IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CIVIL CASE NO. 24/2018**

In the matter between

Zwelithini Bheki Dlamini	Plaintiff
And	
National Commissioner of Police	1st Defendant
Director of Public Prosecutions	2nd Defendant
Attorney General	3rd Defendant

Neutral citation: *Zwelithini Bheki Dlamini v National Commissioner of Police & 2 Others (24/18) SZHC 155 [2022] (15 July 2022).*

Coram :Tshabalala J

Heard :27/11/2020

Delivered : 15/07/2022

Summary: Claim for damages for unlawful arrest and detention, malicious prosecution, impairment of dignity and trauma – Reasonable grounds for suspicion leading to arrest in terms of Section 22 (b) Criminal Procedure & Evidence Act as amended and the principles attended thereto – requirement for prove of malicious prosecution.

JUDGEMENT

[1] The Plaintiff instituted action proceedings against defendants, the National Commissioner of Police, Director of Public Prosecutions and the Attorney-General, for the sum of E9, 164,000 broken down as follows:

(a) Unlawful arrest, detention and malicious prosecution	E7,000 000.00
(b) Impairment of dignity and Reputation	E100,000.00
(c) Emotional trauma and shock	E2, 000 000.00
(d) Loss of earnings (27months x 2000)	E54,000.00
(e) Legal costs	E10,000.00
TOTAL	**E9, 164, 000.00**

The Plaintiff also claims interest to the said amount at 9% computed a *temporae morae*, and costs of suit.

[2] It is common cause that the Plaintiff was arrested by, among other officers, DW1 Detective Constable Nokthula Mdziniso of Matsapha police station on the 16th January 2015 at or near Plaintiff's place of work at Matsapha. Plaintiff was employed as a public transport marshal. The Plaintiff described his position as a person who loads passengers and collects fares. The Plaintiff testified that he was first approached by two police officers while at Matsapha on his way to his residence. The officers questioned him and he identified himself per their inquiries. When he asked why they questioned him for his particulars, the two officers laughed and then drove off.

[3] A few days later, or the same day, it is not clear, the same officers, with four others including DW1 Constable Mdziniso, came to his work station and arrested him. The officers told him that he was arrested for house breaking

and theft of two cell-phones. The officers demanded that he produced a green jacket and pair of jeans that they said he was wearing at the time of commission of the offence. He denied the offence and told the officers that he did not own or possess the clothing items described.

[4] He was detained at Matsapha police station where he was informed that he was being arrested not for theft of cell-phones but rape of two women and attempted murder, which offences he also denied. Plaintiff said that he was assaulted by one officer named Busha. He was taken to his home to fetch his medication. While there, police seized his grey jacket and a tracksuit. Back at the police station he was interrogated, slapped and locked up for not cooperating.

[5] Plaintiff alleges that the following day he was forced to record and sign a statement written by the police without his input. Through slapping he was coerced to sign for the statement he did not know. Blood samples were taken from him at police academy. The day following his arrest he was taken before a magistrate, remanded to Zakhele remand centre, on three charges. In count one he was charged with rape of a 12-year-old girl,[1] at Bethany, on the 17th March 2015. In count two he faced a charge of rape of another 12-year-old girl,[2] alleged to have been committed at Eteteni on the 14th June 2015. The plaintiff also faced a third count of attempted murder of the latter complainant, it being alleged that at the same place and on the same date he strangulated her and stabbed her with a sharp object on the neck.

[6] After a month he applied for bail at the High Court, but was referred to the Magistrate's Court. He was repeatedly remanded in custody, pending trial

[1] Nokwanda Mkhwanazi.
[2] Nokwethu Gamedze.

until charges were withdrawn two years later, after engaging services of an attorney for a second bid to be released on bail.

Unlawful arrest and detention

[7] The claim for unlawful arrest and detention is directed against the 1st defendant, National Commissioner of police whose officers arrested and detained the Plaintiff prior to handing over the docket to the 2nd defendant, Director of Public Prosecutions (DPP) for his decision to prosecute or otherwise. The acts of arrest and detention are not in dispute. Therefore, the 1st defendant bears the burden to show that nothing short of a reasonable suspicion existed leading to Plaintiff's arrest. This settled position of the law is reiterated in the High Court case of **Phiri v The Commissioner of Police & Another**[3] citing the principles enunciated in the Supreme Court's decision of **Mabuza v the Commissioner of Police & 2 Others**[4] –

> *"It is well settled that the onus rests upon the arresting authority to prove the requirements of section 22 of the Criminal Procedure and Evidence Act, 1938 were met when an arrest without a warrant was made..."*

[8] Section 22 (b) of the Criminal Procedure and Evidence Act No. 67/1938 provides thus:

> *"22. Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest without a warrant every person-*
>
> *(a) ...*

[3] Case No. 2855/2009.
[4] Supreme Court Case No. 11/2004.

