

IN THE HIGH COURT OF LESOTHO

In the matter between:-

NYAKAZELA TEETSO

PLAINTIFF

And

OFFICER COMMANDING MABOTE POLICE

1ST DEFENDANT

COMMISSIONER OF POLICE

2ND DEFENDANT

ATTORNEY GENERAL

3RD DEFENDANT

JUDGMENT

**Delivered by the Honourable Madam Justice N. Majara
on the 10th March 2011**

Summary

Action for general damages and medical expenses – onus on plaintiff to adduce evidence to prove his loss – plaintiff not brought sufficient proof for claim for medical expenses - Court to use reasonable discretion to determine non-patrimonial loss –such award not remedy for loss nor enrichment but meant to sooth plaintiff for physical-mental injury and to deter illegal acts.

The plaintiff instituted this action against the defendants wherein he claims damages and medical expenses as a result of an alleged unlawful arrest and assault on his person by officers subordinate to the 1st defendant. To prove his case he testified that, on the 5th August 2007, he left home to Ha-Seoli at his grand-mother's place to take her child to Roma. On his way there, he received a call from one boy of Ha-Masana requesting that they meet at Lakeside. This was followed by another incoming call from a police officer named Lekhooa who told the plaintiff that he was with another police officer named Mahase.

They enquired where the plaintiff was and instructed him to report himself at the Mabote police station. The plaintiff informed the Court that he went to the said police station as instructed but did not find the said police officers. He was told to come again the following day. On the 6th, he reported himself as advised but the said police officers were still absent and he waited for them. Upon their arrival, the police officers asked the plaintiff to hand in a 9mm pistol and the latter replied that he had no knowledge of it. They then instructed him to untie his shoe laces and belt, took his mobile phone and detained him.

On the evening of the 7th, the two police officers fetched the plaintiff from the holding cell and again asked him to disclose where the pistol was. They then told him that they were going to the mountain first although plaintiff did not know what they meant. The police officers covered plaintiff's face with a rubber-like thing and while on the way, Lekhooa asked him to undress. They were travelling in a police vehicle and they assaulted him.

The plaintiff undressed while the vehicle was moving but was told not to remove the rubber on his face. He was then tied hands and feet. On arrival at the destination unknown to him, the police officers pushed the plaintiff because he could not see the way as his face was still covered, until he felt he was falling into some water. He was once more asked where the gun was and he denied any knowledge of it. They dipped him in and out of the water repeatedly, asking him to produce the said gun. They beat him with a stick and he felt something like a boot pressing on his head.

They then took him back to the vehicle where he was told to put on his clothes but they did not uncover his face. When they arrived at the police station, his face was uncovered and he was returned to the holding cell. On the morning of the 8th, the plaintiff was called by Lekhooa and told to wash the police car. Afterwards, he was called to the office, given his belongings and released. The plaintiff told this Court that before he left he went to the reception and asked for a medical form but was denied it. He then left and on his way to town he met his brother one Motlatsi who upon seeing him insisted that they go back to the police station to demand a medical form.

He was then given a medical form and went to see a doctor but because it was late, he only received treatment and was told to collect medication the following day. The medical form was filled in by the doctor and it was handed in by the plaintiff and was marked exhibit "A". The plaintiff further informed the Court that he suffered damages in the amount of M49 591. He also prayed for payment of his medical costs, 18.5 % interest on the amount claimed, 10% collection fee and costs of suit.

The next testimony was that of PW 2, 'Marethabile Mosakeng (Mannini Teetsa) who stated that she is plaintiff's aunt and they both reside at Tsitsa. She stated that on the 5th August 2007, there arrived police officers looking for the plaintiff who was not at home at the time but had gone to his grandmother's place at Ha-Seoli. The police officers left without giving their names. On the following day, other police officers arrived looking for the plaintiff but he was still not at home. The plaintiff arrived home on the 8th and informed PW2 that he was from the police station. He showed PW2 a medical report and told her that the police had assaulted him.

Under cross-examination, PW2 testified that he saw a bruise on Plaintiff's head and when put it to her that she was not telling the truth as she did not say that in her evidence in chief but was only saying that pursuant to the question asked under cross-examination, she insisted that her evidence was true.

