

**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

In the matter Between:

Case No. 335/2013  
and 904/2013

**LUNGILE MNGOMETULU**

1<sup>st</sup> Plaintiff

**KHULEKANI NKWANYANA**

2<sup>nd</sup> Plaintiff

And

**THE ATTORNEY GENERAL**

Defendant

Neutral citation : ***Lungile Mngomezulu and Another & the Attorney General  
(335/13 & 904/2013) [2019] SZHC 141 (30<sup>th</sup> July, 2019)***

Coram : **M. Dlamini J**

Heard : **2<sup>nd</sup> July, 2019**

Delivered : **30<sup>th</sup> July, 2019**

***Civil procedure : Trial – Which evidence is probable,  
relevant and credible? – importance of***

*putting version of defence to plaintiffs witness – if not put, court to consider same as an afterthought especially where plea is silent on the defence.*

**Summary:** The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs demand the sums of E202, 308.69 and E850, 000.00 respectively from the defendant as damages arising from allegations of assault. The defendant denies the allegation and liability.

### **The Parties**

[1] The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are adult female and male respectively. 1<sup>st</sup> plaintiff resides in Matsapha while 2<sup>nd</sup> plaintiff in Manzini, both areas are situate in Manzini region. The defendant is the legal advisor of the Government of eSwatini.

### **Particulars of Claim**

[2] Both plaintiffs allege that on 16<sup>th</sup> March, 2012, at St. George's Barrack in Matsapha they both suffered vicious assaults at the hands of members of the Umbutfo Swaziland National Defence Force. 1<sup>st</sup> plaintiff was assaulted on her face and head. She suffered migraine headache as a result of the assault. 2<sup>nd</sup> plaintiff pointed out that as a result of the assault, he suffered both temporal and permanent injuries. Temporal injuries consisted of sprained left knee, swollen upper body and dislocated jaws. His life injuries were scars on the wrist, scars all over the upper body and persistent headache.

### **Plea**

[3] The defendant merely raised a bare denial on both plaintiff's particulars of claim. It denied assaulting both plaintiffs.

### Preliminary Observation

[4] It is not clear why defendant decided to plead in this fashion in light of the ample authorities in this jurisdiction to the effect that a bare denial is as good as no plea at all. Where a litigant simple denies allegations without advancing its side of the story, the other party is entitled in our law to consider that there are no issues raised and that therefore his version is not denied. That as it may plaintiff did not pursue this irregularity in court. “*Let sleeping dogs lie,*” so goes the adage. By taking the next step, plaintiff opened the opportunity for the defendant to advance its defence under oral evidence. This court has the defendant’s full version as adduced during trial. It cannot at this stage reject or ignore such defence. In the result, it is bound to consider both parties versions and make a determination.

[5] Further, it is irregular to cite the Attorney General alone in this pleadings. It is not clear why plaintiff decided to sue the legal advisor of the Government of the Kingdom instead of citing the Government or the Umbutfo eSwatini Defence Force as the first defendant.

[6] The plaintiff’s counsel was lax in drawing the papers and paying attention to the pleadings. This must go towards costs of suit.

### Oral evidence

[7] PW1, **Constable Thulani Mndzebele** testified that he was a police officer stationed at Matsapha, Sigodvweni police station under the Traffic Department in 2013. He was on duty on 16<sup>th</sup> March, 2012, working together with **Constable Mavuso**. They were using GSD 912 PO attending an accident at Ludzeludze around 2330 hours. 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were detailed to patrol the Manzini-Mbabane highway. He was around 2330

hours raised over the radio by 1<sup>st</sup> plaintiff who called for reinforcement. Ten minutes later 1<sup>st</sup> plaintiff raised them again shouting, “*We are dying at St. Georges!*” They rushed to St. George’s. They found the boom gate opened and drove in.

[8] By the new building, they found over forty Ubutfo Defence Force (USDF) officers. Some were in uniform while others not. The ones in uniform were carrying rifles. Some of those without uniforms were carrying sticks. He saw the police vehicle but not the police officers. Behind the police vehicle was a white double cab parked blocking the way. He peeped through the crowd and noticed a traffic jerking lying on the ground. He also noticed 2<sup>nd</sup> plaintiff lying on the ground being beaten. He suddenly heard a female voice shouting, “*Run away, pull off your jerkins.*” This was 1<sup>st</sup> plaintiff’s voice. At that period, three soldiers were kicking and boxing her. It was too late for him to run. He decided to cock his firearm. At the sound of the firearm, they stopped. He got the chance of running away towards a nearby bush, a direction also taken by **Constable Mavuso**. In the bush, they removed their jerkins.

