

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1174/2016

In the matter between:

SABELO MHLANGA

PLAINTIFF

And

BHEKINKHOSI MHLANGA

DEFENDANT

NEUTRAL CITATION:

**SABELO MHLANGA VS BHEKINKHOSI
MHLANGA (1174/2016) SZHC – 20
[13/03/2024]**

CORAM:

BW MAGAGULA J

HEARD:

**13/02/2023, 23/05/2023, 24/05/2023, 25/05/2023,
18/09/2023, 12/10/2023, 19/10/2023**

DELIVERED:

13/03/2024

SUMMARY:

*Civil Law – Law of delict – Claim for damages
arising out of an assault on the Plaintiff's right eye
- medical expenses – Action injuriarum – On a
preponderance of probabilities, the conspectus of*

the evidence before court pinpoints to the direction that the Defendant did assault the Plaintiff on the day in question – With regard to the second aspect of the Plaintiff's claim, in as much as there is sufficient evidence that has been adduced to meet the requirements of a claim in respect of defamation of character, but meaningful entitlement to damages is not justified in light of the limited publication of the offensive statement – Quantum of damages considered.

HELD:

The Plaintiff's claim for damages has merit, and it must succeed.

JUDGMENT

BW MAGAGULA J

- [1] Serving before court is a delictual action where the Plaintiff claims from the Defendant damages arising from injuries allegedly inflicted on his eye by the Defendant. He also seeks to be compensated for injury suffered to his reputation as a result of alleged certain defamatory utterances by the Defendant. This was allegedly done in the presence of other people on the 12th June 2016.

[2] The claim is particularized in the Plaintiff's particulars of claim as follows;

| | |
|--|---------------------------|
| (a) Temporary pain and suffering and discomfort | E40 000.00 |
| (b) Defamation of character | E35 000.00 |
| (c) Medical expenses | E2 000.00 |
| (d) Future medical expenses and psychological Counselling | E15 000.00 |
| (e) Permanent eyesight disability | <u>E250 000.00</u> |
| TOTAL | <u>E342 000.00</u> |

[3] The Defendant denies that he physically attacked the Plaintiff. He alleges that he only signaled and directed the Defendant to park properly on a certain designated parking place. All this happened during the funeral of the Defendant's mother. Defendant also alleges that the Plaintiff was mistakenly or accidentally hit in the process of hand gestures, as he was signaling the parking spot where the Plaintiff should park his vehicle¹. The Defendant subsequently amended his plea and averred that it was dusk when he hit the tinted window of the Plaintiff's car².

Plaintiff's Case

[4] The first witness to adduce evidence was the Plaintiff himself. After taking the prescribed oath, he testified that on the 12th June 2016, he went to attend

¹ This is contained in paragraph 2.4 of the Defendant's amended plea. In the amendment the Plaintiff states that it was dusk when he mistakenly hit the window of the Plaintiff's car which was open at the time.

² Reference is made to paragraph 2.4 of the Amended Defendant's plea.

a funeral at Defendant's homestead. The Plaintiff proceeded to tell the court that he arrived at the Defendant's place at around 06:00hrs in the morning. He was in the company of his wife (Khanyisile Mhlanga), Kwanele Mhlanga and his aunt Senani Mhlanga.

- [5] As he was reversing his bakkie to park, he was suddenly struck by the Defendant on his right eye, through an open window on his side. The evidence given by the Plaintiff is also that he was still inside his car trying to park when the Defendant punched on him. The Defendant unleashed the punch through the open driver's window and assaulted him. He was outside his vehicle when this happened. He uttered the following words in the process; *"Ufunani la? Awuboni yini kutsi ngulapha wabulala khona tinja tami"*. The words mean, *"What are you doing here, do you realize that this is the place where you killed my dogs"*.
- [6] The Plaintiff's evidence is that the attack was unlawful and unjustified. As a result thereof, he sustained injuries on his right eye. Due to the nature of his injuries, he could not continue attending the funeral. He immediately went to report the assault with the police and thereafter proceeded to hospital. He was accompanied by his wife, Khanyisile Mhlanga. His eye became swollen, when he got to the hospital, he was examined by Dr Danha at the casualty department and was given pain medication³.

³ According to the medical report, both ibuprofen and tramadol were prescribed.

