

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) No 53/19

In the Matter between:

MOKETE JONAS

APPELLANT

AND

COMMISSIONER OF POLICE

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

CORAM: P T DAMASEB AJA

DR P MUSONDA AJA

M H CHINHENGO AJA

HEARD: 14TH OCTOBER 2020

DELIVERED: 30TH OCTOBER 2020

JUDGEMENT

DR. P. MUSONDA AJA

Summary

Condonation application, when grantable –Damages-Unlawful arrest, detention and injuria-Appropriate quantum of damages-when the appellate court can interfere with the primary court award of damages, when the award does not appropriately mirror the seriousness of Police misconduct.

1. This was an appeal against the award of damages by the High Court (Peete J). The appellant was awarded M20, 000 =for unlawful arrest, M10, 000 for unlawful detention and M20, 000=for injuria.

Factual Matrix

2. The appellant was on the 17th August 2011 arrested and detained by police officers pursuant to the criminal procedure and Evidence Act no 9 of 1981. This was not a contested fact.
3. The appellant was arrested at around 08:00 hrs and was released the following day at about 17:00hrs, some 36 hours later.
4. In his declaration the appellant stated that:
 - (i) He was unlawfully arrested in the office of his counsel while sitting in front of his counsel's desk giving him instructions in respect of public interest and civil litigation and in presence of members of other civil organizations;

(ii) The arrest of the appellant damaged his good name and character as it created the perception that appellant was a criminal with the propensity to be arrested at all times,

5. The appellant claimed a global sum of one million Maloti (M1,000,000=00) broken as follows

(i) Three hundred and Fifty thousand Maloti (M350,000=00) for unlawful and wrongful arrest;

(ii) Three hundred and Fifty thousand Maloti (M350,000=) for unlawful detention.

(iii) Three hundred thousand Maloti (M300,000=00) for injuria.

6. The respondent in their plea admitted having arrested the appellant upon reasonable suspicion of having committed an offence in terms of **Section 7(e) of the Public Meetings and Proceedings Act No 14 of 2010**.the respondent denied arresting the appellant in his counsel's office, but outside the office of his counsel.

7. When the court below set the matter for trial on 14th -15th June 2016, there was inactivity for almost three years until 27th February 2019.By then liability was not being contested but the quantum.

The court a quo

8. The appellant's statement was uncontroverted as the respondent's did not contest his arrest and detention. This court will sharply focus on the appropriateness of the awarded damages.
9. The learned Judge was of the opinion that in Roman Dutch law there has been no consensus among judges and jurists on damages awardable for unlawful arrest, detention and accompanying injuria. Lawfulness, manner of arrest, force used, circumstances and treatment, may differ from one case to another.
10. The court went on to say, the quantum of damages falls under the judicial discretion of the court in exercise of which the "principle of fairness" is always paramount. The principle was encapsulated by **Holmes J in Pitt v Economic Insurance**,¹when he said:

"I have only to add that the court must take care to see that its award is fair to both sides it must give just compensation to the plaintiff but must not pour our largess from the horn of plenty of defendant's expense."

11. The court faulted the applicant and his Counsel for furnishing the court with insufficient information required under the High Court rules. It was incumbent upon the

¹ (1957) (3) SA 284 (Page 257 EF)

appellant's counsel to draft summons and declaration in as much detail as possible regarding liability and quantum of one million Maloti (K1M).

12. The Court had been vaguely informed that there were demonstrations by taxi owners at the time, which issue Advocate Molati incorporated in his heads, so the judge lamented.

13. The learned Judge proceeded to award the following damages:

M20, 000=00 for unlawful arrest;

M10, 000=00 for unlawful detention

M20, 000=00 for injuria

The above awards were made despite there being no sufficient detail before him, so the Judge lamented. He made an intelligent guess, so to speak.

The appellant's case

14. The application for condonation was premised on the non-availability of the judgement as the Judge did not release a copy of this judgement. This is the conduct which draws the ire of members of the public. When a litigant has been incapacitated by judicial inefficiency, it will be inappropriate to reject a condonation application. We note that judgement was delivered on the 4th June 2019; appeal was noted on 16th July 2019. Notice was filed on 7th August 2019, together with the

condonation application. We could not say the delay was inordinate given the circumstances.

15. Where sufficient satisfactory grounds being shown, the Court will exercise judicial discretion. This was the tenor of this Court's judgement in **Commander of the Lesotho Defence and Another v Sekoah**.² We therefore condone the late filing of appeal.
16. The appellant filed two grounds of appeal which are in fact a single ground as both attack what the appellant has characterized as shocking low quantum. The award of M-50,000 as against the initial claim of M1,000,000.
17. The appellants in their heads have belaboured to define unlawful arrest and detention and cited a series of authorities dealing with unlawful arrest and detention, when this has not been and is not in dispute, what is in dispute is the quantum and that is what this court will deal with.
18. It was argued for the appellant that the appropriate award of damages for the unlawful arrest and detention were not appropriately awarded by the Court a quo.
19. The Constitutional Court of South Africa in **De Clerk v Minister of Police**,³ stated that:

“A delict comprises wrongful, culpable conduct by one person that is too remote. When the harm in question is a violation of a personality interest caused by

² (2007-2008)2AC 303.

