

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2021/00896

In the matter between:

**JONATHAN KOLELA**

**PLAINTIFF**

and

**MINISTER OF SAFETY AND SECURITY**

**FRANS KAPOFI**

**1<sup>ST</sup> DEFENDANT**

**COMMISSIONER-GENERAL OF CORRECTIONAL**

**FACILITY RAPHAEL AMUNYELA**

**2<sup>ND</sup> DEFENDANT**

**SENIOR CHIEF CORRECTIONAL OFFICER ANGOLO**

**3<sup>RD</sup> DEFENDANT**

**CORRECTIONAL OFFICER SACKY PETRUS**

**4<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER ERASTUS EPITO**

**5<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER MOSES**

**6<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER MATHEW FIKANAWA**

**7<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER TJINYAME**

**8<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER KUUNDA**

**9<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER E N ANDREAS**

**10<sup>TH</sup> DEFENDANT**

**Neutral Citation:** *Kolela v Minister of Safety and Security Frans Kapofi*  
(HC-MD-CIV-ACT-OTH-2021/00896) [2023] NAHCMD  
780 (1 December 2023)

**Coram:** MASUKU J

**Heard:** 24, 25, 26, 27 October 2022, and 6 March 2023

**Delivered:** 1 December 2023

**Flynote:** Civil action – Law of Delict – Alleged assault of inmate by Correctional Service officers – Onus in cases of assault – The Law of Evidence – The approach to deciding disputes of fact, where the evidence adduced is irreconcilable – Computation of damages and factors taken into account.

**Summary:** The plaintiff, an inmate at the Windhoek Correctional facility sued the Minister of Safety and Security and certain other officials, including correctional officers, for assault. The claim was defended, with the defendants denying that the plaintiff was assaulted. They averred that the plaintiff became agitated and was unruly and in the process, he assaulted the correctional service officers. The plaintiff testified and also called a witness, who was a fellow inmate. The defendants called three witnesses, being two correctional officers and a nurse in the employ of the Correctional Services, to adduce evidence in rebuttal of the plaintiff's case.

*Held:* That in cases of assault, the plaintiff bears the onus to prove that there was a violation of his or her bodily integrity by the defendants and that violation, if proved, is *prima facie* unlawful. Once the infringement is proved, the onus shifts to the defendant, to show some legal justification.

*Held that:* Where the parties adduce evidence that is discordant and irreconcilable, the approach to resolving the disputes of fact is that articulated in *Stellenbosch Farmers' Winery Group (Pty) Ltd and Another v Martell Cie and Others* 2003 (1) SA 11 at 14I -15E, namely, for the court to consider the witnesses' candour and demeanour; their latent and patent bias; internal contradictions with what was pleaded or what was put in cross-examination or with established facts or the witness' own extra-curial statements; the

probability or improbability of the witnesses' versions, the witnesses' reliability, to mention but a few.

*Held further that:* The plaintiff's witness, did not impress the court as a credible witness in that his version in parts did not corroborate that of the plaintiff and he answered certain questions unsatisfactorily. That notwithstanding, the court could rely on the evidence of the plaintiff, however, as he stood up well in cross-examination and adduced generally cogent evidence.

*Held:* That the defendants' witnesses, who are all in the employ of the Ministry, did not present themselves as credible witnesses. The answers they returned to certain questions were not convincing and their evidence contradicted what was recorded in the plea.

*Held that:* The defendants failed, for unsatisfactory and contradictory reasons to provide the footage of the encounter between the plaintiff and the correctional officers that gave rise to the claim and that this counted against the defendants.

*Held further that:* The plaintiff managed to prove that there was an interference with his bodily integrity and that the fact that he is incarcerated does not detract from his bodily integrity being inviolable.

*Held:* That the defendants failed to show any justification for the violation of the plaintiff's bodily integrity and were therefor liable to him in damages.

*Held that:* In computing the damages, the court is guided by certain principles, which include that the damages awarded must be to compensate the plaintiff and not for him or her to score a profit; that the court must have in aid, comparable cases in mind, although taking into account the particular facts of the matter before it and that the court must be alive to the possible duplication of awards.

*Held further that:* That after comparing other cases and the facts of the plaintiff, the award of N\$35 000 was reasonable in the circumstances. The court took into account that the plaintiff, being incarcerated, did not have the wherewithal to provide all the necessary evidence and was literally in the hands of the defendants regarding his movement and actions.

Damages of N\$35 000 granted with no order as to costs as the plaintiff's legal practitioner was engaged by the Legal Aid Directorate.

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### ORDER

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1. The defendants are ordered jointly and severally liable, the one paying and the other being absolved to pay the plaintiff the following amounts:
  - 1.1 Damages in the amount of N\$35 000 for assault.
  - 1.2 Interest on the said amount at the rate of 20% per annum from the date of judgment to the date of payment.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

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### JUDGMENT

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**MASUKU J:**

Introduction

[1] Confronting this court, and requiring an unequivocal answer in this trial is the question whether the plaintiff, Mr Jonathan Kolela, is entitled to payment of an amount of N\$500 000, or a lesser amount as a result of an assault allegedly committed on his person by certain members of the Correctional Services of Namibia.

[2] The defendants, being the Minister of Safety and Security, the Commissioner of Correctional Services and individual Correctional Officers, the latter who are alleged to have perpetrated the assault on the plaintiff's person, stand in unison, proclaiming their innocence and they move the court to dismiss the action with costs.

[3] Accordingly, the remit of the court, is, in the circumstances, to decide, on the basis of the pleadings filed, the evidence adduced by both sets protagonists and other relevant documents filed of record, whether the plaintiff has made out a case that would entitle him to be awarded damages in the amount claimed or some lesser amount.

