

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2020/05065

In the matter between:

**ISASKAR MULIKE**

**PLAINTIFF**

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION,  
SAFETY AND SECURITY**

**1<sup>ST</sup> DEFENDANT**

**INSPECTOR-GENERAL OF THE NAMIBIAN POLICE**

**2<sup>ND</sup> DEFENDANT**

**IMMANUEL MURUMENDU**

**3<sup>RD</sup> DEFENDANT**

**Neutral citation:** *Mulike v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-DEL-2020/05065) [2022] NAHCMD 244 (13 May 2022)

**Coram:** SIBEYA J

**Heard:** 31 January, 01 and 04 February 2022

**Judgment:** 13 May 2022

**Flynote:** Delict – Action for damages – Based on bodily injuries, pain and suffering and emotional trauma – Claim resulting from an alleged assault perpetrated by a police officer — The approach to mutually destructive versions restated – Court found that the plaintiff’s evidence is, on the balance of probabilities, true and the

defendants' evidence is on the same scale false – Court found that the plaintiff was assaulted by a member of the Namibian Police during the course and scope of his duties – Plaintiff's claim succeeds.

**Summary:** The plaintiff claims damages allegedly resulting from assault perpetrated by the third defendant while acting in the course and scope of his employment with the first defendant. The plaintiff claims damages for physical and emotional pain and trauma for N\$200 000 and *contumelia* N\$50 000.

Plaintiff was allegedly assaulted (hit with a fist on his mouth) by the third defendant because he merely informed the third defendant where the taxi he was an occupant in, was coming from.

The third defendant vehemently denies assaulting the plaintiff and the defendants resultantly defended the matter and disputed material averments made by the plaintiff.

A trial ensued where the plaintiff testified in his quest to prove his claim and led the evidence of another witness. The defendants, in turn, led evidence of two witnesses in order to repel the evidence brought by the plaintiff.

*Held that* - where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. This includes considering the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradict an established fact.

*Held that* - in this day and age, the said assault perpetrated cannot be condoned. The police are duty-bound to ensure the safety and security of the people. Where the police find themselves at the wrong side of such purpose, their actions are condemned in the strongest of words. This is in the hope that the police officers will learn from their wrongful actions and their colleagues' misdeeds and refrain from committing or attempting to commit similar actions.

*Held that* - Guided by the damages awarded in similar cases, and taking into account that although the plaintiff was only hit once with a fist on the mouth, the consequential effect of such assault was severe to the extent that the plaintiff bled from the mouth, had a loose tooth and his tooth was extracted. This demonstrates the seriousness of the assault. Coupled with the above is the fact that the assault was unprovoked.

The plaintiff is thus awarded damages in the amount of N\$40 000 against the first and third defendants, jointly and severally, the one paying the other to be absolved

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### **ORDER**

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Judgment is granted in favour of the plaintiff against the first and third defendants, jointly and severally, the one paying the other to be absolved for:

1. Payment in the amount of N\$40 000.
2. Interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of full and final payment.
3. Costs of suit.
4. The matter is removed from the roll and regarded as finalized.

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### **JUDGMENT**

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SIBEYA J:

#### Introduction

[1] This court is inundated with cases involving complaints by members of society who claim several kinds of violation of rights including assault, allegedly perpetrated

by members of the security cluster. The security cluster includes the police and the defence force. The number of claims is alarming particularly when regard is had to the fact that the members of the force are duty-bound to be at the forefront of the protection of human rights.

[2] Courts should carefully assess the veracity of the evidence in order to ascertain the true facts.

[3] The plaintiff claims damages allegedly resulting from an assault perpetrated by the third defendant while acting in the course and scope of his employment with the first and second defendants. Plaintiff claims damages amounting to N\$250 000.

#### The parties and their representation

[4] The plaintiff is Mr Isaskar Mulike, an adult male person residing at Oshaambula village, Okankolo, Oshikoto Region. He shall be referred to as such.

[5] The first defendant is the Minister of Home Affairs, Immigration, Safety & Security, duly appointed as such in terms of Article 32(3)(i)(dd) of the Constitution as the Minister responsible for the conduct and affairs of the Namibian police force, whose address is the care of the Office of the Government Attorney, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek. The 1<sup>st</sup> defendant shall be referred to as the Minister.

[6] The second defendant is the Inspector-General of the Namibian Police, duly appointed as such in terms of Article 32(4)(c)(bb) of the Constitution to be responsible for the discipline of members of the police force, their conduct, and to ensure efficient administration of the police force, whose address is the care of the Office of the Government Attorney, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek. The 2<sup>nd</sup> defendant shall be referred to as the Inspector-General.

[7] The third defendant is Mr Immanuel Murumendu, a police officer in the employment of the first defendant holding the rank of a Sergeant. The third defendant shall be referred to as Sgt Murumendu.

[8] Where reference is made to the first, second and third defendants jointly, they shall be referred to as the defendants. Where it becomes necessary to refer to the plaintiff, the first, second and third defendants jointly, they shall be referred to as the parties.

