



CASE NO. I 3119/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ZHANG FUWANG

PLAINTIFF

and

**THE GOVERNMENT OF THE
REPUBLIC OF NAMIBIA**

DEFENDANT

CORAM: NDAUENDAPO, J

Heard on:

03 March 2009

Delivered on:

04 October 2010

JUDGMENT

NDAUENDAPO, J: [1] The plaintiff, Zhang Fuwang, instituted an action for damages in the total amount of N\$5 000 000-00 (five million Namibian Dollar) against the defendant, the Government of the Republic of Namibia.

[2] In the particulars of claim the plaintiff alleges (inter alia) the following:

“3. On 10 August 2004 at the Windhoek Police Station, the Namibian Police (Oscar Sheehama) unlawfully and intentionally seized the plaintiff's person, alternatively arrested him, and took him into custody-

- 3.1 without a warrant of his arrest;
- 3.2 without arresting him in accordance with the law and the prescribed procedures for such arrest;
- 3.3 without any reasonable and probable cause and/or in an arbitrary manner and/or without being informed in a language he understood of the grounds for his arrest;
- 3.4 in violation of his rights as contemplated in Article 11(1) of the Namibian Constitution, and
- 3.5 in violation of his rights as contemplated in Article 11(2) of the Namibian Constitution.

4. On or about 06 August 2004 at the Kalahari Sands Hotel, Windhoek, member (Oscar Sheehama) of Namibian Police unlawfully searched and seized the Plaintiff's Toyota Corolla (in his absence):

- 4.1 without a warrant for the search and seizure.
- 4.2 not in accordance with the law and prescribed procedures for such search and seizure.
- 4.3 which search and/or seizure was excessively intrusive and CD player and/or goods were damaged and/or stolen;
- 4.4 without informing him about the object of the search despite the fact that he was not present, and
- 4.5 in violation of his rights as contemplated in Article 13 of the Namibian Constitution.
- 4.6 The Toyota Corolla (black) N 85405 W was only returned to Plaintiff on 08 June 2007.

5. On the same date at the Windhoek Police Station and at the Police Station in Windhoek, the Plaintiff was unlawfully detained by member/s of the Namibian police:-

- 5.1 without a warrant for his detention;
- 5.2 without having been taken into detention in accordance with the law and the prescribed procedure;
- 5.3 in violation of his rights as contemplated in Article 11(1) of the Namibian Constitution; and
- 5.4 in violation of his rights as contemplated in Article 11(2) of the Namibian Constitution.

6. The member/s of the Namibian Police falsely accused the Plaintiff of providing his own motor vehicle (Toyota Corolla) for drug dealers and lending them money to deal in drugs as partners; thereafter the Plaintiff was placed into an constant over-crowded police jail cell:-

- 6.1 in violation of the rights as contemplated in Article 8(2)(b) of the Namibian Constitution; and
- 6.2 in violation of his rights as contemplated in Article 7 of the Namibian Constitution.

7. On or about 20 November 2004 at the Police Station in Windhoek Plaintiff was transferred to the Police Cells at Hosea Kutako, Airport, Windhoek District.

8. Plaintiff was on regular intervals escorted to the Courts by member/s of the Namibian Police in order for the Plaintiff to appear before the Magistrate at Windhoek and Hosea Kutako Airport, Periodic Court on various dates.

- 8.1 the Plaintiff was kept in a holding cell at the Magistrate's Court at Windhoek, Hosea Kutako Police Cells and Katutura until 16 October 2006.
- 8.2 the Plaintiff received bad food and/or water for the duration of his detention in the said holding cell; (being two years and two months).
- 8.3 the Magistrate ordered that the Plaintiff be acquitted on the 04th of June 2007 after the Regional Prosecutor has withdrawn the matter against Plaintiff.

9. In and as a result of the aforesaid unlawful acts by member of Namibian Police the Plaintiff:-

- 9.1 suffered injury to his personality;
- 9.2 was injured in his dignity and reputation;
- 9.3 was humiliated and suffered great emotional stress;
- 9.4 suffered pain, distress, inconvenience and was emotionally tormented;
- 9.5 was deprived of his fundamental rights to dignity, privacy, liberty and freedom of movement contemplated in Articles 7, 8, 11, 13 and 21(1)(g) and (i) of the Namibian Constitution.