[4] It is important to point this out very early in the judgment, that the standard of proof that the court will inevitably employ, in returning the answer to the above question is whether the plaintiff has been able show on a balance or preponderance of probabilities that he was assaulted by the members of the Correctional Services as alleged. Should he fail to surmount that hurdle, and the probabilities do not favour the plaintiff, the court will have no option but to dismiss the action with consequential relief that may be appropriate.

[5] It is trite law that an assault is *prima facie* unlawful. For that reason, if the plaintiff manages to satisfy the court that he was assaulted as alleged, the onus then shifts to the defendants to demonstrate to the court by admissible evidence that there was some justification for the assault in the circumstances.

#### The parties

[6] The plaintiff, as mentioned above, is Mr Jonathan Maiba, an adult male. He is an inmate serving a sentence in a correctional facility in Walvis Bay. The sentence he is serving is not material to the determination of this action.

[7] The defendants are the Minister of Safety and Security, the Commissioner-General of the Correctional Services of Namibia and various individual members of the correctional services alleged to have partaken in the assault of the plaintiff. The members of the correctional services are Messrs Angolo, Sacky Petrus, Epito, Moses, Fikanawa, Tjinyame, Kuunda and Andreas. The latter are cited as the third to the tenth defendants, whereas the first two defendants are the Minister of Safety and Security and the Commissioner-General for Correctional Services, respectively.

### Representation

[8] The plaintiff was represented by Mr Tjituri, on the instructions of Legal Aid, whereas the defendants were represented by Mr Kauari, of the Office of the Government Attorney. The court records its indebtedness to counsel on both sides for the assistance they dutifully rendered to the court as dedicated officers of this judicial diocese, so to speak.

### The pleadings

[9] The plaintiff, in his particulars of claim, avers that on 26 January 2021, from approximately 12h00 until 13h00, he was assaulted by officers at the Windhoek Correctional facility, in A section thereof. The plaintiff alleges that he was so assaulted by the third to tenth defendants during the said ordeal. In so doing, the officials were acting in the course of duty and within the scope of their employment, hence the Minister is vicariously liable for the harm that the plaintiff suffered.

[10] In this connection, the plaintiff alleges that during the assault, he was handcuffed, with his hands placed behind him, was pushed in the face, kicked all over his body and was trampled upon by the aforesaid officers. The plaintiff alleges further that as a result of the assaults perpetrated, he suffered bruising to the head, experienced pain to the head and stomach and further suffered multiple bruises to the knees, legs and his body. The plaintiff avers further that as a result of the assault, he was attended to by medical

personnel at the facility concerned and the internal doctor on the self-same 26 January 2021. There are other claims in the alternative that the plaintiff avers but I find it unnecessary, for present purposes, to advert to those, save to mention, as previously indicated that it is his case that he is entitled to damages in the amount of N\$500 000.

[11] The defendants' case is a horse of a different colour, as collectively averred in their plea. The defendants allege that on 24 January 2021, the plaintiff was transferred from Walvis Bay Correctional Facility to Windhoek. The following day, he demanded that he be provided with a special diet and to be taken to the kitchen where he would indicate the food that he did not want to partake of. It is the defendants' case that the plaintiff was informed by the officers that he should lodge a complaint at the facility's hospital and in that connection, obtain a medical prescription for the special diet he claimed.

[12] The defendants further aver that on 26 January 2021, the plaintiff requested to be escorted to the clinic. It is the defendants' case that they could not escort the plaintiff at the time he had requested as the doctor for the facility was not available to attend to the plaintiff. The defendants further aver that around 13h00, in A-Section, when the offenders are usually locked up, the plaintiff refused to be locked up, notwithstanding several requests by the officers.

[13] It is the defendants' case that as lawfully required, they pushed the plaintiff into the section by employing minimum and reasonable force in order to ensure that the plaintiff was locked up. In that endeavour to force the plaintiff into his section, he assaulted and punched the fourth defendant in the face and pushed the fifth defendant against the prison grills. The defendants further aver that the plaintiff further uttered derogatory and insulting language against them and threatened to assault and sue the defendants.

[14] The defendants further aver that they handcuffed the plaintiff in order to restrain him from being aggressive and violent. They thus locked him into his cell. They later removed the handcuffs from him after he had calmed down.

The defendants allege further that they later escorted the plaintiff to the clinic, where no injuries were found on the plaintiff's person despite his allegation that he was assaulted.

[15] The defendants further denied that they assaulted the plaintiff in the manner alleged in his particulars of claim. They further denied having violated the plaintiff's bodily and psychological integrity nor that he was subjected to inhuman and degrading treatment as he had alleged. In sum, the defendants denied liability for the amount claimed or any amount at all.

#### The pre-trial report

[16] The court, pursuant to the parties' pre-trial report, issued a pre-trial order. The issues of fact that were recorded as up for determination at trial, were the following:

- (1) whether an assault was perpetrated on the plaintiff by the officers;
- (2) whether any such assault on the plaintiff resulted in personal injury to the plaintiff;
- (3) whether the defendants, when allegedly perpetrated such assault on the plaintiff, acted within the confines of the power imbued on them by law;
- (4) whether there is proof that the plaintiff was assaulted and if such proof exists, whether there is evidence that the said assault was perpetrated by the defendants;
- (5) whether the plaintiff sustained any injuries on his body as a result of the said assaults;
- (6) whether the plaintiff endured any shock and pain, suffered any discomfort and loss of the amenities of life due to the alleged assault;
- (7) whether the plaintiff is entitled to a claim for personal injury as a result of the alleged assault perpetrated by the defendants.

