



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Case No. 542/2017

In the matter between:

**SAMUKELISIWE MATSEBULA**

**PLAINTIFF**

**AND**

**THE NATIONAL COMMISSIONER OF**

**POLICE**

**1<sup>st</sup> DEFENDANT**

**THE ATTORNEY GENERAL**

**2<sup>nd</sup> DEFENDANT**

**Neutral citation:** *Samukelisiwe Matsebula vs The National Commissioner of Police & Another [542/2017] [2020] SZHC 35 (10 March 2020)*

**Coram:** FAKUDZE, J

**Heard:** 18/06/2019; 15/10/2019; 16/10/2019; 17/10/2019; 23/10/2019

**Delivered:** 10<sup>th</sup> March, 2020

**Summary:** *Claim for damages arising from an alleged assault by 1<sup>st</sup> Defendant's employees in the course and scope of duty – Plaintiff seek an order for payment of damages of One Million Five Hundred and Five Thousand Emalangeni (1,505.000.00) all over the body, Defendants deny questioned by the plaintiff was assaulted Court rules in*

*Five Hundred and Five Thousand Emalangeni in that she was unlawfully assaulted, kicked strangled and suffocated by police officers. liability and claim that the Plaintiff was police officers. Evidence establishes that by the police – Plaintiff has proven its case. favour of the plaintiff.*

## **BACKGROUND**

[1] This is a claim for damages arising from unlawful assault, strangulation and suffocation by police officers. The consequence of the assault was that the plaintiff has been enduring serious pain and her operation for appendix was disturbed. She therefore suffered damages for which she holds the defendants liable.

[2] The damages suffered are as follows:

2.1 Pain and suffering E600.000.00 (Six Hundred Thousand Emalangeni);

2.2 Future medical expenses: E200,000.00 (Two Hundred Thousand Emalangeni);

2.3 Medical expenses: E5,000.00 (Five Thousand Emalangeni;

2.4 Permanent disability in the sum of E700,000.00 (Seven Hundred Thousand Emalangeni).

[3] The Defendants have denied liability alleging that the police only questioned the plaintiff and never inflicted any harm. Any harm that was inflicted was caused by a certain Sihle Mavuso.

## **THE PARTIES CONTENTION**

### **The plaintiff**

#### **PW 1 SAMUKELISIWE MATSEBULA**

[4] This witness who is the plaintiff states that she was assaulted by police officers at Bhunya Police Station on the 4<sup>th</sup> November, 2016 at about 1600 hours. She was brought to the Police Station by one Sihle Mavuso who is the Manager for security services at Montigny in Bhunya.

[5] Sihle left the plaintiff with the police and was then led into the offices of the Criminal Investigation Department. After she was left, the police officers assaulted her both physically and verbally. She was kicked all over her body. She was kicked on the stomach and even peed on herself. Blood was all over the floor. She was also handcuffed and was suffocated by the police using a plastic bag. She was lying without any assistance on the bench. The assault on her led to her bleeding in her private parts.

- [6] On the night of the assault, the plaintiff could not sleep due to the pain and could not swallow properly due to the strangulation which resulted in marks on her neck. The police took her to Mankayane Government Hospital for treatment on the following day. The incision where her operation for the removal of an appendix was, was swollen, and painful. Her clothes were also soaked in blood.
- [7] On the 10<sup>th</sup> October, 2019, the plaintiff requested that the police should take her to Good Shepherd Hospital instead of taking her again to Mankayane Hospital. They passed by her homestead where they met the plaintiff's mother who was informed that the plaintiff had been injured. At Good Shepherd Hospital, the police paid for her medical bill. The plaintiff was as operated on to remove pus or abscess on her abdomen. She stayed at that hospital for three (3) months.
- [8] The plaintiff testified that after she was discharged at Good Shepherd, the Bhunya police would frequently take her to Mankayane Hospital for check-ups and the changing of bandages. She later opened a case against the police. The assault led to her not being able to walk long distances. She was also removed from piling planks to rolling out tissue at the toilets to fellow employees at her place of employment.
- [9] In February, 2017, November, 2017 and May 2018, she was operated on in order to remove the pus in her abdomen. The pain she experienced caused

her to attempt committing suicide in February, 2019. The Plaintiff also has difficulty lifting a 5 litre container and doctors have told her that she will no longer be able to conceive. She is only thirty nine years of age and there is always a smelly discharge from her private parts.

