



# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV.CASE.NO.1183/91

In the matter between:

**ELIAS JABULANE SHONGWE**

**PLAINTIFF**

and

**GCAKA MAGAGULA**

**1ST DEFENDANT**

**MAKHAYANA MAMBA**

**2ND DEFENDANT**

**CROOKES PLANTATION LIMITED**

**3RD DEFENDANT**

**CORAM :           DUNN    J**  
**MR. LUKELE FOR PLAINTIFF**  
**MR. SAPIRE FOR DEFENDANTS**

## JUDGMENT

**11 APRIL 1995**

By summons issued on the 21st November 1991 the plaintiff sought an order for payment by the defendants, jointly and severally, of the sum of E29,000. It was alleged by the plaintiff that

In or about February 1991 the first and the second defendant, acting in the course and within the scope of their employ by the third defendant, unlawfully, wrongfully and intentionally arrested the plaintiff and caused him to be detained at Big Bend Police Station.

The E29,000 was made up as follows -

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- (a) E10,000 arising out of loss of employment
- (b) E9,000 being loss of income from cotton
- (c) E10,000 being in respect of general damages.

Further particulars were requested by the defendants regarding the alleged unlawful arrest and the plaintiff stated that he was arrested on the 6th February 1991 following a false allegation by the defendants that "the plaintiff had stolen cattle belonging to the 3rd defendant and instructed, instigated, incited and procured certain police officers stationed at Big Bend Police Station to arrest him".

The plaintiff gave evidence at the trial and called two witnesses in support of his claim. At the conclusion of the plaintiff's case Mr. Sapire applied for an order of absolution from the instance with costs. The test to be applied in an application of this nature was set out in the case of **GASCOYNE v PAUL & HUNTER 1917 TPD 170** as follows -

At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff.

The plaintiff's evidence of his arrest was that he was approached by the 1st and 2nd defendants in the company of one Shabangu, on a Monday evening during February 1991. The 1st and 2nd defendants were armed with revolvers and knobsticks. The two defendants stated that cattle belonging to the third defendant had gone missing. They asked the

plaintiff where the cattle were. The plaintiff replied that he knew nothing about the cattle. Thereupon the two defendants told the plaintiff to dress and accompany them to Big Bend Police Station where he would explain about the cattle. The plaintiff told the court that he complied and accompanied the two defendants to the police station. He told the court that he was handed over to the police who were told to detain him in connection with the cattle from Crookes Plantations. The two defendants left the police station and the plaintiff was interrogated by Sergeant Christopher Matsenjwa. It was the plaintiff's evidence that he spent about three days at the police station. He was not kept in the cells but in an office. On his release, he was advised by Matsenjwa to remain at home as he could be called upon at any time in connection with the missing cattle.

The plaintiff was not in a position to recall the dates of his arrest and subsequent release. It is not clear as to how the date of the 6th February 1991 came to be furnished. The investigation diary in the docket which was opened by Matsenjwa reflects that the first report of the missing cattle was made to the Big Bend police at about 8:00 p.m. of the 14th February 1991. The report was made by the 1st defendant and statements were recorded from him and the 2nd defendant on the same day. The statements which were handed into court were to the effect that 3 head of cattle had gone missing from the third defendant's farm and that a search for them had been unsuccessful. No allegation was made in the statements that the cattle had been stolen. Nobody was named as a suspect in the disappearance of the cattle.

The plaintiff proceeded to testify to an occasion

after his release when the 1st and 2nd defendants requested the Chief's runner for the plaintiff's area to release the plaintiff to accompany the two defendants to the Big Bend Police. The chief's runner Madlozi Thabedze who gave evidence on behalf of the plaintiff told the court that he advised the plaintiff to submit himself to the law and accompany the two defendants to the police. It was the plaintiff's evidence that even on this occasion the two defendants told the police to detain the accused in connection with the cattle from Crookes Plantations. The plaintiff was again not able to recall the date of this incident. He told the court that he remained at the police station for about 5 days before being released. The purpose of this evidence is not entirely clear as the plaintiff is bound by the particulars which he furnished namely, that he was arrested by the defendants on the 6th February 1991. His alleged detention on this occasion is totally irrelevant to the claim as particularised.

Sergeant Matsenjwa, who gave evidence on behalf of the plaintiff told the court that he arrested the plaintiff following the statements which were made by the 1st and 2nd defendants. It was his evidence that the decision to arrest the plaintiff was made by him. The plaintiff was not mentioned by the two defendants in their written statements. It is in the circumstances not clear precisely on what information Matsenjwa acted in arresting the plaintiff. Matsenjwa thereafter set about with his investigations and was not able to find sufficient evidence to found a prosecution against the plaintiff. The plaintiff was thereafter released.

The onus of proving the arrest of the plaintiff as

particularised namely, that the defendants instructed, instigated, incited and procured certain police officers to arrest the plaintiff rests on the plaintiff. This is a matter which was discussed and settled at the pre-trial conference held between the parties in terms of Rule 37. The plaintiff's evidence does not come anywhere near establishing the allegation. Sergeant Matsenjwa made it abundantly clear that he acted on his own when arresting the plaintiff. He cannot in the circumstances be said to have acted on the say so of the 1st and 2nd defendants. Members of the public are at liberty to report alleged crimes to the police and even to name people whom they suspect of having committed crimes. It is then for the police to investigate and satisfy the requirements of the Criminal Procedure and Evidence Act No. 67/1938 before effecting an arrest.

An action lies, in law, against a defendant who has maliciously and without reasonable and probable cause, procured the arrest or detention of a plaintiff by the proper authorities. There is no allegation of malice in the present case. The statements of the 1st and 2nd defendants to the police are factual and straight-forward. The plaintiff's own witness denies that instructions for the arrest and detention of the plaintiff were given by the two defendants.

The plaintiff has failed to establish his case as particularised, within the test formulated in the **GASCOYNE** case supra. The application for an order for absolution from the instance is granted with costs.



B. DUNN

JUDGE