IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 21639/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

31 August 2023 **EJ FRANCIS**

In the matter between:

LLWELLYN SMITH	First Plaintiff
XOLANI ZULU	Second Plaintiff
BENSON QIBI	Third Plaintiff
ABEL PHASHA	Fourth Plaintiff
MTHOKOZISI SITHOLE	Fifth Plaintiff

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Defendant
THE REDRESS TRUST LIMITED	Amicus Curiae

JUDGMENT

FRANCIS J

Introduction

1. We come from a violent past where so many prominent and non-prominent activists

were assaulted, tortured and killed during apartheid whilst they were under police custody. This also involved ordinary members of our society. There would be cover ups by the authorities to hide the atrocities and the cruelty that those victims had suffered whilst in police custody. Some district surgeons would lie about the severity of the injuries that the victims and deceased persons had suffered and would also lie about the causes of death. Some examples that come up is the matter of Steve Biko, Neil Agget, Ahmed Timol, Simon Mthimkhulu etc. There are many other examples that one can refer to. There were brave doctors and pathologists who came to the assistance of those victims and their families and conducted their own autopsies and post-mortems and invariably there were huge differences between their reports and those of the district surgeons who owed allegiance to the apartheid State and had forgotten about the Hippocratic Oath that they had taken. Fortunately, there were human rights organisations like the Legal Resources Centre, Lawyers for Human Rights, The Black Sash, Black Lawyers Association, Community based Advice Centres and progressive attorneys and advocates that came to assist those victims and their families either at inquests, criminal and civil trials. With the dawn of democracy, the hope was that such practices would cease. The question that arises is whether it has ceased. The plaintiffs case is that it has not ceased and the defendant's case is that none of what the plaintiffs alleged happened to them happened. The plaintiffs in this action are not activists but are convicted criminals who were at the time of the incidents inmates at a correctional facility. The fact that they are convicted criminals does not prevent them to be treated like human beings and to deny them the protection afforded to them by our Constitution. The fact that the perpetrators are high ranking officials does not give them the licence to do as they please. Ultimately this court must decide which version is the truth and which is not the truth.

2. This matter was subjected to case management and the parties had estimated that the duration of the matter would be three weeks. It is unclear how the parties had arrived at that estimation since the trial ran for 99 days. It commenced on 29 October 2019 to 19 August 2022. This matter is a sober reminder that judges are independent and should not allow any practitioner or organisation no matter who they are and what their previous backgrounds and positions were that they should attempt to intimidate judges when it comes to court matters. Fairness of court proceedings require judges to be actively involved in the management of the proceedings, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant and to refuse to listen to irrelevant evidence. Judges are not accountable to any party but only to the Constitution.

3. This judgment only deals with the issue of liability since quantum was separated from the merits.

4. The five plaintiffs who were inmates at the Leeuwkop Maximum Correctional Centre (Leeuwkop) instituted two claims for damages against the defendant being the Minister of Justice and Correctional Services on the basis of vicarious liability, for the wrongful and unlawful acts of employees of the Department of Correctional Services (DCS). Claim A arises from the alleged assault and torture of the plaintiffs by DCS correctional services officials on 10 August 2014 in the vicinity of cell B1 whilst the plaintiffs were being held as inmates at Leeuwkop. Claim B arises from the alleged unlawful and wrongful detention of the second to fifth plaintiffs in isolated segregation at Leeuwkop, also amounting to torture over the period 10 to 26 August 2014.

5. The plaintiffs' claims are brought under the *actio iniuriarum* for non-patrimonial harm and *contumelia*; the action for bodily injury involving pain and suffering; and the Aquilian action for patrimonial loss in the form of future medical expenses. The plaintiffs case is that the conduct of the DCS officials was wrongful and unlawful, not just because it constituted assault at common law but also because it constituted torture as defined in the Prevention and Combating of Torture Persons Act 13 of 2013.

6. The defendant denied liability for both claims:

6.1 In respect of claim A, the defendant denied the allegations that the DCS officials assaulted and tortured the plaintiffs on 10 August 2014 in the manner alleged by them. He has pleaded that the officials applied the necessary proportionate minimum force to defend themselves against the plaintiffs who were hurling an assortment of objects at them, including human faeces and refusing to obey lawful instructions from the officials to leave the cell on the morning of 10 August 2014. The use of force was justified as precautionary measures taken in self-defence. The defendant admitted that the plaintiffs sustained injuries as a result of the DCS officers' use of force but disputed the nature and extent of their injuries.

6.2 In respect of claim B, the defendant admitted in its plea that it placed the second to fifth plaintiffs in segregation but contended that such segregation was authorised and lawful. During the trial however, the defendant denied that the second to fifth plaintiffs had been segregated and that the statutory requirements for lawful segregation under the Act were not applicable. The defendant contended that they had merely been separated in terms of section 29 of the Correctional Services Act 111 of 1998 read with Chapter 7 of the B Order and

placed in single cells pending the finalisation of the investigation into their alleged conduct.

7. The defendant conceded that if the version of the plaintiffs were to be accepted then the assault on them would amount to torture. The defendant however contended that no torture had taken place and that the assault that had taken place was justifiable.

8. The Redress Trust Limited (REDRESS) which was established in 1992 to represent victims of torture and to assist them in obtaining justice and reparations, sought to be admitted as an *amicus curia* in this matter pursuant to its mandate to provide justice for torture survivors, to ensure effective reparations for torture victims, and to advocate for governmental accountability at a global level in cases of torture. Its objective is to promote throughout the world the rehabilitation and protection of victims of torture and to assist them, where appropriate their families, in gaining redress for their suffering and to provide legal assistance to those seeking redress, including fair and adequate compensation for the harm they suffered.

9. REDRESS had applied in terms of rule 16A (5) of the Uniform Rules of Court to be admitted as *amicus curiae* solely to file heads of argument and to present oral submissions during closing argument or at any other appropriate stage of the proceeding. This was to assist the court by providing detailed submissions on relevant international and foreign law that has a bearing in the issues raised in this action. Their application was opposed by the defendant on the basis that since liability had been separated from quantum, this court did not need a friend to determine whether the plaintiffs were tortured or not which was in any event denied by the defendant. This

court subsequently granted an order admitting REDRESS as *amicus curiae* to file heads of argument and to present oral submissions during closing argument. It did so since REDRESS was limited to the record and was only going to present oral and written submissions on about relevant international and foreign law in writing and orally during closing arguments. REDRESS did not seek to introduce any evidence or to advance a position in relation to the particular merits of this matter. REDRESS has filed very helpful and oral heads of arguments and had made useful submissions during oral arguments which dealt mainly with the legal position of torture both in South Africa and internationally.

10. All the witnesses who testified before this court were called to testify about the events that had taken place in August 2014 and this is a factor that this court takes into account when assessing their evidence and credibility. Some crucial witnesses who were fingered by the plaintiffs of having taken part in the assaults on them like Mr Maharaj and Mr Manamela were not called as witnesses. Maharaj is alleged to have had taken part in the assaults on the plaintiff both in the courtyard, the office adjacent to the courtyard and in the shower area. He was also alleged to have been in possession of an electric shield. Manamela had used an electric shield on the plaintiffs. No reasons were given why they were not called. This court will have to draw a negative inference about the defendant's failure to have called those witnesses.

11. The events that took place during the morning of 10 August 2014 were not recorded with a video camera contrary to the provisions of clause 7.13 of the Orders issued by the National Commissioner under section 134(2) of the Correctional Services Act 111 of 1998. Since members of the Emergency Support Team (EST) had taken part in those

events the action had to be recorded by video camera. The events also had to be recorded in the Head of the Prisons diary which also did not happen. The video footage would have been vital evidence in this matter.

12. Four of the plaintiffs testified in these proceedings. Abel Phasha the fourth plaintiff did not testify due to his mental incapacity. The plaintiffs had also called various experts to deal with the issue of severity of the injuries that they had sustained. The defendant had also called factual witnesses and experts to deal with the issue of severity or the lack thereof.

13. Before dealing with the evidence led in these proceedings I deem it necessary first to deal with the Torture Act and case law on it and various pieces of legislation including subordinate legislation that is applicable in this matter. I will thereafter deal with the evidence led and submissions made by both parties and my conclusion.

APPLICABLE LEGISLATION

The Prevention and Combating of Torture of Persons Act 13 of 2013 (The Torture Act)

14. The plaintiffs case is that the treatment that they were subjected to by the DCS officials did not just constitute assault at common law but it rose to the level of torture as defined in the Torture Act which was denied by the defendant. This is both in respect of claim A and B of their claims.

15. The court will deal with various section in the Torture Act and foreign case law dealing with torture.

16. The Preamble of the Torture Act reads as follows:

*"**SINCE** section 12(1)(d) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way:*

***AND MINDFUL** that the Republic of South Africa –*

- *Has a shameful history of gross human rights abuses, including the torture of many of its citizens and inhabitants;*
- *Has, since 1994, become an integral and accepted member of the community of nations;*
- *Is committed to the preventing and combating of torture of persons, among others, by bringing persons who carry out acts of torture to justice as required by international law;*
- *Is committed to carrying out its obligations in terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment.*

***AND SINCE** each State Party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must take effective legislative, administrative, judicial or other measures to prevents acts of torture in any territory under its jurisdiction."*

17. The primary purpose of the Torture Act is to criminalise torture. The fact that torture is criminalised under the Torture Act is an indication of the extent to which our society considers such conduct to be abhorrent and reprehensible. The fact that it has been made a crime does not exclude the civil remedies for the infliction of torture to the victims. The key aims of the Torture Act are to give effect to the Republic's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and provide for the offence of torture of persons and other offences associated with the torture of persons.

18. The Torture Act is expressly designed to protect the rights of the vulnerable citizens not to be subjected to torture and other cruel, inhuman or degrading treatment or

punishment at the hands of state actors. It follows that a correlative right not to be subjected to torture is vested in those citizens and they will have the ordinary remedy available for the enforcement of that right namely an action for damages in respect of any loss occasioned by the violation of it. This is confirmed by section 7 of the Torture Act which expressly provides that nothing contained in this Act affects any liability which a person may incur under the common law or any other law.

19. The plaintiffs in contending that they were subjected to torture at the hands of the DCS officials, rely on the statutory definition of torture in section 3 of the Torture Act, namely:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person-

(a) for such purposes as to –

(i) obtain information or a confession from him or her or any other person;

(ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him or her or any other person to do, or refrain from doing anything.

(b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

20. It is clear from the aforesaid definition of torture that torture is distinguished by three characteristics:

20.1 the pain and suffering caused (whether physical or mental) is severe;

20.2 the pain or suffering is inflicted for a recognised purpose;

20.3 the infliction of pain or suffering is caused, instigated, condoned or acquiesced in by a public official.

21. The plaintiffs have pleaded the elements of torture in paragraphs 12A and 14 of their particulars of claim.

22. In assessing the evidence of torture, a court is enjoined to apply the strong evidentiary assumption that is recognised in international law and foreign jurisdictions in applying prohibitions on torture and ill-treatment by the State. Moreover, in determining whether an act constitutes torture, and was committed intentionally and with the requisite purpose, courts have ruled that the burden of proof shifts to the State to disprove torture once a credible allegation has been made.

23. The legal presumption and shifting of the evidentiary burden are premised on the recognition of the fundamental importance and non-derogable nature of the right not to be subjected to torture; and the fact that, in such cases, the State typically has exclusive knowledge of, or ability to obtain the facts.

24. In applying the prohibition on torture in Article 3 of the European Convention on Human Rights which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, the European Court of Human Rights held in *Selmouni v France* (Grand Chamber), 28 July 1999, para 87 that where an individual is taken into police custody in good health but is found to be injured at the time of his release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused.

25. In *Afet Sureya Eren v Turkey* ECTHR, 20 October 2015, the European Court on Human Rights similarly responded to the Government's submission that the applicant's allegations of ill-treatment in custody, amounting to torture, were unsubstantiated and that her injuries originated from the legitimate use of force. The court held that:

> *"29. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*
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> *30. In that respect, where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victims allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention."*

26. Given that torture is a species of assault, the presumption in our law that physical force that impairs the bodily integrity of another is wrongful and intentional applies.

27. The intention requirement for torture is attenuated in international law. In the decision of the UN Committee Against Torture, an extended form of intention is applied, similar to *dolus eventualis.* The Committee has reasoned that the perpetrator need not have intended to cause serious pain or suffering, it is enough if the severe pain and suffering is the natural and most obvious result of the conduct. This approach was taken in the decision of the UN Committee Against Torture concerning Burundi, in which the Committee determined in the matter of *EN v Burundi UNCAT,* Communication No. 578/2013, UN Doc CAT/C/56/D/578/2013. 16 February 2016, para 7.3 that:

> *"The Committee has noted the State's party's argument that the actions of the police officers were unplanned, that the officers were not acting on orders and that therefore the acts in question cannot be classified as torture. In this regard, the Committee observes that, according to information provided by the complainant that has not been contested by the State party, the individuals who beat and interrogated him were uniformed police officers armed with rifles and belts. Furthermore, the complainant*

was severely beaten for two hours by police officers within the police station itself. Based on the information provided to it, the Committee concludes that the abuse inflicted upon the complainant was committed by agents of the state party acting in an official capacity and that the acts constitute acts of torture within the meaning of article 1 of the Convention."

28. The Inter-American Court of Human Rights has gone further to hold that, to establish State liability for torture, the production of evidence of an individual perpetrator's intent is not required; what is critical is that the rights violation occurred with the support or acquiescence of the State. It has held in *Velasquez-Rodriques v Honduras, IACHR (Series A) No.4 Judgment of 29 July 1982 &173 that:*

"Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant – the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the right recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible."

29. All of these approaches indicate that since the prohibition on torture is absolute, and given the asymmetries of knowledge and access to evidence, the victim is not required to adduce evidence to prove that the perpetrator acted with a particular intent to torture. Courts and adjudicative bodies around the world recognise that it is for the State to adduce evidence to rebut credible allegation of torture.

30. In South Africa torture is absolutely prohibited under the Constitution and the Torture Act. There are no exceptions or derogations permitted even in cases of emergencies. The rights protected under section 12(1)(d) and (e) of the Constitution are listed as non-derogable under section 37 of the Constitution. Sections 12(1)(d) and (e) of the Constitution enshrines the right not to be tortured in any way; and not to be treated or

punished in a cruel, inhuman or degrading way. Once torture is established, the prohibition permits of no justification or exception. Section 4(4) of the Torture provides that there are no justifications or defences for the offence of torture and states that:

"No exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture."

31. No question of justification for torture can arise. If the plaintiffs establish with credible evidence that they were tortured by DCS officials, which is not rebutted by evidence led by the defendant bearing in mind the presumptions referred to earlier, it follows that they would be entitled to damages for the harm that they suffered as a result.

The Correctional Services Act 111 of 1998 (The Act)

32. The DCS officials are creatures of statute as far as their duties at correctional centres are concerned. They derive their powers from the Constitution, the Act, the Standing Orders and Regulations promulgated under the Act. Certain sections of the Act are applicable in this matter. This has to do with how demotions can take place, how separations and or isolations should take place, what minimum force may be used by officials of DCS, whether electric shields may be used by the authorities; mechanical restraints etc.

The legal framework applicable to demotions including disciplinary hearings

33. It is common cause that the demotions of the inmates including the plaintiffs of Cell B1 took place on 8 August 2014. This included the withdrawal or restrictions of amenities or privileges.

34. Section 24(1) of the Act provides that disciplinary hearings must be fair and may be conducted by either a disciplinary official, a Head of Correctional Centre or an authorised official. Section 24(3)(a) – (c) of the Act provides that where the hearing takes place before the Head of Correctional Centre or the authorised official, the following penalties may be imposed severally or in the alternative a reprimand; and a loss of gratuity for a period not exceeding one month; restriction of amenities for a period not exceeding seven days. Section 24(5)(a) to (c) provides that where the hearing takes place before a disciplinary official, the following penalties may be imposed namely a restriction of amenities not exceeding 42 days.

35. The privileges or amenities afforded to inmates are dealt with in B - Order 10. Paragraph 10.1 thereof provides that the objectives of amenities programme are primary (sic) to encourage offenders towards good behaviour, to instil a sense of responsibility in them and to ensure their interest and cooperation in the integration into programmes.

36. The amenities package is divided into two groups: individual amenities and group amenities. Individual amenities are sub-divided into groups A, B, and C as well as primary and secondary amenities. Primary amenities include contact visits, the use of the telephone and visit to the shops. Secondary amenities cover leisure time activities such as sports and TV. Group amenities overlap with secondary activities and include group activities such as videos, choir and sports.

37. Paragraph 10.2 of Standing Order 10 provides that all offenders receive group B amenities immediately after admission to the correctional centre. Upgrading from B to A is considered every six months during compulsory assessment of inmates by the Case

Management Committee (CMC). Degrading A, B, or C group takes place normally on ad-hoc task as soon as possible after an infringement of an offender has been handled by the disciplinary committee and found guilty of a particular infringement.

38. Standing Order 7.2(1)(d) provides that any offender who commits a serious disciplinary infringement, e.g., escape, attempted escape, jeopardise the security of the centre, etc. will be degraded to a lower group pending investigation or disciplinary hearing. Standing Order 7.2(1)(d), when read in context, deals with information to be imparted to new inmates upon their arrival at the prison. Standing Order 10.2 governs the restriction or withdrawal of inmates privileges or amenities.

39. The requirements for a lawful demotion are as follows: firstly, the inmate must have been subjected to a disciplinary hearing which was either conducted by a disciplinary official, the Head of Correctional Centre or an authorised official; and secondly, the inmate must have been found guilty of a transgression. It is only after these requirements have been met that the CMC is entitled to demote an inmate and the demotion may take the form of the restriction of or withdrawal or privileges or amenities. The CMC is the authoritative body responsible for demoting inmates.

Isolated segregation

40. Segregation is regulated by section 30 of the Act. Section 30(1)(a) to (f)) states that the segregation of an inmate for a period of time, which may be part 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 upon the written request of an inmate; to give effect to the penalty of the restriction of the amenities imposed in

terms of section 24(3)(c), (5)(c) or (5)(d) to the extent necessary to achieve this objective; (b) if such detention is prescribed by the correctional medical practitioner on medical grounds; (c) when an inmate displays violence or is threatened with violence; (d) if an inmate has been recaptured after an escape and there is reasonable suspicion that such inmate will again escape or attempt to escape; and (e) if at the request of the South African Police Service, the Head of the Correctional Centre considers that it is in the interests of the administration of justice.

41. Section 30(2)(a) and (b) of the Act requires that an inmate who has been segregated in terms of subsection (1)(b) to (f) must be visited by a correction official at least once every four hours and by the Head of the Correctional Centre at least once a day; and must have his or her health assessed by a registered nurse psychologist or a correctional medical practitioner at least once a day. Segregation must be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate. The minimum period of segregation may not exceed seven days. Section 30(6) provides that all instances of segregation and extended segregation must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge. An inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof. Section 30(9) provides that except in so far as it may be necessary in terms of subsection (1)(b) segregation may never be ordered as a form of punishment or disciplinary measure.

The requirements for the lawful use of force

42. Section 32 of the Act governs the use of force. It stipulates that any use of force must

be:

42.1 the minimum force required to ensure safe custody, where no other means are available (s 32(1)(a));

42.2 proportionate to the objective (s32(1)(b));

42.3 necessary for one of the specified purposes – i.e., for self-defence or the defence of any other person; to prevent the escape of an inmate; or to protect property (s 32(1)(c));

42.4 authorised by the Head of Centre, unless a correctional official reasonably believes that the Head of the Correctional Centre would authorise the use of force and that the delay in obtaining such authorisation would defeat the objective (s 32(2)). If force is used without prior permission, the correctional official must report the action taken to the Head of Centre as soon as reasonably possible (s 32(3)); and

42.5 reported to the Inspecting Judge immediately (s 32(6)).

43. If force is used against an inmate, the inmate concerned must undergo an immediate medical examination and receive the treatment prescribed by the correctional medical practitioner (s 32(5)).

44. Chapter 17 of the Standing Orders detail the recording and reporting obligations in the event of the use of force. The Orders stipulate that:

44.1 The use of force resulting in injury to staff, prisoners or any other person must be fully documented and reported (paragraph 2.1).

44.2 The Head of Prison must be notified immediately when any type of force is used. A detailed and signed written report, prepared by the correctional official

who applied force, must be completed not later than the end of that shift and shall include the following information:

- number of prisoners involved;
- an account of the events leading to the use of force;
- an accurate and precise description of the incident and reasons for applying force;
- a description of the restraining devices, if any, and the manner in which they were used;
- a description of the injuries suffered, if any, and the treatment given and/or received;
- a list of all participants and witnesses to the incident;
- a number of officials involved.

Upon receipt of such a report the Head of Prison must decide on the following: whether the case should be regarded as finalised or be further investigated. Where the Head of the Prison was involved in the incident where force was used, the report must be forwarded to the Area Manager for a decision (paragraph 2.5);

44.3 During unrest situations when force is applied in an organised manner, Departmental video cameras must be used (paragraph 2.11); and

44.4 When prisoners lodge an assault complaint, such allegations/ complaint must be referred to the South African Police Service for investigation. A departmental investigation must also be conducted in respect of the matter whereupon appropriate steps must be taken (paragraph 2.9).

45. The Standing Orders give definition to the requirement of minimum force. Paragraph 2.7 of chapter 17 states:

"Minimum force is that application of force which would, in every factual situation, be regarded as justified in a court as being the only essential or necessary force. The force must be the only reasonable means to protect a threatened interest and should not be more damaging than what is necessary to obviate the threat/attack."

46. The Standing Orders also detail the role and responsibilities of the EST in chapter 17, paragraph 7. The Orders provide that:

46.1 Each Management Area must have one EST which shall be responsible to assisting in dealing with any emergency situation (paragraph 7.1);

46.2 The EST is composed of a total of 25 people with team members appointed in writing by the Area Manager. The team is to be made up as follows with a unit leader; second in charge; five sections of four people each (at least two must have a code 11 drivers' licence and there must be four sharpshooters with a good shooting record; one person recording everything; one medically trained person and one video operator/photographer and the team may include dog-handlers, where available (paragraphs 7.2. to 7.3);

46.3 Inside a prison, the EST can be utilised in *inter alia*, situations of riots and unrest, revolts by prisoners and violence (paragraph 7.4.1). The EST shall be activated when the relevant Area Manager, Head of the Prison in emergency situations has utilised all possible alternatives. Teams can be put on standby during the development of emergency situations but must not be deployed when other solutions/alternatives are in place/can be implemented (paragraph 7.5);

46.4 Only the approved security equipment/aids must be applied ad the prescribed uniform should be worn (paragraph 7.6);

46.5 A list of all names of all correctional officials of the EST who participate in actions, must be available. The same principle also applies to correctional officials who are not part of the EST (paragraph 7.7);

46.6 Should the assistance of EST be called in, the relevant Area Manager and Head of Prison must be personally present throughout the execution of the particular action. If necessary, additional senior and middle level managers must be present. Strict control must be exercised by such persons (paragraph 7.8);

46.7 Before any actions commence, the Area Manager/Head of the Prison must personally address the officials and explain exactly what the purpose of the action is, as well as what procedure must be followed and the risks is attached to the non-compliance of directives, must also be clearly spelled out (paragraphs 7.9 and 7.10);

46.8 All instructions as well as the course of actions must be appropriately and fully recorded, and any action by the EST must be recorded by a video camera. It must also be recorded in the Head of Prison diary (paragraphs 7.11 and 7.13);

46.9 The Area manager must ensure that team members of the EST are fully trained and that they know exactly how the various scenarios are to be resolved. Actions must therefore be carried out in an absolutely organised manner. EST officials must receive at least four hours refresher training per month (paragraphs 7.12 and 7.14).

The use of non-lethal incapacitating devices including electric shields and batons

47. The use of non-lethal incapacitating devices is separately regulated under section 33 of the Act and Regulation 19. Non-lethal incapacitating devices include electronically activated devices; and specifically, electrified shields.

48. The use of these devices is subject to the following requirements in the Act and regulations:

48.1 They may only be issued to a correctional official on the authority of the Head of Centre (s 33(1));

48.2 They may only be issued to a correctional official specifically trained in their use (s 33(2) and regulation 19(1));

48.3 They may be used in the manner prescribed by regulation and then only if an inmate fails to lay down a weapon or some other dangerous instrument in spite of being ordered to do so; if the security of the correctional centre or safety of inmates or others is threatened by one or more inmates; or for purposes of preventing an escape (s33(3)); and

48.4 Their use must be reported in writing and as prescribed by regulation.

49. The Standing Orders further regulate the use of electrified shields. Paragraphs 4.1 and 4.4 of chapter 16 stipulate that:

49.1 An electronically activated non-lethal incapacitating device may only be activated for use for the purposes prescribed in section 33 of the Act and only for such a period as absolutely necessary to incapacitate the prisoner after which it must be deactivated (4.1(a));

49.2 Non-lethal incapacitating devices used as mechanical restraints may only be used on prisoners when outside their cells and during transit (escort) (4.1 (b));

49.3 Electrical shields are mainly utilised by EST during situations of unrest inside or outside prisons. Where necessary the Head of Prison can decide which other officials who have been trained in the use thereof can be issued with such shields and under what circumstances (para 4.4.1);

49.4 Whenever electrified shields have been used the incident must be reported immediately to the Head of Prison as prescribed for the electrified shield device (para 4.4.2);

49.5 Whenever the electrified shield has been used against a prisoner(s); the prisoner(s) must where necessary receive immediate medical attention (para 4.4.3); and

49.6 Proper control must be exercised by means of a register in respect of the issue and receipt of electrified shields (para 4.4.4).

50. The use of any other weapons (other than non-lethal incapacitating devices or firearms) may be authorised by the National Commissioner as prescribed by regulation. Such regulations must prescribe the training, manner of use, control and reporting procedures.

51. Under Regulation 21, other weapons that may be used are baton-type equipment and pyrotechnical equipment. The use of such equipment is restricted to the purposes described in section 33(3) and 34(3) of the Act – namely, (i) in self-defence, (ii) in defence of any other person; (iii) to prevent an inmate escaping; (iv) when the security of the correctional centre or safety of inmates or other persons is threatened; or (v) if an inmate fails to lay down a weapon or some other dangerous instrument in spite of being ordered to do so.

52. Batons may only be used by correctional officials trained in the specific techniques for the use of batons. Such training must be done by qualified trainers and correctional officials must receive refresher training at least once every six months. The Head of

Centre must decide which correctional official batons may be issued. The issuing and use of batons must be recorded in a register as prescribed in the Standing Orders.

53. Paragraph 6 of Chapter 16 of the Standing Orders (Security Equipment) regulates the use of batons/tonfas. Paragraph 6.3.1 provides:

(a) Tonfas/batons with holsters must be issued to all officials who do night duty in courtyards/outside posts. Tonfas/batons may be issued at the discretion of the Head of the Prison to officials charged with the managing of prisoners. The number of batons must be accounted for on the inventory and issued and received back by means of a register. Tonfas/batons may be carried only in the prescribed holsters.

(b) Heads of Prisons must use their discretion regarding the method/manner of the issue of tonfas/batons to officials on a daily rotation basis. The Head of the Prison must appoint in writing two officials per division to issue and received tonfas/batons (arsenal controllers can be utilised).

(c) Register divisions: batons provide for a date, time out, number issued, reason for issue, name of recipient (block letters/signature), date returned, time returned, signature of official who receives back, checked by (initials/date). The register must be checked on a daily basis by the Supervisor: Internal custody and on a weekly basis by the Head of Prison/Division Head: Operational Services.

(d) Batons/tonfas issued to an official may not be utilised for private purposes. Batons/tonfas may only be used according to the principles of minimum force and when absolutely necessary for the purposes of self-defence, protection of another person or good order and control.

54. The use of force and the segregation of inmates is strictly regulated under the Act, the Regulations and the Standing Orders issued by the National commissioner of Correctional Services (the National Commissioner) under section 134(2) of the Act (the B-orders or Standing Orders). Section 134(2) of the Act provides that orders issued by the National Commissioner that are consistent with the Act and its Regulations must be obeyed by all correctional officials and other persons to whom such orders apply.

55. Since the evidence establishes and it is common cause that both force was used by DCS officials and that the second to fifth plaintiffs were placed in isolated segregation, the defendant bears the onus to prove that the use of force and the segregation of the plaintiffs were lawful – i.e., that it accorded with all the legislative conditions and requirements.

Safe custody under conditions of human dignity

56. This court is now proceeding to deal with the general principles and conditions of detention specified in the Act. Section 96(1) of the Act provides that the Department and every correctional official in its service must strive to fulfil the purpose of this Act and to that end every correctional official must perform his or her duties under this Act.

57. Section 2 of the Act defines the purpose of the correctional system. It provides that its purpose is to contribute to maintaining and protecting a just, peaceful and safe society by (a) enforcing sentences of the courts in the manner prescribed by the Act; (b) detaining all inmates in safe custody whilst ensuring their human dignity; and (c) promoting the social responsibility and human development of all sentenced offenders.

58. Section 36 of the Act further defines the objective of the implementation of a sentence of incarceration as enabling the sentenced offender to lead a socially responsible and crime-free life in the future.

59. The general approach to safe custody, as set out in section 4, is that the duties and restrictions imposed on inmates must be the minimum required to maintain security and good order; and rights of inmates entrenched in the Act must not be violated or restricted for disciplinary or any other purpose.

