

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 271/2013

In the matter between:

KARINAMUINA REMEMBER TJIPEPA

PLAINTIFF

And

MINISTER OF SAFETY & SECURITY

FIRST DEFENDANT

INSPECTOR-GENERAL OF THE NAMIBIAN POLICE

SECOND DEFENDANT

SERGEANT RUKUMBIRUAVI KEIMUNE

THIRD DEFENDANT

CONSTABLE TJINJUANU KAMGOMBE

FOURTH DEFENDANT

Neutral citation: *Tjipepa v Minister of Safety and Security* (I271-2013) [2014]
NAHCMD 193 (7 August 2015)

Coram: UEITELE, J

Heard: 24 March 2014, 7-9 April 2014 and 27 May 2014

Delivered: 7 August 2015

Flynote: **Delict** - Unlawful arrest - Plaintiff arrested without warrant in terms of s 40(1)(b) of Criminal Procedure Act 51 of 1977 - Police can arrest someone without warrant on reasonable suspicion that Schedule 1 offence has been committed - Such suspicion should be based on facts and not wild hunch or suspicion

Delict - Malicious arrest - What plaintiff must prove to succeed on merits - plaintiff must allege and prove that the defendants (acting in person or through their agents or servants) instigated the deprivation of liberty, that the instigation was without a reasonable and probable cause; and that the defendants acted with 'malice' (or *animo injuriandi*).

Summary: The plaintiff who is a peasant farmer living in a village known as Okatjuru in the Kunene Region of Namibia instituted action against the Minister of Safety and Security, the Inspector General of the Namibian Police, Sergeant Rukumbiruavi Keimune and Constable Tjindjuau Kangombe (who by the time the trial commenced was deceased) alleging that he was unlawfully, alternatively maliciously arrested without a warrant, he was unlawfully, alternatively maliciously detained for two days (i.e. 6-8 April 2011) and that he suffered physical assaults and other breaches of his constitutional rights, such as the right to be brought before a court within 48 hours of his arrest, at the hands of the third and fourth defendants and other members of the Namibian Police Force acting within the scope and course of their employment.

Held that wrongful deprivation of liberty means that a person is deprived of his or her physical liberty without legal justification. To succeed in an action based on wrongful deprivation of liberty the plaintiff must allege and prove that the defendant himself or a person acting as his agent or servant deprived him of his liberty.

Held that section 40(1)(a)&(b) of the *Criminal Procedure Act*, 1977 provides for the arrest without warrant of a person who commits or, attempts to commit any offence in

the presence peace officer or who is suspected (the suspicion must be based on reasonable grounds) of having committed an offence referred to in Schedule 1 of that Act.

Held that the arrest of the plaintiff fell squarely within the ambit of s 40(1) (b) of the Criminal Procedure Act, 1977 and s 9 read with s 2 of the Stock Theft Act, 1990. In the light of the finding that the arrest of the plaintiff was lawful the court found that the seizure of the cattle by the Police officers was lawful.

Held furthermore that in order to succeed with a claim for malicious arrest, the plaintiff had to allege and prove that the defendants (acting in person or through their agents or servants) instigated the deprivation of liberty, that the instigation was without a reasonable and probable cause; and that the defendants acted with 'malice' (or *animus injuriandi*).

Held furthermore that the plaintiff failed to make the requisites allegations in respect of the claim for malicious arrest and also failed to prove that the defendants were actuated by malice when they deprived him of his liberty. The plaintiff also failed to establish a lack of real and probable cause and the existence of *animus injuriandi* on the part of the defendants.

Held furthermore that the third and fourth defendants did not assault the plaintiff.

ORDER

The plaintiff's first and second claims are dismissed with costs.

JUDGMENT

UEITELE, J

Introduction and background

[1] In this matter the plaintiff is a certain Karinamuina Remember Tjipepa, who instituted an action against the Minister of Safety and Security, the Inspector General of the Namibian Police, Sergeant Rukumbiruavi Keimune and Constable Tjindjuau Kangombe (who by the time the trial commenced was deceased).

[2] The plaintiff came to this court alleging that:

- (a) he was unlawfully, alternatively maliciously arrested without a warrant;
- (b) he was unlawfully, alternatively maliciously detained for two days (i.e. 6-8 April 2011);
- (c) the third and fourth defendants and other members of the Namibian Police Force acting within the scope and course of their employment, unlawfully alternatively maliciously confiscated his cattle; and
- (d) he suffered physical assaults and other breaches of his constitutional rights, such as the right to be brought before a court within 48 hours of his arrest, at the hands of the third and fourth defendants and other members of the Namibian Police Force acting within the scope and course of their employment.

[3] The plaintiff as, a consequence of the allegations I referred to above (paragraph 2(a)-(c)) is seeking compensation from the defendants in the following amounts:

- (a) N\$50 000 (Fifty Thousand Namibia Dollars) being damages for *contumelia* in respect of the alleged unlawful, alternatively malicious arrest:
- (b) N\$70 000 (Seventy Thousand Namibia Dollars) being damages for deprivation of freedom and liberty, discomfort suffered by the plaintiff and or violation of plaintiff's constitutional rights;
- (c) N\$30 000 (Thirty Thousand Namibian Dollars) being damages for loss of amenities to engage in subsistence farming ventures alternatively loss of income.

[4] In respect of the alleged assaults (paragraph 2(d)) the plaintiff is seeking compensation from the defendants in the following amounts:

- (a) Medical expenses N\$2 000;
- (b) Pain and suffering N\$50 000;
- (c) *Contumelia* N\$48 000;
- (d) Cruel and inhumane treatment N\$50 000.

