IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) No. 70/2011

In the matter between:

OFFICER COMMANDING ROMA POLICE	**1ST APPELLANT**
TRP TSOLO	**2ND APPELLANT**
THE COMMISSIONER OF POLICE	**3RD APPELLANT**
ATTORNEY GENERAL	**4TH APPELLANT**

AND

JOSIASE ROBOTSE KHOETE	**1ST RESPONDENT**
'MATSABO KHOETE	**2ND RESPONDENT**

CORAM: RAMODIBEDI, P
SCOTT, JA
FARLAM, JA

Heard: 19 APRIL 2012
Delivered: 27 APRIL 2012

Summary

Self defence – means used unreasonable and excessive – damages for pain and suffering – the need to provide a reasoned basis for amount awarded – claim for "emotional shock" - what has to be established for such a claim – claim for "loss of comfort" not recoverable in Aquilian action.

JUDGMENT

SCOTT, JA

[1] The appellants were the defendants in two consolidated actions in the High Court. Both arose out of a shooting incident which occurred on 27 August 2008 at Roma. The plaintiff in the one was Mr Josiase Khoete who sued for damages in consequence of a firearm wound he sustained in the leg. The plaintiff in the second action was his sister-in-law, Mrs 'Matsabo Khoete, who sued for damages as a result of the death of her husband, Mr Lethena Khoete, who was the brother of Josiase. It is common cause that both were shot by Detective trooper Tsolo, the second appellant, who at all material times was acting in the course and scope of his employment with the third appellant, the Commissioner of Police. Tsolo sought to justify the shooting on the ground that he was acting

in self defence. It is clear that the onus was on the appellants, the defendants in the court below, to prove that the shooting was justified and that the force used was reasonable and commensurate with the alleged aggression of the two who were shot. See **Mabaso v Felix 1981 (3) SA 865 (A)**. The consolidated trial was heard by Majara J who found that the onus had not been discharged and awarded damages to both plaintiffs. The appeal is against both the finding that the shooting was not justified and against the damages awarded.

[2] Three witnesses testified on behalf of the respondents. They were the first respondent, Mr Josiase Khoete (PW1), Mr Antone Maime who was a neighbour (PW2) and the second respondent, Mrs 'Matsabo Khoete (PW3). Their account of what occurred, in broad terms, was the following. While the three men, Josiase, Antone and Lethena (to whom I shall refer as the deceased) were in the forecourt of Josiase's house working on or examining a motor car, they heard the sound of gun fire. Josiase insisted they were merely examining the vehicle; Antone said they were working on it. The

significance of this difference will become apparent later. They looked in the direction of the shooting and saw Tsolo advancing on Thabiso Khoete (a young relative of Josiase) whom they described as "*retreating*" in such a manner as to be facing the advancing Tsolo. According to Josiase, Tsolo was firing shots into the ground in front of the retreating Thabiso. Antone, on the other hand, said Tsolo was firing in the air. They both testified that Josiase went out into the road and called to Thabiso to stop, to avoid being hurt. They said that when Josiase was a few paces behind Tsolo, the latter for no apparent reason, turned around and shot Josiase in the leg. The deceased then approached Tsolo and wanted to know why Tsolo has shot Josiase. Tsolo's response was simply to shoot him too. Tsolo and the policeman with him, Trooper Motseki, thereupon continued their pursuit of Thabiso. They did not return to the scene but the policeman, Trooper Nyooko, who was the driver of the vehicle in which the three policemen had come and who had remained in the vehicle, drove the two injured men to hospital. On arrival the deceased was found to be dead.

[3] Mrs 'Matsabo Khoete testified that she was on her way home when, on hearing gunfire, she saw Tsolo advancing on Thabiso who was *"retreating"* in the same manner as described by Antone and Josiase. Tsolo, she said, was firing into the ground. She said that as she entered her yard, they passed by. She then observed Josiase emerge from his yard and call to Thabiso to stop, whereupon Tsolo turned around and shot him. Her husband, the deceased, then also arrived on the scene and wanted an explanation for the shooting of Josiase. Tsolo's response, she said, was to shoot him as well. All three witnesses denied that either Josiase or the deceased was armed with any sort of weapon.

