

**SWAZILAND HIGH COURT
CIVIL CASE NO. 3375/2000**

BETWEEN

JAMES McCREESH

PLAINTIFF

AND

**SWAZILAND GOVERNMENT THE
ATTORNEY-GENERAL**

**1st DEFENDANT 2nd
DEFENDANT**

CORAM:

AGYEMANGJ S. BHEMBE ESQ.

FDR THE PLAINTIFF: FDR THE

V. KUNENE ESQ.

DEFENDANT:

JUDGMENT

In this action the plaintiff has sued the defendant for the following reliefs:

- a) Payment of the sum of E700.000;
- b) Interest calculated at the rate of 9% per annum;
- c) Costs of suit;

d) Any further or alternative orders. The plaintiff, a recent widower and father of five, was once a soldier in the British Army. He emigrated to Swaziland where he has lived since in or about 1982. He has in that period, earned a living as a trader carrying on a wholesaling business: J.M. Wholesalers (Pty) Ltd.

It is common ground that the plaintiff was on the 13 day of April 2000, arrested by the Police and kept in Police custody until the 17th day of April 2000 when he was released; he spent, a total of four days (five nights) in custody. According to the plaintiff, he was detained in an overcrowded cell inhabited by twelve to fifteen people. He alleged that in that cell, there was such a lack of basic facilities including blankets and toilet facilities and good ventilation, that, he suffered grave discomfort. He also allegedly slept on a cement floor, a situation that did not help the fragile health of an asthmatic and heart patient who had undergone surgery on his kidney shortly before the incident. The plaintiff alleged further that during the time of his detention, he was put in fear of torture by Policemen who purported to interrogate him in the dead of night. When he was eventually arraigned before the court on two charges of Housebreaking and Theft, the said charges were withdrawn by the Prosecutor following which he was instead made an ordinary witness for the Crown.

Narrating the circumstances that led to the alleged unlawful and unjustified act of the Police, the plaintiff alleged that about one month before his arrest, that is, in March 2000, a man previously unknown to him: one Thokozane Mondlane

(referred to hereafter as Thokozane or the man), went to him while he was at his work place and tried to sell five truck batteries to him. As he did not wish to buy them, he told the man that he had no money. The man had allegedly come to his shop with a vehicle whereon he carried the batteries but had dispatched that vehicle. So it was that when the plaintiff refused to purchase the wares in spite of assurances he received that the batteries were not stolen but formed part of the man's stock in a failing business, the man allegedly pleaded with the plaintiff to keep same for him until he could come for them.

The plaintiff alleged that that was the first and only time he met the said Thokozane until his arrest. In spite of this, although the latter produced no receipt or other documentation for the batteries he was offering for sale believed his story: that the batteries in fact belonged to him. Being guided then by considerations of Christian charity, the plaintiff allowed Thokozane to leave the batteries with him for safe-keeping when he saw that the latter had no means of transport to cart the batteries away from his premises,. Thokozane, he said, never returned to collect the batteries. The plaintiff, at the material time ran a truck business apart from conducting a trading activity. He thus had a warehouse where batteries he used on his trucks new and old, were kept. The plaintiff allegedly kept the batteries the man left in his charge in the place he kept his own batteries. This led to the circumstance of his workers mixing up the said batteries, with his own.

The plaintiff recounted that on 13th April 2000, when he returned from conducting some business outside his office, he was informed by his workers that the Police had been to his workplace to look for him in connection with some stolen batteries. The plaintiff alleged that he immediately called to mind the matter of the batteries that had been left with him for safe-keeping. He thus ordered his staff to collect the batteries and take them to the Matsapha Police Station while he himself followed in his car. He alleged that he believed that he was taking the batteries entrusted to him to the Police to assist them in their investigations. At the Police Station, he found Thokozane, the man who had brought the batteries to him, in the custody of the Police. It transpired that the latter had admitted to theft of five batteries the subject of Police investigation and had led the Police to the workplace of the plaintiff, informing them that he had sold the stolen batteries to the plaintiff. Thokozane was called in to identify the batteries produced by the plaintiff as the stolen ones. Upon inspection, he declared that the batteries produced by the plaintiff were riot the ones he allegedly sold to him.

