C OF A (CIV) NO.34/94

IN THE LESOTHO COURT OF APPEAL

In the matter of:

MOEKETSI MORU	APPELLANT
AND	
W/O RASELO	1ST RESPONDENT
ATTORNEY GENERAL	2ND RESPONDENT

Held at:

MASERU

CORAM:

STEYN, A.P.
KOTZÉ, J.A.
VAN DEN HEEVER, A.J.A.

JUDGMENT

STEYN A.P.

Appellant was the Plaintiff in the Court below. He sought the following relief against the Respondents, jointly and severally. Arising from an assault upon him by first

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Respondent and another policeman, payment of (1) the sum of M15,000 for pain and suffering as a result of the assault; (2) M5,000 for contumelia; (3) in respect of the theft of money from his person by the said policemen M7,900 and (4) from his house M4,000.

The Court *a quo* - Lehohla J presiding - upheld Appellant's claim that he was assaulted. It awarded him the sum of M5,000 under the heading of general damages and for the impairment of his dignity occasioned by the assault. However it dismissed his claim under the headings (3) and (4) above. It held that:

> "The Court has been unable to find that the plaintiff's claim has been proved against the defendants for M7,900 being money he says was found on his person by the two policemen near the president's court at Thaba-Tseka Local Court.
>
> The Court has been unable to find that the Plaintiff has proved his claim for M4000 being the amount he says was kept in his house."

It is in respect of the rejection of the claims for money stolen from his person and from his home that the Appellant appeals to this Court.

The facts are fully set out in the judgment of the

Court *a quo*. Briefly summarised, the evidence on behalf of the Appellant established that he was assaulted by the policeman concerned. He contended, and he was supported by his business partner in this respect, that he had a large sum of money - some ± 8000 - on his person at the time, and that he was unlawfully deprived of these funds by those who assaulted him. It was also his evidence that the police took the keys of his house from him and that when he returned home some 3 days later, some M4000 which he kept at home had also been stolen.

The only issue before us is whether the Court *a quo* was right to hold that the Appellant had failed to prove that:

(1) he had the large sum of money on his person;
(2) he had been robbed of this money by the police;
(3) he kept some M4000 secreted at home;
(4) the same law officers had also stolen the M4000 from him.

I have cited the findings of the Court in respect of these matters above. However the reasoning which supports these findings is instructive. The Judge *a quo* says the following in this regard:

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"Mr. Nathane conceded that it was never canvassed in evidence what the state of the door was when the plaintiff came back home. Nor was it said whether he had to unlock the door or break in order to gain entry into his house."

In these circumstances it is difficult to say with certainty that DW1 who is alleged to have removed the plaintiff's keys from the latter's custody could be solely held liable for illegal entry into that house and subsequent theft of the alleged M4000-00 from there.

The plaintiff's conduct concerning these thefts fills me with great doubts. No palpable reason is given for his failure to report the question of theft of money from his body to a different police station from the one which was served by the culprit who allegedly robbed him. The policeman to whom he says he reported this denies it. Regard should also be had to the fact that other than the plaintiff's say-so nobody saw for a fact that he had had money in his brown wallet amounting to M7500-00 and another M400 in his trousers pocket at the material time.

All that his witnesses and DW2 say is that when asked what the bulk was he said it is money. None of those present saw it. Nor did any hear what its amount was. Needless to say the plaintiff did not say how much he had on him perhaps because the police searching him never asked him.

The next aspect weighing heavily against the plaintiff's conduct with respect to the M4000-00 he alleges was in his house and was mysteriously found missing after a suspicion that DW1 might have taken it because he had the keys to that house is that he again did not report this loss to anybody. Neither to the landlady or the chief or police of a different station from the one where he legitimately harboured suspicions about its *bona fides*."

However, it is also significant to record that:

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(1) The Court found that what was disconcerting about the two principal police witnesses was "a clear intent to mislead the Court and their brazen-faced purveying of lies".

(2) It made no adverse credibility or demeanour finding against the Appellant and his witnesses. As his reasoning cited above indicates, the learned Judge based his findings on the probabilities as he saw them, and I will deal with the matters he mentions in this context later in this judgment.

It is perhaps unfortunate that in dealing with the circumstances surrounding these events and their significance, the learned Judge expresses the view that "it is difficult to say with certainty .....". We are of course not dealing with certainties. All that is required in civil proceedings for a litigant to succeed is that his case "... must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not, the burden is discharged, but if the probabilities are equal it is not'". Per Lord Denning in *Miller v.*

Minister of Pensions 1947(23) All E.R. 372 at 374.

Indeed as the learned authors put it in the *South African Law of Evidence* (4th Ed) at p. 526:

> "The degree of proof required by the civil standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. On the whole it is not difficult to say that one thing is more probable than another, although it may be impossible to say how much more probable."