[5] The background to the plaintiff's claim is briefly as follows. The plaintiff is a peasant farmer who lives in a village known as Okatjuru in the Kunene Region of Namibia and he mainly farms with cattle. On the evening of 05 April 2011 (between 20h00 and 21h00), three police officers under the command of sergeant Keimune (the third defendant) were on patrol in the area of Okonyota village. Whilst so patrolling they

came across two young boys (a certain Uihama Vetjoza and a certain Mateus Muhimba) who were driving a herd of approximately thirteen cattle. The police officers stopped the boys and enquired whether they had permits or a letter from the local headman to drive the cattle. The boys replied that in that area they did not require a letter or permit to drive the cattle and that the cattle belonged to the plaintiff. The police officers then instructed them to drive the cattle to the kraal of the headman of the Okonyota village where the animals overnighted. The two boys were then taken to the place where the police officers had put up camp and they overnighted there.

[6] The following day, that is, on 06 April 2011 the police noticed that the cattle had different brand marks and one of the cows did not bear a brand mark and that some of the brand marks on the cattle were applied on top of earlier brand marks. They, as a result of that discovery, went (accompanied by Uihama Vetjoza and Mateus Muhimba) to look for the plaintiff for him to come and identify his cattle and to explain the different brand marks on the cattle. When the plaintiff arrived at Okonyota village he could, according to the third defendant, not satisfactorily explain the origin of some of the cattle and why the cattle had different brand marks. The evidence as regards the events which followed thereafter is not harmonious and I will deal with it in the ensuing paragraphs, but what followed thereafter is that the plaintiff, Uihama Vetjoza and Mateus Muhimba were arrested and taken to Werda Police Station where they were kept for two days (i.e. from 06 to 08 April 2011) and released on 08 April 2011. His cattle were also impounded on the same day that he was arrested. The cattle were returned to the plaintiff but the exact date on which the cattle were returned was not determined, but it appears that they were returned after 20 April 2011.

[7] The plaintiff now contends that when the police officers arrested him on 06 April 2011 they arrested him without a warrant of arrest and without informing him why he was being arrested. He further asserts that the police officers had no reasonable basis on which they arrested him. The plaintiff alleges that during the period when he was being questioned by the third and fourth defendants he was subjected to physical

assaults and inhumane treatment. He further contends that when the police officers arrested him and impounded his cattle they acted unlawfully alternatively malicious and that is why he decided to institute the action.

[8] The defendants on the other hand entered a notice to defend the action and deny that they acted unlawfully or maliciously when they arrested the plaintiff and unlawfully impounded his cattle. The defendants alleged that the police officers who arrested the plaintiff had a reasonable suspicion that plaintiff committed an offence of stock theft. They furthermore allege that plaintiff was lawfully arrested and thereafter taken to Werda Police Station for detention. The defendants furthermore denied that the plaintiff was assaulted. I will now proceed to evaluate the competing claims.

The evidence

The evidence on behalf of the plaintiff

[9] The plaintiff testified in support of his claim and called two other persons, a certain Nico Herunga and Dr Razemba to testify in support of his claim. Plaintiff testified that during the year 2005, he applied for the registration of a stock brand and thereafter obtained his certificate of registration of a brand. He was issued with stock brand number being X1857A, which brand number is branded on his cattle.

[10] He testified that during April 2011, his cattle got astray. A relative of his informed him that his cattle which went astray were found at Okonyota village. Okonyota is the village where his mother resides and it is about 10 kilometers from Okatjuru village (i.e. the village where he resides). On 05 April 2011, he sent two gentlemen (Uihama Vetjoza and Mateus Muhimba) to go to Okonyota village to fetch his cattle that were in his mother's kraal. On the 06th of April 2011 while he was at Okatjuru village he was approached by three officers of the Namibian police. They asked him whether he had lost some cattle. He informed them that he had cattle that went astray but he knew the

whereabouts of the cattle and that he had sent two boys to fetch the cattle. They asked him how many cattle went astray and he responded that they were nineteen. They asked him to accompany them to Okonyota where the cattle were. Once at the kraal where the cattle were kept, he was asked to identify the cattle. He testified that he pointed out thirteen cattle that were his.

[11] When he identified the cattle the police officers asked him why the cattle had different brand marks. His response was that the cattle had different brand marks because he bought the cattle from different persons and that the different brand marks were the brand marks of the previous owners of the cattle. He testified further that he was asked to name the previous owners of the cattle and he did as he was asked. The police further enquired as to where he got the one cow that was not branded and he responded that he got it from a certain Mr. Hosea Tjimuine and his village was at Okozongwehe.

[12] The police officers thereafter requested that he take them to his headman. On their way they stopped at Ekango village (According to the witness Ekango village is situated on the route between Okatjuru village and Okozongwehe village) and there he met Nico Herunga, who lives in that village and who knew some of his cows and he spoke to him enquiring whether he remembered some of his cows that were at some stage in their village. He specifically described to him the mother of the cow that he had earlier referred to that was not branded and Nico Herunga confirmed that he remembered it. He alleges that the police heard this conversation and accused Mr. Herunga of telling lies and slapped him on the cheek with an open hand. The police officers thereafter accused the plaintiff of lying and started to assault him with clenched fists on his stomach and abdominal area. He testified that the assaults took place in the full view of the members of the public.

[13] Plaintiff testified that the police officers forcefully twisted his forearm and then handcuffed him and continued beating him on his back and abdominal parts of the body.

