NOT REPORTABLE

Case No.: I 590/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between

BRITIAN SIMISHO LIELEZO	**Applicant**
and	
MINISTER OF HOME AFFAIRS	**1st Defendant**
MINISTER OF DEFENCE	**2nd Defendant**

CORAM:	**PARKER J**
Heard on:	2009 October 5-9
Delivered on:	2010 January 20

JUDGMENT:

PARKER J.:

[1] The plaintiff is presently held in the Windhoek Prison as one of the accused persons being tried in the ongoing criminal proceedings in the 'Treason Trial'. This is delictual action, which the plaintiff instituted in July 2000 against backcloth of the attack that was mounted in Katima Mulilo (the regional administrative capital of the Caprivi Region), and in which the plaintiff has claimed

damages for (1) alleged unlawful arrest and detention (Claim A) and (2) alleged assault (Claim B). The 1st defendant is now Minister of Safety and Security (since 21 March 2005).

[2] To put the institution of the present action into context; it is worth noting that on 23 February 2009 the plaintiff's legal representatives filed an amended index, and the plaintiff is cited as 3rd plaintiff. In the course of events the plaintiff's case was separated from that of the other plaintiffs. In February 2009 the plaintiff amended his July 2000 particulars of claim. The significance of the fact that the plaintiff amended his particulars of claim in February 2009 will become apparent in due course.

[3] In considering the evidence I must keep in my mind's eye what I said in *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D, namely that where the testimonies on either side of the suit are mutually destructive to each other, the proper approach is for the Court to apply its mind not only to the merits and demerits of the evidence from the two opposing sides but also their probabilities, and it was only after so applying its mind not only to the merits and demerits of the testimonies by either party's witnesses but also their probabilities that the Court would be justified in reaching the conclusion as to which evidence to accept as possibly true and which to reject as possibly false.

[4] The principle I relied on in *Harold Schmidt t/a Prestige Home Innovations v Heita* supra had been developed in the earlier case of *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) where approaches necessary to practicalize the principle in *Harold Schmidt t/a Prestige Home Innovations v Heita* were formulated by Nienabar JA at 14I-15D. My brother Muller J relied on the *Stellenbosch Farmers' Winery* formulation in *Kisco Twaimango Sukusheka; Masialeti George Litseho v Minister of Home Affairs* Case Nos. I592/2005

and I595/2008 (Consolidated) (Unreported) (judgment on 2 April 2009); see also *U v Minister of Basic Education, Sport and Culture* 2006 (1) NR 168 (HC) where this Court also approved the *Stellenbosch Farmers' Winery* formulation. Muller J stated in *Sukusheka; Litseho v Minister of Home Affairs* supra thus:

> Nienabar JA had to deal with two irreconcilable versions in the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*, supra. At 14I-15D (5) he formulated the court's approach as follows:
>
> > "[5] 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 summarized 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 depends on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in 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 fact 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 the 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing the latter. But when all factors are equipoised probabilities prevail."

That is the manner in which I approach the consideration of the evidence in these proceedings.

[5] It is worthy of note to observe at the outset that in the *Sukusheka, Litseho* case supra, like the present case before me, the plaintiffs there are also accused persons in the aforementioned treason trial; and moreover, the delictual claims of the two plaintiffs, like those of the plaintiff in these proceedings, also arose from events that led to their arrest and their being prosecuted for high treason. It is also important, therefore, to note that these proceedings relate to events that occurred more than 10 years ago.

Claim A

[6] Under Claim A the plaintiff alleges that he was unlawfully arrested on 27 August 1999 by members of the Namibian Police whose names are unknown to him, after which he was unlawfully detained until 30 August 1999. It is not disputed that in order to succeed in his defence, the defendant must prove that the arrest by the defendants' agents on 27 August 1999 was lawful and also that his subsequent detention from about 14h00 on 27 August 1999 to 29 August 1999, and from 29 August 1999 to 'the evening of 30 August 1999, when plaintiff appeared before a magistrate and his further detention was ordered, at Grootfontein Prison', was also lawful.

[7] Prohibition of unlawful arrest is governed primarily by sub-article (1) of Article 11, and unlawful attention by sub-articles (1) and (2) of Article 11, of the Namibian Constitution. Article 11, in material parts, provides:

> (1) No persons shall be subject to arbitrary arrest or detention.

