

Sibongi

IN THE HIGH COURT OF SWAZILAND

In the matter between:

Sibongile Gumbi

vs

Makhosini Dlamini

Civil Case No. 399/94

Coram Sapiro A C J

For Plaintiff S Dlamini

For Defendant A Lukele

JUDGMENT

26/3/98

The Plaintiff sues the Defendant of payment of damages arising from alleged assaults of her by the Defendant.

The Plaintiff and the Defendant both worked for a concern owned by the Defendant's father known as Rapid Shoe Repairs. The Defendant was the Manager of the business while the Plaintiff was an employee.

The particulars of claim alleged that on the 3rd September 1993 at the premises of Rapid Shoe Repairs the Defendant unlawfully assaulted Plaintiff by striking her with the open hand.

In giving evidence the Plaintiff hardly referred to this assault in chief and there is little to connect it with the damages claimed. The only significance of this allegation is that it was admitted by the Defendant that the matter was subsequently settled.

The Plaintiff further alleges that on 3rd December 1993 at the premises of Rapid Shoe Repairs the Defendant unlawfully assaulted her with clenched fists and banged her head against the floor. In giving evidence the Plaintiff clearly made this claim the basis of her action against the Defendant.

She says that the relationship between her and the Defendant had soured because of the Defendant

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having made sexual advances to her which she rejected. These allegations were not seriously contested by the Defendant when the Plaintiff was cross-examined. The reason for the failure to do so does not seem acceptable as this evidence was intended to establish the cause of the assault. One would have expected the defendant to deal with this allegation rather than ignore it

The Defendant's case in this regard when giving evidence was that he knew nothing of an assault. He

also denies that the Plaintiff reported the matter to the police station as she alleges and said the only report was of the first assault.

We are faced with two conflicting accounts of what happened and what did not happen. The onus of proving the case is on the Plaintiff. There are weaknesses in her case in that she has failed to call witnesses who are clearly available and who would have been able to support the version she gives. I refer to the co-employee and customers who are said to have been present when the assault took place as well as her friend who assisted her by giving her a lift to the hospital. The reasons given for not calling the witnesses are not very convincing.

The Defendant's case is also subject to a number of criticisms. He filed a plea or rather a plea was filed on his behalf in which he denies that he assaulted the Plaintiff on the 3rd November, but goes on to plead in the alternative that in the event of the court finding that the Defendant did hit the Plaintiff, the Plaintiff states that he did so in the heat of the moment by reason of severe provocation given by the Plaintiff who deliberately prior to such quarrel called the Defendant names.

While it is possible to make tactical denial in order not to shift the onus, it is not acceptable for parties to allege in their pleadings facts which they know to be untrue. In this case it is quite inconsistent firstly to deny the assault and then to say the assault did take place by reason of provocation. The Defendant has made no effort to substantiate the allegations of the alternative plea. I find therefor that the pleading was dishonest and this must count against the Defendant.

I also have found that his admission of the previous assault indicates a proclivity on his part to use his hands when he shouldn't.

I also bear in mind that the Plaintiff was not challenged on material aspects of her evidence which the Defendant denied for the first time in giving evidence.

I therefore find that on balance the onus resting on the Plaintiff has been discharged in this regard and that she was indeed assaulted as she described, by the Defendant on the day in question.

When it comes to damages however her case has less merit. Her description of the assault was brief and her account of the injuries she received vague which does not bring the attack into the category of a vicious assault as described by her counsel.

I find that the assault was not of a grievous nature and that the damages to be awarded cannot be substantial. This case could well have been brought in the Magistrates Court as the appropriate amount of the award is within the jurisdiction of that Court.

I accept that the assault was both physically painful and injurious to her dignity, but so seriously

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so as to warrant the award she claims. I consider an amount of E2,000 is adequate compensation.

There will be judgment for the Plaintiff for:

- (a) payment of the sum of E2,000;
- (b) costs to be taxed on the scale appropriate to an action in the Magistrate Court.

S.W. SAPIRE

ACTING CHIEF JUSTICE