

IN THE HIGH COURT OF LESOTHO

In the matter between:-

JONAS MOKETE

PLAINTIFF

and

**COMMISSIONER OF POLICE
MINISTER OF HOME AFFAIRS
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 8th February 2001

On the 15th December 1993 the Plaintiff issued summons against the Defendants claiming M30,000.00 as compensation for the injuries allegedly inflicted upon him by certain policemen who were in the employ of the Lesotho Mounted Police Services of the Lesotho Government. It was alleged in the declaration that the police some of whom came from Mapoteng Police Station and some from Maputsoe Police Station wrongfully shot at Plaintiff severely injuring his abdomen, thighs and legs for no reason.

At once I should refer to Rule 21 (6) which reads:-

- “(6) (a) A plaintiff who sues for damages must set out particulars of his claim in such a manner as will enable the defendant reasonably to assess the quantity thereof.
- (b) Where the claim is for damages for personal injuries the plaintiff shall state in his declaration the nature and effects of the disability alleged to give rise to such damages and shall as far as is reasonably possibly state separately, what amount, if any, is claimed for:-
- (i) medical, hospital and other similar expenses.
 - (ii) pain and suffering.
 - (iii) loss of amenities of life, (full particulars to be given).
 - (iv) disability in respect of loss of income including loss to date of declaration and future loss of income. In this respect the plaintiff’s earnings before the event giving rise to the claim must be fully set out together with prospects for earnings he might still be able to recover and prospects for earnings he would have had but for the disability.
- (c) In all cases the particulars of damages must be set out in such a manner as will enable the defendant, if he so desires, to make a reasonable tender.”

See generally **Bell, van Niekerk vs Oudebaaskraal EDMS (BPK)** - 1985 (1) SA 127; **Cete v Standard and General Insurance (Co) Ltd** - 1973 (4) SA 349 at 354 which point out that where damages claimed are of a general nature the plaintiff is required to particularise his claim in such a way that the defendant is in a position to estimate the **quantum** thereof.

Be that as it may, the defendants filed their plea paragraphs 2 and 3 of which are as follows-

2.

“AD PARA 5 THEREOF

“Save to deny the presence of Mantoro Makaliana, Sefuku Mabetha and Matela in the said operation and that there was no reason for firing at plaintiff, the rest of the contents are admitted. The plaintiff was mistakenly shot at in an attempt to immobilise the bus which he was driving in an attempt to overrun the police who had followed him from Mapoteng and wanted to arrest him.

3.

AD PARA 6 THEREOF

Save to admit that plaintiff might have suffered pain the rest of the contents are denied and plaintiff is put to proof thereof. The police are justified to act in the manner they did and wish to reiterate the contents of paragraph 2 above.”

In the case such as this one, the incidence of onus is very important because the whole case revolves around the issue whether the shooting was justified in the circumstances of the case. Section 6 of the Constitution of Lesotho states-

“Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained, save as may be authorised by law in any of the following cases, that is to say

- (c)
- (d)
- (e)
- (f)
- (g) upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Lesotho.”

In the case of **Senti and Lenko vs Commissioner of Police and Attorney General - CIV/T/15/97** (unreported) **Monapathi J.** said

“The right of every citizen to freedom of movement and liberty is fundamental. An arrest by its nature constitutes a serious restrictionThe law permits the police to effect arrest if there are factual circumstances on the basis of which they objectively suspect that certain offences have been committed. It is trite law that the onus of proving the existence of such circumstances rests squarely on the person who alleges them (**Tsose vs Minister of Justice** - 1951 (3) SA 10 **Brand vs Minister of Justice** - 1959 (4) SA 712 at 714 per Ogilvie Thompson; **Linoko vs Rex** 1991-92 LLR (Bulletin) 109.”

In discussing the circumstances of this case it shall also be important to assess whether the arrest to be affected was for the purpose of bringing the plaintiff before the courts of law or merely to harass and punish him summarily for acts committed by him that morning at Makhoroana and Mapoteng.

The plaintiff gave evidence to the effect that he is aged about thirty-three and that in September 1993 he was employed by Mathepa Mohanoe as a bus driver. At the time he was driving an Isuzu Coaster from Phororong via Makhoroana - Mapoteng to Maputsoe. He told the court that on the 16th September 1993 he started the engine of his bus and observed that a group of would be- passengers standing at the gate and that he then saw a van stopping near the group and the driver talking to them. He says he then saw some of these people embark the van; he later got a report that the van driver was transporting these passengers at a lesser fare. He told the court than in Lesotho vans are never licenced to carry passengers and that the van was pirate taxi.

