

SOUTH AFRICA / JUDGMENT

Maliwa v Minister of Justice & Correctional Services Republic of South Africa (154/2022) [2024] ZAECELLC 21 (22 February 2024)

[2024] ZAECELLC 21

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

154/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

NOT

REPORTABLE

CASE

NO. 154/2022

In

the matter between:

ANDILE

MALIWA

Plaintiff

And

MINISTER

OF JUSTICE &

CORRECTIONAL

SERVICES

REPUBLIC

OF SOUTH AFRICA

Defendant

JUDGMENT

(IN RESPECT OF MERITS)

HARTLE J

[1] The plaintiff, an inmate at the West Bank Correctional Centre at the relevant time, claims that he was wrongfully and unlawfully assaulted on 13 August 2021 by a member of the Department of Correctional

Services, one Mr. Buyani, by kicking him underneath his left foot with a booted foot and by hitting him with a baton.

[2] This unlawful conduct was said to have been committed within the precinct of the prison where the plaintiff was detained and whose officers were responsible for his safe custody. The assault was alleged to have been perpetrated by Mr. Buyani in an office, in the presence of another correctional services officer, “Mr. Mlungwana” (it appears to be common cause that the name is incorrect and that this should have been a reference to a Mr. Magidwana). A fellow inmate, Mr. Kangapi, was also said to have been present.

[3] The defendant denies that the plaintiff was assaulted at all and put him to the proof of the salient allegations. From the plea a narrative was laid down as to how the plaintiff had become injured as follows:

“2.2 In amplification of such denial defendant avers that plaintiff is the one who assaulted another inmate by the name of Luyolo Kangapi and was consequently repelled by other inmates who had intervened to stop the unwarranted attack by plaintiff from continuing.

2.4 Defendant further avers that plaintiff sustained injuries whilst being repelled by other inmates who were stopping him from assaulting fellow inmate Luyolo Kangapi.

...

3.3 ... Defendant reiterates that it was plaintiff who assaulted another inmate by the name of Luyolo Kangapi on the date in issue herein, this sudden and surprise attack by plaintiff upon another inmate was not reasonably foreseeable.

3.10 Defendant further avers that it transpired after the incident that plaintiff had engaged in illegal activities involving exchange of dagga between him and inmate Luyolo Kangapi who was assaulted by plaintiff, that the assault of Luyolo Kangapi by plaintiff was a result of those illegal activities.

3.11 Defendant surmises that the assault committed by plaintiff upon fellow inmate and the physical intervention by other inmates against plaintiff was a gang related incident as it then transpired after the incident that plaintiff was a member of the 26's gang and subscribed to its code.”

- [4] The fact that the plaintiff was injured on that day was not in dispute, the defendant however absolving the Department from any responsibility therefor.
- [5] At the onset of the matter I issued an order (by agreement between the parties) separating merits from quantum.
- [6] The plaintiff himself testified as did his fellow inmate, Mr. Kangapi, who was requisitioned from the prison to come and give his testimony.
- [7] The defendant called the correctional officials who were implicated by the plaintiff.
- [8] A bundle of documents marked Exhibit “A” were entered into the record by consent on the customary basis that they are what they purport to be.
- [9] These documents comprise firstly of medical records of the hospital at the West Bank Correctional Centre but without the salient page of the plaintiff’s in-house examination on 13 August 2021. The reverse of page 5 of the series of documents styled “Medical Practitioners History/Continuation Sheet” was not copied by the Department but following this examination the records do reveal what happened afterwards, namely that the plaintiff was referred to the Frere Hospital on 1 September 2021 following the diagnosis of a fracture to his left foot to have “Plaster of Paris” applied to it and other treatment administered to him.[1]
- [10] The second critical set of documents contains statements, internal memoranda and reports relating to an investigation by the defendant of an alleged assault claim against Mr. Buyani by the plaintiff. (The defendant did not allude to any of the documentation at all in his testimony but referenced it in cross examination during the plaintiff’s case to discredit the latter and his witness).
- [11] Other random prison registers and diaries feature amongst the documents in the bundle but were also not given any particular context in relation to the issues in dispute between the parties.
- [12] The plaintiff’s testimony in line with the extensive allegations set out in his particulars of claim was in essence that he and Mr. Kangapi had been summoned to Mr. Buyani’s officer after the two of them had been involved in a conflict situation that morning, enroute from the kitchen back to their cells after fetching their breakfast. The plaintiff was quite frank that their differences related to an accusation by Mr. Kangapi that he had taken his dagga. He was equally frank that he had rebuffed him and had struck him with his plastic coffee mug on his cheekbone. Other inmates intervened to diffuse the situation and the situation ended there.

