

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-CIV-ACT-OTH-2021/03323

In the matter between:

DENNY DESMOND DOESEB

PLAINTIFF

and

**MINISTER OF SAFETY AND SECURITY, HOME AFFAIRS
& IMMIGRATION ALBERT KAWANA**

1st DEFENDANT

**COMMISSIONER-GENERAL OF THE NAMIBIAN CORREC-
TIONAL SERVICE RAPHAEL T HAMUNYELA**

2nd DEFENDANT

**THE FORMER OFFICER IN CHARGE OF WINDHOEK
CORRECTIONAL FACILITY COMMISSIONER HITTAMUNUA**

3rd DEFENDANT

**THE CURRENT OFFICER IN CHARGE OF WINDHOEK
CORRECTIONAL FACILITY COMMISSIONER ARMAS**

4th DEFENDANT

**SECOND IN CHARGE DEPUTY OFFICER OF WINDHOEK
CORRECTIONAL FACILITY ASSISTANT COMMISSIONER NUMA**

5th DEFENDANT

DEPUTY OFFICER IN CHARGE OF OLUNO CORRECTIONAL FACILITY SENIOR SUPT JACKOP 6th DEFENDANT

Neutral citation: *Doeseb v The Minister of Safety and Security, Home Affairs & Immigration* (HC-MD-CIV-ACT-OTH-2021/03323 [2022] NAHCMD 141 (24 March 2023))

Coram: RAKOW J

Heard: 31 October 2022 – 4 November 2022

Delivered: 24 March 2023

Flynote: Delict – Action for damages – Loss of belongings upon transfer to another facility – Solitary confinement for 166 days – Transferred without plaintiffs green health passport – Received no high blood pressure medication for eleven months – Reason for confinement presented by plaintiff and the reason presented by the defendants differ – Plaintiff was not recommended for any rehabilitation programs yet – Plaintiff did not call any medical expert or lead any evidence that ailments complained of was caused as a result of not taking high blood pressure medication – Some belongings were returned to the plaintiff but some not, defendants could not indicate what happened to these items – The claim for these specific items must be allowed – Rest of the claims dismissed.

Summary: In January 2021, the plaintiff was transferred to Oluno correctional facility and during that transfer, he allegedly lost some of his belongings. He lost one pair of Greencross shoes, one Kappa tracksuit, two 16GB USBs, and a USB radio player, the total value of these items was N\$4000. The plaintiff did not keep all his property with him in his single cell, it was kept in another empty cell. On the morning of 17 January 2021 between six and seven in the morning, he was told to bring his property as he was being transferred. The other cell was allegedly not open for him where his other property was kept and he had to leave it behind. He had a permission slip to have the radio in his possession and valued it at about N\$400 – N\$500. The value of the two USB sticks is also placed at about N\$400, the green cross shoes were valued at N\$1200, and the Kappa tracksuit at N\$500. After some

inquiries were made from the Oluno Correctional Facility, he received back a kettle, some headphones, and some papers.

The plaintiff further alleges he was transferred to the Oluno facility without this green health passport and as a result, he could not receive his high blood pressure medication for eleven months. He was only placed back on the medication on 17 November 2021. He was further transferred without his case management file which resulted in him not being placed or recommended for pre-release programs.

Regarding the quantum of his claim, he explained that he was maliciously placed in solitary confinement for 166 days and for that the plaintiff claims the amount of N\$996 000, which calculates to N\$6 000 per day. For the emotional and psychological distress he suffered, he claims N\$400 000; for the personal items that were lost, N\$4 000, and for the nine months he has to be without his prescribed medicine, he claims N\$600 000. For general loss of ordinary amenities of life, he claims N\$36 000, therefore, in total N\$2 036 000.

