



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2739/2001

In the matter between

**GCINA VILAKATI
MUSA VILAKATI**

**1st Plaintiff
2nd Plaintiff**

And

**THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

**1st Defendant
2nd Defendant**

Neutral Citation: *Gcina Vilakati & Another v The Commissioner of Police & Another (2739/2001) [2014] SZSC 389 (31st October 2014)*

Coram: **Dlamini J:**

Heard: **29th July 2014**

Delivered: **31st October 2014**

Plaintiffs' claim based on unlawful arrest – court to view prevailing circumstance of the case to ascertain whether arrest was unlawful – question was whether there is reasonable suspicion of an unlawful act as per section 30 of Criminal Procedure and Evidence Act No. 67 of 1938 and section 16(3) (b) and (4) of Constitution of Swaziland Act No. 1 of 2005 – defamation – insufficient to state the words uttered – party must establish reputation and how it was tarnished

Summary: The plaintiffs are demanding the sum of E150,000.00 against defendants as damages arising from their unlawful arrest, assault, torture and defamation of character at the hands of 1st defendant. Defendants opposed the claim on the basis that they are not liable. Defendants are opposed to the claim on the basis that there are not liable.

Plaintiffs' particulars of claim

[1] The plaintiffs pleaded as follows:

- “5. *On or about 8th June 2001 plaintiffs while at Mankayane bus station were unlawfully arrested without warrants by members of the Mankayane Royal Swaziland Police.*
6. *Thereafter plaintiffs were detained at the Mankayane Police station for seven (7) hours (between 10.00 a.m. and 17.00 hrs) at the instance of the aforesaid policemen and various other policemen whose names and ranks are to the plaintiffs unknown.*
7. *The said policemen were acting within the course and scope of their employment as policemen of the Royal Swaziland Police.*
8. *In the course of detention, plaintiffs were tortured and assaulted by members of the police force.*
9. *At the time of the arrest at the Mankayane bus station, plaintiffs were insulted and accused by the policemen of being criminals in the presence of members of the public.*
 - 9.1 *Such accusations and statements were unlawful and defamatory of plaintiffs;*
 - 9.2 *The statements were made with the intention to defame plaintiffs and to injure their reputation;*
 - 9.3 *The statements were understood by the addresses and was intended by the said policemen to mean that plaintiffs are bad persons in the following respects:*
 - a) *That plaintiffs are criminals;*

b) *That they were at Mankayane solely to further criminal activities.”*

Viva voce evidence

[2] The plaintiffs gave evidence. 1st plaintiff PW1, on oath identified himself as **Gcina Bongani Vilakati**. He informed the court that he was 34 years old and not married. On the 6th June, 2001, he went to look for employment at Thuthuka Supermarket, situate at Mankayane Town. He was in the company of 2nd plaintiff. They were told that the Manager was not present, having gone to Manzini. They were told that the shop needed two people and therefore should come back on 8th June 2001, a Wednesday. On this day, they went straight to the person who attended to them on the 6th June 2001. This person pretended not to know their matter. They left for the bus rank. After about ten minutes, they saw three police vans approaching. One of the police officers said they should cross over the road and get into the van as they wanted to search them for something relating to the supermarket. They obliged. While in the police van, one of the police officers enquired from his colleagues as to why he was letting them board the motor vehicle without first conducting a search. What would happen if they were carrying firearms. They were then searched and thereafter boarded the police van. They reached the police station where they alighted from the van and entered the charge office. The police officers accompanying them remained outside while they went into the charge office. There were many people in the charge office. The police came in and found them sitting at the charge office. They insulted them calling them by their mothers' private parts for remaining in the charge office. They followed the police officer to the criminal investigations office. The police enquired from them on what they wanted from the shop. They told

them that they were looking for a job and they were told to come back that day. The police said they should tell them the truth on what they wanted from the shop.

