

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CIV/T/0211/2022**

In the matter between:

**NTSOLOANA MATOBO**

**PLAINTIFF**

AND

**MALUTI STAR SECURITY (PTY) LTD  
KHOTSO PULE**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

**Neutral citation:** Ntsoloana Matobo vs Maluti Star Security (PTY) LTD & Another  
[2022] LSHC 150 Civ (30<sup>th</sup> June 2022)

<b>Coram</b>	:	<b>M. J. Makhetha J</b>
<b>Date of Hearing</b>	:	<b>30/ May /2022</b>
<b>Date of judgement</b>	:	<b>30/June/2022</b>

**SUMMARY**

*Law of Delict – Claim for damages for pain and suffering, contumelia and medical and hospital expenses incurred - Plaintiff unlawfully assaulted severally with a baton, a gun pointed at his forehead, thrown into a culvert filled with water and insulted by 1<sup>st</sup> Defendant and his colleagues, all happening in full view of colleagues and members of the public - sustained bodily injuries and blacked out only to wake up in hospital unable to speak and eat – Plaintiff frequently suffering from severe headaches, constant eye pain and nose bleeding post the assault. Joint and several liability – 2<sup>nd</sup> Defendant acted in the course and scope of his employment – 1<sup>st</sup> Defendant, his employer, held vicariously liable for 2<sup>nd</sup> Defendant’s unlawful assault on Plaintiff - Request for Default Judgment – Grounds for – Delictual damages awarded at the discretion of the court taking into account such factors as previous comparable awards in similar cases, the nature and extent of injuries sustained and treatment received and prevalent economic conditions within the jurisdiction - Default judgment entered in favour of the Plaintiff against the Defendants jointly and severally, the one paying the other to be absolved.*

## ANNOTATIONS

### CITED CASES

#### LESOTHO

Commander LDF & 2 Others vs Thloriso Letsie C of A (CIV) 28 of 2009

Koloi Mphekeleli v Thabiso Sello and others CIV/T/827/2013

Mokhankhane v Attorney General (CIV/T/373/18) [2020] LSHC 26

Officer Commanding Mafeteng Police Station and others v Ts'olo Tjela C of A (CIV) NO. 45/2020

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

Tseliso Lethole v Teyateyaneng Police Station and 2 Others (Unreported)

CIV/T/4/2014

Tsoeu Thulo Mahlakeng v Base (PTY) LTD CIV/T/437/18

#### SOUTH AFRICA

Corbett Nene vs Road Accident Fund (EL 352/02) (2005) ZAECHC 49 Manilal De

Jonghg v Du Pisanie NO [2004] 2 All SA 565 (SCA, 2005 (5) SA 457

(SCA)

Hully v Cox 1923 AD 234

Kwazulu-Natal Division Case No.AR551/16

K v Ministry of Safety and Security [2005] (3) All SA 519 (SCA)/ 2005 (3) SA 179

(SCA)

Minister of Police v Mbilini [1983] 2 All SA 282 (A)

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

Rajendra Kumar and another v Makhuparetsi Mpai High Court of South Africa

Stadsraad van Pretoria v Pretoria Pools 1990 (1) SA 1005 (T)

SA Railways & Harbours v Dhlamini [1967] 2 All SA 288 (D)

#### BOOKS

J. Burchell, Principles of Delict, Juta & Co., Cape Town 1993

#### STATUTES

The Constitution of Lesotho, 1993

High Court Rules No.9 of 1980

## JUDGEMENT

### **1. INTRODUCTION**

[1] In this case the Plaintiff instituted an action for damages against the Defendants jointly and severally in which he seeks damages arising from the alleged assault on his person on the 6<sup>th</sup> November 2021.

[2] According to the return of service 1<sup>st</sup> and 2<sup>nd</sup> Defendants were duly served with copies of the summons delivered at 1<sup>st</sup> Defendant's given address at Ha Matala, received by the company's Secretary on the 12<sup>th</sup> April 2022 and 12<sup>th</sup> May 2022 respectively. The return of service of the 12<sup>th</sup> May 2022 was handed in before court on the date of hearing.