60. Certain limitation on the rights of inmates are permitted for the purpose of ensuring safe custody, but only insofar as is reasonable necessary. Section 26 provides:

> *"(1) The right of every inmate to personal integrity and privacy is subject to the limitations reasonably necessary to ensure the security of the community, the safety of correctional officials and the safe custody of all inmates.*
>
> *(2) In order to achieve the objectives referred to in subsection (1) and subject to the limitations outlined in section 27 to 35, a correctional official may-*
>
> (a) *search the person of an inmate, his or her property and the place where he or she is in custody and secure any objective or substance which may pose a threat to the security of the correctional centre or of any person, or which could- be used as evidence in a criminal trial or disciplinary proceedings;*
>
> *(d) apply mechanical means of restraint; and*
>
> *(e) use reasonable force."*

61. The fundamental concern in the Act is to protect the human dignity of all inmates. The object expressly infuses the Act. For instance, chapter III of the Act – which defines the conditions of custody (in section 4-21) is headed "Custody of All Inmates under conditions of Hunan Dignity". The following material conditions of custody are pertinent:

61.1 The accommodation of prisoners must meet the prescribed requirements (in terms of floor space, lightning, ventilation, sanitation and health conditions), which must be adequate for detention under conditions of human dignity.

61.2 Each inmate must have an adequate diet to promote good health, and must be provided by the Department with clothing and bedding sufficient to meet the requirements of hygiene and climatic conditions.

61.3 Every inmate must be given the opportunity to exercise sufficiently in order to remain healthy, and is entitled to at least one hour of exercise daily.

61.4 Every inmate has the right to adequate medical treatment, and the Department must provide adequate health care services, within its available resources, to allow every inmate to lead a healthy life.

62. These conditions are further specified under Regulations 3 to 7. As regards access to medical care, the regulations provide inter alia, that:

62.1 The correctional centre's correctional medical practitioner is responsible for the general medical treatment of inmates and must treat an inmate referred to him or her as often as may be necessary (regulation 7(3)); and

62.2 A registered nurse must attend to all sick and sentenced offenders as often as is necessary, but at least once a day (regulation 7(4)).

Complaints and requests

63. The Act protects the right of inmates to make complaints and requests to the Head of the Correctional Centre (HOC or Head of Centre) or an authorised official. Under section 21, all complaints and requests must be recorded and must be promptly dealt with and the inmate advised of the outcome. If the inmate is not satisfied with the

response, the matter must be referred to the National Commissioner, whose response must be conveyed to the inmate; and if the inmate is not satisfied with the National Commissioner's response, he may refer the matter to the Independent Correctional Centre Visitor. Section 21(2)(c) provides that if an inmate's complaint concerns an alleged assault, the HOC or delegated official must ensure that the inmate undergoes an immediate medical examination and receives the treatment prescribed by the correctional medical practitioner.

64. The procedure for dealing with inmate's complaints and requests is detailed in chapter 6, paragraph 17 of B-Orders.

64.1 The guiding philosophy for dealing with complaints is described as follows (in paragraph 17.1):

> "*One of the elements whereby a calm and satisfied prison population can be accomplished is the existence of a well established and effective complaint and request procedure. The afore-mentioned procedure must be an accessible, efficient and credible system by means of which prisoners can air their complaints and grievance in order to:*
>
> - *create an acceptable prison environment;*
> - *ensure the efficient management of prisons;*
> - *to avoid the build up of frustration and together with that unacceptable and/or destructive behaviour such as gang activities uprisings, hunger strikes, the writing of illegal letters of complaints and assaults;*
> - *ensure control over the requests by writing down the complaints and the requests; and*
> - *ensure proper record-keeping in the interest of both officials and prisoners.*"

64.2 Paragraph 17.2 provides that on admission and daily afterward, prisoners must be given an opportunity to direct complaints and requests to Section Heads. The Head of Prison must also handle complaints and requests from prisoners at least

weekly. The Area Manager must handle complaints at a prison/section at least once per month.

64.3 The approach and procedure for receiving and addressing complaints is detailed in paragraphs 17.3 and 17.4. It provides for guidelines that must be adhered conscientiously. Every complaint and request whether oral or written must be recorded properly in the complaint and request register. Where the complaints and requests are of such a nature that they preferably must be written down, the necessary stationery must be provided for the prisoner's use. The written complaints/requests must be sent via the normal channels to the proper functionary. In every section/division a postal box must be available where written complaints and requests from prisoners can be placed in. It also deals with how such written complaints/requests must be dealt with and treated confidentially. The complaints/requests must be investigated properly by the appointed persons. Feedback must be given to the prisoner. Complaints and requests that have not been settled by the Head of the Prison must be referred in writing to the area manager for further attention and follow up. Prisoners must be informed of the time and place and manner how complaints are aired and dealt according to its merits and generalisation must be avoided. Every prisoner must be granted sufficient opportunity without interference of others, whether correctional officials and/or prisoners to put his/her case. All the relevant facts must be gathered before a conclusion and a decision can be made. The decision must be communicated to the prisoner in such a way that he she understands it and is satisfied.

Discipline of inmates

65. The principles and procedures governing the discipline of inmates are set out in Part B of Chapter III of the Act. The general principle of necessity is applicable to disciplinary measures. Section 22(1) of the Act stipulates that discipline and order must be maintained with firmness but in no greater measure than is necessary for security purposes and good order in correctional centre.

66. Section 24(1) of the Act provides that disciplinary hearings must be fair and may be conducted by either a disciplinary official, a Head of Correctional Centre or an authorised official. The procedural requirements of a fair disciplinary hearing are described in section 24 and regulation 14. Disciplinary penalties or sanctions may only be imposed after a disciplinary hearing. These include the restriction or withdrawal of privileges or amenities.

The use of mechanical constraints

67. The use of mechanical restraints is regulated under section 31 of the Act and Regulation 19. Mechanical restraints include handcuffs or leg irons.

68. Section 31 provides *inter alia*:

> *"(1) If it is necessary for the safety of an inmate or any other person, or the prevention of damage to any property, or if a reasonable suspicion exists that an inmate may escape or if requested by a court, a correctional official may restrain an inmate by mechanical restraints as prescribed by regulation.*
>
> *(3) (a) When an inmate is in segregation and mechanical restraints are to be used, such use of mechanical restraints must be authorised by the Head of the Correctional Centre and the period may not, subject to the provisions of paragraphs (b) and (c), exceed seven days.*

(b) Mechanical Restraints may only be used for the minimum period necessary and this period may not, subject to the provisions of paragraph (c), exceed seven days.

(c) The National Commissioner may extend such period for a maximum period not exceeding 30 days after consideration of a report by a correctional medical practitioner or psychologist.

(d) All cases of the use of mechanical restraints must be reported immediately by the Head of the Correctional centre to the National Commissioner and to the Inspecting Judge.

(5) An inmate who is subjected to such restraints may appeal against the decision to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.

(6) Mechanical restraints may never be ordered as a form of punishment or disciplinary measure.

(7) Mechanical restraints in addition to handcuffs or leg-irons may only be used on inmates when outside their cells."

69. Chapter 16 of the Standing Orders (Security Equipment), paragraph 8, regulates the issuing and receipt of cuffs; and requires that a register be maintained.

THE PLAINTIFFS CAUSES OF ACTION

70. The plaintiffs brought three causes of action under claim A. They rely on the assault that they endured at the hands of the DCS officials on 10 August 2014 and allege that the nature of the assault was such that it constituted torture. Their primary basis for the claim of assault and torture is the delictual action for a wrongful and intentional violation of personality interest, the *actio iniuriarum.* They claim compensation for non-patrimonial harm, being the impairment and infringement of their right to freedom and security of the person, including the right to bodily and psychological integrity, their right to dignity and their right to privacy. These rights are protected as personality right under the common law and under sections 10, 12 and 14 of the Constitution.

71. Secondly, and in addition to damages for *contumelia* or non-patrimonial harm, the plaintiffs also seek damages for pain, suffering and emotional trauma caused by the assault and torture as well as loss of amenities under the delictual action for bodily injury involving pain and suffering.

72. Thirdly, under the Aquilian action, the plaintiffs have claimed damages for patrimonial harm (i.e. future medical expenses), wrongfully caused (whether intentional or negligently).

73. The second to fifth plaintiffs brought an action under claim B which arises from their detention in isolated segregation at Leeuwkop amounting to torture over the period 10 to 26 August 2014.

THE EVIDENCE LED

74. The parties had called several witnesses in this action. They were both factual and expert witnesses. I do not deem it necessary to set out the witnesses' testimonies in any great detail bearing in mind that quantum was separated from the merits. What had happened on 7 August 2014 is not much in dispute. The events of 7 August 2014 are however important to set the scene for the events that unfolded in the vicinity of B Unit at Leeuwkop on 10 August 2014.

75. It is common cause that on 7 August 2014, DCS officials conducted a surprise search of cell B1, the cell in which the plaintiffs and other inmates were housed at approximately 18h00. When they arrived at cell B1 they were unable to open the cell door since the door had been blocked from the inside by the insertion of toothbrushes in the locking device. DCS officials then instructed the cell cleaner to unblock the door

which he did. The officials then entered the cell and instructed the inmates to exit the cell and line up against the courtyard wall opposite the cell to be counted. Each inmate was body searched whilst lined up against the courtyard wall. The inmates were then instructed to remove their belongings from the cell including their clothes, sponges (mattresses) and other belongings, to be searched in the courtyard. Thereafter the inmates were instructed to squat in a line and were counted once more before being returned to the cell and locked up. After the search, inmates were informed by the DCS officials that a cell phone and three sim cards had been found in the cell but those items were not shown to them.

76. When the inmates of cell B1 were later questioned by DCS officials about who had blocked the cell door, no one took responsibility for it. The defendant in the pleadings admitted that the conduct of the inmates of cell B1, including the plaintiffs, prior to and during the search on 7 August 2014 was not violent; was not physically threatening; did not in fact jeopardise the security order of the correctional centre; and was not likely to jeopardise the security or order of the correctional centre.

The evidence around the demotions and disciplinary hearing

77. The four plaintiffs who testified namely Llewellyn Smith (Smith) who is the first plaintiff, Xolani Zulu (Zulu) who is the second plaintiff, Benson Qibi (Qibi) who is the third plaintiff and Mthokozisi Sithole (Sithole) who is the fifth plaintiff all led corroborative evidence that they and the inmates of cell B1 were demoted on 8 August 2014 following the events of 7 August 2014. Zulu testified that the inmates of cell B1 were addressed by Tebogo Jacob Zimba (Zimba) and Mlungisi Ivan Kunene (Kunene) on 8 August 2014 about the repercussions following the events of 7 August 2014. This

was corroborated by Sithole, Smith and Qibi. Zulu testified that Zimba informed the inmates that they were being demoted to C Group and this was corroborated by Smith and Qibi. Zimba ordered that the TV be removed which happened and informed the inmates that their individual privileges had been revoked and this was confirmed by the other three plaintiffs.

78. Zulu and Sithole both testified that they were individually charged by Alpheus Monare (Monare) on 9 August 2014 and during their respective meetings with Monare, he confirmed that they had been demoted. Smith confirmed having seen Zulu and the other inmates being taken individually to the office outside of cell B1 to be charged. Qibi testified that he too was charged individually by Zimba and two other officials, and whilst he was being charged he was told that he had been demoted.

79. During cross examination the issue of the date when the demotion took place was canvassed. Zulu made it clear that on 8 August 2014, Zimba informed the inmates that they were being demoted, and implemented the demotion immediately by removing the TV and revoking their privileges i.e. going to the shop, contact visits and the use of the public phone. He repeated that on 9 August 2014 the inmates were charged individually for the events of 7 August 2014, and while being charged they were told that they were been demoted. It was put to Zulu that Monare would deny that he told him that he was demoted on 9 August 2014. Zulu however was not challenged on his testimony that Zimba and Mlungisi Ivan Kunene (Kunene) had addressed the inmates on 8 August 2014 and informed them of their demotion. Smith, Sithole and Qibi were not challenged in any material respect on their evidence pertaining to the demotion.

80. Kunene confirmed that an inmate had to be found guilty of a transgression before he could be demoted. He did not suggest that the plaintiffs had been found guilty of any transgression following the events of 7 August 2014.

81. It is clear from the undisputed evidence before this court that the plaintiffs were not found guilty of any transgressions before they were demoted on 8 August 2014 nor was any disciplinary enquiry held.

Events subsequent to the Plaintiffs demotions

82. The inmates of cell B1, including the plaintiffs and Zulu were aggrieved with their collective punishment and charge. On 9 August 2014, Zulu wrote a letter addressed to the head of prison, Alpheus Mohale (Mohale), complaining about the collective charge and demotion of all the inmates of cell B1. Zulu gave the letter to Kunene, the supervisor at B section, who gave it to Mohale. Mohale called Zulu over and said in his presence "this is nonsense" and tore up the letter.

83. Zulu testified that according to DCS protocol, if an inmate was dissatisfied with a response to a complaint from the Head of Prison, they could address a complaint to the Area Commissioner. This is borne out by the rules relating to complaints which I have set out previously. Zulu testified that after Mohale tore up his first letter, he wrote a second letter addressed to the Area Commissioner, Mr Thokolo. He gave the letter to Kunene. He received no response to his second letter, but was informed by his cell monitor that he had seen Mohale tear up that letter too.

84. Zulu testified that he tried to take up other measures after attempting to send the letter, including speaking to Kunene and requesting the use of a phone to call his family or lawyers but this was denied. It was his belief that at that stage he had exhausted all his internal avenues. His complaints were never registered and there is no evidence that his complaints were ever recorded in the complaint's register.

85. During cross examination it was put to Zulu that the evidence that he wrote a letter to the Head of Centre and handed it to Kunene; and that Mohale tore the letter up and that he wrote a second letter to the Area Commissioner and handed it to Kunene was false. It was put to him that he did not mention writing the letters of complaint in his statement made for purposes of the internal investigation. This however is not correct since in his statement he mentioned of a request and a formal complaint which supports his version about the letters. His evidence that he had asked Kunene if he could use a phone to phone a lawyer or family members which request was denied by Kunene was not challenged during cross examination. Zulu stated that during the meeting he had convened in cell B1 on the evening of 9 August 2014, he informed his cell inmates of the complaint letters he had written and that he had received no response. This evidence was corroborated by Qibi and Sithole.

The events of 10 August 2014

86. It is common cause that on the morning of Sunday 10 August 2014, Zulu blocked the door of cell B1 by placing a foreign object in the locking device. This had the effect of preventing DCS officers from gaining access to the cell in order to count the inmates and commence with daily prison routine. This was a form of protest on the part of Zulu

against the collective charging and demotion to group C of all the inmates of cell B1 on 8 and 9 August 2014.

87. The defendant's pleaded case is that once the cell door had been opened and DCS officials entered, various objects including human faeces were hurled at them. The defendant pleaded further that the officers were accordingly constrained to take precautionary measures, including using force to among other things defend themselves. According to the defendant only the following four DCS officers took such precautionary measures: Monare, Andrew Moleleki (Moleleki), Mr Molalakgotla and Mr Nkosi.

88. The defendant gave the following further account of the DCS officers entry into the cell in its further particulars; that Kunene and Monare attempted to negotiate with the inmates, to try and get them to open the cell but the inmates refused; that Lesch used an electric grinder to cut open the gate and the main door to the prison. After Lesch had removed his equipment, Zimba instructed the inmates to exit the cell but they refused to do so; that Zimba then telephoned Mohale to request authorisation to use force to remove the inmates from the cell. Mohale authorised Zimba to direct the DCS officers to use minimum force. The authorisation did not permit the use of non-lethal incapacitating devices, firearms or other weapons. DCS officials then entered the cell and were attacked with buckets, electric kettles, electric irons, brooms and water with faeces. They were compelled to use tonfas to ward off advancing inmates and non-electrified shields in order to protect themselves as well as to take control of the cell, restore order and to ensure unhindered access to the cell. The DCS officials' initial intention was to physically remove the inmates from the cell by pulling and dragging

them out so as to take control of the cell. However, when the inmates began attacking the officials, they were constrained to use non-electrified shields and tonfas in order to protect themselves. Only four DCS officials – Monare, Moleleki, Molalakgotla and Nkosi – took those measures, and used only tonfas and non-electrified shields to protect themselves.

89. The plaintiffs disputed the defendant's account of what transpired on 10 August 2014. They denied that any objects were thrown at DCS officers when they entered the cell. The plaintiffs pleaded that upon the DCS officers gaining access to the cell, all inmates were instructed to exit the cell and did so peacefully.

The plaintiffs' version of the events of 10 August 2014

90. Zulu testified that once the locksmith had opened the door, he saw Monare preparing to open the gate or grill in front of the cell door depicted on photograph 13. He could also see a half-moon formation of EST officials armed with electric shock shields behind Monare. At that point, Zulu had maintained his physical position at the point marked D on the cell diagram. From the EST formation he could recognise Manamela, Maharaj, De Beer and Minnaar in the front. Behind them stood more EST officials and ordinary DCS officials. From the latter he could recall seeing Mr Buthelezi, Ms Khan, Rametse, Moleleki, Nkosi, Kunene, Ndzukula, Frans, Chris Nyampule, Zimba, Ngobeni and Ms Madongi Tiro. The inmates remained calm in the cell and they were just sitting on their beds as the events unfolded. He was not aware of any inmates on top of the lockers in the cell, and that this is where they would have to be to throw things over the interior wall separating the cell beds from the shower area. He did not see any inmates throwing things over that wall.

91. Once Monare opened the cell gate or grill, Zulu stepped back and Monare ordered the inmates to exit the cell two-by-two and line up in the courtyard. Monare's position was then marked E on the cell diagram. The position where the inmates were expected to line up against the wall was marked F on the cell diagram and depicted in photograph 9. Zulu noted that the instruction was in fact impossible as the cell door frame was too narrow to permit inmates to exit in twos. Since he was already at Monare he therefore exited alone. As he exited the cell, he held in his pocket a facecloth that he damped in case the threat of teargas came true. He was immediately shocked, kicked, beaten with open hands, beaten with batons within the half-moon formation. He recalled that Manamela of the EST was using the electric shock shield on him, and that he continually electrocuted him with it and used it to push him against the wall. He recalled that Moleleki a grade 1 DCS official, Nkosi a grade 2 or 3 DCS official and Rametsi a captain and head of D section assaulted him. He recalled specifically that Moleleki had slapped him and hit him with a baton and that Nkosi and Rametsi kicked him including on his jaw by Nkosi.

92. Zulu testified that whilst he was being shocked, Monare also beat him with a baton on his head. He testified that they were shocking him with electric shock shields and at that point the beating was so severe and was so painful. Monare then came right there and beat him with the tonfa on the head and on his private parts. He could not remember the names of the other EST officials that were also electrocuting him and he said that he could not see all of the officials that were beating him as he had his hands raised protecting his head. When asked how many times he was struck as he exited the cell, he said he was hit many times.

93. During cross examination it was put to Zulu that he had contradicted himself about the chain of events in that in his testimony in chief he had said that Moleleki had beaten him with a baton before Monare beat him on the head. Zulu confirmed that Monare had first hit on the head before he was approached by Moleleki. He testified to the difficulty in telling the court what happened in sequence. He said that he cannot be so sequenced in a sense that when you are being beaten by a number of people you cannot clearly register who beat you first and what what. But at the end of the day there were a lot of people who had assaulted him at that point in time. But he had seen Moleleki, Nkosi, Rametsi, Manamela and Monare. He knows that some officials were there but he cannot lie and say that he saw them beating him.

94. Zulu described how hard the blow to his head by Monare had been. He noted how much harder it had been than the blows to the head he would often get as a young stick fighter. He also described how at that point he fell down, his vision got blurry and he felt like he was going to die. He yelled out to the officials that they were going to kill him and then Rametsi said that he must die. He could hear in the background that the inmates had now exited the cell and that they were yelling his name seemingly in attempts to explain to the officials that it was he who had blocked the door, and therefore to stop the assaults on them. He passed out in the courtyard and when he woke up he realised that he was still being kicked and beaten with batons. He testified that, that gave him a sense that they had not stopped.

95. Zulu testified that when he regained consciousness in the courtyard and as the assault continued on him, he lay down on the side with his hands protecting his face and he could feel the kicks all over his body. Immediately when he realised that those people

wanted to kill him he stood up and ran. He ran through the door dividing the section B courtyard and the main courtyard towards the latter. As he approached the door, Frans a correctional officer was standing ahead of the door and hit him with a baton as he passed him on his upper body. As he approached the main courtyard as depicted in photographs 1 and 2 he saw Mohale, the Head of Centre, standing with four male officials with dogs on leashes. They unleashed one of the dogs which then chased him. The chase had been close and each time the dog had lunged to bite him it was a near miss. This necessitated him to run back to the section B courtyard and he managed to evade the dog. The dog handler who unleashed the dog was a white official who he said in re-examination was Mr Muller.

96. Zulu described how he could hear his fellow inmates screaming and how he saw some running around in section B court yard. He also saw some inmates being stacked on top of each other in a pile against the wall. They were putting one on top of another like bags of cement and in a sense some inmates were on top of the other inmates while they were being assaulted with batons and electrocuted with shock shields. He estimated that there were approximately 12 people in the pile. Once back in the section B courtyard he returned to the position marked F in the cell diagram where he was again beaten, kicked and electrocuted. At that point he and the rest of the inmates were told to lie down on their stomachs in a line. In the background, the inmates that had remained by the wall were being beaten and being made to do handstands. Zulu noted how when the inmates would fall or got tired from the handstands, they would be electrocuted with a shock shield by Monare, Maharaj and others. Zulu initially testified that he could not recall who was beating and electrocuting him at that time, but only that the batons were raining on him and he could not see properly who was there.

However, when prompted during cross examination he testified that he could recall Moleleki beating him with a baton, Rametse kicking him and Manamela shocking him. He described how he had been lying on his stomach at the time and how Manamela was pressing the shock shield on his left lower back. He was shocking him at the back and was pressing the shield on top of him, not like the normal way when they would shock you but he was pushing it down on him. While he was being assaulted he had tried to explain to the officials that he had done nothing wrong but to no avail. He kept on explaining to himself that he had done nothing wrong and why he was assaulted like that and then he would hear the men saying that he thought that he was clever and who was he to block their prison and so on. The ordeal lasted for about an hour before Zimba arrived and ordered that he be taken to the section B office which is adjacent to cell B1, off the section B courtyard, and is depicted in diagram 368A and photograph 26. The office door is depicted in photograph 10 (in exhibit E): it is the open door on the right. The same photograph depicts the door of cell 1, section B on the left. The interior of the office is depicted in photographs 26 and 29 (in exhibit E), although the arrangement of furniture in the office was not exactly as depicted in the photographs.

97. Zulu testified that he was dragged to the office by Zimba with Maharaj and Manamela following behind. On being taken to the office on Zimba's orders it seemed that he was no longer being beaten for having blocked the door but rather that he was now being beaten to produce a cell phone. He said that all the beatings that had happened before he went to the office was about him blocking the door so when he was taken to the office he heard them saying that he had to produce a cell phone. Zimba and some EST officials said that his name was on a list of people who had cell phones. Inside the office near the entrance to the telephone area he was electrocuted by Manamela with

the shock shield on his upper body. He described in cross examination how Manamela shocked him with the electric shield against the wall with the help of Zimba. He explained how Zimba pushed him against the wall to face Manamela who could then shock him. They were helping each other as a team and Zimba was holding him and Manamela was shocking him. He said that Zimba never assaulted or kicked him in any way, and he was more of an order keeper and did not touch him once. De Beer also did not touch him. Inside the office he was also repeatedly kicked by Maharaj using his knee like a kickboxer style on the top side of his left thigh, whilst he demanded that he produce a cell phone. Maharaj also ordered him to do handstands in the office and each time he fell Manamela would electrocute him. Both officials would then order him to get up again and repeat the handstand. He estimated that the repeated sequence of doing the handstands, falling down and being shocked by Manamela and being kicked by Maharaj lasted about ten to fifteen minutes. This continued until he moved to the inner section of the office where the kitchen is situated. He marked his position in the kitchen area as H on the diagram of the office area. Manamela followed him into the kitchen area and continued to electrocute him with the shock shield until the battery died. Thereafter Maharaj gave Manamela a new shield and he continued to electrocute him.

98. Zulu testified that while he was on the floor, sitting down against the fridge Molokai a grade 1 DCS official entered the office and said to him that it was he who had blocked the door. He then started kicking him repeatedly on his body, stomach and back and he could not recall how many times, except that it was repeatedly. He was also shocked there by Manamela until he lost consciousness again. He described how he was being shocked on his forearms which he would use to protect himself but then he would open his arms as a result of the shocking and be shocked on his body and that is where he

would start to scream. He described the impact that the shock shield had on him. He thought that it was a higher voltage because they shocked him against a non-moving object, either the wall or a fridge and he would see the batons come in slow motion. Immediately when they would release the shield then they would move faster and normally when they used it on other people they would press it once but at that stage when they were shocking him they would press and then push it on him and let it stay on him. He was being hit with batons at the same time as having the shield pressed against him. He could not say who was hitting him since he was focussing on the person with the shield. At that time, he was standing against the fridge and this process continued until he passed out. When he started to regain consciousness, he felt like he was being dragged by a car on the ground, only to realise that this was because the assault was continuing. He was being beaten by Manamela and four other EST members who were hitting him with batons everywhere except the head. He was at that stage sitting with his back against the fridge. At some point, Ms Buthelezi came in and told the officials to stop assaulting him further since they knew that they would kill him. The officials stopped and Manamela ordered him to lie down on his stomach in the centre of the office. At that stage he saw other cell mates coming in namely Smith, Mugabe (Phumlani Buthelezi) and Sithole. Sithole came flying in with Monare on top of the lockers or at the tables and he landed next to him and he thought that he had thrown him on top of the tables so that he could land on the floor. Monare came in after Sithole with a baton in his hand.

99. Zulu testified that he and the other inmates were made to lie there on their stomachs on the floor. He laid there with his cheek on the ground while Monare walked on top of their necks. Monare was quite a big man, bigger than him and he estimated that he

weighed about 95kg which was about his current size and although he was not so sure. He recalled that Monare called them sisters which he understood to mean that they were weak men or gays. When asked how he felt to be walked on by Monare he said that it was so bad and it was inhuman. When asked by the court how many inmates were lying on their stomachs at the time, he recalled that there was Smith, Mugabe and Sithole and there were others but he could not recall who. He described how Monare walked across their necks starting with Phumlani Buthelezi who was also referred to as Mugabe, then himself, then Smith and then Sithole with one foot on one inmate's neck and the other on another in turns for about three times with his 'parabellum' – official shoes. Probed on whether he had told anyone about the alleged neck incident and injuries by defendant's counsel he testified that he had informed his lawyer and Dr van Zyl. He did not inform the nurses on the day of the incident, because they never examined him. He also did not tell Dr Dlamini on 11 August the day after the incident because it was not necessary for the visual examination. He did however tell Dr Dlamini when he requested a scan for the unseen injuries when he was consulting him about his swollen left limb.

100. During cross examination Zulu testified that whilst he was lying on his stomach at the side of the kitchen, Phasha was also in the office. He had heard officials talking to Phasha but did not see him or witness him being assaulted, since Phasha was in another part of the office that he had no view of but it was either at the phone room, or at the entrance of the office. He said that after sometime after the walking on the neck assault Ms Buthelezi took him to the entrance of the office and Monare was beating Sithole at that time. While he was at the entrance of the office, Manamela came with a shock shield and shocked him and Ms Buthelezi then came and told him to stop. Maharaj then

instructed him to do handstands against the wall at the entrance to the office next to the phone room at the position marked I on the diagram 368A. He did so and every time when he would come down from the handstand, Maharaj would kick him repeatedly on his left thigh with his knees or Manamela would shock him with the shield. When Maharaj would leave the area where they were and was out of sight, Ms Buthelezi would tell him to stop doing the handstand with the understanding that she would alert him when Maharaj was heading back to where they were as a cue for him to once more assume the handstand position so as to give the impression or pretend that he had been hand standing all along during Maharaj's absence from the area where they were. Ms Buthelezi was allowing him to cheat with the handstand instruction and appeared to be on his side. At one point during the handstand routine, Zimba came back to the office and told Manamela and Maharaj to stop the handstand and shocking routine and following that they both stopped. Maharaj then proposed that he be taken to the shower. Maharaj and Manamela then tried to drag him to the shower but were told by Zimba that they must stop. Maharaj and Manamela left and so did all the EST officials. He was left sitting at the entrance of the office, leaning against the wall on his right hand side as he left hand side was swollen and painful.

101. Zulu testified that Mohale and Monare came to where he was sitting at the entrance of the office. Mohale was clapping his hands and referred to him (Zulu) as the Head of Centre. He took off his lapel stars (he was in uniform) and placed them on his shoulder whilst he was still seated. Mohale reminded him about how he had told him that he would get him when he had charged Zulu and put him into B section. Mohale pulled him up and both Mohale and Monare proceeded to assault him. Mohale hit him on his face several times with an open hand before hitting him with a closed fist on his neck,

while Monare hit him with an open hand once. While he was being assaulted with open hands, Mohale would be pushing and pulling him up and down and while he was down, Mohale would kick him. When he told them that he had been assaulted enough, Mohale replied that his officials would never do that and also that they have not assaulted him enough if he was still walking. He then instructed that he be taken to the single cells. He was taken with Sithole and Phasha who were outside on the other side and he could not recall if Qibi was there but he saw him at the single cells.

102. Zulu testified that to get to the single cells they had to exit through the door that led to the main courtyard of the prison and Mohale stood at the doorway holding a baton and told Monare to bring them through. Mohale hit him with a baton on his shoulder as he passed him and then threw the baton against the back of his head. He had seen Mohale throw the baton because he was looking behind him as he walked. They initially went to the wrong side of the cells. They went to the single cells of B section on the kitchen side on the east wing when it was intended for them to go to the single cells at the back of D section on the west wing. They then had to return through a door to reach the correct single cells and he was once more beaten by Mohale with a baton as he passed him at the door, this time on his left thigh. The single cells on the east wing were mostly for the police officers who had been arrested and there were cleaners and monitors there and they had bed and sheets and it was more like a medium single cells. The single cells where they were taken on the west wing were more like C-Max.

103. Sithole testified that when the blocked cell door was opened, he was still standing in the passage queuing for the toilet at position M. When the locksmith unlocked the door, he saw Monare opening the grill and he reversed. Monare then said “two-two outside”.

