

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABO JUSTICE LETS'ABA

PLAINTIFF

and

COMMISSIONER OF POLICE  
ATTORNEY-GENERAL

1ST DEFENDANT  
2ND DEFENDANT

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni  
on the 17th day of April 1996

During the month of May 1994 there was a strike action embarked upon by the members of the Police Force. During that period of their strike certain wrongs and/or delicts were committed by those striking members of the Police Force. The Plaintiff herein was unlawfully arrested and detained by those striking policemen. Plaintiff is therefore suing defendants:- Commissioner of Police and Attorney General for damages which he suffered as a result of or which were occasioned by the actions of the striking policemen. Plaintiff is claiming that the defendants are vicariously liable and must therefore be held lawful liable to compensate him in the total sum of M90,000-00 maloti made out of (7) claims.

For the Plaintiff to succeed in this action he must allege and prove that the policemen's actions that are complained of, were committed by those policemen whilst acting in the course of and within the scope of their official duties with the defendants. This is the first allegation that the plaintiff has made in his declaration.

There are a few questions that fall for determination in this matter first of all when were those actions complained of committed? And under what circumstances? The second question is whether or not the striking policemen when they arrested and detained plaintiff were they doing the police work that is expected of them. Did they perceive themselves as policemen arresting for the purpose of preventing or detecting the commission of an offence?

The policemen who arrested and detained plaintiff were on strike. Now, what is a strike? The dictionary meaning by The Concise Oxford Dictionary - the strike is - "The organised refusal by employees to work until some grievances are remedied." Or "Refusal to participate in some other expected activity".

What is the Policeman's work? What is their expected activity? The Policemen are responsible mainly for maintenance of law and order and to perform such other functions as may be prescribed by an Act of Parliament. This is spelled out quite clearly by Section 147 (1) of the Constitution.

More detailed powers and duties of the Police are provided for by section 7 of the POLICE ORDER 1971. The relevant portions read as follows:-

- "7 (1) (a) The Force shall be employed in and throughout Lesotho for preserving the peace, for the prevention and detection of crime, and for the apprehension of offenders against the peace, and for the performance of such duties shall be entitled to carry arms.
- (b) Members of the Force shall have all the powers and duties which are conferred and imposed upon them by any law in force in Lesotho.
- (2) Every member of the Force shall be an officer of the law proper for the service of execution of any summons or warrant or other process directed to him, and every such summons, warrant or process directed to any member of the Force may be served or executed by any other member of the Force, and every such last-mentioned member shall have the same rights, power and authority for and in the service or execution of such summons, warrant or process as if it had originally been directed to him.
- (2) It shall be the duty of every member of the Force promptly to obey and execute all orders and warrants lawfully issued to him by competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist and to keep such books and records and render such returns as the Commissioner may from time to time direct.
- (4) Any member of the Force may be required generally or in any particular instance to appear for the Crown in criminal cases or preparatory examination."

The members of the Police Force when they were on strike, they were not performing those duties perceived or envisaged in these two main statutory provisions: i.e. Constitution and

POLICE ORDER 1971.

The evidence led in this trial showed that first attempt to arrest or take Plaintiff in their custody, was made by the striking policemen, on 15th May 1994. On that date the group of policemen amongst them Lance Sergeant Mokapela and Mpooa arrived at Police Training College where Plaintiff was stationed, and demanded from his commandant Colonel Motjamela - that he release Plaintiff to them. Colonel Motjamela refused to release the Plaintiff.

Three days later, on 18th May 1994 Colonel Motjamela received a call from the Deputy Commissioner of Police to report at his office together with the Plaintiff. They did. On arrival at the Deputy Commissioner's office the two police officers, Plaintiff and his commandant were informed by Deputy Commissioner that there are many policemen who wanted to talk to him, and are waiting for him outside his office. He left these two officers in his office and went out to talk to those many policemen outside his office. On his return from talking to them, he informed Colonel Motjamela and Plaintiff Major LETSABA that those policemen are very angry and want Major LETSABA. At this stage it would appear that the Deputy Commissioner took Major Letsaba with him and the two officers travelled in the Deputy Commissioner's motor vehicle to Maseru Central Charge Office premises. Colonel Motjamela followed behind them in his own motor vehicle. Immediately when the two motor vehicles arrived at Maseru Central Charge Office the

striking policemen demanded that Plaintiff Major Letsaba come out of the Deputy Commissioner's motor vehicle. He obliged. A search was conducted upon his person. They demanded that he surrendered to them his side arm. He once again obliged.

