

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

CASE NO. 2443/04

In the matter between:

**ABEDNEGO NDWANDWE**

**PLAINTIFF**

and

**THE COMMISSIONER OF POLICE  
THE ATTORNEY GENERAL**

**1<sup>st</sup> DEFENDANT  
2<sup>nd</sup> DEFENDANT**

<u>CORAM</u>	:	Q.M. MABUZA-J,
FOR THE PLAINTIFF	:	MR. B. MDLULI FOR BEN J. SIMELANE 8s ASSOCIATES
FOR THE DEFENDANT	:	MR. S. KHUMALO FOR THE ATTORNEY GENERAL'S CHAMBERS

**JUDGMENT 27/11/09**

[1] The Plaintiff seeks payment from the Defendant as follows:

- (1) **E50,000.00 being in respect of damages arising out of assault by the police.**
- (2) **Interest at 9% p.a. a *tempora morae***
- (3) **Costs of suit.**
- (4) **Further and or alternative relief.**

[2] The cause of action is that on or about April 2001 at or near Lubulini area in the Shiselweni District, members of the Royal Swaziland Police based at Lubulini area acting within and during their course of employment as employees of the Swaziland Government, intentionally, unlawfully and without justification assaulted the Plaintiff. The assault took place while the police were effecting an arrest of Plaintiff for a traffic offence.

[3] The police are alleged to have physically manhandled and handcuffed the Plaintiff; they pointed firearms at him; they threatened to assault him even though the Plaintiff was not resisting or refusing to obey their instructions as a direct consequence of the assault, the Plaintiff allegedly suffered as follows:

Physically and emotionally	E20,000.00
Contumelia	E15,000.00
General damages	<u>E15,000.00</u>
<b>TOTAL</b>	<b><u>£50,000.00</u></b>

[4] Notwithstanding lawful demand in terms of the Limitation of Actions Against the Government Act 12/1972, the Defendants have failed, neglected or refused to pay the sum of E50,000.00. Hence the present action.

[5] The Defendants defended the action and filed their plea. In their plea the Defendants deny the allegations by the

Plaintiff. They deny the assault and plead that even though they mounted a roadblock on the stated date they did not deal with the Plaintiff. They further plead that the Plaintiff is not even reflected in the police register of people charged with traffic offences on the material day. They deny any knowledge of the Plaintiff. Consequently, they deny that the Plaintiff suffered the damages in the amounts stated. They admit receipt of the demand but disclaim liability to the Plaintiff in the amount claimed or any amount whatever and put the Plaintiff to the strict proof of all his allegations.

[6] Abednigo Ndwandwe (PW1), the Plaintiff testified that during April 2001 he travelled from Matata Stores to Lubuli his home. Along the way he came across a police roadblock. The roadblock was at a T-Junction towards Lubuli and Lavumisa. As he was going to Lubuli he turned left before reaching the roadblock. This made the police follow him and stop him presumably believing that he was avoiding going through the roadblock. An officer approached and pointed out that he had made a wrong turn. The witness denied this. The officer checked the indicators of PW1's vehicle. The officer requested that this witness purchase him a drink and the witness gave the officer E10.00. The latter refused the money. The witness proceeded on his journey. After he had travelled a distance of 5 - 7 Kms the police followed him at full speed. When the police vehicle was alongside the witness's vehicle a police officer who was in the front passenger seat produced a firearm through the window. The officer indicated that the witness should pull up at the side of the road and stop. He did so.

[7] Alighting from his vehicle the witness wished to know what he had done. There was no reply. Out of shock and fright, the

witness went to urinate beside a small tree. As he was urinating the officer who had the firearm pulled him from the back and the witness fell and splashed himself with urine. The officer instructed the witness to drive right back to where the roadblock was mounted. He did so. At the roadblock his vehicle was searched and the police requested the documents for the vehicle. He informed them that he had left them at work.

At that time he was employed in South Africa. He informed the Court that he was illiterate.

[8] The officer to whom the witness had offered E10.00 wrote out a ticket in which it was alleged that the witness had failed to stop at a stop sign. Mr. Khumalo for the state successfully objected to the filing of the ticket arguing that it was never disclosed in the discovery affidavit. The police ordered the witness to leave the motor vehicle with them. He would collect it once he was able to produce its documents. He then hired a motor vehicle to take him home. He left his motor vehicle with the police and returned home; thereafter returned to South Africa. After two weeks he returned to the police station with the vehicle documents. The police released the vehicle to him. He stated that he did not defy any police order to stop, he did not resist the police, he did not run away from them nor did he fight them.

