



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
31/12/2019	
Date:	Signature: <i>Neukircher</i>

Case no: 51274/2017

In the matter between:

THABISO MABUYA

Plaintiff

and

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

Defendant

NEUKIRCHER J:

- 1) During July 2017, the plaintiff sued the defendant for damages in the amount of R550 000,00 arising from an alleged unlawful assault on him by employees of the defendant at Mogwase Correctional Centre on 24 September 2014. He alleges that

as a result of the assault he suffered injuries to his right wrist and a laceration of the right hand and required hospital treatment.

- 2] In response, and in the plea dated 27 October 2017, the defendant denied all the plaintiff's allegations and specifically pleaded as follows:

"3.2 The Defendant does not have any knowledge of the allegations contained in this paragraph and once the alleged incident has been identified, established and investigated, the Defendant may be in a position to plead to the allegations and may consider amending his plea accordingly."

- 3] On date of trial, the only issue to be decided was that of liability (i.e. the merits of the plaintiff's claim) and accordingly, by agreement the merits and quantum were separated and the quantum postponed sine die. The plaintiff also moved a small amendment to the particulars of claim¹.

- 4] The defendant also moved an amendment to the plea (which was not opposed). This amendment sought to introduce the following admissions:

AD PARAGRAPH 4 THEREOF:

The member of the Defendant admits that he was on duty on 2 September

to the date of the incident and the quantum (which was not pursued before me) – which was not opposed and I granted the amendment to paragraph 4 of the particulars of claim regarding the date of the incident. The further amendment to the quantum was not pursued because of the separation of issues

2014² but denies that he ever had any contact and/or any ever (sic) assaulting the Plaintiff. The Defendant puts the Plaintiff to the proof thereof.

1.2 The members of the Defendant admit that the Plaintiff sustained an injury on 24 September 2014 but denies that its members caused that injury. The Defendant put the Plaintiff to the proof thereof.

AD PARAGRAPH 5 THEREOF:

2.1 The members of the Defendant admit that the Plaintiff sustained injuries on his arm but denies that it was on his wrist and furthermore denied that it was a laceration on his hand instead he sustained a deep cut that was not caused by the members of the Defendant. (sic)"

5] At the end of the trial, the following amendment was moved by the defendant and was not opposed³:

AD PARAGRAPH 4 THEREOF

1.1 The member of the Defendant admits that he was on duty on 2 September 2014 but denies that he ever had contact and/or ever assaulting the Plaintiff. The Defendant puts the Plaintiff to the proof thereof.

² This should read 24 September 2014. It was in answer to the original particulars of claim which had the date as 2 September 2014. Nothing turns on this as it is common cause, and was so throughout the trial, that the alleged incident occurred on 24 September 2014

³ Although it was argued that it was relevant for purposes of any eventual costs order

1.2 *The members of the Defendant admit that the Plaintiff sustained injury on 24 September 2014 but deny that any of its members and/or Mr. Matlakala inflicted and/or caused the said injury.*

1.3 *The member of the Defendant will aver that the Plaintiff sustained the said injury after, he himself, hit an office window pane and grabbed the broken piece of glass and it resulted in his hand through his arm being cut*

2. ***AD PARAGRAPH 5 THEREOF:***

By the deletion of paragraph 3,1 thereof and substitution with the following:

2.1 *The members of the Defendant admit that the Plaintiff sustained an injury on his arm starting from his hand. The deep cut started from the hand through to the Plaintiff's arm.*

3. ***AD PARAGRAPH 6-12 THEREOF:***

By deletion of paragraph 3.2 thereof and substituting with the following:

3.1 *The Defendant deny the rest of allegations contained in these paragraphs and puts the Plaintiff to the proof thereof."*

6] In essence, the amendments to the plea have resulted in the following admissions by the defendant;

6.1 that Mr. Matlakala is in the employ of Correctional Services and was on duty on 24 September 2014;

6.2 that the plaintiff sustained a self-inflicted injury on 24 September 2014 when he hit an office pane, grabbed the broken pieces of glass.

- 7] No further admissions are made by the defendant and the plaintiff's version that he was assaulted and the injury inflicted on him (and not by him) is denied.

