IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/373/2018**

In the Matter Between:-

MACI MOKHANKHANE	**1ST PLAINTFF**
RET'SELISITSOE LEHOMO	**2ND PLAINTIFF**

AND

ATTORNEY GENERAL	**1ST RESPONDENT**
MINISTRY OF LOCAL GOVERNMENT	**2ND RESPONDENT**
'MANTHOBA KHAKHAU	**3RD RESPONDENT**
TAU KOPA	**4TH RESPONDENT**
MATHEALIRA LETSIE	**5TH RESPONDENT**
MASUPHA LETSIE	**6TH RESPONDENT**
MOETI MATHAI	**7TH RESPONDENT**
MOEKETSI MATHAI	**8TH RESPONDENT**
REBAFUOE BLESS	**9TH RESPONDENT**
MOEKETSI 'MOPA	**10TH RESPONDENT**
PHETHISANG RATELEKI	**11TH RESPONDENT**
LEMOHANG SEKOTLO	**12TH RESPONDENT**
PHUTHEHO MONESE	**13TH RESPONDENT**
MALAKIA TIKOANE	**14TH RESPONDENT**

JUDGMENT

CORAM	**:**	**MOKHESI J**
DATE OF HEARING	**:**	**25th.02., 19th.03, and 03rd.08.2020**
DATE OF JUDGMENT	**:**	**15th OCTOBER 2020**

Summary:

LAW OF DELICT: *The plaintiffs are claiming damages from the defendants for assault and torture - the 3rd defendant is being sued for negligent omission for handing over the suspects to the victim to ferry to the police- the victims turning against the plaintiffs along the way by severely assaulting and torturing them- The Chiefs' legal duty flowing from the exercise of their functions in terms of the Chieftainship Act of 1968 discussed- The 3rd defendant's action found to be the probable cause of the plaintiffs' damage- claim against 4th to 14th defendants is based on their actual perpetration of assault and torture of the plaintiffs- Plaintiffs awarded damages.*

Annotations:

Statutes:

Chieftainship Act of 1968

CASES:

Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA (CC)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121

Olitzki Property Holding v State Tender Board and Another 2001 (3) SA 1247 (SCA)

Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) *2003 (1) SA 389 (SCA*)

knop v Johannesburg City Council 1995(2) SA 1 (A)

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431

Kruger v Coetzee 1966 (2) SA 428 (A)

International Shipping Co. (PTY) Ltd v Bentley 1990 (1) SA 680 (A)

National University of Lesotho and Another v Thabane LAC (2007 – 2008) 476

Pitt v Economic Insurance Co. ltd 1957 (3) SA 284 (D)

Protea Assurance coo. Ltd v Lamb 1971 (1) SA 530 (A)

April v Minister of Safety and Security [2008] 3 ALL SA 270 (SE)

Senior Inspector Sepinare Masupha v Trooper Nyolohelo Tae (C of A (CIV) NO. 13/13 [2014] LSCA 13 (17th.04.2014)

Naidoo v Minister of Police (20431/2014) [2015] ZASCA 152

Mokhesi J

[1] INTRODUCTION.

In this matter the two plaintiffs issued summons sued defendants for damages arising out of assaults on the plaintiffs. The case against the 3rd defendant is based on omission, the essence of the plaintiffs' case against the 3rd defendant being negligence in the exercise of her statutory duties as the chief in terms of section 7(1) of the **Chieftainship Act of 1968 (**hereinafter 'the Act'). The rest of the defendants were sued for assaults and torture perpetrated on the plaintiffs.

[3] FACTUAL BACKGROUND.

