

IN THE HIGH COURT OF LESOTHO

In the matter of :

LEFU MOKHESUOE

Plaintiff

v

MINISTER IN CHARGE OF POLICE
SOLICITOR GENERAL
TROOPER PHOHLO

1st Defendant
2nd Defendant
3rd Defendant

JUDGMENT

Delivered by the Hon. Acting Mr. Justice D. Levy
on the 9th day of July, 1986

Plaintiff claims payment of damages for injuries suffered by him when he was shot by the 3rd Defendant. It is alleged that 3rd Defendant is a policeman who was acting within the scope of his employment as such by the 1st Defendant when he shot the Plaintiff.

1st Defendant and 2nd Defendant (the Defendants) in the plea filed on their behalf, denied that at the material time 3rd Defendant was acting within the scope of his employment or that the plaintiff has suffered damages as claimed.

The plea thus far discloses a good defence to the action, but because of the further allegations made by the Defendants in their plea exception has been taken to it by the Plaintiff on the grounds that it does not disclose a defence.

Defendants allege (and I quote in extenso that:

- (1) 3rd Defendant was present at the Maseru Police Station when the Plaintiff and other police officers arrived there.

- (2) 3rd Defendant was instructed and given a mandate (by them) to record the arrest of Plaintiff and his handing over.
- (3) 3rd Defendant then began uttering unfounded baseless threats against Plaintiff, which threats were not the mode of carrying out 3rd Defendant's instructions and mandate.
- (4) Police Officers are custodians of peace, order and stability and are employed as such, and they are mandated to shoot where appropriate, anybody who flees from lawful arrest.
- (5) In shooting Plaintiff, 3rd Defendant was not carrying out his master's instruction. He was engaged in a frolic of his own.
- (6) 3rd Defendant was not acting within the scope of his employment and had deviated from the normal course of his duties by going on a rampage of a drinking mission.

These allegations amount to admissions by the Defendant that:

- (a) 3rd Defendant was drunk on duty at the relevant time.
- (b) 3rd Defendant was engaged in booking and receiving Plaintiff as a prisoner at the Maseru Police Station.
- (c) 3rd Defendant was carrying out his duties as a police officer in doing so.
- (d) In the course of these events 3rd Defendant shot Plaintiff who was in custody at that time without any lawful cause or justification whatsoever.

These admissions by Defendants amount to an admission that the 3rd Defendant notwithstanding that he was drunk on duty nevertheless was entrusted by other police officers with

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the duty of booking in a prisoner at Maseru Police Station; that he then for no rhyme or reason shot at and wounded the prisoner who was the Plaintiff.

The allegations made by the Defendants show prima facie that the 3rd Defendant was acting in the course of his employment. As was pointed out in Minister of Police v Rabie 1986(1) S.A. 117(A) the Defendants in order to escape liability would have to show that in shooting the Plaintiff the 3rd Defendant "was engaged upon functions which pro hac vice took him out of the category of a State Servant". Once it is shown or admitted that the wrongful act complained of was committed by the 3rd Defendant in the scope of his employment then "the State has to show that in committing the act in question the policeman was engaged upon a duty or function of such a nature as to take him out of the category of servant pro hac vice".

It is the Defendants' defence that although the 3rd Defendant was acting in the scope of his employment in performing his duties in the Charge Office, when he came to shoot the Plaintiff he was engaged in a function of such a nature as to taken him out of the category of servant pro hac vice. It would seem to be of the essence of the defence that the 3rd Defendant in his drunken state used this occasion as an opportunity to wreak private vengeance on the Plaintiff or to vent his private feelings upon him. It is possible therefore that Defendants at the trial of the matter may show that 3rd Defendant, notwithstanding that he was on duty at the time, in carrying out his duties viz a viz the Plaintiff, was truly engaged in a frolic of his own in shooting him and that his wrongful act was totally divorced from the duties of his employment as a servant of Defendants.

/The ...

The exception is dismissed with costs.

D. LEVY

ACTING JUDGE

9th July, 1986

For the Plaintiff : Mr. W. C. Maqutu

For the Defendants : Mr. T. Mohapi