

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT-DEL-2017/01508

In the matter between:

VERIKOUYE KAPUIRE	1ST PLAINTIFF
NAPOT KOTJIPATI	2ND PLAINTIFF
PETRUS LUCAS TILEINGE DUMENI	3RD PLAINTIFF
HERMAN DE KLERK	4TH PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY	1ST DEFENDANT
THE COMMISSIONER GENERAL OF THE NAMIBIAN CORRECTIONAL SERVICE	2ND DEFENDANT
SENIOR SUPERINTENDENT OF THE NAMIBIAN	

Neutral citation: *Kapuire v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2017/001508) [2020] NAHCMD 475 (16 October 2020)

CORAM: NDAUENDAPO

Heard: 16 July 2020

Delivered: 16 October 2020

Flynote: Civil procedure-Application for absolution from the instance-Test-Whether the plaintiff adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff-Evidence adduced by the plaintiffs of assaults established a prima facie case-application dismissed.

Summary: The plaintiffs instituted action against the defendants claiming damages in the amount of N\$250 000 each for assaults and torture allegedly perpetrated against them by defendants whilst detained as prisoners. The plaintiffs testified how on 18 January 2017 the correctional officers raided their cell in search of a cellphone. They denied any knowledge of a cellphone or having used a cellphone. They were taken out of the cell and in the court yard they were thoroughly assaulted and tortured by the officers. According to the plaintiffs they sustained injuries as a result of the assaults and torture. After the assaults, they were not taken to hospital for treatment, instead they were treated by a nurse at the clinic at the correctional facility. No medical experts were called to testify in support of their claims. At the end of the plaintiffs' case, the defendants brought an application for absolution from the instance.

Held, that the test for absolution from the instance is whether the plaintiff's adduced evidence upon which a court, having reasonably applied its mind, could or might find for the plaintiffs.

Held, further that the plaintiffs testified that they were assaulted and tortured by the correctional officers.

Held further that although no medical evidence was adduced to corroborate evidence of assaults and torture, there appears that the plaintiffs established prima facie case of common assault perpetrated on them.

Held, the application for absolution is refused.

ORDER

1. The application for absolution from the instance is refused.
2. There is no order as to costs.
3. The matter is postponed to 29 October 2020 at 14:15 for allocation of trial dates.

JUDGMENT

NDAUENDAPO, J

[1] Before me is an application for absolution from the instance. The four plaintiffs instituted an action against the defendants claiming an amount of N\$250 000 for each one of them. In their particulars of claim, they alleged that they were assaulted and tortured by the defendants whilst inmates at the Windhoek Correctional facility and as a consequence suffered damages in the claim amounts.

[2] The defendants opposed the action and denied the allegations.

The evidence in brief

[3] Mr. Verikouye Kapuire testified that he was serving a sentence of twenty (20) years imprisonment at the Windhoek Correctional Facility. On the 18th day of January between the hours of 6pm to 10pm, a group of correctional officers came to unit six, led by S/Supt Silas Mathews and unlocked cell four where he was detained. He was told to go out of the cell and once outside, he was led into the corridor, where he found Mr. Petrus Dumeni, lying next to the wall handcuffed and bleeding from the head. He also saw Mr. Napot Kotjipati being assaulted and kicked by a group of officers. In the corridor, the officers started to question him about a cellphone. He told them that he did not have a cellphone. They handcuffed him and started to assault and torture him. The assault and torture consisted of him being punched in the face, told to kneel on the concrete floor, pulling him by the ankles backwards causing him to fall on the face and pulling his arms upwards whilst in handcuffs, punched with a cell-key, causing serious pain to his body and forcing him to tell them about the cellphone and he continued telling them that he did not have the cellphone, and being kicked whilst on the floor and had his head being stepped on by the said officers.

