LESOTHO

REPORTABLE

IN THE HIGH COURT OF LESOTHO

Held at Maseru **CIV/T/254/2016**

In the matter between:

KABELO KHABANYANE **PLAINTIFF**

AND

THE COMMISSIONER OF POLICE **1ST DEFENDANT**

THE OFFICER COMMANDING MAFETENG POLICE **2ND DEFENDANT**

ATTORNEY GENERAL **3RD DEFENDANT**

Neutral Citation: Khabanyane v The Commissioner of Police & Others [2023] LSHC 11 Civ (2023)

CORAM: S.P. SAKOANE CJ

HEARD: 14 MAY, 23, 30 NOVEMBER 2022

DELIVERED: 7 MARCH 2023

SUMMARY

Delict – claim for damages for assault by the police – police assaulting plaintiff at his home – plaintiff neither suspected of committing any offence nor charged – assault immediately reported to superiors but no action taken – duty of Commissioner of Police, Director of Public Prosecutions and Attorney General to protect the rule of law - systemic and institutional weaknesses affecting effective investigation and prosecution of cases of police brutality - constraints in pursuing compensation in criminal proceedings - determination of award of damages in accordance with pattern of previous awards – imperative to reform the police service in order to curb police brutality – Constitution of Lesotho, 1993 section 11; Criminal Procedure And Evidence Act, 1981 sections 39, 40, 321; - Inquests Proclamation, 1954 sections 6 (f), 17; Penal Code, 2010 section 31 (2); Police Service Act, 1998 section 22.

ANNOTATIONS:

CASES:

LESOTHO

Commander of the Lesotho Defence Force and Others v Letsie LAC (2009 - 2010) 594

Khosi v Second Lieutenant Babeli & Three Others 1991-1996 (1) LLR 275 (HC)

Lesetla v. Commissioner of Police and Another LAC (2013-2014) 337

Moketsepane v. Lesotho National General Insurance Co. Ltd [2022] LSHC 280 (25 October 2022)

Mokotjo v. Commissioner of Police and Attorney General CIV/T/520/2014 (04 March 2020)

Officer Commanding Mafeteng Police Station v Tjela C of A (CIV) 45/2020; [2021] LSCA 23 (14 May 2021)

Phaloane v. R LAC (1980-84) 72

Ratia v. Magistrate Rantšo and Another [2019] LSHC 13 (11 September 2019)

Tjela v. Officer Commanding Mafeteng Police Station & Others (CIV/T/152/2016) [2020] LSHC 36 (04 November 2020)

EUROPE

Al – Skeini v. United Kingdom [2011] 30 BHRC 561 (ECHR)

SOUTH AFRICA

Ex-parte Minister of Safety and Security and Others: In Re: S v. Walters and Another 2002 (7) BCLR 663 (CC); 2002 (4) SA 613 (CC)

Naidoo v. Minister of Police (20431/2014) [2015] ZASCA 152 (2 October 2015)

S v. Sion 1975 (2) SA 184 (NC)

ZIMBABWE

Masawi v Chabita and Another 1991 (4) SA 764 (ZHC)

STATUTES:

Constitution of Lesotho, 1993

Criminal Procedure and Evidence Act No.7 of 1981

Inquests Proclamation 37 of 1954

Penal Code Act No.6 of 2010

Police Service Act No.7 of 1998

INTERNATIONAL STANDARDS

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

BOOKS:

Steytler, Nico (1996) Constitutional Procedure (Butterworths)

Visser, P.J and Potgieter, JM (1993) Law of Damages (Juta)

LAW JOURNALS:

Davis, Peter L. *Roodney King And The Criminalization of Police Brutality In America: Direct And Judicial Access To The Grand Jury As Remedies For Victims Of Police Brutality When The Prosecutor Declines To Prosecute* Maryland Law Review Vol.53:271 (1994)

Panwala, Asist S. *The Failure of Local and Federal Prosecutors to Curb Police Brutality* 30 Fordham Urban Law Journal 639 (2002)

Puddister, K and McNabb D. *When the Police Break the Law: The Investigation, Prosecution and Sentencing of Ontario Police Officers* Canadian Journal of Law and Society, Volume 36, No. 3 (2021)

THESES:

Shale, I.M.P. *Domestic Implementation of International Human Rights Standards Against Torture In Lesotho* PHD thesis University of the Witwatersrand (2017)

Tian, Li. *Victims' Opportunities to Review a Decision not to Prosecute made by the Crown Prosecutor* Masters thesis University of Western Ontario (2013)

