

IN THE HIGH COURT OF SWAZILAND

CIVIL APPEAL NO.21/96

In the matter between:

JETHRO MALINGA : APPELLANT

VS

THE COMMISSIONER OF POLICE : 1ST RESPONDENT

SERGEANT MOSES DLAMINI : 2ND RESPONDENT

ATTORNEY GENERAL : 3RD RESPONDENT

CORAM

: STEYN J.A.

: SCHREINER J.A.

: TEBBUTT J.A.

FOR 1ST, 2ND & 3RD RESPONDENTS

: NO APPEARANCE

FOR THE PLAINTIFF : MR. SIGWANE

JUDGMENT

Appellant (plaintiff in the Count a quo) in this matter instituted an action for damages against the above named three Respondents or Defendants as they were in the Court a quo and as I shall refer to them herein.

In the particulars of claim Plaintiff makes the following allegations:

5.

On or about the 10th day of August, 1994 at Lobamba area Plaintiff was arrested without a warrant by 2nd Defendant and charged with the non-bailable offence of murder. 2nd Defendant was

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acting within the course and scope of his employment as a police officer.

6.

Thereafter Plaintiff was detained at Lobamba Police Station and was subsequently remanded in custody at Sidwashini Prison for a period of nine months and twenty-six days, whereupon he was released on the 6th day of June, 1995 after the charge against him was withdrawn.

7.

As a result of the foregoing, Plaintiff suffered loss or damages in the amount of E443 571.42 (Four hundred and forty three thousand five hundred and seventy one Emalangeneni and forty two cents) made up as follows:-

7.1 loss of income E 15,000.00

7.2 loss of freedom, loss of dignity and personal liberty E428,571.42

8.

Proper notice of the proceedings was given to Defendant in terms of the Police Act. A copy of the notice is annexed as annexure "A".

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WHEREFORE Plaintiff claims:

1. Payment of the sum of E443,571.42
2. Interest thereon at the rate of 9% per annum at tempore morae.
3. Costs of suit.
4. Further and/or alternative relief.

None of the Defendants gave notice of an intention to defend or took any steps to contest the action.

The matter was then set down for default judgment in terms of Rule of Court 31. In view of the fact that the claim was for the payment of unliquidated damages, evidence was led in order to enable the Court a quo to determine the quantum of the damages sustained by the Appellant.

I will deal later with the evidence led in this regard. The question of damages did not, however, engage the consideration of the High Court at the hearing. The learned Judge (Matsebula J) dismissed Appellant's action on two grounds. These were that he had failed to prove "that the persons cited are the proper Defendants" and "that the arrest and detention was unlawful."

The reasoning which sustained this decision is reflected in at pages 30-31 of the record and reads as follows:

"I now turn to the merits of the Plaintiff's claim. The arrest with or without a warrant is

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irrelevant In this case in view of the contents. of exhibit 'B' whose contents clearly indicate that there were allegations that Plaintiff had assaulted the complainant and had been charged with attempted murder and when complainant died the charge became one of murder - a non-bailable crime.

The fact that the charge against Plaintiff is subsequently withdrawn has nothing to do with 1st and 2nd' Defendants that is the Commissioner of Police and the Sergeant. In fact to this extent they have been wrongly cited. After Plaintiff was transferred to the Sidwashini Prison he was removed from the care and custody of 1st and 2nd Defendants and was under the jurisdiction of the Director of Public Prosecutions who subsequently decided after the detention of the Plaintiff for the nine (9) months 26 days to withdraw the Charge.

Had Plaintiff issued summons against 1st and 2nd Defendants for the seven days he was in their custody at the Lobamba Police cells that would be a whole lot different matter.

However, that is not the case here.

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The cases Mr. Sigwane referred the court to are irrelevant for the purpose of this judgment. That is MABONA AND ANOTHER VS MINISTER OF LAW AND ORDER AND OTHERS 1988(11) SA @654-655 this' deals inter alia with arrest without a warrant and reasonable suspicion in effecting such arrest. As I have already pointed out exhibit 'B' disposes of the reasonable suspicion and unlawful arrest.

The second case of Mr. Sigwane referred the court to is that of RAMAKULUKASHA VS COMMANDER VENDA NATIONAL FORCE which deals with the procedure followed in effecting arrest without a warrant, wrongful arrest, and detention and malicious prosecution.

The onus in these matters is always on the Plaintiff to prove on a balance of probabilities that the persons cited are the proper Defendants and also to prove that the arrest and detention was unlawful.

This, the Plaintiff has failed to prove and the court dismisses the action. As there were no representatives on behalf of the 1st, 2nd and 3rd Defendants the court makes no order as to costs."

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I should explain that exhibit 'B' referred to by the learned Judge, is a copy of a newspaper article handed in by the Plaintiff as evidence of the fact that he had been publicly identified as the accused in a murder case involving the stabbing to death of one Khombisile Dlamini. It was introduced as evidence contributing to the nature and extent of the injuria sustained by Plaintiff pursuant to his arrest and detention.

