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IN THE HIGH COURT OF SWAZILAND

ZACHARIA JABULANI DLAMINI

vs

PIGG'S PEAK HOTEL & CASINO (PTY) LTD

AND TWO OTHERS

Civ. Case No. 1895/94

Coram S.W. Sapire A C J

JUDGMENT

(28/4/98)

The plaintiff sued the first defendant which is the Pigg's Peak Hotel & Casino and the second defendant Commissioner of Police the latter being represented by the Attorney General claiming damages for wrongful arrest and malicious prosecution. I was informed at the commencement of the trial that the Plaintiff would not be proceeding with the claim against the hotel first defendant as that aspect of the matter had been settled

The basis of the claim against the remaining defendant made out in the particulars of claim, is that on the 27th April, 1993, so it is alleged, at Pigg's Peak Police Station, in collusion with (the said) Roger Gordon Martin and others, acting upon their instructions, Detective Sergeant Mthembu a Police Officer acting in the course and within the scope of his employment with the second defendant wrongfully arrested, falsely charged and maliciously proceeded with the prosecution of the plaintiff.

The arrest of the plaintiff is a matter of common cause. It is also common cause that the Plaintiff was following on his arrest held in custody for three days before he was released on bail. He was thereafter tried in a subordinate court on a charge of theft. The record of these proceedings was by consent proved in evidence. The record is of course not proof of the truth of what the witnesses said in giving evidence at that trial but is evidence of what they said and what took place including the terms of the magistrate's judgment in finding the plaintiff not guilty at

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the close of the prosecution case.

A claim for damages for malicious prosecution does not lie against the second defendant, the Commissioner of Police, as the responsibility for prosecutions in the Kingdom of Swaziland, and the decision whether or not to prosecute in any particular case is exclusively that of the Director of Public Prosecutions. That officer has not been cited as a defendant, but even if the citation of the Attorney General as third defendant "in his capacity as the legal representative of the Government of the Kingdom of Swaziland" could be considered as bringing the government before court to answer for the delicts of all its servants, including the Director of Public Prosecutions, it is not alleged by the plaintiff that such officer acted wrongfully.

Having regard to the evidence led at the trial, there seems to have been every justification for the prosecution of the plaintiff and those proceedings do not seem to have been maliciously instituted or conducted. On the contrary, the plaintiff may consider himself favoured by the view taken by the magistrate of the evidence, and the decision to discharge him at the close of the prosecution case. There has been no evidence of a conspiracy between the defendants as alleged in the particulars of claim to have the plaintiff arrested and prosecuted. The plaintiff's claim therefor is to be considered as one for damages arising from a wrongful arrest and detention only.

It is averred that when wrongfully arresting, falsely charging and maliciously proceeding with the prosecution of the plaintiff, the said Sergeant Mthembu had no reasonable probable cause for so doing nor had he any reasonable belief in the culpability of the plaintiff.

The particulars of claim further recite that Mthembu refused plaintiff's demand that the person who was present when the money was " drop-safed" and who was officially responsible for such "drop-safing" at the particular time, should be interviewed to explain what actually happened.

A further allegation is made that Mthembu without any explanation refused to accept the offer of an eye-witness to the drop-safing of the money to make a statement as to what actually happened.

In the particulars of claim it is further alleged that as a result of the conduct of the first and second defendants, that is respectively, Roger Gordon Martin and Detective Sergeant Mthembu the plaintiff was held in custody for three days after which he was released on E3 350.00 bail, later prosecuted at Pigg's Peak Magistrate's Court, and duly acquitted of the crime of theft on the 2nd of July, 1993 at the close of the Crown case.

The Plaintiff claims damages in the sum of E102 200.00 which sum is made up as to E2 200.00 being the costs reasonably expended by Plaintiff in defending himself against the aforesaid charge, and E100 000.00 being damages for contumelia, deprivation of freedom, and discomfort suffered by the plaintiff.

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The defence as far as the remaining defendant is concerned is that Detective Sergeant Mthembu arrested the plaintiff in the course of his duty on evidence then available to him which gave rise to a reasonable suspicion and belief that the plaintiff had committed the offence. In other words Detective Sergeant Mthembu was justified in making the arrest, he being a person referred to in section 22(b) of the Criminal Procedure and Evidence Act, who had reasonable grounds to suspect the plaintiff of having committed an offence mentioned in the first schedule to the act. The relevant section provides:

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

(a)

(b) Whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule "

The offence of theft is one of the crimes mentioned in the First Schedule

It is settled law that the onus of justifying the arrest lies on the defendants. See for instance Joel Masotsha Ziyane v The Attorney General decided by Hannah CJ in a judgement in this court delivered on 23/11/90 in civil case No. 396/89. The learned Chief Justice cited as precedent the decisions of cases decided in the courts of the Republic of South Africa, namely Brand v Minister of Justice and another 1959 (4) SA 712 at 714 and Newman v Prinsloo and another 1973(1) SA 125 at 126

The background to this matter is that plaintiff who was a Manager employed by the Pigg's Peak Hotel was on the 27th April, 1993 contacted by the Police and in response to this he went to the Police Station where he was interviewed by Mthembu. It is common cause that morning a complaint had been made by the management of the hotel that a theft of money had taken place at the hotel, and that an investigation at the hotel premises had t taken place.

The report was to the effect that the theft had taken place in this manner. The hotel, for security reasons, has what is known as a drop-safe. Monies accepted by the cashiers at various cash-taking points is handed by the cashier concerned to the manager on duty at the time whose obligation it is to check the cash received by him with the dockets of the cash register. The obligation of the manager is, having received the money and checked that the amount received by him corresponds with the cashier's records, to drop-safe the money in an envelope together with the dockets, and to indicate by signing in a book kept for this purpose that the money had been received checked and drop safed. In the same book the cashier concerned signs as having handed over the money.

The term "drop safing" refers to the introducing of the envelope containing the money and dockets in a safe through a chute so constructed and situated, that once the envelope is so introduced it cannot be retrieved or accessed otherwise than by opening the safe door. The door is locked and only the general manager has the key.

From documentation proved in evidence, and which was made available to the police in the course of their investigating the apparent theft of the monies, it appears that one Vincent, a cashier employed by the hotel handed an amount of E6 701.44 representing monies collected from the front desk to the plaintiff on 23rd April 1993 which fell during a long week end

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After the long weekend Roger Martin, who was the financial Manager employed by the company which runs the hotel who had the only key to the safe, in the presence of a witness opened the safe in order to remove the takings deposited in the drop-safe during the week end, for banking. It was discovered that the envelope which was reflected as having contained the amount of E6 701.44 and which according to the records had been handed by Vincent to the plaintiff was missing.

The conclusion which was drawn was that as the money could not have been removed without the knowledge of Roger Martin, such envelop had not been drop-safed by the person who had received the money, and who by his signature in the appropriate record had acknowledged such receipt. The logical inference which was drawn in the absence of an explanation from the person concerned as to where the money was and why it is not in the safe, was that person was responsible for the loss of the money. The plaintiff was the person concerned and accordingly in making the report of the apparent theft it was conveyed to the Police that the plaintiff was the suspect.

It is apparently for this reason that the plaintiff was summoned to the Police Station.

The crucial issue of this case therefore is what took place in the Police Station and in particular as to whether the plaintiff furnished the Police with information which would have dispelled the suspicion then held by Mthembu, on what appear reasonable grounds raised on the evidence already gained from the investigations up to that time that it was the plaintiff who was responsible for the theft.

It is the plaintiff's case that he had not been the manager on duty at the time the cashier handed over the money for drop safing. He maintained that he was only scheduled to take over from one Julius Mkhathshwa, as manager in charge, at three o'clock, when the latter's shift came to an end. He arrived at the hotel a little earlier than 3.00 and at Mkhathshwa's request took over the duty of receiving the money and drop-safing it. It is for that reason that his name appears as the manager on duty in the record of receipt of the money. The plaintiff's reasoning appears to be that because the safe dropping took place or

should have taken place during Mkhathswa's shift, it is Mkhathswa from whom the explanation for the missing envelope should have come, and it is he in the absence of an acceptable explanation, or at least one which could reasonably possibly be true, should have been charged, and possibly found guilty of the offence.

This somewhat illogical reasoning is the basis of the allegation in the particulars of claim that"

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When wrongfully arresting, falsely charging and maliciously proceeding with the prosecution of plaintiff, the said Sergeant Mthembu:

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7.1 Had no reasonable or probable cause for so doing nor did he have any reasonable belief in the culpability of the Plaintiff

7.2 Refused Plaintiffs demand that the person who was present when the money was drop-safed. and who was officially responsible for such drop-safing at that particular time should be interviewed to explain what actually happened

7.3 Refused without any explanation the offer of an eye-witness to the drop-safing of the money to make a statement as to what actually happened."

