

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

13/5/16

CASE NO: 16184 /2011

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: <i>[Signature]</i> 13/05/2016

TAKALANI NELUHENI

PLAINTIFF

and

SOUTH AFRICAN CUSTODIAL MANAGEMENT

1ST DEFENDANT

MAKWEA

2ND DEFENDANT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Plaintiff, Mr Takalani Neluheni ("Neluheni"), an inmate at Kutama Sinthumule Maximum Prison ("Sinthumule") instituted an action for damages based on an action iniurarium against the 1st Defendant, a custodial management company that manages Sinthumule, and the 2nd Defendant, one Gary Makwea (as duly amended), a custodial officer employed by the 1st Defendant at Sinthumule, based on an *actio iniurarium*, alleging to have been unlawfully assaulted by the 2nd defendant and nine other custodial officers of Sinthumule unknown to him.

[2] He is alleging to have suffered damages in the amount of R250 000.00 consequent upon the alleged unlawful assault. [3] The 1st Defendant specializes in the operation of Correctional, Detention and Health Facilities and Sinthumule falls under its management, therefore cited as the nominal Defendant. The 2nd defendant is an area manager in one of the

Sinthumule prison's called Green Prison and is said to have been at all relevant times acting within his scope and course of employment with the 1st Defendant and in charge of what happens at the Green Prison.

FACTUAL BACKGROUND

[4] It is common cause that the Plaintiff was incarcerated at Sinthumule on a charge of rape serving a life sentence. He arrived at Sinthumule in June 2010 and was held in a cell at the Green Prison, section KD.

[5] It is also common cause that on 11 February 2011 there was an incident between the Plaintiff and a number of the 1st Defendant's custodial officers one of whom was the 2nd Defendant that resulted in the Plaintiff sustaining injuries the nature and extent of which was recorded on the J88 by Dr Rambadu, a medical officer in the employ of the 1st Defendant at a Healthcare facility located within the prison which injuries are mentioned and conceded in the Defendant's Plea.

[6] Plaintiff alleges in his particulars of claim that during that incident the 2nd Defendant and nine other custodial officers without his consent, hit him with open hands, fists and kicked him in public and on sight of other custodial members and fellow inmates. As a result of the assault he had to undergo medical treatment, suffered *contumelia* and in future will require medical treatment that will include psychotherapy. He therefore claims to have suffered damages made up as follows:

[6.1]	Future medical expenses	R50 000.00
[6.2]	General damages for pain and suffering	R100 000.00
[6.3]	<i>Contumelia</i> suffered	R100 000.00
TOTAL		R250 000.00

[7] In their Plea, the Defendants **refute the allegations of assault** alleging in brief that:

[7.1] The Plaintiff who is serving a sentence of life imprisonment for **rape and murder** was, upon being charged and found guilty of an offence of possession of dagga on 30 December 2010 on his plea of guilty, sentenced to 42 days restriction on amenities;

[7.2] Upon being informed **on 11 February 2011 that he was to serve his sentence, Plaintiff refused to be removed for that purpose, threatened to burn his cell and became violent.** Custodial officers Luvhengo, N E Munyai and T Mahladiisa together with Area Manager Makwea, Unit Managers Nemamilwe and Mathebula, all employees of the 1st Defendant assisted each other to remove the burning toilet paper from him and brought the Plaintiff under control.

[7.3] As the Plaintiff was allegedly aggressive, refusing to be handcuffed and had assaulted custodial officers Luvhengo and Munyai, minimum force was used by the officers to subdue the plaintiff, to protect the prison and defend themselves and each other against the attack by him.

[7.4] The Plaintiff as a result sustained injuries of a swollen cheek, upper and lower lips, left ankle and right side of chest, reddish eyes and bruises around the right elbow. Voltran tablets were subsequently prescribed and his right elbow and left ankle x-rayed.

[8] The Defendants deny that either they or any of its officials are liable to pay to the Plaintiff an amount of R250 000.00 or any amount at all and Plaintiff is put to the proof thereof.

[9] In a nutshell, the Defendants concede to the use of force on the Plaintiff that have resulted in the injuries he sustained. Plaintiff alleges that the injuries were sustained as a result of **unlawful** assault by the custodial officials. Once an infringement is established as *in casu* the onus rests on the wrongdoer to prove some ground of justification, since *prima facie* any infringement of the bodily integrity of another is unlawful. The issue therefore would be whether or not the Plaintiff's injuries were sustained as a result of a **deliberate act** by the Defendants to impair Plaintiff of his bodily integrity, **without a just cause**. (required to show a justifiable reason for the use of force, minimum or otherwise?) which must be shown by the Defendants.

[10] However, notwithstanding the concession in the Defendant's Plea that Plaintiff sustained the injuries as a result of use of force by the various custodial officers and also proffering an excuse for such conduct, which is that it was necessary to subdue the Plaintiff as he was threatening to burn the cell, had assaulted officers and was aggressive, the Defendants still denied that they assaulted the plaintiff.

[11] The persistence in the blanket denial of assault by the Defendant whilst admitting to the use of force, created a tricky situation to what was a straight forward issue of dispute. It resulted in the extension of issues and the broadening of the inquisitorial process by the parties. Rather than a probe only on the issue of whether or not there was justification for inflicting injuries upon the Plaintiff, the assault *per se* had also to be interrogated. As a result it was vital to debrief first the connotation and perspective of the "application or use of force" act as alleged by the Defendant in the context of the assault.

[12] Assault was defined by CR Snyman's *Criminal Law*, the 4th edition on p456, as **the application of force to the body of another person**, or inspiring another person to believe that the force will be applied upon them immediately, which definition was regarded as narrow and not covering all the ways in which the crime can be committed. It was therefore improved in the 5th edition on p 455 to read:

‘that assault consists in any unlawful and intentional act or omission which results in another person’s bodily integrity being directly or indirectly impaired, or which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place’.

[13] Accordingly, the elements of assault are:

[11.1] Conduct or an act which results in another person’s bodily integrity being impaired/or the inspiring of a belief in another person that such impairment will take place;

[11.2] Unlawfulness;

[11.3] and intention.

[14] In the new definition the application or use of force, equates to an impairment of bodily integrity and there is a separate element of unlawfulness and intention. Therefore the Defendant’s denial of assault yet admitting to the use of force, should be understood in principle to be a refutation that the custodial officers’ conduct covered all the elements of assault. In other words the Defendants, in the wide explanation they expounded in their Plea, deny unlawfulness. Whilst as indicated proffering an excuse or justification for the impairment of the plaintiff’s bodily integrity. Since assault *per se* infers wrongfulness or *animus iniuriandi* (see *Bennet v Minister of Police* [1980] 3 All SA 817 (C), 1980 (3) SA 24(C)).

[15] Generally, the issues between the parties are defined in the pleadings, which would supposedly then provide an answer in determining which evidence needs to be adduced, by whom and when. In the pleadings *in casu*, the application of force, that is physical interference and the resultant injuries have been admitted and supposedly common cause. The onus (evidential burden) therefore of alleging an excuse or negating the inference of unlawfulness or (absence of wrongfulness) for the application of force and its extent (as its alleged in their Plea) rests on the Defendants; see *Macu v Minister of Safety and Security* [1983] 2 All SA 464 (A), 1983 (4) SA 629(A); *Peterson v Minister of Safety and Security* [2009] ZASCA 88, [2010] 1 All SA 19 (SCA). As the Defendants carry the evidential burden to prove justification they therefore customarily carry the duty to begin.

[16] The parties may, however by agreement re-define the issues arising from the pleadings; See *Knox Darcy & Another v Land & Agriculture Development Bank* of SA 9625/12 [2013] ZASCA 93 (05 June 2013). As in *casu*, notwithstanding the Defendants conceding to the impairment/infringement of the Plaintiff’s bodily integrity, which is *prima facie* unlawful the parties agreed as indicated in their pretrial conference minutes that the Plaintiff is still to establish the facts of the physical interference pleaded by him. According to them Plaintiff nevertheless bore the duty to begin to adduce the evidence required that establishes the assault he has pleaded in his particulars of claim that imputes wrongfulness.

[17] Logic however dictates, that, such infringement being *prima facie* unlawful, and since the setting up of an excuse for the infringement shifted the evidential burden to the Defendant to combat the *prima facie* presumption of unlawfulness, the Defendants would

then carry the duty to begin; see *Mabaso v Felix* 1981 (3) SA 865 (A). The excuse or justifiable cause to be established is a factual issue that is to be determined objectively.

[18] Be that as it may, the matter proceeded on the basis of the parties' agreement, which is that as Plaintiff carried the overall onus to establish the facts pleaded by him that prove that the assault in all its elements took place, he (notwithstanding the admissions in the plea) carries the duty to begin to adduce evidence.

[19] The facts relating to the circumstances under which the Plaintiff sustained the injuries were conflicting. The question whether a person has discharged the onus is invariably dependent upon whether such party's version is more probable than the other's, an approach that was expounded in *National Employees General Insurance Company Limited v Jagers* 1984 (4) SA 437 € at 440D – 441A (AND AT [1984] All SA 622 €-Ed]. However where consideration of probabilities fail to indicate where the truth probably lies, the court will have recourse to an estimate of relative credibility, apart from probabilities. Therefore the question of whether ultimately the Plaintiff discharged the onus resting upon him on a balance of probabilities is therefore ultimately dependent on whether the testimony is truthful and reliable. (See Coetzee's comments on *Koster Ko operstiewe Landboumaatskappy Bpk v Suid Afrikaanse Spoorwee'' en Hawens ()* and *African Eagle Assurance Co Ltd v Cainer* (supra)

AD EVIDENCE

[20] **The Plaintiff was the sole witness testifying on his behalf whilst the Defendants presented the evidence of Dr Rambuda, custodial officers, Luvhengo, Mamailwe, Mathibela and Makwea.**

PLAINTIFF'S CASE

[21] According to the Plaintiff when he arrived at Sinthumule he was booked in with four other inmates in cell 15 at the Green Prison. On February 2011 at about 9h30 in the morning, nine officials arrived at his cell and assaulted him. He was alone in the cell as the other inmates had gone to attend a festival at the gymnasium. The officers demanded to search him and the cell. Whilst searching threw everything around, assaulted him, ordered him to take off his clothes and touched his body. A china dog they brought with them ran around sniffing all over the cell and nothing was found. They have been to his cell two times prior to that incident. The first time was on 24th December 2010 and there was five of them. They came again three days thereafter before 12h00 noon and found him alone in the cell drinking tea. They wanted to search the cell again, saying they are looking for dagga.

[22] He identified Makwea the area manager to be one of the nine officials who were in his cell on 11 February 2011. Amongst other things that they were doing they told him to take off his clothes and put his pants on his knees. Nemamilwe who was also there wearing hand gloves pushed his 2 fingers into his anus, which made him jump. **Makwea then hit him with an open hand on his face. Everybody who was there then took part in assaulting him.** He was told that they were assaulting him for dagga even though no dagga was found. He fell and whilst on the ground he was smacked on the face and one of them **jumped on his private parts. He was** lifted up **and again smacked on the face.** After that he was handcuffed with his hands on his back, his legs shackled, **dragged by his legs and thrown down the staircase.** He

rolled and fell on the ground. The other inmates were screaming and calling the police officers. **They grabbed him by his legs** pulled him down the stairs with his head bumping against the staircase. **He had injuries on his whole body including his head. His eyes were swollen so he could not see properly and both his hands and upper arms were scratched and bruised and his manhood painful.**

[23] **He was thereafter posted to segregation (in a single cell). When he was being taken to the cell the head of prison was already there as well, just standing and watching the others kicking him.** He denied that **he tried to burn the cell with a toilet paper. He confirmed being seen by Dr Rambuda ("Rambuda") thereafter, the prison doctor who completed the J88, recording all the injuries. The doctor admitted him for 4 days. The right side of his chest, the left ankle and also his private parts were swollen with bruises around the right elbow.** He was told that he could not consult a private doctor. He subsequently instituted a civil action against the prison and Makwea for the assault. Two prison officials, Luvhengo and Munyai then opened a criminal case against him of common assault. He was punished in the internal process and tried at the Magistrate Court. **In prison he was not given a written notification of the disciplinary hearing therefore sentenced without a hearing to stay in segregation in the single cell.** He was just called and told that he is going to segregation for 42 days.

[24] **He went on trial at the Magistrate Court on the common assault charge of the two prison officials and was discharged.** After the discharge he was subjected to ill-treatment every day. He reported the matter to the head of the prison who did nothing about it but kept his head down. The decision of the Magistrate Court to acquit him has not been appealed and no one has indicated an intention to do so.

[25] Under cross examination his testimony was that **notwithstanding the Defendant's allegation in court that he was attempting to burn the cell when he was assaulted, he was never charged with the offence or such allegation even mentioned in the criminal case.** He said he was not violent in prison and has never instigated a fight with anyone. So there was no need for use of force to restrain him. The prison officials just wanted to humiliate him. He also could not fight nine people and did not have anything in his body or carried a weapon. **The evidence of the assault that took place outside the cell** when he was lying on the ground after he fell was available on camera, but the Defendants have never **brought it to court despite their denial of the assault having taken place there.**

[26] **He thereafter painted a picture of general mistreatment by the custodial officers. Alleging that whilst he was at the single cell in E Block, that is segregation, without anybody consulting him, he was fed ARVs tablets. He was kept in hospital for the treatment of a Stephen John Syndrome("SJS") without being informed about it. Only when he enquired from a nurse was he told that he has the syndrome. When he complained about the ARV's he was then transferred without being consulted or told what is wrong with him. He was told he was crazy. In August 2012 he was injected with something that made him numb and sleepy all the time and smuggled to Barberton Prison without being consulted, where he was not allowed to communicate with his lawyer, mother or anybody. The move was not as a result of his request. However because he was always sick there they could not do anything to him. They ended up moving him to Mantashe. Till today he does not know where Barberton is. And the poison that he drank from the tea also did not sit well with him.**

[27] On the nature and quantum of damage, he said the search that was done on his anus gave him a problem because it was the first time he was subjected to something like that. His other parts were stiff and not functioning normally. He felt humiliated and troubled due to the assaults and being constantly held in segregation. He confirmed that in his Particulars of Claim that the insertion of fingers in his anus is not mentioned. However he was adamant that he did tell his attorney about it. He also mentioned it to Dr Rambuda even though the doctor recorded on injuries on the anus that n/a. He confirmed that he was never stitched as mentioned in the particulars.

