

IN THE HIGH COURT OF SWAZILAND

CASE NO. 72/05

ZAKHELE GINA

PLAINTIFF

and

COMMISSIONER OF CORRECTIONAL SERVICES 1st DEFENDANT

SWAZILAND GOVERNMENT

2nd DEFENDANT

ATTORNEY GENERAL

3rd DEFENDANT

CORAM: Q.M. MABUZA -AJ

FOR THE PLAINTIFF: MR. MAGONGO

FOR THE DEFENDANTS: MR. LUNGA DLAMINI

JUDGMENT 1/9/06

[1] The Plaintiff herein sued the Respondents for damages in the amount of E680,000.00 (six hundred and eighty thousand Emalangeni) being in respect of damages for unlawful detention.

[2] The Defendants admitted liability and the only issue remaining was that of quantum of damages upon which this Court was requested to adjudicate. The Court reserved judgment on the issue of quantum and now delivers its judgment.

[3] The Plaintiff herein was arrested during the month of November 2003 and charged with the crime of rape by the Hluthi Royal Swaziland Police. The Nhlangano Magistrates Court granted him bail in the sum of E800.00

on the 31st March 2004.

[4] This amount was paid by his father who then went to the Nhlango Clerk of Court to seek a liberation warrant which he obtained. The father proceeded with the liberation warrant to the Nhlango Correctional Services where the Plaintiff was being held to serve the liberation warrant on the Correctional Services officers so that the Plaintiff could be released. The said officers refused to release the Plaintiff citing an executive directive that had been issued by the then Prime Minister, Dr. Sibusiso B. Dlamini.

[5] The directive was not submitted to this Court by Counsel and the Court is not privy to its contents. The effect of the directive was to keep the Plaintiff in custody and not release him.

[6] The Plaintiff was eventually released on the 17th September 2004 after spending 5 months and 17 days in custody or 170 days.

[7] When the Plaintiff was arrested he was in High School and in Form 5. As a result of the failure to release him he was not able to continue with Form 5 and instead was advised to repeat Form 4 upon his release. This means that he has lost two years of his schooling and is now two years behind. However nothing has been claimed for this inconvenience.

[8] The quantum of damages claimed by the Plaintiff has not been broken down and itemised. It is just a general lump sum amounting to E680,000.00

[9] Counsel for the Plaintiff has filed heads of argument wherein he advanced submissions as to certain considerations that should be taken into account in awarding the sum of E680.000.00 to the Plaintiff. He has cited various legal authorities of similar cases to assist the court to use as a guideline. I am indebted to Counsel for his assistance.

[10] I have gone through the said authorities which are distinguishable from the present case.

[11] In the case of **Ramakulukusha v Commander, Venda Natural**

Force 1989 (2) 813 the Plaintiff sought relief under certain specific heads, the relevant one to the present case being wrongful arrest and detention.

[12] The Plaintiff therein was arrested without a warrant. He was viciously assaulted in an effort to extract a confession from him and he was also maliciously prosecuted.

[13] In his claim against the Defendant he was awarded E15,000.00 in respect of the claim for damages for assault. He was awarded E30,000.00 as damages for malicious prosecution, including the defamatory aspects thereof. He was described as a man of good standing in the whole of Venda and beyond the borders of Venda and was the victim of an unwarranted infringement of his personal liberty, safety freedom, dignity and enterprise.

[14] Ramakulukusha's circumstances are vastly different from the present case and cannot in my view be used as a yardstick in the award of damages to the Plaintiff in the present case. The Plaintiff in the present case did not suffer all the indignities that Ramakulukusha suffered. The indignity that the Plaintiff suffered in the present case was unlawful detention for the period after he was granted bail. The Court in Ramakulukusha bundled together the claim of wrongful arrest and detention and still awarded the Plaintiff the sum of E 15,000.00.

[15] In my view this case is not helpful in the present case except that whatever award that is given to Plaintiff should not be excessive but it should be fair and be commensurate with the particular circumstances of the case.

[16] I wish to differ with Counsel for the Plaintiff that Ramakulukusha was awarded the amount of E2500.00 per day for detention from the 3rd February 1983 to 11 February 1983. The amount of E2500.00 was suggested by Counsel for the defence as a total amount to be awarded to the Plaintiff in respect of the head "unlawful detention" and which the learned Judge rejected. The two cases are in my view incomparable. In the present case the Plaintiff has not complained of unlawful arrest nor of the subsequent detention after the arrest before he was granted bail. The unlawful detention came after he was granted bail when the prison officials

refused to release him. The suggested scale is therefore misleading.

[17] I am also disinclined to use the suggested writings of Dr. Robert Koch as his writings normally refer to assessments of damages in bodily injury cases.

Counsel for the Plaintiff also cited the case of **Areff v Minister Van Polisie 1977 (2) S.A. 900 (A)** - The facts therein were as follows:

"The facts were that Plaintiff was a 41-year old director of companies and a businessman. He was humiliated by an arrest and the taking of fingerprints. As against this there was no proof of any vexatious or malicious conduct towards him. He was detained for only two hours and there was no publicity attached to his arrest. The learned Judge awarded him R1 000 as a fair and reasonable measure of compensation".

The facts in that case are distinguishable from the facts in the present case. The issue in the former case was an unlawful detention which followed an unlawful arrest. This is not the case with the present case. In the present case a lawful arrest was followed by a lawful detention on reasonable suspicion of the Plaintiff having committed a heinous crime of rape.