The facts of this case are largely common cause, and they are as follows: The third defendant is the chieftainess of the village of Tele Ha-Khakhau in the Quthing district. The 4th to 14th defendants came from the jurisdiction of a different chief. On the 20th March 2018, the sheep belonging to one of the villagers of Mokanametsong went missing and as a result, a search party made up of 4th to 14th defendants went out in search of it. It would appear that they heard through the grapevines that the sheep had been kept at the 1st plaintiff's place. The plaintiffs reside in the village under the jurisdiction of the 3rd defendant. They immediately went to Ha-Khakhau. At the time the sheep were kept at 1st plaintiff's place he had attended a funeral in the Republic of South Africa, only his wife and children knew about the sheep. It

is common cause that the 2nd defendant had accompanied 1st plaintiff to the funeral in South Africa.

[4] On that day when the search party arrived at the 3rd defendant's place, the 1st plaintiff had attended a meeting at Tele Boarder gate. It must be mentioned that when he returned from the funeral, he was informed by one police officer by the name of Moletsane that the latter had kept some sheep at his place, and that he had already taken them away. When the 1st plaintiff returned from the meeting he was in the company of Mr Safa Mokete when they saw a group of men gathered at the 3rd defendant's place. He suggested to Mokete that they should go to them. When he asked Mokete as to the reason for those men's presence there, the latter appeared to know. When they got to the 3rd defendant's place, Mokete asked the 3rd defendant the question why those men were still there because they said they were leaving. This question made it clear that those men had been there previously that day. The 3rd defendant replied that "they had returned with the same mission; ask them they are outside". It was at this point that Mokete informed the 1st plaintiff that he was suspected of having stolen the sheep. They went outside whereat the 1st plaintiff provided an explanation to the effect that he knew nothing about the sheep as he had attended the funeral in the Republic of South Africa, and that the sheep had been kept at his place by the police officer by the name of Moletsane. These men

suggested that they together with the 1st plaintiff should go to Tele police station.

[5] The 3rd defendant wrote a note or referral letter to the police and tasked Mokete and the 2nd plaintiff to be in the company of these men as they went to the police station. All these men boarded the vehicles the search party had been travelling in. While on the way the chief's messenger, Mokete, was chased away by these men. After Mokete was chased away, these men drove off with the plaintiffs. Instead of going to the nearest police station, Tele police station, they took a direction to Quthing town. The vehicles pulled up at the Bus stop at Mokanametsong where they disembarked leaving the plaintiffs in the car. When these men returned after some time, they were carrying sticks and ropes. They ordered the plaintiffs to disembark from the car. This time they were going to Quthing Police Station on foot. They took a footpath which meanders through the forest. It was while they were deep in the forest that the acts of assault and torture were perpetrated. The group was trying to force an admission from the plaintiffs that they stole the sheep. The plaintiffs were brutally assaulted and tortured in that forest. Before turning to consider whether the third defendant was negligent, I wish to record that when the plaintiffs were being led and during cross-examination it an impression was created that the 2nd plaintiff was the suspect as well, but then, when the 3rd defendant testified in her defence a

contrary scenario was put forth. In fact, the 2nd plaintiff was one of the Chief's messengers, and this is common cause.

[6] It is apposite at this point to recite the allegations against the 3rd defendant as they appear in the plaintiffs' declaration (para. 4 thereof), where it is alleged that:

"

The defendants (respectively) were negligent in one or more of the following respects:

4.1

The Third Defendant: At Tele Ha- Khakhau, Quthing or or about 5 p.m.

a) She released the plaintiffs to the mob or group of men, to which the Fourth Defendant to the Fourteenth Defendant were part of, whom she ought to have foreseen or knew that they would torture and assault the plaintiffs;

b) That she failed to exercise reasonable care to prevent the defendants from torturing and assaulting the plaintiffs;

c) That she failed to take reasonable care to prevent the assault when there was a duty to do so;

d) That torture and assaults to the plaintiffs became known to the members of the public.**"**

