

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO 1057/91

In the matter between:

MAXWELL LUKHELE

PLAINTIFF

and

THE ATTORNEY GENERAL

DEFENDANT

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J U D G M E N T

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(21ST OCTOBER 1994)

M J STRYDOM, J

This is an action in which plaintiff, adviser to the Commissioner of Taxes, Mbabane, claims damages in the sum of E257 000,00 from the Attorney-general in his capacity as representative of the Swaziland government.

In his particulars of claim plaintiff alleges that on 22 June 1990 at Mbabane he was falsely and maliciously arrested by the Royal Swaziland Police without reasonable and probable cause and was thereafter detained in custody until 4 October 1990. He furthermore alleges that on 22 June 1990 defendant falsely, maliciously and without reasonable and probable cause preferred charges of high treason, sedition, subversion and a contravention of paragraph 13 of the King's Proclamation of 1973 against plaintiff and caused the prosecution of plaintiff thereon in a summary trial in the High Court of Swaziland where plaintiff was on 4 October 1990 acquitted and discharged on all such charges. He lastly alleges that by reason of his malicious arrest and prosecution he was suspended from his employment, was injured in his good name and reputation, was deprived of his liberty, endured hardship and suffering and incurred legal costs in defending himself.

Defendant denies that the arrest, detention and prosecution were false, malicious and without reasonable or probable cause, and further denies that plaintiff has suffered damages. Defendant avers that it had reasonable grounds for the arrest, detention and prosecution of plaintiff in that defendant bona fide believed on reasonable grounds that plaintiff had committed the crimes for which he was charged.

At a pre-trial conference held on 30 May 1994 the parties agreed that the only issues to be determined at the trial were the following

- 1 did the defendant have reasonable grounds for the arrest, detention and prosecution of plaintiff and, more particularly, did defendant bona fide believe on reasonable grounds that plaintiff had committed the crimes for which he was charged
- 2 did plaintiff suffer any damages as a result of his arrest, detention and prosecution and, if so, what the amount of such damages is
- 3 that the burden of proof of the issues referred in paragraph 1 rested on defendant and on the issues raised in paragraph 2 upon plaintiff.

The following facts and/or circumstances are common cause

- 1 on 6 July 1989 plaintiff left Swaziland for the United States of America to follow a post-graduate course in international taxation at the Harvard Law School
- 2 after completing the course he returned to Swaziland on 13 June 1990
- 3 on 22 June 1990 he was arrested by the Swaziland Royal Police at Mbabane

- 4 he was taken to the regional headquarters of the  
police at Mbabane and thereafter, on the same day,  
transferred to Manzini
- 5 during the afternoon of that day he was taken to the  
Manzini magistrate's court where he was informed that  
he was held on a charge of treason
- 6 the case was postponed whereupon plaintiff was taken  
to the Matsapha central prison
- 7 at the Matsapha central prison he and ten others were  
held in "condemned cell B", one of two so-called  
"death cells"
- 8 just before the trial commenced he and his co-accused  
were transferred to the Sedwashini prison at Mbabane
- 9 the trial of plaintiff and nine of his co-accused  
commenced on 24 September 1990 in the High Court of  
Swaziland before Hannah CJ
- 10 the indictment on which plaintiff and his co-accused  
appeared read as follows

"COUNT 1:

The accused are guilty of the crime of high treason

In that, whereas King Mswati III is the King of the  
Kingdom of Swaziland and as such is the head of the  
Sovereign State of Swaziland

And whereas during the period covered by the  
indictment the accused who are persons who owed  
allegiance to King Mswati III Head of State of the  
kingdom of Swaziland and his government, the accused

did unlawfully and with a hostile intent to overthrow, coerce, impair or endanger the existence, independence and security of King Mswati III and his government commit certain acts during the year 1988 to June 1990 at various places in Swaziland, the particulars whereof are as follows:

1. The accused conspired to form a political party known as the People's United Democratic Movement with the intention of overthrowing King Mswati III and his government.
2. The accused held meetings at Big Bend, the University of Swaziland at Matsapha, Mbabane and other places in Swaziland to organise Trade Unions, students, women and other people to overthrow the government of Swaziland.
3. The accused held a meeting on 1st January, 1990 at Mawelawela. The meeting was convened by an organisation called 'People's United Democratic Movement' (PUDEMO). The meeting discussed the following:
  - (a) The present system of government and resolved that it was not a good system and must be overthrown and be replaced by PUDEMO government.
  - (b) That a military wing must be formed within PUDEMO to fight the government and overthrow it.
  - (c) That PUDEMO must recruit members of the Swaziland Youth Council and Swaziland Consumer Association, the Trade Unions and

other people to join it in its fight to overthrow the government.

- (d) That the king must be removed or overthrown because he does not care for the people. He spent a lot of money on travelling and in building a palace in Mbabane. The Tibiyo and Tisuka Funds were not properly audited yet they belong to the public.
  - (e) That the king insulted the people when he dispersed the Emabutfo. The king does not investigate the actions of his ministers, and does not care about his people.
  - (f) That the Swazi custom of marrying many wives must be stopped and even the king must stop the custom because it frustrates women.
4. The accused held a meeting under the umbrella PUDEMO at Ekukhanyeni on 28 January, 1990. The meeting discussed the killing of the king because he was setting a bad example. The meeting also elected two officials accused number 9 as Deputy Treasurer and Jabulani Matsebula (alias Arafat) as Secretary for the Military Wing.
- The meeting also discussed the distribution of PUDEMO pamphlets and decided to distribute them by hand as it was expensive to distribute them by post.
5. The accused conspired to and did distribute certain publications, letters and pamphlets, inter alia a document titled 'Message from the People's President delivered on New Year's Eve - December 31st, 1988', a document titled

'People's Manifesto', a document titled 'New Year/New Decade Message from the People's President' and a letter from 'the National Secretary' to the Prime Minister, the Secretary to the Cabinet, the Speaker of the House of Assembly, the Members of Parliament and the Commissioner of Police. ...

6. The accused encouraged students to destroy the property of the Swazi Government, arranged for students to be taught how to make petrol bombs and recruited people to join PUDEMO.

COUNT 2:

The accused are guilty of contravening King's Decree No 13 of the King's Proclamation of 1973,

In that:

During or about the period 1983 to 1990 and at various places in Swaziland the accused unlawfully and intentionally formed or conspired to form a political party known as 'People's United Democratic Movement'.

COUNT 3:

The accused are guilty of contravening section 5(1) of Act 46 of 1938, as amended, alternatively of contravening section 4(a) and (c) of the said Act,

In that:

During or about the beginning of 1989 the accused unlawfully and with subversive intent, alternatively seditious intent conspired to print, reproduce, publish and distribute subversive, alternatively

sedition publications and in fact printed reproduced, published and distributed subversive, alternatively seditious publications to wit a document titled 'A message from the People's President delivered on New Year's Eve - December 31st, 1988' and a document titled 'The People's Manifesto' ...

COUNT 4:

The accused are guilty of contravening section 5(1) of Act 46 of 1938, as amended,

In that:

During or about October/December 1989 and at Nhlangano the accused unlawfully and with subversive intention did, alternatively attempted to encourage students to destroy property belonging to the Swazi Government.

COUNT 5:

The accused are guilty of contravening King's Decree No 12 of the King's Proclamation of 1973,

In that:

On or about the 1st January, 1990 and at or near Mawelawela the accused unlawfully and intentionally organised and/or attended a meeting of a political nature, alternatively participated in a meeting of a political nature, without the prior written consent of the Commissioner of Police.

