

IN THE HIGH COURT OF LESOTHO

In the matter of:

KARABO K. MOHAU  
SALEMANE PHAFANE

1st Plaintiff  
2nd Plaintiff

v

THE COMMISSIONER OF POLICE  
THE ATTORNEY-GENERAL

1st Defendant  
2nd Defendant

JUDGMENT

Delivered by the Hon. Mr. Justice Sir Peter Allen  
on the 3rd day of January, 1989

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This is a claim by two advocates for damages for unlawful arrest and detention by the police. There were separate suits filed but they have been consolidated for convenience.

The plaintiffs are members or partners in the legal firm of G.G. Nthethe and Company of Maseru which on 31 March 1988 filed an urgent habeas corpus application in this Court for the production and release of one Khethang Lebabo. The following day was 1 April which was Good Friday. The application was brought before the Chief Justice on the afternoon of 31 March and an order was made for the production of the detainee, who was said to be in Quthing, at 9.00 p.m. that same night at the residence of the Chief Justice.

/Arrangements ...

Arrangements were made with the plaintiffs to pick up the Assistant Registrar, Mr. Makara, (PW 2) at his home that evening. The second plaintiff, Mr Phafane (PW 1) drove there in a Toyota Cressida car registered number E0282 which belonged to Mr Nthethe. In the car with him was the first plaintiff, Mr Mohau (PW 3). They took Mr Makara to the High Court but were unable to enter as the night watchman with the key had vanished.

Meanwhile Mr Nthethe had also arrived at the Court driving another of his cars, a Mercedes-Benz registered number E2260. With him was a man called Letako Kobine, an accountant, who apparently had nothing to do with the case.

Mr Makara eventually managed to enter the Court building so as to collect the Registrar's file and Court stamp and other items needed for the hearing of the application. But, by then, it was close to 9.00 p.m. So Mr Phafane drove off alone in the Cressida to the Chief Justice's residence so as to inform him why they might be late. At the gate to the residence he got out of the car and went to call for the sentry to open the gate, but there was nobody visible on duty.

After a few minutes a Land Rover arrived and stopped behind the Cressida. The Land Rover was filled with armed men in civilian clothes and blankets. Apparently they were a combined task force of police and soldiers. They were carrying rifles and pistols. Among

/them ...

them were Major Tlali (DW 2) of RLMP and Major Motene of RLDF and Captain Malefane (DW 1) of RLMP. Major Tlali was known to Mr Phafane. These people got out of the Land Rover and pointed their guns at him and seized hold of him and pushed him into the back of the Land Rover. Mr Phafane asked why they were doing this but he was answered only with insults and abuse and threats to kill him.

They drove off leaving the Cressida by the gate with the engine idling and the lights on. In fact it appears that one of the men drove it to the Central Charge Office where it was seen later.

Meanwhile Mr Nthethe was driving his Mercedes-Benz from the High Court to the Chief Justice's residence. With him were Mr Mohau, Mr Makara and Mr Kobine. On the way, near to the British Council office and Maseru Central Charge Office, they met the Land Rover. Someone in the Land Rover ordered the driver to stop the Mercedes-Benz. This he did by swerving to the wrong side of the road and driving straight at the car. They both stopped. Captain Malefane jumped out and approached the driver's side and pointed his pistol at Mr Nthethe's head. Others got out and pointed their guns at the people in the Mercedes-Benz.

Mr Makara was obviously shocked and rather confused by this sudden display of force. He knew Captain Malefane and so he got out of the car and tried to explain that he was the Assistant Registrar of the High Court on duty. He said that they merely mocked and cursed him, and that one of them took him by the back

/of his ...

of his jacket and shouted insults at him. Another kicked his knees. Major Motene, whom he also knew asked him, "How come that as Assistant Registrar you are seen in the company of thieves?"

