CASE NO.: I 2852/05

MALCOLM McNAB & OTHERS –vs– MINISTER OF HOME AFFAIRS N.O. & OTHERS

ANGULA, AJ

12/07/2007

SUMMARY

UNLAWFUL ARREST AND DETENTION

Arrest without warrant by a peace officer. Peace officer to prove that he/she had reasonable grounds for suspicion that the person arrested had committed a Schedule 1 offence.

Held: Peace officer had proved on a balance of probabilities that he had reasonable grounds for suspicion.

CONSTITUTION

Unlawful denial or violation of fundamental rights or freedoms. Plaintiffs held in small, overcrowded and poorly-ventilated cell; filthy, cockroached and lice infested cell; caused to relieve himself in full view of other detainees.

Held: Such conditions degrading and inhuman and in violation of arrested persons' fundamental rights.

PLEADINGS

Cause of action arising from unlawful violation or denial of fundamental rights. Claim for award of monetary compensation in terms of Articles 25(3) and 25(4) of the Constitution to be specifically pleaded. Particulars of claim lacked the necessary averment to sustain the claim. No basis for the relief claimed.

Held: Plaintiffs' cause of action not specifically and properly pleaded to sustain the relief based on the provisions of Articles 25(3) and 25(4) of the Constitution. Claim based on violation of fundamental rights dismissed with costs.

CASE NO. I 2852/05
IN THE HIGH COURT OF NAMIBIA

In the matter between:

MALCOLM McNAB	First Plaintiff
GARETH RAY McNAB	Second Plaintiff
JON ALLEN	Third Plaintiff
DONOVAN PLATT	Fourth Plaintiff
ALOYSIUS YON	Fifth Plaintiff

And

THE MINISTER OF HOME AFFAIRS N.O. First Defendant

DETECTIVE CONSTABLE SCOTT Second Defendant

DETECTIVE SERGEANT THEUNISSEN Third Defendant

CORAM: ANGULA, A.J.

Heard on: 8.11.2005; 9.11.2005; 10.11.2005; 15.11.2005

Delivered on: 12.07.2007

JUDGMENT

ANGULA, A.J.:

[1] The plaintiffs instituted an action against the defendants for damages on the grounds that they were arrested by the first and second defendant without a warrant and detained at the Windhoek Police Station from 3rd April 2003 to about 10th April 2003. In the alternative they alleged that the arrests violated or denied their constitutional fundamental right not to be subjected to arbitrary arrest or detention; their right to personal liberty and freedom of movement; and their right to human dignity. Each plaintiff claimed an amount of N$200 000.00 plus interest at the rate of 20% per annum from date of judgment to date of payment, plus costs of suit.

[2] In their Plea, the defendants admitted that the plaintiffs were arrested without warrants by the second and third defendants; that the first plaintiff was

arrested on 3rd April 2003 while the rest of the plaintiffs were arrested on 4th April 2003. They denied that the arrests were unlawful and pleaded that the plaintiffs were arrested in terms of section 40 (1)(b) of the Criminal Procedure Act, 1977, as amended. Section 40 (1)(b) reads as follows:

> "*A peace officer may without warrant arrest any person who he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escape from lawful custody.*"

[3] The defendants pleaded that the plaintiffs were arrested on reasonable suspicion of having committed an offence referred to in Schedule 1 of the Criminal Procedure Act in that they were suspected of having sold stolen ultra phones or equipment of Siemens Namibia to Telecom Namibia. The selling of stolen goods is a Schedule 1 offence. The defendants further pleaded that the Plaintiffs appeared before a court within 48 hours, which court ordered their further detention until 10th April 2003 pending a formal bail application.

[4] It is common cause that the second and third defendants are police officers, and as such peace officers as contemplated by section 40 (1)(b) of the Criminal Procedure Act.

[5] The issue for determination before me is whether the second and third defendants reasonably suspected that the plaintiffs had committed the offence of selling stolen ultra phones or equipment of Siemens to Telecom

Namibia. Ordinarily, the onus of proving or justifying the arrests rests on the defendants. It was, however, agreed between the parties that the plaintiffs would commence to lead evidence. The evidence of the plaintiffs can be summarised as follows:

Evidence on behalf of the Plaintiffs

[6] Most of the facts were common cause. It is common cause that the first plaintiff was arrested on the evening of 3rd April 2003 by the third defendant accompanied by the second defendant and by Nico Smith, a private detective who had been instructed by Siemens to investigate the allegations of theft of the ultra phones by the defendants. Both the second and third defendants hold the rank of adjutant in the Namibian Police Force. I will refer to them by their surnames. It is common cause that Scott and Theunissen did not have a warrant of arrest when the first plaintiff was arrested and also subsequently when the rest of the plaintiffs were arrested. It is also common cause that all plaintiffs were members of Iikuti Trade and Investment Holdings CC ("Iikuti").

[7] First plaintiff testified that he had been employed by Siemens for about ten years, from 1993 to March 2003. He was internally charged with theft concerning the ultra phones and a disciplinary inquiry was instituted against him, however the charges were withdrawn whereafter he decided to resign.

[8] He testified that during 2002 the plaintiffs decided to register Iikuti Trade and Investment Holdings CC, a close corporation with the purpose of conducting business in Angola. The business in Angola did not materialise, so the focus was directed into Namibia. One of the businesses they focused on were to tender for Telecom Namibia business. He testified that they were awarded a tender to do repairs on Telecom Namibia devices and to provide them with thirty-five (35) units of ultra phones, which they did.

[9] He further testified that one Erasmus who was also charged with them had previously also been employed by Siemens for about five years and that they worked together but in different departments.

[10] Early on the evening of Friday, 3rd April 2003, Theunissen and Scott called at the house of the first plaintiff. The police officers introduced themselves and told the first plaintiff that they were investigating a case of theft of ultra phones from Siemens. They enquired about the first plaintiff's wife's membership in Iikuti. He informed them that she was not involved in Iikuti dealings but that he was the one dealing with the business affairs of Iikuti. After the police officers had interrogated him for about two hours, they asked him to accompany them to the house of the fifth plaintiff. The fifth plaintiff was not at home. The first plaintiff was taken to the police station where he was locked up. The following morning, i.e. 4th April 2003, at about 07h00 the first plaintiff was taken to Scott's office where he found the rest of the plaintiffs together with their

legal representative, Mr Jan Wessels. He was advised by his lawyer with regard to his right not to make a statement. He signed a warning statement in which he chose to remain silent. During the weekend, i.e. Saturday and Sunday, they were interrogated by Scott and Theunissen. On Monday, 7th April 2003, they were taken to the Windhoek Magistrates Court. Their case was postponed to another date for further investigation and pending formal bail application. He was released on bail on Friday, 11th April 2003. The charges against them were later withdrawn on 28th May 2003. Subsequent thereto they were served with summons whereby they were charged with the same offence, however those charges were again withdrawn on 27th January 2004.