The arm twisting and handcuffing were executed in such a manner that it formed a figure of eight. After he was handcuffed the defendants took a pistol butt and hit it on the handcuffs. This was in order to apply more pressure on the wrist. He endured a lot of pain as a result of this assault. He was held by the belt buckle and thrown into a police vehicle, a Nissan Hardbody, and upon landing in the vehicle he felt pain on his left shoulder. He also noticed that he had sustained a bruise and scratch on his forearm.

[14] He continued to testify that after he was thrown into the Nissan pickup vehicle they drove to Okozongwehe village to look for the headman. They did not find the headman and returned to Okonyota. On the way back the police stopped along the way and again assaulted the plaintiff with clenched fists on his stomach, chest and back. Plaintiff testified that he together with the two gentlemen who drove the cattle on his behalf were taken to Werda police station and left in the custody of police officers there. The arresting officer removed the handcuffs on plaintiff and informed the other police officers that he had stolen cattle and they should detain him. On the 8th of April 2011 while in detention the station commander sent a police officer to fetch him and informed him that he would be taken to Opuwo to appear in court. Plaintiff testified that he informed the station commander that the charges against him were not true as he owned the cattle. He informed him that the arresting police officers had assaulted him and was informed that an investigator would be assigned to investigate the stock theft and report back to him. He was later released from custody on the same day, that is, 8th April 2011.

[15] Plaintiff furthermore testified that on his release he was still in pain but he thought that the pain would subside. He eventually saw Dr. Razemba (he visited this doctor on 20 April 2011) who prescribed some medicine and he incurred costs in the amount of N\$ 2 000. Plaintiff testified that during the period over which he was detained Meatco purchased cattle from local farmers and because of his detention and the impounding of his cattle plaintiff could not participate in the sale although he had planned to sell cattle to Meatco and that he would have earned N\$ 30 000 from the sale transaction. He only

received his cattle at a later stage. He testified that he was humiliated and traumatized by this ordeal, he felt embarrassed as he is a respected member of society. At the time of his arrest no one informed him of his rights in law and he was never informed of the reasons of the arrest and detention.

[16] The second witness to testify on behalf of the plaintiff was a certain Nico Herunga who testified that: When the plaintiff came with police to his village, he, while in a conversation with the plaintiff, indicated that he knew plaintiff's unbranded cow because that cow was at some stage in his (Nico Herunga) village. The police overheard that conversation and accused him of lying and the late constable Kangombe (the fourth defendant) slapped him on the cheek. The third and fourth defendants also accused plaintiff of lying and started to assault him (i.e. plaintiff) by beating him with fists on the abdominal parts of his body, the neck, face and back. He further testified that plaintiff was thrown into a Nissan Hardbody vehicle while being held by the belt on the side.

[17] The third witness to testify on behalf of the plaintiff was a certain Dr T Z Razemba who testified that he examined the plaintiff on the 20th of April 2011 at Opuwo. During consultation the plaintiff informed him that he had his arm twisted and was complaining of shoulder pain. He examined him by inspecting the joint but there was no visible swelling or deformity. Palpation revealed tenderness in the shoulder joint as well as a reduced range of motion due to pain aggravated by said motion. He further found that, the plaintiff had minor bruising and scratches on the right forearm and that he exhibited clinical symptoms of inflammation and pain. He then prescribed medicine for him and recommended that he should do an X-ray examination and have a physiotherapy done on him.

The evidence on behalf of the defendants

[18] The first witness to testify on behalf of the defendants was the third defendant (Sergeant Rukumbiruavi Keimune) who testified as follows: On the 5th April 2011, at between 20h00 and 21h00 he was in the field on an anti-stock theft operation with officers Kangombe and Betuel Kawatja. While on patrol between Okonyota village and Omuhama village they came across two young men driving a herd of thirteen cattle. The young men driving the cattle had no permits or letter of authorization from the headman. They then asked the young men to return the cattle to Okonyota and to leave the cattle in the headman's kraal. They took the young men with them and they overnighted at the place where the police officers had put up camp.

[19] The following day (i.e. the 6th April 2011) they inspected the cattle and the inspection revealed that the cattle had different brand marks raising the possibility they belonged to different persons contrary to the young men's indication that they belonged to plaintiff. They accordingly went to fetch the plaintiff from his village (Okatjuru) for him to come and identify his cattle and to explain the different brands on the cattle. When the plaintiff arrived at the kraal he identified thirteen cattle. Asked to explain why the cattle had different brand marks the plaintiff explained that some cattle were inherited, others belonged to other people who requested him to sell them on their behalf and some belonged to his wife. There was a cow that did not have a brand mark. He testified that he found the explanation unsatisfactory and he thus formed the suspicion that plaintiff had either stolen the cattle or was in the possession of stolen cattle.

[20] The plaintiff could not produce any documentation to substantiate his claims that he purchased or inherited the cattle. It was there at the headman's place that plaintiff was informed that he was under arrest because the cattle were driven without a permit, had different brand marks and no documentary proof of plaintiff's ownership of the cattle. He denied that he or the other officers assaulted the plaintiff in any manner and also denied that the plaintiff was handcuffed in the manner complained of. He denied that they hit the handcuffs with a pistol. He substantiated his denial by stating that when

they are in field operations they are issued with rifles and not pistols. He further denied that they held the plaintiff by the belt and threw him into the police vehicle. He substantiated his denial by testifying that on the day of the patrol they were driving a Caspir and not a Nissan vehicle.

