



IN THE HIGH COURT OF ESWATINI
JUDGMENT

In the matter Between:

Case No.1368/2002

MABUTFO DLAMINI

Plaintiff

And

SWAZILAND GOVERNMENT

Defendant

Neutral citation : *Mabutfo Dlamini v The Swaziland Government*
(1368/2002) [2019] SZHC 228

Coram : **M. Dlamini J**

Heard : **19th August, 2019**

Delivered : **28th November, 2019**

- Civil claim* :
- based on assault and torture – well crafted plea – Counsel failing to put case to the plaintiff’s witnesses – defence testimony news to court – procedural irregularity going to the root of the defence –*
 - quantum – no evidence that assault happened in full view of members of public or plaintiff’s colleagues – alleged assault was at the police station - no proof of humiliation and impairment and impairment of dignity*
 - costs orders – plaintiff’s witness testifying on her own ordeal and yet not claimant – waste of courts time – Counsel for plaintiff to explain why costs should not be discounted*
 - defence Counsel failing to conduct trial according to legal expectation despite a well crafted plea and weighty testimony of defence witness– defence Counsel ordered to appear in court to explain why costs should not be from her pocket*
 - plaintiff’s cause of action succeeds*

Summary: The defendant was said to be liable vicariously for plaintiff's unlawful detention and torture at the instance of the Royal eSwatini Police. The defendant denied liability and pleaded lawful detention as there were reasonable grounds for the police to suspect plaintiff of committing robbery.

The Parties

[1] The plaintiff is an adult male and at the time of drafting the Particulars of Claim, an employee of defendant as a clerk. The defendant is the Government of the Kingdom and an employee of the members of the police service.

Particulars of Claim

[2] The plaintiff stated that on the 28th May, 2001 at Mbabane police station, he was unlawfully detained, assaulted and tortured. As a result he sustained bodily injuries and impairment to his dignity.

[3] For all that suffering plaintiff claimed the globular sum of E250 000 together with interest at the rate of 9% per annum a *tempore morae* and costs of suit.

Defence

[4] The defendant prayed that the plaintiff's cause of action be dismissed. It admitted detaining plaintiff. It denied any form of assault and torture on plaintiff. It pleaded that the detention overnight was lawful for the following grounds:

- The plaintiff and **Kholekile Singwane** failed to report a robbery to the police who were within the radius of 50 metres. They only did so after forty five minutes of the robbery.
- This delayed reporting was despite that at all material times they had a cell phone with them.
- Even though the robbery took place in a public place, none of the members of the public witnessed it.

Oral evidence

Plaintiff's case

[5] The plaintiff led in evidence three witnesses. Plaintiff was the first witness in his own case. He testified that on 28th May, 2001 in the company of **Kholekile Singwane (Singwane)**, his colleague went to the automatic teller machines (ATM) at Swazi Plaza, to load cash. The cash was conveyed by security officers. They together with the security officers entered the safe room. The security handed over the cash to them and left. They counted the cash to verify the amount handed. They switched off the ATM. They examined the system for any faults. They also checked the canisters to see if there was any money that had been jammed. Everything was in order. They then loaded the cash and switched on the system back to service.

[6] Thereafter he took the money counting device, while **Nsingwane** took the keys to the ATM room. He proceeded to open the door. As he

opened it, he noticed a gentleman standing by the door. The gentleman pushed him inwards. He tried to push him but in vain. As he attempted to push him back, the man pulled out a firearm. He pointed at him. He immediately locked the storeroom. He ordered him to open the safe. She obliged. He ordered him to assist **Nsingwane** to remove the cash from the canister and load it into his bag. He obliged. As they were removing the cash and loading it to the man's bag, the man would occasionally assault him demanding that they hurry as he did not have time. When they were through, he ordered them to lie down. He warned them not to make a noise for the next ten minutes. If they disobeyed his instruction and the police arrest him, he would know that they had reported him.