[28] During cross examination he did not deny that he was convicted of assault 11 times outside prison from 2000 until his incarceration in 2011, once for malicious damage to property, possession of dagga then of the rape which led to his incarceration in Sinthumule. He pointed out that notwithstanding that fact, as he was never violent inside prison he was never charged with assault, except in respect of the incident of 11 February 2011 and was found not guilty of the charge at the magistrate court. He refuted the allegations that when he was assaulted he held a burning roll of toilet paper in his hands with which he wanted to burn the cell. It was his testimony that since that incident in 2011 to 2012 he spent all his time at Sinthumule locked in a single cell at segregation and all the other charges brought against him whilst he was there. He never fought with the officials but they kept on fighting with him.

[29] Regarding the stairs near his cell from which he was thrown down, he said there is a section camera as well as a camera around the cell. Notwithstanding, the prison could not produce the evidence of the cameras that was sought by the magistrate court. He cannot read or write and would ask fellow prisoners to write for him. He was indeed checked by a psychiatrist whilst in hospital.

[30] Mr Du Preeze, Defendant's Counsel subjected the Plaintiff to further cross examination for the next three days. Plaintiff pointed out that he has never been charged of assaulting any inmate and therefore could not be going about assaulting custodial officials. Regrettably half of the examination that took place had nothing to do with the Plaintiff's claim or issues in the pleadings. He was asked about charges he has been subjected to since his incarceration, the number of times he has been punished, his conviction on rape, wanting to get into detail of that offence for which he was serving sentence at the prison, and on seeing a psychiatrists. Counsel insisted on posing irrelevant questions even when he was warned by the court, to desist from doing so he would persists with his questions which resulted in a cross examination for all those days that was on everything that happened at Sinthumule but for the alleged assault that took place on 11 February 2011. A matter for which the Defendant was being sued and the treatment Plaintiff alleged to have endured under prison officials. Counsel brought up the rape conviction time and again for which the Plaintiff was serving time probably more than 10 times on different days without indicating its relevance to the cause of action of the Plaintiff or Defendant's defence. The psychiatrists' report was brought up a number of times as well. Plaintiff indicated that they kept on keeping him in the single cell wanting to destroy him mentally even though he told them that he wanted to learn, he wanted to go to school. He was quizzed on the set up of cells at Sinthumule without linking the questions to the issues that are to be established. The questions asked were about the inmates' daily program and the amenities that were available which Plaintiff scarcely enjoyed.

[31] The relevant and material questions about the assault came only after the 3 days of cross examination. His evidence in cross On assault, was that he was thrown down the stairs, so he rolled down to the ground at the bottom of the stairs. He was dragged up the stairs with his head hitting the stairs. His hands were handcuffed behind him. He reached the bottom of the stairs and hit the ground with his knees, and right shoulder. The explanation of course has suggestions of being melodramatic. He said at the time he had already served a 42 days sentence but he was put back to segregation. He only went out of segregation once for one day after that incident. He was taken to the yellow prison because they would not take him back at Green Prison. The officials there were fighting with him. The next day he was taken back to segregation.

[32] He was then asked about the times when he felt sick and vomited after he had tea at E Block. Again for a considerable time of the cross examination, Counsel continued to interrogate the Plaintiff on his previous transgressions. Only after dragging all those issues for an unbearable length of time did Counsel ask Plaintiff about the burning of the cell. Plaintiff told the court he does not know what a dupa is. He confirmed that Luvhengo was in charge of his cell 15. The following was then put to Plaintiff regarding the Defendants' version, that after he served the 42 days in a single cell at segregation, he went back to cell **number 16**, his cell upstairs at the Green Prison. Whilst he was in his cell Luvhengo was sent by Nemamilwe to ask him to come to Nemamilwe's office. Luvhengo came up to the cell and told him. He told Luvhengo that he knows what it was about, he has to go back to E Block. Luvhengo left and whilst he was going down the stairs he heard a noise back upstairs. He went back up and found that Plaintiff had removed all his cellmate's belongings and mattresses and only his was left in the cell. Plaintiff had a piece of burning paper in his hand ("a dupa"). **Luvhengo called code CERT 1** on the radio meaning that there was an emergency, saying something like, **"prisoner attempting to burn the cell."** A few of the prison officials responded including, Nemaimela, Munyai, Mathebula, Mahladiisa and Makwea. Makwea ordered the plaintiff to put the burning piece of paper down and he refused. Makwea then moved forward to him to take away the burning paper. **Plaintiff pushed him away. The officers then came to Mokwea's assistance.** The officers say Plaintiff was very aggressive as a result they used minimum force to subdue him. When they had him under control they put him down on the floor face down and cuffed his hands behind his back. He was taken not thrown down the stairs but taken **to the health center and thereafter Plaintiff was taken to Dr Rambuda for examination.** It was further put to him that the stairs are made of steel and the bottom of the stairs is a concrete. Counsel said the prison officials are going to refute that fingers were inserted in his anus. It was further put to him that officials will come and tell the court that they take an injured inmate they suspect of having something in his body, to health care to be examined by the nurses. They would not do it themselves. Further that plaintiff assaulted Luvhengo on the cheek and tore his t-shirt. He also tore a pocket of one of the officials' pants.

[33] Plaintiff replied that the pants may have been torn when he was trying to prevent being hurt. When it was put to Plaintiff that Luvhengo was later examined by Rambuda outside prison as the officials had medical aid and therefore not allowed to be examined by a doctor at his private practice, **Plaintiff denied that it is the case and stated that** Rambuda's evidence in the magistrate court was that **they can also be examined by a prison doctor.** It was put to him that Rambuda also sent the three to the blue room and they denied assaulting him or that he went to hospital. Also that **Munyai and Mathebula in the meantime went to**

the police station to open a case of assault against him. Plaintiff agreed and stated that the officers told the court that after the assault they took him to segregation cell and not to hospital. He repeatedly denied being an aggressive person. He explained that the assaults that took place before his incarceration happened between 2000 - 2011 in the context of their village lifestyle. Since they drank too much, fights would break out afterwards.

[34] Plaintiff also indicated that his left testicles were still not working. He agreed that he was sent to the Urologist who examined him and prescribed a tablet called Bactrim for him, a broad based anti-biotic that caused the Steven Johnson Syndrome ("SJS") that he suffered from later. Subsequently blood was drawn from him and sent to the lab but nobody told him the results until the nurse told him that he has the SJS. **Rambuda sent him to the Urologist on 11 February 2011 because he was complaining about the assault on his testicles.** It took them from February 2011 to 2012 May to send him to the Urologist. During that period he kept asking to see the specialist and they kept telling him that those doctors are scarce. He wrote a letter to the department asking that his attorney be given access to his medical records, after Rambuda asked him if he gives permission for attorneys and private people to have access to his medical records. It was put to him that Rambuda found nothing wrong with his testicles on 11 February but sent him to the Urologist for an old complaint. Plaintiff disagreed saying he entered the facility with no such a problem. Dr Rambuda referred him to an Urologist because of his complain about the assault on his private parts. **He was under the specialist's treatment from 20 May 2012 for 7 days.** When he left the hospital in 2012 he was now imprisoned at the blue prison. On the 4th day **Counsel concluded his cross-examination.**

[35] On re-examination Plaintiff confirmed that whilst at E-Block he was taken to hospital after drinking tea. His attorney and a psychologist came to see him and nobody at the hospital could give them information regarding his sickness. He confirmed that from March to July 2011 there were no transgressions recorded against him. He indicated that all the months that he did not have transgressions he was at segregation at E-Block where he spent most of the period of his incarceration, at Sinthumule.

[36] The next witness, to testify for the plaintiff was Makananisa Rabelani ("Rabelani"), a fellow inmate at Kutama Prison at the time. Plaintiff and Rabelani grew up together in a village called Njelele. Rabelani was serving a sentence of 15 years at Sinthumule for armed robbery. He was there from 2006 until 2012. According to him he heard of the assault on Plaintiff on 11 February 2011 because all inmates were aware of the incident. He was also told by the Plaintiff whose injuries were visible. So the officials will not be telling the truth if they testify that Plaintiff was never assaulted. He too was once assaulted by the prison officials. He was hit with anything that was nearby. He had gone to tell them that he was sick and wanted to go to the health center. After the assault he got a J88 and took it to the manager of the prison Mr Ndembedi. He informed Ndembedi that he wanted to open a case. He was warned that opening a case would cause him problems and his treatment would turn for the worst. He feared for his safety. He did not personally see the assault on the Plaintiff as he stayed in Blue prison, 500 meters away from where Plaintiff was, a stone's throw away. He therefore could not comment on the version of the Defendant because he was not there. He had no idea what

a Dupa is and denied that each prisoner on their first day in prison gets a booklet or is shown a video in their own language about the prison rules. Furthermore that his rehabilitation in prison had nothing to do with the officials who were busy assaulting them.

[37] That was the case for the Plaintiff.

AD DEFENDANT

[38] Dr Ramudzuli Rambuda (herein before and after referred to as ("Rambuda") followed, with his testimony on behalf of the Defendants which was that . His testimony was that he saw the Plaintiff on 11 February 2011, at about 09h45 who alleged to have been assaulted by nine prison officials. He had dust and dirty marks all over his pants and shirt and the following injuries that he recorded on the J88 Form: a swollen right cheek (5cm by 1cm), lower and upper lip, right side of the chest and left ankle. Both eyes were reddish and swollen and bruises around the right elbow. His conclusion was that Plaintiff had suffered soft tissue injuries and his other systems normal. He prescribed Voltaren tablets of which 25 mm was applied intravenously and recommended x-rays for his ankle and elbow. He referred Plaintiff to an Urologist for a previous complaint he had about his testicles. The injuries were all moderate.

[39] On 9 July 2011 he certified Plaintiff to be fit to continue with the criminal trial following his admission at the health center suffering from the SJS ("Stephen Johnson Syndrome"), a skin reaction that looks like burn marks caused by "Bactrim" an antibiotic Plaintiff was taking prescribed by the Urologist that comes about after it has been ingested. Normally it is given to offenders to prevent them from getting opportunistic infections. Plaintiff was clearly allergic to it. He however was clinically stable at the time. He had called the Plaintiff and asked him if he was fine and he said he was fine, so he wrote the report that he can be discharged from hospital. He heard about the Plaintiff drinking tea that was poisoned during the civil court case, however, when Plaintiff arrived at the hospital he had a skin reaction that had nothing to do with the poisoned tea.

[40] He confirmed that he ran a private practice and working shifts at the prison in accordance with the terms of his contract as he worked shifts at the hospital between 8-2pm or 2-5pm. His work did not include treating the prison staff unless on an emergency. They will get stabilized at the prison hospital and then be sent off to wherever they would want to go to consult. They have their own medical aid and a choice to choose whom to consult. He saw Luvhengo on 11 February 2011 at 15h35 but at his rooms. Luvhengo alleged to have been assaulted by an inmate who also tore his t- shirt. The clinical findings he noted on **Luvhengo was a swollen left chin and cheek** plus minus 8cm by 4cm injuries that he recorded as soft tissue injuries. He confirmed that he then testified on behalf of the Plaintiff in the common assault case brought by Luvhengo against the plaintiff, only on information that related to the Plaintiff's injuries and was not asked about Luvhengo's injuries.

[41] Commenting on Plaintiff's complaint about the **anus search**, he said in a case where an inmate is suspected of hiding something like drugs inside his body, the prison officials will contact the nurse in charge of the prison, who will then write a report. **The inmate will then be sent to them for a diagnostic x-ray at the hospital. If there is nothing or something they will then furnish a report that says so. If there is something the inmate is kept in hospital.** He will be monitored with cameras that are inside the hospital cells even when going to the toilet. After three days the drugs or whatever it is, may come out, if it does not it may turn into gangrene whereof they might have to refer the inmate to a surgeon for an operation. He confirmed that there are cells in hospital where an inmate is put on high rate watch where you can see what they are doing even from outside the cell.

[42] He pointed out that **as part of their work they do rounds at segregation that is E Block, every day. So if an inmate has a complaint he has to register it during that time. At the time he saw the Plaintiff, he did mention that he was assaulted by the nine prison officials and wants to open a case that is why he completed the J88.** However if he was assaulted as he had testified his injuries would have been worse. The injuries he saw were tantamount to the force required to subdue him. He would have had cuts not the moderate injuries if he was pushed and rolled down the stairs that slants and turn with a concrete landing.

[43] Under cross examination, his evidence was that the injury on the private parts also falls under soft tissue injuries. He confirmed that he suggested x-rays to exclude the possibility of the injuries being more than what he has assessed **and if the results indicated any further management he would have written that down.** The x-rays are done as a matter of course if prisoners allege that they have been assaulted, to avoid any further complains as they are diagnostic. He was used to seeing the Plaintiff and already had his medical history. He agreed that a normal person reading the J88 would believe that the injuries and complains referred to therein are recent if date of incident not noted. He said in normal situations he writes the complaint as reported by the patient but in this case he left out the complaint about being kicked on the genitals. He confirmed that he completed the J88 for Luvhengo who came to him on the same afternoon and denied there was any conflict since he saw the patients at different times. He was not aware that the prison officials and Department were going to open a case.

[44] The incident report indicated that there was a form he had to write as the doctor before the prison officials can use force. The form is completed by the doctor as an approval that reasonable force can be used. And at the time when the form came to him it was an application that reasonable force is going to be used that is how he saw it. He did not know that the prison officials were going to open a case outside and that there was nine of them. He only saw Luvhengo and not the nine which would have been a conflict then. They have their own doctors and can see whoever they want. He received the form, the application to use reasonable force at about 9h45 after the assault. Changing his stance he then said they

usually go to the director of Correctional Services before they come to him to apply to use the reasonable force.