COUNT 6:

Accused numbers 1, 2 and 6 are guilty of contravening section 4(b) of Act 46 of 1938, as amended,

In that:

On or about the 1st January, 1990 and at Mawelawela the accused listed below did unlawfully and with seditious intent uttered seditious words, to the effect as listed hereunder:

1.1 Accused No 1 - Words to the effect that His Majesty King Mswati III does not care about his people.

1.2 Accused No 2 - Words to the effect that His Majesty King Mswati III does not care about his people.

1.3 Accused No 6 - Words to the effect that His Majesty King Mswati III had insulted the people.

COUNT 7:

The accused are guilty of contravening King's Decree No 12 of the King's Proclamation of 1973,

In that:

On or about the 28th January, 1990 and at or near Ekukhanyeni the accused unlawfully and intentionally organised and/or attended a meeting of a political nature, alternatively participated in a meeting of a political nature, without the prior written consent of the Commissioner of Police.

COUNT 8:

Accused numbers 2 and 4 are guilty of contravening section 4(b) of Act 46 of 1938, as amended,



In that:

On or about the 28th January, 1990 and at or near Manzini the accused did unlawfully and with seditious intent uttered seditious words to the effect as stated below:

1.1 Accused No 2 - Words implying that His Majesty King Mswati III was greedy and a thug.

1.2 Accused No 4 - Words to the effect of suggesting that His Majesty King Mswati III should be killed.

COUNT 9

The accused are guilty of contravening Section 5(1) of Act 46 of 1938,

In that:

During the period January to May, 1990 and at various places in Swaziland the accused did unlawfully and with subversive intention

- (a) counselled defiance of or disobedience to the laws of the Kingdom of Swaziland and lawful authority;
- (b) brought into hatred and contempt the Royal Swazi Police, alternatively excited disaffection against the Royal Swazi Police;
- (c) attempted to seduce from their allegiance the Royal Swaziland Police and the Umbutfo

Swaziland Defence Force; and

(d) supported, propagated and advocated acts and things prejudicial to the public order and the security of Swaziland; and

(e) indicated a connection, association or affiliation with or support for an unlawful society, to wit The People's United Democratic Movement.

COUNT 10:

The accused are guilty of contravening section 5(1) of Act 46 of 1938, as amended,

In that:

During or about the period January to May 1990 and at Matsapho the accused unlawfully and with subversive intention recruited and/or attempted to recruit people to join the People's United Democratic Movement and thereby indicated connection, association and affiliation with an unlawful society, to wit the said People's United Democratic Movement.

COUNT 11:

The accused are guilty of contravening section 5(1) of Act 46 of 1938, as amended, alternatively of contravening section 4(a) and (c) of the said Act,

In that:

During or about the period January to May 1990 the accused unlawfully and with subversive intent,

alternatively seditious intent conspired to print, reproduce, publish and distribute a subversive, alternatively seditious publication and in fact printed, reproduced, published and distributed a subversive, alternatively seditious publication, to wit a document titled 'New Year/New Decade message from the People's President - People's United Democratic Movement'. ...

COUNT 12:

The accused are guilty of contravening section 5(1) of Act 46 of 1938, as amended, alternatively of contravening section 4(a) and (c) of the said Act

In that:

During or about the period March to May 1990 the accused unlawfully and with subversive, alternatively seditious intent, conspired to print, reproduce, publish and distribute a subversive, alternatively seditious publication, and in fact printed, reproduced, published and distributed a subversive, alternatively seditious document, to wit an undated letter attached to the indictment as Annexure 'D'.

COUNT 13:

Accused number 4 is guilty of contravening section 5(1) of Act 46 of 1938, as amended.

In that:

During or about April/May 1990 and at the Trade Fair Youth Centre at Matsapha the accused unlawfully and with subversive intention did, alternatively attempted to, alternatively made preparations to arrange for and

support the making of petrol bombs and the training of people in making petrol bombs."

- 11 At the close of the crown case on 4 October 1990 plaintiff and two of his co-accused were discharged and acquitted on all counts against them after the prosecution had conceded "that it had not made out a case against them". *Qwda.*

The only witness called to testify on behalf of defendant was Mr Absolom Twala who had been the director of public prosecutions in Swaziland from March 1982 until 9 July 1990, when he was "removed" from that position. As director of public prosecutions he was in charge of all prosecutions in the magistrate's courts, the High Court and the court of appeal.

