

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/687/10

In the matter between

NKH'OU LA TAKANA

PLAINTIFF

AND

**THE COMMANDER LESOTHO
DEFENCE FORCE**

1ST DEFENDANT

ATTORNEY GENERAL

2ND DEFENDANT

Neutral Citation: Nkh'oula Takana v The Commander LDF (CIV/T/687/2010)
[20210 LSHC 53 (17 JUNE 2021)]

JUDGMENT

CORAM:

MOKHESI J

DATE OF HEARING:

03/03/2020 and 29 APRIL 2021

DATE OF JUDGMENT:

17 JUNE 2021

SUMMARY

LAW OF DELICT: *Plaintiff claiming damages suffered as a result of a choking gas being thrown into his sleeping quarters- Plaintiff having to retire prematurely due to health complications occasioned by this incident- Plaintiff awarded damages only for pain and suffering and loss of amenities of life.*

ANNOTATIONS

Books:

J M Potgieter et al, **Visser & Potgieter, Law of Damages 3 ed. (Juta)**
Gauntlet, Corbett The Quantum of Damages, Vol. 1 4ed.

Cases:

Dippenaar v Shield Insurance Co. Ltd 1979 (2) SA 904 (A)
Prinsloo v Road Accident Fund (CA 139/2009) [2010] ZAECGHC 9 (25 February 2010).
Goldie v City Council of Johannesburg 1948 (2) SA 913 (W)
Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)
Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (A)
Burger v Union National South British Insurance Co. 1975 (4) SA (W.L.D)
April v Minister of Safety and Security [2008] 3 All SA 270 (SE); 2009 (2) SACR 1 (SE)
Commander Lesotho Defence and Others v Letsie LAC (2009 – 2010) 549

[1] This is an action in terms of which the plaintiff is claiming damages itemised as follows:

- i) Current and future medical expenses: M500,000.00
- ii) Pain and suffering: M1,000,000.00
- iii) ‘Disability in terms of loss of income’: M500,000.00

[2] The facts of this case are straightforward: At the Pre-trial Conference held on the 23rd May 2013, the defendants conceded liability. This court is only concerned with the issue of quantum of damages. The plaintiff was an army officer at the rank of Private, when the incidents which brought about this case occurred. He was a member of the Band and Signals section of the Lesotho Defence Force (LDF). On the 13 December 2009 they attended a training session at Setibing Military Training Base. Two Platoons attended the session. Training was due to start on the 14 December 2009, and it duly commenced as scheduled. In the evening of the 14 December 2009, two officers from the Special Forces by the names of Second Lieutenants Monne and Seutloali arrived. These two officers were there as trainers. On the 15 December 2009 training had continued as planned, but for the plaintiff, it was not an entirely happy day as he returned from training suffering from cramps and as a result could not take part in the training for that day. He was left behind to nurse his muscles. As he was lying down in the dormitory, the plaintiff saw Second Lieutenant Monne approach and threw ‘CS’ gas canister (tear gas) into the dormitory. The tear gas produced smoke which choked the plaintiff, and because he could not walk due to cramps, he had to crawl outside in order to catch some fresh air. He testified that he had to stay outside the sleeping quarters for three hours due to the lingering smell of the tear gas in the rooms. That smell cleared later, and at night they got a chance to sleep.

- [3] On the 16 December 2009, it was Wednesday, training continued, and the plaintiff took part in it, and all the trainees returned to their dormitories. The tear gas was thrown into their sleeping quarters again and they managed to vacate the place. At dawn on Friday, the 18 December 2009, between the 03hrs00 and 04hrs00, as the trainees were asleep, a CS gas canister was thrown into the dormitories yet again, and this time near the exit door. The plaintiff testified that he used to sleep at the corner of the room, and that as the gas canister released the tear gas, the occupants of the room ran towards the corner where he was sleeping. They all scrambled to escape through the window next to his bed. At that time, he was trying to open the window in order to flee.
- [4] This scramble to escape through this single window caused a stampede. The beds were turned upside-down as the occupants tried to run towards the window to escape through. The situation was chaotic. As each officer was fleeing for his safety, they ended up pushing the plaintiff through the window. He lost balance and landed on his back, and as all the officers were escaping through the same window, they trampled on him while lying on the ground struggling to breathe. He testified that from that time he experienced breathing problems which necessitated his superiors to exclude him from taking part in the training exercises scheduled for that day. Paramedics who were in attendance took care of all the injured officers, including the plaintiff, but with regard to him, the paramedics had recommended that he be seen by the medical doctor.
- [5] The plaintiff was transferred to Maseru for medical attention. He went to see Dr. Mosoke who recommended that he went for x-ray examination. When the x-ray results were returned, Dr Mosoke opined that he needed to

see a lung specialist, after giving him painkillers. He was referred to Dr Monyamane. Plaintiff duly went to see Dr Monyamane, who further referred him to Dr Kolobe as the former did not have the necessary machinery for conducting the examination. Dr Monyamane made the examination report which was handed in as exhibit before the court.

