

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES: **PATRICK FONDLING V MINISTER OF CORRECTIONAL SERVICES**
NOT REPORTABLE

Case Number: **584/08**
• High Court: **PORT ELIZABETH**
• DATE HEARD: **18 & 19 JUNE 2009**
• DATE DELIVERED: **25 JUNE 2009**

JUDGE(S): **JANSEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **ADV HARTLE AND ADV KRUGER**
- for the Respondent(s): **ADV I DALA**
-

Instructing attorneys:

- Applicant(s): **JAMES PHILLIPSON ATTORNEYS**
- Respondent(s): **STATE ATTORNEY**

CASE INFORMATION -

- ***Nature of proceedings:***
- ***Key Words:***
- ***Summary:***

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

NOT REPORTABLE

Case No.: 584/08

Date delivered: 25 June 2009

In the matter between:

PATRICK FONDLING

Plaintiff

and

THE MINISTER OF CORRECTIONAL SERVICES

Defendant

JUDGMENT

JANSEN J:

This is an action for damages and ancillary relief.

The incident which gave rise to this action occurred on 25 November 2005. At the time the plaintiff was a prisoner incarcerated at the Medium B Prison, St Albans, Port Elizabeth. It was the plaintiff's case that he, on the day in question, was unlawfully manhandled, mauled and assaulted by employees under the charge of the defendant at the St Albans Prison. The plaintiff claims against the defendant an order declaring the conduct of the defendant's employees to be unconstitutional and in breach of the defendant's obligation to safeguard the plaintiff in his custody and protect his right to personal integrity. The plaintiff further claims an amount of R150 000 being in respect of pain and suffering, shock and trauma and *contumelia* arising from the alleged incident.

It is common cause that the plaintiff was entrusted with cleaning duties in and around a pool room at the Medium B Prison. According to the plaintiff he was during lunchtime on the day in question playing pool against one Nando Goeda, who was also a prisoner in the same section. One Zeelie, employed by the Department, came into the pool room and also played one game against him. According to the plaintiff he also beat Zeelie. Thereafter two other employees one Williams and one Simons also came in. They also played pool against the plaintiff but he also beat both of them. Just after his final game against Williams the plaintiff was grabbed by Zeelie with his arm around his neck. Simons and Williams thereafter grabbed him by the legs and hoisted him off the ground. They pulled off his trousers and trunk. They then carried him to a wooden bench next to the wall. Zeelie held him around the neck whilst the other two officials each had an arm around both of his legs. They pulled his legs open. They put him on the bench and one started to play with his penis and the other with his testicles. He struggled and resisted and eventually managed to break loose. He then went outside to pick up his trousers and his trunk which, according to him, had been thrown out of the door by the officials. When he was about to put his trunk back on, another official, one Rockman, came in. He grabbed him around the neck. Simon and Williams again became involved. They grabbed him and put him on the pool table. Rockman then "twisted" him, as he put it. He was made to lay on his stomach on the pool table. His trunk was again thrown out of the door. A fellow prisoner, one China also came into the pool room. At that stage the plaintiff, in an attempt to free himself, had his arms around Rockman. China tried to get his arms loose. Zeelie then gave an instruction

to Goeda to put his finger into the plaintiff's anus. Goeda complied. That experience, according to the plaintiff, was very painful. Zeelie, who had a snooker cue stick in his hands pushed the blunt end thereof against the plaintiff's anus. It did not penetrate his anus. It was, however, also very painful. He then told the officials that he was going to report them. According to the plaintiff he could smell liquor on the breath of Zeelie, Williams and Simons. The plaintiff thereafter reported the incident to a more senior official, one Hoffman. He was taken to the hospital section where he was attended to by a male nurse, one Davids. According to the plaintiff he was not examined by Davids, but Davids only looked at his anus after he had requested him to pull his buttocks open. He was given painkillers and suppositories by Davids. According to the plaintiff he was approached by Williams the next day. Williams asked him to forgive him for his role in the assault on the plaintiff. He cried and he gave him R10 as a bribe. He took the R10 but handed it later to his attorney, to whom he refers as Mr James.

On behalf of the defendant four witnesses testified. First was the male nurse David who attended to the plaintiff. He was called as a so-called expert witness. He was a poor witness who based his evidence on wrong assumptions. Except for the fact that I will accept that the version recorded by him in the medical file of the plaintiff was indeed given by the plaintiff to him, I ignore his so-called expert evidence *in toto*.

Simons, Williams and Zeelie testified. According to Simons he was playing pool with the plaintiff when he smelled dagga on him. He wanted to search the plaintiff. The plaintiff resisted. At the time Williams was sitting in his office which is adjacent to the pool room. Through a hatch in the wall between the two rooms Simons requested Williams to come and assist him to search the plaintiff. Williams complied. When he got into the pool room the plaintiff was still held by Simons on his jersey. Williams then put his arms around the plaintiff whereupon Simons searched his trouser pockets. What was called a “bompie” then fell out of a pocket. Simons picked up the “bompie” and opened it. It was not dagga inside as he suspected, but only tobacco. Simons then put the “bompie” on the pool table. The plaintiff was annoyed and made the remark towards Simons that he would show him what he could do. He then took his pair of trousers off and threw it out of the pool room’s door. When he wanted to leave, Williams told him that he could not walk out without his trousers on. He instructed him to put it back on, which he did. The plaintiff then left. Zeelie denied that the plaintiff was ever assaulted indecently or otherwise as allegedly by him.

Williams confirmed the evidence of Simons in all material respects. He also denied any assault upon the plaintiff.

Zeelie was in his office next to the pool room. A prisoner with the nick name of China made coffee for him. When he was drinking his coffee he heard voices in the pool room. He then walked to the pool room with his coffee in his hand. When he entered the pool room he saw the plaintiff dressed only in

his pyjama shorts on his lower body. On the pool table was a piece of paper with tobacco in it. He denied any involvement in any assault on the plaintiff. No assault in his presence was committed on the plaintiff. According to him Rockman was on lunch and not present in the pool room.

Ms **Hartle** who, with the assistance of Ms **Kruger**, appeared on behalf of the plaintiff prepared extensive heads of argument. In their nineteen typed pages they deal with the test to be applied in a case such as the instant matter where the plaintiff's version of the events was diametrically opposed to that of the defendant. They deal with the onus, with the probabilities, with vicarious liability, with the defendant's attitude in this matter, with the Departmental investigation, with damages and costs. It was submitted on behalf of the plaintiff that I should accept the version of the plaintiff, reject that of the defendant and award damages with costs to the plaintiff.

Mr **Dala** appeared on behalf of the defendant. In argument, he only pointed out that the onus was on the plaintiff, that the defendant's version was not improbable and that the plaintiff's version was improbable. He did not advance any argument to substantiate his submissions. He concluded with a submission that if I find in favour of the plaintiff a proper award of damages should be R50 000 with costs on the Magistrates' Court scale. Mr **Dala's** argument was of no assistance to me at all. That, however, does not relieve me from the duty to consider the evidence and to give judgment on the question as to whether the plaintiff has proved his case against the defendant.

As mentioned, Ms **Hartle** referred to the attitude of the defendant and the manner in which it conducted this case. I want to add to that. On 9 June 2009, nine days before the trial, an application to compel was brought on behalf of the plaintiff against the defendant. The plaintiff sought an order to compel the defendant to discover a Departmental dossier relating to an enquiry conducted by officials of the Department into the matter. This application to compel was strenuously opposed on behalf of the defendant. Mr **Dala**, who also appeared on behalf of the defendant in that application, at the time submitted that if the dossier is discovered the plaintiff would receive an unfair trial advantage in the matter to the prejudice of the defendant. I granted an order against the defendant, compelling it to discover the dossier. When Mr **Dala** addressed me on the merits of the case, I invited him to point out any unfair trial advantage which the plaintiff has received as a result of my order compelling the defendant to make discovery. Mr **Dala** could not.

It was common cause that the onus was on the plaintiff to prove his case against the defendant on a balance of probabilities.

Counsel on behalf of the plaintiff pointed out the following improbabilities in the defendant's case. It was submitted that it is entirely improbable that the plaintiff could conjure up or contrive a case against four senior officials who he was bound to run into on a daily basis, two of whom the defendant's witnesses claimed were not even on the scene when the plaintiff, on the defendant's version, was allegedly searched for possession of dagga. It was submitted that all sorts of difficulties and unimaginative consequences would

follow on the plaintiff laying a false charge. There is some substance in this argument, but, on the other hand, it is also possible that the plaintiff, who enjoyed a privileged position as cleaner and tea maker, who used to play pool with officials of the defendant, was quite upset about the false accusation by Simons that he was in possession of dagga. The threat made by the plaintiff that he was going to “show them” should not be lost sight of.

It was secondly submitted by counsel that Simons’s evidence that he played pool with the plaintiff for a while before he suddenly had an impulse to search him for dagga is absurd. That was submitted to be an opportunistic attempt to explain away physical contact with the plaintiff. In my view, Simons’s conduct can be explained that he only after some time got so close to the plaintiff that he could smell something on him which he thought was dagga.

It was thirdly submitted on behalf of the plaintiff that the call for the assistance of Williams to search the plaintiff was only an explanation or justification for physical contact that he had with the plaintiff. I do not find this improbable. On Simons’s version the plaintiff resisted the attempt to search him. He could not do it on his own. He required assistance for a body search. Williams was in close proximity. He was the obvious person to be called to give assistance.

The fourth and last submission about the improbabilities in the defendant’s case pointed out by counsel was the story about the plaintiff throwing off his pants which was submitted was curiously odd, but would provide a plausible explanation for the plaintiff’s semi-naked appearance on a video recording. It

is common cause that a video camera was situated outside the pool room. The plaintiff knew about it and the defendant's officials too. According to the plaintiff not only his pair of trousers but also his trunks were thrown out of the pool room by the officials when they assaulted him. That caused him to go out of the pool room with his lower body stark naked to pick up his clothes. That would have been revealed by watching the video recording. It is not known what happened to the video recording. I find it highly improbable that the officials, well aware of the video camera, would throw out the plaintiff's clothes as part of an indecent assault upon him. That would immediately have attracted attention. If they wanted to assault him, and in particular indecently, they would most probably not have thrown out his trousers and trunk for a video recording to be made thereof. On the other hand, the plaintiff, after a threat made as testified by Simons, decided to throw out his pants to concoct a version of an indecent assault inside the pool room. On the plaintiff's version, the officials supplied video evidence against them of an indecent assault upon the plaintiff. I find that highly improbable.

It was submitted on behalf of the plaintiff that he was consistent in his version. I do not agree. Paragraph 7 of the Plaintiff's Particulars of Claim deals with his alleged manhandling and assault. In terms thereof the members: (1) hoisted him off the ground; (2) restrained his person by holding him around his neck in a "vice grip" and on each leg; (3) pulled off his trousers to expose his private parts; (4) squeezed his testicles; (5) strangled him on the neck; (6) further restrained him by having a fellow prisoner hold his hands behind his back; (7) exposed him again by pulling off his trousers for a second time;

(8) had him fingered in his anus by a fellow prisoner; and, (9) rammed the blunt end of a snooker cue stick into his anal opening. In his evidence the plaintiff materially diverted from the allegations made in paragraph 7. He testified that one of the members played with his testicles, as opposed to squeezing his testicles. He specifically did not mention in his Particulars of Claim the fact that one of the members played with his penis in an attempt to get it erected. He gave evidence to that effect. Furthermore, it was specifically testified by the plaintiff that the snooker cue stick was not pushed into his anal opening but only against it, contrary to the allegation made in his Particulars of Claim.

It is common cause that the plaintiff made a statement about the incident to a senior official at St Albans Prison, one Mr Hoffman on 27 November 2005, two days after the incident. That statement appears on page 21 of the bundle marked "A" handed in by the plaintiff. That statement reads as follows:

'On Friday 25 November 2005 at approximately 14:00 myself and fellow inmate Sthembiso Yezo was playing a game of pool in A-Section's poolroom. After I played and win Stembiso I played pool with Mr Zeelie. I win the game and played another game with him, which I also win. Thereafter I played pool with mr Simons. After we was finished with the game and I was busy to prepare the balls for another game, Mr Zeelie grab me around my neck while Mr Simons and Williams Q.D. pull of my trousers. Mr Zeelie throw my trouser out of the room. My body from below my waist was naked. Mr Zeelie then said to them to take me to the operation table. He was referring to the brown wooden table in the poolroom. They lay me down on the table and spread my legs open wide. Then they let me go and I went out of the poolroom to pick up my trouser in the courtyard. I went inside the poolroom and while I was busy pulling on my trouser Mr Rockman came and grab me tight. Inmate "China" Mario Jansen helps Mr Rockman grabbing me. Messrs Zeelie, Simons and Williams pull off my trouser again. Mr Zeelie close the door and said to inmate

Fernando Goeda to insert his finger into my anus. Fernando then do as what Mr Zeelie told him to do and insert his right middle finger into my ans. Then Mr Zeelie said to me in Afrikaans: "Hey you gat stink na kak" and he took the pool cue and squeeze it against my anus. Thereafter they let me go and I went and pull on my clothes.

I went to the investigators office where I report the incident to Mr Hoffman. I went back to A-Unit after Mr Hoffman has phoned Mr Simons to attend to my complaint to see the Head of the Centre but he refuse to assist me. I went then back to Mr Hoffman and he escort me to A-Unit where he recorded my complaint in the unit's diary. Thereafter he escorted me to the Regional Hospital where the incident was also recorded. In the hospital we met Mr Jacobs and report he incident to him.

The following Saturday 26 November 2005 Mr Williams came to me and apologise to me for what they has done to me and gave me a ten rand note (R10.00). I took the money (R10.00) and give it to David Price so that he could give it to my lawyer.' (*Sic*)

This statement materially differs from the evidence given by the plaintiff in Court. He specifically denied that he ever played a game of pool against an inmate by the name of "Sthembiso Yezo". According to his evidence he also played a game against Mr Williams. No mention was made about such a game in his statement. In his statement he did not mention anything about the members playing with his testicles or his penis or an alleged remark about the size of his penis as he testified in Court. In evidence the plaintiff did not mention the remark allegedly made by Zeelie to him in Afrikaans. In his statement he mentioned that he had handed the R10 note given to him by Williams to one David Price. That was confirmed by the plaintiff when he made an additional statement to Mr Hoffman on the 5 December 2005. In that statement he said the following:

“On Saturday 26 November 2005 Mr Williams apologise to me about what happened and handed a ten rand note to me. It took it and gave it to inmate David Price who said he is going to give it to the lawyer, I only know the lawyer as Mr Phillips as it was Price who arranges the lawyer. I did not met him personally but I talk to him over the phone on Monday 28 November 2005. Inmate David Price said to me he is going to give the money R10,00) to the lawyer as proof of the bribery. That’s all I declare.” (*Sic*)

When he was cross-examined he was specifically asked to whom he handed the money. He denied having handed the money to David Price but was adamant that he had handed it to his lawyer. This material contradiction places a big question mark behind the evidence of the plaintiff that he was approached by Williams who apologised to him and wanted to bribe him. That affects the evidence of the plaintiff *in toto*.

The plaintiff, furthermore, materially contradicted himself when he testified about the incident where the finger was allegedly put into his anus. He testified in chief that Rockman grabbed him around his neck and that Simons and Williams then threw him onto the pool table. They again pulled off his trunk. Rockman then twisted him to such an extent that he landed with his stomach on the pool table. Thereafter Goeda was instructed by Zeelie to put his finger into the plaintiff’s anus. Thereafter Zeelie pushed the cue stick against his anus. He created the impression that this was all done to him when he was lying on his stomach on the pool table. During cross-examination he specifically testified that he was not on the pool table when Goeda’s finger was put into his anus and when Zeelie pushed him with the snooker cue stick. He was still on the ground. It was only thereafter that he

was thrown onto the pool table. Nothing more was done to him after he had been thrown onto the pool table.

The plaintiff was not consistent in his version. The plaintiff's version of the events is not more probable than that of Simons, Williams and Zeelie. In my judgment the plaintiff has not succeeded to prove his case against the defendant.

In the result, the plaintiff's claim is dismissed with costs.

J C H JANSEN

JUDGE OF THE HIGH COURT