

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2021/03151

In the matter between:

WILFRED ROOI

PLAINTIFF

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION
SAFETY AND SECURITY**

1st DEFENDANT

**RAPHAEL HAMUNYELA OF THE NAMIBIAN
CORRECTIONAL SERVICE**

2nd DEFENDANT

**JOSEPH JEROBEAN OF HARDAP CORRECTIONAL
FACILITY**

3rd DEFENDANT

Neutral citation: *Rooi v Minister of Home Affairs, Immigration Safety, and Security* (HC-MD-CIV-ACT-OTH-2021/03151) [2023] NAHCMD 282 (23 May 2023)

Coram: RAKOW J

Heard: 14 March 2023, 15 March 2023 and 27 March 2023

Delivered: 23 May 2023

Flynote: Law of Delict – Action for general damages – Physical injuries and pain suffered by the plaintiff on his face, thighs, and testicles as well as for psychological trauma – Plaintiff assaulted with a fist and slaps as well as with a tonfa, causing

injuries to plaintiff's forehead – Third defendant claims he blocked an unlawful attack by the plaintiff – Plaintiff allegedly hit himself against the tonfa and sustained a bruise on the forehead – Third defendant found liable for injuries caused to the plaintiff's forehead and the resultant pain and suffering – Plaintiff's claim succeeds in part.

Summary: The plaintiff, Mr Wilfred Rooi has been an inmate serving an imprisonment term at Hardap Correctional Facility in Mariental since 14 August 2016. On 14 March 2021, he was assaulted by Mr Joseph Jerobeam, a prison warden at Hardap Correctional Facility. This lawsuit seeks general damages in the sum of N\$650 000 for physical injuries and pain suffered by the plaintiff on his face, thighs, and testicles as well as for psychological trauma. The defendants opposed the plaintiff's action on 13 September 2021.

Held that: the court is not satisfied that Mr Jerobeam's means to ward off an attack was justified by using the tonfa in the circumstances. The court is therefore satisfied that the plaintiff was assaulted by the third defendant.

Held further that: there is nothing credible placed before this court by the plaintiff in terms of the psychological damage suffered as well as the injuries on the thigh and testicles of the plaintiff. The court is not amenable to relying on the mere word of the plaintiff. There is no damages affidavit or any medical or psychological evaluation report attached to the plaintiff's claim. What is before the court is a medical examination report, this report however does not outline the severity of the injuries suffered by the plaintiff and makes the injuries seem minor.

Plaintiff's claim succeeds in part.

ORDER

1. The defendants must pay the plaintiff, jointly and severally the one paying the other to be absolved, in the amount of N\$50 000.
2. Payment of interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of full and final payment.
3. There is no order as to costs.

4. The matter is removed from the roll and regarded as finalized.

JUDGMENT

RAKOW J:

The parties

[1] The plaintiff is Wilfred Rooi, an adult unemployed male who is currently incarcerated at Hardap Correctional Facility in Mariental.

[2] The first defendant is the Minister of Home Affairs, Immigration, Safety, and Security, duly appointed as such in terms of Article 32(3)(i)(bb) of the Constitution and cited in his official capacity as the Minister responsible for the Namibian Correctional Services and whose address of service is c/o the Office of the Government Attorney situated at the 2nd floor, Sanlam Centre, Independence Avenue, Windhoek.

[3] The second defendant is Raphael Hamunyela, an adult male duly appointed as the Commissioner General of the Namibian Correctional Services in terms of Article 32(4)(c)(cc) of the Constitution, cited in his official capacity as the head of the Correctional services in Namibia and whose address of service is c/o the Office of the Government Attorney.

[4] The third defendant is Joseph Jerobeam, an adult male duly appointed as a Correctional Officer II, in the department of the Namibian Correctional Service at Hardap Correctional facility and is cited in his official capacity as the Minister responsible for the Namibian Correctional Services and whose address of service is c/o the Office of the Government Attorney situated at the 2nd floor, Sanlam Centre, Independence Avenue, Windhoek.

Introduction

[5] The plaintiff, Mr Wilfred Rooi has been an inmate serving an imprisonment term at Hardap Correctional Facility in Mariental since 14 August 2016. On 14 March 2021, he was assaulted by Mr Joseph Jerobeam, a prison warden at Hardap Correctional Facility. This lawsuit seeks general damages in the sum of N\$650 000 for physical injuries and pain suffered by the plaintiff on his face, thighs, and testicles as well as for psychological trauma. The defendants opposed the plaintiff's action on 13 September 2021.

