

SOUTH AFRICA / JUDGMENT

Minister of Correctional Services v DW (CA43/2019) [2021] ZAECHGC 21 (10 February 2021) [2021] ZAECHGC 21

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B Hartle, T Malusi

CASE / FILE NUMBER

CA43/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No. CA43/2019

In the matter between:

THE MINISTER OF

CORRECTIONAL SERVICES Appellant

and

D[...] W[...] Respondent

APPEAL JUDGMENT

HARTLE J

- [1] The appellant, an inmate at the St Alban's Medium B correctional centre ("the prison"), appeals against a judgment of the magistrate's court in Port Elizabeth pursuant to which it found in favour of the respondent (the plaintiff in the court below) in a nuanced action for damages premised upon an unlawful body search at the prison (amounting in the circumstances to an assault of a sexual nature) and awarded him damages in the sum of R90 000.00, costs on a special scale, and interest.[1]

- [2] The respondent pleaded in his particulars of claim that the offender, one Mr. Khum, a correctional official employed by the Department of Correctional Services (“the Department”), had, in the course of subjecting him to a routine body search at the back gate of the prison on 11 December 2012 upon returning to his cell after work, indecently and roughly searched him in the presence of his fellow inmates and other officials. It is alleged that he touched, rubbed, and felt the plaintiff’s buttocks, in between his buttocks in the anal area, and also touched, rubbed, and felt his scrotum and penis.
- [3] The plaintiff pleaded that, apart from the fact that the incident violated his common law and constitutional rights to dignity and privacy, that the search was conducted contrary to the provisions of Chapter 14 of the Department’s B-Orders.
- [4] As a result, he suffered an injury to his testicles which necessitated medical treatment. He was humiliated; degraded; his dignity and privacy were violated; he suffered emotional shock; trauma, and psychological injury. The damages claimed (in the sum of R100 000.00) was to appease him for the violation of his physical and mental integrity in all the circumstances.
- [5] The appellant admitted that the plaintiff had been subjected by Mr. Khum to a physical body search on that day but justified that it was necessary “... in order to avoid the inmates from smuggling dangerous weapons into the cells and thereby endangering the safety of other inmates”.
- [6] He pleaded further that the search had been conducted in a decent manner as provided for in Chapter 14 of the Department’s B-Orders and with due regard to his common law and constitutional rights to dignity and privacy.
- [7] The respondent was put to the proof of the claimed assault.
- [8] Also placed in contention was the allegation that the respondent was injured pursuant to the search.
- [9] The appellant admitted however that on 14 December 2012 the respondent had attended at the prison hospital and had complained of injuries to his testicles as a result of a supposed vigorous search by employees of the appellant. However, so the appellant asserted, no obvious injuries or swelling were detected, but the respondent was nonetheless given painkillers to deal with the problem that he was complaining about.
- [10] Ostensibly in a further bid to negate that the Department’s medical records of December 2012 gave credence to the respondent’s allegation that he had sustained an injury as a result of the search, and in amplification of his denial that this was the case, the appellant alluded to a prior injury which the respondent had suffered

to his testicles (also reflected in the hospital's records) and for which he had been treated on 19 November 2012. These records (which confirm that he had then reported that he had injured his testicles while he was getting out of bed) suggested, so the appellant pleaded, that the injury the respondent presented with on 14 December 2012 must be one and the "same problem" as earlier reported by him on 19 November 2012.

[11] Only two witnesses testified at the trial, the respondent himself and Mr. Khum. The medical records of the prison were also entered into evidence (Exhibits "A", "B" and "C"

respectively). The focus in them is on three sets of entries dated 12 and 14 December 2012 (a few days after the alleged assault); 19 November 2012 (the prior medical event); and 1 November 2013, (the consequent medical event). Exhibit A was introduced by the respondent and the latter two exhibits were relied upon by the appellant during the cross examination of the appellant.

[12] It is apposite to outline each of the entries so that the context is understood:

Exhibit A:

"12.12.12 15h00 Complaining of paining testicles from yesterday after he was searched. O/E left testicle a bit swollen. Also c/o burning micturition and experience difficulty in passing urine.

14.12.12

Scrotal injury – post vigorous search by members. No obvious injuries/swelling [P] Analgesia. Review if not better

in 2/52

14.12.12 10h00 Patient seen by Dr G335B sent to chemist for brufen and paracetamol."

