

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 13659/2020

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

DATE

SIGNATURE

In the matter between:

JAMANGILE: THEMBA ERNEST

1st Plaintiff

KHUMALO: ANDREW THABO

2nd Plaintiff

and

MINISTER OF CORRECTIONAL SERVICES

1st Defendant

**PROVINCIAL COMMISSIONER (GAUTENG):
DEPARTMENT OF CORRECTIONAL SERVICES.**

2nd

Defendant

JUDGMENT

Kgomongwe, AJ:

INTRODUCTION

- [1] South Africa is founded on the supremacy of the constitution. This case implicates the infringement of a person's constitutionally guaranteed right by their employer.
- [2] I propose the “start at the end approach”¹.
- [3] I find, on facts and evidence before me, that the defendant’s employees have unlawfully encroached on both the plaintiffs’ constitutionally guaranteed rights.
- [4] Based on the above, I find that the defendant is thus fully liable for the plaintiffs’ proven damages. Costs follow the results.

ISSUE BEFORE COURT

- [5] Both plaintiffs are suing their employer, the Minister of Correctional Services, and the Gauteng Provincial Commissioner for Correctional Services (“the defendants”), for damages arising from the incident that occurred on 4 December 2018.
- [6] The matter came before me by way of a default following the 2 August 2022 order of Francis-Subbiah AJ in terms of which the plaintiffs’ exception to the defendant’s (bare denial plea) was upheld.
- [7] The defendant was granted leave to amend their plea. This invitation was declined. Hence the present application.
- [8] Amongst the pertinent questions that must be determined in this matter is whether the employee can sue their employer for damages in terms of the common law amid the presence of a statute² in that respect?

¹ *Some people may prefer starting at the end and working their way to the beginning because it allows them to understand the conclusion or outcome first, which can help them make sense of the steps or process that led to that conclusion. This approach may also help them identify the most important element of key points more easily.*

² *Section 35(1) and (2) of the COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 1993 provides as follows: “(1) No action shall lie by an employee or any*

[9] This is elaborated further on in the body of this judgment.

FACTUAL BACKGROUND

[10] Both plaintiffs are employees of the Department of Correctional services.

FIRST PLAINTIFF'S CASE

[11] I shall first start with facts relating to the first defendant:

[12] In his affidavit³, which was deposed to on 6 August 2023, the first plaintiff states that on the 4th of December 2018, he reported for work at his usual place of work at the Johannesburg prison where he is employed as a correctional service supervising officer.

[13] Whilst he was in the vicinity of the main entrance of the facility, he was summoned to the center manager's office by one Mr. Nkambule. He then proceeded to the manager's officer, one Mr. Dlamini⁴.

[14] Upon his arrival, he found Mr. Dlamini in the company of one Mr. Van Der Merwe.

[15] The former then aggressively accused him of bringing contraband into the prison premises.

[16] Before the first plaintiff could respond, Mr. Dlamini instructed Mr. Van Der Merwe to search the first plaintiff. Mr. Van Der Merwe then conducted a search on the first plaintiff by running his hands all over his body. He went as far as

dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

(2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.”

³ I accepted the first plaintiff's affidavit in terms of Rule 38(2) of the Uniform Rules.

⁴ Mr. Dlamini holds a position of Center Co-Ordinator of the Security Cluster.

squeezing his buttocks and scrotum so hard that the first plaintiff ended up enduring excruciating pain that lasted a few days after the incident.

[17] During this search, Mr. Van Der Merwe asked the first plaintiff to take off his shoes and socks. He then went on to check inside same and found nothing.

[18] This search was conducted in the physical presence of Mr. Nkambule, Mr. Dlamini, and other unnamed prison officials.

[19] After the search Mr. Dlamini yelled at the first plaintiff instructing him to get out of his office and wait outside. Later after the harrowing body search, the correctional services officials named above together with their colleagues went to where the first plaintiff's motor vehicle was parked. When they got there, they asked him to declare what was inside the vehicle. They then went on to search the vehicle without the first plaintiff's consent.

[20] The search on the first plaintiff's motor vehicle was conducted by members of the Emergency Support Team on instructions of Mr. Dlamini. There were approximately 14 people who were watching whilst the first plaintiff's vehicle was being searched.

[21] The incident left a horrible psychological scar to the first plaintiff. He felt let down, embarrassed, and grossly violated. He later went for a consultation with a psychologist who then referred him to a psychiatrist. The latter diagnosed the first plaintiff with Post Traumatic Stress Disorder (PTSD) and a mild depression.

