

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-OTH-2018/00015

In the matter between:

**MARCUS KEVIN THOMAS**

**PLAINTIFF**

and

<b>MINISTER OF SAFETY &amp; SECURITY: CHARLES NAMOLOH</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>COMMISSIONER-GENERAL NAMIBIA</b>	
<b>CORRECTIONAL SERVICES</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>SILAS MATEUS</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>ESRA "SWAPO" KAISITUNGU</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>JOSIAH</b>	<b>5<sup>TH</sup> DEFENDANT</b>
<b>SIAMBANGA</b>	<b>6<sup>TH</sup> DEFENDANT</b>
<b>SHIMBOME</b>	<b>7<sup>TH</sup> DEFENDANT</b>

**Neutral citation:** *Thomas v Minister of Safety & Security: Charles Namoloh* (HC-MD-CIV-ACT-OTH-2018/00015) [2023] NAHCMD 283 (24 May 2023)

**Coram:** PRINSLOO J

**Heard:** 4, 7, 8 December 2020, 15-17 February 2021, 17 – 19 August 2022 and 20 February 2023

**Delivered:** 24 May 2023

**Flynote:** Delict – Action for damages – Infringement of bodily integrity prima facie unlawful and once the infringement is proved, the onus rests on the perpetrator to prove justification – Quantum – Assessment of damages – in Court’s discretion.

**Summary:** The plaintiff alleges that on 13 January 2017, the third to seventh defendants, while acting within the scope of their employment with the first defendant assaulted him with fists, kicked him with boots and beat him with a baton all over his face and body. He further alleges that at the time of his assault, he was in the office of the Head of Security, Silas Mateus. The plaintiff also alleges that as a result of this assault, he sustained bruises and experienced pain all over his body and swelling around his eyes. It is further the plaintiff’s allegation that as a result of this assault by the defendants he had to undergo medical treatment at the Katutura State Hospital. The defendants admit that they assaulted the plaintiff, but deny that the assault was severe and plead that the assault was justified and in accordance with the law.

*Held that* when faced with mutually destructive versions, the court will weigh up and test the plaintiff’s allegations against general probabilities.

*Held that* Dr Hamupembe is the only independent witness in this matter, and his findings on the night of the examination and his evidence in respect of the nature of the injuries observed are not aligned with the magnitude of the assault alleged by the plaintiff.

*Held that* in the court's view, the defendant's version of what happened in Mateus's office is the more probable one.

*Held that* the court is satisfied that this beating was executed by the third defendant only. There is no evidence to support the plaintiff's evidence that other officials also beat him. The plaintiff cited the fourth to the seventh respondent but failed to make out a case against these defendants.

*Held that* the beating executed by Mateus was not warranted.

*Held that* in the court's view the assault on the plaintiff was excessive and that the plaintiff could have been subdued with minimal force.

*Held that* the court finds that an assault was perpetrated on the plaintiff by the third defendant whilst acting in the course and within the scope of his employment with the first defendant.

*Held that* the plaintiff's legal practitioner does not take the relief sought for emotional and post-traumatic stress any further. There is no evidence in this regard placed before this court.

*Held that* the court is not convinced from the evidence presented that a case of damages for contumelia has been made out.

*Held that* Dr Hamupembe did not regard the injuries of the plaintiff of such a nature to have him admitted to hospital and found that the injuries were superficial. Accordingly, no follow-up treatment was required.

*Held that* in the circumstances an award in the amount of N\$50 000 is justified.

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**ORDER**

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The court grants judgment in favor of the plaintiff against the first and third defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of N\$50 000;
2. Interest on the above-mentioned amount at the rate of 20% per annum from the date of judgment to the date of final payment;
3. No order as to costs;
4. The matter is finalised and removed from the roll.

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## JUDGMENT

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PRINSLOO J:

The parties

[1] The plaintiff is Marcus Kevin Thomas, a major male American Citizen currently detained at the trial awaiting section at the Windhoek Correctional Facility (“WCF”), Windhoek, Republic of Namibia.

[2] The first defendant is the Minister of Safety and Security: Charles Namoloh, cited in his capacity as the political head of the Namibian Police and Correctional Services, with his offices situated in the Southern Industrial Area, Windhoek.

[3] The second defendant is the Commissioner-General of the Namibian Correctional Services, appointed under Article 32(4)(c)(cc) of the Namibian Constitution.

[4] The third to the seventh defendants are adult male persons employed as correctional officers at the Namibian Correctional Services (NCS) stationed at Windhoek Central Prison, Windhoek, Republic of Namibia. These defendants are:

- a) the third defendant is Silas Mateus;
- b) the fourth defendant is Esra “Swapo” Kaisitungu;
- c) the fifth defendant is one Josiah, whose further particulars are unknown;
- d) the sixth defendant is one Siambango, whose further particulars are unknown;
- e) the seventh defendant is one Shimbome whose further particulars are unknown.

#### The relief claimed by the plaintiff

[5] In his particulars of claim, the plaintiff claims monetary compensation in the amount of N\$1 100 000. The claim consists of the following:

- i) Payment in the amount of N\$500 000 for assault and torture;
- ii) Payment in the amount of N\$200 000 for emotional and post-traumatic stress; disorder suffered by the plaintiff as a result of the assault;
- iii) Payment in the amount of N\$400 000 for constitutional damages
- iv) Interest and costs of suit.