[3] Despite service on them the Defendants did not enter appearance to defend. As a result, the Plaintiff approached this court to request judgment by default in terms of **Rule 27(3) of the High Court Rules**,<sup>1</sup> and the matter was set down for hearing on the 23<sup>rd</sup> May 2022. On the date of hearing the court determined that the claim was not for a liquid demand and thus ordered that the Plaintiff must lead viva voce evidence to substantiate his claim in terms of the **Rules**.<sup>2</sup> The matter was accordingly postponed to

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<sup>1</sup> No. 9 of 1980

<sup>2</sup> Rule 27(5) (Supra)

the 30<sup>th</sup> May 2022 where the Plaintiff, under oath, narrated his story on the events of the 6<sup>th</sup> November 2021.

[4] In his application, the Plaintiff prays for judgment by default against the Defendants as follows;

*Payment of damages for:*

(a) Pain and suffering:	M200, 000.00
(b) Contumelia:	M 100,000.00
(c) Medical and Hospital Expenses:	M500.00
(d) 18.5% interest temporae morae	
(e) Costs of suit.	
(f) Any further/ or alternative relief.	

## **2. FACTUAL BACKGROUND**

[5] The Plaintiff was an employee (security guard) of the 1<sup>st</sup> Defendant when the cause of action arose. The 2<sup>nd</sup> Defendant is also an employee (Driver) of the 1<sup>st</sup> Defendant, Plaintiff's colleague at work.

[6] The facts that triggered the institution of this action are straightforward and they can be summarized briefly as follows; On the 6<sup>th</sup> November 2021 Plaintiff reported for duty at around 18:40 p.m where he was posted at Super Cars. Upon arrival the Plaintiff and his colleague whom he was to relieve from the shift checked each other as per the company's *modus operandi* whereby he was handed two guns (pump action and Mark 7) which were both loaded with ammunition. Before Plaintiff's colleague left, their employer's patrol car arrived, driven by the 2<sup>nd</sup> Defendant in the company of his colleagues. Upon their arrival the 2<sup>nd</sup> Defendant requested the Plaintiff to hand

over to him both guns that he had received from his departing colleague. However, the Plaintiff informed 2<sup>nd</sup> Defendant that he needed at least one gun because a batch of new stock of cars was about to arrive on the same day.

**[7]** It is Plaintiff's further testimony that when the 2<sup>nd</sup> Defendant drove away, he (Plaintiff) too left the post shortly to charge his phone at a nearby place. Upon his return, Plaintiff noticed that the 2<sup>nd</sup> Defendant had driven back, and as the Plaintiff approached him 2<sup>nd</sup> Defendant began to hurl insults at the Plaintiff demanding 'another' gun from him. Plaintiff says he told 2<sup>nd</sup> Defendant that the gun was in a car which was used for keeping their belongings which was parked at the post. Plaintiff went to look for the gun in the car but it was missing. That is when the 2<sup>nd</sup> Defendant started beating the Plaintiff with a baton and also pointed a gun at his forehead. He also pushed the Plaintiff into a culvert which was filled with water and handed a gun to one of his colleagues, instructing him to shoot and kill the Plaintiff. His colleague refused lest he put him into trouble.

**[8]** Plaintiff went further to testify that when the 2<sup>nd</sup> Defendant and company took a break from assaulting him to smoke dagga he managed to escape and seek refuge at a nearby guest house, but in vain. The security guards there turned the Plaintiff away indicating that he might die in their custody, but they took the initiative to inform the police about the assault.

[9] It is Plaintiff's further testimony that when he failed to get help from his neighbours he returned to his assailants, where the 2<sup>nd</sup> Defendant and company recommenced assaults upon him using derogative language towards him whilst pointing a gun at him again. It would appear from this version of Plaintiff's testimony, including **paragraph 8** above that not only the 2<sup>nd</sup> Defendant assaulted him, but also his companions. When called upon to clarify this version of the story by the court, Plaintiff said he was assaulted by only the 2<sup>nd</sup> Defendant in the presence of his colleagues, one of them by the name of Mashoto. However, throughout the rest of his testimony the Plaintiff referred to the 2<sup>nd</sup> Defendant and company assaulting and insulting him. It is obvious from his testimony that 2<sup>nd</sup> Defendant's colleagues participated to some degree in the assault and/or insults and yet it is not clear why they are not sued together with the Defendants in this action. Nonetheless, it is my considered view from the Plaintiff's evidence as a whole that the 'non-joinder' of the 2<sup>nd</sup> Defendant's colleagues in this action does not absolve the 2<sup>nd</sup> Defendant from his alleged direct participation in the assault upon the Plaintiff.