- [7] His evidence was corroborated by his wife Khanyisile Mhlanga. She testified that she was sitting next to the Plaintiff inside the vehicle. Suddenly, she saw the Defendant's hand inside the car and realized that the Plaintiff had been hit on his right eye. She also testified that the vehicle was a bakkie and Kwanele Mhlanga was sitting at the back.
- [8] This witness proceeded to tell the court that immediately thereafter, they left the funeral with the Plaintiff and proceeded to the police station to lay charges against the Defendant. After laying the charges, they proceeded to Mbabane Government Hospital. At the hospital, the Plaintiff was attended by a Doctor and medication was prescribed for him as the eye was swollen and red.
- [9] The evidence from Kwanele Mhlanga was that he was present during the incident and was sitting at the back of the car. He testified that he witnessed the Defendant assaulting the Plaintiff with his fist on the face. He heard Khanyisile Mhlanga and the Plaintiff's mother Senani Mhlanga exclaiming and telling the Defendant to stop hitting the Plaintiff. Both Khanyisile Mhlanga and Senani Mhlanga were sitting in the front of the bakkie with the Plaintiff
- [10] Kwanele, also testified that the Defendant uttered certain defamatory words to the Plaintiff. There were other people who heard those words as they came closer to witness the incident. The words which were repeated by this witness were the following; *"Awuboni yini kutsi ngulapha wabulala khona tinja*

tami lapha". The witness mentioned that this statement was not true because the Plaintiff is known to be a man of good character in the same area.

[11] This witness proceeded to tell the court that most people in the area have benefited from the Plaintiff by virtue of his position as a Senior Manager at Eswatini Electricity Company. Hence, the people who witnessed the incident were residents of the area.

[12] The expert witness in the matter was Dr. Vincent Msiska. His evidence was that he is an eye specialist. He confirmed that the Plaintiff came to Mbabane Government Hospital and was examined by Dr. Danha on the 12th of June 2016. He told the court that he deduced this from the outpatient record that was written by Dr Danha. It is common cause that Dr Danha is no longer in the country, he did not come to give evidence before court. Dr Msiska proceeded to compile a medical report which was admitted as evidence before court. It reflects that the Plaintiff suffered Hyperemic conjunctival surface on his right eye. Which simply means that he had blood shot eyes. The tiny blood vessels on the white surface of eh eye got irritated and part of it got torn in blunt trauma which caused stress on small structures within the eye and temporal swelling. This in turn caused reduced vision. The witness mentioned that the treatment received by the Plaintiff was for an injury on the right eye. The report indicate that the Plaintiff's eye was swollen and the date is the 12th June 2016. The injury is attributed to being hit by a non-sharp object. The eye was blood shot red and the white surface was irritated.

[13] The witness's interpretation of the medical records is that the Plaintiff's vision was reduced to 6/18, an equivalent of 40 to 50% temporary loss at the time of the injury. Upon further examination of the Plaintiff on the 11th August 2023, he had a few old dust cells on the cornea.

[14] The Plaintiff's claim is for damages in respect of;

- 14.1 Temporary pain and suffering and/or discomfort.
- 14.2 Defamation of character.
- 14.3 Medical Expenses
- 14.4 Future medical expenses and psychological counselling.
- 14.5 Permanent eyesight disability.

The Defendant's Evidence Before Court

[15] The Defendant only placed before court his own evidence and thereafter closed his case. After taking the stand, the Defendant in summary placed the following facts before court;

- 15.1 He confirmed that he met the Plaintiff at around 5:45am on the day of his mother's funeral.⁴
- 15.2 He refuted that he scolded the Plaintiff for coming to his mother's funeral. He denied that he manhandled the Plaintiff by

⁴ In the plea, the Defendant had stated that the incident took place on the eve of his mother's funeral.

holding him with his left hand and he also denied that he punched him on the eye with his right fist.

15.3 He proceeded to tell the court that they are somewhat related with the Plaintiff. The Plaintiff is a son to his uncle. He proceeded to expand on the manner which he pleaded to the Plaintiff's particulars of claim, in particular what he had stated in paragraph 2.4 of the amended plea. He told the court that he stands by his plea, that the Plaintiff was hit by mistake and he proceeded to apologize to him for that. He also pleaded ignorance in respect of the allegations that were attributed to him by the Plaintiff to the effect that he had said Plaintiff had killed his dogs.

15.4 The Defendant also denied that he made any defamatory statements to the Plaintiff in the presence of his wife and Kwanele Mhlanga.

15.5 The Defendant also refuted that the version that was stated by PW2 to the effect that she saw her hand inside the van and shouted that "*ungamshayi*" the Defendant said he never heard such. He also volunteered to the court that ever since PW3 (Khanyisile Mhlanga) came to the Mhlanga family, they do not talk to each other.

15.6 The Defendant also refuted that he was ever called by the police in respect of the incident.

[16] The Defendant was cross examined at length by the Plaintiff's Counsel, Mr Mntshali. The following came out of the cross examination;-

- 16.1 He conceded that he made a court appearance in Mbabane in June 2016 regarding the matter between the parties. He also admitted the he appeared as an Accused. He however, clarified that he was served with a certain document by a person who said he was a messenger of court. Hence, his insistence that police were never involved.
- 16.2 In as much as the Defendant conceded that the Plaintiff came to attend his mother's funeral, however he denied during cross examination that he saw the other people that were passengers in the Plaintiff's vehicle. In other words, he said he did not see their identities. Although he conceded that the Plaintiff had passengers with him on the day, but he does not remember their identities.
- 16.3 When it was put to him that in his plea he had said he accidentally hit the Plaintiff, yet in his evidence in chief, he was now saying he never hit the Plaintiff. His answer was that the correct version is that, if he hit him, he hit him accidentally. He proceeded to explained that the window of the Plaintiff's vehicle was tinted, to the extent that when the Plaintiff's motor vehicle approached the designated parking place, he tapped the window on the driver's side and directed Plaintiff where to park. It is during the process of directing the Plaintiff where he used hand gestures. It is the act of the hand gestures that got the Plaintiff hit.

