

SOUTH AFRICA / JUDGMENT

Malatjie and Others v South African Custodial Management (Pty) Ltd (834/2021) [2025] ZALMPTHC 8 (14 April 2025)

[2025] ZALMPTHC 8

COURT

Limpopo High Court, Thohoyandou

BEFORE

M V Semenya

CASE / FILE NUMBER

834/2021

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU.

CASE

NO. 834/2021

CASE

NO. 756/2021

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

14/04/2025

SIGNATURE:

In

the matter between: RONNY
NDIBA MALATJIE
FIRST
PLAINTIFF
RALPH
NCHOKE MALATJIE
SECOND
PLAINTIFF
LASSY
NGWATO
THIRD
PLAINTIFF
DUMISANI
MOKOENA
FOURTH
PLAINTIFF
and
SOUTH
AFRICAN CUSTODIAL
MANAGEMENT
(PTY) LTD.
DEFENDANT
Heard
on 28 May 2024

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JUDGMENT

SEMENYA DJP

- [1] The defendant in this matter is a company with limited liability, responsible for the daily operations at Kutama Sinthumule Correctional Centre (the Centre) situated at Makhado. The four plaintiffs were serving prison terms at the Centre when the cause of action arose. There initially two separate cases. The first plaintiff, Ronny Malatjie, instituted action in case number 756/2021 and the second plaintiff, Ralph Nchoke Malatjie, the third plaintiff, Lassy Ngwato and the fourth plaintiff, Dumisani Mokwena were joint plaintiffs in case 834/2021. The two cases were consolidated and heard in one single trial. The merits and quantum were separated in terms of Rule 33(4). This judgment concerns the merits part of the action.
- [2] The first plaintiff seeks the following relief:

"1. It is declared that the conduct of the Defendant of assaulting the Plaintiff without the Plaintiff's consent and without just cause while it was reasonably foreseeable to cause the Plaintiff to undergo medical treatment, to suffer emotional shock, contumelia and in future the Plaintiff will require medical treatment, is unconstitutional and invalid;

2. The Plaintiff's constitutional rights claim is in his own interest and members of public interest's interests succeeds;

2.1. The Plaintiffs claim for constitutional damages for breach of each of the Plaintiffs constitutional rights succeeds;

2.2. The defendant be ordered to pay the Plaintiff the sum of R1 000 000.00 (one million rand) for constitutional damages.

3. The Plaintiffs claim for pain and suffering and discomfort as a result of being assaulted by 4 (four) Custodial Officers without his consent and without a just cause succeeds;

3.1 The Defendant be ordered to pay the sum of R500 000.00 (five hundred rand) for pain and suffering and discomfort.

4. The Plaintiffs claim for emotional shock, trauma and depression as a result of being assaulted by 4 (four) Custodial Officers without his consent and without a just cause succeeds;

4.1 The Defendant be ordered to pay the Plaintiff the sum of R500 000.00 (five hundred thousand rand) for emotional shock, trauma and depression.

5. The Plaintiffs claim for humiliation, degradation and contumelia in the sum of R500 000.00 (five hundred thousand rand) succeeds;

5.1. The defendant be ordered to pay the Plaintiff the sum of R500 000.00.

6. The Plaintiffs claim for future medical expenses as a result being assaulted by 4 (four) Custodial Officers without his consent and without a just cause in the sum of R500 000.00 (five hundred thousand rand) succeeds;

6.1 The Defendant is ordered to pay the Plaintiff the sum of R500 000.00.

7. Interest on the aforesaid amount of 10,25% per annum calculated from 14 days after date of judgment to date of payment;

8. Costs of the suit;

9. Further and/or alternative relief.

[3] Prayers 1 to 2.2 of the relief sought by the second to fourth plaintiffs is the same as those sought by the first plaintiff in his prayers 1 to 2.2 above. Their other claims are as follows:

"3. The Plaintiffs' claim for emotional shock, trauma and depression as a result of witnessing Ronny Malatjie being assaulted by 4 (four) Custodial Officers without just cause succeeds.

3.1 The Defendant is ordered to pay each Plaintiff the sum of R500 000.00 (five hundred thousand rand) for emotional shock, trauma and depression.

