



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No.204/2005

SIBONGISENI KHUMALO

Plaintiff

And

COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation : ***Sibongiseni Khumalo v The Commissioner of Police and Another (204/2005) [2019] SZHC 137 (30th July, 2019)***

Coram : **M. Dlamini J**

Heard : **21st June, 2019**

Delivered : **30th July, 2019**

Unlawful arrest : ***The court cannot over-emphasise that police officers in the discharge of their duty to arrest do so on the basis of reasonable suspicion and not prima facie case.***

: ***Once the evidence became common cause that the plaintiff was found in possession of an item alleged to be the subject of a prior reported house breaking and***

theft, the police officer was under duty to bring him before a court of law to be dealt with according to law - it was for the court to exercise its discretion whether it accepted the version of the plaintiff and rejected that of Sandile Dlamini or his wife and not the police - the identification by Sandile Dlamini's wife (PW1) of the contested item by a clearly marked peculiar identity, fortified the reasonable suspicion formed by the police officer.

Unlawful detention : *The plaintiff was taken to court on the following day - he was not kept at the police station for an unreasonable period of time - once an arresting officer takes the suspect to court, the court's duty is to deal with the suspect according to law.*

Malicious prosecution : *The evidence from plaintiff and his witness PW2 is that on their first appearance they were granted bail - further, the evidence coming from plaintiff and PW2 is that charges against them were withdrawn on 3rd September, 2004 - they were kept in custody for seven days - they were granted bail and failed to pay same - they were released on the basis that charges against them were withdrawn - they were given the opportunity to await the outcome of their charge at home - where is malicious prosecution then? - the answer is there is none.*

Summary: Plaintiff demands the sum of E230 000 arising from unlawful arrest and detention and malicious prosecution. Defendants assert reasonable grounds for arrest and detention. They deny liability for malicious prosecution.

The Parties

Plaintiff

[1] The plaintiff is an adult male of Hlathikhulu area, Shiselweni region. The first defendant is in charge of investigation and arrest of suspects. The second defendant is the Attorney of *inter alia* first defendant.

The Parties' Case

[2] Plaintiff's amended particulars of claim filed on 26th March, 2019 states that on the 27th July, 2004 the first defendant officers acting within their course of employment "*unlawfully and maliciously arrested and detained plaintiff Sibongiseni Khumalo until the matter was withdrawn in court on 3rd September, 2004.*"¹ As a result, plaintiff claimed as follows:

"9. As a result of first defendant's actions, plaintiff suffered the following damages;

9.1	Engaging the services of an Attorney	E 10,000.00
9.2	Deprivation of freedom, tranquillity And discomfort	E100, 000.00
9.3	Contumelia	E 20,000.00
9.4	Malicious prosecution	<u>E 100,000.00</u>
	TOTAL	<u>E230,000.00</u>

Defendants

[3] The defendants pleaded:²

"2.

Save to admit that the Plaintiff was arrested by members of the Royal Swaziland police based at Matsapha Police Station, Defendants deny that such arrest was unlawful and with malice.

¹ See para 5 & 6 of Amended Particulars of claim

² Page 8 para 2

Defendants aver that the Plaintiff was unlawfully arrested as there were reasonable grounds to suspect that he had committed the crime of housebreaking with intent to steal and theft on or about the 10th March 2004 and at or near Logoba area in the Manzini Region, at the house of one Sandile Dlamini. Various items were stolen, including a 4 piece technic hi-fi set grey in colour valued at E5000.00. Plaintiff was arrested in terms of Section 22 (b) of the Criminal Procedure and Evidence Act 67/1933.”

[4] Defendants further stated:³

“3.

Allegations hereof are denied and Plaintiff is put to strict proof thereof. Defendants aver that the plaintiff was arrested and detained on the 27th July 2004 and was taken before the Manzini Magistrate Court on the 29th July 2004. Defendants aver that this period of detention was reasonable in the circumstances at it did not exceed the 48 hours statutory period sanctioned by Section 30 (2) of the Criminal Procedure and Evidence Act 67/1938. Defendants aver that since plaintiff was granted bail fixed at E5000.00 on his first day of appearance before the Magistrate Court, defendants cannot be held responsible for the plaintiff’s continued detention from the 29th July to the 3rd September 2004.”

Oral evidence

[5] The plaintiff testified on oath that on 27th July, 2004 while at his rented flat at Mhlaleni, **Maziya** homestead, two police investigators arrived. They took a number of items, saying that he had received them from a house breaking

³ Page 9 para 3

offence. The owner was said to be **Sandile Nxumalo**. The items taken were two multimedia speakers, pioneer timer, pioneer amplifier, two panasonic speakers and an electric cowboy prod. They then detained him at Sigodvweni police station. On 29th July, they took him for a remand in the Magistrate's court.