- 16.4 The Defendant insisted that he did not assault the Plaintiff and he could not have done so under the circumstances. The Plaintiff had come to support him, as he was the one who was bereaved. He could not then reciprocate such a gesture with aggression.
- 16.5 The Defendant also conceded that he is aware that there is no person who has a right to assault another person. The Defendant refuted that there was any assistance that came to the community through the efforts of the Plaintiff. In as much as he conceded that the Plaintiff is employed by the Eswatini Electricity Company, however he denied that there was some form of assistance that the community received by virtue of the Plaintiff's position at the aforesaid company. He went to state further that by the time the Plaintiff settled in the area of Hawane, the community had electricity connection already. The Defendant said he was not aware of the fact that the Plaintiff is a good man in society. His response was that he does not know that.
- 16.6 When answering questions regarding the Plaintiff's moral standing in society, the Defendant's response was that it is difficult to make an opinion regarding that issue as they were currently not in talking terms with the Plaintiff. The Defendant also painted the Plaintiff as arrogant. He told the court that he is

someone that does not talk to people. When questioned on what he had stated in his plea, to the effect that he had pleaded that he had apologized to the Plaintiff. Whilst during cross examination, he then stated that he had intended to engage the Plaintiff on the issue, but they are not in talking terms. When pressed further and asked a pointed question on whether he did apologize or not. His response was that he sent another man to go to the Plaintiff to apologize, but he has forgotten the name of the person he sent.

Common Cause Facts

- [17] The parties are close relatives.
- [18] The parties attended a funeral of the mother of the Defendant on the 12th June 2016.
- [19] There was physical contact between the parties which resulted in the injury of the Plaintiff's eye.
- [20] The Plaintiff's injury was attended to by several doctors in two hospitals and one surgery.
- [21] The Defendant did not present himself for counselling therapy.

Analysis of the Evidence Before Court

[22] The witnesses that gave evidence on behalf of the Plaintiff were three (3). A summary of the evidence of PW1 has already been made. In so far as evidence meeting the requirements of a delictual claim, he told the court that he was assaulted by the Defendant using his right fist. As part of documentary evidence before court, are documents from the Mbabane Government Hospital. They reflect that on the said date, the Plaintiff was attended by this hospital. The doctor, an expert DR. Vincent Tinkani Msiska, gave evidence. His evidence was untarnished, and appears to me to have been credible. He interpreted the notes and comments made by the Dr Danha who initially attended the Plaintiff accurately. It appears to the court that indeed the Plaintiff's right eye was injured. The evidence of Kwanele Mhlanga also corroborates the Plaintiff's evidence together with the one for Sibongile Mhlanga. Both witnesses attribute the assault on the Plaintiff's eye to the Defendant. This corroboration, coupled with the Defendants own version points to the direction that indeed the Plaintiff was assaulted in the eye by the Defendant.

[23] In as much as I accept that PW3 being Sibongile Mhlanga, only said she saw the hand inside the motor vehicle and did not witness the actual assault. It is possible that she may not have seen the hand making an impact on the eye, because of the speed in which it happened. However, looking at the conspectus of the evidence before court in totality, coupled with the Defendant's own version, which says in the event that the Plaintiff was hit it was a mistake. I find the version of the Defendant to be incredible. If consideration is made to his version being that he wanted to tap the window

in an effort to draw the Plaintiff's attention, but unfortunately the window was open and he hit the Plaintiff by mistake. In the pleadings, he says he hit the window of the car as it was closed and it was tinted. How could the window have been closed when, on one hand, the Defendant admits it was open and he hit the Plaintiff whilst trying to open the window as he was using hand gestures? Also, the manner in which he articulated his version and marshalled his defence is all over. There is just contradiction in the different versions he has presented before court. The manner in which Defendant pleaded to this crucial issue in the amended plea, leaves a lot to be desired. The amended plea in paragraph 2.4 appears to be incoherent and projecting two mutually inconsistent positions. On one hand, in amended plea (para 2.4) it is averred that the Plaintiff was mistakenly hit on the face. However, on the following sentence, it is pleaded that "it was dusk when he mistakenly hit the window of the Plaintiff's car which was open at the time". This raises the question, did the Defendant mistakenly hit the Plaintiff's face or the window? It appears to me that the Defendant is at sea with his papers.