4. The Plaintiffs' claim for humiliation, degradation and contumelia in the sum of R300 000.00 {three hundred thousand rand) for the Plaintiffs succeeds.

4.1 The Defendant is ordered to pay each Plaintiff the sum of R300 000.00.

[4] The second to fourth plaintiffs' relief sought in prayer 5, 6 and 7 are the same as in prayer 7,8 and 9 of the first plaintiffs claim.

[5] The plaintiffs' claim for constitutional damages are the same as those claimed by the plaintiff in *Fose v Minister of Safety and Security*[1] (Fose). The action in Fose arose out of a series of assault on the plaintiff by members of the South African Police Service. Fose

claimed that the brutality he experienced in the hands of the authorities violated some of his constitutional rights and prayed for an appropriate remedy in the form of constitutional damages. The Constitutional Court said the following in paragraphs [23,

[66] and [67]:

"[23] The "constitutional damages" are claimed by the plaintiff in addition to the common law damages to which he would be entitled for the assault on which the action is founded. It is contended that these "constitutional damages" are required to enforce the provisions of the Constitution and are appropriate in order to achieve any of the ends mentioned in paragraph 17(a), (b) and (c) above.

...

The damages claimed by the plaintiff

[66] In the present case the court is confronted with the narrow issue of whether in addition to the damages which plaintiff has pleaded in claims "B1" and "B2", he is entitled to any further constitutional damages which, on the plaintiffs argument, would include an amount for the vindication of the infringed rights in question and for punitive damages.

Damages for the Vindication of the Plaintiffs Rights

[67] In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded, he will no doubt, in addition to a judgment finding that he was indeed assaulted, by members of the police force in the manner alleged, be awarded substantial damages. This in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damage."

- [6] The causes of action in the present case are, like those in Fose, based on the alleged assault on the first plaintiff by employees of the Minister of Correctional Services. It is my view that the dictum in Fose, referred to above, is similarly applicable to the present case. The plaintiffs claim damages for emotional shock, pain and suffering as well as contumelia. Common law damages. The plaintiff will be afforded substantial compensation in the form of common law damages, if successful in their claim. There is, therefore, no need to deal further with the claim for constitutional damages. The plaintiffs are not entitled to a relief to that effect.
- [7] The first and second plaintiffs are twin brothers. They share the same surname. They originate from the same village. Ralph is a father to Dumisani's nephew. I am of the view that referring to each plaintiff by his surname in the judgment will therefore cause confusion. I will, as a result, refer to the plaintiffs by their first names. In addition, although the employees of the defendant are referred to as custodial officers in the pleadings, I will refer to them as correctional officers. This accords with their definition in terms of the Correctional Service Act.[2]
- [8] A summary of the evidence presented in this case follows. Ronny testified that he was admitted to the Centre in 2012. He is currently serving a sentence of imprisonment for life. On the 30th of April 2021 at about 09:00, he woke up and proceeded to a certain Block within the Centre in order to attend a textile class. He found that there were no class to attend on that day. He then walked to the healthcare centre as he needed medical attention. As he was so walking, he came across the Dumisani. They walked together to the B Block. They were later joined by Lassy and Ralph.
- [9] The plaintiffs arrived at the entrance referred to as the traffic, where they were supposed to be searched by correctional officers before receiving permission to enter Block B. Ronny and Lassy were the first to enter through the gate. Dumisani and Ralph remained outside. The gate through which Ronny and Lassy entered is made of mesh. This made it possible for Ralph and Dumisani to see what was happening to them inside the traffic.
- [10] Upon entry into the traffic, Ndivhuwo Munyai (Munyai), a correctional officer who was stationed there on the date of the incident, ordered Ronny to face the wall and to place his hands on it. Ronny complied. Munyai asked him why he was standing as if he were posing for a photo shoot. Ronny told Munyai to stop complaining and to search him. Ronny testified that Munyai slapped him on his face from the back. He, Ronny, turned and pushed Munyai backwards. Ronny further stated that other correctional officers joined Munyai and assaulted him with open hands. They backed him into a corner where they continued to assault

him by hitting him several times with open hands. Ralph, Lassy and Dumisani were at all times watching what was happening to him.

