



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 863/13

In the matter between:

**VUSI THWALA**

**PLAINTIFF**

and

**COMMISSIONER OF POLICE**

**DEFENDANT**

Neutral Citation : Vusi Thwala vs. Commissioner of Police (863/13) [2018]  
SZHC 202 (06 DECEMBER 2018)

Coram : MABUZA – PJ

Heard : 2/8/2017; 19/2/2018; 26/3/2018

Delivered : 06 DECEMBER 2018

## SUMMARY

*Civil Law – Law of Delict – Claim for damages arising  
from alleged unlawful arrest, detention and  
assault.*

## JUDGMENT

### **MABUZA -PJ**

- [1] The parties hereto agreed at the commencement of the trial that this Court would decide the issue of liability only and quantum if necessary would be agreed between the parties.
- [2] The Plaintiff is Vusi Thwala, an adult male Swazi of Mahamba in the District of Shiselweni.
- [3] The Defendant is the Commissioner of Police, cited herein in his capacity as such and duly represented by the Attorney General, 4<sup>th</sup> Floor, Justice Building, Usuthu Link Road, Mbabane, in the District of Hhohho.

[4] The Plaintiff's claim is against the Defendant for the payment of the sum of E272,500.00 (Two hundred and seventy two thousand five hundred Emalangeni) being in respect of damages for unlawful detention, arrest and assault computed as follows:

<b>Medical expenses</b>	<b>2,500.00</b>
<b>Future medical expenses</b>	<b>80,000.00</b>
<b>General damages for pain and suffering</b>	<b>130,000.00</b>
<b>Unlawful arrest detention and assault</b>	<b>60,000.00</b>
<b>Total</b>	<b>E272,500.00</b>

[5] The Plaintiff also claims costs of suit and further and or alternative relief.

[6] The Defendant opposes the Plaintiff's claim, admits having received demand but denies liability to the Plaintiff in the sum claimed or in any sum whatsoever and puts the Plaintiff to the strict proof thereof failing which for the Court to dismiss the claim with costs.

[7] In his particulars of claim the Plaintiff alleges that on or about the 4<sup>th</sup> day of January 2012, the Plaintiff was unlawfully arrested by eight members of the Defendant who included Busi Shabangu, Muzi Mabuza, and Maxwell

Dlamini who at the time were all stationed at Nhlangano Police Station after they had arrested the Plaintiff and charged him with theft.

[8] From the assault, Plaintiff alleges that he suffered partial loss of use of his ears, that is partial loss of hearing, Details of the extent of the ear injury are set out in the medical report filed off record.

[9] The Plaintiff alleges that the Defendant is liable to compensate him in the amount of E272,500.00 (Two hundred and seventy two thousand five hundred Emalangeni) as the police officers assaulted the Plaintiff within the course and scope of their employment.

[10] And that despite demand, the Defendant refuses, fails and/or neglects to pay the said sum of E272,500.00 (Two hundred and seventy two thousand five hundred Emalangeni).

[11] The Defendant denies that the Plaintiff was unlawfully arrested, detained and assaulted by members of the Royal Swaziland Police.

[12] The Defendant pleads that the Plaintiff was arrested on reasonable suspicion of having committed the crime of theft from motor vehicles in that at the time of the theft Plaintiff was the sole custodian of these motor vehicles from which the theft took place yet he failed to explain the circumstances surrounding the disappearance of the items in question.

[13] The Defendant further pleads that the Plaintiff was never at any stage assaulted by members of the Royal Swaziland Police as he was cooperative throughout the investigation.

[14] The Defendant further avers that it is worth noting that the examination of the Plaintiff's injuries was conducted on the 7<sup>th</sup> March 2013 – fourteen months after the arrest of the Plaintiff, the date of arrest being the 4<sup>th</sup> January 2012 and that of acquittal being the 30<sup>th</sup> November 2012. And that this raises doubt that the Plaintiff was assaulted by members of the Royal Swaziland Police during the period he was in their custody.

[15] In his replication the Plaintiff stated that there was no reasonable suspicion of theft but the police were on a witch hunt. Evidence of this being that the Plaintiff was acquitted and discharged at the close of Crown's case.

