IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIV. TRIAL NO. 2700/07**

In the matter between:

MANDLA NGWENYA **PLAINTIFF**

AND

THE COMMISSIONER OF POLICE **1st DEFENDANT**

THE ATTORNEY - GENERAL **2nd DEFENDANT**

O. Nzima for the Plaintiff

S. Khumalo for the Defendant

RULING ON ABSOLUTION FROM THE INSTANCE

SEY J.

[1] By Combined Summons dated the 18th day of July, 2007, the plaintiff instituted action against both the first and second defendants for payment of the sum of E450 000.00 being alleged damages he suffered in respect of loss of liberty and freedom, pain and suffering and contumelia and discomfort.

[2] Paragraphs 4 - 7 of the particulars of claim read, inter alia, as follows:

> " 4. On or about the 1st March 2007, police officers based at Pigg's Peak Police Station wrongfully and unlawfully arrested, assaulted and tortured the plaintiff on an alleged offence of robbery and/or dagga possession and thereafter accusing him of having committed rape in South Africa.
>
> 5. During his detention, the plaintiff was assaulted and tortured by the police in breach of his Constitutional Rights. He suffered severe injuries.
>
> 6. Thereafter the plaintiff was illegally taken to South Africa through the Matsamo Border Post. In South Africa and in particular at Schoemenstal, plaintiff was arrested, tortured and assaulted by police officers there and caused to clean floors as well as motor vehicles.
>
> 7. Plaintiff was subsequently released without any charges preferred against him. He was ordered to travel without money and by foot and told to ask for permission from army officers for entry into Swaziland."

[3] The relevant evidence in chief of the plaintiff may be summarised, very briefly, as follows: On 1st March, 2007, at about 4 a.m. police officers had gone to his aunt's home at Busweni and they had asked him about certain boys. The plaintiff had told them that he did not know the boys because he was only visiting his mum who was ill. The police officers had asked him for a gun and he had told them he

did not have a gun. The police officers then told him that he had run away from Mpofu where he lived because he had robbed a store. The police officers handcuffed him and took him back to Mpofu where the lady who was supposed to open the said store was asked to identify him. He said the lady had told the police officers that he was not the one who had robbed the store because she knew him from that area and that the people who had taken the money had done so in broad daylight. The plaintiff said he told the police officers to let him go as it was evident that he was not the one they were looking for.

[4] It is the plaintiff's further testimony that the police officers refused to release him on the basis that he was also wanted in South Africa for the offence of rape. He said the Swaziland police officers then took him to the South African border gates where they took off his handcuffs and handed him over to the South African police. The plaintiff alleged that he was handcuffed and taken to Schoemenstal where he was tortured and assaulted by South African police officers and caused to clean floors as well as motor vehicles.

[5] Under cross examination defence counsel put it to the plaintiff that in his evidence in chief he had not said anything about the alleged torture. In response the plaintiff said he thought he was only giving evidence briefly.

[6] I find it apposite at this stage to reproduce that part of the cross examination hereunder as follows: "XX bvS.khumalo

Put: You have not said anything about the alleged torture.

A: I thought I was only giving evidence briefly.

Put: The police never tortured you and I will call witnesses to prove that.

A: They did arrest and torture me and I resisted when they put me in the vehicle. I could not even eat or drink water. I did not say they assaulted me such that I suffered severe injuries.

Put: What is contained in paragraph 5 of your particulars of claim is not correct.

A: If I had suffered those severe injuries I would have gone to a doctor and I would have opened a case using the doctor's report. If they kicked me I would have gone to the doctor but slapping would not cause severe injuries to warrant me to go to the doctor.

Put: You have not been truthful to the court in your entire claim

A: It is correct. I think that it was a misprint in the particulars of claim which states I suffered severe injuries. By paragraph 6 of the particulars of claim I mean at Schoemenstal police station the officers never assaulted me. They only handcuffed me and when we got to the place at Tjpisi they took off the handcuff.

