



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1264/2013

In the matter between:

MASOTJA NKAMBULE

Plaintiff

And

THE SWAZILAND GOVERNMENT

Defendant

Neutral citation: *Masotja Nkambule v The Swaziland Government (1264/2013)*
[2017] SZHC 164 (1st August 2017)

Coram: M. Dlamini J.

Heard: 30th June, 2017

Delivered: 1st August, 2017

Action proceedings - arrest - The question therefore is, Would the circumstance of the matter induce a reasonable man to have the suspicion that an offence has been or is or is about to be committed?

possession of unlawful thing -

- **The position of the law is that where an unlawful *merx* (thing) is recovered from the premises, the occupants ought to be put to answer. This is so in order to allay any defence by the arrested person to point at another occupant as the unlawful possessor of the *merx*.**

Summary: By means of action proceedings the plaintiff claims for the sum of E100,000 on the ground of unlawful arrest and malicious prosecution. The defendant denies any unlawful or malicious act on its part.

The parties

- [1] The plaintiff (Mr. Nkambule) is an adult male of Mkhulamini area under Manzini region. The defendant is the Government of Swaziland (the Government) duly represented by the office of the Attorney General in terms of its constitutional mandate.

The parties' allegations

- [2] Mr. Nkambule's particulars of claim highlights:

"4. *On 5th October 2010 members of the Royal Swaziland Police Force stationed at Manzini, unlawfully arrested and detained Plaintiff at Manzini Police Station at Zakhele Remand Centre until he was released on bail.*

6. *Consequent to be charged with the offence of possession of an unlicensed firearm, Plaintiff appeared several times on remand before the Manzini Magistrate until he was acquitted and discharged on 11th October 2011.*
8. *The servants of the Defendant when they arrested, detained, charged and prosecuted Plaintiff, had no reasonable belief in their case and did so through malice after Plaintiff's son pleaded guilty to such possession; hence Plaintiff was acquitted and discharged."*

[3] Mr. Nkambule then concluded:

"9. In the above premise, Defendant through its servants unlawfully:

- 9.1 *set the law in motion;*
- 9.2 *acted without reasonable and probable cause;*
- 9.3 *acted with malice; and Plaintiff was accordingly acquitted and discharged.*

10. *Consequent to the above, Plaintiff suffered damages in the sum of E100,000.00 made up as follows:*

- | | | |
|------|--------------------------------------|----------------------------------|
| 10.1 | <i>unlawful arrest and detention</i> | <i>E50,000-00</i> |
| 10.2 | <i>malicious prosecution</i> | <i><u>E50,000-00</u></i> |
| | | <i><u>E100,000-00</u></i> |

The Government

[4] The Government vehemently denied any liability. It pleaded:

"2.2 Defendants aver that the police arrested Plaintiff's son, one Madoda Nkambule for a string of armed robbery cases. Plaintiff's son told the police that the firearm used in the commission of the armed robberies was at his home and that he would hand it over to the police.

2.3 Plaintiff's son led the police to his home, the Plaintiff's homestead. On arrival at the homestead they were welcomed by the Plaintiff. The police explained their mission to the Plaintiff and his son led the investigators to where he had put the firearm. When the police searched where

Plaintiff's son had pointed, they did not find the firearm, the firearm was not there.

2.4 *Plaintiff's son then told his father, the Plaintiff to hand over the firearm to the police. Plaintiff then told the police that he had moved the firearm to the chicken shed. Plaintiff then led the police to where he had placed the firearm and pointed out a black plastic bag and the firearm and rounds of ammunition was retrieved.*

2.5 *The Plaintiff's son confirmed to the police that the firearm his father had pointed to the police was the firearm he had intended to hand over to the police.*

2.6 *The police requested the Plaintiff and his son to produce a licence or permit to possess the firearm and they told the police that they did not have a licence or permit. The Police then charged them with unlawful possession of the firearm.”*

Oral evidence

[5] Testifying under oath and in his own case, Mr. Nkambule informed the court that police officers came to his home in search of his neighbour, one Madoda Nkambule (Madoda). They went to Madoda's homestead and found him in possession of a firearm. They arrested him and took him away to Sigodvweni police station.

[6] The police returned with Madoda the following day. They took him to court in Manzini and incarcerated him. He was in the police cell for a week. He then instructed an attorney who then secured his bail at the amount of E500.00.

[7] He was later prosecuted before Magistrate Mazibuko. He was acquitted by Magistrate Mazibuko who told him that he was not the owner of the said firearm. The owner of the firearm was Madoda. Madoda admitted the firearm as belonging to him. The police knew the owner of the firearm.