- [24] In the circumstances, the court will make a finding of fact that the Defendant did assault the Plaintiff on the eye. Whether intentionally or otherwise is of no consequences in a claim of delict⁵. Especially if the assault resulted in an injury to the Plaintiff.

⁵ JC Van de Walt and Rob Midgley (2005) para 2 define a delict as a civil wrong; and M are narrowly as 'wrongful and blameworthy conduct which causes harm to a person.

[25] Considering that there is a second leg of the Plaintiff's claim, pertaining to defamation of character, it is crucial that the evidence adduced in support of this claim be analyzed and certain findings of fact be made in respect thereof. PW1, told the court that after he was assaulted, the Defendant uttered the following words; *"ufunani la? Awuboni yini kutsi ngulapha wabulala khona tinja tami."*

[26] PW2, Kwanele Mhlanga corroborated the Plaintiff's evidence and testified that he also heard the Defendant uttering these words to the Plaintiff. The other issue that must also be unpacked, is who else heard these words other than Kwanele and the Plaintiff. Kwanele told the court that there were other people who came closer to witness the altercation. He however did not elaborate whether these people heard the uttering of the alleged words. He also did not tell the court who those people were. In as much as the Defendant denies that he uttered the alleged words, but he admitted that he lost his dogs through death at some point in time.

[27] The preponderance of probabilities appear to lean in favour of the Plaintiff's version. It appears to the court that the Plaintiff did utter the alleged statement. Otherwise, how would the Plaintiff have known that the Defendant lost dogs at some point in time? It appears to the court that the Defendant formed a strong view that it is the Plaintiff who killed his dogs. The court will therefore make a finding of fact that the utterance in question was indeed made by the Defendant. However, whether the utterance on its own constitutes a defamation, is a question that will be analyzed later in the judgment.

THE LAW

[28] In light of the fact that the Plaintiff's claim comprises two components, damages arising out of the assault and also damages arising out of the defamation. It is then pertinent that I encapsulate the law pertaining to both legs of the damages claimed.

ASSAULT

[29] An act of assault contain a physical as well as a psychological dimension⁶. A Plaintiff would be entitled to recover damages for all the detrimental consequences of an assault⁷. The bodily and psychological consequences will be recovered by the action for pain and suffering and the inversion of the person's dignity by employing the *actio iniuriarum*.

[30] Although a distinction is made between pain and suffering on the one hand, and *contumelia* on the other hand⁸. Certain circumstances may justify the awarding of a single amount of compensation for all loses experienced⁹. Should the Plaintiff have suffered damage to property, such as clothing or other possessions in the assault, such loss may be recovered through the *actio legis aquiliae*.

⁶ HB Kloppe; Damages Nexis 2017 at page 250

⁷ HB Kloppe (supra) at page 250

⁸ See; April vs Minister of Safety and Security [2006] 3 ALL SA 270 SE282,

⁹ See; Mokone vs Sahara Computers (Pty) Ltd (21881/09) [2010] ZAGPP HC 279 (25 November 2010); Alie vs Road Accident Fund 5 QODK 321

- [31] Assault also constitutes an infringement of a person's human rights in terms of the constitution.¹⁰ The constitution provides for the enforcement of those rights. The constitutional remedy does not include a claim for damages separately from the right at common law, which seek to protect the same interest.¹¹
- [32] The court enjoys a wide discretion to award an amount of compensation which it deems to be fair and reasonable under the circumstances of the case.¹²
- [33] The following factors and circumstances influence an award for damages and *contumelia* associated with assault;
- 33.1 Motive of the attacker¹³
 - 33.2 Nature and seriousness of the assault¹⁴
 - 33.3 Fear experienced by the Plaintiff¹⁵
 - 33.4 Degree of humiliation caused by the assault¹⁶
 - 33.5 Impact of assault on dignity of reputation¹⁷

¹⁰ Section 18 of The Constitution of The Kingdom of Swaziland Act, 2005, protect the dignity of every person as being inviolable.

¹¹ See; HB Kloppe Damages at page 250 See, also Fose vs Minister of Safety and Security 1997 (3) SA 786 (CC) 826

¹² Jacobs vs Chairman, Governing body, Roads High School 2011 (1) SA 160 (WCC)

¹³ See; Needling et al Law of Personality Butterworths (1996) 109

¹⁴ April vs Minister of Safety and Security (supra)

¹⁵ Ibid

¹⁶ GQ vs Yedwa 1996 (2) SA 47

¹⁷ Ramakulukusha vs Commander, Venda National Force 1989 (2) SA 813 (V850)

- 33.6 Possible provocation by the Plaintiff¹⁸
- 33.7 Apology by the Defendant¹⁹
- 33.8 Status of the Plaintiff an extent to which the assault was publicized.²⁰
- 33.9 Other relevant facts
- 33.10 Prior comparable awards.