(2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.

[8] Failure or refusal to satisfy the requirements of sub-article (3) of Article 11 by the arrester or detainer, too, partakes of the element of arbitrariness, rendering the arrest and detention unlawful. But from the pleadings, the plaintiff is not relying on the sub-article (3) requirements, and so it serves no purpose to treat sub-article (3) in these proceedings.

[9] What then is arbitrary arrest and detention? Arbitrary arrest and detention of X simply means X's freedom of movement has been curtailed without lawful excuse; that is, the arrest and detention have been effected in circumstances where the legal power to do so has been abused or misused, and without due regard of the law. In *Beckingham v Bopksbury Licensing Board* 1931 TPD 280 at 282, Tindall J described 'arbitrary' action as that which was 'capricious or proceeding merely from the will and not based on reason or principle.' Thus arbitrary arrest is arrest that is capricious (Lawrence Baxter, *Administrative Law* (1984): pp 521-2); that is, arrest carried out without lawful excuse.

[10] According to Article 11 of the Namibian Constitution arrest is unlawful if it is arbitrary (sub-article (1); and detention is unlawful if the arrestee who is detained in custody is not informed promptly in a language the arrestee understands of the grounds for such arrest (sub-article (2). The requirements in sub-article (1) and (2) of Article 11 converge on one single onus (as Mr Coleman submitted) that the arrester must discharge; that is to say, the arrester must show that he or she had a good reason to arrest and detain the arrestee and he or she promptly informed the arrestee in a language the arrestee understood of the grounds for the arrest.

[11] I now proceed to consider the defendant's contention that the defendant has discharged the onus cast on it; and in doing so I bear in mind the case-law and textual authorities I have mentioned previously.

[12] On the point, the defendant relies on the testimonies of Sgt Kathiyandu, W/O Iita, W/O Kashawa, Inspector Mbinge, Prison Officer Mr Francis, and Nurse Tuuwotene. Sgt Kathiyandu and W/O Iita testified that they were in the company of Constable Ruben (now deceased) when the plaintiff was arrested. The plaintiff confirmed this piece of evidence in his cross-examination-evidence; but the plaintiff contended in his evidence that the arrest was unlawful because 'it is not the right procedure' in that 'I was not informed about my rights' and the persons who arrested him 'did not identify himself'. Sgt Iita testified that he, Ruben and Kathiyandu arrived in the Kongola area, at a place where people drink ('the drinking place'). The plaintiff's name was called out from a list their commander had given them; and at first the plaintiff gave a false name, but later on, he gave 'the correct name after he was shown the paper'. 'The paper', as I understood the witness's evidence, contained a list of names of persons suspected to have taken part in the attack on Katima Mulilo on 2 August 1999.

[13] In his examination-in-chief evidence, Sgt Iita testified that he heard Sgt Kathiyandu conversing with the plaintiff about a mark which the plaintiff said was left by a rifle belt; and they were conversing in English. He testified in his cross-examination-evidence that when Sgt Kathiyandu introduced himself to the plaintiff they spoke in English. In an answer to a question by the plaintiff's counsel as to whether in his opinion the plaintiff understood English, the witness, without prevaricating answered 'Yes we were communicating in English.' The witness testified further that he did not speak Silozi 'or any of the Caprivi languages.' The plaintiff is from the

Caprivi Region, and he contends that he speaks only Silozi and Mbukushu. Sgt Iita testified further in his cross-examination-evidence that the arresting officer Kathiyandu informed the plaintiff that he was being 'arrested because he was suspected to be involved on the attack.' On top of that Sgt Iita testified that he did show his Appointment Certificate to the plaintiff and his team communicated with the plaintiff in English, and he appeared to understand the communication.

[14] Another defence witness who had dealings with the plaintiff was Inspector Mbinge. He testified that he took a warning statement from the plaintiff when the plaintiff appeared before him (Exh. A). There was some dispute as to whether the statement was taken at the Katima Mulilo Police Station or Grootfontein Prison. For my present purposes, that should not bother me unduly. What is significant now is Inspector Mbinge's testimony that he took the statement from the plaintiff on 29 August 1999 and the plaintiff affixed his signature to the statement; and what is more, in response to a question by the Court as to what language the witness had communicated in with the plaintiff, the witness did not equivocate in his response: the witness answered, 'My Lord the only language I could speak with the suspect (the plaintiff) is just English.' The witness repeated, 'Yes, that is the only language I could communicate with the suspect.' The witness testified further that the languages he speaks are Afrikaans, Otjiherero and English. He elaborated in his cross-examination-evidence that he was of the view that the plaintiff spoke enough English for the interview to have been conducted in English; 'that is why,' the witness stated, 'I took the warning statement in English, otherwise I could have looked for an interpreter.'