[9] I find it prudent to clear the air at the outset that although the Inspector-General is sued vicariously for the actions allegedly perpetrated by Sgt Murumendu, it should be known that the Inspector-General is not the employer of Sgt Murumendu. Sgt Murumendu is employed by the Ministry of Home Affairs, Immigration, Safety & Security headed by the Minister and can therefore not be held vicariously liable for the alleged actions of Sgt Murumendu.

[10] The plaintiff is represented by Mr T Nanhapo while the defendants are represented by Ms H Harker.

### Background

[11] This is an action in which the plaintiff claims from the defendants, jointly and severally, the one paying the other to be absolved, damages resulting from an alleged assault.

[12] Plaintiff claims that on Friday, 3 April 2020, he was a passenger in a taxi in Onayena when the taxi was stopped by members of the police who enquired from the taxi driver as to where he drove from. Plaintiff further claims that the driver responded that he drove from Onkakolo but the police will have none of that as they insisted that the taxi driver drove from Epembe, not Onkakolo.

[13] After a few exchanges between the police and the taxi driver regarding the place where the taxi drove from, the plaintiff claims that he informed the police that the taxi drove from Onkakolo. Plaintiff was allegedly assaulted by the third defendant as a result of what he said to the police.

[14] The plaintiff claims that the third defendant acted within the course and scope of his employment. The plaintiff instituted a claim for damages against the

defendants for physical and emotional pain and trauma for N\$200 000 and *contumelia* N\$50 000.

[15] Sgt Murumendu denies assaulting the plaintiff and the defendants resultantly defended the matter and disputed material averments made by the plaintiff.

[16] The trial ensued where the plaintiff testified in his quest to prove his claim and led the evidence of another witness. The defendants, in turn, led evidence of two witnesses in order to repel the evidence brought by the plaintiff.

### Pleadings

[17] The plaintiff alleges, in the particulars of claim, that on 3 April 2020, Sgt Murumendu in the company of other police officers approached and stopped the taxi where the plaintiff was one of the occupants seated in the backseat. The taxi was transporting him from Okankolo to Ondangwa. At Onayena, on the way to Ondangwa, the taxi stopped and one of the police officers enquired from the taxi driver as to where he drove from. He replied that he drove from Okankolo.

[18] The plaintiff alleges that the police officer disputed the response of the taxi driver and persisted that he drove from Epembe and not Okankolo. Plaintiff alleges that he intervened and informed the police officer that they indeed drove from Okankolo and not Epembe.

[19] Subsequent to the said intervention, Sgt Murumendu who stood closer to the place where the plaintiff sat, hit the plaintiff with a fist on the mouth through the window, so the plaintiff claims. The plaintiff claims further that the assault caused him severe toothache, trauma, pain and suffering and made him sustain a loose tooth which was later extracted. The plaintiff claims to have suffered damages in the total amount of N\$250 000.

[20] The defendants denied the claim. Their denial which forms part of the plea provides that on 3 April 2020, police officers stopped and approached the vehicle for purposes of carrying out an investigation of an alleged crime. The plaintiff was an occupant of the said vehicle. The defendants allege that the police officers

questioned the driver of the vehicle. The driver allegedly failed to answer their questions. The plaintiff allegedly interfered with the questioning and investigation when he put his head out of the vehicle through the window and responded to questions that were put to the driver.

[21] The defendants claim that Sgt Murumendu then cautioned the plaintiff to cease interfering with police questioning, but the plaintiff was undeterred and continued interfering. The defendants further claim that Sgt Murumendu then, with an open hand, pushed the plaintiff on his forehead back into the vehicle in an attempt to stop him from continuing to obstruct or interfere with questioning and investigation.

[22] The defendants denied the alleged assault perpetrated by Sgt Murumendu. They further denied that members of the police force failed to protect the plaintiff. Similarly, the damages claimed by the plaintiff are denied by the defendants.

#### The pre-trial order

[23] This court in *Mbaile v Shiindi*<sup>1</sup> discussed the importance of listing issues in dispute between the parties, and remarked as follows in para [10]:

‘The stage of the pre-trial hearing is arguably the most crucial procedural step leading to the trial. It requires of the parties or their legal representatives to analyse the pleadings and documents filed of record with an eagle eye and in order to unambiguously lay the factual issues in dispute before court. Inevitably, at this stage, the pleadings would have been closed and discovery occurred.<sup>2</sup> The parties are therefore duty bound to strip the pleadings and documents filed of record to their bare bones in order to identify the real issues for resolution by the court. Parties should further be mindful that they are bound to the issues which they bring to court for determination. It is not the responsibility of the court to navigate through various issues raised for determination in order to pinpoint what is relevant, but that of the parties to bring forth their disputes and point out the issues for determination from their dispute.’

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<sup>1</sup> *Mbaile v Shiindi* (HC-NLD-CIV-ACT-DEL-2018/00316) [2020] NAHCNLD 152 (22 October 2020).

<sup>2</sup> Rule 26.

