CASE NO.:(P)I 147/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PAUL KENNEDY	**FIRST PLAINTIFF**
BARNEY PIETERSEN	**SECOND PLAINTIFF**
RODERICK KLAASTE	**THIRD PLAINTIFF**
SACHARIA NANGOLO	**FOURTH PLAINTIFF**

and

THE MINISTER OF PRISONS AND CORRECTIONAL SERVICES **DEFENDANT**

CORAM: MARITZ, J

Heard on: 18, 19, 20, 21, 24 and 26/10/2005

Delivered on: 24/06/2008

JUDGMENT

MARITZ, J: [1] When sentencing convicted criminals to effective terms of imprisonment, the Courts are always hopeful that they will

use the time of relative seclusion to reflect upon their misconduct, reassess their lives and rehabilitate themselves to rejoin society upon their eventual release with a fresh commitment to fully realise their potential as human beings, to be a positive force in their communities and to respect the laws set by society for the regulation, protection and benefit of all its members. Sadly, the harsh realities of life in the captive environment of prisons too often produce a different result. This is especially true in correctional facilities where the pervasive sub-culture of prison gangs lures prisoners under the guise of "protection" even further into the darker reaches of criminal conduct – often violent, as the disturbing facts of this case evidence.

[2] The four plaintiffs are all inmates detained in the F-Section of the Windhoek Prison. That section is designated for the incarceration of prisoners who, by the nature of the serious or violent crimes they have committed, are serving long terms of imprisonment. It accommodates arguably many of the most violent and dangerous criminals in Namibia. The first plaintiff, Kennedy, is a leading member of the "26" gang. He is serving a sentence of nineteen years imprisonment for attempted rape, sodomy, murder and malicious damage to property. Pietersen and Klaaste, the second and third plaintiffs, are serving thirteen and sixteen years imprisonment respectively for the crimes of murder. Although the two have denied being "men of number", it is clear that, at the very least, they have been regarded as associates of

Kennedy and, through him, with the periphery of the "26" gang's influence. The fourth plaintiff, Nangolo, was before his more recent release a self-confessed member of the "26" gang.

[3] Their claims against the Minister of Prisons and Correctional Services are for damages in delict arising from an alleged breach of duty which members of the Namibian Prison Services allegedly had to protect them against assaults by other prisoners. They all claim that they have sustained serious injuries as a result of the assaults. In the result Kennedy and Nangolo are seeking general damages in the amount of N$100 000 each, whereas Pietersen and Klaaste are each claiming a more moderate amount of N$80 000. In addition to this cause of action, Kennedy is also seeking damages of N$100 000 and N$30 000 respectively for an assault allegedly perpetrated on him by members of the Namibian Prison Services on a later occasion and because the prison authorities allegedly failed to provide him with prescribed medication for treatment of his injuries. Most of the evidence adduced at the trial, however, focused on the first of these claims –which I shall consider first.

[4] It is either common cause or not disputed that festering tensions between 2 prison gangs erupted in violence on the morning of 30 September 2002 and resulted in the injuries sustained by the plaintiffs. The incident which lay at the root of the assault arose a

number of days earlier when, on 28th September 2002, Kennedy and Nangolo took N$70.00 from one Chris. Chris, as it happened, was the "monitor" of the leader of the rival "28" gang, one Paulus Shimweseleni – also going by the rather ominous-sounding name, "Ninja", which pretty well says it all about his reputation. A "monitor" in the structure of prison gangs (each having its distinctive "objects, its code of laws, its hierarchy of ranks and officers, its methods and procedures, and its language which is intelligible only to the initiated" – per Nicholas AJA in *S v Masuku & Others,* 1985(3) SA 908 (AD) at 910D-E) has the unenviable burden of washing the leader's clothes, serving him with food and, more importantly in the context of this case, of keeping possession of the gang's contraband, including money. I pause here to note that whereas the loss of N$70.00 may not sound like much to an outsider, the loss thereof to the "28" gang in a closed and captive prison community (where even matches may be split to double their value as a commodity) was a significant blow. Moreover, the loss thereof to the rival "26" gang added insult to the economic injury already suffered.

[5] When Chris reported the loss to his leader, Ninja confronted Kennedy and demanded the return of the money. It is not clear whether it was by pride or by the code of the "26" gang that Kennedy refused. Instead, he offered to give Ninja dagga in exchange. The negotiations soon deteriorated into mutual threats of violence and

retribution. Parting, whilst swearing and pointing at each other, they returned to their respective gangs to ready themselves for battle. Although the confrontation was observed by warders, they were out of earshot.

[6] Tensions simmered throughout the night. The next day members of the two opposing gangs assembled and, armed with broomsticks and other concealed weapons, positioned themselves for a fight. A person, described by the witnesses as a "reborn Christian", intervened and reasoned with apparent success that the game was not worth the candle. On resumption of the negotiations, it appeared, at least to Kennedy, that Ninja was not willing to "kill for N$70.00". Kennedy again offered dagga as *quid pro quo* for the money. Apparently one Bruno, also a member of the "28" gang, understood Kennedy's position and suggested to Ninja that they retreat and wait for Kennedy to deliver the dagga. Convinced that the sting of the loss and insult to the "28" gang had been blunted by the offer of dagga, Kennedy left the otherwise acrimonious negotiations. His sleep that night would have been more uneasy had he witnessed, as Klaaste did, that one Makutze (a man of number "28"), broke off an iron bar from his bed to arm himself in anticipation of a fight.

[7] On Monday morning, 30 September 2002, Kennedy and Nangolo went into the dining hall for breakfast. There they were surprised and

attacked by at least six members of the "28" gang armed with sharpened spoons, wires, toothbrushes, plates, iron mugs, iron bars shaped like pangas and broomsticks. Others soon joined the fray. Moving out of the dining hall and keeping his back against the wall whilst feigning to have a sharp object hidden underneath a handkerchief in his hand, Kennedy kept his assailants initially at bay. Nangolo was more unfortunate. His assailants soon increased to about thirty in number. He was stabbed with toothbrushes and sharpened wires and also struck with iron bars and other objects. Retreating as best he could, he shouted for help but to no avail. Eventually he retreated to a grated iron door beyond which he saw seven or eight warders standing and asked them to open the door. One of the officers refused, saying that if he were to accede "it would bring him problems". The assault on him ended when Ninja kicked his already collapsed body and pronounced him dead.

[8] The focus of the main attack then shifted to Kennedy. He too made his way to the grated door where his pleas to open the door were also declined by the prison officers. Moving all the time around the perimeter of the enclosed exercise area in F-section as he unsuccessfully tried avoid injury, he was repeatedly stabbed and struck by his assailants. Fearing for his life, he again retreated towards the grated door where he again asked for it to be opened. His requests were again refused and, when he eventually collapsed under

the sustained attack, Ninja stabbed him a further three times for good measure – on the left side of his upper chest, in his stomach and on the right of his torso. Another inmate, Kamati, took a wheelbarrow (normally used to cart porridge to the dining hall) and threw it onto him. Having done so once was apparently not enough, so he did it a second time. He only left to pursue the attack on the other plaintiffs when Bruno said to him: "He is dead, leave him now." As a final injury, Masete kicked him a further number of times against his head and left him for dead.

