IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A CIV/31/2014

CIV/T/708/2012

In the matter between:

RABONNE LESETLA	**APPELLANT**
and	
COMMISSIONER OF POLICE	**1ST RESPONDENT**
ATTORNEY GENERAL	**2ND RESPONDENT**

CORAM : HOWIE, JA

THRING, JA

LOUW, AJA

HEARD: 14 OCTOBER 2014

DELIVERED: 24 OCTOBER 2014

SUMMARY

Rule 41 (1) – Absolution from the instance granted where defendants failed to appear at the trial – Order set aside and replaced with judgment for the plaintiff – Determination of damages by court on appeal where trial judge had made far reaching credibility findings against plaintiff.

JUDGMENT

Louw,AJA

[1] The appellant sued the Commissioner of Police (the Commissioner) for damages in the mount of M250 030,00 (the amount of M400 000.00 mentioned in the summons appears to be an arithmetical error). The appellant alleged that on 16 November 2009 members of the Mabote police, acting within the course and scope of their employment as members of the Lesotho Mounted Police Service, unlawfully and without a warrant searched his premises, arrested him and thereafter detained and assaulted him at the Mabote Police Station, releasing him the next day, 17 November 2009.

[2] The Commissioner opposed the action and pleaded that there was no record of the appellant's arrest, detention or release at the Mabote Police Station. The Commissioner denied that the alleged arrest, search, detention and assault had occurred at all and that any unlawful acts were committed by the police acting within the course and scope of their employment as members of the police force. Finally, the Commissioner denied that the appellant had suffered the alleged injuries, that he received medical treatment or that he had suffered any damages.

[3] When the matter came to trial before Peete, J on 12 March 2014, there was no appearance for the respondents. The appellant then chose to proceed in terms of Rule 41 (1) of the Rules of the High Court, which reads as follows:

> *" 41 (1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof is upon him, and judgment shall be given accordingly, insofar as he has discharged such burden;*

> *Provided that where the claim is for a liquidated amount or a liquidated demand, no evidence shall be necessary unless the court otherwise orders".*

[4] The appellant was the only witness at the trial. He said that he was employed as a taxi driver by one Masikane, and on 31 October 2009 he drove a Combi owned by his employer. After 8pm that night, four unknown men boarded the vehicle at a bus stop. At Sekamaneng where he was due to turn back on his run, one of the men produced a gun which he cocked. The conductor who was with the appellant then ran away. The robbers proceeded to take the Combi, his cell phone and money at gunpoint. He was taken to Maqalika where the robbers transferred him to a City Golf and took him to Phuthiatsana Masianokeng where he was set free. He managed to telephone his home from the village where he had taken refuge and Masikane later came with two policemen to collect him.

[5] About 2 weeks after the robbery, so he testified, on 16 November 2009, members of the police stationed at Mabote came to the appellant's house. They arrested him and searched his premises, all without a warrant. The

police accused him of complicity in the loss of the Combi and demanded that he tell them where the vehicle was. He was taken to Ha-Mabote where his hands and legs were placed in cuffs. At the Mabote Police Station the police assaulted him "*for an hour* or so" by whipping and kicking him *"all over the body*" and by suffocating him with a rubber tube. As he struggled while being assaulted his hands were injured by the cuffs.

[6] The appellant was detained for 14 hours from 11 pm on 16 November, 2014 until he was released at 1pm the next day, 17 November 2009.

[7] The appellant reported the assaults to the Mabote police and was given a police medical Form which reflects that on 20 November 2009, as the reporting officer recorded, that he is alleged to have been "*assaulted at SSU Police by Police Officers*". The medical form further reflects that the appellant was examined by a doctor at Queen Elizabeth II hospital on 24 November 2009. He paid a fee of M30,00 for the examination. The examining doctor recorded *"abrasions (+) on both wrists and on right knee"* as a result on 20 November 2009 for being

assaulted *"with handcuffs and kicking".* The degree of force exerted was recorded to be *"considerable*", but that there was no danger to his life and that no long term disability was expected. The appellant's evidence was that it took him about a month to recover fully and that during this time he needed assistance to take a bath.