[7] He warned them that he was not alone. He knew where **Singwane** resided at **eZulwini**. They would come for her. Indeed **Singwane** resided at **eZulwini**. He turned to plaintiff and told him likewise, saying that he knew where he resided at **Lobamba**. This information was correct as he was residing at **Lobamba**. He then told them that he was then leaving the room. He turned to plaintiff and ordered him to lock the door to the strong room and that should he not, he would return to shoot him. He obliged.

[8] After the robber leaving, **Singwane** searched for her cellular phone which was in her canvass bag. She had thrown the canvas bag down when the robber demanded their cell phones. She found it and called **Mr. McFadden**, the bank manager. She narrated their ordeal. **Mr. McFadden** instructed them to remain in the strong room until the

arrival of the police. They obliged. The operational manager eventually arrived after thirty minutes. The police were not in his company.

[9] The police eventually arrived, although late. The police explained that they had gone to the other ATM as they had thought that the robbery took place there. The police took them to the Swazi Plaza police post to record statements. Thereafter, they were taken to the main station. The witness then gave a lengthy narration of his interrogation and torture at the police station. I shall refer to his evidence under adjudication. Although his evidence in chief was lengthy his cross-examination was not commensurate. I shall refer to his “cross-examination” later herein. I shall become apparent later as to why the term “cross-examination” is written with inverted commas.

[10] The second witness on behalf of plaintiff was **Dr. Themba Floyd Ceasar Ntiwane**. He has been practising medicine since 1990. He qualified at the University of Dar-esalam, Tanzania in the same year. He referred the court to his report which was later marked as exhibit A13. He testified that he examined plaintiff:

“His complaints tallied with his physical condition. That is multiple assault. That is multiple contusions around his neck, back and ankles (distal lumps) There was information of his conjunction. There was a rupture of his conjunctival blood capillaries.”

[11] The Doctor then opined:

“All these were suggestive of assault.”

[12] He administered pharmaceutical agents and prescribed physiotherapy. He also compiled exhibit A15. Cross-examination of **Dr. Ntiwane** took a similar pattern as that of plaintiff.

[13] The last witness for the plaintiff was **Kholekile Gladness Singwane**. She identified the plaintiff as her former colleague at plaintiff’s institution. On 28th May, 2001, she proceeded with plaintiff to the ATM to load cash. The time was about 0915 hours. They off loaded the cash from the security. They counted it and it summed to E130 000. They sorted it as it was not from Central bank. They put the ATM out of service. They loaded the cash and turned on the ATM device back to service.

[14] Plaintiff took the money counting device and proceeded to the strong room door to open it. As he opened, a gentleman jumped inside, pushing plaintiff. Plaintiff tried to push him back. The man pushed plaintiff inside. She shouted and screamed. The man pulled out a firearm. He ordered them to be quiet. He locked the door. He ordered them to lie down and open the canisters. She took her canvas bag which she had thrown down due to trauma. She removed the keys and opened the canisters. He instructed her to lie on the floor. She heard him asking plaintiff to assist him pack the money in the spot

bag he was carrying. He would hear the man hitting plaintiff with the firearm every now and then. He also swore at them.

[15] While still packing the money, he asked if they had any cellular phones. Plaintiff said that they did not as he was not aware that she had one. The man searched them. He then stood up and told them their names surnames and places of residence. He ordered them to remain in the strong room for ten to fifteen minutes. She testified further:

“If we made any move, he knew where to get hold of us.”

(16) The robber switched off the lights and ordered plaintiff to lock the door. After he left, she asked plaintiff if he locked the door. He said that he did. He asked if the robber took her cell phone. Plaintiff said that he did not know. She took the cell phone under her canvas bag and called the branch manager. She asked him i.e. **Mr. McFadden** to call the police. They remained in the room for about half an hour. She again called the branch manager. He came immediately thereafter in the company of operations’ manager.

[17] The police arrived at about 12:00 noon. They asked them few questions. They were taken to the police post at the Swazi Plaza. They recorded their statements. At about 12:30 hours they were taken to Mbabane police station. They were taken to different rooms. Four police officers instructed them to narrate the incident. They told her

that she knew something about the robbery and that by the end of the day, she should give them the money.