PW3, Motlatsi Mokoma, stated that he is the plaintiff's cousin and that on or around the 6th August 2007, he received a message from his aunt to the effect that the plaintiff had been arrested by the Mabote Police. He went thereat and met the plaintiff who gave him a report. After hearing the story, PW3 insisted that that they go back to ask for a medical form and police officer Lekhooa refused to give it to them. They asked to see the Officer Commanding Mabote Police Station, Mr. Letoane. The latter ordered that they be given a medical form which was filled in by the police. They then left to the hospital. According to this witness, the plaintiff appeared to have been tortured and he noticed that sand came out of his nostrils when he blew his nose. He stated

further that his condition was not as it had been when he last saw him before he was arrested.

PW4, Teboho Samuel Phai's evidence corroborated that of the plaintiff that on the 5th day of August 2007, he was with him when he received a call that summoned him to the Mabote Police Station and told him to look for Lekhooa when he got there. They went together to the station but Lekhooa was not there and they were told to come the following day. On the next day, having tried to reach the plaintiff on his phone and enquiring from his aunt's place but in vain, PW4 proceeded to Mabote police station looking for the plaintiff. Lekhooa told him that it was late and that he should come the next day and that the plaintiff was still with them.

In the morning of the next day, the plaintiff and PW3 arrived at PW4's place. According to PW4, the plaintiff was shivering with cold and he lent him his jacket. When PW4 asked him what was wrong, the plaintiff replied that he was not well but PW4 said he could not take him to the hospital as he had to get to work. During the proceedings in Court, PW4 said that he did not know Lekhooa prior to meeting him at the police station on the mentioned day but could then identify him. He stated further that Lekhooa was in Court and proceeded to point at him. After the above evidence was led, the plaintiff closed his case.

The defence called its first witness, No. 8190 Police Constable Lekhooa. He testified that he was stationed at the Mabote Police Station in August 2007 but denied any knowledge of the plaintiff facially he however added that he only knows his name. Further that he does not know the plaintiff's witnesses except the lady whom he met at Moruthoane where it was alleged the plaintiff

was staying. That on the 5th August 2007, he was with one Sergeant Mahase and other police officers investigating on stolen stock. It was then that they received information that one Nyakazela Teetsa might have an illegal firearm in his possession which may have been used in the crime they were investigating.

When they arrived at the plaintiff's place, they did not find him but were told that he could be at his sister's place at Lithoteng. Upon arrival at Lithoteng, they were informed by the sister that the plaintiff was not present but were given his phone number. DW1 called the number and it was answered by the plaintiff who was informed to report at the Mabote Police Station for explanations. The plaintiff promised to come later that day but according to DW1, he never did.

On the 6th, August, DW1 went to Nazareth for more investigations, some of which concerned the plaintiff although he was still expecting him to report himself. The witnesses told the Court that he never went back to the office that day but only arrived there late on the 7th. He asked his colleagues whether the plaintiff had reported himself and he was told that he never did. DW1 then gave up because he was told the plaintiff must have gone to his mother in Johannesburg.

DW1 added that he would have known if the plaintiff had reported himself because he was not working alone and his co-workers could have told him if he had been arrested. That further, there is a cell-registrar that is filled in to show when a person has been arrested and there are detention forms signed by the arrestee. It is DW1's case that he never arrested nor assaulted the Plaintiff; he told this Court that he has never met nor seen Plaintiff and that he

is still looking for him. DW1 did admit that he knows Letoane and that he was his senior, however, he does not recall any incident such as one before Court happening and he has never refused to give a medical form to such a person.

The second witness for the defence No. 7931 Sergeant Mahase, took the stand and testified that he was stationed with DW1 at Mabote Police Station in August 2007 and knows the plaintiff by name only but has never met him in person. He told the Court that he was with DW1 and other police officers to arrest one Ntheli Kapeso who mentioned that they had used a certain firearm with the plaintiff in committing an armed robbery. The said firearm was said to be with the plaintiff. They went in search of the plaintiff but did not find him. They got his phone numbers and DW1 talked to him.

DW2 was adamant that he has never met the plaintiff, arrested nor assaulted him. He informed this Court that he has never read a report about the plaintiff reporting himself at the Mabote Police Station as he had sent DW1 and other officers on duty on patrol. He added that he has no knowledge of whether the plaintiff was arrested or not although he could have known through the register, the occurrence book and detention forms and he has never seen such. He also denied knowledge of the alleged assault.

