



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Case No 2855/2009

In the matter between

LUCKY PHIRI

PLAINTIFF

and

THE COMMISSIONER OF POLICE

1ST DEFENDANT

THE ATTORNEY GENERAL

2ND DEFENDANT

Neutral citation: *Lucky Phiri vs The Commissioner of Police and another (2855/2009) [2012] SZHC 145*

Coram: **OTA J.**

Heard: **2nd July 2012**

Delivered: **6th July 2012**

Summary: **Absolution from the instance in terms of section 39 (6) of the High Court rules: Applicable principles thereof: Arrest and detention: Section 16 of the Constitution considered**

JUDGMENT ON ABSOLUTION FROM THE INSTANCE

OTA J.

[1] This is an application for absolution from the instance, moved by the Defendants at the close of the case for the Plaintiff.

[2] A brief resume of the history of this case is as follows:-

The Plaintiff instituted proceedings against the Defendants by way of combined summons claiming *inter alia* the following reliefs:-

1. Payment of the sum of E50, 000=00 (Fifty Thousand Emalangeni)
2. Interest on the aforesaid amount at the rate of 9% per annum a tempora morae
3. Costs of suit
4. Further and / or alternative relief

[3] In his particulars of claim the Plaintiff alleged the following facts vide paragraphs 4 to 10 thereof:

“4 On or about the 22nd March, 2009 at Matsapha the Plaintiff was unlawfully arrested by Matsapha Traffic Police and charged with driving under the influence of intoxicating liquor and failing to

comply with police instructions to be detained, and was accordingly detained at Matsapha Police Station.

- 5. The Traffic Police were at all material times acting within the course and scope of their employment as members of the Royal Swaziland Police*
- 6. The arrest of the Plaintiff was unlawful as Plaintiff was not driving under the influence of intoxicating liquor when Plaintiff was arrested by the police*
- 7. As a result of this unlawful arrest and detention Plaintiffs motor vehicle was towed away and Plaintiff had to pay a sum of E400.00 for the towing services.*
- 8. On the 23rd March 2009, the Plaintiff was admitted to a bail of E1000=00 and his trial was set for the 31st March, 2009.*
- 9. On the 31st march 2009 the charges against the Plaintiff were withdrawn as there was no evidence against him.*
- 10. As a result of the arrest and detention, Plaintiff sustained damages in the sum of E50,000=00 made up as follows:-*

<i>(a) Loss of liberty and freedom</i>	<i>E20,000=00</i>
<i>(b) Loss of comfort</i>	<i>E 9,600=00</i>
<i>(c) Humiliation</i>	<i>E10,000=00</i>
<i>(d) Legal expenses</i>	<i>E10,000=00</i>

(e) Cost for towing of the motor vehicle

E

400=00

E50,000=00

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[4] Now, absolution from the instance at the close of the Plaintiff's case is governed by section 39 (6) of the rules of the High Court, which provides as follows:-

"At the close of the case for the Plaintiff, the Defendant may apply for absolution from the instance, in which event the Defendant or one counsel on his behalf may address the court and Plaintiff or one counsel on his behalf may reply. The Defendant or one counsel on his behalf may thereupon reply on any matter arising out of the address of the Plaintiff and his counsel"

[5] The court thus obviously has the power at the close of the case for the Plaintiff to absolve the Defendant from the instance. This is however a power of the court, which the court is enjoined not to exercise arbitrarily or capriciously but judicially and judiciously upon facts and circumstances which show that it is just and equitable to grant same.

[6] It is in a bid to ensure a judicious exercise of this power, that case law has evolved certain parameters to guide the court in this task. These guiding principles were elucidated by the learned editors **Herbstein and Van Winsen in the text the Civil Practice of the Supreme Court of South Africa, (4th edition) page 681**, in the following terms:-

*“After the Plaintiff has closed his case the Defendant, before commencing his own case may apply for the dismissal of the Plaintiff’s claim. Should the court accede to this, the judgment will be one of absolution from the instance. The lines along which the court should address itself to the question whether it will at this stage grant a judgment on absolution have been laid down in the leading case of **Gascoyne v Paul & Hunter**, which contains the following formulation:-*