[45] He also admitted that he was told that Luvhengo was going to open a case as he was assaulted by an inmate, that is why he completed a J88. When asked why Luvhengo consulted him & waited till in the afternoon. He said maybe because other people also wait until he is back at the surgery or he might have been given emergency treatment at the prison, stabilized by the nurses. Each prison has got a clinic that is staffed with 2 nurses to attend to emergencies or stabilizing patients before they are sent to a hospital where the doctor is. It would have been unethical for him to treat Luvhengo at the hospital and happens only if it is an emergency. He could not remember if Luvhengo also consulted him in prison in the morning or prior to him coming to see him in the evening.

[46] He confirmed that at the criminal trial he gave evidence called by the Plaintiff. His evidence which was on the nature and seriousness of the Plaintiff's injuries resulted in his acquittal. Plaintiff had more injuries as he was assaulted by a lot of people. He noted that his bias will be on both ways whether he is testifying for the Plaintiff or for the Defendant, since he saw both the Plaintiff and Luvhengo. He was not forced to complete Luvhengo's J88. He said the use of force on the Plaintiff was authorized and must have been also authorized by the Correctional Services. He could not comment on whether it was actually done, but was aware that if the prison officials will be using force they will bring the information to him as a doctor and he will look at the medical file of an inmate if there are any records which contra indicates that he would comment on that. He was not aware if the doctor has got to be there when it is applied. He agreed that a video footage of the incident should be available. He said a planned use of force will only be authorized in writing to be supervised by a suited director or correctional center deputy director and recorded on a video camera. Only when planned force is to be applied not on an incident that need immediate reaction.

[47] He agreed that a man who had his pants down could not have posed any danger. He could not comment on the alleged excessiveness of the force used in the circumstances by the prison officials. He agreed however that force is to be used as a last resort and was aware that every time there is an incident an investigation must follow. However he was not aware of Mabuza's investigation of Plaintiff's assault. He was referred to Mathebula's comments in the Disciplinary Hearing Findings that Plaintiff was never assaulted by anybody regardless of his violent behavior, but Luvhengo and Monyai were taken to the doctor for medical treatment due to assault." and put to him that he saw the Plaintiff who was assaulted, and yet Mathebula, the manager in the yellow prison said Plaintiff was never assaulted. He (Rambadu) said that the Plaintiff told him that he was assaulted by the prison officials and he is only commenting on what he saw that day.

[48] With regard to the tablet that is said to have caused Plaintiff to be sick it was put to Rambadu that the tablet was given to Plaintiff after he had been sick from the tea. He said Plaintiff visited the health center and was seen by him. He examined him doing a general checkup and blood test. He was admitted in the facility but does not remember the date and the files were taken back to DCS. He could not clearly say what the result of the blood test was, stating that it gives a clinical picture, a clinical syndrome. The Stephen Johnson Syndrome was explained to the Plaintiff. It presents itself as some redness because it manifests itself internally, **the results did not show anything except the drug that he spoke about.** The blood test were done as a matter of cause. **He said he was aware that Bactrim causes SJS and confirmed that the Plaintiff got his first Bactrim from the specialist (Urologist).** He said it does not mean that one would immediately react at that time. Sometimes it can be in a year or 3 months after treatment, it depends on the immune system at the time. On admission Plaintiff had no allergy that was noted on examination and if he mentioned any, it would be indicated in the file. He will then not get that anymore. He was the one treating the Plaintiff after he allegedly drank the poisoned tea and was admitted in hospital for 3 months or longer he could not remember until August. **He has treated the Plaintiff for some time. The bloodstream did not show poisoning. He could not remember when he was transferred. He was not involved in the transfer and what he could remember was that Plaintiff went back to segregation. He was thereafter transferred to another facility.**

[49] He did not know anything about the Plaintiff's removal to Barberton prison or play any role in the plaintiff's transfer as it lies with Correctional Services. **He however remembers that he went to segregation and spoke to the Plaintiff since he had a lot of cases against him for fighting with prison officials verbally or otherwise, he also was concerned about his education and rehabilitation.** He advised Plaintiff to change if he feels not happy to stay in that prison. It was put to him that Plaintiff said he was transferred because he was questioning the reason why he was put on the treatment of ARV'S. **He said he was aware of the Plaintiff being put on ARV's, however at the prison clinic there is a nurse tasked with doing tests but only by consent. If Aids is discovered the treatment will be administered also only by consent, nobody is forced.** Usually an inmate will ask to be tested or if they see that an inmate might be sick they will advise the inmate to test. He did not know anything about Plaintiff' or of inmates forced to take tests or treatment. It was put to him that Plaintiff said he does not know of any test and the reason why he was given ARV's, but blood was drawn from him anyway and no results given to him. When he started complaining about being given the ARV's without any tests, he says he was then injected with something, kidnapped and found himself in Barberton. His reply was that Plaintiff has a right to refuse treatment and could not remember of any instance where inmates were forced to take ARV's.

[50] **He confirmed that he is not supposed to make assumptions on the nature and extent of injuries that should have been sustained and that he only writes what the inmates tell him to be the cause of their injuries.** He agreed that the court is not interested in what he is saying on how the patient was injured. It was put to him that the Plaintiff told him about the anal penetration and he neglected his duty, he did not examine him or record that in the J88

and asked if he was told by his superiors not to put it on the Form. He denied that saying he cannot sacrifice his profession for the contract that he has with the prison and does not remember of a situation where he was told what to do or not do. **He indicated that Luvhengo and Munyai came to him as private patients and used their own medical aid not sent by the prison.** He had a duty to see them once they were at his surgery. **Nemamilwe was also his patient they came together to the surgery that day. He denied that by virtue of his contract with Correctional Services he put himself in a conflicting position by treating the prison officials who each was claiming to have been assaulted by the other.**

[51] Finally, on transfer of an inmate he added that a doctor will play a role if the transfer of the inmate is for medical reasons, for example if the treatment he requires is not available at that facility, otherwise it is the Correctional Services that decide on the transfer.

[52] On re-examination he reiterated that he testified for the Plaintiff in the criminal case with whom he had a good doctor- patient relationship. So Plaintiff could ask him anything even when there are results he does not understand he could ask him. He does not remember the Plaintiff refusing to be examined by him. The 2nd Defendant's disciplinary hearing record on page 55 notes that the Plaintiff refused to give a statement or to be interviewed by the investigating officer. The record also on page 57 reads that "there is no relevant evidence to sustain that injuries outlined on the J88 were due to the fact that the offender Takalani Neluheni was assaulted by officers or staff members." He confirmed that the J88 referred to was the one he completed noting the injuries. **He says they were concerned about his rehabilitation and education, that he was spending too much time at segregation. They were not happy about it that he was there for some time. He was therefore referred to a Psychologist for evaluation. As far as he knows the Plaintiff was not transferred for medical reasons.**

[53] Mr Makwea, ("Makwea"), the next witness, confirmed having joined the private prison services from Correctional Service where he was employed from 1990- 2005. He explained that Sinthumule is a maximum prison that keeps high security inmates housed in three sectional prisons, the Green, Yellow and Blue Section. They also have E-Block with single cells where they keep prisoners with behavioural problems in segregation, either because they fight with inmates or custodial officials or guilty of unbecoming conduct. Mr Van Rensburg is Chief of Security. He was in charge of the Green Prison seeing to it that inmates follow a daily structural program and look after their general wellbeing. He also attended to complains and saw to it that nobody was oppressed. Each section has 12 unit managers and divided into Blocks. The Plaintiff lived in Block K in the KD pad whose unit manager was Nemamilwe. Mr Luvhengo worked within the KD pad as the custodial officer. A 100 prisoners were kept in each pad. Each pad has two floors, the ground with 12 cells and the 1st floor with 13 cells. Before one reaches the stairs there is a landing called a bay before descending the stairs that are about 4 meters high and in a slanting position. The landing is made of cement, supported by slanting poles.

[54] He said Kutama Sinthumule inmates come from correctional services. He confirmed that during induction there are medical people. If blood is drawn it will be done at the request/consent of an inmate and not as part of the induction. A prisoner who has been convicted of infringement in prison may be sentenced to a suspended sentence or detention

at E-Block. He also has a right of appeal. A prisoner can also commit infringements even when he is at E-Block. **The Plaintiff was taken away from the Green Block to go and serve his sentence, he never came back**, but went to the Yellow Block and he never had dealings with him after that as he was under a different area manager. If there is suspicion that an inmate has swallowed a drug or put it in his backside, he is taken to hospital. The custodial officer will not deal with him anymore. The custodial officers did not carry weapons in prison but a two way radio, keys and report. **The restraining equipment are the handcuffs according to the manual. Security equipment is the baton and no firearms. And only an officer issued with a baton can carry and use it. There is a camera in the day room where inmates have their meals that serves as the eye to the officer guarding the 100 inmates in the pod and a controller.** With the aid of the controller the officer is able to see what transpires from one day room to another. There are no cameras inside the cells and the one in the daily room cannot record what is happening there. Each cell door is operated by an operating officer. There are no keys. There is an intercom to the cells that is vital because it can be used if an inmate is not feeling well at night to communicate with the officer to notify him of his situation. It is activated manually with a finger or thumbprint it will then flash a red light to alert the controller. If there is a problem the controller will call the area manager in charge and on shift through the two way radio who will then inform the hospital section of the sick person and his whereabouts. The hospital personnel will go there to attend to the sick person. The unit manager will also be there. **In the event the cell needs to be opened for the inmate to be taken to hospital they will request a backup of five other members before they open the cell.** The hospital personnel will then take over.

[55] On a normal day the controller opens the doors at 6h00 all at the same time after confirming that the number of the inmates is 100. **He confirmed that there are search dogs that are used to search the cells. There are members who are trained to use dogs to sniff for dagga. Anytime the dog handler can lead the dog where he would like the sniffing to be carried out. They may come on their own or when called by the unit manager. If the search is to be conducted on the body of an inmate, it would not be in view of other inmates. The search would be in the presence of two officials, one acting as a witness. He denied that he ever saw Nemamilwe searching somebody like the Plaintiff has described, telling them to bend over and inserting a finger.** As to who will be transferred the Department of Correctional Services is in control of that and the list of inmates supplied by them will be exchanged with those from Matachi. **The head of the prison does not have a say as to who is transferred to where.**

[56] On the use of force on the Plaintiff, he testified that on 11 February 2011, Nemamilwe, Munyai, Luvhengo, Mathladisa, Mathebula and him were all certified to carry out use of force on offenders. Counsel then put to his own witness that what happened to the Plaintiff on 11 February 2011 was an unplanned use of force, to which he agreed. He identified the form that they completed before they go off duty after the use of force signed by the unit manager Mr Nemamilwe, Van Rensburg, and by the DCS controller. The form attaches the incident report by the unit manager. Counsel brought his attention to certain comments made by the head of security that Plaintiff will formally be charged and that the Plaintiff seem to be emotionally unstable so he was to be placed on high risk treatment. He also mentioned a J88 completed by the doctor. The witness was also referred to an affidavit by somebody else to which the witness has confirmed its contents to be true as far as they

refer to him that was filed in terms of Rule 6 (11) for the dismissal of the Applicant's action from which Counsel read to him that "Due to behavioral problems which led to disciplinary hearings the officers of the first Respondent were of the opinion that the change in the environment might assist the Plaintiff and requested the Department of Correctional Services to transfer the Plaintiff to another prison. The Plaintiff was transferred to the Thohoyandou prison ("Matachi") on 29 October 2012. This was an attempt to explain the transfer of the Plaintiff that is alleged to have taken place without his concern. Makwea confirmed that all the records including Plaintiff's medical records were transferred to Thohoyandou as the Plaintiff is no longer in the care of the Defendant, but of Correctional Service. And he might have been transferred from there to another prison without the knowledge of the 1st Defendant because the department does not have to inform the first Defendant. He denied any knowledge about the Plaintiff's kidnap from Sinthumule Kutama to Barberton Prison. He said according to them he went to Thohoyandou.

[57] He confirmed that a tissue paper rolled into knots is called a dupa in prison and used to light a cigarette. The inmates smuggle it into the cells every second fortnight and light it from the fluorescent light in their cell.

[58] According to him on 11 February 2011 he was on duty at his post in Green Prison where Plaintiff's cell is when he heard Nemamilwe on a two way radio sending a CERT 1 call asking for backup at KD. CERT is a code for "assault" and 1 means "backup come and help." The call is heard by the entire prison. He got out of the office and walked to KD. He walked up the stairs to the cell and found the Plaintiff and Luvhengo. He was given a report that Plaintiff had taken items belonging to other cellmates out and only his remained in the cell. Luvhengo told him that the Plaintiff was in possession of a burning tissue and intended to set the cell alight with it. The Plaintiff was holding a tissue with smoke emanating from it. His first words to Plaintiff was that he must drop that thing and extinguish it, Plaintiff refused. He moved forward to him wanting to take the burning tissue out of his hand. Plaintiff pushed him back. At that stage Mathladisa, Mathebula and Munyai were already there. They all then charged forward to him taking away the burning paper out of his hand and pinned him on the floor, face down. He was handcuffed with his hands behind his back and taken out of his pod. They did not use leg irons. They are used only if somebody is taken to court or hospital. The witness was then asked if the Plaintiff was calm. He said Plaintiff was aggressive and doing movements with his hands pulling and pushing. He was asked if the others did help to bring the Plaintiff under control and if any of them were injured. Then only then did he allege that Luvhengo and Munyai were injured and the uniform of Mathebula torn. He was asked if all this happened during the process when the plaintiff was being subdued and he agreed. He said there was no other way to subdue the Plaintiff as when he talked to him he did not pay attention to what he was saying. After he was subdued he was taken to the clinic at the Green Prison. On arrival there he was still aggressive and was referred to the Health care. He did not see any injuries on the Plaintiff and does not know if he had injuries as they took him to health care. When the witness was reminded of Rambuda's finding he now said he neither agrees or disputes that but he did not see injuries on the Plaintiff. He also was not disputing that Rambadu found these injuries. Plaintiff was accompanied by Nemamilwe to the Hospital as his unit manager. According to him there was no lesser method of getting the Plaintiff subdued. Plaintiff's cellmates were out of the cell when this happened. He cannot recall if there was a video recording of the incident. It may not have been recorded since it is something that happened fast and unplanned. The incident happened inside the

cell and there are no video footage in the cells. When asked what could have been the reason for the aggressive behavior of the Plaintiff on that day, he said he heard from the Unit Manager that the custodial officer, sent by him, requested the Plaintiff to report to his office. A Disciplinary Hearing was then convened but he was not involved in it. His duty when he got involved was to see to it that **Nemamilwe is not oppressed and assaulted and that the Plaintiff is treated with dignity and not only him but every prisoner under his care.** He denied that the Plaintiff's ankles were cuffed, that he was pulled up by his legs, dragged, pushed down the stairs, and rolled down the stairs until he landed on the ground floor. According to him the Plaintiff was taken to the doctor. **He said due to the Plaintiff being aggressive he was taken straight to the clinic** and then to the hospital by Nemamilwe. He returned to the office at that stage.