[15] Inspector Mbinge was insistent in his cross-examination-evidence that it was news to him, as put to him by the plaintiff's counsel in cross-examination, that the plaintiff could not speak English. The witness's reason for so saying is that 'if Lielezo (the plaintiff) could not speak English, then there could (be) no any language we could communicate, Mr. Lord.' The plaintiff's counsel

suggested further in her questioning that 'the plaintiff has no recollection that he appeared before you for this warning statement, he does not recognize you, he does not know who you are.' The witness's response was that that could be true; and he also did not 'recall him now'. But, the witness's evidence was that according to Exh. A, the plaintiff appeared before him and 'that is why his (i.e. plaintiff's) signature is on the document here.' As I understood the defence witness, his evidence was that the plaintiff did appear before him and the witness interviewed the plaintiff in English and that is the reason why the plaintiff's signature appears on Exh. A.

[16] Yet another defence witness who had dealings with the plaintiff at the material time is Mr Francis. Mr Francis was Chief Prison Officer in August 1999 and was in charge of the reception office of Grootfontein Prison. As regards the evidence relevant to Claim A, Mr Francis testified in his cross-examination-evidence and re-examination-evidence that when he spoke to the plaintiff, he spoke with him in English. He testified further that at Grootfontein Prison at the material time, there were some nurses at the Prison who spoke Mbukushu and Silozi (apparently the only languages the plaintiff spoke, as aforesaid); meaning, the need did not arise for the witness to use any such nurses as interpreters because the plaintiff understood English and he (the witness) spoke with the plaintiff in English. Mr Francis's evidence also stood unchallenged at the close of the defence case. So did Nurse Tuuwotene's evidence on the issue. She, as discussed below, also dealt with the plaintiff at the sickbay of Grootfontein Prison. Nurse Tuuwotene testified that she and the plaintiff spoke in English. She testified that whenever it became necessary to use an interpreter at the sickbay she would usually fall on the services of another inmate, but in the plaintiff's case the need did not arise because she and the plaintiff discussed what they spoke about in English.

[17] Additionally, there is also the unchallenged evidence of W/O Kashawa, a Special Field Force personnel and one of the defence witnesses, who, as discussed *infra*, collected the plaintiff from

Mayuni and transported him to Katima Mulilo Police station. Kashawa testified that he did not speak Silozi or Mbukushu, the only languages the plaintiff maintains he speaks, as aforesaid; and so he could only communicate with the plaintiff in English. Another defence witness is Sgt Kathiyandu. Kathiyandu, together with the late Ruben and Iita, arrested the plaintiff at the drinking place in the Kongola area. Kathiyandu testified, '…I will tell you that he (the plaintiff) could read and speak English because …with me I am Himba and then I could not communicate (with) him in Otjihimba; that means we were communicating with him (the plaintiff) in English.' Kathiyandu's evidence is corroborated by Sgt Iita's evidence. In his examination-in-chief-evidence, Iita testified that he heard Sgt Kathiyandu conversing with the plaintiff about a mark which the plaintiff said was left by a rifle belt; and they were conversing in English. He testified in his cross-examination-evidence that when Sgt Kathiyandu introduced himself to the plaintiff they spoke in English.

[18] The evidence of the defence witnesses on the point under consideration must cumulatively carry a great deal of credible weight. The witnesses gave their testimonies forthrightly; they did not prevaricate or equivocate. I, therefore, have no good reason to reject their evidence as possibly false. In view of the totality of the overwhelming evidence on the issue, I have no hesitation whatsoever in finding that the plaintiff lied to the Court when he said he could not read or speak or understand English. I must, with the greatest deference, say that the plaintiff has only succeeded in fooling his legal representatives with this moronic mendacity; but he has been unsuccessful in that regard with this Court. I have not one iota of doubt in my mind in holding that the defendant's agents who arrested the plaintiff did not act capriciously: they had a good reason for arresting the plaintiff; and furthermore, the arresting officer did promptly inform the plaintiff in a language he understood, sc. English, of the grounds for the arrest within the meaning of Article 11 (1) and (2) of the Namibian Constitution. In any case – and this is significant – it appears not to be the plaintiff's case, on the pleadings, as Mr Coleman submitted, that the arresting officer did not inform him promptly in a