[8] Mr. Nkambule proceeded to point out to the court that when he was incarcerated in the police cell, he was subjected to ill-treatment. The police cell was very small such that he could not lie down to sleep. He slept in a sitting position with his legs crossed and his back against the wall. Due to the small size of the cell, he found himself congested with many inmates. He described the sitting arrangement as that each inmate was sitting and facing another and were in a line form. As a result of lack of sleeping in the correct position, he developed a lymph knot in his upper thigh.

[9] Upon his release from custody on bail, he was compelled to attend to the Mbabane government hospital. He was admitted to the theatre for an operation of appendites which erupted due to the congestion suffered at the police station.

[10] Mr. Nkambule ended his evidence by pointing out that he thereafter approached his attorney for a claim against the Government. He instructed his attorney to claim the sum of E60,000. However, his lawyer advised him otherwise stating that the quantum should be reduced to E50,000.00. Mr. Nkambule was cross examined. I shall refer to his cross examination later. After cross examination his case was closed.

Defence

[11] The Government led the evidence of 324 Detective Sergeant Solomon Mavuso. He testified that in 2010, he was based at Mbabane Police station. He was a desk officer attached to the Serious Crimes Investigations Department known as Lukhozi. He was in a team of investigators which were investigating series of robbery cases against Madoda.

[12] On 7th October, 2010 Madoda was arrested. He then led the police to his parental homestead for a pointing out of the firearm used in the string of robbery cases. Upon arrival at his parental home which was Mr. Nkambule's homestead, Madoda pointed at a certain place. The police searched the place but could not recover anything. It is at that juncture that Madoda turned to his father, Mr. Nkambule herein, who had by then gathered around and requested him to surrender the firearm to the police.

[13] Mr. Nkambule led the police to the chicken shed where he pointed out the said firearm. He was asked for a permit. He failed to produce any. He was arrested and co-charged for possession of the firearm. He was taken to the police station pending his appearance in court. In the police cell, while awaiting his remand, he did not spend more than forty eight hours.

[14] When the case was prosecuted before the Magistrates' Court in Manzini, Madoda pleaded guilty to the charge. It was Sgt. Mavuso's evidence further that when Mr. Nkambule was arrested. Madoda pleaded with them not to arrest his father.

[15] After cross examination of Mr. Mavuso, the Government closed its case. Likewise, I will highlight the salient features of his cross examination under adjudication herein.

Adjudication

Common cause

[16] It is common cause that Mr. Nkambule was arrested and charged for unlawful possession of a firearm under the relevant statute. It is not in issue that when he was arrested, he was incarcerated at the police cell in Manzini.

Issue

The question for determination before me is whether in so arresting Mr. Nkambule, the police acted reasonably in the circumstance?

Legal principles on arrest

[17] Discussing the principle on arrest, **Lewis JA**¹ articulated:

“The first prerequisite is that there is a right of arrest in terms of the statute.”

[18] Two statutes come to mind when considering the “*right of arrest*” by the police officers. The Police Act No. 29 of 1957 under section 7(3) which reads:

“7(3) Every member of the Force shall promptly obey and execute all orders and warrants lawfully issued to him by any competent authority, collect and communicate intelligence affecting the public peace, prevent the commission of offences and public nuisances, detect and bring offenders to justice, apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist and keep such books and records and render such returns as the Commissioner may from time to time direct.” (underlined my emphasis)

[19] Section 22 of the Criminal Procedure and Evidence Act No.67 of 1938 provides:

¹ In *S v Purcell – Gilpin* 1971 (3) S.A. 548 at 553

“Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest without warrant every 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 II of the First Schedule;
- (c) whom he finds attempting to commit an offence, or clearly manifesting an intention so to do.” (my emphasis)

[20] The second prerequisite is to embark on an enquiry “*in terms of the statute*”. Commenting on the second prerequisite **Lewis JA**² expressed as follows:

“*[T]he statute expressly limits the basis of the right of arrest to reasonable grounds of suspicion.*” (my emphasis)

[21] The enquiry therefore entails the question whether there were reasonable grounds for suspecting a commission of a crime. The learned Judge then cited **Jones AJP**³ as follows:

“*I think I may further state that when one comes to consider whether he had reasonable grounds one must bear in mind that, in exercising these powers, he must act as an ordinary honest man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis.*” (my emphasis)

[22] The question therefore is, Would the circumstance of the matter induce a reasonable man to have the suspicion that an offence has been or is or is about to be committed?⁴

Determination

² (*supra*)

³ In *Rossean v Boshoff* 1945 CPD at 137

⁴ see *R v Heerden* 1958(3) SA 150 at 152E or *Purcell Gulpin supra*

[23] On the first prerequisite of the right of arrest, there is no doubt as clearly evident from the words of the statutes cited above that police officers are empowered to arrest. In establishing the evidential burden, Mr. Nkambule pointed out as follows:

“They (police officers) went to Madoda’s homestead. They found him in possession of a firearm. They arrested him and took him away to Sigodweni police station. The following day, having taken him, they returned. They took me to court in Manzini and kept me in custody. I was in custody for a week. I then instructed an attorney to apply for bail for me. The court granted me bail at E500.00.”

