REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2019/05140

In the matter between:

JAIRUS SHAALUKENI	**PLAINTIFF**

and

MINISTER OF SAFETY AND SECURITY	**1st DEFENDANT**
INSPECTOR GENERAL OF THE NAMIBIAN POLICE	**2nd DEFENDANT**
PROSECUTOR-GENERAL OF THE NAMIBIAN POLICE	**3rd DEFENDANT**
M JAGGER N.O/PUBLIC PROSECUTOR	**4th DEFENDANT**

Neutral citation: *Shaalukeni v Minister of Safety and Security and Others* (HC-MD-CIV-ACT-OTH-2019/05140) [2021] NAHCMD 401 (8 September 2021)

Coram: PARKER AJ
Heard: **7, 8, 9, 10, 11, 15, 16, 17 June 2021**
Delivered: **8 September 2021**

Flynote: Delict – Specific forms – Wrongful arrest and detention – Defendant Police officials putting handcuffs on plaintiff and placing him in a police motor vehicle and driving him to the police station and keeping him at the charge office – Defendants denying there was an arrest.
Held, to arrest a person is to deprive him or her of her liberty by some lawful authority or a person lawfully authorized.

Summary: Delict – Specific forms – Wrongful arrest and detention – Police officials forcefully attempting to serve criminal summons on plaintiff – Plaintiff refused to receive or sign for summons – Fracas ensued between plaintiff and the police officials – Police officials placed handcuff on plaintiff and pushed him into the back compartment of police van and kept him at charge office of police station for a few hours – Court finding that that constituted arrest – Court finding further that the arrest was wrongful – When service of summons failed the next lawful option in terms of the Criminal Procedure Act 51 of 1977 was to lay information with public prosecutor for him or her to apply for a warrant of arrest before a magistrate – Court finding further that the police officials took the law into their own hands – Court concluding arrest was wrongful – Court granting judgment for plaintiff for wrongful arrest and detention and awarding damages against defendants.

ORDER

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1. Judgment for the plaintiff in the amount of N$ 80 000, with costs.
2. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This is a matter where plaintiff alleges in the following terms:

(a) Under Claim A, that he was unlawfully and intentionally assaulted by officials of second defendant's outfit.

(b) Under Claim B, that he was unlawfully arrested and detained by officials of second defendant's outfit.

And defendants plead thus:

(c) As to Claim A, defendants plead that the alleged assault is disputed and plaintiff is put to proof of the allegation.

(d) As to Claim B, defendants plead that the arrest and detention were neither wrongful nor unlawful.

[2] The matter arises from an incidence surrounding second defendant's officials' desire to serve a criminal summons on plaintiff for him to appear in court for his criminal trial in Windhoek, plaintiff's unwillingness to be served and his refusal to take the summons on a public road in the Omusati Region in northern Namibia, plaintiff's detention there and his release from detention by the magistrates court, Windhoek District, after, according to plaintiff, 'almost a week' in detention.

[3] Plaintiff testified on his behalf and called a medical expert witness in the person of Dr Filippus Tuna Omukumo Itembu, a General Practitioner, to testify on his behalf. Defendants called two witnesses, namely, Detective police official Linus Neliwa and Detective Sergeant Daniel Katau Wilbard. For a good reason that will become apparent in due course, I shall consider Claim B first. Ms Ndilula represents plaintiff, and Mr Kauari represents the defendant.

Claim B

[4] In order to sustain a claim of unlawful arrest and detention, the plaintiff must establish two things, namely, that (a) there was an arrest and detention; and (b) the arrest and detention were unlawful. Item (a) is essentially a question of fact, while item (b) is a question of law.

[5] I have considered all the evidence placed before the court. Having done that, I make the following factual findings, which, in material respects are indisputable,

anyway. Police officials consisting of Wilbard, Neliwa, detective Sergeant Stephanus Frans, Detective Sergeant Frieda Hangala, Sergeant Romanis Kamati and Sergeant John Hoaseb made a failed attempt to serve plaintiff with criminal summons for him to appear for his trial in the magistrates' court, Windhoek. This was on 3 December 2018.