- [11] On the same date and after the alleged assault, he attended the SACM Health Care Centre where Dr KN Maluleke-Baloyi examined him and completed a medico- legal Examination Form commonly known as Form J88. It is noted in the report that he had a swollen lower lip, swollen tender left elbow and swollen left forearm. It is further noted that he was complaining about a painful ribcage. Ronny confirmed that those are that injuries that he sustained. In addition, he stated that he told the doctor that his eardrum was painful but the doctor failed to record it.
- [12] Ronny testified that he attended the health care centre again on a Monday, without stating the specific date of the second visit. He was seen by a nurse and a doctor. An X-Ray was performed. He was shown the picture of the X-Ray. However, the doctor did not explain the contents therein to him. His attorney requested hospital records but same were not provided.
- [13] Ronny stated further that the assault left him humiliated, embarrassed and emotionally affected. He feels that his rights were not respected by the authorities and the correctional officers at Kutama Sinthumule. He then began bunking classes as he was afraid that he will go through the same traffic where he may be assaulted again. He launched this action in order to stop the correctional officers from assaulting him further as this was not the first incident. He denies that he became unruly when the correctional officers wanted to search him or threaten Munyai in any manner.
- [14] Ronny states that he was charged with ill-discipline, went through a disciplinary hearing at which he was convicted and sentenced for the alleged assault on Munyai. The sentence of forty days was increased by twenty days when he refused to sign the papers. This happened after the defendant was served with summons commencing action in this matter. He never received any counselling after the incident. He viewed the video footage of the incident which, according to him, does not depict what transpired during the first assault.
- [15] It was put to him in cross-examination that it is necessary to search anyone who comes from the health care centre as some of the inmates fake illness so that they can be given medicine which they will convert into drugs. He could not deny this averment. He stated that the injuries which are noted on J88 were to the only injuries that he sustained during the assault. He stated that he sustained numerous other injuries on his head. He further stated that the custodial officers did not only hit him with open hands as he had said in evidence-in-chief, they also kicked him with parabellum shoes and combat boots on his stomach, legs and chest, which caused him to be admitted in hospital for eight days due to a swollen arm.
- [16] Ronny was taken through the video footage which was displayed the events of the date in question. According to him, the footage does not show the first assault on him by Munyai. It however, shows a person resembling correctional officer Musieni assaulting Ronny whilst restraining his arm. He could also see Munyai raising his hand. He admitted that he also raised his hand when he was asking Munyai why he was assaulting him. He conceded that he was depicted talking but denied that he was telling Munyai that he was not going to allow

correctional officers to search him on that date.

- [17] Ronny conceded that Munyai had tried to search him on three occasions. He denied that a correctional officer called Mukwevho was attracted to the scene when he raised his voice at Munyai. He stated that Mukwevho and others happened to be just passing when the assault by Munyai was taking place. He agreed that the alleged assault by Munyai or any other correctional officer is not depicted anywhere on the video, the reason being that the video depicts his second encounter with Munyai and others. At that stage, so Ronny's version goes, the assault had already taken place.
- [18] With regard to the other plaintiffs' claim, Ronny stated that he, Ralph and the others were talking to other correctional officers at the time Munyai was assaulting him. There was no form of contact between Munyai and Ralph. It was put to him that his oral evidence contradicts the pleaded version in that, according to the particulars of claim, Munyai poked Ralph on the chest and told him not to interfere with his work.
- [19] Ralph testified that on the 30th of April 2021 he went to B Block to attend motor mechanic classes. He proceeded to the healthcare centre where his twin brother was. He found Ronny with Dumisani and Lassy. They left the healthcare centre together. Ronny and Lassy were the first to enter the traffic and he remained outside with Dumisani. He heard Munyai instructing Ronny to touch the wall. He also heard him when he asked Ronny why he was standing as if he were posing for a photograph. He heard Ronny's response to Munyai which resulted in Munyai slapping Ronny at the back of his neck. He asked Munyai why he was assaulting Ronny. Other correctional officers came and assaulted Ronny with hands and kicked him with their booted feet.
- [20] Ralph stated that he was left traumatised by the attack on Ronny, to the extent that he failed his matric examination, has mood swings and suffers from anxiety. He was troubled by the fact that he could not defend his twin brother from the attack. He stated that the correctional officers could have foreseen that the attack on his twin brother could have that kind of effect on him.
- [21] Ralph was taken through the video footage of the first scene which according to him depicts the following: he and the other plaintiffs as they were entering the traffic control area, Ronny touching the wall, Munyai searching Ronny, Munyai hitting Ronny with an open hand on his neck, Ronny turning and pushing Munyai away, he, Ralph, approaching them and asking Munyai why he assaulted Ronny and the other correctional officers moving Ronny to a place where he, Dumisani and Lassy could not see what they were doing to Ronny. He could see a correctional officer removing Ronny from a group of correctional officers. In cross-examination, he conceded that he is unable to say whether what he saw was Munyai assaulting Ronny or whether it was just a soft touch. It was put to him that it was impossible for him not to see everything that was happening to Ronny because there are cameras everywhere in the traffic.

