KERINA GWESHE
versus
MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 1 February and 1 March 2006

Trial Cause

Ms *Mutambaseke*, for plaintiff
Ms *Makurira*, for defendant

MAKARAU J: On 5 November 2006, the plaintiff issued summons out of this court, claiming the sum of $50 million as damages for an assault allegedly perpetrated upon her by members of the Zimbabwe National Army. The claim was resisted and the matter was referred to trial to determine whether the plaintiff was assaulted by members of the national army and if so, whether she is entitled to the amount of damages claimed.

The plaintiff led evidence in support of her claim. Her evidence was as follows:

She resides in Glen View, Harare. In the early hours of 3 June 2003, while she and her husband were in bed, she heard the sound of running engines. She peeped outside her bedroom window and saw three vehicles that had stopped outside their property. These were a Mazda 323 sedan, a Mazda pickup truck and a lorry in the green colours of the army. She saw four armed men jump over the fence into the property. Two of the men broke the screen and door latches to the main house while the other two went to a room with an outside door where some young men were sleeping. Two soldiers entered the house and ordered that the lights be switched on. Thereafter they disconnected the telephone line. The two were in army uniform and red berets. They asked for the keys to the gate and when these were handed over, one of the soldiers left to open the gate while the remaining soldier started to assault the plaintiff and her husband with booted feet and a baton stick. Other soldiers came into the house and joined in the assault. At one stage she was kicked in the chest and fell against a door. She and her husband were made to lie prone on the floor and were then beaten on the buttocks. One of the soldiers got hold of a chair, intending to hit her with it. She blocked the blow with her arm which fractured in the process. One of the soldiers poked her mouth with a firearm demanding money. She then managed to run out of the house. She met more soldiers by the gate. They were in a

uniform similar to the one donned by the soldiers who had entered her house. At the gate she was ordered to lie down together with her husband. Both were then severely assaulted. The assailants were using baton sticks and booted feet. She was assaulted until she felt numb with pain. A man in civilian clothes came out of the small car and made and the soldiers desist from assaulting her. She was later ferried to hospital and to a recuperating centre or clinic. Her broken arm was set and put in plaster of Paris for 3 weeks.

The plaintiff then produced a medical affidavit deposed to by Mr Milos Coric an othorpaedic surgeon who attended to her fractured ulna.

The witness was detailed in her evidence. She testified as to a severe assault whilst she was inside the house. She testified as to a severe assault while she was lying prone and to another severe assault while she was standing. She testified as to yet another severe assault while lying prone at the gate and while standing at the gate. She was subjected to the most perfunctory of cross-examination that did not cross her evidence. I however gained the impression that this witness exaggerates and abused the meaning of the word "severe" during her testimony. She testified as to a most brutal assault at the hands of the soldiers yet the medical report adduced did not substantiate the severe assault save for the broken ulna, which the doctor described as typical of a "defense injury". No evidence of bruises and cuts to her body typical of a brutal assault were adduced even though these had been mentioned in her summary of evidence. I also noted that while the plaintiff was hospitalized at Dandaro Clinic run by Dr Lovemore of Amani Trust for 11 days after the assault, no evidence of her injuries or the nature of the treatment she received at Dandaro were given either by the plaintiff herself or by the personnel that attended to her. At the close of the trail, plaintiff's counsel confirmed that the plaintiff was relying on the injury to her arm only as evidence of the severe assault perpetrated on her.

On the basis of the above, while not rejecting her evidence *in toto*, I am not persuaded that the plaintiff was as severely assaulted as she alleges.

The plaintiff called Pretty Gweshe, her niece as a witness. Pretty was in the house when the soldiers visited the residence on the date in question. She was ordered by the plaintiffs to hide under the bed as the soldiers approached. She saw two soldiers assaulting the plaintiff while they were inside the house. The soldiers used baton sticks.

She also saw one soldier lift up a chair intending to strike the plaintiff with it. The plaintiff blocked the blow with her arm. She and the other girl in her company were ordered to go into the plaintiff's bedroom to sleep. Whilst in that bedroom she saw the plaintiff being assaulted whilst at the gate.

Although the witness was confused as to the dates when the assault took place, her evidence was in the main credible and was corroborative of the evidence of the plaintiff as to how plaintiff sustained the injury to her arm.