[10] The Plaintiff proceeded to claim the amounts as set out in the Particulars of Claim.

[11] During cross examination it was established and put to the plaintiff that it was Sihle and not the police officers who strangulated the Plaintiff. The plaintiff admitted that Sihle strangulated her before taking her to the police station but did not hurt her leading to bruises on her neck. The bruises were caused by the police who also strangulated her until she peed on herself. She was further assaulted all over her body. The cross examination further established and put to the Plaintiff that she was never assaulted. The police only asked her questions. The plaintiff responded by saying that she was assaulted by the police. On the 6<sup>th</sup> October, 2016, she reported to the police the strangulation by Sihle. She could not do so on the 4<sup>th</sup> October, 2016 because the police did not give her a chance to say anything whilst she was being tortured and assaulted. It was also put to the plaintiff that the medical report established that she was in good health. The Plaintiff responded that the doctor who first examined her did not put her through the X ray to determine the extent of the internal injury. It was put to the Plaintiff that the pain where the operation for an appendix took place was as a result of the plaintiff being involved in karate as a sport. The Plaintiff responded that the

karate never affected her at all. The pain was caused by the assault caused by the police. On the issue of being given pain killers and a drip to remove the pain, the plaintiff responded by saying that she is entitled to damages for pain and suffering because the pain is still continuing notwithstanding the medication she received during the early stages of the assault. Not much was established by the re-examination.

**PW 2 NCOBILE SIMELANE**

[12] PW 2 is the mother of the Plaintiff. She testified that on the 10<sup>th</sup> October, 2016 a police van from Bhunya Police Station came to her homestead at Ngcina in the Lubombo Region. Her daughter alighted from the front seat and came to her. PW 2 testified that the plaintiff had difficulty walking and then asked the plaintiff what had happened. The plaintiff told her that she had been assaulted by the police. PW 2 testified that she noticed a pool of blood coming from the Plaintiff's private parts. She then went to enquire from the police as to what had happened. The police told PW 2 that they had been sent by their superiors to inform PW2 that the plaintiff had been injured in the hands of the police.

[13] PW 2 further testified that she witnessed that the plaintiff was weak and appeared to be on the brink of death due to the bleeding and she was very hurt about what she witnessed. PW 2 told the police that she did not want her daughter in that condition. The police then took the plaintiff to Good Shepherd Hospital. PW 2 finally testified that the Plaintiff frequents the hospital as a result of the assault by the police and that doctors have advised

that the plaintiff will no longer conceive as a result of the assault. PW 2 was cross examined and the cross examination established that it was improbable for the Bhunya officers who caused the plaintiff wrong to tell PW 2 that they had committed the wrong. The cross examination further established that if plaintiff was bleeding profusely as described by PW 2 an ambulance would have had to carry her. It was then put to PW 2 that all she heard about the assault was related to her by the Plaintiff and she answered in the affirmative.

### **PW 3 SOZABILE DLAMINI**

[14] This witness testified that in 2016 he worked with the Plaintiff at Bhunya. He saw the Plaintiff being taken in a van belonging to the security officers after being accused of insulting SEIWU personnel. PW 3 testified that on the following day the Plaintiff reported to him that police officers nearly killed her the previous day. He further testified that he witnessed that the police officers would always take the Plaintiff to hospital for medical attention. He finally testified that he observed that the plaintiff had been brutally assaulted. The cross examination of PW 3 did not establish much except that the witness did not see the assault happening. He responded by saying that he saw that the plaintiff had been assaulted.

### **PW 4 ELIAS GWEBU**

[15] This witness' evidence corroborated that of PW 3 in that he saw the Montigny Personnel take the plaintiff and that the plaintiff reported to her

later that she had been assaulted by the police. PW 4 also testified that the police took the plaintiff for medical treatment many times. Nothing much came out of the cross examination.