He says he followed this van from behind and it continued picking up passengers along the road.

He caught up with the van at Makhoroana bus-stop where he learned that it belonged to one Mosoeu - a Police officer at Mapoteng Police Station. (I should here note that at the time of this trial Mosoeu had since passed away.)

He told the court that he then went to the driver of the van and asked him to hand over all the monies he had collected as fares from Phororong. When he refused, Pule - his bus conductor - drew a knife and stabbed the driver on the arm and he, the plaintiff, struck the driver with a stick. Whereupon the driver took out money amounting to about M300.00 and gave it to plaintiff.

He says he then drove on to Mapoteng Police Station. In the charge office he found Mr Mosoeu to whom he made a report about the occurrences at Makhoroana's. He says he also handed over the M300.00. He says that Mosoeu then locked the conductor Pule, in a cell and ordered plaintiff to go and call his employer.

As he was about to drive his bus away the van in question suddenly arrived at the police station and after a report had been made by its occupants, Mosoeu then attempted to stop the plaintiff's bus. Upon stopping, the plaintiff was ordered to park the bus and disembark and park the bus. He says he noticed a changed mood in Mosoeu. When the passengers made a lot of noise about being delayed, he says he drove the bus away telling Mosoeu that he would report to his employer at Metro Maputsoe.

He told the court that at Metro he reported to his employer and drove on to the Maputsoe bus stop where his passengers alighted. After about 30 minutes he then saw Mosoeu arriving with four policemen in uniform and were all armed with SLR rifles. He says Mosoeu then approached the bus holding a revolver and said "come out I kill you." He says he then rolled up the bus window because he realized Mosoeu was angry. As other police approached he told them "The owner of the bus is at Metro, let us go there we talk there." As he started driving the bus, a firing began; he says the first bullet got him in the waist region and caused him to faint in pain. He says the bus having stopped, Mosoeu then entered the bus and shot at his abdomen at point blank (The witness undressed partly to reveal the scar next to his navel and he also pointed out about five scars one being on the leg.

He says he feigned death and Mosoeu left; and the members of the public then took him to Jessy's hospital and was later transferred to Mapoteng Maluti Adventist Hospital where he was hospitalised for six weeks.

He says that police later visited him at his home telling him that they were coming to arrest him. He told them that he and his lawyer would meet them at T.Y.

He says that no docket was found at T.Y. nor has he ever been charged with any offence since then.

Under cross examination, he explained that the pirating van was the cause of the whole trouble on that day and admitted having assaulted the pirating driver and having dispossessed him of the M300.00. He insisted that he reported to the

Mapoteng police before the driver of the van arrived. He went on to say that before he drove his bus away, Mosoeu had not informed him that he was being arrested but instead had said "Go into the cell."

The confrontation at Maputsoe occurred about one and half hours later. He says they found him in the bus which was then stationary at Maputsoe.

"Question:- When they came, you closed the door and window of the bus - closing yourself in?

Answer:- Yes, because Mosoeu had said "come out I kill you" They did not enter the bus."

He says he started the engine and as the bus moved forward the shooting started.

Question: Shooting (you) was accidental ... they intended to shoot the wheels

Answer: I don't know that .. but Mosoeu later came into the bus and shot me when the bus was at Frasers."

The plaintiff then closed his case.

No.8176 Mokhanyeli Albert Tokelo was called as the only witness for the defendants. His story went on like this: On the 16th September 1993 he was on duty at the Mapoteng Police Station and at about 10 a.m. two men arrived in a van at the station. One of them had a bleeding injury on his hand and he made a report concerning the plaintiff; they also reported that they had been dispossessed of about M300.00. He says Lance sergeant Mosoeu then ordered him to go to the road and stop the bus as it passed.

The bus driven by plaintiff was later stopped and the plaintiff escorted into the charge office wherein Mosoeu informed Plaintiff that he was arresting them for forcibly taking the money and for assault. Mosoeu then ordered plaintiff to drive the bus into the police yard; but upon getting into his bus, the plaintiff suddenly drove off towards Maputsoe. He says that Mosoeu never agreed that the owner of the bus was to be fetched. Understandably so because the offences allegedly committed did not involve the owner of the bus but involved the plaintiff and his conductor.