(b) whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part II of the First Schedule." [Emphasis added]

[9] The facts of the case according to Plaintiffs evidence as outlined above, were not substantially disputed under cross examination or materially contradicted by defence witnesses except for a few points that will be referred to below. DW1, Constable Nokuthula Mdziniso was the investigating officer. She recorded statements from two young victims of rape, both aged 12 years of age, Nokwanda Mkhwanazi and Nokwethu Gamedze, respectively. The former was raped at Bethany on the 17 March 2015. Nokwanda Gamedze was raped and stabbed at Eteteni, Matsapha, on the 14 June 2015. DW1 testified that she interviewed Nokwethu on two separate occasions. On the first day the young victim did not provide description of her assailant. On the second occasion, she came to the police station in the company of her mother who presented a photograph. It was on this occasion that Nokwethu opened up about her assailant and revealed that she had previously seen the man before the attack. DW1 testified that the complainant stated that she and her friends often saw the assailant at the traffic lights next to Water Services Treatment plant not far from Usushwana river where they went swimming after school. The child said their sighting of the man would be when they returned from their swimming adventures.

[10] Nokwethu pointed the man in the picture and told DW1 during this second interview he was her assailant. DW1's evidence is that she attached the photograph to the docket, but that it later went missing.

[11] It is DW1's evidence that the photograph was instrumental in identifying the Plaintiff as the rape and attempted murder suspect, and his arrest. It is noted that the photograph was taken, neither by the complainant, nor in her

presence. This renders it a kind of hearsay, more so as the complainant did not testify before this court.

[12] As the defence evidence will show the photograph was taken by a friend of complainant's mother relying for the description of the assailant on what the complainant told her. The arresting officer went on, in the absence of the complainant, and used the photograph to pick on the Plaintiff as the suspect, and arrested him. This was nothing short of careless use of police powers of arrest. To compound matters the photograph is not an exhibit before this court to assist in the assessment exercise to determine the reasonableness and rationality of the suspicion entertained by defendant when arresting the Plaintiff.

The arrest

[13] DW1 testified that armed with the photograph brought by complainant's mother she and colleagues set out to the place where the complainant said she had seen her assailant before. There she arrested the plaintiff, based on the image on the photograph and physical description given by Nokwethu and the other victim Nokwanda of their assailant, which included complexion, physique, missing tooth on lower jaw. From these DW1 testified that upon seeing the Plaintiff she was convinced of his identity as the suspect. Upon introducing themselves to the Plaintiff DW1 said she also noted the gap or missing tooth in Plaintiff's jaw as he talked.

[14] Asked under cross examination why Plaintiff's request for police to mount an identification parade for the complainants to identify their assailant(s) was declined, DW1's response was that it was not necessary to hold identification parade because the complainants, in particular Nokwethu indicated that she knew the attacker, having seen him on prior occasions. What DW1 failed to appreciate was that there was no identification of the

attacker by Nokwanda, that the images taken by DW3 could have been of a person other than the one Nokwethu described since she was not there when the image was shot. This likely error was further perpetrated by DW1 who used the same fallaciously obtained image to purportedly spot the Plaintiff as the suspect in the absence of the complainant.

[15] When quizzed further under cross examination on the reliability of the identification of the Plaintiff as suspect, DW1 attempted to switch her evidence to say that she did not rely on the photograph for the arrest, and that Nokwethu was present and that she pointed at the Plaintiff at the time of his arrest. This was clearly a fabrication and material deviation from her evidence in chief wherein she stated that she relied on the photograph and physical description of the assailant given by the complainants. In any event the version DW1 gave in chief was the one put to the Plaintiff during cross examination by defence counsel. The Plaintiff punched holes in the photograph evidence and highlighted that the complainants never pointed him out despite his asking for and identification parade to be held. Defence counsel categorically put it to the Plaintiff that he was identified by means of a photograph taken by a neighbour, based on complainant's description of her attacker, and the place where she occasionally saw him. Defendant denied hanging around at the robots where he was reputed to be seen by the complainant.