[3] He was told to sleep on a bench which was in the same office. The police took a rope and tied his whole body. One of the police officers sat on his chest. He got hold of a black tube and closed his face and breath. They said they should tell the truth on what they wanted at the shop. They informed them that they wanted employment. They demanded that they produce the dagga they were smoking. They told them that they do not smoke. They said they should breath on them in order to detect the smell of dagga. Upon realizing that they did not smell any dagga, they informed them that they were charging them with house-breaking committed at Velezizweni area under Mankayane. They told them that they have never been to Velezizweni and do not know its location. They detained them from 10.00 a.m. and released them at 5.00 p.m. This witness requested for the sum of E50,000 for unlawful arrest and E10,000 for defamation of character. He was cross examined by learned Counsel for the defendants. I shall refer to his cross examination later.

[4] PW2 was **Musa Bright Vilakati**, the 2nd plaintiff in the present case. His evidence was similar to that of PW1. He was in the company of PW1 and they both went to look for employment at Thuthuka Supermarket where they were informed to come back. They returned on the 8th June 2001 where, however they were told that there was no employment. They left but after ten minutes three police officers emerged. One of them told them that they should board the police van as there was a problem at the shop. They were needed for investigation. This officer introduced himself as Lukhele. While they were boarding the van, one of the police officers

suggested that they be searched. They were then taken to the police station. They were told to go into the charge office while the police remained outside planning. They later entered the charge office and insulted them. They then went with them into the criminal investigations office where they were assaulted. They slapped and kicked them. They blocked their breath and one of the police sat on their chests. When they realized that they did not know that offence, they laid a charge of dagga. Again upon realizing that they did not know the charge of dagga, they charged them for a house-breaking offence which happened at Velezizweni. They also realized that they did not know the offence of house-breaking. It is then that they were released. He then asked the court to order payment of damages. He was cross examined. The plaintiffs then closed their case.

[5] The defendants called three witnesses to give evidence in rebuttal. DW1, **Sibongile Suzan Mndzebele** on oath informed the court that she was a resident of Ngcoseni area. In 2001, she was a shop assistant at Thuthuka Supermarket. On 18th June 2001, a Monday, they opened the shop, preparing to start work. Two gentlemen entered the shop. They moved around the shop. They then approached her asking for the manager. She enquired from them whether they knew the person they were asking for. The reason for so enquiring is because they passed the manager by the tills. Upon this question, the two gentlemen changed their countenance and became angry. She decided to ask them to wait while she was looking for the manager. At this juncture, their anger intensified, saying they wanted the manager. She told them that the manager had gone to Manzini. She had to go and find out whether she had returned. She left straight to the manager and told her that two men were looking for her. She returned and told the two men that the manager was not yet back from Manzini.

[6] This witness then explained the reason for such action. She told the court that an incident had just occurred where robbers went to the manager's homestead at night. They took the manager and forced her into her kombi. They drove with her straight to the Thuthuka Supermarket. At the main gate the security guard opened when the robbers blew a hoot, thinking that it was the manager. They forcefully took the security into the shop's bathroom. They took the manager into the shop and assaulted her severely. They forced her to open the safe and removed all the money. They took all the tobacco or cigarettes from the shelves. They left with the kombi and abandoned it with its keys at Thokozeni area. The manager was left by the robbers thinking that she was dead.

[7] When the two plaintiffs arrived at the shop, the manager was still very ill from the injuries. It was her further evidence that the manager never recovered from the robbers' assaults. She eventually died from the inflicted assaults.

[8] When she informed the two plaintiffs that the manager had not returned, one of them pulled her by her jersey and left. They, however came back on Wednesday. They did not talk to her on this day. They spoke to Jabulani, one of the shop assistants. Jabulani then approached her to enquire whether the two were not the same persons who were at the shop on Monday. She confirmed that they were the same persons. Jabulani went to inform Xolile Dlamini, at the bar section who in turn went to the manager. The manager called the police. The police came. They took the two gentlemen with them while they were at the bus rank. She did not know what eventually happened to the two gentlemen as the manager died thereafter. She ended her examination in chief by informing the court that on the first day, the plaintiffs spent quite some time in the shop.

[9] On cross examination, it was put to her that the plaintiffs went to the shop on Monday to look for employment. She flatly denied this and stated that if plaintiffs' version were true, they would have told her that they wanted the manager because they were looking for employment.