[17] In respect of the legal issues placed for resolution by the court, the parties listed the following issues:



- (1) whether the plaintiff's case can be upheld in law;
- (2) whether the plaintiff is entitled to constitutional damages as claimed;
- (3) whether the plaintiff has proved that any of his fundamental rights were infringed by the defendants, as alleged;
- (4) whether the claim for vicarious liability on the part of the first defendant or any other defendant, is established.

[18] The parties did not end there. They further agreed on matters that were common cause. These are the matters:

- (1) that the assault alleged, took place on 26 January 2021;
- (2) that the alleged assault took place at the Windhoek Correctional Facility;
- (3) that the defendants, in perpetrating the assault alleged, acted within the course and scope of their employment with the first defendant;
- (4) that as a result of the incident, the plaintiff received treatment for injuries at the clinic within the facility.

#### The evidence adduced

##### *The plaintiff*

[19] The plaintiff testified under oath and called one witness. I will commence with the plaintiff's evidence. It was his evidence that he is presently incarcerated at the Walvis Bay Correctional Facility. He testified that on 26 January 2021, members of the correctional services assaulted him on his body at the Windhoek Correctional Facility, where he was incarcerated at the material time.

[20] It was his evidence that on the date in question, he was held in A section of the correctional facility. The fourth to tenth defendants, he further testified, placed him in handcuffs and assaulted him by punching him on his

face, kicked him on the stomach and head. As a result he fell to the ground whilst still manacled by the handcuffs.

[21] The plaintiff further testified that he suffers from gastritis and as a result, certain food was recommended for him to take. On the day in question, he raised the issue of his diet with Superintendent Hainana, a senior officer at the correctional institution. The superintendent, further testified the plaintiff, ordered that the plaintiff be taken to the clinic for verification of his food prescription by the fifth defendant, officer Epito. This was between 08h00 and 09h00.

[22] The plaintiff testified further that at the time, the fifth defendant was playing a game of cards with other officers and did not swiftly heed the instruction issued to him by Supt Hainana. It was the plaintiff's case that the said officer played his cards until around lunchtime. The fifth defendant then told the plaintiff that since it was lunch time, he was leaving, whereupon the plaintiff reminded him that he had been instructed to take the plaintiff to the clinic but had not done so and for a long time.

[23] It was the plaintiff's evidence that the fifth defendant told the plaintiff to wait for the officer who instructed him to take the plaintiff to the clinic and started chatting to the fourth defendant in the Oshiwambo language, which the plaintiff does not understand well. Immediately thereafter, the officers launched a physical attack on him, pushing him around and from side to side. He then reminded the officers that the second defendant had stated that inmates' complaints should be attended to within two days of the lodging of the complaint.

[24] This would appear to have infuriated the fifth defendant, who told the plaintiff that this was not Walvis Bay and that if he has a complaint, he must report it to the second defendant who must then assist the plaintiff. Sergeant Napolo joined the conversation and stated in Oshiwambo that the officers should assault the plaintiff. The fourth defendant immediately left the room

where they were with the plaintiff and they called more officers. The third defendant thereupon slapped the plaintiff on the face.

[25] It was the plaintiff's evidence that when he pleaded with the fourth defendant to desist from slapping him but to listen to his complaint, the fourth defendant stated that when they are called, they only act and do not come to listen. At that point, Sgt Petrus hit the plaintiff on the chest and immediately thereafter, it became a 'free-for-all', as it were, as the officers began to assault him indiscriminately. He was pushed and he fell to the floor and was handcuffed. They proceeded to hit him on the face and kicked him in the stomach, he further testified. Since he was handcuffed, he could not defend himself from the assaults.

[26] It was his further evidence that during the fracas, one of the officers laid a boot on the plaintiff's face in order to prevent him from getting up, while the other members were kicking and beating him. Once they were done, they then lifted the plaintiff up from the floor and pushed him into a cell whilst he was still in handcuffs.

[27] The plaintiff testified further that they returned to the cell to remove the handcuffs but instead increased the pressure of the handcuffs on his wrists, inflicting excruciating pain in the process. This resulted in the plaintiff losing sensation on his arms. They continued to beat him up. He testified that this latter assault took place within the vision of other inmates and upon realising that fact, the officers then closed the door to the cell in order to obstruct the inmates' view. Once done with him, they threw the plaintiff into the cell and left without further ceremony.

[28] The plaintiff testified that immediately one of his fellow inmates, Mr Elias Tjiriange, advised the plaintiff to request for the video footage of the area where the incident took place. There was, however, no response from the authorities on that issue. After the plaintiff's lawyers came on record, the institution replied the plaintiff's lawyer and advised that the footage was lost or

deleted. The plaintiff was instead advised to lay a complaint against the officers he alleged had assaulted him.

[29] When he laid the complaint, however, it is his evidence that he was informed that he would be charged with unruly behaviour and attacking the correctional officers. It was his case that he refused to attend any disciplinary proceedings regarding this matter, as it seemed the officers were using their powers in an arbitrary manner.

[30] The plaintiff testified further that there is no licence under any law or policy that allowed the officers to assault an inmate. It was his evidence that on the day in question, there is nothing that would have justified the assault meted out to him, considering in particular, that he had already been manacled by handcuffs at the time.

[31] Lastly, the plaintiff adduced evidence to the effect that during the assault he sustained serious injuries, which were visible and he had bruises on his knees and legs generally and for which he received treatment at the health facility on 26 January 2021. The plaintiff further testified that for about a week after the assault, he was unable to sleep properly as he experienced bodily pain and discomfort as a result of the assault.