Defamation

[34] I deem it necessary to now proceed and state the law in respect of a claim for defamation. In the heads of arguments, the Defendant has eloquently encapsulated what the position of the law is in this area. Professor **Jonathan M. Burchel** in his work **The Law of Defamation in South Africa Juta 1995 page 150** states two (2) requirements which the Plaintiff must demonstrate in order to succeed in an action for defamation. They are the following;

- 34.1 An inference of unlawfulness or wrongfulness.*
- 34.2 An inference of animus injuriandi (subjective intention) on the part of the individual (Defendant) to impair the Plaintiff's reputation with knowledge of unlawfulness.*

¹⁸ Provocation as a mitigating effect. See; Neethling Law of Personality Butterworths (1996) 109 however commamia verbal communication cannot justify an assault See; Bennet vs Minister of Police and another 1980 [3] ALL SA 817(C)

¹⁹ Apology has also a mitigating consequence, See; Maxabi vs Mafundityala (3) [1979] 4 ALL SA 558 (E)

²⁰ Needling at Law of Personality 109

The Plaintiff's Submissions

[35] The Plaintiff in his closing submissions, has submitted that the court must rely on the evidence of Kwanele Mhlanga who testified that he heard the Defendant utter defamatory words to the Plaintiff and that there were other people who came closer to witness this incidence. Kwanele Mhlanga told the court that these words were repeated by the Defendant, and the exact words which Kwanele Mhlanga heard were the following;

"Awuboni yini kutsi ngula wabulala khona tinja tami lapho".

[36] It is common cause that these words were said in vernacular. I did not get the impression during the trial, that there is a dispute with regard to the literal meaning of these words. It has also not been contested that the words mean that *"do you not realize that this is the place where you killed my dogs"*.

[37] I will traverse further later in the judgment, whether in the evidence before court, was there any negative inference drawn from the meaning of this statement by those who heard it. Who heard this negative inference? Also, whether there was evidence adduced before court by the witness or witnesses who apparently heard this statement. Again, on whether there was perception made with regard to the character of the Plaintiff subsequent to the alleged utterance.

The Defendant Submissions

[38] The Defendant in its closing submissions, argue that the fact that the evidence points to physical contact between the Plaintiff and the Defendant warrants further consideration especially with regard to the claim for pain and suffering. It is argued that the nature and extent of the injury is a key consideration to be taken into account by the court in deciding on the question of damages.

[39] The Defence has proceeded to cite the case of **Mcolisi Brian Mayisela vs Celestino Mariolina Voncecka (88/17 [2018] [SZSC16] (30th May 2014)** at paragraph 43, where the court emphasized that the term general damages is also used to describe non patrimonial loss (pain and suffering etc). As well as prospective patrimonial damage expenses. Loss of any capacity and support amounts to general damages. While material losses sustain up to the date of trial, medical expenses already incurred, loss of past income incurred and support are in a special damages.

[40] The Defendant cited more cases which more or less speak to the amount of quantum of damages to be awarded depending on the situation before that court. Of note, is the case referred to by the Defendant in **Sebenzile Malinga vs Christopher Dlamini²¹**. In that case the court awarded E20 000 (**Twenty Thousand Emalangeni**) for pain and suffering where the Plaintiff had wrongfully, unlawfully and intentionally assaulted the Plaintiff was at the time visiting a friend who resides adjacent to the homestead of the Defendant. As

²¹ 348/05 [2012] SZHC 11th April 2012

a result of the assault the Plaintiff in that case which happened in 2012 had sustained severe injuries to the head and right arm resulting in the Plaintiff suffering extreme pain and persistent headaches.

[41] The Defendant argue therefore, in comparison to the extent of injury suffered in the matter before court. The argument is that the injury suffered by the Plaintiff before court, is to a certain extent lower in magnitude as compared to the injuries suffered by Sebenzile Malinga in the aforesaid judgment.

[42] The court was also urged to also consider the award made by the court in the matter of **Steward Dlamini vs Chief Sebengwane Ndzimandze and 7 others**²² in this case the court had awarded E30 000.00 (**Thirty Thousand Emalangeni**) general damages. On the reading of this decision, the Plaintiff had been assaulted with sticks and knobkerries all over the body and was severely injured at the back of his head.