[8] At the end of the appellant's evidence, judgment was reserved and thereafter delivered on 9 April 2014. Peete, J made an order of absolution from the instance. Hence this appeal.

[9] Under Rule 41 (1), where a defendant fails to appear when a trial is called, the plaintiff may through evidence establish his case on a balance of probabilities.

[10] In coming to the conclusion that absolution should be ordered, the court *a quo* misdirected itself on the law.

[11] Peete, J, purporting to apply what was said in Sayed v Editor, Cape Times, 2004 (1) SA 58 (C) a 66 H – 67 B,

held that the court *"has a special judicial discretion to exercise under Rule 41 and that indeed 'caution' must be exercised under special circumstances of each case".*

Sayed is a case where the **plaintiff** failed to appear and the defendant led evidence in terms of Rule 39 (3) of the South African Rules of Court (the equivalent of the Lesotho Rule 41 (3)). The court held that in such a case the power to grant final judgment instead of absolution from the instance against the plaintiff who failed to appear, should be exercised with caution and only in special circumstances. Since the present is a case where the **defendant** failed to appear, the approach adopted by the court a quo was completely wrong.

[12] The court a quo proceeded to consider the appellant's unchallenged evidence. In doing so it misdirected itself in the following respects:

1. By finding it significant that the Commissioner pleaded, but led no evidence, that there was no record of the appellant's presence, arrest, detention or release the Mabote Police Station.

2. By finding that the appellant had advanced a preposterous claim of M400 000,00. The reference to M400 000 in the summons and evidence was clearly a mistake. The appellant's evidence was clear as to the amounts he was claiming under each head of damage, which amounted to M250 030,00.

3. By attaching significance to the appellant's failure to call Masikane. The evidence was that although Masike was available in the sense that the appellant knew where he lived, Masikane was clearly not able to testify on whether the appellant had in fact been robbed or about the circumstances of his arrest and detention.

4. Without any evidence by the police, the court disbelieved the appellant's uncontested version because it was not *'probable that the police could have high – handedly detained the plaintiff, handcuffed and beat him up so gratuitously and just let him go without any charge or record of his arrest".*

[13] It was on these bases that the court found appellant's version to be *"extremely incoherent*"; that *"it lacked credibility and had no ring of truth- it sounded more a concoction than the truth*",

and that it was

> "*unworthy of credence; improbable, incredulous and quite bizarre*"

[14] The court *a quo* was wrong in its approach to the law and the facts. The appellant's evidence was not challenged by any cross examination nor was it controverted by evidence on behalf of the Commissioner. The court should on the appellant's undisputed evidence, have found for the appellant on the issue of the Commissioner's liability and should have proceeded to determine the amount of the appellant's damages. It follows that the order of absolution from the instance must be set aside.

[15] In the circumstances of this case and where the judge *a quo* has expressed himself as strongly as he has concerning the veracity of the appellant's account of what had occurred, it would not be appropriate to remit

the matter to the trial judge for a decision on the quantum of the appellant's damages. Counsel agreed to this course and this court should therefore determine the quantum of the appellant's damages itself.

[16] The appellant's claim is made up as follows:

1. M90 000 for unlawful arrest and detention.
2. M10 000 for unlawful search.
3. M150 000 for pain, shock and suffering.
4. M30,00 for medical expenses.

[17] It is trite that when it comes to the determination of the amount to be awarded as damages for non-patrimonial loss, each case must be decided in its own circumstances. In fixing the amount, the court has a wide discretion to award fair and adequate compensation. Awards made in other cases in similar circumstances may be used as a guideline as to what amounts should be awarded. I have had regard to the awards made in the following cases.

