



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 1824/2010

In the matter between:

DUMISANI NDZINISA

PLAINTIFF

And

THE COMMISSIONER OF POLICE

1st DEFENDANT

THE ATTORNEY GENERAL

2nd DEFENDANT

Neutral Citation: *Dumisani Ndzinisa v The Commissioner of Police & Another*
(1824/10) [2020] SZHC 176 [2020] (16 September 2020).

Coram: LANGWENYA J

Heard: 27 March 2018; 30 April 2018; 25 June 2018; 5 July 2018;
12 July 2018; 3 October 2018; 16 November 2018; 27 November 2018.

Delivered: 16 September 2020

Summary: *Law of Delict-Claim for damages for unlawful assault, arrest and detention by servants or agents of defendants.*

Plaintiff was shot at by police-plaintiff resisting-plaintiff was wanted in connection of offences listed in Part II of Schedule I of the Criminal Procedure and Evidence Act, 1938-Plaintiff shot at-no warning shot fired-force used excessive-onus to prove lawfulness of arrest and force on defendants-non-prosecution not decisive of reasonableness of defendants' belief in effecting arrest and detention-arrest not without legal cause-suspected stolen property found in plaintiff's home.

Plaintiff proved infliction of gunshot wound but not assault with kicks-plaintiff proved damages for unlawful detention for four days in police cells-damages for pain, suffering and discomfort awarded-damages for contumelia awarded-interest-costs of suit.

JUDGMENT

- [1] This is a claim for damages arising from unlawful assault, arrest and detention perpetrated on the plaintiff by servants or agents of the State herein represented by the defendants. Except for the fundamental divergences on matters of factual detail and legal conclusions thereon, the facts giving rise to this claim are generally common cause.
- [2] On 4 June 2003 and early in the morning, a contingent of police officers from the Manzini police station, Manzini police regional headquarters and from OSSU arrived at plaintiff's homestead at Maliyaduma. They were looking for the plaintiff in connection with a string of housebreaking and theft charges,

robbery and breaking into motor vehicles offences which were alleged to have happened around Salukazi, Nyakeni and Maliyaduma areas. The police arrived at plaintiff's home ostensibly to arrest him and his accomplices in connection with the said offences.

- [3] In his claim, the plaintiff states that he was shot at, assaulted with kicks, arrested and detained by members of the Royal Eswatini Police (REP). It is alleged further that the arrest, assault and detention were unlawful.
- [4] The plaintiff, Dumisani Ndzinisa (PW1) gave evidence in support of his claim. He also called two witnesses-PW2 Dr Sihlongonyane and PW3 Dr Tembe who testified in support of plaintiff's case.
- [5] It is the evidence of plaintiff that on the fateful day he was at home asleep in the morning hours when he heard noise outside his house. He thought it was noise from cattle which, in the winter season would roam around unattended. He went outside to investigate. No sooner had he come out of his house than he was shot at the back by people he later learnt were police officers. The police did not introduce themselves to Mr Ndzinisa; they also did not explain their mission to him before they shot at him. Jomo Mavuso, a senior police officer was heard by plaintiff say this was a case of mistaken identity as the police were not looking for the plaintiff but for Simanga Ndzinisa. Simanga Ndzinisa, the court heard, is since deceased and is a brother of the plaintiff.
- [6] The plaintiff testified that soon after he was shot and was bleeding, he was dragged by the police to the upper part of his homestead where he was kicked by some police officers. There is clearly no independent corroborative evidence that plaintiff was assaulted with kicks by the police when they were arresting him.

- [7] Mr Ndzinisa told the court that he never pointed out anything to the police in response to police investigation. He stated that in the state he was in, lying on the ground and injured, he could not have been able to point out anything to the police.
- [8] It was Mr Ndzinisa's evidence that he was never charged, prosecuted or produced before court to be informed of the charges and to be remanded.
- [9] It has to be noted from the outset and this is common ground, that despite the above averments and evidence led by the plaintiff, Bundle C and Bundle D show court records which reflect that plaintiff was indeed charged for housebreaking and theft. It is also common ground that from the court records, Mr Ndzinisa was never brought to court nor was he remanded in person in the year 2003. It is only on 24 November 2004 that there is an entry in Bundle D to the effect that the plaintiff paid bail of E5,000. This is despite the protestations of DW1 to the contrary-namely that plaintiff was taken to court for remand in the year 2003. The plaintiff disputes that he ever paid bail for any offence. He testified that he was released and told to go home by Magistrate Florence Msibi. Bundle D does not show that the plaintiff ever appeared in Court, all it shows is an entry-'i/c 24/11/2004 bail E5,000'. None of defendants' witnesses testified they took plaintiff to court for remand. DW1, DW2 and DW4 testified that they did not personally take the plaintiff to court for remand. It was their evidence that he was taken to court by the investigating officers who were stationed at Manzini police station. One of the investigating officers-4021 Constable Mandla Dlamini is deceased.
- [10] The plaintiff was taken to the RFM hospital where he was admitted and treated for the injuries for a period of four months. While at the hospital ward, the

