IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 61/2020

HELD AT MBABANE
In the matter between:

SIMON MANDLA YENDE **Appellant**

And

THE SWAZILAND GOVERNMENT **1st Respondent**

THE ATTORNEY GENERAL **2nd Respondent**

Neutral Citation: *Simon Mandla Yende vs The Swaziland Government and Another* (61/2020) [2021] *SZSC* 12 (04th June, 2021)

Coram: **M.J. DLAMINI JA, S.J.K. MATSEBULA JA AND J.M. CURRIE AJA.**

Heard: 24th May, 2021.

Delivered: 04th June, 2021.

SUMMARY: *Civil appeal – A delictual damages claim arising from unlawful arrest, detention and malicious prosecution – The respondents pleaded that the arrest was lawful and relied on Section 200 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended and the Maintenance Act 1970 – Appellant was detained in police custody from 5th October 1999 to 6th October 1999 and thereafter released – Held further that the deprivation of liberty through police arrest and detention is prima facie unlawful in the absence of any legal justification recognized by law, and that the respondents have not discharged the onus of establishing on a balance of probabilities that the arrest and subsequent detention were legally justified – Held further that the Swaziland Government represented by the Attorney General is liable for the harm suffered by the appellant on the basis that factual and legal causation was established on a balance of probabilities – Accordingly, the Court held that the appellant was entitled to damages for the unlawful arrest and*

detention including costs of the appeal – Consequently, the appeal is upheld with costs.

JUDGMENT

J.M. CURRIE AJA

INTRODUCTION

[1] This appeal concerns a delictual damages claim resulting from an alleged unlawful arrest and detention. The claim is brought by a male police officer, against the Government of Swaziland represented, by the Attorney General, for E 100 000 (one hundred thousand Emalangeni) for malicious prosecution which was dismissed by the Honourable Justice M Dlamini in the court *a quo,* which has resulted in an appeal to this Court against that decision. The claim is made up as follows:

a)	Loss of liberty and freedom	E 50 000.00
b)	Discomfort and humiliation	E 30 000.00
c)	General Damages	E 20 000.00

[2] In the Particulars of Claim filed in the High Court the appellant alleged that he was arrested by a police officer acting within the scope of his employment on the 5th October 1999 and detained in custody to the 6th October 1999. He averred that the prosecutor, Mr Israel Magagula, and the magistrate, Mrs. Lorraine Hlophe acted unlawfully and maliciously in facilitating his arrest and detention without any lawful justification whatsoever and that he had suffered damages in the sum of E 100 000.00 (one hundred thousand Emalangeni) as a result of his loss of liberty and freedom, discomfort and humiliation.

[3] The respondents denied liability and averred that the prosecutor and the magistrate had lawful justification to arrest and detain the appellant as, during a maintenance enquiry, the appellant was stubborn and refused to answer questions put to him. His refusal to answer the questions entitled the prosecutor and the magistrate, in terms of Section 200 of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) to arrest him. As the arrest was lawful no liability arose to pay the damages claimed.

[4] At the trial in the court, *a quo,* the appellant contended that he had been summoned to the magistrate's court for the payment of maintenance for a minor child. In his evidence the appellant stated that the child was not his but that he was in a love relationship with the mother of the child. The same day he was served with a warrant of arrest for a period of 7 (seven) days. He was handcuffed and taken to the police station where he was incarcerated overnight. The Station Commander advised him that the reason he was arrested because he was arrogant and refusing to answer questions put to him. The next morning he was made to walk from the police station to the Magistrate's court, hand cuffed without shoes and socks.

[5] He was interrogated by the magistrate at court and when it transpired that he was not the father of the child in respect of whom maintenance was sought he was released.

[6] At the trial the appellant was the only witness and there were no witnesses for the respondent. The court *a quo* dismissed the appellant's claim with costs on the basis that there was no cause of action.

[7] Being dissatisfied with the judgment of the court *a quo* the appellant has lodged an appeal as follows:

> ***"****1.* *The* ***Court Aquo*** *erred in failing to apply the principle that where an arrest and detention is admitted by the Defendant the onus is on Defendant to justify its actions in order to escape liability.*
>
> *2.* *The* ***Court Aquo (sic)*** *erred in law and in fact in failing to understand and appreciate that the Defendants had in its plea admitted identity and the role that the Magistrate and the Prosecutor played in facilitating the arrest and detention of Appellant and that therefore these were no longer issues that fell to be proved at the trial.*
>
> *3.* *The* ***Court Aquo (sic)*** *erred in law and in fact in not only holding that Respondents had the right to begin and also the overall onus to establish justification for the arrest and detention of Appellant.*

4. *The **Court Aquo (sic)** erred in fact and in law by not considering the fact that the evidence of Appellant was uncontradicted as the only witness as Defendant failed to lead any evidence to contradict him and therefore it ought to have believed him.*

5. *The **Court Aquo (sic)** erred in law and in fact in failing to draw an adverse inference on the failure to call then Magistrate L Hlophe and the then Prosecutor Israel Magagula who were not only present but would have elucidated on the issue before the **Court Aquo (sic)**. "*

CONDONATION

[8] The second respondent lodged and application for late filing of its Heads of Argument as well as its Bundle of Authorities on the 17th May 2021, one week before the matter was due to be heard and on the same day filed its Heads of Argument. The Notice of Appeal had been filed by the appellant on the 6th October 2020. No application for an extension of time in terms of Rule 16 of the Rules of this Court had been brought.

