

IN THE HIGH COURT OF ESWATINI
JUDGMENT

In the matter Between:

Case No. 1838/2015

NOMSA MAPHALALA

Plaintiff

And

THE NATIONAL COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2na Defendant

Neutral citation

Nomsa Maphalala v the National Commissioner of Police and Another (1838/2015) [2019] SZHC 159 (1Nh August, 2019)

Coram

M. Dlamini J

Heard

5th August, 2019

Delivered

16th August, 2019

Trial -Rules of procedure : guiding/actors- which version is more probable than the other - first port of call would be to ask if each parties' version

was pleaded in the pleadings serving before court - For if it was not, by reason for instance that a different case has been pleaded or only a bare denial was alleged, an adverse inference may be drawn against the litigant that its version is an afterthought or it has taken a position that its case shall be built along as the trial progresses - the rules of procedure do not allow a litigant to play by the ear - caution must be taken not to plead evidence but sufficient material/acts which would inform the other party of the case it would meet in court - where therefore, a party springs a surprise in a trial, its version stands to be rejected for the reason that it is considered as an afterthought and there/ore improbable - another factor which guides the trial court in determining the more plausible story is demeanour of the witnesses- needless to point though that the trial judge must be very cautious in determining demeanour of witnesses - as the trial progresses, the presiding officer's duty is to assess if a prima facie case is building up at the instance of the plaintiff who bears the onus of proving its case on a balance of probabilities in civil actions and beyond (and not all or any) reasonable doubt in criminal matters - if a prima facie case is made, it follows that its adversary must call for evidence which would refute that of the plaintiff - however, no adverse inference may be made against a party that fails to cross-examine witnesses on a far-fetched version or call for evidence in rebuttal on a weak or improbable version -

where therefore, a party springs a surprise in a trial, its version stands to be rejected for the reason that it is considered as an afterthought and therefore improbable.

Summary: By combined summons, the plaintiff sought an order for the payment of E350 000.00 as damages arising from assault and unlawful detention at the hands of 1" defendant's officers. The defendant denied liability, stating that plaintiff was taken for questioning only.

The Parties

[1] The plaintiff is an adult female of Nsongweni area, Nhlangano in the region of Shiselweni. The 1" defendant is charged with, *inter alia*, investigation and arrest of criminal suspects in the Kingdom. The 2nd defendant is 1" defendant's legal representative. Defendants' offices are both situate at Mbabane, Usuthu - Mhlambanyatsi Link Road, region of Hhohho.

The Plaintiff's Case

[2] The plaintiff alleged in her Particulars of Claim that on or about 26th March, 2015:

"5.

*The plaintiff was wrongfully and unlawfully arrested, assaulted, tortured and detained by members of the Royal Swaziland Police Force based at Nhlangano Police Station. "*¹

[3] She proceeded:

¹ Page4 para 5 of book of pleadings

"6.

*The plaintiff was at no material time ever formally charged and /or prosecuted at any offence. Plaintiff was assaulted, suffocated and verbally abused by the Police Officers at Nhlngano and was later released in the morning of the 27th March, 2015 and returned to her home after spending several hours in custody. "*²

[4] She then claimed as follows:

"7.

<i>a) Damages for unlawful arrest and Detention</i>	<i>-E200 000.00</i>
<i>b) Contumelia</i>	<i>-E 80 000.00</i>
<i>c) Disgrace</i>	<i>-E 70 000.00</i>
<i>Total</i>	<i>E350 000.00"</i> ³

The Defendants Plea

[5] Defendants prayed for the court to dismiss the plaintiffs cause of action. The 1st defendant's plea was brief and crisp as follows:

"AD PARAGRAPH 6

Save to admit that that the Plaintiff was not formally charged of any offence, the Defendant denies assaulting Plaintiff in the manner alleged. The Plaintiff was only taken for questioning and later released. "