He could also see that the EST on the ground had formed a half moon outside the cell door at the position marked G on the cell diagram (366A). Zulu was the first person to exit and he saw him being assaulted with a tonfa by EST officers as he exited the cell. He saw Zulu being hit with a baton on his right-hand side by an EST member who had initially been part of the half-moon formation. He was able to identify the official as an EST member since he was wearing an EST uniform with a black t-shirt marked EST but could not remember the name of the official. He Sithole was number three or four to leave the cell, because of his position at M. He ended up not going to the toilet, but went out on the instruction that the inmate exit two-two. He did not notice who the other inmates in front of him were, and did not see how the other inmates behind him in the cell responded or what they were doing when the cell door was opened. The inmates who exited the cell before him were also assaulted. Everyone in front of him were also protecting their heads for it not to be struck or to be assaulted. He demonstrated that he had held up both his hands on top of his head and bending down his upper body. The inmates were being struck with tonfas on the upper body, including both sides of their shoulders and back. He demonstrated how the tonfa was held and used for hitting and when the inmates were being hit. At that time, he did not see anyone using the electrical shock shields.

104. Sithole testified that he too was assaulted by the EST as he exited the cell door. He was struck with a baton between his right shoulder and neck and could not say how many times he had been struck because everything happened so fast but it was more than once. To protect himself he exited holding both his hands on top of his head and bending over. He was not carrying anything as he left the cell. He and the other inmates were not walking normally as they exited the cell. They slipped and fell like when you

are running or walking fast wearing the prison shoes and the floor is slippery. The inmates did not que outside in the ordinary manner but ended up lying down on top of one another, in the section B courtyard and at the cell wall at position marked O on the cell diagram - 366A. He explained how he slipped when the cell door was opened and he fell on top of inmates and ended up lying on top of two or three of them. Other inmates then lay on top of him and, as a result he was not struck while lying at the wall. The idea was to lie under other inmates to avoid being hit since the ones on top were being struck. While lying at the wall he could hear inmates saying that it was not them but it was Zulu. He could not say whether other inmates were thrown to the ground by officials. After he landed on top of the other inmates he was facing down so he could not see what happened behind him specifically whether the inmates were being thrown to the ground. He did not know how long they were lying there on the ground in the courtyard and did not want to estimate since he was unsure.

105. Sithole testified that whilst lying down at the cell wall in the courtyard, he heard Monare call inmates one by one by name. Monare had a paper in his possession and he called out Benson's name, Llewellyn's name, Xolani's and his own. When he stood up with those lying on top of him moving away, Monare came and questioned him about a cell phone. When he responded that he did not have one, Monare slapped him with an open hand and grabbed him behind his neck (collar). Monare pulled him by his clothes and pushed him inside the section B office which is an office used by officials. As Monare took him into the office he held him with his left hand and in his right hand he held a baton. On entering the office Monare pushed him over the table in the office near the fridge. He marked the position of the table he was thrown over as P on the diagram of the office (368A) and as the position he landed as Q. He saw inmates Zulu, Phumlani

Buthelezi, Smith and Qibi lying on the floor in the office. There was a big space between the tables and he indicated the space as being between H and Q on the diagram of the office (368A). After he landed there he was pulled by Monare and made to lie towards the position marked H, next to Zulu. On the other side of Zulu was Qibi and he could not recall if Smith or Phumlani was next to Qibi. Monare was by then carrying an electric shield in his left hand and the baton in his right hand. Monare then tramped him on his neck and then assaulted him with the baton and then shocked him with his electric shock saying to him that he wanted the cell phone. The electric shock shield is what they use when there is violence in the prison. He could not say if Monare was using the small or large shield. The small one is approximately 30cm wide by 50cm in length and the large one approximately 30cm wide by 1 meter in length.

106. Sithole testified that Monare came over to him and put his feet over his neck and put the choke on his chest. At that moment he was asking about the cell phone. He was lying on his back when Monare first shocked him on his chest but that because of the shock from the shield he could not lie on his back forever and he would turn and move to try to remove the shock of the shield. Monare was standing to the right of him and put his left foot on top of his neck and then squatted down and used the electric shield on his chest. He also used the tonfa to hit him on his joints and he demonstrated this by pointing to his knees, elbows and ankles. Monare was joined in assaulting him by Moleleki and Langa. Sithole explained that Moleleki was on his right side by his feet and Langa on his left, standing near his knees. They too used batons on his joints (ankles and knees). He was lying down whilst he was being assaulted by Monare, Moleleki and Langa. He was hit on the joints so badly that by the time he left the office his ankle was already injured and wide open. When he would stretch his hand to protect

himself he would then be shocked with the shield and he will then hit him with the baton or the tonfa and then he was just thrown and tossed the whole time. He said that he could not describe how he felt like when he was being shocked by Monare and he felt like he would die. Monare was acting in a manner where he did not think anything for him as a human being with a life. He felt like he was dying because he was losing his breath. Monare in the office had held him by the throat to make him give up the cell phone. Moleleki used a tonfa to hit him and he was mostly assaulting him on his ankles, on his knees and on his joints until he left the office and then he Moleleki remained in the office. Whilst assaulting him Moleleki said that he wanted the cell phone and he told him that he did not have a cell phone. Langa also had a tonfa and said that this is a Zulu, a Zulu of his nation and he would not give anything and he is stubborn.

107. Sithole could not testify how the other inmates in the office were being treated because it was chaos and he was focussing on his own suffering. He did not have time to look to see what was happening to the other inmates and each and every man was within his own misery at that time. He repeatedly described how Monare walked back and forth on top of him as well as Zulu, Smith, Qibi and Phumlani Buthelezi. Monare was walking on top of them and tramping on their necks whilst they were laying there. During cross examination he recounted the incident and explained that Monare was carrying a baton and also an electric shield as he did so and that he walked on his neck two or three times. They were not lying there to close to each other so he would step on him and then step on the floor and then step on the other inmates. He said that since the incident and to this day his neck gives him problems. Every day he has to twist his neck from side to side and that started since the day of the incident. He had explained

this to the doctors. He did not tell the nurses on the day of the incident but recalled telling Dr Dlamini about the pain in his neck on 11 August 2014 after he had slept. He also told Dr van Zyl that he was feeling pain in his neck and that when she asked him if he had been assaulted or beaten on his neck he had said no he had put his feet on his neck to pin him to the ground. He could not say why Dr van Zyl did not record that.

108. During cross examination it was put to Sithole that he had never recounted the story of Monare walking on his neck to officials that had previously taken his statement of the events, and that his version of Monare walking on anyone's neck was just a concocted story. He denied the allegations. He stated emphatically that the people who came to approach them about the incident never took statements the same way but what he was telling the court when he was testifying is what had happened to him on that day. It was put to him that his version of being in Monare's office, being assaulted by Monare in the manner that he had testified and by Moleleki and Langa and the testimony that Monare was walking on the inmates' necks was just a concoction which he and Zulu had formulated together. He insisted that his testimony was truthful and denied what was being put to him. It was put to him that if the other inmates had been assaulted in the office then he would have noticed it and since he did not see them being assaulted save in his version for having their necks walked, they were not assaulted. He replied that he could not comment on that and the other inmates must testify for themselves if they were assaulted or not.

109. Sithole testified further in his evidence in chief that he was taken out of the office by Monare and a EST member. They said that they were going to search where he slept in cell 1 of section B. While being taken to the cell, Monare assaulted him and pushed

him with the electric shield. On his way to the cell they were joined by another EST member, who was in the courtyard at the time and whom the officials had called over. This meant that he was being accompanied to the cell by Monare and two EST members. He could not identify the EST officials because they were wearing helmets. Inside the cell, Monare and the two EST officials took him to where his bed was situated. Monare and one EST member started searching for the cell phone. The other EST member assaulted him with an open hand and by shocking him with the electric shield while questioning him about the cell phone's whereabouts. Sithole said that there is a small passage next to his bed and that he was put in the passage and shocked with the shield on his chest. Since the beds were made of steel, when he touched the beds or held on to them, his body would shake a lot.

110. During cross examination Sithole further explained that he used his own hand to try and block the electric shield, while he would try to use the other hand to balance, by holding onto the steel bedframe on the sides. But this intensified the electric shocks and trembling in his body. He described the defensive motions and that the beds are really close to each other so if he was using the one hand blocking the shield, he was using the other hand to hold onto the bed. Then when he moved to come to the other hand he would then use that hand to block the shield and use the other hand to hold the bed. Sithole explained that he stood in the passage together with Monare and the one EST member, while the other EST member was standing at the entrance. He referred to diagram 366A to describe the layout of the passage and the bed scaffolding, and the precise position of Monare as well as the two EST members. He marked on the cell diagram exhibit 366A with R as the position of one of the EST member and S as the position of the other EST member who was shocking him and position T of Monare

who was sitting on Sithole's bed to search the locker and U as the position of the scaffolding – i.e. the bed – that he Sithole touched when he was being shocked. No cell phone was found at his bed and this made Monare very angry after nothing had been found amongst his belongings. Monare then said that they should put him into the shower to tell the truth.

111. Sithole testified that after directing that he be put in the shower, Monare ripped and tore his buttoned shirt and trousers with both his hands. Monare at that time was holding nothing in his hands. At that time, he Sithole was not wearing shoes and he was left completely naked. Monare then pushed him into the shower which is depicted on the cell diagram exhibit 366A, by using the electric shield that was charged. He said that it was not his choice to go into the shower but he had pushed him with the electric shield. That shower is depicted in photograph 15 of exhibit E as the shower he was pushed in and still looks the same. When he was standing inside the shower, Monare and one EST officer were standing on the right side near the urinals while the other EST officer stood on the left side by the toilets. All three of them were holding electric shields and he could not say where Monare got the shield from but he had one when he was searching by his bed. Monare then opened the tap in the shower. Monare and the two officials then took turns shocking him with the electric shields and pushing him from side to side in the shower as he tried to avoid the shocks. He demonstrated how he was pushed and moved in the shower to try and avoid the shocks and he was not able to avoid being shocked. He said that the mix of the electricity and water made things get very bad and it was the way they were shocking him inside the shower.

112. Sithole testified that the assault at the shower continued until he told the officials that Phasha had the cell phone. There was a stage when they had put Philemon Baart inside the shower then it was the two of them. He could not say how long before Baart entered the shower but said that it was after a while. Baart was put into the shower after he had said that Phasha had the cell phone. He was allowed to exit the shower when Baart was put in and was made to stand next to the washbasins guarded by an EST member. He had hoped that they would stop shocking him after he had mentioned Phasha's name and he had believed that Phasha would not be harmed because he had an injured arm and since they could see that his hand had been injured. He had sustained his injury in a soccer match and was wearing a sling on his arm around his neck. Monare then left to fetch Phasha from outside and brought him into the cell. Phasha was made to sit on the first bed in the cell depicted in cell diagram 366A at the bottom right hand side. He saw Monare assaulting Phasha with an open hand and pressing him with the electric shield in front of his chest. One EST member was also with Monare as he assaulted Phasha while the other remained standing next two him where the two wash basins are depicted on the extreme right side of photo 15 marked on the cell diagram 366A as wash basins. As they assaulted Phasha the officials kept saying that they wanted the phone and that he had the phone. When Phasha said that he did not they said that he was lying. Another official Mathibe an ordinary prison warden also came into the cell and assaulted Phasha with Monare on his injured arm. They told Phasha that they were hitting him on the same injured arm. He denied that his version about what had happened to him and Phasha was a figment of his imagination.

113. Sithole testified that he was taken from the cell to the outside into the section B courtyard by an EST member. He was still naked from having been stripped at the

showers. He was humiliated as he was made to walk through the courtyard naked with three female officials present. He could recall that Ms Buthelezi and the lady that worked at the prison shop were one of the females present who saw him naked. As he made his way outside, the official Kunene gave him two tablets and asked him to go and use the tap in order to digest them. Kunene said to him "my homeboy, my homie here are two tablets and go and drink water and use the water from the tap and take two tablets". It was put to him during cross examination that Kunene denied ever doing so and he said that such a denial would be a lie on Kunene's part. Kunene also instructed an inmate Nhlanhla to bring his clothes which he brought back a pair of trousers and a shirt as he came from the tap. He got dressed in front of the cell and also found shoes there in the courtyard. Three minutes could have passed about how long he was naked in the courtyard. The EST member who had been guarding him in the courtyard instructed him to stand by the wall at the door of the courtyard which goes outside. When Monare came out of the cell and was about to go into the office, he instructed him to do handstand against the wall. He explained how whilst he was standing on his hands, more inmates were instructed to join him, namely Phasha and Qibi. They too were instructed to do handstands next to him. The officials were standing with them watching them do handstands but he could not see who they were because he was face down, doing the handstand. He noted how, owing to his injured arm, Phasha was unable to do handstand and yet the officials who Sithole could not properly identify due to his handstand position continued to order Phasha to do so. Phasha could not do proper handstand. He could not lift his body, suspend it from the ground and using his hands because he was injured on the one arm. As they would at times lower their bodies they were focusing on him making him to do handstand as he was unable to do so because of the injury to his arm. This continued until an official came and ordered that the

inmates cease and stand on their feet. While he, Phasha and Qibi were being made to do handstands by the wall, the other inmates were being made to squat two-by-two in the courtyard at the wall between the cell and the office with the officials standing there.

114. Sithole said that from his position at the courtyard he saw Mohale coming out of the office accompanied by Monare and Zulu. He could not hear what they were saying when they were still inside the office but when they were outside the office he saw Mohale remove his rank epaulettes off his own shoulders and place them on both Zulu's shoulders. He was standing by his feet at that time and as Mohale and Zulu came closer he could hear Mohale taunting Zulu saying so you want to be the head of this prison, do you want to be the manager of this prison, do you want to be the boss of the prison. Zulu did not respond and just kept quiet and he had looked like a person who had been assaulted and was limping with his left foot and not walking straight. When Mohale came up to where Sithole was, Monare drew Mohale's attention to him saying "here is this fool and he said that he wants to give the cell phone to you". At that point Mohale stretched out and said to him to give him the cell phone. He told Mohale that he did not have the cell phone and Mohale responded by slapping him three times with an open hand on the left side of his left cheek. While he was slapping him he said "my boys you are disrespecting me and you are corrupting my prison". He also said that those people did not hit him hard enough and he had spoken this in Sotho. Mohale then gave the instruction that the inmates standing at the courtyard door, Sithole, Phasha, Qibi and Zulu be taken to the single cells. As they proceeded through the doorway leading to B section depicted in photo 8, exhibit E, Mohale went and stood on the left side of the door and hit each of them with the tonfa he had in his hand. He was hit on his back. Zulu followed behind him and Sithole saw how Mohale threw the baton when

they were out of the control room or control area as depicted in photo 7 which hit Zulu on his upper back.

115. Smith testified that when the cell door was opened, he was on his bed just like most of the other inmates and Zulu was at the door and had been there the whole morning. The inmates were quiet in the cell and the only people who could be heard were the officials. The first thing he heard when the door was opened was Zulu screaming as he exited the cell. It was very loud screaming and apologising but they assaulted him and he could also hear the shock shield. From the door the screams got louder as he moved closer to the office because he was moving up. Whilst he was screaming the other officials called the inmates to come out and fola, two-two. The officials had formed a half-circle or half-moon going out of the cell toward the office and two or three officers were also at the shower basin in the cell. He was one of the last inmates to leave the cell, as his bed is situated towards the back of the cell. Once the door had been opened, the inmates were instructed to fola and they were beaten and shocked as they exited the cell. They were ordered to fola two by two but with the screams of Zulu and the cops shouting on top, they were hesitant to go out not knowing if they were going to be beaten or not. There was a short delay for a few seconds or so and then afterwards the train went past. So everyone was strong and it was like a stampede. When they came out, he thought that the scaffolds were moving. The officials guarded the inmates from running to the side of the shower and urinal area. They would stop them and beat them and make them to go through the door and from the door they would get resistance by the officials at that half-moon where they would be beaten and shocked and want them to fola against the wall. Going out to the front, he could not walk out because they were being beaten. He said that you either went down sliding, crawling a lot or sometime when

they shocked you, you would go on top of someone else. If you just walked they would beat you back against the wall and then you needed to fola. When coming out it was like he was trying to get into the other inmates for protection and that is what he tried to do and he got assaulted more. Until you were in a line you still would be assaulted until everyone was out of the cell and then the beating would subside.

116. Smith testified that he was among the last few inmates to exit the cell. He tried to squeeze himself into the line, but there was a stampede, and he ended up crawling or sliding out. As he went out of the cell he was shocked and beaten and kicked on his head, back and all over his body and all over his legs. He just felt the shocking, the battering and kicking. Sometimes he could not even feel if it was a kick or something but he just felt the pain and shocks on his body. Going out he tried to squeeze into the line but he could not squeeze in and was assaulted until he reached the end of the line and then went against the wall. The assault went on for some time and then it stopped and he could hear the dogs barking vigorously at that time and someone was screaming and that person came close to him and it was Zulu. He came from the direction of the main courtyard from behind next to him. Smith said that when he exited the cell door there were about 30 plus officials in the courtyard outside the cell, including officials from each unit, officials from the front desk and EST. He saw Ms Khan, and Ms Buthelezi from the reception, officer Makoko from the kitchen unit, captain Rametsi, captain Mthimkhulu from A section, Nkosi from A section, captain Buthelezi from C section, Moleleki and other officials and members of the EST.

117. Smith could not say how many times he was beaten and shocked as he was leaving the cell and going into the courtyard and it was impossible to count. The assault was very

painful and it felt like extreme maximum force. He was never beaten like that in his life and especially the shocking part and he felt like he could die. Because the shock can get so hard and they kept that shock shield on him when it was like everything was going on in slow motion when they started shocking and keeping it so long. It was like the Matrix movie where they shoot bullets and it comes in slow motion and he dodges the bullets. It was something like that when the shock shield was on him. It is like go slow and you could feel everything and then it goes fast and goes slow again and it was just unbearable. On entering the courtyard, he assumed a squatting position by the courtyard wall, with his head facing downwards. He explained that it was a rule of thumb when officials assaulted him or when they came to search him, you must look straight down and just keep quiet. You must not look up or sideways or anywhere. You just need to focus down because when you start looking upward or sideways they would assault you further. At that point he felt Zulu next to him and saw that he was in pain. The assault on him Smith then got worse. He was a victim of circumstances as he had found himself next to Zulu who was being badly beaten. Moleleki assaulted Smith with a baton and Rametsi and Monare shocked him with a shield. When he would be shocked they would keep the shock on him and he would not feel the batons. It was like in slow motion and once the shocking stopped or it would be fast and it was very traumatic. At some point Moleleki was hitting him so hard on his left elbow and hit it and it jumped forward because of the shock in his elbow and he started hitting him in his face and on his back with the tonfa. Monare was also involved in it and Rametsi was the one who was shocking and Moleleki at the time was hitting his face and head and Ms Khan pulled him out of the line of fire and he was screaming at her and asking her if they were really doing that and Rametsi shocked him again. Rametsi a DCS official kept a shock shield at the time but he came to know his identity later on, weeks

after the events of 10 August when he was transferred to D section where Rametsi was in charge.

118. Smith said that the assault in the court yard was very painful and he felt like he was going to die because the pain was so severe especially at the time when Moleleki was hitting him there. He slapped his hands like both forward and at the time being shocked like in slow motion and then it would get fast and Ms Khan took him out because they had started to hit him in his face and head. At the time when he hit his elbow he was crunching and with his left hand he was blocking and protecting his face and head. When they hit him somewhere he just fell forward. When he looked up Moleleki was on top of him hitting him with the tonfa and that is the time when he got hit in the face a lot and on his head and at that time Ms Khan pulled him out and was shouting not in the face, not on the head. He stood up and he was asking why they were doing that and why they were assaulting him like that. He thought that he was screaming but was not sure. As Ms Khan was looking at him Rametsi came from the side and starting shocking him again. As he was walking to him he was pressing the shocking shield and he would hear the buzz sound. He shocked him and he went back to where Zulu was and the beating continued and got worse and he thought that he blacked out a couple of times there. It is very sad because he cannot remember and sometimes he thought that it was better if he could not remember. The inmates told him that they saw that he was lying there and they were beating him and they thought that he was dead and might have broken a lot of bones. After that they gave him the nickname Ntsimbi which means tough. He does not recall how long the assault lasted and that he found himself against the wall between cell 1 and the office door. At that point Monare started calling out the names of the inmates who he thought were Mthokozisi, Phasha, Benson, Smith,

Nhlanhla and Mduduzi. He could not say if he heard all the names but afterwards those were the people that were in the office with him. When his name was called out, he was dragged into the office by Monare and some other officials.

119. Smith testified that as he was dragged to the office Monare hit and smacked him on the face to make him keep his head down. On entering the office, he saw Phasha at the entrance of the phone area on the right side as you enter the office being smacked around by about three or so officers. He could hear Phasha being punched and screaming. He Smith was thrown into the office by Monare on the floor behind the phone next to Zulu. He recalled Zulu apologising to him telling him that he did not think what was happening would happen. He recalled Qibi, Nhlanhla and Mduduzi joining them soon after that. He was lying down on his stomach on the floor next to other inmates and there was a small gap between them. Monare started walking up and down on their heads like he was patrolling up and down. He blacked out and was told at a later stage by the inmates who were with him that Monare started walking and tramping on their faces and necks but mostly on their necks. He could not remember Monare walking on him as he had passed out. When he woke up there was a series of rounds where officials would come in and they could hear them running in, the buzzing of shock shields and the screaming by other inmates getting assaulted and assaulted them. They would move around and end up in a different position after the assault. He remembers that at some point Nhlanhla had been next to him once more and not Qibi who had been on his left side. At some point in time an official from the kitchen unit, Shadow Makoka had dragged him from the line of fire. He did not know when this happened but he remembered waking up and being between his legs. He marked this position as BB on the diagram of the office page 368A. When he woke up and was

lying between Makoka's legs he overheard Zimba and Ms Buthelezi conversing. He heard Zimba issuing an instruction that officials should cease assaulting the inmates in the office. Notwithstanding Zimba's instruction and Ms Buthelezi's agreement to it, the officers still went back into the office and again assaulted the other inmates in the office. He explained that he was not himself assaulted because Makoka would guide the officials away and say no not this one and the officials would turn to the other inmates. These assaults continued with Ms Buthelezi standing there in the office. Zimba's whereabouts were unknown to him at that stage. He described this as a role play because Ms Buthelezi would stop the officers from assaulting the inmates and they would go out but for the other officers or the same bunch to come and again assault the inmates again. He could not say how long that went on for as he had passed out a few times in the office.

120. Smith testified that at some point Monare came to fetch him and pulled him with one hand and was smacking him with another and was taken to cell 1 of B section's shower area. He was taken towards the urinal side of the shower area (at the toilets). He saw an EST official standing with Philemon Baart, who was wet and getting dressed. The EST official's name remains unknown to him. The EST was a black person, and his photo was not amongst those presented to him by the SAPS for the photo parade. The EFT official left Baart to get dressed and came towards Smith and Monare who was standing where it says 1 metre wall-to-wall on the diagram. The EST official stood in front of him and together with Monare they started smacking him and ordered him to get undressed. His left elbow had little movement and his right hand was swollen and paining and as such he had very little movement and experienced difficulty undressing himself. Monare left him with the EST official while he was struggling to get

undressed. At that point Baart had also left after Monare took him away. The EST official got impatient with him struggling to undress and when he showed him his swollen paining hand, the EST official shocked him and told him to hurry up. He eventually managed to get his jacket off. Because he had a short sleeve shirt on it became obvious that his elbow was swollen and his body was bluish in colour. He got naked and was ordered by the EST official to get into the shower. When he got into the shower, it was blocked and there was water in it with faeces. On seeing the faeces in the water on the shower floor he immediately backtracked to the other side of the shower near the basin side but more in the middle. At that point the EST official was standing in the shower area next to the urinal side and ordered him to come forward and asked him to open the shower. He refused causing the EST official to get agitated and repeat his instruction to step forward and open the shower. He understood that the EST official wanted to shock him with the shield while he was wet. He refused to open the shower tap to avoid that. The official tried to reach out to him and pull him forward without any success. He got out of the shower on the right hand side next to the washbasin the opposite where the EST official was standing. Thinking that it was all over, he walked back to where his clothes were lying on the floor. When he got to his clothes, the EST official started shocking him, which resulted in him passing out again. When he came too, the EST official made him face the urinal area with his back toward the cell and told him to squat up and down. As he did so, the official would shock him in the back and this went on for about three or four times. The EST official told him to open his anus: to pull his bum open so that he could see his anus. He was unable to do that which then prompted the EST official to finger up his anus and feel for something. He is unsure if the EST official had been wearing a glove or not, only that he simply felt the fast movement in his anus which caused him to jump forward. No one else was

around at the time that he could see. He was reluctant to tell the court how he felt being searched in his anus and said that it is difficult to talk about it thinking that he would die and it made him not feel like a man and it is like his manhood was taken away from him. After the incident he struggled to get dressed and at that point Monare brought Phumlani Buthelezi into the cell and came forward towards him. Monare then asked Phumlani to speak and Phumlani was just like he was looking up and down and he was shocked at the way he Smith looked because his whole body was purple and blue. Then he turned to Monare and he thought that he spoke in Zulu and what he told him afterwards was that he told Monare to avoid being beaten that the phone that they had found on Thursday was his phone. He was told afterwards by Phumlani that he had been claiming that the cell phone belonged to Smith but when he saw in what state that Smith was in, he changed his story and claimed that the phone actually belonged to him Phumlani. After Phumlani had changed his story Monare started smacking Smith around. Zimba then arrived at the showers and asked Monare whether he had talked to which Monare responded by informing him that Phumlani was changing his story now. Monare took Phumlani away all the while hitting Phumlani. After Phumlani was taken away Smith managed to get dressed and Monare then came back to fetch him and took him back to the office.

121. Smith testified that after being taken back to the office by Monare, he laid in the office where he had been lying previously with Makoka. After he had laid there for some time, Monare came back with inmate Sithole choking him and continued to do so in the office and he could hear Sithole choking as he struggled to breathe and was making a sound. When Monare had returned with Sithole in the office where there is a phone area with a table where files and things are kept. They bumped the table and was

choking him at that time. Smith was near the wall side facing towards the door side so when he came in and they heard a sound and Sithole tripped. He thought that Sithole fainted at that time because he fell down and Monare fell with him to the ground. Smith said that when he was laying there Sithole's lower body from his legs were near his face and Monare was still choking him. He started making the choke sound and his leg started kicking. He Smith when Sithole's leg started kicking shifted up a bit and slid up. Ms Buthelezi came and she grabbed Monare. She pulled him off whilst he was choking Sithole and told him that he was going too far and that was too far. He was shouting at her also but then she positioned herself between him and Sithole. As they were arguing she positioned herself in front of him and he then left the office. Smith said that he was fearful at that time especially when he saw what had happened to Sithole and he Smith passed out again at some point. When he was observing what was happening to Sithole, he feared for his life. That is why he started moving away from Sithole because during the first incident with Zulu when they were outside he was punched next to him and that is what made him to move away from Sithole. He said that when you move you just close your eyes and pray that they must not see you and be invisible and they must forget about you. During that time, he passed out again. He said that every time when he saw Monare he thought about it. It is very hard to describe the experience but it was very hectic. He felt like he might die. Monare kept on holding Sithole by his throat to make him give up the phone and at that point he also felt like he might die.

122. Smith testified that he does not know how long he had passed out in the office but he was woken by a small tap on his cheek and captain Mthimkhulu asking him if he was okay. He said no since his elbow was paining and his answer was followed up by

Mthimkhulu saying to him that he should not worry and should go to the hospital at that time. Officer Mbatha a grade 3 officer in B section who counselled Smith with anger management was also in the office at that time and was instructed by Mtimkhulu to take him to the hospital. As he stood to make his way to hospital Maharaj came into the office and took Zulu to do handstands. They were now referring to Zulu as the head of prison and that he must now hang himself. That signalled that he had to do handstands and at that point Smith left the office followed by officer Mbatha.

123. Qibi testified that soon after the EST arrived at the cell, the officials managed to open the door, at which time he and other inmates stepped back further into the cell fleeing from the officials. At that stage he observed Zulu being assaulted with batons and electric shock shields. The officials would hold the electric shock shield in an upward direction in front of the inmate's chest and would lower down their arms when the inmate came closer. Whilst he could not see who the rest of the officials were or where Zulu was being assaulted, he could see Monare in the group of officials. Upon being assaulted, Qibi backed away further in the cell at the position marked DD in the cell diagram. The officials then came into the cell and started assaulting all the inmates and each one was taken to the outside while being assaulted. He was specifically taken and assaulted by Frans, Mokoka and Monare with batons and chokes (electric shields), tearing his prison clothes/uniform until he was left only with shorts worn underneath the pants, which shorts were also partially torn from the assault, leaving him half naked. While assaulting him, the officials repeatedly demanded that he produce a cell phone. Thereafter the officials took him outside and told him to squat between the office and cell. He said that each of the inmates were singularly taken out from the cell to the outside while being assaulted everywhere on their bodies despite no inmate resisting,

and that he was assaulted on the back and front of his body as well as his head and shoulders. Upon leaving the cell and being assaulted, inmates were taken to the wall between cell 1 and the office and ordered to line up in a que of two and to lay on the ground on top of each other while the assault continued. The officials Rametsi, Kunene, Maharaj, Nkosi, Mokoka, Frans, Langa, Moleleki and Zwane were some of the officials who were assaulting the inmates. At the line while being assaulted Maharaj called him. Maharaj and Kunene questioned him about the whereabouts of the cell phone with Kunene alleging that he knew about the cell phone and Kunene did so while assaulting him all over his body including his hands as he was attempting to block and shield himself with his hands. He tried to protect himself by using his hands to cover his head so that he would be assaulted on his body rather than his head. He demonstrated by lifting his arms in crossbow angle as well as straight or sideways over the face and head depending on the direction of the stick towards the head.