[18] She was called every now and again to narrate her story. She was told she knew the money as the robber would not have left the cell phone behind. At about 1800 hours she was instructed to remove her jewellery and shoes. He was charged with theft. They asked a police woman to search her. She requested the officer who searched her for a telephone to call her colleagues at work to buy her menstrual pads. The officer acceded to her request. She called her colleague to buy her pads. She called her mother and **Mr. McFadden** and informed them that she had been arrested. **Mr. McFadden** undertook to advise head office.

[19] She was taken to the cell. At around 1800 hours police officer called her out. She found her mother who had brought her warm clothes. She was allowed to change to her clothes from the plaintiff's uniform. She asked her mother to buy her pads and other toiletries. She obliged. The officer brought her the pads. At about 1900 hours her colleague, **Mkhonta** arrived with her bag which she had left at work and the sanitary pads. Within a few minutes she heard plaintiff screaming saying he did not know anything. He was screaming all the time for about 30 minutes.

[20] Plaintiff was taken back to the cell. She saw him pass her cell. Plaintiff was walking very slowly and crying. One police officer came to her and took her to a panel of police officers. They were

about twelve. One handcuffed her and cause her to sit on the floor. Before they could say anything, she demanded to know what they had done to plaintiff as she saw him crying. She threatened them that if they did to her what they had done to plaintiff, she would urinate on the floor. They asked her to produce the banks money. When she tried to answer, they assaulted her and insulted her. They instructed her to scream like a cow. She obliged.

They burst into laughter. They said she should stand up while in her handcuffs. She did. They said they would take them to a forest. She spent the whole night in the police cell. In the morning a roll call was made. She then testified:

“I was taken to one of the police office where I found two police officers. One of them said you do not want to show us the money. He then offered me a lift home.”

[21] Again an attempt to cross-examine this witness was made. Plaintiff closed his case.

Defendant’s deffence

[22] The defendant opened its case by leading one witness **Joseph Ebram Mbalekelwa Bhembe**. He gave a detailed account of the circumstances that led them to the arrest of the duo. He was the desk officer at that time. He was the lead investigator. He testified that the town was very busy on the day of the robbery. He received two reports of robbery. The first was said to be at **Mantjolo**. They proceeded to **Mantjolo** only to discover that the report was a hoax.

They again received another report of a robbery at the then Swaziland Electricity Board. They responded to the report. Again it was a sham.

[23] At around 4:00 pm on the same day, they received a further report that there was a robbery at an ATM. Officers from the City Post surrendered to him plaintiff and **Kholekile**. He assembled about six investigators as a team. They interviewed the duo. From the interview, their story did not add well. This was because both of them told them that one robber pushed them into the strong room. They wondered how, as there were police officers detailed to guard the ATM. Further, there were many people moving up and down in that area. That period in this country, the public was active in apprehending criminals. If the duo had shouted, there would have been an immediate response from both the police and members of the public.

[24] What fortified their suspicion is that the robber was able to take only the cash and dashed with it. He left behind a cell phone in the possession of the duo. This was exacerbated by their allegation that the robber did ask them if they had cell phones with them. Worse still, they said that they complied with the robber's instruction to remain inside the strong room for forty minutes. Further, they gathered from the two that when the robber entered, he produced a gun but inside the strong-room he did not. All the above led them to consider the two as their suspects. They detained them. They carried on with their investigations.

[25] The reason they decided to detain them while investigating was to prevent them meeting the robber and sharing the spoils. They carried on with their investigations and contacted their informers until the following morning. In the morning, the investigators assembled together. They did not have substantive evidence against the two. They then released them. He denied any assault against the plaintiff. He testified that none of the officers insulted the plaintiff.

Determination

[26] I must from the onset point out that the evidence adduced by Desk officer **Bhembe** clearly establishes a ground for reasonable suspicion. This is because plaintiff in his own evidence testified that as soon as he opened the door from the strong-room, the robber pushed him back. Now this gives the impression that at all material times, the robber was waiting by the door of the strong-room. Now how could this be in light of the fact, as we all know, that the ATM at Sales House building is along a passage which has been always been abuzz with members of the public. Worse still in 2001, police officers were always stationed at the ATM's around the country.