Taking into account all the evidence, the question that this Court has to determine is whether the plaintiff was indeed arrested and is so whether such arrest was lawful. Secondly whether, the plaintiff was assaulted when in detention.

I find it convenient to deal with all these issues simultaneously and I proceed to do so. It is common cause that the plaintiff received a phone call from

Lekhooa who was in the company of Mahase to report himself at the Mabote Police Station. It is the plaintiff's evidence that he did so report and this is denied by the defence witnesses. However, PW3 testified that on the day he was released, he met the plaintiff near the Mabote police station premises and upon receiving a report from him and noticing the state he was in, he insisted that they go back inside to demand a medical form. The said form/report was handed in as an exhibit before the Court and its contents confirm that the plaintiff was assaulted. pW4 corroborated the evidence viz, that he was with the plaintiff when he was arrested and he did go and see him at the Police Station.

It is my opinion that this evidence constitutes sufficient proof of both the arrest and the assault. However, the two defence witnesses deny that the plaintiff was arrested and/or detained by them. They however agree that they are the ones that ordered him to report at the Mabote Police Station. I therefore do not see who else could have arrested, detained and assaulted the plaintiff aside from the two people who ordered him telephonically to so report. Further, the plaintiff's evidence that Lekhooa even ordered him to wash a vehicle was not rebutted at all.

Although during cross-examination, the Defence Counsel, **Mr. Molokoane**, suggested to the plaintiff that he never reported himself at the police station but caused the police to look for him and if he had indeed reported himself at the police station, the police officers would have known, the plaintiff stuck to the story that he gave in his evidence in chief. **Mr. Molokoane** also put it to him that it is the evidence of the defendants that they never met the plaintiff at all on the said dates, but the plaintiff stated that he did meet the two police

officers on the dates mentioned and that they did arrest him and assault him as aforesaid.

The plaintiff's evidence in this regard together with that of PW4 who went to see him at the police station and PW3 to the extent that the latter met the plaintiff on his way from the police station remains unchallenged. PW2 also told the Court that the plaintiff was away from home for the two stated days after the police had come looking for him. His aunt confirmed the two days absence from home and the apparent injury on his person. Against this background, I cannot be expected to believe that it was by some sheer coincidence that the two police officers who by their own admission ordered the plaintiff to report where they were stationed and where he was arrested, detained and assaulted are not the culprits and that the plaintiff was arrested and assaulted by some unknown people. Their story cannot be believed.

Further, the plaintiff's evidence that he met Letoane who is the two defence witnesses' senior at the Mabote Police Station also remains unchallenged. The medical form is further proof that the plaintiff lodged a complaint and was issued with the medical form thereat. The form bears the Lesotho Mounted Police Service Stamp.

The standard of proof in civil matters is on a preponderance of probabilities and not beyond a reasonable doubt. In my view, the evidence that has been placed before this Court has sufficiently established that the plaintiff has made out his case on a balance of probabilities insofar as the arrest and assault are concerned. That is to say, the probabilities arising from the evidence before this Court are weightier in favour of the plaintiff's case than they are of the defence case. Indeed, I am in respectful agreement with the remarks of the

Court in the case of **West Rand Estates Ltd v New Zealand Insurances Co Ltd 1925 AD** where Kotze JA stated that:-

“It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the onus on the other side to rebut it.”

In the present case, not only has the defence failed to rebut the plaintiff's case, but it is also my view that the half hearted attempt on the part of its two witnesses to plead alibi is totally negated by all the evidence that has been placed before this Court. As I have already stated, not only did they call the plaintiff on his phone and ordered him to report at the Mabote Police Station, but he in fact did so and was detained per their orders and in terms of his un-rebutted evidence by the both of them. I therefore am not persuaded to accept that he was assaulted by some aliens at that very police station and on the very stated days. Further, the evidence of the plaintiff and his witnesses that he was issued with a medical form by the senior officer at the Mabote Police Station was not challenged either during cross-examination nor was Mr. Letoane called to testify to that effect.

