

IN THE HIGH COURT OF SWAZILAND

j

HELD AT MBABANE

CIVIL CASE NO. 945/99

In the matter between:

FOR THE RESPONDENT :

SICELO SIFISO NDZIMANDZE

PLAINTIFF

and

ATTORNEY GENERAL

DEFENDANT

CORAM

:

Q.M. MABUZA-J MR. MNTSHALI

FOR THE APPLICANT

:

OF **P.R.** DUNSEITH

MISS MASEKO OF ATTORNEY

GENERAL'S CHAMBERS

JUDGMENT 24/04/09

[1] The Plaintiff herein issued summons against the Swaziland Government wherein he claims a total amount of E50,000.00 being in respect of damages he suffered as

a result of his unlawful arrest, detention and malicious prosecution. The amount claimed is made up as follows: Legal costs E5,000.00 and general damages E45,000.00. He has also claimed interest at 9% per annum a ***tempora morae***, costs and further and or alternative relief.

[2] The Plaintiff claims that he was arrested without a warrant and detained on the 3rd March 1998 at Manzini Police Station. He was transferred to Lubuli Police Station where he spent 3 days. On the 6th March 1998 he was transferred to Big Bend Remand Centre from Lubuli Police Station. On the 10th March the Director of Public Prosecutions preferred theft charges against him. He alleges that these charges were false and malicious and without reasonable and probable cause.

[3] The Plaintiff further alleges that the Director of Public Prosecutions later withdrew the charges against him and he was acquitted and discharged from custody on the 25th May 1998.

[4] The Defendant denies that the arrest and subsequent detention was unlawful and has pleaded that the arrest was lawful in that the Plaintiff together with one Paddy Steenkamp were the suspects in a theft of property case of complainants of Lubulini and were arrested and detained in regard thereto.

[5] The defendant has further pleaded that the Plaintiff and his co-accused had to be transferred from Manzini where they resided to Lubuli where the complaint originated.

[6] The Defendant has denied that the Director of Public Prosecutions falsely and maliciously and without reasonable or probable cause preferred theft charges against the Plaintiff.

[7] The Defendant has denied that charges were permanently withdrawn against the Plaintiff and that he was acquitted and discharged. The Defendant has pleaded that the charge was temporarily withdrawn because of a backlog of cases and shall be re-instated later. The Defendant has further pleaded that the temporary withdrawal of the charge was to the Plaintiffs advantage because he had failed to pay bail and would have been in custody for a long time. Consequently the Plaintiff was not deprived of his liberty. The Defendant's plea was signed on the 27th July 1999.

[8] The Plaintiffs summons is dated 15th April 1999 and the Defendant's plea is dated 27th July 1999. Pleadings were finalised on the 4th June 2001 when the pre-trial minute was signed. To date the charges have not been reinstated, that is from May 1998 - 2009 is almost 11 years.

[9] The Plaintiff led evidence of one witness himself only and the Defendant led evidence of three witnesses in all.

The Plaintiff testified that on the 3/3/1998 he was at Mhobodleni at ka Khoza area just outside the town of Manzini at Makhosezwe Kunene's home. The said Kunene was the Plaintiffs employer at the time. Plaintiff was employed in one of Kunene's buses. The bus on which the Plaintiff worked was being repaired on Kunene's premises as it had overturned the previous day.

[10] The Plaintiff was with some fellow employees a certain Paddy Steenkamp and Sikhuta Lukhele. The latter was a mechanic. Between 1:00 p.m. and 3:00 p.m. a police van arrived. In it were 4 people: 2 police officers who were not in uniform, 1 officer who was in uniform and an unknown man. They asked for Kunene who was not at home but he had left Mr. Steenkamp in charge. In the yard was a generator and the police wanted to know who the owner was. Mr. Steenkamp advised the police that the generator belonged to Kunene.

[11] The unknown man identified the generator as his. The police loaded it on their van with the assistance of the Plaintiff, Sikhuta Lukhele and Paddy Steenkamp. A log was used to load the generator. Sikhuta Lukhele left the company of the others ostensibly to throw the log away but then ran for it. The officers not in uniform tried to chase him but failed to apprehend him. On their return they requested the Plaintiff and Paddy Steenkamp to accompany them to the police station in order to assist them to off load the generator.

