IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 832/89

In the matter between:

GLADYS NDZINISA	Plaintiff
and	
HENDRICK LUBBER	1st Defendant
ENTERPRISE STORE (PTY) LTD	2nd Defendant

CORAM:	C.J., Hull
FOR THE PLAINTIFF	Mr. Lukhele
FOR THE DEFENDANTS	No appearance

Judgment
(6/2/95)

The plaintiff, a married woman who sues with the assistance of her husband and legal guardian, alleges that she was unlawfully and falsely arrested by the first defendant in a store in Manzini on 23rd October 1987, at which time he was acting in the course of his employment by the second defendant. In her particulars of claim, she avers that in consequence of the arrest she suffered damages in the sum of E30,000.

She filed this action on 9th October 1989.

The affidavit of service was defective in that it was not signed by the server and it does not show on which of the defendants the

2/...

combined summons was served. Nevertheless notice of intention to defend was given on behalf of the second defendant by an attorney. He subsequently gave notice of withdrawal as attorney of record for both defendants in July 1994, and later filed an affidavit of service of that notice on the second defendant, stating in the affidavit of service that he could not serve the first defendant who had left the country.

The plaintiff applied for judgment by default in terms of paragraphs (a) to (c) of the particulars of claim which sought relief against both defendants, the one paying the other to be absolved. Judgment by default was sought on the basis that the defendants had failed to furnish a new address for service within ten days after their attorney's notice of withdrawal had been served on 26th August 1994. It seems to me that there was then a problem in that: the application for judgment by default was signed on 29th August 1994 - in other words before the ten day period had expired. Nevertheless it was not filed until 30th September and in any event the plaintiff filed a further notice of application for judgment by default (dated 24th November 1994) on 29th November 1994.

On 2nd December 1994, Dunn J. granted judgment by default. I interpret this to mean, having regard to the terms of the prayer for judgment, that he did so against both defendants. He postponed the matter to 9th December 1994 for proof of damages.

In the affidavit that she lodged subsequently for the purpose, the plaintiff has deposed that the first defendant detained her on an allegation that she had stolen items from the second defendant. She has also said that she was detained in front of work mates and many customers, and that the first defendant then marched her through the middle of Manzini in front of many members of the public; and that at a subsequent court trial she was acquitted because the first defendant admitted that the items found in her possession could not be identified as belonging to the second defendant. She says that she was deprived of her liberty and suffered public humiliation in consequence of the arrest.

The plaintiff has not said, specifically, that she did not steal anything from the store. Nevertheless, in my view, she does not need to do so. A shop manager has no powers over and above those of ordinary citizens to restrict the liberty of an individual. In particular he has no special powers to do so because the store displays goods for members of the public, thereby soliciting their custom. The store is of course entitled, as in the case of any other private individual or body, to the protection of the criminal law, but if its staff choose to detain someone on suspicion of theft, and cannot show that they are justified in doing so, then the store and such staff will be liable in damages.

As to quantum, there is no special rule either that a private person who arrests someone unlawfully is liable to pay a higher amount of compensation. There have been several decisions in this court in recent years as to the appropriate amount. These have related to actions against police officers. For example, in Ziyane v. The Attorney General (Civ. Case No. 396/59) (detention for one hour in humiliating circumstances) E5000 was awarded. In Nhlabatsi v. Swaziland Government (Civil Case No. 1273/91) (detention for several days) E12000 was awarded. In Lukhele v. Attorney General (Civil Case No. 1057/91) (detention for three and a half months) E50,000 was awarded.

The plaintiff, on her undisputed account, suffered the indignity of being detained in front of people in the store and then paraded through Manzini, as well as the ordeal of a criminal trial. In the circumstances, I assess general damages at E8000 with interest thereon at 9 per cent per annum and costs.

What the record shows, unequivocally, is that the second defendant had notice of the action not later than 2nd November 1993 (when its attorney gave notice of intention to defend) and that the first defendant had notice of it at least from 24th July 1994.

I think that the appropriate orders are therefore as follows:

(a) Judgment in favour of the plaintiff against

the defendants jointly and severally, the one paying the other to be absolved, in the sum of E8000 general damages and interest thereon at 9 per cent per annum from 24th July 1994, and costs; and

(b) Judgment in favour of the plaintiff against the second defendant for interest on E8000 at 9 per cent per annum from 2nd November 1993 until 24 July 1994.

Judgment accordingly.

DAVID HULL
CHIEF JUSTICE