- [16] The plaintiff then closed its case and later applied from the Bar to re-open it so as to call a Medical Practitioner. The defence did not object to the case being re-opened.

**PW 5 DR. MAUREEN MAGAGULA**

- [17] The reason why the plaintiff called Dr. Magagula was that the Government doctors refused to give evidence against their employer. She possesses a Bachelor of Medicine and Surgery which she obtained from the University of Nairobi in 1994. She had been practising as such for the past 25 years. She has been consulted by patients who have been similarly injured particularly whilst still in the employ of Mbabane Government Hospital.

- [18] PW 5 testified that she was consulted by the plaintiff and she complained that she was sick and found it extremely difficult to continue working as an employee. PW 5 examined the Plaintiff and found that in her abdomen there were two scars. One was in the mid line section and the other was near the appendix. PW5 testified that she noted that the scar near the appendix had been opened several times indicative of wound dehiscence and she was told by the plaintiff that it was because the doctors were draining pus. PW 5 then explained to the Plaintiff that there is no medicine that will make her better



and she is permanently deformed and the scars that she had will cause her pain for the rest of her life. PW 5 explained to the Plaintiff that if she decides to take pain killers she had to do that for the rest of her life and they will compromise her kidneys. Chances of mothering another child have been reduced due to her medical condition. The same applies to her ability to maintain her employment.

[19] PW 5 testified that in examining the plaintiff, it transpired that she was assaulted in October, 2016 and a laparotomy was then done at Good Shephard to find out what was the cause of the pain in the abdomen and that was the first time doctors found pus. This was on 10<sup>th</sup> October 2016. PW 5 testified that in February, 2017 the plaintiff was opened again to drain the pus. Same thing happened in November, 2017 and in May 2018. The cross examination established that the wound caused by the operation with respect to the appendix had healed. It further established that the patient came with the medical record which became the basis upon which PW 5 gave evidence. The re-examination established when a scar contracts it causes a lot of pain. The Plaintiff will have to live with the pain for the rest of her life. The Plaintiff closed its case.

### **The Defendant**

#### **DW1 GOODNESS MASEKO**

[20] This witness told the court that the Plaintiff was brought by Sihle Mavuso at Bhunya Police Station for insulting people at her workplace. She was

attended to by three police officers, not four, as alleged by the plaintiff. DW 1 was part of the three officers who questioned the Plaintiff since she is a female. She testified that the Plaintiff was never assaulted at the police station. The witness told the court that the Plaintiff was a suspect in a case of malicious damage to property which had previously been reported. The cross examination established that no one had lodged a formal complaint to the police about the Plaintiff insulting someone. DW 1 answered in the affirmative. The cross examination further established that there was no need for the Plaintiff to be questioned and DW 1 changed tune and said that the questioning had to do with the plaintiff's case of a malicious damage to property that had been reported in June, 2016. The questioning was based on that charge. DW 1 testified that when a victim had been assaulted the involvement of the police is only in taking the victim to hospital and once the RSP 88 Form is filled, that is the end of the police involvement. The medical record shows that the police were involved more than once at Mankayane Hospital and at Good Shepherd Hospital. When DW 1 was re-examined, it transpired that the plaintiff had been brought to the police by Sihle Mavuso for safe keeping because there was fear that commotion between the Plaintiff and SEWU people would erupt.

### **DW 2 JOZANE MAZIYA**

[21] This witness was part of the three police officers who attended to the Plaintiff at the police station. His evidence corroborated the evidence of DW 1. He was asked about the malicious damage to property case. He further testified that on the 4<sup>th</sup> October, 2016 at about 1600 hours the

Plaintiff was brought to the CID office for questioning after having insulted SEIWU personnel. DW 2 disputed that the plaintiff was assaulted. DW 2 further stated that there are two instances when police take a person to hospital. Firstly, when there is an inquiry, and secondly, when helping the concerned person upon request to save life.

