



IN THE HIGH COURT OF SWAZILAND

Civil case No: 2901/98

In the matter between:

WILSON MWELASE

PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

Neutral citation: *Wilson Mwelase v. The Attorney General*
(2901/98) [2012] SZHC136 (9 July 2012)

Coram:
J

M.C.B. MAPHALALA,

Summary

Delict - action for damages arising out of police arrest and detention - no evidence of detention proved on a balance of probabilities - arrest of plaintiff lawful in terms of a warrant - action dismissed - no order as to costs.

JUDGMENT
9th JULY 2012

- [1] The plaintiff instituted action proceedings against the defendant claiming damages of E100 000.00 (one hundred thousand emalangeni) arising allegedly out of his unlawful arrest and subsequent detention by members of the Royal Swaziland Police Service.
- [2] The plaintiff alleged in his Particulars of Claim that he was unlawfully arrested without a warrant on the 11th June 1996 at Luyengo by police officers stationed at Malkerns Police Station; he further alleged that the police, when arresting him, were acting during the course and within the scope of their employment.
- [3] He also alleged that pursuant to his arrest, he was detained at Malkerns Police Station for three days and subsequently at Zakhele Remand Centre for about seven days, and, thereafter released without being charged or brought before a Court.
- [4] He alleged that by reason of his arrest and detention, he was injured in his good name and reputation, was separated from his home and family, was prevented from attending to his work, and, incurred legal costs; he further claimed damages of E95 000.00

(ninety five thousand emalangeni) and legal costs of E5 000.00 (five thousand emalangeni).

[5] The defendant has filed a Notice to Defend as well as the Defendant's Plea. It argued that the plaintiff was lawfully arrested upon a warrant of apprehension issued against him on the 12th June 1996 for failure to comply with a Court Summons to attend Court; in terms of the Warrant, the plaintiff was to be arrested and brought to Court on the 19th June 1996. The defendant consequently denied that the plaintiff suffered damages subsequent upon his arrest.

[6] In his evidence-in-chief the plaintiff testified that he was arrested by the police on the 12th June 1996; and, that during his arrest, the police told him that he had been summoned to appear before Court. He conceded being taken to Malkerns Circuit Court where he appeared before Magistrate Joseph Gumedze. He alleged that after the remand hearing, he was initially detained at Malkerns Police Station for three days, and, that he was subsequently transferred to Zakhele Remand Centre where he was detained for four days. He alleged that the police did not show him the warrant for his arrest; however, it is clear from the evidence that he never asked the police to show him the warrant.

- [7] He admitted that he had previously been served with summons to appear at the Manzini Magistrate's Court on two occasions; however, he was told that the public prosecutor handling the matter was at Mankayane Circuit Court. On the second occasion, he was told that the public prosecutor was at Bhunya Circuit Court. He also admitted that the Summons provided that he had to answer for a maintenance charge.
- [8] He testified that he was not accepted at Zakhele Remand Centre because there was no Remand Warrant for him; he alleged that the police took him back to the Manzini Magistrate's Court where they obtained the requisite Remand Warrant. He was detained at the Remand Centre for four days; thereafter, he was taken to the Manzini Magistrate's Court. However, his matter was not on the roll; and he was advised to attend the Maintenance Offices situated within the Court's premises.
- [9] He was attended by the public prosecutor who ordered members of the Correctional Services to remove the handcuffs and to release him from their custody. In the prosecutor's office, he found his ex-girlfriend Sibongile Zikalala and her grandmother. He was interviewed on the maintenance of his two minor children

and further made to sign certain documents consenting to the payment of maintenance. He denied paternity but was told to pay maintenance pending the paternity test. Thereafter, the prosecutor released him to go home.

[10] He further told the Court that on the third month, garnishee deductions were effected on his salary for the maintenance. He phoned the Bursar at his place of employment, and, he confirmed that the deductions were made pursuant to a Garnishee Order.

[11] His claim is for damages of E100 000.00 (one hundred thousand emalangeni) arising out of his arrest and subsequent detention; he claimed that as a result of the arrest, he was taken away from his family, and his good name and reputation were injured.

[12] Under cross-examination, he admitted being served with Summons to appear at the Manzini Magistrate's Court for maintenance on two previous occasions. He denied defying the Court summons as alleged by the defence and argued that he did attend the Manzini Magistrate's Court pursuant to the summons. However, the plaintiff did not call further witnesses

to prove his claim. He closed his case after his cross-examination.

[13] The prosecutor in the maintenance case, Lorraine Hlophe, testified on behalf of the defence. She told the court that she was a Crown Prosecutor from 1993-1997; thereafter, she was appointed as a Magistrate where she served for ten years. From the 1st April 2007 to 31st March 2009 she was the Registrar of the High Court; thereafter, she was promoted to be the Registrar of the Supreme Court on the 1st April 2009, an office that she currently holds.

