

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/296/18

In the matter between:

DR. MAMELLO SEKHOACHA

PLAINTIFF

AND

THE COMMISSIONER OF POLICE

1st DEFENDANT

THE ATTORNEY GENERAL

2nd DEFENDANT

JUDGMENT

CORAM:

HON. J. T. M. MOILOA J.

DATE OF HEARING:

25 FEBRUARY 2019

DATE OF JUDGMENT:

12 MARCH 2019

ANNOTATIONS:

1. Mahloko Mathoka vs Commissioner of Police & Another CIV/T/225/14
2. Peregrine Group Pty Ltd vs Peregrine Holdings (unreported) 2001(3)SA 1268
3. Ocean Accident & Guarantee and Corporative vs Kock 1963(4) SA 147
4. Pitt vs Economic Insurance Co. Ltd 1957(3) SA 284
5. Hulley vs Cox 1923 A.D 234
6. Mohlaba vs Commander LDF 1995 LLR 648
7. Mokhethoa Mokaka vs Commissioner of Police
8. Tholang Maleka vs Commissioner of Police (CIV/T/131/2013) (unreported)

- [1] At the start of this trial on 25th February 2019 Mr. Tšeuoa appeared for Defendants to seek a postponement. Postponement was opposed by Adv. Teele for Plaintiff. It appears that Defendants were served with summons on 23 April 2018. No action was taken by Defendants until morning of commencement of trial. In support of the application I was told that the matter had been allocated a Ms. Matšosa at Second Defendant's Chambers but she had done nothing to attend to it until her departure to Cabinet Office. It had only now been allocated by Second Defendant to Mr. Tšeuoa who appeared to plead for postponement. In my view all of the above are not justifiable reasons to grant postpone do Defendants literally at the doorstep of the trial Court on the day of its trial. Plaintiff is here to proceed with her trial. She has had to close her practice for the day. It is unfair to ask her to go back and come back again some other day for reasons advanced by these Defendants for the postponement of her case. After hearing arguments I dismissed application for postponement with costs to Plaintiff.
- [2] Plaintiff is a Medical Doctor of 18 Rudle Street Univesitas in Bloemfontein. On 11th December 2015 she was travelling on her motor bike with her friend who was also on her motor bike from Bloemfontein to Maseru. On their arrival at Maseru Bridge Border Post they found the Border extremely congested with people and vehicular traffic. I may add that it is a common phenomenon at Maseru Bridge Border Post that the situation at this time of the year was as described by Plaintiff.
- [3] When Plaintiff and her friend got to the Boom-Gate, it was her friend who found space for parking her bike. The Boom-Gate itself was not closed. Plaintiff and her friend decided that her friend alone would go inside to pay their respective M30.00 each, boom-gate fee. Plaintiff slowly rolled her

bike across the open boom-gate which was unmanned and parked it just beyond the boom-gate near the pay cubicle to await arrival of her friend. After had stopped her motor bike still sitting astride it she heard the sound of gunfire and then felt a sharp pain on her thigh followed by numbness on the rest of her lower limbs. She noticed that blood was streaming down her left leg. She could not fathom what was happening to her. She noticed people crowding around her screaming that: “He has shot her. Is she a thief? Was she robbing someone?” At this time her friend had just come back from paying inside the Border Post Building with their receipts. A lady police officer who happened to be the senior of the shooter was shouting at the shooter and asking him why he had shot the Plaintiff. The policeman who shot Plaintiff was shouting back that Plaintiff was running away to evade paying Boom-Gate fee. The senior policewoman was shouting back at the junior policeman saying “The lady has paid the gate fee! Why do you shoot her? You have caused her serious injury.” Many people gathered around looking at her curiously as if she was a robber. The policeman who shot Plaintiff was shouting back that she was trying to run away without paying the boom-gate fee. The senior female police officer replied that Plaintiff had in fact paid her toll-fee. The senior policewoman called for a vehicle to take Plaintiff to hospital immediately to stop the bleeding. As for the policeman who shot Plaintiff he was utterly without remorse for what he had done to Plaintiff even when he was being reprimanded by his superior female police officer on duty with him.