[27] As correctly observed by Desk officer **Bhembe**, one scream from plaintiff would have attracted members of the public, let alone the stationed police officers. Again it is difficult to believe that any robber or even an innocent person could keep wait at the door of the strong-room without attracting suspicion from both the police officers who were strictly assigned to guard the very ATM, let alone members

of the public. The version of the plaintiff, must conclude is highly unlikely.

[28] That as it may, however, I must hasten to point out that the evidence by Desk officer was all news to the court. None of what he stated was put to any of the plaintiff's witnesses. Cross-examination of the plaintiff's witnesses was merely regurgitating what each witness stated in chief. At the end, the defence granted the plaintiff and his witnesses an opportunity to confirm their evidence in chief.

[29] It is apposite that I take time to capture all the cross-examination of plaintiff.

Ms. B. Mkhonta : "When the robber forced his entry, you were pushing him?"

Plaintiff : "Yes"

Ms. B. Mkhonta : "You were using hands?"

Plaintiff : "Yes"

B. Mkhonta : "You said the ATM is very small?"

Plaintiff : "Yes"

B. Mkhonta : "How many people could fit?"

Plaintiff : “Two without problem, I am sure even 8 people can fit in”

B. Mkhonta : “What is ATM cubicle made of?”

Plaintiff : “I am not an expert in that I would be giving false information”

B. Mkhonta : “Is it made of wood?”

Plaintiff : “I did not observe that”

B. Mkhonta : “Was it your 1st time loading?”

Plaintiff : “No”

B. Mkhonta : “You never noticed it was made of wood or not?”

Plaintiff : “I cannot recall as case happened in 2001”

B. Mkhonta : “You also cannot recall what the canister is made of?”

Plaintiff : “They are plastic although I cannot describe them properly”

B. Mkhonta : “When the robber came in there was even less space?”

Plaintiff : There would be less space as someone is coming in but still there would be space”

B. Mkhonta : “You testified that the ATM was functional again”

Plaintiff : “Yes as that is what we do when we come out”

B. Mkhona : “When you were assisting the robber to load the money into his sports bag, you had to put your hands back into the canister?”

Plaintiff : “He asked me to assist **Kholekile** and not him.”

B. Mkhonta : He had his gun on”

Plaintiff : “Yes.”

B, Mkhonta : “You put your hands in the canister”

Plaintiff : “Yes.”

B. Mkhonta : “You testified that the robber would hit you with his gun”

Plaintiff : “Short small one”

B. Mkhonta : “Your testimony is that the bank said they never laid a charge on you”

Plaintiff : “Yes that is what they said”

B Mkhonta : “Your testimony was that **Kholekile** phoned the manager and asked him to call the police?”

Plaintiff : “Yes”

B. Mkhonta : “When the police came they were responding to a call made by the bank?”

Plaintiff : “The bank called to come and assist. They did not ask them to take us for investigations.”

B. Mkhonta : *“When the police came they were investigating a robbery case, a criminal case”*

Plaintiff : *“They came and asked us what happened, we were afraid of coming out as something could happen to us”*

B. Mkhonta : *“You testified that they asked one to stand and they handcuffed my hands and also my feet?”*

Plaintiff : *“Yes”*

B, Mkhonta : *“They asked you to lie down on belly on the floor?”*

Plaintiff : *“Yes”*

B. Mkhonta : *“You proceeded to lie down?”*

Plaintiff : *“They pushed me to lie down on the floor”*

B. Mkhonta : *“That is not what you said in your evidence in chief”*

Plaintiff : “They were using force”

B. Mkhonta : “Why did you not say that they pushed me on the floor not that they asked me to lie down?”

Plaintiff : “I might put it in a different way but they were forcing me to do that”

B. Mkhonta : “You also testified that about three of them set on your back while you were lying on the floor”

Plaintiff : “Yes I said so”

