



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

NOT REPORTABLE

Case no: 73/2024

In the matter between:

SIMPHIWE NKWATENI

Plaintiff

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Defendant

JUDGMENT

Govindjee J

Background

[1] The plaintiff, a correctional officer employed at the East London Correctional Centre, returned to work after his lunch break on 7 July 2023. He was intercepted by his supervisor, Mr Mrhasi, before he could re-enter the prison section and be subjected to the usual pat down search. He accompanied Mr Mrhasi to his office and was informed that information had been received suggesting that he was bringing

contraband into the facility. The subsequent search revealed no contraband, was conducted without a warrant and caused the plaintiff considerable upset. The plaintiff instituted an action for damages arising from an allegedly unlawful or malicious bodily search. The central disputes concern whether the search was consensual and lawfully undertaken, including the manner and extent of the search. The plaintiff also avers that the search was malicious.

[2] It is common cause that the search occurred in Mr Mrhasi's office (the office), with the door closed, in the presence of Mr Mrhasi, Mr Van Eck and Mr Botes (the supervisors). The factual disputes include whether the plaintiff consented to the search or not, whether he removed his own clothing or whether the supervisors did so, whether all the plaintiff's clothing was removed, including his underwear, whether or not he was made to turn to the wall and squat, and whether the blinds in the office were slanted or in a poor condition so that passers-by could observe the plaintiff in a state of undress. The issues also include whether the absence of a warrant, the use of Mr Mrhasi's office, the absence of a witness of the plaintiff's choosing, and the failure to employ other possible means of search rendered the search unlawful.

The plaintiff's case

[3] The plaintiff was employed by the Department of Justice and Correctional Services as a prison warder, stationed in East London. On 7 July 2023, he was summoned by his supervisor and unit manager, Mr Mrhasi, as he returned from a lunch break. He accompanied Mr Mrhasi to his office. Mr Van Eck, a supervisor working in the single cells unit, was also present. Mr Mrhasi informed the plaintiff that he had received information alleging that the plaintiff was carrying drugs. The plaintiff requested that a shop steward from his union be summoned. Mr Van Eck produced a mobile phone and the plaintiff was able to contact his shop steward. He was informed that the shop steward was in a different part of the city and requested that Mr Mrhasi and Mr Van Eck await his return. They refused to do so and indicated that they intended to search the plaintiff. The plaintiff requested the presence of another person, whom he described as a 'witness'.

[4] Mr Mrhasi left the office and returned in the company of Mr Botes, the head of the centre. Mr Botes enquired, in a tone the plaintiff perceived to be rough, whether

he was refusing to be searched. The plaintiff explained that he had requested the presence of a witness and enquired whether it was permissible for him to be searched without a witness being present. Mr Botes informed him that this was possible, before leaving the room and returning with a copy of the applicable legislation. The plaintiff was required to sign the document and did so, before requesting and receiving a copy. In his mind, the plaintiff was unhappy about what had transpired and intended to complain at a later stage.

[5] Thereafter, the plaintiff was strip-searched in a manner that he described as 'forceful', based on his perception that he had not consented to the search and because a witness of his choice was not present. Those responsible for the search were his superiors and the plaintiff believed that he had no option but to comply with their demand. All his clothes were removed. While the door of the office was closed, there were gaps in the blinds, which were old and tattered, so that it was possible for someone outside the room to observe the search. Mr Mrhasi had seen Mr Mabaso passing outside the window and suggested that the plaintiff call him to serve as a witness, which he refused because he suspected Mr Mabaso to be friendly with members of management, and based on his concern that Mr Mabaso would not tell the truth about what he observed. Instead, the plaintiff requested the presence of Mr Kafile and contacted him using his own phone. Mr Kafile arrived and, on the plaintiff's version, was not permitted to remain in the office as a witness.

[6] As for the actual search, the plaintiff explained that Mr Mrhasi had forcefully removed his clothing, which was given to the others for a thorough search. He was stripped naked, instructed to turn around and face the wall and to squat, to ensure that he was not retaining any contraband in his anus. Nothing was discovered, either in his clothing or on his body. The plaintiff obtained confirmation that the search was concluded, took his clothing, put on his socks and underpants and asked to be excused. He was upset and believed that his dignity had been infringed. He met Mr Kafile outside the room, who pleaded with him to dress. He put on his vest at some point in the passage. Near the veranda he met Mrs Loliwe, who was shocked to see him in a state of undress, and saw Mr Minnaar, who enquired as to what had transpired. He did not answer because of his mental state.

[7] The plaintiff expressed concern that he had been searched by two persons who were not black African, and that other males had been permitted to observe his build. He eventually put on his trousers and boots, without lacing them up, and his shirt. He decided that he would resign from his employment and proceeded to the area commissioner's office. He was requested to go home, given that he was emotional, and the area commissioner promised to talk to Mr Botes. He proceeded to his doctor and obtained some medication before going home to sleep. Later he was advised to draft a grievance pertaining to his dissatisfaction with the search. The plaintiff explained that his experience had affected his home life, and that he was still consulting a psychologist and was receiving treatment. Even though no unlawful substances were discovered during the search, the plaintiff never received an apology.

