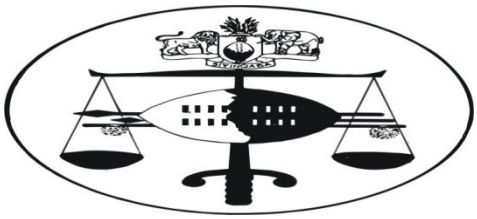

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO.1779 /2003

In the matter between:

THABISO MABASO PLAINTIFF

AND

COMMISSIONER OF POLICE 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

Neutral Citation: *Thabiso Mabaso vs. Commissioner of Police & Other (Case No. 1779/03) [2016] SZHC (68) (2016)*

Coram: MLANGENI J.

Heard: 24/03/16

Delivered: 08/04/16

Summary: *Civil Law – delictual claim for damages arising out of alleged unlawful arrest and detention by members of the Police*

Defendant admitting arrest, but alleging that arrest without warrant was justified on the basis of reasonable suspicion, and subsequent detention was necessary for purposes of further investigation.

Plaintiff alleging that he was arrested for suspected arson and not for unlawful possession of ammunition as alleged by the defence, despite the fact that he did not disown the ammunition. Court found that he was arrested for ammunition and not for arson.

Held: The arrest without a warrant was based on reasonable grounds, and therefore justified.

Plaintiff's claim dismissed with costs.

JUDGMENT

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[1] In this action the Plaintiff claims delictual damages in the amount of E60,000-00. These damages are in respect of compensation arising from alleged unlawful arrest, detention and assault of the Plaintiff by

members of the Royal Swaziland Police Force who were then and there acting within the course and scope of duty as employees of the Crown.

[2] At inception of the trial the Plaintiff withdrew the allegation of assault on account of non-compliance with the requirements of rule 18 (10) of the High Court Rules as amended. This rule requires that in claims based on personal injuries the Plaintiff must fully and clearly describe the injuries sustained, the quantum relating thereto, e.g. for pain and suffering, permanent disability (if any), loss of amenities of life, hospitalization or medical expenses, etc as well as the age of the Plaintiff. The result of the withdrawal of the allegation of assault is that the quantum of E60,000-00 is in respect of unlawful arrest and detention.

[3] It is common cause that the Plaintiff was, in fact, arrested and detained by members of the Police Service who were, at all material times, acting within the course and scope of duty as such. It is also common cause that at the time of arrest the officers were not in possession of a warrant of arrest. In this context it was, therefore, imperative for the defence to demonstrate that the arrest was justified on certain legal and or factual grounds.

[4] Arrest without a warrant is sanctioned by Section 22 (b) of the Criminal Procedure and Evidence Act 1938, which provides as follows:-

> ***"Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part II of the First Schedule."***

[5] The offences listed in the First Schedule are of a very wide range and include theft, common assault, house breaking and theft, offences relating to unlawful drugs and narcotics as well as offences relating to arms and ammunition, to mention but a few. It also includes any offence which is punishable by a period of imprisonment exceeding six months.

[6] The averments which are at the heart of the Plaintiff's claim are to be found at Paragraph 7 of his particulars of claim, where he states the following:-

> ***"The arrest, subsequent detention and assault on the Plaintiff by members of the Police Force were unlawfully (sic) and malicious that there was no reasonable suspicion that the Plaintiff had committed any offence."***

Obviously, the aspect relating to assault must now be overlooked.

[7] In its plea the defendants, at paragraph 7 thereof, deny every allegation in the said paragraph, and the defence that is specifically advanced is at paragraph 3.2 which is in the following terms:-

> ***"The arresting officer had reasonable grounds to suspect that the Plaintiff committed the offence of unlawful possession of a firearm, which is punishable by a period of imprisonment exceeding six months."***

[8] At the hearing this aspect of the plea was amended by the defendants by substituting **"firearm"** with the phrase **"one round of live ammunition"** without a licence. Plaintiff's Counsel reluctantly conceded this amendment in view of the well-established principles relating to the amendment of pleadings, particularly that amendments are generally to be allowed if no prejudice will be occasioned to the other side; but that even if it does occasion prejudice it may still be allowed if such prejudice can be compensated for through a postponement and or an appropriate order for costs. This salutary position has been accepted in the Roman-Dutch common law jurisdictions as far back as 1912 when **RISHTON vs. RISHTON 1912 TPD 718** was decided. It is quoted at page 190 of Herbstein and Van Winsen, The Civil Practice of the Superior Courts of South Africa, Third

Edition. The above-stated case propounds that it does not matter how late or how neglectful the omission may have been, so long as it comes before judgment an amendment may be granted provided that an appropriate order can be made to protect the interests of the other party. This is in keeping with the main purpose of pleadings in civil matters, which is to ventilate the issues between the parties as much as possible.

