

IN THE HIGH COURT OF LESOTHO

In the Matter of :

MOLEFI MOLISE Plaintiff

and

JOEL KHAKHANE Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on
the 6th day of March, 1989.

This is an action in which Plaintiff herein sues Defendant for payment of M4,845-98, interest thereon at the rate of 10% p.a. a tempore morae, costs of suit, further and/or alternative relief. Defendant has intimated intention to defend the action. He has also filed a counter-claim in which he, in turn, sues Plaintiff for damages in the sum of M3,100-00 costs of suit, further and/or alternative relief. Plaintiff has filed notice of intention to defend the counter-claim.

In his declaration to the summons Plaintiff stated, inter alia, that on 28th May, 1982 defendant wrongfully, maliciously and without reasonable and probable cause set the law in motion against him by laying before the Royal Lesotho Mounted Police at Mphahle's Hoek a false charge of assault with intent to do grievous bodily harm thus instigating and causing his arrest and imprisonment. He was subsequently released on bail on conditions that he, inter alia.

2/ reported

reported to Mohale's Hoek police once every week. On 15th November, 1982, Plaintiff was tried, for the aforementioned offence, before the Mohale's Hoek Resident Magistrate who, at the close of the crown case, found him not guilty and discharged.

As a result of the forgoing Plaintiff, who is a migrant labourer in the mines of the Republic of South Africa, could not resume his duties at the mines. He consequently suffered damages in the total amount of M4,845-98 made up as follows:

- (a) M3,185-98 for loss of salary from 29th May, 1982 to 15th November, 1982,
- (b) M1,000 in respect of injury of character and reputation,
- (c) M619-20 in connection with his defence to the charge,
- (d) M40-80 for transport while on bail and reporting to the police.

Notwithstanding demand defendant refused/neglected to pay the amount of M4,845-98 wherefor plaintiff sued him as aforementioned.

In his plea defendant stated that on 29th May, 1982 he was severely assaulted. He had reasonable and probable cause to suspect that plaintiff was his assailant. He accordingly informed the police who, relying on the information, exercised their own discretion to institute criminal proceedings against the plaintiff. Defendant denied, therefore, that he had wrongfully, maliciously and without reasonable and probable cause set the law in motion against plaintiff by laying before the Royal Lesotho Mounted Police at Mohale's Hoek a false charge of assault with intent to do grievous bodily harm. He further denied that he was in any way

3/ liable to

liable to Plaintiff in the amount claimed in the summons. Wherefor defendant prayed that plaintiff's claim be dismissed with costs.

As regards his counter-claim defendant alleged that on 28th May, 1982 and at Ha Khits'ane in the district of Mohale's Hoek, Plaintiff assaulted and inflicted upon him severe injuries for which he was hospitalised for two (2) days. Consequently he incurred damages (for which Plaintiff was liable) in the amount of M3,100.00 made up as follows:

- (a) M100 for medical and hospital expenses.
- (b) M3,000 for pain, shock and suffering.

wherefor defendant claimed against plaintiff as aforesaid.

In his plea to the counter claim plaintiff denied that defendant was assaulted and injured on 28th May, 1982. In particular he denied to have assaulted defendant as alleged. He denied, therefore, that he was liable to defendant in the amount claimed in the counter-claim or at all.

In an attempt to curtail the duration of this trial the parties filed minutes of pre-trial conference in which it was admitted that defendant had in fact been assaulted and injured on 28th May, 1982. The medical report to that effect was admitted. However, Plaintiff denied that he was the person who had assaulted and injured the defendant,

The evidence heard by the court was that of the defendant who, in as far as it is relevant, told the court that he was an ex-school teacher and a farmer. He knew plaintiff from birth and they both lived in the same village. Plaintiff was a migrant labourer but ordinarily came home on weekends.

4/ On the night

On the night in question, 28th May, 1982 he attended a night virgil in his home village of Ha Khits'ane. It was a cold night with the moon shining brightly. People were wearing blankets as they moved about at the night virgil. He noticed plaintiff among the people who attended the night virgil. He too was wearing a blanket, a jacket and a long pair of trousers.

