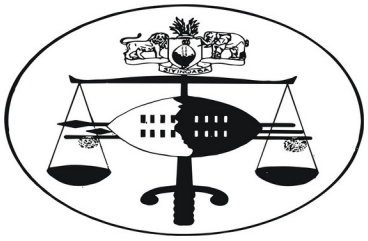

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 951/07

In the matter between

DINGANI MAZIBUKO	**1st Plaintiff**
ROLAND RUDD	**2nd Plaintiff**
ALEX LANGWENYA	**3rd Plaintiff**

and

THE COMMISSIONER OF POLICE	**1st Defendant**
DIRECTOR OF PUBLIC PROSECUTIONS	**2nd Defendant**
ATTORNEY GENERAL	**3rd Defendant**

Neutral Citation: *Dingani Mazibuko v The Commissioner of Police* (951/07) [2012] SZHC 07 (20 January 2012)

Coram: **Mamba J**

Heard:

Delivered: **20 January 2012**

[1] This is a claim for damages arising from unlawful assault, arrest, detention and malicious prosecution perpetrated on the three plaintiffs by servants or agents of the state herein represented by the defendants. The facts giving rise to this claim are largely and generally common cause; save that there are fundamental disagreements or divergences on matters of factual detail and legal conclusions thereon.

[2] On 13th August, 2003 a mass demonstration or march took place in Mbabane. It was organised in the main by Labour Unions and their allied civic organisations. It would appear that a similar demonstration also took place in Manzini on the same day. The evidence establishes though that such demonstration did take place in Manzini on the next day; ie 14th August 2003. The third plaintiff, Mr Alex Somopho Langwenya participated in that march and was arrested at the Matsapha weighbridge on his way to the Convention Centre in Ezulwini where another demonstration had been planned to take place. That venue was chosen as a target because a Smart Partnership Conference or Dialogue was taking place there.

[3] All the plaintiffs have stated in their particulars of claim that on 13th August 2003 they were "arrested by members of the Royal Swaziland Police … without a warrant [and] were subjected to painful and inhuman exercises and further beaten all over their bodies [with] batons, fists and firearm butts

[and] were never taken to a doctor despite the fact that they sustained severe injuries all over their bodies." It is alleged further that the arrest, assault and detention were unlawful. The plaintiffs allege further that they were subsequent to their arrest, charged "with the unlawful possession of four (4) petrol bombs, incendiary material; contravening section 10 (1) read with section 10 (2) of the Police and Public Order Act Number 17 of 1963, contravening section 9 (10) of the Safety and Explosives Act Number 4 of 1961 and Malicious damage of Property." These charges and the prosecution that followed, plaintiffs allege, were malicious. The plaintiffs also charge that they were publicly humiliated by the Police during their arrest and also insulted in public and for all these unlawful acts by the defendants, they claim the various amounts stated by each of them in their respective claims.

[4] It has to be noted from the outset and this is indeed common ground, that despite the above averments by the plaintiff's (a) the 3rd plaintiff, Mr Alex Langwenya was arrested at Matsapha on 14th August 2003 and not 13th August 2003 and (b) Only Mr Roland Rudd, the 2nd plaintiff was charged and prosecuted for the crime of malicious damage to property. He was convicted of this charge too.

[5] At the start of the hearing, both Counsel were in agreement that in view of the fact that it was conceded by the defendants that the arrests of the plaintiffs were effected without a warrant of arrest, the defendants shouldered the onus to prove or establish that each such arrest was lawful or legally justifiable or excusable. Because of this conclusion, counsel further agreed that the defendants should open their case first and lead their evidence which they did and this was the evidence led by the defendants. (In all, nine witnesses were led; all police officers, one of whom acted as the Public Prosecutor at the relevant time). Recently, in **PRINCE KHUMALO v TERENCE EVEZARD REILLEY N.O. & 3 OTHERS**, Civil case No.244/07, unreported judgement delivered on 28th April 2011, I had occasion to say