[4] Thereafter he saw Mr. Herman De Klerk being assaulted and then being taken to the metal detector. He was then taken back to the cell. The following day he requested to be taken to the internal clinic for medical attention and did not receive any assistance from the correctional officers in unit 6 and had to wait for a period of six days before receiving medical attention. His complaint for medical attention was also recorded in the cell four complaints book on the 24th of January 2017. He then spoke to the nurse Mr. Barnabas who then gave the instructions that he must be taken to the internal clinic after showing him the bruises on his body as a result of the assault. Mr. Barnabas then gave him an injection, some tablets and some ointment.

[5] Mr. Napot Kotjipati testified that on the 18th day of January 2017 at the Windhoek Correctional Facility, between the hours of 6pm to 10pm in unit six a group of correctional officers came to unit six, unlocked cell four where he was held at the time and told him to go outside. Whilst outside the cell in the court yard, he was then led into

the corridor, where he found Mr. Petrus Dumeni being assaulted, laying on the floor bleeding from the head and in handcuffs, hands behind his back. Then the officers started questioning him about a cellphone, to which he responded that he did not take a cellphone. They then handcuffed him, pulled him towards a lamp post, tightened the handcuffs on his wrist, causing them to cut through his wrist and causing intense pain to his wrist and in the process pulling his arms upwards by the handcuffs and causing him to fall on the floor. Whilst on the floor they were stepping on his head causing pain to his head. He told them that he was in pain and that he could not feel his arms or wrist, but they continued to hit him with tonfers and batons on his wrist where the handcuffs had been placed and asking him to tell them about a cellphone. He continued telling them that he did not take a cellphone. Thereafter he saw Mr. Verikouye Kapuire in the corridor being assaulted and tortured by other correctional officers, he further saw Mr. Herman De Klerk being assaulted and tortured and taken to a metal detector.

[6] Mr. Petrus Dumeni testified that on the 18th day of January, Wednesday 2017 at the Windhoek Correctional Facility at about or between the hours of 6pm to 10pm in unit six a group of correctional officers including senior correctional officer (S/Supt) Silas Mathews who was then the Head of Security at the Windhoek Correctional Facility, came and unlocked cell 4 and called out his name and demanded him to come outside the cell. He (S/Supt) led him to the corridor outside the unit together with the group of officers and questioned him about a cellphone. And when he told him that he did not have a cellphone, he ordered his subordinates to beat him. The correctional officers started to beat him up and even tortured him. He was then placed in handcuffs (hands behind my back) and was told to go down unto his knees on the concrete floor. They continued to assault him by kicking him all over his body and in the process, they even tightened the handcuffs by pulling his hands from behind by the handcuffs in an upper (upwards) position whilst he was laying on the concrete floor face down. The handcuffs caused some injuries to his wrists.

[7] They continued to demand that he should give them the said cellphone of which he had apparently used to communicate with his cousin. Thereafter, he saw Mr. Napot

Kotjipati, Mr. Verikouye Kapuire and Mr. Herman De Klerk being assaulted, whilst denying any knowledge of a cellphone. After the assault process and torture of which lasted some few hours, they were taken back to cell four. The next day, he went to request to see a nurse (internal medical clinic for offenders) for medical attention, but to no avail. About six days thereafter, he laid a complaint to be taken to the outside hospital, but he was told to remain in the unit until the internal medical clinic nurse would come to the unit. However, the nurse only came to render such medical services on the 24th January 2017 of which he also received medical attention. The nurse prescribed some tablets and ointment.

[8] Mr. Herman de Klerk testified that on the 18th of January 2017 at the Windhoek Correctional Facility, between the hours of 6pm to 10pm in unit six a group of correctional officers came to unit six and unlocked cell four and S/Supt Silas Mathews ordered the correctional officers who were with him to take him outside the cell. On the outside, he was led to the corridor just outside the Unit (six), and there he found other correctional officers and his co-plaintiffs, he further saw the correctional officers assaulting and torturing his co-plaintiffs and had them all in handcuffs with their hands behind their backs. He was then also placed in handcuffs and they started to question him with regards to a cellphone that was allegedly in his possession, when he told them that he did not have a cellphone and knew nothing thereof.