According to the evidence of the Plaintiff, there was a committee of (5) five policemen who were perhaps in charge of the striking policemen. Apparently they were not at that Police station at the time of the arrival of the Plaintiff, Colonel Motjamela and Deputy Commissioner. Plaintiff was told to wait for them. Plaintiff was placed in the Stock Theft Unit Office where he was guarded by one policeman called Makhele. At the time Makhele knocked off one policeman Makateng took his place to guard the Plaintiff.

From Sergeant Makateng's custody another group of striking policemen demanded the release to them of this Plaintiff. Initially Sgt Makateng tried to resist. They persisted that Sgt Makateng handover to them the Plaintiff. His resistance was overcome by them. He released into their custody and care the Plaintiff herein. From Stock Theft Unit office Plaintiff was marched to the Central Charge Office. He was made to walk between two lines of heavily armed policemen. At the Central Charge Office, Plaintiff was kept in a small cell. There was no food. There was no water to drink. For toilet facilities, there was a bucket which Plaintiff thought he could use if he needed to pass urine. There was no blanket or anything to use for bedding. There was a piece of cardboard, what it was for

nobody knows.

During the night at intervals some of those striking policemen used to pip at the window or hole at the door of the Plaintiff's cell to hurl abuse at him. This tormenting of the Plaintiff by policemen went on till the next morning. During his second day of detention one of the Plaintiff's colleagues from Police Training College pipped through that hole at the door of his cell and asked Plaintiff if he wanted food and a blanket. Plaintiff replied in the affirmative. Plaintiff requested that colleague of his to go to his residence at his station, Police Training College to collect a blanket and food. He did bring them. During that second night in detention, for the first time Plaintiff was put before the committee of 4 or 5 striking policemen. These policemen interrogated him for an hour or so that night and he was returned to the cell. Plaintiff's interrogators were sgt Mokapela, Mosili, Mosae and trooper Mohale. All were Plaintiff's junior.

What sort of interrogation did this Plaintiff undergo? It is his evidence that it was rough. The language used was not polite. May be the manner of interrogation itself was humiliating.

What sort of question did this interrogators put to him? Plaintiff could recall that he was asked if it is true that he was at Quthing with FORD SEKAMANE. He was also asked if he knows one THABO MAKAKOLE who is a member of LLA. He was asked

if he knew one CHALDINE TSATSANYANE and if he could deny that he gave him the police video.

All these allegations according to the Plaintiff, were untrue. It would appear that during the interrogation or at any stage during the Plaintiff's detention no suggestion was made or any indication that the Plaintiff is a suspect in the commission of the offence. After the interrogation Plaintiff was returned to the cell where one of them - Mr. Mosae went and took him out and put him into the office where he sat with Plaintiff. Mr. Mosae offered Plaintiff some cigarettes. They chatted for a while, perhaps in a relaxed manner. Thereafter he returned him into the cell where he spent the rest of that morning. That same man from Police Training College who asked Plaintiff if he wanted food and blanket yesterday, came again. This time he asked Plaintiff if he wanted food. Plaintiff said he did. He brought him some food. Sgt Mosae came again to the cell. Plaintiff told him to take him out of that cell. Mosae told Plaintiff that he was making arrangements for his release. But still he told the Plaintiff that he will tell the members of the committee presumably about that request. All these activities took place before lunch. Later that afternoon Plaintiff was once again taken to that Stock Theft Unit Office before his interrogators. They asked Plaintiff if he was prepared to make the speech on tape. Plaintiff was tired, hungry, exhausted and he told them that he is disturbed and considering the condition he is in, he is, in no position to make a speech. His interrogators wanted Plaintiff to record

the replies he gave them yesterday. Eventually they released him. Before he could leave, Deputy Commissioner came and asked Plaintiff to go into his motor vehicle. It was around six o'clock in the evening. Deputy Commissioner took Plaintiff to Police Training College where he left him at his house.

By virtue of their strike action, those policemen were not carrying out their normal or usually expected police duties. They were not on duty. According to the evidence of Deputy Commissioner the striking policemen were out of control of the Commissioner of Police's office. They were virtually doing their own thing. The Plaintiff's action is the claim of damages occasioned by the striking policemen's actions of his arrest, detention, assault and defamation.

