

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2521/07

In the matter between:

MESHACK TIMOTHY SHABANGU

PLAINTIFF

v

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

**1st DEFENDANT
2nd DEFENDANT**

<u>CORAM</u>	:	Q.M. MABUZA -J
FOR THE PLAINTIFF	:	MR. MKHWANAZI OF MKHWANAZI & ASSOCIATES
FOR THE DEFENDANTS	:	MR. KHULUSE OF ATTORNEY GENERAL'S CHAMBERS

JUDGMENT 9/12/09

[1] The Plaintiff herein sued the Defendants for

- (1) Payment of E1.5 million.
- (2) Interest thereon at 9% per annum

(c) Costs of suit

[2] The particulars of claim are that on the 12 August 2003 the 1st Defendant maliciously and without reasonable cause set the law in motion by laying false charges of stock theft against the Plaintiff. When laying this charge the 1st Defendant had no reasonable or probable cause for doing so. The Plaintiff was prosecuted for stock theft and duly acquitted on the 12th September 2006. As a result the Plaintiff suffered damages in the sum of E1.5 million made up as follows:

- Costs reasonably expended in defending himself in the sum of E20,000.00 (Twenty thousand Emalangeni)
- Damages for contumelia, deprivation of freedom and discomfort in the sum of E1,480,000.00 (One million four hundred and eighty thousand Emalangeni).

[3] It is further alleged that the 1st Defendant was acting within the cause and scope of his employment with the Government of Swaziland whom the Plaintiff holds vicariously liable.

[4] The Defendants in their plea admit that the Director of Public Prosecutions preferred stock theft charges against the Plaintiff on the basis that they had sufficient evidence at their disposal indicative of the fact that Plaintiff may have been guilty of the offence of stocktheft in that various complainants had reported cases of stocktheft and police investigations led to recovery of the stocktheft from the Plaintiffs homestead at Nkoyoyo. The 1st Defendant further denies that the acquittal of the Plaintiff was due to his innocence but was due to a technicality which transpired

long after the prosecution had been instituted. Consequently, the defendants deny liability in the sum claimed or in any amount at all and put the Plaintiff to the strict proof thereof.

[5] The Plaintiff testified that he owned two homes; one at Nkoyoyo and another at Manzini. He stated that he was arrested at his home in Manzini on the 1st March 2002. The police who were armed with guns were eleven in number arrived at 5.30 a.m. After arresting him they drove him to Mbabane police station where he was placed in custody in the police cells. He states that the following day the police took him to his home at Nkoyoyo as they were investigating stock theft. When they arrived at his kraal they found some cattle which he advised belonged to him.

[6] He testified that he was placed in police cells for two weeks. He was not remanded for a full week and the police hid his whereabouts to his wife and family until his wife hired the professional services of Mr. Mkhwanazi. Mr. Mkhwanazi was able to trace his whereabouts and he was remanded during the second week. He was admitted to bail on the 6th March 2002. When he attended court on the 22nd May 2003 he was advised that the charges against him were withdrawn. He stated that he instructed his attorney to sue the Government for return of his livestock. The police had removed all the cattle from his kraal together with 63 goats. He was upset by the police action of removing his livestock as he had informed the police that the cattle and the goats belonged to him. He had informed the police that the cattle had been sold to him by James Hlatshwayo. The cattle had been with him for two years and some had calved.

[7] He was advised that James Hlatshwayo had been arrested and released after one day in custody. He testified that as soon as his attorney had written to the Government the charges against him were re-instated. This he says was done in retaliation because he was now suing the Government. He was informed by a police officer Kina Dlamini that the cattle had been returned to their owners.

[8] He further testified that he was acquitted at the trial as there was no evidence linking him to the charge. But to date his livestock was never returned to him. He testified that a result of the malicious prosecution he had suffered damages in the sum of E1.5 million made up as stated in paragraph 2 hereinabove. He stated that prior to his arrest he was employed and earned E3,400.00 per month excluding per diem allowances as he used to ferry members of the Border Restoration Committee headed by Prince Khuzulwandle. He lost this job after he was arrested. From 2002 to 2005 he was unemployed. He was employed during February 2005.