He states that he played no role in the arrest of plaintiff who was arrested by the police. "Somewhere in June 1990", he says, the relevant police docket was to have been brought to him by the commissioner of police, his deputy and the assistant commissioner of police. However, they did not turn up at his office. After a few days the docket was sent to him. He read the docket. He thinks there were two or three names of accused on the cover of the docket. After reading the docket he held interviews with prospective witnesses. Two of those witnesses were Sipho Motsa and Dan Mangwe. During his interview with the two witnesses it transpired that they were "accomplice witnesses".

Both Mangwe and especially Motsa implicated plaintiff. It transpired that they attended meetings at the University of Mbabane and at Big Bend. "If he remembers well", he says, those meetings were organised by a political party called Pudemo.

The meeting at the university was held in the house of Ray Russon, a lecturer at the university. He says that he "thinks he can safely say that Russon is a Pudemo member". Both meetings, although "called" union meetings were in actual fact

Pudemo meetings. This appeared from his interviews with Mangwe and Motsa.

He states that he always interviewed accomplice witnesses "strictly" and that he "showed them that he was not begging them to give evidence against anybody". He used to do this because in the course of his work as a prosecutor he found that accomplice witnesses "implicate people unnecessarily".

He says that on reading the docket he "thinks there was a statement by Kuseni Dlamini in which statement Dlamini said that plaintiff had been elected as an office bearer of Pudemo. It was on that basis that plaintiff's name, if it was not on the "outside" of the docket, was "listed among the accused".

At the beginning of July 1990 he had to prepare the case against the accused. "Round about", he thinks, 9 July 1990 he was removed as director of public prosecutions. Two South African advocates were brought to Mbabane to prosecute the accused. They were later joined by a third advocate from South Africa.

The "final charges" depended on interviews done by the South African advocates.

He says that when he read the docket it appeared clear to him that plaintiff had contravened the King's Proclamation of 1973. It was also clear, from Motsa's statement, that the meetings organised by Russon were political meetings. He entered the names of approximately 12 accused on the "outside" of the docket. Those accused were to be charged. He then returned the docket to the police. However, the final decision who to prosecute was that of the South African advocates.

Under cross-examination he says that the docket contained statements deposed to by Motsa and Mangwe. He read the statements. He also had interviews with Motsa. He did not take a statement from Motsa at the time of the interviews. He did not

think it necessary to do so as he was going to "lead" Motsa in the witness box. In June 1990 he had an "additional interview" with Motsa. Motsa told the South African advocates "substantially the same story" he had told Twala.

During the interviews Motsa changed his version substantially from his version contained in his statement of 19 February 1990. He concedes that Motsa "was not a credible witness to rely upon". He is not aware of the fact that Motsa had made a further statement (exhibit Q) on 15 May 1990. He then says that he does not know whether he had seen that statement. However, he agrees that no reference is made to plaintiff in that statement.

He heard, after the acquittal of plaintiff and some of the accused, that Motsa had "retracted almost everything he had told him during the interviews".

When it was put to Twala that the police diary (exhibit B2-10) contains no reference to plaintiff at all he says that he did not read the diary. He also does not know why plaintiff's name was crossed out on the list containing the names of Pudemo executive members (exhibit B11).

Twala says that at the time he handled the docket he was not aware of the fact that plaintiff was overseas. He came to know thereof for the first time when plaintiff gave evidence the previous day. When referred to page 10 of defendant's bundle of documents which reflects that plaintiff was "abroad" when the office bearers of Pudemo were elected, he says that he did not read Dlamini's statement, mentioning that fact, properly. He cannot remember the report (exhibit C) in which further reference is made to the fact that plaintiff left Swaziland "in June last year" (June 1989). If he had read that report he did "not take notice" of the statement that plaintiff was overseas.

