

IN THE HIGH COURT OF LESOTHO**HELD AT MASERU****CIV/T/496/17**

In the matter between

THABA MONELE**PLAINTIFF****AND****KEISARA MPAKATHE****DEFENDANT****JUDGEMENT**

Coram: Banyane AJ

Date of hearing: 26/08/19

Date of judgement: 02/09/19

Summary

Claim for damages arising from an assault - the nature and extent injuries and treatment to be adequately proved through production of documentary evidence or detailed oral evidence - applicable principles on assessment of damages - award of M25 250.00 made

ANNOTATIONS

BOOKS

R, G Mckerron, The law of Delict, 7th edition, Juta & co

CASES

Road Accident Fund V Marunga 2003(5) SA 164,

Sigournay V Gillbanks 1960(2) SA 552.

National University of Lesotho & Another V Thabane LAC (2007-20080 476

Lesley Judith Young V Ian Leslie Mcdonald Case No. A213/2010 High Court
SA (Western Cape High Court-Capetown)

Sandler v Wholesale Coal Supplies Ltd AD 1941 at 199

Mohlaba and Others v Commander of the RLDF and Others 1995 LLR 648

Philander V Minister of Safety and Security 473/2011 [2013] ZANWHC 51.

Lethole V Commissioner of Police CIV/T/4/2014.

Nkofi V Ramoreboli CIV/T/631/13

Nyolohelo Jae V Masupha CIV/T/246/07

Tseliso Sesinyi V David Nkolanyane CIV/T/26B/81

Introduction

1] This is an unopposed action for damages in the amount M150 000.

This is broken down under the following heads;

a) Medical expenses	541.00
b) Pain and suffering	100,000.00
c) Disfigurement	24, 459.00
d) <i>Contumelia</i>	25, 000.00

2] These damages allegedly arise from an assault perpetrated by the defendant on the plaintiff. The defendant was served with the summons at Nk'unk'u Mohale's hoek on the 05th December 2017. He never entered any notice of appearance to defend. The plaintiff then proceeded to have the matter set down for default judgement as sanctioned by Rule 27(3) and viva voce evidence was then heard in terms of Rule 27(5) of the High Court Rules 1980.

Plaintiff's evidence

3] In a brief testimony by the plaintiff, salient facts that precipitated the launching of this claim are distilled. They are that;

The applicant attended some celebration for initiation school graduates on the 21st day of January 2016. He was at the defendant's brother's place in Mohale's hoek. His evidence reveals that, the defendant, unbeknown and unaware, attacked and hit him with a *lebetlela* stick on the head. He was knocked down as a result. The defendant severally belaboured him on the ribs when he was already on the ground. He sustained two "serious" wounds as a result of the assault. One on the head and the other on his hand. His hand was broken as a result. He had to seek medical treatment and same was given at Mohale'shoek and Queen 11 hospital respectively.

4] He told the court that he could not urinate for one week after the incident and further that he was very humiliated by the incident. The plaintiff concluded his evidence by alleging that he suffered damages (as outlined under paragraph 1 of this judgement).

5] The plaintiff did not however give any details and circumstances surrounding the assault. Such details include; where exactly did the assault take place? In the presence of whom? In what state was he after the incident? How did he leave the place to seek medical attention, did he walk on his own or through assistance of anyone? Was the matter reported to the police? If yes, what action was taken? He similarly proffered no evidence on how he came up with the figures claimed under the heads identified at the prelude of this judgement. The plaintiff nor his counsel did not endeavour to assist the court to arrive at a just and reasonable award for damages. In other words, the plaintiff's evidence is simply a replica of the averments in his declaration and he regrettably added no value on how the amounts stipulated therein have been arrived at.

6] The role of quantifying the damages, if any, is thus left in the hands of the court. I thus proceed to determine to assess the alleged damages.

Applicable principles in the assessment of damages

7] Whilst special damages are often readily ascertainable, a claim for general damages on the other hand is not because there is no measure of damages in the sense of an appropriate standard of money value. Courts have a wide discretion to determine the quantum of damages and to award what is considered to be fair and adequate compensation to an injured party. **Road Accident Fund V Marunga 2003(5) SA 164, Sigournay V**

Gillbanks 1960(2) SA 552. National University of Lesotho & Another V Thabane LAC (2007-20080 476

8] In the exercise of this discretion, Judicial officers should derive guidance from the amounts awarded in previous similar cases (due allowance being made for the depreciation in the value of money)...**R.G Mckerron, The Law of Delict, 7th edition, p 115.**

9] Courts do however take cognizance of the fact that facts of two cases are rarely identical. The usefulness of reference to awards in previous broadly comparable matters is therefore to give the trial court an idea of an appropriate range within which to fix its award. Put differently, what is intended to be achieved through reference to previous similar or comparable cases, is consistency in the general range of compensatory awards. **Lesley Judith Young V Ian Leslie Mcdonald Case No. A213/2010 High Court SA (Western Cape High Court-Capetown)**

10] Other factors to be taken into account in the assessment of damages include; particular facts and circumstances of the case, the injuries sustained by the plaintiff as well as the nature, permanence, severity and impact on his life. **Philander V Minister of safety and security 473/2011 [2013] ZANWHC 51. Lethole V commissioner of Police CIV/T/4/2014.**

I now proceed to deal with damages sought under each head.