[21] The second witness to testify on behalf of the defendants was a certain Johannes Kamati who testified that: He was the shift commander of shift D which was in the charge office at the time when plaintiff was brought to the police station on 06 April 2011 at about 17h00. The driver who arrived with the third defendant and his company was a certain sergeant Betuel Kawatja. Before detaining the suspects who were brought in including the plaintiff, he informed them that they were arrested on suspicion of stock theft. He conducted a body search of the plaintiff and his then co-suspects and their property was booked in. He observed no injuries on any person and he received no complaints from any of them. He instructed Constable Aitembu to record his observation which he had made with regards to the plaintiff and she concurred with such observations. The process which was followed at the time was standard procedures at the charge office. The witness produced his statement and the occurrence book entries into evidence. On cross-examination the witness insisted that the vehicle driven by Betuel was a Caspir.

[22] The third witness to testify on behalf of the defendants was a certain Wilhelmina Aitembu who testified that: She was on duty at the charge office on the day plaintiff was detained. She corroborated Mr. Kamati's evidence that the plaintiff was searched. She also testified that the plaintiff was asked if he had been beaten or was sick and he answered in the negative. She confirmed making the entries in the occurrence book based on the observations she made in concurrence with those of sergeant Kamati.

[23] The fourth witness to testify on behalf of the defendants was a certain Simon Mukuta who testified that: He is employed by the Ministry of Safety and Security as a Police Officer and attached to the uniform branch as the station commander at Werda

police station. As part of his duties, he on a daily basis inspects and signs the occurrence book and the cell register to keep abreast of what is happening in the station. On the 07th of April 2011 he inspected the books and all was well. He noted that three suspects were detained as appeared from the occurrence book and the Pol 8 (the cell register). He went to the cells to check if there were any complaints or issues that needed him to address and there were none. He did not receive any report of assault or sickness among the detainees who included the plaintiff.

[24] On the 8th of April 2011 he again went to the cells and also enquired about the wellbeing of the suspects who were detained there and he received no complaints from the suspects (this includes the plaintiff). Afterwards while in the office he realized that the plaintiff and the other suspects brought in with him had been detained on the 6th on a Wednesday and their 48 hours was about to expire and the investigator was not around to attend to the further enquiries in their case. As a result he had the suspects brought to him one by one at the time and he interviewed them. They gave him their explanation of what had happened. He enquired from them whether they had been beaten and whether they had any complaints. Their response including the plaintiff was that they were not beaten and they had no complaints he therefore explained to them that the investigation would continue but he would release them on their own cognizance at the time. The witness submitted into evidence as exhibits three Pol 38s (Release Declaration) and three Pol 46s (release of suspect) in respect of Mateus Muhimba, Uihama Vetjoza and Karinamuina Tjipepa. When he released the plaintiff he explained to him in a language he understood (Otjiherero) the process and after the explanation the plaintiff affixed his signature and thumb print on the Release Declaration which indicated that he had no complaints in line with their interview and discussion.

[25] The fifth witness to testify on behalf of the defendants was a certain Jackson Toivo Kharuchab who testified that: He is employed by the Ministry of Safety and Security as a Police Officer in particular as a detective warrant officer based at Werda Police Station. He is the Unit Commander of Werda Criminal Investigation Unit and he

is often assisted by the Station Commander Sergeant Mukuta during periods of his absence from the station. On or about the 06th of April 2011 while at Kamanjab he was contacted by his Regional Crime Coordinator, a certain Deputy Commissioner Israel of the incident of the gentlemen who were driving cattle and who were arrested and brought to Werda police station. He proceeded to Werda and while he was at Werda Police station he received a complaint of a rape case in Omaruru. He weighted the two reported crimes and he decided to attend first to the rape case. He thus proceeded to Okonyota where he found the cattle in headman Mr. Mureko's kraal. There were about 13 cattle in total and he took photos of the cattle and drew the brand marks on the cattle. He thereafter proceeded to Omaruru to investigate the rape case. He later received report that the suspects in the suspected stock theft matter were released.

[26] When he came back the cattle were still at the headman's kraal in Okonyota and he was informed that the plaintiff did not want to collect them. Because of the cattle that were still at the headman's kraal he made an announcement on the radio inviting members of the public to come and inspect the cattle. Several community members came to inspect the cattle in case there were any of theirs in the herd. He attempted to find the plaintiff and talk to him in relation to the case with no success as he was on numerous occasions informed that he was not home. He had problems verifying ownership of the different brands that the cattle had as the computer system was faulty. The case however remains pending and the docket is still open. It has only been delayed by the different challenges that came up including that he, on occasions, had to hand over the file to internal discipline investigators who became involved with the issue as a result of plaintiff's complaints of assault and unlawful arrest.

The law

Unlawful arrest

[27] Wrongful deprivation of liberty means that a person is deprived of his or her physical liberty without legal justification.¹ To succeed in an action based on wrongful deprivation of liberty the plaintiff must allege and prove that the defendant himself or a person acting as his agent or servant deprived him of his liberty². An arrest or detention *is prima facie* wrongful and the defendant must allege and prove the lawfulness of the arrest or detention.³ As regards the unlawfulness or wrongfulness of the deprivation of the liberty the Courts in South Africa said the following:

'The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.'⁴

[28] An arrest can be made with or without a warrant⁵. In order to be lawful the arrest must be formally executed. This requires that, first, the body of the person to be arrested must be actually touched unless he submits to custody or if the circumstances so require by forcibly confining his body. Second the person effecting the arrest must, at the time of affecting the arrest or immediately thereafter inform the arrestee of the cause (s) of the arrest. If the arrest was effected by virtue of a warrant a copy of the warrant must be handed to the arrestee upon his or her demand.⁶ Section 40(1)(a) & (b) of the *Criminal Procedure Act, 1977* provides for the arrest without warrant of a person who

¹ Neethling J, Potgieter J M, & Visser P J *Neethling's Law of Personality* 2nd edition LexisNexis p 113

² *Ibid* at p 114, also see *Minister of Police v Rabie* 1986 (1) SA 117.

