IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/23/10**

In matter between:

SEK'HOSANA KALAILE **PLAINTIFF**

AND

COMMISSIONER OF POLICE **1ST DEFENDANT**
ATTERNEY GENERAL **2ND DEFENDANT**

SUMMARY

Action for damages – Unlawful arrest and detention – Malicious prosecution – Judgment entered in favour of plaintiff with costs.

JUDGEMENT

Delivered by the Honourable Madam Justice L. Chaka-Makhooane on the 20th September, 2011

[1] The plaintiff instituted an action for damages against the Commissioner of Police ("Compol") (1st defendant) and the Attorney General ("AG") (2nd defendant), arising out of the alleged unlawful arrest, unlawful detention and for malicious

prosecution by members of the Lesotho Mounted Police Service (LMPS). In the action the plaintiff has couched his claim in the following manner:

(a) One hundred thousand maloti (M100,000.00) for unlawful arrest.

(b) One hundred thousand maloti (M100,000.00) for unlawful detention.

(c) One hundred thousand Maloti (M100,000.00 for malicious prosecution.

(d) Costs of suit at attorney and client scale.

(e) Interest at the rate of 18.5% *a tempore morae*

(f) Further and/or alternative relief.

[2] The facts of this case (most of which are common cause) in brief are as follows; on the 29th March, 2009 at around 11:00 o'clock on a Sunday, the plaintiff was arrested by police officers Jankie and Matjeane respectively. He was allegedly arrested for having committed on offence in contravention of section 70 (6) (j) (10) **Road Traffic Act**, **1981** ("RTA"). In the

process of his arrest, it appears that the two (2) police officers, did not introduce themselves as police officers to plaintiff, especially since they were not in uniform. It appears also that the police officers took plaintiff's cellphone and car keys from him and left the taxi which he was driving at the time, right where it was, unattended.

[3] It is common cause also that on the way to the police charge office, the two (2) police officers attempted to release plaintiff and to hand over his cell phone and keys and when he refused to accept them, he was re-arrested and this time he was taken to the Maputsoe police station where he was detained and charged with a traffic offence. Plaintiff was kept in police custody from the 29th to 31st March, 2009 when he was eventually taken to court for trial. At the end of the criminal trial, plaintiff was acquitted.

[4] The plaintiff is said to be a taxi driver who on that day was ferrying passengers and had stopped to load passengers. It is alleged that he was parked inside the road, contrary to the RTA. He was ordered to remove the vehicle from the road. According to the defendants' witness, DW1, plaintiff was arrested by them because he had refused to obey a lawful order. He also insisted that they had indeed introduced themselves to plaintiff as police officers prior to arresting him. Plaintiff however, shows in his evidence that, the police officers just grabbed his cellphone and car keys and then ordered him to ride in their vehicle. No reasons were advanced to him why he should ride with the two (2) police officers.

[5] DW1 showed further that after driving for a while they decided to release the plaintiff on a warning and attempted to give back his keys and his cellphone. It is common cause that plaintiff refused to accept them. Plaintiff informed the court that he refused to accept the keys citing the safety of his vehicle since they had left it unattended. This is when he was

re-arrested and this time he was taken to the charge office was charged with the offence of parking his vehicle in the road. According to DW1, if plaintiff had accepted the keys and cellphone they would have let him go. He testified that he had refused to accept that what he had done was wrong, that is why they decided to take him into custody. DW1 further testified that plaintiff was informed of the reason for his arrest and detention. They had no malicious intent except that they had a reasonable and probable cause to arrest and lay a charge against plaintiff, as he had contravened the RTA.

[6] The issues for determination are whether plaintiff's arrest was lawful, whether his detention was also lawful and finally whether he was maliciously prosecuted.

[7] Section 32 (4) of the **Criminal Procedure and Evidence Act No. 9** of 1981 ("CP&E") provides that:

> *"Whenever a person effects an arrest without warrant, he shall forthwith inform the arrested person of the cause of the arrest."*

[8] There is consensus that it is the right of the person being arrested to be informed either during the arrest or immediately thereafter the reason for his arrest. See **Nqumba v State President 1987 (1) SA 456 (E).** Plaintiff challenges his arrest on the ground that it was unreasonable and baseless and also that he was not informed of the reasons for his arrest at any time. In **Maseko v AG 1990 – 1994 LAC 13** at **17 -18** it was held that:

> "*It is trite law that when the liberty of an individual has been restrained or limited and the individual that has been so affected, challenges the validity of such restraint or limitation, as the appellant in this case has challenged his arrest and detention by the police, the onus of establishing the lawfulness thereof is on the arrestor or the person who caused the arrest."*