[32] Lastly, the plaintiff testified that he had claimed the amount of N\$5 000 000, as a result of the assault perpetrated against his person by the third to tenth defendants. He testified that when the said defendants assaulted him they acted within their scope of employment and in the course of their duties. As such, they should be held liable for the damages he claimed.

*Mr Reinhardt Kondiri*

[33] The plaintiff also called Mr Kondiri as a witness. I shall, for ease of reference, call him the plaintiff's witness 2, ('PW2'). PW2 testified that he was detained at the Windhoek Correctional Facility on the date in question. It was his evidence that when the incident in question occurred, he was at the

telephone booth around noon. He there saw the plaintiff at the entrance to the door of the unit and was inside the unit.

[34] It was his evidence that soon thereafter, he saw some officers coming into the plaintiff's unit, including Mr Sacky Petrus and others. They confronted the plaintiff and manhandled him in a very aggressive manner. They took him by his hands and they handcuffed him and proceeded to assault him by slapping him on the face and also dragged him through the door of the unit. It was PW2's evidence that there was, from what he witnessed, no reason or cause for the officers to assault the plaintiff. This is because the plaintiff did not at any stage, resist being taken out of the unit. The officers just came in, assaulted him and handcuffed him.

[35] A few minutes later, the officers brought the plaintiff back to the cell. He no longer had a shirt on his upper body and he was handcuffed, something that was unusual when inmates were inside their respective units where they were housed. The officers returned some minutes later and removed the handcuffs from the plaintiff. It was this witness' evidence that from where he was, he could no longer see what happened to the plaintiff when the latter was taken out because he could not see outside his unit. He testified that he saw the assault perpetrated on the plaintiff because that happened in front of him.

[36] These witnesses were cross-examined at length. I will not, for the moment, indulge in the particulars of the questions posed to them in cross-examination. I intend doing so when I deal with the cogency or otherwise of the evidence adduced by the parties' respective sets of witnesses.

#### The defendants' case

[37] The defendants, called three witnesses to testify on their behalf. These were Mr Sakeus Petrus, to whom I will refer as Defendants' Witness 1 ('DW1'). The second witness, was Mr Epito Erastus ('DW 2') and the last

witness, was Mr Joseph Moses, (DW3). I will deal with the version presented by these witnesses in turn, beginning with DW1.

*Mr Sakeus Petrus*

[38] DW1 testified that on the morning of 26 January 2021, he met Supt Hainana and DW2 talking to the plaintiff in the dining hall. The plaintiff was complaining about his prescription. He did not join the conversation but proceeded to serve breakfast to the inmates, as it was time for their meal.

[39] He testified further that around 11h00, while still busy serving inmates, the plaintiff came and found DW2 standing at the entrance. He asked the latter to take him to the hospital where he was to discuss his prescription for food with the doctor. DW2 informed the plaintiff to wait to be taken to the hospital after lunch. The plaintiff was impatient and insisted that he wanted his complaint to be attended to immediately.

[40] It was DW1's evidence that the plaintiff then pushed DW2 out of the door. The witness then locked the door when he saw this event unfold. The plaintiff sat on a door and informed the officers that he will not leave and will stay there until he had been assisted accordingly. DW2 informed him that he will no longer take the plaintiff to the hospital and must wait for Supt. Hainana to do so. The latter said this because the plaintiff was threatening and insulting the officers, calling them young boys in the process. He threatened to 'f...' them up. He also wanted to throw his food at DW2 but was stopped from doing so by the witness. It was this witness' evidence that the plaintiff continued insulting the officers while the other offenders were in their sections.

[41] The witness further testified that he then told the plaintiff that the officers were going for lunch and he must therefore go to his cell. The plaintiff flatly refused to do so. The witness in view of the plaintiff's obstinacy, decided to call other officers to attend to the unit and to assist him. The witness then

stated that the officers came 'and when he saw them he said he will not go in unless we must assault him so that he can sue us and get paid.'<sup>1</sup>

[42] It was the witness' evidence that they then decided to push the plaintiff towards the entrance of the section he was supposed to go into. The witness testified that the plaintiff there and then assaulted him with a punch on the face. He denied that the officers ever assaulted the plaintiff. 'We simply decided to handcuff him in order to restrain him', he further testified.

*DW2 Erastus N. Epito*

[43] This witness testified that on 26 January 2021, he was requested by Supt. Hainana to take the plaintiff to the clinic in order to have his prescription issues sorted out. At around 11h00, the plaintiff came to the witness and requested that he be taken to the clinic. It was this witness' evidence that he informed the plaintiff that he should wait as the witness was still distributing food to other inmates. The plaintiff told the witness that he could not wait and should be taken to the clinic there and then. The plaintiff, was impatient and aggressive. He pushed the witness and as a result the latter collided with the grills.

[44] The witness further testified that the plaintiff started to insult him and threatened to throw porridge at the officers. The plaintiff called the officers 'small boys' who are useless and could do nothing to him. DW1 then locked the other door as the plaintiff was forcing his way out. The plaintiff thereupon sat on the officers' chair and told the officers that they could do nothing to him.

[45] The witness thereafter told the plaintiff that he would no longer take the plaintiff to the clinic as previously arranged because the plaintiff was aggressive and spoiling for a fight. The witness told the plaintiff to wait for Supt Hainana to take him to the clinic in the circumstances. The plaintiff thereupon told the witness that he would call the Commissioner-General and another senior officer, so that the officers he was dealing with, would lose

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<sup>1</sup> Para 8 of the witness' statement of Mr Sakeus Petrus.

their employment. The witness testified that he invited the plaintiff to go ahead with his plan.