[11] During cross-examination the first plaintiff confirmed that his wife was a registered member of Iikuti, however he dealt with all the activities relating to the business of Iikuti. For instance, he had signing power together with other members of Iikuti with regard to the business' cheques. The second plaintiff, Gareth McNab, was his brother who acted as managing director and managed the daily activities of Iikuti. The third and fourth plaintiffs from time to time dealt with quotations and tenders. Another member of Iikuti, one Tuliki, was not that involved except during the time when they were exploring business in Angola. The business office of Iikuti was situated at the house of the fifth plaintiff in Pionierspark, Windhoek.

[12] First plaintiff confirmed that during December 2002 he submitted two invoices to Telecom Namibia in respect of thirty-five ultra phones supplied by Iikuti to Telecom Namibia. He further confirmed that Iikuti carried out repairs of ultra phones for Telecom Namibia during or about December 2002 and in respect of which VAT invoices were submitted to Telecom Namibia in January 2003. He testified that he is a qualified telecommunications technician and that he received his training at Siemens in Germany; that his brother, Ray McNab, is a mechanical engineer; that the fourth plaintiff, Donovan Platt, was working at the Polytechnic of Namibia as a lecturer in information and communication; and that the fifth plaintiff is a retired trade unionist.

[13] According to him, the seven ultra phones were repaired by Erasmus who was at the time employed by Siemens as a technician; however Erasmus worked as a consultant to Iikuti in which capacity he repaired the ultra phones for and on behalf of Iikuti for supplying to Telecom Namibia. He explained that the way they operated was that Telecom Namibia would inform them that it had broken or faulty ultra phones and the plaintiffs would then collect the phones and take them to Erasmus for repair. At times Erasmus also picked up ultra phones at Telecom Namibia for repair. Iikuti would then pay Erasmus for his work.

[14] He confirmed that the police warning statement was read to him, which contents he confirmed; that he was informed by the police that they were investigating a case of theft of ultra phones from the Siemens stores; that

he elected not to make a statement to the police. The warning statement was taken on 4th April 2003. He was questioned about the origin of thirty-five ultra phones they had sold to Telecom Namibia, whereby he explained that the ultra phones were originally supplied by Siemens to Telecom Namibia; Telecom Namibia sent them to Siemens for repair but they were considered by Siemens to be beyond repair; they were therefore bound to be thrown away. He testified that Erasmus told them that he was repairing those ultra phones in his free time. They (Iikuti) paid Erasmus N$1000 per unit for the repair. Iikuti then sold the repaired units to Telecom Namibia.

[15] It was put to him that according to Siemens' stock there were ninety-seven ultra phones and that the thirty-five units that were sold to Telecom Namibia were, according to their serial numbers, from those ninety-seven new ultra phones; and that this information was passed on to the police officers who arrested them. He confirmed that although Iikuti had received a quotation from the company in the USA which had supplied ultra phones to Siemens, Iikuti never went as far as buying ultra phones from that company in the USA. He confirmed that the police officers had informed him that evening that they were going to arrest him for alleged theft of the ultra phones. He further confirmed that at the time he made the deal with Telecom Namibia regarding the ultra phones he and Erasmus were still employed by Siemens.

[16] The first plaintiff confirmed that he knew that Mr Langmaak of Siemens had laid a complaint with the police regarding the stolen ultra phones; that he knew that Langmaak had made a statement on 2nd April 2003 and that one Rodrigues, also employed by Siemens, had made a statement to the police on 28th March 2003 regarding the stolen ultra phones; that a lady by the name of Sowden had also made a statement on 27th March 2003 regarding the stolen ultra phones; and finally, that Erasmus had

made a statement on the afternoon of 3rd April 2003 at about 19h30. He further confirmed that the contents of the statements implicated the members of Iikuti as having stolen ultra phones from Siemens. He further confirmed that when the police officers arrived at his house that evening they questioned him about the ultra phones. It was put to him that Siemens was the sole supplier of ultra phones, to which he responded that that was not correct since their close corporation was also in a position to source ultra phones from somewhere else. He did not specify where.

[17] The second plaintiff, Gareth Ray McNab, testified that he is an engineer with a B.Sc Engineering Systems qualification; that he is a civil contractor and is the brother of the first plaintiff; that he was also a member of Iikuti. On 3rd April 2003 he attended a tender meeting held at Telecom Namibia where private detective Smith was introduced as a consultant to Telecom Namibia. However, it transpired later that Smith had been approached by Siemens to investigate the theft of ultra phones. Later that evening the members of Iikuti gathered at fifth plaintiff's house for a meeting to review the events of the day, in particular their meeting at Telecom. During the meeting Erasmus' wife telephoned and informed the fifth plaintiff that Erasmus was being questioned by Scott and Smith at the Siemens offices. Later on in the evening, second plaintiff received information that Scott was looking for him.

[18] Second plaintiff went on to describe the condition of the cells in which they were held, that they were roaming with cockroaches; that he felt

humiliated and that he could not sleep. He confirmed that Iikuti repaired ultra phones for Telecom and that it provided thirty-five units of ultra phones to Telecom Namibia. He testified that on a certain date he had collected ultra phones from Telecom Namibia because Erasmus could not do it himself.

