

EUGENIA TEERA
versus
THE MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 21 and 28 March 2007

Civil Trial

Mr *H Nkomo*, for the applicant

Mr *Jena*, for the respondent

HUNGWE J: Plaintiff issued summons against the defendant seeking an order that defendant pays to her the sum of \$7 000 000, 00 being damages for pain, shock suffering and contumelia suffered by her as a result of an unlawful assault perpetrated upon her person but certain members of the Zimbabwe National Army during the course and scope of their employment with the defendant on 4th June 2003 at 293/23rd Crescent, Glen View 1, Harare. Plaintiff holds defendant vicariously liable for the delict committed by members of his troop.

Defendant denies all liability.

In her declaration plaintiff makes the following averments. On the 4th of June, 2003 at around 2:00 in the morning she was asleep inside her house eighties 293 23rd Crescent, Glenview 1, Harare. At that time certain members of the Zimbabwe national army forms and entry into the house. The demanded to know the whereabouts of the local Member of Parliament. She did not know his whereabouts. She accordingly advised the army men as such. Upon getting a response these men began to assault her all over her body using button sticks, their rifles' butts booted feet and clenched fists.

As a result she suffered multiple injuries all over her body, physical and mental pain for which she seeks damages from the defendant in the sum of \$7 000 000, 00 made up of \$4 900 000, 00 for pain and suffering; \$100 000,00 being medical expenses; and \$2 000 000,00 for contumelia.

She averred that the defendant was vicariously liable for the delicts of her assailants as at all material times the soldiers were acting in the course and within the scope of their employment with the defendant.

To this the defendant pleaded as follows. He denied that his troops assaulted the plaintiff. He admitted that he deployed his troops within the greater Harare area between 30 May 2003 and 9th June, 2003. This deployment was in a bid to assist the Zimbabwe Republic Police in maintaining law and order during the MDC intended final push. Defendant avers that the Police commanded all operations during this period. The Defendant denies that his men were involved in any such operation as would see them undertaking any task without police presence.

Defendant specifically denies that an operation was carried out and Renee the plaintiff's resistance on the night in question. He further states that at this time there was a problem of impostors and deserters went around masquerading as ZNA soldiers.

The impostors and dissenters went around assaulting and robbing civilians. Most of the deserters and impostors were arrested and court-martialled. Plaintiff may have been assaulted by such deserters for whose acts defendant cannot be held liable

At the pretrial conference three issues were identified for trial. These are whether or not the plaintiff has sued the correct defendant; whether that the plaintiff was assaulted by members of the defendant and whether or not plaintiff is entitled to damages and the quantum thereof.

At the trial plaintiff gave evidence herself. She did not call witnesses and explained that the only eye witness to the assault moved to Bulawayo. She was unable to secure her attendance.

Her evidence was to the point on those issues for which evidence needed to be called.

She said that around midnight as she was asleep someone knocked at her door demanding entry. She refused to let him in. Suddenly the door was kicked open. She saw approximately twenty soldiers burst into the house. They were in camouflage with army boots. They carried assault rifles. They demanded to know where Paul Madzore was. He is the Member of Parliament for Glen View. She told the men that she did not know. She

was pulled out of the house where she was made to lie on her stomach. Four men held her down by pressing her feet hands and neck to the ground using their booted feet. Two men then embarked on a most vicious assault on her. She told the court that they first used the rifle butts to strike upon her buttocks before changing to truncheons and button sticks. They also kicked her using booted feet. Her buttocks and back received the worst of the assault.

The assault persisted for about ten or so minutes. She was ordered to help carry the property belonging to his brother and her into their Army truck. This was a projector and audio cassette. They left. Soon afterwards she collapsed from this assault and only gained consciousness when she was at Dandaro Clinic. She remained detained there for a period she could not recall. She produced a medical report prepared by Dr Lovemore after an examination. She stated that she suffered excruciating pain from the assault and felt deeply humiliated and embarrassed during the pain as she only wore a short skirt and pants underneath without anything else to cushion her body. She told the court that during this time the political atmosphere was tense as the MTC was planning to march into town on their mission. she denied that she was a victim of political violence between rival parties. She maintained under cross examination that her assailants were members of the Zimbabwe national army. She said, no person would wear camouflage uniform, carry an assault riffle and travel in an army truck unless they were ZNA members.

Hour and a close examination she maintained these story

She closed her case without calling further evidence.

Defendant's case was built around two army officers, one Major Munyengeri and another Lieutenant Colonel Marovanidze. The evidence was intended to show that their troops were at the relevant time in their barracks at Southerton Police station awaiting further deployment the following day. Members of this troop could not possibly therefore be responsible for the assault on the plaintiff, if at all it occurred, around midnight on 4 June 2003. Major Munyengeri under cross examination explained that all troops who desert if apprehended are subjected to court martial proceedings as they are still subject to the Defence Act. This much is clear from the defendant's plea. The defendant's witnesses gave formal evidence, and as such nothing turns upon it. They are

senior army personnel who were in various positions of command. In my view their evidence does not in any way contradict the plaintiff's evidence. It remains uncontroverted on the record.

