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# Damages for wrongful arrest, detention and malicious prosecution in Swaziland: Liability issues

## Abstract

This article draws from a wealth of unreported cases decided in the Kingdom of Swaziland in the past two decades relating to the deprivation of personal liberty, human dignity and other fundamental rights infringements arising from wrongful arrest, unlawful detention and malicious prosecution. It investigates and analyses the relevant constitutional rights and the statutory processes, the breaches of which constitute the common law ingredient of wrongfulness, upon which liability in delict is based. An attempt is made to state the contemporary law of arrest, detention and malicious prosecution in Swaziland in a nutshell, starting with the breakdown of the constitutional and delictual frameworks which necessarily leads to the discussion of the fundamental rights to personal liberty and the right to be brought before court without undue delay implicated in *Army Commander v Bongani Shabangu* [2012] SZSC 19; the constitutional right to human dignity and the delictual bases for the plaintiff's cause of action in *Government of Swaziland v Ngomane* [2013] SZSC 73. The enquiry then proceeds to the discussion of the following issues: whether the arresting officer had reasonable suspicion to arrest; whether there was a prosecution; whether the prosecuting officer had reasonable and probable cause to prosecute, and whether the malice element was present to prove malicious arrest or malicious prosecution. Comparative materials are introduced in instances to broaden the discussion and highlight analogous developments elsewhere, while bearing in mind that the primary object of the investigation is to focus solely on the developments in Swaziland.

## 1. Introduction

Like in most countries of the Southern African region, arrest can be made with, or without a warrant in Swaziland. Although an arrest with a warrant is *prima facie* lawful, issues concerning its legality and execution, including testing its constitutionality, arise from time to time.<sup>1</sup> One

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1 For instance, in terms of sec. 31 of the *Criminal Procedure and Evidence Act 67/1938 (CPEA)* (Swaziland), the issue of a warrant by a Magistrate must be preceded by an application. Thus, it was held in *Maseko and Another v Chief Justice* [2014] SZHC 77 (6 April 2014); paras. 34-36 that a warrant would be incompetent where the affidavits used in support thereof were commissioned by an officer of the court who was directly under the Chief Justice who was the victim

well-known instance, where an arrest without warrant can be made, is where the officer has reasonable grounds to suspect that the person has committed an offence mentioned in Part II of the First Schedule to the *Criminal Procedure and Evidence Act 1938 (CPEA)*.<sup>2</sup> In turn, a number of principles have been developed around the expression “reasonable suspicion” for the purposes of arrest and detention.<sup>3</sup> Likewise, the courts have been faced with the problem of determining when a prosecution has been undertaken with reasonable and probable cause, or in the absence of such reasonable and probable cause, and whether the prosecution was effected with an ulterior motive on the part of the prosecutor, since the plaintiff must prove these important elements in order to succeed in an action for malicious prosecution.

Ironically, reasonable suspicion and reasonable and probable cause tend, more often than not, to overlap, since the person who arrests might end up being the prosecutor. It then becomes necessary to draw a line between arrest and prosecution.<sup>4</sup> At the same time, the intersection between reasonable and probable cause and improper motive can be tantalising for, whenever there is reasonable and probable cause, it is unlikely to find that the subsequent prosecution was undertaken with an improper purpose. Case law shows that, once there is reasonable and probable cause to prosecute, it may become academic or difficult to find malice. It is equally possible to find malice where, although there was reasonable suspicion to arrest, but no reasonable prosecutor would have prosecuted in the circumstances, yet, the prosecutor nonetheless proceeded to prosecute for some ulterior motive. An appreciation of the content of these important terms and phrases, which have engaged the

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of the article under which the warrants of arrest related. This rendered the commissioning partial, whereas a person attesting to an affidavit must be completely objective and have no interest of any kind in the contents or input of that affidavit – *DPP v The Law Society of Swaziland* [1996] SZSC 10 (23 May 1996), where the DPP directed the COP to arrest members of the respondent organisation, the Court of Appeal held that the arrest was uncalled for, since all the DPP would have done was to call upon the members to appear in court and show cause why they should not be found guilty of contempt of court. Dlamini J held in *Maseko* that the Chief Justice should have similarly followed the simple procedure of calling upon the applicants, a legal practitioner and Editor of *The Nation*, respectively, to show cause why they should not be found guilty of contempt of court on account of what they wrote and published in *The Nation*, which the CJ considered an attack on the judiciary. The applicants successfully challenged the unconstitutionality of the warrants.

- 2 *Criminal Procedure and Evidence Act:sec. 22(b); Criminal Procedure Act 51/1977 (RSA):sec. 40(1)(b)*.
- 3 *Army Commander v Bongani Shabangu* [2012] SZSC 19 (31 May 2012); *Phiri v Commissioner of Police* [2012] SZHC 240 (20 September 2012); *Mabuza v COP* [2010] SZHC 187 (28 July 2010).
- 4 On this, see *Hussien v Chong Fook Kam* [1970] AC 942 (HL); *George v Rockett* (1990) 170 CLR 104 (HCA); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA); Okpaluba 2013a:245-251.

attention of the courts in recent times, inevitably leads to the understanding of the law of arrest, detention and malicious prosecution in Swaziland. It is, therefore, important that the law relating to these three different, but closely intertwined delictual wrongs be stated briefly. In the process, the investigation of the constitutional and statutory framework of the protection against arbitrary arrest and detention is undertaken. It is only after liability has been established that a court can embark upon the quantification of the damages to be awarded in the case.<sup>5</sup>

## 2. The law of arrest, detention and malicious prosecution in Swaziland in a nutshell

The *Constitution of the Kingdom of Swaziland Act, 2005* guarantees the individual the basic civil and limited political rights.<sup>6</sup> Among such fundamental rights are the rights to life; personal liberty; protection from slavery and forced labour, as well as protection from inhuman or degrading treatment, which includes the right to dignity.<sup>7</sup> While the rights of the arrested or detained person are carefully itemised in sec. 16(2),

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5 See, for example, *Gamedze v Swaziland Government* [2016] SZHC 123 (25 July 2016);par. 80, where the plaintiff's claim for wrongful shooting at his motor vehicle by police officers at an early morning police checkpoint was not established, in that the balance and preponderance of probabilities favoured the defendants. Annadale J held that, even if damages were proved by the plaintiff, the shooting by Constable Mark Dlamini, the defendant's employee, has not been shown to be unlawful, or even negligent, as claimed. Therefore, no liability arises from the shooting. Contra in *Dlamini v COP* [2012] SZHC 149 (13 July 2012);paras. 32-34, where the plaintiff proved liability; hence, the defendant was liable to compensate the plaintiff in respect of pain and suffering, shock and post-traumatic stress, which he was able to prove. Since the parties had agreed that, once liability has been established, they were prepared to engage one another in respect of the quantum of damages, Mabuza J made an order to that effect.

6 What has been the most contentious issue of the contemporary politics between the traditional monarchical oligarchs and the modern democratic and progressive elements in the Kingdom of Swaziland is that political parties, meetings of a political nature remain banned since the *King's Proclamation 1973* repealed the 1968 independence *Constitution* and abolished all political activities. It has remained an offence punishable by imprisonment to engage in political activities in Swaziland up to this date. It is thus not surprising that, in listing the organisations that may seek registration, political parties are omitted in sec. 25(4)(a) of the 2005 *Constitution*. In place of the political party structure is the so-called "tinkhundla-based system" described in sec. 79 of the *Constitution* as "democratic" and "participatory", emphasising "devolution of state power from central government to tinkhundla areas and individual merit as basis for election or appointment to public office". Cf *Constitution of South Africa* 1996:sec. 19; *Constitution of Namibia* 1990:art. 17(1). In other words, political rights in Swaziland do not include the right to form and join a political party; participate in activities of such a political party, or the right to campaign for a political party in national or any elections.

7 *Constitution of the Kingdom of Swaziland Act* 2005:secs 15-18.

sec. 21 guarantees the rights to a fair trial of any person charged with a criminal offence. There is the general provision for the enforcement of the entrenched rights by way of an application to the High Court for redress for an alleged breach or threatened breach of any of the guaranteed rights.<sup>8</sup> Consequently, the High Court is vested with the jurisdiction to “make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement” of these rights.<sup>9</sup> There is another, apparently often forgotten provision specifically designed to provide redress for unconstitutional arrest and detention. It is the provision in sec. 16(8), which stipulates that “a person who is unlawfully arrested or detained by any other person shall be entitled to compensation from that other person or from any other person or authority on whose behalf that other person was acting”. It has been well established in the Commonwealth jurisdictions, where provisions similar to those in sec. 35(1) appear, that it includes the award of constitutional damages as “redress” or “appropriate” order or relief.<sup>10</sup>

This author has not come across any judgment from the Swazi jurisdiction based either on constitutional damages claim under the general enforcement of the fundamental rights provisions aforesaid, or an action seeking compensation in terms of sec. 16(8) of the *Constitution*.<sup>11</sup> Even though these provisions have been in the *Constitution* from inception in 1968,<sup>12</sup> it would seem from available case law and, certainly, from the judgments discussed in this article that litigants take the traditional common law – *actio iniuriarum* – route to recover damages for unlawful arrest and detention rather than approaching the court to enforce a fundamental rights breach and asking for constitutional damages as redress.<sup>13</sup> Having said that, what is, however, critical in the present context is the understanding of the role played by the term “reasonable suspicion”, an expression that appears in both the *Constitution* and the *CPEA* in dealing with the law of arrest; reasonable and probable cause and malice as critical elements in an action for malicious prosecution. This is important, since the appreciation of these elements of the cause of action must be present, in order to successfully establish liability, which is the precursor to a court undertaking the quantification of damage exercise in

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8 *Constitution of the Kingdom of Swaziland*:sec. 35(1).

