



LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/T/152/2016

In the matter between:

TŠOLO TJELA

PLAINTIFF

And

**OFFICER COMMANDING
MAFETENG POLIE STATION**

1ST DEFENDANT

THE COMMISSIONER OF POLICE

2ND DEFENDANT

THE ATTORNEY GENERAL

3RD DEFENDANT

CORAM: S.P. SAKOANE J.

HEARD: 18 AUGUST and 16 SEPTEMBER 2020

DELIVERED: 04 NOVEMBER 2020

SUMMARY

Delict – claim for damages for contumelia, assault, pain and suffering – plaintiff taken from his house by police and tortured in the middle of the village – police not acting under cover of any warrant – no defence to the claim – nature of injuries – quantum of damages influenced by the imperative to eradicate culture of police brutality and uphold values of the Constitution – Constitution 1993, section 8.

ANNOTATIONS:

CITED CASES:

LESOTHO:

Attorney-General And Another v. Swissbrough Diamond Mines (Pty) Ltd And Others (No.2) LAC (1995-99) 214

Letšepe v. The Commissioner of Police And Another CIV/T/425B/2018 (9 September 2020)

Mohlaba And Another v. Commander, Royal Lesotho Defence Force and Another LAC (1995-99) 184

Mokotjo v. Commissioner of Police And Another CIV/T/520/2014 (4 March 2020)

Ramakatsa And Others v. Commissioner of Police And Others Constitutional Case No 22/2018 (16 April 2019)

NAMIBIA:

S v. Acheson 1991 (2) SA 805 (Nm HC)

JUDGMENT

I. INTRODUCTION

- [1] The plaintiff is a 51 year old farmer and a chairperson of the Village Crime Prevention Committee in the village of *Ha Likhoto* in the district of Mafeteng.

Relief

- [2] He is claiming damages against the defendants arising out of torture inflicted on his person by members of the police service. The claim is for damages in the sum of M400,000.00 plus interest and costs broken down as follows:

- (a) Medical expenses - M90.00
- (b) Pain, shock and suffering - M300,000.00
- (c) Contumelia - M99,910.00
- (d) Payment of interest at the rate of 12% per annum
calculated from the date of issue of summons.
- (e) Costs of suit
- (f) Further and/or alternative relief

II. MERITS

Pre-trial minutes

[3] A Pre-Trial Conference was held in terms of Rule 36 (as amended) and the signed minutes placed before the Court at the commencement of the trial. The parties agreed that the minutes be admitted and form part of the evidence.

[4] The signed minutes read as follows”

“ISSUES THAT ARE COMMON CAUSE:

- 1.1 Identity and description of the parties admitted.
- 1.2 That Plaintiff was forced to lie down.
- 1.3 That the Medical Form (sic) filled by Police
- 1.4 That the Medical Form issued to Plaintiff bearing the request that Plaintiff be examined by (sic) medical practitioner
- 1.5 That the Medical Report filled by the doctor depicted injuries sustained by the Plaintiff
- 1.6 Contents of the medical form (sic) not disputed.

ISSUES IN DISPUTE

The only disputed issue is the quantum of damages.”

Oral evidence

- [5] The plaintiff testified that he is a member of the Village Crime Prevention Committee. On the day in question (1 August 2015) he was beaten with sticks and guns by members of the Police Service. The beatings started when he got out of his house as he and other members of the Committee were taken to a spot in the middle of the village.
- [6] On arrival in the middle of the village, they were forced to squat and jump. As they did this, they were being beaten. They were then told to lie down and as they laid down, they were being beaten and stones put on their chests.
- [7] He suffered injuries on the buttocks, the waist, the left eye and bled from the nose. He felt excruciating pain as he walked. This pain took three weeks. He had to walk with the aid of a stick during those three weeks.
- [8] He was shown two pictures of his naked body and injuries thereon. He said one photo is his injured buttocks and the left elbow. The other photo is of the whole face and shows a swollen red eye. Both photos were admitted as evidence and collectively marked as **Exhibit "A"**.

[9] He further testified that he had misplaced the receipts for the medical expenses of M90.00.

[10] Under cross-examination, he testified that he was admitted as an out-patient and suffered temporary disability for three weeks. He said the gender mix of the people who watched as he was being tortured consisted of men and women who were his fellow members in the Village Crime Prevention Committee.

[11] The plaintiff's case was then closed. The defendants also closed their case without leading any evidence.

III. DISCUSSION

[12] It is common cause that the plaintiff and the other members of the Village Crime Prevention Committee of which he led, were rounded up by the police and tortured in the middle of the village. The members of this Committee is made up of men and women.

[13] The plaintiff reported a case of assault and was given a medical form at the Mafeteng Charge Office. That medical form has a portion at the front filled by the police and the back portion filled by a medical doctor. The

front part filled by the police shows that the plaintiff reported a case of assault by the police. It is dated 1st August 2015.

[14] This front part reads thus:

“Dear Doctor
Kindly examine the undermentioned person and submit your report on the reverse side of this form.”

