



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2019/00505

In the matter between:

PENEHAFO NAHOLO

PLAINTIFF

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA
MINISTER OF SAFETY AND SECURITY**

**1st DEFENDANT
2nd DEFENDANT**

Neutral citation: *Naholo v The Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/00505) [2020] NAHCMD 553 (2 December 2020)

Coram: PARKER AJ

Heard: 10, 13 & 14 February 2020, 13 May, 14 & 16 July, 27 August, 29 September, 22 & 28 October 2020

Delivered: **2 December 2020**

Flynote: Delict – Damages – Quantum – Unlawful assault – Awards in other comparable cases helpful – Court must however take factual differences and circumstances into account – Seriousness of assault an important factor to take into account.

Summary: Delict – Damages – Quantum – Unlawful assault – Seriousness of assault an important factor to take into account – Plaintiff being investigated for complicity in armed robbery at plaintiff's place of work – Plaintiff alleged that she was slapped by police officials several times on the face in the course of being questioned – Plaintiff suffering bruises and abrasions on her cheek but no open wounds – Having taken into account awards granted in similar cases court awarding N\$10 000 instead of N\$20 000 prayed for.

ORDER

(a) Judgment for the plaintiff in the amount of N\$10 000, plus interest thereon at the rate of 20 per cent per annum a tempore morae from the date of this judgment to the date of full and final payment.

(b) There is no order as to costs.

(c) The matter is considered finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] Plaintiff and a co-worker, Josephine Haimbodi, were at their workplace, being a gambling house in Katutura, Windhoek. In the wee hours of Saturday, 4 November 2017 there took place an armed robbery at the gambling house. After the robbers had left the gambling house after robbing it, Josephine called the Police. Police

officials arrived at the scene of crime to investigate the matter. The instant matter arises from action proceedings instituted by plaintiff. Josephine is a plaintiff witness.

[2] Plaintiff makes a principal claim and an alternative claim. I shall go on to consider the alternative claim only if I rejected the principal claim (see *Lopez v Minister of Health and Social Services* 2019 (4) NR 1095 (HC) para 8). Plaintiff's principal claim ('the claim') is not drafted in the clearest of terms. For instance, it is not clear whether plaintiff complains of the fact that she was handcuffed or the fact that she was handcuffed in an 'unconventional manner'; whatever that means. It is equally not clear whether plaintiff complains of the fact that she was subjected to 'unconventional methods of questioning', whatever that means, or the fact that she was questioned. Yet again in para 5 of the particulars of claim, plaintiff alleges that the police officials who attended to her had a duty to –

- 5.1 Protect the plaintiff against any threat and or attack on her bodily integrity;
- 5.2 Refrain from subjecting the plaintiff to unlawful assault, arrest and/or detention;
- 5.3 Protect the plaintiff against any insults and or threats;
- 5.4 Refrain from subjecting the plaintiff to any physical or emotional harm.'

[3] It is not clear to me what plaintiff's complaint is about. Is it about the police officials having threatened her with an attack and/or having actually attacked her or about the police officials having failed to protect her from the threat and/or attacks?

[4] If light was thrown at the pleadings in order to illuminate these dark edges, the following appears to emerge. The plaintiff's claim and allegations there are as follows. Plaintiff alleges:

- (1) unlawful arrest;
- (2) unlawful detention;
- (3) 'unconventionally' handcuffed;
- (4) electric shocks administered to her wrists;
- (5) beatings; and

based on the allegations in paras (1) (2), (3), (4), and (5), plaintiff claims N\$100 000 for emotional and psychological shock and trauma, inconvenience and discomfort.

[5] It need hardly saying that plaintiff bears the onus of proving the allegations in para 4 (1) (2), (3), (4), and (5), above, as well as the claim for N\$100 000. In doing so, plaintiff gave evidence and called Josephine and Mr Hashotushi Sageus Katoteli (Josephine's boyfriend) as plaintiff witnesses. It is to the allegations and the evidence to prove them that I now direct the enquiry.

