



CASE NO.: I 380/2006
(T 1931/2004)

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TIVES THEOPHILUS AMBONDO

PLAINTIFF

and

**THE MINISTER OF HOME AFFAIRS
W/O KAYO
W/O CHARLES MATENGU SIMASIKU
W/O JOHN NCHINDO
CONSTABLE MINYOI**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT
FIFTH DEFENDANT**

CORAM: NAMANDJE AJ

Heard on: 15 August 2011

Delivered on: 17 February 2012

INTERLOCUTORY RULING

NAMANDJE, AJ.: [1] This is an application in terms of Rule 38(3) of the Rules of the High Court brought by the Minister of Home Affairs cited as the first defendant herein together with the second, third, fourth and fifth defendants who are all members of the Namibian Police. The plaintiff is Tives Theophilus Ambondo. The parties shall in this judgment be referred to as in the main action. The plaintiff is opposing the application.

[2] The plaintiff, in the main action, claims the sum of N\$200,000.00 plus interest thereon, jointly and severally against the defendants. The plaintiff alleges that he was assaulted by members of the Namibian Police acting within the course and scope of their employment with the first defendant. The assault, it is alleged by the plaintiff, occurred at Katima Mulilo Police Station. The plaintiff claims that as a result of the assault he had to receive medical treatment, was unable to work for three (3) months and he suffered contumelia, pain, shock, discomfort and humiliation.

[3] The defendants *inter alia* plead that at all relevant times the plaintiff was heavily intoxicated and that the members of the Namibian Police were in a process of arresting him on a number of charges¹ when they had to use reasonable force to effect plaintiff's arrest. It is therefore clear *ex facie* the pleadings that while the defendants deny the wrongfulness of any force used against the plaintiff they, to a certain extent, admit that force was used against the plaintiff when he resisted a lawful arrest. Crucial to the enquiry in the main action shall therefore be the question as to whether or not the force used against the plaintiff was reasonable and lawful and further whether or not the force used against the plaintiff was the cause of the injuries allegedly sustained by the plaintiff.

¹Resisting a lawful arrest, obstructing a Police Officer in the execution of his duties, assaulting a Police Officer and pointing of a firearm.

[4] The trial initially proceeded during November 2010 and had to be postponed for a further hearing from 2 – 12 August 2011 due to time constraints. After hearing this application on 15 August 2011 the main action was postponed for a further hearing to 16 - 27 April 2012.

[5] On 27 July 2011 before the continuation of the trial set for 2 August 2011 the defendants filed an application in terms of Rule 38(3) in which they sought an order for the evidence of a certain Darius Shikongo to be taken before a Commissioner of the court at Okahao. Rule 38(3) of the Rules of the High Court provides as follows:

“38(3) A court may, on application on notice in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as to it seems meet, and in particular may order that such evidence shall be taken only after the close of pleadings or only after the giving of discovery or the furnishing of any particulars in the action.”

[6] The court has a discretion whether or not it should make an order for taking of evidence on commission. In exercising its judicial discretion in this respect the court is primarily enjoined to consider whether the taking of evidence on commission is convenient and necessary for the purposes of justice. This is a jurisdictional fact before a court grants an application in terms of Rule 38(3) of the Rules of the High Court.

[7] The court, in addition, should make an assessment of all other circumstances of the case such as the materiality of evidence, the prospect of evidence sought to be adduced through the commission being forthcoming, whether the party seeking the order to adduce the evidence on commission acted with proper diligence in pursuing all

alternatives, is there evidence to support the inference that the commission is being sought on *bona fide* grounds to advance a legitimate case or is there a reason to suspect that it is a tactical stratagem designed to secure some unfair delay or some illegitimate advantages for the plaintiff, how convenient and expensive will the proposed hearing for the commission, what will be the prejudice to the party seeking the commission if the application is refused or prejudice to his adversary if the application is granted and what will be the relative importance would be for the trial court itself to see and hear the particular witness whose evidence is sought to be adduced on commission.² Because of the grounds for the decision I will arrive at, it would not be necessary to consider the factors enumerated under this paragraph.

