IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2181 /1998

In the matter between

ABEDNIGO NDWANDWE Plaintiff

And

ATTORNEY GENERAL 1st Defendant

COMMISSIONER OF POLICE 2nd defendant

Coram: J.P. Annandale, ACJ

For the Plaintiff: Mr. F.S. Bhembe of B.J. Simelane and Associates

For both Defendants: Ms J. Mkhwanazi, Attorney General's Chambers

JUDGMENT

14 AUGUST 2006

[1] The plaintiff herein instituted proceedings by way of action against the defendants, claiming payment of the sum of E100 000.00 (One Hundred Thousand Emalangeni) being in respect of compensation for malicious and/or unlawful arrest, interest on the above amount at the rate of 9% per

annum, costs of suit and further and/or alternative relief.

[2] Plaintiff alleges in his particulars of claim that on or during 26th December 1997 at or around Lubulini area, members of the Royal Swaziland Police wrongfully, unlawfully and maliciously arrested and detained him in custody. It is further alleged by the plaintiff that he was detained at Lubulini Police Station from the 26th December until he was later transferred to Big Bend Remand Centre until the 23rd March 1998 when the charges against him were withdrawn at the Siphofaneni Magistrate's Court at the instance and request of the Crown. The Plaintiff further alleges that he has suffered damages for wrongful, unlawful and malicious arrest and detention in the sum of E100 000.

[3] The defendants pleaded that plaintiffs arrest was neither wrongful nor unlawful and certainly not malicious. The police are said to have arrested and detained plaintiff for the reason that he took part and acted in common purpose in the killing of Ndodebovu Mamba and Piet Mamba of Sinyamantulwa area in the Lubombo Region and also that he took part in the burning of four homesteads in the area. Further, that the plaintiff voluntarily submitted his name to one Elizabeth Hhalaza who was taking down the names of those who **participated** (my emphasis added) in the killings and the burning down of four homesteads. He

is also said to have submitted a knobstick that he was "carrying during the commission of the crimes."

[4] The defendants further pleaded and aver that the plaintiff was brought to court within forty-eight hours of his arrest. They also contend that the mere fact that the charges against plaintiff were withdrawn does not mean that he did not take part in committing the offences, nor does the insufficiency of evidence to prosecute plaintiff of the murder and arson charges mean that his arrest and detention were wrongful and unlawful.

[5] It is trite law that the defendants bear the onus of proving on a balance of probabilities that plaintiffs arrest was neither unlawful nor wrongful and malicious. In other words, the officers of the 2nd defendant must prove on a balance of probabilities that plaintiffs arrest was lawful. It is thus so that here, where the defendants admit the arrest, it is required to establish reasonable course for the plaintiffs arrest and detention - see MAY V UNION GOVERNMENT 1954(3) SA 120(N) and THOMPSON V MINISTER OF POLICE 1971(1) SA 371(E) at 374. In order to discharge that burden, the defendants must satisfy the Court that their version is more probable than the plaintiffs in that it is consistent with all the facts that have either been proven, are common cause or are not disputed.

[6] "Before the hearing of oral evidence commenced in Court, counsel agreed that the only issue to be decided by this Court is that of liability of the defendants. Only if so found, would the aspect of *quantum* be settled after negotiated, failing which, it might have to be determined by court in subsequent proceedings.

[7] In order to determine liability of the defendants or otherwise, it needs to be decided, on the available evidence, whether firstly, the arrest itself was lawful or not, secondly, whether the detention thereafter from the 27th December 1997 up to the 23rd March 1998 was wrongful or not and finally, whether either of the two were malicious or not.

[8] Before I turn to deal with the evidence, it is helpful to have a framework of what needs to be proved by who in order to either prove the cause of action or to dispose of a burden of proof. In this regard, plaintiffs attorney, Mr. Bhembe, submits that it is trite law that for an action of wrongful, unlawful and malicious arrest and detention to succeed, the plaintiff must show on a balance of probabilities that the defendant when effecting the arrest and detention acted without reasonable and probable cause.