Dealing with each of these allegations in turn

a) ad 7.1 (I) The clear evidence, under the hand of the plaintiff himself that he received the monies from Vincent the cashier, was sufficient evidence of this fact. Sgt Mthembu had a sworn statement from Vincent that he had handed the money to plaintiff That the envelope containing the money was not in the safe where it should have been, has never been questioned. This means that if it was "drop- safed" as claimed by the Plaintiff, then it must have been removed from the safe before Roger Martin and his assistant opened the safe to remove and bank, the contents. Sergeant Mthembu knew these facts and also knew that Martin had the only key to the safe. It was never seriously suggested at the time that Martin may himself have come to the hotel during the week end and removed the envelope and indeed this was not even put to him when he was cross examined at the criminal trial where plaintiff was the accused. This is established by the record of those proceedings which was by consent introduced as evidence in this trial

(ii) On this basis there were at least reasonable grounds for suspecting that Plaintiff had received the money but not drop-safed it and failed to account for it. This leads to a reasonable inferences that Mthembu made, that a theft had been committed and that plaintiff was the prime, if not the only suspect.

(iii) It is true that plaintiff s actions in signing for the receipt of the money and failing to drop- safe it or account for it (if such they were) were so stupid that one questions whether the plaintiff would surely have expected that he was the first one on whom suspicion would fall when the loss was discovered. It was however not necessary for Mthembu to believe him to be guilty, or to question the planning or the manner in which the offence was committed. All that was necessary was for there to be grounds for reasonable suspicion before he was entitled to make an arrest

(b) ad 7.2 (I) The facts upon which the allegations in this paragraph are made emerged from the evidence of the plaintiff himself, but more particularly from that of Julius Makhawwa. He it will be recalled, was the manager on duty, whose shift ended at three o'clock. He recounted how the plaintiff arrived shortly ahead of time to relieve him. As he was busy, he requested plaintiff to assist him by attending to the drop safing of the money brought to their post by the cashier Vincent. Plaintiff according to both plaintiff and Makhawwa agreed to do this and attended to Vincent. The book was signed when

the money had been checked and the envelope was placed in the chute by the plaintiff. If this was indeed so what happened to the envelope containing the money?

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(ii) Plaintiff attributes great importance to Makhashwa's evidence as to what happened after the loss had been discovered. He says he was at the hotel when the police made their investigations but he was not questioned and made no statement. It was only when he was riding home to Pigg's Peak on a bus that he noticed plaintiff's motor car parked outside the police station. He felt it his duty to assist the plaintiff if necessary, and to inform the police of what had happened and that he had actually seen Plaintiff drop the money.

He says that he was not welcomed in the police station and that Sgt Mthembu refused to pay any attention to him as the latter considered he had all the evidence he wanted to have. Sgt Mthembu does not recall having seen this witness and denies that any offer was made by him to make a statement. Mthembu conceded that Makhashwa may at a later stage have come to the police station after the Plaintiff's arrest to take plaintiff's motor car for safe keeping.

On the conflict between these two witnesses the probabilities are in favour of the version given by Mthembu.. Makhashwa was far too glib, and was unable to explain why he did not go to his employers with information either originally, at the time of plaintiff's arrest or at anytime thereafter before the criminal trial. Contrary to what he says he had every opportunity to do so.

Plaintiff's case is based on the proposition that until Mthembu had made further investigations as to who the manager on duty was at the time the money was received and should have been placed in the safe his suspicion could not have been based on reasonable grounds. This in turn is because according to the system in force, it was the manager on duty on whom the responsibility rested for ensuring the deposit of monies received. On the facts of this case the plaintiff's proposition is inapplicable. The plaintiff had as we have seen himself signed as manager on duty for the receipt of the monies. Whether he was in fact on duty or not is irrelevant. Moreover the police were in possession of a sworn statement by the cashier Vincent that it was to plaintiff that the money had been handed over and by whom it should have been placed in the safe. There was the undisputed fact that the money was missing.

There are cases where it has been held that a failure to make further investigations can mean that the suspicion held was not entertained on reasonable grounds see *NKAMBULE v MINISTER OF LAW AND ORDER* 1993 (1) SA 848 (T) A and *MABONA AND ANOTHER v MINISTER OF LAW AND ORDER AND OTHERS* 1988 (2) SA 654 (SE) an extract from the head note of which reads

"The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 is objective: would a reasonable man in the particular defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the offence or offences for which he sought to arrest the plaintiffs. It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and

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assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must

be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion."

The principle enunciated is clearly correct but the facts are clearly distinguishable on several grounds. The evidence on which Mthembu acted was supported by sworn statements, documents and the plaintiff's own signature. He was in law entitled to hold the suspicion he had and the arrest was accordingly justified.

There will accordingly be judgement for the defendants with costs

S.W. SAPIRE

ACTING CHIEF JUSTICE