

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0341/2018

In the matter between:

**TEBELLO KHOROMENG t/a LEHLANAHLANA
BUTCHERY**

1st PLAINTIFF

MOEKETSI MOEKETSI

2nd PLAINTIFF

AND

**THE COMMISSIONER OF POLICE
ATTORNEY GENERAL**

**1st DEFENDANT
2nd DEFENDANT**

Neutral Citation: Tebello Khoromeng & Another v COMPOL & Another [2024]
LSHC 238 Comm. (27 NOVEMBER 2024)

CORAM: MOKHESI J
HEARD: 27 AUGUST 2024
DELIVERED: 27 NOVEMBER 2024

SUMMARY

LAW OF DELICT: *The plaintiffs sued the defendants for damages incurred as a result of the 1st defendant's subordinates seizing and seeking an order that the 1st plaintiff's imported meat be destroyed for having been imported without an import permit and for the meat not being fit for human consumption- Held, the plaintiff imported meat on the basis of a valid import permit even though the other one had expired while he was queuing to cross the border in compliance with the tax protocols. In the circumstances, the 1st defendant's subordinates exceeded their statutory authority.*

ANNOTATIONS

LEGISLATION

Constitution of Lesotho 1993

Agricultural Marketing (Meat Agricultural Import Control) Regulations of 1992

Importation and Exportation of Livestock and Livestock Products Proclamation 57 of 1952

Public Health Order 1970

BOOKS

Neethling et al *Law of Delict 3rd ed.*

CASES

LESOTHO

WBHO Construction (Pty) Limited v Mphenetha LAC (2005-2006) 453

SOUTH AFRICA

Cape Town Municipality v Paine 1923 AD 207

International Shipping Co. (Pty) Ltd v Bentley 1990(1) SA 680(A)

Kruger v Coetzee 1966 (2) SA 428 (A)

Minister of Safety and Security v Van Duivenboden [2002] 3 ALL SA 741 (SCA)

Steenkamp N.O v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC)

Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA)

JUDGMENT

[1] **Introduction**

The present matter concerns a claim for damages against the state where the police officers seized the plaintiff's property in the exercise of the statutory duty to seize the meat imported without a permit – Section 2(1) read with Section 6(2) of the Importation and Exportation of Livestock and Livestock Products Proclamation 57 of 1952, read further with the Agricultural Marketing (Meat Agricultural Import Control) Regulations of 1992, regulation 3 read with regulation 7(1) and in terms section 68 of the Public Health Act 1970. In short, in this case, we are dealing with a situation whereby public officials in the performance of their statutory duties caused harm to the plaintiff. The question then which this court must grapple with is whether the police exceeded the bounds of their statutory authority in the manner they acted in this case.

[2] The plaintiffs instituted an action against the defendants claiming a sum of M336,136 (Three Hundred and Thirty-Six Thousand, One Hundred and Thirty-Six Maloti) made of the following:

“(a) Payment of M183,136 (One Hundred and Eighty-Three Thousand, One Hundred and Thirty-Six Maloti) as compensation for the monies the 1st plaintiff spent when buying 7760 kg of chicken.

(b) Payment of M154,000.00 (One Hundred and Fifty-Four Thousand Maloti) as loss of business with regards to profits the 1st plaintiff would have made out of selling that meat.

(c) Payment of M3,000.00 (Three Thousand Maloti) to the 1st plaintiff for the renting out of Mr Moeketsi's truck for transportation of the meat concerned.

(d) Payment of an amount of M30,000.00 (Thirty Thousand Maloti as loss of business for the ten days that the 2nd plaintiff's truck remained at the Qacha's Nek Police Station.

(e) Interest at the rate of 18.5% per annum

(f) Costs of suit

(g) Further and/or alternative relief."