10. At all relevant times to the aforesaid incidents the said member/s of the Namibian Police acted within the course and scope of their employment with the Ministry of Safety and Security, alternatively within the risks created by their employment as such.

11. In the premises the Plaintiff suffered damages in the amount of N\$5 000 000,00 calculated as follows:-

11.1 Pain, suffering, distress and inconvenience N\$2 500 000-00

11.2 Contumelia, injury to the Plaintiff's personality
injury to the Plaintiff's dignity and reputation,
humiliation, deprivation of the Plaintiff's privacy,
liberty, freedom of movement and the deprivation
of his constitutional rights as hereinbefore Pleaded
N\$2 500 000-00

11.3 Fair and reasonable value of the items/goods
Damaged to Toyota Corolla during the seizure
N\$ 5 000-00

Proper notice of the proceedings was given to the Defendant in terms of the Police Act 19, 1990.

14. Notwithstanding the amount of N\$500 5000-00 being due and payable and demand for payment thereof the Defendant failed and/or refused to pay the said amount or any part thereof to the Plaintiff.

WHEREFORE the Plaintiff claims:-

1. Payment of the amount of N\$5 000 000-00.
2. Interest on the amount of N\$5 00 000-00 at the rate of 20% per annum from the date of judgment until the date of payment thereof.
3. Cost of suit.
4. Further and/or alternative relief."

[3] The Defendant filed a notice of intention to defend and a special plea and also pleaded on the merits.

[4] The special plea states the following:

“The plaintiff’s cause of action arose on 06 August 2004 and 10 August respectively.

Plaintiff’s summons was served on the Defendant on 31 October 2007.

In the premises and in terms of section 39(1) of the Police Act 19/1990 the Plaintiff’s action has become prescribed”.

[5] When the matter came before me, Mr. Brandt for the plaintiff and Ms. Potgieter, for the defendant asked the Court to adjudicate on the special plea of prescription raised by the defendant. This judgment (therefore) only deal with the question of the special plea.

Section 39(1) of the Police Act (19/1990) provides:

“Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within 12 months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than 1 month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection.”

[6] **The following issues are common cause and not in dispute:**

(a) It is common cause that the plaintiff’s vehicle was searched and thereafter seized, on 06 August 2004.

- (b) Plaintiff was arrested on 10 August 2004 and detained up until 16 October 2006 when he was released.
- (c) The Plaintiff's vehicle was returned to him on 08 June 2007.
- (d) The Plaintiff's summons was served on the Defendant on 31 October 2007.

- (e) The Minister did not waive compliance with the provisions of Section 39(1) of the Police Act (19/1990).

[7] Ms. Potgieter submitted that the plaintiff's cause of action in respect of the claim for the unlawful search of the vehicle arose on 06 August 2004, being the date on which the vehicle was searched and seized. Therefore, the plaintiff's claim in this regard had become prescribed in terms of Section 39(1) of the Police Act, due to the fact that it was instituted more than 12 months after the cause of action arose.

[8] As far as the claims for unlawful arrest and detention are concerned, Ms. Potgieter submitted that they arose on 10 August 2004 and therefore the claims became prescribed in terms of Section 39(1) of the Police Act 19/1990 as the summons was served on 31 October 2007, which is more than 12 months after the cause of action arose.

[9] Mr. Brandt did not have answers to those submissions except to submit that a similar worded provision as contained in section 39(1) of the Police Act (19/1990) was declared unconstitutional in South Africa. In Namibia the Supreme had occasioned to consider section 39(1) of the Police Act. In the case of **Minister of Home Affairs v Madjiedt and Others 2007(2) NR 475** the court, in refusing to declare section 39(1) unconstitutional, held that: S39(1) *"differentiation (between claimants under the Police Act and other claimants covered by the Prescription Act 68 of 1969) was reasonably connected to a legitimate governmental objective. The inherent inequality said to be existing in S39(1), was justified and reasonably so, by the need 'to regulate claims against the State in a way that*

promotes, speed, prompt investigation of surrounding circumstances so that, where necessary, the State could ensure that it was not engaged in avoidable and costly civil litigation”.

When does a cause of action arise?

Unlawful arrest:

In a claim for damages for unlawful arrest, the delict is committed by the wrongful arrest of the plaintiff, the injury lies in the arrest without legal justification.