[46] DW2 testified further that at around 12:45, which was time for lunch, he told the plaintiff to go into his cell but the plaintiff refused and demanded to be left alone. The witness thereafter requested for reinforcements to assist with getting the plaintiff in his cell, as they were not allowed to leave inmates outside when the officers go for lunch. The other officers came as requested and they pushed the plaintiff out of the grill door of the offices that he was clinging to for dear life. The plaintiff became aggressive and started fighting the officers.

[47] In that melee, the plaintiff punched officer Sakeus in the face. He was then handcuffed by the officers and was placed inside his section. It was the witness' evidence that the plaintiff thereafter refused that the handcuffs be removed from him. Supt Hainana then arrived and told the officers to leave the plaintiff alone. That was the extent of this witness' evidence in chief.

*Mr Joseph Moses*

[48] The last witness called by the defendants was Mr Joseph Moses, (DW3), a nurse in the employ of the Correctional Services. It was his evidence that at the time material to this matter, he was stationed at the Windhoek Correctional Facility and he was a nurse there.

[49] He testified that on 26 January 2021, the plaintiff visited the clinic at the facility and he attended to the plaintiff. The plaintiff complained that he had been beaten by correctional officers earlier that day and stated that he was suffering from a headache and that both arms were in pain. DW3 testified that he made readings of the plaintiff's blood pressure but could find no bruises on his body. His general condition was stable. As a result, the witness testified that he found no need to refer the patient to a doctor. He thereafter gave Betacod 2 tablets to the plaintiff to take three times a day for 5 days.



[50] The defence thereafter closed its case, without calling further witnesses. This juncture of the proceedings requires the court to assess the evidence led by both parties, with a view to deciding where the probabilities lie. It is particularly important to repeat, as mentioned earlier in para 4 above, that in such a case, the onus to prove the assault, which is denied by the defendants, lies with the plaintiff.

#### Assessment of the evidence led

[51] From what has been narrated above, it is clear that the parties' versions are irreconcilable. There are clear disputes of fact, especially regarding the question whether the plaintiff was assaulted by the defendants as he and his witness testified. This must be considered against the version testified to by the defendants, namely, that they never assaulted the plaintiff, corroborated by the evidence of DW3, who states that he examined the plaintiff and never saw any evidence of assault as alleged by the plaintiff.

[52] The proper approach to such matters, where the evidence is contradictory, has been expertly laid down by Nienaber JA in *Stellenbosch Farmers' Wineries Group Ltd and Another v Martell & Cie SA and Others*.<sup>2</sup> The learned Judge adumbrated the applicable principles as follows:

'The technique generally employed by courts in resolving disputes of fact of this nature may conveniently be summarised as follows. 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 extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the

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<sup>2</sup> *Stellenbosch Farmers' Wineries Group Ltd and Another v Martell & Cie SA and Others* 2003 (1) SA 11 (SCA) at 14I – 15 E.

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 *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.'

[53] This is a case that has been cited with approval in many judgments of this court and has been consistently applied by the court in coming to a conclusion whither the probabilities lie in cases where disparate versions have been adduced by the opposing parties before court.

[54] In my experience, it is not in all cases that the trial court will be required to apply all the criteria quoted above. Which of the criteria mentioned above, will come handy in any case, will depend on the nature of the case and the evidence adduced. As such, I will, in the instant case, apply those criteria that I find applicable to the instant case, in deciding the probabilities in this particular case. These will include the reliability of the witness, his candour and demeanour in the witness-box, the bias, latent and patent, to mention but a few.

[55] I will commence with the plaintiff. The plaintiff adduced his evidence matter-of-factly, in my considered opinion. He generally stood up well to cross-examination by Mr Kauari. He maintained that he was assaulted by the officers and that the footage of the assault would have been captured on a camera, which is close to where the assault allegedly took place.

[56] It is common cause that the footage regarding the assault was requested from the defendants. The plaintiff testified that he requested the footage on the very day the incident took place. In this connection, a letter, marked Exhibit "A", was sent by the defendants and in which they advised that, 'both cameras for A section where the incident took place were not working'<sup>3</sup>. It is not in dispute that the video cameras were installed where it is alleged the assault took place. There is, however, no concrete evidence adduced by the defendants that they were not functional at the time.

[57] When the plaintiff's legal practitioner of record came on board, he also requested the relevant footage. A different response was provided to him, *vide* a letter dated 28 March 2022, marked Exhibit "B"<sup>4</sup>. This time, the defendants stated that 'regarding this footage, this office is not in a position to provide the CCTV for the reason that it is no longer available on the system. Our system is designed to only store footages (*sic*) for a period of between seven days and erased after seven days automatically.'

[58] I am of the considered view that this prevaricating by the defendants on this crucial issue, exhibits lack of candour. The reasons proffered for the absence of the footage, differ and do not, on an objective basis, show that the defendants were truthful nor consistent in the explanation they provided. The footage, if availed, would have resolved the issue whether or not the plaintiff was, as he claims, assaulted by the defendants, with minimum difficulty.

[59] It would, in that regard, have been very clear who among the parties, is on the side of the truth. The defendants did not call any witness to deal with the inconsistent responses they provided to the plaintiff regarding the footage in question. In my view, they had a case to answer but did not call a witness to clarify to the court what really happened to the footage.

[60] As indicated above, the footage would have resolved the matter with minimum difficulty and the probability that the defendants deliberately did not

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<sup>3</sup> Letter marked Exhibit "A", dated 31 May 2022 p13 of the defendants' discovery bundle.