² Page 5 para 6 of book of leading

³ Para 6 of book of pleadings

Oral Evidence

- [6] Plaintiff gave evidence in her own case. She narrated in details the events of 26th March, 2015. In the company of her neighbour, a spinster, she set out for Mahamba Boarder Post. Her mission was to purchase maize meal. Having purchased the bag of maize meal, she decided to hitch-hike her way back home. A motor-vehicle which turned out to be driven by Mrs. Khumalo stopped. She was offered a lift at a fee of E25.00: She boarded the motor-vehicle and set at the back seat of the sedan. Seated next to her, was Mrs. Khumalo's mother. As she boarded the motor-vehicle, Mrs. Khumalo together with a lady who was seated in the front seat decided to move out and purchase a bag of maize meal. She remained in the motor-vehicle with Mrs. Khumalo's mother. Her spinster companion had decided to go her way by then.
- [7] They drove until at Nhlangano town where Mrs. Khumalo requested that she be allowed to do some groceries shopping at Spar. She joined her to purchase a loaf of bread. They all proceeded with their journey. She was dropped just by the road. Following that her homestead was nearby, she then showed Mrs. Khumalo and company her homestead.
- [8] At about 2200 hours, while she was asleep, her children knocked at her bedroom door. They reported that there were police officers who were requesting for her attendance. She woke up, put on her morning gown and went out. She found the police officers and greeted them. They enquired if she was Ms. Maphalala. She responded to the positive. They asked for the lady she was travelling with to Mahamba Border Posts. She informed them that she remained at Mahamba. They said that she should

board their sedan. She asked to change. They said she was fine in her gown. She insisted. She left to change her night gowns. She returned and boarded the police motor-vehicle.

[9] In the police motor-vehicle, she found **Mrs. Khumalo**. They drove to the police station. At the police station, they went into **Sergeant Khumalo's** office. **Sergeant Kbumalo** was present in his office and was with two police officers. She was offered a chair to sit. **Sergeant Khumalo** advised her that after boarding **Mrs. Khumalo's** motor-vehicle, money went missing from her bag. They asked her to produce the money she had taken. She enquired as to where exactly the money was. They said it was inside a bag which was at the back seat where she was seated. She said that she did not see any bag next to where she was seated or near **Mrs. Khumalo's** smother.

[10] They insisted that there was a bag next to **Mrs. Khumalo's** smother at the back seat. They accused her of removing the purse inside the bag. **Sergeant Khumalo** insisted that she produce the money. She maintained her innocence. They told her to go outside and ponder. She left and set at the reception for fifteen minutes. She was recalled. As she entered the office where she was, she noted that her interrogators were now coming out from another office. They all converged at the same previous office.

[11] They produced a document and ordered her to sign. She enquired on what it was all about. They threatened her to sign. She asked to call home. **Sergeant Khumalo** asked who she wanted to call from her

home. She said that she wanted to call her brother. **Sergeant Khumalo** responded

asking "You had banked upon your brother when you stole the money?" He enquired as to the name of her brother. She told him that it was **Bheki**. He responded, "Woman, we are not joking here. " They refused to grant her permission to call home. She then appended her signature on the document without knowing its contents. At that moment **Sergeant Khumalo** kept quiet.

[12] The two other police officers became active. They demanded the money from her. The time was by then 2330 hours. She stood her ground on saying that she did not take the money. They also insisted on their orders. After some time they said that she should excuse them. She returned at about 2400 hours. They started all over again. She did not change her response. Then **Sergeant Khumalo** left the office. The time was about 0100 hours. As soon as **Sergeant Khumalo** closed the door behind him; the two officers jumped up, went straight for her, and strangulated her. She cried out loud. The other police officer put something into her mouth which sealed it.

[13] At this juncture, the witness cried before court. After some few minutes, having gained composure, she proceeded to narrate to this court that that was the beginning of her agony. She was severely assaulted. They handcuffed her and assaulted her. At about 0300 hours, they decided to go out with her. They went with her to the reception and straight into the police van. She was at a loss as to where they were taking her to. They ordered her to board the back of the van. As she could not hold the bars

in order to board at the back, she told them she was failing to board. One of the police officers un-cuffed her one hand and ordered her to board.

