

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2018/03930

In the matter between:

PETRUS FRIDEL FREDERIK

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY:

CHARLES NAMOLOH

1ST DEFENDANT

COMMISSIONER GENERAL: NAMIBIAN CORRECTIONAL

SERVICES RAPHAEL TUHAFENI HAMUNYELA

2ND DEFENDANT

OFFICER IN CHARGE DEPUTY COMMISSIONER MAHUNDU

OF THE HARDAP CORRECTIONAL FACILITY

3RD DEFENDANT

CORPERATIONAL OFFICER WARRANT NAMBAHU

HARDAP CORRECTIONAL FACILITY

4TH DEFENDANT

CORRECTIONAL OFFICER SERGEANT JACKSON

HARDAP CORRECTIONAL FACILITY

5TH DEFENDANT

CORRECTIONAL OFFICER SERGEANT ZAL

HARDAP CORRECTIONAL FACILITY

6TH DEFENDANT

Neutral citation: *Frederik v The Minister of Safety and Security: Charles Namoloh*
(HC-MD-CIV-ACT-OTH-2018/03930) [2021] NAHCMD 109 (22
January 2021)

CORAM: NDAUENDAPO J
Heard: 21 September 2020
Delivered: 22 January 2021
Reasons: 29 March 2021

Flynote: Delict - Plaintiff suing for damages in the amount of N\$ 1 400 000 for cutting his dreadlocks – Emotional – Post traumatic stress – Correctional Services Act 2012 - The Commissioner General empowered to issue rules, orders and directives for the proper functioning of correctional facilities – Growing of dreadlocks contrary to Correctional orders - Cutting of the plaintiff's dreadlocks was by consent and it was reasonable and justifiable in terms of art 21(2) of the Constitution - Plaintiff's claim dismissed.

Summary: The plaintiff, an offender serving a long jail term, instituted action against the defendants claiming damages in the amount of N\$1 400 000 for unlawfully and wrongfully cutting his dreadlocks halfway and for emotional post-traumatic stress he suffered as a result of the cutting of his dreadlocks. The defendants pleaded that the growing of dreadlocks was prohibited in a correctional facility and the plaintiff had agreed to have his dreadlocks cut. The plaintiff testified that he was a Rastafarian and the growing of dreadlocks was part and parcel of his culture. He testified that 20% of his dreadlocks was cut off against his will by correctional officers at Hardap correctional facility. That violated his constitutional right to practice his religion. As a result of the cutting of his dreadlocks, he suffered post emotional stress.

The defendants testified that the growing of dreadlocks in correctional facility was prohibited and that the plaintiff was informed about it when he arrived at Hardap correctional facility. He consented to have his dreadlocks cut by the correctional officers and whilst they were busy cutting his dreadlocks he told them to stop as he was going to cut the remainder of the dreadlocks himself. By then his dreadlocks was cut halfway.

Held, that, in terms of the Correctional Services Act 9 of 2012, the Commissioner General was empowered to issue rules, orders and directives for the proper functioning of correctional facilities.

Held, further that, in terms of the Namibian Correctional Services Code of Conduct 2014 for male correctional officers which also applies to sentenced male prisoners provides that: 'correctional officers are not allowed to shave off all their hairs (i.e. bald) without a good reason or to wear a ridiculous hair style and must have their hairs cut or trimmed in a brush-cut manner, not more than 1cm long.

Held, further that the cutting of the plaintiff's dreadlocks was by consent and it was reasonable and justifiable in terms of the correctional services code of conduct and article 21(2) of the Constitution.

Held, further that the plaintiff's claim is dismissed.

ORDER

1. The plaintiff's claim is dismissed.
2. There shall be no order as to costs.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] The plaintiff instituted action against the defendants claiming damages in the amount of N\$1 400 000 for wrongfully cutting his dreadlocks halfway and for emotional and post-traumatic stress disorder, suffered by the plaintiff as a result of the cutting of his dreadlocks by the defendants.

The parties

[2] The Plaintiff is Petrus Friedel Frederik, a major male, Namibia citizen, currently serving 35 years' imprisonment at the Windhoek Correctional Facility.

[3] The first defendant is Charles Namoloh, the Minister of Safety and Security c/o Government Attorneys, Sanlam Centre, 2nd floor, Independence Avenue, Windhoek.

[4] The second defendant is Raphael Tuhafeni Hamunyela, the Commissioner General: Namibian Correctional Services, c/o Government Attorneys, Sanlam Centre, 2nd floor, Independence Avenue, Windhoek.