[9] On the other hand the defendant's witness testified that plaintiff was given reasons for his arrest by police officer Matjeane when he was arrested and at the time of his

detention. It will be noted that the defendants did not call Matjeane to give evidence**. Mr. Moshoeshoe** for the defendants further drew the attention of the court to the fact that there is also an exception to the general rule that the law does not require that an arrested person be informed of the reason for his arrest where he already knows why he is being arrested, such as where he is caught in the act (red-handed). The Court was referred to the case of **Macu v Du Toit 1982 (1) SA 272 (C).** I must mention that if indeed *in casu* plaintiff was informed of the reasons for his arrest and detention why then did defendants have to go the extra mile of referring the court to any exceptions. I find this to suggest a contradiction of sorts.

[10] It is clear that there are two (2) different versions of the same event as related by the plaintiff and DW1. The general approach in such a case was laid down by the Court of Appeal in **Naidoo v Senti 2007 -2008 LAC 161** where at 164 it was held that:

> *"Where the onus rest on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will way up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and it the balance of probabilities fovours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendants version is false."*

[11] *In casu* I must in all fairness to plaintiff show that on a preponderance of probabilities his version is true and it is believed by the court. There was no evidence by the defendants, at least not DW1, to show that infact plaintiff was informed of the reason for his arrest. DW1 only alluded to the fact that he was not the one who had informed him and that it had been done by the other police officer, Matjeane, who was with him. Matjeane was not called to testify on behalf of he

defendants. They were not wearing uniform at the time and had not identified themselves as such to plaintiff, and when the defendants' filed their defendants' witnesses statements, there was no averment that plaintiff was ever given reasons for his arrest and detention, even though defendants were aware that plaintiff was challenging his arrest and detention. In his evidence, DW1 testified that they arrested plaintiff at the scene and drove off with him. It is also pertinent to note that DW1 testified that he was the one who had snatched plaintiff's keys from the ignition while Matjeane had confiscated . Be that as it may, the police officers attempted to release plaintiff somewhere near what is called FNB and also tried to give back his property, but when he refused to take the keys and cellphone and got into a quarrel with Matjeane, he was again arrested and this time it was for real. DW1 argued that had he accepted his keys and cellphone that would have shown that he was remorseful and they would have released him.

[12] One wonders if indeed plaintiff had actually committed an offence at the time or the police officers were flexing their muscle. One minute they are arresting plaintiff the next they wanted him to show remorse by accepting property that they had seized from him and when he refuses, he now definitely faces arrest and detention. This has a malicious ring to it. Plaintiff had either committed an offence or not. In my mind these were mind games played by the police officers DW1 and Motjeane on plaintiff. If at all the police officers ever informed plaintiff of the reasons for his arrest, one wonders at which stage this could have happened. Was it the first time he was arrested at the scene of the alleged crime or at FNB? This was certainly not answered by DW1's evidence. The court was not convinced by the defendants version and have accepted the plaintiff's evidence as true.

[13] There was no dispute that the two (2) police officers arrested plaintiff as peace officers for an alleged crime committed in their presence. I am inclined to agree with what **Harms DP** in

Minister of Safety and Security and Tshei Jonas Sekhoto and One (131/2010) ZASCA at **6** when he said:

> "*This may be used to arrest persons for petty crimes such as parking offences, drinking in public, and the like."*

[14] It stands to reason therefore, that even if police officers have the power and discretion to arrest, this power must be exercised within the bounds of rationality, See **Minister of Safety and Security V Tshei Sekhoto** (supra) at 14. *In casu,* the police officers DW1 and Matjeane clearly had the discretion and power to arrest which they could have used rationally. If, as it appears they also had power to warn the plaintiff, they could have done so but not in the fashion that they decided to adopt, that either plaintiff shows remorse or else he faces arrest and detention. That *prima facie* smacks of *mala fides.* I find that the police officers acted unreasonably in arresting plaintiff. They did not use their power and discretion to arrest rationally or reasonably.