In S v Thompson & another v Minister of Police & another 1971 (1) SA 375:

(at 375F) the court stated that:

“In the main claim based on wrongful arrest however the position is different. There the delict is committed by the illegal arrest of the plaintiff without the due process of the law. Improper motive or want of reasonable and probable cause required for malicious arrest have no legal relevance to this cause of action. It is also irrelevant whether any prosecution ensues subsequent to the arrest and, even if it does, what the outcome of that prosecution is. The injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made”. *In casu*, therefore, the cause of action arose on 10 August 2004 (the date of arrest). The summons was issued and served on 31 October 2007 and this was outside the period prescribed by section 39(1). The claim for wrongful arrest is therefore out of time and cannot be entertained.

Claim for Unlawful detention:

According to the particulars of claim, the plaintiff was detained on or about 06 August 2004 and was released on 16 October 2006. Plaintiff’s cause of action for unlawful detention arose at the moment when he was first detained. Ms. Potgieter on behalf of the defendant referred this court to the case of ***Minister of Home Affairs v Bauleth, 2004 NR. 68***. Where the court drew a distinction between the lawfulness of a person’s arrest and the lawfulness of that person’s subsequent detention. A further distinction was drawn: the initial period of detention that is concomitant to (associated with) the arrest and the period of detention beyond that. The court

further held that precisely when the initial period ends and the rest of the period of detention commences, must depend on the circumstances of each case. *In casu*, the plaintiff alleges that he was detained on or about 06 August 2004 and I will take that as the date when his detention commenced. Summons was only issued and served on 31 October 2007 accordingly the plaintiff's claim for unlawful detention is also out of time and cannot be entertained.

Ms. Potgieter referred this court to the matters of ***Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A)*** and ***Ngcobo v Minister of Police 1978 (4) SA 930 (D)***.

In the Slomowitz's case, the court was concerned with an action for damages for the wrongful and unlawful closing of a road by local authority. The defendant had raised a special plea of prescription in that the plaintiff's claim was barred by the provisions of S. 172 (1) of the Transvaal Local Government Ordinance 17 of 1939 (T) (which contained a limitation similar to that of section 39(1) of the (Police Act 19/1990) as this action was not brought within six months of the time when the cause of action arose. It was held that the plaintiff was only entitled to such damages as he could prove he sustained in respect of the closure of the road for that period which lay within the six months immediately preceding the institution action".

In essence the court held that there is a distinction between what may be regarded as a single wrongful act giving rise to one cause of action and a continuing injury causing damage from day to day which may give rise to a series of rights of action arising from day to day (moment to moment).

In the case of ***Ngcobo supra***, the court stated that: (at p. 932 H):

..."I would have been disposed to hold that while a cause of action accrues at the moment of the commencement of unlawful detention, that cause of action changes and enlarges in scope as the detention continues; that at any given moment during detention there is only one cause of action for damages for the period of detention up to that moment; and that at the conclusion of the period of detention there exists only one cause of action which has assumed its final and complete form at the moment of release".

At 934F the court stated:

“Every wrongful act has some duration in time. It is not clear what duration is necessary to qualify the act for the description “continuing injury”. There is, of course, no conceptual difficulty about a series of repeated acts, each of which would give rise to a fresh cause of action being thus described. In principle, however, a single wrongful act, whatever its duration, give rise to a simple cause of action on its completion.

[10] Ms. Potgieter submitted that the court should follow the approach adopted in **Ngcobo** case. I do not wish to express myself on which of the two approaches is to be preferred, because it is irrelevant for the purpose of this judgment. It is irrelevant because even if this court should find that the plaintiff’s detention constitutes *“a continuing injury causing damage from day to day which gave rise to a series of rights of action arising from day to day”* the plaintiff did not issue and served the summons within 12 months from the date of his release from detention (being 16 October). The summons was only served on the 31st October 2007. The claim for unlawful detention had also prescribed.

[11] In the result, the Plaintiff’s claim for unlawful arrest and detention, the claims for the unlawful search and seizure of the vehicle as well as the damage caused to the vehicle had become prescribed.

The order:

[12] In the result, the special plea is upheld with costs.

NDAUENDAPO, J

**ON BEHALF OF THE PLAINTIFF:
INSTRUCTED BY:**

**Mr. Brandt
Chris Brandt Attorneys**

**ON BEHALF OF THE DEFENDANT:
INSTRUCTED BY:**

**Ms. Potgieter
Government Attorneys**