[9] He was asked by Mr. Khumalo if he had laid a charge against the police for pointing a firearm at him. His response was that it would have been pointless because it would have meant reporting to the very police who had manned the roadblock. He decided instead to report the matter to his lawyers, even though he knew that pointing a firearm at a person was a crime. He stated that he knew that he could

have reported at any other police station. He conceded that he did not have the time or vehicle to do this; as he was most anxious to return to work. It was put to him that the issue of bribery by the police officer was being disclosed for the first time in court; that the particulars of claim did not reveal it. His response was that it had happened, he had informed his attorneys who had drafted the summons without consulting him. He had not formally recorded anything with his lawyer.

[10] He disclosed that he was never handcuffed as the particulars of claim suggest. It was put to him that in his particulars of claim it is stated that the police pointed firearms at him and yet in his evidence in chief he had testified only one officer had pointed a firearm at him. His response was that his lawyer had misunderstood him. He was asked to explain how he arrived at the amount of E50,000.00 as he did not lead any evidence in regard thereto. His response was that firstly; he left his motor vehicle with the police and had to hire a car. Secondly; he was pointed at with a gun, thirdly; he was pulled until he fell down and had urinated on himself. He used to go to work without transport and this caused him tremendous emotional stress. He had to hire a vehicle when he had a vehicle. He further disclosed that he had to use buses when going to work as he could no longer afford to hire a motor vehicle. It was put to him that he does not appear in the police register that he was charged. He denied this.

[11] Nonhlanhla Ndwandwe (PW2) next gave evidence. She testified that she was Plaintiffs sister and that she had gone shopping with him to Matata Stores during April 2001. On their way back home they found a police roadblock. They

turned left towards Lubuli before they reached the roadblock. The roadblock was about 20 metres ahead from where PW1 turned left. A police officer stopped PW1 who was driving. The officer asked PW1 why he did not go through the roadblock, PW1 replied that he thought that the roadblock was meant for those going to Lavumisa. The police asked for a drink and PW1 offered him E10.00 which the officer refused, saying that it was too little.

[12] Thereafter PW1 and herself proceeded on their journey home. After travelling about 6-7 Kms she noticed a police vehicle following them; in it were two officers. The one in the passenger seat produced a firearm through the window. The police stopped PW1's vehicle and ordered him to return to the roadblock. PW1 stopped the vehicle and alighted and went to urinate; while he was urinating the police officer with the gun pulled him back. PW1 tripped and fell and splashed urine on himself. After returning to the roadblock the police wrote out a traffic ticket to PW1 for failing to stop. The police asked for the documents for PW1's vehicle. He did not have them. They impounded the car. PW1 hired another vehicle to take them home.

The cross-examination of PW2 elicited that PW1 did not disclose in his evidence in chief that she was with him on the day of his alleged arrest. That PW1 did not reveal that there were two police officers in the police vehicle that followed PW1 and herself. That it was the Station Commander who drove the police vehicle that followed PW1 and herself. PW1 did not disclose this fact. That E10.00 was refused because it was too little; PW1 did not reveal this in his evidence in chief. She was asked by the court what her level of education and that of PW1 was. She replied that she had been in school up to Form II and PW1 up to Std. 5.

Thereafter the Plaintiff closed his case. Counsel for the Defendants applied for absolution from the instance of the Plaintiffs case.

suspicious and conclude that the civilian is fleeing or avoiding the roadblock because they (civilian) have something to hide. It is reasonable for them to apprehend the civilian using firearms; in case the fleir is armed. The Plaintiff has failed to disprove that such apprehension by the police was unreasonable.

In his particulars of claim he itemised his damages but did not prove them. When he gave evidence he did not allude to the amounts he was claiming nor did he mention what he meant by physical, emotional **contumelia** and general damages. He did not explain how he arrived at the different amounts claimed for each item.

When he was asked in cross-examination how he had arrived at the sum of E50,000.00 he replied as follows:

"Firstly, I left my car there, second I was pointed at with a gun, third I was pulled until I fell down and urinated on myself. I used to go to work without transport. That caused me tremendous emotional stress because I had to hire a motor vehicle yet I had a motor vehicle".

[24] It is not at all clear to the Court as to what precisely is his cause of action. The police in carrying out their duties do cause the odd annoyance, inconvenience, or even hurt a person's pride, such as this case but this cannot be said to found a cause of action.

[25] The Plaintiff called his sister to testify on his behalf. She was not impressive as a witness, in fact she did not assist him at all. I agree with Mr. Khumalo that she seems to have been schooled but not enough for the cracks not to show.

[26] Both PW1 and PW2 adduced evidence which is materially different from the particulars of claim. The Plaintiff even suggested that the particulars of claim filed by his attorneys is wrong.

[27] There is therefore no evidence before me upon which I could find for the Plaintiff nor is there a ***prima facie*** case against the Defendant. The Plaintiffs case does not disclose a cause of action.

[28] In the event, the application for absolution from the instance is granted with costs.



