

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/574/13

In the matter between:

KHAMA S. LETSIE

PLAINTIFF

AND

**COMMISSIONER OF CORRECTIONAL
SERVICE**

1st DEFENDANT

ATTORNEY GENERAL

2nd DEFENDANT

JUDGMENT

CORAM:

HON. J. T. M. MOILOA

DATE OF HEARING:

12/12/2019

DATE OF JUDGMENT:

16 NOVEMBER 2020

ANNOTATIONS:

Cases

1. K. v Minister of Justice 2005 (6) SA 419
2. The Minister of Safety and Security v Nancy MSI [2019] ZASCA 26
3. F. v Minister of Safety and Security 2012 (1) SA 536
4. Leaooa Seoane v Attorney General CIV/T/325/98
5. Booyesen v Minister of Safety and Security 2018 (6) SA 1 (cc)

BACKGROUND

- [1] Plaintiff is a senior member of the Lesotho Correctional Service (LCS) stationed at Maseru Central Correctional Institution and as such part of the management team. It is common cause that on 22nd May 2013 an unlawful strike took place at the premises of LCS Maseru whereby some junior officers inhibited the usual operations at the LCS. In particular these junior officers prevented inmates from being taken to courts for remands. He was the officer in charge of section dealing with remands of inmates at the Maseru Central Prison. In response to the chaotic situation caused by the striking officers the LCS management (including Plaintiff) was called in to address the situation. The officers on strike were unruly and singing insolent songs. The Plaintiff together with his management team attempted to enter the prison block but the striking officers prevented them from accessing inmates in the cells. It will become clearer later in evidence what eventually became of the business of the day under those prevailing circumstances.

PLAINTIFF'S CLAIM AS PLEADED

- [2] On that day the Plaintiff stated at paragraph 4.1 of his plea that “he was severely and brutally assaulted to death by the striking officers.” How Mr. Khama Letsie is today before court and not in his grave he was not able to explain to the court. He alleges that the assaults were both verbal and physical. That he was kicked all over the body and spat on by the striking officers. Also, that the officers were under the command of 1st Defendant. Plaintiff is therefore claiming damages from Defendants in the amount of M500,000.00 broken down under the following headings:

(a) One hundred and fifty thousand Maloti (M150,000.00) for assault

- (b) One hundred and fifty thousand Maloti (M150,000.00) for pain and suffering.
- (c) One hundred and fifty thousand Maloti (M150,000.00) insults and loss of dignity
- (d) Fifty thousand Maloti (M50,000.00) for medical costs
- (e) Interest herein (sic) at 18.5% per annum from the date of institution of summons.
- (f) Costs of suit
- (g) Further and/or alternative relief.

- [3] Plaintiff alleges that while under the command of 1st Defendant the officers administered the physical and verbal assaults on him in uniform and on duty within 1st Defendant's area of command, control and orders. As such the officers were within the scope of employment of 1st Defendant and Plaintiff finds Defendants vicariously liable.

THE DEFENDANTS' PLEA AS PLEADED

- [4] The action is defended. Defendants deny the vicarious liability. Defendants admit that Plaintiff was assaulted by the officers on strike who at that time were on an unlawful strike in defiance of lawful authority of First Defendant but clearly were on a frolic of their own. Liability is therefore denied by Defendants under those circumstances. The assaults on Plaintiff were committed by mutinous officers who on the day, were not acting within the scope of their employment. Defendants plead that they cannot be liable for acts committed by officers who were acting in furtherance of their own personal interests during an unlawful strike.

DEFENDANT'S PLEA ON QUANTUM

Defendants also challenge quantum in that if the court finds them liable, the amount claimed is too high.

THE EVIDENCE

- [5] PW1: Khama Letsie; was the only witness. PW1 gave evidence to the effect that on 22/05/2013 he was injured by officers under his supervision. PW1 said they kicked him with their shoes insulted him and locked him in a confined area within the prison precinct at LCS. PW1 said earlier that morning at 6 a.m. he had been fetched from his home by Sergeant Monoko, saying that Superintendent Makoetlane had ordered for him (Plaintiff) to report at work immediately. PW1 said he obliged. When he got there PW1 found the Commissioner, Officer Commanding Maseru Central and his management. He found this team at the parade ground where the Commissioner was talking to Officer Commanding and Deputy Officer Commanding. He and the team were in uniform.
- [6] PW1 went to Superintendent Makoetlane as called by him. At that time PW1 knew nothing about the strike. He was not part of it in anyway. It was explained to him that officers who were on night duty due to knock off at 05:45 hrs had not knocked off. Those who were to relieve them had come but not gone to their positions to relieve the overnight team. The 07:45 hrs team had also arrived. Even the 13:45 hrs team had come. It was just a pandemonium because the teams were not adhering to their scheduled rosters but had all come and assembled at “the centre” of the prison. As ordered by the Commissioner, the Officer Commanding directed for all the striking junior officers from his Deputy to Lance Sergeant to go into prison and give food to prisoners and ensure that those who were due to courts were taken there. They obliged, including PW1. PW1 said he proceeded to his office and took out the list of prisoners due for remands. He and his colleagues proceeded to the “centre” in order to pass through there to the prison cells. They found the area filled up by the striking junior staff members, about 50 in number. The junior officers