On behalf of the defendants, it was pled that the plaintiff was confined in isolation in terms of s 103(1)(b) and (c) of the Correctional Services Act, 9 of 2012 as there was reason to believe that his safety was in danger. The defendants deny that such solitary confinement led to the infringement of the plaintiff's emotional and psychological well-being or that he was placed in solitary confinement maliciously or that his confinement resulted in unnecessary emotional distress. It is also denied that the plaintiff was denied medication for high blood pressure during his stay in solitary confinement. It is denied further that plaintiff's confinement in solitary led to him not attending any pre-release programs. The defendants deny that the plaintiff lost any property in the process of being transferred from Windhoek Correctional Facility to Oluno Correctional Facility in the amount of N\$1 040 000 as alleged by the plaintiff.

Held that: the evidence presented by the plaintiff shows that he indeed was placed in solitary confinement for 166 days, however, the reason presented by him and the reason presented by the defendants differ.

Held further that: the evidence of the defences witnesses also pointed out that the plaintiff was not recommended for any rehabilitation programs yet. I, therefore, find that the claim regarding detention in solitary confinement cannot succeed and should be dismissed.

Held further that: the plaintiff did not call any medical expert or lead any evidence that the ailments he is complaining of currently was caused as a result of not taking high blood pressure medication. The claim regarding the damages suffered due to not receiving high blood pressure medication should therefore, also be dismissed.

Held further that: some of the items were returned to the plaintiff after being forwarded from this facility to Oluno after he enquired about them. He however, did not receive a white tracksuit, a pair of Greencross shoes, a USB radio, and 2 USB sticks. In response, the defendants could not indicate what happened to these items. For that reason, the claim for these specific items must be allowed.

ORDER

1. Judgement is granted to the plaintiff in the amount of N\$2500 only.
 2. No order regarding costs is made.
-

JUDGMENT

RAKOW J

Introduction

[1] The plaintiff, Mr Denny Desmond Doeseb, an adult unemployed male, is at present incarcerated at the Oluno Correctional Facility in Northern Namibia. The first defendant is the Minister of Safety, Security, Home Affairs, and Immigration, in his capacity as Minister. The second defendant is the Commissioner-General of the Namibian Correctional Service, Commissioner-General Raphael T. Hamunyela. The

third defendant is the former officer in charge of the Windhoek Correctional Facility, Commissioner Hittamunua.

[2] The fourth defendant is the current officer in charge of the Windhoek Correctional Facility, Commissioner Armas. The fifth defendant is the second in charge of the Windhoek Correctional Facility, Assistant Commissioner Numa. The sixth defendant is Deputy Officer in Charge of Oluno Correctional Facility, senior superintendent Jackop. All the defendants are being sued in their official capacities.

The particulars of the claim and the plea

[3] The case consists of three different claims. The first claim alleges that the plaintiff was called to the offices of the third defendant where the third defendant and the head of security, Senior superintendent Ngitoorh and here he was informed that they have reason to believe that the plaintiff's life is in danger and that they will place him in isolation in the single cells. He stayed there for six months which infringed on his psychological and emotional well-being. It further made him not attend the pre-release program he was earmarked for and that again impacted his parole eligibility date.

[4] His next claim deals with the issue that he was transferred from the Windhoek Correctional Facility to the Oluno Facility without his medical card with him, which caused him not to receive his correct blood pressure medication. This caused him medical harm in that he still suffers from headaches and dizziness.

[5] At the time of this transfer to Olunu Facility, the authorities transferred him without his property. At a later stage, some belongings were forwarded to him but he lost a Waksiba USB radio, 2 x 16GB memory sticks, a white Kappa track-suit, Greencross Shoes – black, toiletries, 2 x pairs of socks, and a face mask. He further lost poems he wrote during the ten years he spent in custody as well as music albums he also wrote.

[6] On behalf of the defendants, it was pled that the plaintiff was confined in isolation in terms of s 103(1)(b) and (c) of the Correctional Services Act, 9 of 2012 as

there was reason to believe that his safety was in danger. The defendants deny that such solitary confinement led to the infringement of his emotional and psychological well-being or that he was placed in solitary confinement maliciously or that his confinement resulted in unnecessary emotional distress. It is also denied that the plaintiff was denied medication for high blood pressure during his stay in solitary confinement. It is denied further that plaintiff's confinement in solitary led to him not attending any pre-release programs. The defendants deny that the plaintiff lost any property in the process of being transferred from Windhoek Correctional Facility to Oluno Correctional Facility in the amount of N\$1 040 000 as alleged by the plaintiff.

