IN THE HIGH COURT OF SWAZILAND

CASE NO. 2553/01

HELD IN MBABANE

In the matter between:

MANDLA MNGOMETULU	PLAINTIFF
AND	
THE COMMISSIONER OF POLICE	FIRST DEFENDANT
THE ATTORNEY GENERAL	SECOND DEFENDANT
CORAM	SHABANGU AJ
FOR PLAINTIFF	MR MAPHALALA
FOR DEFENDANT	MS MKHWANAZI

JUDGEMENT 15th June, 2004

This action was commenced by combined summons dated 7th September, 2001 whereby the plaintiff sued for damages amounting to the sum of E500.000 (Five Hundred Thousand Emalangeni) and costs of suit. Whereas in the prayer which is at the end of the particulars of claim the amount is stated simple as E500.000 (five hundred thousand Emalangeni) paragraph eight of the aforesaid particulars of claim breaks down the amount claimed in the following manner. In respect

(a) Pain and suffering the plaintiff claims E150,000.
(b) Loss of liberty and freedom the plaintiff claims E100,000.
(c) Discomfort the plaintiff claims 85,000.
(d) Costs of an attorney 15,000.
(e) Medical expenses .47,500.
(f) Contumelia 100,000.
(g) Damage of property 2,500.

There was no attempt during the trial to prove the costs of an attorney and the damage to property. On behalf of the plaintiff Mr Maphalala indicated at the commencement of the trial that no attempt would be made during the trial to prove the E47,500 (Forty Seven Thousand Five Hundred Emalangeni) referred to in paragraph eight of the particulars of claim and that that aspect of the plaintiff's claim was not going to be pursued and was being abandoned. The result is that the amount claimed by the plaintiff was reduced when the trial commenced by the amounts of E15.000, E47.500 and E2,500 to E435,000 (Four Hundred and Thirty Five Thousand Emalangeni).

The basis of the plaintiff's claim are two causes of action, namely (a) Assault and (b) wrongful arrest and detention which arise from an incident which allegedly occurred on 13* August, 2000. It is alleged in paragraph four of the plaintiff's particulars of claim that at Nyatsini area, the plaintiff was wrongfully and unlawfully shot on his left foot for no apparent reason by a member of the Royal Swaziland Police based at Hlathikhulu. In the next paragraph which is paragraph five of the particulars of claim the plaintiff alleges that he was ""assaulted", arrested and detained by members of the Police force based at Hlathikhulu Police Station and spent about (2) months in police custody." It is alleged that as a result of being shot at, and assaulted by the Police, the Plaintiff sustained severe injuries and endured pain and suffering. At paragraph 7.1 the plaintiff makes the allegation that "the shooting, assault, arrest, detention and damage to the plaintiff's

property was at the instance of the Royal Swaziland Police who were acting during the course of and within the scope of their employment as members of the Royal Swaziland Police for whom the first Defendant is responsible." The plea admits that the plaintiff

was shot in the foot by a member of the Royal Swaziland Police. However the defendants deny that the shooting was "wrongful and unlawful" and plead at paragraph 2.2 that the "plaintiff was shot as a result of his resisting arrest." The defendants' plea further goes on to state the following at paragraphs 2.3 to 2.5,

"2.3. The defendants' aver that the Police received a complaint from one Thelma Masuku, the Plaintiff's mother in law that the Plaintiff was assaulting his wife one Siphelele Masuku. It was further alleged that Plaintiff was causing some commotion and disturbing the peace of Thelma Masuku's home.

2.4. When the Police came to arrest Plaintiff he locked himself in one of the huts at his uncle's homestead which is next to Thelma Masuku's home.

2.5. Despite pleas from the Police to come out of the hut, Plaintiff resisted until the Police fired a warning shot which accidentally injured plaintiff on the foot. "

On the pleadings therefore both the shooting and arrest of the plaintiff is admitted by the defendants. The defendants deny the detention. It appears on the pleadings and this appears to be the basis upon which the matter was dealt with during the trial that the defendants sought to justify their action on the basis that the shooting was in order to effect an arrest which the plaintiff was wrongfully resisting. There also appears to be a suggestion that the shot accidentally injured the plaintiff on his foot.