[9] That this is so bears no argument and it is well settled law. See for example GROENEWALD V

MINISTER VAN JUSTISIE 1972(3) SA 596(O.P.A.) at 602-h(d) and NEWMAN V PRINSLOO 1973(1) SA 125 (W.L.D.) at 129 -C - D. The onus of the defendant, as mentioned in paragraph 5 *supra,* will be discharged if the arrest and detention is found to have been lawful, or legalised by statutory law, such as the provisions of section 22(6) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938). It reads:

> "*22. Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant any person -*
> *(a) who commits any offence in his presence;*
> *(b) whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part 11 of the First Schedule;*
> (c) *whom he finds attempting to commit an offence, or clearly manifesting an intention to do so*".

[10] It is common cause that the plaintiff was arrested without warrant and thereafter, following his first appearance in court, detained in a prison by warrant of detention issued by the Magistrate's court until the date of his release. He was released because the prosecution service decided to withdraw charges against him, not that he was tried and

acquitted or found to be not guilty. It is also so that the charges he was arrested for, murder and arson, are offences which are listed in Part 11 of the First Schedule of the Act.

[11] For Section 22(b) of the Act to cause an arrest without warrant to be deemed as lawful, it has to be so that the arresting officer must have had a reasonable suspicion that the offence was committed by the suspect. In this regard, it is instructive to heed the wise words of Beck JA, in TIMOTHY BHEMBE VS THE COMMISSIONER OF POLICE AND THE ATTORNEY GENERAL, Swaziland Court of Appeal Case No. 55/2004 (Unreported) at page 8, where it was stated that,

> "*It is not the duty of a Police Officer to elevate a reasonable suspicion to the level of certainty before a suspect may lawfully be arrested without warrant. It is the function of a trial court, and not the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence garnered by the police, as the authorities show.*"

The Court of Appeal further referred to the case of S VS GANYU 1977(4) SA 810(R., AD.) wherein Macdonald CJ stated that in deciding whether a reasonable suspicion has been proved, it must of necessity be recognized that a reasonable suspicion

never involves certainty as to the truth. When it does, it ceases to be suspicion and becomes fact.

[12] It is therefore necessary to carefully consider the evidence in order to decide whether the police were justified to arrest and cause the detention of the plaintiff thereafter. The crux of the matter is whether they had a reasonable suspicion to do as they did.

[13] During the trial, the evidence of six witnesses were heard. The plaintiff himself plus a supporting witness testified after which his case was closed. After an Induna of the area and two police officers were heard for the defendants, it became clear that Ms Elizabeth Hhalaza, whose name and involvement in the matter was frequently mentioned, initially would have been a witness for the defendants but they decided not to call her. Seemingly, she had become somewhat hostile towards defendants' counsel. Plaintiff was then granted leave to re-open his case and call her. Her evidence is crucial to the matter and on reflection, also with hindsight, it would have been an injustice to the matter if leave to re-open his case and call her as witness was not granted to the plaintiff. Her evidence, as set out below, is of significant importance in the matter.

[14] The evidence is fairly straightforward. The plaintiffs version of events is that as an innocent soccer player he left his home in the morning to go to

a soccer game at the Mboti area. He there found a commotion and joined a group of about forty bystanders. A Mamba man was assaulted by about three persons. He heard from people in the group that fighting erupted earlier in the day, before his arrival, at a nearby homestead. He is very clear in his assertion that he did not himself participate in any violence or associated himself with anyone else who partook in any attack - his version is that he did no more than join an assembly of curious onlookers.

[15] He stated that the police then arrived, rescued the person who was assaulted and told the crowd of people to sit down whereafter they were told to go to the police station to explain what they saw. His clear evidence is that the police instructed everybody who was present during the event, not only those who participated, to record their names with Ms Elizabeth Hhalaza, which he did. He stated that after Ms Hhalaza listed the names of the plus minus 40 people, as it was getting late, they were told to report at the police station the following day, and on arrival, they were taken into the charge office. Instead of being released after reporting, he and the rest of the group were arrested on charges of murder.

[16] They were detained for the night and some were transferred to other police stations due to being too

many people to hold at Lubuli Police Station, himself being taken to Siphofaneni. He says that on diverse occasions he was questioned about the incident at the soccer field but never asked to record a statement. After his first appearance in court he was remanded in custody until his eventual release on the 23rd March 1998, about three months later.

