



**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Case No: 841/94

In the matter between:

**RICHARD SAM GINA**

**PLAINTIFF**

and

**THE COMMISSIONER OF POLICE**

**1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL**

**2<sup>ND</sup> DEFENDANT**

Neutral Citation : Richard Sam Gina and Commissioner of Police; Attorney General (841/94) [2017] SZHC 266 (28 JUNE 201)

Coram : MABUZA -J

Heard : 15/2/2016

Delivered : 28 JUNE 2017

## SUMMARY

**Law of Delict – Claim for damages for defamation, unlawful and wrongful arrest, unlawful detention alternatively wrongful and malicious prosecution.**

## JUDGMENT

### **MABUZA –PJ**

- [1] The Plaintiff, Richard Sam Gina sued out a summons against the Defendants wherein he claims payment of the sum of E2,009,000.00 (Two Million and nine thousand Emalangeni) being in respect of damages; interest at 9% a *tempora morae* from date of judgment to date of payment; further and alternative relief and costs of suit.
- [2] The matter is defended by the Defendants.
- [3] The cause of action is that on the 18<sup>th</sup> November 1993, the Plaintiff was arrested by members of the Royal Swaziland Police on an allegation that he had murdered one Shayisancele Khumalo on the 9<sup>th</sup> November, 1993.

- [4] Pursuant to his arrest the Plaintiff was held in custody until the 14<sup>th</sup> January 1994 when the charge of murder against him was formally withdrawn for lack of evidence and the Plaintiff was released from custody after spending fifty nine (59) days in custody.
- [5] It emerged that after his release from custody, the said Shayisancele Khumalo was discovered to be alive. The discovery was made around the 6<sup>th</sup> February 1994.
- [6] During the period of detention the Plaintiff attempted to apply for bail but the application was opposed by the Crown and stalled. The application had not been concluded by the time the Plaintiff was released from custody.
- [7] The charge against the Plaintiff was eventually withdrawn on the 14<sup>th</sup> January, 1994.
- [8] The Plaintiff states that his detention were wrongful and unlawful. He further states that the subsequent prosecution against him was wrongful, unlawful and malicious.

[9] He states that he suffered damages to his good name, reputation and standing in the community in which he lives. And that his dignity has been grossly impaired, he has suffered gross discomfort, inconvenience and the disgrace of being imprisoned for fifty nine (59) days. And that he was brought before a court of law in full view of the public, his family, his friends and the media on a charge of murder that had no foundation.

[10] He further states that his arrest, detention and prosecution received considerable publicity in the media in Swaziland and in the community at large.

[11] By reason of the facts aforesaid, the Plaintiff says that he has suffered general damages in the sum E2,000,000.00 (Two thousand Emalangi) in respect of:

- (i) The deprivation of his freedom by the reason of the wrongful arrest and imprisonment and the discomfort, inconvenience and gross disruption of his working, family and personal life as a result thereof;
- (ii) The impairment to his dignity, self-esteem and reputation;
- (iii) His malicious alternatively wrongful prosecution.

[12] The Plaintiff says he further suffered damages in the sum of E9,000.00 (Nine thousand Emalangeni) in respect of legal costs and expenses incurred by him in attempting to obtain bail, which application was resisted by the Crown which had no grounds or foundation upon which to resist the application.

[13] In the premises the government of Swaziland alternatively the Commissioner of Police in his representative capacity as such alternatively both the Government and the Commissioner of Police jointly and severally, are liable to compensate the Plaintiff in the amount of E2,009,000.00 (Two Million and nine hundred thousand Emalangeni) but notwithstanding demand properly and timeously given, the Defendant have failed and/or refused to compensate the Plaintiff in the amount claimed or in any amount.

The said demand constituted due and proper notice to the Defendants in terms  
of the Police Act of Swaziland.