[18] The Commissioner of Police and Another v Neo Rantjanyana C of A (CIV) 11/2010 delivered 22 October 2011. The plaintiff, a trooper in the Lesotho Mounted Police Service was arrested by an inspector in the same force on the allegation that he had helped a prisoner to escape from prison. He was held in custody for three days after which he was released without charges being brought against him. For the first day of his detention he was given no food. He was not assaulted but he suffered from tuberculosis which probably made his incarceration more difficult. Despite serving in the lowest rank, he held a high position within the police association and was a faithful member of and held a prominent position in his church. He was held in high regard by fellow police officers and he felt insulted by his arrest and detention which also reflected badly on his reputation. The award made by the court *a quo* of M500 000 was set aside on appeal and replaced with an award of M50 000.

[19] Officer Commanding Roma Police and Others v J R Khoete C of A (CIV) 70/2011, delivered 27 April 2012. The first plaintiff was awarded M50 000 by the trial court for pain and suffering endured as result of a gunshot wound to his leg. The plaintiff spent two to three weeks

in hospital, where he received unspecified treatment. At the time of the trial he still experienced some pain at times. He described the initial pain when shot as "not that serious". On appeal the award was reduced to M15 000.

[20] Senior Inspector Sepinare Masupha v Trooper Nyolohelo Tae C of A (CIV) 13/2013, delivered on 17 April 2014. The plaintiff, a trooper in the Lesotho Mounted Police Service, was assaulted by a superior officer at the Maseru Central Charge Office who pulled him into an office, closed the door and punched and knocked him down and kicked him all over the body shouting abuse at him. The assault was observed by two female police officers. The plaintiff experienced a lot of pain in his back and received hospital treatment on two occasions. The award of M17000 made by the court a quo consisted of M2000 for pain and suffering and M15000 for *contumelia* and was confirmed on appeal.

[21] Mohlaba and Others v Commander of the Royal Lesotho Defence Force and Anor LAC (1995 – 1999) 104, delivered on 26 June 1996. The three plaintiffs were

arrested, detained in very poor conditions and assaulted. Their incarceration endured for a period of one year in the case of one and six months in the case of the other two. On appeal the awards were increased to M75 000 (in respect of the yearlong detention) and M25 000 and M50 000 in respect of the other two. This case is of limited assistance because it was decided 18 years ago and the treatment of the plaintiffs were far worse than what was meted out to the plaintiff in the present case.

[22] Commander of the Lesotho Defence Force and Others v Letsie LAC (2009 – 2010) 549, delivered on 22 October 2010. The plaintiff was arrested and detained for 12 days during which time he was on three days subjected to severe and prolonged assaults which included being suffocated by placing a blanket or plastic bag over his face until he lost consciousness. At the time of the trial he continued to experience "*flashbacks*". He was awarded M340 000 in the High Court for pain and suffering and *contumelia.* The award was reduced on appeal to M150 000. The circumstances of this case were far more serious than in the present case but the award does provide guidance to the general pattern of awards made by the Courts in Lesotho.

[23] Doing the best I can and bearing in mind that the award should be fair to both sides, I am of the view that since the claim arises from a single series of events a composite amount of M45 000 should be awarded in respect of the unlawful search, arrest and detention and for shock, pain and suffering caused by the assaults and for the medical expenses of M30,00.

[24] In the result the following order is made.

1. The appeal is upheld with costs.
2. The order made by the court a quo is set aside and the following order is made in its stead:

   "The first defendant (Commissioner of Police) is ordered to pay

   (a) damages in the amount of M45000 to the plaintiff.
   (b) Interest at the prescribed rate on the aforesaid amount from date of judgment (9 April 2014) to date of payment,

(c) Costs of suit"

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree

C.T. HOWIE
JUSTICE OF APPEAL

I agree

W.G. THRING
JUSTICE OF APPEAL

For the Appellant: Adv S. Ratau

For the First Respondent: S. Mats'osa

(Office of the Attorney General)