

THE HIGH COURT OF SWAZILAND

COLLEN MUZINGWENYA

Plaintiff

And

COMMISSIONER OF POLICE

1st Respondent

ATTORNEY GENERAL

2nd Respondent

Civil Case No. 2267/2001

Coram: S.B. MAPHALALA - J

For the Plaintiff: MR. M. SIMELANE

For the Defendants: MR. D.V. DLAMINI

JUDGMENT

(4^m November 2005)

The relief sought.

[1] The Plaintiff has issued a combined summons against the Defendant claiming payment of the sum of E100, 000-00 being in respect of general damages for pain and suffering, impairment of health, loss of amenities and disfigurement and payment of the sum of E10, 000-00 being in respect of future medical expenses, interest at the rate of 9% per annum a tempore morae, and costs of suit.

The Particulars of Claim.

[2] In his Particulars of Claim, the Plaintiff alleges that on or about the 6th May 2000, whilst kept at the Sidvashini Prison he was subjected to barbaric beating by some warders who were on duty that day, namely, Mr. Robert Shabangu, Sergeant Themba Dlamini and a Mr. Mabuza on suspicion that he has stolen some money belonging to one of the inmates at the prison, one Mbhoshongo Kunene, who had somehow sneaked the money into the cells. He avers that he was beaten with sjamboks, kicks, fists and thrown against the wall, and that due to the beatings he passed out and that when he came about he was further subjected to barbaric torture by all the afore-mentioned warders.

[3] At paragraph 4 thereof he avers that as a result of the assault and torture Plaintiff fractured his little finger which no longer functions properly and a slight movement of his finger causes unbearable pain. Plaintiff was denied the opportunity to have a proper medical check up for doctors to monitor the damage to his finger. This led to Mr. Ndzimandze, the prison nurse to remove the boxer glove spent without any proper diagnosis on the 25th May 2000, as a result Plaintiffs finger has stayed in one position without any joint movement.

[4] At paragraph 10 and 11 Plaintiff avers that he was so traumatized by this beating hence his academic work has been affected and he suffers sleepless night and stress. As a result, he suffered damages in the sum of E1 10, 000-00; E1, 000-00 being in respect of general damages for pain and suffering, impairment of health, loss of amenities and disfigurement, E10, 000-00 being in respect of future medical expenses. Plaintiff further claims interest thereon at the rate of 9% per annum a tempore morae, costs of suit, further or alternative relief.

The defence.

[5] In their plea the Defendants contend that the warders as mentioned in the Plaintiffs Particulars of Claim, namely, Robert Shabangu, Themba Dlamini and Mr. Mabuza did not beat the Plaintiff at all and/or in the manner described by the Plaintiff, and also, that the Plaintiff was not refused an opportunity to have a proper medical check-up. In the main, at paragraphs 3, 4, 5, 6, 7,8,9 and 10 thereof Defendants deny liability in this case.

The applicable law.

[6] It is trite law that the Plaintiff bears the onus of proving on the evidence that the officers of the 1st Defendant, Robert Shabangu, Sergeant Themba Dlamini and the late Mr. Mabuza beat him and in the manner alleged by him. In other words, he must prove that his version is what happened on a balance of probabilities. For the Plaintiff to discharge that burden, he must satisfy the court that his version is more probable than that of the Defendants in that it is consistent with all the facts which have either been proven, are common cause or not disputed. 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 Plaintiffs version must be more probable than that of the Defendants; otherwise, his claim must fail. (See Noah Ndoda Kunene vs The Commissioner of Police and the Attorney General, Civil Case No. 2333/2000 (unreported) at page 13 (per Shabangu A J) and Bhekinkosi Khumalo vs The Attorney General, Civil Case No. 958/99 (unreported) at page 6 (per Maphalala J).

[7] The above therefore is the legal premise under which the present case ought to be decided.

Facts which are common cause.

[8] In the present case, it is common cause that the Plaintiff was an awaiting trial prisoner at the Sidvwashini Prison at Block B of the Prison cells. It is further common cause that the Plaintiff was transferred to Sidvwashini Prison together with one Mbhoshongo Kunene in the same cell as the Plaintiff. It is furthermore, common cause that Mbhoshongo Kunene lost some money whilst in the cell and that the only person who was aware that Mbhoshongo had some money was the Plaintiff. It is further common cause that an investigation about the whereabouts of the money that allegedly got lost was carried out, and that the money was eventually found in the possession of one Mandla Ngozo.