[14] She admitted handling the maintenance case involving the plaintiff's maintenance when he was still a Crown Prosecutor based at the Manzini Magistrate's Court. She further admitted issuing summons for the plaintiff to appear in Court; she further admitted applying to court for a Warrant of Arrest against the plaintiff who had defied the Maintenance Summons to appear in Court. The Warrant was issued and signed by the Magistrate, and, she gave it to the police to effect his arrest and brings him before Court.

[15] She testified that after the plaintiff had appeared in Court, the warrant was discharged. She denied that the plaintiff was subsequently detained at her directive; she told the Court that she had no authority to do so as a Crown Prosecutor; and that it is only the Court which has the authority to do so.

[16] She further denied as alleged by the plaintiff that she was related to his ex-girlfriend Sibongile Zikalala and insisted that she was seeing her and the grandmother for the first time when they were brought to her by the Social Welfare officers. She admitted that her parental home is at Luyengo Area where the plaintiff, his ex-girlfriend and grandmother come from, but she denied being a resident of the area. She told the court that she was born and grew up in Manzini.

[17] Under cross-examination, she maintained her evidence that the warrant was automatically discharged when the plaintiff appeared in court pursuant to his the warrant of arrest; she maintained that the plaintiff was never detained either at the Malkerns Police Station or at Zakhele Remand Centre as alleged by the plaintiff. She explained that the purpose of a warrant is to ensure the attendance in court of the person named in the warrant.

[18] She admitted meeting the plaintiff, his ex-girlfriend and her grandmother in her offices for a possible agreement on the amount of maintenance before applying in Court for the Garnishee Order. She explained that holding a meeting with the affected parties was a standard procedure in maintenance cases. However, she denied that the plaintiff was brought to her office by members of the Correctional Services in handcuffs. Similarly, she denied threatening the plaintiff with arrest unless he signed blank papers agreeing to pay maintenance of E200.00 (two hundred emalangen) per month notwithstanding his denial of paternity.

[19] The defence brought a second witness Sergeant Makhosonke Mamba, a police officer based at Mafutseni Police Station. He testified that in 1996 he was stationed at Malkerns Police Station; and, that on the 12th June 1996, he was instructed to effect a Warrant of Arrest from the Manzini Magistrate Court for the arrest of the plaintiff. In terms of the warrant, the plaintiff was to be brought before the Malkerns Circuit Court upon his arrest.

[20] According to the witness, he went to effect the Warrant of Arrest upon the plaintiff in the company of Constable Msobho Kunene

and Constable Makhaza Dube. They introduced themselves to the plaintiff as police officers, read to him the Warrant and further explained the contents to him; they also gave the warrant to him to read as well. They took him to Malkerns Circuit Court where he was handed over to the prosecutor Lorraine Hlophe. He denied that the plaintiff was subsequently detained either at the Malkerns Police Station or at the Zakhele Remand Centre. He told the Court that if the plaintiff had been detained at Malkerns Police Station, he would have been the one to detain him. Similarly, he denied that the plaintiff was arrested by two police officers; he reiterated that he was one of three police officers who arrested the plaintiff at Luyengo. He told the court that they found the plaintiff in a river collecting sand. He further told the Court that he knew the plaintiff; and, that Constable Msobho Kunene and Constable Makhaza Dube are now deceased.

[21] He told the Court that he had checked the register at the Malkerns Police Station and there is no entry showing that the plaintiff was detained as alleged on the 12th June 1996 for three days.

[22] The plaintiff is claiming damages arising from unlawful arrest and detention. It is not in dispute that the plaintiff was arrested by

the police. Sergeant Makhosonke Mamba, the Police officer who effected the arrest of the plaintiff admitted in evidence that he arrested the plaintiff with the assistance of Constable Msobho Kunene and Constable Makhaza Dube.

[23] Lorraine Hlophe who also testified on behalf of the defence admitted that she caused a Warrant of Arrest to be issued against the plaintiff for Contempt of Court. She further admitted that the plaintiff was subsequently brought to court on the strength of the Warrant of Arrest. Sergeant Makhosonke Mamba also told the court that the plaintiff was arrested and brought to Court, and, that he was handed over to the prosecutor Lorraine Hlophe.

[24] The claim for unlawful arrest and detention consists in the unjustifiable infliction of a restraint upon the personal liberty of another; in order for the plaintiff to succeed in his claim, he must show that there was a total restraint on his liberty which was not justified in law. See the law of Delict, seventh edition, Juta & Co. Ltd by R.G. Mckerron at page 159.

[25] In addition, for an action of unlawful arrest to lie, it is not necessary that the defendant should act maliciously; it suffices

that the arrest should be unlawful. What is paramount is whether the arrest was justified. See the Law of Delict by R.G. Mckerron (supra) at page 160.

- [26] It is trite law that every interference with the physical liberty of a person is wrongful in the absence of a ground of justification. A warrant of arrest lawfully issued by a duly authorised official would provide the defendant with a complete defence. Liability for wrongful arrest is strict and fault is not a requirement for liability. Wrongful arrest consists in the unlawful deprivation of a person's liberty, and in order to succeed in an action based on wrongful arrest, the plaintiff must show that the defendant himself or someone acting vicariously as his agent or employee deprived him of his liberty.

