

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/279/2019

In the matter between:

**TANKISO
PLAINTIFF**

MOKHOSI

AND

**MINISTRY OF HEALTH
DEFENDANT
ATTORNEY GENERAL
DEFENDANT**

1ST

2ND

Neutral Citation: Tankiso Mokhosi v Minister of Health & Anor [2021] LSHC 56
civ (28 April 2022)

JUDGMENT

Coram : Hon. Mr. Justice E.F.M.Makara
Heard : 17th November 2020
Delivered : 28th April 2022

SUMMARY

This is a delictual claim in which the plaintiff has asked the Court to award him damages for assault inflicted to his son by the Defendants' agents while his son was under their care and protection at Mohlomi mental hospital. The Plaintiff states that as a result of the assault, his son suffered permanent brain damage and is bedridden, lacks anal and urinary sphincter control. Consequently, his son needs a regular medical attention,

special dietary and full time professional nurse. The Defendants do not deny liability but only charge that after receiving the letter of demand, they engaged the Plaintiff's counsel Mr. Matooane for negotiations concerning plaintiff's claim. This is due to the fact that it is impossible for the Ministry to just pay out an amount of Twenty Million Maloti (M20 000 000.00) without referring the child for medical assessment to ascertain the degree of damage (injury) caused.

Held:

The Respondents are liable for the injuries incurred by the child and resultantly, to compensate the Plaintiff.

ANNOTATIONS

CITED CASES

1. **Minister of Police v Steve Dlwathi (20604/14(2016) ZA SCA 6**
2. **Torres v Road Accident Fund(04/29294) ZAGPJHC**
3. **Mahloko Mathoka vs Commissioner of Police & Another CIV/T/225/2014**
4. **Tholang Maleka vs Commissioner of Police CIV/T/131/2013**
5. **Mokhethoa Mokaka vs Commissioner of Police CIV/T/258/2012**
6. **Sekhoacha v The Commissioner of Police(CIV/T/296/2018) [2019] LSHC 5**
7. **NSW Law Reform Commission REPORT 78 (1996) - PROVISIONAL DAMAGES**
8. **Jones v Griffith [1969] 1 WLR 795**

STATUTES & SUBSIDIARY LEGISLATION

1. **The Government Proceedings & Contracts Act No.4 of 1965**
2. **Children's Protection and Welfare Act (CPWA) No.7 of 2011**

BOOKS

1. **NSW Law Reform Commission REPORT 78 (1996) - PROVISIONAL DAMAGES**

MAKARA J

[1] The Plaintiff instituted the proceedings against the Defendants charging that the Defendants were delictually liable for the physical injuries sustained by his minor son while under their care for mental treatment which has incidentally caused him to experience ongoing aggravated mental complications. Understandably, this, rendered the 1st Defendant citable as one

of the Defendants and so the 2nd Defendant who is joined by operation of law¹. Thus, the Plaintiff has asked the Court to award him damages by ordering the Defendants to pay him an amount of money in the tune of Twenty Million Maloti (M20 000 00.00) for the following:

1. Unlawful assault;
2. Pain and suffering;
3. Medical expenses including future medical expenses;
4. Costs of suit;
5. Further and / or alternative relief.

[2] The history of these proceedings is that the Plaintiff instituted them on the 2nd May 2019; the Defendants entered their appearance to defend on the 9th May 2019 and filed their plea on the 9th July 2019. From there, it appears that the Defendant initiated a discussion with the Plaintiff for the purpose of reaching a settlement and the gesture was not successful. A disturbing development is that thereafter, the Plaintiff served the Defendants with several notices of set down for hearing but the Defendants did not feature before the Court on those dates or made any follow up to ascertain progress in the matter. The chronological minutes in the Court demonstrate that in the meanwhile, the Defendants lost enthusiasm towards prosecuting their case.

[3] The proceedings were heard on the 17th November 2020. On account of the stated disinterest on part of the Defendants, they were not represented despite having been timeously

¹ The Government Proceedings & Contracts Act No.4 of 1965

served with the Notice of Set Down. Resultantly, the matter was treated as the default proceedings. The reliefs sought for were clearly and concisely presented in the pleadings before the Court. To complement the picture, the matter was not contested and, the Plaintiff testified to confirm and elucidate his claim.

[4] It is important to be stated that the indifference which the Defendants postured in the matter and the developments at the hearing, gave the Court a *prima facie* perception that the judgment was due to be deliverable immediately. In that simplistic attitude, it almost instantly dictated the judgment to the Judges Clerk so that it would be delivered to the Attorney concerned on the following date.