[24] In the same vein, just as it is important for the parties to list the issues in dispute, so is it vital for the parties to set out unambiguously issues that are not in dispute or common cause between them. This will inevitably avoid sending a court into a wild goose chase for fact-finding on matters that are common cause between the parties. The parties are duty-bound to focus on the real issues in dispute between them and should assist the court to identify the undisputed facts between them, way before the commencement of the trial. The parties are further bound to the issues listed for determination and the listed undisputed issues.

[25] The parties, in a joint pre-trial report dated 12 July 2021 which was made an order of court on 7 September 2021, by agreement, listed the following issues for determination by the trial court:

- a) Whether or not police officer Mr Simon Uusiku (W/O Uusiku) questioned the taxi driver Mr Mateus Kayonga;
- b) Whether or not the plaintiff was physically assaulted (punched in the mouth) by Sgt Murumendu and caused the plaintiff bodily injuries;
- c) Whether or not the plaintiff was pushed with an open hand by Sgt Murumendu;
- d) Whether or not the plaintiff interfered with the duties of W/O Uusiku and Sgt Murumendu;
- e) Whether or not the plaintiff sustained a loose tooth which was extracted and whether this emanated from Sgt Murumendu pushing the plaintiff with an open hand;
- f) Whether or not the plaintiff unjustifiably interfered with the police questioning or investigation;
- g) Whether not the defendants caused the plaintiff non-patrimonial loss amounting to N\$250 000.



[26] The parties agreed on, *inter alia*, the following facts as constituting common cause between them:

- (a) that the incident occurred on 3 April 2020;
- (b) that Sgt Murumendu is in the employment of the Namibian Police Force;
- (c) that the taxi in question was coming from Okankolo;
- (d) that the plaintiff joined the conversation between W/O Uusiku and Mr Kayoga.

[27] I consider it appropriate at this stage to consider the evidence led in order to determine whether the claim was proven or not.

#### Plaintiff's evidence

[28] In his quest to prove his claim, the plaintiff testified and further led the evidence of Mr Mateus Kayoga.

[29] It was the plaintiff's testimony, *inter alia*, that on Friday, 3 April 2020, he telephoned Mr Kayoga, a taxi driver who drove a black seven-seater taxi, to transport him from Okankolo to Ondangwa for shopping. Mr Kayoga picked him up as stated above. He sat in the right rear seat and they proceeded to Ondangwa. On the way, Mr Kayoga dropped off one of the passengers at First National Bank at Onayena, so the plaintiff testified. He further said that it was at that stage that a police van blocked the taxi and four police officers jumped out of the van.

[30] Plaintiff testified further that one of the police officers enquired from Mr Kayoga as to the place where he was driving from, to which he responded that he drove from Okankolo and he was heading to Ondangwa. The police officer disputed and stated that Mr Kayoga drove from Epembe instead. Mr Kayoga repeated that he drove from Okankolo. The police officer would have none of that and persisted that Mr Kayoga drove from Epembe.

[31] The plaintiff, per his testimony, joined the conversation and informed the police that they were coming from Okankolo and not Epembe. He said so in order to assist the police. He further testified that he held the view that he had the right to assist the police when he confirmed the place where they came from.

[32] Plaintiff testified further that, Sgt Murumendu, who stood next to the side of the vehicle where he sat, hit him with a fist on the mouth through an open window. As a result, he bled from the mouth and experienced severe pain in his upper jaw. Subsequently one of the police officers instructed them to leave. They drove away and the plaintiff was dropped off in Ondangwa.

[33] Plaintiff further testified that after the assault he observed blood drip from his mouth but thought that it was not severe. He said that although he felt pain resulting from the assault, he was not swollen. It was only during the weekend while he was at home that he realised that one of his teeth was loose.

[34] Plaintiff testified that on Monday, 6 April 2020, he went to Omuthiya District Hospital where he was examined by a medical practitioner who discovered that his tooth was loose with no prospects of recovery and this led to the extraction of the tooth. He claimed to have suffered severe pain, suffered emotionally, and was traumatised by the assault. He claimed that the assault caused him to suffer damages amounting to N\$250 000 for which Sgt Murumendu is personally liable and the first and second defendants are vicariously liable.

[35] Plaintiff submitted copies of a hospital passport into evidence with the consent of the defendants. The hospital passport revealed that the plaintiff went to the hospital on Monday, 6 April 2020 and complained about toothache which resulted from an alleged assault perpetrated by a police officer.<sup>3</sup> The medical examination report compiled by a dentist, Albertina Sheehama on 6 April 2020 provides that upon medical examination, it appeared that the plaintiff's tooth 11 was mobile and very tender on touch (loose).<sup>4</sup>

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<sup>3</sup> Exhibit "B1".

<sup>4</sup> Exhibit "C".

[36] During cross-examination, Ms. Harker pointed out to the plaintiff that at all material times he referred to the black seven-seater in question as his own vehicle. She referred to a witness statement made by the plaintiff in respect of a criminal complaint registered against the police when the plaintiff said at the material time that he was seated in the back seat of his vehicle. Ms Harker persisted in her question and referred to the same witness statement where the plaintiff states that: 'a police officer ... questioned my driver... my driver informed the light in complexion officer ...' Plaintiff denied saying that he owned the vehicle and disputed the correctness of the witness statement.