(14) As the police van was being driven in the thick of the night, she wondered whether she was being taken to prison or to be thrown away. She lost her bearings as it was dark outside. As they drove in the gravel road, the motor-vehicle stopped for about ten minutes. This accentuated her fears. It is only when the motor-vehicle joined the tar road that she noticed where they were. It took the direction of her home. At Nsirigweni school, by the bus stop, the motor-vehicle came to a halt. One of the police officers alighted from the front, opened the back door and said to her, "*Mother, please alight.* " She alighted. He removed the handcuffs and requested her to board in the front so as to direct them home. She obliged. They drove until the main gate of her homestead. They said to her, "*Mother, we are now dropping you here.* "

[15] She lamented at how her offence was prosecuted in the twilight of the night and never to see the light of the day in a court of law. She testified that her dignity was put into disrepute among her members of the family, community and church. She was considered a thief.

(16) After two days of the incident, a Sunday, a Mhlanga gentleman arrived at her homestead. He works with Mrs. Khumalo at Post and Telecommunication, Nhlango branch. He told her that he had come to pay his condolences at what happened to her on 26th March, 2015. He also told her that Mrs. Khumalo found the money. She asked Mr. Mhlanga to return to work and confirm that indeed Mrs. Khumalo found the money. He returned to say indeed the money was found by the lady who cleans Mrs. Khumalo's office. She testified further that she was distressed by the fact that despite that Mrs. Khumalo found her purse, no

one ever came to her to ask for an apology. She prayed that the court order her compensation for the sum of E350 000.

[17] The second witness on behalf of plaintiff was **Thulani Mpendulo Mhlanga** (PW2). He was an employee of Post and Telecommunications and a technician. He was married to the daughter of plaintiff's brother. He was an acquaintance of **Mrs. Khumalo's** cleaner.

[18] Having learnt of plaintiff's predicament of the night of 26th March, 2015, he began to make investigations about the missing purse. Following that he maintained a friendly relationship with **Mrs. Khumalo's** cleaner, he discussed plaintiff's issue. The cleaner, **Mrs. Diamond** revealed to her that she had found **Mrs. Khumalo's** purse while she was cleaning her office. He then told plaintiff that the purse was found.

[19] PW2 decided to approach **Mrs. Khumalo** with the intention of advising her to apologise to plaintiff. He first approached **Mr. Khumalo, Mrs. Khumalo's** husband following that as a traditional man he would not speak direct to a married woman. He failed to locate **Mr. Khumalo**. He went to **Mrs. Khumalo** direct. **Mrs. Khumalo** said something whose words cannot be repeated in a court of law. He left her.

[20] PW3 was **Thabsile Mirriam Mathabela (Mrs. Diamond)**. She identified herself as **Mrs. Khumalo's** office cleaner. She said on a Monday, as she entered **Mrs. Khumalo's** office to clean, she found a purse on her desk. She kept it in her drawer. On **Mrs.**

Khumalo's arrival at work that morning she gave her the purse. After sometime, T- shirts

went missing at work. They suspected her to have stolen them. As she was friendly with PW2, she told PW2 that they were suspecting her of having stolen the T- shirts. She wondered as to why because if she was prone to stealing, she would have stolen **Mrs. Khumalo's** purse which she found on her desk. PW2 asked if she indeed found the purse. She confirmed and told him that it was brown. PW2 told her that his aunt was assaulted about the purse. Sometime after again PW2 asked her if she indeed found the purse. She confirmed.

[21] The plaintiff and her witnesses were cross-examined. In order not to burden this judgement, I shall refer to the salient questions later. At this juncture, the plaintiff closed her case.

Defence

[22] The first witness on behalf of the defendant was **Mary Vela phi Khumalo (Mrs. Khumalo)** (DWI). She testified that she offered plaintiff a lift at Mahamba Border Post on 26th March, 2015. She assisted the plaintiff to load her bag of maize meal into her motor-vehicle. Plaintiff boarded the motor-vehicle and she went to declare her own bag of maize meal. Upon her return, she found plaintiff standing outside the car. She had alighted from it. They all boarded the motor-vehicle.