> "I should point out from the outset that where the act complained of (injuria) involves an interference, very often physical interference with the plaintiff's property or bodily integrity, such as an assault, arrest and false attachment of property, once the plaintiff establishes such interference, the defendant bears the onus or burden of proving that the interference, in this case the assault, was lawful or excusable. See MAKHOSAZANA DLAMINI v RADIO SHOP Civ Case 3118/05, judgment of this court delivered on 28 April 2011, MINISTER OF LAW AND ORDER v HURLEY, 1986(3) SA 568 (A) MABASO v FELIX, 1981 (3) SA 865(A). The plaintiff need not of course prove that the defendant knew that his actions are unlawful. Vide MINISTER OF FINANCE v EBN TRADING (PTY) LTD 1998(2) SA 319(N) at 329 and MINISTER OF JUSTICE v HOFMEYER 1993(3) SA 131(A) at 157. In the present case, the plaintiff has clearly proven that he was on the day in question shot and wounded by servants of the defendants. The

> defendants admit this fact and have pleaded that it was lawful or justified in the circumstances."

Vide also **MFANAFUTHI MABUZA v THE COMMISSIONER OF POLICE & TWO OTHERS, Civil Appeal Case Number 11/2004 at 2-3 of the typed judgement, BRAND v MINISTER OF JUSTICE AND ANOTHER, 1959 (4) SA 712 (A) at 714 E-H.**

[6] The first defence witness, 3565 Detective Constable Masuku testified that on 13 August 2003 he was one of a number of Police Officers who were deployed in Mbabane City to keep an eye on the marchers and demonstrators around the old bus rank. He stated that he saw the second plaintiff, Mr Rudd, pick up stones and throw them at motor vehicles that were driving about and had stopped at a robot controlled intersection. One of such stones hit and damaged motor vehicle with registration number SD 435 RM, a blue Mercedes Benz owned and driven by Mr Douglas Ntiwane.

[7] Immediately Masuku and his colleagues advanced towards Mr Rudd who ran away westwards towards the SASCO building. After a brief chase he was caught. He resisted being arrested. He was assaulted with batons on his forearm and legs. He was eventually overpowered or subdued and had his hands handcuffed on his back. He was taken to the Mbabane Police Station and there charged with the crime of malicious damage to property,

in respect of Mr Ntiwane's car. He was subsequently detained at the Mbabane Police.

[8] Later that day, Police officers doing their patrol in the city came across a motor vehicle, SD 995 OG a blue Toyota Hilux. This motor vehicle was found parked near the SASCO building. It is common cause that this motor vehicle belong to Mr Dingane Mazibuko, the first plaintiff herein. On being searched, the following items were found in the vehicle, namely:

(a) Two (2) five litre plastic containers of which one that was blue and white in colour was half full with petrol and the other one was empty.

(b) Four (4) 750ml Hansa beer bottles of which 3 were 75% full of petrol and the other half empty. A cloth was submerged in the petrol in each bottle and candle wax was used as a stopper.

(c) Five (5) candles of which two had been partially used.

DW4, 2864 M. Masango referred to the bottled material as Molotov cocktail or petrol bombs. Mr Masango further told the court that petrol was an incendiary material and classified as such under the Police and Public Order Act of 1963. These items and the motor vehicle were taken by the Police to the Police Station.

[9] It is common cause that finger prints belonging to Mr Rudd and Mr Mazibuko were lifted from the Motor vehicle in question. They each

accepted this fact and told the police and the court that they had been the occupants of the motor vehicle that day and Mr Mazibuko had parked it where it was found by the police earlier that day. Both Mr Rudd and Mr Mazibuko denied knowledge of all the items found in the motor vehicle save for the two five litre containers. All the items referred to herein were found under a canvas (sail) that covered the bakkie.

