



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 249/18

In the matter between:

ALBERTUS JACOBUS JOHANNES

VAN RENSBURG

PLAINTIFF

And

NATIONAL COMMISSIONER OF

POLICE

1ST DEFENDANT

THE DIRECTOR OF PUBLIC

PROSECUTIONS

2ND DEFENDANT

THE ATTORNEY GENERAL

3RD DEFENDANT

Neutral Citation: *Albertus Jacobus Johannes Van Rensburg vs. National Commissioner of Police and 2 Others (249/2018) [2021] SZHC (222) 24th November 2021*

Coram: **MLANGENI J.**

Last Heard: **11th November 2021**

Delivered: **24th November 2021**

Summary

Law of delict – claim for damages arising from malicious prosecution – plaintiff prosecuted for alleged theft of a boat in circumstances where there was clear evidence that he had no intention to steal the boat and was in fact acquitted and discharged at the close of the Crown case.

Civil procedure – application for absolution from the instance dismissed on the basis that the plaintiff's case meets all the legal requirements for a claim based on malicious prosecution.

Civil procedure – defendants closed their case without leading any evidence – court's findings in respect of absolution from the instance stand, and court proceeded to determine quantum of damages.

Civil procedure – defendants challenging the plaintiff's particulars of claim for failure to comply with Rule 18 (10) in that the nature of the damage was not specified – defendants did not seek further particulars or raise an exception in terms of rule 23 of the High Court rules – whether the alleged deficiency is fatal to the plaintiff's claim.

Held: Where the court finds that the defendant has a case to answer, and the defendant closes its case without leading any evidence, the court's findings in respect of absolution from the instance stand.

Held, further: In respect of claims for general damages the plaintiff's failure to fully itemise the damages as envisaged by Rule 18 (10) of the High Court rules is not fatal to the claim in as much as such damages are presumed to be the necessary consequence of the act complained of.

Defendants ordered to pay compensation to the plaintiff, with costs.

JUDGMENT

- [1] The plaintiff is a businessman of B.R. Doors and Windows, Matsapha, in the Manzini Region. His claim is for damages against the defendants for malicious prosecution.
- [2] He was charged and prosecuted under Mbabane Magistrates' Court Criminal Case No. 348/2016, for theft of a boat and items thereon, altogether valued at E107, 450.00. It was alleged by the Crown that the plaintiff, as accused, stole the boat at or near Loskop Dam in Mpumalanga Province of the Republic of South Africa, which was in the lawful possession of one John Gary Barow. It was being kept at the farm of one Coetzee in Mpumalanga. It subsequently came to the attention of the complainant that the boat had been removed from Coetzee's farm, and upon enquiry he became aware that it had been taken by the plaintiff. When he took the boat he left a

letter, dated 17/04/2015, addressed **“TO WHOM IT MAY CONCERN”**

[3] It is useful to reproduce the full contents of the letter and I do so presently.

“We hereby confirm, on the 16th October 2012 money amounting to E26, 300.00 was transferred to the personal account of M.C. Coetzee – 288143463632005 ABSA Bank Limited for the purchase of a copy router.

The delivery of the purchase item has not been done to this date and the transaction has not been reversed to our (BR Doors and Windows Pty Ltd) account.

We are no longer interested in the purchase of the copy router, we therefore take into possession your boat named Scooby Doo until the reversal of the transaction is made back into the account of BR Doors and Windows.

We appreciate your cooperation.

Kind Regards

Cobus Janse Van Rensburg.”¹

¹ Page 13 of the Book of Pleadings (BoP).

- [4] It is common cause that the plaintiff took the boat through into Eswatini and he continuously kept it at his residence at or near Siphofaneni in the Lubombo Region.
- [5] Prior to the plaintiff's arrest and prosecution the complainant, Mr. G.J. Barlow, recorded a statement² at Mbabane Police Station. In the statement the complainant states that a friend of his who is the plaintiff's neighbour at Siphofaneni confirmed that the boat was at the plaintiff's home. In a subsequent telephone conversation with the plaintiff, Mr. Barlow told the plaintiff that the boat was his and he had all the proof, including up-to-date licence. According to the statement, the plaintiff's response to the assertion of ownership by Mr. Barlow was that **"If I can prove it belongs to me, I could go to his plot and collect it, I then informed him that I would not go to his plot and collect it, he must take it to his workshop in Matsapha, where I would go and inspect it....."**³. The statement continues in the following manner:-

"I now want to lay charges against Mr. Rensburg for taking my boat without my permission....."

