# IN THE HIGH COURT OF LESOTHO

**CIV/APN/550/2011**

In the matter between:

**THABANG MAKETSI** **1ST PLAINTIFF**
**MARIBANE MOILOA** **2ND PLAINTIFF**

**And**

**THE COMPOL** **1ST DEFENDANT**
**ATTORNEY GENERAL** **2NDDEFENDANT**

## JUDGMENT

**Coram** :Honourable Acting Justice E.F.M. Makara
**Dates of Hearing** :12 February, 2013
**Date of Judgment** :28 February, 2013

## Summary

Arrest – Its lawfulness – Kidnapping – Detention – Its lawfulness – Duty to begin – A party who has the onus to prove the lawfulness of the arrest – Peace Officers arrest without a warrant under sec.24 (b) of the Criminal Procedure & Evidence Act 1981 – Requirements for arrest under the section – failure to follow them – Consequences thereof – A constitutional right of a detainee to inform his relative about the detention – The effect of the police refusal for the detainee to exercise the right – The arrest, the detention and the refusal held unlawful – Plaintiffs omission to include a prayer on the unlawful arrest – The court's ruling against its inclusion under *the further or alternative relief* – The discretionary powers of the court to determine the *quantum* of damages to be awarded – The appropriate rate of interest and the costs.

BOOKS:

Blackslaw Dictionary 3rd Ed., PMA Hunt (Advocate) The South African Criminal Law & Procedure Vol.2 Juta & Co. Ltd., The Constitution of Lesotho 1993.

CITED CASES

***Jonny wa Maseko vs A.G 1990-94 LAC 13 AT 17-18, S v More 1993 (2) SA CR606 (w), Regina v Thus Ntjelo 1955 HCTLR 41 at 42 – L-D, R v Motati; R v Buchenroeder (1896) 13 sc 173 at 178, S v Makwanyane 1995 (b) BCLR 665, Lesotho National Olympic Committee & Ors v Morolong LAC (2000-2004)449 @456, Prakash and Ors vs Ramkumar & Ors AIR 1991 Sc 409 @ p 3 – 4 Para 4.***

THE STATUES & THE SUBSIDIARY LEGISLATION

***The CP&E ACT No. 9 of 1981, CP&E Proclamation 1938.***

**MAKARA A.J.**

**[1]** This is a civil case in which the Plaintiffs have instituted proceedings against the defendants for damages arising from the alleged police kidnapping and unlawful detention.

**[2]** A foundation of the plaintiffs' action is that the police who are stationed in the district of Mafeteng had kidnapped them from their residence at Ha-Tsolo in the district of Maseru, taken them to the Mafeteng Police Station for their detention, refused them any access to their relatives and ultimately released them without any charge. The alleged incidence be it *arrest* or *kidnapping* has, undisputedly, happened on the night of the 18th July 2011 and the plaintiffs were released from custody on the

following day before the expiry of the 48 hrs limitation. It is against this background that they maintain that the whole process was unlawful and hence their prayer for this court to enter a judgment against the defendants by awarding them:

(a) Twenty-five thousand Maloti (M25,000.00) for the kidnapping.
(b) Twenty-five thousand Maloti (25,000.00) for unlawful detention.
(c) Interest thereon at the rate of 18.5% a *tempore morae*.
(d) Costs of suit at the attorney and client scale.
(e) Further and alternative relief.

**[3]** The defendants having duly entered their appearance to defend tendered their plea. They specifically denied that the plaintiff's were ever kidnapped by the police, forcefully transported to the Mafeteng Police Station and unlawfully detained there. They, instead, presented a counter explanation that they had at the material time and place lawfully arrested the plaintiffs and taken them to Mafeteng Police Station for their detention and interrogation. The defendants have in support of this account, justified their measure against the plaintiffs by reasoning that they were throughout acting within the parameters of the law in that:

- They were investigating a case of a brutal murder of one of the residents of Mafeteng. In that task, they had received what could be interpreted as credible information that the plaintiffs were suspected of having committed a crime.

- They had, as a result, lawfully arrested the plaintiffs for their interrogation. They have, vehemently and consistently denied that they had kidnapped the plaintiffs.

- They finally on the following day released the plaintiffs after the interrogation processes had failed to obtain the desired information and that on that note, the plaintiffs were warned that the investigations were still continuing. The implication being that they could still be recalled for further questioning.