[10] The Plaintiff further narrated that during the assault 2<sup>nd</sup> Defendant telephoned the headquarters of their security company informing his superiors that, "they are still interrogating the Plaintiff as per the company's practice" and further instructing the Plaintiff to give an explanation to their superiors about the missing gun while pointing the gun at him yet again. Plaintiff's response was that he knew nothing about the gun.

At that moment the policemen arrived and upon enquiry as to what had happened, the 2<sup>nd</sup> Defendant and his companions responded that the Plaintiff had stolen the (company's) gun, and upon the instruction of the police the 2<sup>nd</sup> Defendant and his companions ferried the Plaintiff to hospital. It is Plaintiff's testimony that he blacked out on the way to the hospital and only woke up to find himself on a hospital bed at Queen Mamohato Memorial, unable to speak and eat where he was medically treated and discharged from hospital on the 9<sup>th</sup> November 2021.

**[11]** The Plaintiff further informed the court that upon discharge from the hospital he reported the assault to the Maseru Central Police under RCI 62-11-2021. In support of his evidence the Plaintiff tendered before court selected certified copies/pages of his health book (collectively marked Exhibit 'A'), a copy of the LMPS medical report (marked Exhibit 'B') and naked pictures of himself taken after he left the hospital (marked Exhibit 'C'), all showing the nature and gravity of injuries sustained as a result of the assault on his body.

**[12]** He added that he also went to report the incident to his employer at the company's Headquarters on the 10<sup>th</sup> November 2021, but he was let down by the Administrative Officer who said the Director could not meet with him as he was busy on that day. Until the date of hearing neither has a criminal nor disciplinary charge been lodged against the Plaintiff by the 1<sup>st</sup> Defendant.

### 3. PLAINTIFF'S CASE

[13] The Plaintiff requests a default judgment for damages against the Defendants arising out of the alleged unlawful assault inflicted on his person, the Defendants having been duly served with the summons and having failed to enter appearance to defend the action. The prayers are as set out at **paragraph 4** above.

[14] It is the Plaintiff's case that at all material times, the 2<sup>nd</sup> Defendant (and his colleagues) carried out the acts of assault and humiliation upon him within the course and scope of his employment with 1<sup>st</sup> Defendant and thereby holding the latter vicariously liable for the acts of the 2<sup>nd</sup> Defendant. He submits therefore, that the Defendants are jointly and severally liable to compensate him for the damage caused to him.

[15] It is further the Plaintiff's case that as a result of the assault upon him by the 2<sup>nd</sup> Defendant and his colleagues he consistently suffers from severe headaches and regular nose bleeding, his left eye is constantly painful and he keeps on buying and using painkillers for the pain to go away and anti-depressants as he cannot sleep at night; this was not the case with him before the incident, he alleged. For this, he therefore claims damages against the Defendants for pain and suffering in the amount of Two Hundred Thousand Maloti (M200,000.00).



[16] He averred that he also suffered humiliation, having been assaulted and insulted in full view of the members of the public, for which he claims damages for *contumelia* in the amount of One Hundred Thousand Maloti (M100,000.00).

[17] As a result of the assault he got hospitalized and had to undergo medical treatment and check-ups and incurred expenses thereon. For this loss he claims damages for medical and hospital expenses in the sum of M500.00. However, the actual total amount added from the receipts (collectively marked Exhibit D) that the Plaintiff handed in later at the request of the court is M412.50. The copies of the receipts were admitted as *ex facie* proof of expenditure incurred by the Plaintiff for medication and treatment arising out of the assault on him by the Defendants. Some are hospital receipts bearing his names on them while others, although they do not have his names on, refer to the time around which he complained of pains to his body following the assault. In his evidence also the Plaintiff averred that he has not been able to go to work until the date of hearing and consequently suffered loss of income as a result of the incident. No claim for loss of income though.

#### **4. ISSUES FOR DETERMINATION**

- a. Whether the 2<sup>nd</sup> Defendant's act of assault on the Plaintiff was justifiable or lawful;

- b. Whether the 1<sup>st</sup> Defendant must be held vicariously liable for the acts of his employee, 2<sup>nd</sup> Defendant; and
- c. Whether the amounts of damages claimed by the Plaintiff against the Defendants are commensurate to the loss suffered.