[12] Upon arrival at the police station in Manzini the generator was offloaded and the police then requested the Plaintiff and Paddy Steenkamp to follow them to the charge office in order to record statements. Instead of recording the statements they recorded their names and placed both of them in the holding cells where they remained from about 3:00 p.m. until 10:00 p.m. when they were taken out of the police cells handcuffed and placed into a police van and driven to Lubuli police station.

[13] At Lubuli police station the Plaintiff and Mr. Steenkamp recorded their names, had their finger prints taken and were thereafter placed in the police cells. All this was done by an officer named Luke Dlamini who had arrived with them from

Manzini. The Plaintiff and Mr. Steenkamp spent the night in the cells until dawn when their employer, Mr. Kunene arrived and tried to have them released but the police refused. The Plaintiff and Mr. Steenkamp spent the next two days in the police cells. On the third day they were taken to the Swazi National Court at Lubuli. This Court declined to hear the matter and suggested that it be heard by a Magistrate. They were returned to Lubuli police station. All this time they were not informed why they were in police custody.

[14] On the 4th day they were taken to the Magistrate's Circuit Court at Siphofaneni. It was here that the charges were read to them and they were advised of their rights to engage the services of an attorney. They were advised of their rights to apply for bail. The charges that were read against them were those of theft of the generator. They both pleaded not guilty and elected to represent themselves as they could not afford the services of an attorney. Both were remanded back into custody until the following week.

[15] The following week they were each admitted to bail in the sum of E4,0Q0.00 which they were unable to pay. They were remanded back into custody each week until the 25/5/98, when Plaintiff even though he was 23 years old at the time was released into his mother's custody. The matter was again recalled after the arrival of the police officer Luke Dlamini and the complainant. The charge against the Plaintiff was withdrawn. There seems to be some confusion at this point. The Plaintiff states that he was acquitted and discharged on the 25/5/ 1998 and the Defendants deny this. The Plaintiff states that the prosecutor on that date was Charles Masango and the Magistrate Israel Magagula.

[16] The attorney for the Respondents, Miss Maseko cross-examined the Plaintiff. She elicited from the Plaintiff that on the day he was arrested by the police they found him at the home of Makhosezwe where he was helping sand paper the bus. He stated that the generator was connected to the house providing electricity. He admitted that when the police arrived they were with the complainant Mvungelwa Dlamini. The latter identified the generator. He confirmed that he assisted the police to load up the generator while Sikhuta ran away. He denied that he had stolen the generator with Sikhuta and Mr. Steenkamp from the complainant's home at Lubuli.

[17] It was also put to the Plaintiff that charges against him were withdrawn before he pleaded and he denied this. It was put to him that charges could still be preferred against him because he was not acquitted and discharged. His response was that he was advised that charges were withdrawn permanently.

[18] Upon re-examination he revealed that when he was arrested on the 3/3/98 he had been residing at Mhhobodleni at ka-Khoza area and not at Makhosezwe's home. It was also disclosed that prior to his arrest he had never been to the home of the complainant at Lubuli nor had he known the complainant prior to this date. In response to questions from the Court he said that when he was arrested the police had no warrant nor was he informed why he was being arrested. He was only informed when he appeared the first time in court the reason for his arrest, after three days in custody. This was the Plaintiffs case.

[19] The defence led three witnesses. The first witness was 2703 Inspector David Ngcamphalala. He informed the court that he was stationed at Mafutseni Police Post. On the 4/3/98 while on duty carrying out office work four men arrived. These were Isaiah Mvunyelwa Dlamini (complainant) Magugu Ndwandwe, Boy Sithole and a Hlanze man. The complainant had come to ask this witness's assistance in recovering the generator. The witness and the complainant were neighbours at Lubuli area. The complainant asked the witness to accompany him to ka-Khoza where he believed his generator to be. Indeed this was done. On the way to ka-Khoza they went via the Manzini Police Station where they requested the assistance of two detectives. When they arrived at ka-Khoza they found the Plaintiff, Sikhuta Lukhele and Paddy Steenkamp using the generator for welding. The complainant identified it as his and it was loaded into a police van.

[20] The witness also confirmed that Sikhuta Lukhele ran away after pretending to go to the latrine. The witness together with the two detectives, the complainant, the Plaintiff and Paddy Steenkamp left for the Manzini Police station together with the generator. This witness confirmed that when they went to ka-Khoza they did not carry a warrant as he believed that the law allowed them to arrest a suspect without a warrant.