According to the plaintiff, after this he was subjected to interrogation for about ten to fifteen minutes by the Police during which he may very well, due to his alleged traumatized state, have told the Police that he kept the batteries as security for a loan he gave to the man. After the interrogation he was detained in a cell afore-described.

In a bid to get him to produce the stolen batteries, the plaintiff was taken by the Police to his workplace in handcuffs the next day in alleged full view of his workers and customers. When that enterprise did not yield the batteries, the Police allegedly subjected him to threatening treatment during interrogations at night. A few days later, when the plaintiff got his staff to produce all the batteries in his warehouse, the enterprise yielded one of the stolen batteries. The identification of the stolen battery was done by both Thokozane and the owner of the stolen batteries. The other stolen batteries were however never traced. As aforesaid, the plaintiff's detention ended when he paid bail money upon the order of the court. Even so by reason of the bail conditions, he was not free to go about his business until the Prosecution withdrew all charges against him.

It was the case of the plaintiff that he suffered injury from this incident in a number of ways: these included the discomfort of being detained in overcrowded Police cells with little ventilation and scant facilities and the financial inconvenience he suffered when he was made to post bail in the sum of E25,000 (which was refunded to him after six months), before his release. The payment of the said amount he said had been quite burdensome as his income at the material time was derived solely from his trade. Furthermore, his business suffered when by reason of the bail condition restricting foreign travel (he was required to surrender his passport), he was prevented from going to South Africa as was his custom, to replenish his stock. The effect of all this, the plaintiff said, was the collapse of his fifteen-year old business which had had a monthly turnover of E65,000 as he was unable to pay his staff who were consequently laid off. The sole breadwinner of his family, he himself was faced with the loss of his livelihood.

The plaintiff alleged that he deserved none of this as his arrest by the Police was unlawful and unjustified.

The plaintiff thus commenced this action suing for the reliefs set out at the first. More particularly, he listed the damage he suffered and quantified same in his

claim as follows:

a)	Loss of liberty and freedom	E100,000
b)	Loss of comfort	E 100,000
c)	Humiliation	E300,000
d)	Loss of business	E190,000
e)	Legal expenses incurred	E10,000

The plaintiffs case was supported by a former employee/salesman of his firm. According to this gentleman, he it was who had taken a message from the Police on the day they had come looking for the plaintiff and the batteries, accompanied by two men including an alleged thief. The Police had left word with him which he delivered to the plaintiff, that the plaintiff should report at the Police Station with the stolen batteries said to be in his custody. Upon delivering the message to the plaintiff on the latter's return, the witness went with five batteries loaded onto a truck to the Police Station on the instructions of the plaintiff.

He further alleged that the plaintiff who followed in his vehicle was detained in cells by the Police as soon as he arrived at the Police Station and that the following day he was brought by the Police to the workplace in handcuffs. The witness confirmed that the business of the plaintiff folded up shortly after this incident as the plaintiff could not secure supplies and could not pay the salaries of his workers within a month of the incident. The employees including himself were thus laid off.

It was the case of the defendant, that, the arrest of the plaintiff was lawful having been done on reasonable suspicion of his having committed the crimes he was charged with.

According to one Petros Fakudze a twenty-six-year veteran of the Royal Swaziland Police and the arresting officer in the instant case, shortly after he was placed in charge of conducting an investigation into the case of the theft of five batteries and two walkie talkie chargers from a place called Kakhoza, he arrested the said Thokozane Mondlane who led him to the plaintiff as the one to whom he had sold the stolen batteries. It. was upon this information that he went with the said perpetrator to the workplace of the plaintiff, to locate

