

**IN THE COURT OF APPEAL OF LESOTHO**

**C OF A (CIV) NO.26/2013**

In the matter between:-

**FIRST NATIONAL BANK  
RETSELISITSOE TSOSANE**

**FIRST APPELLANT  
SECOND APPELLANT**

and

**PETLANE SOLOMON PETLANE**

**RESPONDENT**

**CORAM : SCOTT AP  
HOWIE JA  
THRING JA**

**Heard : 9 October 2013  
Delivered : 18 October 2013**

## **Summary**

*Action for damages for injuria – evidence failing to prove wrongful conduct or intention to injure – trial court’s award of damages set aside.*

### **HOWIE JA**

- [1] At all material times the respondent was a customer of First National Bank (“the Bank”) and Retselisitsoe Tsosane (“Tsosane”) was the manager of the Bank’s branch at Kingsway, Maseru.
- [2] On the morning of 12 August 2009 the respondent was at a teller’s counter in the banking hall at that branch transacting business when he was approached by two men who later proved to be plain clothes policemen. They spoke to him briefly and shortly afterwards the three of them proceeded to the ATM area. Not much later the policemen left the Bank and the respondent continued with his business there. The policemen had told him that an official of the Bank had telephoned the police alleging that a man was in the Bank who was dangerous and obstructing the Bank’s services. Throughout the time the policemen were in the Bank other customers were in the vicinity of them and the respondent. It was not in dispute that Tsosane had summoned the police.

[3] In due course the respondent instituted a High Court action against the Bank as first defendant, Tsosane, as second defendant, and the Commissioner of Police as third defendant, for damages for injuria. What the respondent alleged in his declaration was this:

“5.1 On or about the 12<sup>th</sup> August 2009 plaintiff appeared at the 1<sup>st</sup> defendant’s banking premises to do his usual banking.

5.2 the 2<sup>nd</sup> defendant, whilst at his normal duty as aforesaid, upon seeing plaintiff inside the bank, wrongfully, unlawfully, intentionally and recklessly with the intent to injure plaintiff did the following to wit:

5.2.1 He went to Maseru Central Charge Office and laid false charges against the plaintiff.

5.2.2 He further wrongfully and falsely alleged that plaintiff was inside the 1<sup>st</sup> defendant’s bank and he was dangerous; in addition, plaintiff was obstructing and/or had caused a halt to banking services.

6.1 Based on and acting on 2<sup>nd</sup> defendant’s false and injurious allegations, two police officers from Maseru Central Charge Office arrived at 1<sup>st</sup> defendant’s bank where plaintiff was still doing his usual banking.

6.2 The said police officers, without cautioning plaintiff and in reckless disregard of embarrassing scene they were about to cause to plaintiff's prejudice, manhandled plaintiff in the presence of the 1<sup>st</sup> defendant's customers in the banking hall and into the Automatic Teller Machines' hall. The plaintiff was thereby degraded, humiliated and ignominiously insulted and had his dignity impaired.

6.3 All the foregoing is attributable to false, intentional, malicious, reckless and unfounded alarm raised by the 2<sup>nd</sup> defendant to the police against the plaintiff when opening an unfounded case against plaintiff. Furthermore, the embarrassing scene was caused by unreasonable, reckless and unprocedural conduct of the officers under 3<sup>rd</sup> defendant's command."

[4] In the pleas filed by the Bank and Tsosane it was alleged that the respondent was "hovering" outside Tsosane's office, that Tsosane felt unsafe because the respondent had threatened to cause him harm and he informed the police accordingly. The alleged intention to injure the respondent and the alleged wrongful conduct were denied.

[5] The case was tried by Mahase J who, having heard evidence from the respondent, Tsosane and Dennis Mbingo, Deputy Chief Executive Officer of the Bank in Lesotho, and having viewed video film footage recorded by the Bank's security

cameras, found that no wrong had been proved against the police. However, the learned Judge held that in his capacity as branch manager Tsosane had acted “intentionally, maliciously, recklessly, negligently and in an injurious manner which humiliated the plaintiff”. The respondent was awarded M65 000 as damages. The Bank and Tsosane have appealed.

- [6] The Judge considered that the essential question was whether any wrongful conduct had been committed by the respondent while he was in the Bank on the morning concerned. She gave the question predominant attention and came to the conclusion that because no such conduct had been proved there was no reason to call the police. She also held that the respondent’s evidence that the police had manhandled him and insulted him was unchallenged.
- [7] It is plain that the video footage revealed the respondent’s evidence to have been false in several material respects. Although he protested when challenged in cross-examination about the film evidence that it gave an incomplete depiction, the footage shows, contrary to his evidence, that he did not go straight to the counter after entering the bank and that he was not manhandled at all while in the banking hall before exiting to the ATM area. In addition, the film showed that the manner

in which he was approached at the counter by the policemen was entirely civil.

