

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1627/2006

In the matter:

THOMAS KAASHIWO KANIME

PLAINTIFF

and

THE MUNICIPAL COUNCIL OF WINDHOEK

FIRST DEFENDANT

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

SECOND DEFENDANT

Neutral citation: *Kanime v Municipal Council of Windhoek* (I 1627-2006) [2013] NAHCMD 357 (26 November 2013)

Coram: **VAN NIEKERK J**

Heard: 17, 18, 19 June 2008; 27 October 2008

Delivered: 26 November 2013

Flynote: Claim for damages for unlawful arrest and detention – Issue of defendants liability adjudicated separately from quantum – defendants alleged that arrest lawful under section 40(1) of the Criminal Procedure

Act, 51 of 1977 and that detention lawful in terms of section 50(1) of the Criminal Procedure Act – such proved on balance of probabilities – defendants not liable for plaintiff's damages – plaintiff's claim dismissed with costs.

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

VAN NIEKERK, J:

[1] The plaintiff instituted action against the defendants for damages for wrongful arrest and detention by members of the Windhoek City Police and the Namibian Police during the period 19 - 20 March 2006. He claims an amount of N\$75 000 against each defendant.

[2] In his particulars of claim the plaintiff alleges, *inter alia*, the following:

- '3. On 19 March 2006 at Windhoek, Independence Avenue, members of the City Police unlawfully and intentionally seized the Plaintiff's person and took him into custody –
 - 3.1 without a warrant for his arrest;
 - 3.2 without arresting him in accordance with law and the prescribed procedures for such arrests;

- 3.3 in violation of his rights as contemplated in Article 11(1) of the Namibian Constitution;
 - 3.4 without any lawful or probable cause and/or in an arbitrary manner;
 - 3.5 in conflict with Section 40(1)(b) of the Criminal Procedure Act.
4. On the same date at the police station at Windhoek Police Cells, the Plaintiff was unlawfully detained by members of the City Police and members of the Namibian Police, at the Windhoek Police Station from 19 March to 20 March 2006 –
- 4.1 without a Notice of Detention;
 - 4.2 without having been taken into detention in accordance with the law and prescribed procedure;
 - 4.3 in violation of the Plaintiff's rights as contemplated in Article 11(1) of the Namibian Constitution;
 - 4.4 in violation of the Plaintiff's rights as contemplated in Article 11(2) of the Namibian Constitution;
 - 4.5 without any reasonable and probable cause and/or in arbitrary manner and/or without being promptly informed in a language he understood of the grounds for his arrest and detention.
5. On 19 March 2006 at or near the place referred to in paragraph 4 *supra* the Plaintiff's liberty, dignity and the integrity of his person were unlawfully violated or injured by members of the City Police and Namibian Police and/or on the instructions and/or insistence of members of the City Police and the Namibian Police in that –
- 5.1 the Plaintiff was unlawfully taken into custody as pleaded in paragraph 4.1;
 - 5.2 the Plaintiff was unlawfully detained, at stages in public, as pleaded in paragraph 4.2.
6. In and as a result of the aforesaid unlawful acts by members of the City Police and the Namibian Police the Plaintiff –
- 6.1 was injured in his dignity and reputation;
 - 6.2 was humiliated and suffered emotional stress;
 - 6.3 was deprived of his freedom of movement and his liberty;

6.4 was deprived of his constitutional right to dignity, liberty, due process and freedom of movement as contemplated in articles 7, 8, 11, 13 and 21(1)(g) and (i) of the Namibian Constitution.'

[3] In further particulars provided by the plaintiff upon request by the first defendant he stated that he did not know the names of any of the police officers involved; that at the beginning there were two male City Police members and later a female City Police member who joined them with an alcohol breathalyser; that the prescribed procedures which were not followed were that 'the said members of the City Police did not warn the Plaintiff accordingly (*sic*) to the "Judges Rules" and failed to adhere to those" Judges Rules" while "arresting" and "detaining" the Plaintiff'; that on 20 March 2006 at the Windhoek Police Station the plaintiff was for the first time informed of three charges against him, namely (i) drunken driving; (ii) defeating the ends of justice; and (iii) driving without a driver's licence; that the 'Notice of Detention' was supposed to have been given to him by the members of the City Police and/or the Namibian Police.

[4] In response to further particulars requested by the second defendant the plaintiff stated that the arrest took place between 21h00 and 22h00 on 19 March 2006; that he was never informed by the City Police on which charge or for which offence he was arrested; that he did not drive a motor vehicle, but that it was driven by a Mr Taapopi; that the plaintiff was informed and instructed to blow into the alcohol breathalyzer after waiting for approximately two hours due to the late arrival of the City Police female officer operating the breathalyzer; that the breathalyzer showed a zero result, apparently because it was non-functional, and later the plaintiff was informed by the City Police members that the breathalyzer was non-functional and that he had to be taken to Katutura State Hospital for an alcohol blood sample; that the blood sample was probably taken after midnight; that the plaintiff was formally charged on 20 March 2006 between 11h00 and 12h00; that he appeared in the magistrates' court on 20 March 2006; that the case against him was postponed to 30 October 2006 for further investigation; that he was released on 20 March 2006 before 13h00 at the court after spending several hours in the police cells.

[5] The first defendant's defence as set out in its amended plea is, in a nutshell, that the City Police members were peace officers as defined in the Criminal Procedure Act, 51 of 1977, ('the CPA') and that Const Silumbu lawfully arrested and detained the plaintiff without a warrant in terms of section 40(1)(b) of the CPA until he was handed over to the Namibian Police.

[6] The second defendant's defence is that the plaintiff was arrested and detained by a peace officer in the City Police in terms of section 40(1)(a) or (b) of the CPA and later handed over to the Namibian Police who detained him in terms of section 50 of the CPA and brought him before the magistrates' court within 48 hours where after he was released. It became common cause that the plaintiff was released on a warning to appear on the postponement date.