The evidence

[7] The plaintiff himself gave evidence and called two witnesses. He testified that he was summoned by the head of security and the third defendant who was previously in charge of the Windhoek facility. With him was a certain Mr Gaiseb. He was informed to pack his belongings and that the head of the prison, Commissioner Lyatamuna indicated to him that his life was in danger and that he had to be placed in solitary confinement. This was on 24 December 2020. In January 2021, he was transferred to Oluno correctional facility and during that transfer, he lost some of his belongings. He lost one pair of Greencross shoes, one Kappa tracksuit, two 16GB USBs, and a USB radio player. The total value of these items was N\$4000.

[8] The plaintiff did not keep all his property with him in his single cell, it was kept in another empty cell. On the morning of 17 January 2021 between six and seven in the morning, he was told to bring his property as he was being transferred. They did not open the other cell for him where his other property was kept and he had to leave it behind. He had a permission slip to have the radio in his possession and valued it at about N\$400 – N\$500. The value of the two USB sticks is also placed at about N\$400, the green cross shoes were valued at N\$1200, and the Kappa tracksuit at N\$500. After some inquiries were made from the Oluno Correctional Facility, he received back a kettle, some headphones, and some papers.

[9] He was further transferred to the Oluno facility without this green health passport and as a result, he could not receive his high blood pressure medication for

eleven months. He was only placed back on the medication on 17 November 2021. He was further transferred without his case management file which resulted in him not being placed or recommended for pre-release programs.

[10] Regarding the quantum of his claim, he explained that he was maliciously placed in solitary confinement for 166 days and for that he claims the amount of N\$996 000, which calculates to N\$6 000 per day. For the emotional and psychological distress he suffered, he claims N\$400 000; for the personal items that were lost, N\$4 000, and for the nine months he has to be without his prescribed medicine, he claims N\$600 000. For general loss of ordinary amenities of life, he claims N\$36 000, therefore in total N\$2 036 000.

[11] During his evidence, he disputed that his life was in danger as he was hosted in unit seven which is a high-security unit and would not meet persons who were transferred to their facility as they are kept in separate units and do not have contact with one another. He, however, decided to take some time away from the section, and therefore on 24 December 2020, he wrote and applied for some time away from the section as he needed some time to think about the coming year. He was then placed in a single cell.

[12] On 29 December 2020, he enquired from the head of security as to the time he will have to spend in the single cells. The head of security also informed him that the offenders who could have threatened his life were transferred back to the facility they came from. He further requested the said transfer in writing and the letter was returned to him with an entry in the right-hand corner saying that the offender is an influential gang member and should remain in the single cells for his protection until we have a strategy to ensure his safety. At the same time, the plaintiff also complained in writing about not receiving his blood pressure medication.

[13] After he arrived at Oluno, he went on a hunger strike and was taken to see the fourth defendant. He explained to the fourth defendant why he was so unhappy and that he wished to return to Windhoek. Also, they removed him from Windhoek Correctional Facility without taking all his property. The third defendant phoned the

Windhoek Correctional Facility and requested his case management file, his health passport, and the remainder of his properties be sent to the Oluno Facility.

[14] Regarding the medical complaint, the plaintiff testified that he was diagnosed with high blood pressure in 2017. It does however seem that he was seen by the medical personnel without his green health passport as they proceeded to make health-related observations on white sheets of paper. On 27 November 2021, he was placed back on his medication. He complained of severe headaches and dizziness as well as memory loss. He confirmed that he went to the clinic numerous times during the time that his health passport was not with him and that during such visits his blood pressure was taken. Even the day after he spoke to the fifth defendant he was taken to the clinic and his blood pressure was taken and no medication was prescribed. He indicated that the reason for this was that there was no medical history available to allow for the prescription of blood pressure medicine. He testified that he was taken to the clinic during the period 17 January to 24 November 2021 about six or seven times.