[5] It emerged to the Court as it contemplated the quantum of the compensation prayed for that this was more complex and involved than it had initially thought. This had to be elementarily approached from a solid appreciation of the fact that the Plaintiff is asking the Court to award him the compensation that addresses his present and future damages. These were based upon the said physiological and psychological injuries occasioned by the admitted delictual omission committed by the agents of the 1st and 2nd Defendants. Secondly, the Court had to somehow struggle to ascertain the present and future financial implications on the special medical, food, physio-therapy interventions etc. The challenge

culminated into the understanding that expert evidence was indispensable to resolve the complex impasse.

[6] A mere fact that the Plaintiff is asking for a Twenty Million (M20.000.000.00) Maloti as compensation, posed a serious challenge to the Court since, given the economy within the jurisdiction, that amount is extra-ordinary. In the same vein, the Court has to consider the gravity of the offence and its heart breaking consequences upon the expected quality of life that the young victim was normally scheduled to enjoy in life. Usually, the Plaintiff in analogously similar cases, turn to somehow, help the Court to use its discretion by asking for the amount of compensation which may not create a suspicion that it is unreasonably high and complicates the task of the Court.

[7] The assignment was, on the other hand, further compounded by the fact that the Court had to remain conscientious of the physical and psychological degree of the injuries impacted by the negligence upon the victim. This would have to be done in consideration of their **present and future implications** upon his life, how it has and would continue to adversely affect his life. Secondarily and incidentally, how it has impacted upon those who are closely taking care of him. In this regard, the Court considered the quantification of the damages to necessitate the adoption of some scientific based methodology in assisting itself to arrive at the judiciously justifiable amount for the compensation. This would, in the context of the case, have to be both retrospectively and prospectively calculated.

[8] The medical papers submitted to the Court to support the case of the Plaintiff are complex and not easily interpretable by it especially when it is also called to consider awarding the compensation that would address the future physio-psycho challenges which the child is thought to be destined to experience. It is critical that the Court should be seen to have judiciously exercised its discretionary prerogative as opposed to an arbitrarily made decision or just a guess work for the quick disposal of the matter.

[9] The Court realized that the assessment of the relatively appropriate quantification where the child is involved, should be inspired by the imperativeness of Section 4 of the Children's Protection and Welfare Act (CPWA)² that provides:

(1) All actions concerning a child shall take full account of his best Interests,

(2) The best interests of a child shall be the primary consideration for all courts, persons, including parents, institutions or other bodies in any matter concerning a child.

[10] It is clear from the section that the Court is enjoined to protect and advance the best interest of the child concerned. This would only be achieved if it would be provided with a holistic picture of the predicament situation in which the child is currently at and how it is likely to unfold henceforth. The supportive reasoning is that at the time the proceedings were concluded, the Court was only provided with his condition at

² No.7 of 2011

the time. In all fairness to the Court, it could occasion an embarrassment to it if for instance, the child was immediately awarded the M20.000.000.00 or some amount slightly below only to be discovered that he subsequently recovered to some better degree or had his condition somehow mitigated. Normally, this ever remains possible especially with a child. The relatively extra ordinariness of the amount would naturally trigger anxiety for some investigations. It may have possibly emerged that the award was, in the circumstances of the latest discoveries, unjustifiable. A simplified approach had a possibility of landing the administration of justice into disrepute and warrant adverse speculations, however, unfounded. Unfortunately, history has taught that there are few who dare to defend judicial officers for their *bona fide* inadvertences.

[11] Equally important is the fact that it would constitute a grievous injustice for the Court to award a lesser amount of compensation in the established circumstances where the M20.000.000.00 could have been justifiable. However, it does not necessarily mean that the Court should think of an amount less than the one asked for, but around it, which could, subject to the evidential revelations, be higher. The amount should not be regarded as a jest but thoughtful calculation by the Attorney acting for the Plaintiff and the Court should judiciously base its arithmetic around it.

[12] It appeared to the Court that the Attorney for the Plaintiff thought that the mere fact that their case was not opposed and

that he had provided the Court with the foreign judgments where commanding awards were awarded under the circumstances that he likened to the case at hand, rendered the task of the Court easy and expediently determinable. It was from the beginning, appreciable from the papers and the non-opposition by the Attorney General (AG) that the liability was admitted. Consequently, the Court was left to judiciously determine the quantum by firstly premising its thinking from the claimed M20.000. 000.00.