Exhibit B:

"12.11.19 09h20 c/o hurt his testicle – LE while he was getting out of the bed. +- 3 days ago. Urinalysis. Leukocytes -+

? Infection

RX Ciprobay 500mg stat

Amoxly 500mg tabs 7/7

Panado X10"

Exhibit C:

"3013/11/01 09h30 Came in to clinic with severe pain supra pubic pain spread to left side testical. BP 102/71. Pulse

84. Temp 36.4. Tender on palpation supra pubic. Left testical slightly swollen. Urine : Blood ++ +. Protein ++. Leucocytes large. Phoned Dr Mahleza Livingstone Hospital casualty. Treat for orchitis. No need for referral. For Voltaren imi stat Ciprobay 500mg. BD 07. Brufen 400mg

TD 5 D7. Dolorol 2 a/d prn for pain. Urine for MC5 prior antibiotic. If swelling getting worse in 3 days refer to Livingstone. Admission arranged with Ntonga. I explained to Sr Ntonga. Inmate just passed +50mls of urine for testing. Suffers of difficulty in passing urine therefore I cannot keep the inmate at the clinic as to obtain a urine specimen as she has requested.”

- [13] In summary the plaintiff claims that on 11 December 2012 he was returning to the cells after spending the day painting an office and a store. He had been allocated painting responsibilities since 2013.
- [14] He encountered Mr. Kuhm at the search point. The latter put his hands into his backside and between his bum cheeks. He also purported to search him on the front side on his private parts. He pulled his testicles. He demonstrated a grabbing and pulling motion. Mr. Kuhm did not want to let go. He pushed his hand aside and told him that he was hurting him. After the incident he needed to stand for about five minutes in order to regain his composure. He again emphasized to Mr. Kuhm that he had hurt him. He experienced the pain as excruciating. He also felt humiliated. His experience was that he had been treated like an animal or like someone without rights.
- [15] After the search he took a shower, had a nap, then went to lunch.
- [16] It was only the following morning that he felt a need to consult at the clinic. This was both because he observed that his left testicle was swollen and also because he was in pain worse than he had felt at the time of the search the day before.
- [17] At the clinic he saw a lady name Palasela. She did not examine his genitals and gave him medication for pain. Later he saw someone else. He appeared to be confused about the sequence of clinic/hospital visits. He also referred to a further admission to hospital for the same problem in 2013. He was however led by his counsel only in respect of Exhibit A which he agreed constituted a proper recordal of his interaction with the medical staff in

December 2012.

- [18] Most significantly it appears from Exhibit A from the acronym “O/E” {on examination} followed by the words “left testicle a bit swollen” that apart from the history and symptoms provided by

the respondent upon his visit to the clinic that there was an independent examination of him by the medical staff which evidenced a slightly swollen testicle that was consistent with his report of being vigorously searched the day before.

- [19] After this incident he laid a criminal complaint against Mr. Kuhm. The investigator sought to dissuade him from proceeding therewith citing the fact that Mr. Kuhm is an old man (and was on the point of retiring), but he persisted with the complaint because he perceived it to be a “lifetime injury”. (The aspect of the charge laid, and these subsequent events, were not challenged by the appellant.)

- [20] Under cross examination he denied that Mr. Kuhm was either familiar to him (he claimed it was the first time he had been searched by him) or that he had purportedly found a dead chicken on him when he searched him. He stated that he had an A-Group status because of his good behaviour and appeared to be fastidious about maintaining such a status.
- [21] He conceded that his testicle had also been sore on a prior occasion as was evidenced by Exhibit B but was adamant that the problem on that occasion was due to a bladder issue.
- [22] Exhibit C introduced by the appellant related to the period that he was hospitalised for two weeks and which he considered flowed from the search of 11 December 2012 and the injury to his testicle.
- [23] Mr. Kuhm denied the indecent assault. He claimed to know the respondent fairly well and to have chatted to him before. He conceded that he would not need to search someone in the manner contended for by the respondent.
- [24] Despite attending to approximately 100 – 200 routine searches a day to look for illegal articles he could recall in this instance that the respondent’s “front” when he searched him on the day in question was bigger and that when he pulled up his shirt, he had found a dead chicken on him. Asked what he did next he replied that the respondent went back to his cell and that he took the chicken back to where it belongs, viz the chicken project.
- [25] He acknowledged that a search of an inmate involving the touching of his genitals would be both unnecessary and wrong because it would injure him.
- [26] He claimed that the respondent came in daily with the chicken project and not with the painting team. He denied that the respondent was allocated to the painting work team. Despite the intimation to the respondent during cross examination that evidence would be led to suggest that he was misleading the court about his work allocation, this was not forthcoming.
- [27] He suggested that inmates bringing in chickens at the search point (amongst other contraband items) were not always charged.
- [28] Under cross examination he acknowledged the processes in the B-Orders in respect of the finding of contraband items in the possession of inmates and the need to properly record such articles found. In this instance though he claimed that he did not make an entry because the chicken could not be stored. He also denied that his actions in dealing with the purported discovery of the chicken was in breach of the B-Order Register. Under re-examination he suggested that the B-Orders were rather just guidelines to correctional officials and that they were not required to apply them to a “T” so to speak.