[43] In so far as the damages in respect of the assault in the matter at hand, it appears from the reading of the Defendant's submissions, that they relate more on the quantum than on disputing that the act happened. It appears that the Defendant to a certain extent, has not made much submissions against the court awarding the damages per se, but it is the quantum. This makes the court to conclude that the Defendant to a certain extent concedes that the assault did take place. And to a certain extent that the damages are warranted. In respect

²² High Court Case No. 693/95 [2002]

of the defamation aspect of the claim, the Defendant has submitted that no evidence has been presented to the court to show why the Plaintiff may have wanted to injure the reputation of the Plaintiff. The Defendant argues that there has been no proof of a subject of intention to injure the reputation of the Plaintiff on the part of the Defendant, hence the court was implored to reject the claim for defamation. The court was urged to further consider the dicta as expounded by Professor **Jonathan M. Burchel** in his book **The Law of Defamation in South Africa** Juta 1985 page 50 where the two (2) requirements for defamation were stated to be as follows;

43.1 An inference of unlawfulness or wrongfulness

43.2 An inference of *animus injuriandi*, subjective intention on the part on the individual Defendant, to impair the Plaintiff's reputation with knowledge of unlawfulness.

[44] The Defendant also dealt at length with the expert's evidence adduced by the Doctor. The following was submitted on behalf of the Defendant;

[45] The probative value of the medical report is similar to the probative value of a social welfare report. The reasoning to be followed by the court in considering official professional medical report should therefore not differ from the reasoning in the case of **Daryl Nicholas Du Preeza and Another vs Nerrisa Queenie Du Preez (born Kemp) and 6 Others 1919/2018) [2019] SZHC 99 7th June 2019** where Mlangeni J. reasoned that;

45.1 *The recommendation (s) of a socio-economic report may not be taken lightly. Such reports are compiled by officers who are trained for that purpose. I would be ready to overlook a recommendation only if it is inconsistent with the facts as established in the investigation. In the case before me the recommendation are consistent with the facts established in the investigation. Commenting on the importance and usefulness of the socio-economic report His Lordship M.S Simelane J.²³ quoting with approval from the judgment of Ota J. in the appeal case of Williams v Williams²⁴, had this to say:-*

“The power to order welfare reports lies at the discretion of the court. A very pertinent weapon in the hands of the court indeed, as welfare reports are very useful in resolving custody cases, whether contested or not...This is because even though both parties testify and call witnesses; the welfare report provides the court with an independent assessment of the facts requisite for a judicial and judicious resolution of the matte

[46] It is common cause medical reports are therefore useful in the determination of disability.

²³ In Mashumi Nkentjane v Ncobile Gama and Others (1821/120 [2014] SZHC 37 (14th March 2014)

²⁴ The Gambia Court of Appeal No. 34/2007 at page 30

- [47] The Defendant argues through that it is hard to anticipate that the court can give any weight to the doctor's contradictory evidence in respect of disability. With regard to the question of disability, the court was implored to adopt the dicta in **R v Dlamini (115 of 1996) [1997] SZHC 14 (24 November 1987)** at page 8 which says *"In view of the contradictory nature of the evidence and the statements which were proved it would be impossible to give any weight to what they said at all"*.
- [48] It has also been submitted that the doctor's evidence has no probative value with regard to disability. Evidence of probative value is one which is admissible, relevant and credible – inconsistent and contradictory evidence stands to be rejected (**Kubuta Agric Design & Civils (Pty) Ltd v Emangweni Holdings Sugar Association (Pty) Ltd (2136/2010) [2019] SZHC 252 (13th December, 2019)**). Saying the Applicant's eye has recovered and is normal and then saying his eye is disabled to the degree of 10% is nothing but a contradiction and based on the rationale in Kubuta, such evidence should be rejected as having no probative value, the Defendant further contended.
- [49] The Defendant also submits that, though pleaded, the general damages have not been proven. Some evidence has been adduced to prove patrimonial loss in the form of medical expenses. No evidence has however been led to prove any patrimonial damage or projected patrimony in respect of both physical injury and reputational damage. It would therefore be amiss for the court to award the Plaintiff general damages beyond the amount of E20 000-00 (Twenty Thousand Emalangen) reflected in the case of **Sebenzile Malinga v**

Christopher Dlamini 3480/05 [2012] SZHC, which involved a more severe injury than the injury alleged in this case.

ADJUDICATION

[50] The Defendant in his closing submissions highlights the issue of whether the Defendant assaulted the Plaintiff as one of the facts in dispute. On the reading of the submissions, the argument appears to be premised on the proposition that the Defendant's own version is that he erroneously hit the Plaintiff. Unfortunately, this argument can only mitigate on the quantum aspect of the claim, not on the finding of liability on the physical violation. The intent to assault is not a requirement on the finding of liability. It is the detrimental consequences of the assault that entitles a Plaintiff to recover damages²⁵. To therefore persist that the Plaintiff was hit on the eye mistakenly and such he should not be held liable is an exercise in futility. It appears to me that the Plaintiff has been able to establish the assault by the Defendant on a preponderance of probabilities. The medical reports and the evidence of Dr Msiska points to the direction that Plaintiff was injured on his right eye as a result of the Plaintiff's act. Whether mistakenly or otherwise. As such he is entitled to some form of damages.