[7] For a delictual claim to arise, a person against whom the claim is directed must have caused harm or damage to the claimant through his/her conduct. There must be wrongfulness on the part of the defendant; The impugned conduct must have been intentional (*dolus*) or negligent (*culpa*): There must be a causal nexus between the cause of damage and conduct, and finally, damage. The basis of the plaintiffs' case against the 2nd and 3rd defendants is vicarious liability of the former, and as regards the latter, the omission in the performance of her statutory duties as the chief. In our law of delict, an omission will only be regarded as unlawful, or put differently, a negligent omission will only be wrongful where the defendant was under a legal duty to act positively to prevent harm from occurring. Whether or not legal duty to act positively to prevent harm from occurring exists, entails value judgement (*boni mores*) and reasonableness of imposing liability (***Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA (CC) at paras 20-21***). What is involved *boni mores* enquiry involves consideration of the factual matrix of the case; considerations of legal policy which are steeped in the constitutional norms and values, and considerations of the community's sense of justice:

"…..[T]he test for wrongfulness was said to involve objective reasonableness and whether the *boni mores* required that 'the

conduct be regarded as wrongful'. The *boni mores* is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy, both of which now derive from the values of the Constitution." ***Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121*** at p. 139 para.41.

In ***Olitzki Property Holding v State Tender Board and Another 2001 (3) SA 1247 (SCA)*** at para.12, Cameron JA (as he then was) said:

"The conduct is wrongful, not because of breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy also determined in the light of the Constitution." (see also; ***Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae***) ***2003 (1) SA 389 (SCA*)** paras 9- 10**)**

An omission will be regarded as wrongful after considering the following factors; whether the statute specifically or by necessary inference provides for compensation to the loss-bearing party;

whether there are alternative remedies such as appeal, review or interdict; whether the scheme of the Act in question is geared at protection and advancement of public good; whether the public functionary in question was endowed with discretionary powers; whether imposing liability would have a 'chilling effect' on the exercise of power by public functionaries; whether the loss-bearing party was the author of his/her predicament(***Steenkamp ibid*** at pp.140-1 para.42).

[8] In order to answer the question whether the 3rd defendant owed the plaintiffs a legal duty to protect them from the assaults and the acts of torture they were subjected to by the 4th to 14th defendants, resort must be had to the provisions of the statutes in terms of which the 3rd defendant was acting. The purpose of resorting to the statute is to determine whether it was the intention of the Legislature that the Chiefs owe a legal duty to suspects when exercising their powers under s.7(2) of the Act (***knop v Johannesburg City Council 1995(2) SA 1 (A) atp.31C-D).*** The duties and functions of every chief are found in sections 6 and 7 of the Act, which provides:

> "6 (1) It is the duty of every Chief to support, aid and maintain the King in His Government of Lesotho according to the Constitution and the other laws of Lesotho, and subject to their authority and direction, to serve the people in the area of his authority, to promote their welfare and lawful interests, to maintain public safety and public order among them, and

to exercise all lawful powers and perform all lawful duties of his office impartially, efficiently and quickly according to law.

(2)……..

(3)…….

7(1) It is the duty of every chief to interpose for the purpose of preventing, and to the best of his ability to prevent, the commission of any offence by any person within his area of authority. A 'Chief who knows of a design to commit an offence by a person within his area of authority may arrest, or cause to be arrested, the person so designing, if it appears to that Chief that the commission of the offence cannot otherwise be prevented. A person so arrested unless released within twenty-four hours of his arrest, shall be taken immediately after the expiry of that time before the nearest court or to the nearest member of the police force.

(2) If a Chief receives information that a person has committed, within his area of authority, an offence for which he may be arrested without a warrant, or that a person for whose arrest a warrant has been issued is within the area of his authority, it is the duty of that Chief to cause that person to be arrested and to be taken forthwith before the nearest court or to the nearest member of the police force."

