

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/407/2014

In the matter between:-

LIPHAPANG LIMEMA

PLAINTIFF

AND

COMMISSIONER OF POLICE

1st DEFENDANT

ATTORNEY GENERAL

2nd DEFENDANT

Neutral Citation: Liphapang Limema v Commissioner of Police and Another
(CIV/T/407/2014) [2021] LSHC 03

JUDGMENT

CORAM:

MOKHESI J

DATE OF HEARING:

26TH NOVEMBER 2020

DATE OF JUDGMENT:

18TH FEBRUARY 2021

SUMMARY:

CIVIL PRACTICE: *Claim for damages for unlawful assault by police officers- mutually destructive versions of witnesses- approach thereto.*

ANNOTATIONS

Cases:

1. *Pillay v Krishna and Another 1946 AD*
2. *Stellenbosch Farmer' Winery Group Ltd v Martell et (i.e. 2003 (1) SA1 (SCA) para. 5; Dreyer v AXZs Industries (PTY) Ltd 2006 (5), SA 548 (SCA)*
3. *Dreyer v AXZS Industries (PTY) Ltd 2006*
4. *Naidoo v Senti LAC (2007 – 2008) 161*
5. *Small v Smith 1954 (3) SA 434 (SWA)*
6. *Pitt v Economic Insurance Co. Ltd. 1957 (3) SA 284 (D)*
7. *Hulley v Cox 1923 AD 234*
8. *Mosehle Molise v Officer Commanding Thaba-Tseka police post and 2 others (CIV/T/40/2012)*
9. *Tšolo Tjela v Officer Commanding Mafeteng Police Station and others (CIV/T/152/2016)*
10. *Thapelo Matsau v Commissioner of Police and Another (CIV/T/541/2011) unreported*

[1] This is an action in terms whereof the plaintiff is seeking damages against the defendants broken down as follows:

- a) M250,000.00 for unlawful assault
- b) M350,000.00 for pain and suffering
- c) Costs of suit
- d) 18.5% of interest per annum from the date of judgment

[2] **FACTUAL BACKGROUND**

The plaintiff was the only witness and for the defence, there was only one witness as well. The plaintiff works in the office of the Principal Chief. On the fateful day of the 25th February 2014 he, together with other men from the village of Ha-Selomo Botha-Bothe had been sent by the chief to round up the livestock which was illegally grazing on the catchment areas. For purpose of convenience I will term these chief emissaries, livestock collectors or simply collectors (literally translated from the Sesotho name). These catchment areas are protected. These are swamps which are protected against overgrazing and naturally, as grass would have grown this tend to attract livestock herders to take their chances and graze their livestock thereat. These areas are in the mountains away from the villages.

[3] The plaintiffs told the court that they had found the livestock grazing on these protected areas. The livestock included sheep, goats, donkeys and cattle. These cattle collectors divided themselves into groups with others collecting goats and sheep, while the other group in which the plaintiff was part collected cattle. They collected the livestock and drove it back home for impoundment and for charges to be levied against the transgressors. As the place at which

they collected the livestock was far-flung, they had to rest along the way until darkness caught up with them. Unbeknown to them the herders who had hitherto fled when the collecting party arrived to collect the livestock had alerted the police that their livestock was raided by cattle rustlers. Meanwhile, the police had mobilized and as the party was resting along the way, the police arrived. On arrival the police branded them stock thieves, and despite several attempts at proving that they were not, the police ordered them to lie down and after they had done so, used the sticks and sjamboks to whip the collectors all over on their backs. After that they took the collectors' cellphones and the plaintiff's knife.

[4] The police arrested them and took them to Letšeng-la-Terai police post where they were locked up until the next day. The plaintiff says they were abandoned as nobody said anything to them the next day. He said after the police had opened their holding cells nothing was said to them and they consequently left of their own volition. He testified that as a result of the assault by the police his hands developed cramps, and in particular his right hand has a reduced functionality which he did not describe. He said their details were not written down at the police post. They sought medical attention at Botha-Bothe Government hospital after being given medical forms.

