

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/264/2013

In the matter between:

TEFO CASWELL KOESHE

PLAINTIFF

AND

**THE COMMISSIONER OF POLICE
O/C MOFOLO POLICE STATION
THE ATTORNEY-GENERAL**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

JUDGMENT

CORAM: HON. J.T.M. MOILOA

DATE OF HEARING: 03rd JUNE 2019

DATE OF JUDGMENT: 01st JULY 2019

ANNOTATIONS

Legislature

1. Criminal Procedure and Evidence Act, 1981

Cases

1. Pitt vs Economic Insurance Co. Ltd 1957(3) SA 284
2. Hulley vs Cox 1923 A.D. 234
3. P. S. Mohlaba & Others vs Commander Royal Lesotho Defence Force
1995 LLR 648
4. Mahloko Adam Mathoka vs Commissioner of Police Attorney General
(CIV/T/225/14)

[1] **INTRODUCTION**

This is another case of the many in recent years where police have misused their powers and subjected citizens to abuse, humiliation and brutality for no justifiable cause.

[2] Plaintiff is a 70 year old village of Ha Tšilo, in the Matsieng ward. He is a peasant farmer and married man. He has 4 children and 4 grandchildren. One of Plaintiff's children is a policewoman. Another daughter is a school teacher by profession at Mosoang primary school on the Matsieng Plateau. A third child worked in Bloemfontein. A fourth child (son) went to University though Plaintiff did not recall exactly what qualification he obtained there. Plaintiff worked at Harmony Mine in the Welkom Area where he worked at the Engineering Division as a Pump Attendant from 1972 – 1983. He returned home permanently in 1983 and opened a General Café business in his village which operated until 1996. In the village Plaintiff is a member of the Crime-Prevention Liaison Committee which assists police authorities with crime detection and prevention in his area. He also writes on behalf of his area chief letters to superior chief recommending villagers to be given bewys for their animals. In the last elections he stood as a candidate for local council and he lost.

[3] On the early morning (about 6 am) of 17th September 2011 police contingent knocked at Plaintiff's door. When Plaintiff opened his door he saw a contingent of 6 or 7 policemen and 3 villagers (whom he recognised as Tumelo, Tšepo and Tefo). He noticed that the 3 villagers were arrestees. Police shouted at Plaintiff and said: "*Tefo Suoane give us the firearm.*" In saying so the police were addressing themselves to Plaintiff calling him Tefo Suoane. Plaintiff responded that he was not Tefo Suoane but Tefo Koeshe and he did not have a firearm. Police responded by telling him that

he shall speak the truth and drove him and the other 3 arrestees to the Tlouoe Primary School playing grounds. On arrival there a dark complexioned policeman wearing a police uniform but whose name Plaintiff did not know ordered Plaintiff to roll on the ground. Plaintiff started rolling from the boys' playing ground towards the girls playing ground a distance of about 50 metres. While Plaintiff rolled as ordered he was being killed on the legs and on his hips. Plaintiff was rolling as ordered until he got tired and refused to roll any more. Plaintiff testified that as he rolled he was in great pain and breathed with difficulty. People of the village had gathered at the school playing grounds and watching as plaintiff rolled on the grounds. Police ordered plaintiff to get up when they noticed that he was exhausted and no longer willing to continue rolling as ordered. Plaintiff testified that during this rolling on the ground process he felt severely humiliated. The behaviour of police towards him was crude, rude and totally disrespectful. He was then marched from the school playing fields to Malefane's home where he found Sgt. Lebajoa. Plaintiff was marched to Lebajoa with 6 other detainees. Lebajoa was where police vehicles were parked. They were ordered into the back of the vehicles. At this point one policeman shouted: "Suoane Seeko." The villager so named alighted from the vehicle to go to the front in response where the policemen were seated. They demanded a firearm from Suoane Seeko. Seeko replied that he did not have a firearm. They were all driven away in police vehicles. When the vehicles reached Tšilo's Pass they stopped and Plaintiff was ordered off the van and told to go home. Plaintiff was approximately 4 km away from his home at this time. No explanation was offered why he had been arrested nor why he was being released. Plaintiff walked back home. He obtained a letter from his chief referring him to police to lodge a complaint against police brutality on him. He got the chief's referral letter.

- [4] On 19th September 2011 Plaintiff obtained a Medical Form [LMPS 47] at Maseru Rural Police Station at Morija where he lodged his complaint. He saw a Doctor, at Morija Scott Hospital. The Doctor's examination revealed the following injuries to Plaintiff:

Report on injuries

- "Abrasions on both legs"
- "Tenderness in both external and lateral sides of thigh."

