



[1] This is an action in which the plaintiff claims damages in the sum of E205 000-00 (Two Hundred and Five Thousand Emalangeni) made up as follows:

1.1	Amount of bail paid	E2000-00
1.2	Travelling expenses to court	E3000-00
1.3	Unlawful arrest and suffering	E45 000-00
1.4	General damages for pain and suffering	E120 000-00
1.5	Injury to dignity, defamation of character	<u>E35000-00</u>
	<b>TOTAL</b>	<b><u>E205 000-00</u></b>

[2] The basis of the claim is an alleged unlawful arrest of the Plaintiff by members of the Royal Eswatini Police which took place at Total Gardens Filling Station in Mbabane on the 11<sup>th</sup> April 2015.

[3] Upon arrest, the plaintiff was allegedly charged with the offences of driving a motor vehicle whilst under the influence of intoxicating liquor, driving a motor vehicle without a driving licence; driving an unlicensed motor vehicle and reckless driving.

[4] The plaintiff was arrested together with one Lwazi Manana who was also in the same motor vehicle. Mr Manana was charged with the offence of obstructing the police in the course of their duty.

- [5] The defendants admit the arrest of the plaintiff but maintain that it was lawful and justified in the circumstances. They maintain that the plaintiff was reasonably suspected to have committed the offences he was charged for.
- [6] It is common cause that the plaintiff was not prosecuted for the offences he is alleged to have committed. Plaintiff maintains that he was made to pay bail in the sum of E2000-00 on the 12<sup>th</sup> April 2015. He paid bail at the police station as it was a Sunday when he did so. He was then released by the police and told to report to the police station so that he could be taken to the Mbabane Magistrates court on Monday the 13<sup>th</sup> April. Defendants do not dispute the amount paid as bail nor that it was not refunded.
- [7] On the 13<sup>th</sup> April 2015 he went to the police station and he was taken to the Magistrate's court in a police vehicle. When he appeared before the Magistrate Lwazi Manana was also there. Mr Manana was the first one to see the Magistrate. Mr Manana was charged with obstructing the police in their course of duty by running away with the keys for the motor vehicle. He pleaded guilty and according to plaintiff he was fined E300-00. The defence however maintain that he was fined E500-00.
- [8] Plaintiff then appeared before the Magistrate where he was formally charged with the four offences mentioned above. He pleaded not guilty to all these

offences and the matter was postponed to a future date. It is plaintiff's evidence that the matter was thereafter postponed more than ten times and that each time the matter was postponed he was told that the investigators were not available. Whilst the police agree that the matter was postponed several times they vehemently deny that this was due to the absence of the investigators.

[9] Plaintiff further alleges that after several appearances and on the 8<sup>th</sup> November 2016, the Magistrate acquitted and discharged him for the reason that the police were not coming to court and the docket was now missing. The crown witnesses agree that plaintiff was eventually acquitted and discharged due to the disappearance of the docket. They however deny that they were not appearing in court.

[10] The key issue to be determined by this court is whether or not the arrest of the plaintiff was lawful. If the plaintiff's arrest was lawful, then his claim must fail. An arrest will be lawful only if it is sanctioned or justifiably at law. Arrest is regulated by Part Five of the Criminal Procedure and Evidence Act, 1938.

[11] Section 22 of the said Act provided:

*“ 22. Every peace officer and every officer empowered by law to execute criminal warrants is hereby authorized to arrest without warrant every person.*

*(a) .....*

*(b) Whom he has reasonable grounds to suspect of having committed any of the offenders mentioned in Part II of the First Schedule*

*(c) .....*”

One of the offences mentioned in Part II of the First Schedule is an offence punishable by imprisonment exceeding six months.

[12] The plaintiff was arrested on suspicion *inter arlia* that he was driving a motor vehicle whilst under the influence of intoxicating liquor. This is an offence prescribed by Section 91 (1) of the Road Traffic Act, 2007. Section 122 (2) of this Act provided that such offence shall be punishable by a fine not exceeding E5000-00 or imprisonment not exceeding four years or both such fine and imprisonment.

Clearly therefore, if plaintiff was reasonably suspected of having driven a motor vehicle whilst under the influence of intoxicating liquor, his arrest was lawful.

[13] One fact came out clearly from the evidence of both the plaintiff and his witnesses as well as the witnesses of the Defendants was that the plaintiff was arrested on suspicion that he was amongst other offences, driving a motor vehicle whilst under the influence of intoxicating liquor. This much he was told and actually charged with such offence and others as mentioned above. The question that begs an answer then is, was this suspicion reasonable?

[14] Plaintiff maintains of course that he never drove the motor vehicle in question on that day. The question is however not whether he drove the motor vehicle. The question is whether the police reasonably suspected him of having driven the said motor vehicle whilst under the influence of liquor. Put differently, the question is, did the police have a reason to suspect that plaintiff was driving the motor vehicle at all in light of his defence.