See the case of ***Relyant Trading (PTY) Ltd v. Shongwe (2007) 1 All SA 375 (SCA) para 4 and 6; Rudolph and Others v. Minister of Safety and Security and Others (2009) 2 All SA 323 (SCA) at para 14.***

- [27] In the case of *Zealand v. Minister of Justice and Constitutional Development* (2008) ZACC 3, 2008 (4) SA 458 (CC) at para 52-53, *Langa CJ* dealing with Section 12 (1) (a) which relates to the

right of freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause stated the following:

“52. I can think of no reason why an unjustifiable breach of sec 12

(1) (a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant’s delictual action of unlawful or wrongful detention....

53. I accordingly hold that the breach of section 12 (1) (a) is sufficient, in the circumstances of this case, to render the applicant’s detention unlawful for the purpose of a delictual claim for damages,”

[27.1] *Eksteen J* in the case of *Thompson and Another v. Minister of Police and Another* 1971 (1) SA 371 (E) at 373 stated the following:

“It has been held that in the case of wrongful arrest as it is sometimes called, the defendant is liable when he has restrained the liberty of the plaintiff without lawful justification, and that it is not necessary for the plaintiff to allege or prove malice or want of probable cause on the part of the defendant.”

[28] The defendant argued that the arrest of the plaintiff was effected by the police officers pursuant to a Warrant of Arrest. The plaintiff did not dispute or challenge the evidence of Sergeant Makhosonke Mamba that he arrested him on the strength of a warrant of arrest from the Manzini Magistrate's Court.

[29] Similarly, the evidence of Lorraine Hlophe was also not disputed that the plaintiff was arrested on the strength of the warrant. The plaintiff during cross-examination merely tried to establish that the police did not produce or show the warrant to him. Sergeant Makhosonke Mamba testified that prior to the arrest of the plaintiff, they produced the warrant to the plaintiff, read it for him as well as handed the warrant over to him to read; again this evidence was not challenged by the plaintiff during cross-examination.

[30] It is apparent from the evidence that the arrest was effected by three police officers pursuant to a Warrant of Arrest properly and lawfully issued by the Manzini Magistrate's Court. During the hearing, both parties conceded that the Record of Proceedings before the Magistrate's Court had gone missing; and, that both parties had previously looked for it without success. It is

understandable why the Warrant of Arrest could not be produced in Court during the present proceedings.

[31] Another issue which the court has to deal with relates to the allegation by the plaintiff that he was detained at the Malkerns Police Station for three days and subsequently at Zakhele Remand Centre for four days. According to his evidence, the police who arrested him brought him before the Malkerns Circuit Court sitting at Pholile Hall immediately upon his arrest; and that after his appearance in court, he was detained at the Malkerns Police Station and subsequently at Zakhele Remand Centre. Both defence witnesses deny that he was detained; they maintained their evidence during cross-examination.

[32] The plaintiff told the Court that his family, employer as well as members of the Correctional Services were aware of his detention; however, he did not bring any of them to testify in his favour and in particular to support his allegation that he was detained both at the Malkerns Police Station as well as at Zakhele Remand Centre.

[33] The plaintiff in his evidence-in-chief admitted that he had previously been served with summons to appear at the Manzini

Magistrate's Court on two occasions to answer to a charge of failing to maintain his two minor children; the complainant was Sibongile Zikalala, his girlfriend and mother of the minor children. It is the evidence of Lorraine Hlophe that she applied to Court for the Warrant of Arrest following the failure by the plaintiff to appear in Court pursuant to a summons to do so.

[34] I am satisfied from the evidence tendered that the arrest of the plaintiff was lawful subsequent to the issue of a Warrant of Arrest by the Manzini Magistrate's Court. It is also apparent from the evidence that the Record of Proceedings went missing and it was not possible for the defence to produce the Warrant of Arrest as well as the Summons calling for the plaintiff to appear in court; notwithstanding the missing record, the evidence tendered by the defence shows that the arrest of the plaintiff was lawful and that the plaintiff was never detained as alleged.

[35] The plaintiff alleged that he was not the father of the minor children and that he denied paternity; however, it is apparent from the evidence that when the garnishee order was issued in 1996, he was advised to conduct a D.N.A. test, but he has never done it. He also alleged that the garnishee order was wrongly issued; however, he has never applied for a stay of execution or

a rescission of the garnishee order. The plaintiff is duly employed by the University of Swaziland as an Assistant Librarian and can afford to conduct a DNA test in proof of paternity; in addition, he has an Attorney who could have applied for a rescission of the Garnishee Order if he felt that it was obtained improperly. The only inference to be drawn is that the plaintiff is the father of the children, and, that the Garnishee Order was issued lawfully and properly.

[36] Accordingly, the plaintiff's action is dismissed. No order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant
For Respondents

Attorney M. Mkhwanazi
Attorney Vusi Kunene