language he understood of the grounds of the arrest. I have already set out the basis upon which the plaintiff contended in his evidence that the arrest was unlawful, and the Article 11 (1) (2) requirements do not feature in it. I do not for a moment accept the plaintiff's evidence that he was not told why he was being arrested, and that to this day 'I am still in darkness'; meaning, as I understood him, that up to this day he is still in the dark as to why he was arrested in August 1999, despite the fact that he is been prosecuted for treason for his alleged part in the aforementioned attack on Katima Mulilo in August 1999. The plaintiff, in my view, is a stranger to the truth.

[19] From the foregoing, I am satisfied that the defendant has discharged the onus cast on it: the defendant has proved that the arrest and detention of the plaintiff were lawful. The result is that the plaintiff's Claim A fails.

Claim B

[20] I now proceed to consider the plaintiff's Claim B. Under Claim B, the plaintiff alleges that he was assaulted by members of the Namibia Police whose names are unknown to him at the place where he was arrested (in the Kongola area) and at Katima Mulilo Police station.

[21] It is not in dispute that the plaintiff bears the onus of proving his claim of assaults in order to succeed with Claim B. Mrs Conradie urged the Court to bear 'in mind that a police officer would not easily, if at all, ever admit to assaulting suspects.' It must, in my opinion, also be borne in mind that a plaintiff, in the present plaintiff's shoes, will strenuously say that he (as a suspect) was assaulted by members of the Namibian Police and other law enforcement and security agents, even if he was not, if by so contending he knows he stands to gain substantial amount of money in damages from the State. Thus, in my view the plaintiff's counsel's submission does not take the

plaintiff's case any further than where it started, namely, to prove that the defendant's agents assaulted him, as he alleges.

[22] In his examination-in-chief-evidence the plaintiff stated that the assaults perpetrated against him by the defendant's agents started right at the point where he was arrested by Ruben, Kathiyandu and Iita, at the drinking place in the Kongola area. Ruben has since passed away; and Kathiyandu and Iita deny that they assaulted the plaintiff when he was arrested.

[23] The Claim B particulars were amended as recently as February 2009. I shall weigh the evidence of the plaintiff and those of the defendant with the amended pleadings firmly in my view. The July 2000 pleadings were formulated shortly after the alleged assaults had taken place and when the events and the plaintiff's experiences thereof were rather fresh in his memory; yet the February 2009 pleadings contain the following additions or omissions, which I consider to be afterthoughts. 'Kongola Fort and/or Mayuni Police sub-station' is added to places where the alleged assaults took place. Even here, I fail to understand the plaintiff's claim. In my opinion, the plaintiff was assaulted at Kongola Fort and Mayuni Police substation or he was assaulted either at Kongola Fort or Mayuni Police substation, and yet the plaintiff's amended February 2009 pleadings added a place or places where, he alleges, he was assaulted as being 'Kongola Fort and/or Mayuni Police substation'. The question that remains unanswered is this: where does the plaintiff aver he was assaulted? Furthermore, the nature of the alleged assault was changed in the amended February 2009 pleadings. The plaintiff now contends that no sjamboks were used; he was rather beaten with batons, kicked, punched and slapped, and his hands were bound behind his back with wire. Furthermore, at Katima Mulilo Police station the amended pleadings now claim that the plaintiff was beaten with baton and ordered to place his finger on the ground and rotate on it.

[24] Furthermore and significantly, the February 2009 amended particulars of claim do not mention the names of Ruben, Kashawa, Simasiku, Chizabulyo or Heipa; and yet the plaintiff testified that he had, since the alleged assaults, known those names as the names of persons who had perpetrated the alleged assaults against him. Furthermore, in his testimony the plaintiff stated that he was made to sit on a hot place in the 'Chev' that he travelled in from Mayuni to Katima Mulilo with a police officer or officers sitting on his legs in order to make it impossible for him to change positions in an attempt to avoid the excruciating pain on his buttocks and the area of his private parts; and it was as if he was sitting on fire, and he got burnt as a result. But no mention is made in the pleadings about the alleged ordeal of the 'hot place' although the plaintiff considered the 'hot place' treatment as an extremely excruciating experience in which he suffered very painful injuries because his buttocks, anus and the area around his private parts were burnt.