[37] It was put to the plaintiff that the defendants' witnesses will testify that he put his head out of the vehicle and interfered with the conversation. Plaintiff denied taking his head out of the vehicle through the window and further denied interfering with the police investigation, to the contrary he said he only assisted to confirm the answer provided by Mr Kayoga. Plaintiff said further that he could also not take his head out of the vehicle as Sgt Murumendu stood right next to the side of the vehicle where he sat.

[38] The plaintiff then called Mr Kayoga who testified, *inter alia*, that he is a taxi driver who drives a seven-seater vehicle and he resides at Okankolo. Plaintiff is his usual customer. On 3 April 2020, he was telephoned by the plaintiff who asked to be driven from Okankolo to Ondangwa. He picked up the plaintiff from Okankolo and picked up other passengers on the way to Ondangwa. While proceeding to Ondangwa, he dropped off a passenger at First National Bank, Onayena, so he testified.

[39] It was his testimony further that a police van stopped him and about three police officers from the van approached him. One of the police officers shouted that they were looking for him and was instructed to alight from the vehicle and get in the van, plaintiff responded that they were mistaking him for someone else. He testified further that one of the police officers enquired as to where they drove from, and Mr Kayoga responded that he drove from Okankolo. The police officer disputed such an answer and said that Mr Kayoga came from Epembe. Mr Kayoga repeated his statement that he came from Okankolo and not Epembe. They went back and forth on the same question.

[40] It was at this stage, as Mr Kayoga testified, that the plaintiff joined the conversation and said that they came from Okankolo and not Epembe. After the plaintiff's answer, he heard a sound in the direction of the plaintiff's seat consistent with a punch or a slap with an open hand and he heard the plaintiff ask the police 'why did you beat me.' He testified that the plaintiff was beaten although he could not say whether he was punched or slapped.

[41] Mr Kayoga denied the assertion that the plaintiff removed his head from the vehicle through the window. After the plaintiff asked the police officer why he was beaten, the police officers instructed them to leave and they drove off.

#### Defendants' evidence

[42] The defendants called two witnesses, namely: Sergeant Immanuel Erastus Murumendu (Sgt Murumendu) and Warrant Officer Simon Uusiku (W/O Uusiku).

[43] Sgt Murumendu, testified, *inter alia*, that he has 10 years of experience in the police. He stated that on 3 April 2020, he was on official duty together with W/O Uusiku on the State of Emergency Covid-19 operation. They received a report that a certain lady was selling home-brewed alcohol at a house in Elombe village. The lady was located and fined for violating the Covid-19 Regulations. On her phone, Sgt Murumendu testified that, he observed that the lady (suspect) was tipped by her sister that the police officers were on the way to her. The police officers were informed that the sister ran away when the police arrived.

[44] It was Sgt Murumendu's further testimony that he communicated with the sister of the suspect and enquired as to her whereabouts. She informed him that she was in a seven-seater which is black in colour at the First National Bank Automatic teller machine (ATM) situated at Onayena. The police rushed to the First National Bank ATM and observed a black seven-seater that was about to drive off and was stopped by W/O Uusiku.

[45] W/O Uusiku questioned the driver as to where they were coming from. The plaintiff who was unknown to him and sat in the backseat, Sgt Murumendu testified,

put his head out of the vehicle's window and said that they were coming from Okankolo and not from Elombe and that they were heading to Ondangwa.

[46] Sgt Murumendu testified that by uttering the words said, the plaintiff interfered with police duties. Plaintiff was warned to desist from interfering with the investigation but he did not back down, so Sgt Murumendu testified. Sgt Murumendu said that he then used minimal and reasonable force as allowed by the law to stop the plaintiff from interfering by pushing him back on his seat. He pushed the plaintiff on his forehead. Sgt Murumendu denied assaulting the plaintiff.

[47] In cross-examination, Mr Nanhapo pointed out to Sgt Murumendu that in a statement given to the police on 8 April 2020, Sgt Murumendu said that he grabbed the plaintiff through the window and pushed him back on his seat. Sgt Murumendu said that such a sentence was not properly written as the plaintiff's head was out of the vehicle through the window and only pushed back into the vehicle.

[48] It was further testified by Sgt Murumendu that the reason why they were looking for a black seven-seater was not explained to Mr Kayoga. On a question from the court on whether there are several black seven-seater vehicles in Onayena, Sgt Murumendu said that there are many black seven-seater vehicles at Onayena.

[49] W/O Uusiku, the station commander of Onayena Police Station then took to the stand and testified, *inter alia*, that while on the State of Emergency Covid-19 duty on 3 April 2020, he was informed by a member of the public that a lady was selling homebrew liquor at Elombe village. W/O Uusiku testified that he drove to Elombe village accompanied by Sgt Murumendu and Sgt Itana. The police apprehended the lady who sold homebrew liquor.

