PAUL SHAMBIRA

versus

MINISTER OF DEFENCE

and

MINISTER OF HOME AFFAIRS

and

COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 30 May 2006, 1 & 2 June 2006 & 23 May 2012

**Civil Trial**

*B* P*enduka*, for the plaintiff

*E. Jena*, for the defendant

HUNGWE J: The plaintiff issued summons against the first defendants claiming Z$150 000 000-00 as damages for an assault he suffered allegedly at the hands of members of the Zimbabwe Republic Police (ZRP) as well as the Zimbabwe National Army (ZNA) who, according to the plaintiff, were acting within the course and scope of their employment with the defendants on 31 March 2003. In his declaration the plaintiff makes the following averments.

On 31 March 2003, around midnight, he was asleep in his home when members of the ZNA and ZRP woke him up. They demanded that he surrenders certain material and weapons of war belonging to a certain political party. They turned his house upside down and broke up his household effects in the process of searching for the same. They did not find anything of interest. They then embarked upon an orgy of assault which lasted nearly two hours. In the assault, police button sticks and sjamboks were used. Booted feet and cuffed firsts were also used. He was bundled into an Army lorry and driven into the darkness. Further torture continued throughout.

He was eventually released without any criminal charges being preferred against him. He sustained multiple injuries all over his body. He was medically examined by a doctor.

The plaintiff seeks Z$120 million for pain and suffering and Z$30 million for contumelia interest as well as costs of suit. The defendants do not dispute that the plaintiff was assaulted on the date and the time he claims to have been assaulted. They however deny that the assault was perpetrated by members of the ZRP or the ZNA as claimed. The defendants aver that no members of the respective forces were deployed to carry out the alleged raids, nor was any report of such raid ever received at the Police station in whose jurisdiction the raids occurred.

The defendants therefore deny any liability for damages claimed by the plaintiff.

The issues

In light of the nature of the defence raised by the defendants, the issues became whether the plaintiff suffered assaults at the hands of the members of the ZNA and ZRP. The plaintiff also needed to prove his damages in the ordinary course of events.

The Evidence

The plaintiff gave a detailed description of how he was brutalised by people who raided his house at the dead of night. He described the assault as follows.

He was awakened by people knocking at the windows. He left his bedroom and hid in the spare bedroom. The assailants opened the spare bedroom door. He armed himself with an electric iron ready to fight back. He never got to use it as it was taken away from him by those nearest to him.

The group which invaded his residence comprised men dressed in Army and Police uniforms as well as others in civilian attire. Of the ZNA members he said they wore green barretes, camouflage jackets and long trousers and green T shirts. ZRP members wore grey shirts and navy blue jeans with the ZRP caps or floppy hats.

The soldier who grabbed the electric iron from his suddenly stamped on his chest and pushed him to the bed. A soldier armed with a rifle placed it over his shoulder and fired twice. The next day he recovered a spent cartridge which he produced as exh 2.

A vicious assault then followed. They had used button sticks, sjamboks all over his body. They asked to be led into his bedroom where they said they wanted to search for arms of war and Movement for Democratic Change (“MDC”) materials. He was dressed only in his underpants.

In the bedroom they broke his wardrobe over-turned his bed and tore the mattress apart. Cooking oil was poured over his clothes. They then led him away saying they wanted one Mpofu. When they got outside, he saw an Army truck which he identified by its military green colour and canvass bearing the same colour. He said it is similar to the lorries which the Army uses to transport its military personnel, a Steyr lorry.

He was pushed into the lorry. Inside the lorry were two women who had suffered a similar fate. They were ordered to lie on their stomachs and the assault resumed. He was asked where Mpofu lived. He did not know the address but only that it was next to Chikomo beer hall.

They went to the beer hall. The lorry was parked. He was asked to lead then from door to door till they found Mpofu. All this while he would be assaulted. Anyone they came across would be assaulted. An MDC driver was also caught up in this raid. He was under assault. A couple driving towards Chitungwiza Town Centre was stopped, assaulted and then ordered to continue.

Later, one of the group members asked the others to stop assaulting the hapless hostages as they had had enough. He was taken back to the lorry and ordered to climb into the lorry. They drove on. When they came to a junction, they ordered everyone to jump off from their lorry. Although the women told them they could not walk the assaults persisted.

The three could hardly walk. He got refuge at a certain home for the night. The following day; he was assisted to get to his home.

He later obtained medical attention. The examination report is part of the papers.