[9] They started to assault and torture him, they were kicking him all over his body, told him to go down on his knees, they started to pull his arms by the handcuffs in an upward position and causing him to drop face down on the concrete floor, pulling him up again by the handcuffs and hitting him with confers or batons in the ribs and stomach. Thereafter they took him to the office area of unit seven where he was made to sit on a metal detector, when they found him with nothing one correctional office told him to take off his pants and started to assault him with a broom stick. He was then taken back to where his co-plaintiffs were and found all of them lying on the floor and the said officers were busy interrogating them. Thereafter he was then assaulted again and taken back to cell four in unit six. The following day, due to the pain and discomfort, he then laid a

complaint to be taken to the internal clinic and he was told by correctional officers in the unit to wait for the day when the nurse would be coming to the unit. The nurse only came to the unit on the 24th January 2017 and he received medical attention. He was treated by Mr. Barnabas at the internal clinic. He also explained to him what had occurred.

Submissions by the Plaintiff

[10] Counsel argued that the plaintiffs testified that they were assaulted by the defendants and other correctional officers on 18 January 2017. The extent and nature of the assault perpetrated upon them was fully explained in their written witness statements and evidence in chief.

[11] The effect of the above testimony is strengthened by the fact that the plaintiffs were not assaulted in isolation but in the presence of each other. As a result their testimonies regarding the assault perpetrated upon them are corroborated by each other.

[12] During cross-examination the testimony of the plaintiffs that they were assaulted was not in any way shaken or rebutted by the defendants.

[13] For the above reasons counsel submitted that the plaintiffs are all inmates at the Windhoek Correctional Facility. This in turn has a consequence that they have limited freedom and limited rights as same are severely curtailed due to their incarceration. Accordingly, the court should not be an armchair critic in this case but should put itself in the position of the plaintiffs.

[14] Counsel further argued that the plaintiffs are not in the position of a person who is not incarcerated and who has the freedom of movement in respect of lodging complaints, to the police when he or she has been assaulted and have unrestricted access to nurses, doctors, psychologists and social workers.

[15] Counsel further contended that the plaintiffs gave clear evidence as to why they could not obtain medical, psychologist and social workers reports. One common threat is that even though they requested assistance, they were refused. The logical conclusion is that the very people who assaulted the plaintiffs would not incriminate themselves or expose themselves to disciplinary action by allowing the plaintiffs to obtain the necessary medical assistance or a J88 in order to launch a complaint with the Namibian police or Commissioner General.

[16] Counsel argued that in respect of the first plaintiff, he made an entry in the complaint book on 24 January 2017 that he wants to go to the hospital.

[17] On page 121 of his health passport it is reflected that he was seen by medical personal on 26 January 2017.

[18] The first plaintiff complained of body pain and back pain and was given medication.

[19] In respect of the second plaintiff, counsel argued that, it is not in dispute that the second plaintiff suffered from an injury to his arm which he sustained in a motor vehicle accident. However, he testified that the said injury was aggravated as a result of the assault perpetrated upon him by the third defendant and other correctional officers.

[20] As per the complaints register the second plaintiff indicated that he wanted to go to hospital on 24 January 2017. However as per the health passport of the second plaintiff he was only seen by medical personnel on 14 March 2017 and 27 March 2017.

[21] In respect of the third plaintiff, he made an entry in the complaints book on 24 January 2017 to be taken to hospital. On 26 January 2017 he requested to be taken to the discipline office and unit manager. However, he was not taken. On 27 January 2017 he again requested to be taken to the discipline office – page 86 of the record. He was

not taken. On February 2017 he requested to be taken to CS Ndongi – page 87. He was not taken.

[22] As per the third plaintiff's health passport on page 125 of the record the following entry is made by the nurse on 24 January 2017.

- Chronic headache
- He can't feel his hands.
- Refer to DR.