refused a directive by the Officer Commanding that they vacate the “centre” to the parade ground for their grievances to be heard. PW1 and his colleagues then proceeded to go past them walking along the wall to go to the cells. Eventually they accessed the cells. PW1 and his colleagues could have been 30, he said. As they began to open the cells some of the junior officers came along to assist. The team saw that the inmates had their food. When they had finished eating, they were returned to their cells although PW1 said they were not locked in.

- [7] PW1 testified further that Superintendent Masenkane ordered him to read the list of inmates due for remands at court so that they could be taken there. It had been arranged that the court would hold the remands and releases at the Maseru Central precinct. The inmates were called out of their cells per the list. PW1 said as he returned with 2 prisoners from one of the blocks, he heard a whistle alarm emanating from the “centre”. PW1 left the 2 prisoners in that block C and proceeded to the “centre” in response to the “whistle alarm”. When he got to exit that block C he found the trellis closed with a wire. PW1 had been locked inside and in that position, he could not reach the handle from inside. PW1 discovered that he had been locked inside and that both the senior management and the inmates were no longer there. After some time, officer Tsietsi (from junior officers’ ranks) opened the trellis for PW1. He had been locked in there for about 20 minutes. Thereafter PW1 heard junior officers insulting him with raw insults, however he could not see who uttered the insulting words. PW1 could identify junior officer Mafihlela, who kicked him on his left thigh. Then all the junior officers rushed at him and kicked him. At that point PW1 was unable to identify them and he managed to flee to the “centre” area. From the “centre” area PW1 said he fled to the office of Officer Commanding and reported to him that he was injured. He

requested permission to go and see a doctor. Officer Commanding said PW1 should await a vehicle to take him to see the doctor as requested, which never came. On that day PW1 did not receive medical attention. The following day PW1 used public transport and went to Queen 'Mamohato Hospital where he was attended to and treated as an outpatient.

- [8] PW1 tendered as part of his evidence the following Exhibits: Exhibit "A" being his health book. Exhibit "B" being receipts of his payments when he visited the hospital. Exhibit "C" being (LMPS 47) a police medical form dated 23/05/2013 to prove that PW1 laid a criminal complaint to the police on 23/05/2013. The accompanying medical report dated 27/05/13 reads that: Mild force inflicted, the degree of injury to life is light, no degree of immediate disability, no long-term disability. PW1 said that the police took no action against the junior officers that he reported had assaulted him, they took no action in regard to the criminal complaint lodged on 23/05/2013.

PW1 said he felt humiliated having been assaulted and insulted by his juniors. He sought and received counselling therapy from Dr. Leah Molapo who is his prayer circle leader. 1st Defendant has not apologised to Plaintiff for what his juniors did to him; not did 1st Defendant provide counselling to him for what happened to him on 22/05/2013.

CROSS-EXAMINATION

- [9] PW1 confirmed under cross-examination that the junior officers were on strike on 22/05/2013 and that striking is not part and parcel of the duties assigned to junior officers. In fact PW1 confirmed that the strike was in defiance of lawful orders at the LCS. That there was no order from the Commissioner that the junior officers should assault Plaintiff. PW1

confirmed also that the junior officers acted in defiance of their own employer's lawful authority and instruction on 22/05/2013 acting purely in pursuance of their own personal interests which the employer did not even know of. However, PW1 maintained still that Defendants are liable for what happened to him including damages. Plaintiff also disagreed that the damages he was claiming were excessive. There was no re-examination and Plaintiff closed his case.

DEFENCE CASE

[10] The defence called in 2 witnesses:

DW1: No 38075 Superintendent Limpho Lebitsa

DW1 identified himself as a member of the LCS since 10/05/1988. He said he knew Plaintiff very well having worked with him for more than 10 years. DW1 said he was present on the day of the incident. DW1 said on that day conditions of work were unusual as junior officers were out of control. They were blocking the inmates being taken to court, in protest over salaries. They (management) had received the alert at about 05:45 hrs when junior officers refused to allow for a change of guard to take place. At 07:45 hrs a delegation of junior officers came to them as management. By that time the institution was already chaotic. He held the position of Assistant Superintendent (ASP) prisons. He was therefore part of management.

