REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 546/2013

In the matter between:

JOSEPH KABUYANA KABUYANA **PLAINTIFF**

and

MINISTRY OF SAFETY AND SECURITY **DEFENDANT**

Neutral citation: *Kabuyana v Ministry of Safety and Security* (I 546/2013)[2014] NAHCMD 61 (20 February 2014)

Coram: Damaseb, JP
Heard: **11 – 13, 19 February 2014**
Delivered: **20 February 2014**

Flynote: Constitutional law – Alleged unlawful detention contrary to Articles 7 and 11 of the Namibian Constitution – Plaintiff alleging not brought before a competent court within 48 hours of arrest – Onus of proof on defendant discharged – Defendant discharged onus of lawful detention on balance of probabilities – Evidence established

that plaintiff brought before an 'assistant magistrate' within 48 hours of his arrest – Claim dismissed with costs.

ORDER

The plaintiff's claim is dismissed, with costs, including the costs of instructing and one instructed counsel.

JUDGMENT

DAMASEB, JP:

[1] In the remaining Claim B[1], the plaintiff seeks damages for alleged unlawful detention. It is common cause between the parties that the plaintiff was arrested on 30 August 1999. The plaintiff alleges he was, after the arrest, detained until 31 August 1999 by employees (police officers) of the defendant at the Katima Mulilo police station when, according to his particulars, he 'appeared before a magistrate'[2] and his further detention was ordered. Thereafter, he alleges, he was transferred to Grootfontein Prison on approximately 4 September 1999 and only appeared before a magistrate on 24 January 2000. He claims damages in the amount of N$300 000.

[2] I need to point out at the outset that the plaintiff's case is most confusing and in constant flux. As if that were not enough, his evidence at the trial did not, as one would expect, dovetail with his pleadings. To compound it even further, his counsels' written submissions gave the impression that the plaintiff was (in addition to the alleged

[1]The plaintiff having abandoned claim A which alleged assault.

[2]Which is contrary to his evidence that he never appeared before a magistrate.

unlawful detention attributed to the defendant) taking issue with whether or not the magistrate, who the defendant says presided at the remand hearing of the plaintiff's matter on 31 August 1999, was competent to do so or did what she ought to have done.

[3] In his written heads of argument, Mr Mukonda for the plaintiff cited the following *dictum* from *Minister of Safety and Security v N Ndlovu*[3]:

'In this case it is common cause that the "reception court" never embarked on any judicial evaluation because , as a matter of course, its function was merely to postpone cases without , it would seem, enquiring whether or not an accused person ought to be detained pending trial. It can thus hardly be contended that the unlawful detention of the respondent ceased when he was brought before the "reception court" which ordered his further detention.'

[4] Having cited that dictum, Mr Mukonda goes on to submit, in respect of the magistrate (Mrs Theron), who his client maintains never presided in the matter of his remand on 31 August 1999 that:

'On the facts of this matter, it is clear that Mrs Theron did not know what she was doing, and as such, the question of whether or not she exercised her discretion does not arise. It could only arise if she knew the purpose of her actions and the consequences for the plaintiff when she substituted the Magistrate. Therefore, even if the Plaintiff appeared before her (which is denied) one cannot say Plaintiff appeared before a magistrate.'

[5] Clearly, what Mr Mukonda is doing here is to suggest that if the court finds that the plaintiff appeared before a magistrate, that magistrate did not act as a magistrate should have. Such a case was never pleaded and, in any event, as Mr Coleman correctly submitted during argument, is irrelevant as far the defendant is concerned – the defendant who has been cited in the present proceedings as being vicariously liable for the delicts of police officers and not the actions of a magistrate. When the court

[3] [2012] ZASCA 189 (30 November 2012). The page number for the quotation was not provided by Mr Mukonda.

pointed out the incongruity in this submission to Mr Mukonda, he finally assured the court that the case the plaintiff makes now is that the plaintiff claims damages against the defendant for the failure of police officers who arrested him to bring him before court within 48 hours of arrest. That, as I will show presently, accords with the pre-trial agreement of the parties limiting the factual issues in dispute. It is trite that litigants are bound by the agreement they make limiting the issues falling for adjudication.[4]

[6] For what it is worth, and in so far as it may be implied that the magistrate, Mrs Theron, did not or could not properly discharge the functions of a 'competent court' as contemplated in the Constitution[5], such a case was (a) not pleaded , (b) does not concern the defendant[6] and (c) was disavowed by Mr Mukonda in argument, in the latter respect it having become common cause in argument that the plaintiff's case is that the employees of the defendant breached the plaintiff's constitutional right in that they failed to bring him before court within 48 hours of his arrest.[7]

[7] I will fail in my duty if I do not place on record my disappointment with the manner in which counsel for the plaintiff handled this matter. It was never quite clear to me at any given moment during the trial just what case was being advanced on behalf of the plaintiff. A civil trial is not some kind of game in which the players adjust their positions as the case progresses. Pleadings are intended to define the issues in dispute between the parties and once the issues are defined, the parties must lead evidence and tailor argument in accordance therewith. In that respect I found Mr Mukonda wanting. The

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[4]Stuurman v Mutual & Federal Insurance Co of Namibia Ltd (1) NR 331 (SC).