[9] When Klaaste approached to try and stop the assault on Kennedy (who, incidentally, is his uncle), he was also attacked at the instigation of Makutze. He ran away and unsuccessfully tried to seek assistance from the warders at the grated door. Whilst running away he was assaulted with broomsticks, beaten with fists, kicked and struck by Makutze with an iron bar. He also lost consciousness and collapsed. Pietersen was the next victim. He was accused of having given a knife to someone and Bruno attacked him with a sharpened spoon. Makutze struck him with an iron bar and, as he tried to get to the grated door, he was tripped and fell. There he was assaulted all over his body by more than 10 people until he eventually lost consciousness.

[10] After the commotion had subsided and reinforcements had arrived on the scene, the plaintiffs were recovered from the exercise area and transported to hospital where they received medical treatment. Their many injuries were noted in the medical history cards of the Ministry and in the medical reports of Dr Vries and of nurse Awala. Not surprisingly, Kennedy and Nangolo's injuries were the worst. As a result of the stab wound in his chest, Kennedy suffered a pneumothorax of the left lung. In addition to many other injuries, he had a number of head injuries and metacarpal fractures of both his hands requiring *z*-splint immobilization. Nangolo suffered a pneumothorax of both his left and right lungs because of lacerations in his thorax. He, too, sustained many other lacerations and injuries.

[11] The respondent does not deny the assault on the plaintiffs, neither does it take issue with most of the particulars thereof and, although it has not formally admitted the injuries sustained by the plaintiffs, it has not challenged the evidence of nurse Awala and Dr Vries in that regard. What it has taken issue with in its plea are mainly the following: (a) That "members of the Namibian Prison Services wrongfully and unlawfully and despite a legal duty of care owed to the plaintiff(s), failed to protect plaintiff(s) from assaults by other prisoners"; (b) that the attack had taken place in full view of a number of warders from whom the plaintiffs sought assistance and protection to no avail, and (c) that the plaintiffs have suffered the

general damages as quantified in their respective claims. I shall consider the law and evidence bearing on the issues raised in (a) and (b) first and, to the extent necessary, turn to the remaining one later in this judgement.

[12] Although the concept of a "duty of care" relied upon by the plaintiffs for their cause of action has been unfavourably characterised as "a rather nebulous concept which contains a postulate of that which has to be determined" (per van den Heever JA in *Herschel v Mrupe*, 1945(3) SA 464(A) at 485) and its use in the application of our common law has been condemned in no uncertain terms by Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk.*, 1979(3) SA 824(A) at 833, it is nevertheless often pleaded in delictual causes of action. The context within which the plaintiffs pleaded it ("wrongfully and unlawfully and despite a legal duty of care owed to the plaintiff(s)"), raises both the delictual element of wrongfulness and that of negligence – and does so against the matrix of the peculiar common law and statutory relationship subsisting between the Namibian Prison Services, on the one hand, and the inmates being detained in custody at its various correctional institutions, on the other.

[13] Boberg, "The Law of Delict" (Vol 1 on Aquilian Liability) at p. 31 recognises the duality of the assimilated concept in contemporary law,

i.e., as one connoting both wrongfulness and negligence (in the latter context, to convey the factual conclusion that a reasonable man would have foreseen and guarded against harm in the circumstances). The issues as pleaded by the litigants (referred to paragraphs (a) and (b) above) therefore raise enquiries on two different levels: the first, a policy based, objective, *ex post facto* enquiry into the legal and moral convictions of the community to determine the nature and scope of the legal duty the Namibian Prison Services had and whether it has wrongfully acted in breach thereof. The second level of the enquiry is essentially a fact-based one; whether any negligent omission by members of the Namibian Prison Services resulted in the injuries suffered by the plaintiffs. These enquiries are dealt with *seriatim* hereunder.

[14] For the Court conclude that the members of the Namibian Prison Services acted wrongfully when they failed to protect the plaintiffs from the attacks on them by other inmates, it must first establish whether those members had a legal duty to render such protection in the peculiar circumstances of this case. As Rumpff CJ pointedly noted: without there being a legal duty there cannot be unlawfulness (in *Administrateur, Natal v Trust Bank van Afrika Bpk., supra*, at 833A-B). Given the rule that no person is generally held liable in delict for not doing anything (see: *Saaiman and Others v Minister of Safety and Security & Another*, 2003(3) SA 496(0) at 503H), the enquiry becomes

more complicated when the alleged wrongfulness is not based on a specific act but rather on an omission to act. It is now settled law that one of the exceptions to the general application of the rule mentioned to in Saaiman's case is when, given the particular facts and circumstances of a case and the legal nature of the relationship between the persons involved, the one had a legal duty to prevent harm to the other (see: *Van Eden v Minister of Safety and Security*, 2001(4) SA 646(T) at 654C-E and *Carmichele v Minister of Safety and Security & Another*, 2001(1) SA 489(SCA) at 498F-G). In assessing whether or not such a duty has arisen in any particular case, Courts in the region have often quoted the following passage from various editions of Flemming's "The Law of Torts" (at page 128 in the seventh edition):

> "In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidents and extent of the duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

[15] The norm laid down in *Minister van Polisie v Ewels*, 1975(3) SA 590 (A) at 597A-C, and followed since in a long line of decisions in determining whether an omission falls to be considered as unlawful, is to assess whether the circumstances of a case are of such a nature

that the omission not only incites moral indignation but also that the legal convictions of the community demand that the omission ought to be regarded as unlawful and that the damage suffered ought to be made good by the person who neglected to do a positive act. In analysing the Ewels-judgment and some of those that followed upon it, Hefer, JA, concluded as follows in *Minister of Law and Order v Kadir*, 1995(1) SA 303 (A) at 318E-G:

> "As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people' (per M M Corbett in a lecture reported *sub nom 'Aspects of the Role of Policy in the Evolution of the Common Law'* in (1987) SALJ 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (Corbett (op cit at 68); J C van der Walt *'Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak'* 1993 (56) THRHR at 563-4.)."

[16] I accept, without hesitation, that members of the Namibian Prison Services stand in a special relationship to the prisoners under their care at correctional institutions all over Namibia. In terms of s. 3 of

the Prisons Act, 1998, the functions of the Prison Service includes the following:

> "(a) To ensure that every prisoner is secured in a prison in safe custody until lawfully discharged or removed therefrom;
>
> (b) as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of labour and industry;
>
> (c) to perform all work necessary for, arising from, or incidental to, the effective management, administration, and control of prisoners; …"

Moreover, in terms of s. 25 of the same Act -

> "prison members employed in a prison shall be responsible for ensuring –
>
> (a) the security and safe custody of all prisoners detained in custody in that prison; and
>
> (b) …
>
> shall … act in accordance with this Act and the rules, standing orders and administrative directives made or issued by the Commissioner in terms of section 4(3)."

