



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2295/05

In the matter between:

THEMBA MAZIYA

PLAINTIFF

and

**THE COMMANDER OF THE UMBUTFO
SWAZILAND DEFENCE FORCE
ATTORNEY GENERAL**

**1ST DEFENDANT
2ND DEFENDANT**

Neutral Citation : Themba Maziya vs The Commander of the Umbutfo
Eswatini Defence Force and Another (2295/05) [2019]
SZHC 06 (05 FEBRUARY 2018)

Coram : MABUZA – PJ

Heard : 2016, 2017, 2018

Delivered : 05 FEBRUARY 2019

SUMMARY

Civil Law: Law of Delict – Claim for damages arising from an assault on the Plaintiff allegedly by officers of the Defence Force – Claim succeeds in part with costs.

JUDGMENT

MABUZA -PJ

- [1] The Plaintiff, Themba Maziya an adult Swazi male of Vuvulane issued summons against the Defendant for damages in the amount of E2,000,000.00 (Two Million Emalangeneni); interest thereon at the rate of 9% p.a.; costs of suit and further and/or alternative relief.
- [2] 1st Defendant is the Commander of the Umbutfo Swaziland Defence Force, cited in these proceedings in his capacity as such of Army Headquarters, Bethany, Manzini District.
- [3] 2nd Defendant is the Attorney General of 4th Floor Justice Building Usuthu Link Road, Mbabane, Hhohho District cited in these proceedings in his capacity as the legal representative of the Swaziland Government.

- [4] This Honourable Court is seized with jurisdiction to entertain this matter by virtue of the fact that cause of action arose within Swaziland.
- [5] It is alleged that on or about the 5th day of October 2003 and at Vuvulane Plaintiff was severely assaulted by certain members of the Umbutfo Swaziland Defence Force (Defence Force) by kicking him with heavy boots, punching him with fists, immersing him in a canal full of water and assaulting him with an electric cable.
- [6] It is further alleged that the members of the Defence Force who were acting in the course and within in the scope of their employment accused the Plaintiff of robbing them of a motor vehicle belonging to the Defence Force.
- [7] It is alleged that the Plaintiff was assaulted all over the body and the head. As a result Plaintiff suffered temporary loss of memory, scarification all over the body and severe trauma.
- [8] As a result of the assault the Plaintiff alleges that he suffered damages in the sum of E2,000,000.00 (Two million Emalangeni) in respect of the following:

8.1	Pain and suffering	E1 000 000.00
8.2	Permanent scarification	E 500 000.00
8.3	Temporary loss of amenities of life	E 500 000.00

And that despite demand Defendant neglects and/or refuses to make payment to Plaintiff in the sum of E2,000.000.00 [Two Million Emalangeni] or any sum at all hence the claim set out in paragraph 1 supra.

[9] The Defendant's response to the Plaintiff's claim is as follows:

- (a) **They deny that officers of the Defence Force assaulted the Plaintiff as alleged by him and plead that he was assaulted by some attendants at a wedding party who actually identified him as one of some suspects who had taken a kombi at gun point the previous day;**
- (b) **Defendants deny that the Plaintiff suffered the damages as alleged or at all in the hands of the Defendants or their agents and puts the Plaintiff to the strict proof thereof;**
- (b) **The Defendants admit that due statutory demand was made but aver that they refuse to pay the sum claimed or any amount whatsoever, as they are not liable to pay the same.**

[10] The Defendants pray that the Plaintiff's claim be dismissed with costs.

[11] On the 21st February 2017 the Plaintiff led oral evidence before me. He was represented by Mr. Simelane of Zonke Magaguloa Attorneys. He testified

that on the 5th October 2003 he was in Tshaneni. He was with Dambai Dlamini with whom they were enjoying alcoholic beverages. He left Dambai at Tshaneni and proceeded to his father's farm at Vuvulane where he slept for a short while. At around 1.00 pm. he went to look for manure near Makhomba.

[12] Along the way a red car stopped alongside him. The occupants after asking what his name was requested him to show them the homestead of Israel Magagula. He did so and after that he proceeded to the home of Tryphina Masina from where he was to obtain the manure.

[13] Later on PW1 attended a traditional wedding where the assault on him began. At the traditional wedding a mob of more than 20 men surrounded him. Some of the men pointed at his sneakers saying that they were stolen and they assaulted him for about an hour. Thereafter when the soldiers arrived, he was assaulted by the soldiers.

