

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

CASE NO: 3071/2013
Date heard: 7 September 2017
Date delivered: 22 September 2017

In the matter between

MALCOLM SPENCE

Plaintiff

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Defendant

JUDGMENT

GOOSEN, J.

[1] The plaintiff claims damages arising from an assault perpetrated upon him by a fellow inmate at the St. Albans Maximum Security Correction Centre. At the commencement of the trial the plaintiff applied for an order separating the determination of the liability of the defendant from the quantum of his claim in terms of Rule 33 (4). I granted the order and ordered that the costs of the application be costs in the cause.

[2] The plaintiff's claim is founded upon the alleged negligent breach of a duty of care owed to the plaintiff by the defendant's servants. It is alleged that the assault, which consisted of the plaintiff being slashed across his face with a surgical blade, was caused by the negligence of the defendant's servants in that:

4.1 The Defendant's employees failed to take adequate measures to prevent the fellow inmate from arming himself with the surgical blade.

4.2 The Defendant's employees failed to ensure the safety of the plaintiff, whilst the latter was locked in the passage in B Section at St Albans Maximum Correctional Centre, as they reasonably could and should have done.

[3] I should mention that the latter allegation as formulated in the particulars of claim was amended at the close of the plaintiff's case to bring it in line with the evidence tendered in regard to the place where the assault occurred.

[4] In paragraph 6 of the plaintiff's particulars of claim it is alleged that:

The Defendant's employees had a duty of care towards the Plaintiff to:

6.1 Ensure the plaintiff's safe custody; and

6.2 Ensure the physical and psychological integrity of the plaintiff.

[5] The defendant denied the alleged negligence, set out above, and further pleaded in relation thereto that:

4.2 The defendant specifically states that although reasonable steps are taken from time to time to search cells, individuals and the premises in general, by the very nature of the institution of a correctional facility, contraband will from time to time end up in the hands of detainees.

- [6] In relation to the duty of care alleged by the plaintiff the defendant pleaded as follows:

The defendant states that given the nature of the facility, the nature of detainees conduct from time to time, the culture in existence inside the facility, the conduct of the Plaintiff interacting with fellow detainees, the layout of the facility and the availability of manpower, all reasonable steps had been taken in order to comply with its duty of care.

- [7] The defendant admitted that on 10 April 2012 the plaintiff was assaulted by a fellow prisoner who slashed him across the face with a surgical blade. On the pleadings therefore the issue to be determined at trial was whether there had been a negligent breach of the duty of care which the defendant admitted that it owed to the plaintiff.

- [8] The plaintiff gave evidence at trial and also presented the evidence of Spyres, a Department of Correctional Services official who conducted an investigation into the incident which occurred on 10 April 2012. The defendant closed its case without calling any witnesses.

- [9] The plaintiff's description of events on 10 April 2012 was not placed in dispute. The plaintiff stated that he had been convicted of rape and sexual assault involving a child and was sentenced to undergo imprisonment. Given the nature of the offence for which he was convicted and the period of his incarceration he was incarcerated at the St Albans Maximum Correctional Centre. He explained that persons convicted

of sexual offences, particularly offences involving children, were often subjected to assaults or threats of assaults perpetrated upon them by other inmates held in the Maximum prison. Such prisoners were accordingly kept segregated from the general body of inmates. He stated that he had also suffered from a heart condition and hypertension and on this account also was kept segregated along with other inmates who suffered from ill health. He was therefore kept in the FC4 cell which is part of the B section of the facility. The threat of assault was a constant threat and accordingly the inmates in FC 4 cell were removed from the cell to the exercise area and to the dining facility under escort and separately from other inmates.

- [10] On 10 April 2012 at about 3.00pm he along with the other inmates in the FC 4 cell was taken out of the cell and escorted along a passage in the B section to the dining hall. The entrance to the dining hall is controlled by a locked gate opened from the inside to permit access to the dining hall. Once they were in the dining hall they collected their food for the evening meal. He stated that this consisted of a so-called "double meal" which meant that they were served additional bread on account of the fact that the prison was short-staffed. Once they had collected their food they were to be returned to their cell.

