

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**In the matter between:**

MOKHETHOA MOKAKA

Plaintiff

And

THE COMMISSIONER OF POLICE

1<sup>st</sup> Defendant

THE ATTORNEY GENERAL

2<sup>nd</sup> Defendant

**JUDGEMENT**

Coram : Hon. Acting Chief Justice T. E. Monapathi  
Date of Hearing : 27<sup>th</sup> May, 2013  
Date of Judgement : 12<sup>th</sup> February, 2014

**SUMMARY**

**CITED CASES**

*Miller vs Minister of Pensions (1947) 2 ALL ER 372 @ 374.*

*Ocean Accident and Guarantee Corporation Ltd vs. Koch 1963(4) SA 147.*

*Pergrine Group (Pty) Ltd vs. Pergrine Holdings Ltd 2001 (3) SA 1268.*

**Pitt vs Economic Insurance Co. Ltd 1957 (3) SA 284 Holmes J stated at 287 E-F.**

*Hulley vs Cox 1923 AD 234 @ 246 Innes CJ*

*Ramoholi vs Compol CIV/T/445*

*Letsela Morobi vs Compol CIV/T/230/2010*

*Commander LDF vs Tlhoriso Letsie C of A 28/10*

**STATUTES**

**BOOKS**

[1] This is a case in which the Plaintiff has sued the Defendants for payment of damages as follows:

- A. i) Payment of M100,000.00 for pain and suffering;
- ii) Payment of M80,000.00 for disfigurement;
- iii) Payment of M 50,000.00 for lose of amenities of life;
- iv) Payment of M 20,000.00 for contumelia
- B. **Total** **M250,000.00**
- C. v) Costs of suit;
- D. vi) Further and alternative relief.

[2] The Defendants have defended the action and the court has heard evidence from both sides. In this regard Plaintiff testified about the events that took place on or about 22<sup>nd</sup> December 2011 at a village called Ha Hlalele in the district of Maseru. He also called in support of his case PW2 Mr. Pitso Mohata a fellow co-villager. On the other hand, the Defendants led in defence the evidence of DW1 Sergeant Thulo and DW2 Police Constable Taolane.

[3] As I found the Plaintiff's evidence which has been supported in all material respects by the evidence of PW2 was easy, straight forward, logical and easy to

understand. It is to the effect that on the date in question they were enroute from a circumcision school to their home when they were suddenly confronted by two (2) police officers who were on horse-back.

[4] According to the evidence, it was in the afternoon and the said police officers came shouting at them ordering them to stop. The Plaintiff stopped while three (3) of his companions did not. The court has heard in evidence that whilst two (2) of Plaintiff's companions ran away all together, the third namely PW2 stood in a yard about 25 paces away from where the Plaintiff stood. We could clearly see and hear all what happened. It had been impossible for Defendant to remove him from the scene.

[5] The court has heard further evidence that, the police ordered the Plaintiff to drop his stick and raise his hands which he did. One of the police officers then took the stick and assaulted the Plaintiff therewith and then left taking away the said stick. On the evidence, the Plaintiff and his witness are supportive of each other and they were not shaken at all under cross examination. Plaintiffs' Counsel submitted that this evidence was most probable and ought to be believed when in addition account was taken of the "cock and a bull" story of the defence.

[6] The court has heard further in evidence that following the assault aforesaid Plaintiff reported the incident to his local chief who advised him to report the matter to the police station and to seek a medical report which he did and subsequently consulted a medical doctor at Scott Hospital. He subsequent thereto and upon removal of the POP from his fractured left arm consulted Doctor 'Molotsi Monyamane of Healthy Life Styles Clinic and Diabetes Centre.

[7] In support of his medical condition following the assault aforesaid, Plaintiff has handed in exhibits "A" "B" and "C" the contents of which have been admitted

by the Defendants as being true and correct as regards the nature of the injuries sustained by the Plaintiff.

[8] The medical evidence reflects *inter alia* that, the Plaintiff was found to have sustained a “deformed left forearm, reduced range of movement at the elbow joint as well as pain and tenderness over the deformed part of the arm”. Furthermore, the evidence shows that the Plaintiff will in the future as a result of the injuries sustained “not be able to do normal work at his place of employment because of the reduced range of movement”. Plaintiff was employed as a construction worker as the court has heard in evidence.

