

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2020/04716

In the matter between:

EBEN CLOETE

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

FIRST DEFENDANT

**COMMISSIONER-GENERAL OF THE NAMIBIAN
CORRECTIONAL SERVICE**

SECOND DEFENDANT

**OFFICER IN CHARGE OF THE WINDHOEK
CORRECTIONAL FACILITY**

THIRD DEFENDANT

**THE THEN HEAD OF SECURITY AT THE
WINDHOEK CORRECTIONAL FACILITY**

FOURTH DEFENDANT

**UNIT MANAGER OF UNIT 7 (SEVEN) AT
THE WINDHOEK CORRECTIONAL FACILITY**

FIFTH DEFENDANT

CORRECTIONAL OFFICER SHILONGO AT

WINDHOEK CORRECTIONAL FACILITY

ATTACHED TO UNIT 7

SIXTH DEFENDANT

CORRECTIONAL OFFICER MUNDUVA AT

WINDHOEK FACILITY ATTACHED TO UNIT 6

DEFENDANT

SEVENTH

SENIOR CHIEF CORRECTIONAL OFFICER

LUCAS AT WINDHOEK CORRECTIONAL

FACILITY ATTACHED TO UNIT 7 (SEVEN)

EIGHTH DEFENDANT

CORRECTIONAL OFFICER HAUFIKU AT

WINDHOEK CORRECTIONAL FACILITY

ATTACHED TO UNIT 5 (FIVE)

NINTH DEFENDANT

Neutral citation: *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2020/04716) [2024] NAHCMD 118 (15 March 2024)

Coram: SCHIMMING-CHASE J

Heard: 18 – 19 May 2022; 24 May 2022; 14 – 16 June 2022; 17 August 2023

Delivered: 15 March 2024

Flynote: Delict — Causation — Factual causation — Omission — Whether Prison authorities' failure to maintain a safe environment for prisoners caused plaintiff's bodily injuries — No proof that damage caused by negligence of correctional service — Damage caused by plaintiff's own conduct.

Summary: The plaintiff, a convicted inmate serving a life sentence, sued members of the correctional service for damages in the amount of N\$30 million for permanent loss of eyesight and N\$5 million for pain and suffering, as a result of an alleged attack on the plaintiff during a prison altercation. The plaintiff, witnessed a physical altercation take place between two inmates in full view of some of the correctional officers, who were cited in the action. The correctional

officers did not put a stop to the physical altercation. The plaintiff then intervened in the aforesaid altercation and was injured. He places blame on the defendants for failing to keep him safe and protecting his person, in breach of their statutory duties. The defendants' case is that the plaintiff intervened out of his own volition and that any resultant and injuries cannot be attributed to their members' inaction.

Held that, the three elements of a delictual claim that is founded on negligence are a legal duty in the circumstances to conform to the standard of the reasonable person, conduct that falls short of that standard and loss consequent upon that conduct.

Held further that, negligence and a breach of statutory duty on the part of the correctional service to provide a safe environment for inmates in terms of the Correctional Service Act 9 of 2012 was clearly proven.

Held further that, however the plaintiff on his own evidence decided to intervene of his own accord in a prison fight that was not his and that he was not involved in. The third element, namely loss consequent on the negligent conduct, was not proved, and the plaintiff's claim accordingly failed.

ORDER

1. The plaintiff's claim is dismissed.
2. There is no order as to costs.
3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction and background

[1] The plaintiff, Eben Cloete, is a major male inmate at the Windhoek Correctional Facility. The plaintiff was convicted for the offence of murder on 30 January 2018, and sentenced to 32 years imprisonment. He sued the defendants claiming delictual damages in the amount of N\$30 million for permanent loss of eyesight and N\$5 million for pain and suffering, as a result of an alleged attack on the plaintiff during a prison fight.

[2] The first defendant is the Minister of Home Affairs, Immigration, Safety and Security (formerly known as the Minister of Safety and Security), cited in his official capacity as the responsible Minister for correctional services in terms of the Correctional Service Act 9 of 2012 ('the Act').

[3] The second defendant is the Commissioner-General of the Namibian Correctional Service, duly appointed in terms of Article 122 of the Namibian Constitution read with s 5 of the Act. The second defendant is responsible for the efficient supervision, administration and control of the correctional service in Namibia. The second defendant is also accountable and subject to the directions of the first defendant. I refer to the first and second defendants as 'the Minister' and 'the Commissioner' respectively.

