

IN THE HIGH COURT OF LESOTHO

CIV/T/130/2013

In the matter between:

MAHLOMOLA MAKH'APHA

PLAINTIFF

and

THE COMMISSIONER OF POLICE

1ST DEFENDANT

POLICEMAN SEKONYELA

2ND DEFENDANT

POLICEMAN MOTLOHI

3RD DEFENDANT

POLICEMAN NTSONYANA

4TH DEFENDANT

THE ATTORNEY GENERAL

5TH DEFENDANT

Coram : Hon.T Nomngcongo

Date of Hearing : 26 November 2014

Date of Judgment :15 November 2018

JUDGMENT

[1] On the 19th November 2012, the plaintiff in the company of his lawyer's desk presented himself at the Mafeteng Police Station between eight and nine in the morning. It was apparently in response to a call to do so in connection with an investigation into

the murder of one Mamoratuoa who had been shot dead on the 23rd August 2012.

- [2] The plaintiff says the police did not attend to him until about four to five in the afternoon when he was called into an office where the 4th defendant asked him to take a seat. He was then asked if he knew why he had been called there. He replied that he did not. The 4th defendant a policeman called Ntsonyane instructed another, presumably also a policeman to ask plaintiff to speak louder. His response was, without further ado, to approach the plaintiff and slap him on the face. Ntsonyane then asked plaintiff to give him a gun. When he said he did not have one he was treated to another slap on the face by the same policeman who then left the room. The plaintiff then remained in the room with other policemen who included Ntsonyane, Sekonyela and Charles Motlohi who are 2nd to 4th defendants. The group then asked the plaintiff to produce the gun with which he had shot Mamoratuoa adding that they knew that he had shot her. When he denied shooting Mamoratuoa, he was told that he did not want to tell the truth. He was by then bleeding from the nose as a result of the slapping he had received earlier. He was

instructed to take off his belt and shoe laces. He was all the while being prodded with a “lebetlela” stick he was then taken into a cell.

[3] He was kept in the cell about one hour when he was then called back into the office. There he was persistently asked about the death of Mamoratua. His answer did not please his interrogators. He was eventually asked to undress which he did, remaining only in his underpants. He was ordered to reach out for blankets which were around. He was asked to spread them on the floor. He was ordered and forced to lie down on them by Motlohi. His hands were then cuffed to his back. His legs were tied with tubes and these were trussed up with his cuffed hands. He lay face down in that position. His head was then covered with a blanket suffocating him one of his tormentors then stood on his head as he laid down. Cables were then tied to his small fingers, water was poured on them. He then felt shocks go through his body which in turn convulsed. He then passed out.

[4] When he came to the cuffs tubes and electric cables were not there. Ntsonyane re appeared this time carrying a bullet shell which he said came from the gun the plaintiff had used to shoot Mamoratua.

When he denied knowledge of this Motlohi said “*stab him*” This was a signal to repeat the treatment he had previously received. Later this was improved by putting the electric cables around his waist and later under his armpits. The pain was excruciating until he felt numb and his heart was wrenching. When he was ultimately untied and the blanket that was suffocating him was untied, he realized that a man had been standing on him and he had not felt it for the numbness of his body. He was then struck with a lebetlela stick around his ankles and knees and then ordered to stand. He was unable to do so. This resulted him being kicked with booted feet on the waist and being struck with a lebetlela stick. He was told that he could not stand for what he had done and was pretending that he could not stand up. He was told that, that was a police station and coming there with his little lawyers was of no use because they would beat him up anyway. He crawled to a chair. He found his clothes and put them on. All the time he was being sworn at by his mother’s private parts unable to sit on a chair he decided to sit on the floor. He was told that his mother knew something about the murder and that was why she had brought him to the police station with a lawyer.

[5] During the ordeal there were present men and woman some of who were his age or a little older. He felt emotional pain and hated government and the police. He was then told to go into a vehicle. When it was not possible for him to do so on his own he was pushed by his feet into it. He lay on the floor of the van because he could not sit up or stand. He was driven at night to a place he recognised as Van Rooyen's Gate. He was put in a cell there. The following morning he was taken back to Mafeteng still in great pain. He spent a day and a night there before he was taken to the magistrate's court for remand. Before being taken into custody he requested to see a doctor. The request was granted. The police were present when a doctor who was not a Mosotho attended on him. As he tried to explain his situation. The police said they were in hurry and asked the doctor to give him pain killers. The doctor did as he was told. The plaintiff was taken into custody until he was released on bail. He then decided to sue his tormentors. His lawyer advised him to see a doctor as he had not been properly examined by the government doctor at Mafeteng. He took the advice and consulted Dr. Monyamane who made a report that was handed in as exhibit "A".