[16] DW1 denied under cross examination, Plaintiff's evidence that police informed him during his arrest that he was sought for theft of cell-phones, and that it was only at the police station that he was charged for rape and attempted murder. Nonetheless, defence Counsel did not dispute this to the Plaintiff during cross examination.

[17] DW3 Nothando Matsenjwa, was a friend and neighbour of complainant, Nokwethu's mother.[5] Using her cell phone she took two photographs of two men at the Usushwana robots, following information given by Nokwethu that her assailant hung around that place. Back home, DW3 showed the pictures to DW2 and Nokwethu, and the latter pointed out the assailant in her presence. DW3 obtained print-out of the two photos, which were subsequently handed to the police. Nokwethu was not present when the pictures were taken. The child only pointed the man in the picture in DW3's cell phone. DW3 has since disposed of the phone. DW3 never subsequently identified the man he photographed, at any parade.

[18] DW2 Sanelisiwe, Maseko was Nokwethu's mother. Her evidence corroborated that of DW1 and was corroborated by that of DW3 in all material respects.

[19] The issue for determination by this court is whether the investigating officer reasonably suspected the Plaintiff of the crimes he was charged with and thus lawfully arrested him in terms of Section 22 (b) of the Criminal Procedure and Evidence Act, as amended. It is a test of rationality. This was adumbrated in the case of **Manyoni v the Minister of Police and the Director of Public Prosecutions,**[6] reiterating the position stated in Duncan's case[7] wherein the test is briefly formulated thus -

> *"(a) If the investigating officer had a suspicion, and (b) if so, if his suspicion rested on reasonable grounds."*

[5] Nokwethus's mother testified as DW2
[6] ZAHC Case No. 41499/2018
[7] 1986 (2) SA 367 (SCHA)

[20] The South African Supreme Court case, of **the Minister of Safety and Security v Sekhoto and Another**[8] unpacked the principle governing the exercise of arresting powers, in the following terms -

> *"[38] It remains a general requirement that any discretion must be exercised in good faith, rationality and not arbitrarily.*
>
> *[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optional by the court...*
> *The standard is not perfection or even the optimum judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached."* [Emphasis added]

[21] The test of whether a suspicion is reasonably entertained within the meaning of Section 22 (b) is objective. The court in **Manyoni's** case[9] reiterated the principles set out in **S v Nel & Another**[10] noting that in evaluating the information, a reasonable man would bear in mind that the section[11] authorizes drastic police action, that is, an arrest on suspicion without the need to swear out a warrant. This calls for a reasonable man to therefore analyse and assess critically, the quality of the information at his disposal, and will not accept it lightly or without checking it out where it can be checked.

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[8] 2011 (5) SA 367 (SCA)
[9] Supra.
[10] 1980 (4) SA 28
[11] CP & E Act Section 2 (b)

[22] It is not required of the investigating officer that the information at his/her disposal must be of sufficiently high quality and cogency, as that would make it impossible for police to protect society from criminal elements. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds, failing that it will be unreliable and arbitrary.[12]

[23] Applying the test *in casu,* the question becomes: would a reasonable man in DW1's position, possessed of the same information regarding identity of the offender, have considered that there were good and sufficient grounds for suspecting that the Plaintiff was the person accused of the crimes committed in this case? The known facts are that the Plaintiff was a man, worked at a place in the vicinity of the river and the traffic lights, is dark in complexion, has a gap in his lower jaw. These descriptions could fit a number of people, who are also found at the same area, therefore, fall short to ground a reasonable suspicion to act on, to deprive a citizen of his liberty without further proper follow-up on the identity aspect. It was unreasonable and a failure on the part of the police by taking a short-cut route, and ignoring for example, a form of basic identity parade for the witnesses.[13]

[24] In **Minister of Safety and Security and Another v Swart**[14] the objective test applicable in determining the reasonableness of suspicion that is embodied in the provision similar to our section 22(b) of the CP&EA, was underscored in the following terms -

> *"[20] The reasonableness of the suspicion of any arresting officer acting under Section 40 (1) (b) must be approached objectively. The*

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[12] S V Nel supra. Cited with approval in Manyoni at para [13] supra

[13] There is no connection between the person described by Nokwanda to DW3, the person at the robots whose picture was shot by DW3, and the person arrested by DW1. Identification parade, or other form of connection was essential in these circumstances to either confirm or discount the Plaintiff as the suspect prior to arrest and detention.