I have no doubt that had the Court *a quo* approached the evidence before it in accordance with the guidelines articulated above it would have come to a different conclusion, certainly insofar as the theft of money on the person of the Appellant is concerned. I say this for the following reasons:

(1) The Appellant is a businessman who together with P.W.6 runs a cash business (a butchery).

(2) Whilst the record is very poor, it would seem that the witness Chief Matchane knew about a sum of about M7500 in cash which the Appellant had in his possession towards the end of the year in

question. This sum, which had been generated over a period of 8 - 9 months he gave to Appellant who "put it in his pocket".

(3) It is clear that on the day in question the 8th of November, 1996, the Appellant had something bulky in his breast pocket which he said was money.

(4) There is explicit evidence given by Appellant that he had collected M7500 from P.W.6 and that he had it in his possession on the day in question.

Now as can be seen from the passages in the judgment referred to above, Appellant's failure to report the matter to the police upon his release has been relied upon as a factor to place in the scale against him. In this respect his failure to do so must be considered against the background of a vicious and unprovoked assault upon his person by the police. He would in these circumstances have had a legitimate reluctance to record the fact of the theft at the very police station where the police who assaulted him had taken him.

The Court below also criticised Appellant for not

reporting the theft at another police station. That may be a criticism that would have had some substance had it not been for the fact that appellant immediately upon his release reported the fact of the theft to his chief who writes to the Commanding officer at the Royal Mounted Police station at Thaba-Tseka on the 12th of November, 1994, complaining not only about the assault on the Appellant but also about the theft of both the M7,900 from Appellant's person and the M4000 from his home. The letter reads as follows:

> "Sir,
>
> I pass this my person Moeketsi Moru who reports to have been arrested by your police on the 08-11-88 without reasons and they even tortured him by threatening his life by him with a gun and whip him with sjambok and hit him with a stick.
>
> Further they took his keys for the house and vehicle and other for a house for work, and in the residential house he found M4,000-00 missing.
>
> Further your police took his M7,900-00 and the total sum is M11,900.00
>
> Further I inform you that those police took this sum without reporting themselves before the chieftainship."

Whatever weight should be accorded to the factors mentioned by the trial Judge and to the fact that one would

not normally carry such a large cash amount on one's person, is outweighed by the factors I have mentioned above as well as the following:

(1) The police are proven liars.

(2) There is no adverse credibility finding made against the appellant who testifies that he had received such a sum from P.W.6 on that day.

(3) This evidence is corroborated in material respects by P.W.6.

(4) It is inherently improbable that Appellant would be found with only seven cents in his possession.

(5) According to Appellant there was an allegation made by the police after taking his money that Appellant used money "to bribe the Court President".

(6) That Appellant did not report the theft to the police because he was afraid that he would be killed and only reported the thefts to the police

after he had consulted his lawyer. However he immediately upon his release report it to his chief.

I am firmly of the opinion that the Appellant's version is more probable than that of the Respondents insofar as the theft of the money from his person is concerned. It is my view that the Court *a quo* erred in not finding this proved on a balance of probability.

I come to deal with the M4000 alleged secreted in Appellant's house.

As Mr. *Pheko* for the Appellant correctly conceded, his case in this respect is on less firm ground. There is of course no corroboration of Appellant's evidence in this regard. His landlady had the keys to his house and there is no evidence as to whether the house was ransacked after a breaking in or whether keys were used to effect an entry. Anyone could have broken in during his absence.

Per contra it is clear that the police took the keys from the Appellant during the process of arrest and that the keys were not recorded in the record of items taken from

him. It is clear that the police robbed Appellant of the money he had on him and that they lied not only in this respect but also falsely claimed never having taken the keys from the Appellant.

However, after carefully weighing the evidence, I have concluded that applying the test formulated above, I am not satisfied that there is a balance in favour of Appellant's case that it was the police who also stole the money which he had secreted in his house.

On this issue, I would have ordered "*absolution* from the instance".

It follows that the appeal succeeds to the extent that the decision of the Court *a quo* is set aside in respect of claims (3) and (4) referred to above. In place thereof, the following order is made:

1. The claim for payment of the sum of M7900 with interest succeeds and Respondents are ordered jointly and severally to pay this amount to Appellant, the one paying the other to be absolved.

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2. In respect of the claims for payment of the sum of M4000 the Court orders "*absolution from the instance*".

3. Interest on the said sum of M7900 at 18% per annum is to be paid by Respondents jointly and severally - the one paying the other to be absolved - as from the date of the wrongful appropriation by the police of this sum from the Appellant i.e. the 8th of November, 1988 to date of payment;

(4) Respondents are ordered to pay Appellant's costs in this Court and in the Court below jointly and severally, the one paying the other to be absolved.

.....
J.H. STEYN
ACTING PRESIDENT OF THE COURT
OF APPEAL

I agree: .....
G.P.C. KOTZÉ
JUDGE OF APPEAL

/...

I agree: .....

L. VAN DEN HEEVER
JUDGE OF APPEAL

Delivered at MASERU This ..... day of JUNE, 1996.