[6] The plaintiff says he has not fully recovered from the assaults. He has gone for several check-ups after the first examination and he is still receiving treatment. He still hurts inside especially at the sight of policemen. He cannot do things that he used to do previously such playing volley ball and soft-ball. He cannot even see to catch a taxi or run away from danger. He can't lift heavy objects. He has to bend over to tie his shoe laces.

[7] He was subjected to lengthy cross-examination whose thrust was to deny that he is anyway assaulted the plaintiff and that the assaults he alleges were in consistent with medical report. The witness stood firm by his account of the events of the day and on the suggestion that the doctor would have seen injuries inflicted on him he replied that he suffered pain but there were no wounds. By that I understood that he meant there were no open injuries.

[8] The next witness was Dr. Molotsi Monyamane, a medical practitioner with an impressive curriculum vitae which speaks of a vast experience in things medical. He testifies that he examined the plaintiff and made a report dated 7/12/12 and found the following:

1. A tender swelling on the scalp;
2. Circumferential bruising around both ankles and wrists consistent with blunt trauma over a prolonged period of time;
3. Dislocated left hip joint consistent with convulsions and blunt trauma applied over the lower back;
4. Swelling over lower back and buttocks consistent with blunt trauma.
5. Memory lapses and lack of sleep and headache consistent with post-traumatic stress.

The doctor then examined the plaintiff again almost two years later and on the 11th November 2014 made a report in which he says he found the following:

1. Reduced flexion of the spine
2. Chest pain and tenderness over the right side of the chest wall.
3. Reduced memory recall of previous events.
4. That the patient reported continuation of nightmares and a poor sleeping pattern.

[9] It is not at all clear whether the latter examination was related to the assaults that plaintiff says he suffered at the hands of the police but the fact that the good doctor does not himself expressly say there is

such a link and the lapse of time between militate against such a conclusion.

[10] Two policemen gave evidence for the defence. Both admit that the plaintiff was incarcerated on the relevant dates. They deny that he was assaulted in the manner he described or at all. I am not surprised by this denial. Police often beat up detainees and then deny it because they know that it is unlawful to do so. Under cross-examination DW1 D/Sub inspector Ntsonyane said that he could not deny that the doctor observed the injuries that he testified to when further asked if he suggested that the injuries on the plaintiff were self-inflicted, he replied that he was not saying so. When it was put to him that plaintiff was not limping when he was brought in to the charge office he replied that, he did not know whether it was his way of walking but he described the way he was walking but he described the way he was walking as boasting – an observation he had not made in his statement or in his evidence in chief. DW2 D/Sergeant Sekonyela said he had observed the plaintiff “boasting” which he described as walking in an unusual manner as if he was limping. DW1 was asked if it was standard practice to fill in what is called a detention form for a person who is detained replied in the

positive and asked if it was done with respect to the plaintiff he replied in a non-communal way that it should have been done. He was then asked about its whereabouts. He replied that he did not realize that he had to bring it only to later say that he had to bring it and not found it. You cannot look for it and not found it. You cannot look for something that you did not know that you had to bring along with you is obviously not true that he looked for it.

[11] In a case like this the significance of the detention form is obvious. It is filled in when an arrestee is taken in for interrogation and observations are made on it about the state of his health. On his release against observations are recorded and it is countersigned by the detainee. This would go a long way to obviate allegations of assault in police detention and if the police vacillate about its production adverse inferences will be drawn against them.

[12] In the instant case the plaintiff says he came all healthy. He describes in graphic detail how he was ill-treated in detention by the police. He was observed by DW2 who saw him walking with a limp the morning after. Several days later Dr Monyamane (PW2)

