

CIV/T/259/2008

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOTLALENTOA KOPO
MAMONEUOA KOPO

1ST PLAINTIFF
2ND PLAINTIFF

AND

COMMANDER LESOTHO DEFENCE FORCE
ATTORNEY GENERAL

1ST DEFENDANT
2ND DEFENDANT

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE

DATE OF HEARING: 18TH MAY 2010 and 10TH FEBRUARY 2011

DATE OF JUDGMENT: 9TH MARCH 2011

Summary

Delict – Unlawful arrest and detention – Liability admitted – Quantum of damages – Impaired feelings and dignity of plaintiff – Factors to be considered – Duty of the Court under the Constitution to uphold liberty, safety, privacy and dignity of the individual.

Where first plaintiff, a retired brigadier and his wife are unlawfully detained and the first plaintiff is subjected to cruel and humiliating treatment at the hands of his captors, quantifying damages should be done objectively – all the time bearing in mind that the court has a

paramount duty under the Constitution of upholding the liberty, safety, privacy and dignity of the individual in both civil and criminal proceedings.

Peete J.:

- [1] On the 28th June 2008, the two plaintiffs – a husband and wife – filed a joint summons in office of Registrar in which 1st plaintiff claimed M505,000.00 for unlawful arrest, *contumelia* and medical expenses, while second plaintiff claimed M250,000.00 for unlawful arrest and detention.
- [2] In support of their delictual action for damages, the plaintiffs have filed a declaration in which it is averred that-

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“On the 18th June 2007 and at Maseru, members of the Lesotho Defence Force, acting within the course and scope of their employment as members of the Lesotho Armed Forces, unlawfully arrested plaintiffs without a warrant and for no just or probable cause.”

- [3] It is alleged by the first plaintiff that during the subsequent detention at Ha Ratjomose Barracks (lasting some 26 hours) he was subjected to cruel and unusual treatment namely-

“(a) he was kept in the cells with his handcuffed at all times;

- (b) when he wanted to relieve nature, young soldiers – young enough to be his sons, would undo (unzip) his trousers and the plaintiff had to relieve nature while still handcuffed;
- (c) he was subjected to verbal abuse and harassment.”

[4] It is also alleged that second plaintiff – wife of first plaintiff was unlawfully detained for several hours for which she claimed M250,000.00.

[5] The first plaintiff alleges that as a result of the unlawful acts of the said members of the Lesotho Defence Force plaintiff suffered extreme psychological trauma and had to receive medical treatment to reverse the effect of the said trauma. It is alleged that says he is still in need of further medical attention. All in all he claims M250,000.00 for unlawful arrest and detention and M250,000.00 for *contumelia*, M5,000 for medical expenses.

Defendant's Plea – admission of liability

[6] In their plea the defendants admit that on the 18th June 2007, the second plaintiff was detained for questioning in relation to first plaintiff's suspected involvement with a group of insurgents who were attacking and disarming members of the LDF in June 2007. After questioning she was let to go.

- [7] The defendants also therein admit that on the 18th June 2007 the first plaintiff was also arrested and subsequently detained by personnel of 1st defendant, handcuffed and taken to Ratjomose Military Barracks for questioning; and that the first plaintiff was treated with respect befitting a retired member of LDF but given the security situation at the time security precautions had to be taken.
- [8] Denial of liability was later abandoned by **Mr Motsieloa** for defendants thus leaving the matter of *quantum* of damages to be the only issue. In the case of **Minister of Law and Order vs Monti**¹ the issue of *onus* was discussed re:*delictual liability* and re:*justification* and that in general the defendant bore the *onus* to establish these.
- [9] Counsel for defendants candidly admitted that there was no lawful basis or justification whatsoever upon which the first plaintiff was detained. Even after his release on the following day or afterwards no further investigation or steps were taken regarding any involvement of the first plaintiff in the insurgency. It must be made crystally clear that this court condemns subversion in all its devious forms which imperils the security of the state and safety of the people. People who take arms against the government of the state commit high treason – a capital offence meriting sentence of death.