[4] Tsolo was the only witness to testify on behalf of the appellants. The other policeman, Motseki, was not called. Tsolo said that on the morning in question he went with Troopers Motseki and Nyooko to the house where Thabiso (whom he described as a "boy") lived with his parents. Nyooko drove the police vehicle. The purpose of going there was to arrest Thabiso on a charge of theft. He and Motseki alighted from the vehicle and approached Thabiso. He said that he

then observed that Motseki had not brought handcuffs and he accordingly sent him back to the vehicle to fetch them. When he reached Thabiso, the latter had a trowel in his hands. He informed Thabiso that he was arresting him whereupon Thabiso raised his trowel in a threatening manner. Tsolo drew his firearm and ordered Thabiso to put the trowel into a wheelbarrow that was next to him and move away from it. Thabiso did as he was told. Tsolo said that he then grabbed Thabiso with his left hand. The firearm was in his right hand. He looked back to see Motseki approaching with the handcuffs. As he did so Thabiso broke free and fled. He said that he ran after Thabiso firing two shots in the air to *"warn"* him. As he approached Josiase's house, Josiase came out into the road and blocked his path, saying *"you cannot do this to that person"*, meaning Thabiso. Tsolo said he told Josiase to get out of his way and pushed him aside, using his left hand. Josiase responded by hitting him on his left hand with a metal rod which was used for jacking up vehicles. At the same time somebody grabbed his jersey from behind and pulled him backwards. Josiase then struck him a blow on the right hand. Tsolo said he fired two warning shots in the

air but when the person behind him pulled his jersey even harder he feared that he would be assaulted or even killed. It was then that he shot Josiase in the leg and turned around and shot the person behind him who turned out to be the deceased. He and Motseki then continued their pursuit of Thabiso whom they were unable to arrest. He testified that on the same day he consulted a doctor with regard to the injury he had sustained to his left hand and, in support of his assertion, handed in a medical form issued by the Mounted Police Service and completed by a doctor. According to the report the doctor characterised the injury as *"severe"*. The report bore the stamp of the police dated 27 August 2008.

[5] Majara J found the version of the respondents to be the more probable of the two conflicting versions. She found it highly improbable that Josiase would have attacked an armed police officer and drew an adverse inference against the appellants for their failure to call trooper Motseki as a witness. She observed that the respondents and Maine corroborated each other on material points and that she could find no good reason for disbelieving them.

As far as the medical report produced by Tsolo was concerned, she considered it not to be conclusive because it was not the original (it was a photo copy) and *"because more than one inference [could] be drawn as to how he could have sustained the injury."*

[6] Counsel for the appellants submitted that, on the contrary, the probabilities favoured Tsolo's version rather than that of the respondents. I agree. It would, no doubt, have been unwise for Josiase to have attempted to impede the armed Tsolo in his quest to arrest the fleeing Thabiso, but it is not improbable that he should have attempted to do so. What is most improbable is that Tsolo would have shot Josiase for no better reason than that the latter was attempting to assist Tsolo by calling on Thabiso to stop. Similarly, one may ask why Tsolo would have shot the deceased for simply inquiring why he had shot Josiase. The respondents' version makes no sense. There are also other unsatisfactorily features. All the three witnesses for the respondents described how Thabiso had *"retreated"* so as to have faced the advancing Tsolo. Josiase insisted that Thabiso did not run. But if that were the case, Tsolo

would have had no difficulty in catching up to and apprehending Thabiso. Josiase made a point of saying that they were merely examining the motor car. Antone said they were actually working on it. The latter version would render more likely the version of Tsolo that Josiase was armed with a metal rod of the kind used to jack up a motor vehicle. Again, the learned judge dismissed the medical report produced by Tsolo confirming the injury to his hand he had sustained simply on the basis that the photostatic copy was not the original and that he could have sustained the injury in some other way. Yet, the medical report bore the date stamp of 27 August 2008. That he sustained such an injury on the same day in some other way would have been a most fortuitous coincidence.

