

IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU
45/2020**

C OF A (CIV) NO.

CIV/T/121/2016

In the matter between:

**OFFICER COMMANDING MAFETENG POLICE STATION
APPELLANT**

1ST

**THE COMMISSIONER OF POLICE
APPELLANT**

2ND

**ATTORNEY GENERAL
APPELLANT**

3RD

AND

TS'OLO TJELA

RESPONDENT

CORAM: P. T DAMASEB AJA

P. MUSONDA AJA

DR J. VAN DER WESTHUIZEN AJA

HEARD: 20 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

Delict- Claim for damages for contumelia, assault pain and suffering- Plaintiff taken from his house by police and tortured in the middle of the village- Police not acting under cover of any warrant- no defence to the claim- nature of injuries- quantum of damages influenced by the imperative to eradicate culture of police brutality and uphold values of the Constitution- Constitution 1993, Section 8- Court of Appeal cannot pedantically circumscribe the exercise of discretion in awarding damages, where the variance of awards between similar actions is marginal- The Appellate Court will not interfere. However where the award is on the higher side or based on wrong principle- the Appellate Court will interfere with the exercise of discretion.

JUDGMENT

DR P. MUSONDA AJA

Introduction.

[1] This is an appeal against the award of damages by the High Court (Sakoane J.). The respondent was awarded M90 for medical expenses, M300,000 for pain, shock and suffering and M100,000 for contumelia.

The Factual Matrix

[2] The respondent a 51 year old farmer and Chairperson of the Village of Ha Likhhololo in the district of Mafeteng claimed damages against the appellants arising out of torture inflicted on his person by members of the Lesotho Mounted Police Service.

The respondent claimed the sum of M400,000 plus interest and costs broken down as follows:

- a) Medical expenses- M90 =00;
- b) Pain, shock and suffering- M300,000=00;
- c) Contumelia- M99,910=00;
- d) Payment of interest at the rate of 12 percent per annum calculated from the date of issue of summons;
- e) Costs of suit;
- f) Further and/or alternative relief.
- g)

[3] A pre-trial conference was held in terms of Rule 36 (as amended) by the Court a quo. The signed minutes were by consent admitted as part of the evidence.

[4] The following issues were undisputed:

- i) The parties to the suit;
- ii) The Plaintiff was forced to lie down;
- iii) Was issued a medical report by the Police;
- iv) The medical report completed by the doctor depicted injuries sustained by the plaintiff.

However, the appellants disputed the quantum of damages.

[5] The respondent testified that he was a member of the Village Crime Prevention Committee. On 1st August 2015 he was beaten with sticks and guns by the members of the Lesotho Mounted Police Service. The beatings started when he got out of his house as he and other members of the Committee were taken to a spot in the middle of the village. They were forced to squat and jump. They were told to lie down and they laid down, they were beaten and stones put on their chests.

[6] The respondent sustained injuries on the buttocks and the waist, the left eye and bled from the nose. He felt excruciating pain as he walked. The pain took three weeks. He had to walk with the aid of a stick during those three weeks.

[7] He was shown two pictures of his naked body and injuries thereon. One photo mirrored his injured buttocks and the left elbow. The other photo was for the whole face and showed a swollen red eye. Both photos were admitted in evidence and were collectively marked as Exhibit 'A'.

[8] The respondent testified that he had misplaced the receipts for the medical expenses. That was the Plaintiff's case. The Defendants closed their case without leading any evidence, as they were only contesting the claimed quantum of damages.

Consideration of the Respondent's case in the Court a quo.

[9] The Learned Judge found it as fact that the respondent and other members of the Village Crime Prevention Committee were rounded up by the Police and tortured in the middle of the village. The Committee was constituted by both sexes.

[10] The respondent was given a medical form at the Mafeteng Charge Office after reporting to the assault. The form was duly completed by the Police and the medical doctor dated 1st August 2015.

[11] The degree of force inflicted was described as ‘considerate’, the degree of injury to life was ‘moderate’, the degree of immediate disability ‘light’ and there was no long term disability.

[12] It was the Court a quo’s view that there was no justification by the defendant for their behavior. Their behavior was sadistic and terrorist. They inflicted pain, shock and suffering because of their anger and frustration in failing to find what they were looking for. The plea did not even pretend that they had any search or arrest warrant. Such conduct was anathema to every value of the Constitution and human decency, so the Judge concluded.