<sup>4</sup> Letter marked Exhibit "B", dated 28 March 2022 p30 of the defendants' discovery bundle.

provide it, must be held against them. They had a reason not to avail the footage and its absence is not satisfactorily explained. I would, on this account, find that the plaintiff's evidence is more credible in this respect.

[61] I have considered the evidence adduced by the plaintiff's witness and I must say that his evidence was not reliable. Under cross-examination, he did not strike me as a witness who was credible. He failed to show how he could have seen the plaintiff being assaulted from within the confines of his section, where he was held. Furthermore, he was asked about the injuries the plaintiff sustained and he stated that he had no comment.

[62] Furthermore, when taxed on his evidence that the plaintiff never testified that he was dragged on the floor and also lost his shirt in the process, he merely stated that he stated what he saw. There was clearly a discrepancy between his evidence and that of the plaintiff on these issues. Furthermore, when cross-examined on a number of issues, his standard refrain was that he either does not know or has no comment. As an example, he was asked if he saw the injuries sustained by the plaintiff after being allegedly assaulted by the defendants and his answer was that he does not know. I will, for that reason, not lay much store, if any, on his evidence, which struck me as designed to corroborate the plaintiff's story, which it failed to do. His evidence, is accordingly rejected.

[63] The fact that the plaintiff's witness' evidence has been discarded as inherently unreliable, does not necessarily mean that the plaintiff's evidence, standing alone, should therefor, be discarded as well. The plaintiff's evidence must be considered in light of its own strengths and weaknesses in order for the court to come to a conclusion whether the plaintiff has satisfied the onus thrust upon him.

[64] The difficulty facing the plaintiff was that his entire life, so to speak, was in the hands of the defendants. He could not do anything without relying on the good will of the defendants. For instance, he was questioned severely on the reason why he did not report the alleged assault to the police. I agree with

him that he had no choice as to where to report. He was held in terms of the law by the defendants and exercised no free will as to reporting the matter elsewhere. As I have found, the issue of the footage does not place the defendants in a favourable light as they had every reason to stifle and where possible, obliterate whatever independent evidence could be mounted against them in the plaintiff's favour.

[65] It is also worth mentioning that there was a discrepancy on a crucial issue, namely, in the reason proffered by the defendants in their plea for not taking the plaintiff to see the doctor on the day in question. In their plea,<sup>5</sup> the defendants averred that the plaintiff was not taken to see the doctor because the doctor was not available to attend to the plaintiff on the date in question. In their evidence however, the correctional officers, who testified, stated in unison that they did not take the plaintiff to see the doctor because of shortage of manpower.

[66] This is a clear contradiction between what was pleaded and the evidence later adduced. This, in my view, casts an unfavourable picture on the credibility of the defendants' evidence. A contradiction between what is pleaded and the evidence adduced, comes into the equation when the court deals with the probabilities of a case.

[67] I now turn to the evidence of the defendants. It is clear that the officers, who testified, were individually cited in this matter and cannot be said to be independent witnesses. It was put to the plaintiff in cross-examination, that the officers refused to take the plaintiff to the clinic for the food prescription because he was agitated and insulted the officers. The plaintiff denied that he insulted the officers and told them they had to act in terms of s 50 of the Correctional Service Act.

[68] It was further put to the plaintiff that because he was insulting and agitated, a scuffle ensued, which the plaintiff denied. It was his case that he was assaulted without reason and was refused access to the clinic for the

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<sup>5</sup> Paragraph 2.14 of the defendants' plea.

food prescription. He testified under cross-examination that he asked to open a criminal case but he was not assisted in that regard by the defendants. It was also his evidence that he informed the nurse that he had been assaulted but has no idea why the injuries he suffered, were not recorded in the health passport prepared for him by the correctional institution.

[69] DW1, was cross-examined at length by Mr Tjituri. He admitted that the plaintiff had been placed inside his section with handcuffs on but they later removed these. When put to him that the plaintiff had testified that when he was pushed into his section, the witness then tightened the grip of the handcuffs. DW1 stated tellingly, that he had no comment thereon. The tightening of the handcuffs was clearly an assault on the plaintiff and appears to be needless, as he had already been manacled by the handcuffs, as a result of which he lost sensation on his wrists. I find this for a fact.

[70] DW2, Mr Epito, like DW1, testified that they did not take the plaintiff to see the doctor because of manpower shortage, and not the reason averred in the plea as stated earlier. It was put to him that the reason proffered for not taking the plaintiff to the clinic, was an afterthought and he stated that he had not been asked about that. He failed to clarify the reason for the discrepancy between the pleadings and his statement. I have already made a finding on that very issue above, as it is a clear contradiction between what was pleaded and the evidence belatedly adduced.

[71] DW2 admitted under cross-examination that the reason why the plaintiff was agitated, was that he was hungry and had not eaten until lunch time, whilst waiting to be taken to the clinic. He also contradicted the contents of the plea regarding why the plaintiff was not taken to see the doctor. In the plea, it averred that the reason why the plaintiff was not taken to the clinic, was because he was problematic, aggressive and unruly, yet in the evidence, the reason proffered was that there was a shortage of manpower. This nails the veracity of the defendants' case for all to see. Their evidence was contradictory to the plea and thus credit cannot accrue to their evidence on this aspect.

[72] Furthermore, when it was put to DW2 that the plaintiff testified that he was assaulted at the entrance to his unit, he testified that he does not remember. This is a problematic answer, especially when raised in the context of an assault. DW2 was at the scene and it is no answer for him to say that he does not remember whether the plaintiff was assaulted or not. If the plaintiff was not assaulted, he should have stated so in very clear and unambiguous terms. The answer given by the witness is neutral and non-committal.

