



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.3064/2007

In the matter between:

SABELO MYENI

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

**Neutral citation: *Sabelo Myeni v The Commissioner of Police (3064/2007)*
*[2017] SZHC 258 (14th December 2017)***

Coram: M. Dlamini J

Heard: 29th November, 2017

Delivered: 14th December 2017

Civil law assessment of damages is a question of both fact and law

there are a number of factors that come to play in assessing the amount of damages in this regard. Amongst, these are the time, manner and place of arrest. The period upon which he was

detained together with the conditions of the place of detention are to be considered. His treatment during the period of arrest. The question of whether there was a reasonable suspicion for his arrest falls on question of liability. However, where there is no iota of evidence of suspicion or commission of an offence, let alone reasonableness, such falls to be considered under assessment of damages - the list is inexhaustible.

Summary: Serving before me is a combined summons for a claim of E300 000 on ground of unlawful arrest. The Defendant admitted liability but contest the quantum.

The Parties

- [1] The plaintiff (Mr. Myeni) is an adult male of Fairview, Manzini and employed by Furn City Furnitures as Manager.”¹
- [2] The first defendant (the Commissioner) is the head of the Police organization with a head office at Mbabane, Hhohho Region.
- [3] The second defendant is the legal representative of government, having his principal office in Mbabane, Hhohho Region.

Issue

- [4] It is unnecessary for me to refer to the allegations on unlawful arrest following that the Defendant does not refute liability. On quantum, Mr. Myeni itemised his claim as follow:

¹ page 4 para 1 of book of pleadings

“Accordingly as a consequence of the unlawful arrest and subsequent detention, the Plaintiff has suffered damages of E350,000.00.[sic] made up as follows:

	(1) Unlawful arrest and detention on two occasions	E
50,000.00		
	(2) Loss of dignity/deprivation of liberty, loss of consortium	E200,000.00
	(3) Humiliation and degradation of status	E 50,000.00
	Total:	<u>E300,000.00</u>

[5] He then prayed:

“(a) Payment of the sum of 3000,000.00 (three hundred thousand emalangeni) being damages for unlawful arrest and subsequent detention;

(b) Interest at the rate of 9% per annum on the aforesaid sum of 350,000.00 (three hundred and fifty thousand emalangeni) from date of summons to date of final payment;

(c) costs of suit.”

Oral evidence

[6] Mr. Myeni testified under oath that at the time of his arrest he was the assistant manager at Furn City Furnishers, Manzini. He had married a single wife and had three children. He was a pastor at Makholweni area, under the name of Evangelical Church. This church had just been established at Makholweni.

[7] He commanded some degree of respect in the community of Makholweni, such that a word was circulating around that the people of Makholweni might elect him for Parliament in 2008. Following

that his brother was the Honourable Timothy Myeni, a member of Parliament then, news spread around that electing him to Parliament might bring the expected development needed in the community of Makholweni as Hon. Timothy Myeni was doing well for his constituency. An added credit to the Parliamentary election was that he was actively spreading the gospel of Christ.

[8] It was around 10:00 in the evening when police officers came to the homestead. Two of them were in uniform. One was carrying an R5 firearm. As soon as he realized that they were police officers, he freely opened the door. He had been asleep by then and therefore half naked. As soon as he opened the door, he invited them in. They requested to see Sabelo Myeni. He identified himself. They told him he was under arrest and that they intended taking him to the police station. He asked why he was under arrest. They said he had sexually assaulted someone and that he should go to the police station to answer the said charge. He requested for permission to go to his bedroom to inform his wife that he was under arrest. He did tell his wife who was shocked. She asked as to when the incident happened. He replied saying he did not know. By then the police officers were also in his bedroom. The police told his wife that Mr. Myeni had been arrested for rape. He asked to put on his clothes. By then his wife was arguing with him, saying there is no smoke without fire.

[9] He was put at the back of the police van and driven to the police station. When he alighted, he was directed to follow the police. He obliged. He saw them opening a steel door and ordered him to enter. He refused as he did not know what that place was. He saw two

people seated on the floor and it was not clear on what was happening as the two appeared injured. They commanded him again to enter. He did. They told him that they would see him in the morning. Before entering, they asked him to remove and hand over his belt, shoes, watch, and cellphone. Inside the room, there was nothing to sit on. He therefore stood by the corner for the entire duration of the night. The room was stinking and there was a small opening with burglar proofs on the far top. He could not sleep as the people were in a bad state.

[10] Morning came. He thought he would be removed for interrogation. He requested for permission to make a call to the Hon. Timothy Myeni. He was granted. He called him but he was in Johannesburg. He asked him to secure the services of a lawyer for him so that he could be removed from where he was.

