



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

In the matter between:

Case No. 1180/2000

**SIMON MANDLA YENDE**

Plaintiff

And

**SWAZILAND GOVERNMENT**

1<sup>st</sup> Defendant

**ATTORNEY GENERAL**

2<sup>nd</sup> Defendant

Neutral citation : ***Simon Mandla Yende v Swaziland Government and Another (1180/2000) [2020] SZHC 192 (29<sup>th</sup> September, 2020)***

Coram : **M. Dlamini J**

Heard : **11<sup>th</sup> June, 2020**

Delivered : **29<sup>th</sup> September, 2020**

***Procedure*** : ***Exception - in as much as a litigant can raise a special plea at any time before judgment, he***

*cannot except however, at any time<sup>1</sup> - If he decides to go by way of exception, he must comply with time limits prescribed under Rule 23 [2] - he who alleges must prove, is a cardinal principle of procedure - it is often expressed that the plaintiff or Crown bears the onus of establishing his cause of action or case - most importantly and unless expressly provided otherwise by statutory law, this burden of proof on he who alleges does not shift - it remains fixed throughout the trial [16] - a man who is not sure of his own material evidence such as this, cannot expect the court to make a definitive factual finding on it. [25]*

*: Defendants not obliged to adduce evidence as defence on plaintiff's weak or improbable case. [37]*

**Summary.** The plaintiff's cause of action is based on unlawful arrest and detention following a warrant of arrest issued by the then **Magistrate L. Hlophe**. He demands the sum of E100 000. The defendant deny any liability flowing from a warrant of arrest issued by a competent court of law.

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<sup>1</sup> See *Special Investigating Unit v Nada Sen* (5/2001)[2001]ZASCA 117:[2002] 2All SAA 170  
Where special plea was raised for first time on appeal.

### **The Parties**

- [1] The plaintiff (**Mr. Yende**) is described as an adult male police officer stationed in Matsapha Police College, district of Manzini. The 1<sup>st</sup> defendant is the Government of the Kingdom of Eswatini (the Government). The 2<sup>nd</sup> defendant is the legal representative of the 1<sup>st</sup> defendant.

### **Preliminary issues**

- [2] I must say that on the hearing date the defendants filed an exception raising a constitutional provision to the effect that a judicial officer is immune to law suits. This exception was dismissed on one ground only. In terms of the Rules of this Court, the defendant was time barred from raising an exception. Worse still, was because pleadings had long closed and a pre-trial held. The matter was ripe for trial. The merits of the special plea were not deliberated upon. In as much as a litigant can raise a special plea at any time before judgment, he cannot except however, at any time<sup>2</sup>. If he decides to go by way of exception, he must comply with time limits prescribed under Rule 23.

### **Mr. Yende's claim**

- [3] In his Particulars of Claim, **Mr. Yende** stated that on the 5<sup>th</sup> October, 1999, he was summoned by **Magistrate Lorraine Hlophe** to appear in her court for maintenance enquiry. **Mr. Israel Magagula** was the prosecuting officer. **Mr. Magagula** called him to his office to enquire on whether he was denying paternity. He then stated immediately:

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<sup>2</sup> See *Special Investigating Unit v Nada Sen (5/2001)[2001]ZASCA 117:[2002] 2All SAA 170*  
Where special plea was raised for first time on appeal.

“7. The aforesaid **Mr. Magagula** then prepared a remand warrant committing Plaintiff to jail which warrant was duly signed by **Mrs. Hlophe** at the request of **Mr. Magagula**.

8. As a result of the warrant aforesaid, Plaintiff was arrested by **3389 Constable B. Simelane** who was also acting during and within his scope of his employment as servant of the first Defendant.”<sup>3</sup>

[4] It was **Mr. Yende’s** further allegations that both **Mr. Magagula** and **Magistrate L. Hlophe** acted unlawfully and maliciously in issuing and signing the warrant of arrest which resulted in his detention. He stated that the period of arrest was from the 5<sup>th</sup> October, 1999 to 6<sup>th</sup> October, 1999, i.e. an oversight incarceration.