[9] He stated that he suffered acute embarrassment in his good name and reputation. People took him for a criminal. He used to be a member of bandla ncane at Nkoyoyo and no longer was. His neighbours in Manzini witnessed his humiliating arrest. His arrest was publicized in the media, television and radio. He had to move away from his homes. He had to leave his church and joined another. When he was released he had lice. He had to pay his attorney the amount of E20,000.00 (Twenty thousand Emalangi) for services rendered. He stated he wanted this money as well as E1,500,000.00 (One, five Million Emalangi) from the Defendants.

[10] He stated in cross-examination that he had purchased ten head of cattle from James Hlatshwayo. That his sister kept two of his cows. The remaining four cows were progeny from the cattle that he had purchased from Hlatshwayo making a total of 16 cattle. The Plaintiff reiterated that he was acquitted in respect of all the charges. He further admitted that he changed his plea to guilty in respect of some charges on the advice of his attorney. He was however acquitted even of these charges as they were withdrawn.

[11] In re-examination the Plaintiff revealed that had the police brought Hlatshwayo to him, he, Plaintiff would have made Hlatshwayo admit that he had sold some cattle to the Plaintiff.

The Plaintiff closed his case.

[12] The defence called a total of ten witnesses. DW1 Jochonia Lokotfwayo testified that during May 2001 he lost 5 cows. He recovered 4 cows during February 2002. He testified the three cows were spotted by his daughter Nokuthula PW6 near SOS at Sidwashini. She telephoned the police with the information. The police telephoned the witness who identified them as his. Two boys who were driving the cattle were arrested. The following day the witness was taken to the Plaintiffs homestead at Nkoyoyo from where the two boys had allegedly purchased them. At Nkoyoyo this witness found a fourth cow of his as well as 3 other cows that belonged to his neighbor. The Plaintiff informed them that he had purchased the cattle from James Hlatshwayo.

[13] DW2, Meshack Bhila a police officer stated that during early February 2002, his herd boy telephoned him and informed him that 6 goats had gone missing. He reported this loss to the police. On the 19th February 2002 the police advised him that they had recovered several livestock at the Plaintiffs home, at Nkoyoyo. He went with the police to the Plaintiffs home and recovered 5 of his goats from among the goats at Plaintiffs home.

[14] DW3, Muntu Mthupha, testified that during 2002 he was arrested for stock theft of cattle which allegedly belonged to DW1. He stated that the cattle had been purchased at Nkoyoyo from the Plaintiff who had cleared them at the dipping tank. He stated that 5 cows were cleared even though they took three cows. They had been bought by a Mr. Mthupha of Mbuluzi. It was while they were at Sidwashini that DW1's daughter stopped them as she identified the cattle as her father's.

DW4, Mafelempini Mthupha drove the cattle from the Plaintiffs homestead at Nkoyoyo. He was arrested together with his brother Muntu Mthupha with whom he was found driving the cattle to their new destination. He revealed that when the cattle were being cleared one brown cow had been wrongly cleared as black but he was told to take it along. DW5, the assistant veterinary officer confirmed that during 2002, he cleared three cows which belonged to the Plaintiff. These were new cattle that were on transit. He too recalls that three cows were cleared but one did not correspond with the stock removal permits; and yet he still allowed it to go. DW6, Josephine Lokotfwayo confirmed the evidence of her father DW1 and of DW4, that she recognized the

cattle at Sidwashini and reported the matter to the police who arrested DW4 and his brother, DW3.