[25] These individual discrepancies between the amended pleadings and the plaintiff's testimony may not, standing separately, amount to anything significant. However, if the mosaic of the discrepancies are considered as a whole (see *S v Hadebe and others* 1998 (1) SACR (SCA) at 426g-h, cited with approval by this Court in *Richard Goagoseb and Simon Petrus Ganeb* Case No. CA 90/2005 (unreported) (judgment on 3 March 2008) at p. 7), one finds their cumulative probative value to be significant, and it puts the credibility of the plaintiff in a bad light.

[26] Apart from the aforementioned discrepancies, Kathiyandu and Iita (defence witnesses) were forthright in their testimonies that when the plaintiff was arrested on 27 August 1999, the plaintiff was not assaulted by them or by any other person in their presence. Furthermore, according to those defence witnesses, and the plaintiff testified to that, they handed over the plaintiff to a group of police officers, including Kashawa; and they did not see Kashawa or any of his colleagues assault the plaintiff.

[27] I have already found that the plaintiff does not make it clear where he was assaulted before arriving at Katima Mulilo Police station. In his pleadings, which I have referred to previously, the plaintiff alleges that he was assaulted at 'Kongola fort and/or Mayuni Police substation'. I did not hear the plaintiff to say in his evidence that he did not know the difference between 'Kongola fort' and 'Mayuni Police substation'. Indeed, in his cross-examination-evidence the plaintiff testified that he was not assaulted at Kongola fort, but he was assaulted at Mayuni Police substation; and yet, as I have mentioned *ad nauseam*, the plaintiff avers in his amended February 2009 pleadings that he was assaulted at Kongola fort and/or Mayuni Police substation'.

[28] To all this should be added the evidence of Const. Endjala, the compiler of the entries in Exh. B (Occurrence Book (OB) of the Katima Mulilo Police station), showing the plaintiff's arrival at Katima Mulilo Police station at about 21h30 on 27 August 1999. Endjala testified that there were no injuries on the plaintiff when the plaintiff arrived at the Katima Mulilo Police station. Endjala stated that if there were any injuries on the plaintiff, he would have notice them, and he would have accordingly made entries about them in Exh. B. I juxtapose Endjala's evidence to the plaintiff's evidence that he arrived at Katima Police station, bleeding from his arm and leg and he had sustained a laceration on his ear which also bled – all as a result of assaults carried out against him by the defendants' agents. On this point, Ms Conradie submitted that Endjala's evidence cannot take the matter any further because the plaintiff arrived at the Katima Mulilo police station late at night and the suspect had to be locked up as soon as possible; and furthermore, one could not be sure how closely Endjala looked at the plaintiff. Endjala's evidence was that it was his duty to look at persons being booked in into Exh. B and note any injuries that may be on them and that he would be in trouble – I assume, with his principals – if he failed in that department. I find Endjala's evidence to mean that he was not just some unconcerned bystander; it was his duty to look closely at suspects

whom he booked in into Exh. B. And in the case of the plaintiff he looked at him closely and did not find any injuries on him. I find that the probabilities that Endjala's version may be true far outweigh those in the plaintiff's version as to the alleged assaults before the plaintiff arrived at the Katima Mulilo Police station.

[29] But that is not the end of the matter. The plaintiff avers also that he was assaulted while he was kept in custody at the Katima Mulilo police station. As I have adverted to previously, unlike the original pleadings of July 2000, the amended February 2009 pleadings aver that the plaintiff was beaten with baton and ordered to place one of his fingers on the ground and rotate on it. In evaluating this evidence, too, I take into account what I said thereanent the alleged assaults before the plaintiff arrived at Katima Mulilo Police station, namely, that the cumulative effect of the discrepancies is that the plaintiff's credibility is put in some doubt. That is not all. Simasiku (a defence witness) testified that Kashawa (another defence witness) was not part of the team that interviewed the plaintiff at Katima Mulilo Police Station, and further that he or Kashawa or Heipa did not assault the plaintiff. I accept Ms Conradie's submission that while there is no medical evidence to support the plaintiff's claim, the circumstances that the plaintiff found himself at the material time must be borne in mind. But one must also not lose sight of the fact that the defence case is not built only on the evidence of members of the Namibian Police who had arrested and interviewed the plaintiff in the Caprivi Region; take, for instance, the evidence of Prison Officer Mr Francis and Nurse Tuuwotene, who were based at the material time in Grootfontein Prison.