[14] (194/11) [2012] ZASCA 16, 20212 (2) SACR 226 (SCA) (22 March 2012)

question is whether any reasonable person confronted with the same set of facts, would form a suspicion that a person has committed a schedule 1 offence."

[25] The decision to arrest the Plaintiff is found to have been based on irrational grounds short of the required reasonable standard envisaged by section 22(b) of the CP&EA. This standard is intended to safeguard fundamental rights of liberty and dignity from arbitrary impairment in the course of law enforcement. The arrest and detention in this case is therefore found to have been unlawful.

Malicious Prosecution.

[26] The requirements for a successful claim for malicious prosecution have been articulated in a number of cases. The court in **Celani Shabangu v Swaziland Government & 3 Others,**[15] citing **Moleko's case**[16] stated the requisites for malicious prosecution 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);
(b) that the defendants acted without reasonable and probable cause;
(c) that the defendants acted with 'malice' (or animo injuriandi); and
(d) that the prosecution has failed."

[27] The Plaintiff testified that after being remanded in custody for 27 months, from July 2015, charges were withdrawn, in September 2017, and was

[15] Case 3763/2006 [2019] SZHC 110 (21st June 2019)
[16] Ministry of Justice & Constitutional Development v Moleko [2008] ZASCA 43

released from custody. He had engaged services of an attorney for bail application before a magistrate. Plaintiff stated that he had previously applied for bail before the High Court one month into his detention, but was referred to the Magistrate's Court.

[28] Does the withdrawal of charges dispose of the burden of proof regarding failure or futility of prosecution in line with the 4th requirement that the prosecution must have failed? Counsel for defendants argued that withdrawal of charges does not equate failure of prosecution because charges can be reinstated and prosecution resumed. Counsel submits that only an acquittal should be considered for malicious prosecution claim. However, counsel did not advance any legal principle or rational to support his argument. He only made reference to cases where malicious claims for prosecution were successful, wherein coincidentally the plaintiffs had been acquitted.

[29] I say coincidentally because there are indeed cases where actions for damages for malicious prosecution were successful following, not an acquittal but withdrawal of charges by the prosecution. In **Sithole v Minister of Police & Another,**[17] the plaintiff successfully sued for damages on a claim of malicious prosecution. The court found that all the requirements for prove of malicious prosecution were met including the requirement that prosecution had failed, following withdrawal of charges against by the prosecutor. In **Rudolph & 2 Others v Minister of Safety and Security & Another,**[18] after several appearances in the magistrate's court, the charge against the appellants was withdrawn by the State. The appellants claimed damages arising out of their alleged unlawful arrest, detention and malicious

[17] ZAGHC Case No. 63897/2011
[18] (380/2008)[2009] ZASCA 39 (31 March 2009).

prosecution. The Supreme Court of Appeal found in their favour and awarded them damages, including damages for malicious prosecution. The court accepted at paragraph [16] of the judgment that the requirement that '*prosecution had failed*' had been met. I therefore find no merit in the argument advanced by the defence *in casu* that withdrawal of the charges does not meet the requirements for malicious prosecution.

[30] Following arrest of the Plaintiff police handed the case over to the prosecution, and thereafter the Plaintiff made appearances before the magistrate on charges of rape and attempted murder where he was remanded for the next two years, awaiting trial.

[31] Did the Director of Public Prosecution or his agents act without reasonable and probable cause? The 2nd Defendant did not proffer any evidence in defence of Plaintiff's claim for malicious prosecution. The 2nd defendant's duty to prosecute depends on existence of *prima facie* evidence. The evidence of DW1, was that she expected to be called to testify at the trial for prosecution of the Plaintiff. Instead, she said she learnt with surprise that the charges have been withdrawn. As far as DW1 was concerned, from the police point of view, there was sufficient evidence to prosecute.