[73] In my considered view, the answer is more consistent with the evidence of the plaintiff that he was assaulted by the officers. In point of fact, whenever he was asked about the assault, he stated that he does not remember the plaintiff being assaulted. The witness knew that the complaint against him and his colleagues, was that they had assaulted the plaintiff and he had to give a clear answer regarding the assault, as he was present during the interaction with the plaintiff. His evidence that he does not remember, is rejected as being self-serving and devoid of any credibility. I hold for a fact, in the premises that the plaintiff was assaulted by the officers in question.

[74] Last, but by no means least, I deal with the evidence of Mr Joseph Moses, the nurse, who attended to the plaintiff on the day in question. I must say that from the onset, he was on an exculpation mission – seeking to absolve his colleagues of any wrongdoing. Even before he was asked to read his witness' statement, he stated, without being questioned or prompted by anyone, that there were no bruises on the plaintiff when he examined the latter. I was called upon to admonish this witness not to tender unsolicited evidence. This, in my view, nailed his colours, as an independent witness, to mast.

[75] It was his evidence under cross-examination that the plaintiff informed him that he was experiencing pain in his arms and also had a headache. As a result, he prescribed some tablets for him. It was put to the witness that the

plaintiff had told him that he had been assaulted on his body as well, such that his torso was also in pain. This the witness denied.

[76] In cross-examination, DW3 maintained that the plaintiff had no bruises and could not have been assaulted, as there was no sign of injuries or bruises. In cross-examination, the witness was asked by Mr Tjituri if there would be any bruise if he were punched on the stomach. Incredibly, the witness answered in the affirmative. He was also asked if he was slapped on the face if there would be a bruise. He answered in the affirmative.

[77] This is a witness, who was not independent from his evidence and I do not regard him as a witness of truth. In my assessment, and having regard to his demeanour and general behaviour in the witness-box, he was on an exculpatory mission and forgot his role as a nurse, who should be independent and impartial. Where duty calls for the observance of inmates' rights to bodily integrity, he should not be found wanting, by considering who butters his bread between the employer and his patients. I accordingly reject his evidence as being contrived and geared to exculpate the correctional officers who assaulted the plaintiff.

[78] I consider his evidence, together with that of the other defence witnesses, as falling well below the expected levels of credibility to mount a defence to the claim. I accordingly find that the plaintiff has managed, on a balance of probabilities, to show that he was assaulted by the correctional officers on the date in question. The admitted tightening of the handcuffs is an assault by the officers and was, on the evidence needless, as the plaintiff according to the evidence, had already been placed in his section at that time. He was left with the tightened handcuffs on before they were removed later. It bears mentioning that this assault was corroborated by the evidence of the nurse as he stated that the plaintiff informed him that his wrists were in pain.

[79] Correspondingly, the defendants failed, in my considered opinion, to adduce evidence that would justify the assault perpetrated on the plaintiff.



## Damages

[80] It is now necessary, to deal with the issue of the quantum of damages, considering that I have found that the plaintiff has made out a case for assault by the defendants. There is no question that the assault, as I have found, was committed by the relevant officers within the scope of their employment and in the course of duty. As found above, there was no justification for the assault on the plaintiff by the officers involved.

[81] Before I delve into the matter of the damages meet to be awarded to the plaintiff, it is necessary that I first deal with the sentiments expressed by Ueitele J in *Mouton v Mouton*,<sup>6</sup> where the learned Judge had this to say:

[30] In the unreported judgment of *Lubilo and Others v Minister of Safety and Security*, this court remarked that an assault violates a person's bodily integrity and that every infringement of the body of another is *prima facie* unlawful. Once infringement is proved, the onus moves to the wrongdoer to prove some ground of justification. But before that duty arises, the plaintiff must allege and prove the fact of physical interference. It thus follows that in order to succeed in his damages claim, the plaintiff carries the onus to prove the physical infringement of his body (by the application of force) by the defendant. The onus to show justification for the infringement of the plaintiff's body is on the defendant.'

[82] I have found, on the evidence adduced, that the plaintiff has succeeded in proving that he was assaulted by the correctional officers. The defendants, in turn, failed to prove any justification for the assault of the plaintiff. I must mention that the fact that a person is in the custody of the correctional services, does not deny or denude him or her of humanity, particularly the right to bodily integrity. That remains intact.

[83] I will now deal with some cases where damages were awarded in cases of assault for purposes of gaining guidance as to an appropriate award in this matter. In *Lopez v Minister of Health and Social Services*,<sup>7</sup> certain

<sup>6</sup> *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) para 30.

<sup>7</sup> *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 para 39-41.

principles relevant to this case, regarding the awarding of damages in such cases, are set out. First, a successful plaintiff, is entitled to be compensated for the loss suffered but is not entitled to register a profit, so to speak, from the loss. Second, in granting damages in such cases, the court must bring in aid, comparable cases, with the rider that the circumstances of the individual case before court, must be taken into account. Third, the court should guard against duplication of awards.

[84] The plaintiff had prayed for damages in the amount of N\$500 000 in his pleadings. During argument, Mr Tjituri, however submitted that damages in the amount of N\$150 000, would suffice. The question is whether the evidence suggests the propriety of the latter amount.

[85] With the above issues in mind, I proceed to consider what is in my opinion, a fair and just compensation or award to the plaintiff, given the circumstances of this particular case. I must first accept that by virtue of his position as an incarcerated person, the plaintiff was literally at the beck and call of the defendants. He could not be able to obtain or retain evidence that would have clarified or substantiated his claim. In this wise, there are no pictures of how he looked after the assault. He could not capture pictures and more importantly, the cameras facilitated the absence of evidence as to what happened to him when the officers descended upon him.

