



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2167/2008

In the matter between:

BHEKI SCOTLAND MATSE

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation: *Bheki Scotland Matse v The Commissioner of Police and Another*
(2167 /2008) [2017] SZHC 177 (25th August 2017)

Coram: **M. Dlamini J.**

Heard: **7th August 2017**

Delivered: **25th August 2017**

- **In such cases where each opposite side is adamant on its case, my duty is to sift the evidence and put on the scales of justice material and relevant evidence (*facta probanda*) and weigh it. I cannot put**

on the scales of justice irrelevant and immaterial evidence (*facta probacta*).¹ If the scales tilt against the other, I must uphold the parties' evidence which weighs heavier. This process does not depend on the number of witnesses but on *facta probanda*.

- It must be assumed that he instructed his Counsel that the assault transpired in full view of his wife, children and members of the public. It is also reasonable to assume that Mr. Matse is now denying such because of the heat of cross examination. In the result, no court of law would believe or rely on a witness who blows hot and cold owing to the circumstances of a matter.

Summary: In his particulars of claim, the plaintiff alleged that the first defendant assaulted him by pointing a firearm and pushing him to the ground. The first defendant also insulted him without any provocation on his part. The first Defendant vehemently denied the allegations and put plaintiff to strict proof. The first defendant pleaded that he gave orders to plaintiff but plaintiff refused to obey them.

The parties

Particulars of claim

[1] The plaintiff is Bheki Scotland Matse (Mr. Matse) an adult male of Mhobodleni, Manzini region.

[2] The first defendant is the Commissioner of Police (the Commissioner). The second respondent is the Attorney General who is the legal representative of first defendant.

¹ see case of James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] 65 SC

The parties' cases

[3] Mr. Matse has stated that on or about 11th April 2007 at or near Mhobodleni area, around 19:00 hours, the Commissioner's subordinates unlawfully and intentionally assaulted and insulted him while in the scope of their employment. They pointed a firearm and throttled him. They also pushed him and he fell on the ground.

[4] Mr. Matse further contended that the Commissioner's subordinates did so in full view of the members of the public, including his wife and children. He sustained temporal injuries on the neck and his esteem was lowered. As a result he claimed the sum of E100,000-00 inclusive of pain and suffering to the tune of E50,000-00 and *contumelia* of similar amount. He has made a demand to the first defendant to no avail.

Plea

[5] The Commissioner completely refuted the allegation of assault and injury. He contended that on the particular day, his subordinates were accompanied by a suspect and were looking for his accomplice. They arrived at the accomplice's home and cordoned the area. However, Mr. Matse disobeyed the order not to venture into the cordoned area.

Oral evidence

[6] In support of his claim, Mr. Matse gave evidence under oath. He stated that he was born on 11th January 1972 and has two children. He was not married. On 11th April 2007 while at Mhobodleni area around 7:00 p.m. four police officers arrived. They found him with the mother of his children relaxing at the doorstep of his rented house. They pushed them into his house. They

caused them to lie down. They pointed them with a gun. They said that they were looking for a suspect by the name of Raymond Anderson. He showed them the house where Raymond was residing. Two officers had entered his house and each police officer was pointing them with a firearm. Another tenant was present during this incident.

[7] The police introduced themselves after pointing them with the firearms. They said they were police officers from Sigodweni Police Station. Thereafter one police officer came out while one remained still pointing him with a firearm. He returned later and advised the police officer who had remained with him that Raymond was not in his home.

[8] They left only to return the following day at around 04:00 a.m. He was preparing to go to work as he was outside throwing away his bathing water. When he saw them, he went into the house. Two police officers stood near his house while the two proceeded to Raymond's. He then asked the two police officers who remained near his house on why they ill-treated them the previous day. One of them pointed a firearm at him, strangled him and hit him on the legs. He fell down.

[9] When the two police officers came out of Raymond's house, he was leaving for work. His girlfriend was standing by the door observing what was happening. At that juncture, a Mathonsi police officer, insulted him saying "voestek". They then left. He went to the Station Commander who advised him to lay a charge. He was later called by Sgt. Maseko saying he wanted to apologise. He refuted that the police came in the company of Raymond's accomplice and that he disobeyed a lawful order.

