



## **IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

CIVIL CASE NO. 2097/02

In the matter between:

**BAMBELELA BOYCE**

**PLAINTIFF**

and

**COMMISSIONER OF THE ROYAL  
SWAZILAND POLICE  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

<u>CORAM</u>	:	Q.M. MABUZA -J
FOR THE PLAINTIFF	:	MR. K. MOTSA OF ROBINSON BERTRAM
FOR THE DEFENDANT	:	MR. V. DLAMINI OF ATTORNEY GENERAL'S
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CHAMBERS		

**JUDGMENT 22/8/08**

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[1] In this matter summons were issued against the Commissioner of Police. The cause of action was that

on the 3<sup>rd</sup> August 2000 at or near the Ngwenya Border Post the Plaintiff was wrongfully and unlawfully arrested without a warrant of arrest by members of the Royal Swaziland Police stationed at Mbabane Police Station.

[2] It was further alleged that these policemen were acting within the course and scope of their employment with the Commissioner of Police/Swaziland Government. It is also alleged that the Plaintiff and the two named persons with him Siphamandla Ginindza and Samson Lukhele were charged with possession of dagga or contravention of section 12 (1) (a) (b) and (c) of the Pharmacy Act of 1929 as amended by the Pharmacy (Amendment) Order of 1993.

[3] The Plaintiff alleges that the arrest was wrongful and or unlawful in one or more of the following respects;

**“8.1 Plaintiff was travelling in a separate motor vehicle to the truck in which the dagga was found;**

**8.2 The driver of the truck in which the dagga was found Samson Lukhele, informed the Police that he did not know the Plaintiff nor the passenger Plaintiff was travelling with;**

**8.3 A search of the vehicle in which Plaintiff was travelling did not reveal anything incriminating against him;**

8.4 **There was no evidence whatsoever either linking the Plaintiff to Samson Lukhele or the truck in question, upon which a reasonable man would have effected an arrest.”**

[4] As a result of the Plaintiff’s arrest and unlawful detention, the Plaintiff suffered a deterioration in his health, lost his employment, and has at the date hereof been unable to find alternative employment.

[5] As a further result of the said unlawful and/or wrongful arrest and prolonged period of detention, Plaintiff suffered damages in the sum of E1,200,000-00 (one million two hundred thousand Emalangeneni) made up as follows:

1. **Loss of Employment with attendant benefits  
Including Medical Aid Group - E600,000.00**
2. **Loss of motor vehicle which was repossessed  
and sold in execution - E  
59,000.00**
3. **Deterioration of health including loss of amenities  
of life the pain and suffering - E541,000.00**

[6] The Plaintiff now seeks payment against the Respondents jointly and severally as follows:

- “a) Payment of the sum of E1 200,000.00;**
- b) **Interest on the sum of E1 200,000.00 at the rate of 9% per annum a *tempore morae* to date of final payment;**
- c) **Costs of suit on the scale as between Attorney and own client including collection commission**
- d) **Further and/or alternative relief.”**

[7] At the hearing of the matter the Defendants indicated that that they were no longer contesting liability. In the event there is no need for me to set out the Defendants’ defence. The parties further indicated that the only issue for determination by the Court was the quantum of damages.

[8] The Plaintiff led evidence in proof of damages. He informed the court that he was 39 years old. At the time of his arrest he was employed by Old Mutual and based at Nelspruit as a financial advisor. He was employed during 1999. His job was to service the Nelspruit branch and Swaziland. He lost his job after his arrest and incarceration. He was incarcerated from the 3<sup>rd</sup> August 2000 until 13 December 2000 when he was acquitted and discharged.

[9] He told the Court that on the 3<sup>rd</sup> August 2000, he was travelling to Johannesburg with a friend and colleague in order to attend a business meeting. The friend was Siphamandla Ginindza. When they arrived at the Ngwenya border gate and after they had stamped their passports a certain police officer by the surname Lukhele approached them. He asked to talk to Mr. Ginindza and fifteen minutes later came to ask to talk to the Plaintiff. The time was about 8.00 p.m. He was made to wait until at about 9.40 p.m. He saw 10 men alight from a minibus. The men turned out to be police officers in private clothes. They went into some offices and returned with Mr. Ginindza who was now handcuffed. The police handcuffed the Plaintiff to Mr. Ginindza in front of many people some who knew the Plaintiff. The Plaintiff states that the police treated him very harshly and when he asked what he had done they said that he would be informed by the court. The Plaintiff and Mr. Ginindza were then taken to the Mbabane police station. The Plaintiff noticed that another man whom he did not know was also handcuffed and the police advised the Plaintiff that this man would also be transported to the police station together with him and Mr. Ginindza. The Plaintiff was

meeting this man who turned out to be a Mr. Lukhele for the first time.