[13] The Learned Judge, asserted the supremacy of the Constitution, as a pantheon of values and guarantor of the solemn promises of citizen rights and freedoms as guaranteed. He deprecated the rule of man in a Constitutional democracy like ours. The Constitution is the boss and the case of ***Attorney General and Another v Swissbough Diamond Mines (PTY) Ltd. and Others***¹, was cited in support of that statement.

[14] Despite what the Constitution commands in uncompromising language in section 8, that there shall be no torture, inhuman or degrading treatment, the Police Service continues to brutalize citizens. Such rogue behavior is encouraged by a Prime Minister who told the Police to; “beat them hard but not in public view. When you emerge in public view, smile with them don’t beat

¹ (No. 2) LAC (1999-95) 214.

them”. Such orders which have the potentiality of violating human rights are manifestly illegal and must be disobeyed. The givers of such orders are accomplices in crimes of terrorism, assault, torture and murder of victims. The Police should forever wear the values of the Constitution on the Epauettes of their uniforms. The Constitution protects the rights of all criminal suspects and will be violated in the Police’s bad name. The same warning was given in **Ramakatsa and Others v Commissioner of Police and Others**.²

[15] Assessment of damages in Court a quo the Learned Judge cited the statement of Leon JA in **Mohlaba and Others v Commander of the Royal Lesotho Defence Force and Another**³, when he said:

“but the facts in such cases are never quite the same and such cases are not particularly helpful.”

In his view none of the cases that were referred to him by both learned Counsel were at all fours with this one.

[16] The Learned Judge referred to his decision in **Mokotso v Commissioner of Police and Another**⁴, where he said:

“The entrenchment of rights and freedoms in the Constitution gives them a higher status than previously existed before the adoption of the Constitution in 1993. There is therefore, a Constitutional duty to reassess the principles relating to unlawful infringement of personal liberty, unlawful arrest, torture and the quantum of damages for infringement of such rights and freedoms; Thandani v Minister of

² Constitutional Case No. 22/18(16th April 2019)

³ LAC (1995-99) 1984 at 192C.

⁴ CIV/T/520 2014 4TH March 2020.

Law and Order 1991 (1) SA 702(E), Masawi v Chabata and Another (1991)(4) SA 764 ZH, Bridgman v Witzenberg Municipality (J.L. and Another Intervening 2017 (3) SA 435 (WCC) Para 218.

[17] Personal liberty as a constitutionally guaranteed right enjoins Courts to jealously guard and preserve it against unjustified infringements. Where the Crown, through its agents and servants such as the police, abuse their powers by unlawful arrests or torture of suspects and detainees, the victims are entitled to vindicate their rights through claims for compensation in full measure for any injury, humiliation and indignity suffered. On their part, the police bear statutory and constitutional obligations to protect society and not to torture and assault its members in the course of enforcing the law and investigating crimes: ***N K v Minister of Safety and Security.***⁵

[18] In cases of assault and torture, the most important factor that determines the quantum or amount of compensation is the extent of the physical injury to be established with reference to the intensity, nature and duration of the pain and suffering: ***LAWSA VOL:14 Part 1 Para 118 (3rd Edition).***

[19] In assessing damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party who is the Plaintiff but offer him/her

⁵ 2005 (6) SA 419 (CC).

solatium for injured feelings: **Minister of Safety and Security v Tyulu**.⁶

[20] A substantial award for non-patrimonial loss may be made on account of the serious nature of the physical and psychological harm or the brutal and contemptuous manner in which the rights of the victim have been violated, especially by a person of trust such as a Police Officer.

[21] The Learned Judge wound up his discussion of cases on assessment of damages by an extract from **Mohlaba Supra at 191 F-G**, where Leon JA said:

“When I read this record, I was appalled that human beings could be treated in this Kingdom in such a fashion. The conduct of the offenders warrants strictest censure, for it is reminiscent of some of the exercises of the KGB, the Gestapo as well as the treatment meted out to the late Steve Biko.”

He lamented that twenty-five years down the line, the police have continued brutalizing citizens. It was the Court’s duty to deter the police. They must listen to the voice of the Constitution and not the sirens of political power. He went on to say recent awards of compensation to victims of police brutality have hovered around M350,000, but they have not had a deterrence effect. He awarded M90 for medical expenses, M300,000 for pain, shock and suffering and M100,000 for contumelia plus 12 percent interest per annum from the date of issue of summons.

[22] Aggrieved by the award, the appellants noted an appeal to this Court. The sole ground was that

⁶ 2009 (5) SA(SCA) para 26.

