

SOUTH AFRICA / JUDGMENT

Befile v Minister of Justice and Correctional Services (3868/2017) [2020] ZAECHGHC 11 (28 January 2020)

[2020] ZAECHGHC 11

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

3868/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, GRAHAMSTOWN)

Case

No: 3868/2017

In
the matter

between:

THEMBANI
BEFILE Plaintiff
And
MINISTER
OF JUSTICE & CORRECTIONAL SERVICES
Defendant

JUDGMENT

BESHE J:

- [1] This is an action for damages the plaintiff alleges he suffered as a result of an assault on him by his fellow inmates at the Grahamstown Correctional Centre.
- [2] This court is only required to determine the liability for plaintiff's damages. At the instance of the plaintiff, I directed that the issue of the liability be decided separately. That it be separated from the issue of the quantum of plaintiff's damages.

[3] In his particulars of claim, plaintiff sets out the grounds upon which his claim is based as being: that on or about the 17 and or 18 December 2013 and at the Grahamstown Correctional Facility, he was severely assaulted by Sinethemba Hani and four other inmates with padlocks stuffed inside socks. As a result of the assault, he sustained injuries requiring that he be admitted to various hospitals for treatment.

[4] He also pleaded that the defendant had a legal duty alternatively a duty of care to ensure that he was free from any form of assault either from the employees of the defendant or other inmates. Further that the employees of the defendant's conduct was unlawful or negligent in that:

They failed to take the necessary steps as are necessary to ensure his safe custody.

They failed to maintain security and good order of the prison as required by Correctional Service Act 111 of 1998.

They failed to comply with the duties imposed on them by inter alia Section 12

(2) of the Constitution.

The employees of the defendant failed to exercise due and proper care in the performance of their duties to safeguard the plaintiff whilst incarcerated.

That they failed to stop the plaintiff from being assaulted when they were under a legal duty to do so and were reasonable able to do so.

That they failed to guard against Sinethemba Hani and the other assailants from assaulting the plaintiff.

[5] The defendant on the other hand pleaded that the assault was a gang related incident as plaintiff was a member of the 28's gang and subscribed to its code. Further that he provoked and executed an assault on fellow inmates of the 28's gang in cell E and in self-defence the plaintiff was assaulted. Defendant denies that the injuries sustained by plaintiff are attributable to any wrongful or negligent conduct of the part of defendant's employees. Defendant admits the roles, duties and legal obligations as alleged by the plaintiff and pleads that prison officials acted reasonably by intervening. That there were designated correctional officials in the unit to safeguard offenders in the entire area. Defendant acted reasonably and adequately to establish the safe custody of the plaintiff and that none of its officials breached their duty of care.

[6] The plaintiff, a 27 year old male person, was the only witness to testify in support of his case.

[7] He testified that he had been incarcerated since 28 October 2013 at the Grahamstown Correctional

Facility. It was during December of the same year that he was assaulted by fellow inmates. He could not recall the exact number of the inmates who assaulted him but could recall the names of two of them: Chumani Ncamiso and Sinethemba Hani. Earlier that day, he had received

visitors who left him some supplies. He had sensed that his fellow inmates wanted to dispossess him of the supplies. He however was successful in warding off those advances. Later that day after watching a soccer match in hot weather, he fell asleep. As he was sleeping, he felt a blow on his left arm below the elbow. As he was trying to get up, he hit his head against the bunk bed. He realised that there were many people surrounding him. He also observed that Thulani with whom he had been smoking was also being assaulted. He also suggested that was hit with a steel cabinet used to store their toiletries. He lost consciousness as a result of the assault. He only regained consciousness in April 2014. Asked if he was assaulted with anything else, he stated that he was hit with a trunkop which is a shower knob and padlocks that were stuffed into socks. He testified that he had been serving a sentence for housebreaking. Some of his inmates were serving time for offences such as rape, murder and housebreaking. It also transpired that one of them, Chuma Qangule, was serving time for robbery with aggravating circumstances. He confirmed that he was assessed on his admission to the correctional facility. He denied knowledge of the existence of any gangs in the facility. He denied that the prison employees provided him with any protection against the assault by his fellow inmates.

[8] During cross-examination by defendant's counsel, Mr Mpahlwa, he denied that he was affiliated to any gang in prison. He denied any entry in a document purportedly completed during his assessment where he seemingly admitted to being a member of the 28's gang. It also transpired that the assault took place not long after the door of the cell had been locked (referred to the process of locking as "the master key"). He agreed that that was an indication of the presence of prison official/s was in that vicinity of the cell in which he was. During cross-examination, he indicated that he could not have been struck with a trunkop on his arm because had that been the case, his arm would have been fractured. Plaintiff confirmed that they were allocated steel cabinets in which they stored their belongings and that those were lockable by means of padlocks. That both the cabinets and padlocks were permissible items to have inside as cell. He however denied that the steel cabinets were mounted to the wall, saying they were packed one on top of another. He denied that he was the first to attack his fellow inmates after they had confronted him about having sexual relations with Thulani Malila. He denied that his fellow inmates were defending themselves against him.