[8] During cross-examination, the plaintiff testified that he had very limited knowledge or experience of tip-offs, as these were not given to employees at his level. The plaintiff confirmed that Mr Mrhasi had informed him that he had received some information that he was carrying drugs. He disputed that it was the practice, in such situations, for the employee concerned to be taken aside. He maintained that a search warrant was required and that he could have been searched at a different part of the premises, in a private cubicle designed for that purpose, and which contained a scanner, and which was used to search persons whenever they entered the premises. He testified that had he been in possession of any contraband, he would not have allowed anyone to search him.

[9] The plaintiff indicated that he had signed the piece of legislation that had been shown to him under duress. Further to his suggestion that he could have been searched in the cubicle, the plaintiff averred that there were dogs that were trained to sniff for drugs, given that the scanner would not have picked up non-metallic items in his possession. Furthermore, the Emergency Supporting Team, who were available at the centre, rather than the senior officials concerned, could have performed the search.

[10] In essence, the plaintiff's case was that he had been searched in the wrong place, in an unlawful manner, without any written authorisation and without a witness

of his choice being present. He construed what had occurred as being inhumane and a violation of his dignity. He denied that he had taken off his clothes himself, that his underwear was not removed and that he had been requested to dress himself, instead pushing past Mr Botes before exiting the room.

[11] Mr Kafile testified that he had been employed by the Department for more than 20 years as a correctional official, responsible for rehabilitating offenders. He was called by the plaintiff, who was his colleague, as he returned from lunch on the day in question. He was requested by the plaintiff to witness his search, as he was dissatisfied with the manner in which it was to proceed. He entered the office at the same time as Mr Botes, the head of centre, who subsequently asked him to leave the room, as he had no right to be present. He also observed the plaintiff, Mr Mrhasi and Mr Van Eck in the office. He exited the office and waited outside for approximately 20 minutes. He found it unusual that the plaintiff was not being searched in the cubicle, which was a private space where a single person could have conducted the search.

[12] Mr Kafile observed the plaintiff exit the room, wearing only his underpants and holding his clothing in his hands. He was crying and informed Mr Kafile that he had been strip-searched. Given his emotional state, Mr Kafile attempted to contact the plaintiff's wife and decided that he could not leave the plaintiff alone. He also requested the plaintiff to dress, given that females would see him walking from the office and did not know why the plaintiff did not do so. During this time, Mr Minnaar, also a prison warder, enquired about what had transpired, while the plaintiff was dressing. A female social worker also observed the scene. Mr Kafile advised the plaintiff to visit a doctor, social worker or psychologist and walked him to his car. The plaintiff agreed to do so before Mr Kafile returned to work.

[13] Mr Kafile explained that the EST, as well as sniffer dogs from the dog unit, were called in cases of riot or whenever an official was suspected of smuggling. He explained that the office window was adjacent to and overlooked an external passage and that it was possible to see outside from within the office, which was not a private space.

[14] During cross-examination, Mr Kafile confirmed that he was a co-plaintiff with the plaintiff in other legal proceedings instituted against the defendant. He maintained that he had accompanied the plaintiff from the time he exited the office to his motor vehicle and denied that he visited the area commissioner during that time. He was unable to comment when it was put to him that the centre's sniffer dog had died and conceded that the metal scanner used in the cubicle would be unable to indicate when a person was in possession of drugs.

[15] The witness recalled that the plaintiff had phoned him, rather than using WhatsApp. While walking to the office, Mr Botes had enquired as to where he was going. He informed him that he had been called by the plaintiff and was permitted to sit in the office for a few minutes, where the others (Mr Mrhasi, Mr Van Eck, the plaintiff and Mr Botes) sat in silence, before being told by Mr Botes that he was not supposed to be present. At that stage the plaintiff was still dressed. Mr Kafile recalled that the blinds in the office were open but could not comment on their condition. It was put to Mr Kafile that he had not been present, inside or outside the office, during the material time.

[16] Dr Sokupa, an experienced medical practitioner, testified based on contemporaneous notes she had made when the plaintiff consulted with her on the day of the incident. The plaintiff had been registered with her practice since 2015. He had narrated his experience to her on the day of the incident. This was, she had noted, his second altercation at work and he was experiencing spasmodic headaches, known as cluster headaches. Dr Sokupa had previously referred the plaintiff to a psychiatrist and knew his medical history. She observed that the plaintiff's blood pressure was high, his pulse was accelerated and he was tremulous and sweating, all signifying emotional disturbance, either due to fear or anger, and mental stress. She understood from the plaintiff that the officials of the department had demanded that the plaintiff remove his clothes, based on a rule or policy, when he initially refused to do so. He had then done so, although he had wanted a witness to be present.