the plaintiff and to find the batteries. He alleged that when he met with the absence of the plaintiff at his workplace, he left word for him to report at the Police Station with the stolen batteries. A little later, a truck driven by one John Shiba arrived with five truck batteries at the Police station. The plaintiff arrived shortly after this and alleged the said batteries to be those that Thokozane had left with him for safekeeping. The said Thokozane when called in to identify them said those were not the batteries he alleged he had sold to the plaintiff. The witness as investigating officer then asked the plaintiff to produce those batteries admitted to be stolen by Thokozane and left with him. The plaintiff failed to do so. He testified that it was due to the plaintiff's failure to produce the stolen batteries which were unquestionably in his possession, that he detained the plaintiff in Police cells deeming him to be a co-perpetrator of the crime committed by Thokozane. Furthermore, that it was in an effort to get the plaintiff to produce the stolen items said to be in his custody that he took the plaintiff to his workplace the day after his arrest. He averred that when this did not yield the batteries, the plaintiff was detained for further investigations until the 17th of April 2000 when he produced one of the stolen batteries. The witness testified that it was for these reasons and under these circumstances where the plaintiff had failed to produce stolen batteries said to be in his custody - a matter necessitating investigation that he arrested, detained, and charged the plaintiff with criminal offences before the court. Yet although the witness had investigated the crimes and preferred the charges, he was not called to testify in court; only the complainant gave evidence. He alleged that it was his information that charges against the plaintiff were dropped upon arraignment, and that the plaintiff was made an accomplice witness in the

prosecution of the perpetrators of the crimes of House Breaking and Theft with which he had also been charged.

The witness also averred that the conditions in the Police cells where the plaintiff was detained were satisfactory, and that the plaintiff like other detainees, had access to, among other things, blankets and toilet facilities.

The defendant's case was further supported by the owner of the stolen batteries, one of which was found to be with the plaintiff. The said witness averred that upon being called upon so to do, he identified one of his stolen batteries among the lot produced by the plaintiff on 17/4/00 and that he did so from an invoice number that was engraved on that battery. That battery which was distinctive stood out among the lot produced as it was the only one with an engraving.

At the close of all the pleadings these matters stood out for determination:

1. Whether or not the plaintiffs arrest was unjustifiable and thus unlawful;
2. Whether or not the plaintiff is entitled to his claim.

The plaintiff has asserted that he was arrested by the Police on 13th April 2000 and detained until the 17th April 2000. He was then charged with two offences: Theft and House-breaking and arraigned before the court. When it was time for him to be tried, the Prosecution withdrew all charges against him one after the other, and made him an ordinary witness in the prosecution of the charges against the said Thokozane who had admitted the theft and had led the Police to him to retrieve the batteries. Although the first witness for the defence - the arresting officer alleged that it was his information that the plaintiff had been made an accomplice witness following the withdrawal of the charges against him, it is a fact that the plaintiffs allegation that he had been made an ordinary witness was not denied or even challenged in pleading. That assertion then stands unchallenged and I hold same to be a fact.

The plaintiff whose action is grounded in delict, alleges wrongful arrest and detention by the Royal Swaziland Police and contends that the matter of his arrest and the subsequent

detention for a period of four days and the inconvenience and discomfort he suffered, ought to entitle him to the reliefs he is seeking in this court.

In their defence, the defendants have alleged that although the plaintiff was indeed arrested and detained by the Police, it was justifiable and lawful, it having been based upon a reasonable suspicion that the plaintiff had committed the crimes he was charged with. The defendants rely on the right and duty of Police officers to make an arrest without a warrant upon a reasonable suspicion that a certain offence has been committed. That defence is grounded on the provisions of S. 22 (b) of the Criminal Procedure and Evidence Act which reads: *"Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest without warrant every person... (b) Whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the first schedule"*.

The charges upon which the plaintiff was arrested fall within this category.