Coming to the question whether the arrest itself was unlawful, nothing was placed before the Court to substantiate the claim. Instead, the evidence shows that the plaintiff was called on his phone and told to report at the Mabote Police Station on suspicion consequent to information the police had received that he was in possession of an illegal firearm. This evidence was not challenged at all.

In terms of the law, police officers have powers to arrest any body with or without a warrant as the case may be, upon reasonable suspicion that such person has committed an offence. In my opinion, the test herein is not whether the firearm was indeed found in the plaintiff's possession or not, but whether the suspicion was reasonable. It is my finding that in the absence of any evidence to the contrary, the suspicion was reasonable therefore, the arrest was not unlawful despite the assault.

This in turn brings me to deal with the issue of the quantum claimed by the plaintiff. In terms of the contents of his declaration he claims damages in the amount of **M49, 591.00, M1, 000.00** for medical expenses and interest at the rate of 18.5% from the date of summons.

I now turn to deal with the claim for medical expenses. Aside from testifying that he was treated at Queen II hospital, the plaintiff did not bring any evidence as proof that he did spent that amount on medical bills. During cross-examination, **Mr. Molokoane** put it to him that the amount claimed is so inflated as not to be commensurate with the injuries inflicted. The plaintiff admitted under cross-examination that he did not provide proof of payment at Queen II Hospital before Court although he insisted that he has it at home and that he paid M1, 000.00.

It is trite that a party who makes a claim for patrimonial loss has to bring sufficient proof before the Court can award him the claimed amount. The claim in this respect is a liquidated one and the onus is on the plaintiff to show that he suffered such loss. In my view, the plaintiff has failed to show how he expended **M1, 000.00** at the Government hospital when in terms of his testimony he was not even admitted but was only treated as an out-patient

and told to come and collect his medication on the following day. I am also not in a position to decide on any other amount without the necessary evidence to that effect.

While I agree with the position stated in **ESSO Standard SA (Pty) Ltd Katz 1981 (1) SA 964** quoted to this Court namely that a wrongdoer is not relieved of the necessity of paying damages simply because a plaintiff did not have the foresight to collect evidence which he probably never saw the necessity for at the time when it was obtainable, I am of the view that the plaintiff in the present case should have foreseen the necessity of bring bills on a claim of medical expenses, especially because he is legally assisted. I therefore find that this particular claim cannot stand for want of proof.

With regard to the claim for damages the plaintiff stated in his evidence that as a result of the arrest and assault he suffered damages in the amount of **M49, 000.00**. A claim for general damages for non-patrimonial loss usually presupposes injury to personality which is often rather intangible in its nature. In most cases the loss is caused by the impairment of the physical-mental integrity. Without getting into the different theories propounded by scholars with respect to the nature of non-patrimonial loss, I am of the opinion the said theories are aptly put in their proper perspective by Ogus in his work **Damages**, quoted in **Visser and Potgeiter (supra)** at page 93 where he summarises them in the following terms:-

“The award is measured in (a) by the extent of the injury, in (b) by the extent of the loss of happiness and in (c) by the extent to which the money can provide the plaintiff reasonable solace.”

It is trite that that the extent of the loss in a claim of this nature cannot be assessed with mathematical precision. The Court is thus advised to exercise a

reasonable discretion and other consideration in its determination of what should be a just and fair award. In this regard, the onus is on the plaintiff to adduced sufficient facts to assist the Court to make a fair estimate of the loss.

In terms of the plaintiff's testimony in the present case, during his detention, he was taken to an unknown place with his face covered and was dipped in cold water and assaulted on the body. However, his evidence did not sufficiently reveal the extent of his physical injury nor was any led on the extent of his mental injury.

This in turn leaves the Court with the difficult task of making an estimate of the loss with nothing much to base itself on. Mindful that this type of award is not meant to enrich but is more a form of reparation as well as being retributive and deterrent in nature, it is my view that given the circumstances of this case, an award in the amount of **M30, 000. 00** would be a fair and just. I so find together with interest at the rate of **18.5%** from the date of summons as claimed, as well as costs of suit.

There was also a novel claim of 10% collection fee which was neither supported with facts nor justified in terms of any applicable law and/or rule and I accordingly dismiss it.

N. MAJARA
JUDGE

For the plaintiff : Mr. Metsing
For the defendants : Mr. Molokoane