[17] Dr Sokupa diagnosed the plaintiff with post-traumatic stress disorder with major depression and noted that he was experiencing a panic attack. She

subsequently addressed a report to the treating psychiatrist. Her evidence also reflected that, prior to the incident, the plaintiff had already been referred to a psychiatrist for serious workplace-related difficulties. Dr Sokupa clarified, during cross-examination and in response to the court's questions, that the incident had triggered the plaintiff, in the sense that his previous medical history meant that his situation had been aggravated by the events of the day, particularly by being undressed.

The defendant's case

[18] Mr Mrhasi, the unit manager, testified that he had worked at the Department for 17 years. He also served as acting head of centre on occasion. The plaintiff had worked under Mr Mrhasi for approximately 10 years as a security official. The plaintiff worked directly with inmates and his duties included ensuring that inmates were not in possession of contraband. In Mr Mrhasi's view, employees of the Department who had direct access to inmates were generally implicated when employees were found to be in possession of unauthorised articles.

[19] Mr Mrhasi testified that he had received a telephonic tip-off, shortly before noon on the day of the incident, implicating the plaintiff. The informant indicated that the plaintiff, who was on lunchbreak at the time, would return carrying contraband. Mr Mrhasi decided that he would summon the plaintiff to his office upon his return and did so. Having observed Mr Van Eck, he decided to invite him to his office as well. Once in the office, he informed the plaintiff about the information that had been received. The plaintiff requested the presence of a witness, and Mr Mrhasi and Mr Van Eck permitted him to use the office phone. When this proved to be unsuccessful, Mr Van Eck offered the plaintiff his mobile phone. The plaintiff contacted Mr Ndlovu but could not secure his attendance as he was offsite. The plaintiff then enquired as to the source of the authority for his search. Mr Mrhasi left the office in search of a computer to print out the applicable legislation and found Mr Botes, who had not been present earlier. Mr Botes agreed to assist Mr Mrhasi, printed an extract from the Act and returned to the office with Mr Mrhasi. He explained the contents of the relevant provision to the plaintiff, who appeared satisfied with the explanation and signed the extract. The plaintiff then started undressing of his own accord.

[20] Mr Kafile was not observed at all during this time. Mr Botes remained in the office while the plaintiff undressed and, from time to time, looked into the passage. Mr Mrhasi explained that while there was no provision mandating the presence of a witness, he had decided to proceed with caution given that the search emanated from a tip-off. Mr Mrhasi explained that each of the clothing items was checked for contraband. The plaintiff was eventually dressed in only his underwear. Nothing untoward was discovered during the search process.

[21] The plaintiff gathered his clothing, put it over his arm but, to the surprise of those present, proceeded to the doorway and forced his way out of the room, despite Mr Botes having instructed him to dress and despite attempts to prevent him from leaving. While the plaintiff had been calm during the search and while removing his own clothes, he became angry thereafter and overcame Mr Mrhasi, Mr Van Eck and Mr Botes' attempts to prevent him from leaving.

[22] Mr Mrhasi explained that, given the tip-off, it was inappropriate to allow the plaintiff to be searched, in the ordinary manner, in the cubicle used to search anyone entering the prison. He suggested that the cubicle was 'not safe enough' for the type of search that had to be conducted and explained that there was no sniffer dog available. It was inappropriate and unnecessary for the EST to have been called to conduct the search, particularly because the plaintiff had shown no sign that he refused to be searched. Mr Mrhasi denied that he, Mr Van Eck and Mr Botes had played any part in undressing the plaintiff or that the plaintiff had been stripped naked. He maintained that he had personally closed the door and windows in his office once the plaintiff had entered, and that he had ensured that the plaintiff understood why he had been summoned. Mr Mrhasi indicated that he wanted to ensure that the search occurred in private and in a safe space, in a manner that upheld the plaintiff's dignity. In his recollection, the blinds in the office were secure. He denied having seen Mr Mabaso at all on the day of the incident.

[23] Mr Mrhasi testified that managers were also correctional security officers who were empowered to conduct searches. During cross-examination, he also suggested

that the search was covered by written authority emanating from the National Commissioner.

[24] According to Mr Mrhasi, Mr Botes had read sections 101 and 32 to the plaintiff, who appeared to accept the explanation for the search, signed the document together with Mr Botes and proceeded to remove his clothing. He denied that the plaintiff had wept after the search and could not understand why the plaintiff had become so angry. He testified that, because the search was being conducted on an official rather than a prisoner, those present were satisfied that the plaintiff was not in possession of any contraband even though he had not been stripped naked. It had therefore been considered unnecessary to cause the plaintiff to squat while naked. Mr Mrhasi emphasised that the plaintiff was not a prisoner and that, if a substance were hidden in the anus, it would in any event be for medical practitioners to remove it if necessary.