[30] In his pleadings, the plaintiff avers that from 29 August 1999 to July 2000 while at Grootfontein prison he was treated for the injuries he suffered as a result of the assaults. The evidence of Mr. Francis who at the material time in 1999 was the Chief Prison Officer at Grootfontein Prison and at that time was in charge of the reception office of Grootfontein Prison

point the other way. Mr. Francis testified that he spoke to the plaintiff from whom he obtained some of the information entered in Exh. C (admissions register) and he did not notice any bleeding on the plaintiff's left ear or on his leg or arm; and the plaintiff did not appear to him as someone who had been assaulted a day or so earlier; and furthermore, the plaintiff did not complain to him that he had been assaulted; if the plaintiff had complained to him that he had just been assaulted or if, on inspecting the plaintiff's body, as mentioned below, he had seen any injuries, he would have indicated it in the appropriate entry in Exh. C, concerning the plaintiff, and he would have referred the plaintiff to a nurse; and what is more, he would have referred the plaintiff to the officer-in-charge and he would have been 'taken to the Police (in order for him) to open a case.'

[31] In response to a question in his cross-examination-evidence, Mr Francis stated that he expected the nurses at the sickbay of Grootfontein Prison to keep a proper record of each particular inmate's medical history. Mr Francis's evidence was also to rebut the plaintiff's evidence that he reported his injuries to the nurses but they did not write down everything he told them. Mr Francis testified further that on inspecting the plaintiff's body he found 'one cut mark'; the plaintiff had no tattoo marks on his body. Mr Francis testified that he did the inspection in the morning of 30 August 1999. The plaintiff had arrived at Grootfontein Prison at about 22H00 on 29 August 1999. Mr Francis explained that if a person to be admitted to the Prison had serious injuries, then that fact would be recorded in Exh. D (the medical history register); otherwise, every person to be admitted as an inmate of the Prison was examined by nurses who made appropriate entries in Exh. C (the admissions register). The witness testified in his cross-examination-evidence that the matter concerning inmates, suspected of having carried out the 2 August 1999 attack on Katima Mulilo, was 'a very serious case and we have to record everything on time.' I understood the witness to mean that because of the importance he and his colleagues attached to the matter concerning these

particular inmates, he and his colleagues had to record all items meticulously and timeously. I note that I did not find this significant piece of evidence contradicted.

[32] The long and short of Mr. Francis's evidence is that he did not notice any injuries on the plaintiff when he examined the plaintiff's body for the purpose of noting down identification marks; the plaintiff was not treated by any medical personnel for any injuries. Some other important aspects of Mr. Francis's evidence is that he was straightforward with his testimony; he did not give me the impression that he was lying in order to hide the truth; and what is more, he could identify the plaintiff, sitting in court, during his testimony.

[33] Then there is the evidence of Nurse Salme Tuuwotene of Grootfontein Military Hospital. She testified that she, like some other nurses at the Military Hospital, were occasionally instructed – I suppose by their superior officers – to work at Grootfontein Prison's sickbay where they attended to inmates of the prison who had been admitted to the prison's sick bay. She testified that she recognized her handwriting in a register where she had made entries concerning the plaintiff on 8 September 1999. She recorded that the plaintiff had chest pain and headache. To a question put to her by Mr. Coleman in her examination-in-chief-evidence, Nurse Tuuwotene responded that the plaintiff did not inform her that he had been assaulted and had been injured as a result and that he needed medical treatment. She was categorical in her response to a question by Ms Conradie in her cross-examination-evidence as to whether she recorded accurately what an inmate told her. Nurse Tuuwotene responded unequivocally that she did not leave anything out; she recorded what she was told – in this case, by the plaintiff.