[7] But that is not the end of the matter. Even on Tsolo's own version the shooting of Josiase and the deceased was in my view clearly an overreaction to the situation in which he found himself. It would have been obvious to him that Josiase and the deceased were intent on doing no more than obstructing him in his pursuit of Thabiso. Josiase, he said, struck him a blow on the hand only after

he had pushed Josiase aside. The deceased did no more than pull his jersey from behind to impede his progress. This was hardly life-threatening. All that was required were a few words to explain why he wanted to arrest the youth. If Josiase and the deceased had then persisted in their efforts to prevent him from pursuing Thabiso he would have been free to return with reinforcements and arrest them for obstructing a policeman in the course of his duties. All the persons involved were known to him and he knew where they lived. The shooting of the two was in my view unreasonable in the circumstances and ought to have been avoided. It follows that Tsolo was negligent in taking the action he did and the appellants are accordingly liable for such damages as the respondents were able to prove.

[8] Josiase Khoete claimed damages in a total amount of M310.000 made up as follows:

> "(a) M209 000 for pain and suffering
> (b) M1000 for medical expenses
> (c) M1000 000 for loss of future earnings."

No evidence was adduced in support of the claims in (b) and (c) and they were rightly dismissed by the Court a quo. As far as the claim for pain and suffering is concerned, the only evidence led was that Josiase spent about two to three weeks in hospital and that he still experiences some pain at times. He described the initial pain when shot as *"not that serious"*. There was no medical evidence; there was no evidence as to the nature and extent of the wound; there was no evidence of the nature of the treatment he underwent, save that he was hospitalised, and there was no evidence of the severity of the pain he suffered save as described above.

[9] The learned judge referred to the difficulty associated with assessing an amount to be awarded for pain and suffering; the need to be fair to both parties; the need that like injuries receive like compensation, and concluded:

> "Bearing all these in mind I am of the view that the amount of M50 000 would be a fair one to both the plaintiff and the defendants all things considered."

But the judge gave no indication as to how she arrived at the sum of M50 000. It is appropriate to repeat what was said by this Court in **Commander, Lesotho Defence Force and Others v Tlhoriso Letsie C of Defence A (CIV) 28/09**, delivered on 22 October and as yet unreported, at para 15

> "[15] It is well established that each case must be decided on its own unique circumstances and that the trial judge has a wide discretion to award what he or she in those circumstances considers to be a fair and adequate compensation. Nonetheless, while it is no doubt true that no two cases are precisely the same, guidance must be sought from past awards and in the absence of awards in cases considered to be comparable regard should at least be had to what Potgieter JA described in **Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A)** at 536 B as 'the general pattern of previous awards'. It is also important for the trial court to provide some reasoned basis for the amount awarded in respect of general damages, however difficult that may be (see **Road Accident Fund v Morunga 2003 (5) SA 164 (SCA)** at 172 D para 33.)"

[10] In view of the paucity of information in the evidence regarding Josiase's injury and its treatment, the quest for comparable awards has been no easy task. However I have been able to derive some assistance from the award made in **Field v Road Accident Fund** reported in Corbett and Honey: The Quantum of Damages in Bodily and Fatal Injury cases Vol 5 E4 – 1. In this case an adult male who was knocked down by a motor vehicle sustained a compound fracture of the left tibia and fibula and underwent an immediate operation for the insertion of a pin. He was discharged from hospital after one week but readmitted about a month later for a bone grafting procedure. He was discharged 10 days later on crutches and with a plaster of Paris exoskeleton which had to be worn for about 6 months. He sustained some wasting of the quadriceps muscle, a swelling of the left foot and he continued to suffer pain during cold weather. He was away from work for about

11 months. It was anticipated that ultimately his recovery would be virtually complete and he would be left with no permanent disability. The case was decided by an arbitrator who, after referring to a number of previous awards, determined the plaintiff's general damages in the sum of M22 000. The award was however made on 8 September 1999. Based on the inflation tables reproduced in Corbett and Honey's work, the award in today's terms would be a little more than double that amount, ie about R45 000.