Hospital expenses

11] Compensation for Hospital expenses falls under the category of actual expenditure and pecuniary loss. The compensation sought should be for

recovery of medical, hospital and other expenses incurred by the claimant in connection with the injuries sustained. (**Mckerron ibid p.118**). The plaintiff in the instant case failed to provide hospital receipts nor his health booklet as proof of the alleged injuries and that of course he sought medical assistance and incurred expenses. His explanation for the failure to do is that he gave the necessary documentary proof to his legal representative, Adv Mda KC, and regrettably same were destroyed in a fire calamity that befell his office.

12] There is however no reason, particularly in the absence of evidence to gainsay his version, that

- a)** indeed he was assaulted by the defendant,
- b)** that he was thereby injured
- c)** that he experienced pain during and after the assault and did subsequently seek treatment both in Mohale's hoek or Queen 11 hospitals.

The problem however lies in the deficiency in detail as regards the nature on injuries sustained, the exact treatment he sought and received at both hospitals. Was he treated as an outpatient or admitted in either or both hospitals, if yes, for how long? And what treatment did he receive? Was he referred to queen II by the Mohale's hoek hospital, if yes, did he incur any travelling costs? I pose these questions to illustrate a point that it is insufficient (as will be seen later in the judgement) to simply state an amount in the declaration but proffer no evidence to substantiate same. Under this head therefore, regard being had to the fact that both are government hospitals and there no evidence to support the amount claimed, an award of M250 would be appropriate.

Pain and suffering

13] The damages recoverable under this head cannot be assessed on any arithmetic or logical basis (**Mckerron ibid p 118**). The instructive remarks of WaterMeyer JA (ft) **Sandler v Wholesale Coal Supplies Ltd AD 1941 at 199** however serve as a useful guide on the assessment of damages under this head. He stated;

"It must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case". See also **Mohlaba and others v Commander of the RLDF and Others 1995 LLR 648**.

14] Although there is no medical evidence provided in this case, I have no reason to disbelieve the Plaintiff that the assault on him and consequent injuries resulted in pain and suffering. I will therefore take cognisance of awards made in cases of **Nkofi V Ramoreboli CIV/T/631/13** where the plaintiff was awarded 75 000 for pain and suffering because he developed epilepsy as a result of the assault, the case of **Nyolohelo Jae V Masupha CIV/T/246/07** where an award of M2 000 was made, **Lethole V Commissioner of Police(supra)** as well as in other cases to the extent that the injuries sustained by claimants in those cases are comparable to the injuries sustained by the plaintiff in *casu*.

Contumelia

15] *Contumelia* is awarded as *solatium* for the violation of personal dignity and bodily integrity caused by the physical and emotional suffering. This remedy is not intended to enrich the claimant. **Lethole V commissioner of police (supra)**. It becomes imperative therefore that the allegations as to the amount stipulated in the plaintiff's declaration should be supported by evidence. **Majara J** (as she then was) in the case of **Jae V Masupha (supra)** at para 22 neatly put the position as follows ;

"It is not sufficient for a plaintiff to simply state an amount in damages in his summons. It is incumbent upon him to give the Court a fairly good idea of how he arrived at that amount or why he thinks it should be awarded to him..,"

16] Factors to be considered for assessment under this head include the circumstances such as whether the assault took place in the presence of other people (**Lethole V commissioner of police (supra)**). In *casu*, no such circumstances were described by the plaintiff. I have no doubt however, that for a man of his age, the nature of the assault on him must have been a humiliating and degrading experience. A fair amount under this head is in my view M3 000.

Disfigurement

17] Under this head too, medical evidence was necessary to establish the claim under this head. The plaintiff did not tender any evidence, ether oral or documentary to suggest disfigurement. He relies on his *ipse dixit* that he sustained an injury on the head and hand without stating the impact these had on his appearance. A claim under this head is therefore unjustified and should fall away. See in this regard the case of **Nkofi V Ramoreboli (supra)**

Conclusion

18] In deciding the appropriate award for general damages, I have taken into account all the circumstances stated above, particularly the following;

- a)** Insufficiency of evidence on the nature of injuries and their impact on the plaintiff's life
- b)** no evidence having been given to assist the Court in the proper assessment of damages claims under the various heads,
- c)** no evidence on the extent to which each one of the claimed damages have been suffered,
- d)** comparative cases and awards thereof.

19] I have also given credence to the remarks of Cotran CJ (as he then was) in the case of **Tseliso Sesinyi V David Nkolanyane CIV/T/26B/81** where he said;

"I do not think this Court should slavishly follow damages awarded by Courts in other countries. Lesotho Courts should be left with some elbow room to come to a decision on awards on personal injuries taking the economic circumstances of ordinary people here"

20] In the result, I come to the conclusion that an award in the sum of M 25 000 in respect of general damages (that is M22 000 for pain and suffering and M3 000 for *contumelia*) would be fair and equitable.

21] I therefore make the following order;

- a) The defendant is ordered to pay an amount of M25.000 in general damages and M250 for hospital expenses

b) The defendant is ordered to pay the plaintiff's costs of suit.

P. BANYANE (Acting Judge)

For plaintiff: Adv Mafaesa

For Defendant: No Appearance