[9] Undoubtedly, when the 3rd defendant was exercising her duties in terms of s.7, she was doing so representing the State, and she was under a duty to protect the suspects against acts of torture, assaults or any acts which might tend to be a threat to their lives. The State is bound to account where the breaches of fundamental rights, as in this case, are alleged to have occurred. The next question to determine is whether the State, in this case, can be held to account through other means (remedies) other than imposition of a private law action for damages. Our Constitution in terms of s.8(1) provides that "no person shall be subjected to torture or inhuman or degrading punishment or other treatment." This provision imposes a substantive obligation on the State not to subject people to torture or degrading punishment. Although not specifically provided in s.8 of the Constitution, I consider that the State has duties, by implication, of respecting, protecting, fulfilling and promoting fundamental human rights as are contained in Chapter two. It follows, therefore, that, public functionaries who perform duties on behalf of the State must account for acting contrary to constitutional injunctions. Accountability, therefore, in these circumstances, assumes a pivotal role when it comes to protecting and respecting fundamental rights. However, the fact that the State functionaries acted in conflict with these constitutional duties of protecting and respecting rights does not automatically mean that they must have their actions visited with liability for damages, especially where there are adequate

alternative remedies available to hold the State to account for their misdeeds;

> "Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting……However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm"(***Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431*** at pp.446-7 at para.21).

And further at para. 22 Nugent JA (*ibid*) (as he then was) said:

> "[22] Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of persons are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be

taken into account in determining whether an action should be allowed……"

[10] A Chief, in terms of s.7 of the Act is endowed with enormous powers which limits freedom of movement (power of arrest) and could potentially affect the suspects' right to life and their bodily integrity. The chiefs, when exercising these powers must respect and protect the rights of the suspects. The same duties must obtain even during the transference of the suspects to either the court or the police. The fact that the chiefs are constitutionally bound to respect individual's bodily integrity and their right to life, as already said, must be balanced with other considerations before their omissions can be visited with liability for damages, as already seen from the authorities referred to above. The scheme of the Act reveals that there are no remedies provided therein for the negligent exercise of duties of arrest and transference of suspects by chiefs to the police or the courts; There are no adequate available remedies to cause the State to account for the omission on the part of the 3rd defendant, and no consideration would seem to outweigh imposing liability for damages; I cannot see how imposing delictual liability on the chiefs would hamper them (have a 'chilling effect')in the exercise of their duties and functions, in the sense of having to look over their shoulders due to threat of delictual claims. In this case, the 3rd defendant handed over the plaintiffs(suspects) to the people she did not know with the hope that they will take them to the nearest police station (Tele police

station); As we now know this did not happen, as the mob along the way chased away the chief's messenger; took a direction to Quthing police station, pulled off at Mokanametsong, and instead of driving straight to the police station, decided to go on foot through the forest where, while deep inside, perpetrated the assaults and acts of torture being complained about. Even though much store was placed on the fact that when the 3rd defendant handed the 1st plaintiff over to this mob, there was no reasonable suspicion that they would turn against them along the way as the mob exhibited no signs of being violent, this argument, to my mind, ignores the fact that this mob even though apparently calm, were extremely aggrieved by theft of their sheep, which to me should have heightened the 3rd defendant's sense of protection of the suspect' rights. The conclusion I reach is that the 3rd defendant was under a legal duty not to hand over the suspect (the 1st plaintiff) to the victims of crime to ferry them to the police station.

[11] In my considered view, the legal duty which the Chiefs owe to the suspects cannot be extended to the his or her messengers (2nd defendant). The case by the 2nd plaintiff against the 3rd defendant, as I understand it and should be, is not that the 3rd defendant breached a statutory duty in regard to him as the Chief's emissary, because none exist. The 2nd plaintiff's claim is based on common-law duty. Where a common-law duty is involved the court has to determine whether it is 'just and reasonable' to impose

liability for a delictual claim for damages ***(Olitzki Property Holdings case*** *supra at para.12****).*** When the 3rd defendant send the 2nd plaintiff on an official errand to deliver a suspect to the police, that conduct cannot be characterized as wrongful. To attach delictual liability on this conduct will have a 'chilling effect' on how the Chiefs discharge their functions, because all chiefs, almost invariably rely on the help of emissaries in the daily discharge of their functions. I therefore find that imposing liability for damages in this case would be most unreasonable. The Chief is not responsible for the ordeal that the 2nd plaintiff went through. In fact, in this case the 2nd plaintiff has rightly claimed damages against his assailants.

