

HELD AT MBABANE

CASE NO. 2334/2000

In the matter between:

**GERALD DLAMINI**

and

**SWAZILAND GOVERNMENT**

CORAM : Q.M. MABUZA - JUDGE  
FOR PLAINTIFF : MR. A. LUKHELE  
FOR DEFENDANT : MR. S. KHULUSE

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**JUDGMENT 1/6/07**

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[1] The Plaintiff herein instituted proceedings by way of action against the defendant, claiming payment of the sum of E50,000.00 (Fifty thousand Emalangenani only) being in respect of damages for unlawful arrest. The claim is made up of loss of earnings, general damages,

interest at the rate of 9% p.a. costs of suit, further and or alternative relief.

[2] Plaintiff in his particulars of claim alleges that on or during 24<sup>th</sup> February 2000 at or around Manzini town, near Skonkwane business premises members of the Royal Swaziland Police wrongfully, unlawfully and without any justification arrested and detained him. The detention occurred overnight at Sigodvweni Police Station, Matsapha. It is alleged that he was detained from about 9.00 a.m. on the 24/2/02 up until approximately 11.30 a.m. on the 25<sup>th</sup> February 2000. It is this arrest and detention that is the basis of his suit against the Defendant for damages in the amount of E50,000.00.

[3] The Defendant pleaded that the Plaintiff's arrest though without a warrant was lawful because there was a reasonable suspicion that the Plaintiff had committed the crime of theft in that he had stolen a grass cutter at Ndlunganye, Matsapha area in the Manzini District.

[4] Before the hearing of oral evidence commenced in court, counsel agreed that the only issue to be decided by this Court was that of liability of the Defendant.

The issue of quantum would be negotiated between the parties failing which it would have to be determined by this court.

[5] The issue to be determined herein is whether or not the Defendant had reasonable grounds to suspect the Plaintiff of having committed a crime warranting the Plaintiff's arrest. It is trite law that for an action of this nature 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. That this is so bears no argument and it is well settled law.

[6] The onus on the Defendant on the other hand will be discharged if the arrest and detention is found to have been lawful or legalized by statutory law such as the provisions of Section 22 (6) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938 as amended). It reads:

***“22. Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest***

***without warrant any person -***

***(b) whom he has reasonable grounds to suspect of having committed any offences mentioned in Part II of the First Schedule”.***

- [7] It is common cause that the Plaintiff was arrested without a warrant and detained overnight at Sigodvweni police station. For Section 22 (b) of the Act to cause an arrest without a warrant to be deemed lawful, the arresting officer must have a *reasonable suspicion* that the offence was committed by the suspect.
- [8] It is therefore necessary to carefully consider the evidence in order to decide whether the police were justified in arresting the Plaintiff and whether the subsequent detention of the Plaintiff was lawful.
- [9] The Plaintiff's evidence is that he runs a For-Hire car service and is based at Manzini. He lives at Matsapha in the Manzini District. On the morning of the 24<sup>th</sup> February 2000, he had just finished loading some bags of cement on behalf of a customer. The customer had

hired his motor vehicle to take the cement bags to Nkamazi and the Plaintiff had charged the customer a sum of E450.00 for this service.

[10] When the police arrested him he had to forfeit this service and return the money back to the customer. When he arrived at Sigodweni Police Station in Matsapha, he was interrogated about a certain grass cutter. This grass cutter had been stolen at a site at Ndlunganye on the 23/02/2000 where some people had been hired to cut grass along the side of the main Manzini-Mbabane highway. It had been stolen at about mid-day on the 23/02/2000.

[11] The Plaintiff was arrested by two police officers by the names of David Mdavu Dlamini and a Mthimkhulu police officer whose names the Plaintiff did not know. These officers were known to the Plaintiff. They were in the company of one Mandla Makhanya in whose possession the grass cutter had been stolen.

[12] The Plaintiff's evidence is that upon being informed as to why he was being arrested he responded that he had been in Mbabane the whole day on the 23/2/2000. He had been requested by a friend of his Mr. Elphas

Ndlovu to accompany the said Ndlovu who had gone to see his attorneys in Mbabane. The police rejected the Plaintiff's story offhand and proceeded with him to the police station.

[13] Along the way the Plaintiff says that he requested that they all proceed to Elphas Ndlovu's shop, so that the said Ndlovu could confirm the Plaintiff's story but the police refused to do this.