[15] During cross-examination, he confirmed that he wrote an application to be placed in solitary confinement as he did not wish to be placed there at the behest of the officials at the facility. This letter was dated 23 December 2020 and handed in as an exhibit. He also admitted that he wrote a letter on 29 December 2020 indicating that he requested to be moved to a single cell on 24 December 2020 as he had problems regarding his safety with two gentlemen who at that stage were transferred back to Hardap Correctional Facility. At that stage, he requested to be transferred back to unit 7, the unit where he was originally housed.

[16] It was further pointed out during cross-examination that the reason the plaintiff was placed in solitary confinement after 30 December 2020 was that he maliciously damaged state property. The plaintiff agreed to this, as he stated that he damaged the toilet pot after his letter of 29 December 2020. He further denied that he was involved in gang activities and that that was the reason why he was placed in solitary confinement. He did not dispute that he had tattoos but denied that they relate to gang affiliations.

[17] The next witness which was called was Willem Kaiseb. He testified that he was called together with the plaintiff to the head of the security's office at the Windhoek Correctional Facility on 24 December 2020. The plaintiff was told to pack his things and move to unit 4 single cells because there are offenders in A section which is the referral section that wishes to harm him. It was supposed to be for only a few days. The plaintiff insisted that he does not want to be placed in the single cells and they agreed that he would write a letter requesting to be placed in the single cells. This request was approved by the third defendant.

[18] Sometime later he arrived at unit 4 and found the cupboard the plaintiff used standing open in cell 2 and his belongings laying around in the cell. He collected it and placed it back in the cupboard and locked it with a padlock. After some time Superintendent Mbehawa requested him to bring the plaintiff's belongings to her. He remembers a headset, a kettle, and some papers. At the time the plaintiff moved to the single cell, he saw him pack a pair of Greencross shoes, a white kappa tracksuit, a waxibar USB radio, and two USBs which were attached to his keys but he was not present when the plaintiff was transferred to Oluno and does not know what he took with.

[19] The plaintiff then called Mr Ananias Nekongo Nailenge. Mr Nailenge is also an inmate and traveled with the plaintiff from Tsumeb to Oluno Correctional Facility on 17 January 2022. When they arrived at Oluno Correctional Facility they were taken to the search room where they were being searched by officers from the facility. He observed one officer pushing the plaintiff against a wall and saying that he is a general in a gang and that he is having gang tattoos on his shoulder. The next day, while they were playing cards, the plaintiff was approached by the head of security and some other officers and ridiculed for being a cheap offender who instigates others to stab security officers. During the time that they were together at D Section, the plaintiff was only allowed out of his cell to collect his food and to bathe. He was only in that section for about a week before being moved to another section.

[20] The plaintiff closed his case and the defendants proceeded and called two witnesses. Mr Manfred Jatamunua testified that he is employed as a Deputy

Commissioner by the Ministry of Home Affairs, Immigration, Safety, and Security in the department of Namibian Correctional Service and stationed at the Directorate of Security. He was the officer in charge of the Windhoek Correctional Facility at the time the plaintiff arrived at the facility. He believed that the plaintiff had gang affiliations. The terminology used in correctional facilities refers to a single cell when a person is placed there for disciplinary reasons and a separate cell if it is for other reasons that a person is placed there. The plaintiff was initially placed in a separate cell.

[21] When the plaintiff came from Hardap Correctional Facility, the witness was not informed that he is gang-affiliated, only that he holds a maximum security level. In a letter dated 23 December 2020, the plaintiff requested to be transferred to Walvis Bay Correctional Facility because his sentence is almost completed and he is being distracted by gang activities. He then narrated the incidents where persons were attacked. This prompted the witness to call in the plaintiff and inform him that he needs to be placed in separate confinement for safety reasons. This again led to the letter of 24 December 2020 wherein the plaintiff requested to be placed in solitary confinement.

