



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1999/03

In the matter between:

SIPATJI MANDLA MOTSA

Applicant

and

**COMMISSIONER OF POLICE
Respondent**

1st

**DIRECTOR OF PUBLIC PROSECUTIONS
Respondent**

2nd

ATTORNEY GENERAL

3rd Respondent

Neutral citation: *Sipatji Mandla Motsa and Commissioner of Police and 2 Others (1999/03) [2013] SZHC 49 (21 February 2013)*

Coram : MAPHALALA PJ

Heard : NOVEMBER 2012

Delivered : 21 FEBRUARY 2013

Summary

- (i) In this action the court has to determine what is reasonable cause within the provisions of section 22(b) of the *Criminal Procedure and Evidence Act as amended*.
- (ii) This court finds that the Defendants have discharged the *onus* that the arrest on the person of Plaintiff was activated under the provisions of section 22 of the *Criminal Procedure and Evidence Act*. I accordingly dismiss the Plaintiff's action with costs.

The Plaintiff's action.

- [1] The Plaintiff Mr. Sipatji Motsa, an adult male Swazi of Fairview, Manzini, Swaziland sued out of summons in this court in which summons he is alleging that he was arrested and charged with the capital offence of murder.
- [2] He alleges in the Particulars of Claim the summons that he claims against the Defendants jointly and severally the following:
 - (a) Payment of the sum of E850,000-00;
 - (b) Interest thereon at the rate of 9% per annum;
 - (c) Costs of suit; and
 - (d) Any further and/or alternative relief.

[3] At paragraphs 9 and 10 of the said Particulars of Claim that he ought to be paid damages for malicious prosecution and unlawful arrest. It being alleged that the office of the Director of Public Prosecutions maliciously set the law in motion against the Plaintiff without reasonable or probable cause with the arrest that he was charged criminally, tried and subsequently acquitted.

[4] At paragraph 10 thereof Plaintiff alleges that his arrest by members of the 1st Defendant was unlawful and malicious in that they had no reasonable suspicion that the Plaintiff committed the crime of murder.

The Defendant's opposition.

[5] The Defendant on the other hand has filed their Notice to defend and thereafter a Defendant's plea against liability in this matter. At paragraph 7 thereof Defendants vehemently deny that the arrest was unlawful and malicious. Defendants aver that the arrest was effected in terms of section 22(b) of the *Criminal Procedure and Evidence Act No.67 of 1938* in that Plaintiff himself came to the Police Station to report that he had shot and killed one Ali Mohammed.

[6] At paragraph 8 thereof Defendants disclaim liability to Plaintiff in the sum alleged or in any sum whatsoever and that Plaintiff is put to strict proof thereof.

The chronicle of the evidence of the parties.

(a) For the Plaintiff.

- [7] The Plaintiff was the only witness called to give evidence before this court. He testified that he was arrested on the 26 August 1998 and was charged with murder. That the charge followed the shooting to death of one Ali Mahommed who was shot at Fairview North on the 25 August 1998.
- [8] Plaintiff testified before this court that he reported a break-in at his flat to the police. The police had earlier on brought a suspect one Armando Thutini to the same compound where Plaintiff resides that certain items alleged to be the proceeds of theft in other matters were retrieved. He testified that he was advised by the Police officers that they were looking for one Ali Mohammed whom they suspect to be involved in the break-in to Plaintiff's flat. After the police had left with Armando Thunzini before Plaintiff could get back into his flat, a man appeared and when challenged by Plaintiff as to his identify and after having confirmed with a neighbour that he was the said Ali Mohammed, he then required (him) the person to halt as the police were looking him. At that time Ali Mohammed unshackled his backpack and manhandled the Plaintiff with his hands. He testified that this person ignored a warning shot fired in the air and advanced towards him. It is then that Plaintiff fearing for his life then shot at and fatally injured the deceased.

[9] The Plaintiff further testified that he then dragged the deceased into his flat and locked the door Plaintiff thereafter called the Police. He was eventually taken to hospital and Plaintiff was told that the man was certified dead on arrival. He testified further that when the police came to identify the deceased they tried to look for the spent cartridge and could not find it. They instructed the Plaintiff to report at the Police Station the following day with his firearm. The Police Officers had informed Plaintiff that Ali Mohammed was a dangerous criminal who was at the time being sought in connection with a number of offences including charges related to firearms. He testified that this evidence was accepted by the Supreme Court in the Criminal Appeal case of *Sipatji Mandla vs The King (unreported) Supreme Court Case No.25/2000* at page 2.

[10] The Plaintiff testified further that he reported at the Manzini Police Station on the 26 August as directed that at the Police Station after recording a statement he had an interview with Station Commander who was satisfied with the facts and decided to release him. Whilst Plaintiff was still in town he was informed by another Police Officer that his wife was frantic at the Police Station looking for him. He went back to the Police Station to find his wife and Police Officer Mduduzi Dlamini decided to lock him up and charged him with murder.