- [13] Later he was called by Mr. Magidwana (who in his view could not personally have witnessed his and Mr. Kangapi's altercation) and taken to Mr. Buyani's office. They collected Mr. Kangapi along the way. Another inmate by the name of Mavusi was also summoned by Mr. Magidwana to confirm that the plaintiff had struck Mr. Kangapi with a mug.
- [14] After Mavusi left, Mr. Magidwana made a report to Mr. Buyani that he and Mr. Kangapi had been fighting and "causing problems in the section". It was emphasized that it was not the first time for the plaintiff to be called to the office. Mr. Buyani took out a baton from a table and forced him to sit down. He instructed the plaintiff to take off his shoes. Once he was shoeless, Mr. Buyani stood on his legs and also hit him. When the plaintiff managed to free his leg, Mr. Buyani kicked him on his mouth. He was then ordered to get out of his office.
- [15] He left Mr. Kangapi behind with the two correctional officers.
- [16] Whilst trying to put his shoes back on he realised that his foot was injured and that he could only move on one leg. When he saw Mr. Buyani exit from the office he asked to be taken to the prison hospital because he was injured, but the latter refused to do so, offering instead to bring him Ibuprofen.
- [17] He was escorted back to the cell by Mr. Buyani who instructed him to first wipe the blood off his mouth before he could enter there.
- [18] He guardedly waited until another correctional officer came along to the cell to be asked to be taken to the hospital to receive attention. That person happened to be Mr. Nabe (also known as Radebe) to whom he reported that he had been assaulted by a prison warder.
- [19] The latter undertook to get help and later Mr. Buyani himself arrived to respond to his request.
- [20] He was ultimately taken to the hospital by Mr. Buyani who also collected Mr. Kangapi along the way.
- [21] At the hospital (this was only around 12h00) he consulted with a Dr. Jonas, and Mr. Kangapi saw Nurse Manchowe.
- [22] He knew instinctively (even before having had an x-ray) that his bones were broken because they were protruding at the top of his foot.
- [23] The assault was also mentioned to the Deputy Commissioner who downplayed the incident and who asserted that it was rather an accident.
- [24] He denied that he had been injured by anyone other than Mr. Buyani and under cross examination refuted the elaborate premise of a hit on him by way of a gangsterism cleansing ritual although he candidly admitted being part of the 26's gang.[2]
- [25] Mr. Kangapi corroborated the plaintiff's evidence in most respects except he claimed that he had hit himself with his own mug he was holding at the time, which had occasioned a very slight injury to his cheek. He also related the details of the assault differently. He claimed

that Mr. Buyani had first “clapped” the plaintiff on his head using his knee and that he had, in addition to the baton, also used a broomstick that was to hand to hit him under his legs. The baton featured largely in the assault as well according to him and he confirmed that pressure had been brought to bear on the plaintiff’s legs with this object. Also, contrary to the plaintiff’s testimony, he related that Mr. Magidwana was not present during this ordeal, having left to complete his roll call.

