CIV/T/396/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

CECILIA SHABANGU — PLAINTIFF

and

COMMISSIONER OF POLICE — 1ST DEFENDANT
ATTORNEY GENERAL — 2ND DEFENDANT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 14th June 2000

In this case the plaintiff claims a total sum of M66,758.00 from the defendants being damages suffered by her as a result of wrongful and unlawful killing of one Aubrey Bofihla Komane, her natural son.

In reply to the request for further particulars the plaintiff stated that at the time of his death, the deceased son was 27 years old and that out of his monthly salary of M713.86 at Sasol II Secunda, the plaintiff enjoyed maintenance in the

amount of M300.00 per month. She also annexed an actuary's report of J.A. Carson & Partners who estimated the pecuniary loss suffered by the plaintiff as a result of the death of her son, and put this at M66,758.00.

In their plea the defendants admit that they caused the death of Aubrey Bofihla Komane on the 13th April 1990 at Hlotse in the district of Leribe but deny that the policeman who shot and killed the deceased acted wrongfully or unlawfully because as the policemen were trying to arrest the deceased on suspicion that he had committed an offence, he pointed a firearm at the policemen who were affecting the arrest and that:-

"In the process of resisting the aforesaid arrest he seriously and in a most dangerous manner threatened injury to the lives and bodies of the (defendants) who in reaction thereto, consequently caused the death of the deceased and as a result defendants deny that plaintiff has suffered damages as alleged or at all".

The plaintiff then requested further particulars to the defendant's plea in order to be able to replicate and the defendants supplied particulars to the effect that the deceased was threateningly brandishing a firearm and pointing it indiscriminately at people around him and threatening and asserting that he would kill them ..... As he was doing the aforesaid, the deceased had his forefinger of the right hand bent on or around the trigger of the firearm." These particulars were supplied by Mr Makhethe of the Office of the Attorney General on the 5th July 1991.

After a lull of seven years, an application was made by Mr Makhethe for leave to amend the plea and further particulars in terms of Rule 33, and used in support thereof the affidavit of Tsolo Raliengoane (the policeman who fired the fatal shot) in which he described the circumstances of the shooting. Paragraph 5 of his affidavit is worth quoting in full on account of its relevance to the inquiry whether deceased was killed in self-defence.

"As we were approaching the scene of the said incident, we recognised, on information, the said deceased AUBREY BOFIHLA KOMANE in the company of another man of his size and probably age. They walked in a staggering manner as if in drunken stupor. They were coming towards us, going the opposite direction to the one we were taking. As they approached towards us and we finally got up with them a few paces in opposite directions, we introduced ourselves to them as police-officers and ordered them to immediately stop. However, his companion who to this day we have not been able to identify, ran away and disappeared away from our sight. Plaintiff's son complied and raised his hands. My colleague NEO MOKOTJO approached for purposes of search. We were in uniform and carrying our S.L.R. rifles which are being and easily recognisable. As NEO MOKOTJO approached, plaintiff's son quickly reached for his waist, pulled out a 9 mm firearm, which is very powerful and is mostly recommended for Army and police officers. He pointed it at NEO MOKOTJO who took cover, and lied down. Sensing the danger we were both in, I had no choice but to act to save our endangered lives. The whole thing took hardly more than two minutes. It happened quickly. I shot plaintiff's son twice. The first time I shot, I saw him still standing and pointing his gun towards my colleague NEO MOKOTJO. I shot the second time and it was then that he fell down. When the deceased threatened to shoot as aforesaid, in all the circumstances it would have been very difficult to rule out that if he succeeded shooting my colleague NEO MOKOTJO he would not turn to me. I acted in defence of our lives."

In his own affidavit **Mr Makhethe** explains that the need to amend was necessitated by the incongruity between the original plea and the actual instructions of his clients.

On the date of trial, **Mr Sello** formally consented to amendments to the plea and to the further particulars. Of necessity it was agreed that the lawfulness of the fatal shooting should be determined by this court before the assessment of damages as claimed. It was also agreed that the onus of proof was on the defendants to prove that the killing was excusable or justified under law. This onus may be discharged on a balance of probabilities.

