

CIV/T/293/2014

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

ADAM ISSACS

Plaintiff

And

COMMISSIONER OF POLICE

1st Defendant

ATTORNEY GENERAL

2nd Defendant

Neutral Citation: Adam Issacs vs Commissioner of Police and Attorney General
[2023]LSHC 1 CIV(7th February 2023)

JUDGEMENT

Coram : Hon. Mr. Justice T. E. Monpathi

Date of hearing : 11 December 2018

Date of Judgement : 7th February 2023

SUMMARY

When, as in the present case, there are two mutually destructive stories Plaintiff succeeds because on providence of probabilities his version is true, and Defendant's version is mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court had weighed up and tested the Plaintiff's allegations against the general probabilities. The Plaintiff succeeds because the Court believes him and finds that the Defendant's version is false.

ANNOTATIONS

CITED CASES REFERRED TO:

Naid v Senti CIV/T/813(2003) (2006)LSHC(20March 2006)
DW v Minister of Police and Another – 72485/2012
Mesehle Molise v Officer Commanding Thaba-Tseka Police Post and 2 Others CIV/T/40/2012 (2013) LSHC 74 (11 March 2013)
Ntaote v Commanding Office, LDF and Others CIV/T/125/2001(2011)LSHC 56 (26May 2011)
King vs Minister of Police EL;801/10 :ECD:1701(10)(2012)
Letsela Morobi v Commissioner of Police and Another CIV/T/230(2010) (2012) LSHC1(09 February 2012)
commander of the Lesotho Defence Force and Others v Letsie- C of A (CIV) 25/09 (2010)LSCA 26 (22 October 2010)
Maseko v Attorney General
Woite v The Minister of Safety and Security 08/00091/(2014)ZAGP JHC (11 April 2014)
Die Meester v Joubert 1981 (4) SA 211 (A) at 218
Moller v Erasmus 1959 (2) SA 465 (T) at 467,
Tsosana v Minister of Prison Works 1982 (3) SA 1075 (c) at 1076
Abubaker v Commissioner of Lesotho Revenue Authority CCA 50 /2011

STATUTES REFERRED TO:

BOOKS REFERRED TO:

[1] The Plaintiff herein instituted action against the Defendants for judgement against them in the following terms;

- a) Payment of One Hundred Thousand Maloti (M100,000.00) for assault.
- b) Payment of One Hundred Thousand Maloti (M100,000.00) for pain and suffering.
- c) Payment of One Hundred Thousand Maloti (M100,000.00) for unlawful arrest.
- d) Payment of One Hundred Thousand Maloti (M100,000.00) for unlawful detention.
- e) Payment of Fifty Thousand Maloti (M50,000.00) for contumelia.
- f) Interest at rate of 18.5% per annum.
- g) Costs of suit at attorney and own client scale;
- h) Further and/or alternative relief.

[2] The evidence of the Plaintiff is to the effect that on or around the 9th August 2009, he was arrested by Stock Theft Unit Police Officer of Berea Police Station under the pretext that the bewys of two (2) out of six (6) cattle were incorrect. It was during such detention that the Plaintiff was subjected to assault in the form of being beaten with a knobkerrie, *lebetlela* sticks and fists as well as being kicked with boots all over the body. Exhibit "A" filed of record is a picture that was taken after the Plaintiff was released from detention and it indicated that the Plaintiff had sustained injuries including bruises as they appear in the picture.

[3] The Plaintiff in his examination-in-chief indicated that the bruises were resultant of being hit with a black short stick, the kind that is normally held by police officers. The Plaintiff had after such detention been brought before court, not as an accused person in contravention of any Stock Theft legislation as enforced by the Unit but rather as a witness for the Crown against another accused person in relation to the very same bewys he was detained on account of.

[4] The Defendants called five (5) witnesses in the support of their defence. DW1 P/C Tlali S/S No. 10295 testified to the extent that the Plaintiff was arrested with one Matebesi whom the Plaintiff had bartered for the cattle with as well as the two (2) herdboys who had been found herding the cattle. DW1's testimony is to the effect that the Plaintiff and the above-mentioned people were arrested, and he knocked off to go home at around 14:00 hrs.