[21] He was cross-examined by the Plaintiffs attorney. The witness confirmed that the house at Ka-Khoza where they found the generator belonged to Makhosezwe Kunene who was not at home when they removed the generator and arrested the Plaintiff and his companions. He too confirmed that the Plaintiff and his companions assisted in loading the

generator. He further stated that one of the detectives he was with explained to the Plaintiff why he (Plaintiff) was being arrested.

The second witness for the defence was 3167 Detective Constable S.B. Mamba. He informed the court that he is based at the Manzini police station in the Criminal Investigation Department (CID). He informed the court that on the 4/3/98 at 10.00 a.m. Sergeant Ngcamphalala arrived at the Manzini police station with four men who included the complainant. They reported to him that the complainant's generator had been stolen at Lubuli in the Lubombo District and they had reason to believe that it was at Ka-Khoza in the Manzini District. They proceeded to ka-Khoza.

He further informed the court that when they arrived at ka-Khoza they found the Plaintiff and his companions using the generator which was blue in colour for welding.

Officer Mamba asked their names and informed them that he was investigating a theft case whereby a generator had been stolen at Lubuli. He then cautioned them that they were not obliged to say anything and that if they did this would be recorded and used in evidence against them in a court of law. They elected to say something and before they showed him the generator, he cautioned them again. He called the complainant who identified it as his.

[25] The witness requested the Plaintiff Sikhuta Lukhele and Paddy Steenkamp to assist him load the generator onto the police van. The owner of the home a Mr. Makhosezwe Manana was not at home. After they had loaded the generator, Sikhuta Lukhele absconded. The witness tried to

give chase but Sikhuta outran him. The witness returned to the Manzini police station with the Plaintiff and Paddy Steenkamp whereupon he booked them and put them in the police cells. The time was 10.30 a.m.

[26] This witness telephoned the Lubuli police and talked to 3158 Detective Luke Dlamini who later fetched the Plaintiff and Paddy Steenkamp at 9:00 p.m. on the 4/3/98. He took them to Lubuli police station. This witness showed officer Dlamini the generator which was picked up on another day. He too confirms that he did not have a warrant when he effected the arrest. He did not charge them. He did however tell them that he was detaining them for housebreaking with the intention to steal and theft.

[27] Mr. Mntshali for the Plaintiff cross-examined this witness. Nothing much turns on the cross-examination.

Counsel made an issue of the date of arrest being the 3/3/98 but the witness insisted that the arrests occurred on the 4/3/98 notwithstanding that the 3/3/98 was admitted in the pleadings. This witness further disclosed that they could not charge the suspects nor take them to be remanded because they had no docket as this was a Lubuli case. It was put to the witness that he arrested the suspects on information which had been supplied by Sicelo Hlanze and the witness agreed. When asked whether the owner of the homestead Makhosezwe where the generator was found was ever arrested the witness said no. Asked why? He answered that this was because Makhosezwe had given this witness some information relating to the generator.

The third witness was 3518 Detective Constable Luke Dlamini. He stated that he was stationed at Lubuli police station at the material time in the Criminal Investigation Department. He was

the investigating officer in this matter. He told the court that on the 3/3/98 he received a report that a blue generator had been stolen belonging to Isaiah Dlamini the complainant herein. On the 4/3/98 he received a telephone call from the Manzini police who advised him that they had recovered the generator and that the suspects had been arrested. He drove to Manzini police station where the two suspects were handed over to him by Constable Mamba. The time was about 9.00 p.m. The two suspects were the Plaintiff and Paddy Steenkamp. This witness returned to Lubuli with the suspects where they were formally charged and placed in the cells. They were charged with housebreaking and theft. On the 5/3/98 they were taken to the Magistrates Court for a remand. They were remanded to Big Bend Correctional Services. This witness further stated that he gave the docket to the Siteki Public Prosecutor Mr. Busenga. He believes the matter is still pending as he has never been called to a trial.

Mr. Mntshali cross-examined this witness and elicited from him that as investigating officer he had tried to look for Sikhuta at his parental home at ka-Phunga but failed to locate him. He also disclosed that he took fingerprints of the suspects when he arrived at Lubuli. Mr. Mntshali put to the witness that he had been instructed that the suspects had been taken to the Swazi National Court at Lubuli but the witness denied this and disclosed that he had taken them to the Magistrates Court at Siphofaneni. Some time later he fetched the generator from Manzini police station and took it to the Magistrates Court at Siphofaneni. It was further put to this witness that the Plaintiff was acquitted and discharged on the 25/5/98 but this witness was not aware of this. In response to a question from the Court he confirmed that he had later been advised that charges had been withdrawn but he was not given any reasons therefore.