[6] Some fracas occurred between plaintiff and the servers of the summons. Undoubtedly, the quarrel turned physical as the police officials were hell-bent to serve the summons and plaintiff was determined by hook or crook to refuse to take the summons and sign for it. The police officials placed hand cuffs on plaintiff and pushed him into the rear compartment of a police van. Plaintiff was then transported to the Onandjaba police station. Even at the police station, no amount of cajoling could break plaintiff's determination not to receive, and sign for, the summons.

[7] At the police station – and this is significant – plaintiff was placed at a spot behind the counter where the charge office officials are usually found working. This area is known commonly as 'counter-back'; and is separated by a counter from the area of egress and ingress of the charge office. The area of egress and ingress is where one finds members of the public who have gone to the charge office to transact business with the police officials. In the instant matter, plaintiff did not go to the police station to transact business: He was taken there in handcuffs by the police officials, and was placed at the 'counter-back'.

[8] I feel no doubt that the placing of handcuffs on plaintiff, pushing him into the police van, and transporting him to the police station where he was placed at the 'counter-back' amounted to plaintiff's free movement being restrained. In short, plaintiff was deprived of his liberty thereby. That, no doubt, constituted an arrest. It should be remembered, the word 'arrest' is not defined in the Criminal Procedure Act 51 of 1977 ('CPA'); and so, we should have recourse to the ordinary grammatical meaning by the context of the word 'arrest'. (See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2002 (2) NR 793 para 7.) The CPA only provides persons who may be arrested; how arrest should be carried out; and persons who could be arrested. To arrest a person is to deprive him or her of his or her liberty by some lawful authority or a person lawfully authorized. (Roger Bird *Osborn's Concise Law Dictionary* 7th ed (1983)

[9] In the instant matter, I find that the evidence points inexorably to the conclusion that plaintiff was deprived of his liberty by the police officials, that is, he was arrested on 3 December 2018. The fact that Neliwa and Katau said they assured plaintiff he was not being arrested but that they only wished to serve him with the summons matters tuppence. What matters is that the police officials deprived plaintiff of his liberty. They arrested him (item (a) in para 4 above). The other question to determine is under item (b) in para 4 above, that is, was the arrest unlawful, as plaintiff claims.

[10] The defendants aver that the arrest and detention arose from plaintiff's refusal to receive and sign for the summons on 3 December 2018. The arrest and detention cannot be lawful for the following reasons. The CPA does not entitle the server of a summons to there and then arrest the intended arrestee, if the intended arrestee refused to receive and sign for the summons. In terms of s 38, since the arresters' efforts to serve the summons on plaintiff failed, the next lawful avenue open to the arresters was to pursue the option of arrest. This entailed laying information with the concerned public prosecutor for him or her to apply to a magistrate to issue a warrant for the arrest of plaintiff. By arresting the plaintiff, the arresters took the law into their own hands, making the arrest and the ensuing detention equally unlawful. I note that on the evidence, plaintiff was arrested on 3 December 2018, which was a Monday; and he appeared before the magistrates court, Oshakati, on Tuesday, 11 December 2018, as indicated on the Transfer Charge Sheet, bearing the date-stamp of the magistrate, Oshakati. On that day the matter was postponed to 14 January 2019, and to be before the magistrates court, Windhoek.

[11] The law is very clear. The defendants, who are members of the Executive branch of Government, cannot, upon the *trias politica* of Montesquieu's principle of separation of powers (see *Mostert v Minister of Justice* 2002 NR 76 (HC) at 79E-G; *Iyambo v Minister of Safety and Security* 2013 (2) NR 562 (HC); *Sheehama v Minister of Safety and Security* 2011 (1) NR 294), be held accountable for the actions of the Judiciary, that is, the decisions of the learned magistrate in the instant proceeding. Doubtless, upon being brought before the magistrates court on 11 December 2018, plaintiff was no longer under the sway of the defendants. It follows

as a matter of law and logic that the unlawful detention for which the defendants can be held liable commenced on Monday, 3 December 2018 and ended on 11 December 2018; that is a period of eight days.

[12] Accordingly, I am satisfied that plaintiff has proved its claim under Claim B; and I hold that he was detained from 3 to 11 December 2018. I now proceed to consider Claim A.

