IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 1342/2009
Date Heard: 24 February 2012
Date Delivered: 28 February 2012
REPORTABLE

In the matter between:

MOEGAMAT FATIEG JAFTHA Plaintiff

and

THE HONOURABLE MINISTER OF CORRECTIONAL SERVICES Defendant

JUDGMENT

GOOSEN, J:

[1] The plaintiff, a prisoner, sued the defendant for damages sustained when he was attacked by a fellow inmate in the prison hospital at St. Albans Prison, Port Elizabeth. The plaintiff sustained a severe cut with a surgical scalpel resulting in a wound to his face from the left temporal region down to his jaw line.

[2] At the outset of the trial the parties sought an order, in terms of rule 33(4) of the Rules, separating the determination of the issue of liability from that of the quantum of damages that may have been suffered. A separation of issues was ordered and the matter proceeded solely on the merits.

[3] The issues at trial on the merits were narrowly confined to the question as to whether negligence on the part of the defendant's employees, the relevant prison warders and/or other staff, was established. On the pleadings it was admitted that on 16 May 2007 the plaintiff had been attacked and cut by a fellow prisoner; that the cut was administered using a surgical scalpel blade; and that the attack had occurred in the prison hospital at a time when the assailant was undergoing medical treatment. It was also admitted that the defendant owed to the plaintiff a duty of care to ensure the plaintiff's safe custody, physical and psychological integrity. The defendant denied that it had breached this duty of care and pleaded that all reasonable steps had been taken to ensure the safe custody of the plaintiff.

[4] The facts giving rise to the plaintiff's claim are common cause or were not placed in dispute. The defendant led no evidence to contradict the evidence of the plaintiff having closed its case without calling any witnesses.

[5] On the morning of 16 May 2007 at approximately 6 am and whilst the prisoners were being subjected to an early morning head count and inspection, a fight had broken out between the plaintiff and a fellow prisoner, one Mshiya. What gave rise to the fight or who initiated it was not addressed in the evidence. What was explained is that the plaintiff had struck Mshiya on the head with a lock causing him to suffer an injury to the head. Prison warders on duty intervened and separated the men. According to the plaintiff both he and Mshiya were assaulted by the warders and were thereafter subjected to a strip-search. The lock with which the plaintiff assaulted Mshiya was confiscated. No other weapons were found.

[6] The plaintiff and Mshiya were then ordered to be taken to the single cells. They collected their clothes from the communal cell in which they were then being held, and were escorted to the single cells. According to the plaintiff only one prison warder accompanied them to the single cells section. To get there involved a short walk of a few minutes in which they had to go up to another level in the prison building. When they arrived at the single cells section there was no warder on duty at the section. The warder who was escorting the prisoners, a Mr Ntanga, then took both the plaintiff and Mshiya to the hospital section because Mshiya required treatment to the wound to his head. The plaintiff did not require any medical treatment. All the while, according to the plaintiff's undisputed testimony, both he and Mshiya were only under the guard of Mr Ntanga.

[7] The hospital section is apparently secured by a section door and a locked gate. Between the section door and the gate there is a waiting room facility in which prisoners who are awaiting treatment can be securely held. Inside the locked gate of the hospital section there are offices and a number of treatment rooms. The hospital section is usually staffed by two or three nurses as well as cleaning staff.

[8] On arrival at the hospital section both the plaintiff and Mshiya were taken through the locked gate. Warder Ntanga handed over Mshiya to a Nurse Mama who was then on duty. Mshiya and Nurse Mama went into one of the treatment rooms. The plaintiff was made to sit on a bench in the passage outside of the treatment room whilst Ntanga stood in the passage. The plaintiff and Ntanga were talking to one another whilst Mshiya received treatment. According to the plaintiff there were two cleaners in the

facility as well as warder Kama who was on duty at the gate. Nurse Mama and Mshiya were alone in the treatment room.

[9] The plaintiff also testified that he was at some stage taken back to the single cells section whilst Mshiya was undergoing treatment. Upon arriving there they met a warder Mthathi who said that they must return to the hospital, which they did. The plaintiff was again made to sit on a bench in the passage outside of the treatment room. Warder Mthathi went into one of the offices nearby.

[10] At a certain stage Mshiya came out of the treatment room and, according to the plaintiff, went into the office where warder Mthathi was present. The plaintiff had his back turned towards that office. Whilst sitting there he felt someone touch his face and when he turned to look up he saw Mshiya and that he had a blade in his hand. He put his hand up to his face and when he drew it away saw blood on his hand. Warder Ntanga grabbed hold of Mshiya and the plaintiff fled into the treatment room where the nurse expressed shock at the wound to his face. According to the plaintiff when he looked back out of the room he saw the warders, now including warder Mthathi, assaulting Mshiya.