[25] Mr Mrhasi was not prepared to disclose the name of the person from whom he had received the tip-off. He testified that informants were not paid and that verification of information received would be achieved through questioning, and that information received should be treated with caution. He knew from a colleague that the informant who had contacted him had previously furnished information that had resulted in the discovery of contraband, although he had not participated in that search, and therefore trusted that source. He had previously conducted searches following tip-offs and had done so in the same manner, without utilising the search cubicle or resorting to the EST or medical facilities. Mr Mrhasi considered the cubicle to be inappropriate for conducting the type of search that he contemplated. He had informed Mr Botes of the tip-off at the time when the latter was requested to provide the extract from the Act, which was the only reason that Mr Botes had been summoned, and had conveyed the information to Mr Van Eck, who had been summoned to witness the search. According to Mr Mrhasi, the entire process had not lasted for more than an hour, and he had done everything in his power to satisfy the plaintiff's request for information, which he considered part of the plaintiff's rights.

[26] Mr Mrhasi recalled that the plaintiff had expressed his anger by blowing air out of his mouth but did not notice any weeping. He recalled that the plaintiff had been

admitted to hospital but could not recall precisely when that had occurred. He denied that the plaintiff had been subjected to tremendous stress because of ill-treatment at the hands of management. The plaintiff had been informed of the reason for the search and Mr Mrhasi was satisfied that the job had been performed with due respect for the plaintiff's dignity. According to Mr Mrhasi, the plaintiff was satisfied with the information he had received and had cooperated. As for the presence of more than one individual, Mr Mrhasi considered it prudent to have witnesses present, to prevent false accusations.

[27] Mr Mrhasi was the acting head of the centre that afternoon and had been fortunate to come across Mr Botes when he saw him. Mr Botes had been out of office that morning. The plaintiff, according to Mr Mrhasi, knew about the Institutional Order, which was reviewed each year. Such policies were made available by the responsible authorities and communicated to managers for onward transmission to their subordinates. Mr Mrhasi's evidence was that he had sensitised the plaintiff to the policy, as part of disseminating such information to all the employees who worked under his leadership, whereby they were informed as to the standard of conduct expected of them. Had the plaintiff refused to be searched, the EST would have been called to assist.

[28] Mr JJ Botes, the head of the East London Correctional Centre, testified that he had almost 40 years of service. His duties included overseeing staff. Promulgated legislation was executed by persons in his position, while policy and procedure drafting was the responsibility of the National Commissioner or Minister. The head of a centre was, however, responsible for determining their own prevention strategy by way of institutional order.

[29] Mr Botes explained the Institutional Order that was in operation at the time of the incident, which was designed to provide details pertaining to daily activities, including search of officials, and which provided as follows:

'Searching: Officials:

- A Correctional official required to act in order to control access to or maintain secure custody within a correctional centre may, in terms of section 101(2)(a) of the Act search any correctional official and his or her property.

- In terms of Regulation 70 correctional officials and their property may be searched.
- Officials can be tap down search, full body search, rub down search, removal of clothing, x-ray scanning etc. Depending on each case.'

[30] According to Mr Botes, while officials entering the Centre were ordinarily subjected only to a tap-down search, a fuller search, including removal of clothing, could be undertaken in a case triggered by a tip-off that an official was bringing unauthorised substances onto the premises.

[31] Mr Botes recalled the circumstances surrounding the incident. He had returned from another meeting and Mr Mrhasi, who was the lock-up manager that day and acting head of the centre, had visited him in his office, informed him that the plaintiff was in Mr Mrhasi's office and advised him that he had received information that the plaintiff was intending to bring contraband or drugs into the facility. Mr Botes accompanied Mr Mrhasi to his office and found the plaintiff in the company of Mr Van Eck.

[32] The plaintiff requested information as to the basis for the authority for him to be searched without a warrant. Mr Botes informed him that this was permitted by s 101(2) of the Act. The plaintiff requested a copy. He returned to his office, obtained a copy of the section and brought it to the plaintiff, explained the meaning of the subsection, ensured that he understood same before both signed in acknowledgment. The plaintiff then consented, stood up and started removing all his clothing, barring his underpants. No contraband was found following a search of the plaintiff's clothing or discovered on his person. Thereafter he was requested to dress so that the search could continue at the plaintiff's locker, which was part of the usual search process. This angered the plaintiff, who took his clothes and left despite requests to dress himself.

[33] The blinds in Mr Mrhasi's office were in good condition and closed so that nobody could see into the room. The plaintiff had been calm during the search, until he was informed that Mr Botes intended to proceed to his locker. He then pushed past those in attendance and left without dressing. The EST would have been

engaged had the plaintiff refused to be searched. Given that he had consented and was willing to remove his own clothing, this was deemed unnecessary. According to Mr Botes, the office where the search was conducted was a private space where information pertaining to the tip-off could be discussed with the plaintiff without the risk of passers-by becoming aware of the situation, as would likely be the case at the main gate. Mr Botes testified further that, apart from observing Mr Kafile when he returned to his office after his morning meeting, he did not see him again at any time that day.