He says that he accompanied Mosoeu to Maputsoe having armed themselves with SLR rifles. They drove in the van in question to Maputsoe where they reported themselves to the Maputsoe Charge Office and explained their mission. They were then complemented with other armed police officers. On arriving at the bus-stop they found plaintiff in the driver's seat in the bus. They then surrounded the bus and were all armed. He then saw plaintiff roll up the window and go over to close the passenger door. He says he heard when Mosoeu order one police man to run and fetch to a tear gas cannister from the Charge Office. The bus was all the time surrounded by about six armed policemen. He says that once the policeman arrived with the cannister, the bus driver suddenly drove off towards the police standing at the front of the bus, and they had to jump aside. He then heard a gun shot. He realised that the bus had been shot on the wheels and diesel was leaking. He says many gun shots then followed. The bus continued moving a distance of about two hundred meters until it stopped near Frasers. When they arrived they found the driver had already been taken to a hospital nearby where was later transferred to Mapoteng Maluti Adventist Hospital.

The defendants too closed their case.

In the case of **Tsose vs Minister of Justice and Others** 1951 (3) SA 10 at 17 **Schreiner J.A.** speaking on lawfulness or otherwise of arrest had this to say:-

“If the object of the arrest, though professedly to bring the arrested person before court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrester, without his appearing in court, the arrest is, no doubt unlawful. But if the object of the arrester is to bring the arrested person before the court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law, the arrest is not rendered illegal because the arrester’s motive is to frighten or harass the arrested person into desisting from illegal conduct. An arrest is not unlawful because the arrester intends and states that he intends to go on arresting the arrested till he stops contravening the law if the intention always is after arrest to bring the arrested person to prosecution For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal”.

This case unfortunately suffers an acute paucity of witnesses; there is only one witness for each side; and important witnesses have not been called especially police officer Mosoeu. It is however clear that on that day the plaintiff had allegedly committed certain unlawful acts or offences like assaulting the driver of the pirating van and forcibly dispossessing him of the fares collected that morning. Whether plaintiff reported the incidents first at the Mapoteng Police Station it seems to me is not very material because arrestable offences had been committed by plaintiff that morning at Makhoroana bus stop and I am convinced that when he drove his bus away and sped off to Maputsoe the plaintiff had not been permitted to leave by Mosoeu. This conduct caused Mosoeu to follow plaintiff in hot pursuit.

What is in issue in this case is whether the use of force was justified and if justified whether reasonable bounds were exceeded in the circumstances of the case.

Section 42 of the Criminal Procedure and Evidence Act 1981 reads:-

- “42. (1) When any peace officer or private person authorised or require 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 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 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.”

It is clear that under this section the user of the force bears onus to justify the use of such force on a balance of probabilities and in this case, the incidence of the onus rests squarely on the defendants. I will assume in defendant's favour that Mosoeu was indeed justified in arresting the plaintiff for certain offences already alluded to before in this judgment.

The sanctity of human life, bodily integrity and liberty is a cornerstone of the Bill of Rights in our Constitution, and in enforcing the laws of the land, the police must always exercise restraint in the use of lethal force in effecting arrest. Each case will of course depend on its own particular circumstances. Section 5 (2) of the Constitution reads:

- (2) without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as 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 an extent as is necessary in the circumstances of the case.
- (a)
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained. **(My underlining)**

It is quite clear that Section 5 (2) of the Constitution limits the powers of the police to use force to such as is reasonably necessary and the use of force is limited to offences mentioned in Part II of the First Schedule which lists certain serious offences. In my view whilst it is clear that the plaintiff was being pursued by Mosoeu for having allegedly committed robbery and assault at Makhoroanas the pertinent question rests on the issue whether the police used force which was proportional to the seriousness of the offences. The onus is upon the defendants, as the users of force, to show on a balance of probabilities justification and reasonableness of the force used. In their use of force whether to kill or incapacitate a fleeing suspect, the police have to exercise restraint and use lethal force as matter of last resort when all other means have failed; for example, when the police pursuing a fleeing suspect are armed with rifles, the police have to warn the suspect that the rifles may be used, and if used,

it is necessary perhaps to shoot into the air before actually shooting at the suspect. In this case single burst of firing at the wheels of the bus could have easily punctured them. It seems to me that the shooting was done more to incapacitate the driver than to puncture the wheels.

In the instant case the plaintiff apparently defied the order given by Mosoeu and drove the coaster away from the Mapoteng Police Station. This naturally should have infuriated Mosoeu who then followed in hot pursuit. Now, the question is, was the force used justified in the circumstances of the case? Could the coaster have been effectively immobilised without injuring the driver?

It has not become clear whether the defiant attitude and behaviour of the plaintiff followed his being informed that he was being arrested or whether Mosoeu just said "come out and I kill you." Section 5 (2) of the Constitution and Section 42 of the Criminal Procedure and Evidence Act 1981 reflect well known and powerful considerations of legal policy: the arrest of a person deprives him of his liberty and it is accordingly necessary that he be informed as soon as practicably possible of the reason for the drastic curtailment of one of his fundamental rights. Section 6 (2) of the Constitution in turn reads:-

“(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.”