[11] After the call, he was taken back to the cell. He was given porridge with soup. In the morning he had been given matabela soft porridge. He could not eat both meals because the food was dished in dirty plastic plates and from the manner he was given the food, it was pushed under the door. He went back to the corner and continued to stand.

[12] In the evening he was given porridge with cabbage. Again due to the conditions of the plates, he could not eat. He spent the second night. That night he was troubled by buzzing mosquitoes until morning.

[13] That following morning, that is, on 27th October 2006, he expected to be told exactly when and whom he had raped. He was never told even to date. He was however given soft porridge. At around 8:00a.m, he heard his name shouted out saying he should come out. He went to the front desk and found his brother Hon. Timothy Myeni and a lawyer who was introduced as Mr. Zweli Jele. They advised him that they would move bail application for him. Thereafter he was taken back to the cell. He again stood by his corner.

[14] Around midday or just before 12:00 noon although he could not tell the time following that the cell was dark, he heard the police calling for his name saying he should go to Court. They instructed him to take his belongings.

[15] He boarded a police van together with other inmates. At the Magistrates' Court the other inmates alighted from the van. They instructed him not to as they would come for him later. He remained in the police van for a period of two hours.

[16] A police officer came saying he is not going to appear in Court and therefore he should return to the Police station. He ordered him to alight from the van as it was due to go somewhere. Another police officer told him that he should go back to the police station on foot. He went by foot back to the police station, with the police escorting him.

[17] At the police station they caused him to sign a book saying he was free to go home. He then called his attorney tell him that he had

been released. The time was around 3:30p.m. He boarded a kombi home. He spent about thirty nine hours under custody.

[18] Upon reaching home, he went straight to his wife to explain on what transpired while incarcerated. She would hear none of it. She refused to believe him. She instead filed for a divorce which was granted. He decided to remain unmarried since then.

[19] He went back to work to explain to his superiors. His superiors came from head office, Johannesburg. They demanded to see complainant's statement from the police. Because none was forthcoming, they decided to allow him to continue working.

[20] His arrest and incarceration was reported in the two major newspapers circulating in Swaziland. He handed the extracts from the two papers. He was mostly hurt as the two papers are published world wide. His congregation lost trust in him. There was division in the church as a result of his incarceration. His customers together with his subordinates lost trust upon him. He felt defamed.

[21] He continued to work nevertheless, until 27th March 2007. While at work attending to one of his customers, five police officers came in. They asked for him. They said that he was needed at the police station, Manzini. He enquired on the reason. They said he would know it at the police station. His manager, staff and customers witnessed all this. He asked to call his attorney. He reached out for his lawyer who requested that the police should not take him to the police station, but should wait at the shop for his arrival. The police

agreed. The time was around noon. They waited for attorney Mr. Zweli Jele who arrived after 5:00p.m.

[22] When Mr. Zweli Jele arrived, he enquired why they wanted to arrest him. They spoke to him. His attorney turned back to him and instructed him to board his motor vehicle and proceeded to the police station following the police van.

[23] At the police station, they led them to the interrogation room. He was directed to sit on a chair. They turned to Mr. Jele saying he should leave as they wanted to lock up Mr. Myeni. Mr. Jele protested saying they should arrest him instead of Mr. Myeni. They left the interrogation room. By then Mr. Jele was continuously on his cellphone. They returned and instructed both of them to go home. The time was around 8:00p.m. He went to board a kombi home.

[24] After the incident of 27th March 2007, he was deeply discriminated upon at work. Harsh tones went around at his workplace by subordinates saying they would not take instructions from a rapist. He totally lost dignity. He was compelled to later resign. He is not employed.

[25] This witness was cross-examined. However, no evidence was tendered on behalf of the Commissioner to rebut Mr. Myeni's version of the events that unfolded in the fateful night of 25th October 2006 to 27 October 2006. Counsel for the Commissioner did not apply for absolution from the instance on the evidence on by Mr. Myeni. He offered no evidence in rebuttal as well. The only

evidence before me therefore is that of Mr. Myeni and I consider it as unchallenged.

Legal principle on assessment of damages

[26] **Erasmus v Davis**² is authority that assessment of damages is a question of fact determined from the evidence adduced. It is however, a question of law as I will fully demonstrate below. In other words assessment of damages is a question of both fact and law.