[86] Furthermore, the nurse, DW3 should be warned that he must perform his medical duties truthfully and conscientiously and must stick to his oath of office. To his credit, he did mention though that the plaintiff told him his wrists were painful and he had a headache. The court is however, not placed in a position in which to properly assess the condition of the plaintiff at the time and to award a justified amount of damages. The court has to make do with what is placed before it, considering the invidious position the plaintiff found himself, under the control of those who harmed him, not allowing him room to lodge a case before an independent body in good time for the preservation of critical evidence in his favour.

[87] There is no evidence, for reasons I have stated above, as to the nature and extent of the injuries that the plaintiff claims he sustained at the hands of the officers in question. What is clear, is that he was assaulted by the tightening of the handcuffs such that he lost sensation and was left unassisted with the tightened handcuffs on inside his unit. I have no reason, in the circumstances though, to discard his evidence that he was kicked and punched by the officers, although the gravity of the injuries remains unknown to the court.

[88] Mr Kauari implored the court to follow the case of *S v ML*,<sup>8</sup> where the necessity of placing medical evidence before court, was emphasised. I am of the considered view that that case, although a criminal case, does not find application in the instant matter, considering the plaintiff's peculiar circumstances. He was literally at the mercy of the defendants. He, being in custody, does not have the wherewithal, to place the necessary medical and other evidential documents before court. Even for the complaint he lodged, he has to rely on those he accuses of having assaulted him. It would be unfair and unconscionable to hold his status as an inmate against him when it comes to the quality of evidence he could produce.

[89] In my considered view, the plaintiff was given the short end of the stick. An instruction had been given to the officers to take him to the clinic and they did not do so. He would have been hungry as by lunchtime, he had not eaten anything. The refusal to take him to the clinic was totally out of order. The failure to provide footage of the events relating to this matter, must, in my considered view, be placed at the hands of the defendants. They failed to provide evidence and if their evidence was believed, it would have exonerated them.

[90] In *Thomas v Minister of Safety and Security*<sup>9</sup> Prinsloo J admirably compiled a useful compendium of cases involving assault. She referred to

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<sup>8</sup> *S v ML* 2016 (2) SACR 160 (SCA).

<sup>9</sup> *Thomas v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2018/00015) [2023] NAHCMD 283 (24 May 2023).

*Sheefeni v Council of the Municipality of Windhoek*,<sup>10</sup> where the plaintiff sued the Municipality for wrongful arrest, detention and assault and claimed N\$150 000. The court was of the view that the amount claimed was in all the circumstances, exorbitant and that the plaintiff had contributed to the assault in no small measure. He was awarded N\$50 000, for the assault. He had been slapped, kicked and punched, with his head pushed towards the kerb of the street. He was granted medical costs in the amount of N\$4618 10.

[91] In *Cloete v Minister of Safety ad Security*,<sup>11</sup> the court awarded an amount of N\$50 000 to the plaintiff, he having been kicked by a police officer and unlawfully arrested, as well. Yet in *Mulike v Minister of Home Affairs, Immigration and Safety and Security*,<sup>12</sup> the court awarded the plaintiff an amount of N\$40 000 having been assaulted with a fist in the mouth and resultantly sustained injuries leading to one of his teeth having to be extracted therefor.

[92] As indicated earlier, there is paucity of evidence in this matter, and for understandable reasons regarding the exact nature and seriousness of the injuries sustained by the plaintiff as a result of the assault by the officers. He was for all intents and purposes at the beck and call of the defendants, as it were and had no means at his disposal, to independently capture, obtain and retain evidence that would ultimately assist his case.

[93] In the premises, having regard to the awards issued by the courts in the matters referred to above, and having regard to the scanty information before me, I am of the considered view that an amount of N\$35 000, would meet the justice of the case. I am satisfied that the plaintiff was assaulted by the defendants whilst in their care and they did not assist the plaintiff in documenting any information or evidence in his favour for future production in

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<sup>10</sup> *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

<sup>11</sup> *Cloete v Minister of Safety ad Security* (HC-MD-CIV-ACT-DEL-2018/00404 [2021] NAHCMD 523 (12 November 2021).

<sup>12</sup> *Mulike v Minister of Home Affairs, Immigration and Safety and Security* (HC-MD-CIV-ACT-DEL-5065/2020) [2022] NAHCMD 244 (13 June 2022).

court. As indicated earlier, the defendants failed, in my considered view, to prove a justification for their actions. For what it is worth, they could have filed a counter-claim against the plaintiff, if only to establish his guilt as alleged by them in their defence that he assaulted them. This, they inexplicably, did not do.

### Delay

[94] The judgment, as seen above, was delivered much later than would otherwise have been the case. I had the misfortune of losing my notebook in which I record the evidence during trial. In the event, I had to request a copy of the transcript of proceedings from the transcription company. This process unfortunately took long to complete. I accordingly apologise to the parties for the delay in finalising and rendering the judgment. They were informed of the developments, as they happened.

### Conclusion

[95] In the premises, I am satisfied that the plaintiff has, despite the odds stacked against him, made out a case for an award of damages in his favour. I accordingly issue the following order:

1. The defendants are ordered jointly and severally liable, the one paying and the other being absolved to pay the plaintiff the following amounts:
  - 1.1 Damages in the amount of N\$35 000 for assault.
  - 1.2 Interest on the said amount at the rate of 20% per annum from the date of judgment to the date of final payment.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

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T S MASUKU

Judge

## APPEARANCES

PLAINTIFF: M Tjituri  
On instructions of the Directorate of Legal Aid,  
Windhoek

DEFENDANTS: N Kauari  
Of the Office of the Government Attorney