

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1347/03

In the matter between:

SIPHO MZWANDILE TSELA

PLAINTIFF

v

**THE COMMISSIONER OF POLICE
THE DIRECTOR OF PUBLIC PROSECUTIONS
THE ATTORNEY GENERAL**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

CORAM

FOR THE PLAINTIFF FOR

THE DEFENDANTS

Q.M. MABUZA-J
MR. J. MAVUSO OF JUSTICE
MAVUSO & COMPANY
MR. V. KUNENE OF ATTORNEY
GENERAL'S CHAMBERS

JUDGMENT 9/12/2009

[1] The Plaintiff herein claims from the Swaziland Government the sum of E155,000.00 (One hundred and fifty five thousand Emalangeni) particularised as follows:

(a) Loss of liberty and deprivation of freedom, discomfort and contumelia E150,000.00

(b) Attorney's fees

E 5,000.00

TOTAL

E155,000.00

[2] At the beginning of the trial Mr. Mavuso applied to amend the prayers as follows:

Prayer (1) to include discomfort and contumelia and totalling the amount of E150.000.00.
Prayer (ii) and (iii) to be expunged.
Prayer (iv) to be reduced to E5,000.00. The total amount to be E 155,000.00.

[3] The Plaintiff was incarcerated at Sidwashini Correctional Institution for 14 months and acquitted and discharged at the close of the Crown case on the 15th November 2002.

[4] The arrest and detention was at the instance of members of the police acting within the course and scope of their employment for whom the 1st Defendant is responsible. The Plaintiffs prosecution was at the instance of

the 2nd Defendant, the Director of Public Prosecutions.

[5] The particulars of claim further state that the arrest, detention and prosecution of the Plaintiff was without any reasonable or probable cause. It is further alleged that the Defendants did not have any reasonable belief for the Plaintiffs arrest, detention and prosecution. The arrest detention and prosecution the Plaintiff states was malicious, wrongful and unlawful. Consequently he suffered damages in the amount claimed.

[6] The Defendants admit that the Defendant was acquitted and discharged at the close of the Crown case. They aver that the Plaintiff was arrested on the reasonable suspicion of having taken part in the commission of an offence in contravention of the theft of Motor Vehicles Act of 1991. They deny that the acquittal of the Plaintiff meant that he was not a party to the crime.

[7] Consequently they deny being indebted to the Plaintiff in the amount claimed by the Plaintiff or any amount at all.

[8] The evidence of the Plaintiff revealed that he was arrested by police officers from Mbabane during September 2001. He was at

his home at Mlindazwe at Ezulwini. He was charged with auto theft. He stated that he was placed in the police cells at the Mbabane police station for two days. He was remanded on the 3rd day and sent to Sidwashini Correctional facility. The living conditions in the police cells were terrible. The cell was too small and he had to sleep or sit curled up. He was given food once a day at about 3.00 p.m. He had to use a bucket to relieve himself otherwise he was allowed out of the cell once a day to relieve himself.

[9] The living conditions at Sidwashini were no better. He stated that he used to eat porridge for breakfast and eat supper at 4:00 p.m. There was no lunch. He was often ill-treated and manhandled by older inmates. He stated that he was incarcerated at Sidwashini for 14 months. He was acquitted and discharged and released on the 15 November 2002, because there was no case against him.

[10] He testified that the police had no warrant when they arrested him. He stated that he had to instruct an attorney to assist him and paid E5,000.00.

[11] He was cross-examined by Mr. Kunene and revealed that he was arrested together with

Casper Jarvis, Nhlanhla Manana and Xolani Mavimbela. However, he knew only Xolani Mavimbela. It was his first time to see the other two men. It was put to him in cross-examination that he was arrested because the police found a test light in his possession which was from the stolen car he and the others were charged with having stolen. He denied this. He thereafter closed his case.

[12] The defence case opened with the evidence of DW1, 2621 Detective Constable Siphon John Mabuza. He testified that during September 2001 he received a docket of a theft of a motor vehicle. The motor vehicle SD 793 NH was stolen at Mbabane Post Office. During October 2001 the Lobamba police advised him that they had arrested a co-accused to the Plaintiff named Xolani Mavimbela in connection with the theft of the motor vehicle whose theft DW1 was investigating. He proceeded to Lobamba together with 2056 Detective Inspector Dlamini 2544 Detective Sergeant Thomo and 3543 Constable Simelane. When these officers arrived at Lobamba they interviewed Mavimbela after cautioning him. Mavimbela assisted the officers with regard to information relating to the stolen motor vehicle. He took these officers to Ndzevane to a certain homestead where they found

Lionel Gruneveld. Mr. Gruneveld advised the officers that his brother Jarvis had come to the homestead with Mavimbela driving the stolen motor vehicle. The car had problems with its gearbox and Lionel took it to be repaired at Ndobandoba. Lionel took the police to where the car was and the police impounded it. The police were led by Mavimbela to

Jarvis who led them to Nhlanhla. The latter took the police to his workshop where he gave them a toolbox which had been removed from the stolen car. Nhlanhla took them to the Plaintiff who handed over a test light to the police. The test light was removed from the stolen car although the Plaintiff informed the police that it belonged to him.