[59] He was referred to part of the investigation report on the incident that read "On Friday 11 February the Plaintiff assaulted officers Munyai, Luvhengo and further threatened to burn the cells at Green Prison, K Block D, cell 16, hence this investigation." **He confirmed that he and the others except for Mathebula were interviewed** and the conclusion in the report was also as read out by Counsel that "After having reviewed the aforesaid incident the investigation concluded that the whole scene or scenario was very circumstantial that needed a very drastic intervention in which the staff members responded in a responsible manner. **The investigation further concluded as read out that "injuries sustained by Takalani was also circumstantial and no person, staff members to be interrogated or held liable on that, as the situation out of hand. There is no relevant evidence to substantiate the injuries outlined in the J88 due to the fact that Takalani Neluheni was assaulted by officers. Also read was that "The allegations that the above staff members assaulted the offender Takalani Neluheni has no substance and the allegations are therefore dismissed based on the findings and conclusions stated above.** Van Rensburg, the Deputy Director of Operations Mr Wagenaar and the prison director Mr Ncongwane all made remarks in the report.

[60] Makwea's testimony under cross examination was that he only knew the Plaintiff as one of the inmates confined in the Green Prison for which he was in charge, nothing more. However he confirmed that everything that happened got reported to him. He was referred to the comments made by Van Rensburg in the investigation report that "**Offender Neluheni does not cooperate with staff and wants to do everything his own way.**" Asked why would Van Rensburg know that about the Plaintiff when he as the manager knew nothing about Plaintiff? **He replied that if an offender has behavioral problems he may be referred to the relevant section and should there be an incident report to be compiled the said incident report should be directed to the Chief of Security for all prisoners (Wagenaar).** On what is said on Page 60 attributed to Wagenaar that "this is a long troublemaker." He said he could not comment on that. He confirmed that he was interviewed by Mabasa who conducted the investigation to prove the allegations that led to the injuries of the staff members. He was referred to his statement to Mabasa on how Plaintiff was brought down. **He confirmed that the use of force was activated to bring the Plaintiff down. Also that smoke was coming from the burning toilet roll that was taken away from him and extinguished, after he was subdued. If blown into the sponge of the mattress it could have set the prison alight. He was made aware that the tissue does not form part of the exhibits. He indicated that the tissue was however shown to Plaintiff at the Disciplinary hearing. He argued that the exhibit is shown if a person denies that he used it, however it**

does form part of the evidence. He did not answer to the allegations put to him that clearly from the conclusion on the report on page 52, there was no formal hearing that was held but statements were obtained from the witnesses. He said as far as he is aware, Plaintiff refused to attend the hearing or make a statement, contradicting himself. He was referred to page 55 which reads: "the said offender refused to give a statement or be interviewed by the investigating officers".

[61] He said he knew that the Plaintiff came back from E-Block and on arrival at his cell Luvhengo approached him to inform him that Nemamilwe wants him to come to his office. When he went to the cell he was reacting to a call by his juniors. They informed him that Plaintiff was refusing to hand over the tissue he was holding in his hand. The distance between his office and the cell is about +-800 meter away but he made it because once it is said CERT1 one does not stroll to there. He arrived whilst Nemamilwe was speaking to the Plaintiff telling him to remove the tissue. They took the tissue out of his hands because if it had dropped on the floor it would have created a hole in the plastic. He confirmed that he ran 800 meters whilst the Plaintiff was carrying the burning tissue in his hands and when he arrived the tissue was still burning. **He denied that they were there to unlawfully search the Plaintiff. For the tissue to be taken out of the Plaintiffs hands it was a joint effort of all them, they applied force as the last resort.** They firstly talked to him requesting him and then applied force to get the tissue from him to stop him from endangering his life and that of his fellow inmates. He denied that force was used with the intention to injure or degrade the Plaintiff.

[62] In respect of the force that was used. He said they all advanced forward to Plaintiff whilst he went for the hand and tried to take the tissue away, Plaintiff pushed him back. Because of that he knew from his 27 years' experience that if that happened, he is to single the offender out and respond discriminately in accordance with his action. **After taking the tissue they pinned him down, it was after Plaintiff had assaulted Luvhengo and Munyai that they took him and pinned him on the floor. They realized his hand was raised up when he tore Mathebula's uniform. The raised arm was also cuffed. They were not scared that he might have had something that he could have hurt them with.** After they had subdued him he could not see any visible injuries, which was also noted by the prison director. However after such an incident a prisoner is taken to hospital to check on the injuries. **He said he did not see any visible injuries on the two officers even though they were assaulted in his presence.** He denied that Plaintiff was assaulted with fists and stepped on his private parts. He confirmed that the Plaintiff was taken to hospital and the J88 would reveal the injuries. It was put to him that he was called by Nemamilwe indicating K4 assault and a criminal case was opened against the Plaintiff for assaulting the two officers. He said he does not know about that he never attended court proceedings. Also was not aware of the outcome that the Plaintiff was discharged or that the police not believed by the court that they were assaulted.

[63] According to him what is minimum or maximum force will depend on the injuries because **sometimes with application of minimum force a person turns out to sustain more injuries and maximum force resulting in less or no injuries.** It was put to him that on page 46 it is said the degree of force to be used would be determined by the situation and it should be the minimum necessary under the circumstances. In this matter the situation was of a

man carrying a tissue in his hand. They could have waited for the tissue to extinguish and then get control if their duty was to protect human life.

[64] On sniffer dogs he stated that an official may on his own search the inmates or he can be specially requested to do so. And aware that the search is to be in accordance with the Correctional Service Act. Even though all searches must be authorized by the head of prison, routine or **surprise searches are also authorized. He said as a prison manager he has got delegated powers to deal with the searches. If it is without permission from the head of prison he still had to be notified about the search as the prison manager.** He did not see any injuries on the Plaintiff after they subdued him. His Counsel intervened to say that his evidence was that he does not dispute that Dr Rambuda found those injuries on the Plaintiff. It was put to him that on the same day that he applied minimum force the Plaintiff was examined by the doctor and found to have the injuries noted on the J88 and asked if he knows then what caused the injuries. He replied that he did not see the injuries. It was put to him that the doctor noted that Plaintiff had sustained right cheek upper lips and right side of chest swollen, and so on. He replied that is why he is saying he cannot dispute that if that is what the doctor found. **He could not answer regarding the lack of investigation about Plaintiff's attempt to commit arson or trying to burn the cell although this was their reason to manhandle the Plaintiff. He said Mabasa, the investigator, is on a level of a supervisor but his junior and not in his line of work. He does not agree with the contents of the First Defendant's Plea that the Plaintiff was serving a life sentence for rape or murder. He was asked about the profiling of the Plaintiff done by Mabasa the investigating officer on p 58 of the investigation report that Plaintiff is one of the dangerous offenders whom under any circumstances can kill or attack the officer to a regretful situation hence the said incident" and if that is the reason why the pleading of the 1st Defendant refers to him being convicted for murder.** His reply was that investigators work independently without influence from them. **He consults the record of a prisoner if he needs something from there but does not keep it or is not in charge of the records.**

[65] He further testified that he believed that if the footage from the cameras outside the cell was requested from the facility it would have been provided. He stated that with a planned use of force a video camera is used to show that all the procedures have been followed, that consultation has taken place with that person and a stalemate reached. Agreed that it is also to show the extent of the use of force that was used whether it is necessary or was exceeded. He testified that CERT1 alerts whoever hears it to come forward. CERT 2 is for the riot squad. Handcuffs are carried by him as part of his uniform. He knew that Cert 1 was directed at cell 15 because **when he goes through the door of the pod there are visible cells on the ground and first floor** and through the door on the first floor that is where the **Plaintiff and Nemamilwe** were. Luvhengo in his statement to the police said "At about 9h30 the prisoner Takalani was attempting to burn a cell and I was in the court and I tried to stop him then he became aggressive then I called backup and officers Munyai and unit manager Mathebula. He started to hit me on the chin." He confirmed that Luvhengo called for a back up to be assisted. **Munyai statement was that he was called by a control room operator to attend court D where there was a prisoner by the name of Takalani N who was threatening to burn the prison cell at KD. He said when an announcement is made through the radio or on the control no mention is made of the name of the prisoner.** Munyai

and Luvhengo were at K block where there are 4 courts and the controller is on K block at an elevated position could see all court A TO D. On the issue of distance, he confirmed that from his office to the Plaintiff's cell there are three automatic doors that have to be pressed and then wait for the control room to open the doors. **He heard the call on the radio and ran** as it was an emergency. When he was told that it is impossible to have arrived there after the 800 meters and found the tissue still burning, he said he must correct the issue of the 800 meters and agreed that it is a long distance to reach. He said he had to correct it he thinks he overestimated the distance he would say it is 80 meters, even if he has to pass three doors. He also realize that there was no injury that indicates that he had burns on any of his hands. He denied that tissue story was therefore a makeup story it never happened. He did not know who requested the transfer of the Plaintiff, as he has got nothing to do with the transfer of prisoners but the personnel of DCS. He did associate himself with the affidavit of P Latta that states that the **Plaintiff was due to a number of behavioral problems which led to the disciplinary hearing against the plaintiff, the officers of the 1st Defendant were of the opinion that the change in environment might assist the Plaintiff and requested the DCS to transfer the Plaintiff to another prison and the Plaintiff was transferred to Thohoyandou prison on 29 October 2012. That the transfer of Plaintiff was requested by his employer, the 1st Defendant.** Asked if he knows where the Plaintiff was transferred to after reading the statement on Thohoyandou that he agreed to, he said when they transfer prisoners it is either Thohoyandou or Thamboni prison, which are under DCS. About the alleged smuggling /transfer to Barberton, without there being a request and the injection, he said he does not know anything about that. **He said they cannot transfer a prisoner to Barberton,** it is impossible. He agreed that Kutama may make a request for a transfer, it is for the DCS to can accept or refuse. He does not know anything about the illness of the Plaintiff because **after the incident of the burning tissue the Plaintiff was transferred to the E-Block that is the last time he saw him,** as when he came out he was taken to the yellow prison and then transferred. However a prisoner can be transferred even when he is under treatment, they have done that at Sinthumule and also received prisoners who are under a treatment.

[66] On the use of force he agreed that only certified prison officials who have undergone training and taught prison procedures and training can use force on the offender to subdue him. **He confirmed that the reason minimum force was used is because he said to the Plaintiff he must give him the tissue and he refused thereafter they approached him, he did not plead with him to submit himself to be handcuffed. It was not as pleaded in the Plea that he was refusing to be handcuffed.** On whether there was imminent danger when pouncing on him he said his duty was to protect every offender including the Plaintiff against himself and the use of force was the last resort. He denied that they do searches on prisoners' private parts. He alleged that the Plaintiff wanted to catch the officials off guard in burning the prison. **On that day 11 February 2011, Plaintiff was coming from E Block to serve a sentence of 42 days imposed for possession of dagga on which he was found guilty on 30 December 2010 after admitting to the charge. He refused when he was informed that he was supposed to go back and serve another sentence, he is not sure which one.** Nemamilwe is the person who has the documentation and in control of the Plaintiff he was supposed to call him and inform him of his fate. **It seems at E Block on 10 February 2011 he was charged with the offence of insulting an officer, the charge came after the assault. They did not**

find any dupa on the day. They did not check if he used the fluorescent light to ignite the tissue. Plaintiff continued being aggressive even after being handcuffed using his limbs and shoulders. He was taken to hospital and when he came back to E –Block he was further sent to yellow prison. **There is no offender he has seen being assaulted ever he has been at the facility.**

[67] On re-examination Makwea said the five officials were interviewed by Mr Mabasa who occupies an office located at E Block. **He never influenced Mabasa to say or do anything.** The officials completed the necessary forms after the incident, a combined report was sent to their superiors and the DCS. **The Plaintiff did not consent to be handcuffed when he tried to take the paper from Plaintiff he pushed him, it was then that they charged at him opened his hand took the paper and handcuffed him.** When asked if the Plaintiff was as tame as a lamb after the tissue was taken he replied that, that is when the Plaintiff assaulted an official. He was aggressive. He was then charged with assault, insulting officials and threatened to burn a cell. **The hearing was held on 18 February 2011 and Plaintiff was sentenced to 42 days at segregation.** He was using the toilet paper, a full one minus the cartoon inside the roll. The board inside was pulled out and the inside of the toilet paper ignited. If like that it will then burn for a long time. He said he was not sure if Plaintiff was kidnapped and prevented from proceeding with his civil claim.