- [26] The witness identified the statement purportedly taken from him in the internal investigation as one signed by him on page 3 thereof. He did not recognize the initials endorsed on the first two pages and claimed to have been presented with only a single page of the statement which he was prevailed upon to sign. The statement was not read back to him. He appeared to be surprised by the allegation in it that he had supposedly not been present when the plaintiff was assaulted by officials. (As an aside the investigator who took his statement, Mr. Lungile Javu, was not prevailed upon by the defendant to testify concerning his role played in the investigation or the taking of any of the statements.)
- [27] Mr. Kangapi also refuted the suggestion that the plaintiff had been assaulted by fellow gangsters.
- [28] Mr. Buyani, when he testified, denied that he had assaulted the plaintiff although he professed to have gone about a properly authorized interrogation of the two inmates in his offices, alone, and in the absence of any other officials. He claims also to have made a formal entry concerning his encounter with the two in Mr. Kangapi’s case file. He made a point of emphasizing that he could not trace the plaintiff’s case file at the time because the latter had been charged with possession of dagga, hence the absence of it from the cabinet where it is normally kept. (He did not explain, however, why the file could not be endorsed later, or why it was not endorsed at all for that matter for something so critical that warranted his formal dealing with the matter.)
- [29] He sought to explain that while it was standard operating procedure to take both victim and perpetrator to the hospital to be examined (even though the plaintiff was uninjured according to his testimony) he did not do so at the moment of the plaintiff leaving his office because no nurses would be present at their station by then. Reminded of his earlier testimony that they are already at work by 07h00, he could not account for the lapse in time between dismissing the two inmates from his office and responding to Mr. Nabe’s request later to take them both to the hospital. He asserted

that he had planned to do so in any event and that the reason for this is that protocol required both culprits in a fight to be examined.

- [30] According to him when he ultimately went to collect the plaintiff to take him to the hospital he noticed that he was limping. He asked him why and the plaintiff reported that his foot was sore but declined to tell him what had happened.

- [31] He was present during the examination of the plaintiff. Mr. Melamane (head of security) was also present. (He did not take credit for summoning him here but also failed to explain how he would have known that he should be there as if he knew that his presence was formally required following upon a complaint.)
- [32] He was shocked and surprised by the accusation coming from the plaintiff at the hospital that he was supposedly the perpetrator of an assault that had caused the latter's injury.
- [33] Mr. Magidwana in his testimony denied that he had been present at the time of the assault. Asked by counsel for both parties if the plaintiff had been free of injuries when he handed the inmates over to Mr. Buyani, he claimed not to have noticed anything wrong with the plaintiff.
- [34] Counsel for the parties recognized in making closing submissions that at the end of the day it came down to the court resolving a mutually destructive version between the parties.
- [35] The time honoured assessment of opposing versions in a civil trial is well known and need not be repeated here.
- [36] The only issue in dispute is whether the plaintiff was assaulted in the manner alleged by him, that is by Mr. Buyani, or whether he sustained the injury to his foot in the manner suggested by the defendant in the plea.
- [37] If the latter, I point out immediately that it is then improbable that Mr. Magidwana would not have noticed by the time he handed the men over to be dealt with by Mr. Buyani that the plaintiff was injured as the defendant's pleaded version is that the plaintiff sustained his injuries whilst being "repelled by other inmates who were stopping (the plaintiff) from assaulting (Mr. Kangapi)". This scuffle between the two men is indeed what brought them to Mr. Buyani's office.
- [38] The plaintiff struck me as an honest witness. He readily made concessions even concerning matters that are against his interests as a parolee. His evidence was further consistent with the medical records and was corroborated by Mr Kangapi's to a large extent in respect of the material issue, namely whether he was assaulted by the correctional officer. Mr. Kangapi also testified boldly, and unhesitatingly made concessions concerning matters against his interests as an inmate.
- [39] To my mind the discrepancies in their accounts of the assault are to be expected given the lapse of time since the event and the individual perspectives of each. By all accounts the plaintiff was traumatized and crying loudly and was also, according to Mr. Kangapi, under a table at the time of the assault with only his legs exposed.
- [40] Although only a single discrepancy in a statement made by Mr. Buyani in the internal investigation initiated against him was put to him under cross examination to defend (this concerning him having stated in the affidavit that he immediately took both inmates to the hospital to be examined according to the standing order protocols after he dealt with them

in his office, his statement presented in the official investigation is dramatically different from his evidence given in court that this only happened much later in the morning by reason of the fact that he could not leave the section earlier. It also differs significantly in that in the statement he acknowledged that the plaintiff came to his office already injured whereas in his oral testimony he and his colleague Mr. Magidwana both sought to create the opposite impression.

- [41] I quote from it to give a context to a concern that he was either misleading the court, or the Department in its official investigation against him:

“I interviewed them in the office and I noticed a slight injury on the left cheek of inmate Kangaphi and I took them to inside hospital immediately after having interviewed them because inmate Maliwa informed me about his sore foot. Upon arrival at the hospital he changed the story and said he was assaulted.”

