

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2018/00243

In the matter between:

DAVID KONDJENI USHIINGE

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA
MINISTER OF SAFETY AND SECURITY

1st DEFENDANT
2ND DEFENDANT

Neutral citation: *Ushinge v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2018/00243) [2020] NAHCMD 341 (7 August 2020)

Coram: TOMMASI J
Heard: 29 June 2020
Oral Submissions: 30 June 2020
Delivered: **07 August 2020**

Flynote: Delictual claim – Unlawful arrest and detention – detained for longer than 48 hours –Article 10 of the Namibian Constitution and section 50 of the Criminal Procedure Act, 51 of 1977 applicable – plaintiff released before expiry of the 48 hours

Onus - arrest or detention *prima facie* wrongful - the defendant must allege and prove the lawfulness of the arrest or detention – *in casu*, defendants to prove on a balance of probability that the plaintiff had wilfully obstructed the arresting officer in the execution of his duties.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. Plaintiff's claim be dismissed with costs.
 2. The matter is removed from the roll and regarded as finalized.
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JUDGMENT

TOMMASI J:

[1] The Plaintiff herein claims that on 16 July 2017 at approximately 08h00 he was unlawfully and wrongfully taken into custody by a certain police officer and several other police officers who are not known to him. He was thereafter detained at Katutura Police cells for 55 hours without any proper detention documents and without appearing before a court of law. The plaintiff claims that his rights guaranteed in terms of Chapter 3 article 11 of the Namibian constitution were violated.

[2] As a result hereof, the plaintiff claims to have suffered damages in the amount of N\$200 000. The aforesaid damages cannot reasonably or practically be apportioned to any of the numerous and particular infringements, violations and invasion of the plaintiff's rights. The plaintiff claims the loss or damages as monetary compensation in terms of Article 25(3) and (4) of the Namibian Constitution.

[3] The Defendants admits that the plaintiff was taken into custody on 16 July 2017 and released on 18 July 2017. The defendants plead that the plaintiff was lawfully taken into custody in accordance with the statutes and the provisions in the Namibian Constitution which deal with arrests and detention. The defendants denied that the plaintiff suffered damages or that the plaintiff is entitled to a claim damages.

[4] The factual issues to be determined is whether the arrest of the plaintiff was unlawful and whether his detention exceeded the authorized 48 hours provided for in terms of Article 11(3) of the Namibian Constitution.

The 48 hours

[5] Article 11(3) of the Constitution provides as follows:

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

Section 50 of the Criminal Procedure Act provides as follows:

'(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: Provided that if the period of forty-eight hours expires —

(a) ...

(b) on any court day before four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of such court day;

(c) ...

(d) . . .

(2) A court day for the purposes of this section means a day on which the court in question normally sits as a court.

(3)'

[6] The plaintiff was arrested during the morning hours of Sunday, 16 July 2017 and released at around 14h00 on 18 July 2017. The 48 hours, in terms of s 50 of the Criminal Procedure Act would expire at 16h00. In casu the detention did not exceed the 48 hours as defined in terms of section 50 or for that matter article 11 (3) of the Namibian Constitution. Every hour spent in custody would however be relevant if the arrest is proven to be unlawful.

[7] What remains to be determined is whether the arrest was lawful or not.

Plaintiff's version

[8] The Plaintiff testified that on Sunday 16 July 2017 he was at his brother's house. He was a student at the time. It was his testimony that he had just returned from his parent's home in the north and was due to register for school the following week. At around 09h00 the police officers arrived at his brother's house and one of the officers, Sergeant Ferdinand Nghilganganye (Sgt. Nghilganganye) introduced himself as a police officer with the Serious Crime Unit. Sgt Nghilganganye asked him where a certain Waka was and he informed him that he did not know. He was thereafter arrested and no reasons were given for his arrest. He was put behind police van and taken to Wanaheda Police station. He was released on 18 July 2017 at around 16h00 – 17h00. When questioned whether he knew one Dawid Awala (also known as Waka) he confirmed that it was his brother. He however denied that he had any knowledge of his brother's arrest the same day.

[9] During his detention he suffered degrading treatment whilst in the cell such as assault by inmates which included a forced shower, hunger and no privacy whilst using ablution facilities. After his release his parents lost trust in him and severed their financial support to him.

The Defendants' version

[10] Sgt. Nghilganganye and Mr Lamek, a driver in the employ of the Minister of Works and Transport testified for the Defendants. What follows is a summary of their version of the events.

[11] Sgt. Nghilganganye was investigating a case of housebreaking with intent to steal and theft (case no CR 585/03/2017). One of the items stolen was a Jackpot machine. He received information that Dawid Awala (Mr Awala), plaintiff's brother had purchased the Jackpot machine. He approached Mr Awala who admitted that he bought the machine. He received further information that Mr Awala placed the Jackpot Machine at his neighbour's house.

[12] It was on the strength of this information that he proceeded to the house of Mr Awala on 16 July 2017. It was not disputed that he was accompanied with more or less 20 police officers. It is not entirely clear what time they arrived there as the two witnesses contradicted each other in this respect but it evident that they arrived there in the morning hours. Mr Awala was not there when they arrived. According to Sgt. Nghilganganye they seized the Jackpot Machine from the neighbour's house.

[13] The plaintiff disclosed that his brother was at a neighbour's house. Mr Awala was arrested and placed in the police van. It was at this stage that the plaintiff interfered with the police officers in the execution of their duties by pulling the suspect out of the van, picking up stones, threatening to hit the police officers and calling them stupid. Another person also interfered with the police whilst they were arresting the suspect. All three were arrested and taken to Wanaheda police station where they were detained under docket number CR496/07/2017. Mr Awala was detained for being in possession of goods suspected to be stolen and resisting arrest. The plaintiff was arrested for interfering with the police in the execution of their duty.