[30] The third witness for the defence was Timothy Busenga the Prosecutor in the criminal case against the Plaintiff. He testified that on the 5th March 1998 he received a docket from the Lubuli police from Constable Luke Dlamini. The docket involved the Plaintiff and Mr. Steenkamp who had been charged with the theft of a blue generator the property of Isaiah Dlamini worth E800.00.

[31] The two Accused appeared before the Magistrate at the Siphofaneni Circuit Court for a remand. They applied to be admitted to bail and were granted bail in the amount of E2,000.00 each. Ultimately the Plaintiff was released into the custody of his mother. Mr. Steenkamp continued to appear from time to time as he could not raise the bail amount.

[32] He further stated that the case was set down for hearing on several occasions but could not be heard because there was only one Magistrate in the district. He further stated that the Plaintiff never did plead to the charge and the charge was withdrawn.

During early 1999 this witness received a letter from the Commissioner of Police. Attached to it was a letter from the Attorney General. The letter disclosed that the Plaintiff had instituted proceedings against the Government wherein he was claiming damages for *inter alia* unlawful arrest. In his response to these letters this witness states that he replied that the claim was baseless because the charge had been temporary withdrawn due to a shortage of Magistrates at the time and they dealt with suspects in custody. He also acknowledged that he had released the generator to the complainant on the understanding that it would be returned as soon as the matter had been re-instated as it was an exhibit.

He further testified that he had since re-instated the matter for hearing on the 18/5/07 and that the Plaintiff would be served with summons on the 9/5/07 the date on which this witness was giving evidence. He admitted that what had galvanised him into action was when he heard that the civil matter was proceeding.

Mr. Mntshali cross-examined Mr. Busenga. When asked why he did not re-instate the charges during 1999 he replied that it was because they were dealing with suspects in custody as there was a shortage of Magistrates. He was thereafter transferred to Mbabane and he forgot about this matter. He further disclosed that he was not sure when the charges were withdrawn but the Plaintiff was no longer appearing for remands. He thought the charges were withdrawn during 1999 against both the Plaintiff and Paddy Steenkamp. He did not have access to the docket because it was in the archives and the clerk thereto was on leave. This witness stated that the Plaintiff and Mr. Steenkamp were first remanded on the 5/3/98.

It was put to this witness that when the charge was put to the Plaintiff he pleaded not guilty. The witness responded that he could not have put the charge to the Plaintiff on the first date of remand because he still had to read the docket and verify that the charges were properly drafted. It was further put to him that the Plaintiff was acquitted and discharged on the 25/5/98 and that this happened in the presence of his mother. Mr. Busenga denied this and responded that the Plaintiff had stopped coming to court for remands only Mr. Steenkamp continued to come for remands. Mr. Mntshali put to the witness that on the date charges were withdrawn the prosecutor was Charles Masango and the Magistrate Israel Magagula. Mr. Busenga responded that he was unaware of that he just knew that he caused the charges to be withdrawn before anybody pleaded.

The defence closed its case. **The**

Pleadings

It has been submitted on Plaintiffs behalf that in his particulars of claim the Plaintiff averred that:

3.1 **on or about the 3rd March 1998, he was unlawfully arrested without a warrant;**

3.2 **that he spent three days in custody;**

3.3 **that on the 10th March 1998, charges were formally laid against him;**

3.4 **that he pleaded not guilty to the charges;**

3.5 **that the charges were withdrawn and he was acquitted and discharged and released from prison on the 25th May 1998.**

It was further submitted that the Defendant in his plea did not adequately address or plead to the material averments that were advanced by the Plaintiff. I agree with the Plaintiffs counsel in this regard. The plea leaves a lot to be desired. In fact counsel for the Plaintiff ought to have excepted to the plea right at the outset. What stands out clearly is the failure of the plea to plead the standard plea in such cases: that of justification that the police officers who arrested the Plaintiff had reasonable grounds of suspecting that the Plaintiff had committed a schedule II offence, entitling them to arrest without a warrant.