[10] Upon arrival at the Mbabane police station they were placed in separate cells. They spent the night in the cells. Before they were placed in the cells they were made to take off their shoes, belts and money from their pockets. The condition inside the cells was very bad. The cells were filthy and stank. This stench came from a bucket which was used as a toilet. The cell was very small about 2m x2m and was overcrowded. The witness slept on the bare cold floor without a blanket. Because of the cold he huddled against a wall to make himself warm. He slept under these conditions from the 3/8/2000 until the 8/8/2000 when he was formally remanded to Sidwashini Correctional Facility. He was unable to take a bath and was not given any meal on the night of the 3/8/2000.

[11] The following morning they were again transported to Ngwenya border gate unwashed and without any shoes. They found many police officers including the well known but now deceased Mr. Jomo Mavuso. It was from Mr. Mavuso that they learnt why they had been arrested. He asked them why they had given the old

man Lukhele dagga. Thereafter photographs were taken of the three suspects next to the truck in which dagga had been found. This embarrassed the Plaintiff considerably.

[12] After the photographs were taken, Mr. Mavuso instructed the other officers to return the Plaintiff and the other two to the Police Regional Headquarters at Mbabane. At the Regional Headquarters the Plaintiff was questioned about the truck with the consignment of dagga but he denied any knowledge of it. Nonetheless the police detained him.

[13] On Monday the 7<sup>th</sup> August 2000 the Plaintiff and the other two men were taken to the post office where the police weighed the dagga. The Plaintiff states that this was in front of people he knew and who knew him or of him. He was in handcuffs. Thereafter they were returned to the police station where their fingerprints were taken. On Tuesday the 8<sup>th</sup> August 2000 the Plaintiff was taken to the Magistrates Court for remand. He was taken to Sidwashini Correctional facility thereafter, where he stayed until his release. The room in which he slept in was overcrowded with persons awaiting trial and he slept near the shower. The

Plaintiff was (is) asthmatic before his arrest and he states that the living conditions at the Correctional facility were unhealthy and this caused his health to deteriorate. The showers were cold as the geysers were out of order. He was given three blankets to use on the floor and they were dirty and full of dust making his asthma worse even though he was on medication. The place near the shower was cold as it was open space. There was a constant residue of water on the shower floor left after someone had taken a shower. The water did not dry up immediately. He had many asthmatic attacks at the Correctional facility due to the conditions. He received treatment twice a week while incarcerated. There were two nurses who administered tablets and did general check ups on a daily basis as well as a doctor who came once a week. After his release he was attended to by Dr. Vilakati in Manzini.

[14] At the time of his arrest the Plaintiff earned a net income of E12,944.96 (gross E16,500.00). The Plaintiff was asked to tell the court what loss of amenities he had suffered. He responded that his company used to sponsor choral music at Ezulwini Sun and he was a financial advisor for these activities. He used to get clients therefrom. He was unable to state any loss of



amenities.

[15] He was asked to tell the court what the nature of the pain and suffering was. He talked of the treatment he received from the police officers as well as having to wake up early at Sidwashini and sleeping as early as 9:00 p.m.

[16] He told the court that his reputation suffered because his arrest was publicised in the newspapers. The embarrassment and humiliation caused him to lose business as people no longer trusted him. The police officer Mr. Mavuso spoke with Mr. Bears, the Plaintiff's employer over the telephone and informed him that the Plaintiff had been caught smuggling dagga out of Swaziland. A Mr. Slombo was sent by his employers to verify that he was indeed at Sidwashini Correctional facility. After confirming the Plaintiff's incarceration his employers terminated his employment as he was implicated in a criminal offence.

[17] When he was released during December 2000 he tried to challenge the termination of his employment with CCMA, in South Africa but he lost. He lost his girlfriend because of his tarnished image.

[18] He had a motor vehicle which he had purchased from Wesbank. When he was in custody he could no longer maintain the instalments. He had bought it for E60.000.00. After his release from custody he needed a motor vehicle. The bank refinanced the vehicle and settled the balance with his ex employers Old Mutual. However, he could not maintain regular payments and the vehicle was re-possessed during 2003/2004. At the time it was repossessed he was in Johannesburg.

