

IN THE HIGH COURT OF SWAZILAND

HELD IN MBABANE In

CIVIL CASE NO. 25/13/00

the matter between:

RICHARD MAVFMBELA AND

PLAINTIFF

COMMISSIONER OF POLICE

SERGEANT ISIAH PHAKATHI

1st DEFENDANT 2nd

ATTORNEY GNERAL

DEFENDANT 3rd

DEFENDANT

CORAM

SHABANGU AJ MR.

FOR PLAINTIFF FOR

M. MDLULI MR. V. D

DEFENDANT

LAM INI

JUDGEMENT 12.^h

October, 2004

The Plaintiff, Richard Mavimbela commenced proceedings by way of action before this court in October 1999 against the Commissioner of Police as the 1st Defendant, one Sergeant Isaiah Phakathi as the 2nd Defendant and Attorney General who is cited in his capacity as legal representative of the Swaziland Government and is the 3rd defendant.

The Plaintiff claims the sum of E100.000 plus interest and costs as against the defendants jointly and severally liable the one paying the other to be absolved. The amount of E 100,000 mentioned in prayer (a) of the particulars of claim is in paragraph thirteen

thereof reflected as being made up as follows: Five thousand emalangeneni (E5000) of the one hundred thousand emalangeneni claimed in prayer (a) is described as being for hospital and medical expenses and the balance of ninety five thousand emalangeneni (E95 000) as being for pain and suffering. No evidence at all was led in support of the claim in respect of the five thousand emalangeneni (E5000) for hospital and medical expenses. At the end of the trial during submissions Mr. Mdluli for the plaintiff conceded that the amount of E95,000 claimed in respect of pain and suffering was unreasonably high having regard to the kind of injuries described by the doctor to have been found to be on the plaintiff when he presented himself to him on 10th April 1999. Mr. Mdluli was of the view that an amount of between thirty thousand emalangeneni and fourty thousand emalangeneni would make a reasonable award having regard to the nature of the injuries should it be found that liability attaches to the defendants.

The plaintiff's cause of action is the *actio injuriarum*. He alleges that on the 9 April, 1999 just after 04.00 hours at the Manzini Police Station, he was "assaulted" by Police officers including the second defendant. He further alleges that the second defendant and other police officers were acting within the scope and course of his employment as a servant of the Swaziland Government. He says the second defendant beat him with a sjambok on his left arm, several times on his back and hands without any lawful excuse. According to the evidence and the background to this allegations it appears that on the day of the alleged assault the plaintiff had been asked by his work colleagues to withdraw cash for them from a First National Bank auto teller (ATM) machine at Bhunu Mall in Manzini. For some reason the plaintiff's work colleagues would give him their (ATM) cards together with their secret codes to enable him to withdraw the cash for them from the Auto Teller Machine. On this day the plaintiff therefore had in his possession several (ATM) cards. In fact the plaintiff was carrying in excess of twenty such ATM cards. The plaintiff left his residence in Manzini Fairview at about 04.00 hours in a taxi and proceeded to Manzini Hub Spar to withdraw the cash from the accounts of his colleagues. He had an intention of proceeding to his work place from the A.T.M. He says he was in the company of Celani Dlamini. Whilst in the course of withdrawing the money a security guard stationed at the Hub Spar A.T.M. stopped him and advised him

he was not allowed to do what he was *doing*. The plaintiff with his friend Celani Dlamini then left the A.T.M. at the Hub Sear Mall in Manzini.