B. Mkhonta : “Besides the three that were on top of you, police officers were kicking you”

Plaintiff : “They would take turns even the ones on top of me. I was also trying to come out of the situation as I was so much in pain”

B. Mkhonta : “They would alternate – the other would be putting tube on your face”

Plaintiff : “Yes”

B. Mkhonta : “When those were tired, the ones who were kicking you would sit on you?”

Plaintiff : “I was lying on my belly, someone would tighten the tube on my back. Some of them would kick me some were seating on me”

Court : “Answer question”

Plaintiff : “Yes they were exchanging amongst themselves”

B. Mkhonta : “Were police officers wearing shoes or bare footed?”

Plaintiff : “Wearing shoes as I could feel when kicking me and I could see them”

B. Mkhonta : “They would kick you when there were three police officers on your back?”

Plaintiff : “Yes”

B. Mkhonta : “They manage not to kick the police officers on your back?”

Plaintiff : “I could not see as I was at my back. They kicked me when they said I should stand up”

B. Mkhonta : “You said you even fainted. You heard someone saying it is as if he is going to die”

Plaintiff : “Yes”

B. Mkhonta : “You heard that when you fainted?”

Plaintiff : “I said I fainted for a while then I heard someone, that means when I heard someone I was recovering”

B. Mkhonta : “In the morning there was a roll call”

Plaintiff : “I never said that”

B. Mkhonta : “There was a roll call”

Plaintiff : *“I did not say so in my evidence in chief but there was”*

B. Mkhonta : *“Is it your testimony now that there was a roll call?”*

Plaintiff : *“True just said it now that there was a roll call”*

B. Mkhonta : *“Before you were released to go back to your cell on your own i.e when he was proceeding to the cell?”*

Plaintiff : *“I cannot recall as at first they said I should go to the toilet to clean myself after I had soiled myself. My state of mind was not very good at that time”*

B. Mkhonta : *“During the roll call I am instructed that is when detainees have the opportunity to report their complaint-did you report any complaints?”*

Plaintiff : *“I was not made aware that I had to report my complaints. One of the police officers after the roll call said*

I needed to go back to the office as they were not done with me”

Plaintiff : ***“That is a pure lie”***

B. Mkhonta : *“You said that on the way it was very difficult to walk?”*

Plaintiff : *“Yes”*

B. Mkhonta : *“you said it is only then that you realised your shirt and blazer were torn in the morning”*

Plaintiff : *“I did not say that the shirt and blazer were torn the previous night when they were torturing me. I did not realise that when I was going. I believe that blazer and shirt the union are still having it as when the two officers came they asked for it. I gave it to them.”*

B.Mkhonta : *“You called a taxi home”*

Plaintiff : “I never said I called a taxi. I said I took a taxi home i.e. I mean the public transport kombis”

B. Mkhonta : “You testified that from home you went straight to the doctor”

Plaintiff : “From home I took a taxi coming back to Mbabane to the doctor”

B. Mkhonta : “This is your personal doctor?”

Plaintiff : “He was one of the doctors I would use. However, as I used him most of the time as he would understand my medical history”

B.Mkhonta : “You are well acquainted with **Dr. Ntiwane**”

Plaintiff : “Yes as I have used him for some time”

B. Mkhonta : “You never laid a complaint in the police?”

Plaintiff : *I said no. I did not trust anyone at the police station after what happened to me. That is why I sought for legal advice and a meeting was set up with commissioner of police.”*

B Mkhonta : *“That is your own assumption”*

Plaintiff : *“You confirm that you are praying to court for an award of E250 000 for unlawful assault at the hands of police unlawful assault and torturing”*

B. Mkhonta : *“Yes”*

[30] Firstly, it can be observed from the manner of cross-examination that much time was spent by learned Counsel for the defence regurgitating plaintiff’s evidence in chief. Much time was spent by the defence leading plaintiff to confirm his evidence in chief more particularly on torture. This line of cross-examination led Counsel for the defendant to ask:

B. Mkhonta : ***“After enduring such gruesome torture as alleged, with your hand tied to your back and your hand, you still managed to stand up?”***

[31] I must point out that it was heard for the first time from the defence that the plaintiff “endured such gruesome torture.” The plaintiff never testified firstly about ‘**enduring**’ and secondly that his torture was ‘**gruesome.**’ The end result of this line of questioning at the hands of Counsel for the defence was that plaintiff’s case was boosted in cross-examination.