[10] It was put to her that she had no reason to lie about the whereabouts of the manager because the plaintiffs were not carrying any weapons, it was during broad day light and the manager was not alone. DW1 witness stood her ground that following the robbery and severe assaults upon the manager, she had to protect her. Further, her manager's assailants had not been identified at the time the two came to the shop. She added that such was not the only incident that happened in the area in 2001. One Nedi Nkumane who ran transport business had been shot on the head while giving money to robbers who had demanded the same. It was her evidence that there were three incidents of robbery in that year that occurred around the area. She was quizzed on why she failed to report the charge of assault as she claimed that one of plaintiffs pulled her by the jersey. She responded that it was upon the manager to decide whether to report the charge and not her she was at work during the incident. She could not do so on her own.

[11] The second witness on behalf of defendants was **Jabulani Joshua Simalene**. DW2 gave evidence under oath. He told the court that he was in the employ of Thuthuka Supermarket in 2001 as a shop assistant. On 20th June 2001, a Wednesday, two gentlemen approached him while he was working by the shelves in the shop. They asked as to where the manager of the shop was. He told them that she was not in. He then went to DW1 to enquire whether the two gentlemen were not the same gentlemen who came on Monday. She came closer to look at them and confirmed that they were

the same. He then went to Xolile to report that there were two gentlemen looking for the manager but he had informed them that she was not in.

[12] Under cross examination, this witness denied that the plaintiffs spoke with him on the 18th June 2001 as put by learned Counsel for plaintiffs. It was put to DW2 that the plaintiffs were looking for employment on this day. He responded that they did not say that they were looking for the manager in order to request for employment. If they did, he would have shown them the manager. His cross examination was brief.

[13] The next witness was DW3, **William Malindane Dlamini**. He took oath and identified himself as Station Commander of Mankayane Police station. On 20th June 2001, he received a report from Mrs. Nkumane, the manager of Thuthuka Supermarket. She reported that there were two gentlemen looking for her. It was not the first time they were looking for her at the shop. They had come on 18th June 2001, wondered about the shop without buying anything. They thereafter asked for her. These two gentlemen asked the employees to describe what she was wearing. This information raised suspicions on this witness. It was his evidence that Mrs. Nkumane was frightened and requested that police assist her. He took 3262 Constable Lukhele to go and see the two gentlemen. They proceeded straight to the Supermarket and found DW1. They asked her to show them the two gentlemen. She did and at that time the duo were at the bus rank which is about 30 metres away from the Shop. They approached the gentlemen and requested them to report to the police station following a complaint by Mrs. Nkumane. They boarded a kombi with them to the police station where they were interrogated about the complaint. They enquired what they wanted from Mrs. Nkumane. They took a while to respond and eventually said they were looking for employment. They

explained to them that on those days there were cases of armed robbery at the shop. They informed them that Mrs. Nkumane had been robbed and items taken away from her shop. She feared that she might be robbed again. They also informed them that they were not needed at the shop. The interrogation took less than two hours. They then asked for a lift for them to be taken home. They did not assault the plaintiffs and did not verbally abuse them. The interrogation lasted for less than two hours. As a station commander, he would not allow his officers to abuse suspects. When they attended the call by the manager, they used only one vehicle as they were two of them.

[14] Under cross examination, it was disputed that this witness dealt with the plaintiffs on the day they were accosted to the police station for interrogation. It was said that the only time this witness had anything to do with the plaintiffs was when he ordered officer Lukhele to search them. This officer stood his ground and maintained that he was in the company of officer Lukhele when the plaintiffs were taken to the police station. He was also involved throughout the interrogation of the plaintiffs. He denied ever subjecting plaintiffs under physical violence.

Adjudication

[15] Presented in *viva voce* evidence are two dichotomous versions by the contending parties herein. My duty in such instance is as propounded by her **Ladyship Ota JA in James Ncongwane v Swaziland Water Services Corporation (52/2010) [2012] SZCS 65** at 29 as follows:

“I say this because a judgment of the court is the reason and binding judicial decision of the court delivered at the end of the trial. It is thus mandatory that it be clear in the judgment that the court considered all the evidence at the trial and having placed them on an imaginary scale, the balance of admissible and

credible evidence tilted towards the victor. In his venture, the court is required to first of all put the totality of the testimony adduced by both parties on an imaginary scale. It will put the evidence adduced by the plaintiff on the one side of the scale and that of the defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses.”