[17] The plaintiff is unsure of the exact date of his arrest, either the 26th or 27th December 1997, but is sure that it was on the day after the incident itself. Although the defendant admits the 26th December 1997 as being the date of arrest, the factual position, according to the police evidence, is that the incident itself occurred on the 26th with the arrest the following day, i.e. the 27th December 1997. That is the correct date, not as pleaded, but in context, it is of no real consequence.

[18] The plaintiff is adamant that he never had his name listed by Ms Elizabeth Hhalaza as being someone "involved in the incident", or who "participated" but as one who was present in the group of about forty people. Further, that he had no weapon with him, disputing any evidence to the contrary, especially that of Constable Dube (DW2). Most importantly, his evidence flies strictly in the face of any active participation with the mob violence, or any association with violence committed by persons within the group, or of any admission by

him, actively or by implication, that he admitted to any such adverse behaviour.

[19] The main point of disparity between the parties is whether or not the plaintiff partook in the mob violence. He denies it and the evidence of the defendants does not dispel it on any measure of probabilities, an aspect I deal with below. The other issue between the parties is the is rationale of recording the name of the plaintiff, to which I also revert to below, but the real issue therewith is whether that in itself, on whichever version, can give rise to a reasonable suspicion by the police as good cause to arrest and detain the plaintiff as a suspect.

[20] The plaintiffs version is supported by Vusi Mamba to a great extent. He said that he accompanied him to the soccer match and that on arrival they saw a group of people assaulting someone in the vicinity of the playground. The mob then moved on to burn down a homestead. Both he and the plaintiff, he says, followed and mingled with the group but neither of them took any part in the activities nor did they associate themselves with the arson or assault.

[21] Both of them were arrested on the same basis and in the same fashion, namely having their names recorded on a list and reporting at the police station the following day, whereafter they were detained

until their eventual release after withdrawal of charges against them.

[22] The only aspects in which their versions are open for criticism is whether or not the plaintiff had his soccer boots with him at the time they went to scene and the time that they arrived. Neither of these two aspects, in my view, adversely impact on their credibility.

[23] The most objective and realistic version of the events that gave rise to the claim was heard from Ms Elizabeth Hhalaza, initially intended to be called by the defendant but thereafter, with leave of court to re-open his case, called by the plaintiff. It is she who recorded the names of the people who were arrested, as a result of their names being listed by this woman, when they arrived at the police station the following day.

[24] She related a protracted and detailed account of the events on the fateful day that saw two people being murdered by a mob and some homesteads being burned by the same mob. She related the events that gave rise to the incitement of community members and how the assembly of people grew in numbers and how violence was meted out to people who did not wish to join the group. Seemingly, much force and violence befell those who showed reluctance to increase the numbers and in the

process, she estimated the group to have numbered about forty people in all, with less than five actively participating in the meting out of the violence and assault.

[25] She testified that as one of the group, she went to the various places where it went on the rampage, observing the assaults, killing and arson attacks. She saw how the plaintiff was drawn into the group and also saw that at no stage he participated in any of the violent activities. She was clear to effect that plaintiff was a bystander, a spectator of events, as one of the assembly of people, but that his hands were clean, figuratively speaking, of the crimes committed during the rampage. Also, she did not see any weapon, such as a knobstick, in the hands of the plaintiff.

The second relevant aspect of her evidence is that the police ordered everyone present to have their names recorded, not selectivity limited to only those who actively took part in the crimes. The purpose was to enable the police to select from the list those who they wanted to come to the police station the following day in the course of their investigation. She and a police officer compiled two lists, randomly from two lines formed by the people. At the time, she worked for the police at Mbabane.

She confirmed that all whose names were listed had to report at Lubuli police station the following day, where they were all arrested and detained. Ms Hhalaza herself was detained for five years, then acquitted and discharged after being prosecuted and placed on trial.

