

SOUTH AFRICA / JUDGMENT

Tyatya v Minister of Correctional Services (1850/2010) [2014]

ZAECPEHC 8 (21 February 2014)

[2014] ZAECPEHC 8

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N G Beshe

CASE / FILE NUMBER

1850/2010

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE – PORT ELIZABETH)
CASE NO.: 1850/2010

In the matter between:

CHRISTIAN SIKHOLELO
TYATYA
Plaintiff
And
THE MINISTER OF CORRECTIONAL SERVICES
Defendant

JUDGMENT

BESHE J:

- [1] Plaintiff is suing the Minister of Correctional Services for damages arising from three incidents of assault upon him by fellow inmates whilst he was an awaiting trial prisoner at St Albans Correctional Centre, Port Elizabeth. The Minister of Correctional Services, (the defendant) is sued in his official capacity as the Head of Department of Correctional Services under which the correctional centre in question falls under. Plaintiff's claim is for a globular amount of R500 000.00 for general damages in respect of pain and suffering, shock, trauma, loss of amenities and disfigurement.

[2] Plaintiff's claim is premised on the basis that the employees of the defendant failed to take steps as are necessary to ensure his safe custody and the maintenance of security and good order of the prison as required by the Correctional Services Act 111 of 1998 (the Act). (see paragraph 20 of plaintiff's particulars of claim) That the defendant's employees failed to comply with the duty imposed on it by the Constitution, inter alia, section 12 (2) (b) thereof which requires the defendant to protect the rights of the plaintiff to bodily and psychological integrity of his person. That the employees of the defendant acted unlawfully and negligently in breach of their statutory duties, in that they failed to exercise due and proper care in the performance of their duty to safeguard the plaintiff while he was incarcerated. (paragraph 22 of the particulars of claim) Alternatively that the employees of the defendant acted unlawfully and negligently in that they failed to prevent and or stop the plaintiff from being assaulted on all three occasions when they were under the legal duty to do so and were reasonably able to do so. (paragraph 23 of the particulars of claim)

[3] Plaintiff pleaded that as a result of defendant's employees' statutory breach, alternatively negligent conduct he

suffered damages arising from the three instances of assault.

[4] In his plea, the defendant admits that the plaintiff was assaulted on three different occasions but does not admit that the assaults were wrongful, unlawful and intentional, alternatively that plaintiff contributed to the said assaults by participating

therein. Further that plaintiff was assaulted by his fellow inmates because he had participated in illegal activities which involved the exchange of money between him and the said fellow inmates and the assault was as a result of those activities. It was admitted on the part of the defendant that the employees of the department concerned have legal obligations in terms of the Correctional Services Act and the Constitution and the defendant is vicariously liable for wrongful acts committed by the department's employees during

the course and scope of their employment, but pleaded that the employees of the defendant took all reasonable steps to safeguard the plaintiff. Alternatively that the employees of the defendant did not foresee and or could not reasonably have foreseen that the assault was going to take place, further alternatively, that they could not prevent the assault and or could not reasonably be expected to have prevented the assault from happening in the circumstances. (I take it this applies to each of the three assaults)

[5] Despite defendant pleading in the manner detailed above, it is only the plaintiff who led evidence. Plaintiff testified in support of his claim. The defendant closed its case without leading any evidence. It is trite that the purpose of pleadings is to define the issues in the litigation and to enable the other party to know what case it has to meet. The defendant having pleaded that its

employees took all the reasonable steps to safeguard the plaintiff, or did not or could not have foreseen that the assaults will take place, suggested that plaintiff was the author of his misfortune and imputed contributory negligence on his part, failed to lead evidence to support his plea. Mr Jooste, who together with Mr Simoyi appeared on behalf of the defendant, argued that plaintiff relied on bold allegations about what obligations the defendant had in terms of the Constitution and the Correctional Services Act to impute negligence on the part of the defendant. Further that the plaintiff did not place any evidence before court in this regard and argued that the defendant did not have a case to answer.

[6] I have already alluded to what was pleaded by the plaintiff in his particulars of claim. I will now go on to summarise his evidence in the light of what was pleaded by him and the defendant.