[11] At the first meeting of management after 07:45 hrs DW1 said he was with Plaintiff. The meeting was held at the offices of Deputy O/C. DW1's testimony was materially similar to that of PW1 insofar as efforts were made to see to it that inmates received their meals and preparations made for them to be taken to courts. Also, in relation to the evidence that it was PW1 who went to his office for the list of inmates because the record of

inmates convicted and awaiting trial were kept in PW1's office. And Plaintiff brought the lists to the meeting place. DW1 added that he gave orders in the presence of Plaintiff, to the effect that if when they went down into prison cells area again they got resistance from junior officers they should not engage in confrontation with them but must go back and make a report to their superiors. They moved into the prison cells led by Superintendent Ratsuba. There is only one entry point going into the central area leading into cells where the striking junior officers were congregating.

- [12] Mr. Lebitsa said the arrangement was that Senior Superintendent Ratsuba should not enter but should remain at the entrance so that Mr. Lebitsa would lead the contingent going in. If junior officers locked them inside Senior Superintendent Ratsuba would raise an alarm for reinforcement to be brought to the contingent and they went in and opened the cells and lined up inmates requiring to attend remands at court. He then instructed the team to lead the inmate. The striking junior officers reacted by making a lot of noise threatening to block their way out. They blocked the exit point with the fire bowl (brazier) which normally sits in the middle of the centre area in front of the cells.

Mr. Lebitsa said he was then forced to negotiate with the striking junior officers to allow himself and his team to move out so that they don't become entrapped in there with the inmates. They agreed and they allowed the contingent of management to get out, but they were not persuaded to allow the inmates required for remands to go out as well. The cell blocks are structured in such a way that when this problem arose the inmates themselves were protected and they were able to go back in by themselves.

[13] As the contingent was allowed out by their juniors on strike DW1 said he made sure that he was the last person to get out. Plaintiff and the rest of the team had left before him (DW1). DW1 said he could not risk leaving behind any of his team members. DW1 testified further that he then reported to Senior Superintendent Ratsuba (Deputy O/C) that they had failed to bring out the remand inmates due to the hostile situation inside. Then it was decided that they (management team) should all leave the prison premises and return to their respective offices and in fact they all left the prison area. As regards the allegation by Plaintiff that he was injured inside the prison precinct on 22/05/2013 Mr. Lebitsa emphatically denied that to be true. He further said if it had happened it should have been reported in their OB and/or Plaintiff as immediate supervisor of the group that had revolted, he should have initiated disciplinary proceedings against those involved and submitted such to senior management, which would then have had to provide an arbitrator and prosecutor of the case.

[14] The next day 23/05/2013 Plaintiff reported to DW1 that he had been clapped and kicked by striking junior officers inside the prison on the day of the operation on 22/05/2013. Mr. Lebitsa said he asked Plaintiff when he had been injured, and he replied that he returned to Block C to lock up the inmates who had not been allowed to go to court for remands as originally planned. DW1 testified further that it is not correct that Plaintiff reported to him (DW1) or the senior team that he had been injured on the same day of the incident. Nor is it true that any member in senior management told him that an ambulance had been arranged to take him to hospital. On that day no work was being done. Vehicles were there and DW1 said he could not have been so cruel as to deny him an opportunity for one of the vehicles to take him to see the doctor more so when he had been part of the management.

DW1 told the court that on that day 23/05/2013 when plaintiff reported the alleged assaults on him, he (DW1) responded that plaintiff should take disciplinary steps against those involved so that disciplinary proceedings could take place against them. DW1 testified that Plaintiff replied that he does not want to initiate disciplinary proceedings. He said he wanted to go to court. Plaintiff is said by DW1 to have said “*ke ilo ba isa khotla. Ba tla mpatala*”. (I’m taking them to court. They will pay me). DW1 also said on that day Plaintiff did not intimate that they (Defendants) were in any way responsible for the alleged assault on him.

It came to light during cross-examination that Mr. Lebitsa had not brought the OB with him to court. His explanation was that he had learned sometime in 2015 that there was a strike by the correctional staff in the course of which there was burning of some property including vehicles and that the O/B was part of the prison property which got burned and destroyed.

[15] DW2:46318 Senior Assistant Commissioner Kabo Moeno

Mr. Moeno said he knew Plaintiff and he (DW2) was at LCS Central prison on the day in question. Mr. Moeno said he was aware that he had made a statement concerning events of that day. DW2 read his witness statement into the record and stated that the officers who went on strike were acting on the frolic of their own on the day in question. Plaintiff knew that those officers were on a unlawful strike and Defendants could not be held liable for actions committed by officers furthering their own interests not of the employers. Mr. Molati for the Plaintiff admitted the witness statement made by DW2 (Mr. Kabo Moeno) in which he asserted at paragraph 6 that “those officers were acting on a frolic of their own on the date in question

and Plaintiff knew that those officers were on an unlawful strike. In the circumstances Defendants cannot be held liable for acts committed by officers furthering their own interests not of their employer.” Mr. Moshoeshoe for the Defendants then closed his defence case.

