

JOYCE MWACHINDUKA

PLAINTIFF

and

MINISTER OF HOME AFFAIRS

FIRST DEFENDANT

and

POLICE COMMISSIONER

SECOND DEFENDANT

and

MINISTER OF DEFENCE

THIRD DEFENDANT

and

COMMANDER OF ARMY

FOURTH DEFENDANT

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 14,15,18 February 2005 and 17 May 2006

Mr T Bhatasara for plaintiff

Mr F Ruzive for defendants

GENERAL DAMAGES

BERE J: On the 8th August 2001, Plaintiff's husband Samuel Masiyatsva, died in a shooting incident involving the police and army officers who had been called to deal with industrial action involving employees of a company called Zimbabwe Iron and Steel Company (ZISCO). Plaintiff's husband was one of about 4 000 employees who were involved in the industrial action.

It is the deceased's death which led to the instant civil action by Plaintiff who sought to recover damages for loss of support for herself and her children.

Plaintiff's claim is for Z\$2 001 375-00 and was premised on the following grounds; namely:-

“That the Defendants willfully or alternatively negligently conducted themselves in that: -

- (i) They used excessive force to control a peaceful industrial action which could have been easily controlled by reasonable measures.
- (ii) They fired live bullets into the crowd when it was reasonably foreseeable that someone would be fatally shot by one or several of the bullets.”

Defendants’ response to the claim was a combative one. They denied that they willfully caused the death of the deceased and stated in their plea inter alia that:

“The death was as a result of an accidental discharge caused by some striking workers who attempted to disarm a Zimbabwe National Army member.”

It was argued for the Defendants that what the officers did on the fateful day fell clearly within the ambit of section 15(6) of the then Law and Order (Maintenance) Act (Chapter 11:02) which act has now assumed the name Public Order and Security Act (Chapter 11:17).

In short Defendants’ position was that what they did on the day in question was reasonably necessary to contain the volatile situation at Zisco.

It is with these basically two incompatible versions (from Plaintiff and Defendants) that the court must proceed to look at the tendered evidence.

In looking at the evidence it is also necessary not to lose sight of issues agreed by the parties at the pre-trial hearing on the 27th day of October 2004 where after deliberations the parties agreed that the matter be referred to trial on the following issues:

- “1) Whether the shooting of the deceased by Raymond Zvoushe of the Zimbabwe National Army (ZNA) was unlawful.

- 2) Whether the Plaintiff and her nine children are entitled to the sum of Z\$850 000-00 (later amended by consent to Z\$2 001 375-00) as damages for loss of support.”

It is proposed to look at the evidence first in so far as it relates to issue number 2 of the pre-trial conference as it is felt this issue was less contentious in these proceedings.

The deceased's wife Joyce Mwachinduka was the first to give evidence and it was this witness and the deceased's brother Timothy Masiyatsva Mwachinduka who gave evidence relating to issue number 2.

It was this witness's evidence that their other family name was Masiyatsva hence one of the deceased's children bore this name as his surname. No issue was taken with this part of her evidence and it is accepted for what it is.

The witness testified on her exclusive dependency on the deceased (her husband) as the breadwinner. She testified that she was a sickling woman and that ever since the deceased's death her family has been having a difficult time as there is no one in particular to look after them. The deceased status as a breadwinner was confirmed by his brother Timothy Masiyatsva Mwachinduka (second witness) who said the deceased had been working for Zisco for (29) twenty-nine years prior to his death and that the deceased's untimely death terminated his employment relationship with Zisco.

He confirmed the deceased was the only one looking after his family and that he was good at that.

As rightly pointed out by Defendants' counsel the Plaintiff's testimony had its own limitations. She did not witness how the deceased lost his life. But it would be taking the criticism of her evidence too far for one to say that her evidence did not support her case at all. Accepted, she was not at the scene of the fatal shooting of the

deceased. However, it must be accepted that the thrust of her testimony was never meant to give an indication as to how deceased died. The impact of her evidence was merely to demonstrate that the deceased was indeed a breadwinner and that his demise deprived her family of that status hence this action. She was able to do this and to effectively deal with item 2 of the issues. That in fact is clearly common cause.

WAS THE SHOOTING OF THE DECEASED ACCIDENTAL?

Having sufficiently dealt with issue number 2, it is proposed to deal with item 1 of the agreed issues.

