

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 21639/2015**

In the matter between:

<b>LLEWELLYN SMITH</b>	First Plaintiff
<b>XOLANI ZULU</b>	Second Plaintiff
<b>BENSON QIBI</b>	Third Plaintiff
<b>ABEL PHASHA</b>	Fourth Plaintiff
<b>MTHOKOZISI SITHOLE</b>	Fifth Plaintiff

and

<b>MINISTER OF JUSTICE &amp; CORRECTIONAL SERVICES</b>	Defendant
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**PLAINTIFFS' HEADS OF ARGUMENT**

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## INTRODUCTION

*“A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner.”*

- 1 So stated the Supreme Court of Appeal in the case of *Lee v Minister of Correctional Services*.<sup>1</sup> This is a case in which officials of the state not only failed in their duty to see to the physical welfare of prison inmates but subjected those inmates to assault, so egregious that it rose to the level of torture.
  
- 2 The plaintiffs have brought two claims against 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”).
  - 2.1 Claim A arises from the assault and torture of the plaintiffs by DCS correctional services officials on 10 August 2014 in the vicinity of Cell B1 at Leeuwkop Maximum Correctional Centre (“Leeuwkop”). At the time, all the plaintiffs were being held as inmates at Leeuwkop.<sup>2</sup>

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<sup>1</sup> 2012 (3) SA 617 (SCA) at para 36.

<sup>2</sup> Exhibit G, Pleadings: Particulars of Claim, paras 9-17, pp 3-20.

2.2 Claim B arises from the 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.<sup>3</sup>

3 There is no dispute that the DCS officials who were on duty at Leeuwkop on 10 August 2014, and who committed the conduct that is the subject of the claims, were acting in the course and scope of their employment by the DCS.<sup>4</sup>

4 The plaintiffs' claims are brought under:

4.1 the *actio iniuriarum* for non-patrimonial harm and *contumelia*;

4.2 the action for bodily injury involving pain and suffering; and

4.3 the Aquilian action for patrimonial loss in the form of future medical expenses.

5 The plaintiffs contend that 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 Combatting of Torture Act 13 of 2013 ("the Torture Act").

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<sup>3</sup> Exhibit G, Pleadings: Particulars of Claim, paras 18-22, pp 20-22.

<sup>4</sup> Exhibit G, Pleadings: Particulars of Claim, paras 8, 9 & 18, pp 2, 3 & 18; Plea, paras 4, 9 & 16, pp 27-29. See also Exhibit F, Pretrial and Case Management Bundle, Plaintiffs' Request for Admissions of 15 March 2019, para 7, p 11 and the Defendant's admissions of 14 May 2019, para 7, p 19.



6 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 Correctional Services Act 111 of 1998 (“the Act”), the Correctional Services Regulations promulgated thereunder (“the Regulations”) and the Standing Orders by which DCS officials are bound (“the B-orders”).

7 The defendant denies liability for both claims:

7.1 In respect of Claim A, the defendant admits that DCS officials used force against the plaintiffs on 10 August 2014, but denies that force was used in the manner alleged by the plaintiffs. The defendant pleads that the use of force was justified as “precautionary measures” taken in self-defence.<sup>5</sup> The defendant also admits that the plaintiffs sustained injuries as a result of the DCS officers’ use of force but disputes the nature and extent of the plaintiffs’ injuries.

7.2 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.<sup>6</sup> During the trial however, the defendant denied that the second to fifth plaintiffs had been segregated and contended that they had merely been “separated,” as a consequence of which the statutory requirements

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<sup>5</sup> Plea paras 10 to 13, pp 28-29.

<sup>6</sup> Plea paras 16-17, pp 29-30.

for lawful segregation under the Act were not applicable.<sup>7</sup>

8 Merits and quantum having been separated, these heads of argument will deal with the merits of the plaintiffs' claims only.

9 In substantiating the plaintiffs' case, we structure these submissions in the following parts:

9.1 Part 1: the plaintiffs' causes of action and the legal presumptions and onus;

9.2 Part 2: the applicable statutory framework;

9.3 Part 3: the events of 7 August 2014;

9.4 Part 4: the events of 10 August 2014;

9.5 Part 5: segregation

9.6 Part 6: the impact of the assault and torture on the plaintiffs

9.7 Part 7: conclusions

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<sup>7</sup> In terms of section 30 of the Correctional Service Act 111 of 1998.

## PART 1: THE CAUSES OF ACTION

### CLAIM A: ASSAULT AND TORTURE

#### *The plaintiffs' three causes of action under Claim A*

10 Under Claim A, the plaintiffs rely on the egregious assault which they endured at the hands of DCS officials on 10 August 2014. They claim further that the nature of the assault was such that it constituted torture.

11 The primary basis for the plaintiffs' claim for assault and torture is the delictual action for a wrongful and intentional violation of a personality interest, the *actio iniuriarum*. The plaintiffs 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.<sup>8</sup> These rights are protected as personality rights under the common law and under sections 10, 12 and 14 of the Constitution.

12 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.

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<sup>8</sup> Exhibit G, Pleadings: Particulars of Claim paras 15.2 and 15.3, p 11.

13 Both these causes of action are available in cases of assault, and it is not uncommon for them to be pursued simultaneously in one action.<sup>9</sup>

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

15 Below we discuss some of the principles which govern these causes of action, with a particular focus on the first. We then turn to discuss the nature of torture.

### ***The iniuria of assault***

16 Assault is defined in the common law 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.”<sup>10</sup>

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<sup>9</sup> LAWSA Volume 20(1), Second Edition at 414: “in instances of assault, these two actions are both available. This also appears impliedly in case law, where a distinction is drawn between satisfaction for *contumelia* and compensation for pain and suffering.” See also *W v Minister of Police and Another* [2016] ZAGPPHC 172 at 34-41; *Bennett v Minister of Police and Another* 1980 (3) SA 24 (C) at 35G-H and the authorities cited there.

<sup>10</sup> This is the long-standing definition of assault endorsed by Innes CJ in *Rex v Jolly and Others* 1923 A.D at 179, quoting from Gardiner and Lansdown. It continues to be applied, see *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34 (18 September 2019), para 37 and footnote 33; and *Motsei v Minister of Police, In Re; Phefadu v Minister of Police* (65356/2012, 65249/12) [2014] ZAGPPHC 567 (23 May 2014) at para 6.7.

- 17 The elements of a claim for assault under the *actio iniuriarum* are:
- 17.1 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);
- 17.2 Wrongfulness or unlawfulness; and
- 17.3 An intention on the part of the offender to injure the plaintiff (*animus iniuriandi*).
- 18 The application of physical force that impairs the bodily integrity of another is *prima facie* wrongful and intentional.<sup>11</sup> 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 — ... (c) to be free from all forms of violence from either public or private sources*".<sup>12</sup>
- 19 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

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<sup>11</sup> Neluheni v South African Custodial Management [2016] ZAGPPHC 622 (13 May 2016) para 9; Taylor v Minister of Safety and Security [2016] ZAWCHC 37 (17 February 2016) paras 2 and 3; Daniels and Others v Minister of Police [2015] ZAGPPHC 317 (26 February 2015) paras 75-77; Moghamat v Centre Guards CC [2004] 1 All SA 221 (C) at 224A.

<sup>12</sup> Zealand v Minister of Justice and Constitutional Development and Another 2008 (2) SA 1 (CC) at paras 49-53, where the Constitutional Court addressed the import of the protection of the right to freedom and security of the person under section 12(1) of the Constitution for delictual claims.

or ground of justification.

20 In this case, the defendant has admitted (i) the use of force by DCS officials, and (ii) that the plaintiffs suffered injuries as a result. The onus accordingly rests on the defendant to prove that the use of force was lawful and justified. As will become apparent below, the defendant has failed to discharge this onus.

21 As regards the plaintiffs' claims for impairment of the rights to dignity and privacy arising from the assault, the plaintiffs likewise bear the onus to prove that 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.

22 The courts have long accepted that the law's protection of bodily integrity includes the protection of mental and psychological integrity. As the Appellate Division held in *Minister of Justice v Hofmeyr*:<sup>13</sup>

“One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus*, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element.”

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<sup>13</sup> Minister of Justice v Hofmeyr 1993 (3) SA 131 (A) at 145I-J.

23 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.

24 The right to privacy, protected under section 14 of the Constitution, includes the right not to have one's person searched (section 14(1)(a)). A forced strip-search and forced cavity search of the anus, as some of the plaintiffs were subjected to in this case, are 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.<sup>14</sup>

25 The assault and the intrusions on the plaintiffs' right to privacy also constitute an impairment of the plaintiffs' right to human dignity, protected under section 10 of the Constitution. The Constitutional Court has emphasised the close relationship between the right to privacy and the right to human dignity. In *Khumalo*, O'Regan J 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

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<sup>14</sup> Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) paras 67 to 77.

between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution.”<sup>15</sup>

26 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.<sup>16</sup> Such violations are especially 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, the courts are strict and intolerant. For instance:

26.1 In *Marwana*, the High Court held:

“In my view, any violation of the rights of a human being should be viewed as serious. This is so especially [for] the right to dignity, privacy, and more [so in] circumstances where the plaintiff suffers emotional shock, humiliation and trauma by reason of having been assaulted by the law enforcement agents ... when the defendant is one of the state organs who should have ensured that the rights plaintiff should be respected...”<sup>17</sup>

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<sup>15</sup> Khumalo v Holomisa 2002 (5) SA 401 (CC) para 27

<sup>16</sup> Stanfield v Minister of Correctional Services and Others 2004 (4) SA 43 (C) at paras 123-129; See also the arbitration award of Deputy Chief Justice Moseneke in Families of Mental Health Care Users affected by the Gauteng Mental Marathon Project v National Minister of Health and Others (the Life Esidimeni matter) at para 186.

<sup>17</sup> Marwana v Minister of Police (3067/2010) [2012] ZAECPHC 56, paras 21 and 23; cited with approval in Daniels and Others v Minister of Police [2015] ZAGPPHC, paras 103-105.



26.2 In *Ndlovu v Minister of Police*, a full bench of this division held:<sup>18</sup>

“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 society 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.”

### ***Pain and suffering***

27 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*,<sup>19</sup> in which

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<sup>18</sup> *Ndlovu v Minister of Police* [2018] ZAGPJHC 595, paras 21, 24-25, per Windell J, Mashile and Van der Linde JJ concurring.

<sup>19</sup> 1972 (2) SA 601 (A)

the Appellate Division held:<sup>20</sup>

“... claims for bodily injury involving pain and suffering and the like have this in common with claims under the *actio injuriarum* – namely that both relate to non-pecuniary loss and the amount awarded is regarded in the nature of a *solatium*. As Van Winsen J observed in Hoffa's case *supra*<sup>[21]</sup> at 955A:

‘(T)he 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 injuriarum* to someone as a *salve* for his wounded feelings.’”

28 As noted above, it is not uncommon for this cause of action to be pursued simultaneously in one action with a claim under the *actio iniuriarum*.<sup>22</sup>

### ***The Aquilian Action***

29 Finally, the plaintiffs bring 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 must take the form of patrimonial loss.

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<sup>20</sup> At 607B – C (per Holmes JA)

<sup>21</sup> Hoffa, N.O. v. S.A. Mutual Fire & General Insurance Co. Ltd 1965 (2) SA 944 (C). See also Hoffa, at 952F

<sup>22</sup> LAWSA Volume 20(1), Second Edition at 414: “in instances of assault, these two actions are both available. This also appears impliedly in case law, where a distinction is drawn between satisfaction for *contumelia* and compensation for pain and suffering.” See also *W v Minister of Police and Another* [2016] ZAGPPHC 172 at 34-41; *Bennett v Minister of Police and Another* 1980 (3) SA 24 (C) at 35G-H and the authorities cited there.

30 As quantum and merits have been separated in this action, we do not address the patrimonial loss sustained by the plaintiffs in any detail in these submissions.

### ***Torture***

31 In this case, the treatment that the plaintiffs were subjected to at the hands of the DCS officials, did not just constitute assault at common law, it rose to the level of torture as defined in the Torture Act.

32 The primary purpose of the Torture Act is to criminalise torture. The key aims of the Torture Act are to:

32.1 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

32.2 provide for the offence of torture of persons and other offences associated with the torture of persons.

33 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. But the fact that it has been made a crime does not mean that civil remedies for the infliction of torture are not available to victims.

34 The Torture Act is expressly designed to protect the rights of 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 for the enforcement of that right namely, an action for damages in respect of any loss occasioned by the violation of it.”*<sup>23</sup>

35 That this is the correct position 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.”

36 In contending that they were subjected to torture at the hands of DCS officials, the plaintiffs 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;

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<sup>23</sup> Da Silva and another v Coutinho 1971 (3) SA 123 (A) at 134 (quoting Salmond on Torts, 14<sup>th</sup> ed, p 352).

- (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 to refrain from doing, anything; or

(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.”<sup>24</sup>

37 As appears from this definition, torture is distinguished by three characteristics:

37.1 first, the pain or suffering caused (whether physical or mental) is severe;

37.2 second, the pain or suffering is inflicted for a recognised purpose;  
and

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<sup>24</sup> The statutory definition is similar to the definition of torture in international law. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 defines torture in article 1.1 to mean:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or 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”.

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

38           The plaintiffs plead the elements of torture in paragraphs 12A and 14 of the particulars of claim.<sup>25</sup>

39           In assessing the evidence of torture, the Court must apply the strong evidentiary presumption that is recognised in international law and foreign jurisdictions in applying prohibitions on torture and ill-treatment by the State.<sup>26</sup> 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.

40           This legal presumption and shifting of the evidentiary burden are premised on:

40.1           the recognition of the fundamental importance and non-derogable nature of the right not to be subjected to torture; and

40.2           the fact that, in such cases, the State typically has exclusive

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<sup>25</sup> Pleadings bundle pp 6-7.

<sup>26</sup> This includes the prohibitions on torture in the United Nations Convention against Torture, 1987; article 5 of the United National Declaration of Human Rights; article 7 of the International Covenant on Civil and Political Rights; article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and article 5 of the African Charter of Human and People's Rights.

knowledge of, or the ability to obtain, the facts.

41 In applying the prohibition on torture in article 3 of the European Convention on Human Rights,<sup>27</sup> the European Court of Human Rights held in *Selmouni v France* (a case where there was no direct evidence of intent) that “*where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused*”.<sup>28</sup>

42 In *Afet Sureyya Eren v Turkey*, 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.

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

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<sup>27</sup> Article 3 of the European Convention on Human Rights provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>28</sup> European Court of Human Rights (ECtHR), *Selmouni v. France* (Grand Chamber), 28 July 1999, para 87. See also, *Aksoy v Turkey*, ECtHR, 18 December. 1996.

incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention".<sup>29</sup> (emphasis added)

43 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<sup>30</sup> would plainly apply.

44 The intention requirement for torture is attenuated in international law. In the decisions of the UN Committee Against Torture, an extended form of intention is applied, akin 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.

45 This approach was taken in a recent decision of the UN Committee Against Torture concerning Burundi, in which the Committee determined that:

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<sup>29</sup> Afet Sureyya Eren v Turkey, ECtHR, 20 October 2015, citing Salman v. Turkey (Grand Chamber), no. 21986/93, para 100, ECHR 2000-VII); Tomasi v. France, 27 August 1992, paras 108-111, Series A no. 241-A; Ribitsch v. Austria, 4 December 1995, para 34, Series A no. 336; Aksoy v. Turkey, 18 December 1996, para 62, Reports of Judgments and Decisions 1996-VI; and Selmouni v. France (Grand Chamber), no. 25803/94, para 87, ECHR 1999-V).

<sup>30</sup> Neluheni v South African Custodial Management [2016] ZAGPPHC 622 (13 May 2016) para 9; Taylor v Minister of Safety and Security [2016] ZAWCHC 37 (17 February 2016) paras 2 and 3; Daniels and Others v Minister of Police [2015] ZAGPPHC 317 (26 February 2015) paras 75-77; Moghamat v Centre Guards CC [2004] 1 All SA 221 (C) at 224A.



“The Committee has noted the State 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.”<sup>31</sup>

46 It should be noted that 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 the that the rights violation occurred with the support or acquiescence of the State. It has held:

“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 rights recognized by the

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<sup>31</sup> EN v. Burundi, UNCAT, Communication No. 578/2013, UN Doc CAT/C/56/D/578/2013, 16 February 2016, para 7.3.

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.”<sup>32</sup>

47 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 allegations of torture.

48 In South Africa the prohibition on torture is absolute under the Constitution and the Torture Act. Once torture is established, the prohibition permits of no justification or exception. Thus, if the plaintiffs establish credible allegations of torture, which are not rebutted by evidence led by the defendant, the wrongful and unlawful conduct is established and the plaintiffs are entitled to damages.

## **CLAIM B: ISOLATED SEGREGATION**

49 The second to fifth plaintiffs rely on the same three causes of action – i.e., the *actio iniuriarum*, the action for pain and suffering and the Aquilian action – for *contumelia*, pain and suffering and patrimonial loss caused

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<sup>32</sup> Velasquez-Rodriguez v Honduras, IACHR (Series A) No. 4, Judgment of 29 July 1982, §173; Godinez-Cruz v Honduras, IACHR (Series C) No. 5, Judgment of 20 January 20 1989, §183.

by their wrongful and unlawful detention in isolated segregation by DCS officials over the period 10 to 26 August 2014, each in a single cell.

50 The plaintiffs claim, in the first instance, damages for the unlawful impairment of their personal liberty.<sup>33</sup> Every interference in personal liberty is prima facie unlawful.<sup>34</sup> 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.

51 The general principle was articulated by Innes CJ in *Whittaker v Roos and Bateman*,<sup>35</sup> in what has become known as “the Innes dictum”:<sup>36</sup>

“True, the plaintiffs’ freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for 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

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<sup>33</sup> Exhibit G, Pleadings: Particulars of Claim paras 18-19, p 20.

<sup>34</sup> *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) at paras 24-25.

<sup>35</sup> *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92

<sup>36</sup> At 122-3.

their liberty not warranted by the regulations or necessitated for purposes of goal discipline and administration." (our emphasis)

52 The principle was restated as the "residuum principle" by Corbett JA in the *Goldberg* case<sup>37</sup>:

"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 a 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."<sup>38</sup>

53 As we shall show below, the evidence establishes that the second to fifth plaintiffs were placed in isolated segregation from 10 to 26 August 2014.

This being the case, the defendant bears the onus to prove that their

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<sup>37</sup> *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A).

<sup>38</sup> At 39C-E. See also *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 141C-H, where Hoexter JA endorsed these principles.

segregation (and the further impairment of their personal liberty that this entailed) was lawful and justified.

54 The second to fifth plaintiffs contend that the conditions of their segregation were such that they –

54.1 constituted an aggression on their person or an assault;<sup>39</sup> and

54.2 violated their rights to dignity, liberty and bodily and psychological integrity.<sup>40</sup>

55 The material conditions of the segregation of the second to fifth plaintiffs 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.<sup>41</sup>

56 The unlawful and unjustified imposition of mechanical restraints, such as ankle shackles, is a clear deprivation of personal liberty. It is also recognised as an aggression on the person and a form of assault.<sup>42</sup>

57 The denial of access to medical treatment and the denial of adequate bedding are also clear violations of the rights to human dignity, bodily and

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<sup>39</sup> Exhibit G, Pleadings: Particulars of Claim, para 20, p 20.

<sup>40</sup> Exhibit G, Pleadings: Particulars of Claim, para 21.3, p 22.

<sup>41</sup> Exhibit G, Pleadings: Particulars of Claim, para 20.1 to 20.3, pp 20-21.

<sup>42</sup> See for example *Sebogodi v Minister of Police (1201/2016) [2017] ZANWHC 68 (27 October 2017)* in which the Court held at para 23 that: “*Physical interference, which affects a person’s bodily integrity constitutes assault.*”

psychological integrity: they demonstrate a disregard for the basic human needs of the plaintiffs and for their suffering and discomfort.

58 The plaintiffs contend that their unlawful and inhumane segregation constituted not merely assault, but torture as defined in the Torture Act. This is so because it caused the plaintiffs 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 the plaintiffs.<sup>43</sup>

59 In assessing the nature of the rights infringements caused by the plaintiffs' isolated segregation, and whether it amounts to torture, regard must be had to the cumulative effects of the conditions. This includes 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.<sup>44</sup>

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

60.1 In *Onoufriou v Cyprus*, the European Court of Human Rights concluded that “*the stringent custodial regime to which the applicant*

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<sup>43</sup> Exhibit G, Pleadings: Particulars of Claim, para 20A, p 21.

<sup>44</sup> *Onoufriou v. Cyprus*, ECHR, 2010, Application No. 24407/04, para 68.

*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”.*<sup>45</sup>

60.2 In *İlhan v Turkey*, 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 Abdüllatif İlhan 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.*”<sup>46</sup>

60.3 In *Campos v Peru*, 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 these conditions of isolation to violate both article 7 and article 10 of the International Covenant on Civil and Political Rights.<sup>47</sup>

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<sup>45</sup> Id at para 80.

<sup>46</sup> *İlhan v. Turkey*, Grand Chamber, no. 22277/93, para 87, ECHR 2000-VII

<sup>47</sup> *Polay Campos v Peru*, no 577/1994, para 8.7.

(Campos v. Peru , judgment of 9 January 1998);

60.4 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 (*Castillo Petruzzi et al.*, judgment of 30 May 1999).

60.5 The United Nations' Special Rapporteur 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 in a report tabled in the General Assembly in August 2011.<sup>48</sup> 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

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<sup>48</sup> UN Special Rapporteur on Torture, Report on Solitary Confinement, submitted to the General Assembly, 5 August 2011. UN Doc Number: A 66/268.



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 to situations in which solitary confinement is imposed as a result of a breach of prison discipline, as long as the pain and suffering experienced 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-socialization 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 or 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 degrading 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.” (our emphasis)

61 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:

61.1 pain and suffering;<sup>49</sup>

61.2 loss of amenities of life, in that they have experienced, and continue to experience, recurrent depression, anxiety and post-traumatic stress and insomnia as a result of the segregation they endured;<sup>50</sup>

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<sup>49</sup> Exhibit G, Pleadings: Particulars of Claim, paras 21.1, 21.2 and 22.2.2, pp 21-22.

<sup>50</sup> Exhibit G, Pleadings: Particulars of Claim, paras 21.4 and 22.2.1, p 22.

and

61.3 future medical expenses, specifically for the psychological and psychiatric treatment of the effects of the unlawful segregation.<sup>51</sup>

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<sup>51</sup> Particulars of Claim, para 22.1, p 22.

## PART 2: THE STATUTORY FRAMEWORK

### THE ABSOLUTE PROHIBITION OF TORTURE

62 Torture is absolutely prohibited under the Constitution – no exceptions or derogations are permitted whatsoever, even in cases of emergency. 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) enshrine the right –

“(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

63 Torture is also absolutely prohibited and criminalised under the Torture Act.<sup>52</sup> Section 4(4) of the Act provides that there are no justifications or defences for the offence torture. It states:

“(4) 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.”

64 Thus, no question of justification for torture can arise. If the plaintiffs

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<sup>52</sup> Section 4 of the Torture Act defines the offences and penalties for torture.

establish that they were tortured by DCS officials (bearing in mind the presumptions discussed above), it follows that they are entitled to damages for the harm they have suffered as a result.

## **THE USE OF FORCE AND SEGREGATION UNDER THE CORRECTIONAL SERVICES ACT AND STANDING ORDERS**

65 The use of force and the segregation of inmates is strictly regulated under the Act, the Regulations<sup>53</sup> 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 “the Standing Orders”).

66 The relevant chapters of the Standing Orders are contained in volume 2 of the Legislation Bundle.<sup>54</sup> Section 134(2) 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”.

67 We submit that since the evidence establishes both that 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 was lawful – i.e., that it

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<sup>53</sup> Correctional Services Regulations, GN R323 in GG 35277 of 25 April 2012.

<sup>54</sup> Exhibit H.

accorded with all the legislative conditions and requirements.

68 In this section, we set out the relevant requirements for the use of force and segregation.

69 We begin by highlighting the general principles and conditions of detention specified in the Act, which we submit ought to inform the Court’s interpretation and application of the more specific duties in the Act. Under section 96(1) of the Act,

“[t]he 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”.

## **GENERAL PRINCIPLES AND DUTIES**

### ***Safe custody under conditions of human dignity***

70 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 this 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”. (our emphasis)

71 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.”

72 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 the rights of inmates entrenched in the Act must not be violated or restricted for disciplinary or any other purpose.<sup>55</sup>

73 Certain limitations on the rights of inmates are permitted for the purpose of ensuring safe custody, but only insofar as is “reasonably 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 sections 27 to 35, a correctional official may–

- (a) search the person of an inmate, his or her property

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<sup>55</sup> Section 4(2)(b) and (c).

and the place where he or she is in custody and seize any object 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.”

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

74.1 The accommodation of prisoners must meet the prescribed requirements (in terms of floor space, lighting, ventilation, sanitation and health conditions), which “must be adequate for detention under conditions of human dignity”.<sup>56</sup>

74.2 Each inmate must have an adequate diet to promote good health,<sup>57</sup> and must be provided by the Department with clothing and bedding

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<sup>56</sup> Section 7(1).

<sup>57</sup> Section 8(1).



sufficient to meet the requirements of hygiene and climatic conditions.<sup>58</sup>

74.3 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.<sup>59</sup>

74.4 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.<sup>60</sup>

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

75.1 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

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

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<sup>58</sup> Section 10(1).

<sup>59</sup> Section 11.

<sup>60</sup> Section 12(1) and (2)(a).

## ***Complaints and requests***

76 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 (together with any steps taken in dealing with them) 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.

77 Further, 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”.

78 The procedure for dealing with inmates’ complaints and requests is detailed in chapter 6, paragraph 17 of the B-Orders.

78.1 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 grievances 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 complaint 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.”

78.2 Paragraph 17.2 provides that “On admission and daily afterward, prisoners must be given the 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 at a prison/section at least once per month”.

78.3 The approach and procedure for receiving and addressing complaints is detailed in paragraphs 17.3 and 17.4. They provide, in relevant part:

“17.3.1 To realise the philosophy contained in the introduction and the aim associated with it, the following guidelines must be adhered to conscientiously:

- (a) Every complaint and request, whether it is oral or written. must be recorded properly in the complaint and request register (G365);
- (b) Where 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.

17.3.2 In every section/division a postal box must be available where written complaints and requests from prisoners can be placed in.

- (a) The Head of the Prison must appoint in writing the Section Heads Supervisor: Internal Custody who must take the written complaints/requests from the box/postal box and treat them as confidential from thereon. The Head of the Prison must install measures ensuring anonymity and confidentiality.
- (b) It must be ensured that every complaint

and/or request submitted by a prisoner is investigated properly by the appointed persons.

(c) After every complaint and/ or request of a prisoner has been dealt with in full and feedback has been given to the prisoner, the prisoner must initial/ make his thumbprint in the appropriate column to affirm that he she takes cognisance thereof...

(d) ...

(e) 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 to be followed up.

...

17.4.1 The approach towards the dealing with complaints and requests will differ from case to case and the general guidelines to be followed closely are as follows:

(a) Prisoners must be informed of the time, place and manner how complaints are aired and dealt with;

...

- (f) Every complaint and/or request must be dealt with according to its merits and generalisation must be avoided.
- (g) Every prisoner must be granted sufficient opportunity without interference of others, whether correctional officials and/or prisoners to put his/her case.
- ...
- (j) All the relevant facts must be gathered before a conclusion and a decision can be made.
- (k) The decision must be communicated to the prisoner in such a way that he she understands it and is satisfied.”

### ***Discipline***

79 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.”

80 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.”

81 The procedural requirements of a fair disciplinary hearing are described in section 24 and in regulation 14.

82 Disciplinary penalties or sanctions may only be imposed after a disciplinary hearing.<sup>61</sup> These include the restriction or withdrawal of privileges or amenities.

### ***Privileges***

83 The privileges or amenities afforded to inmates are dealt with in B-Order 10.<sup>62</sup> Paragraph 10.1 thereof provides that:

“The objectives of the amenities [privileges] programme are primary (sic) to encourage offenders towards good behaviour, to instill a sense of responsibility in them and to ensure their interest and cooperation in the integration into (detention and treatment) programmes.”

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<sup>61</sup> This is subject only to the exception in s 22(2): where the inmate has been convicted for an offence committed whilst an inmate, the Department, on the strength of such conviction, may without any further inquiry take disciplinary action against the inmate.

<sup>62</sup> Exhibit H, Legislation Bundle, p 361.

84 The amenities package is divided into two groups: individual amenities and group amenities.

84.1 Individual amenities are sub-divided into groups A, B and C as well as primary and secondary amenities.

84.1.1 Primary amenities include contact visits, the use of the telephone and visits to the shop.

84.1.2 Secondary amenities cover leisure time activities such as sports and TV.

84.2 Group amenities overlap with secondary activities and include group activities such as videos, choir and sports.

85 Paragraph 10.2 provides as follows:

- “All offenders receive group B amenities immediately after admission to the correctional centre.”
- “Upgrading from B to A is considered every 6 months during compulsory assessment of inmates by the Case Management Committee.”
- “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 particular infringement.” (our emphasis)



## THE REQUIREMENTS FOR THE LAWFUL USE OF FORCE

86 Section 32 of the Act governs the use of force. It stipulates that any use of force must be:

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

86.2 proportionate to the objective (s 32(1)(b));

86.3 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));

86.4 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

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

87 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)).

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

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

88.2 “The Head of Prison must be notified immediately when any type of force is used. A dated 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;
- number of officials involved.

Upon receipt of such a report the Head of the 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);

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

88.4 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).

89 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.”

90 The Standing Orders also detail the role and responsibilities of the

Emergency Support Team (“EST”) in chapter 17, paragraph 7. The Orders provide that:

- 90.1 Each Management Area must have one Emergency Support Team which shall be responsible to assisting in dealing with any emergency situation (paragraph 7.1).
- 90.2 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:
  - 90.2.1 Unit leader;
  - 90.2.2 Second in charge;
  - 90.2.3 Five sections of four people each (at least two must have a code 11 drivers’ license and there must be four sharpshooters with a good shooting record);
  - 90.2.4 1 x person recording everything;
  - 90.2.5 1 x medically trained person; and
  - 90.2.6 1 x video operator/photographer
  - 90.2.7 The team may include dog-handlers, where available (paragraphs 7.2 to 7.3);

- 90.3 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);
- 90.4 “Only the approved security equipment/ aids must be applied and the prescribed uniform should be worn” (paragraph 7.6);
- 90.5 “A list of 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);
- 90.6 “Should the assistance of EST be called in...the relevant Area Manager and Head of the 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);
- 90.7 “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 attached to the non-compliance of directives, must also be clearly spelled out” (paragraphs 7.9 and 7.10);

90.8 “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 the Prison’s diary” (paragraphs 7.11 and 7.13);

90.9 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 organized 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 ELECTRIFIED SHIELDS**

91 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.<sup>63</sup>

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<sup>63</sup> Regulation 19(1). See also the Standing Orders, chapter 16 para 4.4 which lists electrified shields as a non-lethal incapacitating device.

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

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

92.2 They may only be used by a correctional official specifically trained in their use (s 33(2) and regulation 19(1));

92.3 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 the purpose of preventing an escape (s 33(3)); and

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

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

93.1 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));

- 93.2 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));
- 93.3 “Electrified shields are mainly utilised by Emergency Support Teams during situations of unrest inside or outside prisons. Where necessary the Head of the 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);
- 93.4 “Whenever electrified shields have been used the incident must be reported immediately to the Head of the Prison as prescribed for the electrified stun device” (para 4.4.2);
- 93.5 “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
- 93.6 “Proper control must be exercised by means of a register in respect of the issue and receipt of electrified shields” (para 4.4.4).

## **THE USE OF OTHER WEAPONS, INCLUDING BATONS**

- 94 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.<sup>64</sup>

95 Under regulation 21, other weapons that may be used are baton-type equipment and pyrotechnical equipment.<sup>65</sup> The use of such equipment is restricted to the purposes described in section sections 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.<sup>66</sup>

96 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 officials batons may be issued to. The issuing and use of batons must be recorded in a register as prescribed in the Standing Order.<sup>67</sup>

97 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

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<sup>64</sup> Section 35.

<sup>65</sup> Regulation 21(1).

<sup>66</sup> Regulation 21(2).

<sup>67</sup> Regulations 21(3) and 21(4).

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 receive tonfas/batons (arsenal controllers can be utilised).

(c) Register divisions: batons

- 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 the Prison/Division Head: Operational Services.

(d) `Batons/tonfas issued to an official may not be utilised for private purposes.

(e) `Batons/tonfas may only be used according to the principle of minimum force and when absolutely necessary for the purposes of self defence, protection of another person or good order and control.”

## **THE REQUIREMENTS FOR LAWFUL SEGREGATION OF INMATES**

98 Segregation is regulated by section 30 of the Act. It provides, in relevant part:

“(1) Segregation of an inmate for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7(2)(e), is permissible –

(a) upon the written request of an inmate;

(b) 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;

- (c) if such detention is prescribed by the correctional medical practitioner on medical grounds;
- (d) when an inmate displays violence or is threatened with violence;
- (e) 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
- (f) 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.

(2)(a) An inmate who is segregated in terms of subsection (1) (b) to (f)–

- (i) must be visited by a correctional official at least once every four hours and by the Head of the Correctional Centre at least once a day; and
  - (ii) must have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day.
- (b) 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.

(3) A request for segregation in terms of subsection (1) (a)

may be withdrawn at any time.

- (4) 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 subsection (5), exceed seven days.
- (5) If the Head of the 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 the period of segregation for a period not exceeding 30 days.
- (6) 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.
- (7) 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.
- (8) Segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.
- (9) Except 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 USE OF MECHANICAL RESTRAINTS

99 The use of mechanical restraints is regulated under section 31 of the Act and Regulation 18. Mechanical restraints include handcuffs or leg-irons.<sup>68</sup>

100 Section 31 provides in relevant part:

“(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.

(2) ...

(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

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<sup>68</sup> Regulation 18(1).

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.

(4) .....

(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.”

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

### **PART 3: THE EVENTS OF 7 AUGUST 2014**

102 The events of 7 August 2014 are important to set the scene for the events that unfolded in the vicinity of the B Unit at Leeuwkoop 10 August 2014. They are particularly important for the purpose of understanding why the second plaintiff, Mr Zulu, blocked the door of cell B1 on 10 August 2014.

#### **THE SEARCH OF CELL B1 ON 7 AUGUST 2014**

103 On 7 August 2014, DCS officials at Leeuwkoop conducted a surprise search of cell B1, the cell in which the plaintiffs were housed. The search was conducted in the evening of 7 August 2014 at approximately 6pm.

104 When DCS officials arrived at cell B1 on the evening of 7 August 2014, they were unable to open the cell door. This was on account of the door having been "blocked" from the inside by the insertion of foreign objects in the locking device. DCS officials instructed the inmates of cell B1 to unblock the door and after a time they complied. The officials then entered the cell and instructed the inmates to exit the cell and line up against the courtyard wall opposite the cell in order to be counted.

105 DCS officials body-searched each inmate while lined up against the courtyard wall. 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 inmates were instructed to squat in a line and were counted once more before being



returned to the cell and locked up.

106 When the inmates of cell B1 were later questioned by DCS officials about who had blocked the cell door, none took responsibility.<sup>69</sup>

107 After the search, inmates were informed by DCS officials that a cell phone and three sim cards had been found in the cell. These items were never shown to the inmates.

108 Importantly, the defendant admits that the conduct of the inmates of cell B1, including the plaintiffs, prior to and during the search on 7 August 2014:

108.1 was not violent;

108.2 was not physically threatening;

108.3 did not in fact jeopardise the security or order of the correctional centre; and

108.4 was not likely to jeopardise the security or order of the correctional centre.<sup>70</sup>

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<sup>69</sup> 5 November 2019, pages 80-81; 6 November 2019, page 94 (Zulu's evidence); 11 November 2021 pages 14-15 (Sithole's evidence); 2 March 2021, pages 12-18; 9 March, pages 2 - 22 (Smith's evidence); 26 July 2021, pages 13 -20 (Qibi's evidence); 16 May 2022, pages 67-84 (Buthelezi's evidence); 13 April 2022, pages 61-80 (Kunene's evidence).

<sup>70</sup> This was a formal admission by the defendant. See Exhibit F, Pre-Trial and Case Management: Plaintiffs' Request for Admissions pages 10-11, para 1; Defendant's Reply to

## THE DEMOTION OF THE INMATES OF CELL B1 ON 8 AUGUST 2014

### *The Legal Framework Applicable to Demotions*

109 Mr Kunene, during cross-examination, confirmed his knowledge of the following sections of the Act pertaining to the withdrawal or restriction of amenities or privileges:<sup>71</sup>

109.1 section 24(1) of the Act, which provides that:<sup>72</sup>

"Disciplinary hearings must be fair and may be conducted by either a disciplinary official, a Head of Correctional Centre or an authorised official."

109.2 section 24(3)(c) of the Act, which provides that:<sup>73</sup>

"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 [...] restriction of amenities for a period not exceeding seven days."

109.3 section 24(5)(c) of the Act, which provides that:<sup>74</sup>

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Plaintiffs' Request for Admissions, page 18, para 1. The defendant brought an application to withdraw this admission. The application was dismissed with costs on 15 June 2022.

<sup>71</sup> 20 April 2022, page 40 to 43.

<sup>72</sup> Exhibit H, page 19; 20 April 2022, page 41, lines 5 – 9.

<sup>73</sup> Exhibit H, page 19; 20 April 2022, page 42, lines 7 – 21; page 43, lines 1 – 2.

<sup>74</sup> Exhibit H, page 20; 20 April 2022, page 44, lines 3 – 5.

"Where the hearing takes place before a disciplinary official, the following penalties may be imposed severally or in the alternative [...] restriction of amenities not exceeding 42 days."

110 Furthermore, Mr Kunene confirmed the operation of Standing Order 10 and paragraph 10.2 thereof which provides as follows:<sup>75</sup>

*"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."*<sup>76</sup>

111 Read together, sections 24(1), 24(3)(c) and 24(5) of the Act and Standing Order 10 provide that before an inmate may be deprived of amenities or privileges, ie demoted, he must first be subjected to a disciplinary hearing conducted by a disciplinary official, Head of Correctional Centre or an authorised official and found guilty of a transgression. Mr Kunene confirmed this.<sup>77</sup>

112 Lastly, Mr Kunene confirmed that the Case Management Committee ("CMC") is the authoritative body responsible for demoting inmates.<sup>78</sup>

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<sup>75</sup> 20 April 2022, page 51, lines 10 – 20.

<sup>76</sup> Exhibit H, Legislation Bundle, p 364.

<sup>77</sup> 20 April 2022, page 51, lines 10 – 20.

<sup>78</sup> 13 April 2022, page 15, lines 3 – 5.

113 Mr Kunene's confirmation of the legal framework applicable to demotions was not altered by the evidence of Mr Zwane, despite the defendant's attempts in this regard.

114 In his evidence in chief, Mr Zwane was taken to Standing Order 7.2(1)(d)<sup>79</sup> which provides as follows:<sup>80</sup>

"Any offender who commits a serious disciplinary infringement, e.g., escape, attempted escape, jeopardize the security of the centre, etc, will be degraded to a lower group pending investigation or disciplinary hearing".

115 What the defendant failed to draw attention to, was that 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. Mr Zwane admitted this in cross examination.<sup>81</sup>

116 It was put to Mr Zwane during cross examination that while Standing Order 7.2(1)(d) deals with information to be communicated to new inmates at orientation, Standing Order 10.2 is the operative order governing the restriction or withdrawal of inmate privileges or amenities.<sup>82</sup>

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<sup>79</sup> 3 May 2022, page 27, lines 10 – 16.

<sup>80</sup> Exhibit H, page 358.

<sup>81</sup> 3 May 2022, page 58, lines 17 – 19.

<sup>82</sup> 3 May 2022, page 62, lines 9 – 11.

Mr Zwane confirmed that this was indeed the case.<sup>83</sup>

### ***Summary of requirements for lawful demotion***

117 The requirements for a lawful demotion may therefore be summarised as follows:

117.1 firstly, the inmate must have been subjected to a disciplinary hearing; and

117.2 secondly, the inmate must have been found guilty of a transgression.

118 Only if the aforesaid requirements are met, is the CMC entitled to demote an inmate. Demotion may take the form of the restriction of or withdrawal of privileges or amenities.

119 We submit that it is clear from the evidence that these requirements were not met prior to the inmates of cell B1 being demoted.

### ***The disciplinary hearing requirement***

120 Prior to the commencement of the trial, the defendant admitted that, following the events of 7 August 2014, Mr Mohale had instructed that the

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<sup>83</sup> *Ibid.*

inmates of cell B1 be demoted. This is apparent from:

120.1 The plaintiffs request for admissions, in which the plaintiffs sought the following admission from the defendant:<sup>84</sup>

"No notice of disciplinary proceedings was given nor were any hearings held in respect of the charges laid against the plaintiffs on 7 August 2014"; and

120.2 the defendant's reply which was the following:<sup>85</sup>

"The defendant acknowledges that there was no notice of hearing and the instruction from the office of the Head of Correctional Centre was that offenders should be demoted".

121 Not only does this confirm that the plaintiffs were demoted, it confirms that this was done without so much as notice of a disciplinary hearing, let alone the conclusion of disciplinary proceedings culminating in guilty verdicts.

122 This formal admission by the defendant was put to Mr Kunene and Mr Mohale in cross examination.<sup>86</sup> In response thereto:

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<sup>84</sup> Exhibit F, page 25, paragraph 12.

<sup>85</sup> Exhibit F, page 43, paragraph 12.

<sup>86</sup> 20 April 2022, page 61, lines 1 - 4.