JUDGMENT

I. INTRODUCTION

> "Police brutality is usually defined as any excessive use of force by a police officer under color of law. Police chiefs from ten major cities have agreed that 'the problem of excessive force in American policing is real' rather than a rare occurrence. Not only does police brutality perpetuate the notion that street justice is acceptable, but also victims are unlikely to develop respect for the law when officers abuse their lawful authority. Instead, justice requires that police officers refrain from acting like street thugs, even if they are 'dissed.'"[1]

[1] In this case the hydra-head monster of police brutality has reared its ugly head and claimed the scalp of a person with a visual disability. This happened on 15 December 2015 when the police rudely woke up the plaintiff from his sleep at dawn and assaulted him. The plaintiff reported the assault the same day The Officer Commanding Mafeteng police and was given a medical form in which the doctor recorded the injuries. Nothing seems to have been done to charge and prosecute the responsible police officers. He claims damages for:

> "(i) Pain, shock and suffering M350,000.00
>
> (ii) Contumelia M149,980.00
>
> (iii) Medical expenses M20.00"

[1] Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 Fordham Urban Law Journal 639 (2002)

[2] In addition, the plaintiff claims payment of interest at the rate of 12% per annum calculated from the date of issuance of summons plus costs of suit.

Pre-trial conference

[3] A signed minute of a pre-trial conference held before me on 23 November 2020 reads thus:

> " 1) **ISSUES THAT ARE COMMON CAUSE**
>
> 1,1. Identity and description of the parties admitted.
>
> 1.2. That on the 15th November, 2015 some members of Lesotho Mounted Police Service (LMPS) had an encounter with the plaintiff at his place at Taung Qhoqhoane in the district of Mohale's Hoek.
>
> 1.3 That a Police Medical Form was issued to plaintiff by the Police on the 15th December, 2015 bearing the request that plaintiff be examined by a medical practitioner.
>
> 1.4 That the Medical Report filled by the doctor depicted injuries sustained by the plaintiff.
>
> 1.5 Contents of the medical form.
>
> 2) **ISSUES IN DISPUTE**
>
> 2.1 The alleged assault of plaintiff by Police Officers
>
> 2.2 Liability and quantum are disputed."

The issues in dispute were referred to trial for resolution by *viva voce* (oral) evidence.

II MERITS

Plaintiff's case

[4] The plaintiff testified as PW1 and told the court that on 15 December 2015, he and his wife were asleep in their house when the police arrived at around 4:15 in the morning. They knocked and ordered him to open the door. He asked them how he could he be sure that they are indeed police officers. They then kicked the door, opened it, entered and pulled him outside. They threw him to the ground, kicked and beat him with a stick. They rolled him for a distance of about 15 metres while kicking and beating him. He felt pain and suffered humiliation. Pain was felt at the elbows, ligaments, ribs and at the back. His right hand is still numb.

[5] After a short while the wife came out of the house and handed him his walking stick as he has a visual disability. The police asked him how he could have a visual disability when he was so talkative. He had not done anything to the police to warrant the assault.

[6] The plaintiff reported the incidence the same day at the Mafeteng police. He was given a medical form to take to the doctor who filled it after being medically examined. He returned to the police with the medical

form. The medical form was admitted in evidence by consent and marked **"Exhibit A"**.

[7] Under cross-examination, the plaintiff disagreed with the suggestion that when he came out of the house, he was wielding a stick which the police forcefully took away and it is during that episode that he fell to the ground.

[8] *Lekhetho 'Makhongoana* (PW2) testified that he knows the plaintiff as a co-villager with whom they grew up together. On the said day, he was at his home when the police arrived at 4 a.m. and knocked. They were six in number. They ordered him to come out and he complied. The police said he should take them to houses in which men reside. On arrival at the plaintiff's house, the police knocked. The plaintiff asked who they were. They identified themselves as police. They ordered plaintiff to come out and then kicked the door and entered. As they stormed into the house, plaintiff pleaded with them not to beat him.

[9] They pulled the plaintiff out of the house, kicking and beating him with a *lebetlela* stick. His mother came and told the police that the plaintiff has a visual disability. The police retorted by asking "What kind of a blind person is this who wants to know our identities?" The plaintiff's

wife pleaded with them to let the plaintiff have his walking stick. The plaintiff had not done anything when the police assaulted him.

[10] Under cross-examination, PW2 reiterated that the police assaulted the plaintiff as he came out of the house and after he fell. At the end of the cross-examination, the plaintiff's case was closed.