[23] Counsel argued that In respect of the fourth plaintiff, as per the complaints register he indicated that he wanted to go to hospital on 24 January 2017 – see page 81 of record. However as per the health passport of the fourth plaintiff he was never taken to the hospital. This is something which the defendants have to explain.

[24] The fourth plaintiff testified he was seen by Nurse Barnabas at the cells on 24 January 2017 but never taken to the internal clinic.

[25] Counsel further argued that the defendants should come and explain why the plaintiffs after six years of incarceration would lay a complaint of assault against them. The plaintiffs had no reason to falsely accuse them of assault. The health passports clearly indicated injuries suffered by the first, second and third plaintiffs. The fourth plaintiff testified that he received from the Nurse Barnabas for his injuries.

[26] In respect of the application by the defendants for Absolution, counsel referred the court to the following; *South African Law of Evidence Hoffmann 2nd* edition on page 351 the learned author stated the following:

'Courts have frequently emphasized that absolution should not be granted at the end of the plaintiff's evidence except in very clear cases, and that questions of credibility should not normally be investigated until the court had heard all the evidence which both sides have to offer. Thus in *Siko vs Zonsa* Solomon J said that a magistrate should not grant absolution

merely because he does not believe the plaintiff's evidence, except "where witnesses have palpably broken down and where it is clear that they have stated what is not true." '

[27] Counsel argued that for the above reasons, the application for absolution from the instance should not be granted.

Summary of submissions by the defendants

[28] Counsel argued that there is no medical or psychological evidence to corroborate the evidence of the plaintiffs that they were assaulted and tortured by the defendants. Nor were J88 forms submitted to substantiate their evidence. Counsel referred to the case of S v ML, though the matter dealt with sexual assault cases, the court held that in seeking to prove the evidence, it is imperative to have medical evidence as it is vital in assisting the court in arriving at its decision after assessing the evidence adduced. Counsel argued that the principle of production of medical records is therefore apposite, the court cannot find for the plaintiffs on a balance of probabilities without the records.

[29] Counsel argued that a close examination of the health passports of the plaintiffs showed the following: The first plaintiff, Mr. Kapuire, the entries showed that on the 12th April 2017, three months after the alleged incident, he requested a form J88. The procedures were explained to him on how to obtain the J88. In spite of that entry, the J88 form is neither attached to his statement nor was it produced as evidence in the proceedings. On the 26th of January 2017, there was bizarrely no mention of an assault in the record. On the 20th of June 2017 and 21st June 2017, no reference to an assault is in the entries. There is further no complaint pertaining to the J88 which he previously requested nor is there an entry pertaining to a failure to assist him in obtaining the J88. It also states no history of trauma and does not state what caused the pain he was complaining about.

[30] In respect of the second plaintiff, Mr. Naboth Kotjipati, all the various entries on his medical record show the following consistently- Chronic pain on the arm which had a prior history. This chronic pain to his arm and wrists was recorded on the 9th of

November 2016 and the 11th of January 2017 before the 18th of January 2017 incident. Thereafter, various ailments resulting from orthopedic pain is recorded and a metal object was inserted in his arm. This caused him pain. He admitted during cross-examination and from a question from the court that he was at some point involved in a motor vehicle accident and the metal object was inserted in his arm. In respect of the third plaintiff – Petrus Dumeni, there is reference to a chronic headache and failure to feel pain on his heads on an entry on 24 January 2017. However, there is nothing on record to show this was caused by an assault or a reference to a request for a J88 from medical expertise to prove an assault. On 24th January 2017 he was also observed and under cross examination he conceded that the various medications he was prescribed to take were for various ailments inclusive of depression. There is no reference to an assault. In respect of the fourth plaintiff, Mr. Herman De Klerk, there is nothing showing neither entry nor visitation to the clinic.

[31] The plaintiffs conceded during cross examination that their names appeared in the books on specific dates without any entry of the nature of the detailed complaint on the complaint section. There is no mention of an assault or request to see a medical doctor, or to state the details of the nature of the complaint commensurate with the claim before court as encapsulated in their particulars of claim.