[23] She was in the company of **Zandile** and her mother. When her mother entered into the motor-vehicle, she found the lunch box which was in the bag with her purse opened. She asked as to who had opened the lunch box. No one answered her as they did not pay much attention to her. They drove until at Mbangweni where plaintiff directed them to her home. She offered to take her to her

homestead. Plaintiff said that she will call her children with a wheelbarrow to assist her carry the bag. They then left her by the tum off to her homestead.

[24] They drove to Manzini and parked at the Bhunu Mall with the aim of doing shopping. She however, failed to locate her purse. They proceeded to do shopping as her companion had money. They then returned to Nhlangano via Nkiliji where her mother was left. They reported the missing purse to the Nhlangano Police Station. They were attended to by **Sergeant Khumalo**. They narrated to him that they had given plaintiff a lift. **Sergeant Khumalo** enquired if they would be able to point out at plaintiff's homestead. They said that they would. He then called the officers to drive with them to plaintiff's homestead.

[25] They did find plaintiff and drove back to the police station with her. **Sergeant Khumalo** enquired from plaintiff if she knew the whereabouts of the purse. She said that she did not know. She turned to them and said, *"Ah, you children gave me a lift pretending to be kind yet you later accuse me of theft."* They told her that they were asking for the purse from her because she was the only person offered a lift. They enquired why she alighted from the motor-vehicle while at the border post. She said that they should not play with her in that fashion. They continued to ask her to produce the purse. She then said she would tell her brother who was a judge. They pressed her on to produce the purse. She said that the purse was in the motor-vehicle. They should all go and search for it. They all went to the motor-vehicle.

[26] They removed virtually everything in the motor-vehicle in search of the purse. Their efforts were in vain. **Sergeant Khumalo** instructed the officers to take plaintiff away. They returned to the police station and recorded the colour of

the purse and went away. They were at the police station for about twenty minutes.

[27] The next witness was Detective Constable Mandlenkhosi Dlamini (DW2). In 2015, he was based at Nhlngano Police Station in the general department. He was on duty on 26th March, 2015. He assumed duty at 2200 hours and knocked off at 0600 hours.

[28] After five minutes having assumed duty, two ladies arrived. They were DWI and Zandile Dlamini. They reported a theft case. He was with Sergeant Khumalo, Maziya, Mthokozisi Dlamini and laMotsa officers. They ushered the two ladies into the interviewing room where they narrated how the purse went missing. Sergeant Khumalo ordered some police officers to fetch plaintiff from her residence. They left in the company of DWI and Zandile who were to direct them to plaintiff's homestead.

[29] Plaintiff was taken to the police station. The officers who fetched her left for patrol. Plaintiff was asked if she knew where the lost wallet was. Plaintiff told them that she did not steal the money. She was elderly and she would not steal. She urged them to allow her to go to the motor-vehicle which was parked within the police station to conduct a search of the purse with the hope to find it. They all proceeded to DWI's motor-vehicle. They searched the motor-vehicle. They failed to recover the wallet and money .

[30] Sergeant Khumalo ordered this witness and Mthokozisi to take plaintiff to her residence. They drove to her homestead and dropped her. The blue lights were on. Mthokozisi opened plaintiff's gate. The time was about

2300 hours. He denied ever handcuffing plaintiff. He insisted that plaintiff was not under arrest. She was merely taken for an interview.

[31] The next witness for the defendant was Sergeant Howard Khumalo. His evidence was along similar lines as DW2. He narrated that the two ladies came to the police station around 10:00 p.m. They reported that they had given plaintiff a lift from Mahamba Border, and that they suspected her of have stolen their wallet. They left plaintiff at her homestead at Nsingweni. He then called the patrolling officers to report to the police station. They obliged. He asked them to take one of the ladies to plaintiff's homestead so as to bring plaintiff to the police station.