[15] The purpose thereof is to get independent, professional examination of the nature and extent of any injuries that a person tortured by the police might have suffered. After the doctor has done his/her examination, the report of the findings must be submitted to the requesting police officer for further necessary investigation of the reported case.

[16] By giving the complainant/plaintiff a copy of the medical form as filled by a medical doctor, the police officer who issued the form triggers a noble process which enables the victim to pursue a civil claim against the police without having to wait for the completion of investigations of the reported criminal case and resultant prosecution.

[17] Thus, a victim of police brutality who opens a case against the police has a legitimate expectation to be given a medical form to be filled by a medical doctor at the expense of the Commanding Officer, Regipol or the

Commissioner. In this way, impecunious victims of police brutality can have at their disposal the necessary medical evidence to make good their civil claims and protection of constitutional rights against rogue police officers and their employers.

[18] *In casu*, the reverse side of the medical form filled by the doctor has a pictorial representation of the parts of a body that are injured. The first picture is a marked left eye and is described as “swollen and reddish”. The second picture is the back lower part of a body and the injury is described as “Bruises”.

[19] The degree of force inflicted is described as “considerate”; the degree of injury to life is “moderate”; the degree of immediate disability “light” and there is no long-term disability.

[20] The findings of the doctor corroborates the evidence of the plaintiff and are consistent with the photos of injuries on his left eye, the buttocks and the swollen back of his left arm. The injuries as depicted in the photos, especially the buttocks and the back of the left arm, show bruises and weals on the buttocks and left arm. They are consistent with severe beatings with sticks and guns. The high probability is that the plaintiff’s eye got injured during the beatings and when he was being forced to lie down.

[21] All this evidence by the plaintiff has not been challenged by the defendants.

The defendants' plea, in which they deny that they assaulted the plaintiff but merely forced him to lie down because he was resisting to be searched for gun in his house, is not backed-up by evidence. In action proceedings, unlike motion proceedings, their plea does not constitute evidence.

[22] There is, therefore, no explanation or justification by the defendants for the behavior of the police officers on the day in question. Without any hesitation, I find that the liability of the defendants is established.

[23] If, as suggested by the defendants in their plea, the police went to the plaintiff's village on a mission to search for guns and they did not find a single gun, then the only purpose of torturing him was an exercise in sadistic and terrorist behavior. They inflicted pain, shock and suffering because of their anger and frustration in failing to find what they were looking for. The plea does not even pretend that they had any search or arrest warrant. Such conduct is anathema to every value of the Constitution and human decency.

[24] The Constitution is not a mere paper or legal nuisance that the police officers can kick away with their boots. It is the conscience, mirror and

soul of the Basotho. It is a pantheon of values and guarantor of the solemn promises of their rights and freedoms as guaranteed. Its value of the rule of law does not compete with rule of man. As a matter of fact, there is no rule of man in constitutional democracy such as ours. It matters not how popular a ruler or politician is nor how powerful be the military arsenal and awesome police power under the ruler's command. The Constitution is the boss: **Attorney-General And Another v. Swissbrough Diamond Mines (Pty) Ltd And Others** (No.2) LAC (1999-95)214

- [25] Despite what the Constitution commands in uncompromising language in section 8 that there shall be no torture, inhuman or degrading treatment, the police service continues to brutalize citizens because it is cursed by words of a Prime Minister who, to paraphrase him, says to them "*Nay, beat them hard but not in public view. When you emerge in public view, smile with them don't beat them.*" It is utterances like these by the head of the Executive which help let loose police officers on this defenseless nation - all in the name of crime prevention. This case is a living example of the bitter results of a lethal toxic cocktail of unprincipled, populist, demagogic and whistle-dog politics of crime control through state-sponsored violence. Crime prevention and respect for human rights are comrades-in-arms in the fight for justice and not antagonists in crime prevention. Any order to violate a human right in preventing crime is manifestly illegal and must be

disobeyed. The one who issues such an order and those who obey it are partners in crimes of terrorism, assault, torture and murder of the victims. The police are, therefore, sufficiently warned: *“Forever wear the values of the Constitution on the epaulettes of your uniforms. The Constitution protects the rights of all criminal suspects and you violate them in your own bad names and not the good name of this Nation”*: The same warning was given in **Ramakatsa And Others v. Commissioner of Police And Others** Constitutional Case Noo.22/2018 (16 April 2019). There shall be no further warnings hereafter except uncompromising judicial eradication of the pernicious culture of police brutality.

Damages

[26] Counsel referred to some judgments of this Court on the quantum of damages. But I heed the word of caution by Leon JA in **Mohlaba And Others v. Commander of the Royal Lesotho Defence Force And Another** LAC (1995-99) 184 at 192C that “but the facts in such cases are never quite the same and such cases are not particularly helpful.” Indeed, none of the cases referred to by both learned counsel is at all fours with this one. *In casu*, there is no pretense at all by the police of acting under the cover of a search warrant or warrant of arrest or having dispensed with them because of the imminence of danger, escape of suspects or

disappearance of items before the warrants could be sought and judicially granted.