[5]Article 12 (1) (a) of the Constitution.

[6]I agree with the dictum of Lowe J to that effect in Sikhununa v Minister of Safety and Security 2013 JDR (ECP) at para 32.

[7]Thus breaching Art 7 of the Constitution and enjoining that no person shall be deprived of personal liberty except according to procedures established by law.

record speaks for itself.

The plea

[8] It is now common cause that the defendant was arrested on 30 August 1999. According to the defendant, the plaintiff was then detained until the morning of 31 August 1999 when he appeared in the Katima Mulilo Magistrate's Court and his further detention was lawfully ordered pursuant to s 50(1) of the CPA.

[9] In the proposed pre-trial order[8] the parties narrowed the factual disputes as follows:

'(a) When was the plaintiff arrested and detained?[9]

(b) Was the plaintiff informed of the reason for his arrest?[10]

(c) Was the plaintiff brought before assistant magistrate Wilhelmina Theron on 31 August 1999?

(d) Did assistant magistrate Theron order that the plaintiff be further detained to 24 January 2000?

(e) Did assistant magistrate Theron issue a warrant for the plaintiff's detention on 31 August 1999?'

[10] In the same proposed order, the parties narrowed the legal disputes as follows:

'(a) Was plaintiff unlawfully detained?

(b) If the court finds that plaintiff was unlawfully detained or both (sic), what is the

[8]Dated 5 February 2014.

[9] By agreement, no longer in issue.

[10]By agreement, no longer in issue.

quantum of damages suffered by the plaintiff?'

[11] The defendant's case is that the plaintiff was arrested on 30 August 1999 at Katima Mulilo and brought before a female assistant Magistrate (Mrs Wilhelmina Theron) on 31 August 1999 and that it was she who remanded the plaintiff and his co-accused to 24 January 2000 at Grootfontein.

[12] In his evidence in chief, the plaintiff testified that he was arrested on 30 August 1999 and accused of high treason, murder and malicious damage to property. He testified further that he was detained at the Katima Mulilo police station from 30 August 1999 to 4 September 1999. He also testified that from 30 August 1999 to 4 September 1999 and whilst still detained at the Katima Mulilo police station, he was never taken to any magistrate's court or any other competent court. He testified that he was transferred to Grootfontein on 4 September 1999 and there never appeared before a magistrate until 24 January 2000. He testified that his further (and presumably lawful) detention was only ordered at Grootfontein on 24 January 2000.

[13] According to the plaintiff, his further detention on 31 August 1999 was ordered by a police officer, Mr Theron, and not by a magistrate.

[14] The plaintiff denied that he appeared before Mrs Theron on 31 August 1999 and persisted that it was a male police officer, Mr Simasiku, who held himself out as a magistrate and remanded the matter as previously stated. There is clearly a contradiction again whether plaintiff's case is that it was Mr Theron who further detained him or whether it was Mr Simasiku who did so.

[15] It transpired on cross examination that the plaintiff has several inconsistent versions: the allegations in his particulars of claim that he appeared before a magistrate on 31 August 1999, the version that he never appeared before a magistrate as Mr

Simasiku took him to a place which was not a court and postponed the matter; the version that it was Inspector Theron who postponed the matter; and the version that he never appeared before a female magistrate.

[16] It was further put to plaintiff on cross-examination that Mrs Theron, who, as assistant magistrate, heard his case on 31 August 1999, would be called as a witness to support the defendant's plea that his detention from 31 August 1999 – 24 January 2000 was duly authorised by her on 31 August 1999. The plaintiff was adamant that he never appeared before a lady magistrate.

[17] The plaintiff was also shown the following documents as proof of the defendant's case negating his claim of unlawful detention beyond 31 August 1999:

a) a warrant for detention dated 31 August 1999 and signed by a 'Theron'. That warrant of detention is directed to the Namibian Police, Grootfontein to receive into custody the plaintiff until 24 January 2000. It is signed by a magistrate;
b) a transcript of a record of court proceedings, again signed by a 'Theron', stating as follows: 'rem 24.1.2000 - all 3 acc remain in custody-transfer to Grootfontein'.

[18] It was put to the plaintiff that Mrs Theron would be called to confirm that she was the person who, as assistant magistrate, signed the warrant for his detention to authorise his detention beyond 31 August 1999 ,and in that she, in that same capacity, presided in the matter on 31 August 1999 when the plaintiff appeared before her, not before Mr Simasiku, at the Magistrate's Court at Katima Mulilo on 31 August 1999.