- [29] In its judgment the trial court recognized that the issue between the parties was whether the purported untoward body search as contended for by the respondent had occurred at all and found on the facts that it had. It also found objective support for the fact of the assault on 11 December 2012 in Exhibit A. It further found that the injuries recorded (Exhibit C) in 2013 probably arose from the “same problem”.
- [30] One of the grounds of appeal is that the magistrate failed in his duty to weigh up the probabilities of the mutually destructive versions, and to assess the credibility of the two witnesses.
- [31] Although the magistrate’s reasons were haphazardly stated in the judgment, I do not agree with this submission.
- [32] To the contrary both the probabilities and issues of credibility were fairly given consideration.
- [33] Firstly, since Mr Kuhm conceded that a search of the nature described by the respondent, if it had happened, would have been unnecessary exactly because it could cause injury to the respondent’s private parts, the trial court found it more probable than not that because the respondent was found on examination on 12 December 2012 to have a swollen testicle (and was prescribed medication), that this must have had a connection with the claimed indecent search the preceding day. The nature of the injury itself was further suggestive of or consistent with his claim of an indecent search.
- [34] Secondly, he disbelieved that Mr. Kuhm had found a chicken in the respondent’s possession when he searched him. This conclusion was based on the fact that the latter had conceded (despite his number of years of experience and senior status as a supervisor of security at the prison) that he had not complied with the Department’s B-Orders in recording the purported find or its alleged handover. (I should add that he testified that he handed it to some nameless person in the Chicken Project who should equally have been obliged in my view to record its reception). This is simply another way of stating that it is improbable that the respondent could have been in possession of anything contraband warranting a robust search of him in the first place.
- [35] Thirdly, there was nothing to gainsay the respondent’s assertion that he had not been suffering from any of “these sicknesses” (that is arising from an injured testicle) before the complained of search.
- [36] Although the magistrate does not say so pertinently it is plain that he concluded that the respondent’s version was believable and more probable than Mr. Kuhm’s.
- [37] I should point out that the assertion regarding the contraband found on the respondent as a means of justifying the search was not raised on the pleadings at all. Indeed, the appellant did not deny that a routine search had occurred as pleaded by the respondent or suggest that the search was instead motivated by a suspicion that the respondent had been found in

possession of something contraband. If it were true that the respondent had come in from the chicken project carrying a dead chicken which he had hid in the front of his trousers (the version Mr. Kuhm testified to), one would have expected

the appellant on such a version, especially against a claimed fabricated accusation against Mr Kuhm, to have pleaded pertinently

that a dead chicken was found on his person as this might explain his injuries. It might also suggest a basis for a false accusation against Mr. Kuhm because the respondent had at the time of the search supposedly breached the prison rules by bringing in a contraband item.

[38] I am not surprised that the trial court regarded this supposed find as a ruse.

[39] I am further satisfied having regard to the record that the respondent's evidence was consistent and logical. He maintained his version under cross examination. There were no material contradictions. The only claimed deviation from his evidence in chief seemed to relate to an issue about a shortage of staff at the hospital (as a reason why he had not seen a doctor as opposed to a nurse) that he had purportedly mentioned in his evidence in chief, but a holistic reading of his narrative suggests that there may possibly have been a misinterpretation by the translator of what he had related in this respect. (This was quite evident too from the confusion around the sequence of medical events including his

hospitalisation which in the narrative appear to have been conflated but was clarified ultimately by his counsel regarding the seminal entries in the medical records of December 2012.) He was quite firm in certain of his statements, yet was respectful and co-operative in his demeanour, even under cross examination.

[40] His testimony was corroborated by the objective documentary evidence with particular reference to Exhibit "A". His reference to the later visit to the clinic recorded in Exhibit C arose merely co-incidentally and not to prove causality as it were or to boost his claim. He also had no hesitation in confirming Exhibit B but was firm that that visit related to a problem that he had had with his bladder. He was clear that this was a different body part to his testicles.