[68] The next defence witness was Ndibuho Luvhengo (“Luvhengo”), who confirmed to have been employed at Kutama Sinthumule since 2004 as a custodial officer. He started by working at Yellow prison and then switched to Green prison KD Block. He is now at Block November at the Blue prison since 2012. **At Green House his immediate superior was Nemamilwe, the unit manager whose superior was the area manager Makwea, the second Defendant, who controlled the three blocks. He knows the Plaintiff and that he was in prison for rape.** Giving details about the setting in the cells he said each cell has got four beds stacked to one at the bottom with two chairs mounted against the wall and a table made of cement. There is a steel toilet at the corner. There are steps from ground floor to the first floor. When he reported for duty every morning he was required to count the inmates from cell to cell. He could see the cell inside through the small glass. He would then report to the controller his counting. The controller sits above K Block in an elevated office, his duty being to open the cell doors and sometimes if there are problems, they will also be reported to the controller. He has computers in front of him that he operates to open the cell doors one after the other, although he can open them at the same time if requested. It is his decision either to open them one by one or at the same time. The controller also has a big screen in front of him from which he is capable to see the movements of every inmate. The controller could not see in the cell but could see when someone gets into a cell there being cameras in the day room. After he has counted the prisoners they will go to shower then breakfast, followed by the beginning of programs for the day. There will be a pills parade that is done at the clinic section, where two nurses will be found then they will either go to school or work or recreation. The program pretty much as it was explained by Makwea. When they come back to the block they go for their meals at the smoking area. There is an electric lighter in the courtyard, the only one he knows they can light a cigarette. The intercoms inside the cells are for reporting if there are problems encountered by the prisoners. They get connected to the controller by activating or by pressing the button. The controller will then report to the correctional officer downstairs. **He knows 90 % of the prisoners. When the Plaintiff came to**

Green Prison he was already there. He from time to time tried to smuggle things into the prison. Dagga and money. He was also a fighting type of a person. Aggressive, quarrelsome and argumentative. Irritable as a prisoner.

[69] On 11 February 2011 he was on duty at KD, he took count of the inmates, Plaintiff was missing, as he was incarcerated at Block E. **Around 8h30 he noticed the Plaintiff coming with his luggage, signaling that he was from E Block.** He accompanied him up the stairs to his cell, **he wanted to have his toiletries or to sleep.** He was carrying all his stuff because when he went to E Block he took all his stuff. When he reached his cell 15, he informed other inmates who were in the cell as their programme for the day had not started yet, that the Plaintiff was back. All four of his inmates were in the cell. He thereafter descended the stairs going back to the ground floor. Whilst he was downstairs doing the patrol he got called via the radio by his manager Nemamilwe who told him to inform the Plaintiff to report to his office. He went upstairs and informed the Appellant that the manager is requesting his presence at his office. Appellant started quarreling and insulting him saying he knows why the manager wants to see him. The manager had not told him why he wanted to see the Plaintiff. The Plaintiff said the manager wanted him to go back to Block E for an offence he had committed. After informing the Plaintiff he went downstairs. As he was busy patrolling in the cells there on the ground floor, he had a noise coming from upstairs, which sounded like people insulting each other. He went upstairs to check and found that the Plaintiff had taken the bedding, sponges and sheets belonging to other inmates outside the cell. The other inmates were also outside the cell, complaining about their belongings being taken out of the cell. Plaintiff was sitting inside the cell holding a burning toilet roll in his hand with the inside of the roll burning as the hardboard inside was pulled out. He had stacked his bed, sheets and blankets together intending to set them on fire. He told the Plaintiff not to do that. **Plaintiff became aggressive towards him,** insulting him saying he is a small boy. He then sought his superiors as the Plaintiff said to him he wants his superiors. **Realizing that Plaintiff was becoming more aggressive he called** for backup. He did that through the radio calling "CERT1", there is a problem at cell 15 KD CELL 15'. The whole prison could hear him. CERT 1 is a local emergency. The officials don't carry weapons save for a radio and keys that they sign for in the mornings. ***The KD Block has nine custodial officers on duty including the manager.*** At his station he is the only one.

[70] **Nemamilwe, the unit manager peached up.** He tried to talk to the Plaintiff to drop the toilet roll but Plaintiff didn't. A minute or two later **Munyai and Makwea arrived.** Makwea tried to talk to Plaintiff as well that he must not do what he was doing and drop the toilet roll, Plaintiff did not. Makwea tried to move towards the Plaintiff and the Plaintiff pushed him back. He (Luvhengo) attempted to intervene and to talk to him not to do that. **The Plaintiff then grabbed him, punched him with a fist on his left cheek.** Monyai then came in trying to grab the Plaintiff. There was also Mathebula and Matladisa. **Then the Plaintiff slapped Munyai with an open hand as they were trying on one hand to take away the toilet roll and him refusing.** Makwea managed to take it away then handcuffed the Plaintiff, who nevertheless continued to be aggressive. Makwea, Nemamilwe and Mathebula carried handcuffs. The Plaintiff was fighting and did not allow himself to be handcuffed. He was fighting so they tried to get him down and after sometime they succeeded. They then tried to get his hands at the back to handcuff him. **It took them sometime for their endeavour to succeed as he was resisting.** He was asked what happened to his clothing at the time. He replied that his shirt was torn by the plaintiff. When asked if it was the only thing torn he

said the pocket on Mathebula's trouser was also torn. He said Plaintiff fell and grabbed Mathebula to stop himself from falling. There were six officials there. After handcuffing the Plaintiff they got him on his feet. All this was happening inside cell 15. The Plaintiff managed to get himself down the stairs and he and Nemamilwe were behind him. All others were behind them. Plaintiff tried to remove the cuffs and to resist. Then Nemamilwe and himself each grabbed him on the side and tried to get him out of the pod. Plaintiff was taken to the green prison clinic. He remained behind in the pod. Nemamilwe and he knew the Plaintiff very well. The Plaintiff was misleading the court when he said that Nemamilwe told him to take down his pants and under pants and inserted two fingers of his gloved hand into his anus and that when he jumped they all started to hit him with fists and kicked him until he fell to the ground. Also that a custodial officer jumped on his private parts. He denied that he followed Plaintiff while his hands were cuffed behind his back. He denied Plaintiff's story of legs that were cuffed and that he was picked up by the legs dragged towards the stairs and said Plaintiff was walking by himself. He also denied that Plaintiff was pushed down the stairs or that he rolled until to the ground his legs curled up to his chest. That he was then pulled up the stairs again and his head bumped against the steel stairs. He denied that he was pulled by the chains on his legs out the pod or gate.

[71] He said he remained behind when they were taking him to wherever. What he and his colleagues did to Plaintiff was necessary to prevent damage being done in cell 15. It was his left cheek that was injured during the incident and was not aware if the Plaintiff was also injured at the time. He did not see any injuries on Plaintiff. He knows and does not dispute that Dr Rambuda examined the Plaintiff and found injuries. And he could have sustained the injuries during the incident because of the way in which he was fighting. He went to see Dr Rambuda for the injuries he sustained as his private patient. He already had a file with him. He saw him around 16h00 on the same day. Monyai also went to see the doctor.

[72] He admitted to his statement that he made when he reported an assault case to the police. In the statement he said he was hit with a clenched fist on the chin by the Plaintiff and sustained an injury, a swollen left chin. He mentioned only four people instead of six and said he forgot the other names and mentioned only those who accompanied him to the doctor. He said he was familiar with the use of force document. The incident in cell 15 was unplanned. The purpose of which was to protect the Plaintiff, the other inmates and property using minimum force. The use of unplanned force document was followed and a filing of a report required. Nemamilwe was required by the document to furnish a report of the incident, which he did, writing that the Plaintiff refused to be examined by the medical staff meaning nurses at Green prison clinic. He confirmed that an investigation was conducted by Mabasa who interviewed him. Mabasa reported that he (Luvhengo), said to him inter alia, that "Plaintiff was in possession of fire on his hand and the area manager requested him to put down the fire and he says the offender refused. Plaintiff then pushed him, tore his t-shirt and hit Monyai on his left cheek. The offender was handcuffed and taken to E Block." He indicated that Makwea's office is about 75 to 80 km from his office. He indicated that the tissue that Plaintiff burnt was a toilet paper roll which they have taken out the carton in the middle and then squeezed and light on the inside. It can burn for about 15 to 20 minutes. Although the Plaintiff said there are four chairs in the cell, there are only two.

[73] During cross examination his testimony was that before he was employed by the 1st Defendant he had no experience of dealing with inmates. He had known the Plaintiff to be a troublesome somebody since 2010. He was once found with dagga and insulting staff members. He said his colleagues were also aware that the Plaintiff was a troublesome somebody, Nemamilwe and Makwea as Nemamilwe reports to him. When told that Makwea said he does not know the Plaintiff he only got to know him on 11 February 2011, he said Makwea works with 152 prisoners and he may not know them individually by name. Asked if he was aware that Plaintiff fought with other inmates, he said he was aware as well as Makwea, the area manager. He was aware because he works with him. He would make sure that it ends there and there. He would sit with the inmates and cause them to apologise individually to each other and ending the matter there and there. As the person who was in charge he could conciliate or report it. Plaintiff did not fight everyday but had a lot of pending cases. He denied that the Plaintiff was assaulted and confirmed that is what he said even during the criminal trial in the magistrate court. He confirmed that there was no charge of attempted arson or malicious damage to property. He got an sms informing him that the accused was acquitted of the charge. (He could not prove the assault on him). It was put to him that the court did not believe his and Munyai's version. He said he reported the incident after 16h00 as he was waiting for the doctor. He went to the doctor at 11h00. At the practice there was no doctor available. He waited since he knew Dr Rambuda for a long time and had a doctor patient file with him.

[74] On the application of minimum force on the Plaintiff he said inmates are to be taken to the clinic before they see a doctor. He did not see any problem with him seeing the same doctor the inmate has consulted. He went first to obtain a form the J88 from the police and then went to the doctor. He hung around at Rambuda's surgery because he preferred the doctor rather than another one. He admits in his statement to the investigator he never said he was assaulted, only said his t-shirt was torn. He said he nevertheless respected the findings of the investigation as a credible outcome. In his statement, he did not mention taking Plaintiff to the clinic but to segregation because he was shortening his statement. It was then pointed out to him that in the criminal court they said he was not injured and they took him to segregation not clinic. So the Plaintiff had to call the doctor who noted the injuries and confirmed that the Plaintiff was brought to him, whilst they were denying that he was injured or saw a doctor. He then agreed that the Plaintiff might have had injuries. It was pointed to him that under oath he said the plaintiff was taken to segregation trying to maintain that there was nothing wrong with the Plaintiff and that they did not see any injuries. His reply was that Plaintiff was first taken to the clinic, that being inconsistent with his statement because he was trying to shorten the statements. In his statement he said Plaintiff was taken to segregation however he is denying that is what happened, they actually took Plaintiff to the clinic and in court he was now saying to the clinic that is what the court must believe. He confirmed that If somebody says he was assaulted on the neck he would be telling the truth. Even though he was assaulted on his cheek. Other transgressions of the inmates, including the other way they light the cigarette was not known by the employer as he did not report them instead he charged them himself.

[75] Regarding the psychologist's report he said it was wrong where it said Plaintiff came back to segregation on 10 February 2011. Also wrong that his cell number was 16. He came back on 11 February. **He did not take the Plaintiff to the segregation room but remained in the pod.** He does not know how the lights look like at the segregation room, thinks they would be the same. **He did not get the time to tell Nemamilwe that the Plaintiff is refusing his orders as he had to call for backup.** When he came with the Plaintiff to the cell, the other inmates were there. He introduced him to them. When he returned he saw Plaintiff with a tissue in his hand the other inmates were outside. The inmates were surprised at the plaintiff trying to set their property on fire. It is an electronic door, during the day the doors remain open. When he went back to Plaintiff the third time he noticed that he was carrying the whole toilet roll in his right hand. The fire was burning from middle of the full toilet roll. He told the Plaintiff to put the fire down. What Plaintiff did that day frightened him as it was unusual and only when he refused to put the tissue down did he call for backup. Nemamilwe, the unit manager was the first to arrive from the K- Block a minute after the call. He had to pass two doors electrically controlled from the control room. He was followed by Makwea who arrived in 2 minutes passing three doors. His office being 75 to 80 meters away. Everybody arrived whilst Plaintiff was still holding the tissue except Mathebula and Mathladisa. When the two arrived Makwea had already taken away the tissue. There was no visible damage to the light. He did not investigate where and how the Plaintiff got the tissue lighted. He disputed that there was no investigation because there was no burning tissue. When Makwea arrived he instructed Plaintiff to put the burning toilet roll down. Plaintiff pushed Makwea with his left hand. He was at a distance since inside the cell. Holding the toilet paper in his one hand for 6 minutes. He (Luvhengo) then moved forward with Makwea now behind him. Makwea then stepped forward to take the burning tissue and he succeeded. After that he resisted to be handcuffed and as the toilet paper was taken from him there was no longer a threat. He then refused to be handcuffed and be taken to the E Block. He (Luvhengo) was summoned back up because the Plaintiff had a burning tissue in his hand. Nobody was burnt by the tissue. The floor shines and can easily be ignited. He does not know what happened to the tissue. Makweia had taken it when they brought him down. In all they were six in number when they did that. He did not see any injury on Plaintiff when they were struggling to handcuff him. Three out of the six officials that were there had their handcuffs with them. Plaintiff was only handcuffed. They don't use leg cuffs so nothing happened to his legs. **Plaintiff got out on his own out of the cell and went down the stairs. When he reached down the stairs he resisted moving forward.**

[76] He confirmed that they were nine prison officials that were in that section working at their pods. He was hearing for the first time that Plaintiff was searched and told to take off his pants and that Nemamilwe inserted his finger in his behind. He denied ever saying they are there to search him for dagga. At no stage was the Plaintiff assaulted. The injuries on the Doctor's J88 might have been at the time when they tried to subdue him in the cell. He did not see his physical injuries but knew about them from reading the paper. He denied that he opened up criminal charges in order to avoid any being opened against him. He however did not dispute the injuries as recorded in Rambadu's report. When Plaintiff was called, he was supposed to go back and serve a 21

days sentence. He denied that after the 10th there were no further transgression of the Plaintiff, or that he served the entire period before he was transferred at segregation. He does not take the blame for what happened on the 11 February and would use minimum force again if an inmate becomes violent. They were not in there on the search for dagga on that day. In his 10 years of being there he has never seen an inmate being assaulted by the prison officials. He only testified about the left chin that was swollen and not the neck as alleged by Mathebula and Makwea.