² Page 12 of BoP.

³ At para 9 of the complainant's statement recorded with the police.

[6] Some salient features of the complainant's statement to the police are worth highlighting. He got to know who had taken the boat; he got the contact details of that person – the plaintiff; he got independent confirmation that the boat was at the plaintiff's home at or near Siphofaneni; he subsequently spoke to the plaintiff and the latter was prepared to release the boat to him upon being furnished with proof of ownership. Significantly the plaintiff, who could well be a layman on legal matters, does not say that he is laying criminal charges because his boat was stolen, he says he is doing so because his boat was taken **“without my permission”**.

[7] It is against this factual background that the plaintiff was prosecuted by the state for theft of the boat Scooby Doo. At the prosecution the Crown did very badly. The plaintiff, as accused, was acquitted and discharged at the close of the Crown case. Put differently, the trial court found that there was no sufficient case made out to call the accused to his defence. On the facts before the trial court this eventuality was, in my view, unavoidable.

[8] The plaintiff then instituted a claim for damages in respect of unlawful arrest and malicious prosecution. The claim for unlawful arrest was later abandoned, and I am called upon to pronounce only on the aspect of malicious prosecution.

[9] The plaintiff testified on his own account and was the only witness in support of the claim. He testified that he is the managing director of BR Doors and Windows (Pty) Limited, a company that fabricates Aluminium doors and windows. He stated that in 2012 he paid E26, 300.00 to one M.C. Coetzee for the supply and delivery of a copy router. Between 2012 and 2015 Mr. Coetzee did not deliver the merx. He referred the court to page 14 of the plaintiff's bundle of discovered documents which is proof of payment to Mr. Coetzee, dated 16th October 2012. He further referred the court to page 13 of the plaintiff's bundle of discovered documents, which is the letter that he wrote and which I reproduced in full at paragraph 3 above. He left this letter with a gardner at Mr. Coetzee's place of residence in Mpumalanga Province and took the boat to Eswatini. At his homestead at or around Siphofaneni he parked the boat under a shade.

[10] Sometime in 2016 the witness received a call from one Gary Barlow who told the plaintiff that he, the plaintiff, was in possession of Mr. Barlow's boat. Witness proceeded in the following manner:-

“I told him that if he can prove that he is the owner he is welcome to collect the boat at Siphofaneni..... He did not come to collect the boat. He e-mailed to

me the registration papers of the boat and trailer, registered in his name, and also documents of when he purchased it and where he repaired it. I gave Mr. Barlow permission to collect the boat from my residence. He did not know my residence but knew where my neighbour resided, one Stewart Bisset.”

[11] Sometime in 2016 the plaintiff got a call from one Inspector Percy Dlamini of Mbabane Police Station who said that Mr. Barlow had opened a theft case against him. Inspector Dlamini and other police officers arrived at the plaintiff's workshop in Matsapha and later travelled with him to his residence at Siphofaneni where they inspected the boat and took pictures of it. On the following day he was made to record a statement regarding the matter. The statement is at pages 6-12 of the bundle of discovered documents. In the statement the plaintiff confirms that he took the boat because he was not being refunded the E26, 300.00 that was paid to Mr. Coetzee for a copy router that was never delivered. He further states that he took the boat into Eswatini and kept it at Siphofaneni. We now know that the team of police officers found it there and took pictures of it.

[12] The boat was eventually towed by the police officers from the plaintiff's residence to Mbabane Police Station and the plaintiff

was subsequently charged with theft. On the trial the plaintiff was acquitted and discharged on the basis that there was no evidence to establish criminal intention to permanently deprive the owner. The trial court's observations are worth quoting and I do so immediately below: -

“I fully agree with the defence that the Crown has not satisfied all the elements of theft beyond reasonable doubt. Even though the taking of the boat was unlawful, the element of intention has not been proved to the satisfaction of this court that accused had the intention to permanently deprive Mr. John Barlow of his boat. The fact that accused had written a letter to Mr. Coetzee notifying him that he had taken the boat until the debt was settled is an indication that accused had no intention of concealing his identity. He further explicitly stated the reasons for taking the boat. The accused had further informed Mr. John Barlow to collect the boat after he had proved ownership of same.”⁴

[13] It is incomprehensible that in spite of all of this – the overwhelming evidence against the State case at the criminal trial, His Lordship S. Vilakati's trenchant observations and all

⁴ Para 23 of His Worship's Ruling on Section 174 (4) of the CP & E, at page 54 of the plaintiff's bundle of discovered documents.