Defendants' case

[11] Police Constable *Seboka Tsanyane* testified as the only witness for the defendants. He said that on the day in question, he was part of the police contingent that conducted an operation at the village of the plaintiff. The contingent consisted of members of the Special Operations Unit and the ordinary unit. On arrival at the village, they were divided into two groups. One group went into the village to arrest suspects while the other group remained on the outskirts of the village. He was in the group that entered the village.

[12] After entering the village, the group went to the home of a suspect by the name of *Khang*. They knocked and the suspect's mother opened. They asked for the suspect's whereabouts and the mother said she last saw him the afternoon of the previous day.

[13] They then proceeded to a nearby house. This was around 5:00 and 6:00 in the morning. They knocked and a male person responded. They introduced themselves as police officers and asked him to come out to help them. That person asked how he could trust that they are police officers. They asked him to point a window next to which they could stand so that he could see them as they were in uniform. The person said he was putting on clothes and would come out.

[14] He took some time to come out. They then asked him whether he was still coming out. He angrily asked whether he should come out naked. DW1 said he heard this person utter the words "bring my stick". He told the person to leave the stick behind but he did not say anything. The person then came out holding a stick. DW1 says he grabbed it to put it down but the person held unto it. At that point DW1's colleague named *Noka* came to his assistance to take away the stick. It is during this encounter that the plaintiff fell down. The plaintiff was not beaten with sticks or kicked.

[15] After the plaintiff fell down, an elderly couple came from a house nearby and told them that the person has a visual disability. On hearing, this they made a determination that he could not be of any help to them

because they came to him to get an explanation "about what he had seen." They then left to look for other suspects.

[16] Since the elderly couple did not tell them the name of the person, DW1 said he only got to know the person's name when he was called to the Law Office for consultations in connection with this case. He also said he does not know the name of PW2.

[17] Under cross-examination, DW1 admitted that when they went to the plaintiff's home, he knew that he was not a suspect. He also admitted that the plaintiff never attacked him. The police knew the suspects they were looking for and as a villager, the plaintiff might have known their whereabouts.

Discussion

[18] The plaintiff slept peacefully in his house when the police arrived and knocked. They ordered him to open the house and, after a short time, they forcefully opened the door and pushed him out. As the plaintiff was pushed out of the house, he fell on the ground. This much is not seriously disputed. What seems to be in dispute is whether in the process he was kicked, beaten with a stick and thrown to the ground or he just fell.

[19] The version of the plaintiff that he was made to fall on the ground by the police while being kicked and beaten with a stick is corroborated by PW2. This is the witness who went to the plaintiff's home at the behest of the police and in their company. PW2 saw the angry mood the police were in and the aggressive manner in which they entered the house, pushing out the plaintiff and kicking and beating him with a stick.

[20] The plaintiff and PW2 testified in a straightforward manner and were not shaken under cross-examination. They came across as honest and truthful witnesses. I have no reason not to believe them.

[21] DW1's evidence that the plaintiff got out of the house holding a stick with which he attempted to beat them is fanciful. It is improbable that a visually impaired person could fight six police officers who must have been armed. He simply could not fight people he could not see. The plaintiff's walking stick was brought to him after the police had forced him out of the house and beaten him.

[22] DW1's denial that PW2 accompanied the police to the plaintiff's home is a cynical attempt to remove him from the place of the events. The denial rings hollow. It was never even put to PW2 that he did not take the police to the plaintiff's house. Furthermore, DW1 conceded that the

plaintiff did not attempt to attack the police with a stick and that he was not even a suspect. I got the distinct impression that DW1 downplayed their callous behaviour. This is borne out by the fact that DW1 did not even bother to ask the plaintiff his names or offer an apology after hearing his mother say he has a visual disability. They just left.

[23] If the plaintiff was not a suspect, why then did the police go to his home and behave in the manner they did? To this question, DW1 said that the police are empowered by the provisions of the **Criminal Procedure and Evidence Act No.7 of 1981** to order any person above the age of sixteen to assist them in investigating crimes. Indeed, he is right because section 39 of the Act provides that:

> "(1) Every male person between the ages of 16 and 60 is, when called upon by any policeman, authorised and required to assist the policeman in making any arrest which by law the policeman is authorised to make, of any person charged with or suspected of the commission of any offence, or to assist the policeman in retaining the custody of any person so arrested.
>
> (2) A male person who, without reasonable excuse, refuses or fails to comply with sub-section (1) is guilty of an offence and liable to 100 maloti and to one month's imprisonment."