[39] **Rule 22 (2)** of the High Court Rules provides that:

"The Defendant shall in his plea either admit, deny, or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies".

Rule 22 (3) states:

"Every allegation of fact of the combined summons or declaration which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted, and if any explanation or qualification of any denial is necessary, it shall be stated in the plea."

[40] Because of the failure to plead as set out in the above rules, as a matter of law the material averments by the Plaintiff that were not denied by the Defendant are deemed to be admitted and require no proof by the Plaintiff.

[41] There was much said about whether the Plaintiff was arrested on the 3/3/1998 or on the 4/3/1998. Also whether the Plaintiff was taken for his first remand on the 4/3/1998 or the 5/3/1998. The dates are near enough to each other and do not make a material difference to the merits of the case. During the course of the trial the words generator and engine were confused and used interchangeably and much was made of these words as well. I agree with Miss Maseko that this confusion should not be fatal to the Defendant's case.

[42] The facts of this case have been outlined above. As the onus in such cases is on the Defendant, it is important to now discuss whether or not the Defendant has discharged it. The Defendant failed to raise essential defences in his plea and

to amend his plea after leading evidence. He has instead properly articulated these in his heads of argument. **Heads of argument do not an amendment make.**

[43] In his heads of argument the Defendant concedes that the arrest of the Plaintiff was without a warrant but **justifies** the arrest without a warrant. His contention is that section 23 (1) (b) of the Criminal Procedure and Evidence Act no. 67/1938 states:

"any peace officer may, without any order or warrant, arrest any person in whose possession anything is found which is reasonably suspected to be stolen property or property dishonestly obtained and who is reasonably suspected of having committed an offence with respect to such thing."

[44] To bolter her argument, Miss Maseko submitted that whilst investigating the theft of a generator the police found the generator at ka - Khoza, Manzini at the homestead of Makhosezwe Kunene. The police arrived with the complaint, Mvungelwa Isaiah Dlamini. The Plaintiff and his friends in crime were caught red handed using the generator in fixing a bus. The complainant identified the generator as his and the Plaintiff did not dispute such identification. The Plaintiff and his friends could not give a satisfactory answer to the police as to how the generator came to be in their possession. Therefore, she submits that the arrest was in line with the above quoted legislation.

[45] Mr. Mntshali's response to this argument is that none of the police offices who arrested the Plaintiff advanced any grounds, let alone reasonable grounds, of suspecting the

Plaintiff to have committed an offence. I agree with Mr. Mntshali. According to the evidence led by the police that went to ka-Khoza, they asked for the owner of the homestead and they were told that he was in town and that Mr. Steenkamp was in charge. The generator was in the yard and the police wished to know who the owner was and Steenkamp advised them that it belonged to Mr. Kunene. 2703, Inspector David Ngcamphalala testified that upon arrival at ka-Khoza, they found the generator being used. The complainant identified it as his whereupon it was loaded into a police van and taken away. There was no warrant of arrest. 3167 Detective Constable S.B. Mamba confirms that there was no warrant of arrest. In fact the police lured the Plaintiff to the police station at Manzini on the pretext that he would assist to offload the generator when he arrived at the police station.

Miss Maseko's justification fails. The proper cause was for the police to investigate before arresting the Plaintiff and not to arrest first and investigate thereafter. In his plea the Defendant baldly states that further investigation was needed in the matter hence the arrest without a warrant. Mr. Mntshali is correct in his submission that there was nothing to investigate. The police had suspects, they had the stolen item and they had an admission from Sicelo Hlanze.

See Baartjies v Nithianandan N.O. 1979-81 SLR 279;

Mngadi v Attorney General 1982-1986 SLR 283;

Sishayi Nxumalo v Attorney General 1982 - 1986 SLR 286.

A reasonable suspicion

In his heads of argument the Defendant raised the defence that the police reasonably suspected that the Plaintiff had committed the offence of theft as they were in possession of the stolen item. As stated earlier, this defence was not raised in the Defendant's

plea. Miss Maseko has correctly stated the law with regard to a reasonable suspicion namely, in *Timothy Bhembe v The Commissioner of Police and Another*, Appeal case no. 55/2004 (unreported) at p. 8 Beck J said:

"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 of the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence garnered by the police, as the authorities show."

Miss Maseko further cited the case of *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 6549 at 658 Jones J states:

"The section requires a suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion." (my emphasis)

As the trial court of this case and using the dicta of Beck J above, it is my function and not the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence garnered by the police. I do so hereunder.

