# IN THE SUPREME COURT OF SWAZILAND

**APPEAL CASE NO.72/05**

**In the matter between:**

**ZAKHELE GINA** **APPELLANT**

**AND**

**COMMISSIONER OF CORRECTIONAL**

**SERVICES** **1st RESPONDENT**

**SWAZILAND GOVERNMENT** **2nd RESPONDENT**

**ATTORNEY GENERAL** **3rd RESPONDENT**

**CORAM: STEYN JA**

**TEBBUTT JA**

**BANDA JA**

**FOR THE APPELLANT: MR. MAGONGO**

**FOR THE RESPONDENTS: ATTORNEY GENERAL**

**JUDGMENT**

SUMMARY

"Claim for damages arising from unlawful detention - such detention admitted - issue quantum of damages to be awarded - procedure adopted to prove damages on affidavit - practice to do so undesirable -such informal procedure not sanctioned by the rules of court - ***viva voce*** evidence should always be given unless extraordinary circumstances compel departure - consequence of failure to adduce oral evidence -punitive damages sought - such approach not part of the common law of Swaziland - approach to be adopted in assessing the propriety of the quantum of damages awarded by the trial court - test to be applied is whether the award is markedly disproportionate to that which the Court of Appeal would have awarded - such not the case -Appeal accordingly dismissed."

Stevn JA

[1] The appellant was unlawfully detained for 170 days. It was common cause that this detention was unlawful because of the following circumstances: The appellant was charged with rape. The Court of Appeal - now the Supreme Court - had held that the Non-Bailable Offences Act which precluded a court from granting bail to those charged with a variety of scheduled offences, including rape, was invalid and unenforceable. Despite this ruling the Executive issued a decree purporting to nullify this judgment of the Court. The appellant had been granted bail and had paid the amount determined by the Magistrate's Court. However on presentation of the bail deposit receipt and a liberation warrant signed by the Magistrate to the Correctional Services authorities and with reliance on the executive decree aforesaid, they refused to release the appellant. He was accordingly unlawfully detained in jail for a period of 170 days until the Executive decree was withdrawn. The appellant was subsequently acquitted by the Magistrate's Court "for lack of evidence".

[2] The appellant alleged in his pleadings that he suffered damages of E680 000. This amount was arrived at by contending that appellant was to be compensated at the rate of E4 000 for each day that he was unlawfully detained. The claim for damages, being an illiquid claim, obliged the appellant to prove them by adducing evidence which would enable the court to determine the quantum of the damages sustained and to do so appropriately.

[3] This the appellant sought to do by tendering evidence on affidavit. When the matter came before us, we questioned the propriety of adopting such a

procedure. We were informed that although it was not sanctioned by the High Court Rules, it was a practice adopted in this jurisdiction to prove illiquid damages by way of affidavit. The reason advanced for the development of such a procedure was the lengthy delays with which litigants were faced when seeking to set matters down for the hearing of ***viva voce*** evidence. It should be noted that there was no objection by the respondent when this procedure was adopted before the High Court. The advisability of presenting oral evidence to prove damages is self-evident. Indeed this case demonstrates how serious the consequences can be and how the adoption of the above practice can militate against a just award. I need only add that no cross-examination is possible, no enquiry to elucidate ambiguity can be made and both the court and the parties are confined to the factual averments contained in the affidavit. It is not a practice to be commended and should be avoided unless no other method is available.

[4] However that may be, after hearing argument and having considered the contents of the affidavit submitted by the appellant, the Court awarded the appellant the sum of E50 000 as damages for his unlawful detention. In doing so the court gave careful consideration to the quantum of damages awarded in a number of decided cases in this jurisdiction as well as those awarded in other Southern African states. (See the list attached) In dealing with the awards made in the Republic of South Africa the learned Judge a quo commented on the risks attendant upon a ready and uncritical acceptance of awards made in that jurisdiction. She says the following in this regard:

> **"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."**

The Court then considered, scrutinized and commented on a number of decisions on the question as to what a fair award is when compensating a plaintiff for damages suffered as a result of an illegal detention.

[5] The Court comments further in this context when it says the following:

> **"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.**
>
> **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."**

See in this regard also the comments of Ramodibedi JA in **N. MAGAGULA VS THE ATTORNEY GENERAL (C OF A) NO. 11/2006** (unreported) where the validity of such an approach is confirmed.

[6] The learned Judge a quo concludes by saying the following in her judgment:

> **"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."**

She then says that in her view a suitable award in all the circumstances is the amount of E50 000 as damages for wrongful detention.

