

CIV/T/172/98

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**THAMAE THAMAE**

**PLAINTIFF**

and

**THE COMMANDER (LDF)  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**CORAM : HON. MR JUSTICE S.N. PEETE**

**DATE : 15<sup>TH</sup> NOVEMBER 2002**

**Headnote**

*Delict - Soldiers kicking at plaintiff who had apparently assaulted a suspected thief. Plaintiff's forearm fractured in the encounter. Plaintiff's allegation that a tyre lever used uncontroverted by the defendants' pleas which amounts to a bare denial. Impropriety of such pleading where defendants' witnesses during trial admit the kicking but seek to justify it on the grounds that plaintiff attempted to draw a gun. Onus on plaintiff discharged on a balance of probabilities.*

*Where general damages are seemingly inflated court has a discretion to proportion the same to relative blameworthiness of parties and degree of injuries suffered.*

In his civil summons the plaintiff claims certain damages from the defendants constituted as follows:-

- (a) Payment of the sum of M50,000.00 for insults.
- (b) Payments of the sum of M100,000.00 for assault, pain and suffering.
- (c) Payment of the sum of M200,000.00 for a broken arm.
- (d) Costs of suit.
- (e) Further or alternative relief.

In his declaration the plaintiff avers that on the 28<sup>th</sup> September 1997 and at or near Nazareth in the area of Thaba-Bosiu, certain six members of the Lesotho Defence Force acting within the scope of their duties hurled insults at plaintiff and brutally assaulted him with a tyre lever breaking his forearm in the process causing him to suffer great pain.

To this claim, the defendant's joint plea states-

2.

*"Contents herein are denied and plaintiff is put to proof thereof. In particular it is denied that plaintiff was ever insulted nor assaulted as alleged. The fact of the matter is that plaintiff was in the company of two or three others at the said place, assaulting someone whose name*

*and particulars are to the defendants unknown. The plaintiff and his party were, together with their victim taken to Ha Matela Police Post and handed to the police by the defendants. No assaults of any kind were ever meted out to plaintiff in the process. "*

In support of his claim, the plaintiff who happens to be a local village chief or headman called Likotsi Mokhethi whose evidence was to the effect that on the early morning of 28<sup>th</sup> September 1997 there was an attempt to steal his Toyota Hilux van at his home and upon waking up he and his brother saw a man walking or running away whom they recognized as Tsietsi Moahloli; they tried to catch up with him as he ran into Ha Ntsi village. He says that he immediately reported this interference to the plaintiff, his local chief; he says that plaintiff then advised him to bring along his van to assist them to quickly pursue the suspect through Ha Ntsi village.

He says that when he got to his van, he noticed some fresh blood stains on the driver's wheel and on door handle.

Driving his van, he says they caught up with the suspect Tsietsi Moahloli near Ha Raselepe. He says as they approached him, Tsietsi began throwing stones at them and they too threw stones in return. They ultimately caught and overpowered him after he, witness, hit him with a stick. He says they then noticed that Tsietsi had a bleeding wound on the head.

They then tied him hands and feet with a rope he had been carrying along in his van. When they interrogated him, Tsietsi explained that he had been assaulted by someone whose business premises he had earlier attempted to

burgle that night. He says they no longer assaulted him after he had been fastened thus with a rope.

As they stood near Tsietsi just outside the village, they then saw about seven soldiers alighting from a land-rover and advancing upon them hurriedly. One of them said, *“what are you doing to this man? Are you ritualizing him?”* The soldiers were wearing green overalls and one had a white shirt and short pants.

*“They started kicking us even before we replied”* and one of them shouted *“nyoa meng ting”*. He says the plaintiff then said *“oh, I am a chief”* to which one replied *“you are a chief of shit”* ..... and another said *“He even has a gun!”*

He says in fact plaintiff had a gun on his waist at the moment. He said they then assaulted plaintiff breaking his arm. He says he then took to his heels leaving plaintiff holding his injured arm and crying in pain.

Under cross examination he insisted that when they subdued Tsietsi, the later already had a head injury about which he made an explanation.