[9] The court has further heard that the assault aforesaid was inflicted in full public view and some villagers had even gathered nearby. That Plaintiff has endured extreme pain and suffering which has lasted for more than a year. The court also had occasion to observe for itself the limited movement on Plaintiff’s left forearm.

[10] The two (2) witness both of whom are police officers gave evidence in defence of the Defendants in this matter. Their story was diametrically different from that of the Plaintiff and his witness. Their story was to the effect that the Plaintiff was never assaulted by the police at all. That on the contrary he was assaulted by some boys at a circumcision school where there had been a fighting and a use of firearms. Incidentally it had been difficult for Defendants to describe fully the imaged events of the circumcision school. They testified that the Plaintiff was assisted by the police who advised him to report the assault by the Ha Hlalele boys at the charge office and to obtain therefrom a medical form which he did. In my view that Police Officers’ advice most probably did not take place. It was a lie. It was the Chief and villagers who did so. It was only that police when pressurized by circumstances to offer the medical form. Not that initially they had advised Plaintiff to attend at their office

[11] According to the Defendants' witnesses they (witnesses) were good Samaritans who found Plaintiff in possession of a dangerous weapon and yet did not arrest and/or charge him. They said they rendered and advised him to seek a medical report and consult a doctor having been assaulted by some boys and yet they preferred no charges against the Plaintiff's assailants. They gave Plaintiff a medical form and yet they never took down his statements nor did they record the complaint that he lodged with the police. As I said why the confrontation with Plaintiff and his friends may have been per chance absolutely no good reason was suggested for the assault on the Plaintiff as I found.

[12] Police claimed to have been told by among others the Plaintiff that, there had been a fight in which someone had been badly injured (the Plaintiff) and there had been a use of firearms and yet they never bothered to go the alleged crime scene nor to follow up in any manner whatever the alleged possession and/or use of the firearms.

[13] Defendants gave Plaintiff a medical form in which they for unexplainable reasons elected not to record the RC1 number. They have not given the short history of the case reported. They have not recorded the person(s) against whom the complaint had been leveled. They have not signed the medical form. The question is why and the answer is not hard to come by. They have lied through and through in their desperate attempt to exonerate themselves. Meaning that the assault was gratuitous ..... If for anything.

[14] The salient question for determination in this matter is whether or not on a balance of probabilities the Plaintiff has proved his case against the Defendants. It is respectfully submitted that the Plaintiff has proved that he was assaulted in the manner described above by non other than the police. His story is logical and most probable.

[15] On the other hand, the Defendants' story is not only extremely improbable but also palpably and patently false. It is full of improbabilities as set out herein above. It is clearly a police cover up which must be rejected as such. The Defendant's story is clearly ludicrous in the extreme and must be rejected as such. It is bizarre in every respect. The First witness story was told in so jocular form that it bordered on contempt and disrespect of the court.

[16] Defendants' witnesses are unable to explain among others, why the man that they have helped so much would turn around and lodge a claim against them. They are unable to explain the patent deficiencies in the medical form. They are unable to explain why they did not follow up on the alleged fighting including use of firearms at the circumstance school but to mention a few. This lends support to this assault on Plaintiff having been gratuitous in the extreme.

[17] To make it worse Defendants' witness came up with story which was never put to the Plaintiff and/or his witness. In this regard, they claimed *inter alia* to have ordered the Plaintiff and his companion to stop and as they not stop they claim to have chased them all over the place until they got to some fields near Mohokare river. They claim to have warning shoots, they claim to have to have introduced themselves and to have produced ID cards to those that they chased and caught up including the Plaintiff, they claim to have found Plaintiff far away from the village where nobody witnessed. I did not believe any of this.

[18] It was submitted that their entire story is an afterthought which must be rejected as such. In a nutshell, the Defendants' story as a whole is not only riddled of improbabilities and absurdities but also preposterous and laughable. Suffice to say that, no reasonable Court may accept it. I agreed with respect.

[19] It was correctly submitted that in a case such as the present, the Court will closely examine the two (2) versions given by the Plaintiffs' and Defendants' side

and will decide which of the two (2) is, on a preponderance, more probable than the other. Thus the Court will decide as to which of the versions carries a reasonable degree of probability.