When it was put to Twala that most of the charges in the indictment refer to crimes committed on dates when plaintiff was

overseas he stated that "he does not take responsibility for the final charges". He says that the South African advocates took over from him. He does not know why the South African advocates took over from him. They "were brought in" by "political figures" who were not civil servants or ministers at the time. Those "figures" were Sishayi Nxumalo (the present deputy prime minister), Mabalizandla Hlabatsi (a senator at the time), Zonki Khumalo (who later became the minister for justice). It was unusual, he says, that these "political personalities" were behind the appointment of the South African advocates. He complained about their appointments because they were paid large sums of money, more than the director of public prosecutions was paid.

He says that the South African advocates, on taking over the prosecution from him, interviewed the witnesses afresh, made their own summary of the evidence and drafted a different indictment from the one he had drafted. Their indictment differed radically from the one he had drafted (see exhibit R, which is the indictment prepared by Twala). He charged plaintiff as a member of Pudemo, he states, because of the statements made by Motsa and the interviews he had had with him. According to Motsa those meetings were Pudemo meetings.

With reference to a number of the changes in the indictment he conceded the following

- 1 count 1, paragraphs 3 and 4: plaintiff was not implicated by anyone in respect of the meetings held on 1 January 1990 and 28 January 1990 at Mawelawela and Ekukhanyeni respectively - he says that those meetings constituted the material particulars relating to the treason charge
- 2 count 1 paragraph 5 : the docket contained nothing implicating plaintiff with the allegations therein contained

3 counts 4, 5, 7, 9, 10, 11 and 12 : there was nothing in the docket linking plaintiff to any of those counts.

It should here be noted that plaintiff was not charged on counts 6, 8 and 13. Furthermore : defendant led no evidence which supports a reasonable or probable cause for the charges in counts 2 and 3 of the indictment.

Plaintiff's evidence, in a nut-shell, is the following

After obtaining the LL.B degree at the University of Swaziland he joined the department of taxes in 1984 as a tax inspector. During 1987 he received specialised training in tax matters in London for approximately 6 months.

He was involved in the revival of the Swaziland National Association of Civil Servants (SNACS) in 1986 and was subsequently elected president of the Association. He was a member of the Richards Salary Review commission which was established in 1988. The task of the commission was to review certain aspects in respect of the remuneration and working conditions of civil servants.

On 6 July 1989 he left Swaziland for the United States of America where he followed a post-graduate course in international taxation at the Harvard Law School. After completion of the course he arrived back in Swaziland on 13 June 1990.

On 22 June 1990 he was arrested by the Swaziland Royal Police at Mbabane. He was not informed of the charges against him at the time of his arrest. He was taken to the regional headquarters where he remained from 09h00 until lunchtime. During lunchtime he was transferred from Mbabane to Manzini. He was not told why. At Manzini he was told by a police officer that he would be taken to the magistrate's court that afternoon.



He appeared in court that afternoon and he was remanded to Matsapha Central prison. He asked the magistrate why he was held in custody. He was then informed that he was held on a charge of treason. He was not represented at court and had no time to consult with a lawyer. His arrest and appearance in court figured prominently in the Swaziland newspapers (exhibits C and D). When on 27 June 1990 he again appeared in court with a member of his co-accused there was "a lot of singing" by his co-accused. He did not participate in the songs or the raising of his fist. This is further borne out by a report in the Times of Swaziland of 28 June 1990 (exhibit E) where it was stated that plaintiff "conspicuously did not join this".

A bail application by plaintiff and his co-accused was dismissed by the High Court on 26 July 1990. Counsel's fees in respect of plaintiff amounted to E2 000 for the application.

At the trial plaintiff was represented by counsel. The fees he had to pay to his legal representatives amounted to E7 000 (exhibit B15).

Plaintiff denies ever having been a member of Pudemo. He says that at no time was he active in politics. Apart from his interest in the civil service he had no other interests in public life.

He states that the meeting held on 3 June 1989 was a trade union meeting which was attended by executive members of various trade unions.

He says that no evidence of whatsoever nature was led against him at the criminal trial.

Under cross-examination he denies that the meeting of 3 June 1989 was a Pudemo meeting. Trade union matters were discussed at the meeting. He denies ever having attended a Pudemo meeting.