plaintiff was handcuffed to the bed and was under police guard. He was admitted on 4 June 2003 and discharged on 17 October 2003. Once he was discharged from RFM hospital, plaintiff was taken by police to Manzini police station where he says he spent four days without being produced in Court. On the fifth day, he testified that he was taken to Mbabane Government hospital where he was 'dumped' outside the hospital gate by the police. This was denied by defendants. In the absence of the officers who took plaintiff to the government hospital, the denial from defendants rings hollow as they were not present when plaintiff was conveyed to Mbabane government hospital.

- [11] At the government hospital, Plaintiff walked with the aid of crutches and was attended to by health personnel. He was admitted at Mbabane Government hospital and spent a month there. While admitted at Mbabane Government hospital Mr Ndzinisa was not under police guard; he was also not handcuffed to his bed. He was discharged from the government hospital on 4 November 2003. Even though Mr Ndzinisa stated in his evidence that he spent a month at the government hospital, according to a letter from the hospital he spent two weeks and was expected to return for review; he did not. Plaintiff only returned to the government hospital on 8 October 2004¹.

Onus to Prove Lawfulness of Arrest

- [12] In view of the fact that the plaintiff alleges that he was arrested and detained by servants or agents of the State, within the scope of their employment, the defendants bear the *onus* to prove that the arrest was lawful or legally justifiable. In *Frank B. Magagula* Rooney J observed at page 2 of the judgment that:

¹ See Bundle B-a letter written and signed by Dr Francis, A.

‘It is well established that any interference with the liberty of the citizen is *prima facie* odious and it is for the person effecting the arrest to establish the fact that in the particular circumstances such interference with liberty was justified².’

- [13] The plaintiff does not need to prove that the defendants knew that their actions were unlawful³. In the present case, the plaintiff has clearly proven that he was shot at, suffered injuries as a result, arrested and later detained by servants of the State. The defendants admit this fact and have pleaded that the shooting was lawful or justified in the circumstances⁴.

[14] Reasonable Suspicion of Commission of Crime

It is important to consider whether or not the police had a reasonable suspicion that plaintiff had committed offences herein. The law requires suspicion and not certainty. However, the suspicion must be based on solid grounds. Otherwise it will be an arbitrary and not a reasonable suspicion⁵. It is settled law that the test in this regard is objective⁶. The crimes for which plaintiff was wanted are specifically provided under Part II of the First Schedule to the Criminal Procedure and Evidence Act, 1938. That means the crimes charged are serious offences.

- [15] The fact that the plaintiff was never prosecuted is, of itself, not decisive of the reasonableness of their belief that the defendants had in effecting the arrest and detention of the plaintiff. It is also not insignificant that the plaintiff's

² See also *Newman v Prinsloo* 1973 (1) SA 125; *Prince Terrence Khumalo v Terence Evezard Reilley NO & 3 Others* Civil case No. 244/07 unreported judgment delivered on 28 April 2011; *Makhosazana Dlamini v Radio Shop*, Civil case 3118/2005; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A); and *Mabaso v Felix* 1981(3) SA 865(A).

³ *Minister of Finance v EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N) at 329; *Minister of Justice v Hofmeyer* 1993(3) SA 131(A) at 157.

⁴ *Mfanafuthi Mabuza v The Commissioner of Police & 2 Others* Civil Appeal Case No. 11/2004 at pages 2-3.

⁵ See: *Mabona & Another v Minister of Law and Order & Others* 1988 (2) SA 654 at 658.

⁶ See: *Nana Sikhondze v The Commissioner of Police* Civil Appeal Case Nol 36/2006

mother is said by DW2 to have sold a stolen dress given to her by plaintiff to a certain woman. This evidence was not disputed.