[5] In cross-examination Ms. Tau for the defendant sought to demonstrate that the plaintiff was not a credible witness as the dates appearing on the witness statement and the one he testified about as being the dates on which he was assaulted, differ. I do not think much should be attached to this discrepancy as it may have been due to a genuine error or forgetfulness, in any event it is

not disputed that the plaintiff had an encounter with the police around that time. It was also put to the plaintiff as the version of the police that the plaintiff was arrested for stealing livestock. It was also put to the witness that they were released by the police with the instruction to come back, but as they had given the police wrong names they never came back.

[6] In the medical report the doctor who examined the plaintiff had only recorded an observation of multiple bruises on the back part of both thighs. After the medical report was admitted and record into the record, the plaintiff closed his case.

[7] **DEFENCE CASE**

In defence, the Sub-Inspector Thabo Polihali (retired) testified as the sole witness for the defence. He testified that on the 25th February 2014 between 21hrs and 22hrs he received a telephonic call from livestock farmers requesting the police to come to their aid as their livestock was being rustled at their cattle posts in the mountains and were already being driven away. He mobilized his officers and headed in the direction where the livestock was allegedly taking. He was with three of his colleagues when they drove out in search of the supposed rustlers. They met the party near the Motete river where they were basking by fire. When they approached, he could see that next to those men, were donkeys, cattle and horses. The police accordingly introduced themselves to the men and sought their explanation regarding their possession of the said livestock and why it was being driven at night. He said upon searching them they found a bag of dagga, but he did not say what he meant by a bag of dagga and where it was found.

- [8] The explanation they got was that they had been sent by the chief to collect livestock grazing on the catchment area. He said the party did not provide them with documentary proof that they were chief's collectors. As they were still there, they saw light around the livestock and as that gave them an impression they were not alone, fearing they may have been surrounded, they left the men there and retreated to where they had left their vehicle. They retreated because the plaintiff's party said they did not know the men who were surrounding the livestock.
- [9] As they retreated, they saw those lights going to the plaintiff and his colleagues. They stood there and watched. It is at that point when they heard noises as if someone was being beaten saying "Don't beat me!" He said a herd boy emerged from the darkness and they asked him who was beating others, to which the 'herd boy' replied it was one of the shepherds. He said there were five collectors and quite a substantial number of livestock. He instructed that the herd boys keep the livestock in one place over night for ease of selection and identification the next day.
- [10] The men were arrested and taken to Letšeng-la-Terai police post where their details were taken. Upon examination it was discovered that those men had whip marks on the thighs. The men were given a charge of illegal possession of dagga only. On the following day, he instructed his officers to release them. He further instructed the men to go to and get medical forms at Botha-Bothe police station as they were arrested in its jurisdiction. The witness told the court that he had seized these men's cellphones, which were not given back to them upon their release because he had left earlier with key to the safe where they were kept. He said the men did not return on the appointed day as

they had been ordered. He testified that the men did not return as instructed because they had given the police false names. They inquired about the men in the village the men had intimated they came from, but they could find them. It was when they got to Botha-Bothe police that they got wind of the whereabouts of the men as they were told by their colleagues that some people had arrived and reported about being assaulted by Letšeng-la-Terai police officers. They left the cellphones they had seized from the men at Botha-Bothe police station, and that he never saw the men again.

[11] Under cross-examination the witness admitted that they were told by those men that they had been sent by the chief of 'Moteng to collect livestock. As to what happened to dagga which was allegedly found in the possession of the party, the witness could only say that it was still kept at the police post. And further the witness said the cell register of the names of the men who were arrested on the fateful day was left at the police post. He was adamant that the men gave the police false names. Regarding the whipping, the witness said the collectors were not beaten by the police but instead had had a fight with the herd boys. In his testimony the witness never said there was a fight between the herd boys and the collectors, but instead had heard a person being beaten and pleading that he be not beaten.