[12] In the preceding paragraph I concluded that the chiefs owe a legal duty to arrested persons in the manner contended for in this matter. However, what I said in para. 9 by reference to the Constitution and accountability, should not be misconstrued as being the main thrust of what was ultimately the basis of concluding that indeed the legal duty was owed. Reference to the Constitution and accountability was merely one of the factors, owing to the circumstances of this case – in concluding that a legal duty was owed. The basis of holding that a legal duty was owed were the provisions of the Act. The main thrust of the decision in placing a legal duty on the chiefs to protect the suspects and concomitant state's vicarious liability, was due to the nature of the

powers the chiefs are endowed with under the Act. In the final analysis the individual liability of the chiefs is the focal issue. Their individual liability is the end in itself and not a means to holding the state accountable. I have fully heeded Marais JA's comments in his minority judgment in ***Van Duivenboden (ibid) at*** paras [5] and [7] where he said:

> "[5] I accept that in a given case accountability requirement **may** prompt a finding that there is liability for a negligent omission to act but I would prefer not to elevate accountability to the status of a factor giving rise to something akin to a rebuttable presumption of liability to pay damages under the *lex Aquilia…"(*original emphasis)

And further at para. [7] he said:

> "[I]t is usually the omissions of individual functionaries of the State which render it potentially liable. If one is minded to hold the State liable, one will at the same time be holding the individual functionary liable. That he or she may never be called upon to pay is not a good reason for ignoring the concomitant personal liability which will be inherent in finding the State liable. That does not mean of course that the spectre of personal liability should be allowed to paralyse a court when it is considering whether to recognise that a legal duty to act exist. It is simply a reminder that more is at stake

than imposing liability upon an amorphous entity such as the State."

[13] Negligence:

The conclusion that 3RD defendant owed a legal duty does not necessarily mean that she acted negligently, this court has still to determine is whether she was negligent. The test for negligence was formulated in ***Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E – G*** thus***:***

"For the purpose of liability *culpa* arises if -

1. a *deligens paterfamilias* in the position of the defendant –

i. would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

ii. would take reasonable steps to guard against such occurrence; and

2. the defendant failed to take such steps…

….whether a *deligens paterfamilias* in the position of the person concerned would take any steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down."

[14] It is common cause that the 3rd defendant referred the 1st plaintiff to the Tele Police in the company of the search party from Mokanametsong; that she also sent her two right-hand men who were members of the community policing forum, to be in their company; that on the way the men from Mokanametsong took a different direction to Quthing town instead of proceeding to where they were expected to, Tele Police Post – which is nearer; that on the way Mr Safa Mokete was chased away leaving the 1st and 2nd plaintiffs in the company of that mob; that the 2nd defendant as the messenger of the 3rd defendant was also assaulted and tortured together with the 1st plaintiff.

[15] Given the circumstances of this case a reasonable person in the position of the 3rd defendant would reasonably foresee when a group of men who are aggrieved about their stolen sheep when they encounter the suspect(s), there might be an outpouring intense emotions of anger with the possibility of violent reaction. The 3rd defendant allowed the victims of crime to transport the suspect in their own vehicles to the police. Even though the 3rd defendant argued that she mitigated the possibility of assaults on the suspect by sending two of his trusted lieutenants, it needs to be mentioned that one of her messengers, Mr Safa Mokete, was very old, aged 83 years at the time. The 2nd plaintiff is not able-bodied. So, clearly, the two men together with the suspect were no match against the group of twelve able-bodied men if anything were to happen to the suspect along the way.