The only issue put forward in the defendant's case is whether in the circumstances of this case the defendant could be held liable where it conducted the operation under the command of another responsible authority.

I will dispose of this issue as a non-issue on the basis that no evidence sufficient to controvert the plaintiff was put forward on defendant's behalf. As I said plaintiff's evidence remained unchallenged when she says her assailants were all male soldiers. They wore camouflage. They carried AK47 Assault rifles. They used an armoured personnel carrier to get around. Their questions as they assaulted her in my view do indicate a close connection with their employer's business. She was asked where the local Member of Parliament could be found. She was also asked about the purpose of the march to the State House. These men were clearly pursuing a political programme. They were averse to the MDC inspired demonstration dubbed the "Final Push". They were literally punishing her on the assumption that she was either an MDC sympathizer , supporter or member. But she was not told why she was being assaulted. This inference is the only logical one in the given circumstances of this case. I believe her when she says her assailants were members of the national army. Defendants have not put forward evidence to controvert this. She has no reason to lie as to the identity of her assailants.

The only question that arises may be whether her description is sufficient enough to identify these assailants as soldiers. I am satisfied that the evidence sufficiently identifies her attackers as members of the ZNA. The question that arises is whether, assuming in defendant's favour that they may have been deserters, the defendant is still liable for the acts of army deserters.

The defendant contented that should it be accepted that the assailants were army deserters, then there can be no basis for holding the defendant vicariously liable for the delicts committed by the deserters. I disagree. There is a line of cases which indicate that in spite of the employee engaging in what may amount to "a frolic of his own" public policy considerations underlying the principles of vicarious liability required that the

employer be held liable for the delicts of the employee even if those acts benefited only the employee. (See: *Feldman (Pty) Ltd v Mall* 1945 AD 733; *Minister of Police v Mbilini* 1983 (3) SA 705 (A); *Minister of Police v Rabie* 1986 (1) SA 117 (A); *Nott v Zimbabwe African National Union (Patriotic Front)* 1983 (2) ZLR 208; *Biti v Minister of State Security* 1999 (1) ZLR 165).

In *Minister of Finance and Others v Gore NO* [2007] 1 All SA 309 the respondent was a liquidator of an insolvent company. The previous liquidator of the company had sued the appellants for damages arising from the fraudulent award of a tender for which the company was a bidder. Subsequent to the action being instituted, the respondent was substituted as liquidator of the company. The court a quo having found in the liquidator's favour, the present appeal was noted. The appellants' second defence was that those employees responsible for perpetration of the fraud were acting outside the course and scope of their employment and thus their employers were not liable for any loss their conduct may have inflicted on the insolvent company.

Dismissing this defence the court held that even though a deliberately dishonest act that was committed solely for the employee's own interest and purposes may fall outside the ambit of conduct that renders the employer liable, it is in our law established that liability may nevertheless follow if, objectively seen, there is a sufficiently close link between the self-directed conduct and the employer's business. Applying that test to the present case the court found that the appellants were vicariously liable for any damages proved.

In the present case I have demonstrated how a close link exists between the purpose of this escapade and the interests of their employer. In my view from every conceivable angle the defendant cannot escape vicarious liability.

As for the damages, plaintiff's counsel conceded that she has not been able to prove the special damages claimed in the sum of \$100 000, 00. That claim therefore falls away. For pain suffering and contumelia, she claims a total of \$6 900 000,00. I will deal with both heads in my assessment.

Plaintiff is a middle aged woman. Her only offence, if at all in anyone's eyes it was such, was to be perceived as a sympathizer for the opposition party the MDC. She

had retired to bed in the security of her home. She was defenceless. She had in no way provoked her assailants. Rifle butts, button sticks and booted feet were used all over her body particularly her buttocks. She wore a short skirt. She must have exposed herself during the course of the assault thereby suffering further humiliation. Quite clearly, she experience excruciating pain at the hands of the defendant's employees. The medical report reveals that indeed certain tale-tale signs of assault wit a blunt weapon were found on her during medical examination the following day. This is all consistent with her evidence regarding the weaponry used during this vicious attack. There is no evidence to support her claim that she spent 21 days detained in hospital. Careful not to express opinion on matters outside the court's knowledge I can hazard the guess that the injuries described in exhibit 1 cannot be such as to warrant that lengthy detention. She conceded that she could not recall for how long she was detained. I must add that had her legal practitioners approached this aspect of her case with due diligence, the court would have been better placed to assess the degree of injury. As matters stand, the court has to rely on scant documentary evidence to assess the appropriate level of an award.

Paying due regard to the inflation levels and the dearth of medical evidence before me I am of the view that plaintiff has shown that she is entitled to an award of \$4 000 000, 00. There will therefore be an order in the following terms;

It is ordered;

1. That defendant pays to the plaintiff the sum of \$4 000 000, 00 being damages for an unlawful assault upon her person;
2. That defendant pays interest on the said sum at the prescribed rate from the date of judgement till payment in full.
3. That defendant pays plaintiff's costs of suit.

Zimbabwe Human Rights NGO Forum, plaintiff's legal practitioners

Civil Division of the Attorney-General's Office, defendant's legal practitioners