[4] **AS TO LIABILITY OF DEFENDANTS**

On the facts outlined above I am satisfied on a balance of probabilities that a servant of Defendants (policeman who shot Plaintiff) was on duty about his masters business at Maseru Bridge Border Post on 11th December 2015 when he shot Plaintiff on her thigh. See **Peregrine vs Peregrine 2001 (3)**

SA 1268 Ocean, Ocean Accident & Guarantee Corporative vs Kock 1963 (4) SA 147. I am also satisfied completely that Defendant's policeman shot Plaintiff for no justifiable cause whatsoever. The policeman was simply reckless as to the use of his police firearm he had on duty on that day. In my view it is uncalled for that the Defendant's police used a firearm on a member of the public for a paltry sum of M30.00 even assuming Plaintiff was avoiding payment of toll-fee which Plaintiff was not doing anyway. It simply does not make sense to me that a trained (if this policeman was trained and disciplined at all) to shoot a lady member of the public for M30.00 transgression of whatever law the policeman was defending. It is just senseless reaction by the policeman. In any case the policeman was wrong that Plaintiff was evading payment of M30.00 anyway. A firearm is used only in situations of dire/grave circumstances such as in self-defence or in apprehending a dangerous criminal. In my view there was no grave situation created by Plaintiff to justify the policeman shooting Plaintiff. I accordingly find that the policeman and his masters the Defendants herein are liable in damages to Plaintiff for the injuries caused to Plaintiff by the policeman on 11 December 2015. See **Mathoka vs Commissioner of Police & Attorney General CIV/T/225/14** (unreported). Too often in this country courts have increasingly been witnessing police use of brutal force on members of the public with no justifiable and little regard to the consequences of their use of firearms in particular on members of the public. In the Mathoka case policeman rendered a 20 year herdboy comatose for no justifiable reason at all other than he may have been involved in a fight with boys of a neighbouring village during which fight the boys of Plaintiff's village were alleged to have fired a shot at boys from their neighbouring village. Police had no evidence that Mathoka had a firearm on that he had been present at the herdboys fight the previous day. Instead of the police

properly investigating the complaint police raided Plaintiff's village at night and went on a shooting rampage which critically injured an innocent herdbooy.

[5] **AS TO DAMAGES QUANTUM:**

Plaintiff was carried to a police van and placed in its load bay. But there was a long delay as the van stood outside police station police explaining to her that they were waiting for authorisation to take Plaintiff to hospital. When Plaintiff and her friend noticed that it was taking long for the authorisation to arrive and she was losing blood at a fast rate Plaintiff and her friend decided to hire a taxi to take Plaintiff to Maseru Private Hospital. At Maseru Private Hospital they found no doctors but only nurses. No anaesthetics were available either to ease Plaintiff's pain. The nurses did their best to stop Plaintiff's bleeding. Plaintiff and her friend returned to the Police Border Post to give a statement. But shortly after arrival Plaintiff began to feel dizzy and began to vomit. Plaintiff and her friend abandoned giving their statement when they noticed that Plaintiff was continuing to bleed and her condition was worsening. They took hired taxi to rush Plaintiff to Queen 'Mamohato Memorial Hospital to deal with the bleeding.

[6] **QUEEN 'MAMOHATO HOSPITAL**

On arrival at Queen Mamohato Memorial Hospital, Plaintiff and her friend found the Emergency Unit congested. She was in great pain. Eventually she was admitted to overnight as the Theatre was fully booked. She was not attended to. Next day on 12 December 2015 Plaintiff hired a transport to take her to Mediclinic Bloemfontein where she got admitted and received treatment. Mediclinic confirmed that the bullet had lodged deep in Plaintiff's thigh muscle and flesh. The bullet was lodged very close to

her thigh bone and had rested very close to a critical nerve which if disturbed could result in Plaintiff's paralysis in the opinion of the doctors there. Doctors made a decision to avoid that risk by not attempting to remove the bullet at that point. Instead the Doctors decided to take a safer option and rely on the body rejecting the bullet and pushing it up where it might be safer to take it out at a later date. The bullet still remains lodged in Plaintiff's thigh to date. At Mediclinic the Doctors removed surgical gloves which had been stuffed into Plaintiff's wound to stop her bleeding. They cleaned her wound and properly dressed it. I conclude from the above evidence before me that Plaintiff endured great pain between 11th and 12th December 2015 without intervention of any pain killers to ease her pain.

[7] **FIRST DISCHARGE FROM MEDICLINIC 13TH DECEMBER 2015:**

On 13th December 2015 Plaintiff was discharged from hospital. She was given crutches and allowed to go home to recover. She was restricted to hobbling inside her house or being confined to her bed at home. However the wound developed infection. As a result on 5th January 2016 Plaintiff was re-admitted to Mediclinic with infection. Treatment was given to deal with the infection. On 7th January 2016 Plaintiff was discharged from Mediclinic. She was still on crutches and her movements severely curtailed. She testified that she continued to experience great pain on her wound. I accept this fact given the nature of her injury and the surgery that was needed to address it.