[22] When he was moved to Oluno Correctional Facility, he was moved with all his belongings except the belongings he left behind with another inmate. These were some papers and a kettle that was forwarded to the plaintiff at Oluno Correctional Facility. Some incidents took place before the plaintiff asked to be placed in a separate cell. One offender was stabbed by another offender and lost sight in his eye. Another offender was burned with hot water from a kettle. This information was received from the plaintiff during discussions the witness had with him. The plaintiff also removed his shirt and showed him his rank tattoo. Initially, the plaintiff requested to be transferred to Walvis Bay but he could not do so, because of his security classification.

[23] Whilst in Windhoek on temporary transfer from Oluno, the plaintiff wrote to the witness and informed him that he is suffering psychologically due to being kept in a single cell. This letter was dated 29 March 2022 and handed in as an exhibit. Upon receipt of such complaints, the witness would refer the inmate for one on one

counseling sessions with either a psychologist or a social worker who works as a case officer and who is qualified to deal with these problems. Commissioner Vries, who is the head of the unit reported back to the witness and indicated that the plaintiff indeed saw an officer at the psycho-social program unit.

[24] The plaintiff has also not been referred to participate in any of the rehabilitation programs. His case management officer is the one who is supposed to refer him but these programs have a long waiting list as they can only accommodate 12 to 13 inmates at a time. Regarding the inmates property, the witness explained that there is a register that needs to be completed when they receive an inmate which indicates what valuable property the inmate has with him that needs to be booked in. When you want to acquire items while you are serving your sentence like a radio, there is a form that needs to be completed and the officer in charge will either approve or disapprove your request. You will then have this approval slip to prove that you have permission to possess the said item. The plaintiff had such an approval slip for his radio as well as a letter where the possession of the 2 USB drives was approved.

[25] The defendant called Veiko Armas next. Mr Armas is a deputy commissioner in the Ministry of Home Affairs, Immigration, Safety and Security in the department of the Namibian Correction Service and is the officer in charge of the Windhoek Correctional Facility. Previously he was stationed at the Oluno Correctional Facility. The plaintiff upon his arrival at the Oluno Correctional Facility was placed in a single cell as the witness had reason to believe that he belonged to a gang and that his life is in danger. The plaintiff further informed him that he left some of his belongings at the Windhoek Correctional Facility and he engaged the previous witness to forward those belongings.

[26] He testified that he knew the plaintiff for some time as he found him as a young offender in the Walvis Bay Correctional Facility. At Oluno Correctional Facility the two of them had several conversations. He also engaged with the plaintiff regarding his gang affiliations. He also explained to him that there is a member of a rival gang at the facility and that it is for his safety that they did not place him in the general population. The plaintiff was kept in D Section with other inmates that are in

single cells. They would be in their cell but would come out and mingle for exercise time. He would therefore be unlocked in the morning and outside his cell with the other inmates.

[27] Medical complaints will be dealt with in the mornings when the officer moves from cell to cell and is informed of any problems. If there is a medical problem, the inmate will be taken to the clinic. Here he would receive medication or if the doctor cannot help him, he would be referred to an outside facility. The witness confirms that the plaintiff came without a health passport to their facility.

[28] The last witness called by the plaintiff is Mr David Kambalala. He is a male senior registered nurse and is employed as the senior superintendent and the head of nursing services at the Windhoek Correctional Facility. He testified that he perused the medical passport of the plaintiff as it was discovered and saw that he was attended to at various times during June 2021 and on some of those occasions there is no complaint relating to high blood pressure. He was further not continuously on high blood pressure medication. If an offender does not have his health passport, a new passport can be issued. Health services are available 24 hours. If the plaintiff had abnormal blood pressure at any of his visits, he would have been prescribed high blood pressure medication.

Arguments

[29] The plaintiff argues that the defendants had failed to successfully defend the plaintiff's case based on the evidence in front of the court. He produced enough evidence to sustain his claim as his evidence also collaborated with other evidence before the court. He was in malicious solitary isolation for 166 days, he suffered emotional and psychological distress, his items were lost, there was medical negligence in the manner that he was treated and he also proved loss of ordinary amenities of life. It is argued that he indeed was placed in solitary confinement which made him depressed, and frustrated, caused him to have suicidal thoughts, and live the same process over and over, memory loss, pain in his chest, lacked exercise, and difficulty falling asleep, showing that he indeed suffered trauma and that is why he wrote to the head of the prison and was also taken to see a counselor.