[13] It appears to have escaped the wisdom of the counsel that the substantial millions of Maloti that they are asking for, by itself, presents a serious challenge for the Court to premise its consideration of the compensation upon it. The understanding of the Court is that the Plaintiff and his counsel have asked for that obviously extra-ordinary amount in full recognition of the seriousness of the physical and psychological harm that the incidence has caused and not to put the Court into an unnecessary test. This said, it is suggestive that though the liability of the Respondents has, by default, been established, the Plaintiff remains, nonetheless, with the burden of proving the accuracy of the substantial millions asked for at least in estimated amounts. The Court should perceive the Plaintiff to have expected it to use its discretion around that amount. Otherwise, it would mean that the figure is intended to confuse it and cause it to make a wild guess while purporting to judiciously determine a justifiable amount of compensation.

[14] The crux of the concern is that besides the success of the Plaintiff to have proven the liability of the Respondent, he complementarily bears the onus to prove the authenticity and the accuracy of the unusual amount of compensation in this jurisdiction. It should, in all fairness, be realized that the mere fact that the Respondents did not contest the compensation asked for, complicated the matter even more since it is left alone to assess the deserving amount. It would, perhaps be easier if this was not phenomenally high within the context of the precedents in this jurisdiction and its economy. Without necessarily saying that the plaintiff should have advanced actuarially ascertained amounts, he should have at least, gone beyond just proving his case on the basis of the medical, dietary, physio-therapy etc necessities he provided the Court with. He must have justified that with some expert evidence on the financial implications of that into the future since he is also asking for the damages that would address future needs.

[15] To illustrate the importance of the expert evidence that would talk to the future demands, there must be evidence on the likelihood of the recovery by the child and its implications or if his condition would get worse. These should not be matters of speculation disguised as discretionary determinations. Thus, the Court found it judicially wise to proactively utilize Section 4 of CPWA.

[16] The consideration of the decision warranted the Court to reinforce itself with some further evidence to enable it to avoid

making an arbitrary decision for the sake of the final completion of the task. This is particular justified by the mere fact that the Plaintiff is *inter alia*, seeking for compensation in relation to the future sufferings including the coverage of the projected specialized treatments, medications and the food stuffs.

[17] The foreign judgments upon which the Attorney for the Plaintiff had relied in persuading the Court to award the M20.000.000.00, are Minister of Police v Steve Dlwathi³ where the court had given the plaintiff Two Hundred Thousand Rand (R200 000.00) for facial injuries, loss of hearing, depression caused from unlawful arrest by the police and Torres v Road Accident Fund⁴ where the plaintiff was awarded Six Hundred Thousand Rand (R600 000.00) of which its current value is One Million Two Hundred and Forty Nine Thousand (R1 249 000.00) for general damages. Noticeably, the economy in the Kingdom is far different from that of South Africa. Thus, the Court and legal practitioners should always be guided by that fact.

[18] The Court, in seeking to rationalize the amount, sought for guidance from the decisions on the same subject matter within the jurisdiction. The only difference is that those matters did not address a situation where the victim was a child *per se*. This notwithstanding, they give a reliable direction on our judicial trend. The few of such decisions which the Court would cite are Mahloko Mathoka vs Commissioner of Police & Another⁵

³ (20604/14(2016) ZA SCA 6

⁴ (04/29294) ZAGPJHC

⁵ CIV/T/225/2014

where the Ninety Thousand Maloti (90 0000.00) was awarded as compensation for the plaintiff, a herd boy who was a victim of police shooting that left him with a permanent disability; Tholang Maleka vs Commissioner of Police⁶ in which the plaintiff was awarded Two Hundred and Twenty Thousand Maloti (M220,000.00) as damages for assault where his injuries left him with no permanent disability; Mokhethoa Mokaka vs Commissioner of Police⁷ (unreported) in which the court awarded Two Hundred and Fifty Maloti M250,000.00 where Plaintiff's injuries were a broken arm which had substantially healed at the time of the trial the plaintiff and in Sekhoacha v The Commissioner of Police⁸ where the court awarded Two Million Nine Hundred and Twenty eight Thousand and Thirty Four Maloti (M2,928,034.00). This amount was broken down as follows:

Eight Hundred Thousand Maloti (M800,000.00) for contumelia; One Million Eight Hundred and Fifty Thousand Maloti (M1,850,000.00) for pain and suffering as well as shock and discomfort; Seventy Four Thousand and Thirty Five Maloti (M 75,034.00) for medical expenses incurred; Two Hundred Thousand Maloti (M200,000.00) for future medical expenses; Two Thousand Five Hundred Maloti (M2,500.00) in respect of her hire of private transport from Queen 'Mamohato Memorial Hospital to Mediclinic Bloemfontein and Five Hundred Maloti (M 500.00) in respect of taxi transport from Maseru Border Post to Maseru Private Hospital and from Maseru Private to Maseru Border Post Police and to Queen 'Mamohato Memorial Hospital.