## **5. DEFENDANTS' LIABILITY**

### **5.1 2<sup>nd</sup> Defendant's Liability**

[18] This is a case for delictual damages arising from the alleged assault inflicted on the Plaintiff by the 2<sup>nd</sup> Defendant on the 6<sup>th</sup> November 2021. The basis of the Plaintiff's case against 1<sup>st</sup> Defendant is vicarious liability in that the 2<sup>nd</sup> Defendant assaulted him in the course and scope of his employment.

[19] I find it more appropriate at this stage to start the discussion with the 2<sup>nd</sup> Defendant's alleged liability to the Plaintiff to clarify the basis for the delictual damages sought against both defendants jointly and severally. It is trite that a person seeking delictual damages against a wrongdoer must not only prove entitlement to such damages, but must also prove that the act of the defendant which caused him harm was wrongful or unlawful. The standard of proof being on a balance of probabilities in civil cases, must equally apply to undefended actions (my view). In **Mokhankhane v Attorney General**,<sup>3</sup> Mokhesi J amplified the elements for delictual liability as follows;

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<sup>3</sup> (CIV/T/373/18) [2020] LSHC 26

*“In order 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 conduct must be intentional (dolus) or negligent (culpa), there must be a causal nexus between the cause of damage and the conduct; and finally, damage.”*

[20] Undefended by the Defendants, the Plaintiff’s evidence is that it was the 2<sup>nd</sup> Defendant (and his colleagues) who assaulted him on the allegation of theft of the company’s missing gun which he knew nothing about. It is the Plaintiff’s further evidence that since the allegations of theft against him and the resultant assault upon his person there has been no criminal charge lodged or disciplinary hearing held against him by the 1<sup>st</sup> Defendant up to the date of hearing. This behaviour of the 2<sup>nd</sup> Defendant calls for a determination of whether the act was wrongful (unlawful) or not. **The Constitution of Lesotho**<sup>4</sup> commands in uncompromising language that there shall be no torture, inhuman or degrading punishment or other treatment upon the persons of the citizens, unless there is some other law which authorizes and thus makes lawful the infliction of any description of punishment on a person. Assault without legal authorization is therefore, one such infringement of the right of freedom from inhuman treatment protected by the supreme law of this country. Now wrongfulness (unlawfulness) as an element of delict involves the infringement of a legally protected right or interest, and in determining wrongfulness (unlawfulness), Burchell J.<sup>5</sup> warns that, “the courts must first decide whether the right or interest is legally protected. If it is legally protected, then the courts must go on to decide

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<sup>4</sup> March 1993 Section 8

<sup>5</sup> Principles of Delict: Juta & Co. Ltd, Cape Town 1993 at p28

whether there has been an infringement of this right or interest and, in deciding this, the decisive criterion is one of reasonableness (the legal convictions of the community as determined by the legal policy makers i.e the courts or the legislature). The principle was recently clarified by Leo Boonzaier<sup>6</sup> in his presentation as follows;

*“The test for wrongfulness has been described as an objective, reasonableness test and looks at whether the harm was caused in a legally reprehensive way. 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, **boni mores.**”*

In applying the above principles to the undefended evidence of the Plaintiff, how the assault on his person came about, I am satisfied that the conduct (physical assault) of the 2<sup>nd</sup> Defendant on the Plaintiff amounted to pure infringement of the Plaintiff’s right of freedom from torture and inhuman treatment, a right jealously guarded by the country’s supreme law of the country to afford utmost protection to innocent victims from the immoral and cruel acts of the wrongdoers, without a justification.

[21] According to the Plaintiff there were two company guns when the Plaintiff took over duty from day shift colleague on the material day. One of the guns was taken away by the 2<sup>nd</sup> Defendant who left the post after a failed attempt to remove both guns from the Plaintiff. For suspicious reasons the second gun went missing when the Plaintiff shortly left the post to charge his phone nearby and came back only to be confronted about it by the 2<sup>nd</sup> Defendant who had come back to the post ahead of him. It is Plaintiff’s evidence that the 2<sup>nd</sup> Defendant demanded the gun from the Plaintiff and the latter looked for it but could not find it from the parked company vehicle