He denies the defendant's suggestion that he had been told of his election during his absence to the executive of Pudemo.

During re-examination he reiterates that the meeting held on 3 June 1989 was held to discuss trade union problems. No political matters were discussed at the meeting. He never knew that Russon and Mngomezulu, who attended the meeting were members of Pudemo. It was not reflected in the minutes of the meeting that political matters were discussed (see exhibit B22). At the criminal trial Motsa gave evidence on behalf of the crown. In regard to the said meeting Motsa testified that it had been a union meeting and that trade union problems were discussed at the meeting.

He finally states that he had never expressed ideas of a political nature. He denies ever having expressed sympathy with Pudemo.

The initial decision to indict plaintiff on a charge of treason and the other counts reflected in exhibit R, was that of Twala. From his evidence it appears that his decision to do so was mainly taken on what he was told by Motsa and Mangwe during the interviews he had with them. From those interviews he appears to have been satisfied that plaintiff committed the acts referred to in counts 1 to 6 of his indictment (exhibit R). He was also satisfied that plaintiff was in actual fact a member of Pudemo as plaintiff had been elected vice president of Pudemo on 28 January 1990. He was lastly satisfied that the respective meetings that had been referred to were meetings of Pudemo held under the guise of trade union meetings. This conclusion he reached on what he had been told by Motsa and Mangwe.

It is common cause that plaintiff was absent from Swaziland from 6 July 1989 to 13 June 1990 when he returned from the United States of America. That being so he could not have committed any of the crimes referred to in counts 4, 5, 7, 9, 10, 11 and 12 of the indictment drafted by the South African advocates. On the

same basis he could not have committed the crime referred to in count 4 of Twala's indictment. Furthermore, and again on the same basis, he could not have performed the acts referred to in paragraphs 3 and 4 of count 1.

In any event, in regard to those paragraphs, Twala himself testifies that plaintiff was not implicated by any witness in respect of those allegations. Of particular importance is Twala's evidence that the meetings held on 1 January and 28 January 1990 constituted the "material particulars" relating to the treason charge. In respect of paragraph 5 of count 1, he concedes that the docket contained nothing involving plaintiff in the alleged acts.

The question then is on what basis was plaintiff arrested and eventually prosecuted on ten of the thirteen counts. On Twala's evidence the docket contained, inter alia, the following

- 1 an affidavit deposed to by Motsa dated 19 February 1990 (see defendant's bundle of documents)
- 2 a statement made by Kuseni Dlamini on 18 May 1990 (see defendant's bundle of documents)
- 3 possibly a further statement made by Motsa on 15 May 1990 (exhibit Q)
- 4 the investigation diary (exhibit B1-10)
- 5 a list containing the names of the Pudemo executive members (exhibit B11).

On a perusal of the above the following is clear

- 1 plaintiff's name is mentioned by Motsa in respect of the meeting held on 3 June 1989 only

- 2 according to Motsa that was a trade union meeting
- 3 he does not involve plaintiff in respect of any other  
relevant meeting or in any other way
- 4 Kuseni refers to the meetings held on 1 January and 28  
January 1990 only
- 5 in regard to the meeting held on 28 January 1990 he  
states that "Maxwell who is abroad" was elected vice  
president of Pudemo
- 6 it is common cause that the "Maxwell" referred to by  
him is plaintiff
- 7 it is also abundantly clear from his statement that  
plaintiff did not attend that meeting and that  
plaintiff, at the time of the meeting, was overseas
- 8 plaintiff's name is not mentioned at all in the  
statement made by Motsa on 15 May 1990
- 9 plaintiff's name does not figure at all in the  
investigation diary.

Twala's decision to indict plaintiff could, bearing the  
aforementioned in mind, only have been made on what he had been  
told by Motsa during his interview with him and on Kuseni's  
statement to the effect that plaintiff had been elected vice  
president of Pudemo. As a matter of fact that is also the effect  
of Twala's evidence.