[6] However, in his written and oral submissions, counsel for the plaintiff submitted that the plaintiff would not persist with his claim as set out in his particulars of claim. Still, after due consideration, he adjusted his damages claim to N\$500 000, which is constituted as follows:

- i) Payment in the amount of N\$250 000 for pain and suffering; and
- ii) Payment in the amount of N\$250 000 for contumelia.
- iii) Interest and costs of suit.

[7] From the closing submissions of the plaintiff, it is clear that the plaintiff does not persist with the constitutional damages initially claimed.

#### Introduction

[8] The incident that gave rise to the plaintiff's claim was preceded by a physical altercation between the plaintiff and another inmate, Reinhold litembu (litembu). It is common cause that on 13 January 2017, the plaintiff came across litembu near the cash office. When the plaintiff met up with litembu, he struck litembu, unprovoked, with the fist causing litembu to fall to the ground. In the process, litembu sustained injuries to his face.

[9] This incident between the plaintiff and litembu was prompted by the fact that litembu was suspected to be an informer by some of the inmates (including the plaintiff), which led to the search of the cells for contraband.

[10] This was the third assault perpetrated on litembu within a few days. On more than one occasion, he was assaulted by other inmates and had to be transferred between sections of the correctional facility for his safety.

[11] The correctional officers intervened during the altercation between the plaintiff and litembu. They separated the combatants and took litembu to the offices of the Head of Security, Silas Mateus ("Mateus"), the third defendant, to make a report. The plaintiff was escorted back to his cell in Echo-section.

[12] The plaintiff was, however, summoned to the office of the Security Head (Mateus) to be questioned about the incident between him and litembu.

[13] When the plaintiff arrived at Mateus' office, litembu was still there, and that is when an incident occurred that caused the plaintiff to issue summons against the defendants.

### Pleadings

[14] The plaintiff pleads that on 13 January 2017, he was assaulted by many correctional officers (including the third to the seventh defendants), while acting within the course and scope of their employment with the first defendant.

[15] The plaintiff further pleads that he was assaulted with fists, kicked with boots and beaten with batons all over his face and body. He further asserts that at the time of his assault, he was in the office of the Head of Security, Mr Mateus.

[16] The plaintiff avers that as a result of this assault, he sustained bruises all over his body and experienced pain all over his body and swelling around his eyes. The plaintiff pleads that after the assault, he was placed in an isolated single cell. However, on the insistence of the Deputy Officer in charge of the correctional facility, Mr Kambinda, the plaintiff was examined by a nurse from the correctional facility's clinic. Pursuant to that, the plaintiff was taken to Katutura State Hospital for medical treatment.

[17] Upon his return from the hospital, the plaintiff was again placed in an isolated single cell. The plaintiff pleads that Mateus directed that he should not be admitted to the medical ward of the correctional facility despite the seriousness of his injuries. The plaintiff further pleads that Mateus directed that the plaintiff should not receive visitors or be allowed to make telephone calls to the American Embassy.

[18] The plaintiff pleads that after the assault, criminal charges were laid against the third defendant, and an internal disciplinary hearing followed, during which the third defendant was convicted on a charge of assault. The finding of assault by the disciplinary committee was reduced by the Commissioner-General to one of the use of excessive force. The third defendant was re-assigned to a different duty station as a result of the incident.

[19] In their plea, the defendants plead that the conduct of the plaintiff and that of the other inmates who perpetrated the assault on litembu caused a serious security breach and a threat to the good order and discipline of the correctional facility. They further

pleaded that when the plaintiff was confronted regarding the assault on litembu, he admitted the assault and made offensive threats towards litembu, in the presence of the correctional officers.

[20] The defendants plead that whilst in the office of Mr Mateus, the plaintiff grabbed litembu before the correctional officers could intervene. When instructed to let go of litembu, the plaintiff did and sat down on the ground as directed. However, when litembu was ordered to leave the office, the plaintiff again grabbed litembu and threatened to kill him.

[21] The defendants plead that litembu was in pain and distress and unable to break free from the grip of the plaintiff. The correctional officers could not separate the plaintiff and litembu, and litembu's life appeared to be in danger. As the plaintiff defied the instructions to release litembu, the third defendant, Mateus, used a plastic baton, also known as a tomfa, to hit the plaintiff to force the plaintiff to release litembu.

[22] The defendants plead that only Mateus hit the plaintiff and that the beating was necessary and reasonable under the circumstances, as there was a concern that the plaintiff would seriously injure or kill litembu. The defendants plead that the third defendant's beating of the plaintiff and other correctional officers' efforts to restrain the plaintiff resulted in the plaintiff eventually letting go of litembu, who then managed to exit Mateus' office.

[23] The defendants, therefore, admit the beating of the plaintiff but deny that the assault was severe and aver that it was justified under the circumstance.

### The evidence

#### *Plaintiff's case*



[24] The plaintiff testified and called one witness to testify on his behalf, namely Dr Aron Hamupembe.

[25] In his testimony, the plaintiff related that on 13 January 2017 and at the Windhoek Central Correctional Facility, he was involved in an altercation with another trial awaiting inmate, litembu. After the fight, he was escorted to Echo section by the guards from where he was summoned to the office of Mateus. When he entered the office, he found litembu, 30 to 35 correctional officers and Mateus waiting for him. Mateus ordered his subordinates to close the door behind the plaintiff and asked why he had an altercation with litembu. The plaintiff responded that it was because litembu had been an informer regarding him and his co-accused since 2013.

