

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2021/03665

In the matter between:

KRISTOF HAUFIKU

PLAINTIFF

and

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

1ST DEFENDANT

COMMISSIONER GENERAL RAPHAEL HAMUNYELA

2ND DEFENDANT

SAM FRANZ OF THE NAMIBIAN CORRECTIONAL SERVICE

3RD DEFENDANT

KAVARI OF THE NAMIBIAN CORRECTIONAL SERVICE

4TH DEFENDANT

Neutral citation: *Haufiku v The Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-OTH-2021/03665) [2022] NAHCMD 689 (19 December 2022)

Coram: SIBEYA J

Heard: 14 and 17 November 2022

Judgment: 19 December 2022

Flynote: Delict – Action for damages – Based on bodily injuries, pain and suffering and contumelia – Claim emanating from an alleged assault where the fourth defendant allegedly pushed the plaintiff to the ground and forcefully pushed a

cell burglar door on the plaintiff's leg several times injuring him – The plaintiff is alleged to have sustained an open wound, swelling and excruciating pain in the leg resulting in walking with difficulties – The defendants claimed that the plaintiff was injured accidentally – Contumelia not proven – It was proven on a balance of probabilities that the fourth defendant, acting in his course and scope of employment, assaulted the plaintiff and caused him injuries – The first and fourth defendants (on the basis of vicarious liability) found liable for the injuries caused to the plaintiff's leg and the resultant pain and suffering – Plaintiff's claim succeeds in part and awarded damages in the amount of N\$50 000.

Summary: In this matter the plaintiff claims, from the defendants, damages arising from an alleged assault that occurred on 12 January 2021 at Hardap Correctional Facility. Then plaintiff claims to have been hit by the fourth defendant by pulling and pushing the cell burglar door several times on the plaintiff's left leg.

Held that: There is overwhelming evidence that the injuries sustained by the plaintiff were consistent with the attack to the left leg after being hit with a cell burglar door.

Held further that: It is foreseeable that by hitting the plaintiff on the leg with a cell burglar door, causes injuries.

Held further that: Any bodily interference with or restraint of a man's person which is not justified in law, or excused by law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim damages as he can prove he has suffered owing to that interference.

Held further that: Physical and emotional pain usually emanates from an assault. The assault perpetrated by the fourth defendant on the plaintiff caused the plaintiff physical and emotional pain and trauma.

Held further that: In the premises of the evidence led in its totality, the particulars of this case, the nature of the injuries sustained and considering the quantum awarded in comparable cases, the plaintiff should be awarded damages in the amount of N\$50 000.

ORDER

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

SIBEYA J:

Introduction

[1] In the case of an emergency, persons must act reasonably. Where there is riot in a correctional facility, correctional officers must act reasonably in attempt to suppress the emergency. Excessive force or force without reasonable care to others may attract adverse consequences.

[2] In this matter the plaintiff claims, from the defendants, damages arising from an alleged assault that occurred on 12 January 2021 at Hardap Correctional Facility. The plaintiff claims to have been hit by the fourth defendant by pulling and pushing the cell burglar door several times on the plaintiff's left leg.

The parties and their representation

[3] The plaintiff is Mr Kristof Haufiku, an adult male person residing at Swakopmund, who was during January 2021 incarcerated at Hardap Correctional Facility in Mariental.

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

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

[6] The third defendant is Mr Sam Franz, an adult male duly appointed as the Deputy Commissioner of the Namibian Correctional Services, the officer in charge at Hardap Correctional Facility and whose address of service is c/o the Office of the Government Attorney.

[7] The fourth defendant is Mr Elvis Menongongo Kavari, an adult male currently medically boarded and previously employed as a senior Chief Correctional Officer in the Namibian Correctional Services stationed at Hardap Correctional Facility and whose address of service is c/o the Office of the Government Attorney.

[8] The plaintiff is represented by Ms Chinsemu while the defendants are represented by Ms Hinda.

Pleadings

[9] The plaintiff alleges, in the particulars of claim, that on 12 January 2021 between 11h00 and 12h00, at cell 3 of the Hardap Correctional Facility, the fourth defendant assaulted him. The plaintiff claims that the fourth defendant, while acting in the course and scope of his employment with the first defendant, pushed and pulled the cell's burglar bar door several times on his left leg resulting in injuries.