[4] The third, fourth and fifth defendants are the Officer in Charge of the Windhoek Correctional Facility, the erstwhile Head of Security of the Windhoek Correctional Facility and the Unit Manager of Unit Seven, who are all cited in their official capacities. For convenience, I will refer to these defendants as they are cited in the particulars of claim.

[5] The sixth, seventh, eighth and ninth defendants are Officers Shilongo and Muduva, and Senior Chief Correctional Officers Lukas and Haufiku, cited

in their official capacities as correctional officers at the Windhoek Correctional Facility. I refer to these defendants as either 'the correctional officers', collectively, or by their titles as cited, individually. For ease of reference, the sixth to ninth defendants were the correctional officers on duty on the day that the events leading to this action took place.

[6] The plaintiff was represented at the trial by Mr Hifindaka of the Directorate of Legal Aid and the defendants were represented by Ms Matsi of the Government Attorney's Office. Evidence in this matter was led in 2022. Written closing submissions were delivered in August 2023. Due to counsel for the plaintiff's inability to appear to make closing submissions, the matter was determined without hearing argument, and with reference to the written submissions.

The pleadings

[7] The plaintiff's allegations in support of his claim for damages are that on 24 March 2020 and at the Windhoek Correctional Facility, specifically unit seven, a physical altercation (which started off as an argument), took place between two inmates. The plaintiff alleged that the correctional officers present at the time, namely sixth to ninth defendants, failed to intervene and stop this altercation and given their inaction, the plaintiff intervened in an attempt to stop the altercation.

[8] In the process of doing so, the plaintiff was stabbed in the left eye by one of the inmates. As a result, he purportedly suffered permanent loss of eyesight in his left eye.

[9] The plaintiff alleges that the Commissioner and the correctional officers failed to comply with their statutory duty to keep him safe and protect his life.

[10] The altercation on the pleaded date is not in issue. The defendants deny liability towards the plaintiff. The defendants plead that the plaintiff was involved in a physical altercation involving two other inmates inside a cell that

was allegedly gang related. At that time, the sixth to ninth defendants were positioned in the dining area, which was a distance from the cell where the altercation took place, serving food to the inmates. The fight was not reported by the plaintiff.

[11] In the alternative and in any event, the defendants pleaded that the plaintiff had no duty to intervene in the altercation as pleaded, and any injuries that the plaintiff occasioned was as a result of the plaintiff's intervention in the altercation (as opposed to reporting same), and not through any negligence of the defendants.

The evidence

The plaintiff's evidence

[12] The plaintiff testified and called two other witnesses. He testified that on 24 March 2020 at unit seven at 08h00 to 09h00, an argument took place between two inmates, namely, Barry Tsuseb and Reynold Goagoseb. The plaintiff testified that this argument later turned physical, in full view of the sixth to ninth defendants, despite the plaintiff's earlier pleas to them to intervene. The plaintiff maintained that the altercation took place in the presence of these correctional officers and that he informed the sixth defendant, C/O Shilongo, twice of the alleged altercation, but he did nothing.

[13] The plaintiff's evidence was that as a result of the correctional officers' inaction, he decided to separate the two inmates himself. According to the plaintiff, the altercation took place in the courtyard of unit seven. Mr Goagoseb then followed Mr Tsuseb into the cell, where the altercation proceeded and became physical. It is at this stage that the plaintiff intervened to separate the two and in this process of attempting to intervene, he was stabbed with a sharp metal object in his left eye.

[14] It was his further evidence that had the correctional officers reacted timeously, this would not have occurred. The only reason he intervened in the

fight was because a similar incident occurred in 2012 resulting in another inmate's death. Further, the 'saw something wrong' happening and maintained (during cross-examination) that his intent was not to join the altercation as maintained by the defendants, but merely to separate the two inmates.

[15] As a result of the stab wound, the plaintiff testified that he lost permanent sight in his left eye. He seeks monetary compensation for the pain that he endured when he was stabbed. His calculations in respect of the monetary compensation are based on consultations that he had with his medical practitioner.