[19] The Plaintiff was cross-examined by Mr. Dlamini. He revealed that at the time of giving evidence in respect of this claim he was unemployed. He lived in Johannesburg. Mr. Dlamini for the respondents denied that the police were harsh to the Plaintiff nor that he was ever handcuffed. The Plaintiff repudiated this. Mr. Dlamini informed the Plaintiff that the cells were perfectly habitable and were not overcrowded but the Plaintiff denied this. The Plaintiff further revealed that he suffered from asthma as a child but when he was 15 years old the asthma was no longer severe but when he was in custody it became very severe. He was asked by Mr. Dlamini what amenities of life he had suffered he responded in the following manner:

**“Because of the defamation, the publicity in newspapers and the malicious prosecution I lost my job.”**

Mr. Dlamini said to the witness:

“I put it to you that you did not suffer any amenities of life at all”.

The Plaintiffs response was:

“From the time I was arrested it was unlawful, based too on the fact that Samson Lukhele made an affidavit that he did not know us and also the space of time I spent in prison when I could be working. My health deteriorated and the pain that I could feel as well as the suffering.”

[20] At this juncture I shall discuss the claims ***ad seriatim***.

(a) Loss of Employment with attendant benefits

including medical aid group 600,000.00

- Loss of earnings:

The Plaintiff was in custody for 4 months 10 days.

From 3<sup>rd</sup> August 2000 - 13<sup>th</sup> December 2000. He

earned a net amount of E12,944.96 x 5 (to the nearest) = **64,724.80**. The Plaintiff has proved the

claim under this head and I shall allow it.

- Loss of future earnings:

The Plaintiff had carved a future for himself with Old Mutual. He could not find a job after his release. I

shall award him at the very least 12 months

compensation hereunder.

I accordingly award him this amount i.e.  $12,944.96 \times 12 =$  **155,339.52**. There is no guarantee or proof that the Plaintiff would have worked at the same place for the number of years he is claiming even though he had carved a niche for himself. The Plaintiff gave evidence that he was employed for a short while after he was released but the company went into liquidation as it was not properly registered. He however looked fine to me. There is no reason why he cannot be gainfully employed in due course. The arrest occurred in Swaziland and not South Africa. There was no evidence led with regard to its publicity in the media in South Africa.

He did not lead documentary evidence that being incarcerated was a dismissible offence from work nor did he show the court proof of the reasons for his dismissal from work.

- Loss of medical aid scheme.

This scheme was E255.00 per month. I would award the Plaintiff an amount for the 5 months he was in custody plus for a further 12 months.

Thus  $255.00 \times 17 \text{ months} =$  **43,350.00**

- Pension Fund

This amounted to E579.132 per month. I would award him for a similar period as above namely 579.12 x 17 months = 98,450.40.

**The total amount under this head is the amount of**

**= 361,864.72**

(b) Loss of motor vehicle which was repossessed and sold

in execution = **E59,000.00**

I am satisfied that the Plaintiff has proved this item and accordingly award him the claimed amount.

(c) **Deterioration of health including loss of amenities**

**541,000.00**

- I agree with the Defendant's attorney Mr. V. Dlamini that the Plaintiff has not made out a case under this head. He led evidence that while in custody his health deteriorated because of the poor conditions. He stated that there were two nurses who administered tablets and did a general check up daily as well as a doctor who came once a week. He received treatment twice a week while in custody. After he was released he was attended to by Dr. Vilakati in Manzini. He did not file

any medical report as evidence of this deterioration nor did he call Dr. Vilakati or any doctor to state that his health did deteriorate and to what extent. In fact when he gave evidence he seemed to be in fine mettle was robust and did not once show signs of stress even during cross-examination.

- When he was asked to tell the court what amenities of life he had lost, he was unable to tell the court. He was not a contestant in the music competitions his company sponsored so one cannot say his voice was affected or any of his limbs or organs. He was asked what the nature of pain and suffering was. He described it as stated in paragraph 15 and 16 of my judgment. This however is not the type of pain and suffering envisaged by a damages claim under this head. The type of pain and suffering envisaged happens after a bodily injury. There will be no award under this head.