124. Qibi testified that after being assaulted outside cell 1B he was then taken to the office next to cell 1B by Monare, Frans and Makoka with Monare grabbing him by the waist of his shorts to the left, with other official following behind Monare and continued to assault him. Upon arriving at the office, he found Zulu, Smith and Mugabe already in the office being made to lie down while the officials were busy assaulting them. He was made to lie down between Zulu and Mugabe's feet and he marked the position on the diagram of the office 368A as position EE. While he could not remember all the officials present in the office, he recalls that the officials were made up of both members of the DCS and EST and in particular recalled Manamela belonging to the EST and Ms Buthelezi being an ordinary DCS official. On his arrival in the office the officials were already assaulting Mugabe, Smith and Zulu with batons and electric shields instructing

them to "chaffkop" which meant that the inmate must not raise their heads. If they raised their heads after being told to chaffkop then the officials would press or trample the inmate with a boot on the back of the head or on the neck to press the person down.

125. Qibi testified that the Monare scolded the inmates complaining that they had locked the doors and kept cell phones in the cell and demanded that they give him the cell phone. Thereafter Monare trampled over the inmates on their backs while laying down, face down. Monare was trampling on their backs in a manner to inflict pain. Monare had trampled him on his shoulder blade. Sithole joined them later in the office after being dragged by Monare whilst also being assaulted. While in the office Monare dragged Sithole over the table that faced the door at the entrance of the office. Qibi heard Phasha crying but from the telephone section of the office. When he was later taken out to the showers, he saw Phasha being assaulted by one of the officials. Qibi marked Phasha's position on the diagram of the office (368A) as position FF. Monare then came to him and asked him about the cell phone and told him that he would take out the cell phone and produce it, the impression being that he had hidden it. Thereafter Makoka arrived and upon entry he immediately took used dirty dishwashing water and poured it on him. He then proceeded to shock him with an electric shield and thereafter grabbed him by the waist line of his shorts on the left and pulled him to the shower. He said that using an electric shield is a common occurrence. The officials generally bring the electric shields during searches and on most occasions but mainly whenever a fight erupts amongst inmates or during a random search. The pain from the electric shield is extraordinary painful when a person is first poured with water and then shocked with an electric shield.

126. Qibi confirmed that he was unsure how long the incident in the office took and was unable to estimate. He testified that Mokoka and Monare were the officials that pulled him to the showers and that whilst at the showers, inmate Baart was already inside the shower area and inmate Sithole was in the area next to the sink marked by Sithole as GG in diagram 366A of the cell diagram. Sithole was wet all over his body with no clothes on when he saw him. Monare accompanied by Mokoka then pushed him (Qibi) into the shower with Baart who was already in the shower. He was instructed to take his clothes off and was naked in the shower. Thereafter the officials instructed him to take out his dirt there in the shower by forcing him to defecate in the shower. Mokoka then used the electric shield to shock him and then made him stand under the cold water shower and forced him to sit down and defecate. While Monare and Mokoka were busy with him Frans also arrived and joined them. The officials shocked him on his back and on his torso and anywhere they could find an opening. The entire experience was very painful and being made to defecate in front of others, made him feel very bitter, hurt by the entire experience and robbed of his dignity. In testifying why they made him defecate he said that the officials thought that he had possibly hidden something in his body which he pushed up his anus. The act of making him defecate was with a view to force the object out which they believed was a cell phone. However, the officials found no cell phone or other object. Thereafter the officials ordered him to clean the faeces in the shower area before assaulting him further and removed him from the cell and took him back to the cell courtyard. At that point he was instructed to wear his torn pants again.

127. Qibi pointed out that in the courtyard they were taken to the side of the door of B1 photograph 8 of Exhibit E against the wall on the right hand side with the extinguisher.

He saw Smith, Phasha, Sithole, Zulu and Sqwayi at the wall in the courtyard. When they arrived at the courtyard they were forced to do handstands by the officials who had previously assaulted them but were joined in the courtyard by a bigger group including Frans, Monare, Mokoka, Ms Buthelezi, Zwane, Moleleki, Kunene and Nkosi from the DCS officials and De Beer, Manamela and Maharaj from the EST. Whilst doing the handstands the officials repeated their demand to them for a cell phone and for the inmates responsible for the blocking of the door. When the inmates would get tired and fail to maintain the handstand the officials would repeatedly assault and shock them with the electric shield and then force the inmates to raise their legs again and maintain the handstand. While that was done with all the inmates in the courtyard Phasha seemed to have received the worst of the treatment and was seriously or bitterly assaulted. Although Phasha's arm was broken before the incident of 10 August 2014 he was subjected to the same assault and treatment as other inmates, notwithstanding his broken arm. He knew that Phasha's hand was broken from the time when they stayed in the same room/shared a room prior to the incident of 10 August 2014 and Phasha had told him that his arm was broken when he playing soccer and he had plaster of Paris on his arm. Despite Phasha crying from the assault, the officials kept on assaulting Phasha and accusing him of faking his injury to the arm and that the broken arm claim was a charade since he had never broken his arm playing soccer. The entire occurrence with Phasha made him feel very terrified since the officials were assaulting Phasha on the same broken arm, with the entire experience leading him to think that the officials were intending to kill them. Returning to his own assault, he testified that Kunene and Monare approached him and continued assaulting him and telling him that they wanted the phone. Whilst Kunene and Monare were assaulting him, he was now lying on the ground on his torso with his face to the left hand side. Ms Buthelezi then approached

and sat on his head facing his feet and proceeded to slap him on his back with open hands. At that point he struggled to breathe and started suffocating. As a result of that he started hitting Ms Buthelezi on the buttocks trying to push her off his face and head. This caused Frans, Monare and Kunene to accuse him of attacking and hurting official Ms Buthelezi and as a result they intensified their assault on him. Whilst they were assaulting him Mohale arrived and approached Zulu saying this was the inmate who had closed the door. Mohale then assaulted Zulu, kicked him, took of his epaulettes and placed them on Zulu. He then called out the other officials and mockingly told them that Zulu was the one who was in charge of the prison because he wanted to be in charge of it. Qibi indicated that the position at which Mohale was standing on photograph number 8 as the door on the right-hand side next to the fire extinguishers but Mohale was on the outside of that door on the other side of the wall. Thereafter Mohale issued an order that the inmates must be taken to the single cells. Mohale stood at the gate of B1 and as the inmates were passing through the gate to go to the single cells as ordered, he started hitting each inmate passing through the gate with a baton. Mohale hit him on the crown of his head with the baton. He attempted to hit him again on the head but he had raised his arms over his head before Mohale could hit him again.

The plaintiffs evidence about their segregation in single cells

128. The three plaintiffs namely Zulu, Qibi and Sithole (Phasha did not testify) who were placed in segregation testified about the dire, inhumane conditions that they were subjected to.

129. Zulu gave the following testimony about the period in which he was segregated. He said that his single cell did not have a bed – only a mattress; he heard Mohale instructing

inmates to remove the beds from the cells; the mattress did not have any sheets and was wet from the leaking toilet and sink; the locker normally found in the single cell had been removed (along with the bed); due to the wet and cold condition of the single cell, the fact that he had been provided with a blanket did not help. He was restrained with ankle cuffs for 23 hours a day, for approximately 10 days; and his ankle cuffs were removed for 1 hour when he was allowed to exercise. His left leg was injured and swollen to the point that he could not move it; he had visible injuries that were made more painful by the cell's wet condition, which included a small laceration to his head that was bleeding; and injury to his hip and lower back; and an injury to his wrist, hands and thumb. He was seen on 10 August 2014 by the nurses, but was not examined in any proper fashion; he was not asked any questions about his condition by the nurses; he was given two panados and told that he was fit for segregation and he received no other treatment. On 18 August 2014 he was seen by Dr Dlamini and was not offered any treatment for his injuries.

130. Qibi gave the following testimony about the period in which he was segregated. He said that Zimba ordered the removal of the mattresses and beds from the single cells; the toilets did not flush and the sink was blocked; the floor was full of water; his blankets were wet and the beds were turned about 5 to 7 days after he was initially placed in the single cells. He was restrained with ankle cuffs while detained, and it was only during the hour of exercise time that the ankle cuffs were taken off. He had head injuries; an injury to his left-hand small finger; he had abdominal pain and had injuries to his shoulders and his right wrist. On 10 August 2014 he was seen by a nurse and declared fit for segregation despite the fact that his whole body was in pain from the assault that took place on that day. On 11 August 2014 he was seen by Dr Dlamini in

the presence of Mohale who conducted a superficial, inadequate examination of his injuries and Dr Dlamini did not prescribe any medication for his injuries. On 18 August 2014 he refused to be attended to by Dr Dlamini based on Dr Dlamini's previous inadequate examination of him and the fact that he had failed to properly treat him for his injuries. He was never seen on a regular basis by any nurse or doctor.

131. Sithole gave the following testimony about the period in which he was segregated. He said that his bed had been removed and was only returned about 7 days after he was placed in the single cell; and he only had a mattress to sleep on which was wet from the leaking toilet. He was restrained with ankle cuffs while detained for 23 hours a day for at least 7 days, and it was only during the hour of exercise that the ankle cuffs were taken off. He had injuries to his right ankle; his right shin; his right knee; his right shoulder; his right side of the forehead; his left thigh; his left arm; he had a painful lower back and right hip; he had lacerations on his ankles and on both sides of his buttocks. On 10 August 2014 he was seen by the nurse who had asked him where he felt pain, but was not examined and was not given adequate medical treatment for his injuries; he was given two Panado's and "rub-rub" which did not help at all. On 11 August 2014 Dr Dlamini superficially examined his visible injuries, but did not examine him for injuries covered by his clothing and gave him no treatment. On 18 August 2014 he was seen by Dr Dlamini but told him that he was fine as he did not trust him to conduct a proper examination due to his inadequate examination conducted on 11 August 2014.

The physical injuries sustained by the plaintiffs on 10 August 2014 – the medical evidence

132. The court will now deal with the medical evidence led by the plaintiffs. What should

be taken into account is that quantum was separated from the merits and this has to do with whether the injuries sustained by the plaintiffs were severe or not.

133. The plaintiff called the late Dr Doreen Sindiswe van Zyl to give evidence on her medical examination of the second to fifth plaintiffs conducted at Leeuwkop on 15 August 2014. She was an independent medical practitioner and at the time of the events in issue at this trial was a member of Medicins Sans Fronteirs (Doctors without Borders). She had extensive experience in trauma medicine, including the examination of trauma patient and the completion of J88 forms, having completed hundreds of those forms throughout her career. Given the expertise required to examine the second to fifth plaintiffs, to complete the J88 forms and to reach conclusions based on her observations, Dr van Zyl was called as both a factual and expert witness. She testified that one of the challenges that she faced in her examination of the second to fifth plaintiffs was that she was not permitted to take into the prison hospital all the equipment that she required, in particular a camera for purpose of taking contemporaneous photographs of the second to fifth plaintiffs injuries.

134. Dr van Zyl emphasised the importance of examining a complainant in an assault case of taking a full medical history, conducting a thorough head to toe examination of each patient and comprehensively recording all findings arising from the examination. She said that you have to observe and your observation is important. You have to take a full history and after your history you then note and do a head to toe examination of the patient and note all your findings and write that down. She was asked how she would indicate an injury that she had observed and wish to record on the diagram on the document. She said that you describe the nature of the injury, you describe the location

and also describe the size of the injury. She identified the possibility that, in the intervening time between the events of 10 August 2014 and her examination of the second to fifth plaintiffs on 15 August 2014, some of the injuries sustained by them had faded. The injuries she observed and recorded are those that were still present on 15 August 2014, and were described by her as fresh and therefore not scars from old unrelated injuries. Following her examinations, she completed a J88 form for each of the second to fifth plaintiffs, as well as making contemporaneous notes for each of them. The contemporaneous notes recorded her clinical findings.

135. Dr van Zyl' s observations and findings in respect of each of the second to fifth plaintiffs were as follows:

135.1 Her examination of the second plaintiff, Zulu lasted approximately 25 minutes. She recorded in the medical history taken that Zulu was assaulted on Sunday 10 August 2014 with batons and electric shields. He was kicked and slapped. Her conclusions based on her examination of Zulu were that he was assaulted as described above and the injuries sustained were from blunt object. He was hit with batons, kicked and hit with electric shields, bruising extensively around the left thigh, left lower limb, with subsequent swelling and induration and tenderness. She described as severe Zulu's injuries on his left limb and thigh, his left lower leg and the base of his right thumb. These injuries were consistent with the application of blunt force.

135.2 Her examination of the second plaintiff Qibi lasted approximately 15 minutes. Her medical history recorded that he was hit with batons, kicked, slapped and shocked with electric shields. She observed scars and bruising on his left upper shoulder and right upper shoulder, swelling and bruising on his left wrist and

pain decreased range of movement on the small finger of the left hand. She testified that those injuries were sustained as a result of the application of blunt force. During cross examination it was put to Dr van Zyl that her failure to note the severity of the injuries sustained by Qibi in the J88 form and contemporaneous notes supports the conclusion that his injuries were not severe. She denied this, stating that this opinion was based on her examination of Qibi and her assessment of his injuries.

135.3 Her examination of the fourth plaintiff Phasha lasted approximately ten minutes. She concluded that the main injury sustained by him was the bruising and swelling of his left elbow, resulting in a decreased range of movement. At the time when she examined him she was aware of his prior elbow injury. The tenderness, bruising and swelling in the elbow area supported her conclusion that fresh injuries had been inflicted. She also observed tenderness and bruising on his scalp and injury to his left shoulder. The injuries according to her were all sustained as a result of the application of blunt force. It was put to her during cross examination that her conclusions regarding his injuries were based on speculation, and that the J88 form and her contemporaneous notes did not address the severity of his injuries. She denied this stating that the conclusions she reached were based on her examination of him, her completion of the J88 form and her contemporaneous notes.

135.4 Her examination of the fifth plaintiff Sithole lasted for approximately 25 minutes. She concluded that he sustained injuries and detailed bruises after the assault. He was kicked, slapped and hit with batons and electric shields. She observed bruising and swelling around the neck and shoulder area; bruises, weal's and reddening on the back, a laceration near the right nipple; bruising

and swelling in the left forearm; tenderness of the hand, bruising, swelling and induration around the left lateral lower limb; bruising and swelling in the left and right buttocks, bruising and scarring on the left thigh, swelling and bruising on the right hip and knee and laceration and bruising on the right ankle. In addition to the bruising on his body she observed visible scarring that looked like a burn. She described as severe Sithole's injuries to his shoulder, his left thigh and left lower limb, his left buttock and his right hip. Those injuries resulted from the application of blunt force and trauma apart from the injury that resembled a burn which could have been caused by an electric shield. She said that it was clinically not easy to tell if an injury had been caused by an electric shield unless there was a burn. It was put to her during cross examination that her description of the fifth plaintiff's injuries was superficial which she denied.

136. Based on her examinations of the second to fifth plaintiffs, Dr van Zyl expressed the opinion that they ought to have been hospitalised and x-rayed and those with head injuries ought to have received CT-scans, and all ought to have undergone abdominal sonar scans to check for internal injuries. The second to fifth respondents ought to have been given adequate pain relief and post-trauma counselling. She testified that had she examined those plaintiffs in a clinical setting rather than prison, she would have hospitalised them and referred them for those interventions. However, given the context in which she examined the plaintiffs, she was not able to make those referrals or prescribe any treatment since she was a guest of the prison.

137. It was put to Dr van Zyl during cross examination that she did not have the requisite expertise to give evidence on the nature and the extent of the injuries sustained by the second to fifth plaintiffs. Dr van Zyl testified that although she was not a traumatologist or an orthopaedic specialist, her medical training was sufficient to equip her with the necessary expertise to give evidence on the injuries sustained, based on her J88 forms and the contemporaneous notes she made during her examination of the plaintiffs.

138. It was further put to Dr van Zyl during cross examination that her conclusions were merely recordal of the history that she received from the second to fifth plaintiffs, and that no clinical skill went into reaching her conclusions. She denied that and testified that in her opinion the injuries sustained by the second to fifth plaintiffs were consistent with the description by each of them about the events of 10 August 2014.

139. It was further put to Dr van Zyl during cross examination that she had not provided the court with an expert opinion regarding the second to fifth plaintiffs' injuries. She was however not required to record an assessment of the severity of the injuries on the J88 forms. Her evidence that her opinions regarding the severity of the plaintiff's injuries as well as her other opinions, were informed by and followed logically from her consultations with and examinations of the plaintiffs. She confirmed this under re-examination.

140. The defendant also challenged Dr van Zyl's conclusions regarding the severity of the plaintiffs' injuries on the basis that they were not based on a grading scale. Dr van Zyl acknowledged that she had not used a grading scale, but she stood by her assessment of the severity of the plaintiffs' injuries based on her medical examinations of them.

141. Dr Mahomed Farhard Khan is an independent medical doctor and general medical practitioner. He testified that he examined the first plaintiff (Smith) on 13 August 2014 and completed a J88 form in which he recorded Smith's injuries sustained on 10 August 2014. He then examined all the plaintiffs in 2019 for ongoing injuries, and completed reports in respect of each plaintiff.

142. The focus is now only on Dr Khan's examination of the first plaintiff on 13 August 2014. Given his expertise required to examine the first plaintiff, to complete the J88 forms, and to reach his conclusions based thereon, and Dr Khan testified as both a factual and expert witness. He has extensive experience as a medical practitioner in the fields of surgery and trauma. He has experience dealing with assaults sustained in the context of police brutality. He gained significant experience in neurosurgery at Chris Hani Baragwanath Academic Hospital. He is responsible for training incoming registrars at Chris Hani Baragwanath Academic Hospital on surgical technique, general surgery and neurosurgery. At the time of the events in issue, he was in general practice at a surgery in Ennerdale.

143. On 13 August 2014, Dr Khan examined Smith at Leeuwkop. On arrival at the prison and prior to his examination of Smith, his equipment was confiscated and he was denied permission to photograph Smith's injuries. Following this, Dr Khan had asked DCS officials to request the Head of Centre for permission to photograph the injuries. This request too was denied. His examination of Smith took just under an hour. He recorded his observations by making sketches and writing down his clinical findings. These included that Smith had a laceration of his mouth being 0.5 centimetres in length, ecchymosis on his left thigh, a haematoma on his left buttock, ecchymosis on his left

shoulder, a swollen and tender right shoulder, a swollen right hand and halitosis. He also observed a direct physical assault injury and muscular contractions which had been aggravated by the effects of the prolonged use of electric shock equipment. He was informed by Smith that his injuries had been sustained during assault by the DCS officials on 10 August 2014 and Dr Khan testified that he had no basis to doubt that. The injuries to Smith were indicative of severe blunt trauma.

144. Following his examination, Dr Khan requested the Head of Centre to ensure that Smith undergo an X-ray to assess the injury to the back of his right hand in the light of its severity. He was eventually taken to Sunninghill Hospital for X-rays only after obtaining a court order to that effect on 29 August 2014. Dr Khan testified that the X-rays revealed that there was tissue swelling but no dislocation fractures. The fact that the swelling was still present 19 days after the injury was sustained was indicative of the severity of the injury. He testified that although the laceration to his mouth should have been treated and stitched within 24 hours of the injury, it had been left unattended. By the time he saw Smith it was too late to apply sutures to that injury.

145. Dr Khan testified that when he examined the plaintiffs he found the following ongoing injuries (after conducting the necessary tests to rule out malingering on the part of the plaintiffs). In respect of Smith, Dr Khan testified that Smith informed him during the examination on 25 April 2019 that he suffered from sexual dysfunction in that he was having difficulty having sex and, when he did have sex it was painful. Dr Khan testified that this may have been caused by the injuries to his back, in particular the spinal cord. He said that Smith suffered from a tender left elbow with ongoing pain, and that the assault was the probable cause of his injury. He referred him to a neurologist, Dr

Ranchod, who examined Smith. Dr Khan explained that the findings that were made by Dr Ranchod were consistent with his observations and that Smith has sensory loss of the feeling in his left upper and lower limb. An MRI conducted at the Lenmed Ahmed Kathrada Private Hospital showed that he suffers from a degenerative condition of the spine, which manifested itself as a result of the injuries sustained on 10 August 2014. This was likely triggered by the application of electric shocks which caused muscular contortions. He also suffered from urinary dysfunction that was likely caused by neurological damage due to the sustained use of electric shock equipment. Smith confirmed the existence of those injuries during his evidence, apart from his left elbow which has now healed.

146. In respect of Zulu, Dr Khan testified that his examination of the top of his head revealed that the area on the vertex of the head where there was a swelling and tenderness was probably caused by the assault. The presence of the injury five years later indicated that there was an underlying condition with the bone, suggesting that the bone might have been fractured at the time or, after being left untreated, became infected and left a condition called osteophytes. He recorded ongoing pain and reduced functioning in his right upper limb and entire lower left leg. Moreover, Zulu could not close his fist completely and he could not move his elbow against any significant pressure. He also could not elevate or flex his wrist against gravity. Dr Khan confirmed that what he had said about the difficulties experienced by Smith in relation to urinary dysfunction applied equally to Zulu. Zulu had confirmed in his evidence that he still experiences migraines, pain in his left lower limb, his right wrist, his hip and lower back. He also confirmed that he still suffers from urinary dysfunction.

147. In respect of Qibi, Dr Khan recorded that his left fifth finger (little finger) could not be flexed at the proximal and distal interphalangeal joint due to damaged flexor tendons. Although Qibi did not experience pain or swelling, there was impairment of the finger which did not move beyond the joint at all. Qibi had testified that the injury to his left finger has not yet recovered and he still cannot bend his finger at the last knuckle.

148. In respect of Phasha, Dr Khan testified that on examination he had an extremely tender left elbow that was painful after being compressed. The movement of the elbow was, however normal. When examining Dr van Zyl's clinical findings, Dr Khan stated that the swelling on the left elbow that was observed could not have been caused by Phasha's soccer injury that had happened three months prior since it would have healed by then. The records of the treatment and testing that Phasha had received, revealed that he had suffered a further injury to his elbow following the events of 10 August 2014.

149. In respect of Sithole, Dr Khan testified that during his examination, Sithole indicated that he had difficulty in passing urine (known as urine hesitancy). This could be caused by the application of electric shocks and was in Dr Khan's opinion caused by the assault of Sithole. Dr Khan also described an injury to Sithole's right knee, which caused him to suffer pain and swelling. On examination he identified ongoing pain and sensory loss at the right knee using pin prick testing. He also testified that Sithole had suffered an injury to his left ankle tendon which had caused bruising and swelling, and reduced the function of the ankle. Sithole testified that he continues to suffers from those ongoing injuries.

The evidence led about the plaintiffs' psychiatric injuries

150. The plaintiffs called Dr Joanna Taylor an expert psychiatrist to testify about their psychiatric injuries as a result of their assault and torture.

151. Dr Joanna Taylor administered standardised tests to each of the plaintiffs, most notably the CAPS-5 test, which is a standardised rating score that has been statistically validated to evaluate for all aspects of post-traumatic stress disorder (PTSD) which she described as the gold standard test for PTSD diagnosis; the Hamilton Depression Rating Score (HAM-D test), which is a well validated and commonly used tool for screening for depression, assigning it a severity score and monitoring any changes; and the Folstein Mini Mental State Examination, which is used as a screening test for neurocognitive disorders to rule out anything that may affect capacity, as well as to rule out conditions such as traumatic brain injury and delirium.

152. Following the administration of each of these standardised tests to each of the plaintiffs, Dr Taylor reached the following conclusions:

152.1 In relation to Smith, that he sustained severe psychological and physical injuries in August 2014 at the hands of his correctional custodians while detained at Leeuwkop. He had no prior significant medical or psychiatric history. During the assault and severe physical and psychological injuries in question he believed that his life to be in danger for a sustained period of time. His account and injuries are congruent with this subjective belief. He suffered repeated violations of his bodily and psychological integrity. He developed major depressive disorder, severe PTSD with dissociative symptoms, insomnia disorder, anxiety disorder, and erectile disorder as a consequence of those

events. The physical injuries that he sustained have had lasting consequences including chronic pain, loss of mobility, and possible neurological and urological sequelae. He also sustained a head injury during the assaults and has experienced chronic headaches subsequently. He received delayed acute medical treatment for his injuries in prison and no treatment for his psychiatric conditions or his chronic pain. His symptoms remained severe and have become entrenched. He experiences daily significant subjective distress and functional impairment. His life prospects are profoundly affected by those disabling chronic conditions. He will struggle to regain the physical, social, occupational, and emotional levels of functioning he might otherwise have attained and sustained. He will also incur lifelong medical treatment costs, these disruptions to his future will include a reduction in his potential for full rehabilitation towards a life of productive economic activity.

152.2 In relation to Zulu, that he developed severe to extreme PTSD, severe major depressive disorder, and insomnia disorder as a result of severe physical and psychological injuries experienced at Leeuwkop in August 2014. He also sustained significant physical injuries during those assaults in question. He had no prior significant medical or psychiatric history. During the events of 10 August 2014, and solitary confinement, he believed his life to be in danger for a sustained period of time. His account and injuries are congruent with this subjective belief. Those responsible for his injuries were his custodians at the time and continued to guard him for years after the assaults. The physical injuries that he sustained have had a lasting consequences including chronic pain, loss and of mobility, and possible neurological and urological sequelae. He also sustained a head injury during the assaults and has experienced chronic

headaches and possible epileptic symptoms subsequently. He received delayed acute medical treatment for the injuries in prison and no treatment for his psychiatric conditions or his chronic pain. His symptoms remained severe and have become entrenched. He experiences daily significant subjective distress and functional impairment. His life prospects are profoundly affected by those disabling chronic conditions. He will struggle to regain physical, social, occupational and emotional levels of functioning he might otherwise have attained and sustained. He will also incur lifelong medical treatment costs. These disruptions to his future will include a reduction in his potential for full rehabilitation towards a life of productive economic activity.

152.3 In relation to Qibi, that he has developed major depressive disorder and severe PTSD as a result of severe psychological injuries sustained during assaults and solitary confinement in 2014 at Leeuwkop. His physical and psychological injuries were inflicted by the custodians of his correctional services sentence, the officers in a unique position of power over him and his fellow prisoners. The power relationship, with its particular dependence and intimacy, goes some way towards explaining the resulting severity of the psychiatric damage caused by the events in question. Qibi had no previous psychiatric diagnosis, he has received no treatment for the depression or the PTSD and his symptoms have become chronic and entrenched. He experiences significant subjective distress and functional impairment. His life prospects are likely to be profoundly affected. He will be unlikely to attain the social, occupational, and emotional levels of functioning that he might otherwise have achieved, or to regain previous levels. The disruption to his future will include a reduction in his

potential for full rehabilitation towards a life of non-criminal productive economic activity.

152.4 In relation to Phasha, that he sustained severe physical and psychological injuries at the hands of his correctional services custodians in August 2014. He had no previous significant medical or psychiatric history. During the events of 10 August 2014 and the subsequent solitary confinement he believed his life to be in danger for a sustained period of time. He developed PTSD as a consequence of those events. He has had no treatment for his condition and his symptoms have become entrenched. He experiences significant subjective distress and functional impairment. His life prospects are likely to be profoundly affected by this chronic condition. He will struggle to regain the social, occupational and emotional levels of functioning he might otherwise have sustained. This disruption to his future will include a reduction in his potential for full rehabilitation towards a life of non-criminal productive economic activity.

152.5 In respect of Sithole, that he sustained severe physical and psychological injuries at the hands of his correctional services custodians in August 2014. He had no previous significant medical or psychiatric history. During the assaults, torture and solitary confinement in 2014 he believed his life to be in danger for a sustained period of time. He developed severe PTSD as a consequence of those events. He had no treatment for this condition and his symptoms have remained severe and have become entrenched. He experiences significant subjective distress and functional impairment. His life prospects are likely to be profoundly affected by his chronic condition. He will struggle to regain the social, occupational, and emotional levels of functioning he might otherwise

have sustained. This disruption to his future will include a reduction in his potential for full rehabilitation towards a life of non-criminal productive economic activity.

THE EVIDENCE LED BY THE DEFENDANT

153. The defendant's first witness was Kunene. He testified that he was informed by Minnar on 10 August 2014 at approximately 7:30 am that the lock of cell B1 was jammed. Monare took the key from Minnar and tried to unmaster the door but was unable to do so. Kunene then called Michael Ndlovu, the cell representative to ask what was happening. Monare requested the offenders to open the door but they refused because they were not willing to risk their lives. At that at stage Zulu was walking up and down but he Kunene did not speak to him to find out what was happening and the offenders were shouting in the cell. Kunene reported the matter to the internal security office since this was a security breach and the inmates could not be counted and the cell could not be checked. He advised the inmates in cell B1 that those who wanted food should come to get it and Phasha told them to 'voetsek'and that they could 'keep their damn food'. There were other offenders shouting as well although he could not identify them. Zimba then informed him that they had called the EST to assist in controlling the situation. He saw the EST members in the courtyard and briefed de Beer on how the door was locked. He also updated the unit journal at Mbatha's request.

154. Kunene testified that when he went back to the cell, there was a noise outside and he heard the members shouting at the inmates to get out. The members could not get into the cell. At the time when they passed by the door there would be a noise and insults directed at them. Vulgar words would be coming out, but when they were not there

next to the cell it would almost be calm. He saw Zulu running towards him at the door where he was standing and the officials were shouting at him Kunene to run away as Zulu had something in his hand. Kunene ran towards the gate and the officials continued to shout at the offenders to get out of the cell, and those who were outside were made to squat. At the time that Zulu came running out of the cell, there were still other offenders inside the cell. He Kunene assisted a Mr Morori who was on crutches. The reason he did so was that the offenders were all running towards the cell door, some stumbling over each other and he did not want Moriri to get injured in the stampede. Once the offenders had all come out of the cell the situation was calm again and they could be counted. He went inside the office to verify the total number of inmates in the cell. The offenders were searched in the courtyard while he was in the office. When he came out of the office he went into the cell and was greeted by the smell of faeces. There was water spillage and cool drink bottles both two litre and 500 ml lying on the floor by the door. There were also broken electrical appliances. He saw three or four irons and three or four kettles. The beds had also been shifted to different positions.