9 *Constitution of the Kingdom of Swaziland*:sec. 35(2)(b).

10 *Maharaj v Attorney General of Trinidad and Tobago* (2) [1979] AC 385 (PC); *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324 (PC) (Trinidad and Tobago); *Simpson v Attorney General* [1994] 3 NZLR 667 NZCA; *Taunoa v Attorney General* [2008] 1 NZLR 429 (NZSC) (New Zealand); *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC) (South Africa).

11 See *Attorney General of St Christopher, Nevis & Anguilla v Reynolds* [1980] AC 637 (PC).

12 *Constitution of Swaziland* 1968:sec. 5(6) (compensation for unlawful arrest or detention); *Constitution of Swaziland* 1968:sec. 17(1) (enforcement of protective provisions).

13 *Constitution of the Kingdom of Swaziland*:sec. 35(1) and (2).

the first instance, but also for understanding the problem encountered in so doing. However, before embarking upon that journey, it is important to discuss, albeit in a brief compass, the law of arrest and detention as laid down in the *Constitution of Swaziland Act*, which forms the backbone for literally every individual claim discussed in the present context.

## 2.1 The constitutional and delictual frameworks

Arrest on reasonable ground is one of the ten exceptions to the constitutional guarantee that no one shall be deprived of the right to personal liberty, unless “upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence under the laws of Swaziland”.<sup>14</sup> Further, rights of a person arrested or detained are entrenched in the same sec. 16, but particular reference is made to those subsections that are relevant to this discussion. For instance, in terms of subsec. (2), an arrested or detained person “shall be informed as soon as reasonably practicable, in a language which that person understands, of the reasons for the arrest or detention”. Subsec. (3)(a) addresses the obligation of bringing the arrested person to court as the essence of an arrest, while (3)(b) provides that an arrested or detained person must be brought to court “without undue delay”. Subsec. (4) places the burden of proof upon the person alleging that the arrested person was brought to court within 48 hours, while subsec. (7) provides that, where undue delay of bringing the arrested person to court has occurred, such a person must be released unconditionally or on such reasonable conditions that will enable him/her to appear at a later date for trial or for preliminary proceedings to trial. But, once the person is brought to court, his/her further detention from then on would lawfully be carried out by an order of a court.<sup>15</sup> The courts interpret and apply the foregoing provisions in determining the factor of wrongfulness and thus the liability of the defendant before entering into the problematic quantification exercise. Some of these provisions, especially, sec. 16(3)(b), (4) and (7) were deliberated upon in *Army Commander v Bongani Shabangu*,<sup>16</sup> which is discussed later in this article. Meanwhile, suffice it to say that Ota J had held that, having regard to the above-mentioned constitutional provisions and the *Bongani Shabangu* judgment, a person arrested or detained on reasonable suspicion must be brought before court within 48 hours.<sup>17</sup> So, where, as in *Phiri*, the plaintiff was brought to court within 17 hours and bail was thereupon granted in compliance with sec. 16(4) of the *Constitution*, his detention was held to be lawful.<sup>18</sup>

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14 *Constitution of the Kingdom of Swaziland*:sec. 16(1)(e).

15 *Constitution of the Kingdom of Swaziland*:sec. 16(5).

16 [2012] SZSC 19 (31 May 2012).

17 *Phiri v Commissioner of Police* [2012] SZHC 240 (20 September 2012).

18 *Phiri v Commissioner of Police*:paras. 40-42.

### 2.1.1 The fundamental rights involved in Bongani Shabangu

Although the court had to determine the constitutional issues arising from the conduct of the Military Police officers in *Bongani Shabangu*, but, like in *Government of Swaziland v Ngomane*,<sup>19</sup> the constitutional violations formed the bases of the actions that were *ex delicto* and the Supreme Court treated them as such. Agim JA held that a detention for 5 months without taking the person to court for allegedly having committed a criminal offence of negligently losing his service rifle while on duty violated that person's fundamental right to personal liberty provided for in sec. 16(1) and (3) of the *Constitution of Swaziland Act 2005*. In particular, sec. 16(3) provides that "a person who is arrested or detained upon reasonable suspicion of that person having committed or being about to commit a criminal offence shall, unless sooner released, be brought without undue delay before a Court". Sec. 16(4) also provides that "where a person arrested or detained pursuant to the provisions of subsection (3), is not brought before a court within forty-eight hours of the arrest or detention, the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance". Thus, in the present case, the Military Police officers had the mandatory obligation to take the respondent before a court within the specified period, or to release the arrested person. In effect, the phrase "without undue delay", as used in sec. 16(3)(b), means within 48 hours; hence, 5 months' delay constituted such an undue delay.<sup>20</sup> The release contemplated in the subsection could be unconditional or conditional. The officers could release the arrested person conditionally, that is, on bail. For instance, where it became obvious to the arresting, investigating or prosecuting officer that it was improbable to bring the person arrested before a court without undue delay, the lawful course to take would be to release the arrested person on bail, pending his being brought to court. The fact that the investigation was ongoing should not prevent the arrested person from being released on bail. Agim JA, however, counselled that it was always better practice to investigate whether there was reasonable basis for suspecting that a person has committed a crime, before arresting him/her.<sup>21</sup>

In addition to the infringement of the "undue delay" clause, the court had to link the assaults on his person and the forced labour to which Bongani Shabangu was subjected to their constitutional origin. First, it was held that the assault during and after the arrest of the respondent

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19 *Government of Swaziland v Ngomane* [2013] SZSC 73 (29 November 2013).

20 *Army Commander v Bongani Shabangu*:par. 10. Reference was made to the Bahamas Supreme Court judgment in *Beneby v COP* (1996) 1 CHRLD 28, where the applicant was arrested on 5 February 1995 upon reasonable suspicion of having committed various offences contrary to the *Dangerous Drugs Act* (Ch. 228). Although there were several courts open and sitting on 6 and 7 February 1995, to which he could have been taken, it was not until 8 February that he was brought before a magistrate. It was held that the applicant's right to be brought before a court without undue delay following his arrest had been infringed.

21 *Army Commander v Bongani Shabangu*:par. 10.

by the Military Police officers was a violation of the arrested person's fundamental right not to be subjected to torture, inhuman or degrading treatment or punishment within the context of sec. 18(2) of the *Constitution of Swaziland Act*. There was no evidence that the respondent resisted arrest, but, even if he did, there would still be no justification for the kind of assault inflicted on him in the circumstances. According to Agim JA, sec. 40 of the *CPEA* prescribes how an arrest should be carried out. It states that "in making an arrest, the peace officer or other person authorised to arrest shall actually touch or confine the body of the person arrested, unless there is submission to the custody by word or action". Implicit in this provision is that, if there is no resistance to the arrest as in this case, there is no need to touch or confine the body of the person. Where there is resistance to arrest, it is trite law that the force applied to touch or confine the body of the person must be reasonable enough or necessary to subject him to such arrest in the circumstances of the case.<sup>22</sup>

The court then referred to *Beneby*, a case from the Supreme Court of the Bahamas,<sup>23</sup> where it was held that persons awaiting trial should not be subjected to "pre-trial punishment", as that would be tantamount to a reversal of the presumption of innocence. Further, that it had to be borne in mind that, apart from the applicant in *Beneby*'s case being convicted in 1989, which was the subject of an appeal, he was to be presumed innocent of all offences with which he was charged until the contrary was proved. The court in *Bongani Shabangu* further held that subjecting the respondent to the forced scrubbing of the floor of the guardroom while in detention was a violation of his fundamental right protection from forced labour in terms of sec. 17(2) of the *Constitution of Swaziland Act*. No police officer or any other law-enforcement officer who arrested or detained any person on reasonable suspicion of having committed or being about to commit a crime had authority under the law to subject such a person to forced labour in any shape or form. Only the court of law has authority to impose any form of punishment.<sup>24</sup> The forced labour was also a gross violation of his right to protection from inhuman or degrading treatment or punishment under sec. 18. In the final analysis,

The failure to observe the fundamental rights of a person arrested or detained upon reasonable suspicion of having committed or about to commit a criminal offence may render the fairness of the pre-trial criminal processes suspect. It is important that law enforcement agencies are sensitive to their constitutionally mandatory duty to strictly observe the fundamental rights of such persons at all stages of the criminal process. The duty is emphasised by s 14(2) of the 2005 Constitution stating that 'the fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other Organs or Agencies of government and where applicable to them, by all

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22 *Army Commander v Bongani Shabangu*:par. 11.

23 *Beneby v COP*.

