seemingly at the request of the Respondent issued the following Order of Court;

“ COURT ORDER / SUBPOENA

**BEFORE: HER LADYSHIP JUDGE Q. M. MABUZA on the 28th
November**

WHEREUPON: It was ORDERED and Directed that:-

**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 08th 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 VEHICLE to produce:

- 2. Details of vehicle registration number SG 048 NR for on 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 08th 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 3rd February 1997.”**

[16] From the Record it is evident that none of those ordered to bring or adduce the required information and or evidence and or items did so. There is no doubt that all of the entities concerned could be said to be in contempt of an Order of the Court *a quo* save that, understandably, UDF maintained throughout that it was not involved in the matter concerned in any way.

[17] Instead, Inspector Mandonsela (3337), a ballistic examiner gave evidence and a summary of his evidence is as follows;

1. He was given only the bullet which was extracted from the body of the Respondent to examine and was not given a weapon or the relevant cartridge.
2. He concluded that the bullet was a 6.35 mm calibre bullet fired from a civilian weapon. (Page 60 of the Record).
3. That UDF did not have or issue weapons of that calibre and that UDF only used and issued weapons with 9mm and 7.62mm calibre ammunition. The following exchange appears at Page 74 of the Record;

“ATTORNEY RODRIGUES: So in other words, you wouldn’t be able to say with certainty that in 1997, the army did not have this type of calibre firearm?

OFFICER MANDONSELA: Now I will mention it 100% sure that the army or the NATO people

don't acquire this type of firearm.

I am certain about that

ATTORNEY RODRIGUES: How certain are you?

OFFICER MANDONSELA: 100% sure

ATTORNEY RODRIGUES: What makes you certain?

OFFICER MANDONSELA: At the beginning, I was talking about the NATO and the Warsaw

ATTORNEY RODRIGUES: Are you privy to such information in terms of the army?

OFFICER MANDONSELA: 100% sure

ATTORNEY RODRIGUES: That is all my Lady"

[18] Thereafter, Police Officer Mabuza (2149) gave evidence to the effect that;

1. The cartridge which had been sent to South Africa all those years ago had gone missing (Page 104 of the Record).
2. He had gone to CTA relating to the purported Government vehicle driven by the assailants and to UDF but he was unable to find any information relating to that particular vehicle (Page 106 of the Record).

3. He also went to UDF and established that there was no report of a service pistol issued by it having been discharged on the date in question (Page 108 of the Record).

[19] Counsel for the Appellant simply argued that there was no credible evidence before the Court *a quo* linking UDF to the occurrence when the Respondent was assaulted and injured.

[20] Counsel for the Respondent argued that the surrounding circumstances and circumstantial evidence was sufficient for the Respondent to have discharged the onus on him to prove the identity of the assailants and that they were acting in the course and the scope of their employment with UDF and these included;

1. That the driver wore a uniform.
2. That the assailants were driving in a Government vehicle at the time of national unrest.

3. That the occupants of the vehicle had indicated that they were looking for PUDEMO.

[21] Turning to the Judgment of the Court *a quo*;

1. At Paragraphs 4 and 6 at Pages 113 and 114 of the Record it was correctly pointed out that the Appellant denied that members of the Defence Force or any persons acting on their behalf assaulted the Respondent.
2. At Paragraph 13 at Page 116 of the Record, the Court states that the Respondent says that the driver wore a defence force uniform and did not notice what the others wore (my underlining).
3. At Paragraph 16 at Pages 116 and 117 of the Record, it is stated that the Respondent said **“they had their guns with them”** and **“the driver gave the other man a gun”**.
4. At Paragraph 22 on Page 118 of the Record, it is stated that;

“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” (my underlining).

5. At Paragraph 83 on Page 137 of the Record, the Learned Judge states that the Respondent contends that the shooter was a member of the Defence Force acting in the course and scope of his duty on the basis 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. (my underlining)

(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 the 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."

[22] The Learned Judge accepted this version and granted Judgment in favour of the Respondent.

[23] With the greatest of respect, I cannot agree with the Learned Judge and state that on a strict reading of the actual evidence before the Court *a quo* and this Court, all we have is the following:

1. The evidence of a person who at the time was seventeen (17) years old and who by his own admission under oath was drunk and may I

add a perfect example of very tragic consequences relating to underage drinking.