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<sup>6</sup> UCT Law@work 2002 Presentation on 25<sup>th</sup> May 2022

where they kept their belongings (including guns), a place known by both the Plaintiff and the 2<sup>nd</sup> Defendant. Considering the behaviour of the 2<sup>nd</sup> Defendant from the time that he demanded both guns from the Plaintiff and coming back shortly to demand same I am not able to find that it was the Plaintiff who was responsible for the missing gun, but the 2<sup>nd</sup> Defendant who returned to the post ahead of the Plaintiff. From his conduct, it is my considered view that the 2<sup>nd</sup> Defendant always had the requisite intention (*dolus*) to implicate the Plaintiff so he could achieve his premeditated plan to cause harm to the Plaintiff. It is the Plaintiff's evidence that the 2<sup>nd</sup> Defendant then started assaulting him with a baton, pointed a gun at his forehead and also threw him in a culvert filled with water while he also hurled insults at the Plaintiff. At some stage during the assault the 2<sup>nd</sup> Defendant and his colleagues paused to smoke dagga and continued the assault on the Plaintiff, obviously a painful experience for the Plaintiff confirmed by the nature and extent of the injuries he sustained from the medical records tendered in as evidence. According to the Plaintiff, the police officers who arrived at the scene asked the 2<sup>nd</sup> Defendant and company if they wanted to kill the Plaintiff, and instructed them to ferry him to hospital. The police must have been satisfied that the assault inflicted on the Plaintiff was severe as indeed the medical report handed in confirms same. He also became unconscious on the way to hospital only to wake up on a hospital bed at Mamohato Memorial. Against the above background, I am satisfied that the Plaintiff in *casu* has successfully made up a case of wrongful assault on his person against the 2<sup>nd</sup> Defendant.

## 5.2 1<sup>st</sup> Defendant's Vicarious Liability

[22] I now turn to the evidence of the Plaintiff in relation to the alleged liability of the 1<sup>st</sup> Defendant in the present case. The law is clear that there may be occasions when an employer will be held liable for damage occasioned by delicts committed by an employee.<sup>7</sup> In **Stadsraad van Pretoria v Pretoria Pools**,<sup>8</sup> the court underlined that the onus rests on the Plaintiff to allege and prove in addition to the usual allegations establishing delictual liability that the person who committed the delict was an employee of the defendant and that the employee performed the delictual act in the course and scope of his or her employment. And should the Plaintiff succeed in establishing facts from which it could be inferred that the employee was acting in the course and scope of his or her employment, it will be for the employer to discharge the tactical onus.<sup>9</sup> However, the courts have also warned that the fact that the act complained of took place while the employee was on duty does not provide *prima facie* proof that the act was committed in the scope and course of her duties.<sup>10</sup>

[23] In *casu*, the Plaintiff's undisputed evidence is that while the 2<sup>nd</sup> Defendant assaulted and insulted him, claiming that he had stolen their employer's (1<sup>st</sup> Defendant) missing gun, he (2<sup>nd</sup> Defendant) telephoned the headquarters of their security company informing his superiors that, "they are still interrogating the Plaintiff as per the company's practice" and further instructing the Plaintiff to give an

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<sup>7</sup> K v Ministry of Safety and Security [2005] (3) All SA 519 (SCA), 2005 (3) SA 179 (SCA)

<sup>8</sup> 1990 (1) SA1005 (T)

<sup>9</sup> SA Railways & Harbours v Dhlamini [1967] 2 All SA 288 (D)

<sup>10</sup> Minister of Police v Mbilini [1983] 2 All SA 282 (A)

explanation to their superiors about the missing gun while pointing a gun at him yet again. It is also the Plaintiff's evidence that when he was discharged from hospital, he made an effort to meet with the company's Director but he was turned down by the office Administrative Officer who said the Director was busy on that day. There is no indication that the 1<sup>st</sup> Defendant ever bothered to check on the Plaintiff while in hospital or thereafter, and it is the Plaintiff's version that he has not been to work following the assault on him by the 2<sup>nd</sup> Defendant. Even then, the employer never enquired from the Plaintiff about what had ensued between him and the 2<sup>nd</sup> Defendant on the 6<sup>th</sup> November 2021. It can accordingly be inferred from the 1<sup>st</sup> Defendant's conduct and the 2<sup>nd</sup> Defendant's call to the head office about the missing gun that the company was, in the circumstances, part of the plan to torture the Plaintiff for reasons unknown to him but best known to the Defendants. It is therefore, my considered view that the 1<sup>st</sup> Defendant knew or rather the 2<sup>nd</sup> Defendant had been sent by the 1<sup>st</sup> Defendant to assault the Plaintiff as he did. The telephone call to the superiors sounds more of a feedback by the messenger to the one that sent him. Accordingly, I am satisfied to the extent of the 2<sup>nd</sup> Defendant's participation in Plaintiff's unlawful assault that the company is vicariously liable for the damage or loss, both patrimonial and non-patrimonial, caused to the Plaintiff in *casu*. It is my well thought out view that the 1<sup>st</sup> Defendant had a legal duty by reason of the employer-employee relationship between the company and the Plaintiff to protect the rights of the Plaintiff from infringement by another employee or colleague (the 2<sup>nd</sup> Defendant and other colleagues who were present during the assault), but failed to do so.