[7] At the start of the trial the Court gave leave for the issue of liability to be determined separately from the issue of the measure of damages. It was further agreed that the onus to begin is on the defendants.

First defendant's case

[8] The first defendant presented the evidence of three witnesses: Const. Thomas Silumbu, Sgt. Katrina Auchas (formerly Isaacks) and Const. Andreas Hamukwaya.

Const Silumbu

[9] He is a constable in the service of the first defendant's City Police. He was on duty from 22h00 on 19 March 2006 to 6h00 on 20 March 2006 and tasked with crime prevention. During the early hours of 20 March 2006 at about 2h30 he was on duty with Const Amukwaya. They were both in City Police uniform and using a clearly marked City Police van. He attended to a complaint at the Wika service station in Mandume Ndemufayo Avenue in Windhoek. While there, he observed a Hyundai vehicle about 15 metres away that made an illegal turn from the one side of the said Avenue to the other, by ignoring a no entry traffic sign. At the time he ignored the transgression as he was busy dealing with the complaint.

[10] About 10-15 minutes later he was driving the police vehicle in Sam Nujoma Drive near the robot controlled intersection with Independence Avenue when he observed the same Hyundai vehicle in front of him at the intersection travelling from south to north in Independence Avenue. The vehicle was travelling in the same direction, but very slowly and not properly in his lane as the vehicle's wheels were straddling the white line. This raised his suspicions and he decided to follow the Hyundai. He switched on the blue light of his vehicle and later also the siren to indicate that the Hyundai should stop. Near the Kalahari Sands Hotel the Hyundai finally pulled over to the side. He stopped behind the Hyundai and got out, moving to the driver's side, while Const Amukwaya went to the front passenger side. The driver, who was the plaintiff, opened the window. There was one passenger sitting in front in the passenger seat. It is common cause that the person who was in the vehicle with the plaintiff was Mr Taapopi.

[11] Const Silumbu introduced himself and when he took out his appointment certificate, the plaintiff said that he could see that he was of the City Police. He asked the plaintiff whether there was something wrong or whether there was something wrong with the car. The plaintiff responded by asking, "Does it look like there is something wrong?" Const. Silumbu replied by saying that the first time the plaintiff made wrong turn and now he was driving at a very slow speed and not straight in his lane. The plaintiff responded by saying "Maybe you were sleeping that time." Const. Silumbu asked the plaintiff to step out of the car. The plaintiff wanted to know why, to which the constable replied that the plaintiff smelled of alcohol and that he would be calling for a breathalyzer test to be done. The exchanges between them took place in English.

[12] The plaintiff got out. He was unsteady on his feet and looked like he wanted to fall. He moved around the front of the vehicle and sat down on the pavement. He then asked the witness whether he knew who he (the plaintiff) was. The witness replied in the negative. The control room was called and a request was made that a traffic officer be sent to conduct a breathalyzer test.

[13] About 10 minutes later Sgt Auchas arrived. Const. Silumbu introduced her to the plaintiff, to which the plaintiff replied that he knew who they were and that he does not have to be told. When the plaintiff was informed of the traffic officer's intention to take the test, he pretended not to understand and started to speak in Oshiwambo. Const Amukwaya, who could speak the language, translated what was said. The first attempt at taking the test failed. The witness was not sure whether the plaintiff could not blow or whether he was just being difficult. On the second attempt the reading was 0.85. Sgt Auchas stated that as the reading was over the legal limit of 0.37 (milligrams per 1 000 millilitres) he would be arrested and taken for another test with a device which provides a written record of the results.

[14] Const. Silumbu then placed his hand on the plaintiff's shoulder and stated that he is arresting him for driving under the influence of alcohol. When the witness wanted to explain his rights, the plaintiff said he knew what they were. He resisted having to get into the police van and said that they did not know who he was and that they would lose their jobs. He insisted that he should travel in his own vehicle. Eventually Const Silumbu drove the Hyundai to the police station accompanied by the plaintiff and Mr Taapopi, while Const. Amukwaya and Sgt. Auchas drove in the latter's traffic control vehicle. Everyone waited at the police station while Const. Silumbu and Sgt Auchas returned to fetch the police van. When they returned to the police station, the plaintiff was put in the van at the back. During cross-examination he was at first not sure whether Mr Taapopi accompanied the plaintiff in the van as alleged by the cross-examiner. Later something jolted his recollection and he stated that he was sure he not there.

[15] They drove to the traffic police headquarters where three attempts were made to take a breathalyzer test. The plaintiff appeared not to blow properly and readings could not be taken. The device shuts down after three attempts and can only be used again after 30 minutes. They therefore decided to take the plaintiff to the hospital for his blood to be drawn. Throughout the plaintiff was rowdy, resisting being moved and wanted to fight. He actually kicked Sgt Auchas. They therefore handcuffed him in order to restrain him. At the Katutura State hospital the plaintiff spoke English to the medical officer. A blood sample was taken. Afterwards the City

Police members involved transferred the plaintiff to the Central Police Station and handed him over to the Namibian Police to be kept in custody.

[16] During the events of that early morning the plaintiff at no stage claimed that someone else had been driving the Hyundai.

[17] He was not sure of the time that passed during the events, but he estimated that they spent about 15 minutes at the headquarters; that they did not wait long at the hospital as priority is given to the police; and that the plaintiff was back at the police station at about 4h00.

[18] During cross-examination on behalf of the plaintiff Const Silumbu readily admitted that he was not able to identify the driver or the passenger in the Hyundai when it made the turn at Wika.