[50] W/O Uusiku further testified that he observed another lady who ran away from the scene and she jumped into a black vehicle that drove away. The police then drove to the police station and whilst one way, W/O Uusiku noticed a black seven-seater vehicle parked at First National Bank ATM at Onayena. W/O Uusiku testified further that he approached the black seven-seater vehicle, introduced himself and questioned the driver about the whereabouts of the lady who ran away from the

scene. He observed that the lady they were looking for was not in the vehicle but proceeded to question the driver in order to ascertain her whereabouts.

[51] While talking to the driver, the plaintiff who sat in the backseat of the vehicle and who was unknown to the W/O Uusiku by then, intervened by trying to answer questions posed to the driver. W/O Uusiku testified further that the plaintiff put his head out through the window and said 'this is my car and we are coming from Epembe'. He also said that W/O Uusiku must stop asking silly questions, so it was testified.

[52] W/O Uusiku testified further that as a means to protect him from unforeseen circumstances and given the persistent interference with the police investigation, Sgt Murumendu pushed the plaintiff on his head back into the vehicle. W/O Uusiku concluded his evidence by saying that save for minimal force used to subdue the plaintiff no physical fight occurred. He did not observe any assault or injury caused to the plaintiff. It was further W/O Uusiku's testimony that he did not concern himself with what the plaintiff said.

#### Brief submissions by counsel

[53] Mr Nanhapo argued that what the plaintiff did on 3 April 2020, was to confirm the answer provided by Mr Kayoga to W/O Uusiku in good faith that they travelled from Okankolo and not Epembe as persisted by W/O Uusiku. He argued further that Sgt Murumendu hit the plaintiff with a fist on the mouth in order to silence him thereby causing the plaintiff's teeth to be loose and extracted later.

[54] Mr Nanhapo argued that it was impossible for Sgt Murumendu to push the plaintiff's head into the vehicle when he stood next to such vehicle as the presence of Sgt Murumendu next to the vehicle prevented the plaintiff from taking his head out of the said vehicle.

[55] Ms Harker did not take the arguments by Mr Nanhapo hands down. On the contrary, she argued with all force and might at her disposal that Sgt Murumendu did not hit the plaintiff with a fist but resorted to using reasonable force as empowered by

the Police Act.<sup>5</sup> She argued that Sgt Murumendu pushed the plaintiff's head back into the vehicle in order to stop the plaintiff from interfering with the investigation.

### Burden of proof

[56] The parties are *ad idem*, correctly so in my view, that the plaintiff bears the burden to prove his claim on a balance of probabilities.

[57] Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*<sup>6</sup> discussed the burden of proof and remarked as follows:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her

<sup>5</sup> Police Act 19 of 1990. The relevant sections of the Police provide as follows:

- '13. The functions of the Force shall be –
- (a) The preservation of the internal security of Namibia;
  - (b) The maintenance of law and order;
  - (c) The investigation of any offence or alleged offence;
  - (d) The preservation of crime; and
  - (e) The protection of life and property.

14(10) Any member may use force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large...

35. (2) Any person who –

- (a) resists or wilfully hinders or obstructs a member in the execution of his or her duty or functions, or a person assisting a member in the execution of his or her duty or functions; or
- (b) in order to compel a member to do so, or to abstain from doing, any act concerning his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon, such member or any of his or her relatives or dependants or any other person, or threatens or suggests any injury to the property of such member or any of his or her relatives or dependants or any other person, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.'

<sup>6</sup> *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

[58] There is no suggestion from the defendants in particular that the above tried and tested approach to the analysis of evidence stands true to date. There appears to be no discontentment with the above-mentioned approach. The said established approach undoubtedly, sets the tone for the analysis of evidence.

#### Mutually destructive versions

[59] It is clear from the evidence led by the plaintiff that his head was not out of the vehicle through the window while the defendants' witnesses insist that the plaintiff's head was out of the vehicle through the window.

[60] Plaintiff testified further that he was hit with a fist by Sgt Murumendu while the defendants' witnesses testified that Sgt Murumendu did not hit the plaintiff but only pushed his head back into the vehicle.

[61] The aforesaid versions, *inter alia*, constitute mutually destructive evidence. They are material versions that cannot co-exist just like night and day.

[62] The approach to mutually destructive versions was set out in the Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et Cie and Others*, where the court remarked that:<sup>7</sup>

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order

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<sup>7</sup> *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.



of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extracurricular statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

[63] It follows from the above passage that where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. This includes considering the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradict an established fact.

[64] In *National Employers' General Insurance v Jagers*,<sup>8</sup> Eksteen AJP said the following while discussing the approach to mutually destructive evidence:

'In a civil case ... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

[65] With the above in mind I, proceed to analyse the evidence led.

### Analysis of evidence and submissions

#### *The alleged assault*

[66] Plaintiff's evidence is fairly straightforward and it is that he was hit with a fist on the mouth by Sgt Murumendu. As a result of the assault, he sustained injuries leading to one of his teeth being loose and extracted.