[11] The Plaintiff testified that since he had explained his actions to the police and the facts established are clear self-defence and it was therefore not reasonable or they acted without reasonable and probable cause.

[12] The Plaintiff was searchingly cross-examined by attorney for the Crown and I shall revert to his pertinent answers later on in this judgment.

The evidence of the Defendant.

[13] The Defendant called two witnesses being PW1 Detective Sergeant Kunene and PW2 Assistant Superintendent Phumzile Maseko-Magagula.

[14] PW1 testified before court that he was investigating a case of house breaking and theft his investigation pointed towards one Armando Thunzini. Earlier on the 25 August he met one Ali Mohammed from whom he inquired about the whereabouts of Armando Thunzini. Unbeknown to officer Kunene, Armando Thunzini was already in custody. He testified that he then took Thunzini to a homestead in Fairview North with flats to let where Thunzini proceeded to point certain stolen items which included a television set and a white toaster.

[15] DW2 denied the evidence given by the Plaintiff that they knocked at Plaintiff's flat and asked to be shown Thunzini's flat. However Plaintiff stated that it was officer Maphindane who knocked at the door and inquired.

[16] The above is the extent of DW1's evidence and he was cross-examined searchingly by Plaintiff's attorney where he conceded under cross-examination that he drove off before officer Maphindane could stop his motor vehicle so he is aware of what Maphindane could have done or said to Plaintiff.

[17] The above is the sum total of officer Kunene's evidence save to add that he also conceded that Ali Mohammed was one of the most dangerous criminals at the time.

[18] The second witness for the Defence was DW2 Assistant Superintended Phumzile Maseko-Magagula who was a shift-officer at the Manzini Police Station at the relevant time. She testified that her duties included making sure that complaints made at the Police Station were attended to. That in this particular instance she received information from the switchboard operator that a certain man had been shot at Fairview North. She testified that she then dispatched the relevant motor vehicle to the scene and later followed in another motor vehicle. She testified that by that time the deceased had been taken to hospital and was later informed that the person

who had been shot was one Ali Mohammed and was certified dead on arrival at the hospital.

[19] DW2 testified that on the following day she called Plaintiff to the Police Station then proceeded to charge him with murder after reading him his rights.

[20] DW2 was cross-examined searchingly by Plaintiff's attorney. I shall revert to some of her pertinent answers later on as I proceed with this judgment.

[21] The above therefore is the extent of the evidence of the defence and I shall proceed in the following paragraphs to analysis the evidence of the parties and the arguments advance by both attorneys. Furthermore, I shall make my conclusions.

The arguments of the parties.

(i) For the Plaintiff

[22] The attorney for the Plaintiff filed very detailed Heads of Arguments for which I am grateful. The nub of the arguments of the Plaintiff revolved around the evidence of Assistant Superintendent Phumzile Maseko-Magagula. That she was at pains to explain that she was not a detective although she had been

trained on the art of evaluating evidence she had never practiced it as she had never been posted to the CID office.

[23] In support of the above arguments the attorney for the Plaintiff cited the *dictum* by *Browde JP* in the case of *May vs Union Government 1954(3) SA 120* at 120(A) to the following legal proposition:

“An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime inputed.”

[24] The attorney for the Plaintiff further cited the case of *Professor Dlamini (supra)* at page 14 where the above definition was adopted and approved.

[25] That proceeding by this definition it cannot be said no matter how one stretches the matter that officer Magagula acted reasonable with an honest belief or upon a full conviction founded upon reasonable grounds. Further that because she was not able to tell the court what informed her decision to charge Plaintiff with murder other than the fact that Ali Mohammed had been shot dead. That it would appear that it was completely lost to the officer that not all deaths by unnatural causes may be classified as murder.

[26] That the Defendant acted from an improper or ulterior motive and were activated by malice. That malice has been defined as “a desire to do harm to one, ill will. The absence of an honest belief in the guilt of the accuser or improper or indirect motive which may, but need not be spite or ill will”.

[27] The final and concluding arguments advanced for the Plaintiff are that charging him with murder was not based on evidence and therefore not reasonable. The officer cannot claim to have acted with an honest belief and in the absence of reasonableness, and honest belief *animus injuriadi* or “consciously wrongful intent” found.

[28] At paragraph [5] of the Heads of Arguments of the Plaintiff his attorney dealt with the issue of damages which the parties agreed in arguments that at this stage the court ought to first decide on liability.

(ii) For the Defendants

[29] The Crown Counsel representing the Defendants also filed very useful Heads of Arguments for which I am grateful for his professionalism.