Cause of injuries "Assault"

- Degree of force inflicted: mild
- Degree of injury to life: light
- Degree of immediate disability: light
- Degree of long terms disability: none
- Duration of hospitalisation: 1 to 1
- Treated as an out-patient: yes

Police never took any action on his complaint despite his several visits to Maseru District Rural Police Office at Mazenod to follow up on his complaint. Plaintiff testified that in these circumstances he felt compelled to seek redress of the courts to protect his rights as a citizen, as he put it.

- [5] Plaintiff's evidence was corroborated in material respects by Mahlomola Molikeng who is a neighbour of Plaintiff. Molikeng testified that on the morning of 17 September 2011 he noticed a group of policemen going past his gate and entering Plaintiff's yard. Plaintiff's gate from his is about 11 paces away. When he noticed the group enter Plaintiff's gate he stopped and watched. The police group consisted of 6 or 7 policemen plus 3 villagers whom they had handcuffed and were driving. Molikeng testified

that he approached closer to watch what was happening. A police officer wearing camouflage uniform knocked at the door of Plaintiff. He knocked about 3 times saying “Tefo come out” Plaintiff opened the door and came out to meet the police contingent. Police then said to Plaintiff: “Tefo Suoane give us a firearm” Plaintiff replied that he was not Tefo Suoane and he had no firearm. A policeman wearing a blue camouflage uniform responded by assaulting Plaintiff with an open hand on the head and said: “you will take out the firearm boy.” Plaintiff again said he was not Tefo Suoane but Tefo Koeshe. Plaintiff further said to the police: “This is my house where I live alone. You can enter and search.” The policeman reacted by saying: “you must put on our clothes so that we may go and you will give us the firearm.” Molikeng testified that at that juncture Plaintiff entered the house and after a few minutes re-appeared carrying his light blanket which he put on. Police broke Plaintiff away on foot together with 3 others that were already detained by police. As they left Plaintiff’s home one of the policemen pulled Plaintiff by the neck holding him together with his clothes saying: “Let’s go!” Plaintiff protested to the police and said: “My children why do you drive me like this, a man of my age.” Molikeng explained that he understood Plaintiff to be pointing out to the policemen concerned that he was old and ought to be treated with respect like an elder in society.

- [6] He followed them to see where they were going with Plaintiff and other detainees. PW2 testified that as he knew Plaintiff to be a law abiding villager and a member of the Policing Forum Liaison Committee in their village he was surprised at the treatment being meted out to him. PW2 testified that he saw them being driven in the direction of the school yard. After Plaintiff and the police contingent reached the school yard they reached a soccer field. One of the policemen said to Plaintiff: “Tefo

Suoane roll on the ground.” As Plaintiff was preparing to roll on the ground he was protesting to them that he was not Tefo Suoane but Tefo Koeshe. They took no notice of his protests. Plaintiff rolled down on the ground as ordered. Plaintiff rolled from the soccer field until he reached the girls netball ground. All the while the villagers including me and the other detainees were watching the spectacle being done to Plaintiff. Suddenly Plaintiff school up crying. I did not notice whether he stood up because he had been ordered to stand up. But I did hear a policeman say “stand up.”

- [7] From there police drove Plaintiff and other detainees with him to Khabele’s home. PW2 followed them. At Khabele’s home there were already some men there crying. PW2 did not go into Khabele’s yard. From Khabele’s home the police drove the Plaintiff together with other detainees up towards the village bus terminus. PW2 noticed that police vehicles were parked there. There PW2 recognised Lebajoa, a policeman who had frequented their village holding *pitso*’s to talk about crime detection and reporting. By this time the police contingent was larger than when it left Plaintiff’s home. PW2 testified that he did not speak to Lebajoa. When he realised that Plaintiff and other detainees were going off in police vehicles, PW2 quickly returned to Plaintiff’s home to close the door of the house which had been left open by police earlier. He also took Plaintiff’s phone in the house and phoned his wife and children. Plaintiff’s wife lived at Mosoang where she was a teacher at Mosoang Primary School on the Matsieng Plateau, another daughter was a policewoman in Qacha’s Nek. PW2 was joined by Mrs. Koeshe and her daughter Lineo from Qacha’s Nek at Mofoka Store. Mofoka store is near Mofoka Police Station. The three then proceeded to the Police Station carrying additional blankets and food for Plaintiff. But on arrival there they did not find Plaintiff among

the detainees. They went back to Plaintiff's home where they found Plaintiff.

