

# IN THE HIGH COURT OF LESOTHO

CIV/T/72/2011

In the matter between:-

**LORI RAMASHALA**

**PLAINTIFF**

**AND**

**POLICEMAN MAKUTLE MAKUTLE**

**1<sup>ST</sup> DEFENDANT**

**THE COMMISONER OF POLICE**

**2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL**

**3<sup>RD</sup> DEFENDANT**

## **JUDGMENT**

**Coram** : Hon. Mahase J.  
**Date of hearing** : Various dates  
**Date of Judgment** : 15<sup>th</sup> August 2013

### *Summary*

*Civil Procedure – Arrest without warrant – Unlawful torture and arrest – Whether arresting police had reasonable grounds of suspicion – Claim of damages for same – Discretion of court to award general damages.*

ANNOTATIONS

CITED CASES

- **Commander of Lesotho Defence Force v. Tlhoriso Letsie C. of A. (CIV) No 28/2009 dated 12/10/2010 (unreported).**
- **Neo Masupha v. Commissioner of Police CIV/T/149/2005.**
- **Naidoo v. Senti, LAC (2007 – 2008) 161 at 164.**

- **National Employers' General Insurance v. Jagers 1984 (4) S.A. 437 (E) at 440 E G.**
- **Mhaga v. Minister of Safety and Security (2001) 2 All S.A 534 (TK)**
- **Minister of Safety and Security and Another v. Johannes F. Swart, case No. 194/11**
- **Duncan v. Minister of Law and Order, 1986 (2) S.A. 805 (A) at 818 G – H.**
- **Jonas Mokete v. Commissioner of Police and Others; CIV/T/610/93**
- **Commissioner of Police and Another v. Rantjanyana C. of A. (CIV) No. 11 of 2010 ([www.lesotho.lii.org](http://www.lesotho.lii.org))**
- **Pitt v. Economic Insurance Co. LTD 1957 (3) S.A. 284 (D) at 287 E – F.**

#### STATUTES

- **The Constitution of Lesotho**
- **Criminal Procedure and Evidence Act No. 9 of 1981**

#### BOOKS

- **Law of Delict 3<sup>rd</sup> Edition, 1999, page 353 per Neethling, Potgieter and Visser**

[1] The plaintiff, a self-employed businessman is claiming damages in the sum of one hundred and fifty thousand maluti (M150,000.00) against the defendants for unlawful arrest and detention, assault, pain, shock and suffering, contumelia and medical expenses.

He is claiming payment of same at the rate of 12% interest per annum as well as costs of suit.

[2] The defendants are defending this matter even though they do not deny that the plaintiff was arrested and detained from the 1<sup>st</sup> up to the 3<sup>rd</sup> November 2010.

- [3] The parties are also in agreement that the plaintiff was ultimately not criminally charged with having committed an offence subsequent to his arrest and detention.
- [4] They also agree that force was used against the plaintiff because the plaintiff refused to be put in the police cell. Of course the plaintiff denies that he refused to go into the police cell.
- [5] The plaintiff was arrested by the first defendant who acted within and during his scope of duties. The reason for the plaintiff's arrest being based on an allegation that the plaintiff had committed the crime of house breaking and theft where a cell-phone belonging to one resident at Thabana-Morena had allegedly been stolen.
- [6] Subsequent to his arrest, the plaintiff was taken to Thabana-Morena police station, just a few kilometers out of Mafeteng town. At the police station, the plaintiff is alleged to have refused to go into the police cell but he was forcefully taken into that cell by the first defendant assisted by some of his colleagues. In that cell he found DW2 with whom he was locked.
- [7] Once in the police cell, plaintiff was taken yet into an inner room wherein he was severely tortured for a lengthy period for two days. Actually he testified that it was the first defendant who ordered him to undress. He obliged, and remained only with his underwear.
- [8] Having undressed, the first defendant and another policeman whose name the plaintiff did not know, then forced him to sit over iron bar, handcuffed

him, made him sit over the iron bar which they had placed across on opposite chairs. In other words he was made to sit in that iron bar which had been put between the two chairs. In that position his feet were suspended from the floor.

[9] The two policemen then assaulted the plaintiff with sticks over his body and under his feet. He felt great excruciating pain. They also had pepper spray sprayed over his eyes thereby momentarily causing him to lose sight. They also suffocate him in such a way that he could hardly breathe. Refer to his statement and declaration filed of record.

[10] Plaintiff's evidence is that this kind of treatment was repeated upon him by the said first defendant and a colleague of his even on the next day and at all material times he was being insulted and was also asked to admit that he had committed the alleged offence.

