CASE NO.: I 1384/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACOBUS GERT HENDRIK DE JAGER **PLAINTIFF**

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **1st DEFENDANT**

CONSTABLE HAIHAMBO **2nd DEFENDANT**

CORAM: HANNAH, J

HEARD ON: 20-21/09/2005

DELIVERED ON: 24/10/2005

JUDGMENT

HANNAH, J.: In this action the plaintiff claims damages of N$40 000 for unlawful arrest and detention.

In their plea the defendants admit that the plaintiff was arrested without a warrant on 12th May, 2002 by the second defendant in Windhoek. They deny that the arrest was unlawful. They aver that the plaintiff was arrested in terms of section 40(1)(b) of the Criminal Procedure Act, No 51 of 1977, which reads:

"40(1) A peace officer may without warrant arrest any person –

(b) *Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."*

The defendants aver that the plaintiff was arrested on reasonable suspicion of having committed the offences of pointing a firearm, common assault and assault through threatening. Pointing a firearm is a Schedule 1 offence. It is not in dispute that the second defendant was, and still is, a peace officer.

The only issue on the question of liability is whether the second defendant reasonably suspected that the plaintiff had committed the offence of pointing a firearm. Although the burden of proving this lies on the defendants it was agreed that the plaintiff would testify first. His evidence may be summarized as follows.

The plaintiff is 49 years of age and in May, 2002 he resided in Suiderhof. He was having a lapa built at his house. On Saturday, 11th May he and his wife returned home in the afternoon. On looking out of a window he saw a workman who was working with a trowel throw cement and his Jack Russell dog immediately yelped. On going out he found that the dog had cement in its eyes. The workman denied doing anything but as the plaintiff had seen what had happened he ordered the workman off the premises. When he did not react he grabbed him by the arm and marched him off the premises.

On Sunday, 12th May the plaintiff saw two people standing outside the wall of his property and next to a vehicle. He went out and spoke to

them. They said that they were from the police and that they were there to arrest him. The plaintiff asked what it was about and they said it was assault and pointing a firearm. The plaintiff asked when this was supposed to have happened and one of the two said the previous day.

The plaintiff said that he told the police officers that there had been no such incident. He had been at home with his wife, his brother and two friends and they were all there when the incident happened. There was no firearm involved and no assault. He had asked the workman to leave and taken him by the arm and escorted him off the premises. One of the police officers repeated that he was there to arrest the plaintiff and he had to go with him.

The plaintiff was then allowed to telephone his attorney, Mr Mostert, and having done so he gave his cellphone to one of the police officers. The officer had a conversation with Mostert at the end of which he said that he was still going to arrest the plaintiff.

The plaintiff then tried to telephone Mostert again but without success. One of the police officers also made a call on his cellphone and a little later a police vehicle arrived with uniformed police officers. In the meantime the plaintiff telephoned his building contractor as it was one of his employees who had made the complaint. He arrived shortly before the other police officers. At some stage the plaintiff was asked to fetch his firearm and he asked which one? He was told to fetch any firearm he liked. He then took a handgun from his safe and, having removed the ammunition, handed it over. He was then told to fetch the rounds of ammunition which he did.

Other matters alluded to by the plaintiff was the fact that the police officer produced no formal identification although he said that he

accepted that they were police officers. He also said that he asked them to interview those who had witnessed the events of the previous day but this request was ignored.

The plaintiff was given the opportunity to change his clothes, which he did, and he was then arrested and taken to the police station. He described the conditions in the cell in which he was held. He was released on bail at about 8pm that evening.

The plaintiff testified that he appeared in court the following day on charges of pointing a firearm and common assault and thereafter the case was postponed four times. Ultimately, the case was withdrawn.

In cross-examination the plaintiff said that when the building contractor arrived he was accompanied by a police officer named Cronje. He was also called to testify. At the time he was a warrant officer in the police force. He had been in the force for 24 years. He said that he went to the plaintiff's house at the request of the building contractor.

Cronje said that on arrival at the plaintiff's house police officers arrived. It was Const Haihambo and another officer. Inside the house Haihambo told the plaintiff that he wanted to arrest him. I pause here to say that Cronje obviously got the sequence of events wrong. Haihambo and his colleague must have arrived before he did. It was their arrival which provoked the call by the plaintiff to the building contractor.

Cronje said that he asked Haihambo what the charge was and Haihambo told him that it was common assault and that he, Cronje, should "Keep out of the Story" as it was not his case. Again, this

evidence cannot be correct. The plaintiff testified that he was told that he was being arrested for pointing a firearm and common assault.

Nonetheless Cronje went on to say that he told Haihambo that he cannot arrest for common assault and advised him to take the complainant to the police station and open a docket. Haihambo's response was to tell the plaintiff to come with him. Cronje then advised the plaintiff to go. He went.

That was the case for the plaintiff.

