

C OF A (CIV) NO.22\96
C OF A (CIV) NO 20\96
C OF A (CIV) NO 21\96

IN THE COURT OF APPEAL OF LESOTHO

In the matter between :

PAUL SESETE MOHLABA	Appellant
TS'EPE TS'EPE	Appellant
TS'OLO JOSEPH PHIRI	Appellant

and

COMMANDER OF THE ROYAL LESOTHO DEFENCE FORCE	1st Respondent
THE ATTORNEY GENERAL	2nd Respondent

HELD AT MASERU

CORAM:

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

For Appellants : Mr Sello
For Respondents: Mr Mohapi

J U D G M E N T

LEON, J.A.

It will be convenient to refer to the parties as the plaintiffs and the defendants as the respondents. Three actions, based upon similar, but not identical facts, were heard together.

In the first action the plaintiff MOHLABA claimed the sum of M250,000 against the defendants as damages in consequence

of his unlawful detention in the Maseru Maximum Security Prison for a period of one year and assaults upon him by members of the Royal Lesotho Defence Force during his detention. This plaintiff was awarded the sum of M35,000.

In the second action the plaintiff PHIRI claimed the sum of M120,000 against the defendants as damages in consequence of his unlawful detention for 23 days from the 27th November 1990 at the Maseru Maximum Security Prison and for assaults committed upon him by members of the Royal Lesotho Defence Force during the period of his detention. He was awarded the sum of M8,000.

In the case of the plaintiff TS'EPE he claimed damages in the sum of M120,000 in respect of his unlawful detention in the same prison for a period of six months and for assaults committed upon him by members of the same defence force while he was in detention. In his case the trial Court awarded him damages in the sum of M20,000.

In their pleas the defendants denied liability but during each of the trials liability was admitted on behalf of the defendants leaving only the question of the quantum of damages in issue.

Each of the plaintiffs has appealed against the award of damages and there is no cross-appeal by the defendants.

In the case of the plaintiff MOHLABA it is claimed in

the Notice of Appeal that the Court a quo erred in awarding him damages for pain, suffering and contumelia leaving him without redress for his unlawful arrest and detention (see page 149).

In TS'EPE's case the Notice of Appeal alleges that the quantum of damages awarded by the Court a quo is grossly inadequate thus entitling the Court of Appeal to interfere.

In PHIRI's case the same ground of appeal is taken as in TS'EPE's case save that it is amplified by the further point that the trial Court erroneously took into account, to the prejudice of this plaintiff, that he was only a private in the army.

Before I refer briefly to the evidence which was led in each case there are certain preliminary observations which I wish to make. Firstly, there is a striking and sordid similarity in the cases both in regard to the manner of the detention; the conditions under which each of the plaintiffs was detained, the manner of the assaults (although not identical in each case), the food that was supplied, and the toilet and ablution facilities that were available if they can be dignified by such a description. Secondly, the background to these cases is that certain moneys had been misappropriated at the Labour Construction Unit. The plaintiffs were suspected of being involved in this offence. They were detained for different periods, taken to what the learned Judge a quo referred to as the "torture chamber" where they were viciously assaulted in an

attempt to force them to admit that they were involved in the offence. The attempts failed, and later, as a result of a habeas corpus application the assaults ceased, they were allowed food from their relatives and ultimately released. The last preliminary matter to which I wish to refer is the circumstance that no medical evidence was led. The reason for this appears from page 260 of the Record where the plaintiffs' Counsel stated that the medical reports were not legible but that he would make an effort to have them typed in the hope that they would assist the Court. In the event no medical evidence was adduced. Nor did the defendants lead any evidence.

The trial Judge was left only with the evidence of the plaintiffs and she had to do the best she could with the evidential material which was available. In her judgment she referred to the matters that were common to each of the plaintiffs i.e. the cell, the bedding, the toilet and ablution facilities and then dealt in each case with the manner in which each of them had been assaulted. She also took into account the length of time in which each had been detained following an unreported decision of this Court in NKAU MATETE vs THE MINISTER IN CHARGE OF POLICE AND 2 OTHERS C of A (CIV) No.24 of 1987 (unreported) holding that the greater the number of days the plaintiff lost his freedom the greater the amount of damages that should be awarded. I pause to interpolate that in each of these cases a globular amount of general damages was claimed. No distinction was drawn between the arrest, the detention and the assaults. The sums claimed were alleged to be in respect of all

of these matters nor did the defendants request any further particulars in respect of the sums claimed. In the course of her judgment regarding the plaintiff PHIRI the learned Judge observed that :

"the injury to his dignity is not the same as the injury caused on the dignity of the Captain of the Army" (The plaintiff MOHLABA was a captain in the army).