First to be called by the defendants was Captain Rakhongoana Mohanoe who informed the court that in April 1990 he was a police warrant officer stationed in Leribe (National Security Services). He told the court that on the afternoon 13th April 1990 he was watching television in the private bar at Leribe Hotel. At about 3 pm one person came in holding a quart of beer. Having sat down the man, unknown to him at the time, then pointed at the television set and loudly remarked, "Leabua with his soldiers have killed our fathers!" and thereupon produced a gun - 9mm colt - and pointing it upwards, said "Someone can excrete." Silence fell upon the private bar and people began filing out. He says he became frightened as he did not have his own service gun.

After this man had left the private bar, he says he then went to the Hlotse police station and he noticed that the man was now in the public bar. He says he then made a formal report to Sgt. Lepheane about the gun wielding man at the hotel.

Sgt Lepheane then patrolled out two troopers - Raliengoane and Mokotjo to go to the Leribe Hotel. The two troopers jumped into the buck of his van and wore overall uniform and armed with SLR rifles. He says that next to Pep Store they saw two men coming towards them. He then pointed out the man who had been wielding a gun in the private bar. He says that at the time he pointed him out, the man did not have anything in his hands. He said after the two troopers had alighted, he drove on towards the hotel intending to make a u-turn. He said he then suddenly heard a gun shot-even before he could make a u-turn. The gun shot was from behind. He then turned his vehicle and drove back only to find people milling around a man who was prostrate on the ground.

He goes on to say that Trooper Mokotjo came up to him and said "Here is the gun - we have it." He saw the gun which Mokotjo was then holding. It was the gun he had seen being wielded in the private bar.

They then loaded the man onto the van and transported him to Motebang hospital where he was later certified dead.

Under cross-examination by **Mr Sello**, the witness agreed that it was rather unusual that there was no gun handed in at the inquest. He agreed that the deceased looked drunk when he uttered the words "Leabua has killed our fathers" and was pointing the gun upwards

"Question: What offence was committed by him?
Answer: Frightening the people

He explained his purpose of going to report him at the Charge Office was in order to effect his arrest and "not to execute him" (as Mr Sello put it). He says Mokotjo explained to him that they shot the man because the man was also shooting them - having produced the gun - and that he had missed and that Raliengoane shot him. It was brought to his attention that at the inquest neither Mokotjo or Raliengoane stated that the deceased had fired a shot before he was shot by Raliengoane. He denied that he drove on so that the deceased could be shot.

He conceded that in his twenty years experience he had never come up with a situation where a suspect who is confronted by two armed police, could draw out a gun to shoot. He says he heard only one shot although Raliengoane says he fired two shots.

Next called was Trooper Raliengoane who told the court that he is the member of the Lesotho Police having joined the force in 1987. In 1990 he was stationed at Hlotse Charge Office. On the afternoon of 13th April 1990, Warrant Officer Mohanoe arrived at the charge office and made a report that there was a man brandishing a firearm at the Leribe Hotel.

He goes on a state that Sgt Lepheane then patrolled him and trooper Mokotjo to proceed to the hotel; they embarked the van then being driven by W/O Mohanoe. They were both wearing brown overall uniforms and carried long SLR automatic rifles.

When they were near Pep Store or Dambah's Store, W/O Mohanoe pointed out a certain man as the person who had been brandishing a gun in the hotel private bar. He says he and Mokotjo then alighted and stopped the man and his companion having identified themselves as police. He says they then said "Hands up" and one of the two men suddenly ran away leaving the deceased behind, who had then raised his hands up. He says he said to Mokotjo "Go to him" whilst he remained behind covering Mokotjo with his gun at the ready.

As Mokotjo approached the man suddenly lowered his hands, took out the gun from his waist and pointed it at Mokotjo. He says sensing that Mokotjo's life was in danger he fired at the deceased in order to protect Mokotjo and because he thought that after shooting Mokotjo the man would then turn upon him and shoot. He says he shot at the chest; when the man did not fall, he fired again. All the time, Mokotjo stood still. The deceased then staggered and fell down. He says he became frightened when deceased was pointing the gun at Mokotjo.

"I thought that this man is shooting and might shoot Mokotjo" he says, and continues to state -

"I did not consider shooting his hand as I thought I might miss it."