[11] The plaintiff said that he collected two trays of food, one for himself and one for a friend who was still in the cell. Once they had collected their food the inmates were made to wait at the gate which allowed access to the passage leading back to their cell. He stated that there were only three prison warders in the dining area. The prison warder, who was in control of the gate, used a two-way radio to make contact with the warder who was in control of the gate at the end of the passage which would enable the inmates to be admitted to the FC 4 cell section. The prison warder asked Vawa, the warder at the end gate, if the passage was clear. The gate leading into the passage was then unlocked and the inmates were allowed to enter the passage. He said that they were not accompanied by a prison official, as usually occurred, because there was a shortage of prison officials. He made his way along the passage to the gate at the other end. When he got there the gate was still locked and there was no prison official to be seen. He therefore waited at the gate. No prison official arrived. Whilst waiting at the gate he noticed that the passage was filling up with other inmates who had been admitted to the passage from the dining hall. This had not occurred before and he immediately became apprehensive. As the passage filled up he noticed an inmate between him and the gate. He had by then stepped back from the gate and he noticed this inmate pacing backwards and forwards in front of him.

[12] He said that he felt a blow to the side of his face on the left side. When he turned towards his fellow inmates they stepped back from him in apparent shock. It was then that he noticed blood and that he was bleeding profusely. There was still no prison warder at the gate. He decided to make his way back along the passage in the direction of the gate at the dining hall entrance. Someone gave him a rag with which to stop the bleeding. As he made his way through the crowded passage the prisoner who had been pacing in front of him walked alongside him. He noticed that he had a blade in his hand and that this prisoner taunted him and was making lunging movements towards him. When he got to the gate at the dining hall the attacker was still alongside him and remained there. The plaintiff managed to alert a prison warder who opened the gate and came to his assistance. He was then led back down the passage to the end of the passage by the prison official and ultimately taken for medical treatment. His attacker had dropped the blade on the floor before he was led away by two warders. The plaintiff received medical treatment for a 17 cm gash which ran from the left temporal region to the jaw line on the left side of his face.

[13] As already indicated the plaintiff's description of what transpired was not placed in dispute during cross-examination. Instead the cross-examination was directed towards the location of the place where the attack occurred and the question as to

whether the attack was provoked in any manner. It was also directed towards steps that the prison officials take from time to time to ensure that the inmates do not have in their possession weapons or contraband.

[14] In regard to the place where the attack occurred the plaintiff indicated that it occurred in the passage located in the B section of the prison leading from the dining hall back towards the FC 4 cell areas. He conceded readily that the description in the particulars of claim was incorrect inasmuch as it referred to the passage between the B and D sections of the prison. It was, in consequence of this, that the amendment was sought to the particulars of claim.

[15] The plaintiff stated that, insofar as he was concerned, the attack was entirely unprovoked and that nothing had given rise to it. He conceded, therefore, that the prison officials could not have anticipated the particular attack upon him by the perpetrator. However, he indicated that the inmates held in FC 4 cell were kept segregated from other inmates precisely because of the threat of assaults being perpetrated upon them by other inmates held in the Maximum Prison.

[16] The plaintiff accepted that the prison was short staffed on the occasion of the attack and that it was in consequence of this that a so-called 'double meal' was served and

that they were not escorted in the passage. He explained, however, that on previous occasions when that had occurred, the gate at the end of the passage was kept locked so as not to admit any other inmates into the passage when the FC 4 inmates were in the passage. He could not say why this had not been done. When he had been admitted to the passage from the dining hall he expected to have the gate at the other end of the passage opened by a prison official so that he and his fellow inmates could then enter the cells. The fact that the gate was not opened and that other prisoners were admitted to the passage from the dining hall had resulted in the FC 4 prisoners mingling with the other inmates. It was in these circumstances that the assault had occurred.

- [17] In regard to the searches conducted by prison officials, the plaintiff conceded that searches were conducted both on prisoners and their cells. He accepted that it was also possible that, notwithstanding searches being conducted, contraband would nevertheless be possessed by prisoners and that such contraband could include a dangerous weapon such as the surgical blade that the perpetrator had used in his attack upon him. He expressed the view that regular and more rigorous searches, including searches involving the use of scanning devices, might prevent the possession of such unlawful weapons.

[18] As indicated the plaintiff also presented the evidence of Spyres. It is in my view not necessary to dwell upon this evidence. He explained that he was appointed as the investigating officer to investigate the incident that occurred on 10 April 2012, and in this regard presented an investigation report. Included in that report was a statement apparently made by the perpetrator of the assault in which he admitted the assault upon the plaintiff and furthermore claimed to have been in possession of the weapon since he had been transferred to the St Albans Maximum Prison. The investigation, such as it was, did not cast any light on the circumstances giving rise to the assault upon the plaintiff since it does not appear that any prison officials were interviewed pursuant to the investigation. All that the evidence of Spyres established is that an assault was perpetrated on the plaintiff by a fellow inmate in the circumstances described by him.