It was the plaintiff’s evidence that during this period, there was an Army unit as well as a Police Unit encamped at Chitungwiza Police Station. He could tell this because tents were pitched at the station. Normally tents are not pitched at the Police Station. Prior to retiring to bed, he had passed through Makoni Shopping Centre and observed an eerie silence engulfing the usually bristling township. He had asked the reason for the unusual calmness and was advised that there were solders beating up people around the area. Before he got home he came across two soldiers beating up a person. One of the soldiers was speaking in Ndebele

Under cross-examination he explained that his house is close to a tower light which floods his house with enough light for one to go about their usual chores inside the house. When they got into his spare bedroom, the light there was on, enabling him to clearly take note of the peoples clothing. He reported that the group consisted of 2 soldiers, 2 police officers and 2 in civilian clothes. He did not claim to know anyone in the group.

In the heat of the assault he explained that he could not tell who did what in the assault on his person.

When it was suggested that no ZNA or ZRP personnel was involved in this attack on his person, he insisted that they were, as he was one of the victim of generalised violence perpetrated by Army and Police details in the area. He insisted that ZRP Chitungwiza was aware of this operation hence it made no sense to report to the Police at Chitungwiza or anywhere for that matter as he believed the Police and Army had conspired against the civilian population perceived to belong to, or sympathetic to the MDC. Reporting to the same institution which was victimizing people may draw the wrath of those forces. He did not feel safe anymore.

Clara Taderera is another resident of Chitungwiza whose residence was raided by a violent group of people clad in ZRP and ZNA uniforms on the night of 31 March 2003. They asked her where her husband was, why he was not yet home. At the same time they assaulted her. They took her out of their home to a spot near the plaintiff’s residence. People she found there kept her under guard and under assault as the others went for the plaintiff. They saw the plaintiff being force marched towards where they were and being assaulted at the same time.

When the plaintiff and his assailants joined her party, they were ordered to climb into the lorry. Inside, they were ordered to lie face down. They were told they were going to look for one Mpofu. As the lorry drove to find Mpofu, the assaults continued. They got to a spot where it was said they will find Mpofu.

She was ordered to get out of the lorry but because she could not they helped her disembark. Her evidence clearly follows that of the plaintiff regard what happened as they looked for Mpofu till they were drove up to a junction where they were all dumped.

She described the attire worn by the assailants as consisting in Army and Police uniforms in the same way the plaintiff described it.

The following morning the witness found a medical aid card in the name of one Tawanda Moyo of Police, Prisons and Airforce. It is a Public Service Medical Aid Society Card (PSMAS) No. 00338856W. It is exh 3.

The defendants failed to challenge this witness evidence after she produced the PSMAS membership card. Her evidenced is therefore accepted.

Again the evidence of a third witness, the Karsteh Mungazi who was similarly brutalised by men in Police and Army uniform on the night of 31 March 2003 in Chtungwiza was not challenged. He was employed by the MDC as a driver at the time of this incident. He was left for dead.

Prior to being left for dead, he had noticed the plaintiff under guard by men in Army and Police uniform next to an Army lorry. This was near his residence. Dr Lovemore told the court that the plaintiff injures were constant with assaults using button sticks.

The defendants called the evidence of Lieutenant Colonel Marovanidze ZNA and Chief Superintendent Sadzamari of the ZRP.

Lt. Col. Marovanidze evidence was of a formal nature. As Staff Officer grade 1 he was responsible for operations. He issued directives regarding deployments of ZNA personnel and kept records of such deployments. According to him, troops were deployed in Chipinge between 20 March and 26 March 2003. On 26 March 2003 they were withdrawn. This deployment was in response to a request by Police. As such the deployed units would take orders from the Police Command in the area.

Under cross-examination Lt Col Marovanidze agreed that his evidence was based on the records in the office which records were prepared by officers who manned this office in 2003. He assumed duty in this office in July 2005. According to him it is not possible for a deployment by the Army units to deploy without the Army Headquarters knowledge; otherwise there will be chaos. He conceded that the spentcartridge may have been a result of an Army rifle being fired as the ZNA uses this type of ammunition.

Chief Superintendent Sadzamari was stationed at Chitungwiza District Headquarters at the time of the incident. She denied any knowledge of the events described by the plaintiff. If a rifle was fired, she would have heard it as the plaintiff’s residence is not far from the station. She told the court that due to lapse of time she could not say whether or not the Army was camped at the Police station on 31 March 2003. She however conceded that there was a period when the Army was encamped at the Police Station. She was unable to say when this was.

She mentioned that at the relevant period there had not been any Army and Police joint operation in Chitungwiza. No report on this incident was filed with the Police Station.

Under cross-examination, whilst maintaining that the Army never pitched tents, Sadzamari agreed that sometime in March 2003 the Army was encamped at the Police Station for six days. It used a disused Police Canteen building for the duration of its stay. This Army deployment, according to her, was merely on standby. It was never involved in joint operations with any Police unit.

