

**THE HIGH COURT OF SWAZILAND**

**SAMUEL DLAMINI**

Plaintiff

And

**THE PRINCIPAL SECRETARY**

**MINISTRY OF PUBLIC WORKS AND TRANSPORT**

1<sup>st</sup> Defendant

**THE ACCOUNTANT GENERAL**

2<sup>nd</sup> Defendant

**THE ATTORNEY GENERAL**

3<sup>rd</sup> Defendant

Civil Case No. 2355/2003

Coram: S.B. MAPHALALA – J

For the Plaintiff: MR. L. SIMELANE

For the Defendant: MR. S. KHULUSE

**JUDGEMENT**  
(3<sup>rd</sup> May 2006)

[1] The Plaintiff has instituted action proceedings against the Swaziland Government by way of combined summons claiming damages for emotional shock, loss of dignity and humiliation allegedly suffered as a result of the unlawful deduction of his salary. The Plaintiff seeks an amount of E1 50, 000-00 as damages suffered.

[2] In these proceedings the 1<sup>st</sup> Defendant is the Principal Secretary of the Ministry of Public Works and Transport who is cited in his capacity as the administrative head of the Ministry. The 2<sup>nd</sup> Defendant is the Accountant General who is cited in his capacity as the officer responsible for paying salaries to civil servants. The 3<sup>rd</sup> Defendant is the Attorney General cited in his capacity as the legal representative of the Swaziland Government in all legal proceedings with his offices at 4<sup>th</sup> Floor, Ministry of Justice Building.

[3] The Defendants have filed a Notice of Intention to Defend and a plea. In the said plea the Defendant have denied, *inter alia*, that the Plaintiff suffered any damages as alleged. Defendants avers that even if the Plaintiff did suffer emotional shock, the type of shock sustained by a person who discovers that his salary has been unlawfully deducted is not something which compensation or damages should be awarded. The shock was not serious enough to merit compensation. Further that Defendants disclaim liability to Plaintiff in the sum alleged or in any sum whatsoever and Plaintiff was put to strict proof thereof.

[4] Evidence was led before this court that the Plaintiff whilst still in the employ of the Swaziland Government and attached to the Ministry of Public Works and Transport, had at some point in time, being summoned to appear before a committee that was chaired by one Almon Mbingo in his capacity as the then Under Secretary for the aforesaid Ministry. Only the Plaintiff gave evidence in support of the action. Also on the part of the Defendants only the evidence of Almon Mbingo was called. It is common cause in the evidence of these two witnesses that the meeting was to get an explanation as to why the Government vehicle that had been assigned to the Plaintiff for official use was consuming a lot a fuel than any other Government vehicle in the ordinary course of duty, such that in some instances the said vehicle would fill up fuel twice a day. Evidence was led before court by the Defendants' witness Mr. Almon Mbingo that at the said meeting Plaintiff failed to give a satisfactory explanation why his vehicle was consuming so much fuel but that upon being confronted with documentary evidence of mismanagement of fuel admitted to have siphoned the fuel from the said vehicle for personal gain. Such explanation was reduced into writing by the Plaintiff. Plaintiff in re-examination admitted to have made the written admission but that such admission was made under duress as he was threatened with imprisonment by the Chairman of the committee. The Defendants on the other hand through the evidence of Mr. Mbingo submitted that the Plaintiff was never threatened but rather given an option whether to have

the matter reported to the police or to have it dealt with administration, and he chose the latter.

[5] The Plaintiff in his evidence stated that he did not consent to the deductions made by the Defendants on his salary, as the Defendants did not have legal authority to surcharge him. Only the Principal Secretary of the Ministry of Finance had the authority to surcharge a public officer. He further deposed that the Under Secretary Mr. Mbingo did not have authority to make investigations of misconduct. He was not informed that deductions were going to be effected on his salary. The deductions came as a shock. The Plaintiffs evidence is that he suffered loss of dignity as a result of these unlawful deductions. He was a supervisor. His junior staff ridiculed him. His feelings of self-respect and dignity were infringed. He related that his junior staff got to know that deductions were being effected on his salary and he was earning nothing. As a result of this state of affairs he developed high blood pressure. He was a sole breadwinner for the family. The deductions were effected when money was needed the most. According to Plaintiffs medical history as from September 1999 after meeting Mr. Mbingo, the Under Secretary and two other officers, his blood pressure shot up. He went to hospital for check-ups frequently, something which never happened before. As a result of all this the Plaintiff stated that he incurred very high medical expenses which were triggered by the deductions.