*Question: The defendants will say that they told you that it had been reported to them that you were assaulting Tsietsi?*

*Answer: I don't know what caused his death. I said I assaulted him with a stick when he threw stones at us.*

*Question: Can you say how the plaintiff's arm was broken and his eye injured?*

*Answer: I cannot say how.*

*Question: Can you deny that his arm was broken when a soldier tried to disarm him?*

*Answer: That did not happen.*

*Question: Did the soldiers have anything in their hands?*

*Answer: They had nothing. They only kicked us also insulting us. I only realized that plaintiff was injured.*

*Question: The defendants will say that they were invited by the villagers to rush to this place where you were assaulting this person and then plaintiff tried to reach for his gun and a tussle ensued.*

*Answer: No, I don't know who informed the soldiers. They found us doing nothing. Plaintiff never reached for his gun. As I tried to run away a short panted man pointed a gun at me and I immediately returned; and I was kicked repeatedly and I found myself already in the van and we were taken to Ha Matela police Station.*

Under re-examination he admitted that they were later charged with the offence of culpable homicide for Tsietsi's death.

Plaintiff then gave evidence on oath. He informed the court that he is aged about 47 years and is the headman of Ha Ntsi in the Thaba Bosiu area.

He says that he was at his restaurant on that day when P.W.1 arrived and gave him a report about an attempted theft of his van. He then asked him to go and fetch that van so that they could quickly pursue the suspect.

After the van arrived, he, P.W.1 and Motlatsi Tjokobane drove off to follow the suspect Tsietsi and they caught up with him at Mantša-tlala fields. He says Tsietsi then turned to throw stones at them but they managed to overpower him after P.W.1 had struck Tsietsi with a stick. They then grabbed and subdued him. They used a rope to fasten him and then started asking him why he was trying to steal P.W.1's vehicle. Tsietsi then explained that he was going to sell it at Peka.

He says it was at that time that he saw a military land-rover approaching and stop near some fields- it was off the road. The soldiers then alighted, crossed the donga and came running towards them.

Upon arrival one said *"Are you ritualizing this man? What are you doing?"* He says he replied – *"I am the chief"* – and they said *"you are a chief of shit.... Nyoa 'mao tooe – what are you doing to this man"?*

He said he took this to be a grievous insult "*It can make you faint in extreme anger.*" He was being insulted by young soldiers before his subjects. It was really humiliating, he says.

He says one of them then hit him with a tyre lever on his left arm and it fractured and he repeated to hit him on the left eye with it. He felt grievous pain – "*I saw stars ... and something like a flying cat*" and to top it, he got another blow to his back.

He says one of them then took away his gun from his waist. He could not resist because his arm was fractured and his right eye closed "*Both bones of my left arm were fractured and the hand was hanging down loosely.*"

He said it was a lie that his arm was broken as the soldiers tried to wrestle the firearm from him [anyway this was not pleaded by the defendants]. He says he was then ordered to board the van and along the way to his home before proceeding to Matela Police Station, they asked for his licence and he gave it to them when they reached his place – where another military vehicle with a mechanical problem had been parked.

They proceeded to Matela Police Station and from there they were transported to St Joseph's Hospital after being given medical forms; he says as he did not receive any treatment at Roma he proceeded to Thetsane Hospital where his arm was X-Rayed and then plastered.

He handed in the medical report as Ex "A".

He also handed in what are receipts (bills) dated 29/9/97 (M280.00) 19/11/97 (M89.00) 1/11/97 M50.00

He also handed in photographs of himself which depict him in an armsling on his left arm and with a bruised and swollen right eye.

He says that his arm was under plaster for three months. He says his left arm is now fully recovered. He says for the humiliating insults he claims M50,000.00. He claims R100.000.00 for pain and suffering as a result of the assaults on his body. He says:-

*"I have been assaulted by law enforcement officers for no good reason when they are trained to protect. My left arm is no longer fully operational as I cannot use it like before and lift heavy objects."*

Under cross examination he says that they began throwing stones at Tsietzi when he was trying to escape. He denied that he was in a rage when the soldiers arrived and he denies ever reaching for his gun.