³ *Lombo v African National Congress* 2002 (5) SA 668 (SCA), para.32; *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk).

⁴ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) Also see the case of *Ingram v Minister of Justice* 1962 (3) SA 225 (W) where the court said: 'All interferences with the liberty of the citizen are *prima facie* odious and it for the person responsible to establish why in the particular circumstances such interference is legally justified.' And *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) where the court said 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

⁵ Section 39 (1) of the *Criminal Procedure Act, 1977* (Act 51 of 1977).

⁶ Section 39 (2) of the *Criminal Procedure Act, 1977*.

commits or, attempts to commit any offence in the presence of a peace officer or who is suspected (the suspicion must be based on reasonable grounds) of having committed an offence referred to in Schedule 1 of that Act.

[29] In the South African case of *Minister of Police and Another v Mthlane*⁷ the court said the following with regard to a reasonable suspicion:

‘...I think I may further state that when one comes to consider whether he had reasonable grounds one must bear in mind that, in exercising these powers, he must act as an ordinary honest man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis.

The test is an objective one and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion.’

And in the matter of *Duncan v Minister of Law and Order*⁸

‘...And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion.’

[30] In the matter *De Jager v Government of the Republic of Namibia and Another*⁹ Hannah J said the following:

‘...Mere suspicion, a policeman's hunch, is insufficient, but suspicion is a lesser state of mind than knowledge of guilt. Some evidence, some information from witnesses, affording objective grounds for suspicion must be established. Once reasonable cause for suspicion is established, the constable need not generally prove that arrest was necessary. Constables are endowed with a discretion to arrest; they are rarely under a duty to do so. The House of Lords in *Holgate-Mohammed v Duke* held that the

⁷ 1978 (3) SA 542 (N).

⁸1984 (3) SA 460 (T) also see *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N) at 216; *R v Van Heerden* 1958 (3) SA 150 (T) at 152; and *Wiesner v Molomo* 1983 (3) SA 151 (A) at 159).

⁹ 2006 (1) NR 198 (HC); also see *Garces v Fouche and Others* 1997 NR 278 (HC).

constable's discretion to arrest could be challenged only if he could be proved to have acted on some immaterial or irrelevant consideration. Arrest of a woman in the belief that once in police custody she would more readily confess was held to be not unreasonable. An arrest for the purpose of using the period in custody to dispel or confirm suspicion by questioning the suspect or seeking further evidence was well within the discretion of a constable. Taking advantage of suspicion of crime to arrest your wife's lover and incarcerate him for a few hours would be clearly unlawful'

Malicious arrest (deprivation of liberty)

[31] Unlike in the case of wrongful arrest, where the result complained of must have been caused without justification by the defendant himself or some person acting as his servant or agent, in the case of malicious deprivation of liberty the conduct takes place under the guise of a valid judicial process.¹⁰ The difference between a wrongful arrest and a malicious arrest was put as follows in the matter of *Cole's Estate v Olivier*¹¹:

'I apprehend the law to be (1) that acts done in excess of and without judicial process give rise to an action for damages without requiring proof of malice, but (2) acts done under the sanction of judicial process improperly obtained do not give rise to an for damages unless done maliciously and without a reasonable and probable cause.'

[32] In *Newman v Prinsloo and Another*¹² Marco J explained the difference as follows:

'Stated shortly, the distinction is that in wrongful arrest, or false imprisonment, as it is sometimes called, the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose actions he is vicariously liable, whereas in malicious arrest the interposition of a judicial act, between the act of the defendant and the apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the

¹⁰ Neethling *supra* footnote 1 at p 122.

¹¹ 1938 CPD 464 at 468.

¹² 1973 (1) SA 125 (W).

defendant but the act of the law. The importance of the distinction is that, in the case of wrongful arrest, neither malice nor absence of justification need be alleged or proved by the plaintiff, whereas in the case of malicious arrest it is an essential ingredient of the plaintiff's cause of action, which must be alleged and proved by him, that the defendant procured or instigated the arrest by invoking the machinery of the law maliciously.'

[33] It therefore follows that in order to succeed (on the merits) with a claim for malicious arrest, a claimant must allege and prove:

1. That the defendants instigated the deprivation of liberty;
2. That the instigation was without a reasonable and probable cause; and
3. That the defendants acted with 'malice' (or *animo injuriandi*)¹³.

Unlawful detention

[34] Article 11(3) of the Constitution and s.50 of the Criminal Procedure Act (CPA),¹⁴ deal with detention after arrest. The effect of these provisions was discussed by Hannah AJ (as he then was) when he stated the following in *S v Mbahapa*¹⁵:

'The terms of art 11(3) are to my mind quite clear. The article provides in plain terms that an arrested person must be brought before a magistrate within 48 hours of his arrest or released. It is only if it is not reasonably possible to bring an arrested person before a magistrate within the 48- hour period that further detention in custody is permitted and even then the detained person must be taken before a magistrate 'as soon as possible'. In the context of art 11(3) the words 'as soon as possible' require little interpretation or explanation. There must, of course, be an element of reasonableness implied but once

¹³Cf *Prins v The Government of the Republic of Namibia* (I 1361/2004) [2013] NAHCMD 259 (2013) delivered on 18 September 2013.

¹⁴ Act no 51 of 1977.

¹⁵ 1991 NR 274 (HC) at 280E-H.

the circumstances are such that it is reasonably possible to take the arrested person before a magistrate that must be done. If it is not then the arrested person is deprived of his fundamental right to freedom as guaranteed by the Constitution. As I have indicated, what is possible or reasonably must be judged in the light of all the prevailing circumstances in any particular case. Account must be taken of such factors as the availability of a magistrate, police manpower, transport, distances and so on. But convenience is certainly not one such factor.'