Plaintiff denied, however, that he was at the night virgil on the night in question. According to him Plaintiff arrived home at about 8 p.m. from his place of work at the mines of the Republic of South Africa. He then went to bed and did not even know that there was a night virgil in the village.

Plaintiff's evidence that he was not at the night virgil on the night of 28th May, 1982 was corroborated by P.W. 3, Thabiso Letsoenyo who admittedly attended the night virgil which was held in the village.

Assuming the correctness of his evidence that it was at about 8 p.m. when he arrived home from his place of work at the mines of the Republic of South Africa it seems to me highly probable that Plaintiff was testifying to the truth when he said he was not aware that there was a night virgil in the village. He could not, therefore, have attended it. In any event, as a result of his long journey on that day he would naturally have been too tired to go to a night virgil. I am inclined to accept as the truth Plaintiff's evidence corroborated by that of P.W.3 that he did not attend the night virgil on the night of 28th May, 1982 and reject as false defendant's story that he did.

5/ Be that as

Be that as it may, defendant went on to tell the court that later on that night he left the place where the night virgil was held and went home. On his way home he noticed a person sitting some distance away from the path he was following. It was as if that person was relieving nature.

When defendant approached next to where he was sitting that person stood up and came towards the path he (defendant) was following. As he passed next to that person defendant recognised him as the plaintiff who without uttering a word struck him a blow first on the head and then on the forehead with a "lebetlela" stick he was armed with. The plaintiff was then wearing a short pants, a skipper and gumboots. When he delivered a third blow defendant warded it off with his left arm and asked plaintiff why he was assaulting him. Plaintiff did not reply. Instead he ran away.

Defendant raised an alarm in response to which Thabo Mpatlise, Thabiso Letsoeny (P.W.3 and Thetso Motjeleba came to the scene. He reported to them that he had been assaulted and injured by someone who had run away in the direction he (defendant) pointed out. The three people who had come to his rescue followed that direction but returned without the plaintiff.

Later on, defendant noticed Plaintiff among a crowd of people who had come to the scene. He was still wearing a skipper, a short pants and carrying a "lebetlela" stick. He was, however, bare footed i.e. no longer putting on gumboots. When plaintiff asked what had happened defendant again replied that he had been assaulted by someone who had run away.

6/ According to

According to him defendant did not want to disclose the name of the plaintiff as the person who had assaulted and injured him for fear that he (plaintiff) might abscond back to the mines in the Republic of South Africa.

Coming back to his evidence, Plaintiff told the court that at about midnight and whilst he was in bed he heard the alarm raised by a person who was screaming loudly and calling out the name of Mpatlise. He got out of the house and noticed two people going in the direction from which the alarm came. He followed those people to the spot where they found the person who had been raising the alarm. He was wearing only a bluish skipper, a short ~~pants~~ of his pyjamas. He was bare footed and carried no stick or weapon of any sort. When he finally came to them the two people/^{he} had been following were with the person who was raising the alarm. He recognised the two people as Thabo Mpatlise and Thabiso Letsoenyo (P.W.3). He also recognised the person who had been raising the alarm as the defendant who was obviously injured. Mpatlise and P.W.3 were attending to his injuries. He confirmed that on arrival he had inquired as to what had happened and defendant replied that he had been assaulted and injured by someone who had run away.

After his injuries had been attended to, defendant was taken by Mpatlise, P.W.3 and others to a vehicle which was to convey him to Mohale's Hoek hospital whilst he (plaintiff) returned to his house. Plaintiff denied, therefore, defendant's evidence that he was the person who had waylaid, assaulted and injured him on the way home from the place where the night virgil was held on 28th May, 1982.

7/ In as far

In as far as it is material, the evidence of plaintiff was corroborated by that of P.W.3 who confirmed that after attending to his injuries he, Mpatlise and one Belete transported defendant to Mohale's Hoek hospital. On the way to the hospital defendant told them that the person who had assaulted him was the plaintiff. Asked why he did not mention it whilst they were still at the scene of crime defendant replied that he did not want to do so in the presence of the Plaintiff for fear that he might abscond to the mines in the Republic of South Africa.