At the close of the case for the Plaintiff, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the Plaintiff “----- The question therefore is, at

the close of the case for the Plaintiff was there a prima facie case against the Defendant Hunter: In other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against Hunter”

It follows from this that the court is enjoined to bring to bear the judgment of a reasonable man and

“Is bound to speculate on the conclusion at which the reasonable man of (the court’s) conception not should, but might or could arrive. This is the process of reasoning which, however difficult its exercise the law enjoins upon the judicial officer

The reasoning is different from that applicable when the court comes to consider, after having heard the evidence for the Plaintiff and the evidence, if any tendered for the defendant, whether to grant absolution from the instance at the close of the Defendant’s case. The inquiry then is: is there evidence upon which the court ought to give judgment in favour of the Plaintiff? It is quite possible, therefore, for a court that has refused an application by a defendant for absolution at the conclusion of the Plaintiff’s case to give a judgment of absolution

after the Defendant has closed his case even though no evidence has been tendered by the Defendant.”

See **Gascoyne v Paul & Hunder 1917 Ltd 170.**

[7] Similarly, in the case of **Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 A at 409 - H**, the court stated as follows:-

“----- when absolution from the instance is sought at the close of the Plaintiff’s case, the test to be applied is not whether the evidence led by the Plaintiff established what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Plaintiff ----“

[8] It is worthy of note, that the continued application of the foregoing parameters in the courts in the Kingdom has rendered them sacrosanct. The cases abound. One of which is the case of **TWK Agriculture Ltd v SMI Ltd and another Civil Trial 4263/05**, where the court declared as follows:-

“The learned Judge of Appeal advocated for a test where the court trying the case (and not some other court or person), brings its own judgment to bear on the evidence adduced before it and decides

whether the Plaintiff has at the close of its case, made out a case such that that court could or might find for it, even in the absence of the defendant's evidence at that stage. If it could find for the Plaintiff on that evidence, then the Defendant ought to be put to its defence. If not, then cadit quaestio that constituted a proper case for the grant of absolution from the instance -----"

See *Mandla Ngwenya v The Commissioner of Police, Civil Trial No. 2700/07 paragraphs 12 and 14, Mershack Langwenya v Swazi Poultry (Pty) Ltd Civil Case No. 737 / 2009*

[9] It is therefore an indisputable fact from the authorities paraded ante, that the duty cast upon the court at this stage of the proceedings, is to ascertain whether there is any evidence upon which the court acting reasonably could or might (not should or ought to) find for the Plaintiff. In other words, has the Plaintiff made out a prima facie case against the Defendants?

[10] It is apposite for me to visit the totality of the evidence led by the Plaintiff in a bid to answer the foregoing poser. Now, in proof of the facts alleged in his pleadings, the Plaintiff Lucky Phiri testified and called no other witnesses. Plaintiff told the court that on the 22nd of

March 2009, that he was driving along the Mathangeni road at Matsapha around 8 pm, when he was stopped at a road block by 3 police officers manning same. That the police officers told him that he looked like he was drunk. Plaintiff denied this. The police officers did not administer any breathalyzer test on Plaintiff at the road block. Rather, they told Plaintiff to get out of his car, and leave his car keys in the ignition. That Plaintiff obeyed. Thereafter, the police officers took him into the police station. That 20 minutes after that, the police officers informed him that they were taking him to the Mbabane Government Hospital for blood test and he agreed. That whilst on the way to the Mbabane Government Hospital, around the Matsapha Shopping Centre, that they came across a man who drove his car negligently. That the police officers chased the car for about 2 kilometers and caught it. That thereafter, the police officers took the car to the Matsapha Police Station, where they took the driver into the police station and left the Plaintiff waiting in the car for 40 minutes to one hour. That it was thereafter that the police officers told the Plaintiff to go inside the police station to take a breathalyzer test. That before they administered the test, they informed the Plaintiff that the breathalyzer would turn red in colour if he was drunk. That the police officers administered the breathalyzer test around 10pm and it did not turn to red.

