

THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 778/04

[1] This is an action in which the plaintiff sues the Attorney General herein representing the Government of Swaziland claiming damages for maliciously prosecuting him.

In the matter between

PROFESSOR DLAMINI

v

THE ATTORNEY GENERAL

Coram

For the Respondent

Banda, CJ Mr.

For The Plaintiff

Shilubane Mr.

Khumalo

JUDGMENT

[2] The particulars of claim allege that on 20th September 2000 at Mbabane, the Royal Swaziland Police and or the Director of Public Prosecutions, acting within the course and scope of their employment with the Government of the Kingdom of Swaziland, wrongfully and unlawfully set the law

in motion by causing the plaintiff to be indicted for murder, robbery and possession of arms in contravention of the Arms and Ammunition Act, 1964. The particul

ars further allege that in causing the plaintiff to be indicted and prosecuted the said Royal Swaziland Police and or the Director of Public Prosecutions had no reasonable and probable cause for so doing, nor did they have any reasonable belief in the truth of the information contained in the police dockets on

which the charges were allegedly based. The particular ars also allege that as a result of the said police and or the Director of Public Prosecutions conduct, the plaintiff was

arrested and held in custody from 20th

September 2000 to 18th June 2001 until the plaintiff was prosecuted on the said offences.

The plaintiff was discharged by the High Court, sitting at Mbabane on 8th December 2003, after the prosecution had conceded they could not proceed

with Crown's case.

[3] The defendants while admitting that they had instituted the prosecution against the plaintiff they deny that the prosecution was false and

malicious and without reasonable and probable cause. The defendants contend that they had reasonable and probable cause to prosecute the plaintiff in that they had bona fide believed, on reasonable grounds, that the plaintiff had committed the offences on which he was charged.

[4] Malicious prosecution is sometimes defined as an abuse of the process of the Court by wrongfully setting the law in motion on a criminal charge. And in order to succeed in an action

for malicious
prosecution
the plaintiff
must prove
the
following:

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(iii) That
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(v) That
 the plaintiff
 suffered
 damages.

[5] In the heads of
 argument
 which Mr.
 Shilubane
 used in his
 final
 submissions
 to the Court
 he argued
 that the
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 action is
 founded on
 the delict of
 malicious
 prosecution
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e cause to prosecute him. He contended that the plaintiff was arrested without a warrant contrary to the provisions of Section 30 of the Criminal Procedure and Evidence Act. He also contended that the plaintiff was held in custody for a period of 8 months on a law which, he said, had

been held to be unconstitutional by a Court of Appeal. The judgment of the Court of Appeal was not produced to this Court nor was its citation given. It was Mr. Shilubane's argument that

it had been held that all arrests are prima facie illegal and he cited, as authority for that

proposition, that

he

Zimbabwean case of *STAMBOLIE v COMMISSIONER OF POLICE*

1990(2) SA 369 and that the onus was on the person who effected the arrest to prove that it was legally justified.

See also the

case of *MAY v UNION GOVERNMENT* 1954 3 SAR 120

[6] The second reason Mr. Shilubane gave for contending that the defendants had no probable cause was that the defenda

nts had acted on an unsworn and on an uncorroborated statements of an accomplice. The third reason Mr. Shilubane gave for his contention that the defendants had no probable cause was that the prosecution was actuated by malice and that the evidence by the plaintiff on this issue

was not challenged by the defendants. The fourth reason Mr. Shilubane gave on this issue of lack of probable cause relate to the alleged concessions made by the defendants' witness in the

trial. I will deal with this issue later in the judgment.

[7] Mr. Khumalo who appeared for the defendants has submitted that the indictment and prosecution of the plaintiff was lawful and justified under the circumstances, in as much as the plaintiff was reasonably

suspected to have committed the offence on which he was charged. Mr. Khumalo has contended that the plaintiff's acquittal was no indication of his innocence of the

charges. He submitted that the plaintiffs acquittal was as a result of the Crown's witness who changed his evidence in the middle of the plaintiffs trial. It was suggested that the witness was later charged with the offence of perjury.

[8] The plaintiff gave evidence and he was

the only witness for his case.