[19] Against the background of the identified challenges particularly the limited assistance it was provided with, the Court was inspired by Section 4 of CPWA to advance and protect the interests of the child by ordering the Ministry of Social

⁶ CIV/T/131/2013

⁷ CIV/T/258/2012

⁸ (CIV/T/296/2018) [2019] LSHC 5

Development to conduct a social inquiry in the matter and then advise it upon the specified aspects. The understanding was that it would use its experts in the relevant areas of concern to make a scientific based assessment upon each and that it would do so with reference to the documentations relied upon by the Plaintiff. This appeared indispensable especially when the correctness of their contents were never tested before it. Otherwise, the Court would run the risk of over-exaggerating the justifiable amount which would amount to injustice upon the tax payers or unwisely under estimates it to the detriment of the poor child and the parents who are taking care of him.

[20] Moreover, in the case of a child, it would be injudicious for the Court to rely exclusively upon the papers and the reliefs sought for by the Plaintiff. Instead, it is, as the upper guardian of minor children, enjoined under Section 4 to holistically consider the case of each child to protect and advance his/her interests. The matter should not be exclusively adversarial but must also accommodate inquisitorial approaches. In the instant case, for example the Court could make extra orders for the Ministry to continue supporting the child in number of ways than it is contemplated in the prayers presented before it. This is precisely where the expertise of the officers of the Ministry would be valuable.

[21] It should suffice to be recorded that unfortunately, despite constant appeals by the Court and the interventions of the Principal Secretary of the Ministry (PS) for the social inquiry to

be expedited so that it could be assisted in its outstanding consideration, there were delays in the completion of the assignment. This was initially attributed to a miscomprehension of what the Court expected and some internal logistical challenges.

[22] The focus in this case should be on the welfare of the child from the holistic perception of his present and future needs and not just on the monetary compensation. It is precisely towards that end that the Court found it judiciously wise to solicit for the expertise of the social workers who could, given the scarcity of resources, provide the best assistance to the Court.

[23] It unfortunately emerged that even after the PS had intervened again to resolve the misunderstanding, the report that was transmitted to the Court concentrated on raising the defence despite the fact that the Attorney- General (AG) had already not contested the liability and the compensation asked for. Sadly, even their suggestion that the Plaintiff could be entitled to a Three Hundred Thousand Maloti (M300. 000.00) was not based upon any forensically itemized considerations.

[24] The expectation was that the lawyers of the Ministry would collaborate with their Social Welfare Officers counterparts to produce a professionally analyzed document. It was contemplated that the details therein would be reflective of the amounts commensurate to each of the injuries, current and the possible future health and social survivalist challenges. It

would, in the same logic be in consonance with the expertise of the Ministry to make recommendations on the future education, special needs of the child and most importantly, the undertakings of the Ministry to intervene in the continued special treatment of the patient.

[25] In November 30th 2021, the Court after being frustrated by the report from the Ministry of Social Development, thought it is wise to solicit for the intervention of the Children Court intermediaries from the Magistrate court. They are equally trained in social welfare affairs, social behavioral sciences and specialize in the inquires pertaining to the child justice. The officer upon whom the Chief Magistrate assigned the task, reported some two weeks later that she could not locate the home of the parents of the victim for the execution of the task. The Judge's Clerk informed the Court that the Attorney for the Plaintiff has told him that the man was lately not contactable through the phone numbers he had given him. To compound the problem, he advised that the Attorney did not know the exact physical address of the plaintiff save that he lives in Roma. After sometime, it occurred to the Court that it would be wise to ask for the intervention of the Police Senior Superintendent attached to the Court, to assist in locating the home of the Plaintiff. This became successful within few days.

