IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

SIMPHIWE MBENA **111th Plaintiff**

XOLANI SIKO **182nd Plaintiff**

And

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **Defendant**

Coram: **Chetty J**

Heard: **19/05/2014 – 23/05/2014; 26/05/2014; 28/05/2014 – 30/05/2014; 2/06/2014 – 5/06/2014; 9/06/2014 – 10/06/2014; 2/02/2015; 4/02/2015 – 6/02/2015; 9/02/2015 – 13/02/2015; 16/02/2015 – 19/02/2015; 23/02/2015 – 26/02/2015; 10/06/2015 – 12/06/2015; 17/06/2015 – 18/06/2015; 22/06/2015, 28 - 29/07/2015**

Delivered: **27/08/2015**

Summary: ***Delict*** *– Assault – Onus – Determined from pleadings – Alleged mass assault – A non-issue – Matter to be determined on facts presented – Probabilities – Claims dismissed*

JUDGMENT

CHETTY J:

[1] A murder provided the catalyst for this litigation. On 15 July 2005, more than a decade ago, Mr *Babini Nqakula* (*Nqakula*/the deceased), a correctional officer at the St Albans Maximum Correctional Services Centre (Maximum), Port Elizabeth, was stabbed to death whilst on duty in the dining mess at Maximum. His murderer, an inmate, Mr *Simphiwe Mbena* (*Mbena*), then serving a sentence of thirty-two (32) years imprisonment for robbery and attempted murder, was subsequently arraigned for trial in this court on a charge of murder, duly convicted, and sentenced to imprisonment for life. The murder precipitated a lock down of Maximum the next day and the introduction therein of the correctional services department's emergency support team (the EST), for several days. Its deployment, and in particular the conduct of its personnel, founded delictual actions for damages by two hundred and thirty (231) inmates (the plaintiffs) against the defendant. The common thread in each of their particulars of claim is the allegation that they were victims of a mass assault perpetrated upon them by members of the EST. The underlying theme, capitalised upon during the trial, to borrow the iconic phrase from Shakespeare's Hamlet, was that the EST was deployed to Maximum to ***"revenge his (Nqakula's) foul and most unnatural murder"***. That notion resonated throughout the proceedings and its validity must perforce be examined.

[2] At the onset however, it is necessary, to dispel any misconceptions about this matter. It is not a class action. The fact that the two hundred and thirty-one individual actions were consolidated for purposes of trial is entirely irrelevant and of no

consequence. The case of each of the plaintiffs is disparate and enjoins separate adjudication. This matter concerns two plaintiffs only, Mr *Xolani Siko (Siko)*, and *Mbena*. Their actions against the defendant, extant their particulars of claim, based upon the *actio iniurarium*, is for damages consequent upon alleged assaults. Leaving aside the incidence of the onus, to which I shall revert shortly, the justiciable issue, quintessentially, is whether the plaintiffs were assaulted as alleged. Consequently, questions concerning a prisoner's general conditions of detention, adherence to, and/or breach of statutory and regulatory obligations by officialdom pertaining to their (i.e. the inmates) confinement, assumes a secondary importance. Their introduction into these proceedings served merely to obfuscate the real issues.

The Onus

[3] In determining the question upon whom the overall onus of proof rests, the pleadings generally provide the answer. Mr *Dyke* fairly conceded that in so far as *Mbena* was concerned he bore the onus. As regards *Siko* however, he submitted that the defendant was saddled with the onus. The submission is in my view untenable.

[4] In his particulars of claim, *Siko* alleged that:

> "4. During July 2005, the Defendant's functionaries aforesaid embarked upon a mass assault of prisoners at the Centre, following upon the murder of an employee

of the Defendant and a Warder at the Centre, Babini Nqakula, by a prisoner at the Centre. The Plaintiff (and the further Plaintiffs cited on the annexure to the Summons) was a victim of the mass assault as particularised hereunder.

5. Over the period of five days, from 16 to 20 July 2005 and at St Albans Maximum Prison, Port Elizabeth, the Defendant's functionaries in the employ of the Defendant unlawfully and intentionally assaulted the Plaintiff by inter alia:

5.1 Beating him with batons on various parts of his body;

5.2 Making him strip naked;

5.3 Making him lie on the cement floor with his face in another inmate's buttocks;

5.4 Kicking him on his neck, back and other parts of his body;

5.5. Throwing buckets of water on him in (*sic*) during mid-winter temperatures;

5.6 Applying electrical shocks to various parts of his wet body;

5.7 Setting dogs upon him which were goaded to attack him;

5.8 Dragging him by his legs on the floor while his head was hitting on the cement, and,

5.9 Handcuffing him by his hands and feet to a gate grille and setting dogs upon him which were goaded to attack him.

These actions are collectively referred to as "the assault".

[5] In response thereto, the defendant pleaded that: -

"3. **AD PARAGRAPH 4 THEREOF**

3.1 The Defendant admits only that Babini Nqakula, a warder at St Albans Maximum prison, was murdered during July 2005 at the centre.

3.2 Save as aforestated the further averments in these paragraphs are denied.

4. **AD PARAGRAPH 5 THEREOF**

4.1 During or about July 2005:

4.1.1 St Albans Maximum prison was beset with gangsterism;

4.1.2 Many prisoners held at the centre, being members of rival gangs, were in unlawful possession of dangerous weapons;

4.1.3 The said Babini Nqakula was murdered in the prison by a member of a gang;

4.1.4 A security risk existed in the prison which endangered:

4.1.4.1 the lives and safety of prisoners and correctional officials;

4.1.4.2 the security of the correctional centre;

4.1.4.3 the security of the community.

4.2 In the circumstances:

4.2.1 a search of each cell in the centre and of each prisoner and his possessions was conducted on 16th, 17th, 18th, 19th and 21st July 2006 in accordance with the provisions of Section 26 and 27 of the Correctional Services Act (hereinunder referred to as "the Act") 111 of 1998.

4.2.2 on 30 July 2005, subsequent to the said search, a follow up search was undertaken in accordance with Section 26 and 27 of the Act to ensure that any weapons which may have been introduced after the aforesaid search were removed from the prison.

4.2.3 4.2.3.1 During the aforesaid searches (hereinafter referred to as "the procedure") a small number of

individual prisoners resisted the procedure and/or refused to surrender weapons in their possession.

4.2.3.1 In these circumstances correctional officials were required to use such force as was necessary to disarm and search such prisoners as they were entitled to do, in terms of Section 32 and 33 of the Act.