¹ 1995 (1) SA 35

Quantum of Damages (*non-patrimonial loss*)

- [10] In this case, it was common cause that the first plaintiff was detained from 7 am on the 18th June 2007 and released around 9 am on the 19th June 2007 – (this detention lasted about 26 hours). Second plaintiff was kept in detention for 3-6 hours. It was also common cause that the first plaintiff was handcuffed all the times. There were however no physical assaults during the lengthy interrogation.
- [11] In giving evidence, the first plaintiff *Motlalentoa Nelson Kopo* informed the Court that he first became a policeman in 1966 and later joined the Police Mobile Unit in 1974. He had only done standard six and had later completed a Junior Certificate whilst still a serving soldier.
- [12] He then sky-rocketed through the army ranks till he became a colonel and finally an army brigadier. He has also deputized Major General in his time in the Defence Force. His sterling career came to a crushing halt when he says he was given an early retirement in 1996. He then joined security service at MacCarthy Security Unlimited, a well known private security firm in Maseru.
- [13] He then went on to inform the Court that on a Monday morning of the 18 June 2007 at about 7 am as he was standing at the forecourt at LPPA (*Lesotho Parenthood Planning Association* (near the Sparrows Tavern) two or three army vehicles suddenly arrived and some soldiers quickly alighted carrying army rifles such as galilees. He

- identified one Mofolo donning a red beret. These soldiers then surrounded him pointing their rifles at him from the back, front and sides. He could feel the rifle muzzles. He says he then saw his wife sitting in the cabby of one of the vehicles.
- [14] He says they then barked an order “...*search him...*” and after searching him they took away 2 cell phones and car keys and gave these items to his wife. They then ordered “...*Bring your hands we fasten you No negotiations ...no talk...*” He says he was handcuffed at back.
- [15] Having embarked into another van, they transported him to Ha Ratjomose Barracks. Rifles were pointed at him all time.
- [16] He was escorted to a stone office building where he found three armed soldiers one of whom was Mofomobe and these were joined by others: Captain Ntoi, Lieutenant Moshidi, Sergeant Makara, Daneso (who was bursting with anger). The interrogation then went on like:-

Daneso: *Where are the army rifles? What is your party?*

Kopo : *What army rifles!*

Daneso: *Joale oa re halefela...?*

Kopo : *...I am sorry ...I have no party.*

Daneso: *Are you linked to Twala of the ABC- Thabane’s Party.*

Kopo: *I am not ... but my herdboy Retselisitsoe Moloji is an ABC member who frequently dons ABC colours.*

Moshidi: *Ntate enoa ke rangoane oa mosali oa ka!*

Kopo : *That is true.*

Daneso: *Have you been to an ABC rally/caucus?*

Kopo : *No!*

Daneso: *On the 9th June 2007 you were at Lakeside with the ABC as a member of the Committee styled Defence and Security Committee and you instigated the capture of army rifles ...?*

Kopo : *I don't know that ... I was at work?*

Daneso: *Now you are coming to speak ... (boiling with anger).
[Time : 9-10 am.]*

Kopo : *May I go to pass water?*

This is but part of the questions put to first plaintiff during the lengthy interrogation that night.

- [17] He then says Mofomobe (a 25 year old soldier) volunteered or was ordered to accompany him (still handcuffed) and he “*unzipped my trousers ... took out my penis so that I could urinate.*” Mofomobe was also embarrassed. “*This severely traumatized my mind ... it was my most private part. I was terribly humiliated as I passed water.*” At 1.00 noon when he again wished to be allowed to pass water he was told that Mofomobe had been sent an errand to town and another

young soldier repeated the unzipping procedure; taking out his penis so that he could urinate.

- [18] He says towards midnight Warrant Officer Mokete took over the interrogation. He was very humble and professional but was seeking to know more about ABC. At 9.30 am he was told he was being released.

- [19] He says he later went to Thaba-Nchu in the Free State where he was attended to by his son a doctor Leboli Kopo at Thaba-Nchu and he also went to Pelonomi Hospital in Bloemfontein.

- [20] He says afterwards since the detention trauma, he is used to uncontrollably shouting “...*Masole a ntsekisang*...?” This may be a post-traumatic symptom.

- [21] He submitted certain documents indicating attendance at Dr Mosotho’s Clinical Psychologist Clinic Bloemfontein and at Moroka Hospital. In particular one notes reads:-

*“Dr L. Mosotho
Pelonomi Private Hospital
Dr Belcher Road
Bloemfontein*

06/07/2007

To whom it may concern

Re: Motlalentoa Nelson Kopo

This is to certify that Mr M.N. Kopo was evaluated and treated by me for Acute Stress disorder caused by detention and psychological and emotional abuse during detention. He has however recovered after intensive psychological treatment.”