[34] Under cross-examination, Mr Botes testified that the plaintiff should have been aware, from the institutional order and his training, that fuller searches, including removal of clothing, could be conducted when there was suspicion that an official possessed unauthorised substances. He conceded that there was no written stipulation that such searches had to be conducted in the offices of senior personnel, but explained that there was no danger in doing so in the present circumstances because, on his version, the plaintiff had consented to the search.

[35] Mr Botes confirmed that no sniffer dog was available at the time. He also testified that information of the kind received by Mr Mrhasi had to be handled with care, which, according to him, was why the plaintiff was taken to a separate office rather than searched at the ordinary entry point. Mr Botes denied that there was any longstanding feud between himself and the plaintiff, although he accepted that there had been an enquiry and pending litigation involving himself, the plaintiff and Mr Kafile on an unrelated matter.

Analysis

Did the plaintiff consent to being searched?

[36] Section 101 of the Act provides as follows:

‘101. Entry, search and seizure.– (1) In addition to the powers of a correctional official to search inmates, their cells and their property and to seize articles in terms of s 27, a correctional official also has the power to enter any premises, to search without warrant any other person or place and seize any article when this is reasonably necessary for –

- (a) maintaining the safe custody of an inmate, the security of a correctional centre and controlling access of persons to and permissibility of goods in a correctional centre;
- (b) ...
- (c) preventing or gathering evidence of, the commission of any offence under this Act; or
- (d) investigating theft, fraud, corruption and maladministration by correctional officials.

(2) Despite the provisions of subsection (1) –

- (a) a correctional official may not search another correctional official or seize his or her property without his or her consent or being authorised to do so by the National Commissioner but a general authorisation to search other correctional officials may be granted to a correctional official who is required to act in to control access to or maintain secure custody within a correctional centre, or to give effect to subsection (1) (d); ...'

[37] On his own version, the plaintiff was informed by Mr Mrhasi that information had been received suggesting that he was carrying drugs. He had already accompanied Mr Mrhasi to the office without demur. His immediate response was not to refuse to be searched. Instead, he asked that his shop steward be called. When that individual proved to be unavailable, he requested the presence of another witness. This is of some importance. It indicates that the plaintiff's objection, at least initially, was directed not at the fact or the place of the search itself, but rather at the absence of what he regarded as the appropriate procedural safeguards.

[38] The plaintiff's own evidence further establishes that, when Mr Botes arrived, the issue he raised was whether he could be searched without a witness and whether there was any written authority entitling the supervisors to search him. Mr Botes then left and returned with an extract from the Act. On the plaintiff's version, he was shown the relevant provision, was required to sign it, did so, and was given a copy. He accepted that he signed the extract and that the search then proceeded. That contemporaneous conduct is not easily reconcilable with a continued refusal to be searched. On the probabilities, it is more consistent with acquiescence once the statutory basis for the search had been explained.

[39] The plaintiff sought to characterise his signature as having been given under duress. That description, however, finds little objective support in the evidence. He did not suggest that any threat was made to him, that force would be used if he refused, or that he was told that he had no choice but to sign on pain of some immediate adverse consequence. His evidence, rather, was that he signed because the document was presented by his superiors, because he was dissatisfied with the refusal to await his chosen representative, and because he believed that the proper course was to comply and complain later. That falls short of establishing duress, or any comparable form of coercion, sufficient to vitiate consent.

[40] Significantly, even on the plaintiff's own version, he did not, after the statutory basis for the search had been explained and the extract signed, verbalise any continuing refusal to be searched. This is important because it demonstrates that, while the plaintiff may have been unhappy with what was occurring, his evidence does not establish that he maintained an express objection after the legal basis for the search had been furnished. Read together with his signature on the extract and the fact that the search then proceeded without further objection, this is more consistent with the conclusion that the plaintiff consented to the search. The plaintiff's initial insistence on being shown the authority for the search did not amount to a maintained refusal once that authority had been furnished and explained.

[41] The plaintiff's own explanation for why he regarded the search as 'forceful' is also revealing. It was not rooted primarily in any specific coercive conduct on the part of the supervisors at the point when the decision to search him was made. Instead, it was based on his perception that he had not truly agreed to the search, that he had not been afforded the presence of a witness of his choice, and that he considered a warrant bearing his name to be necessary before he could lawfully be searched. The latter belief was mistaken. His dissatisfaction with the legal position, and with the supervisors' refusal to await his preferred representative, does not itself establish an absence of consent once the position was explained and he signed the statutory extract.

[42] The plaintiff also explained that he did not resist because resistance would have made him appear guilty and would have suggested that he was indeed in possession of drugs. That explanation is difficult to reconcile with a case of continuing refusal. It points rather to a conscious decision on his part to submit to the search in the circumstances then confronting him.