He says after this he ran back to the charge office where he made a report. When he came back he then looked at the gun closely and saw it to be a 9mm pistol.

He says the man was then searched by Sgt. Lepheana and one 22 bullet was found in his pocket. The man was then transported to the Leribe Hospital where he was certified dead on arrival.

He told the court that he was later charged with culpable homicide but was found not guilty (CR 536/94).

Under cross-examination by Mr Sello, this witness explained that they had proceeded to the hotel because W/O Mohanoe had reported that a man was wielding a gun at the Leribe Hotel and they wished to arrest him and had armed themselves with SLR self-loading rifles for self-defence. He said Sgt. Lepheana had ordered them to arrest that man for his threatening behaviour.

He agreed that during their police training they are taught martial arts and that depending on the circumstances, use of force must be resorted to as a last resort. He denied that the deceased was "executed" in cold blood but "I shot him because he took out a gun," he says. "I wanted to disable him. I did not shot at the arm. I aimed where he could not shoot anymore .... I shot at random aiming at the chest. My aim was to disarm him." He also explained that when the man raised his hands up he had seen a gun on the right hip-underpinned by his belt. He says the man had a jersey under which a gun was revealed when he raised his hands up.

At this point in time, his companion had fled. He went further to say he did not remember asking Mokotjo to take cover nor did Mokotjo throw himself down and roll away.

Next called was P.W.3 Major Michael Raleaka to whom the 9mm gun was given by W/O Lepheana. He testified that later he sent one policeman Khobotlo to take the 9mm found at the scene for ballistic examination and that this examination revealed that the gun had not been used at all. This 9mm was handed in as an exhibit at the inquest (Leribe Inq. 808/92). On examination, this 9mm could be described an old, rusty firearm no longer in a working condition in fact it could be 80 years old (It bears model - 1902). According to the Major the gun is not 9mm but an old. 38 which is shaped like a 9mm and appears to have been exposed to weather and rusty conditions.

On being asked by **Mr Sello** whether he could have produced such a gun in the circumstances described, the Major opined that it would be to invite trouble from police armed with SLR rifles - a drunk person would however unwisely do so. He agreed that the police guidelines on the use of firearms stipulate that the suspect must be disabled in order to arrest him. The policemen are trained in the shooting techniques - that is about how and when to use a gun. He agreed that shooting a man on the chest and twice so, indicates intention to kill. He says that there must be a warning shot - but that this depends on the situation at hand.

P.W.4 - Maitumeleng Tsotetsi was then called to give evidence. She told the court that she used to work as a bar lady at the Leribe hotel public bar. She says

that she used to know the deceased to whom she was related and that on the 13th April 1990 the deceased had arrived at the hotel in the company of two men and one lady.

They bought beer and drank; then the deceased took out a gun and said "This is my stick," as if addressing his companions. She identified the old gun before the court as the one the deceased held on that day; the cross examination further revealed that the television set was not in the public bar but in the private bar; and she in fact says that she did not see Mohanoe. The two men who accompanied the deceased that day were Nkhasi and Malefane Mohale.

P.W.5 was Detective Trooper Mokotjo who told the court that in April 1990 he was stationed at Hlotse Charge Office. He says that on the 13th April 1990 he was on duty when a report was received to the effect that someone was causing trouble at the Leribe hotel in that he was wielding a gun which had an unsettling effect on the customers. He says Warrant Officer Lepheane then patrolled Raliengoane and himself to proceed to the hotel to apprehend the man with the gun.

They proceeded towards the hotel in the van driven by P.W.1 who had made the initial report. They were also armed with SLR rifles and wore brown police overalls. At the circle, Mohanoe then pointed out one man as the man who had been wielding a gun at the hotel. They then alighted from the van and Mohanoe drove on. He says they then ordered the man and his companion to stop. The man (the deceased) stopped but his companion suddenly took off ran away.

He says they ordered the deceased to raise his hands up and he complied; he says that as he was approaching him the man suddenly dropped his hands and immediately took out a gun and pointed it at him. He was about two paces away when this happened. Being shocked he immediately dived to the ground and rolled away having left Raliengoane behind to cover him. He says he then heard two gun shots. When he got up, he says he found the man already lying prostrate apparently having been shot by Raliengoane and he says he saw a gun lying next to him. Raliengoane then rushed to the charge office and returned with Lepheane; the man was then transported to the Leribe hospital where he was certified dead on arrival.

