IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO, 1276/04

In the matter between :

KHAYA FANA TSABEDZE PLAINTIFF

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS 1st DEFENDANT

THE COMMISSIONER OF POLICE 2nd DEFENDANT

THE ATTORNEY GENERAL 3rd DEFENDANT

CORAM SHABANGU AJ

FOR PLAINTIFF MR. S.C. SIMELANE

FOR DEFENDANT MR. S. MASEKO

27th August, 2004

In this action the plaintiff has instituted an action in which he claims damages as detailed in his particulars of claim, which damages allegedly arise from the alleged arrest, detention and malicious prosecution by the Defendants. The arrest which was without warrant and is alleged to have occurred on the 8th December, 2001 is admitted by the defendant. It is further admitted that the aforementioned arrest was followed by a subsequent detention of the plaintiff who was kept in custody until 30th September, 2003 when the defendants' withdrew the charges against the said plaintiff on the basis of section 6 of the Criminal Procedure and Evidence Act 67/1938. It is therefore common cause that the plaintiff was arrested and kept in custody for almost two years and that the

Defendants did not proceed with the scheduled trial on 30th September, 2003 but instead withdrew the robbery charges. In paragraph nine of the particulars of claim the plaintiff further alleges that "there was no reasonable basis upon which the Plaintiff could be suspected of having committed the offence for which he was arrested." At paragraph ten the plaintiff's particulars of claim conclude as follows;

"The prosecution of the Plaintiff by the First Defendant was malicious and or wrongful in that there was no evidence on the basis of which the charge of which the Plaintiff had been indicted, could be sustained. In fact, the Plaintiff was never in jeopardy of being convicted. "
The defendant in its plea has responded to paragraph five of the particulars of claim by simple stating that "the contents of this paragraph are not denied. The defendants state that the arrest was effected within the ambit of section 22 of the Criminal Procedure and Evidence Act (as ammended) 1938." To paragraphs nine and ten the defendant after denying the contents of those paragraphs and stating that the plaintiff is put to strict proof thereof plead as follows;
"6... The defendants state that the arrest and detention of the plaintiff was lawful for the plaintiff was arrested on reasonable suspicion that he had committed a crime of robbery."

Then at paragraph seven of the plea the defendant states;

"7... The defendants state that the prosecution withdrew charges before plaintiff was called to plead so there is no question of malicious and unlawful prosecution."

The Plaintiff has excepted to the Defendant's plea and the exception is formulated in the following terms. The complaint is that "the plea does not disclose a defence, alternatively, that the plea lacks necessary averments to sustain a defence in that;

1. The defendant's state that the arrest and detention was lawful as the Plaintiff was arrested on the reasonable suspicion that he had committed the crime of robbery.

1.1 The Defendants however, do not state the facts upon which the [suspicion] was founded, i.e. whether the Plaintiff was positively identified as the person who committed the robbery. Such allegations are necessary for a litigant to establish a defence to the Plaintiff's action.

1.2

2. The Defendants state that the Plaintiff was never prosecuted as the charges were withdrawn before the Plaintiff was called upon to plead.

2.1 Such allegations do not establish a defence to the Plaintiff's action and are untenable at law since the prosecution commences upon the accused person being charged with the offence and ends either upon or such Judgement being passed on the matter or such earlier event i.e. withdrawal of the charge. The trial is only part of the process of prosecution.

2.2 In casu the Plaintiff was charged at the Magistrates court, remanded in custody on various occasions, committed for trial in the High Court, indicted for the offence of robbery, underwent a pre-trial conference and actually attended court on the day of the trial where upon the charges were withdrawn. It cannot therefore be said that the plaintiff was never prosecuted for the offence of robbery."

If one were to summarise and paraphrase the matters raised by the exception the matters so raised may be stated as follows, namely whether it is necessary for a defendant who pleads that an arrest and a subsequent detention of the plaintiff was because the defendants' had reasonable suspicion that the plaintiff had committed an offence mentioned in Part II of the First Schedule, to make factual allegations which if proved at the trial the conclusion that the defendants' had reasonable grounds for the suspicion, would follow. The defendants' plea does not make any factual allegations which allegations would if proved at the trial justify the conclusion that the defendants had a reasonable suspicion or reasonable grounds for the suspicion by the defendants. Paragraph 3 of the plea as already observed simple states that "the arrest was effected within the ambit of section 22 of the Criminal Procedure and Evidence Act, 1938. This is not a pleading. Whether the arrested was indeed effected within the ambit of section 22 of the Criminal Procedure and Evidence Act 67 of 1938, is a matter of law which the court will have to determine having regard to the factual circumstances revealed by the evidence at the trial or as revealed in the plea. It is the factual circumstances which the defendant must plead. The defendant must make allegations of facts which would bring

the defendants' conduct within section 22 of the Criminal Procedure and Evidence Act of 1938.