In this case, the plaintiff's burden was discharged upon proof of the arrest and detention and matters ancillary to it. The burden of establishing that the arrest was lawful was upon the defendant, see: ***Ziyane v. Attorney-General Civil Case No 396/89 (Unreported) atp.4.***

As aforesaid, Petros Fakudze the Police Officer who in the course of his investigative work in connection with five stolen batteries, arrested and detained the plaintiff, maintained that he did so when the plaintiff failed to produce stolen batteries that he acknowledged were handed over to him by the confessed thief Thokozane. He insisted that he considered the said circumstance compelling in arriving at the decision that the plaintiff was implicated in the crimes of Thokozane.

It seems to me at this point, pertinent for the court to have regard to the surrounding circumstances in arriving at a determination of this all-important question: Could the arrest and detention of the plaintiff which is not in contention, be said to have been done upon reasonable suspicion that the plaintiff may be guilty of the offences for which he was arrested and charged?

It is the gravamen of the defendant's case that the plaintiff who acknowledged that the confessed thief left batteries with him, failed to produce them without explanation. Not only was this the case, but the plaintiff produced some batteries which the latter failed to identify as the ones he handed over. Although the plaintiff maintained in court that he had taken custody of the batteries for safekeeping only, he acknowledged that during the interrogation that followed his failure to produce the batteries handed over to him by Thokozane, he may have told the Police that he held the batteries as security for a loan he had given to Thokozane.

The witness for the defence recounting the circumstances of the arrest and detention, alleged matters which were corroborated by the plaintiff and his witness. These included that the involvement of the Police with the plaintiff in this entire matter started when Thokozane, a confessed battery thief led the Police to the plaintiff. That the plaintiff had indeed received the stolen batteries, whether through purchase, as security or for safekeeping (as the case may be), but failed to produce them. As the plaintiff's story included an allegation that he had never met Thokozane until the day that the batteries were brought to him, it was a curious matter for him to allege: that he gave a loan to him.

These circumstances would leave a reasonable man (the objective standard for suspicion reasonably held by the arresting officer), with a number of pertinent questions. These included: how much of a loan did the plaintiff make out to a total stranger if the security therefor was constituted of five truck batteries? Furthermore, how was it that the plaintiff, a man of years and of apparent astute business sense, take custody of five truck batteries which had no receipt or other documentation at all?

Whether for safe-keeping or as security, how was it that the plaintiff could not produce same?

Was it reasonable conduct of a man of plaintiff's calibre to take possession of goods (either as security or for safe-keeping) as alleged, from a lone man travelling alone with no means of transport and who was unknown to the plaintiff, especially as the goods did not have

receipts or other documentation and not to secure same, especially as he used similar goods in his own business?

The plaintiff did not deny when confronted with his statement to the Police during cross-examination, that he had told the latter that he kept the batteries as security for a loan he gave to Thokozane. Was it reasonable conduct for a man such as the plaintiff to treat the matter of goods left with him (whether as security as he told the Police, or even in safe keeping as he told the court), so lightly that his workers would not recognize the goods for what they were and so use same as he alleged? It must be borne in mind that the battery that was eventually found to be with the plaintiff was said to be distinctive and easily identifiable by the second witness for the defence owner thereof. Regarding the evidence of the defence witness: that Thokozane who admitted theft of the batteries the subject of Police investigation, informed the Police that he sold the batteries to the plaintiff and led them to the plaintiff's premises for retrieval, sight must not be lost of the fact that it is part of our criminal jurisprudence that where a man is found to be in possession of stolen goods and the circumstances of their coming into his custody should have alerted him to the fact that they were stolen, he stands to be charged with the offence of Receiving Stolen Goods in accordance with **S. 190 Criminal Procedure and Evidence Act**.

It is then reasonable to say that since the confessed thief led the Police to the plaintiff who later acknowledged to the Police that the thief had indeed left the stolen batteries with him, that circumstance itself (unless the plaintiff could satisfactorily explain that the circumstances under which he took delivery of the goods could exculpate him from wrongdoing), laid him open to arrest and a charge of Receiving Stolen Goods after investigations were duly conducted by the Police.

