

**SWAZILAND HIGH COURT  
CIVIL CASE NO. 3375/2000**

BETWEEN

**THEMBA FAKUDZE...**

**PLAINTIFF**

AND

**THE COMMISSIONER OF POLICE ...**

**1<sup>st</sup> DEFENDANT**

**THE ATTORNEY-GENERAL ...**

**2<sup>ND</sup> DEFENDANT**

CORAM:

AGYEMANG J

FDR THE PLAINTIFF:

[I.NZIMAESQ.

FDR THE DEFENDANT:

N. L. MATSEBULA (MS)

**JUDGMENT**

In this case the plaintiff has sued the defendants for the following reliefs:

- a) Payment of the sum of E500,000;
- b) Costs of suit;
- c) Further and/or alternative relief.

At all times material to this incident giving rise to the present action, the plaintiff who had an Ordinary Level Certificate education, was a businessman and Director of a hardware business referred to as Liftquip (Swaziland) (Pty) Ltd based in Manzini.

The matters giving rise to this case are that in or about August 2003, the plaintiff who was charged with the offence of Robbery was placed in custody and detained at the Correctional Services sometime in August 2003. On September 1 2003, the court granted the plaintiff bail. Although the plaintiff paid the bail amount, the Correctional Services refused to release the plaintiff. The plaintiff thus remained in custody until the 19<sup>th</sup> of November 2003 when he was released. He had been wrongfully detained for eighty days. The plaintiff who was released after he engaged counsel upon the payment of legal fees alleged that as a result of his wrongful detention by the Correctional Services, his business collapsed. Regarding the said business, the plaintiff placed in evidence, a Certificate of Incorporation Exhibit A, the Memorandum and Articles of Association - exhibit B and a lease for the rental of a business premises - exhibit C.

He alleged that although the business previously had a turn-over of E100,000 per month, due to his incarceration while its other Director was in England, business decisions such as applications for loans could not be proceeded with. In consequence, the business ran into problems, could no longer pay its three employees or pay rent for the premises it operated from. It eventually closed down.

Although the plaintiff led no evidence regarding same, he alleged that he was tortured and humiliated while in custody. He quantified his claim as follows:

- |                   |   |           |
|-------------------|---|-----------|
| 1. Loss of Income | - | E,150,000 |
| 2. Discomfort     | - | E 150,000 |
| 3. Contumelia     | - | E 100,000 |
| 4. Attorney Costs | - | E 15,000  |

5. Deprivation of freedom and liberty - E85.000

The defendants have submitted to judgment which has in consequence been entered against them. This judgment is therefore concerned with the assessment of damages due to the plaintiff.

In this exercise of attempting to compensate the plaintiff on an illiquid claim, I have found myself handicapped as the evidence adduced gave so little information on the plaintiff himself, his lifestyle as affected by the unlawful detention, and the conditions under which he was detained. Regarding the heads of damage set out, the plaintiff concerned himself with the alleged loss of his income. I will thus take that as a starting point. The plaintiff testified that he had had a business the existence of which he established by tendering exhibits A, B and C aforesaid. He further alleged that the said business had had a monthly turn-over of E100,000. He however did not support that assertion with any documentary or other evidence. During cross-examination, his statement that the business folded up completely due to his eighty-day incarceration was challenged when he acknowledged that there were employees who could have carried on the business in his absence. Eventually he based his case on why the business folded up upon an assertion that such employees could not access loans in his absence and in the absence of his co-Director for the running of the business.

The plaintiff has made a claim for the sum of E500.000 as general damages for his wrongful detention and consequential loss flowing therefrom. In particular he has pleaded loss of E150,000 for loss of income. As aforesaid, he however adduced very little cogent evidence of such loss. His allegation that the business had had a turn-over of E 100,000 per month was not substantiated, nor did he give the court any idea as to the profits of the business over any period. The court is thus constrained in the circumstance, regarding the determination of the quantum of damages that will adequately reflect the plaintiff's loss of

his business, to have regard only to the following matters: that the plaintiff was put out of work for a period of eighty days; that in that period, he was removed from the running of a business he had oversight and control of in his capacity of a Director; that the plaintiff's business which allegedly had a turn-over of E100,000 per month was lost following the period of the plaintiff's detention. It is my view that an award of E50,000 will adequately compensate him for his loss and I award the same accordingly.