[11] It will be immediately apparent that the injury and its sequelae in the **Field** case were to a considerable degree more severe than those suffered by Josiase. This is particularly so having regard to the paucity of information presented to the Court in the instant case. Had the matter been heard in South Africa it seems to me that an appropriate award would have been a figure somewhat less than half the amount awarded in the **Field** case, after making due allowance for inflation. But some allowance must also be made for the differing economic conditions in the two countries. In the result, the amount for pain and suffering that I would have awarded is M15 000.00. The disparity between this amount and the amount determined by the Court a quo is such as to entitle this Court to interfere with the award and the appeal against the damages awarded must accordingly be upheld.

[12] I turn now to the damages awarded to 'Matsabo Khoete. She claimed M1, 000.000 for *"emotional shock"* and M1,000.000 for *"loss of comfort"*. She was awarded M60 000 for the former and M80 000 for the latter.

[13] The claim for *"emotional shock"* (more commonly referred to as *"nervous shock"*) unaccompanied by physical injury to the claimant has been the subject of three leading judgments in the Court of Appeal in South Africa. They are: **Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A)**; **Barnard v Santam Bpk 1999 (1) SA 202 (A)**, and **Road Accident Fund v Sauls 2002 (2) SA 55 (SCA)**. These cases establish that for such a claim to succeed two requirements must be satisfied. First, the claimant must be shown to have suffered some identifiable psychiatric injury or illness and second, the harm must have been reasonably foreseeable having regard in particular to the relationship between the claimant who sustained the psychiatric injury and the person whose injury or death gave rise to the claimant's injury. In **Barnard**, the court at 208 J to 209 A emphasised that the term *"nervous shock"* (or "*emotional shock")* was a misleading term that lacked psychiatric content and that the real question was whether the claimant had been shown to have sustained an identifiable psychiatric injury. It was this requirement that answered the so-called *"flood gate argument"* raised by those who contended that such a claim should not be actionable. The

court at 216 E to F noted that as a rule psychiatric evidence would be required to establish that the claimant had indeed sustained an identifiable psychiatric injury.

[14] In the present case the only evidence to support the claim for *"emotional shock"* was that of 'Matsabo Khoete herself to the effect that at some stage shortly after witnessing the shooting she appears to have fainted. However, she recovered in time to be able to accompany her husband to hospital. There was no psychiatric evidence and her evidence was clearly insufficient to establish her claim. The appeal against the award for emotional shock must accordingly be upheld.

[15] In support of her claim for *"loss of comfort"* 'Matsabo Khoete testified that the loss of her husband had deprived her of the love and care he provided and, as she put in it, *"a shoulder to cry on".* There was no claim for patrimonial loss. The court a quo relied on two cases in support of its award of M80 000. They were **Viviers v Killian 1927 AD 449** and a decision of the Supreme Court of California, **Rodriguez v Bethlehem Steel Corp.**, **12 Cal 3d 382 (1974)**.

[16] In **Viviers v Killian** the defendant had committed adultery with the plaintiff's wife. The plaintiff's subsequent claim for damages for *contumelia* was upheld. The decision is clearly distinguishable. The plaintiff's action was the *action injuriarum*. The liability of the

appellant in the present case is for negligence under the Aquilian action. A claim for loss of comfort, as opposed to a claim for patrimonial loss of support, is not actionable under the Aquilian action. This was made clear in **Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657** at 662 where Lord de Villiers CJ explained the distinction as follows:-

> "As to the loss of 'the comfort and society' of the plaintiff's wife, I know of no rule or principle of our law under which such a loss constitutes a ground for awarding damages in an action based upon the defendant's negligence. Reference was made in the Court below to the Cape case of Biccard v Biccard and Fryer (9 C.S.C. p473) [a case relied upon in Viviers v Killian supra] where it was said that the complete loss of the wife's society constitutes the main element in the estimation of damages, but that was a case in which damages were claimed from an adulterer for the injury done to, and dishonor brought upon, the husband by the adultery with his wife. As was said by Professor *Melius de Villiers* in his notes to *Voet* 47, 10, 18, in the action for injury retribution is sought by way of a pecuniary penalty for the benefit of the sufferer, in order to satisfy his injured feelings. It is wholly different in an action founded on negligence."