The admissibility of certain documents not discovered.

[9] During the course of the trial the Plaintiff sought to introduce two documents in order to prove that indeed, the Plaintiff did go to hospital and that he was referred thereto by one Dr. Khayyam. The Plaintiff had not disclosed these documents in question in his discovery affidavit. Mr. Dlamini who appeared for the Defendant took strong objection to the admissibility of these two documents citing the provisions of Rule 35 of the Rules of Court. He further contended that the Defendants will be prejudiced by the admission of such document at this stage. In this respect he cited the case of Mlamla and another vs Marine & Trade Insurance Co. 1978 (1) S.A. 401 (E) at 402 H). After hearing arguments I allowed the documents and they were duly entered as exhibit "1" and "2" [which should have been exhibits "A" and "B" as it is a customary practice in labelling documentary evidence]. Mr. Dlamini persistent in this point even when the matter came for arguments. I find that it would not be proper for me to re-open the matter where I had already made a definite ruling. The issue therefore can only be taken up with the Appellate court. The fact of the matter is that for present purposes the two documents viz exhibit "A" and "B" have been admitted as part of the evidence. It remains to be seen though what evidential weight should be attached to these exhibits regard to be had to the fact the Defendants did not cross-examine the authors thereof. I shall revert to this aspect of the matter later on in this judgment.

The chronicle of evidence.

[10] Turning to the evidence in this matter the following appears. The Plaintiff at the material time was an inmate at the Sidvashini Remand Centre awaiting trial. He was kept in a cell called Block "B" with many others including one Mbhoshongo Kunene, Nkosinathi Brian Masuku (who was an overseer of inmates in that cell) and Manqoba Kunene. According to Plaintiffs testimony Mbhoshongo slept next to him.

He informed him that he had some money being a sum of E20, 000-00. Plaintiff informed Mbhoshongo that according to the prison regulations no money was allowed inside the cells. Then on the 6th May 2000, Mbhoshongo reported that he had lost a sum of E500-00. Plaintiff told him to report the matter to the inmates overseer one Brian Masuku (PW2) whereupon a search was conducted by the inmates themselves. As they could not find who had taken the money PW2 Brian Masuku then reported the incident to the prison warders. The warders then came inside the cell and asked who had taken the money. It was mentioned that he was the one who told the other inmates about the money. He testified that one Sergeant Themba who led the other warders who had come inside the cell did not say anything to him but struck him with a sjambok. When he tried to resist he was told to get out of the cell. Outside there were other officers. Thereafter, Plaintiff was beaten with a sjambok, kicks, and fists and due to the beatings Plaintiff passed out. When he came about he was further subjected to the barbaric torture by the warders. He felt that his left arm was paralysed. He saw that his left hand was swollen. It was the small finger at the end.

[11] He testified that he could not sleep because of the pain he felt the whole night. On the following day he asked to be taken to hospital but the warders refused. He tried the following day which was a Monday and again they refused to take him to hospital. On the 9th May 2000, the prison doctor Dr. Khayyam came and attended to him. Dr Khayyam then wrote a letter that he be taken to hospital at the Mbabane Government Hospital. In hospital they placed a "boxer glove" on his hand. They told him to come back from time to time for check-ups. One time he asked the prison nurse to be taken to hospital for these regular check-ups whereupon the prison

nurse then took out a pair of scissors and he removed the "boxer glove". He testified that there were about 15 warders who participated in this assault outside Block "B".

[12] The Plaintiff was subjected to a lengthy and searching cross-examination by Counsel for the defence. The thrust of the cross-examination was that Plaintiff was not assaulted by the warders at all. Plaintiff was adamant in his answers that he was assaulted in the manner he had described in-chief. It was also put to him that he never suffered any injuries in the hands of the prison officers. Again, Plaintiff maintained that he suffered an injury in his little finger. It was also put to him that when he came into the prison he had told officers in the reception area that his bandaged hand was injured in a boxing match as Plaintiff claimed to be a boxer. In answer the Plaintiff denied that and that he was a boxer. Plaintiff further insisted that he was never taken to hospital when he required such that it was only the intervention of Dr. Khayyam.

[13] Plaintiff then led the evidence of PW2 Nkosinathi Brian Masuku who was the overseer of the other inmates at Block "B". His evidence is similar to that of the Plaintiff in some respect but he differed with the Plaintiff that the warder when they entered the cell assaulted all the people who were suspected in the theft. He testified that Mbhoshongo, Mancoba, Mandla Ngozo and the Plaintiff were all assaulted by the warders. Under cross-examination he deposed that he did not see the assaults on the Plaintiff after he was taken out of the cell. This witness was also adamant that Plaintiff was assaulted by the warder including the others like Mbhoshongo.