The others were told amidst much abuse to get out of the Mercedes-Benz and Mr Phafane was pulled out of the Land Rover. They were held in a group and marched at gun-point into the Charge Office after one of the officers had ordered that the "bad elements" should be taken to the cells. Inside the charge office there was some argument among the officers about whether Mr Makara should be locked up with the others. Perhaps someone among them with more sense than the others realised that this would be going too far and Mr Makara was ordered abruptly to leave the charge office and go home, which he did.

In the charge office the three lawyers and the accountant were searched. Major Motene took Mr Nthethe by the beard and turned his head from side to side. Mr Mohau said that a soldier called Mphana took off his (Mr Mohau's) waist belt and unzipped his trousers in the course of searching him. They dropped to his knees and he felt embarrassed and humiliated. The four of them were taken to a small cell in which there were already five men, thus bringing the number up to nine. There was no furniture and only the concrete floor to sit on. In one corner was a bucket for toilet purposes. It was full and very smelly. They were not given any blankets or toilet paper. At one point in the night

/Mr Mohau ...

Mr Mohau knocked on the cell door and a policeman came and opened a square slot in the door. Mr Mohau asked to be taken outside to the toilet. There was no reply and the cover of the hole was closed.

Early in the morning of Good Friday Mr Nthethe was called out of the cell by a policeman called Maapesa who handcuffed him and took him away. He did not return. At around 10.00 a.m. the occupants of the cell were taken outside for counting. Mr Mohau and one of the other men were required to carry the full toilet bucket outside to empty it. In the charge office they saw Mr Pheko an attorney, who told them that he and others were looking for them. But they were ordered to go back into the cell.

At around 4.00 p.m. they were taken out of the cell again and brought before Lieut. Colonel Phapo of RLMP who was with some other police officers who had Mr Nthethe with them. The colonel told them that he was detaining Mr Nthethe and he was releasing them but they should know that from that day onwards they should stop representing people whom he and his colleagues regarded as criminals. Mr Mohau asked for an explanation of this and whether he should get the colonel's permission before representing anyone in future. The colonel became angry and replied that he did not want any occasion to arise when he would have to deal with them again for such matters and that it was not going to be discussed any further. The vehicles were also being held in the compound but they were told to walk away.

/Mr. Mohau ...

Mr Mohau said that he was in an untidy and dishevelled state with the smell of the cell around him. As he walked along Kingsway like this he met various acquaintances who asked him what was wrong. He said he was embarrassed and humiliated at having to explain where he had been spending the night. Apparently news of the arrest was broadcast on Radio Lesotho and picked up and repeated by the BBC World Service, which added to their embarrassment. They were not told why they had been arrested and detained until they were released and warned not to represent criminals. Mr Phafane added that their office was ransacked by the police and files were removed or mutilated.

Both plaintiffs asserted that their arrests were without good reason and so unlawful and that they had consequently suffered considerable impairment of dignitas and contumelia. They each asked for damages of

1. M 5,000 for unlawful arrest;
2. M 6,000 for assault;
3. M 5,000 for unlawful detention;
4. M20,000 for impairment of dignitas;
5. M 5,000 for contumelia.

That is a total of M82,000 and costs in the suit.

For the defence Captain Malefane (DW 1) gave very vague and unsatisfactory evidence. He said that they picked up "somebody" at the residence of the Chief Justice but he did not know who it was. He said that

/they ...

they did so because they wanted the Cressida as it was a vehicle belonging to Mr Nthethe. He admitted that he was in the group of armed men at the scene but he did not know what was said or who arrested the man at the gate or whether the Cressida was taken to the charge office. His job was to stop other motor vehicles from entering that road although he did not know why the road was to be closed to the public.

On the way to somewhere undefined they saw the Mercedes-Benz and "someone" told the driver to stop it. He said that their information was that it was a stolen car with dangerous people in it. So he got out of the Land Rover and went to the driver's window and pointed his pistol at the driver. He added that they had been looking for a fleet of suspected stolen cars belonging to Mr Nthethe but he did not know which vehicles they were. He agreed that he had seen Mr Nthethe driving the Mercedes-Benz many times.