[14] The Plaintiff states that the arrest was humiliating to him because he was arrested in front of his business colleagues, his customers and the public at large. He was further humiliated when he had to offload the cement and return the E450.00 to the customer who had hired him. He told the court that he had never been arrested in his life and this was the first time.

[15] When the Plaintiff arrived at the police station the Plaintiff was locked up in one of the cells. He was not given any food nor any blanket throughout the night.

[16] On the 25/2/2000 Mr. Elphas Ndlovu came to the police station to enquire about the Plaintiff whereupon the Plaintiff was taken out of the cells. It was after Mr.

Ndlovu had confirmed the Plaintiff's story that the police released the Plaintiff.

[17] The Plaintiff's evidence is that after he was released from police custody the police did not contact him thereafter as an indication that they were continuing with investigations. He says that after his release the police questioned his wife about his whereabouts on the 23/2/2000 but did not take the matter any further.

[18] Next to give evidence was Elphas Ndlovu whose testimony supported the Plaintiff. Mr. Ndlovu stated in his evidence that the Plaintiff was well known to him because he was his neighbour and that they did many things together to help one another. On the 23/2/2000 Mr. Ndlovu had requested the Plaintiff to accompany him to Mbabane where Mr. Ndlovu wished to see his attorneys Mr. S.C. Dlamini and Mr. Bheki Simelane. They left Mhlaleni at 8.00 a.m. using Mr. Ndlovu's motor vehicle. They visited the offices of Mr. S.C. Dlamini first and at about 12.00 p.m. arrived at Mr. Bheki Simelane's offices.

[19] Mr. Simelane's secretaries advised them to return at 2.00 p.m. They left Mr. Simelane's offices and went to

have lunch. They were unable to see Mr. Simelane at 2.00 p.m. and returned to Mhlaleni at about 5.00 p.m.

[20] Mr. Ndlovu was alerted by the Plaintiff's wife about the likelihood of Plaintiff having been arrested by the Sigodvweni police on 24/2/2000. He then proceeded to the said police station whereupon he made enquiries about the Plaintiff. Before the police confirmed that the Plaintiff had been indeed arrested they made enquiries about Mr. Ndlovu's relationship with the Plaintiff and when he had last seen the Plaintiff.

[21] Thereafter the officer who had been questioning Mr. Ndlovu fetched the Plaintiff and a certain boy who turned out to be Mr. Makhanya. According to Mr. Ndlovu, Mr. Makhanya related that a grass cutter had been stolen whilst in his possession at Ndlunganye. It was alleged that the Plaintiff had been seen at the place from where the grass cutter had been stolen and it was suspected that the Plaintiff had stolen it.

[22] However, Mr. Ndlovu informed both the police and Mr. Makhanya that the Plaintiff was with him in Mbabane at the time Mr. Makhanya is alleged to have seen him and could not have stolen the grass cutter. The police



officer released the Plaintiff who was then driven to his house by Mr. Ndlovu.

[23] Mr. Ndlovu stuck to his story even during cross-examination. He also maintained that Mr. Makhanya had said that he suspected the Plaintiff of having stolen the grass cutter as he had been seen walking in the area where the grass cutter had been stolen. Mr. Ndlovu also maintained that Mr. Makhanya did not say that he had seen the Plaintiff stealing the grass cutter.

[24] The defence called one witness Detective Constable David C. Dlamini (2998). His evidence was that during February 2000 he was stationed at Sigodvwenni Police Station and was involved in carrying out investigations. During February 2000, the said officer was investigating a theft of a grass cutter. A suspect had been arrested who led this officer to the Plaintiff. The said suspect revealed to the police officer that he had given the grass cutter to the Plaintiff because the Plaintiff had asked him (suspect) to steal the grass cutter for the Plaintiff. This suspect turned out to be Vusumuzi Makhanya.

[25] According to this witness, he first went to the plaintiff's

home with Mr. Makhanya but the Plaintiff was not there. He had already gone to work. They proceeded to the Plaintiff's place of work at Manzini where Makhanya pointed the Plaintiff out. It turned out that the plaintiff knew Makhanya.

[26] This witness also informed the court that the complainant a supervisor of a certain unnamed company in this matter had reported the theft of the grass cutter but this witness could not remember the complainant's name. All he could recall was that the complainant suspected Mr. Makhanya who was in charge of the grass cutters.