[21] While leading evidence the Plaintiff claimed a sum of E3,500.00 per day x 40 days for unlawful detention. I had difficulty in awarding the Plaintiff this claim. He did not claim it in his particulars of claim nor did he amend his particulars to incorporate it even after giving

evidence. The Plaintiff has only belatedly particularised the claim in his heads of argument but heads do not make an amendment. I would have dismissed this claim but for the fact that Mr. Dlamini for the Respondents does not seem to object to this court awarding the Plaintiff general damages under this head. He has suggested an award of E50,000.00.

[22] I do not think that an amount of E50,000.00 is appropriate. It is too low. Police in appropriate cases such as this one should investigate first and when their case is fool-proof and tight only then should they arrest someone and even then after they have interviewed the person. To arrest first and ask questions later is not only a violation of a person's dignity it is an affront to a person's reputation. I am not unaware of the evils of drug trafficking but the enthusiasm to get a commendation should not blind the police from carrying out their work with fairness and integrity.

[23] The directorate of public prosecutions should equally be circumspect in its prosecution of weak cases. It should not zealously oppose bail for its sake. It should study the cases carefully before bringing a prosecution when it is satisfied that it will be able to prove a case

beyond a reasonable doubt. A criminal case has a very high standard of proof and the cases sought to be prosecuted should be studied carefully as to whether all the elements of the crime charged are present and can be fully proved. Likewise the police should also satisfy themselves that they have investigated the matter and all elements of the offence have been satisfactorily investigated before they arrest a suspect. More so if they detain the person for protracted periods and oppose the granting of bail. Otherwise the administration of justice is brought into disrepute.

[24] There are currently many cases of this nature featuring on the court roll. The unfortunate instances of wrongful arrest, unlawful lengthy periods of detention and malicious prosecution ultimately lead to abuse of taxpayers money. It is the taxpayer who pays for the incarceration of the suspect for such long periods. It is the taxpayer who pay the police who carry out unsatisfactory investigations. It is the taxpayer who pay the directorate of public prosecutions who often fail to carry out a successful prosecution. It is the taxpayer who pay for court proceedings and court officials for proceedings which fail. It is the taxpayer who pays the money awarded to a victorious claimant such as in



the present case.

[25] I have no idea whether the head of the police both Commissioner and ultimately the Prime Minister receive judgments wherein a Plaintiff has been successful in a civil suit against them or even the Director of Public Prosecutions. It is important that they receive such judgments in order for them to become proactive in helping to curb wastage of tax payers money by avoiding arbitrary arrests, long periods of incarceration and to generally avoid such claims. Prudent fiscal policy should also apply to the administration of justice as a whole.

**Wrongful arrest:**

[26] In the present case the Plaintiff was 32 years old when he was arrested. He was in the prime of his life. He was educated in South Africa where he obtained a matric certificate and later did courses in insurance and asset management. He joined the work force during 1989. During 1993 he joined Old Mutual schemes in South Africa a reputable company where he carved a career for himself. When he was arrested in 2000 he was a financial adviser. When he gave evidence he was articulate, personable and well presented. When

he was arrested he was going to attend a course in Johannesburg. He was arrested at the border gate in front of people he knew. He was handcuffed to a colleague of his Siphamandla Ginindza. When he asked why he was being arrested the police were harsh and sarcastic and told him that he was going to get an explanation in court. He protested his innocence but this was rubbished by the police.

[27] He was photographed next to a truck at the border post wherein he was seen by his clients. The police went to verify his whereabouts from his relatives in his absence and were told that he was on a course in Johannesburg, but continued to arrest and detain him. He was at some point during his detention marched to the Mbabane Post Office in handcuffs to weigh dagga that he denied knowledge of. He denied any knowledge of the truck caught with dagga. He denied any knowledge of the driver of the truck containing dagga. The driver denied knowledge of him but the police instead of being stayed were spurred on with vigour in the arrest of the Plaintiff. His arrest was publicised not only to his employer by a very senior officer the late Jomo Mavuso but also by newspapers to the public. The police opposed bail. Defendants have

admitted that the arrest was unlawful.