4.2.3.3 In the performance of the procedure and in the application of said force necessary to fulfil the said objective, correctional officials utilised battens (*sic*) and shock shields, as they were entitled to do.

4.2.3.4 Save that correctional officials were required to use force in order to carry out the procedure and/or to disarm the Seventy Fourth Plaintiff, the Defendant has no knowledge of the identity of the further prisoners who were subjected to such legitimate force, does not admit that any of the other Plaintiffs were subjected to such force, or any force at all, and puts the further Plaintiffs to the proof thereof.

4.2.3.5 Save where the averments set out in these paragraphs accord with the aforegoing, the averments set out in paragraph 5 of each set of Particulars of Claim are denied."

[6] It will be gleaned from the aforegoing that the primary allegation made, i.e. that *Siko* was a victim of the alleged mass assault, is denied. Furthermore, paragraph 4 of the plea merely encapsulates the defendant's factual allegations apropos the *modus operandi* of the EST in conducting the searching of the cells within Maximum. The admission, that force was employed to disarm certain inmates who resisted the search, is clearly not proffered as justification for the violation of *Siko's* bodily integrity. In paragraph 4.3.3.4 the defendant specifically pleaded that: -

> "4.2.3.4 Save that correctional officials were required to use force in order to carry out the procedure and/or to disarm the Seventy Fourth Plaintiff, the Defendant has no knowledge of the identity of the further prisoners who were subjected to such legitimate force, does not admit that any of the other Plaintiffs were subjected to such force, or any force at all, and puts the further Plaintiffs to the proof thereof."

[7] Consequently, the submission that the plea encompasses an excuse for the assault on Siko and shifts the onus to the defendant, is entirely misplaced. In my view, the form of the pleadings saddled both *Siko* and *Mbena* with the onus. The factual allegations however, give rise to two conflicting versions as to the circumstances under which inmates may have sustained injuries, and, in this regard,

Mr *Epstein* fairly conceded, the evidential burden to combat Siko's allegations, rested upon the defendant. The distinction between the overall onus of proof and the evidential burden, was articulated by Corbett JA in ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd***[1] as follows: -

> "As was pointed out by DAVIS, A.J.A., in Pillay v Krishna and Another, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In Brand v Minister of Justice and Another, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus ". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also Tregea and Another v Godart and Another, 1939 AD 16 at p. 28; Marine and Trade Insurance Co. Ltd. v Van C der Schyff, 1972 (1) SA 26 (AD) at pp. 37 - 9.)"

[1] 1977 (3) SA 534 (A) at 548A-C

[8] The question whether a party has discharged the onus is invariably dependent upon whether such party's version is more probable than the other's. This approach was propounded by Eksteen AJP in ***National Employers' General Insurance Company Limited v Jagers***[2] as follows: -

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only 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 as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of 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 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

[2] 1995 (1) SA 35 (AD) at 39G-40C

nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by COETZEE J in Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra) and African Eagle Assurance Co Ltd v Cainer (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[9] Although no consensus could be reached on the incidence of the onus prior to the commencement of the trial, the parties resolved at the Rule 37 conference that the plaintiffs would begin. In hindsight, the plaintiffs' assumption, to commence with the adduction of evidence, becomes manifest, given the import of the testimony which preceded that of the plaintiffs, to wit, a mass assault of inmates by the EST

over several days. In the prologue to this judgment I adverted to the disparate nature of each plaintiff's claim and cautioned that the question concerning the proclaimed mass assault on the inmates at Maximum was not the triable issue. Its importation into these proceedings is inextricably linked to the decision to begin, a stratagem, ostensibly, to gain an advantage of sorts. Consequently, save for considering certain aspects of the evidence pertaining to the events which unfolded once the searching of the cells at Maximum had commenced, it is wholly unnecessary to traverse such testimony.

[10] The question whether *Siko* and *Mbena* have discharged the onus resting upon them on a balance of probabilities, is, ultimately, dependent on whether their testimony is truthful and reliable. The determination of that issue must perforce commence with an enquiry into the deceased's murder and the identity of the perpetrator(s) for it has a decisive bearing in unravelling the truth. In his evidence in chief, *Siko*, whilst acknowledging that he was a member of the 26 gang (the 26's) sought to portray himself as a rehabilitated offender, one actively involved in promoting peaceful co-existence between the prison gangs inter se and the correctional officials. That evidence was tendered to exonerate himself completely from any involvement in the deceased's murder. In the course of his soliloquy on his role as a model prisoner, he adverted to his interaction with the head of the Centre, Mr *Mshunqane (Mshunqane)* and the deceased and their intercourse in the participation management committee (the PMC), which resulted in a cessation of all gang activities to the extent that, as he testified, ***"There was not even a little thing of stabbing or assault, anything. It was very (indistinct) whereby you can sleep and dream, because when (indistinct) gangsterism you cannot sleep, always***

the time you must open your eyes because you do not know what is going to happen. By the time of the committee people were dreaming or sleeping nicely and they were happy." I interpolate to state that under cross-examination, his claim to membership of the PMC was exposed as false. I now turn to an analysis and appraisal of *Siko's* testimony under individual explanatory headings concerning specific instances which he recounted were significant and which left an indelible imprint on his psyche.

Relationship with the deceased

[11] In his evidence in chief, and In response to a question concerning the events which unfolded on the morning of 15 July 2005, he spontaneously decried having seen the deceased and thereafter expounded upon their quasi-paternal relationship. He further testified that during the early afternoon the deceased opened the sections cell doors to facilitate the inmates' ingress to the dining hall for lunch and, after he had partaken of his meal, and whilst in the corridor, he was informed by one *Fezile Sazi* that *Mbena* had stabbed the deceased in the dining hall. This information, he lamented, caused him untold anguish. The evidence was clearly tendered to distance himself from any involvement in the stabbing of the deceased.

[12] *Siko's* testimony concerning - the tranquillity of Maximum, the camaraderie between the gangs *inter se* and the amity between the gangs and the correctional officials, is, upon a consideration of the probabilities, contrived. Maximum was, on the evidence adduced, no wonderland. It was beset with internecine violence, an

institution, in which the correctional officials' working environment was fraught with danger given the immense power wielded by the gangs.