Issues to be resolved

[6] The issues which the court is to resolve is summarised as follows:

- a) Whether or not the third defendant assaulted the plaintiff;
- b) Whether the third defendant committed the assault in self-defence or by using minimal force to ensure the plaintiff's compliance with lawful instructions, and
- c) Whether the injuries inflicted by the defendant are adequate to justify the general damages claim of N\$650 000.

Witnesses for the plaintiff

Mr Rooi

[7] On 14 March 2021 with the permission of one Sgt. Asheela he went to the B Section of Hardap Correction Facility to cut his hair. Arriving in B section he found the barber busy cutting the hair of another inmate. He waited his turn. In the B section courtyard, other inmates were playing soccer. He joined the match as a goalkeeper for one of the teams. The third defendant told him to stop playing soccer and leave B section claiming his presence in B section was unlawful. The plaintiff stopped playing soccer as requested and sat with other inmates.

[8] After he had stopped playing soccer as requested, he pleaded with the third defendant to permit him to stay in the B section for a while so that he could cut his hair. The third defendant did not heed his plea. He said the third defendant left and when he returned, he had a tonfa in his hands. He testified further that despite the fact that he was not resisting, the third defendant insulted him and pushed him out of the B section. While they were at the stairs, he asked the third defendant why he was 'stressing'. When he asked that, the third defendant attacked him with 'fists' and 'slaps'. He also kicked him between his legs, inflicting severe pain injuries on his thigh, testicles, and his then recently circumcised penis.

[9] The third defendant further assaulted him on the forehead twice with a tonfa causing him to collapse or fall on the floor. He was treated at the inmate's clinic where he was referred to the Mariental Hospital and where the open wound in his forehead was sutured and treated further. He also opened an assault with intent to do grievous bodily harm case against the third defendant. He denied that he had assaulted the third defendant. He contended that he was entitled to N\$650 000 because he endured severe pain in his thigh and testicles, an open wound on his forehead that required four stitches, and psychological trauma. Further, informed the court that he still suffers from dizziness as a result of the assault. Under cross-examination, he informed the court that his penis has not enjoyed an erection since the third defendant attacked his manhood. Lastly, he rejected the defendant's assertion that he had suffered a bruise on his forehead maintaining that he suffered an open wound.

Mr Kooper

[10] Mr Kooper testified that on the date in question, he was in B section. He confirmed that the plaintiff came into the B section to cut his hair. He also confirmed that the plaintiff played soccer while waiting for his turn to cut his hair. He furthermore, confirmed that the defendant came and instructed the plaintiff to stop playing soccer and the plaintiff complied. He saw and heard the third defendant

telling the plaintiff to leave B section. He confirmed further, that the plaintiff pleaded with the third defendant to stay and wait for his turn to cut his hair.

[11] He confirmed, furthermore, that the third defendant remarked that 'today I will show you your the boss' or words to that effect. After making that statement, the third defendant left and returned with a tonfa. He also confirmed that the third defendant pushed the plaintiff to the door and, as they walked down the stairs, the third defendant kicked the plaintiff on the testicles, slapped him, and struck him in the face with a tonfa. Moreover, he confirmed that the plaintiff appeared disorientated and that he collapsed. He observed all this through the window. He disputed that the plaintiff had ever assaulted or resisted the third defendant. According to him, inmates had always been playing soccer in the courtyard and the last time that he played soccer in the courtyard was last month (February 2023).

Witnesses for the defendants

Mr Joseph Jerobeam (third defendant)

[12] The third defendant testified that on 21 March 2021, while he was busy doing normal patrol in the section, he observed that there were offenders playing soccer in the courtyard and the plaintiff was one of them. He was wondering what the plaintiff was doing in the B section of the correctional facility as he was not housed there. The third defendant enquired from the plaintiff, what he was doing and who opened for him. The plaintiff told him that he had been opened by the correctional officer Mbuale and that the officer was aware that he came to B section to play soccer.

[13] The third defendant further stated that whilst demanding that the plaintiff return to his section, the plaintiff became unruly, prompting him to remove the plaintiff from the B section. The plaintiff then pushed him and in an attempt to stop the plaintiff's attack, he blocked the attack with a tonfa injuring the plaintiff on the forehead. The third defendant further testified to taking the plaintiff to the facility clinic that same day.