**6. ASSESSMENT OF DAMAGES FOR PAIN AND SUFFERING, CONTUMELIA, MEDICAL AND HOSPITAL EXPENSES.**

[24] In the present case, the evidence of the plaintiff giving rise to this action stands unchallenged and this leaves the amount of damages under each head now the remaining issue for determination. It is now well established that though the trial court exercises a measure of unfettered discretion in determining an award of damages, it must ensure that the award is essentially fair to both parties and should have regard to previous awards in comparable cases.<sup>11</sup> This is particularly relevant to situations where the loss is not easily quantifiable. The same principle has been reiterated in amongst others the case of **Commander LDF & 2 Others vs Thloriso Letsie**.<sup>12</sup> In **Hulley v Cox**<sup>13</sup>, however, the court equally warned that while the comparison of previous awards is a general indication of what is fair and appropriate compensation, the courts must bear in mind that, “a comparison with other cases can never be decisive, but instructive.”

[25] From a plethora of decided cases in this Court it is accepted that in order for a court to determine a fair amount for pain and suffering, the court is at liberty to take into account the evidence of the plaintiff and the circumstances of each case, as well as other factors such as .... the economic situation of Lesotho and must be wary not to award too high an amount especially for non-patrimonial claims. This is basically

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<sup>11</sup> The National University of Lesotho and Another v Thabane LAC (2007-2008) 476 at 488 (I)

<sup>12</sup> C of A (CIV) 28 of 2009

<sup>13</sup> 1923 AD 234 at 246



because an award for non-patrimonial loss is not easily determinable in monetary terms.<sup>14</sup>

[26] With respect to the claim for pain and suffering, *contumelia* and general expenses, it is generally accepted that those kind of damages are designed to ameliorate as far as they can compensate the impairment of dignity caused by the physical or emotional suffering, but are not aimed at enriching the plaintiff.<sup>15</sup> Thus, quoting with approval the decision of the court in **De Jongh v Du Pisanie (supra)** the court in **Corbett Nene vs Road Accident Fund**<sup>16</sup> stated that in awarding damages courts must strive to set reasonable and consistent limits and ensure that the award is fair to both sides. It must thus give just compensation to the plaintiff, but must not simply “*pour out largesse from the horn of plenty at the defendant’s expense.*”<sup>17</sup>

[27] 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 severity, nature, permanence, impact on Plaintiff’s life, as well as the duration of the pain and suffering.<sup>18</sup> It follows that the more severe the injuries sustained and the likelihood of long term or permanent disability of the Plaintiff resulting from the assault, the higher the

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<sup>14</sup> De Jongh v Du Pisanie NO [2004] 2 All SA 565 (SCA), 2005 (5) SA 457 (SCA)

<sup>15</sup> Koloi Mphekeleli v Thabiso Sello and others - CIV/T/827/2013 at para 9 <https://lesotholii.org/>

<sup>16</sup> (EL 352/02) (2005) ZAECHC 49

<sup>17</sup> By Holmes J in Pitt v Economic Insurance Co. Ltd 1957 (3) SA 284 (D) at 287F

<sup>18</sup> Tseliso Lethole v Teyateyaneng Police Station and 2 Others (Unreported) CIV/T/4/2014

amount of damages that the courts may award. The medical report (Exhibit B) tendered in by the Plaintiff to sustain his claim shows that the degree of force inflicted on his body was **severe**, the degree of injury to life **moderate**, the degree of immediate disability **moderate** and the degree of long term disability **partial**. The report was supplemented by copies of the Plaintiff's health book (Exhibit A) and pictures of his naked body (Exhibit C) which all confirmed that he had sustained multiple bruises, lacerations and abrasions all over the body, including injury to his left eye which he says is consistently painful following the assault. The present case is one of those claims that call for a fair compensation to the Plaintiff against the unlawful acts of employers who fail in their legal duty to protect their employees' right to freedom from torture against infringement by their fellow colleagues.