[6] In his next remand, he requested from the Magistrate to find out from the police where he had stolen the items seized. The Magistrate advised him that an answer would be forth-coming on his next remand. On his next remand, the Prosecutor enquired as to where they should keep his seized items as they had been released. He declined to show them and protested his incarceration. They took the items to his sister at Mhlaleni who was also renting a flat. He continued to be incarcerated despite that his items were released. He was advised of his trial date as the 3rd September, 2004. On the trial date, he was advised that his matter was withdrawn. His items were all released to him.

[7] When the police arrived at his rented flat to arrest him, they assaulted him. The owner of the rented flat, **Mr. Maziya** came. They reported to him that he had stolen the items. **Mr. Maziya** instructed him to vacate his flat and never return. He was suffering from tonsillitis when he was arrested. **Dr. Mphandlana** had given him a prescription. The tablets given to him by **Dr. Mphandlana** were finished while in custody. The sickness persisted. He could not get help from prison. He was booked at Mbabane Government Hospital. He remained without any medication for a week. If he had not been arrested, he would have returned to **Dr. Mphandlana** for further prescription.

[8] In custody, he was kept in an overcrowded cell. He was kept with inmates who were smoking yet he was a non-smoker. He could not rest as he wanted to and could not sleep during the day. He developed an allergy due to some

of the food he was given in custody. His incarceration portrayed him as a hard core criminal. This follows that he met a relative while in hospital who saw him in handcuffs. The relative was afraid of greeting him. People in hospital gave way as he was walking as they feared him.

[9] He had applied for a job at Swaziland Railways as a shunter. He was invited for an interview. He passed his first interview. He was invited for a second interview. He missed it because he was incarcerated.

[10] The next witness for plaintiff's case was **Lucky Khumalo**. He testified that he had purchased a hi-fi four piece Technique from **Sibusiso Dlamini** of Mankayane. He then sold the said hi-fi set to plaintiff. Plaintiff could not buy it as he was not employed. He then decided to keep it with plaintiff as plaintiff had electricity. He continued to look for a buyer.

[11] On a particular day, a customer came saying he was selling his television set. He was a taxi driver at that time. He told the customer that he was also looking for a buyer for a hi-fi set. The customer returned on the following day with **Sandile Dlamini** who was interested in buying his radio hi-fi set. He then took them to plaintiff's rented flat to show them the said radio. **Sandile Dlamini** upon inspecting the radio said that he needed to go to town to withdraw cash for purchasing the radio hi-fi set. He drove **Sandile Dlamini** and his customer to town to withdraw the cash. In town, **Sandile Dlamini** alighted and asked him to park next to the kombis to Johannesburg. **Sandile** returned shortly in the company of another gentleman who asked him to drive him to Sigodvweni police station.

[12] At Sigodvweni police station, two police officers directed him to drive to his brother's flat to see the radio hi-fi set. They arrived at his brother's flat and

assaulted him and confiscated the radio hi-fi set. They also took his computers. They took him and his brother to Sigodvweni police station. They charged them both with theft. They were never prosecuted as the case was withdrawn. In custody his brother was ill. They slept on the floor. They could not turn as they were congested. The plaintiff closed his case.

[13] The defence led evidence of witnesses as well. The first witness was **Sibongile Dlamini** nee **Dube**. She testified under oath that she was the wife of **Sandile Dlamini** who was since deceased. On 27th July, 2004, they had their house broken into at Logoba White City. A number of items were stolen including a radio hi-fi set, four piece Technique, grey and black in colour. The break in was reported to the Sigodvweni police. He reported to her sometime in 2004 that a gentleman in the name of **Samkeliso Khumalo** was selling him a radio. He went with **Samkeliso** to see the radio. She returned to inform her that he has seen the radio hi-fi set and it was his. Later police invited her to identify the radios. He identified the radio and took it to her custody. She was able to identify the radio by a scratch which she had made on it.

[14] The second witness was **Constable Cyril Mamba**. He was on duty on 27th July 2004. **Sandile Dlamini** came in the company of **Samkeliso Khumalo** concerning a sound system Technique. They both claimed ownership. In the company of other police officers, they all proceeded to plaintiff's residence. They introduced themselves as police officers and informed him of their mission. They cautioned him about being found in possession of a stolen sound system. There were two desk top computers in the house. They asked plaintiff to produce documentation of the items failing which he would be arrested. **Constable Nxumalo** also informed him that he would be taken for questioning over the items. Plaintiff was then taken to Sigodvweni police

station with **Samkeliso Khumalo** and **Sandile Dlamini**. The items which were, two desk tops and the four piece technique system were taken to Sigodvweni police station.