122.1 Mr Kunene denied that the inmates of cell B1 were demoted. He could not explain the defendant's formal admission and sought to contend that he was not bound by it. Mr Kunene admitted that no disciplinary hearings were held.<sup>87</sup>

122.2 Mr Mohale, on the other hand, contradicted himself with regards to whether or not the inmates of cell B1 were demoted. Mr Mohale's evidence in this regard is dealt with in detail below. Mr Mohale admitted that no disciplinary hearings were held.<sup>88</sup>

#### *The guilty verdict requirement*

123 The plaintiffs led corroborative evidence that they were not found guilty of any transgression before they were demoted on 8 August 2014.<sup>89</sup>

124 Notably, Mr Kunene and Mr Zwane confirmed that an inmate had to be found guilty of a transgression before he could be demoted<sup>90</sup> They did not suggest that the plaintiffs had been found guilty of any transgression following the events of 7 August 2014.

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<sup>87</sup> 20 April 2022, page 62, line 1 – 5.

<sup>88</sup> 28 April 2022, page 22, lines 12 – 18.

<sup>89</sup> The plaintiffs' evidence is set out in detail below.

<sup>90</sup> 20 April 2022, page 56, lines 3 – 5.

## DID THE DEMOTIONS IN FACT TAKE PLACE ON 8 AUGUST 2014?

### *The Plaintiffs' Evidence*

125 Mr Zulu, Mr Qibi, Mr Sithole and Mr Smith led corroboratory evidence in substantiation of their contention that the inmates of cell B1, including themselves, were demoted on 8 August 2014, following the events of 7 August 2014.<sup>91</sup>

126 Mr Zulu testified that:

126.1 the inmates of cell B1 were addressed by Mr Zimba and Mr Kunene on 8 August 2014 in relation to the repercussions following the events of 7 August 2014<sup>92</sup> (as corroborated by Mr Sithole,<sup>93</sup> Mr Smith,<sup>94</sup> and Mr Qibi<sup>95</sup>);

126.2 Mr Zimba informed the inmates that they were being demoted to C Group<sup>96</sup> (as corroborated by Mr Smith<sup>97</sup> and Mr Qibi<sup>98</sup>); and

126.3 Mr Zimba ordered that the TV be removed from the cell (which it

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<sup>91</sup> To avoid unnecessary repetition, the evidence of Mr Zulu is set out in detail – and where his evidence was corroborated by the other plaintiffs, same is indicated in brackets. Other additional evidence as given by the plaintiffs is set out below.

<sup>92</sup> 5 November 2019, page 82, lines 7 – 12; 6 November 2019, page 108, lines 1 – 8.

<sup>93</sup> 6 November 2019, page 15, lines 4 – 10.

<sup>94</sup> 2 March 2021, page 21, lines 5 – 9.

<sup>95</sup> 26 July 2021, page 20, lines 25; page 21, lines 1 to 5.

<sup>96</sup> 6 November 2019, page 15, lines 4 – 10.

<sup>97</sup> 2 March 2021, page 21, lines 5 – 9; 9 March 2021, page 24, lines 10 – 12.

<sup>98</sup> 29 July 2021, page 24 lines 5 to 6.



was) and informed the inmates that their individual privileges had been revoked<sup>99</sup> (as confirmed by Mr Sithole<sup>100</sup>, Mr Smith<sup>101</sup> and Mr Qibi).<sup>102</sup>

127 Mr Zulu and Mr Sithole both led evidence that :(i) they were individually charged by Mr Monare on 9 August 2014; and (ii) during their respective meetings with Mr Monare, he confirmed that they had been demoted.<sup>103</sup>

128 Mr Smith confirmed having seen Mr Zulu and other inmates being taken individually to the office outside of cell B1 to be charged.<sup>104</sup>

129 Mr Qibi led evidence that he too was charged individually by Mr Zimba and two other officials, and that while being charged, he was told that he had been demoted.<sup>105</sup>

130 During cross-examination, counsel for the defendant sought to obfuscate the date on which the demotion took place. In response, Mr Zulu made it clear that:

130.1 on 8 August 2014, Mr Zimba informed the inmates that they were being demoted, and implemented the demotion immediately by

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<sup>99</sup> 5 November 2019, page 82, lines 15 – 20.

<sup>100</sup> 12 November 2019, page 63, lines 10 - 13;

<sup>101</sup> 2 March 2021, page 21, lines 10 – 13 and lines 20 – 24.

<sup>102</sup> 26 July 2021, page 21, lines 14 – 23.

<sup>103</sup> 6 November 2019, page 82, lines 9 – 25; 11 November 2019, page 16, lines 2 - 10, and page 65, lines 23 – 24;

<sup>104</sup> 2 March 2021, page 26, lines 18 – 21; 9 March 2021, page 30, lines 5 – 7.

<sup>105</sup> 26 July 2021, page 27; 30 July 2021, page 24, lines 1 - 9.

removing the TV and revoking the inmates' privileges (i.e. to the shop, contact visits, use of the public phone);<sup>106</sup> and

130.2 on 9 August 2014, inmates were charged individually for the events of 7 August 2014, and while being charged were told that they had been demoted.<sup>107</sup>

131 It was put to Mr Zulu during cross examination that Mr Monare would deny that he told Mr Zulu that he was demoted on 9 August 2014.<sup>108</sup> Mr Zulu was however not challenged on his testimony that Mr Zimba and Mr Kunene had addressed the inmates on 8 August 2014 and informed them of their demotion.

132 Mr Smith, Mr Sithole and Mr Qibi were not challenged in any material respect on their evidence pertaining to the demotion.

### ***The Defendants' Evidence***

133 During the first day of his examination-in-chief, Mr Mohale was asked if the inmates of cell B1 had been demoted on the 8<sup>th</sup> of August 2014, following the events of 7 August 2014. Mr Mohale responded:<sup>109</sup>

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<sup>106</sup> 6 November 2019, page 109, lines 17 – 23.

<sup>107</sup> *Ibid.*

<sup>108</sup> 6 November 2019, page 110, lines 20 – 21.

<sup>109</sup> 22 April 2022, page 25, lines 3 – 7.

*"To my knowledge, yes, that was part of our process which was followed by Mr Simba and the team if ever I can remember well".*

134 Mr Mohale went on to explain that the CMC was responsible for the demotion, and that he had received a report from the CMC regarding the demotion of the inmates of cell B1.<sup>110</sup>

135 However, after a break in the trial proceedings, Mr Mohale, backtracked on this evidence, now stating that:

135.1 he never gave an instruction for the inmates of cell B1 to be demoted (despite the formal admission of the defendant);<sup>111</sup> and

135.2 he had made an error in his evidence-in-chief - and the true state of affairs was that the CMC had only demoted the inmates at a later stage.<sup>112</sup>

136 In cross examination, Mr Mohale was asked where his lawyers would have got the information that he had instructed that the inmates of cell B1 be demoted, if not from himself. Mr Mohale could not answer this<sup>113</sup> and ultimately, like Mr Kunene, could not explain the defendant's formal

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<sup>110</sup> 22 April 2022, page 26, lines 15 – 18.

<sup>111</sup> 28 April 2022, page 124, lines 16 – 17.

<sup>112</sup> 28 April 2022, page 125, line 2 5 – 6.

<sup>113</sup> 29 April 2022, page 5, lines 3 – 4.

admission in this regard.

137 Mr Mohale's claim that the inmates of cell B1 were not demoted on 8 August 2014 is also belied by the contents of Dr Fitz's report. Dr Fitz's report set out his understanding of the demotion that had taken place on 8 August 2014 in the following terms:<sup>114</sup>

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

138 In cross examination, Mr Mohale could not explain where Dr Fitz would have got this from or, at the very least, why this had not been corrected, if this had not in fact happened.

139 Having regard to the above, we submit that the evidence establishes that following the events of 7 August 2014, the inmates of cell B1, including the plaintiffs, were demoted without due process on 8 August 2014.

## **WHICH PRIVILEGES WERE REVOKED?**

### ***The Plaintiffs' Version***

140 The plaintiffs testified that when the inmates of cell B1 were demoted on

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<sup>114</sup> Exhibit D4, page 17, paragraph 19.

8 August 2014, the following privileges were revoked:

- 140.1        The television set. Mr Qibi,<sup>115</sup> Mr Smith,<sup>116</sup> and Mr Zulu<sup>117</sup> all testified that the television set was removed from cell B1 on 8 August 2014.
- 140.2        Access to the shop. Mr Qibi,<sup>118</sup> Mr Sithole,<sup>119</sup> Mr Smith,<sup>120</sup> and Mr Zulu<sup>121</sup> all gave corroboratory evidence that access to the shop was revoked on 8 August 2014.
- 140.3        Contact visits. Mr Qibi,<sup>122</sup> Mr Sithole,<sup>123</sup> Mr Smith,<sup>124</sup> and Mr Zulu<sup>125</sup> all gave corroboratory evidence that their entitlement to contact visits was revoked on 8 August 2014.
- 140.4        Reduced exercise time. Mr Qibi,<sup>126</sup> Mr Smith,<sup>127</sup> and Mr Zulu<sup>128</sup> all

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<sup>115</sup> 26 July 2021, page 21, lines 14 – 17.

<sup>116</sup> 2 March 2021, page 21, lines 20 – 24;

<sup>117</sup> 5 November 2021, page 82, lines 14 – 16; 6 November 2021, page 108, lines 2 – 5, page 118, lines 11 – 13; 8 November 2019, pages 2 and 3, lines 21 -25 of page 2 and line 1 of page 3;

<sup>118</sup> 26 July 2021, page 21, lines 21 – 23; 29 July 2021, page 52, lines 1 -2; and 30 July 2021, page 24, lines 8 – 9.

<sup>119</sup> 14 November 2021, page 60, lines 22 – 25.

<sup>120</sup> 2 March 2021, page 21, lines 12 – 15; and 9 March 2021, lines 6 – 22.

<sup>121</sup> 5 November 2019, page 82, lines 14 – 20; 6 November 2019, page 108, lines 2 – 7; page 118, lines 11 – 16; page 120, lines 7 – 10.

<sup>122</sup> 26 July 2021, page 21, lines 21 – 23; page 27, lines 14 – 16; 29 July 2021, page 52, lines 1 -2; 30 July 2021, page 24, lines 8 – 9;

<sup>123</sup> 12 November 2021, page 64, lines 5 -7.

<sup>124</sup> 2 March 2021, page 23, lines 23 – 25.

<sup>125</sup> 5 November 2019, page 82, lines 15 -20; 6 November 2019, page 118, lines 12 – 23;

<sup>126</sup> 30 July 2021, page 24, lines 8 – 9.

<sup>127</sup> 2 March 2021, page 21, lines 12 – 15.

<sup>128</sup> 6 November 2019, page 119 and 120, lines 18 – 25 of page 119 and lines 1 – 10 of page 120; 8 November 2019, page 2 and 3, lines 19 – 25 of page 2 and line 1 of page 3;

gave corroboratory evidence that their exercise time was reduced to the minimum of 1 hour per day on 8 August 2014.

140.5 Access to the phone. Mr Sithole,<sup>129</sup> Mr Smith,<sup>130</sup> and Mr Zulu<sup>131</sup> all gave corroboratory evidence that their access to the public phone was revoked on 8 August 2014.

141 Mr Qibi, Mr Sithole and Mr Smith were not challenged in any material respect on their evidence as to the privileges that were revoked on 8 August 2014.

142 Mr Zulu was steadfast in cross examination as to the privileges that were revoked on 8 August 2014. He was asked by Advocate Moerane:<sup>132</sup>

"Please tell his Lordship precisely what privileges were removed or taken away?".

143 Mr Zulu's response was the following:<sup>133</sup>

"TV and normal exercise with other inmates, shop, I cannot buy in the shop. The time and visit, visiting times between B Group and C Group differs, which means I will get more less time now to visit."

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<sup>129</sup> 11 November 2019, page 15, lines 15 – 16;

<sup>130</sup> 2 March 2021, page 21, lines 10 – 14;

<sup>131</sup> 5 November 2019, page 82, lines 15 -29; 6 November 2019, page 118, lines 24 – 25.

<sup>132</sup> 6 November 2019, page 118, lines 11 – 12.

<sup>133</sup> 6 November 2019, page 118, lines 13 – 16.

144 Mr Zulu also testified that access to the public phone was revoked and that on 9 August 2014 Mr Kunene had refused him access to the public phone – giving his demotion as the reason for the refusal.<sup>134</sup> This was not challenged by the defendant under cross-examination in any manner whatsoever.

### ***The Defendant's Evidence***

145 The defendant's evidence on this point was a bundle of contradictions. Mr Mohale testified that only the TV was withdrawn on 8 August 2014, but this was a "concession" and not a privilege and therefore did not amount to a demotion.<sup>135</sup> Mr Kunene admitted that the TV was removed and in conceded, in addition, that exercise time of the inmates was reduced to the minimum.<sup>136</sup> However, the following day Mr Kunene backtracked and said that the inmates' exercise time had not in fact been reduced, claiming that his earlier evidence had been erroneous.<sup>137</sup>

146 Neither Mr Mohale nor Mr Kunene could explain Dr Fitz's report and why he stated that the TV had been removed, exercise time reduced and the shop privilege revoked.

147 In the result, we submit that the evidence establishes that, following the

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<sup>134</sup> 6 November 2019, page 130, lines 2 – 25; and page 131, lines 1 – 13.

<sup>135</sup> 29 April 2022, page 7, line 19 – 21; page 8, lines 1 - 5.

<sup>136</sup> 20 April 2022, page 80.

<sup>137</sup> 21 April 2022, page 4.

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 the public phone; their TV removed and their exercise time reduced to the minimum required by law, viz 1 hour per day. In addition to this punishment, it is common cause that, following the events of 7 August 2014, all the inmates of cell B1 were charged with contravening section 23(1)(o) of the Act.

## **THE COMPLAINTS BY ZULU**

148 The inmates of cell B1, including Mr Zulu, were aggrieved by their collective punishment and charge. On 9 August 2014, Mr Zulu wrote a letter addressed to the Head of Prison, Mr Mohale, complaining about the collective charge and demotion of all inmates of cell B1.<sup>138</sup> Mr Zulu gave the letter to Mr Kunene, the supervisor at B section, who gave it to Mr Mohale. Mr Mohale called Mr Zulu over, said in his presence “this is nonsense” and tore the letter up.<sup>139</sup>

149 Mr Zulu testified that according to DCS protocol, if an inmate is dissatisfied with a response to a complaint from the Head of Prison, they can address a complaint to the Area Commissioner.<sup>140</sup> This is borne out by the rules relating to complaints set out above. Mr Zulu testified that after Mr Mohale tore up his first letter, he wrote a second letter addressed

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<sup>138</sup> 5 November 2019, page 83 lines 16-25

<sup>139</sup> 5 November 2019, page 84 lines 11-25; page 85 lines 1-5.

<sup>140</sup> 5 November 2019, page 86 lines 9-11.



to the Area Commissioner, Mr Thokolo. He gave the letter to Mr Kunene.<sup>141</sup> Mr Zulu testified that he received no response to his second letter, but was informed by his cell monitor that he had seen Mr Mohale tear up this letter too.<sup>142</sup>

150 Mr Zulu testified that he tried to take other measures after attempting to send the letters, including speaking to Mr Kunene and requesting the use of a phone to call his family or lawyers but this was denied.<sup>143</sup> Mr Zulu testified that it was his belief that at this stage he had exhausted all his internal avenues.<sup>144</sup>

151 Mr Zulu testified that his complaints were never registered.<sup>145</sup> Indeed, there is no evidence that Mr Zulu's complaints were ever recorded in the complaints register.

152 In cross - examination, it was put to Zulu that the following facts were false:<sup>146</sup>

152.1 that a wrote a letter to the Head of Centre and handed it to Mr Kunene;

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<sup>141</sup> 5 November 2019, page 84 lines 16-24.

<sup>142</sup> 5 November 2019, page 84 lines 19-21.

<sup>143</sup> 5 November 2019, page 89 lines 10-15.

<sup>144</sup> 5 November 2019, page 89 lines 17-19.

<sup>145</sup> 5 November 2019, page 87 lines 4-14.

<sup>146</sup> 6 November 2019, page 121 lines 2-18.

- 152.2 that Mr Mohale tore the letter up; and
- 152.3 that he wrote a second letter to the Area Commissioner and handed it to Mr Kunene.
- 153 In an effort to substantiate these averments, the defendant contended that Mr Zulu did not mention writing the letters of complaint in his statement made for purposes of the internal investigation.<sup>147</sup> This is however not correct. There is, in Mr Zulu's statement, mention of a request and a formal complaint, which, we submit, is clearly a reference to the letters.<sup>148</sup>
- 154 Notably, Mr Zulu's evidence that he asked Mr Kunene if he could use a phone to phone a lawyer or family members (which request was denied by Mr Kunene) was not challenged under cross-examination.
- 155 Moreover, Mr Zulu stated in cross examination that during the meeting he convened in cell B1 on the evening of the 9<sup>th</sup> of August, he informed his cell mates of the letters of complaint he had written and that he had received no response.<sup>149</sup> This evidence was corroborated by Qibi and

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<sup>147</sup> 6 November 2019, page 121 lines 23-24; page 122 lines 1-25; page 123 lines 1-25; page 124 lines 1-25.

<sup>148</sup> 6 November 2019, page 125 lines 3-25; page 126 lines 10-16; page 129 lines 22-24. Exhibit A4 Volume 4: Preliminary report on the Allegations of Assault of Inmates by Correctional officials at Leeuwkop Maximum Correctional Centre B Section Call Number 1 on 10 August 2014, pages 436 - 437 paragraph 2.6.

<sup>149</sup> 6 November 2019, page 132 line 9-25.; page 133 lines 1-16.

Sithole.<sup>150</sup>

156 Having regard to the above we submit that the evidence establishes on a balance of probabilities that Mr Zulu wrote the letters of complaint to Mr Mohale and Mr Thokolo respectively.

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<sup>150</sup> This evidence was corroborated by Qibi at 26 July 2020, page 28 lines 7-25; page 29 lines 1-7 and Sithole at 11 November 2021, page 19 lines 13-22.

## PART 4: THE EVENTS OF 10 AUGUST 2014

### THE PARTIES' PLEADED VERSIONS

157 It is common cause that on the morning of Sunday 10 August 2014, Mr Zulu blocked the door of cell B1 by placing a foreign object in the locking device.<sup>151</sup> This had the effect of preventing DCS officers from gaining access to the cell in order to count the inmates and commence with the daily prison routine. The plaintiffs pleaded that Mr Zulu embarked on this action as a form of protest against the collective charging and demotion to Group C of all the inmates of cell B1 on 8 and 9 August 2014.<sup>152</sup>

158 The defendant pleaded that once the cell door had been opened and DCS officers entered, “*various objects, including human faeces, were hurled at them*”.<sup>153</sup> The defendant pleaded further that, “*the officers were accordingly constrained to take precautionary measures, including using force to among other things defend themselves*”.<sup>154</sup> According to the defendant, only the following four DCS officers took such precautionary measures: Mr Monare; Mr Moleleki; Mr Molalakgothla; and Mr Nkosi.<sup>155</sup>

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<sup>151</sup> Exhibit G, Pleadings: Replication para 3.1, p 36.

<sup>152</sup> Exhibit G, Pleadings: Replication para 3.3, p 37.

<sup>153</sup> Exhibit G, Pleadings: Plea para 9, p 28.

<sup>154</sup> Exhibit G, Pleadings: Plea para 10, p 28.

<sup>155</sup> Exhibit F, Case Management Bundle: Defendant's Further Particulars of 24 July 2019, para 1.1.1 to 1.1.4, p 35.

159 The defendant gave the following further account of the DCS officers' entry into the cell in its further particulars:<sup>156</sup>

159.1 Mr Kunene and Mr Monare attempted to negotiate with the inmates, to try to get them to open the cell but the inmates refused.<sup>157</sup>

159.2 Mr Lesch used an electric grinder "*to cut open the gate and the main door to the prison*" (sic). After Mr Lesch had removed his equipment, Mr Zimba instructed the inmates to exit the cell but they refused to do so.<sup>158</sup>

159.3 Mr Zimba then telephoned Mr Mohale<sup>159</sup> to request authorisation to use force to remove the inmates from the cell. Mr Mohale authorised Mr Zimba to direct the DCS officers to use "minimum force".<sup>160</sup> The authorisation did not permit the use of non-lethal incapacitating devices, firearms or other weapons.<sup>161</sup>

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<sup>156</sup> Exhibit F, Case Management Bundle: Defendant's Further Particulars of 24 July 2019, para 2.1-2.6, pp 35-36.

<sup>157</sup> Exhibit F, Case Management Bundle: Defendant's Further Particulars of 24 July 2019, para 2.1, p 35.

<sup>158</sup> Exhibit F, Case Management Bundle: Defendant's Further Particulars of 24 July 2019, paras 2.2 and 2.3, p 35.

<sup>159</sup> Mr Mohale is incorrectly described in paragraph 2.4 of the Defendant's Further Particulars as "the Area Commissioner". He is correctly designated in paragraph 6 of the same document.

<sup>160</sup> Exhibit F, Case Management Bundle: Defendant's Further Particulars of 24 July 2019, paras 2.4- 2.5, p 36.

<sup>161</sup> Exhibit F, Case Management Bundle: Plaintiffs' Request for Further Particulars of 15 March 2019, para 5.3.6, p 5; and Defendant's Further Particulars of 24 July 2019, para 8, p 37.

159.4 DCS officers 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.”*<sup>162</sup>

159.5 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, *“[w]hen inmates began attacking the officials, the officials were constrained to use non-electrified shields and tonfas in order to protect themselves”*.<sup>163</sup>

159.6 Only four DCS officials, – Mr Monare, Mr Moleleki, Mr Molalakgothla and Mr Nkosi – took these measures, and used only tonfas and non-electrified shields to protect themselves.<sup>164</sup>

160 The plaintiffs dispute the defendant’s account of what transpired on 10 August 2014.

161 The plaintiffs deny that any objects were thrown at DCS officers when

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<sup>162</sup> Exhibit F, Case Management Bundle: Defendant’s Further Particulars of 24 July 2019, para 2.6, p 36 and para 9, p 38.

<sup>163</sup> Exhibit F, Case Management Bundle: Defendant’s Further Particulars of 24 July 2019, para 3.1 and 3.2, p 36.

<sup>164</sup> Exhibit F, Case Management Bundle: Defendant’s Further Particulars of 24 July 2019, para 5.1 and 5.2, p 37.

they entered the cell.

162 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.<sup>165</sup>

163 The plaintiffs allege that, when they exited cell B1, they were assaulted and tortured by DCS officers in the vicinity of the cell, the Section B yard, the office adjacent to the Section B yard and in single segregated cells, through *inter alia* the following:

163.1 they were slapped, punched and kicked repeatedly;

163.2 they were beaten with batons repeatedly;

163.3 they were shocked with electric shock shields repeatedly;

163.4 they were set upon by dogs;

163.5 they were forced to squat in painful positions for prolonged periods and repeatedly;

163.6 they were forced to do handstands for prolonged periods and repeatedly; and

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<sup>165</sup> Exhibit G, Pleadings: Replication para 3.5, p 37.

163.7 they were forcibly dragged across the ground.<sup>166</sup>

164 The plaintiffs pleaded that, *inter alia*, the following further acts of assault and torture were perpetrated on them:

164.1 Several officials, including Mr Monare, forced the first, third, fourth and fifth plaintiffs into a shower, and forcibly made them remove their clothes and placed them under running water while electrocuting them with electric shock shields;

164.2 An official forcibly searched the anus of the first plaintiff, in public and without any reasonable grounds; and

164.3 Several officials, including Mr Monare, forced the third plaintiff to defecate in the shower in front of a number of the officials.<sup>167</sup>

165 The plaintiffs pleaded that each of them was rendered unconscious for short periods of time during the assault and torture which lasted for several hours.<sup>168</sup>

166 The plaintiffs pleaded the names of eleven DCS officers who they contend committed these acts, together with other officials of the DCS whose identities were unknown to the Plaintiffs.<sup>169</sup> The known officials

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<sup>166</sup> Exhibit G, Pleadings: Particulars of Claim para 11, p 5.

<sup>167</sup> Exhibit G, Pleadings: Particulars of Claim para 12, p 5.

<sup>168</sup> Exhibit G, Pleadings: Particulars of Claim para 13, p 6.

<sup>169</sup> Ibid at para 10, pp 3-4.



are: Ms Buthelezi; Mr Frans; Mr Langa; Mr Maharaj; Mr Moleleki;<sup>170</sup> Mr Mohale; Mr Mokoka; Mr Monare; Mr Nkosi; Mr Nyampule;<sup>171</sup> and Mr Rametsi.<sup>172</sup>

167 The plaintiffs pleaded, in detail, the injuries they sustained as a consequence of the assault and torture on 10 August 2014.<sup>173</sup>

168 The defendant admitted that “*some of the inmates, including the plaintiffs, sustained injuries during the operation.*”<sup>174</sup>

169 The defendant denied the injuries pleaded by the plaintiffs “*save as is consistent with what is reflected in the medical reports*” compiled by Dr Dlamini.<sup>175</sup>

## **THE PHYSICAL INJURIES SUSTAINED BY THE PLAINTIFFS ON 10 AUGUST 2014 – THE PLAINTIFFS’ MEDICAL EVIDENCE**

### ***Dr Van Zyl’s testimony and findings***

170 The plaintiffs called the late Dr Doreen Sindisiwe van Zyl to give evidence

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<sup>170</sup> The correct spelling of Mr Moleleki’s name was indicated in Exhibit F, Pretrial bundle: the Defendant’s Reply of 24 July 2019 to the Plaintiffs’ Request for Further Particulars, para 1.1.2, p 35.

<sup>171</sup> As noted, the correct spelling of Mr Nyampule’s name was indicated in Exhibit F, Pretrial bundle: the Defendant’s Reply of 14 May 2019 to the Plaintiffs’ Request for Admissions, para 16, Pretrial bundle p 13.

<sup>172</sup> Exhibit G, Pleadings: Particulars of Claim para 10, pp 3-4

<sup>173</sup> Exhibit G, Pleadings: Particulars of Claim para 14, pp 4 – 11.

<sup>174</sup> Exhibit G, Pleadings: Plea para 11, p 28.

<sup>175</sup> Exhibit G, Pleadings: Plea para 14, p 29.

on her medical examinations of the second to fifth plaintiffs conducted at Leeuwkop on 15 August 2014.<sup>176</sup>

171 Dr van Zyl was an independent medical practitioner.<sup>177</sup> At the time of the events at issue in this trial, Dr Van Zyl was a member of Medicins Sans Frontiers (Doctors without Borders).<sup>178</sup>

172 Dr Van Zyl had extensive experience in trauma medicine, including the examination of trauma patients and the completion of J88 forms, having completed hundreds – or even a thousand – of these forms throughout her career.<sup>179</sup>

173 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 served as both a factual witness and an expert witness.<sup>180</sup>

174 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 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

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<sup>176</sup> 4 November 2019, p 84, lines 21 – 23.

<sup>177</sup> 1 November 2019, p 99, lines 10 – 11.

<sup>178</sup> 1 November 2019, p 109, line 20 – p 110, line 6.

<sup>179</sup> 1 November 2019, p 103, lines 5 – 15; p 104, line 9 – p 107, line 17.

<sup>180</sup> 4 November 2019, p 86, lines 18 – 20.

to give evidence on the injuries sustained, based on her J88 forms and the contemporaneous notes she made during her examinations of the plaintiffs.<sup>181</sup>

175 Dr van Zyl emphasised the importance in 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.<sup>182</sup>

“DR VAN ZYL: You have to observe, so your observation is important. You have to take a full history and after your history you then note..., you do a head, a head to toe examination of the patient and you note all of your findings and, and you write that down...”<sup>183</sup>

“MS COWEN: And, and how do you indicate an injury that you observed and wish to record on the diagrams, on, on the document?

DR VAN ZYL: So we, we, you, you describe the nature of the injury, you describe the location and you also describe the size of the injury.”<sup>184</sup>

176 Notably, the plaintiffs all testified that Dr Dlamini did not follow these

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<sup>181</sup> 4 November 2019, p 109, line 24 – p 111, line 4.

<sup>182</sup> 1 November 2019, p 110, line 20 – p111, line 12.

<sup>183</sup> 1 November 2019, p110, line 22 – p111, line 2.

<sup>184</sup> 1 November 2019, p111, lines 10 – 12.

steps, and instead engaged in a superficial engagement with the plaintiffs, with no medical history being taken and no proper physical examination being performed.<sup>185</sup> For example, when asked to describe his visit to Dr Dlamini's office, Mr Zulu testified:

“When I got to the doctor, the doctor did not want to examine me physically. He just looked at me across the desk. I even told him that he must write the report and he said I cannot tell him how to do his job, and then I left the office.”<sup>186</sup>

177 When asked how Dr Dlamini had recorded the injuries on his J88 form, Mr Zulu explained:

“I would tell him that there is an injury here and then he would tick, and then I will tell him there is an injury here, and he will tick. But I believe in his J-88 form there are some injuries that he did not note down because he could not see them, because he did not examine me.”<sup>187</sup>

178 One of the challenges Dr Van Zyl 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 she required; in particular, she was not permitted to take a camera for the purpose of taking contemporaneous

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<sup>185</sup> Sithole: 12 November 2019, p 5, line 20 – p 6, line 15; Qibi: 28 July 2021, p14, lines 12-22; Smith: 3 March 2021, p43 line 11 – p44, line 16.

<sup>186</sup> 6 November 2019, p 37, lines 11-20.

<sup>187</sup> 6 November 2019, p 38, lines 19-23.

photographs of the second to fifth plaintiffs' injuries.<sup>188</sup>

179 Dr Van Zyl also 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 may have faded.<sup>189</sup> The injuries she observed and recorded are those that were still present on 15 August 2014, and were described by Dr Van Zyl as “fresh” (and therefore not scars from old unrelated injuries).

180 Following her examinations, Dr Van Zyl 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 Dr Van Zyl's clinical findings.

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

181.1 The Second Plaintiff: Mr Zulu

181.1.1 Dr Van Zyl's examination of Mr Zulu lasted for approximately 25 minutes.<sup>190</sup>

181.1.2 She recorded in the medical history taken that Mr Zulu “was

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<sup>188</sup> 1 November 2019, p 112, lines 10 – 17.

<sup>189</sup> 1 November 2019, p 120, lines 23 – 25.

<sup>190</sup> 1 November 2019, p 115, lines 22 – 23.

*assaulted on Sunday 10 August 2014. He was assaulted with batons and electric shields. Patient was kicked and slapped.”<sup>191</sup>*

181.1.3 Her conclusions, based on her examination of Mr Zulu, were that he *“was assaulted as described above. Injuries sustained are from blunt object. He was hit with batons, kicked, and hit with electric shields, bruising extensively around left thigh, left lower limb, with subsequent swelling and induration and tenderness.”<sup>192</sup>*

181.1.4 Dr Van Zyl described as severe Mr Zulu’s injuries on his left limb and thigh, his left lower leg and the base of his right thumb.<sup>193</sup>

181.1.5 These injuries, she testified, were consistent with the application of blunt force.<sup>194</sup>

## 181.2 The Third Plaintiff: Mr Qibi

181.2.1 Dr Van Zyl’s examination of Mr Qibi lasted approximately 15

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<sup>191</sup> 1 November 2019, p 124, lines 2 – 4; expert reports bundle, vol 1, p 12.

<sup>192</sup> 1 November 2019, p 124, lines 13 – 18; expert reports bundle, vol 1, p 12.

<sup>193</sup> 4 November 2019, p 25, lines 17 – 22.

<sup>194</sup> 5 November 2019, p 56, lines 17 – 18.

minutes.<sup>195</sup>

181.2.2 Her medical history recorded that Mr Qibi was hit with batons, kicked, slapped and shocked with electric shields.<sup>196</sup>

181.2.3 She observed scars and bruising on his left upper shoulder and right upper shoulder, swelling and bruising on his right wrist and pain and decreased range of movement on the small finger of the left hand.<sup>197</sup>

181.2.4 Dr Van Zyl testified that these injuries were sustained as a result of the application of blunt force.<sup>198</sup>

181.2.5 It was put to Dr Van Zyl under cross-examination that her failure to note the severity of the injuries sustained by Mr Qibi in the J88 form and contemporaneous notes supports the conclusion that his injuries were not severe.<sup>199</sup> She denied this, stating that in her opinion the injuries were severe and that this opinion was based on her examination of Mr Qibi and her assessment of his injuries.<sup>200</sup>

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<sup>195</sup> 1 November 2019, p 115, lines 23 – 24.

<sup>196</sup> 4 November 2019, p 40, lines 14 – 22; expert reports bundle, vol 1, p 30.

<sup>197</sup> 4 November 2019, p 41, line 18 – p 42, line 10; expert reports bundle, vol 1, p 30.

<sup>198</sup> 5 November 2019, p 34, line 19 – p 36, line 12.

<sup>199</sup> 5 November 2019, p 40, lines 19 – 21.

<sup>200</sup> 5 November 2019, p 62, line 25 – p 63, line 9.

181.3            The Fourth Plaintiff: Mr Phasha

181.3.1            Dr Van Zyl's examination of Mr Phasha lasted for approximately ten minutes.<sup>201</sup>

181.3.2            She concluded that the main injury sustained by Mr Phasha was the bruising and swelling of his left elbow, resulting in a decreased range of movement.<sup>202</sup> At the time that Dr Van Zyl examined Mr Phasha, 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.<sup>203</sup>

181.3.3            Dr Van Zyl also observed tenderness and bruising on Mr Phasha's scalp and an injury to his left shoulder.<sup>204</sup>

181.3.4            The injuries sustained by Mr Phasha were, according to Dr Van Zyl, all sustained as a result of the application of blunt force.<sup>205</sup>

181.3.5            It was put to Dr Van Zyl under cross-examination that her conclusions regarding Mr Phasha's injuries were based on

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<sup>201</sup> 1 November 2019, p 115, line 22.

<sup>202</sup> 4 November 2019, p 47, lines 1 – 3; expert reports bundle, vol 1, p 36.

<sup>203</sup> 4 November 2019, p 53, lines 3 – 5.

<sup>204</sup> 4 November 2019, p 48, line 10 – p 49, line 2.

<sup>205</sup> 5 November 2019, p 10, line 18 – p 15, line 19.



speculation, and that the J88 form and her contemporaneous notes did not address the severity of the Mr Phasha's injuries.<sup>206</sup> Dr Van Zyl denied this, stating that the conclusions she reached were based on her examination of Mr Phasha, her completion of the J88 form and her contemporaneous notes.<sup>207</sup>

181.3.6 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, those with head injuries ought to have received CT-scans, and all ought to have undergone abdominal sonar scans to check for internal injuries. Dr Van Zyl also testified that the second to fifth plaintiffs ought to have been given adequate pain relief and post-trauma counselling.<sup>208</sup>

181.3.7 Dr Van Zyl testified that had she examined these plaintiffs in a clinical setting rather than a prison, she would have hospitalised them and referred them for these interventions. However, given the context in which she examined the plaintiffs, she was not able make those referrals<sup>209</sup> or

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<sup>206</sup> 5 November 2019, p 22, lines 15 – 25.

<sup>207</sup> 5 November 2019, p 64, lines 1 – 18.

<sup>208</sup> 4 November 2019, p 58, lines 19 – 24; expert reports bundle, vol 1, p 8, para 25.

<sup>209</sup> 4 November 2019, p 95, paras 12 – 21.

prescribe any treatment.<sup>210</sup> She was, as the Court described her, “a guest of the prison”.<sup>211</sup>

### ***The Challenges to Dr Van Zyl’s evidence***

182 It was put to Dr Van Zyl under cross-examination that her conclusions were merely a recordal of the history that she received from the second to fifth plaintiffs, and that no clinical skill went into reaching her conclusions.<sup>212</sup> Dr Van Zyl denied this, testifying that, in her opinion, the injuries sustained by the second to fifth plaintiffs were consistent with the description by each of these plaintiffs of the events of 10 August 2014.<sup>213</sup>

183 It was further put to Dr Van Zyl during cross-examination that she had not provided the Court with an expert opinion regarding the severity of the second to fifth plaintiffs’ injuries.<sup>214</sup> Dr Van Zyl was however, not required to record an assessment of the severity of the injuries on the J88 forms.<sup>215</sup> In any event, the defendant’s argument relies on an artificial distinction between factual evidence and expert evidence: it is plain from Dr Van Zyl’s evidence that her opinions regarding the severity of the plaintiffs’ injuries, as well as her other opinions, were informed by and followed logically from her consultations with and examinations of

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<sup>210</sup> 4 November 2019, p 121, lines 18 – 24.

<sup>211</sup> 4 November 2019, p 125, line 17.

<sup>212</sup> 5 November 2019, p 55, lines 11 – 18.

<sup>213</sup> 5 November 2019, p 677, line 2 – p 68, line 16.

<sup>214</sup> 4 November 2019, p 106, lines 9 – 12.

<sup>215</sup> 5 November 2019, p 62, lines 20 – 24.

the plaintiffs. Dr van Zyl confirmed this under re-examination.<sup>216</sup>

184 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.<sup>217</sup> While Dr Van Zyl acknowledged that she had not used a grading scale, she stood by her assessment of the severity of the plaintiffs' injuries based on her medical examinations of the plaintiffs.

185 It is apparent from the above, and it must be emphasised, that Dr Van Zyl was challenged in cross examination respect of her conclusions and opinions only. In particular, she was challenged on her conclusions as to how the plaintiffs' injuries were sustained and on her opinion as to the severity of the plaintiffs' injuries. Dr Van Zyl was however not challenged on her clinical findings in respect of the plaintiffs' injuries. In particular, it was not put to Dr Van Zyl that any of her clinical findings were false, exaggerated, erroneous or incorrect on any other basis.

186 In respect of Mr Zulu, Dr Van Zyl's medical findings were not merely uncontested, they were conceded by the defendant's counsel. This occurred during Mr Zulu's re-examination on 6 November 2019:

"COURT: Of D1, I think just her clinical findings. I think what appears to be in challenge, I think, is just was her conclusions

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<sup>216</sup> 5 November 2019, p 63, line 3 – p 64, line 2.

<sup>217</sup> 4 November 2019, p 113, line 15 – p 114, line 9.

but I do not recall I think that she was told that what appears at page 15 was not factually correct.

.....

MS BLEAZARD: Of the clinical findings in paragraph 5 of the J88.

COURT: Yes

MR MOERANE: It was not challenged.

COURT: It was not challenged.”<sup>218</sup>

187 A little later the Court confirmed the effect of this concession as follows:

“COURT: If it is unchallenged it basically means the findings made by Dr Van Zyl is unchallenged.”<sup>219</sup>

### ***Dr Khan’s testimony and findings***

188 Dr Mahomed Farhard Khan is an independent medical doctor and general medical practitioner.<sup>220</sup>

189 Dr Khan examined the first plaintiff on 13 August 2014 and completed a J88 form in which he recorded the first plaintiff’s injuries sustained on 10 August 2014.<sup>221</sup> Dr Khan then examined all of the plaintiffs in 2019 for ongoing injuries, and completed reports in respect of each of the

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<sup>218</sup> 6 November 2019, p 45, lines 7 – 25.

<sup>219</sup> 6 November 2019, p 46, lines 13 -14.

<sup>220</sup> 19 July 2021, p 26, lines 15 – 20.

<sup>221</sup> Volume D1, p 77.

plaintiffs.<sup>222</sup> This will be dealt with in detail below. This section deals only with Dr Khan's examination of Mr Smith on 13 August 2014.

190 As was the case with Dr van Zyl, and given the expertise required to examine the first plaintiff, to complete the J88 forms, and to reach conclusions based thereon, Dr Khan testified as both a factual witness and an expert witness.

191 Dr Khan has extensive experience as a medical practitioner in the fields of surgery and trauma.<sup>223</sup> He has experience dealing with assaults sustained in the context of the police brutality.<sup>224</sup> Dr Khan gained significant experience in neurosurgery at Chris Hani Baragwanath Academic Hospital.<sup>225</sup> He is responsible for training incoming registrars at Chris Hani Baragwanath Academic Hospital on surgical technique, general surgery and neurosurgery.<sup>226</sup> At the time of the events in issue, Dr Khan was in general practice at a Surgery in Ennerdale.<sup>227</sup>

192 On 13 August 2014, Dr Khan examined Mr Smith at Leeukop. On arrival at the prison and prior to his examination of Mr Smith, Dr Khan's equipment was confiscated and he was denied permission to photograph

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<sup>222</sup> Volume D1, pp 84 – 89; volume D\$, p 90.

<sup>223</sup> 19 July 2021, p 27, lines 18 – 24, p 28, lines 1 – 24, p 29, lines 1 – 7, p31 lines 20-24, p32 lines 1 – 7, p33 lines 13 – 24, p 34 lines 11 – 22.

<sup>224</sup> 19 July 2021, p 29, lines 10 – 23.

<sup>225</sup> 19 July 2021, p 31, line 5, p32 lines 10 - 14.

<sup>226</sup> 19 July 2021, p 34, lines 20 - 22.

<sup>227</sup> 19 July 2021, p 26, lines 17 – 19.

Mr Smith's injuries.<sup>228</sup> Following this, Dr Khan asked DCS officials to request the Head of Centre for permission to photograph the injuries.<sup>229</sup> This request too was denied.<sup>230</sup>

193 Dr Khan's examination of Mr Smith took just under an hour.<sup>231</sup> He recorded his observations by making sketches and writing down clinical findings.<sup>232</sup> These included that Mr Smith had a laceration of his mouth being 0.5 centimetres in length, ecchymosis on his left thigh, a hematoma on his left buttock, ecchymosis on his left shoulder, a swollen and tender right shoulder, a swollen right hand and halitosis.<sup>233</sup> Dr Khan 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.<sup>234</sup>

194 Dr Khan testified that he was informed by Mr Smith that his injuries had been sustained during assault by DCS officials on 10 August 2014 and that he had no basis to doubt this.<sup>235</sup>

195 Dr Khan testified that the injuries to Mr Smith's buttocks were indicative

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<sup>228</sup> 19 July 2021, p 51, lines 8 – 9, p 52 lines 6-8.

<sup>229</sup> 19 July 2021, p 51, lines 8 – 9, p 52 lines 10 - 13.