[34] The only witness called by the plaintiff to testify in support of the plaintiff's case is Mr. Gilbert Poshowe. In considering Mr. Poshowe's evidence as to its probative value and the witness's

credibility I keep firmly in my mental spectacle the following factors. Mr. Poshowe is, like the plaintiff, a co-accused in the ongoing treason trial referred to previously. He is also suing the Police, and the plaintiff is going to be his witness. For these reasons, I accept Mr. Coleman's submission that Mr. Poshowe's attempt to corroborate the plaintiff must perforce be treated with caution. Additionally, I also accept Mr. Coleman's submission that in those circumstances, the likelihood of 'I wash your back; you also wash my back' cannot be easily discounted. In addition, as Mr. Coleman submitted, in view of the rule against self-corroboration, whatever the plaintiff told Mr. Poshowe must be excluded if its object is to prove the veracity of what the plaintiff told the witness. (See Schwikkard *et al*, *Principles of Evidence*, 2 edn., *passim*.) With these considerations in my mind's eye, I proceed to consider Mr. Poshowe's evidence.

[35] In essence, Mr. Poshowe testified that the plaintiff 'told me that he was taken to the other place, where the Police officers they were beating him, even though I do not know the place'. Mr. Pushowe testified further that when the plaintiff returned to the cell which he shared with the plaintiff, he noticed that the plaintiff was bleeding from below his right knee.

[36] Mr. Poshowe's evidence cannot take the plaintiff's case any further as I demonstrate. In this regard, in view of the aforementioned rule against self-corroboration, I exclude whatever the plaintiff told Mr. Poshowe; it cannot be used to prove the veracity of what plaintiff told Mr. Poshowe. Besides, Mr. Poshowe's evidence, on the probabilities, cannot possibly be true. The plaintiff's testimony was that he was assaulted by Police Officers Kashawa, Simasiku and Heipa and about three or four other Police officers. When Ms Conradie asked the plaintiff, 'What kind of assaults were they?' His response was, 'They just carried on assaulting me at my buttocks with baton, My Lord.' Ms Conradie asked the plaintiff specifically, 'What else did they do?' The plaintiff's response was that Mr. Simasiku asked him to place 'my finger' on the ground and rotate

on it. He became weak; and he fell down. Mr. Simasiku lifted him up and 'then he hit me with a fist, My Lord.' 'Then they took me back to the cell.' The plaintiff added that he did feel pain as a result of the said assaults, and 'it lasted long time, My Lord, even now I am still feeling the pain.'

[37] Thus, the plaintiff did not testify that he was hit below his right knee or that he was dropped on his right knee; and what is more, he did not say that he suffered any bleeding injuries. Besides, if, indeed, the plaintiff told Mr. Poshowe that the Police officers had beaten him, human experience tells me that on top of that, the plaintiff on his own accord would have shown his injuries to Mr. Poshowe to prove his point that he had, indeed, been beaten to the extent that he suffered those injuries.

[38] Then, there is also the uncontradicted evidence of Mr. Simasiku that it was a strategic practice at the material time that law enforcement personnel involved in interviewing suspected 'rebels' did not mix 'rebel' detainees, who had already been interviewed, with new arrivals. This stratagem, I understand, was put in place in order to avert the possibility of 'rebels' who had already been interviewed by the interviewing team exchanging information with new arrivals before the latter have been interviewed. In my view, the stratagem makes a great deal of sense, and the fact that it was put in place is possibly true. Doubtless, those were perilous and trying times and the stratagem suited the situation; and so I do not think the law enforcement personnel would have lowered their guard, just to suit Mr. Poshowe and the plaintiff. Mr. Poshowe's disingenuous attempt to wash the plaintiff's back in these proceedings so that the plaintiff would wash his back when his time comes cannot be discounted, as aforesaid. I find Mr. Poshowe's evidence, with the greatest deference, utterly useless and worthless.

[39] Having applied my mind not only to the merits and demerits of the evidence on both sides of the suit and to their probabilities, I accept the defendant's witnesses' version on the material aspects to be possibly true and I reject the version of the plaintiff and his witness as possibly false. Accordingly, I hold that the plaintiff has failed to discharge the onus cast on him as respects Claim B. The result is that Claim B also fails.

[40] In the result, the plaintiff's case is dismissed with costs; such costs to include costs occasioned by the employment of instructed counsel.

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PARKER J

ON BEHALF OF THE PLAINTIFF:	Ms L Conradie
Instructed by:	Legal Assistance Centre
ON BEHALF OF THE DEFENDANTS:	Adv. G. Coleman
Instructed by:	The Government Attorney