[26] He testified that Mateus did not believe his version of events but suggested that the plaintiff fought with litembu because he had a problem with all "Africans". The plaintiff testified that hereafter Mateus ordered litembu to leave the office. On his way out, litembu kicked him on the back of his head. The plaintiff testified that he grabbed litembu's leg, and when the guards intervened, he released litembu's leg, and litembu left the office.

[27] According to the plaintiff, Mateus instructed the guards to close the door behind litembu and then ordered one of the guards to open a floor cabinet in the office and pass out the reinforced batons (tomfas) to the 30 to 35 correctional officers present. The correctional officers were standing in double lines along Mateus' office walls. Once all the officials were armed, Mateus, seated behind his desk at the time, took a tomfa, came around the desk, and faced the plaintiff. The plaintiff testified that Mateus instructed him to go down on his knees, but he refused.

[28] Immediately after that, an unknown correctional officer struck the plaintiff with a fist on his head, and Mateus assaulted the plaintiff with the baton in his face, on the left eye. It then became a free-for-all as all other correctional officers in the office attacked the plaintiff with batons by hitting him all over his body and kicking him.

[29] Plaintiff further testified that several bouts of 'armed gang beatings' were briefly halted in between and would commence again. The plaintiff could recall that two of those bouts of assault continued for approximately ten minutes each. During the assault, he was repeatedly hit and kicked. Many blows and kicks were directed at the plaintiff's face, arms, back, and spine. The plaintiff could not enumerate the number of blows and kicks but surmised it was in the hundreds. He stated that during one of the bouts of assault, he was hit about 100 times and received the same number of kicks in the face. The plaintiff further testified that he tried to protect his face and manoeuvred himself into a corner, whilst on his knees, curled into himself. The plaintiff testified that he took the majority of the blows on his back and arms and as a result of the position he took on the ground.

[30] The plaintiff testified that when the assault on him eventually stopped, Mateus instructed the correctional officers to handcuff him and lock him up in an isolated cell. The plaintiff testified that during the day, Mr Kambinda, the Deputy Officer in charge at the WCF, came to the solitary cell where he was detained to determine his medical condition and took pictures of the plaintiff's injuries. Mr Kambinda arranged for the plaintiff to receive medical treatment. The plaintiff was attended to by the resident nurse at the WCF, Mr Augustinus Matjayi, who examined the nature and extent of the injuries and recommended that the plaintiff be taken to Katutura State Hospital for further medical assessment.

[31] Plaintiff further testified that when he arrived at the hospital, the nurses took his vitals, interviewed him, did tests, administered injections, took x-rays and ran an IV drip. Afterwards, he was escorted back to the WCF. He was returned to a cell and not admitted to the facility's clinic. At the time he still had an IV drip running and received no further medical attention at the facility.

*Dr Aron Hamupembe*

[32] Dr Hamupembe testified that he holds a Bachelor of Medicine Degree and is employed as a medical officer at the Emergency Department at the Katutura State Hospital and has been practicing as a medical officer since 2016. On 13 January 2017 at 20h20, the plaintiff was referred to him for a medical examination.

[33] He further testified that the plaintiff complained of the following symptoms; headache, lower back pain, pain in the right arm, pain in both eyes and dizziness. The plaintiff did not exhibit loss of consciousness, and during his examination of the patient, he observed no bleeding from the nose and ears. Dr Hamupembe observed bruises all over the plaintiff's back, on his arms, and periorbital edemas on both eyes (raccoon eyes). In layman's terms, the witness explained that periorbital edemas mean swelling around the eyes. Dr Hamupembe testified that the plaintiff displayed normal vision, stable blood pressure and a normal heart rate.

[34] No fractures or dislocation was detected from the x-rays taken of the patient's back and arms. However, Dr Hamupembe noted that he observed soft tissue injury due to the assault. He described the bruising as a result of as a severe beating on the plaintiff's body but that no damage to the internal organs was caused, nor was there any damage to the plaintiff's eyes, despite the swelling around them.

[35] Further, Dr Hamupembe testified that the plaintiff has a history of arthritis and asthma. However, these are recurrent conditions independent of the assault. Dr Hamupembe recommended that a pulmonologist be consulted to determine any long-term consequences of the assault. Similarly, an ophthalmologist would be required to evaluate the long-term effects, if any, relating to the vision secondary to the assault.

[36] Dr Hamupembe discharged the plaintiff back into the care of the correctional officers after treatment and believed that admission to the hospital was unnecessary.

[37] On questions of the court, the witness would not commit himself as to whether the plaintiff's injuries would be concomitant with hundreds of blows and kicks to the

face. Dr Hamupembe testified that although the plaintiff was badly bruised, he did not observe any open wounds and recorded what he observed in the health passport of the plaintiff.

### *The health passport*

[38] In the health passport of the plaintiff, Dr Hamupembe recorded that the plaintiff complained about lower back pain, right upper arm pain, and dizziness. The doctor further recorded his observations as: no bleeding of the nose, no bleeding of the ear, no loss of consciousness and no convulsions.

[39] Upon examining the plaintiff, the doctor recorded the following as present: bruises all over the back and arms and periorbital swelling. The doctor found that the plaintiff's chest was clear, and his heart was fine. The plaintiff's abdomen was fine and had no tenderness. In his assessment, it was soft tissue injury secondary to assault.

[40] The doctor prescribed that the plaintiff receive intravenous fluids and pain medication. The doctor further recorded that the plaintiff was referred to x-rays and upon return from x-rays noted that there were no fractures or dislocations. Nevertheless, the doctor proceeded to prescribe medication and directed that the plaintiff's arm be placed in a sling to support the arm, although nothing was evident from the x-ray.