- [10] Mr. Matse was cross-examined at length. I will refer to his cross-examination later in order not to burden this judgment.
- [11] The second witness on behalf of plaintiff was Khabonina Nomsa Dlamini (Ms Dlamini). She took oath and stated that she knows Mr. Matse who was the father of her children. On 11th April, 2007 they were residing together. Around 7:00 p.m. Mr. Matse arrived and found her seated on the stoop of their rented room. Four men also arrived and found them seated. They pointed them with firearms. They pushed them into their room. They asked for the whereabouts of Raymond and Mr. Matse replied saying he was residing at room No.3. The man who was pointing a firearm at her left her but the other continued to point Mr. Matse with the firearm. The three police officers returned later. They all left.
- [12] The police officers returned the following day while Mr. Matse was preparing to leave for work. The time was about 4:30 a.m. – 5:00a.m. Mr. Matse opened the door to go outside to spill water. He told her that the people who were there yesterday were now outside. He told her that he intended to ask them as he was ill-treated the previous day.
- [13] Mr. Matse then approached the police officers saying, “*You ill-treated me yesterday without an apology*”. They responded saying, “*What are you going to do about it?*” One of them held him by the collar of his uniform shirt and jersey. He kicked him and he fell. He produced a firearm and insulted him. He asked as to why he was insulting him. The officer replied by asking as to what he was going to do about it. He rose up, shook himself and left for work.

[14] During the day Mr. Matse called and instructed her to go to Sigodvweni. She did. She spoke to the Station Commander, Mr. Maphosa and narrated the events. Mr. Maphosa responded that it was wrong to do so. Ms Dlamini was also cross-examined on similar lines as Mr. Matse. Mr. Matse closed his case.

[15] The defendant opened his case by calling 3135 Detective Assistant Inspector Mcebo Langa (Assistant Inspector Langa). On oath he testified that he had been a police officer for twenty five years. He was based in Matsapha police station on 11th April 2007. He, together with his colleagues were investigating a housebreaking offence which had taken place at Costal Hire Services, Industrial Site, Matsapha.

[16] During the day they arrested Thembinkosi Mkhonta of Mhobodleni area. On his interview, Thembinkosi Mkhonta implicated Raymond Anderson. In the evening they, together with Thembinkosi Mkhonta, proceeded to Mhobodleni to look for Raymond. They devised a strategy to approach Raymond's house without drawing any attention that they were police officers. This was because they were highly suspicious that Raymond might not be home. Thembinkosi Mkhonta stood at a distance and pointed at the house of Raymond. They thereafter took him back to the police van which was parked at a far distance. Some of the police officers remained with the suspect while a few of them went to Raymond's house. They were three, including Assistant Sgt. Langa. Upon reaching the flat, they found two men seated outside on the stoop. They greeted them and pretended to be friends of Raymond. They enquired on whether Raymond was around. One of the men responded by saying he was not aware if he was around. He also pointed at Raymond's room. Assistant Sgt. Langa went to the door and

knocked. There was no response. They quickly left and thanked the men who were seated at the stoop.

[17] The next morning at about 5:00 a.m. they returned looking for Raymond. They cordoned the area. Assistant Sgt. Langa then went to Raymond's room. On his way, he noticed a man by the door of the stoop where they found two men seated the previous day. The man was tying his shoe laces. He did not pay much attention to him and went straight to Raymond's door. He knocked while Detective Mathonsi was behind him. A female voice responded. He introduced himself. She opened the door. They asked for the whereabouts of Raymond. She said that he had not returned the previous night. She suggested that they look for him in the main house. They searched the room but could not find Raymond. They went to the main house. They found school children preparing to go to school. They asked for the elders and the children called Gogo Anderson. They enquired from her about her son and she said that she did not know where he was. They searched the main house in vain.

[18] Assistant Sgt. Langa was cross examined at length. His evidence in chief was repeated to him and he confirmed it. He was asked if he saw anyone reprimand Mr. Matse on the second day of their visit. He said that he only greeted Mr. Matse and proceeded straight to Raymond's door. He agreed that in his evidence in chief he did not testify that Mr. Matse disturbed them in their line of duty. He denied any assault on Mr. Matse on both days. He refuted the allegation that his evidence in chief was at variance with his plea.

[19] The second witness on behalf of defendants was 3894 Sergeant Menzi Masuku who was based in Matsapha Police station. His evidence was along similar lines as Assistant Sgt. Langa in that having received a house breaking

offence report, they embarked on their investigation and eventually arrested Thembinkosi Ndzinisa (Thembinkosi). Thembinkosi implicated Raymond who was residing at Mhobodleni area, Manzini. Thembinkosi then led them to Raymond's house. Thembinkosi stood at a distance and pointed at Raymond's house. He also showed them Raymond's grandmother's house. Desk Officer Methula took Thembinkosi back to the police motor vehicle. They proceeded to Raymond's two room flat. They went past two people who were seated by the door step of one of the rooms and were drinking liquor. Thembinkosi had also seen the two and advised them that Raymond was not among those who were seated by the door step. They however, enquired from the duo as to whether Raymond was among them. They responded in the negative and showed them the same house as Thembinkosi. They went straight to Raymond's house and knocked. No one responded. They left without introducing themselves as police in order not to raise suspicion on Raymond's neighbours.