<sup>230</sup> 19 July 2021, p 51, lines 8 – 9, p 52 lines 13 - 18.

<sup>231</sup> 19 July 2021, p 58, lines 10 – 11.

<sup>232</sup> 19 July 2021, p 59, line 13.

<sup>233</sup> 19 July 2021, p 65, lines 9 – 24, p 66 lines 1 – 14, p 71 lines 16 – 20.

<sup>234</sup> 20 July 2021, p 47 lines 22 – 24, p 48 lines 1 – 10.

<sup>235</sup> 19 July 2021, p 67, lines 3-5.

of severe blunt force trauma.<sup>236</sup>

196 Following his examination, Dr Khan requested the Head of Centre to ensure that Mr Smith undergo an X-Ray to assess the injury to the back of his right hand in the light of its severity.<sup>237</sup> Mr Smith was eventually taken to Sunninghill Hospital to be X-Rayed only after obtaining a court order to that effect on 29 August 2014.<sup>238</sup> Dr Khan testified that the X-Ray revealed that there was tissue swelling but no dislocations or fractures.<sup>239</sup> Dr Khan testified that the fact that swelling was still present 19 days after the injury was sustained was indicative of the severity of this injury.<sup>240</sup>

197 Dr Khan testified that although the laceration to Mr Smith's mouth should have been treated and stitched within 24 hours of the injury, it had been left untreated.<sup>241</sup> By the time Dr Khan saw Mr Smith, it was too late to apply sutures to this injury.

198 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 Mr Smith's injuries. Dr Khan's clinical findings in respect of Mr Smith's injuries were not challenged as

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<sup>236</sup> 20 July 2021, p 10, line 16.

<sup>237</sup> 20 July 2021, p 13, lines 13-16.

<sup>238</sup> 20 July 2021, p 13, lines 9 – 13.

<sup>239</sup> 20 July 2021, p 15, lines 11-14.

<sup>240</sup> 20 July 2021, p 15, lines 18-20.

<sup>241</sup> 19 July 2021, p 71, line 10-11.

being false or incorrect on any basis. Like Dr Van Zyl's clinical findings, Dr Khan's clinical findings therefore stand uncontested.

## **THE DEFENDANT'S MEDICAL EVIDENCE**

199 The defendant called nurses Nkatingi, Mafura and Sodi and Dr Dlamini to testify in respect of the plaintiffs' injuries sustained on 10 August 2014. Their testimony is examined below.

### ***The Nurses' Testimony***

200 The nurses testified that they saw the plaintiffs as follows:

200.1 Nurse Nkatingi saw Mr Sithole and Mr Phasha on 10 August 2014;

200.2 Nurse Mafura saw Mr Qibi on 10 August 2014; and

200.3 Nurse Sodi saw Mr Smith and Mr Zulu.

201 All three nurses gave uncannily similar, and in some respects identical evidence, indicative of having been coached. Each nurse's testimony revealed an abject failure to properly examine the plaintiffs or to properly record and treat their injuries.

202 Importantly, all three nurses conceded that they had no independent recollection of their consultations with the plaintiffs and that they were



therefore relying on what was contained in the medical continuation sheets.<sup>242</sup> As a consequence, none of the nurses were able to refute the plaintiffs' versions pertaining to what had actually transpired in each consultation. In particular, this meant that:

202.1 Nurse Nkatingi could not refute Mr Sithole's allegation that she did not in fact examine him;<sup>243</sup>

202.2 Nurse Mafora could not refute Mr Qibi's allegation that she did not in fact examine him;<sup>244</sup> and

202.3 Nurse Sodi could not refute Mr Smith's and Mr Zulu's allegations that they were not in fact examined by her.<sup>245</sup>

203 The testimony of the nurses was characterised by the following disturbing elements:

203.1 Much of the nurses' testimony was similar in content and certain identical phrases were used by all three nurses. This is highly suggestive of the nurses having been coached.

203.2 The nurses' clinical findings had stark incongruencies with Dr

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<sup>242</sup> Nkatingi: 19 May 2022, p24, lines 5 – 8; Mafora: 19 May 2022, p104, lines 8 – 14; Sodi: 20 May 2022, p73, line 19 – p74, line 6.

<sup>243</sup> 14 November 2019, p37, lines 6-12.

<sup>244</sup> 3 August 2021, p48, lines 1-24

<sup>245</sup> Smith: 3 March 2021, p34, lines 1 – 10; Zulu: 6 November 2019, p 30, line 11 – 18.

Dlamini's clinical findings made within 24 hours of theirs, compelling the conclusion that there was a failure to properly examine the plaintiffs and honestly record their injuries.

203.3 The nurses' explanations for these incongruencies were largely identical, again highly suggestive of coaching.

204 In respect of their "scope of practice," the three nurses testified as follows:

204.1 Nurse Nkatingi:

"My scope of practice was, is I will assess patient, all the patient or sick patients. Then, sick patient will include the one presenting with injuries or any illnesses. Then when coming to the one presenting with injuries I will assess and treat minor soft tissue injuries. Then if according to my assessment a patient has sustained severe or moderate to severe, I will refer to the doctor if he is in the centre. If not, I will refer the patient to our referring hospital which was then Edenvale Hospital."<sup>246</sup>

204.2 Nurse Mafora:

"If the patient has minor injuries my scope of practice allows me to treat the patient. And if the patient has moderate to

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<sup>246</sup> 19 May 2022, p4, line 19 – p5, line

severe injuries, I will refer to the referring hospital, which is Edenvale Hospital.”<sup>247</sup>

204.3 Nurse Sodi:

“My scope of practice in the Department of Correctional Centre at that time was to manage the minor soft tissue injuries.”

“The moderate and the severe soft tissue injuries, at that moment, if the doctor is not available in the premises, we refer them to Edenvale Hospital for further management.”<sup>248</sup>

205 Following from the above, each of the nurses testified that they had concluded that each plaintiff had sustained “*minor soft tissue injuries*”:

205.1 Nurse Nkatingi on Sithole:

“As according to my scope of practice and after I have done all my history taking, physical examination, I came up with the diagnose to say it is minor soft tissue injuries and I can treat that in the centre without further referral for further assessment and management.”<sup>249</sup>

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<sup>247</sup> 19 May 2022, p86, lines 11 – 15.

<sup>248</sup> 20 May 2022, p54, lines 5 – 13.

<sup>249</sup> 19 May 2022, p11, line 19 – p12, line 3. Nurse Nkatingi also concedes her failure to record her diagnosis of minor soft tissue injuries: 19 May 2022, p11, lines 1 – 3.

205.2 Nurse Mafora on Qibi:

“Yes, I was confident that my scope of practice allows me that. So, I’m confident in that that I will manage minor injuries, his injuries with bruises.”<sup>250</sup>

205.3 Nurse Sodi on Zulu:

“...according to my assessment it was the minor soft tissue injuries.”<sup>251</sup>

205.4 Nurse Sodi on Smith:

“Yes, My Lord, they were within my scope of practice.”<sup>252</sup>

“My Lord, they were minor.”<sup>253</sup>

206 We submit that it is apparent from the above that the nurses’ testimony was tailored for the purposes of deflecting the contention that the plaintiffs’ injuries were serious or may have required hospitalisation. The use of identical terminology by the nurses and the repeated parroting of the phrase “*minor soft tissue injuries*” by all three nurses renders it highly likely that they were coached.

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<sup>250</sup> 19 May 2022, p92, line 20 – p93, line 2.

<sup>251</sup> 20 May 2022, p59, lines 3 – 5.

<sup>252</sup> 20 May 2022, p67, lines 5 – 7.

<sup>253</sup> 20 May 2022, p68, lines 1 – 2.

207 The disparities between the nurses' clinical findings and the clinical findings made by Dr Dlamini less than 24 hours later are glaring. For example:

207.1 Nurse Mafora was cross-examined on why Dr Dlamini had observed and recorded swelling on Mr Qibi's right wrist, which she had not recorded. Nurse Mafora could provide no explanation for this and simply denied the existence of this injury at the time of her examination.<sup>254</sup>

207.2 Similarly, nurse Sodi, in respect of the plaintiffs seen by her, could provide no explanation for injuries that had been recorded by Dr Dlamini but not recorded by her. She could only state – *"I cannot My lord speculate on the notes of the doctor"*.<sup>255</sup>

207.3 Notably, this was a phrase that was parroted by all three nurses, repeatedly, during their testimony.

208 Glaring disparities were also evident in respect of the clinical findings of the nurses compared with those of the independent doctors.

208.1 When questioned in this regard, Nurse Nkatingi could not account for eight injuries that she had failed to record in respect of Mr Sithole, which had been recorded by Dr Van Zyl. Nurse Nkatingi

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<sup>254</sup> 20 May 2022, p7, line 15 – p8, line 3.

<sup>255</sup> 23 May 2022, p14, lines 7-8.

stubbornly and irrationally maintained that she had recorded all Mr Sithole's injuries.<sup>256</sup>

208.2 Nurse Mafora could provide no explanation for how or why Dr van Zyl had observed and recorded significantly more injuries on Mr Qibi's body than she had. When pressed for an explanation Nurse Mafora parroted – *"I cannot speculate on the doctor's findings because the day that I saw the patient all these other injuries were not there"*.<sup>257</sup>

208.3 Nurse Sodi could not account for why Dr van Zyl had observed and recorded more injuries on Mr Zulu's body than she had. When asked for an explanation she used the identical phrase as Nurse Mafora: viz *"My Lord, I will not speculate on the doctor's findings"*.<sup>258</sup> Nurse Sodi provided the same response in respect of the injuries observed and recorded by Dr Khan on Mr Smith's body – *"My Lord, I cannot speculate on Dr Khan's findings"*.<sup>259</sup>

209 Lastly, the nurses' testimony in respect of the adequacy of the treatment they prescribed for the plaintiffs was also highly problematic.

209.1 Despite having Mr Sithole's evidence put to her regarding the extent

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<sup>256</sup> 19 May 2022, p47, line 19 – p48, line 5.

<sup>257</sup> 20 May 2022, p12, line 16 – p13, line 2.

<sup>258</sup> 20 May 2022, p86, lines 8 – 15.

<sup>259</sup> 20 May 2022, p110, lines 16 – 19.

of pain he was in on 10 August 2014, Nurse Nkatingi 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.<sup>260</sup>

209.2 Despite having Mr Qibi's evidence put to her regarding the extent of pain he was in on 10 August 2014 (some of which Mr 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.<sup>261</sup>

209.3 Nurse Sodi was taken through the various courses of treatment and care Mr Smith has 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. As with Nurse Nkatingi, Nurse Sodi sought to justify this on the basis that Dr Dlamini had also failed to provide treatment.<sup>262</sup>

210 Notably, this constituted another instance of the nurses providing identical answers when confronted with difficult questions under cross examination.

211 Having regard to all of the above, we submit that the only plausible

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<sup>260</sup> 19 May 2022, p51, line 13 – p52, line 8.

<sup>261</sup> 20 May 2022, p14, line 18 – p15, line 15.

<sup>262</sup> 23 May 2022, p15, line 15 – p17, line 6

conclusion to be drawn from the nurses' failures to examine, adequately record and treat the plaintiffs' injuries was that it was part of an active attempt to conceal the true nature and extent of the plaintiffs' assault at the hands of DCS officials on 10 August 2014.

### ***Dr Dlamini's Testimony***

212 At the outset, and importantly, Dr Dlamini conceded 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.<sup>263</sup>

213 Dr Dlamini 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. He was then, under cross examination, afforded an opportunity to explain the discrepancies between his clinical findings and those of the nurses:

213.1 In respect of Mr Zulu, Dr Dlamini testified that he did not see the haematoma on Mr Zulu's forehead recorded by Nurse Sodi.<sup>264</sup> Dr Dlamini could not provide an explanation for the discrepancy and stated that when he reviews a nurse's finding, it is only for purposes

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<sup>263</sup> 24 May 2022, p33, line 10 – p34, line 9. Dr Dlamini noted that he had also prepared contemporaneous notes of his examinations of each plaintiff; however, these were never discovered. Dr Dlamini also did not have an independent recollection of the contents of the contemporaneous notes – 24 May 2022, p34, lines 10 – 17; p43, line 11 – p44, line 9.

<sup>264</sup> 24 May 2022, p84, lines 9 – 13.



of monitoring the treatment prescribed.<sup>265</sup> This is improbable and in any event fails to take account of the fact that Nurse Sodi prescribed panado for this injury.

213.2 In respect of Mr Smith, Dr Dlamini could not explain why Nurse Sodi had recorded only a single (left-hand) injury in respect of Mr Smith, nor why he had not found this injury amongst the injuries he had observed and recorded in respect of Mr Smith.<sup>266</sup>

213.3 In respect of Mr Qibi, Dr Dlamini accepted that Nurse Mafora had failed to record the swelling on Mr Qibi' s right wrist that he had observed. He could provide no explanation for this.<sup>267</sup>

214 Dr Dlamini testified, disturbingly, that the nurses' failures to record all the plaintiffs' injuries did not concern him as – *“it was not my practice to work on what the nurses found ... when assessing the patients”*.<sup>268</sup> Nevertheless, Dr Dlamini conceded that given the abovementioned discrepancies and gaps, the nurses could not have possibly conducted full physical examinations of the plaintiffs as alleged in their testimonies.<sup>269</sup> This concession must stand in spite of Dr Dlamini's later attempt to recant it by asserting that it was not for him to pronounce on

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<sup>265</sup> 24 May 2022, p87, lines 8 – 12.

<sup>266</sup> 24 May 2022, p92, lines 2 – 19.

<sup>267</sup> 24 May 2022, p102, lines 15 – 19.

<sup>268</sup> 24 May 2022, p93, lines 5-6.

<sup>269</sup> 24 May 2022, p99, lines 14 – 17; p103, lines 2 – 8.

whether the nurses had done their jobs properly.<sup>270</sup>

215 Dr Dlamini 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.<sup>271</sup> Dr Dlamini could offer no explanation for why his consultations with the plaintiffs had been so disturbingly short, merely stating: *"I wouldn't comment on that."*<sup>272</sup>

216 Dr Dlamini conceded that he 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.<sup>273</sup> Dr Dlamini could provide no explanation for his failure to properly complete the J88s in respect of the plaintiffs. His concessions in this regard are set out in respect of each plaintiff below.

216.1 Regarding Dr Dlamini's completion of Mr Qibi's J88:

216.1.1 Dr Dlamini conceded that he failed record Mr Qibi's swollen right wrist in the summary of injuries, despite having noted it

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<sup>270</sup> 24 May 2022, p104, lines 11 – 12.

<sup>271</sup> 24 May 2002, p116, line 14 – p117, line 16

<sup>272</sup> 24 May 2022, p119, lines 1 – 6.

<sup>273</sup> 24 May 2022, p110, lines 7 – 20. See also Exhibit M.

in the diagrammatic sketches.<sup>274</sup>

216.1.2 Dr Dlamini conceded that he failed to complete the J88 with the same degree of detail and precision as Dr Van Zyl.<sup>275</sup>

216.1.3 Dr Dlamini conceded that he should have taken measurements of Mr Qibi's injuries.<sup>276</sup>

216.1.4 Dr Dlamini conceded that he had failed to describe the location of some of Mr Qibi's injuries.<sup>277</sup>

216.1.5 Dr Dlamini conceded that he had not described the extent, nature or severity of Mr Qibi's bruising.<sup>278</sup>

216.1.6 Dr Dlamini conceded that had failed to record at least two breaches of Mr Qibi's skin noted by Dr van Zyl. He sought to deny the existence of the breaches.<sup>279</sup>

216.1.7 Dr Dlamini conceded that he failed to record the injury to Mr Qibi's left little finger. Dr Dlamini attempted to deny the existence of the injury; however, it was put to him that both the plaintiffs' Dr Khan and the defendant's Prof Becker had

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<sup>274</sup> 24 May 2022, p100, line 19 – p101, line 8.

<sup>275</sup> 24 May 2022, p129, lines 3 – 8.

<sup>276</sup> 25 May 2022, p10, lines 14 – 15.

<sup>277</sup> 24 May 2022, p129, lines 9 – 12.

<sup>278</sup> 24 May 2022, p129, lines 13 – 16.

<sup>279</sup> 24 May 2022, p130, lines 4 – 12.

observed the injury as ongoing approximately five years later, in 2019. Dr Dlamini then attempted to place blame on Mr Qibi for not having informed him of the injury. However, it was also put to Dr Dlamini that Mr Qibi had testified about advising Dr Dlamini of the injury. It was also put to Dr Dlamini that the defendant's Dr Rossouw had agreed that the injury had likely been sustained while Mr Qibi was trying to defend himself on 10 August 2014.<sup>280</sup>

216.2 Regarding Dr Dlamini's completion of Mr Zulu's J88:

216.2.1 Dr Dlamini conceded that he had failed to record detail or measurements in respect of the injuries he noted.<sup>281</sup>

216.2.2 Dr Dlamini conceded that he had failed to record the swelling on Mr Zulu's skull and only made a diagrammatic sketch thereof, and further conceded that this was insufficient.<sup>282</sup>

216.2.3 Dr Dlamini conceded that he had provided insufficient detail in respect of the injuries to Mr Zulu's left upper arm and failed to record the injuries to Mr Zulu's right thumb, right wrist and swollen right arm. Dr Dlamini suggested that these were

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<sup>280</sup> 24 May 2022, p132, line 5 - p135, line 6

<sup>281</sup> 25 May 2022, p45, lines 8 – 13; p50, lines 7 – 11.

<sup>282</sup> 25 May 2022, p46, lines 7 – 14.

covered by his reference to “upper limb injury”.<sup>283</sup>

216.2.4 Dr Dlamini conceded that he failed to record Mr 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.<sup>284</sup>

216.2.5 Dr Dlamini could not provide an explanation as to why, in respect of Mr Zulu, 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<sup>285</sup>

216.3 Regarding Dr Dlamini’s completion of Mr Sithole’s J88:

216.3.1 Dr Dlamini conceded that he had failed to fulfil his duty to properly indicate the nature, position and extent of Mr Sithole’s injuries in the J88.<sup>286</sup> 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.<sup>287</sup>

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<sup>283</sup> 25 May 2022, p47, lines 1 – 16; p48, lines 1 – 6; p49, lines 11 - 17.

<sup>284</sup> 25 May 2022, p48, lines 7 – 18; p50, line 12 – p51, line 17.

<sup>285</sup> 25 May 2022, p50, lines 3 – 6.

<sup>286</sup> 25 May 2022, p54, lines 7 – 20.

<sup>287</sup> 25 May 2022, p60, lines 7 – 9.

216.3.2 Dr Dlamini conceded that he had failed to record the laceration near Mr Sithole's right nipple,<sup>288</sup> swelling on Mr Sithole's right knee,<sup>289</sup> injuries to the right shin,<sup>290</sup> the laceration and bruising on the right ankle,<sup>291</sup> bruising and swelling on the left buttock,<sup>292</sup> swelling of the right hip.<sup>293</sup> Dr Dlamini did not provide any explanation for these omissions.

216.3.3 Dr Dlamini conceded that his reference to "generalised injuries" in Mr Sithole's J88 fell short of the standard required and the level of detail provided by Dr van Zyl in her J88.<sup>294</sup>

216.4 Regarding Dr Dlamini's completion of Mr Phasha's J88:<sup>295</sup>

216.4.1 Dr Dlamini conceded that he failed to record the injury to Mr Phasha's scalp. He sought to deny the existence of this injury.<sup>296</sup>

216.4.2 Dr Dlamini conceded that he failed to describe Mr Phasha's elbow injury with the level of precision and detail applied by Dr van Zyl and ultimately failed to record any bruising on the

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<sup>288</sup> 25 May 2022, p56, lines 8 – 9.

<sup>289</sup> 25 May 2022, p56, lines 13 – 15.

<sup>290</sup> 25 May 2022, p57, line 5.

<sup>291</sup> 25 May 2022, p57, lines 6 – 7.

<sup>292</sup> 25 May 2022, p60, lines 10 – 14.

<sup>293</sup> 25 May 2022, p60, lines 15 – 18.

<sup>294</sup> 25 May 2022, p59, lines 6 – 8.

<sup>295</sup> A copy of Mr Phasha's j88 form was not discovered – 25 May 2022, lines 1 - 5

<sup>296</sup> 25 May 2022, p11, line 16 – p12, line 5

elbow. Dr Dlamini's explanation in this regard was simply "*I did not notice any bruising*".<sup>297</sup>

216.5 Regarding Dr Dlamini's completion of Mr Smith's J88:

216.5.1 Dr Dlamini conceded that he had failed to provide any detail or measurements in respect of Mr Smith's injuries.<sup>298</sup>

216.5.2 Dr Dlamini conceded that he failed to specify the injury to Mr Smith's right hand and swollen left elbow, and had instead noted an injury to "upper limbs" in general terms. Dr Dlamini conceded that this fell below the standard required for the completion of a J88:<sup>299</sup>

"Doctor, is this how a J88 should be completed? Can you really sit here and tell this court that this is how a J88 should be completed? -- No, obviously there should have been more detail that would have gone into it."<sup>300</sup>

216.5.3 Dr Dlamini conceded that he failed to record a laceration on Mr Smith's mouth,<sup>301</sup> a tender left shoulder,<sup>302</sup> weals on Mr

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<sup>297</sup> 25 May 2022, p13, line 9 – p14, line 5.

<sup>298</sup> 25 May 2022, p27, lines 4 – 7.

<sup>299</sup> 25 May 2022, p33, line 8 – p34, line 9; p35, line 17 – p36, line 5.

<sup>300</sup> 25 May 2022, p29, lines 14 – 17.

<sup>301</sup> 25 May 2022, p31, line 5 – p32, line 14.

<sup>302</sup> 25 May 2022, p32, line 15 – p33, line 4.

Smith's back,<sup>303</sup> and a large haematoma on his left hip.<sup>304</sup>

When pressed for an explanation, Dr Dlamini sought to deny the existence of these injuries.

217 As with the nurses, it is submitted that the only plausible conclusion to be drawn from Dr Dlamini's abject and admitted failure to adequately complete the J88s in respect of the plaintiffs was that it was part of an active attempt to cover up the true nature and extent of the plaintiffs' assault at the hands of DCS officials on 10 August 2014.

218 In this regard, it is important to note, that each of the plaintiffs testified that the Head of Centre, Mr Mohale, was either in Dr Dlamini's consultation room or in the vicinity of his consultation room during his so-called examinations of the plaintiffs.<sup>305</sup>

219 Finally, it is important to note that Dr Dlamini conceded, in respect of three of the plaintiffs, that if they had sustained the injuries recorded by the independent doctors, such injuries would have qualified as moderate to severe and would have warranted hospitalisation.

219.1 In respect of Mr Smith, Dr Dlamini was asked to assume that Mr Smith had sustained the injuries recorded by Dr Khan and asked

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<sup>303</sup> 25 May 2022, p35, lines 1 – 7.

<sup>304</sup> 25 May 2022, p35, lines 8 – 10.

<sup>305</sup> Zulu: 6 November 2019, p 37, lines 12 – 22; p 38, lines 2 – 12; Smith: 3 March 2021, p 43, lines 15 – 24; p 44, lines 1 – 19; p 46, lines 10 -13; Sithole: 12 November 2021, p 9, lines 10 -14; Qibi: 28 July 2021, p 12, lines 3 – 16, p 13, lines 14 -24, p 14, lines 1 – 11.



what the appropriate course of action would have been. He responded as follows:

“Obviously, I don’t have the real grasp of what is actually written here. I haven’t gone through it in detail, but if that was the case, it would have fallen onto that scale where if it’s moderately severe, the patient would have been referred to our hospital section or if they were severe injuries, then the patient would have been referred outside.”<sup>306</sup>

219.2 Dr Dlamini confirmed this under cross-examination. He had the following exchange with the Court:

“And I think you are not asked to comment on whether or not – well if Mr Smith has sustained I think the injuries that Dr Khan you know saw. Are they moderate to severe? Let us forget about what your view might be. We are just looking at you know what Dr Khan had said and let us for now for present purposes accept that what Dr Khan I think said is what appears I think and what has been put to you,. Would that be moderate to severe? – Moderate to severe, ja.”<sup>307</sup>

219.3 After considering Dr Khan’s findings in more detail, Dr Dlamini

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<sup>306</sup> 23 May 2022, p 99 lines 6 – 13.

<sup>307</sup> 25 May 2022, p 41 lines 6 – 14.

repeated this concession:

“And if one accepts that those are the injuries that Dr Khan had found, would they be moderate to severe? And would that mean that he has got to be placed in a hospital setting? So I think take your time. Look at page 83 you know D1 page 83 and the table. – Yes, I would say he could be in the hospital section based on the list of this injuries. He could be in hospital section of the Centre.<sup>308</sup>

219.4 Dr Dlamini made the same concession in relation to Mr Zulu’s injuries:

“These are, doctor, this is a list of Dr van Zyl’s findings that we have been through. --- All right.

You accept presumably that if these findings, if Mr Zulu had been injured as is set out here, this would have constituted moderate to severe injuries and he would have been likely hospitalised. Would you like to have a look again? --- The (inaudible) first is that I am not saying I agree with Dr Van Zyl’s findings. I am actually just asked to give an opinion that if these were the findings, then the patient would be placed in a hospital. I hope I am understanding this ... (intervenes)

Doctor, that is the question. Yes?

COURT: I think I understand you quite correctly. You know, you stand by what you have said, but I think it is that if we

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<sup>308</sup> 25 May 2022, p 43 lines 5 – 11.

were to find that those are her – her findings are correct, what would the position be.

Dr S DLAMINI: Okay.

COURT: And we are understanding you quite clearly that you are not agreeing with us, you know.

Dr S DLAMINI: Okay. Yes, the patient would be transferred to the hospital section.<sup>309</sup>

219.5 Dr Dlamini also conceded that if Mr Sithole had sustained the injuries recorded by Dr Van Zyl, he should have been hospitalised:

“Yes, looking at the extent and the number of areas that the doctor has actually mentioned, this one is . . . there is no life threatening conditions on him. However, it could go either way. It could be manged in a hospital section, but there is nothing that is actually threatening his life.

No, that wasn’t the question, doctor. You weren’t asked to give your view in relation to whether anything was life threatening or not. You were asked to give your view as to whether these are moderate to severe injuries. --- I would say mild to moderate.

And Mr Sithole would have been hospitalised, if these injuries had been correctly found at the prison. --- For monitoring purposes, yes.”<sup>310</sup>

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<sup>309</sup> 25 May 2022, p 52 line 13 – p 53 line 13.

<sup>310</sup> 25 May 2022, p 69 lines 7 – 20.

## **Conclusion**

220 In concluding this section, we make the following submissions:

220.1 As set out above, 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 Mr Zulu, the clinical findings made by Dr Van Zyl were conceded by the defendant's counsel.

220.2 It is common cause that the plaintiffs sustained their injuries on 10 August 2014.

220.3 The evidence of the nurses and Dr Dlamini to the effect that many of the plaintiffs' injuries recorded by Dr Khan and Dr Van Zyl were not present on 10 and 11 August 2014 must therefore be rejected as false.

220.4 The only plausible explanation for the failure of the nurses and Dr Dlamini to properly examine the plaintiffs and to honestly record and treat their injuries is that they were part of an active cover up of the nature and extent of the assault by DCS officials on the plaintiffs 10 August 2014.

221 We submit that it has therefore been established that the plaintiffs sustained the physical injuries recorded by Drs Van Zyl and Khan on 10 August 2014.

222 The question which then arises is how did the plaintiffs sustain these injuries? There are only two possibilities. Either they were sustained on the defendant's version of events or they were sustained on the plaintiff's version of events.

223 We begin by examining the defendant's version.

## **THE DEFENDANT'S VERSION**

### ***The alleged attack by inmates on DCS Officials on 10 August 2014: A fabrication***

224 As set out above, the defendant's version is that when DCS officials entered cell B1 on the morning of 10 August 2014, they were attacked by the inmates in the cell, who hurled an assortment of missiles at them. As we will see below, these missiles morph over time and depending on which of the defendant's witnesses was testifying about them, but they are said to have included *inter alia* kettles, irons, broomsticks, soap, water bottles and buckets of urine and faeces. Mr Monare's evidence was that a bucket of faces was thrown over him during this attack. He testified that he was terrified and feared for his life.<sup>311</sup> The defendant's version is that it was as a consequence of this violent attack by inmates that DCS officials were constrained to use force to defend themselves against

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<sup>311</sup> 5 May 2022, p 2 lines 13 – 19.

inmates on 10 August 2014.

225 There are three fundamental difficulties with the defendant's version regarding this attack by inmates which, taken together, we submit, compel the conclusion that the attack is a fabrication.

225.1 The first is the absence of any mention of this attack in any contemporaneous account of the events of 10 August 2014 by DCS officials.

225.2 The second is the absence of any consistent account of what was thrown at the DCS officials during this attack. As we shall see, the missiles allegedly thrown morph dramatically over time and depending on which DCS official was testifying.

225.3 The third is the defendant's failure to charge a single inmate of cell B1 with assault or even violent and aggressive behaviour following this attack.

226 We deal with each of these points in turn below.

***The absence of any contemporaneous mention of the attack***

227 There are three documents that serve as contemporaneous records of the events of 10 August 2014:

227.1 First, the Head of Centre's diary,<sup>312</sup> 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 physical 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 no mention in the Head of Centre's diary of any attack on DCS officials by the inmates of cell B1. This was confirmed by Mr Mohale in cross-examination.<sup>313</sup>

227.2 Second, the internal memorandum in terms of which Mr Mohale requested a formal investigation into the incidents of 10 August 2014.<sup>314</sup> 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.

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<sup>312</sup> Exhibit A4, p 370. The transcript appears at exhibit A4, pp 445 – 447.

<sup>313</sup> 29 April 2022, p 57, lines 1 – 8.

<sup>314</sup> Exhibit A1, pp 26 – 27.

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 inmates taking medication was at risk and operations such as visit was delay although I addressed visitors about the challenge we were faced with.”* Again, while the memorandum purports to provide 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. Mr Mohale confirmed this in cross examination and was unable to explain it.<sup>315</sup>

227.3 Third, the report of the Judicial Inspectorate for Correctional Services (“**JICS**”),<sup>316</sup> 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 to the inmates, according to this report, was applied with *“the objective of ensuring that services are rendered for the day, i.e. counting, serving*

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<sup>315</sup> 29 April 2022, p 59, lines 12 – 16.

<sup>316</sup> Exhibit A1, pp 431 – 440.



*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.*” Thus while the report records the officials’ rationale for the use of force, there is no mention of a violent attack on DCS officials by inmates which left Mr Monare covered in faeces. Nor is there any mention of any need by DCS officials to act in self defence. This, too, was confirmed by Mr Mohale in cross examination.<sup>317</sup> Again he was unable to explain it.

228 None of the contemporaneous records supports the version of events offered by the defendant. It is, in our respectful submission, inconceivable that there would be no mention of this violent attack by inmates on DCS officials in any of these contemporaneous accounts of the events of 10 August 2014, if the attack had in fact happened.

229 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:

229.1 Mr Monare, who testified that he feared for his life as a result of the attack, testified that did not tell anyone about the alleged attack by the inmates until 5 September 2014, when he made a statement to

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<sup>317</sup> 29 April 2022, p 70, lines 16 – 18.

investigators for purposes of the internal investigation.<sup>318</sup> 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.

229.2 Mr Moleleki testified that when he entered cell B1 on 10 August 2014, he saw inmates standing with items that they could use as weapons.<sup>319</sup> He also testified that the inmates inside the cell threw missiles at him.<sup>320</sup> He testified that he did not report these events to anyone.<sup>321</sup>

230 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 upon to make statements for purposes of the internal investigation. This was almost a month after the alleged attack had taken place. Despite the account that this was a horrifying and terrifying experience for the DCS officials<sup>322</sup> and that the attack was extremely violent, with dangerous implements being hurled at officials,<sup>323</sup> not one of the DCS officials who was present during the attack made any mention of it at the time. This, we submit, is inconceivable if the attack had in fact happened.

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<sup>318</sup> 4 May 2022, p 93 line 5 – p 97 line 7.

<sup>319</sup> 11 May 2022, p 92 lines 1 – 3.

<sup>320</sup> 11 May 2022, p 99, lines 3 – 7.

<sup>321</sup> 11 May 2022, p 92 lines 7 – 11.

<sup>322</sup> 4 May 2022, p 94, lines 19 – 21.

<sup>323</sup> 29 April 2022 lines 19 – 21.

### ***The morphing missiles***

231 If the alleged attack on DCS officials by the inmates of cell B1 had in fact occurred, one would have expected there to be a consistent account of what was thrown at DCS officials by inmates. As we shall see below, there is anything but a consistent account in this regard with the missiles allegedly used morphing and changing over time and depending on who was giving evidence.

232 The statements provided by the DCS officials and EST members for the purpose of the internal DCS investigation recorded the following:

232.1 Mr Zimba stated that “an assortment of items (Broom, bar soap, buckets etc) were thrown at us.”<sup>324</sup>

232.2 Mr Kunene made no mention in his statement of any items being thrown.<sup>325</sup>

232.3 Mr Moleleki indicated in his statement that he observed faeces on Mr Monare’s upper body and that missiles were thrown at the officials when they went into the cell.<sup>326</sup>

232.4 Mr Molalagotla stated that Mr Monare was “*wet and smelly, so was*

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<sup>324</sup> Exhibit A4, p 318A.

<sup>325</sup> Exhibit A4, pp 326A-B.

<sup>326</sup> Exhibit A4, p 337A.

*the floor*” and that he saw human faeces on Mr 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 these items were.<sup>327</sup>

232.5 Mr 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 me.”* He stated that when he entered the cell a second time with Mr Moleleki, Mr Molalagotla and two EST officials, they used shields to block items that were thrown at them.<sup>328</sup>

232.6 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.”*<sup>329</sup>

233 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. It is important to note that there is not a single reference to a kettle or an iron being thrown by inmates in any statement in the internal DCS investigation.

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<sup>327</sup> Exhibit A4, p 337D.

<sup>328</sup> Exhibit A4, p 337E – 337F.

<sup>329</sup> Exhibit A4, p 337H; pp 338 – 339; p 342; pp 344 – 345; pp 347 – 348; pp 350 – 351; p 353; pp 356 – 357.

234 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 litre bottles of water:

234.1 It was put to Mr Zulu that *“when the cell door was opened and they entered the cell they were pelted with various objects. Amongst them, 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.”* Mr Zulu denied this.<sup>330</sup>

234.2 The following was put to Mr Sithole, all of which was denied:

MR MOERANE: And when the cell door was eventually opened, the inmates started hurling various objects and missiles at the officials.

MR SITHOLE: No M’Lord, that never happened.

MR MOERANE: That is including buckets, urine and human faeces.

MR SITHOLE: No M’Lord that is a grave exaggeration, it never happened.

MR MOERANE: Electric kettles, electric irons and broom sticks.

ME SITHOLE: We have never done that M’Lord what would we then use to make tea or to take these items and use them and hurl them at the officials and use electrical irons and all that appliances M’Lord.

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<sup>330</sup> 8 November 2019, p 52, lines 10 – 21.

MR MOERANE: And two litre bottles filled with water.

MR SITHOLE: Two?

MR MOERANE: Two litre bottles

MR SITHOLE: Two Litre bottles?

MR MOERANE: Yes.

MR SITHOLE: Firstly let us correct one thing, cool drink in two litre bottles is not sold at the Leeuwkop prison so where would one get it. Where would prisoners find that?<sup>331</sup>

234.3 It was put to Mr Qibi that upon entering cell B1 the officials were attacked “*with various items including brooms and broomsticks and electrical irons, kettles and water or urine with faeces.*” Mr Qibi denied this.<sup>332</sup>

235 The missiles allegedly hurled by inmates at officials changed again when the DCS officials gave evidence before this Court:

235.1 Mr 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.<sup>333</sup>

235.2 Mr Kunene’s reference to 500 ml bottles – which bottles had not

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<sup>331</sup> 14 November 2019, p 97 line 20 – p 98 line 16.

<sup>332</sup> 4 August 2021, p 30 lines 12 – 16.

<sup>333</sup> 14 April 2022, p 15 lines 7 – 12.

been referred to before – can only be a response to Mr Sithole’s unchallenged evidence that two litre bottles were not available at Leeuwkop at the time of the incident.

235.3 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.

235.4 Mr 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.<sup>334</sup>

235.5 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 Mr Monare opened the cell door a bucket was thrown at him, although she did not know whether it contained water or urine.<sup>335</sup> Ms Khan specifically denied seeing items such as kettles and irons.<sup>336</sup>

235.6 This was the first mention of toothbrushes and toothpaste being thrown by the inmates. This was never put to the plaintiffs, nor was

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<sup>334</sup> 4 May 2022, p 45 lines 2 – 14.

<sup>335</sup> 9 May 2022, p 90 lines 8 – 20.

<sup>336</sup> 10 May 2022, p 55 lines 5 – 7.

this evidence given by any previous DCS witness.

235.7 This was also the first mention of any missiles being thrown into the courtyard. Ms Kahn testified that the inmates were standing on top of the beds and throwing missiles through the windows into the courtyard.<sup>337</sup> This was new evidence, never given by any previous DCS witness. Nor was it put to the plaintiffs.

235.8 Ms Kahn's express denial of the presence of kettles and irons is also significant.

235.9 Mr 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 Mr Monare had faeces on his shirt.<sup>338</sup>

235.10 It appears that Mr Moleleki sought to corroborate Ms Kahn's evidence that the courtyard was a mess, and that the inmates had thrown soap and toothpaste into the courtyard.

235.11 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 in

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<sup>337</sup> 10 May 2022, p 54 lines 14 – 19.

<sup>338</sup> 11 May 2022, p 23 line – p 24 line 14.



cross-examination.

235.12 Mr Makoka testified under cross-examination that he saw papers and soap in the courtyard.<sup>339</sup>

235.13 This is a clear attempt by Mr Makoka to corroborate the evidence of the witnesses who testified before him.

235.14 Finally, Ms Buthelezi's evidence was that when she arrived at B unit, the courtyard was filthy with papers and tubes of toothpaste.<sup>340</sup>

235.15 This is another obvious attempt to corroborate the evidence of the witnesses who testified before her.

236 An examination of the defendant's evidence on the missiles allegedly thrown by the inmates of cell B1 on 10 August 2014 is riddled with contradictions and inconsistencies. The simple point is that if the inmates of cell B1 had in truth thrown missiles at DCS officials on 10 August 2014, there would be a clear account from DCS officials as to what they were. There is none.

***No inmate was charged with attacking any DCS official on 10 August 2014***

237 Following the events of 10 August 2014, the plaintiffs were charged<sup>341</sup>

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<sup>339</sup> 12 May 2022, p 40 lines 5 – 20.

<sup>340</sup> 17 May 2022, p 53 lines 8 – 11.

<sup>341</sup> Exhibit A1, pp 33 – 36.

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.*” Mr Kunene’s evidence was that these charges arose from the blocking of the cell door.<sup>342</sup>

238 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 –

238.1 is abusive to any person;<sup>343</sup>

238.2 commits an assault;<sup>344</sup> or

238.3 in any manner defaces or damages any part of the correctional centre or any article therein or any state property.<sup>345</sup>

239 Had the inmates of cell B1 in fact attacked the DCS officials as alleged, one would have expected that they would have been charged and disciplined for such attack.<sup>346</sup> Indeed, Mr Kunene testified that assault in

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<sup>342</sup> 21 April 2022, p 83 lines 7 – 9.

<sup>343</sup> Section 23(1)(c).

<sup>344</sup> Section 23(1)(h).

<sup>345</sup> Section 23(1)(l).

<sup>346</sup> This was confirmed by Mr Moleleki on 11 May 2022, p 94 lines 12 – 18.

a correctional centre is a serious offence that may warrant detention in a single cell as a disciplinary sanction.<sup>347</sup>

240 However, during cross-examination, Mr Kunene confirmed that the plaintiffs were not charged with violence, assault, damage to property or hurling any missiles at DCS officials.<sup>348</sup> The only disciplinary steps taken consequent on the events of 10 August 2014 related to the blocking of the cell door.

241 Moreover, it is common cause that Mr Zulu, Mr Qibi, Mr Phasha and Mr Sithole were placed in single cells following the events of 10 August 2014. 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. Mr Kunene expressly denied, however, that the placement of the second to fifth plaintiffs in single cells arose from any display or threat of violence.<sup>349</sup>

### ***Conclusion***

242 We submit that the above facts taken together compel the conclusion that

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<sup>347</sup> 13 April 2022, p 44 lines 6 – 10.

<sup>348</sup> 21 April 2022, p 82 line 5 – p 83 line 3; p 114 lines 1 – 15.

<sup>349</sup> 20 April 2022, p 89 lines 1 – 3.

the alleged attack by the inmates of cell B1 on DCS officials on 10 August 2014 is a fabrication. 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.

243 The defendant 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.

244 The attack by inmates against DCS officials is the lynchpin of the defendant's defence. Having exposed this attack as a fabrication, the defendant has no conceivable justification for the conduct of its officials. We submit that the defendant's version stands to be rejected on this basis alone.

245 We now turn to consider the evidence of the DCS officials in this Court regarding the events of 10 August 2014.

#### **THE EVIDENCE OF THE DEFENDANTS' WITNESSES REGARDING THE EVENTS OF 10 AUGUST 2014**

246 The evidence of the defendant's witnesses as to what transpired on 10 August 2014 is so riddled with material gaps and inconsistencies as to

offer no coherent version whatsoever as to what transpired in cell B1 that morning or how the plaintiffs sustained their injuries.

### **Mr Kunene's evidence**

247 The defendant's first witness was Mr Kunene.<sup>350</sup> He testified that:

247.1 He was informed by Mr Minnaar on 10 August 2014 at approximately 7:30 am that the lock for cell B1 was jammed. Mr Monare took the key from Mr Minnaar and tried to unmaster the door but was unable to do so. Mr Kunene then called Michael Ndlovu, the cell representative, to ask what was happening. Mr Monare requested the offenders to open the door but they refused because they were not willing to risk their lives.