- i) The Court a quo erred ad misdirected itself by awarding the Plaintiff excessive amount of damages while he did not even suffer permanent disability.

[23] It was submitted following our decision in **Commissioner of Police and Another v Rantjanyana**⁷, when we said:

“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 loathe to interfere with such discretion in the absence of material misdirection indicating that the discretion was not exercised judicially or that it was exercise capriciously or upon a wrong principle or an improper basis”

[24] It was valiantly argued that, in determining an amount which will be fair in all circumstances of the case the Court should take comfort in the following remarks of Holmes J, as he then was in **Pitt v Economic Insurance Co. Ltd.**⁸ when he said:

“I have only to add that they must take care to see that its award is fair to both sides- I must give just compensation to the Plaintiff, but must not pour (out) largesse from the horn of plenty at the Defendant’s expenses.”

It was the appellant’s submission that in its discretion in assessing damages, the trial Court, did not exercise such judicially, but capriciously, upon wrong principle and on an improper basis.

[25] The trial Court should have considered previous cases such as **Commander of the Lesotho Defence Force and Others v Letsie**⁹, where the Plaintiff claimed the amount of M750,000=00 made up of M300,000=00 for unlawful arrest, M300,000 unlawful

⁷ 2011 LSCA 42.

⁸ 1957 (3) SA 284 (D) at 287 E-F.

⁹ LAC (2009-2010) delivered on 22nd October 2010.

detention, M150,000=00 for contumelia. The Plaintiff was detained for 12 days during which he was for three days subjected to severe and prolonged assault which included being suffocated by placing a blanket or plastic bag over his face until he lost consciousness.

[26] In ***Losetla v Commissioner of Police and Another***¹⁰. The Plaintiff claimed M250,000=00 for having been assaulted 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. This Court awarded him M45,000=00 in respect of unlawful search, arrest, detention and for shock, pain and suffering caused by the assaults and for medical expenses M30=00 bringing the total to M45,030=00.

In ***Officer Commanding Roma Police Station and Another v Jr. Khoete***¹¹, the Plaintiff claimed M310 in damages, the High Court awarded him M60,000=00, this Court reduced that to M15,000=00.

[27] It was therefore submitted that this Court should intervene as the award was excessive. In a nutshell that was the appellant's case.

Respondent's Case

[28] It was the argument for the respondent that the High Court was correct to award aggravated damages given the culture of

¹⁰ 2014 LSCA 45 24th October 2014.

¹¹ C of A (CIV) 70/2011 delivered on the 17th April 2012.

police brutality in the Kingdom. The award of general damages is essentially a matter for the discretion of the trial Court and the Appellate Court should not lightly interfere with that exercise of discretion. **Mohlaba's Case (supra)** was cited in aid of that proposition.

[29] The Court a quo was referred to several past comparable cases and the point was made that the Court had to take into account the time when judgments were delivered. In **Neo Masupha v Commissioner of Police and Another**¹², a case of police brutality delivered on 15th February 2010, Plaintiff was awarded a total sum of M100,000=00 for pain, shock and suffering and *contumelia* by the High Court. She was tortured, while a suspect in police custody. In **Tefo Caswell Koeshe v Commissioner of Police and 2 Others**¹³, the plaintiff was awarded M200,000=00 in damages for unlawful arrest, assault and *contumelia*. In **Makhaplia v The Commissioner of Police and 4 Others**¹⁴, the plaintiff was awarded M500,000=00 for unlawful arrest and detention , pain and suffering and *contumelia*, M100,000=00 for loss of amenities and interest at the rate of 18 percent a **tempore morae**. The Learned Judge said thus:

“The Plaintiff in this case was subjected to torture after he had been stripped almost naked in the presence of several policemen and women. He was subjected to extreme pain and not to mention humiliation. Unfortunately these cases come before our Courts with disturbing regularity and the methods used to inflict pain on detainees by the police are strikingly similar.”

¹² CIV/T/149/2005.

¹³ CIV/T/264/13.

¹⁴ CIV/T/130/2013.

[30] It was forcefully argued that from the discussion of the Court a quo, it was clear that the Court awarded aggravated damages because the evidence showed that the police had gratuitously, and in the most barbaric manner, undermined the rights of the appellant. The case of **Naidoo (supra)** where it was observed that:

“In awarding damages the Court place high premium on among others, right to dignity and right to freedom and security of the person. And where these rights have been gratuitously undermined, ‘an award of aggravated damages (as opposed to punitive damages that are not allowed) may be justifiable”.