[16] Mr Edmund Elvis Nanub ('Mr Nanub') was called as the plaintiff's second witness. He is also an inmate at the Windhoek Correctional Facility, serving life imprisonment. He testified that unit seven houses serious offenders with extensive terms of imprisonment. He was present during, and witnessed the altercation between the two inmates. He corroborated the plaintiff's version that the incident took place in the courtyard of unit seven (in the view of the sixth to ninth defendants) and that the said correctional officers failed to intervene and merely observed the altercation. Mr Nanub further testified that he did not observe the stabbing incident that gave rise to the plaintiff's claim as that had occurred inside the cell.

[17] The plaintiff's third witness, Mr Barry Tsuseb ('Mr Tsuseb'), is also an inmate at the correctional facility and incarcerated at unit seven. He testified that prior to the incident, he informed C/O Shilongo (the sixth defendant) that Mr Goagoseb had threatened to stab him. C/O Shilongo did nothing. He then left and proceeded to his cell. Mr Goagoseb and another inmate, Mr Charles Aixab entered his cell. After an exchange of words, the altercation became physical.

[18] Mr Tsuseb testified that the correctional officers failed to intervene and merely stood and observed the altercation. He testified that it was only the inmates that intervened, in particular the plaintiff, who had followed him into

his cell and who advised him not to fight with Mr Goagoseb. It was then that the plaintiff was stabbed. Mr Tsuseb maintained, during cross-examination, that the correctional officers were aware of the altercation, from the get go.

The defendants' evidence

[19] The defendants called C/O Shilongo and Senior C/O Lukas. C/O Shilongo confirmed that he was assigned to unit seven as a security officer, with duties to provide security to all inmates in custody, as well as general correctional duties. He testified that on the date of the incident, he was stationed at unit seven. This unit was apparently understaffed, the ratio of correctional officers to inmates being three correctional offenders responsible for 120 inmates.

[20] C/O Shilongo testified that, usually after the breakfast is completed, the inmates are left to roam freely in the courtyard, and the cells until the next meal. He testified that it is not uncommon for physical altercations to break out between the inmates during this time.

[21] C/O Shilongo testified that at the time that the alleged incident took place he and his colleagues were serving the inmates in their individual cells which took approximately 30 minutes to complete. The cell doors are opened one by one and the inmates inside are fed in this fashion.

[22] After the last cell door was opened and the last meal was served, C/O Shilongo and his colleagues emerged from the dining area to hear that there had been a physical altercation between Messrs Tsuseb and Goagoseb inside one of the cells. It was C/O Shilongo's evidence that no one reported or sought assistance regarding the altercation. C/O Shilongo only observed the injury to the plaintiff after the fact, when he ran out of the cell with his hand over his left eye. He and C/O Lukas entered the unit and asked what had happened. When they entered the unit, the two inmates were still trying to fight despite the correctional officers' presence, which did not deter them.

[23] C/O Shilongo's testimony was that it was typical for gang related fights to take place during the breakfast period. However, according to him, none of the inmates reported the altercation to the correctional officers. C/O Shilongo held the view that the incident was gang related. He denied that Mr Tsuseb or any other inmate, reported any suspicious behaviour to him. He maintained that he did not observe a fight in the courtyard or the cell.

[24] It was further C/O Shilongo's testimony that after the plaintiff had left the cell, Messrs. Tsuseb and Goagoseb remained verbally, but not physically, aggressive. Therefore, he saw no need to intervene. The plaintiff was taken to hospital.

[25] C/O Lukas testified that he was the case management officer at unit seven. He also testified that in his opinion, the incident was gang related, because he observed that the plaintiff always moved with Mr Tsuseb, who is apparently the head of a prison gang.

[26] He also did not see the altercation. When he entered unit seven, after the fact, he observed some inmates standing around, and he observed Messrs. Goagoseb and Tsuseb intending to continue with their alleged physical altercation. However, he was able to convince Mr Goagoseb to not continue as he was a case management officer.

Analysis of relevant evidence and legal principles

[27] There are a number of material disputes of fact relating to the events that led to the plaintiff being stabbed in the eye at the Windhoek Correctional Facility. From where the officers were stationed at the time, to whether C/O Shilongo was warned by the defendant or other inmates of the potential threat, to what the officers observed when the altercation took place, is in dispute between the opposing parties.