### Defendants' case

[41] Four witnesses gave evidence for the defendants, i.e. Silas Mateus, David Shimbome, Kletus Anghuwo, and Augustinus Matjaji.

### *Silas Mateus*

[42] Mr Mateus testified that he is employed as a Senior Correctional Officer in the Namibian Correctional Service (“the NCS”) with many years of service. He holds the rank of senior superintendent and is currently stationed at the NCS’s North-West/North-Eastern Regional Commander’s office in Rundu, Kavango region. He is a security official at the operations section at the NCS Regional Headquarters. The witness testified that he was a unit manager at the Maximum unit when the plaintiff was admitted at the WCF in 2011.

[43] The witness testified that he is well acquainted with the plaintiff as an inmate and that the plaintiff had issues with discipline in the facility. For example, he would regularly refuse to be searched by the WCF officials and use derogatory and vulgar language toward the officials and other inmates.

[44] He testified that on 10 January 2017, at Echo trial-awaiting section, an inmate named Reinhold litembu was assaulted by several inmates because they suspected him to be the WCF authorities’ informer. It is further his testimony that on 13 January 2017, litembu was attacked and assaulted by the plaintiff. litembu was punched to the ground by the plaintiff and suffered a swollen face and eye. litembu fled to his office and reported the assault to him. He then arranged for security officers to gather in his office to investigate the assault on litembu (by the plaintiff).

[45] The witness testified that litembu was waiting in his office, and he instructed the plaintiff to be summoned to his office. When the plaintiff entered his office, he (Mateus) was seated behind his table. litembu was also sitting on a chair. The witness testified that about 10 to 15 officers were in his office then. He then asked the plaintiff why he was beating up “his people”. The plaintiff became emotional and agitated and continued to use vulgar language towards litembu.

[46] Plaintiff then grabbed litembu’s shirt. He ordered the plaintiff to desist from what he was doing and to sit on the floor. The plaintiff obliged and sat down. Mateus further

testified that he instructed litembu to leave his office, who brushed against the plaintiff while walking out. The plaintiff grabbed litembu's left leg, pulled litembu closer to him, and threatened to kill him. At the time, the plaintiff had a grip on litembu's leg close to his private parts. Three correctional officers jumped to litembu's assistance and tried to pull him away from the plaintiff's hold. He testified that officers David Shimbome, Matthews Ingashitula and Simon Utoni intervened and attempted to separate the two inmates but failed despite their specialised training. According to the witness, most of the officials in his office left (or fled), leaving him with only three other officials to assist in separating the plaintiff from litembu, whether these officials that ran away did so in fear or not. The witness testified that the plaintiff had a reputation in the facility of being dangerous and the rumor was that the plaintiff was in the US Marine Corps but he could not say whether these officials that fled from his office did so out of fear or not.

[47] The witness testified that due to the plaintiff failing to let go of litembu, he fetched a tomfa and used it to strike the plaintiff on his hands, arms and back to get him to release litembu from his grip.

[48] The witness testified that the plaintiff, although of small stature, is physically strong, and his hold on litembu endangered the other inmate's life. The witness further testified that he had a duty to protect the life and limb of an inmate if such an inmate is in danger, which he did on this occasion. It is further his testimony that, in his opinion, the assault on the plaintiff was justified in the circumstances and that he used minimum and reasonable force. Finally, he concluded his testimony by stating that he acted in terms of the provisions of the Correctional Services Act 9 of 2012 ("the Correctional Service Act"), its Regulations and the Rules, Standing Orders and Administrative Directives.

[49] The witness conceded during cross-examination that he was found guilty of assault during disciplinary proceedings instituted against him but stated that the Commissioner-General reduced the conviction and penalty imposed. The witness maintained that despite the finding that he used excessive force, the beating of the

plaintiff was proportionate to the situation. The witness remained adamant that he was the only one administering the blows to the plaintiff and submitted that the plaintiff exaggerated the assault. He further testifies that the plaintiff's version of being assaulted by 20 to 30 (or more) officials is not supported by the facts or the injuries sustained.

[50] The witness was extensively questioned on the injuries sustained by the plaintiff. Mr Mateus denied that he hit the plaintiff in the face with the tomfa and testified that a tomfa is manufactured of hard rubber and that if a person is hit in the face with force with a tomfa, he would be injured to the extent that he would not see again. The witness again emphasised that he stood behind the plaintiff and limited the blows to the arms and the back of the plaintiff.

[51] On a question by Mr Kanyemba as to why the plaintiff was not returned to his cell in Echo section upon return from the hospital, the witness testified that the plaintiff was placed in a single cell for his protection and to avoid an escalation of violence in the sections. At the time, there was unrest in the different sections of WCF. The witness further denied that he attempted to conceal the plaintiff's injuries or that he did so to prevent contact with the American Embassy.

*David Shimbome*

[52] Mr Shimbome testified that he is employed as a chief correctional officer in the Namibian Correctional Service with 12 years of service and is stationed at the WCF and has been stationed at the WCF since 2008. It was his testimony that there were unconfirmed reports that the plaintiff was a soldier in America and a trained fighter as an American "marine". He could confirm the truthfulness of this allegation. However, he has observed the plaintiff's physical strength. Mr Shimbome further testified that the plaintiff had disciplinary issues and unruly behaviour and often used derogatory and demeaning language towards other inmates and WCF officials.

