



**IN THE HIGH COURT OF ESWATINI**

HELD AT MBABANE

CIVIL CASE NO. 985/2019

In The Matter Between

CONGO NKAMBULE

Plaintiff

And

THE NATIONAL COMMISSIONER OF POLICE

1<sup>st</sup> Defendant

THE ATTORNEY GENERAL

2<sup>nd</sup> Defendant

Neutral Citation: *Congo Nkambule V The National Commissioner of Police & Another (985/19) SZHC 121 [2022] (10 June 2022).*

Coram : D Tshabalala J

Heard : 28/09/2020

Delivered : 10/06/2022

*Summary: Claim for damages for unlawful detention and interrogation: Police acted lawfully with the scope of the law when they invited the Plaintiff for information following the use of his bank details to commit fraud.*

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## JUDGMENT

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[1] The Plaintiff instituted action proceedings against Commissioner of police and Attorney – General claiming inter alia, E800,000 (Emalangen Eight Hundred Thousand) as damages for alleged unlawful arrest and detention, interest at the rate of 9% at *temporae morae* and costs of suit. The claim amount is particularized as follows:

(a) Wrongful and unlawful interrogation and detention	E2000,000.00
(b) Impairment of Dignity and Reputation	E500,000.00
(c) Emotional trauma and shock	<u>E100,000.00</u>
	<b><u>E800,000.00</u></b>

[2] It is common cause that on the 23<sup>rd</sup> May 2018 the Plaintiff presented himself at Manzini police station. However the Plaintiff alleges that the invitation included accusation that he had stolen or fraudulently syphoned E115,000.00 from Select Management. Defence on the other hand deny the alleged purpose and state that the purpose for inviting the Applicant was to solely inquire from the Plaintiff whether he lodged a refund claim with his lender, Select Management Services, and to ascertain whether he had received any refund money.

[3] The Plaintiffs evidence is that an officer phoned inviting him to the police station, and accused him on the phone of theft of money amounting to E115,000.00 At the police station the accusations for theft were repeated and he was asked where the money was. The interrogation was aggressive, forceful and included a slap by one of the officers he did not name.

- [4] Plaintiff alleges that he was taken in police van to his bank, the Building Society to get a statement of his account, which he did. There was no deposit of stolen money in his account. He gave the statement to the police after which he was released.

### **Background**

- [5] DW1, Bheki Dlamini, General Manager from Select Management Services Limited, Manzini branch (hereinafter, Select) reported a case of fraud at Manzini Regional Headquarters Fraud department on the 9<sup>th</sup> April 2018. In a statement of complaint to the police DW1 stated that he discovered on the 6<sup>th</sup> April 2018, that a Select employee helped herself to refund monies that were due to the company's clients who have over-paid their loans. Several clients including the Plaintiff were victims of the crime which was committed by fraudulently opening fake accounts with banks using affected Select clients personal details. Money stolen in this fashion amounted to E139, 852.68.
- [6] DW1 testified that he did not lay criminal charges against the Plaintiff but against Select employee who stole E139, 852.68 from the microlender. In laying the charge DW1 also provided the police with relevant documents which included a list of customer names whose accounts with the lender were used to commit the fraud. Plaintiff's name was part of the list. No where in DW1's evidence nor that of the officers who investigated this case was it suggested that the Plaintiff or any of the customers were implicated as collaborators with the in-house fraud star.
- [7] Acting on the criminal charge lodged against Select's employee the police did what was expected of them and proceeded to investigate the matter. Starting with the documentary information furnished by DW1, police invited

the Plaintiff over the phone to come to the police station. DW2 Constable Bhekisiza Bulunga made the call on the 21<sup>st</sup> May 2018.

- [8] According to the Plaintiff, he was with his wife and children harvesting maize in the fields when the caller Accused him on the phone of theft on money amounting to E115,000, and invited him to the police station. PW1 told the officer that he will come when he had money after receiving his salary. Plaintiff presented himself on the 23<sup>rd</sup> May 2018.