The award of E2700.00 per day is too high given the circumstances of the case. I have not lost sight of the fact that the courts are charged with the task of upholding the liberty of the individual. Counsel further referred me to the case of **May v Union Government 1954 (3) S.A. 120 (N)** the Plaintiff in that case sued the Defendant for damages for wrongful arrest and malicious prosecution. He succeeded on the claim for damages for wrongful arrest. This case too is distinguishable from the present case. In that case the Plaintiff was an advocate of standing and in actual practice. He was a professional man of good reputation in the community. He was the author of legal textbooks and of other works in more than one branch of literature. His arrest was unceremonious and was given wide publicity in the press. According to the Judges (Browne JP) opinion the Plaintiff therein was entitled to a substantial sum, the amount of 1,000.00 pounds.

[21] The Judge went on to say that: *"our law has always regarded the deprivation of personal liberty as a serious injury and where the*

deprivation carries with it the imputation of criminal conduct of which there was no reasonable suspicion the injury is very serious indeed (at page 130)." The arrest and detention were taken together and one lump sum was awarded.

[22] There were many cases that this Court was referred to by the Plaintiffs attorney particularly from the Republic of South Africa. These were not of much assistance because of the disparity in the awards and lack of uniformity and guidelines for subsequent cases. Our Courts should be wary in following the decisions of South African Courts in such cases. Those cases prior to 1993 should be carefully screened for racial bias. Those post 1993 should be equally screened for over compensation against racial inequalities which occurred prior to 1993.

It is equally important that the electorate in Swaziland should through their representatives initiate and pass legislation which will hold former Governments individually and collectively responsible for bad political decisions passed by them for which successor Governments and the **taxpayer** become liable.

[23] The Defendants in their heads of argument referred this Court to cases that emanated from the Swaziland Courts. I am grateful to Counsel therefore. A case in point is the case of **Maxwell Lukhele v Attorney General Civil Case No. 1057/91** (SLR 1987 - 1995 (VOL 4) p. 65. The Plaintiff was awarded general damages in the amount of E50,000 for having been unlawfully arrested and detained from 22nd June 1990 until 4th October 1990. The said case was decided in 1994. The wrongful detention was for a period of about 4 months.

Another case cited by the Defendant's Counsel is the case of **Professor Dlamini v The Attorney General Civil Case No. 778/2004** (unreported) which was decided on the 23rd February 2005. The Plaintiff therein was awarded damages in the amount of E75,000.00 for unlawful detention. The Plaintiff therein was held in custody from 20th September 2000 until 18th June 2001, a period of some 9 months.

[24] The Defendant was ordered to pay the Plaintiff a sum of E75,000.00 towards his general and special damages. The amounts in respect of

general damages and special damages are not separated. This Court has no way of knowing what amounts were claimed in respect of each item.

[25] Mr. L. Dlamini for the Defendant enjoined the Court to also take into account the issue of escalation of awards. However, it is difficult for this Court to do this because there is no yardstick that has been suggested that the court use for this purpose.

[26] I am aware that in a work place environment there are adjustments such as cost of living adjustments, inflationary adjustments. These adjustments follow certain acceptable patterns. My difficulty in following Mr. Dlamini's suggestion is what adjustment would there be for an incarcerated youth who had not been gainfully employed when he was arrested.

[27] The Court took the liberty of reading the judgment in the case of **Ntombifuthi Magagula and the Attorney General** Civil Appeal No. 11/2006 (unreported). The exercise was to compare the awards in respect of damages awarded by the Swaziland Courts. Ntombifuthi Magagula sued the Attorney General in respect of general damages inclusive of pain suffering, loss of amenities of life and disablement in the amount of E2.5 Million.

[28] The Appeal Court awarded her an additional amount of E150,000.00 in respect of general damages after this Court had awarded her general damages in the amount of E50,000.00. The injuries that Ms. Magagula suffered are horrific to say the least and these are set out at pages 10 -11 of the Appeal Courts judgment. The reason I have referred to this case is in the pursuit of finding a logical scale which could be used as a guideline in awarding damages and to also point out the obvious disparity of awards between bodily injury cases and wrongful arrest, wrongful detention and malicious prosecution cases emanating from this Court.

[29] One major difficulty this Court had to overcome was the tendency for our Courts to use South African cases as a benchmark or guideline in awarding damages in cases such as this one. The economy of Swaziland is very small compared to that of South Africa. The economic growth is equally slower than that of South Africa.

[30] Another fact which added to this Court's difficulty is that the sources of revenue for Swaziland from which these awards are payable is much narrower than that of South Africa which boasts of a broad base.

[31] In the present case the Plaintiff was not yet gainfully employed as he was still in High School. However, it is important that any award given to Plaintiff should not be unduly excessive and should not be seen as unduly enriching him otherwise the Courts will be seen to be sending out a wrong message to society at large. The purpose of an award in such cases is not only to compensate a Plaintiff upon whom a delictual wrong has been committed but also to register the Court's disapproval in the deprivation of the personal liberty of an individual by the state and its officials.

[32] After careful consideration of all the authorities I was referred to and those that I personally consulted I am of the view that a suitable award in the circumstances is the amount of E50,000.00 being general damages for wrongful detention.

[33] The Plaintiffs attorney has submitted that this Court should grant costs of the action at attorney and own client scale. I am loathe to acquiesce even though the nature of the wrongful detention was unusual. The Defendant's have behaved in an exemplary manner firstly by admitting liability. Secondly they were equally successful with regard to the quantum of damages.

[34] I make the following order:

(a) Judgment is granted in the Plaintiffs favour in the amount of E50,000.00 with interest thereon at the rate of 9% per annum from the date of this judgment until the date of payment.

(b) The defendants are to pay the costs of action on the ordinary scale.

Q.M. MABUZA -AJ