[16] There is a medical report (from Mbabane government hospital) and evidence documenting the nature, extent and gravity of the injuries sustained by the plaintiff. It was stated in the letter of 8 October that the plaintiff presented with a mild abdominal scar from infra umbilicus to a bone above the pubic symphysis. His wound was discharging and it was on the left lower abdomen and gluteal left region. PW3 testified that since plaintiff was not first admitted at Mbabane government hospital and was not transferred from RFM hospital to the government hospital, it is difficult for them to know what the extent and gravity of the injuries was when plaintiff was first admitted to hospital immediately after he was shot. The plaintiff is said to have told health personnel on admission that he opted to come to the government hospital because it was expensive for him to receive treatment and dressing from RFM hospital. This, in my view presupposes that plaintiff came to the government hospital on his own accord to access cheaper medical care.

[17] The plaintiff testified also that he was assaulted with kicks by the police while he lay on the ground at his homestead after he was shot at. The medical report proves a gunshot wound. There is no independent corroborative evidence regarding assault with kicks-for instance in the form of a medical report or the evidence of an eye witness. I am, in the circumstances unable to hold that Mr Ndzinisa has proved that he was assaulted with kicks by the police.

[18] At the time of his arrest, Mr Ndzinisa was twenty-one years of age, unemployed and had one child. He spent four months admitted at RFM hospital under police guard. On discharge, he spent four days at Manzini

Police station before he was transported to Mbabane government hospital where he was admitted for a further two weeks. He was not under police guard at the government hospital. Fifteen years later, the plaintiff has still not been prosecuted for the offences charged. DW1 testified that he does not know from the prosecution why the matter was never prosecuted.

[19] Arrest not without Reasonable Cause

The arrest of the plaintiff was not without reasonable or probable cause as I explain later in the judgment. It was lawful therefore. The same cannot be said to be true of his detention especially after he was discharged from RFM hospital and was kept in police custody for four days before being taken to the government hospital.

[20] Even though defendants argued that plaintiff was personally produced before court for remand, the court records tell a different story. Bundle C reflect that on 18, 29 September 2003 and on 13 October 2003, plaintiff was reported sick. On 11 November 2003 plaintiff was remanded in absentia and no reason was advanced in court why he was absent. We now know with benefit of hindsight that plaintiff was discharged from the government hospital on 4 November 2003⁷; he ought to have appeared in court on 11 November 2003, he did not and no reasons are given why. If plaintiff was still facing charges and still in custody, he would have been produced on 11 November 2003. He was not produced. None of defendants' witness know why that is so. The undisputed evidence is that plaintiff was discharged from RFM hospital into police custody on 17 October 2003. Even though defendants testified that

⁷ See Bundle B-a letter from one of the doctors who attended to the plaintiff.

plaintiff was taken to court for remand soon after he was released from RFM hospital, the court records reflect the converse to be true.

[21] The plaintiff was charged and admitted at RFM hospital under police guard, for four months and upon discharge was taken to a holding cell at Manzini police station where he was kept for four days before he was transported to Mbabane government hospital where he was admitted on 21 October 2003 at 10.10pm. I cannot ignore that he would have in any event have remained in hospital for four months and two weeks at RFM hospital and at Mbabane government hospital respectively. According to the available evidence, the *de facto* detention was only for four days in the year 2003.

[22] It follows that in respect of the merits regarding plaintiff's detention in the year 2003, I must find in favour of the plaintiff, whose version of the events is more probable. All the witnesses for the defendants did not deny that when plaintiff was discharged from RFM hospital he was taken to the police holding cell and kept there for four days. The evidence of DW1 during cross examination in this regard is telling:

Question: Plaintiff was removed from RFM hospital under the pretext you were taking him to court but you locked him up at Manzini police station

Answer from DW1: I deny that, I did not do that. If plaintiff was discharged in the evening what would officers do because cells are for keeping people pending their appearance in court? It is unfortunate that other aspects of the case should be referred to my colleagues because I wasn't there during the court proceedings.

Question: You kept plaintiff in custody for four days without taking him to court or without charging him formally

Answer from DW1: Not true. Charges were pending, I don't know about plaintiff being taken to custody

Question: After four days you dumped plaintiff at gate of Mbabane government hospital without charge

Answer from DW1: I don't know anything about what has been put to me.