[9] They then went out of the bush taking the main road direction. They pounced upon a soldier who directed them to stop and not approach the crowd which was beating 2<sup>nd</sup> plaintiff. After a while, he called them to take their vehicle. They boarded it and left. 1<sup>st</sup> and 2<sup>nd</sup> plaintiff were later conveyed to hospital while they proceeded with their routine work.

[10] PW2 was **Constable Ntokozo Ginindza**. He testified that on 16<sup>th</sup> March, 2012, he was on duty with **Constable Nhlabatsi** in the general duty department doing their night shift. They were patrolling around Matsapha Industrial Site when they were raised over their radio by a female voice

calling for reinforcement at St. George's Barracks. At the background there were people shouting and making noise. They went to St. George's Barrack. They found soldiers, some in uniform while others not. He estimated them to be about more than thirty in number. They were assaulting the 2<sup>nd</sup> plaintiff with handcuffs and sticks. They could not intervene to assist 2<sup>nd</sup> plaintiff as the crowd was larger. They stood at a distance of about thirty metres and observed. They shouted, "*Release him, you knew how to handcuff him.*"

[11] 2<sup>nd</sup> plaintiff managed to run towards the police motor-vehicle. However, there was a double cab motor-vehicle which was positioned in a manner in which the police van could not have a way. The crowd pursued him, assaulting him. **Constable Mngometulu** appeared from nowhere and joined them in watching. They were also joined by **Constable Mavuso** and **Mndzebele**. They were all helpless. Eventually 2<sup>nd</sup> plaintiff managed to enter into the police motor-vehicle. He reversed and escaped. He bled profusely.

[12] 2<sup>nd</sup> plaintiff took the witness stand as PW3. He testified that as he was deployed in the traffic department, he took motor-vehicle GSD 959 PO as a driver. He was working with 1<sup>st</sup> plaintiff. They were patrolling the highway. At around 2315 hours, they decided to patrol around the street where there is Southern Star Company.

[13] At the first street, they noticed a fiat polo red, registered PSD 237 VM. It was about 30 to 40 metres away from where they were. He heard high raves coming from it. He wondered why the driver was suddenly stopping on the middle of the road. It flashed headlights about three times. He decided to approach it. He took about three to four steps towards it. The

driver of the fiat polo drove towards him. He signalled it to stop. It drove straight to him in zig-zag. He was forced to run away from it. He noticed two occupants of the red fiat. The driver was male. The passenger, a female. He together with his colleague jumped into the police motor-vehicle and pursued the fiat. It turned right next to kaSipho Block yard and took the third street. They opened their serene and flash lights signalling the driver to stop. As it was driving at an average speed, they easily caught up with it. The driver however, disregarded a stop sign at kaSipho junction. The driver drove towards the Fire Station and took Seventh Avenue road. He drove, joining the road towards Matsapha police station towards Matsapha Trading. Again, the driver of the fiat failed to obey stop sign. They tried to over-take the driver as they had caught up with him. However, the driver would block their motor-vehicle.

[14] Near Matsapha Repair Centre, the driver turned left to join the MR 31 road from Ndlunganye to Matsapha Police College. All efforts to stop him were water under the bridge. The driver was wearing civilian clothes and driving a personal motor-vehicle. The driver drove into St. George's Barrack. The gate was opened and without anyone manning it. They continued to pursue the motor-vehicle. The driver drove to a secluded place at the barrack. They followed him, parked their motor-vehicle and both of them went towards the polo fiat motor-vehicle. The driver of the polo tried to alight from his motor-vehicle. 1<sup>st</sup> plaintiff pushed the door with her hip while he was taking handcuffs. He got hold of the handcuffs and proceeded straight to the driver. He informed the driver that they were police officers from the traffic department. They were charging him with reckless driving and they wanted to conduct alcoholic reading from his breath. This was because they were suspecting that he was driving under the influence of liquor as there was a strong smell of it from him. He then handcuffed both his hands.

[15] The lady passenger ran out of the polo motor-vehicle into the thick of the night. The driver shouted calling for help. He resisted arrest. He pulled him towards the police motor-vehicle. At about five or so minutes, some soldiers in uniform emerged. Some were carrying log range rifles. One of them shouted, “**Mangisi**, *what is the matter?*” They came straight to him. He was convinced that they were coming to assist him effect arrest. To his surprise and dismay, they slap him forcefully with the back of the rifle. Others charged towards 1<sup>st</sup> plaintiff and likewise hit her.

