

Held at Mbabane

Civil Appeal No. 39/06

In the matter between

MFANAFUTHI MABUZA

APPELLANT

And

THE COMMISSIONER OF POLICE

FIRST RESPONDENT

**DIRECTOR OF PUBLIC
PROSECUTIONS**

SECOND RESPONDENT

THE ATTORNEY GENERAL

THIRD RESPONDENT

**CORAM: BROWDE AJP
 ZIETSMAN JA
 RAMODIBEDI JA**

HEARD: 10 NOVEMBER 2006

DELIVERED: 16 NOVEMBER 2006

SUMMARY

Civil appeal - Quantum of general damages for unlawful arrest and detention - Assessment thereof within the discretion of a trial court - When an appeal court will interfere.

JUDGMENT

RAMODIBEDI JA

[1] The appellant's claim in this matter is couched in delict. It arose from the following circumstances. In the early hours of the morning on 4 July 2000 at Matsapha the appellant was unlawfully arrested by members of the Royal Swaziland Police acting within the scope and in the course of their employment with the Government of the Kingdom of Swaziland. He was suspected of having committed theft of a motor vehicle. He was subsequently

charged with this offence and detained.

[2] On 7 July 2000 the appellant was remanded into custody. He could not obtain bail because the offence in question was non-bailable. He was subsequently tried but was acquitted and discharged. He was released from custody on 8 May 2001, having spent a period of ten (10) months or 300 days in detention.

[3] Thereafter the appellant instituted an action against the respondents for, *inter alia*, payment of a sum of E250 000.00 as damages for "*unlawful incarceration*". He specifically alleged in his declaration that the arrest and subsequent detention in question was "*wrongful, unlawful, malicious and vexatious and it was without any lawful justification or excuse.*" The High Court (Matsebula J) dismissed the appellant's claim on the ground that the appellant had failed to prove his case on a balance of probabilities.

[4] On appeal to this Court in Civil Appeal No. 11/04 the appellant's appeal was upheld. The order of the court *a quo* was set aside. In effect the issue of liability was decided against the respondents. The matter was then remitted to the court *a quo* for the assessment of the quantum of damages arising from the wrongful arrest and subsequent detention of the appellant.

[5] In July 2006 (the exact date is not given in the judgment) the court *a quo* made the following award :-

"(a) Plaintiff (i.e. appellant) is awarded E2 500.00 multiplied by 10 months.

(b) E1 5,000.00 for unlawful incarceration.

(c) Interest at the rate of 9% per annum a tempora morae.(d) Costs of suit."

[6] This Court has stressed more than once that an award of general damages is a matter which lies within the discretion of a trial court. This Court will only interfere in an appropriate case if there is a misdirection by the trial court or if the figure which it considers to be appropriate quantum differs substantially from the figure awarded by the trial court.

See for example **NTOMBIFUTHI MAGAGULA v THE ATTORNEY GENERAL Civil Appeal No. 11/06.**

Before determining the issue of quantum however it is necessary to refer briefly to the facts of the case in so far as they are relevant to the issue.

[7] The appellant is an educated young man in the threshold of his life. He was aged 27 years old at the material time in question. He holds a B.Comm degree

from the University of Swaziland (UNISWA) obtained on 11 September 1999. He also holds a diploma in Commerce from the same University obtained on 13 September 1997. He has formerly been involved as a volunteer with an organisation described as Swaziland Hospice at Home. He is Chairman of a soccer team called Lusushwana Arsenal. It is thus clear that the appellant is a person of high social standing, a factor which the court *a quo* failed to take into account.

[8] At the time of his arrest and incarceration, the appellant was employed by an organisation called Caritas as an Assistant Durable Solutions Officer. His salary was fixed at E2 500-00 per month. Regrettably for him, however, he had only spent two weeks at work when he was arrested. By the time he came out of his incarceration he had lost his job due to his long period of absence from work. He was thereafter without a job between 8 May 2001 when he was released from custody and September 2001 when he was employed by Swaziland Development and Savings Bank as a motor vehicle finance officer.

[9] Regarding the conditions under which he was staying while in custody, the appellant testified as follows :-

"It is not nice to be absent from home especially, considering the conditions in prison like mixing up with hardened criminals when you are not one as well as the conditions of cleanliness and the food that was served there."

He testified that he stayed in a dirty environment which exposed one to diseases such as TB. In fact under cross-examination he testified that he was taken to the Government Hospital where he was diagnosed with early symptoms of TB for which he received treatment. "Unfortunately", as he testified, he did not have documentary evidence as proof of this as records were kept by the prison nurse.

[10] In his judgment the court *a quo* said this:-

"In his particulars of claim plaintiff alleges to have suffered E250,000.00 as a result of the unlawful incarceration. This amount is against the backdrop of plaintiff being "a fairly educated young man who was just beginning his B.Comm degree. He has never had brushes with the law before."

Now, I consider that it is at this point that the learned Judge *a quo* erred. As pointed out in paragraph [7] above, the appellant was not just

beginning his B.Comm degree at the time of his arrest and subsequent incarceration. On the contrary, he was a graduate with a B.Comm degree obtained in 1999, long before his arrest. Furthermore, he was a holder of a diploma in commerce obtained prior to his degree. I have therefore come to the inescapable conclusion that the learned judge *a quo* misdirected himself and that such misdirection inevitably led him to make the inadequate award that he did. This Court is thus entitled to interfere.