Claim A

[13] Under Claim A, too, I have considered all the evidence placed before the court. Having done that, and going upon a mere preponderance of probility (see *M Pupkewitz & sons (Pty) Ltd t/a Pupkewitz MegaBuilt v Kurz* 2008 (2) NR 775 (SC) para 30), I make the following factual findings. The police officials (the servers of the summons) were unsettled because plaintiff had downright refused to receive, and sign for, the summons. And what is more, plaintiff had the audacity to tell them he could not be served with the summons on a public road where they had stopped him; and if they wished to serve him with the summons, they should follow him to Oshikango, some 50 km away. The police officials could not entertain such impudence. Some fracas ensued between the police officials and plaintiff.

[14] Common human experience (see *Nailenge v the Municipal Council of the City of Windhoek* NAHCMD 46 (7 March 2019) para 7) tells me that the police officials did not take plaintiff's attitude kindly. The police officials were hell-bent to serve the summons on plaintiff on the public road. Both plaintiff and the police officials were agitated: the latter were in no mood to stomach the impudence of plaintiff; and plaintiff was not to be outdone by the police officials who were forcing him to receive, and sign for, the summons willy nilly. No doubt, bad insulting words were uttered by the police officials on the one hand and the plaintiff on the other hand.

[15] It is more likely than not that the police officials attempted to forcefully serve the summons on plaintiff and plaintiff fought back. In order to subdue plaintiff, the officials placed handcuffs on his hands; and pushed him into the back compartment of a police van, as I have found previously. I do not believe that one unarmed man would attack a group of five police officials in a secluded place.

[16] Plaintiff alleges that he received the injuries he pleads in his particulars of claim from the assault he received at hands of the police officials. The material response to the plaintiff's allegations is encapsulated in the following crisp words in the defendants' plea: 'Whilst he was in the police vehicle (ie the police van) the plaintiff proceeded to hit himself against the steel net of the police van.' I understand defendants' plea to mean that any injuries plaintiff might have suffered was self-inflicted.

[17] In our law, the burden of proof lies with him or her who asserts, but if a party sets up a special defence, as the defendants do in the instant matter, the onus of proving that defence is on the party that raised it. (PJ Schwikkard et al *Principles of Evidence* (1997) at 400-401; approved in *Taapopi v Ndafediva* 2012 (2) NR 599; and A*casia Resorts (Pty) Ltd v Rehoboth Town Council* NAHCMD 154 (12 April 2021)). In this matter, defendants have failed to present any evidence tending to prove their special defence in order to discharge the onus cast on them that plaintiff's injuries were self-inflicted. In any case, plaintiff witness Dr Itembu, in response to a point of clarification raised by court, stated that the nature of plaintiff's injuries belies any suggestion that those injuries were self-inflicted.

[18] I accept Ms Ndilula's submission made upon authority, that is, *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC), that an assault that is not reasonably necessary to effect an arrest goes beyond the pale allowed by s 49 (1) of the Criminal Procedure Act 51 of 1977. With respect, Mr Kauari misses the point in his reliance on *Sheefeni*. In *Sheefeni*, the police officials were effecting an arrest for an offence under municipal bye-laws. In the instant matter, the police officials were not effecting an arrest. They themselves testified to that effect. There is no law on our statute books or at common law where a server of criminal summons is permitted to use force – it is of no moment the degree of force – to effect service thereof; see para 10 above. Accordingly, going upon a mere preponderance of probability (see *Kurz*), I find that the police officials assaulted the plaintiff; and plaintiff sustained injuries. The assault was not reasonably necessary to effect service of the summons, as I have found previously. This finding takes me to the next level of the enquiry where I should consider the evidence of Dr Itembu,

particularly the entries he made in the J88 (Medical Examination Report). I accept that the J88 has probative value; and so, it is relevant. According to Dr Itembu, plaintiff suffered these injuries, namely, (a) severe swelling of the right jaw; (b) abrasions on the elbows and arms; (c) dislocation of the left wrist (para (c) in the particulars of claim) Therefore, the injuries in paras (c) and (e) of para 8 of the particulars of claim cannot be separated.

[19] As I have said, the injuries were pleaded and testified to by plaintiff and Dr Itembu. For instance, plaintiff testified that the swelling to the right jaw was caused by a blow delivered by one of the police officials, using an unknown object. The averments of plaintiff and Dr Itembu were not met with a rebuttal in the form of expert evidence. It is a risk that defendants ran. Plaintiff's version remained undemolished at the close of plaintiff's case.