The first question which arises for determination therefore is whether there was legal justification for the attempt by the Police to have the plaintiff arrested on the date in question. If the Police were justified in seeking to arrest the plaintiff then depending on the appropriateness of the force (a gunshot) that was directed at the plaintiff it is possible that the shooting may be justified by the fact that it was by the Police in the course of and for the purpose of effecting a lawful arrest which the plaintiff was resisting. On the other hand if the arrest intended was wrongful any force including the firing of a shot, that was used by the Police cannot excuse the Police in shooting the Plaintiff. On the pleadings, as already observed, but also on the evidence the defendants' say that they wished to arrest the plaintiff because a complaint had been made at the Police Station to the effect that the Plaintiff had assaulted his wife on some earlier date. What was clear on the evidence is that the assault was not continuing at the time the Police arrived at the homestead of the plaintiff's uncle to arrest him. The alleged assault according to the

evidence had taken place about a month from the date of the shooting incident, which latter incident occurred on the 13th August, 2000. No evidence was tendered that the arrest was justified by a warrant. Indeed even the plea does not make an allegation that a warrant existed in respect of the arrest which the Police intended to effect. As a matter of principle an arrest or detention can either be wrongful or lawful. If an arrest takes place without a warrant of arrest, the defendant must allege and prove the lawfulness of the arrest, (see BRAND V. MINISTER OF JUSTICE & ANOTHER 1959 (4) SA 712 A @ 714, UNION GOVERNMENT V. BOLSTRIDGE 1929 AD 240, MINISTER OF LAW AND ORDER V. HURLEY & ANOTHER 1986 (3) SA 568 (A) 587-89). See also FRANK B. MAGAGULA V. COMMISSIONER OF POLICE & OTHERS unreported civil case no. 455/90 delivered on 7th February, 1992 and the case of NOAH NDODA KUNENE VS. THE COMMISSIONER OF POLICE & ANOTHER unreported decision in case 2331/2000 delivered on 11th November, 2003. In the Frank B. Magagula mattter Rooney J, observed at page two of the judgement that;
"It is well established law that any interference with the liberty of the citizen is prima facie odious and it is for the person effecting the arrest to establish the fact that in the particular circumstances such interference with liberty was justified. NEWMAN V. PRINSLOO 1973 (1) SA 125. "

Put differently once the arrest is admitted the onus to allege and prove facts which would justify the

arrest, is borne by the defendant. In spite of the fact that the cause of action is the actio injuriarum, a plaintiff need not allege and prove the presence of animus injuriandi. Nor can the defendant escape liability by alleging and proving its absence. An honest belief in the legality of the arrest is no defence, (see L.T.C HARMS, AIMLER'S PRECEDENTS OF PLEADING 3rd EDITION page 33. See also the cases cited there TSOSE V. MINISTER OF JUSTICE & OTHERS 1951 (3) SA 10 (A) @ 18, RAMSAYV. MINISTER VAN POLISIE & ANDERE 1981 (4) SA 802 A 818 SMIT V. MEYERTON OUTFITTERS 1971 (1) SA 137 (T) ; Similarly in respect of the assault which is a delict affecting a person's bodily intergrity the cause of action is the actio injuriarum. (see MABASO V. FELIX 1981 (3) SA 865 (A); BENNET V. MINISTER OF POLICE & ANOTHER 1980 (3) SA 24 (C) @ 35. A physical

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Interference with another person's bodily intergriry, is normally, wrongful. It is for plaintiff to establish the wrongfulness of the physical interference but as was observed in Mabaso's case supra at page 874 wrongfulness is (normally) a legal issue which does not carry an onus. The allegation of an "assault" implies wrongfulness and animus injuriandi. See Bennett's case supra page 34-5. It is for the defendant(s) to allege and prove facts which disprove animus injuriandi. It is sufficient for the plaintiff to plead and prove facts which indicate, prima facie and objectively, a wrongful act. See AIMLER'S PRECEDENTS OF PLEADING supra at page 34-5. Compare JACKSON V. SA. NATIONAL INSTITUTE FOR CRIME PREVENTION 1976 (3) SA 1 (A), Earlier doubts as to where the onus of proof lay have now been clarified. The onus of alleging and proving an excuse for or justification of the assault is on the defendant, (see Mabaso's case supra. Compare with MATLOU V. MAKHUBEDU 1978 (1) SA 956 (A). The learned author of AIMLER'S PRECEDENTS OF PLEADING observes at page 35 that "in a defence of justification for an assault it is not advisable for the defendant to admit the 'assault' on the plaintiff. He should rather use a neutral word, such as 'stacking' which does not imply wrongfulness or animus injuriandi. It was in light of the aforestated principles relating to the onus and the undisputed facts on the pleadings that I ruled at the beginning of the trial that the defendant had a duty to begin and that they were therefore obliged to give their evidence before the plaintiff opened his case. This approach was also followed by Rooney J, in the unreported case of FRANK B. MAGAGULA V. COMMISSIONER OF POLICE civil trial 455/1990 a judgement delivered on 7th February, 1992. In that case at page two of the Judgement Rooney J observed that "because the onus lay upon the defendants to prove the lawfulness of their conduct they were obliged to give their evidence before the plaintiff opened his case." This approach is consistent with the principle that the party who bears the onus of proof on the issues or any issue in relation to the trial has a duty to begin and lead his or her evidence in proof of that issue.