It is to be remembered, however, that according to the evidence of the Plaintiff, P.W.3 and, indeed, the defendant himself when Mpatlise and P.W.3 came to where defendant was found injured plaintiff was not present. On his own words defendant reported to Mpatlise and P.W.3 that he had been assaulted and injured by someone who had run away. The report was made before Plaintiff had arrived at the scene of crime and therefore, not in his presence. That being so, defendant's allegation that he could not, at the scene of crime, disclose that plaintiff was his assailant because the latter was present is unconvincing. The truth of the matter is that defendant merely identified his assailant as someone wearing a skipper, a pair of short pants, gumboots and carrying a stick. When he later saw him in the crowd wearing a skipper and a short pants of his pyjamas he assumed that plaintiff was the person who had assaulted and injured him.

It is not really disputed that after he had told the people who were transporting him to Mohale's Hoek that plaintiff

8/ was the

was the person who had assaulted and injured him defendant was taken first to Mohale's Hoek police charge office where he and P.W.3 admittedly laid a charge against the plaintiff. According to him defendant was given a medical form by which he was referred to the Government hospital in Mohale's Hoek for medical treatment on the same night, 28th May, 1982. He was admitted and discharged on the afternoon of the following day, 29th May, 1982. This is, however, disputed by Plaintiff according to whom defendant accompanied the police who came to arrest him at his home in the early morning of 29th May, 1982.

It is worth noting that the medical form by which defendant was allegedly referred to the government hospital in Mohale's Hoek on 28th May, 1982 was not produced in this trial. Instead defendant produced a medical form completed on 3rd June, 1982 by a private medical practitioner, one Doctor Moshoeshoe. In my view this document is no convincing proof that defendant was on the night of 28th May, 1982 admitted in Mohale's Hoek government hospital. Plaintiff may well have been testifying to the truth when he said on the early morning of 29th May, 1982 defendant was still walking in his home village and actually accompanied the police who came to arrest him at his house. That being so, it must be accepted that defendant's story that he was hospitalised from 28th May, 1982 until the afternoon of the following day, 29th May, 1982, is an exaggeration which must be rejected as false.

Although in the pleadings defendant stated that he had incurred M100 as damages for medical and hospital expenses it emerged from his evidence that M60 thereof was transport expenses

9/ and only

and only M40 was medical and hospital expenses. However, no receipts were produced as proof that defendant had, indeed, paid the alleged M80 and M40 as transport and medical expenses respectively. In the circumstances, I am not prepared to make any award under these headings.

In his evidence Plaintiff further told the court that following his arrest by the police who were in the company of defendant, he was taken to Mohale's Hoek police station where he was formally charged of assaulting the defendant with intent to cause him grievous bodily harm, but later released on bail on conditions that he inter alia, reported at the police station once every week. Eventually the trial took place on 15th November, 1982 when he was found not guilty and discharged at the close of the crown case. As proof thereof P.W.2 Mathabo Lefoka, the clerk of court at the Magistrate Court in Mohale's Hoek, handed in as exhibit "C" the record of proceedings in C.R. 127/82 - Rex v. Molefi Molise.

It is to be remembered that in the pleadings plaintiff claimed the amount of M40-80 as damages for transport. In his testimony he told the court that whilst on bail he paid M1.20 a return journey every time he travelled to report himself at the police station. In addition he spent .65 on his meal. When the trial started before the Magistrate Court, he called two defence witnesses. He paid for transportation of each of them at the rate of M1.20 a return journey. He also spent M2.00 on each witness for meals.

10/ Although

Although he told the court that the witnesses were in attendance for two days Plaintiff did not disclose for how many times he himself had to report at the police station whilst he was on bail. It is, therefore, not possible to calculate the total amount of expenses incurred by the plaintiff. In any event no receipts are produced in support of the alleged expenses. I am not prepared to make any award under this heading.