[16] This “*quality or the probative value of the testimony*” was referred to by the court in **Orion Hotel (Pty) Limited t/a Pigg’s Peak and Casino v Mag Air CC 20/2010** as “*the probabilities of the matter*”.

[17] The question therefore arises: “*What are the probabilities of the matter?*” in the face of the two irreconcilable versions presented before court?

Factual Matrix

[18] It is common cause that the two plaintiffs went to the supermarket shop on two occasions. They sought to be shown the manager. It is further not in issue that police approached them while at the bus rank and accosted them in a police van to the police station for interrogation on the basis of seeking to see the manager of the supermarket. It was not disputed that around this period, the manager had been severely assaulted and left for death by armed robbers who were still on the run. The manager eventually succumbed to death as a result of the injuries inflicted upon her by the armed robbers.

Plaintiffs’ version

[19] The plaintiffs have instituted a claim for the sum of E150,000 based on the following grounds:

“6. *Thereafter plaintiffs were detained at the Mankayane Police Station for seven (7) hours (between 10.00 and 17.00 hours) at the instance of the a*

foresaid policemen and various other policemen whose names and ranks are to the plaintiffs unknown.

8. *In the course of detention, plaintiffs were tortured and assaulted by members of the police force.*

9. *At the time of the arrest at the Mankayane bus station, plaintiffs were insulted and accused by the policemen of being criminals in the presence of members of the public.*

9.1 *Such accusations and statements were unlawful and defamatory of plaintiffs;*

9.2 *The statements were made with the intention to defame plaintiffs and to injure their reputation;*

9.3 *The statements were understood by the addresses and was intended by the said policemen to mean that plaintiffs are bad persons in the following respects:*

a) That plaintiffs are criminals;

b) That they were at Mankayane solely to further criminal activities.”

10. *As a result of the foregoing plaintiffs suffered damages made up as follows:*

a) Unlawful arrest E 90,000.00

b) Assault and torture E 50,000.00

c) Defamation of character E 10,000.00

TOTAL E150,000.00

Unlawful arrest

[20] Evidence adduced in support hereof by 1st plaintiff runs:

“After about ten minutes we saw three police van approaching us. One police in private clothing came to us and said we should cross over the road and get into the van as they wanted to search us on something relating to the shop. They did not tell us what they wanted to search. We boarded the police van. Another

police officer came and asked his colleague why he was letting us board the van without searching us. What would happen if we are carrying guns and we shoot them. They searched us and made us to board the van.”

2nd plaintiff testified:

“We left the shop. After ten minutes they police emerged. They were three. One of them a Lukhele came to us. He ordered us to get into the police van there is a problem in the shop. They wanted to investigate something. While we were boarding the van, one police came saying we should be searched. They took us to the police station.”

[21] Both plaintiffs informed the court that prior to their arrest, they had visited the shop for purposes of seeing the manager in order to seek employment. They were attended on the first day by a male who informed them that the manager was not around that day and that they should come on another day. They again reported to the shop, requesting audience with the manager. 1st plaintiff stated under oath:

“On June 6th 2001 I went to look for employment at Thuthuka Supermarket. I was with Musa Vilakati. We were told that the manager was not present. He was in Manzini. The person we spoke to stated that the manager would need two people. We should come back on Wednesday 8th June 2001. On Wednesday we approached the person who attended to us Saturday. This person pretended not to know our matter. We left to the bus rank.”

2nd plaintiff testified of the same event.

“On 6th June 2001, I went to Mankayane looking for a job. I found a male, I spoke to him. He said I should come back on 8th June. On the 8th when I returned, I said I am looking for employment. They said there is none. We left the shop.”

[22] Glaringly, their versions of the events of the 6th June 2001 do not tally. 1st plaintiff who testified that he was in the company of 2nd plaintiff, informed

the court that at the shop they requested for the manager in order to find employment while 2nd plaintiff stated that they went to the shop and requested for employment. They were told to come back and on their return, they were told that there was no employment. On the other hand 1st plaintiff said that on the second occasion, the person who had attended to them pretended not to have seen them before. This is the person who attended to them the first day and had advised them that the manager was looking for two persons. This material contradiction in the plaintiffs warrants the court to view their testimony with caution.

