CIV/T/246/07

IN THE HIGH COURT OF LESOTHO

In the matter between:

NYOLOHELO TAE	**PLAINTIFF**
And	
SEPINARE MASUPHA	**DEFENDANT**

JUDGMENT

Coram : Hon. Majara J.

Date of hearing : 10th September 2012

Date of judgment : 12th January 2013

Summary

Action for general damages and medical expenses – onus on plaintiff to adduce evidence to establish contumelia, pain and suffering and medical expenses – Court to use reasonable discretion to determine non-patrimonial loss – such award not

remedy for loss nor enrichment but to assuage plaintiff's feelings for physical – mental injury and to deter and censure illegal acts especially of a violent nature - insufficient proof for claim for medical expenses.

ANNOTATIONS

BOOKS

1. L H. Hoffmann and D Zeffertt; the South African Law of Evidence 4th Edition

CASES

1. Thabane v National University of Lesotho LAC (2007-2008)
2. Mohlaba and Others v Commander of the RLDF and Others LAC (1995-1999) at 191
3. R v Tager 1944 AD 339
4. Botha v Pretoria Printing Works Ltd 1906 TS 710
5. Nyakazela Teetsa v Commissioner of Police & 2 Others CIV/T/ 445/07 (unreported)

[1] This is an action for damages in the sum of M50, 000.00 against the defendants for contumelia, pain and suffering, impairment of dignity and hospital expenses arising out of an alleged wrongful and unlawful assault of the plaintiff by the 1st defendant who in terms of the plaintiff's evidence, hit him with a fist on the forehead, kicked him all over the body and hurled insults and abusive words at him in public and in sight of members of the Lesotho Mounted Police services (LMPS) and some suspects that were detained thereat.

[2] The matter was initially heard and judgment granted by default in favour of the plaintiff sometime in August 2007. The judgment was however rescinded and set aside during the same month subsequent to which a pre-trial conference was held in December 2011 and the matter was enrolled for hearing before me.

[3] On the date of hearing the plaintiff who is a police officer took the stand and adduced evidence to the effect that on the 25th December 2006 he was on duty at the Beat Office of the Maseru Central Charge Office in the company of police officers Seleke, Ralejoe and Police Assistant Masupha. It was his testimony that he was the most senior of all the said police officers. Around 4.30 pm they were eating in the office when the defendant arrived and parked his car outside. He came in and was very furious and told them to get out of the office. He told the defendant that they were eating and the defendant shouted that they should get out and accused the plaintiff of being in the habit of talking back at him.

[4] As they moved to get out, they met the defendant in the doorway and the latter manhandled him by his clothes. He then told the others to leave, closed the door and hit him with fists whereupon the plaintiff fell down. The defendant then kicked him all over the body and insulted him in the process; *"fuck you Tae, fuck you Tae!*" at the top of his voice. He then stood on his ear whilst the plaintiff was still on the floor. He then picked him up, placed him on the desk and continued to hit him with fists, still insulting him.

[5] When the plaintiff looked up he noticed Police Woman Lehloenya (PW2) Trooper Tsasanyane (PW3) and PW2 pleaded with the defendant to stop assaulting him. The defendant then went out and charged at the officers that were outside and

had been observing the assault through the window and it is the plaintiff's testimony that he saw others running away. He then went to lay a complaint at the Maseru Central Charge Office.

[6] It was his further evidence that on that day, the defendant was not on duty and was not in uniform as he was in his private clothes namely short pants and a t-shirt. Further that he went to hospital but does not have the receipts for the hospital expenses.

[7] PW2's testimony was to the effect that on the day in question she was on duty in the company of troopers Mokorotloane, Sello and Tsasanyane. As they went past the Beat Office to the toilets where they were escorting suspects they saw the 1st defendant who was in his vehicle speaking to the police officers that were in the office and telling them to go out to work. It was her evidence that she and the other proceeded to the toilets and as they were waiting there they heard some commotion coming from the Beat Office. She and PW3 went to investigate and as they looked through the window they saw the defendant standing on someone and hitting him with fists. He then pulled that person up and placed him on the desk whereupon PW2 realised that it was the plaintiff.