Three witnesses were called on behalf of the defendants. I will start with a summary of the evidence of the second defendant, Detective Constable Haihambo. He said that on 12th May, 2002 he was on duty at Windhoek Police Station and the docket in CR 415/03/05/02 was booked out to him for preliminary investigation. The complainant was one Daniel Mwapopyange and the complaint was that Mr De Jager, the plaintiff in the present case, had pointed a firearm at him and had assaulted him both physically and by threats. In fact it emerged in cross-examination that Haihambo himself had taken the complainant's statement the previous day.

Haihambo said that he asked a colleague, Const. Shikongo, to accompany him to the address given by the complainant in order to arrest the plaintiff. On arrival at the address two men and a woman came out. Haihambo said he identified himself as a police constable and produced his appointment certificate. This last piece of evidence is at variance with that of the plaintiff but nothing turns on it as the plaintiff accepted that he was being confronted by police officers.

Haihambo said that he explained that he was looking for Mr De Jager and the plaintiff identified himself. Haihambo told him that a case of pointing a firearm, common assault and assault by threats had been opened against him. The plaintiff then denied the allegations saying that the complainant had poured cement in his dog's eyes but he did not point a firearm at him nor did he assault him. Haihambo told the plaintiff that he was acting according to the case docket and he had to arrest him. The plaintiff replied that the would not be arrested and that he is going to telephone his lawyer.

The plaintiff went inside the house and returned with a cell phone which he gave to Haihambo. The person on the other end identified himself as Mostert, the plaintiff's lawyer, and asked Haihambo why he wanted to arrest his client. Haihambo told him the reason. Mostert then said that it would be an unlawful arrest and Haihambo replied that he was working according to the case docket which had been opened. Haihambo said that Mostert then became abusive and he switched off the phone.

Haihambo said that he then telephoned Chief Inspector Heita, his Unit Commander. He explained the situation and Heita asked to speak to the plaintiff. However, the plaintiff refused to speak to him. Heita then instructed Haihambo to continue with the arrest. Haihambo said that he told the plaintiff he will arrest him. He then telephoned members of the Special Field Force for assistance.

When members of the Special Field Force arrived Haihambo told the plaintiff that they wanted to confiscate his firearm and Cronje, who had also arrived, advised the plaintiff to cooperate. The plaintiff fetched his firearm and he was arrested, taken to Windhoek Police Station and detained. Haihambo produced from the criminal docket what is called

a warning statement. This cautions a suspect and explains his rights and then he is asked whether he wishes to say anything. The plaintiff merely said:

> "*I do not want to make any statement. I will give my statement in the court*."

Haihambo was cross-examined but he adhered to his evidence-in-chief which, in any event, was on similar lines to the evidence of the plaintiff. No additional material of any real relevance emerged.

Chief Inspector Heita also testified. In May, 2002 he was the Commander of the Windhoek Criminal Investigation Unit. He confirmed that on 12th May he was telephoned by Haihambo at home and told that he was having a problem with a suspect. He asked to speak to the suspect but the suspect refused. He then instructed Haihambo to effect the arrest.

The other witness to testify on behalf of the defendants was Const. Shikongo. His evidence was for the most part similar to that of Haihambo. One difference was that according to Shikongo they went to the plaintiff's address in order to ascertain whether the allegation made against him was true or not. It was the plaintiff's failure to cooperate which led to his arrest.

The only other piece of evidence to which I need refer is the statement of Daniel Mwapopyange, the complainant. In it he relates how on 11th May the plaintiff came out shouting and asking who had thrown cement at his dog. Before the complainant could reply the plaintiff grabbed him by the neck, punched him and tried to hit his head against a wall. The complainant stated that when he managed to get

the plaintiff off him the plaintiff ran indoors and came out with a pistol. He pointed the pistol in the direction of the complainant and said that he would give him two seconds before killing him. He then quickly picked up his tools and ran. The statement was made under oath.

Two points of criticism made by Mr Mostert during cross-examination were that the statement does not set out the complainant's full address and the telephone number given is that of a public telephone booth. How, he asked, did Haihambo expect to trace the complainant? Haihambo said that they were in fact able to trace the complainant within a few days of 12th May. He added that complainants almost invariably follow up their complaint at the police station in order to ascertain what has happened.

I now turn to the applicable law.

I have already set out the provisions of section 40(1)(b) of the Criminal Procedure Act, No 51 of 1977. I will not repeat them. What it comes to is that the defendants have the onus to establish on a balance of probability that the second defendant had reasonable grounds for his suspicion that the plaintiff had committed a Schedule 1 offence, namely pointing a firearm at the complainant. In this regard Mr Mostert cited the case of *S v Purcell-Gilpin* 1971(3) SA 548 (R.A.D). In that case Lewis J.A referred to passages in two earlier judgments. One is contained in *Rosseau v Boshoff* 1945 CPD 145 where Jones A.J.P said at 137:

> *"I think I may further state that when one comes to consider whether he had reasonable grounds one must bear in mind that in exercising these powers he must act as an ordinary honest*

> *man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis."*

The other passage is contained in *R v van Heerden* 1958 (3) SA 150(T) where it was said at 152E:

> "…*the grounds of suspicion must be those which would induce a reasonable man to have the suspicion."*

In other words the test is an objective one.