[16] In few seconds, a group came to join them in the assault. 1<sup>st</sup> plaintiff cried out very loud. Some were using sticks, knobkerries, clinched fists and open hands. Others kicked him. He was able to identify one of the soldiers. He had attended a training session on peace keeping with him in Zambia. This army officer was in civilian clothing. He grabbed him using him as a shield against the all assorted blows inflicted upon him. This officer however, joined his colleagues in assaulting him. He did notice three other soldiers who were either wearing army trousers or army boots in addition to their civilian clothing. These were **Sithayi, Ace Vilakati** and one **Bhekumusa** who is now grey headed. He was severely assaulted. He fell on the ground as a result of assault on his body. He could still hear his colleague shouting for help, “*Inyandzaleyo ngilamuleleni.*”

[17] He lost his consciousness. He was awoken up by many people shouting. “*Since you were able to handcuff him, take off the handcuffs.*” He was shivering at that stage. He had blood on his face. He attempted to remove the handcuffs. He was still beaten. He managed to release one handcuff. As soon as he un-cuffed one hand, “*Hell broke loose,*” so testified 2<sup>nd</sup> plaintiff. The pursued driver assaulted him with the hand that was

handcuffed, using the handcuffs as a beating instrument. He targeted his face. He fell down. He woke up again and removed the handcuffs from the other hand. He then boarded the police sedan and locked the doors. His colleague entered through the passenger door as he unlocked it for her to enter. He noticed a white double cab blocking his way as he was reversing. He then remained in his motor-vehicle. He saw the double cab opening way. He drove away.

[18] He noticed the presence of other police officers as he was driving out. He noticed **Constable Nhlabatsi** who had a long range rifle (R4) in his hands. He also saw **Constable Ginindza, Mavuso** and **Mndzebele**. All the police officers, including him and his pilot were in uniform. He drove straight to the police station. He retrieved her medical form and went to hospital. He was attended to and referred to Mbabane Government Hospital to see a dentist as he had a dislocated jaw. He was later called by his officer in charge, **Mr. Hlophe** to report to work. He was told that the driver of the polo fiat was at the police station. He had been handed over by the army supervisors.

[19] 2<sup>nd</sup> plaintiff handed to court two medical reports which were marked as Exhibit A and B without any objection from defendant. In cross-examination, the witness was for a while subjected to confirming what he said in his evidence in chief. He was cross-examined on the identity of the driver and the stage at which he became aware of who the driver was. Following that it was pointed out that this was a soldier based at St. Georges Army base, he was said to have known the driver prior. He denied this. He was taken to task for failure to stop at the entry gate at St. Georges despite the boom gate closed and presence of the guard manning the gate.



[20] He replied that there was no one at the gate and that the boom gate was opened. Much time was spent on how the 2<sup>nd</sup> plaintiff entered the gate. He maintained his ground that the gate was opened and unattended. He was also cross-examined on his failure to comply with the law in that he was not permitted to arrest a soldier at his base. Again ample time was taken on this line of cross-examination. It was disputed that soldiers in uniform formed the crowd that assaulted him. This was because no soldier would be in uniform at that time of the night. He maintained his version. He was queried on the nature of his injuries. He was referred to his exhibits in this regard. It was pointed out to him that he never laid an assault charge against the soldiers. He testified that he was advised not to by his seniors.

[21] It was pointed out that even the charge against plaintiff was withdrawn by prosecutions. He denied this and pointed out that he gave evidence on plaintiff's criminal charge at Magistrate. The matter was still awaiting judgement. He explained the cause of delay as due to the transfer of the trial magistrate to another region. It was put to him that his failure to claim workman's compensation is because he was never assaulted in the line of duty. He maintained his ground saying that he was advised by the relevant office at his workplace that he was not entitled to the workman's compensation because he did not sustain permanent injuries.

[22] 1<sup>st</sup> plaintiff was PW4. Her evidence was on similar lines as 2<sup>nd</sup> plaintiff. She testified that having pursued the fiat polo motor-vehicle and its driver having driven into St. George's, she was first to alight from the police motor-vehicle. She ran straight to the polo fiat and its driver opened the door. As he did so, she was already next to him. The fiat driver assaulted her with his clenched fist on her face. He pulled the door to block him. 2<sup>nd</sup> plaintiff joined them. He introduced himself and her as police officers. He

asked to take a breath specimen from the fiat driver (**Mangisi**). He refused. He fought them. They both held him. 2<sup>nd</sup> plaintiff removed handcuffs from his pocket. He handcuffed him.

[23] They asked the **Mangisi** to come with them to the police motor-vehicle. He resisted. They held him to their police motor-vehicle. At that stage the **Mangisi** cried out for help, shouting, “*Inyandzaleyo.*” A group of about nine soldiers responded. One was carrying a rifle. They approached them. They pounced on her with fists and kicks. She fell. She heard one of them saying “***Mangisi**, are you the one?*” They also assaulted 2<sup>nd</sup> plaintiff. She crawled to the police sedan. She reached for the radio. She screamed, “*We are dying at St. George’s.*” By that time, they were still assaulting her. They ordered 2<sup>nd</sup> plaintiff to un-cuff **Mangisi**. She attempted to assist 2<sup>nd</sup> plaintiff un-cuff Mangisi. She failed as she fell down.