[3] Background

The parties held a pre-trial conference and agreed on the following common cause facts: On the 15 May 2018, the 1st plaintiff applied for and was issued with a permit to import meat on the 16 May 2018. The expiry date of the permit was 17 May 2018. The issuing authority was the Ministry of Agriculture. The 1st plaintiff was further issued with a permit to import meat and its related products by the Ministry of Small Business Development, Cooperatives and Marketing for a period from 15 May 2018 to the 31 May 2018. The meat was certified by the veterinarian, upon its sale at Brown's Cash & Carry at Matatiele in the Republic of South Africa, to be fit for human consumption. Though not part of the agreed common cause facts, it is common cause that the plaintiff went to Matatiele to buy the meat on the 17 May 2018 and came back on the same day. After going through the customs declaration protocols, the goods were cleared to exit the border on 18 May 2018 at 19:47 Hours. In other words, the Ministry of Agriculture permit expired while the plaintiff was held up at the border by tax bureaucratic red tape. The distance of travel between Matatiele and Qacha's Nek border posts is about 35 kilometres long.

Following confiscation of meat by the police at Qacha's Nek border post, the 1st plaintiff was charged before the Qacha's Nek Magistrate's Court with Contravention of Section 2 (1) of the Importation and Exportation of Livestock and Livestock Products Proclamation No. 57 of 1957, and Contravention of Section 68 (1) of the Public Health Order 1970.

[4] He was found guilty of Contravening the Public Health Order, 1970 and acquitted on the charge of contravening the Importation and Exportation of Livestock and Livestock Products. He appealed against the guilty verdict and was successful.

[5] On importation of chicken meat into the country, the permit which was issued by the Ministry of Agriculture had expired by a day, the only permit which was still valid was the one issued by the Ministry of Small Business Development. It was due to expire on 31 May 2018. On the 21 May 2018, the 1st plaintiff applied for and was granted an interim Court Order by the Qacha's Nek Resident Magistrate Kolobe, for refrigeration of the meat alternatively its release to him for refrigeration. The meat was neither refrigerated nor released to him for the same purpose, despite the court order. The meat was disposed of on the 24 May 2018 following condemnation order by Qacha's Nek Magistrate Mahlehle. The reason for seeking and having been granted condemnation order was that it was exposed to contamination. The 1st defendant is being held vicariously liable for the delictual acts of his subordinates.

[6] **Facts in dispute**

- (i) The 1st defendant, through Police Constable Mosenene and Inspector Kobeli had authority to seize the 1st plaintiff's chicken meat.
- (ii) The 1st defendant, through Police Constable Mosenene, Inspector Kobeli as well as Public Health officers, had authority to confiscate and apply for disposal of the 1st plaintiff's chicken meat.
- (iii) The plaintiffs suffered loss of profit as a result of the 1st defendant's acts.

[7] At the end of the 1st plaintiff's case Adv. Lesaoana informed the court that the 2nd plaintiff was abandoning its claim and would not testify. This then left only the 1st plaintiff's claims still extant. I now turn to deal with the evidence adduced in the matter: Plaintiff's evidence is based on his testimony, documentary evidence and oral evidence of Mr Lebakeng Pitso. Defence case is based on the evidence of two witnesses, Police Constable Lebohang Mosenene and Mr Tšeliso Tsebo – a health Inspector from the Ministry of Health.

[8] I will not burden this part of the judgment with the regurgitation of common cause facts. PW1, Mr Tebello Khoromeng had imported chicken meat on being permitted to do so by two authorities namely, Ministry of Agriculture and Ministry of Small Business Development. At the time the meat was brought into the country, the Ministry of Agriculture permit had expired while the other one was still valid. The meat was not transported in a cold storage vehicle but an open – carriage truck whose bin was covered in a sail. The meat was contained in boxes wrapped in plastic. On 19 May 2018, the truck laden with the chicken meat consignment weighing 7700 kilograms was

seized by DW1 Police Constable Mosenene and was kept in the police custody for 10 ten days despite the court's order to the effect that it either be refrigerated or handed over to him for refrigeration. At the time one kilogram of chicken meat was M50.00. He testified that the meat was fit for human consumption when he bought it 35 kilometres away at Matatiele. He was not present when the meat was tested to see if it was fit for human consumption at Qacha's Nek border crossing.