[67] Sgt Murumendu on the other hand testified that he grabbed the plaintiff on the head through the window and pushed him back in his seat. As alluded to above, Sgt

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<sup>8</sup> *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440E-F.

Murumendu denies hitting the plaintiff with a fist. I shall revert to the assault as the judgment unfolds.

[68] It was testified by W/O Uusiku that the reason why the police stopped the taxi driven by Mr Kayoga was to find out if that was the same black seven-seater vehicle in which the suspect that they were looking for from Epembe climbed into and if so, in order to determine the suspect's whereabouts. In his testimony, W/O Uusiku said that he questioned Mr Kayoga about the whereabouts of the second suspect who ran away. Sgt Murumendu contradicted W/O Uusiku and testified that Mr Kayoga was not informed of the reason why he was stopped save for being asked about the place where he drove from. This is a material contradiction considering that at the heart of it is the reason why the police officers stopped Mr Kayoga's vehicle.

[69] The plaintiff and Mr Kayoga stated that the police officers did not inform them of the reasons why they stopped Mr Kayoga's vehicle except for asking them where they drove from. This version is supported by that of Sgt Murumendu who said that Mr Kayoga was not informed of the reason why his vehicle was stopped by the police.

[70] Mr Kayoga denied more than once, the assertion that he came from Epembe and insisted that he came from Okankolo. The further persistence by the police officers that Mr Kayoga came from Epembe prompted an intervention by the plaintiff to confirm the version of Mr Kayoga that they indeed came from Okankolo.

[71] If the police were sure that Mr Kayoga's vehicle is the one that transported the suspect that they looked for, the police officers could have questioned Mr Kayoga as to the whereabouts of the suspect that he transported. Their failure to do so confirms that the police officers were not certain as to whether Mr Kayoga's vehicle transported the suspect.

[72] In the plea, the defendants stated that when the driver (Mr Kayoga) was questioned, he failed to answer. This version was refuted by Sgt Murumendu who testified that Mr Kayoga upon being questioned as to where he drove from, he responded, but perhaps just did not give an answer desired by the police. This is again a further contradiction in the evidence of the defendants.

[73] It is not in dispute that Mr Kayoga was asked back and forth as to where he drove from and that the plaintiff later said to the police officers that they drove from Okankolo.

[74] The question that begs for an answer is on what basis did W/O Uusiku insist that Mr Kayoga drove from Epembe and not Okankolo? I find that the plaintiff and Mr Kayoga informed the police that they drove from Okankolo and not Epembe. It is clear from the evidence that the police officers did not observe Mr Kayoga's vehicle at Epembe. The information which the police had was that the suspect they were pursuing climbed in a black seven-seater vehicle which was spotted at Onayena. Sgt Murumendu testified that there were several black seven-seater vehicles in Onayena. How W/O Uusiku then insisted on Mr Kayoga's vehicle to be the one that came from Epembe and not Okankolo with no basis is difficult to comprehend.

[75] The weighty question that remains unanswered is how the plaintiff interfered with the investigation when he confirmed their place of departure, which could very well be true. Assuming that the plaintiff and Mr Kayoga came from Okankolo as they stated, will the confirmation by the plaintiff that they came from Okankolo constitute interference with the police investigation or not. It should be remembered that police investigation must be aimed at ascertaining the truth. The police should therefore at all times seek the truth, with nothing more, no exaggeration and nothing less.

[76] I find that in the absence of evidence to the contrary, there is nothing to gainsay the version of the plaintiff and Mr Kayoga that they drove from Okankolo and not Epembe and I, therefore, find as an established fact that the plaintiff and Mr Kayoga drove from Okankolo and not Epembe.

[77] The above finding is further supported by the fact that it is not in dispute between the parties and thus agreed to and made an order of court, that the taxi in question was coming from Okankolo. I find that when the plaintiff said to the police officers that they were coming from Okankolo and not Epembe, he spoke the truth.

[78] If the plaintiff spoke the truth in order to assist the police to unearth such truth, how can that constitute interference? Simply put, how can saying the truth be

interference. I find that the plaintiff said the truth to the police to assist them in their investigation following W/O Uusiku's persistence that Mr Kayoga was not coming from Okankolo.

[79] The plaintiff said that he responded to the police in order to assist them and such assistance was not disputed by the police officers save to state that the police officers viewed the same as interference. W/O Uusiku and Sgt Murumendu did not dispute the assistance rendered by the plaintiff. Their concern was that such assistance was not solicited from the plaintiff by the police and it amounted to interference because he was not the one who was questioned. I find that Mr Kayoga responded but W/O Uusiku did not believe him and persisted in his questioning and caused the plaintiff to join in the conversation and tell the truth. I find nothing untoward with the confirmation by the plaintiff as to where they came from. The police should, instead, celebrate the truth being told by a person in whatever manner or form as that is their duty to find the truth and would have been assisted in their duty to get to such truth.