[10] It is common ground further that when the motor vehicle was found and examined by the police, Mr Mazibuko was not on the scene. He came to the police station later that evening to report that his motor vehicle had gone missing from the spot where he had parked it and he did not know who had taken it away. He was interrogated by the police about what had been found in his motor vehicle. He explained to them and in court that the two five litre containers and petrol were his. He denied knowledge of the rest of the items found in the vehicle. He explained that whilst in Mbabane in the morning that day, he had received a request for help from one of his friends, a Mr Mabuza who was in Siphocosini that his motor vehicle had run out of petrol. Mr Mazibuko had thus gone to T and E garage where he got the two containers and purchased the petrol to take to Mr Mabuza. But whilst near Mbabane Central School, Mr Mazibuko was informed by Mr Mabuza, telephonically I assume, that Mr Mabuza's problem had been overcome or solved and he need not travel to Siphocosini. Mr Mazibuko

decided to proceed to the city where the march was taking place. Just before getting into the city, near Cooper Motors, he was joined in his motor vehicle by Mr Rudd who was well known to him and was also going for the march in town. He then parked his vehicle near the SASCO Building. This was in the morning.

[11] At around 3pm, the situation in town became tense as the police started assaulting the demonstrators. This caused Mr Mazibuko to retreat to the relative calm of the Plaza Restaurant nearby. He left the restaurant at about 6 pm only to find his motor vehicle missing from the spot where he had parked it. He reported this to the Police at the Mbabane Police Station. He was interrogated, assaulted and insulted by the Police and detained at the Police Station. He said he was accused of inter alia bombing Police structures. The following day, together with Rudd, he was driven in a Police motor vehicle to his house at Mhlambanyatsi and armed police conducted a search there. Nothing was found. He was in leg irons and his family witnessed this in his house. He was caused to appear in court the next day and was joined by the rest of the plaintiffs herein and a certain Mr Ncongwane, who does not feature in these proceedings. The plaintiff's application for bail was refused on their first appearance on the basis that the matter was still under investigation or that such investigation was incomplete.

[12] According to the evidence of Pw9, Cecilia Ndlovu, the plaintiffs were initially charged with the offence of manufacturing bombs and malicious damage to property. Only Mr Rudd featured on the latter count. She later amended the charge to one of contravening section 10 of the Police and Public Order Act 17 of 1963. After further studying the docket, she decided to drop or withdraw the charges against the 3rd plaintiff. She said she took this decision in mid 2004 and before a plea was taken. The other two plaintiffs were acquitted and discharged on the 1st count at the close of the case for the crown. Mr Rudd was however, eventually convicted of malicious damage to property.

[13] Based on the above events and circumstances, the plaintiffs have each claimed that their assault, arrest and detention were unlawful and their prosecution malicious. For these transgressions by the defendants, they argue, they deserve to be compensated and they have each tabulated their individual claims herein.

[14] The defendants have denied any wrongdoing and whilst admitting arresting each plaintiff without a warrant, they claim such arrests were nonetheless lawful and excusable in law and the ensuing prosecution not malicious. Although not specifically pleaded in this action, the origin or basis of this

contention is section 22 of the Criminal Procedure and Evidence Act 67 of 1938 which provides that:

> "Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person –
>
> (a) Who commits any offence in his presence;
>
> (b) Whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part II of the First Schedule;
>
> (c) Whom he finds attempting to commit an offence, or clearly manifesting an intention to do so."

[15] The unchallenged evidence before me is that Mr Rudd was arrested after he had been seen by the Police officers committing an act of malicious damage to property. His situation is therefore clearly covered by subsection (a) of section 22 of the Criminal Procedure and Evidence Act quoted above. He committed a crime in the presence of the arresting officer. His arrest and detention in the circumstances cannot be said to have been unlawful simply because there was no warrant sanctioning it. Similarly, his prosecution on this charge cannot be said to have been malicious. There was clear and direct evidence that he had damaged Mr Ntiwane's motor vehicle. He was tried and convicted of this crime. That conviction stands. Such conviction is in law, a bar to a successful claim based on malicious prosecution. See in this regard the remarks by **EKSTEEN J in THOMPSON AND ANOTHER v MINISTER OF POLICE AND ANOTHER, 1971 (1) SA 371 (E) at 375** that

> "In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudged by the civil action. …The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney General has declined to prosecute."