[9] The affidavit in support of the application for condonation is attested to by Bonsile Temtini Shabalala, a duly admitted attorney practising at the Attorney General's Chambers.

[10] She avers that her reason for the delay is that she was forced to self-isolate as she had been in contact with a family member who succumbed to Covid-19. She provides no dates as to when she was self-isolating or for how long. She ought to have provided the date and duration of the self-isolation.

[11] No prospects of success were alleged, as required by this Court and the deponent only alleged that the appellant seeks to sue the Government of eSwatini on the strength of an order meted out by a judicial officer in her judicial capacity and ought to be protected.

[12] The application for condonation is opposed by the appellant on the basis that the explanation for the delay is inadequate and does not comply with the requirements laid down by this Court on numerous occasions and, in

particular, the second respondent did not adequately address the prospects of success.

[13] It was pointed out to the deponent that the condonation application was in adequate and no reasonable explanation had been given for the delay. Furthermore, that one of her colleagues could have prepared the Heads of Argument and Bundle of Authorities and filed same. The second respondent conceded this and tendered costs of the condonation application.

[14] An application for condonation ought to have been filed as soon a litigant becomes aware of the non-compliance and not as the matter is ought to be heard in court.

[15] Taking into account the fact that proceedings were instituted in 2000 and have not yet been finalised it was decided by this Court, that, in the interests of justice that condonation be granted and that the matter proceed on the merits, despite the non-compliance with the requirements laid down by this Court.

APPELLANT'S ARGUMENT

[16] The appellant contends that the magistrate and the prosecutor acted unlawfully and maliciously when they effected the arrest of the appellant and the arrest was done solely to punish the appellant. The arrest and detention are a violation of a person's constitutional right to liberty and freedom.

[17] The appellant further contended that the respondents had a duty to establish lawful justification for their actions – see ***Joel Masotsha Ziyane v Attorney General N.O. Case No. 396/89*** (unreported) where Justice Hannah stated:

> ***"The Plaintiff's case is one of wrongful arrest and detention and Mr. Letwaba accepts the arrest being admitted, the onus of proving justification for the arrest rests on the Defendant.*** See ***Brand v Minister of Justice & Another 1959 (4) SA 712."***

[18] In the present matter the respondents did not, or were not willing, to come to court to testify in their defence.

[19] The respondents contend that the magistrate and the prosecutor were justified in effecting the arrest in terms of Section 200 of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) which provides as follows:

"if any person appears in obedience to a subpoena or warning or by virtue of a warrant, or is present and is verbally required by the court to give evidence, refuses to be sworn, or having been sworn, and refuses to answer such questions as are put to him, or refuses or fails to produce any document or thing which he is required to produce, without in any such case offering any just excuse for such refusal or failure, such court may adjourn the proceedings for any period not exceeding eight days, and may, in the meantime, by warrant commit the person so refusing or failing to a gaol, unless he sooner consents to do what is required of him."

[20] Appellant contends that this section deals with a witness in criminal proceedings who, being a witness in criminal proceedings is required to give

evidence, refuses to be sworn in, or refused to give evidence or to produce a document without just excuse. Appellant was never such a person contemplated by the legislature. Appellant submits that the Respondents chose Section 200 of the Criminal Procedure Act over Section 5 (3) of the Maintenance Act solely to punish the Appellant.

[21] It is common cause that the appellant was brought to court under the Maintenance Act 1970. Section 5 provides:

> **"(3) A person who, having been summoned to attend an inquiry or called upon to produce any book, document or statement as provided for in sub-section (1) fails, without reasonable cause, to attend at the inquiry at the time and place specified or to produce such book, document or statement, or who fails to remain in attendance until the conclusion of the inquiry or until he is excused by the court from attendance, shall be guilty of an offence and liable on conviction to a fine not exceeding fifty emalangeni or to imprisonment for a period of not exceeding three months. "**

[22] Section 10 provides:

> **"A person who wilfully interrupts the proceedings at an enquiry under this Act or who wilfully hinders or obstructs the court in the performance of its functions at any such inquiry shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred emalangeni or an imprisonment for a period not exceeding six months or to such fine and imprisonment."**

[23] *In casu* the appellant was merely being questioned by the prosecutor prior to the maintenance hearing and had not been sworn in and the questions put to the appellant were merely investigative. For this reason Section 10 is not applicable but the Prosecutor applied for a warrant of arrest as per section 200 of the Criminal Procedure and Evidence Act.