[11] There is in my view further justification for this Court's interference in the matter. It is that the figure which we consider to be appropriate quantum differs substantially from the figure awarded by the trial court. Apart from that court's misdirection referred to in the preceding paragraph, we are satisfied that an amount of E15 000.00 for unlawful incarceration does not do justice in the particular circumstances of this case. In this regard it is important to observe one further misdirection by the court *a quo*. It is this. Nowhere in its judgment does the court take into account the conditions under which the appellant stayed whilst in custody. These are fully set out in paragraph [9] above.

[12] There can be no doubt in my mind that the

appellant was subjected to humiliating treatment. Not only was his arrest unlawful and malicious but he was wrongfully incarcerated for an inordinate period of time, namely, 10 months or 300 days, as pointed out earlier. On any account, this is a dreadful encroachment on the liberty of an individual in a democratic country such as the Kingdom of Swaziland. In the particular circumstances of this case, such conduct in my view merits far heavier damages than those awarded by the trial court. This is more so in view of the fact that the appellant was wrongfully arrested for a crime which he had not committed. The police simply ignored the evidence which clearly exonerated the appellant from the alleged theft of a motor vehicle. It must accordingly be accepted that they acted maliciously in so doing.

[13] Before concluding this issue it is appropriate to make one further comment. The discretionary nature of assessment of damages makes it inevitable that different judges will come to different awards in different courts. It behoves the courts in this jurisdiction, however, to try and strive for some measure of uniformity in the awards that they give on general damages. Otherwise disparate awards in similar cases will soon bring the justice system in this country into disrepute.

In **ZAKHELE GINA v COMMISSIONER OF CORRECTIONAL SERVICES AND TWO OTHERS Civil Appeal No. 72/2005** which was decided during the current session of this Court a judge of the High Court awarded the plaintiff general damages in the sum of E50,000.00. The plaintiff had been unlawfully detained for 170 days. In contrast to the present case, he was still in school, doing Grade 4 which he had to repeat due to his incarceration. Now, the disparity between the award made by the trial court in that case and the award made by the court *a quo* in the present case, namely, E50,000.00 and E15, 000.00 respectively is self-evident. What is incomprehensible to me, at any rate, is that a more serious case was treated less generously. This cannot be right. Not only does it accord with logic and common sense but it is also in the public interest that more serious cases be treated more generously in assessing general damages.

In the light of the foregoing considerations, I should emphasize that the present case deserves far heavier general damages than ZAKHELE GINA'S case. As fully set out above, it is far more serious than the latter case. Not only was the period of incarceration almost double, namely, 300 days as opposed to 170 days, but the appellant in the present case was subjected to ill-treatment and his incarceration caused him considerable

suffering. This is in contrast to ZAKHELE GINA'S case where no evidence of this nature was adduced. As pointed out earlier, the appellant was much more highly educated. Furthermore, he enjoyed a higher social standing in the community.

[16] For the foregoing reasons I have come to the conclusion in the circumstances of this case that an amount of E100 000.00 is an appropriate quantum for general damages in this case. In arriving at this figure I have borne in mind the following salutary remarks of Holmes J (as he then was) in **PITT v ECONOMIC INSURANCE CO. LTD. 1957f3) SA 284fDI at 287 E - F:-**

"[T]he Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff but must not pour out largesse from the horn of plenty at the defendant's expense".

[17] The appellant's claim for damages for loss of earnings can quickly be disposed of. He was awarded "E2 500.00 multiplied by 10 months" under this head, totalling E22,500.00. The sum of E2,500.00 represents the appellant's monthly salary which he lost as a result of his incarceration. As will be recalled, the appellant was detained for a period of 10 months. He was thereafter unemployed for a further period of 3 months, thus making a total of 13 months for which he should be appropriately

compensated. In fairness to him, Mr. Dlamini for the respondents conceded the claim under this head. In my view the concession was properly made. Although he appeared to contradict himself, the learned trial judge correctly found as a fact that the appellant was employed at Caritas as alleged.

[18] It follows from the foregoing considerations that the learned trial judge erred in considering only 10 months for loss of earnings. He should have awarded 13 months, totalling E32,500.00.

[19] In his evidence the appellant testified that the lawyer who defended him at his criminal trial in question charged him E13,955.00 as legal fees. He claimed this figure from the respondents. However it is common cause that he actually paid E8 000-00 only. Dealing with this aspect of the matter, the learned trial judge said this in his judgment:-

"Plaintiff paid E800-00 as attorney's fees and he is entitled to that amount."

The learned judge was correct in finding that the appellant is entitled to payment of the amount he expended as legal fees. With respect, it is however

incomprehensible to me where he got the figure of E800.00 from. In fairness to him once again, Mr. Dlamini properly conceded that the appellant is entitled to payment of E8000.00 under this head. I should add that the appellant's application to amend his particulars of claim accordingly was duly granted by consent.

[20] In the result the following order is made:-

- (1) The appeal is upheld with costs.
- (2) The judgment of the court *a quo* is set aside and the following is substituted in its place :-

"Judgment is entered for plaintiff as follows:-

- (a) Payment of E 100,000.00 general damages;
- (b) Payment of E32,500.00 for loss of earnings;
- (c) Payment of E8 000.00 in respect of legal fees;
- (d) Interest at the rate of 9% per annum calculated from the date of the first court *a quo*'s judgment leading up to Civil Appeal No. 11/04 between the parties.

(e) Costs of suit."

M.M. RAMODIBEDI

JUDGE OF APPEAL

I agree

J. BROWDE

ACTING JUDGE PRESIDENT

I agree

N.W. ZIETSMAN

JUDGE OF APPEAL

For Appellant: Mr. B. Magagula

For Respondent: Mr. D.V. Dlamini