### **DW 3 SIMPHIWE MASHWAMA**

[22] The witness stated that she got into the CID room where the plaintiff was with the police. The plaintiff greeted DW 3. DW 3's purpose of entering the room was to get a bench. The plaintiff was not assaulted when DW 3 found her. The cross examination established that the plaintiff was in the CID room on the 4<sup>th</sup> October, 2016 at around 1600 hours and she admitted that. DW 3 admitted that on the 5<sup>th</sup> October, 2016, she and another officer came to take the Plaintiff to Mankayane Hospital and that the plaintiff was in great pain in the abdomen.

### **DW 4 BHEKISISA BULUNGA**

[23] This witness stated that he was not part of the officers who attended to the plaintiff on 4<sup>th</sup> October, 2016 contrary to what the plaintiff told the court. He further told the court that he was aware of a docket which highlighted that the Plaintiff reported an assault against Sihle Mavuso. Under cross examination he stated that he never saw Sihle Mavuso.

## **DW 5 CHARLTON MTHETHWA**

[24] This witness stated that sometime in 2015, the Plaintiff joined a karate team whose instructor was DW 5. She left in March, 2016 complaining of stomach pains.

## **DW 6 DR NOMZAMO DLAMINI**

[25] This witness stated that she was the first one to examine the plaintiff. She filled in RSP 88 Form. There were no blood stains on the clothes. DW 6 noted that the plaintiff had done an appendix and a caesarean operation. There were injuries on the plaintiff's right forearm and left wrist. There were pains in the chest and neck and the soft tissues had been affected. The plaintiff was allegedly assaulted with blunt trauma on the neck, fore arms, legs and chest. DW 6 did not observe any disorders; that is why she concluded that the plaintiff was in good health. She also alluded to the fact that an ultra sound report reflected that the cyst in the plaintiff was abnormally large. It expands on its own and can only be corrected by gynaecological means. DW 6 further stated there was pus coming out of the plaintiff's body usually caused by bacterial infection. She was analysing the report in page 37 of the medical record.

[26] On the issue of the abdominal pain DW 6 stated that the concoction the plaintiff drank when trying to commit suicide could be the cause for the abdominal pain. When cross examined DW 6 confirmed that she carried out a physical examination of the Plaintiff. She did not do any ultra sound scan.

She further confirmed that an old scar can open up when a patient has trauma. She further confirmed that the operation carried on the Plaintiff was for the removal of pus that had accumulated in the abdomen. It was not for the removal of the cyst.

**DW 7 MFANALENI MAVIMBELA**

[27] This witness stated that he is one of the police officers who were instructed to take the Plaintiff to Siteki Good Shephard following her request. The witness told the court that the plaintiff requested to take the medical records at the homestead on the way to hospital. He denied that they reported to PW 2 that the plaintiff had been injured by members of the police service whilst they were in the course and scope of their employment. On cross examination it was put to DW 7 that they never reported to PW 2 that the plaintiff was injured under the hands of the police and that this was not put to PW 1 and PW 2. It was also put to DW 7 that the relevant medical papers from Mankayane Government were with the plaintiff on that day and there was no need to go to her homestead except to report that the police assaulted her and DW 7 refused to respond to that assertion.

[28] The defence then closed its case.

## **THE PARTIES SUBMISSIONS**

### **The Plaintiff**

- [29] The plaintiff states that there is no doubt that the plaintiff was assaulted; RSP 88 Form, the medical records, the evidence of Dr. Magagula, Dr Dlamini, the plaintiff and the other witnesses establish this fact. There is further no doubt that as a result of the assault, the plaintiff was treated for the injuries and the pain on her abdomen persisted up until an operation was done to find out the cause of the pain. It was discovered that there was pus in the abdomen on the 27<sup>th</sup> October, 2016 and same was drained. Various operations have been performed on the plaintiff including those in February, 2017, November, 2017 and recently in May, 2019.
- [30] The plaintiff submits that the evidence of DW 5 (Charlton Mthethwa) to the effect that the plaintiff's condition was caused by her taking part in the karate sport in 2016 should be thrown away. The same applies to the evidence of the police officers who were Defence witnesses which suggested that Sihle Mavuso was responsible for the assault. The plaintiff's version has to be accepted that she was assaulted by the police because there is evidence that she was interrogated by the police on the day of the assault. The police version indicates that she was interrogated with respect to two matters; One related to a malicious damage to property offence which had happened earlier during the year. The other one was that the plaintiff had been brought to the police for her safety following that she had allegedly insulted workers at Montigny. With respect to the malicious damage to property, this had taken place sometime back and with respect to the safe

keeping, there was nothing to interrogate. Evidence has been established that Sihle Mavuso brought the plaintiff to the police station in order for the police to “deal” with her.