247.2 At that stage Mr Zulu was walking up and down, but Mr Kunene did not speak to him to find out what was happening. The offenders were shouting inside the cell.

247.3 Mr Kunene reported the matter to the internal security office as 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 Mr Phasha told them to "*voetsek*" and that they could "*keep [their] damn food*".

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<sup>350</sup> Mr Kunene version of events appears in the transcripts of 13 April 2022, p 94 line 11 – p 104 line 18 and on 14 April 2022, p 7 line 22 – p 8 line 11; p 11 line 3 – p 17 line 9.

There were other offenders shouting as well, although Mr Kunene did not identify them.

247.4 Mr Zimba then informed Mr Kunene that they had called the EST to assist in controlling the situation. Mr Kunene saw the EST members in the courtyard and briefed Mr De Beer on how the door was locked. He also updated the unit journal at Mr Mbatha's request.

247.5 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. He testified that *"at the time when we passed by the door, there will be noise, there would be insult directed as us. Vulgar words will be coming out, but when you are not there next to the cell it will be almost like calm."*

247.6 Mr Kunene saw Mr Zulu running towards him at the office door where he was standing and the officials were shouting at Mr Kunene to run away as Mr Zulu had something in his hand. Mr Kunene ran towards the gate.

247.7 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 Mr Zulu came running out of the cell, there were still other offenders inside.

247.8 Mr Kunene assisted Mr Moriri who was on crutches. Mr Kunene

testified that 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 Mr Moriri to get injured in the stampede.

247.9 Once the offenders had all come out of the cell the situation was calm again and they could be counted. Mr Kunene 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.

247.10 When Mr Kunene came out of the office he went into the cell and was greeted by the smell of faeces. There was water spillage and there were cooldrink 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.

247.11 Those inmates who were thought to be ringleaders were then taken to the office and asked what happened and why they had blocked the door. They stated that they had blocked the door to avoid being charged for having cell phones.

247.12 Mr Kunene told Mr Zimba that once they had been searched, those inmates who were injured should go to the hospital. The searching took about 40 or 45 minutes. The inmates were taken to the hospital in groups of five from approximately 11:20 or 11:30.

247.13 Mr Kunene denied assaulting any inmate on 10 August 2014 nor did he witness any assault on an inmate by any of official or EST member. He only observed bruising on one inmate, Mr Sithole, who was walking around shirtless. He also knew that Mr Phasha had a prior injury.

***Mr Monare's evidence***

248 Mr Monare's testimony<sup>351</sup> was as follows:

248.1 Mr Monare was with Mr Kunene, Mr Minnaar and Mr Frans while they were attempting to open the door, when they could not do so Mr Kunene called Mr Ndlovu to ask him what was happening. Mr Ndlovu said he was not the one who blocked the door and he could not unblock it, for fear of his life. He also would not tell Mr Kunene who blocked the door.

248.2 Mr 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. Mr Kunene instructed Mr Minnaar and Mr Frans to unmaster the other cells and then went to make a phone call.

248.3 At that time the noise from the cell was becoming louder. Mr Kunene

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<sup>351</sup> Mr Monare's version of events appears in the transcripts of 4 May 2022, p 29 line 16 – p 59 line 6.



tried to talk to the inmates but they did not give him any chance because they were making too much noise. The only voice Mr Monare could identify was Mr Phasha's voice. He also saw Mr Phasha through the window, standing on top of the beds. He testified that Mr 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."*

248.4 Although Mr Phasha was the only inmate Mr Monare could recognise, there were lots of insults coming from other offenders who were standing on top of the beds.

248.5 Mr Monare suggested to Mr Kunene that they leave the inmates inside the cell, but Mr Kunene refused because the officials needed to count the inmates, give them breakfast and allow those needing to see the doctor to do so.

248.6 Mr Zimba then arrived at the unit and he approached the cell. The inmates were whistling and insulting Mr 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.

248.7 The officials then served breakfast to the inmates in the other cells and locked those cells again. At that stage Mr Zimba came back,

followed by a locksmith and EST members.

248.8 Once the cell was unlocked, Mr Monare took two steps inside and instructed the inmates to “fola-fola” outside. As he said that, items were thrown at him, and Mr Zimba pulled him outside of the cell by his belt while he was also pushed out. On Mr 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.

248.9 The noise increased and more officials arrived at the unit. They were awaiting further instructions from Mr Zimba when an official arrived with two non-electrified shields that they could use if they went back into the cell. Mr Zimba advised the officials that he had been given permission to use minimum force and that they should go in and remove the offenders.

248.10 Because of the earlier situation where the inmates had thrown missiles, the officials held the shields on top of their heads. Mr Monare led the way, with Mr Moleleki and Mr Molalagotla on either side of him. He was holding a tonfa in his right hand. There were two EST officials, Mr Mokobodi and Mr Manamela, behind them.

- 248.11 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.
- 248.12 Some of the offenders held their hands up and moved out of the cell. The officials had difficulty removing “the likes of” Mr Qibi and Mr Zulu, who were the last to leave the cell (Mr Zulu being the very last to leave). Mr Phasha and Mr 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. It was in the course of that removal that some of the inmates were injured. Mr Monare testified that he struck Mr Zulu on the lower part of his body, specifically his left leg, while he was standing on the bed. Mr Monare could not explain how Mr Zulu sustained his other injuries. Mr Monare could not explain how any of the other plaintiffs sustained their injuries either.
- 248.13 Once the inmates were all out of the cell, Mr Monare went to change his uniform. At that stage the inmates were squatting and waiting to be counted.
- 248.14 When he arrived back 45 minutes to an hour later he saw that the inmates were cleaning the items that were on the floor. Cell 1B had been locked up with the inmates inside. There were also inmates returning from the hospital.

248.15 Mr Monare denied all of the plaintiffs' allegations against him. He testified that he was not aware of any of the plaintiffs' injuries until these proceedings were brought.

***The contradictions between the evidence of Kunene and Monare***

249 The following fundamental contradiction arises from the evidence of these two witnesses:

249.1 Both Mr Kunene and Mr Monare gave positive and unequivocal accounts of the order in which the inmates, and Mr Zulu in particular, left the cell. Mr Kunene's version was that Mr Zulu ran out of the cell at an early stage while many inmates were still inside, whereas Mr Monare testified that Mr Zulu was the very last person to leave the cell.

249.2 The witnesses also contradicted each other with regards to how Mr Zulu exited the cell. While Mr Kunene testified that Mr Zulu came running out of the cell, Mr Monare's version was that he had to apply force to make Mr Zulu get down from the top of the bunk beds to leave the cell. Mr Monare testified that he then marched Mr Zulu out of the cell.

250 We submit that this contradiction strikes fundamentally at the truth of the defendant's version and it is therefore important to set out this evidence in some detail:

250.1 Mr Kunene testified that Mr Zulu came running out the cell at an early stage when many inmates were still inside the cell:

“Certainly there were still other offenders in the cell when Mr Zulu came running out, correct? – That is correct.

And it was after – well let us do it this way. We know that you assisted Mr Moriri who was on crutches, correct? – That is correct.

. . .

And by that time Mr Zulu was already out of the cell, correct? – That is correct.”<sup>352</sup>

250.2 Mr Monare however, testified that Mr Zulu was the very last person to leave the cell and that he marched him out:

“Okay, so that is how it happened then Mr Monare. Mr Zulu – when you went into the cell Mr Zulu was standing on a bed and you removed him and he was the last person to be removed from the cell, correct? – That is correct, My Lord.”<sup>353</sup>

250.3 Mr Monare confirmed later during cross examination:

*“ADV H BARNES: He was the very last person that you marched out of the cell? --- That is correct.”*<sup>354</sup>

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<sup>352</sup> 21 April 2022, p 59 line 2 – p 60 line 10.

<sup>353</sup> 5 May 2021, p 43 lines 19 – 21.

<sup>354</sup> 5 May 2021, p 6 lines 14 – 15.

251 The following further contradictions emerge from the evidence of Mr Kunene and Mr Monare:

251.1 While Mr 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, Mr Kunene made no mention of this. In fact Mr Kunene made no mention in his evidence of any attack by the inmates of cell B1 on DCS officials on 10 August 2014.

251.2 Mr Kunene testified that he witnessed a stampede occurring as inmates exited cell B1, with inmates crashing into one another and falling over. Mr Kunene testified that he feared that Mr Moriri who was on crutches would get injured in the stampede and assisted him to leave the cell. Mr Monare made no mention of a stampede in his evidence.

252 These inconsistencies were compounded by the evidence of subsequent witnesses for the defendant.

### ***Ms Khan's evidence***

253 Ms Khan's testimony was that she was in the C unit when she responded to a request from Mr Zimba for members to beef up security in 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 Mr Monare opened the door a bucket was thrown at him. Ms Khan did not know whether the bucket contained water or urine. She heard Mr Zimba scream at Mr Monare and Mr Monare then locked the cell and stood back. Mr Monare went to get a shield and went into the cell with two other officials. Offenders came out with their hands in the air and Ms Khan instructed them to “*vang die muur*” at the far end of the courtyard to be searched. Mr Smith, Mr Zulu and Mr Phasha were among the last offenders in the cell and had to be forcibly removed from the cell. Mr Zulu came out of the cell running with something in his hand. He ran past Ms Khan and towards Mr Kunene. Mr Smith and Mr Phasha went to the wall to be searched. Mr Zimba then took Mr Smith and Ms Khan took Mr Phasha into the office to ask them what had happened and who had blocked the door. They said that they did not know anything. Ms Khan escorted Mr 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. Ms Khan denied having assaulted any of the inmates. She also denied assisting them or protecting them from assault by other officials.<sup>355</sup>

254 This was the first mention by the defendant’s witnesses of soap,

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<sup>355</sup> 9 May 2022, p 89 line 7 – p 105 line 2.

toothpaste and toothbrushes thrown at the officials. It was also the first mention of anything being thrown into the B section courtyard. Neither Mr Monare nor Mr Kunene, who were present during the entire operation, testified that these things had happened.

255 Ms Khan testified that the mess in the courtyard did not include kettles or irons that had been thrown at the officials.

256 She also testified that what was thrown at Mr Monare appeared to be urine or water. She did not see any faeces being thrown at him.

257 Ms Khan's evidence that Mr 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 Mr Kunene and Mr Monare. It appears that this was an attempt to reconcile their two versions on this issue. However, the result of this poorly disguised attempt is that there is now a third version as to how Mr 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.

258 Neither Mr Kunene nor Mr Monare testified that Mr Smith and Mr Phasha were taken into the office to be interrogated by Mr Zimba and Ms Khan, nor was this put to Mr Smith in cross-examination.



### ***Mr Moleleki's evidence***

259 Mr Moleleki testified that when he got to 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. Mr Moleleki was standing next to Mr Monare with Mr Molalagotla when he managed to open the grill, but then Mr Monare had to relock the grill. He noticed that there was faeces on Mr Monare's shirt and that his shirt was wet. Mr Moleleki grabbed a shield and went inside with Mr Monare and Mr Molalagotla and they had two non-electric shields between them. They were backed by members of EST (although Mr Moleleki could not recall how many). Mr 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 offenders were on the beds, while others were running towards the exit gate in a stampede. Mr Moleleki 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 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, Mr Moleleki left the shield in the office of B unit and left. He did not see any

of the officials assaulting any inmates.<sup>356</sup>

260 Mr Moleleki continued the narrative of items being thrown into the courtyard, this time including papers and coca cola bottles. While he did not testify that the inmates threw kettles and irons at the officials inside the cell, he did say that they 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 a kettle or an iron being thrown at him, he could not provide a clear answer.<sup>357</sup>

261 Mr Moleleki 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.

262 Mr Moleleki made no mention of Mr Smith and Mr Phasha being taken into the office for interrogation.

263 Crucially, despite being in cell B1 during the entire time that the plaintiffs sustained their injuries (on the defendant's version) he could shed no light whatsoever on how any of the plaintiffs' injuries were sustained.

### ***Mr Mokoka's evidence***

264 Mr Mokoka's evidence was that he was working in the kitchen on 10 August 2014. When he went to B unit investigate why the food trolleys

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<sup>356</sup> 11 May 2022, p 22 line 17 – p 36 line 11; p 50 lines 1 – 2.

<sup>357</sup> 11 May 2022, p 101 lines 4 – 17.

from section B had not yet been brought back, he saw the offenders lined up two by two with Ms Khan and Mr Kunene. Mr Makoka participated in searching of the inmates and they were then made to line up against the wall next to the cell. At that stage Mr Makoka saw two offenders coming out of cell B1, followed by Mr Monare whose uniform was soiled. Mr Moleleki, Mr Mokobodi, Mr Manamela and Mr Molalagkotla came out of the cell last. After the inmates had been counted Mr Mokoka went back to the kitchen. Mr Makoka did not go into the cell or into the office. He also testified that he did not witness any assault on the inmates.<sup>358</sup>

265 Mr Makoka did not give evidence in chief about seeing any objects in the courtyard. When pressed under cross-examination he said that he saw papers and soap.<sup>359</sup>

266 Notably, Mr Makoka's evidence was that he saw Mr Monare came out of cell B1 with his uniform soiled by faeces. However, Mr Monare's testimony was that it was his jersey that became soiled, and he took it off before entering the cell for the second time. These two versions are therefore entirely contradictory.

267 Mr Makoka also gave no evidence about Mr Smith and Mr Phasha being taken into the office for interrogation.

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<sup>358</sup> 12 May 2022, p 22 line 6 – p 29 line 10.

<sup>359</sup> 12 May 2022, p 40 lines 5 – 20.

### **Ms Buthelezi's evidence**

268 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 far wall. She noticed that the courtyard was filthy with papers and tubes of toothpaste. Mr 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 reception. She did not go into cell B1, nor did she witness any assault on the inmates in cell B1.<sup>360</sup> Ms Buthelezi also denied having assisted any of the plaintiffs during their assault and torture as they alleged.<sup>361</sup>

269 While it is clear from this evidence that Ms Buthelezi sought to corroborate Ms Khan's and Mr Moleleki's evidence about the state of the courtyard, her evidence on the timeline in section B materially 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, Ms Buthelezi's 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.<sup>362</sup> This too is entirely contradictory.

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<sup>360</sup> 17 May 2022, p 15 line 15 – p 6 line 21, p 53 lines 15 – 16.

<sup>361</sup> 17 May 2022, Op 63 lines 1 – 7.

<sup>362</sup> 17 May 2022, p 54 lines 1 – 15.

## **Conclusion**

270 In the result the defendant's version of what happened on 10 August 2014 is so riddled with inconsistencies and contradictions as to be incoherent. It is also apparent that 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 the tailoring of the evidence.

271 Moreover, and despite leading the evidence of numerous witnesses as to the events of the morning of 10 August 2014 –

271.1 The defendant's witnesses could not single out any inmate, including any of the plaintiffs, who had thrown any missiles at any officials. Moreover Mr Phasha – who was the only plaintiff who did not testify, as a result of his diminished capacity – was the only inmate singled out as hurling insults at the officials. The other four plaintiffs were not alleged to have engaged in any aggressive, unruly or insulting conduct.

271.2 None of the defendant's witnesses could account for how the plaintiffs sustained their injuries, other than the injury to Mr Zulu's left lower limb, which Mr Monare testified he may have inflicted.

271.3 While the defendants' witnesses testified that calm was restored in section B after the inmates were removed from the cell, none of

these witnesses could account for the period between the alleged restoration of calm and the plaintiffs' consultation with the prison nurses.

272 In the result:

272.1 The defendant's version that DCS officials were attacked by inmates on 10 August 2014 was not substantiated by the defendant's witnesses; and

272.2 The defendant's witnesses failed to provide a coherent version of what happened in Cell B1 on 10 August 2014 or any version as to how the plaintiffs sustained their injuries (with the possible exception of Mr Zulu's left lower limb).

### ***Professor Fitz***

273 The defendant sought to rely on the expert report of Prof Fitz to establish that the force applied by DCS officials to the inmates of cell B1 on 10 August 2014 was justified.<sup>363</sup>

274 Prof Fitz had no personal knowledge of the events of 10 August 2014 and confirmed that he had relied solely on the statements provided in the course of the internal DCS investigation, and other documents provided

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<sup>363</sup> Prof Fitz's report appears in volume D4, pp 12 – 38.

to him by the defendant, for purpose of compiling his report.<sup>364</sup>

275 It became clear during cross examination of Prof Fitz that his report presented a partisan view of the events of 10 August 2014 which favoured the defendant. This was apparent from, *inter alia*, the following:

275.1 Prof Fitz's report recorded as an established fact that inmates had hurled missiles at officials.<sup>365</sup> However, Prof Fitz conceded under cross-examination that none of the inmates had indicated in their statements that they had seen objects hurled at any official, nor that they had done so.<sup>366</sup>

275.2 Prof Fitz's report made no reference whatsoever to the inmates' version that they exited the cell peacefully and were assaulted by DCS officials.<sup>367</sup> The internal DCS investigation report contains accounts from 28 inmates who stated that they were beaten and shocked as they exited the cell peacefully. Prof Fitz made no reference in his report to any of these accounts. Instead he recorded, as a fact, that inmates had been forcibly removed from the cell by DCS officials.<sup>368</sup>

276 In maintaining that the inmates had to be removed from the cell by force,

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<sup>364</sup> 14 June 2022, p 53 line 7 – p 54 line 5.

<sup>365</sup> Exhibit D4, p 18 para 22.

<sup>366</sup> 14 June 2022, p 47 lines 1 – 19.

<sup>367</sup> 14 June 2022, p 49 lines 1 – 6.

<sup>368</sup> 14 June 2022, p 51 line 3 – p 54 line 10.

Prof Fitz applied circular reasoning, inferring that they must have resisted exiting the cell because force was applied to them.<sup>369</sup> In other words, he took the presence of force as evidence that its application must have been justified.

277 Prof Fitz also exaggerated or overstated certain aspects of the officials' account of the events of 10 August 2014. For example –

277.1 Prof Fitz's report stated that inmates of cell B1 moved their beds to block the cell door and prevent the officials from opening the cell.<sup>370</sup> During cross-examination, it emerged that Prof Fitz had based this on the statement provided by Mr Moleleki that the inmates were pushing a bed in the direction of the officials after the officials had entered the cell.<sup>371</sup> There was however no mention in this, or any other statement, of inmates moving the beds to block the cell door. Prof Fitz conceded that his report was inaccurate in this respect.

277.2 Prof Fitz's report also stated that Mr Zulu had displayed aggression which caused inmates Gule and Ndebele to fear for their lives.<sup>372</sup> Under cross-examination, however, Prof Fitz conceded that neither Mr Gule nor Mr Ndebele had made these allegations in their

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<sup>369</sup> 14 June 2022, p 56 lines 6 – 10.

<sup>370</sup> Exhibit D4, p 18 para 21.

<sup>371</sup> 14 June 2022, p 65 lines 1 – 8.

<sup>372</sup> Exhibit D4, p 18 para 22.



statements.<sup>373</sup>

278 Ultimately, Prof Fitz conceded that he did not know the true facts of what had 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.<sup>374</sup> He conceded further that had the use of force been unnecessary, it would have been unjustified, and the question or proportionality would not have arisen.<sup>375</sup>

279 In the result, Prof Fitz's report took the defendant's case no further.

## **THE PLAINTIFFS' VERSION**

280 In this section we set out the plaintiffs' version of the assault and torture that they were subjected to on 10 August 2014. We do so sequentially, with reference to the different areas in Leeuwkop's B Unit in which the assault and torture took place.

### ***When the cell door was opened and as the inmates exited the cell***

#### **Zulu's account**

281 Once the locksmith opened the door, Zulu described how he saw Mr Monare preparing to open the gate (or "grill") in front of the cell door

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<sup>373</sup> 14 June 2022, p 71 line 9 – p 75 line 4.

<sup>374</sup> 14 June 2022, p 79 lines 15 – 18.

<sup>375</sup> 14 June 2022, p 80 line 5 – p 82 line 12.

(depicted on photograph 13). He could also see a half-moon formation of EST officials armed with electric shock shields behind Monare.<sup>376</sup> At this point, Zulu had maintained his physical position at the point marked “D” on the cell diagram.<sup>377</sup>

282 From the EST formation, Zulu could recognise Mr Manamela, Mr Maharaj, Mr De Beer, with Mr Minnaar in the front. Behind them stood more EST officials and ordinary DCS officials.<sup>378</sup> From the latter, Zulu could recall seeing Mr Buthelezi, Ms Khan, Mr Rametse, Mr Moleleki, Mr Nkosi, Mr Kunene, Mr Ndzukula, Mr Frans, Mr Chris Nyampule, Mr Zimba, Mr Ngobeni, and Ms Madongi Tiro.<sup>379</sup>

283 Zulu testified that the inmates remained calm in the cell; *“they were just sitting on their beds”*.<sup>380</sup> Defendant’s counsel presented a different version of the events at that point but Mr Zulu maintained that the inmates had remained calm as the events unfolded. Zulu also testified that 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

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<sup>376</sup> 5 November 2019, p109 line 23 – p110, line 2. The cell grill is depicted at photograph 13 of the exhibit. The half-moon formation was drawn on the cell diagram and marked “G”: 5 November 2019, p114, lines 7 – 15.

<sup>377</sup> 5 November 2019, p108, line 24 – p109, line 10.

<sup>378</sup> 7 November 2019, p12, line 21 – p13, line 6.

<sup>379</sup> 7 November 2019, p13, line 16 – p14, line 25.

<sup>380</sup> 5 November 2019, p109, lines 19 – 22.

inmates throwing things over that wall.<sup>381</sup>

284 Once Mr Monare opened the cell gate (or grill), he stepped back and ordered the inmates to exit the cell “two-by-two” and line up in the courtyard. Mr Monare’s position was then marked “E” on the cell diagram.<sup>382</sup> 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).<sup>383</sup> In cross-examination, Mr Zulu noted that the instruction was in fact impossible as the cell’s door frame was too narrow to permit inmates to exit in twos.<sup>384</sup>

285 Zulu testified that since he was already at the door, he indicated to Mr Monare that he was already there and therefore would exit alone.<sup>385</sup> As Zulu exited the cell, he held in his pocketed hand a facecloth that he had dampened in case the threat of teargas came true.<sup>386</sup> Zulu testified that he was immediately “*shocked, kicked, beaten with open hands, beaten with batons*” within the half-moon formation.<sup>387</sup>

286 Zulu recalled that Mr Manamela (of the EST) was using the electric shock shield on him, and that he continually electrocuted him with it and used it

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<sup>381</sup> 5 November 2019, p115, line 13 – p 116, line 16.

<sup>382</sup> 5 November 2019, p110, line 23 – p111, line 17; p112, lines 1-10; 7 November 2019, p12, line 9 - 11.

<sup>383</sup> 5 November 2019, p113, lines 2-9; 20-21

<sup>384</sup> 7 November 2019, p15, line 24 – p16, line 6.

<sup>385</sup> 5 November 2019, p115, lines 1-7; 7 November 2019, p 12, lines 13 – 14.

<sup>386</sup> 5 November 2019, p116, line 21 – p117, line 2.

<sup>387</sup> 5 November 2019, p117, lines 9 – 14.

to push him against the wall.<sup>388</sup> Zulu also recalled that Mr Moleleki (a Grade 1 DCS official), Mr Nkosi (a Grade 2 or 3 DCS official) and Mr Rametsi (a Captain and Head of the D Section) assaulted him. He recalled specifically that Mr Moleleki had slapped him and hit him with a baton; and that Mr Nkosi and Mr Rametsi kicked him,<sup>389</sup> including on the jaw by Mr Nkosi.<sup>390</sup>

287 Zulu testified that, whilst he was being shocked, Mr Monare also beat him with a baton on the head. He testified:

*“They were shocking me with electric shock shields and at this point M’Lord, the beating were so severe, it was so painful. And then Mr Monare came right there and then he beat me with the tonfa [baton] on the head and on [Zulu word, meaning his private parts]”.*<sup>391</sup>

288 Zulu could not remember the names of the other EST officials that were also electrocuting him; he also testified that he could not see all of the officials that were beating him as he had his hands raised protecting his head.<sup>392</sup> When asked how many times he was struck as he exited the

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<sup>388</sup> 7 November 2019, p16, lines 9 – 16; p20, lines 17-25. Mr Zulu also demonstrated to the court how the electric shock shield had been pushed against his chest: 7 November 2019, p16, line 22 – p17, line 10.

<sup>389</sup> 5 November 2019, p117, line 15 – p118, line 10 and p119, lines 10 – 24.

<sup>390</sup> 7 November 2019, p19, lines 14-24.

<sup>391</sup> 5 November 2019, p118, line 12 to 22.

<sup>392</sup> 7 November 2019, lines 15 – 24.

cell, he said “*so many times*”.<sup>393</sup>

289 Defendant’s counsel attempted to find contradiction in the chain of events, by suggesting that in his testimony-in-chief, Zulu had said Mr Moleleki had beaten him with a baton before Mr Monare beat him on the head.<sup>394</sup> Zulu confirmed that Mr Monare had first hit him on the head before he was approached by Mr Moleleki. Zulu testified to the difficulty in telling the court what happened in sequence. He said:

“It cannot be so sequenced M’Lord in a sense that when you are being beaten with a number of people you cannot clearly register that who beat you first and what, what. But at the end of the day the people that I noticed there; there were a lot who assaulted me at that position at that point. But I notice Maluleke, Mr Nkosi, Mr Rametsi, Mr Manamela and Mr Monare. I know some other officials were there but I cannot lie and say I saw them beating me.”<sup>395</sup>

290 Zulu described how hard the blow to his head by Mr 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.<sup>396</sup> Zulu also described how at that point he fell down, his vision got blurry and he felt like he was going to die. Zulu yelled out to the officials that they were going to kill him, “*and*

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<sup>393</sup> 5 November 2019, p120, lines 8-10.

<sup>394</sup> 7 November 2019, p18, lines 9-15; p19, lines 7 – 13.

<sup>395</sup> 7 November 2019, p18, lines 18-25.

<sup>396</sup> 7 November 2019, p23, lines 17-23.

*then Rametse said he must die*".<sup>397</sup>

291 Zulu testified that he could hear in the background that the inmates had now also 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.<sup>398</sup> Zulu passed out in the courtyard. When he awoke, he realised that he was still being kicked and beaten with batons. He testified *"that gave me a sense that they have not stopped"*.<sup>399</sup>

#### Sithole's account

292 When the cell door was opened, Sithole was still standing in the passage queuing for the toilet (at position M).<sup>400</sup> Sithole stated that when the locksmith unlocked the door, he saw that Monare *"opened the grill, and he reversed. He then said: 'Two-two outside'"*.<sup>401</sup> 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).<sup>402</sup>

293 Sithole testified that Zulu was the first to exit the cell, and that he saw Zulu being assaulted with a "tonfa" (baton) by EST officers as he exited

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<sup>397</sup> 5 November 2019, p119, lines 3 – 9; p120, lines 10 – 12; 7 November, p27, lines 6 – 11.

<sup>398</sup> 7 November 2019, p24, line 19 – p25, line 6.

<sup>399</sup> 7 November 2019, p28, lines 12 – 23.

<sup>400</sup> 11 November 2019, p 33, line 24 to p 34, line 7; 13 November 2019, p 17, line 16-17

<sup>401</sup> 11 November 2019, p 34, lines 15-18; 13 November 2019, p 18, lines 13-17.

<sup>402</sup> 11 November 2019, p 35, lines 8-12; p 36 line 21 to p 37, line 12.

the cell.<sup>403</sup> In cross-examination, Sithole went further to state that he saw Zulu being hit with a baton on his right-hand side by one of the EST members who had initially been part of the half-moon.<sup>404</sup> Sithole explained that he was able to identify the official as an EST member as he was wearing an EST uniform with a black t-shirt marked 'EST', but could not name the official.<sup>405</sup>

294 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 of the door on the instruction that the inmate exit "two-two".<sup>406</sup> 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.<sup>407</sup> However Sithole testified that the inmates who exited the cell before him were also assaulted. He stated in examination in chief that: "*the ones that went out before me, in front of me M'Lord, were also assaulted. .. M'Lord, everyone who was in front of me were protecting their heads, for their heads not to be struck or [to] get assaulted*". Sithole demonstrated the body position by holding up both his hands on top of his head and bending down his upper body.<sup>408</sup>

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<sup>403</sup> 11 November 2019, p 37, lines 14 to 25.

<sup>404</sup> 11 November 2019, p 34, lines 23 to p 35, line 12; & p 37, lines 1-12; 13 November 2019, p 19, lines 11 to p 20, line 8.

<sup>405</sup> 13 November 2019, p 20, lines 5 – 8.

<sup>406</sup> 13 November 2019, p 18, lines 19-25.

<sup>407</sup> 11 November 2019, p 38, lines 1-6 and 13; 13 November 2019, p 19, lines 4-6.

<sup>408</sup> 11 November 2019, p 38, lines 17-25; 13 November 2019, p 20, lines 23-25.

295 Sithole testified that the inmates were being struck with tonfas on the upper body, including on both sides of the shoulders and back. He demonstrated how the tonfa is held and used for hitting, and where the inmates were being hit.<sup>409</sup> He says that he did not see anyone using the electric shock-shields at that time.<sup>410</sup>

296 Sithole testified that he, too, was assaulted by “the EST” as he exited the cell door.<sup>411</sup> Sithole demonstrated to the court that he was struck with a baton between his right shoulder and neck.<sup>412</sup> He could not say how many times he was struck “*because everything happened fast*”, but it was more than once.<sup>413</sup> Sithole demonstrated how, in order to protect himself, he exited holding both his hands on top of his head and bending over.<sup>414</sup> He was not carrying anything as he left the cell.<sup>415</sup>

297 Sithole testified that he and other inmates were not walking normally as they exited the cell, and so they slipped and fell – “*like you are running or walking fast wearing the prison shoes it is slippery, the floor is slippery*”.<sup>416</sup>

298 The inmates did not queue outside in the ordinary manner, but ended up

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<sup>409</sup> 11 November 2019, p 39, lines 3-18.

<sup>410</sup> 11 November 2019, p 39, lines 19-22.

<sup>411</sup> 11 November 2019, p 40, lines 14 – 16.

<sup>412</sup> 11 November 2019, p 41, lines 13 – 19; p. 42, lines 2-10; 13 November 2019, p 22, line 14 to p 23, line 8.

<sup>413</sup> 11 November 2019, p 41, lines 19-24.

<sup>414</sup> 11 November 2019, p 42, lines 5 – 15; 13 November 2019, p 22, lines 10-13.

<sup>415</sup> 11 November 2019, p 42, lines 11-13.

<sup>416</sup> 13 November 2019, p 24, lines 10-12.



lying down, on top of one another, in the section B courtyard by the cell wall (at the position marked “O” on the cell diagram, 366A).<sup>417</sup>

299 Sithole graphically explained how he slipped and fell on top of inmates, and ended up lying on top of two or three of them.<sup>418</sup> Other inmates then lay on top of him and, as a result, he was not struck while lying by the wall.<sup>419</sup> He explained that the idea was to lie under other inmates to avoid being hit (since the ones on top are struck).<sup>420</sup> While lying at the wall, he could hear inmates saying “*It is not us, it is Zulu*”.<sup>421</sup>

300 Sithole could not say whether other inmates were thrown to the ground by officials. He testified that after he had landed on top of the other inmates, he was facing down, so he could not see what happened behind him (and specifically, whether inmates were being thrown to the ground).<sup>422</sup>

301 Sithole testified that he did not know how long they were lying on the ground in the courtyard, and he declined to provide an estimate since he was unsure.<sup>423</sup> It was put to Sithole that on previous occasions, when he had recounted the events in question and in general (such as to Mr

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<sup>417</sup> 11 November 2019, p 40, lines 1 – 5;

<sup>418</sup> 11 November 2019, p 42, lines 22-25; p 43, lines 2–12; p 44, lines 10-14; 13 November 2019, p 23, lines 20-23 and p 24, lines 10-23.

<sup>419</sup> 11 November 2019, p 44, line 18 to p 45, line 12.

<sup>420</sup> 11 November 2019, p 44, lines 18-21.

<sup>421</sup> 11 November 2019, p 25, lines 14-21; and p 45, lines 23-25; 13 November 2019, p 26, lines 17-18.

<sup>422</sup> 13 November 2019, p 25, lines 20 – 23.

<sup>423</sup> 11 November 2019, p 46, lines 10-12; and 13 November 2019, p 28, lines 1 - 9.

Thakadu and Dr Taylor), he “gave an estimate of the time of the incident”. Sithole denied this claim. It is not clear how Sithole understood the question, as Sithole did not deny giving “estimates of time” to these people.<sup>424</sup>

### Smith's account

302 Smith testified that when the cell door opened, he was on his bed<sup>425</sup> just like most of the other inmates<sup>426</sup> and that Zulu was at the door (having been there the whole morning).<sup>427</sup> The inmates were quiet in the cell; the only people who could be heard were the officials.<sup>428</sup> The first thing he heard when the cell door was opened was Zulu screaming as he exited the cell:

“It was loud, very loud, screaming and apologising. But they assaulted him and you could hear the shock shields also. From the door M’Lord the screams got louder as he moved closer towards the office because he was like moving up. So the screams became louder and louder.... Xolani went out screaming, screaming, while he was screaming other officials called the inmates to come out and fola, two-two.”<sup>429</sup>

303 Smith testified that officials had formed a half-circle or half-moon going

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<sup>424</sup> 13 November 2019, p 29 line 15 to p 30, line 4; emphasis added.

<sup>425</sup> 2 March 2021, p40, line 1.

<sup>426</sup> 2 March 2021, p40, lines 5-6.

<sup>427</sup> 2 March 2021, p40, lines 2-3.

<sup>428</sup> 2 March 2021, p40, lines 8-10.

<sup>429</sup> 2 March 2021, p40, lines 2-11.

out of the cell toward the office, and that two or three officers were also by the shower basin (in the cell).<sup>430</sup>

304 Smith was one of the last inmates to leave the cell, as his bed is situated towards the back of the cell.<sup>431</sup> Smith described the actions of the other inmates once the cell door opened and they were instructed to fola, and how they were beaten and shocked as they exited the cell:

“They were ordered to [fola] two by two, but with screams of Xolani and the cops shouting on top, the first image here, we are a bit hesitant to go out. Not knowing if we are going to get beaten or not. Yes M’Lord, so there was a slight delay, few seconds or so and then afterwards the train went past. So everyone was strong and it was like a stampede. Everyone wants to go out. So basically it is protecting yourself and using another inmate as a shield M’Lord. So that’s why we became a stampede”.<sup>432</sup>

...

“Coming out M’Lord I think the scaffolds were moved. Going out here, so these officers would not allow, would actually guarded for inmates not to run this side to the shower area and the urinal area. So they would stop you from here and beat you and [make] you go to the door, and from the door you get the resistance of the half-moon where they will beat you and shock you and want you to fola against the wall.... So upon going out the front – I do not know whether I explain it right (...) – you cannot walk out because you are being beaten. So you either go down sliding,

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<sup>430</sup> 2 March 2021, p 40 line 15 – p 41, line 3.

<sup>431</sup> 2 March 2021, p42, lines 21-25.

<sup>432</sup> 2 March 2021, p42, lines 11-12.

crawling a lot or sometime when they shock you, you go on top of someone [else]. So when you come outside again, you just walk, they beat you back towards the wall. And then you need to fola. When coming out it is like I said you want someone to protect you. You are trying to get into the other inmates, that is what I tried to do also and I got assaulted more. So ja, till you are in the line you still get assaulted until everyone is out of the room and then it subsides, the beating."<sup>433</sup>

### Qibi's account

305 Mr Qibi testified that soon after the EST arrived, the officials managed to open the door, at which, he and other inmates stepped back further into the cell fleeing from the officials.<sup>434</sup> Mr Qibi testified that at this stage, he observed Mr Zulu being assaulted with batons and electric shock shields.<sup>435</sup>

306 Per the Court's request, Mr Qibi demonstrated that 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.<sup>436</sup>

307 Mr Qibi testified that while he could not see who the rest of the officials were or where Mr Zulu was being assaulted, he could see Mr Monare in

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<sup>433</sup> 2 March 2021, p42, lines 3-20.

<sup>434</sup> 26 July 2021, p38, lines 10-20.

<sup>435</sup> 26 July 2021, p39, lines 12-23, p40, lines 1-4.

<sup>436</sup> 26 July 2021, p40, lines 20-24, p41, lines 1-10.

the group of officials. Upon seeing the assault, Qibi backed away further into the cell – this position was marked as “DD” on the cell diagram.<sup>437</sup> Mr Qibi testified that the officials then came into the cell and started assaulting all inmates and each one was taken to the outside while being assaulted. He testified that he was specifically taken and assaulted by Mr Frans, Mr Mokoka and Mr Monare.<sup>438</sup>

308 Mr Qibi testified Mr Frans, Mr Mokoka and Mr Monareng assaulted him with batons and “chokes” (electric shield), 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 Qibi produce a cell phone.<sup>439</sup> Thereafter, the officials took Mr Qibi outside and told him to squat. This was between office and cell 1 according to his testimony.<sup>440</sup>

***Zulu runs to the main courtyard and is chased by a dog back to the section B courtyard and assaulted in the courtyard***

***Zulu’s account***

309 Zulu testified that when he regained consciousness in the courtyard,<sup>441</sup>

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<sup>437</sup> 26 July 2021, p41, lines 12-24, p42, lines 1-8.

<sup>438</sup> 26 July 2021, p42, lines 10-21.

<sup>439</sup> 26 July 2021, p43, lines 4-24, p44, lines 1-14.

<sup>440</sup> 26 July 2021, p44, lines 15-17.

<sup>441</sup> 5 November 2019, p120, lines 13-14.

and as the assault continued on him, he lay down on his side with his hands protecting his face and how he could feel the kicks all over his body.<sup>442</sup> *“Immediately when I realised that these people want to kill me I stood up. I ran.”*<sup>443</sup> Zulu testified that he ran through the door dividing the Section B courtyard and the main courtyard, towards the latter.<sup>444</sup> As he approached the door, Mr Frans (a correctional officer)<sup>445</sup> was standing ahead of the door. Mr Frans hit Zulu with a baton as he passed him on Zulu’s upper body.<sup>446</sup>

310 As Zulu approached the main courtyard (as depicted in photographs 1 and 2), he saw Mr Mohale, the Head of Centre, standing with four male officials with dogs on leashes.<sup>447</sup> They unleashed one of the dogs which then chased Zulu. Zulu described how close the chase had been and how each time the dog had lunged to bite him, it was a very near miss. This necessitated that Zulu run back to the Section B courtyard. Zulu managed to evade the dog.<sup>448</sup> Zulu testified that the dog-handler who

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<sup>442</sup> 7 November 2019, p27, line 14 – p28, line 6.

<sup>443</sup> 7 November 2019, p29, lines 9-10. The position from which Zulu got up was marked “J” and also depicted at photograph 9: 7 November 2019, p32, line 12 – p33, line 24.

<sup>444</sup> Depicted at photograph 8 of the exhibit. 5 November 2019, p120, lines 15 – 21; 7 November 2019, p29, lines 11 - 16.

<sup>445</sup> An ordinary DCS official.

<sup>446</sup> 5 November 2019, p121, lines 1-16; 7 November 2019, p29, lines 17 – 21; p 30, lines 2 – 14.

<sup>447</sup> Their position in the main courtyard was described using photograph 4. Mr Zulu testified that Mr Mohale and the four EST officials were standing next to the green and cream pole – 7 November 2019, p40, lines 14 – 24.

<sup>448</sup> 5 November 2019, p121, line 17 – p122, line 13; 7 November 2019, p39, lines 2 – 6; p41, lines 14 – 16; p42, lines 20 – 24; p45, line 20 – p46, line 9. In cross-examination, Mr Zulu described that at least three of the dogs were large in size, and that the dog that had chased him was medium in size and brown – 7 November 2019, p39, lines 11 – 18; p41, line 19 – p42, line 3.

unleashed a dog was a white official – in re-examination he said he thinks it was Mr Muller.<sup>449</sup>

311 Zulu described how he could hear his fellow inmates screaming and how he saw some running around the section B courtyard.<sup>450</sup> He also saw some inmates being stacked on top of each other in a pile against a wall: *“...they were putting one on top of another, like the bags of cement.... in a sense M’Lord that some inmates were on top of another inmates, while they were being assaulted”*.<sup>451</sup> Zulu went on to describe how the inmates were being beaten with batons and electrocuted with shock shields.<sup>452</sup> Zulu estimated that there approximately 12 people in the pile.<sup>453</sup>

312 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.<sup>454</sup> At this point, Zulu 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 get tired from the handstands, they would be electrocuted with a shock shield by Mr

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<sup>449</sup> 7 November 2019, p 45, line 9-11; 8 November 2019, p 79, line 17 - p80, line 8.

<sup>450</sup> 7 November 2019, p35, line 24 – p36, line 6.

<sup>451</sup> 7 November 2019, p36, line 17 – p37, line 2.

<sup>452</sup> 7 November 2019, p37, lines 14 – 20.

<sup>453</sup> 7 November 2019, p38, lines 3-8.

<sup>454</sup> 5 November 2019, p122, line 24 – p123, line 7.

Monare, Mr Maharaj and others.<sup>455</sup>

313 Zulu initially testified that he could not recall who was beating and electrocuting him at this time, but only that *“the batons were raining on me I could not see proper who was there”*.<sup>456</sup> However, when prompted in cross-examination, Mr Zulu testified that he could recall Mr Moleleki beating him with a baton, Mr Rametse kicking him and Mr Manamela shocking him.<sup>457</sup> Zulu described how he had been lying on his stomach at the time and how Mr Manamela was pressing the shock shield on his left lower back: *“He was shocking me at the back and was pressing the shield on top of me, not like the normal [way] when they shock you... He was pushing it down to me”*.<sup>458</sup>

314 Zulu testified that, while he was being assaulted, he had tried to explain to the officials that he had done nothing wrong, to no avail:

“I kept on explaining myself that I have done anything wrong, why would I be assaulted like this and then you will hear men saying that you think you are clever ... who are you to block our prison, and so on...”<sup>459</sup>

315 Zulu thinks the ordeal lasted for about an hour before Mr Zimba arrived

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<sup>455</sup> 5 November 2019, p123, line 18 – p124, line 14 & lines 19 - 22.