[8] **SECOND ADMISSION AT MEDICLINIC 15 JANUARY 2016**

The wound became infected again and Plaintiff had to be re-admitted to Mediclinic for the second time on 15 January 2016. Doctors decided to do a procedure called *debretchment* to the wound in order to deal with the

infection problem. This procedure Plaintiff explained to me involved a deep removal of upper lying tissue on her thigh around the wound in order to remove the infection altogether. Plaintiff described this necessary procedure in dealing with her infection problem as causing her the most excruciating pain of all the pains she had endured up to that point. Despite being given pain-killers, the pain she felt was most persistent and excruciating of all. Again I accept Plaintiff's evidence on this operation given its nature and the fact that even to date the area operated on has left a deep depression on her thigh. The wound needed to remove the infection must have, of necessity, been very deep indeed and caused her tremendous pain as Plaintiff said.

[9] **THIRD DISCHARGE FROM MEDICLINIC 24 JANUARY 2016**

Plaintiff was discharged from Mediclinic on 24th January 2016 following *debranchment* procedure to deal with her wound infection. She continued to be on crutches and confined at home. She continued to experience tremendous pain on her wound.

[10] **PHYSIOTHERAPY SESSIONS: 12 FEBRUARY 2016 – 30TH MAY 2016**

Plaintiff began her physiotherapy sessions on 12th February 2016 and maintained them regularly until 30th May 2016. During these necessary physiotherapy sessions she continued to experience pain throughout the journey of her recovery process.

[11] **MEDICAL EXPENSES**

Plaintiff tendered the following receipts in relation to her medical expenses following her injuries by Defendants' servant at Maseru Bridge Border Post on 11th December 2015.

11/2/15	Maseru Private Hospital	-	M 500.00
12/12/15	Queen Mamohato Memorial Hospital	-	M 2,000.00
5/01/16	Mediclinic Bloemfontein	-	M 7,000.00
05/01/16	Mediclinic Bloemfontein	-	M75,034.00
30/05/16	Maryna Wessels Physiotherapist	-	M13,443.00
			<hr/>
SUB TOTAL			M98,049.56

[12] **TRANSPORT**

Plaintiff testified that she incurred the following transport costs following directly from injuries she received from Defendants' policeman and servant.

11/12/2015	Taxi transport Maseru Bridge Border to Maseru Private Hospital/Maseru Border Post/Queen Mamohato Memorial Hospital	-	M 500.00
12/12/15	Private Transportation Queen Mamohato Hospital to Mediclinic Bloemfontein	-	M 2,500.00
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SUB TOTAL			M101,049.56

[13] **GENERAL DADMAGES**

Plaintiff claims general damages under three heads as follows:-

13.1 **Contumelia**

Under this head Plaintiff claims M800,000.00 as compensation. In her evidence she testified that she is a Medical Doctor practising her profession as such at Universitas Hospital, Bloemfontein. She is a respected member of her profession and a law abiding citizen. On

11/12/2015 she was peacefully travelling to Lesotho with her friend. At the Maseru Bridge Border Post there were hundreds of people crossing this border post and as she waited for her friend who had gone into the building to purchase toll-gate ticket she guided her bike through boom-gate to park it next to boom-gate as the area was full of vehicles everywhere at that time of the year. She was shot on her thigh while stationary and seated astride her bike past the boom-gate by a police officer and servant of Defendants while on duty and acting within the scope of his duty as a servant of Defendants. The policeman who shot her did so under the pretext that she was dishonest and was trying to avoid paying tollgate fee of M30.00 for her motor bike. Even as the policemen's superior, the lady police officer, was pointing out to guilty policeman that in fact Plaintiff had paid her bikes toll-fee, he still insisted that Plaintiff was a dishonest person and that he was justified to shoot her as he had done. By this time crowds had gathered to witness the spectacle, and the guilty policeman continued to insist to the enquiring crowd that the Plaintiff was a criminal. Some in the crowd were inquiring if Plaintiff was a robber and thief and he responded positively promoting the image that Plaintiff was a criminal. In my opinion it was clearly a serious injury to the dignity and honour of Plaintiff. I accordingly determine that M800,000.00 as compensation for her dignitatis is fair bearing in mind that Plaintiff is a medical doctor and a member of medical profession with no criminal blemish in her character. She was treated like a criminal by an ill-disciplined policeman who shot her and was viewed as a criminal by the crowd that gathered around her. Defendant's policeman continued to promote that image of and concerning Plaintiff.