Whilst the plaintiff and his companion were walking towards the Bhunu Mall a vehicle *with* VIP Security Personnel arrested him and took him to the Manzini *Police Station*. He says that whilst at the Manzini Police station he was beaten with a sjambok by the second defendant just behind the reception counter. He says this happened in spite of his explanation as to how he came to be in possession of the cards. Following upon the assault he was held in custody until at about 09.00 hours at which stage he was conveyed by the Police Officers to his workplace. It appears that the intention of the police in conveying the plaintiff to his workplace was to verify the truthfulness of his explanation. His explanation was verified by a number of his work colleagues who confirmed to the *Police* that they had indeed given him possession of their Auto Teller machine (ATM) cards together *with* their secret codes for the purpose that he would withdraw cash on their behalf, from the said Auto Teller Machine. The *Police* thereafter released him from custody at about 10.00 a.m. He says on being released from custody he presented himself at Dr. Douglas' Clinic. He says he was attended by nurses there. The plaintiff proceeds to say that the employees of the company *which* employed him were treated or attended at the same *clinic* in the event they required to attend a clinic. He says he was not referred to Dr. Douglas and he went back to work and continued with his duties for the day. On knocking off for the day from work he decided to go to the Manzini Police Station, before *going to* his house, to report and lay a charge of assault against Sergeant Phakathi, the *second* defendant. He says he had been in pain at his work place for the whole of that day. At the Manzini Police *Station* he was handed the R.S.P. 88 form for completion by the medical practitioner who was *going to* examine him for the injuries he alleged were inflicted by the second defendant. He says he showed the bruises to his colleagues at the workplace and residence. The pain became more severe at *night* and during the next day on 10th April, 1999 he proceeded to the Mbabane Government Hospital where he appears to have been examined by a certain Dr. Armlak. In both the RSP 88 and his outpatient medical card it is recorded that he presented *with bruises, welts, and abrasions* on the body and back of hands.

The defendants dispute in the pleadings that the plaintiff was assaulted as he claims in his particulars of claim. However during the trial nothing was said during cross-examination to dispute the testimony of the plaintiff that he was assaulted. The defendants however called the second defendant to give evidence during the trial whereupon the second defendant denied ever assaulting the plaintiff. The second defendant was supported in this by one Constable James Ndlangamandla.

The first question which arises for decision therefore is one of fact, namely, whether the second defendant did assault the plaintiff by beating him at the back of his body and hands with a sjambok as claimed in the testimony of the plaintiff. In determining this question it is important to note that there is no dispute as to the presence of the injuries found on the body of the plaintiff when she was examined by Dr. Armlak the next day at 11.00 a.m. It is also not disputed that the plaintiff was with one Celani DIamini when he was picked up by the security guards from V.I.P. Security and that on his release from Police custody the plaintiff showed the bruises and welts at the back of his body and hands to the said Celani DIamini and others. The second defendant also stated during his evidence that the plaintiff appeared healthy and does not say that when the plaintiff was handed over at the Manzini Police Station by the V.I.P security he had the bruises. In the circumstances all the above factors are consistent with the plaintiffs version to the effect that he got the bruises and welts at the Manzini Police station after he was handed over by the VIP security personnel. The defendants have not suggested that the plaintiff had the injuries at the time he was handed over to them. It is also clear that he did report a case of assault at the Police station wherein he named the second defendant as the person responsible for the assault. In the circumstances I am satisfied on a balance of probabilities that the plaintiff incurred the injuries observed by the doctor at the hands of the second defendant. The third defendant which is the Swaziland government is vicariously liable for the acts of the second defendant in beating up the plaintiff.

It is trite that an assault is a delict affecting a person's bodily integrity in our law. The cause of action being the *actio injuriarum* the essential elements of such an action must

be established. MAJBASO V. FELLX 1981 (3) SA 865 (A), BENNET V. MINISTER OF POLICE & ANOTHER 1980 (3) SA 24 (C) @ 35. The essential elements of the assault are (a) wrongfulness, which occurs when there is a physical interference with another person bodily integrity, like when force is used on his body and (b) Animus injuriandi and (c) damages. Proof that force was applied for instance by beating the plaintiff with a sjambok satisfies the element of a wrongful act and whereas animus injuriandi is one of the essential elements it is for the defendant to allege and prove facts which disprove animus injuriandi. See BENNETS' case *supra*. The defendant also bears the onus of proving an excuse for or justification for the assault. The plaintiff must also establish damages which ordinarily are general damages which need not be particularised like special damages. In the circumstances of the present case the beating of the plaintiff by the second defendant using a sjambok on the body constituted the wrongful act. In the absence of evidence tending to disprove *animus injuriandi* it must be held that *animus injuriandi* is established. The damages which are of a general nature are said to be for pain and suffering which the plaintiff stated himself to have suffered and lasted for between a week and two weeks.

In the circumstances the plaintiff's action succeeds and he is awarded an amount of E30.000, thirty thousand emalangeneni as damages.

ALEX S  UUDGE