[19] The version of the plaintiff was put to him. It is that there initially were four persons in the Hyundai: the plaintiff, Mr Taapopi, Chief Insp. Shikongo and a certain Thomas. At about 22h00 the latter two were dropped off at First National Bank, Ausspannplatz. Mr Taapopi drove the vehicle in Independence Avenue from south to north. At the intersection with Sam Nujoma Drive he observed the City Police vehicle and the blue light. After the siren was put on he pulled to the left at Kalahari Sand Hotel and parked the Hyundai. He switched off the engine and he and the plaintiff got out of the vehicle. They were standing on the pavement when the two policemen arrived. Const Silumbu never showed his appointment certificate. He asked "Who is the owner of this Hyundai?" Then Const. Silumbu called Sgt Auchas to come to do the breathalyzer test. When she arrived she tested the plaintiff, but showed him no results. She said that the equipment was not functioning properly. Const Silumbu and Mr Taapopi drove to the police station in the Hyundai while the plaintiff was taken in the police van. After waiting about 20-30 minutes the plaintiff and Mr Taapopi were put into the van and taken to the State Hospital for blood to be drawn. Const. Silumbu did not accompany them, but Const Amukwaya and Sgt Auchas did. Const Silumbu allegedly did not explain the Judges' Rules to the plaintiff.

[20] Const. Silumbu denied everything that was at variance with his testimony. He vehemently denied that the incident happened at 22h00 on 19 March. He said that Mr Taapopi said to them that the plaintiff was rude to them because he was drunk and that they should not listen to the plaintiff. Mr Taapopi did not say that he was the driver of the Hyundai.

[21] He could not say how long it took to move from the scene to the police station, but from the police station to the traffic police headquarters took about 6 minutes, from there to the hospital about 10 minutes, they spent about 10 minutes there and driving back to the police station took about 10-15 minutes.

[22] It was put to him that the plaintiff spoke only Oshiwambo that evening and that he never sat on the pavement, which version Const Silumbu denied.

[23] During cross-examination on behalf of the second defendant Const Silumbu said he did ask for the plaintiff's driver's licence, but he had none. He was also charged with the offence of driving without a driver's licence. He confirmed that he only came on duty at 22h00 on 19 March. At that time he had to attend the duty parade at the police offices where all the duty officers were briefed about the shift and inspected for sobriety, proper uniform and possession of required documents, e.g. the appointment certificate. This procedure took about 30 minutes. It would therefore have been impossible for him to have been involved in the incident with the plaintiff at 22h00.

[24] He said he only found out later that the plaintiff was a magistrate. He described the plaintiff as drunk and very arrogant.

[25] During re-examination he stated that he had the impression that the only reason why the plaintiff started speaking in Oshiwambo after Sgt Auchas arrived was to waste time and to delay the taking of the tests. It was drawn to his attention that the plaintiff's further particulars state that they had to wait two hours for Const Auchas to arrive. He denied this and repeated his earlier evidence that they only waited about 10 minutes. He further testified that if the plaintiff or Mr Taapopi had insisted that the latter was the driver, they would have tested him for alcohol as well.

Sgt Auchas (formerly Isaacks)

[26] She is a traffic officer in the service of the City of Windhoek. She also worked the 22h00 to 06h00 shift from 19 - 20 March 2006. She was on patrol duty. When she received the call from the radio control room to proceed to the Kalahari Sands Hotel to perform the breathalyzer test, she was in the suburb of Kleine Kuppe. She immediately acted on the instruction.

[27] She corroborated the evidence of Const Silumbu in all material respects. She further stated that the reason why the breathalyzer tests failed was because the plaintiff did not blow into the pipe with the necessary force to provide the required minimum volume of breath. The plaintiff and Mr Taapopi never stated that the latter was in fact the driver. She further stated that the plaintiff was aggressive when he was ordered to get into the police van. He resisted their efforts to put him into the van at the traffic headquarters and kicked her on her leg on one occasion.

[28] The doctor who took the blood sample explained the procedure to the plaintiff. A form was filled in (Exh "B") in which Sgt Auchas (whose surname was then Isaacks) recorded the examination at Katutura Hospital took place at 03h35. This was confirmed by the doctor in writing in her presence. He also indicated that the blood sample was taken at 03h40. Sgt Auchas stated that she returned to the police station between 04h00 and 04h30 where she handed the plaintiff and the sealed blood sample to the charge office personnel.

[29] Sgt Auchas stated that the plaintiff smelled of liquor, he was talking too much, and he was aggressive. He resisted being put into the van and kicked her. His behaviour and condition led her to conclude that he was under the influence of alcohol.

[30] On 20 March 2006 she issued the plaintiff with a notice to appear in the magistrate's court with the option of paying an admission of guilt fine for the offence of driving a motor vehicle without being the holder of a driver's licence, alternatively without carrying the driver's licence with him. She indicated that the plaintiff was

unemployed because that is what he told her. It is only later that she found out that the plaintiff was in fact employed as a magistrate at the time.

[31] During cross-examination on behalf of the plaintiff she explained that she had the breathalyzer with her and she conducted the test because she was a traffic officer, whereas the other two members were ordinary police officers. She was adamant that she arrived at the Kalahari Sands at about 2h30, which was 8 - 10 minutes after call and that the blood sample was taken within two hours of receiving the instruction to attend at the scene.

[32] It was put to her that the plaintiff denied going to the police station in his vehicle and that he went in the van instead, but this she denied. She also denied that Mr Taapopi went along to the hospital or that she drove him home.

[33] She said she asked the plaintiff for his driver's licence but he did not produce it. That is why she issued the notice, which she handed to him at the charge office. She denied the allegation put that the plaintiff had the licence on him the whole time, but that no-one asked him for it.

Const Amukwaya

[34] He confirmed the evidence of the previous two witnesses in all material respects.

Second defendant's evidence

[35] The second defendant called Const Annette Goagoses, Const Vilho Amoomo, Const Jackson and Const J P Jarson.

Const Goagoses

[36] She is a member of the Namibian Police and was on duty from 22h00 on 19 March 2006 to 6h00 on 20 March 2006 at the Windhoek Central police station in the charge office. At about 4h05 Sgt Auchas brought the plaintiff in on a drunken driving charge with the instruction that he be detained in custody. She made the necessary entries in the occurrence book (Exh "E") and placed the blood sample she received

from Sgt Auchas into the safe. The plaintiff was very drunk and could not tell her his name. She did not place him in the waiting cell because she was worried that other detainees may take advantage of his drunken state. She detained him in the charge office where she had the assistance of the cell guards. She did not charge him then because he was too inebriated to understand. In such circumstances the detainee is given time to sober up. When she went off duty he was not yet charged.

