REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3121/2010

In the matter between:

HENOK IYAMBO **PLAINTIFF**

and

MINISTER OF SAFETY AND SECURITY **DEFENDANT**

Neutral citation: *Iyambo v Minister of Safety and Security* (I 3121/2010) [2013] NAHCMD 38 (12 February 2013)

Coram: PARKER AJ
Heard: **29 – 30 January 2013**
Delivered: **12 February 2013**

Flynote: Delict – Plaintiff's action based on unlawful arrest and detention by defendant's Ministry's police officials – Plaintiff brought before a magistrate within 48 hours after arrest and detention in compliance with the Namibian Constitution – Defendant therefore conceding liability – Court asked to determine quantum of damages only.

Flynote: Costs – Plaintiff not having gained substantial success court departing from rule of practice that costs follow the event.

Summary: Delict – Plaintiff's action based on unlawful arrest and detention by defendant's Ministry's police officials – Plaintiff brought before a magistrate four days after arrest and detention in violation of Article 11(3) of the Namibian Constitution –

Defendant having admitted liability only question remaining being quantum of damages – In assessment of damages court taking into account circumstances surrounding arrest of plaintiff and treatment of plaintiff by arresting police officials, period of unlawful detention being four days, plaintiff's loss of freedom of movement and loss of esteem among members of the local community where plaintiff worked as a primary school teacher and amount of damages awarded recently by the court for unlawful arrest and detention – Court in the result awarding damages of N$12 000,00 as against N$150 000,00 claimed by plaintiff.

Summary: Costs – Party entitled to costs must have gained substantial success – Substantial success measured according to the nature of relief claimed and granted and whether claim sounding in money excessive and grossly disproportionate to the amount granted – In instant case court awarding damages for N$12 000,00 as against plaintiff's claim of N$150 000,00 – Grounds therefore exist to justify departure from the general rule that costs follow the event – Accordingly court making order that each party pays its own costs.

ORDER

(a) Judgment is for the plaintiff (in respect of Claim A) in the amount of N$12 000,00.

(b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The plaintiff instituted action against the defendant and makes two distinct claims, namely Claim A and Claim B. Claim A is for unlawful arrest and detention;

and he claims damages in the amount of N$150 000,00. Claim B is for the plaintiff's inability to report for work for more than 30 days; as a result of which he was deemed to have been discharged from the Public Service in virtue of s 24(5)(a) of the Public Service Act No. 13 of 1995; and he claims N$59 458,95 being lost remuneration.

[2] In the parties' joint proposed pre-trial order two issues are to be determined by the court, namely (a) the lawfulness or otherwise of the arrest and detention and (b) proof of quantum of damages. At the commencement of the trial, Mr Ntinda, counsel for the plaintiff, informed the court that the plaintiff was abandoning Claim B altogether. And as respects Claim A; I understand both counsel, ie Mr Ntinda, for the plaintiff and Mr Chibwana, for the defendant, to submit that the arrest and detention of the plaintiff before he was brought before the learned magistrate of the Magistrates' Court, Tsumeb, on 14 September 2009 was unlawful, but the defendant persists in his defence that the defendant is not liable for the continued detention of the plaintiff after he had appeared in the Magistrates' Court. That being the case, the burden of the court is to determine two main issues, that is: first, whether the defendant is liable for damages arising from the unlawful arrest and detention of the plaintiff after 14 September 2009, that is, after he had appeared before the learned magistrate and second, quantum of damages, that is for unlawful arrest and detention and for whatever period.

[3] I now proceed to determine the first issue. That the defendant was arrested and detained on Thursday, 10 September 2009, by police officials of the defendant's Ministry and brought before the learned magistrate of the Magistrates' Court, Tsumeb, on 14 September 2009 are not disputed. Furthermore, the defendant concedes, as intimated previously that the arrest and detention up to the time the plaintiff appeared before the learned magistrate was unlawful. That is the submission of Mr Chibwana. Mr Ntinda argues contrariwise. It is Mr Ntinda's submission that since the original arrest and detention were unlawful, they remained unlawful, albeit the plaintiff was brought before a magistrate within 48 hours in compliance with the 48-hour rule under Article 11(3) of the Namibian Constitution, and the plaintiff's case was then remanded by the learned magistrate.

[4] It is ironic that the counsel who made a similar argument and was rejected by the court in the earlier case of *Gabriel v Minister of Safety and Security* 2010 (2) NR 648 practises from the same law firm as Mr Ntinda. In *Gabriel*, after reviewing the authorities Muller J held, 'When the plaintiff was brought before the magistrate and his detention was further ordered, the lawfulness, or not, of his arrest and previous detention became irrelevant'. I think this dictum, with respect, must be qualified. In my view the arrest and the original detention will be irrelevant only if the plaintiff was brought before a magistrate within 48 hours of his or her arrest within the meaning of Article 11(3) of the Namibian Constitution and the magistrate then extended the original detention beyond 48 hours, as happened in the instant case. (See *Sheehama v Minister of Safety and Security and Others* 2011 (1) NR 294.)