*Principles of Evidence 2<sup>nd</sup> edition p. 594. By Schickard, Van Der Merwe and Others.*

*Miller vs Minister of Pensions (1947) 2 ALL ER 372 @ 374.*

*Ocean Accident and Guarantee Corporation Ltd vs. Koch 1963(4) SA 147.*

*Pergrine Group (Pty) Ltd vs. Pergrine Holdings Ltd 2001 (3) SA 1268.*

I agreed that I ought to accept the version of the Plaintiff.

[20] There is no fixed formula for the assessment of damages for non-patrimonial loss. It is recognized that the Court has a power to estimate an amount *ex aequo et bono* and consequently enjoys a wide discretion with fairness as the dominant norm. In *Pitt vs Economic Insurance Co. Ltd 1957 (3) SA 284 Holmes J stated at 287 E-F.*

[21] Plaintiff's Counsel added that the Court must take care to see that its award is fair to both sides. It must give just compensation to plaintiff, but it must not pour out largesse at the horn of plenty at the Defendants' expense. Amounts previously awarded in comparable provide a general indication of what is fair and appropriate compensation. In *Hulley vs Cox 1923 AD 234 @ 246 Innes CJ* commended that a comparison with other cases can never be decisive but is instructive. Previous awards are updated to current value invariably employing the consumer price index. I agreed.

[22] Plaintiff has sought damages in the amounts set out hereinabove which amounts are commensurate with the damages suffered. He was attacked and

brutally assaulted by police for no reasons whatsoever. On the evidence the attack and assault took place in broad day light in full view of the members of the public, thus subjecting Plaintiff not only to pain and suffering but also public ridicule and emotion hurt.

[23] The court has seen that the Plaintiff has sustained grievous bodily injuries. I believed he has experienced excruciating pain which lasted several months. Above all Plaintiff has had his arm disfigured and deformed in consequence of which he can no longer be able to perform the physical work that he relays on as the construction worker in order to earn a living. He has been reduced to a position of a disabled man for no reason whatsoever. I believed that medical evidence is very instructive and informative in this regard.

[24] As I observed, Plaintiff is a young man who still has many years to live and to make ends meet for himself and his family and children. He still has to enjoy life and its amenities. All these are but dreams never to come true as he is now physically incapacitated as the result of the unlawful attack and assault on his person by the police.

[25] I took some factors into account in assessing the damages that may be awarded to the Plaintiff in this matter. It was correctly submitted that the sum the sums claimed are but a token of compensation as indeed no monetary value would ever adequately compensate the Plaintiff for the pain and suffering he has endured, the permanent disfigurement he has been subjected to, the close of amenities of life including ability to work for himself as well as the feelings that were gravely hurt. This court was thus for a good reason in my opinion asked to award the damages in the minimal sums set out in the summons with costs.

[26] In the case of *Ramoholi vs Compol CIV/T/445, Her Ladyship Chaka-Makhoaoane J.* on the 29<sup>th</sup> August 2011 awarded damages in sum of M250,000.00



to the Plaintiff who had sustained injuries far less than those sustained by the Plaintiff in this matter. In the case of *Letsela Morobi vs Compol CIV/T/230/2010, Her Ladyship Hlajoane J*, on the 9<sup>th</sup> February 2012, awarded damages in the sum of M100,000.00 to the Plaintiff whose injuries can safely be referred to as being superficial as compared to the Plaintiff in the present case who has sustained fractured bones among others. In the case of the *Commander LDF vs Tlhoriso Letsie C of A 28/10* the Court of Appeal awarded damages in the sum of M150,000.00 to a plaintiff who also did not have broken bones.

[27] In the present case, I agreed. Plaintiff has sustained grievous bodily injuries. He has been left disfigured and deformed by the police in consequence of which he is no longer able to perform his duties as a construction worker. He is enduring a continuing pain as a result of police brutality which was total uncalled for and unwarranted.

[28] In the result the sums herein claimed are close to fair and reasonable and ought to be awarded as prayed. It was accordingly ordered that judgement is hereby entered for Plaintiff against the Defendants jointly and severally on paying the other to be observed as prayed for in the summons including costs of suit.

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**T. E. MONAPATHI**  
**ACTING CHIEF JUSTICE**

For Plaintiff : Adv. S Phafane KC  
For Defendants : Adv. L. Tau