



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 75958/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

10 MARCH 2022

.....
SIGNATURE

.....
DATE

JERRY BAFANA MATHIBELA

PLAINTIFF

And

MINISTER OF JUSTICE & CORRECTIONAL SERVICES FIRST DEFENDANT

JUSTICE MALULEKA

SECOND DEFENDANT

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file on CaseLines.

JUDGMENT

LESO AJ

INTRODUCTION

- [1] This is an action for a claim of damages against the defendant(s) for the alleged assault and torture of the plaintiff at Kgosi Mampuru 11 Correctional Centre. The second defendant is joined in the application as the member of the first respondent who has allegedly acted in common purpose with the other three members of the first defendant. The plaintiff is a convict at Kgosi Mampuru 11 Correctional Center that is under the care and management of the first defendant.
- [2] During trial, the plaintiff brought two applications. The first application was in terms of Rule 33(4) to separate merits from quantum and the second application was for the amendment of particulars of claim, specifically paragraph 4.9. Having granted the mentioned applications, the court will only deal with the merits.

I shall refer to the second respondent and the National Task Team members as the members of the first respondent for the purpose of this judgment.

ISSUES IN DISPUTE

- [3] The issue to be determined is whether on 12 January 2019, the plaintiff was assaulted and tortured by the members of the first defendant by kicking him with booted feet and hitting him with open hands. The plaintiff's claim is one of vicarious liability against the first respondent.

EVIDENCE ON MERITS

- [4] It is common cause that in the early hours of 12 January 2019 the National Task Team that comprised of the members of Kgosi Mampuru 11 Correctional Centre officials and other officials from nation-wide correctional centres conducted a surprise search for counter-brand goods at Kgosi Mampuru II wherein the plaintiff's prison cell or room was searched. The plaintiff was found to be in possession of a cellphone, which was confiscated and then kept as evidence.

It is not in dispute that the members of the first respondent conducted a search while acting within the course and scope of employment.

- [5] It is common cause that the members of the first respondent removed the plaintiff from his cell to another section where he was interviewed by a nurse who was responsible to check the plaintiff's fitness before transferring him to segregation at F-section.
- [6] The plaintiff called two witnesses to testify in support of his claim for damages. He also relied on the documentary evidence that was admitted without objection by the defendant save for J88 wherein the Dr Sibisi was called to testify. The plaintiff relied on the following documents:
- 6.1 A Referral Note by Dr Sibisi dated 14 February 2019 wherein he recommended that the plaintiff should be admitted at Kalafong hospital and also noted the following *"Assault, casualty please,...he was allegedly assaulted by the prison members"*.
- 6.2 A nursing History Continuation Chart reflecting that on 14 February 2019 the plaintiff presented abdominal and scrotum pains.
- [7] Plaintiff testified that on 12 January 2019 in the early morning at 2H00 am when he was sleeping in his cell room at G4-section number 8 Three wardens opened the door to his prison cell and woke him up. He said that two members were wearing balaclavas save for the second respondent, Justice Maluleka. He testified that he could tell that the two members were coloured males because of their English accent and he could identify the second defendant because he knew him as a resident warden at Kgosi Mamapuru II. According to the plaintiff, his cell was searched and he was found to be in possession of a cellphone that was suspected to have being used by the plaintiff to communicate with a fellow inmate at I-section through the WhatsApp platform.
- [8] The plaintiff testified that the members of the first respondent instructed him to hand the cellphone and its password or pin and he complied without resistance. He said the other member proceeded to search his cell while the other was

questioning him about the alleged WhatsApp communication with the other prisoner that he denied. A member slapped him with an open hand and the other member kicked him with booted feed on his left waist. He said he complained that he is in pain because he has an operation but the members told him that they do not care and they told him to squat thereafter they kicked him twice, first on the left hip and then on his private parts with booted feet. Plaintiff testified that after the assault he suffered significant pains although not excruciating on his lower abdomen and genitalia. He said that the entire ordeal took approximately 30 minutes after which the warden left and locked him in the cell.