[32] The defence asked the plaintiff if he did lay a complaint during the roll call. The defendant answered that although a roll call was there, he did not know he had to lay one and no one invited him to lay any. It went as follows:

B. Mkhonta : “ *The Station Commander always asks detainees if they had any complaints, the station commander did ask you and you did not lay any complaint about being assaulted.*”

Plaintiff : “*I did not even know who I was speaking to and did not know his position. I do not recall anyone asking me if I had any complaint*”

B. Mkhonta : “*You never laid a complaint because you were never assaulted*”

[33] Well and good if the cross-examination ended there or continued along those lines. However, the defence Counsel later pulled out a RSP 88

form (a medical examination form originating from the defendant). She put to the witness that the said form was given out by the police to persons who laid complaints. She asked in this regard:

B. Mkhonta : ***“This document is obtained only when only a person has laid a complaint”***

Plaintiff : ***“I do not know where such document is sourced. I do not know the procedures of laying a complaint. I reported a complaint to a union”***

B Mkhonta : ***“This form is at the request of Royal Police.” If he can look at this form there is a date stamp. It is 26 June. The incident happened on 28th May.***

Plaintiff : ***In between we had a meeting with the Commissioner. I assumed it was after the meeting. I said when two Senior Officers came, they assured us they would do investigation on this matter. They promised they would come back to us but until today they did not”***

Plaintiff : *“You sourced this document because you had been assaulted by the robber during the scuffle?”*

[34] The question that boggle the mind is why was it put to the witness that he never laid any complaint of assault to the police if at the end of the day as Form RSP 88 is pulled reflecting that a complaint was made? This is more so because this question was meant to draw the court to conclude that the plaintiff was not assaulted as if he had, he would have laid a complaint to the station commander when he came for the roll call on the morning. It was never intended to demonstrate plaintiff’s credibility to the effect that he said he never laid any complaint and yet he did. To pull the form RSP 88 simple means that the plaintiff did make a complaint of his assault. This is more so after the response by the defence that he never laid any complaint because he was not assaulted.

[35] The line of questioning posed secondly, created some doubt on the defence. Obvious, by putting to him that he never made any complaint but later showing evidence in the form of RSP 88 that he did.

[36] Now by producing form RSP 88 as demonstrated above and taking it into isolation by not considering the first position that he never laid a complaint, there is some doubt cast upon the defence even though it pointed out that he sourced RSP 88 because he was assaulted by the robber. The doubt arises firstly, from that it was never put to **Dr.**

Ntiwane or **Singwane** that the plaintiff had been assaulted by the robber. Secondly, when desk officer **Bhembe** gave evidence, he did not tell the court that the plaintiff arrived at the police station having been assaulted. Worse still his evidence was to the effect that when they interviewed the plaintiff, he told them that in as much as the robber pointed the firearm to him while outside the strong room, he did not use the firearm when they were inside the strong room. Now this evidence is not congruent. In other words, according to **Bhembe** and as he put it, the plaintiff was never assaulted. If he was assaulted to the degree described by **Dr. Ntiwane** in his medical report, desk officer **Bhembe** would have noticed him and so testified. In fact desk officer **Bhembe** never testified about RSP 88. He was not even led in chief by Counsel for the defence. He was not even led in chief about what was put to the plaintiff that he was assaulted by the robber.