I shall presently describe the nature and extent of the assaults perpetrated on the plaintiffs. What is common to each of the three cases is the cell in which each was housed, the lack of proper bedding or toilet facilities and the lack of proper ablution facilities. The cell was described by one of the plaintiffs as being about the size of a toilet. It had extremely limited ventilation. It was dark by day as well as by night. There was no lighting and the solitary window which could not open was painted dark green. There was some kind of chamber pot in the cell but no toilet paper although the latter was later provided after a habeas corpus application. The plaintiffs slept on a thin rubber mat which was about the size of a car mat. Two worn blankets were provided but no pillow. To add insult to injury the plaintiffs were placed in these cells naked, although as the learned Judge found it is probable that when their families were allowed to visit them then they were wearing clothes. Each morning the plaintiffs were requested to walk 300-350 metres to wash out their chamber pots and to wash themselves. But there was neither soap nor hot water. The food given to them was unfit for human consumption, one of the plaintiffs vomited when trying to eat it while the others were unable to do so. All

these matters were not called into question in cross-examination which was in each case quite perfunctory . The only real matter raised was that there was a degree of exaggeration in the evidence of each of the plaintiffs in that, vicious as the assaults undoubtedly were, they were not so vicious as to prevent the plaintiffs from walking 300-350 metres the following morning to empty the chamber pots and attempt to wash.

The assaults upon each of the plaintiffs are described in great detail in the judgment. I shall not repeat that exercise but shall refer briefly to the salient features thereof.

The plaintiff MOHLABA was 44 years old when he gave evidence. He was then a farmer but had been a Captain. He was arrested on 2\5\90 and detained for a year. He was taken to cell 26 which was dark, extremely small with virtually no ventilation. He was stripped naked. There was a ladies chamber pot in the cell and no water. He spent the first day in the cell until a dish was pushed inside his cell. It contained a kind of "pap" which caused him to vomit. The next day he was ordered to wash. He went to a pump where the water was cold and there was no towel. All he could do was to wash his face and dry it with one of his blankets. He returned to his cell and was given some so-called porridge which he was unable to eat. After about a month and as a result of a Court order he was allowed cold food from outside. He described his life in the cell as "a life for animals".

On the night of 10th May his cell was opened, his hands handcuffed behind him, a blanket placed over his head and he was taken to what the learned Judge referred to as the "torture chamber". He was asked about stealing the Government money which he denied. A rubber tube was twisted around his neck which suffocated him. If he wanted to talk he was ordered to stamp his feet which he did in order to get some air. But he refused to confess. They held his feet and he fell to the ground hitting the cement floor with his forehead. They suffocated him with the tube again and he felt that he was dying. He tried to hit the floor but he did so with his nails as he was lying down. He lost a toe-nail. One of his tormentors suggested the use of electricity. The plaintiff became so frightened that he urinated all over himself. He was then made to kneel on crushed stones. Both his nose and the place where his toe-nail had been, began to bleed. His testicles were twisted. Because of the pain he was carried back to his cell.

During this episode he was assaulted three times in the same fashion with intervals of 15 minutes between each incident. After he had been returned to the cell one THETSANE visited him and saw blood all over the cell and said that he would report the matter to his superiors. He was still numb on the left side of his face. He was visited by Doctors Choy, Ankra and Yenke. An ointment was applied and his wounds were bandaged. He was not allowed any exercise nor did he have a single bath during his period of detention.

About a week later he was taken back to the torture chamber but it was then observed that he was bandaged and he told them that he had reported the assaults to Mr Monyoli. He was then returned to his cell.

An application was made for his release which was granted in June but as he stepped out of the prison gates he was re-arrested and spent a further 10\11 months in gaol before his final release. He was not assaulted again but he had to endure the same miserable and depressing conditions of solitary confinement. If he wanted water he had to bang on his cell door and walk to the pump. Blotches appeared all over his body. He still suffers from chronic headaches. His other pains lasted about 6 months after his release. He had a week without food.

As to the number of assaults his evidence is not entirely clear. In his evidence-in-chief he stated that he was assaulted three times on the first occasion with 15 minute intervals yet right at the end of the cross-conversation he suggested that he was assaulted daily for 7 days.

The point made in the notice of appeal that the learned Judge ignored the arrest and the detention of this plaintiff does not seem to me to be borne out by the judgment. I shall return later to the question of damages.