[43] I accept that the plaintiff did not welcome the search, that he would have preferred the presence of his shop steward or another witness, and that he remained dissatisfied with what was occurring. But those considerations do not negate consent for purposes of s 101(2)(a). The question is not whether the plaintiff was content to be searched, but whether, having been informed of the reason for the search and shown the statutory provision relied upon, he freely agreed to it, or at least voluntarily acquiesced in it. For the reasons already given, the probabilities show that he did.

[44] This conclusion is in any event consistent with the evidence of Mr Mrhasi and Mr Botes, both of whom testified that, once the statutory basis for the search had been explained and the extract signed, the plaintiff voluntarily consented to the search. Their evidence on that issue is, for the reasons that follow, to be preferred. I accordingly find that the plaintiff consented to the search within the meaning of s 101(2)(a) of the Act.¹

Was the search conducted in the manner alleged by the plaintiff?

[45] It remains necessary to determine whether the search was conducted in the manner alleged by the plaintiff and, if so, whether it exceeded what was permissible. In that regard, the parties presented materially different versions on the remaining issues. These include whether the plaintiff removed his own clothing or whether the supervisors did so, whether all his clothing, including his underwear, was removed, whether he was required to turn to the wall and squat, whether the blinds in the office were in such a condition that passers-by could observe him in a state of undress, and whether Mr Kafile was present in the manner alleged.

¹ Cf *Ziboti and Another v Minister of Police and Others* 2025 (2) SACR 396 (ECGq) para 24.

[46] Those disputes must be resolved in accordance with the ordinary approach to mutually destructive versions, as articulated in *SFW Group Ltd & Another v Martell et Cie & Others*² (SFW):

‘On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.’

[47] Turning first to credibility, I was not persuaded that the plaintiff’s evidence on the disputed features of the search could be accepted without reservation. He was plainly dissatisfied with the fact that he was searched, and I accept that the incident upset him. But his dissatisfaction with what occurred appears, at least in part, to have coloured his account of what exactly transpired. That is evident from his repeated insistence that a warrant bearing his name was required, from the emphasis he placed on the absence of a witness or representative of his own choosing, and from his evidence that the search affronted his sense of dignity and cultural propriety, particularly because he did not wish other men to see him in a

² *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) para 5.

state of undress. Such matters, while explaining the intensity of the plaintiff's grievances, do not enhance the reliability of his account of events.

[48] The plaintiff's description of the search as 'forceful' was also not entirely satisfactory. On closer examination of the evidence, that description seemed to derive less from any clear evidence of physical coercion at the outset than from his own perception that he had not truly agreed to be searched and that the process was unfair absent a warrant and because his preferred witness was absent. Importantly, his evidence as to how Mr Mrhasi allegedly 'forcefully' removed his clothing lacked the kind of detail one would have expected had events unfolded in the dramatic manner alleged. This is particularly so given the importance attached by the plaintiff to the allegation that he was stripped naked, including the removal of his underwear, and thereafter made to squat.

[49] The plaintiff was not materially assisted by the evidence of Mr Kafile. While he was called as a witness to bolster the plaintiff's version of events, he was plainly not an independent witness, having conceded that he and the plaintiff were co-plaintiffs in other litigation against the defendant. More importantly, aspects of his evidence were inherently improbable. His account that Mr Botes encountered him on the way to the office, understood that he was going there at the plaintiff's request, allowed him to enter and sit there in silence for a few minutes, and only thereafter instructed him to leave, cannot be accepted. On the probabilities, had management intended to exclude him from the process, it makes little sense that he would first have been permitted to enter and remain present without objection.

[50] Mr Kafile's evidence was also unsatisfactory in other material respects. There was, in addition, an unexplained tension between his version and that of the plaintiff concerning what occurred after the plaintiff exited the office. Mr Kafile was adamant that he accompanied the plaintiff from the office to his motor vehicle and denied that the plaintiff visited the area commissioner during that time. The plaintiff's own account of the sequence of events thereafter differed from that version. Mr Kafile's evidence concerning the condition of the blinds and the possibility of observation from outside was similarly weak. Although he suggested that the office was not private, he was unable to provide satisfactory detail about the condition of the blinds,

and his account of what could in fact be seen from outside was unconvincing. In these circumstances, I am unable to place reliance on Mr Kafile's evidence insofar as it purported to corroborate the plaintiff on the disputed events in the office.

[51] By contrast, both Mr Mrhasi and Mr Botes impressed me favourably as witnesses. Each gave evidence in a straightforward and satisfactory manner. Mr Botes, in particular, came across as measured and experienced. In that regard, it is significant that the plaintiff's allegation that Mr Botes spoke to him in a rough tone when enquiring whether he was refusing to be searched was not put to Mr Botes in cross-examination. Their evidence was broadly consistent on the central features of what occurred in the office. Both gave a plausible account of why the plaintiff was taken to Mr Mrhasi's office, why the statutory basis of the search was explained to him, and why the search was conducted there rather than at the ordinary search point. Their evidence provides a more satisfactory basis for the evaluation of the remaining disputed issues.