[30] He further argued that his older medical history indeed showed that he took medicine for high blood pressure which he was not given after his health passport was not forwarded to Oluno Correctional Facility, although he tried on multiple occasions to receive it again. As a result, he suffers from chronic headaches, photophobia, vision disturbance, poor control of his hands, and short time memory loss.

[31] On behalf of the defendants, it was argued that it was common cause that the plaintiff was placed in a single cell from 24 December 2020 to 17 January 2021 and that the plaintiff was transferred to Oluno Correctional Facility on 17 January 2021. The remainder of the evidence however leads to two irreconcilable versions.

[32] Section 103(1)(b) and (c) of the Correctional Facilities Act should apply. It reads:

‘Where the officer in charge considers it necessary –

(b) for the safe custody of an offender, that such offender be confined; or

(c) for any other security reasons,

such officer in charge may order that such offender be confined, with or without mechanical restraint, in a separate cell and in the prescribed manner.’

[33] It was argued that the provision must be applied bearing in mind that the plaintiff was not in the same correctional facility at all times during the period for which he claims he was maliciously kept in a single cell which period is pleaded in his particulars of claim as 24 December 2020 to 15 June 2021. The plaintiff was kept at various facilities during that period and he was accommodated at those facilities in a manner suitable for the circumstances for instance when he was in transit from one facility to another or when he was on a temporary transfer where such offenders are accommodated in a separate unit from offenders who are permanently based at the facility.

[34] It was further argued that the pre-trial report which was made an order of this Court sets out the issues which are to be determined at trial. As far as the determination on whether the plaintiff was accommodated in a single cell for his safe custody, plaintiff has not disproved or brought before this court credible evidence to cast doubt on the defendants' version and has not discharged the onus to prove his case.

[35] It was further pointed out that the plaintiff did not place before the court a medical and psychological report to support his claims relating to not taking high blood pressure medication and the alleged psychological harm he suffered as a result of being accommodated in a single cell. The probabilities point away from the plaintiff's claims in that the alleged effects of his not taking high blood pressure medication are complaints that were indicated in his health passport as pre-existing, long before the period in which he was not on the medication, he also did not produce any evidence showing that there was an abnormal reading relating to his high blood pressure and that he was refused medication in such instance nor did he call an expert to establish if he is indeed suffering from any effects linked to not taking high blood pressure medication. The plaintiff likewise could not produce any other documentary or expert evidence in support of the alleged psychological harm and a reliable diagnosis about his mental state aside from the one occasion when he was on temporary transfer to Windhoek for three weeks and on that occasion, his complaint was attended to, resolved and no other complaints were made by the plaintiff.

The applicable legal principles

[36] In *Dannecker v Leopard Tours Car & Camping Hire CC*¹ the court dealt with the onus that rests on a plaintiff as well as what it contains:

' As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna and Another*, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, inter alia, two distinct concepts:

¹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2016] NAHCMD 381.

- (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and
- (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent.

Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p. 715, Ogilvie Thompson, J.A., called it "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1939 AD 16 at p. 28; *Marine and Trade Insurance Co. Ltd. v Van der Schyff*, 1972 (1) SA 26 (AD) at pp. 37 - 9.)'

[37] In *National Employers' General Insurance v Jagers*² the duty to discharge the onus was described as follows:

'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.'

Mutually destructive versions

[38] Various legal principles came into play when deciding the current matter before the court. It is common cause that two mutually destructive versions regarding what property the plaintiff had and did not have as well as what exactly happened regarding the placing of the defendant in solitary confinement.

[39] In this matter, the evidence demonstrates, that the two versions of the protagonists are mutually destructive. The approach is set out in *National Employers' General Insurance Co Ltd v Jagers*³ as follows:

² *National Employers' General Insurance v Jagers* 1984(4) SA 437 at 440 E-F.

³ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities 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. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[40] In *Burgers Equipment Spares Okahandja CC V Aloisius Nepolo t/a Double Power Technical Services*⁴ the court stated that:

'In *Sakushesheka & Another v Minister of Home Affairs*⁵, Muller J referred with approval to the case of *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et cie & Others*,⁶ where the Supreme Court of Appeal of the Republic of South Africa stated that, where there are two irreconcilable versions in a civil matter, in order to come to a conclusion on the disputed issues, a court must make findings on a) the credibility of various factual witnesses; b) their reliability; and c) the probabilities.'

Evaluation

[41] The evidence presented by the plaintiff shows that he indeed was placed in solitary confinement for 166 days, however, the reason presented by him and the reason presented by the defendants differ. Through cross-examination of the witnesses for the defendants, the plaintiff insisted that his life was never in danger and that there was no need to house him separately. However, the court accepts that he wrote the letter of 23 December 2020 requesting to be transferred to Walvis Bay Correctional Facility because of two attacks that happened on other inmates

⁴ *Burgers Equipment Spares Okahandja CC V Aloisius Nepolo t/a Double Power Technical Services* [2018] NASC 405 (17 October 2018) at 114.

⁵ *Sakushesheka & Another v Minister of Home Affairs* 2009 (2) NR 524 (HC).

⁶ *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et cie & Others*, 2003 (1) 11 (SCA) at 14I-15D.

which caused the plaintiff some concern. The court further accept that he on 24 December 2020 wrote a letter to the head of the facility, requesting to be placed in a single cell. This was after the concerns regarding his safety were raised with him.

[42] It is the evidence of both the first and the second witnesses for the defendants that they feared for the plaintiff's safety and that is why they proceeded and kept him in a single cell. They however testified that he had all the privileges that are normally available to a person in a single cell. He presented no evidence of his psychological condition and what the impact of being in a single cell could have on a person. The first witness for the defendants further testified that when he received a letter from the plaintiff on how he was feeling at that stage, to his attention, he referred him for psychological counseling. The evidence of the defenses witnesses also pointed out that the plaintiff was not recommended for any rehabilitation programs yet. I, therefore, find that the claim regarding detention in solitary confinement cannot succeed and should be dismissed.

[43] The plaintiff testified that he did not get his high blood pressure medication because his health passport was not transferred with him when he was transferred to Oluno and because of that, he is suffering certain ailments. It was never disputed that the health passport did not accompany the plaintiff to Oluno but it was testified that although he did not have a health passport, he was still taken for visits to the clinic where his blood pressure was taken regularly but did not prescribe medication for him because his blood pressure seems not to be excessive. It further transpires that a record, although not in the health passport, was separately kept of these visits. The plaintiff also did not call any medical expert or lead any evidence that the ailments he is complaining of currently was caused as a result of not taking high blood pressure medication. The claim regarding the damages suffered due to not receiving high blood pressure medication should therefore also be dismissed.

[44] The evidence of the plaintiff sets out several items that were left behind at the Windhoek Correctional Facility when he was removed from it there on 17 January 2021. Some of these items were returned to him after being forwarded from this facility to Oluno after he enquired about them. He however did not receive a white tracksuit, a pair of Greencross shoes, a USB radio, and 2 USB sticks. That he in

deed had these items were corroborated by the evidence of the second witness for the defense. In response, the defendants could not indicate what happened to these items. For that reason, the claim for these specific items must be allowed.

Costs

[45] The plaintiff did not incur any costs for which he should be reimbursed even if he is partially successful in his claim. I shall therefor make no order as to costs.

Order

[46] I, therefore, make the following order:

1. Judgement is granted to the plaintiff in the amount of N\$2500 only.
2. No order regarding costs is made.

E RAKOW
Judge

APPEARANCES

PLAINTIFF:

In Person

1ST & 2ND DEFENDANTS:

Ms van der Smit
Of Government Attorneys