24 *Army Commander v Bongani Shabangu*:par. 12.

national and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution'.<sup>25</sup>

## 2.1.2 The constitutional basis for the plaintiff's claim in Ngomane

Briefly stated, in *Ngomane v Government of Swaziland*,<sup>26</sup> the plaintiff, a truck driver, had an encounter with a soldier on guard duty at the South Africa/Swaziland border when the latter had seen the former excreting openly in a nearby bush along the border fence. The soldier thereupon ordered the truck driver to collect his faeces with his hands into a plastic bag, and that he, the truck driver, must do press-ups for several hours. The truck driver brought an action for damages against the State for the conduct of her servant, the soldier. It is thus important to first investigate the plaintiff's constitutional rights, which were violated by the Kingdom of Swaziland through the soldier maintaining and enforcing law and order at the border and later, the delictual aspect of the claim. It is also important to mention that, in jurisdictions where constitutional damages are more frequently resorted to, and where that cause of action has been developed as an alternative cause of action, a case such as *Ngomane* would probably have been taken through the constitutional-redress route for the ventilation of the rights of the truck driver.<sup>27</sup> However, taking a delictual route to compensate the injured for the wrongful conduct of the defendant does not necessarily exclude the thorough canvassing of the rights involved, whether they are delictual or constitutional in nature.<sup>28</sup>

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25 *Army Commander v Bongani Shabangu*:par. 13.

26 *Ngomane v Government of Swaziland* [2013] SZSC 73 (29 November 2013).

27 See, for example, the West Indies: *Maharaj v Attorney General of Trinidad and Tobago* (2) [1979] AC 385 (PC); *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 338 (PC); *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23 (29 July 2010); *Lucas and Carillo v Chief Education Officer, Ministry of Education and Others* [2015] CCJ 6 (AJ) (22 April 2015); New Zealand: *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667 (NZCA); *Taunoa and Others v Attorney General and Another* [2007] 5 LRC 680 (NZSC); India: *Basu v State of West Bengal*; *Ashok K Johri v State of Uttar Pradesh* [1997] 2 LRC 1 (SC); *Nilabati Behera v State of Orissa* [1994] 2 LRC 99 (India SC); *Rudul Sah v State of Bihar* [1983] AIR 1983 SC 1086; *Sebastian M Hongray v Union of India* [1984] 1 SCR 904, [1984] 3 SCR 544; *Bhim Singh v State of Jammu & Kashmir* (1985) 4 SCC 677; *Saheli, A Women's Resources Centre v Commissioner of Police, Delhi Police Headquarters* (1990) 1 SCC 422; *State of Maharashtra v Ravikant S Patil* (1991) 2 SCC 373; Botswana: *Oatile v Attorney General* [2010] BWHC 454 (2 March 2010); *Attorney General v Oatile* 2011 (2) BLR 209 (CA); *Diau v Botswana Building Society* [2003] 2 BLR 409; *Dow v Attorney General* [1992] BLR 19 *Petrus v The State* [1984] BLR 14; *Attorney General v Moagi* [1982] 1 BLR 124; Seychelles: *Charles v Attorney General* [2001] 2 LRC 169 (CC), and quite recently, Canada: *Vancouver (City) v Ward* [2010] 2 SCR 28 (SCC). See also Okpaluba:2012b.

28 It is sometimes advisable in this type of case, where the plaintiff has a choice of pursuing his/her claim under either a constitutional or delictual cause of action, that the plaintiff may do well to approach the court by filing both causes



The Supreme Court had no doubt that the soldier compelled the plaintiff to do push-ups; hence, the trial judge was well within his right to consider these facts in the award of damages. Push-ups are a common form of punishment used in the military, in school sport, or in some martial arts dojos.<sup>29</sup> The court held that a person arrested or awaiting trial should not be subjected to pre-trial punishment, as that would equate to a reversal of the presumption of innocence. Therefore, harming a person without first granting him/her a hearing infringes upon the human dignity of that person. Many rights of the accused derive from his dignity as a human being, namely the presumption that every person is innocent until proven guilty; the right of the accused to a fair trial; the right of the accused to a speedy trial; the right of a person to know the charges against him or why he has been arrested, and the right of the accused to effectively defend against those charges are all part of human dignity. It follows, therefore, that the push-ups which the soldier compelled the plaintiff to do in the circumstances of this case was a violation of the plaintiff's inalienable right to human dignity.<sup>30</sup>

Rejecting as inconceivable the contention by the soldier that the push-ups were necessary to humble the plaintiff into submitting to arrest, the court referred to what Agim JA said<sup>31</sup> where the court encountered a similar situation, as discussed earlier. Like Agim JA in *Bongani Shabangu*, Ota JA held that it was inexorably apparent from the facts that the only option open to the soldier in the face of the allegation that the plaintiff was resisting arrest was to use reasonable or necessary force to effect the arrest by way of touching or confining the plaintiff's body. It was not open to him to subject the plaintiff to push-ups or any other form of punishment. The fact of the push-ups, which the plaintiff was compelled to do, was a violation of his right to dignity and was thus unlawful.<sup>32</sup> The judgment of the Supreme Court is further discussed under the following sub-headings.

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of action as alternative so as to avoid the kind of scare that the plaintiff in *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) was literally confronted with in respect of causation – a proof peculiar to the delict action. In a delictual claim, the plaintiff would ride on the constitutional breach as constituting the elements of wrongfulness and fault in delict and go further to show that there was damage, contributory fault, and causation. A constitutional cause of action is different from a tort or delict claim (*Maharaj v Attorney General of Trinidad and Tobago* [1978] 2 All ER 670 (PC)) and presumably, proof of a breach of right and the injury caused will be sufficient to tilt the case in favour of the claimant.

29 *Government of Swaziland v Ngomane*:par. 63.

30 *Government of Swaziland v Ngomane*:par. 64.

31 *In Army Commander v Bongani Shabangu*.

32 *Government of Swaziland v Ngomane*:par. 66.

### a. Infringement of the right to dignity

As observed earlier, the action in *Ngomane*<sup>33</sup> was not brought as a constitutional damages' claim. It was an action in delict. That did not, however, deter Ota JA from extolling the human dignity implications of the "unsavoury tale" that was the facts of this case. After all, human dignity is an important guarantee in the *Constitution of Swaziland Act* 2005. To begin with, in its list of the fundamental rights and freedoms of the individual under sec. 14, "protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry" are provided for under subsec. (1)(e). The *Constitution* then proceeds to entrench each and every one of the rights recognised under sec. 14. For instance, the protection from inhuman or degrading treatment is specifically provided for under sec. 18, where the dignity of every person is declared "inviolable". It is noteworthy that, in terms of the non-derogation provisions of sec. 38, there can be no derogation from the enjoyment of the freedom from torture, cruel, inhuman or degrading treatment or punishment.<sup>34</sup>

To further illustrate the importance placed upon the right to dignity and protection from inhuman and cruel treatment is sec. 57 of Chapter V of the *Constitution* on "Directive Principles of State Policy and Duties of the Citizen", which incorporates law enforcement objectives. As much as the provisions of this Chapter are not part of the entrenched fundamental rights and freedoms, they are, therefore, not enforceable on their own. However, they serve as guides to "all organs and agencies of the State" in the application and interpretation of the *Constitution* or any other law when "taking and implementing any policy decisions, for the establishment of a just, free and democratic society".<sup>35</sup> What is critical in this context is the fact that sec. 57 has outlined the duties and responsibilities of law-enforcement officials, which the courts would have regard to in interpreting and applying the foregoing guarantees of human dignity and protection from torture and inhuman treatment. In terms of sec. 57, law-enforcement officials "shall at all times fulfil the duty imposed upon them by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession".<sup>36</sup> In the performance of their duty, law-enforcement officials "shall respect and protect human dignity and uphold the human rights of all persons".<sup>37</sup> Accordingly, they "may not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances as a justification of torture or other cruel, inhuman or degrading treatment or punishment".<sup>38</sup>

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33 *Government of Swaziland v Ngomane*:par. 4.

34 *Constitution of the Kingdom of Swaziland*:sec. 38(e).

35 *Constitution of the Kingdom of Swaziland*:sec. 56.

36 *Constitution of the Kingdom Swaziland*:sec. 57(1).

37 *Constitution of the Kingdom Swaziland*:sec. 57(2).

38 *Constitution of the Kingdom Swaziland*:sec. 57(3).

Ota JA started his judgment in *Ngomane* by quoting Justice GM Pikis, President of the Supreme Court of Cyprus, who had stated that:<sup>39</sup>

The essence of human rights lies in the existence within the fabric of the law of a code of unalterable rules affecting the rights of the individual. Human rights have a universal dimension, they are perceived as inherent in man constituting the inborn attributes of human existence to be enjoyed at all times in all circumstances and at every place.<sup>40</sup>

The Justice of Appeal then made the following speech which is rather reproduced in its entirety than paraphrased:

We live in an era of human rights ... The substratum of all human rights is the right of dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole. It is universally recognized that human dignity is firstly the dignity of each human being as a human being. In this encapsulates the viewpoint that human dignity includes the equality of human beings. Discrimination infringes on a person's dignity. Human dignity is a person's freedom of will. This is the freedom of choice given to people to develop their personalities and determine their own fate. Human dignity is infringed if a person's life or physical and mental welfare is harmed. It is infringed when a person lives or is subjected to humiliating conditions which negate his humanity. It envisages a society predicated on the desire to protect the human dignity of each of its members.<sup>41</sup>

Ota JA, therefore, held that the right to human dignity cannot be infringed upon without an appropriate procedure. It is thus the infringement of that right that is the gravamen of the complaint in the present litigation.<sup>42</sup> No matter from which angle one examines this case, it is a "distasteful" tale that "invokes a sense of revulsion. Our discipline as Judges however demands that we bear the full brunt of the aftermath of this saga."<sup>43</sup>

## b. Delictual basis for the claim in *Ngomane*

Having dealt with the constitutional dimension to the truck driver's matter, the court embarked upon the examination of the legal angle to his claim from the point of view of delict. On the question as to whether or not the trial judge was correct in law and, in fact, in holding that the soldier committed an *iniuria* and *contumelia* against the truck driver, Ota JA affirmed the findings of the trial judge that the truck driver was compelled to do the push-ups and to pick up the faeces with his hands. The reason

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39 *Government of Swaziland v Ngomane*:par. 1.