[11] The plaintiff was thereafter treated for the wound to his face, a 17 cm long slash from his left temporal region down to his jaw line.

[12] The plaintiff also led the evidence of Nurse Mama, the nurse who had treated Mshiya on the day in question. At the time of the incident she was employed as a nurse

at the St. Albans Prison hospital. She has since been transferred to the East London Prison.

[13] She confirmed that Mshiya had been brought to the hospital section by warder Ntanga. She did not see whether the plaintiff was in the company of warder Mthathi. She only saw warder Mthathi after the attack on the plaintiff. According to her it is standard procedure for a warder to be present in the treatment room when a prisoner is receiving treatment. This is so as to ensure the safety of the nursing staff. On this occasion there was no warder present.

[14] She explained that the wound to Mshiya's head required suturing. To do this she needed to shave off some of his hair. Mshiya was apparently angered by this because he did not want his dreadlocks removed. After explaining to him the need to do so she shaved his hair using a surgical scalpel blade. The blade was kept on an instrument tray in front of her and very close to the prisoner. After using the scalpel blade she replaced it on the tray. She then proceeded to treat the wound, presumably by suturing it. She was not yet finished with the treatment when Mshiya stood up and left the treatment room. She called out to him but he ignored her. As he left the treatment room he attacked the plaintiff who was outside the room.

[15] It was put to the plaintiff in cross-examination that he and Mshiya were at all times accompanied by two warders, namely Ntanga and Mthathi. It was also put that the reason why the plaintiff had been taken to the hospital was because of a procedural requirement that an inmate could only be admitted to the single cells after a medical examination had been conducted. Certain aspects of the plaintiff's description of the

sequence of events immediately prior to the attack were also placed in issue. Nothing in my view however turns on this. No evidence was led to contradict the version of events presented by the plaintiff.

[16] The undisputed facts establish that Mshiya was treated by Nurse Mama without there being a prison warder present to guard the prisoner whilst under treatment. The facts also establish, on the probabilities, that the surgical blade used by Mshiya to attack the plaintiff was acquired by him during the treatment he received. It will be recalled that immediately after the fight both plaintiff and Mshiya were searched and no weapons were found in Mshiya's possession. On the evidence presented the plaintiff was not undergoing any examination such as regulations may have required as a precursor to confinement in a single cell and that he was, at the time of the attack, in the passage immediately outside of the treatment room.

[17] The question that falls to be answered is whether these facts establish negligence on the part of the defendant's employees.

[18] The approach to this question has recently been succinctly stated by Nugent, JA in *Minister of Safety & Security v Van Duivenboden* 2002(6) SA 431 (SCA) at paragraph 12, in the following terms:

> "Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also

> culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it."
>
> (Footnotes omitted)

[19] In this instance the defendant has conceded that it is under a legal duty to ensure the safe custody of the plaintiff. It is accordingly necessary only to determine whether the harm that eventuated in the form of the attack upon the plaintiff by Mshiya was reasonably foreseeable and whether, in the circumstances, the defendant's employees had taken reasonable measures to avert such foreseeable harm.

[20] In *McIntosh v Premier, Kwazulu Natal & Another* 2008(6) SA 1 (SCA) the following was said at paragraph 12:

> "As is apparent from the much quoted dictum of Holmes, JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at 430 E – F, the issue of negligence itself involves a two-fold enquiry. The first is: was the harm reasonably foreseeable? The second is: would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second enquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the enquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty."

[21] In *Mukheiber v Raath & Another* 1999(3) SA 1065 (SCA) the well known test formulated in *Kruger v Coetzee* 1966(2) SA 428 (A), was reformulated (at 1077 E – F) in the following terms:

> "For the purposes of liability *culpa* arises if –
> (a) A reasonable person in the position of the defendant –
> (i) would have foreseen harm of the general kind that actually occurred;
> (ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) The defendant failed to take those steps."

[22] The approach to determining foreseeability of harm involves a careful appraisal of the particular facts and circumstances of the matter, to determine whether having regard to those circumstances a reasonable person in the position of the defendant would have foreseen the potential for harm. *Joffe & Company Ltd v Hoskins and Another*; *Jolfe & Company Ltd v Banamour N.O and Another* 1941 (AD) 431 at 451.

[23] It is not necessary that the plaintiff should establish that the manner in which the harm occurred ought to have been foreseen nor even that the degree or extent of the harm caused be foreseen. *Kruger v Van Der Merwe* 1966(2) SA 266 (A) at 272 F.

[24] Mr *Potgieter*, who appeared for the defendant, argued that the attack on the plaintiff was not reasonably foreseeable and that the plaintiff's claim should be dismissed on this basis. In support of these submissions Mr *Potgieter* argued that the fight that had occurred between the plaintiff and Mshiya earlier that morning was over and that the two prisoners had been in company together from when they were taken from the communal cell to the single cell facility and thereafter to the hospital. At no stage had it appeared that either party wanted to continue the fight. This the plaintiff had conceded. It was therefore submitted that the warders had no reason to believe that Mshiya would launch any attack on the plaintiff.

[25] These submissions lose sight of the following facts. It is common cause that the warders responded to the fight between the plaintiff and Mshiya by taking two important actions. The first was to strip-search both the plaintiff and Mshiya to ensure that neither was in possession of a weapon. The clear purpose of so doing was to ensure that there was no risk that either of the two of them could, should an altercation occur or continue, inflict serious harm on the other. The second action involved taking both the plaintiff and Mshiya to the single cell facility so that they could be detained there in single holding cells. This action necessarily implies that it was considered necessary to separate the plaintiff and Mshiya in a secure holding facility so as to prevent any further violence between them and to ensure their individual safe custody.

[26] In this regard the provisions of section 30 of the Correctional Services Act, 111 of 1998, which provides for the segregation of prisoners, is of relevance since it reflects both the circumstances within which segregation may be applied and it's particular purpose. The section provides that:

> "(1) Segregation of an inmate for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7(2)(e), is permissible –
> (a) ...
> (d) when an inmate displays violence or is threatened with violence.
> (8) Segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.
> (9) Except insofar as it may be necessary in terms of subsection (1)(b) segregation may never be ordered as a form of punishment or disciplinary measure."

[27] The Act clearly contemplates the necessity for the application of segregation of persons in circumstances where violence has erupted between prisoners or where there is a threat of violence. This, since it is not for the purposes of punishment, must

necessarily be for the purpose of the prevention of further harm. The utilisation of the power to segregate must flow from an acceptance that there is a reasonable risk of further violence and therefore the risk of harm occurring to the prisoner or prisoners concerned.

[28] If, as it was suggested in argument, the mere fact that the fight was over indicated that the likelihood of further violence was not foreseeable, then there would be no reason to place either the plaintiff or Mshiya in single cells. In my view the mere fact that the plaintiff and Mshiya were to be placed in single cells must mean that the warders on duty foresaw that there was a risk of further violence between the individuals and accordingly a risk of harm in the event that they were not segregated.

[29] Common sense too suggests that where a violent altercation breaks out between two prisoners, even where it is stopped by warders, that there is a risk of further violence for as long as those prisoners remain in one another's presence, at least in the immediate aftermath of the conflict. Violence between prisoners is not an uncommon phenomenon. Prison security procedures involve regular searches to ensure that contraband and dangerous weapons are not secreted away by prisoners. This is to secure both the safety of warders and other staff as well as other inmates. It was for the purpose of segregating the prisoners in a secure facility which could ensure their respective safe custody that they were to be removed to the single cells. That the prison authorities intended to ensure the segregation of plaintiff and Mshiya however does not assist the defendant since they were in fact not segregated.

[30] Instead of being segregated by being placed in the single cells both plaintiff and Mshiya were taken to the hospital section. There too they were not kept in the segregation facility available and, furthermore, Mshiya was treated in circumstances plainly contrary to established security procedures.

[31] It requires no great stretch of the imagination to accept that the close guarding and surveillance of a prisoner whilst he is undergoing medical treatment is necessary to ensure both the safety of medical personnel and to prevent the prisoner from acquiring goods that may serve as weapons. A medical facility where a prisoner is treated for wounds has within it a number of items, including surgical equipment, which may serve as a dangerous weapon.

[32] In this instance, Nurse Mama was left unaccompanied. She used a surgical blade to shave Mshiya's hair. The tray was within easy reach of Mshiya. These facts establish, in my view, that the defendant's employees were negligent in at least this respect, namely that they failed to take adequate measures, apparently contrary to policy, to ensure that Mshiya could not arm himself with a dangerous weapon whilst undergoing medical treatment in the hospital facility.

[33] On the undisputed evidence the plaintiff and Mshiya were not kept separated. Although the plaintiff was kept in the passage whilst Mshiya was being treated this, it appears, was immediately outside of the treatment room. Upon leaving the treatment room Mshiya would of necessity pass in close proximity to the plaintiff. The hospital section does have a facility in which prisoners can be held whilst awaiting treatment.

This was not used. It was common cause that warder Kama was present and on duty and, it appears from the evidence, he had control of access to and egress from the hospital facility. There was therefore undoubtedly a readily available means to ensure that the plaintiff and Mshiya were indeed kept separated. The facts establish that there were two warders, apart from warder Kama, present at the facility at the time of the attack on the plaintiff. Whether Mthathi came to be there in the manner described by the plaintiff or whether he had in fact accompanied Ntanga in bringing the plaintiff and Mshiya to the hospital initially, is of no moment. The fact remains that he was present immediately prior to the attack and therefore that the defendant possessed the necessary means to ensure that the plaintiff and Mshiya were properly secured. The failure to keep the plaintiff properly secured and properly separated from Mshiya whilst in the hospital facility too is an omission which may constitute a negligent breach of the duty of care.

[34] I am satisfied that it was indeed reasonably foreseeable that in the absence of effective segregation of the prisoners, Mshiya would, if presented with the opportunity, respond to or retaliate to the attack upon him by the plaintiff and that there was indeed a reasonably foreseeable risk that physical harm of the general kind actually suffered by the plaintiff would be caused to the plaintiff if Mshiya was afforded that opportunity.

[35] In *Minister of Safety & Security v Van Duivenboden* 2002(6) SA 431 (SCA) the court said, in respect of the second element of the test for negligence, namely whether a *diligens paterfamilias* in the position of the defendant would take reasonable steps to guard against the consequence of harm, that the answer (at 448 F – G) to:

> "That enquiry offers considerable scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of the resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably."

[36] In this instance I have already indicated that the prison officials had at their disposal a facility which could readily and easily have been utilised in order to keep the plaintiff and Mshiya segregated whilst Mshiya was undergoing medical treatment. Furthermore the prison officials had at their disposal sufficient resources, it being common cause that there were at least two warders present at the time immediately prior to the attack on the plaintiff, to ensure that Mshiya was properly guarded and kept under surveillance during the course of the treatment.

[37] The failure to properly segregate the prisoners and to ensure that both the plaintiff and Mshiya were sufficiently monitored and guarded until such time as they could be securely segregated constitutes a breach of the duty of care that the defendant owed to the plaintiff, namely the duty to ensure his safe custody in circumstances where violence had broken out between him and a fellow prisoner. This failure resulted in the plaintiff suffering physical harm in consequence of the violent attack upon him by his fellow prisoner.

[38] It accordingly follows that the plaintiff has succeeded in establishing that the defendant is liable to him in damages for the breach of the duty of care owed to him.

[39] A final aspect concerns the question of costs. Mr *Niekerk*, who appeared for the plaintiff, argued that by reason of the nature of the injuries and the likely cost of future

medical treatment that it is likely that the plaintiff in due course will establish a quantum of damages which would entitle him to costs on the scale allowed in the High Court. For this reason I should at this stage of the proceedings order the defendant to pay the plaintiff's costs.

[40] The evidence regarding the plaintiff's losses is not before me. All that is apparent from the pleadings is that the plaintiff claims an amount of R50,000.00 for future medical treatment and R200,000.00 by way of general damages.

[41] I find myself in a position similar to that in *Van Der Spuy v Minister of Safety and Security* 2004(2) SA 463 (SE). In that matter too a separation of issues had been ordered. The plaintiff had suffered a gunshot wound to the arm during the course of a prison escape. Leach, J (as he then was) said the following at 477 I:

> "*In casu*, although there is no detailed medical evidence before me, I know that the plaintiff suffered a gunshot wound of the arm. It is certainly premature for me to comment on the advisability of his actions in suing in the High Court, but his injuries do not appear to me to be so severe that he will undoubtedly recover costs on the High Court scale notwithstanding the amount of his claim being far in excess of the upper jurisdiction of the magistrate's court."

[42] These remarks are apposite in this matter. I too consider that it would be unfair at this stage of proceedings to saddle the defendant with a costs order on the scale allowed in the High Court when the quantum of the plaintiff's loss may yet fall within the jurisdiction of the Magistrate's Court.

[43] I accordingly make the following order:

1. The defendant is declared to be liable to the plaintiff for whatever damages he may have suffered arising from the bodily injuries he sustained in the assault perpetrated on him by a fellow prisoner at the St. Albans Prison Hospital on 16 May 2007, which is the subject of these proceedings.

2. Costs are reserved.

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GG GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCE:

FOR THE PLAINTIFF:	Mr D Niekerk, instructed by Egon A Oswald Attorneys
FOR THE DEFENDANT:	Mr L Potgieter, instructed by The State Attorney