[9] The first witness to testify in support of defendant's case was Mr Tshete, who at the time of his testimony was a Centre Co-ordinator Corrections at the St Albans Correctional Centre Port Elizabeth. He is therefore an official of the defendant. At the time of the incident he was attached to the Grahamstown Correctional Facility. He outlined the procedure that is followed when an inmate is admitted to a correctional facility. He took the court through the

plaintiff's classification report. He was then placed at cell E which houses medium risk prisoners aged between 20 and 26 years. He confirmed that prisoners were provided with lockable facilities in the form of steel cabinets. According to him, these were mounted on the walls. That at all the centres he had worked he has never come across a case where a steel cabinet was used to attack an inmate. These are locked by means of small padlocks. That therefore it is permissible to have

a padlock in a cell. He testified that unauthorised items are removed from the cells. That there was no way they could have prevented the assault on the plaintiff. Understandably, Mr Tshete could not shed any light on the assault on the plaintiff because he was not present inside the cell when the assault took place.

[10] It also transpired that he was not actively involved in the admission and assessment process in respect of the plaintiff, but has access to the relevant documentation. He could not recall if any inmates concerned were charged in connection with gang related activities. Mr Tshete confirmed that prior to this incident there had been incidents of prisoners being assaulted with padlocks. He also confirmed an investigation that was conducted by an official by the name of Sias into the incident – assault on plaintiff and Mr Malila. That no mention is made of any fighting. Mr Tshete expressed the view that Mr Sias’s report was substandard. He also confirmed during cross-examination that it was the duty of correctional services’ officials to ensure the safety of inmates. To ensure that they are not harmed during their incarceration.

[11] During questioning by court, Mr Tshete indicated that he has been aware since joining correctional services in 1992 that padlocks would be used by inmates as weapons. That even allowing only small sized padlocks did not stop the attacks.

[12] The next witness to testify in support of defendant’s case was Mr Sinethemba Hani. Mr Hani presented with a heavily bandaged head but indicated that he will be able to testify. At the time of giving evidence in this matter, Mr Hani was 29 years old. He testified that during December 2013 he was serving a 12 months sentence for housebreaking at Section E of the Grahamstown prison. Hani testified that he was a member of one of the gangster groups that operated in prison – the group of 28s. He was the leader of the said group. On the 27 December 2013 a report was made to him about plaintiff and one Mr Malila who, according to him also belonged to the 28s group, breaching the group’s code of conduct. It was alleged that they were having sexual relations. When they tried to address the matter by confronting the two about the said allegations, a fight broke out. Malila threw a plate towards him but it missed him. Because he and his “investigator” were being overpowered by the plaintiff and Malila, Chuma, Detroit and Ija joined forces with him. During the course of the fighting Malila fled leaving the plaintiff behind. Later Hani noticed that plaintiff had stopped fighting. According to Hani, no weapons were used, only bare hands. Plaintiff was taken to hospital. Hani confirmed that they were provided with steel cabinets to store their belongings. That these were mounted to the wall and locked by

means of padlocks. During cross-examination, Mr Mgidlana drew Mr Hani’s attention to the fact that his version was not put to the plaintiff and thus he did not get an opportunity to comment in relation thereto.

[13] Mr Hani’s evidence concluded the defendant’s case.

- [14] It is on the basis of the evidence summarised above that I must determine whether the plaintiff has managed to show on a balance of probabilities that the defendant should be held liable for damages he suffered as a result of the injuries he sustained during the assault by his fellow inmates.
- [15] From both the pleadings and the evidence, it appears to be common cause that the plaintiff was assaulted by fellow prisoners during his incarceration at the Grahamstown Correctional Facility. It is also common cause that as a result of the assault he sustained injuries which required that he be admitted to a hospital/s.
- [16] I have already alluded to the fact that in the pleadings, defendant admitted that the plaintiff was assaulted by fellow prisoners. Claiming that they assaulted him in self-defence. Significantly, defendant admitted that padlocks stuffed inside socks were used to assault the plaintiff. The defendant's employees' roles, duties and legal obligations in terms of the Correctional Services Act and the Constitution were admitted.
- [17] Section 12 (2) of the Constitution guarantees the right to bodily and psychological integrity for everyone. Section 35 (2) (e) of the Constitution provides that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity.
- [18] Section 2 (b) of the Correctional Services Act[1] provides:

"2 Purpose of correctional system

The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by–

- (a)
- (b) detaining all inmates in safe custody whilst ensuring their human dignity."