[37] In cross-examination on behalf of the plaintiff it was put to her that, although the plaintiff had taken some liquor on 19 March, he was not drunk when she saw him, which she denied.

[38] During cross-examination by Mr *Erasmus* for the first defendant, she confirmed that once the members of the City Police had arrested the plaintiff and handed him over to the Namibian Police, their jurisdiction ended.

Const Amoomo

[39] He served in the Department of Investigation of the Namibian Police. On 20 March 2006 at 08h00 he started his duties at the Windhoek Central police station as a standby officer for accidents and cases of drunken driving. At the charge office he signed out all the dockets which were supposed to be registered. On the way to his office the plaintiff called him over by name. They knew each other. The plaintiff explained that he was being detained for drunken driving and asked whether the witness had the docket, which he affirmed. He booked the plaintiff out and took him to Const. Jackson to be formally charged.

[40] After he was charged the witness booked the plaintiff back and noted that the police had set bail of N\$500. As the plaintiff could not pay this amount, he later that morning at about 10h00 booked the plaintiff out to be taken to court for his first appearance. The plaintiff's case was called soon and he was released on warning. The witness assisted the plaintiff by taking him home.

Const Jackson

[41] Const Jackson confirmed that he received the plaintiff and charged him on 20 March 2006. In the docket he noticed that mention was made that the plaintiff had no driver's licence. When has asked the plaintiff about this, he said that he had a licence but that it was not in his possession that day.

Const Jarson

[42] Const Jarson is the investigating officer in the matter. The charges against the plaintiff entered in the police docket (Exh "D") were that he drove a vehicle under the influence of intoxicating liquor and that he drove a vehicle recklessly, negligently or inconsiderately. He testified that at the time of the civil trial the blood sample had not yet been analyzed. He noticed at some stage that the criminal case had been withdrawn on 3 September 2007 because the results of the test were not yet available. He never charged the plaintiff with defeating the ends of justice and evidently did not take any statements which indicated that the plaintiff had not been the driver of the vehicle, nor did he investigate such a charge.

The plaintiff's evidence

[43] The plaintiff testified and called three witnesses. They are Chief Insp Shikongo, Sgt Numbala and Mr Immanuel Taapopi.

The plaintiff

[44] His testimony may be summarized as follows. He had been employed as a public prosecutor since 1991 and since 200 as a magistrate. At the time of the events in this case he was serving as such in Windhoek. He is the owner of the Hyundai vehicle, but since the morning of 16 March 2006 up to the incident, which occurred on a Sunday, he did not drive the vehicle as he did not know Windhoek well. It was driven by Mr Taapopi. On the Sunday he, Mr Taapopi, Thomas and Chief Insp Shikongo had visited a certain house in Otjomuise where they drank a traditional maroela drink usually made during the rainy season. This drink did not contain much alcohol as it is prepared like a juice.

[45] Between 22h00 and 23h00 on 19 March 2006 the four men drove into the city centre with Mr Taapopi as the driver. The plaintiff was in the front passenger seat and the other two men at the back. They dropped the latter two off at a circle in Independence Avenue near First National Bank, which is close to their place of residence. From there Mr Taapopi drove in Independence Avenue towards the Kalahari Sands Hotel. Close by they saw the police vehicle's blue lights and heard the siren behind them. Mr Taapopi veered towards the left and parked in front of the hotel. The both got out and stood on the pavement. The municipal police vehicle stopped behind them. Two uniformed officers approached them and asked who the owner of the Hyundai was. The plaintiff responded in Oshiwambo that he was the owner.

[46] These officers started to accuse him of being drunk and being the driver of the Hyundai. He 'tested' them by saying 'You are saying that it's me driving the vehicle and saying I'm drunk', and he took issue with the fact that he did not know just from their uniforms who they were as they did not identify themselves. The one officer who was able to speak Oshiwambo was trying to interpret to the other officer, but expressed himself in a mixture of broken Afrikaans and English. These officers told him that he was drunk and called for their colleagues on the radio.

[47] It took 'a long while' until the colleague arrived. It was a female officer who required of him to perform a breathalyzer test. She then informed him that he was drunk. He enquired about her identity as she just wore a uniform without a name tag. The reason why he asked this information was because there often are cases where thugs pose as police officers.

[48] He confirmed that he blew once but was told that there was not enough breath. He blew a second time and the female officer said that the instrument did not work properly and that he would be taken to Katutura for a blood sample. He refused and asked how she could come with an instrument that was not working properly when she is on duty. Beside this she did not tell him that she was investigating anything or tasked to do that work – she just 'came' to him.

[49] The officers required of him to get into the van, but he asked where the law said that he should get into the van if he had his own vehicle. They tried to get hold of him to put him into the van, but he refused, saying that he would go in his own vehicle to the police station. One of the police officers then drove his vehicle, Mr Taapopi sat in front and he sat at the back. He said that the police officer who was interpreting 'falsely' and the female officer went in her police car. (He did not say in what way the interpretation was false). The van remained at the scene. His vehicle was parked at the police station. They all entered the police station where he and Mr Taapopi remained with the officer who interpreted while the other two officers disappeared for a long time.

[50] Then 'a' female and male officer arrived and asked him to get into the van that had been left behind at the scene. They were to go to the hospital. He refused to get into the van and required an explanation, which was given, namely that the breathalyzer instrument they had was not working. He said that he would rather go to the hospital in his vehicle, but they refused and said that if he does not get in they will do their work as they usually do it. He was handcuffed and put inside the van. Mr Taapopi who had been standing at a distance, also got into the van, saying that, if the plaintiff is going, he has no reason to stay behind.