40 Pikis 2000:7.

41 Per Ota JA, *Government of Swaziland v Ngomane*:paras. 1-3. Quoted with approval in *African Echo (Pty) Ltd t/a Times of Swaziland v Simelane* [2014] SZSC 83 (3 December 2014):par. 2.

42 *Government of Swaziland v Ngomane*:par. 5.

43 *Government of Swaziland v Ngomane*:par. 6.

for so confirming, the Justice of Appeal held, is that the concept of *iniuria* as a general delict encompasses the protection of personality rights in non-physical interest such as good name, dignity, feelings of chastity, privacy, liberty, life, property, or reputation. *Actio iniuriarum* or *iniuria* as a delict accords redress to a person whose legal rights in these respects have been intentionally infringed by another. Such intentional and wrongful injury entitles the victim thereof to claim sentimental damages of a penal nature for the *contumelia* or insult, without having to prove any pecuniary loss.<sup>44</sup> The court referred to the judgment of Innes CJ who, in *R v Umfaan*,<sup>45</sup> had stated that *iniuria*:

... is a wrongful act designedly done in contempt of another, which infringes his dignity, his person and his reputation. If we look at the essentials of *iniuria* we find ... that they are three. The act complained of must be wrongful; it must be intentional, it must violate one or other of those real rights, those rights in rem, related to personality, which every free man is entitled to enjoy.<sup>46</sup>

It was held that there was no iota of doubt from the above that an *iniuria* is the wrongful intentional infringement of, or contempt for a person's *corpus*, *fama*, or *dignitas*. For the present purposes, only the last of these concepts requires discussion. Generally, the courts identify, recognise and protect *corpus* (physical integrity) and *fama* (good name) as separate interests of personality. The court, therefore, expressed the view that the jurisprudence as to the meaning to be accorded to the concept of *dignitas* is considerably divergent. The most prominent view across jurisdictions remains that expressed by Watermeyer AJ in *O'Keeffe v Argus Printing and Publishing Co Ltd*<sup>47</sup> to the effect that *actio iniuriarum* is available for

... an intentional wrongful act which constitutes an aggression upon a person's [plaintiff's] dignity or reputation. Since in this case there was no question of the infringement of the plaintiff's 'person' or 'reputation' the only question was whether there was infringement of 'dignity' or 'those rights relating to dignity'.<sup>48</sup>

Ota JA held that this decision extended the meaning of *dignitas* so wide that it encapsulated all aspects of legally protected personality, except *fama* and *corpus*. *Dignitas* is thus a collective term for all rights or interests of personality, save for the right to good name and to physical integrity.<sup>49</sup> The act of degrading, humiliating or ignominiously treating the plaintiff, by being compelled by the soldier to do push-ups without due process and to

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44 *Government of Swaziland v Ngomane*:par. 69, citing Gibson 1977:502, 534.

45 *R v Umfaan* 1908 TS 62 at 66.

46 *Government of Swaziland v Ngomane*:par. 70.

47 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 247-248.

48 *Government of Swaziland v Ngomane*:par. 72. See also Neethling *et al.* 2016:218.

49 *Government of Swaziland v Ngomane*:par. 73. See also Neethling & Potgieter 2015:12-16.

pick up his faeces with his hand stood out in its stark enormity. These acts were held to have infringed the plaintiff's right to human dignity.

There is no doubt that the plaintiff's act of profanity in defecating in the open and in public glare, near the international bordergate, was conduct that should attract swift disapprobation by the law-enforcement agencies of the country. Their duty in this respect would include the arrest of the plaintiff, to investigate the crime, and prosecute him for any relative offence.<sup>50</sup> This was not the cause of action followed by the soldier whose subsequent conduct was

... certainly unbecoming of the law enforcement agency. He became lawless in his own conduct. You cannot fight lawfulness with lawlessness otherwise, anarchy will be enthroned. I agree with the court *a quo* that the soldier outstepped his boundaries and disgraced his country.<sup>51</sup>

Annandale J's finding on this matter could not be faulted when he held that the obligation placed upon the plaintiff was "demeaning and grossly humiliating". The Court of Appeal emphasised that the functions of law-enforcement agencies in a democratic society have corresponding responsibilities, duties and obligations. These duties and functions include to secure the public interest, public safety, public peace, public order, public morality, and public health. The soldier's lawless conduct could, therefore, not be reasonably justifiable in a democratic society. It surely constituted an *iniuria*.<sup>52</sup>

## 2.2 Establishing reasonable suspicion

The difficulty of establishing reasonable suspicion to arrest is not peculiar to the law of Swaziland. Similar problems are encountered by courts in other Commonwealth countries, where comparable provisions exist in their criminal procedure legislation.<sup>53</sup> It is generally accepted that an important deciding factor in determining the issue is the information available to the arresting officer at the time of the arrest<sup>54</sup> and that the test has both subjective and objective elements. In *Shongwe v Commissioner of Police*,<sup>55</sup> Maphalala PJ provides a working summary of the law relating to "reasonable suspicion" as it applies to Swaziland which, in many respects, does not significantly differ from the interpretation South African courts have assigned to the meaning of that expression in sec. 40(1)

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50 *Government of Swaziland v Ngomane*:par. 74.

51 *Government of Swaziland v Ngomane*:par. 75.

52 *Government of Swaziland v Ngomane*:par. 76.

53 See, for example, *Police and Criminal Evidence Act 1984* (UK):sec. 24(6) ('reasonable grounds'); *The Crimes Act 1900-24* (Australia):sec. 352 ('reasonable cause'); *Canadian Criminal Code 1985*:sec. 495(1)(a) ('reasonable grounds'); *New Zealand Crime Act 1961*:sec. 315 ('good cause to suspect').

54 *Ruddock v Taylor* (2005) 222 CLR 612 (HCA):par. 40.

55 *Shongwe v Commissioner of Police* [2010] SZHC 220 (19 March 2010):paras. 7-15.

(b) of the South African *Criminal Procedure Act* 51 of 1977.<sup>56</sup> First, a reasonable suspicion that an offence has been committed must carry with it a reasonable degree of probability, but not so high as would be required in a criminal case.<sup>57</sup> Second, the defence has to prove, on a balance of probabilities, that it possessed a reasonable suspicion to arrest the plaintiff.<sup>58</sup> Third, in a situation where a police officer arrests a suspect without a warrant, that officer bears the onus of proving that the arrest was lawful or that it was permitted by sec. 22 of the *CPEA*. The Court of Appeal confirmed this in *Mfanafuthi Mabuza v Commissioner of Police*<sup>59</sup> to the effect that “it is well settled law that the onus rests upon the arresting authority to prove that the requirements of section 22 (*CPEA*) were met when an arrest without a warrant was made”.<sup>60</sup> Fourth, in answering whether reasonable grounds existed, the standard applicable is that of a *bona fide paterfamilias*, for it was held in *Mfanafuthi Mabuza* that, before arresting the appellant on a charge of having committed a non-bailable offence, it behoved the arresting inspector to conduct conscientiously a careful and thorough investigation into the circumstances of the appellant’s alleged involvement. Fifth, in determining whether the officer concerned possessed the necessary suspicion when arresting the individual, the test is taken to be that often-cited formulation of Jones J. In *Mabona v Minister of Law and Order*,<sup>61</sup> the learned Judge had stated the following:

It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked.<sup>62</sup> It is only after an examination of this kind that he will allow himself to ascertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The

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56 See the discussion by Okpaluba 2014:par. 4.

57 Per Masuku J, *Dlamini v Swaziland Government* (HC Civil Case No. 3073/1998), quoting with approval per Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372:374.

58 *Ocean Accident and Guarantee Corporation v Koch* 1963 (4) SA 147 (A):157.

59 Appeal Case No. 11/2004. See also *Phiri v Commissioner of Police*:par. 22.

60 *Mfanafuthi Mabuza v Commissioner of Police* Appeal Case No. 11/2004;page 2. See also *Minister of Law and Order v Hurley* 1986 (3) SA 586 (A):579F-G; *Rosseau v Boshoff* 1945 CPD135:137.

61 *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE). See also *S v Hlaphezula* 1965 (4) SA 439 (A):440D-H; *S v Dladla* 1980 (1) SA 526 (A); *Bhembe v Commissioner of Police* Civil Appeal Case No. 55/2004.