[6] In his report, Dr Monyamane made the following findings:

1. Pleural effusion in both lungs and constrictive lung disease. Pulmonary oedema due to inhaled irritant gas this will result in long term defect of both lungs.
2. Restricted movement of the right shoulder from a fall – this has resulted in arthritis and disability.
3. Pain between the shoulders and weakness of the right arm caused by spinal injury due to a fall from a height.
4. Psychological trauma resulting in lack of sleep, poor concentration, nightmares and aggressive behaviour as result of a scary incident.

[7] This report was directed to the plaintiff's superiors for consideration, it was not prepared for purposes of this trial. As Dr Monyamane could not testify in person due to covid-19 restrictions, he had to prepare an affidavit in terms of which he drew the following conclusions from the above observations he made on the plaintiff.

“7. Following this consultation, the Plaintiff has been constantly seeing medical practitioners with an attempt to reduce effect of inhaling this lethal gas.

8. *This kind of gas which he inhaled seemed to be an extremely dangerous gas which cannot be used indoors unless one has an appropriate mask and supply of oxygen. This gas as seen from tests done on him and his explanation consumes an oxygen in such a manner that a culprit would not survive or may survive with devastating lung damage.*

9. *In my view, the plaintiff is most likely to suffer from excruciating pains, lack of sleep, aggressiveness as well as a constricted breathing for a long term to an extent that he may have to consult Medical Doctors over same issues for a long term if not rest of his life.*

10. *Therefore in my view, plaintiff is most likely to incur a lot of money to sustain his life.”*

[8] In the aftermath of this gas incident, the plaintiff's health deteriorated as he struggled to work. His inability to perform his duties caused a lot of friction between him and his superiors as he had to frequently see medical doctors. As the friction between him and his superiors escalated, he took an early retirement, after several mediation efforts proved fruitless. He was 45 years old at the time. His health situation did not get better after retirement, as he experienced aggressiveness; he could not handle heavy objects; he could not sleep facing upwards (supine position); he has had to hire a domestic worker to take care of him; he experiences pain in the spine and back, and on many occasions, he struggles to breath. All this evidence is not disputed as the defendants are admitting liability and contesting the quantum, as already said.

[9] **Loss of earning capacity:**

The plaintiff had filed amended pleadings in terms of which he sought damages for loss earning capacity, although it was formulated in a rather inelegant fashion as “Disability in terms of loss of income.” The approach to be applied in determining reduction in earning capacity was stated in a leading case of **Dippenaar v Shield Insurance Co. Ltd 1979 (2) SA 904 (A) 917 B – D.**

[10] In terms of this approach the court must determine the difference between plaintiff’s present monetary value of earnings and what he would have brought into the estate had the damage – causing event not occurred. When the two scenarios are juxtaposed the difference between them constitutes a loss to the plaintiff’s estate to be compensated. This is because capacity to earn forms part of one’s estate and any diminution in this capacity diminishes that person’s estate or causes loss to it. (see also: **Prinsloo v Road Accident Fund (CA 139/2009) [2010] ZAECGHC 9 (25 February 2010).**

[11] When the court undertakes this exercise, it has to be guided by the approach espoused in **Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) 920** and in **Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) 113G – 114B**

“An enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make one an assessment, by what of mathematical calculation, on the basis of assumptions resting on evidence.

The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non possumus attitude and make no award. See Hersman v Shapiro & Co 1926 TPD 367 at 379 per Stratford J:

'Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages.'

And in Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (A) Holmes JA is reported as saying, at p.451 B – C:

'I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damage for future loss: ...'

[12] It is important to stress that this exercise will only be made possible by presentment of evidence. In the instant matter the court was not presented with evidence of relevant financial figures regarding the plaintiff's earnings and no explanation was offered as to why that is the case. Inasmuch as the approach mentioned above allows for some guesswork, that guesswork cannot be made in the vacuum, it has to have a bare minimum of evidentiary figures the court is called upon to work with. For this reason, I find, that the plaintiff has failed to discharge the onus placed on him in this regard, and I make no award under this head.

[13] **Current and Future Medical Expenses:**

It is trite that in order to prove damages for future medical expenses the plaintiff must prove that it is possible, in percentage terms, that he will have to incur such expenses:

“A related aspect of the technique of assessing damages in this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is a 30 percent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 percent is less than 50 percent and there is therefore no proved preponderance probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure.” **(Burger v Union National South British Insurance Co. 1975 (4) SA (W.L.D) 72 at 75 D – F).**

[14] The learned authors J M Potgieter et al **Visser & Potgieter, Law of Damages 3 ed. (Juta)** write that:

“It is obvious that a decision on the future medical treatment of an injured person can be based only on expert medical evidence. A plaintiff’s medico-legal report should thus also deal with his or her prognosis (the future development of the injuries and their consequences) as well as the nature and cost of the required treatment.” (emphasis added)

[15] In the instant matter, the plaintiff merely contents himself with merely stating that he will incur M500,000.00 medical expenses for “current and future medical expenses: As I understand him he is merely clubbing together an amount for expenses already incurred (current) and prospective medical expenses, but without any particularization of the future expenses he will possibly incur, expressed as a percentage. This he did not do.