[15] It is apposite at this juncture to point out that the plaintiff does not deny that he had taken liquor on that day. In fact he says when the police came to the place where the motor vehicle had stopped, namely TOTAL GARDENS FILLING STATION, they found him carrying a bottle of intoxicating liquor in his hand. He further does not deny that he was in the motor vehicle in respect of which an offence was suspected by the police to have been

committed. All he says is that he was a passenger in the motor vehicle and not a driver thereof.

[16] It is plaintiff's evidence that on the 11<sup>th</sup> April 2015 he was enjoying alcoholic beverages with friends at a place called Pasadas. He eventually got a lift home in his neighbour's car, Lwazi Manana. The motor vehicle stopped at Total Gardens Filling Station to re-fuel. After refueling they left the fuel station to join Sozisa road intending to proceed in the Checkers direction. As they were about to join the main road they stopped at the stop sign. Plaintiff states in his evidence:

*“ As we stopped at the stop sign Lwazi Manana, who was driving, saw police officers near Nandos. He then reversed his car back to the filling station. He took off the key from the ignition switch and ran away.*

*Wondering why Lwazi Manana was running away I alighted from the vehicle with my bottle of hunters dry. As I was standing the police came and stopped their car in front of Manana's vehicle. They asked me why I was running away. I told them I had not run away and that is why they found me there.*

*They asked me who was driving the motor vehicle and I told them that Lwazi Manana was driving the car and he had run away. They*

*ordered me to give them the car keys. I told them the car keys left with Lwazi Manana who was driving the motor vehicle. They then took me to the police vehicle. I asked them why they were arresting me since I was not driving the motor vehicle. They told me that I was crazy and I could not tell them how to do their job.*

*They then said I should try to call Manana. I called him and put my cellphone on loud speaker mode. When I called him he asked; where are they? I said they had left and he should come back. I saw him through the window and I pointed him out to the police officers saying there is the driver of the motor vehicle.”*

[17] It is common course that there was a third occupant of the motor vehicle whom plaintiff says was Manana’s girl friend. This lady was seated on the back seat of the car. The police asked this lady who the driver of the car was and she said she did not know.

[18] It is plaintiff’s evidence that after Manana had returned the police demanded the keys from him and he gave them the keys. They further asked him who the driver of the car was and he said plaintiff was driving the car. Although plaintiff did not state that he disputed this allegation by Manana, when asked in cross – examination if he disputed this allegation he answered in the affirmative.

The police then arrested both plaintiff and Lwazi Manana and charged them with different offences as indicated above.

[19] Apart from his own evidence the plaintiff led two other witnesses who are employees at Total Gardens Filling Station. These witnesses corroborated plaintiff's evidence and did not contradict it in any manner.

[20] The defence witnesses gave evidence which was at variance with that of the plaintiff and his witnesses in a number of material respects. First of all the police said they were conducting a roadside check next to the entrance to Build – It hardware shop whilst the plaintiff said he saw them near Nandos restaurant. These are two different spots and are about thirty (30) metres apart. Secondly the plaintiff said there were three (3) police officers and the police said they were two. Thirdly and most important, the plaintiff said when the car he was travelling in reversed back to the Filling Station when the driver noticed the police, the police followed it with their own vehicle. On the other hand the police said they left their vehicle where it was and both of them chased after the reversing car running on foot after it. Fourthly, plaintiff said when the car he was travelling in was about to enter Sozisa road, the driver saw the police and then reversed to the

Filling Station. The police said when the motor vehicle started reversing it was already on Sozisa road. Fifthly, the plaintiff said when the police caught up with the car he was travelling in, the driver of the motor vehicle had already alighted and ran away. One of the police officers however said when the driver alighted he was about ten (10) metres away and he never lost sight of the motor vehicle. The plaintiff and his witness also said it was around 10:00 pm when the incident took place. The police on the other hand said it was around 11:30 pm. Again and also most importantly, the plaintiff and his witnesses told the court that after reversing and stopping the motor vehicle at the filling station, the driver of the car ran away and later returned when the police had already arrested the person they found standing next to the car. The police say they actually gave chase to the driver and got hold of him at the back of the fillings station when he was stuck between a fence and a donga.

[21] The problem I have with the evidence of the police is that their version was not put to the plaintiff and his witnesses. In fact there are clear instances where the evidence of the police could, have been put to the plaintiff's witnesses but this was not done. For instance the plaintiff was asked in cross – examination :

***“ How far was the police van from the one you were traveling in when parked at the filling station.”***

The plaintiff answered:

***“ About one metre”.***

When the police testified however they said the police vehicle never went to the filling station. One then wonders why this version was not put to the plaintiff when he said the vehicles were parked one metre apart.

[22] A similar question was also posed to one of the plaintiff’s witnesses as follows:

Defence counsel ***“ what was the distance between the police van and that of the plaintiff?”***

Witness ***“ All the vehicles were at the pumps but one at the lower pump and the other at the upper pump.”***

Again it was not put to this witness that the police van never came to the filing station.