DW9, Detective Sergeant Dlamini was one of the investigators of the case which ultimately led to the arrest of the Plaintiff on a charge of stocktheft. Before the Plaintiffs arrest, two men DW3 and DW4 who were found with DW1's cattle were arrested. DW3 and DW4 led the police to the Plaintiff who they alleged sold the cattle to them. DW9 testified that the said cattle were identified by their owner DW1 at a cattle pound where the police had placed them. DW1 had reported them missing a year before. DW1 further identified one cow which belonged to him in Plaintiffs cattle kraal at Nkoyoyo. He also identified three of his neighbours cattle at the same kraal. Other people who did not give evidence identified their cattle at the Plaintiffs kraal namely, Mphandlana Maseko: three; France Khumalo two; Phuhlaphi Dlamini: three. DW2 also identified five goats which belonged to him. Thereafter the defence closed its case.

[17] The Plaintiff has based his argument on the unreported case of Professor Dlamini v the Attorney General; High Court Civil Case no. 778/2004. Therein the learned Chief Justice set out five requirements which a Plaintiff should prove in an action for malicious prosecution if he is to succeed. These are tabulated as follows:

- That the Plaintiff instituted proceedings; and
 - That the Defendant acted without reasonable or probable cause; and
 - That the Defendant was activated by malice; and
 - That the proceedings terminated in favour of the Plaintiff;
- and

- That the Plaintiff suffers damages.

In casu the Defendants led evidence that implicated the Plaintiff in the theft of cattle belonging to various complainants. The complainants actually identified their livestock in the Plaintiffs kraal at Nkoyoyo. DW3 and DW4 testified that their family had bought the cattle that were found in their possession at Sidwashini from the Plaintiff. He took the police to the Plaintiffs home. He further testified that when they were being cleared at the dipping tank, the Plaintiff was there. **Firstly**, there was a problem with the stock removal permit; it was for five cattle but only three were cleared. **Secondly**, the third cow was black but the stock removal permit had stated that it was brown, and yet DW6 still allowed him to take a very obviously black cow not stated in the removal permit at the instance of the Plaintiff and the assistant veterinary officer.

Thirdly, the cattle were new and were already in transit even before settling down. **Fourthly**, the Plaintiff did not inform the Court how much he paid for the cattle from Hlatshwayo or how he came about the goats belonging to DW2.

The Plaintiff did not challenge the above crucial evidence. This informs me that that the cattle were stolen and the Plaintiff and dare I say even the assistant veterinary officer may have suspected but colluded with the Plaintiff by clearing the cattle.

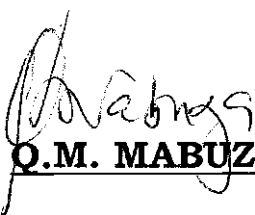
DW2 also identified five goats in the Plaintiffs kraal. He testified that before then, he constantly lost his livestock in batches of three, two or one. Inasmuch as the other complainants did not testify; DW10 testified that many of them also identified their livestock at Plaintiffs homestead. Could he have bought all these cattle from James Hlatshwayo? Maybe; maybe not. Unfortunately

when I heard the matter Mr. Hlatshwayo was no longer alive. But evidence is always available. The Plaintiff did not produce documentary proof of ownership of the cattle he said were his. He did not produce any stock removal permits from James Hlatshwayo: these are always available at the Ministry of Agriculture. Copies which remain in the registers are also available. A register of all Hlatshwayo's cattle are also kept at the Ministry of Agriculture but this information was not sourced or subpoenaed by the Plaintiff.

[21] The defence has proved very competently that the police had a reasonable suspicion that the Plaintiff had committed an offence. That is all they need to prove. Acquittals occur all the time but do not prove that the Plaintiff is innocent in some cases; if it occurred in this instance with all the evidence led in this Court, then there must have been another reason why the Plaintiff was acquitted; certainly not because he was innocent.

[22] I am satisfied that the defence has discharged the onus placed on it; namely that the police not only had a reasonable suspicion that the Plaintiff had committed the offence of stock theft but have even gone beyond that and proved the actual commission of the offence.

[23] In the circumstances the Plaintiffs claim is dismissed with costs.


Q.M. MABUZA -J