RESPONDENTS ARGUMENT

[24] The respondents admit that a warrant of execution was prepared by the prosecutor and signed by the magistrate which resulted in the arrest and incarceration of the appellant. They contend that the detention was lawful

and justified in terms of section 200 of the Criminal Procedure and Evidence Act, 1938 as well as Section 5 (2) of the Maintenance Act. The Maintenance Act is a later Act which bestows a maintenance enquiry with the powers of criminal court as provided for in section 5 (2).

[25] In a malicious prosecution the burden of proof is on the appellant who must show that all four elements developed by the courts must be present - see **Minister of Justice and Constitutional Development v Moleko (131/07) ZASCA 43 2008 All SA 47 .**

[26] The respondents did not deny that the prosecutor applied for a warrant of arrest which was then signed by the magistrate so therefore the burden of proof was on the appellant to show malice on the part of the prosecutor and the magistrate.

[27] The respondents further contended that the appellant has failed to establish a case of *animus injuriandi* on the part of the prosecutor and the magistrate

because the magistrate acted within the ambit of her powers as envisaged in section 200 of the Criminal Procedure and Evidence Act.

[28] With regard to the detention of the appellant the respondents rely the case of **Professor Dlamini v the Attorney General, Civil Appeal No. 27/2007** where Tebbut JA stated:

> *"In order to succeed in his action, a Plaintiff would therefore have to establish a desire on the part of the defendant to cause him harm or a conscious or deliberate intention to injure him by setting in motion the legal proceedings against him."*

THE ISSUE

[29] The facts are largely common cause. The issue for determination by this Court is whether the arrest and subsequent detention of the appellant was lawful on a balance of probabilities. If it was lawful that brings the matter to an end. However, if the Court finds that it was unlawful, the respondents become liable for the harm suffered by the appellant as a result of his arrest and subsequent detention.

[30] I am of the view that the Appellant was justified in approaching the High Court. The facts are largely common cause and the arrest of the appellant is not denied. Therefore the onus of proving lawful justification rests on the respondents.

[31] Whilst the appellant had been summoned to attend a maintenance enquiry with regard to the minor child of his lover, according to the evidence in the court *a quo,* the hearing had not yet commenced. The prosecutor put questions to the appellant with regard to the minor child; in particular whether the child was his. He said that it was not. He then left the prosecutor's office and shortly afterwards an arresting officer came to him carrying a warrant of arrest, signed by the magistrate.

[32] In the court *a quo* the learned judge found that there was no malice on the part of the prosecutor and the magistrate but in my view this conclusion is incorrect. The prosecutor and the magistrate had no just cause to arrest the appellant and it is clear that he was arrested in order to punish him which equates to malicious conduct on their part in these circumstances. Section 200 of the Criminal Procedure is not applicable in the circumstances as this

section pertains to a witness in criminal proceedings who is required to give evidence and refuses to be sworn in, or refuses to give evidence, or to produce a document without good reason. If the respondents felt that the appellant's conduct or answers were not satisfactory they could have used Section 5 (3) of the Maintenance Act. All the appellant did was deny paternity and from the evidence available he did not frustrate nor impede the conduct of the proceedings.

[33] When the appellant was arrested he was handcuffed and taken to the police station where he was incarcerated overnight. The Station Commander advised him that the reason he was arrested because he was arrogant and refusing to answer questions put to him. The next morning he was made to walk from the police station to the Magistrate's Court without shoes and socks. It was extremely humiliating for a Police Officer to be paraded barefoot through the town.

[34] The issue of compensation payable to the appellant remains to be considered. Whilst the appellant was only incarcerated for one night, he was publicly humiliated by being forced to walk through the town of Manzini

dressed as a police officer without shoes. The appellant lodged his claim for compensation on the 17th April 2000, almost 21 years ago and I have borne in mind the rate of inflation over the last 21 years. The respondents have not challenged the amount of compensation claimed. No doubt, had the claim been instituted at the present time the damages claimed would be far higher.

[35] Having considered all the relevant factors I consider it appropriate to award just and equitable non-patrimonial damages in the sum of E 40 000.00 (forty thousand Emalangeni). Undoubtedly the costs will follow the result.

[36] I accordingly make the following Order:

1. The appeal is upheld with costs.

2. The order of the Court *a quo* is set aside and replaced with the following:

   (a) The defendant is ordered to pay the plaintiff the following sums:

      (i) Loss of liberty and freedom 10 000.00

(ii) Discomfort and humiliation 25 000.00

(iii) General Damages 5 000.00

(b) The defendant is ordered to pay interest at 9% per annum *a tempore morae* on the sum of R40 000.00 from date of summons.

(c) The respondents are ordered to pay the appellant's costs of suit including the costs of the condonation application.

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J. M. CURRIE
ACTING JUSTICE OF APPEAL

I agree

M.J. DLAMINI
JUSTICE OF APPEAL

I agree

S.J.K. MATSEBULA
JUSTICE OF APPEAL

For the Appellants: BEN J. SIMELANE ASSOCIATES

For the Respondent: ATTORNEY GENERAL