*Question: One soldier rushed at you and there was a tussle for he gun?*

*Answer: It is a lie.*

*Question: One soldier kicked you hand?*

*Answer: I was never kicked by a soldier, I was hit with a tyre lever.*



*Question: You were seriously assaulting the man such that he died.*

*Answer: We were asking him questions; we had fastened him up already.*

*Question: P.W.1 assaulted Tsietsi with a stick?*

*Answer: Yes, he hit him with stick at the back; we were listening to his explanations when the soldiers arrived. We were not assaulting him then.*

*Question: P.W.1 says in his evidence that the soldiers had nothing in their hand when they arrived?*

*Answer: I was assaulted with a tyre lever. I saw I when he struck me with it.*

*Question: The only thing they did was kicking you?*

*Answer: Lie. They never kicked me.*

*Question: Only one strong kick was inflicted on you?*

*Answer: That will be false.*

*Question: Insults were never uttered at anytime at all?*

*Answer: It will be false evidence.*

He was then taken to task as to how he computed and justified the amounts he was claiming. He explained that the grievous insults he was publicly subjected to and the excruciating pain he suffered and also punitive damages, were the basis of his claim.

*Question: M50,000.00 and M200,000.00 you just suck them from your mouth and are unrelated to any alleged wrongs?*

*Answer: They are.*

*Question: You are not entitled to damages because you were found assaulting a man with stones.*

*Answer: I deserve these damages because we were no longer assaulting ... we did not belabour him with sticks and stones.*

*Court: Where was your gun positioned when soldiers arrived.*

*Answer: I had my .38 in my holster. I had a licence for it. I carry it at all times.*

Next called Dr Kelvin Hoedoatia who said he is a Ghanaian national and was a general practitioner who was working at Maseru Private Hospital as a resident doctor.

He was shown the medical report Ex “A” and he immediately recognised the handwriting at its back as his truly. He says that on the 29/9/97 he had examined the plaintiff and had observed the following particular injuries:-

- (a) a swelling (contusion) around the right eye.
- (b) The back was painful to touch.
- (c) The left arm had its “*ulna*” bone fractured and plaintiff was in pain. He decided to put on plaster-of-Paris after the X-Ray results.

He was of the opinion that a “*moderate to severe force*” could have been used to fracture the *ulna* like “*a karate*” kick whereas a mild force could have caused the eye injury.

He explained that medically the fractured *ulna* could heal after six weeks though 100% recovery is never achieved and there could still be some post-traumatic episodes of pain.

The plaintiff then closed his case.

For the defendants, Paul Mokhele Thamae was called and he informed the court that he was member of the LDF in 1997 and that he left the Force in October 2001.

He told the court that on the 28/9/97 he was patrolled with the following to attend to a breakdown at Ha Ntsi-

1. Private Leshoboro Letsie;
2. Private Setho Letsie;
3. Private Lerotholi;
4. Private Tokho.

They proceeded to Ha Ntsi in a military landrover and as they were about to reach Ha Ntsi village, a coaster-bus stopped them and its passengers reported to them that there were some people assaulting a man just outside the village in the fields thereby. They then hurried to the scene.

He says that at about 200 metres they saw four men and they were assaulting the fifth prostrate man. One was armed with a stick.

Upon arrival he asked them *“Hey, what is happening – are you ritualizing this man?”* He says other men then dispersed as if running away and that he then saw the chief pull up his shirt and

*“I then noticed a gun on his waist ...” I rushed at him and kicked him ... I kicked him on he abdominal region. He the parried with his hand. I kicked the hand. I cant remember which hand. As I tried to kick him again Lerotholi grappled the chief by the waist and “headed” him. Lerotholi then wrenched the gun and the chief was helpless.”*

After this the other men were rounded up and made to unfasten the prostrate man and all ordered to board the van. He says the plastic ropes had sunken into the wrists of the man who was then motionless and was bleeding from the head.

He says:-

*“... in the van there was a tyre lever which had some blood strains.”*

He says that as he kicked the plaintiff none of them soldiers was carrying any tyre lever (even though they were going to repair their vehicle). At the Matela Police Station he says Private Leshoboro handed in the gun and the tyre lever.

He also says from under the front seat of the van, they also found a 9mm which they also handed in to the police.

Under cross examination he asserted that he was attempting to disarm the plaintiff ...