[24] She crawled towards the back of a white van. It is then that she noticed the presence of **Constable Mndzebele** and **Mavuso**. He told them to take off their jerkins and run for cover. They ran into the bush. She tried to follow them, she could not as three soldiers were still pursuing her and beating her. One of them was carrying a stick. She saw **Constable Nhlabatsi** and **Ginindza**. They were watching at a distance. She and 2<sup>nd</sup> plaintiff were taken to Raleigh Fitkin Memorial Hospital where they were treated and discharged. She ended her testimony by describing her injuries and treatment. I shall refer to it later in this judgement.

[25] Her cross-examination was not different from what had been advanced to 2<sup>nd</sup> plaintiff. She demonstrated to be poor in terms of distances as when asked how far apart her motor-vehicle was and that of **Mangisi** during the chase towards the main gate of St. George’s, she replied that it was 200 km.

When the court asked her to demonstrate the distance, she pointed at about 10 metres apart. She maintained that there was no one manning the boom gate and that it was opened when they entered in that evening. She stood her ground that the people who assaulted them were soldiers who some were in uniform while others in civilian clothing.

[26] The 1<sup>st</sup> plaintiff's evidence on her medical condition was challenged at great length. However when plaintiffs closed their case and applied that the court makes a determination on liability only, defendant consented.

### **Defendant**

[27] The first witness on behalf of defendant was **Mangisi Bongani Mahlalela**. He testified that he was employed by defendant as an army officer. On 16<sup>th</sup> March, 2012, he went to Mahhala driving a borrowed motor-vehicle from his colleague. He went to pick up his girlfriend. His colleague had notified him that the borrowed motor-vehicle malfunctioned. He left Mahhala driving back to St. George's Barrack. On the way, while driving and at Unitrans Matsapha, his motor-vehicle's engine suddenly cut off. He restarted it. In front of him was a police motor-vehicle parked by the side of the road. He continued to drive until he reached kaSipho. At that area, the motor-vehicle cut off again. As the road was sloppy, he merely kicked started it. He drove straight to St. George's Barrack.

[28] At the main gate, he was attended by the army security. He registered his entry. He drove to the parking bay and parked the motor-vehicle. As he was parking a police motor-vehicle appeared behind him with its flash lights and serene on. The police dashed to him, opened his door. The male officer asked how he was driving. He covered him with his coat and strike

him with his hand cuffs. His girlfriend bloated away. She shouted saying, “Here is **Mangisi**. He is dying.”

[29] He recognised the police officer as 2<sup>nd</sup> plaintiff. He asked him as to what was happening. 2<sup>nd</sup> plaintiff said they would talk once he had been handcuffed. He did handcuff him. 1<sup>st</sup> plaintiff set at his back and bit him. Following that he was in pain from 1<sup>st</sup> plaintiff biting and 2<sup>nd</sup> plaintiff’s very tight handcuffs, he raised an alarm, calling for help. Men responded. He was at that time lying down with his back. 2<sup>nd</sup> plaintiff had his knee pressed against his chest. One of the men who responded asked why they were fighting instead of discussing the matter.

[30] He woke up and 2<sup>nd</sup> plaintiff released the handcuffs. At that juncture, there was a police white van. Other men who responded to his alarm came from the police college entry. Some were in police uniform while others in plain clothes. They were carrying sticks. Then two more police vans arrived. He heard one police officer shouting, “It is so and so.” The police vans thereafter left.

[31] On the following morning, the army military police escorted and handed him over to the Manzini regional headquarters’ police. He was severely assaulted at the police station. He was told that he would vomit the beans. They accosted him to find her companion he was with the previous night. She was located. In the Kombi, she was told to tell the truth only as they would buy her the beans. She did not have to beg for them from him.

[32] He was taken to Manzini Magistrates’ court the following day at 1400 hours in a private motor-vehicle. This was despite that they had advised his attorney that his remand would be the following day at Matsapha. At

Manzini Magistrates' court a police officer came carrying documents and demanded that he (**Mangisi**) writes down his charges. Inside the court, his charges were read to him and the presiding officer enquired if he had anything to say. His charges were reckless driving. The Magistrate explained that he failed to observe a stop sign and drove in zig-zag. He pleaded guilty. He pointed out that his attorney had been misdirected to Sigodvweni, Matsapha. The court remanded him to Zakhele Remand Centre. In his subsequent remand, he was granted bail of E6000. He was thereafter remanded many times until they said they would summon him to court in 2015. He was thereafter taken away for Royal duties. His cross-examination was very brief. I shall refer to the pertinent questions later.