[37] The court noted from the medical examination report prepared by **Dr. Ntiwane** that the plaintiff was described as **Mr. Lucky Mabu Dlamini**. Firstly there was no objection from the defence to have such a report admitted. One would have expected an astute defence lawyer to resist such a report on the basis that it did not refer to the plaintiff who stated his name as **Mabutfo Lucky Dlamini**. Now, it is one thing to admit a document without resistance. What is worse is that the plaintiff's attorney did not lead **Dr. Ntiwane** to say that **Mabu** is the brief name for **Mabutfo**. Surprisingly, it is the defence Counsel who led **Dr. Ntiwane** to that effect. Although the defence Counsel expected **Dr. Ntiwane** to agree to the proposition put to him that **Mabu** is the abbreviation for **Mabutfo**, he did not do so. He simply

stated that it was the name he was given during medical examination. But why did the defence take this line of cross-examination? The answer is unknown except that defendant's Counsel simply took the position that she would strengthen plaintiff's case, period.

[38] Then there is a legal procedural irregularity to the manner the trial was conducted at the hands of the defence and this goes to the root of the defence. It is that in as much as desk officer **Bhembe** gave weighty testimony establishing reasonable suspicion warranting detention of the duo, his evidence was news to the court. Not an iota of his evidence was put to any of the plaintiff's witnesses. What confounds the defence again is that the plea was well crafted, reflecting the circumstances that informed the investigation team to take the decision to detain overnight the duo. However, during the trial, neither desk officer **Bhembe** evidence nor the allegations in the plea were put across to the plaintiff and his witnesses.

[39] The *ratio decidendi* which was well captured by **CJ Hannah**¹ over three decades ago and has been repeated over the years in our jurisdiction is apposite:

“It would be difficult to ever-emphasise the importance of putting the defence case to prosecutions witness and it is certainly not a reason for not doing so that the answer will almost certainly be a denial.....so important is the duty to put the defence case that, practitioners in doubt as to the course to

¹ The King v Dominic Mngomezulu Crim Case No: 94/1990 citing S v P 1974 (1) SA 581 at 582

follow, should err on the side of safety and either put the defence case, or seek guidance from court.”

[40] The learned Justice then referred to Phipson²:

“As a rule a party should put to each of his opponent’s witness in turn so much of his own case as concerns the particular witness or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing Counsel should indicate how much he accepts of such version, or suggests to the witness a different one. If he asks no question he will in England though perhaps not in Ireland, generally be taken to accept the witness’s account. Moreover where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination so that he may have an opportunity of explanation.”

[41] The learned Justice proceeded:

“It is, I think clear from the foregoing that failure by Counsel to cross-examine an important aspect of a prosecution witness’s testimony may place the defence at risk of adverse comments being made and adverse inference being drawn. If he does not challenge a particular item of evidence then an inference may be made that at that time of cross-examination his instructions were that the unchallenged item

² Evidence 10th Ed, at para 1542

was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question the court may infer that he had changed his story in the intervening period of time.”

[42] **CJ Banda**³ drawing adverse inferences on the defence story, stated on the above *ratio*:

”I would therefore reject the first accused’s story as false and an afterthought. It is a story which was never put to the prosecution witness to get their reaction to it. It is important for the defence to put its case to the prosecutions witness. The court is entitled to see and hear the reaction of a witness on every allegation make although there is no onus placed on the accused to convince the court of his explanation.

Quantum

[43] Both Counsels urged the court to decide only on liability and not on quantum. However, I am duty bound to mention that I found no corroboration on the evidence by plaintiff that he was so severely assaulted such that he defecated on himself. I say this because the evidence by **Nsingwane** was to the effect that she saw plaintiff passing by her cell walking slowly and crying. If indeed he had defecated on himself, she would have at least testified that plaintiff had a foul smell as he passed by.

³ Thandekile Malinga & Two Others Crim Case No: 130/07 unreported at page 32

[44] Further plaintiff told the court that after soiling himself, he was instructed to wash his clothing in the morning before he was released to go home. He said that he boarded a public transport home. How in wet trousers? This is a far-fetched story. He was a banker. He could have easily called for a taxi if indeed he had defecated himself. He would still be stinking and wet by the time he was boarding the public transport. As a banker, I do not expect that he would have boarded a public transport home. The inference is that whatever magnitude of assault inflicted upon him was not of such a nature that it would cause defecation. He did not. He was still in his day clothes and without any smell when he boarded the public transport. He was therefore normal. The evidence that he soiled himself stands to be rejected. He exaggerated his story.