[11] He testified that after having so brutally assaulted and tortured him, the said police officers left him in that suspended position for a long time before they ultimately unfastened him and ordered him to go back into the cell in which he had left DW2. That he could not walk due to the injuries and pain which had been inflicted upon him. He was once again assaulted with a stick and his attackers accused him of being lazy. He struggled back into the cell with great pain.

[12] He was later taken back to that inner room where on arrival thereat, the said policemen changed tactics. They had him half naked, forced him to lie on a bench in a facedown position; had him handcuffed once more on that bench.

The first defendant then assaulted him on his waist with a knobkerrie while another one was assaulting him with a stick under his feet. When ultimately the plaintiff was taken out of that police cell to meet his mother, he could not walk due to the said brutal assault and his mother had to support him so as to assist him to walk.

[13] He was ultimately taken to Mafeteng Magistrate's Court with the help of his mother who supported him all the way from the police station to that taxi/bus stop. The plaintiff was never charged formally even though he was taken before the Magistrates' Court in Mafeteng.

[14] His unchallenged story is that he was left outside by first defendant and his (plaintiff's) relatives when they went into the prosecutor's office. After some time, the first defendant went to where the plaintiff had been left outside the prosecutor's office and he informed the plaintiff that the prosecutor did not prefer charges against him on the grounds that he was innocent. The first defendant then dismissed the plaintiff.

[15] At one stage, the plaintiff's brother-in-law asked the first defendant what steps they were to take now that the plaintiff had been injured, to which the first defendant replied that they should do as they pleased.

[16] The plaintiff was ultimately taken to medical doctors after he had had his case against policeman Makutle and Thabana-Morena police reported to the Mafeteng Police. There at Mafeteng he was issued with a medical form which was later filled in by the medical doctor who had him examined. In fact he sort medical treatment from two medical doctors.

- [17] Both medical doctors have written their observations but not in equal particularity nor in same details. However a common feature between their reports is that they indicate that the plaintiff has been tortured and or assaulted. Exhibit A, which was filled in by a private practitioner, one Dr. Rathebe, on the 8<sup>th</sup> November 2010, is more detailed and he indicates that the plaintiff had sustained injuries of a severe nature. He observed and noted abrasions (cuff marks) wrists and ankles – bruises on waist and feet.
- [18] He observed and wrote further that the “plaintiff walks with a limp and had weakness of the hands (severely limited movement of the wrist joints and fingers (very poor grasp))”.
- [19] The second medical report dated the 9<sup>th</sup> November 2010, is not so very clear because the medical doctor has used human diagrams thereat and since he was not called to testify, this Court cannot say with clarity what the positions of the diagrams indicated by the arrows actually mean.
- [20] Be that as it may, it is also indicated therein that the plaintiff has been assaulted as the cause of the injuries therein shown. It goes further to show among others that the force used to inflict the said injuries was considerate and that the degree of injury to life was light so also was that of disability and that there is no long term disability. It is also indicated that there were contusions on both soles, feet and other multiple linear contusions. Refer to same.

- [21] The above observations made by both doctors are also consistent with the history of the case as reported by the police on the reverse side of this medical form to the extent that plaintiff was assaulted.
- [22] The above is, in a nutshell, the evidence of the plaintiff in support of his claim. The defendants, on the other hand do not deny that the plaintiff was arrested and detained by and at the Thabana-Morena Police Station on the suspicion that he had committed the above shown criminal offence.
- [23] In fact and in fairness to the defendants, even though they are saying that the plaintiff's version is not probable, they have suggested or conceded that an amount of ten thousand (M10,000) would be a fair award of damages to the plaintiff. Refer to last page of their written submissions. This is stated in general terms. The basis for such a suggestion has not been offered.
- [24] However, the plaintiff is claiming a far larger sum of money as damages than what is suggested by the crown. A breakdown of this sum of money is as follows:
- a) M50,000.00 for unlawful arrest,
  - b) M50,000.00 for assault, pain and suffering,
  - c) M50,000.00 for contumelia and
  - d) M170.00 for medical expenses
- [25] This being a non-patrimonial claim of damages the onus to prove same rests on the plaintiff. It is the defendants' case that the plaintiff has failed to prove the damages he is claiming against them. The reason advanced for the

above argument being that the plaintiff has not tendered any evidence to prove his damages, thereby leaving this onerous difficult task to the Court.

[26] With the greatest respect, the above argument overlooks the fact that the plaintiff has attached to his papers, a medical hospital cash receipt in which it is indicated that he has paid the sum of M170.00 for the medical examination and other related costs.

[27] Be that as it may, the next issue to be determined by this Court is whether in the circumstances of this case, the plaintiff is entitled to be paid the sums of money listed above as damages except that of medical expenses whose cash receipts he has produced.