[14] He says that among the soldiers that were assaulting him was Mbongiseni, Theminkosi, their brother in-law and his wife. They pulled him into a

sugar cane field and at first he thought that they were rescuing him from the mob because he kept protesting his innocence.

[15] They put him into a van and drove to Magagula's home from where they took *sigeja* and an electric cable. They plaited the cable and took him to a river where they tied his hands and legs and put him into the river head first. They assaulted him on the head with the cable and stabbed him on the head with *sigeja*. They assaulted him on his back with the cable, kicked him and threw stones at him. He says that a nerve/vein on his left temple burst due to the assault and from that day he became mentally disturbed.

[16] He testified that while he was being assaulted, his assailants took off his sneakers claiming them to belong to them. His assailants ordered him to inform them who was involved in their being highjacked. He informed them he did not know anything about the highjacking.

[17] He stated that he was assaulted by the soldiers from 2.00 pm to 4.00 pm. Around 4.00 pm., the police from Simunye arrived and stopped the assault. The police informed his assailants that the Plaintiff was not the one who had hijacked them. The police ordered his assailants to untie him, which they

did after spitting phlegm at him. He says that they only released him after the police drew a gun on them.

[18] The police took him to the police station at Simunye where he formally reported the assault and a docket was opened. After that the police took him to Good Shepherd Hospital at Siteki where he was admitted for treatment.

[19] He was not treated immediately upon arrival at the hospital. He testified that his ribs were fractured and he had sustained serious injuries on his back inflicted by the cable. He was bleeding internally and was mentally disturbed.

[20] On the following day the police returned in order to record another statement from him. They informed him that he had nothing to do with the case which he had been suspected of and assaulted for.

[21] He says that he was admitted for one night and discharged. Thereafter he returned as an outpatient and eventually discharged.

[22] He was subsequently admitted at the Psychiatric Hospital in Manzini where he stayed for three weeks. After his discharge he returned for a second time and stayed another three weeks. He returned a third time for another three weeks until he was fully recovered. He stated that he was now fully recovered. He says that he was severely assaulted hence the constant visits to the Psychiatric Hospital because the assault left him mentally disturbed.

[23] He stated that after he was discharged from the hospital at Siteki, he was called by the police at Simunye police station. He went there and was accompanied by his father and his brother. He found his assailants at the police station only this time they were dressed in their Defence Force uniforms. The police pointed them out as being his assailants.

[24] When he was cross-examined he stated that he was able to identify three soldiers from the mob of twenty at the police station on the 7th October 2003 after he had been released from the hospital. He also recognized them on the 5th October 2003 while they were assaulting him.

[25] He stated that his injuries were caused by the assaults by both the mob and the soldiers.

[26] He was asked what he understood by stating in his particulars of claim that the soldiers were acting in their scope of duty. He responded that he knew that soldiers were on duty 24 hours round the clock. That when they assaulted him on the 5th October 2003, they were not in uniform but were in uniform when they were at the police station on the 7th October 2003.

[27] He was asked if the injuries that he had sustained were caused by the soldiers. He responded in the affirmative and stated that he was assaulted by Bonginkosi Mavimbela of Mafucula and a Magagula man and his brother, all soldiers. Upon re-examination he stated that he got to know their names at the police station on the 7th October 2003. The Plaintiff closed his case thereafter.

[28] When the matter next came before me on the 2nd June 2017, the Plaintiff appeared in person as he no longer was represented. This state of affairs continued with him representing himself until the matter was concluded. His not being represented gave rise to many challenges in the progress of the matter until hearing of evidence was ultimately concluded on the 5th February 2018.

[29] On that date the defence led the evidence of 4103 Detective Sergeant Sibusiso Nkomonye. He testified that on the 24th January 2017, this Court ordered that the police at Simunye produce the docket wherein the report of the assault was reported by the Plaintiff.

[30] After receipt of the order from this Court, he looked for the docket. He discovered that on the 5th October 2003, the Plaintiff (then 26 years old) of Vuvulane reported that a mob had assaulted him at about 5.00 pm. at Vuvulane. The witness stated he noticed that an inquiry file had been opened. He looked for it and found that it had been converted into a docket which showed that the Plaintiff had been assaulted by a mob (File No. 100080/2003).

[31] He continued looking for it and found that on the 29th June 2005 it was closed, undetected. He explained that files that were closed undetected are then filed in their police archives at the relevant police station.

[32] He went to search in the archives and found that these files were destroyed which included the Plaintiff's file.