[41] The evidence of Kuhm was plainly and definitively contradicted by the objective documentary evidence. It would be absurd to suggest that the recordal of the respondent's injury and treatment administered in Exhibit A in the appellant's own records falls to be questioned.

[42] There is also the lack of recordal in the Department's internal registers of the discovery and confiscation of the alleged dead chicken found on the respondent's person. I have to an extent dealt with this aspect above. It is implausible in my view, if it were true, that the respondent would not have been charged in relation to the claimed contraband find by Mr. Kuhm.

- [43] In the result I am satisfied that the record bears out that the respondent was a credible and reliable witness and that the probabilities favoured his version. The same cannot be said of Mr. Kuhm.
- [44] It was appropriate in the result that upon due consideration of all the evidence and adopting the usual approach to a disputed factual issue that the defendant's version should have been rejected where it conflicted with the respondent's. There is therefore no warrant in my view for this court to interfere with the trial court's finding on appeal.
- [45] I deal briefly with the appellant's second ground of appeal, which is that the magistrate erred in refusing his request for a postponement to allow him to call an expert witness. The ostensible purpose of such testimony, after the respondent had closed his case, was in effect to challenge the latter's credibility and to negate his casual testimony that the injury caused to his testicles on 11 December 2012 was linked to a reoccurrence thereof in October 2013. What had happened after the fact was however certainly not the thrust of the respondent's case. Indeed, the summons was issued months before his visit to the clinic recorded in Exhibit C. The respondent had further quite co-incidentally raised the issue of his hospitalisation later on in 2013 in his evidence in chief and merely stated his belief that this had a connection with the injury occasioned to his testicles by Mr. Kuhm on 11 December 2012.
- [46] Had the amendment been allowed, and the expert evidence sought to be rallied disproved a connection between the two events, then what of it? At best for the appellant, it would have established that the respondent's lay opinion was wrong and even if the expert testimony sought to be introduced at the late stage established that the respondent was prone to orchitis, the respondent's clear testimony of the rough and indecent search on 11 December 2012 and the objective recordal that on examination on the 12th one of his testicles appeared swollen would remain.
- [47] In any event, the magistrate was correct in my view to dismiss the ill-conceived application for a postponement. No clear or satisfactory reasons were advanced of the circumstances that rendered the supposed expert testimony relevant or what its effect would be. The application was further brought at an extremely late stage after the respondent had already testified and his credibility exhaustively tested.
- [48] The third and final ground of appeal is that the quantum award is excessive. Without putting up any comparative analysis of like awards, the appellant merely suggests that an award of R20 000.00 would be fair and just to the parties.
- [49] Even though the magistrate ostensibly also took into account the "sequelae" of the respondent's injury occasioned to his testicle on 11 December 2012, namely that he had to be hospitalized in 2013, the violation of the respondent's rights remains an egregious one. In this respect the following features are important to bear in mind: The respondent, being a

sentenced offender, was under the care of and vulnerable to Mr Kuhm and the other correctional officials in question; the search was conducted in public and full view of others; the assault was of a sexual nature; the injury suffered by the respondent (as recorded in Exhibit A) was of a serious nature on its own; the incident had caused the respondent to feel like an “animal”, “someone who does not have rights” and “less of a human being”; the grave infringements of the respondent’s constitutional and private law rights; and the fact that the appellant had offered no apology to the respondent to ameliorate the harm caused to him.

[50] In the circumstances I am not persuaded that there is any basis to interfere with the magistrate’s discretion in this respect.

[51] In the result I issue the following order:

1. The appeal is dismissed with costs.

B HARTLE

JUDGE OF THE HIGH COURT

I agree,

T MALUSI

DATE OF HEARING: 12 June 2020

DATE OF JUDGMENT: 10 February

2021

*Judgment delivered electronically on this date by email to the parties.

APPEARANCES:

For the appellant: Mr. D S Bands instructed by State Attorney care of N T Vuba Incorporated Attorneys, Grahamstown (ref. Mr L Potgieter).

For the respondent: Mr. A Moorhouse instructed by Egon Oswald Attorneys care of Netteltons Attorneys, Grahamstown (ref. Mr Oswald).

- [1] I suspect that the magistrate’s order mistakenly omitted to reflect interest on the damages award. This was not raised by way of a counter-appeal, but I am sure that the omission is easily capable of rectification by agreement between the parties.

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