He said that "someone" told the people in the car to get out and "someone" ordered them to go to the charge office. He "thought" they got out but he was not sure. He did not know who was in each car. In spite of this extraordinary vagueness he agreed that he saw them being taken into the charge office. He did not remember why they were being taken into a cell. He could not remember being told why they had been arrested. He believed that the seized motor vehicles were later checked but he did not know. He did not see anything

/abnormal ...

abnormal in their treatment. About the only thing that he admitted knowing was their names. He said they were Mr Nthethe, Mr Mohau, Mr Phafane and an accountant. He denied that any abusive or insulting language was used. He said that it was normal to arrest dangerous people at gunpoint. He admitted that when the men were searched nothing special was found in their possession.

At first in cross-examination Capt. Malefane denied knowing that the plaintiffs were going to the Chief Justice's residence on that night. Then he admitted that he knew about the detainee Lebabo at Quthing who was supposed to be produced before the Chief Justice. He denied that they knew that Mr Phafane would be there and that an ambush was deliberately laid. He claimed that they were there "by chance" and merely saw one of the motor vehicles that they were looking for.

This most unsatisfactory evidence is not the sort of testimony that this Court expects to hear from a senior and experienced police officer such as a police captain. It was the type of testimony one might unfortunately sometimes receive from a poorly trained, unintelligent recruit with no knowledge of what is expected of him by the courts. It consisted of about one part truth and nine parts evasiveness and lies.

The defendant's second witness was Major Tlali (DW 2) of CID Headquarters. He said that he was "one of the senior officers" in the armed group of officers on that night but not in charge. Neither he nor Capt Malefane seemed to know who was in charge. They were

/looking ...



looking for some unspecified motor vehicles belonging to a company. He did not know the registered numbers of the vehicles but they had a note of them at the time. He did not know the name of the company but it belonged to Mr Nthethe and the two plaintiffs. He did not explain how he, as a senior CID officer, would not know a long established firm of lawyers in Maseru.

He said they had information that these lawyers possessed suspected stolen cars. After much evasiveness and reluctance to answer he said that the information came from RSA. The information did not state from where the vehicles were stolen nor who were the owners. It consisted merely of the bare fact that some vehicles in possession of these lawyers were suspected to have been stolen. He said it was "very reliable" information.

When questioned about what investigations he made prior to the arrests Major Tlali said that he went "to some offices to look in files to see if any records were there." He could not get any files so he "got nothing" and could not verify the information. So he went ahead with the arrests. He insisted that having received what he called reliable information was sufficient in his opinion and that he had not "jumped into the arrests" on what was clearly insufficient information. In fact it sounded like a most unsatisfactory and incompetent way of carrying out a straightforward investigation.

He said that he arrested Mr Phafane at the gate of the Chief Justice's residence "because he was driving

/a suspected ...

a suspected stolen vehicle" although in fact, at the time he was outside the car and standing near the gate.

With regard to the Mercedes-Benz he said it was not a haphazard mission. The Land Rover driver stopped it as described but he did not know who gave the order for him to do so. Again there was this reluctance to state who was in charge and who gave the orders. He agreed that guns were pointed at the occupants of the car but he did not say why this was thought to be necessary. Capt. Malefane had said vaguely that he understood the occupants were dangerous people, although elsewhere he admitted they were local lawyers well-known to him. Major Tlali said nothing of the occupants being dangerous or armed. He said that they had guns because it was at night and they were outside. One cannot help wondering why the every day common procedure of stopping a suspected stolen car should require a heavily armed group of senior police and army officers, especially as it was a well-known vehicle around town.

The plaintiffs testified that in spite of several demands and queries they were never told why they had been arrested. Major Tlali stated he told Mr Phafane that he was to be taken to the charge office because he had been found in a suspected stolen vehicle. He added that those arrested outside the charge office were also told by him the same thing. He agreed that he gave the order for them to be detained in the cells. He said that he had questioned them about the vehicles and he got no answers. This was on the way into the charge

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office. He did not interrogate them inside the charge office. Since he also said that he did not see them get out of the vehicle and walk into the charge office it is difficult to see how he could have questioned them on the way.