[11] That thereafter, the police officers detained him until 3 pm the following day, when he was admitted to bail in the sum of E1,000.00 and asked to report at the court on the 31st of march 2009. It is further the Plaintiff's evidence that he was also charged for refusing to be detained by a police officer in full uniform. Plaintiff further told the court that he was not given any food through out his period of detention even though he requested for food. He also told the court that he was not given water to take a bath. He also stated that he did not sleep well whilst in the said detention because he could not use the blanket which was dirty and had lice. He therefore slept on the floor. That the whole experience was very painful to him.

[12] It was further Plaintiff's evidence, that there was no stop sign on the road where he was arrested contrary to the Defendants' plea. That he does not drink alcoholic beverage. Therefore he was not drunk. Plaintiff told the court that 30 minutes after he was arrested on the 22nd of March 2009 and asked to get out of his car and go into the police station, that his vehicle was towed and he had to pay E400 towing fees. The receipt of the E400 towing fees was admitted in evidence as exhibit A. It was further the Plaintiff's testimony that when he appeared at the Manzini Magistrates Courts on the 31st of March 2009, the charges preferred against him were withdrawn because there was

no evidence against him. The charge sheet in respect of said charges was admitted in evidence as exhibit B.

[13] Under cross examination, the Plaintiff told the court that even though he was detained from 8 pm on the 22nd of March to 3 pm on the 23rd of March, a period of 17 hours, that he was humiliated in the eyes of the public when he appeared in court. That he was also humiliated in the eyes of his family who followed him to court. Plaintiff also told the court that he paid his lawyers E9,000=00 as legal fees and also had to buy food and pay transport for the people who accompanied him to court. That he lost his freedom and liberty. He was unable to carry out his appointments the following Sunday morning - when he was scheduled to attend a funeral and also to take people to the construction site where he works. He further told the court that he suffered loss of comfort because he did not sleep well during his one night of detention.

[14] Now, it is clear from the Defendants' plea, that whilst they do not deny arresting and detaining the Plaintiff as alleged, their case however is that they lawfully detained the Plaintiff upon reasonable suspicion of his driving a motor vehicle under the influence of alcohol. Under cross examination of the Plaintiff, learned Crown Counsel Mr Khumalo

premised the justification for the reasonable suspicion on the basis of the breathalyzer test administered on the Plaintiff and the attempt by the police officers to take the Plaintiff to the Mbabane Government Hospital to undertake a blood test.

[15] It was at the end of the Plaintiff's case that Mr. Khumalo moved the present application for absolution from the instance seeking for a dismissal of the Plaintiff's case. His stance is that not only was the Plaintiff's arrest and detention lawful in terms of the Constitution and the Criminal Procedure and Evidence Act, 67/1938 as amended, but the Plaintiff has failed to prove that he suffered any damages by reason of the said detention.

[16] In his reply, Mr Bhembe contended that the Plaintiff's detention was not justifiable and that the Defendants should be called upon to demonstrate the basis for the alleged reasonable suspicion that the Plaintiff had committed an offence

[17] Now, both sides have urged both the provisions of the Criminal Procedure and Evidence Act as well as the Constitution Act, upon the court, in support of their respective stance. Since it is common cause

that the Plaintiff's arrest was without a warrant, the relevant legislation for the purposes of this exercise would be section 22 of the Criminal Procedure and Evidence Act, which empowers a police officer to arrest without a warrant a person.

“

(a) *who commits any offence in his presence*

(b) *whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part 11 of the First Schedule.*

(c) *whom he finds attempting to commit any offence, or clearly manifesting an intention so to do”*

[18] Similarly, section 16 of the Constitution Act guarantees the Fundamental Right of every Swazi to personal liberty. It is apposite for me to recite section 16 (1) (e), 3(b) 4 and 7 of the Constitution for the purposes of this exercise.