[33] The second witness was **Colani Mngometulu**, an army officer. In his brief testimony, he informed the court that on the day in issue, he was manning the main gate at St. George's. A sedan police vehicle entered without stopping at the main gate. It used the exit to enter. It was being driven in a high speed. This motor-vehicle was pursuing a motor-vehicle which was from the gate driven by PW1. When the police sedan entered, he raised his superiors through the radio. Police later arrived in vans. They spoke to him. There was no cross-examination as defence pointed out that there was no issue on pursuit of PW1, **Mangisi**.

[34] The third witness was **Bhekumusa Motsa**, another army official. He told the court that he knew 2<sup>nd</sup> plaintiff as they were together in South Africa in 2009 and that 2<sup>nd</sup> plaintiff frequented St. George's Barrack, his work station. In the night in issue, he was asleep. The time was about 11.00pm. He heard a female voice raising an alarm and shouting, "*Here is **Mangisi** being killed.*" He woke up and withdrew his curtains to see who was shouting. He saw the lady shouting and standing near the road. She then

returned to the canteen from where she came from. He woke up, put on his clothes and rushed to the direction where the alarm was raised. There was no one at the canteen. He heard some noise downward near Correctional Services. He approached the place where noise was coming from. He found a crowd. The crowd was shouting “*Un-cuff Mangisi.*” Others were enquiring as to why he was being assaulted. He should not be assaulted. Some said “*Ah; it is this one.*”

[35] He noted that it was a police officer known to him. He enquired what the matter was. 2<sup>nd</sup> plaintiff replied saying “*I have arrested Mangisi.*” He looked at **Mangisi**. He noticed handcuffs which were deep in his flesh and he was bleeding. He told 2<sup>nd</sup> plaintiff to loosen the handcuffs as they were causing **Mangisi** to cry. 2<sup>nd</sup> plaintiff replied that the keys were lost. He helped him search for keys. They used the light in their cell phones to find the keys. He released the handcuffs from **Mangisi**. He told him that he will ask the military police to bring **Mangisi** to him in the morning. He did this in order to avert any mayhem from the crowd.

[36] It was put to him that when he arrived at the scene 2<sup>nd</sup> plaintiff was already bleeding. He disputed this saying **Mangisi** was bleeding. It was disputed that a female police officer carried a R5. He stood his ground.

[37] The next witness was **Bonginkhosi Vilakati**. He identified himself as a Senior Sergeant in the army. At the thick of the night, he was awoken by a female voice raising an alarm saying, “*There were people killing Mangisi.*” He followed the alarm and heard a crowd making noise. It was from the canteen. He went there. He found police officers and a rowdy crowd. The police officers were rowdy, fighting with each other. People were saying, “*un-cuff Mangisi.*” The police officer un-cuffed him. When **Mangisi** was

un-cuffed, people entered through an opening by the fence. They were from the Police College. Some were wearing uniforms bearing police badges. They were carrying sticks asking what was happening in the crowd. These people were then heard saying, *“Oh it’s this one. It serves him right.”*

[38] He enquired from 2<sup>nd</sup> plaintiff as to what was happening. He said that he was effecting an arrest upon **Mangisi** after a chase on suspicion that he was drunk. However, the people did not want him to arrest **Mangisi**. He asked why he did not alert him as before. He would have arrested **Mangisi** on his behalf and handed him over to the police. 2<sup>nd</sup> plaintiff replied that it was an emergency. He was also not sure if **Mangisi** was a soldier. **Bonginkosi Vilakati** undertook to investigate and find the truth. There were high ranking officers from the police. They spoke to him saying they should work on the matter together instead of fighting. He undertook to work on it. They all left.

[39] The next witness was **Bongani Masilela**. He told the court that he was a lieutenant in the defence force. He was in charge on the night under consideration. He deployed his guard at the main gate. He went to retire at his barrack. He later heard a knock and someone saying there was noise outside. He went straight to the main gate to enquire about it. The guard told him that **Mangisi** entered driving a red sedan. He recorded his arrival. He then closed the gate. **Mangisi** left. At about fifty metres apart, a police motor-vehicle entered using the exit gate in a high speed. Upon noting that it was a police van, he then called for this witness to assist him.

[40] While he was discussing with the guard, a police van arrived. He went to the occupants and asked the driver to park aside in order to register him.

The driver, a police officer said that it was merely reporting as a matter of courtesy otherwise it would drive through. It drove through without registering. Thereafter military personnel from Royal duties came to make their reports. He attended to them. He never attended to the crowd making noise. This witness was not cross-examined. The defence closed its case.

### **Adjudication**

#### **Issue**

[41] My call is to ascertain not whether the two plaintiffs were assaulted on 16<sup>th</sup> March, 2012. It is however, to determine who assaulted the two plaintiffs on the night in issue.

