

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2019/05058

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

PLAINTIFF

and

MICKEY MWALONGATJINI MBWALE

DEFENDANT

Neutral citation: *Government of The Republic of Namibia v Mbwale* (HC-MD-CIV-ACT-DEL-2019/05058) [2022] NAHCMD 301 (16 June 2022)

Coram: COLEMAN J

Heard: 09 - 10 & 12 May 2022

Delivered: 16 June 2022

Flynote: Prescription – Prescription of claim – Any defect in respect of service can be cured by the entering of opposition by the party served on.

Delict – Negligence – Unauthorized driving of police vehicle – Written trip authority necessary even for a vehicle allocated for official duties when driven to another town – Defendant overturned the motor vehicle and plaintiff suffered damages as a result.

Summary: Plaintiff's case is that defendant, on 19 November 2016 on the Khorixas/Outjo main road, overturned a police vehicle while he was driving it without authority. As a result, the vehicle was damaged and defendant is liable for it. The issues raised are prescription, denial that defendant had no authority to drive the vehicle on the particular day and no negligence in the overturning of the police vehicle.

Held that defendant was a Warrant Officer at the time. Therefore, the service of the summons at Opuwo police station on Sergeant Andreas was not strictly in terms of rule 8(2)(c) since she cannot be said to be '...apparently in authority over...' the defendant. However, she was clearly the conduit through whom the summons was eventually handed to defendant by Inspector Karupa. Defendant entered appearance to defend, filed a plea and the matter ended up in court. Any defect in respect of service can be cured by the entering of opposition by the party served on. Therefore, the special plea of prescription is dismissed.

Held that the evidence is clear, and was not contradicted under cross-examination, that a written trip authority is necessary even for a vehicle allocated for official duties when driven to another town. Defendant overturned the motor vehicle and plaintiff suffered damages as a result.

ORDER

JUDGMENT

COLEMAN J:

Introduction

[1] This is a delictual claim. Plaintiff claims N\$ 149, 625.47 from defendant for damage to a police vehicle which defendant was driving when he overturned it. The alleged delict is the defendant's unauthorized driving of the police vehicle.

[2] The issues raised are prescription, denial that defendant had no authority to drive the vehicle on the particular day and no negligence in the overturning of the police vehicle.

Plaintiff's case

[3] Plaintiff's case is simply that defendant on 19 November 2016 on the Khorixas/Outjo main road overturned a police vehicle while he was driving it without authority. As a result, the vehicle was damaged and defendant is liable for it.

Defendant's case

[4] The summons in the matter was served at the Opuwo police station on Sergeant Andreas on 18 November 2019. Defendant alleges that the summons was 'improperly' served and as a result the claim has prescribed.

[5] Defendant denies that he drove the vehicle without authorization and pleads that although he had no written authority to drive to the Okonguarri psychotherapeutic centre near Outjo he acted within the course and scope of his employment or the execution of his duties. Therefore, he pleads, authorization was implied. He also denies negligence.

[6] According to the pre-trial report dated 27 January 2022, defendant admits that he drove the police vehicle without trip authority and that it was damaged as a result of an accident while being driven by him. He also admits the quantum.

The evidence

[7] Police Commissioner Nderura, the Regional Commander of the Kunene region, testified on behalf of the plaintiff. He testified that a police vehicle can only be driven out of town where it is stationed, if the driver was given a written trip authority by a supervisor. Defendant confirmed this under cross-examination. This applies also to a police vehicle assigned to a particular police station for police work. This was not challenged under cross-examination. Commissioner Nderura also testified that defendant did not have the written trip authorization for his trip to the Okonguarri psychotherapeutic centre which was out of town.

[8] In respect of service of the summons Commissioner Nderura testified that the summons was served on Sergeant Andreas at the Opuwo police station. She is Commissioner Nderura's secretary, who is responsible for receiving all correspondence. She brought the summons to him for his signature and it was then referred to the administrative department to get it to the defendant. The Opuwo

police station and the regional head-quarters are in the same building. While stationed at Opuwo, defendant attended a work shop at the time on a farm near Kamanjab. Inspector Karupa delivered the summons to him on 22 November 2019.

