



SIPHO SIBUSISO POMA MASUKU

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

THE ATTORNEY GENERAL

3rd Defendant

Civil Case No. 2312/2003

Coram

S.B. MAPHALALA - J

For the Plaintiff

MR. S. SIMELANE

For the Defendants

MR. KHULUSE

JUDGMENT

(21/07/2004)

The Plaintiff instituted action against the Defendant by way of combined summons dated 12th September 2003 where he claims a sum of E800, 000-00 as damages he

alleges to have suffered as a result of unlawful arrest and subsequent malicious prosecution.

Defendants by way of notice in terms of Rule 23 of the High Court rules raised an exception to the Plaintiffs summons. The basis of the Defendants' exception is that Plaintiffs Particulars of Claim lack the necessary averments to sustain a cause of action in that no allegation is made of the fact that at all material times the members of the Royal Swaziland Police Force were acting within the course and scope of their employment by the Swaziland Government.

The Defendants in their submissions contend that it is trite law that for an employee to be held liable for the wrongful conduct of his employee, the employee must have acted within the cause and scope of his employment when the delict was committed. In *casu* there is nothing whatsoever to associate the Swaziland Government with the conduct that is complained of. It is merely alleged that members of the 1st Defendant did something unlawful in respect of the Plaintiff, but it is not shown how the Swaziland Government is affected thereby.

The court was referred to the cases of *Belfort vs Morton and Co. 1920 CPD 589* at 591 and that *o f Mckenzie vs Farmers Co-operatives Meat Industries Ltd 1922 AD 16* at 23 to support the Defendants arguments.

Mr. Simelane arguing for the Plaintiff took the view that the exception advanced by the Defendants is purely technical in that it does not advance the Defendants' case in any way. He argued that the Particulars of Claim in the present case reflect a cause of action in accordance with the general principles in pleadings. He argued further that the liability of the Commissioner of Police is a matter of law. He attacked the exception itself as being defective in that it does not conform to the full strictures of Rule 23.

Having considered the submission advanced in this case I am inclined to agree with the submissions made on behalf of the Defendants. An employer is liable for damages occasioned by the delicts committed by his employee in the course of his employment. The **onus** rests on the Plaintiff to allege and prove that the person who

committed was: (see *Stadraad Van Pretoria vs Pretoria Pools 1890 (1) S.A. 1005 (T)*):

- 1) The servant of the Defendant; (see *Gibbins vs Williams, Muller Wright & Mostery Ingelyf 1987 (2) S.A. 82 (T)*).
- 2) That he performed the act in the course and scope of his employment;
- 3) What the servant's duties were or with what work he was entrusted at the relevant time, (see *Mkize vs Martens 1914 A.D. 382, Minister of Police vs Mbilini 1983 (3) S.A. 705 (A), Nel vs Minister of Defence 1979 (2) S.A. 246 (R)* and *Amler's Precedents of Pleadings* at page 320).

The Plaintiff in *casu* has not complied with requirement (b) set out above.

Therefore for the reasons advanced above I would allow the exception taken and I would, however allow the Plaintiff to file an amended pleading within 14 days from the date of this judgment.

The costs to be costs in the cause.



S.B. MAPHALALA
JUDGE