– the defendants still moved an application before me at the close of the plaintiff’s case for absolution from the instance.

[14] For the plaintiff to succeed in a claim for malicious prosecution it has to establish the following legal requirements: -

14.1 that the defendant has set the law in motion by prosecuting him or her;

14.2 that in so doing the defendant(s) acted without reasonable and probable cause and were activated by malice;

14.3 that the prosecution ended in his or her favour.

See: PROFESSOR DLAMINI v THE ATTORNEY GENERAL, Supreme Court Case No. 27/2007.

[15] It is common cause that the defendants set the law in motion against the plaintiff. It is also common cause that the case ended in the plaintiff’s favour. Upon reviewing the application for absolution from the instance, I came to the conclusion that **“in prosecuting the plaintiff the defendants acted without reasonable or probable cause”** and that the plaintiff’s case meets all the legal requirements for a claim based on

malicious prosecution⁵. The defendants were therefore put to their defence.

[16] In exercise of their right, the defendants closed their case without leading any evidence. The result of that is that there is no legal or factual basis upon which I can come to a different conclusion on the merits of the matter, in that the defendants have opted not to advance any defence or anything to gainsay the plaintiff's version of events. I accordingly find that the plaintiff has proved the merits of his case on a balance of probabilities. I therefore proceed to determine the quantum of damages.

[17] It is appropriate for me to capture the plaintiff's pleadings in respect of quantum, and I do so below: -

“12. As a result of the malicious prosecution the plaintiff had to retain attorneys to defend him on the matter at a huge expense.

13. In the circumstances, the plaintiff seeks damages for the malicious prosecutions in the sum of E300, 000.00.....against the second and third defendants jointly.

⁵ At para 6 of my ruling on absolution from the instance, dated 16th June 2021.

14. The plaintiff also seeks payment of the sum of E24,345.00being in respect of attorneys fees in defending him which he holds the second and third defendants vicariously liable jointly.”⁶

[18] The amount of E24, 345.00 in respect of legal fees was amended by leave of court to E41, 006.00. In his evidence in chief the plaintiff directed the court to various invoices and corresponding receipts which are part of his discovered documents. These are at pages 69,70,71,72,73,74,75,76,78,79 and 83 of the bundle of discovered documents. I am satisfied that the total amount that the plaintiff paid in respect of attorneys fees is E41, 006.00. It is settled in our law that legal fees are compensable, to the extent that was actually paid.

See: MFANAFUTHI MABUZA v THE COMMISSIONER OF POLICE AND TWO OTHERS, Civil Appeal No.39/06, para 19.

[19] I hold that the plaintiff is entitled to payment of the sum of E41, 006.00 in compensation for what he spent on legal fees.

⁶ At page 9 of BoP.

[20] In respect of the general damages the defendant's counsel has levelled much criticism to the plaintiff's pleadings, specifically that the plaintiff's averments do not meet the requirements of Rule 18 (10) of the High Court rules as amended. The sub-rule is worded in the following manner: -

“10. A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof.”

[21] In his written submissions defendants' counsel makes the point in the following terms: -

“.....in terms of our law, there are no damages known as unlawful arrest and malicious prosecution. On the contrary, there are damages arising from these items.....for example, loss of dignity, loss of income, damages to plaintiff's reputation, loss of business etc.⁷”

[22] In respect of general damages all that the plaintiff has averred is that he **“seeks damages for the malicious prosecution in the sum of E300, 000.00.....”**. In my view the defendants' criticism is well-founded. In the case of *MANDLA NGWENYA v THE COMMISSIONER OF POLICE AND ANOTHER* Sey J.