- [19] Section 26 of the Correctional Services Act provides for safe custody of the inmates and states that:

"26 Safe custody

- (1) The right of every inmate to personal integrity and privacy is subject to the limitations reasonably necessary to ensure the security of the community, the safety of correctional officials and the safe custody of all inmates.
- (2) In order to achieve these the objectives referred to in subsection (1) and subject to the limitations outlined in sections 27 to 35, a correctional official may–
 - (a) search the person on an inmate, his or her property and the place where he or she is in custody and seize any object or substance which may pose a threat to the security of the correctional centre or of any person, or which could be used as evidence in a criminal trial or disciplinary proceedings." [emphasis provided]

[20] Based on the abovementioned provisions, can it be said that the defendant, through defendant's officials, upheld the duty to take the necessary steps so as to provide the inmates, in particular the plaintiff with safe conditions during his incarceration. In other words, can it be said that there was negligence on the part of the defendant.

[21] As to what amounts to negligence, the following was stated in *Mukheiber v Raath and Another*[2]:

“(D) Negligence

[31] In our law, the standard of conduct expected from all members of society is that of the bonus paterfamilias, ie the reasonable man or woman in the position of the defendant. An act which falls short of this standard and which causes damage unlawfully is described as negligent, ie it is tainted with culpa.

The test of culpa can, in the light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A) be stated as follows (see *Boberg The Law of Delict* at 390):

For the purposes of liability culpa arises if-

- (a) a reasonable person in the position of the defendant-
 - (i) would have foreseen harm of the general kind that actually occurred;
 - (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
 - (iii) would have taken steps to guard against it, and
- (b) the defendant failed to take those steps.”

[22] The “weapon” used to assault the plaintiff was not contraband and it was an object or objects that was / were permissible within the confines of a cell in which the inmates were housed. Padlocks that were stuffed in socks were used to assault the plaintiff. Same are used to lock the cabinets that inmates use to store their belongings. No amount of searching, be it of the inmates, their property or the place where they are kept, would have eliminated the padlocks.

[23] There is however evidence that the prison authorities were aware that the padlocks were being used as weapons

to perpetuate assaults amongst the inmates. During the re-examination of Mr Tshete by Mr Mpahlwa the following emerged:

“MR MPAHLWA: As the court pleases. You remember you were asked about weapons that you listed as being used by inmates to assault other offenders and among those you indicated a padlock?”

MR TSHETE: It is so Sir.

MR MPAHLWA: And it was put to you that the Department of Correctional Service failed to declare that weapon as a dangerous weapon, do you still remember that?

MR TSHETE: That I recall.

MR MPAHLWA: And you indicated that you did not agree with the suggestion.

MR TSHETE: Yes it is so.

MR MPAHLWA: If the Department so did declare this padlock as a dangerous weapon would that have eliminated any possibility of assaults being carried through by other means?

MR TSHETE: No it is not so Sir.

MR MPAHLWA: Please indicate why you say so?

MR TSHETE: As I've explained in court inmates they use anything to do what they want to do, that is wrong."

[24] During questioning by court Mr Tshete indicated that he had been aware of the use of padlocks as weapons by inmates from the time he joined defendant's department in 1992. He was asked what steps had been taken to eliminate the use of padlocks as weapons. His response was that this was done by only allowing the use of small padlocks. Asked if that had stopped the assaults using padlocks, he said no. Indeed it is clear that this had not helped because the same object was used to assault the plaintiff.

[25] Prior to Mr Tshete giving his testimony, plaintiff had also during cross-examination expressed himself as follows in this regard:

"MR MPAHLWA: Now let us just Mr Befile understand your case before court. It is not your evidence that officials of the defendant could have foreseen an assault that would be carried to you on that day, is that correct?"

MR BEFILE: It was not expected that I can be assaulted, nor any person, we are not there to be assaulted, we are there to serve our sentence.

MR MPAHLWA: It is also not your case, correct me if I am wrong, it is also not your case that officials should have foreseen the use of a self made weapon, either in the form of a padlock to assault you?

MR BEFILE: I do not think I was the first one to be assaulted by a padlock, I think they should have known that padlocks are being used to assault people there."

[26] In my view, it was not only foreseeable, but known by the prison authorities that padlocks, even in their "small" form were used by inmates to assault each other. No steps were taken to replace them with safe locking facilities.