**[4]** The Defendants have fairly conceded that they had, during the plaintiffs detention denied them an opportunity to inform their relatives about their being kept in police detention. Their justification for that is that this was not necessary since the plaintiffs were to be detained for some short duration.

**[5]** It fortunately transpired from the extended pre-trial conference which *inter alia* considered means through which the duration of the proceeding could be curtailed that the material facts which have triggered this litigation were common cause. This resulted in the common understanding between the court and the counsel for the parties that in the circumstances, the standing issues for interrogation and determination were purely of a legal nature and that only lawyers could normally be entrusted with that task. Thus, the approach adopted was that there was no real need for a *viva*

*voce* evidence save for the one to be testified by the plaintiffs to prove the *quantum* of damages which they have prayed for.

**[6]**The undisputed material facts in the pleadings, the police statements which the plaintiffs had procedurally availed to the court and the elucidation of same through the heads of arguments and the evidence on the claimed *quantum* would suffice for the determination of justice in this case.

**[7]** The conference culminated in the conclusion between the court and the counsel that against the backdrop of the admitted facts of significance, the issues for interrogation by the counsel would be on:

- The question of the meaning of *kidnapping* in contradistinction to *arresting* a person;

- Whether having established the legal technical meanings of the terms in consideration, which of them could, regard being had to the facts, are recognized to have happened;

- Whether in the event of a finding that the plaintiffs had been arrested, the arrest was lawful;

- Whether the plaintiffs' detention was lawful and this incidentally occasions a challenge for a consideration of the legal consequence of the police refusal to allow the

plaintiffs the opportunity to inform their relatives that they were in a police detention;

- Whether the plaintiffs would, at the end of the day, prove the *quantum* of damages for which they have prayed.

**[8]** The nature of the challenge presented against the police actions by the plaintiffs, dictates that the latter bear a duty to state their case first. This was determined early in the pre-trial session. The defendants on the other hand, have a burden to prove that the *arrest* and the *detention* were lawful. The approach was detailed in the clearest terms in ***Jonny wa Maseko v Attorney-General 1990-94 LAC 13 at 17-18*** where the Court of Appeal directed that:

> It is trite law that when the liberty of an individual has been restrained or limited and the individual has been so affected, challenges the validity of such restraint or limitation, as the appellant in this case has challenged his arrest and detention by the police, the onus of establishing the lawfulness thereof is on the arrestor or the person who caused arrest.

**[9]** It would logically follow that a lawful detention of a person should result from a lawful arrest. The converse version being that a lawful arrest could in principle result in a lawful detention. This would apply where the police in their wisdom determine that the detention would be a necessary option in their endeavor to investigate a crime towards a possible genuine charge against the detainee before the expiry of the 48 hrs time limitation.[1]

[1] This is in terms of section 6 (1) (b) of the Constitution and section 32 (1) of the Criminal Procedure & Evidence Act No. 9 of 1981.

**[10]** *Arrest* and *kidnapping* represent key technical terms for the determination of justice in this case. The ascertainment of their meanings respectively, would subsequently, be synthesized with the facts in consideration for the purpose of the analysis as to whether or not the plaintiffs were *arrested* or *kidnapped*.

**[11]** In seeking to define *arrest*, it is cautioned that the word has not been assigned any statutory legal meaning. This, for the sake of pacifism, includes **the Criminal Procedure and Evidence Act No.9 of 1981 (CP&E Act)** which is a basic procedural instrument in the administration of criminal justice in the Kingdom. This notwithstanding, the courts have remained at large to seek for guidance from other sources and from the court decisions in which the term has been given a more practical and comprehensive version. Thus, in the process, the jurisprudence around the word has been systematically developed for reliance.

**[12]** *The term arrest means to deprive a person of his liberty by legal authority under real or assumed authority; custody of another for the purpose of holding or detaining him to answer a criminal charge or a civil demand. In criminal cases, the apprehending or detaining of the person in order to be forth coming to answer an alleged or suspected crime.* [2]

**[13]** The above legal dictionary meaning is assigned an operational version (not theoretical) in the relevant provisions of

[2] Blacks Law Dictionary 3rd ed p 141

the **CP&E Act**. This lends elucidation from the courts decisions in which the subject has been traversed.

