

HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1914/02

In the matter between:

SIPHO DLAMINI

PLAINTIFF

and

SWAZILAND ROYAL SUGAR COMPANY

DEFENDANT

CORAM

K.P. NKAMBULE - J

FOR PLAINTIFF

LUKHELE

FOR DEFENDANT

MAGAGULA

JUDGEMENT

24/9/03

In this action the plaintiff sues for damages alleged to have been suffered by him in consequence of his wrongful arrest in August 1995 and his subsequent detention at Simunye Police Station for a period of between three to four days.

The plaintiff at the time of arrest was employed by the defendant. In his particulars of claim plaintiff alleges that on 3rd August 1995, or shortly thereafter, the defendant falsely and maliciously and without reasonable or probable cause preferred a charge of theft against the plaintiff to be arrested by the police on a charge of stealing a chain block.

As a result of the defendant setting the law in motion as aforesaid, the plaintiff was detained in police custody for a period of three days, whereafter he was released when the police and/or the Director of Public Prosecutions refused to prosecute the plaintiff.

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The plaintiff contends that he has suffered damages as a result of the defendant's aforesaid conduct in the sum of E80,000- (eighty thousand Emalangenis).

Plaintiff gave evidence under oath. He told the court that on the day of the disappearance of the chain block he started work in the evening as he was to relieve his colleague who was working during the day, a certain Mazibuko.

Plaintiff told the court that the procedure at the change of shifts is that the person who has been on duty hands over the company property and that includes the tools and other valuable company property. He said on the day in question Mr. Mazibuko told him that there was a chain block upstairs but he did not go with plaintiff to show him the exact location of the chain block. After Mazibuko was gone plaintiff could not find the chain block. He then reported this to his supervisor. The matter was eventually reported to the company security who interrogated both Mr. Mazibuko and the plaintiff and eventually called the police to investigate.

During the interrogations it transpired that the plaintiff had stolen what Mazibuko said was company property and transported it to Hlatikulu his parental home. Police in the company of Joseph Dlamini, one of defendant's security officers, proceeded to Hlatikulu in the company of the plaintiff.

On arrival at Hlatikulu some property belonging to plaintiff was taken by police. According to plaintiff the items were pointed out and identified by Joseph Dlamini as belonging to the company. The items were transported to Simunye Police Station. Defendant's employee failed to identify these items as belonging to the company.

On the following day the chain block was recovered by the defendant. It was found deposited in the very same place where Mazibuko said he had left it. At the time of its recovery the plaintiff and Mr. Mazibuko were in police custody.

As a consequence Mazibuko was released. Plaintiff was charged for theft of the items fetched from Hlatikulu. The matter went to court for trial. On trial date the defendant failed to come to court as witnesses. The matter could not proceed and the magistrate made an order that the items be returned to plaintiff.

The defendant's case is that it only reported and placed information related to the theft of its chain block to the police. Subsequent investigations by the police led to the arrest of the plaintiff by the police on reasonable suspicion of theft of the chain block.

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Defendant witness Raymond Matsenjwa told the court that the theft of the chain block was reported to him and that he exercised his discretion and arrested both the plaintiff and Donald Mazibuko on reasonable suspicion of theft of the chain block. This witness further told the court that he released Mazibuko after he received a report that the chain block had been found. He said the reason he retained the plaintiff was because he was facing the charge of theft of the other items. He further told the court that he was at the forefront of investigations of both alleged offences.

The law which has to be applied in the aforementioned facts is as follows:

In order for the plaintiff to succeed in an action such as this one, he must establish:

- a) That the defendant set the law in motion (ie. Instituted the proceedings;
- b) That it acted without reasonable and probable cause;
- c) That it was actuated by an indirect or improper motive (malice).

Regarding a) above the plaintiff must allege and prove that the defendant instituted the proceedings or instigated them. The placing of a complaint of theft to the police as a result of which proceedings are instituted is insufficient.

See *Lederman Vs Moharah Investment (Pty) Ltd 1969 (1) SA 190 (A)* at 196 - 7 Where a complainant makes a statement to the police which is willfully false in a material respect but for which no prosecution could have taken place, he instigates a prosecution and may be personally liable.

The plaintiff must therefore allege and prove that the defendant instituted proceedings without reasonable and probable cause. Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified.

Where a person merely gives a fair statement of the facts to the police and leaves it to the latter to take such steps thereon as they deem fit and does nothing more to identify himself with the prosecution, he is not responsible in an action for malicious prosecution, to a person whom the police may charge. But if he goes further and actively assists and identifies himself with the prosecution he may be held liable. "The test is whether defendant did more than tell the detective the facts and leave

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him to act on his own judgement", per Bristowe, J, in Bater Vs Chrisiane, 1920 WLD 14.

The question that this court must answer is whether the defendant did more than tell the police the facts and leave him to act on his own judgement.

From the foregoing facts the defendant reported to the police the disappearance of the chain block. This was after a thorough search was conducted. The defendant only gave information surrounding the disappearance of the said chain block.

Police arrested plaintiff and Mr. Mazibuko on reasonable suspicion of theft of the chain block. In arresting the plaintiff police were exercising their discretion in terms of Section 22 (b) of the criminal procedure and evidence act.

The defendant made a genuine complaint to the police after its property which was entrusted to both plaintiff and Mazibuko went missing. It is therefore the opinion of this court that the defendant did no more than tell the police the facts relating to the disappearance of the machine. By arresting plaintiff and Mazibuko the police acted on their own judgement in order to further their investigations.

It is therefore the opinion of this court that the plaintiff has not succeeded in discharging the onus resting on him. Judgement is therefore entered against the plaintiff with costs.

K.P. NKAMBULE

JUDGE