Similarly in my opinion to merely state as the defendants have done in paragraph six of their plea that " plaintiff was arrested on reasonable suspicion that he had committed a crime of robbery," is merely to state a legal proposition. What is required of the defendant is to allege facts which if proved at the trial can lead the court to conclude that there were reasonable grounds for suspecting the plaintiff of having committed the crime of robbery. What the defendant has done is simple to state its view about the reasonableness of the suspicion, even though it is for the court to determine that question. To require the defendant to plead the facts or grounds upon which the reasonable suspicion was based is not to require the defendant to plead the evidence. To allege, for example that plaintiff was found in possession of items a, b and c which items are also alleged to have been taken from the robbery would be to plead the appropriate facto, probanda to justify the arrest. Whether in fact being found

with the items would legitimately justify a reasonable suspicion that the person found with the items (i.e. plaintiff) had committed the robbery is a matter which the plaintiff would be able to assess on the pleadings and understand fully the case he has to meet at the trial. Having regard to this therefore the complaint raised by the exception that "the defendants...do not state the fats upon which the [suspicion] was founded" is well founded. On this latter point even though I have not been referred to case law in support thereof and I have not been able to find any case law authority which is directly in point I am of the view that the complaint raised by the exception is well founded. In the premises the point raised in paragraph 1.1 of the exception is upheld.

I turn now to the aspect of the exception raised and as formulated in paragraph 2 of the plaintiff's exception to the defendants' plea. This aspect of the exception relates to the allegation in paragraph seven of the defendants' plea that "the prosecution withdrew charges before the plaintiff was called upon to plead". After making this factual allegation the defendant continues to draw the conclusion that there can be no case for malicious and unlawful prosecution therefore. In other words the defendants' case

5

appears to be that because the charges were withdrawn before the plaintiff was called upon to plead it cannot be said that there was a prosecution of the plaintiff in fact and that since there was no prosecution the wrong of malicious prosecution was not committed. On the other hand it was argued on behalf of the plaintiff that it does not matter and therefore it is no defence to the claim that the plaintiff was not called upon to plead. In other words the plaintiff disputes, as a matter of law, the legal conclusion which the defendant seeks to draw from the fact that the charges were withdrawn before the plaintiff was required to plead. (See ISAACS, BECKS THEORY AND PRINCIPLES OF PLEADING IN CIVIL ACTIONS 5th EDITION 1982 at paragraph 62 page 125). The exception raises a question of law as to whether in a claim of malicious prosecution it is necessary that the plaintiff must have pleaded to a criminal charge before such a claim could lie. Rule 23 of the rules of this court defines the circumstances when it would be competent for a party to except to a pleading. Subrule (1) of that rule reads;
"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6 (14)... "

The subrule three of the aforementioned rule makes it a requirement that the grounds upon which the exception is founded shall be clearly and concisely stated. A reading of the said subrule 1 of rule 23 may seem to suggest that the excipient who complains that the pleading does not disclose a cause of action or defence must clearly and concisely state what essential averment is lacking in the pleading, thus rendering same to be excipiable. This is the usual method by which an exception is taken to a pleading. However as ISAACS supra observes at paragraph 62,

"The modern exception being thus restricted to pure matters of law it is of the essence of a valid exception that no new facts should be raised at all, no any facts disputed. The excipient, for the purposes of the exception is bound by the pleading to which he excepts and is taken to admit those facts. This admission is, however, purely for the purpose of the exception and for nothing more... An exception being thus understood to be a legal objection which admits the correctness of the facts averred but urges that, the truth thereof notwithstanding, those facts do not in law establish any sufficient case either of claim or defence as the case may be,..."

6

From the above quoted passage that even though the rales limit the circumstances under which exceptions can be taken to pleadings, the exception taken in the present matter is not outside the scope of those limits.

I now turn to the question of law raised by the exception, namely whether the fact that the plaintiff did not reach a stage in the proceedings whereby he was called upon to plead to the robbery charge, would be a defence to the plaintiff's claim. The wrong of malicious prosecution sometimes also known

as malicious procedure does not require that the plaintiff must have been called upon to plead in order for the wrong to have been committed. In fact even the plaintiff has not averred that the criminal proceedings which the defendants's instituted against him had reached a stage where he was called upon to plead. No authority either at the level of case law or principle was cited to me in support of the proposition that a plaintiff who sues for damages arising from malicious prosecution or procedure must have been required to plead to a criminal charge in order to succeed in his claim. In fact whether he has been required to plead or not is irrelevant to the case, that is, to any cause of action or defence that might be raised. The essential elements of the cause of action based on malicious prosecution appear to be these (a) that the defendant set the law in motion (b) that the defendant acted maliciously (c) that the defendant acted without reasonable and probable cause and (d) the criminal proceedings must have been instituted upon a charge which is false in fact. ISAACS, BECKS THEORY AND PRINCIPLES OF PLEADING IN CIVIL ACTIONS paragraph 120 and the cases cited there. (See also HARMS L.T.C. AMLER'S PRECEDENTS' OF PLEADINGS, 3RD edition. P. 197) In light of this there is a possibility that the plaintiff's particulars claim themselves do not disclose a cause of action for malicious prosecution. That the plaintiff's particulars of claim may not disclose a cause of action is arguable but I make no finding on whether indeed no cause of action for malicious prosecution is disclosed. In any event no exception has been taken by the defendants that no cause of action is disclosed in the particulars of claim. It is the label in paragraph eleven of the particulars of claim which informs the defendants that the plaintiff intends to claim for inter alia, malicious prosecution. That is not to say that the label in itself sufficiently informs the defendants of the case against them. Whether a case for malicious prosecution is correctly and sufficiently made depends on the allegations of

fact made in the body of the particulars of claim and not on the label. Inspite of these the objection raised in paragraph two of the exception is also upheld.

The whole exception is therefore upheld with costs. The defendants are given twenty-one days within which to ammend their plea, if they are so advised.

ALEX'S. SHABANGU

ACTING JUDGE