The record of proceedings will show that the evidence relevant to this aspect came from Plaintiff's witnesses namely Timothy Masiyatsva Mwachinduka, Moses Kavhenga, Lawrence Mangezi and Clement Rafumoyo. For Defendants the relevant evidence came from Makemore Musimwa and Davison Jeure.

The thrust of Plaintiff's case was that the deceased died as a result of indiscriminate shooting by the Defendants' officers. Plaintiff contended that such shooting was negligent in the circumstances.

As already highlighted, the Defendants in their plea disputed that their officers were negligent. They alleged the bullets which killed the deceased were discharged accidentally from Raymond Zvoushe's gun. Further, they claimed that the accidental discharge occurred when some employees who were involved in the industrial action attempted to disarm the officer concerned. Put differently, the Defendants put the fatal discharge squarely on the commotion created by some of the demonstrators who were alleged to have made an abortive attempt disarm Raymond

Zvoushe who incidentally was not called to testify by the Defendants. The non-calling of this witness and its implications will be dealt with later in this judgment.

It will be appreciated that there was no direct evidence led in these proceedings on the deceased's shooting which the court could rely on. The evidence was therefore, of a circumstantial nature.

Timothy Masiyatsva Mwachinduka, the deceased's brother, was the first to give evidence on behalf of the Plaintiff on the shooting itself. The witness told the court that when the trade union for Zisco's employees and the Zisco management had failed to reach an agreement on wage negotiations, the trade union instructed the workers to go on a peaceful demonstration within the company premises. The demonstration started on the 7th of August 2001 and spilled over to the shooting day, the 8th day of August 2001. The witness estimated the number of the demonstrating workers to have been running into thousands.

The witness testified that on the 7th day of August 2001, the demonstrating workers had put up on the company premises in the presence of the Zimbabwe Republic Police officers who appear to have been called to monitor the situation. There was no problem on the 7th day of August 2001 as the police and the demonstrating workers put up peacefully on the premises.

The witness told the court that trouble began on the 8th of August 2001, when armed riot police officers and the army came to the company premises. The Zimbabwe National Army officers were armed and they came in army trucks and at this stage the striking workers were seated and unarmed. The witness was until this time with among others the deceased who was seated on the lawn.

The witness categorically denied the demonstrating workers started any commotion as a prelude to the subsequent shooting and death of his brother, the

deceased. He said the commotion was started by the soldiers who started tear gassing the employees as they were now going out of the company premises through one of the company gates following the instructions of their trade union leaders, who appeared to have been coordinating the demonstration.

It was the witness's clear testimony that he heard several guns shots as he and other colleagues ran out of the company premises. He said, as they were running out the tear-gassing continued and he continued to hear gun sounds. At this stage he had separated from his brother, the deceased. He did not see him being shot at. He denied under cross-examination mistaking gun sounds for teargas firing. He suspected the deceased was shot at by one of the soldiers in a Puma motor vehicle which was following behind him and others as they were fleeing.

The medical report (Exhibit 11) in respect of the deceased's body clearly indicates that the doctor observed gunshot wound in the forehead and right jaw. The witness's evidence was that when he eventually saw the deceased's body he observed the bullet that took his brother had entered the deceased's head from the forehead coming out above the upper lip.

Exhibit 11 would tend to be consistent with the witness's testimony that the deceased must have been shot at from above by soldiers who were trailing them in a Puma motor vehicle which was obviously above the fleeing demonstrators.

The witness categorically denied under cross-examination that the deceased was accidentally shot at as he tried to disarm one of the soldiers.

It is clear to the court that if the deceased was shot in the manner suggested by the defence, then the wound ought to have been somewhere else consistent with an accidental discharge. As indicated exhibit 11 and the observations by the witness of the deceased's wounded body are consistent with the testimony of the witness. The

witness was found to be a substantially credible witness despite his difficulty in remembering whether the shooting was on the 8th or 9th of August 2001.

The third witness Moses Chivhenga, who was Vice Chairman of the workers union and a negotiator testified that he too heard several gunshots made at intervals. It was his revealing testimony that even some supervisors and managers manning essential machinery were also assaulted by the soldiers. He confirmed that there was peace at Zisco on the 7th day of August 2001, and that commotion started on the 8th day of August 2001 with the workers having done nothing to provoke the ugly scene that occurred.