[51] There is also a discrepancy with regard to the time of day on which this incident took place. In the amended plea²⁶ the Defendant avers that the incident took place on the eve of the funeral, yet the Plaintiff gave evidence

²⁵ See the comments of S.B. Maphalala J. in the case of Qondile Ndlovu vs Nonhlanhla Beckam: High Court Case No. 4264/2006

²⁶ Paragraph 2.2

that he arrived early in the morning on the day of the funeral. This was not disputed by the Defendant during cross-examination. It therefore begs the question why did the Defendant mislead the Court in the plea by pointing to a different time. This cast a credibility issue on the Defendant.

[52] In as much as the Defendant has argued ferociously, that the expert evidence of Dr Vincent Msiska is contradictory. The contradiction apparently emanates from the fact that in his medical report the Doctor had said the Plaintiff's vision had fully recovered. It is important that the doctors' conclusion must be viewed in the context of his evidence. The criticism fails to consider the specific details that the doctor highlighted regarding the impact of the assault on the Plaintiff's eye. First, the examination contained three parts. The first examination was done by Dr Danha. The scan was done by Dr Msiska himself. The third one was what he told the court was the Optically Coherence Tomography Scan (OCTS) and a Humphrey Visual Field Analyzer (HVFA). He explained to the court that the OCTS shows the back of the eye. In terms of his analysis, all the layers were normal size. The HVFA on the other hand, looks at the glaucoma. He discovered that the glaucoma was cleared. He then qualified his evidence by saying the chances of the glaucoma coming back in the future, are there, and it can cause trauma. He told the court that such things do not go away. They are like a scar in the eye. Once you heal, they clog in the membrane. In his evidence in chief, he had not mentioned any percentage of disability. It is the Defendant's Counsel in cross-examination that invited the doctor to make the percentage of the disability that could be caused. The doctor then estimated the ten percentage.

[53] Therefore, I believe it is unjustifiable to use the principles outlined in the case of **Khubuta Agric Designs Civils (Pty) Ltd v Emangweni Holdings Sugar Association (Pty) Ltd** to discredit the doctor's testimony regarding the plaintiff's disability, and consequently reject it as unreliable. I disagree with this assessment. The doctor's statement in his report, where he mentioned the plaintiff's eye had healed to 6/6, was referring to his vision and should be considered within that context. In the ten percent he was estimating the percentage of the glaucoma the effect glaucoma and the scarring of the eye. Which necessary does not translate to vision, it is damage of the eye at the time the eye was examined and the percentage was estimated after he had conducted the scans as were detailed out by the doctor.

[54] The next question that must be determined is the quantum. The Plaintiff has claimed the amount of E342 000.00 (**Three Hundred and Forty Two Thousand Emalangen**).

[55] The Defendant has, in his closing submissions, urged the court to look comparatively at other decisions where a delictual claim were decided by the courts.

[56] I will commence with the **Mxolisi Brian Mayisela vs Selestino Mariolima Fonseca**²⁷. This decision the court had granted an all-inclusive award for E100

²⁷ 88/17 [2018] SCZ

000 (**One Hundred Thousand Emalangeni**) for general damages. The amount was inclusive of patrimonial loss and patrimonial damage. In that decision the court awarded the sum of E100 000 (**One Hundred Thousand Emalangeni**).

[57] In the South African case of **Sigournay vs Guill Banks 1960 volume 2 SA 552 AD 572**, where the learned Judge Shriner stated the two (2) objective considerations that act as a framework for assessment of damages being as follows;

57.1 The collective judicial consciousness of a country has as a notion scale of compensation appropriate to the social economic status of that country;

57.2 Within this scale justice requires that life injuries receive life compensation this implies that regards had to previous awards in similar cases (with due allowance for the decline of a value of money) to maintain continuity.

[58] I accept that it is now trite that an award of damages and an entirely in the discretions of the court.²⁸

[59] The Defendants have argued strenuously that this Court should follow the amount as granted in **Sebenzile Malinga vs Christopher Dlamini 3480/05**

²⁸ Candy Ratabane Ramainoane and Ano vs Moketsiselo 1999 – 2000 where the Court of Appeal confirmed Moketsiselo vs Candy Ratabane Ramainoane and Another 131/99 - 2001 LLR 284

[2012] SZHC delivered (11th April 2012) where the Court awarded E20 000 (Twenty Thousand Emalangeni) for pain and suffering, where the Plaintiff had wrongfully, unlawfully and intentionally assaulted the Plaintiff who was at the time visiting a friend who resides adjacent to the homestead of the Defendant. As a result of the assault Plaintiff sustained severe injuries to the head and to the right arm resulting the Plaintiff suffering extreme pain and persistent headache. The Defendant argued that the current injury is far less to that injury and magnitude in the Sebenzile case.

[60] In so far as the quantum issue pertaining to the defamation is concerned, the court will consider that, in his own evidence, the defendant considered that the plaintiff did not kill his dogs. So, clearly, he did not harbor any anger against the plaintiff at the time. However, he has failed to explain why he punched the plaintiff in the eye if he knows that the plaintiff did not kill his dogs.