³ (329/17) [2018] ZASCA 45

intentional conduct, then the person who suffered the harm must institute the actio injuriam to claim compensation for the non-patrimonial harm suffered. The harm the Appellant complains of in respect of this detention is the deprivation of liberty- a significant personality interest. It alleges that it was his wrongful arrest that caused the harm. The Appellant was awarded three hundred thousand Rands (R 300,000=00) as general damages.”⁴

20. The Appellant climbed down from seven hundred Maloti claimed in the Court a quo for unlawful arrest and detention to three hundred thousand Maloti (M 300,000=00) in line with the **De Klerk’s** case.
21. In **Commander of the Lesotho Defence Force and others v Letsie**⁵, this Court reduced the award and suffering and contumelia from M340, 000=00, which was awarded in the High Court to M150, 000=00.
22. It was argued that in the same vein the personality of the Appellant herein had been greatly infringed by the unlawful arrest and detention he was subjected to at the instance of the Respondents. It is only just that a fair and reasonable award of damages be made to his claims.

⁴ 2019 2ACC 32.

⁵ (2009-2010) LAC 549.

Respondents Case

23. The respondents argue that the learned judge properly exercised his discretion in awarding M30, 000= for wrongful and unlawful arrest and detention instead of the claimed M700,000=Assessment of damages a matter which lies primarily in the discretion of the trial court. To interfere with such exercise of discretion there must be a material misdirection demonstrating that the discretion was not exercised judicially or upon a wrong principle or improper basis. The case of ***Media workers of SA v perskor***,⁶ was cited in support of that proposition.
24. It was the appellant's case that there were no aggravating circumstances .Although the appellant was arrested and detained,he was never assaulted The awarded sum is fair .In ***Commissioner of police & Another v Rantjanyana***,⁷the plaintiff then claimed M500,000= for unlawful arrest and High Court awarded M500,000=, on appeal this Court rduced it to M50,000=
25. The respondent opposed the award for injuria in the sum of M20, 000 as against the claim of M300,000. In the Respondent's, view the claim was unsubstantiated The Appellant merely felt insulted and the conduct of the Respondents injured his feelings and no more. In injuria, the aggrieved person's dignity must have actually been impaired in

⁶ (1992) (4) SA 791

⁷ (2011) LSCA 42

order to succeed. This court's decision in **Commander Lesotho Defence force v Makhele**,⁸ was cited for that proposition.

26. In the case of **Nkau Matete v The Minister in Charge of Police & Others**⁹, the court observed that the greater the number of days the plaintiff lost his freedom, the greater the amount of damages. In that case the plaintiff had been in detention for 120 days.
27. In **Mohlaba & Others v Commander of Lesotho Defence force**,¹⁰ the applicant claimed M250,000 = as damages arising from his unlawful detention in the maximum security prison for a period of one year. The High Court awarded him M35,000= 00 which on appeal was increased to M75,000=00.
28. It was therefore submitted the amount awarded under this head was fair and just.

The issues

29. Where both parties applying for condonation and there is no opposition, the appropriate approach, where there is no long delay.
30. When can the appellate court disturb the learned Judges exercise of discretion in the award of damages.

⁸ C of A (Civ) No 39/2017

⁹ C. of A (CIV) No.24 of 1987

¹⁰ 1995-1997 LAC 184

Consideration of Appeal

31. Both the appellant and the respondent applied for condonation, the appellant for non-timely filing of the appeal, the respondent for non-timely filing of the heads .in the context of condonation there was no opposition. In the circumstances this court exercises its discretion and allows both applications as there was no serious delay.

There was an averment by the appellant which was uncontroverted that the judge retrieved the judgment to go and perfect it. The appellant could not lodge an appeal based on what one may characterize as a draft judgment.

32. I now discuss the elements that guide the assessment of damages in cases of false imprisonment .In ***Khecaline and Another v Commissioner of Police and Others***,¹¹plaintiff were awarded M50,000 for unlawful or wrongful detention pain and suffering. The elements taken into account were

- (a) Status ,position and reputation of plaintiff;
- (b) Humiliation and malice;
- (c) Nature and effect of assault; and
- (d) Nature of suffering;

33. ***Attorney General & others v Phiri***,¹²in dealing with the quantum of damages and awards, cases must be treated with caution, if it is sought to rely on them as a guide. The award of

¹¹ (Civ/t/133/2000 (CivT/T/133/2000 (2001) LSHE 24th September 2001

¹² Appeal No 161/2014 (2017) ZMSC 63 (29) sue 2017

general damages in cases of false imprisonment must where these factors are present, always take into account the circumstances of the arrest and detention, the affront to the person's dignity and the damages to his reputation. In assessing damages for wrongful detention the factors to be considered include duration, sanctity of personal liberty, presence or absence of the suffering of anxiety or indignity manner and circumstances of detention ,and the reasonableness of the explanation for the detention where the tortuous circumstances are more serious then, the awards must reflect this, as well as the impact of inflation in order to arrive at a fair and reasonable amount .The prevailing economic social condition must also be considered..