[31] The plaintiff’s case is that she was brought to her mother to inform her that the plaintiff had been injured at the hands of the police. This evidence was not challenged by the Defendant when cross examining “PW 2.” The evidence of “DW 7”, Mfanaleni Mavimbela, that the police officers went to the plaintiff’s home to fetch medical records was not put to “PW 1” and “PW 2.” It was an afterthought. The uncontroverted evidence is that they went to report that the plaintiff had been injured in the hands of the police. This is further consistent with the undisputed fact that the police frequently took the plaintiff thereafter to hospital for medical check-ups. This is inspite of the fact that all the police officers called as witnesses maintained before the court that the involvement of the police in assault cases only ends once RSP 88 Form has been filled.

[32] The plaintiff submits that the police denial that they never assaulted the plaintiff is not consistent with the evidence led and it cannot be true. The plaintiff detailed how she was assaulted, suffocated, kicked all over the body, pinned down on the bench and insulted and this was never challenged by way of cross examination. It is further common cause that as a result of the assault, the plaintiff suffered serious and permanent injuries. This is seen from RSP 88 Form, the medical history of the plaintiff, and the evidence of the plaintiff, her mother and Dr. Magagula. The RSP 88 Form

reflects that the plaintiff was assaulted all over the body. Page 1 of Medical Records shows that too. The evidence of “DW 6” Dr. Dlamini, that the pus was not caused by the assault but by the operations for the draining of cyst on the plaintiff must be rejected. This is so because DW 6 conceded under cross examination that no operation was done on the plaintiff as shown in pages 2 and 5 of the Medical Records to remove any cyst. DW 6 conceded that the only operation on the Plaintiff was on the 27<sup>th</sup> October, 2016 as shown in page 8 of the Medical Records and that was an exploratory laparotomy – an operation to find out the cause of the pain in the abdomen. “DW 6” conceded that is when the pus was discovered and it was drained. “DW 6” conceded that the assault or trauma could have caused the pus.

[33] The plaintiff testified that there was incessant and unrelenting pain on her abdomen leading to an operation on the 27<sup>th</sup> October, 2016 to find out the cause of the pain and the pus. A number of operations, three in total, were thereafter done to remove the pus yet again. Dr. Magagula and Dr. Dlamini also agreed that chances of plaintiff conceiving are slim. Dr. Magagula stated that the plaintiff has been deformed permanently and will feel the pain for the rest of her life. This was not disputed by the defendants.

[34] On the issue of the damages, the plaintiff states that she told the court the nature of assault she had to endure and that she could not sleep on the night of the assault. She even attempted committing suicide on the 8<sup>th</sup> February, 2019. Dr. Magagula indicated that if the plaintiff decides to take pain killers to reduce the pain, she will be causing damage to her kidneys. The



E600,000.00 is therefore justified in the circumstances. On the issue of the E200,000.00 for future medical expenses, same is warranted considering that the plaintiff has had to pay for her medical expenses from the time of the assault in 2016 to date at a huge cost to her. The sum of E5,000.00 for medical expenses is warranted. The plaintiff's injury is permanent. This has been confirmed by Dr. Magagula. The plaintiff has been removed from doing hard work to do light duties. She is also not at work most of the time due to the injury and does not get paid. Evidence has been led that the plaintiff will no longer have children. Therefore E1,000.000 would be warranted for this head. The smelly discharge and the pus the plaintiff has is permanent. Finally, it is submitted that qualifying expert's fees and disbursements for the involvement of Dr. Magagula in this matter was warranted and the court should in addition to the costs order, also grant the same.