#### **Who assaulted the plaintiffs?**

[42] From the line of cross-examination and the evidence adduced on behalf of the defence, it appears that there is no issue raised on the evidence that the plaintiffs were assaulted. Defendant's army officers distanced themselves from inflicting any assaults upon the plaintiffs. Their version was that any assaults on plaintiffs was inflicted by a crowd composed of canteen attendants and the police themselves who were seen entering through an opening by the fence and carrying sticks and a R5. The plaintiffs on the other hand were adamant that the defence force officers assaulted them.

#### **Legal Principle**

[43] Writing on the procedural aspect of weighing evidence on the scales of justice, **Ota JA**<sup>1</sup> meticulously articulated:

*“In this venture, the court is required to first of all put the totality of the testimony adduced by both parties on an imaginary scale. It will*

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<sup>1</sup> James Ncongwane vs Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 (30 November 2012)



*put the evidence adduced by Plaintiff on the one side of the scale and that of defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses.”<sup>2</sup>*

[44] The learned Justice wisely expatiated:

*“This is because although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible, relevant and credible evidence that is conclusive, and that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before the court however must be considered to determine which has weight and which has no weight.”*

[45] Now, my duty in resolving the issue at hand is to ask, “Which evidence is probable, relevant and credible?”

### **Determination**

[46] The version by both plaintiffs which finds support from their witnesses’ evidence is that they were assaulted by the members of the defence force while arresting **Mangisi**, DW1, at an army base. I have highlighted above that the defendant did not plead its defence except to make a bare denial. The question that boggled the court was therefore what was defendant’s defence in this case?

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<sup>2</sup> See paragraph 32 of 1

[47] The defendant's defence was first heard from the cross-examination of PW1 **Constable Thulani Mndzebele**. The main defence, viewing from the thirty-four questions posed to PW1 which were all on the same point, was that the two plaintiffs had no authority at all to arrest **Mangisi**, a soldier in the army terrain. This defence was fortified by an equally lengthy cross-examination upon PW1 asserting that the police officers did not even have authority to enter the army base as they forced their entry without attending to the army security.

[48] Only a few questions were put to PW1 to the effect that the persons alleged to have assaulted the plaintiffs were police officers themselves and not soldiers. The evidence on behalf of the defence that police officers were prohibited from effecting arrest at army bases was testified to by DW4 **Senior Sergeant Bonginkhosi Vilakati** who however put it in much subtle form as follows:

*“I asked why he did not tell us on that day that there is an officer who has committed an offence as before you would tell us so we could work hand in hand and submit the offender to the police?”*

[49] I must hasten to point out that the evidence of DW4 as quoted above came very late during the trial. I say this based on, firstly, throughout the evidence of plaintiffs case, the defence had raised that there was not a single army officer in the crowd which according to the defence consisted of about thirty people. These group was made out of police officers and civilians following that St. George's Barrack has a number of canteens which are open to the public for even at that hour of the night. However, when the defence witnesses took the stand, all but one of its witnesses who were all soldiers placed themselves at the scene of the assault. This was

surprising as all along during the plaintiffs' case, there was not a single soldier who responded and joined the group that assaulted the plaintiffs. It was not clear why suddenly the defence placed its witnesses in the scene.

[50] The answer however, lies in law of evidence viz., that the defence is an afterthought. This reasoning is bolstered by the fact that the defendant failed even to raise a plea in the pleadings. Secondly, I know no law, neither did the defence refer to any that a person in the circumstances of **Mangisi** ought not to be arrested by police officers who were fully dressed in uniform by reason that he was at the barrack. I do not accept that police officers in the likes of the plaintiffs, glad fully in their uniform deserve to be assaulted just because they forcefully gained entry into the army territory, if the allegation of forced entry is anything to go by. I say this because the trial was protracted by this form of defence. Defendant ought to have concentrated on the *causa*.

It follows therefore that the first defence raised by defendant during trial be rejected.

[51] Witnesses for the plaintiffs' case were again subjected to very lengthy cross-examination on defendant's defence on how they entered through the gate. It was put to almost all the plaintiffs' witnesses that they ignored both the boom gate army security stationed at the gate by forcing their entry. PW1 was cross-examined:

*“They gained entry **after the security officer gave chase after you having forced your entry.**”*

[52] She was again asked:

*“The 2<sup>nd</sup> plaintiff forced entry”*

[53] PW1 disputed this. Surprisingly, when the sentry (DW2) gave evidence, he testified in reference to the police motor-vehicle driven by 2<sup>nd</sup> plaintiff:

*“I did not follow the car but communicated with my supervisor who had left. The gate was closed. The motor-vehicle by the police entered through the exit way.”*

[54] Firstly, the evidence now suddenly changed to say there was no pursuit between the plaintiffs and the sentry when the defence took to the stand. This was obviously different from what was put to the plaintiffs’ witnesses. Secondly, it was never put to the plaintiff’s witnesses that with the boom gate lowered, they gained entry through the exit way. The court heard this for the first time when much time was spent on each of the plaintiffs’ witnesses on this point. Again in law, this is evidence of afterthought.