[28] In the case of *Officer Commanding Mafeteng Police Station and others v Ts'olo Tjela*<sup>19</sup> the following principle was reiterated;

*In awarding damages the courts place high premium on among others, right to dignity and right to freedom and security of the person. And where these rights have been gratuitously undermined, an award of aggravated damages (as opposed to punitive damages that are not allowed) may be justifiable.*

[29] Mngadi AJ (as he then was) in the case of *Manilal Rajendra Kumar & Another v Makhuparetsi Mpai*<sup>20</sup> also had the following to say;

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<sup>19</sup> C of A (CIV) NO. 45/2020 at para 30 quoting the case of **Naidoo**

<sup>20</sup> High Court of South Africa Kwazulu-Natal Division Case No.AR551/16 at page 14 para 27  
<http://www.saflii.org/za/cases/ZAKZPHC/2017/65.html>

*Damages is a monetary equivalent damage awarded to a person with the object of eliminating as fully as possible his past as well as future patrimonial as well as non patrimonial damage. The non-patrimonial damage is the diminution because of a damage-causing event in the quality of the legally recognized personality interests, namely; physical-mental integrity, liberty, reputation, dignity, privacy etc. The injured person may claim compensation for all pain, suffering and discomfort flowing from the injury. It includes both physical and mental pain and suffering in the past and in the future. The aim of the award is to enable the injured party to achieve the object of compensation or satisfaction. It provides some psychological satisfaction for the injustice done. The nature and extent of the injustice must balance with the quantum of damages awarded.*

## **7. REQUEST FOR A DEFAULT JUDGMENT**

### **7.1 Service of Process**

- i. In terms of **Rule 4(1)**<sup>21</sup> service of any process of the court directed to the sheriff shall be effected by the sheriff in one or other of the following manners:-*
  - (a) .....*
  - (b) .....*
  - (c) By delivering a copy of the process at the place of employment of the person, guardian, tutor or curator to be served to some person apparently of the age of 16 years or older and apparently in authority over the person to be served or over the guardian, tutor or curator of such person.*
  - (d) Where the person to be served is a company or other corporate body service shall be effected by delivering a copy of the process, to some responsible employee thereof at the registered office or principal place of such company or corporate body within the court's jurisdiction. Provided that if there is no such employee willing to accept service, by affixing a copy of the process to the main door of such office or place of business or by addressing a registered copy of such process to the registered office of principal place of business of such company or corporate body;  
Provided further that if there is any statute or law providing for a manner of service on such company or corporate body service shall be effected in such manner as provided by the statute or law.*

### **7.2 Failure of a Party to Enter an Appearance to Defend the Matter.**

*“In terms of **Rule 27 (3)** whenever the defendant is in default of entry of appearance or is barred from delivery of a plea, the plaintiff may set the action down for application for judgment. When the defendant is in default of entry of appearance no notice to him of application for*

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<sup>21</sup> High Court Rules (supra)

*judgment shall be necessary but when he is barred from delivery of a plea not less than three days notice shall be given to him of the date of hearing of the application for judgment.”*

[30] In the present case I am satisfied that the Plaintiff followed due court process in terms of the **High Court Rules** to bring the Defendants before court to defend the action against them. The Defendants having failed to enter appearance to defend, and the Plaintiff having successfully established a case of unlawful assault on his person, the available remedy in favour of the Plaintiff in the circumstances is an award of judgment by default.

[31] Having heard and considered the Plaintiff's evidence in *toto*, including acceptance of documentary evidence tendered in proving the extent of the injuries he sustained arising from the unlawful assault on his person and the costs he incurred for medical treatment and hospitalization, I am satisfied that the Plaintiff deserves a fair amount of compensation as damages for both patrimonial and non-patrimonial loss suffered. In determining the most appropriate amount of damages I have relied mainly on, but not limited to, the most recent awards by the Lesotho Court of Appeal in cases of similar nature for consistency. In the result, I make the following order; Default Judgment is entered in favour of the Plaintiff against the Defendants jointly and severally, the one paying the other to be absolved as follows;

- a. Payment of M100,000.00 for pain and suffering;

- b. Payment of M50,000.00 for *Contumelia*;
- c. Payment of M412.50 for medical and hospital expenses;
- d. Interest at the rate of 18% per annum from the date of judgment; and
- e. Costs of suit.

**M. J. MAKHETHA**  
**JUDGE**

**For the plaintiff** : Adv Malabulabu

**For the defendant** : No appearance