[24] Mr. Nkambule further proceeded:

“When the matter was prosecuted, I was acquitted by Magistrate Mazibuko. The Magistrate said that I did not commit the crime because the firearm is not mine. The police know the owner of the firearm. The owner of the firearm also admitted it as his.”

[25] He was asked by his Counsel whether he had dealt with the firearm previously. He responded:

“When the police came to arrest me the following day, they just said that I also know the firearm. I saw the firearm the police were referring to. I saw the firearm when the police showed me saying ‘you also know about it’.”

[26] Mr. Nkambule then concluded his evidence by asking that the court order the Government to pay him the sum of E50,000.00 as compensation. From the above presentation of Mr. Nkambule’s case, one is impressed with the conclusion that the police came to Mr. Nkambule’s neighbour, one Madoda Nkambule, found him in possession of a firearm and arrested him. They took him away, only to return the following day to arrest Mr. Nkambule. This impression is further fortified by Mr. Nkambule stating his prayer. It was not until his attorney prompted him by posing the following questions

after having paused twice whether Mr. Nkambule ever dealt with the firearm before and the answer was the same that he first saw the gun when police showed him.

“Mr. S. G. Simelane: “Defendant will call witnesses who will tell the court that you hid the gun in one of the chicken shed.”

[27] The court expected Mr. Nkambule to deny this and maintain that he saw the firearm for the first time when police showed him. However, the answer was surprising. He responded:

“Madoda, who was my neighbour, when the police came to fetch him, he came to my homestead. He threw the firearm at my chicken shed. When he threw it, the police came back with him. On his return, the police asked him as to where was the firearm. He pointed at the chicken shed saying it is at the chicken shed. He pointed at the firearm. That is when the police took him to the cell and they then took me saying since it was found in my shed, I knew it yet I did not.”

[28] This piece of evidence, no doubt, linked Mr. Nkambule to the firearm. From the manner in which Mr. Nkambule presented his case, which is that this piece of evidence came from Mr. Nkambule after his Counsel prompted him and after Mr. Nkambule gave the impression to the court that he was through with his evidence in chief, demonstrates clearly that Mr. Nkambule himself must have appreciated that the evidence on the place where the firearm was recovered would implicate him to an offence.

[29] Worse still, when Mr. Nkambule was cross examined, it was put to him that he pointed out the firearm at his chicken shed. Mr. Nkambule did not dispute the evidence that the firearm was recovered at his shed but only raised issue on that he did not point at the firearm but Madoda did.

[30] The position of the law is that where an unlawful *merx* (thing) is recovered from the premises, the occupants ought to be put to answer. This is so in order to allay any defence by the arrested person to point at another occupant as the unlawful possessor of the *merx*. In the circumstance of the case therefore, the police were justified in arresting Mr. Nkambule as the firearm was retrieved from his premises.

[31] It appears that the above position of the law was appreciated by Mr. Nkambule for the reason that during the hearing, Mr. Nkambule abandoned his case on unlawful arrest and based his claim on damages for suffering and pain while incarcerated in a small cell. I have quoted Mr. Nkambule's particulars of claim at paragraph 3 above. This ground was not raised on the pleadings and therefore this court is not in a position to make a determination on it. It is however, apposite to point out that although Mr. Nkambule pointed out that he was attended by the doctor as a result of the pain suffered, not a singly evidence to support his version was advanced by him. The court was only left with his say so despite that the Government ferociously disputed his evidence on pain and suffering under cross examination.

[32] In the result, the following orders are entered:

1. Plaintiff's cause of action is hereby dismissed;

2. Plaintiff is ordered to pay costs of suit.

A handwritten signature in black ink, appearing to be 'M. Dlamini', written over a horizontal dashed line.

**M. DLAMINI
JUDGE**

For Plaintiff : **S. G. Simelane of Zonke Magagula & Co.**
For Defendant : **V. Kunene from the Attorney General's Chambers**