THE PLAINTIFF

- 8] The plaintiff's evidence was that at the time of the incident he was prisoner in Mogwase Correctional Centre. He was on his way back to his cell from the visitation centre, and had just left the visitation area when he was confronted by Mr Matlakala, a correctional services officer working for the defendant. He was told by the latter *"I have been waiting for you"*. According to the plaintiff, Mr Matlakala told him that he owed him money⁴ for a cellphone that the latter had sold him for R800,00. Mr Matlakala demanded the return of the phone and on the way back to the plaintiff's cell he called a colleague of his to accompany them.

- 9] They first went to plaintiff's cell where a search was conducted and the phone was found.

⁴ An amount of R400

10] They then took plaintiff to the office and on the way Mr Matlakala said *"I want to take this clever attitude of yours out of you."* There were other people in the office when they arrived there. Mr Matlakala locked the office door, took out his baton and started hitting him on his body and when that fell to the floor he used his fists. The Plaintiff testified that he was standing next to a window which started at ear height⁵ and when he was assaulted he *"fell onto"* the window and sustained a cut. During his evidence later, the plaintiff stated that Mr Matlakala pushed him into the window. The evidence was that he sustained injuries to his body but the major injury was to his wrist.

11] All the while the other members of Correctional Services who were present simply stood by and watched the assault.

12] He told Mr Matlakala that he was going to open a case against him and the response was that the latter did not care. The Head of the Section then called the ambulance. As he left the office, another prisoner (a Mr Oageng) who had been outside the door shouted that the plaintiff should lay charges. The plaintiff was taken to Mogwase Clinic and admitted for 2 days. He was then taken to George Thabane Hospital where his right hand was operated on and he spent 2 weeks in hospital before being transferred back to the prison.

⁵ Which he demonstrated by putting his left hand on the wall of the court behind his chair at approximately ear level

- 13] He then laid assault charges against Mr Matlakala. Shortly thereafter, he was transferred to Leeukop Prison and was released during February 2019.
- 14] Whilst the assault was denied by the defendant during cross-examination, the plaintiff's injuries were not: It was the defendant's version that Mr Matlakala would testify that his sister informed him that the plaintiff was communicating with her and as a result of that the plaintiff's cell was searched. The plaintiff was then taken to the office to open a case of misconduct and there were 3 Correctional Services officers (over and above Mr Matlakala): Mr Mokgopong, Mr Chauke and Mr Lesejana. The plaintiff injured himself by throwing himself against the window. It was the defendant's version that the reason plaintiff did this was to try to avoid the trouble he was in because of a phone he was not supposed to have.
- 15] Cross-examination also established that 1) there was an incident on 4 August 2014 where the plaintiff's right arm was twisted in an altercation with another prisoner and 2) on 8 August 2014 an assault on him allegedly by another prison officer⁶

⁶ The hospital records show an injury to his left ear and to his scapula but the plaintiff denies this – In fact, the plaintiff denies the entire incident.

THE DEFENDANTS' WITNESSESMR MATLAKALA

- 16] He is an employee at Correctional Services, Mogwase since 2002 and was on duty on 24 September 2014. His evidence was that he had received a tip-off from his sister that the plaintiff had a cellphone – she knew this because she had been receiving texts from the plaintiff one of which was a photograph of him in his prison overalls.
- 17] Mr Matlakala brought this information to the attention of his unit manager and supervisor and after the morning parade, it was decided that a search would be conducted of his cell later that same day.
- 18] The plaintiff had a visitor that day during visiting hours and the plan was that after this would be the ideal time to search his cell. Thus, Mr Matlakala, Mr Ramophudi, Mr Sithiwe and Mr Lesojane⁷. As the evidence transpired it appears that they 4 took the plaintiff to his cell where it was searched – they searched his bed and Mr Ramophudi found a box. Inside this was a cell phone. They then took plaintiff to the office where he was also confronted by Mr Matlakala with the photo his sister had messaged him. The phone was given to Mr Sidiko who was in charge of the office⁸.