[53] The witness confirmed that he was aware of the assault on litembu by the plaintiff and testified that the reason for the assault was that the plaintiff suspected him to be an informer for the WCF authorities and Namibian police.

[54] The witness testified that on the day in question, litembu was punched, causing him to fall, and as a result of the assault, litembu sustained injuries to his face. litembu fled to the Head of Security's office after the plaintiff assaulted him. He was summoned to Matheus's office for an enquiry about the altercation between litembu and the plaintiff. It was his testimony that the plaintiff was called to Matheus' office for questioning over his assault on litembu. Upon his arrival at Matheus' office, he found the plaintiff, litembu and 15 correctional officers in Matheus' office.

[55] The witness testified that he observed that the plaintiff appeared emotional. After a scuffle ensued between the plaintiff and litembu, the plaintiff grabbed hold of litembu. litembu seemed in distress from the plaintiff's grip and cried out loud, and several officers rushed to litembu's assistance but to no avail. Matheus then fetched a rubber security baton from his office cupboard that he used to strike the plaintiff on his body to force him to release litembu. litembu ran out of Matheus' office as soon as the plaintiff let him go. He further testified that, in his opinion, the physical force used on the plaintiff by the officers was justified in the circumstances and was aimed at protecting litembu.

*Kletus Anghuwo*

[56] Mr Anghuwo testified that he is employed as a correctional officer in the Namibian Correctional Service and is stationed at the WCF. He now holds the rank of Superintendent and has 23 years of service. He continued to testify that there was suspicion that litembu was an informer and that he was known for informing the authorities about illegal activities taking place within the facility. It is his testimony that on 13 January 2017, litembu was attacked and physically assaulted by the plaintiff.



[57] The witness testified that during the period 11 to 15 January 2017, there was unrest and tension in the trial awaiting section of the WCF over the discovery of various illegal activities and the discovery of contraband in possession of inmates, and it also gave rise to litembu being assaulted on numerous occasions by other inmates.

[58] Mr Anghuwo testified that he was not present at the time when the plaintiff was summoned to the office of the Head of Security (Mateus) and cannot testify about what transpired in that office.

*Augustinus Matjayi*

[59] Mr Matjayi testified that he had been a registered nurse by profession since 1 February 1990 and had been working at the WCF clinic for eight years at the time of the incident.

[60] The witness testified that on 13 January 2017, he was on standby and was called to the facility at approximately 16h00 by Assistant Commissioner Benhard Kambinda. He was informed that there had been inmate fights that had resulted in the correctional officers having to use force on the plaintiff to subdue him, and the plaintiff had sustained injuries in the process.

[61] The witness testified that he was asked to attend to the facility to render any medical assistance that may be required. He was directed to the single cells in Unit 4, where he found the plaintiff. After enquiring what happened to the plaintiff and listening to him narrating the incident, he conducted a routine medical check on the plaintiff. The witness physically examined the plaintiff and recorded his vital signs, blood pressure, and temperature, amongst other things, in the plaintiff's health passport.

[62] Mr Matjayi testified that it was difficult to physically examine the plaintiff as he appeared to exaggerate the extent of the injuries he had sustained as the plaintiff

wincing every time he was touched. The plaintiff complained of a painful right arm and that he was unable to move his arm. The plaintiff indicated that he could not remove his t-shirt because of his injuries. To examine the plaintiff's body, Mr Matjaji lifted the plaintiff's t-shirt, and when he did so, he observed some bruises on the plaintiff's back. The witness testified that he also observed bruises on the plaintiff's arm, right knee and face. The plaintiff's left eye was swollen, but he observed no bleeding or open wounds.

[63] The witness testified that the injuries were from being hit with a blunt object, like a tomfa. Additionally, the witness testified that, from his observation, the plaintiff had sustained several bruises. Still, all the bruises appeared superficial and were mainly on the upper part of the plaintiff's body and shoulder area.

[64] The witness testified that he believed the plaintiff would need further examination and x-rays because of his complaint that he could not move his arm. However, as the WCF clinic was not equipped with the necessary equipment, it was required to refer the plaintiff to the Katutura State Hospital for further treatment and to determine if the plaintiff had sustained any fractures.

[65] The plaintiff was returned to the WCF that same night. His arm was in a sling. There were no further instructions from the medical practitioner who treated the plaintiff that he should be monitored upon his return to the correctional facility.

[66] The witness testified that the medical personnel of Katutura State Hospital found no fractures on the plaintiff, and the observations made regarding the plaintiff's condition were in line with his initial assessment of the plaintiff's injuries.

#### Plaintiff's submissions

[67] Mr Kanyemba submitted that the assault perpetrated on the plaintiff by the defendants was unnecessary and unreasonable and disagreed that the assault and

force used in the circumstances were reasonable and resultantly justified. In this instance, the parties' versions are mutually destructive, as is evident from the pleadings and evidence led during the trial. He further submitted that the plaintiff's version is true and acceptable, and the defendants' version is false and must be rejected.

[68] Mr Kanyemba continued to submit that because of the assault on the plaintiff, he sustained severe pain and bruises on his back, chest and arms, so severe that the resident nurse at the correctional facility recommended that the plaintiff be transferred to the Katutura State Hospital to undergo specific and extensive medical examination. Furthermore, the extent of the injuries sustained by the plaintiff have further been demonstrated by the pictures of the plaintiff, which were discovered by the parties in this matter.