[8] The deponent to the defendants' founding affidavit is Mr Jabulani Ncube who is acting as the legal practitioner of the defendants. Apart from his founding affidavit there are no other witnesses' supporting affidavits in support of his allegations. There are two confirmatory affidavits attached to the defendants' replying affidavit, but such affidavits add no value to the defendants' case at all. The purpose of the application is stated by Mr Ncube as being for the "*evidence of witness Darius Shilongo who is currently confined to his sickbed and is on home base care in Okahao to be adduced before a Commissioner of this court for purposes of trial*". Mr Shikongo is said to be the defendants' key witness as he was with the plaintiff at the time of the alleged assault and he would corroborate other defendants' witnesses "*on the mannerisms of the plaintiff on the date he was arrested by the police*".

[9] Attached to the defendants' founding affidavit is a letter dated 14 June 2011 in which it is recorded "*Darius Shilongo has been discharged from hospital and was given*

²See *Fernandez v Fittinghof*, 1993 (2) SA 704 at p 708 – 709.

six (6) months, home based care".³ It is alleged in the said letter that the witness is unable to attend a consultation with the defendants' counsel on 20 June 2011 due to his health condition. The defendants also produced a document dated 27 April 2011 marked "*Sick Leave Certificate*" in which it indicated that the witness was on sick leave from 29 April 2011 to 30 June 2011. Lastly the defendants produced another document which *ex facie* appears to have emanated from Okahao Medical Clinic marked "*Medical Certificate*" in which it is recorded that "*D Shilongo has been seen/admitted by me for medical investigation and treatment on 11 July 2011, he/she suffers from KS. For this reason he is unfit for work from the 1st of July 2011 to 1 August 2011*".

[10] On the basis of the two documents purporting to be medical certificates the defendants allege that the health condition of the witness is the reason for his indisposition to appear and testify in court. In my view, notwithstanding the interlocutory nature of this application, in the absence of any supporting or confirmatory affidavit from the authors of such two documents the statements therein in relation to the nature and extent of the health condition of the witness remain inadmissible hearsay evidence.⁴ The rule against admission of hearsay is, in my opinion, rarely relaxed in interlocutory matters on condition that the deponent swears an affidavit of information and belief and stating the source of information. It is my view that the defendants in this matter did not satisfy the above requirement.

³Ending on 30 June 2011.

⁴*Vulcan Rubber Works (Pty) Ltd v South African Railway and Harbours*, 1958 (3) SA 285 (A) at 296 F. Hearsay evidence is defined in the following terms:

"Oral and written statements by persons who are not a party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say." S v Chanda, 2005 NR 398 at p 402 A-B.

See also *Mahamat v First National Bank of Namibia Ltd*, 1995 NR 199 at 203 – 204.

[11] The above statements concerning the witnesses' condition further amount to inadmissible evidence in as far as such were made for the purposes of medically certifying that the witness is unable to attend and testify in court due to his health condition. This is because the defendants did not make requisite allegations on the basis of which the authors of the two documents could be found to be properly qualified to tender such medical opinion evidence. The mere fact that a document appears to have emanated from a medical facility or that the name appearing as that of the author is preceded by "DR" is insufficient in this respect. In any event even if I were prepared to accept such medical records it is simply indicated that the witness was not fit to be at work. That does not necessarily, without further details properly tendered as evidence, mean that the witness is unable to attend and testify in court.

[13] Another problem with the plaintiff's application is that the subpoena that was issued out of the office of the Registrar at the instance of the defendants' legal practitioners for the witness to appear in court was addressed to "*the messenger or his/her deputy or a member of the police*" as opposed to the sheriff. The defendants did not produce proof of service or non-service in any shape by and from the messenger, his deputy or a member of the police to whom the subpoena was addressed. There is also no explanation as to why the subpoena was not addressed to the sheriff.

[14] Having made the above findings, I am satisfied that the defendants did not make out a case for this court to grant an application in terms of Rule 38(3). Accordingly I make the following order:

- (i) The defendants' application in terms of Rule 38(3) is dismissed with costs.

NAMANDJE, AJ.

ON BEHALF OF THE PLAINTIFF:

T. IPUMBU

INSTRUCTED BY:

TITUS IPUMBU LEGAL PRACTITIONERS

ON BEHALF OF THE DEFENDANTS:

J. NCUBE

INSTRUCTED BY:

GOVERNMENT ATTORNEYS