[10] The plaintiff further claims that the assault occurred in sight of other unknown correctional officers who stood idle despite being present and being on duty.

[11] The plaintiff further claims that the correctional officers denied him access to medical attention and treatment on 12 and 13 January 2021 for the injuries sustained. He claims further that due to refusal of medical care, he was subjected to additional pain, suffering and discomfort and by 30 March 2022, when he issued summons, he still had difficulties in walking. He also claimed contumelia on the basis that his right to bodily integrity was violated.

[12] The plaintiff, as a result, claims damages for pain and suffering in the amount of N\$150 000 and for contumelia N\$150 000. In the alternative, he claimed constitutional damages in the amount of N\$300 000. He also claims interest at the rate of 20% from date of judgment as well as costs of suit.

[13] The defendants denied the claim. They amplified their plea that the plaintiff was unintentionally hit by the cell door of cell 3 when it was being closed. The defendants pleaded further that the plaintiff received medical attention on 12, 14, 17, 20, 21 and 28 January 2021.

[14] The pre-trial order

[15] The parties filed a joint pre-trial report dated 22 July 2022 which was made an order of court on 24 August 2022. In the pre-trial report, the parties set out the following facts which are not in dispute between them as agreed facts:

- (a) That the plaintiff was injured on 12 January 2021;

(b) That the plaintiff was provided with medical treatment during the period of 14 to 21 January 2021.

[16] The parties further listed a plethora of issues to be resolved during the trial, but when closely assessed, the listed issues in dispute are limited to the following:

(a) Whether or not on 12 January 2021 at about 11h00 to 12h00 the plaintiff was assaulted by the fourth defendant and whether or not the fourth defendant acted within the course and scope of his employment during the relevant time of the assault;

(b) Whether the alleged assault occurred in sight of other correctional officers and whether or not the said officers had an obligation to stop the alleged assault;

(c) Whether or not the plaintiff was denied medical attention on 12 and 13 January 2021 for treatment of his injuries sustained.

(d) Whether or not the plaintiff sustained an open wound, swelling and excruciating pain at his left leg as a result of the alleged assault and whether he endured pain for about 90 days where he walked, laid down and slept with difficulties.

(e) Whether or not the plaintiff suffered contumelia on the basis of his bodily integrity being violated.

(f) Whether or not the plaintiff suffered damages and in the alternative constitutional damages of N\$300 000.

Plaintiff's evidence

[17] The plaintiff testified, *inter alia*, that on 12 January 2021, he was incarcerated at Hardap Correctional Facility in Mariental. He was together with Mr Junias Sackaria in the corridors of the correctional facility when the correctional officers instructed inmates to gather in the dining hall. Inmates complained that the dining hall was small for inmates to adhere to social distancing as per the COVID-19 Regulations. Resultantly a fight broke out between the inmates and the correctional officers. Correctional officers started to beat inmates who then retaliated.

[18] The plaintiff further said that correctional officers beat the inmates and used pepper sprays to control and disperse the inmates. He observed that Deputy Commissioner Franz was stabbed by gang offenders. Correctional officer Nambahu who was beaten by inmates ordered that the cells be opened. Inmates ran to their cells after being ordered to do so by the correctional officers.

[19] The plaintiff said that he was the last inmate to enter his cell (cell 3), and when he so entered, the fourth defendant, who was on duty as a correctional officer, stood next to the cell door. The fourth defendant used excessive force to close the cell door which hit the plaintiff's left leg and he fell to the ground. The plaintiff testified that the said assault was perpetrated in full view of other correctional officers and inmates, and left him ashamed. Mr Junias Sackaria dragged him away from the cell door.

[20] The plaintiff said that he sustained an open wound and swelling to his left leg and blood was flowing. The open wound was about 13 to 15 cm in length. He informed the fourth defendant that the fourth defendant injured him, to which he responded that he does not care. The plaintiff reported the incident to another correctional officer who could not assist. He requested the Head of Security of the Correctional facility, Mr Kalipi to take him to the hospital which request was denied. He was taken to the Hardap Correctional Facility Clinic from 14 to 21 January 2021 where he received pain killers and ointment.

[21] The plaintiff stated that as a result of the injuries sustained he could not walk or jump.

[22] The plaintiff testified that fourth defendant acted within the course and scope of his employment when he perpetrated the assault, and he, therefore, called for the first and fourth defendants to be jointly held liable for damages suffered.