[15] At Sigodvweni, DW1 arrived having been called by **Sandile Dlamini** carrying documents for sound system. They checked the serial number and found that it corresponded with the systems. The owner was reflected in the receipt as **Sibongile Dlamini** (DW1). **DW1** also identified the sound system in the presence of plaintiff and **Samkeliso Khumalo**. Both plaintiff and **Samkeliso Khumalo** were both arrested. They were taken to remand and were both granted bail.

Determination

[16] Two questions call for attention. Was the plaintiff unlawfully arrested and detained? Was plaintiff maliciously prosecuted?

Unlawful arrest and detention

[17] The circumstances surrounding the arrest of plaintiff were well explained by PW2, **Samkeliso Khumalo** who identified himself as the brother of the plaintiff. His evidence was along similar lines as the evidence alluded to by the defence under cross-examination of plaintiff who was PW1. In fact, the court first learnt through the cross-examination of PW1 that there was one **Samkeliso Khumalo** who had taken complainant to plaintiff's house to view the radio hi-fi set under the pretext that he wanted to buy it as it was on sale. Throughout this evidence in chief, plaintiff gave the impression that he was all alone in this matter. In fact, he created the notion that while he was in the comfort of his home, police officers pounced on him and seized a number of computers and such related items.

[18] Not only was **Samkeliso Khumalo** and **Sandile Dlamini's** presence concealed by plaintiff in his evidence in chief but also the seizure of the four piece technique system (radio hi-fi set). I must point out that plaintiff's act of concealing such evidence called for the court first to approach his testimony with caution. Secondly, it necessitated the court to enquire on why he concealed such crucial evidence. The answer is not far off. It is found in plaintiff's own testimony and that is the plaintiff wanted the court to believe that all the items seized had no complainants. The police officers were in a frolic of their own. In fact plaintiff mentioned more than once that the police seized items without any complainants from his house. This evidence as I have pointed above, fell on plaintiff's cross-examination as he conceded that **Sandile Dlamini** who had prior visited his rented flat in the company of **Samkeliso Khumalo** (PW2) as a buyer turned out to claim the four piece technique system as his and which was lost through a burglary that took place in his house.

[19] PW2, **Samkeliso Khumalo** gave a detailed account of how **Sandile Dlamini** came to him selling a television set. He said that he was also selling a four piece technique system. **Sandile** asked to go to PW2's house to see the system. He took him to plaintiff's house where he had kept it. **Sandile** advised them that he had to return to town to withdraw cash for paying for the four piece system. This was not to be so as he together with a person organised by **Sandile Dlamini** directed PW 2 to drive to the Sigodvweni police station. At Sigodvweni police station, **Sandile Dlamini** requested the police to accompany them to plaintiff's house as he had identified the four piece system as his. This evidence cannot be hearsay in the present matter because it was advanced at the instance of the plaintiff and supports the defence version albeit under cross-examination in as much as **Sandile**

Dlamini could not be called as a witness due to his passing on. It is evidence which is common cause between the parties.

[20] DW1, **Sandile Dlamini's** wife confirmed that the four piece technique system belonged to her as she identified it by a scratch mark which she had caused on it. She further pointed out that she handed to the police receipt from Lewis Furnishers as evidence of ownership of the item.

[21] DW2, one of the investigators, testified that when DW1 submitted receipts from Lewis Furnishers, he compared the serial number on the receipt and that on the hi-fi itself. The serial numbers corresponded. It is on that basis that the plaintiff and PW2 were arrested for the house breaking and theft offence reported to the Sigodvweni police station by **Sandile Dlamini**. No documentary evidence of ownership forthcame from plaintiff and his accomplice, PW2, **Samkeliso Khumalo**. In fact both plaintiff as PW1 and **Samkeliso Khumalo** as PW2 did not have such as they pointed out that the four piece system was purchased from a person who was HIV positive and sickly at Mankayane who since left Mankayane to his homestead which was not disclosed.

[22] The court cannot over-emphasise that police officers in the discharge of their duty to arrest do so on the basis of reasonable suspicion and not *prima facie* case. Articulating similarly, **Van Heerden JA**⁴ wrote:

“Section 26 of the old Act therefore authorised arrest without a warrant in circumstances where the peace officer, although entertaining a reasonable suspicion, knew that proof in order to make out a prima facie case was lacking. Hence, if 526 and 533

⁴ Duncan v Minister of Law and Order for the Republic of South Africa (38/1985) [1986] ZASCA 24 AT PAR 29

of the old Act are read together, it must clearly have intended that further investigation, inter alia, by means of questioning of the suspect could follow an arrest. Were it otherwise, 531 (1) would no doubt have provided that the power to arrest without a warrant could only be exercised if there were reasonable grounds for believing in the existence of a prima facie case against the arrestee.”