The complainant, Mvungelwa Isaiah Dlamini was not called to testify. He had direct evidence as to how his generator went missing from his home. The generator was found at the homestead of Makhosezwe Kunene at ka Khoza. Mr. Kunene certainly had direct evidence as to how the generator turned up at his home but he was not called to give evidence nor was he arrested. Instead his employees who were found at his home, repairing his bus using the stolen generator were arrested. One employee Sikhuta Lukhele ran away when the police arrived. He too may have had knowledge as to how the generator had arrived

at Kunene's homestead. He was not arrested after displaying guilty conduct nor was he called as a witness. Sicelo Hlanze who had made certain admissions to the crime was not called to give evidence.

[51] Instead, 2703 Inspector David Ngcamphalala testified that the complainant had laid the charge with him. The complainant had come to him with Sicelo Hlanze. 3167 Detective Constable S.B. Mamba testified that he had arrested the Plaintiff on information which had been supplied by Sicelo Hlanze. Sicelo Hlanze was not called to testify; the court was deprived of Hlanze's information.

[52] Three crucial witnesses were not called to testify namely, the complainant, Makhosezwe Kunene and Sicelo Hlanze. Instead the police officers testified and all gave hearsay evidence which is inadmissible. There is consequently no solid evidence before this court upon which a reasonable suspicion could be based or for this court to reach a conclusion as to the reliability and sufficiency of the evidence garnered by the police.

[53] Miss Maseko contends that a reasonable suspicion was established as the Plaintiff was caught red handed using the generator and failed to give a satisfactory explanation as to how the generator came into his possession. My answer to her submission is that the Plaintiff was employed by Kunene. He was at Kunene's home repairing Kunene's bus. It is Kunene who should correctly answer as to what the generator was doing at his home repairing his bus and not the Plaintiff. There was no evidence led linking the Plaintiff to the theft of the generator. The admission by Sicelo Hlanze

is not admissible evidence against the Plaintiff: see section 228 of the Criminal Procedure and Evidence Act 67/1938.

Detention

The Plaintiff established that he was detained from the 3/3/1998 and was released on the 25/5/1998 when charges were withdrawn. This calculates to 2 months and 22 days or 86 days. He however did not testify with regard to the health conditions of the police cells and the correctional facility and how he was affected thereby. In his summons he referred to injury to his good name and reputation but he did not lead any evidence in regard thereto. The court will restrict itself to a finding in respect of the unlawful arrest and deprivation of liberty.

Malicious prosecution

The Plaintiff testified that a charge was put to him and he pleaded not guilty. He testified further that the charge was withdrawn and he was acquitted and discharged. The defence refuted the evidence of his acquittal and discharge by calling one of the prosecutors of the criminal case, Mr. Busenga. Mr. Busenga testified that as far as he could recall the charges were withdrawn temporarily and not permanently. Mr. Busenga did not have access to the prosecutor's file before giving evidence. He stated that the file was already in the archives. The Plaintiff testified that the day on which the charges were withdrawn and he was acquitted and discharged, Mr. Masango was the prosecutor and Mr. Israel Magagula the Magistrate. The criminal court record was not availed to this court: it would have settled this dispute. I believe the Plaintiff when he says that he was acquitted and discharged there being no evidence from the Defendant to the contrary.

[56] Mr. Busenga testified that after giving evidence herein he would re-instate the charges but he has never done so. It is clear to the court that there is no intention to reinstate the charge against the Plaintiff. The statement made by Mr. Busenga confirms the Plaintiffs assertion of malicious prosecution as well as torture and torment. I am satisfied that the Plaintiff has proved his claim.

[57] I would like to commend both counsel for a job well done especially Miss Maseko. It is difficult to prosecute a case which was bad from the outset and which had no prospects of success. Many a time the Honourable Legislators complain about perceived incompetence of Counsel from the Attorney General's Chambers. This perception is incorrect and ill-conceived. It is often the origins of the case itself that is bad and indefensible such as this one.

[58] The Defendant's defence is dismissed. The Defendant is ordered to pay to the Plaintiff the sum of E50,000.00 (Fifty thousand Emalangeneni), interest thereon at the rate of 9% p.a. a ***tempora morae*** and costs of suit.


Q.M. MABUZA-J