[12] It is trite that the burden of proof rests on the shoulder of a party making a claim (**Pillay v Krishna and Another 1946 AD Vol. II 946 at 951**) by adducing credible evidence proving same. Where the version of the plaintiff and that of the defendant are mutually destructive the plaintiff can only succeed in discharging the burden if he proves on the balance of probabilities that his version is the correct and accurate one and that of the defendant be

rejected for being false or mistaken. In deciding which version is to be preferred, the court will be guided by the following approach:

“To come to a conclusion on the disputed issues a court must make findings on (a) credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias latent and blatant, (iii) internal contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspect of his version, (vii) the caliber and cogency of his performance compared to that of other witnesses testifying about the incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a), (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability of each of the disputed issues. In the light of is assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail,”
(Stellenbosch Farmers’ Winery Group Ltd v Martell et (i.e. 2003 (1) SA1 (SCA) para. 5; Dreyer v AXZs Industries (PTY) Ltd 2006 (5), SA 548 (SCA) at 558 E – G; Naidoo v Senti LAC (2007 – 2008) 161).

[13] Adv. Tau for the defendants sought to cast the credibility of the plaintiff in doubt for his forgetfulness of the date of the occurrences the subject matter of these proceedings. The plaintiff’s forgetfulness in this regard, in my view can be attributed to the events having taken place a long time ago. In any event it is not disputed that the police had arrested certain individuals inclusive of the

plaintiff on the 25th February 2014. The other issue which the plaintiff seemed to forget is where they were given medical forms. He told the court that they were given medical forms at Botha-Bothe Hospital, but it is common cause that these forms are given out by the police to victims of police brutality as part of their investigations, therefore, they could not have been kept at the hospital as the plaintiff seemed to suggest. The events having taken place a long time ago, some memories would fade naturally, and this appears to have been the case with the plaintiff. I found the plaintiff to be a credible and reliable witness. His cross-examination did not yield anything of substance. The plaintiff emerged out of cross examination unscathed.

[14] Testifying for the defence, on the other hand, Mr. Polihali told the court that he was telephonically informed by the farmers that their livestock was being stolen. The police had promptly responded to the call for help and went to intercept the supposed thieves. They came across the supposed thieves who were basking by the fire at night. Upon searching the men, they found bags of dagga. The quantity dagga was not stated by the witness. Upon questioning the men about their possession of the livestock they were informed that they were the Principal Chief's collectors, although no documentary proof could be provided.

[15] It should be recalled that it was put to the plaintiff that they were arrested for theft of stock, but as it emerged during Mr. Polihali's testimony the reason for arresting the men was because they were found with "bags of dagga". The plaintiff was not cross-examined about the alleged dagga find which led to their arrest. It is important, and it is a salutary principle of our law that an opposing party should put so much of his case to the opposing witnesses to

enable them to deal with the adverse allegations (**Small v Smith 1954 (3) SA 434 (SWA) at 438 E – H**). My considered view is that the presence dagga being the basis of the plaintiff's arrest is an afterthought designed mainly to justify arresting the plaintiff and his party. The plaintiff and his party could not have been arrested for stock theft because as it appears the police were convinced that they were collectors, because had they not been convinced the plaintiff and his colleagues would have been charged with stock theft.

[16] In his testimony, the plaintiff told the court that after spending the night in the police holding cells they were left to their own devices without a word from police, hence their decision to leave on their own accord. He told the court that their details were not taken by the police upon being locked up in the holding cells. But as it turned out, Mr. Polihali had left to Mokhotlong with a key to the safe where the men's cellphones were kept. DW1 however said as the men had provided them with false names, on the day appointed for them to return to be dealt with for unlawful possession of dagga, the men did not show up. This prompted the police to follow up in the villages where the men had said they came from but to no avail as the police were told the persons bearing those names were not the inhabitants of 'Moteng village.