[8] It was her further evidence that she called out to the defendant and pleaded with him to stop and the defendant let go of the plaintiff and chased her calling her a whore and she outran the defendant towards another office. She then left. She

also testified that the defendant was not wearing his uniform on that day. PW3 corroborated the evidence of PW2 in most if not all the material aspects. He added that the defendant was very furious and he had never seen him dressed in private at work.

[9] At the end of the plaintiff's case the defendant elected to close his without taking the stand. This effectively means that the plaintiff's story was not gainsaid but for what was put to the witnesses during cross-examination. While it is his right to do so, he has unfortunately denied the Court the benefit of hearing his version of events. It is a trite that what is suggested to witnesses by the defence Counsel during cross-examination is not evidence.

[10] In the heads of arguments that he submitted on behalf of the defendant, **Mr. Matooane KC** made the submission that the alleged assault on the plaintiff was witnessed by two people only, was short-lived, not severe and did not cause any personal injury. He urged the Court to contrast the circumstances of this case with those in **Thabane v National University of Lesotho**[1]where the defendant was assaulted in front of a large crowd of his own students and suffered bodily injury.

[11] It was also **Mr. Matooane**'s submission that with respect to the claim for damages for impairment of *dignitas,* the plaintiff did not tell the Court during his testimony how the words *"fuck you Tae"* that he alleges the 1st defendant uttered

[1]LAC (2007-2008)

made him feel as he had the duty to do so. He added that the evidence that has been placed before the Court is insufficient to guide it in assessing damages under this head with respect to the seriousness of the insult, the plaintiff's social status and the degree of publicity to outsiders.

[12] Lastly, Counsel for the 1st defendant added that the defendant was not driven by personal interest but his duty to protect the public and that the plaintiff conceded to his serious dereliction of duty and insolent behavior when he was ordered to back to duty and that for these reasons, the assault was caused by the provocation by the plaintiff and that these were justifiable grounds for the defendant's conduct. He urged the Court to award the plaintiff the nominal damages of no more than M5.00.

[13] I now proceed to consider the question whether given these circumstances the plaintiff has successfully made out his case of assault. I have already shown that the defence elected to remain silent so that the only evidence that the Court has to consider is that of the plaintiff. I need not dwell much on this factor as in my opinion the plaintiff has successfully established that the 1st defendant did assault him on that day as was corroborated by the two eyewitnesses.

[14] The next question for my determination is whether the plaintiff has successfully made out his case for the quantum he seeks under the different heads namely *contumelia*, pain and suffering, impairment of dignity and hospital expenses.

Contumelia

[15] A claim for damages under this head is normally sought where a person feels that his dignity has been impaired and it includes his subjective feelings of dignity or self-respect. These may be violated by any conduct which actually insults a person. It is accordingly required that the plaintiff must prove that he actually felt insulted on account of the defendant's conduct.

[16] In this matter, the plaintiff testified that he was assaulted in the office and that this was witnessed by the two officers that took the stand after he did. He however did not tell the Court how the incident made him feel and/or whether the two witnesses or any other person ever made reference to the incident in a manner that hurt his dignity or self-respect. He therefore left this responsibility in the hands of the Court. For claims under this head, the test to be applied is a subjective one but the onus is still on the plaintiff to prove it.

[17] My understanding of how *contumelia* is determined is that the act should in itself be demeaning. Physical assault on the person of another is a demeaning act in itself and this is a matter **of general knowledge** which in my view cannot be disputed by a reasonable person and of which I take judicial notice. [2] Indeed as the Appellate Division of South Africa approved the sentiments of the learned author Wigmore in his work Evidence and which remarks I respectfully agree with:-[3]

> *"... the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer outside court."*

---

[2] L H Hoffmann and d Zeffertt; The South African Law of Evidence 4th P417

[3] R v Tager 1944 AD 339 AT 344

[18] However, although I am of the view that the act of being assaulted is demeaning in itself, the difficulty I have is how to ascertain how the plaintiff actually felt without his having told the Court. However, I am guided in this regard by the remarks of Innes CJ [4]which **Mr. Tsenoli** quoted to this Court where the learned Chief Justice had this to say:-

> *"When one man slaps another's face there may be no great pain inflicted and no doctor's bill incurred; but the insult offered to the man attacked is the thing which the court is justified in compensating by substantial damages. If courts of law do not intervene effectively in cases of this kind, then one of the two results will follow - either one man will avenge himself for an insult to himself by insulting the other, or else he will take the law into his own hands."*

[19] I am also mindful that the alleged assault did not happen out of the blue, albeit the 1st defendant did not testify in his defence. During cross-examination, the plaintiff did concede that he was supposed to be on duty out in the streets and that the 1st defendant was his senior at that time hence his arrival at the office in a foul mood judging from the admitted exchange of heated words between the two of them.