[77] On re-examination he confirmed that he made a statement to the police on his assault by the Plaintiff. He said in it his t-shirt was torn apart and then they managed to handcuff him and took him to segregation cell. He however did not accompany him to the segregation cell. He was taken by Nemamilwe. On whether he was unknown to the Plaintiff. He agreed that he would not have recognized him. Plaintiff did not know him at all. He was known to the Plaintiff and also Nemamilwe who had his office on the block as well as Monyai who had his office near the passage. He denies that Plaintiff was assaulted. At court nothing was said about the gloves and Nemamilwe or pushing Plaintiff down the stairs. The leg irons are only used when an inmate is being transported or escorted outside court. And not used inside the prison. Defendant's counsel then made statements on whether or not the doctor was in cohorts with the prison officials on the assault. P 553. He thereafter made an application to lead evidence about the torn clothes and about the Plaintiff being smuggled to Barberton prison, which was refused.

[78] N E Mathebula, an erstwhile college educator who has been working in Sinthumele prison since 2002 indicated that on being employed he underwent training by Fidelity Security Group for six weeks and obtained a certificate for working with offenders. He started by working at the Blue prison as a correctional service (custodial) officer. He was then promoted to a level of a supervisor within that prison and then a Unit Manager, the position he was holding on the date of the incident. Presently he has moved to the special treatment unit, that is segregation at E Block. He said they are rotated in order to stop the prisoners getting familiar with them. He used to report to Makwea, the Green Prison's area manager, when he once worked in M Block at the Green Prison. He had four pods with 380 offenders in M Block.

[79] According to him he received a radio call at about 9h30 coming from Luvhengo at KD asking for a response because of a situation at KD that is in Green Prison where the unit manager was Nemamilwe. On hearing the code which conveyed only that there was a problem, he ran to the situation from his office which is about 90 meters away, going through 4 gates opened from the control room. The first door at his section opened by the control officer stationed there and the other controllers from K Block had to open the remaining three doors. He was therefore the last person to arrive at cell 15. The officers were trying to subdue the Plaintiff. He did not know the Plaintiff at the time. It was the first time that he had to deal with him. Plaintiff was refusing to be restrained and very violent. He did not know what was happening he says he only got to know the whole story when it was related to him after the incident. Plaintiff was refusing to be handcuffed. In a spur of a moment he saw the Plaintiff assaulting Luvhengo with a fist and Munyai with an open hand. He assisted in trying to subdue the Plaintiff. Plaintiff managed to hold his uniform pants with his hand and tore it whilst he was on the floor. They managed to take Plaintiff's hands off and

restrain him with the handcuffs. He did not see any burning stuff in the cell or anywhere else. He said they ordered Plaintiff to move out of the cell and he did unaided, until down the stairs to the pod. As he reached the entrance of the pod Plaintiff started to refuse to move again that is when Nemamilwe and Mahladi held both his hands, one on the left and the other on the right and hauled him out of the unit to the clinic. Plaintiff was fighting refusing to be taken out. They succeeded in taking him out because of the restraints they applied on his hands. Plaintiff was taken to health care whilst he went home to change the torn uniform and then came back to prison. He did not see any injuries on the Plaintiff. if he was injured as per Dr Rambuda's J88 it was under the circumstances that he described because restraining is not something that is done kindly as he was violent. In the process of trying to get some order he could have sustained those injuries. In an event of an offender being violent they consider the safety of the inmates, of himself and the safety of staff and also the safety of the property that they are supposed to safeguard. They have something that is called use of force procedure. It can be a planned use of force or unplanned use of force. The one exercised on the Plaintiff was not planned. As it was a response to an unexpected event /occurrence. He does not know why the Plaintiff behaved that way that day. He was seen by the doctor as it is procedure.

[80] He said as a unit manager he was aware of the procedures he had to adhere to after the unplanned use of force. He would have called the members who were involved to complete a use of force form and to check the statements which would be taken along with the use of force. And the second thing is to take the person who was involved and subdued to be seen by the medical staff or doctor. Counsel then put it to him that as a unit manager he had to fill up an incident report within an hour after the incident which was to be submitted to their principals. He said Nemamilwe completed the report as the unit manager at K Block approved by Van Rensburg and Mr Damano who comes from DCS who is their client. An investigation report was also filed by Mr Mabuza L S who works at the investigation unit, a separate unit from the Green Prison and any of the prisons' units. He confirmed that he made a statement to Mabuza that 'he responded to a call by Luvhengu and found Nemamilwe, Munyai, Makweia there. That Plaintiff assaulted Luvhengu and also Munyai with a fist on the cheek and on the face with an open hand. They then helped one another to restrain Plaintiff and while they were trying to do so Plaintiff tore Luvhengu's T shirt and his pocket. They managed to restrain him and the offender was taken to E-BLOCK. Offender Plaintiff was never assaulted by anyone regardless of his violent behavior. Munyai and Luvhengu were taken to see the medical doctor for treatment.' When he made the statement he was responding to the allegations of assault made by the other officials against the Plaintiff. Counsel read in the document that Plaintiff's attorney was going to discover, photos and witness statement and only discovered SAPS docket and the charge, mentioned therein is common assault and the complainant is Luvhengu he mentioned punched by fists. He was reading from the cover sheet of the docket in respect of Luvhengu's complaint about the assault by Plaintiff. He confirmed that the Plaintiff was acquitted on 26 July 1011. It was put to him by Counsel that he also made a statement and was asked to read it. He read that "At 9h30 he received a radio call to say he should report to K Block Pod D. On arrival he found offender Plaintiff PDS210743159 who was threatening to burn the prison cell. He was also aggressive. When ordered to calm down he started assaulting officer Luvhengu and Munyai with fists. When trying to restrain him the Plaintiff further tore officer Luvhengu's T shirt and his trouser pocket apart. Officer Luvhengu

sustained a swollen left chin and neck during the assault.” He confirmed that he said he did not see anything about the burning of the cell and made the statement on the angle of reporting at the police station as a witness of an incident of assault that took place on officer Luvhengo and officer Munyai. There was a debriefing on the cause of the incident about what happened after the incident before they went to the police station. After each and every incident the people who were involved sit around to discuss the incident reported whether it is injury, restraining or anything that has to be reported in the incident report, the members have got to talk about it, that is policy and procedure. That is where he got the information as to why the Plaintiff was violent and was restrained. He confirmed that he mentioned something he did not see. After the incident he had nothing further to do with the Plaintiff.

[81] He denied Plaintiff’s allegations about leg irons or cuffs stating that they do not carry leg irons in prison and did not use leg irons on him. He was never pushed or pulled by anybody. Nobody inserted any finger on his private parts. That has never taken place it is a fabrication. The only time leg iron are used by Kutama is when the offenders are to move from one prison to another to minimize the risk of escape. He carries only the keys, handcuffs and radio that he signs for in the morning. The custodial officers on duty in the pod do not carry firearms or handcuffs, they carry only keys and a radio. The unit manager carries the handcuffs. He was seeing the Plaintiff for the first time on the date of the incident. Inmates are not allowed to have fire in their cells but they always try and make means to have fire and because inside the cell there is fluorescent. There is an electrical device that is mounted on the wall and that is done under supervision of a custodial officer in the court yard. Is the smoking area. The other means are unlawful. Which are, they will take a spring from a Bic pen and scratch it and connect it to the fluorescent light and when it is connected it attracts heat from the fluorescent light and it burns. When it is hot and red they are able to put some toilet paper and it ignites fire for their own personal use which is unlawful. After that they take off that spring and hide it. According to him it is very rare to see, but sometimes one would see small blackish marks on the fluorescent light. There is a small cover that they are able to pull out and once they are done with the use of the light they put back the cover. It is not completely closed. They have to be at one end of the tube light to do that. He was shown something he called the dupa. His testimony was that the inmates string a tissue paper together. When they have ignited the fire from the fluorescent light, they attach it to that so that it burns slowly for their smoking purposes. If one is a smoker and want to smoke after hours when he is having that kind of a fire with them in the cell in the night he is able to go to it and light the cigarette until dawn. It is kept in the cell unlawfully, burning, as they are not allowed to smoke in the cells. It can burn for two hours depending on the length of the string and it is a general thing. The toilet paper spoken about can burn for twenty minutes.

[82] In reply to cross examination he testified that it was officer Munyai or Luvhengo who was calling on the radio telling them to respond to KD where there was a problem. He mentioned CERT 1 code which when interpreted means people must respond and the number of people that must respond should be a minimum of six people regardless of what kind of a situation. Luvhengo or Munyai did not mention what was the problem in the radio. He was the last one to arrive. His office is furthest then Makwea’s. It took him plus minus 3 minutes from a distance of approximately 90 meters where he was stationed to reach the

cell, passing three doors, on each having to press the intercom button for somebody (the controller) to open for him. The time it takes to open the door depending on the emergency. The Plaintiff's cell 15 was in the first floor. In his statement to the investigation report he refers to cell 16 which he believes is an error not a lie to which all of them have said cell 16. Also Luvhengo's left cheek was swollen. On his statement to the police he said officer Luvhengo sustained a swollen left chin and neck due to his assault. He never mentioned the neck because two things happened that day. After the incident there was a debriefing during which Luvhengo mentioned that he is feeling pain on his neck. That is what influenced him to write in his statement to say that a painful cheek and neck, influenced by what he heard from Luvhengo and he believed him. So the neck was not a mistake even though Luvhengo in his evidence also did not mention it. He denied that Luvhengo was never assaulted, stating that he was assaulted in his presence. He could not say which hand the Plaintiff used to assault Luvhengo. There was a mix up in that situation. He saw the assault and did not see any burning thing in the cell. When he was told that Luvhengo said when he was assaulted on the cheek the Plaintiff was carrying the toilet paper on his right hand and he hit him with the left hand. He said he did not see that because he was concentrating on restraining the Plaintiff. It was put to him that he also did not see the tissue because the Plaintiff never carried any tissue. He said any form of violence regardless of the cause he is obligated to prevent it from further occurring. Whether he could or could not see it, he is responsible to stop that kind of violence. He did not see anything happening to Mokwea as he came late. He never saw anything. However he saw when Plaintiff assaulted Luvhengo. Although his pants were damaged, he did not open a criminal case because that is not his property. He only reported it to his employer.

[83] On the assault on the Plaintiff, It was put to him that the assault on Plaintiff was unlawful and the search intended to humiliate him. He said they applied minimum force because the Plaintiff was violent, assaulting staff. Restraining was the best they could have done and that is what they did as their lives and that of inmates were in danger. Plaintiff used fists to injure Luvhengo and Munyai. He denied Plaintiff's story that he was thrown down the stairs or that there is something like lawful assault in prison. He said Plaintiff was not assaulted but only restrained with handcuffs. He also indicated that offenders who take part in the illegal way of burning cigarettes are charged. And it goes to the director of prisons. He arrived late but what he said was enough according to what he saw. He saw the assault, help restrain an offender (the Plaintiff) and did not see the Plaintiff being assaulted because he was never assaulted. He agrees that the Plaintiff sustained injuries as documented by Dr Rambuda but not because he was assaulted but during the time he was being restrained.

[84] After the scuffle in the cell, according to him Plaintiff was taken to the clinic and healthcare by Mahladiisa and Nemamilwe, he saw them taking Plaintiff to the clinic. He however said it is correct that he told Mabuza that the Plaintiff was taken to E Block which was his final destination. He said he went to the clinic in court because that is the procedure. Procedure says that they must via through the clinic, healthcare and then E Block. He just stated the summary of the whole thing. It was put to him that they said that to Mabuza because they were denying that Plaintiff had injuries. He replied that it has never happened in his time working in the facility that an offender will be admitted in E Block without via the medical personnel. It has never occurred and denied that they said Plaintiff was not taken to the doctor. He admitted that they have cameras at the corridors. It was put to him

that there were camera recording after Plaintiff was taken out of his cell down the stairs, until to the clinic or E Block, even when they allege that he started acting aggressively.

[85] On re-examination he confirmed what was put to him by Counsel that Plaintiff was seen by Rambadu at 9h45 on 11 February 2011. The health clinic is not far from E Block it is 15 to 20 minutes away. He confirmed that Plaintiff did see Dr Rambadu that day shortly after he received the help call at 9h30.

[86] That was the Defendant's case

ANALYSIS OF THE EVIDENCE

[87] It is apparent that the Plaintiff was regarded as a nuisance by the custodial officers at Sinthumule. He was referred to in strong and harsh terms. Allegations made about him by those who allege to have been familiar with him or have interacted with him one way or the other indicated that he was loathed as an unpleasant character. The Defendants' witnesses described him as a fighting type, aggressive, quarrelsome, argumentative and irritable as a prisoner, branded a convicted murderer and a rapist in the Defendant's Plea and referred to him in their internal incident report, as one of the dangerous offenders whom under any circumstances can kill or attack the officer to a regretful situation meaning he would not hesitate to kill. He was also said to be a troublesome somebody since 2010, having once been found with dagga and insulting staff members. Also alleged that officers were aware that Plaintiff was troublesome. It was as a result noticeable from his evidence and demeanor that such awareness and knowledge of how he is perceived, of the type of character he was projected to have and the general negativity in which he was held frustrated him. One could, during the presentation of his evidence sense that as much as he wanted to coherently present to the court the facts of his alleged assault and indignity thereof, he was eager to also express as well as convey his general discontentment and the frustration he suffered due to that perception and the unkindness that he felt was being meted out to him.

[88] He complained of having spent most of his incarceration at Sinthumule locked up in segregation and that all the charges were brought against him whilst he was there. Since 30 December 2010 until he was transferred in August 2012. He indicated that they kept on keeping him in the single cell wanting to destroy him mentally even though he told them that he wanted to learn. He felt humiliated and troubled due to the assaults and the segregation. Rambadu also confirmed that at the end he was concerned about plaintiff spending so much time at segregation that he was not being rehabilitated or getting educated. He only attended school up to Standard 5 and according to Plaintiff could not read or write.