155. Kunene testified that those inmates who were thought to be ringleaders were then taken into the office and asked what had happened and why they had blocked the door. They stated that they had blocked the door to avoid being charged for having cell phones. He told Zimba that once they had been searched, those inmates who were injured should go to hospital. The searching took about 40 or 45 minutes and the inmates were taken to hospital in groups of five from approximately 12:20 or 11:30. He denied assaulting any inmate on 10 August 2014 nor did he witness any assault on an inmate by any official or EST member. He only observed bruising on one inmate, Sithole, who was walking around shirtless. He also knew that Phasha had a prior injury.

156. Monare testified that he was with Kunene, Minnar, and Frans while they were attempting to open the door. When they could not do so Kunene called Ndlovu to ask him what was happening. Ndlovu said that he was not the one who had blocked the door and he could not unblock it for fear for his life. He also would not tell Kunene who had blocked the door. Monare then moved away from the door towards the courtyard because the cell started to become noisy and the inmates were starting to insult the officials. Kunene then instructed Minnar and Frans to unmaster the other cells and then went to make a phone call. At that time the noise from the cell was becoming louder. Kunene tried to talk to the inmates but they did not give him a chance because they were making too much noise. The only voice that he could identify was Phasha's voice. He also saw Phasha through the window, standing on top of beds. Phasha spoke to him in an African language, translated as: *"Voetsek, we don't want to talk to you dogs. We want your senior, we want to engage with your seniors."* Although Phasha was the only inmate that Monare could identify, there were a lots of insults coming from other offenders who were standing on top of the beds. Monare suggested to Kunene that they leave the inmates inside the cell, but Kunene refused because the officials needed to count the inmates, give them breakfast and allow those needing to see the doctor to do so. Zimba then arrived at the unit and he approached the cell. The inmates were whistling and insulting Zimba as well. He could not engage the inmates and after about two minutes he told the officials to wait there and said that he would go and talk to the Head of the Correctional Centre. The officials then served breakfast to the inmates in the other cells and locked those cells again. At that stage Zimba came back, followed by a locksmith and EST members.

157. Monare testified that once the cell was unlocked he took two steps inside and instructed the inmates to 'fola-fola' outside. As he said that items were thrown at him and Zimba pulled him outside of the cell by his belt while he was also pushed out. On Zimba's instructions, he locked the door again. When he was standing outside he realised that items had been thrown at him including tins of food and water with faeces. He also saw electric irons, empty and half full two litre bottles, empty buckets and damaged kettles. He removed his jersey, which had been soiled with faeces. The noise increased and more officials arrived at the unit. They were waiting for further instructions from Zimba when an official arrived with two non-electrified shields that they could use if they went back into the cell. Zimba advised the officials that he had been given permission to use minimum force and that they should go in and remove the offenders. Because of the earlier situation where the inmates had thrown missiles, the officials held the shields on top of their heads. He Monare led the way, with Moleleki and Molagothla on either side of him. He was holding a tonfa in his right hand. There were two EST officials, Mokobodi and Manamela behind them. The inmates were standing on the beds in the centre of the cell and hurling missiles down at the officials who were using the shields to protect themselves. Some of the offenders held their hands up and moved out of the cell. The officials had difficulty removing the likes of Qibi and Zulu, who were the last to leave the cell, Zulu being the very last to leave. Phasha and Sithole were also among the last to leave. The officials had to use tonfas to get the inmates off the beds and out of the cell, and it was in the course of that removal that some of the inmates were injured. Monare said that he had struck Zulu on the lower part of his body, specifically his left leg, while he was standing on the bed. He could not explain how Zulu sustained his other injuries. He could not explain how any of the other plaintiffs sustained their injuries either. Once the inmates were all out of the cell, he

went to change his uniform and at that stage the inmates were squatting and waiting to be counted. When he arrived back after 45 minutes to an hour he saw that the inmates were cleaning the items that were on the floor. Cell B1 had been locked up with the inmates inside. There were also inmates returning from the hospital. Monare denied all of the plaintiffs' allegations against him. He said that he was not aware of any of the plaintiffs' injuries until these proceedings were brought.

158. Ms Khan testified that she was in the C unit when she responded to a request from Zimba for members to beef up security at B unit. On arrival at B unit, she could hear shouting and swearing from the inmates inside the cell but she could not see who it was. The noise was overwhelming. The inmates were throwing used toothbrushes, colgate tubes and sunlight pieces at the officials and the whole courtyard was a mess. As soon as Monare opened the door a bucket was thrown at him. She did not know whether the bucket contained water or urine. She heard Zimba scream at Monare and Monare then locked the cell and stood back. Monare then went to get a shield and went into the cell with two other officials. Offenders came out with their hands in the air and she instructed them to 'vang die muur' at the far end of the court yard to be searched. Smith, Zulu and Phasha were among the last offenders in the cell and had to be forcibly removed from the cell. Zulu came out of the cell running with something in his hand. He ran past her and towards Kunene. Smith and Phasha went to the wall to be searched. Zimba then took Smith and she took Phasha into the office to ask them what had happened and who had blocked the door. They said that they did not know anything and she escorted Smith back to the courtyard where the offenders were counted, served food and locked up again. This was at approximately 10:30 or 10:45. She denied

having assaulted any of the inmates and also denied assisting them or protecting them from assault by other officials.

159. Moleleki testified that when he got into the B unit, he noticed that the inmates were shouting at the officials and insulting them, and that the courtyard was a mess. He saw papers, coca-cola bottles, soap and toothpaste that had been thrown out of the window. He was standing next to Monare with Molagothla when he managed to open the grill, but then Monare had to relock the grill. He noticed that there was faeces on Monare's shirt and that his shirt was wet. He then grabbed a shield and went inside with Monare and Molagothla and they had two non-electric shields between them. They were backed by members of the EST although he could not recall how many. Zimba had given them instructions to use necessary force to get the offenders out of the cell. The offenders were throwing missiles at the officials and they were protecting themselves with shields. Some of the offenders were on the beds, while others were running towards the exit gate in a stampede. He could not remember interacting with or assaulting any of the plaintiffs and could not explain how they sustained their injuries. He used his tonfa on the feet of some of the inmates who were standing on the beds, and on the upper limbs of others who were throwing missiles. After the officials drove the inmates out of the cell, they lined up at the wall to be searched. Once the situation was calm, he left the shield in the office of B unit and left. He did not see any of the officials assaulting any inmates.

160. Moleleki testified about the items being thrown into the courtyard, including papers and coca cola bottles. He did not testify that the inmates threw kettles and irons at the officials the cell, but said that he found kettles lying on the floor, and that they had used

shields to block the missiles being thrown at them. When it was put to him in cross examination that he would have noticed kettles or an iron being thrown at him, he could not provide a clear answer. He could shed no light on the order in which the inmates exited the cell, despite being one of the last officials to leave the cell. He made no mention of Smith and Phasha being taken into the office for interrogation. He could shed no light about how any of the plaintiffs' injuries were sustained.

161. Mokoka's evidence was that he was working in the kitchen on 10 August 2014. When he went to B unit to investigate why the food trolleys from the section had not yet been brought back he saw the offenders lined up two by two with Ms Khan and Kunene. He participated in searching the inmates and they were then made to line up against the wall next to the cell. At that stage he saw two offenders coming out of cell B1, followed by Monare whose uniform was soiled. Moleleki, Mokobodi, Manamela and Molagothla came out of the cell last. After the inmates had been counted he Mokoka went back to the kitchen and did not go into the cell or into the office. He did not witness any assault on the inmates.

162. During his examination in chief he gave no evidence about seeing any objects in the courtyard. When pressed during cross examination he said that he saw papers and soap. His evidence was that he saw Monare coming out of cell B1 with his uniform soiled by faeces and he took it off before entering the cell for the second time. He gave no evidence about Smith and Phasha being taken into the office for questioning.

163. Ms Buthelezi's evidence was that she arrived at B unit between 10:30 and 11:00 on 10 August 2014 and that the inmates were squatting against the wall. She noticed that the

courtyard was filthy with papers and tubes of toothpaste. Zimba was inside the office on the phone. She took the totals from the count of the inmates in B section and went back to the reception. She did not go into cell B1, nor did she witness any assault on the inmates in cell B1. She also denied having assisted any of the plaintiffs during their assault and torture as they alleged.

The defendant's medical evidence

164. The defendant called nurses Nkatingi, Mafora and Sodi and Dr Dlamini to testify in respect of the plaintiffs' injuries sustained on 10 August 2014. They were factual witnesses. The nurses testified that they saw the plaintiffs as follows: nurse Nkatingi saw Sithole and Phasha on 10 August 2014; nurse Mafora saw Qibi on 10 August 2014; and nurse Sodi saw Smith and Zulu on 10 August 2014.

165. All three nurses gave similar evidence and in some respects identical evidence. I do not deem it necessary to set out their evidence in any great detail since it is clear from their evidence that they had failed to properly examine the plaintiffs or to properly record and treat their injuries. They had no independent recollection of their consultations with the plaintiffs and that they were relying on what was contained in the medical continuation sheets. None of the nurses could refute the plaintiffs' versions to what had actually transpired in each consultation. Nurse Nkatingi could not refute Sithole's allegation that she did not in fact examine him; nurse Mafora could not refute Qibi's allegation that she did not in fact examine him; and nurse Sodi could not refute Smith's and Zulu's allegations that they were not in fact examined by her.

166. All three nurses testified that they had concluded that each plaintiff had sustained minor soft tissue injuries. Nurse Nkatingi on Sithole testified that according to her scope of practice and after she had done all her history taking, physical examination, she came up with the diagnose to say that it was minor soft tissue injuries and she could treat that in the centre without referral for further assessment and management. Nurse Mafora on Qibi testified that she was confident that her scope of practice allowed her and that she was confident that she would manage minor injuries, his injuries with bruises. Nurse Sodi on Zulu testified that according to her assessment it was minor soft tissue injuries. Nurse Sodi on Smith testified that his injuries were within the scope of practice and they were minor.

167. The disparities between the nurses' clinical findings and the clinical findings made by Dr Dlamini less than 24 hours later are glaring and was taken up during cross examination. Nurse Mafora was cross examined on why Dr Dlamini had observed and recorded swelling on Qibi's right wrist, which she had not recorded. She could not provide an explanation for that and simply denied the existence of that injury at the time of her examination. Nurse Sodi in respect of Zulu and Smith could provide no explanation for injuries that had been recorded by Dr Dlamini but not recorded by her. She stated that she could not speculate on the notes of the doctor.

168. Nurse Nkatingi could not account during cross examination for the eight injuries that she had failed to record in respect of Sithole, which had been recorded by Dr van Zyl. Nurse Mafora could provide no explanation for how or why Dr van Zyl had observed and recorded significantly more injures on Qibi's body than she had. When pressed for an explanation she said that she cannot speculate on the doctor's findings because the

day she saw the patient all those other injuries were not there. Nurse Sodi could not account why Dr van Zyl had observed and recorded more injuries on Zulu's body than she had. When asked for an explanation she used the identical phrase as nurse Mafora that she would not speculate on the doctor's findings. Nurse Sodi provided the same response in respect of the injuries observed and recorded by Dr Khan on Smith's body namely that she cannot speculate on Dr Khan's findings.

169. The nurses' testimony in respect of the adequacy of the treatment they prescribed for the plaintiffs was problematic. Despite having Sithole's evidence put to her regarding the extent of pain he was in on 10 August she maintained that 200mg of Brufen anti-inflammatories and rubbing ointment was sufficient. She sought to justify this on the basis that Dr Dlamini also failed to prescribe any further treatment. Despite having Qibi's evidence put to her regarding the extent of pain he was in on 10 August 2014 (some of which Qibi testified in 2021 he was still suffering from), Nurse Mafora maintained that 200mg of Brufen – which she classified as a pain killer – had been sufficient.

170. Nurse Sodi was taken through the various courses of treatment and care Smith had received since sustaining his injuries on 10 August 2014 and questioned regarding the sufficiency of having only prescribed two Panados, an arm sling and some rubbing ointment. Nurse Sodi justified this on the basis that Dr Dlamini had also failed to provide treatment.

The evidence of Dr Dlamini

171. Dr Dlamini testified that his independent recollection of his examinations of the

plaintiffs was limited and that he was relying heavily on the documented record of his consultations with the plaintiffs. He confirmed that he had knowledge of the contents of the medical continuation sheets insofar as they were completed in respect of the nurses' consultations with the plaintiffs on 10 August 2014.

172. In respect of Zulu, Dr Dlamini testified that he did not see the haematoma on his forehead recorded by nurse Sodi. He could not provide an explanation for the discrepancy and stated that when he reviews a nurse's finding, it is only for purposes of monitoring the treatment prescribed. In respect of Smith, Dr Dlamini could not explain why nurse Sodi had recorded only a single (left-hand) injury, nor why he had not found that injury amongst the injuries he had observed and recorded in respect of Smith. In respect of Qibi, Dr Dlamini accepted that nurse Mafora had failed to record the swelling on Qibi's right wrist that he had observed and he could provide no explanation for that.

173. Dr Dlamini testified that the nurses' failure to record all the plaintiffs' injuries did not concern him as it was not his practice to work on what the nurses found when assessing the patients. He conceded however that given the abovementioned discrepancies and gaps, the nurses could not have possible conducted full physical examinations of the plaintiffs as alleged in their testimonies. He conceded that the records indicated that he spent an average of five minutes examining each plaintiff while Dr van Zyl had spent an average of fifteen to thirty minutes per plaintiff. He could offer no explanation for why his consultations with the plaintiffs had been short merely stating that he could not comment on it.

174. Dr Dlamini conceded that he had failed to complete the plaintiffs J88s to the standard required of a reasonable doctor. This despite Dr Dlamini confirming that he understood and appreciated that in order for a J88 to serve its purpose, it needed to contain sufficient information and detail for an external observer to understand (i) the presence or absence of an injury; (ii) the precise location of an injury on the body; and (iii) the extent and severity of the injury. He could provide no explanation for his failure to properly complete the J88s in respect of the plaintiffs.

175. Dr Dlamini made the following concessions in respect of each plaintiff;

175.1 Regarding the completion of Qibi's J88, Dr Dlamini conceded that he failed to record his swollen right wrist in the summary of injuries, despite having noted it in the diagrammatic sketches. He conceded that he failed to complete the J88 with the same degree of detail and precision as Dr van Zyl. He conceded that he should have taken measurements of Qibi's injuries and that he had failed to describe the location of some of his injuries. He conceded that he had not described the extent, nature or severity of his bruising. He conceded that he had failed to record at least two breaches of his skin noted by Dr van Zyl and he sought to deny the existence of the breaches. He conceded that he had failed to record the injury to his left little finger. He attempted to deny the existence of the injury but it was put to him that both Dr Khan for Qibi and Professor Becker for the defendant had observed the injury on Qibi as an ongoing injury approximately five years later in 2019. He then attempted to place blame on Qibi for not having informed him of the injury. It was put to him that Qibi testified about advising him of the injury. It was also put to him that the

defendant's Dr Rossouw had agreed that the injury had likely been sustained while Qibi was trying to defend himself on 10 August 2014.

175.2 Regarding the completion of Zulu's J88 Dr Dlamini conceded that he had failed to record detail or measurements in respect of the injuries he noted. He conceded that he had provided insufficient detail in respect of the injuries to Zulu's left upper arm and failed to record the injuries to his right thumb, right wrist and swollen right arm. Dr Dlamini suggested that those were covered by reference to upper limb injury. Dr Dlamini conceded that he failed to record Zulu's bruised left forearm, swollen left lower limb from the hip to the big toe and the lacerations to the left side of his abdomen. In this regard Dr Dlamini claimed that he had not seen the bruising and swelling and sought to deny the existence of the laceration. He could not provide an explanation about why he had included more injuries and described them in more detail in the DCS's internal G337 form as compared to the SAPS J88 form.

175.3 Regarding the completion of Sithole's J88, Dr Dlamini conceded that he had failed to fulfil his duty to properly indicate the nature, position and extent of his injuries in the J88. He further conceded that he had failed to provide any detail or measurements of the injuries in the J88 and that he ought to have done so. He conceded that he had failed to record the laceration near Sithole's right nipple, swelling on his right knee, injuries to his right shin, the laceration and bruising on the right ankle, bruising and swelling on the left buttock, swelling of the right hip. He did not provide any explanation for those omissions. He conceded that his reference to generalised injuries in Sithole's J88 fell short of the standard required and the level of detail provided by Dr van Zyl in her J88.

175.4 Regarding the completion of Phasha's J88, Dr Dlamini conceded that he failed to record the injury to his scalp and he sought to deny the existence of the injury. He conceded that he failed to describe his elbow injury with the level of precision and detail applied by Dr van Zyl and ultimately failed to record any bruising on the left elbow. His explanation about this was simply that he did not notice any bruising.

175.5 Regarding the completion of Smith's J88, Dr Dlamini conceded that he had failed to provide any detail or measurements in respect of Smith's injuries. He conceded that he failed to specify the injury to his right hand and swollen left elbow, and had instead noted an injury to the upper limbs in general terms. He conceded that this fell short of standard required for the completion of a J88 and that there should have been more details that would have gone into it. He conceded that he failed to record a laceration on his mouth, a tender left shoulder, weals on his back and a large haematoma on his left hip. When pressed for an explanation he sought to deny the existence of those injuries.

176. Dr Dlamini conceded, in respect of three of the plaintiffs, that if they sustained the injuries recorded by the independent doctors, such injuries would have qualified as moderate to severe and would have warranted hospitalisation. In respect of Smith, Dr Dlamini was asked to assume that Smith had sustained the injuries recorded by Dr Khan and asked what the appropriate course of action would have been. He responded and said that obviously he did not have the real grasp of what was actually written there. He did not go through it in detail but if that was the case it would have fallen onto that scale where if it was moderately severe, the patient would have been referred to their hospital section or if they were severe injuries, then the patient would have been

referred outside. During exchange with the court he said that if one accepts that the injuries recorded were correct those injuries would be moderate to severe. He said that he looked at page 83 of D1 he would be in the hospital section of the Centre based on the list of those injuries.

177. Dr Dlamini made the same concession in relation to Zulu's injuries and said that if the findings made by Dr van Zyl were correct than the patient would be transferred to the hospital section. He made the same concession in relation to the injuries recorded by Dr van Zyl in respect of Mr Sithole that if they were found to be correct than the injuries would be mild to moderate. He would be assessed for monitoring purposes.

178. It is clear from the evidence led that the clinical findings made by Dr van Zyl and Dr Khan in respect of the plaintiffs' injuries were not contested by the defendant. In respect of Zulu, the clinical findings made by Dr van Zyl were conceded by the defendant's counsel. It is common cause that they sustained their injuries on 10 August 2014.

The evidence of professor Fitz

179. The defendant sought to rely on the expert report of Prof Fitz to establish that the force applied by the DCS officials on the inmates of cell B1 on 10 August 2014 was justified. However, he had no personal knowledge of the events of 10 August 2014 and he confirmed that he had relied solely on the statements provided in the course of the internal DCS investigation and other documents provided to him by the defendant for purposes of compiling his report. He did not rely on the inmates' version of events

and that they had not hurled any objects at the officials. His report presented a partisan view of the events of 10 August 2014 which favoured the defendant.

180. His report should be rejected and no reliance can be placed on his report and the evidence that he gave before this court. His report recorded as an established fact that inmates had hurled missiles at officials. However, he conceded under cross examination that none of the mates had indicated in their statements that they had seen objects hurled at any official, nor that they had done so. His report made no reference whatsoever to the inmates' version that they exited the cell peacefully and were assaulted by DCS officials. The internal DCS investigation report contains accounts from 28 inmates who stated that they were beaten and shocked as they exited the cell peacefully. He made no reference in his report to any of those accounts. Instead he recorded, as a fact, that inmates had been forcibly removed from the cell by DCS officials. In maintaining that the inmates had to be removed from the cell by force, he applied warped reasoning, inferring that they must have resisted exiting the cell because force was applied to them. In other words, he took the presence of force as evidence that its application must have been justified.

181. Ultimately Prof Fitz conceded that he did not know the true facts of what transpired on 10 August 2014 and that if the inmates had in fact exited the cell peacefully, there would have been no necessity for DCS officials to have used force. He conceded further that had the use of force been unnecessary, it would have been unjustified, and the question of proportionality would not have arisen. In the result his report took the defendant's case no further.

The evidence of professor Becker

182. Professor Becker's evidence was that his examination of the plaintiffs revealed more limited ongoing injuries: he found that Smith reported lower back pain at the sacroiliac joint, spreading down the left lateral side of the upper thigh; he reported no ongoing injuries in respect of Zulu; he reported that Qibi's left little finger does not flex and that it should be examined by a hand surgeon; he reported no ongoing injuries in respect of Phasha; and he reported that Sithole had a loss of sensation in his right knee lateral to the patella tendon junction.

183. Despite these limited findings by Prof Becker, the joint expert minute concluded between Dr Khan and Prof Becker recorded their agreement on the following:

183.1 That it would be clinically appropriate for Smith to be referred to a neurologist for further investigation of his ongoing pain in his left hip and ongoing injuries indicating neurological damage; and a urologist for further investigation of his urinary urge incontinence, in line with same recommendation made Dr Ranchod.

183.2 That it would be clinically appropriate for Zulu to be referred to an orthopaedic surgeon for assessment of his swollen and tender left ankle for months after the assaults and torture, with ongoing pain and discomfort; a urologist for assessment of his severe pain and suffering when urinating for months after the alleged assaults and torture, with ongoing discomfort and urinary urge incontinence; and a neurologist for assessment of his head injury with possible symptoms of brain and spinal injury, his ongoing severe headaches with ongoing epileptiform symptoms and hallucinations, and his ongoing pain and

reduced function is his right upper Limb (excluding his shoulder) and his left lower limb.

183.3 That it would be clinically appropriate for Qibi to be referred to a hand surgeon for examination of his severe pain, swelling and bruising on the small finger of his left hand for months after the assaults and torture, with ongoing pain, discomfort and impaired movement; and a neurologist for assessment of his head injuries with symptoms of possible injury to the brain and ongoing headaches.

183.4 That it would be clinically appropriate for Phasha to be referred for X-Rays and/or scans with possible further treatment by an orthopaedic surgeon if warranted for the severe pain, extensive bruising and swelling of his left elbow for months after the assault and torture with ongoing moderate pain and discomfort and impaired movement, and moderate pain and discomfort and impaired movement, and moderate pain and aggravation of a previous injury to his left arm.

183.5 That it would be clinically appropriate for Sithole to be referred to a neurologist to assess his lateral swelling and ongoing pain and sensory loss at his right knee and to a urologist for assessment of his ongoing urinary urge incontinence.

184. Dr Khan and Prof Becker agreed that the plaintiffs presented with ongoing injuries and/or complaints which required further assessment and investigation by specialists in the relevant fields. There would have been no reason for them to have recorded the need for referrals were this not the case.

The evidence of Dr Lawrence

185. The defendant engaged the services of an expert psychiatrist Dr Lawrence, who examined the plaintiffs and diagnosed each of them with personality disorder as follows: Smith was diagnosed with anti-social personality disorder with features of borderline personality disorder; Zulu was diagnosed with anti-social personality disorder; Qibi was diagnosed with anti-social personality disorder; Phasha was diagnosed with anti-social personality disorder; and Sithole was diagnosed with anti-social personality disorder.

186. During cross examination it was contended that Dr Lawrence in both his reports on the plaintiffs and in his testimony in court, had failed to display the level of competence, professionalism and impartiality expected of a psychiatrist. First was a comparison of Dr Lawrence's reports reveals that his findings in relation to each of the five plaintiffs are almost identical. This was illustrated in exhibit O, which is a 27-page document that highlights the extent to which he simply cut and paste his reports prepared for each plaintiff. Dr Lawrence conceded this, but sought to explain it away by suggesting that his recorded findings are identical because his observations of each of the plaintiffs were identical. He went so far as to testify that if he has five individuals that end up in the same population group or facility or type of world, he would be surprised that they acted in the same way.

187. Dr Lawrence conceded that none of the instruments that he used in his assessment of the plaintiffs, test for a specific, psychological disorder, nor do they test specifically for personality disorders. He therefore did not administer any formal diagnostic tests. In particular, he did not test any of the plaintiffs for PTSD. His explanation for this was

that the facts do not explain a diagnosis of PTSD for him. He conceded, however, that Smith, Zulu, Qibi and Sithole all displayed and reported symptoms of PTSD. He maintained that he nevertheless had no duty to test for PTSD. He was therefore not in a position to dispute Dr Taylor's diagnosis of PTSD, given that he failed to administer any test to confirm or rule it out. He also did not administer any tests to test any of the plaintiffs for depression.

188. Dr Lawrence's conceded that a conclusive personality disorder diagnosis could never be made in a one-off interview with a patient. He had relied on an outdated version of the DSM, namely the DSM-4, when diagnosing the plaintiffs. He conceded this in cross examination. The diagnostic criteria for anti-social personality disorder require a pervasive pattern of disregard for and violation of the rights of others from age 15 as indicted by three or more of the criteria listed in the DSM5. However, he conceded that he had no information in respect of any of the plaintiffs that any of the listed criteria had occurred since age 15. He conceded that he could not make any conclusive diagnosis of anti-social personality disorder in respect of any of the plaintiffs. A diagnosis of borderline personality disorder requires at least five of the prescribed diagnostic criteria to be present. He conceded that he had not identified five of the prescribed diagnostic criteria required for borderline personality in respect of Smith. He conceded that he had therefore made no valid diagnosis of borderline personality disorder in respect of Smith. In diagnosing Phasha with mixed anti-social personality disorder and borderline personality disorder, he stated that he had identified some features of each disorder but conceded that he had made no valid diagnosis of either disorder in respect of Phasha.

189. In response to the proposition that he had not made a full or conclusive diagnosis of any personality disorder in respect of any plaintiff, Dr Lawrence testified that in the time that he had, there was no way that he could make a full diagnosis. They don't have proper tools or properly trained people to actually make the diagnosis.

190. Dr Lawrence confirmed that a personality disorder cannot and should not be diagnosed in the presence of active psychiatric symptoms. He confirmed that it is incumbent on a psychiatrist to deal with any psychiatric disorder that presents itself before making a diagnosis of a personality disorder. He testified that when he assessed Phasha, he formed the view that he had a possible psychiatric disorder. He did not however record this in is his report in respect of Phasha. He conceded that he took no steps to establish whether Phasha did in fact have a psychiatric disorder. He could not recall asking Phasha if he had a pre-existing psychiatric disorder nor could he recall asking him whether he was on treatment. Despite the fact that Dr Lawrence suspected that Phasha may have had psychiatric disorder, he proceeded to diagnose him with personality disorder. When it was put to him in cross examination that it was impermissible for him to have diagnosed a personality disorder in the presence of a psychiatric disorder he did not deny this. He maintained that his diagnosis of Phasha was merely provisional. He did not however deny that his diagnosis of Phasha with personality disorder, in the presence of a psychiatric disorder, was impermissible and invalid.

191. In defence of these defects Dr Lawrence repeatedly stated that his diagnosis of the plaintiffs of antisocial personality disorder were provisional and that the court has only one set of conclusive diagnosis by Dr Taylor. He agreed that there is no full or conclusive diagnosis of any personality disorder in respect of any of the plaintiffs.

The application to admit as evidence two affidavits of Zimba

192. The defendant had applied that this court admits the two affidavits that were made by Zimba who had passed away before the hearing had commenced in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 (LEAA) as evidence. The two affidavits were deposed to by him on 5 September 2014 and 28 October 2014 respectively. He had described the events of 7 August 2014 and the role he played and deposed again to an affidavit dealing with the events of 10 August 2014. He could not be called as a witness since he has passed away.

193. It was contended on behalf of the defendant that Zimba was employed as the Divisional Head of Security at Leeuwkop and was in charge of the surprise search of 7 August 2014 as well as during the events of 10 August 2014. The evidence contained in both affidavits was central to this case. He was in charge of security on both days and had addressed the inmates of cell B1 on 7 August 2014 and warned them against blocking the cell door. He again attempted to reason with the inmates of cell B1 on the morning of 10 August 2014, and on failing in the attempt at negotiations and on realising that the inmates were intransigent towards the officials, he contacted Mohale and after explaining the situation to him, he requested approval for the officials to use minimum force. After the events of 10 August 2014 Zimba advised Mohale of the identities of the ringleaders and advised him to separate them from the rest of the inmates of cell B1. They were identified as the second to fifth plaintiffs.

194. It was further contended by the defendant that from the beginning of the evidence in this case, Zimba's affidavits have been referred to by both parties throughout the proceedings. For obvious reasons the probative value of his evidence was very high.

On account of his demise, it was impossible to secure him in order to give evidence. Absent those affidavits, the defendant contended that he would be prejudiced as his case will be incomplete. No prejudice would arise from the court admitting those affidavits into evidence. It was submitted that it was in the interests of justice as well as common sense demanded that both his affidavits be admitted.

195. Section 3(1)(c) of the LEAA reads as follows:

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail;

(vii) any other factor which should in the opinion of the court be taken into account;

is of the opinion that such evidence should be admitted in the interests of justice."