[69] Counsel referred the court to the matter of *Lopez v Minister of Health and Social Service*,<sup>1</sup> where Parker AJ postulated the general principle that a successful plaintiff is entitled to be compensated for the loss suffered but is not entitled to profit from the loss. He also cited *Sheefeni v Council of the Municipality of Windhoek*,<sup>2</sup> wherein assault was perpetrated by the council's city police officials. The Plaintiff was pulled forcefully and violently from the taxi he was driving, slapped, kicked and punched, and his head pushed to the curb of a street in Windhoek by City Police officials who were on patrol, and in the process, he hit his head against the curb. Mr Sheefeni was awarded N\$50 000. It is counsel's submission that the *Sheefeni* matter would assist the court in assessing the damages suffered by the plaintiff, notwithstanding how the assault occurred.

#### Defendants' submissions

[70] Mr Khupe submitted that the plaintiff has the onus of proving his claim on a balance of probabilities, but the plaintiff has failed to do so, and the court should dismiss his claim with costs. Mr Khupe further submitted that the plaintiff's damages claim

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<sup>1</sup> *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) paras 39-46.

<sup>2</sup> *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

based on the alleged violation of his constitutional rights (constitutional damages) is misplaced whilst he ought to have based his claim on damages in delict (common law). Mr Khupe contended that the constitutional damages claim is inappropriate as the court does not lightly grant constitutional damages where a litigant has the same remedies available under common law.

[71] Mr Khupe further submitted that the parties have two mutually destructive versions, and the credibility of either party's version is critical in the court's determination of the civil action. In his view, the defendants' version is credible and should be preferred by the court to that of the plaintiff.

[72] In support of his contention, Mr Khupe submitted that the overall evidence presented to the court during the trial supports the defendants' version of events and the defendants' case as presented in their plea and not the version of the plaintiff as presented in his particulars of claim.

#### Issue for determination

[73] The issues to be decided are not whether the plaintiff was assaulted but rather whether it was justified and whether the defendants should be held liable for the damages suffered by the plaintiff as a result of the alleged assault, and whether the plaintiff is entitled to damages in the amount of N\$500 000.

#### Burden of proof

[74] It is trite law that he who alleges bears the burden of proof of such allegation on a balance of probabilities to sustain his claim.

[75] Ueitele J in *Mouton v Mouton*,<sup>3</sup> said the following regarding the test applicable to delictual claims based on assault:

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<sup>3</sup> *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) para 30.

[30] In the unreported judgment of *Lubilo and Others v Minister of Safety and Security*,<sup>4</sup> this Court 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.<sup>5</sup>

### Mutually destructive versions

[76] It is common cause that the plaintiff was assaulted, and I can find that with confidence. However, there is a disagreement between the parties as to who perpetrated the assault, what the extent of the assault was and whether it was justified or not. In this regard, the versions of the plaintiff and defendants are indeed mutually destructive. When faced with mutually destructive versions, the court will weigh up and test the plaintiff's allegations against general probabilities.

[77] Both parties referred the court to the oft-quoted dictum of Eksteen AJP (as he then was) in *National Employers General Insurance Co. Ltd v Jagers*:<sup>6</sup>

' [W]here the onus rests on the plaintiff . . . and where there are mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities 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. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the

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<sup>4</sup> *Lubilo and Others v Minister of Safety and Security* (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

<sup>5</sup> *Mabaso v Felix* 1981 (3) SA 865 (A).

<sup>6</sup> *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G. See also inter alia *Burgers Equipment and Spares Okahandja CC v Aloisius Nepolo t/a Double Power Technical Services* (SA 9/2015) delivered on 17 October 2018 at par 112.

probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[78] In *Koolike Consultancy CC v Benguela Current Commission*,<sup>7</sup> Ueitele J referred to the matter of *Motor Vehicle Accidents Fund v Lukatezi Kulubone*,<sup>8</sup> wherein Mtambanengwe JA adopted the approach by MacKenna J, in determining which of two conflicting versions to believe. The learned Mtambanengwe JA stated as follows:

'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help. This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.' (My emphasis)

[79] I intent to take the direction from what Mtambanengwe JA said when evaluating the evidence of the witnesses hereunder.

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<sup>7</sup> *Koolike Consultancy CC v Benguela Current Commission* (HC-MD-CIV-ACT-CON-2020/01354) [2023] NAHCMD 182 (11 April 2023).

<sup>8</sup> *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 40 para 51.

### Evaluation of the evidence

[80] It is the evidence of the plaintiff that he was subjected to a violent assault at the hand of 30 to 35 correctional officials. The defendants' counter-evidence is that there were initially 10 to 15 officials in Mateus' office, of which the majority ran away when things started to reach boiling point in his office.

[81] The plaintiff testified that although he could not say the exact number of blows and kicks received, it counted into the hundreds. The opposing evidence by Mateus is that he hit the plaintiff with the tomfa on his body and arms until he released litembu.

[82] During cross-examination, Mr Khupe enquired from the plaintiff what the size of Mr Mateus's office was, and according to the plaintiff's estimations, the office size is 10 x 5m. I then invited the plaintiff to explain to the court how, in an office of approximately 10 x 5m, 35 correctional officers would fit in and how these officials would have room to assault him if he (the plaintiff) was on the ground on his knees curled into himself to protect his face and the front of his body. The plaintiff's response thereto was that he might be mistaken in respect of the number of officials present.