- [22] Other documents (esp one dated 20/06/07) indicate (despite their cryptic handwriting) that first plaintiff had acute depression, anxiety, and acute stress disorder. When he was examined at Thaba-nchu and Pelonomi Hospital in Bloemfontein in the Republic of South Africa. These doctors did not give evidence. These documents were however admitted by counsel.
- [23] ‘Mamoneuo Irene Kopo – second plaintiff also gave evidence in which she told the court that she was a teacher at Sefika High School and that she lived with first plaintiff and children at their home in Lithabaneng Ha Keiso.
- [24] She went on to tell the court that on the morning of the 18th June 2007 as she was readying the kids off to school, a group of soldiers arrived at her home and told her that they had come to search. They proceed to disconnect the telephone and armed with pointed rifles, they

proceeded to search all the rooms and Montseng (a daughter) asked “*where is the search warrant?*” to which they replied “*...so that we understand each other, do as we say!*” “*...where is Kopo?* **Answer:** “*At work at MacCarthys.*”

- [25] Having completed their search the soldiers then ordered: “*Take us to him.*” She says she offered to take them even though she was as yet not fully dressed to go out; she put on her coat.
- [26] Outside was parked a 4x4 army vehicle into which she made to enter and it was driven away at great speed.
- [27] At LPPA, the soldiers found the first plaintiff whom they immediately handcuffed him and all drove to Ha Ratjomose where the first plaintiff was led to a stone office building and she was driven back to their Lithabaneng home where they continued searching until they found a handgun and 3 rounds belonging to first plaintiff.
- [28] She says after this incident she has had sleepless nights. “*It was hard. There was nothing that entitled or justified the treatment we received up to today I am still emotional. It was difficult. It still touches me emotionally when/my husband arrived on the following day he was sickly ... I am entitled to a reasonable compensation even though it will not heal my trauma.*”

Constitution of Lesotho - 1993

[29] The Lesotho of today is a democratic Kingdom with a democratic Constitution of Lesotho. *Section 8* thereof declares-

Freedom from inhuman treatment

“8. (1) *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.*

(2) *Nothing contained in or done under the authority or any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Lesotho immediately before the coming into operation of this Constitution.”*

This right can only be attenuated under law one and one that is not prescribed in anyway. In a modern civilized society cruel or inhuman or humiliating punishment or treatment cannot and should not be meted to another human being. No one – whether soldier, police or prison officer – is allowed to mete out to anyone any treatment which can be described as *cruel* or *inhuman* or *indeed degrading* or *humiliating*. Such treatment violates human privacy and dignity given to man by God.

[30] The Constitution of the Republic of South Africa clearly protects human dignity in this form:-

“Human Dignity

10. Everyone has an inherent dignity and the right to have their dignity respected and protected.”

The benevolent and liberal, if not progressive, interpretation of this section resulted in the handing down by the Constitutional Court of South Africa of the now seminal case of *S. v Makwanyane*² which abolished capital punishment in South Africa as being a violation of human dignity, and as being cruel and inhuman form of punishment.

[31] Today Lesotho however still retains capital punishment and death by hanging is not regarded in as a cruel or inhuman punishment; and this is contained in the constitution of Lesotho - 1993³

[32] What is significant in this case is that the factual allegations made by the plaintiffs before this court have not been controverted and that once that factual foundation has been made, the *onus* rested on the defendant to show lawfulness or justification. Indeed, it is a trite principle of our Constitution that the *onus* to prove lawfulness of an arrest or detention rests squarely upon the arrestor. *Section 6* of the Constitution reads in part:

² 1995 (3) SA 391 (CC)

³ **Section 5 of the Constitution.** See also sections 297, 298 and 300 of the **Criminal Procedure and Evidence Act No.10 of 1981.**

“6. (1) *Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorized by law....*

.....
the burden of proving that he has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.” (my underline)

[33] It has long been recognized by our courts that the *quantum* of damages or compensation for unlawful detention, infringement of bodily integrity and impairment of feelings cannot be easily quantified in money terms by the courts.⁴ The courts have established certain principles in assessing compensation for cases involving non-patrimonial loss; but each case must be determined by its own particular circumstances. Some cases are aggravated in nature and in some cases the compensation for impaired dignity and integrity may exceed that for bodily pain. *Contumelia* (infringement of *dignitas*) includes outward embarrassment and subjective feelings of dignity and self-respect. These feelings may be violated by any conduct that actually insults a person.⁵

⁴ **Boberg** – Delict, 489.

