

IN THE HIGH COURT OF SWAZILAND

CIVIL TRIAL NO. 360/1997

In the matter between:

AMOS FANYANA LUKHELE

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Coram

ANNANDALE, ACJ

For Plaintiff                      Mr. M. Mnisi

For Defendant                    Mr. P. Msibi

JUDGMENT 21 July 2004

The plaintiff sues Government for E40 000, interest and costs arising from the alleged loss of his property and money that he would have suffered when his household effects and property was moved by his employer's servants, in his absence, from his former residence at Pigg's Peak to his new residence at Mliba Police Station. Following issuance of his summons in February 1997 and the subsequent processes, the matter was partially heard by the former Chief Justice, the Honourable Mr. Justice Sapire, and postponed for continuation on a date to be arranged. Before that was done the learned

2

Chief Justice resigned from the Bench, without giving judgment, and the parties agreed to have the matter heard de novo before this court and it was so heard on three different dates this year.

The essence of the plaintiff's case is that he was a police officer stationed at Pigg's Peak when he was notified that he was to be transferred to Mliba Police Station on the 25th August 1996. While he was away from home, on the 21st August that year, i.e. some four days before the notified transfer, his effects were removed from his home by another police officer, Constable Samuel Thwala, who was acting under instructions from the Hhohho Regional Headquarters, and who deposited his belongings at his new quarters, the police station at Mliba. His case is that during this process, some E32 400 in cash disappeared, being monies he used to conduct a money lending business alongside his police duties and further, that some of his effects were damaged or lost, his total loss and damages amounting to E40 000.00. He avers that his losses and damages was at the instance of members of the Royal Swaziland Police while acting in the course and within the scope of their employment. His particulars of claim does not allege that the defendants officers were negligent or that they wilfully stole his property, causing the loss. The state's attorney did not argue this issue as a legal point or at all and I can only assume that no prejudice is perceived by the defendant as to the alleged loss resulting "at the instance of ... the...Police..." to mean in effect that the loss and damage was occasioned by either the negligence of the Police, or even wilful theft of the missing money and other items. The latter was not pleaded but brought to the fore during evidence, the same regarding damage to certain items. The lack of specific allegations

3

regarding the loss and damage of the plaintiff was not excepted to and the specific absence of essential averments in the pleadings of the plaintiff was not pleaded to, save for the general and

unspecific plea by the defendant, in response to the particulars of claim in the combined summons, that the contents of the relevant paragraphs "are denied and that plaintiff is put to the strict proof thereof." The attempt at a pre-trial conference did not prove to be fruitful either, it being a mere confirmation of the pleadings, wherein the defendant denied all but the formal citations of the parties, requiring proof of all allegations. For instance, it was not even agreed to on which date the transfer was scheduled, when it was actually effected, or which officer was in charge of the operation as driver of the truck, whether the plaintiff had a refrigerator at the time of his transfer, whether it was functional before and after the transfer, or what the costs of repairs were, let alone whether such repairs were necessitated by negligent removal. All of these aspects are merely denied and disputed.

The issue to decide at the end of the matter is whether the defendant is to be held liable for any damages suffered and proved by the plaintiff, or not. As said, the pleadings herein are not of much assistance, nor is the pre-trial conference. The onus remains squarely on the plaintiff to prove his claim on a balance of probabilities, to the fullest extent. No concessions were made and no facts were agreed upon.

The plaintiff's own evidence is that he is a police officer who was stationed at Pigg's Peak. He was transferred to Mliba Police Station, as was formally communicated to him per exhibit "A", a Royal Swaziland Police Message Form. Therein, his date of

4

transfer is indicated as the 25th August 1996, The form bears the Mliba Police date stamp of the 19th August, and he says that he saw the message on the 15th August, a few days earlier. The form itself reads that its date of origin is the 19th. However unlikely it is that the difference in dates are reconcilable, it was not established whether it is the same message form as exhibit "A" that he saw, or a different one.