In the present case there can, in my view, be no doubt that Haihambo suspected that the plaintiff had committed the offence of pointing a firearm at a person. He had in his possession a statement under oath in which the complainant had made that allegation in explicit terms. The question is: was that suspicion reasonable? Mr Mostert submitted that a suspicion based merely on the *ipse dixit* of a complainant can never, or seldom ever, be reasonable. Such suspicion can only be reasonable once steps have been taken to allay or confirm it if the opportunity for taking such steps exists. He pointed to the fact, a fact which I accept, that Haihambo set out on 12th May with the intention of arresting the plaintiff regardless whether witnesses other than the complainant were available. This, counsel contended, means that his suspicion cannot be held to have been reasonable, particularly when the plaintiff told him that there were witnesses to the incident of the previous day.

Mr Mostert also questioned the need for the arrest. The plaintiff was a householder who had ready access to a lawyer whose identity Haihambo knew. Other arrangements could have been made for the plaintiff to be interviewed.

In considering Mr Mostert's submission I find the following passage in *Street on Torts (8th Ed)* at pp 89,90 helpful:

> *Powers of arrest, and the police's complementary crime prevention powers of search and seizure, are generally dependent on reasonable cause for relevant suspicion. The adjustment of the conflict between the citizen's interest in personal freedom and the public interest in efficient enforcement of the criminal law is a delicate one. Traditionally the common law has dictated that the courts show no tendency to attach excessive weight to the second, to the detriment of the first factor. So the burden of proving reasonable cause, of justifying the arrest lies on the defendant, albeit that in malicious prosecution it is on the plaintiff. Jury trial is still available in actions for false imprisonment. The jury must find the facts on which the matter depends, but what amounts to reasonable cause is a question of law for the judge. Mere suspicion, a policeman's hunch, is insufficient, but suspicion is a lesser state of mind than knowledge of guilt. Some evidence, some information from witnesses, affording objective grounds for suspicion must be established. Once reasonable cause for suspicion is established, the constable need not generally prove that arrest was necessary. Constables are endowed with a discretion to arrest; they are rarely under a duty to do so. The House of Lords in Holgate-Mohammed v Duke held that the constable's discretion to arrest could be challenged only if he could be proved to have acted on some immaterial or irrelevant consideration. Arrest of a woman in the belief that once in police custody she would more readily confess was held to be not unreasonable. An arrest for the purpose of using the period in*

> *custody to dispel or confirm suspicion by questioning the suspect or seeking further evidence was well within the discretion of a constable. Taking advantage of suspicion of crime to arrest your wife's lover and incarcerate him for a few hours would be clearly unlawful!*

In England the relevant statutory words are, or in 1984 were,

> "*Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence.*"

The latter part of that provision has the same effect as section 40(1)(b) of our Criminal Procedure Act. It matters not whether the legislation refers to "reasonable cause" or to "reasonable grounds".

I turn then to *Holgate-Mohammed v Duke* 1984 AC 437, referred to in the passage just cited, where Lord Diplock pointed out at 445E:

> "*That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales (1981)(Cmnd 8092) at paragraph 3-66 to be well established as one of the primary purposes of detention upon arrest. That is a fact that will be within the knowledge of those of your Lordships with judicial experience of trying criminal cases…*"

That accords with my knowledge of the position in jurisdictions in Southern Africa, including Namibia, based on almost 25 years sitting on criminal trials. Like the Royal Commission and the House of Lords I can see nothing objectional with that practice.
At the end of the day the question is whether it has been established, on a balance of probability, that Haihambo had reasonable grounds for his suspicion that the plaintiff had committed a Schedule 1 offence. In my judgment it has. He was armed with a plausible, sworn statement from the complainant. His was not a hunch or a wild suspicion. In my view, it was a reasonable suspicion. The plaintiff's action must therefore fail.

As for costs, the defendants were not able to produce Haihambo as a witness on the first day of the trial. Had they produced him the trial would have been concluded on that day. The costs of the second day were, in those circumstances, unnecessarily incurred. I think that the right course to take is to order each party to pay its own costs of the actual trial.

Accordingly, the plaintiff's claim is dismissed with costs but excluding the costs of the actual trial.

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HANNAH, J

ON BEHALF OF THE PLAINTIFF: **MR C MOSTERT**

INSTRUCTED BY: **MOSTERT LEGAL PRACTITIONERS**

ON BEHALF OF THE FIRST & SECOND DEFENDANT: **MR ASINO**

INSTRUCTED BY: **GOVERNMENT ATTORNEY**