[45] Plaintiff has alleged in his Particulars of Claim:

“As a result of Plaintiff’s assault and torture as aforesaid, the Plaintiff suffered damages for pain and suffering, humiliation and impairment of his dignity in the sum of E250 000.”

[46] I must hasten to point out that there was not a single evidence led on humiliation and impairment of dignity by the plaintiff and his witnesses. Correctly so because the alleged assault took place in the police station and not among members of the public. He could not be

humiliated and his dignity impaired when he was among police officers. In brief, quantum only stands to be considered in respect of pain and suffering and not humiliation and impairment of dignity.

Costs of suit

[47] Two factors came to my mind in the determination of costs of suit in the case at hand. The first concerns the plaintiff. **Nsingwane** took much of the court's time testifying about her ordeal in the hands of the police. Why in light of the fact that she was not a claimant in the proceedings? Why did Counsel for the plaintiff waste so much time leading irrelevant evidence? From what she testified about with regard to the plaintiff, a relatively short period of time would have been spent by her in the witness box. However, for the reason that 90% of her testimony concentrated on herself, the court was caused to spend time unnecessarily. The plaintiff is invited to appear in court by Counsel to answer why one day should not be discounted against costs which are in his favour.

[48] The second factor is directed to defence Counsel. I have to take time to demonstrate how defence Counsel dismally failed to cross-examine plaintiff's witnesses. This was despite a well drafted plea. This court has time and again pointed out that junior Counsel should desist from spending most of their time in chambers. They should attach themselves to senior lawyers and come to court to observe how litigation is conducted. There can be no learning by remote in this regard. Internship is all about getting on the job and pairing yourself

to experienced Counsel. One cannot hope to conduct litigation without first observing how it is conducted. This warning has obviously fallen on deaf ears. In this regard Counsel for the defence is ordered to appear in court to answer why costs of suit should not be drawn from her pocket in this regard.

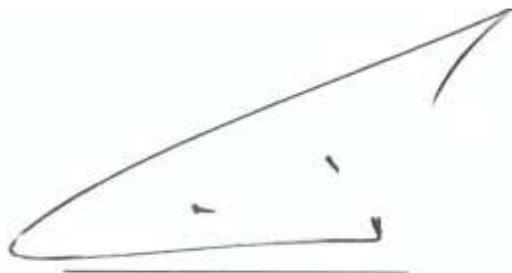
[49] In brief both Counsel for the plaintiff and defence are ordered to appear in court on the postponed date to respectively address the court on the issue raised on costs of suit.

[50] In the final analysis I enter as follows:

50.1 Plaintiffs cause of action succeeds;

50.2 Plaintiff is awarded costs of suit subject to order 50.3 herein.

50.3 Matter on costs of suit is postponed to 4th December, 2019 at 8:30 AM in terms of paragraph 39 herein.

A handwritten signature in black ink, appearing to be 'M. Dlamini J', written over a horizontal line. The signature is stylized and somewhat cursive.

M. DLAMINI J

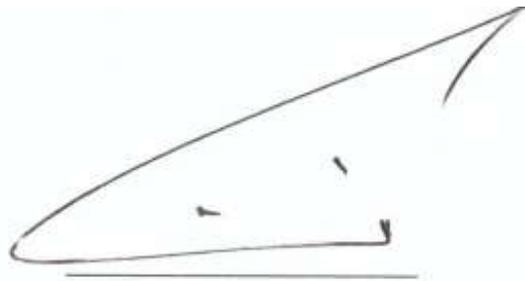
For Plaintiff : H. S. Nhleko of Dunseith Attorneys

For Defendant : B. Mkhonta of the Attorney General

4th December, 2019

Costs Order

Having heard both Counsel and both Counsel appreciating their errors, defendant is hereby ordered to pay costs of suit.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that tapers to a point on the right. The signature is written above a horizontal line.

M. DLAMINI J