**[14] Sec. 24 (b) of the CP&E Act,** *inter alia* empowers every peace officer to arrest without a warrant every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in **Part II of the First Schedule**. This spontaneously assigns the court a task to ultimately determine if the offence suspected to have been committed by the plaintiffs or by whomever, fell within the purview of the schedule and whether, therefore, the measures taken against them by the police were contextually warranted for by the law.

**[15]** It is understandably imperative to mention that **sec. 26 of the same enactment**, sanctions the peace officer **to call** upon any person whom he has power to arrest; any person reasonably suspected of having committed an offence; or any person who may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence. The power is bestowed upon the peace officers for the exclusive purpose of facilitating for them to obtain from such persons their full names and addresses. The section in conclusion, enjoins the peace officer to arrest and *detain* the person who fails to furnish him with the required particulars or lies about them. The detention is limited to 24 hrs. Such a detainee renders himself liable to a judicial punishment upon conviction for having failed to provide the required information.

**[16]** The relevance of **sec. 26** to the instant case is, for clarity sake, that it provides an avenue as to how peace officers could treat the specified class of persons.[3] The Plaintiffs could in the final analysis, have fallen within it. This could, therefore, have a telling effect on the lawfulness of their arrest and the subsequent detention.

**[17]** The courts have, in recognition of the seriousness of the adverse impact of arrest on the fundamental human rights and freedoms particularly on human dignity, described the conditions under which it could be strictly resorted to. In **S v More 1993 (2) SA CR 606 (w)** it was cautioned that:

> Arrest by definition, constitutes a serious restriction of the individual's freedom of movement and can affect his dignity and privacy. In extension of the principle that before conviction an accused person ought to be treated as far as possible as being innocent, it is submitted that arrest should be used only where a summons or written notice to appear would probably be ineffective.

**[18]** On the same note, **Kheola CJ** (as then was) addressed the prerequisite conditions under which a peace officer is authorized in terms of **sec. 24 (b) of the CP&E Act**.[4] He, in **Rex v Lehlomela Nkhabutlane CRI/T/9/1994 P.19** (unreported) emphatically warned the police on how the abuse of the power entrusted upon them in the section could inflict a harm to human rights in particular to human dignity and self development. The learned Judge reiterated the in-built statutory safeguard that the exercise of the

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[3] These are persons who inter alia may be resourceful concerning the particulars of those who are suspected of having committed any offence.

[4] The section empowers a peace officer to arrest without a warrat every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Para II of the First Schedule. These are serious crimes including murder, rape, robbery, treason etc.

power to arrest under the section, must indispensably, be preceded by the arrestor's discovery of reasonable grounds upon which he would suspect that the accused has committed any one of the **First Schedule Offences.** He specifically, highlighted that the reasonableness of the grounds relied upon for the suspicion, must be objectively determined and stated that they must be indicative of a somehow *prima-facie* commission of the **First Schedule Offence** by the arrestee.[5]

**[19]** The learned Judge had cited with approval the similar judicial views expressed in **Regina v Thuso Ntjelo 1955 HCTLR 41 at 42 – L –D** where Elvan J had ruled that a policeman had not lawfully exercised the powers given to the peace officer under **sec 26** of the **Criminal Procedure and Evidence Proclamation 1938.[6]** A policeman had in that case arrested the accused without a warrant on the explanation that he had a reasonable suspicion that the man had committed a **First Schedule Offence**. The evidence had revealed that the chieftainess was the one who had suspected that the accused had committed the offence and that the arrestor simply reciprocated by arresting him without having mounted any investigation and, thereby, having not been in any position to establish if there were the requisite grounds upon which he could suspect that the accused has committed any of the listed offences.

[5] The reasoning has been laboriously detailed in pages 23-25.

[6] The section has been replicated by section in section 24 (b) in the Criminal Procedure and Evidence Act 1981 which has repealed the said colonial Criminal Procedure and Evidence Proclamation.

**[20]** The understanding created in the cases referred to is that the arrest premised upon **sec. 24 (b) of the CP&E Act**, must be a result of the reasonable grounds upon which the peace officer suspected that the arrestee has acting individually or collectively with others committed a **First Schedule Offence**. The decision that there are reasonable grounds would have to be revealed by the investigation made by the concerned peace officer. This would provide a basis for testing whether the suspicion by that peace officer was reasonable. The assessment here would be objectively formulated in that the standard employed would be that of the perception of a reasonable man in the presented circumstances.