The witness observed that commotion was started by police details who fired teargas in an effort to drive the demonstrating workers out of the company premises. The police were at the same time joined by soldiers who were in uniform and armed with among other weapons AK 47 rifles. He said he heard gun shots from a distance of about 50 metres and some of them hit the roofs of the company buildings.

Perhaps, one of the most important aspects of this witness's testimony was to do with the aftermath of the events of the 8th of August 2001. He said on the 9th of August 2001, about 10 employees reported to their trade union offices. Among these employees was a young man who had a bullet lodged in his buttocks. He told the court that from the reports received they concluded that two people had died from the shooting and others had been injured on the back.

The testimony of this witness suggests, contrary to the suggestion by the defence that only two bullets were accidentally discharged that infact several bullets were fired. His evidence clearly suggests that there was random and careless shooting at the company premises leading to the death and injuries of employees.

Equally telling, was the witness's evidence that the deceased, Masiyatsva's body had a bullet wound suggesting the bullet had gone in through the forehead and existing on the right side of the jaw.

Under cross examination the witness denied ever seeing workers conducting themselves in a violent manner as according to him they were busy running away.

It was extremely difficult for the court to find fault in the witness's testimony which was largely corroborative of the second witness. The court accepted the witness's testimony that the workers were peaceful and the soldiers and police unjustifiably aggressive in the use of excessive and unwarranted force in dealing with the workers.

If there was need for further corroborative evidence of the random shooting that took place on the day in question, then it came from none other than Lawrence Mangezi. He confirmed he was privy to what happened at Zisco on the 8th day of August 2001, as he was the National Organizing Secretary for Iron and Steel Workers Union of Zimbabwe, and was present at Zisco when the fatal shooting occurred.

The witness told the court that trouble started when the union advised the workers that they were required to leave the company premises. He said immediately after some workers queried this the riot police officers started firing teargas all over the place and the workers started running away and as they did so the soldiers were indiscriminately assaulting people and randomly firing their guns, amongst which were AK 47 ones. He confirmed numerous shots were fired. He also indicated that their official records revealed that eventually about nineteen people came to their union to report different injuries. Surely these could not have been caused by two bullets accidentally discharged in the manner the defence would want this court to believe

The last witness for the Plaintiff was Clement Rafumoyo who was the General Secretary for the Iron and Steel Workers Union of Zimbabwe. He advised the court that he was at the company on the day the deceased lost his life. Looked at in the context of the other witnesses' testimony, his evidence confirmed there was indiscriminate shooting although like many other witnesses he did not actually see how the deceased was shot or how the other injured employees sustained their respective injuries as he ran to hide in a tunnel during the commotion.

It was this witness' evidence that when the shooting started, they thought they were only warning shots. It was after about (11/2) one and half hours that he and others emerged from the tunnel where they had hidden only to establish that the deceased and another employee Never Daniels had died.

The witness confirmed the version that it was the arrival of the soldiers which caused commotion. He saw army vehicles with soldiers whom he estimated to be no more than (20) twenty or so.

It will be noted in the final and comprehensive analysis of the evidence given by the Plaintiff's witnesses that basically all of them were agreed that the demonstrating workers did not start the commotion. They were non-violent.

It was common cause that the evening before the fatal shooting of the deceased, the striking workers had peacefully put up on the company premises with unarmed police officers. It was also not in dispute that the following day more reinforcements were called for, first to come were armed riot police officers followed by armed soldiers. It is tempting to conclude that reinforcements were called because the situation was getting out of control but the difficulty with this conclusion is that it is not borne out of the evidence given. In any event, it is inconceivable in my view that the previously docile or passive striking workers who

had slept with unarmed police officers would have attempted to be violent when confronted by several gun wielding army officers and riot police officers. I accept that the striking workers were non-violent on the fateful day.

The defence case as set out in their plea was a denial of any indiscriminate shooting as alleged. It was stated inter alia in their plea that:

“The death was a result of an accidental discharge caused by some striking workers who attempted to disarm a Zimbabwe National Army member.”

It is significant to note that the National Army member Raymond Zvoushe whose firearm was alleged to have accidentally got discharged was not called to testify. This was against the background that in paragraph 4.2 of their summary of evidence the Defendants had stated that:

“Defendants will call Mike Musimura also a duly attested member of the Zimbabwe National Army who will corroborate the evidence of Raymond Zvoushe.”

In the absence of the testimony of Raymond Zvoushe it is difficult to sustain the Defendants’ case.

