

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T433/07

In the matter between:-

NKETSI ELLIOT MAKHERA t/a Makhera Elliotts

PLAINTIFF

AND

MINISTRY OF JUSTICE

1ST DEFENDANT

COMMISSIONER OF POLICE

2ND DEFENDANT

OFFICER COMMANDING MASERU-CENTRAL

3RD DEFENDANT

THE LEARNED MAGISTRATE-MRS LESUPI

4TH DEFENDANT

THE ATTONEY GENERAL

5TH DEFENDANT

JUDGEMENT

Delivered by the Honourable Mr Justice T. E. Monaphathi

on the 14th day of May 2010

1. Defendants have filed an exception to Plaintiff's claim.

In this action the Plaintiff claims the following:

1. Payment of M400,000.00 for malicious arrest.
2. Payment of M200,000.00 being compensation for unlawful search
3. Payment of M200,000.00 being compensation for threatening plaintiff with arrest.

4. Payment of M850,000.00 for loss of business
5. Costs on attorney and client scale

2. In his declaration, the Plaintiff states that on the 30th day of March 2007, on around 14hrs two police officers arrived at his offices and informed him that they had come to arrest him and take him to the Magistrate Court Maseru. Plaintiff says that he appeared before the learned Magistrate Mrs. Lesupi(fourth defendant) in open court for remand. He then waited in court for more than two hours before the court was in session. This was so even though he had told the learned Magistrate that he had criminal case to attend before another magistrate in the afternoon. It is the plaintiff story that the Fourth Defendant even threatened to lock him up.

3. Plaintiff says further that the Fourth Defendant ordered his subordinates, the police officers to search his offices for the record of the court CC295/07 allegedly taken by him. As a result, Plaintiff alleges , his offices were searched without a search warrant being issued. The record was, however, not found. After the search was conducted in his offices he alleges that he was taken back to court where Fourth Defendant once again threatened to send him to jail.

4. In paragraph 6 of the declaration Plaintiff states that he suffered the following:

“ 6.1. Being maliciously arrested without justifiable cause and thus suffering harassment, degradation of character and damage to his reputation.

6.2. The offices of Makhera Elliot being unlawfully and illegally searched and invaded by the employees of the second defendant hence resulting in the violation of the secrecy, privacy and privilege of the counsel and client.

6.3. The plaintiff have (sic) since lost business turnover and emolument to the tune of M850, 000.00 (eight hundred and fifty thousand maluti)”

Having also reiterated to High Court Rule 18(5).

5.The Defendant has taken an exception in terms of Rule 29(1) of the High Court Rules 1980 to the plaintiff’s claims on the following grounds.

(a) Malicious Arrest

The defendants contend that plaintiff being a firm of advocates cannot be arrested unlawfully, maliciously or otherwise, alternatively the plaintiff has failed and/ or

neglected to allege that he was arrested without reasonable and/or justifiable cause and that the defendants acted animus iniuriandi.

(b) Unlawful Search

The Defendants submit that the order of the magistrate amounted to a search warrant and consequently the plaintiff has no cause of action as the search was lawful. Alternatively, the plaintiff has failed to aver that the search was unlawful.

(c) Threat of Incarceration.

The Defendants excepts to this claim on the ground that there is no delictual claim based on threat of incarceration. Alternatively, the defendants argue that plaintiff has failed to aver that he has suffered harm as a result of that act which is wrongful and capable.

(d) Loss of Business

Defendants complain that Plaintiff has failed to make necessary averments that can sustain claim under this head in that he failed to allege that lost business and that the loss was a result of unlawful action of defendants.

The Defendants therefore pray that the exception be upheld and the action be dismissed with costs.

Rule 18 (5) and 29(1) (a) are consequently applicable in this matter. They read as follows:

“ 18 (5). The summons shall contain a concise statement of the material facts relied upon by the plaintiff in support of his claim, in sufficient detail to disclose a cause of action”

“29 (1) (a). Where any pleading lacks averments which are necessary to sustain an action or defense , as the case may be, the opposing party within the period allowed for the delivery of subsequent pleading, may deliver an exception thereto.”

6. In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defense is disclosed, failing this, the exception ought not to be upheld. **See (Pete’s warehousing and sales CC v Bowsink investment 2000(3) and Amalgamated Footwear & Leather Industries v Jordan & Co. Ltd 1948(2) SA 891© at 893.)**

Thus an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defense, is designed to obtain a decision on point of law which will dispose of the case in whole or in part, and avoiding the leading of unnecessary evidence at the trial. **See:**

**Dharumphal Transport (pty) Ltd v Dharumpal 1956 (1) SA 700(A) at 706 E
and Lefa Poko v Motseare Lerotholi & others C of A (CIV) No. 8 of 2006.**

7. In the instant case as it is also trite the onus rests upon the recipients (defendants) not upon the plaintiff because they are the one who are alleging that the summons does not disclose a cause of action and upon every possible interpretation no cause of action is disclosed. This the Defendants must demonstrate in order to succeed in their exception.

8. Let me begin with the exception raised under the claim of unlawful search. The Defendants complain that the offices of the Plaintiff were searched pursuant to an order of court. That order, it would seem, was verbal. It is their submission that the said order amounted to a search warrant and consequently the Plaintiff has no cause of action as the search was unlawful.

9. It is common cause that the Fourth Defendant ordered the police officers to search the offices of the Plaintiff. She did not issue a search warrant. Those officers

were duly searched by the police officers and most importantly, without any search warrant. It is on this basis that Plaintiff claims that such search was unlawful.