[5] DW2 is Lance Sergeant Matela whose evidence was to the effect that the Plaintiff had been charged by the police per R.C.I. 101/03/2009 under court case CR/41/09 at Mohale Magistrate Court. He indicated further that the Plaintiff had not been pursued criminally but that he was later turned into a Crown witness. DW3 is P/C Raseleman No. 49915 who testified that he had been on duty between 18:00 till 06:00 on the material day. His testimony was to the extent that there are an occurrences book and detention forms both of which are filled in by police officers who received detainees in police custody. He did however admit that he neither filled in the said documents nor did he receive the Plaintiff at the Plaintiff's arrest and/or detention.

[6] DW4 is Senior Inspector Mokhethi No. 9918 who testified that he had been stationed in the Berea Police Stock Theft Unit in 2009 and that a record of the Plaintiff's arrest had been filled in in the occurrence book, cell register and detention form. The cell register was tendered into evidence as Exhibit "A". DW5 is one Tankiso Sekese who is the sibling of Morake Sekese whom the Plaintiff had bartered for the cattle with. His testimony was to the extent that there had been six (6) cattle missing from the herd and they followed through on this to learn that the cattle had been in possession of the Plaintiff.

[7] The evidence of the Plaintiff follows in chronological order as opposed to that of the witnesses placed before the court for the Defendants. DW1 could not attest to having any knowledge of occurrences after his departure from work as he left shortly after 14:00 hrs. The assault of the Plaintiff took place over the night of the Plaintiff's detention by the Stock Theft Unit Officers.

[8] The cross-examination of the Plaintiff was targeted at discrediting the Plaintiff's version however it did not succeed. The Plaintiff has indicated under oath before the court that exhibit "A" was taken while he was at hospital shortly after his release from detention by the Berea Police Officers. It is the Plaintiff's submission that exhibit "A" is further corroborated by the Medical Form which indicates the extent of the Plaintiff's injuries which were 'bruised buttocks' and "tender right hip" caused by blunt force trauma. Therefore, the Plaintiff's version ought to succeed over that of the Defendants.

[9] The evidence of both DW2 and DW3 did not aid in the establishment of the defense's case as they were both not there at the material times that could have made their testimony helpful to the court. DW2 reasserts the Plaintiff's version that he had indeed never been charged while DW3 could not say with certainty as to whether or not the detention form and occurrences book had indeed been filed in relation to the Plaintiff's detention.

[10] As for DW4, his testimony was only to the extent of availing to the court the cell register. He claims not be the one who hit the Plaintiff and that he was not watching the Plaintiff while the Plaintiff was in detention. He does not however deny that the Plaintiff had indeed been detained overnight by Berea Stock Theft Unit Police Officers and that he has no knowledge as to whether or not the Plaintiff was taken to court, read a charge, remanded or released. Therefore, he could not state with certainty in relation to the assault alleged or the justification of the detention the Plaintiff was subjected to.

[11] DW5's testimony was only to the extent that the Plaintiff had indeed come forward when it was discovered that the cattle which had been in the possession of the Plaintiff at the time had been cattle allegedly stolen from his Deceased brother. The testimony of DW5 cannot be doubted as credible and aiding in the determination of the matter the court as it does not go to the issue for determination, namely: whether the Defendants are liable, or the quantum of damages claimed herein.

[12] Therefore, in light of the assessment of the evidence that was adduced in this trial, the general approach was laid down by the Court of Appeal in **Naid v Senti** as follows:

“Where the onus rests on the Plaintiff as in the present case, where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore (the defendant’s version is) mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the Plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case [if] the probabilities of the case favor the Plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favor the Plaintiff’s case anymore than they do the Defendant’s, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true, and that the Defendant’s version is false.”