[33] He stated that the Royal Swaziland Police Standing Order 634, empowers the Station Commander to destroy dockets which have been outstanding for five (5) years because of the inability to detect them. That is why the police did not have the Plaintiff's docket.

[34] He confirmed that the police records proved that there was a report of assault lodged by the Plaintiff.

[35] He was asked to explain what he meant by stating that the docket was undetected. He replied by stating that there were several reasons for that for example if the detectives fail to identify the assailant because there was insufficient evidence as to who the suspect was.

[36] And that in the Plaintiff's case it was an assault by a mob and that meant that the detectives could not identify the culprits.

[37] Asked if while investigating the docket he was able to tell if there were any names which included three soldiers, he responded in the negative.

[38] He handed in an affidavit outlining the evidence before me that he had earlier prepared together with a certificate of destruction of the docket (Exhibit DA).

[39] The Plaintiff cross-examined him. He put to the witness that he was assaulted by soldiers whose names were Thembinkosi Mavimbela, Jabulane Ndwandwe and Mbongiseni Magagula all based at Nkoyoyo.

[40] The Plaintiff also complained that the docket was closed without his knowledge. Thereafter the defence closed its case.

[41] The witness offered to try and find the investigating officers and other officers that the Plaintiff says he reported the matter to.

[42] On resumption a while later the witness advised the Court that he was unable to locate any of these officers.

[43] In the circumstances the matter now stands closed and it is so ordered. I proceed to now decide the matter.

[44] This matter is very old and because of that has given rise to many challenges one of them being that the Plaintiff is not an easy person to deal with. He was more often than not extremely unpredictable and irrational in his speech and mannerism. I had to call him to order many times.

[45] The summons was issued during 2005 and the pre-trial conference took place on the 14th March, 2006. There was no explanation offered as to why the matter had taken so long to come to trial, until it appeared on my roll on the 9th August 2016.

[46] On the 17th November 2016, I issued the following orders:

- (a) **For the medical examination of the Plaintiff in view of the head injury;**
- (b) **For the release of his medical records from Good Shepherd Hospital; and**
- (c) **For the release of the Inquiry File in respect of the assault made to the police at Simunye by the Plaintiff during 2003.**

[47] I was subsequently advised by his then attorneys that the Plaintiff refused to go for a medical examination and assessment with regard to the head injury and its possible effects on his mental faculties.

[48] Even after his attorneys had withdrawn their services, I put the proposition to him and he refused.

[49] Good Shepherd Hospital responded and filed a report dated 29th September 2003 which is reproduced hereunder:

“29 September 2017

TO WHOM IT MAY CONCERN:

MEDICAL REPORT FOR THEMBA MDADA MAZIYA (MALE 26 YEARS)

Themba Mdada Maziya was brought to our hospital on the 5th of October 2003 with history of assault.

- **On examination, general condition was satisfactory**
- **Chest- clear**
- **Abdomen – soft**
- **Cardio Vascular System – S1 S2**
- **No pallor**
- **Mild swelling with bruises on the right eye – No visual impairment**
- **Multiple stick marks over the back**
- **Chest X-ray – Normal**
- **Assessment – Soft tissue injury**

He was admitted on the same day of arrival and was treated and discharged on the 6th of October, 2003.

Yours sincerely

**Dr. Koshy K.
SENIOR MEDICAL OFFICER”**

[50] They also furnished an in-patient information sheet number 7493/003. The information sheet details the Plaintiff's personal particulars which are followed by a detailed report about his date of admission, notes about his bodily condition medical treatment and discharge; as reflected in the report dated 29th September 2003.

[51] The police responded positively to my order of 17/11/2016 as reflected in the evidence by Detective Sergeant Nkomonye outlined above.

[52] The fact of his assault on the 5th October 2003 is corroborated by the evidence of Detective Sergeant Nkomonye and the police records. As well by the report from Good Shepherd Hospital.

[53] The police officer testified that in terms of their standing orders, the station commander is empowered to destroy a docket which has been outstanding for five years after the complaint was lodged and remains undetested. In this case the complaint was lodged on the 5th October 2003 and the docket was destroyed during 2010.

[54] There was no evidence led by any police officer as to whether or not any investigations were ever carried out after the Plaintiff lodged the complaint and why the investigation was stopped and why the docket was undetected.

[55] The defence did not challenge the evidence of the Plaintiff that on the 7th October 2003, he was called by the police to the police station. And that when he got there, his assailants were at the police station and they were in uniform, the Defence Force uniform.