[23] In cross-examination it was put to him by Ms Hinda that the Head of Security was Mr Kaheka not Mr Kalipi, to which the plaintiff conceded. Ms Hinda further questioned him that he provided a written statement to Mr Matsuib about the incidence where the plaintiff said that he was injured by accident. The plaintiff denied being injured by accident and further denied informing Mr Matsuib as such, and he further said that Mr Matsuib recorded a statement and did not give it to him thereafter to read but only required him to sign the statement.

[24] When questioned further by Ms Hinda, the plaintiff agreed that on 20 and 28 January 2021, he was referred to Mariental State Hospital where he received Ibuprofen, panado and an ointment. It was his testimony further that certain pages were missing from his health passport and he claimed that at all times such health passport was in the custody of the correctional facility.

[25] When questioned on how he arrived at the amount of N\$300 000 claimed, the plaintiff said that after being injured, the correctional officers failed to assist him and they did not provide him with medical treatment and he endured severe pain.

[26] The plaintiff led the evidence of Mr Sackaria Junias, who testified, *inter alia*, that he is incarcerated at East Ekongo Correctional Facility while in January 2021 he was incarcerated at Hardap Correctional Facility. He corroborated the plaintiff's evidence to a large extent that on 12 January 2021, correctional officers informed the inmates to gather in the dining hall. Inmates complained that the dining hall was too small and will violate the social distancing prescribed by the COVID-19 Regulations. A scuffle broke out between the correctional officers and the inmates. Inmates were then instructed to return to their cells which they complied with.

[27] Mr Junias said he stayed in cell 3 and they entered the cell upon being instructed by correctional officers. The plaintiff entered the cell last. As the plaintiff was entering the cell, the fourth defendant pushed the plaintiff and he fell to the ground. The fourth defendant then hit the plaintiff with the cell's burglar door about

three times on his left leg by pushing and pulling the door. Mr Junias said that he got hold of the cell door, and the plaintiff managed to remove his leg from the door. Mr Junias further said that he saw that the plaintiff was injured, he dragged the plaintiff away from the cell burglar door.

[28] The plaintiff led the evidence of Mr Kennedy Orina who testified, *inter alia*, that he is incarcerated at Hardap Correctional Facility where he was in 2021. He said that he did not witness the incident that led to the plaintiff's injuries, but he observed the injury to the plaintiff's foot several weeks after the incident and it was swollen. Mr Orina stayed in cell 2 while the plaintiff stayed in cell 3 but the plaintiff was later moved to cell 2. The plaintiff as a result walked with difficulties and was in severe pain. He also observed that the plaintiff did not receive medical treatment on time and at times he did not receive medical treatment at all. Mr Orina gave the plaintiff pain killers and an ointment to apply on his injuries.

Defendants' evidence

[29] The defendants led the evidence of Mr Elvis Menongongo Kavari (the fourth defendant) who testified, *inter alia*, that he is medically boarded but in 2021 he was employed as a Senior Chief Correctional Officer stationed at Hardap Correctional Facility. His duties included guarding offenders, looking after their wellbeing, locking and unlocking cell doors, attending to offenders' daily complaints, etc.

[30] The fourth defendant said that on 12 January 2021, he was on duty between 07h00 and 16h00 when the Head of Security, Senior Superintendent Kaheka, instructed correctional officers to conduct a search in C-Section of the Hardap Correctional Facility. In order to conduct the search, they gathered all the inmates in the dining hall, which the offenders resisted citing that the limited space violated the social distancing allowed by COVID-19 Regulations. A fight broke out between the correctional officers and the inmates and some of the correctional officers were stabbed. The Namibian Police officers were called to assist to restore order.

[31] The search was eventually conducted. The fourth defendant testified further that he was not aware that the plaintiff was injured. He said that it was only after the

riot settled that he was informed of the plaintiff's injury. He stood at the door of the cell when the inmates were entering the cells. He further said that he was closing the cell doors during the disorder and he might at that time have accidentally hit the plaintiff with the grill door in the process.

[32] It was put to him by Ms Chinsembu in cross-examination that as the plaintiff was entering the cell, the fourth defendant used maximum force to push the cell door. The fourth defendant responded that he used maximum force to put the plaintiff in the cell because he was refusing to enter the cell. In re-examination, Ms Hinda was at pain to seek clarity on the fourth defendant's understanding of maximum force, to which the fourth defendant said that he only held the plaintiff on the hand and said to him 'come my brother'. He said what he used was necessary force. Subsequently, the court questioned the fourth defendant on what he meant by maximum force to which he said that it is using more force.