observed, *interalia*, that the plaintiff had a dislocated left hip joint consistent with convulsion and blunt trauma applied over the lower back. I would add that it was also consistent with how the plaintiff says he was trussed up with hands-cuffs and tubes at his back and electrocuted which resulted in convulsions. DW1 D/Sub Inspector Ntsonyane does not say that plaintiff had any signs of ill health when he was taken for interrogation but he says before they took him to prison they took him to hospital because he told him and his colleague Toka Sekonyela (DW2) that he was not feeling well. Strangely however he says when they parted plaintiff did not complain of anything as he was not assaulted. This is policeman Ntsonyane once again shooting himself in the foot in a desperate attempt to deny that plaintiff was assaulted. He concludes by saying that whatever injuries the doctor found on plaintiff, they were not inflicted while he was in their custody. In response to a question whether he suggested that the injuries were self-inflicted he replies that he does not say so. Well from the nature of the injuries some of which were on his back and others around his wrists, no one can say so either. The plaintiff arrived at the police station without these injuries and left it limping. I conclude that he sustained these injuries during his sojourn in the police cells in the horrific manner that he

described. The police even failed to produce the detention forum which is obviously meant to indemnify them against allegations of assault.

The plaintiff claims the following:

1. R50,000 for unlawful arrest and detention
2. R500,000 for pain and suffering
3. R100,000 for *contumelia*
4. R300,000 for loss of *amenities* of life and disability
5. Interest at a rate of 18% a *tempore morae*

[13] In his declaration the plaintiff says that his arrest and detention were rendered unlawful by acts of assaults meted out on him by the police. The question that arises from this is whether an otherwise lawful arrest can be rendered unlawful by assaults in custody. It seems to me that the acts from, acts of arresting and detaining are inseparable. Arresting is the act of the police of assuming the control over a person's movement with the intention of bringing him to justice See **R V Maludisa 1961 (1) SA 380**. The Plaintiff with his lawyer took himself to the charge office. There he was kept for

inordinate hours without explanation. When he was finally attended to he was subjected to torture to extract information. These actions, after the plaintiff had himself surrender to be arrest, belie any intention of bringing him to justice, confirming the unlawfulness of the arrest and subsequent detention of plaintiff.

[14] The assaults themselves have been proved by the plaintiff's evidence against the police's perfunctory denial. It remains to deal with the difficult question assessing damages under the remainder of plaintiff's claims viz pain and suffering, *contumelia*, and loss of amenities of life and disability. In embarking upon their exercise a judge has a wide discretion circumscribed by fairness to both parties as Holmes J. famously stated in **Pett v Economce Insurance C-Ltd 1957 (3) SA 284 at 287.**

“ ... the court must take care to see 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 defendant's expense”.

[15] In determining, an award that will as nearly as possible compensate a plaintiff for injuries sustained innumerable other factors come into play. In a case like the present obviously, the severity and duration of the pain may be taken into account. I do not think it would be remiss also to take into account the conduct of the defendants. I am attracted in this regard to the **English House of Lords very old case** where exemplary damages were awarded to the plaintiff because the actions of the servants of the government were regarded oppressive, arbitrary and unconstitutional re **Huckley V Money (1763) 2 Wils 205 referred to in Winfield and Jolowicz on Tort 1th Ed. By W.V.H. Rogers**. In that case the plaintiff was unlawfully detained for no more than six hours during which he was treated very civilly and was feted with beef steaks and beer yet the court refused to interfere with a substantial award of damages awarded by the court a quo.

[15] The plaintiff in this case was subjected to torture, no less, after he had been stripped almost naked in the presence of several policemen and women. He was subjected to extreme pain and not to mention humiliation. Unfortunately these cases come before our courts with disturbing regularity and the methods used to inflict pain

on detainees by the police are strikingly similar. Mr Phafane has referred the court to six such cases which are but a tip of the iceberg:

1. **Ramoholi vs Compol CIV/T/445/2011** in which Makhooane J. awarded damages in the sum of M250,000.
2. **Letsela Morobi vs Compol CIV/T/230/10** in which Hlajoane J. awarded damages in the sum of R100,000 for injuries far less than in the present case.
3. **Commander LDF vs Tlhoriso Letsie C of A 28/10** for which the Court of Appeal awarded damages for assault in the sum of M150.000.
4. **Mokhethoa Mokaka vs Compol and Another CIV/T/258/12** in which Monaphathi J. awarded damages in the sum of M250,000 for a broken arm.
5. **Mare Taole vs Napo Sehloho and Others CIV/T/27/10** where Hlajoane J. awarded M200,000 for assault by the police

[16] Considering all these circumstances I would award general damages as follows:

Unlawful arrest and detention pain and suffering with *attendat contumelia* – M500,000. Loss of amenities – R100,000. Interest at the rate of 18% a *temporae morae*.

T. Nomngcongo
Judge

For plaintiff : Mr Phafane

For defendant: Mr Moshoeshoe