[9] Under cross-examination when a question was put to him that one of the conditions for issuance of a permit to import meat, was that it be transported in a refrigerated vehicle, the plaintiff answered that it was not the first that he transported meat in the manner he did as traders had been directed by the Ministry of Small Business to transport it that way. PW1 said he complied with all the laws. It was put to him that when the health Inspectors inspected the meat on 19 May 2018 it was found not to be fit for human consumption. He said he was not aware when it was tested and inspected because he was not present when this was done. It was put to him that the application for disposal of the meat was made on the same day of 19 May 2018. PW1 denied this was the case as the application was made five to six days later. On the question of how he arrived at the figure of three hundred and thirty-six thousand Maloti, he replied that his accountant would explain it. He was asked about the method he used to buy the meat; it being suggested being that he bought it on credit. He agreed that he bought it on credit.

[10] PW2, Mr Lebohang Pitso testified that he was an accountant employed at Sethobane and Associates accountants. He prepared a document he referred to as the financial statement for the plaintiff. He is a General Accountant having qualified as such in 2013 at the Centre for Accounting. In 2018-2019

he was employed at Tšooana and Partners. PW1 was one of their clients. As he was doing tax returns for the plaintiff under the trade name Lehlana-Hlana Butchery, he came across EXH “C” which is the invoice related to chicken meat weighing 7760 kg., which PW1 said it had issues related to it in the courts law. One kilogram of meat was M50.00 at the time. PW2 then prepared a cashflow statement. He testified that under normal circumstances the meat would take three weeks to be sold out. Had the meat been sold, the total expenses for the month of June would be M193,144.00. This amount when deducted from M388,000.00 would give the difference of M196,144.00. The financial statement is unsigned. Cross examination of the witness was very short and unhelpful. In short, the process of making calculations was not questioned.

- [11] DW1 was Police Constable Mosenene who testified that on 18 May 2018, he was with Inspector Kobeli and Sergeant Hlao when a truck carrying plaintiff’s goods entered the border from South Africa. It was a tipper truck whose bin was covered in a black sail. The meat was dripping with water. During the night after the vehicle was arrested PW1 arrived but failed to produce import permit for the meat. He instructed the driver to come the following day for inspection to be done. The truck was uncovered for police and Health Inspector (DW2) to inspect the consignment. An import permit was handed over to DW1 by an official from the Ministry of Agriculture saying it was from Mr Joele – the truck driver. DW2 jumped into bin of the truck, and upon disembarking he informed them that the meat was not fit for human consumption and as result made a certificate for its condemnation. He told the court that at the time PW1 was nowhere to be found until 20 May 2018 when he applied for his warrant of arrest. DW1 told the court that he was not

aware of the Court directing that the meat be refrigerated or handed over to the plaintiff for the same purpose pending the conclusion of the investigations.

[12] During cross examination he admitted that the meat was seized in May but denied that it was very cold in Qacha's Nek that day. He was questioned on the statement he prepared on 30 May 2018 in which he did not state that what caught his attention was that the meat was dripping with water. He admitted that he mentioned this for the first time in chief. He was shown part of his statement in which he said Mr Joele produced an expired import permit, contrary to what he said in chief that Joele said he did not have it. In his testimony the witness said that PW1 passed through the border on 19 May 2018 contrary to what he said that his whereabouts were unknown until a warrant for his arrest was issued. DW1 agreed that he made an application for disposal of the meat on 25 May 2018.