[22] Lazarus (referred to earlier as Lassy) stated that he is Ronny and Ralph's neighbour and that they were taking care of him when he was growing up. He was serving a prison term at Kutama Sinthumule on the date of the incident. He confirmed what was said between Ronny and Munyai when they arrived at the traffic. He also confirmed the assault on Ronny by Munyai. He stated that the attack on Ronny made him feel bad, made it difficult for him to fall asleep and felt like he might be next victim of assault by the correctional officers. He never received psychological treatment thereafter. He later met Ronny with an injured arm and carrying a drip. He further stated that the SACM authorities did nothing to protect his right to dignity and

honour when they assaulted Ronny in his presence.

[23] Dumisani testified and repeated what has been said by other plaintiffs. He too stated that he could not sleep after witnessing the incident and had recurrent nightmares about it. He felt humiliated by the assault on Ronny who was older than him. He was affected by the incident as he was the uncle to Ronny's nephew.

[24] It was put to him during cross-examination that they have all testified in exactly the same way and that this is proof that they have connived to fabricate a story against the defendant. He responded by saying that the evidence is similar because they have all witnessed the same incident at the same place and at the same time.

[25] Edward Ndivhuwo Munyai, Sabian Rogan Musieni (Musieni), Jeffrey Lebogang Malatjie (Malatjie), Jeremiah Cecil Mahlelehlele (Mahlelehlele) and Tshifhiwa Lomment Mbau (Mbau) testified on behalf of the defendant. Munyai stated that he was in the employ of the defendant and stationed at the Centre as a correctional officer on the 30th of April 2021. He was attached to the unit known as the traffic. His duties entailed searching and controlling inmates whenever they leave or enter their units. Ronny and Lassy arrived at the traffic at about 09:20. They were from the Blue prison side. Ronny entered with another person. The gate closed and the other two remained outside. He asked Ronny for permission to search him. Ronny

swore at him. He approached Ronny and gently tapped him on his back and told him to open his legs. He told Ronny not to stand as though he was posing for a photograph. He denied that Ronny responded by saying he must do his job and stop complaining. According to him, Ronny said "voetsek, you are a mere guard and that the prison does not belong to your mother". Ronny further turned and pushed him away.

[26] Munyai stated that Ronny's conduct did not make him angry as he has been trained to control his emotions. As correctional officers are not allowed to assault inmates, he and Musiene, who is also a correctional officer, approached him and held his wrists with the intention of bringing him under control. Ronny became aggressive and they held him in order to calm him down. Malatjie, Khodovho and other correctional officers came close to them. Khodovho came and separated them. He and Musiene left because he was now under control.