2. He states that he saw four (4) persons in the vehicle but only noticed that the driver had a uniform on.
3. Most importantly, there is no evidence of any nature in the Record which in fact identifies the uniform to be that of the Defence Force or the Police or Correctional Services or any other similar entity. It is merely stated at Page 38 of the Record that one of the parties, the driver, wore a uniform and nothing more. The transcribed evidence of the Respondent does not ever refer to the Defence Force.
4. It cannot remotely be said or surmised what the evidence of Mbuso Dlamini was and what evidence of the Respondent was allegedly corroborated and as such, with respect, no weight of any nature can be attached to the purported evidence of Mbuso Dlamini.
5. At Page 41 of the Record, he says that both the driver and the second person who got out of the vehicle had their guns. He goes on to say that he was shot by the person other than the driver and who he did

not notice wearing any form of uniform. He states that in fact the driver allegedly gave his gun to the second person who then shot him. If the second person had his own gun, why on earth would he have had to be given a gun to shoot the Respondent when he already allegedly had his own gun?

6. He alleged that the motor vehicle was a Government motor vehicle but he could not remember the registration number.

[24] We then have the uncontroverted evidence of Mandosela that the bullet found in the Respondent's body was of a calibre used in civilian handguns and that UDF did not have or issue that calibre of handgun to its members.

[25] We then have the unhelpful evidence of Officer Mabuza but in the absence of any evidence to the contrary, one has to accept that the alleged vehicle could not be tracked down at CTA and that UDF denied that any of its issued weapons had been discharged on that day.

[26] At this point, it is necessary for me to point out that I agree wholeheartedly with the Judge in the Court *a quo* that the co-operation of the authorities left

much to be desired but that in itself cannot give rise to the assumptions being made.

[27] It is clear from our law that the onus of proving his claim lay squarely on the Respondent in that he, in this instance, on the balance of probabilities, was required to prove the identity of his assailants, and that the assailants were acting in the course and scope of their employment with their employer and that the employer and/or employees were negligent in order to prove vicarious liability. **As Boberg, The Law of Delict Vol. 1 at Page 377** states,

“The onus is on the Plaintiff to prove in a civil case upon a preponderance of probabilities that the Defendant was negligent.”

See also McKerron The Law of Delict in that regard

[28] Can it accordingly be said that it was remotely proven on the balance of probabilities that the person who shot the Respondent was a member of the Defence Force and/or acting on the instructions of a member of the Defence Force and in the course and scope of his employment? For the reasons set out in Paragraph 23, 24 and 25 above the answer with regret must be no.

[29] That being the case, one need not even move to the next level as to whether the Appellant was negligent or not because there is simply no credible evidence before us to the effect that UDF was in any way involved in this tragic incident.

[30] At this point I wish to say that I have no doubt that this young man suffered extremely painful injuries and I have every sympathy with him in that regard. I am pleased to note from the further evidence that he gave before the Court *a quo* that he is now gainfully employed, that his health has improved, that he is able to live a reasonably normal life and that he was assisted by the Phalala Fund with medical assistance.

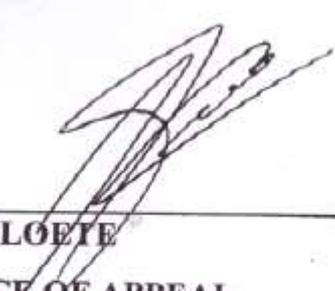
[31] I also wish to state that this was a pathetically botched investigation and I would not have been surprised if the Court *a quo* had instituted sanctions against those who failed to obey the Order of that Court. However, one needs to also understand that this was a civil matter and perhaps reliance should not only have been placed on the investigators.

[32] For the reasons set out above, the Order of this Court is as follows;

ORDER

1. The appeal succeeds with no order as to costs.

2. The Judgment of the Court *a quo* is herewith set aside.



R. J. CLOETE
JUSTICE OF APPEAL

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

I agree



JP ANNANDALE
JUSTICE OF APPEAL

For the Appellant : S. HLAWWE

For the Respondent : J. RODRIGUES