[13] DW2 Mr Tšeliso Tsebo testified that he was a health Inspector for the Ministry of Health at the time of the incidents. On 19 May 2018 he conducted an inspection on a meat consignment which was held in a truck. The truck's bin was covered in a sail. It was carrying wet boxes which were dripping with water which had blood and that some of the boxes were broken; there was soil in the bin of the truck. He used infra-red thermometer to detect the meat temperature. He filled out the information he discovered in the Inspection Report form. He told the court Mr Joele that the meat was carried in a "wrong vehicle". He made a condemnation certificate because as port health authorities, they had just received a report from South Africa to the effect that there was an outbreak of listeriosis there. He found the meat temperature to be +20°C, whereas in terms of Port Health Guidelines the imported meat should be at a temperature of -12°C. He told the court that the meat which

does not comply with this temperature will be in an unwholesome condition and can get easily contaminated with microorganisms. He testified that he notified PW1 of the decision to condemn the meat.

[14] Under cross examination the witness admitted that because he was not present on 18 May 2018 when the meat was seized, he could not vouch for its temperature. He also conceded that he did not seek condemnation of the meat on the basis that the boxes were dripping of water or because the boxes were broken nor that there was soil in the bin of the truck.

[15] **Evaluation of evidence**

Both plaintiff witnesses testified in a satisfactory manner and came across as credible. They testified on the events they had first-hand experience on. I therefore have no problem accepting their evidence. On the other hand, DW1 Police Constable Mosenene did not come across as credible nor reliable for the reasons that in his witness statement he prepared on 30 May 2018 he did not state that he was drawn to the plaintiff's truck because the meat was dripping with water which had blood in it, contrary to what he said during his evidence in chief. Also, in his evidence in chief he told the court that after he had pulled over the truck driver – Mr Joele – and asked him for import permit, the latter said he did not have it. This contradicts with what he stated in his statement that Mr Joele produced an expired import permit. And this can hardly be reconciled with what he stated in chief that he only got to know of the expired permit on 19 May when it was handed over to him by the lady who works at the Ministry of Agriculture. There is no truth to the assertion that the witness did not see all the permits which were in possession of the driver at the time of arrest. It is highly improbable that the driver only had in his possession one expired permit. In fact, there is uncontroverted evidence

that two import permits were issued to the plaintiff before the truck left for South Africa. The witness further wants to paint a picture of PW1 being a fugitive who evaded the police for days after his goods were seized. But contrary to this, in chief, he told the court that PW1 passed through the border on the 19 May 2018.

[16] DW2, Mr Tšeliso Tsebo was also not reliable and credible in material respects. When giving evidence in chief he told the court that he seized the meat because as port health authorities they received a report of outbreak of listeriosis in South Africa, the boxes were dripping with water which had blood in it and were broken, and that the soil was present in the bin. The basis for seizing the meat as indicated in his report is two-fold, namely, (i) the meat was not carried in an “appropriate” vehicle “hence does not prevent infection and contamination thereof”, and (ii) It was at room temperature +20⁰C when measured using infrared thermometer and this consistent with what he stated in the Food Condemnation Certificate wherein he stated the “condition” of the meat to be that it was “exposed to contamination.” Hence, he condemned the meat on the strength of Public Health Order 1970 Section 68(2) thereof and Port Health Guidelines.

[17] **Issues to be determined**

(i) Whether the defendants are delictually liable for the 1st plaintiff’s loss.

[18] **The Law and discussion**

It is trite that delictual liability arises when the conduct which causes harm or loss to another is both wrongful and negligent (**Stenkamp N.O v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC)** at para.39).To

appreciate the difference between wrongfulness and negligence, what was stated by the court in the **Minister of Safety and Security v Van Duivenboden [2002] 3 ALL SA 741 (SCA)** at para. 12, is apposite:

“Negligence, as it is understood in our law; is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that law recognizes as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in Kruger v Coetzee, namely, whether a reasonable person in the position in the position of the defendant would have foreseen the harm but would have acted to avoid it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legal recognised), nevertheless, in order to avoid conflating these two separate elements of liability it might often be helpful to assume that the omission was negligent when asking whether as a matter of legal policy, the omission ought to be actionable.”