[23] On the above crucial matter DW1 and DW4 were evasive and did not appear on the face of it to be reliable witnesses on the issue of plaintiff's discharge from RFM hospital into police cells and later being 'dumped' at Mbabane government hospital. DW2's evidence was that he does not recall plaintiff being released from hospital (RFM) into police custody. DW2 testified during cross examination that he was not part of the officers who took plaintiff to the government hospital but insisted that police could not have 'dumped' plaintiff at the government hospital because that is not how police operate. I got the distinct impression that the defendants were closing ranks on the issue of failure to produce the plaintiff before court after he was discharged from RFM hospital.

[24] Defendants did not admit nor did they deny that plaintiff was again re-arrested in 2004, detained at Zakhele remand centre for a period of six months before he was released by the magistrate court without being prosecuted. Defendants' witnesses testified that they were not the investigating officers of the matter involving the plaintiff and his associates. From the court records though Bundle D, on count 4 alleges that the plaintiff committed a crime of housebreaking and theft with his accomplices on 14 May 2004. There is an entry also, that reflects that plaintiff was released on payment of E5,000 bail in November 2004. Considering these factors, it is more probable that plaintiff was re-arrested in the year 2004 if he is alleged to have committed an offence in May 2004-six months after he was discharged from Mbabane government hospital in November 2003. If this is the case, his arrest and detention in 2004 cannot be said to have been unlawful.

[25] The case for Defendants

The first defence witness 3004 Superintendent Sikhumbuzo Fakudze testified that he was one of the police officers who went to plaintiff's home at Maliyaduma in the morning of 4 June 2003. At the time he was stationed at Manzini regional police headquarters. The police were looking for the plaintiff, Simanga Ndzinisa and Velibanti Dlamini who were part of a syndicate that was committing crimes of housebreaking and theft and robbery in the Maliyaduma and Salukazi areas.

[26] On arrival at plaintiff's home, the police introduced themselves and explained their mission. It while the police were introducing themselves that one of the officers fell into a ditch and fractured his leg at Mr Ndzinisa's home. The ditch was of a foundation of a house. As the police assisted the officer in question, they found various household goods, grocery items as well as car windscreens and car radios that were hidden in the said ditch. The police suspected that the goods found in the ditch were part of the items reported stolen by various complainants from Salukazi, Nyakeni and Maliyaduma areas.

[27] The police went to a house where they believed the plaintiff and his 'partners in crime' were. The police shouted and informed the suspects that they were police officers and that they should open the door. Jomo Mavuso stood next to the door. DW1 is unsure whether the door was opened by Jomo Mavuso or by the people who were inside the house. Inside the house, the police found more groceries in bags. As soon as the door opened, the plaintiff and Simanga Ndzinisa fled in different directions from the scene through a window.

[28] The police pursued the two suspects. DW1 and DW4 3167 Detective Sergeant Sipho Bhatinisi Mamba were in the group of officers who chased after the

plaintiff who fled on a downward direction from his homestead. DW2 3106 Detective Constable Musa Masimula and DW3 2944 Assistant Superintendent Justice Mabuza pursued plaintiff's associate who fled upward in the direction toward eKukhanyeni. Plaintiff's companion outpaced the police and was not arrested on that day. He was arrested about two months later.

[29] Mr Ndzinisa, the court heard, fled and hid in a small bush about two hundred metres below his homestead. The police cordoned the bush and looked for the plaintiff. After about thirty minutes, the plaintiff came out of the bush and fled uphill. He was chased for a long distance before he was shot at the back. Before he was shot, warning shots were fired and the plaintiff was ordered to stop as the police wanted to arrest him. The plaintiff did not comply. According to DW1 the plaintiff was shot at a distance of about a kilometer from his home. He was shot with a high calibre R4/R5 rifle whose shooting range is between three hundred and four hundred metres. The police officers who shot at plaintiff were at a distance of about four hundred metres away from him.

[30] DW1 testified that in the team of police officers who chased after the plaintiff- were Jomo Mavuso (deceased), Superintendent Vusi Nkambule; Assistant Superintendent Justice Mabuza, Constable Shabangu (deceased), and Constable Musa Masimula. Constable Shabangu is the officer who suffered a fracture to the leg when he fell into a ditch at plaintiff's home. How he could have pursued the plaintiff after he suffered a fracture to his leg is unclear from the evidence of DW1. DW4's evidence that Shabangu fell into the ditch when the police were hot on the heels of the plaintiff is more probable.