The plaintiff also called Rutendo Munengami. She was in one of the vehicles that drove to the plaintiff's residence on the night in question. She had been picked up by the soldiers earlier on from her own residence. A man in a mask, riding in the same car with her, directed the vehicles to the plaintiff's residence. She saw the plaintiff and her husband come out of their house being assaulted by the soldiers who had gone into the property.

The witness was credible and her evidence also corroborated that of the plaintiff in the main as to the identity of the plaintiff's assailants.

The defendant called Lt Colonel Paradzai Marovanidze who has been in the National Army for the past 25 years. He has seen records that detail how during the period in question, the National Army seconded personnel to the police. He was not in office during his period but has had access to such records.

The evidence of this witness was not seriously challenged as it was largely common cause.

Next to testify on behalf of the defendant was Major Munyengeri. He has been with the Zimbabwe National Army for the past 11 years. In March – July 2003, when the army was called in to assist the police during the political unrest immediately prior to the planned demonstration code named "Final Push" that was scheduled for 6 June, he was seconded to assist the police in Harare South as officer commanding. He and his men were not given police uniforms but retained their army uniforms and weaponry. He was deployed at Southerton Traffic Section, which covered the plaintiff's residence in its area of policing. His men were in green helmets and he is not aware that the plaintiff was assaulted on the day alleged. He did not get a report to this effect before he left for duty in the Democratic Republic of Congo. His men did not go to the plaintiff's residence on the date in question.

The witness gave his evidence well and I have no reason to disbelieve him.

After this witness, the defendant closed his case.

On the basis of the above evidence, it is my finding on a balance of probabilities that the plaintiff was assaulted on the day in question by members of the Zimbabwe National Army. The plaintiff's evidence to this effect was not challenged by the defendant.

I further find that the soldiers who assaulted the plaintiff wore red berets on the day in question. In my view, these soldiers most probably did not come from the contingent that was under Major Munyengeri as he did not deploy his men into the area on the morning in question and in any event, his men were in their combat fighting equipment order which included green helmets and not red berets. This finding on my part does not detract from my finding that the plaintiff was assaulted by member of the National Army. It simply serves to explain why after I have found Major Munyengeri a credible witness, I proceed to find that the plaintiff was assaulted by members of the National Army.

I further find that as a result of that assault, the plaintiff broke her right ulna that had to be set in a cast for 3 weeks. I have above discounted the plaintiff's evidence that she was severely assaulted but accept that some force was applied to her person unlawfully and as a result, she broke her arm. The content of the medical affidavit by Mr Coric which supports this finding was not challenged.

Now turning to the legal issue the arises from these facts, it was argued on behalf of the plaintiff that the defendant is vicariously liable for damages for the assault perpetrated on the plaintiff by the soldiers. I find this submission unassailable. A group of soldiers unlawfully assaulted the plaintiff on the date in question. Their employer cannot escape liability for the delict.

The defendant in turn argued that he is not liable as when the assault was perpetrated, the soldiers had been seconded to the Ministry of Home Affairs, who should be the proper defendant in these proceedings.

Firstly, it is my finding in this matter that on a balance of probabilities, the soldiers that assaulted the plaintiff were not from Major Munyengeri's contingent. It is common cause that the soldiers that had been seconded to the police were under the command of Major Munyengeri. The men under Major Munyengeri did not perpetrate the

assault. Some other group did. If it had been proven that it was part of Major Munyegeri's contingent that perpetrated the assault, the argument may have been tenable but not even then, as I shall demonstrate.

In my view, even if the group of soldiers that assaulted the plaintiff had been seconded to the police under the Public Order and Security Act [*Chapter 11:17*], that would not have absolved the defendant from liability.

On a factual level, I cannot better the language of Major Munyengeri in his testimony as to the identity of the soldiers that were seconded to assist the police. He testified in a manner that to me smacked of professional pride when he said soldiers retained their identities as soldiers and they wanted the populace to feel and know of their presence. Elsewhere in his evidence, the Major was quite clear that the soldiers were not only deployed to disperse crowds, protect life and property but also to show strength of force by driving around in their amoured vehicles and in their uniforms. Thus, they had to retain their identity as soldiers for this purpose as well. The Major also testified that while the command of the operations was under the police, he was responsible for his men and retained control of them.