[51] He could not see properly where they were going, but later found himself at the Katutura hospital. He did not know for what purpose he was taken there. The handcuffs were taken off and blood was drawn, but he did not know for what disease. At this time Mr Taapopi was waiting outside. Afterwards he was handcuffed again and they returned to the van. The officers said that they were going to lock him up. The next thing he just found himself back at the police station again. He does not know what time it was because he was in a lot of pain as a result of being handcuffed. He was locked up.

[52] He stated that the evidence that he was taken to the traffic headquarters to take another breathalyzer test is lies. He further expressed surprise at the evidence by Const Goagoses and said that he was detained in a 'small place' with three or four other people. He dealt with a male officer. He was given no blanket, had to sleep

while sitting up and was denied medical attention after he complained of pain because of the handcuffing.

[53] He recalls that an unknown officer charged him and that Const Amoomo took him to court between 10h00 and 11h00. He complained to the presiding magistrate that he had been arrested illegally. He was eventually warned to return to court for the next appearance. Const Amoomo took him back to the police station at 12h00 and he was released at 13h00.

[54] He had his wallet containing his driver's licence on him the whole time at the scene and while he was in custody. The Hyundai's key he received back at the charge office. His vehicle had been parked in the sun 'as abandoned.'

[55] He denied that his driver made any illegal U turn. The notice to appear issued by Sgt Auchas was shown to him in court, to which he replied that he was seeing it for the first time.

[56] He denied that he was drunk that evening or that he sat on the pavement.

Chief Insp Shikongo

[57] He is a member of the Namibian Police who testified in his personal capacity. He resided at the Namibian Police flats. On Sunday, 19 March 2006 during the afternoon he was invited by the plaintiff to join him at Mr Taapopi's home in Otjomuise for a braai and a celebration of the marula tree. He went there by taxi with Mr Thomas Numbala. He found the plaintiff, Mr Taapopi and a female person there. They all, except Mr Taapopi drank some of the marula drink, but they were not drunk. Past nine o'clock they left in the Hyundai with Mr Taapopi driving. They returned to the city centre along John Meinert Street and Mandume Ndemufayo past the Wika service station. The driver did not make the turn described by the witnesses for the first defendant. Between 22h00 and 23h00 he and Mr Numbala were dropped off at Ausspannplatz, whereas the plaintiff and Mr Taapopi continued along Independence Avenue in the direction of the Kalahari Sands Hotel. The plaintiff told him the next afternoon about his arrest and detention. He agreed that he could

not dispute that the plaintiff was found behind the Hyundai's steering wheel at about 2h30.

Sgt Numbala

[58] Chief Insp Shikongo's evidence was confirmed in all material respects by Sgt Thomas Numbala, a member of the Namibian police who also testified in his personal capacity. He could not recall at what time they left the celebration, but estimated that they were dropped off between 22h00 and 23h00. He called the plaintiff on his cell phone early the next morning at about 8h00 because they are friends and to hear how he had arrived home. The plaintiff said that he was safe but that he had been caught and that he was in pain. He later heard from Chief Insp Shikongo that the plaintiff had been arrested for drunken driving. They never thought to inform the police that the plaintiff was not the driver. He further confirmed that the plaintiff was transferred to Windhoek at the end of 2004.

Mr Taapopi

[59] He could not say since when he knew the plaintiff. On 19 March 2006 he went to visit the plaintiff at his home in Eros as he usually does. From there they went to his brother's house in Otjomuise where they had the marula celebration. He did not drink anything. He further confirmed the evidence given by the plaintiff.

[60] He further stated that the vehicle that stopped them was a City Police van. The two officers did not ask who had been driving the Hyundai. They said that the plaintiff was under the influence of liquor and contacted a colleague to come and test the plaintiff. He estimates that they waited about 30 minutes until a female officer arrived. The plaintiff blew twice but the device did not function. He told the officers that he was the one who drove the vehicle, but they did not listen, they just focussed on the plaintiff.

[61] He confirmed that the plaintiff travelled to the police station in the Hyundai and that the police van was left behind. They waited there while the one officer and the female officer left. After a while they returned and instructed plaintiff to get into the van to go to the hospital to have a blood sample taken. The plaintiff refused to get

into the van and wanted to travel in his own vehicle. The police handcuffed him and pushed him inside. He decided to accompany the plaintiff. At the hospital the plaintiff could not get out and the officers had to drag him out by his legs. He remained at the van while the plaintiff was taken inside. Afterwards they all returned to the police station and the plaintiff was locked up. One of the police officers took the witness home.

[62] None of the officers introduced themselves that evening, but he could see that they were wearing City Police uniforms.

Evaluation of the witnesses and the evidence

[63] The witnesses called for the defendants generally made a favourable impression on me. They gave their evidence in a clear and straightforward manner.

[64] The plaintiff, on the other hand, made a very poor impression on me. He tended to be longwinded and argumentative. His testimony, both in chief and under cross-examination, is riddled with contradictions, improbabilities and absurdities. I shall mention only some of the most glaring.

[65] The plaintiff's version is that Mr Taapopi drove his vehicle as he always does because he uses Mr Taapopi as a driver. The reason for this is that he did not know Windhoek well enough at the time to drive. When he was asked how long before the incident he moved to Windhoek, he claimed not to recall, which is in itself unlikely. Later when it was put to him that he moved to Windhoek in 2004, he stated that he had no answer to give. His own witness, Sgt Numbala later confirmed that the plaintiff did indeed move to Windhoek at the end of 2004.

[66] It is clear from the cross-examination by Mr *Erasmus* on behalf of the first defendant that the plaintiff had ample time and opportunity to become acquainted with the streets of Windhoek and that since 2005 he had the use of the Hyundai. His answer that he did not look around when he travelled by taxi is improbable. I agree with counsel's suggestion that the plaintiff falsely attempted to create the impression that he did not know Windhoek well enough to drive and therefore used the services of Mr Taapopi that whole weekend.