Vide also **RUDOLPH AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER, (2009) 3 ALL SA 323 (SCA) at 327f-h, RUSSEL BREWT DE BEER v MINISTER OF SAFETY AND SECURITY case no. 356/09 (SCA) (unreported) judgment delivered on 03 September 2010, ANDERSON LUMKILE MANDELA v SENDRICK SIMON AMSTERDAM (EC High Court) case CA 102/2010 (unreported judgment delivered on 23rd August 2010)**

[16] I shall return to the prosecution of all three appellants later in the judgement in relation to the first count which was either under the Police and Public Order Act 17 of 1963 or the Safety and Explosives Act 4 of 1961.

[17] The arrest of Mr Langwenya, the third plaintiff, falls on a different plane. He was arrested at Matsapha on 14th August 2003 and charged with an offence allegedly committed in Mbabane on 13 August 2003. On the face of it, this does not appear to have any sinister connotation, as it is possible that Mr Langwenya could have been in Mbabane on 13th August, 2003 as indeed he was. However, there was not an iota of evidence in this direction suggesting his involvement in the commission of the offence. The crown prosecutor was compelled to withdraw the charge against him simply because there was no evidence at all implicating him with the charge.

[18] Mr Langwenya stated that after his arrest he was assaulted and taken to Lobamba Police Station where he was again interrogated, physically assaulted and insulted. He was accused of causing a disturbance by being involved in the demonstration whilst the country was hosting the Smart Partnership dialogue. He was further accused of conspiring with the other two plaintiffs in making or manufacturing a bomb. From Lobamba Police Station, he was transferred to Mbabane Police Station where again, the interrogation, assault and insults continued. He was caused to appear in court on the next day wherein his application for bail was turned down. He spent about four (4) weeks in jail before he was released on bail. The charge against him was eventually dropped by the crown. This was in 2005, he said.

[19] The defendants have led no evidence whatsoever to say why Mr. Langwenya was arrested, detained and prosecuted. I am mindful of his evidence that he was acquitted and discharged – obviously after having pleaded – and the contrary evidence by the prosecutor that the charge was withdrawn before he pleaded. I find it neither necessary nor strictly relevant to ascertain which version is the correct one in this instance. The deciding factor in this equation is the fact that the criminal proceedings terminated in his favour – by either an acquittal or a withdrawal of the charge by the crown. That the charge was eventually withdrawn, does not, in my judgement detract from the fact that Mr Langwenya was indeed prosecuted.

[20] From the above analysis of the evidence, there is in my judgement, no evidence by the defendants showing that the arrest, detention and prosecution of Mr Langwenya were in law justified. The defendants have failed to discharge the relevant onus in this case. There was no reasonable or probable cause. What the Police did was a clear abuse of power to achieve an ulterior and illegal act.

[21] On the issue of being assaulted by the Police, Mr Langwenya said he was kicked and insulted by the police at the Lobamba and Mbabane Police

Station. This has been denied by the defendants. There is no independent corroborative evidence in this regard, e.g. in the form of a medical report or eye witness. I am, in the circumstances unable to hold that Mr Langwenya has established that he was assaulted by the police in this case.

[22] At the time of his arrest, Mr Langwenya was employed by SD Civils as an artisan or boiler maker. He was single and spent about four weeks in custody before he was released on bail. The charges were dropped against him about two years after his arrest and detention. His arrest and detention constituted a serious invasion of his liberty and integrity. Such intrusion was without any reasonable or probable cause. He was accused of a very serious offence; that of manufacturing or being in possession of bombs.

[23] All the plaintiffs herein abandoned their individual claims for legal costs incurred in defending themselves in the criminal trial. It is my considered judgement that Mr Langwenya be awarded damages as follows and it is so ordered:

(a) E100,000-00 (One hundred thousand Emalangeni) for unlawful arrest and detention or deprivation of liberty and a sum of

(b) E75,000-00 (Seventy five thousand Emalangeni) for malicious prosecution.