[19] The second plaintiff was cross-examined about the warning statement taken by Scott regarding the investigation of the theft of ultra phones from Siemens. He confirmed the contents of the statement. He confirmed further that he had chosen not to make a statement; that he learned later that Langmaak had laid a charge of theft of ultra phones of Siemens. Regarding the thirty-five units supplied to Telecom Namibia, he testified that his understanding was that Telecom Namibia needed to be supplied with ultra phones. However, Siemens could not supply the ultra phones so Erasmus offered to Iikuti to rebuild or repair the units which were written off by Telecom Namibia so that Iikuti could supply the ultra phones to Telecom Namibia. According to his understanding it was Erasmus who supplied the spare parts and also did the repairs in respect of ultra phones. The contents of the statements of Langmaak and Rodrigues were put to him. It was put to him that the ultra phones which were traced at Keetmanshoop and Gobabis were part of the ninety-seven ultra phones which went missing from the Siemens stores. According to him Iikuti had received a letter from a company by the name of TXR in the USA that they would be able to supply ultra phone spare parts to Iikuti. It was put to him that the police were in possession of a statement by

Sowden of Telecom Namibia, taken on 27th March 2003, dealing with five ultra phones found at Telecom Namibia stores at Keetmanshoop, the serial numbers of which corresponded with the serial numbers of the thirty-five units. He responded that he had no knowledge of that. It was further put to him that the statement of Erasmus which was taken on 3rd April 2003 at around 17h00 implicated all members of Iikuti as having been involved in the theft of ultra phones from Siemens. Again, he did not dispute that statement. He confirmed Erasmus' statement that the VAT invoice in respect of the thirty-five units delivered to Telecom was issued under the name of Iikuti. It was further put to him that at the time he was arrested the police were in possession of the report of the investigation carried out by Nico Smith. He confirmed that, however, he went on to say that in his view the police did not correctly investigate the allegations. He confirmed that on the date he was arrested he voluntarily went to the police station and surrendered himself. The report compiled by Nico Smith was then handed in evidence as an exhibit.

[20] The third plaintiff, Jon Allen, testified that he is the marketing manager of New Start Voluntary Counselling and Testing Centre. He confirmed that during the evening of 3rd April 2003 while attending a meeting, they received a phone call from Erasmus' wife who informed him that Erasmus was being interrogated by Nico Smith and Scott at the Siemens offices. He testified further that the following morning they went to the office of Mr Wessels, their lawyer, and from his office they walked to the Windhoek

police station. At the police station Scott then explained to them why they were being sought the previous night. Prior to going to the police station they had been advised by their lawyer not to make statements. He testified that in the course of the day he was interrogated by Scott and Theunissen on separate occasions; that he signed the warning statement late that afternoon. At around 18h00 they were taken to the holding cells where they were locked up for the weekend. He described in detail the appalling conditions in the holding cells. He confirmed that they were released on bail on 11th April 2003.

[21] During cross-examination he confirmed that the repairs of the ultra phones were done by Erasmus as a consultant for Iikuti. He confirmed that he knew about the thirty-five ultra phones supplied by Iikuti to Telecom. He identified the VAT invoices submitted by Iikuti to Telecom. As to the origin of the units, he testified that Erasmus was essentially the middle man who supplied the units to Telecom. He testified that his understanding was that the units were made up from spare parts which had been declared obsolete or unusable by Telecom; furthermore that according to his understanding the spare parts never came from Siemens; they were in the possession of Erasmus in his private workshop at home. His understanding was further that Erasmus worked on or repaired the ultra phones during his spare time outside his employer's setup. According to him, that arrangement was acceptable to him. He testified that he had concerns or questions about the legitimacy of the proposal by Erasmus due to the fact that at that time Siemens was the sole supplier of ultra

phones and the sole service provider for repairs of the ultra phones. However, based on the assurance from Erasmus and the report by Malcolm McNab after his inspection of Erasmus' workshop at his house, and which inspection confirmed that Erasmus was doing the repair work after hours and which further confirmed that Erasmus possessed the expertise, they accepted the proposal or the arrangement.

[22] He confirmed further that after his release from detention and during the preparation of this trial, he became aware that Scott and Theunissen were in possession of statements which implicated them in the theft of Siemens ultra phones. Commenting on the statement by Langmaak that Siemens was the sole supplier of ultra phones, he conceded that that might have been the position up to the point of the tender issued by Telecom; however, according to him after or during the tender Siemens was no longer the sole provider because Iikuti became a supplier to Telecom through Erasmus who was rebuilding and repairing the units for Iikuti.

[23] Erasmus' statement was put to the third plaintiff in which Erasmus had stated that the ultra phones came from Siemens; that he removed some casings and components to build the thirty-five units which were supplied to Telecom Namibia; that all the plaintiffs knew that he got the thirty-five units from Siemens and that they were satisfied with the arrangements. He responded that that was not the case because they were assured by Erasmus that the units were coming from his workshop.

[24] The fourth plaintiff, Donovan Mervin Platt, testified that he is a lecturer at the Polytechnic of Namibia. He basically confirmed what had been testified by the other plaintiffs; the receipt of the news about the arrest of Erasmus and Malcolm McNab; their reporting to the police station on Friday morning; their interrogation by the police officers; that he did not give a statement; their being arrested and locked up; the conditions in the cells; and ultimately being granted bail. Regarding their arrest, he was of the view that, having regard to the information in the police officers' possession, the police officers did not give much thought or proper attention to the information; and that had they done so they would have realised, or formed a doubt, that the plaintiffs were not involved in the alleged theft of ultra phones.

[25] During cross-examination he was questioned about the thirty-five ultra phones delivered by Iikuti to Telecom Namibia. He testified that his understanding was that they were rebuilt by Erasmus from spare parts which were the property of Erasmus, however, he did not know how the units were put together by Erasmus. According to him, it had never been stated that the spare parts were obtained from Siemens. His understanding of computer matters was that it is possible to source electronic spare parts from anywhere in Windhoek and build something new out of such parts. His thinking was that the same would apply to spare parts for ultra phones. According to him, even if Siemens might have been the sole supplier of ultra phones there was a company in the United States of America (TXR) which also supplied the ultra phones;

however, Iikuti did not proceed to order ultra phones from that company since the tender by Telecom Namibia to supply the said phones was called off because of the investigation which gave rise to their arrest.

[26] The fifth plaintiff, Aloysius Frederick Yon, testified that he is a retired trade unionist, now a pensioner. He likewise confirmed the events leading to their arrest as testified by his co-plaintiffs. He testified that he did not give a statement but only a warning statement; that he asked Scott why they were being arrested whereupon Scott informed him that he was being suspected of theft of ultra phones; he stated that during the meeting called by Slenter of Telecom where Nico Smith was present he had realised that Iikuti's tender was posing a threat to Siemens and that Siemens was employing underhand tactics to eliminate Iikuti as a competitor; that that was the reason Siemens caused them to be arrested and detained so that Siemens would get the tender. He described the appalling conditions in the detention cells; and their ultimate release on bail.

[27] He testified that Iikuti obtained the ultra phones from Erasmus and that the latter told them that he had built them from obsolete boxes that were discarded by Telecom. According to him Erasmus had told them that he supplied the thirty-five ultra phones to Telecom, invoiced Telecom and thereafter received a cheque from Telecom, which cheque was made payable to Iikuti; that they paid Erasmus from that money. He conceded that the information which was in possession of the police officers Erasmus implicated him and other members of Iikuti of having stolen the ultra phones.