[13] The purported camradery between the gangs *inter se* is equally concocted. Major General *Jeremy Veary* (*Veary*), the defendant's expert witness, is an eminent authority on the origin, history, structure, internal processes and operations of prison gangs within the South African penal system. Although the adduction of his evidence was initially objected to, the challenge soon dissipated. His uncontroverted testimony compels the conclusion that in murdering the deceased, *Mbena* was not on a frolic of his own but had committed the dastardly deed, not only with the sanction of the 26's, but under the aegis and watchful eye of its leadership. *Mbena* provided ample corroboration for Veary's testimony. He testified that the use of violence by prison gangs was strictly regulated and required its imprimatur from the leadership structures. In his testimony, *Mbena* had refuted any suggestion that the stabbing of the deceased enjoyed the sanction of the gang leadership and was committed in the presence of *Siko* and another 26 inmate, *Cameron Liwani*. That denial was in direct conflict with testimony tendered by him in his criminal trial.

[14] In his evidence in chief, *Veary* was referred to a statement, dated 16 July 2005, ostensibly emanating from *Mbena* and minuted by an investigator. Mr *Khoza*, wherein *Mbena* implicated two individuals named therein as *Zwayi* and *CID*. It is not in dispute that the acronym *CID*, is in fact a reference to *Siko* and the name *Zwayi*, a reference to *Cameron Liwani*. *Veary*, in delineating the leadership structures of the

26 gang testified that the abbreviation, *CID*, was descriptive of the rank of an Inspector 1, to which, with reference to his monograph, he described as follows: -

"Inspector 1

This officer is a member of the Twelve points circle (leadership of the 26 gang) and also fulfils the detective and investigative functions for the gang in respect of profiling potential recruits ("hy ry tot by die stimela om te kyk of daar nie ouens geland het nie") and identifying threats to the gang. For this purpose he is issued with a pair of binoculars ("Mafutas om die wereld uit vir hoeke te sien"). In contrast to the Inspector 1 who only has a magnifying glass ("glase" – "mangatcha") for close range inspection, the Inspector 2 has to move among non gang members ("in die bos") where it is believed a greater range an omnidirectional view is required.

The Inspector 1 maintains investigation "dockets" against members in which he records information about transgressions. He is accountable to the Fighting general and reports directly to him. During times of war or correcting a wrong, he decides where a 26 member will attack his opposition in terms of location and usually accompanies the member and a Captain 1 to the scene to ensure that the attack is carried out according to the General's specifications. The inspector is also delegated by

the General to negotiate with the 28's in the presence of a Captain 1. Both he and the Captain 1 also sit in court cases against members as an investigator leading evidence.

The inspector does not wear a uniform because he (sic) secret investigative work requires a disguise in civilian clothes ("privaat klere") when he is among non gang members. Nonetheless, when asked to describe himself he identifies the following:

- **Civilian clothes ("privaat klere");**
- **Binoculars ("verkykers, Mafutas");**
- **26 dockets for cases ("26 dockets vir sake");and**
- **Handcuffs for members suspended in cases ("kamandelas vir ouens wat sake vang").**

[15] In elaborating upon the function of an Inspector 1, *Veary* testified as follows: -

". . . the CID the reason he is called the CID is like a criminal investigation in the old British system where the history of this lies in, he is the investigator of any threats or any problems, he is also whenever something needs to be corrected in prison where a member has to for example stab a warder or some blood thing, him and the captain ,

the tandolo in their terms will be present when the whatever is executed on instruction of the Number, the 26 leadership is executed, so that essentially is his rank.

So you see in the statement I gave you to look at that Mabena says that he was accompanied by Liwane and by Siko and they had their knives, when he went to stab Nqakula he was accompanied escorted by Liwane and Siko both 26's. --- If that is how the statement reads, yes. They are both 26's according to the way they identified them, the CID would normally accompany whoever duty to do the stabbing Your Lordship, to the actual stabbing to ensure that it was executed correctly according to the requirements of the Number.

And if it is not executed correctly what would the escort do? --- They would deal with him right there, to correct it, one, but if it is not executed in the manner it was that person would face a blood penalty at a later stage."

[16] *Siko*, whilst acknowledging his 26 affiliation and that he was often referred to as *CID*, steadfastly maintained that he was merely, what he referred to as, a ***"number one"***, and that the appellation, *CID*, was merely a nickname. That tittle of evidence is clearly concocted regard being had to *Veary's* testimony, *Mbena's* fingering of *Siko* in the murder of the deceased likewise surfaced in his criminal trial. I interpolate to say that his testimony before me that his evidence in that forum was false, is blatantly untrue. The transcript of those proceedings form part of the bundle

of documents which the parties resolved at the Rule 37 conference are what they purport to be. *Mbena's* evidence in his criminal trial is, despite Mr *Dyke's* submission to the contrary, clearly admissible in these proceedings as a matter of law.

[17] The transcript of *Mbena's* criminal trial is illuminating. *Mbena's* initial version in chief and under cross-examination was that *Mshunqane* had elicited his support to kill the deceased and provided him with a knife to execute him for a reward of R15 000, 00. His counsel then sought an indulgence from the trial judge to call a defence witness and the matter stood adjourned. On resumption, counsel announced that pursuant to further consultations with *Mbena*, the prospective witness would not be called but that *Mbena* wished to testify further. The transcript records the following: -

> **"Mr Mbena, please proceed, tell the court what you wish to tell it. --- Firstly I want to apologise to this Honourable Court. I want to apologise to Mr Mshunqane who is not present in Court. The reason for me to tell lies in this court and to lie about him as well is because I am afraid that where I am the prisoners have promised to cut my head off. Mt Lord (indistinct) the Court all what I said in Court was not the truth.**
>
> **COURT:** **Sorry, I didn't hear you Madam Interpreter, please raise your voice. --- My Lord I want to tell this Honourable Court all what I said in Court is not the truth. Now I am prepared to tell the truth in Court.**

Ja? --- I was SENT BY Xolani, Sipho and Cameron Luwane My Lord that I should stab the deceased My Lord. At the time I was committing the crime they escorted me, they had also knives in their possession. The knives were found by the police in their possession. The reason for me to be afraid to reveal the truth My Lord is because the same day we were removed from here, we were taken to Kokstad in the same van, it is then that they said I should tell a lie about Mr Mshunqane because they told me that previously they had that conversation with Mr Mshunqane to kill the deceased but I was not aware about that. The phone number that I have that belongs to Mr Mshunqane I got it from them. I have got people who can come and testify and confirm Mr Lord what I am saying, what I have said just now, right now. One of them is Vuyani Numbali, the second one is Siabulela (indistinct). My Lord I have decided to come and tell the truth, whatever they have said they will do to me, that must happen when I have already revealed the truth in Court. That is all My Lord."

[18] It will be gleaned from the aforegoing that *Mbena's* testimony mirrors the statement minuted by *Khoza*. As I shall in due course elaborate upon, Mbena's denial of having made the statement is false. The narrative corresponds with *Veary's* evidence that an assault on a correctional official by an inmate requires the sanction of the gang hierarchy and be witnessed by one or more of their coterie of similarly minded criminal miscreants. *Siko's* denial of any prior knowledge of *Mbena's*

murderous intent, is in direct conflict with a statement which featured a correctional officer, Investigator *Michael Bones* (*Bones*) as the amanuensis. Therein, *Siko* narrated a conversation he had with *Mbena* concerning the latter's ascension in the structure of the 26s. The statement records the following: - **"I then explain to him that the only way to become a general is to stab a member".**

[19] As I shall in due course elaborate upon, *Siko* steadfastly maintained that although he had been accused of complicity in Nqakula's murder and had been assaulted by *Bones*, he decried making any statement to him. The contested statement is an exculpatory one taken during the investigation of the murder of the deceased. *Ex facie* its content, it imports knowledge of *Mbena's* intent, albeit in its embryonic state and with a faceless victim. It is in my view nonsensical to suggest that *Bones* not only authored the statement, but moreover forged *Siko's* signature thereon. The probabilities ineluctably compel the conclusion that the content of the statement emanated from *Siko*, and that he voluntarily appended his signature thereto. His attempt to know distance himself from any prior knowledge of *Mbena's* murderous design exemplifies his disingenuity – a trait which permeated the entire body of his testimony. But, to continue his narrative, in truth a diatribe, relating to an alleged mass assault, the stage for which had been orchestrated by Mr *Johannes Lottering* (*Lottering*) and Mr *Ahmed Patel* (*Patel*), former inmates of Maximum.

<u>The corroborative evidence of Lottering and Patel regarding the initial incident</u>

[20] Their evidence that the floor and walls of the corridors in Maximum, B and D sections, constituted a melange of human excrement, bodily fluids, blood, human

tissue and an agglomeration of prison issue and civilian clothing was tendered as antecedent corroboration for *Siko's* anticipatory testimony that he and the inmates of B and D sections had had their clothes forcibly ripped and baton beaten off their bodies and been forced to lay naked in the corridors where they were brutally assaulted by members of the EST. I can attach no credence whatsoever to their testimony. They were both untruthful witnesses, the blatancy of their prevarications being seriously exposed under cross-examination. Their evidence was moreover directly in conflict with that of Mr *Adriaan van Heerden* (*Boela*) and Mr *Joseph Peter Bain* (*Bain*), both warders at the medium B facility at St Albans. Their cross-examination by Mr *Dyke* was characterised by the innuendo that by virtue of their employment with the defendant, they were party to a cover-up of the mass assault. The insinuation is devoid of any merit and I accept their evidence unreservedly. The corollary is that *Patel* and *Lottering's* evidence concerning the condition, not only of the corridor, but in particular, the blood spattered and torn clothing, is false. The inference can thus properly be drawn that it was tendered purely to provide corroboration for *Siko's* version, i.e. that, after being bludgeoned from cell D4 he was rendered naked, baton assaulted till he lost consciousness, and awoke naked in the corridor of the single cells, a condition which endured for several days in the cell itself until he was given a set of clothing immediately prior to his hospital visit.

[21] Lottering's untruthfulness was thoroughly exposed during Mr *Dyke's* cross-examination of *Bain*. It elicited an unintended consequence. During the repartee with Mr *Dyke*, *Bain*, affronted by the suggestion that he was being untruthful, adverted to a diary which, he maintained, established his honesty and would establish that he was not at work on the dates as testified to by *Lottering*. Perhaps

presciently, further cross-examination thereanent was not pursued. During re-examination, Mr *Epstein* sought clarity on the whereabouts of the diary and *Bain's* further questioning was held over pending the location of the diary. When he was recalled the following day, *Bain* produced the diary which confirmed his absence from work on the Saturday and Sunday. The authenticity of the diary is beyond question. It fully corroborates *Bain's* testimony and establishes *Lottering* and *Patel's* collusion in *Siko's* subterfuge.

The Injuries

[22] To embellish his case further and to provide an explanation for the injury to his hands he adverted to a raft of horrendous assaults – with batons, tonfas, shock shields and bog bites over several days until he was wheeled into Livingstone hospital allegedly clothed in a blood drenched pants and with blood dripping from his body onto the floors. During his examination in chief, ostensibly to buttress his claim, he was referred to a series of photographs of various parts of his body. It is common cause that those photographs had been taken on the morning he testified.

[23] The photographs, styled, ***"plaintiff's photo bundle",*** were of *Siko*, numbered consecutively, and in respect of the first twenty-four and number twenty-eight, *Siko* ascribed certain marks portrayed thereon to dog bites. Photographs twenty-five (25), twenty-six (26) and twenty-seven (27), he ventured, represented scaring, the aftermath of being shocked with a shock shield by one *Kasibe*, a reference to Mr *Vulindlela Joel Kasibe* (*Kasibe*), a correctional official, assigned to the A and C

sections of Maximum. It is not in issue that Kasibe was a member of the EST during the period in question. In his testimony he denied having assaulted *Siko* in the terms alleged or at all. In his evidence in chief, *Siko* pointed to a prominent skin discolouration discernable on photographs twenty-five to twenty-seven, pontificating that this represented the scaring of having been burnt with the shock shield by *Kasibe*. To embellish his case further, he steadfastly maintained that *Kasibe* and the other correctional officials who had likewise shocked him with the shock shields, threw water over him prior to applying the shield to his body, presumably to aggravate the effect of the shocks.

[24] *Siko's* evidence hereanent is a product of his fertile imagination. Mr *Tienie Labuschagne* was the manager of Force Products CC, the manufacturers of the shock shields. Pursuant to the provisions of Rule 36 (9) (b), a summary of his evidence, and the reasons, had been provided to the plaintiffs' attorneys. It is apparent, given the consensual adduction of his report as evidence, that his conclusions were accepted as true. Germane to this matter, the following conclusions were irrefutable, and they establish the extent of Siko's untruthfulness: -

> "6 Labuschagne will state that in his opinion the shields are effective as a non-lethal deterrent product in self-defence. The reasons for this are that when the shield is in contact with a person and activated, as recommended during bursts of 2-3 seconds, it produces localized pain, which dissipates after approximately 45 seconds and there are no further physical effects."

7 Labuschagne will state that in his opinion the characteristics of the unit are safe. The reasons for this are that they have been classified as safe by the South African Bureau of Standards. In this regard, Labuschagne refers to

7.1 Test report in accordance with IEC60335-2-76, 1997 and 2006 "PARTICULAR REQUIREMENTS FOR ELECTRIC FENCING". (See paragraph 2.1.1. of Annexure B hereto).

7.2 "The SABS accepts conformance certificate 007851. A copy of the Certificate is attached hereto marked 'A'.

7.3 "The factored output of the electrified right shields are a fraction of permissible parameters pertaining to energy and output voltage 40 mJ (8 joules allowed) and 1.6 KV (10 KV allowed)."

8 "Three types of shields are manufactured by Force Products, namely Maxi, Midi and Mini."

8.1 The results of the tests done on the maxi shields are contained in the SABS Report no. 7232/2352528/X1010B dated 25.03.2004. A copy of the Report is attached marked "B";

9 Labuschagne will state that the shields supplied to the Department of Correctional Services were of the same type and specification referred to in the aforementioned Report. The specifications of the shields have not changed since 2004. On file, test reports conducted in 2004, 2008 and again 2013 all document similar test parameters."

10 Labuschagne will explain that if a person is wet and is shocked by the shields, it will not have a different resultant effect from the effect experienced by a person who is not wet. The reasons for this are:"

10.1 The energy level outputs are within the mJoule parameters, far below 8 Joule's allowed for similar equipment."

10.2 Normal tap water is not a good enough conductor to make a significant difference on increasing the level of shock experience.

10.3 It is a localised shock not reliant on conductivity to ground (earth), as would be the case with mains electricity and water and the level of resistance to ground.

10.4 The electronic module would short circuit and not function properly if short circuited with water.

10.5 The energy output is pulsed and not constant."

[25] Thus, faced with the quandary of having to provide an explanation for *Siko's* inherently unacceptable evidence thereanent, Mr *Dyke* sought refuge in *Siko's* alleged emotional state when viewing the shields in a room adjacent to the courtroom. I have no doubt that counsel observed a visibly distraught individual. But, as the saying goes – appearances can be deceptive. *Siko's* sojourn in the witness stand demonstrated, quite unequivocally however, that he is a consummate actor.

This was evidenced by his nuanced responses to provide credible answers to pertinent questions and, when none could be forthcoming, supplanted by a tearful exhibition. That display of emotion is, in my view, clearly contrived.

The dog bites

[26] As adverted to hereinbefore, *Siko* sought corroboration for his contention that he had been bitten by a dog from twenty-five (25) photographs in the bundle referred to previously. Those injuries, he stated, were sustained on Monday, 18 July 2005, after he had been shocked by *Kasibe*. He testified that after that ordeal, two correctional officials, whom he referred to as *Padayachee*[3] and *Pokbas*[4], entered the single cells and dragged him, whilst naked, holding onto his ankles, into the corridor. Other warders, whom he identified as Kasibe, Dan. Loyiso, Lulu and Spelman, were also present. *Pokbas* and *Padayachee* left and returned with another naked inmate, one *Xolisi Vellem* (*Vellem*). He and *Vellem* were forced to stand and commandeered down the stairs to cell D4 where they were assaulted, further shocked and questioned about knives. During this process *Manuel*[5], a dog handler, let go of his dog and goaded it to bite him repeatedly on both legs. Thereafter he was taken out of the cell and chained to a grill gate where *Manuel* once more egged his dog to bite him repeatedly.

[3] Mr Kumaran Padayachee (not called)

[4] Mr Leon Pokbas

[5] Mr Manuel, a correctional official. He was not called as a witness.

[27] The defendants' witnesses who were called, having been identified as being present during this incident, refuted *Siko's* evidence. Their uncontroverted evidence was that the dogs that are used are extremely vicious and loyal only to their respective handlers. The thrust of their testimony was that in the scenario postulated by *Siko*, his flesh would have been ripped asunder. I interpolate to say that in an effort to counter this evidence, Mr *Dyke* sought to temper *Siko's* testimony by suggesting that the dog may only have nibbled at him. *Siko's* evidence must however be evaluated in its unadulterated form, which, on the probabilities, falls to be rejected as false. Dr *Martin's* evidence vis-à-vis the photographs was limited and of no evidential value. In reply to a question by Mr *Epstein* concerning the scaring on *Siko*, she responded, saying: -

> "No the images are really bad which is why I had a look at his legs this morning. And all I can tell the Court is that they are scars. The distribution of the one particular one on his leg could be consistent with a dog bite with upper and lower... you know the way dogs bite. Apart from that I can't go any further. It's a scar."

The reply encapsulates the high water mark of her testimony. It provides no corroboration for *Siko's* testimony that he had been bitten by dogs in the manner described.

[28] *Siko's* untruthfulness concerning the dog bites is further exemplified when regard is had to the report of Mr *Ian Meyer* (*Meyer*)[6]. It is not in issue that *Siko* consulted with *Meyer* who had prepared a report for purposes of trial. It records that *Siko* informed *Meyer* that whilst laying naked in the corridor abutting cell D4, he was bitten several times by dogs set on him. In cross-examination Siko was referred to *Meyer's* report and denied having informed *Meyer* accordingly. It is obvious that Siko was the source of Meyer's factual exposition and his denial merely compounds his dishonesty.

Concealment of the knife

[29] *Siko's* disingenuousness permeates his testimony. I have earlier, briefly referred to Bones and his interaction with Siko. He commenced employment with the defendant in 1994. By July 2005 he had progressed through the ranks and worked as an investigator in the office of the area commissioner. *Siko* identified him as one of the correctional officials who had head butted him to the point of collapse at the single cells on Saturday, 17 July 2005. Prior thereto, he narrated, he had been savagely assaulted by *Dan* and *Loyiso* whilst being interrogated about the concealment of knives. He was thereafter forced to squat in the shower area to facilitate the ejection of a knife which he was accused of having concealed in his anal cavity. During that process, he stated, he was forced to defecate on the shower floor, but to no avail - the concealed weapon failed to materialise as, according to him, he had not concealed any weapon on his person. Further assaults continued unabated until he fainted and was dragged to the single cells.

---

[6] The plaintiff's witness. His report formed part of the plaintiff's bundle.

[30] *Siko* introduced *Bones* into his narrative at this juncture. *Bones* allegedly came to the front of the cell, asked whether he was the *Siko* who had murdered *Nqakula*, informed him that he was an investigator and, prior to leaving, uttered a death threat. *Bones*, he continued, returned a while later, unlocked the cell, grabbed hold of him and escorted him out of the cell, down the corridor to another cell where he observed *Mbena* who appeared to have been viciously assaulted. He was then head butted by *Bones* and collapsed into a heap, whereupon *Bones* dragged him back to the single cells, where the assaults continued until he was finally taken to hospital on 20 July 2005 where his hands were encased in plaster of paris. I shall in due course allude to the fact that *Siko* was, notwithstanding his protestations to the contrary, only treated at the Livingstone hospital on 22 July 2005. The reasons for his intractable stance, i.e. that he went to the Livingstone hospital on 20 July 2005, is not difficult to fathom.

[31] *Siko* was faced with the dilemma of providing an explanation for the presence of his signature on a statement dated 19 July 2005, minuted and commissioned by *Bones*. Thus, to assail not only the authenticity of his ostensible signature, but the authorship of its content, he lamented: -

> **"Tell His Lordship what your hands were like on Tuesday or Wednesday the 19th or the 20th of July 2005. --- My hands or my fingers, or the full hands, were unable to move. That means I cannot write, I cannot eat, I cannot even use the spoon, I cannot even handle anything."**

[32] *Siko's* vilification of *Bones* is self-evident. The content of the statement, which undoubtedly emanated from him, whilst exculpatory, attributes prior knowledge of *Mbena's* intent to him. *Siko* could have been under no illusion that the interview with *Bones* was informed by the allegation that he was party to *Nqakula's* murder. This much is clear from the prefatory paragraph which records the following narrative: -

> "I was approached by Mr Bones an investigator regarding an allegation that I was the person who instructed my fellow inmate Mabena "Tyson" into stabbing Mr Nqakula. I did not know about Tysons intentions but will state the following. That I am a member of the "26" gang and I'm having the rank of number 1. I was the highest office in the rank in the section but inmates Zwayi, Carolus and Stoya also had the same rank but not the same office. Three days after Tyson was transferred to our section he asked me why are we not actively practicing gangsterism. I've then told him that we as the 26-gang has an agreement with Mr Nqakula and the members of the section do not practice gangsterism. Tyson then told me that at the juvenile section he got the rank of "madageni" (one who works to be a general and only receives instruction from the generals) and he still had to work towards general-rank. I then explained to him that the only way to become a general is to stab a member. That was the only thing I know about that. One day "Zwayi" Liwane Cameroon told me that Tyson spoke to him the same thing, but Zwayi did not take him seriously. Tyson was then quiet all the time and was always with Zama and Stoya who were also at the juvenile section and who he knew from outside. I then investigated the 28 murder

> of the juveniles and found that Scott who had the rank of general there was the one who gave Tyson that rank and I've also learned that Tyson was the one who investigated that stabbing with the instruction from Scott. I never gave Tyson any knife to stab any member or instructed any prisoner to stab any members. I understand now that I'm being framed because I was the one prevented gangsterism from being practiced in the section. That is all that I can declare at this stage."

Siko's denial of having made and signed the statement is clearly contrived.

The hospital visit

[33] *Siko's* evidence concerning the events immediately prior to and after his visit to Livingstone hospital is similarly punctuated with gross distortions of the truth. It became common cause, at least, as between the legal representatives, that *Siko* had been taken to the hospital on the 22nd July 2005 and not 20 July 2005. When it was put to him that the hospital records vouchsafed that he had been attended to on that date, his riposte was that the records had been doctored. *Siko's* insistence, in the face of concrete evidence that he had only visited the hospital on 22 July 2005, is illustrative of his tendency to embellish his testimony. This is underscored by his evidence that even after his hands had been encased in plaster of paris, he had relentlessly been beaten for several days. His version of events prior to, and on his return from the hospital, is moreover in direct conflict with Meyer's report. The

allegations of brutality, which he allegedly endured immediately prior to his hospital visit and post his return, is conspicuously absent from *Meyer's* report.

Fractured fingers

[34] *Siko's* testimony, both in chief and under cross-examination, was goal directed to substantiate the allegations of assault which the particulars of claim foretold. The parameters of those assaults were delineated in the relevant paragraphs and the consequences specified. In his testimony, *Siko* expounded upon the manner in which he sustained each of the injuries, with one notable exception, viz, how his fingers were fractured. The medical report of the orthopaedic surgeon, Dr ***P A Olivier***, annexed to the particulars of claim, under the rubrics, **Injuries Left Hand** and **Fracture Right Hand**, respectively, record the following: -

> **"the patient sustained fractures involving the left second, third and fourth proximal phalanges".** and, **"The patient sustained a fracture involving the proximal phalanx as well as a fracture of the right hand."**

[35] Those injuries, per se, are not in issue, but the circumstances surrounding their infliction. And yet *Siko*, the recipient, feigns total ignorance. It is not his case that the injuries to his hands could have been caused in fending off blows directed at

his body. The high water mark of his case hereanent is the suggestion that those injuries must have been inflicted after he had lost consciousness. The contention is opportunistic and proceeds from a speculative hypothesis. Contrariwise, when regard is had to the probabilities, *Siko's* amnesia is nothing more than a sham to conceal the true state of affairs, viz the resistance in the cell.

[36] The only account of the circumstances under which *Siko* could have sustained the injuries to his hands was tendered by the defendant's witnesses, Mr *Leon Pokbas (Pokbas)*, Mr *Lazola Lowell Banzana (Banzana)*, Mr *Loyiso Kabase (Kabase)* and Mr Xolani Patrick *Nogilana (Nogilana)*. Synopsized, their version was the following.

[36.1] The inmates of D4 were ordered to exit the cell. A group of approximately fifteen (15) refused to heed the order, stood their ground and congregated in one area. Spotters had conveyed information that the resisters comprised the gang leaders, were padded up and armed with knives. *Banzana* described **padding up** as follows: -

> "They were padded up. They had towels around their necks.
>
> What do you mean padded up with towels around their necks; what did they have on? --- They had put on extra clothing, fake clothing.

Why? Where did they get that from? --- They would take sheets, bed sheets, cut them up and then basically sew them into the inside of their shirts to make them thicker and this they would do you know to protect themselves against blows or knives I suppose.

And the towels, what is that for? --- They would wrap the towels around their necks to protect their necks.

Are the inmates allowed to keep private clothing? --- No, they are not.

Do you conduct searches at the cells from time to time? --- Yes, we do and we do find private clothes sometimes.

And clothing of the type you described now with sheets sewn in. --- Yes.

Have you found that before? --- We have found that a lot before. Sometimes they would take even towels and sew them on the inside to make the shirts stiffer and thicker."

[36.2] The EST entered the cell, armed with riot shields and tonfas. Given the confined space, their number and the obstacle caused by the beds in the cell, manoeuvrability was constrained. In order to disarm the obdurate knife wielding resisters, they were struck with batons on their hands and arms and once this had been achieved they were commandeered out of the cell and ordered to lay prostrate with the other inmates in the corridors.

[37] *Siko* was identified by *Banzana*, *Kabase* and *Nogilana* as one of the armed resisters. Their testimony, including *Pokbas'* was excoriated. There is however no merit in the contention that they concocted their evidence. The probabilities compel the acceptance of their version. Their testimony, that the leadership of the 26's was housed in cell D4, was never challenged. In his monograph, under the rubric, ***War in defence of territory ("land")***, *Veary* dealt with the inviolability of the cell by the inmates as follows: -

> "Prison gangs regard the space they physically occupy in a cell or section as their land in the same way as a nation state would regard the country in which it is located. In this regard any violation of that space is thus deemed a serious enough offence to warrant a violent reaction ("die land van die oemkosie moet met bloed verdedig word")."

[38] In his testimony, he elaborated on the sanctity of the cell and the gang's reaction to any perceived invasion of their space as follows: -

> "Can you talk about the relationship of the gangs to the warders. --- Your Lordship when I used the word "mapusa" earlier, it needs to be understood it is the natural enemy of the gangs in prison (indistinct). The area in which... let's say the 26's dominates in a cell, or the 28's and the 26's together, is considered their land, or

the 28 their "kraal"... "hulle ...". If you enter that land it is an invasive act whether you are a warder, whether you are a prisoner who happens to be there you might be tolerated but the rules will be said to you very clearly about how you will traverse and move in this land. They literally consider it their ownership. The expression they use is "ons pasellie" what they mean we control here.

But do they consider a search by correctional officers, is that an invasion of their land? --- That is an invasion of the land but worst, you are finding their lives (indistinct), you are taking their military capacity to defend themselves according to the number if you're the 26, away from them by that very act.

Now if inmates are seen adding up and putting on extra clothing, putting towels around their necks, what would that indicate? --- I can actually speak there of practical cases as recent as January that we're investigating on that matter. But apart from that when you prepare yourself for war in the 26 gang, you say you are Britishing yourself; "Ons gaan onsself 'British'; ons maak gereed vir oorlog". That means that if there is a confrontation extra padding gets put in the clothes. The section around the neck with the towel is a standard thing I've seen in other prisons where such incidences have occurred, which we are investigating, where it is to protect the vulnerable areas of the neck from injuries in that particular case. So it's a normal practice.

MR EPSTEIN Genl. Verry I don't know if you remember where you were. You were talking about vulnerable areas and towels around their necks. --- Yes I am giving the answer that it is to protect

> yourself after you've padded yourself everywhere, the most vulnerable points is your neck. So they usually tie – I've seen that in prisons – they tie the towel around their neck to prevent that injury.
>
> You have confirmed p.223 on your report, the gangs mimic not only the prison authorities but society in general. The gangs of an army (indistinct) judicial system and several authority which governs the conduct of the gangs. The gangs have policies on how to behave and when to attack. They refer to where they stay in cells as their land, they regard it as their private property, it is a pseudo national state. The warders (indistinct). Do you confirm that? --- I confirm that."[7]

Veary's evidence corroborates *Banzana*, *Kabase* and *Nogilana's* testimony in every material respect and I accept that they gave a truthful account of the events which unfolded in cell D4. It provides the only version of the manner in which *Siko's* fingers came to be fractured and accords with the probabilities.

Presence of knives

[39] The fact that knives were found during the course of the searches conducted by the EST was not seriously disputed. The charge levelled against the defendant's witnesses was, rather, that the quantity found had been inflated and the imputation was made was that most of the knives and sharpened objects contained in the vanity case (exhibit 9) were fraudulently inserted therein to discredit the plaintiffs. The mere

[7] I have deleted Mr Dyke's interjection from the reproduction purely by reason of its irrelevance.

fact that the individual items were not officially recorded, as ordained by the regulatory regime, does not lend itself to the conclusion contended for. Ms *Suzette Neethling* nee *Adendorf's* uncontroverted testimony was that shortly after the deceased's death, exhibit 9 was kept in *Mshunqane's* office, and handed to her by *Benn*. She kept it under lock and key until she handed it to one of the defendant's junior counsel prior to the trial. On the probabilities, the entire contents of exhibit 9 were seized during the searches. The alternative scenario postulated by the plaintiffs is fanciful and remote.

[40] As adumbrated earlier, there is a striking incongruity in *Siko's* narrative. In his detailed exposition of the assaults which he had been subjected to and its *sequelae*, foreshadowed in the particulars of claim, there is, as I remarked earlier, no reference whatsoever of the circumstances in which his hands were allegedly fractured. Those injuries and their *sequelae* constitute a substantial component of the damages claimed and introduced the occupational therapist, Ms *Letitia Strauss* (*Strauss*), into the proceedings. It is obvious from her testimony that she had succumbed to *Siko's* wile. Her perception of him as being ***"honest and sincere at all times"*** was exposed under cross-examination as being based upon *Siko's* deliberate concealment of the true facts. *Strauss'* subjectivity is accentuated by her evasiveness concerning *Siko's* previous conviction for murder, his recent participation in several sporting codes, post injury, and the *sequelae* of his injuries.

[41] The only explanation tendered for the circumstances under which the injuries to *Siko's* hands were inflicted, rests upon the hypothesis that they were inflicted

during the course of the assaults or when he had lost consciousness. There is not a tittle of evidence from *Siko* that his hands were injured by being struck with batons. The possibility that it occurred whilst he was comatose, is fanciful in the extreme. The only plausible explanation, and the only one which accords with the probabilities, is that testified to by the defendant's witnesses, to wit, that *Siko* resisted, disobeyed the order to vacate the cell, was armed and had to be disarmed.

[42] In the course of his address Mr *Dyke* adverted to a raft of inconsistencies in the testimony of *Pokbas*, *Banzana*, *Kabase* and *Nogilana*. It is indeed so that differences abound in their narrative of the events. In my view however, the differences relate to peripheral issues, and, given the effluxion of time, a decade, are to be expected. On the central issue, they corroborate each other in all material respects.

[43] In paragraphs [29] to [31], I dealt with *Siko's* denial of having concealed the knife, exhibit "6" on his person. The defendant's witness, Mr *Mtutuzeli Leofill Swartbooi* (*Swartbooi*), *Kabase* and *Nogilana* testified that he had. The probabilities favour their version and I accept their evidence. In argument before me, no doubt cognisant of the deficiencies in *Siko's* testimony, Mr *Dyke* submitted that, even assuming the correctness of the defendant's version that *Siko* had concealed and ejected exhibit "6", the methodology employed by the defendant's witnesses *per se* constituted an assault. The written heads[8], under the rubric, **"Searches as degrading treatment"** contain a veritable treasure trove of judicial precedent

[8] Additionally, countless other authorities were collated on a disc.

dealing with the issue. It makes for interesting reading but the authorities cited are completely irrelevant. *Siko's* amended particulars of claim delineated the ambit of the actionable assault. It omits entirely, the form of the searches now assailed. In any event, the methodology employed by Swartbooi *et al* enjoys legislative sanction – s 27 of the Correctional Services Act[9].

[44] Thus, during argument, recognising the imperfections in *Siko's* testimony and that his version abounded with improbabilities, the fall-back position adopted was that less invasive methods could have been employed in ejecting Siko and the other resisters from cell D4. That scenario had been explored by Mr *Dyke* when *Banzana* testified. His unchallenged evidence, in response to the question, ***"was there any other means you could have used?"*** was: -

> "Not at that stage.
>
> Could you lock the cells and put teargas in? --- No. If you had locked the cell and put teargas in, you basically will suffocate the inmates because they would have had no place to get out, you pose a danger that some of them could be asthmatic; it would trigger asthma and then what? It would be dangerous and it would not make sense, like I said. In a confined space, teargas is very effective. It not only burns you but it, how can I put it, it induces an element of panic because you want as far as possible to be away from that area so locking the cell and spraying gas would not really, would not particularly end, if you do put gas in it,

[9] Act No, 111 of 1998

normally, in an open space even, inmates would have T-shirts around their faces, if they had you know the intention of fighting, they would still stay but it would not be a wise decision because we would not be able to go in to get them out of the cell [interrupted].

[Indistinct] to open the door for those who do want to come out? --- We would not know. They may even barricade the, when they do barricade, if you lock it they will barricade it and then you can't even and start burning the cell, what do you do?

Why would they burn the cell? --- That is part of what they would do and when you know, they were fighting."

[45] *Banzana's* further testimony that no other means, other than disarming the resisters by using batons and tonfas, stands uncontradicted and, given the factual scenario, eminently reasonable. It follows from the aforegoing analysis and appraisal of the testimony adduced that Siko failed to acquit himself of the onus resting upon him. His claim for damages must consequently fail.

Mbena's Case

[46] In the concluding paragraph of their written heads of argument, plaintiffs' counsel made the submission, ". . . **that the plaintiffs have proven that they were subjected to egregious treatment amounting to an assault which meets the definition of torture at the hands of the Defendant's employees during the mass**

assault of inmates which occurred during July 2005". Notwithstanding the invocation, in considering whether Mbena has satisfied the onus resting upon him to prove the pleaded case, the facts must be evaluated and appraised without befuddlement by emotive secondary issues. In his amended particulars of claim, the assault, which founded the damages sought, was succinctly stated to be:

> "5.2 Beating him with batons on various parts of his body and
>
> 5.3 Electrocuting him with shock shields.
>
> These actions are collectively referred to as "the assault".'

[47] The foundation for *Mbena's* testimony had been laid, at the inception of the trial, by plaintiff no. 48, a co-inmate of *Mbena* at Maximum, Mr *Mzukisi Jack* (*Jack*). He was called as a corroborative witness for *Mbena's* pending claim that he had been assaulted after discarding the murder weapon and surrendering to officialdom. *Jack* was a thoroughly disreputable witness with scant regard for the truth. His feigned ignorance of the 26's leadership in Maximum and their machinations was exposed under cross-examination as blatantly untrue and, so too, his prior knowledge of *Mbena*. The omission of any reference to *Siko* and *Liwani's* presence, in close proximity to *Mbena* during the stabbing, attests to his suppression of the truth. Clearly, he was not the ***"independent witness"*** avouched for by Mr *Dyke*. His obeisance, and concomitant allegiance to the 26's, negates any notion of independence. In addition, as a plaintiff, he has a clear vested interest in the wider litigation. Jacks account of the actual stabbing of *Nqakula* is irreconcilable with

Mbena's evidence and justifies the inference that his version has been concocted. His evidence falls to be rejected in its entirety as palpably false.

[48] Consequently, *Mbena's* version that he had been assaulted after having surrendered his weapon stands alone. Given his penchant for prevarication and deceit, a character trait which permeated the entire body of his testimony, both in these and prior proceedings, no weight whatsoever can be accorded to his claim that he was assaulted after having surrendered. On the contrary, I unreservedly accept the evidence of Mr *Lindile April* (*April*), the correctional official who witnessed *Mbena's* murderous assault on *Nqakula*. The shortcomings in his testimony are inconsequential and clearly do not impact deleteriously on his creditworthiness.

[49] *Mbena's* evidence that he had repeatedly been assaulted over the ensuing days both prior to and after his court appearance at Maximum is unsubstantiated and must be adjudged against his penchant to lie. I have already adverted to his untruthfulness concerning the testimony tendered during his criminal trial. Both then and before me, his deceitfulness held no bounds. As the cross-examination unfolded, it became abundantly clear that *Mbena* is a pathological liar. Not only does his version not accord with the probabilities, it is saturated with lies. His claim for damages must therefore fail.

[50] In the result the following order will issue: -

The plaintiffs', Mr Simphiwe Mbena and Mr Xolani Siko's, claims are dismissed with costs, including the costs of three/two counsel, where so occasioned.

D. CHETTY

JUDGE OF THE HIGH COURT

Obo the plaintiffs:	*Adv B.C Dyke/ Adv A.C Moorhouse/ Adv M Morgan*
Instructed by	*Egon A. Oswald Attorneys*
	22 Bird Street, Central, Port Elizabeth
	Ref: E Oswald
Obo the defendant:	*Adv H. Epstein SC/ Adv I Dala/ Adv R Laher*
Instructed by	*State Attorneys*
	29 Western Road, Central, Port Elizabeth
	Ref: Mr Potgieter
	Tel: (041) 585 7921