[28] For this Court to make a determination upon the said claim, it has to be guided by a number of principles as laid down in various cases decided by our Courts and those from other jurisdictions. The said authorities have (though not all) been listed by the defendants and this Court agrees with same. Refer to the defendants' written submissions as well as to those of the plaintiff.

[29] Firstly and foremost, can we say in the circumstances of this case, the alleged arrest of plaintiff by the said police was unlawful? This should be answered in the negative for the simple reason that nowhere has the plaintiff denied that police had received information upon which they acted with regard to the cell-phone in question having been stolen following a breaking in at the residence of someone at Thabana-Morena.



[30] Plaintiff has also not challenged evidence that the said police got to know about him through one Mokiti; the person to whom the plaintiff had allegedly sold the said stolen cell-phone. Neither has he challenged evidence that he and Mokiti know each other. In the premises, the police had acted on the information which they had received from the man from whom the said cell-phone was found. They could therefore not have ignored such an information. In other words, the police acted upon a reasonable information received from Mokiti that the plaintiff and Mokiti were suspects who had committed the crime of house breaking and theft, hence why they had arrested Mokiti first.

[31] In a nutshell, the facts of this case and its surrounding circumstances are such that all jurisdictional facts which justify an arrest without a warrant were present. These are:

- The arresting officer must be a peace officer
- The arresting officer must entertain a suspicion
- The suspicion must be that the suspect or the arrestee committed an offence and
- The suspicion must be based on reasonable grounds.

[32] The arresting officer should, as a matter of principle, not lightly embark upon arrest and interfere with the liberty of any person without him having a reasonable suspicion that the suspect has committed an offence. That explains why he has to act objectively and also why he bears the onus, to prove the lawfulness of the arrest.

[33] In the instant case, an offence had been committed and a first suspect had already been arrested whose explanation led to the arrest of the plaintiff. One cannot therefore say that the arresting police officer had no reasonable suspicion for having arrested the plaintiff. This arrest of the plaintiff can therefore not be said to have been without any foundational basis, unreasonable or unlawful; particularly because, the said police complied with all the requirements before they had the plaintiff arrested. They duly identified themselves to plaintiff as well as cautioning him and informing him why they had come to him. This is a matter of common cause.

[34] What is unlawful is the fact that having so arrested him, the police then assaulted and tortured the plaintiff in the way that the plaintiff has described in his evidence. To add to that, they had the plaintiff locked up in police cells for three days, instead of the two days (48 hours) in terms of the provisions of Section 32(1) of the Criminal Procedure and Evidence Act No. 9 of 1981.

[35] The only issue, which the crown has failed to adequately deal with is the assault upon the plaintiff by the police after the plaintiff had been put in the police cell. I need not repeat the said facts. Suffice it to mention that, the fact that the plaintiff was put in a police cell where he remained for about three days and also that he was subjected to crueling torture and brutal assault remains unchallenged.

[36] Of particular interest is the fact that this assault was carried out in another inner room away from Mokiti with whom the plaintiff had been incarcerated. Mokiti did not ever witness such an assault even though he has

unsuccessfully tried to portray a picture that the plaintiff was never assaulted by the police.

[37] In fact, both medical reports indicate that when on two different days the plaintiff went to see medical doctors, there were clear, visible signs of assault and injuries. These have already been dealt with above. In particular, contents of exhibits A are clearer.

[38] This is a medical report of the medical doctor who the plaintiff first consulted on the 8<sup>th</sup> November 2011 he was released without any charge having been preferred against him due to lack of evidence. There is no evidence that prior to his arrest and incarceration at Thabana-Morena Police Station the plaintiff had any injuries and that he was then walking with a limp or having difficulty in walking. Neither has it been indicated that prior to that incarceration the plaintiff had all the assault injuries indicated on the medical report, exhibits B dated the 9<sup>th</sup> November 2011. There is no evidence indicating that the said injuries observed upon the plaintiff had been self-inflicted.

[39] In the premises, it is the considered view of this Court that, due regard being had to the circumstances of this case, and bearing in mind that the plaintiff remained in police custody for three days, instead of for two days (48 hrs) without a warrant for his further detention having been sort and obtained, the question of damages which is reasonable, is that of M20,170.00 (twenty thousand, one hundred and seventy maloti).

[40] The plaintiff is first and foremost a human being who should have been treated with dignity and unmanly. He is a self employed businessman providing services to his fellow people. He is therefore a respected person amongst is own people.

[41] He is accordingly awarded the total sum of M20,170.00 damages broken down as follows:

- Unlawful detention (for three days) M4,000.00
- Assault, pain, shock, suffering M12,000.00
- Contumelia M4,000.00
- Medical expenses M170.00

Plus

Costs of suit.

**M. Mahase**

**Judge**

For plaintiff : Adv. Pitso Pitso

For Defendents : Adv. M. Moshoeshoe