<sup>456</sup> 5 November 2019, p125, lines 6 – 12.

<sup>457</sup> 7 November 2019, p47, lines 10 – 17.

<sup>458</sup> 7 November 2019, p47, line 20 – p48, line 7.

<sup>459</sup> 5 November 2019, p125, lines 16 – 20; p125, line 25 – p126, line 4.



and ordered that he be taken to the Section B office.<sup>460</sup>

Smith's account

316 Smith testified that he was among the last few inmates to exit the cell.<sup>461</sup> He tried to squeeze himself into the line, the stampede, and ended up crawling or sliding out. As he went out the cell, he was shocked and beaten and kicked<sup>462</sup> on his head, back and all over his body.<sup>463</sup> When asked to describe where he was shocked and hit as he exited the cell, Smith testified:

“On my head, on my back, it was all over my body. Your legs, all over. You just felt a shocking and the battering and the kicking. Sometimes you cannot even feel if it is sure it is the kick or something, but you just feel the pain on your body, the shocks on your body. Going out I tried to squeeze into the line, but I could not squeeze in and I was assaulted until I reached the end of the line and went against the wall then. The assault went on for some time and then it stopped. When it stopped M’Lord, I could hear the dogs again barking, vigorously this time and someone was screaming. And that person came next to me, it was Xolani . So he came [from the] direction [of] the main courtyard M’Lord, from behind me, [to] next to me.”<sup>464</sup>

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<sup>460</sup> 5 November 2019, p125, line 22 – p126, line 3; p129, lines 17-19; 7 November 2019, p48, lines 22 – 25; p49, lines 7 - 11.

<sup>461</sup> 2 March 2021, p58, lines 3-4.

<sup>462</sup> 2 March 2021, p58, lines 4-6.

<sup>463</sup> 2 March 2021, p58, lines 9-10.

<sup>464</sup> 2 March 2021, p57, lines 11-22.

317 Smith testified 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.<sup>465</sup> Smith testified to seeing Ms Khan and Ms Buthelezi (from reception), officer Makoko (from the kitchen unit), Captain Rametsi, Caption Mtimkulu from A section, Nkosi from A section, Captain Buthelezi from C section, Mr Moleleki, and other officials and members of the EST.<sup>466</sup>

318 Smith could not say how many times he was beaten and shocked as he was leaving the cell and going into the courtyard – it was impossible to count. He testified that the assault was “very painful” and that it felt like “extreme maximum force”. He said:

“I was never beaten up like that in my life. And especially the shocking part M’ Lord, you think you can die. Because that shock can get so hard, they keep that shock shield on you when it is like everything is going [in] slow motion when they started shocking and they are keeping it long on you. So I do not know M’Lord if you can remember... like the Matrix movie where they shoot the bullets and it comes in slow motion and he dodges the bullets. It is something like that M’Lord when that shocking is on you. So it is like go slow, like you can feel everything, and then it goes fast and it goes slow again. It is just unbearable M’Lord.”<sup>467</sup>

319 On entering the courtyard, Smith assumed a squatting position by the

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<sup>465</sup> 2 March 2021, p58, lines 23-24, p59, line 1.

<sup>466</sup> 2 March 2021, p59, lines 6-14.

<sup>467</sup> 2 March 2021, p59, lines 1-12.

courtyard wall, with his head facing downwards (colloquially referred to as “*shellkop*”).<sup>468</sup> Smith explained that “*it was a rule of thumb*” when officials assaulted you or when they came to search you, 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 will assault you further*”.<sup>469</sup>

320 Smith testified that at this point, he felt Xolani next to him and saw that Xolani was in pain.<sup>470</sup> This is when the assault on Smith “got worse”. Smith described himself as “a victim of circumstance” as he found himself next to Xolani who was being badly beaten. Smith described being assaulted at this point by Mr Moleleki, who hit him with a baton, Mr Rametsi who shocked him with a shield, and Mr Monare. He also described Ms Khan intervening to pull him “*out of the line of fire*”. Smith described the assault as follows:

“I was just like... a victim of circumstance, because I was next to him. But then the beatings really started M’Lord and the shocking got worse and M’Lord it is like when they shock you and they keep the shock on you, you do not feel the batons. Like I said it is slow motion, but once the shocking stops, it is like, it comes so, like a fast round ... (indistinct) so, it was very traumatic. At some point in time... Mr Moleleki was hitting me so hard on my left elbow... he hit it and it jumped forward because of the shock

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<sup>468</sup> 2 March 2021, p60, line 20.

<sup>469</sup> 2 March 2021, p 59 line 13 – 23.

<sup>470</sup> 2 March 2021, p 59 line 24-25.

in my (...) elbow. And he started hitting me in my face and on my back.

With what? --- With the tonfa.

Were there any other officials that you know who were involved in these acts on you at this time? --- Mr Monare.

And Mr Rametsi was the one shocking. And the time Mr Moleleki was hitting my face and head. There was a time Ms Khan pulled me out and she pulled me out of the line of fire. ... She pulled me out and then I asked her, I think I was screaming at her, are they really doing this? And the other time Mr Rametsi he shocked me again”.<sup>471</sup>

321 At this point in his testimony, Smith got visibly emotional, and the court adjourned his testimony for the day.<sup>472</sup>

322 On resuming his evidence the following day, Smith explained that Mr Rametsi – a DCS official and not part of EST – kept a shock shield in his office “24/7”.<sup>473</sup> Smith explained that he did not know Mr Rametsi at the time but came to know his identity later on, weeks after the events of August 10<sup>th</sup> when he was transferred to D section where Mr Rametsi was in charge.<sup>474</sup>

323 Smith was asked if there was anything else about the assault in the

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<sup>471</sup> 2 March 2021, p 60 line 20- p 61, line 3.

<sup>472</sup> 2 March 2021, p 60 lines 3-24; 3 March, p 13, line 13-16.

<sup>473</sup> 3 March 2021, p13, line 7-13.

<sup>474</sup> 3 March 2021, p13, lines 7-13.

courtyard that he wished to recount. He testified:

“I said M’Lord that it was very painful and you feel like you are going to die because the pain is so severe. Especially at the time Mr Moleleki hit me there. He slapped my hands like both forward and at the time being shocked like ... slow motion. And then it gets fast and then Mrs Khan took me out because they started hitting me in my face and my head.

Slow down. - - - Ja M’Lord, so the time he hit my elbow, he hit both forward like this. ... My left hand M’Lord. It felt like I was crunching like this. Blocking and protecting my face and my head. So when they hit me somewhere here M’Lord, I just fell forward.... That time when I was looking [it was] Mr Moleleki [who] was on top of me, hitting me with the tonfa. So that is the time I got hit in the face a lot and in my head... And that is the time Mrs Khan pulled me out and she was shouting ‘not in the face. Not in the head’. I stood up M’Lord. I was asking why are you doing this, why are you assaulting me like this? I think I was even screaming, I am not too sure. As she was looking at me M’Lord, (...) Mr Rametsi came from the side here and he started shocking me again. Because as he was walking to me he was pressing the shocking shield, you hear the buzz sound [making buzzing sound] as he was approaching me. That is when I looked. He did shock me M’Lord and I went (...) back to where Xolani was and the beating continued and it got worse and I think I blacked out a couple of times there M’Lord. So it is very sad M’Lord because I cannot remember.... Sometimes you think it is better you cannot remember. ...

[T]he inmates told me they saw me just laying there and they were beating me M’Lord. And they thought I was dead and might have broken a lot of bones. And after that they gave me the

nickname 'Ntsibi' M'Lord ... It is basically like I am tough or something..."<sup>475</sup>

324 While Smith could not recall how long the assault lasted for, he testified to finding himself against the wall between cell 1 and the office door.<sup>476</sup> At this point, Mr Monare started calling out inmates' names – he thinks it was Mthokozisi, Phasha, Benson, Smith, Nthlanthla and Mduduzi. Smith testified that he couldn't say if he heard all the names but afterwards those were the people that were in the office with him. When Smith's name was called out, he was dragged into the office by Mr Monare and some other officials.<sup>477</sup>

#### Qibi's account

325 Mr Qibi testified 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 the body as well as his head and shoulders.<sup>478</sup> Mr Qibi testified that upon leaving the cell and being assaulted, inmates were taken to the hall between cell 1 and the office, ordered to line up in a queue of two, to lay on the ground and on top of each other while the assaulting

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<sup>475</sup> 3 March 2021, p 13 line 17 - p 15 line 14.

<sup>476</sup> 3 March 2021, p15, lines 16-18.

<sup>477</sup> 3 March 2021, p15, lines 20-24, p16, lines 1-2.

<sup>478</sup> 26 July 2021, p49, lines 19-23, p50, lines 1-20.

continued.<sup>479</sup>

326 Mr Qibi further testified that the officials, Mr Rametsi, Mr Mlungisi Kunene, Mr Maharaj, Mr Nkosi, Mr Mokoka, Mr Frans, Mr Langa, Mr Moleleki and Mr Zwane were amongst some of the officials assaulting the inmates.<sup>480</sup> At the line while being assaulted, Mr Maharaj called Mr Qibi. Mr Maharaj and Mr Kunene questioned him about the whereabouts of the cell phone with Mr Kunene alleging that Mr Qibi knew about the cell phone because Kunene was aware that Qibi had a cell phone similar to his own. Kunene did so while assaulting Mr Qibi all over his body, including the hands as he was attempting to block and shield himself with his hands.<sup>481</sup>

327 Mr Qibi testified that 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.<sup>482</sup> Mr Qibi demonstrated by lifting his arms in crossbow angle, as well as straight or sideways over the face and heads depending on the direction of the stick towards the head.<sup>483</sup>

### ***The assault inside the section B office***

328 The office is adjacent to cell B1, off the section B courtyard, and is

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<sup>479</sup> 26 July 2021, p50, lines 21-22, p51, lines 1-13.

<sup>480</sup> 26 July 2021, p51, lines 14-22.

<sup>481</sup> 26 July 2021, p52, lines 1-16.

<sup>482</sup> 26 July 2021, p52, lines 18-23, p53, lines 1-10.

<sup>483</sup> 27 July 2021, p3, lines 4-24, p4, lines 1-20.

depicted in diagram 368A and photograph 26.<sup>484</sup> 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.<sup>485</sup> 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.

### Zulu's account

329 Zulu testified that he was dragged to the office by Mr Zimba, with Mr Maharaj and Mr Manamela following behind.<sup>486</sup>

330 Zulu testified that, on being taken to the office on Mr Zimba's orders, it seemed that he was no longer being beaten for having blocked the cell door but rather that he was now being beaten to produce a cell phone. He testified: *"All the beatings that have happened before I went to the office was about me blocking the door. So when I was taken to the office I heard they said I had to produce a cell phone."*<sup>487</sup> Zulu went on to explain that Mr Zimba and some EST officials said his name was on the list of people who had cell phones – seemingly referring to the list that Monare had presented to Mr De Beer during the exchange at the blocked

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<sup>484</sup> 5 November 2019, p126, lines 15 – 23; and p127, lines 16 – 22.

<sup>485</sup> 11 November 2019, p 48, line 18 to p 49, line 11.

<sup>486</sup> 5 November 2019, p125, line 22 – p126, line 3; p129, lines 17-19; 7 November 2019, p48, lines 22 – 25; p49, lines 7 - 11.

<sup>487</sup> 5 November 2019, p128, line 25 – p129, line 8.



cell door.<sup>488</sup>

331 Inside the office, near the entrance to the telephone area, he was electrocuted by Mr Manamela with the shock shield on his upper body.<sup>489</sup> Zulu described in cross-examination how Mr Manamela shocked him with the electric shield against the wall with the help of Mr Zimba. He explained how Mr Zimba pushed him against the wall to face Mr Manamela and held him there, so that Mr Manamela could shock him: *“They were helping each other... Mr Zimba was holding me. Mr Manamela was shocking me. They were a team”*.<sup>490</sup> Zulu also stated in evidence-in-chief that *“Mr Zimba never assaulted or kicked me in any way. He was more of an order keeper, so he did not touch me once, same as Mr De Beer”*.<sup>491</sup> The effect of this testimony appears to be that while Mr Zimba assisted Mr Manamela by holding him up against the wall, Mr Zimba did not himself strike Zulu.

332 Zulu testified that inside the office he was also repeatedly kicked by Mr Maharaj using his knee (*“like a kickboxer style”*), on the top side of his left thigh, whilst he demanded that Zulu produce a cell phone.<sup>492</sup> Mr Maharaj also ordered Zulu to do handstands in the office and each time he fell, Mr Manamela would electrocute Zulu. Both officials would then

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<sup>488</sup> 5 November 2019, p129, lines 9 – 16.

<sup>489</sup> 5 November 2019, p130, lines 15 – 17.

<sup>490</sup> 5 November 2019, p130, lines 20 – 22; 7 November 2019, p49, line 14 - p50, line 14.

<sup>491</sup> 5 November 2019, p130, lines 24-25.

<sup>492</sup> 5 November 2019, p130, lines 9 – 17; 7 November 2019, p50, line 18 – p52, line 9.

order Zulu to get up again and repeat the handstand.<sup>493</sup> Mr Zulu estimated that the repeated sequence of doing the handstands, falling, being shocked by Mr Manamela and being kicked by Mr Maharaj lasted about ten to fifteen minutes.<sup>494</sup>

333 This continued until Zulu moved to the inner section of the office where the kitchen is situated.<sup>495</sup> Mr Zulu marked his position in the kitchen area as “H” on the diagram of the office area.<sup>496</sup> Mr Zulu testified that Mr Manamela followed him into the kitchen area and continued to electrocute Zulu with the shock shield till its battery died.<sup>497</sup> Thereafter, Mr Maharaj gave Mr Manamela a new shield and Mr Manamela continued to electrocute Zulu.<sup>498</sup>

334 While Zulu was on the floor, sitting down against the fridge, Mr Mokoka (a Grade 1 DCS official)<sup>499</sup> entered the office and said “*it is you who blocked the door*”. Mr Mokoka then started kicking Zulu repeatedly on his body, his stomach and back. He could not recall how many times, except that it was repeatedly.<sup>500</sup> Zulu testified that he was also shocked there by

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<sup>493</sup> 7 November 2019, p51, line 24 – p52, line 10; p52, lines 17 - 19.

<sup>494</sup> 7 November 2019, p52, lines 11 – 16.

<sup>495</sup> There is a minor inconsistency in Zulu’s evidence as to how he got to the kitchen-side of the office. In evidence in chief, Zulu stated that he was “taken to” and “placed at the back” of the office (by the kitchen area), while in cross-examination he testified that he “ran” there. 5 November 2019, p130, lines 4-5 and 20; 7 November 2019, p52, lines 21-22.

<sup>496</sup> 5 November 2019, p126, line 24 – p127, line 13. Mr Zulu had also drawn in the positions of the fridge and table in the office. Using photograph 26, Zulu explained that he was in the corner where the batons are hanging in the photo – 5 November 2019, p132, lines 2 – 21.

<sup>497</sup> 7 November 2019, p 52, lines 20 - 25.

<sup>498</sup> 7 November 2019, p53, lines 1 – 10.

<sup>499</sup> 7 November 2019, p53, lines 14 - 16.

<sup>500</sup> 5 November 2019, p131, lines 2 – 13; 7 November 2019, p53, lines 19-22.

Mr Manamela “too much”, until he lost consciousness again.<sup>501</sup> Zulu described 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 you start to scream*”.<sup>502</sup> He described the impact the shock-shields had on him:

*“I think it was higher voltage there because they shock you against a non-moving object, either the wall or a fridge, you would see the batons come in a slow motion. And immediately when they release the shield, then they will move faster ... Normally, when they use it on other people ... they would press it once, ‘khi, khi’. But at that stage when they were shocking me they would press and then they would push it on me and let it stay on me”.*<sup>503</sup>

335 Zulu was asked in cross-examination if he was saying that he was being hit with batons at the same time as having the shield pressed against him. Zulu confirmed this was correct. Zulu could not say who was hitting him, as he was focused on the person with the shield. At that time, he was “standing against the fridge”. This process continued until he passed out again.<sup>504</sup>

336 Zulu testified that when he started to regain consciousness, he felt like

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<sup>501</sup> 7 November 2019, p53, lines 24-25.

<sup>502</sup> 7 November 2019, p54, line 15 – p 55, line 5.

<sup>503</sup> 7 November 2019, p55, line 7 – p 56, line 5. Zulu explained that they still shock people for cellphones: p 56, lines 17-18.

<sup>504</sup> 7 November 2019, p 57, line 15 – p 58, line 11.

he was being dragged by a car on the ground, only to realise that this was because the assault was continuing.<sup>505</sup> He was being beaten by Manamela and four other EST members who were hitting him with batons everywhere except the head.<sup>506</sup> He was at this stage sitting with his back against the fridge.<sup>507</sup>

337 Zulu testified that at some point, Mrs Buthelezi came in and told the officials to stop assaulting him further. Zulu testified that she said “*You know guys, stop. You will kill him*”. The officials did then stop and Mr Manamela ordered him to lie down on his stomach in the centre of the office.<sup>508</sup>

338 At this stage, Zulu testified, he saw other cell mates coming in – Llewelyn Smith and Mugabe (Phumlani Buthelezi) and Mthokozisi Sithole.<sup>509</sup> Zulu described how Sithole “*came flying in with Mr Monareng, on top of the lockers ... or at the tables, and he landed next to me ... I think they threw him on top of the tables, so that he can land on the floor*”.<sup>510</sup> Mr Monare came in after Sithole, with a baton in his hand.<sup>511</sup>

339 Zulu testified that he and the other inmates were made to lie on their

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<sup>505</sup> 7 November 2019, p 58, lines 3 – 20.

<sup>506</sup> 7 November 2019, p 59, lines 2 – 14.

<sup>507</sup> 7 November 2019, p 60, lines 2 – 4.

<sup>508</sup> 7 November 2019, p 60, line 25 – p 61, line 12.

<sup>509</sup> 5 November 2019, p 134, lines 2 – 7; 7 November 2019, p 61, line 14 – p 62, line 2.

<sup>510</sup> 5 November 2019, p134, lines 2 – 21; p 135, line 22 – p136, line 4.

<sup>511</sup> 5 November 2019, p135, line 22 – p 136, line 2; 7 November 2019, p 61, lines 1 – 25.

stomachs on the floor, and demonstrated that he lay there with cheek on the ground,<sup>512</sup> while Mr Monare “walked on” the top of their necks.<sup>513</sup> Zulu testified that Mr Monare was “quite a big man”, bigger than him, and estimated that he weighed about 95kg (about Zulu’s current size), although he could not be sure.<sup>514</sup>

340 Zulu recalled that Mr Monare called them “sisters” – which he understood to mean that they were weak men, or gays.<sup>515</sup> When asked how it felt to be walked on by Mr Monare, Zulu said “*It was so bad... it is inhuman*”.<sup>516</sup>

341 When asked by the court how many inmates were lying on their stomachs at the time, Zulu recalled that there was Smith, Mugabe and Sithole, and that there were others but he could not recall who.<sup>517</sup> Zulu described how Mr Monare walked across their necks, starting with Mr Phumlani Buthelezi (also referred to as Mugabe), then himself, then Smith and then Sithole, with one foot on one cell mate’s neck and the other on another in turns,<sup>518</sup> for about three times with his “parabellem”, official shoes.<sup>519</sup>

342 Probed on whether he had told anyone about the alleged neck incident and injuries by counsel for the defendant, Zulu testified that he had

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<sup>512</sup> 7 November 2019, p 64, lines 2-16

<sup>513</sup> 5 November 201, line 6-7; 7 November 2019, p 62, lines 1 – 11.

<sup>514</sup> 6 November 2019, p 3, lines 11-24; 7 November 2019, p 64, lines 10 – 22.

<sup>515</sup> 5 November 2019, p 136, lines 10-19.

<sup>516</sup> 5 November 2019, p 137, lines 9-10.

<sup>517</sup> 6 November 2019, p 3, lines 4-9.

<sup>518</sup> 7 November 2019, p 65, lines 10 – 22.

<sup>519</sup> 7 November 2019, p 66, lines 5 – 22.

informed his lawyer and Dr Van Zyl.<sup>520</sup> He testified that he did not inform the nurses on the day of the incident, because they never examined him.<sup>521</sup> He also did not tell Dr Dlamini on the 11<sup>th</sup> of August (the day after the incident) “because it was not necessary for the visual examination”.<sup>522</sup> Zulu testified that he did, however, tell Dr Dlamini when he requested a scan for unseen injuries, when he was consulting him about his swollen left limb.<sup>523</sup>

343 In cross-examination, Zulu testified that, whilst he was lying on his stomach by the side of the kitchen, Phasha had also been in the office. Zulu testified that he had heard officials talking to Phasha, but he did not see him or witness him being assaulted, as Phasha was in another part of the office that he had no view of – “the phone room, or maybe in the entrance of the office”.<sup>524</sup>

344 Zulu testified that, sometime after the ‘walking-on-neck assault’, Ms Buthelezi took him to the entrance of the office.<sup>525</sup> Zulu recalled that at this time, Mr Monare was “beating Mthoko” (Sithole).<sup>526</sup>

345 Zulu testified that while he was at the entrance of the office, Mr Manamela

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<sup>520</sup> 7 November 2019, p 67, lines 18-19, and p 69, lines 11-13.

<sup>521</sup> 7 November 2019, p 67, line 22 – p 68, line 5.

<sup>522</sup> 7 November 2019, p 68, line 19 – p 69, line 5.

<sup>523</sup> 7 November 2019, p 68, lines 5-15.

<sup>524</sup> 7 November 2019, p 79, lines 5-25.

<sup>525</sup> 7 November 2019, p 72, lines 16.

<sup>526</sup> 7 November 2019, p 72, lines 19 - 20.

came with a shock shield and shocked him.<sup>527</sup> Ms Buthelezi then came and told Mr Manamela to stop – saying “No, I said stop”.<sup>528</sup>

346 Zulu testified that Mr 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 “1” on the diagram 368A).<sup>529</sup> Zulu testified that he did so, and every time when he would come-down from the handstand, Mr Maharaj would kick him repeatedly on his left thigh, with his knees or Mr Manamela would shock him with the shield.<sup>530</sup>

347 Zulu testified that when Mr 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 Ms Buthelezi would alert him when Mr Maharaj was heading back to where they were as a cue for Zulu to once more assume the handstand so as to give the impression or to pretend that he had been hand-standing all along during Mr Maharaj’s absence from the area where they were.<sup>531</sup> Zulu testified that Ms Buthelezi was allowing him to “*cheat*”<sup>532</sup> with the hand-standing instruction and appeared “*to be on his side*”.

348 At one point during the hand-standing routine, Zulu also testified under

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<sup>527</sup> 7 November 2019, p 72, lines 23 - 25.

<sup>528</sup> 7 November 2019, p 72, line 25 & p 73, line 1.

<sup>529</sup> 6 November 2019, p 7, lines 20-24 and p 8, lines 9-15; 7 November 2019, p 73, lines 1 – 3;

<sup>530</sup> 6 November 2019, p 8, lines 17- 24; 7 November 2019, p 73, lines 11-18; p 75, lines 1-5.

<sup>531</sup> 7 November 2019, p 73, line 19 – p 74, line 4.

<sup>532</sup> 7 November 2019, p 74, lines 7, 20-22.

cross-examination that Mr Zimba came back to the office and told Mr Manamela and Mr Maharaj to stop the hand-standing and shocking routine and following that, they both stopped.<sup>533</sup> Zulu then testified that Mr Maharaj then proposed that Zulu be taken to the shower. Mr Maharaj and Mr Manamela then tried to drag him to the shower but were told by Mr Zimba that “they must stop”.<sup>534</sup>

349 Zulu testified that after attempting to drag him to the shower, Mr Manamela and Mr Maharaj left and so did all the EST officials.<sup>535</sup> He was left sitting at the entrance of the office, leaning against the wall, on his right-hand side (as his left-hand side was swollen and painful).<sup>536</sup>

#### Sithole's account

350 Sithole testified that, whilst lying down by 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 Sithole stood up (with those lying on top of him moving so he could do so), Monare came and questioned him about a cell phone. When Sithole responded that he did not have one, Monare slapped him with an open hand and then grabbed him behind his neck (Sithole demonstrated towards his collar). Monare pulled Sithole

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<sup>533</sup> 7 November 2019, p 75, lines 1-8.

<sup>534</sup> 7 November 2019, p 75, lines 10-21.

<sup>535</sup> 7 November 2019, p 75, lines 23-24.

<sup>536</sup> 7 November 2019, p 76, lines 1 – 4.



by his clothes and pushed him inside “the section B office”, an office used by officials.<sup>537</sup> Sithole explained that, as Monare took him into the office, Monare held him with his left hand, and in his right hand, Monare held a baton.<sup>538</sup>

351 On entering the office, Sithole testified that Monare pushed him over the table in the office that was kept near the fridge.<sup>539</sup> Sithole marked the position of the table he was thrown over as “P” on the diagram of the office (368A), and the position he landed as “Q”.<sup>540</sup>

352 Sithole testified to seeing the inmates Xolani Zulu, Phumlani Buthelezi, Llewelyn Smith, and Benson Qibi lying on the floor in the office.<sup>541</sup> Sithole explained that “there was a big space between the tables” – he indicated the space as being between “H” and “Q” on the diagram of the office (368A).<sup>542</sup> Sithole testified that, after he had landed, he “was pulled” by Monare, and “made to lie” towards the position marked “H”, next to

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<sup>537</sup> 11 November 2019, p 46, line 14 to p 48, line 3. See also evidence under cross-examination: 13 November 2019, p 37, lines 18 – 24; and p 38, lines 13-22.

<sup>538</sup> 11 November 2019, p 48, lines 10-14.

<sup>539</sup> 11 November 2019, p 48, lines 16 – 23; p 50, lines 16 – 20; and p 51, lines 1-5; 13 November 2019, p 38, lines 19 - 23.

The interior of the office is depicted in photographs 26 and 29 (in Exhibit E). Sithole testified that the table depicted in the middle of the office was not in that position at the time. Two tables were kept in the office: one table was used by the officers when they sat outside (and would be removed from the office for that purpose), and the other table would be used by the officer when they cook and eat. The table depicted in the centre of the office in photograph 26 was the one that was kept close to the fridge, and used by the officers when they ate. See 11 November 2019, p 49, line 12 to p 51, line 5.

<sup>540</sup> 11 November 2019, p 51, line 25 to p 52, line 8.

<sup>541</sup> Sithole, 11 November 2019, p 54, lines 12-24; 13 November 2019, p 38, lines 1-10, 18-25.

<sup>542</sup> 11 November 2019, p 52, lines 16-20.

Xolani.<sup>543</sup> And on the other side of Xolani Zulu was Benson Qibi. He could not recall if Smith or Phumlani was next to Qibi.<sup>544</sup>

353 Monare was, by then, carrying an electric shield and baton (the electric shield in his left hand, and the tonfa in his right hand).<sup>545</sup> Sithole testified that Monare “then tramped, My Lord, on my neck... He then assaulted me with a baton and then he shocked me with this electric shock, saying to me he wants the cell phone”.<sup>546</sup>

354 Sithole explained that by ‘electric shock’ he meant the “shield that they use when there is violence in the prison... that shocks”.<sup>547</sup> Sithole could not say if Monare was using the small one or the large shield. He demonstrated the different sizes to the court – he estimated the small one to be approximately 30cm wide by 50cm in length; and the large one to be approximately 30cm wide by 1 metre in length.<sup>548</sup>

355 Sithole testified that Monare came over to him and “put his feet over my neck. Then he put the choke on my chest. At the moment he was asking about the cell phone”.<sup>549</sup> Sithole testified that he was lying on his back when Monare first shocked him on his chest, but that “because of the

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<sup>543</sup> 11 November 2019, p 53, lines 1 to 10.

<sup>544</sup> 13 November 2019, p 39, lines 2-18.

<sup>545</sup> 11 November 2019, p 53, lines 13-16; p 54, lines 19-21. 13 November 2019, p 39, lines 3-4.

<sup>546</sup> 11 November 2019, p 53, lines 14-18.

<sup>547</sup> 11 November 2019, p 54, lines 2-6.

<sup>548</sup> 13 November 2019, p 43 line 15 to p 45 line 2.

<sup>549</sup> 13 November 2019, p 45 lines 6 to 9.

shock from the shield, you cannot lay on your back forever. You will turn, try to remove the shock of the shield”.<sup>550</sup>

356 Sithole explained that 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.<sup>551</sup> Sithole testified that Monare also used the tonfa to hit him on his joints – Sithole demonstrated this by pointing to his knees, elbows and ankles.<sup>552</sup>

357 Monare was joined in assaulting Sithole by Mr Moleleki and Mr Langa. Sithole explained that Moleleki was on his right side by his feet, and Langa was on his left, standing near his knees.<sup>553</sup> They too used batons to hit Sithole on his joints (ankles and knees).<sup>554</sup> Sithole testified that he was lying down whilst he was being assaulted by Monare, Mr Moleleki and Mr Langa.<sup>555</sup> Sithole testified that he was hit on the joints so badly that by the time he left the office, his ankle was “already injured and wide open”.<sup>556</sup>

358 Sithole further described his position at the time as follows:

“When you stretch out your hand to protect yourself, you will then be shocked with this shield, and he will then hit you with the baton

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<sup>550</sup> 13 November 2019, p 46 lines 2-5.

<sup>551</sup> 13 November 2019, p 47 line 7 to p 48 line 12.

<sup>552</sup> 11 November 2019, p 54, lines 18-25.

<sup>553</sup> 13 November 2019, p 48 line 13-21

<sup>554</sup> 13 November 2019, p 46, lines 7 – 11.

<sup>555</sup> 11 November 2019, p 54, line 25.

<sup>556</sup> 13 November 2019, p 49 lines 6-9.

or the tonfa. Then you [are] just thrown and tossed the whole time”.<sup>557</sup>

359 Sithole described what it felt like to be shocked by Monare. He stated:

“My Lord, you know electricity. My Lord, I cannot explain how I feel because when he shocked you with that thing, you feel like you can die. And he is acting in a manner where he does not think anything for you, a human being, a life, a human being with life.”<sup>558</sup>

360 He used similar language when describing the incident under cross-examination. He stated: *“On that day, I felt like I am dying because I was losing my breath and the electric shock was... [cut off by defendant’s counsel]”*<sup>559</sup>

361 He further testified that in the office, Monare had held him by the throat to make him give up the cellphone.<sup>560</sup>

362 As regards Moleleki’s conduct in the office, Sithole testified that Moleleki used a tonfa to hit him, and that “he was mostly assaulting me on my ankles, on my knees... on my joints, until I left the office and then he remained in the office.” When assaulting him, Moleleki said that he wants

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<sup>557</sup> 11 November 2019, p 55, lines 7-10.

<sup>558</sup> 11 November 2019, p 55, lines 16-22.

<sup>559</sup> 13 November 2019, p 49 lines 16-17.

<sup>560</sup> 11 November 2019, p 36, line 24 to p 37, line 15; 14 November 2019, p 89, lines 6-17 (with reference to Dr Taylor’s report at paragraph 4.2.1)

the cellphone. Sithole says that he told him that he does not have a cellphone.<sup>561</sup>

363 As regards Langa's conduct in the office, Sithole testified: "He also had a tonfa, My Lord. And he said: This is a Zulu, a Zulu of my nation. He will not give anything. He is stubborn."<sup>562</sup>

364 Sithole could not testify to how the other inmates in the office were being treated because "it was chaos" and he was focused on his own suffering. He stated in cross-examination: "In the office, I did not have time to look what is happening to other inmates. Each and every man was within his own misery at that time".<sup>563</sup>

365 However, Sithole repeatedly described how Monare walked back and forth on top of him, as well as Xolani Zulu, Llewellyn Smith, Benson Qibi and Phumlani Buthelezi.<sup>564</sup> Sithole testified in chief that, Monare was walking on top of us and tramping on our necks whilst we were laying there".<sup>565</sup> Under cross-examination, Sithole again recounted this incident. He 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

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<sup>561</sup> 11 November 2019, p 56, lines 9-19.

<sup>562</sup> 11 November 2019, p 56, lines 21-25; 13 November 2019, p 50 lines 3-4.

<sup>563</sup> 13 November 2019, p 61 lines 2-3.

<sup>564</sup> 11 November 2019, p 57, lines 2-15, 22-25 and p 58, lines 1 to 9; 13 November 2019, p 50, lines 5 – 22.

<sup>565</sup> 11 November 2019, p 56, lines 5-8.

times. Sithole described this as follows:

*“The way we were lying we were not that too, too ... close, so he will step on me, then to others he will step on the floor, then he will step on the other inmates.”*<sup>566</sup>

366 Sithole testified that since the incident and to this day, his neck gives him problems. He says that every day he has to twist his neck from side to side, and that this started the day of the incident. He testified that he had explained this to doctors. He did not tell the nurses on the day of the incident, but recalled telling Dr Dhlamini about the pain on his neck on the 11<sup>th</sup> (the day after he slept). He also testified that he told Dr Van Zyl that he was feeling pain in his neck and that when she asked if he had been assaulted or beaten on his neck, he had said “No, he put his feet on my neck to pin me to the ground”.<sup>567</sup> He could not say why Dr Van Zyl did not record this.<sup>568</sup>

367 In 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 this version of Monare walking on anyone’s neck was “just a concocted story” – Sithole denied the allegations.<sup>569</sup> He stated emphatically:

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<sup>566</sup> 13 November 2019, p 50 lines 18-20.

<sup>567</sup> 13 November 2019, p 52 line 5 to p 53 line 20.

<sup>568</sup> 13 November 2019, p 54 lines 2-3.

<sup>569</sup> 13 November 2019, p 50 line 23 to p 52, line 4.

*“What I can tell the court is that the people who came or approached us about the incident, they never... took statements the same way. But what I am telling the court today is what happened on that day”.*<sup>570</sup>

368 Counsel for the defendant further put it to Sithole that his version of being in Monare’s office, being assaulted by Monare (in the manner that Sithole had testified) and by Mr Moleleki and Mr Langa (in the way that Sithole had testified), and the testimony that Monare was walking on the inmates’ necks was just a concoction which Sithole and Zulu formulated together.  
<sup>571</sup> Sithole insisted that his testimony was truthful and denied the version put to him.<sup>572</sup>

369 It was also put to Sithole that if the other inmates had been assaulted in the office, then he would have noticed, and since he did not see them being assaulted (save, on his version, for having had their necks walked on), then they were not assaulted. Sithole replied that he could not comment on that, and the other inmates must testify for themselves if they were assaulted or not.<sup>573</sup>

### Smith’s account

370 Smith testified that as he was dragged to the office, Mr Monare hit and

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<sup>570</sup> 13 November 2019, p 51, lines 2 – 9.

<sup>571</sup> 13 November 2019, p 57, lines 1 – 7.

<sup>572</sup> 13 November 2019, p 57, lines 8 – 9.

<sup>573</sup> 13 November 2019, p 64 line 11 to p 65 line 17.

smacked him on the face to make him keep his head down (“*shellkop*”).<sup>574</sup>

On entering the office, Smith testified to seeing Phasha at the entrance of the phone area (on the right of the passage as you enter the office) being “smacked around” by about three or so officials. Smith testified that he could hear Phasha being punched and Phasha screaming.<sup>575</sup>

371 Smith was thrown by Mr Monare into the office, on the floor behind the phone and next to Xolani Zulu.<sup>576</sup> He recalled that Zulu apologized to him, telling him that he did not think that what was happening would happen.<sup>577</sup> Smith recalled Qibi, Nhlanhla and Mduduzi joining them soon after.<sup>578</sup>

372 Smith described lying on his stomach on the floor,<sup>579</sup> next to other inmates.<sup>580</sup> There was a small gap between them.<sup>581</sup> Smith testified that Mr Monare starting walking up and down by their heads – “like he was patrolling up and down”.<sup>582</sup> Smith testified that he “blacked out” and was told a later stage by the inmates who were with him that Mr Monare had started walking and tramping on their faces and necks, but mostly their necks.<sup>583</sup> Smith testified that he could not remember Mr Monare walking

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<sup>574</sup> 3 March 2021, p16, lines 1-5.

<sup>575</sup> 3 March 2021, p16, lines 16-20.

<sup>576</sup> 3 March 2021, p16, lines 5-9.

<sup>577</sup> 3 March 2021, p17, lines 2-4.

<sup>578</sup> 3 March 2021, p16, lines 9-10.

<sup>579</sup> 3 March 2021, p17, line 6.

<sup>580</sup> 3 March 2021, p16, lines 23-24, p17, line 1.

<sup>581</sup> 3 March 2021, p17, line 1.

<sup>582</sup> 3 March 2021, p17, lines 19-21

<sup>583</sup> 3 March 2021, p17, lines 22-24, p18, line 1.



on him, as he had passed out.<sup>584</sup>

373 Smith testified that when he awoke, there were a series of rounds where officials would come in (they could hear them running in, the buzzing of the shock shields and the screaming by other inmates getting assaulted) and assault them.<sup>585</sup> Smith explained how they would move around and end up in a different position after the assault.<sup>586</sup> In particular he remembered that, at some point, Nhlanhla had been next to him once more and not Benson who had been on his left side.<sup>587</sup>

374 Smith testified that at some point an official from the kitchen unit, Mr Shadow Mokoka, had dragged him from the line of fire.<sup>588</sup> He did not know when this happened but he remembered waking up and being between his legs.<sup>589</sup> Smith marked this position as “BB” on the diagram of the office, p 368A.<sup>590</sup>

375 When awake and lying between Mr Mokoka legs, Smith overheard Mr Zimba and Ms Buthelezi conversing.<sup>591</sup> Smith testified to hearing (“*I made out*”) Mr Zimba issuing the instruction that officials should cease

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<sup>584</sup> 3 March 2021, p18, lines 1-2.

<sup>585</sup> 3 March 2021, p18, lines 6-10.

<sup>586</sup> 3 March 2021, p18, lines 10-11.

<sup>587</sup> 3 March 2021, p18, lines 11-13.

<sup>588</sup> 3 March 2021, p18, lines 25-26.

<sup>589</sup> 3 March 2021, p18, lines 17-18.

<sup>590</sup> 3 March 2021, p10, line 10.

<sup>591</sup> 3 March 2021, p21, lines 5-7.

assaulting the inmates in the office.<sup>592</sup> Smith noted how, notwithstanding Mr Zimba's instruction and Ms Buthelezi's agreement to it, officers still went back into the office and again assaulted the other inmates in the office.<sup>593</sup> Smith explained that he was not himself assaulted because Mokoka would guide the officials away and say 'not this one', and the officials would turn to the other inmates.<sup>594</sup> These assaults continued with Ms Buthelezi standing there in the office. Mr Zimba's whereabouts were unknown to him.<sup>595</sup> Smith described this as a "role-play", because Mrs Buthelezi would stop the officers from assaulting the inmates and they would go out but only for other officers or the same bunch to come in again to assault the inmates again. Smith could not say how long this went on for, as he passed out a few times in the office. At some point, Mr Monare came to fetch Smith – he pulled him with one hand and was smacking him with another.<sup>596</sup> He was taken to cell 1 of B section's showers.<sup>597</sup>

### Qibi's account

376 Mr Qibi testified that after being assaulted outside cell 1B, he was then taken to the office next cell 1B by Mr Monare, Mr Frans and Mokoka, with Mr Monare grabbing him by the waist of his shorts to the left, with other

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<sup>592</sup> 3 March 2021, p21, lines 8-10.

<sup>593</sup> 3 March 2021, p21, lines 10-12.

<sup>594</sup> 3 March 2021, p21, lines 22-24, p22, lines 1-3.

<sup>595</sup> 3 March 2021, p21, lines 13-15.

<sup>596</sup> 3 March 2021, p22, lines 4-6.

<sup>597</sup> 3 March 2021, p22, lines 7-8.

official following behind Mr Monare and continuing with the assault Mr Qibi.<sup>598</sup>

377 Qibi testified that 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.<sup>599</sup> Mr Qibi testified that he was made to lie down between Zulu's and Mugabe's feet.<sup>600</sup> Qibi marked his position on the diagram of the office (368A) as position "EE".<sup>601</sup>

378 Qibi explained that 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 Mr Manamela belonging to the EST and Ms Buthelezi being an ordinary DCS official.<sup>602</sup>

379 Qibi testified that on his arrival in the office, the officials were already assaulting Mr Mugabe, Mr Smith and Mr Zulu with batons and electric shields, instructing them to "Chaffkop", which according to Mr Qibi, meant that the inmate must not raise their heads. If the inmate 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

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<sup>598</sup> 27 July 2021, p7, lines 9-21.

<sup>599</sup> 27 July 2021, p8, lines 2-8.

<sup>600</sup> 27 July 2021, p8, lines 9-12.

<sup>601</sup> 27 July 2021, p8, lines 13-24, p9, lines 1-24, p10, lines 1-7. *Mr Qibi was also requested to confirm if the office layout as per the photograph 26 in the photo album accords with his recollection of the layout as it was on the day and he that "No these are the same appliances, the fridge was at the corner, and the table which is in the centre here was not available at the time".* - 27 July 2021, p10, lines 22-24, p11, lines 1-17.

<sup>602</sup> 27 July 2021, p11, lines 20-24, p12, lines 1-13.

person down.<sup>603</sup>

380 Mr Qibi testified that Mr Monare scolded the inmates complaining that they locked the doors and kept cell phones in the cell and demanded that they give him the cell phone. Thereafter, Mr Monare trampled over the inmates on their backs while laying down, face down. Mr Qibi further explained that Mr Monare was trampling on the backs in a manner meant to inflict pain. He further pointed out that Mr Monare had trampled him on his shoulder blade.<sup>604</sup>

381 Asked whether he remembers seeing Mr Sithole, Qibi testified that Mr Sithole joined them later in the office being dragged by Mr Monare whilst also being assaulted. Mr Qibi testified that while in the office, Mr Monare dragged Mr Sithole towards and over the table that faced the door at the entrance of the office.<sup>605</sup>

382 On being asked if he recalled seeing Mr Phasha in the office, Mr Qibi testified that he heard Mr Phasha crying but from the telephone section of the office. Mr Qibi continued that when he was later taken out to the showers, he saw Mr Phasha being assaulted by one of the officials.<sup>606</sup>  
Qibi marked Phasha's position on the diagram of the office (368A) as

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<sup>603</sup> 27 July 2021, p12, lines 14-24, p13, lines 1-20.