The next question is whether Twala had an honest belief in the  
guilt of plaintiff 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  
ordinarily prudent and cautious man, placed in the position of

the accuser, to the conclusion that the person charged was probably guilty of the crimes imputed (Hicks v Faulkner 8 QBD at 171, May v Union Government 1954 3 SA 120 at 129 A).

I am not at all satisfied that Twala had such an honest belief or could have had such a belief that plaintiff was probably guilty of the crimes imputed. He had meagre facts at his disposal to have come to a decision to indict the plaintiff. I say so for the following reasons

- 1 if he had properly and conscientiously, as the director of public prosecutions, considered and evaluated the facts known to him, he would undoubtedly have been forewarned that plaintiff might not have committed any of the alleged crimes because, on Kuseni's statement, plaintiff was overseas
- 2 that being so he would have enquired whether in fact plaintiff was overseas and, if so, at what stage he had been overseas
- 3 notwithstanding, at no stage did either he, or the police at his request, consult with plaintiff and afford plaintiff the opportunity to answer the allegations against him
- 4 on the contrary, Twala relied on what he was told by especially Motsa when he consulted with him, notwithstanding the fact that Motsa changed his version substantially from the version contained in his statement of 19 February 1990
- 5 Twala, on his own version, realised that Motsa "was not a credible witness to rely upon"
- 6 he was well aware of the danger to rely upon the evidence of an accomplice "because in his work as a

prosecutor he found that accomplice witnesses 'implicate people unnecessarily'".

Twala's evidence of the interviews he had with Motsa is, in my view, highly unsatisfactory. It seems to be inconceivable that no statement or any written record of any description would have been taken or kept of such a significant and material departure from two previous statements made by Motsa. Evidence led at the trial is consistent with Motsa's first statement. It was clearly inconsistent with what Motsa had allegedly told Twala during the interviews. No inconsistency was brought to the attention of the trial court by prosecuting counsel. In my view Twala's evidence regarding the interviews is unreliable and I reject it. In any event, even if the evidence with regard to the interviews is accepted, it should have been clear to Twala that Motsa was a totally unreliable witness. Reasonable and probable cause to prefer the charges could not, in my view, have been founded on the contradictory statements which Motsa allegedly made.

Twala furthermore concedes that there was no evidence in the docket which could support plaintiff's involvement in meetings at Mawelawela and Ekukhanyeni. It is clear that plaintiff was in the United States of America at the time. Twala nevertheless indicted plaintiff for high treason in respect of those meetings. He concedes in his evidence that those meetings constituted the material particulars of the treason charge. His evidence in chief, is to the effect that he decided that plaintiff had contravened the King's Proclamation of 1973. However, he does not say why and on what facts he had come to that conclusion.

There seems to have been no evidence of whatsoever nature in the docket to support the allegations contained in any of the counts in the indictment. Twala concedes that there was no evidence to support the allegations in paragraphs 3 and 4 of the treason charge. He concedes that there was no evidence to support counts 4, 5, 7, 9, 10, 11, and 12 of the indictment. In addition, defendant led no evidence whatsoever to support a reasonable and

probable cause for the charges in counts 2 and 3 of the indictment. There is also evidence, coming from Twala himself, of an interference with the discretion of the director of public prosecutions with regard to the conduct of the prosecution of plaintiff and those charged with him. He says that he was "removed" as director of public prosecutions and that "political personalities" (Nxumalo, Hlabatsi and Khumalo) were "behind the appointment" of South African advocates to prosecute in the criminal trial. Apart from that, he does not know why he was removed. It would seem to me that this is a factor which is indicative of the malicious nature of the prosecution. In any event, I would have expected the defendant, having had regard to the evidence of Twala, to have called the "political figures" to say why their intervention in the prosecution was necessary and, more particularly, to show that such intervention was necessary and that they had reasonable and probable cause for so doing.

Furthermore, defendant saw it fit to rely on the evidence of only Twala. Twala dealt with the matter for only a short period of time before being removed as director of public prosecutions. No evidence was forthcoming from the police officer or officers who had arrested plaintiff. No evidence was led on what basis it was decided to arrest plaintiff. There was also no evidence led on what transpired after the South African advocates had taken over the prosecution and on what basis it was decided to indict plaintiff on the charges they had preferred against him.