[17] To that end and to maintain discipline in prison the officer in charge may, in terms of s. 30 of the Act, authorise prison members to use such force against a prisoner as is reasonably necessary. These, and many other of the provisions in the Act have been framed not only for the protection of the community at large (as I shall shortly show) but also in part for the protection and rehabilitation of inmates and for

maintaining discipline, good order and the effective management of correctional institutions (compare: *Mtati v Minister of Justice*, 1985(1) SA 221(A) at 223F-H). These powers, duties and responsibilities defines the statutory scope and extent of actions which should be taken to protect one prisoner from the undisciplined conduct and assaults of other prisoners.

[18] Moreover, and perhaps more importantly in this context, Article 8(1) of the Constitution protects the dignity of all persons in Namibia and, in sub-article (2), guarantee respect for human dignity "during the enforcement of a penalty" and prohibits "torture or cruel, inhuman or degrading treatment or punishment". These rights are amongst those enshrined in Chapter 3 of the Constitution which, in terms of Article 5 thereof, "shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies ...". If a prison authority were to support a prison gang and knowingly allow it to impose its collective will or rules on other inmates by the use of violence, it will constitute a clear breach of its constitutional duty under Article 5 and violate the Article 8(2)-fundamental rights of the inmates in its custody.

[19] It therefore follows that in the assessment and interplay of the many factors which a Court must objectively consider to determine the legal perceptions of the community, these constitutional guarantees,

statutory responsibilities and the corollary duty to respect and uphold them, must be accorded sufficient weight. They give content to the legal relationship between the prison authority and the prisoners being detained in correctional institutions under its control. They require of members of the Namibian Prison Services to ensure the security, safe custody and human dignity of prisoners under their custody. But, as the facts to which I shall later refer to demonstrate, their respective rights, duties and interests are not only defined by looking at the nature of their relationship *inter* se, but also – and perhaps more importantly so in the context of assessing the unlawfulness of a particular omission – by the interests of the community. After agreeing with M M Corbett's remarks in a lecture reported *sub nom* on "*Aspects of the Role of Policy in the Evolution of the Common Law*" in (1987) SALJ 104 at 67 that the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people", Ackermann and Goldstein JJ went on to say in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 CC, at 957B-C:

> "[43]... What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck

> in accordance with what the Court conceives to be society's notions of what justice demands...".

[20] The protection of society, its interests and its members against crime and criminals is and remains one of the most important considerations in the development of criminal law and the principles of sentencing in modern penology. It is to that end that society has established administrative, law enforcement and judicial structures for detection, investigation and adjudication of criminal cases and created correctional facilities, institutions and structures for the secure accommodation and rehabilitation of offenders. The interests of the community often require the removal of serious or dangerous offenders from society to protect its members and to safeguard the laws and values which constitutes the very fabric of society. In fact, punishment is sometimes designed to reflect "the anxiety of the Court to ensure that the convicted person remains incarcerated after he or she has served the punitive component of his or her sentence, simply because the Court is not satisfied that society may not be endangered by his or her release either because of some mental instability or some other defect in the character of the person." (per Mahomed CJ in *S v Tcoeib*, 1999 NR 24 SC at 35F-G; 1996(1) SACR 390 (NmS) at 400I).

[21] It is therefore not only the interpersonal relationship between guard and prisoner which should be considered in determining the unlawfulness of an omission to prevent an assault by one prisoner on

another. Many other considerations bearing on the personal safety of the warders themselves, those of other prison members and staff and, ultimately, of members of the public at large and of society itself must also be considered. The issue, in the words of Vivier JA in *Carmichele v Minister of Safety and Security & Another,* 2001(1) SA 489(SCA), at paragraph [7] "in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court." With this in mind I turn to the facts.

[22] At the outset I must dispose of the belief expressed by Nangolo that the warders instigated the attack on him. The reasons advanced by him for that belief relates to a much earlier incident and is speculative at best. Moreover, if it was Nangolo's case from the outset that the assault on him had been instigated by the warders, one would have expected such an allegation to be pertinently raised in the pleadings. The pleadings, after all, define the questions of fact and law to be tried by the Court (cf. *Solomon v Law Society of the Cape of Good Hope,* 1934 AD 401 at 408). In the absence of such an allegation in the pleadings, Nangolo's evidence suggesting active instigation by the warders is not part of the *lis* between the litigants and need not be dealt with any further.

[23] The unlawful omission attributed to the defendant in the pleadings is the alleged failure of members of the Namibian Prison

Services to protect the plaintiffs from assaults by other prisoners. Although the allegation is repeated in a subsequent paragraph together with further allegations that the attack had taken place in full view of a number of prison members and that the plaintiffs have sought assistance and protection from them, it is not specifically alleged in which particular respects the prison members omitted to act in breach of the legal duty they allegedly had. The purpose of further particulars being "to fill the picture of the plaintiffs' cause of action, to limit the generality of the allegations therein, and to define with greater precision the issues which are to be tried" (See: *South African Railways & Harbours v Deal Enterprises (Pty) Ltd.,* 1975(3) SA 944(W) at 946H-947A), one would have hoped that a request for further particulars could have fleshed out the allegation and would have resulted in a more meaningful plea than the general denial of wrongfulness in this case. Regrettably, it has not been done by the respondent. The litigants having failed to narrow the general allegation down to more specific issues, the Court, rather unfortunately, is constrained to embark on the laborious task of dealing with all the omissions raised in or suggested by the evidence of the plaintiffs.

[24] The evidence of the plaintiffs suggests a number of possible omissions: (a) That the warders noticed during earlier stand-offs that members of the two opposing gangs had been armed with broomsticks and other weapons but failed to take any steps to confiscate them; (b)

that the warders stored weapons confiscated during earlier searches in a storeroom which they failed to adequately secure, thereby allowing members of the "28" gang a ready supply of weapons to assault the plaintiffs; (c) that the prison members failed to enter the enclosed area where the melee took place and to physically intervene and protect the plaintiffs from the assaults; (d) that the warders refused to open the grated steel door beyond which they were standing to allow the plaintiffs a route through which they could escape from their assailants; (e) that the warders did not use means or weapons at their disposal to protect the plaintiffs from assaults; and (f) that the Prison Services should have been able to respond more rapidly with adequate means to prevent the assault or to bring it to an end.

[25] In what follows, I shall briefly deal with the evidence in respect of each one of these assertions made in evidence.

[26] Kennedy testified that, when the two gangs congregated on Saturday, 28th September 2002, members of the "28" gang were seen by the warders to carry broomsticks, sharpened spoons and other weapons but failed to confiscate them. His evidence received scant support from the other plaintiffs on this point. Klaaste, who was about fifty metres away, could not see any weapons and neither could Pietersen. Pietersen, however, believed that they had weapons concealed underneath their clothes. One of the witnesses called by

the plaintiffs, Zedekias Gainkob, testified that the two quarrelling groups did not have any weapons on that day. Klaaste testified that during the stand-off the next day he saw that Ninja and some of his friends had broomsticks with them. Although there were warders in the vicinity, they did not intervene to take the broomsticks away. Those broomsticks, he testified, were taken by members of the "28" gang into the cells with them. His evidence about the presence of weapons on that occasion was also not really supported by that of the other plaintiffs or any of the witnesses called by them.