[5] The third defendant is Ikosa Leonard Mahundu, the officer in charge, deputy commissioner: Hardap correctional facility, residing in Mariental.

[6] The fourth defendant is Warrant Gideon Nambahu, a Correctional Officer, stationed at Hardap correctional facility.

[7] The fifth defendant is Sergeant Jackson Nghitotelwa, a correctional officer, stationed at Hardap correctional facility.

[8] The sixth defendant is Sergeant Zed Zal, a correctional officer stationed at Hardap correctional facility.

Pleadings

[9] In the amended particulars of claim, the plaintiff alleges that upon his arrival at Hardap correctional facility, fourth to six defendants took him to a room telling him that he is at Hardap prison and they don't allow dreadlocks. They pushed him around. Thereafter the fourth defendant started to graze (sic) the plaintiff in order to hold him still and the fifth defendant took out a scissor from his pocket and cut the plaintiff's dreadlocks half way. He alleges that it has taken many years to grow his dreadlocks and to care for them and cutting his dreadlocks has changed his identity as a Rastafarian and it will take a very long time for his hair to grow to the same level. He alleges that his claim for damages is in terms of article 25(2) of the Namibian Constitution and articles 10(1) of the International Covenant on Civil and Political Rights.

Defendants' plea

[10] The defendants deny that any of its (sic) employees acted wrongfully or negligently in any respect, and the plaintiff is put to the proof thereof. In amplification of this denial, the defendants plead that the plaintiff has dreaded his hair not for religious reasons, but rather for the furthering of gang activities which included the illegal smuggling of contraband. The plaintiff at the time was operating as the leader of a gang named "Vocos Logos" and recruited other inmates to dread their hair as a symbol of allegiance to the plaintiff's gang. The growing of the dreadlocks is in violation of the Correctional Services Code of Conduct 2014 and B Orders Chapter 15.23.3, which states that an inmates' hair must be cut or trimmed in a brush-cut manner, not more than 1cm long.

Plaintiff's Replication to Defendant's amended plea

[11] Plaintiff replicated that: 'he has before being incarcerated adopted the Rastafarian Religion in accordance with Article 21 (1)(c) of the Namibian Constitution and at no stage got involved in any gang activities. Plaintiff pleads that he knows nothing about the "Vocos Logos" gang, the Defendants referred to and denies having been a leader of such a gang.

[12] 'The Constitution is the Supreme Law of Namibia. To the extent that the Correctional Services Code of Conduct 2014 and B Orders Chapter 15.23.3 are Subsidiary Legislation, they offend Articles 19 and 21 (4)(c) and can never have primacy of the Constitution. Plaintiff therefore re-iterates that Defendants acted unlawfully and wrongfully by cutting his dreaded hair.'

Plaintiff's evidence

[13] He testified that he is serving a 25 years' imprisonment at the Windhoek Correctional Facility. He testified that he has adopted the Rastafarian religion and culture as his own. The Rastafarian religion and culture *inter alia* entails the growing and braiding of dreadlocks.

[14] He testified that at the time the cause of action arose, he was incarcerated at the Hardap correctional facility. He testified that he was taken to a room inside the Hardap Correctional Facility by the fourth to sixth defendants. He was pushed inside the room by the fourth to six defendants.

[15] He testified that inside the room, the said defendants said to him that he was at Hardap Correctional Facility and that he will not change how it was run or managed. They started to push him around and told him that they do not allow dreadlocks at the facility. Thereafter fourth defendant grabbed him, twisted his arms and held them at his backside to the point where he could not move. The fifth defendant then took out a pair of scissors from his pocket and then cut his dreadlocks halfway with the scissors.

[16] On 19 February 2018, he reported the incident to the head of C-section, warrant officer Hangula Natangwe. During cross examination he was asked whether the officers cut the whole or part of the dreadlocks, he responded that only from the middle of the head up to the front. On the question by the court he testified that only 20% of the hair was cut. During cross examination he testified that he was mentally and emotionally affected by the cutting of his dreadlocks. The dreadlocks had sentimental value to him, and he lost a part of him and he will not have it again, those hair will not grow again and that is why he is claiming the one million Namibian dollars in damages.

[17] During cross examination he was asked about his Rastafarian religion and he said:

'It becomes a feeling, it is a peaceful religion, and I was not that active when I was outside because of my parents, they hated that. I am from a royal family, my father approached me and said it is an embarrassment. But when I was in prison I decided to live the life of a Rastafarian'.