[33] Ms Chinsembu further questioned the fourth defendant whether he pushed the plaintiff where after the plaintiff fell to the ground. The fourth defendant agreed and said further that this was necessitated by the fact that the plaintiff was refusing to enter the cell. The fourth defendant said that after pushing the plaintiff into the cell, he locked the door and left and no one informed him that he injured anyone. He further said even the next day when he was at the cell section he was not informed that he injured the plaintiff.

[34] Ms Chinsembu further questioned the fourth defendant about the possibility of injuring the plaintiff to which, he said that it was possible that when he slammed the cell door, he could have injured the plaintiff.

[35] The defendants further led the evidence of Raynold Madawa Matsuib, who testified, *inter alia*, that he is a Correctional Officer stationed at Hardap Correctional facility at Complaints and Discipline as an investigator and initiator. His duties are to investigate incidents relating to inmates and correctional officers and if need be to initiate disciplinary proceedings against the inmates and offenders.

[36] Mr Matsuib said that he investigated a riot that occurred on 12 January 2021 and he recorded witness statements including that of the plaintiff. The plaintiff

informed him that he was injured by accident when the fourth defendant closed the burglar door and it hit his ankle.

[37] The defendants further led the evidence of Ms Johanna Shimwandi, who is a Chief Correctional Officer stationed at Hardap Correctional Health Facility as a nurse. She said that she attended to the plaintiff at the Correctional Health Facility on 13 January 2021, where the plaintiff complained of ankle pain and she observed a slight laceration on his ankle. He was provided with Ibuprofen for pain, and Betadine dressing ointment to dress the wound. On 28 January 2021, at the Correctional Health Facility the plaintiff was referred to Mariental State Hospital for treatment. When she was asked about the whereabouts of the plaintiff's health passport, she said that the plaintiff never asked for it.

[38] Ms Shimwandi also said that when she saw the plaintiff at the Correctional Health Facility, he walked properly while unassisted. When asked as to which ankle did she observe the laceration which she also referred to as a scratch? She confidently said that it was on his right ankle.

[39] The defendants further led the evidence of Mr Abel Shawana Shipopyeni, a Senior Chief Correctional Officer stationed at Hardap Correctional Health Facility. He testified that on 20 January 2021, the plaintiff attended to the Correctional facility's clinic with a history of an injury on the left ankle and he was referred to Mariental State Hospital. On 27 January 2021, he attended to the plaintiff and referred him to Mariental State hospital for examination by a medical doctor. He further said that the plaintiff was released from Hardap Correctional Facility and was given his health passport.

Brief submissions by counsel

[40] Ms Chinsemu argued that the plaintiff established that he was assaulted and injured on 12 January 2021 and further that he had suffered from related pain ever since. She argued that the plaintiff was pushed by the fourth defendant after which he fell to the ground and thereafter the fourth defendant hit him with a cell burglar door on the left leg using maximum force several times. The said assault which was in full view of other inmates and correctional officers, injured the plaintiff's left leg and

caused an open wound and swelling. Ms Chinsembu argued that Mr Junias corroborated the evidence of the plaintiff regarding the assault and the injuries sustained while Mr Orina corroborated the evidence of the plaintiff regarding the said injuries.

[41] Ms Chinsembu further argued that unlawful interference with the bodily integrity of the plaintiff is clear on evidence. On the quantum, the court was urged to consider related cases for guidance.

[42] Ms Hinda argued the contrary and dealt with the arguments of the plaintiff pound for pound, so to speak. She argued that a fight broke out at Hardap Correctional Facility whereby Deputy Commissioner Franz was stabbed by gang offenders and Correctional Officer Nambahu was beaten by inmates. Ms Hinda argued that the fourth defendant might have accidentally injured the plaintiff during the closing of the cell doors resulting from the disorder at the C-Section.

[43] Ms Hinda further argued that the fourth defendant did not understand what is meant by maximum force in relation to the force he used to close the cell door. She further argued that the plaintiff informed Mr Matsuib that he was injured by accident, therefore, none of the defendants should be held liable for the injuries sustained by the plaintiff. Besides, it was argued that the plaintiff only had a small laceration on the ankle as observed by Ms Shimwandi.