[27] The allegations that the warders had observed that members or peripheral members of the two gangs had been carrying broomsticks and other weapons were disputed by the defendants' witnesses. Senior Prison Officer Julius Nambutunga and warder Immanuel Kakoto both denied that they had observed prisoners carrying weapons on any of those days. Kakoto, in particular, was very specific that he had noticed prisoners congregating and walking in groups over the weekend and that he was suspicious about it. He feared, on account of an earlier briefing, that plans were afoot to stage a fight between gangs as a ruse to capture prison officers as part of the stratagem of a planned escape. Although he noticed the groups were circling one another at times, he did not notice that any of the prisoners had been carrying weapons.

[28] Having considered the conflicting evidence on this point, I find the suggestion that the warders knowingly allowed inmates to bear weapons without taking steps to disarm them not only improbable, but also unbelievable in the context of the evidence as a whole. It is clear from the undisputed evidence that extensive measures were in place to regularly search and confiscate weapons and objects that could be used as weapons. Senior Prison Officer Nambutunga testified that general searches were being conducted twice a month. In addition, further searches were conducted on a weekly basis and inspections on a daily basis. The last general search took place on 19 September 2002. The officer in charge of the Windhoek Central Prison, Richard Malambu, explained that a general search was conducted by all the prison members. They would go straight after the morning parade to the cells and conduct a meticulous search of virtually every conceivable hiding place for weapons and other contraband. According to Nambutunga, the last ordinary search of the section was done on 23 September 2002. In addition, random searches were conducted whenever information had been received of weapons or contraband being hidden by inmates. Given the mechanisms in place and the steps regularly and actually taken to find and confiscate weapons in the F-Section, I do not accept the plaintiffs' evidence that the warders knowingly allowed some of the inmates to carry weapons and failed to disarm them.

[29] Kennedy also suggested in his evidence that the warders failed to adequately secure weapons confiscated during earlier searches, thus allowing easy access thereto by members of the "28" gang. According to him, the weapons confiscated during the search three days before the assault were taken to a storeroom inside the section for safekeeping. Keys to the storeroom were kept by a warder and by one Mafete, a member of the "28" gang, who worked in the storeroom and who also participated in the attack on him. There is no unanimity amongst the plaintiffs on this point. According to Klaaste, the storeroom from which the assailants collected broomsticks and other weapons was an open room used for the storage of cleaning materials. It was situated next to the grated door behind which the warders were standing during the assault. Nangolo thought that the weapons were retrieved from a nearby garden where they had been hidden. He could not say whether any weapons had been obtained from the storeroom for cleaning materials. According to him confiscated weapons were stored behind locked doors in another room deeper into the prison complex.

[30] The defendant took issue in evidence with Kennedy's suggestions. According to Senior Prison Officer Nambutunga, confiscated weapons were entered into a register and taken to the "discipline office". None of them were stored in the F-section.

[31] Again, on the probabilities established by the evidence as a whole, Kennedy's suggestion falls to be rejected. The evidence establishes that the confiscated weapons have been stored in a storeroom which could not have been accessed that day by the plaintiff's assailants. One of the plaintiffs' witnesses, Kevin Van Wyk, conceded that much. According to him, confiscated weapons were stored in a locked storeroom which was only accessible from the courtyard in F-section through a passage behind the grated steel door and, in addition, would have required the unlocking of at least two further steel doors. He thought that some of the weapons used during the assault had been hidden in the storeroom for cleaning materials (where the wheelbarrow had apparently also been stored). His explanation, on the probabilities, seems to be the most plausible. It is safe to assume that the weapons used that day had either been manufactured since the previous search three days earlier (such as the iron bar which Makutze had broken off his bed the night before the assault) or had been so cunningly hidden by some of the prisoners on their persons or elsewhere in the F-section that they had not been discovered during the search. I am satisfied that none of the weapons used during the attack were amongst those which had been confiscated by the prison authorities during earlier searches.

[32] The third omission attributed in evidence to the defendant was the failure of the prison members to physically intervene in the fray and protect the plaintiffs against the assault on them. It is common cause that none of the warders so intervened. Whether their failure was unlawful should be assessed against the background of a plethora of facts and considerations – of which I shall mention only a few.

[33] The situation which confronted up the prison officers was most serious. About 470 prisoners, amongst them some of Namibia's most hard core and dangerous criminals, congregated in the restricted space of F-section's courtyard. Some 80 of them were either members or supporters of the 28 gang who actively participated in the attack on the plaintiffs and pursued them as they tried to avoid injury. Many of them were armed with sharpened spoons, irons, wires and toothbrushes as well as with broomsticks and locks wrapped in cloth. Others, not participating in the attack might also have had such weapons, which, according to Kennedy, is "freely available" notwithstanding the attempts of the authorities to find and seize them. Made, ostensibly for purposes of self defence, he testified, the prison was "full of them". The scene was one of mayhem and extreme violence being perpetrated by dangerous, armed criminals in a contained area. There were but 10 prison officers on duty at F-section. Except for one, who carried a baton, they were all unarmed. They had no shields, no helmets and no riot gear of any nature. They had no immediate

access to arms, smoke grenades or any other means to command or otherwise assert control in the situation. For them to have entered the fray either individually or as a group with only whistles to blow on would have been at great personal risk of life and injury. Moreover, given the level of noise, the sheer number of prisoners running about, the level of violence, the nature of the dangerous weapons being used, the type of criminals involved, it would have been sheer folly for the prison officer in command at the section to order his subordinates into the courtyard to assist the plaintiffs. From a tactical point of view, the prison officers were simply not sufficient in number or sufficiently equipped to suppress the violent and riotous behaviour of such a large number of armed and dangerous criminals bent on violence and retribution.

[34] By entering the arena, the officers would not only have put their own lives at risk, but could have afforded some of the prisoners with a means to escape, thereby putting the safety and security of other prison and administrative staff and that of the public in jeopardy. The staging of fights amongst prisoners, whether actual or as a ruse to capture one or more prison officers and to either use their keys and uniforms to escape or to hold them hostage as a means to escape, is a well-known strategy. It is one which was actually successfully employed at the B-section of the prison and resulted in the escape of a number of prisoners, one of which was still at large at the time of the

trial. The possibility of a repeat under the leadership of Ninja was rumoured and so noted in the diary of the officer in command at the prison on 14 February 2002. A pertinent warning of a planned escape by taking prison officers hostage was received by the officer in command of F-section a week before the incident and recorded in the Occurrence Book. The warning was taken so seriously that the number of warders doing duty at any one time in F-section was doubled from 5 to 10. The officers were expressly alerted to the intended ploy and, in addition, knew that one of the gangs operating in F-section, known as the “Air Force” gang, had the planning and staging of escapes as its principal objective. By entering the courtyard unarmed and severely outnumbered by armed and dangerous criminals under chaotic circumstances would have created an ideal opportunity to those who intended escape to take them hostage and use them or their keys and uniforms as a means to escape.