Findings

The evidence regarding the identity of the plaintiff’s assailants hinged on several factors such as the visibility afforded by the lighting conditions at the scene; the mobility of the scene; the familiarity with the objects described as identifying marks, the reliability of the witnesses and so on.

According to the plaintiff he is familiar with military attire as well as the Police uniforms. It is public knowledge that camouflage is largely associated with the ZNA or its association in the Airforce. But this was not the only basis for his conviction that the assailants were members of the ZNA. There is exh 2, the spent cartridge which was found inside his bedroom the following morning. There was also the lorry which he described as a Steyr type of lorry. Only the Army, during this period, had acquired this type of vehicle for its operations. It may well be that because the plaintiff knew that if he gave this name, as it is associated with Army trucks, his evidence will be more credible. But I am aware of the need to carefully and cautiously approach the plaintiff’s evidence. He is a victim of a brutal assault. That may be a source of his resentment against the ZNA as he may have mistaken the type of clothes worn as well as the vehicle used by his assailants. Could that resentment have created the scarred walls made inside his bedroom? It is highly unlikely that the complainant was being imaginative regarding what happened inside the bedroom. Photographs show what appears to be scarred walls. Taken together with the spent cartridge, I am in no doubt that Army and Police personnel assaulted the plaintiff in the manner he described both in his declaration and in court.

There is sufficient corroboration to the evidence tendered by the plaintiff. Two more witnesses confirmed being subjected to torture tactics by uniformed men. These two witnesses are not related to the plaintiff but one of them is a member of the MDC as was the plaintiff. The court cannot fail to take note of the grave nature of the evidence led before it because it amounts to politically motivated violence being driven by armed state institutions against unarmed civilians. The reason they were being targeted is clearly that they belonged to the MDC.

If any doubt lingered in the defendants counsel regarding the identity of the assailants, these lingering doubts were put to rest by the evidence of the only lady witness at whose residence a medical aid society membership card was found the following day. It identified one of the persons present in the group as Tawanda Moyo.

Although Counsel for the defendants asked for a postponement in order to seek out and establish where Tawanda Moyo was on the night of 31 March 2003, nothing of this investigation was ever heard.

The defendants conceded that one of its members is Tawanda Moyo. There was reference to possibility of settlement. This appeared to have fallen through, so the matter continued. There was, thereafter, no challenge to the plaintiff’s case.

In the result I have no difficulty in finding that on the night of 31 March 2003 a group of ZNA and ZRP personnel together with other unidentified people brutally attacked the plaintiff. He sustained the injures after a 11/2 to 2 hours assault in which all sorts of weapons including button sticks and sjamboks were used.

The evidence tendered by the defendants does not cast any doubt on whether or not the incident occurred but on whether or not it was officially sanctioned.

To my mind, even if I held that this raid was not officially sanctioned by the defendants I am unable to say that it will follow that the defendants are not liable for the acts of their employees.

The test for vicarious liability is whether in all the circumstances it is a fact that the employee acted in the course of his employment and within the scope of his employment. This test may be satisfied and vicarious liability will accrue despite lack of blame or fault on the part of the employer.

The test is satisfied even where the act of the employee is specifically prohibited by the employer or in terms of the employment contract, provided that the act in question is so connected with the employers business and authorised acts that it constitutes a mode, through an improper one, of carrying out such business acts.

(See *Fawcett Security Operators (Pvt) Ltd* v *Omar Enterprises* (*Pvt*) Ltd 1990(2) ZLR 108).

I did not hear Mr Jena to argue that the defendants are not vicariously liable for the delicts of its servants if indeed it was found that its servants assaulted the plaintiff.

I am satisfied that the plaintiff has been able to establish that he was assaulted by members of the ZNA and ZRP on 31 March 2003.

The defendants are liable for the damages inflicted by their officers.

Damages

The gravity of the assault which took between 11/2 to 2 hours by armed military person on someone within his home cannot be exaggerated. A look at the medical report will leave no doubt that indeed the plaintiff suffered serious bodily injury, pain and suffering.

The rapid loss of value of the Zimbabwe dollar make light the award claimed. There can possibly be no guide in an environment in which the currency is constantly losing value. I therefore fix damages at the rate claimed by the plaintiff regarding both heads. The will be judgment in favour of the plaintiff as claimed as claimed together with interest as well as costs of suit.

*Zimbabwe Human Rights NGO Forum*, plaintiff’s legal practitioners

*Civil Division of the Attorney General’s Office*, defendants’ legal practitioners