**[21]** The judgment now turns to the definition of *kidnapping* and to its relevant dynamics. The term is basically a common law concept which exists within the province of criminal law. It is an offence punishable by imprisonment or fine. Notwithstanding the divergences of insignificance in the meanings ascribed to the word, the one advanced in the old cases of **R v Motati; R v Buchenroeder (1896) 13 sc 173 at 178** [7] appear to be precise and self contained. It is therein defined as:

> The wrongful and unlawful carrying away or concealing of a human being with a view to depriving him of this liberty.[8]

Kidnapping being intrinsically a criminal act, is predominantly committed in pursuit of some *illegal* object and the methods employed in that endeavor are correspondingly *unlawful*. It is commonly a crime which is committed by underground criminal

[7] P.M.A. HUNT (Adv) Referred to in the South African Criminal Law and Procedure Vol. II Juta & Co. LTD p470
[8] Ibid p 470.

syndicates and by the operatives of politically inspired organizations which are struggling for a political change through revolutionary means. The captives in kidnapping are usually held in captivity in a clandestine place. The intention would normally be to exploit that to assert some demand such as calling for the release of their comrades held in the enemy camps or asking for a ransom payment.

**[22]** The explored technical and legal meaning of *arrest* and the briefly captured definition of *kidnapping* would at this stage be respectively applied to the facts which are a *substratum* of the issues for adjudication. The approach would facilitate for the assessment of the quantum of damages prayed for as well. The facts would, firstly, be used to reveal whether or not the plaintiffs were arrested and if so, whether the measure was lawful. The same would, afterwards be done in relation to *kidnapping* except that there wouldn't be a question on the lawfulness of kidnapping.

**[23]** The material facts which are subscribed to by the parties are that the police officers who are attached to the Criminal Investigation Division in Mafeteng had received information from their informers that a serial killer who had been at large for sometime, would arrive at Ha-Tsolo in the district of Maseru on the following night. The killer was linked to the brutal killings of Moliko who was a famous radio presenter, one Masumonoha and Selomo who was a celebrity within the circles of the *famo* music.

The victims all came from Mafeteng and were associated with the *Terene – Fito-Famo* musical group.

**[24]** The following day at midday, the said officers and their informers proceeded to Ha- Tsolo for the identification of the house where the suspect would be accommodated by his friends. It transpired that these were the plaintiffs.

**[25]** Around eleven o'clock at night the same officers this time in the company of the Chief of Ha-Tsolo, arrived at the plaintiffs home which is situated at the place. They disclosed their mission to them and then apprehended them for their failure to provide them with satisfactory explanations.

**[26]** The Plaintiffs were then taken to Mafeteng where they were detained at the district Charge Office for interrogation. They were released on the next day after the interrogation had failed to bear the desired fruits. Their release was further occasioned by the fact that the police informers had failed to identify any of the plaintiffs as a wanted serial killer. This was at the identity parade held for the purpose.

**[27]** The Court acting on the strength of the stated Black's law Dictionary meaning of the word *arrest* and by the **operational** definition ascribed to it by case law and the relevant statutory provisions, finds that the police had at the material time arrested the plaintiffs. This is crystally clear from the undisputed basic

facts, the admitted police statements and from the parties heads of argument which illuminate the scenario.

**[28]** The fact that it is common cause that the police had apprehended the plaintiffs in their desperate search for the serial killer and that they had acted so without a warrant, creates a perception that they were purportedly proceeding so in accordance with **sec 24 (b) of CP&E Act.**[9] The finding that the police had arrested the plaintiffs is reinforced by the fact that the police had taken the plaintiffs to the Mafeteng police for interrogation on the subject concerning the series of the killings of the *Seakhi-Fito Famo* music artists and the radio presenter. The Plaintiffs were, resultantly, detained at the Mafeteng Police Station for questioning on same. It should suffice to state the obvious that this is a public place which is *inter alia* dedicated for the detention and the interrogation of the criminal suspects. The police had on the next day released the plaintiffs without any charge and, therefore, without taking them before a Magistrate Court to face whatever charge. They were so released before the expiry of the 48 hrs time limitation for the detention of a criminal suspect.[10]

**[29]** The afore-described features in the police approach towards the plaintiff are indicative of the police arresting practices regardless of the possible procedural defects.

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[9] The section empowers a peace officer to arrest without a warrant any person in relation to whom he has reasonable grounds to suspect that he has committed a First Schedule Offence.