ON LIABILITY

- [16] It is Plaintiff’s case that Defendants are liable to pay him damages in the amount he is claiming based on the principle of vicarious liability. This Plaintiff says is because the officers who assaulted him were under 1st Defendant’s command as they committed the unlawful acts on Plaintiff. Plaintiff pleads vicarious liability on the part of Defendants and relies *inter alia* on the decision in **K v Minister of Justice 2005 (6) SA 419** and quotes the following statement made by the judge in that case:

“The general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. The courts have held that as long as the employee is acting “within the course and scope of his or her duty” or “engaged with the affairs of his master” that the employer will be liable in certain circumstances a person in authority will be held liable to a third party for injuries caused by a person falling under his or her authority.”

- [17] Defendants’ plea and testimony deny vicarious liability in that those officers who assaulted Plaintiff were on the frolic of their own. They were on an unlawful strike and were not on that day submitting to authority. That they cannot be held liable for acts committed by officers furthering their own interests not of the employer. Defendants too appreciate that “an employer is vicariously liable for the wrongful acts or omissions of a employee committed within the course and scope of employment or whilst the employee engaged in any activity reasonably incidental to it”, and they refer this court to **The Minister of Safety and Security v Nancy MSI (273/2018) [2019] ZASCA 26(28 March 2019)**. Respondents also argue

that apart from the test where an employee commits the wrongful act while going about the employer's business the other test in determining vicarious liability is where the wrong doing takes place outside the scope of employment; deviation cases. See **F v Minister of Safety and Security 2012 (1) SA 536**. Defendants submit that the junior officers on an unlawful strike were not furthering the interests of the employer but their own interests. Defendants also rely on a decision by my brother **Monapathi J.** in **Leaooa Seoane v Attorney General CIV/T/325/98 (2009) LSHC 23 (04 March 2009)** in persuading this court that the striking officers were out of control during their unlawful strike, against LCS management and therefore vicarious liability was not established.

- [18] In the case of **Booyesen v Minister of Safety and Security 2018(6) SA 1 (CC)** the court said “the test for vicarious liability consists of two questions; first, whether the employee committed the wrongful acts solely for his or her own interests or those of the employer (the subjective question); and second, if he or she was acting for his or her own interests, whether there was nevertheless a “sufficiently close link” (the underlining mine) between the employee's conduct and the business of his employment (the objective question)”.

In *casu* I am satisfied that the striking officers were on 22 May 2013 committed their wrongful acts solely for their own personal interest and not those of their employer. Secondly, I am satisfied that their wrongful acts against Plaintiff do not have sufficiently close link to their employer. In fact, the striking officers' acts were so far removed from their employer's interests that they cannot be reasonably attributable to their employer (Defendant). Indeed, by all accounts the striking officers acted in defiance of First Defendants orders.

CONCLUSION

- [18] It is common cause that on the day in question, the junior officers were on an unlawful strike. They had gone out of control and in Plaintiff's own testimony, the officers disrupted the normal activities of the facility and the strike was in defiance of lawful orders of the LCS management. They refused a directive by the Officer Commanding to vacate the "centre" and go to the parade ground for their grievances to be heard. The striking officers were simply unruly. Surely this could not have fallen within the scope of their duties as members of a disciplined force. I am satisfied on the balance of probabilities that they were pursuing their own interest which had nothing to do with lawful authority. Nor was there a sufficiently close link between engaging in an unlawful strike, disrupting the business of the day and in the process assaulting Plaintiff. I cannot under the circumstances hold Respondents vicariously liable for the wrongful acts of their subordinates in that rampage. Also, it does not help Plaintiff to have not joined some of the perpetrators who inflicted harm on him or even pursued claims against them personally. For instance, in his testimony Plaintiff did say that he identified junior officer Mafihlela who kicked him on his left thigh. Mafihlela and his friends were rebels against the lawful authority of 1st Defendant. This group of rebels were on a personal mission of their own pursuing their own personal interest and not that of their employer. He and his striking colleagues were not acting within the course and scope of their employment. They had completely deviated from same. Vicarious liability has not therefore been established against Defendants.

The Plaintiff's claim is dismissed with costs to Defendants.

J. T. M. MOILOA
JUDGE

FOR THE PLAINTIFF: ADV. L. A. MOLATI

FOR THE RESPONDENTS: ADV. L. P. MOSHOESHOE