[5] He tabulated his claim as follows:

“11. As a result of the unlawful arrest and detention, Plaintiff suffered damages amounting to **E100,000.00** made up as follows:

a) Loss of liberty and freedom	E50,000.00
b) Discomfort and Humiliation	E30,000.00
c) General damages	E20,000.00

**Total** **E100,000.00**<sup>4</sup>

<sup>3</sup> Page 3 para 7 & 8 of book of pleadings

<sup>4</sup> Page 4 para 11 of book of pleadings

### **Defendants' plea**

[6] In the Government's plea, it is reflected:

*“7.2 Defendants aver that **Mr. Magagula and Mrs. Hlophe** had a lawful justification to arrest and detain Plaintiff because during the said enquiry when the Court asked the Plaintiff some questions, he remained stubborn and refused to answer.*

*Therefore Plaintiff's refusal to answer questions put forth to him entitled **Mr. Magagula and Mrs. Hlophe** to facilitate his arrest and detention. This is in terms of the Criminal Procedure and Evidence Act No.20 of 1938 (as amended).”<sup>5</sup>*

### **Oral evidence**

[7] In discharging his *onus* of establishing his case, **Mr. Yende** took to the witness box and swore to his evidence. He testified that he has been under the employ of the Government at the Royal Eswatini Police Service since 1994. He was born in 1965. He was not married, although he had nine children. On 5<sup>th</sup> October, 1999, he received summons calling upon him to appear in Manzini Magistrate Court. He complied.

[8] At the Magistrate's court, he spoke to **Mr. Magagula**. It was about a child he was not maintaining. He told him that the reason he was not

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<sup>5</sup> Page 13 para 7.2 of book of pleadings

paying maintenance was because the said child was not his. He was merely helping with maintenance because he was in love with the mother of the child. **Mr. Magagula** left him in his office. During the discussions, the mother of the child was present. She also left the office. He remained behind until some ladies requested him to excuse them. He left to wait outside.

[9] At about 4:00 p.m., a police officer, **Brian Simelane** served him with a detention warrant. In terms of the warrant, he was to be confined for seven days. He read the detention warrant. It was signed by **Magistrate Hlophe**. He was on duty on that day, wearing a jungle blue police uniform. **Brian Simelane** handcuffed him. He walked with him from the court's premises to the police station. They took a route that passed through town.

[10] Upon reaching the police station, they found many junior police officers who were knocking off from work. **Brian Simelane** ordered him to remove his shoes and socks. He detained him. It was further his evidence that he felt very demeaned by walking through town in handcuffs. He was a taxi driver before. His friends congratulated him for finding work as a police officer. He met them as he walked through town. He felt like he was a hard core criminal. His spirit was hurt when officer **Brian Simelane** ordered him to remove his shoes and socks. The cell he was detained in had a strong urine odour such that if a detainee was asthmatic, he would not survive. He failed to sleep following that the cell had been converted from a cold room.

[11] At about 10:00 p.m., the Station Commander, **Jomo Nhlengethwa** arrived and asked him why he was detained. The Station Commander left and returned shortly. The Station Commander informed him that the Magistrate had told him that the reason he arrested him was because he was arrogant. The Magistrate requested him to bring him before her the following morning. He was taken to the Magistrate Court the following morning. He was escorted by a criminal investigation officer. He walked through town. He was without shoes even by that time.

[12] The Magistrate asked him why he was failing to maintain the child. He explained to her that the child was for his lover. The Magistrate asked him how he could prove that the child was not his. He gave her a telephone number belonging to the child's grandmother. The Magistrate called and the child's grandmother responded. She confirmed his version. The Magistrate then released him, saying he would call him again. She never did. He walked back to the police station bare footed. He had to collect his belt and shoes.

[13] **Mr. Yende** asked that the court should grant him a sum more than demanded in his summons because of effluxion of time. He had previously appeared before the Magistrate as he was facing a culpable homicide charge.

[14] **Mr. Yende** was subjected to a lengthy cross-examination. At its end, **Mr. Yende** closed his case.

## **Determination**

### **Issue**

- [15] Has the plaintiff established his cause of action? Has he discharged his *onus* of proof?

### **Principles on *onus* of proof**

- [16] He who alleges must prove, is a cardinal principle of procedure. It is often expressed that the plaintiff or Crown bears the *onus* of establishing his cause of action or case. In civil matters, the proof must be on preponderance of probabilities while in criminal matters, beyond reasonable and never shadow of doubt. Most importantly and unless expressly provided otherwise by statutory law, this burden of proof on he who alleges does not shift. It remains fixed throughout the trial.