[32] Plaintiff was directed to the interview room. In the presence of the two ladies and two police officers, he introduced everyone to the plaintiff. He enquired from plaintiff if he remembered if she was given a lift by the two ladies. She agreed. He explained the two ladies' mission to the police station. He asked her to produce the money. Plaintiff stated that she did not see the purse although she saw the bag. Mrs. Khumalo, the complainant and DWI herein pleaded with plaintiff to produce the money. Plaintiff stood her ground. Plaintiff requested to go and check in DWI' s motor-vehicle. They all went out. They conducted a search in the motor• vehicle but in vain. He instructed the two police officers to take plaintiff back home. He recorded statements from the two ladies.

[33] The last witness was Constable Mthokozisi Dlamini. His evidence was brief. He was led on four questions by the defence. He denied assaulting and handcuffing plaintiff. He denied receiving instructions to assault

plaintiff from Sergeant Khumalo. He testified that he recalled very well that plaintiff arrived at the police station at 2230 hours and the interview did not last even thirty minutes.

Determination

[34] It is common cause that plaintiff was fetched by the defendant officer's on 26th March, 2015 to the Nhlngano Police Station. The time was about 2200 hours. It is also not in dispute that DWI reported that her money which was inside a bag kept at the back seat went missing. The prime suspect was plaintiff. It is also not in issue that plaintiff was not seated alone in the back seat where the said purse was said to have gone missing.

[35] It is common cause further that at the police station, upon her arrival, plaintiff was quizzed about the whereabouts of the purse in the presence of the complainant (DWI) and her companion. It is not disputed that plaintiff refuted the accusations levelled against her of stealing the purse. To demonstrate her honesty on her denial she asked that the motor-vehicle be searched. The search was futile.

Issue

[36] Plaintiffs case is that she was seriously assaulted by the pt defendant's officers. The l " defendant denied any allegation of assault. The question for determination by this court is, "*Whose version is more probable.* "

Guiding Principles

[3 7] A number of factors come to play in guiding the trier of fact on the question of which version is more probable than the other. For instance,

the first port of call would be to ask if each parties' version was pleaded in the pleadings serving before court. For if it was not, by reason for instance that a different case has been pleaded or only a bare denial was alleged, an adverse inference may be drawn against the litigant that its version is an afterthought or it has taken a position that its case shall be built along as the trial progresses. The rules of procedure do not allow a litigant to play by the ear.

[38] Of course, in pleading its case, caution must be taken not to plead evidence but sufficient material facts which would inform the other party of the case it would meet in court. The rationale is to avoid springing of surprises at the same time keeping the version brief and concise. Where therefore, a party springs a surprise in a trial, its version stands to be rejected for the reason that it is considered as an afterthought and therefore improbable.

[39] The next question is to ask if the party testified on its recorded version. Was the litigant consistent in its version? Stating the reason behind this rule of procedure F. Kroon J authored:

*"A pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another."*⁴

⁴ Twain and Others v Premier for the Province of Eastern Cape and Others (460/99) [2008] ZAECHC 1969 (1 October 2008) at para 81

[40] If it is still the plaintiff's case, the defence must put its case by means of cross-examination. If it does not, the court must accept the evidence of the plaintiff and its witnesses as unchallenged. Emphasizing on the importance of this rule of procedure, Kroon J⁵ eloquently stated:

*"The institution of cross-examination not only constitutes a right, but also imposes obligations. and as a general rule, it is essential to draw witnesses' attention to aspects of his testimony which are contested, because if a point in dispute is left unchallenged in cross-examination the party calling the witness is entitled to assume that the unchallenged evidence is accepted as correct. "*⁶

[41] The learned judge wisely proceeded:

"[T]he rule is born of, inter alia, considerations of fairness in that a challenge to a witness's testimony affords him an opportunity to meet same by offering a response thereto and /or calling for corroborative evidence. "

[42] Another factor which guides the trial court in determining the more plausible story is- demeanour of the witnesses. Needless to point though that the trial judge must be very cautious in determining demeanour of witnesses for the reason as well canvassed by Wessels JA⁷ as follows:

⁵⁵ At para 94 N₃

⁶ *Op cit.*

⁷ EState Kaluza v Braeuer 1926 AD 243 at 266

"A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story."