Evidence on behalf of the Defendants

[28] The first witness for the defendants was Gunther Langmaak, managing

director for Siemens, Namibia. He testified that he became suspicious that there was theft of ultra phone units and unauthorised repairs being done, as a result of which he enlisted the services of Nico Smith. The investigation lasted for about three weeks which established that criminal activities were being perpetrated, whereafter Nico Smith contacted the police on his behalf. The investigations revealed that Iikuti was doing repairs on the ultra phone units. According to him nobody could do the repairs on his own because to repair the units required complicated repairing equipment; that through investigation they managed to establish that a number of units were stolen from Siemens and delivered to Telecom; that they verified the stolen units with reference to their serial numbers. With regard to the thirty-five units, Langmaak went on to explain that apart from the test equipment which they got from the United States of America they had also received a number of spare parts referred to as 'turn-up spares' that were part of the contract. In respect of those spare parts they had a list of equipment detailing exactly the serial number of each unit. Using the serial number, they were able to identify the units which were found at Telecom's offices at Gobabis, Keetmanshoop and Windhoek. In turn, those units could be traced back, with reference to serial numbers, to the stock in the Siemens stores. It was meant to be backup spare parts. With the assistance of Telecom Namibia they eventually managed to establish that before Iikuti delivered the ultra phone units to Telecom Namibia there had been no stock of ultra phones at Telecom Namibia. According to him, the units which were supplied by Iikuti were from Siemens which were ultimately deployed by Telecom

Namibia to their offices in Keetmanshoop, Gobabis and Windhoek. The serial numbers of the thirty-five units were part of the batch of the ninety-seven new units. He disputed the plaintiffs' evidence that the units were assembled from redundant units. In this respect he explained that the only instance when a unit is scrapped is for instance if the whole PC board is for instance struck by lightning; once that happened, no one else can use it; furthermore, if units are rebuilt it must be reprogrammed with special equipment to accept the serial number which is used by Telecom Namibia to activate the units on Telecom Namibia's network. He confirmed that the units that were repaired at the Siemens workshop were the property of Telecom Namibia. However, the ninety-seven units were in a separate store at Siemens and they were left as backup. Furthermore, that the thirty-five units supplied by Iikuti to Telecom Namibia were part of the ninety-seven back-up units; they were not intended to be replaced with those units from Telecom Namibia which needed repair.

[29] The next witness for the defence was Adjutant Clifford Theunissen. He testified that he was in charge of the investigation regarding the theft of ultra phones from Siemens. He was instructed by his commanding officer to make contact with private investigator Nico Smith. A formal charge had been laid through the statement by Rodrigues of Siemens. Later the same month he met Smith who was with Langmaak. Smith gave him a typed statement by Langmaak and he confirmed its contents with Langmaak. Due to the fact that he was busy with a court case he assigned his junior, Scott, to assist him with the preliminary investigation.

On the evening of 3rd April 2003 he joined Scott and Smith who were at that time interrogating Erasmus. By that time Erasmus had already made two statements.

[30] Theunissen confirmed that he commissioned the first statement by Erasmus on the evening of 3rd April 2003. The second statement by Erasmus was confirmed the following morning at the police station. He stated that late that night of 3rd April 2003 he was in possession of the statements by Erasmus, Langmaak, Rodrigues and Sowden; that it was on the basis of information contained in those statements that he decided to arrest Erasmus and Malcolm McNab that night. He arrested Malcolm McNab because although he was not a shareholder, Malcolm had told him that his wife was not involved in Iikuti's business dealings. He testified that the following morning when the other members of Iikuti reported themselves at the police station he informed them that he had been looking for them the previous night because their close corporation, Iikuti, had sold ultra phones to Telecom Namibia which Siemens claimed were stolen from their stock. He took their warning statements in which they chose not to make a statement.

[31] During cross-examination by Mr Brandt for the plaintiffs, Theunissen confirmed that the docket was opened on 3rd April 2003 although the statements had been taken by Smith a few days before that date. He had already received the statements of Rodrigues and Sowden from Smith

before 3rd April 2003. He received the statement by Langmaak on the evening of 2nd April 2003 which he commissioned at the offices of Nico Smith. He confirmed that he took the warning statement of Erasmus on that Friday evening after Erasmus had been arrested. He further stated that after he had received Langmaak's statement he went to the Siemens offices to collect further supporting documents from Rodrigues. It was then that Rodrigues explained to him how the serial numbers of the thirty-five units recovered were utilised to identify the units.

[32] Adjutant Scott testified that he was requested by Theunissen to assist him with the investigation of theft of ultra phones from Siemens. He stated that he was present when Erasmus made his first statement; that at first Erasmus denied any knowledge about the phones; that later Erasmus broke down and started crying, whereupon he requested Scott to excuse them so that he could speak alone to Smith because the two had been together in the police force and that Erasmus felt comfortable to talk to Smith alone. He testified that when Theunissen joined them that evening he briefed him about the status of the investigation; that they went to McNab's house and started questioning McNab's wife about the stolen phones; that her explanation was that although her name appeared as a member she did not deal with the affairs of Iikuti but that her husband did; that they interrogated McNab for about two hours. He confirmed that after they left McNab's house they proceeded to Yon's house but there was nobody at Yon's house. From Yon's house they went to Gareth McNab's house; the latter was not at home either. From Gareth's house

they went to the police station where Erasmus and McNab were arrested by Theunissen. He testified that Erasmus and Malcolm McNab were arrested earlier that evening because there was a *prima facie* case that linked the plaintiffs to the theft of ultra phones based on the information contained in the statements. He explained, with respect to *prima facie*, that according to the information in the statements the ultra phones which had disappeared from the Siemens stores were later found to have been delivered to Telecom Namibia by Iikuti, which units were bearing serial numbers of the units which were supposed to be in the Siemens stores. He confirmed that the following morning they interrogated the plaintiffs and took warning statements. According to him, Erasmus' statement confirmed the suspicion. It was on that basis that Erasmus was arrested. According to him the first plaintiff also made certain admissions during questioning which confirmed their suspicion. As far as Erasmus was concerned he would have been arrested with or without his statement.

[33] After Scott's evidence Mr Swanepoel closed the case for the defence.

[34] The legal position is very clear: that the defendants bear the onus to establish on a balance of probabilities that they had reasonable grounds for their suspicion that the plaintiffs had committed the offence of theft, which is a Schedule 1 offence. The test for the existence or otherwise of a reasonable ground for suspicion is determined by an objective test.