[56] The Plaintiff was not advised that his matter was undetected. There was no evidence from the investigators that this was the case.

[57] According to the documentary evidence filed by the defence, the Plaintiff reported a case of assault with the intent to do grievous bodily harm on him by his assailants. That evidence also recorded that 3638 Detective Constable P. Dlamini was reported to have actioned the Plaintiff's case. He was not called to give evidence as to how far he had gone with the investigation of the case.

[58] After the police officer gave evidence the Plaintiff who was in the company of his sister agreed to attend an evaluation at the Psychiatric Hospital in the company of his sister. The Registrar penned a letter to accompany the Plaintiff dated the 11th July 2018. He attended the hospital and the hospital sent a letter to the Registrar dated 1/8/2018. I reproduce in abridged form the salient contents thereof:

“RE: MR. THEMBA MAZIYA, HOSPITAL FILE NO. MP 572/10

Mr. Themba Maziya is a patient known to our institution since October 2008, a diagnosis of major mental illness was confirmed and was admitted for inpatient care. He was then re-admitted in August 2010 and August 2014. He has been well and adherent to medications since his last admission. Thorough mental status evaluation was done on the 1st August 2018 and confirmed that he was of sound mind.

It is my opinion that Mr. Themba Maziya currently of sound mind capable of managing his personal and financial affairs with very minimal support.

Kindly provide the needed support. Thank you.

Respectful submitted.”

[59] On the 31/7/2018, Mr. Dlamini for the Crown advised the Court that Mr. Thwala who was the investigating officer herein had since died. 3638 Constable Phila Dlamini testified instead. Officer Dlamini was visibly unwell but bravely gave evidence.

[60] He stated that he could no longer recall everything because of his illness. He recalled that the Plaintiff had made a report that he had been assaulted by members of the Defence Force. The police provided the Plaintiff with the police medical form to take to the hospital where he was treated for completion. The police opened a docket because the Plaintiff had said that he was assaulted by a Government employee. The docket was given number 3872 and assigned to Constable Thwala to investigate the matter.

[61] The witness stated that he could not recall what happened after Constable Thwala took over the docket. He recalled that the docket was later closed and he did not know why it was closed.

[62] The witness said that he recalled that the Plaintiff had come to the police charge office and had pointed at some soldiers who were also at the charge office and were wearing Defence Force uniforms.

[63] The witness also stated that when the Plaintiff went to record a statement with the police, he told him that it was the police who had separated him from some soldiers who were assaulting him. The soldiers did not want to

release the Plaintiff until the police pointed their (police) firearm at them. That is all the witness had to say.

[64] The assault on the Plaintiff has been clearly proved. Constable Dlamini's evidence corroborates the assault. He also corroborates the evidence that soldiers assaulted the Plaintiff. The soldiers were at the police station and the Plaintiff identified them. During the trial the Plaintiff mentioned the soldiers by name and that he had given their names to the police but there was no follow up by the police.

[65] As mentioned earlier, the medical report and history confirm that the Plaintiff was assaulted and he was treated at the Good Shepherd Hospital in Siteki.

[66] The medical report from Good Shepherd does not mention any head injury. The nearest to a head injury is the "mild swelling with bruises on the right eye." It also mentions "multiple stick marks over the back". This is what the Plaintiff refers to as scarification.

[67] Clearly the hospital at Siteki could not have picked up on his mental issues if any, hence their releasing him soon after treatment. And they are not a psychiatric hospital.

[68] The psychiatric report of September 2018 suggests that the Plaintiff is fine. I had my doubts that, that was a fair assessment of the Plaintiff's mental faculties, because I have observed him throughout the trial and he did not seem alright to me. He constantly displayed erratic behavior.

[69] Because of that and fearing that an injustice would be unwittingly carried out, during December 2018 I requested, through the Registrar's office, that Dr. Violet Mnjwali at the Psychiatric Hospital revisit the matter, relating to his claim that he suffered a head injury due to the assault inflicted on him by the soldiers. And that the head injury was the cause of his mental illness. Part of the letter read "He suggests that the major illness you (the doctor) you referred to in your letter dated 1/8/2018 was caused by the assault on his head."

[70] Her response is in a letter to the Registrar dated 22/12/2018. In deference to the doctor/patient relationship, I have selected one salient paragraph of that

letter and left out the rest. In summary the doctor is of the view that the mental illness complained of by the Plaintiff was not caused by the assault.