### **The defendants**

[35] The defendants state that the plaintiff told the court that she was assaulted by Sihle Mavuso on their way to Bhunya Police Station. The plaintiff is not suing Sihle Mavuso. She told the court that she was further assaulted at the police station. The police deny assaulting the plaintiff. It was put under cross examination that the plaintiff has never been assaulted by the police, but Sihle Mavuso. It was also put to PW 2 that the police never came to report any injury at the plaintiff's homestead. The version of the Defendants was put by the police officers who testified before court.

[36] Further, PW7 told the court that as a police officer who was instructed to take the plaintiff to Siteki Good Shepherd, they were never sent to report any injury, but were instructed to take her to hospital as she so requested. The defendants' evidence was consistent that the plaintiff was never assaulted by the police. The defendants submit that the plaintiff minimised the role played by Sihle and exaggerated the role by the police. Consequently the plaintiff deliberately failed to sue Sihle despite overwhelming evidence that he assaulted her. There is further overwhelming evidence that the plaintiff was assaulted in her karate activities. The plaintiff seeks to sue Government for the damages caused by Sihle and complications resulting from her previous medical history, her previous leg injury and her karate assaults. Such liability should not be imputed to the police in terms of the law.

[37] The plaintiff stated in her evidence in chief that she ingested jeyes fluid, a harmful substance which can lead to complications as per the expert's evidence which was tendered before court. The plaintiff complained of complications which she said caused her to do several visits at hospitals. The question still remains as to how the injuries complained of are attributed to the police. In the event the court finds in favour of the plaintiff, how would the alleged assault by the police be differentiated from the assault by Sihle, from the karate kicks, complications from the plaintiff's previous medical records as well as her ingestion of jeyes fluid, for purposes of quantum. The plaintiff relies also on the non-prosecution of the criminal offence on the assault. This also reveals the plaintiff's impermissible desire to scrutinize privileged documents in possession of the defendants.

[38] Still on the issue of quantum, the defendant states that the plaintiff has not been referred to any authority that can be used as a baseline for assessments of damages, particularly those that have similarities to the present case. The RSP 88 Form shows that the plaintiff had soft tissue pains on the legs, chest and neck pains. However, no causal link was established between these pains and the alleged assault. The plaintiff also exaggerates the injuries in that there were not fractures or dislocation as per the expert report and the evidence tendered before court. Cross examination revealed that the plaintiff received treatment, was subjected to a drip and pain killers. The injuries were therefore mitigated.

[39] As far as the claim for permanent disability is concerned, the defendant's states that the plaintiff is claiming E600,000.00 for it. Permanent disability was not pleaded and the resultant conduct thereof by the Defendant was not pleaded. No disability was proved by the expert witness sought to be rely on by the plaintiff. The plaintiff is therefore not entitled to permanent disability. The medical records filed do not suggest that the plaintiff suffered any permanent disability. Permanent disability should be distinguished from continuous medical check-ups as revealed by cross examination.

[40] On medical expenses, the defendant states that the plaintiff is claiming for medical expenses in the sum of E5,000.00. The plaintiff only attended government hospitals. The plaintiff was also brought to hospital by the police and patients brought by the police do not pay. The plaintiff failed to account for the claimed medical expenses on cross examination. On simple

deduction of mathematics, the purported medical expenses amount to E552.00.

[41] Future medical expenses are claimed by the plaintiff as E200,000.00. The plaintiff failed to show how many medical check-ups are done per year. In contemplation of the life expectancy for females in eSwatini to compute future medical expenses, the court has to consider (a) the need for future medical provision, (b) estimated check-up costs per year, age of the plaintiff and taking into account the average life expectancy for females in eSwatini, multiplied by the costs to be incurred per year. Therefore future medical expenses have not been proved and therefore there is no need for such an award.

[42] The defendant alleges that the plaintiff had pleaded one case on the pleadings and established another case in trial. The plaintiff did not plead her age and never pleaded that the police were sent to the plaintiff's homestead to report the injury. Further the trauma which the plaintiff subsequently sought to establish on trial was never pleaded. Therefore the plaintiff's claim is bad law and has to be rejected by the court.