[61] As I have commented earlier, I reject the defendant's version that this was accidental. If you look at the extent of the damage as portrayed by the evidence of the doctor who examined the eye, there was definitely scarring in the eye which was said to cause future trauma. The plaintiff could not have had red blood shots from an accidental touch in the eye. The defendant was at pains to persuade the court to believe that the injury was caused by his hand signals. The extent of the damage shows that this must have been a substantial punch.

[62] This then leads the court to conclude that the defendant punched the plaintiff for other reasons that are best known to him that is if he denies that he was harboring anger that the plaintiff killed his dogs. Whatever the motive was, at the end of the day, the plaintiff suffered injuries on his eye and as a consequence thereof, he suffered pain.

[63] I note the amount of E20, 000 that was awarded as pain and suffering in the matter of Sebenzile Malinga vs Christopher Dlamini. First, this award was done in 2012 and we are now in 2024. In my view, the eye is quite a sensitive part of the body and as much as I acknowledge that in the Sebenzile Malinga matter, the injury was quite sensitive as well as it was in the head and on the right arm. However, the eye is a very sensitive organ also situated in the head and it is delicate.

[64] The Court will therefore award higher damages compared to the Sebenzile Malinga vs Christopher Dlamini matter.

[65] In as much as the plaintiff is claiming E250, 000, for his eyesight disability, his basis is premised under the unjustified belief that eyesight was permanently disabled. The evidence presented in court, does not support the disability part of the claim. In fact, the doctor testified that he estimates the disability to be around 10%. Consequently, the court will award E45, 000 for the eye disability, instead of the E250, 000 claimed by the Plaintiff in his particulars of claim.

[66] Regarding the temporal pain and discomfort, the plaintiff had claimed E40, 000. In as much as the court is cognizant that the plaintiff may have experienced some degree of pain due to the assault. Notwithstanding, the doctor testified that the plaintiff has fully recovered and was not currently experiencing any pain. Therefore, based on this expert evidence, the court will award a reduced amount of E20, 000.

[67] In respect of the defamation part of the claim, the evidence confirms that the words allegedly uttered by the defendant were indeed said. I now discern to consider if the utterance was perceived to lower the Plaintiff's self-esteem when in the eyes of those who heard the statement. If one is accused of killing someone else's dogs, the offensive statement by its very nature impugnes the character and reputation of that person. Although the defendant denies saying this statements, what is crucial for the court to consider, is the number of people who heard these words. This speaks to the publication requirement of a defamation claim. The court finds that the publication was minimal²⁹. At most, the individuals who heard these statements could have been Kwanele Mhlanga, the plaintiff's wife, and Senani Mhlanga.

[68] In as much as Kwanele Mlanga who was one of the witnesses before court testified that there were other people who arrived after hearing the altercation. The evidence falls short because it does not specify the detail of those additional individuals who are alleged to have also heard the offensive statement. Be that as it may, the court takes into consideration that Kwanele

²⁹ In the case of Priscilla Mbuli vs Joshua Jele High Court Case No. 1805/2006, the court recognized the extent of the publication as a consideration to be taken as a factor when assessing the question of damages.

Mhlanga may not have been able to identify those people by their names. Nonetheless, providing an estimate of their number would have enabled the court to assess the extent of damage to the plaintiff's reputation in their perception.

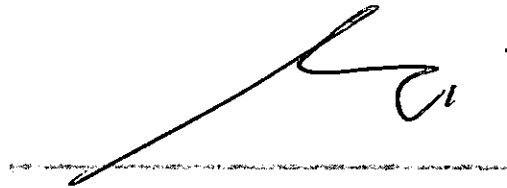
[69] When considering the evidence before court, it is not known how many people were drawn by the altercation and the extent of which their perception of the statement may have lowered the Plaintiff's dignity. In as much as the court accepts that the defamation happened. But the publication thereof was quite minimal. The court will therefore award E10 000 (**Ten Thousand Emalangeni**) for the defamation. The future medical expenses are to be awarded as per the claimed amount. However the physiological counselling claim has not been proved. As such it will be declined.

[70] In the totality of the foregoing, the Court finds that the Plaintiff's claim must succeed. Defendant is liable for the damages in following amounts;

| | |
|--|-----------------------|
| • Temporal pain and suffering and discomfort | E20 000 |
| • Defamation of character | E10 000 |
| • Medical expenses | E2 000 |
| • Eye sight disability | <u>E45 000</u> |
| TOTAL | <u>E77 000</u> |

[71] The court therefore grants the following order against the Defendant.

- a) Payment of the sum of E77, 000 as damages.
- b) Interest thereon at the rate of 9% per annum, a *tempore morae* from date of summons to date of final payment.
- c) Costs of suit.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For Plaintiff:

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