[89] It was in that vein that Plaintiff presented his evidence. It is therefore understandable that his evidence although sincere, carried an air of bitterness and overstatements. However, considering his background I do not believe his evidence was thus tainted. The incident of assault occurred a few minutes he came out of the said segregation having spent 42 days there for possession of dagga, the longest period (maximum sentence) that a prisoner can be punished to stay at segregation. Part of Plaintiff's evidence was not challenged by the defendant's witnesses particularly that Plaintiff was alone in the cell when quite a number of the custodial officers descended on it. Plaintiff says there were nine officials plus a sniffer dog. They started searching the cell

with the dog sniffing around and when they could not find anything, he was told to lower his pants and two fingers inserted in his anus to search him. He jumped (feeling uncomfortable) as a result the officers assaulted him with fists, kicked, handcuffed and escorted him out of the cell. He was pushed down the stairs, dragged and escorted out the pod to segregation at the single cell. He had visible injuries that he sustained during the assault, however no injuries were noted on his head by the doctor that were from hitting his head against the steel rails that he alleged to have also sustained when he was dragged with his feet held high. An apparent exaggeration which explains why visible injuries were not noted by Rambadu. All the same it does not take away the fact of the probability of him having been dragged out to the pod. He might have felt a bump but possible it did not manifest into an injury. Therefore except for the propensity of overstating some of the facts I am satisfied of the sincerity of his evidence.

[90] It is also his testimony that he was kicked and one of the officials jumped on his genitals. He complained about it to Rambuda, when he consulted with him on the injuries he sustained during the assault. In respect of that complain Rambuda noted on the J88 Form that "refer to see Urologist. When Rambuda was quizzed with regard to such an inscription on the J88, he said it was in reference to an old complaint about Plaintiff's testicles. He however could not say exactly when was that complaint made and why he did not refer the Plaintiff to an Urologist when it was made or why he recorded the referral for an old complaint on the J88 which was being completed to note injuries sustained that morning during the assault allegedly by the nine officers so that Plaintiff can open a case. The assault was the only complaint recorded on the J88. Rambuda confirmed that he completed the J88 after Plaintiff had indicated his intention to sue for the injuries he sustained during the assault. It also could not be coincidental that a few minutes after the assault Rambadu notes the resultant injuries and include the referral to an Urologist, a specialist on male and female private organs with no further explanation. According to the J88, Plaintiff's narration of how the assault took place is not recorded save just to state that he was assaulted by nine custodial officers. The version of the doctor that he included a referral on something else without indicating in the document that the referral is separate from the injuries resulting from the assault does not make sense, is far-fetched and such version highly improbable. I therefore find Plaintiff's complaint about the testicles to have been made to the doctor as part of the assault. And also probable to have been sustained during the application of force on the Plaintiff by the custodial officers. Plaintiff's version that one of the custodial officers jumped on his private parts is more probable.

[91] I would not deal with the whole of Rambuda's evidence but only with what is noteworthy to solve some of the incongruities and inconsistencies I found when taking into account the whole of the Defendant's evidence. One such instance that is of significance is the evidence he gave when he was highlighting his work in the Sinthumule prison, specifically he mentioned his daily visits to the single cells at segregation in E Block that were part of his work and pointed out what took place on the date of this incident. The Defendant's witnesses made conflicting evidence about what exactly happened to the Plaintiff after he was subdued by the custodial officers and taken out of his cell at KD section. The doctor's evidence clarified that. It is Plaintiff's evidence that out of the pod he was taken to segregation, at E-Block.

[91.1] Luvhengo in his evidence in chief testified that Plaintiff was taken to the prison clinic. He refused to be treated there and was therefore sent to the health centre. However he confirmed that in a statement he made to the police in the criminal case he instituted against the Plaintiff for common assault he stated that the offender was handcuffed and taken to segregation at E Block by Nemamilwe. He however did not accompany him to the segregation cell. He also confirmed that it was also his testimony under oath during the criminal trial that Plaintiff was taken to segregation and not assaulted. The reason he gave to the court for the application of force on Plaintiff after the tissue was allegedly taken away from him was that Plaintiff was refusing to be handcuffed and taken to the E- Block.

[91.2] Makwea on the other side testified that Plaintiff was taken to the clinic and health centre as part of the routine that after a prisoner is subdued through the use of force he will be sent to the clinic or doctor to be examined even though according to him he could not see any injuries on the Plaintiff and as far as he was concerned Plaintiff was not injured. He said due to the Plaintiff being aggressive he was taken straight to the clinic and then to the hospital by Nemamilwe.

[91.3] According to Mathebula after the scuffle in the cell, Plaintiff was taken to the clinic and healthcare by Mahladiisa and Nemamilwe, he saw them do that. However it is correct that he told Mabuza that the Plaintiff was taken to E Block which was his final destination. He said in court he is saying that Plaintiff went to the clinic because that is the procedure. Actually after the incident he had nothing further to do with the Plaintiff. Offender Plaintiff was never assaulted by anyone regardless of his violent behavior. The evidence of the officers could not be trusted.

[91.4] Rambadu on the other hand testified about his rounds at segregation E Block that were part of his work, every day. He said if an inmate has a complaint he has to register it during that time. During those rounds at segregation he saw the Plaintiff, who then mentioned that he was assaulted by the nine prison officials and wanted to open a case, so he went ahead and completed the J88. The J88 indicates that it was completed at 9h45. So if Plaintiff was seen by Rambadu at E Block as it is apparent, and during that time told the doctor that he wants to open a case upon which the J88 was completed indicating the time to have been 9h45, it is apparent that he was taken straight to segregation from the cell after the injuries, a fact which is more probable and in line with Plaintiff's evidence and the J88. The incident started at 9h30. At around 9h45 Plaintiff was taken out of the cell. It is therefore evident that after the use of force on the Plaintiff he was taken to segregation at E Block as he alleged.

[92] The version of the Defendants' witnesses changed or was altered constantly, depending to whom it was made. Actually Luvhengo confirmed that his evidence under oath in the criminal trial against Plaintiff on the same incident was different to what he said in a statement he made to the policeman investigating the case and also compared to his statement to Mabuza, the prison internal investigator. Likewise, Mathebula also said that although something different happened he was mentioning not what really happened but what is supposedly the procedure (or supposed to happen) and what he also heard at the debriefing. In that respect the evidence of these witnesses is discredited and cannot be

relied upon. Except, in the case of Rambadu the doctor, the challenge was different in that I had to take into account that as an expert he was hypothetically a neutral witness, his evidence was not to be partisan but to assist the court to understand the medical evidence a genuine opinion through his expertise as a medical practitioner, whilst at the same time also taking into account that he was intricately involved with the prison due to his employment.

[93] Assessing the custodial officers evidence of what happened in the Plaintiff's cell revealed further instances of incongruence and inconsistencies in the version of the Defendants by the officers: -

[94] Makwea's evidence in chief was that he heard Nemamile on the radio calling for help required at the Plaintiff's cell. When he arrived there he found Luvhengo and the Plaintiff. Luvhengo told him that Plaintiff wanted to burn the cell. Plaintiff was holding a burning tissue in his hand that was emitting smoke. He told Plaintiff to drop that tissue and extinguish it, Plaintiff refused. He moved forward to the Plaintiff to take the burning tissue out of his hand. Plaintiff pushed him back. At that stage Mathladisa, Mathebula and Munyai were already there. They all then charged forward to the Plaintiff, took away the burning paper out of his hand, pinned him on the floor face down and handcuffed his hands behind his back. He was then taken out of his pod. That is the version that was put to the Plaintiff by the Defendant's counsel. Under cross examination Makwea said he arrived in the cell whilst Nemamilwe was telling the Plaintiff to remove the tissue. The burning tissue was taken from Plaintiff when they all advanced towards the Plaintiff and subdued him. That is when he went for the tissue in Plaintiff's hand. The version differs from his initial evidence that he found Luvhengo with the Plaintiff. Now saying he found Nemamilwe already there talking to the Plaintiff. He could not answer as to the whereabouts of the tissue, there being no investigation on Plaintiff's attempt to commit arson or burn the cell even though according to them that was the reason why they were all assembled in Plaintiff's cell and they ended up using force on him.

[95] Luvhengo said he was the one who sent out the radio call for help at Plaintiff's cell when Nemamilwe peached up who was according to him. the first to arrive and to talk to the Plaintiff telling him to drop the toilet roll but Plaintiff didn't. Munyai and Makwea arrived together a minute or two later. Makwea also told the Plaintiff to stop what he was doing and drop the toilet roll. Makwea then moved towards the Plaintiff and the Plaintiff pushed him back. He (Luvhengo) then tried to intervene. Plaintiff then grabbed him, punched him with a fist on his left cheek. Munyai then came in trying to grab the Plaintiff. There was also Mathebula and Matladisa. Plaintiff slapped Munyai with an open hand as they were trying on one hand to take away the toilet roll and him refusing. After that Makwea managed to take the roll away and they handcuffed the Plaintiff, who nevertheless continued to be aggressive. It is important to note that according to Luvhengo Plaintiff grabbed and hit him and Munyai whilst carrying the burning tissue on his right hand.

[96] Mathebula's testimony was that he received a radio call at about 9h30 coming from KD from Luvhengo to respond to a situation at KD. He also changed under cross examination and said the help call was either by Luvhengo or Munyai. He said he was the last person to arrive at cell 15. The officers at the time were trying to subdue the Plaintiff. Plaintiff was refusing to be restrained and was very violent. He did not know what was happening he got

to know the whole story when it was related to him after the incident. In a spur of a moment he saw the Plaintiff assaulting Luvhengo with a fist and Munyai with an open hand. He then assisted in trying to subdue the Plaintiff. Plaintiff tore Mathebula's pants whilst he was on the floor. They managed to take Plaintiff's hands off and restrain him with the handcuffs. He said he did not see any burning stuff in the cell or anywhere else. It is ironic and difficult to imagine how he could not have been aware of the tissue when according to Luvhengo and Makwea Plaintiff hit Luvhengo and Munyai whilst he was holding the burning tissue in his hand. Luvhengo said Plaintiff slapped Munyai with an open hand as they were trying to take away the toilet roll from the other hand. So if Mathebula was there when the two were hit by the Plaintiff, which happened before the tissue was taken he would have seen it. He would also have seen Makwea taking the burning tissue away as that allegedly happened after plaintiff had assaulted the two officers and was being taken down by all of them. Mathebula saw neither the Plaintiff nor Makwea in possession of the burning tissue. The only probable explanation is that the Plaintiff was never in possession of a burning tissue. Since also none of the witnesses, even Makwea the one that is alleged to have taken the tissue away from the Plaintiff, could give a sensible explanation during the trial as to what happened with that tissue, even though it formed a material aspect of the whole case and was the reason why Luvhengo called for assistance. Makwea's explanation that it was shown to the Plaintiff during a disciplinary hearing of the Plaintiff was proven to be untrue as he agreed that Plaintiff never attended a disciplinary hearing. As also indicated by the Plaintiff, the burning of the cell and tissue was never mentioned during the internal process or in the criminal trial. So there is no credible evidence that Plaintiff was indeed in possession of a tissue.

[97] The worst in the Defendant's case was the shocking confirmation by Mathebula under cross examination that even though he did not see the incident of the tissue he nevertheless went ahead and made a statement which he read into the record at the request of Plaintiff's Counsel, which read "At 9h30 I received a radio call to say I should report to K Block Pod D. On arrival I found offender Plaintiff PDS210743159 who was threatening to burn the prison cell. He was also aggressive. When ordered to calm down he started assaulting officer Luvhengo and Munyai with fists. When trying to restrain him the Plaintiff further tore officer Luvhengo's T shirt and his trouser pocket apart. Officer Luvhengo sustained a swollen left chin and neck during the assault." He then admitted that indeed he did not see anything about the burning of the cell but, after the incident there was a debriefing on what happened and the cause thereof. He said the debriefing happened before they went to the police station and made the statement. The statement was geared on the angle of reporting at the police station as a witness of the incident of assault that took place on officer Luvhengo and officer Munyai. He also confirmed that it was not the only fact he did not know anything about on which he testified. He further said he did not see any injuries on Luvhengo and Munyai, that is, the swollen chin and neck but heard during the debriefing that Luvhengo's chin and neck were painful from the assault. He said that is where he also got the information as to why the Plaintiff was violent and was restrained. He confirmed that he mentioned something he did not see. Nevertheless he is the one who also accompanied Munyai to the police station.

[98] It is therefore evident that the excuse or the whole reason for the impairment of the Plaintiff's dignity and for the officers' presence in his cell was a fabrication by the custodial officers. As established from their testimony that they were trying very hard to present

what they thought was the appropriate or suitable version for this case and therefore deviating from statements they previously made under oath about the same incident. The officers' version about Plaintiff holding a burning tissue intending to burn the cell could not be sustained. It is therefore evident from the evidence that the real reason for the officers to have been in the Plaintiff's cell and to have subdued the Plaintiff had nothing to do with the burning of the cell with a tissue. In all probability they were there to remove the Plaintiff to segregation (as per pleadings).

[99] In the plea it is also alleged that Plaintiff refused to be handcuffed that is why he was subdued or force used against him. Makwea said they never asked Plaintiff to surrender himself for handcuffing so therefore he could not have refused. In their whole evidence as well there is no allegation by any of the officers that the Plaintiff was asked to hand or surrender himself to be handcuffed. The purpose of the use of force can therefore also not be associated with an attempt to handcuff him.

[100] The allegations about Plaintiff assaulting Luvhengo and Munyai was also inconceivable. Different versions of what happened were presented by the Defendant's witnesses. The Plaintiff is said to have hit Luvhengo on the left cheek, then chin, first with a fist and then the other witness saying with an open hand, whilst holding the burning tissue in his right hand. Mathebula added a neck injury. He had already confirmed that he was not being truthful when he said Luvhengo was hit on the chin and neck. He said he only heard Luvhengo complaining about his neck. He also confessed under cross examination that he never saw any injuries on the two officers but accompanied Munyai to the doctor and the police station to open a case of common assault.