[44] Ms Hinda wrapped up her arguments by inviting the court to consider the contradictions in the evidence of the plaintiff and his witnesses, on whether his wound bled or not and return a finding that the plaintiff was not credible as a witness. She further argued that the plaintiff failed to prove the monetary award that he sought.

Burden of proof

[45] It is settled law that that the plaintiff bears the burden to prove his claim on a balance of probabilities.

[46] Ueitele J in *Mouton v Mouton*¹ said the following regarding the test applicable to delictual claims based on assault:

[30] In the unreported judgment of *Lubilo and Others v Minister of Safety and Security*,² this Court³ remarked that an assault violates a person's bodily integrity and that every infringement of the bodily integrity 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 claim the plaintiff carries the *onus* to prove the physical infringement of his body (by the application of force to his body) by the defendant. The *onus* to show justification for the infringement of the plaintiff's body is on the defendant.⁴

Analysis of evidence and submissions

[47] At the commencement of the analysis of evidence, I hold the view that, the claim based of contumelia can be disposed of without scratching one's head. The plaintiff claims that he was assaulted in full view of other inmates and correctional officers and this left him humiliated and lowered his self-esteem. This claim is contrary to the evidence. No evidence was led to support the narrative that the assault was perpetrated in full view of the inmates. There was an allegation that there were others correctional officers at the scene. The plaintiff called no such correctional officers to testify neither did Mr Junias who blocked the door and dragged the plaintiff from the door testify that there were other correctional officers present at the scene.

[48] The plaintiff failed to explain in evidence as to how he was humiliated. In any event, even if it is assumed that other correctional officers were present, one wonders how that would humiliate or lower the self-esteem of the plaintiff. In my view, the plaintiff remained in the starting blocks in his attempt to prove contumelia and this claim falls to be dismissed as a result.

¹ *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) para 30.

² *Lubilo and Others v Minister of Safety and Security* (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

³ Per Damaseb JP at para 9.

⁴ *Mabaso v Felix* 1981 (3) SA 865 (A).

The assault

[49] The question for determination is whether the plaintiff was assaulted by the fourth defendant or not. The moment it is established that the plaintiff was assaulted by the fourth defendant, then the onus shifts to the defendants to prove justification for the assault.

[50] It is apparent from the evidence that while the plaintiff claims to have been assaulted by the fourth defendant without justification, the fourth defendant, on the other hand, claims that he may have assaulted the plaintiff by accident. Clearly, therefore, the version of the plaintiff and that of the defendants on this score is mutually destructive.

[51] In *National Employers' General Insurance v Jagers*,⁵ Eksteen AJP said the following while discussing the approach to mutually destructive evidence:

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

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

[53] With the above-mentioned in mind I, now analyse the evidence led.

[54] In order to determine whether or not the fourth defendant unlawfully assaulted the plaintiff I have regard to the following:

⁵ *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440E-F.

(a) The plaintiff testified that the fourth defendant pushed him and hit him with a cell burglar door several times on his left leg causing him injuries. This version was corroborated by Mr Junias who blocked the door and dragged the plaintiff away from the door;

(b) The defendants in their plea to the plaintiff's particulars of claim stated that the plaintiff was unintentionally hit by the door when the cell 3 door was closing;

(c) The parties set out as an agreed fact between them that the plaintiff was injured on 12 January 2021;

(d) The fourth defendant conceded to a question from Ms Chinsebu that he pushed the plaintiff who then fell to the ground, and his reason was because the plaintiff was refusing to enter the cell;

(e) The fourth defendant further conceded in cross-examination that he used maximum force to put the plaintiff in the cell because he was refusing to enter the cell and also used maximum force to push the cell burglar door;

(f) I am reminded by the effort employed by Ms Hinda to attempt to downplay the fourth defendant's expression that he used maximum force to close the door to be tantamount to the fourth defendant not appreciating the meaning of the words maximum force and to her credit, if it can be said to be one, Ms Hinda was flocking a dead horse as the fourth defendant is a former Senior Correctional Officer who, when asked what maximum was, responded that maximum is maximum meaning using more force, therefore. I reject the evidence testified to by the fourth defendant when he said in re-examination that his understanding of maximum force was simply holding the plaintiff on the hand and saying to him 'come my brother', as constituting an afterthought invented to attempt to cover the trouble that he got himself into upon such realisation;