It is the evidence of the Deputy Commissioner Makoaba that during that strike by the members of the Police Force he was a mediator between the striking policemen and Government. Deputy Commissioner told this court that he spent a lot of time with the strikers. Having studied and assessed the prevailing conditions of that strike, the Deputy Commissioner concluded that if the strikers themselves arrest the plaintiff herein there could be danger to his life. He offered or requested the strikers to let him bring to them the Plaintiff. On their arrival at Maseru Central Charge Office the striking policemen pointed their guns at him, the Deputy Commissioner, the Plaintiff LETSABA and at one other officer who was with them. The situation was tense. Deputy Commissioner talked to the



strikers and they listened. Deputy Commissioner asked the strikers to discontinue pointing their guns at them. They apparently did as asked. Deputy Commissioner seemed surprised although proud of his success to manage to get through to that riotous disorderly mob of striking policemen. He must be congratulated in his achievement.

It is the Deputy Commissioner's evidence that he was not part of the striking policemen. He was the mediator between them and Government. It is admitted that it is the Deputy Commissioner's action of bringing to the striking policemen the Plaintiff whom they arrested and detained. It is this witness's initial action of handing over the plaintiff to the strikers which resulted into plaintiff's unlawful arrest and detention. He created a dangerous situation. He should have foreseen the danger of arrest and detention. Deputy Commissioner foresaw something more serious than arrest and detention. Liability based on risk by deliberate creation of dangerous situation is new principle and seems quite unpopular. Its application is definitely restricted. Harm has been suffered by the Plaintiff. There is a strong feeling that for this delict reparations must be made. The question is who should compensate the Plaintiff. In the search for the person who should bear the responsibility great care must be taken to avoid over stretching the principle of vicarious liability well beyond accepted legal limits.

It is Deputy Commissioner's further evidence that he deliberately chose to handover himself this Plaintiff because he

feared the worst that could happen if the striking policemen themselves arrested Plaintiff. His action as he stated was done for the purpose of preventing the commission of an offence. It was his fear that Plaintiff's life might be in danger. But while acting for the furtherance of his police duty to prevent crime and also as a mediator between the striking policemen and Government, he took the step that resulted in Plaintiff sustaining these delictual wrongs of unlawful arrest and detention. Deputy Commissioner took that step with all these good intentions of saving Plaintiff's life. It is argued on Plaintiff's behalf by Mr. Matooane that the Deputy Commissioner should have foreseen that his actions will result in the Plaintiff sustaining the wrongs done to him by those striking policemen. There is no allegation in the Plaintiff's declaration that the delicts suffered by him were caused by Deputy Commissioner's negligence while he performed his duties during the course of and within the scope of his employment. At paragraph 5 of the Declaration it is alleged that "During the month of May in 1994, especially on 15th, 18th, 19th and 20th of the said month, police officers subordinate to the 1st Defendant whilst acting within the scope of their official duty with defendants unlawfully arrested the Plaintiff."

It is the evidence of Commandant of Police Training College where Plaintiff was stationed at the time that he received a call from Deputy Commissioner that he and Plaintiff should report at his office. This they did. There is nowhere in the evidence of Deputy Commissioner and that of Colonel Motjamela Plaintiff's

commandant and that of Plaintiff himself, that there is even a slight hint that the Deputy Commissioner effected an arrest of Plaintiff. At the time Plaintiff was in the Deputy Commissioner's company he was not under arrest. Even up to the stage when the Deputy Commissioner and Plaintiff were separated at Maseru Central Charge Office no hint nor mere suggestion was made that the Plaintiff was under arrest. Deputy Commissioner knew that the striking policemen wanted to arrest some of his officers. Apparently fearing for their lives especially in the case of this Plaintiff, Deputy Commissioner decided he should be present when the strikers make their arrests. According to the plaintiff on their arrival at the Maseru Central Charge Office he was taken to Stock Theft Unit Office to await the arrival of those members of the strike committee who wanted to interrogate him. Deputy Commissioner did not arrest Plaintiff. He merely put him there to answer their question.

Plaintiff was arrested and detained by the striking policemen not by the Deputy Commissioner. Lawful arrests can be done as provided by CRIMINAL PROCEDURE AND EVIDENCE ACT 1981, Legal Notice No.9 of 1981. PART V A and B. This action is brought against the Commissioner of Police and Attorney General alone. The striking policemen are not sued. They have not testified. Their reasons for arresting and detaining Plaintiff are not known by this court. These actions of arrest and detention of Plaintiff by the striking policemen were done entirely within their strike period. Those policemen who participated in the strike were not on duty. Their actions were

not carried out in the course of or within the scope of their employment. The striking policemen and/or their committee did not claim or is it indicated anywhere that their actions:- arrest, detention, interrogation of the Plaintiff were dictated by what they considered was required of them as policemen. [TSHABALALA V LEKOA CITY COUNCIL 1992 (3) SA 21].