He also said that they were not at the Chief Justice's residence for any particular reason. They were simply patrolling the town looking for stolen vehicles or any other criminal activity. He did not know that one Lebabo was to be produced before the Chief Justice on that night. He denied that Lebabo had been detained in Quthing and added that he was released in Mafeteng.

Major Tlali said that next day he inspected the vehicles and made enquiries and found no evidence that the vehicles were stolen. He instructed that the plaintiffs should be released but that Mr Nthethe should be detained. He was eventually released on 6 April after a habeas corpus application was made on his behalf. Major Tlali declared that there was nothing abnormal or improper in their arrest and detention, nor in the seizure of the cars. If he was correct in this then the plaintiff's case would not succeed.

There is no doubt that the onus was on the defendants to justify the arrest and subsequent detention (see for instance: Solicitor-General v Mapetla C of A (CIV) No.18 of 1984 (unreported)). To succeed in this they had to show that whichever officer ordered the arrests had reasonable grounds for suspecting that the plaintiffs  
/were ...

were in possession of stolen vehicles. Suspicion is not the same as proof, but it must be such that a reasonable man in possession of the facts would agree that there was reasonable ground to suspect that the plaintiffs were at least concerned with vehicles that were reasonably suspected of being stolen.

According to Major Tlali their reliable information from RSA was merely to the effect that this firm of Maseru lawyers were in possession of certain suspected stolen vehicles. He was not told when, where or from whom they had been stolen and he did not try to find out. He had access to comprehensive records in Maseru showing that the vehicles had been properly registered and licenced in Lesotho after having been cleared by the police as is required. Yet he did not look at those records until after the arrests. The vehicles had been in use around Maseru for a long time. Capt. Malefane admitted that he had often seen Mr Nthethe driving around in his car. Any checks thought to have been necessary by the police could have been made before the arrests and in day time. The lawyers were well-known as were the cars. They could have been seen and checked at any time.

Why then was it necessary for all this heavily-armed "rough stuff" at or near a particular place at night where the police were well aware that these lawyers were engaged in approaching the Court regarding the production and release of a man whom the police apparently did not want to be released? It was not by chance and there was no coincidence involved, I am quite sure.

/It was ...

It was for Major Tlali to impress this Court with the reasonableness of his actions. Apart from his evasive and unsatisfactory answers his whole attitude in Court was most significant. He had to be warned several times about his manner of answering, or not answering, questions and his way of addressing the Court. This attitude and an apparent indifference to the truth made him a most unimpressive witness.

Even if the alleged information had really been passed to them, I can say, speaking as a former police officer myself, that no competent, responsible and experienced police officer of any rank (let alone senior officers such as the witnesses) would have acted in this impulsive fashion upon such meagre and unsubstantiated information, most especially when it was clearly possible to check it first and also to obtain all the details that were lacking which I have already referred to above. Their actions were clearly unlawful.

Consequently I find that the defendants utterly failed to discharge the onus of justifying the arrests and detentions of the plaintiffs. No reasonable grounds were shown. Furthermore, I do not believe the story about suspected stolen vehicles. It was offered by the defence witnesses as a "reasonable" explanation of their actions but in fact it totally lacked credibility in my eyes. It puzzles me why the defendants called such unsatisfactory witnesses. They would have been better advised to have admitted liability and merely to have  
/disputed ...

disputed the quantum of damages if they could not negotiate a settlement. As it is the defendants are liable for the unlawful arrest and detention of the two plaintiffs.