[80] The police officer who is alleged to have been interfered with is W/O Uusiku who was asking Mr Kayoga questions. In his evidence, W/O Uusiku testified that he did not concern himself with what the plaintiff said. This statement by W/O Uusiku suggests that he was unbothered by what the plaintiff said. I hold the view that it can therefore not be said with the slightest of imagination, that the plaintiff interfered with the investigation carried out by W/O Uusiku who cared less about the remarks by the plaintiff.

[81] Sgt Murumendu testified that he applied reasonable force in order to restrain the plaintiff from interfering with the investigation carried out by W/O Uusiku who was questioning Mr Kayoga. W/O Uusiku was not bothered by what the plaintiff said. The question, therefore, is how do the words said by one person interfere with another when that other person does not concern himself with what is said? Bluntly put, how can there be interference with another through word of mouth when the person to whom such words are directed does not feel interfered with? All possible answers point to no interference. I hold the view that, in the premises of the above and strictly speaking W/O Uusiku was not interfered with nor was his investigation interfered with because after all, he was unbothered by what was said by the plaintiff.

[82] It is interesting to note that police investigation was on shaky ground, as no identification features specific to the vehicle in issue were placed on record except that the vehicle that they were looking for was a black seven-seater in the face of the defendants' evidence that there were several black seven-seater vehicles in Onayena.

[83] What is further surprising is that immediately after the altercation between the plaintiff and Sgt Murumendu, Mr Kayoga was instructed by the police officers to drive away. The question that rings in one's mind is what came of the police officers' faith in insisting that the vehicle in question is the one that transported the suspect from Epembe. The answer that may not be the only answer but which I find most probable is that the police officers had no proof that the vehicle that they were looking for is that of Mr Kayoga save for being a black seven-seater. The police officers were therefore trying their luck by insisting that Mr Kayoga drove from Epembe. It turned out that luck was not on the police officers' side.

[84] To put this matter to rest, it is a criminal offence to hinder or obstruct a police officer in the execution of his or her duties or functions, which could attract a punishment of a fine not exceeding N\$20 000 or 5 years imprisonment or both.<sup>9</sup> The plaintiff was not charged for alleged contravening s 35(2)(a) of the Police Act, to the contrary, Mr Kayoga was instructed to drive away just after the altercation between the plaintiff and Sgt Murumendu. The police offered no explanation why the plaintiff was not charged for interference. Even if he was charged, I doubt if such charges could withstand the test of trial.

[85] The above analysis strips down to the ground the alleged reasonable force relied upon by Sgt Murumendu for grabbing the plaintiff on his head and pushing him back on his seat, as per his version. Grabbing another person on the head and pushing him or her down constitutes a violation of such a person's body. In *casu*, it follows that even if it is accepted that Sgt Murumendu indeed grabbed and pushed the plaintiff, then there was no justification for his actions as the plaintiff did not interfere with W/O Uusiku. Such grabbing and pushing would violate the plaintiff's person.

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<sup>9</sup> Section 35(2)(a) of the Police Act.

[86] The plaintiff testified in a forthright manner with minor contradictions and all in all I find the plaintiff to be a credible witness. The plaintiff's evidence was materially corroborated by Mr Kayoga. W/O Uusiku and Sgt Murumendu, on the other hand, self-contradicted in evidence and contradicted each other.

[87] I accept the evidence of the plaintiff that he was hit with a fist by Sgt Murumendu and further accept that Mr Kayoga heard a sound that is consistent with hitting the other with a fist or slap. The defendants did not dispute the evidence that Mr Kayoga heard such sound nor was it disputed that the plaintiff asked Sgt Murumendu the reason why he beat him.

[88] Considering the evidence led in totality, I accept the evidence of the plaintiff and Mr Kayoga as being reasonably possibly true. I find that Sgt Murumendu beat the plaintiff with a fist on the mouth and I reject the version of W/O Uusiku and Sgt Murumendu that Sgt Murumendu did not beat the plaintiff with a fist as being inconsistent with established facts and therefore false.

#### Injuries sustained

[89] There is no dispute that on 6 April 2020, the plaintiff had a loose tooth that was tender when touched and which was later extracted.

[90] There was evidence that the plaintiff had a tooth extracted before and Ms Harker argued that the loosening of the tooth is unrelated to the event of 3 April 2020.

[91] It was the plaintiff's testimony that although he did not endure severe pain earlier, he observed blood drip from his mouth and the pain exacerbated over the succeeding weekend.

#### Damages

[92] The plaintiff led no evidence to substantiate the claim for the relief on based *contumelia*. As a result, this court will not be consumed in an unsubstantiated claim. The court will restrict itself to the relief based on a claim for physical and emotional pain, and trauma where the plaintiff claims an amount of N\$200 000.

[93] In an old decision of *Stoffberg v Elliot*,<sup>10</sup> Watermeyer J remarked as follows when he discussed resulting from an assault:

‘Any bodily interference with or restraint of a man’s person which is not justified in law, or excused by law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim damages as he can prove he has suffered owing to that interference.’

[94] Physical and emotional pain and trauma usually arise from an assault. No cogent reasons were brought to the attention of the court why hitting the plaintiff with a fist on the mouth will not bring about physical and emotional pain and trauma to the plaintiff, neither could I find any such reasons. I, therefore, find that the plaintiff suffered physical and emotional pain and trauma as a result of the assault.