He could not recall if a Mr Chauke was also there or not
But who no longer works there

- 19] During this interrogation, Mr Matlakala attempted to body search the plaintiff – the plaintiff then jumped onto a table on his left hand side, stretched out his left hand which was fisted and broke the window. Mr Matlakala testified that the pane was broken but there were still intact pieces left in the frame and it appeared that the plaintiff was trying to reach for one. He was stopped and taken to the prison hospital where he was attended to.
- 20] This was the end of Mr Matlakala's interaction with the plaintiff.
- 21] Mr Matlakala denied assaulting the plaintiff – he denied that he carries a baton with him and he denies assaulting the plaintiff with his fists.
- 22] In cross-examination, Mr Matlakala denied ever seeing the plaintiff before 24 September 2014; denied selling him a cellphone and denied the plaintiff's version of how he was injured. His version is that the plaintiff deliberately injured himself in an attempt to avoid the disciplinary action he knew was coming for the possession of an unauthorized cellphone.
- 23] He also revealed that the window in question started at approximately just under his arm and was about 1,2 meters high. He confirmed that the plaintiff jumped onto a table and into the window.

- 24] He confirmed that there was a complaint laid and that he had been visited by an investigator, Mrs Edith Modisele, but he did not know what the outcome was.

MR MOKGPODI

- 25] He is a Unit Manager based Magwase Correctional Services. He has been in the employ of Correctional Services for 17 years and was on duty on 24 September 2014.
- 26] His evidence was that he was in charge of Unit A-1 where plaintiff was housed. Mr Matlakala informed him that his sister was being harassed by an inmate who was calling her and sending her pictures, one of which was a photo of him in his prison uniform. Mr Matlakala wanted to confirm that the plaintiff was housed in Unit A-1.
- 27] A meeting was held to discuss how they would search for the phone at approximately 13h00. The plaintiff received a visitor between 13h00-14h00 on the day in question and Mr Mokgopodi called Mr Mesejane and Mr Sithue to assist with the search.
- 28] When the plaintiff returned from his visit they went into his cell to search it. Mr Sithiwe, Mr Lesojane and Mr Mokgopodi were present during the search. Mr Mokgopane found the cellphone in a box containing the plaintiff's belongings under the plaintiff's bed. From there they all went to the office

to interrogate the plaintiff and Mr Mokgopane gave the phone to Mr Sithwe to put into the safe for safekeeping.

29] The plaintiff was not searched after his 13h00 visitation, and so Mr Matlakala tried to search him but the plaintiff jumped onto a table and into the window pane, breaking it with his right hand which was cut when the window pane broke. And Mr Mokgopane instructed Mr Matlakala to take the plaintiff to the prison clinic.

30] He confirmed under cross-examination that there was an internal investigation into the incident but he could not say what had come of it as he was not notified.

31] Mr Mokgopane denied the plaintiff's version of events. He denied that Mr Matlakala carried a baton and denied that plaintiff was assaulted.

32] He put the window as starting above his head and stated that the plaintiff jumped onto a table standing against the wall to get to the window.

THE OVERALL IMPRESSION OF THE WITNESSES

33] Of the three that testified, Mr Mokgopane impressed me as the most open and honest. Although he was accused of tailoring his answers as he is a Law Student, I did not get that impression. I did sometimes get the

impression he was trying to avoid a complete answer but overall he was a credible witness.

- 34] The plaintiff and Mr Matlakala did not create good impressions. They avoided proper answers and, when prompted became overly defensive and, with especially Mr Matlakala, became argumentative and refused to listen to or answer the questions put.

SUMMARY OF EVIDENCE

- 35] At the end of the day, at issue are the versions put before this court. At present I have 2 mutually destructive versions⁹ to contend with:

35.1 the plaintiff's version is that he was assaulted in the office by Mr Matlakala first with his baton and then with his fists. He was pushed through a window and his arm was badly hurt.

35.2 the defendant's version is that the plaintiff was not assaulted. Mr Matlakala does not possess a baton and there was no assault. The plaintiff jumped onto a table and jumped through the window in an attempt to avoid being charged with the possession of the cellphone;

35.3 on the defendant's own version, the persons who searched the plaintiff's cell did not match and whilst Mr Matlakala states that he was present during this search, the plaintiff denies it;

⁹Which was conceded by both plaintiff's and defendant's counsel in argument

35.4 the time that Mr Matlakala also arranged for the plaintiff's cell to be searched was also contradicted by Mr Mokgopane: he stated it was arranged at approximately 1pm whilst Mr Matlakala testified that this was arranged on the parade ground earlier that morning;

35.5 each witness testified that the window was a different height.