[16] A reasonable person in the position of the 3rd defendant would have called the police rather than cause the suspect to be accompanied by the victim to the police. In my view a reasonable person in the position of the 3rd defendant would have foreseen, that handing over the suspect to the victims in the company of two men, the other of an advanced age, might result in the harm being inflicted on the suspect. In my view once it is reasonably foreseeable that a suspect would be attacked, the same analogy should extent to the chief's messenger, as in order to assault the suspect the men would inevitably have to deal with the messenger. Given the scourge of stock theft and the intense emotions that they naturally evoke, often when search parties get hold of the suspect, assaults and murders often result, and this is commonplace in this country.

[17] CAUSATION

I turn to consider whether the wrongful and negligent conduct of the 3rd defendant, was the cause of the plaintiffs being assaulted and tortured. The test for causation is two-fold, *viz*, the factual causation (but for test) and the legal causation. The test for causation was stated in the case of ***International Shipping Co. (PTY) Ltd v Bentley 1990 (1) SA 680 (A) at 700E – 701C****:*

> "As has previously been pointed out by this court, in the law of delict causation involves two district enquiries.

The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but -for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test, one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, *viz*, whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether,

as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation" …. Fleming *The Law of Torts* 7th ed at 173 sums up this second enquiry as follows:

> 'The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This enquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.'"

[18] In respect of factual causation, the plaintiff is required only to prove that the conduct which is wrongful and negligent was

probably the cause of the harm. In *casu,* had the 3rd defendant fully appreciated that she was dealing with a suspect and the victim, she would not have allowed herself to make a decision which allowed the victim to transport the suspect to the police station without the possibility of harm occurring ever dawning on her. In the circumstances, in the ordinary human way of doing things a sensible thing to do would have been to call the police for help. In my considered view the plaintiffs have established that the conduct of the 3rd defendant was a probable cause of the plaintiffs' harm.

[19] As regards the second leg of the enquiry i.e legal causation and remoteness, I find that there is a reasonable connection between the conduct of the 3rd defendant and the harm that befell the plaintiffs. There are no public policy considerations, reasonableness which militate against imposing liability on the 3rd defendant. The loss suffered by the plaintiffs was not remote.

[20] Case Against the 4th to 14th defendants.

The case against the above defendants rests on a different footing, as they stand accused of actually inflicting the harm on the plaintiffs. All the defendants chose not to attend trial despite being aware that the trial was proceeding, and therefore judgment against them will be entered by default. The plaintiffs had claimed damages under four different heads, *viz*:

a) M40,000.00 for contumelia

b) M55,000.00 for pain and suffering
c) M25,000.00 for present and estimated future medical and hospital expenses
d) M50,000.00 for loss of earnings.

[21] Present and Future medical expenses:

1st Plaintiff.

While it is common cause that the plaintiffs sustained injuries, in respect of the 1st plaintiff this court was only told that he went to seek medical help, but that is all is said about his medical side of things. The evidence of financial cost of medical treatment was not adduced at all, neither is evidence regarding any form of future medical treatment.

2nd Plaintiff.

The 2nd plaintiff told the court that he did not seek medical help because he did not have money to do so. As regards both plaintiffs there is simply no evidence regarding future medical and related expenses. In the result the defendants are absolved from the instance.

[22] Loss of earning capacity:

1st plaintiff:

First plaintiff adduced evidence that he is a subsistence farmer. He told the court that he sells some of his produce and earns

M5000.00 per month. He told the court that due to the severity of the injuries he sustained, this affected his earnings – though he did not say by how much. He said the injury to his left arm has left him unable to cultivate the crops necessitating him to employ people for that purpose. It must be said that apart from saying he earned M5000.00 monthly from selling farm produce nothing else was said by how much his earning capacity has been affected. Even as regard the amount of M5000.00 no basis was provided for it; what is it that he sells which earns him M5000.00 monthly all year round. I do not think evidence of the plaintiff's earning capacity was adduced.

[23] 2nd plaintiff

The 2nd plaintiff only contended himself with saying he earned his living by cutting rocks, but as to how much he earned and how his earning capacity has been affected by the injuries is not stated. In the result, in respect of both plaintiffs I consider that there was no evidence adduced of their earning capacity, and therefore the defendants are absolved from the instance.