[20] The following day, they again went to Raymond's house. They parked their motor vehicle at a distance. Assistant Sgt. Langa, Officer Mathonsi, Detective Fakudze and himself proceeded to Raymond's door while the others remained at a distance. Officer Fakudze cordoned the area while officer Langa and officer Mathonsi and himself went to knock at Raymond's door.

[21] They met a man in Guard Alert Security uniform by the doorstep of a room tying his shoe laces. This man then left taking the direction from which they came from. By then that place had been cordoned. It is then that they introduced themselves as police officers and told him that as the place had been cordoned, no one should leave the place. At that time Sgt. Langa and officer Mathonsi were talking to a lady by Raymond's house. The Guard

Alert Security officer refused to cooperate. He was, however ignored and they concentrated on what was going on at Raymond's house.

[22] The two police officers at Raymond's house entered and returned very shortly. Sgt. Langa signaled to Desk Officer Methula to proceed to come over. They all proceeded to the main house. Upon knocking, an elderly woman responded. They introduced themselves and asked for Raymond. She stated that Raymond was not around and his whereabouts were unknown. They then left for the police station.

[23] Sgt. Masuku's cross examination was directed in displaying inconsistencies between Sgt. Langa's and his evidence. It centred mainly around on who remained in the police van with the police and who proceeded to Raymond's house. The disparity alleged was that Sgt. Langa had stated that Desk officer Methula and not Mathonsi remained with Thembinkosi. It was also contended that Langa never asked whether any of the duo was Raymond as by the time they approached the houses, they knew that Raymond was not amongst the two following that Thembinkosi had already told them so. Sgt. Masuku stood his ground.

[24] He was asked if the man in Guard Alert Security uniform said anything the following day. The response was that he did not. It was put to Sgt Masuku that he did and that he asked why he was assaulted the previous day. He denied this. He disputed any form of assault by the police on Mr. Langa.

[25] He was also quizzed on who actually responded at the main house. It was revealed to him that Sgt. Langa had said that the children responded and woke up Mrs. Anderson (elderly woman). This officer stated that he did

not pay much attention to such details except that Mrs. Anderson attended to their query.

[26] The third witness was 4448 Detective Constable Jabulani Mathonsi. On oath he testified that while he was investigating a house breaking case, Thembinkosi was arrested. He led them to Raymond who was said to be in possession of the exhibits. On 11th April 2007 Thembinkosi led them kaKhoza, Mhobodleni area. He showed them a room where Raymond lived. As they were approaching it, they passed two men seated by the stoop of one of the rooms. He, however remained behind with Thembinkosi while Sgt. Langa and Masuku went to the house. He saw his colleagues knock at Raymond's house. They returned to report that there was no response.

[27] On the following day at about 05:00 a.m. they went back to Raymond's house. As they knew which house to approach, he went with Sgt. Langa, Masuku and Fakudze. Sgt. Langa went to Raymond's door to knock while the others remained outside. Adjacent to Raymond's house was another room where an officer from Guard Alert Security Services was by the door tying his shoe laces. They did not say anything to him but proceeded to Raymond's door to knock. Raymond's girlfriend responded. They introduced themselves and told her that they were looking for Raymond. She said that Raymond was not around. Sgt. Langa and himself entered the house and conducted a search. Raymond was not around.

[28] Masuku and Fakudze remained outside. When they came out of Raymond's house the two officers followed them to the main house. They did not find Raymond in the main house. They returned to the police station.

[29] On cross examination, Detective Constable Mathonsi denied insulting and assaulting the plaintiff. He denied knowledge of the plaintiff as on the first day he stood at a distance of about 50 metres from Raymond's house and it was dark. He insisted that it was two men that were seated by the stoop. He disputed pushing plaintiff and his girlfriend down and pointing a firearm. He also denied the allegation that plaintiff's girlfriend reported a complaint of assault at Matsapha police station. He said that they went to enquire from Mrs. Anderson about Raymond's whereabouts on 11th April, 2007.

Determination

[30] The plaintiff and his witness were adamant in their evidence that the police pushed, pointed them with a firearm and assaulted them. The Police officers on the other hand vehemently denied ever assaulting the plaintiff and his witness. In such cases where each opposite side is adamant on its case, my duty is to sift the evidence and put on the scales of justice material and relevant evidence (*facta probanda*) and weigh it. I cannot put on the scales of justice irrelevant and immaterial evidence (*facta probacta*).² If the scales tilt against the other, I must uphold the parties' evidence which weighs heavier. This process does not depend on the number of witnesses but on *facta probanda*.