[23] The defendants' witnesses on the other hand informed the court that the duo first came into the shop on the 18th June 2001 and DW1 proceeded:

“Two gentlemen entered the shop. They moved around the shop and came to me. They asked for the manager, I asked them whether they knew the person they were asking for. What made me ask them that question was that they had passed the manager by the door near the tills. They then changed their countenance. I said they should wait while I look for her. They changed and became hostile. I went back to them and told them that she was not yet back from Manzini. The other one pulled me by the jersey and they left.”

DW2 testified as follows about their second day at the shop:

“On 20th June 2001, Wednesday two gentlemen came by the shelves where I was. They enquired as to where the manager was. I said he was not in. I went to Mrs. Shongwe (DW1) to enquire whether the two gentlemen were not the same who came on Monday. When she came closer to look at them, she said they were.”

[24] Both DW1 and DW2 were cross examined. However, it was never put to both witnesses that either DW1 or DW2 or any of the shop assistance advised them to come back the following day for purposes of seeing the manager who needed two more employees. I say this because plaintiffs

justified their presence at the shop on the two instances on the basis that they had gone there to seek for employment. Their return was upon the advice of one of the employees. This version was never maintained when defendants' witnesses took the witness box. This was not surprising in view of the contradiction in their own evidence in chief highlighted above. I may pause here and refer to the cross examination verifying that the plaintiff did not state the reasons for requesting to be shown the manager.

Mr. Mkhwanazi: "When the two gentlemen came to the shop did you ask them why they were looking for the manager?"

DW2: "No".

Mr. Mkhwanazi: "Since you say they didn't ask why they wanted the manager – they wanted the manager to seek for employment."

DW2: "They didn't talk about employment. If they did, we wouldn't be here."

[25] From the above line of questioning, it is clear that the plaintiffs themselves admit that they did not tell the witness the reason they were looking for the manager. This is contrary to their evidence in chief where they stated that they did ask for the manager and explained that they were looking for employment, thus the advice that they should come again on another day. The above lends credence to the version by defendants.

[26] The defendants' version is that the plaintiffs who moved around the shop for some time before approaching her and enquiring the whereabouts of the manager, became hostile when she enquired as to whether they knew the

person they were looking for. When she informed them that the manager had not returned from Manzini, they pulled her by the jersey. It is upon their return the second time that the police were called. The police did not *mero motu* arrest the plaintiffs. They received a call from the manager. They arrested the plaintiffs for purposes of interrogation following a report by the manager. DW1 described in details the events that led them to be suspicions of the two plaintiffs and thereafter report them to the police. Her manager had been subjected to severe assault by armed robbers. Another businessman had just been shot dead by armed robbers in their area. Then the plaintiffs had come previously looking for their manager without any explanation. For the above reasons the court is bound to accept the version by defendants' witnesses.

[27] The 1st plaintiff and not the 2nd plaintiff.

“They arrested us at 10.00 a.m. and released us at 5.00 p.m.”

Section 30 (1) and (2) of the Criminal Procedure and Evidence Act No.67 of 1938 reads:

Procedure after arrest without warrant

“30 (1) No person arrested without warrant shall be detained in custody for a longer period than in all the circumstances of the case is reasonable.

(2) Unless such person is released by reason that no charge is to be brought against him, he shall, as soon as possible, and without undue delay, be brought before the magistrate’s court having jurisdiction upon a charge of an offence.”

[28] From sub-section (2) it is clear that the law does permit arrest for purposes of interrogation. Sub-section (1) informs that whether a person is arrested

for laying of a charge or not, he should not be detained for “*a longer period than in all the circumstances of the case is reasonable*”.

Section 16 (3) (b) and (4) of the Constitution of Swaziland Act No: 1 of 2005 stipulates:

“16 (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.

(4) Where a person arrested or detained pursuant to the provisions 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.”

[29] Do the circumstances of this case warrant the period of detention for plaintiffs in the hands of 1st defendant?

S v Mbahapa 1991 (4) S.A. 668 at 669 it was held:

“Further that what was possible or reasonably possible had to be judged in the light of all the prevailing circumstances in any particular case, account having to be taken of such factors.....”