[9] In sum, therefore, the case of the Plaintiff is that he was unlawfully arrested and detained by the servants of the crown and the Crown, while admitting the arrest and detention, seeks to justify it in that the arrest was based on reasonable suspicion that he had committed an offence that is within the ambit of part II of the First Schedule, being possession of a live round of ammunition without a licence, the punishment of which is in excess of six months.

[10] In view of the admission of arrest and detention by the defence, it made good sense that the defence be the first to lead evidence in justification of the arrest in line with its plea. This approach was actually in line with the parties' pre-trial conference agreement as reflected in the minute which is at pages 21 and 22 of the book of pleadings.

THE EVIDENCE

[11] From the onset I highlight that the parties are on opposite ends regarding the following factual issues: date and place of arrest, reason for the arrest as well as the duration of the detention. These factual issues, to the extent to which it may be necessary, will be resolved on the basis of balance of probabilities. The arrest of the Plaintiff occurred in July 2001, almost fifteen years ago. A witness with the proverbial memory of an elephant might not have full recollection of all important events. It is with this in mind that I accept that the dispute between the litigants on some aspects of the matter, including the exact date of the arrest, appears to be nothing more than human frailty. Some might even be rendered insignificant in the event that I find that on the totality of the circumstances the arrest was lawful, but if the arrest was unlawful it might be necessary to make a finding on the exact date of arrest and number of days spent in Police custody as well as the circumstances under which the Plaintiff was kept, as these have a direct bearing on quantum.

[12] The defence led the evidence of two witnesses, one being the Investigation Officer 2750 Inspector Nhlanhla Mkhabela and the other one being a school teacher by the name Vusisizwe Clayton Mahlalela

whose work station at the material time was Franson Christian High School where the suspected offence and arrest took place.

[13] The evidence of the two defence witnesses is largely along the same lines in substance and in detail, except where one or the other has no personal knowledge. The evidence is that:-

13.1 On or around July 2001 Franson Christian High School was afflicted by several fires that occurred at the Boys hostel.

13.2 On or around the 16th July 2001 a fire occurred at the boys' hostel, and school authorities reported this at Hluti Police Station.

13.3 Hluti Police responded to the report and came to the school to investigate the cause of the fire;

13.4 during the investigation a school teacher, Vusisizwe Clayton Mahlalela, handed to the Police a live round of ammunition which he had earlier found in a locker that the Plaintiff shared with a roommate, and the roommate had told the teacher that the round belonged to the Plaintiff. It is common cause that when the round of ammunition was found in the locker the Plaintiff was not at the school; he had gone home for the weekend.

13.5 Both witnesses suggested that the Plaintiff was arrested on the first visit by the Police following this latest fire, and that the

arrest was effected at the headmaster's office in the late evening.

13.6 The Investigating Officer specifically stated that the arrest of the Plaintiff was in respect of the round of ammunition that was found in his locker and whose possession he did not deny. Under cross-examination he maintained this position and categorically denied that the arrest was in respect of the fire that occurred at the boys' hostel. This is an important point of departure because if the arrest was in fact in relation to the fire it is likely to be outside the bounds of reasonable suspicion.

13.7 The Investigation Officer states that upon the Plaintiff's admission of the round of ammunition he was arrested and taken to Hluti Police Station for further investigation and, as it was late in the night, investigation resumed in the following morning and the Plaintiff was later released the following day around mid-day. No charges were laid against the Plaintiff in respect of the ammunition, the main reason being that the Plaintiff was not present when the teacher found the round.

[14] The Plaintiff gave evidence in support of his case and did not bring any other witness. He confirms that the ammunition was discovered in his absence and further confirms that prior to that it was in his possession,

having received if from one other school boy who found it somewhere next to the grave site within the school precincts.

[15] His evidence includes the following salient parts:-

15.1 he was arrested on the 10th July 2001.

15.2 he was arrested in respect of the fire that had occurred around that time.