The plaintiff TS'EPE: This plaintiff was 31 years of age when he testified. At the time of his arrest and detention

at the Maseru Maximum Security Prison he was a private. He was detained for six months. The circumstances and manner of his detention were substantially the same as in the case of the previous plaintiff. He was stripped naked, placed in a similar sized cell with no light, with a plastic toilet bucket and a thin rubber mat to sleep on, with no pillow, and with two worn blankets. He described the darkness as terrible.

On the day of his detention he was handcuffed from behind, a blanket was tied around his neck and he felt that he was being strangled. He was taken to the torture chamber and suffocated with a tube. He was also asked about the stolen money and told to stamp his feet if he wished to speak. He did so but claimed that he knew nothing about the money. He was assaulted in that fashion about three times that day. He was also assaulted with a blunt iron object on his right foot. He could not walk and was carried back to his cell.

On the next day he was assaulted in like manner but in addition his testicles were pulled about 5 times. Something cut him, he bled and was carried back to his cell.

The third day he was assaulted yet again. But on this occasion he was thrown on the floor, one stepped on his neck while the others kicked him behind with booted feet. He was placed on crushed stones and then carried back to his cell.

The assaults continued thereafter. He was not able to

count how many but they only stopped as a result of a Court order. But the bad uneatable food continued. Once a week he received food from his family.

He developed a rash all over his body. A doctor saw him and said that this was caused by the suffocation and lack of ventilation. Toilet paper was provided but only occasionally.

In the habeas corpus application brought on his behalf he was examined by Mr Justice Kheola who found that he had sustained injuries and who referred to them in his Judgment.

At the end of his evidence-in-chief this plaintiff's claim was amended to M150,000.

In cross-examination he said that, despite his assaults of the night before when he was unable to walk, he was able to walk on the following morning albeit very slowly to rinse out his mouth at the pump and throw water over his face. The luxury of soap was denied to him. He was obliged to walk because he had to empty the toilet bucket.

The Plaintiff PHIRI was 36 years old when he testified. When he was first detained he was subjected to the humiliation of having his anus searched. He was detained at the same time as the plaintiff TS'EPE and incarcerated in similar squalid and degrading conditions. His tormentors came to his cell handcuffed him behind his back, took him to another room and

began to beat him with what felt like a sock filled with soil. He was assaulted on the ribs. He fell on the cement floor, his forehead hitting crushed stones. He bled but was assaulted all over his body, then covered with a blanket and suffocated with a rubber tube. His torturers wanted him to be an accomplice witness. His testicles were twisted. He was thrown on the floor and passed out.

He was assaulted every day for about a week, the same methods being used. The assaults stopped as a result of an application being brought by his wife in the High Court. When he appeared before Mr Justice Kheola in a habeas corpus application he was limping and the learned Judge observed wounds on both his wrists.

He was seen by Dr Makenete in prison. When the learned Judge observed that the injury to this plaintiff who was a private was not the same as the indignity suffered by a captain I think she was wrong. Humiliation, indignity, pain and suffering can be suffered in equal measure by any human being. Shylock's anguished plea in the Merchant of Venice bears eloquent testimony to that.

When I read this record I was appalled that human beings could be treated in this Kingdom in such a barbaric fashion. The conduct of the offenders warrants the strictest censure for it is reminiscent of some of the excesses of the KGB, the Gestapo as well as the treatment meted out to the late

Steve Biko.

The question is whether this Court can interfere with the quantum of damages awarded.

There are no scales by which pain and suffering can be arithmetically measured in money. I am also fully aware of the fact that the trial Court had a discretion as to the amount of general damages which should be awarded. One does not lightly interfere with such discretion. Apart from the case of the plaintiff PHIRI the learned Judge has not misdirected herself in any way.

However giving this matter the best attention that I can and having regard to the disgraceful manner in which each of the plaintiffs was incarcerated and treated there is a striking disparity between the amounts which I would have awarded and that awarded by the learned Judge. That conclusion justifies interference by this Court.

In my judgment the plaintiff MOHLABA should have been awarded the sum of M75,000, the plaintiff PHIRI the sum of M25,000 and the plaintiff TS'EPE the sum of M50,000. In reaching this conclusion I have not overlooked other cases which have been pressed upon us in argument but the facts in such cases are never quite the same and such cases are not particularly helpful.

In my judgment the appeal must be upheld with costs and the award of damages by the Court a quo must be set aside and be substituted by the amounts referred to in the previous paragraph.

Signed:
R.N. LEON
Judge of Appeal

I concur Signed:
J.H. STEYN
Acting President

I concur Signed:
L. VAN DEN HEEVER
Acting Judge of Appeal

Delivered this 29th day of June, 1996.