As already observed if the arrest is without a warrant of arrest, the defendant must allege and prove the lawfulness of the arrest. Arrests and the basis upon which they can be justified in the absence of a warrant are dealt with under part V of the Criminal procedure

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and Evidence Act 67/1938. In section 22 of that Act a peace officer (which by defination includes a police officer is authorised to arrest without warrant any person who commits an offence in his presence. That statutory provision was not and could not be relied upon by the defendants. The other basis mentioned in section 22 upon which a police officer may arrest a person without a warrant is In terms of section 22 (b) when the police officer "has reasonable grounds to suspect such person of having committed any of the offences mentioned in part II of the First Schedule;" Again this subsection had no application to the facts of the present matter. What is pleaded in the defendants' plea is that the offence in connection with which the police sought to have the plaintiff arrested was assault. In the course of the trial an attempt was made to change the description and nature of the offence in respect of which the police wanted to have the plaintiff arrested, to assault with intent to do grievious bodily harm. In both instances assault or assault with intent to do grievious bodily harm the defendants would not have been excused because none of this offences is an offence mentioned in part II of the First Schedule. In the result section 22 (b) of the Criminal procedure and Evidence Act could not be relied upon to justify the arrest. Section 22 (c) is also not applicable and therefore cannot assist the defendants because there was neither an allegation in the plea nor evidence during the trial that the plaintiff was found attempting to commit an offence or clearly manifesting an intention so to do. No attempt to plead or rely in any manner on any of the circumstances or conditions mentioned in section 23 of the Criminal Procedure and Evidence Act 67/1938 as a basis which would justify an arrest

without warrant was made. In the result the arrest which the Police intended to effect on the plaintiff was unlawful and or wrongful and unjustified. Similarly the arrest which was effected as a result of the forced submission of the plaintiff, namely the shooting of the plaintiff, was in my view unlawful. It follows that if the arrest was unlawful then the force which was used to effect such arrest was also unjustified and therefore unlawful. A further basis for holding that the arrest was unlawful may be found in the fact that there is no evidence, that when the Police arrived at the homestead of the plaintiff's uncle with the expressed purpose of effecting an arrest they ever informed the plaintiff of the cause of the arrest. Indeed it does not appear that at any stage the Police informed the plaintiff of the reason for his arrest. It is a statutory requirement, namely section 30(4) of the Criminal Procedure and Evidence Act, that a

person who is being arrested must be informed of the cause of the arrest. In the matter of FRANK B, MAGAGULA supra at page sixteen Rooney J made the following observation in relation to section 30 (4) of the Criminal Procedure and Evidence Act, 67/1938;

"The importance of this requirement of the law must never be disregarded. In England the House of Lords decided in CHRISTIE V. LEACHINSKY 1947 (1) ALLER 567 that the matter was one of substance and was on the elementary principle that in that country a person is prima facie entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that restraint should be imposed. An arrest without warrant, either by a policeman or by a private person can be justified only if it is an arrest on a charge which is made known to the person arrested unless the circumstances are such that the person arrested must know the substance of the alleged offence, e.g. where the alleged wrongdoer is caught red handed. The Lords went on to declare that an ommission to give the information to the person arrested made the arrest unlawful and constituted false imprisonment. I would not expect any lesser respect for the right to individual freedom to apply in Swaziland. The Roman Dutch law as interpreted by the courts in neighbouring countries follows the same general principle as the Law of England."