[16] And that there is proof of the Plaintiff's initial consultation at Swaziland Government hospital on the 4<sup>th</sup> January 2012 and that he was accompanied by two female police officers.

[17] The parties adduced evidence before me. The Plaintiff, Vusi Champion Thwala (PW1) testified that he was employed at Central Transport Agency (CTA) in Matsapha as a security guard. Before then and during 4 January 2012 he was based at the CTA Nhlanguano branch. He says that on the 4<sup>th</sup> January 2012, police officers arrived at his home. They informed him that they were looking for certain car parts that had gone missing from CTA, Nhlanguano where he was employed.

[18] Among the police officers was one Busi Shabangu. The police asked for permission to search his home and he agreed. They searched and did not find any missing car parts.

[19] Thereafter, the police requested him to accompany them to the Nhlanguano police station. He did so.

[20] Upon arrival at the police station he was given a list of the missing car parts which were worth E21,600.00 (Twenty one thousand six hundred Emalangeni). The police continued questioning him about the missing car parts and he denied any knowledge of them.

[21] They then took him to a bush near the Casino where they assaulted him. The officers were eight in number and included Busi Shabangu. He says that the police assaulted him with the butt of a gun on the back of his waist and he fell down.

[22] They handcuffed him with his hands behind him. He was insulted and told to lie down facing up. His feet were tied together. They tore a plastic sheet and used the pieces to cover his face. Thereafter he was assaulted and he could not tell who assaulted him. They beat him up all over his body using sticks which they had broken off from the surrounding trees. They kicked him as well.

[23] The plastic that was placed over his nose made it difficult for him to breathe. He bit it in an effort to breathe and swallowed it.

- [24] An officer had earlier taken out a rope from the back of the police car and surgical gloves. The rope was used to tie his feet together and the gloves used to cover his nose and they were very tight. He says that he almost died because he could not breathe.
- [25] He testified that what made his heart ache was the behavior of Busi Shabangu who sat on top of him with her buttocks on his face saying that today he would eat her vagina while the other officers continued to assault him. He felt humiliated by Ms. Shabangu's remark and actions as vaginas were inedible.
- [26] While in the bush he heard a bystander shout at the police, saying that they would kill him by the way they were assaulting him. He did not see who this person was. Eventually he was returned to the police station and placed in the police cells.
- [27] Other police officers brought him some food and he requested that he be taken to the hospital as he was injured and felt very weak and his whole body was sore and he was covered in blood.



[28] He was taken to the hospital on the same day that is on the 4<sup>th</sup> January 2012. The doctor asked him how he was injured and he informed the doctor that some police officers had assaulted him. He was injected and given some rubbing medicine and some pills. He filed Exhibit A which is a record of his hospital attendance stamped 4<sup>th</sup> January 2012.

[29] On the 5<sup>th</sup> January 2012, he was taken to the Magistrates Court, Nhlngano for remand. On the 13<sup>th</sup> January 2012, he was released on bail.

[30] He continued attending outpatient clinic for his injuries. He says that he had a bad pain in his chest which still troubles him to date. He gets cramps. His left ear was also injured and his hearing is impaired and he cannot hear when someone talks softly.

[31] He says that the police told him that they were assaulting him because he had stolen things from CTA which they wanted.

[32] He stated that to this day he does not know where these things were because he did not have them.

[33] Ultimately he was charged and tried for theft but was acquitted because there was no evidence against him.

[34] The Defendant's plea was put to him, namely, that he was arrested on reasonable suspicion of theft from the cars because he was the sole custodian of the motor vehicles at the time.

[35] His response was that he was not the only security guard at CTA, Nhlango as there were three of them at night and one during the day. There were many people employed at CTA, Nhlango including about thirty to forty mechanics and drivers who all had access to the motor vehicles.

[36] Finally, he stated that he wanted compensation as claimed in his particulars of claim.

[37] PW1 was cross-examined by Miss Xaba. She put to him that he was arrested on suspicion that he had stolen petrol and stripped the motor vehicles of parts; that when these items went missing he was on duty and that it was generally known in the community that he sold petrol and car

parts, and that empty petrol containers were found at his home as proof that he sold petrol.