- [8] In defence the Defendant led only P/C 38879 Makhalemele. His version was a flat denial that police ever arrested Plaintiff on 17/9/2011. He said on the day in question police arrived at Plaintiff's village at Ha Tšilo armed with a list of suspects who police information indicated possessed illegal firearms. Makhalemele was a member of the police contingent that went to Ha Tšilo on the early morning of 17 September 2011. They were backed up by a contingent of Special Operations Unit which was a camouflage uniform different from the ordinary police uniform. The story of Makhalemele is that 3 of them went to the chief's place to report their (police) presence in the village and to seek identity of the homes of suspects police were looking for. He alleges that the home of Plaintiff was pointed out by the chief pursuant to the list that police had. On arrival at Plaintiff's home they asked him to accompany them to the school grounds where Sgt. Lebajoa who was leading the operation was waiting for police teams collecting suspects from the village. Makhalemele insisted throughout his evidence in chief that at no point did they arrest Plaintiff. According to him police merely requested Plaintiff to accompany them to Sgt. Lebajoa at the school grounds. On arrival to Lebajoa at the school grounds, Lebajoa immediately recognised Plaintiff as a member of Crime Prevention Liaison Committee and released him. Lebajoa explained that the Tefo Koeshe they were looking for is a young person and not the old man they had brought to him. According to Makhalemele Plaintiff was immediately asked to return to his home.
- [9] When asked to explain away the detailed testimony of PW1 and PW2 regarding police actions at Plaintiff's home, at the school playing grounds

and at Lekhalong, Makhalemele could not give me satisfactory explanation of the vast discrepancy of the detail between his version and that of PW1 and PW2. All Makhalemele could tell me was that Plaintiff was never arrested. Makhalemele admitted that they had no search warrant for Plaintiff. When I pointed out to him that in terms of **Section 47 and 48 of the Criminal and Procedure and Evidence Act, 1981** police on a mission like theirs and in circumstances similar to theirs on that day needed to be accompanied by the chief or the chiefs' representative when they conducted their search in the village, Mr. Makhalemele admitted he was not aware of this requirement. Finally he admitted that among them there was no one holding a rank of Warrant Officer or above. The highest rank held among them was that of Sgt. which was held by Sgt. Lebajoa. I am not persuaded that Makhalemele told the court the truth. I am satisfied that Plaintiff was maltreated by police as the evidence of Plaintiff disclosed in detail. Makhalemele himself was an unsatisfactory witness completely unable to satisfactorily refute the testimony of Plaintiff's evidence. Accordingly I accept the evidence of Plaintiff and his witness that he was arrested for no justifiable cause, assaulted and humiliated in full view of his fellow villagers on 17 September 2011. All these unlawful acts were done by police officers under Sgt. Lebajoa's command in the course of their duty as policemen going about the duty of their Master to search for illegal firearms. Defendants liable to Plaintiff accordingly.

[10] **Quantum of Damages**

In his summons Plaintiff claims are formulated as follows:

- (a) M200,000.00 for violation of his fundamental right to freedom from torture and inhuman treatment.
- (b) M150,000.00 for pain and suffering

- (c) M150,000.00 for unlawful arrest and impairment of plaintiff's person, dignity and reputation.
- (d) Interest at rate of 22% per annum
- (e) Costs of suit
- (f) 10% collection commission
- (g) Further and/or alternative relief

For purposes of calculation of quantum of damages due to Plaintiff I shall confine myself to the first three heads of claims in Plaintiff's Summons. During oral arguments I asked Counsel for Plaintiff how she had calculated and established the amounts that she is claiming for each of the 3 heads of claims. She was unable to give me a satisfactory answer except to say only that the quantum of damages she leaves in the hands of the Court. Defendants pleadings on this aspect is equally unhelpful for the issues were never probed in request for particulars for purposes of pleading their defence nor for purposes of trial. In fact no work was done at all by Counsel for the parties in assisting the court to define and refine the issue of quantum at all. In fact I got so frustrated about their lack of effort that I enquired whether these sums were sucked by them out of the air. Both Counsel made no effort at all in their pleadings and preparation for the trial of this matter to interrogate damages aspect of this case. I am left to figure it out for myself.

[11] **MEASURE OF DAMAGES**

As to the measure of damages to be awarded in each case I am guided by the principle enunciated by **Holmes J in Pitt vs Economic Insurance Co. Ltd. 1957(3) SA 284 at page 278** where he said:

"I have only to add that the Court must take care to see that its award is fair to both sides in that it must give just compensation to Plaintiff,

but it must not pour out largesse at the horn of plenty at Defendant's expense."

I agree wholeheartedly with the above principle. Amounts previously awarded in comparable cases provide in general an indication of what is fair and appropriate compensation of what is fair and appropriate compensation. But against this principle though helpful must be tempered with a caution made by **Innes C. J. in Hulley vs Cox 1923 A.D. 234@246** where the learned judge said:

"A comparison with other cases can never be decisive but is instructive. Previous awards are updated to current value invariably employing consumer price index....."