[101] Makwea related the whole story of the emergency call, the burning tissue and the bringing of the Plaintiff down without mentioning any assault except that he was pushed. When he was asked if the Plaintiff was calm only then did he mention that he was aggressive and doing movements with his hands pulling and pushing. He had to be asked a leading question, that is, 'if any of them were injured.' Only then did he mention the alleged assault of Luvhengo and Munyai and the tearing of Mathebula's uniform. Initially he said they charged towards the plaintiff after he was pushed by the Plaintiff. He was asked if the assault on the two happened during the process when the plaintiff was being subdued and he agreed without explaining how it happened. It was almost as if he had nothing to add. He then again said that he could not see any visible injuries on the two officers even if they were assaulted in front of him. He is the second person who was there to say that he did not actually see any injuries on the two. He also at the end of his testimony said the role he was playing there was to see to it that Nemamilwe the unit manager is not oppressed or assaulted and that Plaintiff is treated with dignity, remarkably not mentioning the burning of the cell or the officers who were allegedly assaulted although commonsensically they would have needed protection.

[102] According to Luvhengo he tried to intervene and to talk to Plaintiff after Makwea was pushed trying to take the tissue, by moving towards the Plaintiff and the Plaintiff pushed him back. The Plaintiff then grabbed and punched him with a fist on his left cheek. Munyai then came in trying to grab the Plaintiff. There was also Mathebula and Matladisa. The Plaintiff then slapped Munyai with an open hand as they were trying on one hand to take away the toilet roll. Makwea managed to take it away then handcuffed the Plaintiff, who continued to

be aggressive. He confirmed that in the statement he made to the police he said he was hit by the Plaintiff with a clenched fist on the chin and sustained an injury, a swollen left chin. He mentioned only four people instead of six that were in the cell. To Mabasa he said "Plaintiff was in possession of fire on his hand and the area manager requested him to put down the fire and he says Plaintiff refused. Plaintiff then pushed him, tore his t-shirt and hit Monyai on his left cheek. The offender was handcuffed and taken to E Block," saying absolutely nothing about being hit by the Plaintiff either on the cheek, chin or neck. He admitted that he indeed in this crucial statement to the investigator never said he was assaulted. He then under cross examination confirmed that he would agree if somebody said he was assaulted on the neck, which is what Mathebula said. Now considering all this conflicting testimony, was Luvhengo assaulted, if so where? on the chin, cheek or neck? There is also no credible evidence to prove that the officers were assaulted.

[103] Furthermore, in respect of the manner the assaults were executed on the officers, they say when Plaintiff was pushing and hitting the officers with his left hand, he was all the time holding the burning tissue on the other hand. He is said to have pushed Makwea, hit Luvhengo with a fist on the chin, left cheek or neck, grabbed and tore his t-shirt and hit Munnyai on the left cheek. Luvhengo insisted that he was hit by Plaintiff's left hand on the left cheek because he was facing downwards. When Monyai also stepped forward, Plaintiff hit him with his open hand on the left cheek. It is obviously impossible to hit somebody with an open left hand on their left cheek, and also with such force that the assault will result in a swollen injury. When Luvhengo was told that Makwea said after Plaintiff pushed him all of them charged forward, he said he cannot answer to what Makwea said. He was testifying on what he himself observed. There is definitely no plausible or credible evidence from which it can be concluded that indeed either Luvhengo or Munnyai was assaulted and exactly how and it is unlikely to have taken place in the manner in which the assault is alleged to have taken place.

[104] The question that arises is if the Plaintiff was not holding a burning tissue and there is no credible evidence that Luvhengo and Munnyai were indeed assaulted or that any of them needed protection, Plaintiff was not asked to hand himself for handcuffing and therefore did not refuse to be handcuffed, what was the reason for the officers to apply force on him? Makwea said he was protecting Nemamilwe and was called by him to come and assist, with what?

[105] Luvhengo has alleged that Nemamilwe sent him to tell the Plaintiff to come to his office, Whilst Makwea said he was told that Luvhengo told the Plaintiff that Nemamilwe wanted him to report to his office so that he can be taken back to segregation. According to the Plea Plaintiff was supposed to go to segregation and he refused to be removed for that purpose and refused to be handcuffed, so the officers were there to forcefully remove him from the cell and forcefully handcuff him. There was no story of a burning tissue or of assault as alleged by the officers.

[106] All the officers were pitiful as witnesses and their version evidently fabricated. They continuously denied that the Plaintiff sustained the injuries as noted by Rambadu in the J88 that their counsel had to remind them time and again that the injuries have been conceded. Even though they denied Plaintiff's version of how he sustained the injuries, none of them

explained to the court how exactly they applied the alleged minimum force, who hit Plaintiff on the face as it was swollen and who kicked him on the chest and how the bruises on the ankle and elbow came about. In as far as they were concerned as was clear from their evidence, Plaintiff did not sustain any injuries, all of them subscribing to what was recorded on the investigative report that "there is no relevant evidence to sustain that injuries outlined on the J88 were due to the fact that the offender Takalani Neluheni was assaulted by officers or staff members." continuously covering up and contradicting the contents of their Plea.

[107] In respect of the extent of the assault (or force that was used) on Plaintiff outside the cell, Luvhengo alleged that he was walking behind the Plaintiff with the rest of the officers following behind when Plaintiff was taken out of the cell. Plaintiff managed to get himself down the stairs and it was now him and Nemamilwe who were walking behind him. All others were filing behind them, as to why it is beyond comprehension, Plaintiff was already handcuffed why were they all now following him. They say Plaintiff tried to remove the cuffs and to resist. So, Luvhengo and Nemamilwe grabbed him on the side and tried to get him out of the pod. There was no explanation as to how did they try to do that. Luvhengo then changed his testimony and denied that he followed Plaintiff while his hands were cuffed behind his back. In the meanwhile Mathebula said they ordered Plaintiff to move out of the cell and Plaintiff moved by himself unaided until down the stairs to the pod. As he reached the entrance of the pod he started to refuse to move again that is when Nemamilwe and Mahladisa held both his hands, one on the left and the other on the right. They held him out of the unit. Plaintiff was fighting refusing to be taken out. They succeeded in taking him out because of the restraints that was applied. So now who was Nemamilwe with when he removed the Plaintiff from the pod, Luvhengo or Mahladisa? Three names have been mentioned to have been involved in restraining him outside. Again, no explanation is given how the restraints helped to get him out, whilst denying that they assaulted Plaintiff as he alleges.

[108] On that dispute, Plaintiff pointed another anomaly in the conduct of the Defendant, that they conceded that they have access to the footage from the cameras outside the cell that recorded everything that happened that day, but they failed to furnish or refer to the footage, notwithstanding challenging the Plaintiff's version and denying that they assaulted the Plaintiff in the manner that he has described to the court. The footage could have put the contention to rest. That is evidence that under the control of the Defendants and readily available to them. Plaintiff has urged the court to view that in a dim light since the onus is upon the Defendants to prove that their use of force or impairment of the Plaintiff's bodily integrity was justified and without any mala fide. The Plaintiff called upon the court to find that the Defendants conduct is proof that what is in the footage is detrimental to their version. Defendant's countenance with an argument that the Plaintiff could have called on the Defendant to discover the footage. The onus is upon the Defendant to prove that it has got a justifiable cause for impairing the Plaintiff's bodily integrity,

[109] The Plaintiff have raised a valid point, as the onus is indeed upon the Defendant to prove that the conduct of its officers was justified, the Plaintiff having established a prima facie case against them. Their failure to present such evidence that is material to their case when available should be to their detriment, with the necessary inference drawn that the footage probably does not advance its case but expose facts unfavourable to it.

[110] Another dissatisfaction about the Defendant's conduct of the case is their failure to call Nemamilwe whose name has been mentioned several times through- out the trial and was the unit manager responsible for the plaintiff's cell and who started the whole matter. He is obviously available to the Defendants being in 1st Defendant's employment. He is mentioned to have been the first to arrive at the cell and Makwea claimed to have heard him calling on the radio for help, and to have found him already at the cell. He is also said to have walked out with the Plaintiff, and taken him to Plaintiff to the clinic or segregation. As the unit manager he was also responsible for the report. Luvhengo said he is the one who sent him to call Plaintiff. Therefore he has been proven to be a material witness, yet he was not called to testify. No explanation was given for the failure to call him. This also calls for an adverse inference to be drawn especially where the other officers have failed so dismally to refute the Plaintiff's claim; see *R v Phiri* 1958 3 SA 161 (A); *Elgin v Fireclays Limited v Webb* 1947 4 SA 744 (A).

[111] Defendant have indeed failed to prove that the application of force against the Plaintiff was justified and without any animus *iniuriandi*. **The evidence of the officers was full of inconsistencies, contradictions and irregularities and therefore unreliable. They have even testified in contradiction to what is stated in the Defendant's Plea; see *Kriel v Bowels* 2012 (2) SA 45 (ECP).** Even though any admissions, denials or agreements between the parties recorded in the pretrial minutes as it would be with the pleadings are binding between the parties. So on trial the pleadings were standing, with no amendment applied for by any of the parties and therefore the matter was proceeding with the Plaintiff's claim and the Defendants' defence as it has been pleaded in the pleadings. The Defendants' Plea had its own snags in that it stated that:

[111.1] The Plaintiff who is serving a sentence of life imprisonment for **rape and murder**, upon being informed on **11 February 2011 that he was to serve his sentence, Plaintiff refused to be removed for that purpose, threatened to burn his cell and became violent.** The Plea is not correct that the Plaintiff was serving a sentence for murder. The falsehood gives credence to Plaintiff's apprehensions about being portrayed in a worst light by the Defendant. The **allegation was not retracted, even when its falsity was pointed out during the trial. The officers continued at some point propagated by Counsel for the Defendant when he relentlessly interrogated the Plaintiff on the charge of rape for which he was serving life sentence, and on the number of times he was punished, disciplined or kept at segregation, the transgressions that he was convicted of before he entered prison to indicate how unpalatable a character the Plaintiff was. The Plaintiff's behavior or character was played out to authenticate the officers story and as part of the just cause that they were alleging necessitated the application of force on the Plaintiff. This extended even to the heads of argument presented by the Defendant's counsel that emphasized Plaintiff status as a convicted prisoner who is serving a life sentence.**

[111.2] According to the Plea, the officers were in Plaintiff's cell for the purpose of removing the Plaintiff for him to start another sentence in for 42 days in segregation. Plaintiff refused to be removed and handcuffed hence the use of force. However their testimony was that they were there responding to a call for help to

come and assist to prevent the Plaintiff from burning the cell, alleging that he was threatening to do so.

[112] According to our Constitution everyone has inherent dignity and the right to have their dignity respected and protected, the right to be free from all forms of violence from either public or private sources, not to be tortured and not to be treated in a cruel, inhuman or degrading way (See s 10 & 12 (1) (c) (d) (e)) of the Constitution of South Africa). The Plaintiff's right to be treated with dignity and for his dignity to be protected and respected was undoubtedly violated by the impairment of his bodily integrity without a just cause.

[113] So it is evident that this was part of the Defendant's crusade to denigrate the Plaintiff to a person who is just crazy having fabricated the story about him wanting to burn the cell with a non-existent tissue and to have assaulted the two officers. The Defendants have failed to establish the existence of a just cause for assaulting the Plaintiff and the absence of *animus inuiriandi*, Plaintiff's claim must succeed.

DAMAGES

[114] The Plaintiff as a result sustained injuries of a swollen cheek, upper and lower lips, left ankle and right side of chest, reddish eyes and bruises around the right elbow as indicated in the J88. Plaintiff says the search that was done on his anus gave him a problem because it was the first time he was subjected to something like that. His other parts were stiff and not functioning normally. He felt humiliated and troubled due to the assaults and being constantly held in segregation. He indicated that his treatment by the Urologist was delayed by nearly six months and therefore he endured the humiliating disposition relating to his affected private parts for some time. He was assaulted in front of fellow prisoners and custodial officers which he says humiliated him.

[115] To determine a fair sum, our courts generally have regard to comparable previous decisions. However the assessment of general damages for pain, suffering and shock has been said to be a subjective inquiry which depends, *inter alia*, on the time, degree and intensity of the discomfort and suffering. So while this is a salutary practice which ensures consistency and fairness, the courts should be mindful that no two cases are the same and guard against slavishly adhering to precedents to the extent that their discretions may be impermissibly fettered; see *Protea Assurance Co Ltd v Lamb* 1971 (1) 530 (A) at 535 A-536B). An award in respect of *contumelia*, which relates to the impairment of the *dignitas* or bodily integrity of a person should take into consideration any aggravating or mitigating circumstances in order to arrive at a fair sum.

[116] An amount of R120 000.00 (present day value is R139 000.00) was regarded as fair and reasonable by Plasket J in **Peterson v Minister of Safety and Security 2011 (6K6) QOD (ECG)** for also an assault by a police officer on a prisoner. The learned judge described the conduct of the policeman as thug-like and disgraceful. The plaintiff had suffered wounds on the head and jaw and widespread abrasions on the back, shoulder blades and buttocks. While the plaintiff did not suffer permanent injuries, the learned judge took into account that he had suffered pain for a few days after the assault.

[117] other judgement indicated a serious disparity like in **Bennet v Minister of Police and Another 1980 (3) SA 24 (CPD)**, damages in the amount of R600-00 (2016 value being R30 000)

were granted and *Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (VSC)*, where the court awarded damages in the amount of R15 000.00 (the 2016 value being R140 000.00).

[118] The Plaintiff was assaulted by at least six or more officers when it was not necessary and then a story fabricated about a burning tissue and the assault of two of them. He was even falsely accused after the incident a criminal case opened against him for common assault. He was named a murder arising from this incident. He endured further harsh treatment by being taken to segregation instead of the clinic. All these having been taken into account together with the nature of injuries that have been sustained and that he was made to wait for nearly more than three months to see a specialist. Plaintiff also said he was admitted for 4 day in hospital. A fact that was not disputed by the Defendants. I have taken all that into consideration and have not differentiated between general damages and *contumelia* and granted a global amount for all the damages.

[119] I therefore under the circumstances make the following order

[119.1] Plaintiff's claim is upheld.

[119.2] The Defendant is liable to the Plaintiffs for the damages Plaintiff suffered as a result of the unlawful assault on 11 February 2011.

[119.3] The 2nd Defendant is ordered to pay the sum of R200 000.00 constituted as follows:

[119.4] The Defendants to pay the Plaintiff's costs.



N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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