[24] However, the section does not authorise the police to require assistance by use of force and assaults. Their legal recourse is to bring a charge in terms of sub-section (2) if a private person refuses or fails, without reasonable excuse, to render assistance. There is no evidence that the

police called upon the plaintiff to assist them in making an arrest of any person charged with or suspected of committing crime. They approached the plaintiff in an aggressive manner, shouting and ordering him to open the door of the house as if he was the one about to be arrested. When he hesitated, they forcefully entered the house, pulled him out kicking and beating him with a stick. They treated him like a suspect resisting arrest. The concession by DW1 that the plaintiff was not a suspect makes the defendants' case worse, in that the police unjustifiably invaded the plaintiff's constitutional right to respect for private and family life guaranteed in **section 11** of the **Constitution**.

[25] The sanctity of a person's home is jealously protected by the Constitution. "It is subject to the highest expectation of privacy reflecting the old adage that the home is a person's castle."[2] The law does not allow police officers to enter the house without permission. **The Criminal Procedure and Evidence Act, 1981** carefully delineates the narrow circumstances under which the police can forcefully enter and the procedure to follow when entering for the purpose of making an arrest. It reads thus:

> "40. (1) Subject to sub-section (2) any peace officer or private person who is by law authorised or required to arrest any person known or suspected to have committed any offence, may break open for that purpose the doors and windows of, and may enter and search, any premises in which the person whose arrest is required is known or suspected to be.

[2] Steytler, Nico (1996) Constitutional Criminal Procedure (Butterworths) p.99

> (2) Any peace officer or private person shall not act under sub-section (1) unless he has previously failed to obtain admission after having audibly demanded entry and notified the purpose for which he seeks to enter the premises."

Reference to "peace officer" includes a police officer as defined in section 3 of the Act.

Liability

[26] Absent any reasonable suspicion by the police that the plaintiff had committed an offence and not informing him that his assistance was required to arrest a known suspect, the police had no business to wake him up rudely, enter his house without permission and push him out. They had no authority in law to touch him at all or to enter his house without permission.

[27] The medical report records that the plaintiff suffered injuries on the muscles, the upper part of the right leg to the right side of the stomach and on the elbow of the right hand. The injuries did not cause immediate or long-term disability. The degree of force used to inflict the injuries is mild.

[28] I find that the plaintiff was assaulted in the manner described by him and as witnessed by PW2. He sustained injuries described in the medical report. The police are liable for the assault and injuries caused.

Asserting the rule of law

[29] In **Tjela v. Commissioner of Police and Another**[3] the Court of Appeal called for action against police brutality in these words:

> "we depreciate the escalating incidence of police brutality the culprits must be prosecuted to protect rule of law"

The call is directed to the Commissioner of Police, Director of Public Prosecutions and the Attorney General as the triumvirate bearing the constitutional duty to protect the rule of law by investigating, prosecuting and not defending the indefensible.

[30] A similar call was made by the court in **Ratia v. Magistrate Rantšo and Another**[4] where the police had forced a suspect to eat human faeces. This court's judgment was brought to the attention of the relevant agencies for investigation and prosecution of the perpetrators of the despicable, inhuman act. But to date nothing has been done to hold the concerned police officers accountable. The same situation obtains in **Tjela**, Thus,

[3] C of A (CIV) No.45; [2020] LSCA 23 (14 May 2021)
[4] CRI/REV/23/2019; [2019] LSHC 13 (11 September 2019)

there is an emerging pattern of failure to protect the rule of law. This is bad news for our democracy.

[31] Protecting the rule of law requires that there must be official investigations and prosecutions whenever people are seriously injured, die in custody or are arbitrarily killed by agents of the State. The essential purpose of investigations and prosecutions is to secure the effective implementation of laws safeguarding the right to life, freedom from torture and inhuman and degrading treatment. Responsible State agents must be held accountable whenever people are injured, tortured or die under their responsibility.[5]

[32] In cases of deaths in police action and in police custody, investigations and prosecutions must be done in terms of the **Inquests Proclamation 37 of 1954** (as amended per **Proclamation 6 of 1964).** Section 6 (f) stipulates the following procedure:

> " ... where a person dies (otherwise than in lawful execution of sentence of death) while detained in any prison or reformatory or while in the custody of the police, to direct that an inquest into such death shall be held as soon as practicable; and for this purpose it shall be the duty of the person of the person having charge of the police in the district in which such death occurred forthwith to report the same to the Magistrate."