[22] He struggled to sleep and had memory loss. He could not follow basic instructions at work.

[23] He attended 11 psychological sessions to alleviate the psychological injuries that he sustained because of this incident.

[24] I pause to state that I do not intend to deal with the quantum aspect of the present action proceedings because the parties agreed in their 25 June 2021 pre-trial conference (paragraph 6) to separate the issues should the plaintiff file expert reports. The Plaintiff has filed the expert reports. I shall come back to this issue later.

[25] I propose however, to briefly deal with some contents of the expert report which outlines the psychological scars inflicted on the first plaintiff by the employees of the defendant.

[26] The search on the first plaintiff was characterized by the notion that it was in the course of employment. This is misguided having regard to the evidence.

[27] A search within the scope of employment should be acceptable. This is if it is reasonable and within the lawful confines. Should the search exceed reasonable confines then it bothers on encroachment of another's constitutionally guaranteed rights wherein then it ceases to be "within the scope of employment". In my view, the encroachment of another's constitutionally guaranteed right is the case in the present proceedings.

[28] Dr Brook, a specialist psychiatrist, states in their medical report dated 27 May 2019 that the first plaintiff has been treated for severe post-traumatic stress disorder since January 2019. This expert states that the first plaintiff developed this disorder at work after having been accused of possession of drugs and being searched by his superiors in front of his colleagues. This, in my view, is uncontroverted proof of causal link.

[29] On his last follow up on 7 May 2019, the first plaintiff appeared anxious and depressed. He was socially withdrawn, had impaired concentration and no motivation.

[30] The first plaintiff was further assessed by a clinical psychologist, V, Matshazi, on 7, 9, 10, 11, 14, 16, 18, 21 January, 23, 25 February, 25 May, 18 June and 19 July 2019.

[31] This clinical psychologist states as follows in their report:

"Mr Khumalo is a 48 years old divorced, residing in Kagiso. Over the past 24 years he is employed by the correctional services Johannesburg as a unit head. During December 2018 he was accused at work by his superior of being involved with illegal activity. According to him he was requested to take off his clothes in front of his colleagues and was searched. Since the incident he

started experiencing severe anxiety and depressive symptoms coupled with nightmares of the incident. He was admitted to Lenmed hospital for 3 weeks of intensive treatment and currently he is treated as an outpatient, and he is still severely anxious, he pressed the end dysfunctional.”

[32] In my view, the first plaintiff's undisturbed evidence on affidavit and the reports of the psychiatrist and the clinical psychologist are a clear proof that the wrongful conduct of the defendant's employees is directly linked (causation), to the damage (injury) caused to the first plaintiff's personality.

[33] I consider the conduct of the defendant's employees to be *contra bonis mores* and therefore unlawful. It is unfathomable that a person could infringe on another person's constitutionally guaranteed right to dignity and privacy all in the name of acting in the cause of employment. That is unsustainable. Once this kind of unjustified constitutional offense arises, legal interference and the protection should suffice.

[34] I am thus satisfied that the first the plaintiff has proven liability.

[35] I now turn to the second plaintiff.

SECOND PLAINTIFF'S CASE

[36] In his 6 August 2023 deposed affidavit, the second plaintiff states that on the 4th of December 2018 he reported for work that his usual place of work, the Johannesburg correctional services where he is employed as a full-time correctional services officer.

[37] Whilst in the vicinity of the main entrance, he heard Mr. Nkambule summoning the first plaintiff to the center manager's office. The first plaintiff is the second plaintiff's immediate supervisor.

[38] After a while, the second plaintiff was also summoned to the same office where he found the center manager, Mr. Dlamini, in the company of one Mr. Van Der Merwe, Mr. Nkambule and other unknown superiors.

- [39] As soon as the second plaintiff made his entry into the office of the center manager, Mr. Dlamini gave instructions to Mr. Van Der Merwe to search him.
- [40] No explanation whatsoever proffered on why the second plaintiff was being subjected to a random search in front of so many people.
- [41] Mr. Van Der Merwe conducted the search in a violent and disrespectful manner. It was during this time that the second plaintiff felt that his privacy and dignity was being violated.
- [42] During the search, Mr. Van Der Merwe ran his hands all over the body of the second plaintiff to the extent of squeezing his buttocks and scrotum. He squeezed his private parts so hard that the second plaintiff endured excruciating pain (that lasted for several days after the incident).
- [43] He unbuttoned his shirt, unzipped his trousers, and dropped them on the floor. At that point the second plaintiff was left with his underwear. Mr. Van Der Merwe then pushed his finger through the underwear into the anus of the second plaintiff.
- [44] He then asked the second plaintiff to take off his shoes and socks. He checked inside them and found nothing.
- [45] After the search was completed, the second plaintiff was told that they need to search his car which they did. Again, the latter search was absent the second plaintiff's consent.
- [46] There were approximately 14 people watching when the second plaintiff's vehicle was being searched by the emergency support team.
- [47] This incident severely traumatized him. He felt let down, embarrassed, and grossly violated. He lost his sleep for several days after the incident. He had flashbacks on what had happened.
- [48] After a few days, the second plaintiff went to a doctor because he was not coping at all. The doctor referred him to a psychologist. The latter then referred

him to a psychiatrist who admitted him at the Lenmed hospital for psychiatric and psychological assessment and treatment.

[49] The second plaintiff was diagnosed with a post-traumatic stress disorder and major depression.

[50] He struggled to sleep, had memory loss, and failed to follow basic instructions at work.

[51] He incurred a lot of medical and hospital expenses because of the incident *in casu*.

DISCUSSION AND EVALUATION

[52] In *National Employees General Insurance v Jagers*⁵ Eksteen AJP (as he was known then) had this to say about onus of proof —

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff”.

[53] I stated in my introductory remarks, there is no law that is above the Constitution of the Republic of South Africa.

[54] The facts in this matter are clear. Both plaintiffs’ constitutionally guaranteed right to dignity and privacy have been grossly violated.

[55] No meaningful defense was mounted by the defendant on the gravamen of the issue before court and, it is no surprise that they elected not to partake in these proceedings. This is even though they were extended an olive branch to amend their otherwise unhelpful bare denial plea (in order to engage the plaintiffs’ case). They did not do so.

[56] Section 35(1) and (2) of the COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 1993 bars the employee from recovering

⁵ 1984 (4) SA 437 (E) at 44D.

damages from their employer in respect of occupational injury or disease resulting in the disablement or death of such employee.

[57] The rider to this provision is that the indemnity afforded to the employer will suffice only when the occupational injury or disease occurs within the provisions of the Act⁶.

[58] This is not the case in the present matter.

[59] Inasmuch as this legislative piece enjoins the employee party to lodge and claim for occupational injury with the Compensation Commissioner, I find on the facts of this matter that (despite there being no evidence that such claim was lodged), there cannot be any fathomable reasons on why there was such violation. Not only was there a violation. It was gross and unjustified.

[60] There can hardly be any honest suggestion that the search was in the course of duty. It was done to humiliate both plaintiffs.

[61] In any event, no such defense (“in the course of employment”) has been raised in the defendant’s plea and I find it that it should not be the place of this court to venture into issues that it has not been invited to making determination on.

SEPARATION OF ISSUES

[62] As I stated earlier, the parties agreed in their 25 June 2021 pre-trial conference (paragraph 6) to separate the issues should the plaintiff file expert reports. The Plaintiff has filed the expert reports.

[63] I am bound by the agreement between the parties.

[64] A pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties⁷.

⁶ “*In the course of an employee's employment and resulting in a personal injury*”.

⁷ See *Shoredits Construction (Pty) Ltd v Pienaar NO & others [1995] 4 BLLR 32 (LAC) at 34E-F; Filita-Matrix (Pty) Ltd v Freundenberg 1998 (1) SA 606 (SCA)*.

ORDER

[65] In the premises, the following order is made:

1. Merits are separated from quantum in terms of Rule 33(4) of the Uniform Rules.
2. Quantum is postponed *sine die*;
3. The defendants are liable to pay the first and second plaintiffs' such damages caused by the incident on 4 December 2018 as the parties may agree or as the plaintiffs may prove with the other one paying and the other to be absolved.
4. The defendants shall pay the first and second plaintiffs' costs on a High Court party and party scale with the other one paying and the other to be absolved.

M KGOMONGWE
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing:

For the Defendant:

Date of Judgment:

For the Plaintiff:

1 and 2 August 2023

January 2024

M MTHOMBENI (Adv) instructed by
FOUT ATTORNEYS

No appearance