[19] Mr. *Oswald*, on behalf of the plaintiff, argued that the evidence establishes that the defendant's servants failed to take adequate steps to secure the plaintiff from assault by a fellow inmate. It was argued that the case was on all fours with Jaftha v Minister of Correctional Services [2012] 2 All SA 286 (ECP). In that matter a fellow detainee had slashed the plaintiff across his face with a surgical blade after receiving treatment in the prison hospital. It was found that the defendant was liable on the basis that prison official had failed to take steps to segregate the prisoners following a prior altercation between them.

[20] Mr. *Jooste*, on behalf of the defendant, submitted that the facts in Jaftha are distinguishable. It was submitted that in that matter the foreseeability of harm had been triggered by the prior assault whereas no such trigger arose in the present matter.

[21] Mr. *Jooste* argued that the defendant did not have a case to meet. This was so, so the argument went, because on the plaintiff's own evidence a similar procedure had been effectively used on previous occasions when the Department of Correctional Services was short of personnel; that searches are regularly carried out to confiscate weapons and other contraband items; and it was not possible to guarantee that no weapons or other items could be retained in the possession of prisoners. It was furthermore argued that the attack was not foreshadowed by threats as it had been unprovoked. In the circumstances, so it was argued, the attack on the plaintiff was not reasonably foreseeable. The defendant's employees could not have anticipated the attack and therefore could not have taken steps to avoid it.

[22] The argument, however, does not address the fact that the prison officials, on the uncontested evidence of the plaintiff, had taken steps to keep the plaintiff and his cell inmates segregated from the general body of maximum security inmates. The steps included holding the plaintiff in a separate cell, the so-called security cell, and

ensuring that prisoners were escorted to and from the dining hall separate from other inmates. It also does not address the evidence of the plaintiff, which was to the effect that the prisoners held in the security cell were frequently subjected to abuse and threats of assaults by other inmates. It was the plaintiff's evidence that the prison officials had employed the mechanism of controlling entry into the passage area from the dining hall to ensure that those prisoners did not mingle with other inmates. They were also taken to and from the exercise yard, separately for a similar reason.

[23] These measures pointed to an acceptance of risk associated with mingling the security prisoners with the general body of inmates and must, in my view, indicate that the prison officials foresaw that the possibility of harm would eventuate if they were not segregated. Certainly no evidence was led to contradict the evidence of the plaintiff that they were kept segregated from the other inmates for this reason.

[24] Whilst it is so that the facts in Jaftha differ from the present matter the judgment nevertheless provides guidance as to the foreseeability of harm in circumstances such as the present and the necessity to act in accordance with such foresight.

[25] It is appropriate here to note the provisions of s 30 of the Correctional Services Act, Act 111 of 1998 which provides that:

- (1) Segregation of an inmate for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7(2)(e), is permissible –
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) when an inmate displays violence or is threatened with violence.
- (2) ..
- (3) ...
- (4) ..
- (5) ..
- (6) ..
- (7) ..
- (8) Segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.
- (9) Except insofar as it may be necessary in terms of subsection (1)(b) segregation may never be ordered as a form of punishment or disciplinary measure.

[26] As was noted in Jaftha at par [27],

The Act clearly contemplates the necessity for the application of segregation of persons in circumstances where violence has erupted between prisoners or where there is a threat of violence. This, since it is not for the purposes of punishment, must necessarily be for the purpose of the prevention of further harm. The utilisation of the power to segregate must flow from an acceptance that there is a reasonable risk of further violence and therefore the risk of harm occurring to the prisoner or prisoners concerned.
(Emphasis added)

[27] The measures contemplated by s 30 may vary from segregation in a single cell to measures short of such isolation which may be appropriate in the particular circumstances.

[28] We know from the evidence of the plaintiff that the defendant's servants had taken steps to prevent the possible harm from occurring. On previous occasions, the

security prisoners, including the plaintiff, were escorted in the passage. When faced with personnel shortages the prisoners were allowed to enter the passage from the dining hall and then admitted to their cell at the other end before other inmates were allowed to enter the passage. This mechanism had been effectively employed previously.

[29] On this occasion the warder who opened the gate to allow access to the passage did so after calling the other warder, Vawa, on the radio, presumably to ensure that he would be in a position to open the gate at the other end. Instead, while the plaintiff and the other FC 4 prisoners were confined in the passage other inmates were allowed to enter the passage contrary to the procedure previously employed. No evidence was presented to explain why the method previously employed to secure the FC 4 prisoners was not employed on the present occasion.

