REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: 1662/2008

MLANDELI DICKSON YANTA Plaintiff

And

MINISTER OF SAFETY AND SECURITY Defendant

Coram: **Chetty J**

Date Heard: **5 June 2013**

Date Delivered: **18 June 2013**

Summary: ***DELICT*** *– Negligence – Whether failure to conduct a cavity search of an arrestee constitutes negligent conduct – Fundamental rights – Right to privacy, dignity and bodily integrity – Negligence not established*

JUDGMENT

Chetty, J

Introduction

[1] The plaintiff, the father of *Melikhaya Samson Yanta* (the deceased), was appointed as the executor of the deceased's estate by the Master of the High Court, Bhisho on 8 May 2008. In July 2008, he instituted an action for damages against the defendant, premised upon the alleged wrongful deprivation of support and maintenance which he and the deceased's siblings allegedly received and would have continued to receive from the deceased had it not been for his untimely demise whilst incarcerated at the Fort Beaufort Police station. The defendant's liability, he contended, arose from the negligence of servants of the defendant in failing to conduct a proper search of the deceased's murderer, one *Vuyane Qhalo* (*Qhalo*), prior to his incarceration in the cell occupied by the deceased. In its plea, the defendant, whilst admitting that the deceased had been knifed to death by *Qhalo*, refuted the allegation that its servants had not conducted a proper search of *Qhalo* prior to his admission to the cell. It pleaded that subsequent investigations, notably an admission by *Qhalo* that he had secreted the murder weapon into his anus, prior to his arrest, precluded its detection during *Qhalo's* physical search.

The stated case

[2] The matter comes before me as a stated case for adjudication in terms of Rule 33 of the Uniform Rules of Court, the agreed facts, formulated as follows: –

"6. On 25th April 2008 and whilst being held in detention in the Police cells at the Fort Beaufort Community Service Centre in Fort Beaufort, Eastern Cape Province, the deceased was stabbed, with the aid of a knife, in the left side of his chest by VUYANE QHALO (hereinafter referred to as "QHALO"), who had been detained in the same Police cell as the deceased on the grounds of assault with intent to commit grievous bodily harm.

7. Prior to admitting QHALO to the same Police cell in which the deceased was detained, QHALO had been subjected to standard external bodily searches, which included his four limbs, the trunk of his body and his clothing, including his shoes, by members of the South African Police Services upon his arrest and subsequently at the premises of the Fort Beaufort Community Service Centre.

8. The members of the South African Police Services who arrested QHALO and who processed his detention in the Fort Beaufort Community Service Centre did not conduct a physical cavity search of QHALO's body prior to his arrest and subsequent detention.

9. No metal detector was available to members of the South African Police Services employed at the Fort Beaufort Community Service Centre at the time of the arrest and detention of QHALO.

10. Subsequent to the incident of stabbing the deceased, QHALO admitted that he had concealed a knife inside his anus prior to his arrest, which knife was used by QHALO to stab the deceased.

11. The knife which had been inserted by QHALO into his anus was not detected by the members of the South Africa Police Services who arrested him or the members of the South African Police Services who processed his detention in the Fort Beaufort Community Service Centre subsequent to conducting a physical search of his body.

12. At all times material hereto the members of the South African Police Services who searched, arrested and detained QHALO acted within the course and scope of their employment with Defendant and Defendant would be vicariously liable for any negligence established on the part of such employees in respect of the death of the deceased."

The legal issue

[3] The question of law which falls for decision has been framed thus: -

"13.1 were members of the South African Police Services stationed at the Fort Beaufort Community Service Centre causally negligent in respect of the death of the deceased in:

13.1.1 not conducting a physical cavity search of QHALO's body, particularly his anus; and/or

13.1.2 not making use of a metal detector in conducting the physical search of QHALO's body prior to his detention."

[4] Although the aforegoing summary of the pleadings and reproduction of the statement of agreed facts adds to the prolixity of the judgment, I have been constrained to incorporate it herein by reason of a rather gracious invitation extended by Mr *Cole*, for the plaintiff, to not limit the legal enquiry to the grounds of negligence relied upon, but to consider alternative measures which servants of the defendant could have considered implementing to obviate harm befalling the deceased. Counsel's request must however be declined. The matter falls for adjudication strictly within the parameters of the pleadings and the stated case.

[5] In delictual actions premised upon negligence, the legal position is trite. It was expressed by Holmes JA in ***Kruger v Coetzee***[1] as follows: -

> **"For the purposes of liability *culpa* arises if -**
> ***(a)*** **a *diligens paterfamilias* in the position of the defendant -**
> **(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and**
> **(ii) would take reasonable steps to guard against such occurrence; and**

[1] 1966 (2) SA 428 (A) at 430E-G

(b) **the defendant failed to take such steps."**

[6] As adumbrated hereinbefore, it is not in dispute that *Qhalo* had been thoroughly searched prior to his confinement in the police cell. Section 23 of the ***Criminal Procedure Act***[2] specifically authorized such a search. In similar vein, section 4 of the Police Standing Order (G) 341, under the rubric, ***"Search of the arrested person"*** obligates a police official to conduct a search of an arrested person. It provides as follows: -

> "(4) Search of the arrested person
> In terms of section 23 of the Criminal Procedure Act, 1977, a member may search an arrested person. The purpose of such a search is twofold, namely to find any article that may be in such person's possession and which could be used as evidence, and to find any article which such person could use to injure himself or herself or any other person.
> (a) Every arrested person must always, immediately upon his or her arrest, at least be searched to determine whether he or she has any concealed weapons on him or her.
>
> (b) The search of an arrested person must be undertaken in a decent manner which displays respect for the inherent dignity of the person as required by section 29 of the Criminal Procedure Act, 1977, and a person may only be searched by a person of the same gender."

[2] Act No 51 of 1977

It will be gleaned from the aforegoing that any search must be conducted in a manner that does not infringe an arrestee's fundamental rights.

Did the failure to conduct a cavity search constitute negligence?

[7] Finding succor in what he contended was a widely documented, ingenious practice devised by the criminal class, of concealing contraband and other paraphernalia within their bodily cavities, Mr *Cole* submitted that the police were negligent in not subjecting *Qhalo* to a cavity search prior to his incarceration in the cell. Leaving aside for the moment the question whether a court can take judicial notice of such a practice, which I very much doubt, any such search constitutes an infringement, not only of an arrestee's right to privacy but moreover to dignity and bodily integrity. In my judgment, a cavity search would only be justified where an arresting officer has reasonable cause for believing that an arrestee was concealing evidence. Given the admitted facts, it is untenable to suggest that the police should have foreseen the possibility that *Qhalo* had secreted the weapon in his anus. There is no suggestion whatever that the routine pat down search, revealed that *Qhalo* may have concealed a knife within his anus.

[8] Although I have been unable to locate any South African case law directly on point, useful guidance can be found in the Canadian Supreme Court matter of

Golden v R[3], where the majority, per **Iacobucci** and **Arbour** JJ, said the following: -

> "[92] The second requirement before a strip-search incident to arrest may be performed is that the search must be incident to the arrest. What this means is that the search must be related to the reasons for the arrest itself. As expressed by Lamer CJ in R v Caslake [1998] 1 SCR 51 at [17], a search 'is only justifiable if the purpose of the search is related to the purpose of the arrest'. In the present case, the strip-search was related to the purpose of the arrest. The arrest was for drug trafficking and the purpose of the search was to discover illegal drugs secreted on the appellant's person. Had the appellant been arrested for a different reason such as for a traffic violation, the common law would not have conferred on the police the authority to conduct a strip-search for drugs, even if the police had knowledge of previous involvement in drug related offences, since the reason for the search would have been unrelated to the purpose of the arrest. In the circumstances of the present case, we conclude that the search was conducted incident to the arrest.
>
> [93] The reasonableness of a search for evidence is governed by the need to preserve the evidence and to prevent its disposal by the arrestee. When arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip-search, the risk of disposal must be reasonably assessed in the circumstances. For instance, in the present case, it was suggested that the appellant might have dropped the drugs on the sidewalk or in the police cruiser on the way to the station and that it was therefore necessary to search him in the field. As we discuss below, however, the risk of his disposing of the evidence on the way to the police station was low and, had the evidence

[3] [2002] 3 LRC 803

been dropped in the police cruiser on the way to the station, circumstantial evidence could easily link it back to the accused.

[94] In addition to searching for evidence related to the reason for the arrest, the common law also authorises police to search for weapons as an incident to arrest for the purpose of ensuring the safety of the police, the detainee and other persons. However, a 'frisk' or 'pat down' search at the point of arrest will generally suffice for purposes of determining if the accused had secreted weapons on his person. Only if the frisk search reveals a possible weapon secreted on the detainee's person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee's person will a strip-search be justified. Whether searching for evidence or for weapons, the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip-search.

[95] The requirement that a strip-search be for evidence related to the grounds for the arrest or for weapons reflects the twin rationales for the common law power of search incident to arrest. Strip searches cannot be carried out as a matter of routine police department policy applicable to all arrestees whether they are arrested for impaired driving, public drunkenness, shoplifting or trafficking in narcotics. The fact that a strip-search is conducted as a matter of routine policy and is carried out in a reasonable manner does not render the search reasonable within the meaning of s 8 of the Charter. A strip-search will always be unreasonable if it is carried out abusively or for the purpose of humiliating or punishing the arrestee. Yet a 'routine' strip-search carried out in good faith and without violence will also violate s 8 where there is no compelling reason for performing a strip-search in the circumstances of the arrest.

> [96] It may be useful to distinguish between strip-searches immediately incidental to arrest and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment. However, this is not the situation in the present case. The type of searching that may be appropriate before an individual is integrated into the prison population cannot be used as a means of justifying extensive strip-searches on the street or routine strip-searches of individuals who are detained briefly by police, such as intoxicated individuals held overnight in police cells: R v Toulouse [1994] OJ no 2746 (QL).” (Emphasis supplied)

[9] The clarity of the court’s reasoning obviates the need for any additional comment, save to say, that I agree fully with the approach adopted by the learned judges. It is evident from the aforegoing extracts of the judgment that the common denominator in both the Canadian and our own jurisprudence is the requirement of reasonableness. In *casu*, the pat down search yielded no positive results and there was consequently no need for the police to take any additional precautions prior to incarcerating *Qhalo* in the cell. On the admitted facts, it was not reasonably foreseeable that *Qhalo* had secreted the knife within his body cavity. The fact that a metal detector was not used cannot *per se* constitute negligence. There was no metal detector available at the police station. In the result the following order will issue: -

The plaintiff’s claim is dismissed with costs.

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D. CHETTY

JUDGE OF THE HIGH COURT

Appearance:

For the plaintiff:	Adv S.H Cole
Instructed by	Milli Attorneys
	Eskom Building, 110 High Street
	Grahamstown

Ref: Mr Milli
Tel: (046) 622 7076

For the defendant:	Adv R.W.N Brooks
Instructed by	Whitesides Attorneys
	53 African Street
	Grahamstown
	Ref: Mr Barrow
	Tel: (046) 622 3546