[30] The gravamen of the Defendant's defence to the Plaintiff's action is that at the time of the institution of the criminal proceedings against the Plaintiff the first Defendant had sufficient information at her disposal that was indicative of the fact that the Plaintiff could have been guilty of the offence of murder. That such information was in the form of firstly, a telephonic report of death of a person at Fairview where Plaintiff resided, and upon investigating that report it transpired that a person who was shot was Ali Mohammed and further that it was the Plaintiff who shot the deceased.

[31] Secondly, it is contended for the Defendant that Ali Mohammed was certified dead at RFM Hospital in Manzini. Further the arresting officer stated that she also relied on the recorded statements when arresting the Plaintiff and furthermore that the Plaintiff admitted to have shot the deceased and handed over his pistol which he used in committing the offence.

[32] Crown Counsel contended that in order to succeed on a claim based on malicious prosecution the *onus* is on the Plaintiff to prove on a preponderance of probabilities that:

- (a) That the Defendant instigated or instituted the criminal proceedings;
- (b) That in doing so the Defendant acted without reasonable and probable cause;

- (c) That the Defendant was activated by an improper motive (malice) or put differently that the Defendant acted with *animus injuriandi*; and
- (d) That the proceedings terminated in the Plaintiff's favour.

[33] In support of the above principles of law the learned Crown Counsel cited the cases of *Mtimkhulu and Another vs Minister of Law and Order 1993(3) SA* at 432(E) at 438; *Professor Dlamini vs Attorney General Civil Case No.27/2002*.

[34] It is contended for the Defendants that the Plaintiff has dismally failed to prove the above requirements in that during his evidence-in-chief he made no mention of any fact or evidence suggesting that the proceedings were activated by malice and that there was no reasonable and probable cause to prosecute him. Therefore the issue for determination by this court is whether the Defendant in instituting the criminal proceedings against the Plaintiff acted without reasonable and probable cause and that the Defendant was activated by malice.

[35] At paragraph 6, 7 & 8 of the Crown Counsel's Heads of Arguments he dealt with the issue of unlawful arrest and cited the cases of *Mbuso Dalton Shongwe vs The Commissioner of Police and Attorney General Civil Case Bo.1559/2001* and that of *Lucky Phiri vs The Commissioner of Police and Attorney General Civil Case No.2855/2009*.

[36] At paragraphs 9 and 10 of Crown Counsel's Heads of Arguments dealt with the Defendants' case and in paragraphs 11, 12 & 13 dealt with the issues for determination. That the crux of the matter for determination in this case is whether the Plaintiff's arrest and detention was justified. That section 22(b) of the *Criminal Procedure and Evidence Act No.67 of 1938* provides:

“Every state officer and every officer empowered by the law to execute criminal warrants is hereby authorised to arrest without warrant every person:-

(b) whom he has reasonable grounds to suspect of having committed any of the offences mentioned in paragraph Part II of the first schedule.”

[37] Crown Counsel further cited the cases of *Lucky Phiri vs The Commissioner of Police and Attorney General, Civil Case No.2855/2001* and that *Timothy Bhembe vs The Commissioner of Police and Another, Appeal Case No.55/2004* to support his arguments.

The courts analysis and concluding thereto

[38] The gravamen of the case revolves around the evidence of Police Officer Phumzile Magagula who was the arresting officer. The question is whether she had reasonable suspicion when she arrested the Plaintiff for the offence of murder. It would appear to me in my assessment of the evidence of both parties and the arguments of both the attorneys of the parties that the

submissions by the Defendants are correct. I say so for a number of reasons I shall outline in the following paragraphs.

[39] Firstly, it is in evidence that before charging the Plaintiff DW2 had received a telephone report as she was desk officer that a person had been shot at Fairview. She gathered that the person shot was one Ali Mohammed who died at RFM Hospital in Manzini.

[40] Secondly, the officer stated that she then went to the scene of crime to conduct her own investigations. She further received recorded statements from investigating officers in this case.

[41] Thirdly, the officer stated that she then interviewed the Plaintiff who surrendered the pistol that he used in committing the offence.

[42] In my view, in the totality of the above reasons I have come to the considered view that a reasonable suspicion was formed by DW1 that Plaintiff was the one who committed the offence of murder and she accordingly charged him for the said offence.

[43] In my reading of the legal authorities cited by the parties I find that the cases of *Lucky Phiri vs The Commissioner (supra)* and that of *Timothy Bhembe vs The Commissionr of Police (supra)* are apposite.

[44] Furthermore in the case of *Lucky Phiri (supra)* I agree *in toto* with the ratio by *Ota J* that the position of the law that reasonable suspicion in terms of section 22 of the *Criminal Procedure and Evidence Act*, a suspicion and not “certainty”. The arguments for the Plaintiff on the other hand require that “certainty” should have prevailed. And I do not think so in view of the above legal authorities.

[45] In the result, for the foregoing reasons the Plaintiff’s action is dismissed with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE

FOR PLAINTIFF : Mr. Z. Magagula

FOR RESPONDENT : Mr. M. Dlamini