[5] Al-Skeini v. United Kingdom (2011) 30 BHRC 561 (ECHR)

[33] The Magistrate must hold an inquest and subpoena witnesses to give evidence or to produce any document or thing. If before or at the termination of the inquest the Magistrate is of the opinion that the death is caused by known police officers, s/he must cause them to be arrested or summoned in order to be prosecuted[6]

[34] In *casu*, protecting the rule of law requires that the responsible police officers be charged with the offence of aggravated assault defined in section 31 (2) (f) - (g) of the **Penal Code Act No.6 of 2010** as an assault committed in the following circumstances (among others):

> "(f) the assault of a person who by virtue of age, physical or mental condition is vulnerable;
>
> (g) the commission of assault in circumstances where the accused was at the time of the assault in a position of authority over the victim;
>
> (h) the assault takes places in the private dwelling of the victim and is committed by a person other than a member of the victim's household."

[35] Lesotho[7], Canadian[8] and America[9] scholarship highlight the following as direct and indirect enablers of police brutality:

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[6] Section 17. *The Head of the CID was prosecuted following this process in R v. Phaloane LAC (1980-84) 72*

[7] *Shale, I.M.P. Domestic Implementation of International Human Rights Standards Against Torture In Lesotho* PHD thesis University of the Witwatersrand (2017)

[8] Puddister, K and McNabb, D. *When the Police Break the Law: The Investigation, Prosecution and Sentencing of Ontario Police Officers*. Canadian Journal of Law and Society, Volume 36, No. 3 (2021); Tian, Li. *Victims' Opportunities to Review a Decision not to Prosecute made by the Crown Prosecutor*. Masters thesis, University of Western Ontario (2013)

[9] Footnote 1; Davis, Peter C. *"Rodney King And The Decriminalization Of Police Brutality In America: Direct and Judicial Access To The Grand Jury As Remedies For Victims of Police Brutality When The Prosecutor Declines To Prosecute"* Maryland Law Review (Vol. 53:271; (1994)

- Populist utterances by politicians who encourage use of force by the police with the aim of deterring criminal conduct and extracting information from suspects. Such utterances appease an electorate that is reeling under high levels of crime.

- Lack of political will to enact a distinct anti-torture legislation and failure to prosecute members of the security services implicated in cases of torture. This encourages the police to torture suspects in order to extract information.

- Failure to prosecute those found liable for assaults and torture by the courts in civil cases. This leads to the conclusion that assaults and torture are condoned by those in authority and are thereby institutionalised.

- Weak investigation machinery in the offices of the Police Complaints Authority and the Ombudsman in instances where citizens lodge complaints of police assaults.

- The Commissioner of Police has a hopeless conflict of interest in that he has to investigate complaints of police brutality

simultaneously with charges brought by the police against the very victims.

- Lack of accountability and consequence management. Supervision is bad and it is common to promote officers with a history of complaints.

- Absence of meaningful disciplinary action and failure to act on citizens' complaints breed a culture tolerant of abusive police behaviour.

- Effective and successful investigations and prosecutions demand close cooperation between the prosecution and police investigating those accused of brutality. Where investigations are not prosecution – led, the prosecution has little, if no choice, but to rely on inherently biased investigations conducted by police against their colleagues.

- A problem exists in cases where the only witnesses to prove brutality are police officers and there is no forensic evidence. They are often reluctant to testify against each other. Such behaviour encourages the "the blue wall of silence", which prevents thorough investigations.

- Dominance of decision-making by prosecutors in criminal prosecutions ensures that they are the gate-keepers that decide who gets prosecuted and not prosecuted. Prosecutors are not obliged to consider the views of victims of crime when making decisions declining to prosecute and do not have to provide them with an explanation for declining. Thus, prosecutors can close the avenue of prosecutions for police brutality.

- Prosecutors often fall back on their discretion to decline to prosecute rather than pursue the victims' complaint. Those among them who tolerate police perjury in order to establish good working relationships overlook excessive use of force by the police.

- In criminal proceedings, it is more difficult to get a conviction because of the higher threshold of proof beyond reasonable doubt that the police officer used excessive force with intent. Absent a conviction, the victim's prospects for getting compensation from the accused are nil.

- Courts impose moderate sentences because they are often insensitive to the fact that police brutality is an abuse of power and authority deserving harsh sentences.

[36] Recommendations for tackling the aforementioned enablers of police brutality are:

- Enactment of a distinct anti-torture legislation with heavy criminal sanctions.

- Provision for redress for victims of torture that is not limited to monetary compensation but includes medical treatment and psychological support.

- Creation of an independent statutory body outside police control to receive citizen's complaints of serious injuries and deaths and to investigate and prosecute police officers.

- Development of a national and standardized system of receiving and recording complaints against police officers. Assigning this to the independent statutory body may encourage victims distrustful of the police to come forward and report abuses when they might otherwise not do so.