> "*As has been pointed out above, the onus was on the appellant to establish on a balance of probability that he had reasonable grounds for his suspicion. In this regard, it may be useful to refer to the remarks of JONES, A.J.P., in Rosseau v. Boshoff, 1945 C.P.D. 135, where the learned Judge said at p. 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 test is an objective one, and as was said in R. v. van Heerden 1958 (3) S.A. 150 (T) at p. 152E:

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

See: S v Purcell-Gilpin 1971 (3) SA 548 at 553 G

See also: Jacobus Gert Hendrik De Jager v Government of the Republic of Namibia (unreported), Case No. 1384/2003 delivered on 24th October 2005

[35] Dealing with the meaning of the words "reasonable grounds", Galgut in R v Heerden 1958 (3) SA 150 at 152 D – E, stated the following:

"*These words must be interpreted objectively, and the grounds of suspicion must be those which induce a reasonable man to have the suspicion.*"

[36] As to the test for "reasonable suspicion", Van Der Spuy AJ in the matter of Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 at 836 I – J stated as follows:

"*How is this 'reasonable suspicion' to be tested? Now it is clear that 'there must be an investigation into the essentials relevant to the particular offence before it can be said that there is a reasonable suspicion that it has been committed*'"

The point was equally made in S v Purcell-Gilpin 1971 (3) SA 548 at 554 C – D where Lewis JA said the following:

"*It seems to me that where the opportunity exists either to allay or confirm an initial suspicion, and especially one of so flimsy and insubstantial a nature as that which the appellant apparently*

> *entertained in the instant case, that opportunity should be taken, and the failure to take it is a failure to act as a reasonable and honest man. I agree with the trial court that he did not have reasonable grounds for his suspicion.*"

[37] Mr Brandt submitted that the crux of the argument on behalf of the plaintiffs was that the statement by Erasmus constitutes an inadmissible confession which in terms of the Criminal Procedure Act should have been totally ignored or excluded by the police officers in their consideration for reasonable suspicion. In this respect, he referred to section 219 of the Criminal Procedure Act which provides:

> ""*No confession made by any person shall be admissible as evidence against another person*."

. He further referred to the case of R v Baartman & Others 1960 (3) SA 535 A. The Baartman case is discussed by Du Toit & Others in *Commentary on the Criminal Procedure Act*, page 24 to 70, as follows:

> "*In R v Baartman & others 1960 (3) SA 535 (A) H, one of five accused persons charged with murder, made a confession which implicated the others. The evidence showed that the accused were together some time before the murder and also at some time after the murder, but the evidence did not establish that any one of them had participated in the actual commission of the offence. The trial court, in determining the guilt of the non-confessing accused, correctly excluded from consideration the inculpatory statements made by H. However, because of 'their association with the proved murderer' H, they were convicted. This, Schreiner JA found, was 'clearly wrong' . . . since there was no evidence of H's guilt sufficient to support his conviction outside of his confession. The trial court had thus 'used the confession to establish an essential part of the chain of inference leading to their conviction, namely that H had taken part in the murder*'"

[38] I do not think that there is merit in Mr Brandt's submission. Section 219 prohibition deals with the confession made by one person and being used

as **evidence** against another person. In my view it would not matter that the statement by Erasmus constituted a confession and would therefore not be admissible against another person. It is immaterial for the purpose of determining whether the police officers took such "confession" into account in forming their "reasonable suspicion". In my view the police were entitled and in fact obliged to take Erasmus' statement into account and as part of the material upon which they formed their reasonable suspicion. Furthermore, in my view it does not matter whether the statement constitutes an inadmissible confession in accordance with the requirement of section 219A of the Criminal Procedure Act to the extent that it had not been proved to have been made freely and voluntarily and taken by one of the persons specified in that section 219A. Sight should not be lost of the purposes for which the Erasmus statement was utilised by the police officers at that stage of the investigation; it was not utilised as 'evidence' but merely as part of the body of materials, constituting written statements, oral statements, including observations or inspections of things, e.g. documents from which the police officers formed or gathered their suspicion. I think that there is a substantial difference between evaluation of information received by a police officer to form a suspicion that a crime had been committed in order to arrest without a warrant, as opposed to the evaluation of evidence by a court upon which it would hold in favour of or against a litigant; or convict or discharge an accused. The problem I have with Mr Brandt's argument is this: it does not differentiate between the information gathered in the course of the police investigation and the information which would ultimately be

tendered to the court as evidence. Mr Brandt sought to rely heavily on what was stated in the matter of S v Banda & Others 1990 (3) SA 466. At 507 B – E Friedman J expounded the legal position with regard to executive statements made by a co-conspirator as follows:

> "*From the authorities that I have cited in the aforegoing paragraph, the result is that, if a witness or an accused were to testify in Court as to an 'executive' statement made by a co-conspirator, that is a statement made in furtherance of the common purposes, such statement would be admissible in evidence against any person who is party to such a common purpose. As far as such 'executive' statement may be contained in an extra-curial statement, made by one of the accused, such 'executive' statement is not admissible against any of the other co-accused, because the extra-curial statement is hearsay and therefore is inadmissible against any accused other than its maker, notwithstanding that the accused may be found to have a common purpose with the person who made the extra-curial statement . . . An authoritative guide on this subject is contained in s 219 of the Criminal Procedure Act which provides that 'no confession made by any person shall be admissible as evidence against another person'. In other words, a confession made by A is not admissible directly or indirectly against B. The section clearly provides that no confession shall be admissible against any person except its maker. The same must also apply in regard to admissions.*"

It is a correct statement of the law. My view is, however, that it is not applicable to the facts of this case. I have already stated my views and I think it is unnecessary for me to make any further comment to this argument, save to say that if the statement by Erasmus was indeed a confession – a question I am not called upon to decide in this case – and it was tendered in evidence against his co-accused at a criminal trial, Mr Brandt's argument would have been perfectly correct. For these reasons I am therefore of the opinion that there is no substance in that submission. My finding is that the police officers were entitled to take Erasmus'

statement into consideration in forming their suspicion.