Under cross examination, witness Mokotjo insisted that he actually dived to the ground and then rolled away to avoid being shot; and the court noted that at the inquest, there was no mention made about diving and in fact Raliengoane before this court makes no mention of the fact that Mokotjo dived to the ground and rolled. This fact was also not mentioned at the criminal trial at the Leribe Subordinate Court.

The defendants then closed their case.

Mr Sello having considered his position then elected not to call any witnesses and also rested his case.

It was common cause that the incidence of onus in this case rested upon the defendants to show on a balance of probabilities that the killing of the deceased was justified in the particular circumstances of the case.

In this inquiry one must be cautious not to import the criminal standard and require that justifiability of the killing must be proven beyond a reasonable doubt. Under criminal law, factors or considerations which may render the accused's act not unlawful are usually described as "defences" to criminal liability; these statutory defences which may establish absence of unlawfulness and in appropriate circumstances can be relied upon by the accused to escape conviction e.g. statutory defence under section 42 of the Criminal Procedure and Evidence Act No.9 of 1981 is phrased as follows:-

"42. (1) When any peace officer or private person authorised or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected to having committed any of the offences mentioned in Part II of the First Schedule, attempts to make the arrest, and the person whose arrest is so attempted flees or resists and cannot be apprehended and prevented from escaping, by other means than by the peace officer or private person killing the person so fleeing or resisting such killing shall be deemed justifiable homicide.

(2) Nothing in this section shall give a right to cause the death of a person who is not accused or suspected on reasonable grounds of having committed any of the offences mentioned in Part II of the First Schedule, the offence of theft being limited for the purposes of this section, to theft in a dwelling house at night, and theft of stock or produce."

As it can be observed the right to kill is a restricted one under our law. Under the 1993 Constitution, Section 5 guarantees "Right to Life" with the following provisions:-

"(2) (1) Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is necessary in the circumstances of the case -

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war or in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted."

Our law therefore recognises and guarantees the sanctity of human life and a person can only be lawfully killed only in circumstances circumscribed by the law and it is upon the doer of the deed that deprives a life to justify his act, hence the incidence of the onus of proof being cast on him.

Under our law a person who can prove that the deceased had a duty to support him or her, is entitled to claim for the patrimonial loss of support resulting from the unlawful and culpable killing of his breadwinner. The plaintiff has to firstly prove that he or she has a right of support against the deceased (Visser & Potgieter Law of Damages (1993) pp 219, 375;

In the present case, the plaintiff's right as the natural mother of the deceased to claim support has, however, not been disputed. What is in issue in these proceedings in whether the killing of the deceased was justified in law and in the circumstances of this case.

The backbone of the case of the defendants is to the effect that when he was shot, the deceased had whipped out a gun and was pointing it at Trooper Mokotjo who was then proceeding towards him to search for a gun which he, deceased had been wielding in the Leribe hotel private bar. In fact, simply put, it was a killing in defence of another, and it ultimately boils down to an issue of credibility of witnesses; in this case only the defendants called witnesses and the plaintiff rested its case without calling any witnesses. The ultimate inquiry therefore is whether the defendants have discharged the onus cast on them on a balance of probabilities. In a civil case the onus is discharged if the story of the party bearing the onus is more probable than the other.

Whilst it is clear that the gun which was handed in these proceedings was never fired nor was it capable of ever being fired, being an ancient piece of metal, it is a pertinent question of fact whether on that day and occasion the deceased

suddenly dropped his arm, drew out the gun from his waist and pointed it at Trooper Mokotjo. Regard being had to circumstances it would indeed be complete foolishness for the deceased to have done so a few paces from two armed policemen. On the other hand it is also a real probability that Trooper Raliengoane could have over-reacted by shooting at the man dropping his hand because a gun had been exposed when he raised his hands.