36] Mr Mokgopane confirmed Mr Matlakala's evidence in certain respects – the fact that he was called because of the cellphone, where the cellphone was found in the plaintiff's cell, the fact that they took plaintiff to the office to search and charge him, the fact that the plaintiff jumped onto a table and into the window and cut his hand.

37] He could not confirm the message from Mr Matlakala's sister, nor the time he was notified of the infraction, nor did he corroborate Mr Matlakala's version that the latter was present when the plaintiff's cell was searched.

38] In fact, the exact details of how the plaintiff injured his hand on the wrist area was never canvassed.

39] In *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*¹⁰, Nienaber JA formulated the test to be applied in these circumstances as follows:

¹⁰ 2003 (1) SA 11 (SCA)

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less

convincing will be the latter. But when all factors are equipoised probabilities prevail."

THE LAW

- 40] It is trite that he who alleges must prove.¹¹ The onus thus rests on the plaintiff to prove the assault. Mr Tshavunga argues that the plaintiff was injured when he put his hands over his face to shield himself from the assault and was pushed into the window. This detail was never provided by the plaintiff. Furthermore, each witness testified to a different window height:
- 40.1 the plaintiff said the window started at about ear level;
 - 40.2 Mr Matlakala said the window started at a level under his arm;
 - 40.3 Mr Mokgopodi said the window started just above his head.
- 41] Mr Tshavunga failed to cross-examine on this issue at all¹². In my view, this is a crucial issue which goes to the heart of the probabilities of the matter. On both plaintiff's and Mr Mokgopodi's version, the window is position very high – in my view too high to simply reach without either standing on a

¹¹ *Pillay v Krishna & Another* 1946 A D 946 at 951 outlined in the "*Corpus Juris Civilis* as" *Semper necessitas probandis incumbit illi qui agit* (meaning that 'the requirement of proof always falls on the person who brings the action'.

¹² *President of the RSA v SAREU and Others* 2000 (1) SA 1 (CC) at [58] – [65] : "[61] The institution of cross-examination not only constitutes a right it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to me made and to afford the witness an opportunity while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct..."

table or putting one's hands over one's head. As the latter was never testified to nor cross-examined on, and there was direct evidence on the former, the first is the most probable and stands as uncontroverted evidence.

42] No medical records were introduced which indicated that any assault took place other than the hospital admission records¹³ recording the plaintiff's injury on his wrist and subsequent surgery to repair his lacerated tendon. In fact, the medical records produced do not speak of any injury other than that to his tendon which I find puzzling given that the plaintiff testified that he was beaten with Mr Malakala's baton until it fell out of his hands and then he was beaten by Mr Matlakala with his fists – 3 days later there is no evidence of this at all.

43] The evidence of defendant was that the plaintiff deliberately injured himself in an attempt to avoid charges pertaining to the unauthorized use and possession of the cellphone – while much was made of the alleged photo sent by Mr Matlakala's sister, there was a dearth of evidence and cross-examination on this issue. It was also not in dispute that the plaintiff had a history of laying charges of assault against officers and from the evidence it was clear that this was not the first time he was transferred to a different prison because of it.

44] Mr Tshavhunga's submission is that where the evidence lacks, I must use circumstantial evidence to "fill in the gaps". Even were this so, the evidence before me, in my view does not assist plaintiff. And the plaintiff cannot escape the problem that where 2 mutually destructive versions serve before court, and the probabilities¹⁴ do not point in the plaintiff's favour, the plaintiff's claim must be dismissed.

CONCLUSION

45] Thus, in my view, while it was admitted that the plaintiff was injured whilst in the presence of the defendant's employees, how that injury occurred is not clear and the plaintiff has not proven his case.

ORDER

46] Thus the following order is made;

The plaintiff's claim is dismissed with costs.



NEUKIRCHER J

JUDGE OF THE HIGH COURT

Date of hearing: 27 – 28 November 2019

Date of judgment: 28 December 2019

For plaintiff: Adv Tshavhunga
Instructed by: Makwarela Attorneys
For defendant: Adv Mlombo
Instructed by: State Attorneys