The evidence in general

[32] Counsel further argued that in addition to their failure to produce corroborative documentary evidence, the evidence of the plaintiffs is not only contradictory but it is poor, it is not credible and unsatisfactory in material respects.

Discussion

[33] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H in these terms:

'...When absolution from the instance is sought at the close of a plaintiff's case. The test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.'

[34] In the matter of *Dannecker vs. Leopard Tours Car & Camping Hire CC* (T 2909/2006) [2015] NAHCMD 30 (20 February 2015) Damaseb JP said the following on page 10 & 11.

'The relevant test is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or out to) find for the plaintiff.'

The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial; which is: Is there evidence upon which a court ought to be judgment in favour of the plaintiff?

[35] The following considerations are in my view relevant and find application in the case before:

- a) Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;
- b) The plaintiff is not to be lightly shut out where the defense relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;
- c) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case.
- d) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favor in the sense of supporting his or her cause of

action and destructive of the version of the defense, absolution is an inappropriate remedy.

e) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led b and on behalf of the plaintiff, unless the plaintiff's evidence is incurable and inherently so improbable and unsatisfactory as to be rejected out of hand."

The law to the facts

[36] The plaintiffs testified that on 18 January 2017 they were assaulted and tortured by the defendants. The assaults were triggered by a cellphone which was allegedly used by the third plaintiff to call his brother, Insp Angula. Cell four where the plaintiffs were kept was raided by the correctional officers in search of the cellphone. From what was put to the plaintiffs by counsel for the defendants, there is no denial that indeed the cell of the plaintiffs was raided and searched. What is denied by the defendants is that they were assaulted and tortured. From their own testimonies, the plaintiffs did not make out a prima facie case of torture. Counsel for the defendants submitted that there is no medical evidence to support their claim of assault and torture.

[37] I agree with counsel on that point, the only evidence before court is from the complaint book where some of the plaintiffs requested to be taken to hospital and for those who were taken to hospitals or clinic, the entries in the health passports do not corroborate evidence of assault. However the plaintiffs testified that they were refused medical treatment on 18 and or 19 January 2017. some of them where only taken to the clinic many days after the alleged assault and any minor injuries that they may have sustained, may have healed by the time they saw the nurse.

[38] A lot of criticism have been levelled against the fact that the plaintiffs did not report the assault to the police or even to family members who could have corroborated their versions, there may be merit in that criticism, however one must not lose sight of the fact that when a detainee is kept in prison, their freedom is severely curtailed. Their contact with the outside world is limited and regulated and their movement limited. The

first plaintiff testified that he made an entry in the complaint book on 24 January 2017 that he wants to go to hospital. In his health passport dated 26 January 2017 an entry was made stating: “seen with complaints of an assault on January 18 2017 was not seen or send to hospital according to him”.

[39] In respect of the second plaintiff as per the complaints register he indicated that he wanted to go to the hospital on 24 January 2017, the third plaintiff testified that he made an entry in the complaint book on 24 January 2017 to be taken to hospital, he was not taken, he also testified that on 26 January he requested to be taken to the discipline office to lay a complaint of assault, but was not taken. The fourth plaintiffs requested to be taken to the hospital on 24 January 2017, but was not taken. On 24 January 2017 he was seen by Nurse Barnabas. On the claim of assault, I am satisfied that there appears to be a prima facie case of assault that the defendants have to answer, there appears to be prima facie evidence of common assaults perpetrated on the plaintiffs.

Order

1. The application for absolution from the instance is refused.
2. There is no order as to costs.
3. The matter is postponed to 29 October 2020 at 14:15 for allocation of trial dates.

G N NDAUENDAPO
Judge

APPEARANCES:

FOR THE PLAINTIFF

Mr. J Diedericks
Of Viljoen & Associates
Windhoek

FOR THE DEFENDANT

Ms. H Harker
Of Government Attorneys
Windhoek