- [9] The plaintiff further testified that he was moved from his cell to Delta section then to the clinic before Qebengu took him to the segregation. He said he positively answered a question of whether he was assaulted which was put to him by a prison nurse, Mr More who was tasked to examine and confirm if he was fit to be referred to the segregation section(F-unit). He said that he did not tell Qebengu he was assaulted nor did he complain to him about being in pain. According to the plaintiff, while he was placed in segregation from 12 January 2019 until 14 February 2019 he noticed blood coming out when he was urinating on 13 January 2019 and he immediately reported the incident to warden Steyn who was in charge of the segregation section who arranged for him to be examined by a medical practitioner.
- [10] The plaintiff testified that on 14th January 2019 he was examined by Dr. Sibisi who is a private medical practitioner contracted to the first defendant to provide primary health care services to the inmates and Sibisi transferred him to Kalafong hospital where he was treated by Dr Nzhukuma on 16 January 2019. The plaintiff claims that the assault and torture aggravated his existing pains from an operation he had done on or about 16 December 2018. During the cross-examination, he challenged the admissibility of the statement that he made to Magoboe on the basis that the statement was not read back to him and he was not aware that the first respondent was investigating his case of allegation of assault at the time when he was making the statement. He said according to him when he made the statement he understood it to be in connection with his committal to segregation.

- [11] Dr. Saneliso Sibisi testified on behalf of the plaintiff to the effect that the plaintiff was his patient who has a history of kidney stones operation wherein a tube was inserted in the plaintiff's abdomen. He said that when he examined the plaintiff on 14 January 2019 the plaintiff reported to him that the members of the first defendant assaulted him and upon examination of the plaintiff, he felt a mass of approximately 5 centimetres soft lump on one of his testicles. He testified that he does not think that the mass on the scrotum had anything to do with the tube inserted on the plaintiff's abdomen however, there is a possibility that it might be because of swelling or something else. The doctor concluded that the swelling could be caused by injury or assault on the scrotum. He said that he noted that the plaintiff was assaulted because he got that information from the plaintiff.
- [12] Dr Xhadi Nzukuma testified on behalf of the plaintiff to the effect that the plaintiff is one of his urology patients who he treated for kidney stones in 2018 and the plaintiff was scheduled to undergo kidney surgery sometime in February 2019. He testified that on 19 January 2019 he examined the plaintiff on a non-predetermined schedule date after his emergency admission to the hospital's urological facility on 16 January 2019. He said that upon his examination of the plaintiff, he observed that the plaintiff was bleeding from his penis and there were blood clots in his penis vessels. His prognosis was that the plaintiff suffered what he referred to as "urethral stricture" caused by trauma to the urethra or pelvis. He said that he treated the plaintiff and inserted a catheter. Into the urethra opening of the penis. The doctor concluded that the urethral stricture is caused by trauma, inflammation or sexually transmitted diseases and the bleeding from the penis could be caused by kidney stones, bladder trauma, or kidney trauma.
- [13] Justice Maluleka was the first witness who testified for the defence. He said that he was a warden at Kgosi Mampuru II Correctional Centre with a service record over eight years. He confirmed that he was part of the EST search team that searched the plaintiff's prison cell in the early hours of 12 January 2019. He testified that when they arrived in the prison cell at I- section they found an inmate in possession of a cellphone busy chatting on WhatsApp and when

confronted him he told them he was chatting with the plaintiff. He said that he together with the two members proceed to the G4-8 block where the plaintiff was kept to search. He testified that while he was standing outside the plaintiff's prison cell two members entered and immediately requested the plaintiff to hand over his cellphone and to give them the password or pin that the plaintiff did without resistance and the members continued to search the plaintiff's cell and after fifteen minutes, they all left. He denies any assault or torture inflicted on the plaintiff during the search. The witness said that the other members were wearing a cloth called a buffer, which is used by members as mask to protect themselves from inhaling dust during the search, and he disputed the plaintiff's version that the others were wearing balaclavas.