I think there was a misprint in paragraph 6 because when I explained the case to my lawyer I did not tell him that I have been arrested and tortured and assaulted by police officers. Some of what is in paragraph 6 is wrong.

I do not know what the oath means. I am telling the court the truth. The mistake is that when I left the lawyer's office they were still writing on a piece of paper and I am only seeing paragraph 6 now."

[7] The defendants' counsel further put it to the plaintiff that he was not assaulted and tortured and that he had only been arrested on suspicion of commission of an offence, then questioned and discharged. However, the plaintiff retorted that the police officers had assaulted him and he said that he was tortured because the police officers arrested him and they never asked him any questions but rather they were just "telling him things." He said he did not report the assault and that he took it as something minor because he was not hurt and he did not suffer severe injuries.

The plaintiff also stated that he was never detained but he was handcuffed from the early hours of 4 a.m. up to the evening. He said that in Swaziland he was going around in the car with the police officers and that in South Africa he was not put in a cell although he was handcuffed whilst sitting in the office.

[8] In answer to further questions as to why he was claiming the sum of E450 000.00, the plaintiff said:

> "The problem was that the police officers deported me and wrongfully assaulted me. That is the statement I made to my attorney. I was detained for more than 11 hours and for those 11 hours I am claiming E450 000.00. I see paragraph 10 of the particulars of claim. It is correct that I have claimed E200 000.00 for loss of liberty and freedom. I arrived at this amount due to the fact that there was pain in my heart and for not being free in spirit and also for being assaulted. I have claimed El 50 000.00 because the pain is due to the fact that I was handcuffed tightly and when I asked them to remove it they refused. Even when they took them off the blood was not circulating and there were blood clots. I took the incident as a minor thing because being handcuffed is not the same as being assaulted. I have claimed El 00 000.00 for discomfort because even in the community I was regarded as a criminal."

[9] The plaintiff tendered the evidence of his aunt Sizakele Ngosi who testified about what the South African police said and did whilst the plaintiff was in South Africa.

[10] At the close of the case for the plaintiff, counsel for the defendants applied for absolution from the instance on the basis that the plaintiff had failed to make out a prima facie case and therefore the defendant had no case to answer.

[11] This application for absolution from the instance is governed by the provisions of Rule 39 (6) of the Rules of the High Court which reads as follows:

> "At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one counsel on his behalf may address the Court and the plaintiff or one counsel on his behalf may reply. The defendant or one counsel on his behalf may thereupon reply on any matter arising out of the address of the plaintiff or his counsel."

[12] The overriding consideration for granting absolution from the instance at the end of the plaintiff's case is that it is considered unnecessary in the interests of

justice to allow the case to continue any longer in the absence of a prima facie case having been made out by the plaintiff.

See **Putter v Provincial Insurance Co Ltd and Another 1963 (4) SA771(W)**

Also **Adecor (pty) Ltd v Quality Caterers (Pty) Ltd 1978 (3) 1037 (N) 1078F**

[13] In the case of **Gascoyne v Paul and Hunter 1917 T.P.D. 170 at 173 Villiers J. P.** opined thus:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable
> man might find for the plaintiff? .....The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant Hunter; in other words, was there such evidence upon which a reasonable man might, not should, give judgment against Hunter?"

[14] The test for absolution to be applied by a trial Court at the end of the plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H** in these terms:

> ".....When absolution from the instance is sought
> at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably to such evidence, could or might (not should, nor ought to)

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[15] In a nutshell, what this implies is that a plaintiff has to make out a "prima facie" case to survive absolution because without such evidence no Court could find for the plaintiff.

[16] Judging from the plethora of cases dealing with absolution from the instance, the question in this present case therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendants? In other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against the defendants named herein?