### **Unlawful detention and Interrogation**

- [9] It has already been stated that police deny that the Plaintiff was unlawfully detained nor interrogated / investigated. Their version is that Plaintiff was invited to come as part of investigation to shed light whether or not he lodged refund claim with Select and whether or not he received any such refund money. The police assert that the interview was necessary as part of the investigation. That it was conducted respectfully and politely, with no aggression or assault as alleged by the Plaintiff. The Plaintiff claims that he was pressurized to go and obtain a bank statement of his account, and was bundled in the back of a police van. DW2 and DW3 deny that the Plaintiff was transported to the bank and insist that he volunteered and went to the bank and back on his own.
- [10] It is common cause that Plaintiff's bank statement did not reflect any deposit of sought after money, and coupled with Plaintiff's explanation that he obtained loans from Select which were paid up and that he never lodged or received any refund arising from loan repayment excess, Plaintiff was released. Both the Plaintiff and defence estimate the interview time to a few hours, which was extended by Plaintiff's trip to the bank.

[11] Questions that arise from determination are

- 1) Whether police interview / interrogation of Plaintiff was unlawful,
- 2) Whether the police accused the Plaintiff of theft E115,000.00 belonging to Select.
- 3) Whether Plaintiff's suffered alleged trauma, impaired dignity, and whether this was as a result of Defendant's unlawful conduct.

### **Analysis and Findings**

[12] Police derive authority from Police Service Act 2018 (PSA) Criminal Procedure and Evidence Act 1938 (CP&EA) and above all their conduct is governed and must be in compliance with provisions of the Constitution Act of 2005. Among the functions of police outlined by the Police Service Act Section 9 (b) is to investigate crime. It is required in terms of Section 10 (2) that in the performance of their duties members of the police service shall at all times respect and protect human dignity and uphold human rights of all persons. Section 10 (3) without inflicting among others any act of cruelty or degrading treatment or punishment.

[13] It is in the light of the above stated provisions of the Police Service Act in conjunction with other laws that defendant's conduct is measured in dealing with the Plaintiff in this matter, and determining whether the Plaintiffs claims have any basis.

### **Whether Plaintiff's interrogation / interview was unlawful**

[14] The evidence led before this court is clear that from the point of view of Select Management Services there was only one culprit in the fraud and theft case of E139,758.00 from the company, that is the employee one Ntsikelelo Sigwane. In reporting the incident to the police no suspicion was cast against the Plaintiff and any of the clients whose accounts were used to commit the

crimes. Infact there is evidence that the company apologised to the Plaintiff for the inconvenience caused by the investigation into the matter. That said, the police were not in any way confined or restricted in widening their investigation of the matter as they deemed fit within the confines of the law. It is prudent of the police to leave no stone unturned when dealing with the matter at hand. The conduct of the police to interview affected Select customers to hear their side of the story, as DW2 and 3 put it, was justified and withing the scope of their function to investigate crime. The court is satisfied that the invitation of the Plaintiff and his questioning that took place was lawful as sanctioned by the law. The imputation of indignity, humiliation and degrading treatment is not borne by evidence. It is noteworthy that the Plaintiff was not arrested was invited by phone to come to the police station. He was further allowed to come at his own convenience when he had received his salary at his request. After furnishing satisfactory information to the investigations he was released and advised that he would be called as a witness at the criminal trial of the fraud case.

All the defence witnesses were credible and consistent in their testimonies on this aspect. Alleged accusation of theft of E115, 000.00.

- [15] There is no credible evidence in support of the allegation that the police accused the Plaintiff of theft of E115, 000.00 from Select Management Services. DW2 who phoned the complainant to invite him to provide information denied this. It is not clear or explainable why the police would accuse the Plaintiff of theft of E115, 000.00 which amount was not related to the amount of the reported theft. There is no rationale, basis or supporting evidence for this allegation.

### **Alleged trauma, impaired dignity**

[16] There is no evidence other than that of the plaintiff that he was illtreated during interrogation. The court has the word of the Plaintiff against denial of two defence witnesses, DW1 and DW2 who formed part of the interrogation team. Both defence witnesses testified that they did not regard the Plaintiff as a criminal suspect and only required his statement as one of the victims of the crime of fraud, in so far as his personal details were used to commit the crime. There is no discernable reason for the plaintiff to be treated with indignity in the circumstances. Any trauma and feelings of indignity that the Plaintiff may have had are not shown to have been caused by the conduct of the investigators in this matter.