[43] On the issue of the quantum of damages, the defendant states that the claimed amount of One Million Five Hundred and Five Thousand (E1505.000.00) is excessive in relation to the injuries sustained in the circumstances. Fifty Thousand Emalangenani (E50,000.00) is fair and

reasonable. On the issue of costs for the medical expert, Dr Magagula, who was brought by the plaintiff, the defendant states that witness fees and disbursements have never been part of a bill of costs let alone a Court Order. The witness was brought after the Plaintiff had closed and re-opened her case. It is not clear what necessitated the bringing of this witness. The Plaintiff must therefore bear the costs of bringing this witness. The court should therefore dismiss the action.

### **The Applicable Law**

[44] In **Collen Muzi Ngwenya V Commissioner of Police and Another Civil Case No. 2267/2001** the court held that:-

*“[22] It is trite that if the preponderance of probabilities is such that the court cannot say which version is more probable than the other, then the party who bears the onus of proof, namely the Plaintiff must fail. In other words the Plaintiff’s version must be more probable than that of the Defendants, otherwise his claim must fail.....”*

[45] Likewise, in the case of **Attorney General V Howard Pokwane Nkambule Civil Appeal (29/2018) [2019] SZSC 1 (01/03/2019)** the Supreme Court held as follows:

*“[27] It is clear from our law that the onus of proving his claim lay squarely on the Respondent. In this instance and on the balance of probabilities he was required to prove the identity of the*

*assailants and that the assailants were acting in the course and scope of their employment.”*

[46] On the issue of damages, Her Ladyship Mabuza AJ, in the case of **Zakhele Gina V Commissioner of Correctional Services and 2 Others Case No. 72/05** stated as follows on proper assessment of damages:-

*“[31] ..... It is important that any award given to Plaintiff should not be unduly excessive and should not be seen as unduly enriching him otherwise the courts will be seen to be sending out a wrong message to society at large.”*

[47] In **Delisa Kenneth Masina V Umbutfo Swaziland Defence Force and Another Case 274/2005** (unreported), the court stated as follows:-

*“A plaintiff has to prove on a balance of probabilities that he has suffered damage, the extent of such damage and what amount of compensation he should be awarded in respect thereof. Damage and damages are determined through the appropriate measures of loss as well as the particular circumstance of each case..... If a plaintiff has not proved his damage, he is not entitled to allege that since the defendant is in possession of the necessary documentation an ‘enquiry as to damages’ should be held so that the damages which are found to be due to him may be paid..... In cases (wherein damage and damages are capable of precise calculation or assessment), it is incumbent upon a Plaintiff to*

*produce sufficient evidence  
of damages.”*

*substantiating the exact amount*

### **COURT’S ANALYSIS AND CONCLUSION**

[48] The plaintiff claims that on the 4<sup>th</sup> October, 2016 she was assaulted by the Bhunya police all over the body. She also states that before the assault, she had been throttled by Sihle Mavuso but was not hurt. The defendants are disputing this fact and alleging that the plaintiff was assaulted by Sihle Mavuso. The plaintiff should have sued Sihle Mavuso.

[49] Although the defendants have denied liability, the evidence led shows that there is merit in the plaintiff’s case. The evidence led shows that she suffered internal injuries which led to pus accumulating in her abdomen. She has had to undergo couple of operations to remove it. The plaintiff has pointed out how after having been assaulted by the defendants, she met Sozabile Dlamini whom she told that police almost killed her. Sozabile observed that the plaintiff had been assaulted and that she was walking slowly. He also testified that he saw the police on various occasions come to fetch the plaintiff to take her to hospital. The plaintiff and Sozabile were staying in the same compound. Elias Gwebu also confirmed that he saw the police come to fetch the plaintiff on several occasions.

[50] DW 3 Siphwe Mashwama was cross examined on whether the plaintiff was in the hands of the police on the 4<sup>th</sup> October 2016 or not. This was at or

around 1600 hours. She confirmed that it was so. She admitted that on the following day, she and another police officer came to take the plaintiff to Mankayane Hospital. They brought with them RSP 88 Form. She observed that the plaintiff had difficulty walking. This further lends credence to the plaintiff's version that the police assaulted her the previous day.