- [27] Malatjie denied that he or other correctional officers punched Ronny, or struck him with open hands, or kicked him with booted feet. He further denied that Ronny's arm was manhandled on that date. Malatjie stated that there were cameras all around the scene and that had this happened, same would have been depicted on the video footage.
- [28] Munyai went further and stated that the Malatjie twins are troublemakers in the Centre. He said that they deal in drugs, are gang leaders and are always reported for all the wrong reasons. He denied that Ronny sustained the injuries that he has testified about and that had he done so, his version is confirmed by nurse Netshitonze in the SACM Medical Incident Report. It is worth mentioning that a small cut on the lower lip and a bruise on the left hand are the injuries recorded in the report. He further stated that experience has taught him that there are times when inmates inflict injuries on themselves. He denied that he poked Ralph on his chest. He stated that it is not correct that Ralph only asked them why they were assaulting them and said he also pushed them.
- [29] It was put to Munyai in cross-examination that the averment that he just tapped on Ronny's shoulder, as opposed to delivering a hard slap him, was not pleaded. He denied that he dragged Ronny away from cameras. It was further put to him that Ronny requested a copy of the incident report through his lawyers and that he was told that it was not available.
- [30] Musiene testified that he was on duty at the Centre on the date of the incident. He was in the company of Munyai when Ronny and other plaintiffs arrived at the traffic control area. His version is similar to that of Munyai. He too denied that Ronny sustained injuries in their presence.
- [31] Malatjie testified that he was on duty at the Centre on the date of the incident. He stated that he did not see the assault on Ronny and does not know why his names are mentioned as one of the correctional officers who took part in the alleged assault on Ronny in the particulars of claim. He denied that he joined the others in assaulting Ronny.
- [32] Mahlelehlele testified that he too was on duty as a duty manager on the date of the incident. He heard that there was an altercation between Ronny and correctional officers. He denied that Ronny requested him to take him to the clinic and said that he would have assisted him had he requested him to do so.
- [33] Mbau testified that he was on duty at the Centre on the date of the incident. He stated that he was never at the traffic control area on that date. He further denied that he took part in the assault on Ronny.
- [34] That concludes the summary of the evidence in this case.

[35] On the issue of onus, and in particular, on the claim based on the alleged assault on Ronny, the plaintiffs contend that the onus of proof lies with the defendant. The plaintiffs contend that the Form J88 lends support to their argument in that it confirms that Ronny's bodily integrity was impaired as a result of the conduct of the defendant's employees. The plaintiffs rely on the judgment in *Mabaso v Felix*[3] (Felix) in this regard. The following was stated in that case:

"There is another reason why, at any rate in delicts affecting the plaintiff's personality and bodily integrity, the onus of proving excuse or justification, such as self-defence, should be placed on the defendant: usually, the circumstances so excusing or justifying his wrongdoing are peculiarly within his own and not the plaintiff's knowledge. True, Wigmore rejects that consideration as a "universal working rule" for determining the incidence of onus of proof (*ibid*), but that is no reason for its not being most apposite in the kinds of delicts just mentioned. To put it another way, it would for that reason, be fair and accord with experience and good common sense that in such delicts the defendant should ordinarily bear the onus of proving the excuse or justification. There is certainly no ground for adopting in such cases the rule prevailing in criminal law. We also think that, if the excuse or justification pleaded is self-defence, the onus is generally on the defendant too to plead and prove that the force used by him in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression,

again unless the pleadings place the onus on the plaintiff. In our opinion, however, this element is such an essential, integral part of the defence of excuse or justification that the defendant should in all fairness and common sense bear this onus too. After all, it would be peculiarly within his knowledge why he employed the degree of force in question. In any way, as will be presently emerge, the pleadings will usually impose this onus on him."

[36] My understanding of Felix is that the starting point in the determination of the issue of where the onus lies, is with the pleadings. In instances where the defendant admits the assault, but raises self-defence or reasonable force as justification, the onus will rest on the defendant. The defence raised by the defendant in the present case is a denial of the allegations in the summons and particulars of claim, in particular, that any of its employees assaulted Ronny on the date of the incident. In other words, the defendant did not admit that its employees assaulted Ronny in self-defence.

[37] On the use of reasonable force, the defendant pleaded that Ronny resisted a lawful search by the correctional officer. Other correctional officers arrived and simply surrounded Ronny. It is not the defendant's plea that any form of physical force was used on Ronny by any of its employees.