[30] The circumstance of the case are that during the period the plaintiffs were arrested, there were two armed robberies. In the first robbery, the suspects demanded money from a businessman who was running transport business. When he handed them the cash, they shot him direct on his head and he died instantly. This evidence stands to be accepted because it was not challenged under cross examination. Further the manager of the shop who

was the person who reported the plaintiffs who were said to have raised suspicion and fear on the employees of the shop, had recently been severely assaulted by robbers. She was taken away from her home and forced into her motor vehicle. She was then driven to the shop where the security opened the gate, thinking it was his boss upon seeing the motor vehicle. The security was tied and manager compelled to produce cash from the safe with a number of items taken away from the shop. She was nevertheless severely assaulted and left for death by her assailants who were still at large by the time the duo came to the shop and demanded to see the manager. Again, this evidence remained unchallenged under cross examination and therefore stands to be accepted. When asked whether they knew her, they became hostile. They returned after one day and demanded to see the same manager. This caused panic and prompted the manager to call the police.

[31] No doubt, these “*prevailing circumstances*” as pointed out in **Mbahapa supra** provided as a “*reasonable suspicion*”(as per the constitution) by the manager and her employees to call for the arrest or detention of the plaintiffs for purposes of interrogation.

[32] The constitutional provision cited *supra* guides law enforcement agents who have taken a suspect for questioning by setting forty-eight hours as reasonable time unless other factors are adduced. *In casu*, the plaintiffs, if their version is anything to go by, testified that they were detained for ten hours.

[33] Surely this period does not go near forty-eight hours. I say this much alive to the *ratio decidendi* in **S v Mbahapa 1991 (4) S.A. 668** at 669 where it was held:

“G. *Held further, that what was possible or reasonably possible had to be judged in the light of all the prevailing circumstances in any particular case, account having to be taken of such factors as the availability of a magistrate, police manpower, transport, distances and so on, but certainly not of convenience.*

Held further, that in determining what construction should be placed on s 50 and in particular whether it applied to periodical courts, regard could be had to art 11 (3) which dealt with the continued detention of an arrested person.

H. *Held further, that if the reference in s 50 to lower courts were to be construed as including periodical courts, it would mean, in certain circumstances, that the police would be empowered to hold an accused in custody for up to nine days, and possibly even longer, simply because the nearest court sat only at intervals of one week, and that the primary purpose of such a provision could properly be said to be to avoid inconveniencing the police rather than ensuring that an accused was brought before a magistrate as swiftly as possible once the 48-hour period had expired.*

I. *Held further, that such a construction would be repugnant to the provisions of art 11 (3) of the Constitution and, invoking the presumption of constitutionality, the alternative construction was the correct one, namely that s 50 included a periodical court if one were sitting at the appropriate time but excluded it when the arrested person could not be given the protection to which he was entitled if he were to be brought before it.”*

[34] For the reason that they were not detained beyond the period stipulated by the legislature and owing to the circumstances that led to their detention, I find that their arrest was lawful and therefore their claim is without merit.

Assault and torture

[35] The 1st plaintiff’s testimony reflected:

“There was a bench saying I should sleep on it facing upwards. They took a rope and tied my whole body. One of them sat on my chest. He took a black tube and closed my face and my breath.”

He then proceeded:

“They said we should speak the truth. What we wanted from the shop and we said we wanted employment. They said we should produce dagga we were smoking. We said we don’t smoke. They said we should breath into them so that they may detect whether we were smoking. Upon realizing that we were not smoking any dagga, they told us that we had charges of house-breaking committed at Velezizweni. We told them that we had never been to Velezizweni and we don’t know that area.”

He then concluded:

“They arrested us at 10.00 a.m. and released us at 5.00 p.m.”

2nd plaintiff warranted:

“They went with us to the CID’s office to assault us. They slapped and kicked us. They blocked our breath and one of them sitting on the chests. When they realized that we don’t know this charge, they laid a charge of dagga. When they realized that we don’t know the charge of dagga, they charged us for house-breaking at Velezizweni. Upon realizing that we don’t know this charge as well, they released us. That is all.”

He was led by his counsel:

Mr. Mkhwanazi: “Who was with you when you were arrested?”