Mr Magagula on behalf of defendant, submits that Twala believed, on reasonable grounds, that plaintiff had committed the crimes mentioned in counts 1, 2 and 3 of exhibit R (the indictment drafted by Twala). That does not go to the crux of the problem. The real question is whether the police believed, on reasonable grounds, that plaintiff had committed the crimes he had been arrested on and whether the South African advocates had an honest belief in the guilt of plaintiff 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 ordinarily prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crimes imputed. In this regard it must be emphasised that the eventual indictment differed substantially from the one drafted by Twala.

Having given due consideration to the evidence placed before me and all the surrounding circumstances as set out above, I am satisfied that plaintiff has proved, on a balance of probability, that the criminal law was set in motion against him, not with the object of obtaining the conviction of the plaintiff, but for some ulterior object. A plaintiff need not prove what that object was. It is sufficient if he can prove, on a balance of probability, that there must have been some such object. That relates not only to plaintiff's arrest and detention but also to the decision to prosecute him on extremely serious charges without there being reasonable and probable cause for doing so. The intervention of "political figures" in the process of the prosecution goes a long way to show the malicious nature of the prosecution.

I should in conclusion state that plaintiff impressed me as an exceptionally good, honest and reliable witness. No criticism of whatsoever nature can be levelled at him as a witness or at his evidence. Throughout his evidence he remained calm and at ease, answered questions promptly and directly and did not contradict himself in any respect. He stood up well to a long and searching cross-examination. I have no hesitation at all in accepting his evidence in toto.

The same cannot be said of Twala. He did not impress me as a good or reliable witness. Time and again he gave long and irrelevant replies to direct and straightforward questions. On occasion I had to request him to carefully listen to questions, to answer it directly and not to just ramble on. To sum it up: Twala was an unimpressive witness.



I now turn to consider the quantum of plaintiff's damages.

In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on the courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. In the words of Broome JP in May v Union Government 1954 3 SA 120 N at 130F

"Our law has always regarded the deprivation of personal liberty as a serious injury."

The plaintiff was not only wrongfully arrested and detained but also had to face, as was stated earlier, serious criminal charges, including high treason. That being so, plaintiff is, in my view, entitled to be compensated in full measure for the humiliation and indignity that resulted in the relevant circumstances.

What are the relevant circumstances? The plaintiff, a married man with two children, and who has a LL.B degree, is and was at the time of his arrest attached to the department of taxes. When arrested he was a tax inspector in the department. He is at present the assistant commissioner of taxes. He was and is a man of standing in the community. His arrest was given wide publicity in the two national newspapers of the country. There was predominant front page coverage of the criminal proceedings against him and his co-accused (see inter alia exhibits M N O and P). He was detained as from 22 June 1990 to 3 October 1990 ie for a period of almost 3½ months what is more, he was locked up in "condemned cell B", one of two so-called "death cells" at the Matsapha central prison. No explanation was forthcoming why that was necessary in the circumstances. As a civil servant plaintiff involved himself in the Swaziland National Association of Civil Servants, an organisation registered in terms of the Industrial

Relations Act 1980. He was also president of the association. He was not paid his salary for several months (see exhibits B40 and B44). Plaintiff says that his arrest and subsequent prosecution affected his life. It tarnished his image in the public eyes and it lowered the esteem his colleagues held for him.

After considering awards made in other cases and after considering all the circumstances of the present matter and the steady decline in the value of money, I consider a fair award in respect of general damages to be one of E50 000. To this amount must be added the sum of E9 000 in respect of special damages.

In the result there will be judgment for plaintiff in the sum of E59 000 with costs.



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M J STRYDOM  
JUDGE OF THE HIGH COURT OF SWAZILAND

FOR THE PLAINTIFF: MR P. FLYNN  
FOR THE DEFENDANT: MR J. MAGAGULA