[24] Now, dealing with the arrest of the 1st plaintiff, his detention and prosecution. I shall deal with it as it applies to the 2nd plaintiff. They were jointly charged because their finger prints were found or lifted from the motor vehicle which had the offending materials. They admitted their respective association with that motor vehicle. Mr Mazibuko was the owner and driver thereof and Mr Rudd had been a passenger therein that morning. In examining this evidence and the reaction or response by the police in relation thereto, this court is alive to the fact that both plaintiffs denied knowledge of the offending items in the motor vehicle other than the petrol contained in the five litre containers.

[25] According to Masango, the Police officer who examined the contents of the motor vehicle in question, each bottle and its contents constituted a molotov cocktail or petrol bomb. The petrol, he said, was incendiary or inflammable material. He explained that there was no switch that was necessary to be present on an apparatus or device to qualify as an explosive whereas such was necessary for a bomb. A Molotov cocktail or petrol bomb is also known as a gasoline or fire-bomb and is a generic name used for a variety of incendiary weapons. The mechanism is said to be a breakable bottle containing a flammable substance which is the source of ignition such as a cloth or wig held in place by the bottle stopper. (I pause to add here that this information or definition of a Molotov cocktail has been sourced by me

on the internet. Both Counsel were, one would assume, content with the description given by Masango that the four bottles found under the canvas in the motor vehicle in question were Molotov cocktails or petrol bombs. The name or appellation Molotov was given by the Finnish people after the Soviet People's Commissar for Foreign affairs Vyacheslav Molotov claimed during the 1939 winter war that the Soviet army was not bombing the Finns but delivering food baskets to them). Masango was the police front-line man or expert on such matters, he said. It was him who told the police what those items were and the rest of the police acted on his advice and the arrest and detention of the first and second plaintiffs followed.

[26] I have already referred to the provisions of section 22 in paragraph 14 above. This must be read in conjunction with section 9 of the Explosives Act 4 of 1961 which provides as follows:

> "Any person who is found to have in his possession or under his control any explosive under such circumstances as to give rise to a reasonable suspicion that he intended to use such explosive for the purpose of injuring any person or damaging any property shall, unless he satisfies the court that he had no such intention, be guilty of an offence and liable on conviction to the penalties in section (1) (c)"

The penalty referred to above is a term of imprisonment without the option of a fine for a period not exceeding 15 years, where death is not occasioned

by the act or omission. Again, Section 10 (1) of the Public Order Act 17 or 1963 proclaims that :

> "10 (1) Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, in circumstances which raise a reasonable presumption that the firearm, ammunition offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order shall be guilty of an offence and liable on conviction to imprisonment not exceeding five years."

[27] It is noted that the possession that is prohibited or outlawed by the two sections quoted above is that which is "used in a manner or for purposes prejudicial to public order and safety or in relation to an explosive, one intended to be used for purposes of injuring any person or damaging any property. Mere possession without the requisite intent is not enough, legally. Again, it has to be noted that these offences are not specifically provided or listed under Part II of the First Schedule to the Criminal Procedure and Evidence Act 67 of 1938, however, such offences are covered by that section as "offences the punishment whereof may be a period of imprisonment, exceeding six months."

[28] I now turn to consider whether or not the police had a reasonable suspicion that the two plaintiffs had committed an offence herein. It is settled law that the test in this regard is objective. See in this regard the judgment of

this court in **PRINCE KHUMALO (supra).** In **NANA SIKHONDZE v THE COMMISSIONER OF POLICE AND ANOTHER, Civil Appeal Case No. 36/2006, RAMODIBEDI JA** (as he then was) stated:

> "…it is not the duty of a police officer who decides to effect an arrest to conduct a mini trial as to the cogency of a statement or incriminatory information he has received before he can arrest a suspect. I have no doubt that such a procedure would fail to protect the community, and would work an injustice."

Having said that though, this court has to bear in mind that

> "…in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man would therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion."