*“we were not acting in self-defence ... we only wanted to remove the gun ... I cant deny that he could have been injured as I kicked him.”*

It was put to him that in his plea it is stated:-

*“No assaults of any kind were ever meted out to plaintiff”*

*Answer: I say I kicked him. He was also head-butted. I admit I assaulted him because I kicked him. I agree that my evidence is at variance from the plea ... I kicked him. Our plea does not state that injuries were inflicted as we were disarming him.*

*Question: Your story is a recently fabricated one. ... That is why it differs from the plea.*

*Answer: I say what happened. I am not desperately fabricating.”*

**[The court then asked him to demonstrate in court how he kicked at the Plaintiff that day. He did this by a quick moving kick to the waist/abdomen area and explained that he also had military boots on]**

*“As I kicked him again, Lerotholi arrived from the side and grappled him, and succeeded to wrench the gun away from the plaintiff.”*

*Question: Plaintiff never reached for his gun. It is false.*

*Answer: It is not false.*

*Question: Plaintiff and his party knew you were soldiers – five of you.*

*Answer: I don't know if they saw we were five.*

*Question: Only a foolhardy person could draw a gun on soldiers?*

*Answer: There he did it.*

*Question: Your evidence is a tall story. You say plaintiff's gun was handed in at Ha Matela.*

*Answer: It was.*

He denied ever going to plaintiff's house before proceeding to Ha Matela Police Station.

*Question: Did you see that his hand was injured and his eye swollen?*

*Answer: No I did not see.*

*Question: You assaulted him with a tyre lever and broke his arm?*

*Answer: I saw no one assault him with a tyre lever.*

*Question: He was never kicked. He was struck with a tyre and he was grievously insulted before his subjects?*

*Answer: We never insulted him. We only asked why he was ritualizing the man, we disarmed him. We took it because he tried to use it unlawfully thus committing an offence.*

*Question: That is a figment of your imagination?*

*Answer: He tried to use the gun as we approached to intervene.*

*Question: Do you see this 38 revolver?*

*Answer: Yes.*

*Question: It was in its holster?*

*Answer: He made as if to grab it.*

*Question: When you got there you started kicking at random and used a tyre lever.*

*Answer: I said I saw one of the plaintiff's mates assaulting Tsietsi with a tyre lever. I kicked him with my boot. I am telling he truth.*

Next called was Vincent Motseare White Lerotholi who told the court that he was a member of the LDF since 1996. One Sunday the 28/9/97 at about 9 am they en route to Ha Ntsi to repair a vehicle that had broken down.

Along the way they were stopped by a coaster whose passengers begged them to go to the assistance of a man being assaulted in the fields.

He says they proceeded immediately to the scene and when they approached, they stopped their vehicle and rushed to the scene where some men stood; as they approached other men scattered and one remained near a man tied with ropes.

On arrival he inquired "*Are you ritualizing this man?*" This man then reached for his gun at the waist. He says one of their group then kicked him and he dived at him grappling him. He succeeded to wrench his gun away. It was a .38 revolver.



Having rounded others up, they ordered them into the van. These people explained that the fastened man was a thief and was fleeing.

He denied ever insulting these men nor a tyre lever being used.

*“We kicked him as we struggled for the gun ... the kicking was justified because he was trying to draw. Makhale kicked him on the arm.”*

Under cross examination he admitted that he had all the time through the proceedings been sitting next to **Mr Mapetla** – defendants’ counsel. He admitted that the defendants’ plea differed greatly with their version in court when giving evidence. He denied head-butting the plaintiff but that their *“heads could have collided accidentally.”*

*Question: D.W.1 said you head-butted plaintiff?*

*Answer: He could have thought so- but I know how I collided with him when I dived and grappled his waist he had no chance of grabbing him because I grappled him firmly. I then pulled out his gun.*

*Question: There was no struggle – plaintiff was brutally assaulted with a tyre lever – broke his arm and eye bruised?*

*Answer: We don't know whether he had been injured before we arrived ... when we saw them one of them ... we wanted to intervene only we were not angry – we were provoked by seeing the gun.*

The defendants then closed their case.

### **Facts Proven**

1. On the morning of the 28/9/97 P.W.1 discovered that his Toyota Hilux had been interfered with.
2. P.W.1 then saw Tsietsi escaping from the scene and then having secured the assistance of his chief the plaintiff they followed Tsietsi driving the Toyota.
3. As they caught up with him, Tsietsi began pelting them with stones,
4. They also threw stoned at him and P.W.1 hit Tsietsi with a stick thus incapacitating him and then they fastened him with plastic ropes and began interrogating him.
5. In the meanwhile, the villagers had reported the incident to soldiers who were passing in a landrover.
6. The soldiers then rushed to the scene to intervene.