[27] The police officers who were not in uniform introduced themselves to the Plaintiff and advised him that they were investigating the theft of a grass cutter. When confronted by Mr. Makhanya about the grass cutter the Plaintiff denied any knowledge thereof.

[28] This witness went on to say that they then took the Plaintiff to the police station at Sigodweni for further investigations but the Plaintiff continued to deny knowledge of the grass cutter. The witness took the Plaintiff to his home to look for the grass cutter but

despite a search of the Plaintiff's house there was no grass cutter. They returned with the Plaintiff to the police station where they recorded a statement from Makhanya. Thereafter the Plaintiff was formally processed and locked up in the police cells until the following day when he was released after Mr. Elphas Ndlovu had come looking for him.

[29] This witness says that the Plaintiff was detained at 1400 hrs on the 24/2/2000 and released on the 25/2/2000 at 0900 hrs because there was insufficient evidence against him.

[30] This witness also mentioned that when Mr. Ndlovu arrived at the police station and advised them of the Plaintiff's movements on the material day, he says that he (officer) was convinced that the Plaintiff was not in the vicinity of the crime they were investigating on the alleged day. Thereafter the Plaintiff was released.

[31] It was this officer's evidence that he had arrested the Plaintiff on the evidence received from Makhanya that the latter had given the Plaintiff the grass cutter.

[32] The defence closed its case after this witness. Mr.

Makhanya was not called as a witness nor was the complainant.

[33] It is apparent to me that there are two issues that must be decided. First is the issue of the period of incarceration of the Plaintiff. Second whether or not the Defendant has discharged its onus of having proved on a balance of probabilities that the Plaintiff's arrest, was based upon reasonable grounds of suspecting the Plaintiff of having committed any of the offences mentioned in Part II of the First Schedule in Section 22 (6) of the Criminal Procedure and Evidence Act 67/1938 cited above. The Plaintiff having been charged with the theft of a grass cutter.

[34] With regard to the first aspect, the Plaintiff has given evidence in support of his particulars of claim that he was arrested at about 8.30 a.m. on the 24/2/2000 and released at about 1.00 p.m. on the 25/2/2000. The Defendant led evidence to the effect that the Plaintiff was detained at about 1400 hrs on the 24/2/2000 and released at about 9.00 a.m. on the 25/2/2000. A photocopy of the police registrar where these times were recorded was handed in as Exhibit 1, the original having been left at the police station.

[35] The Plaintiff is a layman and not a professional like the police witness. There is no time clash in my view because Plaintiff is most likely referring to the time he was picked up and the time spent in the company of the police on the 24/2/2000. whereas the officer is referring to the times when Plaintiff was formally processed. The times that the Plaintiff has stated in his evidence include those in his particulars of claim and as there was no application for amendment the times in the particulars of claim are to remain as they are in the computation of time.

[36] With regard to the second aspect, the Defendant led evidence to the effect that a certain self-confessed thief Mr. Makhanya told their investigating officer that he had given the grass cutter to the Plaintiff after stealing it and this is how the reasonable grounds for suspecting the Plaintiff arose. However, Mr. Makhanya was not called as a witness to support the sole defence witness. I have before me hearsay evidence which was given by the arresting officer David Dlamini. I do not have anything tangible before me from which I could conclude that there were reasonable grounds for suspecting the Plaintiff of having committed the alleged

theft. In the case of **Timothy Bhembe v the Commissioner of Police and the Attorney General, Swaziland Court of Appeal No. 55/2004** unreported at page 8 it was stated:

“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 a 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”. *per Beck JA.*

[37] The evidence given by the arresting officer is hearsay evidence and is inadmissible.

[38] The Defendant’s attorney in his submissions has suggested that the Plaintiff through information elicited while being cross-examined corroborated the defence case. I do not agree with defence counsel. He ought to have brought independent evidence to prove his case.

[39] In the event the evidence of the Plaintiff stands uncontroverted. There is nothing placed before me from which I could conclude that the arresting officer had reasonable grounds to suspect the Plaintiff of having committed the theft of the grass cutter. I hold

that the Plaintiff's arrest and detention was wrongful,  
unlawful and without justification.

Q.M. MABUZA  
JUDGE.