[9] Defendant testified that on 19 November 2016 he was informed that one of his staff, Constable Gariseb was admitted to the Okonguarri psychotherapeutic centre and he decided to drive there. The centre is situated between Outjo and Khorixas. He attempted to contact Commissioner Nderura but could not get hold of him. He was the Station Commander of the Fransfontein police station at the time and decided to make the trip anyway. He did not testify that it was an emergency. The sick leave document, which relates to the admission, introduced as Exhibit “D” on behalf of defendant, refers to one Benjamin Quiko-Oab and not Constable Gariseb.

[10] Defendant testified further that as far as he is concerned he drove the vehicle with authority since he was the station commander and the vehicle was allocated to him for his official duties. This aspect was not put to Commissioner Nderura when he testified.

Conclusion

[11] As far as prescription is concerned, section 15(1) of the Prescription Act, 1969, stipulates that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. Service is not defined in this Act.

[12] Rule 8(2)(c) of the rules of this Court prescribes how service should occur at a place of employment of a person. The requirement is that service must occur on a person over the age of 16 and apparently in authority over the person. In this case the summons was handed to Sergeant Andreas who is the secretary of

Commissioner Nderura. She handed it to him and he effected the dispatch of the summons to where defendant was doing training. There it was handed to defendant by Inspector Karupa. Defendant was a Warrant Officer at the time. Therefore, the service of the summons at Opuwo police station on Sergeant Andreas was not strictly in terms of rule 8(2)(c) since she cannot be said to be ‘...apparently in authority over...’ defendant. However, she was clearly the conduit through whom the summons was eventually handed to defendant by Inspector Karupa. Defendant entered appearance to defend, filed a plea and the matter ended up in court.

[13] In the matter of *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* 2013 (1) NR 245 (HC) Smuts J, as he then was, held in para 17 that any defect in respect of service can be cured by the entering of opposition by the party served on. In my view proper service occurred here for the purposes of section 15(1) of the Prescription Act, 1969. It may not be perfect service for the purposes of rule 8(2)(c) of the rules of court but it achieved the purpose contemplated in section 15(1) of the Prescription Act, 1969, i.e. to claim payment of the debt by the creditor from the debtor. Therefore, the special plea of prescription is dismissed.

[14] On the merits, defendant's defence is essentially that he had implied or tacit authority to drive the vehicle to the psychotherapeutic centre since the vehicle was allocated to him for use in his official duties. Defendant did not explain why he had to drive so urgently on 19 November 2016, a Saturday, to visit the psychotherapeutic centre where a staff member was allegedly being treated. He did not allege that the staff member was due for duty on that day. The evidence is clear, and was not contradicted under cross-examination, that a written trip authority is necessary even for a vehicle allocated for official duties when driven to another town.

[15] Mr Coetzee, acting for the defendant, contended that plaintiff was unable to show how defendant's negligence caused the damage to the vehicle. My

understanding is that plaintiff's case is that the delict committed by defendant here is the unauthorised use of plaintiff's motor vehicle. During that use, defendant overturned the motor vehicle and plaintiff suffered damages as a result. In this scenario it is neither here nor there that defendant may or may not have driven negligently. As mentioned, defendant admits the quantum.

[16] In my view the plaintiff proved its claim.

[17] There is no reason why costs should not follow the result. Therefore, I make the following order:

[17.1] Defendant is ordered to pay plaintiff N\$ 149, 625.47.

[17.2] Interest is payable on the said amount at the rate of 20% per annum from the date of this order; and

[17.3] Defendant is to pay plaintiff's costs.

G Coleman
Judge

APPEARANCES:

PLAINTIFF: Mr Kadhila
Office of the Government Attorney

DEFENDANT: Mr Coetzee
PD Theron & Associates