[28] In the case of Joel Ziyane v Attorney General, High Court case no. 396/1989, the Honourable Court in 1989 looking at similar factors mentioned above, awarded the sum of E5,000.00 (Five thousand Emalangeni only) for wrongful arrest. In the case of Shepherd Nhlabatsi v Swaziland Government Case No. 1273/1991 at page 11 Hull CJ stated:

**“In the case decided by my predecessor Chief Justice Hannah in the case of Ziyane, the Plaintiff was awarded in 1990 - which is now over three years ago E5,000.00. I award E12,000.00”.**

The present case is 17 years later after Ziyane’s case. In Nhlabatsi’s case an escalation of E3,000.00 per year was used from Ziyane’s case. Applying the same scale to this case this would be 17 years x E3,000.00 = E50,000.00. The amount of E50,000.00 is a fair and appropriate award for the wrongful arrest and it is so ordered.

### **Unlawful Detention:**

[29] After the Plaintiff was arrested he was at first held at the police cells which were overcrowded and dirty.

There were no bathing facilities and no proper facilities to relieve himself save for a bucket which stank of urine and on occasion faeces. There was no proper food. He slept on a cold bare floor. After he was remanded he was transferred to Sidwashini Correctional facility where he stayed until his release. The room he slept in was overcrowded with people awaiting trial and he slept near a shower. The Plaintiff was asthmatic before his arrest and as the living conditions were unhealthy this caused his health to deteriorate in the sense that he had many asthmatic attacks compared to before his incarceration. The showers were cold as the geysers were out of order. He was given what I was informed was the regulatory three blankets to use on the floor. The blankets were dirty and full of dust making his asthma worse even though he was on medication. Because he slept on the floor near the shower, the floor was cold as it was open space. There was a constant residue of water on the shower floor left after someone had taken a shower. It did not dry up immediately. The change of status from being a financial advisor of Old Mutual schemes to common criminal was humiliating and mentally shocking. He lost his job and his girlfriend left him as she could not associate with a criminal.

[30] The Plaintiff's attorney has asked this court to follow the appeal case of Mfanafuthi Mabuza v The Commissioner of Police, Civil Appeal case no. 39/2006 (unreported) as a guideline in awarding damages under this head. The court therein considered the fact that Swaziland was a democratic state, the prison conditions, the Plaintiff's status and the period of incarceration as a guideline. There an award of E200,000.00 (Two hundred thousand Emalangeni only) for unlawful detention was given. In casu the Plaintiff earned more than Mfanafuthi who was earning a gross E2,500.00 (Two thousand five hundred Emalangeni only) per month and had just started a job whereas the Plaintiff was earning E16,500.00 (Sixteen thousand five hundred Emalangeni only) gross and had worked from 1989 to 2000. Hence, it is alleged the detention was seriously prejudicial to him. I agree and I order that the Plaintiff be awarded in the amount of E200,000.00 (two hundred thousand Emalangeni only) under this head.

**Malicious prosecution:**

[31] The Plaintiff testified that Samson Lukhele the driver of the truck bearing dagga orally and by affidavit told the

police that he did not know him and could not connect him to the dagga. The police went to his relatives to enquire where he was the previous day and was informed that he had gone to Johannesburg on a course but they still arrested him. He maintained his story from the first day of his arrest that he was innocent and did not know anything about the dagga but the police still detained him. The state opposed bail maintaining that they had a good case against him and he was deprived of his liberty for over four months. In the end he was acquitted. In the case before me the state acknowledged liability and only contested the quantum.

[32] Mr. Dlamini for the Defendants has cited the case of **Zakhele Gina v Commissioner of Correctional Services & two others** High Court case no. 72/2005 (unreported) wherein I awarded the amount of E50,000.00. That case is distinguishable from the present case in the sense that Mr. Gina did not lead any oral evidence and I indicated my frustration in that regard.

[33] The inescapable conclusion is that the prosecution was malicious as the police did not have evidence to back up the charges. The award in **Maxwell Lukhele**

**v Attorney General** 1987 1995 SLR 65 of E59,000.00 was a bulk award for wrongful arrest, unlawful detention and malicious prosecution. An appropriate award for malicious prosecution would in my considered view be E50,000.00.

In summary the total award stands as follows:

- Loss of employment with attendant benefits including medical aid group 361,864.72
  - Loss of motor vehicle 59,000.00
  - Wrongful arrest, unlawful detention and malicious prosecution 300,000.00
- TOTAL** **720,864.72**

[34] In the event the Plaintiff is awarded:

- (a) a total amount of E720.864.72 (Six hundred and twenty thousand one hundred and thirty nine Emalangeneni and ninety two cents).
- (b) interest thereon at the rate of 9% from date hereof to date of payment.

(c) costs of suit on the ordinary scale.

**Q.M. MABUZA -J**