- [38] I fail to comprehend the plaintiffs' reliance on Form J88 in their submissions that the onus rests on the defendant. I had the advantage of reading the contents of this form. Nowhere is it stated that the injuries the author observed on Ronny were inflicted by the employees of the defendant, except that it is Ronny who told him so, which is denied. The author was not at the scene when the alleged assault took place. Such a recording would have amounted to inadmissible hearsay.
- [39] For the reasons stated in the preceding paragraphs, the plaintiffs' contention that the onus lies with the defendant is rejected. The four plaintiffs generally and, in particular, Ronny, has a duty to prove that he was assaulted by the employees of the defendant on the date in question. If he succeeds the remaining plaintiffs will have to prove that they suffered damages out of witnessing the assault on Ronny.
- [40] It is common cause that the cause of action as it appears from the pleadings is assault. The defendant's plea is one of bare denial of the allegations that its employees have assaulted Ronny. It is upon the plaintiffs to present evidence that proves, on a balance of probabilities that he was indeed assaulted by employees of the defendant who were acting within the scope of their employment.
- [41] It is common cause that all correctional officers who were mentioned by the plaintiffs were identified as perpetrators and were on duty on the date of the incident. It is further common cause that Munyai and Musieni were stationed at the traffic control area and tasked with the duty to search all those who were about to go beyond its boundaries. It is further common cause that Munyai is the one who searched Ronny on that day. It is further common cause that Ronny arrived at the traffic control area in the company of the other three plaintiffs.
- [42] The version of the events of the 30th of April 2021 as deposed to by the witnesses for the plaintiffs and those for the defendant is irreconcilable. The technique referred to by Nienaber JA in paragraph [5] of *Stellenbosch Farmer's Winery Group Ltd and Another v Martell & Cie SA and Others*[4] will be of assistance in the evaluation of the evidence presented in this case. The court is required to pay attention to, among others, the credibility and reliability of various factual witnesses. Contradictions in a witness's own evidence, namely, what the witness said in his evidence in-chief and answers to questions in cross-examination and contradiction between the versions of other witnesses.
- [43] The plaintiffs contended that the witnesses for the defendant performed poorly in the witness stand. They submitted that this court should reject their version as they evaded questions put to them in cross-examination and contradicted each other on material aspects. The plaintiff submitted that they, as witnesses, performed well, stood by their version during in cross-examination and that this court should, on that basis, find in their favour.
- [44] The argument that the plaintiffs were truthful witnesses is not entirely correct. Ronny contradicted himself in cross-examination. His version is also not consistent with what has been pleaded. No mention is made of the assault by way of kicking with booted feet is made

in the pleadings and in chief. Furthermore, he stated in chief that Munyai assaulted him with an open hand on the face from the back. It was pleaded that he was assaulted on his neck. He further stated that he was kicked on his belly, chest and legs. There was no mention of him sustaining any injuries on those parts of the body, which I find to be improbable, bearing in mind the type of shoes he alleged he had been allegedly kicked with.

- [45] Kutama Sinthumule is categorised as one of the maximum security correctional centres. The defendant's averment that there are cameras all over entrance area is highly probable. The version of the plaintiffs that Ronny was taken to a spot where the other plaintiffs could not see him is rejected.
- [46] The Form J88 completed by Dr Maluleke-Baloyi and the Medical Incident Report were both completed on the date of the incident. They both provide confirmation that Ronny was injured on the same date, namely, the 30th of April 2021. The Medical Incident Report was completed at 11:35 and the J88 at 16:07. According to Ronny, the procedure applicable when a prisoner requires medical attention at the healthcare centre is that, he will first be seen by a nurse who will complete the Medical Incident Report Form and will thereafter be seen by a doctor.
- [47] The probabilities in this are that the injuries noted on the two medical reports were sustained on the date of the incident. There is no evidence to suggest that Ronny was beaten up at a place other than at the traffic control of the Centre. There is further no evidence that proves that he had an altercation with other people except the correctional officers who were on duty on that date, among others, Munyai. The bare denial of the allegations by the defendant, in the face of such overwhelming evidence, stands to be rejected. The reliance on the evidence of Munyai that prisoners have a tendency of injuring themselves, and that Ronny may have done the same thing, is found to be farfetched.
- [48] Assault violates a person's bodily integrity which gives rise to the delict of *actio iniuriarum*[5]. Infringement of the bodily integrity is *prima facie* wrongful.[6] Ronny has exaggerated the nature of the assault. The evidence, at the least, proves that he was slapped by Munyai. The probabilities are that he sustained the injuries on the arm and elbow when Munyai and Musieni were grabbing him. This was admitted by both witnesses and that the injury on the mouth was sustained when he was slapped on the neck. Ronny testified that he was slapped on the face from the back. The assault by kicking on the belly, legs and face is rejected as an exaggeration. Having found that the evidence proves that Ronny was assaulted on the date of the incident, it follows that his claim for pain and suffering and discomfort must succeed.
- [49] The plaintiffs pleaded, not only the material facts upon which they rely for their claims, as prescribed by the Rules. In addition, the summons put forward, contrary to the dictates of Rule 18, the plaintiffs' own conclusions and opinions. The plaintiffs have further pleaded the evidence upon which they rely, including, for example, statements such as "the same person who assaulted Ronny, is the same person who assaulted Mr Neluheni Takalani who was an