[17] Upon a further search, at Botha-Bothe police station, they were told that some men had arrived complaining of assault by Letseng-la-Terai police station. It needs to be recalled that the purpose for this search was to arrest the men for not honouring an appointment to be charged with unlawful possession of dagga. But what happened upon the police getting the wind of the whereabouts of the men leaves a lot to be desired regarding the probabilities of the defence's version of events; when the Letseng- la- Terai police got to

Botha-Bothe police station, they were told about the whereabouts of the supposedly at large suspects, but the former handed over the cellphones of the “suspects” to their Botha-Bothe colleagues for onward transmission to the ‘suspects.’ To date the ‘suspects’ have not been arrested and dealt with in terms of the law. I find it improbable that the plaintiff and his party were found in possession of dagga nor were they searched for by the police as alleged for not honouring their appointment. If indeed this was true, the Letšeng-la-Terai police would have made the concerted effort to re-arrest them because their whereabouts were known by their Botha-Bothe colleagues, instead what they did was to return the men’s cellphones without further ado.

[18] DW1 testified that the men were assaulted by the shepherds after the police had retreated for fear that they could have been surrounded. He said they returned to intervene after being told by one of the shepherds that the collectors were being beaten by one of the shepherds, but under cross-examination DW1 said there was a fight between the collectors and the herd boys. I found DW1 to be uncreditworthy given what I said about his testimony. His testimony is merely tailored to give an aura of legality to the plaintiff’s arrest. In my judgment the whip marks on the thighs of the plaintiff are consistent with the plaintiff’s version that they were made to lie down and were whipped by the police using sjamboks and sticks. Upon the conspectus of all the evidence I find that the plaintiff had proved on the balance of probabilities that he was assaulted by the police. The version of the defendants is rejected as being false.

[19] An award of damages lies within the discretion of the court, the exercise of which must ensure that the award is fair to both parties (**Pitt v Economic**

Insurance Co. Ltd 1957 (3) SA 284 (D) 287F). A trial court in the process will be aided by previous comparable awards to the matter before it (**Hulley v Cox 1923 AD 234 at 246**).

[20] In motivating for the award claimed in the summons, Adv. Ntoko, for the plaintiff, cited the case of **Mosehle Molise v Officer Commanding Thaba-Tseka police post and 2 others (CIV/T/40/2012) [2013] and 2 others (CIV/T/40/2012) [2013] LSHC 74 (11 March 2013)**. In this matter the plaintiff was brutally assaulted by the police while in custody on suspicion of stock theft. The plaintiff was hospitalized for more than two weeks. The assault on him was extensive. The events took place on the 08th May 2011. The plaintiff was released without a charge. The court awarded damages as follows:

Assault – M50,000.00

Pain and suffering – M3,000.00 plus interest

The above case is not comparable to the instance case as the extent of assault in that case was extensive.

[21] I was further referred to the case of **Tšolo Tjela v Officer Commanding Mafeteng Police Station and Others (CIV/T/152/2016) [2020] LSHC 36 (04 November 2020)**. In this case among others, the court awarded M300,000.00 as damages for pain, shock and suffering as a consequence of the police brutality on the plaintiff. Both these cases are not comparable to the instant case. It is trite that the constitution places a premium on bodily integrity. In violation with bodily integrity however miniscule it may appear should be frowned upon. In *casu*, the plaintiff together with his colleagues

were whipped on the thighs and arrested when no justification exists. There was no cause for arrest as there was no crime for which they were suspected. The plaintiff's assault and arrest were unlawful.

[22] In the case of **Thapelo Matsau v Commissioner of Police and Another (CIV/T/54/2011)** (unreported) delivered on 13 September 2018) I had occasion to deal with an assault by the police officers of the plaintiff. Arrest was also unlawful. The plaintiff was assaulted using knobkerrie and hammer on his toes and was kept in detention for two nights. I awarded a combined sum of M70,000 for unlawful arrest and detention; M80,000.00 for assaults, torture, pain and suffering. I consider that the instant case comes closer to this case.

[23] In the result the following order is made: The plaintiff is awarded damages as follows:

- (a) Combined sum of M80,000.00 for unlawful assault, pain and suffering plus interest at the rate of 11.5% from the date of judgment.
- (b) Costs of suit.

MOKHESI J

For the Plaintiff:

Adv. Ntoko
Instructed by T. Mahlakeng & Co. Attorneys

For the Defendants:

Adv. Tau
From the Attorney General's Chamber