The version of events as outlined by the Defendants cannot be mutually destructive as placed at par with that of the Plaintiff. None of the witnesses called by the Defendants neither attest to the assault on the Plaintiff nor can they say with certainty that the detention and arrest of the Plaintiff was lawful.

[13] It is the Plaintiff’s submission that the balance of probabilities favours the version of the Plaintiff and not that of the Defendants. The law recognizes corpus or physical integrity as a protected personality interest. It is in light of this that the Plaintiff herein seeks damages for the assault he was subjected to while detained by the LMPS. The court in **DW v Minister of Police and**

Another had the following to say in respect of a claim available to a Plaintiff who has been assaulted:

“In a case of the nature, a Plaintiff has three (3) separate actions available in respect of which compensation can be claimed for the damages sustained.”

The court in **Mesehle Molise v Officer Commanding Thaba-Tseka Police Post and 2 Others** had the following to say:

“While it is trite that in a case such as the instant one, the trial court (has) a discretion as to the amount of general damages it should award to the Plaintiff; it should have regard to a number of relevant factors which have a bearing on the matter.

There is a plethora of decided cases in which relevant factors have been suggested. Above all, a court should not (lose) sight of the fact that an assault in whatever form is delict which affects a person’s bodily integrity, further on, and of particular importance, the provision of section 9(1) prohibit in mandatory terms, torture or inhuman or degrading punishment or other such treatment by anybody upon a human being. In short, inhuman treatment upon any person is prohibited by our Constitution.”

[14] The Plaintiff submits to the court that his personal integrity was infringed and should in this instance be compensated for such infringement. In **Ntaote v Commanding Office, LDF and Others**, the court awarded damages in the amount of One Hundred Thousand Maloti (M100,000.00) where it had been established that the Plaintiff therein had indeed been assaulted.

[15] Damages in the amount of One Hundred Thousand Maloti (M100.000.00) as claimed by the Plaintiff herein is justified as the police officers of Berea Stock Theft Unit assaulted the Plaintiff, leaving his dignity impaired and warranting compensation. The medical form indicating the extent and cause of injuries inflicted on the Plaintiff to prove that the Plaintiff had indeed been assaulted.

[16] It has been established that “every factual infringement of a person’s physique or psyche violates his corpus”. In ***King vs Minister of Police***, the Court had to make a determination of the quantum of damages to be awarded where the Plaintiff had been assaulted by the members of the South African Police Service. It had the following to say:

“it is trite that the assessment of general damages for pain, suffering and shock is a subjective inquiry which depends, inter alia, on the time, degree and intensity of the discomfort and suffering. In determining a fair sum our courts generally have regard to comparable previous decisions. While this is a salutary practice which ensures consistency and fairness, no two cases are the same and courts should guard against slavishly adhering to precedents to extent that their discretion may be impermissibly fettered.”

The Plaintiff herein had been assaulted with a baton or black stick that is normally carried by police officers. The result of this left the Plaintiff with bruises on his buttocks and the right side of his hip which were inflicted with the weapon which, in the Plaintiff’s humble submission, put him through a lot of pain.

[17] There may not be one way of determining the amount of damages to be awarded where a Plaintiff has been assaulted but the court in ***Letsela Morobi v Commissioner of Police and Another*** stated that there are factors to be considered by a court in the final determination of the quantum to be awarded. It listed them as:

“The nature and seriousness of the assault, the fear created in Plaintiff, the extent of humiliation, the motive of the attacker, the status of the Plaintiff, an apology on the part of the Defendant, previous awards in comparable cases not still giving allowance for inflation.”

In ***commander of the Lesotho Defence Force and Others v Letsie*** the Court of Appeal reduced the award of damages for pain and suffering and contumely from M340,000.00 which was awarded in the High Court to M15,000.00. This in turn serves as a guiding factor for the damages to be awarded to the Plaintiff herein for pain and suffering.

