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HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

**JUDGMENT**

Case no: I 2705/2012

In the matter between:

**ALAN JOHN MEYER**

**PLAINTIFF**

and

**ALBERTO GOMES FELISBERTO**

**DEFENDANT**

**Neutral citation:** *Meyer v Felisberto* (I 2705/2012) [2014] NAHCMD 85 (14 March 2014)

**Coram:** MILLER AJ

**Heard:** 10-13 February 2014

**Delivered:** 14 March 2014

**Flynote:** Action for malicious prosecution. Defendant a private citizen who laid a charge of theft against the plaintiff. Defendant aware that the facts do not prove theft. Not sufficient that defendant merely provided the facts to the police. In addition defendant must assist in or associate himself with the prosecution. In *casu* this was established. Damages awarded.

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**ORDER**

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The defendant is ordered to pay to the plaintiff the sum of N\$29 000. The defendant shall pay the plaintiff's costs which will include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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MILLER AJ : [1] The events which give rise to this action happened in the northern town of Rundu during the year 2009 and in the earlier part of 2010.

[2] The plaintiff, who was 58 years old at the time owned and conducted a business providing mechanical field services from certain premises in that town.

[3] The defendant likewise owned and conducted its business of a supermarket under the name and style of Rundu Spar. At the relevant time the defendant embarked on certain alterations to enlarge the business premises. A part of the work to be done was the construction and erection of steel trusses and structures. The defendant engaged Mr. Jacobus van Zyl to do that portion of the work. Mr. van Zyl conducted business under the name and style of J.R. Welding in Rundu.

[4] In order to execute the work Mr. van Zyl needed bigger premises. He then approached the plaintiff and concluded a written agreement with him on 24 June 2008 in terms whereof he leased from the plaintiff a portion of the premises from which the plaintiff conducted his own business. The agreed rental payable was N\$5 000 monthly.

[5] The defendant purchased a large amount of steel necessary to do the work he required Mr. van Zyl to do. The steel was delivered to the premises Mr. van Zyl had leased.

[6] The plaintiff was aware that some steel delivered to the premises belonged to the defendant, but says that he was never shown or told which items they were.

[7] As time progressed Mr. van Zyl, fell into arrears with his rental payments and as at 7 September 2009 the amount outstanding come to N\$49 272,76. By that time the plaintiff denied Mr. van Zyl any access to the leased premises.

[8] On 7 September 2009 the plaintiff addressed a letter to the defendant which reads as follows:

RUNDU SPAR  
P.O. Box 941  
RUNDU  
NAMIBIA

E.A. ENTERPRISES  
P.O. Box 1330  
RUNDU  
Cell no. 0.....

07/09/2009

Att.: Mr. A.G. Felisberto

Dear Sir

I, Alan John Meyer, Owner of E.A. Enterprises, hereby wish to inform you of the following situation. Mr. Jacobus van Zyl entered into an agreement with me, for the use of these premises for the following. To construct and store steel structures and use of a portion of the workshop to carry out the above work.

The amount agreed upon was N\$5 000 (Five thousand Namibian Dollars) per month, plus a portion of the lights and water. This account of Mr. J.P. van Zyl is now in arrears. The outstanding amount is N\$49 272, 76 (Fourty Nine Thousand two Hundred seventy two Namibian Dollars and Seventy Six cents).

I now find it necessary to inform you, that I have claimed possession of all goods stored on these premises, until such time that the above amount is settled in full. Only then will material and goods be removed from these premises. Under my personal supervision and signed for by the person removing them.

I thank you for your co-operation regarding the above matter.

A.J. MEYER  
MANAGER'

[9] Shortly thereafter he spoke to the defendant's sister. Mrs. Janse van Rensburg who ran the defendant's business at that time. The plaintiff enquired from her if Mr. van Zyl had received any payment from the defendant. Mrs. Janse van Rensburg showed him a book containing entries of payment made to Mr. van Zyl. There is some dispute between the plaintiff and Mrs. Janse van Rensburg as to whether the latter said the payment were made to enable Mr. van Zyl to pay the rent. Nothing turns on that in the end and I need not resolve the matter.

[10] According to the plaintiff the next development was a visit to his business premises by the defendant and Mr. van Zyl on 3 November 2009. The defendant handed to the plaintiff a letter prepared by the then lawyer of the defendant, Mr. Neves and dated 2 November 2009. The letter was written in response to the letter drafted by the plaintiff on 7 September 2009 which I referred to earlier.