### **Police letter of 12 June 2018**

[17] Much seemed to have been made from DW5, Senior Assistant Commissioner of police Dumisa Ngwenya's attitude expressed in the letter of the 12<sup>th</sup> June 2018 to Plaintiff's attorneys, to the effect that the plaintiff was a suspect in the Select fraud case.

[18] It is noted from DW5's testimony that he received Plaintiff's attorney's correspondence requesting source documents forming part of Plaintiff's investigation in the Select fraud case. Before responding DW5 who was based at Headquarters in Mbabane made inquiry from Manzini concerning the matter and learnt that many people were connected to the investigation. A docket was presented from which he informed himself before penning the response. DW5 testified that he assessed contents of the docket and then stated in the letter that the investigation of the matter was still ongoing. He further stated his opinion that the Plaintiff was a suspect in the matter under investigation.

- [19] Quizzed under cross examination why he referred to the Plaintiff as a suspect, DW5 explained that from the information from the docket that the Plaintiff was customer of Select and that the fraud was committed by employee of Select, he drew from his experience for similar crimes that employees often colluded with clients of the institution in the execution of the offences. He therefore could not rule it out until completion of investigations whether or not Plaintiff was involved.
- [20] Noteworthy is that DW5's position regarding the Plaintiff differed materially with that of the investigators DW2, 3 and 4 who regarded the Plaintiff as a potential witness, rather than a suspect in the matter.
- [21] Defence Counsels submission that DW5's utterances are supportive of the Plaintiff's case of alleged unlawful detention, investigation and subjugation to shock and trauma, cannot be sustained. DW5's opinion based on his interpretation of contents of the docket, cannot in any way change the factual position that the investigators did not treat or regard the Plaintiff as a suspect in the fraud, especially after their interview or questioning of the Plaintiff. It is noteworthy that DW5 did not have conversations with the investigators pertaining the matter, but relied for his conclusion on the documents in the docket. Having said that, the investigators' views on the matter and those of their superior, ie. DW5 are not mutually destructive. This is because, objectively speaking the status of the Plaintiff which one may call co-victim of the fraud along with Select, could change at any stage if new evidence implicating him in the crime emerged, for instance collusion with Select employee. Therefore DW5 was not entirely wrong to hold or express the view that investigations were on-going and in the circumstances of the case and in his opinion the Plaintiff was a suspect until they were closed. DW5 took theoretical view of the matter while the investigating officers in



Manzini who were closer to the matter were influenced by the facts they had which were probably not all contained in the docket.

All in all the fact that DW5 referred to the Plaintiff as a suspect adds nothing to the nature of the case and how the Plaintiff was treated during the investigation. I have found that the defence witnesses 1, 2, 3 and 4 acted within the law and respected the dignity of the Plaintiff in seeking audience with him in the investigation of the matter which directly affected him as well.

- [22] It was stated by this Court in **Lucky Phiri v Commissioner of Police and Another**<sup>1</sup> wherein the defence admitted the fact of the Plaintiff's arrest and detention but denied unlawfulness of the conduct, that they then bore the onus of providing justification of the conduct of the police officers on a balance of probabilities. Ota Judge as she then was quoted from the Supreme Court case **Mfanafuthi Mabuza v Commissioner of Police and two Others**<sup>2</sup> thus:

*"It is well settled law that the onus rests on the arresting authority to prove that the requirements of Section 22 (of the Criminal Procedure and Evidence Act 1938) were met when an arrest without a warrant was made..."*

- [23] The Plaintiff does not allege unlawful arrest but unlawful detention, interrogation and investigation by the police. Nonetheless the same principle should apply *in casu*, and the onus should shift to the defence. Testimony of DW1, 2, 3 and 4 discharged that onus. I also find that the

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<sup>1</sup> Case No. 2855/2009

<sup>2</sup> Appeal Case No. 11/2004 at page 2

attitude of DW5 did not in anyway weaken the defence case, or taint the conduct of the officers as unlawful.

[24] It follows therefore that trauma and shock, if any suffered by the Plaintiff can't be attributed to the conduct of the defendants as they acted lawfully within the law.

[25] None of the heads of Plaintiffs claim can be successful. The action fails and it is dismissed.

[26] There of order as to costs.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala  
Judge

For the Plaintiff: Mr L. Dlamini of Lucas BKS Dlamini Attorneys

For Defendants: Ms N. Xaba – Attorney Chambers