[95] In *Lopez v Minister of Health and Social Services*,<sup>11</sup> it was stated that as a general rule a successful plaintiff is entitled to be compensated for the loss suffered but not to profit from such loss.

[96] There is no mathematical formula for calculating non-patrimonial loss which cannot be given an economic value. The court, however, finds assistance in other comparable cases in the exercise to determine the quantum of damages to be awarded in a particular case.

[97] The parties referred the court to several comparable cases which may be of assistance to quantify damages sustained. The said cases include *Sheefeni v Council of the Municipality of Windhoek*,<sup>12</sup> where the plaintiff claimed damages emanating from an assault perpetrated on him by members of the Council’s City Police Officials. The plaintiff was forcefully removed from a taxi whereafter he was

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<sup>10</sup> *Stoffberg v Elliot* 1923 CPD 148.

<sup>11</sup> *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) para 40.

<sup>12</sup> *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

slapped, kicked and punched and his head was hit against the curb of a street. The plaintiff was awarded damages in the amount of N\$50 000.

[98] In *Naholo v The Government of the Republic of Namibia*,<sup>13</sup> the court, in December 2020, awarded an amount of N\$10 000 for damages resulting from an assault perpetrated by police officials on the plaintiff by slapping him several times while he was in police custody.

[99] In a recent matter of *Cloete v Minister of Safety and Security*,<sup>14</sup> the court, in November 2021, awarded damages to the plaintiff in the amount of N\$50 000 for assault after being kicked by a police officer and unlawfully arrested.

[100] As stated above, I found that Sgt Murumendu hit the plaintiff with a fist on the mouth on 3 April 2020, which caused the plaintiff pain. The pain exacerbated during the subsequent weekend. It is evident before court that the plaintiff observed blood drops from his mouth and sustained a loose tooth. The tender condition of the tooth was corroborated by the medical evidence. The tooth was later extracted.

[101] Except for suggestions made, no evidence came to the fore to state that the plaintiff's injury was unrelated to the assault of 3 April 2020. I, therefore, find that the looseness and tender condition of the tooth as well as its extraction resulted from the assault perpetrated by Sgt Murumendu.

[102] This court has noted the escalating number of claims for damages resulting from several kinds of assault perpetrated by police officers and or members of the Namibian Defence force on the court roll. It is alarming to even phantom a situation where men and women of the forces trained to protect persons and properties carry out the unthinkable and assault the very persons that they are duty-bound to protect. This situation is worsened by the history of this nation where members of the forces brutally and unjustifiably carried out atrocities on the people of this nation. Such barbaric actions by some of the members of the forces should not be condoned in our democratic society where the protection of human rights should reign supreme.

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<sup>13</sup> *Naholo v The Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/00505 [2020] NAHCMD 553 (2 December 2020).

<sup>14</sup> *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] NAHCMD 523 (12 November 2021).



## Conclusion

[103] After considering the evidence led in its totality, and having regard to the quantum awarded in the above comparable cases, I take note that the plaintiff, in *casu*, was assaulted for telling the truth and for assisting the police officers in their investigation.

[104] I find that Sgt Murumendu who, beyond dispute, acted within the course and scope of his employment, hit the plaintiff with a fist on the mouth. The assault caused the plaintiff to bleed from the mouth and to sustain a loose tooth that was tender and was subsequently extracted.

[105] In this day and age, the said assault perpetrated should be condemned. The police are reminded that their duty is to ensure the safety and security of the people. Where the police find themselves on the wrong side of such purpose, their actions should be condemned in the strongest of words. This is in the hope that the police officers will learn from their wrongful actions and their colleagues' misdeeds and refrain from committing or attempting to commit similar actions.

[106] Guided by the damages awarded in similar cases, and taking into account that although the plaintiff was only hit once with a fist on the mouth, the consequential effect of such assault was severe to the extent that the plaintiff bled from the mouth, had a loose tooth and his tooth was extracted. This demonstrates the seriousness of the assault. Coupled with the above is the fact that the assault was unprovoked and resulted from assistance rendered to the police. In my analysis of the facts of this matter, an award in the amount of N\$40 000 meets the justice of this matter.

## Costs

[107] It is well established in our law that costs follow the event. No compelling reasons were placed before the court why the said principle should be departed from and no persuasive reasons could also be deduced from the evidence to that effect. Consequently, the plaintiff is awarded costs.

Order

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

Judgment is granted in favour of the plaintiff against the first and third defendants, jointly and severally, the one paying the other to be absolved for:

1. Payment in the amount of N\$40 000.
2. Interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of full and final payment.
3. Costs of suit.
4. The matter is removed from the roll and regarded as finalized.

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O S Sibeya  
Judge

## APPEARANCES:

PLAINTIFF:

T Nanhapo  
Of Brockerhof & Associates,  
Windhoek.

DEFENDANT:

H Harker  
Of the Office of the Government Attorney,  
Windhoek