The first witness called by the Defendants was Makemore Musimura. His evidence was to the effect that theirs was a joint operation between the army and the police. At first he said when they arrived there was commotion at Zisco premises as some striking workers were fighting with police whilst others were trying to open tanks with gas. In one breath he said, the demonstrating workers were calm to the extent that his commander was able to address them.

The witness said as they were driving the demonstrating workers he saw some workers surrounding his colleague from a distance of about 20-25 metres but

surprisingly he did not see how many these people were. He did not see them attempting to disarm his colleague Raymond Zvoushe.

The witness was adamant that when the dust had settled they established that the only two bullets from Raymond Zvoushe's firearm were found to be missing. There was however, no documentary exhibit tendered to confirm the reconciled figures of the bullets that had been taken out of the armoury and those which could not be accounted for.

The witness confirmed all the soldiers were armed with AK 47 guns. Under cross-examination he confirmed that it was not advisable to take a loaded and cocked AK 47 firearm to control a riotous crowd.

When the court sought clarification the witness conceded that if the army and the police had set down to plan their operation they could have avoided using AK 47 guns and relied on the use of tear gas in their operations. He speculated on how Raymond Zvoushe's firearm could have got discharged and could not give a cogent explanation as to how two people could have been shot on different positions if the discharge was accidental.

As rightly observed by Counsel for the Defendants the witness was jittery and his evidence came short where it mattered most. Save for speculating on behalf of Raymond Zvoushe he could not explain further the theory of the alleged accidental discharge. His evidence was largely speculative in this regard and therefore of no assistance at all.

Davison Jeure, another member of the army was the second and last witness to testify for the Defendants.

The witness confirmed the non-violent nature of the striking workers at the time the army arrived. He confirmed the Plaintiff's witnesses's position that the situation was calm when the soldiers arrived.

The witness testified that their instructions were to drive out everyone from the company premises. When they did so they were in a "cow-horn battle formation" with an army truck, Puma following behind them. This aspect of his evidence corroborated the second witness for the Plaintiff's testimony.

The most revealing part of this witness's testimony was that he did not hear any warning shots being fired and that he did not see any employee assaulting others or attempting to disarm Raymond Zvoushe.

More importantly the witness conceded under cross examination that if anyone had attempted to disarm Raymond Zvoushe, Raymond Zvoushe could have retreated, and fired warning shots. He heard no such warning shots. He also conceded that with hind sight the situation at Zisco could have been better handled by both the army and the police.

As indicated earlier on, it is quite significant that Raymond Zvoushe was not called to give evidence by the Defendants. Indeed he was a central figure in these proceedings. The Defendants' case was built around him. It was only him who could have explained, how and when his firearm got accidentally discharged.

From the way the pleadings were framed, it was clear that all the evidence of the other witnesses for the Defendants was going to converge on the evidence of Zvoushe. It will be noted that virtually all the witnesses were asked questions premised on the supposed evidence of Zvoushe whom the Defendants had clearly stated would call as a witness but decided not to call at the last minute. Until that time the Defendants' Counsel had created the impressive to the court that the

Defendants' case rested entirely on the evidence of Zvoushe. It was precisely because of the understanding that Zvoushe would be called that the court allowed Defendants' Counsel to premise part of his cross-examination on the supposed evidence of Zvoushe. The sudden failure to call him meant that the Defendants had made an abortive attempt to smuggle vital evidence into the court record. That must be condemned as it is both unprocedural and unethical.

As indicated, the absence of Zvoushe's evidence created a yawning gap in the Defendants' case. That gap could not be closed by the speculative evidence of his fellow army members.

In conclusion, the court is more than satisfied that the joint operation of the Defendants at Zisco on the 8th day of August 2001 was an unwarranted use of excessive force in the joint operation which cost the deceased's life and deprived Plaintiff of support from the deceased.

The court is further satisfied that the Plaintiff has established her claim on a balance of probabilities and consequently judgment is granted in her favor-

IT IS ORDERED THAT: -

- a) That the Defendants be and are hereby jointly and severally the one paying the other to be absolved the following sums of money:
 - (i) \$2 001 375-00 being damages for loss of support.
 - (ii) Interest on the above sum at the prescribed rate from the date of service of summons to date of full and final payment.

Costs of suit.

Zimbabwe Human Rights Forum for Plaintiff

Civil Division of the Attorney General for Defendants