196. I accept that Zimba is deceased and cannot be called as a witness in these proceedings. One of the issues that arises in this matter was whether the plaintiffs and the inmates were aggressive and had thrown objects at the DCS officials. The role played by Zulu is also central in this matter. He had admitted that he had blocked the cell door after he had exhausted all internal procedures in the matter. He was right in front of the cell

door when it was opened and was the very first person who was ordered to leave the cell. He did so. None of the other witnesses who had testified on behalf of the defendant mentioned what objects each and every plaintiff had on them when hurling it. Zimba in his affidavit mentions the five plaintiffs and two other individuals who hurled an assortment of items. There was a material contradiction between the evidence of Mohale and Kunene about where Zulu was. The defendant has not pleaded that the plaintiffs are the ones who had hurled objects at the officials. There is no reference made in the Head of the Correctional Centre's diary about the attack on them by the plaintiffs or the inmates.

197. The events that gave rise to this action took place on 7 and 10 August 2014 yet Zimba who was the head of security only deposed to affidavits on 5 September 2014 and 28 October 2014 respectively. There is no explanation why it had taken the head of security so long to depose to such affidavits. The commissioner of oaths who had taken the oaths were also not called as a witnesses to confirm that they had administered the oaths to him. Due to the discrepancies about the versions amongst the defendant's witnesses and that of the plaintiffs, I do not believe that it will be in the interest of justice to admit Zimba's affidavits as evidence. It is also clear from the evidence led by the plaintiffs that Zimba had played a crucial role when they were tortured and had taken part in some of the assaults on them and had witnessed it. He had at a later stage ordered the officials to stop assaulting the plaintiffs.

198. In the circumstance this court refuses to admit into evidence the affidavit of Zimba since it is not in the interest of justice to do so.

Analysis of the evidence led and arguments raised

199. Both parties had called several witnesses in this action. The plaintiffs instituted two claims in this action namely claim A and claim B. Both claims also involve torture. I have earlier referred to the relevant provisions of the Torture Act, and International cases dealing with torture. It is not necessary to repeat those cases and principles.

200. It was contended on behalf of the defendant that this court was made to trawl through mounds of documents and listen to evidence for days on end in respect of a relatively straightforward delictual claim. The question that the court must answer is whether the plaintiffs were assaulted (which include torture). They submitted not. On the evidence before the court, the unlawfulness and the wrongfulness alleged in the pleadings and on the evidence by the plaintiffs is not substantiated by the facts. There is not satisfactory evidence that the plaintiffs were assaulted as they allege. The defendant's two witnesses, Monare and Moleleki told the court that the application of minimum, proportionate force only occurred inside the cell when the plaintiffs were throwing missiles at the officials. No assault occurred in the courtyard or inside the office of cell B. Ms Khan was there and it was not only an EST line and they were mixed. There is no evidence that dogs were set on the plaintiffs as alleged. All five plaintiffs were identified by Zimba in his affidavit as having been involved in the throwing of missiles at the officials. According to the evidence of the eye witnesses, he was positioned at a place where he could have seen the events as they unfolded.

201. The defendant contended further that the plaintiffs were not assaulted, but rather force was applied on them lawfully and justifiably. The force applied was minimal and proportionate to the objective, which was to protect the officials from further assaults

from the plaintiffs, and to ensure safe custody of all the inmates at cell B1. There was no indiscriminate assault on the plaintiffs. They were not electrocuted with electric shields. No electric shields were issued out from the armoury on 10 August 2014. The shield register and the evidence of Langa bear relevance. The injuries they sustained were minor and consistent with the application of minimum force. They were appropriately managed by the nursing staff, who were clear that their scope of practice was to only treat minor injuries.

202. It was further contended by the defendant that on the facts before this court, there is no evidence of torture. The wide ranging allegations by the plaintiffs are not supported by the facts. There is no need for this court to go beyond the facts on the evidence before it. Nothing exists to support the allegation of torture.

203. It was further contended by the defendant that there is no credible evidence that the four plaintiffs were accommodated and subjected to sub-human conditions in the single cells. They never complained to any officials including officials from the office of the Inspecting Judge (Mr Thakadu), or the IPV.

204 The defendant contended that to the extent that the plaintiffs allege to suffer from ongoing injuries, this court is not in any way able to consider the extent and the nature of such ongoing injuries. There is no medical evidence to link the events of 10 August 2014 to the alleged ongoing injury. Dr Dlamini had as early as 25 August 2014 excluded any permanent injuries or disabilities flowing from the events of 10 August 2014. Professor Becker also excluded long-term sequelae from the plaintiffs arising from the events of 10 August 2014, but was open to the suggestion by Dr Khan that

they be referred to other experts as a measure of being objective and respecting the patients' right to healthcare. He was clear, however, that he did not believe that the injuries of the 10 August 2014 would have caused the plaintiffs to suffer from ongoing injuries.

205. The defendant contended that the detention of four of the plaintiffs in the single cells was not unlawful as claimed by them. Mohale had explained the reasons behind separating and admitting plaintiffs in the single cells. He told the court that the reason they were in B unit, cell 1 was because they had transgressed the rules in the cells from which they had originally been accommodated. They were placed there because they were transgressors. They were then identified as being behind a further serious transgression inside the transgressors' cell. He had no other place to accommodate them while they were being investigated and the single cells were the only available cells in that maximum facility to accommodate them. The conduct was reasonable as due process of reporting the separation and ensuring that they were assessed medically was done. Moreover, the detention of a sentenced officer in a single cell may be used as normal accommodation in a correctional centre.

206. The defendant contended that the two claims should be dismissed since they are not supported by the facts and the evidence led.

207. It is trite that assault in the common law is defined as the act of intentionally and unlawfully applying force to the person of another, directly or indirectly, or attempting or threatening by any act to apply that force, if the person making the threat causes the other to believe that he has the ability to effect his purpose.

208. The elements of a claim for assault under the *actio injuriarium* are:

208.1 The application of physical force that impairs the plaintiff's bodily integrity (or an attempt or threat that inspires a belief in the plaintiff that such impairment will take place);

208.2 Wrongfulness or unlawfulness; and

208.3 An intention on the part of the offender to injure the plaintiff (*animus iniuriandi*).

209. The application of physical force that impairs the bodily integrity of another is *prima facie* wrongful and intentional. This presumption is not only recognised in the common law, but has constitutional force under section 12(1)(c) of the Constitution, which provides that everyone has the right to freedom and security of the person, which includes the right to freedom and security of the person, which includes the right - …(c) to be free from all forms of violence from either public or private sources.

210. Once an infringement of the bodily integrity of the plaintiffs by the use of force is established, the defendant bears the onus of proving a defence or ground of justification. In this case the defendant has admitted the use of force by DCS officials and that the plaintiffs suffered injuries as a result. Therefore, the onus is on the defendant to prove that the use of force was lawful and justified.

211. As far as the plaintiffs' claims for impairment of the rights to dignity and privacy arising from the assault is concerned, the plaintiff bears the onus to prove that the DCS officials committed acts that caused such impairments. Once the harmful acts have been proved, the defendant bears the onus of justifying the acts in order to avoid liability.

212. It is trite that the law's protection of bodily integrity includes the protection of mental and psychological integrity. In this regard see *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) at 145I-J. The scope of the law's protection for the security of the person is made clear in section 12(2) of the Constitution, which protects the right to bodily and psychological integrity and draws no distinction between these facets.

213. The right to privacy which is protected under section 14 of the Constitution includes the right not to have one's body searched (section 14(1)(a). A forced strip search and forced cavity search of the anus, as some of the plaintiffs alleged they were subjected to would if this is found to be true, be undoubtedly intrusions of the inner sanctum of a person and infringe the core of the right to privacy. As such, these violations attract a higher burden of justification.

214. The assault and the intrusion on the plaintiffs right to privacy also constitute an impairment of their right to human dignity, protected under section 14 of the Constitution. The Constitutional Court has emphasised the close relationship between the right to privacy and the right to human dignity. In *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 7 held as follows:

"It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution."

215. Acts of assault violate the right to human dignity when they display a careless disregard for the worth of the individual, when they ignore or downplay the suffering of the individual, or when they demean or denigrate the self-worth of the individual. Such

violations are egregious, and are often particularly shocking and traumatic for the victim, when they are committed by persons in positions of authority and who owe the victim a duty of care. In such cases, our courts are strict and intolerant.

216. In *Ndlovu v Minister of Police* [2018] ZAGPJHC 595, paras 21, 24-25 a full bench of this division held:

> *"During his* [detention] *the appellant in the present matter was subjected not only to assault, but to torture, and as a result suffers long term effects. The conduct of the police officers was shocking, cruel and inhumane and the award should reflect society's abhorrence.*
> ...
> *Counsel for appellant submitted that the court should take a dim view of this type of behaviour, especially because the South African Police Service is the publicly appointed protectors and sentinels of our civilized democratic society. The police service forms a critical part of ordered as it is there to protect and serve its public. Instead the police officers conducted themselves in a most reprehensible manner.*
>
> *...The conduct of the police officers was shocking and goes against the very ethos of our constitutional society. In the circumstances of this case it is appropriate for the court to mark its disapproval of the conduct of the police officers by ordering a punitive costs order."*

217. The basis of the plaintiffs second cause of action under Claim A was set out in *Government of the Republic of South Africa v Ngubane* 1972(2) SA 601 A) where it was held that claims for bodily injury involving pain and suffering and the like have this in common with claims under the *actio iniuriarum* - namely that both relate to non – pecuniary loss and the amount awarded is regarded in the nature of a solatium. The damages awarded therefore bear a direct relationship to the personal suffering of the injured party and are intended for his personal benefit. The damages awarded to him are in a certain sense analogous to the solatium which is awarded under the *actio iniuriarum* to someone as a salve for his wounded feelings.

218. The plaintiffs brought a claim for patrimonial loss under the *Actio Legis Aquiliae.* It is trite that the elements of the delict are the same, save for the fact that the harm takes the form of patrimonial loss. However, since quantum has been separated from the merits this issue needs not to be dealt with at this stage.

219. The plaintiffs claim in the first instance damages for the unlawful impairment of their personal liberty. Every interference in personal liberty is *prima facie* unlawful. This presumption applies equally to the curtailment of the personal liberty of inmates, who retain all such freedoms, rights and liberties as have not been lawfully taken away from them.

220. The general principle was articulated by Innes CJ in *Whittaker v Roos and Bateman* 1912 AD 92 at 122-3 as follows:

> *"True, the plaintiffs freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect of what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration."*

221. The principle was restated as the 'residuum principle' by Corbett JA in *Goldberg and Others v Minster of Prisons and Others* 1979 (1) SA 14 (A) At 39C-E:

> *"It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner is placed. Of course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties (for sake of brevity) I shall henceforth speak merely of "rights") are very considerable. He no longer has freedom of movement and has no*

choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress."

222. Whether the conduct of the DCS officials was wrongful and unlawful also falls to be determined with reference to the statutory duties owed by DCS officials under the Act, the Correctional Services Regulations promulgated thereunder (the Regulations) and the Standing Orders by which the DCS officials are bound (the B-orders).

223. The first issue that needs to be determined is whether any disciplinary enquiry was held before the plaintiffs were demoted. Prior to the commencement of the trial, the defendant had admitted in a response from the plaintiffs that no notice of disciplinary proceedings was given nor were any hearings held in respects of the charges laid against the plaintiffs on 7 August 2014. The instruction from the office of the Head of Correctional Centre was that offenders should be demoted. The formal admission by the defendant was put to Kunene and Mohale during cross examination. Kunene denied that the inmates of cell B1 were demoted but he could not explain the defendant's formal admission and said that he was not bound by it. Kunene admitted however that no disciplinary hearings were held. Mohale contradicted himself about whether the inmates were demoted. He however admitted that no disciplinary hearings were held. During cross examination Mohale was also asked where his lawyers would have received the information that he had instructed that the inmates of cell B1 be demoted, if not from himself. Mohale could not answer that and ultimately could not explain the defendant's formal admission in that regard.

224. Mohale's claim that the inmates of cell B1 were not demoted on 8 August 2014 is also belied by the contents of Dr Fritz's report. Dr Fritz's report set out his understanding of the demotion that had taken place on 8 August 2014 in the following terms:

"The management thereafter informed the offenders that they were withdrawing the privileges of those in the cell by removing the amenities such as TV, shopping and extra exercise due to their improper conduct".

. Neither Mohale nor Kunene could explain where Dr Fritz would have got them from namely that the TV had been removed, the exercise time reduced and the shopping privilege had been revoked if this had not happened.

225. During the first day of his examination in chief, Monare was asked if the inmates of cell B1 had been demoted on 8 August 2014 following the events of 7 August 2014. He responded by saying that to his knowledge that was part of their process which was followed by Zimba and the team if he remembered well. He went on to explain that the CMC was responsible for the demotion, and that he had received a report from the CMC about the demotion of the inmates of cell B1. Later during his examination in chief Monare backtracked and said that he never gave an instruction for the inmates of cell B1 to be demoted despite the formal admission made by the defendant; and that he had made an error in his examination in chief and that the true state of affairs was that the CMC had only demoted the inmates at a later stage.

226. The defendant's evidence consisted of contradictions. Mohale testified that only the TV was withdrawn on 8 August 2014 but that it was a concession and not a privilege and therefor did not amount to a demotion. Kunene admitted that the TV was removed and that the exercise time was reduced to the minimum. The following day, however

he backtracked and said that the inmates exercise time had not in fact been reduced and said that his earlier evidence had been erroneous.

227. The plaintiffs testified that when the inmates of cell B1 were demoted on 8 August, the following privileges were revoked on the same day namely the television set was removed from cell B1; access to the shop; contact visits, reduced exercise time to a minimum of 1 hour per day and access to the public phone. All the plaintiffs who testified corroborated each other about the revoked privileges.

228. Qibi, Sithole and Smith were not challenged in any material respect on their evidence about the privileges that were revoked on 8 August 2014. Zulu was firm during cross examination about the privileges that were revoked on 8 August 2014. He said that the TV and normal exercise with other inmates, and that he could not buy at the shop. The time and visiting times between B Group and C Group differs which meant that he would get less time to visit. He said that access to the public phone was revoked and that on 9 August Kunene had refused him access to the public phone and gave demotion as the reason for the refusal. This was not challenged during cross examination.

229. The admission made by the defendant not only confirms that the plaintiffs were demoted but that this was done without notices of disciplinary hearings, let alone the conclusion of disciplinary proceedings culminating in guilty verdicts.

230. I am satisfied that the evidence establishes that following the events of 7 August 2014, the inmates of cell B1 were demoted without due process by the revocation of their privileges pertaining to the shop, contact visits, the use of public phones, their TV

removed and their exercise time reduced to the minimum required by law namely one hour per day.

231. This brings the court to the events that took place on 10 August 2014 which was much in dispute. The plaintiffs' version is that no objects were hurled at any of the officials. The defendant's version is that the inmates were aggressive and had hurled an assortment of objects at the officials who then used minimum force against them to defend themselves.

232. The defendant gave different versions about this aspect and the question that arises is which version should be accepted by the court. If the court accepts the version of one of the defendant's witness it follows that the other version of the other defendant's witness must be rejected as false. This would mean that the defendant's version stands to be rejected as false and contradictory.

233. If one considers the defendant's plea, it bears the onus to prove that the inmates had hurled objects at them which necessitated them having to defend themselves at that moment. The defendant's counsel had conceded that if the court were to reject the version of the defendant then what the plaintiffs were subjected to would amount to torture. The defendant had also denied that any further assaults had taken place outside the cell in the courtyard or the adjacent office and in the showers in the cell. The court will have to consider whether further assaults had taken place outside the cell in the courtyard, in an office adjacent to the cell and in the shower area. If one considers the defendant's version, the only assaults that had taken place was inside the cell. Even if the plaintiffs were the aggressors inside the cell any attack on them once they were

outside the cell should have ceased immediately since they were no longer a threat to the officials. Any further assaults on the plaintiffs outside the cell would have been unjustified and would amount to torture since the plaintiffs were identified as the ringleaders and had to be dealt with.

234. In deciding whether the plaintiffs were tortured one would have to look at the statutory definition of torture as contained in section 3 of the Torture Act which is any act by which severe pain or suffering, whether physical or mental, is intentionally afflicted on a person for such purposes as to obtain information or a confession from him or her or any other person; or punish him for an act he or any other person has committed, is suspected of having committed or is planning to commit or intimidate or coerce him or any other person to do, or refrain from doing anything. The medical evidence will also have to be looked at to see whether the injuries sustained by the plaintiffs were severe or not. It does not include any pain and suffering arising from, inherent in or incidental to lawful sanctions. If the assault was only limited to what had happened in the cell that cannot be construed as torture.

235. It is common cause that the cell door had been blocked on 10 August 2014 by Zulu. He had done so after he had earlier informed his fellow inmates of his intention to do so and why he was going to do that. He had made it clear to them what his thinking was and that he would take responsibility for it. He had urged the inmates not to become aggressive. He testified that when the cell door was being unblocked he stood right in the vicinity of the cell door and that he was the first inmate to have exited the cell after having been instructed to do so. He was then assaulted by both DCS officials and EST officials who had formed a half moon formation when he exited the cell. He denied

that any missiles and objects were hurled at the DCS officials or EST members. His version was also supported by the other plaintiffs who had testified about what had happened during that morning. All of them testified that they did not see or hurl any objects at the officials and that they left the cell as instructed to do so by the officials. They all testified that they had been assaulted with batons, were shocked with electric shields, kicked and slapped.

236. On the other hand, the defendant's version is that the officials were attacked with an assortment of items and they had used the necessary force during that attack on them. There were fundamental contradictions that arose from the evidence of Kunene and Monare who were the defendant's witnesses. They both gave positive and unequivocal accounts of the order in which the inmates, and Zulu in particular, left the cell. Kunene's version was that Zulu ran out of the cell at an early stage while many inmates were still inside, whereas Monare testified that Zulu was the very last person to leave the cell. Monare's version was that he had to apply force to make Zulu to get down from the top of the bunk beds to leave the cell and he was the last person he had marched out of the cell. This contradiction strikes fundamentally at the truth of the defendant's version. If one accepts Kunene's version of account to be correct this must mean that Zulu was not aggressive and would not have hurled any objects at the officials and the question that will arise is how he had sustained the injuries that he had sustained. The court will return to this later. If one accepts the version of Monare as correct that he would have struck him on his left lower leg who then had inflicted the other injuries that Zulu had sustained bearing in mind that the defendant's version is that no assaults had taken place outside the cell in the courtyard or in the offices next to the cell.

237. There was a further contradiction between Kunene and Monare. While Monare testified that he had to lock the cell immediately after opening it because of an attack from the inmates during which he was covered with faeces, Kunene made no mention of this. He also made no mention in his evidence of any attack by the inmates of cell B1 on DCS officials on 10 August 2014. Kunene testified that he witnessed a stampede occurring as the inmates exited cell B1, with inmates crashing into one another and falling over. He testified that he feared that Moriri who was on crutches would get injured in the stampede and he assisted him to leave the cells when Zulu was already out of the cell. Monare made no mention of a stampede in his evidence but had said that Zulu was on the bed and was the last person that he had marched out of the cell.

238. The evidence of the defendant's witnesses as to what transpired on 10 August 2014 in the cell is so riddled with material gaps and inconsistencies with no coherent version about what had happened in cell B1 that morning or how the plaintiff sustained their injuries.

239. The defendant's version about the assortment of missiles that were hurled at them when they entered cell B1, changed over time and depending on which of the defendant's witnesses were testifying about them, but they are said to have included *inter alia* kettles, irons, broomsticks, soap, water bottles, and buckets of urine and faeces. Monare's evidence was that a bucket of faeces was thrown at him during that attack. He testified that he was terrified and feared for his life. It was as a consequence of this violent attack by the inmates that DCS officials were constrained to use force to defend themselves against inmates on 10 August 2014.

240. The defendant version about an attack on the officials by inmates was a thought out version that was manufactured later to deal with the plaintiffs' case around the assault and torture. There is simply no mention made of that attack in any contemporaneous account of the events of 10 August 2014 by the DCS officials. There is also the absence of any consistent account of what was thrown at the DCS officials during that attack. As stated above the missiles allegedly thrown changed dramatically over time depending on which DCS official was testifying. None of the inmates of cell B1 were charged with assault or even violent and aggressive behaviour following the attack. There is also the failure to have taken any video recordings of the attack. The video recordings would have been vital evidence about any attack on the DCS officials.

241. There are three documents that serve as contemporaneous records of the events of 10 August 2014. The first one is the Head of Centre's diary which functions as an official record of events in the Correctional Centre. The record of the events of 10 August 2014 reads as follows:

"When counting offenders for the total to tally, offenders from B-unit, cell 1 tampered with the cell grill so that we cannot open the cell for unlock physically counting. We tried to plead offender to open. Offender Xolani Zulu, 21A292768 was the leader of the inmates. HOC was informed. He instructed that EST be called for backup. Mr Mphele locksmith was called to open the grill. Mr Mphele did come and the door was open. Necessary force was used at minimal due to the nature of the situation it was force for offenders to use minimum force. Those injured offenders were taken to hospital in after was report of the [illegible words]."

There is clearly no mention in this diary of any attack on DCs officials by the inmates of cell B1. This was confirmed by Mohale in cross examination.

242. The second document is the internal memorandum in terms of which Mohale requested a formal investigation into the incidents of 10 August 2014. The memorandum, dated

11 August 2014, records the need for an investigation into the alleged breach of security, possession of unauthorised articles in the prison and instigation. The memorandum records that:

"Minimum degree of force was used to achieve the objective to remove the inmates from the cell, be counted and searched as required. The action of the inmates jeopardised internal security and the operation of the day because the breakfast was delayed and the health of the inmates taking medication was at risk and operations such as visit was delay although I addressed the visitors about the challenge we were faced with."

Again, while the memorandum provides a summary of the events that took place on 10 August 2014, there is no mention of a violent attack by inmates on DCS officials. Mohale confirmed that in cross examination and was unable to explain it.

243. The third document is the report of the Judicial Inspectorate for Correctional Services (JICS) which summarises the events of 10 August 2014 as recounted by the Head of Centre but records no report of any attack on DCS officials by inmates. The report, which followed a visit from Mr Thakadu of JICS on 15 August 2014, records that the inmates barricaded the door, preventing the officials from serving breakfast, counting the inmates and providing medical treatment where necessary. The force applied, was within the objectives of ensuring that services are rendered for the day, i.e. counting, serving breakfast, and provision of meals to inmates as well as ensuring that other inmates in the cell received visits for the day from their families. The report records the officials' rationale for the use of force, but there is no mention of a violent attack on DCS officials by inmates which left Monare to be covered in faeces. There is also no mention made of any need by the DCS officials to act in self-defence. This was also confirmed by Mohale during cross examination and he was unable to explain it.

244. None of the contemporaneous records supports this version of events offered by the defendant. It is inconceivable that there would be no mention of this violent attack by inmates on DCS officials in any of those contemporaneous accounts of the events of 10 August 2014, if the attack had in fact taken place.

245. It is clear from the evidence led that the defendant had utilised the services of members of EST. Since they had utilised the said members they were obliged or compelled in terms of the Standing Order to have taken video footage about the events in the cell that morning. No video footage was taken of the events by members of the EST in terms of the Standing Order. The question that arises is why that did not happen. That footage if it was recorded would have been sufficient evidence to back up the version of the defendant that the DCS officials were hurled with an assortment of objects. The fact that no recording was taken about it indicates that the officials wanted to hide what they were intent in doing so that Zulu who had written two letters before that and had blocked the cell could be dealt with. None of the defendant's witnesses could pinpoint any specific inmate or plaintiff who was hurling objects at them. Zulu could not have hurled any objects at them since he was the first inmate who had left the cell. He had testified that when he left the cell he had a cloth that he was going to use to cover his face in the event that teargas was going to be used. This evidence was not challenged. There is simply no evidence placed before this court that the inmates or the plaintiffs had disobeyed an instruction to come out of the cell. The first instruction that was given for them to come out was when the cell door had still been blocked by Zulu and naturally they could not come out.

246. The defendant's witnesses who testified about the alleged attack by the inmates also conceded that they did not report the attack to anyone in the days following the events of 10 August 2014. Monare, who testified that he feared for his life as a result of the attack, testified that he did not tell anyone about the alleged attack by the inmates until 5 September 2014, when he made a statement to investigators for purposes of the internal investigation. One would have expected him to have reported this serious and traumatic incident to the Head of Centre or the Head of Security. He could not explain why he did not do so. Moleleki testified that when he entered cell B1 on 10 August 2014, he saw inmates standing with items that they could use as weapons. He also testified that the inmates inside the cell threw missiles at him. He testified that he did not report these events to anyone.

247. The first report of this alleged attack on DCs officials by the inmates of cell B1 was on 5 September 2014, when DCS officials were called to make statements for purposes of the internal investigation. This was almost a month after the alleged attack had taken place. Despite this account that this was a horrifying and terrifying experience for the DCS officials and that the attack was extremely violent, with dangerous implementations being hurled at officials, none of the DCS officials who were present during the attack made any mention of it at the time. This is inconceivable if the attack had happened.

248. The statements provided by the DCS officials and EST members for the purpose of the internal investigation recorded that Zimba stated that an assortment of items (brooms, bar soap, buckets etc.) were thrown at them. Kunene made no mention in his statement of any items being thrown. Moleleki indicated in his statement that he observed faeces

on Monare's upper body and that missiles were thrown at the officials when they went into the cell. Molakgotla stated that Monare was wet and smelly, so was the floor and that he saw human faeces on Monare's body. He stated that the officials who entered the cell used shields for cover because the offenders were unruly and throwing items at them. He did not specify what those items were. Monare stated, in relation to his first entry into cell B1 that items such as water with faeces, empty tins of food stuff, bar soap and other items were thrown at him. He stated that when he entered into the cell a second time with Moleleki, Molakgotla and two EST officials, they used shields to block items that were thrown at them. Eight EST members – whose statements are identical – stated that the inmates in cell B1 were having brooms, soap and buckets that they might use as weapons.

249. According to the statements in the internal investigation therefore, the missiles hurled by inmates at officials consisted of brooms, soap, buckets, faeces and empty food tins. There is no single reference made to a kettle or an iron being thrown by inmates in any statement in the internal DCS investigation.

250. When the plaintiffs were cross examined, the list of missiles allegedly thrown at the officials grew to include electrical kettles, electrical irons, urine and two litres of bottle water. It was put to Zulu that when the cell door was opened and they entered the cell they were pelted with various objects. Amongst the objects being electrical kettles, electrical irons, brooms, buckets, human faeces and urine, two litre bottles of water and these were thrown at them by the inmates. Zulu denied this. It was put to Sithole when he testified that when the cell door was eventually opened the inmates started hurling various objects and missiles at the officials including buckets, urine, human faeces,

electric kettles, electric irons and brooms sticks. He said that it never happened and that it was a grave exaggeration and they never did that. He then wanted to know what they would then have used to make tea if they had hurled those items at the officials. On the question that they used two litre bottles filled with water he said that he wanted to correct one thing and that cool drink in two litre bottles were not sold at the Leeuwkop prison so where would the prisoners have found that. It was put to Qibi that upon entering cell B1 the officials were attacked with various items including brooms and broomsticks, electric irons, kettles and water or urine with faeces. He denied that.

251. If the alleged attack on DCS officials by the inmates of cell B1 in fact occurred, one would have expected there to be a consistent account of what was thrown at DCS officials by inmates. There is no consistent account in this regard with the missiles allegedly used changed over time and depending on who gave evidence. The missiles allegedly hurled by inmates at officials changed again when the DCS officials gave evidence in court. For example, Kunene testified that he went into cell B1 after all of the offenders had been removed. He was greeted by the smell of faeces, and he saw water spillage and both two litre and 500 ml bottles on the floor. He also saw three or four electric irons and three or four electric kettles. His reference to 500 ml bottles, which bottles had not been referred to before was clearly in response to Sithole's unchallenged evidence that two litre bottles were not available at Leeuwkop at the time of the incident. Notably it was never put to any of the plaintiffs that they hurled 500 ml bottles at the officials, or that any other inmate did so. Monare's evidence was that as he instructed the inmates to fola outside, items that included tins of food (including some tins containing cigarette butts) and water with faeces were thrown at him. He

also saw electric irons, empty and half full two litre bottles, empty buckets and damaged kettles.

252. Ms Khan testified that when she arrived at B unit on 10 August 2014, the inmates were throwing used toothbrushes, toothpaste tubes and pieces of sunlight soap, and that the whole courtyard was a mess. She testified that as Monare opened the cell door a bucket was thrown at him, although she did not know whether it contained water or urine. She did not mention that faeces was thrown at him. She denied seeing items such as kettles and irons. This was the first mention of toothbrushes and toothpaste being thrown by the inmates at the officials and the first time mention that it was thrown in the courtyard. This was never put to the plaintiffs, nor was this evidence given by any previous DCS witness. Neither Monare nor Kunene who were present during the entire operation testified that these things had happened. Ms Khan testified that the mess in the courtyard did not include kettles or irons that had been thrown at the officials. Ms Khan testified that the inmates were standing on top of the beds and throwing missiles through the windows into the courtyard. This was also the first mention of any missiles being thrown into the courtyard. This was new evidence that was not put to the plaintiffs. Her denial of the presence of kettles and irons is also significant.

253. Ms Khan's evidence that Zulu was among the last inmates to come out of the cell, and that he came running out of the cell with something in his hand, contradicts the evidence of both Kunene and Monare. This appears to have been a belated attempt to reconcile their two versions on this issue. This is now a third version about how Zulu exited the cell: that he came running out of the cell with something in his hand, but that he was one of the last offenders to exit the cell.

254. Moleleki's testimony was that the courtyard was "deurmekaar" and that he saw papers, coca-cola bottles, soap and toothpaste that had been thrown out of the window. He also noticed that Monare had faeces on his shirt. Moleleki sought to corroborate Ms Khan's evidence that the courtyard was a mess, and that the inmates had thrown soap and toothpaste into the courtyard. This was the first mention of bottles being thrown through the windows into the courtyard. It was also the first mention of papers being thrown. These allegations were never put to the plaintiffs during cross examination.