- Collection of data on complaints, its analysis and disaggregation will enable the statutory body to discern patterns of abuse and support

civil claims. This will deter the police from sanitizing their records, force them to acknowledge the culture of police violence and expose those that have failed to discipline the offending officers.

- Provision of adequate resources to enable investigations and prosecutions agencies to effectively discharge their constitutional mandates.

[37] If taken on board, these recommendations can strengthen the institutional and functional independence of, among others the Police Complaints Authority. As presently constituted, the Authority does not bite simply because in the first place it was never intended to bite. It lacks the power to directly receive complaints from the victims – let alone powers to investigate and prosecute. It only deals with complaints referred to it by the Minister and the Commissioner of Police[10].

[38] In this context, judicial officers cannot afford to be naïve about the efficacy of the criminal justice process to hold the police accountable and provide adequate compensatory redress to victims of police brutality. I take judicial notice of the fact that the standard practice of the police is to issue medical

[10] Section 22 of the Police Service Act No.7 of 1998.

forms to victims when they report brutalization and assaults by the police, albeit this might not be in all complaints brought to the attention of the police. As I pointed out in **Tjela**[11], the medical form is issued when a criminal complaint is lodged by the victim and a criminal case opened. The purpose is to enable the victim undergo medical examination to prove the injuries suffered. It is an important medical report that should be filed in the docket as part of its contents. The victim gets a copy and, as is the practice, victims rely on these medical forms in civil claims against the police.

[39] Although victims register complaints of assault and torture, often no progress is made in arrests and investigations. The victim, as the most crucial prosecution witness, does not get to be informed whether and when a criminal case will be brought. As a result, in most cases victims are left with no option but to sue the Commissioner of Police who in most cases, is readily defended by the Attorney General notwithstanding that the police are in possession of a medical record of his or her injuries.

[40] Because of delays and failures to investigate, charge and prosecute, victims cannot pursue the avenue of compensation provided by the criminal

[11] Tjela v. Officer Commanding Mafeteng Police Station & Others (CIV/T/152/2016) [2020] LSHC 36 (04 November 2020).

process under section 321 of the **Criminal Procedure and Evidence Act, 1981**. The section reads as follows:

> "321. (1) When any person is convicted of an offence, which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may after recording the conviction and upon the application of the injured party, award him compensation for the injury, damage or loss where the compensation claimed does not exceed the civil jurisdiction of the court if the compensation, save as is otherwise provided in any other law, does not exceed 400 maloti.
>
> (2) For the purpose of determining the amount of compensation or the liability of the accused therefore, the court may refer to the proceedings and evidence at the trial or hear further evidence either upon affidavit or verbal.
>
> (3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution in addition to the sum (if any) awarded under sub-section (1), but if the private prosecution was instituted after a certificate by the Director of Public Prosecutions that he declines to prosecute, the court may order the cost thereof to be paid by the Crown.
>
> (4) When a subordinate court makes any award of compensation, costs or expenses under this section the award shall have the effect of a civil judgment of that court, and when the High Court has made any such award the Registrar of the High Court shall forward a certified copy of the award to the clerk of the subordinate court of the area of jurisdiction wherein the convicted person underwent the preparatory examination held in connection with the offence in question, and thereupon the award shall have the same effect as a civil judgment of that subordinate court.
>
> (5) Any costs awarded under this section shall be taxed according to the scale, in civil cases, of the court which made the awards.
>
> (6) Where any money of the accused has been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made from that money.
>
> (7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been made, and who has accepted the award, to any civil proceedings in respect of the injury for which compensation has been awarded."

[41] According to the section, a victim gets compensation only in the event of conviction. However, convictions are realistically possible only if thorough investigations are done and cases are well prosecuted. This is the first hurdle that faces the victim. The second hurdle is that the victim must lodge a proper application and not just express a desire to be compensated[12]. Compensation is sought from the accused and not the Crown. Thus, the Crown is absolved from the obligation to compensate even if a convicted police officer does not have means to compensate the victim. The third hurdle is that the victim only gets an award of compensation that falls within the civil jurisdictional limit of the court and, if there is no law providing otherwise, the award is limited to M400.00 – a limit that constitutes a travesty of justice. The fourth hurdle is that if the victim gets an award, s/he is deprived of another chance to sue for damages if that suit is based on the same cause of action or complaint. The victim is, therefore, well-advised careful to make a proper assessment of all possible future losses and include them in the section 321 application for compensation[13].

[12] S v. Sion 1975 (2) SA 184 (NC)
[13] Visser, P.J and Potgieter, JM (1993) Law of Damages (Juta) p.124.