- [17] The **Corpus Juris (22. 3. 10)**, expresses in this regard:

*“Onus is on the person who alleges something and not on his opponent who denies it.”*

### **Case in casu**

- [18] In terms of the combined summons, **Mr. Yende** alleged that both the Prosecuting Officer and the Magistrate were malicious. The question is did **Mr. Yende** establish malice on the part of the two officers?

### **Evidence against prosecuting officer, Mr. Israel Magagula**

- [19] In testifying against **Mr. Magagula**, **Mr. Yende** stated:



*“I went there (Magistrate Court). I stayed for a while and was attended by a prosecutor. I spoke or had deliberations but did not reach conclusion. I spoke to him about a child whom the mother said I did not maintain her. The mother was also present.”*

[20] He proceeded later:

*“I was not paying maintenance as I told prosecutor that the child was not mine.”*

[21] Before this evidence he had testified immediately after testifying that he did not reach any conclusion with the prosecutor:

*“At about 10:00 a.m., the prosecutor left me in the office.”*

[22] In his evidence, he continued to narrate that he left the prosecutor’s office after some ladies asked him to leave. No further evidence was adduced against the prosecutor despite that his particulars of claim reflects that the prosecutor filled up a warrant of detention. This piece of evidence was not adduced. In fact, under cross-examination, he testified that the arresting officer came to him carrying a warrant of arrest already signed.

[23] The question is, where is the evidence of malice against the prosecuting officer? The answer is obvious to all and sundry. There is not an iota of such evidence. His case stands to be dismissed for

want of evidence therefore with regard to the prosecuting officer, **Mr. Israel Magagula**.

**Evidence against Magistrate Lorraine Hlophe**

[24] The first piece of evidence coming from **Mr. Yende** against the Magistrate in chief was:

*“The warrant was signed by Magistrate **Hlophe**, if I am not mistaken.”*

[25] The portion of his evidence *“if I am not mistaken”* said especially in the absence of the warrant of arrest was damning on his duty to discharge his *onus*. How can a litigant make a demand based on a warrant of arrest saying it was issued unlawfully and with malice by the signatory testify that *“if I am not mistaken”* on the identity of the signatory thereto? The answer is privy to **Mr. Yende**. In the eyes of the court, his evidence has no weight for it to be put on the scales of justice. In other words, a man who is not sure of his own material evidence such as this, cannot expect the court to make a definitive factual finding on it.

[26] Again, no evidence of malice was adduced on the part of the Magistrate. The next piece of evidence relating to the Magistrate was that the following day she held an enquiry and verified his allegations by putting the telephone on loud speaker. She released him immediately thereafter. This evidence on the contrary demonstrates clearly that the honourable Magistrate had absolutely no malice at all.

This is so when juxtaposed with the evidence still adduced in chief by **Mr. Yende** to the effect that the warrant of arrest was for his committal for seven days.

[27] Now here is a Magistrate who orders the Station Commander to bring **Mr. Yende** before her the following day despite her warrant committing him for seven days incarceration. When he is arraigned, she quickly deals with his matter and releases him without further ado. Surely, with due respect, the honourable Magistrate went beyond her duties to serve justice in the present matter. To say she was malicious in the circumstances of the case flies at the face of **Mr. Yende**.

[28] I must say that from the evidence serving before me, it is not surprising why **Mr. Yende** failed to adduce an iota of evidence in regard to the duo. It is that as clearly confirmed by him in cross-examination, he was not present when the warrant of arrest was issued. He does not know what transpired in court or what circumstances informed the honourable Magistrate before issuing the warrant of arrest. He cannot even tell who the prosecutor was when the warrant of arrest was issued.

[29] There is further startling testimony protruding from **Mr. Yende's** mouth. It is verbatim as follows:

*“I was very hurt in my spirit for removing shoes and socks and be detained into the cell ‘ngingakagangi kakhulu’, (not having committed a serious crime). (my emphasis)*

[30] So **Mr. Yende** himself acknowledged that he had committed a crime but he considered it not a serious one. Now it is a matter of subjectivity. What is critical is that both in the eyes of **Mr. Yende** and **Magistrate Hlophe**, his conduct was an offence. If then it is common cause that **Mr. Yende** committed an offence on 5<sup>th</sup> October, 1999, in the eyes of the law, that offence deserved censure. There is therefore no justiciable ground for the Honourable Magistrate to be impugned.