Assault

[35] In the Criminal Law context assault is defined as the unlawful and intentional application of force directly or indirectly to the person of another or inspiring a belief in another person that force is immediately to be applied to her.¹⁶ In the context of Delict, Neethling, Potgieter & Visser¹⁷ argue that 'The *corpus* (bodily and psychological integrity) is protected against every factual infringement of the person's physique or *psyche*. The same authors¹⁸ argue that infringements of the *corpus* are most often encountered in instances where physical harm is paramount and that such infringements may occur with or without violence and with or without pain and are regarded as *iniuriae* with regard to the *corpus*.

[36] In the matter of *Stoffberg v Elliott*¹⁹ Watermeyer, J as he then was, instructed the jury as follows:

"I want first of all to explain to you what, in law, an assault is. In the eyes of the law, every person has certain absolute rights which the law protects. They are not dependent upon a statute or upon a contract, but they are rights to be respected, and one of those rights is the right of absolute security of the person. Nobody can interfere in any way with the person of another, except in certain circumstances which I will further explain to you.

¹⁶ C R Snyman *Criminal Law* 4th ed, Butterworths at 430.

¹⁷ *The Law of Delict* 5th ed, LexisNexis Butterworths, 2006 at 301.

¹⁸ In Neethling's *Law of Personality* 2nd edition, LexisNexis Butterworths, 2004 at 84.

¹⁹ 1923 CPD 148.

Any bodily interference with or restraint of a man's person which is not justified in law, or excused by law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference."

[37] In the unreported judgment of *Lubilo and Others v Minister of Safety and Security*²⁰ this Court²¹ remarked that an assault violates a person's bodily integrity and that every infringement of the bodily integrity of another is *prima facie* unlawful. Once infringement is proved, the *onus* moves to the wrongdoer to prove some ground of justification. But before that duty arises, the plaintiff must allege and prove the fact of physical interference. It thus follows that in order to succeed in his claim the plaintiff carries the *onus* to prove the physical infringement of his body (by the application of force to his body) by the defendant himself or a person acting as his agent or servant . The *onus* to show justification for the infringement of the plaintiff's body is on the defendant.²²

Discussion

Unlawful arrest

[38] The following facts are not in dispute between the parties.

- (a) That on 05 April 2011 the third and fourth defendants found agents or servants of the plaintiff driving cattle along the road between Okonyota and Okatjuru villages at night (i.e. between 20h00 and 21h00) .

²⁰ High Court Case No (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

²¹ Per Damaseb JP at para [9].

Bennet v Minister of Police and Another 1980 (3) SA 24 (C)

²² *Mabaso v Felix* 1981 (3) SA 865 (A).

- (b) That the agents or servants of the plaintiff did not have a permit or letter of authorization from the local chief or headman to drive the cattle.
- (c) That on 06 April 2011 the plaintiff was fetched from his village (Okatjuru) and taken to (Okonyota) where the cattle were. There he identified thirteen cattle as being his. But the thirteen cattle had different brand marks and one of it did not have a brand mark at all. His explanation for the different brand marks on the cattle is that he bought it from different owners.
- (d) The plaintiff did not provide any documents to prove that he purchased the cattle in question.
- (e) That the third and fourth defendants did not accept that explanation and as a result they arrested him and took him to Werda Police station.
- (f) On 08 April 2011 the plaintiff he was released from detention.

[39] The defendants did not dispute that the third and fourth defendants when effecting the arrest of the plaintiff were acting within the scope of their employment with the first defendant. The main dispute was whether the arrest of the plaintiff was a lawful arrest. I have indicated above that s40 (1) (b) of the Criminal Procedure Act, 1977 empowers a 'peace officer' to, without warrant, arrest any person whom *he reasonably* suspects of having committed an offence referred to in Schedule 1. There is no doubt that stock theft is and offence referred to in Schedule1. In addition ss 2 and 9 (1) of the Stock Theft Act, 1990²³ provide as follows:

'2 Failure to give satisfactory account of possession of stock or produce

Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence.

²³ Act, No. 12 of 1990.

3 ...

9 Arrest and search without warrant

(1) Subject to the provisions of Article 11(2) and (3) of the Namibian Constitution, any person may, without warrant, arrest any other person upon reasonable suspicion that such other person has committed the offence referred to in section 2 or 4.

[40] Plaintiff's counsel contended that the plaintiff's evidence that; he owns livestock, he acquired and accumulated his first stock from his father, during April 2011 plaintiff's cattle strayed and they were found at Okonyota village, that a relative of the plaintiff informed him that the cattle were found there and they are at the kraal of the plaintiff's mother in Okonyota, was not controverted and that I must thus accept it and make positive findings in that regard. He further argued that in the light of that evidence by the plaintiff, it is evident that the police officers who arrested the plaintiff had knowledge at the time of the arrest that the cattle of the plaintiff strayed. He thus submitted that, a reasonable police officer who had that knowledge would have investigated this aspect as there were people both in Okatjuru and Okonyota villages who could have confirmed and corroborated the assertion of the plaintiff that the cattle in question were indeed of the plaintiff and this information would have allayed the concerns or suspicions of theft (if any) that the police officers allegedly had.

[41] Counsel for the plaintiff furthermore submitted that by having the knowledge (which counsel termed uncontested) and failing to investigate it, the police officers could not have formulated a reasonable suspicion of theft .He thus submitted that in view of the fact that the *onus* is on the defendants to justify the arrest and bearing in mind that the test in that regard is objective it was unreasonable for the police officer who has knowledge of the fact that cattle strayed from one village to another and there are people in those villages who can either dispel or confirm his or her suspicion who does not investigate that aspect acts whimsically when he arrests that person.