[43] **Diemont JA**s expressed a similar position as follows:

*"The hallmark of a truthful witness is **not always** a confident and courteous manner or an appearance of frankness and candour. "*

[44] He then continued:

"On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person. "

[45] That as it may, demeanour remains one of the tool in assessing a probable version. In this regard, the expression by **Diemont JA** cannot be ignored:

"Nevertheless while demeanour can never serve as a substitute for evidence, it can and often does, reflect on and enhance the credibility of oral testimony. The experienced

⁸ S V Kelly 1980 (3) SA 301 at 308

trial officer is well aware of this fact; it is a matter of common sense. He observes the witness closely - evasions, hesitations and reactions to awkward questions. He will note, if he is alert, all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. "

[46] As the trial progresses, the presiding officer's duty is to assess if a *prima facie* case is building up at the instance of the plaintiff who bears the *onus* of proving its case on a balance of probabilities in civil actions and beyond (and not all or any) reasonable doubt in criminal matters. If a *prima facie* case is made, it follows that its adversary must call for evidence which would refute that of the plaintiff. However, no adverse inference may be made against a party that fails to cross-examine witnesses on a far-fetched version or call for evidence in rebuttal on a weak or improbable version. In such instances the version by plaintiff must be rejected and his action dismissed.

Case at hand

[47] The version of the plaintiff was crisp. It was that having boarded Mrs. Mary Khumalo's (DWI) motor-vehicle as she was offered a lift, she was that evening at 10:00p.m. fetched by the police officers for interrogation on DWI's assertions that she had lost money at her instance. She was firstly interrogated in the presence of DWI and her companion. Thereafter, DWI and her friend were excused. She remained behind in the interrogation room where she was subjected to torture. She testified of her assault:

"What grieved me the most, which I will never forget for the rest of my life, is Sergeant Khumalo left the office. It was going for 11:00 p.m. When he closed the door behind, the two police officers stood up. One officer strangulated me. I cried out loud. The other put something on me which sealed my mouth. That is when the torture began. I was severely assaulted. "

[48] The plaintiff was in tears as she narrated her ordeal. It was her further evidence that the torture, having commenced when the clock was going for one in the morning, it was only at about 3:00a.m. that she was instructed to leave the interrogation room and board the back of the police motor-vehicle. Her testimony was that she was handcuffed during her assault and even when she was ordered to board the motor-vehicle. She informed the court that when she boarded the police motor-vehicle, she was not told where she was taken to. Her mind raced within her as to her destination. She did not know whether she was being taken to a place where she would breathe her last breath.

Were these assaults denied at the instance of the defendant?

[49] Thirty-one questions were posed to the plaintiff during her cross-examination. Of note, part of the version of the defendant was put. This was that Mrs, **Mary Khumalo** was present during the interview. The interview did not last more than thirty minutes. Of grave concern and noteworthy is that not a single question was put to the plaintiff refuting the allegations of assault in a form of strangulation and suffocation. The defence preferred to ask for example in relation to assault:

"Were you injured during the assault?"

"Did you report the assault to the police on the day?"

"Did you go for treatment? "

"Can you relate the kind of pain that you felt?"

"Have you ever been to the doctor in relation to your pain? "

[50] Now, juxtapose the above questions at the instance of defence with the failure to refute the evidence by plaintiff that she was assaulted. It is immaterial whether the response to the question is yes or no, in the absence of any question put rebutting her version of assault. These questions fortifies her evidence of assault. If I am wrong in this regard, the following questions posed by defendant gives more credence to my analysis:

Mr. M. Mashinini (Counsel for defence): *"Sergeant Khumalo will tell the court that when you were interviewed, no one switched off the lights."*

[51] This question was very startling to the court as the plaintiff, as PW1, did not in her evidence-in-chief testify that Sergeant Khumalo switched off the lights. I have at paragraph 45 above taken time to refer to plaintiffs evidence. She testified that Sergeant Khumalo left the interviewing room and closed the door. The response to this question which was never testified to in-chief sealed the plaintiff's case. Her answer was as follows:

Ms. N. Maphalala: "He did when he closed the door. He switched off the lights. "

[51] Obvious, plaintiff was reminded of incidences that happened during her assault, viz., lights were switched off. What exacerbated defendant's case is that immediately, on putting this question about lights being switched off, the court cautioned Counsel for the defence on the rationale for putting such a question as the plaintiff had not testified so in chief. Counsel for the defence paid a blind eye to the court's caution. Instead of withdrawing the question, he gazed at plaintiff, signifying of course, that he was awaiting a response. The court was left with no option but to allow the plaintiff to answer the question. This reaction at the instance of the defence could not be faulted as it was in line with its position which it had taken, namely not to challenge the evidence on assault.