[18] The Plaintiff herein willingly went to the police in an aim to hear about the discrepancy of the *bewys* only to be detained and further subjected to assault. In the premises set out above the Plaintiff ought to be compensated for the pain he had undergone at the hands of police officers while he was in detention. The Plaintiff's case in respect to this claim is that his arrest had been unlawful and that he ought to be compensated, therefore. It is the Plaintiff's case further that the Defendants herein bore the *onus* of establishing that the arrest of the Plaintiff had indeed been lawful and that they have failed to establish the basis thereof. It was held in ***Maseko v Attorney General*** That:

“It is trite law that when the liberty of an individual has been restrained or limited and the individual that has been so affected, challenges the validity of such restraint or limitation, as the appellant in this case has challenged his arrest and detention by the police, the onus of establishing the lawfulness thereof is on the arrestor or the person who caused the arrest.”

In ***Woite v The Minister of Safety and Security***, the court stated that the onus is on the Defendants to prove that the arrest and detention were lawful after the Plaintiff has set out a *prima facie* case on the unreasonableness of his arrest and/or detention. DW1 to DW4, in their testimony never spoke to the justification of the arrest and detention of the Plaintiff. It is the Plaintiff’s humble submission that the evidence of these witnesses was but a façade to evade the liability of the Defendants for the treatment the Plaintiff received at the hands of LMPS officers acting during the course and within the scope of their employment with the First Defendant

[19] The court in ***M v Minister of Safety and Security*** awarded damages in the amount of One Hundred Thousand Maloti (M100,000.00) for unlawful arrest and detention. Therefore, the claim of the Plaintiff herein for payment One Hundred Thousand Maloti (M100,000.00) under the headings of unlawful arrest and unlawful detention is justified.

[20] The Plaintiff herein, as a result of the conduct of the LMPS officers at Berea, was humiliated and his dignity impaired. The court in *Philander* awarded M180,000.00 for damages for *contumelia* and had the following to say in relation to the claim for damages under *contumelia*:

“Contumelia is awarded for a direct and serious invasion of the Plaintiff’s bodily integrity and personal integrity.

The Plaintiff, as a result of the assault, suffered a serious invasion of her person, her integrity, dignity and self-worth, which is the contumelia element.”

In the same vein, the Plaintiff’s claim for damages in the amount of Fifty Thousand Maloti (50,000.00) *contumelia* is justified and should thereby granted.

[21] The Plaintiff herein claims for costs against the Defendants on the scale of attorney and own client. The purpose for costs has been highlighted as to indemnify the successful litigant for the expense to which he has been put through having been unjustly compelled to initiate litigation. See ***Die Meester v Joubert 1981 (4) SA 211 (A) at 218***. It is prudent to point out that even though the court’s discretion in the granting of costs is unfettered, ***Moller v Erasmus 1959 (2) SA 465 (T) at 467***, such discretion must be exercised judicially and is a matter of fairness. See ***Tsosana v Minister of Prison Works 1982 (3) SA 1075 (c) at 1076***.

[22] The law in this regard is that an unsuccessful party who is vexatious, unscrupulous, dilatory or mendacious may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs. See ***Abubaker v Commissioner of Lesotho Revenue Authority CCA 50 /2011*** judgment of Molete J unreported. Had it not been for the conduct of the Berea Stock Theft Unit officers, the Plaintiff herein would not have been forced into litigation. It is the Plaintiff’s submission that the calling of the defense

witnesses was not an attempt to establish a proper defense by the Defendants but rather a manner of lengthening an already length process of trial. Therefore, costs should in this instance be granted against the Defendants on attorney and own client scale.

[23] In the result, the following order is made; The Plaintiff's claim succeeds.

(a)	For assault	M 25,000.00
(b)	Pain and suffering	M 100,000.00
©	Unlawful arrest	M 5,000.00
(d)	Unlawful detention	M 5,000.00
(e)	Contumelia	M 50,000.00
TOTAL		<u>M 185,000.00</u>

T.E MONAPATHI

JUDGE

For Plaintiff: Adv Molati

For Defendants: Adv M. Moshoeshoe