[38] His response was that he was not at work but at home when these things went missing; he denied having stripped any motor vehicles as he was not a mechanic. He stated that the containers belonged to his wife who purchased them at her workplace and were used for storing water. He denied that he sold petrol from his home, he denied having sold car parts to anyone.

[39] He further responded that he was surprised that he was the only one arrested and charged as he was not the only security guard employed at CTA, Nhlalango.

[40] It was while put to him that he had sold some car parts to one Mthokozisi Njabulo Dlamini. He denied this.

[41] It was put to him that he was never assaulted and that he did not raise this issue in the Magistrates Court. He could not remember if he had raised it or not but he recalled that he had requested some police officers to take him to hospital which they did.

[42] Justice Mthimkhulu (PW2) next gave evidence on behalf of the Plaintiff. He told the Court that he is employed as a security guard in Nhlangano by Crime Stop. And that on the 4<sup>th</sup> January 2012 he witnessed the assault of the Plaintiff by the police.

[43] He testified that the bush that the police took the Plaintiff to is near to the showground at Nhlangano near a landing strip. That it was his job to remove cattle that had strayed onto the landing strip.

[44] It was while removing these cattle into a nearby bush that he witnessed the assault. The police had driven there in a blue and white police van. When he entered the bush he heard someone crying. Then he saw the Plaintiff and realized that it was him who was crying.

[45] He noticed that the Plaintiff's feet were tied with a rope and he was handcuffed to a young eucalyptus tree. He was surrounded by police officers and was bleeding through his nose. He recognized him as Scorpion Thwala the security guard from another firm. PW2 says that he was standing about 50 metres away from the Plaintiff and police officers.

[46] He became scared at what the police were doing to the Plaintiff and shouted at them asking that how could the police kill someone when they were expected to protect people. Thereafter a police officer instructed the others to untie the Plaintiff and to leave.

[47] PW2 says that he reported this incident to his boss who arrived shortly after the police had left with the Plaintiff.

[48] After about a month PW2 met the Plaintiff near the supermarket and made a comment about him being alive. PW1 was taken aback as to what PW2 meant. PW2 then narrated to him how he had witnessed the incident in the bush with the police.

[49] The Plaintiff confirmed to PW2 that indeed it was him that had gone through the ordeal with the police in the bush and that he had been looking for the person who had rescued him by speaking out to the police while they were assaulting him. The Plaintiff also requested his cell number in case he needed him as a witness.

[50] PW2 was cross-examined. Under cross-examination he explained that the Plaintiff was known to him over 4 years. When he saw him in the bush his hands were cuffed and the links of the cuffs were around a young tree. A rope tied his feet together. The rope was tied around the tree. His feet were facing the tree. The tree was bent towards him. PW1 was lying on his back with the tree between his hands and feet.

[51] His evidence was challenged on the basis that PW1 in his evidence in chief did not say that he was tied to a tree but he maintained his story.

[52] Asked how he was able to identify PW1 as the latter had given evidence that his face was covered with a plastic. His response was that when he arrived PW1 had no plastic on his head as the police were assaulting him and were wearing protective gloves.

[53] When PW2 arrived he says that he did not see the female officer sitting on PW1. He stated that even though he did not count them there were more than five police officers including one female officer. He knew most of them including her as he often saw them in Nhlangano.

[54] It was put to him that his inability to state the precise number of the police was because he never witnessed the incident. He denied this. He was asked whether it was possible for the female officer to have sat on PW1 given the witness's evidence that he was tied and handcuffed to a tree. His response was that this was not possible.

[55] Told that his evidence was inconsistent with that of PW1 in that PW1 said in chief that he was made to lay on the ground facing up and was assaulted with the butt of a gun. His response was that he saw a gun but did not see the police assault him with it.

[56] Asked how he could have witnessed the incident in view of the trees and distance. He responded that the old trees were cut and new ones had grown in their place and also had their branches trimmed and it was easy to see through them.

[57] After PW2 was cross-examined, the Plaintiff closed his case and the Defendant opened its case.

[58] DW1 was Thomas Mkiphile Mkhonta. He testified that he was a pensioner. Before his retirement he was employed at CTA, Nhlango. He stated that before December 2011, they were preparing to sell the old Government cars.