[28] It is, however, my considered view that a determination of where the truth lies on the above issues will not assist in the determination of whether the plaintiff is entitled to the damages claimed. My reasons are set out below.

[29] Firstly, it is important to note the relevant provisions of the Act. These provisions inform the statutory duties of the defendants towards offenders and inmates. Section 3 makes it clear that the functions of the correctional service are (a) to ensure that every inmate is secured in a safe and humane custody, within a correctional facility, until lawfully discharged or removed therefrom; (b) to render health care to inmates; (c) as far as practicable, to apply such rehabilitation programmes and other meaningful and constructive activities to sentenced offenders that contribute to their rehabilitation and successful reintegration into community as law abiding citizens; (d) to supervise offenders who are on conditional release; (e) to perform all work necessary for, arising from, or incidental to, the effective management, administration and control of correctional facilities and community correctional centres. (Emphasis supplied.)

[30] The importance of the obligations on the correctional service¹ towards inmates was underscored in the context of adequate healthcare by Nugent JA writing for the South African Supreme Court of Appeal in *Minister of Correctional Services v Lee*² as follows

'[36] A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments. One is s 12(1) of the Correctional Services Act 111 of 1998, which obliges the prison authorities to 'provide, within its available resources, adequate health care services, based on the principles of primary care, in order to allow every inmate [of a prison] to lead a healthy life'. The obligation is also inherent in the right given to all prisoners by s

¹ In terms of s12 of the South African Correctional Service Act 111 of 1998 .

² *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA).

35(2)(e) of the Constitution to 'conditions of detention that are consistent with human dignity'. (Emphasis supplied.)

[31] It is not in dispute from the evidence led by all the parties that gang related fights do occur at unit seven, and that they typically occur during feeding times when the cells within the units are open and all inmates are free to roam around the courtyard.

[32] It is extremely disquieting to hear evidence that for 120 inmates, who have been convicted of serious crimes; only three unarmed correctional officers are responsible for feeding the particular unit housing the inmates when the risk of a fight breaking out is so high. One cannot say, on any construction, that this is a safe environment for inmates.

[33] To my mind, and based on the undisputed facts, the Minister and the Commissioner breached their statutory duty to ensure that every inmate is secured in safe custody within a correctional facility, by allowing such a state of affairs to exist, and negligence is clearly present. After all, '...prisoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations'.³

[34] However for the plaintiff, this is not the end of the matter. The three elements of a delictual claim that is founded on negligence are well established — a legal duty in the circumstances to conform to the standard of the reasonable person, conduct that falls short of that standard, and loss consequent upon that conduct.⁴ The Minister and the Commissioner have not complied with the first two elements.

[35] It is with the third element, however, that the plaintiff finds himself in treacherous waters. The plaintiff has to show loss consequent upon the negligent conduct. This is the element of causation.

³ *Minister of Correctional Services v Lee supra* at 625H.

⁴ *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA) para 1 and the authorities collected there.

[36] The undisputed facts are that the plaintiff took it upon himself to go and intervene in a physical fight between two alleged gang members, ostensibly for the safety of everyone concerned. But that was not the plaintiff's responsibility or business. One can safely say that on the plaintiff's own evidence, that had he not intervened in the fight, he would not have been stabbed in his left eye. To put it differently, the bodily injury was caused by the plaintiff's intervention in a fight that was not his to become involved in. Effectively the plaintiff is responsible for his own injuries as it were, and the saying that 'no good deed goes unpunished' is apposite in the circumstances. The plaintiff's case eventually falls on the element of causation.

[37] Before I conclude, I must consider the issue of costs. It is common cause that the plaintiff is legally aided in these proceedings. There is no provision in the Legal Aid Act 29 of 1990 that precludes me from making any adverse cost order against the plaintiff. I am alive to the fact that this court enjoys discretion as regards costs. I am not persuaded to grant costs against the plaintiff and, accordingly, make no order as to costs.

Conclusion

[38] In the end and for the foregoing reasons, I make the following order:

1. The plaintiff's claim is dismissed.
2. There is no order as to costs.
3. The matter is regarded as finalised and removed from the roll.

E M SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

V Hifindaka

Of the Directorate of Legal Aid, Windhoek

DEFENDANTS:

F Matsi

Of the Office of the Government Attorney,
Windhoek