Employing the above principles, I have searched for comparable cases to our present case without success. In **P. S. Mohlaba & Others vs Commander Royal Lesotho Defence Force 1995 LLR 648 Leon JA of our Court of Appeal** reminded us as follows:-

"There is no scales by which pain and suffering can be arithmetically measured in money." In **Mahloko Adam Mathoka vs Commissioner of Police & Attorney General CIV/T/225/14** (unreported) delivered by me on 7th December 2015 I had the following to say in part on this aspect:

"The trial court has a discretion in the award it makes taking into account the particular circumstances and facts of each case. It is useful to see what awards the courts have made in our jurisdiction in similar cases. But it is equally useful to see what awards in comparable cases have been made in South Africa who is our closest neighbour. I caution that our economies are vastly different. Our courts must be careful not to blindly make awards that are similar in magnitude to South African awards. The Court will bear in mind the date of the awards and seek to make suitable adjustment based on economic indices prevailing at the time of award."

In many of the cases in this court that I have seen such awards as have been made have not been comparable circumstances to this present case.

Secondly, many of the cases I have come across have not really attempted seriously to interrogate the quantum claimed in the summons nor have the court in our jurisdiction attempted to interrogate the quantum arrived at against the principles outlined above. So I am really at large when it comes to determination of quantum in the case before me now.

- [12] I do not consider that prayer 5.3 (a) and 5.3 (b) and (c) can be differentiated. I take them to be essentially two heads known in our law as:-

(a) Contumelia which is injury to one's dignity and status among one's neighbours and fellowmen; and

(b) Pain and suffering which is pain and the unlawful assault by defendant on the body of plaintiff.

12.1 CONTUMELIA

There is overwhelming evidence that Plaintiff was unlawfully arrested by police officers of First Defendant from his house and that in the process of that arrest Plaintiff was subjected to abusive language which was disrespectful of his status as an elder in the community of Ha Tšilo where among other things he was a respected member of the community and its member of Crime Prevention and Detection Forum. He was also a businessman though at the time of the incident complained of his business no longer operated. Plaintiff is a father of 2 girls one of who was herself a police officer stationed at Qacha's Nek while the other worked in Bloemfontein. Plaintiff's wife is a qualified teacher working at Mosoang Primary School. All in all Plaintiff's family is a respected family at Ha Tšilo all of whom hold responsible positions in society. He was made to roll on the ground from the boys' football ground to the girls' netball field for no purpose other than to humiliate him in the full glare of his fellow

villagers, young and old despite his protestations. He was kicked on his legs and thigh areas while being made to roll on the ground by officers of Defendant who were much younger than himself. Officers of the Defendants in my view abused their positions as policemen by assaulting humiliating and demeaning Plaintiff for no justifiable cause whatsoever other than to enjoy abuse of their power over an old man probably older than their own parents. A truly despicable act by young men in whose custody State power was reposted in them to combat crime. To my mind the humiliation of Plaintiff at the hands of the police was demeaning. It deserves an award of M150,000.00 in compensation as damages for his dignity.

12.2 Assaults, Pain and Suffering

In regard to Defendant's officers assault of Plaintiff I observe that the medical evidence shows that there were bruises and scratches on Plaintiff's legs and thighs. This is consistent with Plaintiff's testimony of the nature of the kicks inflicted on him by Defendant's officers. But again the medical evidence shows that there were no permanent disabilities that resulted from such assaults, nor open wounds as a result thereof. There was no hospitalization of Plaintiff as a result thereof. Although Plaintiff said he suffered great pain, I am not persuaded that he suffered such excruciating pain as he tried to describe to me. I am satisfied that he did suffer pain but the quantum of such pain I am equally convinced is exaggerated by Plaintiff. In the circumstances I estimate and believe that an award of M50,000 compensation for pain and suffering arising from the assaults is adequate, fair and just.

[13] **CONCLUSION**

I have concluded that Defendant's officers unlawfully and unjustifiably maltreated and humiliated Plaintiff in front of many villagers at his home when they unlawfully arrested him and assaulted him. Thus I concluded as explained above that Defendants are liable for the unlawful actions of his officers against Plaintiff while carrying their duty to detect and suppress crime at Ha Tšilo on 17th September 2011.

I believe a total of M200,000.00 in damages is adequate compensation to Plaintiff against Defendants.

[14] **COSTS**

Costs shall follow the result as a rule unless some special circumstances exist calling for a variation of that rule. I have found no special circumstances justifying such a deviation. Accordingly I award costs to Plaintiff against Defendants on party and party basis.

J. T. M. MOILOA
JUDGE

FOR PLAINTIFF:

ADV. N. B. PHEKO

FOR DEFENDANTS:

ADV. F. F. THOLOANA
ADV. R. J. TŠEUOA