Per **JONES J in MABONA AND ANOTHER v MINISTER OF LAW AND ORDER AND OTHERS, 1988(2) SA 654 (SECLD) at 658**, and quoted with approval by our Supreme Court in Mfanafuthi Mabuza (supra).

[29] I have outlined above the evidence that linked the two plaintiffs with the motor vehicle and the incriminating material and there is no need to plough the same ground twice here. The fact that the plaintiffs were eventually acquitted and discharged at the close of the case for the crown is, of itself, not decisive of the reasonableness of their belief that the defendants had in effecting the arrest, detention and prosecution of the plaintiffs. It is also not insignificant that when the discovery of the incendiary or explosive items was made, there had been yet undetected bombing of certain structures in Swaziland, namely the Deputy Prime Minister's Building and Police structures. The two plaintiffs were questioned on this by the police upon their arrest. Both plaintiffs were not implicated in those offences of course.

[30] Having considered all the evidence and the circumstances of this case, I am of the view that the defendants have shown, on a preponderance of probability that they entertained a reasonable suspicion that the plaintiffs were guilty of an offence and therefore liable to be arrested and charged in that regard. The suspicion was reasonable in the circumstances and therefore the arrest and resulting detention not unlawful. Their prosecution was again not malicious as there was reasonable and probable cause to warrant their prosecution. Both plaintiffs' claim fail under these heads.

[31] I now turn to the issue of the alleged assault. The Police officers who arrested Mr Rudd admitted having assaulted him during his arrest. They said he was fighting them resisting arrest. There were at least three police officers who confronted Mr Rudd and assaulted him on his hands and legs. The evidence is that he was subdued by the police and caused to lie down prostrate and his hands were handcuffed on his back. He was assaulted as he lay on the ground and also as he was taken through town to the Police station. At the police station he was again assaulted, insulted and derisory remarks made of him having a "double mind" because he is coloured. The assault on him was witnessed by Pw2 Musa Vusi Lukhele. When he was brought to the scene where the motor vehicle was found, he was limping as a result of his injuries. The beating was so severe, he said, that at one stage he blacked-out or fell into a coma as a result. There is no medical report or evidence documenting the nature and extent or gravity of the injuries he sustained. As a witness he impressed me as truthful and accurate in his evidence and I believe him. On the other hand, the Police merely admitted assaulting him in order to arrest him. The evidence is much more than that though as I have found. The assault was both physical and emotional (in the form of insults), severe, prolonged and unlawful and he is entitled to be compensated for this, under the heading of contumelia – which is essentially an insulting, abusive, contemptuous and humiliating treatment

of another. A sum of E75,000.00 (Seventy five thousand Emalangeni) will meet the justice of his case.

[32] The evidence by the first plaintiff regarding the assault was very scanty and was given only in general terms. He has failed to prove his case in this regard.

[33] For the foregoing reasons I hold that:

(i) The action by the 1st plaintiff Mr. Dingane Mazibuko is hereby dismissed with costs.

(ii) The action by the 2nd plaintiff Mr. Roland Rudd hereby partly succeeds and he is awarded a sum of E75,000.00 (seventy five thousand Emalangeni) in respect of the contumelia meted to him by the police.

(iii) The action by the third plaintiff Mr Alex Langwenya succeeds in part and he is awarded a sum of E100,000.00 (One hundred thousand Emalangeni) in respect of the unlawful arrest and detention and a further sum of E75,000.00 (seventy five thousand Emalangeni) for malicious prosecution. His total award is a sum of E175,000.00 (one hundred and seventy five thousand Emalangeni).

(iv) The defendants are ordered to pay interest on the awards at the rate of 9% per annum a tempore morae with effect from 10th February 2012.

(v) The defendants are ordered to pay the costs of action by the second and third defendants.

MAMBA J

Delivered in open court on this 20th January, 2012.

FOR PLAINTIFFS **Mr. V.Z. Dlamini**

FOR DEFENDANTS **Mr. S. Khumalo**