[42] I cannot, for the reasons that I will advance below, agree with Mr. Khama (Counsel for the plaintiff). Firstly it is fallacious to argue that because the evidence of the plaintiff is not contradicted I have to accept it. Whether or not I must accept that evidence will depend on the quality and value of the evidence. This was said more than one hundred years ago by Innes CJ in the matter of *Siffman v Kriel*²⁴, where he said:

'It does not follow, because evidence is uncontradicted, that therefore it is true...The story told by the person on whom the onus rests may be so improbable as not to discharge it.'

[43] In my view, there were a number of unsatisfactory aspects in the plaintiff's evidence particularly the allegations that the cattle went astray and that they were allegedly found by a relative of the plaintiff. The relative who allegedly found the cattle and informed the plaintiff of the presence of the cattle in Okonyota was not called to testify, that part of the evidence therefore remains hearsay and inadmissible. Secondly the 'say so' of the plaintiff or any other person for that matter would never be proof of the fact that the cattle belonged to the plaintiff. The fact that the plaintiff was issued with a brand mark could also not dispel the suspicion that the cattle may have been stolen. The only valid prove of ownership of the cattle is a herd statement drawn from the veterinary offices in the district concerned.

[44] The evidence of the third defendant was that, the reason why they arrested the plaintiff was the fact that the thirteen herd of cattle which they found being driven by the plaintiff's servants or agents had different brand marks and one of the cattle was not branded. When the plaintiff was fetched to identify the cattle the police officers were not satisfied with the plaintiff's explanation and the plaintiff did not provide them with documents to prove ownership of the cattle. It was for that reason that he was arrested and taken to Werda Police station while they investigate the ownership of the cattle.

²⁴1909 TS 538 at 543 also see , *Da Mata v Otto* NO 1972 (3) SA 858 (A), *McDonald v Young* 2012 (3) SA 1 (SCA).

[45] I find it appropriate to echo the words of Van Dijkhorst J in the matter of *Duncan v Minister of Law and Order*²⁵ where he said:

'The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the Legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt.

[46] The plaintiff's counsel cross-examined the third defendant on the lines that there was no reasonable suspicion against the plaintiff as he had information that the cattle belonged to the plaintiff and he could easily verify that information with members of the community of the Okonyota and Okatjuru villages. In the *Duncan* matter Van Dijkhorst J said the following:

'A lawful arrest in terms of that subsection [i.e. s 40(1)(b)] can be made upon a reasonable suspicion. The word "suspicion" connotes an absence of certainty and of adequate proof, as does the word "verdenking" in the Afrikaans text. As it was aptly put by Lord DEVLIN in the Privy Council in *Shaaban Bin Hussien and Others v Chong Fook Kam and Another* [1969] 3 All ER 1626 at 1630:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."

[47] I am therefore of the view that the police officers were not required to have *prima facie* evidence to lawfully arrest the plaintiff. All that is required in terms of s 40(1)(b) is

²⁵ *Supra* footnote 8 at page 14.

that they must have a suspicion and that the suspicion must be based on reasonable grounds. In the light of the facts sergeant Keimune and his colleagues had at their disposal (the facts being that; the cattle were found being driven at night without an animal movement permit or letter from the headman of the village, the cattle had different brand marks and the plaintiff had no documents to prove how he acquired the cattle), the suspicion formed by the police officer was in my view reasonable. The arrest of the plaintiff therefore fell squarely within the ambit of s 40(1) (b) of the Criminal Procedure Act, 1977 and s 9 read with s 2 of the Stock Theft Act, 1990. In the light of my finding that the arrest of the plaintiff was lawful I also find that the seizure of the cattle by the Police officers was lawful.

[48] The plaintiff pleaded in the alternative that his arrest was malicious. I have above stated that in order to succeed with a claim for malicious prosecution, the plaintiff had to allege and prove that the defendants (acting in person or through their agents or servants) instigated the deprivation of liberty, that the instigation was without a reasonable and probable cause; and that the defendants acted with 'malice' (or *animo injuriandi*). The only allegation, in the plaintiff's particulars of claim, relating to the alleged malicious arrest is his claim that he was maliciously arrested. In my view that is not an allegation but a conclusion. The plaintiff reaches that conclusion without setting out the basis on which he reached that conclusion. Apart from the failure to make the requisite allegations in respect of the claim for malicious arrest the plaintiff failed to prove that the defendants were actuated by malice when they deprived him of his liberty. The plaintiff has in my view also failed to establish a lack of real and probable cause and the existence of *animus injuriandi* on the part of the defendants. The claim for malicious arrest also fails.

Unlawful detention

[49] The Namibian Constitution (the Constitution) provides as follows in Article 11(1) to (3):

'Article 11 Arrest and Detention

- (1) No persons shall be subject to arbitrary arrest or detention.
- (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.
- (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.'

[50] Parker J commenting on the provision Article 11 of the Constitution said:

'[5] With the greatest deference to Ms. Koita, such argument is not only sad, it is also unfortunate, apart from being puerile in the extreme, particularly when it is made in a country whose very life and soul are nourished by 'the triadic ideals of democracy, human rights and the rule of law'. (See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2009 (2) NR 793 (HC) at 798H.) One must not lose sight of the fact that the object of art 11(3) of the Namibian Constitution is to ensure the prompt exhibition of the person of an arrested and detained individual before a magistrate or other judicial officer so as to prevent the detention of a person incommunicado is itself an affront to our constitutionalism, democracy and respect for basic human rights. It is also an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance, alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her; treatment that is outlawed by art 8(2) of the Namibian Constitution. The 48 hour rule is therefore one of the most important reassuring avenues for the practical realisation of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution.