In the peculiar circumstances of this case, a crime of theft of five batteries had been committed. The perpetrator had identified the plaintiff as the one in possession of the stolen loot. The plaintiff did not deny that they had been handed over to him. He however denied that he had bought them and alleged a loan/security transaction of a specious nature. In spite of this, he failed to produce the batteries without any reasonable explanation. Indeed his assertion that he thought the batteries he presented to the Police were the correct ones

and that finding them not to be so, he believed his workers had mixed them up, was to allege in effect that he did not know what had happened to the batteries left in his custody but which he said he had not purchased. Was it reasonable in these circumstances for the Police investigator to suspect that the plaintiff was involved in the theft?

In face of the defence of reasonable suspicion proffered which centred on the plaintiffs inability to produce stolen batteries which he admitted had been handed over to him and which he said he had riot bought, taken together with inconsistencies in the plaintiffs story that gave credence to the suspicious circumstances of the whole enterprise involving the plaintiff, it seems to me that the officer had reasonable grounds to suspect the plaintiff of involvement in the theft of the batteries.

Was it reasonable for the Police to arrest the plaintiff for the purpose of conducting investigations? It seems to me that it was. For the arrest of a person to be lawful, it had to be established that the arresting Police Officer in accordance with S. 22 (b) of the Criminal Procedure and Evidence Act had a reasonable suspicion that the crime regarding which the arrest was being effected had been committed by the person. The court had to be satisfied that there existed enough circumstances such as would inform an honest belief in the guilt of the person. The test is objective, for the circumstances should be such that a reasonable and prudent and honest man would arrive at the same conclusion, see: **Lukhele, Maxwell v. Attorney-General 1987-95 SLR Vol.4 65.**

It is however important to note that although the circumstances must be compelling, they need not amount to positive evidence regarding the crime alleged to be committed, see: **Bhembe v. Commissioner of Police and anor Appeal case No. 55/2004 (unreported) at p. 8.** It is enough that the evidence placed before the Police suggests complicity of such degree that it necessitates

the conduct of investigation as to the involvement of the person.

The Police at that point are entitled to arrest on grounds of reasonable suspicion of the commission of the offence for the purposes of conducting an investigation.

In ***Maobona and anor v. Minister of Law and Order and ors 1988 (2) SA 654 (SECLD)***

the matters to be considered by an arresting Police Officer while he determines whether there exist grounds for suspicion were set out by Jones J and these include analyses and assessment of information at his disposal. Upon the information placed before the Police investigator, was it reasonable for the police to detain the plaintiff after the arrest?

The circumstances under which the Police may detain a person suspected of committing a crime include measures to ensure that he may not tamper with evidence or witnesses as investigations go on. The evidence of the witness for the defence as corroborated by the plaintiff himself was that the plaintiff produced batteries in a case regarding the theft of batteries an act by which he acknowledged what the confessed thief of the batteries alleged: that he handed the stolen batteries to him. In fact the plaintiff alleged that the batteries had only been left with him, he had not bought them. Yet he did not, when requested to do so, produce the ones handed to him. The plaintiff was the owner of a business, who had control of his premises and staff, and who could thus tamper with investigations aimed at producing the stolen batteries especially if he desired to hide same from the Police.

It was thus not unreasonable for the investigating officer who allegedly had such a perspective on the matter, to detain the plaintiff when he did so, as investigations proceeded.

Was it reasonable for the Police to continue to detain the plaintiff as they did for four days? The evidence for the defence was that even a visit to the plaintiffs premises did not yield the batteries he acknowledged had been handed to him. In that circumstance, the decision of the Police to continue with their investigations unhindered by the plaintiff going about his business at his premises was not unreasonable. Their decision it seems was vindicated when an employee of the plaintiff produced on the fourth day the 17th day of April 2000, another lot of batteries one of which was found to be among the stolen lot the subject of the investigation.

As aforesaid, the defendants contend that the arrest and subsequent detention of the plaintiff were not unlawful, same being justified as there were reasonable grounds of suspicion of the commission of the offences the plaintiff was charged with.