[27] During oral argument, Mr. *Mohloki* for the defendants, told me that the police who tortured the plaintiff were members of a special task team from Maseru and not Mafeteng. This speaks to the lack of urgency in the operation and the impunity with which the Constitution and the **Criminal Procedure Code** were thrown out of the window. Surely, if these police officers look themselves in the mirror of the Constitution, they would not celebrate but crawl on their bellies in shame because of the nakedness of their brutality against defenseless men and women of a Village Crime Prevention Committee which is their ally in crime prevention. They behaved like terrorists in uniform and not in a manner befitting proud enforcers of the law.

[28] In **Mokotjo v. Commissioner of Police And Another** (CIV/T/520/2014 (04 March, 2020), I said

“[6] The entrenchment of rights and freedoms in the **Constitution** gives them a higher status than previously existed before the adoption of the **Constitution** in 1993. There is therefore, a constitutional duty to reassess the principles relating to unlawful infringement of personal liberty, unlawful arrest, torture and the quantum of damages for infringement of such rights and freedoms: **Thandani v. Minister of Law & Order** 1991(1) SA 702 (E); **Masawi v. Chabata and Another** 1991 (4) SA 764

(ZH); **Bridgman v. Witzenberg Municipality (JL and Another intervening)** 2017 (3) SA 435 (WCC) para 218.

- [7] Personal liberty as a constitutionally guaranteed right enjoins courts to jealously guard and preserve it against unjustified infringements. Where the Crown, through its agents and servants such as the police, abuse their powers by unlawful arrests or torture of suspects and detainees, the victims are entitled to vindicate their rights through claims for compensation in full measure for any injury, humiliation and indignity suffered. On their part, the police bear a statutory and constitutional duty to protect society and not to torture and assault its members in the course of enforcing the law and investigating crimes: **NK v. Minister of Safety and Security** 2005 (6) SA 419 (CC).
 - [8] In cases of assault and torture, the most important factor that determines the quantum or amount of compensation is the extent of the physical injury to be established with reference to the intensity, nature and duration of the pain and suffering: **LAWSA** Vol. 14 Part 1 para 118 (3rd Edition).
 - [9] In assessing damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party who is the plaintiff but offer him/her solatium for injured feelings: **Minister of Safety & Security v. Tyulu** 2009 (5) SA 85 (SCA) para 26.
 - [10] A substantial award for non-patrimonial loss may be made on account of the serious nature of the physical and psychological harm or the brutal and contemptuous manner in which the rights of the victim have been violated – especially by a person who occupies a position of trust such as a police officer: **LAWSA** (supra).”
- [29] The extent and nature of the inflicted injuries and duration of the pain and suffering the plaintiff underwent is borne out by his oral evidence and the doctor’s observations. Considering that there was no justification at all for being tortured, let alone in the manner and extent depicted by these injuries, the plaintiff deserves full compensation. A fair and reasonable

compensation has to be influenced by what I said in **Mokotjo** at para [22], namely:

“... The courts still attach significant importance to the questions of unlawful arrest and detention as well as unlawful assault by members of the police service. High premium is put on adequate, compensatory award because such involves the violation of important constitutional rights and raises issues of public interest in curbing police brutality.”

[30] The following salutary remarks by Leon JA in **Mohlaba** (supra) at 191 F-G are befitting here:

“When I read this record, I was appalled that human beings could be treated in this Kingdom in such barbaric fashion. The conduct of offenders warrants the strictest censure, for it is reminiscent of some of the excesses of the KGB, the **Gestapo** as well as the treatment meted out to the late Steve Biko.”

[31] These remarks were made on 29 June 1996 in respect of torture of soldiers by other soldiers. They are still relevant and apply with more force to brutalization of civilians by the police. Twenty-five years down the line, the police remain deaf to their ringing tone. For them, the Constitution is a mere piece of paper and not a game-changer. This court’s duty is to give them a rude awakening. They must shape up to be good, loyal servants of the law who do not resort to violence and brutality in combatting crime. They must listen to the voice of the Constitution and not the sirens of political power.

[32] Recent awards of compensation to victims of police brutality have hovered around M350,000. But they seem not to have any effect in deterring the police from torturing and maiming defenceless citizens. In the circumstances, I find the quantum of damages claimed by the applicant not to be out of the ordinary. By giving the compensation in the amount claimed would not be to pour out largesse at the horn of plenty at the defendants' expense.

Addendum:

A copy of this judgment must be brought to the attention of the Police Complaints Authority, Police Authority and the Director of Public Prosecutions for follow-up prosecutorial action in the criminal case which the plaintiff opened against the rogue police officers and their removal in terms of section 31 of the Police Service Act, 1998.

Order

[33] In the result, the plaintiff is awarded the amount of damages:

1. M90.00 for medical expenses
2. M300,000 for pain, shock and suffering
3. M100,000 for contumelia
4. Interest at the rate of 12% per annum calculated from the date of issue of summons.

5. Costs of suit.



S.P. SAKOANE
JUDGE

For the Plaintiff: Z. Mda KC with B. Mokoatle
instructed by T. Mahlakeng & Co

For the Defendants: T. Mohloki instructed by
Attorney General