Although there has been no evidence called to gainsay the evidence of the two policemen Mokotjo and Raliengoane, their evidence must however be tested upon their own credibility and probability. It seems to me that it is more probable that Raliengoane was a bit quick to shoot when he saw he an exposed gun than a case of the deceased pointing a rusted old hag of a gun at an armed policeman who was also being covered by his colleague. I am also of the view that the conduct of the deceased on the day of publicly displaying the gun was blameworthy itself to say the least. It is irrelevant that he was in fact toting what he knew was an old gun which could never hurt a fly. Other people did not know that and were indeed justified to treat the gun as capable of being fired. He the deceased created and brought about a risky situation upon himself. It is unfortunate that although Nkhasi and Mohale gave evidence at the criminal trial, they were not called by the plaintiff if at all an execution-style shooting was being alleged. These two men seem to have been present at the scene immediately before the shooting occurred. This court is not going to conclude that the deceased was indeed "executed" without cause, without clear evidence to that effect being adduced. That would be to speculate without evidential foundation. The position of the gun shot wounds is also of importance; if say,

for example, the gun entry wounds were at the back of the head or body, then perhaps the inference might be drawn that the shooting was unjustified. This court is the view that the more plausible probability is that when he was shot at by Raliengoane, the latter believed rightly or wrongly that the deceased dropped his hand or hands in order to draw out from his waist the gun which had been exposed when the deceased raised his hands up. As I have already pointed out, it is improbable that the deceased was shot at by Raliengoane without cause. I hold therefore that by wielding a gun in the hotel and wearing it under his belt the deceased created for himself a hazardous if not a dangerous situation which further created panic when he raised his hands exposing the gun under his belt. The two policemen could not be expected to have known that the gun was old and utterly useless and totally incapable of harming any one. I dare say even if it was a Christmas toy-gun, their reaction could still be similar if such a toy looked like a real gun!

On the other hand, I am of the view that the reaction of Raliengoane to shoot when the deceased dropped his hands was a bit panicky and he could have swiftly disabled the deceased with his automatic rifle without killing him. It is also the evidence of Mokotjo and Raliengoane that the deceased was staggering about as he came along and appeared drunk. In my view shooting the man on the chest was not completely justified and was not the only option left.

Section 42 of our Criminal Procedure and Evidence Act No.9 0f 1981 is worth referring to though neither **Mr Makhethe** or **Mr Sello** referred to it in these proceedings. It seems to me that section 42 above purports to authorise the

taking of human life in certain circumstances; this section however circumscribes this right to only those situations where the deceased has or is reasonably suspected of having committed any of the serious offences under Part II of the First Schedule. It is therefore unnecessary to decide whether by wielding a gun (old, loaded or unloaded) in a public place like the Leribe hotel the deceased thereby committed one of the offences listed under Part II of the First Schedule. In the case of **Raloso vs Wilson and others** - 1998 (4) SA 369 where section 49 of the South African Criminal Procedure Act 51 of 1977 was pleaded to justify the killing and its constitutionality was considered by the court (see also section 5 of the Lesotho Constitution quoted above).

It seems to me that generally speaking the killing may be unjustified if it is the result of the use of force to such extent as is necessary in the circumstances of the case (a) for the defence of any person from violence ... or (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained ... or (d) in order to prevent commission by that person of criminal offence. Section 5 of the Lesotho Constitution indeed crystalizes the common law principles of private defence; each case must however be decided objectively upon its own particular circumstances - see **R . v Labuschange** - 1960 (1) SA 632 per Schriener J.A. who noted that section 37 of Criminal Procedure Act 56 of 1955 (similar to our section 42) afforded the police an extremely and, indeed dangerously wide protection and opined that the Legislature could not possibly have intended that recourse to shooting should be had light - heartedly. The ultimate test should be whether the defendants have proved on a balance of probabilities that there was no way in which the policemen could have

incapacitated the deceased save by killing him. Where section 42 of the Criminal Procedure and Evidence Act does not apply e.g. where the offence committed or reasonably suspected to have been committed is not listed in Part II of the First Schedule), the common law principles applies, according to which the lawfulness of the force used will depend on all the circumstances **inter alia** the seriousness of the offence must be weighed against the degree of force - **Matlou v Makhubedu** 1978 (1) SA 946; **R.v. Britz** - 1949 (3) SA 293 at 303 -4; **Wiesner** v **Molomo** - 1983 (3) SA 151. In the circumstances of this case, I have already found that is not probable that the deceased actually pointed the firearm at Trooper Mokotjo as he approached; at the same time it was not unreasonable for Trooper Raliengoane to have believed that when he dropped his hands, the deceased was going to take out the exposed gun and shoot Mokotjo. Trooper Raliengoane all the time had his finger on his rifle trigger (as any diligent policeman will do) and could have fired at the lower limbs or torso of the deceased to disable him. Here it must be understood that Trooper Raliengoane could not be expected to shoot with a cowboy precision of wild Texas and to have shot the hand going to grab the gun.