Determination

[27] The defence has urged this court to grant Mr. Myeni the sum of E30 000. The court was referred to the case of **Zakhele Gina v Commissioner of Correctional Services and 2 Others, HC No. 72/005** where Mr. Gina spent 170 days in custody. The court granted him E50 000. The facts of the Gina case are far distinguishable from the present case. In Gina's case, the claim was only for unlawful detention. There was no claim for unlawful arrest. A charge had lawfully been drawn against Gina. Gina had been lawfully arrested by the police. There was no claim for loss of dignity and consortium. In fact the continued detention of Gina was not just out of the blue as regards the Commissioner. The Commissioner was carrying out an executive directive when he continued to incarcerate Gina. The sum of E50 000 ordered against

² 1969 (2) SA1 (A) at SF/G is authority

him was therefore in other words a penalty to the Commissioner suggesting that he was wrong to comply with an executive directive in the presence of a Magistrate's Court order releasing Gina on bail.

[28] In the assessment of Mr. Myeni's damages however, I do not lose sight of the Commissioner's conduct of admitting liability. This must go to his credit as he did not waste the court's time on a glaring matter. I am also guided by the letter of demand by Mr. Myeni served upon the Attorney General in terms of section 2 (1)(a) of the Limitation of the Legal Proceedings against the Government Act No. 21 of 1972 where he claimed a lesser amount than what is claimed today in court. He ought to have maintained the sum in the letter of demand, a document that was discovered at his instance. In fact there was another correspondence emanating from Mr. Myeni's attorney emphasizing a claim lower than that reflected in the summons.

[29] As pointed at paragraph 4 above, Mr. Myeni claimed for "*unlawful arrest and detention, loss of dignity/deprivation of liberty, loss of consortium; and humiliation and degradation of status.*" To me deprivation of liberty is akin to unlawful detention. Loss of dignity is synonymous with humiliation and degradation. I shall therefore classify his claim as unlawful arrest and detention and humiliation or degradation of status and loss of consortium.

Unlawful arrest and detention

[30] The question for determination is not whether Mr. Myeni was unlawfully arrested and detained but how much would be awarded to

Mr. Myeni for his unlawful arrest and detention following that the Commissioner admitted liability.

[31] There are a number of factors that come to play in assessing the amount of damages in this regard. Amongst, these are the time, manner and place of arrest. The period upon which he was detained together with the conditions of the place of detention are to be considered. His treatment during the period of arrest. The question of whether there was a reasonable suspicion for his arrest falls on question of liability. However, where there is no iota of evidence of suspicion or commission of an offence, let alone reasonableness, such falls to be considered under assessment of damages. The list is inexhaustible.

[32] The unchallenged evidence before me is that Mr. Myeni was taken in for a crime of rape at 10:00p.m. It is not clear why the police could not wait until the following morning. The offence was one of rape and not robbery. Worse still, he was only told of the offence. He was never advised as to who the complainant was and when and where the rape had occurred. He was taken from the comfort of his home, awoken up and separated from his wife and children. He was accused of rape without a formal charge.

[33] Despite that he was a pastor, he was accused of rape, connoting that he was a man of lose morals. It is not surprising to hear that his congregation lost trust upon him and his church was divided. The statement from his wife that there could be no smoke without fire rang also among the members of his congregation, community at large, his colleagues and subordinates.

[34] What exacerbates this act at the hands of the police is that after removal from his home and family, he was taken straight to the cell without any interrogation. His evidence is that he anticipated that he would be taken for interrogation the following morning in order to know who the complainant was and where and when the rape took place. None of this happened.

[35] He spent the entire night and day in custody until the arrival of his attorney on 27th October 2006. Even then he was not released. Instead, he was taken to the Magistrates' Court where he was left at the back of the van for two hours. Instead of arraigning him before the Magistrate, he was removed from the back of the police van and caused to walk on foot in town in the company of a police back to the police station. He was thus paraded for all and sundry to see as it were. This set of circumstance translates into one plausible explanation, it was never intended that he appears before a court of law, contrary to the dictates of section 16(3) of our constitution. After all how could he appear before a Court of law as there was no charge, let alone a complainant or a name of a complainant. Removing him from the cell to the Magistrate's premises was just a sham, dust thrown at his face, as it were. It was never meant that he be remanded on that day.

[36] He also lamented the conditions of the place where he was detained. He did not sit for the entire duration of his detention in the cells. Counsel on behalf of the Commissioner correctly computed his detention, period and submitted that it was for thirty nine hours. He

also did not eat the food provided on the basis of the conditions of the plates.

[37] Upon his arrival at the police station after the journey from the Magistrates Court, he was caused to enter his signature into a book. No one explained the nature of the book and purpose for appending his signature. Thereafter he was told to go home, without a word on the reason for the thirty nine hours' detention.

