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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

(4) 17/10/2016.

CASE NO: 16184/2011

17/10/2016

TAKALANI NELUHENI — **PLAINTIFF/ RESPONDENT**

and

THE SOUTH AFRICAN CUSTODIAL MANAGEMENT — **1ST DEFENDANT**

P G MAKWEA — **2ND DEFENDANT**

JUDGMENT - LEAVE TO APPEAL

KHUMALO J

[1] Applicants seek leave to appeal to the Supreme Court of Appeal, against the whole of the judgment of this court upholding the Plaintiff's claim against the 1st and 2nd Defendant, the order and reasons of which were delivered on 26 April 2016 and 13 May 2016 respectively, and upon which corrections in terms of Rule 42 (1) (b) of the High Court Rules were effected on 20 September 2016.

[2] The court is implored, when considering the Application to have due regard to whether or not there are prospects that the Judges of Supreme Court of Appeal would take a different view, therefore find that the court erred in its assessment of facts or its application of the law to the facts.

[3] The Applicants/ Defendant in the trial action conceded that the test whether there is a reasonable prospect of success on appeal is the same in criminal as it is in civil cases. The parties are hereinafter referred to as cited in the trial action.

[4] The Defendants' overall view of the court's Judgment as raised in their heads of argument is that it is not fair, lucid or well-reasoned.

[5] A special mention was then made of an averment in the Defendants' Plea that "the Plaintiff was serving a sentence of life imprisonment for rape and murder", to be an innocent *plus petitio* with no consequence that the court elevated to a falsehood. It is a fact that the allegation is false. The court therefore did not elevate the allegation to a falsehood. The false allegation was never retracted despite the Defendant conceding during the trial that its incorrectness was known at the time of pleadings. The Defendants allowed the matter to proceed on that basis, with the false allegation as part of its *facta probanda*.

[6] During the cross examination of the 2nd Defendant, a report which referred to the Plaintiff as "one of the dangerous offenders whom under any circumstances can kill or attack the officer to a regretful situation hence the said incident" was mentioned whilst questioning him on the allegation in his Plea that Plaintiff is a convicted murderer. It is therefore not true that the parties were not given a chance to deal with the issue during trial. Even then the Defendants did not move for an amendment of their Plea. Parties are bound by their pleadings.

[7] As to the allegation that the court did not understand the difference between an onus to begin and burden (onus) of proof: the Judgment dealt extensively with the issue of the burden of proof, as a matter of substantive law, its applicability and effect to the duty to begin, including how the parties themselves had decided to deal with the duty to begin.

[8] The allegation that the court imputed that the Defendants' Plea constituted an admission of guilt is unmerited. It is clarified in the Judgment that the Defendant had the onus to prove that the assault or the application of force (as Defendants refer to it) on the Plaintiff was justified (dealing with unlawfulness). It would not have been expected of the Defendants to do so if the court regarded their Plea to admit that the application of force was unlawful. The court also noted the Defendants' cautiousness, not simply admitting to assault, that it was because of the inference that arises from the word assault that imputes that the act itself is unlawful. Therefore there was no misconception about what the Defendants were admitting in its Plea. See Judgment [9] – [15].

[9] Now I turn briefly to deal with the grounds of appeal, raised in the notice of appeal, almost all of which are on the facts.

> [9.1] The court is alleged to have erred in finding that the Plaintiff was assaulted by the Second Defendant and other custodial officers in respect of an assault not pleaded by the Plaintiff in his particulars of claim and of which the Defendant were not warned and therefore did not plead to. The court did not find any problem with Plaintiff's particulars of claim. He only had to set out his cause of action detailing the essentials or basis of his claim and not detail all the supporting facts which are a matter for evidence.