[20] Based on these reasons, I conclude that plaintiff has proved Claim B to the extent appearing in the order. For instance, as I have shown in para 18 above, the injuries under para 8 (c) and 8 (e) of the particulars of claim are taken as going together. No rebuttal expert evidence was placed before the court to challenge the evidence. The conclusion is, therefore, inescapable that that piece of evidence remained unchallenged at the close of plaintiff's case.

[21] Upon a consideration of the facts and the law, I conclude that plaintiff has proved Claim B, too, to extent appearing in the order. For instance, as I have shown in para 11 above, the unlawful detention of applicant lasted eight days and not one week, as claimed by plaintiff. I now proceed to consider the damages claimed by plaintiff.

Claim A: Damages

[22] Plaintiff claims N$500 000 for the traumatic experience, severe assault, injuries sustained and pain and suffering. Plaintiff rehearses the cliché one finds in such matters. No evidence was placed before the court tending to establish that plaintiff experienced trauma or that his injuries were severe. Indeed, I do not see the difference between trauma on the one hand and pain and suffering on the other. In

virtue of Ms Ndilula's reliance on *Hipandulwa v Kamupunya* 1993 NR 254 (HC), I should say this. I keep in my mental spectacle the caution that 'in the award for general damages, the court should guard against duplication of awards and overlapping awards'. (*Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) para 48) Awards for 'trauma' and 'pain and suffering' are a duplication of awards.

[23] In the recent case of *Lopez* where the medical negligence of a medical doctor led to the death of a lady while giving birth and the death of the newly born baby, too, (the mother of the lady) I rejected a claim of damages in the amount of N$900 000 by the lady's mother for emotional shock and trauma as excessive. I did so on the basis that 'when determining the quantum of damages in such claims, courts seek in aid awards granted in comparable claims, although – and this is important – the instant court must always take into account the circumstances of each individual case. (*Lopez* para 39)

[24] I have taken into account the aforementioned principles. I also recall that plaintiff did not prove that he 'experienced trauma' and that the injuries were severe. I have also taken into account what I have said previously about the need for courts to guard against duplication of awards and overlapping of awards (see para 22 above). In the end, I conclude that on the facts and in the circumstances of case, the claim for N$500 000 is exceedingly over the top. I consider an award of N$50 000 to be fair and reasonable.

Claim B Damages

[25] Under Claim B, plaintiff claims damages of (a) N$200 000 for pain and suffering, and (b) N$100 000 for contumelia; and (c) special damages of N$200 000. Recalling the caution courts should be aware of regarding duplication and overlapping of awards, I consider the awards claimed under items (a) and (b) as duplication and overlapping of awards; and so, I treat them as one composite item.

Paras (a) and (b)

[26] In *Iyambo v Minister of Safety and Security* 2013 (2) NR 562 para 13, I said, relying on *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) at 403H-404G, that in the assessment of damages, it is useful to consider awards of damages made in recent cases. I have also taken into account the considerations adverted to by the court in *Vivier NO and Another v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 (HC), referred to the court by Ms Ndilula. In *Iyambo*, I rejected plaintiff claim for N$150 000 for unlawful arrest and detention for four days because it was exceedingly over the top, having compared awards made for similar infraction. Similarly, I find the amounts claimed for items (a) and (b) (which is N$300 000) to be most exceedingly over the top. In *Iyambo*, I awarded N$ 12 000 for unlawful arrest and detention. Considering the facts and circumstances of the instant matter, particularly my finding that it was not necessary for the police officials to arrest and detain the plaintiff as it was wrong to attempt to forcefully serve him with the criminal summons and the fact that the detention lasted eight days, I consider an award of N$30 000 to be fair and reasonable.

Para (c)

[27] Plaintiff claims N$200 000 for loss of income. It would seem plaintiff sucked the amount from his thumb. Special damages must be proved; and proved with sufficient and satisfactory evidence. There is no evidence sufficient and satisfactory to consider. This claim falls to be rejected as unproved.

Costs

[28] As to costs, I think costs should follow the event. Plaintiff has been successful as respects both claim A and B, albeit he did not succeed in the quantum of damages prayed.

Conclusion

[29] In the result, I order as follows:

1. Judgment for the plaintiff in the amount of N$ 80 000, with costs.

2. The matter is finalized and is removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

PLAINTIFF:	H NDILULA Of Kadhila Amoomo Legal Practitioner, Windhoek
FIRST RESPONDENT:	N KAUARI Of Government Attorney, Windhoek