<sup>604</sup> 27 July 2021, p13, lines 22-24, p14, lines 1-24, p15, lines 1-24, p16, lines 1-24, p17, lines 1-20.

<sup>605</sup> 27 July 2021, p17, lines 22-24, p18, lines 1-9.

<sup>606</sup> 27 July 2021, p17, lines 22-24, p18, lines 1-24, p19, lines 1-24.

position “FF”.<sup>607</sup>

383 Mr Qibi testified that Mr Monare then came to him and asked him about the cell phone and told Qibi that he would take out the cell phone and produce it. The impression being that Qibi had hidden the cell phone.<sup>608</sup> Thereafter, Mr Mokoka arrived and upon entry, he immediately took used dirty dishwashing water and poured it on Qibi. Mokoka 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.<sup>609</sup>

384 Mr Qibi explained that the electric shield is a common occurrence. The officials generally bring the electric shields with even during searching and on most occasions, but mainly whenever a fight erupts amongst inmates or during a random search.<sup>610</sup> Mr Qibi further explained in general that, the pain from the electric shield is extraordinarily painful when a person is first poured with water and the shocked with the electric shield.<sup>611</sup>

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<sup>607</sup> 27 July 2021, p18, lines 20-24, p19, lines 1-24, p20, lines 1-5.

<sup>608</sup> 27 July 2021, p20, lines 6-11. At this point, Qibi explained to the Court about a prison concept called “upping” in which cell phones are hidden in one’s stomach – 27 July 2021, p20, lines 12 – 20.

<sup>609</sup> 27 July 2021, p20, lines 22-24, p21, lines 1-24, p22, lines 1-13.

<sup>610</sup> 27 July 2021, p22, lines 13-17.

<sup>611</sup> 27 July 2021, p22, lines 18-19.

***Sithole, Phasha, Qibi and Smith are taken to the cell and assaulted there***

*Sithole's account*

385 Sithole testified in chief that he was taken out of the office by Monare and one of the EST members. They said they were “going to search where he sleeps”<sup>612</sup> – that is, in cell 1 of section B.<sup>613</sup> While being taken to the cell, Monare assaulted him and pushed him with the electric shield. On the way to the cell, they were joined by another EST member,<sup>614</sup> who was in the courtyard at the time and whom the officials had called over. This meant that Sithole was accompanied to the cell by Monare and two EST members.<sup>615</sup> Sithole could not identify the EST officials because they were wearing helmets.<sup>616</sup>

386 Inside the cell, Monare and the two EST officials took Sithole to where his bed was situated. Monare and one EST member started searching for the cell phone. The other EST member assaulted Sithole with an open hand and by shocking him with the electric shield while questioning him on the cell phone's whereabouts.<sup>617</sup> Sithole testified in chief 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

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<sup>612</sup> 11 November 2019, p 59, lines 16 - 18.

<sup>613</sup> 11 November 2019, p 59, line 23.

<sup>614</sup> 11 November 2019, p 60, lines 2-3.

<sup>615</sup> 13 November 2019, p 67, lines 3-9.

<sup>616</sup> 11 November 2019, p 60, lines 21 - 25.

<sup>617</sup> 11 November 2019, p 60, lines 8 – 9; lines 11 - 20.

made of steel, when he touched the beds or held on to them, his body would shake a lot.<sup>618</sup>

387 In cross-examination, Sithole further explained that he used his one hand to try to 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.<sup>619</sup> Sithole explained his defensive motions as follows:

“... these beds are really close to each other, so if you are using one hand blocking the shield, I am using the other one to hold on the bed. Then when he moves to come to this other hand, then I use this hand to block the shield, then I will use the other one to hold the bed”.<sup>620</sup>

388 Defendant’s counsel went to great lengths to interrogate Sithole’s and the officers’ exact positioning in the passage, and Sithole’s actions in between the beds (in particular, how Sithole went about blocking the electric shield while holding on to the bed scaffolding from inside the passage).<sup>621</sup> Sithole explained that he stood in the passage together with Monare and the one EST member, while the other EST member was standing in the entrance.<sup>622</sup> Sithole referred to diagram 366A to describe

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<sup>618</sup> 11 November 2019, p 61, lines 3 – 15.

<sup>619</sup> 13 November 2019, p 69, lines 5 – 9; and p 75, lines 1-4 and 12-14;

<sup>620</sup> 13 November 2019, p 77, lines 13-17.

<sup>621</sup> 13 November 2019, p 70 – p77.

<sup>622</sup> 13 November 2019, p 67, lines 18 - 22.

the layout of the passage and the bed scaffolding, and the precise positioning of Monare as well as the two EST members. Sithole marked on the cell diagram (Exhibit 366A): “R” the position of the one EST member; “S” the position of the other EST member who was shocking him; “T” the position of Monare (who was sitting on Sithole’s bed to search his locker); and “U” the position of the scaffolding – i.e., the bed – that Sithole touched when he was being shocked.<sup>623</sup>

389 Sithole testified (in chief and cross-examination) that no cell phone was found in the search at his bed, and that this made Monare very angry.<sup>624</sup> Sithole testified that, after his things had been searched, *“Monare was very angry for not finding anything. He then said let us put him into the shower ... he will tell us the truth.”*<sup>625</sup>

390 Sithole testified that, after directing that he be put in the shower, Monare “ripped” and “tore” his clothes.<sup>626</sup> Specifically, Monare “tore off his buttoned shirt and trousers” with both hands (at that time, Monare was holding nothing in his hands).<sup>627</sup> At the time Sithole was not wearing shoes.<sup>628</sup> He was left completely naked.<sup>629</sup>

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<sup>623</sup> 13 November 2019, p 71, lines 2-20; and p 72 line 14 to p 73 line 13.

<sup>624</sup> 11 November 2019, p 61, lines 15 -21; 13 November 2019, p 68, lines 1-9; 18 – 22.

<sup>625</sup> 11 November 2019, p 61, lines 21-24.

<sup>626</sup> 11 November 2019, p 62, lines 1-6;

<sup>627</sup> 13 November 2019, p 78, lines 9 – 25.

<sup>628</sup> 13 November 2019, p 79, lines 17-20.

<sup>629</sup> 13 November 2019, p 79, lines 20-22.



391 Sithole described how Monare then pushed him into the shower (depicted on the cell diagram, Exhibit 366A). Monare did so using an electric shield that was charged.<sup>630</sup> Sithole stated: *“M’Lord it was not my choice to go in to that shower. I was pushed with this electrical shield”*.

392 Sithole confirmed that the shower depicted in photograph no. 15 in Exhibit E was the shower in the cell that he was pushed into, and that it still looked the same.<sup>631</sup> Sithole explained that 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).<sup>632</sup> All three of them were holding electric shields.<sup>633</sup> Sithole could not say where Monare got the shield from again, but he confirmed that Monare had had a shield when he was searching by his bed.<sup>634</sup>

393 Sithole testified that when he was in the shower, Monare opened the tap in the shower.<sup>635</sup> Monare and the two EST members 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. Sithole demonstrated in

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<sup>630</sup> 11 November 2019, p 63, lines 20-25, p 64, lines 1-6;

<sup>631</sup> 11 November 2019, p 62, lines 15-21.

<sup>632</sup> 11 November 2019, p 62, lines 23-25, p 63, lines 1-19; 13 November 2019, p 79, line 24 to p 80 line 4; p 81, line 1-3; p 88 – p 90.

<sup>633</sup> 11 November 2019, p 64, lines 1-3.

<sup>634</sup> 13 November 2019, p 85, line 22 to p 86 line 15.

<sup>635</sup> 11 November 2019, p 64, lines 9-18; 13 November 2019, p 81, lines 24-25.

court how he was pushed and moved in the shower to try to avoid the shocks, and testified that he was not able to avoid being shocked.<sup>636</sup> He testified that the mix of electricity and water made things get very bad.<sup>637</sup>

He stated:

“It was the way they were shocking me M’Lord inside the shower. It was so hard in the manner they were shocking me M’Lord inside the shower, it was so hard”.<sup>638</sup>

394 Sithole explained further in cross-examination that, on the right side of the shower, the one EST member was standing next to the urinal basin, but not coming into the shower, while Monare was closer to the shower area.<sup>639</sup> He described again how Monare and the two EST officers alternated in turns, with each applying the electric shield on him depending on which side he turned to avert the electrocution.<sup>640</sup> Sithole reiterated that Monare was also involved in shocking him with an electrical shield, and that this was applied on his torso as well as his back as he was turning and moving.<sup>641</sup> Despite lengthy cross-examination on the exact positions and movement of all present, Sithole’s version was unshaken.

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<sup>636</sup> 11 November 2019, p 64, line 25 to p 65, lines 9; 13 November 2019, p 87, lines 6-11.

<sup>637</sup> 13 November 2019, p 82, lines 18-25 and p 83, lines 4-7.

<sup>638</sup> 11 November 2019, p 65, lines 15-17.

<sup>639</sup> 13 November 2019, p 88 line 6 – p 90, line 20.

<sup>640</sup> 14 November 2019, p 6, lines 22 – 28.

<sup>641</sup> 14 November 2019, p 7, lines 4 – 14.

395 Sithole testified that the assault at the shower continued until he told the officials that Mr Abel Phasha had the cell phone. Sithole also testified that *“there was a stage M’Lord when they put in Philemon Baart inside the shower, then it was the two of us now.”*<sup>642</sup> Under cross-examination, Sithole was asked to specify how long it was before Baart entered the shower, but Sithole could not say; he could only say it was “after a while”.<sup>643</sup> Sithole confirmed, however, that Baart was put into the shower after he had said that Phasha had the cell phone.<sup>644</sup> He himself 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.<sup>645</sup>

396 Sithole explained that he had hoped to stop being shocked in the shower by drawing the officials’ attention to Phasha, who he believed would not be harmed because he had an injured arm.<sup>646</sup> Sithole stated:

“For them to stop shocking me inside the shower it is because I said Phasha has the phone. ... The reason why I said Phasha had the phone is because he was injured on his hand and they would never assault him because they could see he is injured.”<sup>647</sup>

397 Sithole explained that Phasha had been injured at soccer and so was

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<sup>642</sup> 11 November 2019, p65 lines 21 – 22.

<sup>643</sup> 13 November 2019, p 81, lines 12 - 19.

<sup>644</sup> 13 November 2019, p 87, lines 23 to p 88 line 1.

<sup>645</sup> 14 November 2019, p 11, lines 19-23.

<sup>646</sup> 11 November 2019, p 65, lines 23 – 25, p 66 lines 1 – 6.

<sup>647</sup> 11 November 2019, p 65, lines 23 – 25, p 66 lines 4 – 6. 13 November 2019, p 87, lines 14-22.

wearing a sling on his arm and around his neck.<sup>648</sup>

398 However, after Sithole said this, Monare left the cell to fetch Phasha from outside and brought him into the cell.<sup>649</sup> Phasha was made to sit on the first bed in the cell (depicted on the cell diagram 366A at the bottom right hand side, closest to the cell gate),<sup>650</sup> and assaulted there.<sup>651</sup>

399 Sithole testified that he saw Monare assaulting Phasha with an open hand and “pressing him” with the electric shield in front, on his chest.<sup>652</sup> One EST member was also with Monare as he assaulted Phasha, while the other remained standing by Sithole, next to the two wash basins (depicted on the extreme right of photo no. 15 and marked on the cell diagram 366A, as “wash basins”).<sup>653</sup>

400 Sithole testified that, 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 he was lying.<sup>654</sup>

401 Sithole further testified in chief that another official Mr Mathibe (an ordinary prison warder, not EST) came into the cell and also assaulted

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<sup>648</sup> 11 November 2019, p 68, lines 18-25, p 69 lines 1 – 9.

<sup>649</sup> 11 November 2019, p 66, lines 18-23; 14 November 2019, p 9, lines 3-7; p 12, lines 3 – 12 & 18-19.

<sup>650</sup> 11 November 2019, p66 lines 9-17,

<sup>651</sup> 11 November 2019, p66 lines 8 – 9; p 67, lines 1-19.

<sup>652</sup> 11 November 2019, p67 lines 1-5.

<sup>653</sup> 11 November 2019, p 67 lines 17 – 25; p 68, lines 1-17.

<sup>654</sup> 11 November 2019, p 67 lines 9-15.

Phasha with Monare. Sithole testified that Monare and Mr Mathibe were hitting Phasha on his injured arm.

402 Sithole repeated this account of the assault on Phasha under cross-examination. He repeated how Monare used the electric shield by placing it on Phasha's chest, stating that Monare "*was using that electric device to shock him [Phasha] on the chest and then he was pressing him against the wall*".<sup>655</sup> He also repeated how, during the assault on Phasha, another official, Mr Mathibe, came into the cell and assaulted Phasha with Monare, including by hitting Phasha on his injured arm. Sithole stated:

"And then Mathibe came in. They then assaulted him, went on to assault him and they assaulted him and hit the very same arm that was injured. And they also mentioned that, we are going to, in fact, we are hitting you on the very same injured arm".<sup>656</sup>

403 Sithole's version of what transpired in the cell remained consistent under cross-examination. Defendant's counsel put it to Sithole that his entire account – of being taken to the shower, being electrocuted and of Monare fetching Phasha from outside and slapping him and asking him about the cell phone – was just a figment of Sithole's imagination, and never happened.<sup>657</sup> This was firmly denied by Sithole; he insisted that what he

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<sup>655</sup> 14 November 2019, p 12, lines 18 – 25.

<sup>656</sup> 14 November 2019, p 13, lines 3 – 7.

<sup>657</sup> 14 November 2019, p 13, lines 13 – 17.

was telling the court is the truth.<sup>658</sup>

Qibi's account

404 During his testimony, Mr Qibi confirmed that he was unsure of how long the incident in the office took and was unable to estimate. He testified that Mr Mokoka and Mr Monare are the officials that took/pulled him to the showers and that whilst at the showers, inmate Mr Baart was already inside the shower area and inmate Mr Sithole was in the area next to the sink (*The position at which Mr Sithole was is marked as GG in diagram 366A – cell diagram*).<sup>659</sup>

405 Mr Qibi testified to the conditions in which Mr Sithole was when he saw him, that, Mr Sithole was wet all over his body with no clothes on. Mr Qibi further testified that Mr Monare (accompanied by Mr Mokoka) then pushed him into the shower with Mr Baart who was already in the shower.<sup>660</sup>

406 Mr Qibi testified that he was instructed to take off his clothes and was thus naked in the shower.<sup>661</sup>

407 Thereafter, the officials instructed Qibi to “*take out my dirt there in the shower*” – by forcing him to defecate in the shower. It was Mr Qibi's

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<sup>658</sup> 14 November 2019, p 13, lines 18-19.

<sup>659</sup> 27 July 2021, p23, lines 7-23, p24, lines 1-15.

<sup>660</sup> 27 July 2021, p24, lines 16-23.

<sup>661</sup> 27 July 2021, p30, lines 1-12.

testimony that, the officials instructed him *to take out his dirt*, then Mr Mokoka used the electric shield to shock Mr Qibi and then made him stand under the cold-water shower and forced him to sit down and defecate.<sup>662</sup> While Monare and Mokoka were busy with him, then Mr Frans also arrived and joined them.<sup>663</sup>

408 Mr Qibi testified that the officials shocked him on his back on his from on the torso and effectively anywhere they could find an opening. He testified that the entire experience was very painful and that being made to defecate in front of others made him feel very bitter, hurt by the entire experience and robbed of his dignity.<sup>664</sup>

409 In testifying on why the officials had made him defecate, Mr Qibi that the official thought that he had possibly hidden something in his body which he pushed up into the anus. The act of making him defecate was with a view to force the object out; an object which they believed was a cell phone. However, the officials found no cell phone or other object. Thereafter, the officials ordered Qibi clean the faeces in the shower area before assaulting him further and removing him from the cell and taking him back to the cell courtyard.<sup>665</sup> At this point, he was also instructed to wear his torn pants again.<sup>666</sup>

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<sup>662</sup> 27 July 2021, p24, lines 16-23, p25, lines 1-21.

<sup>663</sup> 27 July 2021, p25, lines 22-24,

<sup>664</sup> 27 July 2021, p26, lines 2-19.

<sup>665</sup> 27 July 2021, p26, lines 20-23, p27, lines 1-14.

<sup>666</sup> 27 July 2021, p30, lines 1-12.

Smith's account

410 Smith testified that, on being brought into cell 1 by Mr Monare he was taken towards the urinal side of the shower area (by the toilets).<sup>667</sup> He saw an EST official standing there with Philemon Baart, who was wet and getting dressed.<sup>668</sup> The EST official's name remains unknown to Smith.<sup>669</sup> In cross-examination Smith testified that the EST official was a black person, and his photo was not amongst those presented to him by SAPS for the photo parade.<sup>670</sup>

411 The EST official left Baart to get dressed and came towards Smith and Mr Monare (who were standing where it says '1 metre wall-to-wall' on the diagram).<sup>671</sup> Smith testified that the EST official stood in front of him and together with Mr Monare, they started smacking him and ordered him to get undressed.<sup>672</sup> Smith told the court that 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.<sup>673</sup> Mr Monare left Smith with the EST official while Smith was struggling to get undressed.<sup>674</sup> At this point Baart had also left: Smith testified that if

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<sup>667</sup> 3 March 2021, p23, line 14.

<sup>668</sup> 3 March 2021, p22, lines 12-14.

<sup>669</sup> 3 March 2021, p26, lines 16-17.

<sup>670</sup> 10 March 2021, p58, lines 4-9.

<sup>671</sup> 3 March 2021, p23, lines 14-15.

<sup>672</sup> 3 March 2021, p23, lines 16-18.

<sup>673</sup> 3 March 2021, p24, lines 1-5.

<sup>674</sup> 3 March 2021, p24, lines 8-9.



his memory served him well, Mr Monare had taken Baart away.<sup>675</sup>

412 Smith testified that the EST official got impatient with him struggling to undress.<sup>676</sup> When Smith showed him his swollen paining hand, the EST official shocked him and told him to hurry up.<sup>677</sup> Smith eventually managed to get his jacket off.<sup>678</sup> Smith notes that because he had a short sleeve shirt on it become obvious that his elbow were swollen and his body was a bluish in colour.<sup>679</sup>

413 Smith got naked and was ordered by the EST official to get into the shower. When Smith got into the shower it was blocked – there was water in it and faeces in the water.<sup>680</sup> Smith testified that 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.<sup>681</sup> At this point, the EST official was standing in the shower area next to the urinal side, noted Smith.<sup>682</sup> He ordered Smith to come forward and asked him to open the shower.<sup>683</sup> Smith testified that he refused, causing the EST official to get agitated and repeat his instruction to step forward and open the shower.<sup>684</sup> Smith explained that he understood that

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<sup>675</sup> 3 March 2021, p24, lines 1-5.

<sup>676</sup> 3 March 2021, p24, line 10.

<sup>677</sup> 3 March 2021, p24, lines 10-14.

<sup>678</sup> 3 March 2021, p24, line 14.

<sup>679</sup> 3 March 2021, p24, lines 14-16.

<sup>680</sup> 3 March 2021, p24, lines 16-20.

<sup>681</sup> 3 March 2021, p24, lines 21-23.

<sup>682</sup> 3 March 2021, p25, lines 1-2.

<sup>683</sup> 3 March 2021, p25, lines 2-3.

<sup>684</sup> 3 March 2021, p25, lines 3-4.

the aim of the EST official was to shock him with the shield while he was wet.<sup>685</sup> Smith refused to open the shower tap to avoid this.<sup>686</sup>

414 Smith explained how the EST official tried to reach out to him and pull him forward, without any success.<sup>687</sup> The EST official then instructed Smith to get out of the shower.<sup>688</sup> Smith testified that he got out of the shower on the right hand side, next to the washbasin (the side opposite to where the EST official was standing). Thinking it was all over, Smith walked back to where his clothes were lying on the floor.<sup>689</sup>

415 Smith then testified that when he got to his clothes, the EST official started shocking him,<sup>690</sup> which resulted in him passing out again.<sup>691</sup> When he came to, the EST official made him face the urinal area (with his back towards 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.<sup>692</sup> Smith testified that the EST officer told him to open his anus: to pull his bum open so that he could see his anus.<sup>693</sup> Smith testified that he was unable to do this, which then prompted the EST official to push his finger up Smith's anus and feel for something.<sup>694</sup> Smith

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<sup>685</sup> 3 March 2021, p25, lines 5-6.

<sup>686</sup> 3 March 2021, p25, lines 7-9.

<sup>687</sup> 3 March 2021, p25, lines 11--12.

<sup>688</sup> 3 March 2021, p25, lines 12-13.

<sup>689</sup> 3 March 2021, p25, lines 20-24.

<sup>690</sup> 3 March 2021, p26, lines 3-4.

<sup>691</sup> 3 March 2021, p26, lines 5-6.

<sup>692</sup> 3 March 2021, p26, lines 12-16.

<sup>693</sup> 3 March 2021, p26, lines 19-20.

<sup>694</sup> 3 March 2021, p26, lines 21-23.

was unsure if the EST official has been wearing a glove or not, only that he simply felt the fast movement in his anus which caused him to jump forward.<sup>695</sup> Smith testified that no one else was around at the time that he could see.

416 When asked to describe how it made him feel to have his anus searched as he'd described, Smith was reluctant to answer, submitting to the court that: "*M'Lord, it is always difficult to talk about this, especially thinking you are going to die there and (Indistinct). It is not a nice thing. I do not want to talk about it*".<sup>696</sup> Smith proceeded, however, to testify that: "*It made me not feel like a man. It is like taking your manhood away from you M'Lord*".<sup>697</sup>

417 Smith testified that after this incident, he struggled to get dressed and at this point, Mr Monare brought Phumlani Buthelezi into the cell and came forward towards him.<sup>698</sup> Mr Monare then –

“...asked Phumlani to speak and Phumlani was just like he was looking up and down a lot and I think he was shocked at the way I looked, because I was purple and blue M'Lord, my whole body. Then he turned to Mr Monareng and he just said like – I think he spoke in Zulu M'Lord, but basically what he told me afterwards,

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<sup>695</sup> 3 March 2021, p27, lines 1 -3.

<sup>696</sup> 3 March 2021, p27, lines 7-9.

<sup>697</sup> 3 March 2021, p27, lines 14-17.

<sup>698</sup> 3 March 2021, p29, lines 1-3.

he told Mr Monareng to avoid being beaten, the phone that they found Thursday, was my phone".<sup>699</sup>

418 Smith testified that he was told afterwards by Phumlani that he had been claiming that the cell phone belonged to Smith,<sup>700</sup> but when Phumlani saw the state that Smith was in, Phumlani changed his story and claimed that the phone actually belonged to him (Phumlani).<sup>701</sup> Smith said: "*I think he was shocked at the way I looked, because I was purple and blue M'Lord, my whole body*".<sup>702</sup>

419 Smith told the court that after Phumlani's changed his story, Mr Monare starting smacking Smith around.<sup>703</sup> Mr Zimba then arrived at the showers and asked Mr Monare "*did he talk?*",<sup>704</sup> to which Mr Monare responded by informing him that "*he [Phumlani] is changing his story now*".<sup>705</sup> Mr Monare then took Phumlani away, all the while hitting him (Phumlani).<sup>706</sup>

420 After Phumlani was taken away, Smith managed to get dressed and then Mr Monare came back to fetch him and take him back to the office.<sup>707</sup>

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<sup>699</sup> 3 March 2021, p29, lines 3-10.

<sup>700</sup> 3 March 2021, p29, lines 13-15.

<sup>701</sup> 3 March 2021, p29, lines 13-15.

<sup>702</sup> 3 March 2021, p29, lines 5-6.

<sup>703</sup> 3 March 2021, p29, lines 16-19.

<sup>704</sup> 3 March 2021, p29, lines 19-20.

<sup>705</sup> 3 March 2021, p29, lines 20-21.

<sup>706</sup> 3 March 2021, p29, lines 22-24.

<sup>707</sup> 3 March 2021, p30, lines 1-3, line 9.

***Sithole, Phasha, Qibi and Smith are returned from the cell to the courtyard and office***

*Sithole's account*

421 Sithole testified that he was taken from the cell back outside (into the section B courtyard) by an EST member. He was still naked from having been stripped at the showers.<sup>708</sup> Sithole testified of his humiliation as he was made to walk through the courtyard naked with three female officials present.<sup>709</sup> Sithole could recall that Ms Buthelezi and the lady worked at the prison shop were one of the females present who saw him naked.<sup>710</sup>

422 Sithole testified that 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 ingest them.<sup>711</sup> Sithole testified that Kunene said to him “my homeboy, my *homie*, take pills, here are two tablets. Go and drink water, use the water from the tape and take the two tablets”.<sup>712</sup> It was put to Sithole under cross-examination that Kunene denied ever doing so, to which Sithole maintained that such a denial would be a lie on Kunene’s part.<sup>713</sup>

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<sup>708</sup> 11 November 2019, p 71 lines 5-12; 14 November 2019, p 13, lines 24 – 25 & p 14, lines 1 – 6.

<sup>709</sup> 11 November 2019 p71, lines 19 – 26; p 72, lines 15-19; 14 November 2019, p 17, lines 9 – 13.

<sup>710</sup> 14 November 2019, p 17, lines 14 – 17.

<sup>711</sup> 14 November 2019, p 14, lines 8 – 11.

<sup>712</sup> 14 November 2019, p 15, lines 11-15.

<sup>713</sup> 14 November 2019, p 14, lines 8 – 21.

423 Sithole also testified that Kunene instructed an inmate, Nhlanhla,<sup>714</sup> to bring Sithole his clothes, which Nhlanhla brought back a pair of trousers and a shirt as Sithole came from the tap. Sithole got dressed in front of the cell, and also found shoes there in the courtyard.<sup>715</sup> When asked for how long he was naked in the courtyard, he said “three minutes could have passed”.<sup>716</sup>

424 Sithole testified that 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”.<sup>717</sup> When Monare came out of the cell and was about to go into the office, he instructed Sithole to do a handstand against the wall.<sup>718</sup> Sithole further explained how, whilst he was standing on his hands, more inmates were instructed to join him, namely, Mr Abel Phasha and Mr Benson Qibi. They too were instructed to do handstands, next to Sithole.<sup>719</sup>

425 Sithole explained that officials were standing with them, watching them do the handstands – but he could not see who they were because he was face-down, doing the handstand.<sup>720</sup> He noted how, owing to his arm

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<sup>714</sup> This appears to be Ndlovu Nhlanhla. His statement is included in the DCS Report as A14 (Core Bundle v 3, pp 229-233).

<sup>715</sup> 11 November 2019, p 72 lines 2-14; 14 November 2019, p 15, line 18 – p 16, line 4.

<sup>716</sup> 11 November 2019, p 72 lines 21-23.

<sup>717</sup> 11 November 2019, p 72 lines 24-25 and p 73, lines 1 -2; 14 November 2019, p 17, lines 18 – 22.

<sup>718</sup> 11 November 2019, p 73, lines 4-24; 14 November 2019, p 17, lines 20 – 25 & p 18, lines 1 - 13.

<sup>719</sup> 14 November 2019, p 18, lines 20 - 25.

<sup>720</sup> 11 November 2019, p 75 lines 2-9.

injury, Phasha was not able to do a handstand and yet the officials (whom Sithole could not properly identify due to his handstand position) continued to order Phasha to do so.<sup>721</sup> Sithole stated in chief:

“M’Lord when you get tired of the handstand and maybe you like to go down, they would tell you to stand up straight or to go back and do the handstand, especially to Phasha, because Phasha could not do the handstand because he was injured on his arm.”<sup>722</sup>

426 He reiterated this account in cross-examination, stating:

“Whilst I was hand-standing there, I was joined by others. In fact, others were also instructed to go and stand next to me. It was Phasha and Benson. Thereafter M’Lord, I noticed that Phasha could not properly handstand. He could not lift his body, suspend it from the ground, you know, using his hands, because he was injured on one arm. So, as we would at times lower our bodies, they were focusing on him, making him to handstand as he was unable to do so because of the injury to his arm...They were officials there... As I explained, I could not see them properly because I was facing the ground.”<sup>723</sup>

427 This continued until an official (whom Sithole could also not recall)

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<sup>721</sup> 14 November 2019, p 18, lines 24 – 25 & p 19, lines 1 - 25.

<sup>722</sup> 11 November 2019, p 74 line 22 to p 75, line 1.

<sup>723</sup> 14 November 2019, p 18, line 22 to p 19, line 6.

ordered that the inmates cease and stand on their feet.<sup>724</sup>

428 Sithole testified that 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 by the wall (between the cell and office), with officials standing there.<sup>725</sup>

### Qibi's account

429 Mr Qibi pointed out that in the courtyard they were taken to the side of the door to B1, (*photograph number 8 of EXHIBIT E*) against the wall on the right-hand side with the fire extinguisher.<sup>726</sup> At this point, Qibi testified that he saw Mr Smith, Mr Phasha, Mr Sithole, Mr Zulu and Mr Sqwayi at the wall in the courtyard.<sup>727</sup>

430 Mr Qibi testified that when they arrived at the courtyard, they were forced to do “handstands” by the officials previously assaulting them but now joined in the courtyard by a bigger group including, Mr Frans, Mr Monare, Mr Mokoka, Ms Buthelezi, Mr Zwane, Mr Moleleki, Mr Kunene and Mr Nkosi from the DCS officials and Mr De Beer, Mr Manamela and Mr Maharaj from the EST.<sup>728</sup>

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<sup>724</sup> 11 November 2019, p75 lines 15 – 19; 14 November 2019, p 20, lines 24 – 25 & p 19, lines 1 - 7.

<sup>725</sup> 11 November 2019, p 73, line 25 to p 74 line 15;

<sup>726</sup> 27 July 2021, p28, lines 1-11.

<sup>727</sup> 27 July 2021, p28, lines 13-24, p29, lines 1-19.

<sup>728</sup> 27 July 2021, p30, lines 13-23, p31, lines 1-5.



431 Mr Qibi testified that while doing the handstands the officials repeated their demand to them for a cell phone and for the inmates responsible for locking 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.<sup>729</sup> Qibi testified that while this was done with all the inmates in the courtyard, Mr Phasha seemed to have received the worst of the treatment and was “seriously or bitterly assaulted”.<sup>730</sup>

432 With particular reference to the assault on Mr Phasha, Mr Qibi testified that although Mr Phasha’s arm was broken before the incident of 10 August 2014, Mr Phasha was subjected to the same assault and treatment as other inmates, the broken arm notwithstanding.<sup>731</sup>

433 Mr Qibi testified that he knew that Mr 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 Mr Phasha had told him that his arm was broken from when playing soccer and he had plaster of the Paris on his arm.<sup>732</sup> Mr Qibi testified that despite Mr Phasha crying from the assault, the officials kept on assaulting him and accusing him of faking his injury to the arm and that the broken arm claim was a charade since he had

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<sup>729</sup> 27 July 2021, p31, lines 6-23, p32, lines 1-13.

<sup>730</sup> 27 July 2021, p32, lines 13-18.

<sup>731</sup> 27 July 2021, p32, lines 19-24, p33, lines 1-2.

<sup>732</sup> 27 July 2021, p33, lines 7-10.

never broken his arm playing soccer.<sup>733</sup> Mr Qibi testified that the entire occurrence with Mr Phasha made him feel very terrified since the officials were assaulting Mr Phasha on the same broken arm, with the entire experience leading him to think the officials were intending to kill them.<sup>734</sup>

434 Returning to his own assault, Mr Qibi testified that Mr Kunene and Mr Monare approached him and continued assaulting him and telling him that they wanted the phone.<sup>735</sup> It was Mr Qibi's testimony that whilst Mr Kunene and Mr Monare were assaulting him, he was now laying on the ground on his torso with his face to the side (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.<sup>736</sup>

435 Mr Qibi testified that at the point of Ms Buthelezi sitting on his head, he struggled to breathe and started suffocating. As a result thereof, Qibi started hitting Ms Buthelezi on the buttocks trying to push her off his face and head.<sup>737</sup> This caused Mr Frans, Mr Monare and Mr Kunene to accuse Mr Qibi of attacking and hurting an official, Ms Buthelezi, and as a result they intensified their assault on Mr Qibi.<sup>738</sup>

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<sup>733</sup> 27 July 2021, p33, lines 11-14.

<sup>734</sup> 27 July 2021, p33, lines 15-18.

<sup>735</sup> 27 July 2021, p33, lines 19-23.

<sup>736</sup> 27 July 2021, p34, lines 1-24, p35, lines 1-5.

<sup>737</sup> 27 July 2021, p35, lines 7-11.

<sup>738</sup> 27 July 2021, p35, lines 12-14.

Smith's account

436 After being returned to the office by Mr Monare, Smith lay in the office by the wall (where he had been lying previously with Mr Makoka). Smith testified that after some time of lying there, Mr Monare came back with inmate Mthokozisi Sithole.<sup>739</sup> Smith testified that Mr Monare was choking Sithole as he brought him in, and continued to do so in the office, and that he could hear Sithole choking as he struggled to breathe.<sup>740</sup> Smith described the incident as follows:

“Mr Monareng came back with Mthokozisi.... On returning M’Lord, when you enter the office when you pass the phone area, there was like a table there where they kept files and stuff. He came in with Mthokozisi and they then like bumped the table. At that time M’Lord, he was like choking him. The reason why I am saying choking M’Lord, is that you could hear like when a person cannot breathe, he was making that sound.

Yes? --- He choked and I was there near the wall side M’Lord facing towards the door side, so when he came, the table went, they heard the sound and then they come and then they came back and he like tripped. I will not actually say tripped, I think Mthokozisi fainted at that time, because he just fell down and Mr Monareng fell with him to the ground.

Yes? --- So, M’Lord, when I am laying here, Mthokozisi, his lower body from his legs were like by my face side, near my face.

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<sup>739</sup> 3 March 2021, p30, lines 10-13.

<sup>740</sup> 3 March 2021, p30, lines 18-20.

Mr Monareng was still choking him. He started making that choke sound again and his leg started kicking.

Yes? --- When his leg started kicking M'Lord, I shifted up a bit and I just slid up. At that same time M'Lord, Mrs Buthelezi came and she grabbed Mr Monareng.

Yes? --- She pulled him off while he was still busy choking and she pulled him off and she like told him that you are going too far, this is too far. He was shouting at her also, but then she positioned herself between him and Mthokozisi M'Lord. As they were arguing, she positioned herself in front of him. He then left the office. I was very fearful at that time M'Lord, especially when I saw it happen to Mthokozisi and I passed out again M'Lord at some point.”<sup>741</sup>

437 Asked to describe how he felt observing this, Smith testified:

“Like I said M'Lord, I was fearing for my life. That is why I started moving away from Mthokosizi, because the first incident with Xolani outside, were punched also there next to him, that is why I just moved away from him. When you move away, you just close your eyes and you just pray like they must not see you, you must be invisible, they must forget about you. During that time, I passed out again.”

438 Sithole did not recount this incident in his testimony. It is, however, referred to by Dr Taylor in her report of what Sithole described to her had

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<sup>741</sup> 3 March 2021, p30, line 11 – p 31, line 17.

happened to him. In describing Sithole's subjective experience of the assault of 10 August 2014, Dr Taylor records:

"4.2.1. Mr Sithole recounts that the worst part of the events for him was when they were shocking him in the shower. He said "that memory can't be going". Every time he sees Mr Monare he thinks about it. He says it is very hard to describe the experience and that it was "very hectic". He felt like he might die. Mr Monare kept holding him by the throat to make him give up the phone. At that time he also felt like he might die."<sup>742</sup>

439 Smith testified that he does not know how long he was passed out in the office for, but he was woken by a small tap on his cheek<sup>743</sup> and Captain Mtimkhulu asking him if he was okay.<sup>744</sup> Smith said 'no' as his elbow was paining<sup>745</sup> and his answer was followed up by Captain Mtimkhulu saying to him "*don't worry, go to the hospital now*".<sup>746</sup> Officer Mbatha, a Grade 3 officer in B section (who also counselled Smith with anger management) was also in the office at that time and was instructed by Captain Mtimkhulu to take him to the hospital.<sup>747</sup>

440 Smith testified that as he stood up to make his way to the hospital, Mr Maharaj came into the office and took Xolani Zulu to do handstands.

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<sup>742</sup> Dr Taylor's report on Sithole: Exhibit D, Experts Bundle, vol 2, p 113, para 4.2.1.

<sup>743</sup> 3 March 2021, p32, lines 4-6.

<sup>744</sup> 3 March 2021, p32, lines 15-17.

<sup>745</sup> 3 March 2021, p32, lines 18-19.

<sup>746</sup> 3 March 2021, p33, lines 1-2.

<sup>747</sup> 3 March 2021, p33, lines 2-8.

Smith testified that “they were now referring to him (Xolani) as the head of prison”,<sup>748</sup> and that Mr said to Xolani ‘Kom hang jou self nou’.<sup>749</sup> Smith explained to the court that ‘Kom hang jou self nou’ signalled that Zulu was instructed to do handstands.<sup>750</sup> At this point, Smith left the office, followed by Officer Mbatha.

***Zulu is mocked and assaulted by the Head of Centre at the entrance to the office and instructed to be taken to single cells***

441 Zulu testified that Mr Mohale and Mr Monare came to where he was sitting at the entrance of the office. Mr Mohale was clapping his hands and referred to Zulu as the ‘Head of Centre’. Mr Mohale took off his Lapel Stars (he was in uniform) and placed them on Zulu’s shoulder whilst he was still seated.<sup>751</sup> Zulu testified that Mr Mohale reminded Zulu of how he had told him ‘he would get him’ (when he had charged Zulu and put him in B section).<sup>752</sup>

442 Zulu testified that Mr Mohale pulled him up and both Mr Mohale and Mr Monare proceeded to assault him. Mr Mohale hit him on his face several times with an open hand before hitting him with a closed fist on his neck, while Mr Monare hit him with an open hand once.<sup>753</sup> Zulu testified that

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<sup>748</sup> 3 March 2021, p33, lines 9-13.

<sup>749</sup> 3 March 2021, p33, lines 12-14.

<sup>750</sup> 3 March 2021, p33, lines 15-19.

<sup>751</sup> 6 November 2019, p 12, lines 5-19; 7 November 2019, p 76, lines 5 – 21.

<sup>752</sup> 6 November 2019, p 12, line 21- p 13, line 5.

<sup>753</sup> 6 November 2019, p 13, line 20 – p 14, line 15; 7 November 2019, p 76, line 22 – p 77, line 22.

while he was being assaulted with open hands, Mr Mohale would be pushing and pulling him up and down and that while he was down, Mr Mohale would kick him.<sup>754</sup> Zulu further testified that when he told them that he had been assaulted enough, Mr Mohale replied that “his officials would never do that” and also that “they have not assaulted me enough if I am still walking”.<sup>755</sup>

443 Mr Mohale then instructed that he be taken to the single cells.<sup>756</sup> He was taken with Sithole and Phasha who were outside ‘on the other side’. He couldn't recall if Benson was there, but he saw Benson at the single cells.<sup>757</sup>

444 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 that Mr Mohale stood at the doorway holding a baton and told Mr Monare to bring them through.<sup>758</sup> Mr 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 saw Mr Mohale throw the baton, because he was looking behind him as he walked.<sup>759</sup>

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<sup>754</sup> 7 November 2019, p 77, line 24 – p 78, line 7.

<sup>755</sup> 6 November 2019, p 14, lines 12-19.

<sup>756</sup> 7 November 2019, p 78, lines 9-12.

<sup>757</sup> 7 November 2019, p 78, lines 13– 20; p 79, lines 1-4.

<sup>758</sup> 7 November 2019, p 80, line 5 – p 81, line 8.

<sup>759</sup> 6 November 2019, p 17, lines 6-18; 7 November 2019, p 81, lines 9 - 25.

445 Zulu testified that they initially went to ‘the wrong single cells’.<sup>760</sup> 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 the D section (on the west wing).<sup>761</sup> Zulu testified that Mr Mohale said, ‘no, they must be taken to the other cells’.<sup>762</sup> They then had to return through a door to reach the correct single cells, and he was once more beaten by Mr Mohale with a baton as he passed him at the door, this time on his left thigh.<sup>763</sup>

446 Zulu testified to the difference between the two sets of single cells: The single cells on the east wing were mostly for the police officers who have been arrested; there were cleaners and monitors there; they had beds and sheets; “*it was more like a medium single cells*”. The single cells where they were taken (on the west wing), were “*more like C-Max*”.<sup>764</sup>

447 Zulu’s account was corroborated by Sithole and Qibi.

448 Sithole testified that, from his position at the courtyard door, he saw Mohale come out of the office accompanied by Mr Monare and Zulu. Sithole said that 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

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<sup>760</sup> 6 November 2019, p 17, lines 21-22.

<sup>761</sup> 7 November 2019, p 82, lines 13 – 16.

<sup>762</sup> 6 November 2019, p 60, lines 18-19.

<sup>763</sup> 7 November 2019, p 82, lines 5 – 25; and p 83, lines 1-5

<sup>764</sup> 6 November 2019, p 60, line 20 – p 62, line 6.



on both of Zulu's shoulders.<sup>765</sup> Sithole testified that he was standing on his feet by this time.<sup>766</sup> He testified that, as Mohale and Zulu came closer, he could hear that Mohale was taunting Zulu, saying "*so you want to be the head of this prison*", "*do you want to be the manager of the prison; do you want to be the boss of the prison?*".<sup>767</sup> Sithole testified that Zulu did not respond but "just kept quiet". When asked to describe Zulu's condition at the time, Sithole stated:

"He looked like a person M'Lord that was assaulted and also M'Lord his left foot, he was not walking straight, he was limping his left foot".<sup>768</sup>

449 Sithole testified that when Mohale came up to where he was, Monare drew Mohale's attention to him, saying "*here is this fool, he said he wants to give the cell phone to you*".<sup>769</sup> At that point, Mohale stretched out his hand and said to Sithole "give me the cellphone". Sithole testified that 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 face (Sithole pointed to his left cheek).<sup>770</sup> While he was slapping him, Mohale said: "*my boys you are disrespecting me, you are corrupting my prison*".