On arrival at home Plaintiff had to suffer the embarrassment of explaining herself to her children that she was not a criminal and to assure them that she had done no wrong when the policeman shot her.

13.2.1 Plaintiff claims one million Maloti as compensation for pain and suffering. The measure of pain and suffering inflicted on a person does not depend on whether a person is a medical doctor or a labour. Pain and suffering is dependant in my view on the nature of the pain and its duration. It depends also on the circumstances in which it takes place. In the instant case, the intensity of the pain following the shooting on her thigh was such that Plaintiff's entire lower limb went numb. There was severe loss of blood. There was delay to provide Plaintiff with medical assistance. Even when Plaintiff finally brought herself to Maseru Private Hospital, there was no anaesthetic administered at Maseru Hospital when the nurses tried to stop Plaintiff's bleeding. It has to be remembered that Maseru Private Hospital was the nearest medical facility to where Plaintiff could be taken for assistance. I bear in mind also that even when Plaintiff admitted herself at Queen 'Mamohato Memorial Hospital she was not attended to because of congestion at that hospital on 11/12/2015. She had to discharge herself there and obtain transport to take her to Mediclinic Bloemfontein on the morning of 12/12/2015. As she testified she was all along in excruciating pain coupled with her continuing loss of blood. What help she got from Maseru Private was crude and ineffective as the nurses there simply stuffed her wound with surgical gloves. Throughout

her crude treatment there was no anaesthetic used. Plaintiff continued to endure severe pain.

13.2.2 Plaintiff endured severe pain on 11th and 12th December 2015 when she eventually reached Mediclinic in Bloemfontein. There she received pain killers to ease her pain. Her testimony was that despite the pain killers being administered she still felt pain only it was not as severely as before receiving any medication. But as soon as the effect of pain killers subsided the severe pain returned and she endured it.

13.2.3 As we have seen Plaintiff had to be operated upon three times. Firstly on her arrival at Mediclinic on 12/12/18 when the Doctors attempted to remove the bullet lodged in her thigh as well as to stop the bleeding. She was given blood as she had lost a lot of blood the previous day. Both these procedures involved great pain and great discomfort to Plaintiff, albeit that some anaesthetic was administered to Plaintiff to ease the pain during actual procedure. Nevertheless when the effect of anaesthetic subsided severe pain returned. Secondly as we have seen, Plaintiff had to be re-admitted on 5th January 2016 to deal with an infection on her wound. Again a cleaning procedure of the wound was undertaken. This procedure is not free of pain. The procedure is in itself painful. She had to be hospitalised from 5th to 7th January 2015 while treatment was being administered to tame the infection. She still endured pain when discharged on 7th January 2015. Even throughout her recuperation at home Plaintiff endured pain resulting from her injury.

13.2.4 On 15th January 2015 Plaintiff was again re-admitted into Mediclinic Hospital to deal with infection on her wound which seemed to be stubborn to be brought under control. This time the doctors determined that it was best to adopt a “*debritchment procedure*” to deal with the problem. As we have seen earlier this procedure involved a deep removal of upper lying tissue to remove the infection. Plaintiff testified that all the pain she suffered as a result of his shooting this was the most painful of all. She was discharged from Hospital on 24th January 2016. Of course the pain persisted throughout until the wound healed. I accept that the intensity of the pain subsides as the recovery progresses. I take that into account in determining how much compensation to award under this head.

13.2.5 Plaintiff underwent physiotherapy sessions up to the end of May 2016. This procedure in itself is painful and uncomfortable.

13.2.6 The measure of pain and suffering and the compensation that the court must attach to it is not a mathematical calculation. See **Pitt vs Economic Insurance Co. Ltd. 1951(3) SA 284 @ 278**. A court of law must exercise its judgment to be fair and just in the circumstances of the facts before court in each case. Holmes J in **Pitt vs Economic Insurance (supra)** made the following important remarks:-

“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 bear these important words of wisdom in mind from an outstanding jurist of his time.