[38] To add salt to the injury, five months later, the police pounced again. This time, in broad day light and at his workplace. They announced their arrival and purpose for all and sundry to hear. From 12:00 noon to after 5:00pm he was under police guard at his workplace while they waited the arrival of his attorney. They immediately moved to the police station where his lawyer was told to move out as they wanted to lock him up. Were it not for the aggressive protest put up by his attorney, he would have been detained once again on a completely trump up charge of what? This time he was not told of the charge warranting him to be locked up.

[39] Oh my Saviour! Such gross injustice and violation of his constitutional rights at the very hands that were supposed to protect him as an innocent citizen of this country! It goes without saying that the sum of E100 000 is on the lower side of the scale.

Loss of dignity or humiliation

[40] He pointed out that he was a Pastor of the Evangelical Church at Makholweni. He was also active in spreading the good news of

Christ. He was a married man with three children. He was a respected member of the family and was a prospective Member of Parliament in the eyes of his community. He occupied the executive rank at work as he was assistant manager. His arrest and detention together with the false accusation of rape were published in both leading local print media within and without the borders of Swaziland.

[41] As a consequence of his arrest, he lost his respect in his community, his church members did not trust him. His subordinates at work did not respect him. His superiors had to come down to Swaziland and investigate him on the matter, although he was exonerated before his eyes. The second arrest added fuel as his subordinates refused to take instructions from him and in harsh tones protested that they could not do so from a person accused of a rape charge.

[42] His wife flatly refused to listen to him pointing out that there is no smoke without fire. He eventually lost his wife. His prospect of becoming a member of parliament was completely shattered. He was eventually compelled to resign from work as his *dignity* was destroyed at the hands of his arrest on a heinous charge, which turned out to be completely fabricated. I shall award him a sum of E100 000.

Loss of Consortium

[43] The defence has raised that Mr. Myeni did not make a ground for loss of consortium. I differ as loss of consortium appears at para 9 of his particulars of claim and not under prayers only. Defence was

at liberty to request further particulars if it needed further information on this loss of consortium.³

[44] It is not disputed that as a result of his incarceration in October 2006, his relationship with his wife was strained. She refused to entertain any explanation from him. She believed the idiom, “There is no smoke without fire”. This led her to institute divorce proceedings on the basis of the very trump up charge of rape which turned to be adultery for purposes of divorce action.

[45] The defence pointed out that since the divorce was not contested, it should be inferred that he admitted the ground of adultery. I do not think so under the circumstance of this case. Evidence before me is that there was no complainant in the charge of rape. Mr. Myeni pointed out that his superiors came from Johannesburg and requested for witnesses’ statements to no avail. I guess by Mr. Myeni not contesting the divorce proceedings was in line with the proverbial expression, “*silence is golden*” as opposed to “*qui non negat fatetur – he who does not deny, admits.*”

[46] In the result, I award him the sum of E50 000. This is in respect of loss of consortium.

Interest on *quantum*

[47] Mr. Myeni has prayed for interest from date of summons. On whether to award *mora* interest, I am guided by the ratio *decidendi*

³ see **Probert v Baker 1983(3) SA 229** page 236 F-G

by **Innes CJ**.⁴ The Court dealing with the question of *mora* interest pointed out that in a claim for damages, *mora* interest could only be ordered where even though the claim is unliquidated, is easily ascertainable. I guess for instance in a claim for damages arising from injury, hospital fees are easily determinable. However, where the amount is ascertainable:

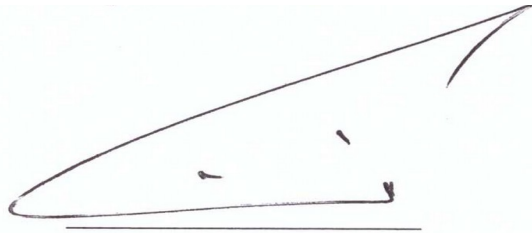
“After a long and intricate investigation, the defendant cannot be properly held liable for interest prior to judgment upon the sum, finally assessed”.

[48] In the present case, there is no doubt that the *quantum* on damages were unliquidated and only ascertainable after intricate extended inquiry. In this regard I cannot order *mora* interest before judgement date.

[49] In the final analysis, I enter the following orders namely, there being no contention on liability, the first defendant is ordered to pay the plaintiff:

- (a) the sum of 250 000;
- (b) interest thereof at the rate of 9% from date of judgment;
- (c) costs of suit.

⁴ in **Victoria Falls and Transvaal Power Co. Ltd v Consolidated Language Mines Ltd 1915 AD 1** at 31-33

A handwritten signature in black ink, appearing to be 'M. DLAMINI J', written over a horizontal line. The signature is stylized and somewhat abstract.

M. DLAMINI J

For Plaintiff: N.D. Jele of Robinson Bertram Attorneys

For Defendant: N. G. Dlamini from the Attorney General's Chambers