[19] **Wrongfulness**

There is a principle in our law to the effect that “every man has a right not to be injured in his person or property” (**Cape Town Municipality v Paine 1923 AD 207** at 216). When the 1st defendant’s subordinates sought disposal of the meat, such a conduct was *prima facie* wrongful. However, only because the plaintiff’s property was destroyed at their instigation is not finally determinative of the question whether their conduct was wrongful or not. I

understand the 1st defendants' s case to be that his subordinates were acting in terms of the statutory authority when they seized and sought the disposal of the meat. In short, the defendants are offering justification for their conduct. It is trite that when certain public officials, such as the police in the present matter, are authorised by law to perform certain acts, and in the performance of which harm ensues, they will not be held liable unless they exceed their authority (Neethling et al *Law of Delict 3rd ed.* p.104). In these circumstances of the present case their conduct would not be wrongful because seizure and destruction of property would have been done in terms of statute. Though not explicitly stated, the plaintiff's case is that the police exceeded the bounds of their authority because he was issued with two meat import permits, the one which expired while he was queuing at the border to comply with tax protocols, and therefore, should have been allowed to proceed back home. In short, the plaintiff's argument is that it was reasonably feasible for his truck to have been allowed to pass through unhindered as the one of the permits was still valid while the other one expired in the circumstances outlined in the preceding sentences. In the premise the onus of proof that a reasonably feasible alternative to enforcing the law than seizure and destruction of the meat would have been to let the truck pass through (**Neethling et al** above p.105)

- [20] In the present matter it is common cause that Police Officer Mosenene was acting in terms of the statutes, referred to in the introductory part of this judgment, which prohibits importation of livestock or its products without the permit from the veterinary office and the Principal Secretary in the Ministry of Small Business Marketing. The Principal Veterinary Officer's role is important in matters of importation of livestock and its products. It is to guard against transmission of diseases from beyond our borders. He/she would be

the first and the best person to know whether there is an outbreak of disease in the neighbouring countries making it unsafe to import livestock or its products from such jurisdictions. In the present matter the plaintiff was issued with these import permits. The one from the Ministry of Agriculture expired while the plaintiff was queuing in the line to be cleared by the tax authorities. For the police officer Mosenene to say that the plaintiff imported the meat without the permit of the Principal Veterinary Officer is disingenuous, and quite frankly is symptomatic of the failure on his part to apply his mind to the facts of the case before him.

[21] I now turn to deal with the actions of the police with regard to Section 68(1) of the Public Health Act 1970. As regards this Act the police acted based on the investigations of the official form from the Ministry of Health. It was on the findings of Mr Tsebo that the meat was unfit for human consumption that police officer further seized the meat and sought its destruction. It should be recalled that the Ministry of Health is not a party in these proceedings. Mr Tsebo was an unreliable witness: In order to justify his decision to apply for condemnation of the meat on the basis that it was unwholesome, unadulterated or unfit for human consumption he told the court that the meat oozed blood, was soiled, its box containers were broken and the truck had water dripping from it. It is important to state that these factors were not stated among the reasons for seeking condemnation. The reasons for seeking condemnation as stated in the Condemnation Certificate were that the vehicle which transported the meat 'was not appropriate for transportation of meat, it was open hence does not prevent infection and contamination' and at room temperature (+20°C). As can be gleaned from these reasons Mr Tsebo did not say that as matter of fact that the meat was contaminated or had infections. The reasons

which he advanced in court were an afterthought meant only to bolster his case that the meat was not fit for human consumption.

[22] The police further seized the meat on the score that it was transported in a non-refrigerated truck when no law provides for such a requirement. In terms of section 71(g) of the Public Health Order 1970 the minister is enjoined to make regulations with regard to inspection and storage and transportation of meat imports, among others, but to date no such regulations have been promulgated. Instead, the Ministry of Health relies on Guidelines for Port Health to demand that the meat be transported in vehicle which has cold storage compartment. These Guidelines are not law but mere recommendations with no force of law. At the risk of being repetitious, the issue of temperature and type of transport are not provided for in the law. The plaintiff did not break any law in this regard. On the conspectus of the evidence my view is that the plaintiff has succeeded in discharging the onus of proving that it in the enforcement of the law , as an alternative seizure and destruction, it was reasonably feasible to have allowed the meat to pass through unhindered because it was imported lawfully even though one of the permits expired while the truck was on the queue at the border.