7. Upon arrival, plaintiff and his mates were asked whether they were ritualizing the man.
8. Plaintiff then replied he was a chief.
9. Struggle ensued when the soldiers noticed that plaintiff had a gun on his waist.
10. The plaintiff incurred a broken ulna and blackened eye in the encounter.

Question is: Was the *ulna* fracture caused with a tyre lever or by a kick?

The plaintiff in this case has the *onus* to prove that the assault upon him was unlawful and unjustified. It is important to note from the outset that in their plea the defendants deny the assault but in their evidence they admit having kicked the plaintiff. **Isaacs in Beck's Theory and Principles of Pleading in Civil Actions 1982** states that the litigant is bound by his pleading –

*“Once pleadings are filed, the parties are bound by them. If pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case may be) would fail unless amendments are granted – p.35.*

**Van Winsen & Herbstein** – Civil Practice of the Supreme Court of South Africa (1997) states at 464-

*“A defendant who has knowledge of the facts alleged by the plaintiff and is not prepared to admit them must deny them. In doing so, he puts those facts in issue. If he fails to deny them, they are, as pointed above, deemed to be admitted. ... a defendant must deal specifically with each allegation contained in the plaintiff's declaration.”*

In the case of **Hlongwane v Methodist Church of SA** - 1933 WLD 165 **De Wet J.** at 169-70 said:

*“... the denial of any particular paragraph in the declaration must not involve any ambiguity. ... the defendant must deal specifically with each such allegation.”*

See also **Nyandeni v Natal Motor Industries Ltd** – 1974 (2) SA 274 where **Fannin J.** stated as follows:-

*“The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.”*

This is what happened in this case; a bare denial that assault ever took place as alleged and now at the trial the defendants' witnesses admit kicking the plaintiff on the arm but seek to avoid liability upon the ground that the kicking was justified in order to disarm the plaintiff.

In this case the defendants did not even request further particulars to enable them to plead. In my view, it is good practice that if any explanation or qualification of any denial is indeed necessary, such must be stated in the plea. Rule 22 (4) of the High Court Rules reads as follows:-

*“Every allegation in the declaration, which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.”* (my underline)

A party is not entitled to misdirect the attention of the other party by failing to disclose the true reason for a denial – **Nieuwoudt v Joubert** - 1988 (3) SA 84. It seems the proper pleading should not have been bare denial but confession and avoidance specially pleaded.

In this case, the fracture and eye injury were not self inflicted but occurred in that encounter outside the village of Ha Ntsi.

Indeed a contrast between the material aspect of the plea and defendant's evidence in court affects the latter's credibility. To the special allegation that six members of the LDF *“brutally assaulted plaintiff more especially with a tyre lever”* the plea sanctimoniously denies as follows:

*“In particular it is denied that plaintiff was ever insulted nor assaulted as alleged. The fact of the matter is that plaintiff was found in the company of two or three others at the said place assaulting someone whose name and particulars are to defendants' unknown.”*

This amounts to a bare denial, it is equivocal, elusive as well as inelegant. It fails to address the issue; and if it was in accordance with their true instructions as deposed to in evidence later in court, the plea could have alleged that the plaintiff was kicked when he was about to produce a gun holstered on his waist; the latter version otherwise then smacks of as an after thought or at most a fabrication.

In my view the soldiers intervened commendably out of sense of duty as law enforcement officials and not so much as “*good Samaritans*” but they over-reacted in bringing the situation under control.

In his evidence in chief D.W.1 stated:-

*“Other dispersed as if running away. The chief pulled up his shirt and I saw a gun on his waist. I rushed at him and kicked him.”* He does not say an attempt to draw a gun was made. Any way this was not pleaded.

This confirms the fact that when the kicking began, there had been no attempt, actual or apparent, to draw the gun upon the advancing soldiers and I tend to agree with **Mr Mohau** that the force used was not commensurate to any danger apparent or real. They over-reacted and in kicking at his lower arm it got fractured. I do not believe, though, that a tyre lever was used as deposed to by the plaintiff because (a) this tyre lever was not seen by P.W.1 and (b) if it was in fact used both *ulna* bones could have been fractured. I believe that the kicking did the job (c) the eye injury is more consistent with a head-butting than a strike with a tyre-lever which in my view could have cut the skin resulting in bleeding.

