

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2021/01642

In the matter between:

ARTHUR ALEXANDER GOTZ

PLAINTIFF

and

THE INSPECTOR GENERAL OF THE NAMIBIAN POLICE

1st DEFENDANT

THE MINISTER OF SAFETY AND SECURITY

2nd DEFENDANT

Neutral citation: *Gotz v The Inspector General of the Namibian Police* (HC-MD-CIV-ACT-OTH-2021/01642) [2022] NAHCMD 572 (20 October 2022)

Coram: COLEMAN J

Heard: 12 - 15 September 2022

Delivered: 20 October 2022

Flynote: Malicious prosecution – Manifests when defendants set the law in motion by instigating or initiating the proceedings, without reasonable or probable cause, with malice, and the prosecution failed – May manifest against an informer who makes a statement to the police which is wilfully false in a material respect.

Summary: On 29 April 2019 the plaintiff was involved in a motor vehicle accident with a police vehicle in Outjo. As a result of this accident, he was charged with two counts of contraventions of the Road Traffic and Transport Act 22 of 1999 (the Act). On 17 July 2020, Magistrate Udjombala discharged the plaintiff on both counts in terms of s 174 of the Criminal Procedure Act 51 of 1977. Plaintiff now claims damages from the defendants as a result of this prosecution.

Held that police officers are in a potentially very powerful position as far as criminal charges are concerned. Therefore, a prosecution initiated by police officers should be scrutinized very carefully.

Held that the court is satisfied that the plaintiff made out a case of malicious prosecution.

ORDER

1. The defendants are ordered to pay the plaintiff N\$60 024, jointly and severally, the one paying the other to be absolved.
 2. Interest on the said amount is payable at the rate of 20% per year calculated from the date of this order.
 3. Costs of suit.
 4. The matter is removed from the roll and regarded as finalized.
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JUDGMENT

COLEMAN J:

Introduction

[1] On 29 April 2019 the plaintiff was involved in a motor vehicle accident with a police vehicle in Outjo. As a result of this accident, he was charged with two counts of contraventions of the Road Traffic and Transport Act 22 of 1999 (the Act). On 17 July 2020, Magistrate Udjombala discharged the plaintiff on both counts in terms of s

174 of the Criminal Procedure Act 51 of 1977. Plaintiff now claims damages from the defendants as a result of this prosecution.

Plaintiff's case

[2] According to the plaintiff's particulars of claim, police officers who acted as state witnesses lied under oath about the events around the motor vehicle accident in the magistrate's court. As a result of this, plaintiff contends he suffered damages, being his expenses to defend himself in the criminal trial, loss of income and travel expenses.

[3] According to the pre-trial report, the parties agreed that issues to be resolved are, amongst others, whether plaintiff was unlawfully charged for the offences and whether the charges against him were reasonable and fair or based on good grounds.

[4] The plaintiff testified that because he was '...unlawfully charged and prosecuted...' based on untrue and incorrect facts, he suffered damages. He testified that the accident was caused solely by the negligence of the police officer driving the police vehicle. He also testified that he was driving slowly through the intersection where the accident occurred since he had firefighting equipment on his truck.

[5] The plaintiff's case pivots around the magistrate's findings in discharging him. The judgment is an annexure to his particulars of claim. In this judgment, the magistrate makes various adverse findings against the state. He in no uncertain terms concludes that the police officers lied and concocted evidence. The judgment was not appealed against, or taken on review.

Defendants' case

[6] Defendants' case is essentially a denial that any of the police officers lied in the criminal case. According to the witnesses called on behalf of defendants, the accident was caused entirely by the plaintiff who drove at an excessive speed. One

witness went as far as contending that the plaintiff deliberately drove into the police vehicle. He maintained that the plaintiff has some kind of vendetta against the police.

[7] Counsel on behalf of the defendants submitted that malicious prosecution cannot exist in the manifestation proffered on behalf of the plaintiff since the Prosecutor-General's office makes these decisions.

Conclusion

[8] Malicious prosecution manifests when the defendants set the law in motion by instigating or initiating the proceedings, without reasonable or probable cause, with malice, and the prosecution failed.¹ It may even manifest against an informer who makes a statement to the police which is wilfully false in a material respect.²

[9] It is clear to me that a normal motor vehicle collision, which at worst could end up in a civil court, resulted in a prosecution here because there were police officers involved. From the testimony by the driver of the police vehicle, it is clear that animosity exists between the plaintiff and the police in Outjo. As mentioned, the witness went as far as suggesting that the plaintiff deliberately drove into the police vehicle.

[10] Reference to the charges raise serious question marks. Count 1 comprises of the alleged contravention of s 80(1) of the Act, being reckless or negligent driving, without alleging how the accused drove recklessly or negligently. The charge is to be read with ten other sections of the Act, some of which have nothing to do with the charge. Count 2 is an alleged contravention of s 78(3) of the Act. This section is explicit, a vehicle involved in an accident in which any person is killed or injured may not be removed from the position in which it came to rest. The evidence is clear that no one was killed or injured in this accident. The police officers involved know it. In addition, the plaintiff asserts that he left the scene with the consent of the police officer involved. This charge is without doubt ill conceived.

¹ *Groenewald v The Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2016/02153) [2021] NAHCMD 507 (29 October 2021).

² *Prinsloo v Newman* [1975] 2 ALL SA 89 (A).

[11] Police officers are in a potentially very powerful position as far as criminal charges are concerned. Therefore, a prosecution initiated by police officers should be scrutinized very carefully. The simple fact that Count 2 was initiated and pursued suggests malice.

[12] The findings of the magistrate are his opinion. Without assessing and deciding on it, in my view, it goes to show how far the police officers involved were prepared to go. In light of my approach herein, I do not see the necessity to decide on the correctness of the magistrate's rulings. In my view the facts alluded to above speak for themselves.

[12] Having considered all the evidence and the submissions on behalf of the parties, I am satisfied that the plaintiff made out a case of malicious prosecution. He claims N\$62 867,15 as damages. This amount includes N\$2 843,15 - an insurance excess payment. Counsel for the plaintiff conceded that it should not form part of the damages claim. Despite the protestations on behalf of the defendants, I am satisfied that the plaintiff proved his damages.

[13] Consequently I make the following order:

1. The defendants are ordered to pay the plaintiff N\$60 024, jointly and severally, the one paying the other to be absolved.
2. Interest on the said amount is payable at the rate of 20% per year calculated from the date of this order.
3. Costs of suit.
4. The matter is removed from the roll and regarded as finalized.

G COLEMAN
Judge

APPEARANCES

PLAINTIFF:

PJ Coetzee

Of PD Theron and Associates, Windhoek

DEFENDANTS:

H Harker

Of Office of the Government Attorney, Windhoek