He testified that he was an articled clerk and that he was a political activist; that he belonged to the People's United Democratic Movement (PUDEM O); that the

police were very interested in his movements and that they always followed his movements; that he was arrested in 2000 and was subjected to interrogation by the police on the guise that they were looking for arms;

that he was kept in custody and that although initially he was not allowed bail, he was later granted bail by

the Court of Appeal. He referred to the charges against him and that there was no evidence adduced against him at the trial and that he was acquitted under Section 136 of the Criminal Procedure & Evidence Act. He said that his trial was widely publicised and that such publicity had

greatly affected him; that there was no evidence to implicate him. In cross examination he admitted that as a member of PUDEMO he was not being paid but that he was engaged in other forms of livelihood; that the police were still interested in his movements, although it is not as extensive as it was before. That he knew the Crown witness by the name of Collin Magagula whom he knew when the latter was working at PUDEMO

offices; that he referred to Collin Magagula as "comrade". He assumed Collin Magagula was a member of PUDEMO because he was always at PUDEMO's President's office. He admitted, on being shown a statement by Collin Magagula, that it implicated him although he still maintained that it did

not implicate him. The plaintiff also admitted in cross examination that he knew Richard Nkambule. He said he, too, was a member of PUDEMO. He said that he was not surprised when Nkambule said that the plaintiff wanted his machines.

The plaintiff said that by machines he meant his cameras. The plaintiff said that he knew that Nkambule knew what the plaintiff was looking for and that he, the plaintiff, would not

be surprised if Nkambule did not know what machines he was looking for. He agreed that he had gone to Collin Magagula's house looking for his "machines."

[9] The defendants called two witnesses, a police officer and the Deputy

Director of Public Prosecutions who actually conducted the trial on behalf of the prosecution.

The police officer was the Sergeant who was in charge of investigation at the time the alleged offences were committed.

He confirmed that he arrested the plaintiff on charges of armed robbery and possession of arms. He said

in the month of August 2000 there were a series of robberies which stretched to September. In all the robberies AK 47 rifles were used. It was in Ezulwini areas. He said after a tip off they

arrested two Swazi nationals, Shongwe and Maseko. There were also two Nigerian nationals.

He said Shongwe and Maseko handed to the police two A.K. 47 rifles which they said belonged to professor Dlamini, the plaintiff in this case. The guns were actually handed to the police by Collin Magagula who alleged

the guns belonged to the plaintiff; that Collin Magagula was arrested as he had participated in one robbery. Magagula told the officer that the guns had been given to him by Professor

Dlamini to use them in the robbery and that Magagula would bring 10% of the proceeds of the robberies to Professor Dlamini; that Collin Magagula was called as a witness at the plaintiffs trial but did not complete his evidence as he changed his evidence; that Collin Magagula mentioned Nkambule, who was a

teacher at SOS Primary School; that the officer invited Nkambule for questioning. Nkambule told the officer that the plaintiff had approached him to give directions on how to get to Collin Magagula's

house; that Nkambule told the officer that the plaintiff had told Nkambule that Collin Magagula was keeping the plaintiffs machines; that Nkambule had led the plaintiff to Collin Magagula's house where they did not find him. The officer further stated that he also questioned Martha

Dlamini, the wife of Collin Magagula. Collin Magagula had told the officer that the plaintiff had gone to his house looking for his guns. Martha Dlamini confirmed to the officer that the plaintiff and

another person had gone to her house looking for "things" - that at first they were angry when they did not find Collin and they had to look for him under the bed and that when she asked them why they were looking for Collin they said something in Siswati which meant "he knows the oath". The officer stated

more statements were taken from Mazgazi and other people and that in all other statements the plaintiff was implicated. He said Mazgazi, who is also known as Tito, gave evidenc

e at the trial of the plaintiff. The officer said that the statement of Nkambule was confirmed by Magagula that what was referred to as machines were guns. The officer stated that the empty cartridges which were found at the scene of robberies matched the guns which were said to belong to

Professor, the plaintiff. The officer denied the allegation on which suggested that the plaintiff was charged because he is a member of PUDEM O. He said there are

many people
and he does
not know
who is and
who is not a
PUDEMO
member.

[10] The second
witness for
the
defendants
was Mr.
McMillan
Maseko the
Deputy
Director of
Public
Prosecutions.
He is the
counsel who
prosecuted
the plaintiff
in the
criminal trial.
He denied
the claims

made
by the
plaintiff
and
stated
that the
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which
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brought
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contained
statements
which
implicated
the
plaintiff.
He
referred
to the
statement
of
Collin
Magagula
and

stated that the essence of that statement was to the effect that he had received some AK47 rifles from the plaintiff and had in turn handed them to one Nelson Maseko for purpose of carrying out robberies. He said that it was on the basis of that evidence that he preferred charges against the plaintiff. He stated that

the statement by Collin Magagula was maintained through out the criminal trial until Magagula took the stand to testify. Mr.