[30] In Mukheiber v Raath and another 1999 (3) SA 1065 (SCA) at 1077E-F it was stated that:

For the purposes of liability *culpa* arises if

(a) A reasonable person in the position of the defendant –

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

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

(b) The defendant failed to take those steps.

- [31] In this instance the facts and circumstances of the matter (cf. Joffe & Company Ltd v Hoskins and another; Joffe & Company Ltd v Banamour N.O. and another 1941 A.D. 431 at 451) are such that a reasonable person in the position of the defendant would have foreseen the possibility of harm flowing from an assault if the prisoners were not kept segregated. It is not necessary that the defendant's servants should have foreseen that the assault would take the form of an attack with a blade or other sharp instrument (Kruger v Van der Merwe 1966 (2) SA 266 (A) at 272F).
- [32] The evidence also establishes that a reasonable person in the position of the defendant would have foreseen the general kind of causal sequence by which the harm to the plaintiff occurred, namely that if the inmates were not segregated an attack, such as occurred, could result upon one or more of the prisoners requiring segregation in order to protect them from such assault.
- [33] This brings me to the second leg of the enquiry. It was the plaintiff's case that a similar procedure had been followed on previous occasions without incident. The plaintiff conceded that regular searches of prisoners and cells were conducted to remove weapons and other contraband. He conceded also that it would be impractical to conduct body searches on inmates every time they leave their cells. These concessions were fairly made.

[34] As I understood Mr *Jooste's* argument it was the concession, namely that preventive steps had been taken, which put paid to any form of negligence on the part of the defendant's servants.

[35] I disagree. As indicated above the alleged negligence of the defendant was founded upon two grounds, namely the failure to prevent the plaintiff's attacker from arming himself and the failure to ensure his safety whilst locked in the passage. The plaintiff's concession that searches were conducted and his further concession that it is very difficult to eliminate the presence of weapons or contraband amongst prisoners does not absolve the defendant from explaining what steps were actually taken to prevent the attacker from being in possession of a dangerous weapon. We know that he was in possession of such weapon. The defendant pleaded that it had taken certain measures and that those measures could not have prevented the attack given, *inter alia*, the layout of the facility and the culture in the prison. No evidence was led to contradict the plaintiff's evidence that the layout was such that measures had previously been successfully employed to keep the two groups of prisoners separated.

[36] Defendant's plea in respect of the possession of dangerous weapons by prisoners took the form of a confession and avoidance. Yet no evidence was presented to

indicate what measures were taken and that such measures as were taken were reasonable in the circumstances.

[37] Furthermore, in regard to the second ground of negligence the plaintiff's evidence was that in this instance the FC4 prisoners were not escorted in the passage as usually occurred and that they were not released from the passage before other inmates were admitted as it been done on previous occasions.

[38] In Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at 448F/G it was stated that the enquiry into what steps a reasonable person would take to avoid harm,

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

[39] In this instance we do not know what measures the defendant took to ensure that maximum security prisoners are unable to arm themselves with weapons such as that which was used. Even if it is accepted, for present purposes, that searching every prisoner every time he is removed from a cell and or employing metal detectors and other scanners is beyond the resources of the defendant and that such measures as were employed were reasonable, we are still left with the second ground, namely that the prisoners were not kept segregated. According to the

evidence of the plaintiff this was as a result of the failure to follow the segregation procedure which had previously been successfully employed. The plaintiff's evidence that had the prison official opened the gate at the end of the passage the prisoners would not have been confined in the passage was unchallenged. It is therefore not in dispute that the defendant could have ensured that the FC 4 prisoners were escorted out of the passage before the other inmates were admitted. By failing to do so the defendant's servants negligently breached the duty of care owed to the plaintiff.

[40] As indicated above the only issue was whether the defendant's servants had acted negligently. Accordingly, I am satisfied that the plaintiff has succeeded in establishing that the defendant is liable to him in damages for the harm suffered by him in consequence of the defendant's breach of its duty of care owed to.

[41] I therefore make the following order:

1. The defendant is declared to be liable to the plaintiff for whatever damages he may have suffered arising from the bodily injuries he sustained in the assault perpetrated on him by a fellow prisoner at the St. Albans maximum Prison on 10 April 2012;
2. The defendant is ordered to pay the costs.

For the Defendant
Adv. P. E. Jooste
Instructed by the State Attorney