[11] That letter demanded that the plaintiff return the defendant's property by close of business on 3 November 2009, failing which the defendant will lay a charge of theft with the police or alternatively seek an order from this Court.

[12] The plaintiff was initially intimidated by the contents of the letter and agreed to release the defendant's goods. He later phoned his legal practitioner in Otjiwarongo, Mr. de Koning and discussed the situation with him. Mr. de Koning advised him that he was in law entitled without more to retain the defendant's property until the arrear rent was paid. This advice is repeated in a letter Mr. de Koning addressed to Mr. Neves on 19 November 2009. The plaintiff then advised the defendant that he will not release the defendant's goods.

[13] It was put to the plaintiff that prior to the letter dated 2 November 2009, the defendant and Mr. van Zyl visited the plaintiff at his flat and that some agreement

was reached to pay the arrear rent. This the plaintiff denied. In my view no such meeting took place.

[14] There is an irreconcilable contradiction between Mr. van Zyl and the defendant to what was agreed upon. According to Mr. van Zyl the defendant agreed to settle the full amount outstanding forthwith and in one lump sum. According to the defendant he only offered to pay a certain portion of the outstanding amount.

[15] It is moreover improbable that at the alleged meeting an agreement had been reached to settle the amount outstanding. Had that been the case, that would have been the end of the matter in all probability. I would also have expected that the letter written by Mr. Neves would have alluded to the settlement agreement reached. There is however no mention of it.

[16] On 20 November 2009 the defendant visited the police station where he laid a charge of theft by false pretences against the plaintiff. He also deposed to an affidavit which reads as follows:

'Rundu CR 82/11/2009

Adalberto Gomes Felisberto state under oath ID No. 6....., 42 yrs old, Namibian male citizen, Residence at T.... Location House no. 4... Cell. 082....., Owner of Rundu Spar, Tel. 066-255570, My home language Portugues but I state in English.

1. On being of June 2008 I have purchase iron steel cash at Grootfontein Pupkewitz and they have delivered the goods at Mr. Jacobus van Zyl who have get the tender to make the new proof at Rundu Spar thereon only building process was delay due to reason that Town Council fail to approved the plan of building the proof.
2. So now currently the plans was approved on 12 November 2009. So I have approach the guy which I have give tender to start with the project Mr. Jacobus van Zyl thereon. Mr. Jacobus van Zyl and me have went to the place where he have kept the iron steel. He workshop that he was renting from Alan

John Meyer. But Alan John Meyer first given me green light to take my iron steel but later phone and tell that that first Mr. Jacobus van Zyl must paid him rent thereon he will release my property. But due time I was not involved in they are renting agreement. I am only the owner of the iron steel who have give tender to Mr. Jacobus van Zyl who have take steel thereon to work on it. But Mr. Alan John Meyer refuse to release the building material proof steel that belong to me. I phone my lawyer who have advice me to lay a charge.

3. The description of stolen item are iron steel bar that costs the value of N\$4 40 000.00.
4. I have not give right or permission to the person to commit theft under false pretence. So I need police investigation as well as prosecution into this case.

I know and understand the contents of this statement.

I have no objective of taking the prescribed oath.

I consider the prescribed oath as binding on my conscience.

Rundu

20 November 2009

19 hour 42

I certify that deponent acknowledge that he knows and understands the contents of this statement that he have read through sworn thereafter put his signature thereon in put presence on 20 November 2009.'(sic)

[17] Mr. van Zyl also made a statement on that day which is similar by and large to the one deposed to by the defendant.

[18] As a consequence the plaintiff was summoned to the Rundu police station on 13 January 2010. When he arrived there he was arrested on a charge of theft relating to the property of the defendant. The plaintiff states that he was placed in a cell of about 12-15 square metres. There were some 15-20 people in the cell. The conditions were unhygienic. The plaintiff had not been arrested before and according to him he felt depressed and demoralized.

[19] A friend of his Mr. Theart paid him a brief visit and handed him a blanket. The next day he was taken to the local Magistrate's Court. The case was postponed and he was granted bail in the sum of N\$1 000 which was paid. He had to attend Court on six occasions thereafter until the charge was withdrawn on 13 January 2011.

[20] The defendant when he testified blew hot and cold over the underlying motive which led to him preferring a criminal charge against the plaintiff. He at one stage denied that he had preferred a charge only to admit it at a later stage. He at one stage contended that the sole purpose of him going to the police was to prevent his steel being sold in execution and that he did not want the plaintiff to be arrested. He stated that he never thought subjectively that the plaintiff had stolen anything belonging to him despite the contents of the letter written by Mr. Neves and that he had no right to open a case. Yet when he was advised that the plaintiff was arrested he attended Court but didn't speak to anyone or question why the plaintiff had been arrested.