[35] It is therefore unsurprising that, to avoid to personal injury and hostages being taken, the standing operating procedures applicable to members doing duty in the various sections expressly provides (in Chapter 7 par. 19.1 dealing with emergency procedures in the event of fighting in cells) that a member may "under no circumstances unlock the cell" because it "may be a pretence to lure (him) into the cell in order to overpower him". With only about 40 prisoners in a cell, the logic behind the standing order holds all the more true as a *caveat* for

prison members not to enter a courtyard filled with approximately 470 prisoners of which more than 80 were actively involved in a fight.

[36] It is with these considerations in mind that I must conclude that society's notion of what justice demanded under the circumstances did not require of the 10 unarmed prison officers to put their lives, the safety of other prison staff and of the public at risk by entering the courtyard filled with about 270 dangerous criminals and to physically intervene to protect the 4 plaintiffs from the assaults being perpetrated upon them by about 80 members of the 26 gang, some of whom were armed with dangerous weapons.

[37] The next question which must be examined is whether the warders' refusal or omission to open the grated steel door beyond which they were standing to allow the plaintiffs a route through which they could escape from their assailants was unlawful. To the extent that it has been disputed by the defendant that some of the plaintiffs actually requested the prison officers to open the door, I must note at the outset that the weight of evidence and the probabilities of the case militate against the denial. It is only to be expected that 4 unarmed prisoners being trapped in the courtyard and attacked by a force of about 80 fellow inmates, many of them armed, would seek to escape through the only available exit or seek refuge with the warders standing behind the door – who, after all, had a duty to protect them.

The proximity of their badly injured bodies to the gate after the attack lent further credence to their evidence and adds weight to the probability that they would have made those pleas. I, therefore, reject as the evidence of Sgt. Uushona to the contrary. His exculpatory attempts to distance himself in evidence from the gate and his denial that he had been beseeched by some of the plaintiffs to open the gate are as improbable as they are insincere.

[38] Walls, doors and guards are what keep the public safe from dangerous, imprisoned criminals. Every one of those defences breached brings the scourge of criminality closer to and endanger the safety of law abiding citizens. Based on the considerations I have mentioned earlier, it stands to reason that it would not have been unlawful for the warders to keep the door between them and the prisoners locked notwithstanding the plaintiffs' entreaties, if, by opening it to allow one or all the plaintiffs to slip through, they were at risk of being overwhelmed and taken hostage by those or the other prisoners as part of a planned escape. In an objective assessment of the setting under consideration, the weight to be accorded to the public's safety and protection against dangerous convicted criminals must necessarily take precedence over the personal safety of the four plaintiffs - some of whom, admittedly, through their unlawful conduct aggravated a rival gang and by refusing to return the money exacerbated the already explosive situation. So too, must the personal

safety of the prison officers and that of the rest of the prison and administrative staff of the institution in my assessment of the legal convictions of the community be preferred above the risk of injury to the plaintiffs. Had the door been unlocked and, as a consequence, the prison officers been taken hostage, they or their keys and uniforms been used to take other prison officers and administrative staff hostage and people have died in the ensuing riot or because dangerous prisoners have escaped, that single act would undoubtedly have been considered both negligent and unlawful and the Prison Services would have had to bear the responsibility for the delictual and other consequences thereof – not to mention the disciplinary ramifications it would have had for the officers concerned.

[39] If, however, there was sufficient opportunity to let one or more of the plaintiffs out of the courtyard without a real and substantial risk that the prison officers might have been overwhelmed, it would have clearly been unlawful to turn a blind eye to the plight of the plaintiffs. Society's notion of justice in such a situation would demand that the plaintiffs be allowed refuge behind the door. According to Kennedy, the warders had at least two such opportunities. One, he testified, was when he stood close to the door and kept his assailants at bay by "stabbing" at them with an imaginary knife he pretended to have hidden in a handkerchief which he held in his one hand. Further examination revealed that his assailants stood about 1.5m away from

him. It does not take the mind of a strategist of note to realise that the distance could have been covered in a fraction of a second if the door had been opened to let him out. The time required for the prison officers to open the door for him to move through before closing it would have been more than sufficient for the other prisoners to rush the door, force it wider open and get to the prison officers behind it. He did not elaborate on the second opportunity and the question whether the door could have been opened safely on any other occasion during the assaults has not otherwise been adequately explored in evidence.

[40] Although not on all fours with the facts of this matter, a similar situation arose in the matter of *Dudley v John Stubbs*, 489 US 1034. Stubbs was attacked by a gang of 20 to 30 Muslim inmates armed with homemade knifes. He ran towards Officer Dudley and another correctional officer who were standing before a door leading to the administrative control centre of the Prison. Dudley and the other officer were unarmed and, when they saw Stubbs running towards them with the gang in pursuit, they entered the administration corridor and secured the door from the other side. Despite the entreaties of Stubbs, they refused to open it. Stubbs then ran towards a telephone room shouting for help. The officers in the telephone room and an inmate who was with them, immediately removed themselves to positions of safety. At that point the mob caught up with Stubbs and beat him severely in the absence of any interference by the

correctional officers. In the course of her opinion in which she summarily reversed the judgment of the Court of Appeals for the Second Circuit, Justice O'Connor of the US Supreme Court (with whom the Chief Justice and Justice Kennedy agreed) analysed the ratio of that Court's judgment in *Withley v Albers*, 475 US 312 in which it held that the "deliberate indifference" standard articulated in *Estelle v Gamble*, 429 U.S. 97, "was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities" but where prison security and the safety of both prison officials and inmates is threatened, the balance must be struck differently. In such a setting, it held, a deliberate indifference standard does not adequately capture the importance of the competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance. With the *Whitney* standard in mind, the opinion in Stubbs case concluded (at 1038):

> "The situation here was arguably more dangerous than in *Whitley*, where, although a hostage had been taken, the situation had stabilized and the correction officials had time to plan a course of action. Here a split-second decision had to be made. A single door stood between armed prisoners, who had engaged in a sit-in earlier in the day, and the prison arsenal and the office of the prison superintendent. Application of the deliberate indifference standard in

> a setting like this one essentially renders prison officials strictly liable for putting the security of the prison and the lives of all its inhabitants before the physical security of one inmate. In this case, if Officer Dudley had attempted to aid respondent by opening the door, and tragedy had ensued, he would no doubt have been subject to disciplinary action by his superiors, not to mention state law tort liability for any ensuing injuries caused by his decision."