[83] It was important to this court to understand how so many adult males could fit into such a small space and assault the plaintiff with batons/tomfas without hitting one another. Once the plaintiff demonstrated his proposition to the court, he realised how improbable his numbers were. The version of the plaintiff in this regard is implausible in my view. The evidence is inconsistent in respect of the exact number of officials in the office, however, the version of the defendants appears to be more probable given the size of the office of the third defendant. In this regard, I must also point out that the uncontradicted evidence of Mr Mateus is that there are not 35 tomfas in the WCF. He testified that the facility only had 14 tomfas, of which one was kept in his office, three at Echo section, four at the maximum unit and six at the medium unit.

[84] The plaintiff testified that he was kicked repeatedly in the face. The plaintiff testified that during one bout of assault, he was hit approximately 100 times and kicked in the face the same number of times.

[85] In this regard, it is critical to consider the evidence of the nurse and the medical practitioner who examined the plaintiff. Both these gentlemen testified that the plaintiff was severely assaulted, but all the injuries were superficial. The plaintiff's skin was not broken, although his body had clear bruises. The bruises were concentrated on the plaintiff's back and arms.

[86] The court had the benefit of considering the photographs taken of the plaintiff's injuries, and there were red welts on the plaintiff's back and right arm. These marks are clear and stand out, so much so that they can be counted if one is inclined. There is also a swelling under the left eye of the plaintiff.

[87] Dr Hamupembe is the only independent witness in this matter, and his findings on the night of the examination and his evidence in respect of the nature of the injuries observed is not aligned with the magnitude of the assault alleged by the plaintiff.

[88] Mr Matjayi saw the plaintiff shortly after the assault, and his observations were similar to that of Dr Hamupembe.

[89] For some reason, the plaintiff regarded it necessary to exaggerate the number of officials in Mateus' office and the extent of the beating. However, the undisputed evidence by Mateus is that if one applies force with a tomfa to an inanimate object like a wooden witness stand, it will break the wood.



[90] Suppose the assault on the plaintiff persisted for the time and with the intensity that the plaintiff alleges, I am confident he would have suffered multiple fractures, open wounds and a concussion, or even worse.

[91] The evidence presented on behalf of the defendants was that the plaintiff had an issue with discipline in the facility to the extent that he was described as a security risk, and it appears that the plaintiff wanted to make out a case that he was beaten to within an inch of his life to teach him a lesson.

[92] In my view, the defendant's version of what happened in Mateus' office is the more probable one. litembu, the bane of the plaintiff's existence, was in Mateus's office complaining about the earlier incident when the plaintiff was brought in. The plaintiff was already agitated and it is possible that litembu did more than brush past the plaintiff when he walked out and that it aggravated the plaintiff even more, causing him to grab litembu in some form of a choke hold and did not want to release his grip, giving rise to the beating that followed.

[93] With the greatest deference to the plaintiff, he only compromised his credibility by exaggerating what happened on the day in question. The plaintiff was his own worst enemy during his evidence by exaggerating facts that are largely common cause (specifically that the third defendant beaten the plaintiff).

[94] I do not doubt that the plaintiff was hit repeatedly with a tomfa. It is common cause. I am further satisfied that this beating was executed by the third defendant only. There is no evidence to support the plaintiff's evidence that other officials also beat him. The plaintiff cited the fourth to the seventh respondent but failed to make out a case against these defendants. It is unclear if they were in the head of security's office.

[95] The question to consider is, thus, if the beating executed by Mateus was justified or not. I must, without hesitation, say that it was not warranted. It is the evidence of

Mateus that the officials that remained with him in his office were officials that received specialised training for circumstances such as the one that played out in his office.

[96] This court finds it hard to believe that the correctional officers who remained in the office could not break the hold of the plaintiff on litembu and that it was necessary to repeatedly hit the plaintiff with a tomfa, which the third defendant knew could cause serious injury. I believe that the assault on the plaintiff was excessive and that the plaintiff could have been subdued with minimal force.

### Discussion

[97] The court in *Lubilo and Others v Minister of Safety and Security*<sup>9</sup> stated that an assault violates a person's bodily integrity and that every infringement of the physical integrity of another is prima facie unlawful.

[98] By the defendants' concession, the plaintiff was beaten with a tomfa over his back, arms and legs, resulting in substantial bruising and discomfort. I do not doubt that the plaintiff's physical pain emanated from the assault by the third defendant, Mateus.

[99] It is further common cause that Mr Mateus was found guilty at a disciplinary hearing following the assault.

[100] On the totality of the evidence, I find that an assault was perpetrated on the plaintiff by the third defendant whilst acting in the course and within the scope of his employment with the first defendant.

### Damages

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<sup>9</sup> *Lubilo and Others v Minister of Safety and Security* (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

[101] On 20 February 2023, I directed the parties to file supplementary heads of arguments on the issue of quantum on or before 31 March 2023. However, only the plaintiff filed heads on this issue. The defendants' counsel failed to file supplementary heads of argument. I take this opportunity to express my disappointment in this regard.

[102] In his particulars of claim, the plaintiff claims monetary compensation in the amount of N\$1 100 000. However, as stated earlier in this judgment, Mr Kanyemba indicated that the plaintiff does not persist with his initial claim amount and apparently no longer persists with constitutional damages either. I will, therefore, not address the latter issue any further.

[103] I must further point out that the plaintiff's legal practitioner does not take the relief sought for emotional and post-traumatic stress any further. There is in any event no evidence in this regard before this court.

#### *Contumelia*

[104] The plaintiff's claim has been modified to N\$500 000, consisting of a) pain and suffering and b) contumelia. Contumelia is awarded for a direct and serious invasion of the plaintiff's bodily integrity and personal dignity. These damages should not be confused with damages for mental pain or anguish or psychological illness and its consequences. The plaintiff, for the first time in his supplementary heads of argument, attempted to make out a case for contumelia.