[7] Counsel for the appellant challenged the sufficiency of this award on several bases. One of these was the invitation to import into our law the principle of exemplary or punitive damages. In this regard he referred us to the decision of Lord Devlin in **ROOKES VS BARNARD 1964(1) A.E.R. 367 (H.L.)** at 407 where the court held the following:

**"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may be thought that this confuses the civil and criminal function of the law; and as far as I know the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and Your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England. It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to pecuniary loss that can be specifically proved. In the present case for example and leaving aside any question of exemplary or aggravated damages, the**

**appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by a change of jobs and the unhappiness by a change of livelihood. In a case such as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss approved. Moreover it is very well established that in cases where the damages are at large the jury or the judge if the award is left to him, can take into account motives and conduct of the defendant where they aggravate the injury done to the Plaintiff. There may be malevolent or spite or the manner of committing the wrong may be such as to injure the plaintiffs proper feelings of dignity and pride. There are many factors, which the jury can take into account in assessing the appropriate compensation.**

**There are certain instances in which the award of exemplary damages can serve a useful purpose in vindicating the strength of the law thus and thus affording a practical justification for admitting into the civil law, a principle which ought to belong to criminal."**

(We were unable to access the full report of this judgment. The above citation is a version of the judgment as set out in the appellant's heads of argument)

***Per contra*** counsel for the respondent referred us to the decision of the Constitutional Court in the Republic of South Africa in the case of **FOSE V MINISTER OF SAFETY AND SECURITY** reported in **1997(3) S.A. 786 (C.C).** In rejecting the invitation to import this concept into common law of the Republic of South Africa, the court motivated its rejection as summarized in the headnote at page 789 as follows:

> **"Held, further, that in a country where there were great demands on the public purse and the machinery of government as a result of constitutionally prescribed commitments with substantial economic implications and the urgent need for economic and social reform, it was inappropriate to use scarce resources to pay punitive constitutional damages to plaintiffs who were already fully compensated for the injuries done to them with no real assurance that such payment would have any deterrent or preventative effect. Funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement. (paragraph [72] at 827H/I-828C)."**

These considerations apply with even greater force to the Kingdom of Swaziland where the scourge of poverty cries out for the preferential allocation of resources ahead of claims for the award of exemplary or punitive damages.

See in this context also the judgment of Lord Keith in **BROOME V CASSEL AND COMPANY 1972 A.C. 1027 (HL)** at 1085 - 1086 where the learned law Lord says that "... **damages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered."** As the court in Fosa supra puts it:

> **"His (Lord Keith's) principal objection was to purely punitive damages, where the plaintiff was given a pure and undeserved windfall at the expense of the defendant (who) ... was being subjected to pure punishment."**

For the reasons articulated above, we cannot see our way clear to import into Swaziland a highly contentious innovation of this kind.

At the same time I endorse the approach of the High Court that it is inappropriate to calculate general damages on a ***per diem*** basis. It could lead to absurd outcomes where the period of detention is lengthy and it could well generate legislative responses directed at limiting the power of the courts to make awards of general damages which are appropriate, given the circumstances of each case.

Whilst I may well have awarded damages somewhat more substantial than those granted by the ***court a quo,*** I may not substitute my discretion for that of the trial Judge. In this regard I point out that her already difficult task was compounded by the inept and uninformative manner in which the appellant presented his case. The affidavit which was presented contained no information concerning the nature of the detention. It was not suggested that the appellant was not well treated or that he suffered any deprivation other than that of his liberty. That such an in-road into his freedom is a grave injustice and deserves substantial damages speaks for itself. Liberty is the sacred right of each Swazi subject. Its denial is not only an affront to dignity but is an invasion striking at a core value of the citizen. The question remains, is the quantum of damages this court would have awarded markedly disproportionate to those the High Court deemed fair. (See in this regard the comments of Bizos JA in **BOTSWANA INSURANCE COMPANY LTD V GOULDING 1987 B.L.R. 529** at 534). The paucity of the information the Court was given meant that - in a sense - the trial Judge had to guess rather than estimate. Thus e.g. not even the age of the appellant is known. We know only two things about him. Firstly, that he was an adult and second that he was still in school and had to repeat Grade 4 because of his incarceration.

[13] We have been referred to the judgment of the Court of Appeal in Botswana in **SELETLO V THE ATTORNEY GENERAL 2005(1) BLR 96.** The headnote to the judgment records the following:

> **"Held: (1) The Court of Appeal did not readily interfere with an estimate by the court appealed from. Before an award of damages was interfered with, the court should be satisfied that the judge acted on a wrong principle of law, or had misapprehended the facts, or had made a wholly erroneous estimate of the damage suffered. It was not enough that there was a balance of opinion or preference. The scale had to go down heavily against the figure attacked if the court was to interfere, whether on the ground of excess or insufficiency, (2) The onus was clearly upon the appellant to show that there was sufficient material upon which, and because of which, the Court of Appeal could properly interfere with the award of the *court a quo.*"**

We agree with this approach. We find it impossible to say that the trial Judge, who is an incola of this country, and who gave such careful consideration to the issues before her was clearly wrong in awarding only the sum of E50 000 as general damages.

[14] For these reasons I would dismiss the appeal. Costs including the costs of counsel will follow the event.

J.H. STEYN
Judge of Appeal

I AGREE

P.H. TEBBUTT
Judge of Appeal

I AGREE

R.A. BANDA
Judge of Appeal

Delivered in open court on this 15thNovember 2006.