- [31] DW2 Constable Masimula and DW3 Assistant Superintendent Justice Mabuza denied that they chased after plaintiff. Their evidence is that they pursued plaintiff's associate and he outran them. All the officers who gave evidence on behalf of the defendants denied that they were investigating officers in the matter. It was DW2's evidence that the plaintiff was subsequently taken to court after he had stayed in hospital for a while. He was taken to court by Mkhetsfwa Dlamini who is now deceased. Mkhetsfwa was with another officer when they are said to have taken plaintiff to court. DW2 stated that DW4 was one of the investigating officers of the cases involving plaintiff-a fact that is denied by DW4.
- [32] DW4 testified that DW2 and 4021 Mandla Dlamini were investigating officers in the matter involving the plaintiff. 4021 Mandla Dlamini is deceased. At the time of plaintiff's arrest, DW4 was stationed at Lukhozi Serious Crimes Unit and was at Maliyaduma to provide reinforcement on 4 June 2003. In chief, DW1 testified that in the years 2003-2005 he was one of the investigating officers of the matter involving the plaintiff and his associates. DW1 changed tune during cross examination when he stated that the investigating officers of the case against the plaintiff were Assistant Superintendent Mabuza and Constable Shabangu among others.
- [33] When the police finally caught up with the plaintiff, he was cautioned in accordance to the Judges' rules. According to DW1 and DW4 plaintiff told the police that the exhibits in connection with the crimes of housebreaking and theft were hidden in the foundation of the house outside his house. DW4 testified that the plaintiff pointed the exhibits out when they reached his homestead. Plaintiff testified that he could not have pointed out anything to the police because at his home, where he was shot, he was dragged to the

upper part of his homestead and lay on the ground there until he was taken to the hospital.

- [34] I am of the view that the arrest of the plaintiff was not without legal cause. Certain items, suspected to be exhibits for crimes of housebreaking and theft were recovered from plaintiff's homestead and from inside plaintiff's house. The plaintiff was subsequently charged with housebreaking and theft and was released on bail.

[35] **Use of Force: Was it Justified?**

The issue to be decided is whether the use of force by defendants was justified, and if justified, whether reasonable bounds were exceeded in the circumstances of the case.

- [36] Section 41(1) of the Criminal Procedure and Evidence Act, 1938 is apposite:

'(1) If any peace officer or private person authorized or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any of the offences mentioned in Part II of the First Schedule, attempts to make such arrest, and the person whose arrest is so attempted flees or resists and cannot be apprehended and prevented from escaping by other means than by such officer or private person killing the person so fleeing or resisting, such killing shall be deemed in law to be justifiable homicide.'

- [37] It is clear under this section that the user of the force bears the *onus* to justify the use of such force on a balance of probabilities and in this case, the incidence of the *onus* rests squarely on the defendants. I will assume in defendants' favour that they were indeed justified in arresting plaintiff for certain offences he allegedly committed.

[38] The sanctity of human life, bodily integrity and liberty is a cornerstone of the Bill of Rights enshrined in our Constitution⁸. The police, in enforcing the laws of the land, must always exercise restraint in the use of lethal force in effecting arrest. Each case will of course depend on its own particular circumstances. Section 15(4) of the Constitution reads:

‘15 (4) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are mentioned in this subsection, a person shall not be regarded as having been deprived of life in contravention of this section if death results from use of force to such an extent as is reasonably justifiable and proportionate in the circumstances of the case-

(a)....

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c)...

[39] It is quite clear that section 15(4)(b) of the Constitution limits the powers of the police to use force to such an extent as is reasonably justifiable and proportionate and the offence is limited to offences mentioned in Part II of the First Schedule of the Criminal Procedure and Evidence Act, 1938 which lists certain serious offences.

[40] In my view, while it is clear that plaintiff was being pursued by the police for having allegedly committed housebreaking and theft at Salukazi, Nyakeni and Maliyaduma areas, the pertinent question rests on the issue whether the police used force which was proportional to the seriousness of the offences. The *onus* is upon the defendants, as the users of force, to show on a balance of probabilities justification and reasonableness of the force used.

⁸ Chapter 3 of the Constitution of ESwatini Act 1/2005.