- [14] Peter More testified that he was a professional nurse employed at Kgosi Mampuru II Correctional Centre for over 16 years and part of his responsibilities is to examine prison inmates' fitness before their committal to different detention facilities. He said that on the morning of 12 January 2019 a warden member escorted the plaintiff to his office to check the plaintiff's fitness before transfer to the segregation section (F-unit). He said that he is required to conduct an oral interview and physical examination of the convict before detention to the segregation section however he did not conduct a physical examination on the plaintiff because he was not cooperative and his attitude created tension but he did ask him whether he was assaulted and the plaintiff's answer was negative. He said that he then confirmed the plaintiff's fitness to be committed to the segregation unit. He said that he cannot clear the patient to be isolated if he is not fit because he has the responsibility to advocate for the patients' health and he denied that the plaintiff told him that he was assaulted.
- [15] Emman Qebengu testified that he is the head of the security division and a middle manager at Kgosi Mampuru II Correctional Centre with a service record of 25 years. He indicated that the EST was part of what he referred to as national "operation vala" which is routinely carried between 1 December and the third week of January. That at Kgosi Mampuru they had approximately 400 EST members drawn from correctional facilities across the country who were divided into small groups without recording names in the group therefore he cannot name the members who had accompanied the second respondent

during the search in the plaintiff's cell. He testified that he found the plaintiff at Delta courtyard and he had to walk with the plaintiff 102 stairs to the segregation section, He said the plaintiff was walking with ease and he did not complain of injuries or the assault. He said that illegal possession of cellphones by inmates results in the plotting of crimes like murder. He also explained that segregation is used for a variety of reasons, ranging from isolating inmates with infectious diseases, aggressive behaviour and those under investigation pending charges and he refuted the plaintiff's version that the segregation area was used as a punishment for inmates. He said the first respondent has an independent body called the Judicial Inspector of Correctional Centres (JUICE), which inspects and notes the complaints from the segregation sections daily and there was no complaint reported by the plaintiff on 12 and 13 February 2019.

- [16] Matome Costa Mogoboya testified that he was a warden at Kgosi Mampuru II Correctional Centre with a service history of 15 years and on 21 January 2019, the first respondent mandated him to investigate the plaintiff claim of the alleged assault and torture. He said that the key terms of reference in the investigation were to determine circumstances surrounding the incident of assault, determination of the extent of injuries sustained by the plaintiff and the medical intervention required. He confirmed that he interviewed More, Maluleka, Qebengu and Ramoshaba regarding the plaintiff's alleged assault. He testified that he wrote the plaintiff's statement but he did not read it back to him before he got him to sign it however, the plaintiff read the statement, initialed every page and signed the last page. He maintains, that the plaintiff is not telling the truth that EST members assaulted him.

EVALUATION OF EVIDENCE

- [17] In the heads of argument, the plaintiff's counsel firstly argued that the respondent was negligent because of the failure to identify and take statements from EST members who searched the plaintiff's cell. The court does not need to entertain this argument because the identity of the members is not disputed. Secondly, the plaintiff's counsel took issue with the fact that Mogoboya took the

plaintiff's statement and administered oath himself. This issue was however not argued further.

- [18] The third argument by the plaintiff's counsel was that the respondent's witness could not explain why the two independent doctors who examined the plaintiff were not interviewed and why their records was not taken into consideration during the investigations. I only have a medical record in the form of J88 and other medical history of the plaintiff before me. It is not clear which records the counsel refers to save to state that the plaintiff could have requested more records that were necessary to prove his claim, after all the burden is on him to prove his case.
- [19] The counsel for the defendant argued that the plaintiff was not a credible and honest witness. He bases his arguments firstly on the fact that the plaintiff's oral evidence regarding the duration of the alleged assault was inconsistent, the allegations in the particulars of the claim contradict the details of how the plaintiff is alleged to have been assaulted and the statement he made to Mogoboya. Secondly, the counsel argued that the plaintiff's oral evidence was inconsistent with the averments in the plaintiff's particulars of claim as far as the claim relating to the participation of the second defendant in his alleged assault and the duration of the search. Thirdly, the counsel raised an issue about the plaintiff's denial of his knowledge of the investigations about his assault on the basis that the plaintiff read, initialed every page and signed the statement and that those investigations were conducted to the benefit of the plaintiff.
- [20] The plaintiff's challenge on the admissibility of the statement he made to Mogoboya and his denial of knowledge about the investigation of the alleged assault on him by the members of the first defendant is nonsensical. In essence, the plaintiff denies having followed the internal processes before approaching the court. During the trial, the plaintiff spoke fluent English when he was giving his testimony and he confirmed that he read the statement, initialed every page and signed the last page. I do not believe the plaintiff when he said he was not aware of the contents of the statement that was written by Mogoboya in English because the statement was not read back to him. My view

is that the plaintiff has realized that his statement does not support his claim and with his oral testimony, he attempts to build a new case.