[31] There is another aspect of **Mr. Yende** which I am bound to point out. It transpired during cross-examination. The fourth question put to him was as follows:

**Counsel B. Shabalala** : “Had you ever been married?”

**Mr. Yende** : “I cannot recall.”

**Counsel B. Shabalala** : “Are you divorced or separated?”

**Mr. Yende** : “separated.”

[32] Juxtapose the responses with his evidence in chief which was that he had nine children and not married. This is a police officer based at Police College where training of police officers takes place. He told the court that he is not married and under cross-examination changes

his tune. Why? No one can tell except that in law, his demeanor as a witness was wanting.

[33] Another evidence revealing his demeanor is as follows:

**Counsel B. Shabalala** : “What is the name of the child you were said you were not maintaining?”

**Mr. Yende** : “I do not know her.”

[34] At this juncture the court intervened with the hope that he would seize the opportunity and recollect his mind:

**Court** : “You do not know the name of the child?”

**Mr. Yende** : “Yes”.

**Counsel B. Shabalala** : “I put it to you that is not correct as in the book of pleadings at page 10 and paragraph 6 the name of the child is mentioned as **Thandi Gina Yende.**” (my own emphasis)

**Mr. Yende** : “I do not know (meaning, I dispute) *what is written here. This is a fabrication.*”

**Counsel B. Shabalala** : “Are you saying *B. J. Simelane and Associates fabricated this?*”

**Mr. Yende** : “I think it was reported by the *mother of the child.*”

**Counsel B. Shabalala** : “But *B.J. Simelane was your attorney. How could he have received it from the mother of the child?*”

**Mr. Yende** : “I do not know. I think he got it from the *prosecutor’s.*”

[35] Such evidence by **Mr. Yende** cannot be admitted to the scales of justice. It changes every now and then. He turned out to be an unreliable witness at the end of the day. Worse still, his testimony was infested with hearsay evidence. I have already pointed out that his warrant of arrest was not produced in court despite his evidence in chief that he was handed the same by Officer **Brian Simelane** and he read it. Why he decided not to produce such crucial piece of evidence

was not clear. I appreciate that it was not in dispute that a warrant of arrest against him was issued. However, in the face of his evidence saying “*if I am not mistaken*” the warrant was signed by Magistrate **L. Hlophe**, that piece of evidence was material at his own instance.

[36] Further, being not sure who signed the warrant, he ought to have invited Officer **Brian Simelane** to support his version or give evidence on malice following that he was not present when the warrant was issued. He failed to do so. At any rate, he did not testify that the Magistrate or the prosecutor was malicious in his evidence and worse, he did not testify on any circumstances upon which this court can infer the presence of malice.

[37] The totality of the above is that his case was a non-starter. It is not surprising that the defendants decided to close their defence without taking to the witness stand. **F. Kroon J**<sup>6</sup> stated on a similar procedure:

*“It does not follow that an adverse inference should be drawn against a party who fails to testify or call evidence in refutation of a weak or improvable case against him.”*

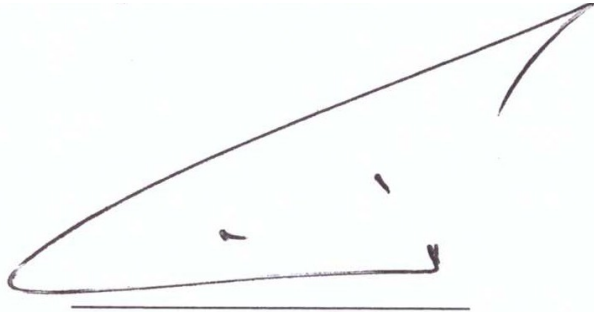
[38] In the final analysis, I enter the following orders:

38.1. The plaintiff’s cause of action is dismissed;

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<sup>6</sup> **Twain & Others v Premier for the Province of Eastern Cape and Others (460/99)**  
[2008] ZAECHC (1969) 1 October 2008

38.2. The plaintiff is ordered to pay costs of suit.

A handwritten signature in black ink, appearing to be 'M. Dlamini J', written over a horizontal line. The signature is stylized and somewhat abstract, with a large loop on the left side and a sharp point on the right.

**M. DLAMINI J**

For Plaintiff : **B. J. Simelane of Ben J. Simelane & Associates**

For Defendant : **B. Shabalala of the Attorney General**