Be that as it may, his evidence is that on the 20th August he took the day off to "go home" and report the transfer, returning on the 21st, a few days prior to the notified date of transfer. This is uncontroverted.

To his surprise and dismay, he noticed upon his return that the police house which he occupied at Pigg's Peak had new curtains. He investigated closer, to find that his own effects had been removed and that someone else's property was now in the house, with some of his children's clothing placed in the toilet.

He received a report that his belongings had been taken to Mliba upon which he drove there. At his new house, he found his belongings already inside the house. He asked his housemaid about a suitcase which would have contained money and she told him that the driver of the truck who moved his effects carried it at some stage. He then opened the suitcase and says that whereas it used to contain envelopes with money in them, none such envelopes were there anymore, a total sum of E38 000 missing.

5

His evidence is that over and above this pecuniary loss, some police uniforms were also lost in the process, without specifying what pieces of uniform, or its value. Also said to be lost are a .22 rifle, police ID Card and a police raincoat. Again without any details or values, he says that a video cassette recorder was damaged, a dressing table mirror broken, a hi-fi speaker damaged and that his refrigerator ceased working.

Mr. Lukhele states that a year later, his missing .22 rifle and missing money was found through "the assistance of (his) ancestors". He did not say how much money was recovered. He has it that the rifle was recovered from one Enock Nkambule, who made a report to him, which remains unconfirmed hearsay, as to whom he obtained it from.

The plaintiff endeavoured to place evidence before court pertaining to the money he claims to have

lost in the process of his transfer, with his personal property being moved in his absence.

He says that on eight different dates in August 1996, he received amounts between E1 440 and E6 000, in total E21 000 cash. These were repayments from his money lending business and he handed up a number of Loan Agreement Forms, being agreements between four individuals and Umzamo or Umusa Savings and Credit Cooperative Society (Pty) Ltd. (exhibits B - E).

6

He said that he also had cash income from his "For Hire" transport business, which he intended to buy a vehicle with, in Johannesburg "that Friday". A further amount of E10 000 was to be used in his money lending business.

The total amount of money he kept in a suitcase in his house was stated to be E38 000, according to the plaintiff's evidence. His particulars of claim, in contrast, put the amount of money "used in his money tending (sic) business" at E32 400.

During the course of the initial trial before the former Chief Justice, a transcript of which was filed by the "defendants attorneys" (in fact the plaintiff's attorneys), the plaintiff put across (at page 23 - 26) a third version of the amount of money lost. There, he said he had sold two vehicles, keeping E7 000 from each sale, a further E9 400 being repayments from his debtors and E10 000 with which he intended to buy another vehicle - a total sum of E33 400. E38 000, E32 400 and E33 400 are three different amounts, although the latter two are fairly similar, which begs the question as to how much money he indeed wants to be compensated with.

This question becomes more relevant when the documents on which the plaintiff claims the loan transactions were recorded on, are examined closer.

In his evidence, the plaintiff testified that among the lost monies was a repayment of E1800 which he received on the 13th August 1996. The same amount and date is recorded in red ink on the face of exhibit "E", the Loan Agreement Form with one Isaac

7

Ginindza. According to the document, Ginindza received the sum of E1 500 on the 24th July 1996. The endorsement in red on the face of the form reads: 'Paid E1 800 on 13/8/96'. In other words, it is held out that Ginindza borrowed E1 500 on the 24th July and that he repaid the loan on the 13th August. If 20% interest per month is taken into account, (the legality of which is not the present issue) the sum balances out. E1 500 capital and E300 interest (for two full months) when added together leaves a sum of E1 800, which is held forth as a repayment, money received by the plaintiff, and claimed as a part of his alleged losses. However, on the back of the same form a different picture emerges. It reads that E1 950 plus E225, being 10% interest from 24/7/96 to 6/8/96 was brought forward, a total of E2 175 as balance due with effect from 11/8/96. Underneath this total it reads that "E225 paid late on 15/8/96" left an amount of E1950 due.