(g) The fourth defendant said that after he pushed the plaintiff into the cell, he locked the cell door and left and no one informed him that he injured anyone and the next day he was at the same cell section and he was not informed that he injured the plaintiff, in evidence in chief, his testimony was that only after the riot settled was he informed of the plaintiff's injury which he said that he could have accidentally caused when he was locking the cell door as there was disorder;

(h) The fourth defendant was clear that it was possible that when he slammed the cell door he could have injured the plaintiff;

(i) The agreed fact between the parties that the plaintiff was injured on 12 January 2021, coupled with the above analysis puts the assault perpetrated on the plaintiff on 12 January 2021 beyond dispute.

[55] The question that remains is how was the plaintiff was assaulted? In this regard, the evidence of the plaintiff corroborated by that of Mr Junias is unties the proverbial note, so to speak, that the fourth defendant hit the plaintiff's left leg with a door several times (estimated at about three times) causing injuries. It is apparent from the evidence of the fourth defendant that his evidence was marred not only by contradictions with established facts but also self-contradictions. For instance, the fourth defendant claimed to have pushed the plaintiff with maximum force and pushed the cell door with maximum force but later attempted to state that he did not use such maximum force. The fourth defendant further contradicted himself when he said that no one informed him even the next day when he was at the same cell section that the plaintiff was injured, while earlier in his testimony he said that he was informed that the plaintiff was injured just after the riot settled.

[56] To the contrary the evidence of Mr Junias was clear that when the fourth defendant pushed the plaintiff and the plaintiff fell to the ground, the fourth defendant hit the plaintiff with the cell burglar bar door by pushing and pulling it on the plaintiff's leg, causing him injuries. Mr Junias further testified, undisputedly, that he blocked

the cell door and dragged the plaintiff away from the said cell door. As alluded to above, the evidence of Mr Junias corroborated that of the plaintiff.

[57] Mr Junias testified in a forthright manner and was impressive as a witness while the fourth defendant was far from that. The fourth defendant kept pretending not to properly hear the questions particularly in cross-examination, his evidence was full of contradictions and he was not impressive as a witness.

[58] In view of the aforesaid discussions and conclusions, I find that the version of the plaintiff and Mr Junias is more probable and credible compared to that of the fourth defendant.

[59] I, therefore, find on a balance of probabilities, that the fourth defendant assaulted the plaintiff by hitting him with a cell burglar door several times on the left leg causing the plaintiff injuries.

[60] I further find that the plaintiff was the last inmate to enter cell 3, and there was no justification for slamming or hitting the plaintiff with the cell burglar door. The fourth defendant did not claim that it was perhaps necessary to slam the door on the plaintiff's leg because of the riot situation that prevailed at the time. In any event, the fact that there was a riot would not automatically justify the assault as each action would have to be assessed on the basis of the surrounding circumstances in order to determine if the action taken was necessary. *In casu*, I find that it was unnecessary for the fourth defendant to assault the plaintiff, thus there was no justification for the said assault making such assault unlawful.

[61] Nothing, in my view turns on the evidence of Mr Matsuib who said that he was informed by the plaintiff that the plaintiff was injured accidentally. This is premised on the evidence of the plaintiff that when Mr Matsuib recorded the statement he did not read such statement back to the plaintiff. The testimony of Mr Matsuib is further contrary to the established fact based on the evidence of the plaintiff and Mr Junias that it was actually the fourth defendant who injured the plaintiff and it was not by accident.

Injuries sustained

[62] The parties agreed that the plaintiff sustained injuries on 12 January 2021. The evidence of the plaintiff is that he sustained an open wound of about 13 to 15 cm, he bled and had swelling on the left leg. Mr Junias observed the swelling on the left leg of the plaintiff. Mr Orina testified that several weeks after the incident he observed the injury to the plaintiff's left foot which was swollen. He further observed that the plaintiff was in severe pain and walked with difficulties. He gave the plaintiff pain killers and an ointment to apply on the injuries. This version corroborates that of the plaintiff regarding the injuries sustained.

[63] Nothing of significance turns on the evidence of Ms Shimwandi who testified with confidence that all she observed was a laceration on the plaintiff's right ankle. With respect, her confidence was misplaced as the plaintiff was not injured on his right ankle but rather on his left leg.