Whilst the evidence of the two troopers is not satisfactory and congruent on certain aspects e.g. whether trooper Mokotjo threw himself to the ground and rolled away when the deceased suddenly dropped his arms, their evidence cannot be discounted **in toto** as fabrication more so because their evidence has not been gainsaid. At the same time it cannot be said the deceased was shot and "executed" for no cause at all. Probabilities point to an over-reaction on the part of Raliengoane when faced with a sudden emergency, and that this was

precipitated by a foolish act on the part of the deceased. There is in my view contributory fault on the part of the policeman who shot on one hand and on the deceased on the other. This being the case, Section 2 of the Apportionment of Damages Order No.53 of 1970 is pertinent. It reads:-

"2. (1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so."

Generally speaking the assessment of the extent to which a plaintiff's compensation should be reduced in accordance with his negligence is obviously within the equitable discretion of a trial court - **South British Insurance Co. Ltd vs Smith** - 1962 (3) SA 826 at 837; **Shield Insurance Co. Ltd vs Theron** - 1973 (3) SA 515 (A) at 518. In the case of **Bay Passenger Transport Ltd vs Franzen** 1975 (1) SA 269 Trollip JA. at p.274 stated as follows "The best that a court can do is to decide by the broadest general considerations an amount which it considers to be "fair in all circumstances of the case" ... the general rule that should be observed in assessing the amount is, I think, the well known

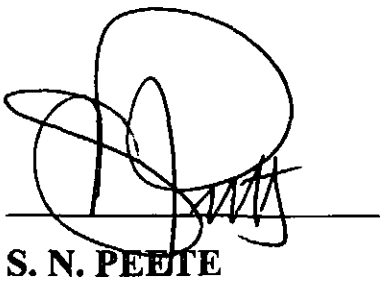
fundamental one that, in such circumstances of difficulty and dubiety, defendants should be regarded with greater favour than plaintiffs"- **favorabiliores rei potius quam actores habentus** (Digest 50.17.125). In other words, in striving to determine an amount that will be fair in all the circumstances, the court should act conservatively rather than liberally towards the plaintiff lest some injustice be perpetrated on the defendant." - The learned Judge of Appeal cited as follows from **Pitt v Economic Insurance Co. Ltd** - 1957 (3) SA 284 at 287 (Holmes JA)

"..... the court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff but must not pour out largesse from the horn of plenty at the defendants expense."

The learned Judge further noted that "one's natural sympathy for an injured person does not result in overlooking the fact .. That the figure of justice carries a pair of scales, not a cornucopia - **Innes vs Visser** 1936 WLD 44/45 - See also **Phae v Monyane & others** - 1974 - 75 LLR 285 **Mohlaba vs Commander LDF** 1995-96 LLR 235.

In assessing the amount of compensation the court should pay regard to actuarial evidence which can play an important role in assisting the court in cases where parties cannot reach an agreement. Although an actuary possesses the necessary skill to calculate mathematically the amount in a somewhat logical way the court still has a bona fide discretion in the matter - **Legal Ins. Botes** 1963 (1) SA 608 at 614. (For damages for loss of support caused by the death of another, see generally Visser & Potgieter - supra page 374 etc)

Having considered all the circumstances of this case I am of the view that fault must be apportioned proportionally and I apportion it proportionally at 40% (plaintiff) and 60% (defendant). The plaintiff is therefore entitled to 20% of the amount claimed assuming the correctness of the actuary's assessment. This would then come to M13,351.60.



S. N. PEETE

JUDGE

For Plaintiff: **Mr Sello**

For Defendants: **Mr Makhethe**