[41] The prison policy underlying the standing orders to prison officers when fighting occurs in cells (to which I have referred to in the discussion of an earlier point raised) must also to be accorded considerable weight in the overall assessment of the lawfulness of the omission under consideration. The same policy formulated for fighting in cells must apply with even more force to fights in the confine of a courtyard where not 40 but more than 400 prisoners are present and about 80 are directly involved in several "fights". In the absence of expert testimony, the Court does not have the same experience, knowledge, expertise and is in general not similarly positioned in the assessment of the reasonableness policies bearing on the prison's internal security as the formulating authorities have been. Except for those policies which are evidently unreasonable and unfair or otherwise derogating from or conflicting with the Constitution or legislation validly enacted, the Court must allow some measure of appreciation to the executive or administrative authority responsible for the formulation thereof. Although somewhat differently measured in another legal context, I find some support for the principle in

Whitley's case (*supra,* at 321) where the US Supreme Court dealt with the formulation and implementation of those policies along the following lines:

> "When the 'ever-present potential for violent confrontation and conflagration' *Jones v North Carolina Prisoners' Labor Union*, Inc., 433 U.S 119 ..., ripens into actual unrest and conflict, the admonition that 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators,' *Rhodes v. Chapman, supra*, 452 U.S., at 349 ..., carries special weight. 'Prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' *Bell v. Wolfish*, 441 U.S., at 547...That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventative measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith or for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice."

[42] The duty which the prison officers had to protect the personal security of the inmates under their care and supervision is an important one. The laudable objectives of punishment will come to nothing if prisoners are subjected to the tyranny of institutionalized gangsterism, sexual abuse and violence. A prison constitutes a captive environment from which the victims of such aberrational conduct cannot escape. This, in itself, is reason why the duty of protection is

perhaps more onerous and more important. Unless these abuses are effectively addressed in the management approach of the prison authorities; unless the dignity and personal safety and security of prisoners are respected and protected and unless a rehabilitative environment is created within which a prisoner may do penance for his or her crime, prisons will fail as "correctional institutions" and the results of incarceration would substantially detract from that which the Courts intend and the penal system in this country is supposed to achieve.

[43] Whilst I accord due weight to the plaintiffs' rights in their interpersonal relationship with the prison officers, I must also bear in mind their responsibility to other prison and administrative staff and their duty to maintain the safety and security of the public at large. In striking a balance I cannot disregard the presence of a gang in F-section with the planning and orchestration of escapes as its principle objective; the credible information that Ninja, the leader of the "28" gang, was planning an escape by taking prison officers hostage; the information from an identified source less than a week before the incident that the same plan was about to be executed; the mobility of the chaotic situation in the courtyard during the incident; the violent or dangerous disposition of the prisoners present; the ratio of about 47 to 1 by which the prisoners outnumbered the guards; the nature and number of the dangerous weapons which many of the prisoners

carried or used and the fact that the guards were unarmed; the dire – perhaps tragic – consequences to the public, other prison and administrative staff which might have resulted if, by opening the gate for a moment the prisoners, would have forced their way in and taken the prison officers hostage or escaped. Having carefully weighed these and the other considerations mentioned earlier, I must conclude that the plaintiff's rights and interests had to yield to the need for the public's protection against such criminals and the rights to personal security of the prison and administrative staff. In the result, I do not consider the prison officers' refusal to open the door unlawful under the circumstances.

[44] The short answer to the suggestion that the warders failed to use the means and weapons at their disposal to protect the plaintiffs from being assaulted is perhaps to say that they had none. Only officer Kakoto had a baton. It would have been folly for him to venture on his own into the courtyard for the reasons I have already mentioned. Moreover, aside from presenting himself as an ideal candidate to be taken hostage had he done so, he could have been easily disarmed and the baton, instead of it being used to protect the plaintiffs, could have been used against them by their assailants. Some of the officers blew on the whistles they had. I understand that the blowing of a whistle is understood in a correctional institution to be both a call for assistance by fellow officers and a warning to inmates that they

should desist from a particular course of conduct. Given the level of noise generated by the shouting and fighting mass of prisoners in the courtyard, it is unsurprising at that the whistles and the accompanying shouting of orders to the prisoners could not be heard above the ruckus.

[45] Some of the plaintiffs alluded to presence of armed guards in walkways and towers on the roof of prison and suggested that they could have fired shots. Whilst the officer in charge of the Windhoek prison, Chief Superintendent Malambo, acknowledged the presence of armed guards on the roof, he testified that, given the situation in the courtyard, the best those guards could have done was to fire shots into the air. In his opinion, it would have had no effect because it is unlikely that the shots would have been heard above the noise. Although the use of firearms against a prisoner who is using violence against another prisoner or is engaged in violent or disorderly behavior is authorised under section 30(2)(a)(iii) and (iv) of the Prison Act, 1998, considerable restrictions are placed on the use thereof in subsections (4) and (5). Notwithstanding the authorization in subsection (2), a prison member may not in the presence of another prison member senior in rank to him or her use the weapon unless he or she has been so authorised by the senior member and, in any event, is obliged to use the minimum force necessary in the circumstances to restrain the act intended and must, as far as reasonably possible, use the weapon

to disable and not to kill. It is evident that the use of firearms are strictly regulated and should be resorted to only in circumstances falling within the narrow parameters of the statutory authorisation contained in the section. No evidence has been adduced to enlighten the Court to as to what the roof guards could see but is clear from the evidence that a large number of persons congregated in the courtyard and that the situation was very mobile with many running around and groups surging to and fro. It would have been very difficult to identify and target the plaintiffs' assailants from a distance and to have fired shots into the enclosed area without the real danger of injury and death to innocent bystanders. Given the competing considerations, I do not think that the legal convictions of the community required the use of firearms under the prevailing circumstances and, to her credit, I must note that I do not think Ms Conradie, appearing for the plaintiffs, suggested otherwise.

[46] Finally, it was suggested that the Prison Services should have been able to respond more rapidly with adequate means to prevent the assault or to bring it to an end. This suggestion seems attractive at first blush. Surely, one is inclined to reason, something should or could have been done more expeditiously or effectively than the authority's response in this case which left two prisoners close to death and two others seriously injured. If not, do the Courts in essence condemn every convicted criminal send to prison to life

behind bars at the whim of prison gangs for the duration of the sentence? The facts of this case show that the assaults on the 4 plaintiffs extended over a period of about 10 minutes in full view of - and only meters away from - the prison officers and came to an end, not because of any effective measure of intervention, but because they were either left for dead or the assailants thought that the level of retribution meted out was adequate for the affront. It militates, to say the least, in my assessment of society's notion of justice and incites indignation about the prison authority's "lame duck" response.

[47] I appreciate that the officers who witnessed the incident blew on their whistles, shouted instructions to the assailants, made frantic calls for the siren to be activated and notified senior officers elsewhere in the building. I also appreciate that the officer in command notified his deputies and called for reinforcements from the police task force; that officer Mberirua rushed to the armoury in the prison and returned from there with two other officers and that the task force eventually rushed to the prison and were brought to the section by Commissioner Martin – all of which came as cold comfort to the plaintiffs laying half-dead or seriously injured in their own blood meters away from those who were supposed to be responsible for their safety!

[48] The difficulty I have in finding that the failure of the prison authority or members to respond more expeditiously and adequately and that their failure, objectively assessed, falls short of the measure of justice demanded by society in the circumstances, is that the Court does not possess the expertise to authoritatively conclude that alternative measures could have been effectively introduced beforehand or taken at the time to stop the assault earlier and no expert evidence was presented to justify such a conclusion. A layperson, for example, may ask why the prison officers in the section had not been issued with firearms with which they could have immediately brought their authority to bear in the situation. At least this question was answered by the evidence: By bearing firearms the members ran the risk that the prisoners might have laid their hands on them and used them against the members or other prisoners or to shoot their way out of prison. Smoke grenades or teargas? They too might have been stolen or used against the prison officers if kept in the section. Moreover, it is not evident what the health and security risks may be if they were used in enclosed areas without adequate ventilation. Should small armouries not be constructed in the various sections of the prison; what about immobilisers; should a small but well armed reaction unit not be on standby? With every suggestion, reasons spring to mind why they may not be adequate solutions or, even worse, may present an even greater danger to the prison authorities or the public at large. Without expert evidence of viable

alternative, effective and expedient responses in such situations, the Court is simply not positioned to assess whether the omission under discussion was unlawful or not. But, before stepping off this subject, I must request the defendant to carefully examine the structures and mechanisms put in place to deal with the type of exigencies which presented themselves in this case and to assess whether viable alternatives do not exist which may be employed more effectively. To leave the targeted victims of prison gangs essentially to fend for themselves when attacked is intolerable and constitutes an affront to every notion of fairness and justice which society demands of its penal institutions. Had such viable alternatives been established by expert evidence, the Court would not have hesitated to conclude that the failure to implement them in the circumstances of this case was unlawful.

[49] In the result, I conclude on the facts established in this case that, the failure of the Prison Services to protect the plaintiffs from assaults by other inmates on 30 September 2002 at the Windhoek prison was not unlawful in the circumstances. For this reason alone the first plaintiff's principal claim and the claims of all the other plaintiffs must fail. However, given the duality of the "duty of care"-concept, it is perhaps expedient to briefly deal with the other leg thereof: that of negligence and, more particularly, negligence in the sense that

reasonable persons in the position of the prison members would have foreseen and guarded against harm to the plaintiffs.

[50] Many of the facts and circumstances relevant to the issue of wrongfulness are equally relevant to the consideration of negligence. In the latter context, however, they are not considered with the perfect vision of hindsight as the assessment of unlawfulness in the delictual framework of conduct, causation and consequence require, but with the foresight and conduct expected of a reasonable person similarly positioned in mind. The difference in the assessment of those facts and circumstances is perhaps better summarised by Boberg, *op cit*, at 269-270:

> "Where wrongfulness is in issue, the question is whether it was objectively unreasonable for the actor to bring about the consequence that he did, judged *ex post facto* and in the light of all relevant circumstances, including those not foreseeable by the actor or beyond his control.... Here the emphasis is upon the effect of the actor's conduct, and a finding of wrongfulness expresses the law's disapproval of the result that he produced. With negligence, on the other hand, the enquiry is whether the actor himself behaved unreasonably, judged in the light of his actual situation and what he ought to have foreseen and done in the circumstances that confronted him. Here the emphasis is about the actor's role in bringing about a consequence that has already been branded wrongful, and a finding of negligence expresses the law's disapproval of the part that he personally played in producing it."

[51] Would reasonable men in the position of the prison members have foreseen injury to the plaintiffs and have taken steps to protect the plaintiffs against injury resulting from the attacks of the other inmates in addition to or different to those actually taken? This question must, in turn, be asked in the assessment of each one of the context of each five omissions suggested in evidence (listed in paragraph 24 above). The first two and the last of the suggested omissions, are either not supported or not adequately supported by the evidence as I have held earlier in the judgment. What remains is to consider whether the prison members were negligent when they failed to physically intervene and protect the plaintiffs from assault; when they failed to open the grated door for the plaintiffs to escape from their assailants and when they failed to use whatever weapons or means they had at their disposal to protect the plaintiffs from assault.

[52] Having dealt with the evidence relevant to these suggestions at some length during the discussion of the issue of unlawfulness, I do not intend to restate them for purpose of this discussion. Suffice it to say that being outnumbered by 47 to 1; being confronted by a chaotic situation where approximately 80 dangerous, core criminals convicted in Namibia of the most serious violent and dangerous crimes were bent on blood and where about 400 other equally dangerous criminals were screaming and shouting and moving about in an enclosed area; being armed with only one baton shared by 10 prison members and

facing many prisoners brandishing and using dangerous or lethal weapons; being aware that prisoners have previously taken prison members hostage to effect or aid in an escape and having been recently alerted that such plans were again afoot; being aware of prison policy and standing instructions prohibiting entry under such circumstances, only fools would have rushed in where even angels (let alone reasonable persons!) would have feared to tread. Although the prison members, such as Kakoto and others, realised soon enough that the attack on the four plaintiffs were not feigned, they nevertheless feared that it was part of a ploy by Ninja and his supporters to get them involved, overpower them and then take them hostage to facilitate an escape. Information that Ninja was planning an escape in just such a manner was known to them since February 2002. Some of them believed Ninja was the leader of the "Airforce" gang which, as its principal objective planned mass escapes. The fact that the information about the planned escape was again confirmed by a named source only days before the event and that Ninja was the leader of the attack on the plaintiffs would have been enough for any reasonable person to consider the dire consequences to himself, his fellow officers and the other prison staff and the public at large if he were to enter the fray and be seized upon as a hostage.

[53] Much the same can be said about the reasonableness of the refusal to open the grated door to allow the plaintiffs an opportunity to

escape from their assailants. To have opened the door with the fighting prisoners only a couple of meters away would have accorded them an opportunity to rush the door and overpower the prison members. With that, they would not only have had hostages to kill or to use as bargaining commodities in a planned escape but they would also have had access to guards' keys and uniforms. The prison's policies contained in standing instructions dealing with the conduct of officers when faced with fighting in a prison cell expressly proscribed the opening of the cell door and entering it (without an adequate number of officers present - as qualified in evidence) applied with equal force to the outnumbered guards. To have acted contrary to those orders and come to the assistance of some of the plaintiffs would not only have invited potential tragedy if hostages were taken and prisoners escaped, but also delictual responsibility and disciplinary action.

[54] Lastly, to suggest that officer Kakoto (the bearer of the only baton) should have engaged the 80 armed attackers in defence of the four plaintiffs would have been a Quixotian act of stupidity hardly deserving of further discussion in the context of reasonableness.

[55] In the absence of any established unlawfulness or negligence, it is unnecessary to discuss the litigants' submissions on the *quantum* of the first claim of the first plaintiff and the claims of the other plaintiffs. They all fall to be dismissed with costs.

[56] What remains is the First Plaintiff's claim for damages resulting from an alleged assault on him by members of the Prison Service on 22 October 2002 and for withholding prescribed medicine from him during the period 22 October – 10 November 2002.

[57] It is common cause that Kennedy set his mattress and blankets alight on 22 October 2002. He claims to have done so because the Head of Prisons refused to accommodate him in the hospital section of the prison. As a result of the earlier assault on him, both his hands had been immobilised and, having been locked up in a single cell, he was unable to wash and otherwise take care of his personal needs. Fortunately, a trial awaiting prisoner who had been locked up in a neighbouring cell, one Jeffrey Malima, noticed the fire and alerted the warders who, with the assistance of other prisoners, extinguished it. Kennedy was apparently temporarily removed from the cell during the incident and, when later the afternoon he had to return turn to the cell, he refused. It is the events that followed which are in dispute.