In face of the evidence adduced by the defendant as corroborated by the plaintiff and his witness regarding the matters upon which the arrest and detention were based, I am inclined to agree with them.

It is trite learning that the importance of the individual's liberty in society to liberty is underscored by the law placing the burden of proving the lawfulness of an arrest on the defendant. The plaintiff's burden thus requires him to establish the matter of his arrest and detention after which the burden shifts onto the defendant as aforesaid. In the instant case, however, the story of the plaintiff himself seemed to corroborate the circumstances alleged by the first defence witness and raised questionable matters such as: how or why a man of the plaintiff's apparent calibre would take into his custody in unusual circumstances, batteries which turned out to be stolen and be unable to produce them without reasonable explanation particularly as it was his case that he had not purchased them. In such a circumstance, a suspicion by the Police that he had in fact been involved in the commission of the offences of House Breaking and Theft of the five batteries with which the perpetrator was charged was reasonable and provided cause for the arrest and detention of the plaintiff while investigation was carried out. For this purpose it mattered not that the perpetrator (Thokozane), himself had alleged that he sold the stolen loot to the plaintiff. This was so, especially as the plaintiff's story on the transaction differed from Thokozane's. Even if the charge of Theft had been wrongly laid regarding circumstances which should have supported a lesser charge of Receiving Stolen Goods, that did not render it bad and the arrest in connection with it, without basis. In any case, if such were found to be the case by the trial court, it was empowered to convict of the lesser offence on the evidence. That the prosecution for their own reasons chose to discontinue prosecution of the plaintiff and use him as an ordinary witness in proof of their case against Thokozane, did not mean that there were no reasonable grounds to suspect him of commission of the crimes charged at

the point of arrest, the sole requirement for the Police to make an arrest and detain for the purposes of conducting investigations.

It is my view that the defendants discharged the burden of proving the lawfulness of the arrest by adducing evidence of reasonable suspicion justifying same. The case of the plaintiff that he was unlawfully arrested and detained and suffered consequential loss must therefore fail.

I consider it needful at this point to comment on this matter of the plaintiff suffering the loss of much of his business capital when he was made to pay an amount of E25,000 for bail upon his arraignment at the magistrate's court. I have observed that the plaintiff did not make it his case that it was by reason of a charge laid maliciously and without probable cause that he was made to suffer financially. It appears that the charges laid against the plaintiff were of Housebreaking and Theft involving goods worth upwards of E65,000 rather than the theft of five batteries. This circumstance which resulted in the grant of bail upon onerous terms, may perhaps have supported a cause of action in malicious prosecution even if the arrest and detention were found to have been lawfully carried out. Sadly however, there was no pleading to this effect and even the mention of this was only introduced by learned counsel during the cross-examination of the defence witness. There is no gainsaying that that circumstance could never cure an omission in the case of the plaintiff whose complaint was grounded on the alleged unlawfulness of his arrest and detention, and not an alleged malicious prosecution.

While the plaintiff could perhaps have made out a case grounded on the latter cause of action based on the disparity between what the Police Officer could reasonably have suspected of the plaintiff (that is, the theft of five truck batteries), and what he in fact included in the charge he laid: theft of items worth more than E65,000, he chose not to do so. Had the plaintiff made such his case in pleading and by his evidence, the court may have gone into whether the charge laid (for which such an enormous amount of bail money was paid), which went far beyond the theft of the five batteries, was actuated by malice not

having been done upon reasonable and probable cause. Not being in a position to make the plaintiffs case for him, the court will not, as matters stand, go into that matter.

I have found and hereby hold it to be a fact that the arrest of the plaintiff by the Police and his detention for four days while perhaps unfortunate, was justified and lawful, as having been done upon a suspicion reasonably held by the arresting Police Officer upon the matters that were brought to his attention during the investigation of the theft of five truck batteries. The plaintiffs case must therefore fail. I make no order as to costs.

Dated the 29th day of January, 2009

MABEL AGYEMANG (MRS)
HIGH COURT JUDGE