[14] The Defendant's plea at paragraph 5 and 6 is couched in the following terms:

- 4.1 The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny that Plaintiff's arrest and detention was wrongful and unlawful.
- 4.2 The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the Police had reasonable grounds for suspecting that Plaintiff had actually unlawfully caused the death of Shayisancele Khumalo hence he was arrested, detained and subsequently charged with murder.
- 5.1 However, the Defendants aver that at the time of the Plaintiff's arrest, there were reasonable grounds for suspecting that he had murdered the said Shayisancele Khumalo for the reasons listed herein below:
  - 5.1.1 there was evidence that Plaintiff had in fact brutally assaulted the said Khumalo.
  - 5.1.2 the said Khumalo thereafter disappeared without trace, after having complained of severe pains on his body.
  - 5.1.3 a corpse was discovered in a forest and was reliably identified as that of the said Khumalo.
- 6.1 The Defendants deny that Plaintiff's arrest, and detention and subsequent prosecution were unlawful and malicious and aver that –
  - 6.1.2 the evidence available to the police suggested reasonably that the said Khumalo had actually been murdered by Plaintiff.

[15] The Defendants admit that the demand was properly and timeously given.

[16] In order to prove his case the Plaintiff was called to give evidence. He testified that he was arrested during November 1993 at Nisela and was taken to the Lubuli Police Station. He said that he knew Shayisancele Khumalo. Khumalo resided at the Plaintiff's home and used to plough the Plaintiff's cotton fields. He says that the police accused him of having beaten Khumalo which he denies. Instead he says that he beat up Jabulane Mpofo who worked for him as his herd boy.

[17] Plaintiff says that one day he arrived home and his sister informed him that Jabulane and Khumalo had eaten his sister's chicken. Whereupon he called Jabulane and instructed him to lie down and he administered corporal punishment on Jabulane's buttocks.

[18] While he was beating Jabulane, Khumalo arrived and asked him to stop beating Jabulane. Khumalo admitted he was the one who had invited Jabulane to eat the chicken with him.

[19] The Plaintiff says that he pushed Khumalo away with his knobstick which hit him on the thigh telling him that he should let him discipline Jabulane.

He says that Khumalo was not injured but he fired him. When he left for work Khumalo was still there.

[20] He says that when he was arrested on 18<sup>th</sup> November 1993 the police called him a well known ritual murderer and that the law had finally caught up with him. The police did not show him Khumalo's corpse. He put in an application for bail and was advised that the crime of murder was not aailable offence.

[21] He says that he was released by Dunn J as the police failed to produce a postmortem report. He was released on the 14 January 1994.

[22] He says that when he was arrested he was never shown any corpse but after his release his sister came with a cousin who advised him that Khumalo was alive and was employed at Matsanjeni at a certain Mfanawendlela Ngcamphalala homestead. After this information he says that together with some family members they proceeded to this Ngcamphalala family and they found Khumalo there.



[23] They took Khumalo to the police station at Lavumisa. Upon arrival there, the Plaintiff says that he reported to the desk officer. The arresting officer was not in. He says that even though the Station Commander arrived while he (Plaintiff) was at the police station, he did not attend to him despite the desk officer advising him of the purpose of his visit.

[24] The desk officer recorded a statement from Khumalo and they left thereafter. He left word for his arresting officer that Khumalo was alive and well and was with him.

[25] He says that after his arrest he was suspended at work. After taking Khumalo to the police, he thereafter went with Khumalo to his boss to show the latter that Khumalo was alive. His boss advised him to keep Khumalo in his work quarters while monitoring to see if the Lavumisa police would attend to him.

[26] When the police failed to attend to him the Plaintiff reported the matter to the Times of Swaziland. After the report was published three police officers arrived and during their conversation informed him that they were unhappy

with his arrest. The Plaintiff suggested that this conversation take place in the presence of his attorney but it never did.

[27] The Plaintiff says that at the time of his arrest he was a farm manager at Nisela. He was in charge of between 180 – 200 people who were under different departments. He earned E22,000.00 (Twenty two thousand Emalangeni) net per month. He had a wife and three children. He says that subsequent to his arrest his workmates consider him to be a murderer to this day. He says that he stopped working at Nisela during 2004.

[28] After his arrest, he returned to work during March 1994. He did not get paid during November 1993, the month of his arrest. He did not receive any bonus that year as he was in custody. He did not get paid for the period that he spent in custody because his employers thought that he had absconded with the company car. Meanwhile the police has impounded the car as they alleged that he had used it to dispose of the body.