10. Search and seizure of property is regulated under part IV of the Criminal Procedure and Evidence Act 1981 (CP&E). The relevant provision therein is section 46 of the CP&E. It provides as follows:

“ 46(1) if it appears to judicial officer on complaint made on oath that there are reasonable grounds for suspecting that there is upon or at any premises or other place or upon in any vehicle or receptacle within his jurisdiction-

(a) Stolen property or anything with respect to which any offence has been, or is suspected on reasonable grounds to have been, committed; or

(b)

(c)

He may issue a warrant directing a policeman named therein or all policemen to search any such person, premises, other place vehicle or receptacle, and to seize any thing if found, and to take it before a magistrate to be dealt with according to law.”

Regard being had to the provisions of section 46 of the CP&E; I am of the view that cause of action can be perceived out of the Plaintiff's averments in regard to the claim of unlawful search. In my opinion the recipients have failed to persuade the court that in all its possible meanings no cause of action is disclosed under this head. The question whether or not a verbal order to search the offices was sufficient without issuing a warrant as per the CP&E would be decided at trial. But the fact remains that search was conducted without a search warrant as it is required by CP&E. For the foregoing reasons I am therefore inclined to dismiss the exception based on unlawful search as prayed.

11. The next exception has been raised against the claim of malicious arrest. The Defendants argue that Plaintiff has failed to aver that he was indeed arrested or that the arrest was without reasonable and probable cause or malicious. Defendants complain that Plaintiff seeks to reach a conclusion of law which is not supported by material averments and accordingly he has not disclosed any cause of action against the Defendants.

12. The question to be decided would be whether the excipients have discharged the onus upon them that upon every possible interpretation of the declaration no cause of action is disclosed under the head of malicious arrest.

13. Plaintiff in his summons has averred that two police officers arrived in his office and informed him that they came to arrest him and take him to court. He states that he appeared before the Fourth Defendant in an open court for remand. He further alleges in his declaration that the Fourth Defendant ordered the police officers to see to it that he does not run away. It is his story that fourth defendant thereafter ordered the police officers to go to the Plaintiff's offices to search for a missing court file which was however not found in those offices. As a result of this Plaintiff claims that he had been maliciously arrested without justifiable cause and thus suffered harassment, degradation of character and damage to his reputation.

14. What I can gather from the facts above is that Plaintiff was taken away from his office by the police and he was presented before the Fourth Defendant for remand. He had been placed under the custody of the police to see to it that he does not flee. That allegation on itself create a cause of action. Surely no one can

normally appear before a magistrate for remand unless he or she had been arrested.

15. It had been observed in **Lockhat & Others v Minister of Interior 1960(3) SA 765(N) at 775** as stated by Henochsberg J that;

“ the proper legal meaning of the expression ‘cause of action’ is every fact which is material to be proved to entitle a plaintiff to succeed in his claim” (see also: **Plakosky Gerhard 1942 TPD 15at 16; Mckenzi v Farmers Co-operative Meat Industries Ltd 1922 AD 16 at 23 Abrahamse and Sons v S.A.R 1933 CPD 626 at 637**).

I therefore find plaintiff’s declaration under the claim based on malicious arrest discloses material facts which if proved on a balance of probability during trial, by way of evidence, could entitle him to the relief he claimed. Even Schutz JA in **Ramakoro v Peete 1980-84 LAC 94 at 100** remarked that a cause of action can be dimly perceived. As a result the exception against the claim for malicious arrest is dismissed as prayed.

16. I shall now deal with an exception in respect of a claim of loss of business. The Defendants argue that Plaintiff merely reaches a conclusion that he has lost business turnover but he neglects to make or plead material facts upon which he basis his conclusion. As a result they submit that Plaintiff has no cause of action against the Defendants in so far as the claim of loss of business is concerned.

17. Plaintiff on the other hand submits that he has made out his case as set out in the summons and he prays that the exception be dismissed with costs. In his summons he talks about suffering harassment, degradation of character and damage to his reputation. Further that the unlawful search at his offices has resulted in violation of secrecy, privacy and privilege of counsel and client.

18. Plaintiff however fails to plead material facts which will disclose an injury to his business turnover and emolument. Those are the material facts which will, when proved in trial, link the actions of the Defendants to the harm or damage suffered by his business. As a result I am of the view that plaintiff's declaration lacks necessary averments to sustain his claim of loss of business and it therefore does not disclose cause of action. The exception against this claim is accordingly upheld as prayed.

19. The last exception is in regard to claim of threat of incarceration. The Defendants attack this claim on two grounds. Firstly they contend that plaintiff has neglected to aver what damage he suffered and what wrongful and culpable action caused the damage. Secondly Defendants demurs on the ground that there is no delictual claim founded on threat of incarceration in law. Plaintiff has averred in his summons that the fourth defendant has on two occasions of the very same day threatened to lock him in jail.

20. I will not decide whether there is a claim in delict which can be founded on threat of incarceration. But assuming without conceding that there is such a claim I have to decide whether the Plaintiff's declaration contain material averments which upon every interpretation would disclose a cause of action.

21. It is averred that the alleged threats were uttered by the fourth defendant acting in her capacity as a judicial officer. However, Plaintiff's declaration does not contain material averments which at least show that he had suffered harm as a result of those utterances. Most importantly there are no material facts which, if proven on trial, will establish that the judicial officer acted with *animus iniuriarum*.

As a result I find that Plaintiff's declaration does not disclose cause of action under this head. Exception is accordingly upheld.

22. I now have to deal with the issue of costs. It is trite that under normal circumstances costs follow the events. However, since in the instant case both parties have partly succeeded and partly failed I order that costs will be lost in the case.

I therefore make the following order:

- (a) Exceptions in respect of malicious arrest and unlawful search are dismissed.
- (b) Exceptions in respect of loss of business and threat of incarceration are upheld.
- (c) There is presently no order as to costs.

T. E. Monaphathi
Judge

For Applicant :
For Respondent :