[10] Section 32 (1) of the CP& E Act reiterates the prohibition provided under section 6(1)(b) of the Constitution that person *arrested* without a warrant shall not be detained in custody beyond 48hrs and that unless that person is released for no charge preferred against him, he shall be made to appear before a Magistrate against a charge.

**[30]** The next logical inquiry in relation to the finding that the police had *arrested* the plaintiffs would be whether the *arrest* was lawful. The focus would, therefore, be on the examination of the methods followed by the police in the arrest to ascertain if they were in accordance with the procedures prescribed in the applicable law.

**[31]** It would be appropriate from the onset, to state that the court holds that the arrest of the plaintiffs was unlawful. The main reason for the determination is that the police had effectively purported to effect the arrest under **sec. 24 (b) of the CP&E Act** but circumvented the procedures contemplated in the section.

**]32]** The crime which had triggered the police to arrest the plaintiffs was, admittedly, **a First Schedule Offence**. The police could, therefore, arrest its suspect without a warrant provided that they had in consequence of their investigations found that there were reasonable grounds upon which they could suspect that the plaintiffs had committed one or more of the offences listed in the schedule. In the instant case, the police had just spontaneously arrested the plaintiffs on the basis of the information they had received from their informers. They had never embarked on their own investigation campaign so as to establish it for themselves if there were reasonable grounds for them to suspect that the plaintiffs had committed the offence. This was a dereliction of duty on their part.

**[33]** The police had analogously in this case acted similarly to their counterparts in **Regina vs Thuso Ntjelo**,[11] where the court had considering the same defect in the police approach under the section, held the arrest to have been unlawful.

**[34]** The police were reckless and over zealous in their decision to arrest the plaintiffs. They were not cognizant of the plaintiff's due process rights [12]and the potential adverse impact of that on their human dignity. In the process, the move violated the plaintiff's rights to presumption of innocence.

**[35]** The police miscalculations and attachment of little or no significance to the plaintiff's dignity is revealed by the fact that according to them, they had been informed about the planned arrival of a serial killer at Ha-Tsolo in Maseru. They nonetheless, arrested two people when they got there. The latter happened to be the plaintiffs. They hadn't at the time of arresting the two, involved their informers whom they had brought along with them from Mafeteng to assist in the identification of the wanted serial killer. The paradox is that they later invited the informer to identify the killer at the identification parade. The informer didn't identify any one of the plaintiffs as the wanted man and hence their release from detention.

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[11] Supra para 17where Kheola C.J. had found that the accused was arrested under sec 24 ( ) as a result of the Chieftainess suspicion and not that of the police man since he had never investigated the case himself

[12] This is the already referred to section 26 which sanctions the police to simply **call** a person to provide them with the particulars of the suspect.

**[36]** The police had effectively behaved like a fisherman who casts his net widely to catch even the unwanted fishes and then threw the undesirable ones back into the sea. This became clear when the defendant's counsel conceded during his addresses to the court that the police had actually arrested and detained the plaintiffs so that they could help them about the particulars of the serial killer.

**[37]** There is also an element of uncertainty in the defendant's case. This appears in paragraph 4.2 of their plea. Their pleaded defence here is simply that the police had arrested the plaintiffs because they reasonably suspected that they had committed **a crime.** The defendants should have consistently and unequivocally pleaded that the plaintiffs were arrested because the police had following their investigations found that there were reasonable grounds upon which they had suspected that the plaintiffs were *socio criminis* in the said serial killings or that one of them was the wanted serial killer. This explains their counsel's last minute concession that in truth the plaintiffs were arrested and detained because the police thought that they could provide information about the serial killer.

**[38]** The Plaintiffs should have been treated in terms of **sec.26 of the CP&E Act** [13] instead of purportedly under **sec. 24 (b) of same**. They were, obviously, being sought for so that they could provide the police with the required particulars of the killers. In the

[13]It empowers the police to **call** a person whom they believe could provide them with the particulars of the criminal suspect or any relevant information. Such a person could only be arrested and detained if he fails to provide such information or be charged for that failure.

alternative, the police could have delivered a written notice calling upon the plaintiffs to report themselves before the concerned police at the Mafeteng charge office on the appointed date and time. This would have been in harmony with the less invasive approach indicated in **S v Moore**[14] that arrest should only be used where summons or written notice to appear would probably be ineffective.

**[39]** It follows from the identified procedural irregularities and the disregard for the plaintiffs rights that their arrest was throughout unlawful. Thus, their detention at the Mafeteng police station was, logically, unlawful.