[13] When the toolbox and the test light were shown to the complainant of the stolen car, a Mr. Dlamini he identified both items as his. They were kept in the car and were stolen together with the car. The Plaintiff was arrested together with Mavimbela, Nhlanhla and Jarvis for the theft of Mr. Dlamini's motor vehicle.

[14] Mr. Mavuso for the Plaintiff cross-examined DW1. DW1 agreed with Mr. Mavuso that the Plaintiff was acquitted of the theft of the

motor vehicle because Jarvis who was the 1st Accused pleaded guilty to auto theft as the motor vehicle was found in his possession. It was put to DW1 that there was no evidence linking the Plaintiff to the theft of the auto. DW1 disputed this and stated that the test light which was found in the possession of the Plaintiff linked him to the theft.

[15] I agree with DW1 that the test light linked the Plaintiff to the offence. So did Mavimbela who led the police to the Plaintiff. Mr. Mavuso laid too much stress on the fact that the Plaintiff was acquitted in the criminal trial. But that is not the issue *in casu*. The issue herein is whether or not there was a reasonable suspicion or probable cause that made the police suspect that the Plaintiff had committed an offence.

[16] DW2, 2544 Detective Sergeant Thomo in his testimony corroborated DW1. He testified that on the 16th September 2001 a motor vehicle theft was reported at the Mbabane Police Station. During October, 2001, the Mbabane police received information from the Lobamba police that the latter had arrested Xolane Mavimbela for auto theft. DW2 told the same story as DW1 culminating in the arrest of the Plaintiff and the recovery of the stolen vehicle at Ndobandoba. DW2 confirmed that the police were led to the

Plaintiff by Mavimbela who was helping them with their investigations. The police found a test light in the Plaintiffs possession. The test light was identified by the complainant as his. DW2 corroborated DW1 that the Plaintiff was arrested on the 8/10/2001. DW2 denied that the police cells were small. He stated that the cells could hold at least ten people comfortably and the suspects had three meals per day.

[17] Cross-examination of this witness did not take the matter any further than the evidence already stated.

[18] The Plaintiff relies heavily on the proceedings that took place in the Magistrate Court during the criminal trial involving him and three others. He relies heavily on the fact that he was acquitted and discharged at the end of the Crown case. He argues that this fact is not disputed. But it is disputed. DW1 states that the Plaintiff was discharged at the beginning of the trial. His co-accused Jarvis Gruneveld who was the first accused pleaded guilty to auto theft and the Prosecutor accepted the plea and discharged the Plaintiff and the other two co-accused. The Law of Evidence is very clear; he who avers must prove. The Plaintiff should have provided the record of proceedings from the Magistrates Court to assist him. He should

have in addition subpoenaed the learned Magistrate to give evidence confirming the Plaintiffs averments. It is trite that the verdict being the opinion of the learned Magistrate he would have been the best person to give such evidence on the Plaintiffs behalf.

[19] The Plaintiff has submitted that the Defendants have failed to call the complainant Mr. Henry Siphon Dlamini; its not clear to me why the Defendants would have needed to call the complainant. In my view the onus on the Defendants was to show that there was a reasonable suspicion that the Plaintiff had taken part in the commission of the offence complained of.

[20] The Defendants have discharged this onus namely

- they led evidence that Mavimbela led them to the Plaintiff from whom they recovered a test light which belonged to the complainant. The test light was removed from the stolen motor vehicle.
- Mavimbela drove in the motor vehicle to Ndzevane with Jarvid Grunewald.

- Mavimbela was known to the Plaintiff among all the co-accused.

[21] In addition, Mavimbela who is an acquaintance of the Plaintiff was never called as a witness for the Plaintiff to repudiate the Defendant's evidence.

[22] The evidence of a reasonable suspicion advanced by both DW1 and DW2 was not repudiated by the Plaintiff. I accept the possibility that the police may have overreached themselves when they charged the Plaintiff for auto theft but that is not the test in a civil suit of this nature. The test is whether or not there was a reasonable suspicion on the part of the police that the Plaintiff had committed an offence. In my view there was.

Section 23 (1) (b) of the Criminal Procedure and Evidence Act no 67/1938 states:

"any 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."

The test with regard to a reasonable suspicion was aptly stated in **Timothy Bhembe v The Commissioner of Police and Another**, Appeal case no. 55/2004 (unreported) at 8. Beck J said:

"It is not the duty of a police officer to elevate 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."

In **Mabona and Another v Minister of Law and Orders 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."

[24]

I am satisfied that the Defendants have discharged the onus in regard to the defence raised; namely that the police who arrested the Plaintiff did so upon a reasonable suspicion that he had taken part in auto theft. A test light which had been stolen from the stolen motor vehicle was found in his possession.

[25]

In the circumstances the claim against the Defendants is dismissed with costs.

Q.M. Mabuza

Judg

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