62 Revelas J considered and applied the *Mabona* test in *Visagie v Minister of Safety and Security* [2009] ZAEHC 2:paras. 20-23 in answering the question as to whether a reasonable police officer would have arrested the plaintiff in the circumstances of that case.

section (s 40(1)(b)) of the Criminal Procedure Act 51 of 1977) requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.<sup>63</sup>

In *Shongwe*,<sup>64</sup> the judge held that there existed a set of facts implicating the plaintiff such that created a reasonable suspicion on the minds of the arresting police officer. First, a witness identified the plaintiff as the veterinary officer who assisted the accused and his brother with the stock-removal permits. Second, at the plaintiff's homestead, the police found a beast belonging to the complainant. The plaintiff pointed out that this was a token of appreciation he had received from the brothers for having assisted with the stock-removal permits. Bearing in mind that it is not the duty of the police to elevate the reasonable suspicion to the level of certainty before a suspect may be lawfully arrested without warrant, there was clear and un-contradicted evidence that the plaintiff was implicated in the cattle theft such that the circumstances created a reasonable suspicion on the minds of the police officers who arrested him. That he was eventually discharged does not countermand that fact.<sup>65</sup>

It has been held that it is not the duty of the police officer, before he/she decides to arrest, to conduct a mini-trial as to the cogency of the statement or incriminating information he has received before he can arrest a suspect.<sup>66</sup> Nor is it the duty of that officer to elevate a reasonable suspicion to the level of certainty before a suspect may be lawfully arrested without a warrant.<sup>67</sup> The reason is that, if it involves certainty, it ceases to be a suspicion, but becomes fact.<sup>68</sup> Thus, it was held in *Sikhondze v Commissioner of Police*<sup>69</sup> that the police had reasonable grounds for suspecting that the appellant had committed the offences of attempted robbery and malicious damage to property. The fact that the

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63 *Mabona v Minister of Law and Order*:658E. See also *Mazibuko v COP* [2012] SZHC 7 (20 January 2012):par. 28; *Prince Khumalo v Terence Evezard Reilley NO* [2011] SZHC 111 (28 April 2011).

64 *Shongwe v Commissioner of Police*:par. 37.

65 *Shongwe v Commissioner of Police*:par. 37. Maphalala J held in *Motsa v COP* [2013] SZHC 49 (21 February 2013):paras. 38-44 that, in answering the question in the affirmative that the arresting officer had reasonable suspicion when she arrested the plaintiff for the offence of murder, was supported by the following evidence: (a) before charging the plaintiff, she had received a telephone report as the desk officer that a person had been shot at Fairview and that that person was one Ali Mohammed; (b) she then got to the scene of crime to conduct her own investigation and later received recorded statements from the investigating officers in the case, and (c) the officer stated that she then interviewed the plaintiff who surrendered the pistol he used in committing the offence.

66 *Sikhondze v Commissioner of Police* [2006] SZSC 24 (16 November 2006):par. 23.

67 *Bhembe v Commissioner of Police* Appeal Case No. 55/2004.

68 *S v Ganyu* 1977 (4) SA 810 (AD):813C.

69 *Sikhondze v Commissioner of Police*:par. 25.

Public Prosecutor at the Magistrate's Court decided to lay a charge of attempted robbery of cash and not of the security officer's shotgun was incomprehensible. And so was the fact that no charge of malicious damage to property was preferred against the appellant. The Public Prosecutor had enough information and statements of witnesses to lay proper charges, but he did not. The point, however, is that his *post facto* remissness could not affect the question as to whether the police had reasonable grounds, at the time of arrest, for suspecting that an offence falling under Part II of sec. 22(b) of *CPEA* had been committed.<sup>70</sup>

### 2.3 Was there a prosecution?

The point has been made<sup>71</sup> that Isaacs CJ of the High Court of Australia had stated in *Davis v Gell*<sup>72</sup> that malicious prosecution includes the setting of the law in motion in matters "sufficiently analogous to a criminal prosecution". Recently, the same Court held in *Beckett v NSW*<sup>73</sup> that the wrong, for which malicious prosecution provides redress, "is the malicious instigation and maintenance of the prosecution of the plaintiff without reasonable and probable cause". Instructive enough is the opinion of the editors of *Salmond and Heuston on the Law of Torts*<sup>74</sup> who posit that the word "prosecution" in an action for malicious prosecution "has a wider meaning than in the criminal law and, conversely, not all proceedings, which are technically prosecutions, are capable of founding an action for malicious prosecution". The following very important question arises in the process: What is prosecution or when can it be said that prosecution was

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70 The question to be determined by Hlophe J in *Sabelo Mabuza v Commissioner of Police* [2010] SZHC 187 (28 July 2010):paras. 25-27 and 34 turned ultimately on whether it could be said from the evidence that there was a reasonable ground for suspecting that the plaintiff had committed the offence so as to be arrested and kept in custody. In other words, could a reasonable person conclude that there was a reasonable ground for suspecting that the plaintiff had committed the offence, with which he was charged? The Judge was convinced that given the evidence, the defendants had discharged the onus placed on them by the law and had proved that the arrest of the plaintiff was a result of a reasonable suspicion on the part of the arresting officer. The corroborated evidence of three witnesses together with the doctor's report and other surrounding circumstances did establish a reasonable suspicion justifying the police to arrest the plaintiff.

71 Okpaluba 2017a:par. 2.

72 *Davis v Gell* (1924) 35 CLR 275 (HCA) at 282.

73 *Beckett v NSW* [2013] HCA 17:par. 4.

74 Heuston & Buckley 1996:390-391. See also Rogers 2010:paras. 19-3, 19-4.



initiated by the defendant?<sup>75</sup> Thus, the issue in *Mutton v Baker*<sup>76</sup> involved the exploration of the element that the prosecution was initiated by the defendant. In the process, the Court of Appeal of the State of Victoria had to pose the questions as to whether the plaintiff has alleged that he was prosecuted,<sup>77</sup> and whether the plaintiff has alleged that the defendant instigated the prosecution?<sup>78</sup> Similar issues of the initiation of the prosecution were deliberated upon by the Namibian High Court in *Meyer v Felisberto*;<sup>79</sup> the Ontario Superior Court of Justice, Divisional Court, in *Su v Chowdhury*,<sup>80</sup> and Ontario Court of Appeal in *Pate Estate v Galway-Cavendish and Harvey (Township)*.<sup>81</sup>

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75 The English authorities culminating in the leading House of Lords case of *Martin v Watson* [1996] AC 74 (HL) and leading up to the application of the rule enunciated in that case by the Court of Appeal in *Hunt v AB* [2009] EWCA Civ. 1092 and *Ministry of Justice v Scott* [2009] EWCA Civ. 1215 were discussed in Okpaluba 2013a:paras. 2.1-2.1.1.2. That issue was once more revisited in the recent English Court of Appeal judgment in *Commissioner of Police for the Metropolis v Copeland* [2014] EWCA Civ. 1014 (CA):paras. 25-38. After reviewing relevant authorities including *Watson*, *Scott* and other cases, Moses LJ was satisfied that the trial judge asked himself the right question: “Whether DC Bains was ‘instrumental in the bringing of the prosecution’ or was ‘in substance the person, or at the very least, a person responsible for the prosecution being brought’”. PC Cooper’s discretion as to whether to prosecute was vitiated by the bad faith as found by the jury of PC Bains, who had lied in order to procure the prosecution. In my view, Hickinbottom J’s test and approach to the facts cannot be impugned.”

76 *Mutton v Baker* [2014] VSCA 43.

77 *Mutton v Baker*:paras. 22-37.

78 *Mutton v Baker*:paras. 38-40. It is important to note that where it is clear, as in *Dudla v Minister of Safety and Security* [2015] ZAKZDHC 4:par. 102, that the issue of the defendant having instigated the prosecution was not in doubt, but that the prosecution did not terminate in favour of the plaintiff, it was not shown that there was no reasonable and probable cause in prosecuting the plaintiff; and that in the absence of malice, a claim for malicious prosecution cannot succeed.

79 *Meyer v Felisberto* 2014 (2) NR 498 (HC):paras. 20-30, where the defendant did no more than place facts or information before the police as a result of which proceedings were instituted, such would not be sufficient to attract liability for malicious prosecution. In order to satisfy the requirement of instigating or instituting prosecution, the defendant must go further and actively assist and identify his-/herself with the prosecution. In this case, however, the defendant associated himself with the prosecution for, when he learnt of the arrest and court appearance of the plaintiff, he was content to have the proceedings proceed, knowing fully well that the case was without merit. Contra in *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC):404F, where it was found that the defendant merely brought information to the attention of the police and, so, was not associated with the prosecution.

80 *Su v Chowdhury* 2014 ONSC 5730 (CanLII).