34. The award to express disapproval of the nature and effect of treatment. The police had attempted to murder the plaintiffs by suffocation with a tube to merit M50, 000 between the two plaintiffs. The award was in 2001.
35. In ***Bryan James De Klerk v minister of police***,¹³the plaintiff claimed one million Rands (R1M) for the arrest and detention .He was detained for seven (7) days .He was awarded thirty thousand Rands (R30,000).
36. As Ramodibedi a distinguished member of this court said in ***Commissioner of Police v Rautjanyana Supra***,¹⁴

¹³ 329/17 (2018) ZASCA 45 28th March 2018

¹⁴ AHAFRICA.Com 30th August 2018 Nigeria.

“Now, as a matter of first principle the assessment of damages is a matter which lies primarily in the discretion of the trial court. The appellate court is generally not to interfere with such discretion in the absence of a material misdirection indicating that the discretion was not exercised judicially or that it was exercised capriciously or upon wrong principle or on an improper basis. Furthermore, this court will interfere with the discretionary award of the trial court on quantum if it considers that there is a striking disparity between the amounts actually awarded by the court below”.

37. This court reduced from M500, 000 awarded by the lower court to M50, 000=00.

38. There was lamentation by the learned trial judge in these terms:

39. *Because of the paucity of detail, the court is not in a position to gauge the gravity of the arrest and detention and the court is at large to exercise its discretion only within the cryptic parameters of the plaintiff’s case all the time balancing the award on the scales of fairness.*

40. Before I conclude I must express this Court’s uneasiness about paragraph 20 of the judgment where the learned judge said :

“This deficiency could not be remedied by the well – known demagoguery of advocate Molati.”

I think such language goes beyond the legitimate criticism of the professional conduct of an advocate .The following passage is instructive from **The Rules of professional conduct in Nigeria: A Tale of two ministers in the Temple of Justice states:**

“Lawyers like judges are a ministers in the temple of justice .The lawyer’s duty to this court includes condour, honesty and fairness. A judge is also a lawyer. A judge assumes the role of Divinity when he sits in his judicial capacity”.

I agree that there be times when Advocates play theatre in the court room, but he criticism must be in modest language

41. We accept that the Police conduct of unlawfully arresting and detaining the Appellant while in the office of his Lawyer consulting to institute civil proceedings against the State for violating his constitutional rights and is an act of lawlessness. As Lord Scaman¹⁵ once said, a lawless State is a menace to the enjoyment of civil liberties and constitutional democracy that needs to be destroyed. Though we are mindful he was not assaulted and his detention was for less than thirty six hours (36) hours, we strongly urge the Police to conduct investigations

¹⁵ Onlinelibrary.willey.com 30th December 2015.

first in order to have a basis for reasonable suspicion before arresting a citizen.

42. It is appropriate to lament on the paucity of evidence in Jonas' statement submitted in terms of the rules in place of oral evidence as to quantum. In our view the award could have been higher if the evidence was clearer and detailed.

43. However a message of censure must be sent to men in uniform that the Courts will not condone unjustified arrests and detentions of citizens. What more from a lawyer's office who is an officer of the Court.

44. When the Police Service becomes an instrument of oppression the rule of law and civil liberties are in peril. The Judiciary remains the only hope to enforce human rights. Prempeh, characterizes judicial enforcement as human rights as "Juridical constitutionalism."¹⁶ The Judiciary should send a strong message of censure of police brutality.

45. **Conclusion**

The Court has taken into account the conduct of the police, the inflationary trends of the Moloti and the duration of detention. The Appeal is allowed the Order of the Court a quo is set aside, in substitution thereof the following order is made

46. **Order:**

¹⁶ H K Prempeh/ Judicial Review and the challenge of constitutionalism in contemporary Africa, 80mTulane law Review 1st July 2006.

- (i) A global figure of one hundred thousand Maloti (M100,000=00) for unlawful arrest and detention and Injuria is awarded.
- (ii) With eighteen percent interest P.A. (18%) from the date of judgement in the Court a quo (4th June 2019) until payment.

47. **Costs:**

Costs will follow the event to be taxed in default of agreement.



DR. P. MUSONDA
ACTING JUDGE OF APPEAL

I agree



M. CHIHENGO
ACTING JUDGE OF APPEAL



**P T DAMASEB
ACTING JUDGE OF APPEAL**

FOR THE APPELLANT:

ADV L. MOLATI

FOR THE RESPONDENT:

ADV M BROWN