- [21] I have before me the section 3 notice marked annexure "BM3" which is part of the admitted evidence where the plaintiff outlines his claim for damages. The doctor's prognosis was that the plaintiff suffered urethral stricture caused by a trauma to the scrotal area and blood clotting in the penis vessel. This evidence has a piece of information that stands out, which is the specific body part(s) where the plaintiff experienced trauma or where he was injured and there is no corroboration in the plaintiff's oral evidence and the medical record including the pleadings. It is apparent that the circumstances under which the plaintiff was assaulted are different from those described in the particulars of their claim
- [22] Qebengu's opinion that the plaintiff could not have walked 120 stairs
- [23] It is trite that the version of the accused must not be considered on its own but against the background of all the evidence in totality, regardless of contradictions. I am compelled to consider and analyse all the facts and decide whether there is a substance in the plaintiff's proven facts. It was held in *S v Sauls*¹, that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. That the trial court should weigh the evidence of the single witness and should consider its merits and demerits and having done so, the court should decide whether it is satisfied that the truth has been told despite the shortcomings, defects or contradictions in its evidence
- [24] It is important to consider the circumstances surrounding the plaintiff's injuries, the motive for the alleged assault, where on his body the plaintiff was assaulted, and how he was assaulted. The fact that on the date of the alleged assault the plaintiff interacted with at least two officials being Qebengu and More before he was referred to the doctor by Steyn but he did not report the alleged assault to any one of the above two officials creates doubt in my mind that the plaintiff was assaulted and/or injured by the members of the first respondent.

¹ *S v Sauls*¹1981 3 SA 172 (A):180E

- [25] The plaintiff was evasive when he was asked about the statement that Mogoboya took concerning the alleged assault he claimed he had suffered. My observation of the plaintiff's conduct was that he attempted to cure the inconsistency in his particulars and his statement.
- [26] The comments of the two doctors on the issue of the alleged assault were based on the information from the plaintiff and not on the independent findings. Dr Sibisi testified that the mass found on the plaintiff's scrotum could have been an incidental finding meaning the mass was there but it was not causing complications for the plaintiff. The J88 as well as the evidence of the two doctors are inconclusive in as far as, whether the plaintiff's injuries were caused by an assault.
- [27] The defendant's counsel argued that there was no need for the members of the first defendant to assault the plaintiff because the plaintiff had complied with the demand to hand his cellphone and password is more probable than the plaintiff's version that the members assaulted him after he had fully cooperated.
- [28] The plaintiff is a single witness on the alleged assault; I am therefore implored to approach the plaintiff's evidence with caution. The version of the defendant is such that it is more plausible the truth than that of the plaintiff and even if I were to accept both parties' versions as the truth, I must finally decide on what is the probable truth. From the totality of all the evidence, the defendant will be successful as the plaintiff carries the burden of proof. In this case, the credibility of the plaintiff as a witness and the improbabilities of his version was factored in the decision to reject the plaintiff's claim that he suffered injuries because of the assault.

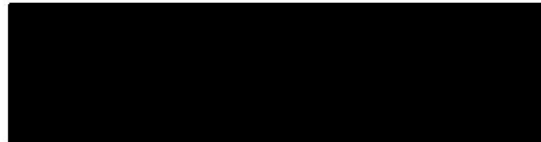
CONCLUSION

- [29] I find that the plaintiff failed to prove that his injuries were as a result of an attack on his person.

[30] I am not satisfied that the plaintiff has made a prima facie case for his claim of damages against the defendant(s) and therefore his claim must fail.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

- 1] The plaintiff's claim for damages against the defendant(s) is dismissed with costs.



JT LESO

Acting Judge of the High Court

Date of Hearing: 19 August 2021

Judgment Delivered: 10 March 2022

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