[23] Having concluded that the action of the police is wrongful, I now turn to determine whether the police officers was negligent. This determination is determined in terms of the well-known case of **Kruger v Coetzee 1966 (2) SA 428 (A)**. In order to determine whether liability arises, the test is whether a reasonable person in the position of the police officer Mosenene would foresee the reasonable possibility of his conduct injuring the plaintiff's property rights and causing patrimonial loss, and such a reasonable person would have taken reasonable steps to prevent such injury from eventuating.

In the present matter it was foreseeable that the plaintiff's property would be destroyed once a determination is made that he imported meat without a permit of a Principal Veterinary Officer in circumstances where quite frankly the officers should have applied their minds to the fact that the plaintiff's permit expired while his truck was on the queue complying with tax protocols before it could be allowed to cross back into the country. Reasonable persons would have allowed the plaintiff to cross the border with the imported meat in these circumstances, and failure to do this on the part of the 1st defendant's subordinates was negligent.

[24] The next issue to determine is one of remoteness of damage, that is, whether failure to recognise that the plaintiff had an import permit caused the plaintiff's meat to be destroyed. The test for remoteness was stated in the case of **International Shipping Co. (Pty) Ltd v Bentley 1990(1) SA 680(A)** at 700E – 701F. In this case to determine causation a two-step enquiry is held, with the first one being whether the wrongful conduct factually caused the loss, and the second one is whether in law the wrongful act should be regarded as a cause of the plaintiff's loss.

[25] In the present case had the police officer applied his mind to the fact that the plaintiff was issued with an import permit by a veterinary office, which permit expired while he was fulfilling the tax legal requirements for crossing the border with meat, he would not have seized the meat on this basis. He acted unreasonably in the circumstances. Once the meat was seized in this fashion it was bound to be destroyed. The facts of this case are uncomplicated: I therefore find that there was a direct chain of causation between the seizure of the meat by the police and its destruction. The losses which the plaintiff incurred in this case are not remote. The negligent and wrongful conduct of

the police caused the plaintiff's meat to be destroyed, and for which he must be compensated. The first claim in relation to compensation for the money he spent in buying the meat should succeed as there is no query with regard to this amount.

[26] Even his claim for loss of profit should succeed. This claim is recognised in our law. (**WBHO Construction (Pty) Limited v Mphenetha LAC (2005-2006) 453, Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA)** at para. 15). The court in the latter case, at para.15, stated that the method for assessing the loss of profit involves the determination of the difference the position of the plaintiff which was brought by the delictual conduct and what his position would have been (hypothetical position) had the damage-causing conduct not occurred. The accounting method which the plaintiff's witness, Mr Lebohang Pitso used in terms of which the loss of profit was arrived at by deducting all expenses which would have been incurred in selling the meat for three weeks, as the time within which the meat is sold out with the price of one kilogram of meat being M50.00. These figures were not seriously put into question, and I therefore find that the plaintiff is entitled to be compensated for loss of profit in the amount claimed in the summons.

[27] In the result the following order is made:

(a) The 1st defendant must pay the plaintiff an amount of M183,136.00 (One Hundred and Eighty-Three Thousand, One Hundred and Thirty-Six Maloti as compensation for the money he spent when buying 7760 kilograms of chicken meat.

(b) The 1st defendant must pay the plaintiff an amount of M154,000.00 (One Hundred and Fifty-Four Thousand Maloti) for loss of profit.

(c) Payment of interest at the rate of 10.75% p.a. from the date of judgment until final payment.

(d) Payment of the costs of suit.

MOKHESI J

For the Plaintiffs: Adv. T. A Lesaoana

For the Defendants: Adv. T. V Molise and Adv. Matete