Arguments

Plaintiff

[14] In argument, Mr Velikoshi, for the plaintiff stated that Annexure WR-1 of the plaintiff's particulars of claim shows that the plaintiff received medical treatment on 14 March 2021 and 15 March 2021 at a state Hospital in Mariental where it was noted that bleeding was under control and wound dressed. The defendant did not at all say anything about this annexure when it pleaded to the particulars of the claim.

[15] Mr Velikoshi further argues that there is no question that the plaintiff sustained an open wound from a tonfa that was in the hands of the third defendant. The plaintiff's evidence in this aspect was corroborated, in that it was a direct assault and not an accident or use of minimum force as the third defendant would like the Honourable Court to accept and believe.

[16] Further, Mr Velikoshi adds that as to the allegation that the plaintiff's penis no longer experiences erections, this aspect was elicited in cross-examination. However, the plaintiff also testified that he was kicked on his testicles and he felt severe pain. The kicking was also confirmed by Mr Kooper. The injury on the inner thigh measuring 4 x 3cm indicates the determination that the third defendant had to inflict serious injuries which ultimately resulted in the plaintiff's penis not to erect since that time.

[17] Mr Velikoshi outlines that the plaintiff is required to prove his case on a balance of probabilities and he argues that the plaintiff's version of events of 14 March 2021 is the one closer to the truth. This version was corroborated. The third defendant's defence that he used minimum force to ensure compliance or self-defence is farfetched and pure fabrication. It has been disproved as there was no situation necessitating the use of minimum force or self-defence. The third defendant's conduct was unlawful and therefore he has no valid defence in law.

Defendants

[18] In argument, Mr Kauari, for the defendants stated that the probabilities favour the version of the defendants in that it is highly improbable that a trained correctional officer such as Mr Joseph would just assault the plaintiff for no particular reason. Mr Kauari further argued that Mr Joseph testified that as a trained officer he is a rehabilitator and not employed to assault inmates.

[19] Mr Kauari further argues that the probabilities favour the version of the defendants in that the version of the defendants has been consistent with the pleadings. Mr Kauari states that the plaintiff claims that he was assaulted multiple times at different stages of his alleged encounter with the third defendant but does not have any medical evidence to corroborate his version of events.

[20] Mr Kauari argues that the plaintiff failed to call the nurse that attended to him at the clinic of the facility and therefore that evidence is not before the court, Mr Kauari further points out that the plaintiff also failed to call the doctor that attended to him at Mariental state hospital.

[21] Mr Kauari further submits that the plaintiff failed on a balance of probability to prove that he was assaulted by the third defendant in a manner that he says he was and as such the plaintiff is not entitled to damages in the amount of N\$650 000.

The legal principles

[22] In *Haufiku v The Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-OTH-2021/03665) [2022] NAHCMD 689 (19 December 2022), Sibeya J stated as follows:

[51] In *National Employers' General Insurance v Jagers*,¹ Eksteen AJP said the following while discussing the approach to mutually destructive evidence:

In a civil case ... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.

[52] In the consideration of the evidence, where the probabilities do not resolve the matter, the court can have regard to the credibility of witnesses in order to find in favour of one or the other party. The court may have to consider the candour and demeanour of witnesses, self-contradiction, or contradiction with the evidence of other witnesses who are supposed to present the same version as that of the witness or contradict an established fact. '

[23] In *Lopez V Minister of Health and Social Services*², which was a matter also cited by the parties, my brother Parker J outlined the following principles under paragraphs 39 to 56 in terms of damages claim:

[39] Thus, under the principal claim, the plaintiff claims both patrimonial and non-patrimonial damages. In considering what the plaintiff claims under this heard, the following significant principles and approaches are relevant and apropos. First, there is no general right to recover damages for patrimonial harm suffered as a result of the injury or death of another person. There are exceptions, though, to these general principles, namely, in cases where the harm derives from a recognized duty of support, eg based on family relationships. (See Max Loubser (Ed) and Rob Midgley (Ed) *The Law of Delict in South Africa* at 286.)

[40] Second, the general principle is that a successful plaintiff, as is the case in the instant proceedings, is entitled to be compensated for the loss suffered but is not entitled to profit from the loss.