- [27] Was the assault on the plaintiff an act of self defence against an attack by the plaintiff on his assailants? Or, as per defendant's plea, "the plaintiff had provoked and executed an assault on fellow inmates of the 28 gang in Cell E and in self-defence the plaintiff was assaulted".
- [28] During cross-examination, it was put to the plaintiff that when he together with Mr Thulani Malila were questioned about sleeping together, he (plaintiff) started hitting them with fists and the other inmates defended themselves by hitting him with fists.
- [29] The problem with this is that the version that was put to the plaintiff differs from Mr Hani's evidence as to how the fighting started. Secondly, despite the admission that the plaintiff was assaulted by means of padlocks stuffed inside socks, Mr Hani said they used their bare hands. As to how the fight started, he had this to say about what occurred at the time they were questioning the plaintiff and Thulani Malila:

" Thulani wanted to use violence and Thembani (plaintiff) helped him out, then a fight broke out and Thulani threw a plate towards me, but he missed me and it fell on the bed, and then we started fighting "

During cross-examination by Mr Mgidlana he confirmed that it was Thulani who started the fight with plaintiff joining in. Unfortunately Mr Hani's evidence was not put to the plaintiff. He was not given an opportunity to respond thereto.

- [30] Be that as it may, I am not persuaded that there is any evidence that the assault on the plaintiff was as a result of provocation on his part or that it was an act of self-defence.
- [31] The second reason the plaintiff imputes negligence on the part of the defendant is that he was locked up with inmates who had been convicted of violent crimes. In his evidence plaintiff stated that he was placed in the same cell with murder and rape convicts as well as those convicted of housebreaking with intent to steal like him, as well as one Chuma Qangule who had been convicted of robbery with aggravating circumstances. This was not placed in dispute. Evidence does reveal that care was taken to place offenders between the ages 20 to 26 in Cell E. It is not clear what other reasons informed the decision that these inmates were "medium risk prisoners" despite some of them having been convicted in respect of serious violent crimes. So plaintiff may have a valid point in this regard.
- [32] I have not dealt much with the allegation that plaintiff was a member of the 28's gang as suggested by defendant's witnesses. Plaintiff is alleged to have confessed to being a member of the 28's gang during the assessment

procedure. However neither he nor Mr Tshete who testified about the document where this is recorded authored the document. Plaintiff disavows having confessed to being a member of the 28's gang. The reason I have not dealt with this aspect at any length is that firstly, as I understand defendant's case, it is upon being questioned about breaching the code of conduct of the 28's gang that plaintiff allegedly attacked / provoked his assailants who in turn acted in self-defence. But Mr Hani's evidence does not establish this defence. According to him, a fight took place after Malila had thrown a plate towards his direction. Secondly, the fact that the plaintiff was, if at all he was,

a member of a gang did not justify an assault on him.

[33] My considered view is that, it is not in keeping with the duty to ensure the safe custody of those who are

incarcerated in defendant's facilities, knowing that padlocks are used to carry out assaults amongst inmates, not to take steps to avert such assault. This in my view, by eliminating the use of such padlocks. By removing the padlocks from the access of inmates some of whom have been convicted of serious violent crimes as was in the case in respect of plaintiff's fellow inmates.

[34] There is one more issue I need to address. Plaintiff suggested that he was also hit with a steel cabinet on his face. He observed the same spinning towards him before it struck his face. However, no mention is made in the particulars of claim of the use of steel cabinet. What is recorded in paragraph 4.2 of plaintiff's particulars of claim is:

"The plaintiff was assaulted by Sinethemba and his four assailants using padlocks stuffed inside socks". At some stage he would be heard to be saying he was also hit with a trunkop which he described as a shower head placed inside a sock. Later he could be heard to disavow having been struck with this trunkop. This too was not mentioned in his particulars of claim. In response to it being put to him that there is no allegation in his particulars of claim that he was also hit with a steel cabinet, he stated that "if it was only padlocks that was (sic) used I would not have lost consciousness". No explanation was forthcoming as to why there was no such allegation in his particulars of claim. During the closing address Mr Mgidlana asked for the amendment of paragraph 4.2 of plaintiff's particulars of claim, submitting that this aspect was fully ventilated during the trial. Plaintiff's evidence in this regard must also be viewed in due consideration of defendant's evidence that the steel cabinets are mounted to the walls. (Tshete and Hani). The use of steel cabinets was not alleged in plaintiff's claim, there appears to have been a lot of commotion around him after he felt the blow to his arm and he was surrounded by a number of people. He also had just hit his head against the bunk bed on top of his bed. Plaintiff's evidence in this regard is therefore not reliable. I am therefore unable to find as a matter of fact that he was also struck with a steel cabinet."

[35] I am however satisfied that the defendant is liable to the plaintiff for damages he may have suffered as a result of bodily injuries suffered as a result of being assaulted by his fellow inmates during December 2013 at Cell E Grahamstown

Correctional Facility.

[36]

1. Accordingly, judgment is entered in favour of the plaintiff against the defendant for damages he suffered as a result of the assault on him as described in the preceding paragraph.
2. Defendant to pay the costs.

NG BESHE

JUDGE OF THE HIGH COURT

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Date Heard : 28, 29 & 30 October 2019 and 11 November 2019

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[1] Act 111 of 1998.

[2] 1996 (3) SA 1065 SCA at 1077 paragraph [31].

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