Evidence must not be pleaded; see *Durr v S.A. Railways and Harbours* 1917 C.P.D. at p. 287 and *Osman v Jhavery and Others* 1939 A.D. 351. Plaintiff therefore in his particulars of claim did not give all the details of the assault on where exactly was he assaulted but did so in his testimony. In *Beck's Theory of Principles and Pleadings in Civil Actions* 2nd Edition by I Isaacs on p33, it is stated that "There is a distinction between giving evidence of a fact and stating that fact.... Stating that a thing was done is stating a fact; giving the details of how it was done would be giving evidence of it."

[9.2] Furthermore, Dr Rambuda wrote in the medical report on the injuries sustained by the Plaintiff during the assault, that he referred the Plaintiff to the Urologist, whilst it was the Plaintiff's testimony that his testicles were also injured during the assault. Since the referral to the Urologist followed the examination on the injuries sustained during the assault, the court considered the probabilities in favour of the plaintiff's evidence very high that the injuries on the testicles were sustained during the assault. See [90] of the Judgment.

[9.3] The Defendants complain also about what they allege to have been the court's criticism for their failure to produce the video footage of the incident inside the Plaintiff's cell is unjustified. The comment made in the judgment is undoubtedly in respect of the video footage of the incident outside the cell which the Defendants' witnesses confirmed that it was recorded. It was significant especially because the Defendants were disputing the Plaintiff's version of how the assault outside the cell took place. The video footage could have settled the dispute. There is no criticism in the Judgment for failure to produce a video recording of the incident inside the cell as alleged in the notice of appeal. See [107] – [109] of the Judgment were the issue is dealt with extensively.

[9.4] The final complaint is that the court erred in drawing an adverse inference from Defendants' failure to call Nemamilwe. He is said to have been in charge of the block of cells where Plaintiff was held, to have made the call for backup to Plaintiff's cell, having been the first one to arrive at the Plaintiff's cell and found him holding the burning tissue. He is also alleged to have been found by the other officers negotiating with the Plaintiff to drop the burning tissue. He was therefore a material witness to the Defendants on whose behalf all these allegations were made. Also since there was a serious contention about what happened when the alleged assault took place in the cell, especially relating to the allegation that Plaintiff had a burning tissue that caused the whole incident. No explanation was tendered for failure to call Nemamilwe. The court also dealt with this aspect of the Plaintiff's complaint substantially in [111] of its judgment.

[9.5] In respect of all other complains raised with regard to the evidence of the Defendants' witnesses, the Judgment deals extensively with the facts as presented by the witnesses and on how the court arrived at its conclusion on each of the contentions raised by the Defendants in the Notice of appeal.

[10] On all these issues there are no prospects of another court arriving at a different conclusion. The arguments raised have no merit. The matter has no prospects of success

deserving neither the attention of the Supreme Court of Appeal nor the full bench. The issues raised are only that of fact and involve a trifling amount. They have been substantially and irrefutably dealt with.

[11] On the amendment of the order. It is common cause between the parties that the custodial officers who include the 2nd Defendant were acting within the scope and course of their employment with the 1st Defendant. As a result their actions binding upon the 1st Defendant; see *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 © 179-180. Liability was intended to be imposed upon the 1st Defendant. The amendment was effected for the reason that the order did not reflect the true intention of the court, having erroneously referred to the 2nd Defendant being liable for the payment of damages and the costs instead of the 1st Defendant.

[12] It is also stated in the judgment that although the *contumelia* and general damages were considered separately a global amount has been granted for both damages. The amendment was effected accordingly.

[12] Under the circumstances I make the following order:

[12.1] Application for leave to appeal to the Supreme Court of Appeal is dismissed with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT

On behalf of Applicant:	**Adv Du Preeze**
Instructed by:	**Coxwell, Steyn Vise & Naude Inc Attorneys** **C/O Sanet De Lange Inc** **012 362-3970** **Ref: S De Lange**
On behalf of Respondents:	**S O Ravele Attorneys** **C/O Nortje Attorneys** **015 516 2823** **Ref: S Ravele**