This is irreconcilable with the endorsement that E1 800 was paid on 13/8/96, reflected on the front of the document, which amount and date was used by the plaintiff to substantiate his loss of that amount. If the entries might have been misinterpreted, this is allayed by a further entry, on the back of the same form, to the effect that no payment was made on the 4th September, 1996, and that with a payment on 12/9/96 of E480, a balance of E2 055 remains, after addition of further interest.

The point is that there is an adverse credibility issue at hand, as to the amount alleged to have been lost by the plaintiff and that the documents he relies upon in only a few of the instances, show him to be unbelievable.

8

The other sums of monies, like the E14 000 in respect of two vehicles sold and partially paid, was only

testified about in the initial trial and not heard by this court. The further anomaly is that during the present trial, he testified that E21 000 of his claim was made up of sums of money received from his debtors, whereas at the first trial, that amount was said to be E9 400 (page 26). He then also had it that it took him about 4 to 5 months to accumulate that sum, while presently he stated that E17 240 was received between the 7th and 14th August 1996, with a further E3 700 on the 10th July 1996 - E21 000 in all. Both the amounts and the period differ significantly.

This serves to strongly doubt the veracity of his evidence regarding the claimed amount. To compound this, there is the further question as to exactly how the loss occurred.

I accept that his effects were removed from his house in his absence. The inference that the plaintiff wants to have drawn by the court is that it is the police officer who took charge of the removal who is to be blamed for the loss of his money. On a balance of probability I do not find so, due to the following evidence.

Plaintiff called one Angel Dlamini, a young lady, 15 or 16 years of age at the time of the transfer, who testified about the events in his house on the 21st August 1996. She said that she lived there at the time, looking after his children for the past nine months, when Lukhele, the truck driver arrived to load the effects of the plaintiff. Her evidence is that a small black briefcase, in which plaintiff's money was kept, was placed behind the driver's seat, as well as a gun, by herself. On their arrival at Mliba, she removed the case

9

from behind the seat where it still was, but forgot about the gun. She said that there were also other people in the Mliba house, who remained there while she went to do shopping, 'thinking' that she had locked the room in which the money case was kept, later to say that indeed the room was locked.

Following the arrival of the plaintiff at Mliba after dark that evening, he called her to the room to ask her about the missing money and the missing firearm, to which she could offer no explanation.

Her evidence is not to the effect that she verified the money still to be in the case when it was loaded into the police truck at Pigg's Peak, also not that she knew about the loss before being confronted by the plaintiff in the evening. She did not keep the case under her eye during the course of the day, nor did she see anyone tamper with it. The police truck driver was not the only person who could have had access to it. In the Pigg's Peak house, others were also there to help with the loading. In the Mliba house, again there were other people, strangers to her. According to her own version, she was the only person to have handled the suitcase, with Thwala, the removals man, also having "access" to it. The case itself was not locked either.

Dlamini did not adduce any evidence about the items claimed to have been damaged in transit. According to his particulars of claim, this would have been to the extent of E7 600 for damaged and missing items. She mentioned that plaintiff's 'gun' (a

10

.22 rifle) was loaded into the police truck, but did no more than that, save to say that when plaintiff asked her about the gun, she was 'surprised.'

Ms Dlamini did not make a positive impression as a witness. She was unclear in many aspects and I frequently noted that she seemed to be at a loss for words when asked questions. Certainly she did not keep an eye over the 'suitcase' or briefcase in which she said money was kept. Her evidence does not lead to a conclusion of any reasonable firmness that Thwala, the police driver, took money from the case. It could have been any of a number of other people, if indeed there was a large amount of cash in it. At least one other lady helped to pack the belongings at Pigg's Peak. Men that were not known to her were at Mliba when the plaintiff's property was offloaded. She did not verify that there was any money in the case when she placed it inside the truck, stating that it was during the previous night that she placed around E300 in the case.

In all, she did not advance the plaintiff's case persuasively nor did she corroborate him much further than confirming the event of the removal of his effects during his absence.