A court may seek guidance from similar cases. See **Hulley vs Cox 1923 A.D 234**; Also **Mohlaba vs Commander LDF 1995 LLR 647**. But even then no one injury is exactly similar to the next one. Even in relatively similar awards the court has to factor in economic circumstances between then and now between similar cases. In 1995 Mohlaba was awarded, M75,000.00 for unlawful arrest and detention and assault in 1990. In **Mokhethoa Mokaka vs Commissioner of Police** (unreported) this court awarded M250,000.00 where Plaintiff's injuries were a broken arm which had substantially healed at the time of the trial. In **Tholang Maleka vs Commissioner of Police** delivered on 30 December 2014 Plaintiff was awarded M220,000.00 as damages for assault where his injuries left him no permanent disability. In **Mahloko Mathoka vs Compol** (supra) decided on 7th December 2015 this court awarded Plaintiff, a victim of police shooting that left Plaintiff herdboys with a permanent disability, damages of M900,000.00.

13.2.7 When I take all of these matters into account I arrive at an assessment that says it is fairer to combine Plaintiff's claim 10.5 and 10.6 and that I should treat them as one on the basis that the shock and discomfort claimed under 10.6 is, to a large extent, in effect experienced by Plaintiff at the same time as

she experienced the pain and suffering under heading 10.5. I have already dealt at length with the pain and suffering of Plaintiff as a result of her being unlawfully shot Defendants' policeman and servant. In all the circumstances of this case I have come to a determination that for the two claim heads an award of M1,850,000.00 (one million eight hundred and fifty thousand Maloti) is fair compensation for the pain and suffering as well as for Plaintiff's shock and discomfort as a result of Defendants' servant shooting Plaintiff unlawfully on 11th December 2015. I accordingly award this amount for these two heads of claim together.

[14] **FUTURE MEDICAL EXPENSES**

Plaintiff claims M200,000.00 for future medical expenses as a result of being assaulted by Defendants policeman on 11th December 2015. Plaintiff explained that as a result of the policeman's bullet still remaining lodged in her thigh, medical advice is that after her body has naturally tried to reject the bullet where it is presently sitting, the chances are that the bullet will come up through her flesh sufficiently away from the nerve where it is presently sitting. If it does, as hoped then an operation will be necessary to remove it safely out of her body. Plaintiff testified that she travels a lot by air. At present the bullet in her is a source of irritation and embarrassment for she has to explain herself ever so often to security personnel at airports that the blipping of their scanning equipment is a result of a bullet still lodged in her body as a result of Defendants assault on 11th December 2015. Indeed the wound itself, though healed now, has left a deep and unsightly gulf on her thigh which is an embarrassment to her and may well in itself need cosmetic surgery in the future.

[15] Plaintiff testified that as a member of Univesitas medical staff belongs to Bestmed Medical Scheme. As such she is entitled to certain medical benefits which in the instant case amounted to M24,316.00 and were met by that scheme. It is reflected in Exhibit “D”. She did not claim this amount from Defendants as costs settled by this Scheme did not come out of her pocket and the Scheme is not funded by any contribution from herself. But the value of Exhibit “D” lies in the fact that it completes a fuller picture of the total costs assaulted with her injury to date and gives an indication of what future medical expenses might be needed for any future medical expenses. When I factor in the value of money 5 – 10 years from now *vis-à-vis* the costs medical procedures in that period I come to the conclusion that an estimate of M200,000.00 for future probable medical expenses is not unreasonable. I accordingly award Plaintiff M200,000.00 for future probable medical expenses.

[16] **CONCLUSION**

16.1 In the result therefore I find that the assault of Plaintiff by Defendants’ servant policeman on 11th December 2015 was reckless and unlawful. The policeman who shot Plaintiff was on duty at the time about the duties of his employer, the Defendant which he carried unlawful during his execution. Defendants are vicariously liable for his unlawful acts of the policeman servant of shooting Plaintiff on 11th December, 2015.

16.2 I award damages to Plaintiff as follows:

16.2.1M 800,000.00 for contumelia

M1,850,000.00 for pain and suffering as well as shock and discomfort

M	75,034.00	for medical expenses incurred
M	200,000.00	for future medical expenses
M	2,500.00	in respect of her hire of private transport from Queen ‘Mamohato Memorial Hospital to Mediclinic Bloemfontein
M	500.00	in respect of taxi transport from Maseru Border Post to Maseru Private Hospital and from Maseru Private to Maseru Border Post Police and to Queen ‘Mamohato Memorial Hospital.

**TOTAL
AWARD**

M2,928,034.00

J. T. M. MOILOA
JUDGE

For Plaintiff: Adv. M. Teele KC

For Defendants: Adv. R. Tšeuoa