⁵ *Delange v Costa* – 1989 (2) SA 587; *Benett v Minister of Police* – 1980 (3) SA 24. See *Mohlaba v Commander Royal Lesotho Defence Force* – 1991-96 vol1 at p.652.

Circumstances/factors

[34] In the present case, the Court has taken the following material factors into consideration:-

- (a) Status of first and second plaintiffs in society (namely first plaintiff is a retired brigadier after thirty years military service; second plaintiff is a high school teacher in the centre of Maseru and the court assumes that both are held in high esteem in their community;
- (b) The fact that invasion of the privacy of their home on the 18th June 2007 was both unlawful and groundless and admittedly so. These acts violated their fundamental right to privacy and family life as guaranteed under the Constitution – *Section 11* reads:-

“Right to respect for privacy and family life.

11. (1) *Every person shall be entitled to respect for his private and family life and home.*
- (2) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –*
- (a) *in the interests of defence, public safety, public order, public morality or public health; or*
 - (b) *for the purpose of protecting the rights and freedoms of other persons.*

(3) *A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the right guaranteed by section (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2) (a) or for the purpose specified in subsection (2) (b).*” (my underline)

The Englishman of old usually quipped “...*An Englishman’s home is his castle...*” meaning that the privacy of his home was paramount.

- (c) the brazen and public manner in which the arrest and detention were executed;
- (d) the degree of impairment of feelings of dignity – the test here should be an **objective** one - i.e how would a reasonable Mosotho of plaintiff’s status feel upon being subjected to such arrest, detention, abuse, humiliation? etc.;
- (e) respective length of detentions;
- (f) court to bear in mind that it is charged under the Constitution of Lesotho with the duty of upholding the liberty, safety and dignity of the individual⁶.
- (g) gauged probable indignity, discomfort, distress, fear and anxiety – [It however should be noted that no professional or expert evidence of doctor(s) who treated first plaintiff was called;
- (h) that the arrestors acted without reasonable or probable cause and this was admitted by their counsel;

⁶ Section 6 and 8 *Ramakulukusha v Commander Venda National Force* – 1989 (2) SA 813 at 847;

- (i) it has however not been shown that arrestors were actuated by an improper motive or malice nor were they “*on a frolick of their own*”.⁷ We also do not know who gave orders;
- (j) that a man of good standing was made a victim of unwarranted infringement of his personal liberty, safety, freedom, dignity and esteem at workplace tarnished.

[35] It has been often stated that the true value or worth of these human rights are not fully appreciated until one personally experiences their infringement! Other considerations are:-

- (i) publicity;
- (ii) previous cases – inflation;
- (iii) fairness vs *largesse*;
- (iv) conservative vs benevolent interpretation of the rights.
- (v) a retired soldier is in law a civilian and not subject to military discipline.

[36] The counsel for plaintiff and of the defendant have candidly agreed that the amounts claimed are a bit on the high side of *largesse* and could be reduced by the court having considered all circumstances and factors stated above. All previous decisions indicate that no cases are ever alike and some claims in some cases are sometimes inflated.⁸

⁷ **Thompson v Minister of Police** – 1971 (1) SA at 313 E-F

⁸ **Teboho Khosi v Second Lieutenant Babeli** – 1991-96 (Vol 1) LLR 275; see also **Solicitor General vs Simon Frank Mapetla** – C of A (CIV) No 17 of 1974.