[14] The third witness for the Plaintiff was PW3 Manqoba Kunene who was also an inmate at Block "B" with Plaintiff, PW2 and others at the material time. He also described the incident in similar terms to that of the Plaintiff. He said the warders came in and asked who knew about the money whereupon Plaintiff's name was mentioned. Sergeant Themba Dlamini who had a sjambok hit the Plaintiff and then took him outside where many other warders were. He deposed that there was a commotion outside. After 3 minutes the warders came back inside looking for another boy. They then called one Mandla Ngozo who later produced the money. After

that Plaintiff came back with his hand swollen and his shoes were torn. Plaintiff could not eat that evening. The witness also deposed that Plaintiff was not taken to hospital.

[15] He was cross-examined briefly by Counsel for the defence where in the main he maintained his evidence given in-chief.

[16] The Plaintiff then closed his case whereupon the defence led the evidence of five (5) warders. In the main the officers denied that they assaulted the Plaintiff in the manner described by the Plaintiff and his witnesses. Their evidence was that Plaintiff was not assaulted at all. Defence witnesses advance a defence that when Plaintiff came to the Remand Centre he was already injured in his hand. The story he gave to DW1 Bheki Nhlanhla Dlamini was that Plaintiff sustained the injury in his bandaged hand in a boxing match way before he was arrested. DW2 Robert Shabangu related at great length of what transpired that day. The thrust of his evidence was that Plaintiff was not assaulted at all as this was a normal search and there was no reason to assault the Plaintiff. DW3 Sergeant Themba Dlamini also gave a lengthy account of what happened and said that he would not have assaulted the Plaintiff as he had helped them recover the money. In this regard the officer said the following:

"I could not do that because he helped in the recovery of the money. We did not even do the rubdown search. He made my task easy. We never assaulted the Plaintiff. He was not assaulted because he did not give us problems in the investigation

[17] In cross-examination DW3 was adamant that they never assaulted the Plaintiff but that he was making up the story with his friends.

[18] DW4 Martin Mabilisa was the senior officer in-charge of the other officers on the 6th May 2000. Nothing much was revealed by his evidence except that he sent DW3 to conduct the search for the money in Block "B".

He was not involved in the search himself. DW5 was Simon Ndzimandze the nurse at the prison on the 6th May 2000. He testified that Plaintiff never talked to him about this matter and that it was not true that Dr. Khayyam referred Plaintiff to Mbabane Government Hospital. He testified that if he did he would have known about that because he was the first port of call at the Remand Centre and he kept all the records pertaining to inmates. This witness was subjected to a lengthy cross-examination by Plaintiffs attorney. He was confronted with the controversial annexure "B" and he confirmed that the Plaintiff was referred to the Mbabane Government Hospital on the 9th May 2000. However, he was not sure whether Plaintiff was taken to hospital as directed in annexure "B". In the main the witness maintained that Plaintiff did not talk to him about this matter. He denied that he removed the boxer glove from the Plaintiffs hand.

The submissions for and against.

[19] Mr. Simelane for the Plaintiff argued at great length in this matter contending that Plaintiff has discharged his onus on a balance of probabilities. In this regard he relied on the dicta in the South African case of the Ministry of Justice vs Hofmer 1993 (3) S.A. 131. He went on to analyse the evidence of each witness led in this case.

[20] Mr. Dlamini who appeared for the Crown filed very comprehensive and useful Heads of Argument for which I am most grateful. He also advanced a formidable argument and in the main contended that the evidence of the Plaintiff and his witnesses, both in-chief and under cross-examination cannot cumulatively be construed at any stretch of the imagination to conclusively prove that the Plaintiff was assaulted in the manner alleged. The court was urged to find that Plaintiffs version is not probable at all. In fact, the Plaintiffs story is nothing but a total fabrication which is aimed at "squeezing" some money out of the Government of the Kingdom of Swaziland.