“

16 (1) *A person shall not be deprived of personal liberty save as may be authorized by law in any of the following cases:-*

- (e) *Upon reasonable suspicion of that person having committed, or being about to commit a criminal offence under the laws of Swaziland,*
- (3) *A person who is arrested or detained:-*
- (b) *Upon reasonable suspicion of that person having committed or being about to commit an offence shall, unless sooner released, be brought without undue delay before a court*
- (4) *Where a person arrested or detained pursuant to the provisions of subsection (3), is not brought before a court within forty eight hours of the arrest or detention, the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance*
- (7) *If a person is arrested or detained as mentioned in subsection (3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions, as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial”*

[19] It is thus beyond dispute from the statutes above, that a person can be arrested and detained without a warrant. However, such an arrest must be lawful. It can be lawful:-

- (1) if it is done in accordance with procedure prescribed in a law,
- (2) if the ground for such arrest is that there is a reasonable basis for suspicion that the person has committed or is in the process of committing a criminal offence, and
- (3) if the person arrested or detained is brought without undue delay before a court, i.e within 48 hours of the arrest or detention, and released either unconditionally or upon reasonable conditions.

[20] It is therefore an obvious fact that, quite apart from bringing a person arrested to court within 48 hours and releasing him to bail, the law requires that there must be reasonable basis for suspicion that the person committed an offence. The Plaintiff had testified that there was no reasonable basis for the suspicion leading to his arrest and detention. He has premised this contention on the allegation that he passed the breathalyzer test and the fact that the charges against him were withdrawn. Plaintiff also told the court that there was no stop sign along the road where he was arrested and where he allegedly

failed to stop warranting his arrest. I hold the view on the state of the pleadings and evidence led, that the Plaintiff has made out a prima facie case against the Defendants, that his arrest and detention were not justified, warranting an answer from them.

[21] Since the Defendants allege that the Plaintiff was arrested and detained because he was reasonably suspected to have been driving under the influence of alcohol and he failed to stop at a stop sign (paragraph 4 Defendants' plea), there is a duty cast upon the court in these circumstances, to find out whether there was any reasonable basis for the suspicion. If there was none, then an arrest on that ground is unlawful and will therefore not be in accordance with section 16 (3) of the Constitution or section 22 of the Criminal Procedure and Evidence Act. But if there was reasonable basis for the suspicion then there is lawful ground for the arrest and the arrest will therefore be lawful.

[22] The onus of proving that there was a basis for the reasonable suspicion justifying the Plaintiff's arrest, lies on the Defendants. This is the position of the law as demonstrated by case law in this jurisdiction. For instance in the case of **Mfanafuthi Mabuza v The Commissioner of Police and Two Others Appeal Case No 11/2004 at page 2**, the Supreme court declared as follows:-

*“It is well settled law that the onus rests upon the arresting authority to prove that the requirements of section 22 (of the Criminal Procedure and Evidence Act, 1938) were met when an arrest without a warrant was made. Thus in **Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (A) at 589 E-F, Rabie CJ** referred to the earlier decision of the South African Appellate Division in **Brand V Minister of Justice 1959 (4) SA 712 (A)** which held that a peace officer who makes an arrest in reliance on the provisions of subsection (1) (a) of section 22 of the Act, bears the onus of proving that those provisions were complied with. The learned Chief Justice then went on to say:-*

“I consider it to be good policy that the law should be as there stated. An arrest constitutes an interference with the liberty of the individual concerned, and it seems to be fair and just that a person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law”

See Sabelo Mabuza v Commissioner of Police and Others Civil Case No. 724/03

[23] Now, on the question of damages, the Plaintiff has testified to his general discomfort, expenses and humiliation by reason of his arrest and detention. In practice this sort of damages need not be proved with arithmetical exactitude. This is because if at the end of the day the court comes to the conclusion that the Plaintiff did suffer damages as alleged, the court is quite competent to award him general damages.

[24] In the light of the totality of the foregoing and on the evidence led by the Plaintiff, I find that the Plaintiff has made out a prima facie case against the Defendants. This application fails.

[25] On the premises, I make the following orders:-

1. That the application for absolution from the instance be and is hereby dismissed.
2. That the Defendants be and are hereby called upon to enter into their defence.

For the Plaintiff:

S. Bhembe

For the Defendant:

S Khumalo (Crown Counsel)

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE..... DAY OF2012

OTA J.

JUDGE OF THE HIGH COURT