[52] Mr Botes also materially corroborated Mr Mrhasi on the plaintiff's allegation that he had been required to squat. He denied that any such instruction was given and regarded such treatment as inhumane. That evidence strengthens the conclusion that the search was not conducted in the degrading manner alleged by the plaintiff. It is also significant that, on the accepted evidence, Mr Botes would not have been present had the plaintiff not requested information about the authority for the search. His evidence that the office door was closed but not locked, and that aggrieved officials could utilise the grievance process, is likewise inconsistent with the suggestion that he was brought in to intimidate the plaintiff or that the search occurred in a threatening atmosphere. That Mr Botes alone identified the proposed continuation of the search to the plaintiff's locker as the trigger for the plaintiff's anger does not, in my view, amount to any contradiction of consequence. At most, it reflects a difference in perception as to why the plaintiff became angry, and it does not detract from the substantial consistency of the defence version on the central events.

[53] As to reliability, the plaintiff's account of the disputed features of the search must be approached with caution. His own evidence demonstrates that, at the time,

he was preoccupied with what he regarded as the unfairness and indignity of the process, particularly the absence of a warrant, the absence of a witness or representative of his choosing, and the affront to his dignity and cultural propriety. Those considerations appear to have shaped not only his grievance, but also his reconstruction of what occurred thereafter. That is particularly so given the sparse detail he provided on some of the most serious aspects of the version he advanced.

[54] Mr Kafile's reliability is materially undermined by the rejection of his evidence that he entered the office and remained there briefly, so that his opportunity to observe the disputed events in the office falls away. His account of what could allegedly be seen from outside, and of the condition of the blinds, was in any event poor.

[55] Dr Sokupa was a reliable witness within the limited compass of her evidence. She could speak to the plaintiff's presentation later that day and to the fact that the incident may have triggered or aggravated pre-existing psychological difficulties. Naturally she could not assist the court with the detail of what occurred in the office.

[56] By contrast, both Mr Mrhasi and Mr Botes were direct participants in the events in the office and had full opportunity to observe what occurred. Their recollection of the sequence was coherent and mutually supportive on the central issues.

[57] Turning to the probabilities, and bearing in mind the considerations already discussed in relation to consent, the first is that the search did not occur in the coercive and disorderly manner suggested by the plaintiff. The plaintiff accompanied Mr Mrhasi to the office without any suggestion of immediate resistance. By the time the search commenced, he had been informed of the reason for it, shown the statutory extract relied upon, signed it and received a copy. The evidence of Mr Mrhasi and Mr Botes that the plaintiff then undressed himself is inherently more probable than the plaintiff's version that the supervisors proceeded physically to strip him. That conclusion is strengthened by the absence of any convincing detail on the part of the plaintiff as to how the supervisors allegedly proceeded physically to strip him.

[58] The plaintiff's version that Mr Mrhasi forcefully removed all his clothing, including his underwear, is improbable. Given the intensity of the indignity which the plaintiff said he experienced, and given the emphasis he placed on not wishing other men to see him in a state of undress because of his sense of dignity and cultural propriety, one would have expected a clear and detailed account not only of how the final items of clothing were allegedly removed, but also of some more immediate protest at that critical moment. That detail was lacking. The probabilities favour the version that the plaintiff removed his own clothing and was left in his underwear.

[59] Similar considerations apply to the plaintiff's evidence that he was required to turn to the wall and squat. That allegation was central to his case on humiliation and excess, yet it was not supported by any reliable corroboration. It was denied by both Mr Mrhasi and Mr Botes, whose evidence I accept in preference to that of the plaintiff on the issue. Here, too, the plaintiff's account lacked the kind of detail one would have expected had events occurred in that manner.

[60] The probabilities also do not favour the plaintiff's version concerning the blinds. I accept the evidence of Mr Mrhasi and Mr Botes that the blinds were closed and in good or secure working condition, and that the office was used as a private space in which to discuss and conduct the search away from the ordinary movement of persons in the vicinity. The contrary version depended materially on the evidence of the plaintiff and Mr Kafile. For the reasons already given, I do not regard Mr Kafile as a reliable witness on the issue. The plaintiff's reliance on the alleged sighting of Mr Mabaso through the window appeared contrived and is rejected. On the probabilities, the search was not visible to passers-by from outside the office.

[61] In the light of the credibility and reliability findings already made, the plaintiff was left without reliable corroboration for his account of what allegedly occurred inside the office. Considering the evidence holistically, and applying the approach in *SFW*, the probabilities favour the version of Mr Mrhasi and Mr Botes on the disputed issues. I therefore accept that the plaintiff removed his own clothing and remained in his underwear, that he was not required to turn to the wall and squat, and that the blinds were closed and in sufficient working order to prevent passers-by from

observing the search from outside the office. I further reject Mr Kafile's claim to have been present in the office in the manner alleged.