81 *Pate Estate v Galway-Cavendish and Harvey (Township)* 2013 ONCA 669:paras. 43-51. This case shows the importance of independent police investigation in this area of the law and, at the same time, illustrates the precarious nature of police work where the police depends on information from parties either involved or interested in the prosecution of the case. One Beaven, who, as plaintiff’s immediate head, terminated the plaintiff’s appointment from the

The plaintiff in *Sabelo Mabuza v Commissioner of Police*<sup>82</sup> was arrested without a warrant on a reasonable suspicion that he had committed rape. He claimed damages for wrongful arrest, detention, and malicious prosecution. The claim based on malicious prosecution was not pursued, because the plaintiff conceded that his guilt or otherwise had never been determined such that it could not be said that the proceedings were concluded in his favour, which is a requirement that must be established for such a claim to succeed. Hlophe J recounted the four well-known grounds for a successful claim for malicious prosecution, including the foregoing, as laid down in *Professor Dlamini v The Attorney General*,<sup>83</sup> and upheld in *Sabelo Mabuza*,<sup>84</sup> that there was no basis for the alleged claim, because the prosecution has not yet been finalised, not to talk about its having been terminated in the plaintiff's favour. After having so ascertained, one may consider the absence of reasonable and probable cause to prosecute the plaintiff, including whether the prosecution could be said to have been actuated by an indirect or improper motive. But, the first problem with this judgment is that the court had earlier stated<sup>85</sup> that the appellant was brought to court, which ordered his remand and subsequently his release on 13 May 2002 from custody "following a withdrawal of the charges by the prosecution". The second is embedded in the statement that the first requirement that the prosecution must have been initiated or continued was equally not met, since no prosecution ever took place. If one understands the court's judgment, it means that, since no hearing had taken place, there could have been no prosecution that

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Township, had also investigated the alleged employment misconduct on the part of the plaintiff and, in the process, excluded certain exculpatory evidence from the police. Although the police were initially reluctant to press charges, they were persuaded to do so upon pressure from those higher in command in the Ontario Provincial Police organisation. The plaintiff was acquitted after a four-day criminal trial. In a bid to escape liability for malicious prosecution in this case, the Township contended that, had the Ontario Provincial Police conducted a proper investigation, which would have included putting statements and allegations to the plaintiff when it interviewed him on two occasions, it could have discovered the information that was withheld by the Township. It argued that the police investigation was incompetent or negligent and that this must absolve the Township of liability for malicious prosecution. It was held that a complainant, not being a police officer, could be said to have initiated prosecution if he desired it; or by furnishing information to the prosecutor, knowing it to be false, or by withholding information which he knows to be true – *O'Neil v Toronto (Metro) Police Force* (2001) 195 DLR (4<sup>th</sup>) 59; paras. 7 and 51; *Kefeli v Centennial College of Applied Arts and Technology* [2002] OJ No 3032 (QL); par. 24. Thus, the element of initiation can be satisfied where, as in *Pate Estate*, the Township knowingly withheld exculpatory information from the police, which the police could not be expected to find in the circumstances. See also *McNeil v Brewers Retail Inc.* 2008 ONCA 405 (CanLI); par. 52.

82 *Sabelo Mabuza v Commissioner of Police* [2010] SZHC 187 (28 July 2010).

83 *Professor Dlamini v The Attorney General* [2007] SZSC 1; page 10.

84 *Sabelo Mabuza v Commissioner of Police*; paras. 9-10.

85 *Sabelo Mabuza v Commissioner of Police*; par. 2.

could have terminated in the plaintiff's favour. Assuming that to be the correct interpretation of the trial judgment, it is not an accurate statement of the law, for it has long been held that a "withdrawal" of the charge(s), even if it be "provisional", is a termination of the prosecution in favour of the plaintiff.<sup>86</sup> There is no precedent for the contention that, unless there has been an actual trial, a conviction or acquittal, there is no prosecution for the purposes of the law of malicious prosecution.<sup>87</sup>

The foregoing submission finds favour with the earlier judgment of the court in *Tsabedze v DPP and Others*,<sup>88</sup> where a contrary view to that expressed in *Sabelo Mabuza* was made. In *Tsabedze*, the defendants in defence of an action for damages arising from an alleged arrest, detention, and malicious prosecution had contended that the arrest of the plaintiff was effected on reasonable suspicion that he had committed the crime of robbery within the ambit of sec. 22 of the *CPEA*. They further argued that the plaintiff was never prosecuted, as the charges were withdrawn before he was called upon to plead. In effect, the element of prosecution in a claim for malicious prosecution was absent in the case. The plaintiff argued that such allegations did not establish a defence to the plaintiff's action and were untenable in law, since the prosecution commenced upon the accused person being charged with the offence and would end either upon judgment being passed on the matter or such earlier event as withdrawal of the charge. If, as in this case, the plaintiff was charged at the Magistrates Court; remanded in custody on various occasions; committed for trial in the High Court; indicted for the offence of robbery; underwent a pre-trial conference, and actually attended court on the day of the trial whereupon the charges were withdrawn, it could not be contended that the plaintiff was never prosecuted for the offence of robbery. The trial was only part of the process of prosecution. The question of law raised by the defendant's exception was whether the fact that the plaintiff did not reach a stage in the proceedings, whereby he was called upon to plead to the robbery charge, would be a defence to the plaintiff's claim. Rejecting the defendants' argument and upholding the plaintiff's exception, Shabangu AJ held that the delictual wrong of malicious prosecution, sometimes also known as malicious procedure, does not require that the plaintiff must have been called upon to plead, in order for the wrong to have been committed. No authority, either at the level of case law or principle, was cited in support of the proposition that a plaintiff who sues for damages arising from malicious prosecution or procedure must have been required to plead to a criminal charge, in order to succeed in his claim. In fact, whether he has been required to plead or not is irrelevant to the cause of action or defence that might be raised.

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86 *Bayett v Bennett* [2012] ZAGPJHC 9:par. 204; *Lemue v Swartbooi* 1896 13 SC 403:405-407.

87 See, generally, Okpaluba 2013b:236.

88 *Tsabedze v DPP and Others* [2004] SZHC 117 (27 August 2004).

## 2.4 Reasonable and probable cause<sup>89</sup>

The guiding principle has been restated by the Privy Council in *Trevor Williamson v Attorney General of Trinidad and Tobago*<sup>90</sup> to the effect that, in order to satisfy this requirement, the prosecutor must have:

... an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in

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89 In *Glinski v McIver* [1962] AC 726:753-754, 758, 766-767, Lords Radcliffe, Denning and Devlin offered universally acceptable explanations of the element of reasonable and probable cause in a claim for malicious prosecution. First, Lord Radcliffe stated that the ultimate question was not so much whether there was reasonable or probable cause as to whether the prosecutor, in launching his charge, was motivated by what presented itself to him as reasonable and probable cause. Mere belief in the truth of the charge would not protect a prosecutor if the circumstances could not have led an ordinarily prudent and cautious person to conclude that the person charged was probably guilty of the offence. Second, Lord Denning observed that the police officer does not have to believe in the guilt of the accused. He has only to be satisfied that there is a proper case to go before the court. He cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him. Third, Lord Devlin held that the prosecutor does not have to believe in the probability of obtaining a conviction. He is only concerned with the question as to whether there is a case fit for trial. These pronouncements were adopted by Rajnauth-Lee JA in the Trinidad and Tobago Court of Appeal in *Juman v Attorney General of Trinidad and Tobago* CA 22 of 2009, and Kokaram J in *Morgan v Attorney General of Trinidad and Tobago* Claim No. CV2013-03924 (20 February 2015); paras. 15-17. It was held in *Morgan* that, in determining whether the arresting officer has reasonable and probable cause to prosecute the claimant, the first inquiry was to ascertain what was in the mind of the arresting officer and to determine whether the grounds on which he relied as the basis for his suspicion were reasonable, or that the circumstances were such as to lead an ordinary prudent person to conclude that the person charged was probably guilty. In a case of wrongful arrest/false imprisonment such as the present, it is for the defendant to justify the arrest and detention of the plaintiff. It must be demonstrated that the arresting police constable had reasonable and probable cause to effect the arrest. It is for the plaintiff in the malicious prosecution claim to prove that the arresting police constable did not have reasonable and probable cause to lay the charge and prosecute him and, in doing so, acted maliciously. In simple terms, the question is one of fact which translates into whether the arresting police constable in this case held an honest belief based on a full conviction founded on reasonable grounds that the plaintiff was probably guilty of the crime imputed. On further appeal to the Privy Council in *Juman v Attorney General of Trinidad and Tobago* [2017] UKPC 3 (20 February 2017); par. 13, it was held that the CA correctly summarised the test for reasonable and probable cause. See also *Willers v Joyce* [2016] 3 WLR 477 (UKSC); par. 54.

90 *Trevor Williamson v Attorney General of Trinidad and Tobago* [2014] UKPC 29 (03 September 2014); par. 14.

the position of the accuser, to conclude that the person charged was probably guilty of the crime imputed.<sup>91</sup>

It has equally been stated that the honest belief required of the prosecutor is a belief not that the accused is guilty as a matter of certainty, but that there is a proper case to place before the court.<sup>92</sup> Therefore, once reasonable and probable cause to prosecute existed, the fact that the prosecutor preferred the wrong charge would not make any material difference to the existence of a reasonable and probable cause as required by the law.<sup>93</sup>

Following his arrest, the plaintiff in *Simelane v Commissioner of Police*<sup>94</sup> was charged with the rape of a 12-year-old girl, for which charge he was subsequently acquitted. He claimed damages for having been unlawfully and intentionally arrested and detained by members of the Royal Swaziland Police acting in the course and within the scope of their employment as servants of the Government. The defendants countered that the arrest and detention of the plaintiff were both lawful and on probable or reasonable cause.<sup>95</sup> The subsequent prosecution was also lawful and without malice, as the defendants had in their possession sufficient evidence to justify or warrant the prosecution of the plaintiff on the rape charge. Mamba J adverted to what the plaintiff must show on a preponderance of probabilities, in order to satisfy the court that the injury he complained of was actionable. Since the claim was a combination of unlawful arrest and detention<sup>96</sup> as well as malicious prosecution, it followed that the plaintiff must prove all the requisite elements of the three, namely that:

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91 Citing per Hawkins J, *Hicks v Faulkner* (1978) 8 QBD 167:171.

92 Per Lord Denning, *Gliniski v Mclver*:758.

93 *Trevor Williamson v Attorney General of Trinidad and Tobago*:par. 21.

94 *Simelane v Commissioner of Police* [2010] SZHC 67 (22 April 2010).