Then the learned judge proceeded to refer to the case law authority as follows;

"In R V. Kistesamy 1947 (4) SA 789 HENOCKSBERG J. confirmed at 792 that when a constable effects an arrest without a warrant he is required under the corresponding section in Act 13 of 1912 of South Africa to inform the person arrested forthwith of the cause of his arrest. If that is not done the arrest is not lawful. The learned Judge cited GOVENDER V. REX 1946 (2) PH, H.258. In SV. NGIDI 1972 (I) SA 733 the appellant escaped from custody after arrest. The evidence showed that he had not been informed of the cause of his arrest although there had been ample time in which to do so. HENNING J. held that he was not in lawful custody when he escaped because he had not been informed of the cause of his arrest. In BRAND V. MINISTER OF JUSTICE 1959 (4) SA 712, OGILVIE-THOMPSON J.A. said at 718:-

'Some reliance was also sought to be placed by Mr Kotze upon section 26 of Act 56 of 1955 which provided that

'Whenever a person arrests any other person without warrant, he shall forthwith inform the arrested person of the cause of the arrest.'

Decisions exist to the effect that, if this section be not complied with, the arrest is unlawful (see GARDNER AND LANSDOWNE, 6TH ed. Vol. I P215 and R V. KISTESAMY, 1947 (4) S.A 788(N) @ P. 792). It may be that such a result will not always follow if the circumstances be such that the arrested person for instance, a thief who is caught red-handed-necessarily must know why he has been arrested (c.f CHRISTIE & ANOTHER V. LEACHINSKY, ILL. 1947 (1) A.E.R 567, and R V. NDARA, 1955 (4) SA 182 (AD) @184. It is, however, not necessary, for the purpose of this appeal, to express any opinion on that question;..."

After referring to the case law in the above quoted passage Rooney J, concluded at page seventeen of the judgement;

"I have no reason to dissent from the view that the law of Swaziland is no different from the Law of England and that if in ordinary circumstances a person is arrested, he must be informed as soon as possible by the arresting police officer of the reason for his arrest and any subsequent detention of that person is unlawful. Applied to this case the position is that even if the defendants had been able to justify the arrest of the plaintiff, the manner of the arrest was contrary to law. "

It is clear therefore that FRANK B. MAGAGULA'S case turned on the failure by the arresting Police officers to inform the plaintiff in that case of the reason for the arrest as required by section 30(4) of the Criminal Procedure and Evidence Act 67 of 1938.

In the premises and on the basis of the aforegoing I hold that the arrest, shooting and subsequent detention of the plaintiff was unlawful.

In relation to the damages the plaintiff claims, damages for pain and suffering amounting to E150,000. The pain and suffering arises from the injuries he sustained when he was shot by the Police who intended to effect an unlawful arrest upon the plaintiff. The doctor who gave evidence on behalf of the plaintiff who attended him a day after the incident or after he was admitted by his colleague described the injuries as serious and said that though he had not seen the patient (that is plaintiff) for a long time since he last treated him he was certain that the injuries were permanent and the patient would never walk properly ever again. Indeed the plaintiff who was still using crutches during the trial stated that he was still experiencing pain as a result of the injury. This was not disputed during the trial. In respect of the pain and suffering I consider that the amount of E150, 000 (One hundred and fifty thousand Emalangeni) claimed by the plaintiff is not excessive. He also claims E100,000, E85,000 and another E100,000 for what he describes as loss of liberty and freedom, discomfort and contumelia respectively. In respect of the loss of liberty and freedom, I take into account that the period of detention lasted about two months, which is a long time. The plaintiff was kept at an office at the Hlathikhulu Police Station and made to sleep in an office which had no bed. The Plaintiff was never taken to a Magistrate for a remand hearing before the date of his

release on bail at an amount of E250.00 (two hundred and fifty emalangeni). There is no evidence that the plaintiff was brought before a Magistrate as required by section 30 (2) of the Criminal Procedure and Evidence Act 67 of 1938. There is therefore no evidence of an order authorising the continued detention of the Plaintiff as required by the aforesaid section. The Police appear to have acted in total disregard of the plaintiff's individual rights and dignity as a person which gives rise to an element of contumelia. Having regard to the lengthy period during which the plaintiff was kept in custody and the conditions under which he was detained at an office at the Hlathikhulu Police Station it appears to me that a total amount of E70,000 (seventy thousand Emalangeni) in respect of the loss of liberty and freedom, discomfort and contumelia would be a fair and reasonable award. There was no claim for estimated future medical expenses and loss of earning capacity possibly arising from the gunshot injury. In the result the plaintiff is awarded damages as follows;

1. E150,000 in respect of pain and suffering.
2. E70,000 in respect of the arrest and detention of the plaintiff including the discomfort and contumelia, bring the total amount awarded to E220,000 (Two Thousand and Twenty Thousand Emalangeni).
3. The Plaintiff is also awarded the costs of the action.

ALEX S. SHABANGU

ACTING JUDGE