[28] She lends support to the plaintiffs contention that preciously little information was solicited from the detainees in the course of investigation and especially that the arrest and detention was not based on either first hand observation by the police themselves, nor on statements by witnesses given to the police. The basis for arrest was to have one's name listed, either by herself or by the police officer, with the names given as result of a police directive that all those who were part of the group had to record their names, not that only those in the group who participated in the criminal activities had to do so. This version by Ms Hhalaza is consistent with those of the plaintiff himself and his friend, but furthermore, it comes from the mouth of not only the person who helped in the recording of the names but as one who was arrested on the same basis as the other two men. They were fortunate enough to have charges withdrawn after about three months but she spent five years in jail until her

acquittal by the court. Ms Hhalaza was quite emotional at times, especially so when she recounted the enormously long time she spent in custody until her acquittal. That is understandable. However, I did not gain any impression that she coloured any aspect of her evidence through vindictiveness or that she tried to "get back" at Government or the police. Also, the plaintiff did not know until the defendants closed their case, that Hhalaza would not be called as witness for the defendants. This strongly militates against the possibility that she might have been couched in details of her evidence. On the contrary, plaintiffs attorney let her do the talking herself instead of giving evidence on a question and answer basis, with very few guiding prompts in between, save for seeking more details or clarification where necessary.

[29] Moreover, Ms Hhalaza was on the scene well before the arrival of the plaintiff and witnessed various events that he did not see. She saw him arrive and was able to give a clear version of what his role was - that of an observer, a person that followed the spectacle without involving himself in the mob violence. Of further importance is that her evidence gives direct support to the plaintiffs case, namely that his arrest and detention came about as a

> result of his name being on a list and that he was required to report at the police station the following day for investigation, questioning and giving an explanation or account of his activities the previous day. Instead, he was arrested and detained for a considerable period of time.

Defendants' counsel provided comprehensive and well detailed heads of argument and submissions in an endeavour to assist the court in reaching the correct finding. Contrary to the view I take of the plaintiffs case, she urges the court to find that the evidence of the plaintiff and his two witnesses failed to corroborate each other, is full of contradictions and submits that they were not candid in their testimony. As example, the date of arrest, which was wrongly pleaded and testified to by the plaintiff as being the 26th instead of the 27th December 1997, is held out as such example. This contention negates the pleadings of the defendants, where the same erroneous date is admitted as correct.

Whether or not the plaintiff carried his soccer boots when he arrived at the scene is equally of scant significance and it also is not an issue that was canvassed extensively during the trial so as to hinge an overreactive credibility finding on it. Various other discrepancies are singled out and sought to be elevated to a finding that is not allied to the overall

view of the plaintiffs case. It misses the point in issue, namely whether the police had a reasonable suspicion to justify the arrest and detention for three months, before charges against the plaintiff were withdrawn by the crown. The plaintiff is not on trial for

participation in mob violence. It is the defendants who bear the onus to show that there was a justified cause to arrest and detain the plaintiff. Also, the court is to decide the matter on a balance of probabilities and not on the stricter test of proof beyond reasonable doubt.

On a consideration of the plaintiffs case, one would rather hove drawn adverse conclusions of the evidence of the different witnesses, had there been a carbon copy consistency, indicative of collusion and pre-trial rehearsal, instead of what was actually said. Each witness had a different place in the events, recalling details in relation to what they perceived to happen and giving different priorities to their recollections of events close to nine years ago. Objectively, to recall precise details so much later is taxing to people with very good memories. I certainly did not gain the impression that the plaintiff and his witnesses were not candid, or that they failed to corroborate each other in material respects or that their evidence is full of contradictions.

Against the above scenario there is the evidence of two police officers and the Indvuna of the area which has to be considered. Mr. Nhlava Mamba is an old and senior man, the Indvuna who was alerted of the mob violence which by then had already resulted in one death. He testified that on his arrival at the scene near the soccer playground, he noticed an unruly mob of people running and chasing after another, up and down - quite a commotion. His priority was to check on the victims and he also fetched the police.

Central to his evidence is that the mob of about 40 people was separate from onlooking bystanders and that the plaintiff was within the ranks of the mob. By the time he approached the area of the playground at the grocery shop, he saw the group running up and down and when he got there, they had already moved off. He then went to look at the injured person, fetched the police and on his return the crowd had returned and were sitting under a tree where both himself and the police addressed the people.