I therefore hold that the plaintiff has discharged the *onus* on a balance of probabilities that he was assaulted unlawfully and suffered a broken *ulna* and a bruised eye.

### **Insults**

As regards the insults and whether they were uttered on the occasion, this is a matter that should be considered upon the real probabilities of the case. It is indeed quite probable that when they arrived at the scene where plaintiff and his mates stood next to hapless Tsietsi, the soldiers were excited, incensed and probably annoyed by the sight they saw, i.e. a injured man tied hand and foot; they were provoked further when they saw the gun holstered on the waist of the plaintiff. In my view, the kicking and words uttered were contemporaneously and spontaneously done and “*are inextricably bound up by factors of time, place and circumstance ...*” **Hoffman & Zefertt** – *The South African Law of Evidence*. 4d Ed 156-15 on *Res Gestae*. As **Wigmore** puts it-

*“in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one’s actual impression and beliefs”* – **Evidence**, para 1747-49.

The probative force that these insults were uttered depends upon the credibility of the plaintiff and P.W.1 and the contemporaneity and spontaneity as relevant factors. I hold that the soldiers uttered the insolent words.

## Quantum of Damages

As regard the various amounts claimed, the damages for bodily injury and pain and suffering are usually classified as general damages (non-patrimonial). Our law awards damages for any unlawful violation of bodily integrity, dignity and reputation. Rule 21 of our High Court Rules states:-

*“(6)(a) A plaintiff who sues for damages must set out particulars of his claim in such a manner as will enable the defendant 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 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. ....*



- (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.* ” (my underline)

The main purpose of this rule is not cosmetic but is threefold –

- (a) the plaintiff as the injured party is the right person to suggest the amount of damages for the injury he has suffered.
- (b) the defendant can, if he so desires, make a reasonable tender in settlement.
- (c) the court has material upon which to base its award.

But unfortunately most of the declarations in cases such as this are often very brief and superficial yet claim huge sums as damages. It makes the job of the court rather difficult. See **Cete vs Standard and General Ins.** 1973 (4) SA 349 at 353-35 where **Synman J** says,

*“Damages can, of course only be accurately and finally assessed by the trial court on the evidence placed before it at the trial.”.*

The plaintiff bears the onus to prove on a balance of probabilities that he suffered damage as he claims, the extent of such damage and what amount of compensation he should be awarded in respect thereof- **Ngubane vs SA Transport Services** – 1991 (1) SA 756; and the court in exercising its discretion must take into consideration the particular circumstances of each

case. In the action for pain and suffering, the extent of the loss cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. The plaintiff bears the *onus* of adducing sufficient factual information which will reasonably enable the court to make an appropriate and fair estimate of the loss - **Visser & Potgieter** – *Law of Damages* (1993) page 439.

Where the assessment of the amount of damages is a matter of estimation rather than calculation, the trial court has a wide discretion regarding what is in the particular circumstances fair and adequate compensation. **Commercial Union Association of SA v Stanley** 1973 (1) SA 699 at 703. See generally **Erasmus and Gauntlett** – *Law of SA* 58-9.

It is not however always possible to express “*pain and suffering*” directly in money terms, since it lacks an inherent patrimonial value – In **Sandler V Coal Suppliers Ltd** – 1941 AD 194 at 199 **Watermeyer JA** said-

*“The question now arises whether this Court should increase the amount awarded to the appellant for pain and suffering and permanent disability. In considering the question it must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded*

*as compensation 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 the circumstances of the case."*

Indeed where the plaintiff claims substantial damages, the defendant may indeed be entitled to resort to the provisions of High Court Rule 35 requiring plaintiff to further submit to medical examination. It reads:-

*"(1) Subject to the provisions of this rule any party to proceedings in which damages or compensation in respect of alleged bodily injury shall have the right to require any party claiming such damages or compensation where state of health is relevant for the determination thereof to submit to medical examination."*

In this case the plaintiff is claiming M200,000.00 for his broken arm and M100,000.00 for assault and resultant pain and suffering. It is by all account a huge claim and it is the duty of this court to preserve a balance between the two parties. It has to take into consideration the nature of the injuries, degree or seriousness of disability, the nature and extent of the pain and suffering.