[24] Damages for contumelia, pain and suffering:

It is trite that the determination of damages for non-patrimonial loss is a matter which lies within the judicial discretion of the court (***National University of Lesotho and Another v Thabane LAC (2007 – 2008) 476 at 448***). In exercising its discretion, the court has to take into account the unique circumstances of each case and

award compensation which is fair and adequate. The court must be fair to both sides (***Pitt v Economic Insurance Co. ltd 1957 (3) SA 284 (D) at 287F****).* While it is generally accepted that each case falls to be determined based on the uniqueness of its facts, guidance should be sought from past comparable awards, and in the absence of comparable awards, the court must allow itself to be guided by the general pattern of previous awards "(***Protea Assurance coo. Ltd v Lamb 1971 (1) SA 530 (A) at 536 B****).* In casu, the plaintiffs seek truncated damages in the amount of:

(i) M15,000.00 for contumelia

(ii) M50,000.00 for pain and suffering.

[25] For present purposes the two will be treated together as they follow from the same transaction – assault and torture (***April v Minister of Safety and Security [2008] 3 ALL SA 270 (SE) at para. 18).*** It should be stated that counsel did not provide me with comparable cases which this court can work with. The search made of comparable cases did not yield any result. In the case of ***Senior Inspector Sepinare Masupha v Trooper Nyolohelo Tae (C of A (CIV) NO. 13/13 [2014] LSCA 13*** (17th-04.2014) the court of Appeal confirmed an award of M15,000.00 for contumelia and M2000.00 for pain suffering. The two parties were both police officers, with the appellant being the senior in rank. The appellant had assaulted the respondent in front of his colleagues and hurled insults at him. The appellant meted out on the respondent by

punching him, knocking him down on to the floor and kicking him all over the body.

[26] In the old matter of the ***National University of Lesotho v Thabane*** (supra) the plaintiff whose status differed from that of the current plaintiffs (as he was a Senior Lecturer at the University) was assaulted by a security guard in full view of the students. He was awarded M15,000.00 for pain and suffering and M25,000.00 for *contumelia*. Given the premium our Constitution places an individual's liberties, an unjustified infringement of same will always be met with an aggravated award of compensation ***(Naidoo v Minister of Police (20431/2014) [2015] ZASCA 152 at para. 49).*** In the present case, the plaintiffs were brutally assaulted by a group of twelve able-bodied men who tied them with ropes. The force with which the ropes were tied left deep scars which are clearly visible even today. The acts of torture and assault went on for a long time. This should have been a draumatic experience for both plaintiffs. The deep emotional scarring which this experience left on the plaintiffs was clearly on display in court as the 2nd plaintiff battled to contain the flow of tears as he narrated what happened to him. In my considered view the fairness of this case will be met by awarding damages as follows: Each plaintiff is awarded M50,000.00 combined sum total for contumelia, pain and suffering.

[27] In the result the following order is made:

a) Each plaintiff is awarded a combined total sum of M50,000.00 for contumelia, pain and suffering.

b) In respect of the 1st plaintiff, all the defendants are jointly and severally liable for the amounts mentioned in paragraph (A) of this ORDER, the one paying, the others to be absolved, plus costs of suit.

c) In respect of the 2nd plaintiff, the 4th to 14th defendants are jointly and severally liable for the amount mentioned in paragraph (A) of this ORDER, the one paying, the others to be absolved, plus costs of suit.

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MOKHESI J

FOR THE PLAINTIFFS: ADV. MOHLOUA INSTRUCTED BY K.D. MABULU ATTORNEYS.

FOR 1ST, 2ND AND 3RD DEFENDANTS: ADV. MOSHOESHOE L.P. FROM THE ATTORNY GENERAL'S CHAMBERS

FOR THE 4TH TO 14TH DEFENDANTS: NO APPEARANCES