[7] According to the plaintiff, he was held at St Albans Correctional Facility from October 2005 as an awaiting trial prisoner. On the 16 September 2007, whilst still held at the said facility and whilst helping out in the prison kitchen when breakfast was being served to 200 and 300 prisoners, one Wonder Tini, a fellow prisoner stabbed him with an Okapi knife. One of the four to five warders who were present at the time intervened. As a result of the stabbing he sustained three stab wounds to his left upper arm. As a result of the stabbing he received treatment that comprised of ten stitches (6, 2, 2) respectively. He was however not given any medication. Photographs depicting scarring to his upper arm were produced. Plaintiff testified that as a result of the stabbing he was scared and felt unsafe. To this end he requested Mr Sampson, a prison head, to move him to the section with single cells, known as Kulukutu. His request was turned down. He testified that he can use his left arm but at times it feels numb and weak and suffers pain now and then which he ignores.

[8] Regarding the second incident, plaintiff testified that, on the 13 April 2008, he was helping out in the prison kitchen during meal time. He was attacked by two inmates with a stone/rock and a broken water tap fitting respectively. Both objects were covered with a cloth. Prison warders intervened and he managed to run to the office. As a result of the assault he sustained injuries to

his head which required stitching. He was also hit on the body. After this assault he once again felt unsafe and scared. He once again requested that he be moved to a single cell. He was told that the single cells were full.

[9] The third assault took place on the 19 November

2008. On this occasion, plaintiff testified that he was working in the court yard at B section of the prison. When it was announced that it was meal time, he proceeded towards his cell in order to leave his

jacket and put the spade he was using away. As he was walking back from his cell towards the office, still having the spade in his possession, he felt someone grabbing him from behind and stabbing him repeatedly with a knife. He used the spade to retaliate. He had by then been

stabbed by yet another inmate on his back, ear, arm, head and finger. Some of his injuries were stitched. As a result of the assault he once again felt scared and unsafe. He once again requested that he be moved to single cells. It was only after making a formal application in this regard that he was moved to single cells.

[10] In respect of all three attacks on him, plaintiff had not had any prior dealings with the attackers and does not know the reason or motive for the attacks.

[11] According to him, before the first attack a search of the cells has occurred some two to three weeks before the attack on him. A month had elapsed after the cells were searched when the second attack took place. Regarding the last attack which took place

on 19 November 2008 the cells were last searched at the end of October. He testified that no regular searches of the prisoners took place. That it is only those coming from courts that are searched daily. He testified that he was still suffering from the sequelae of the assaults in that he is not the same person he was before the assaults.

[12] It is common cause that the plaintiff was sentenced to fifteen years imprisonment on the 2 October 2009.

[13] During cross examination by Mr Jooste, he conceded that awaiting trial prisoners were treated differently from sentenced prisoners in that they can receive visitors every day, are allowed to get food from outside prison every day. Go out to attend court proceedings outside the prison. That he had been in custody for approximately twenty three months before the first attack took place. He conceded that prison staff did everything possible to stop the attacks from continuing by intervening as this was their job. He conceded that he did not anticipate the attacks and that no one could because he does not know what motivated the attacks and that he was not a member of a prison gang. He testified that many inmates get attacked in prison.

[14] The issue to be decided is whether the employees of the defendant acted negligently, and whether their negligence caused or resulted in the attacks on the plaintiff or breached their statutory duties. As to what happened on those three occasions, when

he was attacked, plaintiff's evidence stands uncontroverted.

[15] Section 4 (2) (a) of the Correctional Services Act 111 of 1998 (the Act) provides that "The department must take such steps as are necessary to ensure the safe custody of every inmate and to maintain security and good order in every correctional centre".

Section 26 which deals with safe custody provides that:

"(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 of 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.”

[16] Section 134 of the Act empowers the defendant to make regulations as to, inter alia, the safe custody of inmates and the maintenance of good order, discipline and security in correctional centres. The said regulations were issued on the 30 July 2004 per Regulations Gazette number 8023. Regulations 15 and 16 deal with safe custody and searches respectively.

[17] The manner and frequency of the searches referred to in regulation 16 is set out in the standing orders that are issued in terms of the Act. In terms of these orders, searching of prisoners, their possessions and cells is one of the most important aspects in ensuring a safe and secure environment in prison for both correctional officials and prisoners. According to these orders, both

the prisoners and their cells must be searched daily. Prisoners must also be searched when moving from and to any section of the prison.