[15] In terms of **sections 32 (1)** and **32 (2)** of the CP&E respectively, a person arrested without a warrant of arrest cannot be kept in custody for a period longer than 48 hours and that the arrested person shall as soon as possible be brought before a subordinate court. **The Constitution of Lesotho 1993** at **section 6 (3)** also provides that:

> "*Any person who is arrested or detained-*
>
> *(a)…; or*
>
> *(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,*
>
> *and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within forty-eight hours of his arrest or from the commencement of his detention, the burden of proving that he has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*

[16] Plaintiff challenges his detention as unlawful in that he was kept in police custody from the 29th to the 31st March, 2009 without an explanation by his arrestors, why he was not made

to appear before the court on the 30th March, 2009. It appears that he was arrested on a Sunday and was only taken to court on the Tuesday. DW1 does not deny that plaintiff was only brought to court on Tuesday the 31st March, 2009. He however, explains that they were unable to cause plaintiff to appear before the court on the Monday 30th March, 2009 because they had gone away on a police operation and only managed to come back in the afternoon. He further showed that the subordinate court of Leribe does not accept fresh cases in the afternoon. Plaintiff was ultimately made to appear before the subordinate court only on Tuesday. During this entire time, no one bothered to explain to plaintiff why he had been kept in custody since Sunday. Plaintiff concludes therefore, that having failed to take him to court on a reasonably earliest date, the defendants were punishing by the defendants for refusing to obey their order when he was told to take the car keys and his cellphone.

[17] It is plaintiff's contention that other than to refuse to accept the keys and cellphone, he had been cooperating with the police officers all along. Anything to the contrary was not proved through evidence by the defendants. He shows that he should not have been detained so long without reason in terms of **section 32 (1)** of the CP&E

[18] The defendants on the contrary argue that plaintiff's detention was lawful since it did not exceed 48 hours. Defendants show that plaintiff was arrested on Sunday and his detention started running on the working day, which was on Monday the 30th March, 2009 to Tuesday the 31st March, 2009, when he was taken to court. As far as they were concerned, since the period of detention was within the 48 hours stipulated by law, then the detention was not unlawful.

[19] In **Minister of Safety and Security and Tshei Jonas Sekhoto** (supra) at 14, Harms DP aptly captured it when he showed that:

> *"While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours ... Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court."*

[20] It seems to me that if at any one point the police officers *in casu* were ready to release the plaintiff on a warning, had he accepted his keys and cellphone, then the suspected offence was relatively trivial and in consequence an arrest was clearly not necessary, worst still any form of detention was certainly irrational and unjustified. If the police officers so desired they could easily have warned plaintiff to avail himself on Monday to attend court and whether or not the alleged offence had been committed would have been assessed by the bringing of

evidence before the court and the court making its ruling based on the evidence before it. As it turned out the court finally acquitted the plaintiff. I conclude that there was no reasonable explanation for having kept plaintiff in police cells for that length of time (even if it was still within 48 hours) for an alleged offence that was so trivial that the police officers themselves were willing to release plaintiff on a warning.

[21] It is trite that in order for a litigant to succeed on a claim for malicious prosecution he or she must allege and prove the following:

(a) that the defendants set the law in motion (instigated or instituted the proceeding);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with malice (or *animo injuriandi*); and

(d) that the proceedings terminated in plaintiff's favour.

See **Minister of Justice and Constitutional Development v Moleko SCA 43 2008 paragraph [8], Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 at 837** and **the Director of Public Prosecution and Another and Kalake Mofubetsoana C of A (CIV) 4 2007**

[22] Since the onus is on the plaintiff to prove his/her case on a balance of probabilities, in this case, it is common cause that the defendants set the law in motion which takes care of requirement (a). It is not disputed also that plaintiff was acquitted at the end of his criminal trial, which would again dispose off requirement (d). With regard to the absence of reasonable and probable cause, it was established in **Prinsloo and Another v Newman 1975 (1) SA 481 (A) at 495 (H)** that reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of prosecution is

justified. It has been shown that the concept involves both a subjective and an objective element.

[23] In this case it cannot be said that the police officers had an honest belief in the guilt of the plaintiff, if they were willing to let him go with just a warning. Their conduct was such that, had he done what they had asked initially, which was to take back the keys and his cellphone, they would have let him go. This was confirmed by DW1 himself.

[24] It is further to be noted that the conduct of the police was unreasonable when they claimed that he had parked his taxi in the road, yet they snatched his keys from the ignition, ordered him to ride with them and left the vehicle where they claimed it was obstructing traffic, for another 30 minutes or so. To my mind this is not the conduct of an objectively reasonable person, who should be using ordinary care and

prudence. See **Minister of Justice and Others and Moleko** (supra) at paragraph [20].

[25] It can hardly be said that the defendants, in deciding to detain and eventually prosecute plaintiff for an alleged offence, had taken reasonable measures to deal with that matter. If as already mentioned the vehicle was causing a traffic jam and was parked in the road, the reasonable thing to do would have been to see to the removal of the said vehicle before leaving the scene. The defendants failed to objectively exercise reasonable measures as would be expected of police officers. Plaintiff as a result has discharged the onus of proving absence of reasonable and probable cause.