[55] I am now left with one defence, namely that the soldiers did not assault the plaintiffs but the civilians who were from the canteen and the police officers who gained entry through the fence boundary hole opening following that St. George’s Army base and the Police College share a fence boundary. I have already alluded that when the two plaintiffs and their witnesses were cross-examined, it was flatly denied that there were any army personnel in the crowd that is said to have assaulted the plaintiffs. This was despite 2<sup>nd</sup> plaintiff’s evidence that he identified DW3, **Lance Corporal Bhekumusa Motsa** as he had attended a training with him. He testified that he expected him to come to his rescue. However, DW3 had a field day assaulting him.

[56] The consequence of the defence denial of the presence of any of the soldiers among the crowd was that their version was not put to the plaintiffs and their witnesses. For instance, it was not put to the plaintiffs that in fact DW3 and DW4 and DW5 responded to the noise by the crowd. That they joined the crowd and observe what they advanced in their evidence in chief. The presence of the army officers among the crowd which was said by the defence during cross-examination of the plaintiffs and their witnesses to consist of civilian and police officers only was heard for the first time during the defence case.

[57] DW4 testified that he spoke to the 2<sup>nd</sup> plaintiff and enquired as to why he did not alert them that an army officer has committed an offence. This version was never put to any of the plaintiffs and their witnesses. Even the said response by 2<sup>nd</sup> plaintiff that he could not do so because it was a matter of emergency was never put to 2<sup>nd</sup> plaintiff let alone to any of the plaintiffs' witnesses. **Mangisi** testified that when he was at the army barrack, both plaintiffs assaulted him. 2<sup>nd</sup> plaintiff even set on his chest and strangulated him. All this again was never put despite the plaintiffs taking their time narrating in finer details how they were severely assaulted by the police.

[58] If the version by **Mangisi Mahlalela**, DW1, was anything to go by, it would have been put to the plaintiffs and their witnesses who testified on how they stood afar observing 2<sup>nd</sup> plaintiff being assaulted at the hands of the army officers. It is not clear as what was the difficulty by the defence to say, "*in fact you assaulted **Mangisi** in the following manner.*" The failure by the defence to put their versions across the plaintiffs and their witnesses flows from defendants' initial failure to file a plea to the particulars of claim. The basis for this is that their version was an afterthought. The meticulous words of Hannah CJ in the King v Dominic

Mngometulu Crim. Case No: 94/1990 with reference to S v P 1974 (1) Sa 581 at 582 are very apposite:

*“It would be difficult to over-emphasise the importance of putting the defence case to the prosecution witness and it is certainly not reason for not doing so that the answer will almost certainly be a denial.*

[59] The learned Chief Justice emphatically proceeded:

*“So important is the duty to put the defence case that, practitioners in doubt as to the correct course to follow, should err on the side of safety and either put the defence case, or seek guidance from court.”*

[60] He then concluded:

*“It is also important that Counsel should put the defence story accurately. If he does not and the accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused’s story.”*

[61] The above ratio decidendi applies with equal force in civil trials. I do not wish to depart from it.

[62] No probative value can be attached to evidence which is an afterthought in terms of our law. No credibility can be associated to those who tender it. Such evidence stands to be held inadmissible and therefore rejected.

[63] It is common cause that the plaintiff suffered assaults while at the army barrack. The plaintiffs and their witnesses stated that the time was about 2400 hours. This was not disputed. It is common cause that an alarm was raised. In fact, the sentry, DW2, testified that on seeing the police motor-vehicle entering in a high speed, he raised his superior. Surprisingly though, his superior who testified that he responded to a knock advising him that there was pandemonium outside, told the court that he did not go to the crowd despite having heard the noise himself after he was alerted about it.

[64] He preferred to go to the main gate. He preferred to attend to other duties unrelated to the commotion he was raised for. This is totally inconsistent with a reaction by a trained soldier who was holding a senior position such as DW5. Further, both plaintiffs and the defence testified of the loud noise in the thick of the night. However, the defence's position was firstly that not a single army officer responded to it. Later, they changed tune to say all but one of their witnesses who were all soldiers attended. On the other hand they testified that police officers who were not in the vicinity of their territory but at Police College responded to the alarm in their numbers.

[65] The defence version is improbable. An alarm raised within the perimeters of the army base could only attract police officers who were in another territory? There is something amiss in the defence story. Even worse, the senior army officer who is awoken to attend to the noise, decided to ignore it and attend to other unrelated issues, if his evidence is anything to go by. This is highly improbable. The evidence of the plaintiff stands to be believed, namely that an alarm was raised and the soldiers responded in their numbers. The defence which took most of the time in this

proceedings almost across all the plaintiff's case that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff were prohibited to enter and effect an arrest upon a member of the defence force in its base explains the reason why the defence force officers decided to assault the two plaintiffs.