[5] In the instant case, it is common cause between the parties that the defendant complied with the 48-hour rule, and in the exercise of his judicial authority given to him by Article 11(3) of the Namibian Constitution, the learned magistrate extended the detention in custody of the plaintiff beyond 48 hours. It cannot, therefore, by any stretch of legal imagination be argued that the defendant (a member of the Executive) is liable for the learned magistrate's judicial exercise of authority given to him by the Namibian Constitution. It follows that Mr Ntinda's argument that if the learned magistrate had been informed by the Prosecutor that the arrest was unlawful, the learned magistrate might not have extended the detention of the plaintiff beyond 48 hours is neither here nor there. It must be remembered that it is not the defendant's police officials who prosecuted the case in the proceedings in the magistrates' court. The prosecution was conducted by the Prosecutor under delegated authority of the Prosecutor-General (see Article 88(2) of the Namibian Constitution), and since the prosecuting authority is an independent authority, the defendant's officials cannot be held accountable for what the Prosecutor did or did not do during the judicial proceedings or, what is more, what the learned magistrate did in the exercise of his judicial function. It must be remembered that when the plaintiff appeared before the learned magistrate, he put up his hand to indicate that he wanted to address the court, and he was allowed to address the court. He then informed the court that he wanted to be admitted to bail. The learned magistrate

informed him that he could seek legal representation and also bring a formal application for bail. These exchanges between the plaintiff and the learned magistrate were in the course of judicial proceedings and over which the defendant had no control.

[6] For these reasons and conclusions, I am impelled inevitably to hold that the defendant is not liable for the learned magistrate extending the plaintiff's detention in custody beyond 48 hours when he appeared before him on 14 September 2009. Consequently, the first issue is decided in favour of the defendant. I proceed to consider the second issue.

[7] The second issue concerns quantum of damages for the unlawful arrest and detention of the plaintiff from 10 to 14 September 2009, that is before he was brought before the magistrate. The amount of damages I grant should be related to the unlawful arrest and the period of days during which the detention is unlawful. On my calculation, since the day of arrest and detention was a Thursday, 10 September, the next court day on which the plaintiff could have reasonably been brought to the magistrate was Friday, 11 September. After that the next court day was Monday, 14 September, that is, the date on which he was brought to the magistrate. I find that it was not 'reasonably possible' for the defendant's police officials to have brought the plaintiff before the magistrate on 12 or 13 September 2009. On my reckoning, it would seem the plaintiff was brought before a magistrate within 48 hours of his arrest and detention. I find that the arrest and detention were unlawful within the meaning of Article 11(2) of the Namibian Constitution because it is not clear on the evidence that the police officials formally arrested the plaintiff and informed him about the grounds of the arrest. He was merely invited to accompany the police officials to the police station to enable the police officials to check the plaintiff's mobile phone to see if he had phoned one Nande, whom the police were about to arrest for an offence, in order to tip Nande off to run away. Upon his arrival at Oshivelo police station, the plaintiff was placed in a holding cell and brought before the magistrate on 14 September 2009. I, therefore, accept Mr Chibwana's concession that the period of unlawful arrest and detention should be four days; and so the amount of damages to be awarded ought to relate to four days.

[8] As regards the assessment of damages for delictual conduct; relying on the Supreme Court case of *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 403H-404G, I take the view that the court ought to take a comparative look at awards made by the court in similar cases; of course, regard being had to factual differences and circumstances of the commission of the wrongful act complained of.

[9] In the instant case, I accept Mr Chibwana's submission that on the plaintiff's own testimony, the circumstances surrounding the arrest of the plaintiff, a teacher, at his school, Antoni Primary School, was not violent or depraved. The two police officials who fetched him from the school arrived in an unmarked police motor vehicle and the motor vehicle did not bear police registration number plates. They got permission from the Principal of the school before transporting the plaintiff in the motor vehicle. The evidence of plaintiff is that the cleaner who went to call him referred to the two police officials as visitors, not police officials. The two police officials and the plaintiff walked from where the Principal was to where the motor vehicle was parked. Furthermore, from the plaintiff's further testimony, I think it is reasonable to say that the pupils who were out and about the school would not conclude that their teacher (the plaintiff) was being arrested, even though he boarded the back of the pick-up motor vehicle with the police official in camouflage police uniform as the other passenger in the back of the motor vehicle.

[10] It is also the plaintiff's further testimony that he was driven not straight to the police station but through, first, a 'cuca shop' (ie. a bottle store) while still riding in the back of the motor vehicle and from there to Sportsman Bar (at Cassablanca), a bottle store-cum-restaurant. I do not think the onlookers at, and patrons of, those public houses who saw the plaintiff concluded there and then that the plaintiff was 'a criminal' – as the plaintiff testified – simply because he was riding in a motor vehicle with police officials. No evidence was placed before the court to support the plaintiff's contention. Furthermore, no evidence was placed before the court to show what the living conditions of the plaintiff were like when he was held in custody during those four relevant days. I hasten to add that this is not put forth to play down the serious nature of deprivation of a person's right to freedom of movement guaranteed to him

or her by the Namibian Constitution. It is merely to show the circumstances of the arrest and detention of the plaintiff.