[20] In my opinion the evidence reveals that the altercation was caused by the plaintiff and his colleagues' dereliction of duty which somewhat lessens the moral blameworthiness of the 1st defendant even though what he did was unlawful and cannot be countenanced. In addition, the fact that he was in private clothes at the time he arrived is neither here nor there as the evidence before the Court has

[4] Botha v Pretoria Printing Works Ltd 1906 TS at 710

established that he went there as a result of the absence of his juniors the plaintiff included, at their place of work.

[21] When these factors are considered together with the fact that the evidence has revealed that the incident was witnessed only by three of his colleagues, two of whom also came to testify on behalf of the plaintiff and all of whom were also supposed to be on duty on that day, I am led to conclude that a substantial award would not be justifiable because I also have to take into account their irresponsible behavior as police officers. Indeed the Court is enjoined to use reasonable discretion to determine non-patrimonial loss because such an award is not a remedy for loss or enrichment of the plaintiff but is meant to sooth him for physical-mental injury and to deter similar illegal acts.

Pain and Suffering

1. Damages under the head, pain and suffering is a claim for non-patrimonial loss. The onus is on the plaintiff to establish before the Court how he allegedly felt and suffered. While I cannot pretend not to know that any act of physical assault can cause pain and suffering, it is however logical that the degree thereof will always be established by the evidence of the claimant. While the plaintiff in this case did testify that he was assaulted with fists and kicked while he was on the floor, he did not tell the Court how he felt. He also said nothing about the actual pain and suffering he felt during and post, the assault. This too, he left in the hands of the Court to figure out the quantum for itself.

[22] It is not sufficient for a plaintiff to simply state an amount in damages in his summons. It is incumbent upon him to give the Court a fairly good idea of how he arrived at that amount or why he thinks it should be awarded to him. In this regard, I had occasion to quote with approval the remarks of Leon JA in **Mohlaba and Others v Commander of the RLDF and Others**[5] where he stated that "*there are no scales by which pain and suffering can be arithmetically measured in money.*"

[23] One of the guiding factors in determining an award of this nature is to always bear in mind that the idea is not to enrich a claimant but simply to offer him an award that will somewhat assuage his feelings. Unfortunately under these circumstances the only award I can give to the plaintiff in this case is a nominal sum for the reason that he has failed to establish how he suffered under this head. This is more so because he conceded under cross-examination that he did not have any visible injuries in the form of contusions, wounds etc. He also did not hand in any medical report as proof of his injuries save to testify that he went to Queen II and Lady-brand hospitals respectively.

Medical expenses

[24] This in turn brings me to the last head namely, medical expenses. In this regard, the only evidence I can rely on is that of the plaintiff to the effect that he went to the two hospitals mentioned above. He did not hand in any documentary proof such as receipts, a health book or a medical report. I therefore do not know how much he spent if at all especially in the light of his admission that there were no visible injuries. It does happen that one can get assaulted without necessarily

[5] LAC (1955-1999) at 191

having to go to the doctor's and or to get any form of medication. Thus, the plaintiff ought to have submitted some form of proof with respect to how he allegedly spent the amount of M1, 000.00 in medical expenses.

[25] When considering this very issue in the case of **Nyakazela Teetsa v Commissioner of Police** & **2 Others** [6] I stated as follows:-

> *"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 q****uoted 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 bringing 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."*

[26] It is on the basis of the same sentiments that I am unable to award the plaintiff any sum under this head. In the result and for the above reasons I order that the plaintiff's claim be granted as follows:-

---

[6] CIV/T/445/07

(i) M15, 000.00 for contumelia;

(ii) M2, 000.00 for pain and suffering;

(iii) Costs of suit

<u>N. MAJARA</u>
JUDGE

For the plaintiff	:	Mr. P. Tsenoli
For the defendant	:	Mr. T. Matooane KC