[17] The law is trite, that he who asserts a fact must prove it, and where enough and relevant evidence is not adduced, then it is he who has failed to produce the

evidence that will fail in his case. The burden is on a plaintiff to show that he is entitled to the reliefs sought. That burden does not shift to the defendant. After all, a plaintiff should not rely on the weakness of the case of a defendant but rather on the strength of his case as proved in Court. Accordingly, a Plaintiff who fails to prove the relief (or reliefs sought) goes home without victory. So it was held by the **Supreme Court of Nigeria holden in Abuja on December 18, 2009 before their Lordships: Niki Tobi, JSC; Aloma Mukhtar, JSC; Ikechi Ogbuagu, JSC; Ibrahim Muhammad, JSC; and Christopher Chukwuma-Eneh JSC in Appeal Case No. SC. 62/2003 between Mrs. Ethel Orji And Dorji Textiles Mills (Nig.) Ltd & ors.**

[18] Coming back home to this jurisdiction, I feel emboldened to place reliance on **W.A. Joubert (editor)** ***The Law of South Africa*** (first reissue 1999) volume 9, Butterworths, page 444 at paragraph 639, where he states "That he who asserts must prove - because if one person claims something from another in a Court of law, he has to satisfy the Court that he is entitled to it."

[19] In the instant case, counsel for the defendants has submitted to the Court that the plaintiff has abysmally failed to make out a *prima facie* case because not only had the plaintiff denied the allegation of assault and torture, as pleaded, but he had also testified that he had considered the injuries to be minor. Counsel further submitted that by virtue of section 22 (b) of the Criminal Procedure and Evidence Act No. 67 of 1938, the police are empowered to arrest, without warrant, on reasonable suspicion and question the suspect. Furthermore, counsel submitted that even though the plaintiff's claim is against the Swaziland police, the plaintiff's witness, PW1, testified to the effect that the Swaziland police officers never dealt with her. Counsel stated that PW1 devoted a lot of time talking about things that were dealt with by the South African police. It is also counsel's further submission that the plaintiff failed to lead evidence in proof of damages to discharge the onus on him and to thereby convince this Court that he is entitled to the reliefs claimed.

[20] I must state that I am in agreement with defence counsel's submissions that the plaintiff denied the allegation of assault and torture under cross examination. He categorically stated that he did not say the police officers assaulted him such that he suffered severe injuries. He even went on to explain that if he had suffered those severe injuries he would have gone to a doctor and he would have opened a

case using the doctor's report. In his own words he said "If they kicked me I would have gone to the doctor but slapping would not cause severe injuries to warrant me to go to the doctor."

[21] At this stage, I deem it necessary to state that having carefully perused the pleadings of the parties herein as well as the evidence produced by the plaintiff at the trial, it is apparent to this Court that the plaintiff departed from his pleadings as set out in the particulars of claim. It can be seen from the extract of the pleadings, which I have recited earlier on above, that the plaintiff had made allegations of torture resulting in severe injuries. However, it is in evidence that he denied such allegations under cross examination. When the plaintiff was confronted by defence counsel with the various inconsistencies, he claimed that there was a misprint in paragraph 6 of the particulars of claim. He then strenuously went on to state that when he had explained the case to his lawyer he did not tell him that he had been arrested and tortured and assaulted by police officers. Be that as it may, however, it is settled law that parties are bound by their pleadings and no party is allowed to present a case contrary to its pleadings. Therefore, it need hardly be stressed that the whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action, trie issues upon which reliance is to be placed. See **Durbach v**

Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082) as well as the recent case of **Nel v Jonker (A653/2009) [2011] ZAWCHC 5** dated 17 February 2011.

[22] On the whole, in my considered view and judging from the totality of the evidence adduced by the plaintiff Mandla Ngwenya and his witness, I find that this case did not reach the minimum threshold of making out a *prima facie* case which was necessary to escape absolution from the instance. Consequently, I am inclined to grant the defendant an absolution from the instance. I so hold.

[23] In the result, the defendants' application for absolution from the instance is hereby granted and the plaintiff is ordered to pay the costs of this action in terms of Rule 68 (2) of the High Court Rules.

DELIVERED IN OPEN COURT IN MBABANE ON THIS 8th DAY OF APRIL, 2011

M. M. SEY(MRS)
JUDGE OF THE HIGH COURT