With regard to the quantum of damages the plaintiffs have each asked for awards under five heads: for unlawful arrest, unlawful assault, unlawful detention, impairment of dignitas and contumelia. I have dealt with a considerable number of cases of this sort and I have not found it practicable or even possible to break down and separate an incident in this way so as to put a particular value upon each part of it. There is almost always a considerable overlapping. For instance, it is sometimes convenient to consider a physical assault separately, but the arrest and detention go together and both involve some loss of dignity and contumelia. I have also noticed that the Court of Appeal in *Mapetla* (supra) and in various cases frequently prefers to make a single award.

In the present instance very little was said about the claim for assault. No evidence was given of any physical assaults on the plaintiffs and, in fact, the assault alleged was a technical one consisting of the pointing of firearms at the plaintiffs at the time of their arrest which I would regard as being an integral part of this actual arrest itself in the circumstances, rather than a separate incident of assault. No doubt to respectable professional people and other civilians who are not used to being arrested in any circumstances, it is a most upsetting and shocking experience at any time.

/If, too, ...

If, too, they are unused to being closely involved in much of a display of firearms, and particularly in having guns pointed aggressively at them, the shock is even more traumatic. This was reflected and expressed here in the high amount of damages claimed, a total of M41,000 for each plaintiff, and particularly their claims for M20,000 each for impairment of dignitas.

I would condemn the actions of these senior police officers in the strongest terms, particularly as I am convinced that they were well aware that the plaintiffs were on their way at the time to appear before the Chief Justice in a habeas corpus application which they apparently wished to prevent from being heard. This is inexcusable. Nevertheless I consider that the plaintiffs' claims are excessive in the circumstances, apart from the fact that I am not prepared to break them down in the way set out in the summonses. In any case these are general damages which are entirely the business of the Court to assess.

In Solicitor-General v Mapetla (above) the plaintiff was aged 78 years and a well-known and respected chief, a person of considerable standing in the Kingdom. He was illegally arrested and detained for some four days. He was subjected to degrading treatment in prison, being insulted, threatened and physically assaulted. The trial judge awarded him M8,000 damages for arrest and detention and M3,000 for the physical assaults, a total of M11,000. The Court of Appeal reduced this amount and said that it preferred to consider the events together and made one award of M8,000 in 1985.

/In ...

In Makhesi v O.C. Police Mafeteng & Anor CIV/T/380/86 (unreported) the plaintiff was manager of a hotel who reported a robbery at the hotel to the police. Some suspects were later arrested. After this the police also arrested the plaintiff, but without a warrant, and detained him for two whole days before releasing him because they had no evidence on which they could charge him with any offence. In February 1988 he was awarded M4,500 damages (M2,000 for unlawful arrest, M1,500 for detention and M1,000 for loss of reputation).

As far as I can see the actions of the police officers concerned in this incident on that night were carried out with the apparent purpose of trying to persuade these lawyers to stop representing certain suspected criminals who had been arrested by the police. This was an absurd and totally unacceptable undertaking that cannot be permitted to succeed. It is to be hoped that police officers with such ideas are very much in a minority and that they will be severely discouraged.

With regard to the claims for arrest and assault I take into account that they occurred at night in alarming and threatening circumstances, though fortunately without resulting in physical harm. Nevertheless, the manner in which the arrests were carried out could be described as unnecessarily harassing and undignified. The unlawful detention lasted for about nineteen hours in most unpleasant and degrading conditions. The plaintiffs were locked up together with suspects and criminals in a

/small ...



small, crowded and unhygienic cell.

Taking all this into account, and regarding the incident as a whole, I shall make one award for the arrest, assault and detention including considerations of contumelia and impairment of dignitas. In the circumstances I am of the opinion that an award to each plaintiff of M10,000 would be fair, reasonable and appropriate.

Accordingly, judgment is entered in favour of the two plaintiffs in the sum of M10,000 general damages each; that is a total of M20,000 together with costs in the suit. Since there was no prayer for interest in either summons, none will be awarded.



P. A. P. J. ALLEN

J U D G E

3 January 1989

Mr Phafane for 1st plaintiff

Mr Mohau for 2nd plaintiff

Mr Lenono for defendants