[29] He says that his children were disturbed by his arrest. His mother got a stroke and his grandmother was affected. His status was affected in the community because people no longer trusted him.

[30] He says that he had a football team and ran a security company but everybody had lost faith in him. He had difficulty during night patrols because everyone was suspicious of him.

[31] He says that he built his home far from his work place but people still considered him a threat and would tell others that he murdered someone.

[32] He stated that there was a corpse that the police showed his sister Dudu but this was a body of someone who had been murdered in Hluthi and was not that of Khumalo.

[33] He reiterated his claims as set out in the summons being payment of the sum of E2 Million, E9,000.00 legal costs and costs of suit.

[34] A short cross-examination by Mr. Vilakati elicited information from the Plaintiff that he was never served with an indictment. That initially he was remanded in Nhlngano and later on in Mbabane at the High court where he was ultimately released by the High Court. Thereafter the Plaintiff closed

his case. The Defendants did not lead any evidence, they too closed their case.

[35] In his heads of argument the Plaintiff seems to have reduced his claim of damages to the amount of E300,000.00 (Three hundred thousand Emalangeni) and to have abandoned the amount of E9,000.00 (Nine thousand Emalangeni) earlier claimed for legal costs. There was no formal amendment for reducing the claim or abandonment of the legal costs. I shall consider the claim as it stands reduced in the heads of argument.

[36] At the commencement of the trial the Defendants withdrew their opposition to the claim for unlawful arrest and detention. The reason for the withdrawal was that the arresting officers and investigating officers had died in the period between the arrest of the Plaintiff in November 1993 and the start of the trial in February 2016. The Defendants were in no position to discharge the onus of proving that the arrest and detention were lawful. Consequently the only outstanding issue in respect of this head of damage is the quantum. The claims for impairment of dignity, malicious prosecution and legal costs remained opposed.

### **Unlawful Arrest and Detention**

[76] Since the Defendants did not contest liability in respect of the claim for unlawful arrest and detention I accept the evidence of the Plaintiff and hereby confirm that his arrest and detention were unlawful. I shall return to this topic when discussing the assessment of quantum later in my judgment.

### **Malicious prosecution**

[38] The learned author LTC Harms in his book “Amler’s Precedents of Pleadings, 7<sup>th</sup> Edition”, at page 274 states that:

- (a) the defendants set the law in motion – they instigated or instituted proceedings;
- (b) the Defendants acted without reasonable and probable cause;
- (c) the Defendants acted with ‘malice’ (*or animo inuriandi*); and
- (d) the prosecution has failed”.

See also **Minister of Justice and Constitutional Development v Moleko** (2008) 3 All SA 47 (SCA) (para 8).

### **The Plaintiff’s arguments**

[39] The police fetched the Plaintiff from his place of work at Nisela on the 18<sup>th</sup> November 1993 put him at the back of the police van and drove with him to the Lavumisa Police Station where they told him that they were arresting him for the murder of Shayisancele Khumalo and detained him.

[40] The above piece of evidence, which has not been controverted by the Defendants, puts it beyond doubt that the police officers initiated the arrest.

[41] The above piece of Plaintiff's evidence also proves the malice on the part of the Defendants. The Court in **Minister for Justice and Constitutional Development vs Maleko** [2008] 3 All SA47 (SCA) in dealing with the requirements of malice took the view that, what was required was animus and relied in this regard on the exposition by Neethling in "Law of Delict (5<sup>th</sup> Edition) that:

"In this regard *animus injuriandi* (intention) means that the Defendant directed his will to prosecuting the Plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were possibly absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the Defendant will go free where reasonable grounds for prosecution was lacking, but Defendant honestly believed that the Plaintiff was guilty. In such a case the second element of *dolus*, namely

consciousness of wrongfulness and therefore, *animus injuriandi*, will be lacking. His mistake therefore excluded the existence of *animus injuriandi*”.

[42] In *casu* there is no evidence of the Defendants to prove that, as Professor Neethling puts it, “Defendant honestly believed that the Plaintiff was guilty”. We only have the Plaintiff’s evidence that:

“Upon his arrest he was not shown the body of the person he is alleged to have killed”.

[43] The above extracts from Plaintiff’s evidence, viewed objectively, would exclude a finding that the arresting officer honestly believed that Plaintiff was guilty of the offence prosecuted for. In affecting arrest, the police officers did not take into account the Plaintiff’s version which bears out the improbability of Shayisancele having been gravely assaulted by Plaintiff to death and within three days his body having totally decomposed. The police did not bother to confirm Plaintiff’s version from Plaintiff’s herdboy and sister. The Defendants therefore having failed to lead evidence to prove a subjective belief in the guilt of the Plaintiff when he was arrested, it remains that the Plaintiff’s version remains fort and that the arrest was without reasonable and probable cause and the prosecution was therefore malicious.

[44] It is further borne out of Plaintiff's evidence that the prosecution was unsuccessful because the State could not produce a post mortem report in respect of the death of the alleged murder victim. This proves that the prosecution failed.

### **The Defendants' arguments**

[45] The Plaintiff failed to prove that the law was set in motion against him.

Under

cross-examination the Plaintiff was unable to say that he was formally charged

with murder. On this basis alone the claim for malicious prosecution must fall.

[46] More importantly the evidence adduced by the Plaintiff does not establish 'malice'. In **Moleko** the Court said this with regard to the requirement of 'malice':

"The Defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the Defendant ...will not suffice".



[47] The Plaintiff was arrested for the murder of Shayisancele Khumalo who it turned out was in fact alive. For the ‘malice’ element to be satisfied there must be proof that police or the Director of Public Prosecutions (DPP) foresaw the possibility that Khumalo was alive but nevertheless continued to prosecute the Plaintiff for his murder reckless as to the consequences of their conduct.

[48] The evidence does not establish ‘malice’. There is no proof that either the police or the DPP foresaw the possibility that Khumalo was alive but nevertheless persisted in prosecuting the Plaintiff. On the contrary the Plaintiff’s evidence is that he found Khumalo at a Ngcamphalala homestead in Matsanjeni, after his release from custody, and took him to the police.

[49] In conclusion the Defendant’s argue that in light of the foregoing the Plaintiff’s

claim for malicious prosecution must fail. I disagree it is my considered view that the Plaintiff has made out a case for malicious prosecution.

### **Quantum of Damages**

[50] The assessment of damages lies in the discretion of the trial judge. Bosielo AJA (as he then was) in **Minister of Safety and Security v Tjulu 2009** (5) SA (SCA) articulated the guidelines as follows:

“(26) in the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our Courts should be astute to ensure that the awards they make for such infractions reflects the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts...”.

[51] As a guideline Mr. Vilakati has referred me to the cases of **Maxwell Lukhele v Attorney-General** 1987 – 1995 (4) 65 (HC) and **Mfanafuthi Mabuza v The Commissioner of Police and Others** Appeal Case No. 39/2006 are a useful guide in assessing damages in the case at bar.

[52] The Plaintiff in **Lukhele** was the holder of an L.L.B. degree, a legal advisor to the Commissioner of Taxes and the President of the Swaziland National Association of Civil Servants. He was arrested and prosecuted on multiple charges including the serious offence of treason. He was detained in cells reserved for prisoners awaiting execution (death row) for more than three months. He was discharged by the High Court on all counts and thereafter sued for unlawful arrest and detention and malicious prosecution. The Court awarded him, in 1994, general damages of E50,000.00 (Fifty thousand Emalangeni) for all the heads of damage.

[53] In **Mabuza** the Plaintiff was twenty nine years (29) years old at the time of his arrest. He held a B Com Degree and was gainfully employed. He was arrested for the theft of a motor vehicle and spent ten months in detention. The conditions of his detention were appalling such that he contacted tuberculosis in prison. The Supreme Court awarded him damages for unlawful arrest and detention in the amount of E100,000.00 (One hundred thousand Emalangeni). The year of the award was 2006.

[54] In the case at hand, the Plaintiff was thirty five (35) years old at the time of his arrest. He was a farm manager at a sugar cane plantation. He was in

custody for 59 days. The Court did not hear any evidence in connection with the conditions of detention and that the Plaintiff suffered no degradation beyond that inherent in imprisonment.

[55] The Plaintiff herein is of a lower social standing than the Plaintiffs in **Lukhele** and **Mabuza**. He was detained for a shorter period than the Plaintiffs in the two cited cases and there is no proof whatsoever as to the conditions of his detention.

[56] Mr. Vilakati submits that taking into account, the facts of this case, past awards made by our Courts and the diminution in the purchasing power of money, E50,000.00 (Fifty thousand Emalangeni) would be the appropriate award to make for general damages for unlawful arrest and detention.

[57] On the other hand Mr. Nkomondze has referred me to the case of *Bambelela Boyce v Commissioner of Police and Another* High Court civil case No. 2097/2002 (unreported) wherein this Court made an award as follows:

(i)	Unlawful arrest	-	E50,000.00
(ii)	Unlawful detention for 40 days	-	E200,000.00
(iii)	Malicious prosecution	-	E50,000.00

[58] The above case was decided in 2002, as such even if the Court were to be inclined to award lesser damages in the present case, it is humbly submitted that inflation has to be considered as this case is being decided some 14 years later and that the number of days for unlawful detention in the earlier case were lesser compared to the present case.

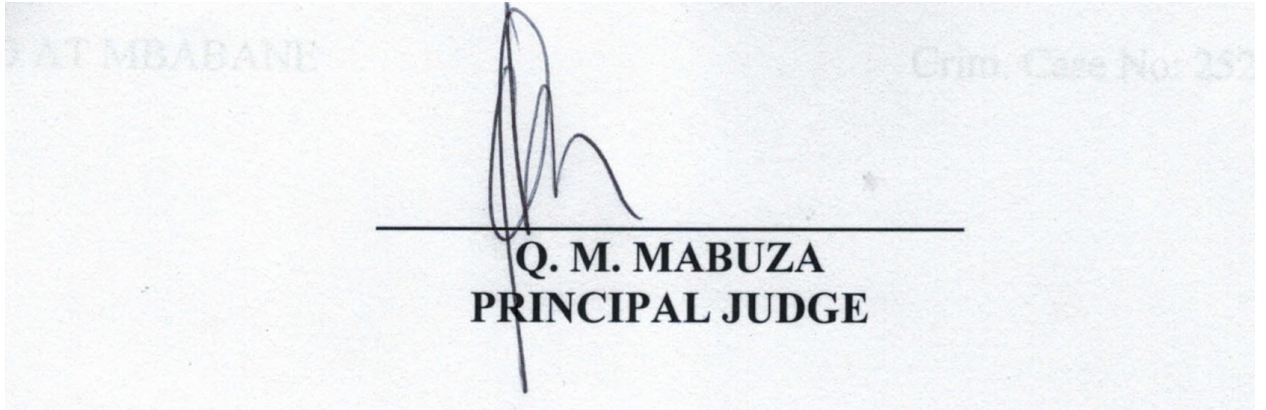
[59] It was submitted on behalf of the Plaintiff that he had made out a proper case for the award of E300,000.00 (Three hundred thousand Emalangeni) for unlawful arrest and detention. I agree.

[60] In awarding damages I shall follow the guideline suggested by Plaintiff's Counsel. It is a terrible thing to be accused of murder let alone to be arrested and incarcerated for a crime that the Plaintiff did not commit. It does not bear thinking what would have happened had the prosecution been taken to its finality and the Plaintiff had been found guilty.

[61] I believe him when he says that to date he is regarded with suspicion as a ritual murderer and that he has failed to rid himself of the stigma of being "lijabhane" (a ritual killer).

[62] The award of this Court is as follows:

- (a) Payment of the sum of E300,000.00 (Three hundred thousand Emalangeni) to be made to the Plaintiff for unlawful arrest, detention and malicious prosecution. Such payment to be made by the Defendants jointly and severally the one paying the other to be absolved;
- (b) Interest thereon at 9% a *tempore morae* from the date of judgment to date of payment; and
- (c) Costs of suit.



For the Plaintiff : Mr. G. Nkomondze  
For the Defendants : Mr. M. Vilakati