Para [4] (1). Unlawful arrest

[6] In para 6.1 of the particulars of claim, plaintiff alleges that she was arrested at the gambling house on about 8 November 2017. But in her examination-in-chief-evidence she stated categorically and unreservedly that 'I know that I was never implicated in that robbery because I was never arrested'. From the evidence, I find that plaintiff was prepared to make such categorical statement because Constable Timoteus Andreas Helao, a defence witness and one of the police officials who fetched plaintiff from the gambling house when investigating the robbery, assured her that she was not under arrest. Because of the assurance she received from Constable Helao, plaintiff agreed to accompany the police officials to the police station when she was invited to do so. I shall return to this piece of evidence in due course.

[7] It seems to me clear that the allegation that plaintiff was arrested could not be proved because plaintiff knew that she was not arrested by the police officials and she testified she was not arrested. Accordingly, I hold that there was no arrest – lawful or unlawful. This holding disposes of the question of unlawful arrest. Common sense and logic tell me that there cannot be an unlawful action where there is no action. I proceed to consider the allegation of unlawful detention.

Para [4] (2). Unlawful detention

[8] Plaintiff alleges unlawful detention; but not a wraith of evidence was put forth to prove the allegation. On the evidence, I find that plaintiff was taken to the police

station for questioning. In my view, the police officials were within their right, indeed, it was their duty, to do so. Armed robbery is a serious offence. And the evidence is clear that the gambling house was at the relevant time under the control of plaintiff and Josephine when it was robbed. Plaintiff and Josephine were naturally the first port of call in any investigation of the robbery; and what is more, it has not been alleged and proved by plaintiff that she was placed in any police detention facility, eg police holding cells. And it must be remembered, plaintiff had not been arrested and she had accompanied the police officials voluntarily to the police station for questioning, as I have found previously.

[9] Based on the foregoing reasons, I conclude that the allegation of unlawful detention remained unproved at the close of plaintiff's case. Consequently, I reject plaintiff's allegation that she was detained and unlawfully so. I pass to treat the allegation of 'unconventionally handcuffed'.

Para [4] (3). Unconventionally handcuffed

[10] In her examination-in-chief-evidence, plaintiff testified that at about 13H00 on 8 November 2017 the police officials invited her to go with them. When they reached the police vehicle 'they handcuffed me'. The handcuffs were removed in an office at the police station. The handcuffs had been secured at her front but later they were secured at her back. I do not see what is unconventional about that; and plaintiff did not say in her evidence why she says that she was 'unconventionally handcuffed', considering that the adverb 'unconventionally' connotes that what is done is not considered normal. I have nothing to hold on to from the plaintiff for me to say that plaintiff has proved that which she alleges.

[11] Consequently, I reject plaintiff's claim under this head. I proceed to consider the allegation under para [4] (4).

Para [4] (4). Electric shocks administered to her wrists

[12] In her examination-in-chief-evidence, plaintiff testified that whenever she answered the questions put to her by a police official she felt a sharp electrifying pain

emanating from the handcuffs, which went through her body; and so, for her she was electrocuted while under questioning. She did not testify as to what made her come to the definitive conclusion that she was electrocuted. A police official and a defence witness, Constable Timoteus Andreas Helao, testified that he had left plaintiff at the charge office of the Windhoek Police Station because the Operation Office was full of police officials. He is one of the police officials who drove plaintiff back to the gambling house. He testified further that he had no knowledge of any metal instrument having been attached on the handcuffs on plaintiff's wrists which sent an electric shock through her body. It is important to make this crucial point. According to the information given to the medical doctor who attended to plaintiff on 8 November 2017 on Form J88, plaintiff told the doctor that she had been assaulted. It is more probable than not that if electric shocks had been administered through her body she would have given such crucial information to the doctor, considering that she consulted the doctor unaccompanied by any other persons.