Issue

Was the plaintiff assaulted on the 11th and 12th April 2007?

² see case of James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] 65 SC

Common cause

[31] It is not disputed that the police officers proceeded to Mhobodleni area, Manzini region to search for Raymond Anderson. It is common cause that in the rented flat of Raymond there was another tenant in the name of Mr. Matse. Mr. Matse was present in both days when the police officers visited Raymond's homestead.

Determination

[32] Mr. Matse describing the assault stated:

“On the 11th April 2007 at Mhlobodleni, kaKhoza at 7:00 p.m. police officers from Sigodvweni, Matsapha. They were four. They found me with the mother of my children seated at the doorstep of the rented house. They pushed us into the house. They caused us to lie down. They pointed us with a gun. They said they were looking for a suspect Raymond Anderson. They were two police officers in the house. Each police officer was pointing each one of us with a firearm. Two remained outside.”

[33] Under cross examination, it was revealed as follows:

“Mr. B. Tsabedze: “You say police officers were four in number, two pushed you inside, what do you mean?”

Mr. Matse: “They said enter inside the house.”

Mr. B. Tsabedze: “You and your wife were lying down?”

Mr. Matse: “No it is only me that was lying down.”

[34] It must be noted that this piece of evidence came after Counsel for the Commissioner cross examined Mr. Matse on the size of the room which Mr. Matse alleged that he together with his girlfriend were forcefully made

to lie down. The cross examination by learned Counsel was intended to show that the size of the room and the items or furniture in it could not make it possible for two people to lie down. Appreciating this fact, Mr. Matse decided to change his story and state that it was only him who was caused to lie down. In fact when he was pressed further on his evidence in chief on why he did not say it was only him who lied down, he said that he made a mistake. In the face of a denial that Mr. Matse and his wife were pushed to the floor as evidence of the assault, his evidence on the assault by the police stands to be rejected.

[35] Mr. Matse also testified in chief:

“There is another tenant in the same place I was when the police came. They introduced themselves after pointing us with the gun that they were police officers from Sigodvweni.”

[36] He was cross examined on this evidence:

“Mr. B. Tsabedze: “You said there was a tenant there. Is it a female or male?”

Mr. Matse: “She was female.”

“Mr. B. Tsabedze: “Was she present when police assaulted you?”

Mr. Matse: “Which instance? First or second instance?”

Mr. B. Tsabedze: “Which ever instance?”

Mr. Matse: “She was not present on the first instance.

Mr. B. Tsabedze: “Who was present on the first instance?”

Mr. Matse: “Gogo Anderson.”

Mr. B. Tsabedze: “How far was she?”

Mr. Matse: “50 metres.”

Mr. B. Tsabedze: “Was it during the day that you would see a person 50 metres away from where she was?”

Mr. Matse: “It was in the morning.”

[37] The above responses completely distort Mr. Matse’s evidence in chief. Mr. Matse had indicated that police first arrived on 11th April 2007 at 7:00 p.m. He had further stated that when the police first arrived, they pushed him and his live-in-lover into their rented room, another tenant was present who witnessed the assault. Under cross examination however, the story changed to be in the morning and the other tenant witnessed the incident in the morning. It must be noted that this evidence came after learned Counsel for the defendants cross examined Mr. Matse with a view to showing that it would be impossible to witness an incident 50 metres away inside a room when it was dark.

[38] He was also asked as to who was present when the police came for the first time. He responded saying no one except for the mother of his children. This disparity in Mr. Matse’s evidence goes to the root of his evidence for the reason that if indeed another tenant mentioned in his evidence in chief was present, it was necessary that she be called to corroborate his evidence mainly on the assault allegations. This would be an independent witness with no interest in the matter, unlike PW2 who was his lover and mother of his two children.

[39] With regard to the second instance assault, Mr. Matse testified:

“The following day in the morning at around 4:30 a.m., they (police officers) came back. I was preparing to go to work ... The two went into the suspect’s house while two stood next to my house. I asked the two who were next to my house as to why they manhandled us the previous day and also failed to apologise. The other pointed a firearm to me, strangled and hit me on the legs

and I fell. The two who were at Raymond's house came out and I was leaving for work by then. My girlfriend was standing by the door observing. The Mathonsi police insulted me saying 'voetsek'. They left."

[40] On the above, he was cross examined:

"Mr. B. Tsabedze: "When the police arrived the following day, did they talk to you?"

Mr. Matse: "No."