[62] It may be noted that there was no explanation for why Mr Van Eck was not called, notwithstanding that he was present in the office and could have spoken directly to the events in issue. While that omission is unsatisfactory and warrants caution, it is not decisive. As indicated above, the evidence of Mr Mrhasi and Mr Botes was acceptable on the material issues, and the probabilities independently favour their version. The adverse inference to be drawn from Mr Van Eck's absence is insufficient to disturb the conclusion reached on the facts.

[63] I assume in the plaintiff's favour that an admitted bodily search of this kind constituted a prima facie wrongful invasion of privacy and dignity, requiring justification by the defendant. It remains necessary to consider whether, on the facts as found, that justification was established and whether the search was otherwise conducted in a manner that exceeded what was permissible.

Was the search nevertheless unlawful?

[64] The plaintiff repeatedly suggested that a search warrant bearing his name was required before he could lawfully be searched. That contention cannot be sustained, given that s 101 of the Act expressly contemplates warrantless searches within a correctional centre in defined circumstances. In the present matter, the plaintiff was searched inside the correctional centre by correctional officials who were acting on information that he was bringing contraband into the facility. On the facts as found, and given the plaintiff's consent to the search, the absence of a warrant did not render the search unlawful.

[65] Nor does the fact that the search was conducted in Mr Mrhasi's office, rather than at the ordinary search cubicle, avail the plaintiff. On the accepted evidence, the search was triggered by a tip-off and was conducted in the office because it was regarded as a more private and controlled setting than the ordinary search area. The plaintiff's preference for the usual search point does not, without more, establish unlawfulness. Nor was there any evidence of any rule or policy requiring that a search of this kind, once triggered by a tip-off, could only lawfully be conducted at

the ordinary search cubicle. The cubicle was, on the evidence, the designated point for routine entry searches and it does not follow that a targeted search arising from a tip-off also had to be conducted there. The use of the office as a private and controlled setting, with the door and blinds closed, served to protect the plaintiff's privacy and dignity during the search.

[66] The plaintiff's further complaint that he was not afforded the presence of a shop steward or witness of his own choosing also does not establish unlawfulness. The evidence established no rule, policy or statutory requirement entitling the plaintiff to insist upon the presence of such a person before the search could proceed. On the contrary, the plaintiff was afforded an opportunity to attempt to secure the attendance of his preferred shop steward, and when that proved unsuccessful the search proceeded after the statutory basis for it had been explained. In those circumstances, the absence of a witness or representative of the plaintiff's choosing did not render the search unlawful.

[67] The plaintiff also relied on the existence of other possible means of search, including the search cubicle, scanner, sniffer dogs and the EST. That evidence does not advance his case sufficiently. At best for the plaintiff, it shows that there may have been other methods by which the search could have been undertaken. It does not follow that the failure to employ one or more of those alternatives rendered the search unlawful. On the accepted evidence, the scanner was not designed to detect drugs, no sniffer dog was available at the time, and the EST was not regarded as necessary because the plaintiff had not refused to be searched. That, too, is consistent with the defendant's version of the incident. In those circumstances, the decision to proceed with the search in the manner adopted did not amount to unlawful conduct.

[68] Viewed cumulatively, none of the plaintiff's remaining complaints establishes unlawfulness on the facts as found. The defendant discharged the burden of justifying the admitted search. The search fell within what was permissible under s 101 of the Act and was not conducted in a manner that rendered it unlawful. The plaintiff's evidence that he was thereafter seen by colleagues outside the office in a state of partial undress also does not advance his case. It is common cause that he

emerged from the office before he had fully dressed. On the accepted facts, however, that was not because the supervisors forced him from the office in that condition or denied him the opportunity to dress. The more probable inference is that the plaintiff, being upset and angry, chose to leave before fully dressing, despite being urged to do so. To the extent that this added to his sense of humiliation, it does not alter the findings already made concerning the lawfulness and manner of the search itself.

[69] The defendant has accordingly discharged the burden of justifying the admitted search on a balance of probabilities. The search was not conducted in the manner alleged in the plaintiff's evidence, and there is no evidential basis for the allegation of malice. It follows that the action falls to be dismissed.

[70] Although the matter implicated dignity and privacy, it was in substance a delictual damages claim turning primarily on factual disputes, and there is accordingly no basis to depart from the ordinary position as to costs. Having considered the relevant factors contemplated in the Uniform Rules, including the nature and complexity of the matter and the relief sought, I am not persuaded that any scale other than the ordinary default position should apply.

Order

[71] The following order is issued:

1. The plaintiff's claim is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 21–23 April, 27 May 2026

Delivered: 17 June 2026

Appearances:

For the Plaintiff:

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For the Defendant:

Adv Mbenyane

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