[42] Aware of deficiencies in compensation regimes in member States, the UN General Assembly has adopted the **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**[14] which requires that:

> "12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
>
> (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
>
> (b) The family, in particular dependants of persons who have died, or become physically or mentally incapacitated as a result of such victimization."

Assessment of damages

[43] In determination of what should be considered as a fair and adequate compensation, so says the **Court of Appeal**[15], guidance must be sought from past awards. In their absence, regard must be had to the general pattern of previous awards. The court must also factor in the depreciation in the value of money wrought by inflation. This says to me that while considering the general pattern of previous awards, the court is not tethered to the past but the present.

[44] A collection of cases indicative of the general pattern of previous awards is found in **Lesetla v. Commissioner of Police and Another**[16] delivered

[14] Adopted by General Assembly Resolution 40/34 of 29 November 1985
[15] Commander of the Lesotho Defence Force and Others v. Letsie LAC (2009-2010) 549 para [15]
[16] LAC (2013-2014) 337

seven years ago by the Court of Appeal on 24 October 2014. The court said:

> "[17] It is trite that when it comes to the determination of the amount to be awarded as damages for non-patrimonial loss, each case must be decided in its own circumstances. In fixing the amount, the Court has a wide discretion to award fair and adequate compensation. Awards made in other cases in similar circumstances may be used as a guideline as to what amounts should be awarded. I have had regard to the awards made in the following cases.
>
> [18] *Commissioner of Police and Another v Rantjanyana* LAC (2011-2012) 140 delivered on 22 October 2011. The plaintiff, a trooper in the Lesotho Mounted Police Service was arrested by an Inspector in the same force on the allegation that he had helped a prisoner to escape from prison. He was held in custody for three days after which he was released without charges being brought against him. For the first day of his detention he was given no food. He was not assaulted but he suffered from tuberculosis which probably made his incarceration more difficult. Despite serving in the lowest rank, he held a high position within the police association and was a faithful member of and held a prominent position in his church. He was held in high regard by fellow police officers and he felt insulted by his arrest and detention which also reflected badly on his reputation. The award made by the Court *a quo* of M500 000.00 was set aside on appeal and replaced with an award of M50 000.00.
>
> [19] *Officer Commanding Roma Police and Others v Khoete and Another* LAC (2011-2012) 309 delivered 27 April 2012. The first plaintiff was awarded M50 000.00 by the trial Court for pain and suffering endured as a result of a gunshot wound to his leg. The plaintiff spent two to three weeks in hospital, where he received unspecified treatment. At the time of the trial he still experienced some pain at times. He described the initial pain when shot as "not that serious". On appeal the award was reduced to M15 000.00.
>
> [20] *Masupha v Tae* LAC (2013-2014) 236 delivered on 17 April 2014. The plaintiff, a trooper in the Lesotho Mounted Police Service, was assaulted by a superior officer at the Maseru Central Charge Office who pulled him into an office, closed the door and punched and knocked him down and kicked him all over the body shouting abuse at him. The assault was observed by two female police officers. The plaintiff experienced a lot of pain in his back and received hospital treatment on two occasions. The award of M17 000.00 made by the Court a quo consisted of M2 000.00 for pain and suffering and M15 000.00 for *contumelia* and was confirmed on appeal.
>
> [21] *Mohlaba and Others v Commander of the Royal Lesotho Defence Force and Another* LAC (1995-1999) 184, delivered on 26 June 1996. The three plaintiffs were arrested, detained in very poor conditions and assaulted. Their incarceration endured for a period of one year in the case of one and six months in the case of the other two. On appeal the awards were increased to M75 000.00 (in respect of the year-long detention) and M25 000.00 and M50 000.00 in

respect of the other two. This case is of limited assistance because it was decided 18 years ago and the treatment of the plaintiffs were far worse than what was meted out to the plaintiff in the present case.

[22] *Commander of the Lesotho Defence Force and Others v Letsie* LAC (2009-2010) 549, delivered on 22 October 2010. The plaintiff was arrested and detained for 12 days during which time he was for three days subjected to severe and prolonged assaults which included being suffocated by placing a blanket or plastic bag over his face until he lost consciousness. At the time of the trial he continued to experience "flashbacks". He was awarded M340 000.00 in the High Court for pain and suffering and *contumelia*. The award was reduced on appeal to M150 000.00. The circumstances of this case were far more serious than in the present case but the award does provide guidance to the general pattern of awards made by the Courts in Lesotho."