[37] As my brother **Monapathi J.** commented in the **Khosi** case

*“...It is difficult to measure **contumelia**, pain and suffering in terms of money. It is not the purpose of the law to punish but to seek to compensate the plaintiff as much as possible with the aid of whatever evidence and information at the courts disposal, based on broad general considerations...”*

Aggravation and humiliation

[38] Whereas the amounts claimed by the plaintiffs may seem rather on the high side and ought to be reduced, what remains unmoved or unshakable are the sad and sombre facts of the arrest and detention their unlawfulness, their unfoundedness and absence of just cause; the first plaintiff, a retired soldier of high standing was arrested in public - probably in full view of his work mates; was handcuffed and bundled into an army van at gun point and driven *post haste* to Ratjomose barracks – subjected to rigorous interrogation that was based on misinformation about ABC links. The first plaintiff was continuously kept handcuffed for about 26 hours and not temporarily allowed even a free hand to enable him pass water on his own. An ordinary mosotho man values his manhood and his “*penis*” as one of his most private and precious assets of is body. A youngish soldier *Mofomobe* had an unpleasant duty to unzip the pants of the first plaintiff and take out his penis so that he could pass water. This disgraceful humiliation was done twice. One wonders: having arrested, searched and handcuffed, first plaintiff, why was first plaintiff’s other hand let free and he be escorted under armed guard to the toilet so that he might be able to

relieve himself? The only other motive – beside alleged security reasons – could only be to humiliate first plaintiff where it hurt most – his private manhood! Humiliation suffered by him was most extreme and hurtful to any reasonable, decent, respectable and right thinking Mosotho man. At any rate none of the senior army officers thereat could have tolerated the said treatment meted unto themselves. The Biblical advice “...*do unto others as you would like them do unto yee...*” still has a moral force even in our courts! The treatment meted to first plaintiff was atrocious, humiliating and shameful as well as unbecoming the serving members of the LDF.

[39] Brutality, atrocity and cruelty, besides being wholly uncivilized, dehumanizes other beings. Not only delictual but criminal liability may be attracted. Brutality and inhuman or sadistic treatment have been outlawed by many international instruments especially the **1948 Universal Declaration of Human Rights**. To allow, or to tolerate or to condone acts of cruelty and inhumanity tarnishes both our national image and our very civilization.

[40] A sub-culture of atrocity brutality and inhuman treatment should not be allowed to flourish in the armed forces; besides dehumanizing the victims, it promotes a self-perpetuating desire of revenge and retribution and can manifest itself in terrible and long lasting post-traumatic effects to all persons concerned; it also has a rippling labeling effect throughout the military institution.

[41] Very high standards of behaviour and discipline are required from the army personnel and at times these high standards call for high personal sacrifice of life and limb and at the expense of their own human rights⁹. A soldier obeys commands at all times and much has been said and written about the topic “*Obedience to Superior Orders*”.¹⁰

Assessment of Damages

[42] In determining the quantum of damages appropriate to both plaintiffs, the court has considered the cases of **Paul Sebeta Mohlaba and others vs Commander Royal Lesotho Defence Force**¹¹, where **Leon JA** of the Court of Appeal of Lesotho increased the award of damages made by the High Court from M35 000.00 to M75 000.00 describing the treatment meted to appellant “*barbaric ...disgraceful.*” Aggravation in Mohlaba’s case was very extreme, and detentions lengthy.

[43] In the case of **Commander, Lesotho Defence Force and others vs Tlhoriso Letsie**¹² **Scott JA** described the treatment meted to plaintiff as “*almost too ghastly to contemplate*” – but recognized that each case must be decided on its own unique circumstances and that the

⁹ See Section 24 (3) of the Constitution which attenuates the application of human rights to members of disciplined forces save those under sections 5,8 and 9 of the Constitution.

¹⁰ **R v Mokhantso** – CRI/T/95/02. See also **Osiel** – “*Obeying Orders – Atrocity, Military Discipline and Law of War.*”

¹¹ 1991-96 LLR vol.1 page 648 at 652; LAC (1995-1999) 184.

¹² C of A (CIV) 28/09.

trial judge has a wide discretion to award what he or she considers to be a fair and adequate compensation.

[44] I am of the view that though grossly humiliated during his detention both during the relentless interrogation and when he was caused to urinate with the help of junior officer unzipping his pants taking out his penis in order to him to urinate, first plaintiff was neither tortured or physically assaulted.

1. **First Plaintiff**

(a) Unlawful arrest and detention – M20,000.00

(b) *Contumelia* - M75,000.00

(c) Medical expenses – M5,000.00

2. **Second plaintiff**

(a) Unlawful detention - M15,000.00

(b) *Contumelia* - M25,000.00

3. Costs to Plaintiff

S.N. PEETE

JUDGE

For Plaintiff : **Mr Teele, KC**

For Defendants : **Mr Motsieloa**