[52] The position not to challenge plaintiff's evidence on assault was consistent. PW2 who testified that having learnt that his aunt (PW1) had been assaulted due to a missing purse, testified that he began to investigate the whereabouts of the purse. He was similarly cross-examined:

Mr. M. Mashinini: "Who told you that plaintiff was assaulted? "

PW2 : "Plaintiff. "

Mr.M. Mashinini : "You said Ms. Maphalala told you she was assaulted by the police?"

PW2 : "Yes. "

[53] No further follow up question was put to PW2. Again the assault version remained unchallenged despite that PW2 testified on it. The final analysis on the assault version by plaintiff is that she was assaulted.

Inconsistencies on the parties' version

[54] PW3 gave evidence on how she found the missing purse. She testified that she found it on Mrs. Khumalo's table in her work place. Now the version put to her by the defence was that the purse was never found. However, Mrs. Mary Khumalo was subpoenaed by the defence to give evidence on its behalf. Her testimony was that she found the missing purse in the motor-vehicle she was using. She retrieved it under her seat. This evidence was completely at odds with the defence version as put to the plaintiff and her witnesses. Why? The only reasonable inference to be drawn, in light of the unchallenged assault version, was that the court ought to find a justification for the assaults upon the plaintiff. The defendant was mitigating its unlawful conduct therefore. Unfortunately, it turned out to be a clumsy mitigation factor. Worse still, it failed to find corroboration from defendant's own witness as the evidence of DWI was that she found the purse with all its contents.

[55] A further factor that militates against defendant following DWI's evidence on the purse is that the version was inconsistent. Plaintiffs witnesses were told that the purse was never found. This evidence was to be brought by DWI. This evidence was to contradict plaintiffs evidence.

However, DWI, corroborated plaintiff's evidence that the purse was found. I appreciate that plaintiff's version was that it was found in her office while DWI said she found it in her car under her seat. There is however no contradiction on the material fact which is that the purse was found. In fact there is no contradiction at all as the *ipso facto verba* of the case as viewed from the totality of the evidence is that after DWI found the purse underneath the driver's seat, she must have taken it to her office where it was eventually found by PW3, her office helpmate.

[56] In all this however, one undeniable fact is that the version of the defendant was contradictory. In law it is without weight for it to tilt the scales of justice in favour of the defence. It is not clear why the defence decided to call witnesses in view of its failure to challenge the plaintiff and her witnesses on the assault evidence. The defence testimony refuting the evidence on assault of plaintiff after plaintiff's close of her case was as good as water under the bridge. It could not assist the defence at that stage. In law, it was an afterthought. Again putting it on the scales of justice would be a futile exercise.

The parties' evidence - general probability

[57] Suppose for a second, the court might be inclined to consider the defendant's version to the effect that the plaintiff was never assaulted. An analysis of the totality of the defence's evidence does not support that as I demonstrate hereunder.

[58] The defence's evidence was that the interview was conducted in the presence of DW1. Plaintiff was taken home after her failed search of the purse. DW2 testified in this regard:

"Sergeant Khumalo ordered me and Mthokozisi to take Ms Maphalala to where she resided. "

[59] **Sergeant Khumalo** who was DW3 testified that after the search in **Mrs Khumalo's**(DW1) car:

"I said to the two police officers please take Ms Maphalala back to her homestead. "

[60] It is common cause that **Mrs. Khumalo**, DW1 also joined the party that went outside to observe plaintiff conduct a search on her motor-vehicle. One would therefore expect that DW1 would testify similarly on what happened to the plaintiff after the search. However, when DW1 gave evidence she testified in chief:

"We went to the motor-vehicle. We opened it, removing everything in it, she (plaintiff) searched for it but could not find it. "

[61] She proceeded:

"The officer (Sergeant Khumalo) instructed other police officers to take gogo (plaintiff) away. "

[62] At the end of her cross-examination, the court asked DWI:

Court: "You testified that Sergeant Khumalo instructed the police officers to take Ms. Maphalala away.