¹ *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440E-F.

² *In Lopez V Minister of Health and Social Services* (HC-MD-CIV-ACT-DEL 2346 of 2017) [2019] NAHCMD 367 (24 September 2019).

[41] Third, when determining the quantum of damages in such claims, the courts seek aid awards granted in comparable cases, although – and this is important – the instant court must always take into account the circumstances of each case (*Getachew v Government of the Republic of Namibia* 2006 (2) NR 720 (HC)).

[42] Fourth I should, based on the *Getachew* approach (see *Getachew v Government of the Republic of Namibia*), look at the circumstances of the present matter – through the prism of the circumstances surrounding the unlawful omission of the medical personnel and also the prism of the circumstances of the unspeakable and enduring loss suffered by a grandmother who at one go loses her daughter and her baby grand-daughter.

[43] Fifth, in that regard, the Supreme Court of Appeal South Africa has cautioned that in making an award for general damages, courts should guard against duplication of awards and awards overlapping, and the plaintiff being overcompensated. (*Ngubane v South Africa Transport Service* 1991 (1) SA 756 (A))...'

[24] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* (427/01) [2002] ZASCA 98 (6 September 2002) which is the locus classicus regarding issues of fact when there are mutually destructive versions, the court found as follows:

'[5] On the central issue, as to what the parties decided, there are two irreconcilable versions. So too on several peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To conclude 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 of 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's 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 extra curial 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's 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.'

Discussion

[25] The third defendant does not dispute the fact that as a result of him making use of the tonfa, he injured the plaintiff on the forehead. The court, therefore, accepts that the plaintiff was injured by the third defendant. In listening to both versions the court is not satisfied that the third defendant's means to ward off an attack was justified by using the tonfa in the circumstances. The court is therefore satisfied that the plaintiff was assaulted by the third defendant. Mr Kooper also confirmed the assault caused to the plaintiff by the third defendant.

[26] The difficulty the court has is that the plaintiff failed to present the court with substantial evidence regarding how long the open wound on his forehead took to heal and how long he had any kind of discomfort or pain regarding the wound on his forehead. The plaintiff does, however, say that when the third defendant kicked him between his legs he underwent severe pain and injuries to his thigh and testicles. The plaintiff on that count states that his penis has not enjoyed an erection since the attack by the third defendant. There is, however, no medical report before this court that can substantiate this and therefore these claims can't hold water.

[27] Further, there is nothing credible placed before this court by the plaintiff in terms of the psychological damage suffered as well as the injuries on the thigh and testicles of the plaintiff. The court is not amenable by going on the mere word of the plaintiff. There is no damages affidavit or any medical or psychological evaluation report attached to the plaintiff's claim. What is before the court is a medical

examination report, this report however does not outline the severity of the injuries suffered by the plaintiff and makes the injuries seem minor.

[28] There is various case law on general damages, which both parties cited in their heads and which the court has also had sight of.³ The court therefore will not recite the case law. The generally accepted amount for general damages is the amount of N\$50 000. I am satisfied that this case also falls within the ambit of the generally accepted amount for damages.

Costs

[29] The plaintiff is represented on the instructions of the Directorate of Legal Aid. And in terms of s 18 of the Legal Aid Act 29 of 1990, no order as to costs shall be made against the state in or in connection with any proceedings in respect of which legal aid was granted and neither shall the state be liable for any costs awarded in any such proceedings. It is therefore crucial for the court to outline that the plaintiff, being an inmate, was by no means put out of pocket by the defendants in them defending the action. Therefore in applying the above provision and the fact that the plaintiff incurred no costs for which he should be reimbursed even if he was partially successful in his claim, the court will make no order as to costs.

Order

[30] I, therefore, make the following order:

1. The defendants must pay the plaintiff, jointly and severally the one paying the other to be absolved, in the amount of N\$50 000.
2. Payment of interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of full and final payment.

³ *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] nahcmd523 (12 November 2021); *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC); *Haufiku v The Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-OTH-2021/03665) [2022] NAHCMD 689 (19 December 2022).

3. There is no order as to costs.
4. The matter is removed from the roll and regarded as finalized.

E RAKOW
Judge

APPEARANCES

Plaintiff:

I Velikoshi
Of Ileni Velikoshi Inc., Windhoek

Defendants:

N Kauari
Of Office of the Government Attorneys,
Windhoek