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<sup>765</sup> 11 November 2019, p75 lines 12 to p 76, line 2; 14 November 2019, p 20, lines 11 – 25.

<sup>766</sup> 11 November 2019, p 75, line 20.

<sup>767</sup> 11 November 2019, p75 line 23 to p 76 line 4; 14 November 2019, p 20, line 24 to p 21 line 10.

<sup>768</sup> 11 November 2019, p76, lines 5 – 9.

<sup>769</sup> 11 November 2019, p76 lines 10-23; 14 November 2019, p 21, lines 14 – 16.

<sup>770</sup> 11 November 2019, p76, lines 22 – 25 & p77, lines 1 – 15; 14 November 2019, p 21 line 18 to p 22, line 1.

Mohale also said *“these people did not hit you hard enough”*. (When Sithole described Mohale’s statements, he spoke in Sotho.)<sup>771</sup>

450 Sithole testified that Mr Mohale then gave the instruction that they (i.e., the inmates standing at the courtyard door, Sithole, Phasha, Qibi and Zulu) be taken to the single cells.<sup>772</sup> As they proceeded through the doorway leaving B-section (depicted in photograph 8, Exhibit E), Mohale – who went and stood on the left side of the door – hit each of them with the ‘tonfa’ he held in his hand. Sithole was hit on the back.<sup>773</sup> Zulu followed behind him, and Sithole described how he saw Mohale throw 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.<sup>774</sup>

451 Mr Qibi testified that when Mr Frans, Mr Monareng and Mr Kunene were assaulting him for allegedly attacking Ms Buthelezi, Mr Mohale arrived. Upon arriving, Mr Mohale approached Mr Zulu saying *“this is the inmate who closed the door”*. Mr Mohale then assaulted Mr Zulu, kicked him, took off his own epaulettes and placed them on Zulu. He then called out to other officials and mockingly told them that *“Zulu is the one who is in*

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<sup>771</sup> 11 November 2019, p77, lines 16 – 21 & p78, lines 3 – 10; 14 November 2019, p88, lines 2 – 5.

<sup>772</sup> 14 November 2019, p 23, lines 15 – 20.

<sup>773</sup> 11 November 2019, p 78, lines 11 – 15 & p79, lines 1 – 19; 14 November 2019, p 23, lines 17 – 25; Photo 8, Exhibit E.

<sup>774</sup> 11 November 2019, p79, lines 20 – 25 & p 80, lines 1 – 8; 14 November 2019, p 24, line 23 to p 25, line 19.

*charge of the jail, of the prison, because he want to be in charge of it.*<sup>775</sup>

452 Mr Qibi indicated that the position at which Mr Mohale was standing on photograph number 8 as the door on the right-hand side next to the fire extinguishers but Mr Mohale was on the outside of that door on the other side of the wall.<sup>776</sup>

453 Thereafter, Mr Qibi testified that Mr Mohale issued an order that the inmates must be taken to the single cells. Mr Mohale then stood at the gate of B1 and as the inmates were passing through the gate to go the single cells as ordered, he started hitting each inmate passing through the gate with a baton. Mr Qibi testified that Mr Mohale hit him on the crown of his head with the baton. Thereafter, Mr Mohale attempted to hit him again on the head but Qibi had raised his arms over his head before Mr Mohale could hit him again.<sup>777</sup>

### **Conclusion**

454 We submit that it emerges clearly from the plaintiffs' various accounts of their assaults that:

454.1 DCS officials assaulted the plaintiffs in order to solicit information

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<sup>775</sup> 27 July 2021, p36, lines 1-23, p37, lines 1-13.

<sup>776</sup> 27 July 2021, p37, lines 15-24.

<sup>777</sup> 27 July 2021, p37, lines 14-24, p38, lines 1-23, p39, lines 1-8.

as to who was hiding or in possession of illicit cell phones;

454.2 DCS officials assaulted the plaintiffs in order to solicit information as to who had blocked the door of cell B1.

454.3 DCS officials assaulted the plaintiffs in order to punish them for hiding or possessing illicit cell phones; and

454.4 DCS officials assaulted the plaintiffs in order to punish them for blocking the door of cell B1.

455 What also emerges clearly from the plaintiffs' accounts of the events is that none of the plaintiffs or fellow inmates were the aggressors on 10 August 2014. At all times, the plaintiffs were victims of an egregious and protracted series of assaults at the hands of multiple DCS officials.

456 In this regard it is submitted that the plaintiffs' version as to 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 expert forensic pathologists: Dr Naidoo and Dr Rossouw, as recorded in their joint expert minute. The following points of agreement between the experts are particularly important and support the plaintiffs' version of events:

456.1 All or most of the plaintiffs' recorded injuries (with the exception of the possible burn mark of plaintiff 5) are in the category of blunt

force injuries.<sup>778</sup>

456.2 The defensive postures in unrestrained (non-handcuffed) individuals are suggested in the injuries of the heads, exposed shoulders, outside of upper limbs and flanks.<sup>779</sup>

456.3 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.<sup>780</sup>

456.4 The injuries as reported by both the DCS and independent doctors are physical traumatic injuries generally of a severe nature for all plaintiffs.<sup>781</sup>

456.5 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

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<sup>778</sup> Exhibit D5, Joint Minute of Medical Experts, p 3, para 10a.

<sup>779</sup> Exhibit D5, Joint Minute of Medical Experts, p 3, para 10h.

<sup>780</sup> Exhibit D5, Joint Minute of Medical Experts, p 4, para 10i.

<sup>781</sup> Exhibit D1, Naidoo Report, p 65, para 47a read with Exhibit D5, Joint Minute of Medical Experts, p 4, para 12.

dynamics as alleged by the plaintiffs.<sup>782</sup>

456.6 The appearances are in keeping with those of assault-type injuries, and neither accidental nor self inflicted.<sup>783</sup>

456.7 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.<sup>784</sup>

457 Finally, in this section, it remains to deal with the electric shock shields which the plaintiffs contend were used by multiple DCS officials, repeatedly, during their assault and torture.

### ***Electric shock shields***

458 The use by the DCS and EST officials of electric shock shields on 10 August 2014 was a highly contested issue during the trial.

459 The defendant contended that officials only used two non-electric shields on that day<sup>785</sup> and any electric shields that were at Leeuwkop on the day

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<sup>782</sup> Exhibit D1, Naidoo Report, p 65, para 47b read with Exhibit D5, Joint Minute of Medical Experts, p 4, para 12.

<sup>783</sup> Exhibit D1, Naidoo Report, p 65, para 47c read with Exhibit D5, Joint Minute of Medical Experts, p 4, para 12.

<sup>784</sup> Exhibit D1, Naidoo Report, p 65, para 47d read with Exhibit D5, Joint Minute of Medical Experts, p 4, para 12.

<sup>785</sup> 4 May 2022, p 47, lines 6 – 7; 13 April 2022, p 102 line 19 – p 103 line 2.

in question were not in working order.<sup>786</sup>

460 The defendant's denial that there were electric shields that were both available and in working order on 10 August 2014 is contradicted by the following:

460.1 The shields produced by the defendant at the shield inspection on 12 July 2021, which included functional electric shields from the Leeuwkop armory; and

460.2 The shield register produced by the defendant, which appears to have been tampered with to cover up the issue of electric shields to DCS officials on 10 August 2014.

461 We deal with these in turn.

*The shields produced at the shield inspection*

462 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.<sup>787</sup>

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<sup>786</sup> 4 May 2022, p 65 line 18 – p 66 line 21.

<sup>787</sup> Exhibit I3, pp 24 – 27.

463 The inspection took place on 12 July 2021, and was attended by Mr Duane van Wyk of Webber Wentzel. Mr Van Wyk testified<sup>788</sup> that –

463.1 Upon arrival at the shield inspection, he was advised that the shields to be inspected had been brought in from another correctional centre because the electric shields at Leeuwkop had not worked since 2010.

463.2 Mr Van Wyk requested that the shields from the Leeuwkop armory 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 armory.

463.3 When he inspected one of the shields brought in from the Leeuwkop armory, Mr Van Wyk was able to turn the shield on. A light on the motor unit came on to confirm that the shield was on.

463.4 Mr Mogano, who attended the shield inspection together with Ms Khan, confirmed to Mr Van Wyk that the shield was working but that it did not have sufficient charge on that day to make a sound. He therefore went to fetch a charger, but could not charge the shield because the charger was not working.

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<sup>788</sup> 23 August 2021, p 23 line 11 – p 29 line 5.



464 Mr Van Wyk's evidence that he switched the electric shield on in the presence of Mr Mogano was not challenged in cross-examination.

465 Moreover, Ms Khan confirmed in cross-examination that Mr Van Wyk had switched on one of the shields from the Leeuwkop armory, which meant that the shield was working.<sup>789</sup>

*The shield register*

466 The defendant's denial of electric shields being used on 10 August 2014 could easily have been corroborated by the shield register, a copy of which was produced in response to a request for further and better discovery.<sup>790</sup>

467 Upon receipt of the copy of the shield register, the plaintiffs suspected that it had been tampered with. In particular –

467.1 The register has been completed in single spacing. It records that on 20 September 2011, electric shields were issued to Mr Kunene.

467.2 The following line is blank.

467.3 In the line that follows, the register records that twelve electric

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<sup>789</sup> 10 May 2022, p 27, lines 1 – 12.

<sup>790</sup> The shield register appears in exhibit A4, p 382.

shields were taken from the inventory on 16 September 2014.

467.4 Had there been any 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.

468 To satisfy themselves that the entry for 10 August 2014 had not in fact been deleted, the plaintiffs requested in 2019 that the defendant provide the original shield register.<sup>791</sup>

469 The original shield register was never produced.

470 When asked about the failure to produce the original shield register, Mr Monare testified as follows:

“To the best of my recollection I had a shield register, the original and the shield because there was also a request for the shield. Electrified and non-electrified shield plus a tonfa. I brought them to court. And when Mr Mtukushe was informing me that the shield register is not available, to the best of my recollection it is a possibility that I might have returned them back to the centre. I have spoken now – Advocate Mtukushe spoke to me this morning. I have spoken to the Armory Controller to say please locate the shield register. It is needed in court. and they promised me that they will look for it and once they get it they will bring it

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<sup>791</sup> Exhibit I2, pp 192 – 193.

to court. ... [I]f it is not brought I will personally ensure that it is brought to the court."<sup>792</sup>

471 Mr Langa, the armory controller, testified before this Court. His evidence was that after he gave Mr Monare the shield register for copies to be made, it was never returned to him. He also testified that he had not been asked in the past month where the original shield register might be.<sup>793</sup>

472 The defendant has therefore failed to provide evidence to contradict the inference that the record of electric shields being issued to DCS officials on 10 August 2014 was tampered with.

473 We submit that these facts, taken together and when considered with the plaintiffs' evidence, establish that there were in fact functional electric shields available for use on 10 August 2014, that they were used by DCS officials in their assault and torture of the plaintiffs.

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<sup>792</sup> 6 May 2022, p 3 line 17 – p 4 line 9.

<sup>793</sup> 16 May 2022, p 15 line 15 – p 16 line 10.

## PART 5: SEGREGATION

### SEPARATION V SEGREGATION

474 The defendant contended for the first time midway through the trial that it had not segregated the second to fifth plaintiffs following the events of 10 August 2014 but had merely “separated” them.

475 Notably, in its plea, the defendant admitted that it had segregated the second to fifth plaintiffs. It did so in the following terms:

*“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.”*<sup>794</sup>

476 In conflict with the above, and midway through the trial for the first time, the defendant’s witnesses sought to contend that the second to fifth plaintiffs had not been segregated in terms of section 30 of the Act but had merely been “separated.” This had been done, contended the defendant’s witnesses, in terms of section 29 of the Act.

477 Section 29 of the Act is entitled “security classification” and provides as follows:

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<sup>794</sup> Exhibit G, Pleadings: Plea, p 29, para 16.

## **“29 Security classification**

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.”

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

“7.1.2 Prisoners of different security classification categories must be kept separately. In order to effectuate and maintain control over prisoners, prisoners need to be detained in prisons suitable for their security classifications. Provisional Commissioners, in conjunction with Area Managers and Heads of Prison 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.”

479 The defendant’s claim that it “separated” the second to fifth plaintiffs in terms of the above provisions is a disingenuous and belated attempt to escape the consequences of its abject failure to comply with the

provisions of section 30 of the Act which regulate the segregation of inmates. It is a claim that is in any event doomed to failure for two fundamental reasons:

479.1 First, the evidence establishes that, as a matter of fact, the defendant did act in terms of section 30 of the Act when it placed the plaintiffs in isolated detention in single cells; and

479.2 Second, and in any event, as a matter of law, section 30 is the only provision of the Act in terms of which isolated detention in single cells is permissible. Put differently, 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.

***The Defendant acted in terms of section 30 of the Act***

480 Firstly, the defendant admitted, prior to the commencement of the trial, in response to a request by the plaintiffs for formal admissions, that Mr Mohale had approved applications for the segregation of the second to fifth plaintiffs.<sup>795</sup> 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”<sup>796</sup>

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<sup>795</sup> Exhibit F, Case Management Bundle, p 23.

<sup>796</sup> See Exhibit F, Case Management Bundle, p 27, para 16 where the admission is requested and p 45, para 16 where the admission is made.

481 Secondly, the defendant admitted, also 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.<sup>797</sup> 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.”<sup>798</sup>

482 Thirdly, in other pre-trial procedures, notably discovery, the defendant did  
not deny that it had acted in terms of section 30 of the Act when placing  
the plaintiffs in single cells and in fact impliedly admitted it.

483 Thus, on 15 May 2019, the plaintiffs filed a request for further and better  
discovery in terms of which they requested:<sup>799</sup>

483.1 any and all records of the visits made by DCS officials and by the  
Head of the Centre to the second to fifth plaintiffs held in

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<sup>797</sup> Exhibit F, Case Management Bundle, p 23.

<sup>798</sup> See Exhibit F, Case Management Bundle, p 229, para 29 where the admission is requested  
and p 47, para 29 where the admission is made.

<sup>799</sup> Exhibit I, Discovery and Examination Notices: Volume 1, p 106.

segregation as required in terms of section 30(2)(a)(i) of the Act;<sup>800</sup>

483.2 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<sup>801</sup>; and

483.3 reports and the approvals required for the extension of the second to fifth plaintiffs' beyond 7 days, as required under sections 30(5) and 30(6) of the Act.<sup>802</sup>

484 Importantly, the defendant's response to the above requests was not a disavowal that it had acted in terms of section 30 of the Act, rendering these requirements inapplicable. On the contrary, the defendant either provided the documentation requested (in the case of medical records),<sup>803</sup> or stated it was searching for it.<sup>804</sup>

485 Fourthly, the defendant reported the segregation of the plaintiffs to the Judicial Inspectorate for Correctional Services as required by section 30(6) of the Act.<sup>805</sup> In cross examination, neither Mr Kunene<sup>806</sup> nor Mr

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<sup>800</sup> Exhibit I, Discovery and Notices: Vol 1, p 108.

<sup>801</sup> Ibid.

<sup>802</sup> Ibid.

<sup>803</sup> Exhibit I, Discovery and Notices: Volume 2, p 18.

<sup>804</sup> Ibid at p 18-19.

<sup>805</sup> See Exhibit A, Core Bundle: Vol 1 p 8 for the Judicial inspectorate Confirmation Report for the fourth plaintiff; p 11 for the Judicial inspectorate Confirmation Report for the second plaintiff; p 14 for the Judicial inspectorate Confirmation Report for the third plaintiff and p 25 for the Judicial inspectorate Confirmation Report for the fifth plaintiff.

<sup>806</sup> See Transcript of 20 April 2022, p 18 to p 20.



Mohale<sup>807</sup> 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.

486 Fifthly, Mr 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.

486.1 On 18 August 2014, Ms Clare Ballard of Lawyers for Human Rights, sent correspondence to Mr Mohale requesting reasons for the extension of the plaintiffs' segregation in terms of section 30(5) of the Act.<sup>808</sup>

486.2 On 20 August 2014, Mr 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.<sup>809</sup> Mr Mohale further confirmed that his correspondence stated that "*on the 19<sup>th</sup> of August 2014 they were referred to the doctor and a nurse. It was certified that the extension of segregation is*

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<sup>807</sup> 28 April 2022, p 77 to p 83.

<sup>808</sup> See Exhibit A, Core Bundle, Volume 1, p 48.

<sup>809</sup> Ibid at p 57.

*desirable.*"<sup>810</sup> Mr Mohale conceded that this was required by section 30(5) of the Act. He claimed, disingenuously, that it was a coincidence that there was a symmetry and alignment between this portion of his letter and the requirements of section 30(5) of the Act. Mr Mohale claimed, just as disingenuously, that the use of the word "segregation" in his letter was a "typing error."<sup>811</sup>

486.3 Nowhere in his correspondence did Mr 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 Mr Mohale was unable to explain the content of his correspondence in the light of his claim that he had not been acting in terms of section 30 of the Act.<sup>812</sup>

487 Having regard to all of the above, we submit that the evidence establishes, despite the defendant's protestations to the contrary during the trial, that it was indeed acting in terms of section 30 when it placed the second to fifth defendants in detention in single cells on 10 August 2014.

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<sup>810</sup> Ibid at p 57A.

<sup>811</sup> Ibid at p 87, line 15.

<sup>812</sup> See 28 April 2022, p 84- 89.

***Isolated detention in single cells can only be done in terms of section 30***

488 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 of the Act kick in. The requirements of section 30 are necessary and strict precisely because of the limitations on rights and inherent dangers that accompany isolated segregation. Mr Kunene conceded this in cross examination. There is, simply put, 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 stands to be judged.

**THE SEGREGATION OF THE PLAINTIFFS WAS UNLAWFUL AND INHUMANE**

***The Segregation was Unlawful***

489 The segregation of the second to fifth plaintiffs was unlawful and flouted the requirements of section 30 of the Act in a whole host of respects.

Non-compliance with section 30(1) of the Act

490 Section 30(1) provides seven permissible grounds on which an inmate may be segregated, these being:

490.1 at the request of an inmate;<sup>813</sup>

490.2 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;<sup>814</sup>

490.3 if the segregation is prescribed by the correctional medical practitioner on medical grounds;<sup>815</sup>

490.4 when an inmate displays violence or is threatened by violence;<sup>816</sup>

490.5 if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape;<sup>817</sup> and

490.6 if at the request of SAPS, the Head of Centre considers it in the

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<sup>813</sup> Section 30(1)(a) of the Act. Exhibit H, page 22.

<sup>814</sup> section 30(1)(b) of the Act. Exhibit H, page 22.

<sup>815</sup> Section 30(1)(c) of the Act. Exhibit H, page 22.

<sup>816</sup> Section 30(1)(d) of the Act. Exhibit H, page 22.

<sup>817</sup> Section 30(1)(e) of the Act. Exhibit H, page 22.

interests of the administration of justice.<sup>818</sup>

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

492 Mr Kunene was the DCS official responsible for applying for the segregation of the second to fifth plaintiffs.<sup>819</sup> Mr Mohale, as the Head of Centre, was the official responsible for granting the applications for segregation.<sup>820</sup> Both Mr Kunene and Mr Mohale confirmed in their evidence that the plaintiffs had not been segregated in terms of section 30(1)(a),<sup>821</sup> (b),<sup>822</sup> (c),<sup>823</sup> (d),<sup>824</sup> (e)<sup>825</sup> or (f)<sup>826</sup> of the Act.

*Non-compliance with section 30(2)(a)(i) of the Act*

493 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 of his own accord):<sup>827</sup>

"(i) must be visited by a correctional official at least once every

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<sup>818</sup> Section 30(1)(f) of the Act. Exhibit H, page 22.

<sup>819</sup> 20 April 2022, page 87, lines 4 – 6.

<sup>820</sup> See Exhibit A1, page 7.

<sup>821</sup> 20 April 2022, page 87 line 20 and 88 lines 1 – 2.

<sup>822</sup> 20 April 2022, page 88, lines 3 – 17.

<sup>823</sup> 20 April 2022, page 88, lines 18 – 20.

<sup>824</sup> 20 April 2022, page 89, lines 1 – 3.

<sup>825</sup> 20 April 2022, page 89, lines 5 – 7.

<sup>826</sup> 20 April 2022, page 89, lines 8 -12.

<sup>827</sup> Exhibit H, page 22.

four hours and by the Head of the Correctional Centre at least once a day".

494 When asked to whether he had complied with this section of the Act, Mr Mohale contended that the section was not applicable because the plaintiffs had been separated and not segregated.<sup>828</sup>

495 It must be noted that Mr Zulu admitted to receiving visits from Mr Mohale, however he testified that Mr Mohale used the visits to threaten him – going as far to tell Mr Zulu that in prison, he only has the right to life, but that even that right could be taken away.<sup>829</sup> Mr Sithole<sup>830</sup> and Mr Qibi,<sup>831</sup> testified that they received intermittent visits from Mr Mohale while they were in the single cells.

496 There was no evidence before the Court that the plaintiffs were visited by a correctional official at least once every four hours as required by this subsection.

*Non-compliance with section 30(2)(a)(ii) of the Act*

497 Section 30(2)(a)(ii) of the Act provides that an inmate who is segregated for any reason (save for when that inmate requests segregation of his

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<sup>828</sup> 28 April 2022, page 114, lines 10 – 20.

<sup>829</sup> 6 November 2019, page 35, lines 4 – 21.

<sup>830</sup> 12 November 2019, page 30, lines 5 – 10.

<sup>831</sup> 29 July 2019, page 8, lines 8 – 10.

own accord):<sup>832</sup>

"(i) must have his or her health assessed by a registered nurse, psychologist or correctional medical practitioner at least once a day."

498 Mr Qibi<sup>833</sup> and Mr Sithole<sup>834</sup> testified that they were not seen by a nurse, doctor or psychologist once a day while they were segregated in the single cells. Mr Zulu could not recall if he was seen by a nurse at any single stage during his segregation, but confirmed that he was not seen by a nurse every day.<sup>835</sup>

499 Dr Dlamini's evidence on this point was highly problematic and evinced the defendant's disregard for this requirement of the Act. When asked whether he had seen Mr Zulu in the single cells to check Mr Zulu's blood pressure (given that he suffered from hypertension), Mr Dlamini stated the following:

"Patients that are on segregation are visited by the nurses as far as I know. It is the nurses that go there. I never used to go to single cell isolation for – and if there was a problem with the patient the patient would be brought to the consulting room".<sup>836</sup>

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<sup>832</sup> Exhibit H, page 22.

<sup>833</sup> 28 July 2021, page 9, lines 16 – 18.

<sup>834</sup> 12 November 2021, page 33, lines 10 – 19.

<sup>835</sup> 8 November 2021, page 21, lines 8 – 13.

<sup>836</sup> 25 May 2022, page 107, lines 9 – 16.

500 As to whether the nurses had indeed visited the plaintiffs every day as required by section 30(2)(a)(ii) of the Act, Dr Dlamini knew nothing about this:<sup>837</sup>

"I have never visited the area and as to how frequently the nurses were doing the visitations, I do not know about that."

501 The nurses, for their part, gave the following evidence:

501.1 Ms Sodi: Ms Sodi confirmed that the nurses are required to visit the offenders in the single cells every day.<sup>838</sup> She explained that the nurses take turns to visit the single cells in this regard.<sup>839</sup> Ms Sodi, could however, provide no evidence that she, or any other nurse, had in fact visited the plaintiffs in August 2014

501.2 Ms Mafora: Ms Mafora could not remember if she had visited the plaintiffs while they were in the single cells.<sup>840</sup> However, Ms Mafora testified that had she or any other nurse visited the plaintiffs as required by section 30(2)(a)(ii), the visits would have been recorded in the single cell journal.<sup>841</sup> Notably, the single cell journal was never

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<sup>837</sup> 25 May 2022, page 112, lines 1 -3.

<sup>838</sup> 20 May 2022, page 97, lines 14 – 17.

<sup>839</sup> 20 May 2022, page 97, lines 18 – 20.

<sup>840</sup> 20 May 2022, page 27, lines 2 – 5.

<sup>841</sup> 20 May 2022, page 27, lines 18 – 20 and page 28, lines 1 – 3.



provided by the defendant to substantiate compliance with the Act.

501.3 Ms Nkatingi: Ms Nkatingi provided no evidence to suggest that the defendant complied with section 30(2)(a)(ii).

502 Alongside the problematic evidence of Dr Dlamini and the nurses was the disturbing testimony by Mr Goso. Mr Goso testified that neither Dr Dlamini or the nurses visited the plaintiffs while they were in the single cells.<sup>842</sup>

503 Mr Goso testified that the failure of medical practitioners to see inmates in single cells was normal practice at Leeuwkop – indicative of the defendant's disregard for this requirement of the Act. Mr Goso testified that 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.<sup>843</sup>

504 In the circumstances, we submit that it has been established that the defendant failed to comply with section 30(2)(a)(ii) of the Act insofar as the plaintiffs were concerned.

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<sup>842</sup> 18 May 2022, page 107 lines 19 – 20 and page 108, lines 104.

<sup>843</sup> 18 May 2022, page 108, lines 1 – 7.

Non-compliance with section 30(5) of the Act

505 Section 30(4) of the Act states that:<sup>844</sup>

"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 subsection (5), exceed seven days".

506 Section 30(5) of the Act states that:

"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 the period for a period not exceeding 30 days."

507 Thus, section 30(5) must be complied with should segregation of an inmate exceed seven days.

508 The second to fifth plaintiffs were segregated for 16 days.<sup>845</sup> Thus, and in accordance with the provisions of section 30(5):

508.1 a correctional medical practitioner or psychologist was required to

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<sup>844</sup> Exhibit H, page 22.

<sup>845</sup> 21 April 2022, page 42, line 17.

declare that their continued segregation would not be harmful to their health; and

508.2 Mr Mohale was required to obtain the permission of the National Commissioner to extend the segregation of the plaintiffs.

509 These statutory requirements were put to Mr Mohale<sup>846</sup> and Mr Kunene<sup>847</sup>. Both officials confirmed their knowledge of these requirements,<sup>848</sup> which are discussed below:

509.1 Did a medical practitioner or psychologist declare the plaintiffs fit for extended segregation?

509.1.1 Dr Dlamini testified that:

509.1.2 he was aware that for inmates to be placed in the single cells for an extended period, they needed to be declared fit for segregation by a medical practitioner;<sup>849</sup>

509.1.3 he sought to examine Mr Zulu, Mr Sithole, Mr Zulu and Mr Qibi on 18 August 2014 for the sole purpose of following up on their injuries – not for the purpose of declaring them fit for extended

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<sup>846</sup> 28 April 2022, page 36, lines 14 – 20.

<sup>847</sup> 21 April 2022, page 16, lines 12 – 16.

<sup>848</sup> 28 April 2022, page 37, lines 8 – 9.

<sup>849</sup> 25 May 2022, page 106, lines 16 – 18.

segregation;<sup>850</sup>

509.1.4 he had no recollection of conducting a medical examination on Mr Zulu, Mr Qibi, Mr Sithole or Mr Phasha for the purpose of determining their fitness for extended segregation,<sup>851</sup>

509.1.5 had he assessed the relevant plaintiffs for purposes of determining their fitness for extended segregation, there would be paperwork to prove it.<sup>852</sup> He was not aware of such paperwork.

509.2 This statutory requirement was therefore not complied with.

509.3 Did Mr Mohale obtain the permission of the National Commissioner to extend the period of segregation for the plaintiffs?

509.3.1 Mr Mohale gave evidence that for segregation to be extended, he had to engage "the higher authority". Mr Mohale contended that the permission had to be sought from the National Commissioner via the Office of the Area Commissioner.<sup>853</sup>

509.3.2 Mr Mohale maintained that the plaintiffs had been separated and not segregated and that it had accordingly not been

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<sup>850</sup> 25 April 2022, page 102, lines 1 -2.

<sup>851</sup> 25 May 2022, page 104, lines 8 – 12; page 105, lines 3 – 7.

<sup>852</sup> 25 May 2022, page 105, lines 13 - 16.

<sup>853</sup> 28 April 2022, page 36, lines 1 -5.

necessary for him to obtain this permission.

509.4 This statutory requirement was therefore not complied with.

### ***The Segregation was Inhumane***

#### *The corroboratory evidence of Mr Zulu, Mr Qibi and Mr Sithole*

510 The plaintiffs placed in segregation testified to the dire, inhumane conditions that they were subjected to. Not only is this contrary to their constitutional rights in and of itself, but it exacerbates the effect of their unlawful segregation.

511 Mr Zulu, Mr Qibi and Mr Sithole provided corroboratory evidence as to the deplorable state of the single cells, the fact that they were placed in mechanical restraints for 23 hours a day and the fact that they were denied medical treatment.

#### Mr Zulu

512 Mr Zulu gave the following testimony with regards to the period in which he was unlawfully segregated:

### The condition of the cell

- 512.1 his single cell did not have a bed – only a mattress;<sup>854</sup>
- 512.2 he heard Mr Mohale instructing inmates to remove the beds from the cells;<sup>855</sup>
- 512.3 the mattress did not have any sheets and was wet from the leaking toilet and sink;<sup>856</sup>
- 512.4 the locker normally found in the single cell had been removed (along with the bed);<sup>857</sup>
- 512.5 due to the wet and cold condition of the single cell, the fact that he had been provided with a blanket did not help.<sup>858</sup>

### How he was restrained

- 512.6 he was restrained with ankle cuffs for 23 hours a day, for approximately 10 days;<sup>859</sup> and
- 512.7 his ankle cuffs were removed for 1 hour when he was allowed to

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<sup>854</sup> 6 November 2019 Transcript, page 23, line 6.

<sup>855</sup> 6 November 2019 Transcript; 7 November 2019 Transcript; 2 April 2022 Transcript, page 105, lines 9 – 14.

<sup>856</sup> 6 November 2019 Transcript, page 23, line 8; page 24, line 9.

<sup>857</sup> 6 November 2019 Transcript, page 23, line 22.

<sup>858</sup> 6 November 2019 Transcript, page 24, line 7.

<sup>859</sup> 6 November 2019 Transcript, page 24, lines 16 – 25; page 25, lines 1 – 14.

exercise.

His physical condition

512.8 his left leg was injured and swollen to the point that he could not move it;<sup>860</sup>

512.9 he had visible injuries that were made more painful by the cell's wet condition, which included:

512.9.1 a small laceration to his head that was bleeding;<sup>861</sup>

512.9.2 an injury to his hip and lower back;<sup>862</sup> and

512.9.3 an injury to his wrist, hands and thumb.<sup>863</sup>

The medical treatment provided

512.10 on 10 August 2014:

512.10.1 he was seen by the nurses,<sup>864</sup> but was not examined in any proper fashion;<sup>865</sup>

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<sup>860</sup> 6 November 2019, page 26, line 11 and lines 21 – 22.

<sup>861</sup> 6 November 2019, page 26, lines 24 – 25 and page 27, lines 1 - 4.

<sup>862</sup> 6 November 2019, page 27, line 6.

<sup>863</sup> 6 November 2019, page 27, lines 8 – 21.

<sup>864</sup> 6 November 2019, page 31, line 13 – 14.

<sup>865</sup> 6 November 2019, page 30, lines 13 – 14.

512.10.2 he was not asked any questions about his condition by the nurses;<sup>866</sup>

512.10.3 he was given two panados and told that he was fit for segregation;<sup>867</sup>

512.10.4 he received no other treatment<sup>868</sup>

512.11 on 11 August 2014:

512.11.1 he was seen by Dr Dlamini, who conducted an inadequate, superficial examination from across the desk;<sup>869</sup>

512.12 on 18 August 2014:

512.12.1 he was again seen by Dr Dlamini and was not offered any treatment for his injuries.<sup>870</sup>

Mr Qibi

513 Mr Qibi gave the following testimony with regards to the period in which

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<sup>866</sup> 6 November 2019, page 31, lines 18 – 20.

<sup>867</sup> 6 November 2019, page 30, lines 13 – 20.

<sup>868</sup> 6 November 2019, page 32, lines 1 – 6.

<sup>869</sup> 6 November 2019, page 37, lines 12 – 25 and page 38, lines 1 – 15.

<sup>870</sup> 6 November 2019, page 52, lines 21 – 25; page 53, lines 1 – 14. It must be noted that Mr Zulu was offered Panado. However, Mr Zulu explained that he refused the Panado as he had serious injuries that required more effective medication than Panado.



he was unlawfully segregated:

The condition of the single cells

- 513.1 Mr Zimba ordered the removal of the mattresses and beds from the single cells;<sup>871</sup>
- 513.2 the toilet did not flush and the sink was blocked;<sup>872</sup>
- 513.3 the floor was full of water;<sup>873</sup>
- 513.4 his blankets were wet;<sup>874</sup> and
- 513.5 the beds were returned about 5 to 7 days after he was initially placed in the single cells,<sup>875</sup>

How he was restrained

- 513.6 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;<sup>876</sup>

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<sup>871</sup> 21 July 2019, page 40, lines 12 -14.

<sup>872</sup> 27 July 2021, page 41, line 3.

<sup>873</sup> 27 July 2021, page 41, line 4.

<sup>874</sup> 27 July 2021, page 41, line 6.

<sup>875</sup> 27 July 2021, page 41, lines 9 – 10.

<sup>876</sup> 27 July 2021, page 41, lines 11 – 21.

His physical condition:

513.7 he had head injuries;<sup>877</sup>

513.8 he had an injury to his left-hand small finger;<sup>878</sup>

513.9 he had abdominal pain;<sup>879</sup>

513.10 he had injuries to his shoulders and his right wrist;<sup>880</sup>

The medical treatment provided while he was in segregation:

513.11 on 10 August 2014:

513.11.1 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 10 August 2014;<sup>881</sup>

513.12 on 11 August 2014:

513.12.1 he was seen by Dr Dlamini in the presence of Mr Mohale;<sup>882</sup>

513.12.2 Dr Dlamini conducted a superficial, inadequate examination of

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<sup>877</sup> 27 July 2021, page 49, lines 8 – 12.

<sup>878</sup> 27 July 2021, page 49, line 20.

<sup>879</sup> 27 July 2021, page 49 line 23 – 24 and page 50, lines 1 – 3.

<sup>880</sup> 27 July 2021, page 49, lines 20 – 24.

<sup>881</sup> 28 July 2021, page 9, lines 8 – 15.

<sup>882</sup> 28 July 2021, page 12, lines 3 – 16.

his injuries;<sup>883</sup> and

513.12.3 Dr Dlamini did not prescribe any medication for his injuries;<sup>884</sup>

513.13 on 18 August 2014:

513.13.1 he refused to be attended to by Dr Dlamini based on Dr Dlamini's previous inadequate examination of him, and the fact that Dr Dlamini failed to properly treat him for his injuries.<sup>885</sup>

513.13.2 he was never seen on a regular basis by any nurse or doctor.<sup>886</sup>

#### Mr Sithole

514 Mr Sithole gave the following testimony with regards to the period in which he was unlawfully segregated:

#### The condition of the single cells

514.1 the bed had been removed,<sup>887</sup> and was only returned about 7 day

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<sup>883</sup> 3 August 2021, page 51, lines 12 – 17.

<sup>884</sup> 28 July 2021, page 15, line 20.

<sup>885</sup> 4 August 2021, page 22, lines 8 – 18.

<sup>886</sup> 28 July 2021, page 9, lines 16 – 18.

<sup>887</sup> 11 November 2019, page 83, lines 17 – 25.

after he as placed in the single cell;<sup>888</sup>

514.2 he only had a mattress to sleep on which was wet from the leaking toilet;

515 How he was restrained

515.1 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 time that the ankle cuffs were taken off;<sup>889</sup>

516 His physical condition:

516.1 he had injuries to:

516.1.1 his right ankle;<sup>890</sup>

516.1.2 his right shin;<sup>891</sup>

516.1.3 his right knee;<sup>892</sup>

516.1.4 his right shoulder;<sup>893</sup>

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<sup>888</sup> 11 November 2019, page 84, line 25 and page 85, lines 1 – 8.

<sup>889</sup> 11 November 2019, page 84, lines 4 – 24.

<sup>890</sup> 11 November 2019, page 86, lines 18 – 23.

<sup>891</sup> 11 November 2019, page 86, lines 18 – 23.

<sup>892</sup> 11 November 2019, page 86, lines 18 – 25.

<sup>893</sup> 11 November 2019, page 87, line 7.

- 516.1.5 his right side of his forehead;<sup>894</sup>
- 516.1.6 his left thigh;<sup>895</sup>
- 516.1.7 his left arm;<sup>896</sup>
- 516.1.8 he had a painful lower back and right hip;<sup>897</sup>
- 516.1.9 he had lacerations on his ankles;<sup>898</sup> and
- 516.1.10 he had lacerations on both sides of his buttocks.<sup>899</sup>

The medical treatment provided while he was in segregation:

- 516.2 on 10 August 2014:
- 516.2.1 he was seen by the nurse who was asked where he felt pain, but was not examined and was not given adequate medical treatment for his injuries;<sup>900</sup>
- 516.2.2 he was given two Panado's and "rub-rub" which did not help

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<sup>894</sup> 11 November 2019, page 87, lines 7 – 10.

<sup>895</sup> 11 November 2019, page 87, line 11.

<sup>896</sup> 11 November 2019, page 87, line 11.

<sup>897</sup> 11 November 2019, page 86, lines 22 – 23.

<sup>898</sup> 11 November 2019, page 87, lines 14 – 15; 12 November 2019 Transcript, page 6, lines 7 - 8.

<sup>899</sup> 11 November 2019, page 87, lines 14 – 15.

<sup>900</sup> 11 November 2019, page 88, lines 11 – 17.

at all;<sup>901</sup>

516.3 on 11 August 2014:

516.3.1 Dr Dlamini superficially examined his visible injuries, but did not examine him for injuries covered up by his clothing and gave him no treatment.

516.4 on 18 August 2014:

516.4.1 he was seen by Dr Dlamini, but told Dr Dlamini that he was "fine", as he did not trust Dr Dlamini to conduct a proper examination due to the inadequate examination conducted on 11 August 2014 (which was further informed by the proper examination undertaken by Dr Van Zyl).<sup>902</sup>

## **THE DEFENDANT'S EVIDENCE**

### ***Date of admittance to the single cells***

517 Mr Goso testified that he was on duty from 10 to 14 August 2014.<sup>903</sup>

518 Mr Goso was the official responsible for signing the admission book that records the dates on which inmates are admitted to the single cells. Mr

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<sup>901</sup> 11 November 2019, page 87, lines 24 – 25; page 88, line 15.

<sup>902</sup> 12 November 2019, page 11, lines 12 – 25; page 12, lines 1 – 25; and page 13, lines 1 – 5.

<sup>903</sup> 18 May 2022, page 46, lines 15 – 16.

Goso recorded that Mr Zulu, Mr Sithole, Mr Qibi and Mr Phasha were admitted to the single cells on 11 August 2014,<sup>904</sup> but gave oral evidence that he had admitted them on 10 August 2014. Mr Goso testified that the discrepancy was human error,<sup>905</sup> but failed to provide an adequate explanation for why the error was made in the first place or why it was never corrected – despite admitting the importance of recording these dates correctly.<sup>906</sup>

### ***The condition of the single cells***

519 The evidence of Mr Zulu, Mr Qibi and Mr Sithole in so far as the conditions of the single cells were concerned was put to Mr Mohale, Mr Goso and Mr Thokolo.

520 Mr Mohale<sup>907</sup> and Mr Goso<sup>908</sup> denied the plaintiffs' claims that the single cells were in an inhumane condition with no bedding, a wet floor, and blocked sinks and toilets.

521 Mr Mohale further denied giving any instruction for bedding to be removed from the single cells.<sup>909</sup> Mr Goso conceded that had Mr Mohale instructed him to remove the beds from the single cell, he would have

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<sup>904</sup> Exhibit A4, page 374.

<sup>905</sup> 18 May 2022, page 43, lines 4 -5.

<sup>906</sup> 18 May 2022, page 81, lines 14 – 19.

<sup>907</sup> 22 April 2022, page 62, lines 16 – 25; page 63, lines 1 – 7.

<sup>908</sup> 18 May 2022, page 50, lines 11 – 25; page 51, lines 1 – 12.

<sup>909</sup> 29 April 2022, page 106, lines 8 – 10.

complied with the instruction<sup>910</sup> – 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. This was a disturbing concession by Mr Goso.

522 Mr Mohale<sup>911</sup> and Mr Thokolo<sup>912</sup> testified that the inmates get sheets, blankets and a pillow when they are placed in the single cells.<sup>913</sup> This was in direct contradiction of Mr Goso's evidence, who stated:<sup>914</sup>

"No, we wont give a sheet when he is separated on the Section 29 when there's a security threat included there, because for his safety and the safety of property of the state, sheets can be used for hanging themselves. So, it's risky to put such a person together with sheets."

523 Mr Goso further explained that the only person who was allowed to approve the provision of sheets to inmates in the single cells was the medical doctor.<sup>915</sup>

524 When the inconsistency in his evidence was put to Mr Goso, he backtracked, stating that the prison doctor or Head of Prison could

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<sup>910</sup> 18 May 2022, page 106, lines 14 – 17.

<sup>911</sup> 28 April 2022, page 15, lines 16 – 17.

<sup>912</sup> 6 May 2022, page 79, line 13.

<sup>913</sup> 28 April 2022, page 15, lines 16 – 17.

<sup>914</sup> 18 May 2022, page 102, lines 1 – 10.

<sup>915</sup> 18 May 2022, page 102, lines 9 – 10.



approve the provision of sheets, on application by the relevant inmate.