inmate at the Defendant's facilities and claimed that Takalani Neluheni assaulted them." The plaintiffs included the full citation of the Neluheni case in the particulars of claim as Neluheni v South African Custodial Management (1684/2011) [2016] ZAGPPHC 622 (13 May 2016). The sections of the statutory provisions on which the plaintiffs intended to rely upon to prove their cases, are also cited in the particulars of claim.

- [50] Despite all the unnecessary details, nothing is said about him being later hospitalised for a period of eight days. Ronny said nothing about the details of the treatment he received during his stay in hospital in his evidence in chief. Same was required in view of the defendant's failure to disclose the hospital records referred to earlier. The fact that the defendant failed to disclose the record is something to be frowned upon. However, same cannot be an excuse for failure to present evidence on the reasons why he was hospitalised and the treatment he received, even if it is presented in a layman's terms.
- [51] In the absence of further evidence regarding the injuries other than those reflected in the medical report, which according to Dr Maluleke-Baloyi did not require hospitalisation, I am unable to find any evidence that supports the need for future medical costs. There is no evidence to prove that same will be necessary. In any event, he stated that he is serving a sentence of imprisonment for life. The Correctional Service Department is enjoined to provide medical treatment for inmates in their custody.
- [52] The Supreme Court of Appeal in *Komape v Minister of Basic Education*[7] (*Komape*) restated that our law recognises a claim for emotional shock attributable to a psychological lesion. In *Barnard v Santam Bpk*[8] (*Barnard*) the court stated that an insignificant shock that last for a short duration is not sufficient. In *Komape*, the plaintiffs proved that Mrs Komape fainted upon seeing her child's body in the pit toilet. She thereafter experienced nightmares during which she was haunted by hand reaching out towards her. A similar nightmare haunted Komape's father who arrived after his mother and had to sit next to his child's body for hours waiting for the emergency services. Both Mr and Mrs Komape were diagnosed with post-traumatic stress disorder and for years had difficulty sleeping and required psychological counselling.
- [53] In *Road Accident Fund v Sauls*[9] (*Sauls*), a case referred to in *Komape*, the plaintiff witnessed his fiance being struck by a motor vehicle in his near vicinity. She thought he had been killed or severely injured, which was not the case. She was left in a state of shock and confusion. She was subsequently diagnosed with post-traumatic stress disorder which became chronic and unlikely to improve. The court in *Sauls* stated that, to succeed in a claim of emotional shock, the plaintiff must prove that he or she has detectable psychiatric injury and that mere nervous shock is not sufficient.
- [54] In the present case, Ronny is the primary victim and the second to fourth plaintiffs are the secondary victims of the source of the alleged emotional shock. Unlike the victims in *Komape*, *Sauls* and *Barnard* above, none of the plaintiffs were diagnosed with post-traumatic disorder.