[23] Once the evidence became common cause that the plaintiff was found in possession of an item alleged to be the subject of a prior reported house breaking and theft, the police officer was under duty to bring him before a court of law to be dealt with according to law. It was for the court to exercise its discretion whether it accepted the version of the plaintiff and rejected that of **Sandile Dlamini** or his wife and not the police. The identification by **Sandile Dlamini’s** wife (DW1) of the contested item by a clearly marked peculiar identity, fortified the reasonable suspicion formed by the police officer.

[24] Much effort was put under cross-examination of the defence witnesses and in evidence in chief by plaintiff and PW2 to demonstrate that the plaintiff was assaulted. This was not the plaintiff’s case in his pleadings. **Shongwe ADP**⁵ referred to **Nkabinde J**⁶ as follows:

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.

⁵ De klerk v Minister of Police (329/17) [2015] ZASCA 45 (28 March 2018) at para 7

⁶ Minister of safety and security v Labbert [2010] 2 ACC SA 474 SCA

It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

[25] I do not wish to deviate from the above well settled principle in our jurisdiction by attending to the question whether the plaintiff was assaulted during his arrest. I can only repeat that what is material in the case at hand is that both plaintiff and his witness and defendants testified that the police were led by **Sandile Dlamini** in the company of PW2 into the rented flat for plaintiff. It is common cause as adduced on behalf of plaintiff and the defence that in plaintiff’s rented flat there was the four piece technique system. It is further not in issue that this system was contested by **Sandile Dlamini** as one of the items lost during a house breaking and theft in his house.

[26] I appreciate that the plaintiff suggested that the court ought to have rejected **Sandile Dlamini’s** version and believed his version that the radio belonged to PW2 who purchased it from a man in Mankayane who was however no longer residing at Mankayane following that he left for home. How in light of PW2, **Sandile Dlamini’s** wife pointing at an indemnable mark and producing receipt with a serial number corresponding with that on the system? In the result, I find that there is no justification for the plaintiff’s cause of action in regard to unlawful arrest.

Detention

[27] The evidence, again which is common cause, is that the plaintiff was taken to court on the following day. He was not kept at the police station for an unreasonable period of time. Plaintiff, during his evidence did not take any issue of his detention in the police custody. It must be borne in mind that once an arresting officer takes the suspect to court, the court’s duty is to deal with

the suspect according to law. Now the question is how did the court deal with the plaintiff?

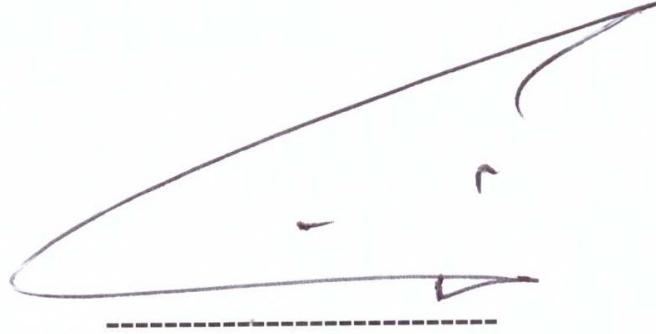
Malicious prosecution

[28] The evidence from plaintiff and his witness PW2 is that on their first appearance they were granted bail. This was confirmed by PW2 and the investigating officer. Further, the evidence coming from plaintiff and PW2 is that charges against them were withdrawn on 3rd September, 2004. They were kept in custody for seven days. They were granted bail and failed to pay same. They were released on the basis that charges against them were withdrawn. They were in brief, never prosecuted. Their trial never saw the light of the day. They were given the opportunity to await the outcome of their charge at home. Where is malicious prosecution then? The answer is there is none.

[29] In the final analysis, the following orders are entered:

29.1 Plaintiff's cause of action is dismissed.

29.2 Plaintiff is ordered to pay the 1st defendant costs of suit.

A handwritten signature in dark ink, consisting of a large, sweeping loop on the left and a series of smaller, connected strokes on the right, ending in a sharp point. The signature is positioned above a horizontal dashed line.

**M. DLAMINI
JUDGE**

For Plaintiff

: J. Simelane of Ben J Simelane and Associates

For Defendant

: L. Simelane of the Attorney General