[41] In their use of force, whether to kill or incapacitate a fleeing suspect, the police have to exercise restraint and use lethal force as a matter of last resort when all other means have failed; for example, when the police pursuing a fleeing suspect are armed with rifles, the police have to warn the suspect that the rifles may be used, and if used, it is necessary perhaps to shoot into the air before actually shooting at the suspect. The court was told that DW4 was the closest officer to plaintiff when he was pursued. DW4 was not carrying a firearm; he was armed with a baton instead. DW4 was in hot pursuit of plaintiff when he heard a gunshot from across the valley; immediately thereafter plaintiff reduced his speed and DW4 and the other officers caught up with plaintiff. DW4 said nothing about hearing warning shots before the shot that felled plaintiff was fired. DW4 testified that he introduced himself and the other officers to the plaintiff; he cautioned him in terms of the Judges' rules, plaintiff. Plaintiff said something about items found hidden in the dug up area of a foundation of a house at his homestead. The items found included, but were not limited to car windcreens, car windcreens and car radios.

[42] In this case, plaintiff fled from the police and hid in a bush. He remained in the bush for about thirty minutes while the police cordoned the bush. This must have frustrated the police. When the plaintiff came out of the bush, he persisted in fleeing from the police.

[43] Now, the question is, was the force used justified in the circumstances of the case?

[44] Section 15(4) of the Constitution and section 41 of the Criminal Procedure and Evidence Act, 1938 reflect well known and powerful considerations of legal policy: the arrest of a person deprives him of his liberty and it is

accordingly necessary that he be informed as soon as practicably possible of the reason for the drastic curtailment of one of his fundamental rights. Section 16(2) of the Constitution in turn reads:

‘16(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which that person understands, of the reasons for the arrest or detention and of the right of that person to a legal representative chosen by that person.’

[45] According to plaintiff, police never attempted to effect an arrest upon him at Maliyaduma, they simply shot at him. Jomo Mavuso is said to have stated that the shooting of the plaintiff was a case of mistaken identity as they were looking for Simanga Ndzinisa. I take the view that it is not necessary to decide this point because it lacks sufficient evidence as Jomo Mavuso has since died and because I have decided to assume in defendants’ favour that the arrest was lawful.

[46] In this case I propose therefore to proceed on the premise that DW1 and the other police officers were entitled to arrest the plaintiff and to pursue him if he attempted to flee; the inquiry then should be whether in light of the circumstances of this case, the force used was justified and excusable. As I have pointed out already, the *onus* to justify the use of force rests upon the defendants to discharge same on a balance of probabilities. Here we have an unarmed plaintiff fleeing from the police and being flushed out of a bush and continuing to flee. The police pursuing him are armed with R4 and R5 rifles of high calibre. In their shooting, it seems more probable that they intended to incapacitate the plaintiff and in my opinion it was an excessive use of force. The police could have shot into the air to cause plaintiff to surrender.

According to DW4's evidence, there clearly was no warning shot fired before plaintiff was shot.

[47] After plaintiff was shot, DW4 testified he still ran but his speed reduced. It was then that police caught up with him and arrested him.

[48] For the above reasons, I come to the conclusion that the defendants have failed to discharge the *onus* that primarily rests on them and find that the use of force in the circumstances of this case was excessive and hence unlawful.

[49] **Damages**

In the absence of actuarial assessment, it is often difficult to measure damages for pain and suffering with mathematical precision. In claims of damages, the purpose of law is not to punish the defendants in as much as it is to compensate the plaintiff⁹.

[50] In his particulars of claim the plaintiff claims E1000 000-00(one million Emalangeni) for pain and suffering; E500 000-00 (five hundred thousand Emalangeni) for discomfort; E1000 000-00 (one million Emalangeni) for *contumelia* and E400 000-00 (four hundred thousand Emalangeni) for future medical expenses and earnings. The total amount claimed is E2000 000-00(two million Emalangeni).

[51] A claim for pain and suffering is for non-patrimonial loss. In making an award for such non-patrimonial loss the principles of fairness and conservatism play a decisive role as it calls for the consideration of other factors such as:-agony and suffering of the plaintiff, provocative role, if any played by the plaintiff in precipitating the assault. In this case, it is quite probable that plaintiff's

⁹ *Khosi v Babeli* 1991-1996 LLR 275.

conduct in fleeing, hiding in a bush and later fleeing again from the police after police orders to stop was provocative and a *sine qua non* of the unfortunate sequel of events that led to his injuries.