[26] The defendants had every intention of prosecuting plaintiff hence they kept him in custody for the length of time that they did. They were aware that in prosecuting him he would, in all probability be injured in his good name. The defendants had

foreseen that in instituting the prosecution, they were acting wrongfully yet they nevertheless went ahead without a care as to the possible consequences of their conduct. All they were interested in was to "nail" plaintiff for having refused to accept the keys and cellphone. By his own admission DW1 informed the court that, if plaintiff had seen reason and accepted the keys and cellphone, they would have let him go on a warning. He did not do so. Then the detention and prosecution followed inspite of the possibility that they were acting wrongfully. It is concluded that the police officers, the servants of the defendants acted with malice which according to **Prinsloo v Newman** (supra), means in the context of the *animus injuriandi*, includes not only the intention to injure, but also the consciousness of wrongfulness. Plaintiff has succeeded to prove that defendants acted with malice (or *animus injuriandi*).

[27] I tend to agree with **Mr. Molise** for plaintiff that there was no argument raised by defendants on the quantum of damages.

The only issue they raised on that score was to deny that plaintiff suffered any damages.

[28] It is trite that an award of damages is in the discretion of the court, which discretion must be exercised judicially. It is also trite that each case must be decided on its own unique circumstances. My brother Monapathi J aptly captured it when he said the following in **Machaha v Sekopo and Others CIV/T/340/2000** (unreported).

> *"This is a mammoth task because there is no yardstrick (sic) for measuring or determining such an amount."*

See also **Moeketsi Sello v Candy Ratabane Ramainoane 1999 – 2000 LLR 284.**

[29] It is important to note that plaintiff had prayed for a total of three hundred thousand maluti (M300,000.00) as damages. I find the claim to be some what exorbitant given the fact that there was no evidence of assault during the unlawful

detention. In the case of **Paul Sebete Mohlaba and Others v Commander Royal Lesotho Defence Force and Another LLR and Legal Bulletin 1995 – 1996 235,** the plaintiff had claimed M250,000.00 against the defendants for his unlawful detention in the Maseru Maximum Security Prison. He had been detained for a period of a year and had been assaulted during that time by the members of Lesotho Royal Defence Force. The High Court awarded him M35,000.00.

[30] In **Masupha v Commissioner of Police and Another CIV/T/149/2005** (unreported) plaintiff had claimed damages in the amount of M100,000.00 for unlawful arrest and imprisonment. Plaintiff had also claimed other damages in the amount of M300,000.00 for medical expenses, pain, shock and suffering and *contumelia*. The court awarded plaintiff M10,000.00 for unlawful detention. She was also awarded M110,000.00 for the other damages. It is significant to note that plaintiff in this case was a woman who had been detained for some five (5) days in police custody. Plaintiff was

assaulted, tortured and generally debased to the extend that she soiled herself at some point.

[31] In another case of **Commander, Lesotho Defence Force and Others v Tlhoriso Letsie Letsie C of A (CIV) 28/09** where I had been the trial judge and had awarded plaintiff M340,000.00 in an action for damages, the Court of Appeal awarded plaintiff M150,000.00 for pain and suffering and *contumelia.* Again in that case plaintiff had been arrested and detained from the 12th December, 2004 to the 24th December, 2004. During this time in detention, plaintiff was exposed to assaults and inhumane treatment which persisted until he lost consciousness. Plaintiff was an officer in the Lesotho Defence Force and he was arrested and tortured by members of the Military Intelligence assisted by members of Lesotho Mounted Police Service.

[32] *In casu* although plaintiff's arrest detention and his ultimate prosecution were malicious and totally unnecessary, even though he was not assaulted or tortured as seems to be the pattern, he was nevertheless exposed to an infringement of his dignity. He was even forced to engage the services of counsel at the trial in the court *a quo.* A fair award in this regard would be a total of M40,000.00 in damages.

[33] Having found that plaintiff has made out a case for unlawful arrest, unlawful detention, malicious arrest the following order is made;

(a) Plaintiff's claim for judgment against the defendants succeeds as follows:

(a) Unlawful arrest – M10,000.00

(b) Unlawful detention – M 10,000.00

(c) Malicious prosecution – M20,000.00

(d) With costs on the ordinary scale

(e) Interest at the rate of 18.5% a *tempore morae*

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L. CHAKA-MAKHOOANE
JUDGE

For Plaintiff : Mr Molise

For Defendant : Mr Moshoeshoe

Mr Sekati