It is clear from the record of the evidence led and the argument advanced that the only matter in issue was the quantum of the damages sustained by the Plaintiff. Ex facie record, at no stage - either in evidence or in argument - did the learned Judge raise the issues on which he non-suited the Plaintiff.

It was clearly irregular for the Judge to decide the matter on issues which were never raised in the pleadings, in the evidence or in argument. He denied Plaintiff the opportunity of dealing with these concerns. I believe that had he done so he would have been disabused of his views because they are clearly untenable.

It must be borne in mind that the Defendants saw fit not to defend this action. They did not contest their locus standi, neither did they contest their liability for the arrest and detention nor did they contend that such liability was

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vitiated by the fact that Plaintiff could not be granted bail by virtue of the fact that he had been indicted in respect of a non-bailable offence.

In any event, this latter contention is clearly insupportable. It was the fact of his initial arrest, (which on the facts of this case must be presumed to have been unlawful), that set in motion the train of events culminating in the lengthy incarceration of the Appellant.

The evidence in this regard was uncontested. It established that Plaintiff was arrested without a warrant and that he was not informed of the reason for his arrest at the time of his apprehension or initial incarceration. Indeed there can be no doubt that the onus to justify the legality of the arrest rested on the Defendants. No attempt was made to prove that reasonable grounds existed to suspect that Plaintiff had committed the offence in question. There can therefore be no doubt:-

1. That Defendants bore the onus to prove that the arrest without warrant was justified. See BRAND VS MINISTER OF JUSTICE AND ANOTHER 1959(4) @712 and 718(A); MINISTER OF LAW AND ORDER AND OTHERS VS HURLEY AND ANOTHER 1986(3) 568(A) AT 587-589(A) and the judgment of HANNAH C.J. IN THE HIGH COURT OF SWAZILAND IN ZIYANE VS THE ATTORNEY GENERAL N.O. (judgment delivered on 23/11/1990); and

2. that this onus was not discharged.

I have great difficulty in understanding the reasoning of the trial Judge in respect of the identity of the Defendants and whether they were correctly cited. In essence what the Plaintiff did was to identify eo nomine those representatives of the Crown who could be held accountable for the actions of their officers or officials. Clearly the initial arrest was made by a police officer, the judicial process is under the control of the Attorney General and the Commissioner of Prisons is accountable for those detained in prison. More 'especially as they never challenged their accountability and the point taken mero motu by the Court a quo was never aired in evidence or in argument, it was grossly irregular to have dismissed Plaintiff's action on this ground.

The appeal succeeds and judgment is entered for the Plaintiff. The only question left is the quantum of the damages to be awarded. Appellant has asked us not to delay this matter further by sending it back and asked us to quantify the amount of the damages sustained. We proceed to do do. The facts proven are the following:

Plaintiff is 36 years old. He is a married man with children. He worked briefly as an assistant librarian and for some years as what he called a "technical storeman" in the Swaziland Defence

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Force. At the time of his arrest he was together with his mother in the business of buying second-hand clothes in South Africa and selling these locally. He testified that from" this business he was generating an income of "E1,600 a month or more depending on the time." This income he forfeited during the period of his incarceration i.e. 9 months and 26 days. This pecuniary loss is therefore readily ascertainable i.e. the amount claimed of E15,000.00.

His general damages are more difficult to determine. We have had due regard to other cases both in neighbouring countries and in this Kingdom. However, each case must depend on its own facts. During Appellant's detention at the police cells immediately after his arrest, he was incarcerated in reprehensible conditions and circumstances. He was obliged to sleep in a small room, 2x3 meters in extent with a dozen people or more. The blanket he was given was "so worn out that you could see through it,"

There was a small mat on the floor on which he slept. The toilet conditions were, as described by him, a constant affront to his dignity. For the 7 days he was in this cell, he was never allowed to wash or to receive visits from his relatives. He was only taken to Court at the expiry of this 7 day period. The charge against him was withdrawn nearly 10 months later without any explanation. When he was

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released, his wife had disappeared. At the time he testified he was still unaware of her whereabouts.

The newspaper in question never reported the withdrawal of the charge against him. He contended that he has lost considerable status in his community as a result of the cloud that still hangs over his head.

It is our view that an appropriate award in these circumstances as general damages would be the sum of E50,000.00.

Before making this order we should refer to the fact that Counsel conceded that it was customary, and probably advisable, that - in addition to alleging that the arrest was without a warrant - to aver that it was also wrongful and unlawful. He accordingly moved an amendment to include these averments in the particulars of claim. This is in the nature of a formal amendment and we do not consider that any

prejudice would be caused to the Defendants. We therefore, grant the application to amend the Plaintiff's particulars of claim accordingly.

In the result the appeal is upheld. The order dismissing the action is set aside. In place thereof the following order is granted:-

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Defendants are ordered to pay the Plaintiff jointly and severally, the one paying the other to be absolved, the amount of E65,000.00 as damages for wrongful and unlawful arrest and detention and to pay the costs of suit both in this Court and in the Court below.

J.H. STEYN J.A

I agree:

W.H.R. SCHREINER J.A.

I agree:

P.H. TEBBUTT J.A.

Delivered in open Court on this 7th day of October 1996