Defendants' evidence

[18] Mr. Zed Zaal testified that he is employed by the Ministry of Safety and Security: Correctional Services in the rank of Senior Correctional Officer. He is stationed at the Hardap Correctional Facility, since 13 October 2008. On or about 19 February 2018 he reported for duty around 06h45. At around 07h00, he was walking to the reception area when he noticed the plaintiff and his two colleagues, the fourth and fifth defendants, in an office along the corridor.

[19] He stopped at the door and observed the fifth defendant cutting the Plaintiff's hair with a scissor. He was not held down by the fourth defendant and he observed no resistance from the Plaintiff. He did not engage his colleagues or the Plaintiff in a conversation. He then continued his walk to the reception area. This whole encounter lasted less than three minutes.

[20] Mr. Nghitoteiwa Jackson testified that he is employed by the Ministry of Safety and Security: Correctional Services in the rank of Correctional Officer Class II. He is stationed at the Hardap Correctional Facility, since 03 September 2011. He testified that he serves under the Emergency Response Unit within the facility. The mandate of this unit is to secure the safety of the facility and to prevent riots and similar incidents. His daily duties include patrolling and gathering intelligence on gang activities. Shortly, after the plaintiff arrived at the facility, intelligence was received that the plaintiff had started recruiting other inmates to his gang called "Vocos Logos" in the section where the plaintiff was housed.

[21] According to the intelligence received, the plaintiff persuaded other inmates to dread their hair as a symbol of being part of the gang. It was further determined that the gang engaged in smoking tobacco as part of their manifesto. On or about 19 February 2018, at around 07h00, they conducted an inspection to establish whether the inmates were smoking tobacco. The plaintiff refused to cooperate. They asked him to step outside the cell and to wait outside, which he did without any resistance.

[22] When the inspection was completed, he and the fourth defendant escorted the plaintiff to an office located next to the section. The fourth defendant reminded the plaintiff of a directive which was given to him by the third defendant on the first day he arrived at the facility, which was that long hair was not allowed and that he should cut it short.

[23] The plaintiff was defiant. He informed the plaintiff about the hygiene of inmates in terms of Section 30 of the Namibian Correctional Services Act (Act 9 of 2012).

[24] He gave him an ultimatum: either he cuts his own hair or they will assist him. He stated that he should proceed because he would not cut his own hair. He moved the Plaintiff to the room next to the office and proceeded to get a pair of scissors.

[25] He started cutting the Plaintiff's hair without any resistance from him. When he was halfway through with this process, the plaintiff calmly stated that he would complete the haircut himself. He walked back to his sectional cell without incident.

[26] Mr. Gideon Kauko Nambahu testified that he was employed by the Ministry of Safety and Security: Correctional Services in the rank of Chief Correctional Officer since 03 September 2011 and is stationed at the Hardap Correctional Facility. He testified that he first met the plaintiff when he was transferred from Windhoek to Hardap due to his father's ill-health. At this meeting, the third defendant informed the plaintiff that the facility strictly does not allow long hair as a matter of hygiene. The third defendant pointed out that the plaintiff had short hair on his offender profile when he was first sentenced. The Plaintiff agreed to cut his hair voluntarily.

[27] He testified that shortly after the plaintiff arrived at the facility, intelligence was received that the plaintiff had started recruiting other inmates to his gang, "Vocos Logos" in the section where the Plaintiff was housed.

[28] He testified that according to the intelligence received, the plaintiff persuaded other inmates to dread their hair as a symbol of being part of the gang. It was further determined that the gang engaged in smoking tobacco as part of their manifesto.

[29] He testified that on or about 19 February 2018, at around 07h00 they conducted an inspection to establish whether the inmates were smoking tobacco. The plaintiff refused to cooperate. They asked him to step outside the cell and to wait outside, which he did without any resistance.

[30] When the inspection was completed, he and the fifth defendant escorted the plaintiff to an office located next to the section. He reminded the plaintiff of the directive which was given to him by the third defendant on the first day he arrived at the facility, which was that long hair was not allowed and that he should cut it short.

[31] The Plaintiff was defiant. The fifth defendant informed the Plaintiff about the hygiene of inmates in terms of Section 30 of the Namibian Correctional Services Act (Act 9 of 2012).