[11] Furthermore, the plaintiff's attempt to persuade the court to take into account the fact that his children's education fund benefit was lost as a result of his detention in custody (I repeat; for four days) cannot succeed; for, as Mr Chibwana submitted, this aspect is not pleaded by the plaintiff in his particulars of claim.

[12] It must be remembered that it became clear at the trial that the plaintiff's claim under Claim A are general damages for 'loss of freedom' and attendant psychological pain. In the exercise of my discretion as to an appropriate amount of money to award as damages, I have taken into account the following factors in addition to the aforementioned circumstances surrounding the unlawful arrest and detention. I have said more than once that the relevant period for which the defendant is liable is four days. The plaintiff occupies an important and respectable position in the local community among whom he works as a teacher and counselor to pupils and fellow teachers. It is not far-fetched to say that the unlawful arrest and detention lowered to some extent the esteem in which the plaintiff was held by his friends, pupils, colleagues and members of the local community.

[13] I have also kept in my mind's eye counsel of Chomba AJA in *Trustco Group International v Shikongo* loc. cit. that in the assessment of damages it is useful to consider awards of damages recently made for defamation. I note that the instant case is not about defamation, but I see no good reason why the authority in *Shikongo* cannot apply with equal force to other delictual claims.

[14] In this regard, I have looked at *Hoco v Mtekwana and Another* 2010 (2) SACR 536 (ECP) where the court there granted judgment for R80 000,00 in favour of the plaintiff. The plaintiff had been detained unlawfully for four days that is, beyond 48 hours allowable under South African law (like Namibia's). Not much assistance can be derived from *Hoco* because in that case the plaintiff was not brought before the court within 48 hours of his arrest and detention, and the court held that the plaintiff was transported 'as a criminal' in the presence of his minor child; and he was

exposed to squalor in the prison where he was held. I have also considered *Government of the Republic of Namibia v Getachew* 2008 (1) NR 1 (SC). *Getachew* is unlike the present case; it is about a plaintiff arrested and kept in custody under the Immigration Control Act 7 of 1993 who may be detained under a warrant for a period of 14 days to enable the immigration official concerned to investigate the arrestee's status. It also concerns failure by the immigration officials to comply with Article 18 of the Namibian Constitution and also flouting by the immigration officials of Article 8 of the Namibian Constitution when they exposed the plaintiff to indignity during part of his detention, particularly in Okahandja. *Securiforce CC v Ruiters* 2012 (4) SA 252 (NCK) was also referred to me. There, the court held that R90 000,00 for the unlawful arrest, detention and malicious prosecution is not over the top. What is significant for my present purposes is that Kgomo JP (Pakati AJ concurring) issues the following telling caveat: 'I must caution, though, that this award must not be taken as a precedent' (at para 42). *Ruiters* is, therefore, also not of assistance. Besides, in the present case malicious prosecution is not part of the plaintiff's case.

[15] I have undertaken some comparative analysis of the amount of damages awarded in those cases, albeit bearing in mind – as I have observed previously – that the facts and circumstances of those cases are very different from those of the instant case.

[16] Keeping the aforementioned authorities in my mental spectacle together with the facts of, and circumstances in, this matter, I conclude that the amount of N$150 000,00 is exceedingly over the top. In my opinion, an award of damages of N$12 000,00 for unlawful arrest and detention for four days (instead of N$150 000,00 for 52 days as pleaded by the plaintiffs) is reasonable and fair.

[17] I pass to consider the question of costs. It is Mr Ntinda's submission that the plaintiff should be awarded its costs. Mr Chibwana, on the other hand, submitted that in the way the case has turned out, including the concessions by counsel and abandonment of part of the plaintiff's claim, the court should make an order that each party pays its own costs. Counsel's submission makes a great deal of sense. By abandoning its Claim B, the plaintiff effectively withdrew part of its action.

9
9
9
9
9

Furthermore, even though the plaintiff has been successful in the action, he has not been successful substantially, and so, therefore, costs should not follow the event. On this score alone it is fair and reasonable that the plaintiff is not awarded costs. (See *Windhoek Tool Centre CC v Oruuano of Namibia and U P Shekupe* Case No. I 1885/2011 (Unreported) at p 7.) Accordingly, this is a proper case where it is fair and reasonable that each party pays its own costs.

[18] In the result I make the following order:

(a) Judgment is for the plaintiff (in respect of Claim A) in the amount of N$12 000,00.

(b) There is no order as to costs.

C Parker

Acting Judge

10
10
10
10
10

APPEARANCES

PLAINTIFF : M Ntinda
Of Sisa Namandje & Co. Inc., Windhoek

DEFENDANT: T Chibwana
Of Government Attorney, Windhoek