95 A more incisive discussion of this element of malicious prosecution was conducted by the High Court of Australia in *A v New South Wales* (2007) 230 CLR 500 (HCA) and, subsequently, by the Court of Appeal of New South Wales in *State of New South Wales v Quirk* [2012] NSWCA 216, both of which dealt extensively with the burden of proof. See Okpaluba 2013a, and the subsequent judgment of the Privy Council in *Trevor Williamson v Attorney General of Trinidad and Tobago* discussed by Okpaluba 2016:265, par. 2.3.1.

96 Cf in *Ramsingh v Attorney General of Trinidad and Tobago* [2012] UKPC 16:par. 8, where the Privy Council set out the relevant principles to determine the tort of false imprisonment (unlawful detention) to include (a) that the detention of a person is *prima facie* tortious and an infringement of sec. 4(a) of the *Constitution of Trinidad and Tobago*; (b) it is for the arrestor/defendant to justify the arrest; (c) a police officer may arrest a person if with reasonable cause he suspects that the person concerned has committed an arrest-able offence; (d) thus, the officer must subjectively suspect that the person has committed such an offence; (e) the officer's belief must have been on reasonable and probable ground to make the arrest, and (f) any continued detention after arrest must also be justified by the detainer. The Privy Council further held that the test of reasonable and probable cause in a claim of false imprisonment has both subjective and objective elements. Similarly, reasonable and probable cause in a claim for malicious prosecution is both subjective and objective – *Dallison*

- i. The police who arrested and detained him were at the material time acting during the course and within the scope of their employment as servants of the Government;<sup>97</sup>
- ii. His arrest and detention were both unlawful;
- iii. The defendants instigated or instituted the prosecution of the plaintiff;
- iv. The defendants acted without reasonable or probable cause;
- v. The defendants were actuated by malice or an improper motive – the intention here being *animus iniuriandi* – in the form of direct intention; and
- vi. The criminal trial had been concluded and finalised in his favour.<sup>98</sup>

In reviewing the facts, certain issues were common cause: the arresting officers and prosecutors were acting in their capacities as Crown servants; the criminal trial ended in an acquittal of the plaintiff, and, in arresting the plaintiff, the police had information based on what the complainant told them as attested to by respective witnesses at the trial.<sup>99</sup> This matter fell eventually to be decided on whether there was malice in the arrest and prosecution and whether there was absence of reasonable or probable cause in carrying out the prosecution. Mamba J referred to the speech of Hoexter JA in *Minister of Justice v Hofmeyer*<sup>100</sup> and held that what the Justice of Appeal mentioned therein reflected the law applicable in Swaziland.<sup>101</sup> To begin with, in an action for damages based on *iniuria*,

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*v Caffrey* [1964] 2 All ER 610:619; *Baco v Attorney General* HCA 1388 of 1989 (TTHC); *Morgan v Attorney General of Trinidad and Tobago*:par. 13.

97 In *Masuku v COP* [2004] SZHC 95, the plaintiff claimed E800,000 damages for the injury he had suffered as a result of unlawful arrest and subsequent malicious prosecution. By way of an exception under Rule 23 of the High Court Rules, the defendants argued that the plaintiff's particulars of claim lacked the necessary averments to sustain a cause of action in that no allegation was made of the fact that, at all material times, the members of the Royal Swaziland Police Force were acting within the course and scope of their employment by the Swaziland Government. The defendants contended that it was the law that, for an employer to be held liable for the wrongful conduct of his employee, the latter must have acted within the cause and scope of his employment when the delict was committed. In this instance, there was nothing whatsoever to associate the Swaziland Government with the conduct complained of. The claim merely alleged that members of the RSPF did something unlawful in respect of the plaintiff, but it was not shown how the Swaziland Government was affected thereby. Upholding the exception, Maphalala J held that the onus rests on the plaintiff to allege and prove that the person who committed the offence was: (a) the servant of the defendant – *Gibbins v Williams, Muller Wright and Mostery Ingelyf* 1987 (2) SA 82 (T), and (b) that he performed the act in the course and scope of his employment – *Minister of Police v Mbilini* 1983 (3) SA 705 (A).

98 *Simelane v Commissioner of Police*:par. 9.

99 *Simelane v Commissioner of Police*:paras. 10-11.

100 *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A):145.

101 *Simelane v Commissioner of Police*:par. 13.

the plaintiff must prove intent (*dolus, animus iniuriandi*) on the part of the defendant. Intent and motive are, however, discrete concepts. For, as Stratford JA stated in *Gluckman v Schneider*,<sup>102</sup> motive “is the actuating impulse proceeding intention”. Intention, on the other hand, reflects the will rather than the desire. The pertinent difference between the two concepts was stressed in the judgment of Solomon J in *Whittaker v Roos and Bateman*<sup>103</sup> to the effect that it was not necessary, in order to find that there was an *animus iniuriandi*, to prove any ill-will or spite on the part of the defendants towards the plaintiff. Furthermore, *dolus* encompasses not only the intention to achieve a particular result, but also the consciousness that such a result would be wrongful.<sup>104</sup> It is clear that without *dolus* the action for an *iniuria* would not lie in either Roman law or Roman Dutch law.<sup>105</sup> It is equally clear that, in a limited class of *iniuriae*, the current of precedent has in modern times flowed strongly in a different direction. In this limited class of delict, *dolus* remained an ingredient of the cause of action, but in a somewhat attenuated form, in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods. There is the possibility that, in the case of certain forms of *iniuria*<sup>106</sup> involving constraints on personal liberty, the wrongdoer’s legal liability might exist, even in the absence of his appreciation of the wrongful nature of his injurious act. This has been explicitly recognised by the courts. Finally, the principles of the law of delict that govern the legal liability of a wrongdoer for the infliction of unlawful body restraint, touching as they do on the liberty of the subject, are principles of vital importance in the polity.<sup>107</sup>

Having examined the information available to the police in *Simelane*, the court had to answer the question as to whether it could be said that they had no reasonable and probable cause to arrest or detain the plaintiff. In answering that question in the negative, the court considered the fact that the plaintiff was well known to the complainant. On the day in question, they had left the complainant’s home together and were subsequently gathering maize together at the plaintiff’s garden. On her return from his garden, it was discovered that someone had had sexual intercourse with her and she was walking with some difficulty. Given that this set of facts were in the possession of the police, the judge concluded that they were entitled not only to arrest, but also to prosecute the plaintiff, notwithstanding his denial. That he was eventually acquitted and discharged at the close of the Crown’s case did not make the arrest unlawful and the prosecution malicious. His acquittal, according to Mamba J “means nothing more

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102 *Gluckman v Schneider* 1936 AD 151:159.

103 *Whittaker v Roos and Bateman* 1912 AD 92:131.

104 *Dantex Investment Holdings (Pty) Ltd v Brenner and Others* NNO 1989 (1) SA 390 (A):396E.

105 Per Davis J, *Wade & Co v Union Government* 1938 CPD 84:86.

106 On different forms of *iniuria*, see Neethling *et al.* 2015:341-378, paras. 2.3.2-2.3.3.

107 *Simelane v Commissioner of Police*:par. 13.

than the court saying the Crown has failed to lead sufficient evidence implicating him with the commission of the offence charged”.<sup>108</sup> In effect, there was reason to suspect not only that the plaintiff had committed an offence to warrant his arrest and subsequent detention, but also that the prosecutor had sufficient evidence to enable him to exercise the discretion to proceed to trial, there being a reasonable or probable cause to do so. Further, on the authority of the Supreme Court judgment in *Professor Dlamini’s* case,<sup>109</sup> there was no proof of malice on the part of either the arresting officer or the prosecutor.<sup>110</sup>

## 2.5 Malice<sup>111</sup>

In providing what the Privy Council has described as “a good working definition”<sup>112</sup> of what was required for proof of malice in the criminal law context, the Australian High Court judgment in *A v New South Wales*<sup>113</sup> held that “what is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an ‘illegitimate or oblique motive’. That improper purpose must be the sole or dominant purpose actuating the prosecutor”. In another case, their Lordships of the Privy Council held that an improper and wrongful motive lies at the heart of an action for malicious prosecution; it is the “driving force” behind the prosecution.<sup>114</sup> It is generally accepted that what must be shown is that the prosecutor’s motive(s) was for a purpose other than bringing the arrested person to justice.<sup>115</sup> In line with this reasoning, their Lordships rejected an appellant’s attempt to treat the failure of the police to carry out sufficient investigation before charging the appellant as amounting or equivalent to malice; or similarly the attempt to treat recklessness as amounting to malice. According to their Lordships, “recklessness’ is a word which can bear a variety of meanings in different contexts. It is not a suitable yardstick for the element of malice in malicious prosecution”.<sup>116</sup> A failure to take steps, which would be elementary for any reasonable person to take before instituting proceedings, might in some circumstances serve evidentially as a pointer towards deliberate misuse

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108 *Simelane v Commissioner of Police*:par. 14.

109 *Professor Dlamini v Attorney General*.

110 *Simelane v Commissioner of Police*:par. 15.

111 See, generally, Okpaluba 2012a.

112 *Trevor Williamson v Attorney General of Trinidad and Tobago*:par. 11.

113 *A v New South Wales*:par. 91.

114 *Crawford Adjuster v Sagicor General Insurance* [2014] AC 366 (PC):par. 101.