[6] ...

[7] What art 11(3) says — in material part — is that '*no such persons shall be detained in custody beyond such period (i.e. 48 hours) without the authority of a Magistrate or other judicial officer*'. (Italicized for emphasis.) The simple, irrefragable fact that seems to escape Ms. Koita's comprehension is that when the applicant was at last brought before the magistrate on 17 February 2011 the applicant had already been 'detained in custody beyond such period (i.e. 48 hours) without the authority of a Magistrate or other judicial officer' — in blatant violation of the applicant's art 11(3) basic human right..²⁶

[51] Section 50(1) of the Criminal Procedure Act, provides that:

'(1) A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding 48 hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause for his arrest: Provided that if the period of 48 hours expires...'

[52] I am therefore of the view that where the arrest of a person is found to be lawful the detention of that person for a period of 48 hours or a period less than that is not *per se* unlawful. It will in my view only be unlawful if the detention is whimsical or malicious²⁷. In the present matter the evidence is that when the plaintiff was taken to Werda Police station he was there informed that he is being detained on suspicion of stock theft. The provisions of Article 11(2) were thus complied with. Although the plaintiff was not brought before a Magistrate he was released prior to the expiration of the 48 period. The plaintiff has not placed any evidence before me to indicate that his detention

²⁶ *Sheehama v Minister of Safety and Security and Others* 2011 (1) NR 294 (HC)

²⁷ *Garces v Fouche and Others* 1997 NR 278 (HC)

from 06 April 2011 to 08 April 2011 was whimsical or malicious. I therefore find that the plaintiff's detention was lawful.

Assault

[53] The plaintiff is pursuing two claims against the defendants one of the claims is for the alleged assault during the period of his arrest. In respect of the claim for damages arising from the alleged unlawful assault the plaintiff carries the *onus* to prove all the elements of the assault - i.e. the unlawfulness of the beating, the intention of the third and fourth defendants and the application of excessive force. The evidence of the plaintiff and the third defendant is, in relation to the crucial facts that have a direct bearing on the question of whether or not the plaintiff was assaulted, mutually destructive. The following legal principles are now well settled in our law namely that:

- (a) where the evidence of the parties' presented to the court is mutually destructive the court must decide as to which version to belief on probabilities²⁸; and
- (b) the approach that a court must adopt to determine which version is more probable is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.²⁹

[54] Counsel for the plaintiff contended that the version of the plaintiff asserting that he was assaulted by the third and fourth defendants must be accepted. He justified that submission on the following grounds: There was evidence that the version of the plaintiff's assault at Ekango was witnessed amongst others by Nico Herunga whom the plaintiff called and who corroborated his evidence of the assault. An independent

²⁸*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.

²⁹*Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 39 - 17 para 51).

witness, Doctor Razemba had examined the plaintiff and found that he indeed was in pain. On the other hand Counsel for the defendants contended that the plaintiff has failed to discharge the *onus* resting on him to prove the alleged assaults.

[55] Weighing up the versions of the various witnesses and taking into account the probabilities, I incline strongly to the view that the third and fourth defendants did not assault the plaintiff. I am so inclined for the following reasons. First, the plaintiff testified that the assaults on him at the Ekango Village were in the full view of the members of the public including Mr. Herunga. I do not regard Mr. Herunga as an independent witness for the simple reason that on his own version he was also a victim of the alleged assaults. I therefore do not attach much weight to his evidence. Secondly, the reliance by Mr. Khama (counsel for the plaintiff) on the evidence of Doctor Razemba that it corroborates the allegations of assault is misplaced. I agree with Mr. Ndlovu (counsel for the defendants) who argued that doctor Razemba's evidence opens up the possibilities that the injuries suffered by the plaintiff could have resulted from causes (e.g. wrestling with cattle) other than an assault on him.

[56] Thirdly the defendants led the evidence of one Mukuta the station commander of Werda Police station whose testimony I set out above and will not repeat it here, save to state that Mukuta testified that he interviewed (in a language which the plaintiff understands) the plaintiff before he released him and the plaintiff confirmed that he was not assaulted or injured during the process of arrest. The defendants' witness submitted into evidence the Pol 38 (Release Declaration) and Pol 46 (release of suspect) in respect of the plaintiff as exhibits K1 and K2 respectively. In the Release Declaration, Exhibit K1, the plaintiff amongst other things declares that he has not sustained any injuries whilst in detention and that he has no complaints.

[57] On 08 April 2011 the plaintiff deposed to a statement under oath as regards the events which led to his arrest. That statement was submitted into evidence as exhibit N.

In the statement the plaintiff does not mention that he was taken to Ekango nor does he mentioned that he was assaulted and that he sustained some injuries. I regard exhibits K1, K2 and N as contemporary documents. The plaintiff's evidence under oath at the trial and the statements in the contemporary documents differ in material respects (in that in the exhibits the plaintiff omits to mention that he was assaulted). The omission to mention the alleged assaults was also manifest when the plaintiff consulted Doctor Razemba. The plaintiff was, in cross examination, confronted with the omissions and he, in my view, did not explain the omissions but was evasive on those important aspects. The plaintiff's claim for assault must therefore fail.

[58] In the result, the plaintiff's first and second claims are dismissed with costs.

SFI Ueitele
Judge

APPEARANCES:

PLAINTIFF:

D Khama
Instructed By Tjitemisa & Associates

DEFENDANT:

M Ndlovu
Government Attorney