[39] Even if I were wrong in holding that the police officers were entitled to take into consideration the content of Erasmus' statement, it was not the only information in possession of the police officers upon which they formed the basis of their suspicions. The uncontested evidence is that days before Erasmus' statement was taken Theunissen was already in possession of other statements, i.e. those of Rodrigues and Sowden The statement of Langmaak was obtained earlier that afternoon before Erasmus' statement. The police officers had already carried out extensive investigation before the statement by Erasmus was finally taken. In fact, Erasmus' statement was the last statement taken. Furthermore, it is common cause that before the arrest of Malcolm McNab and Erasmus that evening the police officers had spent a long time interrogating Malcolm McNab at his house. I have had regard to the statements by Rodrigues, Langmaak and Sowden together with the testimonies by Langmaak, Theunissen and Scott and I am satisfied that the defendants have established on a balance of probabilities that the police officers had reasonable grounds for their suspicion that plaintiffs had committed a Schedule 1 offence and they were therefore justified in arresting the plaintiffs without a warrant. The plaintiffs' claims based on common law grounds therefore stand to be dismissed.

[40] There remains for consideration the alternative claims based on constitutional grounds. In this respect Mr Brandt submitted that the plaintiffs' evidence is undisputed that they were detained under horrible conditions, whereby their fundamental rights were violated and/or denied. Mr Swanepoel, on the other hand, submitted that the plaintiffs' main claims were based on a common law delictual claim arising out of unlawful arrest and detention and that the alternative constitutional claims are also based on unlawful arrest and detention. Therefore, so the argument goes, if it is found that the delictual claims of unlawful arrest and detention were indeed lawful it would also follow on the same facts that the alternative claims based on constitutional grounds should fail. I think there is merits in Mr Swanepoel's submission in this regard, but I do not think that the issue is that simple. In my view different considerations apply in evaluating a claim based on the infringement of fundamental rights under the Constitution. Much depends on how the cause of action has been formulated.

[41] I will proceed to consider the allegations of the unlawful denial or violation of the plaintiffs' fundamental rights as set out in the particulars of claim. I should point out that all these allegations are denied by the defendants, relying on the provisions of section 40 of the Criminal Procedure Act that the police officers were entitled to arrest the plaintiffs without a warrants in that they had reasonable suspicion.

[42] The first allegation is that the arrests were unlawful and denied or violated the plaintiffs' constitutional right not to be subject to arbitrary arrest or detention as embodied in Article 11 of the Constitution. Article 11 reads as follows:

"*(1) No persons shall be subject to arbitrary arrest or detention.*

(2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.

(3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer."

[43] The legal position in a constitutional context of South Africa is discussed in *Constitutional Law of South Africa* 1996 edition by Chaskalson and others, at p. 27.4 as follows:

"*The appearance of the arrested person before a court to be charged, tried, and convicted or acquitted is always the primary object of an arrest. If the person effecting the arrest does not intend to bring the detainee or the arrested person before a court and arrests him for other reasons, there can be no lawful arrest in such circumstances for the purposes of s 40(1)(b) of the Criminal Procedure Act. This approach is now strongly fortified by the provisions of s 25(1)(b) of the Constitution. It is submitted that arrest for interrogation may very well come under attack as unconstitutional in that the primary – and constitutional – aim of arrest should be to bring a person before a court of law as soon as possible, but not later than 48 hours after the arrest. Alternatively, the intention must be to release the person failing an appearance before a court and obtaining a court order directing the arrested person's further detention pending a future trial or investigation. It is obviously not suggested that a matter cannot be investigated subsequent to the arrest. The point is made that the person is to be arrested and brought before court immediately and not later than 48 hours after his arrest and that future investigation should take place subsequent to a court order directing further or continued detention pending investigation where such detention is absolutely necessary. This, in my view, will give recognition to the directly expressed intention of the Constitution-giver that a person should not be kept in detention by the police or the authorities, but should be brought as soon as reasonably possible before a court of law so that the court can order continued detention, where it is shown to be necessary and where bail or release on warning is not possible.*"

In my view the legal principles discussed above are applicable to the Namibian constitutional situation. The provisions of section 40 of the South African Criminal Procedure Act are exactly the same as those of section 40 of our Criminal Procedure Act. In applying those principles to the facts of this case, I should first point out that it was not suggested that the object or the intention of the police officers in arresting the plaintiffs were not to charge them and bring them before court. The evidence was that the first plaintiff was charged the same evening, immediately after his arrest. The rest of the plaintiffs were charged the same morning, immediately after they had reported themselves to the police station. The evidence was further that they were thereafter intermittently interrogated during the day and were only locked up late that afternoon. Theunissen testified that when the plaintiffs' lawyer enquired about the possibility of bail, he informed him that he would be prepared to take the plaintiffs to court for a bail application should their lawyer make arrangements with the public prosecutor. The plaintiffs were taken to court at the first available opportunity within the prescribed period of 48 hours. The police officers did not oppose bail being granted to the plaintiffs. I am satisfied that the police officers did not act capriciously or with ulterior motives in arresting the plaintiffs. I therefore find that the plaintiffs were not arbitrarily arrested or detained.

See: Djama v Governemnt of the Republic of Namibia & Other 1992 NR 37

[44] The second allegation in the plaintiffs' particulars of claim is that the

plaintiffs were deprived of personal liberty as embodied in Article 7 of the Namibian Constitution. Article 7 provides as follows:

> "*No person shall be deprived of personal liberty except according to procedures established by law.*"

There is no substance in this allegation. Section 40 of the Criminal Procedure Act clearly establishes the procedure by which a police officer may arrest a person without a warrant. I have already found that the police officers had complied with the requirements prescribed by section 40. They have established on a balance of probabilities that they had reasonable suspicion that the plaintiffs had committed a Schedule 1 offence, and it was on that basis that they proceeded to arrest the plaintiffs. This allegation was proved to be baseless and was dispelled through the evidence of the two police officers.

[45] The third allegation in the plaintiffs' particulars of claim is that the plaintiffs' rights to freedom of movement as embodied in Article 21 (1)(g) of the Constitution was denied or violated. Article 21 (1)(g) reads as follows:

> "*(1) All persons shall have the right to:*
>
> *(g) move freely throughout Namibia;*"

The rights guaranteed by this Article are subject to the limitations set out in Article 21(2). The limitations in respect of Article 21(1) were discussed by Mahomed CJ in Kauesa V Minister of Home Affairs & Others 1996 (4) SA 965 at 976 B – C as follows:

> "*Article 21(1)(a) has limitations. The Court has to ask whether those limits are reasonable. The limitations are set out in art 21(2). Freedoms shall be exercised in accordance with the law of Namibia only if that law imposes reasonable restrictions on the exercise of the rights and freedoms entrenched in art 21(1)(a). The restrictions must be necessary in a democratic society. Not only must they be necessary in a democratic society, they must also be required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality or in relation to contempt of Court, defamation or incitement to commit an offence. Limitations are imposed in order that the rights enshrined in the Constitution should not interfere with the rights and freedoms of others and with Namibia*."

In addition to the limitations imposed by Article 21(2) on the rights enumerated in Article 21(1), Article 11(3) of the Constitution by necessary implication accepts that the right to freedom of movement would be limited through arrest and detention. In my view the right of movement in Article 21 (1)(g) is specifically limited by Article 11(3). This is so because Article 11(3) provides as follows:

> "*All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.*"

If a person is arrested and detained then obviously he or she cannot move freely within Namibia. However, there is a limitation of a 48hour period imposed. Both section 50 of the Criminal Procedure Act and Article 11(3) of the Constitution prohibit the detention of a person for more than 48 hours. These provisions impose the limitation on deprivation of the right of movement through arrest and detention to a maximum period of 48

hours. Any detention beyond 48 hours must be authorised by a competent court. On the facts of the case, the plaintiffs were lawfully arrested and detained for 48 hours, whereafter they were brought before court which authorised their further detention pending formal bail applications. It follows therefore in my judgment that this allegation was equally proved to be baseless and dispelled by the defendants' evidence.

[46] Finally, it was alleged in the plaintiffs' particulars of claim that they were denied their right to human dignity as embodied in Article 8 of the Constitution or that such right was violated. Article 8 provides as follows:

> "*(1) The dignity of all persons shall be inviolable.*
>
> *(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*
>
> *(b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*"

As to the meaning of the words "*inhuman*" and "*degrading*", the following were stated in S v Ncube; S v Tshuma; S v Ndhlovu 1988 (2) SA 702 at 717 D – F:

> "*The precise meaning of the words 'inhuman' and 'degrading' must now be considered: 'Inhuman' is defined in the Oxford English Dictionary as:*
>
> > *'destitute of natural kindness or pity; brutal, unfeeling, cruel; savage, barbarous.'*
>
> *And to 'degrade' as:*

> *'To lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase.'*

Barnett, in The Constitutional Law of Jamaica (1977) at 391, deals with s 17(1) of the Jamaica Constitution, which is in similar terms to s 15(1), and sums up its purport as follows:

> *'It seems that 'inhuman' is limited to such action as by its very nature is barbarous, brutal or cruel and not merely such treatment as results from want of pity or human feeling, and 'degrading' connotes treatment which is calculated to, or in all probability will (not merely might), destroy the human qualities and character of the recipient.'*

The court, in S v Makwanyane 1995 (6) BCLR 665 (CC) at paragraph 144, stated the following with respect to the right to dignity:

> "*Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3 IC . . . Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.*"

[47] The application of Article 8 was considered in Ex Parte Attorney-General Namibia: In Re Corporal Punishment by Organs of State 1991 NR 178 (SC). The court, interpreting Article 8(2) of the Constitution, held that the words "*no persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment*" should be read disjunctively, resulting in seven different conditions, i.e. (i) torture; (ii) cruel treatment; (iii) cruel punishment; (iv) inhuman treatment; (v) inhuman punishment; (vi) degrading treatment; and (vii) degrading punishment. The court went on to say at 187 I – J:

> "*Although the Namibian Constitution expressly directs itself to permissible derogations from the fundamental rights and freedoms entrenched in chap 3 of the Constitution, no derogation from the rights entrenched by art 8 is permitted. This is clear from art 24(3) of the Constitution. The State's obligation is absolute and unqualified. All that is therefore required to establish a violation of art 8 is a finding that the particular statute or practice authorised or regulated by a State organ falls within one or other of the seven permutations of art 8(2)(b) set out above; 'no questions of justification can ever arise'.*
>
> *It accordingly follows that, even if the moderation counselled or contemplated in some of the impugned legislation or practice succeeds in avoiding 'torture' or 'cruel' treatment or punishment, it would still be unlawful if what it authorises is 'inhuman' treatment or punishment or 'degrading' treatment or punishment.*

Further, at 188 A – B and D – F:

> "*The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court.*
>
> *It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.*"

[48] I have already pointed out that it was not the plaintiffs' case that they were subjected to torture or cruel treatment at the hands of the police officers. However, all the plaintiffs testified that they were subjected to inhuman and degrading conditions at the holding cells. Following are excerpts from each of the plaintiffs' testimonies regarding the conditions in the

holding cells:

Malcolm McNab	:	"... *terrible condition ... plus minus forty prisoners or inmates ... there was the smell of human sweat and excrement ... could not sleep because the insects is crawling over your body ... we were really kept in a pig cage ... a big humiliation to lock up people in such terrible situation*."
Gareth McNab	:	"*It was absolutely terrible. There were everywhere cockroaches and lice ... the smell of dagga pollute the whole area ... indescribable humiliation to see how people receive their food in rubbish bins*."
Jon Allen	:	"... *difficult to find space to even sit down ... the stench, there was smoke and dagga .. .*"
Donovan Platt	:	"... *fifty prisoners at one time ... very crowded ... no proper ventilation ... the amount of cockroaches was unbelievable ... there was lice everywhere ... cockroaches crawling all over you ... it was extremely dirty ... conditions was absolutely horrible ... if you should keep animals in the same conditions as that the SPCA would certainly crucify you*."
Aloysius Yon	:	"... *the most humiliating experience … floors crawling with insects and cockroaches .... the stench, all people could see what you are doing on the toilet pan … it is humiliating and I think we should not have such type of treatment in a free country*."

[49] This evidence was not disputed. I am therefore bound to accept it. Having said that, I should point out that in my view the police officers cannot be held liable for the degrading and inhuman conditions prevailing in the holding cells. The liability rests with the State. That the conditions of the police holding cells are "*horrendous*", "*unhygienic*" and "*lack basic facilities*" is notorious and has become a matter of public knowledge and of which this court is entitled to take judicial notice. Local newspapers have over recent years been carrying headlines bemoaning the conditions of the police cells in the country. I am aware of these reports. I refer to some of the excerpts I have been able to lay my hands on:

"***Suspect escaped 'because I wanted to go to jail'***

A suspect being held at the Walvis Bay Police cells says the "unbearable conditions there compelled him to escape so that he could be sent to jail instead . . . Visagie claimed the conditions at the police cells were "inhuman".

The Namibian, 7 June 2004

"***Police force in crisis***

The Namibian Police could be forced to scale down and even terminate its services because of a lack of finances.