- [42] There were several other aspects of his testimony and his claims as an officer as to how he officially dealt with the matter that do not align with the official records of the prison. He put the discrepancy regarding the time at which he supposedly took the plaintiff and Mr. Kangapi to the hospital to be examined down to a mistake on the part of the deposing officer, Mr. Javu's, but the latter was not called by the defendant to deal with the obvious conflict.
- [43] Other anomalies (or stark differences) between Mr. Buyani's testimony and the department's official records introduced into evidence as Exhibit “A” were also not cleared up by any explanation by the Department that is responsible for the care of prisoners under its guard. The official report of the security official, Mr. Melamane, excludes any indication that there was a gang related incident or that the plaintiff was supposedly assaulted after the fact by gang members, this being Mr. Buyani's version when he testified. Although naming Mr. Kangapi as a perpetrator (who is noted in the report to have punched the plaintiff with a fist after the two of them had a quarrel) the security report confirms

additionally that the plaintiff was indeed taken to the official's office and beaten under the foot with a tonfa. (The report also happens to confirm the plaintiff's testimony that he suffered a facial injury as well).

- [44] A complaint register, albeit dated 21 August 2021, recorded that the plaintiff was assaulted “by officials” and wished to make a case. It was not explained why he was not afforded an audience with the police officer to do so.
- [45] The particular page of the hospital's clinic notes which would have indicated exactly what time the plaintiff was examined and whatever else was recorded in the staff's clinical notes was not photocopied and the court's directive to the Department to bring the original documents to the court so that the reverse page could be read in was not complied with.

- [46] One would have imagined, given the defence mounted by the defendant, and the lawful obligation on it to maintain the safe custody of inmates under the Department's care (and to give an official account therefor), that the Department would have gone out of its way to deflect any indication of wrongdoing on the part of Mr. Buyani if that were the case, but several gaps were left wide open, leaving it to be plausibly inferred that there was indeed a contemporaneous complaint against him and that it arose by virtue of him having beaten the plaintiff as claimed by the latter. The further implication of it all is that testimony presented by the defendant, inconsistent with the pleaded case as well, falls to be rejected as untrustworthy.
- [47] The strange nature of the assault on the plaintiff further supports the probability of a secret assault, or one that could not easily be detected afterward.
- [48] I point out incidentally that the further suggestion that Mr. Kangapi would falsely implicate Mr. Buyani by his testimony because he was angry concerning the revocation of his parole, was refuted by counsel placing on record that Mr. Kangapi's decision to testify on the plaintiff's behalf had preceded the revocation. Mr. Kangapi's unchallenged evidence further is that he was regarded in prison as a "model prisoner".
- [49] Mr. Radebe who would have been able to provide an official account of his involvement (confirmed by the fact that he also made a statement in the investigation consistent with the plaintiff's case that he had called out to him in passing to report that he had been assaulted and wanted to be taken to the hospital) was surprisingly not called by the defendant.
- [50] In the result I am satisfied on balance of probability that the plaintiff has met the burden on him to establish that he was assaulted by Mr. Buyani under the circumstances claimed.
- [51] In the result I make the following order:
1. The defendant is liable to compensate the plaintiff for such damages as may be proven or agreed arising from the assault upon him at the West Bank Correctional Centre on 13 August 2021 by a correctional official, Mr. Buyani.
 2. The defendant is liable for the costs of the action.

B HARTLE

JUDGE OF THE HIGH COURT

DATES OF HEARING 9 November 2023 & 6 & 7 February 2024 DATE OF JUDGMENT 22 February 2024
Appearances: For the plaintiff: Ms. T Mabuza instructed by S. Magobiane Attorneys Inc., East London (ref. Mr. Magobiane). For the defendant: Mr. M. Mayekiso instructed by the State Attorney, East London (ref. Ms. Isaacs).

- [1] It is to be noted that the defendant failed to comply with a directive I issued during the conduct of the trial to bring the

original records to court.

[2] What was put to the plaintiff under cross examination in this respect was patently inconsistent with the defendant's pleaded case.

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