There is no reason to doubt the evidence of the Indvuna. His evidence does not contradict that of the plaintiffs witnesses either. He did not impute active participation by the plaintiff in the wrongs of the mob, limiting it to his presence in it, as readily stated

by the plaintiff and his witnesses. He also has it that everyone in the mob, about forty people, had to have their names recorded, a general list of names and not selective to only those who were actively involved in the wrongdoing. He did not state whether or not he also saw the plaintiffs witnesses in the mob.

[36] Two police officers were also called in an effort to bolster the defendants' case. The first officer, Constable Dube, accompanied the Indvuna to the scene. On their arrival they saw burning homesteads and stopped *en route* at an already killed person, before engaging the angry mob. At that time, the mob were driving two women in front of them, "with all intent to kill the two." He says the mob were armed with sticks, knobkerries and bushknives. Fortuitously, he recognised Ms Hhalaza (PW3) in their ranks, a woman who worked for the Police, and he asked for her assistance to speak to the people and calm them. The group assembled under a tree and were spoken to by the police and emotions cooled down. The Police Superintendent (Mgabhi) then ordered that the names of "all those involved in the incident" be recorded, which was done by Ms Hhalaza and another officer, Simelane. The following day, those people whose names were taken, including the plaintiff, came to the police station. The only significant variation of the

theme is that he has it that those who participated in the incident, not those who were merely part of the group, had their names recorded.

[37] Clearly, he does not even imply that the listed names were as a result of any manner of investigation, verification or information by eyewitnesses. The whole group of about forty people were ordered to list their names indiscriminately, with the common denominator that they were in a large group of people, with some individuals in the group causing havoc by murdering and setting fire to homesteads. This officer did not see any wrongdoing by the plaintiff, nor did he verify or ascertain any aspect that could have justified the forming of a reasonable suspicion that plaintiff himself, or any other particular individual for that matter, personally did any wrong, or actively participated or associated him or herself with such deeds, sufficiently so to justify arrest and detention of the whole group of forty. It was a shotgun approach - first arrest all of them then detain them and only later on, to then investigate and obtain evidence. In the result, it so happened that no prosecution of the plaintiff was instituted.

[38] Defendants also called detective Sergeant

> Mkhabela, another officer who visited the scene of the mob violence. By the time of his arrival the mob were already seated under a tree and being addressed by the Indvuna and the police. Like the others, he confirms that in fact the people actually intended to all go to the police station by trucks, there and then, to have their statements recorded. Instead they were told to record their names on a list and report the following day. Similar to Constable Dube, he has it that officer Mgabhi said that all those who participated were to list their names. Again, a blanket statement to forty people, without a word of caution as to the consequences that would befall them as a result, self incrimination elevated to the forming of a reasonable suspicion that each of the arrestees participated in the crimes of murder and arson.

The further evidence he gave has it that he saw the plaintiff, as part of the seated mob, separated from the bystanders and onlookers, with a knobstick in his possession. Some few days later, the 31st December, he accompanied various arrestees back to the area where they handed some weapons to him, notably that the plaintiff would have given him a knobkerrie.

Whether or not the plaintiff actually gave him the knobkerrie or not is besides the issue at hand. The fact of handing over, or pointing it out some few days

later, does not impact on the matter. In any event, it is vigorously disputed that he would have handed over the knobkerrie to the police and especially so whether he in fact had such weapon at the time the police were at the

scene. If indeed he was armed at the relevant time, it could have strengthened a suspicion by the police that he participated in the rampage. Fact remains that he was not arrested on such a basis. He, as well as the remainder of a group of about forty people were required to have their names recorded and to report at the police station the next day. By all accounts, these people were then arrested due to the fact that they reported there, and not because the police had justification vis-a-vis a reasonable suspicion to do so, over and above this specific aspect.

[41] The evidence of Sergeant Mkhabela is not beyond reproach. In the course of cross examination it transpired that he was unsure of various relevant facts, especially insofar as it pertains to exactly what was said to the crowd of people in the assembly that caused them to have their names recorded. Certainly, they were not told that if their names are on the list they would be arrested and thereafter detained until such time as investigations have been done. Certainly they were not given any option as to

whether their names were to be listed or not.