- [55] Ronny testified that he had nightmares, felt embarrassed and humiliated and bunked classes. He stated further that such injury was reasonably foreseeable. Ralph testified that the incident left him traumatised and anxious. He also suffers from mood swings and failed his matric though his results were not presented to the court. Lassy stated that the incident made him feel threatened that he may be the next victim of assault. He could not sleep well thereafter. Dumisani stated that he too could not sleep after the incident because of nightmares. He also felt humiliated.
- [56] Unlike the position in the Supreme Court of Appeal cases referred above, the plaintiffs in this case were not diagnosed by relevant practitioners with post-traumatic disorder. The plaintiffs testified that the employees of the defendant did not take them for counselling. This court has already found that, based on the contradictions in the evidence of Ronny, the only assault that was proved is that of slapping him on his back. Ronny further contradicted himself in regard to the extent to which the other plaintiffs have witnessed the assault and their alleged interaction with the correctional officers. In view of these facts, this court has to find whether the witnessing of the slapping, once by Munyai, could cause the emotional stress allegedly suffered by the four plaintiffs. I am of the view that the slapping could not have caused shock beyond the nervous shock referred to in *Sauls*. It could not have resulted in psychiatric injury. The plaintiff failed to prove emotional shock on a balance of probabilities.
- [57] The other issue in this case is whether it is necessary for this court to declare the conduct of the defendant's employees unconstitutional. In *Cordiant trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[10] it was stated that the court is not obliged to grant a declarator even in situations where a party has established that he or she has an existing, future or contingent right or obligation. However, the court must consider all the relevant factors and decided whether it should refuse or grant the order. In other words, the court must exercise its discretion. As stated in *Hoerskool Ermelo*, courts are urged to look at the real issues between the parties. In this case, the real issue is damages arising out of the conduct of the employees of the defendant.
- [58] Plaintiffs contended that the conduct of the defendant's employees violates their rights as entrenched in sections 10, 12 and 35 (2)(e) of the Constitution of the Republic of South Africa, 1996. These sections provide as follows:

"Section 10: Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12. Freedom and security of the person

1. Everyone has the right to freedom and security of the person, which includes the right
 - a. not to be deprived of freedom arbitrarily or without just cause;
 - b. not to be detained without trial;

- c. to be free from all forms of violence from either public or private sources;
 - d. not to be tortured in any way; and
 - e. not to be treated or punished in a cruel, inhuman or degrading way.
2. Everyone has the right to bodily and psychological integrity, which includes the right
- a. to make decisions concerning reproduction;
 - b. to security in and control over their body; and
 - c. not to be subjected to medical or scientific experiments without their informed consent.
35. Arrested, detained and accused persons

Section 2

- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

[59] The constitutionality of conduct that violates any rights entrenched in the above sections had been decided by our Constitutional Court in the past in, among others, *S v Makwanyane and Another*[11] and *Christian Education South Africa v Minister of Education*[12]. There is no need for this court to exercise its discretion in this regard.

[60] The plaintiff (Ronny) has partially succeeded in this case, that is, in a claim for pain and suffering and discomfort. In line with established legal principles, as a successful litigant, he is entitled to costs. However, the other three plaintiffs have failed to prove any of their claims. I am inclined to follow the principle laid down in *Biowatch*[13] it will not apposite to order the plaintiffs to pay the defendant's costs.

[61] In the results the following order is made:

In relation to the first plaintiff:

1. First plaintiffs declarator claim is dismissed;
2. First plaintiff's constitutional right claim in his and public interest is dismissed;
3. First plaintiffs claim for constitutional damages for breach of each of the plaintiffs constitutional rights is dismissed;
4. First plaintiffs claim for pain and suffering and discomfort succeeds;
5. First plaintiff's claim for emotional shock, trauma and depression is dismissed;
6. First plaintiffs claim for humiliation, degradation and contumelia is dismissed;
7. First plaintiffs claim for future medical expenses is dismissed;

8. The defendant is ordered to pay first plaintiff's costs of the suit.

Second, third and fourth plaintiffs;

1. All claims in respect of the second, third and fourth plaintiffs are dismissed.

2. There shall be no order as to costs in respect of second, third and fourth plaintiffs.

M V SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO LOCAL DIVISION; THOHOYANDOU

APPEARANCES:

For the plaintiffs: Mr SO Ravele

SO Ravele Attorneys

For the defendant: Mr TE Matumba

Tambani Matumba Attorneys Inc

[1] 1997 (3) SA 786 (CC)

[2] 111 of 1998.

[3] 1981(3) SA 865 (A) at 873E-874E

[4] 2003 (1) SA 11 (SCA)

[5] Mabaso v Felix (supra)

[6] Bennett v Minister of Police [1980] 3 All SA 817 (C)

[7] 9754/201 and 1051/2018) [2019] ZASCA 192 {18 December 2019) at par 32

[8] 1999(1) SA 202 (F)

[9] 2002 (2) SA 55 (SCA)

[10] 2005 (6) SA 205 (SCA)

[11] 1995(3) SA 391

[12] 2000 (4) SA 757

[13] Biowatch Trust v Registrar of Genetic Resources and Others 2009 (6) SA 232 (CC)

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