Respondent’s Counsel concluded his submissions by restating that the damages awarded were not excessive.

Consideration of the appeal

[31] The issue: The sole issue to be determined by this Court is whether the damages awarded were wrong in principle so as to be interfered with, bearing in mind that this was an excise of discretion which this Court as an Appellate Court must be slow to interfere with.

[32] The starting point is, I do not agree with the use of the word capricious, although it seems to be often used in cases of this nature, in my view it does not accord with dignifying the Court. In assessment of damages Judges usually make intelligent guesses.

Law not being a subject of mathematical precision, there are variations.

[33] The modern thinking in International Humanitarian Law is that if a Court has to err, it must err on the side of accentuating rather than attenuating fundamental rights and freedoms. In ***Resident Doctors Association v Attorney General***¹⁵, the Supreme Court of Zambia, per **Mambilima JS** as she then was, held:

“Courts as final arbiters when interpreting the Constitution and the law as made thereunder, which confer the freedoms there is need for the Court to adopt an interpretation which does not negate the rights. Most jurisdictions adopt a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of the rights”

The Court awarded an equivalent of M500,000=00 to each petitioner for having been denied the right to demonstrate and were detained for a day, that was 18 years ago.

[34] In ***Attorney General of the Gambia v Tobe***¹⁶. Lord Diplock delivering the opinion of the Board of Judicial Committee of the Privy Council said:

“A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and a purposive construction.”

¹⁵ 2003 ZR.

¹⁶ 1985 LRC (Const.) 536 at 565.

[35] Lord Woolf in the case of **Huntley v Attorney General of Jamaica**¹⁷, also delivering the opinion of the Board Judicial Committee of the Privy Council had this to say, when endorsing Lord Diplock's view:

"The Court should look at the substance and reality of what was involved and should not be over concerned with what are more than technicalities."

The Court entirely agrees with the views expressed by his Lordships. The police in this case flagrantly violated the dignity of the respondent, more so in a traditional setting, to whip an elderly man like a child in full view of men, women and children, when they did not find what they were looking for and also a collaborator in crime prevention are aggravating features.

[36] This Court awarded M150,000=00 in the case of **Commander LDF v Letsie (supra)** 11 years ago.

[37] I acknowledge that the circumstances were more brutal than in the present case. In the case of **Mokete Jonas and Commissioner of Police and Another**¹⁸, we recently awarded a global figure of M100,000=00 for unlawful arrest and detention and *injuria*, though no aggravating circumstances were brought to the fore. It would be inappropriate to award M150,000=00, today where there are aggravating circumstances, this Court said in para 42

¹⁷ (1995) 1 ALL ER 308 at page 316.

¹⁸ C of A (CIV) NO 53/19.

“It is appropriate to lament on the paucity of evidence in Jona’s 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 clear and detailed.”

[38] We further said:

“When the police service becomes an instrument of oppression to rule of law and civil liberties are in peril. The Judiciary remains the only hope to enforce human rights.”

Prempeh, characterizes judicial enforcement of human rights as ‘juridical constitutionalism’. The judiciary should send a strong message of censure of police brutality. As Lord Scarman once said, a lawless State is a menace to the enjoyment of civil liberties and constitutional democracy that needs to be democratically and constitutionally destroyed.

Conclusion

[39] We have carefully considered domestic as well as international human rights jurisprudence and the Learned Judges human rights spirited sentiments. There are inflationary trends and weakening of the Maloti, but we need to be consistent, we are of the view that award was wrong in principle. The Roman Dutch approach which commends itself is not to grant punitive damages in delictual claims. This principle was mirrored in **Naidoo (supra)**. We deprecate the escalating incidence of police brutality, the culprits must be prosecuted to protect the rule of law. We

therefore allow the appeal. We set aside the award by the Court a quo and substitute it with the following Order.

[40] Order

- I. Appeal allowed;
- II. A global figure of two hundred and fifty thousand Maloti (M250,000=00) for pain, shock and suffering, *contumelia* and medical expenses is awarded;
- III. This will attract twelve percent interest per annum (12 percent) from the date of issuance of summons.

[41] Costs:

This is a human rights matter, we will therefore make no order as to costs.



DR P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree



P. T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree



DR J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR APPELLANT:

ADV T. MOHLOKI

FOR RESPONDENTS:

ADV NAPO MAFAESA