[14] Sgt Nghilganganye released the plaintiff on 18 July 2017 on the instructions of the Station Commander. The reason advanced to him was that the family requested the Commander to release the plaintiff to complete his studies.

The Law

[15] In *Tjipepa v Minister of Safety and Security and Others* 2015 (4) NR 1133 (HC) Ueitele J succinctly sets out the law as it relates to wrongful and unlawful arrest on page 1142, para 27,

'Wrongful deprivation of liberty means that a person is deprived of his or her physical liberty without legal justification. 1. To succeed in an action based on wrongful deprivation of liberty the plaintiff must allege and prove that the defendant himself or a person acting as his agent or servant deprived him of his liberty. 2. An arrest or detention is *prima facie* wrongful and the defendant must allege and prove the lawfulness of the arrest or detention. 3. As regards the unlawfulness or wrongfulness of the deprivation of the liberty the courts in South Africa said the following:

'The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.'¹ 4

[16] The arrest of the plaintiff by Sgt. Nghilganganye who acted in the course and scope of his employment with second defendant, and his subsequent detention are admitted.

[17] Section 40 (1) (j) of the Criminal Procedure Act provides that a peace officer may, without a warrant arrest any person who wilfully obstructs him in the execution of his duty. The onus is thus on the Defendants to prove on a balance of probability that the plaintiff had wilfully obstructed the arresting officer in the execution of his duties.

¹ *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) at 153D – E. Also see the case of *Ingram v Minister of Justice* 1962 (3) SA 225 (W) at 227D – E where the court said:

'All interferences with the liberty of the citizen are *prima facie* odious and it for the person responsible to establish why in the particular circumstances such interference is legally justified. . . .'
And *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F where the court said:

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

[18] Article 11 (2) of the constitution provides further that no persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest. A similar provision is found in section 39 (2) of the Criminal Procedure Act.

[19] There is a clear factual dispute in terms of what had transpired when the police arrived at the house of Dawid Awala. The court is confronted with two irreconcilable versions and it follows logically that only one can be true. When confronted with two irreconcilable versions the court must ‘... make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities’ (See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SC)).

[20] The plaintiff was the only witness and his version was short and to the point i.e he was arrested for no reason at all and he was not informed why he was arrested. Cross-examination and the testimony of Mr Lamek revealed that the “certain Waka” was none other than plaintiff’s brother. This corroborates and the version of Sgt. Nghilganganye that the purpose of their visit to the house was to look for plaintiff’s brother whom he suspected was in possession of stolen property.

[21] It was not disputed during cross-examination that plaintiff was arrested together with his brother and another person. The plaintiff’s denial that he had no knowledge of the arrest of his brother is clearly a blatant lie.

[22] Ms Siyomunji, counsel for the plaintiff highlighted some inconsistencies, improbabilities, discrepancies and contradictions in the testimony of the defence witnesses. The two witnesses contradicted each other in respect of the time they arrived at the house. Sgt. Nghilganganye furthermore was utterly confused as to the date of the arrest and the release. He however acknowledged that he was ill prepared for the hearing.

[23] Further criticism was levelled against the confusion with the case numbers. It is apparent from the case numbers itself that the first case number was allocated in March 2017 and the second case number was allocated in July 2017 the same month of the

plaintiff's arrest. Sgt. Nghilganganye was adamant that the case under which the plaintiff was charged was the latter one.

[24] Ms Siyomunji argued that the offence was a serious offence and it is improbable that the police would just withdraw the case. Sgt. Nghilganganye maintained that the plaintiff was released because his family requested the Station Commander to release him since he was a student. Ms Siyomunji acknowledged during cross-examining that the family came to see the Station Commander. This was indeed a serious offence and it is arguable that the conduct of the Station Commander was irregular. This is however not the case this court has to determine. The fact that the family did speak to the Station commander was satisfactorily established.

[25] A material discrepancy highlighted is the fact that the conduct of the plaintiff which forms the basis for his arrest was nowhere mentioned in the extra curial statements made by Sgt. Nghilganganye and Mr Lamek. It was only mentioned when the civil action was instituted. A careful reading of the extra-curial statement of Sgt. Nghilganganye shows that the emphasis was on the offences committed by the plaintiff's brother and not on the offence the plaintiff was charged with. Sgt. Nghilganganye indicated that his intention was to charge all three persons for different charges in the same docket. The statements clearly relate to the charges against the plaintiff brother and not the charge against plaintiff. I cannot therefore conclude that their testimony of the conduct of the plaintiff was fabricated. A further discrepancy is that both witnesses did not mention in their evidence in chief that the plaintiff actually threw stones at the police van. They both however testified that the plaintiff tried to pull his brother out of the van.

[26] When looking at the evidence adduced in its totality, I find the version of the defendants, despite the shortcomings, more plausible. The plaintiff offered a blank denial of having any knowledge of the involvement of his brother and his version therefore is not reliable.

[27] Sgt Nghilganganye testified that he was the arresting officer and he informed the plaintiff of his rights and the seriousness of the offence. This was not challenged during

cross-examination. I thus find that the arrest itself was properly executed and that the plaintiff was informed why he was arrested.

[28] I am satisfied that the Defendant's discharged the onus of proving on a balance of probability that the arrest was lawful.

[29] In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.
2. The matter is removed from the roll and regarded as finalized.

M A TOMMASI

Judge

APPEARANCES:

PLAINTIFF: Ms. M Siyomunji
Of Siyomunji Law Chambers
Windhoek

DEFENDANT: Mr. L Tibinyane
Of Office of the Government Attorney
Windhoek