[23] Another question was asked:

Defence counsel ***“ So the one who ran away was carrying the keys of the motor vehicle.”***

Witness ***“ Yes because he is the one who gave the police the car keys.”***

The police version however was that they got the keys from the person they found standing next to the car after searching him. This version was never put to the plaintiff's witness.

[24] The evidence of the police is also contradictory at list in one aspect.

One of the officer's Lwazi Mkhwanazi stated:

*“ The motor vehicle reversed to the premises of the filling station. After it had just passed the fuel pumps it stopped. Both front doors opened. The driver started running towards the rear of the filling station. The passenger alighted and stood next to the car.”*

However 4415 Sergeant Nkosinathi Gama states:

*“ After reaching the car I noticed that the driver who had run away had two passengers. A female who was asleep at the back seat and a male, Lwazi Manana, who was seated, at the front passenger seat.”*

This is a clear contradiction. The passenger could not be seated in the car and standing outside it at the same time. Although following each other, it is their evidence that the police almost reached the car at the same time.

[25] In light of these contradictions and particularly in light of the fact that in their evidence the police came with a totally different version of what transpired on the day in question, which version was not put to the plaintiff and his witnesses I cannot but reject the bulk of the evidence of the police

as an after thought. I only accept that they saw the motor vehicle reversing and suspected that it not was being driven in compliance with the law. They then pursued it and eventually concluded that two of its occupants had violated the law. The question is whether such conclusion was reasonable. Their evidence does not help the court in this regard.

[26] I now turn to the evidence of the plaintiff and his witnesses to see if it can assist the court to come to a just on lawful decision. The police arrested the plaintiff on suspicion that he was driving the motor vehicle whilst under the influence of intoxicating liquor. They also observed that the motor vehicle was unlicensed and the plaintiff was not licensed to drive a motor vehicle. They also allege that the motor vehicle was driven recklessly.

[27] Out of all these allegations by the police the plaintiff denies only that he was driving the motor vehicle in question. I find it necessary to emphasize that in this civil suit the question to be answered is not whether or not the plaintiff was actually driving the car. Rather it is whether or not plaintiff was reasonably suspected to be the driver of the motor vehicle. The question whether or not he was actually driving the car is of course relevant to establish his criminal liability. If he was actually not driving the car, even if reasonably suspected to have been the driver, he had to be acquitted and discharged. But for him to succeed in this claim for unlawful arrest he must

prove that there was no reasonable suspicion that he had committed any offence.

[28] One thing that comes out from the plaintiff's own evidence is that when the police came to the filling station they found him standing next to the motor vehicle with a bottle of intoxicating liquor in his hand. They asked him who the driver of the motor vehicle was. He replied that Lwazi Manana was the driver and that he had run away. The police demanded the keys for the car and he told them that the keys had gone with the driver. The police then took him to the police van. In his own words he says:

*“ I asked them why they were arresting me as I was not driving the motor vehicle. They told me that I was crazy and I could not tell them how to do their job.”*

[29] I take particular note that at this point in time the police had not seen the alleged driver, Lwazi Manana. The only person associated with the motor vehicle who had been seen by the police, and who could possibly be the driver of the motor vehicle was the plaintiff. They therefore reasonably suspected him to be the driver of the motor vehicle and his arrest at this point was therefore justified. They could not rely on his bold assertion that the driver was someone who had disappeared into the thick of the night.

Plaintiff did not deny that he was an occupant of the car. He only denied that he was driving it.

If indeed he was driving it, that was a question for further investigation and his arrest for further questioning was justified.

[30] Continuing with their investigations, the police asked the plaintiff to call Lwazi Manana, obviously in order to establish if such a person existed at all. The plaintiff called Lwazi Manana telephonically and indeed he surfaced. The police asked Manana who the driver of motor vehicle was. It is plaintiff's evidence that Manana told the police that the driver was the plaintiff. The police then arrested both of them and took them to the police station.

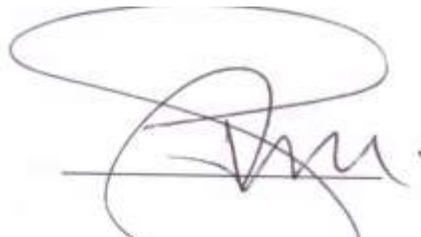
[31] From the foregoing there is no doubt in my mind that the arrest of the plaintiff was based on a reasonable suspicion and therefore lawful and justified. All the police knew at this time is that the motor vehicle was driven by either of these two gentlemen. One was pointing at the other as the driver. It was not for the police to conduct a mini trial at the filling station. They were justified in arresting both suspects for further questioning and they did just that. In the circumstances I can only come to one conclusion; the arrest of the plaintiff was based on a reasonable suspicion that he had committed

the offences he was eventually charged of having committed, and that his arrest was therefore lawful.

[32] For the foregoing reasons the following order is made:

32.1 The plaintiff's claim is dismissed save that he is entitled to the E2000-00 he paid as bail;

32.2 Costs are awarded to the Defendants.



J.S MAGAGULA J

**For the Plaintiff: Ms S. Dlamini**

**For the Defence: Ms N. Xaba**