[32] The fifth defendant gave him an ultimatum: either he cuts his own hair or they will assist him. He stated that we should proceed because he would not cut his own hair. They moved the Plaintiff to the room next to the office and proceeded to get a pair of scissors.

[33] The fifth defendant started cutting the plaintiff's hair without any resistance from him. When he was halfway through with this process, the Plaintiff calmly stated that he would complete the haircut himself. He walked back to his sectional cell without incident.

Submissions by plaintiff

[34] Counsel argued that the defendants are now relying on section 5 of the Correction Services Act 9 of 2012. However, no evidence is on record to the effect that the cutting of plaintiff's hair was based on the said section.

[35] Counsel submitted that the defendants were supposed to tell the court that they proceeded on the basis of the orders or directives made in terms of section 5(3) of the Act.

[36] Counsel argued that it is "common cause" that the plaintiff is an adherent of the Rastafarian religion" after he adopted that religion and dreadlocks are symbolizing the Rastafarian religion which is protected by the Namibian Constitution.

[37] Counsel argued that the evidence on record is that fourth defendant cut the hair of plaintiff halfway. We must point out here that what was cut was actually not the natural hair in that form but dreadlocks. Why did the fourth defendant not reduce the dreadlocks to the prescribed length? Why was it necessary to remove the whole dreadlocks halfway on plaintiff's head?

[38] Counsel submitted that the actions of the defendants constitutes a violation of plaintiff fundamental right to practice and manifest his religion. Counsel referred this court to the *Prince* matter, quoting from the matter of Christian education case, where the court stated that:¹

‘A number of provisions in the RSA Constitution affirmed the right of people to be who they were without being forced to subordinate themselves to the cultural and religious norms of others and highlight the importance of individuals and communities being able to enjoy what has been called the right to be different. In each case space (had) been found for members of communities to depart from a general norm... The provisions collectively and separately acknowledged the rich tapestry constituted by civil society indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.’

Counsel submitted that for all those reasons the claim of the plaintiff must succeed.

Submissions by the defendants

[39] Counsel argued that in terms of section 5 the Correctional Service Act 9 of 2012, the Commissioner-General, in addition to such other powers, duties and functions as may be conferred upon or assigned to him or her by or under this act, is responsible for the efficient supervision, administration and control of the Correctional Service.

(3) Subject to the provisions of this Act, the Commissioner-General may, for the efficient supervision, administration and control of the Correctional Service and for observance by offenders and correctional officers, make or issue such rules, standing orders or administrative directives as he or she may consider necessary or expedient.

[40] It is on the basis of the above that the Commissioner-General is empowered to issue and/or create Prison Service Orders. One such order is the B. Order Chapter 15.23.3 which provides that:

‘Sentenced male prisoners’ hair should be cut in accordance with the requirements for male members of the department.’

¹ *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

Counsel for the defendants correctly submitted that those orders are valid and binding until such time as they have been declared unconstitutional. Counsel further argued that the evidence adduced by the defendants was that he was informed of the policy of correctional facility regarding the growing of dreadlocks and that he consented to have the dreadlocks cut off by correctional officers. Counsel argued that that the cutting of the dreadlocks was not in violation of art 2 (1)(c) Of the Namibian Constitution. It was reasonable and justifiable for the proper and efficient operation of correctional facility.

Discussion

The legal framework

[41] Before analyzing the evidence, it is important to briefly discuss the relevant legal framework under which the correctional facilities operate. The Commissioner-General of the Namibian Correctional Facility is appointed by the President in terms of Art 122 of the Namibian Constitution. In terms of section 5 the Correctional Service Act 9 of 2012 (the Act), the Commissioner-General, in addition to such other powers, duties and functions as may be conferred upon or assigned to him or her by or under this act, is responsible for the efficient supervision, administration and control of the Correctional Service.

Section 5 (3) provides: Subject to the provisions of this Act, the Commissioner-General may, for the efficient supervision, administration and control of the Correctional Service and for observance by offenders and correctional officers, make or issue such rules, standing orders or administrative directives as he or she may consider necessary or expedient.(My emphasis)

[42] It is on the basis of the above that the Commissioner-General is empowered to issue and/or create Prison Service Orders. One such order is the B Order Chapter 15.23.3 which provides that:

‘Sentenced male prisoners’ hair should be cut in accordance with the requirements for male members of the department.’

Counsel for the defendants correctly submitted that those orders are valid and binding until such time as they have been declared unconstitutional.