Maseko stressed that even before Magagula took his stand to testify he continued to

maintain the statement he made to the police. He said that when Magagula took his stand the sequence of his evidence complied with his statement until he had to say that he received the guns from the plaintiff when he changed and mentioned another person and that the only change Collin Magagula made was the name of the person from whom he had received the guns and it was for that reason that he did not wish to apply

to treat Magagula as hostile witness. Mr. Maseko told this Court that had he known that Magagula would change his evidence he would have considered changes in the charges against the plaintiff. The witness emphasised the point that the reason he prosecuted the plaintiff was purely on the basis

of the statements which were in the docket. He said after Magagula had changed his evidence he conceded that there would be no evidence against the plaintiff because the evidence to corroborate the evidence of Nkambule, and that of Tito Mazgazi would not be there. The witness referred to the statement of Nkambule and reference to "machines" at Magagula's house. He also referred to the statement of the wife of

Magagula - Martha Dlamini. The witness stated that the statements showed that the guns supplied by the plaintiff were used in the robberies. He said the evidence he had, showed that the plaintiff had supplied the arms which were used in the commission of the offences. Mr. Maseko

stressed that he always decided to prosecute on statements which are not made on oath. The witness denied that he prosecuted the plaintiff on basis of the plaintiff's political affiliation. He stated that the plaintiffs prosecution was solely based on the statements the police recorded from witness including the statements of Collin Magagula who was PW14 in the criminal prosecution. He stated that he was confident of the evidence of

Magagula before the latter changed it.

[11] There is no principle of law which obliges the police and the prosecution to consider only sworn statements when deciding to arrest or prosecute

te. It was held in the case of MAY V UNION GOVERNMENT 1954 3 SAR 129 that it was not an essential pre-requisite that all material facts necessary to obtain a conviction should have been deposed on oath on an application for a warrant of arrest. Broome JP stated as follows:-

"I do not think that it is at all necessary to obtain a conviction should have been deposed on oath on an application for a warrant of arrest. Broome JP stated as follows:-

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sworn
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tion in
forming
his
opinion.
I have
no
doubt
that the
sworn
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in forming his suspicion, the official concerned is not obliged to accept that the sworn information is true."

[12] I would like at this stage to consider the issue of the alleged concessions by the defendants to which Mr.

Shilubane referred in his heads of argument. I have carefully reviewed the evidence of the two witnesses the defendants called in the case. There is no passage in the evidence of

both witnesses that contain the alleged concessions to which Mr. Shilubane has referred. On the contrary the express assertions of Mr. Maseko was to the effect that had he known that Magagula would change his evidence he, Mr. Maseko, would have considered changing the counts against the plaintiff. The

concessions on which Mr. Maseko made was in relation to the application on which the defence had made at the end of the prosecution case after Magagula had changed his evidence

e. Nor is there any evidence to show that Mr. Maseko conceded that it was "unimaginable to prosecute on unsworn statements." Indeed Mr. Maseko actually stated that they prosecuted on the basis of the unsworn statements which the police recorded from witnesses.

And the first witness who is a police officer did not think that statements from witnesses are always taken on oath. It is also not true to state that the plaintiff assertion that the prosecution was actuated

by malice
was not
challenged.

This was
specifically
denied when
both the
police officer
and Mr.
Maseko said
that the
prosecution
was not
based on the
political
affiliation of
the plaintiff
but purely on
the
statements
which were in
the police
docket.

[13] There can be
no doubt
and this is

admitted by
the defend
ants that
they institut
ed the prosecu
tions against
the plaintiff
and that it
terminated in
his favour. I
must now
consider
whether the
defend

ants had a reasonable and probable cause to institute the prosecution against the plaintiff.

[14] The evidence which was adduced by the police and the Deputy Director of Public Prosecutions was briefly as follows: There had been, in the months of August and September, 2000 a series of robberies

in the area of Ezulwini and on a tip off the Police arrested two Swazi National s together with two Nigerian National s. The Swazi National s who were arrested were Shongwe and Maseko.