255. Makoka testified during cross examination that he saw papers and soap in the courtyard. This was a clear attempt by him to corroborate the evidence of the witnesses who testified before him. Ms Buthelezi's evidence was that when she arrived at B unit, the courtyard was filthy with papers and tubes of toothpaste. This was another attempt to corroborate the evidence of the witnesses who testified before her and this had not been put to the plaintiffs when they were cross examined.

256. The defendant's evidence about the missiles allegedly thrown by inmates of cell B on 10 August 2014 is riddled with contradictions and inconsistencies. If the inmates of cell B1 had thrown missiles at DCS officials on 10 August 2014, there would be a clear account from DCs officials about what they were. There was none.

257. Section 23 of the Act caters for disciplinary offences arising from attacks on officials, such as that alleged by the defendant's witnesses. An inmate commits a disciplinary infringement in terms of this provision if he or she is abusive to any person; or commits an assault; or in any manner defaces or damages any part of the correctional centre or any article therein or any state property. Following the events of 10 August 2014, the

plaintiffs were charged with contravening section 23(1)(o) of the Act, which prohibits the creation or participation in a disturbance or fomenting a mutiny or engaging in any other activity that is likely to jeopardise the security or order of a correctional centre. Kunene's evidence was that those charges arose from the blocking of the cell door. He said that assault in a correctional centre is a serious offence that may warrant detention in a single cell as a disciplinary sanction. However, during cross examination Kunene confirmed that the plaintiffs were not charged with violence, assault, damage to property or hurling any missiles at DCS officials. The only disciplinary steps taken consequent to the events of 10 August 2014 related to the blocking of the cell door.

258. Had the inmates of cell B1 in fact attacked the DCS, one would have expected that they would have been charged and disciplined for such an attack in terms of section 23(1)(h) which deals with an assault. It is a criminal offence for any person to assault another person unless that person was acting in self-defence. If the defendant's version is accepted as the truth one would then have expected that the perpetrators of the violence against them would have been charged criminally or internally and that did not happen.

259. The defendant bears the onus to have proven that the plaintiffs and inmates were the aggressors and had attacked them with an assortment of missiles which necessitated them taking appropriate action. The defendant had sought to create a picture of an immediate violent threat that would warrant the application of force in self-defence. The defendant feared that, absent such justification, its officials would be found to have used excessive force against the plaintiffs. The defendant's version evolved with the

testimony of each witness as the previous witness's evidence was successfully challenged in cross-examination, indicative of tailoring of the evidence.

260. The defendant had led the evidence of several witnesses about the events of the morning of 10 August 2014. None of the witnesses could single out any inmate including the plaintiffs who had thrown missiles at them. Phasha who was the only plaintiff who did not testify due to his diminished capacity was the only inmate singled out as having hurled insults at the officials. Even if that happened it would not be justification to assault the inmates because of that. The other four plaintiffs were not alleged to have engaged in any aggressive, unruly or insulting conduct. None of the defendant's witnesses' could account for how the plaintiffs sustained their injuries, other than the injury to Zulu's left lower limb, which Monare testified he may have inflicted. While the defendant's witnesses testified that calm was restored in section B after the inmates were removed from the cell, none of those witnesses could account for the period between the alleged restoration of calm and the plaintiffs' consultation with the prison nurses.

261. It is clear from this evidence that Ms Buthelezi sought to corroborate Ms Khan's and Moleleki's evidence about the state of the courtyard, her evidence on the timeline in section B manifestly contradicted that of Ms Khan: while Ms Khan's evidence was that the inmates had all been locked up again by the time she left B section at 10:30/10:45, her evidence was that when she arrived at 10:30 or 11:00, Ms Khan had already left and the inmates were still squatting against the wall. This too is entirely contradictory.

262. It is my finding therefore that the defendant has failed to prove on a balance of

probabilities that the plaintiffs and inmates had attacked the DCS officials or EST members and that they had to act in self-defence. The attack on them simply did not happen and I can find no conceivable justification for the conduct of the officials. The defendant's version about what happened on 10 August 2014 was riddled with inconsistencies and contradictions and is rejected as false.

263. The next question that this court must decide is how the plaintiffs had sustained their injuries and whether assaults had taken place outside the courtyard, in the office and in the shower inside the cell and why they had been assaulted.

264. It is clear from the defendant's version that some of the inmates including the plaintiffs sustained injuries during the operation when the DCS officials and EST officials had opened the cell door and had entered the cell. However, they denied the injuries pleaded by the plaintiffs save as is consistent with what is reflected in the medical reports compiled by Dr Dlamini and that any further assaults had taken place in the courtyard, the office and in the shower in the cell and that a dog had been set on Zulu.

265. The plaintiffs had pleaded and also testified that they were slapped, punched and kicked repeatedly; they were beaten with batons repeatedly; they were shocked with electric shocks repeatedly; Zulu was set upon by a dog; they were repeatedly forced to squat in painful positions for prolonged periods; they were repeatedly forced to do handstands for prolonged periods; and they were forcibly dragged across the ground. Zulu, Sithole and Smith were rendered unconscious for short periods of time during the assault and torture which lasted for several hours.

266. The plaintiffs testified further that, *inter alia*, the following further acts of assault and torture were perpetrated on them namely that several officials, including Monare, forced Smith, Qibi, Phasha and Sithole into a shower, and forcibly made them remove their clothes and placed them under running water while electrocuting them with electric shock shields; an official forcibly searched the anus of Smith in public and without any reasonable grounds; several officials, including Monare, forced Qibi to defecate in the shower in front a number of officials.

267. The plaintiff pleaded the names of eleven DCS officials who they contended committed those acts, together with other officials of the DCS whose identities were unknown to them and some EST officials. The known officials are Ms Buthelezi, Frans, Langa, Maharaj, Moleleki, Mohale, Mokoka, Monare, Nkosi, Nyampule and Rametsi.

268. It is clear from the plaintiff's evidence that a Maharaj had taken part in the assaults on them both in the office and outside the court yard. He was not called as a witness. A Manamela had also taken part in the assaults on them and had been using an electric shield. No cogent reasons were given about why they were not called and the only inference to be drawn is they were not going to support the defendant's version. Smith had also testified that whilst he was in the office and had passed out he was woken up by captain Mthimkhulu who had tapped him on his cheek and had asked him if he was okay. He told him that he was not okay and Mthimkhulu told him not to worry and that he should go to hospital and was accompanied by officer Mbatha. Captain Mthimkhulu was not called as a witness by the defendant and the only inference to be drawn was that he was not going to support their version of events. The same with officer Mbatha.

269. What emerges from the plaintiffs' various accounts of their assaults is that the DCS officials assaulted them in order to solicit information as to who was hiding or in possession of illicit cell phones and for having blocked the door of cell B1 and to punish them for that. The plaintiffs were the victims of an egregious and protracted series of assaults at the hands of multiple DCS and EST officials.

270. The plaintiffs' version about the events of 10 August 2014, and particularly their version that they were the victims of assault and not the aggressors, is supported by the views of the two forensic pathologists Dr Naidoo and Dr Rossouw, as recorded in their joint minute. The following points of agreement between the experts are particularly important and support the plaintiffs' version of the events:

270.1 All or most of the plaintiffs recorded injuries with the exception of the possible burn mark of Sithole are in the category of blunt force injuries.

270.2 The defensive postures in unrestrained non-handcuffed individuals are suggested in the injuries of the heads, exposed shoulders, outside of upper limbs and flanks.

270.3 On the question of whether falling to the ground would cause any of the injuries both experts agreed that they cannot exclude any falls which might have caused injuries to certain areas of the body, such as the knees or elbows, impacted by the ground upon falling, but that most or all of the other injuries were caused by direct infliction.

270.4 The injuries as reported by both the DCS and independent doctors are physical traumatic injuries generally of a severe nature for all plaintiffs.

270.5 The nature and characteristics of the injuries sustained by the plaintiffs are not in keeping with defensive actions as alleged in the defendant's plea but are strongly consistent with the incident dynamics as alleged by the plaintiffs.

270.6 The appearances are in keeping with those of assault-type injuries and neither incidental nor self-inflicted.

270.7 The nature and characteristics of the injuries sustained by the plaintiffs are not consistent with the use of minimum force that may be used in simple restraint or purely defensive actions against unarmed victims.

271. I am satisfied that there is no credible evidence that contradicts the plaintiffs' versions about how the assaults on them had taken place and how they had sustained the said injuries.

272. This brings me to the issue whether electric shock shields were used on the plaintiffs. The issue about whether electric shock shields were used by DCS and EST officials on 10 August 2014 was a highly contested issue during the trial. The defendant contended that officials only used two non-electric shields on that day and any electric shields that were at Leeuwkop on the day in question were not in working order. This version was disputed by the plaintiffs.

273. On 15 March 2021, the plaintiffs delivered a notice in terms of rules 35(3) and 36(6) calling upon the defendant to produce *inter alia,* examples of both electrified and non-electrified shields available for issue to those in the employ of the DCS and/or the EST at Leeuwkop during August 2014.

274. The inspection took place on 12 July 2021 and was attended by Duane van Wyk of Webber Wentzel who testified that upon arrival at the shield inspection he was advised that the shields to be inspected had been brought from another correctional centre because the electric shields at Leeuwkop were not working since 2010. He requested that the shields from the Leeuwkop armoury be brought in, even if they were not working, as he wished to inspect those shields. The officials then brought in two electric shields from the Leeuwkop armoury. When he inspected one of the shields brought in from the Leeuwkop armoury he was able to turn the shield on and the letter on the motor unit came on to confirm that the shield was on. Mr Mogano who attended the shield inspection together with Ms Khan confirmed to van Wyk that the shield was working but that it did not have sufficient charge on that day to make a sound. Mogano went to fetch the charger but could not charge the shield because the charger was not working. Van Wyk's evidence that he switched the electric shield on in the presence of Mogano was not challenged in cross examination. Moreover, Ms Khan confirmed in cross examination that van Wyk had switched on one of the shields from the Leeuwkop armoury which meant that the shield was working.

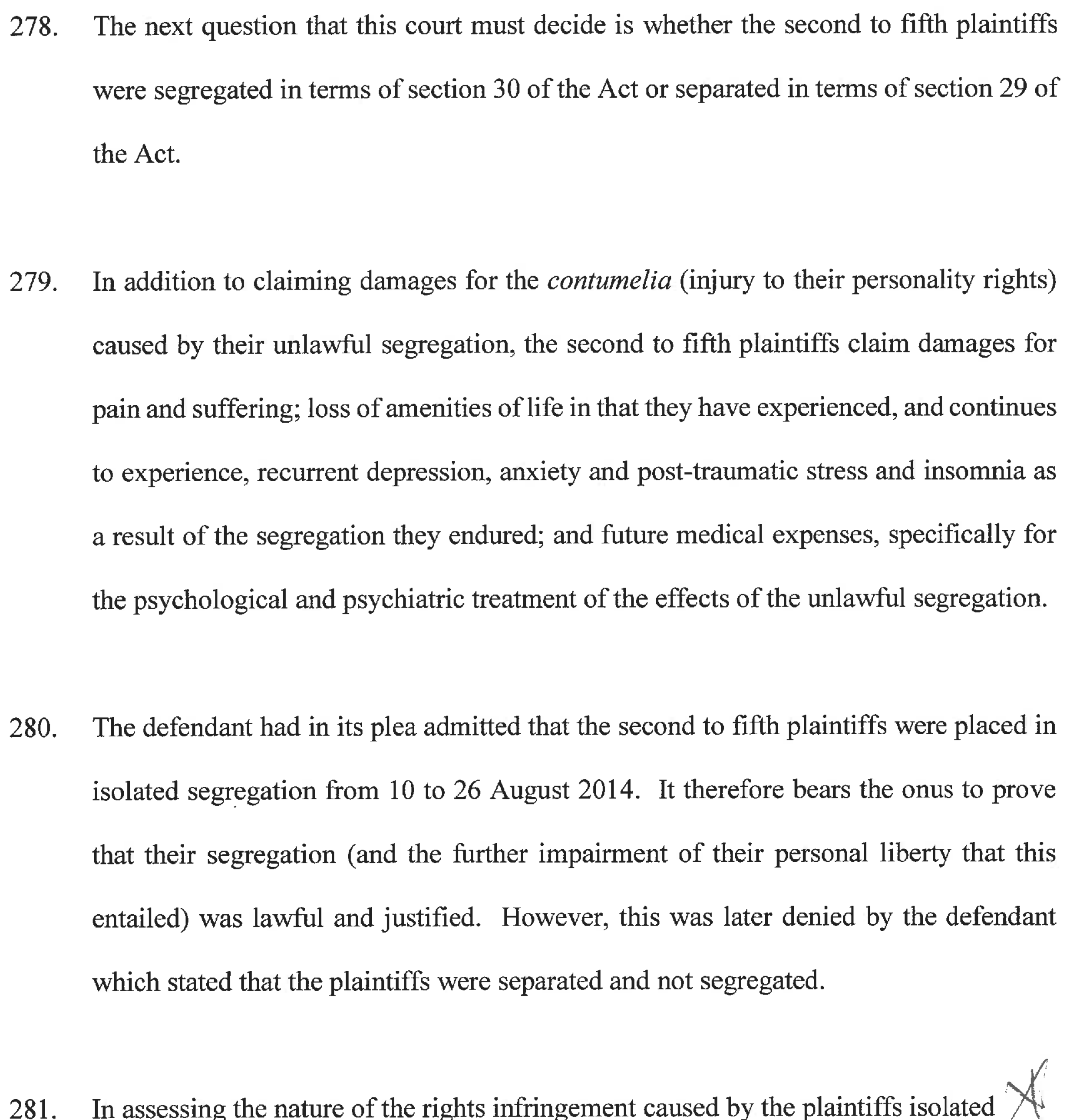
275. The defendant's denial that there were electric shields that there both available and in working condition on 10 August 2014 was contradicted in that the shields produced by the defendant at the shield inspection on 12 July 2021 included functional electric Leeuwkop armoury. The defendant's denial of the electric shields being used on 10 August 2014 could easily have been corroborated by the shield register, a copy of which was produced in respect of a request for further and better discovery. Upon receipt of a copy of the shield register the plaintiffs suspected that it had been tampered with, in particular that the register had been completed in single spacing. It indicated that in

September 2011, the electric shields were issued to Kunene. The following line on the shield is blank. In the line that follows, the register records that twelve electric shields were taken from the inventory on 16 September 2014. Had there been an electric shields issued on 10 August 2014, this would have appeared in the blank line between the entry for 20 September 2011 and 16 September 2014.

276. To satisfy themselves that the entry for 10 August 2014 had in fact not been deleted, the plaintiffs requested in 2019 that the defendant provide the original shield register which was never produced. When asked about the failure to produce the original shield register Monare testified that to the best of his recollection he had a shield register, the original and the shield because there was also a request for an electrified and non-electrified shield plus a tonfa. He brought them to court and when advocate Mtukushe was informing him that the shield register was not available, he said that to the best of his recollection it was a possibility that he might have returned it to the centre. Advocate Mtukushe spoke to him that morning and he had spoken with the armoury controller to ask them to please locate the shield register since it was needed in court and they had promised him that they would look for it and once they got it they would bring it to court. If it was not brought, he would personally ensure that it was brought to court. Langa the armoury controller testified and his evidence was that after he had given Monare the shield register for copies to be made, it was never returned to him. He said that he had not been asked in the past month where the original shield register might be.

277. The defendant has failed to provide evidence to contradict the evidence that the record of the electric shield issued to DCS officials on 10 August 2014 was tampered with.

These facts taken together with the plaintiff's evidence establishes that there were in fact functional electric shields available for use on 10 August 2014 and they were used by DCS officials in their assault and torture of the plaintiffs. The evidence led before this court was that Maharaj was in possession of an electric shield but he was not called as a witness. Manamela too was using an electric shield and he too was not called as a witness.



278. The next question that this court must decide is whether the second to fifth plaintiffs were segregated in terms of section 30 of the Act or separated in terms of section 29 of the Act.

279. In addition to claiming damages for the *contumelia* (injury to their personality rights) caused by their unlawful segregation, the second to fifth plaintiffs claim damages for pain and suffering; loss of amenities of life in that they have experienced, and continues to experience, recurrent depression, anxiety and post-traumatic stress and insomnia as a result of the segregation they endured; and future medical expenses, specifically for the psychological and psychiatric treatment of the effects of the unlawful segregation.

280. The defendant had in its plea admitted that the second to fifth plaintiffs were placed in isolated segregation from 10 to 26 August 2014. It therefore bears the onus to prove that their segregation (and the further impairment of their personal liberty that this entailed) was lawful and justified. However, this was later denied by the defendant which stated that the plaintiffs were separated and not segregated.

281. In assessing the nature of the rights infringement caused by the plaintiffs isolated

segregation and whether it amounts to torture, this court is enjoined to consider the cumulative effects of the conditions. This would include the duration of the segregation, the conditions of the plaintiffs' confinement, the lack of amenities in the single cells and the lack of timely and appropriate medical treatment.

282. It is recognised in international law and in foreign courts that segregation and the denial and access to adequate medical care can amount to torture. For instance:

282.1 In *Onoufriou v Cyprus*, ECHR, 2010, Application No. 24407/04 at paragraph 68, the European Court of Human Rights concluded at paragraph 80 that "the stringent custodial regime to which the applicant was subjected during his period in solitary confinement, including the prohibition on visits and the material conditions in which he was detained, caused him suffering clearly exceeding the unavoidable level inherent in detention. His exposure to these conditions for a period of 47 days amounted to degrading treatment contrary to Article 3 of the Convention."

282.2 In *Ilhan v Turkey,* Grand Chamber, no. 22277/93, para 87, ECHR 2000-VII, the European Court on Human Rights found that the lack of appropriate and timely medical care amounted to torture: *"Having regard to the severity of the ill-treatment suffered by Abdullatif Ilhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture."*

282.3 In *Campos v Peru,* no- 577/1994, para 8.7, judgment of 9 January 1998, the United Nations Human Rights Committee expressed serious concern about the fact that "*Mr Polay Campos continues to be kept in solitary confinement in a*

cell measuring two metres by two, and that apart from his daily recreation, he cannot see the light of day for more than 10 minutes a day." The Committee found those conditions of isolation to violate both article 7 and article 10 of the International Covenant on Civil and Political Rights.

282.4 The Inter-American Court of Human Rights has held that prolonged solitary confinement constitutes a form of cruel, inhuman or degrading treatment prohibited under article 5 of the American Convention on Human Rights.

282.5 In a UN Special Rapporteur on Torture, Report on Solitary confinement submitted to the General Assembly on 5 August 2011, UN Document Number A66/268 on Torture and other cruel, inhuman or degrading treatment or punishment, addressed solitary confinement as a form of torture and cruel, inhuman or degrading treatment or punishment, the Special Rapporteur, Mr Juan E Mendez reported as follows:

> *"70 Given its severe adverse health effects, the use of solitary confinement itself can amount to acts prohibited by article 7 of the International Covenant on Civil and Political Rights, torture as defined in article 1 of the Convention against Torture or cruel, inhuman or degrading punishment as defined in article 16 of the convention.*
>
> *71. The assessment of whether solitary confinement amounts to torture and other cruel, inhuman or degrading treatment or punishment should take into consideration all relevant circumstances on a case-by-case basis. These circumstances include the purpose of the application of solitary confinement, the conditions, length and effects of the treatment and, of course, the subjective conditions of each victim that make him or her more or less vulnerable to those effects...*
>
> *72. Solitary confinement, when used for the purpose of punishment, cannot be justified for any reason, precisely because it imposes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour and thus constitutes an act defined in article 1 or article 16 of the Convention against Torture, and a breach of article 7 of the International Covenant on Civil and Political Rights. This applies as well as to situations in which solitary confinement is imposed as a result of a breach of prison discipline, as long as the pain and suffering experience by the victim reaches the necessary severity.*

> 74. *Where the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals who are subjected to the confinement, the conditions of solitary confinement amount to torture or to cruel and inhuman treatment as defined in articles 1 and 16 of the Convention, and constitute a breach of article 7 of the Covenant.*
>
> 76. *Long periods of isolation do not aid the rehabilitation or re-socialisation of detainees (E/CN.4/2006/6/Add.4, para.48). The adverse acute and latent psychological and physiological effects of prolonged solitary confinement constitute severe mental pain or suffering. Thus the Special Rapporteur concurs with the position taken by the Committee against Torture in its General Comment No 20 that prolonged solitary confinement amounts to acts prohibited by article 7 of the Covenant, and consequently to an act as defined in article 1 of article 16 of the Convention. For these reasons, the Special Rapporteur reiterates that in his view, any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or treatment or punishment, depending on the circumstances. He calls on the international community to agree to such a standard and to impose an absolute prohibition on solitary confinement exceeding 15 consecutive days."*

283. It is common cause that Zulu, Qibi, Phasha and Sithole were placed in single sells following the events of 10 August 20114. Section 30(1)(d) of the Act permits the segregation of inmates for a period of time, including their detention in single cells, where they display violence or are threatened with violence. Had any of the plaintiffs displayed violent or aggressive behaviour on 10 August 2014 it would have been open to DCS officials to segregate them in terms of that section. Kunene expressly denied, however, that the placement of the second to fifth plaintiffs in single cells arose from any display or threat of violence.

284. The plaintiffs in their particulars of claim had pleaded that the second to fifth plaintiffs were segregated. The defendant in its plea as well as amended plea admitted that they were segregated and pleaded as follows:

"The Defendant pleads that on 10 August 2014 DCS officials including Mr Mohale, acting in the scope of their employment and being authorised to do so, placed the Second to Fifth Plaintiffs in segregation."

285. However, the defendant in conflict with its plea and midway through the trial his witnesses testified that the second to fifth plaintiffs had not been segregated following the events of 10 August 2014 in terms of section 30 of the Act but had merely been separated in terms of section 29 of the Act.

286. Section 29 of the Act is entitled Security Classification and provides as follows:

"Security classification is determined by the extent to which an inmate presents a security risk and so as to determine the correctional centre or part of a correctional centre in which he or she is to be detained."

287. The defendant also sought to rely on Standing Order 7 for its entitlement to separate the second to fifth plaintiffs. The order provides in relevant part as follows:

"7.1.2 Prisoners of different security classification categories must be kept separate, in order to effectuate and maintain control over prisoners, prisoners need to be detained in prisons suitable for their security classifications. Provincial Commissioners, in conjunction with Area Managers and Heads of Prisons must identify specific prisons/sections of prisons suitable for the incarceration of the various security classification of prisoners.

7.1.3 In addition, prisoners must be detained separately in such a manner that conflict/intimidation influencing is restricted to the absolute minimum as far as possible. In other words, irreconcilable persons must as far as possible be detained separately from one another."

288. The defendant had however admitted, prior to the commencement of the trial, in response to a request for formal admissions, that Mohale had approved applications for the segregation of the second to fifth plaintiffs. It did so in the following terms:

"On 10 August Mr Mohale approved applications made by a DCS official for the segregation (detention in a single cell of the second, third, fourth and fifth plaintiffs."

289. The defendant also admitted in response to a request by the plaintiffs for formal admissions, that section 30(5) of the Act was applicable to the segregation of the plaintiffs. It did so in the following terms:

"On 18 August 2014, Dr Dlamini conducted a medical examination of the second, third, fourth and fifth plaintiffs for the purposes of determining their fitness for continued segregation (beyond 7 days) as required by section 30(5) of the Correctional Services Act."

290. In other pre-trial procedures, notably discovery, the defendant did not deny that he had acted in terms of section 30 of the Act when placing the plaintiffs in single cells and in fact impliedly admitted it. On 15 May 2019, the plaintiffs had filed a request for further and better discovery in terms of which they requested any and all records of the visits made by DCS official and by the Head of Centre to the second to fifth plaintiffs held in segregation as required in terms of section 30(2)(a)(i) of the Act; records of daily medical assessments of the second to fifth plaintiffs while in segregation as required in terms of section 30(2)(a)(ii) of the Act; and reports and the approvals required for the extension of the second to fifth plaintiffs' beyond 7 days, as required under section 30(5) and 30(6) of the Act.

291. The defendant's response to the above requests was not a disavowal that he had acted in terms of section 30 of the Act, rendering those requirements inapplicable. On the contrary, the defendant either provided the documentation requested (in the case of medical records), or stated that it was searching for it.

292. The defendant had also reported the segregation of the plaintiffs to the Judicial Inspectorate for Correctional Services as required by section 30(6) of the Act. In cross examination, neither Kunene nor Mohale were able to explain why the plaintiffs'

segregation had been reported in terms of section 30(6) of the Act if they had not been acting in terms of section 30.

293. Mohale in his correspondence with Lawyers for Human Rights during August 2014 confirmed that the second to fifth plaintiffs had been segregated in terms of section 30 of the Act. On 18 August 2014, Ms Clare Ballard of Lawyers for Human Rights sent correspondence to Mohale requesting reasons for the extension of the plaintiff's segregation in terms of section 30(5) of the Act. On 20 August 2014, Mohale responded. His correspondence was entitled continued segregation of inmates. Firstly, he corrected Ms Ballard's misapprehension that the first plaintiff had been segregated but confirmed that the second to fifth plaintiffs had been segregated and that their segregation had been extended. He further confirmed that his correspondence stated that on 19 August 2014 they were referred to the doctor and a nurse and that it was certified that the extension of the segregation was desirable. He conceded that this was required in terms of section 30(5) of the Act. He claimed that the use of the word segregation in his letter was a typing error. Nowhere in his correspondence did Mohale state that Ms Ballard was labouring under a misapprehension that the plaintiffs had been segregated in terms of section 30 of the Act and/or clarify that the correct position was that the plaintiffs had merely been separated in terms of section 29 of the Act. Under cross examination he was unable to explain the content of the correspondence in the light of his claim that he had not been acting in terms of section 30 of the Act.

294. Quite apart from the facts however, the defendant's claim to have separated the plaintiffs outside of the ambit of section 30 of the act is unsustainable in law. It is clear from the Act that once an inmate is detained in isolation in a single cell (other than

normal accommodation in a single cell as contemplated in section 7(2)(e) which does not apply here) the strict requirements of section 30 kicks in. The requirements of section 30 are necessary and strict precisely because the limitations of rights and inherent dangers that accompany isolated segregation. Kunene conceded this in cross examination. There is simply no escape from the requirements of section 30 once an inmate is placed in isolated segregation and it is accordingly against the requirements of section 30 that the defendant's detention of the plaintiffs in single cells need to be judged.

295. Section 30(1) of the Act provides for seven permissible grounds on which an inmate may be segregated, these being at the request of an inmate; to give effect to the penalty of the restriction of the amenities imposed in terms of section 24(3)(c); or (5)(c) or 5(d) to the extent necessary to achieve this objective; if the segregation is prescribed by the correctional medical practitioner on medical grounds; when an inmate displays violence or is threatened by violence; if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape; and if at the request of SAPS, the Head of Centre considers it in the interests of the administration of justice.

296. For the defendant therefore to have complied with section 30(1) of the Act when segregating the plaintiffs, it had to be done so for one of the reasons as set out above.

297. Kunene was the DCS official responsible for applying for the segregation of the second to fifth plaintiffs. Mohale as the Head of Centre, was the official responsible for granting the applications for segregation. Both Kunene and Mohale confirmed in their

evidence that the plaintiffs had not been segregated in terms of section 30(1)(a), (b), (c), (d), (e) or (f) the Act.

298. Section 30(2)(a)(i) of the Act provides that an inmate who is segregated for any reason (save for when that inmate requests segregation if his own accord) must be visited by a correctional official at least once every four hours and by the Head of Correctional Centre at least once a day. Zulu had admitted to receiving visits from Mohale. However, he testified that Mohale used the visits to threaten him and told him that in prison he only has the right to life, but even that right could be taken away. Sithole and Qibi testified that they received intermittent visits from Mohale while they were in the single cells. There was no evidence that the plaintiffs were visited by a correctional official at least once every four hours as required by the subsection.

299. Section 30(2)(a)(ii) of the Act provides that an inmate who is segregated for any reason (save for when the inmate requests segregation of his own accord) must have his or her health assessed by a registered nurse, psychological or correctional medical practitioner at least once a day. Qibi and Sithole testified that they were not seen by a nurse, doctor or psychologist once a day while they were segregated in the single cells. Zulu could not recall if he was seen by a nurse at any single stage during segregation but confirmed that he was not seen by a nurse every day.

300. Dr Dlamini's evidence on this point was problematic and showed the defendant's disregard for the requirement of section 30(2)(a)(ii) of the Act. When asked if he had seen Zulu in the single cells to check his blood pressure (given that he suffered from hypertension) he said that those that are on segregation were visited by the nurses as far

as he knows. It is the nurses that go there. He never used to go to single cell isolation and if there was a problem with the patient the patient should be brought to the consulting room. About whether the nurses had indeed visited the plaintiffs every day as required, Dr Dlamini knew nothing about it and said that he never visited the area and as to how frequently the nurses were doing visitation he did not know about that.

301. Nurse Sodi confirmed that the nurses are required to visit the offenders in the single cells every day. They take turns to visit the single cell in that regard. She could however provide no evidence that she or any other nurse had in fact visited the plaintiffs in August 2014. Nurse Mafora could not remember if she had visited the plaintiffs while they were in single cells. However, she testified that had she or any other nurse visited the plaintiffs as required in terms of section 30(2)(a)(ii), the visits would have been recorded in the single cell journal. The single cell journal was not provided by the defendant to substantiate compliance with the Act. Nurse Nkatingi provided no evidence to suggest that the defendant complied with section 30(2)(a)(ii) of the Act.

302. Goso testified that neither Dr Dlamini nor the nurses visited the plaintiffs whilst they were in the single cells. He testified that the failure of medical practitioners to see inmates in single cells was normal practice at Leeuwkop. The practice at Leeuwkop was that inmates in the single cells would only be seen by a nurse or medical practitioner if they had a specific complaint.

303. It is clear from the evidence led that the defendant had failed to comply with the provisions of section 30(2)(a)(ii) of the Act insofar as the plaintiffs were concerned.