[59] He could not recall the date of the sale. He requested his assistant Dumisane Hlophe and a security guard, Wilson Thwala to check the condition of the cars that were to be sold. They were to check that there were no parts missing. The two men carried out the instructions of DW1.

[60] Prior to the date of the sale the public were allowed to inspect the vehicles and indicate their interest in any vehicle. A lady showed interest in a certain motor vehicle. She was allowed to inspect it and they started it for her. DW1 says that the vehicle was in good condition when they closed shop in the afternoon. Before they left for the day the Plaintiff arrived to start his night shift and he was informed about the condition of the cars and about the sale on the following day.



[61] On the date of sale the interested lady returned but the car could not longer start. DW1 requested the mechanics to inspect it. They did and reported that it could no longer start because the computer box had been removed.

[62] He asked the mechanics what had happened to the computer box. He was unable to get an answer and he then went to report a theft to the police.

[63] Suspicion of the theft fell on the Plaintiff because he was on duty the night before the sale and for the whole week thereafter.

[64] DW1 was cross-examined by Mr. Jele. DW1 could not provide documentary proof of the date of sale as he could not recall the date. What he recalled was that the Plaintiff was on duty on the night that the computer box was stolen. DW1 denied that two guards worked at night and one during the day. He stated that one worked during the day and one at night. However, he agreed that a computer box was a complex item that only a mechanic could dismantle and or start it.

[65] Njabulo Dlamini (DW2) next gave evidence. He testified that he was a mechanic and that during December 2012 during the auction sale at CTA his

mother was interested in a vehicle that was to be auctioned at CTA and she asked him to start it and it failed to start.

[66] He says that its ignition was not firing even after he had changed the fuse. He examined it closely and found that in front of the gear lever there was a hole indicating that the car had been broken into and the computer box was missing and the cables were hanging.

[67] He informed his mother that there was no computer box. It was near closing time and they were requested by the CTA staff to push the car out of the premises.

[68] Outside the premises DW2 met a Thwala man (the Plaintiff) whose details he did not know at the time. This man asked what was wrong with the car and DW2 informed him that it had no computer box. The man then advised him that it would not be wise to purchase a new computer box as it would require re-programming and offered to assist DW2 and his mother by looking around for a computer box. DW2 gave the Plaintiff his cell number.

[69] Later that day someone phoned DW2 and informed him that he had found a computer box for the car that his mother had purchased. He identified himself as Jabulane. DW2 advised his parents who instructed him to buy the computer box. He telephoned Jabulane and asked for the price and Jabulane advised him that he should carry E2,000.00 and that they should meet next to the scrap yard on the following day. Jabulane then gave DW2 directions to the scrapyard.

[70] The following morning DW2 went to meet Jabulane as previously arranged. When they met, Jabulane gave DW2 a plastic bag which had a computer box and its module which were the parts needed for the car. DW2 gave Jabulane the money and returned home. He fitted the parts onto the car and it started.

[71] Mr. Jele declined to cross-examine this witness.

[72] Jabulane Siphon Masuku (DW3) next gave evidence. He testified that he was a mechanic employed at Car Towing Services and Breakdown, Nhlanguano. That one day at around closing time, the Plaintiff arrived and asked him about the man who operates the breakdown service. He advised the Plaintiff

that the man had stepped out. The Plaintiff then said that he had a car part which would be collected by someone at the scrapyard.

[73] The Plaintiff then asked to use DW3's cellphone. He called an unknown man whom he told about the car part. This unknown man thereafter called DW3 and made arrangements to meet. DW3 did not identify this man. This man arrived inspected the car part and gave DW3 the amount of E2,000.00 (Two thousand Emalangeni) and DW3 gave him the car part.

[74] The Plaintiff returned some five minutes later and DW3 handed over to him the amount of E2,000.00 (Two thousand Emalangeni). DW3 says that the Plaintiff was known to him first as a security guard and later he used to fix cars for him.

[75] DW3 was cross-examined by Mr. Jele. It was put to him that the transaction was between him and DW2 and did not involve the Plaintiff. He denied this as being incorrect and that Plaintiff was involved. That the Plaintiff had brought the computer box.