Again, in his pleadings Plaintiff claimed that he had incurred M619.20 as damages for legal expenses. In support thereof he produced Exh. "A" - receipts issued by his Attorney of record. It is significant to observe that according to Exh "A" the total amount of legal expenses paid by the plaintiff is only M600-00. There is no documentary evidence to support the additional M19-20. Wherefor, I find no justification to allow it.

Plaintiff's claim for M3,185-98 as loss of salary is based on the allegation that from 29th May, 1982 to 15th November, 1982 he could not return to his place of work in the mines of the Republic of South Africa where he was paid M18-28 (amended) a day. As proof that at the material time he was earning M18.28 a day plaintiff handed in Exh "B" - his pay slip.

It is to be noted, however, that Exh "B" is plaintiff's pay slip for the month of February, 1983 and not May 1982. The fact that in February, 1983 plaintiff was earning M18.28 a day cannot, in my view be conclusive proof that he was paid at the same rate in May 1982 when he came home for the weekend.

11/ It is common.....

It is common cause from the evidence that on the night in question, 28th May, 1982 defendant did report to the police at Mohale's Hoek that he had been assaulted and injured by the plaintiff. As a result of the report, plaintiff was criminally prosecuted but found not guilty and discharged at the close of the crown case. The salient question is whether or not, in the circumstances, plaintiff could successfully claim against the defendant, as he did. In his work Principles of South African Law (1956 Ed) at page 533 Wille has this to say on the issue:

" In order to succeed the plaintiff must prove each and every one of the following four facts; (My underlining)

- (1) Institution of the Legal Proceedings by the Defendant.
- (2) Without justification,
- (3) Absence of Reasonable and Probable cause on the part of the Defendant,
- (4) Malice on the part of the Defendant.

In the above cited passage I have underscored the words "each and every one" to indicate my view that in order to succeed in a claim of this nature the plaintiff must prove all the four points. Failure to prove any one of them will render Plaintiff unsuccessful in his claim.

In the present case I am, on the evidence, satisfied that defendant did report to the police at Mohale's Hoek that Plaintiff had assaulted and injured him. He had, therefore, set the law in motion or instigated the institution of criminal proceedings against the plaintiff. As regards the second point to be proved by plaintiff it is to be observed that at page 534 of Wille op. cit. the learned author says :

12/ "In the case

"In the case of criminal proceedings, it must be proved that the plaintiff was acquitted after a final trial"

It is common cause that the criminal proceedings instituted against him were terminated in Plaintiff's favour. Plaintiff has therefore, satisfactorily proved the second point.

I have found on evidence that defendant was, on the night in question, assaulted and injured by a person who was dressed in a skipper, a pair of short pants and gumboots. When he saw him in the crowd dressed more or less like the person who had earlier assaulted him defendant may well have genuinely believed plaintiff to be his assailant. It cannot, therefore, be correctly said that defendant had no reasonable and probable cause to claim that plaintiff was his assailant. That being so, I take the view that the third point has not been satisfactorily proved by the plaintiff.

Even if I were wrong in the view I have taken on the third point it seems to me that in reporting the incident to the police defendant's interest was that justice should be done to plaintiff whom he genuinely suspected to have committed a criminal offence. That being so it can hardly be said that defendant had malice in reporting or setting the law in motion against the plaintiff.

On the foregoing reasons, I come to the conclusion that plaintiff has not successfully proved all the four points he had to prove in order to succeed in his claim. The question I have earlier posted viz. whether or not, in the circumstances, plaintiff is entitled to succeed in his claim against the defendant must be answered in the negative. Accordingly plaintiff's claim is dismissed with costs.

Coming now to defendant's counter claim I have already pointed out, earlier in the judgment, that although defendant was, indeed, assaulted and injured on the night in question, I am not convinced that Plaintiff was his assailant. He cannot, therefore, be held liable for whatever damages are incurred by the defendant.

I would likewise dismiss the counter-claim with costs.



B.K. MOLAI

JUDGE

6th March, 1989.

For Plaintiff : Mr. Mafisa,

For Defendant : Mr. Sello.