- [52] On the other hand, the police, in my view failed to exercise restraint when this was necessary. At the end of the day the court should exercise its discretion to decide by the broadest general considerations on an amount which it considers to be fair in all circumstances of the case. The following extract from the learned Judge Trollip JA is apposite:-

‘[T]he court should act conservatively rather than liberally towards plaintiff lest some injustice be perpetrated on the defendant-*favorabiliores rei potius quam actors habentus*¹⁰.’

- [53] In this case, the injuries of the plaintiff were quite serious as they involved extreme pain as well as an extended period of stay in hospital. During the trial, fifteen years after the gunshot injury was inflicted, the gunshot wound was still discharging. PW3 Dr Tembe stated that plaintiff would have to be subjected to further tests and assessments to ascertain why the wound was not healing.

- [54] Concerning the disuse atrophy of the left leg and quadriceps muscles as well as the loss of sensation on the left leg and lateral dorsum of the left foot, PW3 could not say for certain if this was a result of the gunshot wound or if it was a condition the plaintiff had prior to him being shot by the police. It has therefore not been shown that the disfigurement of plaintiff's left leg is a result of the assault by the police. Nor has it been shown, in the absence of

¹⁰ See *Bay Passenger Transport v Franzen* 1975 (1) SA 269 at 274.

independent corroborative evidence that it has affected plaintiff's personal, present as well as future prospects of his ability to work.

- [55] It has been said that pain and suffering cannot be expressed directly in money since it lacks an inherent patrimonial value. In *Sandler v Wholesale Coal Suppliers Ltd*¹¹ the court stated as follows:

'The amount to be awarded can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the Judge's view of what is fair in all circumstances of the case.'

- [56] It has not been shown that the disfigurement of the plaintiff's left leg is a result of the assault by the police. Nor has it been shown, in the absence of independent corroborative evidence- that it has affected plaintiff's personal, present as well as future prospects of employment.
- [57] I take into account the period of detention was four days after plaintiff was discharged from RFM hospital. The plaintiff was charged and detained at RFM hospital under police guard for four months and upon discharge was taken to a holding cell where he was kept for four days before he was taken to Mbabane government hospital where he was admitted. I cannot ignore that he would in any event have remained in hospital for four months at RFM hospital and for two weeks at Mbabane government hospital. Thus, the *de facto* detention in the year 2003 was only for four days. Plaintiff was never taken to the magistrate court in person for remand hearing in 2003 nor is a record of what became of the charges preferred against him in 2003 present in the pleadings.

¹¹ 1941 AD 194 at 199: see also *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988(2)SA 1 at 11.

- [58] There is also no evidence plaintiff was brought in person before a magistrate court as required by section 30(2) of the Criminal Procedure and Evidence Act, 1938. There is therefore no evidence of an order authorizing the continued detention of the plaintiff as required by the aforesaid section. The police appear to have acted in total disregard of the plaintiff's rights and dignity as a person which gives rise to an element of *contumelia*.
- [59] The plaintiff's gunshot wound was still discharging pus fifteen years after he was shot. This was observed by the court during the trial in 2018. The plaintiff did not, however lead any evidence of future hospital and medical expenses that he will likely incur. He was also unable to prove the amount he spent at the government hospital as he testified that he misplaced the document reflecting the amount he paid for treatment there. Plaintiff did provide a document reflecting that at RFM hospital he was charged E1036.00 (one thousand and thirty-six Emalangeni only)¹². He did not lead any evidence of hospital and medical expenses that he is likely to incur in the future. No figures have been presented for consideration in this regard. Medical expenses are in the form of special damages which must be based on actual or estimated figures.
- [60] In the result, I make the following orders:-
- [61] Defendants are ordered to pay E250,000-00 (two hundred and fifty thousand Emalangeni) for pain and suffering and discomfort; E50,000-00 (fifty thousand Emalangeni) for contumelia.
- [62] In the event the action succeeds in part and the plaintiff is awarded damages in the total sum of E300,000-00 (three hundred thousand Emalangeni)

¹² See Bundle B.

together with interest and costs at the ordinary scale. Interest on the amount awarded at the rate of 9% per annum *a tempore morae* with effect from 16 September 2020 being the date of judgment to date of payment.


M. LANGWENYA
JUDGE OF THE HIGH COURT

For Applicant: Mr O. Nzima

For Defendants: Mr B. Tsabedze