[76] DW4 3097 Sergeant Busisiwe Shabangu stated that she was based at Nhlangano during the occurrence of this matter. She testified that on the 24<sup>th</sup> December 2011 while on duty she received a docket from the desk officer about the theft of motor vehicle parts at CTA, Nhlangano. The charge was laid by Tom Dlamini the manager of CTA, Nhlangano at the time.

[77] She went to interview Mr. Dlamini who informed her that certain motor vehicles belonging to CTA had parts stolen from them. These vehicles had been selected to be sold by auction on the 19<sup>th</sup> December 2011. They were put on display on the 12<sup>th</sup> and 13<sup>th</sup> December 2011 for public viewing. The cars that had missing parts were the ones that some members of the public were interested in.

[78] She began her investigations and recorded statements from certain people among whom were Njabulo Dlamini (DW2) and Jabulane Masuku (DW3).

[79] Her investigations ultimately led her to the Plaintiff who was a security guard at CTA, Nhlangano and who was on duty the week during which the thefts occurred.

[80] She says that on the 4<sup>th</sup> January 2012 together with other officers she proceeded to the home of the Plaintiff. They found him and his wife at home. They informed him that they were investigating a theft at CTA, Nhlanguano and asked him to accompany them to the police station.

[81] Before leaving for the police station they sought his permission to search his home.

[82] They recovered some empty plastic containers which smelt of petrol. At the police station the Plaintiff stated that he was not feeling well and the desk officer instructed that he be taken to the hospital.

[83] She eventually charged him with the theft of a computer box from motor vehicle SG 372 CP and detained him. He appeared before a magistrate for remand on the 5<sup>th</sup> January 2012.

[84] She denied that she or any of the other police officers assaulted the Plaintiff. She stated that she testified at his trial. She later heard that he had been acquitted.

[85] She recovered the computer box from Njabulo Dlamini (DW2) who told her that he had got it from Jabulane Masuku (DW3) who had purchased it from the Plaintiff.

[86] She was cross-examined by Mr. Jele. She denied having taken the Plaintiff to a forest. She denied that she and other police officers assaulted the Plaintiff. She denied knowing PW2. She denied any knowledge of the Plaintiff's injuries on arms, legs and chest. She denied that she sat on his face in the forest.

[87] The defence closed its case after her evidence.

[88] Has the Plaintiff proved his claim on a balance of probabilities? The core of the Plaintiff's claim is that he was unlawfully arrested, detained and assaulted. The Defendant's defence is that it had a reasonable suspicion that the Plaintiff had committed theft.

### **Unlawful arrest and detention**

[89] The evidence shows that the Plaintiff was arrested on the 4<sup>th</sup> January 2012, remanded on the 5<sup>th</sup> January and released on bail on the 13<sup>th</sup> January 2012.

He was detained for eight (days). He claims that his detention was unlawful. The evidence shows that he was remanded within a reasonable time of arrest without a warrant (section 30 of the Criminal Procedure & Evidence Act No. 67/1938) and within 48 hours of detention in compliance with section 16 (3) (b) and (4) of the Constitution which provides as follows:

**“(3) A person who is arrested or detained -**

**(b) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence,**

**shall, unless sooner released, be brought without undue delay before a court.**

**(4) Where a person arrested or detained pursuant to the provision of subsection (3), is not brought before a court within forty-eight hours of the arrest or detention the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance.”**

See also the cases of **Lucky Phiri vs the Commissioner of Police and Another** [2855/2009]; **Wilson Ngidi v Swaziland Government** (2758/2004) [2004] SZHC 141.

[90] The Defendant denies that the arrest and detention were unlawful. It has pleaded that the Plaintiff was arrested on a reasonable suspicion of having committed the crime of theft with which he was subsequently charged. And



that the theft was of parts from motor vehicles which were under his custody as a security guard. And that the thefts occurred while he was guarding the cars and he failed to explain how they were stolen under his watch.

[91] The Defendant led evidence to the effect that a computer box was stolen from one of the motor vehicles which were to be put on auction sale. The computer box was in the car the day before the sale when the car was inspected but had disappeared on the day of the auction which took place the following day.