304. Sections 30(4) and 30(5) of the Act states that:

"Segregation in terms of subsection (1)(c) to (f) may only be enforced for the minimum period that is necessary and this period may not, subject to the provisions of section (5), exceed seven days.

If the Head of Correctional centre believes that it is necessary to extend the period of segregation in terms of subsection (1)(c) to (f) and if the correctional medical practitioner or psychologist certifies that such an extension would not be harmful to the health of the inmate, he or she may, with the permission of the National Commissioner, extend this period for a period not exceeding 30 days."

305. The provisions of section 30(5) of the Act must be complied with should segregation of an inmate exceed seven days. The second to fifth plaintiffs were segregated for 16 days. In terms of the provisions of section 30(5) of the Act a correctional medical practitioner or psychologist was required to declare that their continued segregation would not be harmful to their health, and Mohale was required to obtain the permission of the National Commissioner to extend the segregation of the plaintiffs. Both Kunene and Mohale confirmed that they knew about the aforesaid requirements.

306. It is clear from the evidence led that the aforesaid requirements were not complied with in that no medical practitioner or a psychologists declared the plaintiffs fit for an extended segregation. Dr Dlamini testified that he was aware that for inmates to be placed in single cells for an extended period, they needed to be declared fit for segregation by a medical practitioner. However, he had sought to examine Zulu, Sithole, Phasha and Qibi on 18 August 2014 for the sole purpose of following up on their injuries and not for purpose of declaring them fit for an extended segregation. He had no recollection of conducting a medical examination on them for the purpose of determining their fitness for an extended segregation. Had he assessed the relevant

plaintiffs for purposes of determining their fitness for extended segregation, there would be paperwork to prove it and he was not aware of such paperwork.

307. It is also clear from the evidence led that Mohale did not obtain the permission of the National Commissioner to extend the period of segregation for the plaintiffs. Mohale gave evidence that for the segregation to be extended he had to engage the higher authority. He contended that the permission had to be sought from the National Commissioner via the office of the Area Commissioner. He maintained that the plaintiffs had been separated and not segregated and that it had accordingly not been necessary for him to obtain that permission.

308. The defendant's claim that it separated the second to fifth plaintiffs in terms of section 29 of the Act was disingenuous and a belated attempt to escape the consequences of its failure to have complied with the provisions of section 30 which regulate the segregation of inmates. There new version is rejected since I am satisfied that the evidence has established that the defendant acted in terms of section 30 of the Act when it had placed the aforesaid said plaintiffs in a single cell. Section 30 is the only provision of the Act in terms of which isolated detention in single cells is permissible.

309. It is not legally permissible to detain inmates in isolation in single cells in terms of any provision of the Act other than section 30 of the Act. It follows that the segregation of the second to fifth plaintiffs was unlawful and flouted the requirements of section 30 of the Act as indicated above.

310. The second to fifth plaintiffs were admitted to the single cells on 10 August 2014 as

testified to by them. Goso for the defendant testified that he was on duty from 10 to 14 August 2014 and that the admission book had indicated the date of admission as 11 August 2014 but they were admitted on 10 August 2014 and the entry made on the admission book was a human error on his part.

311. The next question that needs to be determined is about the conditions of the single cells and whether the plaintiffs wore ankle restraints whilst they were so segregated for 23 hours a day.

312. The second to fifth plaintiffs testified that the conditions of their segregation were such that it constituted an aggression on their person or an assault and violated their rights to dignity, liberty and bodily and psychological integrity. The material conditions of the segregation of the second to fifth plaintiffs according to them were that they were cuffed at their feet with ankle shackles, denied adequate medical care and access to treatment and denied adequate and sufficient bedding.

313. It is fairly trite that any unlawful and unjustified imposition of mechanical restraints, such as ankle shackles, is a clear deprivation of personal liberty. It will also be recognised as an aggression on the person and a form of an assault. The denial of access to medical treatment and the denial of adequate bedding will also be clear violations of the rights to human dignity, bodily integrity, and is demonstrative of a disregard for the basic human needs of the incarcerated persons and for their suffering and discomfort.

314. The second to fifth plaintiffs contended that their unlawful and inhumane segregation constituted not merely assault, but torture as defined in the Torture Act. This is so

because it caused them severe pain and suffering and was committed with intent by the responsible DCS officials for a recognised purpose i.e. to obtain information or a confession, or to punish or intimidate or coerce them.

315. The evidence of Zulu, Qibi and Sithole about the conditions of the single cells was put to Mohale, Goso and Thokolo. Mohale and Goso denied their claims that the single cells were in an inhumane condition with no bedding, a wet floor and blocked sinks and toilets. Mohale further denied giving an instruction for bedding to be removed from the single cells. Goso conceded that had Mohale instructed him to remove the beds from the single cells, he would have complied with his instruction, this despite the fact that he was well aware of the legal requirements that ought to be adhered to in so far as the conditions of the single cells are concerned.

316. Mohale and Thokolo testified that the inmates get sheets, blankets and a pillow when they are placed in the single cells. This was in direct contradiction to Goso's evidence who stated that an inmate would not be given a sheet when he is separated in terms of section 29 when there's a security threat included there, because for his safety and the safety of the property of the State, sheets can be used to hang themselves, so it is risky to put such a person in a single cell together with sheets. Goso explained that the only person who was allowed to approve the provision of sheets to inmates in single cells was the medical doctor. When the inconsistency in his evidence was put to him, he backtracked, stating that the prison doctor or Head of Prison could approve the provision of sheets on application by the relevant inmate.

317. Mohale denied the allegations by Zulu, Sithole and Qibi that they were restrained at all

while they were in segregation. On the other hand, Goso testified that the inmates were restrained during their hour of exercise with ankle cuffs. It is not clear under whose instructions Goso was acting when he decided to restrain the inmates, as Mohale was adamant that the inmates were approved for detention in the single cells without restraint.

318. Thokolo testified that he visited the single cells on 10 and 15 August 2014. He did not engage with the second to fifth plaintiffs when he visited on 15 August 2014. However, Goso testified that he was on duty at the single cells for the period 10 to 14 August 2014 and during which period he had not seen Thokolo visit the inmates.

319. A further inconsistency between the evidence of Goso and Thokolo was the manner in which Thokolo checked up on the inmates on 10 August 2014. Thokolo gave evidence that when he visited the relevant plaintiffs held in the single cells the doors were closed and he peeked through the doors explaining that there is an opening in the door that allows one to observe the inside of the single cell. Goso on the other hand, gave evidence that the door to the single cell is kept open and can be opened or closed by the inmate on the cell (or the official). He explained that the door is not locked so as to allow him to conduct patrolling duties of the cells.

320. Sithole testified that Thokolo only visited him once on 15 August 2014. His evidence was not challenged during cross examination. The fact that he was not challenged on the assertion that Thokolo had only visited him once was put to Thokolo and he could not explain that.

321. It was never put to Zulu that Thokolo had visited the single cells on 10 August 2014. Zulu testified that Thokolo visited the single cells on 15 August 2014 and gave the following evidence about his interaction with Thokolo on that day. Zulu had asked him why the EST had to torture or assault them and he said that he had no idea because he was off duty that weekend but at the same time said that he should have called the army. Thokolo could not explain how Zulu knew that he was off duty that weekend. Zulu's contention that he had conversed with Thokolo on 15 August 2014 was not challenged during cross examination or that he had indicated that he would have called the army.

322. Smith testified that on 15 August 2014 he complained to Thokolo about the medical examination conducted by Dr Dlamini after the assault on 10 August 2014; he raised unhappiness about the illegal demotion of the inmates of cell B1; and he was told by Thokolo to appeal his demotion. Thokolo could only offer a bare denial of ever having conversed with Smith. However, that bare denial was not put to Smith during cross examination. Moreover, this denial holds no water given the fact that after his discussion with Thokolo, the inmates in cell B1 wrote a letter that recorded his discussion with Smith and corroborated Smith's version that he had been advised by Thokolo to appeal the demotion. Smith's evidence was not challenged during cross examination and Thokolo could not explain why that was the case. Qibi testified that he saw Thokolo on 15 August 2014 and complained that he was in a lot of pain and detested the conditions of the single cells. Qibi was not challenged during cross examination on this evidence.

323. It was not put to any of the plaintiffs during cross examination that Thokolo visited the single cells on 10 August 2014. It is inconceivable that this would not have been done

if that visit had in fact taken place. Thokolo's evidence in relation to his visit of the single cells on 10 August 2014 was also inherently contradictory. He testified that he made an extra effort to visit the single cells on 10 August 2014 when he was not on duty to determine whether anything abnormal had transpired during the events of 10 August 2014. However, upon his arrival he failed to ask the plaintiffs if they were injured; spent no more than a minute inspecting the cells in which the plaintiffs were held and did not see any injuries on them.

324. The second to fifth plaintiffs led corroboratory evidence that was largely unchallenged in so far as their segregation and the state of the cells were concerned. The defendant's evidence was however uncorroborated and inconsistent. Moreover, the evidence of Thokolo that he visited the single cells on 10 August 2014; and that he did not engage the plaintiffs when he visited the single cells on 15 August 2014 was patently false and is rejected as such.

325. I am satisfied that the plaintiffs have established with credible evidence that the conditions under which they were kept in isolation was inhumane. They had been cuffed for 23 hours a day and their cells were wet. The beds had been removed and were only returned at a later stage.

326. The next issue that needs to be determined is the question of the ongoing injuries of the plaintiffs and the issue of severity. This is to examine the impact of the assault and torture on the plaintiffs and in particular the severity thereof.

327. In support of their contentions that they suffered ongoing physical injuries as a consequence of the assault and torture, the plaintiffs relied on the evidence of Dr Khan. In opposing the plaintiffs' contentions in this regard, the defendant relied on the evidence of Professor Becker, a specialist surgeon.

328. Before I deal with the issue of severity of the injuries I need to deal with the medical evidence presented by the nursing staff and Dr Dlamini.

329. All three nurses gave similar, and in some respects identical evidence, which raises question marks about whether or not they had been coached. It is clear from their evidence that there was a failure on their part to have properly examined the plaintiffs or to have treated their injuries. They conceded that they had no independent recollection of their consultations with the plaintiffs and that they were relying on what was contained in the medical continuation sheets. As a result, none of the nurses were able to refute the plaintiffs' versions pertaining to what had actually transpired at each consultation, in particular, this meant that nurse Nkatingi could not refute Sithole's allegation that she did not in fact examine him. Nurse Mafora could not refute Qibi' s allegation that she did not in fact examine him. Nurse Sodi could not refute Smith's and Zulu's allegations that they were not examined by her.

330. Much of the testimony of the nurses were similar in content and certain identical phrases were used by all three of them. Their clinical findings had stark incongruence with Dr Dlamini's clinical findings made within 24 hours of theirs, compelling the conclusion that there was a failure to properly examine the plaintiffs honestly and record their injuries. Their explanations for these incongruences were largely identical.

They testified that they had concluded that each plaintiff had sustained minor soft tissue injuries. It is clear that their testimonies were tailored for the purposes of deflecting the plaintiffs' contentions that their injuries were serious and required hospitalisation. The disparities between the nurses' clinical findings and the clinical findings made by Dr Dlamini less than 24 hours later were also glaring.

331. There were also glaring disparities in respect of the clinical findings of the nurses compared with those of the independent doctors. When questioned in this regard, nurse Nkatingi could not account for eight injuries that she had failed to record in respect of Sithole, which had been recorded by Dr van Zyl. She maintained that she had recorded all Sithole' s injuries.

332. Nurse Mafora could provide no explanation for how or why Dr van Zyl had observed and recorded significantly more injures on Qibi's body than she had. When pressed for an explanation she said that she cannot speculate on the doctor's findings because the day she saw the patient all those other injuries were not there. Nurse Sodi could not account why Dr van Zyl had observed and recorded more injuries on Zulu's body than she had. When asked for an explanation she used the identical phrase as nurse Mafora that she would not speculate on the doctor's findings. Nurse Sodi provided the same response in respect of the injuries observed and recorded by Dr Khan on Smith's body namely that she cannot speculate on Dr Khan's findings.

333. The nurses' testimony in respect of the adequacy of the treatment they prescribed for the plaintiffs was also problematic. Despite having Sithole's evidence put to nurse Nkatingi regarding the extent of pain he was in on 10 August 2014 she maintained that

200mg of Brufen anti-inflammatories and rubbing ointment was sufficient. She sought to justify this on the basis that Dr Dlamini had also failed to prescribe any further treatment.

334. Despite having Qibi's evidence put to her regarding the extent of pain he was in on 10 August 2014, nurse Mafora maintained that 200mg of Brufen, which she classified as a pain killer, had been sufficient.

335. Nurse Sodi was taken through the various courses of treatment and care Smith had received since sustaining his injuries on 10 August 2014 and questioned regarding the sufficiency of having only prescribed two Panados, an arm sling and some rubbing ointment. Nurse Sodi justified this on the basis that Dr Dlamini had also failed to provide treatment.

336. It is clear from the evidence led that the nurses had failed to examine and adequately record and treat the plaintiffs' injuries and this was an attempt to conceal the true nature and the extent of the plaintiffs' assault at the hands of the DCS officials on 10 August 2014.

337. The plaintiffs all testified that Dr Dlamini engaged in a superficial engagement with them, with no medical history being taken and no proper physical examination being performed. For example, when asked to describe his visit to Dr Dlamini's office, Zulu testified that when he got to the doctor he did not want to examine him physically and had just looked at him across the desk and he even told him that he must write the report and he said that he could not tell him how to do his job and he then left his office.

338. When asked how Dr Dlamini had recorded the injuries on his J88 form, Zulu explained that he would tell him that there is an injury here and then he would tick and then he would tell him that there is an injury there and he would tick. He said that he believed that in his J88 form there were some injuries that he did not note down because he could not see them, and did not examine him.

339. In respect of Zulu, Dr van Zyl's medical findings were not merely uncontested, they were conceded by the defendant's counsel. This occurred during Zulu's re-examination on 6 November 2019 where the defendant's counsel conceded that her clinical findings were not challenged and were conceded.

340. As was the case with Dr van Zyl, the challenge to Dr Khan's evidence during cross examination was limited to his conclusions and opinions particularly in relation to the severity of his injuries were not challenged as being false or incorrect on any basis. His clinical findings in respect of Smith's injuries were not challenged as being false or incorrect on any basis. Like Dr van Zyl's clinical findings, Dr Khan's clinical findings therefore stand uncontested.

341. Dr van Zyl was challenged in cross examination in respect of her conclusions and opinions only. In particular, she was challenged on her conclusions on how the plaintiffs' injuries were sustained and on her opinion about the severity of the plaintiffs' injuries. She was however not challenged on her clinical findings in respect of the plaintiffs' injuries. In particular, it was not put to her that any of the clinical findings were false, exaggerated, erroneous or incorrect on any other basis.

342. The issue of severity of the plaintiffs' injuries sustained at the hands of the DCS officials was a highly contested issue during the trial. In an attempt to refute severity, the defendant went so far as to have its expert witness in respect of the plaintiffs' ongoing injuries, Professor Becker, opinion based on the Southampton Wound Grading System, that the physical injuries sustained by the plaintiffs on 10 August 2014 were minor.

343. It is trite that the Southampton Wound Grading System was developed to assess post-operative wounds following hernia operations. It was designed to grade the healing process with reference to the complications and infections that may arise in post-operative wounds, and the extent to which a post-operative surgical wound would heal spontaneously or complicate post-surgery. The Southampton Wound Grading cannot meaningfully or usefully be applied to the plaintiffs' injuries given that they exhibited not post-operative wounds, but blunt force trauma injuries.

344. Professor Becker conceded that the plaintiffs did not undergo any surgery on 10 August 2014; their bodies were not exposed to the risks attendant upon surgery; none of the plaintiffs had a sutured surgical wound or post-operative wound; the plaintiffs' wounds were of a completely different nature, namely blunt force trauma injuries; the plaintiffs were not exposed to the risks that accompany suturing of a surgical wound where the suture punctures the skin. He conceded that the risks are different because there are foreign bodies (stiches) going into the wound and that is a portal for entry of bacteria and that those risks do not exist in the case of blunt force trauma.

345. Moreover, it was pointed out in cross examination that it made for Professor Becker to apply a grading system that assesses for the presence of bruising and inflammation five years after the injuries were sustained, as there would self-evidently no longer be bruising or inflammation after this lapse of time. This irrationality was compounded by the fact that Professor Becker, by his own admission, did not have comprehensive information regarding the progression of the plaintiffs' injuries over the 5-year period. He conceded that if Smith needed sutures for the laceration to his mouth and if his mouth became infected as a consequence of that injury, then his injury should have been graded at level four; and Zulu's injuries should have been graded at a higher level than zero.

346. It is clear therefore that not only is the Southampton scoring system inapplicable in the circumstances of this matter, but Professor Becker also applied the system irrationally and incorrectly, rendering his assessments of the severity of the plaintiffs' injuries of no use to this court.

347. Dr Khan examined Smith for ongoing injuries in April 2019. Both Dr Khan and Professor Becker examined all of the plaintiffs during May 2019. At that stage, the experts agreed that many of the injuries sustained by the plaintiffs on 10 August 2014 were no longer visible due to healing. Dr Khan and Professor Becker's evidence of the plaintiffs ongoing injuries was accordingly confined to the residual effects of the injuries sustained on 10 August 2014.

348. Prof Becker sought to underplay this in his testimony, however contending that the agreement with Dr Khan that the plaintiffs needed to be referred to specialists did not

necessarily indicate his concurrence with Dr Khan that there was anything wrong with the plaintiffs. He testified that he agreed to the referrals in order to give the plaintiffs the benefit of doubt in the event that there was something wrong that he may have missed in his examinations. Importantly however he conceded that he could not rule out the complaints or injuries in respect of which referrals to specialists were considered clinically appropriate. He conceded further that he may have missed those in his examinations of the plaintiffs.

349. While Dr Khan could testify positively to his findings in relation to the plaintiffs'' ongoing injuries, Professor Becker could not state with certainty that those ongoing injuries did not exist. It follows from the professor's agreement that it was clinically appropriate to refer those injuries to specialists in the relevant fields, and he conceded that those ongoing injuries could not be ruled out.

350. I am satisfied that the severity of the plaintiffs' physical injuries has been established by the following:

350.1 The evidence of the plaintiffs and the independent doctors pertaining to the injuries themselves;

350.2 The concession by Dr Dlamini, in respect of at least three of the plaintiffs, that if they had sustained the injuries recorded by the independent doctors, they would have qualified as moderate to severe and would have warranted hospitalisation; and

350.3 The fact that all of the plaintiffs had ongoing physical injuries even if this was limited, to the injuries in respect of which both Dr Khan and Professor Becker agreed should be referred to appropriate specialists.

351. However, the plaintiffs did not suffer just physical injuries as a consequence of their assault and torture at the hands of DCS officials, they also suffered psychological injury as well. It has been established through Dr Taylor, the plaintiff's expert psychiatrist, that the plaintiffs contracted both PTSD and major depressive disorder as a consequence of their assault and torture at the hands of DCS officials. She has explained in her reports, that the plaintiffs' psychological injuries were brought about on by the cumulative effects of *inter alia*, the violent assaults on the plaintiffs which caused them to fear for their lives; their isolated segregation in inhumane conditions for an extended period of time and the failure to provide the plaintiffs with timely and adequate medical treatment.

352. I am satisfied that based on the evidence before me that it had been established that Smith contracted Major Depressive Disorder and severe PTSD with dissociative symptoms as a result of the events of 10 August 2014. Zulu contracted severe to extreme PTSD and Severe Major Depressive Disorder as a result of the events of 10 August 2014 and his subsequent detention in single cells. Qibi contracted Major Depressive Disorder and severe PTSD as a result of the events of 10 August 2014 and his subsequent detention in single cells. Phasha contracted PTSD as a result of the events of 10 August 2014 and his subsequent detention in single cells. Sithole contracted severe PTSD as a result of the events of 10 August 2014 and his subsequent detention in single cells.

CONCLUSION

353. It is rather sad and disturbing that some of the events that took place during the dark days of Apartheid continues to take place in our beloved country at correctional

facilities where some of the people in charge have learnt from their former masters about how to treat inmates who do not toe the line. It is also shocking that some officials would gang together to come up with a version in an attempt to mislead the courts about what really happened at their facility. It is rather disturbing that such conduct by officials occupying higher positions continues to carry on. This case is a typical case of mob justice that still plagues our country only that in this case the officials wanted and had applied mob justice against the plaintiffs. It is also rather sad that none of the officials who had witnessed the events and would be whistle blowers came to testify to court about what they had witnessed.

354. If I take into account the facts of this case the only conclusion that I can reach is that the allege attack by the inmates of cell B1 on DCS officials on 10 August 2014 was a figment of their imagination. Having been compelled to admit to using force against the plaintiffs and faced with the evidence of the injuries sustained by the plaintiffs, the defendant concocted a scene of violent and aggressive behaviour on the part of the inmates in an attempt to justify the conduct of its officials. The defendant made up its version as the case enfolded in court hence why some of the plaintiffs' evidence that they had led was not challenged during cross examination.

355. It is clear from the evidence led that following the search on 7 August 2014 when a cell phone and three sim cards were found, DCS officials punished the plaintiffs and inmates of cell B1 firstly by demoting them. They were stripped of their individual privileges namely their entitlements to buy from the prison shop, receive contact visits, use the public phone, their television set was removed from the cell and their exercise time was reduced to the minimum amount required by law, namely 1 hour per day.

356. Their collective demotion was affected without due process. In particular, none of the inmates of cell B1, including the plaintiffs, had been afforded a disciplinary hearing or found guilty of any transgression prior to being demoted. The collective demotion was unfair and unlawful. All the inmates of cell B1, including the plaintiffs, were collectively charged under section 23(1)(o) of the Act for creating or participating in a disturbance or fomenting a mutiny or engaging in any other activity that is likely to jeopardise the security or order of a correctional centre. The collective charge was in the circumstances inherently unfair. It was also irrational given the defendant's admission that no inmate of cell B1 had been violent or threatening on 7 August 2014 and that there had, as a matter of fact, been no threat to the order or security of the prison on 7 August 2014.

357. It was in response to those events and unfair actions of the DCS officials, imposed on the entire cell without due process, that Zulu wrote two letters of complaint, the first one to the Head of Centre, Mohale and the second one to the Area Commissioner, Thokolo. Mohale dismissed Zulu's letter as nonsense and tore it up. Zulu's complaints were not recorded in the complaints register and he was not permitted to use the phone to call a family member or a lawyer.

358. Before the assaults that took place on 10 August 2014, except for Phasha who had previously sustained an injury in a soccer match, none of the plaintiffs had any injuries on them. After the incident of 10 August 2014 they had injuries on them, which injuries were inflicted by officials of the DCS and EST. Like in the past, the prison nurses and doctors down played the injuries that the plaintiffs had suffered to appease their seniors and persons in authority. The plaintiffs corroborated each other and gave testimony

about how they had sustained their injuries. Their account was also supported by the expert forensic pathologists who had examined the available evidence, (including the defendant's forensic pathologist), as well as the doctors that examined the plaintiffs as well as their expert psychiatrist, Dr Taylor who testified that the plaintiffs PTSD and depression could only be explained by their assault and torture at the hands of DCS officials.

359. In assessing the nature of the rights infringements to which the plaintiffs were subjected too and whether it amounted to torture, I took into account the cumulative effects of the violations that the plaintiffs endured, including protracted and egregious assaults, humiliation, unlawful and inhumane segregation and the denial of timely and adequate medical treatment. The assaults that were inflicted on them rose to the level of torture as defined in the Torture Act. The pain and suffering that was inflicted was for a recognised purpose as described in the Torture Act and the pain and suffering caused was physical and also mentally severe. Those requirements were clearly established through their evidence which established that DCS officials and EST members assaulted them in order to solicit information about who was in possession of illicit cell phones and to solicit information about who had blocked the door in cell B1. They were also punished for that.

360. The defendant's version of what had happened inside the cell after the door had been unblocked was a pack of lies. The medical evidence of the injuries sustained by the plaintiffs and the clinical findings of the independent doctors on the physical injuries sustained by the plaintiffs on 10 August 2014 are uncontested and incontrovertible and

is accepted. The only reasonable conclusion that I can reach is that the plaintiffs sustained the injuries after they were ordered out of the cell and beaten in the process, and further assaults that took place in the courtyard, in the office and in the shower area in cell B1. They had sustained their injuries during the protracted assault and torture at the hands of DCS officials in the vicinity of the B Unit.

361. The assault of the plaintiffs did not end on 10 August 2014, but continued in respect of the second to fifth plaintiffs', when they were placed in isolated segregation unlawfully and in inhumane conditions for a period of 16 days. The defendant's claim that it did not segregate the plaintiffs in terms of section 30 of the Act but merely separated them in terms of section 29 of the Act is simply not true. The defendant made this claim in a desperate and belated attempt to escape the consequences of its failure to have complied with the provisions of section 30 of the Act.

362. The second to fifth plaintiffs were placed in isolated segregation in terms of section 30 of the Act and the defendant, on his own version, had failed to comply with the applicable statutory requirements. The defendant had no permissible legal basis to segregate the plaintiffs; failed to ensure that the plaintiffs received regular visits from correctional officials as required by the Act and failed to ensure that they received regular checks by medical personnel as required by the Act. The defendant also kept the plaintiffs in segregation in excess of the maximum period permitted by the Act in violation of the Act. The segregation of the second to fifth plaintiffs was plainly unlawful.

363. The segregation of the second to fifth plaintiffs was also inhumane. They were cuffed

at their feet with ankle shackles for 23 hours a day, denied adequate medical care and treatment and denied adequate and sufficient bedding. The plaintiffs gave detailed and corroborative evidence in this regard. Thokolo's claim to have visited the plaintiffs in segregation on 10 August 2014 was clearly false. So too was his denial that he engaged with the plaintiffs during his visit to the prison on 15 August 2014. His evidence is rejected and that of the plaintiffs is accepted.

364. I am satisfied that the plaintiffs have established on a balance of probabilities not just that the events of 10 August 2014 and the subsequent segregation of the second to fifth plaintiffs constituted an assault upon them but that it also amounted to torture. They have proven both claims A and B.

365. The defendant is 100% liable for the damages that the plaintiffs might prove.

366. There is no reason why costs should not follow the result which includes the employment of three counsel by the plaintiffs.

367. In the circumstances the following order is made:

367.1 The defendant is found to be 100% liable for the plaintiffs' damages arising from acts of assaults and torture as contemplated in the Prevention and Combating of Torture of Persons Act 13 of 2013.

367.2 The defendant is 100% liable for the following damages sustained by the plaintiffs:

367.2.1 In respect of the first plaintiff:

367.2.1.1 Future medical expenses;

367.2.1.2 Pain and suffering;

367.2.1.3 Violation of privacy;

367.2.1.4 Impairment of dignity, freedom and security of the person, and bodily and psychological integrity;

367.2.1.5 Loss of amenities of life; and

367.2.1.6 Past medical expenses constituting expenses of a general practitioner, radiology, chiropractic treatment, orthopaedic consultations and medication.

367.3.1 In respect of the second plaintiff:

367.3.1.1 Future medical expenses;

367.3.1.2 Pain and suffering;

367.3.1.3 Impairment of dignity, freedom and security of the person, liberty and bodily and psychological integrity; and

367.3.1.4 Loss of amenities of life.

367.4.1 In respect of the third plaintiff:

367.4.1.1 Future medical expenses;

367.4.1.2 Pain and suffering;

367.4.1.3 Violation of privacy;

367.4.1.4 Impairment of dignity, freedom and security of the person, liberty and bodily and psychological integrity; and

367.4.1.5 Loss of amenities of life.

367.5.1 In respect of the fourth plaintiff:

367.5.1.1 Future medical expenses;

367.5.1.2 Pain and suffering;

367.5.1.3 Violation of privacy;

367.5.1.4 Impairment of dignity, freedom and security of the person, liberty and bodily and psychological integrity; and

367.5.1.5 Loss of amenities of life.

367.6.1 In respect of the fifth plaintiff:

367.6.1.1 Future medical expenses;

367.6.1.2 Pain and suffering;

367.6.1.3 Violation of privacy;

367.6.1.4 Impairment of dignity, freedom and security of the person, liberty and bodily and psychological integrity; and

367.6.1.5 Loss of amenities of life.

367.7 The determination of the *quantum* of damages is postponed *sine die*.

367.8 The defendant is liable for the plaintiffs' costs, including the costs of three counsel.

FRANCIS J
HIGH COURT JUDGE

FOR PLAINTIFFS	:	S COWEN SC, H BARNES SC WITH J BLEAZARD, N STEYN, N KAKAZA, INSTRUCTED BY LAWYERS FOR HUMAN RIGHTS & WEBBER WENTZEL ATTORNEYS
FOR DEFENDANT	:	M MOERANE SC WITH L MTUKUSHE INSTRUCTED BY STATE ATTORNEY
FOR AMICUS CURIAE	:	G MARCUS SC WITH C MCCONNACHIE & N CHESI-BUTHELEZI INSTRUCTED BOWENS INC
DATE OF HEARING	:	28, 29, 30, 31 OCTOBER 2019; 1, 4, 5, 6, 7, 8, 11, 12, 13, 14 NOVEMBER 2019; 26, 27, 28, 29, 30 July 2020; 1, 2, 3, 4, 5, 8, 9, 11, 12 MARCH 2021; 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 JULY 2021 3, 4, 5, 6, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 31 AUGUST 2021; 1, 2,6, 8, 10 SEPTEMBER 2021; 11, 12, 13, 14, 19, 20, 25, 28, 29 APRIL2022; 3, 4, 5, 9, 11, 12, 16, 17, 18, 19, 20, 23, 25, 27 MAY 2022; 1, 2, 6, 7, 10, 13, 15 JUNE 2022; 2, 3, 19 AUGUST 2022.
DATE OF JUDGMENT	:	31 AUGUST 2023