The evidence of the Police Officer, who was involved in the investigation of this case, was that in all the robberies AK 47 rifles were used. The two Swazi Nationals who had been arrested handed over to the Police the AK 47 rifles. It was the evidence of this witness that spent cartridges

were found at the scene of the offences and that they matched the AK 47 rifles which had allegedly been used in the robberies. Those guns had been identified by police

witnesses
and, in
particular,
Collin
Magagula as
belonging to
the plaintiff.
There was
evidence
that those
guns were
kept at
Magagula's
house and
there is the
evidence to
show that
the plaintiff
had gone to
Magagula's
house to look
for his
"machines".
A witness
identified
those
machines as

guns. It
is
significa
nt to
note
that the
plaintiff
agreed
that
those
machin
es were
his and
he did
not
dispute
the fact
that he
had
gone to
Magagu
la's
house
to look
for the
"machin
es". The

plaintiff has described those "machines" as cameras.

[15] I carefully observed the manner in which both witnesses for the defendants gave their evidence. They impressed me as credible witnesses. They gave their evidence in a calm and collected manner and I did not form

the impression that they are the kind of people who would frame up charges against any person for any ulterior motive. Indeed they clearly discounted any suggestion that they were

actuated by any improper motive in prosecuting the plaintiff. I did not believe the plaintiff when he stated that the "machines" which he agreed were his and were kept at Collin Magagula's house, were cameras. Indeed there was evidence to suggest that this was the first time the plaintiff referred to the "machines"

as "cameras".

[16] The plaintiff in an action for malicious prosecution is required to prove both an indirect and improper motive on the part of the defendant and the absence

of reasonable and probable cause. When it is alleged that a defendant had no reasonable ground for prosecuting, this means that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged. If despite his having such information, the

defendant is shown not have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause:
vide
BECKEN

STRATER V
 ROTTCHER
 AND
 THEUNISSEN
 1955 (1) SR
 129. And as
 was said in
 the Privy
 Council case
 of COREA
 v PEIRIS
 1909 AC,
 549 "...the
 requirement
 of proof of
 absence of
 reasonable
 and probable
 cause seems
 to be a most
 sensible one".
 And
 incidentally it
 was held in
 that case (re
 Corea) that
 "the

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[17] The
 evidenc
 e of Mr.
 Maseko
 who
 prosecu
 ted the
 plaintiff

was that he continued to believe in the evidence of Collin Magagula up to the day when the latter took his stand to testify. Mr. Maseko continued to believe in the guilt of the plaintiff throughout and up to the time Collin Magagula testified.

[18] The plaintiff must prove that the defendants

were actuated by malice in prosecuting the plaintiff. The plaintiff must show that the defendant did not have an honest belief in the guilt of the plaintiff or was actuated by some improper

r or indirect motive in the sense of some motive other than that of bringing the plaintiff to justice. The plaintiff did not produce an evidence to support the allegation of malice other than suggesting, albeit obliquely, that he was prosecuted because of his affiliation to PUDEMO. I have already commented on the

credibility of the defendant's witnesses who rejected any suggestion that they were motivated by any ulterior motive.

[19] I am satisfied that the information which continued to

be available to the prosecution up to the time of the trial of the plaintiff, was, in my view, sufficient to lead a reasonable prosecutor to conclude that the plaintiff had probably committed the offences charged. It is significant to note what Schreiner JA said in the case of BECKENSTRA

TER v
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(supra)
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<i>prosec</i>	<i>ff</i>
<i>ution</i>	<i>e</i>
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<i>deterre</i>	<i>".</i>
<i>d from</i>	
<i>setting</i>	
<i>the law</i>	
<i>in</i>	
<i>motion</i>	
<i>against</i>	
<i>those</i>	
<i>whom</i>	
<i>they</i>	
<i>believe</i>	

[20] The fact that the plaintiff was subsequently discharged, when a

prosecution
witness
changed his
evidence
during trial,
did not, in
my
judgment,
destroy the
basis upon
which the
prosecutor
initially
decided to
prosecute
the plaintiff.
As was
stated in the
case of
HICKS v
FAULKNER 8
Q.B.D. and
whose dicta
was applied
in the case of
MAY v UNION
GOVERNMENT

T supra
there
were
circumstances
in this
case
which
would
reasonably
lead any
ordinarily
prudent
and
cautious
man,
placed
in the
position
of the
defendants, to
the
conclusion
that

the plaintiff
was probably
guilty of the
offences
charged. I
am satisfied
and find that
the plaintiff
has not
proved, on a
balance of
probabilities,
his claim

Pronounced IN
open court this. 7
day of August
2007

against
the
defenda
nts. I
would
dismiss
the
plaintiff
s action
with
costs.

R.A. BANDA CHIE
JUSTICE