[66] In the final analysis, the version by the defence stands to be rejected and that of the plaintiff accepted for the foregoing reasons.

### **Quantum**

[67] I was urged by both Counsel to make a determination on liability only in this matter. The parties take the view that they would settle the quantum among themselves. I accept this procedure. However, the justice of the matter calls upon me to mention that both 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs exaggerated the assaults and the injuries sustained.

[68] 2<sup>nd</sup> plaintiff pointed out that he was "*beaten to pulp*" on that night. He stated further that "hell got loose" when he un-cuffed **Mangisi** who mercilessly assaulted him with the handcuffs.

[69] In support of his evidence on the degree of the assault suffered, 2<sup>nd</sup> plaintiff submitted two doctors' reports. One was completed at Raleigh Fitkin Memorial Hospital while the other at Mbabane Government hospital. There is a glaring discrepancy in the two reports. 2<sup>nd</sup> plaintiff testified that he left the scene bleeding with his uniform soaked in blood. He rushed to RFM hospital and was attended by a doctor. His jaw was dislocated. The doctor advised him to proceed to Mbabane Government – for the attention of the jaw.



[70] Exhibit A said to have been authored by the doctor at RFM is silent on the jaw dislocation. Similarly is Exhibit B supposedly completed by the doctor in Mbabane. A further anomaly on Exhibit A and B is the date. Exhibit A reflects the attendance upon 2<sup>nd</sup> plaintiff to be on 17<sup>th</sup> May, 2012 while Exhibit B on 19<sup>th</sup> March 2012. Worse still, Exhibit A states the conditions of the patient (2<sup>nd</sup> plaintiff) to be “*clean*” while Exhibit B reflects, “*soaked in blood*” How could this be? One would expect that the information on Exhibit B would be reflected in Exhibit A by reason that it was recorded on the date of the assault whereas Exhibit B was two days after. Exhibit B stands to be rejected therefore. In the result, I accept that 2<sup>nd</sup> plaintiff was assaulted and he sustained the injuries outlined in Exhibit A only, namely that the 2<sup>nd</sup> plaintiff had, “*bruise on (L) wrist, bruise on lower lip.*”

[71] Turning to 1<sup>st</sup> plaintiff. Likewise, there is no medical support to her evidence that she lives without a gall bladder. Not an iota of evidence was adduced in support of this permanent disability. She attempted to justify why she could not produce medical report in this regard. She testified that she did not have money to go to Nelspruit to collect them. One wonders why she left them behind in the first place as she knew that they would assist her in her claim. In the analysis, I find that 1<sup>st</sup> plaintiff was assaulted by the army officers of defendant but did not sustain any injury although she felt pain. The above analysis must therefore be considered by the parties in negotiating quantum

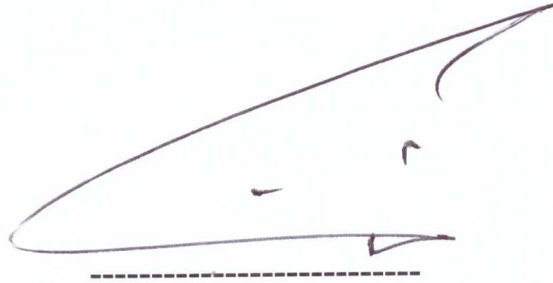
### **Costs of suit**

[72] At paragraphs 4 and 5 of my judgment, I demonstrate the laxity at the hands of the plaintiff. Firstly, it failed to note that the defendant had failed to raise a proper plea. Secondly, it cited the Attorney General without citing the

relevant Ministry or Government entity as defendant. Such conduct must be visited by costs. As a general rule, costs follow the event. However, the trier of fact may decline to award costs in certain situations. I do not intend to do so in this matter. However, a one day's trial cost must be discounted against the plaintiff for its attitude. Defendant is ordered to pay costs of suit except for one day trial.

[73] In the end result, I enter the following orders:

- 73.1 1<sup>st</sup> and 2<sup>nd</sup> plaintiff cause of action succeeds;
- 73.2 Defendant is held liable for assaulting the 1<sup>st</sup> plaintiff and 2<sup>nd</sup> plaintiff;
- 73.3 By parties consent, issue on quantum is referred to the parties;
- 73.4 Parties are ordered to take into paragraphs 67, 68, 69 70 and 71 in assessing quantum.
- 73.5 Defendant is ordered to pay costs of suit in terms of paragraph 72 hereof.



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**M. DLAMINI**  
**JUDGE**

For plaintiffs : **S. Gumedze of V.Z. Dlamini Attorneys**

For Defendant : **N.G. Dlamini of Attorney General's Chambers**