According to the plaintiff, Mosoeu never attempted to effect a formal arrest upon him either at Mapoteng or at Maputsoe (cf **Minister van Veiligheid en Sekuriteit -**

1996 (1) SALR 720); **R vs September** - 1989 (4) SA 288. It is not necessary however to decide this point because it lacks sufficient evidence, Mosoeu having since died and because I have decided to assume in the defendant's favour that the arrest or attempted arrest was lawful.

In this case I propose therefore to proceed on the premise that Mosoeu and his policemen were entitled to arrest the plaintiff and to pursue him if he attempted to flee; the inquiry then should be whether in the light of the circumstances of this case, the force used was justified and excusable. As I have already pointed out, the onus to justify the use of force rests upon the defendants to discharge the same on a balance of probabilities. Here we have a case of a suspect who is found seated in the bus, probably unarmed, and whose bus is immediately surrounded by six police officers all armed with heavy rifles. In my view the bus could have been easily and quickly immobilised by shooting at its wheels without injuring the driver, the rifles being of a high calibre. In their random shooting, it seems to me more probable that the shooting was done to "incapacitate the driver" and in my opinion it was an excessive use of force. The police could have shot into the air or at the bus windows to cause plaintiff to surrender. I do not think that shooting the deceased was accidental either because the wheels of a coaster bus are large enough to have been targeted and shot at without injury to the plaintiff. I come to the conclusion that the defendants have failed to discharge the onus that primarily rested on them and find that the use of force in the circumstances of this case was excessive and hence was unlawful.

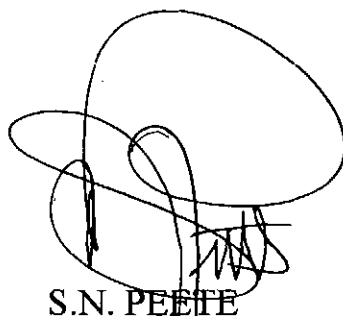
Coming to the issue of damages it should be pointed out that in the absence of actuarial assessment it is often difficult to measure damages for pain and suffering with mathematical precision. It is not the purpose of the law to punish the defendant but to seek to compensate the plaintiff (**Khosi vs Babeli** - 1991-96 (1) LLR 275.)

In his summons and declaration the plaintiff claims M30,000.00 being compensation for pain and suffering and for other expenses. In making an award for such non-patrimonial loss the principles of fairness and conservatism play a decisive role; other considerations are relevant e.g. agony and suffering of plaintiff, provocative role, if any, played by the plaintiff in precipitating the assault and in this case it is quite probable that plaintiff's conduct in driving the bus away at Mapoteng against police orders to stop was provocative and a **sine qua non** of the unfortunate sequel of events that led to his injuries. On the other hand, the police, in my view, failed to exercise restraint when this was necessary. At the end of the day the court should exercise its discretion to decide by the broadest general considerations on an amount which it considers to be fair in all circumstances of the case and as it was put by **Trollip J.A.** in **Bay Passenger Transport vs Franzen** 1975 (1) SA 269 at 274 "the court should act conservatively rather than liberally towards plaintiff lest some injustice be perpetrated on the defendant (**favorabiliores rei potius quam actores habentus**)."

In this case whilst the injuries of the plaintiff were quite serious in that they involved extreme pain, the plaintiff has fully recovered despite the scars still visible on his body, and the court was not advantaged with any evidence to support the amount as claimed (**Blyth vs Van den Heever**, 1980 (1) SA 191). Pain and suffering, it has been said, cannot be expressed directly in money since it lacks an inherent patrimonial

value - "The amount to be awarded can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the judge's view of what is fair in all circumstances of the case" - **Sandler vs Wholesale Coal Suppliers Ltd** 1941 AD 194 at 199; **Mutual and Federal Insurance Co Ltd vs Swanepoel** - 1988 (2) SA 1 at 11. It has not been shown that disfigurement has occurred or that this has affected the plaintiff's personal and professional life as a husband or as a driver.

Having considered the circumstances of this case and the role played by plaintiff and defendants, the circumstances under which the shooting occurred and the nature and extent of injuries suffered by plaintiff, I award an amount of M12,000.00 as compensation.

A handwritten signature in black ink, appearing to read 'S.N. PEELE', is written over a large, loopy scribble.

S.N. PEELE

JUDGE

For Plaintiff : Mr Hlaoli
For Defendants : Mr Molapo