**[40]** The legally foundationless *arrest* and *detention* of the plaintiffs and the violation of their rights are aggravated by the fact that the police had denied them the opportunity to alert their relatives that they were in police detention.

[**41]** The police denial of the plaintiffs, the earliest opportunity to inform their relative about their detention tantamount to subjecting them under a psychological fomentation and to inhuman treatment. This resultantly, impacted adversely against the detainees' right to human dignity which represents the core essence of a human kind. According to Chaskalson in **S v Makwanyane 1995 (b) BCLR 665:**

> The rights to life and dignity are the most important of all human rights and the source of all other personal rights.....[15]

[14] Supra para 15 (herein)

[15] S v Makwanyane (supra) para 144

**[42]** The court pronounces it in clear terms that the plaintiffs had a constitutional and a judicable right to have been allowed by the police to inform their respective relatives about their being in police detention. The denial of this right by the police has further led to a violation of the plaintiffs corresponding rights which interfaces with this declared right. These rights would be a right to life in a diversified sense,[16] a right of a criminal suspect to the fair trial rights in particular presumption of innocence and a right to a legal representation since a detainee could initiate a process for his representation by arranging for it through his relative.

**[43]** It could be inferable from the circumstances that the police refusal for the plaintiffs to express their predicament to at least, one of their relatives amounted to a violation of their right to freedom of expression[17] in under legally permissible conditions. This is an inherent right which even a newly normally born child is expected to exercise at the moment of his or her arrival on earth so that his or her needs could be interpreted.

**[44]** The police must be warned against the culture of arbitrary arrests and the effectively automatic detentions of the suspects without any objective justification for such drastic measures.

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[16] The denial could frastrate for the detainee from accessing some medication which could be strictly scheduled for specific times. Thus, the refusal could be fatally detrimental to the life of the detainee or place it under a potential danger. A communication with a relative could reduce the detainee's stress levels occasioned by the detention itself.

[17] **Sec. 14 of the Constitution** provides the right to freedom of expression. The right, however, has the limitations which do not include its exercise in the plaintiff's situation.

**[45]** It should suffice to indicate that against the background of the facts in this case and their reconciliation with the law relating to *arrest* and to the crime of *kidnapping* respectively; it is decided that the police did not commit the latter act.

**[46]** The plaintiffs later filed an affidavit in lieu of *viva voce* evidence to evidentially support their claimed *quantum* for damages. The testimony is materially a repetition of their pleadings which had been accepted as common cause.

**[47]** The court has in recognition of the pressure upon the police to apprehend the serial killer, avoided making an armed chair judgment. It, has, instead in its assessment of the justifiable amount of damages to be awarded to the plaintiffs, been inspired by the Basotho words of wisdom which could be loosely translated in these terms:-

> It is the cattle that are placed under a yoke to pull the plough which would leave some patches in the field not ploughed, but not those lying down on their bellies in the veld. *(ke tse jokong temeng tse tlang ho lema banka eseng tse bothileng)*

**[48]** The determination of the amount of damages which the plaintiffs would qualify for has further been done with reference to the criterion considerations which Peete J has systematically formulated in **M.Kopo & M. Kopo vs Commander LDF & Attorney General. CIV/T/259/08**. The Learned Judge has listed them as;

- the manner in which arrest and detention were executed;
- the degree of impairment of feeling of dignity;

- the length of detention;
- the court's duty to safeguard the liberty, safety and dignity of the individual;
- the measure of indignity, discomfort, distress and anxiety suffered;
- absence of reasonable or probable cause;
- the individual's standing in society.

**[49]** The enunciated formulation has laid down a scientific approach for the assessment of the appropriate amount of damages. It represents a pioneer work for future reference and development.

**[50]** The unfortunate last minute discovery in this case is that the plaintiffs have seemingly inadvertently left a prayer for damages as a result of the unlawful arrest. This stands so and yet the issue of *arrest* and its unlawfulness had been throughout pleaded by the defendants and argued by counsel. The subject, nevertheless, had to be addressed in the judgment since it is inter related with the question of the plaintiffs detention and the police refusal for them to inform their relatives about the detention.

**[51]** The Plaintiffs counsel skillfully contended that the inadvertently omitted prayer is accommodateable under the general prayer which is couched in *further or alternative relief* terms.