[92] The evidence is that when the CTA staff knocked off the day before the auction, they left the Plaintiff guarding the motor vehicles and the computer box was still in the car. It was gone the following day.

[93] The evidence shows that the Plaintiff sold a computer box to the son of the buyer of the motor vehicle whose computer box had been stolen. DW2 stated in evidence that when he fitted the computer box into the car after purchasing it, it fitted perfectly and the car was able to start. DW2 says that the Plaintiff left the computer box with DW3 who handed it over to him

after he had handed over the sum of E2,000.00 (Two thousand Emalangeni) which the Plaintiff sold it for.

[94] Indeed all the activities I have just described above do lead to one having a reasonable suspicion. That being the case I find that the Defendant has discharged the onus on it to prove that the police who arrested the Plaintiff were laboring under a reasonable suspicion that he had stolen the computer box which indeed he has. It is my finding that the arrest of the Plaintiff was lawful and it follows therefore that the detention was lawful in terms of section 22 (b) of the CPEA which provides as follows:

**“Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person-**

- (a) Who commits any offence in his presence;**
- (b) Whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule.”**

### **Assault**

[95] On its own, the evidence of the Plaintiff in respect of the assault is credible. However, coupled with the evidence of PW2, it crumbles. PW2 was

supposed to corroborate the evidence of PW1 but failed to do so. There are many discrepancies between the evidence of PW1 and PW2 namely:

- (a) PW1 testified that in the bush he was made to sleep on the ground facing up with his feet tied with a rope. PW2 testified that PW1 was cuffed to a small tree (or sapling) which hung between his legs.
- (b) PW1 says that DW4, Miss Shabangu sat on his face. PW2 says that due to the position that PW1 was in, it was not possible for Miss Shabangu to sit on PW1's face.
- (c) PW1 says that he was struck with the butt of a gun and he fell down. PW2 says that he did not see any gun.
- (d) PW1 did not say that he was tied or handcuffed to a tree. PW2 stated that PW1 was handcuffed to a tree.
- (e) PW1 says that the police placed a plastic over his head and he could not breathe. PW2 says that there was no plastic on PW1's face.

[96] In view of the above inconsistencies, I have to reject the evidence of both PW1 and PW2, which I hereby do.

[97] It is recorded in Exhibit A that the Plaintiff's BP was taken, that he complained of having been beaten with kicks and stones over the head; that he sustained bruises over the head and arms and had chest pains. Exhibit A is date stamped 4<sup>th</sup> January 2012.

[98] The contents of Exhibit A are credible and would have corroborated the evidence of the Plaintiff were it not for the fact that the author thereof was not called to give evidence nor was the document authenticated in terms of the rules of documentary evidence. Regrettably I must likewise reject Exhibit A which I hereby do. Equally, there is no proof relating to the injury to his ear nor in respect of the 30% loss of hearing.

[99] The Plaintiff also filed a police Form A medical report which he attached to the summons. The Court cannot accept that report as it was completed on the 7<sup>th</sup> March 2013 long after the alleged assault. There is no medical history from the 4<sup>th</sup> January 2012 to the 7<sup>th</sup> March 2013 that links the latter report to the assault. Consequently I reject this medical report.

[100] General damages for pain and suffering and permanent disability of any kind were not proved. Loss of 30% hearing and trauma were not proved. The

medical report dated 7<sup>th</sup> March 2013 does not establish any causal link between the assault of 4<sup>th</sup> January 2012 and the Court has rejected it.

**Medical expenses – E2500.00**

[101] No proof was led in respect of this head. Consequently the Defendant is not liable under this head.

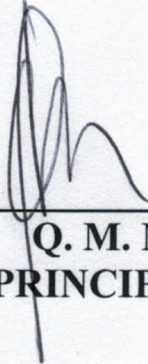
**Future medical expenses – E80-000.00**

[102] No proof was led in respect of this head. Consequently the Defendant is not liable herein.

[103] In view of the foregoing and in all the circumstances of the case I find that the Defendant is not liable in any respect for any damages to the Plaintiff and consequently dismiss the Plaintiffs claim with costs.

MT MBABANE

Crim. Case No. 252



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**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Plaintiff : Mr. S. Jele

For the Defendant : Miss N. Xaba