PW2: “I was with another lady”

Mr. Mkhwanazi: “Who else?”

PW2: “I was with 1st plaintiff”

Mr. Mkhwanazi: “ How were you suffocated?”

PW2: “I was tied on the bench facing upwards as one sat on my chest suffocating me.”

[36] Under cross examination of both plaintiffs, defence counsel denied that the duo were ever assaulted. It was further put to them that police even offered them a lift to their homes after the interrogation. Both plaintiffs did not

deny this although they maintained that they were suffocated. They were asked as to for how long were they suffocated. Both stated that it was for five minutes. They were asked whether they were attended by a doctor for the assault. They both replied in the positive. They also informed the court upon cross examination that they reported the assault by 1st defendant at Bhunya Police station. However, no records either from the hospital or police were tendered as proof of same.

[37] Looking at the narration by 1st plaintiff, it appears to me that there was conversation between the plaintiff and the 1st defendant. I say this because 1st plaintiff said that first they asked them why they were at the shop, they responded. The police enquired on another subject, that is, dagga. They responded. They (police) moved to enquire on another subject, again that is, robbery at Velezizweni, they gave an explanation. The police then released them. To me this manner of questioning appears that every explanation by plaintiffs was accepted by the police hence they move to the next question on different subject matter. It is no wonder therefore, as verified by DW3, that the plaintiffs themselves did not decline the offer made by the police of a lift to plaintiffs. In fact under cross examination plaintiffs were asked as to how they could have accepted a lift from persons that assaulted them. They did not respond to this question and further did not deny that they were offered a lift to their homes. In the above analysis, I find that the claim for assault and torture is improbable.

Defamation of character

[38] One may infer as evidence in support hereof the following from both plaintiffs.

1st plaintiff:

“At the charge office we found people, many of them and we sat down. The police came in and insulted us saying ‘why are you seated here you bogolo’ (mother’s private parts) follow us to the investigations office.”

2nd plaintiff:

“They (police) waited outside planning. When they entered they insulted us saying ‘fusekani, (go away) language used to chase away dogs) bogolo’.”

[39] Nothing further was adduced in relation to this claim. The 1st plaintiff introduced himself as a resident of Mhlangeni and was thirty four years old. He was not married. The 2nd plaintiff on the other hand informed the court that he was also a resident of Mhlangeni and thirty three years of age. Nothing further was stated on their status. Is this sufficient to warrant a claim under defamation of character?

[40] **“The South African Judicial Dictionary” by J. J. L. Sisson QC 1960** defined defamation as follows:

“Defamation was in Roman law a species of injuria by which the reputation of a person was affected as a member of Society, so that he was not thereafter regarded by his fellow-citizens with the same esteem. This is also the case in Roman Dutch law.”

[41] Firstly from the definition one must establish his own social standing. How he is viewed by the members of his society or class who are usually those present when the defamatory words are uttered. *In casu*, we were only informed that the plaintiffs were residents of Mhlangeni. The words so uttered, if they were at all, are said to have been uttered at Mankayane, an area away from Mhlangeni. We are not told whether there were people in

the charge office at Mankayane who knew both plaintiffs except that 1stplaintiffs stated that there were many people at the charge office. The court was not informed as to the reaction of the hearers of the defamatory words viz., whether they were as a consequence held in lower esteem. This piece of evidence was vital to assist the court in ascertaining plaintiffs' reputation and how far their reputation was affected by the utterances. Nothing *in casu* was established on behalf of plaintiffs except to be informed what the police uttered in the presence of many people. For the above, I find that the plaintiffs failed dismally to adduce evidence in support of their third claim viz. defamation of character by reason that the evidence adduced fall far too below the standard expected.

[42] In the final analysis of the above, I find that plaintiffs have dismally failed to establish their cause of action on the balance of probabilities.

[43] I therefore enter the following orders:

1. Plaintiffs' cause of action is dismissed;
2. Plaintiffs are ordered to pay costs jointly and severally, one paying the other to be absolved.

M. DLAMINI
JUDGE

For Plaintiffs : **M. Mkhwanazi of Mkhwanazi Attorneys**
For Defendants : **N. Vilakazi of Attorney General's Chambers**