[21] On the issue of damages the court was referred to a plethora of decided cases including the South African cases of Klopper vs Maloko 1930 T.P.D. 860; Lazarus vs Rand Steam Laundries (Pty) Ltd 1952 (3) S.A. 134 and the case of Odendaalstrust GoldGeneral Investments & Extensions Ltd vs Naude NO. 1958 (1) S.A. 381 to the general proposition that where a Plaintiff has failed to bring evidence to substantiate his claim for damages, he should not be awarded any damages, whatsoever. It would appear to me that this argument does not apply in the present as it was agreed between the parties at the commencement of trial that the matter will proceed in two stages and thereafter, depending on the judgment of the court on liability to the second stage that of the determination of the quantum of damages.

The court's analysis and conclusions thereon.

[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 Plaintiffs version must be more probable than that of the Defendants, otherwise, his claim must fail. In the instant case, it is common cause that the Plaintiff was an awaiting trial prisoner at the Sidvashini Prison at Block "B" of the prison cells. A further fact which is common cause is that the Plaintiff was transferred to Sidvashini Prison together with one Mbhoshongo Kunene and the said Mbhoshongo Kunene lost some money whilst in the cell and that the only person who was aware that Mbhoshongo had some money was the Plaintiff. It is also common ground that an investigation about the whereabouts of the money was carried out, and that the money was eventually found in the possession of one Mandla Ngozo. It is further a common fact that the prison warders entered the cell in Block "B" on the day in question after the loss of the money has been reported to them by an inmate who was a prefect PW2 Brian Masuku. It is also a common fact that the Plaintiff assisted the warders in the recovery of the money.

[23] The only point of divergence is what happened in the cell when the prison warders entered on the 6th May

2000. The Plaintiff stated that one of the prison warders assaulted him without uttering a word and thereafter he was dragged outside where he was further subjected to assaults with sjamboks and kicked all over. PW2 Brian Masuku, the prefect stated this point that the prison warders when they entered the cell they indiscriminately assaulted many people inside the cell including Mbhoshongo who lost the money. PW3 Manqoba Kunene who was also an inmate there said officer Sergeant Themba Dlamini when entering the cell assaulted the Plaintiff with a sjambok and dragged him outside.

[24] In my assessment of the evidence of the above witnesses the Plaintiffs witnesses who were supposed to corroborate and gave evidence to the effect that officers of the 1st Defendant, more specifically DW3 did in fact beat and/or assaulted the Plaintiff in the manner alleged by him did not succeed in doing so. The evidence of PW2 Brian Masuku is at variance with that of Plaintiff and PW3 Manqoba Kunene and lend no corroborative value on the evidence of both Plaintiff and PW3 Manqoba Kunene.

[25] It appears to me that the evidence of the warders is more credible than that of the Plaintiff on the simple fact as pointed out in paragraph [15] supra that officers did not have any motive to assault the Plaintiff, as he had helped them in recovering the money which had gone missing. There was no reason at all that I could discern from the evidence why the officers would have acted as alleged. This was in broad daylight in full view of tens of inmates. I find the Defendants' version more credible.

[26] On the totality of the evidence brought forth I find the evidence of the defence more probable than that of the Plaintiff. The evidence of DW1 1652 Bheki Nhlanhla Dlamini who was a Receptionist at the time when Plaintiff was admitted to Sidvashini lends some credence to the Defendant's defence. His testimony is to the effect that when the Plaintiff was admitted into the prison, he had a bandage on his left hand. He further testified that upon enquiring from the Plaintiff why he had a bandage on, the Plaintiff said that he injured himself whilst engaging in some boxing exercise before his arrest. DW1's evidence is corroborated by that of PW3 who testified

the Plaintiff had a bandage on his left hand.

[27] Finally, I come to consider the evidential weight to be attached to exhibits "1" and "2" viz, as stated earlier on at paragraph [9] supra of this judgment. The Defendants relied on the dictum in Mlamla and another (supra) in opposing the admission of the said exhibits. Further, that the authors of the said document were not brought to court for purposes of cross-examination, in order to test the veracity of the said exhibits. Furthermore, that this documents were deliberately withheld by the Plaintiff so as to unsettle the Defendants make them to not properly prepare their case. Plaintiff failed to discover them nor did he tell the court the reasons that led to the failure to discover the same. After considering the matter carefully it would appear to me that the Defendants' contention in this regard is the correct one, that these documents have little or no evidential weight in that they were not tested through cross-examination. Therefore, for purposes of this judgement I have not placed any reliance on them, whatsoever.

[28] In the result, for the afore-going reasons it is my considered view that Plaintiff has failed to prove the relief sought and therefore the action fails with costs to follow the event.

S.B. MAPHALALA

JUDGE