⁷ At para 13 of the defendants' written submissions dated 3rd November 2021.

posits that **“it need hardly be stressed that the whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action, the issues upon which reliance is to be placed⁸.”** Against this scanty pleading, in his oral evidence the plaintiff testified that he is a businessman, that he spent a lot of time travelling between his place of work in Matsapha, and Mbabane, to consult with his attorneys and to make court appearances. This resulted in him cancelling **“a lot of business meetings”**, and he concluded by saying that this **“hurt my reputation as a businessman.”**

[23] To the defendants’ well-founded criticism Mr. Jele’s response is that the defendants were entitled in terms of the rules of procedure to seek further particulars or make an exception as may be advised, but opted not to do so. This, according to Mr. Jele, opens the door for his client to lead such oral evidence as would bolster up its case. I have reservations about this. In action proceedings the foundation upon which a plaintiff’s case is built is the material averments. It is upon such averments that oral evidence is led to prove those averments.

[24] But even assuming that Mr. Jele’s argument was correct, the evidence that was tendered falls short. For instance the court

⁸ High Court Case No. 2700/2007 at para 21

is unable to put quantum to the many business meetings that the plaintiff cancelled, or to the time that he spent travelling between his workstation at Matsapha and Mbabane, or to the damage done to his reputation as a businessman. The plaintiff did not hazard any figure at all, and the court was left in the dark on these important issues. The unavoidable conclusion, therefore, is that the plaintiff has not sufficiently assisted the court in determining quantum in respect of general damages.

[25] However, the conduct of the defendants is a stark example of recklessness and gross violation of the rights of an individual who at all material times manifested any intention except to steal the boat. In the case of *LUKHELE v ATTORNEY-GENERAL*⁹ the court held, per Strydom J., that the courts should jealously guard against the infringement of the liberty and fundamental rights of the individual and have a duty to preserve these rights against infringement. On the facts before it the court accepted that the plaintiff's prosecution tarnished his image in the public eyes. The words of Ramodibedi J.A. (as he then was) in the case of *MABUZA v THE COMMISSIONER OF POLICE AND OTHERS*,¹⁰ are of relevance.

“The police simply ignored the evidence which clearly exonerated the appellant from the alleged

⁹ 1987 – 1995 (4) SLR 65.

¹⁰ Civil Appeal No.39/06.

theft of a motor vehicle. It must accordingly be accepted that they acted maliciously.”

[26] In my view it would be a travesty of justice if the defendants got away with impunity. In this regard I find fortitude in a passage at paragraph 17 of LAWSA¹¹ which says the following:-

“.....since ‘general’ damage is presumed it is sufficient if in the pleadings it is alleged generally.....”.

There is no reason to doubt that the plaintiff was put to hardship as a natural consequence of the unnecessary prosecution by the state.

[27] The defendants must therefore pay some compensation to the plaintiff and I proceed to determine the amount. In this quest I am mindful of the words of Holmes J. (as he then was) in the case of PITT v ECONOMIC INSURANCE CO. LTD¹² where he observed that the court **“must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour largesse from the horn of plenty at the defendant’s expense.”**

¹¹ Joubert, THE LAWS OF SOUTH AFRICA, VOL7, 1st Re-issue page 15.

¹² 1957 (3) SA 284 D at 287 E-F

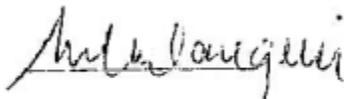
[28] In MFANAFUTHI MABUZA, supra, the court awarded E100, 000.00 general damages for unlawful arrest, detention and prosecution. That is some fourteen years ago, but I must also take into account that in the present matter the plaintiff was not incarcerated. In my view the amount of E65, 000.00 should serve the purpose. On the basis of the foregoing I make the following order: -

28.1 Defendants are to pay to the plaintiff a total amount of E106, 006.00 which comprises: -

i)	Special damages	=	E41, 006.00
ii)	General damages	=	<u>E65, 000.00</u>
	TOTAL	=	<u>E106, 006.00</u>

28.2 Interest thereon at the rate of 9 per cent per annum calculated from date of judgment to date of final payment.

28.3 Costs of suit, such costs to exclude those in respect of the amendment.


T.M. MLANGENI

For the plaintiff: Mr. N. D. Jele

For the Defendants: Mr. H.S.Dlamini