Regarding the plaintiff's claim for damages for loss of liberty, the only consideration here is the fact of the wrongful detention for a period of eighty days. It cannot be over-emphasised, that in a society such as ours subject to the rule of law, the right of an individual to personal liberty is hallowed. An interference with the individual's liberty and right to freedom then for no apparently justifiable reason must be viewed with the utmost disapproval by the court. The award of exemplary damages, so popular under English Law where high-handed treatment of individuals by the State is involved, has been held to be inapplicable in this jurisdiction, see per Steyn JA in ***Zakhele Gina v. Commissioner of Correctional Services and two ors., Appeal Cases No. 72/2005*** approving the sentiments of the court in ***Fose v. Minister of Safety and Security 1997 (3) SA 786 at 789***.

Even so, an award of general damages must in some measure, fulfil the dual function of reflecting the censure of the court, while also endeavouring to compensate the victim of such treatment. Under this head, I award the sum of E70,000

The plaintiff further made a claim for the discomfort he allegedly suffered and for contumelia. Once again the plaintiff did not adduce any evidence in support of these although he made a cursory reference to humiliation and torture while he was in detention. I cannot in the circumstance find my way clear to awarding damages on unproven claims.

Having considered all these matters, I make an award of E120,000 being general damages for the wrongful detention of the plaintiff and the consequential loss he suffered in his person and in his business.

The plaintiff tendered the statement of account from his lawyers showing legal fees of E15,000 he paid in order to secure his release. Having been challenged on the full amount he paid regarding the case the subject of this action, he submitted to the judgment of this court on the matter. I have considered the said statement and I have found that the sum of E 8,500 represents what the plaintiff paid in legal fees regarding matters the subject of this action. The said sum is thus awarded to him as special damages pleaded and proven. Learned counsel for the plaintiff urged the court in this exercise of assessing damages, to be guided by the various awards in such South African cases as: *Ireff v. Minister Van Polisie 1977 (2) SA 900*; *Minister of Police and anor v. Gamble and anor 1979 (4) SA at 759*; and *Todt v, Ipser 1993 (3) SA at 577* where the court awarded an average of R10,000. While I am indebted to the assistance so graciously proffered, it is my view that the caution administered by the learned trial judge in ***Zakhele Gina v. Commissioner of Correctional Services and two ors Civil Case No. 75/02 (Unreported)*** must be taken into account when awarding damages in Swaziland. These matters included the desire to limit the burdens on the public purse while compensating in some measure the loss suffered by the plaintiff. So it must be, for this country has a history so different from its neighbor South Africa, and a not so big public purse either.

I have awarded E120,000 general damages as well as allowing for legal fees as special damages guided by comparable awards in this jurisdiction. I also bear in mind that the matters giving rise to this action are not that the plaintiff was unlawfully arrested and

detained; the unlawful detention in this case commenced at the point when the plaintiff's bail was ignored by the first defendant.

In ***Zakhele Gina v. Commissioner of Correctional Services and two ors., Appeal Cases No. 72/2005*** the award of E50.000 made by the trial court was found to be adequate for the loss of liberty of a High School student who had been incarcerated for one hundred and seventy days. In upholding the said award, the learned judge, Steyn JA commented that had he been in the position of the trial judge he would have made a more substantial award although he was disinclined to substitute his discretion for that of the trial judge. He further applauded the matters aforesaid that the learned trial judge concerned herself with in making that award. In the present instance, I have had regard to the fact that the plaintiff who was wrongfully deprived of his liberty, was a working man, in charge of a business now lost, that employed three persons. Although no evidence was adduced regarding his social circumstances including his family responsibilities which were adversely affected by his wrongful detention such as would aid in determining the amenities due him, it is my view that the award of E128, 500 is fair compensation for his loss.

The plaintiffs claim for general damages for wrongful detention succeeds. Judgment is accordingly entered for the plaintiff with costs.

Dated the 29<sup>th</sup> day of January, 2009.

*MABEL AGYEMANG* (mrs. justice)

HIGH COURT JUDGE