15.3 he was not arrested in respect of ammunition, and that the incident of ammunition had occurred much earlier, on or about 2nd July 2001, and at that point he was merely admonished for it and was not arrested or charged.

15.4 he was detained at Hluti Police Station from the 16th July to the 20th July 2001, under harsh conditions which included being pressurized to identify suspects, being moved from one office to another and physical abuse.

15.5 When he was arrested he was yanked out of his dormitory by many armed police officers around the hour of 10:45 p.m. At that time he was in the company of about eighteen fellow students who resided in the same dorm with himself.

[16] It is inexplicable why with all the potential witnesses that he could have brought to corroborate the important circumstances of his arrest as well as the dates of arrest and subsequent release, the Plaintiff opted to let his case rest upon his sole evidence.

[17] My assessment of the evidence of both sides leads me to the following conclusions, based upon a balance of probabilities:-

17.1 The Plaintiff was arrested for the admitted 'possession' of ammunition without a licence. It is a very serious matter for a school boy to keep ammunition in his school locker, and I am unable to accept that agents of the law or school authorities could simply admonish him and let the matter end there. It is extremely unlikely that the school authorities would have ignored this serious issue for about a week, only to revive it at a later date when Police come to the school to investigate a report of suspected arson.

17.2 It is also logical that at the end of the day charges in respect of the ammunition would have been difficult sustain because the Plaintiff was not there when the round was found in his locker and there was an element of hearsay about the finding.

17.3 In the absence of corroborated evidence to the contrary, I find that he was detained overnight for only one day or at most two. Prudence would have required that, since he was arrested very late in the evening – an aspect that there is agreement upon – he would be taken away for further investigation regarding the ammunition and possibly the incidents of suspected arson.

17.4 The issue of the ammunition and suspected arson are objectively not likely to require the Plaintiff to have been kept at Hluti Police Station for four days as he claims and the harsh treatment that he alleges, but which was not put to the defence witnesses, is liable to be treated as an afterthought.

17.5 Despite the Plaintiff's assertion that he was not told why he was being arrested, it is not likely that the reason for his arrest was not communicated to him. This is in view of the straightforwardness of the matter that was being investigated by the Police as well as the unexpected finding of ammunition in his locker. The Investigating Officer was unevasive that the purpose of going to the school was to investigate suspected arson but once there they were confronted with the ammunition which had been undeniably kept by the Plaintiff in his locker.

THE LAW

[19] The liability of the State for the arrest and detention of the Plaintiff depends squarely on whether he was arrested on the basis of reasonable suspicion or not.

[20] For the avoidance of doubt, it must be observed that the suspicion leading to the arrest without a warrant must be based on reasonable grounds. In other words, the test is objective. In the case of D**UNCAN vs. THE MINISTER OF LAW AND ORDER 1986, (2) SA 805** it was observed that the question is whether a reasonable person in the position of the arrestor would entertain the suspicion. The case further propounds that an arrestor is entitled to arrest upon reasonable suspicion, even though he intends to make further enquiries after arrest before deciding to initiate prosecution. In this case a minor called Noel was interrogated by a Police Officer in the presence of his guardian, in relation to an offence of assault. In the course of interrogation he admitted to the Police Officer that he knew about the assault. At that point in time his guardian instructed him to say no more and he complied and maintained this position. At that stage the Police Officer arrested him with the intention to pursue further investigation. The court found that the arrest without warrant was in fact based on reasonable suspicion, and therefore justified.

[21] It is my considered view that if facts and circumstances link X to the possession of ammunition and X does not produce a licence or admits that he does not have a licence; it is an objective conclusion that he has committed an offence, and an arrest without a warrant is justified in the circumstances. Of course further investigations may subsequently show that the charges initially conceived cannot or are unlikely to be sustained, and at that stage the suspect must promptly be released. The defence has cited the English case of **SHABAAN BIN HUSSEIN AND OTHERS vs. CHONG FOOK KAM AND ANOTHER (1969) 3 ALL ER 1627** (Privy Council) to the effect that at the stage of suspicion **"prima facie proof is the end"**. Per Lord Devlin: "suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. It is desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police."

[22] On the basis of the aforegoing the Plaintiff's claim is dismissed with costs.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF: **MR. T. MAMBA**

FOR THE DEFENDANT: **MR. M. VILAKATI**