[21] In my view the defendant's sole purpose in laying the charge was to coerce the plaintiff into releasing his property. In so doing he no doubt foresaw that the plaintiff may be arrested and prosecuted. It is in this regard also significant that the defendant says that the purpose of the letter written by Mr. Neves was to scare the plaintiff.

[22] As is apparent from the plaintiff's particulars of claim his cause of action is one of malicious prosecution as distinct from one of unlawful arrest.

In *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC) Damaseb JP states the following at p. 404 F:

'To sustain a claim based on malicious prosecution the plaintiff must allege and prove:

- (i) That the defendant actually instigated or instituted the criminal proceedings;
- (ii) Without reasonable and probable cause; and that
- (iii) It was actuated by an indirect or improper motive (malice) and;

- (iv) That the proceedings were terminated in his favour; and that
- (v) He suffered loss and damage.'

[23] Damaseb, JP, relying on *Waterhouse v Shields* 1924 CPD 155, held that if a person does no more than place facts or information before the police as a result of which proceedings are instituted, such would not be sufficient to attract liability for malicious prosecution.

[24] It was held in *Waterhouse* that in addition that person must go further and actively assist and identify himself with the prosecution.  
(Compare also *Cohen v Benjamin* 1885-1886 SC 99).

[25] I have no difficulty in concluding that the plaintiff proved the requirements mentioned in (ii), (iii), (iv) and (v) of the passage in *Akuake* I quoted.

[26] It remains to consider whether the plaintiff proved the first requirement.

[27] As indicated it is not sufficient to establish merely that the defendant instituted the criminal proceedings. The further question is did he assist or identify himself therewith.

[28] My finding is that the defendant did associate himself with the prosecution. When he learnt of the arrest and court appearance of the plaintiff he was content to have the proceedings proceed well knowing that the case was without merit. This accords with the portion of his affidavit to the police that:

'So I need police investigation as well as prosecution into (sic) this case'.

[29] These facts distinguish this case from the *Akuake* case.

[30] It follows that the plaintiff has proved that in law the defendant is liable in damages.



[31] I turn to consider the issue of the quantum of damages.

[32] The plaintiff's first claim is for payment of the sum of N\$17 144,40. This amount according to the plaintiff comprises his travelling costs to attend the court proceedings. He determined the amount by calculating the number of kilometers travelled and multiplying that with an amount per kilometer travelled. The amount per kilometer he obtained from what he termed the AA rates. These were not placed before me nor was it explained to me how the rate was calculated or how reliable or otherwise they are. In my view it is a matter which will require expert testimony.

[33] Ms. van der Westhuizen who appeared for the plaintiff points to the fact that the defendant did not dispute this part of the evidence. That may well be the case but the defendant also did not admit this amount.

[34] I remain unpersuaded that any reliance can be placed on that evidence.

[35] The plaintiff's second claim is for payment of the sum of N\$150 000 being damages for *contumelia*, deprivation of freedom and discomfort.

[36] In exercising my discretion in determining the amount of damages I take into account the following facts:

- (i) The plaintiff's age at the time of his arrest.
- (ii) The fact that he had not been arrested prior to this incident.
- (iii) He was detained for one day at most.
- (iv) He was detained in unhygienic conditions in a crowded cell.
- (v) The fact of his arrest caused him to feel humiliated and he became depressed.

[37] As to the latter aspect the plaintiff's evidence as to the seriousness and degree of his state of depression was in my view somewhat over stated, but it does not detract from the fact that he became depressed.

[38] Counsel for both the plaintiff and the defendant referred to some authorities in which damages were awarded in cases where the plaintiff had been deprived of his liberty. They are useful guidelines, but only guidelines nonetheless.

[39] Having given the matter some consideration I determine the amount of damages to be awarded as N\$25 000.

[40] In the result I make the following orders:

1. The defendant is ordered to pay to the plaintiff the sum of N\$25 000.
2. The defendant shall pay the plaintiff's costs which will include the costs of one instructing and one instructed counsel.

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P J MILLER  
Judge

APPEARANCES

PLAINTIFF: C VAN DER WESTHUIZEN  
Instructed by Etzold-Duvenhage, Windhoek

DEFENDANT: W BOESAK  
Instructed by Kwala & Company Incorporated, Windhoek

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