[45] To this list of cases I add **Mokotjo**[17] delivered on 4 March 2020 and **Tjela**[18] delivered on 14 May 2021. In **Mokotjo** this court made an award of M275,000.00. There the plaintiff had been in detention for 5 days during which he was assaulted. In **Tjela** the Court of Appeal reduced this court's award[19] of M400 000.00 to M250 000.00 on the reasoning that:

"[39] ... There are inflationary trends and weakening of the Maloti, but we need to be consistent, we are of the view that award was wrong in principle. The Roman Dutch approach which commends itself is not to grant punitive damages in delictual claims. This principle is mirrored in **Naidoo** (*supra*). We deprecate the escalating incidence of police brutality, the culprits must be prosecuted to protect the rule of law".

[46] Assessment of damages is not an easy task. In **Moketsepane**[20] I said this:

"[36] So the only damages which have been proved by mathematical precision are medical and hospital expenses in the total amount of M410.00. As for general damages for pain, suffering and loss of amenities of life, their assessment and computation, the court cannot embark upon conjecture where there is no

[17] Footnote 16
[18] Footnote 3
[19] Footnote 11
[20] Moketsepane v. Lesotho National General Insurance Co. Ltd [2022] LSHC 280 CIV (25 October 2022)

factual basis in evidence for their assessment. But this does not mean that nothing can be done. The assessment of quantum is within the reasonable discretion of the court.

[37] The difficulty in quantifying such damages is well-captured by Watermeyer JA in **Sandler** where he said:

> "The question now arises whether this Court should increase the amount awarded to the appellant for pain and suffering and permanent disability. In considering that question it must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case.""

[47] I also in respectful agreement with the remarks of **Monapathi AJ** (as he then was) in **Khosi v Second Lieutenant Babeli & Three Others**[21] where he said:

> " It is difficult to measure *contumelia*, pain and suffering in terms of money. It is not the purpose of the law to punish but to seek to compensate the plaintiff, as much as possible with the aid of whatever evidence and information at the court's disposal, based on broad general conversations."

[48] In **Mokotjo**[22], I said that:

> "[8] 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 intensity, nature and duration of the pain and suffering: **LAWSA** Vol. 14 Part 1 para 118 (3rd Edition).
>
> .....
>
> [10] A substantial award for non-patrimonial loss may be made on account of the serious nature of the physical and psychological harm or the brutal and contemptuous manner in which the rights of the victim have been violated –

[21] 1991-1996 (1) LLR 275 (HC) @ 277

[22] Mokotjo v. Commissioner of Police and Attorney General CIV/T/520/2014 (04 March 2020)

especially by a person who occupies a position of trust such as a police officer: **LAWSA** (supra)."

[49] Once it is accepted, as it must, that the plaintiff was not suspected of committing any crime, the police had no business at all disturbing him in his sleep, ordering him to come out of the house, forcefully entering and pushing him out and beating him. This disrespect of plaintiff's rights to privacy, invasion of his home and liberty was completely unnecessary, unjustified and legally impermissible. The police should not have touched his body at all. Their aggression and resort to use of force were unwarranted and unlawful[23].

[50] Where humiliation is part of the assault, the *contumelia* is an integral part of the assault and aggravates damages.[24] The humiliation suffered by the plaintiff arises from the following features:

50.1 The police committed the delict in the sanctuary of the plaintiff at a time and hour of his comfort. He was rudely woken up and assaulted in front of his wife and other villagers. The police behaved in a violent and intimidatory manner and even mocked him when informed that he has visual disability.

[23] Ex-parte Minister of Safety and Security and Others: In Re: S v. Watters and Another 2002 (7) BCCR 663 (CC) para [54]

[24] Masawi v Chabita and Another 1991 (4) SA 764 (ZHC)

50.2 The plaintiff did not pose any danger to them, but even if he posed a danger, he was perfectly within his rights as a law-abiding citizen to protect his home, himself and wife from all manner of strangers.

[51] In sum, the high-handed and undignified manner in which the police treated the plaintiff had the effect of bruising his personal feelings, demeaning his pride and integrity.

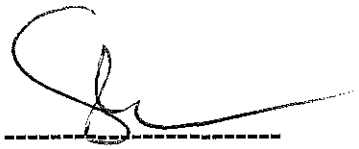
Award

[52] The plaintiff has made good on his claim. Doing the best that I can in the light of the general pattern of awards in the more recent cases of **Mokotjo** and **Tjela**, the following award is given:

(a) General damages in the amount of M150 000.00.

(b) Interest at the prescribed rate on the aforesaid amount from date of judgment to date of payment.

(c) Costs of suit.



S. P. SAKOANE
CHIEF JUSTICE

For Plaintiff: Z Mda KC

For Defendants: L Tau