[43] Namibian Correctional Services Code of Conduct 2014 for male correctional officers which also applies to sentenced male prisoners provides that:

‘Correctional officers are not allowed to shave off all their hairs (i.e. bald) without a good reason or to wear a ridiculous hair style. Therefore - Male correctional officers must have their hairs cut or trimmed in a brush-cut manner, not more than 1cm long; well-trimmed moustaches are allowed but beards are not allowed except on the prescription of a medical officer.’

It must be pointed out that the plaintiff is not challenging the constitutionality of the orders, rules and directives made under section 5(3) of the Act and therefore they remain valid and binding.

[44] Section 32 of the Correctional Services Act provides that:

‘Subject to section 66, correctional officers employed in a correctional facility are responsible for ensuring – (a) as far as is practicable, the security and safe custody of all offenders detained in custody in that correctional facility; and (b) that the treatment and discipline of offenders therein is in accordance with the provisions of this Act, and must in the performance of their functions under this Act be under the direction and control of the officer in charge and act in accordance with this Act and the rules, standing orders and administrative directives made or issued by the Commissioner-General in terms of section 5(3) and the directive or instructions made or issued by the officer in charge in terms of section 18(2)(c).’

Counsel for the defendants correctly argued that as per Section 32 of the Correctional Service Act, correctional officers are in the performance of their functions under the Act expected to act in accordance with the Act, the rules, standing orders and administrative directives made or issued by the commissioner-General in terms of section 5(3) and the directive or instructions made or issued by the officer in charge in terms of section 18(2) (c). Principles that guide Correctional Service, under the Act provides ‘(e) that offenders are expected to obey correctional rules and conditions of release and to actively participate in programs designed to promote their rehabilitation and reintegration...’ (My emphasis)

[45] Article 21 (1) provides that all persons shall have the right to: (c) freedom to practice any religion and to manifest such practice; sub article (2) further provides that the fundamental freedoms referred to in Sub Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interest of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

[46] In *Kauesa v Minister of Home Affairs and others*,² the court said the following in relation to Article 21 of the Namibian Constitution:

‘Article 21(1)(a) has limitations. The court has to ask whether those limits are reasonable. The limitations are set out in art 21(2). Freedoms shall be exercised in accordance with the law of Namibia only if that law imposes reasonable restrictions on the exercise of the rights and freedoms entrenched in art 21(1)(a). The restrictions must be necessary in a democratic society. Not only must they be necessary in a democratic society, they must also be required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to commit an offence. Limitations are imposed in order that the rights enshrined in the Constitution should not interfere with the rights and freedoms of others and with Namibia.’

...

‘The Court in assessing the extent of the limitations to rights and freedoms, must be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values.’

I fully agree with the sentiments expressed therein.

[47] The evidence adduced was that the plaintiff grew his dreadlocks contrary to the orders, rules and directives issued by the Commissioner-General of correctional services. There is a question mark about the genuineness of the plaintiff’s religious belief. When questioned about the Rastafarian religion, his answers left much to be

² 1995 NR 175 SC.

desired. I got the distinct impression that he knows little, if any, about the Rastafarian religion. He testified that when he arrived at the Hardap correctional facility, he was informed that dreadlocks were not allowed and that he must cut his hair or alternatively the correctional officers will assist him to cut it for him. He was taken to a room where he agreed to have his hair cut. When Sergeant Nghitotelwa started to cut his hair halfway, he told him to stop as he would continue to cut the rest of the hair himself. According to the plaintiff only 20% of his hair was cut by Sergeant Nghitotelwa. The evidence of the Sergeant Nghitotelwa who cut the hair of the plaintiff was corroborated in material respect by the other witnesses who testified for the defendants.

[48] The cutting of the dreadlocks of the plaintiff was in accordance with the rules, directives and orders of correctional facility. It was justifiable and reasonable for hygienic, orderly maintenance of peace and for security reasons in a democratic society as the plaintiff was encouraging fellow inmates who were members of his gang to grow dreadlocks. Accordingly it was not inconsistent with art 21(1)(c) of the Constitution.

[49] For all those reasons, the plaintiff's claim cannot succeed. There will be no order as to costs, as both counsel for plaintiff and defendants are paid by taxpayers' money.

Order

1. The plaintiff's claim is dismissed.
2. There shall be no order as to costs.

G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF

Mr. Mbaeva
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FOR THE DEFENDANTS

Ms. Meyer
Of Government Attorneys
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