Minister of Safety and Security Peter Tsheehama raised the alarm in the National Assembly yesterday, painting a grim picture of trial-awaiting prisoners going hungry, of having to close charge offices at night and of Police mortuaries faced with decomposing bodies over the next year . . .

Minister Tsheehama warned that water and electricity would once again be cut at some Police stations and border posts, as had happened in the past year, because there was not enough money to pay the bills.

"Imagine overcrowded Police cells without water to flush toilets!" exclaimed Tsheehama.

"Unhygienic conditions will result in deteriorated health conditions and in extreme cases even loss of life . . ."

The Namibian, 16 June 2005

"***Conditions in Police cells leave Magistrate shocked***

The conditions in which people are being kept in custody at the Wanaheda Police Station cells in Windhoek are shocking, horrendous and a contravention of the Constitution, a Windhoek Magistrate declared after an inspection of the cells yesterday."

The Namibian, 9 May 2006

"***Police cells high on Ombudsman's agenda***

The conditions in which trial-awaiting crime suspects are being detained in Police cells in Namibia are as worrying to Namibia's Ombudsman as they proved to be to a Windhoek Magistrate who released a man on bail . . . because of the "shocking and horrendous" state of the holding cells at the Wanaheda Police Station."

The Namibian, 11 May 2006

"***Police cells 'hell on earth'***

Police facilities at Rosh Pinah are so limited that keeping trial-awaiting prisoners there for more than a day might qualify as inhuman treatment and a health hazard.

This was just one of the conclusions a recent National Council committee came up with after a fact-finding mission to 12 regions."

The Namibian, 21 February 2007

The uncontested evidence by the plaintiffs on this aspect which I accept, is borne out by these reports it is therefore clear that the plaintiffs' descriptions of the conditions in the cells in which they were detained are not exaggerations. They are borne out by the findings of the Minister whose Ministry is in charge of the holding cells; the Ombudsman, and by members of a Committee of the National Assembly. The Minister himself has in fact confirmed the conditions in the cells. In my view, the reported incident of the arrestee who escaped in order to be convicted for unlawful escape from custody and sentenced so that he can be held at the prison rather than continue to be held in the holding cells because of their horrendous condition, constitutes the highest watermark of the extent to which an arrestee is prepared to go in order to avoid being kept in the

inhuman conditions of the holding cells. It is a clear indication that the conditions of the cells are such that they drive a person to rather commit a crime and be sentenced as the only way of getting out of those cells. Ordinarily, the rights of the sentenced person are more curtailed than those of the trial-awaiting person.

[50] In terms of Article 12 (1)(d) of the Constitution an arrested person is presumed to be innocent until proven guilty. After the arrest the arrested person retains all his or her fundamental rights including their right to human dignity. It is inhuman for an arrested person to be locked up in a confined cell with about 40 other persons; it is inhuman to lock up a person in a cell infested with cockroaches and lice. It amounts to degrading treatment. Some persons are allergic or simply cannot stand the sight of a creepy or crawly insect; it is degrading to serve persons with food in rubbish bins; it is inhuman and cruel to hold 40 to 50 persons in a small, poorly-ventilated cell; and finally, it is degrading to cause a person to answer the call of nature in full view of other persons held in the same cell, in particular when that person happens to be a senior citizen. I may mention in this context that Mr Yon broke down in tears when he recounted his experience in the cell. An arrested person has a right to be held in conditions which are not degrading. It is a violation of an arrested person's constitutional right to be held in such horrendous conditions. It is plainly unconstitutional and unlawful. We all have accepted the Constitution as our Supreme Law. We are all parties to this sacred contract. As a judge, I am oath-bound to uphold the Constitution for the benefit of all who live in Namibia. It is of no consequence to me that those who are responsible for the upkeep of holding cells say that they have no resources to maintain the holding cells in a clean and hygienic condition in compliance with the dictates of the Constitution. It has been held by this court that a lack of financial resources should not be a factor to be taken into account by a court in enforcing the fundamental rights enshrined in the Constitution. The State is constitutionally bound to find and make such resources available, failing which it will be held liable for violation of the person's fundamental rights.

> "*This Court therefore not only has the power but is obliged in terms of the Constitution to see to it that the Articles of the Constitution are not only pious provisions to be quoted in academic circles but are the practical instruments for fulfilling the notable preamble to the Constitution the first paragraph whereof provides:*
>
> > *'Whereas recognition is given to the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace.*'"

See : Mwilima & Others v Government of the Republic of Namibia & Others 2001 NR 307 at 315 G - H

[51] Article 25(2) of the Constitution provides that aggrieved persons who claim that a fundamental right or freedom guaranteed by the Constitution has been infringed shall be entitled to approach a competent court to enforce or protect such right or freedom. Sub-article (4) provides that the power of the court shall include the power to award monetary compensation in respect of any damages suffered by the aggrieved person in connection with such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of a particular case.

[52] I have arrived at the conclusion that the conditions in the holding cells in which the plaintiffs were detained are inhuman and degrading and therefore unlawful in that it violated the plaintiffs' constitutional right to human dignity. It does not, unfortunately, automatically follow that the plaintiffs would thereby succeed with their claims on this ground. The success of the plaintiffs' claims depends much on how their claims have been formulated or pleaded in the context of the Constitution. Now, in terms of the rules of pleading, the object of the particulars of claim is to inform a defendant of the nature of the claim the defendant is expected to meet. Consequently, it is insufficient for a plaintiff to merely set out the relief claimed; the plaintiff is required to set out the cause of action and on what it is based.

See: Herbstein & Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3rd ed., Juta, 1979, p. 180

Where a plaintiff wishes to claim damages as a result of unlawful denial or violation of his fundamental rights or freedoms, he must formulate his cause of action in such a way that it is clear that such cause of action is premised on the provisions of sub-articles 25(3) and 25(4) of the Constitution. Those are the sub-articles which empower the court to award monetary compensation arising from the unlawful violation or denial

of fundamental rights. In this case the plaintiffs merely cited the fundamental rights which were violated, particularly the right to human dignity, but failed to set out the basis for the relief claimed. The defendants did not know what cause they were required to meet. The particulars of claim therefore lacked the necessary averment to sustain the relief claimed. I am of the further view that had the plaintiffs' claims been properly pleaded, the circumstances of this case would have been appropriate as envisaged by sub-articles 25(4) of the Constitution to award monetary compensation arising from the unlawful violation of their right to human dignity.

[53] For the aforegoing reasons, I make the following order:

That the plaintiffs' main claims as well as the alternative claims are dismissed with costs.

_____

ANGULA, A.J.