### ***The ankle restraints***

525 Mr Mohale denied the allegations by Mr Zulu, Mr Sithole and Mr Qibi that they were restrained at all while they were in segregation.

526 On the other hand, Mr Goso testified that the inmates were restrained during their hour of exercise with ankle cuffs.<sup>916</sup> It is not clear under whose instruction Mr Goso was acting when deciding to restrain the inmates, as Mr Mohale was adamant that the inmates were approved for detention in single cells *without* restraint.

### ***Mr Thokolo's Evidence***

527 Mr Thokolo testified that he visited the single cells on 10 August 2014 and 15 August 2014.<sup>917</sup> He testified that he did not engage with the plaintiffs when he visited on 15 August 2014.

#### Mr Goso

527.1 Mr Goso testified that he was on duty at the single cells for the period 10 to 14 August 2014,<sup>918</sup> during which period he had not

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<sup>916</sup> 29 April 2022, page 52, lines 12 – 16; page 98, lines 1 – 3.

<sup>917</sup> 6 May 2022, page 89, lines 3 – 5.

<sup>918</sup> 28 May 2022, page 46, lines 14 – 18.

seen Mr Thokolo visit the inmates.<sup>919</sup>

527.2 Another inconsistency between the evidence of Mr Goso and Mr Thokolo was the manner in which Mr Thokolo checked up on the inmates on 10 August 2014. Mr 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.<sup>920</sup>

527.3 Mr 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 in the cell (or the official). Mr Goso explained that the door is not locked so as to allow him to conduct his patrolling duties of the cells.<sup>921</sup>

### Mr Sithole

527.4 Mr Sithole testified that Mr Thokolo only visited him once – on 15 August 2014. Mr Sithole's evidence was not challenged under cross-examination.<sup>922</sup> The fact that Mr Sithole was not challenged on his assertion that Mr Thokolo had only visited him once was put

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<sup>919</sup> 18 May 2022, page 107, lines 14 – 16.

<sup>920</sup> 9 May 2022, page 19, lines 12 – 20.

<sup>921</sup> 18 May 2022, page 53, lines 1 – 5.

<sup>922</sup> 9 May 2022, page 38, lines 12 – 16.

to Mr Thokolo.<sup>923</sup> Mr Thokolo could not explain this. h

### Mr Zulu

527.5 It was never put to Mr Zulu that Mr Thokolo had visited the single cells on 10 August 2014.<sup>924</sup>

527.6 Mr Zulu testified that Mr Thokolo visited the single cells on 15 August 2014 and gave the following evidence regarding his interaction with Mr Thokolo on that day:

"Then I asked him why the EST have to torture us or assault us and then he sad he had no idea, because he was off duty that weekend, but at the same time he said something that was shocking to me. He said "I should have called the army".<sup>925</sup>

527.7 Mr Thokolo could not explain how Mr Zulu would have known that he was off duty that week-end.<sup>926</sup>

527.8 Mr Zulu's contention that he conversed with Mr Thokolo on 15 August 2014 was not challenged under cross-examination.

527.9 Even more telling was that Mr Zulu's assertion, that Mr Thokolo had

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<sup>923</sup> 9 May 2022, page 38, lines 12 – 16.

<sup>924</sup> 9 May 2022, page 51, lines 6 – 8.

<sup>925</sup> 6 November 2019, page 35.

<sup>926</sup> 9 May 2022, page 47, lines 10 – 12.

indicated that *he would have called the army*, was not challenged by the defendant during cross-examination.

### Mr Smith

527.10 Mr Smith testified that on 15 August 2014: (i) he complained to Mr Thokolo about the medical examination conducted by Dr Dlamini after the assault on 10 August 2014; (ii) he raised his unhappiness about the illegal demotion of the inmates of cell B1; (iii) he was told by Mr Thokolo to appeal the demotion.

527.11 Mr Thokolo could only offer a bare denial of ever having conversed with Mr Smith.<sup>927</sup> However, this denial was not put to Mr Smith in cross examination. Moreover, this denial holds no water given the fact that after his discussion with Mr Thokolo, the inmates of cell B1 wrote a letter<sup>928</sup> that recorded his discussion with Mr Smith and corroborated Mr Smith's version that he had been advised by Mr Thokolo to appeal the demotion.

527.12 It is important to emphasise that Mr Smith's evidence, as set out above, was not challenged in cross examination.<sup>929</sup> Mr Thokolo could not explain why this was the case.

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<sup>927</sup> 9 May 2022, page 61, lines 5 – 11.

<sup>928</sup> Exhibit C, page 4.

<sup>929</sup> 9 May 2022, page 62, lines 1 -3.

Mr Qibi

527.13 Mr Qibi testified that he saw Mr Thokolo on 15 August 2014, and complained that he was in a lot of pain and detested the condition of the single cells.<sup>930</sup>

527.14 Mr Qibi was not challenged on this evidence in cross examination.

528 It is important to note that it was not put to any plaintiff in cross examination that Mr Thokolo had visited the single cells on 10 August 2014. It is inconceivable that this would not have been done if this visit had in fact taken place.

529 Mr Thokolo's evidence in relation to his visit of the single cells on 10 August 2014 was also inherently contradictory:

529.1 Mr Thokolo testified that he made an extra effort to visit the single cells on 10 August 2014 (a day on which he was not on duty) to determine whether anything abnormal had transpired during the events of 10 August 2014.<sup>931</sup>

529.2 However, upon arrival, he:

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<sup>930</sup> 4 August 2021, page 7.

<sup>931</sup> 9 May 2022, page 18, lines 6 – 8.

- 529.2.1 failed to ask the plaintiffs if they were injured;<sup>932</sup>
- 529.2.2 spent no more than a minute inspecting the cells in which the plaintiffs were held;<sup>933</sup> and
- 529.2.3 did not see any injuries on the plaintiffs.

## **CONCLUSION**

530 The plaintiffs led corroboratory evidence that was largely unchallenged in so far as their segregation, and the state of the single cells, was concerned. The evidence provided by the defendant, however, was uncorroborated and inconsistent.

531 Moreover, the evidence of Mr Thokolo:

531.1 that he visited the single cells on 10 August 2014; and

531.2 that he did not engage the plaintiffs when he visited the single cells on 15 August 2014;

is patently false and stands to be rejected as such.

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<sup>932</sup> 9 May 2022, page 21, lines 4 – 6.

<sup>933</sup> 9 May 2022, page 6 – 9.

## **PART 6: THE IMPACT OF THE ASSAULT AND TORTURE ON THE PLAINTIFFS**

### **ONGOING PHYSICAL INJURIES**

532 The plaintiffs' ongoing physical injuries were dealt with in the trial and are addressed here, not for purposes of quantum, but for purposes of demonstrating the impact of the assault and torture on the plaintiffs, and in particular the severity thereof.

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

534 Dr Khan examined the first plaintiff 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 Prof Becker's evidence of the plaintiffs' ongoing injuries was accordingly confined to the residual effects of the injuries sustained on 10 August 2014.<sup>934</sup>

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<sup>934</sup> Exhibit D5, p 6, para 7.

### ***Dr Khan's evidence***

535 When Dr Khan examined the plaintiffs, he found the following ongoing injuries (after conducting the necessary tests to rule out malingering on the part of the plaintiffs).

#### **Mr Smith**

536 In respect of Mr Smith:

536.1 Dr Khan testified that Mr Smith informed him during 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.<sup>935</sup> Dr Khan testified that this may have been caused by the injuries to Mr Smith's back, in particular the spinal cord.<sup>936</sup>

536.2 Dr Khan further testified that Mr Smith suffered from a tender left elbow with ongoing pain, and that the assault was the probable cause of this injury.<sup>937</sup>

536.3 Dr Khan referred Mr Smith to a neurologist, Dr Ranchod, who examined Mr Smith on 15 August 2019.<sup>938</sup> Dr Khan explained that

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<sup>935</sup> 20 July 2021, p 25, lines 23 – 24, p 26 line 1.

<sup>936</sup> 20 July 2021, p26 lines 5 - 7.

<sup>937</sup> 20 July 2021, p 29 line 2, p 29 line 2, p 30 line 9 - 10.

<sup>938</sup> 20 July 2021, p 33 lines 4 - 7.



the findings that were made by Dr Ranchod were consistent with his observations and that Mr Smith has sensory loss of the feeling in his left upper limb and lower limb.<sup>939</sup>

536.4 Dr Khan further testified that an MRI conducted at the Lenmed Ahmed Kathrada Private Hospital showed that Mr Smith suffers from a degenerative condition of the spine, which manifested as a result of the injuries sustained on 10 August 2014. Dr Khan testified that this was likely triggered by the application of electric shocks which caused muscular contortions.<sup>940</sup>

536.5 Dr Khan testified that Mr Smith also suffered from urinary dysfunction that was likely caused by neurological damage due to the sustained use of electric shock equipment.<sup>941</sup>

537 Mr Smith confirmed the existence of these injuries during his evidence, apart from his left elbow which has now healed.<sup>942</sup>

### Mr Zulu

538 In respect of Mr Zulu:

538.1 Dr Khan testified that his examination of the top of Mr Zulu's head

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<sup>939</sup> 20 July 2021, p 33 line 20 - 23.

<sup>940</sup> 20 July 2021, p 41 line 1, p 45 lines 10 – 13, 19, p 48 line 10 - 15.

<sup>941</sup> 20 July 2021, p 53 line 21.

<sup>942</sup> 4 March 2021, p 14 line 6 – p 15 line 7; p 37, lines 2 – 7;.

revealed an area on the vertex of the head where there was a swelling and tenderness that was probably caused by the assault.<sup>943</sup> Dr Khan stated that the presence of the injury five years later indicated that there was an underlying condition with the bone,<sup>944</sup> suggesting that the bone might have been fractured at the time or, after being left untreated, became infected and led to a condition called osteophytes.<sup>945</sup>

538.2 Dr Khan recorded ongoing pain and reduced functioning in Mr Zulu's right upper limb and entire lower left leg.<sup>946</sup> Moreover, Mr 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.

538.3 Dr Khan confirmed that what he had said about the difficulties experienced by Mr Smith in relation to urinary dysfunction applied equally to Mr Zulu.<sup>947</sup>

539 Mr Zulu confirmed in his evidence that he still experiences migraines, pain in his left lower limb, his right wrist, his hip and his lower back. He

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<sup>943</sup> 20 July 2021, p 58 line 3, p 58 lines 6 - 15.

<sup>944</sup> 20 July 2021, p 59 line 13 - 17.

<sup>945</sup> 20 July 2021, p 59 line 13 - 17.

<sup>946</sup> 20 July 2021, p 61 line 1 – 6.

<sup>947</sup> 20 July 2021, p 67 line 12.

also still suffers from urinary dysfunction.<sup>948</sup>

Mr Qibi

540 In respect of Mr Qibi:

540.1 Dr Khan recorded that Mr Qibi's left fifth finger (little finger) could not be flexed at the proximal and distal interphalangeal joint due to damaged flexor tendons.<sup>949</sup>

540.2 Dr Khan testified that although Mr Qibi did not experience pain or swelling, there was impairment of the finger which did not move beyond the joint at all.<sup>950</sup>

541 Mr Qibi testified that the injury to his finger has not yet recovered.<sup>951</sup> He still cannot bend his finger at the last knuckle.<sup>952</sup>

Mr Phasha

542 In respect of Mr Phasha:

542.1 Dr Khan testified that on examination he had an extremely tender

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<sup>948</sup> November 2019, p 53 line 14 – p 54 line 6.

<sup>949</sup> 20 July 2021, p 68 line 19.

<sup>950</sup> 20 July 2021, p 69 lines 2 – 4.

<sup>951</sup> 27 July 2021, p 51, lines 21 – 22.

<sup>952</sup> 27 July 2021, p 52, lines 17 – 19.

left elbow that was painful after being compressed.<sup>953</sup> The movement of the elbow was, however, normal.<sup>954</sup> 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 Mr Phasha's soccer injury that had happened three months prior as it would have healed by then.<sup>955</sup> Dr Khan testified that the records of the treatment and testing that Mr Phasha had received, revealed that he had suffered a further injury to his elbow following the events of 10 August 2014.<sup>956</sup>

### Mr Sithole

543 In respect of Mr Sithole:

543.1 Dr Khan testified that during his examination, Mr Sithole indicated that he had difficulty in passing urine (known as urine hesitancy). This can be caused by the application of electric shocks<sup>957</sup> and was, in Dr Khan's opinion, caused by the assault of Mr Sithole.<sup>958</sup>

543.2 Dr Khan also described an injury to Mr Sithole's right knee, which caused him to suffer pain and swelling.<sup>959</sup> On examination, Dr Khan

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<sup>953</sup> 20 July 2021, p 73 line 6, p 74 line 6.

<sup>954</sup> 20 July 2021, p 74 line 1.

<sup>955</sup> 20 July 2021, p 75 lines 19 - 20.

<sup>956</sup> 20 July 2021, p 85 lines 13 – 16.

<sup>957</sup> 20 July 2021, p 55 lines 11 – 19; p 56 lines 3 – 7.

<sup>958</sup> 20 July 2021, p 59 lines 12 – 18.

<sup>959</sup> 20 July 2021, p 87 lines 1 – 2.

identified ongoing pain and sensory loss at the right knee using pin prick testing.<sup>960</sup>

543.3 Dr Khan also testified that Mr Sithole had suffered an injury to his left ankle tendon which had caused bruising and swelling, and reduced the function of the ankle.<sup>961</sup>

544 Mr Sithole testified that he continues to suffer from these ongoing injuries.<sup>962</sup>

***Prof Becker's evidence***

545 Dr Becker's evidence was that his examinations of the plaintiffs revealed more limited ongoing injuries:

545.1 He found that Mr Smith reported lower back pain at the sacroiliac joint, spreading down the left lateral side of the upper thigh;

545.2 He reported no ongoing injuries in respect of Mr Zulu;

545.3 He reported that Mr Qibi's left little finger does not flex and that it should be examined by a hand surgeon;

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<sup>960</sup> 20 July 2021, p 86 line 20, p 87 line 8.

<sup>961</sup> 20 July 2021, p 88 lines 21 – 24.

<sup>962</sup> 12 November 2019, p 16 line 8 – p 17 line 17; p 23 line 15.

- 545.4 He reported no ongoing injuries in respect of Mr Phasha; and
- 545.5 He reported that Mr Sithole had a loss of sensation in his right knee lateral to the patella tendon junction.
- 546 Despite these limited findings by Prof Becker, the joint expert minute concluded between Dr Khan and Prof Becker recorded their agreement on the following:<sup>963</sup>
- 546.1 That it would be clinically appropriate for Mr Smith to be referred to:
- 546.1.1 a neurologist for further investigation of his ongoing pain in his left hip and ongoing injuries indicating neurological damage; and
- 546.1.2 a urologist for further investigation of his urinary urge incontinence, in line with the same recommendation made by Dr Ranchod;
- 546.2 That it would be clinically appropriate for Mr Zulu to be referred to:
- 546.2.1 an orthopaedic surgeon for assessment of his swollen and tender left ankle for months after the assaults and torture, with ongoing pain and discomfort;

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<sup>963</sup> Exhibit D5, pp 5 – 12.

546.2.2 a urologist for assessment of his severe pain when urinating for months after the alleged assaults and torture, with ongoing discomfort and urinary urge incontinence; and

546.2.3 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 in his right upper limb (excluding his shoulder) and his left lower limb;

546.3 That it would be clinically appropriate for Mr Qibi to be referred to:

546.3.1 a hand surgeon for examination of his severe pain, swelling and bruising on the smallest finger of his left hand for months after the assaults and torture, with ongoing pain, discomfort and impaired movement; and

546.3.2 a neurologist for assessment of his head injuries with symptoms of possible injury to the brain, and ongoing headaches;

546.4 That it would be clinically appropriate for Mr Phasha to be referred:

546.4.1 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 aggravation of a previous injury to his left arm;

546.5 That it would be clinically appropriate for Mr Sithole to be referred to:

546.5.1 a neurologist to assess his lateral swelling and ongoing pain and sensory loss at his right knee; and

546.5.2 to a urologist for assessment of his ongoing urinary urge incontinence.

547 It is clear from the above that 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 Dr Khan and Prof Becker to have recorded the need for referrals were this not the case.

548 Prof Becker sought to underplay this in his testimony, however, contending that his 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 the doubt” in the event that there was something he may have missed in



his examinations.<sup>964</sup>

549 Importantly however, Prof Becker 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 these in his examinations of the plaintiffs.<sup>965</sup>

550 In other words, while Dr Khan could testify positively to his findings in relation to the plaintiffs' ongoing injuries, Prof Becker could not state with certainty that those ongoing injuries did not exist. Indeed, it follows from the Professor's agreement that it was clinically appropriate to refer those injuries to specialists in the relevant fields, and the Professor conceded, that those ongoing injuries could not be ruled out.

551 It bears noting that the plaintiffs' attorney of record, Ms Clare Ballard, went to great lengths to secure the further assessments and examinations that Dr Khan and Prof Becker agreed were clinically appropriate. She contacted 14 neurologists, two orthopaedic surgeons and four urologists. Although some of these specialists agreed to assess the plaintiffs on a pro bono basis or at a reduced rate, these examinations never materialised due to the insistence by the defendant that the plaintiffs pay for their own transportation, officials to escort them and the associated fees and treatment costs. The plaintiffs did not have the

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<sup>964</sup> 2 June 2022, p 57 line 18 – p 58 line 3.

<sup>965</sup> 8 June 2021, p 19, lines 2 – 13.

necessary funds for this.<sup>966</sup>

552 The defendant's refusal to co-operate and to facilitate these medical examinations amounts to a denial of medical treatment and care in circumstances where the defendant's own expert witness was of the view that such treatment and care was warranted.

### **THE PLAINTIFFS' PSYCHIATRIC INJURIES**

553 In addition to the physical injuries they sustained, the plaintiffs suffered psychiatric injury as a consequence of their assault and torture.

#### ***The Plaintiffs' Psychiatrist***

554 Dr Joanna Taylor, the plaintiffs' expert psychiatrist, administered standardised tests to each of the plaintiffs, most notably:

554.1 The CAPS-5 test, which is a standardised rating scale that has been statistically validated to evaluate for all aspects of post-traumatic stress disorder ("**PTSD**"). Dr Taylor described this test as the "*gold standard for PTSD diagnosis*";<sup>967</sup>

554.2 The Hamilton Depression Rating Score (HAM-D test), which is a well validated and commonly used tool for screening for depression,

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<sup>966</sup> Evidence of Patrick Heron, 1 September 2021, p 59 line 1 – p 61 line 2.

<sup>967</sup> 16 August 2021, p 69 line 13 – p 70 line 4.

assigning it a severity score and monitoring any changes;<sup>968</sup> and

554.3 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.<sup>969</sup>

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

Mr Smith

555.1 In relation to Mr Smith, that he “sustained severe psychological and physical injuries in August 2014 at the hands of his correctional services custodians while detained at Leeuwkop Maximum Security C. He had no prior significant medical or psychiatric history. During the assault and severe physical and psychological injuries in question he believed 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 Post-Traumatic Stress Disorder with dissociative symptoms, Insomnia Disorder, Anxiety Disorder, and Erectile Disorder as a

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<sup>968</sup> 17 August 2021, p 41 lines 13 – 17.

<sup>969</sup> 17 August 2021, p 64 line 19 – p 65 line 2.

consequence of these 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. Mr Smith 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 these 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.”<sup>970</sup> (our emphasis)

Mr Zulu

555.2 In relation to Mr 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 Maximum Prison in August 2014. He also sustained

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<sup>970</sup> Exhibit D2, pp 36 – 37.

significant physical injuries during the 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.”

555.3 “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 and possible epileptic symptoms subsequently.”

555.4 “Mr Zulu 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 these 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.”<sup>971</sup> (our emphasis)

Mr Qibi

555.5 In relation to Mr Qibi, that he has “developed Major Depressive Disorder and Severe Post-Traumatic Stress Disorder as a result of severe psychological injuries sustained during assaults and solitary confinement experienced in 2014 at Leeuwkop Maximum C. 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. Mr Qibi had no previous psychiatric diagnoses, 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

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<sup>971</sup> Exhibit D2, pp 62 – 63.

activity.”<sup>972</sup> (our emphasis)

Mr Phasha

555.6 In relation to Mr 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 Post-Traumatic Stress Disorder as a consequence of these events. He has had no treatment for this 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.”<sup>973</sup> (our emphasis)

Mr Sithole

555.7 In respect of Mr Sithole, that he “sustained severe physical and

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<sup>972</sup> Exhibit D2, p 85.

<sup>973</sup> Exhibit D2, pp 106 – 107.

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 Post-Traumatic Stress Disorder as a consequence of these events. He has 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 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.”<sup>974</sup>

### ***The Defendant’s Psychiatrist***

556 The defendant engaged the services of an expert psychiatrist, Dr Lawrence, who examined the plaintiffs and purported to diagnose each of them with personality disorders as follows:

556.1 Mr Smith was diagnosed with anti-social personality disorder with

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<sup>974</sup> Exhibit D2, p 128.



features of borderline personality disorder;<sup>975</sup>

556.2 Mr Zulu was diagnosed with anti-social personality disorder;<sup>976</sup>

556.3 Mr Qibi was diagnosed with anti-social personality disorder;<sup>977</sup>

556.4 Mr Phasha was diagnosed with mixed borderline and anti-social personality disorder,<sup>978</sup> and

556.5 Mr Sithole was diagnosed with anti-social personality disorder.<sup>979</sup>

557 It is submitted that in both his reports on the plaintiffs and in his testimony in Court Dr Lawrence failed to display the level of competence, professionalism and impartiality expected of a psychiatrist.

558 First, a comparison of Dr Lawrence's reports reveals that his findings in relation to each of the five plaintiffs are almost identical. This is illustrated in Exhibit O, which is a 27-page document that highlights the extent to which Dr Lawrence 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

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<sup>975</sup> Exhibit D3, p 63.

<sup>976</sup> Exhibit D3, p 91.

<sup>977</sup> Exhibit D3A, p 26.

<sup>978</sup> Exhibit D3A, p 51.

<sup>979</sup> Exhibit D3A, p 77.

testify that *“if I have five individuals that end up in the same population group or facility or type of world, I would not be surprised that they acted in the same way.”*<sup>980</sup>

559 It is clear from both his reports and his testimony that Dr Lawrence did not regard the plaintiffs as individuals but rather as unrehabilitated and unrepentant criminals *“who repeatedly commit the same offences, facing the same repercussions repeatedly and claim that the force used as stated in the Correctional Services Act of 1998 is traumatic.”*<sup>981</sup> Dr Lawrence opined in identical terms in respect of each plaintiff that: *“his traumatic experiences that were expressed do not stop him from repeating the offences over and over again.”*<sup>982</sup>

560 Dr Lawrence conceded that none of the instruments that he used in his assessments of the plaintiffs, test for a specific psychological disorder, nor do they test specifically for personality disorders.<sup>983</sup> Dr Lawrence therefore did not administer any formal diagnostic tests. In particular –

560.1 He did test any of the plaintiffs for PTSD. His explanation for this was that *“the facts do not explain a diagnosis of PTSD for me.”*<sup>984</sup> He conceded, however, that Mr Smith, Mr Zulu, Mr Qibi and Mr

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<sup>980</sup> 9 June 2022, p 15 lines 22 – 24.

<sup>981</sup> Exhibit D3, p 56. As per his modus operandi, Dr Lawrence made the identical statement in respect of each plaintiff in each of his reports.

<sup>982</sup> Exhibit D3, p 84. As per his modus operandi, Dr Lawrence made the identical statement in respect of each plaintiff in each of his reports.

<sup>983</sup> 9 June 2022, p 81 lines 3 – 7.

<sup>984</sup> 7 June 2022, p 51 lines 14 – 15; 9 June 2022, p 140 lines 17 – 18.

Sithole all displayed and reported symptoms of PTSD.<sup>985</sup> He maintained that he nevertheless had no duty to test for PTSD.<sup>986</sup> Dr Lawrence was therefore not in a position to dispute Dr Taylor's diagnosis of PTSD, given that he had failed to administer any test to confirm it or rule it out.

560.2 Dr Lawrence also did not administer any tests to test any of the plaintiffs for depression.<sup>987</sup> Again, it follows that Dr Lawrence was not in a position to dispute Dr Taylor's diagnoses of depression, given that he had not tested for it.

561 Dr Lawrence's failure to administer formal tests for any specific disorders also undermines his purported diagnoses of the plaintiffs' personality disorders. Indeed, his comment that reference to the DSM would be too "academic" for the purposes of these proceedings<sup>988</sup> exposes the bizarre and unprofessional manner in which he conducted his diagnoses of the plaintiffs. Moreover:

561.1 Dr Lawrence conceded that a conclusive personality disorder diagnosis could never be made in a one-off interview with a patient.<sup>989</sup>

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<sup>985</sup> 9 June 2022, p 8 lines 12 – 17.

<sup>986</sup> 9 June 2022, p 10 lines 24 – 25.

<sup>987</sup> 9 June 2022, p 140 lines 19 – 20.

<sup>988</sup> 3 June 2022, p 67 lines 10 – 12.

<sup>989</sup> 9 June 2022, p 70, lines 8 – 10.

- 561.2 Dr Lawrence relied on an outdated version of the DSM, namely the DSM-4, when diagnosing the plaintiffs. He conceded this in cross examination but was entirely unapologetic stating that *“it is what I had.”*<sup>990</sup>
- 561.3 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 indicated by three or more of the criteria listed in the DSM5.<sup>991</sup> However –
- 561.3.1 Dr Lawrence conceded that he had no information in respect of any of the plaintiffs that any of the listed criteria had occurred since age 15;<sup>992</sup>
- 561.3.2 He therefore conceded that he could not make any conclusive diagnoses of anti-social personality disorder in respect of any of the plaintiffs.<sup>993</sup>
- 561.4 A diagnosis of borderline personality disorder requires at least five of the prescribed diagnostic criteria to be present.<sup>994</sup>

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<sup>990</sup> 9 June 2022, p 66, lines 6 – 11.

<sup>991</sup> Exhibit D6, p 23.

<sup>992</sup> 9 June 2022, p 67 lines 1 – 19.

<sup>993</sup> 9 June 2022, p 68 lines 1 – 5.

<sup>994</sup> Exhibit D6, p 24.

561.4.1 Dr Lawrence conceded that he had not identified five of the prescribed diagnostic criteria required for borderline personality in respect of Mr Smith. He conceded that he had therefore made no valid diagnosis of borderline personality disorder in respect of Mr Smith.<sup>995</sup>

561.4.2 In diagnosing Mr Phasha with “mixed” anti-social personality disorder and borderline personality disorder, Dr Lawrence 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 Mr Phasha.<sup>996</sup>

561.5 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 I had, there was no way I could make a full diagnosis, number one. Number two, we don’t have proper tools or properly trained people to actually make the diagnosis.”*<sup>997</sup>

562 A further aspect that negates Dr Lawrence’s diagnosis of Mr Phasha arises from Mr Phasha’s psychiatric state at the time of the examination:

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<sup>995</sup> 9 June 2022, p 69 lines 5 – 17.

<sup>996</sup> 9 June 2022, p 69 line 18 – p 70 line 1.

<sup>997</sup> 9 June 2022, p 70 lines 2 – 7.

- 562.1 Dr Lawrence confirmed that a personality disorder cannot and should not be diagnosed in the presence of active psychiatric symptoms.<sup>998</sup> He confirmed that it is incumbent on a psychiatrist to deal with any psychiatric disorder that presents itself first before making a diagnosis of a personality disorder.<sup>999</sup>
- 562.2 Dr Lawrence testified that when he assessed Mr Phasha, he formed the view that he had a possible psychiatric disorder.<sup>1000</sup> He did not however record this in his report in respect of Mr Phasha. Notably, at that stage, Mr Phasha had been diagnosed with psychosis.
- 562.3 Dr Lawrence conceded that took no steps to establish whether Mr Phasha did in fact have a psychiatric disorder. He could not recall asking Mr Phasha if he had a pre-existing psychiatric disorder nor could he recall asking him whether he was on treatment.<sup>1001</sup>
- 562.4 Despite the fact that Dr Lawrence suspected that Mr Phasha may have had psychiatric disorder, he proceeded to diagnose him with a personality disorder.<sup>1002</sup> His diagnosis of the personality disorder is therefore invalid. When it was put to Dr Lawrence in cross

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<sup>998</sup> 9 June 2022, p 70 lines 13 – 15.

<sup>999</sup> 9 June 2022, p 45 lines 8 – 13.

<sup>1000</sup> 9 June 2022, p 43 lines 18 - 19.

<sup>1001</sup> 9 June 2022, p 47 lines 1 – 18.

<sup>1002</sup> 9 June 2022, p 46 lines 16 – 19.

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 Mr Phasha was merely provisional. He did not however deny that his diagnosis of Mr Phasha with a personality disorder, in the presence of a psychiatric disorder, was impermissible and invalid.<sup>1003</sup>

563 In defence of these defects, Dr Lawrence repeatedly stated that his diagnoses of the plaintiffs were provisional, leading to the following exchange between him and the plaintiffs' counsel:

“So, you couldn't make a valid diagnosis of antisocial personality disorder in the absence of that fact, could you? --- I could make a diagnosis of provisional.

So, if its' provisional, it's not conclusive. Is that correct? --- Correct, yes. At long last we can hear each other.

So, your diagnosis of antisocial personality disorder in respect of all of the plaintiffs is not conclusive. Correct? --- Yes, yes, at long last we hear each other.

Yes we agree wholeheartedly on this, Doctor. --- Yes.

Dr Taylor's diagnoses are conclusive. Correct? Hers are not provisional. --- Yes.

Yes, so the Court has only one set of conclusive diagnoses before it. Correct? --- Correct.

. . .

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<sup>1003</sup> 9 June 2022, p 46 lines 20 -24; p 48 lines 17 – 24.

So, there is no full or conclusive diagnosis of any personality disorder in respect of any of the plaintiffs. Correct? ---  
Correct.<sup>1004</sup>

564 We respectfully submit that the following emerges from this:

564.1 Only one of the expert psychiatrists, namely Dr Taylor, made conclusive diagnoses in respect of the five plaintiffs;

564.2 Only one psychiatrist, namely Dr Taylor, administered a recognised test for PTSD. Any denial by Dr Lawrence that the plaintiffs suffered from PTSD is accordingly baseless; and

564.3 Only one psychiatrist, namely Dr Taylor, administered a recognised test for depression. Any denial by Dr Lawrence that the plaintiffs suffered depression is similarly without any basis.

### ***Conclusion***

565 In the circumstances, we submit that the plaintiffs have established that:

565.1 Mr Smith contracted Major Depressive Disorder and Severe PTSD with dissociative symptoms as a result of the events of 10 August 2014;

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<sup>1004</sup> 9 June 2022, p 68 lines 1 – 11; p 70 lines 2 – 5.



- 565.2 Mr 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;
- 565.3 Mr 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;
- 565.4 Mr Phasha contracted PTSD as a result of the events of 10 August 2014 and his subsequent detention in single cells; and
- 565.5 Mr Sithole contracted severe PTSD as a result of the events of 10 August 2014 and his subsequent detention in single cells.

## **PART 7: CONCLUSION**

### **THE EVIDENCE**

#### ***The events leading up to 10 August 2014***

566 We submit that the evidence has established that, following the search on 7 August 2014 during which a cell phone and sim cards were apparently found, DCS officials punished the inmates of cell B1, including the plaintiffs, as follows:

566.1 Firstly, all the inmates of cell B1, including the plaintiffs, were demoted. They were stripped of their individual privileges, namely their entitlements to buy from the prison shop, receive contact visits and use the public phone. Their TV was removed from the cell and their exercise time was reduced to the minimum amount required by law, viz 1 hour per day.

566.2 The collective demotion was effected 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 accordingly unlawful and unfair.

566.3 Secondly, 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 formenting a mutiny or engaging in any other activity that is likely to jeopardise the security or order of a correctional centre.”

566.4 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.

567 It was in response to these unlawful and unfair actions by DCS officials, imposed upon the entire cell without due process, that Mr Zulu wrote two letters of complaint, the first to the Head of the Centre, Mr Mohale and the second to the Area Commissioner, Mr Thokolo.

568 Mr Mohale dismissed Mr Zulu’s letter as nonsense and tore it up. Evident in Mr Mohale’s response to Mr Zulu’s letter, is the same violent contempt he exhibited towards Mr Zulu on 10 August 2014.

569 Mr Zulu’s complaint was not recorded in the complaints register and he was not permitted to use the phone to call a family member or a lawyer.

570 On the morning of 10 August 2014, having run out of options, and as act of protest, Mr Zulu blocked the door of cell B1 and demanded an audience with the Area Commissioner. Mr Zulu has always admitted this action and taken full responsibility for it.

### ***The events of 10 August 2014***

571 The starting point, we submit, in understanding what happened on 10 August 2014, is in the medical evidence of the injuries sustained by the plaintiffs.

572 The clinical findings of the independent doctors on the physical injuries sustained by the plaintiffs on 10 August 2014 are, we submit, uncontested, incontrovertible and must be accepted.

573 Once the nature and extent of the physical injuries sustained by the plaintiffs on 10 August 2014 is established then the question which falls to be determined is how did these injuries arise?

574 There are only two possibilities in this regard and they are starkly divergent: either the plaintiffs sustained their injuries when DCS officials used force to defend themselves against an attack by inmates in cell B1; or, the plaintiffs sustained their injuries during the protracted assault and torture at the hands of DCS officials in the vicinity of the B Unit.

575 The lynchpin of the defendant's version is that DCS officials came under attack by inmates when they entered cell B1 on 10 August 2014. Even before one considers the testimony of the defendant's witnesses, this claimed attack is, on its own terms, wildly improbable. This is so for at least three reasons: first, there is no mention of this attack in any

contemporaneous account of the events of 10 August 2014; second, there is no consistent or coherent account of what was used to attack the DCS officials; and third, not a single inmate of cell B1 was charged in relation to the attack. Each of these is simply inconceivable if the attack had in fact happened. Without the attack on DCS officials by the inmates of cell B1 on 10 August 2014, the defendant's entire version crumbles.

576 Moreover, and far from bolstering the defendant's version that the use of force on 10 August 2014 was justifiable, the evidence of the defendant's witnesses further undermined it. The coherence of the defendant's version as to what transpired on 10 August 2014 was ripped open by the stark contradiction in the evidence of Mr Kunene and Mr Monare. This has been set out in detail above. Mr Kunene testified that Mr Zulu was one of the first inmates to come running out of the cell while Mr Monare testified that Mr Zulu was the very last person he marched out of the cell. These accounts cannot both be true and we submit that this fundamental contradiction, unexplained during the course of the trial, is, without more, demonstrative of the falsity of the defendant's version.

577 Ultimately, the defendant's witnesses could give no coherent account of what transpired on the morning of 10 August 2014, still less what happened inside cell B1 on that morning. Crucially, the defendant's witnesses could give no explanation for how the plaintiffs sustained their injuries on 10 August 2014 except possibly for a single injury to Mr Zulu's leg which Mr Monare testified he may have inflicted.

578 Against this must be weighed the detailed and highly corroborative account of the plaintiffs as to how their injuries were sustained. The plaintiffs' account is supported by the expert forensic pathologists who examined the available evidence, (including the defendant's forensic pathologist), as well as the doctors that examined the plaintiffs and the plaintiffs' 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.

579 As we have set out above, there is a presumption of wrongfulness and intention in our law once an infringement of bodily integrity is established. This means that once it is established that the plaintiffs sustained their injuries as a consequence of the use of force by DCS officials, then defendant bears the onus of proving a defence or a ground of justification. The defendant has manifestly failed to do so.

580 In the circumstances we submit that the assault of the plaintiffs on 10 August 2014 at the hands of DCS officials has been established. Whether it has been established that this rose to the level of torture will be considered below.

581 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.

## ***Segregation***

582 The defendant's disingenuous 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 has been dealt with above. It is clear that the defendant made this claim in a desperate (and belated) bid to escape the consequences of its failures to comply with the requirements of section 30 of the Act. As we have sought to demonstrate above, the defendant's claim in this regard is unsustainable at a both a factual and a legal level.

583 It follows that the second to fifth plaintiffs were indeed placed in isolated segregation in terms of section 30 of the Act and that the defendant, on his own version, failed to comply with the applicable statutory requirements in this regard. In particular, the defendant had no permissible legal basis on which to segregate plaintiffs; failed to ensure that the plaintiffs received regular visits from correctional officials as required by the Act and failed to ensure that the plaintiffs received regular checks by medical personnel as required by the Act. Furthermore, the defendant kept the plaintiffs in segregation in excess of the maximum period permitted by the Act in violation of the Act. In all these respects, the segregation of the second to fifth plaintiffs was unlawful.

584 The segregation of the second to fifth plaintiffs was also inhumane. In particular, the second to fifth plaintiffs were cuffed at their feet with ankle

shackles for 23 hours a day, denied adequate medical care and access to treatment and denied adequate and sufficient bedding. As has been set out above, the plaintiffs gave detailed and corroborative evidence in this regard. The defendant called the Area Commissioner, Mr Thokolo, in attempt to refute the plaintiffs' claims in this regard. It is submitted, for the reasons set out above, that Mr Thokolo's claim to have visited 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. The evidence of Mr Thokolo therefore stands to be rejected and that of the plaintiffs, on this score, accepted.

## **TORTURE**

585 In determining whether the assault established by the plaintiffs rises to the level of torture as defined in the Torture Act, there are two key areas of inquiry.

586 The first is whether the pain or suffering was inflicted for a recognised purpose (as described in the Torture Act) and the second is whether the pain and suffering caused (whether physical or mental) was severe.

### ***Recognised Purpose***

587 It is submitted that this requirement is clearly established through the plaintiffs' evidence, which established that:



- 587.1 DCS officials assaulted the plaintiffs in order to solicit information as to who was in possession of illicit cell phones;
- 587.2 DCS officials assaulted the plaintiffs in order to solicit information as to who had blocked the door of cell B1.
- 587.3 DCS officials assaulted the plaintiffs in order to punish them for hiding or possessing illicit cell phones; and
- 587.4 DCS officials assaulted the plaintiffs in order to punish them for blocking the door of cell B1.

### **Severity**

- 588 The issue of the severity of the plaintiffs' injuries sustained at the hands of the DCS officials was a highly contested issue during the trial.
- 589 In an attempt to refute severity, the defendant went so far as to have its expert witness in respect of the plaintiffs' ongoing injuries, Prof Becker, opine, based on the Southampton Wound Grading System, that the physical injuries sustained by the plaintiffs on 10 August 2014 were minor.
- 590 The Southampton Wound Grading System was developed to assess post-operative wounds following hernia operations.<sup>1005</sup> It was designed

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<sup>1005</sup> 9 June 2022, p 12 line 5 – p 13 line 11.

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.<sup>1006</sup>

591 Self-evidently, 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.

592 In this regard Prof Bekker conceded that:

592.1 The plaintiffs did not undergo any surgery on 10 August 2014;

592.2 Their bodies were not exposed to the risks attendant upon surgery;

592.3 None of the plaintiffs had a sutured surgical wound or post-operative wound;

592.4 The plaintiffs' wounds were of a completely different nature, namely blunt force trauma injuries.<sup>1007</sup>

592.5 The plaintiffs were not exposed the risks that accompany the suturing of a surgical wound where the suture punctures the skin.  
In this regard Prof Bekker conceded that *"the risks are different*

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<sup>1006</sup> 9 June 2022, p 15 lines 1 – 12.

<sup>1007</sup> 9 June 2022, p 23 line 13 – p 24 line 9.

*because there are foreign bodies (stitches) going into the wound and that is a portal for entry of bacteria” and that “these risks do not exist in the case of blunt force trauma.”<sup>1008</sup>*

593 Moreover, it was pointed out in cross examination that it made little sense for Prof Bekker 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 Prof Bekker, by his own admission, did not have comprehensive information regarding the progression of the plaintiffs’ injuries over the 5-year period.<sup>1009</sup>

594 In this regard, Prof Bekker conceded that:

594.1 If Mr Smith needed sutures for the laceration to his mouth (which injury was uncontested by the defendant) and if his mouth became infected as a consequence of that injury, then his injuries should have been graded at level four;<sup>1010</sup> and

594.2 Mr Zulu’s injuries should have been graded at a higher level than zero.<sup>1011</sup>

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<sup>1008</sup> 9 June 2022, p 34 lines 3 – 16.

<sup>1009</sup> 9 June 2022, p 35 line 9 – p 42 line 8.

<sup>1010</sup> 9 June 2022, p 50 line 15 – p 52 line 11.

<sup>1011</sup> 9 June 2022, p 39 line 14 – p 40 line 2.

595 In the result we submit that, not only is the Southampton scoring system inapplicable in the circumstances of this matter, but Prof Becker also applied the system irrational and incorrectly, rendering his assessments of the severity of the plaintiffs' injuries of no use to the Court.

596 We submit that the severity of the plaintiffs' physical injuries is established by the following:

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

596.2 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

596.3 The fact that all of the plaintiffs had ongoing physical injuries (even if this is limited, for the sake of argument, to the injuries in respect of which both Dr Khan and Dr Bekker agreed should be referred to appropriate specialists).

597 Crucially however, the plaintiffs did not suffer just physical injuries as a consequence of their assault and torture at the hands of DCS officials, they suffered psychological injury as well. In this regard, 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.

598 As Dr Taylor explained in her reports, the plaintiffs' psychological injuries were brought 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.

599 Indeed, we submit that in assessing the nature of the rights infringements to which the plaintiffs were subjected and whether it amounted to torture, regard must be had to the cumulative effects of the violations that the plaintiffs endured in this case, including protracted and egregious assault, humiliation, unlawful and inhumane segregation and the denial of timely and adequate medical treatment.

600 Having regard to the above, we submit that it has been established, not just that events of 10 August 2014 and the subsequent segregation of the second to fifth plaintiffs, constituted assault upon the plaintiffs but that it amounted to torture.

**H BARNES SC**

**N STEIN**

**N KAKAZA**

Plaintiffs' Counsel

*Chambers, Sandton, 28 July 2022*