The striking policemen were not acting in the course of or within the scope of their employment. "A master is answerable for the torts of his servant committed in the course of his employment bearing in mind that an act done solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may be done during his employment". My underlining for emphasis. This was said by INNES JA in the case of MKIZE V MARTENS 1914 AD 392 at 390.

First the acts of arrest and detention of Plaintiff in our case were done by striking policemen. No claim is made that they purported to carry out their police duties. The actions of arrest and detention of Plaintiff were solely for the striking policemen's interests and purposes.

- As the evidence of the Deputy Commissioner - who took Plaintiff into the custody of the strikers shows, their actions were not controlled by the office of the Commissioner which he and Plaintiff represented. Secondly those actions were not those described as police duties or

those actions envisaged as actions to be performed by policemen under the Police Order 1971.

MKIZE V MARTENS 1914 ad 382 AT 390 BY INNES JA. The main question to be asked with regard to the principle enunciated in this case is: Was the police strike the business of their employer? No. It was their very own affair for their very own interests and purposes?

The strikers' arrest and detention of Plaintiff was not connected with their work even although policemen are authorised to a arrest and detain suspects. Plaintiff was not suspected of commission of any offence. It was not challenged that his interrogators asked him questions such as: "Do you deny that you were at Quthing with FORD SEKAMANE. Do you deny that you know THABO MAKAKOLE and that he is a member of LLA. Do you deny that you gave Chaldine a police video. What offence was he suspected of Committing? None was mentioned. There is no offence suspected of being or heaving been committed in those questions. What was the arrest and the detention for? To satisfy their very own personal grudges they had against Plaintiff. This is the only inference that can be safely drawn from these facts. The arrest and detention were totally unconnected with their master's work. Therefore the master cannot be held vicariously liable.

South African Railways and Harbours v Marais 1956 (4) SA 610. In this case an engine driver against the instruction of his master, allowed a passenger to travel in the locomotive. As

a result that passenger was killed. On allowing the appeal against the decision of the lower court which allowed the widow to sue in forma pauperis Water Meyer CJ at Page 617 B-D pointed out that

"the test is not whether the act or omission complained of occurred whilst the servant was engaged in the affairs of his master, but whether it constituted negligence in performance of the work entrusted to the servant."

Strike action was certainly not the work the Defendants entrusted to the policemen. Consequently their action during strike action done in the furtherance of their strike or done for their own interests and purposes, cannot attract liability directly or vicariously to the Defendants.

The Plaintiff was arrested and detained in the Police cell. Plaintiff is not basing his claim of liability of defendants on this ground. As in MINISTER OF LAW AND ORDER V NQOBO 1992 (4) SA at 829 B & C the policemen in our present case were not on duty - they were on strike. They were not at any stage purporting to be carrying out any police functions. They were pursuing gratification for their own personal grudges. The use of police station is in the same way irrelevant as the use of lawful issued firearm used in the killing of Respondent's son by off duty constables in Nqobo's case - Supra.

The use of Deputy Commissioner's good offices for intervention in that industrial dispute is also irrelevant. Perhaps that is why there is no allegation of negligence against

the Deputy Commissioner in the Plaintiff's declaration. Plaintiff does not claim that it was Deputy Commissioner's clumsiness in the performance of his official duties that caused his arrest and detention. It would appear that no policeman during that period of strike, was exercising the functions to which he was appointed - AFRICAN GUARANTEE AND INDEMNITY CO. LTD V MINISTER OF JUSTICE 1959 (2) SA 437 A.

The payment for bread looted at the Bakery by striking policemen was made 4 months or so after the act. According to the evidence of the Deputy Commissioner this was done for the purposes of smoothing the relations between the police and the public. It cannot be regarded as an admission of liability for all delicts committed by the striking policemen. There may be difficulties as regards the point where the line of demarcation must be drawn. But that single act of ex-gratia payment cannot be regarded as establishing either a practice or basis for admission of liability. This action is dismissed. Each party to pay its costs.



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K.J. GUNI

JUDGE

For Plaintiff : Mr. Matoane

For Defendants: Mr. Putsoane