[32] There is no doubt that the evidence was wanting in many respects. Firstly, the arbitrary picking of the Plaintiff as the suspect which I have dealt with in the preceding paragraphs under unlawful arrest. Defence counsel alluded to loss of the photograph as the deciding factor in the withdrawal of charges. But not only did the controversially sourced photograph of the alleged suspect go missing, DW1 testified that the vaginal swab taken by the doctor from Nokwethu was disposed of by the hospital because there was a delay in

collecting it, with the result that intended forensic analysis and comparison with Plaintiff's blood sample could not happen. Therefore, there was lack of forensic evidence linking the Plaintiff to the offence, hearsay evidence surrounding his identity through a photograph, among others. I have already found, by applying a different test[19] that there was no reasonable suspicion to support Plaintiff's arrest by the 1st Respondent. These deficiencies show that there could not have been a reasonable and probable cause to prosecute, as well. It suffices to say, in the absence of *prima facie* evidence of identification of the Plaintiff as a suspect, or linking him to the offences, that the 2nd Defendant or his agents acted with *malice* when a decision to prosecute on the charges was embarked upon in the circumstances.

[33] In dealing with the question of *malice* the decision in **Rudolph's case**[20] is instructive:

> *"[16] ...although the expression 'malice' is used, the claimant's remedy in a claim for malicious prosecution lies under the actio injuriarum and that what has to be proved in this regard is animus injuriandi."*

[34] To prove the requisite *animus injuriandi*, direct evidence is not requirement in so far as recklessness will suffice. "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*)..."[21]

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[19] The test relevant for reasonable suspicion to ground an arrest without a warrant in terms of section 22(2) CP&EA.

[20] Supra.

[21] Minister of Justice and Constitutional Development, Director of Public Prosecutions & Minister of Safety and Security v Sekele Moleko (131/07) [2008] ZASCA 43 (31 March 2008).

[35] Following arrest and after being furnished with the docket 2nd Defendant ought to have appraised the evidence. The 2nd defendant should have realized those deficiencies. For example, the glaring gaps in the identification of the suspect should have been obvious to the prosecutor from the on-set. The request by prosecution for remands for over two years, in the absence of the photograph itself, and forensic evidence is inexplicable. The prosecutor was aware of the fact that when he instituted prosecution and remanded the plaintiff in custody, by so doing, the plaintiff would in all probability have had his freedom violated and his dignity negatively affected. The 2nd Defendant's action falls well in the description of *animus injuriandi*. In any event no evidence was tendered to either justify 2nd defendant's actions or to counter the evidence placed before court.

[36] The plaintiff testified that as a result of the arrest, detention and charges being laid against him, he lost his job where he earned E2000 per month as Combi Association Office Manager or Marshall. He sued defendants for impairment to his dignity, emotional shock and trauma, among others.

Unlawful detention

[37] The unlawful detention of the Plaintiff by the 1st Defendant lasted for 24 hrs. It is Plaintiff's evidence that he was arrest on the 16th July 2015 and brought before Court on the 17th July 2015. Therefore, Plaintiff was detained unlawfully by the 1st Defendant for approximately 24 hrs. That is the period for which 1st Defendant is liable for the unlawful incarceration of the Plaintiff. Plaintiff's detention for the rest of the 27 months was not at the behest of the police, but was authorized by the magistrate before whom the Prosecutor applied each time for further detention. The prosecution on its

own cannot commit a person to custody. It applies to the court for detention. The court on its part assesses the request and circumstances before granting the order for detention. The court is not obliged to grant a detention order, it can refuse and order the release of a suspect if it deems it fit in exercise of a judicial discretion. The court or the magistrate is not a party to this claim or proceedings.

[38] In conclusion the court makes a finding that -

(1) The claim for unlawful arrest and detention (in police custody) against the 1st defendant succeeds.

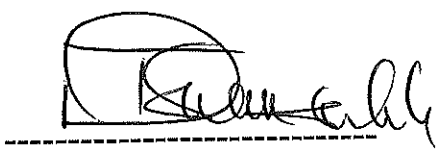
(2) The claim for malicious prosecution against the 2nd defendant succeeds.

[39] The court makes the following order -

(1) Order for costs against 1st and 2nd defendants, jointly and severally, one paying the other absolved.

Quantum of damages.

[40] The parties are afforded opportunity to negotiate and reach agreement on the quantum of damages, within 30 days from the date of delivery of this judgment. Failing agreement, the Plaintiff or Defendants may set the matter down for decision of this court on the quantum.



D Tshabalala
Judge

For the Plaintiff: Mr Lucas Dlamini (Lucas BKS Dlamini Attorneys)

For the Defendants: NG Dlamini (Attorney General's Chambers)