

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1722/98

In the matter between

THULANE MNDZEBELE

PLAINTIFF

And

THE COMMISSIONER OF POLICE

1st RESPONDENT

ATTORNEY GENERAL

2nd RESPONDENT

Coram

S.B. MAPHALALA – J

For Plaintiff

MR. P. SMITH

For Respondent

MISS MATSE

JUDGEMENT

(21/05/99)

Aphalala J:

This was initially an urgent application brought with a certificate of urgency on the 31st July 1998, for an order inter alia that the Commissioner of Police, Regional Commander for Manzini District and Manzini Station Commander be ordered to forthwith release the money and items listed below in their possession belonging to applicant and to return same to the applicant.

- a) Motor vehicle to wit, a VW Golf 1984 model. Registration No. BRV 011 GP Engine No. J B 504920 Chassis No. 17B06266944
- b) A sum of E4.000-00 (four thousand emalangeni)
- c) Grocery (food stuff worth E50-00 (fifty emalangeni)
- d) Car radio worth E1,400-00 (one thousand four hundred emalangeni)
- e) Wheel spanner, jack spanner, spanners.

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Costs of this application and further and/or alternative release.

The respondents filed their notice of intention to oppose. Subsequently the respondent filed their answering affidavit in respect of the sum of E4, 000 (four thousand emalangeni) and filed a certificate of consent in respect of the motor vehicle. The court on the basis of the consent certificate granted an order in terms of prayers 2(a), (c), (d) and (e) of the notice of motion. The issue in respect of prayer 2 (b) viz, the release of the sum of E4, 000-00 (four thousand emalangeni) was referred to oral evidence as there was a material dispute of fact.

The court heard evidence on the 8th February 1999, to determine whether the sum of E4,000-00 should be released to the applicant, if it ever existed when the police arrested the applicant. The applicant was arrested in connection with a certain crime where all the items were impounded by the police. The basis of the applicant's case is that the said amount is in the possession of the police and ought to be released to him as they are holding it unlawfully. On the other hand a contra submission by the respondents is that there was never such money amongst the items impounded by the police when the applicant was arrested.

Mr. Smith for the applicant called the applicant to the witness stand to give evidence. His story is that he resides at Hlatikulu but spend most of his time in South Africa where he is employed. On the 7th February 1998, he was arrested by the police at Mbangweni on suspicion of having in his possession

an unlawful firearm together with its magazine. He was handcuffed. At the homestead where he was arrested he had parked his motor vehicle outside. The police asked him who was the owner of the motor vehicle and he replied that it was his. He then asked the police to be given a chance to retrieve certain items in the motor vehicle for safekeeping before he was taken by the police. The police declined to grant him such permission. The police started to manhandle him and one of them throttled him and commenting that at last they have found the criminal. In the motor vehicle there was a sum of E4,000-00 and there were also groceries. He then assisted the police to start the motor vehicle and one officer drove the motor vehicle. He was transported in another motor vehicle, which belonged to the police. They drove him to the Manzini police station. Even there he was never given the opportunity to go to his motor vehicle to take what he wanted from it. He was subsequently charged with the crime of having found in possession of a firearm. The police never found the firearm in his possession. He was on a later occasion released by the police on the 11th July 1998. He had told a Magistrate on remand on a certain date that he did not know why he had been arrested. The magistrate ordered that the applicant be further investigated. He never saw his motor vehicle after his release and on the 15th July 1998, he went to Lobamba police station in the company of the Manzini police to check for the motor vehicle. He found his motor vehicle but the sum of E4,000-00, groceries, car radio, wheel spanner, jack spanner and spanner were missing from his motor vehicle.

This is the extent of the applicant's evidence. He was cross-examined by Miss Matse where it was suggested to him that it is not true that he had a sum of E4,000-00 kept in the car, but the applicant maintained that he did. It was also put to him that other than the alleged sum of E4,000-00 he had a sum of E103-00, which was found his possession, he answered in the affirmative. It was also put to him that it was not true that he had E4,000-00 inside the house and left it in the car outside and went to sleep.

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That one would expect him to have taken the E4,000-00 with him to the house lest it was stolen by thieves in the night. His answer to this is that he kept it there as he was of the view that this was in a rural area nothing untoward would happen to his motor vehicle. It was further put to him that when he was released from Zakhele remand centre, he went to Manzini police and borrowed a sum of E20-00 for transport home and a sympathetic police officer lent him E20-00 for his transport to Nhlngano and he answered this on the affirmative. I must comment on this aspect of his evidence. Why borrow a sum of E20-00 from the police when you had surrendered upon your arrest at least a sum of E103-00, which is not denied by the police? To me with the greatest respect to the applicant this does not make sense at all.

The applicant then closed his case.

The respondent's then called the evidence of police officer 3299 J. Motsa who was in the squad that arrested the applicant on the 7th July 1998. That the police proceeded Mbangweni to investigate the applicant who was suspected of armed robbery. They were shown the house where the applicant was. They found the applicant and cautioned him in terms of the Judges Rules. They gave him the opportunity to take his possessions from the motor vehicle as it was suspected stolen. He took some money from an ashtray and he refused to take out the perishables. He did not tell the police that he had other valuables in the motor vehicle. They then drove him straight to the Manzini police station. At the police station they took out the car radio, some spanners which were in a bag and the groceries. On the 14th July 1998, the applicant was released by the magistrate at the Manzini Magistrate Court. The applicant came to the police station and said he had left his money at the remand centre and wanted his car to drive home. One of the officers gave him E20-00 to board a bus to Nhlngano. The officer told the court that he was not in the position to say whether or not the applicant had made a complaint to the station commander as regards the disappearance of the E4,000-00. This is the extent of this witness testimony.

He was cross-examined at length by counsel for the applicant. It was suggested to this witness that a complaint was made by the applicant as regards the disappearance of the E4,000-00 to the station commander a certain Ndlangamandla and this witness replied that he did not know anything about the alleged complaint. It was also put to him that when the applicant was arrested there was a sum of E4,000-00 in the motor vehicle where the officer answered in the negative.

These are the facts in the matter.

The court then entertained submissions from both counsels. I have considered their submissions in toto and also the evidence in its entirety. It is trite law that the burden of proof in a case such as this one lies on the plaintiff to prove his case on a balance of probabilities. There are ample authorities to support this proposition and my view is that it is an elementary proposition in civil matters for me to cite any authorities. I am of the view that the submission made by Miss Matse were sound. I disagree with Mr. Smith that it was the duty of the respondent to call Station Commander Ndlangamandla, my view is that the converse would hold. Ndlangamandla was mentioned by applicant in his evidence-in-chief as the person who received his

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complaint that he had lost a sum of E4,000-00. It is not at all the respondent duty to prove a case for the applicant as Mr. Smith wants the court to believe. The issue in this case is whether the applicant left money in his motor vehicle or he did not. From the evidence it is clear that the police gave the applicant an opportunity to remove his valuables and this was done on the day he was arrested. The applicant choose to retrieve a sum of E103-00 from the ashtray one wonders why he did not retrieve the E4,000-00. He did not even remove the perishables. It is also suspected that applicant would leave a sum of E4,000-00 in his motor vehicle during the night on the eve of his arrest. I do not believe the explanation given by the applicant on this aspect.

In sum, I am of the view that the applicant has not proved his case on a balance of probabilities.

The application, therefore, ought to fail with costs.

S. B. MAPHALALA

JUDGE