“Mr. Themba Maziya is a patient known to our institution. He consulted for the first time on the 26th October 2008 which is three years after the traumatic assault incidence. A diagnosis of major mental illness was confirmed and was admitted for inpatient care and discharged on 27th of November 2008 . He has been well and adherent to medications since his last admission in 2014. Thorough mental status evaluation was done on the 13th December 2018 and confirmed that he is of sound mind.”

[71] The Plaintiff’s mental illness was not caused by the assault. He was assaulted during 2003 and only attended the psychiatric hospital during October 2008. There is no proof that his mental illness was caused by the alleged assault.

[72] It is my finding therefore that the Plaintiff has proved to the satisfaction of the Court that he was assaulted by the soldiers, employees of the Defence Force on his back and face as the medical report from Good Shepherd Hospital indicates. I uphold this claim.

[73] He has failed to prove that he was assaulted on the head. He has failed to prove that the injury on his head was caused by the assault by the soldiers. He has failed to prove that his mental illness is due to the assault on his head which assault was inflicted by the soldiers.

[74] The portion of his claim that is grounded on the assault to his head is hereby dismissed.

[75] In the case of **Howard Nkambule vs Attorney General** Case no. 2973/2001 (unreported), I lamented the failure of the police to investigate assaults on civilians perpetrated by members of the Defence Force.

[76] I repeat my concerns in this matter. When the police fail to investigate in such matters the perception created is that the police are protecting members of the Defence Force at the expense of ordinary people.

[77] In **Howard Nkambule's** case I stated that "Ending impunity for the armed forces is critical in a constitutional state for the rule of law to be maintained. They cannot simply act with impunity by shooting unarmed civilians".

[78] The matter in *casu* ought to have been properly investigated by the police and the perpetrator charged with a criminal offence and brought before a court of law in order to face the injurious consequences of their acts. The

failure to investigate the matter makes the police appear complicit in the crime herein.

[79] Turning to the computation of the damages claimed I align myself with the dicta of Ramodibedi JA in the case of **Ntombifuthi Magagula v The Attorney General** Appeal case No. 11/2006 (unreported) at para 20:

“I turn now to that most difficult part of the case, namely the measure of general damages. Difficult in the sense that there are no scales by which pain and suffering can be measured in monetary terms. I commence this exercise by pointing out that the principles which would guide a court in the assessment of general damages are well established. Essentially the question of the assessment of such damages is a matter pre-eminently within the discretion of a trial court. ... a finding on general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life, as here, is essentially a matter of speculation and estimate.”

[80] The Plaintiff is in my view entitled to a measure of damages for pain and suffering as a result of the assault on him by the members of the Defence Force. He has however, failed to prove claims (b) and (c) i.e. permanent scarification (E500,000.00) and temporary loss of amenities (E500,000.00) respectively. I assume that by scarification, he meant scarring. Even though he was assaulted on his back, he has not filed proof of any permanent scarring

[81] As mentioned in the quotation above that **“a finding on general damages comprising pain and suffering ... is essentially a matter of speculation and estimate.”** I am however, guided in my speculation and estimate by the case of **Nonhlanhla Simelane v The Commissioner of Police and Another case no. 2351/03 (unreported)**. In that case the Plaintiff was assaulted by the police. As in this case the injuries in that case were not major. I awarded the Plaintiff therein the sum of E50,000.00 (Fifty thousand Emalangeni). Equally herein an appropriate amount to award to the Plaintiff would be in and around that region for pain and suffering. The judgment in that case was delivered on the 11 July 2013, the cause of action having arisen during 2003.

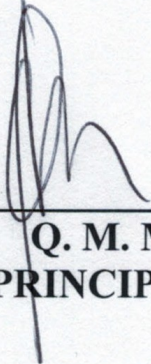
[82] In view of the foregoing and taking into account the passage of time. I order as follows:

- (a) The Plaintiff is awarded damages for pain and suffering in the sum of E70,000.00 (Seventy thousand Emalangeni);

the Defendant is hereby ordered to pay this amount to the Plaintiff.

- (b) Costs of suit to be paid to the Plaintiff by the Defendant.
- (c) Interest on the amount awarded to the Plaintiff at the rate of 9% per annum *a tempora morae* with effect from the date when the combined summons were served on the Defendants.

AT MBABANE Crim. Case No. 252/2



Q. M. MABUZA
PRINCIPAL JUDGE

For the Plaintiff : In Person
For the Defendants : Mr. M. Dlamini