[51] The evidence of DW 1 was contradictory in certain respects. She told the court that the plaintiff was brought by Sihle Mavuso. She was never assaulted. In cross examination she said that the plaintiff was interrogated for a malicious damage to property offence which she had allegedly committed in June, 2016. When re-examined, she stated that the plaintiff was brought to the station for her own safety because there was commotion at her workplace because she had insulted somebody and that commotion between the plaintiff and SEWU was about to occur. DW 1 did not appear as a credible witness and her evidence did not improve or enhance the defendants' case. DW 1 further stated that the police only assist a victim of assault by taking him or her to hospital accompanied by RSP 88 Form. They do this once, meaning that after the victim has seen a doctor, the police are no longer involved. DW 1's version was confirmed by DW 2 who further stated that this service can be extended to a community member who requests it from the police. This is the basis upon which the police helped the plaintiff to go to Good Shepherd Hospital on the 10<sup>th</sup> October, 2016.

[52] RSP 88 Form is another piece of evidence that seeks to confirm the Plaintiff's version that she was assaulted by the police. Although the doctor



who first examined the plaintiff at Mankayane Hospital states that the plaintiff was “in good health,” she does state that there were bruises and abrasions “on the right forearm, left wrist.” She further says under any other injuries “general soft tissue pains, legs, chest, neck plains,” were manifest. When cross examined on what caused the pus in the plaintiff’s abdomen, the doctor said that the pus was not caused by an assault but by the cyst. She later admitted that no operation to remove the cyst was ever carried. The first operation to be carried out on the plaintiff was that of 27<sup>th</sup> October, 2016 at Siteki Good Shepherd where the pus was removed. The purpose of the operation was to establish the cause of the pain in the plaintiff’s abdomen. She later conceded that the assault or trauma caused by the police could have caused the pus in the abdomen. Under cross examination she further confirmed that an old scar (the appendix one) could open and lead to pus accumulating because of the blunt trauma. She further said that it is possible that the pus was caused by the blunt trauma. A number of operations thereafter were carried out all intended to remove the pus. In page 1 of the medical record the doctor states that there are “strangulation marks on the neck, and as well as pain on the chest wall, small abrasions on forearm, left wrist pains on legs.” The doctor further observed that the patient was an “assault victim – soft tissues.....? RSP 88 Filled.” The first part of page 1 states that the plaintiff as follows “having been assaulted by police while they were having a meeting at work on the chest and all over the body also strangled her yesterday at around 4pm.” All these point towards the police being responsible for the plaintiff’s medical condition.

[53] Evidence led by the Plaintiff through cross examining DW 1 established that the RSP 88 Form is used where the complainant has been assaulted or raped. Without it, the doctor cannot examine the complainant. In filling in this Form, the doctor observed that the plaintiff had “allegedly” been assaulted. She then stated in the outpatient Record/Prescription her findings and conclusions were that the plaintiff is “an assault victim.” Based on this conclusion, medication was then prescribed. It is more probable that the plaintiff was assaulted by the police as opposed to Sihle Mavuso given that there were no charges preferred against Mavuso notwithstanding that a crime of assault had been committed.

[54] The defendants finally raised the issue of the plaintiff’s past medical history coupled with the fact that she once participated in the karate sport as a case possible cause of her pain. As far as her medical history is concerned, evidence was established that the plaintiff underwent an operation to remove the appendix when she was young. She had had no problem with her appendix thereafter. It is only after she had been kicked and assaulted by the police that the appendix became painful. When the plaintiff was attending the karate classes, the appendix was not affected. The plaintiff made it clear that she suffered the injuries long after she had stopped playing karate. There was no way her injury could be linked to this sport. It is worth noting that “DW 5” did not testify that the plaintiff suffered early injuries as a result of the karate sport prior to the assault of the 4<sup>th</sup> October, 2016. “DW 5”’s evidence adds no value to the defendants’ case.

[55] It is court's humble view that the plaintiff has successfully proven its case. The parties are at liberty to deal with the issue of quantum and if they fail to reach an agreement, they are free to approach the court for same to be determined by it.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a cursive name, written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

PLAINTIFF: N.D. JELE

DEFENDANT: S. HLAWA