[16] I turn to the medical evidence of Dr Monyamane which was contained in the affidavit: Dr Monyamane had observed that the plaintiff suffered pleural effusion; that he had restricted movement of the right shoulder; pain between the shoulders and weakness of the right arm; psychological trauma resulting in lack of sleep, poor concentration, nightmares and aggressive behaviour, he concludes in the shortest possible way by saying;

“In my view, the plaintiff is most likely to suffer from excruciating pains, lack of sleep; aggressiveness as well as constricted breathing for a long term to an extent that he may have to consult Medical Doctors over same issues for a long term if not rest of his live. (sic)

10. Therefore in my view, Plaintiff is most likely to incur a lot money to sustain his life.”

[17] As can be seen, Dr Monyamane does not deal with the future development of the above injuries and their consequences, their nature and costs which will need to be on hand to treat them. It follows that there is no evidence that future medical expenses will be incurred. I therefore, cannot make any award under this head as well.

[18] Under the same head the plaintiff is claiming for “current” medical expenses. I understood this to mean medical expenses already incurred for his treatment before instituting the case. It should be recalled that past medical expenses fall under a rubric of special damages. In terms of this, this being patrimonial loss, the aim is to place the plaintiff, by way of compensation in the position he would have been but for (as far as possible) the incident which caused the injury and consequent loss. In which case the plaintiff must produce proof of actual expenditure he incurred as expenses for medical treatment. No such proof was tendered in this case showing how much the plaintiff actually paid for medical treatment. He failed to discharge the onus of proving how much he incurred as medical expenses. I treated past and future medical expenses separately because they straddle special and general damages requiring different approaches (**Gauntlet, Corbett The Quantum of Damages, Vol.1 4ed. at pp 2 – 4**)

[19] **Pain and suffering and loss of amenities of life**

The plaintiff has claimed compensation under these heads separately and individually, but I have decided to deal with them globally. It was stated in **Corbett** (ibid) that:

“Generally, however, the modern tendency is to compute the special damages item by item and then to assess the general damages, if any, under the various main heads of damage, which are usually taken as being pain and suffering, disfigurement, loss of amenities, shortened expectation of life and loss of future earnings (or loss of earning capacity as it is often described); and then to award as damages the aggregate of these various sums.”

[20] However, it should be stated that the court is not bound to approach the award of general damages in this fashion as it may award a round figure as damages based on all the evidence presented, given that all the general damages “are all natural and sometimes inevitable consequences of physical injury” (**April v Minister of Safety and Security [2008] 3 All SA 270 (SE); 2009 (2) SACR 1 (SE)** at para.18).

[21] The extent of the plaintiff’s harm has already been alluded to, but for purposes of this leg of enquiry it will be repeated: Dr Monyamane has made the following observations on the plaintiff; that he suffered pleural effusion in both lungs and constrictive lung disease. Pulmonary oedema due to the inhaled irritant gas which is capable of causing a defect in both lungs; the plaintiff had a restricted movement of the right shoulder as a result of falling from a heightmap and that has caused arthritis and disability; the plaintiff had a pain between the shoulders and weakness of the right arm caused by spinal injury as a result of falling from a height; the plaintiff experienced psychological trauma resulting in lack of sleep, poor concentration, nightmares and aggressive behaviour.

[22] In addition to Dr Monyamane’s observations the plaintiff testified that in the aftermath of the gas incident, his health was no longer the same; he could not perform his duties as a soldier to the extent that this inability to

discharge his duties resulted in a friction between him and his superiors as he had to frequently see medical doctors. He was given light work but as friction between him and his superior due to his health condition was got worse, he was left with no option but to resign in 2011. He testified that to date, his health conditions had not changed as he has to visit a doctor regularly for check-ups. He has become aggressive and short-tempered. He cannot handle heavy objects. He only sleeps on the left side, as his right side is painful. This has affected his marriage, to the extent that his wife had to leave. He had to hire a domestic worker to take care of him. He testified that on many occasions he suffers shortness of breath at night. He feels pain all the time when he breathes.

[23] It is trite that each case has to be decided on its own merits and that the court has a discretion to award compensation which is both fair and adequate. To achieve this, assistance may be sought from past and comparable awards (**Commander Lesotho Defence and Others v Letsie LAC (2009 – 2010) 549 at para.15**). Counsel on both sides have cited several cases as being comparable to the present matter, however, I found those not to be comparable (there is no need to deal with them specifically as they related to acts of torture and assault in police and military detention). That notwithstanding, in my considered view the combined effect pain and suffering, and lost amenities of life cry out for a combined award in the amount of M180,000.00.

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

(a) The 1st defendant must pay to the plaintiff damages for pain and suffering and lost amenities of life, in the amount of M180,000.00.

(b) Payment of 8.5% interest *per annum*, on the above-mentioned amount, from the date of this judgment until final payment.

(c) Cost of suit.

MOKHESI J

For the plaintiff:

**ADV. L. C. MONESA instructed by
Naledi Chambers Attorneys**

For the Defendants:

**ADV. P. D. PHATŠOANE from the
Attorney General's Chambers**