115 See *Crawford Adjuster v Sagicor General Insurance*:par. 101. See also *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL); *Gibbs v Rea* [1998] AC 786; *Stevens v Midland Counties Railway Company* (1854) 10 Exch. 352; *Kvello Estate v Miazga* [2009] 3 SCR 339 (SCC); *Proulx v Quebec (Attorney General)* [2001] 3 SCR 9 (SCC); *Nelles v Ontario* (1989) 2 SCR170 (SCC).

116 *Juman v Attorney General of Trinidad and Tobago*:par. 17.



of the court's process, "but sloppiness of itself is very different from malice".<sup>117</sup>

If the police had reasonable suspicion to arrest and the prosecutor reasonable and probable cause to prosecute, where does that leave the malice requirement? The seemingly straightforward answer to this question is that the plaintiff's case has partially collapsed because both elements must be proved in order to succeed. In effect, if there is no basis for the prosecution, the inquiry into the motive of the prosecutor becomes even more curious to pursue, while, if such reasonable cause existed, the motive behind the prosecution may not be relevant. In light of the *Simelane* case, the question to ask is whether either or both the investigator and the prosecutor acted maliciously in the circumstances? Mamba J held that the plaintiff had not led evidence to prove any of the elements of his claim, it being common cause that he was arrested and detained by the defendants' servants, prosecuted and acquitted on the charge of rape. The unlawfulness of his arrest and detention as well as the malicious intent in his prosecution were wanting.<sup>118</sup> In resolving these issues, the court relied on the judgment of Tebbutt JA in *Professor Dlamini v The Attorney General*,<sup>119</sup> where the Justice of Appeal, relying on a number of South African cases, held that malice in the context of malicious prosecution also includes *animus iniuriandi*. There has been much judicial pronouncements on whether malice has been replaced by *animus iniuriandi* in the third of the requirements that a plaintiff has to prove.<sup>120</sup> The author of the section on malicious prosecution in the *Law of South Africa (LAWSA)* opines that this is open to question<sup>121</sup> and submits that malice should still be required to establish wrongfulness. Tebbutt JA then held that the two concepts, although one is concerned with lawfulness and the other with fault,<sup>122</sup> yet, within the context of an action for malicious prosecution, they differ but little from one another. *Animus iniuriandi* has been defined as "consciously

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117 *Juman v Attorney General of Trinidad and Tobago*:par. 19. It was held in *Willers v Joyce*:par. 55 that malice requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation. But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the *bona fide* purpose of trying that issue, but to secure some extraneous benefit to which "he has no colour of a right". The critical feature to be proved is that the proceedings instituted by the defendant were not a *bona fide* use of the court's process.

118 *Simelane v Commissioner of Police*:par. 15.

119 *Professor Dlamini v Attorney General*.

120 See, for example, *Lederman v Moharai Investments (Pty) Ltd* 1969 (1) SA 190 (A):196; *Moaki v Reckitt and Colman* 1968 (3) SA 98 (A):103-104; *Prinsloo v Newman* 1975 (1) SA 481 (A):492A-C; *Thompson v Minister of Police* 1971 (1) SA 371 (E):373-374.

121 *LAWSA*:par. 612, line 2.

122 *LAWSA*:par. 612, line 2.

wrongful intent<sup>123</sup> or an intention to injure, that is, a deliberate intent to harm. In order to succeed in his action, a plaintiff would, therefore, have to establish a desire on the part of the defendant to cause him harm or a conscious or deliberate intention to injure him by setting in motion the legal proceedings against him.<sup>124</sup>

It was held in *Professor Dlamini's* case that, in order to succeed in the action, the appellant would have had to prove that the police and the DPP had a desire to do harm to him, that is, they bore him ill-will, or that they had a deliberate intention to injure him when they set the law in motion against him. The very definition of the action carries the adjective "malicious" on its forehead, that is, that the prosecution was instituted with ill-will towards him, which, in effect, is tantamount to a desire to harm, or an intention to injure him.<sup>125</sup> The court found no shred of evidence to support the appellant's bald suggestion that he was prosecuted, because the police and the DPP had been actuated by malice towards him on account of his political affiliations, being a political activist and member of a political organisation known as the People's United Democratic Movement. Incidentally, the trial court was not satisfied with the appellant's malice plea, nor did it find that the police prosecution lacked reasonable and probable cause in instituting the prosecution against the appellant. The Supreme Court held that it was perfectly correct in doing so. The police and the DPP had ample evidence before them which ordinarily any prudent and cautious person would have been quite reasonable in believing the appellant's guilt. They were adamant that they had an honest belief in the appellant's guilt and that they had "a good case" to take to court.

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123 *Maisel v Van Naeren* 1960 (4) SA 836 (C).

124 Page 11, transcript of the judgment. See also *Ochse v King Williamstown Municipality* 1990 (2) SA 855 (E):856-857. See, generally, Neethling *et al.* 2016:179, par. 3.1.2.3.

125 See the approach of the courts in Trinidad and Tobago, where the plaintiff is not required to demonstrate spite or hatred, but only needs to show that the prosecutor was prompted by improper and indirect motives. As the Court of Appeal explained in *Cecil Kennedy v Attorney General* [2005] TTCA 28:paras. 31, 34-36, the proper motive for a prosecution is the desire to secure the ends of justice and, if this is not the defendant's true or predominant motive, then the plaintiff will succeed on a claim for malicious prosecution. Again, if it is shown that there was some other motive for the prosecution of the charges, while not invariably so, an absence of reasonable and probable cause can be evidence of malice. Applying the *Cecil Kennedy* principles to the facts of *Imran-Khan v Attorney General of Trinidad and Tobago* Claim No CV2012-04559 (17 November 2014):paras. 73-74, Rampersad J held that the police officer did not seem to have been motivated towards securing the ends of justice, but rather towards penalising the claimant directly on his own on account of previous encounters between the two men. The police officer admitted in evidence that the claimant complied with his requests to stop his vehicle, hand over his documents, and attend to the police station. The court held that the prosecution of the claimant for causing unnecessary obstruction and used his motor vehicle for another purpose on the day and time in question was motivated by malice.

Having found that there was no proof of absence of reasonable and probable cause, the question as to whether the police and the DPP were actuated by some indirect or improper motive became practically irrelevant. However, due to the insistence of counsel to the appellant, Tebbutt JA nonetheless made a finding with regard thereto. The appellant had contended that there had been an absence of reasonable and probable cause during the course of the criminal trial and that there was evidence of malice on the part of the respondent when the DPP did not immediately stop the prosecution at the end of Magagula's evidence when it became apparent, as the DPP conceded, that the Crown case against the appellant had failed. In effect, continuing with the trial until the conclusion of the Crown case when the defence had to apply for the appellant's discharge, which was not contested, was clear evidence of the respondent's malice. It was held that the operative time in considering whether the respondents had reasonable and probable cause or were actuated by malice is when they instituted the proceedings and set the law in motion. A correct reflection of the position in a malicious prosecution claim, as decipherable from all the relevant case law, is that one of the requirements that a plaintiff must prove is that the prosecution set the law in motion and it is at that material time that the question arises as to whether there was reasonable and probable cause to do so. In the present case, the prosecutor was justified in not immediately withdrawing the case after Magagula's evidence. The prosecutor had other witnesses to call. In upholding the trial court, the Supreme Court held that the appellant as plaintiff, therefore, failed to establish the two elements for success in his action, namely an absence of reasonable and probable cause, and that the respondent was actuated by an improper motive in doing so.

### 3. Conclusion

It clearly emerges from this study that both the police and the military personnel in the Kingdom of Swaziland appear to take the law into their own hands whenever they "suspect" that a person has committed an offence or even where no such reasonable suspicion existed. This is evidenced by the frequency with which these physical assault cases and the vehemence or severity with which they are perpetrated reach the courts. Cases such as *Bongani Shabangu* and *Ngomane* will remain textbook illustrations of man's inhumanity to man, man-created hardships and extra-judicial punishment imposed upon individual members of the public by government officials bereft of any legal authority to do so. Needless to say, the treatments meted out were ostensibly designed by the perpetrators to humiliate, dehumanise and lower the individual esteem of the victims in utter disregard of the judicial process and the rule of law. As burdensome as the judicial function might have been in disposing of these heinous and sometimes frightening cases, and for upholding the rule of law, the sanctity of the entrenched human rights, one can venture to suggest that, through the cases surveyed in this article, the judiciary

in Swaziland must have acquitted itself creditably in the discharge of its constitutional duties to the citizenry at large.

Incidentally, it has become normal practice in modern times for the courts, not only in Swaziland, but also throughout the Commonwealth, to refer to or adopt leading Commonwealth case law in adjudicating cases that fall within the area of law with which they are dealing. That this modern practice is common in this field of the law is understandable because of the apparent uniformity in the individual country's criminal procedure legislation and the similarity in the entrenched human rights protections in the Constitutions, the Human Rights Acts or Bill of Rights legislation. It has been established in the Commonwealth jurisdictions that the High Court of Australia judgment in *A v New South Wales* has provided "a good working definition" of malice and reasonable and probable cause in the law of malicious prosecution, and the courts in Swaziland are no exception. In this article, the reader's attention is also drawn to the subsequent Privy Council judgment from Trinidad and Tobago in *Trevor Williamson*, which has restated the principles relating to the malice and probable cause elements in the law of malicious prosecution of which the courts should be aware of its relevance and impact.

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