[18] In casu, if regard is had to plaintiff’s evidence, attacks on inmates occur frequently. Searches of inmates and cells only take place once every two to three weeks or after a month. Clearly, in the circumstances this amounted to a negligence and or breach of their statutory obligation on the part of the employees of the defendant. Can it be said that the omission on the part of the employees of the defendant unlawful? In *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 SCA, Nugent JA stated as follows at paragraph 12:

“Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court, namely, whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.”

[19] In casu, defendant's employees failed to conduct regular searches of inmates and their cells as is required and in circumstances where attacks to inmates are common place. As a result they could not detect that the assailants of the plaintiff were armed with different objects on all three occasions when he was attacked, as a result of which he was assaulted. Put differently had regular searches as required by the standing orders issued in terms of the Act been carried out, the assaults on the plaintiff would have been averted.

[20] Mr Jooste suggested that the rules applicable to or treatment of convicted prisoners differs from that of awaiting trial prisoners. In respect of the latter category, the rules are applied with less evasiveness because they are presumed innocent. However, in reply to plaintiff's request for further particulars for trial – to a question relating to, inter alia, the measures taken by correctional services officials to ensure that no offenders were in possession of weapons or other dangerous articles, defendant responded as follows:

“The defendant applied the standard practise and procedures as prescribed in the Correctional Services Act 111 of 1998 and the Regulations thereto.”

I have already alluded to what the Act and the Regulations provide. Mr Jooste's submission also loses sight of the fact that the Act applies to both convicted and awaiting trial inmates. This is also apparent from the definition of an inmate for purposes of the Act. An inmate is defined as meaning “any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility or who is being transferred in custody”

[21] I am satisfied on the evidence before me that the defendant through his employees is liable for the injuries that were suffered by the plaintiff on the three instances when he was attacked by his fellow inmates. I am satisfied that the prison officials were negligent in the performance of their obligation to provide a safe environment for the plaintiff.

[22] As indicated earlier, plaintiff's claim is for an amount of R500 000.00 as general damages in respect of pain and suffering, shock, trauma, loss of amenities and disfigurement. In assessing what would be a fair and reasonable award in the circumstances to both parties, I will be mindful of what Watermeyer JA said in *Sandler v Wholesale Coal Supplies Ltd* 1941 AD namely that “It must be recognised that though the law attempts to repair the wrong done to the sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case”. Ms Rawjee who appears for the plaintiff submitted that an award of R300 000.00 would be a fair one given that the plaintiff was assaulted on three occasions. Apart from being stitched he was not given any other treatment on all three

occasions. He still suffers from pain, especially on his arm.

[23] Mr Jooste who had prayed for dismissal of plaintiff's claim or absolution of the defendant, submitted that should I find for the plaintiff, and in considering an appropriate award for damages, I must consider the following factors:

Plaintiff's injuries did not require admission to a hospital.

No treatment other than stitching was administered, therefor his injuries must have been superficial wounds.

There were no broken bones.

There was no evidence of trauma suffered by the plaintiff, or severe pain. He submitted that an award of less than R100 000.00 will be appropriate.

[24] I was referred to a number of cases, albeit not for awards that were given therein. I will have regard to an award given in one of those cases for purposes of guidance and

comparison. In that matter:

Klass Britz v The Correctional Services Case Number 2838/09 Dambuza J awarded the plaintiff R50 000.00. The plaintiff in that matter was also stabbed by a fellow inmate and sustained three lacerations of about 4cm each on the face. The wounds were treated with forty sutures and a dressing. The plaintiff in that case was given pain tablets. Plaintiff in casu was attacked on three occasions. On the second occasion by two attackers with a rock and water tap fitting. Twice he was stabbed

with a knife. He was not given any pain medication. In my view the attacks on him were much more serious than the attack on the

plaintiff in the matter Dambuza J dealt with.

[25] Having considered all the factors referred to above, I am of the view that an amount of R120 000.00 would be a fair and reasonable award for damages suffered by the plaintiff in the hands of the defendant.

[26] Judgment is accordingly granted in favour of the plaintiff against the defendant for:

1. Payment of the sum of R120 000.00 as and for general damages.
2. Interest on R120 000.00 at the rate of 15.5% per annum, from fourteen (14) days of this order to payment thereof.
3. Cost of suit such costs to include the costs of two counsel.

N G BESHE

JUDGE OF THE HIGH COURT

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