- [8] It seems to me, however, that the essential question was whether it was proved that Tsosane's act in having called the police was accompanied by the intention to cause the respondent injury and whether it was wrongful.
- [9] It was common cause that at some time before the date in question Tsosane was accused by the respondent's woman friend, who was an employee of the Bank, of sexual harassment. The accusation was the subject of a disciplinary enquiry by the Bank. Tsosane was absolved of blame. It is then that the evidence of Denis Mbingo is of importance.
- [10] He testified that on the day that the result of the disciplinary enquiry was made known the respondent telephoned him that evening. They had spoken before about the woman's complaint. The respondent was extremely unhappy about the verdict. He said he was going to see that the respondent got "sorted out", that he himself would sort him out and that he would teach the respondent a "permanent lesson". Mbingo said he found these statements very unsettling. They made him extremely uncomfortable. In particular this was so when

the respondent said that he was a Mosotho and, having been a policeman, he understood the justice system in Lesotho and whatever he did to the respondent should not lead to the expectation that he (the respondent) would spend time in jail. Mbingo said that the respondent was shouting over the telephone when he said these things.

[11] When the gist of that account was put to the respondent he said it was untrue. However, the impact which the respondent's threats had on Mbingo was such that he informed Tsosane of the threats and even discussed with the Bank's Chief Executive Officer the provision by the Bank of protection for Tsosane. When protection was later suggested to Tsosane he declined it, saying it would attract attention he did not want. He said he would rather report to the police.

[12] Shown the video footage, Mbingo said that it showed the respondent, *inter alia*, walking back and forth outside Tsosane's office at a stage after entering the bank and before going to the counter.

[13] The Judge said in regard to Mbingo's evidence that the words used by the respondent, apart from the reference to sorting out, had not been expressly recounted and she had "not been

told” why Mbingo understood them to have been threatening as regards Tsosane. In my view the reference to sorting out, teaching a permanent lesson and evasion of imprisonment conveyed clearly enough the threat that the respondent would take the law into his own hands and inflict physical violence on Tsosane. That interpretation is reinforced by Mbingo’s reaction to the threats and his concern to provide Tsosane with physical protection.

[14] As I have mentioned, the respondent claimed to have gone straight to the teller on entering the bank but after being confronted with the video footage showing him walking up and down outside what was identified as Tsosane’s office, he shifted his ground and said that he had a right to walk up and down there because he had gone to the bank “for services”.

[15] Whether the complaint of sexual harassment was genuine or not Tsosane would have had good reason to expect the respondent to react angrily to the result of the disciplinary enquiry. Mbingo’s evidence – which the Judge did not, indeed could not reject – shows that the respondent reacted extremely angrily and that he uttered serious threats to Tsosane’s bodily safety. The very next morning, soon after opening time, the respondent entered the Bank and paced up and down outside



Tsosane's office. When Tsosane saw this he telephoned the police and locked himself in his office until they arrived.

[16] Those were the crucial facts in the case. Their importance was not recognised by the Judge and they were accordingly not appropriately considered in the trial court's judgment.

[17] On those facts it is far more probable that Tsosane's having summoned the police was prompted by the expectation that the respondent had come to the Bank in order unlawfully to carry out the threats which Mbingo had reported, than that Tsosane intended to injure the respondent. Clearly, Tsosane had a lawful right to take reasonable steps to prevent an unlawful attack upon himself. The steps which he did take were neither precipitate nor excessive and one cannot but conclude that they were taken by Tsosane with the intention to avoid a reasonably apprehended unlawful assault by the respondent.

[18] It follows that the respondent failed to prove that Tsosane acted unlawfully with the intention to injure him. The action ought therefore to have failed.

[19] This Court's order is

1. The appeal succeeds with costs.
2. The order of the court below is set aside and for it is substituted the following:

“The defendants are absolved from the instance, with costs.”

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**C.T. HOWIE**

**JUSTICE OF APPEAL**

I agree

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**D.G. SCOTT**

**ACTING PRESIDENT**

I agree

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**W.G. THRING**

**JUSTICE OF APPEAL**

**For Appellant : P.J. Loubser**

**For Respondent: No appearance**