The defendants called Thembi Hlatshwayo, who also was present when the police truck loaded the plaintiff's items on the 21st August 1996, assisting Angel Dlamini with packing and loading.

11

She says that after they removed plaintiff's property from the house, one Matsenjwa arrived. He is known to her as plaintiff's 'for hire' driver, and he was told by Angel Dlamini that the plaintiff instructed her to tell him to take the sofa and other items to plaintiff's homestead at Mpuluzi. This contrasts with Angel Dlamini's version that the driver himself offered to take sofas to Mpuluzi, (not that she conveyed plaintiff's instructions to him). She (Dlamini) also gave two different identities of the driver - her evidence in chief has him as a Motsa, while he became a Matsenjwa during her cross-examination.

She also contradicts Dlamini regarding the presence of money, stating that on her enquiry, she was told that there was none and that plaintiff was 'broke', further that there was no 'trunk box' or suit/brief case in which money would have been kept but that she saw empty cotton bank money bags.

The defendants also called the police truck driver, Thwala, to testify. He says that he was sent to Pigg's Peak to convey the plaintiff's belongings to Mliba on the 21st August 1996. On his arrival, the plaintiff was not at his home. He reported this at the Pigg's Peak Police station and called his supervisor who ordered him to go ahead as there were other people at plaintiff's house. When loading the effects, and knowing plaintiff to be a money lender, he checked with Angel Dlamini that there was no money lying around the house. He also says that there is no room behind the seat of his truck for a 'trunk box'. He further denied that Dlamini left him alone at the Mliba house to go shopping, further that he knew nothing about a firearm that went missing during the process of

12

moving house. He differs from Angel Dlamini as to the presence of other policemen in the Mliba house upon their arrival there, stating it to have been empty.

Thwala certainly could not have been expected to come to court and confess that he stole plaintiff's money and rifle. Nor did he do so, or anywhere near remotely so. He did not come across as the best witness to have been heard, nor as one who must be disbelieved. If however a question mark was to be placed behind his evidence, it could have been if exhibit "F" was proven to be true.

This document was tendered and admitted on the basis that its purpose was only to prove the theft of a firearm, and no more. Its authenticity and veracity was not proven. The author of the statement is deceased. Accordingly, I can read no more into it than that a certain .22 rifle was lost and recovered. Insofar as it reflects on Thwala, no conclusions can be adversely drawn against him, nor can the document be used to discredit his evidence of a denial insofar as the plaintiff's rifle is concerned. In any event, Thwala disputes the contents of the statement made by his late uncle and held forth that there was a longstanding dispute between the two of them, owing to a land dispute. Nor can the inadmissible contents of the statement be used to draw an adverse inference against Thwala insofar as the money is concerned, or anything else that would favour the plaintiff. It does not advance his case any further.

As said at the onset of this judgment, the plaintiff remains with a full onus to prove his case. From the totality of evidence heard during the trial, I hold a firm view

13

that he did not succeed in discharging this onus. While it might be true that he lost money during the transfer of his effects in his absence and that some of his property might have been damaged during the event, there is no justification to hold the defendants, or their agents, responsible to compensate

him. The plaintiff's own evidence regarding the money itself is self-controverting. His witness, Angel Dlamini, could not and did not rectify this serious discrepancy.

The damage to his goods cannot be attributed to the defendants either. There is no evidence to substantiate any quantum in that regard, let alone a factual finding on any measure of probability that it was caused by the (non-alleged) negligence or fault of Thwala, or his principals by implication.

The loss of the firearm is an accepted fact, but likewise it cannot be attributed to Thwala or the defendants.

If an adverse finding to the contrary had to be made, it would rather have been that the plaintiff was negligent in the keeping of his money and safeguarding his .22 rifle, but I need not go that far in this matter. I am also constrained not to make any comment about the propriety of a police officer who operates as a "loan shark" alongside his official police duties, charging some 20 and 30 percent interest per month on his loans, as it is not necessary to do so in order to decide the merits of this case.

14

In the event, the plaintiff's claim is ordered to be dismissed, with costs.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE