

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - PORT ELIZABETH)**

**CASE NO: 58/2011
DATE HEARD: 28/02/2012 –
02/03/2012; 09/05/2012
DATE DELIVERED: 18/09/2012**

In the matter between

SIVUYILE BOETANA BAM

1ST PLAINTIFF

SANDISO DLAKAVU

2ND PLAINTIFF

SIVUYILE YAKO

3RD PLAINTIFF

ZOLA SKIEFILE

4TH PLAINTIFF

and

THE MINISTER OF CORRECTIONAL SERVICES

DEFENDANT

JUDGMENT

ROBERSON J:-

[1] The plaintiffs are all sentenced offenders, serving their sentences at St. Alban's Maximum Correctional Centre, Port Elizabeth (St. Alban's). In this action they claim damages arising from alleged assaults perpetrated on them by correctional officials (members) in the employ of the defendant, while acting in the course and scope of their employment. The events giving rise to the claims occurred on 16 May 2010 at St. Alban's. St. Alban's houses inmates who have

been sentenced to long terms of imprisonment, for offences such as murder and rape.

[2] The defendant admitted the assaults on the first and third plaintiffs, and all that has to be decided in respect of their claims is the quantum of general damages. The defendant admitted that the second and fourth plaintiffs suffered certain injuries during a fight which broke out between members and the second and fourth plaintiffs. The defendant pleaded however that the members had used necessary force, as authorised by s 32 of the Correctional Services Act 111 of 1998, in order to defend themselves and to subdue the second and fourth plaintiffs, and that at all material times the members acted in self defence and under severe provocation.

[3] The parties agreed that the first and third plaintiffs' claims were to be adjudicated upon by way of a stated case. Besides setting out the manner of the assaults, the injuries inflicted and their *sequelae*, the stated case contained a brief reference to the events leading up to the assaults. It was stated that the members who assaulted the first plaintiff believed that he was one of the instigators of a perceived hostage incident which occurred earlier on 16 May 2010. It was common cause that this "perceived hostage incident" referred to the events giving rise to the second and fourth plaintiffs' claims.

QUANTUM FIRST PLAINTIFF

[4] The first plaintiff is serving a fifteen year sentence for murder. He was born in 1984 and is unmarried. Members assaulted him with batons and he sustained the following injuries: bruising and swelling of his arms; bruising to his abdomen and back; a haematoma of the head; and a severe fracture of the knee. He initially suffered severe pain and presently suffers moderate pain in his back and knee, which is worse in cold weather. He received the following treatment: a reduction of the fracture of the knee, including stabilisation of the knee using wires; the application of a plaster cast; surgery to remove the internal fixatives; hospitalisation for eight days; and pain medication. He has restriction of movement of the knee, a left-sided limp, and patello-femoral osteoarthritis. The assault caused him shock, trauma, humiliation and loss of dignity.

[5] I was referred to several cases by both Counsel, involving motor collision injuries and assaults. Awards in cases involving similar injuries serve as a guide and provide some context in which to decide on an appropriate award. The most serious injury the first plaintiff sustained was that to his knee. I have had regard to the following cases involving knee injuries: *Rabe v Road Accident Fund* 2011 (6E7) QOD 13 (GNP), *Aeschliman v Road Accident Fund* 2010 (6E7) QOD 1 (ECP), *Pitt v Pitt* 1971 (2E7) QOD 268 (C), *Bosch v Parity Insurance Co. Ltd* 1964 (2) SA 449 (W), and *Visser v Standard General Insurance Co. Ltd* 1952 (1E7) QOD 456 (T). I have considered the awards in those cases, the degrees of severity of the injuries and their *sequelae* in those cases, and the other injuries suffered by the first plaintiff. I have also taken into account the humiliation and

loss of dignity the first plaintiff suffered at the hands of persons entrusted with his welfare. In all the circumstances I am of the view that an award of R180 000.00 is a suitable award for general damages. The first plaintiff's future medical expenses were agreed in the sum of R128 556.00.

QUANTUM THIRD PLAINTIFF

[6] The third plaintiff was assaulted with batons by members of the defendant and sustained the following injuries:

A 2cm laceration to his right hand

A 1 cm laceration to the right foot

A 2 cm laceration to the head

Painful ribs

Bruising of both arms

He suffered severe pain, shock, trauma, humiliation and loss of dignity. He was treated at hospital and the wounds on his head, foot and hand were stitched. He also received pain medication.

[7] I have had regard to the awards made in the following cases involving assaults to which I was referred: *Peterson v Minister of Safety and Security* [2009] JOL 24495 (ECG), *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE), and *Nodongwe v Minister of Safety and Security* [2007] JOL 20373 (SE). I am of the view that a suitable award for general damages in the present

case is R75 000.00.

[8] It was submitted on behalf of the defendant that costs should be awarded on the Magistrate's Court scale if the award was less than R100 000.00. In the circumstances, namely a revenge attack on a person in custody by the very persons who were entrusted with his security, I am of the view that the third plaintiff was justified in approaching the High Court to vindicate his right to dignity and bodily security. In addition, all the plaintiffs have sued in a single action and some of the first and third plaintiffs' costs will overlap.

SECOND AND FOURTH PLAINTIFF'S CLAIMS

[9] In this portion of the judgment I shall refer to the second plaintiff as Dlakavu and to the fourth plaintiff as Skefile. The defendant admitted that they had suffered injuries and received treatment as follows:

9.1 Dlakavu

Bruising, swelling and pain to his left arm and hand;

Bruising to his abdomen, particularly on the left side of his back;

Three lacerations to the back of his head, two of 1cm and one of 4cm, which required stitches;

He was treated at St. Alban's Maximum and Livingstone hospitals and received tablets for pain and his lacerations were stitched.

9.2 Skefile

A painful left leg

Linear bruises on his back

A bruised and painful right small finger

A bruised and painful left upper arm

A 6cm laceration to his head which required stitches

He was treated at St. Alban's Maximum hospital and received tablets for pain and his laceration was stitched.

[10] Dlakavu and Skefile both alleged in their particulars of claim that they had been assaulted by members Tshaka, Hans, Ndabeni, and April.

[11] There were conflicting versions of the events leading up to and surrounding the infliction of force by the members on Dlakavu and Skefile. It is necessary first to find which version is more probable. In the event that the defendant's version is found to be more probable, it will be necessary to determine whether the infliction of the injuries was justified, or whether there was provocation justifying a reduction of damages. Retaliation on the part of the members was also raised in argument.

[12] It was agreed that the defendant would begin.

EVIDENCE FOR THE DEFENDANT

[13] Lindile April testified that he had been a correctional official for twenty four

years and had been stationed at St. Alban's since 2001. On 16 May 2010 he and another member, Mrs.Roxo, were in the Isiqalo unit office at St. Alban's, when he heard a noise from the passage leading to the office. Skefile was brought into the office by members Tshaka and Hans. They were shouting at one another and the members were pushing Skefile, who was resisting. After they entered he closed the door, because when it was opened it struck his leg. He asked what was happening but received no response. The altercation continued in the office.

[14] Dlakavu then entered the office, with another inmate, shouting at Tshaka and Hans, asking what they were doing to his fellow man and swearing at them. Tshaka managed to push the other inmate away. Tshaka and Hans were occupied with Skefile, and Dlakavu took Hans' baton from him and waved it around. April did not know if Dlakavu was trying to defend himself but at that stage Hans had not done anything to him. Dlakavu hit Hans and another member on their hands with the baton, and also hit Hans on his back. Within a minute after Dlakavu had entered, the door to the office was kicked, and Tshaka and Ndabeni, who had at some stage also entered the office, held the door closed. Inmates outside the door were pushing and kicking the door, as well as hitting it with an object, and were shouting that Tshaka should open the door and that they wanted him to come out. Judging from the noise there were many inmates outside. April assisted in keeping the door closed and Ndabeni went to the assistance of Hans, who was struggling with Dlakavu for possession of the

baton.

[15] Skefile came to Dlakavu's aid, using his fists. Hans recovered possession of his baton and he and Ndabeni struck Dlakavu and Skefile with their batons, while Dlakavu and Skefile used their fists. Mrs. Roxo went into the toilet in the office and called for help. Hans and Ndabeni continued to use their batons on Dlakavu and Skefile until the arrival of other members at the office. April did not take part in the fight. During this time he realised that the situation was serious (he said "things were bad, very bad to me") and was wondering what would happen if the inmates managed to get into the office, from which there was no way of escape. When the fighting ceased, he saw blood on Dlakavu and Skefile and on the members' clothes, but did not notice any injuries on Tshaka, Hans or Ndabeni.

[16] His general response when the contrary versions of Dlakavu and Skefile were put to him was to say he had no knowledge, or had no answer. He specifically denied that he had struck Dlakavu with a baton, that when Dlakavu entered Skefile was lying bleeding on the floor, and that Skefile had managed to crawl out of the office before the other members arrived and had been brought back into the office.

[17] In his written statement made on 16 May 2010 for the internal investigation, he said that when Tshaka and Hans entered the office with Skefile, they were

arguing, and Skefile was swearing at them. When asked in cross-examination why he mentioned an argument as opposed to an altercation (presumably meaning a physical altercation), he said he was unable to answer. When it was then put to him that in fact there was only an argument and not a physical exchange he said he was unable to answer and that he saw what happened the way he saw it. Later during cross-examination he said there was no physical fighting and just an exchange of words, but later still said that they were fighting verbally and grabbing one another as if they were fighting. When it was put to him that Dlakavu had asked why the members were assaulting Skefile, he said he did not know if that happened. However in his written statement he said “the inmate asked the members why they assault that inmate”. He agreed that was correct.

[18] Thandikosi Tshaka testified that he has been in the employ of the Department of Correctional Services for seven years, and stationed at St. Alban’s since 2008. On 16 May 2010 he and Hans were maintaining security while the inmates were having lunch in the dining hall. The inmates themselves dished out the lunch. He noticed a number of inmates in the courtyard who were not going into the dining hall and told them to do so. Some of the inmates heeded his order but a few remained in the courtyard. One of them was Skefile, with whom he argued about his failure to go to the dining hall. Skefile swore at him and Hans, so he decided to call Skefile to the Isiqalo office where he intended to charge him with disobeying an order and swearing at him. Skefile accompanied

him and Hans to the office without resistance, but at the door of the office resisted. Tshaka took hold of him and Skefile tried to break loose, but was pulled into the office. Tshaka thought Hans closed the door after them. He did not hear April asking what was going on. In the office he looked for Skefile's file and a charge sheet, and while he was doing so, Ndabeni entered the office. At this time Skefile was not resisting and was listening to them. Tshaka then heard the door of the office being kicked and he and other members tried to close the door, but Dlakavu managed to get into the office. The third plaintiff, Yako, was outside the office. One of the inmates, he did not remember which one, but later remembered that it was Dlakavu, grabbed Hans' baton from his waist and hit Hans on the forehead with it. He did not first wave the baton around. Ndabeni was struck with the baton on his arm. The inmates were very aggressive and the fight then started. It had not been the members' intention to fight, but Dlakavu had caused the fight. Tshaka and Ndabeni used batons, while Hans, whose baton had been taken, went to hold the door closed with April, to prevent the inmates outside from getting in to the office. Hans' baton was recovered from Dlakavu. Dlakavu and Skefile fought back, and because of the dangerous situation created by the inmates outside trying to get in, the members continued to fight with them until they were on the ground. They needed to achieve this result in order to be able to deal with the inmates outside, in case they managed to break into the office. After Dlakavu and Skefile were down, they all held the door closed. Tshaka could not say how many inmates were outside, but from the noise they were making it sounded like many. They were calling his name and

saying that they wanted to kill him. During the fight, Roxo called from the toilet for help and eventually other members came to their rescue.

[19] Tshaka was mentally traumatised by the incident and was counselled by a psychologist. He sustained injuries to his back, thumb and ankle, the latter injury caused when he was pushed against a steel cupboard in the office. The doctor was not available that day so he took pain medication, and went to the doctor the following day. The doctor gave him tablets. He claimed compensation from the Department of Correctional Services for psychological injuries sustained while on duty. He, Hans and Ndabeni laid criminal charges with the police. Tshaka has since been transferred from St. Alban's and did not wish his new station to be disclosed.

[20] In his written statement made to the police on 17 May 2010, he said that other inmates in the courtyard told him they had eaten and he told them to go to their cells. They complied with his order but Skefile argued with him and swore at him. Although he had said when he testified that when he argued with Skefile there were a few inmates in the courtyard, he said that those inmates had not argued with him and had left.

[21] In his written statement given for the internal investigation and in his written statement to the police, he did not mention that Skefile had resisted at the office door. His explanation for this omission in his statements was that he was in a

state of confusion and shock.

[22] He also said in his police statement that the other inmates had assumed that the members were attacking Skefile and the door was kicked and Dlakavu and another inmate entered. When asked why he said they assumed Skefile was being attacked, he said that never before, when they called an inmate into the office, had other inmates come to defend him or fight for him.

[23] He was asked in cross-examination about the procedures to be followed when an inmate assaults a member. He agreed that there was a disciplinary procedure to be followed but at the time of an assault there would not be an opportunity to write a report, only some time afterwards. This line of questioning related to the fact that his written statement for the internal investigation, made on 16 May 2010, suggested that Dlakavu was the aggressor and not both Dlakavu and Skefile. Tshaka's response was that had Dlakavu not entered the office, there would not have been a fight, but he repeated that both Skefile and Dlakavu had fought.

[24] He denied in cross-examination that he had ordered Skefile to go to his cell when they met in the courtyard, or that he swore at him and Skefile told him he was tired of his insults. He said he only learned Skefile's name that day. He could not remember if he had told Skefile in the office that he was stubborn and a troublemaker. He denied that he and Hans had slapped Skefile in the office, and

that he, Hans and Ndabeni had assaulted Skefile with batons prior to Dlakavu's entrance. He denied that Dlakavu had apologised for Skefile and had told them to charge him. He did not hear Dlakavu ask why they were assaulting Skefile. He denied that Skefile had managed to get out of the office.

[25] The third and last witness for the defendant was Nyamego Mnaymese, who is a court interpreter and was the interpreter in the trial. His testimony concerned two letters allegedly written by Dlakavu. The admissibility of these letters was in issue, and I shall deal later in this judgment with their admissibility. The letters were written in what Mnaymese described as colloquial Xhosa, and were translated by him into English. The English translations were for the most part unintelligible and there is no point in repeating them in this judgment. There were portions of the translated letters on which the defendant sought to rely. These portions were as follows:

"I have again done a hostage myself and Zibha on Sunday we went to forcefully take second (illegible) from Mankwaleni. So now I have two cases. All the boys/jail comrades are saluting."

"I have again done a hostage now I am Madakeni."

Mr. Mnaymese said that the translation was complicated because the Xhosa did not make sense and when translated into English did not make sense.

EVIDENCE FOR THE SECOND AND FOURTH PLAINTIFFS

[26] Skefile, who is sometimes called Zibha, testified that on 16 May 2010, he was on his way to the dining hall at St. Albans's. He stopped in the courtyard to ask for his food bowl (referred to as a "scoff tin") to be thrown to him from a cell on the upper floor. After he caught the bowl, he was approached by Tshaka and Hans who would have seen the food bowl in his hands. Tshaka insulted him by referring to him as a young boy and swearing at him, and told him to go to the cells. He did not go to the cells, and told Tshaka not to insult him, and that he had not eaten and was on his way to the dining hall. Hans also insulted him and told him to go to the cells. Neither of them responded when he told them he had not eaten and instead said he was troublesome and stubborn, and that he should go with them to the office. He thought they might be taking him to the office to find out from a cleaner whether or not he had eaten.

[27] He walked behind Tshaka and Hans to the office, and did not resist when they reached the office. April and Roxo were seated in the office and the door was left open. He did not see Tshaka looking for a charge sheet in the office. Tshaka said to him that he had noticed for a long time that he was troublesome and Skefile responded by asking what he meant. At this, Tshaka seemed annoyed and he and Hans slapped him several times on his face. He tried to approach Roxo for help but Hans prevented him from getting near her. Ndabeni then came in and also referred to him as a young boy, and the three of them, Tshaka, Hans, and Ndabeni, drew their batons and struck him all over his body, one blow striking his head, while he had his back to the wall and was trying to

protect himself. He did not fight back. They ceased hitting him after he had fallen down. He had blood on his face and on his clothes. All this time April and Roxo remained seated and did nothing.

[28] While he was being beaten, Dlakavu came into the office. Dlakavu apologised on his behalf and told the members that they should charge Skefile if he had done something wrong. Their response was to tell Dlakavu not to tell them how to do their work. Tshaka, Hans and Ndabeni then left him and approached Dlakavu and hit him with their batons. Dlakavu did not get hold of Hans' baton. The members were not watching Skefile at this time and he got up and ran out of the office. Under cross-examination he said initially that he did not crawl out of the office (as had been put to April), but later said that he crawled to the door, and then jumped up and ran. The members tried to close the door but he managed to get out and fell outside the door. The door was then closed. He was picked up by other inmates, and he told them that he had been assaulted and that Dlakavu was in the office being assaulted. There were many inmates and they tried to open the door by pushing, bumping and kicking it. The inmates were making a noise but he did not hear them calling for Tshaka or saying that they wanted to kill Tshaka. Other members arrived and put these inmates in their cells. Skefile went back into the office with member Zonyani and saw Dlakavu sitting there, with blood on his head and clothes. Skefile reported to member Konono that they had been assaulted by members. He and Dlakavu were then taken to the prison hospital.

[29] During cross-examination he was referred to two written statements he had made. The first was made on the 16 May 2010, for the purpose of the internal investigation. In that statement he said, *inter alia*, that on that day he met Tshaka while he was waiting for his scoff tin and that Tshaka had told him to go and get his meal. Skefile said the investigator was in a hurry to take the statement and that when he made the statement he had not yet seen the doctor and was confused. In his written statement made the next day, when he was still not feeling well, he said he and Dlakavu had been assaulted by Tshaka, Hans, Ndabeni and April. When this portion of his statement was put to him, his response was to apologise to April and say that April had never got up from where he was seated. In the second statement he also mentioned that Ndabeni had slapped him when he entered the office. He said that all that he remembered was that Ndabeni had entered the office and hit him with a baton.

[30] Dlakavu testified that on 16 May 2010 he was in the passage near the Isiqalo office, having come from the dining hall. He was in the company of member Badula. He saw Skefile being assaulted with batons inside the office by Tshaka, Hans and Ndabeni, and asked Badula to intervene. Badula did not want to get involved and Dlakavu decided to intervene himself. He was not afraid that he would be assaulted because he had done nothing wrong. He entered the office alone and saw Skefile lying on the ground with blood on him. April and Roxo were in the office and did not react to his entrance. He asked what Skefile

had done to warrant the assault and said that it would be better to charge him if he had done something wrong. The members' response was to tell him that he could not tell them what to do. Ndabeni then hit him on the head with a baton, and Tshaka, Hans and April joined in, all of them hitting him with batons. He did not fight back and at some point he lost consciousness. When he regained consciousness members Minnaar, Konono and others were in the office, and he saw Skefile coming into the office with another inmate. He and Skefile were then taken to the prison hospital. He knew nothing about a crowd of inmates who were trying to get into the office. He was never charged internally for attacking the members, nor was his prisoner status lowered.

[31] He denied writing the letters which had been translated from Xhosa into English, although his name was written at the end of each of them. He did not know who would have written letters in his name, and he did not know the meaning of some of the contents which were put to him. He did not know of any hostage situation which had taken place at the prison. He corrected the translated portion referred to in paragraph [25] above by saying that the word Sunday should have been Crown, and agreed that Yako was known as Crown.

[32] In his written statement made on 16 May 2010, he said he was standing with Badula and inmate Yako when he saw Tshaka and Hans coming from the dining hall to the office, and they were assaulting Skefile, who was bleeding. Tshaka, Hans, and Ndabeni then entered the office with Skefile, at which time he

(Dlakavu) entered the office, told them he had witnessed the assault on Skefile, and he was then assaulted. Roxo called for help when she heard inmates outside the office complaining. Yako entered the office and was also assaulted and ran away. When these contents were put to him, he said that he had never stood with Yako, that he had not seen Tshaka and Hans coming from the dining hall and entering the office, and that he had only seen Skefile being assaulted in the office. He denied that Roxo had called for help because she heard inmates outside the office and he never saw Yako in the office that day. His explanation for the differences between his evidence and the statement seemed to be that he was in pain and receiving treatment.

ADMISSIBILITY OF CERTAIN EVIDENCE

[33] The plaintiffs submitted that certain evidence should be disallowed.

Letters allegedly written by Dlakavu

[34] Dlakavu did not admit that he was the author of the letters which were translated into English. There was no evidence on behalf of the defendant to prove that the letters were written by Dlakavu. The letters were therefore inadmissible.

Injuries of Hans and Ndabeni

[35] Hans and Ndabeni did not testify. Tshaka testified that they had all gone for psychological counselling and that they had met at the psychologist's rooms. This was in my view insufficient proof of psychological injuries to Hans and

Ndabeni. Tshaka also said that Hans and Ndabeni were treated by a psychiatrist, because they told him so telephonically. This evidence was correctly objected to as hearsay.

Evidence of propensity and standing

[36] The defendant sought to admit the judgments of the High Court in which Dlakavu and Skefile were convicted and sentenced, for two purposes: firstly to show a propensity for aggression and secondly that the judgments would impact on quantum. Dlakavu and Skefile were convicted of violent crimes and are serving life sentences. I am of the view that the judgments are inadmissible for the purpose of proving that Dlakavu and Skefile were the aggressors that day. In my view the degree of similarity between the circumstances of the present incident and the circumstances in which the crimes were committed, is slight, and the probative value of the judgments is therefore similarly slight. The crimes were committed by the plaintiffs while they were free persons in the community, unrestrained in inflicting violence on helpless victims, and not in confinement, subject to ever present authority. If for example there was evidence that while inmates they had previously committed unprovoked assaults on members or other inmates, such evidence would have more probative value. It is not necessarily so that all persons convicted of violent crimes commit or instigate violent acts while in prison. For reasons which will become apparent, it is not necessary for me to decide on the admissibility of the judgments with regard to quantum.

DISCUSSION

[37] There were mutually destructive versions of the events leading up to and during the infliction of the injuries on Dlakavu and Skefile. The correct approach in these circumstances is that which was stated in *National Employers' General Insurance v Jagers* 1984 (4) SA 437 at 440D-G 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 nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”

[38] April was a markedly reluctant, obstructive, argumentative, and evasive witness during cross-examination. Even during his evidence in chief he seemed occasionally reluctant to answer a question. One got the impression that he did not want to be associated at all with the events in the Isiqalo office on 16 May 2012, and was not at all comfortable with having to testify. On a number of occasions he simply said he had no knowledge of something specific which was

put to him, when he was clearly in a position to have known. On at least two occasions he had no answer when he must have been able to provide an answer. He was present throughout the events until help arrived, and the office was admittedly small. He contradicted himself with regard to whether or not there was a physical fight between Tshaka and Hans and Skefile when they entered the office. He initially said that he did not know if Dlakuva had asked why Skefile was being assaulted, whereas he agreed he had said so in his written statement.

[39] Tshaka was in my view a satisfactory witness. He answered questions directly and did not attempt to play down his role in the infliction of injuries on Dlakuva and Skefile. He frankly admitted that they were beaten until they were down. He did not try to suggest that Skefile was aggressive prior to the entrance of Dlakuva, and said that Dlakuva was the cause of what happened. When he spoke about how serious the situation had been, he genuinely communicated the critical atmosphere in the office, as well as his fear. It was submitted that he was evasive at times, for example when he was asked about a disciplinary procedure with regard to Skefile, and the sequence of events after Dlakuva entered the office. I do not agree that these aspects of his evidence demonstrated evasiveness. He agreed that there were disciplinary procedures and he did make a statement for the investigation into the incident. He also laid a criminal charge. He was merely uncertain about precisely who had held the door closed after Dlakuva entered. If one considers that Dlakuva's entrance was unexpected

and thereafter there was a crowd of inmates trying to get in, it is understandable that he could not remember who held the door closed. He never tried to suggest that he was not involved in the physical fight with Dlakavu and Skefile.

[40] It was submitted that his explanation for the portion of his written statement where he said the other inmates assumed that Skefile was being assaulted was improbable. I am not of the view that his explanation for this statement supported a finding that Skefile was assaulted prior to the entrance of Dlakavu. There must have been a reason why Dlakavu and Yako were at the door and Tshaka merely gave his theory. At worst for Tshaka, he might have said this in his statement because Dlakavu had asked why Skefile was being assaulted, but that does not mean he admitted that Skefile was being assaulted. He did not deny that Dlakavu had asked why Skefile was being assaulted, he said that he did not hear Dlakavu ask.

[41] Skefile was a fairly consistent witness who maintained his version under cross- examination. He unhesitatingly agreed that April had not assaulted him and had remained seated, and offered his apology. Dlakavu was mostly consistent, but when questioned about the letters was evasive and argumentative.

[42] There were contradictions between April and Tshaka but in my view they were not material, for example who closed the door after Tshaka and Hans

entered with Skefile, whether or not April intervened, whether or not the altercation between them continued after they entered, what happened after Dlakavu entered, what happened at the door while the inmates were outside, and at what stage Tshaka, Hans and Ndabeni ceased beating Dlakavu and Skefile. Tshaka and April both said that as Tshaka and Hans entered with Skefile, there was some sort of physical struggle. Dlakavu must have entered soon afterwards and his entrance would have been significant in the circumstances. It was therefore understandable that memories would differ as to what precisely was going on between Tshaka, Hans and Skefile after they entered the office. Once there was violence in the office, and there was a crowd of inmates outside trying to force the door open, it is not surprising that in this frightening situation memories would differ. What is important is that Tshaka and April did not try to play down the beating of Dlakavu and Skefile, and it was not in dispute that inmates outside were trying to force the door open, and the members would have had to try to prevent them from doing so.

[43] One would have thought that had Skefile resisted at the door to the office, Tshaka would have mentioned this in his statements. On the other hand, he was clear that Skefile was not violent in the office until the fight started after Dlakavu's arrival, and said that if it had not been for Dlakavu, the fight would not have happened. Even taking into account April's unsatisfactory evidence on this aspect, I do not think the omission in Tshaka's statements carries significant weight.

[44] On the other hand, I am of the view that the deviations from their written statements by Dlakavu and Skefile were material and significant, and play an important role in deciding the overall probabilities of the respective versions. Although both of them claimed to be distracted by their injuries when they made the statements, the contents of the statements were fairly explicit concerning the sequence of events and who did what to whom, and in some respects were in line with the evidence of Tshaka and April.

[45] The starting point was what happened in the courtyard between Tshaka, Hans and Skefile. Tshaka's evidence was that he was maintaining security while the inmates were being served their lunch. Although he said that the inmates were dishing out the food, he twice used the expression "we were serving lunch" which implies that part of his duties was to ensure that the inmates went to the dining hall and had their lunch. It is therefore more probable that his altercation with Skefile in the courtyard followed his order that Skefile should go to the dining hall, rather than an order that Skefile should go to his cell. Skefile himself said that he had not yet eaten. This probability is significantly strengthened by Skefile's written statement in which he said that Tshaka had instructed him to go and get his meal. It is improbable that Skefile made a mistake in his statement in this regard. His claimed reason for making a mistake, namely that he was confused, was most unconvincing. In his written statement the next day, he made no mention of being told to go to his cell. He did not try to suggest that his

statements had been wrongly recorded. The inference to be drawn from these aspects of both his written statements is that his evidence that Tshaka ordered him to go to his cell and did not listen to him when he said he had not yet eaten, was fabricated, and an attempt to suggest that Tshaka did not care if he had not eaten. Tshaka's evidence that Skefile did not heed his order to go to the dining hall, that an argument ensued, and that he decided to take him to the office to charge him, must therefore be accepted. On his own evidence Skefile disobeyed Tshaka, albeit following a different order, and this too supports Tshaka's version of a decision to charge Skefile.

[46] Tshaka denied that Skefile was assaulted in the office prior to the arrival of Dlakavu. He in fact said that Skefile was not resisting in the office until the arrival of Dlakavu. In his written statement and in his particulars of claim Skefile included April as one of the members who assaulted him, but agreed that April had not assaulted him and that April had remained seated. This aspect of his evidence not only supports that of April, but adversely affects the reliability of Skefile's evidence of what happened to him prior to the arrival of Dlakavu. Further, if he was not resisting in the office, it is improbable that Tshaka, Hans, and later Ndabeni, would set upon him with batons. Tshaka clearly blamed Dlakavu for starting the fight, and this supports his evidence that his intention was to charge Skefile, and not to assault him.

[47] Dlakavu's evidence of an assault on Skefile prior to his arrival was flawed.

He clearly stated in his written statement that he saw Skefile being assaulted by Tshaka and Hans on their way from the dining hall before they entered the office, and that he followed them into the office. His explanation for this aspect of his written statement, namely that he was in pain, was also unconvincing. He too did not suggest that his statement had been wrongly recorded. Although when his statement was put to him he insisted that he had only seen Skefile being assaulted in the office, the material differences between his evidence and the statement adversely affected his credibility.

[48] In the result it is more probable that Skefile was not assaulted in the office prior to the arrival of Dlakavu.

[49] Dlakavu claimed to have entered the office as a kind of peaceful mediator. In my view this was improbable. If Skefile was being beaten with batons by three members, it is unlikely Dlakavu would have entered and subjected himself to the risk of assault, and unlikely that he would have believed that the members would have ceased their assault at his intervention. It is more probable that he entered the office as an aggressor, particularly as according to both April and Tshaka Dlakavu was not alone when he entered the office (April said a second inmate was pushed away by Tshaka and Tshaka said that Yako was outside the door) and not long afterwards there was a crowd of angry inmates outside trying to force open the door. As already mentioned, there was no dispute that there was such a crowd of inmates. This was Skefile's evidence and was mentioned by

Dlakavu in his written statement (he said that Roxo had heard the inmates “complaining” outside the office). In my view it is highly probable that Dlakavu did not act as a lone peacemaker, but was associated with an aggressive movement against members in the office, Tshaka in particular. Tshaka’s evidence about Yako being outside the door when Dlakavu managed to get inside the office, was supported to some extent by the portion in Dlakavu’s written statement where he said that after he had been assaulted, Yako had entered the office, was assaulted, and had run away. Dlakavu nevertheless insisted that he had not seen Yako in the office that day.

[50] In this aggressive atmosphere it is probable that Dlakavu did get hold of Hans’ baton and assault him and Ndabeni, and that both Dlakavu and Skefile were aggressive, particularly as they had the backing of the crowd at the door. Dlakavu said he knew nothing about the crowd of inmates trying to get in, but mentioned in his written statement that the inmates were “complaining” outside the office. It is unlikely he would have said this in his statement if he did not know there was a crowd of inmates at the door. His evidence about losing consciousness must therefore be viewed with scepticism.

[51] While I have excluded the evidence of injuries to Hans and Ndabeni, Tshaka testified about his own injuries and the treatment he had received, both physical and psychological. It is unlikely he would have gone to the doctor if he had not been injured, and unlikely he would have been treated by a psychologist if he had not been traumatised. It is unlikely that his application for

compensation for psychological injuries sustained on duty was a ploy to deflect culpability. If he was injured physically and psychologically, it is unlikely these injuries would have been suffered if Dlakavu and Skefile had merely been passive victims.

[52] It follows from my view of the probabilities that I must accept the version of the defendant in preference to that of Dlakavu and Skefile. Overall the defendant's version flowed more logically and was more consistent with the common cause facts and sequence of events, namely that Skefile disobeyed an order and was taken to the office, that Dlakavu entered, that there was a crowd of inmates trying to force open the door of the office, and that Skefile and Dlakavu were injured. Both Skefile's and Dlakavu's versions flowed from flawed premises (the material deviations from their statements) and in my view this aspect of their versions tainted their versions throughout. I therefore find that Skefile was not assaulted by the members prior to the arrival of Dlakavu; that Dlakavu entered the Isiqalo office, grabbed Hans' baton and assaulted him and Ndabeni; that Skefile joined in the fray with his fists; that Tshaka, Hans, and Ndabeni struck them with batons in order to ward off the attack, until they were no longer fighting back; and that during this time there was a crowd of aggressive inmates trying to break open the door, uttering threats against Tshaka.

SELF DEFENCE

[53] The attack by Dlakavu and Skefile was unlawful and the members were

entitled to defend themselves and the other members in the office. Was the force they used reasonable in the circumstances? It is apposite to refer to the following passage in the judgment in *Ntanjana v Vorster and Minister of Justice* 1950 (4) 398 (C) at 406A-D (some authorities omitted):

"The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic wise after the event, weighing the matter in the secluded security of the Court-room.Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation of imminent peril. "Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons" *per* INNES, J.A., in *Union Government v. Buur* (1914, A.D. 273 at p. 286)."

[54] With regard to the need to avoid the role of the armchair critic, a telling portion of Tshaka's evidence is worth quoting:

"Milady, it was very, very, very bad. The situation was very, very bad at that time. There was no time of thinking as to what could happen. It was very bad. The only thing that we were thinking about was our lives."

[55] It is very important to remember the atmosphere in the small office, from which there was no escape. There were five members in the office, one of whom was a woman, and there was a crowd of aggressive inmates at the door, uttering threats against Tshaka. If the inmates had managed to force open the door, it is highly probable that serious harm to the members, who were outnumbered,

would have resulted. In my view in those circumstances it was reasonable to use the force which was used against Dlakavu and Skefile. It was necessary to use such force to ensure that they were no longer a threat so that the members could use all their efforts to prevent the crowd outside from getting in, and to defend themselves and the other members in case they did get in. Dlakavu's and Skefile's injuries, while not slight, were not so severe that they suffered long term effects. They were temporarily incapacitated. In my view, if they had not been subdued, they would probably have continued to be aggressive, supported as they were by the aggressive inmates outside.

[56] It follows that in my view the force used by the members was in all the circumstances commensurate with the attack, and the defence of self-defence should succeed.

ORDERS

[57] First plaintiff

The defendant is ordered to pay the first plaintiff:

57.1 R180 000.00 for general damages

57.2 R128 556.00 for future medical expenses

57.3 Interest on the above amounts at the legal rate from date of judgment to date of payment

57.4 Costs on the High Court scale

57.5 Interest thereon at the legal rate from a date 14 days after date of

allocatur to date of payment

[58] Second plaintiff

The second plaintiff's claim is dismissed with costs, such costs to include the costs of an inspection-in-loco and the preparation of the photograph album.

[59] Third plaintiff

The defendant is ordered to pay the third plaintiff:

59.1 R75 000.00

59.2 Interest thereon at the legal rate from date of judgment to date of payment

59.3 Costs on the High Court scale

59.4 Interest thereon at the legal rate from a date 14 days after date of allocatur to date of payment.

[60] Fourth plaintiff

The fourth plaintiff's claim is dismissed with costs, such costs to include the costs of an inspection-in-loco and the preparation of a photograph album.

J M ROBERSON
JUDGE OF THE HIGH COURT
Appearances: -

**For the Plaintiffs:- Adv M Beneke, instructed by James Philipson
Attorneys,
Port Elizabeth**

**For the Defendant:- Adv B Pienaar, instructed by The State Attorney,
Port Elizabeth**