The distinction was again reiterated in **Nochomowitz v Santam Insurance Co. Ltd 1972 (1) SA 718 (TPD)** where in an action for damages for loss of support arising from the death of the plaintiff's husband, Botha AJ (as he then was) said the following at 721 B:

> "My conclusion on this part of the case, therefore, is that in our law a widow has no right to claim compensation for loss of social advantages flowing from the death of her husband where such loss is not of a patrimonial nature. Accordingly the plaintiff's claim for damages under this head must be dismissed."

[17] In the Californian case of **Rodriguez v Bethlehem Steel Corp**, supra, which was the other case relied upon by the Court a quo, the court awarded damages for loss of consortium, ie, for *"loss of conjugal fellowship and sexual relations",* to a plaintiff whose husband, as a result of the negligence of the defendant's servants, had suffered grievous bodily injuries resulting in his becoming a lifelong invalid and bedridden for a great deal of time. The judgment was innovative in California to the extent that previously an award for loss of consortium had been granted only in the case of the death of a husband.

[18] It is clear from the majority opinion of Mosk J that the award of damages for loss of consortium was founded on a medley of conflicting precedents. In some States in the USA the liability for such a loss is not recognised. In others the liability is governed by legislation. Indeed, in **Rodriguez**, McComb J expressed the view in a dissenting opinion that any change in the law denying the wife recovery for the loss of consortium should be left to legislative action.

[19] It is also apparent that the law of delict in Lesotho is founded on principles totally at variance with the law of tortious liability in the USA (and England). The Aquilian action for negligence lies for patrimonial loss. The exceptions are claims for pain and suffering, disfigurement and loss of amenities of life associated with actual bodily injury, being claims recognised under the influence of

Germanic Customary Law: see **Hoffa NO. v SA Mutual Fire & General Insurance Co Ltd 1965 (2) SA 944 (C)** at 951. A more recent exception is the claim for nervous shock which, as pointed out above, is regarded as a species of bodily injury. But the decision in **Union Government v Warneke**, supra, has never been departed from and remains our law. I am unpersuaded that there is justification for the far-reaching innovative step which the recognition of a non-pecuniary claim for loss of consortium would involve. To do so, could well open the door to a flood of similar non-pecuniary claims such as for example claims for grief or bereavement which have never been recognised as actionable. See eg **Barnard v Santam**, supra, at 206 H-I and 217 A – C.

[20] It follows that in my view the appeal against the award of damages for "*loss of comfort*" must likewise be upheld.

[21] In the result the following order is made:

(1) (a) The appeal in the action brought by Mr Josiase Khoete (case Number CIV/T/25/2009) is upheld in part;

(b) The costs of appeal are to be paid by the said Mr Josiase Khoete;

(c) The judgment of the court a quo in that action is set aside and the following substituted in its stead:

"Judgment is granted in case number CIV/T/25/2009 in favour of the plaintiff for:

(i) damages in the sum of M15 000 for pain and suffering
(ii) interest thereon at the rate of 18.5 percent per annum from the date of judgment;
(iii) costs of suit."

(2) (a) The appeal in the action brought by Mrs 'Matsabo Khoete (case number CIV/T/69/2000) is upheld with costs.

(b) The judgment of the Court a quo in that action is set aside and the following substituted in its stead.

"The action is dismissed with costs".

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D.G SCOTT
JUSTICE OF APPEAL

I agree:

_____
M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____
I.G FARLAM
JUSTICE OF APPEAL

For the Appellants : Adv. R. Motsieloa

For the Respondents : Adv. K.J. Metsing