[105] I am, however, not convinced from the evidence presented that a case of damages for *contumelia* has been made out.

#### *General damages*

[106] In the matter of *Sandler v Wholesale & Coal Supplies Ltd*<sup>10</sup> Watermeyer JA said the following:

‘. . . . The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge’s view of what is fair in all circumstances of the case.’

[107] In determining the quantum of damages, especially general damages, the court seeks aid in awards granted in comparable cases. However, in doing so, the court must always consider each case’s circumstances and make a discretionary finding that it deems reasonable.<sup>11</sup>

#### *Comparable awards*

[108] Damaseb JP in *Ndeitunga v Kavaongelwa*<sup>12</sup> states that the court has a wide discretion regarding quantum, to be exercised judicially and is guided by comparable awards in previous cases.

[109] In *Haufiku v The Minister of Home Affairs, Immigration, Safety and Security*,<sup>13</sup> the court awarded the amount of N\$50 000 in an instance where excessive force was used to close a cell door which hit the plaintiff’s leg resulting in swelling and bruising.

[110] In *Sheefeni v Council of the Municipality of Windhoek*,<sup>14</sup> the plaintiff was forcefully removed from a taxi, slapped, kicked and punched, and his head was hit against the

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<sup>10</sup> *Sandler v Wholesale & Coal Supplies Ltd* 1941 AD 194 at 199.

<sup>11</sup> *Kleophas v Minister of Safety and Security & Others* (HC-MD-CIV-ACT-DEL-2019/01902) [2021] NAHCMD 419 (19 August 2021) at para 32.

<sup>12</sup> *Ndeitunga v Kavaongelwa* (I 3967/2009 ) [2012] NAHC 319 (27 November 2012) para 106.

<sup>13</sup> *Haufiku v The Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-OTH-2021/03665) [2022] NAHCMD 689 (19 December 2022).

<sup>14</sup> *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

curb of a street. As a result, the plaintiff was awarded damages in the amount of N\$50 000.

[111] In *Cloete v Minister of Safety and Security*,<sup>15</sup> the plaintiff was awarded damages in the amount of N\$50 000 for being kicked by a police officer and unlawfully arrested.

[112] In *Sullivan v Government of the Republic of Namibia*,<sup>16</sup> the plaintiff was awarded damages in the amount of N\$25 000 for whipping and slapping the plaintiff.

[113] In *Mulike v Minister of Home Affairs, Immigration, Safety and Security*,<sup>17</sup> the plaintiff was awarded damages of N\$40 000 after he was hit with a fist on the mouth and sustained injuries leading to one of his teeth being loose and extracted.

[114] Having considered the cases above, it is clear that our courts only, in exceptional circumstances, award damages above N\$100 000. Some of these exceptions are:

a) *Gabrielsen v Crown Security*,<sup>18</sup> the plaintiff was awarded N\$600 000 for *contumelia* and pain and suffering after he was shot around the chest area, and the injury had reduced him to a paraplegic.

b) *Mouton v Mouton*,<sup>19</sup> the plaintiff was awarded N\$100 000 in respect of shock, pain and suffering and *contumelia* as the plaintiff was head-butted and injured on his left eye. He suffered an orbit fracture that resulted in a permanent reduction of his vision.

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<sup>15</sup> *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] NAHCMD 523 (12 November 2021).

<sup>16</sup> *Sullivan v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2020/01020) [2021] NAHCMD 439 (31 August 2021).

<sup>17</sup> *Mulike v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-DEL- 5065 of 2020) [2022] NAHCMD 244 (13 June 2022).

<sup>18</sup> *Gabrielsen v Crown Security CC* (I 563/2007) [2013] NAHCMD 124 (13 May 2013).

<sup>19</sup> *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021).

c) *Hailaula v The Minister of Safety and Security*,<sup>20</sup> the plaintiff was awarded N\$100 000 as the plaintiff suffered conductive hearing loss due to assault.

d) *Owoses v Government of the Republic of Namibia*,<sup>21</sup> the plaintiff was awarded N\$145 000 as the plaintiff was hit with the butt of a rifle and was diagnosed with post-traumatic stress disorder.

[115] In the current instance, the plaintiff was examined by a nurse from the facility and a medical doctor. Dr Hamupembe did not regard the injuries of the plaintiff of such a nature to admit him to the hospital and found that the injuries were superficial. Accordingly, no follow-up treatment was required.

### Conclusion

[116] 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. Accordingly, in my analysis of the facts of this matter, an award in the amount of N\$50 000 is justified.

[117] My order is as follows:

The court grants judgment in favor of the plaintiff against the first and third defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of N\$50 000;
2. Interest on the above-mentioned amount at the rate of 20% per annum from the date of judgment to the date of final payment;

<sup>20</sup> *Hailaula v The Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2019/00926) [2021] NAHCMD 92 (26 February 2021).

<sup>21</sup> *Owoses v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL- 1723 of 2020) [2022] NAHCMD 484 (15 September 2022).

3. No order as to costs;
4. The matter is finalised and removed from the roll.

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JS Prinsloo  
Judge

Appearances:

For the plaintiff:

S Kanyemba  
Of Salomon Kanyemba legal practitioners  
Instructed by the Directorate of Legal Aid  
Windhoek

For the defendants:

M Khupe  
Of Office of the Government Attorneys  
Windhoek