Mr. B. Tsabedze: "They just went pass the house to Anderson's house."

Mr. Matse: "Yes."

Mr. B. Tsabedze: "When they returned, did they stop to talk to you?"

Mr. Matse: "No they only insulted me."

Mr. B. Tsabedze: "That is the only thing that happened to you?"

Mr. Matse: "Yes."

[41] At this juncture Mr. Matse kept quiet and after a while he stated:

"I was strangled."

[42] Counsel for defendant proceeded:

"Mr. B. Tsabedze: "I said did they stop to talk to you when they came back?"

Mr. Matse: "They only insulted me and left. They did not stop to talk to me."

[43] An analysis of the above shows that Mr. Matse could not stand his ground on the second day assault. In his evidence in chief, he had stated that the police pointed him with a firearm, strangled and hit him to the ground. They later insulted him. On cross examination he said that the police only went pass him and returned only to insult him. Obviously his evidence in

chief on assault crumbled under cross examination. This means that there is nothing to put on the scales of justice for both instances of the 11th and 12th April 2007. This is because his claim is founded on the assault and not that police came to his rented flat.

[44] There is another aspect which renders Mr. Matse's evidence weak. He was cross examined:

“Mr. B. Tsabedze: “The police officers that had an encounter with you found you seated at the doorstep with another man and you were drinking?”

Mr. Matse: “No, I was with my girlfriend and not drinking.”

[45] However, his very first questions posed to him under cross examination were as follows:

“Mr. B. Tsabedze: “Do you indulge in alcohol?”

Mr. Matse: “No.”

Mr. B. Tsabedze: “Did you drink before?”

Mr. Matse: “Yes, but I ceased long ago.”

Mr. B. Tsabedze: “At the time when this incident happened, were you indulging in alcohol?”

Mr. Matse: “Yes, but I was from work.”

[46] To later deny that when the police arrived he was drinking in the face of his responses earlier falls to show that Mr. Matse's credibility must be approached with greater caution as it is suspicious. It is not therefore amazing that his evidence in chief, more particularly on assault could not stand under cross examination.

[47] Mr. Matse further denied material portion of his particulars of claim under cross examination. He had pointed out that the assault upon his person and his wife was in full view of his children and members of the public. However, under cross examination, he flatly denied ever so stating as it turned out that he had an infant who was asleep on the first incident and his other ten year old child was not living with him during that period. He pointed out under cross examination that the mother of his children was not his wife. On the presence of the members of the public as per his particulars of claim he stated:

“I did not say that the assault happened in full view of the public.”

[48] The allegation of the presence of his children and members of the public mentioned in his particulars of claim aggravated the assault for purposes of the *quantum*. However, they were denied by the very source, that is, Mr. Matse. It must be assumed that he instructed his Counsel that the assault transpired in full view of his wife, children and members of the public. It is also reasonable to assume that Mr. Matse is now denying such because of the heat of cross examination. In the result, no court of law would believe or rely on a witness who blows hot and cold owing to the circumstances of a matter.

[49] The evidence of plaintiff’s girlfriend also fell under cross examination. She had testified similarly as plaintiff in chief. She, however, pointed out on the second day’s assault:

“They came back the following day when he was preparing to go to work ... He (plaintiff) asked saying as ‘you manhandled me yesterday without an apology’. They said ‘what are you going to do?’ One of them held him by the collar of his uniform shirt and jersey. He then kicked him and he fell and produced a firearm

and insulted him. Plaintiff asked why he was assaulting him. He responded saying 'what are you going to do?' He insulted him saying 'voetsek'.

[50] Her cross examination was as follows”

Mr. Tsabedze: “When they came back you did not see them (police)?”

PW2: “Yes.”

Mr. Tsabedze: “When was he assaulted?”

PW2: “He was only pointed with a firearm.

Mr. Tsabedze: “On the 11th he was not assaulted?”

PW2: “Yes.”

[51] The evidence of PW2 also could not be accepted as it could not stand under cross examination. At any rate, she could not resuscitate plaintiff’s evidence which fell from plaintiff’s cross examination. She was not the plaintiff. There was only one plaintiff and it was Mr. Matse. The Commissioners’ witnesses stood at the same footing as PW2. They could not resurrect Mr. Matse’s evidence which had fallen from his (Mr. Matse’s) mouth, no matter how inconsistent their (defence) version might be, if at all.

[52] In the final analysis, I enter the following orders:

1. Plaintiff’s cause of action is dismissed;

2. Costs to follow the event.

M. DLAMINI
JUDGE

For Applicant: Mdluli of M. H. Mdluli Attorneys

For Respondents: B. Tsabedze from the Attorney General's Chambers