In dealing with the issue of general damages for pain and suffering and disability **Kumleben JA** (as he then was) in **Ngubane vs South African Transport Services – 1991 (1) SA 756 at 786** cautioned that the court should be mindful of the danger of duplication when making an assessment of compensation for general damages for the assault itself and for pain and suffering – the two being medically causally linked – what the court should

decide is what is fair and appropriate in all circumstances of the case (**Sandler v Wholesale Coal Suppliers** – 1941 AD 194 at 199).

Upon his word, the plaintiff has admitted that he has fully recovered though not 100% as the Dr Hoedoatia put it. The court must take this into consideration in awarding a compensation.

In the assessment of fair compensation for pain and suffering the *subjective experience* of the plaintiff (which may be established through evidence by the plaintiff and medical doctor) is of paramount importance “*A plaintiff’s subjective experience is determined by the nature, duration and intensity of the pain and suffering*” – **Visser and Potgieter – Law of Damages** – p.399; that subjective experience must be of “an average person” – **Marshall v Southern Association Ltd.** – 1950 (1) PH J6(D) at 14; **Blyth v Van den Heever** – 1980 (1) SA 191 (A) at 227; **Capital Ass. Ltd v Richter** 1963 (4) SA 901 at 905. In the case of **Blyth v van den Heever** (*supra*) the plaintiff had sustained fractures of his right radius and ulna and a medical practitioner had negligently diagnosed the injury and the plaintiff after treatment had suffered much pain and suffering. **Corbett JA** decided it convenient to make one composite award.

Upon an average person, a fracture of an ulna can only be caused by a severe force – I do not think for once that this is the so called “*thin-skull case*”. The resulting pain must have been severe and enduring. The plaster was only removed after three months. There is no doubt that the plaintiff is entitled to an appropriate award of damages.

The plaintiff has also claimed damages for *contumelia* alleging that he felt insulted by insults I need not here recount. Such insults, objectively speaking, injure an average Mosotho's feelings of dignity and self respect. I should here note the learned words of **Van der Spur AJ in Ramakulusha v Commander, Venda National Force** 1989 (2) SA 813 where says:

*"It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual."*

This is even more imperative because we live in a Lesotho where human rights and freedoms are guaranteed under the Constitution. (See **Khosi v Second Lieutenant Babeli & Three others** –1991-96 LLR 275)

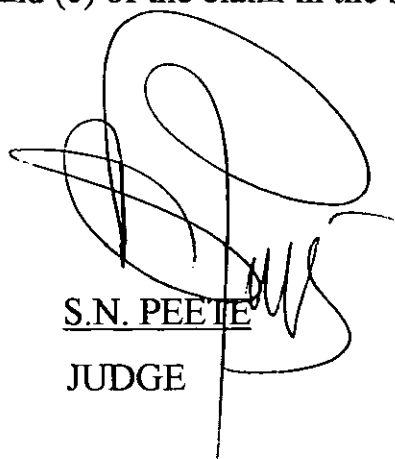
The particular facts of this case indicate that the plaintiff was a peace officer – a village headman who was on that day apparently attempting to apprehend a suspected thief – who was probably assaulted in the process; the defendants' soldiers were law enforcement officers who dutifully sought to intervene in the saga. They however over-reacted and used force more than was necessary to bring the situation under control; the plaintiff suffered a fractured ulna and a contused right eye. The court is informed that the plaintiff and his people are facing a charge of culpable homicide because Tsietsi later died.

Peace officers and other law enforcement officials like police and soldiers must always exercise restraint in the enforcing the law – because even the suspects have the right not to be assaulted for no good reason. They have to

be apprehended – using reasonable means – and be brought before the court for their misdeeds.

Having considered all the circumstances of this case, the order of the court is as follows:-

1. Judgment in favour of the plaintiff in the sum of M7,500.00 for the insults.
2. Judgment in the favour of the plaintiff in the sum of M15,000.00 as a composite award under (b) and (c) of the claim in the summons.
3. Costs of suit.



S.N. PEETE  
JUDGE

For Plaintiff : **Mr Mohau**  
For Respondents : **Mr Putsoane**