[64] There is overwhelming evidence, in my view, that the injuries sustained by the plaintiff were consistent with the attack to the left leg after being hit with a cell burglar door.

[65] I find that it is foreseeable that by hitting the plaintiff on the leg with a cell burglar door, causes injuries. In my view, therefore, I find that the fourth defendant foresaw that by assaulting the plaintiff he will cause him injuries.

[66] I further find, based on the evidence and the above discussions, that as a result of the assault, the plaintiff sustained injuries causing an open wound and swelling to his left leg as well as excruciating pain to the said left leg.

[67] Considering the evidence led and findings made hereinabove, I find that the fourth defendant, is liable for assaulting the plaintiff and the consequent injuries caused, and that the first defendant is liable on the basis of vicarious liability as the employer of the fourth defendant.

Damages

[68] In an old matter of *Stoffberg v Elliot*,⁶ Watermeyer J said the following regarding damages resulting from an assault:

‘Any bodily interference with or restraint of a man’s person which is not justified in law, or excused by law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim damages as he can prove he has suffered owing to that interference.’

[69] Physical and emotional pain usually emanates from an assault. I harbour no doubt that the assault perpetrated by the fourth defendant on the plaintiff caused the plaintiff physical and emotional pain and trauma.

[70] Quantifying non-patrimonial loss which cannot be given an economic value is extremely difficult. Courts have since resorted to comparable cases in order to determine the quantum of damages to be awarded in each case while bearing in mind the particular circumstances of such case.

[71] In a matter involving law enforcement officers of *Sheefeni v Council of the Municipality of Windhoek*,⁷ the plaintiff claimed damages resulting an assault perpetrated on him by members of the Council’s City Police. The plaintiff was forcefully removed from a taxi, slapped, kicked and punched and his head was hit against the curb of a street. The plaintiff was awarded damages in the amount of N\$50 000.

[72] In another matter of *Cloete v Minister of Safety and Security*,⁸ the court, in November 2021, awarded damages to the plaintiff in the amount of N\$50 000 for being kicked by a police officer and unlawfully arrested.

[73] In this matter, I accept that the plaintiff sustained an open wound and swelling in his left leg. I further accept that the plaintiff had difficulties in walking. The difficulty is that the evidence is silent on when the open wound healed and how long the

⁶ *Stoffberg v Elliot* 1923 CPD 148.

⁷ *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

⁸ *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] NAHCMD 523 (12 November 2021).

swelling persisted. Medical evidence or evidence substantiating the extent of the period that the plaintiff endured pain and suffering would have been helpful in the determination of the quantum. Obviously the longer the anguish that the plaintiff could prove to have suffered, the more the quantum to be awarded.

[74] All I have is the word of mouth by the plaintiff that even at the date of testifying he still endured pain as a result of the assault. In my view, that is not enough and I shall give the benefit of the doubt to the defendants and will limit the quantum to what I consider reasonable with the limited information available.

Conclusion

[75] In the premises of the evidence led in its totality, the particulars of this case, the nature of the injuries sustained and considering the quantum awarded in the above comparable cases, I hold the view that the plaintiff should be awarded damages not far off from the damages awarded in the above-mentioned cases. In my analysis of the facts of this matter, an award in the amount of N\$50 000 is justified in this case.

Costs

[76] It is well established in our law that costs follow the event.

[77] *In casu*, the plaintiff is, however, represented on instructions of the Directorate of Legal Aid. Section 18 of the Legal Act,⁹ provides that: "No order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings."

[78] Section 18 of the Legal Aid is, in my view, instructive in nature that where legal aid is granted to the claimant as in the present matter, no costs order should be made against the State. Applying the above provision to the present matter makes its rationale plain, that the plaintiff, who is legally aided, was not put out of pocket by the defendants for defending the claim. The plaintiff literally incurred no costs for

⁹ Legal Aid Act, Act 29 of 1990.

which he should be reimbursed even if he is successful in his claim. I shall, therefore, make no order as to costs.

Order

[79] In the result, the following order meets the justice of this matter:

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

O S Sibeya
Judge

APPEARANCE:

PLAINTIFF:

W Chinsembu
Of Henry Shimutwikeni & Co Inc,
Windhoek.

DEFENDANTS:

J Hinda
Of the Government Attorney,
Windhoek