[26] After the Plaintiff was found, he was appraised about the progress towards concluding the matter. The judge's Clerk informed the Court that he told both the Plaintiff and his wife

that the liability of the Respondents was never an issue and, therefore, not a problem. They were further informed that the remaining task was for the Court to be forensically assisted with the determination of the scientifically justifiable quantum of damages especially to address the future damages which the Plaintiff has asked for. Afterwards, the Court was on the scheduled day informed and assured that the Plaintiff and his wife appreciated its measures and the intention.

[27] The frustrations experienced from the deficiencies in the report made by the officials of the Ministry of Social Development, resulted in the thought for an alternative expert assessment to be made by the Social Worker in the Probation Office. The latter is an integral component of the Magistrate Court which is dedicated to conduct social inquires to provide expert advice to the courts in matters concerning children who may be in conflict with the law. Consequently, sometime towards the end of 2021, Probation Officer M Khalane was assigned to intervene in the matter.

[28] The newly assigned official appreciated the urgency of the task and undertook to conclude it within two weeks. She unfortunately immediately encountered the initial problem. This was occasioned by what she reported to be a problem of communicating with the Plaintiff through the cell phone numbers given to her by the Judge's Clerk. The latter had received them from the Attorney for the Plaintiff. The Judge's Clerk informed the Court that even the Attorney himself has

admitted that the Plaintiff is not reachable through the same numbers.

[29] Incidentally, the Court was told that on the very date, the logistical obstacles were explained to the Plaintiff, the Judge's Clerk took the opportunity to phone Social Worker Khalane in order for the two to make an appointment to meet her for the social inquiry and for arranging the necessary logistical imperatives. At that time, the Social Worker expressed her regret that unfortunately for the Plaintiff, she was just about to be admitted in the maternity ward and that she could, at any moment be blessed with a child. The Judge's Clerk recounted that the wife of the Plaintiff who was also present even lamented that the maternity leave would take three months. The bottom line is that both parents are said to have, in spite of the odds, understood the efforts made by the Court to determine the quantum and accepted that it should be given time to do so.

[30] The paradox and the rather disturbing dimension in this case is that, despite the assurance given to the Court through its official that the parents of the victim are on board, appreciate the predicament in which the Court is and its endeavour towards reaching a justifiable amount of compensation, their counsel demonstrated otherwise. He, despite the explanation given directly to him by the Court, wrote series of letters asking for the judgment. His reasoning was throughout simplistically that the Court should simply use

its discretion to determine the appropriate amount of compensation especially against the background that even the M20, 000 000.00 they had asked for was never contested. This was unfair to the Court and even to the victims of the offence since it would run the risk of arriving at a subjective assessment which could land the administration of justice into dispute. This could be occasioned by awarding an amount which could later emerge to be unjustifiable or unrealistic to the situation.

[31] The Court has, in realization of the continuing uncertainty of the time when the expected expert witness would intervene, found it judicially prudent to intervene on the basis of Section 4 of the CPWA, by making an interim order for the compensation of the Plaintiff pending the assessment by the expert. This is done in recognition that in cases like the one at hand, the common law *once and for all rule* payment of damages does not rhyme well with the sense of justice. The dilemma was succinctly captured by New South Wales Law Reform Commission⁹ in these words:

An award of damages under the once-and-for-all rule will, therefore, almost certainly be wrong. It will result either in under-compensation which disadvantages the plaintiff who is prevented from commencing another action in respect of the injuries, despite further manifestation; or overcompensation for an injury that never manifests itself to the degree expected.

[32] Lord Scarman¹⁰ is quoted to have taken the rule even further thus:

⁹ NSW Law Reform Commission REPORT 78 (1996) - PROVISIONAL DAMAGES @ para 2.7

¹⁰ *Lim v Camden and Islington Area Health Authority* [1980] AC 174 at 183. See also comments by Harman LJ in *Jones v Griffith* [1969] 1 WLR 795 at 802

The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering - in many cases the major part of the award - will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.

[33] In awarding provisional damages, this Court therefore, reserves its right to subsequently reconsider possible enhancement of the provisional amount of compensation and decides that:

1. The Respondents are liable for the injuries incurred by the child and, therefore to pay the Plaintiff the consequent damages;
2. Pending the final determination of the final judgment on the amount of compensation, the Plaintiff be awarded Five Hundred Thousand Maloti (M500 000.00)

E.F.M. MAKARA
JUDGE

**For Plaintiff : Mr. T. Matooane of T.Matooane & Co
Attorneys**
**For Defendant : Ms. K Khoboko from the Attorney General's
Chambers**