It presents itself clearly to me that on a factual basis, the soldiers that were deployed under the operation never switched identities to become temporary policemen. They wore their uniforms and reported to their army superior who was under the command of the police. They did not at ant stage terminate their employment with the army to take up temporary employment with the police. The fact that the police were directing operations did not in my view affect the employment status of the soldiers in any manner. They remained soldiers who had been seconded to beef up the strength of the police.

What remains is for me to investigate whether there is any legal provision that may have varied the factual position.

Section 37 of POSA under which the soldiers were seconded to the police provide that:

> "(1) *If, upon a request made by the Commissioner of Police, the Minister is satisfied that any regulating authority requires the assistance of the Defence Forces for the purpose of suppressing any civil commotion or disturbance in any police district, he may request the Minister responsible*

for defense to authorize the Defence Forces to assist the police in the exercise of their functions under this Act in the police district concerned.

(2) Where authority is given under subsection (1) for the Defence Forces to assist police-

(a) every member of the Defence Forces who has been detailed to assist the police in any police district in the exercise of their function under this Act shall be under the command of the regulating authority concerned; and

(b) a member of the Defence Forces who is assisting a police officer in the exercise of his functions under this Act shall have the same powers, functions and authority, and be subject to the responsibilities, discipline and penalties, as a member of the Police Force, and liable in respect of acts done or omitted to be done to the same extent as he would have been liable in the same circumstances as if he were a member of the Police force, and shall have the benefit of any indemnity to which a member of the Police Force would in the same circumstances be entitled."

Sub-section (2) (b) makes express provision for the powers and responsibilities of soldiers seconded to the police under the Act. The import of the subsection in my view is to put the soldiers on secondment on the same footing as members of the police in as far as powers, responsibilities and discipline are concerned. The subsection makes no further provision as to the liability of the requesting authority for the delicts of the soldiers while on secondment. The subsection does not expressly hold the requesting authority liable for the delicts committed by members of the Defence Forces while acting under the command of the requesting authority. If that was the intention of Parliament, it would have said so. Parliament expresses its intentions through the use of language. By failing to make express provision in this regard, Parliament cannot be taken to have intended to change the existing provision at common law that the employer of the Defence Forces is vicariously liable for the delicts committed by members of the forces. It is not for the court to impose vicarious liability on the requesting authority for the delicts of the members of the Defence Forces detailed to assist the requesting authority when parliament did not say so.

It is therefore my finding that the defendant is vicariously liable for the assault perpetrated by members of the Defence Forces on the plaintiff on 3 June 2003 because the soldiers that assaulted the plaintiff were not deployed in terms of section 37 of POSA

and even if they were, the defendant remains vicariously liable for the delicts of members of the Defence Forces so deployed.

Regarding the quantum of damages, I have not been able to come up with a recent case where an award was made for assault damages in similar circumstances and for similar injuries. The challenges I face in assessing a suitable amount is the ever deprecating value of money in this jurisdiction due to inflation and the shrinking size of the economy where more and more of the populace are being pushed into poverty with little or no disposable funds. The double challenge that presents itself to me is that while money has lost its buying power, it has become increasingly difficult to come by due to the increasing levels of poverty. Thus, the inflated value of an award made 10 years ago may be sadly out of step with the realities of the economy today. (See *Biti v Minister of State Security* 1999 (1) ZLR 165 (S)). It is my view that for some time to come, judicial officers have to use the discretion vested in them to award general damages without the aid of awards made in comparable cases. A direct reference to awards made in comparable cases, even allowing for inflation, may spiral awards into unprecedented amounts that are not in tandem with the shrinking economy.

In assessing the damages due to the plaintiff, I have taken into account the nature and seriousness of the injury sustained by the plaintiff, the fact that the assaulted was perpetrated by members of the Defence Forces against an unarmed citizen and the fear that the assault must have created in the plaintiff. Taking all these into account, I award the plaintiff the sum of $10 million.

In the result, I make the following order:

1. The defendant shall pay the plaintiff the sum of $10 million.
2. The defendant shall pay the plaintiff's costs.

Zimbabwe Human Rights NGO Forum, plaintiff's legal practitioners.
Civil Division of the Attorney-General's Office, defendant's legal practitioners.