[67] The plaintiff adapted his version as the case went on. For example, he stated in further particulars that he was stopped by the police between 21h00 and 22h00. The version put to Const Silumbu, the first witness, by the plaintiff's lawyer, is that the incident occurred at about 22h00 just after Chief Insp. Shikongo and Sgt Numbala were dropped off at Ausspannplatz. However, when Const Silumbu clearly testified during cross-examination the second defendant's lawyer that he only came on duty at 22h00 and had to attend the duty parade which lasted about 30 Minutes, it became evident that the stopping could not have occurred at 22h00. Const Silumbu was corroborated in this respect by Sgt Auchas. Only after this evidence was given did the plaintiff's version change to state that he and his friends left the party in Otjomuise between 22h00 and 23h00, but before midnight. The pleadings were however not amended to reflect this.

[68] Apart from this adaptation the plaintiff's evidence about the times that various things happened was contradictory. Although the plaintiff clearly stated in his further particulars that they waited for approximately two hours for Sgt Auchas to arrive, he never stated this in evidence and only mentioned 'a long time'. It was also not put to the defendants' witnesses that they waited two hours. In cross-examination he stated that he could not say how long they waited for Sgt Auchas to arrive as he had no watch. All he knew is that she came after a while. He could not explain why the answer was given in the further particulars that he waited for approximately two hours for her to arrive. In his view these two versions were consistent.

[69] In his pleadings the plaintiff alleged that he was only charged between 11h00 and 12h00 on 20 March 2006. However in testimony he stated that this occurred between 10h00 and 11h00 and that he was brought back from court at 12h00.

[70] Another aspect is his evidence about the stopping by the police. He said he noticed the blue light because it lights up one's car inside. When it was put that the City Police car was close to his vehicle, he stated that the blue light is visible from afar, even if behind because it would be visible in the rear view or side mirrors. When he was pertinently asked how far the police vehicle was when the light was put on, the plaintiff then answered for the first time rather startlingly that they had

already stopped by then, but he was evasive when invited to state the reason why. He was also evasive when asked to estimate how long they had stopped before the police vehicle also stopped. He did say, though, that he and Mr Taapopi were already outside on the pavement and let slip that they 'expected' the police to confront them. When asked why they expected this, he, curiously, said he did not know. When further pressed he then denied that he used the word 'expected', but he also did not make a correction earlier.

[71] He said he and Mr Taapopi did not say anything to each other when Mr Taapopi stopped. Yet they both got out in order to wait on the pavement. This is also rather strange.

[72] When he saw the blue light and heard the siren, he expected the vehicle to be an ambulance, a police vehicle or an official escort vehicle. He said the van looked similar to a police vehicle and the uniforms looked similar, but he was surprised when he did not see the officer's wearing name badges or rank insignia. Nevertheless he did not instruct his lawyer to cross-examine the officers on this issue when they testified that they had been inspected at the duty parade. He gave a nonsensical answer, saying that he did not give such instructions 'because people do get robbed by people using police vehicles and police uniforms'.

[73] The reason why he spoke Oshiwambo was because he was entitled to speak his own language. He could not explain why he did not switch to English when he heard that Const. Amukwaya had difficulty interpreting correctly in English.

[74] In cross-examination he stated for the first time that when he was accused of driving while drunk, he denied being the driver and stated that Taapopi was the driver and that the latter also said so. He said none of the officers asked him or Taapopi for their licence and none asked Taapopi to blow, even though they both told them that Taapopi was the driver. He could not explain why, expect to say that in many instances police officers behave very badly when they appear on the scene. In my view it is highly improbable that if they had said that Mr Taapopi was the driver the police would have ignored this, unless they were very sure that they found the plaintiff behind the wheel. If they did not and they were unsure, it is probable that

they would have tested Mr Taapopi as well, as Const Silumbu testified. It is also probable that the officers asked for the driver's licence as the incident involved a driving offence.

[75] It was put to him that when Const Silumbu wanted to show his appointment certificate, the plaintiff said that he did not have to show it, he knew they were police officers. To this he replied that there were no appointment certificates shown and that the officers only fetched these after the arrest. I find this most improbable. If they did not have them in the first place, why would they fetch and show them later?

[76] The plaintiff testified that he only accepted that the first defendant's witnesses were indeed police officers and peace officers on the day before he testified. If this is so one wonders on what basis he instituted the proceedings and made allegations that they were indeed police officers!

[77] At the point he testified he still did not accept that they were on duty on 19 – 20 March 2006 because they came on duty with a breathalyzer that did not work! He obstinately insisted that the first breathalyzer did not work because it printed no result in spite of being informed that that type of device does not have the capability of printing a result.

[78] Later he testified that he did not know whether the first three witnesses were indeed police officers because they did not follow the correct procedure by law before they took the alcohol test. However, when invited he could not state what the correct procedure was and that they should know! At a later stage he set out a certain steps to be followed, which amounted to the steps actually followed by Const Silumbu and Sgt Auchas.

[79] The plaintiff complained high and low about the fact that his rights were not explained to him upon arrest. Even if this was not done, there could hardly be any prejudice as he probably knew his rights better than the police did bearing in mind that he was a prosecutor before and a magistrate of several years' standing at the time. He did not explain why he required them to explain things to him that he

already knew. Such an explanation in any event is not required to effect a lawful arrest.

[80] His testimony that he travelled to the police station in the Hyundai and that the van remained at the scene contradicts the version put to the witnesses by his lawyer. He did not explain this contradiction.

[81] He testified that the police officers told him at the scene that they would be taking him to the hospital to draw a blood sample for alcohol. Yet he testified that when the blood was drawn at the hospital, he did not know for what disease it was drawn!

[82] At first he disputed the occurrence book entry by Const Goagos, but later said that she might have written it, but she was not there!

[83] He complained about the injuries and pain caused by the handcuffs, but he did not report these to the doctor who drew the blood even though he was in such pain at the time that he could not make out if the doctor was male or female as both males and females wear ear rings these days!

[84] When it was put to him that he clearly was confused that night, he dismissed the suggestion by saying that everything that had been stated about him was lies.

[85] He testified that after his release he could not go to the doctor about the injuries sustained because he had to go to Dordabis for work the next day, which was a Tuesday, but did not explain why he did not go on the Monday afternoon. He was at a loss when confronted with the fact that the Tuesday was a public holiday, namely Independence Day.

[86] The plaintiff testified that when he was formally charged at the police station, he was informed for the first time that the charges against him were (i) drinking and driving; (ii) defeating the ends of justice; and (iii) driving without a driver's licence. However, he was never charged with defeating the ends of justice. In fact, on the defendants' case they were not aware of any allegation that the wrong person had been charged or that the wrong person had been tested and such a charge had

never been investigated. To my mind this indicates that the issue of the plaintiff not being the driver was never raised at all at the time, but is only part of a story subsequently made up by the plaintiff and Mr Taapopi.

[87] I now turn to Mr Taapopi's evidence, which was evasive and vague on several material aspects, especially during cross-examination. The following examples suffice.

[88] He says they arrived at the marula party at about 16h00 and the others drank throughout until they left. He did not want to give a clear answer about their state of sobriety or otherwise. He said he could not say if they were drunk, but their behaviour did not show they were drunk. When asked whether any of the others could have driven the vehicle he said that he cannot say 'anything', but usually he drives plaintiff's vehicle. When it was suggested that at the age of 36 he should know if someone is drunk, he evasively answered that 'the drunkenness of people differs.' When asked if he could see that if the plaintiff was drunk he said he did not notice it, which is improbable. When confronted with evidence of police officers about the plaintiff's state of drunkenness he said that it is very difficult for him to answer and countered by asking an argumentative question, namely 'If a person cannot do anything how can he be handcuffed'? When it was put that he was avoiding the question and 'covering' for his friend he evasively stated, 'I did not see that he was drunk.' To sum up, he never actually denied that the plaintiff was drunk.

[89] He denied making a U-turn at Wika and that it is even possible to make a U-turn where he drove. The latter is improbable.

[90] He stated that he saw the blue light of the police vehicle behind him. It was about 20 metres behind him when the siren sounded and he immediately pulled to the left and parked the Hyundai. He agreed that the police vehicle would have taken about 2-3 seconds to come to a standstill behind him.

[91] When asked to explain why he and the plaintiff got out of the vehicle rather than wait for the police officers, he said that they were not sure if the police were behind them and if the police were indicating to them or to someone else. Yet he repeatedly

stated in evidence that only they were there. He also said that he thought that the police vehicle was perhaps on its way to an emergency or that a convoy would be passing. All this evidence is improbable and rather indicates that he feigned not knowing the true reason for them being pulled over. Any emergency vehicles could easily have passed them without the need for pulling over. It is also unlikely that a convoy would be passing there at that time of the morning.

[92] He said that the officer called a female officer to come and test the plaintiff because the latter was apparently drunk. When it was put that he knew why she was called he suddenly became evasive and said that he did not really understand what was said at the time. After several questions he conceded that he did know that there was another police officer on her way to test the plaintiff because one of the officers was Oshiwambo speaking. The implication is that this officer explained to them what was happening.

[93] He contradicted the plaintiff's evidence when he stated that the female officer did explain to the plaintiff how to use the breathalyzer.

[94] During cross-examination Mr Taapopi stated for the first time that he informed all three police officers that it was he who was the driver and that he did so at the stage when they ordered the plaintiff to get into the van to go to the police station.

[95] Curiously, he never made a written statement that he was the driver. He states that the plaintiff also did not ask him to make a statement that he was the driver. In fact, they never even discussed the possibility that he should make such a statement. All this evidence tends, to my mind, to indicate that he was not the driver and that he also never said to the police that he was the driver.

[96] He also said that they waited for about 30 minutes for Sgt Auchas to arrive, which is much shorter than the two hour period alleged in the plaintiff's pleadings.

[97] Mr Taapopi said in cross-examination that the plaintiff phoned him the next day to say he was on his way to court. This was between 09h00 and 10h00, which rather tends to confirm the police evidence. Furthermore, it contradicts the plaintiff's evidence that he did not have his cell phone with him.

[98] He further stated that he was dropped at home by two police officers at home between 01h00 and 02h00, but by this time the blood had not yet been drawn. I think that it is very unlikely that both Sgt Auchas and the doctor would have written the incorrect time on Exh "B".

[99] As for Chief Insp Shikongo and Sgt Numbala, their demeanour in the witness box was satisfactory. While their testimony does support the evidence of the plaintiff and Mr Taapopi they cannot testify about the crucial events that form the heart of this case as they had already been dropped off, as Chief Insp Shikongo also readily conceded. An unsatisfactory aspect of their evidence is that they did not really explain why they never provided statements to the investigating officer to attempt to clear their friend who was wrongly accused, arrested and detained as one might have expected.

The relevant law

[100] At the outset it is convenient to state that the onus to establish that the plaintiff's arrest and detention was lawful is on the defendants. (*Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at p309; *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at p589; *Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A) at p730E-F; p739G-H; *Cabinet for the Interim Govt of SWA v Bessinger* 1989 (1) SA 618 (SWA) at 621C-E).

[101] The defendants both rely on section 40(1)(b) of the CPA, while the second defendant in its plea relies also on section 40(1)(a) and section 50 of the CPA. In argument, however, the focus fell on section 40(1)(b) and section 50(1). It is convenient to set out the relevant parts of these provisions.

[102] Section 40(1)(a) and (b) provide:

'40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a) who commits or, attempts to commit any offence in his presence;

- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;'

[103] Section 50(1) provides:

'50 Procedure after arrest

(1) A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause for his arrest

[104] Schedule 1 of the CPA refers to, *inter alia*:

'Any offence the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine.'

[105] The offence for which Const Silumbu arrested the plaintiff is a contravention of section 82(1)(a) of the Road Traffic and Transport Act, 1999 (Act 22 of 1999). It is common cause that, by virtue of the applicable penalty provision contained in section 106 of Act 22 of 1999, it is an offence referred to in Schedule 1.