[19] Plaintiff's attitude under cross-examination was that the documents in question were not prepared in his presence and that he could not confirm their accuracy. Quite

clearly, he was implying that the documents were a forgery. In so doing, the plaintiff implicates Mrs Theron in a diabolical scheme orchestrated to prove, to his detriment, that he appeared before a magistrate when in truth and fact he did not. That is a very serious allegation.

[20] The plaintiff, in truth, is alleging official misconduct. Such a thing is, I must assume in his favour, not entirely impossible human nature being what it is; except that it requires strong evidence[11] to sustain such an allegation which was,in any event, not made against the assistant magistrate. Our courts have always held a plaintiff who alleges fraud - a very serious allegation – to a higher standard of proof.

[21] As it happens, Mrs Theron was called as a witness to confirm that she on 31 August 1999 presided as assistant magistrate at Katima Mulilo when, together with others, the plaintiff was brought before her and his case remanded by her to 24 January 2000 at Grootfontein. She confirmed the transcript of the court proceedings as her handwriting and that she indeed ordered for the plaintiff to be transferred to Grootfontein.

[22] Considering that Mrs Theron, as assistant magistrate, signed the warrant for the plaintiff's detention and that she signed a transcript of a record evidencing that she presided at a hearing where the plaintiff's case was remanded to 24 January 2000 at Grootfontein, it was not put to her that she was not telling the truth. (In argument Mr Mukonda stated that that was implied). Most importantly, it was never put to her, which must have been, that she was part of an elaborate fraud calculated to prove a fictitious set of facts aimed at showing that the plaintiff was brought before court when, in truth and fact, he was not.

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[11]Rally for Democracy and Progress v Electoral Commission 2013 (2) NR 390 at 416, para 200 where the court said:'it is trite that the more serious the allegations or its consequences, the stronger must be the evidence before a court will find the allegations established.'

Probabilities overwhelmingly in favour of defendant's version

[23] I have no reason to doubt Mrs Theron's version that the plaintiff was brought before court on 31 August 1999 at Katima Mulilo in compliance with the requirements of the Constitution. That is the case that the plaintiff, on whom the onus rested to prove lawful detention[12], had to show on balance of probabilities. In addition, Mrs Theron's evidence that she was a duly appointed magistrate on 31 August 1999 remains undisputed. It is in fact corroborated by the transcript of a court proceeding of 31 August 1999, the charge sheet and the warrant of detention signed on the same date.

[24] Section 1 of the CPA defines 'Lower Court' as a magistrate's court and Magistrate is defined to include an assistant magistrate. Furthermore, in terms of s 12(2)-(4) of the Magistrate's Court Act 32 of 1944, an assistant magistrate, being a 'court' as contemplated in Art 12 (1) (a) of the Constitution has, inter alia, the following powers and responsibilities:

> '12. Powers of Judicial officer.-
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> (2) An additional magistrate or an assistant magistrate –
>
> (a) may hold a court;
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> (b) shall possess such powers and perform such duties conferred or imposed upon magistrates as he is not expressly prohibited from exercising or performing either by the Minister or by the magistrate of the district.
>
> (3) An acting magistrate, additional magistrate, or assistant magistrate, respectively, shall possess the powers and jurisdiction and perform the duties of the magistrate, additional magistrate, or assistant magistrate in whose place he is appointed to act, for the particular case or during the time or in the circumstances for which he is appointed to act.

[12]Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E-F.

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(4) Every additional magistrate and every assistant magistrate shall, in each district for which he has been appointed, be subjected to the administrative direction of the magistrate; and the magistrate shall allocate the work among the additional magistrates and assistant magistrate.

[25] It is before Mrs Theron, an assistant magistrate, with the above powers and responsibilities, that the defendant's employees brought the plaintiff on 31 August 1999. Having done that, their obligations in terms of Article 11 and s 50 of the CPA were discharged.

[26] The evidence of Mrs Theron that she presided in the matter of the plaintiff on 31 August 1999 was corroborated by Chief Inspector Evans Simasiku who was plaintiff's arresting officer and the person who took him to court on 31 August 1999 where the plaintiff appeared before Mrs Theron. Chief Inspector Theron was also called and he emphatically denied any involvement in the matter of the plaintiff, either as arresting officer or in the signing of either the transcript of court proceedings or the warrant of removal.

[27] I conclude that the defendant satisfied the onus that the plaintiff was brought before court on 31 August 1999, being 48 hours after his arrest, and that he was detained thereafter on the authority of a warrant issued by a magistrate and not, as he claims, in furtherance of the illegal actions of Mr Simasiku or indeed any other police officer, being employee of the defendant. The claim must therefore fail, with costs.

[28] In the result:

The plaintiff's claim is dismissed, with costs, including the costs of instructing and one instructed counsel.

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P T Damaseb

Judge-President

APPEARANCES

PLAINTIFF:	R Mukonda (Assisted by C Van Wyk)
Of	Legal Assistance Centre, Windhoek
DEFENDANTS:	G Coleman (Assisted by C Machaka)
Instructed by	Government Attorneys, Windhoek