[13] Upon the authority of *Goran v Skidmore* 1952 (1) SA 732 (N) at 734A-D, per Selke J, approved by the Supreme Court in *M Pupkewitz 7 Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) para 30, going upon a mere preponderance of probability, I find that there is no cogent and satisfactory evidence tending to establish that police officials administered an electric shock to plaintiff's body. Plaintiff's claim under this head is, accordingly, rejected. The last allegation under the principal claim is treated next.

Para [4] (5). Beatings

[14] The allegation in the particulars of claim is that while plaintiff was in handcuffs, a police official 'then proceeded to step on plaintiff's face seven consecutive times'. I dare observe that plaintiff's pleadings are drafted slovenly. It is, with respect, clumsy. It is unclear how a police official could step on plaintiff's face when plaintiff was in a sitting position, and not in a supine position. And what does 'seven consecutive times' mean? Be that as it may, the evidence was that a police official slapped plaintiff on her face seven times.

[15] The defendants deny any such assault on plaintiff by a police official or police officials. Constable Helao testified that he did not assault plaintiff, neither did he see any of his colleagues assault her. Plaintiff testified that as a result of being beaten she felt pain on her face, especially on the left cheek. Indeed, Form J88 indicates bruising on the left cheek. It is worth noting that nowhere in the defendants' plea that this allegation by plaintiff is challenged. They only deny it generally in para 3 of the defendants' plea.

[16] Josephine testified that while she was injured on her knees by the robbers, plaintiff was not injured during the robbery; neither was she beaten. This forms part of the *res gestae* in that a self-confessed robber of the gambling house told the police that there were four accomplices and that one of the robber's girlfriend, being plaintiff, gave the robbers information that there was money at the gambling house. It stands to reason that the robbers did not beat or injure their confederate in the crime, being plaintiff.

[17] Josephine testified further that she only saw that plaintiff was injured on her face after she was returned to the gambling house by the police officials. Another plaintiff witness, Katoteli corroborated Josephine's testimony that plaintiff had no visible injuries after the robbery. He only noticed fresh injuries after the police official had brought her back to the gambling house.

[18] Based on these reasons and upon the authority of *Goran v Skidmore* (see para 13 above), I feel that it is safe and satisfactory to infer that, going upon a mere preponderance of probability, plaintiff was assaulted on her face by a police official – whether one or two officials, it generally matters tuppence; neither is it generally of any moment how many times she was slapped.

[19] Based on these reasons and upon the authority of *Goran v Skidmore*, I can infer that a police official assaulted plaintiff, but I am not prepared to find that he or she slapped plaintiff 'seven consecutive times', whatever that means. It follows that in my judgment, plaintiff has proved the allegation under this head.

Vicarious liability and alternative claim

[20] In their plea, defendants do not raise the issue of vicarious liability; it is rather raised in the pre-trial order, and that is not proper. The foundation for an issue of law to be resolved at the trial should have been laid in the pleadings, in particular, on the facts of the instant matter, in the plea. Be that as it may, Mr Mutorwa did argue the issue of vicarious liability. It is only Ms Zenda Harris who deals with it. I take it that vicarious liability is not an issue persisted in by defendants. Furthermore, having not rejected the principal claim in its entirety, I am not entitled to consider the alternative claim (see para 2 above).

Damages claim

[21] The next level of the enquiry deals with the claim of N\$100 000 in damages. Plaintiff dragged defendants to court on five disparate and distinct constituent claims under the principal claim (see para 4 above). The claim for N\$100 000 is for all the five claims. And since, in terms of the Namibian Constitution, no right is greater or more important than the other, I shall divide N\$100 000 equally among the five claims to enable me to determine reasonably and fairly the quantum of damages that the court should consider. This means each claim is for N\$20 000. I have done that in order to solve a similar problem that confronted the court in *Hipandulwa v Kamupunya* 1993 NR 254 (HC) where there was a multiplicity of wrongs committed by the defendant and for which plaintiff claimed a global amount of general damages for four separate claims. In the instant matter, I have rejected four of the five claims, leaving only the claim under para [4] (5) as having been successful. The upshot is that as respects the claim in respect of para [4] (5), I should work around N\$20 000.