DWI: "Yes, when we were outside."

Court: "Do you know to where?"

DWJ: "I do not know."

[63] Now, if at all Sergeant Khumalo instructed the two police officers to take plaintiff to her homestead, firstly DWI would have said so in her evidence. Now to dispel any doubt, the court enquired from DWI as to where Sergeant Khumalo said plaintiff was to be taken. This witness who ought to have corroborated the police's evidence said that she did not know.

[64] Now the version by plaintiff that she was taken to the interrogation room where she was severely assaulted for a period spanning over three hours stands to be accepted. At any rate, the version that she was returned home immediately after her futile search for the purse was not put to her or her

witnesses. It was learnt for the first time when the defence witnesses gave evidence.

Unlawful detention

[65] I must lastly mention a glaring irregularity on the manner DWI's complaint was handled. It arose from the evidence that the purse was found by DWI in the very motor-vehicle it was alleged to have gone missing. This evidence was not surprising to the court. Ms. **Maphalala's** unchallenged evidence was that when she was dropped at the tum-off leading to her homestead, she showed DWI and her companion where her homestead was. This was confirmed by the evidence that when **Sergeant Khumalo** asked DWI if she could identify the suspects homestead, DWI responded positively. She further took the patrol police officers to Ms **Maphalala's** homestead despite that it was at night. This act by Ms **Maphalala** of showing **Mrs. Khumalo** and company her homestead suggests to an ordinary person, let alone trained officers in the likes of DW2, 3 and 4 that it is inconsistent with a thief, as it were. In brief, the police ought to have appreciated that if indeed Ms **Maphalala** had stolen the money, she would not have showed them her homestead. However, the police officers decided to take **M1.s. Khumalo's** say so without any investigations.

[66] The above view is fortified further by the fact that no one among the police officers attempted to search the motor-vehicle where the purse was alleged to have gone missing. This was despite Ms. **Maphalala's** later plea to have the motor-vehicle searched. Instead,

the investigators decided to take the position that Ms. **Maphalal** should search the motor-

vehicle herself. Why? They failed in their duty because they believed that she had stolen the money. Had they, as police officers executed their duties according to their training, they would have been no need even to fetch Ms. **Maphalala** from her residence in the thick of the night as they did because they would have found the purse which was eventually found by DWI, a civilian. I say this because Police officers undergo a thorough training on how to conduct searches. They would not have missed the purse which was lying tucked underneath the driver's seat. They opted to stand by that night and watch an elderly woman such as Ms. **Maphalala** conduct a search. They dismally failed in their duties. The detention was without reasonable justification and therefore unlawful as well.

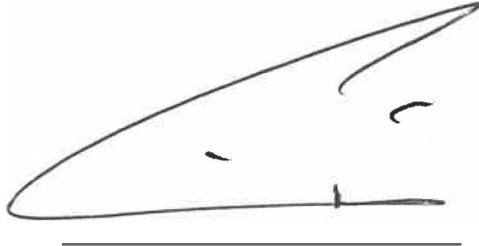
[67] I have been asked to decide on liability only by both parties. In the final analysis, I find in favour of the plaintiff. I enter as follows:

67.1 Plaintiffs cause of action succeeds;

67.2 Defendant is liable to the plaintiff for the quantum to be agreed upon within 30 days from date of judgement;

67.3 Interest thereof at the rate of 9% per annum *a tempore morae*;

67.4 Costs of suit.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and a series of smaller, connected strokes on the right, all contained within a faint rectangular border.

M.DLAMINI

For Plaintiff:

O. Nzima of Nzima and Associates

For Defendant

M. Mashinini & M. E Simelane of the Attorney General's
Chambers