[42] A measure of prejudice also vests in this witness. He is adamant that at the time plaintiff and his friends left their homes for the soccer match, they did not go there to play or watch soccer, but stated as fact that "they left their homesteads with the purpose of killing people." This is farfetched and wholly unsubstantiated. The Sergeant has no cause to say so whatsoever, no basis or disclosed information on which he could substantiate such a hugely prejudicial and speculative statement.

[43] The purposesiveness but biased attitude of the sergeant is amply demonstrated in his reply to a question as to what evidence he relies upon to justify the arrest of the people. He responds by saying that on his arrival, belatedly as it was, he noticed a mob, of whom almost all were happy, proud of themselves, for killing these two criminals in their area. Also, that in terms of Section 22(b) of the Criminal Procedure and Evidence Act, he just had to arrest them because they committed offences as listed in Part II scheduled offences, arson and murder.

[44] That such crimes were committed is common cause. That such crimes were listed as testified can also hold water, as they are incorporated in Part II of the First Schedule to the Act. The issue that hinges

on the evidence before court is whether there was indeed a reasonable suspicion that the plaintiff partook in such offences, to bring his arrest and subsequent detention within the ambit of the legislation he referred to.

[45] Conscious that the police have by necessity to sometimes, as in these circumstances, have to make snap decisions on the spur of the moment, it also requires that such decisions, if wrongly made, be reversed as soon as is possible.

[46] From the totality of evidence heard at the trial, it seems that the decision to arrest and detain the plaintiff was entirely based on the fact that he reported at the police station on the day after the fracas. He reported there because the police ordered him to do so. He was so ordered because his name was taken down by either Ms Hhalaza or a police officer. He gave his name because he happened to be one of forty people who herded together under a tree after the rampage.

[47] If the investigation that followed thereafter was diligently and expeditiously conducted, his arrest perhaps could have been termed as merely unfortunate in the event that he was released soon thereafter. He was not released but detained for a further three months before charges were withdrawn against him and an unknown number of other

detainees arrested on the same grounds.

[48] The question remains whether the police had reasonable grounds to suspect him at the time of his arrest and also during the subsequent incarceration. In my judgment, objectively *ex post facto* but also subjectively at the relevant time, based on the totality of evidence heard in the course of the trial, the answer by necessity has to be in the negative.

[49] The opinions held by the police officers, especially Sergeant Mkhabela, cannot withstand scrutiny of any depth without being tainted with prejudice and generalisations of some magnitude. At best it could be termed as a knee-jerk reaction by the police, faced with difficult circumstances, but resulting in severe prejudice to the people who unwittingly and in consonance with orders given by the police, had their names recorded *en masse.* However they might have understood the order to record their names, it cannot be imputed on them under those circumstances, that they acquiesced to confessing that each of them either partook in the mob violence or that they willingly and actively associated themselves with it.

[50] On a balance of probabilities, the plaintiffs version far outweighs the version presented by the

defendants. From the facts, I would err to hold that there was a reasonable suspicion that the plaintiff gave rise to a reasonable suspicion that would justify his arrest and detention. From the facts, it rather is the position that the police decided on a fishnet approach, to arrest whoever they could, thereafter to sort out the facts and then to release their quarry once it transpired that there is no case they have to meet.

[51] Finally, I accept that this incident took place quite some time before the advent of our present Constitution. By today's standards, having regard to a constitutionally entrenched presumption of innocence, the scales would have swayed even further in favour of the plaintiff. But, by the then prevailing standards, it would have required at minimum a suspicion which could be termed as reasonable, to warrant the consequences that befell the plaintiff, as well as Ms Hhalaza and the remainder of the group of forty.

[52] It is therefore, based on the evidence and the law, that the court has to hold against the defendants and grant judgment, on the merits, in favour of the plaintiff.

[53] E l00 000 was claimed as compensation for the malicious arrest and detention, over a period of some

almost three months. Unless the parties reach a negotiated settlement of the *quantum,* the matter may be re-enrolled in order for the court to make such determination.

Costs are ordered to follow the event.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE