



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No. 3763/2006

CELANI SHABANGU

Plaintiff

And

SWAZILAND GOVERNMENT

1st Defendant

THE COMMISSIONER OF POLICE

2nd Defendant

THE DIRECTOR OF PUBLIC PERSECUTIONS

3rd Defendant

THE ATTORNEY GENERAL

4th Defendant

Neutral citation : ***Celani Shabangu & Swaziland Government and Three Others.***
(3763/2006) [2019] SZHC 110 (21st June, 2019)

Coram : **M. Dlamini J**

Heard : **9th May, 2019**

Delivered : **21st June, 2019**

Arrest

- ***Police officers arrest on the basis of reasonable grounds for suspicion¹ and not just suspicion - where the suspicion is not reasonable the arrest is viewed as motivated by malice - any arrest based on malice must be held unlawful - it is the peculiar circumstance of each case that would guide the trier of fact on whether the suspicion was reasonable or not.***
- ***Police are not obliged to effect an arrest on the ground of a prima facie evidence proving commission of the offence - it is the terrain of the prosecutor to assess the evidence in the docket before prosecution.***
- ***information sourced from an accused person pointing at a certain person as his accomplice forms a reasonable ground for suspicion that the pointed person as an accomplice was involved in the commission for the offence and therefore his arrest is justified.²***

Detention

- ***The purpose of effecting arrest by police officers is to bring the suspect before a court of law - it is the duty of the court to assess the charge, its summonses, and peculiar circumstances of both the case and accused and decide whether to remand him in or what of custody - the duties of the police officer in arresting a suspect ends upon presenting the suspect to a court of law where arrest is without a warrant - where a warrant is issued, the warrant will guide the officer where to take the suspect.³***

Malicious prosecution - It is of course correct that unlawful arrest and detention gives rise to malicious prosecution, if any - however, the converse does not hold true - reasonable ground justifies lawful arrest and detention for suspicion which does not equate to prima facie case warranting prosecution.

¹ See section 22 (b) of the criminal Procedure and Evidence Act No.67/1938 as amended

² See *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) at 18

³ See *Magagula v Minister of Safety and Security* [2016] ZAGPPHC 611 (17 May 2016)

Summary: Is the defendant liable to pay plaintiff the sum of E4 053 000.00? Alternatively, was the plaintiff subjected to unlawful detention and malicious prosecution by the defendants? The defendants resists payment of the sum claimed on the basis that the detention and prosecution was lawful and without malice.

The Parties

[1] The plaintiff is an adult male Swazi of Mobeni South, Mbabane. The first defendant is the employer of the second and third defendants. The second defendant is in charge of the police force in the Kingdom. His headquarters are at Mhlambanyatsi-Usuthu Link Road, Mbabane. The third defendant is a creature of statute and mandated to prosecute criminal matters. The fourth defendant is the legal representative of the first defendant and its institutions.

Particulars of Claim

[2] I must point out from the onset that assertions pertaining to the medical conditions of the plaintiff were abandoned following that records were said to have gone missing from plaintiff's erstwhile attorneys office. I shall therefore refer to allegations relating to unlawful arrest and malicious prosecution in the Particulars of Claim and oral evidence adduced.

[3] The plaintiff stated in his Particulars of Claim that on 3rd December, 1999 while at Ludzeludze, **Boy Mamba** of second defendant arrested him without a warrant of arrest. He was then detained in the Manzini Police Station for five days from 3rd December, 1999 to 8th December, 1999. He was then prosecuted for a charge of theft of a motor-vehicle while under remand in Zakhele Remand Centre in Manzini. He was acquitted of the charges on 13th March, 2003. Before his incarceration, plaintiff was employed as a labourer earning E800.00 per month. He then wrote:

“14. Both the arrest and detention were wrongful and the subsequent prosecution malicious since there could never have been any reasonable suspicion and/or belief that the plaintiff had committed any criminal offence nor did the Police and/or the Director of Public Prosecutions have any reasonable belief that the information contained in the Police dockets on which the charges were preferred were truthful.”

[4] He then claimed the sum of E4 053,000.00 for wrongful arrest, unlawful detention and malicious prosecution.

Plea

[5] The defendants denied liability. They allege that plaintiff was arrested for the offence of robbery (armed) which occurred on 9th November,

1999. Plaintiff sold properties looted to **Sabelo Dlamini**. Evidence of plaintiff taking part in the commission of the offence was sourced from one **Wellman Langa** who was plaintiff's accomplice.

Oral evidence

[6] **Celani Nicholus Shabangu** testified under oath. He told the court that prior to 3rd December, 1999, **Rudolph Nyoni**, well known by him, accompanied by three men, arrived at his Mobeni South, Mbabane residence. The two were carrying a motor-vehicle radio and a video camera. **Rudolph** advised him that he was in need of E400. He requested him to lend him the said sum. **Celani** was to keep the radio and the video camera as security. **Celani** took them to his friend, **Sabelo Dlamini** who gave them E400. They left the radio and the camera with hm.

[7] On 3rd December, 1999, **Boy Mamba**, a police officer together with another **Mamba** officer and other police officers arrived at his residence. They enquired what **Wellman Langa** gave him. He told them that he came carrying a radio and a video camera. These items were left with **Sabelo Dlamini**. They all proceeded to **Sabelo Dlamini**. **Sabelo Dlamini** confirmed his version. He however pointed out that the radio had been taken for repairs at Auto-Electric for purposes of determining the code. The police officer asked **Sabelo** to handover the radio and the video camera. They took the video camera. **Sabelo** then requested him

to go to Auto-Electrical to get the radio and surrender it to the police as he was rushing to work. He complied.

[8] At the police station, he found the **Mamba** police officer who thanked him for bringing the radio. He told him that he shall advise him of the date of trial in order to testify as a witness. In the morning of 3rd December 1999, police officers arrived at **Sabelo Dlamini's** residence. They requested **Sabelo Dlamini** to direct them to this witnesses' residence. He accompanied them to Matsapha where he was at that time. The police officers asked for the where about of **Rudolph Nyoni** and **Dumisani Mavuso** as they had arrested **Wellman Langa**. He advised them that he did not know their whereabouts. They took him to Lobamba police station where they interrogated him. He maintained his version. One officer **Jomo Mavuso** told his colleagues that he should be taken back as he appreciated that he did not know where they were.

[9] However, **Mamba** the police officer took him to Manzini police station. He told him that he was arresting him for hiding the whereabouts of the two. He told him that only the court would release him. He was kept at Manzini police station for three to four days. The Station Commander then questioned his subordinates why he was kept at the cells. They then took him to court. He was remanded from December, 1999 until 18th March, 2003.

[10] On 18th March, 2003, the trial date, one of the warders approached him saying they were requesting for him. He was led to one of the officers

where he found officers from the criminal investigation department. They requested him to be a witness in the matter. They promised to have him released if he acceded to their request. He insisted that he should be tried following his arrest. They returned him to the cells.

[11] The presiding officer was the then Principal Magistrate **Selby Gama**. He enquired from him before commencement of the proceedings on to which entrance was used by witnesses. The honourable principal magistrate took his time to explain about the law in relation to witnesses. At the end, he asked him to sit down. He pleaded to theft of motor-vehicle offence. The Principal Magistrate then addressed him saying charges ought to be withdrawn against him. However, he was acquitting him. Prior to his arrest he was assisting **Sabelo Dlamini** to run his errands and do construction. He earned E800.00. He concluded by praying that he be granted compensation as per the sum reflected in his summons.

[12] **Sabelo Fred Dlamini** was the next witness for the plaintiff's case. On oath he testified that he was a friend of **Celani**. He later employed **Celani** around 1998 and engaged him in the construction of his residence at Mpolonjeni.

[13] On a certain weekend while together with **Celani**, certain gentlemen arrived and requested to speak with **Celani**. **Celani** left to attend them.

He returned. He advised that the gentlemen who were known by him were borrowing money. He protested saying he could not give money to strangers. He assured him that they were known by him. One of them was **Rudolph**. He informed him that they will leave the radio and camera with him if he lends them the money. He acceded to their request. They left the items as security for the money loaned.

- [14] In the middle of that week police officers arrived. They asked to have the radio and camera as they were stolen. He protested asking them where he would get his E400 which was loaned. The police replied that it was none of their business. They took the items and left. Thereafter, the police returned to ask for the whereabouts of **Celani**. He took them to Ludzeludze where **Celani** was. They took **Celani** and they all proceeded to Lobamba police station. While at Lobamba police station, he asked to be excused as he had to rush to work. He enquired what they would do to **Celani**. They said they would interrogate him. It was **Sabelo's** further evidence that he did explain to the police how the radio and camera came to his possession. The plaintiff closed his case. The defendant led the evidence of one witness.

Defence's Case

- [15] The defendant called upon **3231 Detective/Sergeant Boy Mamba**. On oath, he informed the court that in 1999, as a police officer he was stationed at Manzini police under the criminal investigation department. In 1999, he investigated the crime of robbery, car theft and kidnapping.

The complainant was **Elizabeth Wright**. **Elizabeth** knew one of the suspects as **Wellman Langa**. **Wellman** was later arrested. **Wellman** led him to the plaintiff in Mobeni. **Wellman** informed them that the exhibits, viz, motor – vehicle radio and video camera were with the plaintiff.

[16] They proceeded to Mobeni where they found the plaintiff. Plaintiff informed them that he had sold the exhibits to **Sabelo Dlamini**. Plaintiff then led them to **Sabelo Dlamini**. At **Sabelo Dlamini's** house, plaintiff told him about the exhibits he had sold to him. **Sabelo Dlamini** acknowledged the exhibits. **Sabelo** produced the video camera. He said that the motor-vehicle's radio was taken to the mechanic for fixing. **Sabelo** stated that he purchased the items for E400 and only gave the plaintiff the sum of E200.

[17] They advised **Sabelo** that he would be a witness in the matter. They told plaintiff to bring the car radio to the police station. He did bring it. He told plaintiff to report his whereabouts as they were still investigating following that complainant had told him that they were four suspects. They later arrested **Rudolph Nyoni** and **Dumisani Mavuso**. They then went back to Mobeni to arrest plaintiff. However, he was not there. **Wellman Langa** told them that he had a girl friend at Ludzeludze. They proceeded to Ludzeludze where plaintiff was arrested. Plaintiff was also taken to Lobamba police station where he was investigated for a murder charge of which this officer was not part of.

[18] Defendant closed its case after cross-examination. In order not to burden this judgement I shall refer to all the witnesses' pertinent cross-examination later in this judgement.

Legal Principles

[19] The plaintiff's cause of action is unlawful arrest and detention and malicious prosecution. The guiding principles are well enunciated in both statutory and case law.

a) Unlawful arrest

[20] The question for determination is whether there were any reasonable grounds to suspect the plaintiff to have committed the offences eventually charged with. Police officers arrest on the basis of reasonable grounds for suspicion⁴ and not just suspicion. Where the suspicion is not reasonable the arrest is viewed as motivated by malice. Any arrest based on malice must be held unlawful. It is the peculiar circumstance of each case that would guide the trier of fact on whether the suspicion was reasonable or not.

[21] Police are not obliged to effect an arrest on the ground of a *prima facie* evidence proving commission of the offence. It is the terrain of the

⁴ See section 22 (b) of the criminal Procedure and Evidence Act No.67/1938 as amended

prosecutor to assess the evidence in the docket before prosecution. The words of **Jones AJP** are apposite:

“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 suspicion which have a reasonable basis”⁵ (My emphasis)

[22] The Constitutional Court in South Africa defined suspicion in the following terms:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. I suspect but cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of a prima facie proof is the end.”⁶ (My emphasis)

Analysis

[23] According to the plaintiff, he was acquainted to **Rudolph Nyoni**. **Rudolph Nyoni** came in the company of three other persons requesting to borrow the sum of E400. They undertook to leave as security for payment of the sum of E400 a moto-vehicle radio and a video camera. He did not have the said sum. He then took the quartet to **Sabelo**

⁵ *Rosseau v Boshoff* 1945 CPD 135 at 137

⁶ Sourced from *Devlin Shabaan Bin Hussen and Others v Chong Fook Kan and Another* [1969] 3 All ER 1627(PC) at 1630

Dlamini who lent them the said sum of E400 in the same terms that the items would be used as security.

[24] In cross-examination of plaintiff, the defendant pointed out that plaintiff was part of the robbery of a motor-vehicle where the video camera and the radio were taken. Plaintiff and his accomplices sold the items to **Sabelo Dlamini** who gave them the sum of E200 and the balance remained owing and due. This version was confirmed by the investigation officer **3231 Detective/Sergeant Boy Mamba**.

[25] He testified:

*“One of the suspects was known by the complainant. This was **Wellman Langa**. He was later arrested. After his arrest, he led us to plaintiff at Mobeni.”*

[26] Now the question that begs for an answer is, whose version is the court to believe in the circumstances following that plaintiff vouched that he did not participate in the offences alleged. It is for that reason that he was acquitted. On the other hand, **3231 Detective/Sergeant Boy Mamba** insisted that the plaintiff was implicated by the complainant who stated that four men robbed her of the motor-vehicle and kidnapped her. She further pointed at one of them who was **Wellman Langa**. Upon the arrest of **Wellman Langa**, he pointed at plaintiff as his accomplice.

[27] This dilemma facing the court is fortified by the *dicta* to the effect that information sourced from an accused person pointing at a certain person as his accomplice forms a reasonable ground for suspicion that the pointed person as an accomplice was involved in the commission for the offence and therefore his arrest is justified.⁷

[28] It would on the other hand be remiss of me to admit this piece of evidence in light of plaintiff's version. Fortunately, the evidence by **Sabelo Dlamini** shed some light on whether there was reasonable ground for suspicion. The evidence of plaintiff and **Sabelo Dlamini** is that the exhibits (radio and video camera) were left by **Sabelo** as security for the loan sum.

Were the exhibits a security for the sum lent?

[29] A determination of this question will shed light on whether the version by plaintiff and **Sabelo Dlamini** is to be believed or not. For if it is to be believed, then the investigator could not be held to have had reasonable grounds for his suspicion.

[30] **Sabelo Dlamini** testified that he was relaxing with plaintiff when the three men came requesting to speak to plaintiff away from his presence. After a while, plaintiff returned in the company of one of the men referred to as **Rudolph**. Plaintiff pleaded that he should borrow them E400 and the exhibits be retained as security. Plaintiff somehow corroborated this version by stating that the trio arrived in his flat. They borrowed E400. He did not have it. He then took them to **Sabelo**

⁷ See *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) at 18

Dlamini's flat where he requested him to give them the sum as they undertook to leave behind the exhibits as security.

[31] **Sabelo** testified further that not very long police arrived in the company of plaintiff. They took the items as exhibits. Plaintiff on the other hand informed this court that upon the police's arrival, they could not find the radio. It had been taken for repairs. In fact plaintiff in his evidence in chief pointed out that the radio could not function without its code. The purpose for it to be taken to the mechanic was to render it functional.

[32] Cross-examined on why **Sabelo Dlamini** decided to utilize and alienate items which he ought to have kept as security, he replied that he could do anything to the items. Is this action by **Sabelo Dlamini** consistent with items kept for security? The answer is an emphatic "No". In the ordinary course of events items kept as security are not to be interfered with. One cannot change them either by fixing them or removing them from his custody. **Sabelo Dlamini's** conduct of taking the radio for repairs for his use is clear. It is in terms of the version advanced by **3231 Detective/Sergeant Boy Mamba**. He had purchased the items. Otherwise why spend more money on them in repairs instead of waiting for the return of E400 and then give the owner. The basis for spending further money on them is obvious. They were to be kept by **Sabelo** without any intention for their return. This evidence is fortified by **Sabelo** who testified that when the police demanded seizure, he protested, asking where would he recover his E400. For this reason alone, it is clear that **Sabelo Dlamini** purchased the exhibits.

[33] The second reason for accepting the version of **3231 Detective/Sergeant Boy Mamba** is that plaintiff and **Sabelo's** evidence was at variance. Plaintiff testified that the quartet came to his flat. He then took them to **Sabelo Dlamini's** residence. **Sabelo Dlamini** on the other hand informed the court that he was in the company of plaintiff, both relaxing when the trio came and asked to speak to plaintiff. Which is which? It is of significance that the variance is not only on where the plaintiff's friends found plaintiff and **Sabelo** but also on the number of persons that came on that day. Plaintiff said four men approached him whereas **Sabelo** said that three men approached both plaintiff and himself. The reason for plaintiff to testify that they were four men who came carrying the stolen items was to allay the evidence by the defendant that the complainant informed them that four men robbed her of her motor-vehicle and kidnapped her. **Detective/Sergeant Mamba**; testified that having arrested the three men, there was a fourth man who was missing. This man was the one pointed by one of the accomplice **Wellman Langa**. It is clear that for the plaintiff to testify that four man approached him is because he was concealing that he was the fourth men. However, his friend, **Sabelo Dlamini** said that three man approached them (plaintiff and himself). Now we know the fourth man to be plaintiff as pointed out by **Wellman**.

[34] The third reason for rejecting plaintiff's version is that both plaintiff and **Sabelo Dlamini** asserted that the sum of E400 was lent to plaintiff's accomplices. None of them told us when this money was to be returned and the goods left retrieved. This was crucial evidence in the scheme of things. The reason this piece of evidence is missing is clear to infer. It

is because there was never any intention to have the items returned. **Sabelo Dlamini** had purchased them.

[35] Another point worth mentioning is that it is not clear why **Sabelo Dlamini** in his evidence in chief testified that when the police arrived in the company of plaintiff, he gave them both the radio and the camera. When confronted in cross-examination about the version of plaintiff that he, **Sabelo** had taken the radio for repairs, **Sabelo** said he could not remember because the matter was old. Why fail to state such evidence? It is because he was trying to show that at all material times the items were kept by him without interference, thereby his conduct consistent with goods kept as security? What is vital though is that he did under cross-examination concede that the radio was taken for repairs, although he protested the relevancy of this evidence when pressed further.

[36] Another piece of evidence against plaintiff is as adduced by him in chief. Plaintiff testified that the radio could not function as it needed a code. **Sabelo** decided to take it to Auto-Electrical. I guess this was to override the code so as to render it functional. Now if for a second we may accept **Sabelo's** evidence that he had a right to use the items anyhow while his money was in the hands of the trio, the question that begs for an answer is why did he not ask plaintiff to approach the trio for the code. The answer is obvious, they both plaintiff and Sabelo knew the sources of the items viz, to be stolen. That is the reason they took the radio to Auto-Electrical to override the code.

(b) **Detention**

[37] The purpose of effecting arrest by police officers is to bring the suspect before a court of law. It is the duty of the court to assess the charge, its summonses, and peculiar circumstances of both the case and accused and decide whether to remand him in or what of custody. The duties of the police officer in arresting a suspect ends upon presenting the suspect to a court of law where arrest is without a warrant. Where a warrant is issued, the warrant will guide the officer where to take the suspect.⁸

[38] The evidence by **3231 Detective/Sergeant Boy Mamba** was to the effect that at the time the plaintiff was arrested, the offence of armed robbery and theft of motor-vehicle fell under the non-bailable offence. In the result the Magistrate's hands were tight. He had to remand plaintiff into custody. Having found that plaintiff's arrest was lawful, this has a bearing on his detention. He was so detained under the Non-Bailable Offences Order.

(c) **Malicious Prosecution**

[39] In **Moleko's**⁹ case, the court laid down as follows:

“In order to succeed (on the merits) with a claim for malicious prosecution a claimant must allege and prove –

(a) that the defendants set the law in motion (investigated or instituted the proceedings);

⁸ See *Magagula v Minister of Safety and Security* [2016] ZAGPPHC 611 (17 May 2016)

⁹ *Minister of Justice and Constitutional Development v Moleko* [2008] ZASCA 43 at paragraph 8

- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with ‘malice’ (or animus injuriandi); and
- (d) that the prosecution has failed.

[40] Plaintiff testified that he was acquitted of all the charges. This was after he had refused to become a witness. In his evidence in chief, **3231 Detective/Sergeant Boy Mamba** justified that plaintiff was released under section 375 following that he had spent a long time in prison. However, he was cross-examined by Learned Counsel for plaintiff as follows;

Mr. S. Masuku : “Were you in court when he was acquitted and discharged?”

3231 Detective /Sergeant Mamba: “Yes”

What of malice?

(41) The plaintiff testified that there was no evidence to establish a *prima facie* case against him or put directly, warranting his prosecution. In as much as the investigating officer gave evidence, he did so to justify the arrest and detention of the plaintiff. There was no evidence from the defendant to show that there were grounds for prosecution. In fact, the testimony of the plaintiff of his malicious prosecution was not countered at all. **3231 Detective/Sergeant Mamba** was cross-examined; by learned Counsel for plaintiff:

Mr. S. Masuku : “Plaintiff informed the court that he was asked to be a state witness”

3231 Detective/ Sgt. Boy Mamba: “I am not aware of that;”

Mr. S. Masuku : “Were you in court when he was asked to plead?”

3231 Detective/Sgt. Boy Mamba: “No”.

[42] Following the above, the defence attorney re-examined:

Mr. M.G. Dlamini : “When a person is remanded to Zakhele, what is the procedure?”

3231 Detective/Sgt. Boy Mamba: “In his first appearance, they read the charge sheet and explain why he is arrested”

Mr. M.G. Dlamini : “Is he remanded at the instance of the police or prosecution”

3231 Detective/Sgt.Boy Mamba: “Prosecution.”

[43] At that juncture the defence closed its case. Why, in view of the claim based on malicious prosecution? The answer is not clear except that there was not an iota of evidence contradicting the claim against malicious prosecution. If there was, it did not pass muster. I guess the

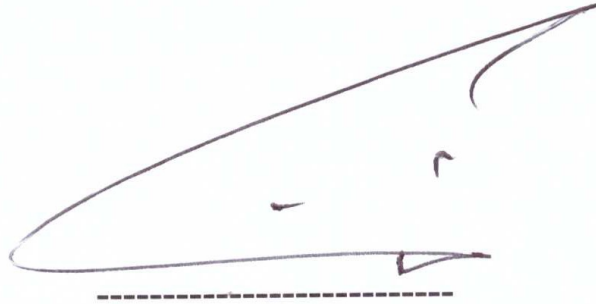
defendant took the position that once there was lawful arrest and detention, malicious prosecution cannot stand. Unfortunately that is not the case. As I have demonstrated in this judgement, the elements for each are different. It is of course correct that unlawful arrest and detention gives rise to malicious prosecution, if any. However, the converse does not hold true. Reasonable ground for suspicion justifies lawful arrest and detention which does not equate to *prima facie* case warranting prosecution.

[44] In the result I find as follows:

43.1 The claim against unlawful arrest and detention is hereby dismissed;

43.2 The claim against malicious prosecutions succeeds.

43.3 Parties are to decide on quantum not later than 30th July, 2019 if they are so inclined, failing which the matter is enrolled for 2nd August, 2019.

A handwritten signature in dark ink, consisting of a large, sweeping loop on the left and a series of smaller, more intricate strokes on the right, all contained within a light blue rectangular border.

M. DLAMINI
JUDGE

For the Plaintiff : S. Masuku of Howe Masuku Nsibande Attorneys
For the Defendant : N.M. Dlamini of the Attorney General