[106] Counsel for all three parties were further *ad idem* as to the applicable legal position, which is set out further below.

[107] In *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) the Court stated (at p818G-819H:

'The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).

(4) That suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect.'

[108] The question whether the suspicion is reasonable must be approached objectively and 'the grounds of suspicion must be those which would induce a reasonable man to have the suspicion' (*R v Van Heerden* 1958 (3) SA 150(T) at 152; see also *De Jager v Government of the Republic of Namibia* 2006 (1) NR 198 (HC) at p2021-203B; *Mcnab and Others v Minister of Home Affairs No and Others* 2007 (2) NR 531 (HC) at p542D-I). In the *McNab* case Angula AJ also said (at p542I-543A):

'[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 (V) at 836I - 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 application of the law to the facts

[109] Both Mr *Erasmus* and Mrs *van der Merwe* on behalf of the defendants submitted that the jurisdictional grounds for an arrest in terms of section 40(1)(b) were met on the facts of this case. Mr *Brandt* for the plaintiff, correctly so, accepted that Const Silumbu proved that he was indeed a peace officer at the time of the incident as is also clearly stated in his appointment certificate, a copy of which was handed in as Exh A.

[110] It is also abundantly clear that Const. Silumbu indeed had a suspicion that the plaintiff had committed the Schedule 1 offence of driving under the influence of intoxicating liquor in contravention of section 82(1)(a).

[111] The only legal issue in dispute is whether Const Silumbu held that suspicion on reasonable grounds and it is on this issue that Mr *Brandt* concentrated in his submissions by traversing the facts during argument.

[112] In this regard he submitted that there was nothing wrong in the manner that the vehicle was driven, except for the alleged illegal turn. He stated that this fact is not mentioned in Const. Silumbu's witness statement, which was referred to during evidence. However, in the statement Const. Silumbu states that while he was attending to a complaint at the Wika service station "I spotted a car while I suspected the driver was drunk. And as I was driving to the control room office I spotted the same car passing through the traffic lights at the coner (*sic*) of Independence Avenue and Sam Nuyoma Drive at a very slow speed. I followed the car and stopped the driver I asked him why he had made a wrong turn first time I spotted his car.....". There is therefore no merit in this submission.

[113] It is so that when Sgt Auchas wrote on the police docket in the column a description of the 'method and/or instrument used' in committing the alleged offences, she stated: 'By driving N106055W Hyundai m/car in Indep Ave in front of Kalahari Sands Hotel making a U-turn over the barrier lines'. This is not quite accurate, but I take into consideration that this was a very short summary giving only the barest details, which does fit in with the fuller description given by Const Silumbu that the plaintiff illegally turned and crossed from one side of Mandume Ndemufayo Avenue to the other by entering a road in which there was a 'no entry' sign. She stated in evidence that Const Silumbu reported to her that the plaintiff had earlier made 'a wrong turn in Mandume' and that he saw the Hyundai again in Independence Avenue driving very slowly.

[114] Mr *Brandt* submitted that a person as drunk as the police officers described him would not have been able to react by stopping the vehicle so promptly as he did. However, this is only one aspect of the driving. The fact that he drove so very slowly and not properly in his lane for no obvious reason tends to show that the driver drove in this manner precisely because he was under the influence.

[115] Counsel for the plaintiff submitted that the plaintiff was adequately corroborated by his three witnesses and that on the probabilities the defendant's did not relieve themselves of the burden on them to prove that the arrest was lawful. In this context

he submitted that, on all the probabilities, the plaintiff did not drive the vehicle that night.

[116] It is not necessary to deal with all the submissions made on the facts in view of the discussion of the facts earlier in this judgment as well as the credibility findings made. Apart from all the reasons already stated why the evidence of the plaintiff and his witnesses is unsatisfactory, it suffices at this stage to state that the probabilities indicate that Const Silumbu and his colleague were intent on observing the conduct and driving of the driver of the Hyundai precisely because it drew their attention. On all the facts it is common cause that their van was very close to the Hyundai when the blue light and siren were switched on and that the Hyundai came to a standstill not far from the van. In my view it is improbable that the plaintiff and Mr Taapopi immediately got out and when to stand on the pavement for no good reason. I accept the evidence of the police that they remained in the vehicle and that the plaintiff was found behind the steering wheel.

[117] Furthermore, I find it highly improbable that the police would ask who the owner of the Hyundai is as this fact is completely and obviously irrelevant in circumstances where they were concerned with the manner in which the vehicle was being driven. In addition, I accept the evidence that the police officers would have tested Mr Taapopi as well if they had been told that he actually was the driver in circumstances where they were uncertain.

[118] In my view the evidence presented by the defendants sufficiently establishes that the plaintiff was the driver that evening; that he smelled of alcohol, that he was boisterous and argumentative; that he was unsteady on his feet; that a preliminary reading showed the concentration of alcohol in his breath to be far above the legal limit, that he made an illegal turn, that he drove suspiciously slowly for no good reason and not properly in his lane. All these facts, objectively viewed are sufficient to provide a basis for forming a reasonable suspicion that the plaintiff drove the vehicle that night while under the influence of alcohol.

[119] To sum up, the defendants have established on a balance of probabilities that all the requirements for an arrest in terms of section 40(1)(b) of the CPA were met.

In so far as it may be necessary, it may be stated that, in my view, the jurisdictional requirements of section 40(1)(a) were also met as the offence was committed in Const Silumbu's presence. It further follows that the plaintiff was lawfully detained in terms of section 50 of the CPA and that, because he was unable to pay the bail amount set by the police, he was lawfully further detained until he was released on warning by the magistrates' court.

[120] The result is that the defendants' liability for any damages suffered by the plaintiff has not been established. As such the plaintiff's claim is dismissed with costs.

_____ (signed on original _____)

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

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For the first defendant:

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