[6] In arguments before me it was contended for the Plaintiff that it is not in dispute that the deductions that were effected on the Plaintiffs salary during the period between January 2000 to April 2000 were unlawful. The Defendants are disputing that Plaintiff suffered damages as a result of their wrongful conduct. On the wrongfulness of Defendants' conduct it was contended for the Plaintiff that he did not consent to the deductions. The Defendants did not have legal authority to surcharge the Plaintiff. The said deductions did not conform to Section 21 of the Finance and Audit Act No. 18 of 1967. In this regard the court was referred to the case of *Cleopas Myeni vs Ministry of Finance - High Court Case No. 1850/97*. Further, that the Under Secretary did not have authority to make investigations of misconduct. He was not the Head of the Department as provided for in Regulation 41 to 50 of the Civil Service Board Regulations of 1973. That the deductions were in violation of the provisions of the Employment Act of 1980 in Section 57 (4) thereof. Further that the deductions were in violation of Section 25 (1) (a) of the Finance and Audit Act No. 18 of 1967.

[7] It was further contended that the Defendants are vicariously liable for the wrongful conduct of the officers that effected the deductions. The Defendants are liable to pay the damages suffered as a direct consequence of the wrongful conduct. In this regard the court was referred to the textbook by *Neething, Potgieter, Visser, Law of Delict, 2<sup>nd</sup> Edition* at page 174-175.

[8] *Mr. Khuluse* for the Defendants advanced arguments *au contraire* to the general effect that the Plaintiff could not have suffered emotional shock as a result of the deductions of his salary because he knew about the said deductions prior to his actual discovery that the decision to have his salary deducted had been put to effect. Alternatively, it is submitted for the Defendants that if the court finds that the Plaintiff did suffer emotional shock as a result of the deduction of his salary such damage cannot be attributed to the Defendants. In this regard the court was referred to the authorities of *Jourbert, The Law of South Africa, Vol 9 page 9; Boberg, The Law of Delict* at page 176, *Bester vs Commercial Union Versekeringsmpy Van S.A. Bank 1973 (1) S.A. 769, Jourbert, The Law of South Africa (Lawsa) Vol. 9 paragraph 12.*

[9] It is clear on the facts that Plaintiff knew about his salary deductions prior to actually discovering that indeed the salary had been deducted. The question therefore is whether in view of this prior knowledge the Plaintiff have suffered emotional shock when he discovered that the decision of the committee that had been tasked to investigate the mismanagement had actually been effected. On the facts before me it appears to me that the Plaintiff knew about his salary deductions prior to actually discovering that indeed the salary had been deducted and therefore he cannot be said to have suffered emotional shock. In this regard it is my considered view that the *dicta* in the South African case of *Bester vs Commercial Union Versekeringsmpy Van S.A. Bank 1973 (1) S.A. 769 (A)* is apposite on the facts of the present case. The facts in the *Bester* case (*supra*) which is in Afrikaans but the headnotes therein are in English are that when two brothers, Deon (aged 11 years) and Werner (aged 6 years), crossed the road, a motor car driven negligently by K collided with Werner, who died of his injuries on the same day. Deon who was slightly ahead of his brother, was physically unscathed. However, the fact that he had witnessed the fatal collision affected him psychologically, giving rise to an anxiety neurosis that required medical treatment. In an action against the statutory third party insurer of the motorcar the boys' father, B, claimed, *inter alia*, the cost of Deon's medical treatment (in his personal capacity) and R2 500-00 damages for shock and indisposition (on behalf of Deon). The trial court dismissed these claims on the ground that they did not arise from physical injury to Deon. Reversing this decision, the Appellate Division held that Deon and his father were entitled to compensation for the damage they had suffered as a result of the accident.

[ 10] The author *Boberg, The Law of Delict (1984)* at page 176 states the following:

**"South African law, burdened with the artificial "personal apprehension of danger to himself limitation adopted from the undeveloped English law, languished in the doldrums until the Appellate Division put the matter right in *Bester vs Commercial Union Versekeringsmaatskappy van***

*SA BPK1973 (1) SA 769 (A)* (case [26] below 178). That decision established that the criterion of liability for injury caused by shock in our law is the foreseeability of injury by shock. Though shock may be more readily foreseen where the Plaintiffs personal safety is endangered, said the court, there is no arbitrary rule confining liability to such cases. Nor should this be regarded as an extension of the Aquilian action, for the brain and nervous system which suffer injury through shock are as much parts of the body as an arm or a leg. Compensation will not, however, be awarded for insignificant temporary emotional disturbance having no material effect upon a person's welfare".

[11] Further, it would appear to me that Defendants' Counsel is correct when he relied on what is said by the author *Jourbert, The Law of South Africa, (Lawsa) Vol. 9* at paragraph 12 thereof that the "**Appellate Division, decided that the criterion for liability on the grounds of emotional shock is that of reasonable foreseeability**".

Defendants could not reasonably have foreseen injury to the Plaintiff by shock because the Plaintiff had consented to the event that is alleged to have caused him emotional shock. Furthermore, I am in agreement with the Defendants that in the absence of foresight of injury by shock the Plaintiff has failed to establish a cause of action based on emotional shock.

[12] In the result, for the afore-going reasons the action is dismissed and the Plaintiff to pay costs thereof.

**S.B. MAPHALALA  
JUDGE**