[58] According to Kennedy, Superintendents Swartz and Makube arrived with a contingent of about seventeen warders. Makube enquired about his reasons for setting his cell alight. Kennedy explained his reasons and persisted with his refusal to go back into the cell, insisting throughout that he should be taken to the hospital

section. Makube thereupon instructed the warders to forcibly return him to his cell. He resisted. Sgt. Uushona kicked his feet from under him as a result whereof he fell onto the floor. Whilst on the floor, Uushona kicked him on the right side of his torso. Warder Kalombo joined in and kicked him on the left side of his chest and against his head. He was then pulled up by his injured hands and forcibly pushed into the cell. In the process, one of the warders kicked him from behind. He lost his balance and fell with his hands against the opposite wall. These events were witnessed and, in general terms, corroborated, by Malima. Malima testified that he had protested the assaults on Kennedy and was told not to get involved.

[59] The defendant called two witnesses about the incident: Sgt. Uushona and warder Kalomo. Neither of the two superintendents was called. Uushona denied that he had been present. According to him, Superintendent Swartz called him for reinforcements to assist in forcibly returning Kennedy to his cell. He was busy at the time and instructed Kalomo to hasten to the aid of Swartz. When he followed Kalomo a few minutes later, he encountered Swartz on the way, who informed him that the problem had been solved. Kalomo confirmed that Kennedy refused to go into the cell but, without anyone laying a hand on him, was led into the cell. Kennedy at one stage pushed against the door of the cell to prevent the warders from locking it. The

only thing which he (Kalomo) did, was to assist in manipulating the door for the others to lock it. He did not see Kennedy being assaulted.

[60] I have no hesitation to reject the evidence of the two officers on the probabilities. Earlier in this judgment, I commented negatively on the credibility of Uushona. In this instance too, he tries to remove himself as far as possible from the scene. Kalomo too, did not strike me as a credible witness. His version that Kennedy simply allowed himself to be led into the cell hardly conforms to Kennedy's character – evident, amongst others, from the extreme nature of his earlier protest. Moreover, the mood of the prison officers was dead set against him after the fire. The occurrence book shows that a specific instruction was given that he should be locked up in the same cell - amongst the soot, water and dirt which was left in the cell after the fire had been extinguished, according to Kennedy. By contrast, the evidence of Kennedy, irrespective of its unreliability in other aspects, stands corroborated by Malima. Malima was an independent observer with no interest in the outcome of the case. He came across in Court as a credible witness. His evidence is without inherent contradictions and has a clear ring of truth to it. So for instance, did he testify, that after his protests had been brushed aside, he still maintained towards the Superintendents that "two wrongs do not make a right" – suggesting to them that Kennedy's unlawful acts of protest were no justification for them to act unlawfully towards him. He frankly

admitted that he was not able to identify the warders who assaulted Kennedy and I did not to get the impression that he exaggerated any event which he had observed or that he had an ax to grind with any of the prison officers. I therefore, conclude that Kennedy established on a balance of probabilities that he was assaulted in the manner alleged.

[61] In terms of section 30(1) of the Prison Act, an officer in charge may "authorise prison members to use such force against a prisoner as is reasonably necessary to ensure compliance with lawful orders or to maintain discipline in the prison". The defendant did not rely on this section to justify the actions of the officers concerned. He simply denied the assault. But even if he had, it is apparent that the level of force used to put Kennedy back into the cell carried a measure of retribution for the damage caused by him and, in any event, significantly exceeded that which was reasonably necessary to ensure compliance with the order given to him. The excessive force used constitutes an unlawful assault and, given the *sequelae* thereof, justifies an award for damages.

[62] I have some difficulties with the *quantum* of Kennedy's damages. Although he elaborated on past and present pain and suffering, the loss of some amenities of life and the like, he did not differentiate between that caused by the injuries he had sustained during the prison gang assault on 30 September 2002 and that which he had

sustained during the assault by the warders on 22 October 2002. Many of the *sequelae* referred to in the pleadings in relation to the latter assault are also alleged in respect of the earlier one. The difficulty, of course, stems partly from the fact that he was not taken to a doctor immediately after the later assault and no medical evidence was available to corroborate or detail any of the injuries suffered as a consequence. Ms Conradie, appearing for the plaintiffs, refers to *McLean v Minister of Police,* 1972 (2) C&B 358 (E) and *Swartz v Minister of Police(1),* 1977(2) C&E 353 (E) – both involving assaults police officers using batons – as authority for her contention that the inflationary adjusted awards of R6 600.00 and R 26 000.00 should translate to an award of between N$ 20 000 and N$25 000 in the present instance. *Contumelia* has not been alleged and no damages has been claimed for any suffered. Given the paucity of evidence regarding the physical consequences of the assault by the warders, fair and reasonable damages awarded for the Kennedy's pain and suffering is fixed in the amount of N$15 000.00.

[63] Kennedy's last claim is for damages resulting from additional pain, suffering and discomfort endured by him as a consequence of Superintendent Hawala and WO Barnabas' failure to provide him with prescribed medication without delay and denying him such medication during the period 22 October to 10 November 2002. This Cinderella claim was by enlarge glossed over in evidence, which understandably

focused mainly on the other more substantial claims. There was some dispute as to whether Kennedy had been given pain killers on 24 October 2002 by the prison nurse – as his medical history card suggests. The difficulties I have with this claim is that there is neither evidence of any prescription for the administration of medication for the period 22 October to 10 November 2002 nor is there any evidence that Hawala and Barnabas were involved in any denial of such mediation. This claim, in my view, has not been proven on a balance of probabilities and must fail.

[64] Given the remarks I have made earlier in this judgment about the Court's concern about gang related violence in prison; the safety and security of prisoners placed in correctional institutions; the need to consider the establishment of structures to react more expeditiously and effectively in suppressing assaults by prisoners on one another and the need to create an environment conducive to rehabilitation if the objectives of the penal system in Namibia is to be achieved, I deem it necessary to direct that a copy of this judgment also be forwarded to the Commissioner of Prisons.

[65] In the result, the following orders are made:

1. The first and third claims of the First Plaintiff and the claims of the Second, Third and Fourth Plaintiffs are dismissed with costs.

2. In respect of the second claim of the First Plaintiff, judgment is entered for the First Plaintiff against the Defendant –

   2.1 in the amount of N$15 000.00;

   2.2 interest on the amount of N$15 000.00 at the rate of 20% *per annum* from the date of judgment to the date of payment;

   2.3 costs of suit in respect of this claim.

3. The Taxing Master is directed to tax the competing cost orders on the basis that one tenth of the trial was taken up by the evidence relating to the second claim of the First Plaintiff;

4. The Registrar is directed to cause a copy of this judgement to be delivered to the Commissioner of Prisons.

Maritz, J