[22] In working around the amount of N\$20 000, I fall back on those principles that I applied in *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) paras 39-46 and which are relevant on the particular facts of the instant matter. They are as follows:

(1) The general principle is that a successful plaintiff is entitled to be compensated for the loss suffered but is not entitled to profit from the loss.

(2) When determining the quantum of damages in such claims, the courts seek in aid awards granted in comparable cases. In doing so the instant court must always take into account the circumstances of each individual case.

(3) When making awards for general damages, as is in the instant matter, courts should guard against duplication of awards and awards that overlap, leading to the successful plaintiff being overcompensated.

[23] In the instant matter, the claim in which plaintiff has been successful is under para [4] (5), that is, beating. I prefer to call it assault. From the aforementioned Form J88, I find that the examining medical doctor found plaintiff's general state of health to be normal. There was bruising over her left cheek. There were no open wounds. That is not to say that I overlook the fact that any unlawful assault should be condemned. The court, which is the first-instance bastion of protection of human rights, should always take such violation of one's human right seriously and condemn it in the strongest terms, as I do. That, notwithstanding, I must still apply the relevant *Lopez* principles in order to do justice to both parties as to the reasonable and fair amount the court should award to compensate plaintiff for being successful in her claim under para [4] (5).

[24] I now take a comparative approach in arriving at a reasonable amount of compensation (see *Iyambo v Minister of Safety and Security* 2013 (2) NR 562 (HC)). *Iyambo*, which Mr Mutorwa, counsel for defendants, referred to me is not on point as respects quantum of damages. The reason is that, *Iyambo* concerned a claim for unlawful arrest and detention. I shall rather look at *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC) where there was a claim for assault, apart from unlawful arrest and detention, perpetrated by the Council's City Police officials. There, the assault consisted of the plaintiff being pulled forcefully and violently from the taxi he was driving, slapped, kicked and punched, and his head pushed to the curb of a street in Windhoek by City Police officials who were on patrol there, and in the process hitting his head against the curb. Compared with the assault in the instant matter, the assault in *Sheefeni* was by far more serious.

[25] By all account, compared with the assault in the instant matter, the assault in *Sheefeni* was more serious, brutal and life threatening. There, plaintiff claimed N\$150 000 as general damages for assault. The court considered the amount to be exorbitant, and awarded an amount of N\$50 000, which the court found to be reasonable and capable of meeting the justice of the case (see para 9 of *Sheefeni*).

[26] In the instant case, I have worked it out that each of the five claims is for N\$20 000 (see para 21 above). On the facts of the case, I think N\$ 20 000 for the assault is exorbitant. In my judgment, an award of N\$ 10 000 is reasonable and is capable of meeting the justice of the case.

Costs

[27] It remains to consider costs. Plaintiff has succeeded in only one of the total number of five claims. She has not chalked substantial success. It is rather the defendants who have succeeded substantially, having successfully resisted four out of five claims; and so, in the normal run of things, it is defendants who should have their costs. Nevertheless, I have taken into account the following important factors: The defendants are from the Government. The plaintiff is an ordinary, unemployed person who came to court to vindicate her rights guaranteed to her by the Namibian Constitution. Such conduct by poor, ordinary persons should be encouraged in a constitutional State. For these reasons, I think it is fair and just that each party pay their own costs.

[28] Based on these reasons, I order as follows:

(a) Judgment for the plaintiff in the amount of N\$10 000, plus interest thereon at the rate of 20 per cent per annum a tempore morae from the date of this judgment to the date of full and final payment.

(b) There is no order as to costs.

(c) The matter is considered finalized and removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF:

S Z HARRIS

Of Legal Assistance Centre, Windhoek

DEFENDANTS:

N MUTORWA

Of Government Attorney, Windhoek