**[52]** The court refuses the application to have the prayer crafted into that general prayer. It does so because the plaintiff hadn't prayed for that and that it didn't represent what could be recognized as a logically incidental prayer from any of the presented ones. The refusal has been inspired by the decision in **Lesotho National Olympic Committee & Others vs Morolong LAC (2000-2004) 449 @ 456** where it was re-affirmed that:

> It is indeed trite law that a litigant cannot be granted relief which he or she has not sought.

The Court of Appeal had in **The Lesotho National Olympic Committee & Ors vs Morolong** [18] corrected a High Court Order which had gone beyond the parameters of what the respondents had prayed for. They had simply asked for a declaratory order that the elections of the National Executive Committee of the Lesotho National Olympic Committee were invalid and of no legal force and effect. The Court *a quo* had, however, declared that the entire conference was unconstitutional.

**[53]** The position that the court must confine itself to the prayers presented before it, had further been held in the Indian case of **Om Prakash and Ors v Ram Kumar & Ors AIR 1991 SC 409 @ p349 paragraph 4.** There it was similarly held that:

> A party cannot be granted a relief which is not claimed if the circumstances of the case are such that the granting of such relief would be prejudicial to the interested parties.

It would, in the instant case be prejudicial against the defendants to accommodate a prayer that the police arrest be found to have

[18] Supra para (e)

been unlawful and, therefore, the court should award the plaintiffs damages for that. This would be so since the plaintiffs case had throughout been that the police had kidnapped them. They had, ironically, maintained the same position in the face of the defendant's adamant explanation that the police had *arrested* the plaintiffs and the denial that they had *kidnapped* them.

**[54]** The plaintiffs counsel has referred the court to the judgment of my brother Molete AJ (as then was) in **Malefetsane Tsehla v Commissioner of Police & Attorney-General CIV/T/463/11.** (Unreported) The plaintiff had in that case, been *inter-alia* awarded M75,000.00 for bodily assault, pain, suffering and *contumelia* and M50,000.00 for unlawful arrest and detention. He referred to the case to motivate his point that the court should grant the plaintiffs the *quantum* of damages for which they have prayed and to react likewise to the incidental prayers. The counsel emphatically persuaded the court to recognize the damages awarded in the judgment as being representative of the current trend in both the High Court and the Court of Appeal. He punctuated that by appealing to the court to maintain the same standards so that the superior courts could be seen to be consistent in their dispensation of justice in analogous circumstances. The Counsel never provided the court with the Court of Appeal decisions which according to him would demonstrate the trend.

**[55]** This court appreciates the basis of the judgment by Molete AJ (as then was), regarding the *quantum* of damages which he awarded the plaintiffs. It, however, maintains that the

assessment of the award should be based upon merits of each case and that the determination of actual amounts of damages remains a preeminent discretion of the Presiding Judge concerned.

**[56]** It is found imperative that the facts in **Malefetsane Tsehla v Commissioner of Police and Ano,** [19] be distinguished from those on the ground in the instant case. The reality is that in the former case, the plaintiff's unlawful arrest was followed by a series of demeaning bodily and psychological treatment while he was in detention. This is demonstrated by his admitted lamentation that the police stripped had him naked, assaulted him until he soiled himself, (regrettably to record it) forced him to eat his own faeces and that when he couldn't sustain the pain any longer he fainted. His human dignity had been insulted beyond description. The Learned Judge had, understandably, taken into account those inhuman excesses and, therefore, registered his indignation against them by awarding the commensurate quantum of damages. In the present case, there are no such similar degrees of violations of human rights while the plaintiffs were in police detention. The *quantum* of damages to be awarded cannot, appreciably maintain the proposed standard.

**[57]** In the premises, the plaintiffs have proven their case on the balance of probabilities regarding unlawful detention. They are accordingly and respectively awarded:

- Fifteen Thousand Maluti (M15,000.00) damages for

[19] Supra para 6

unlawful detention.

- 12.5% (per cent) rate of interest on the principal sum of money from the date of the judgment.

**[58]** There is in accordance with the last minute agreement by the counsel, no order on costs.

**[59]** The court registers its gratefulness to the counsel for their co-operation and dedication to have justice timeously dispensed in this case.

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**E.F.M. MAKARA**
**ACTING JUDGE**

| | | |
|---|---|---|
| For the Plaintiff | : | Adv. S.S. Tšabeha |
| For the Defendants | : | Adv. L.P. Moshoeshoe |