

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 336/2013

In the matter between:

BENESTUS TJIJEURA

PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY

DEFENDANT

Neutral citation: *Tjjeura v Minister of Safety and Security* (I 336/2013) [2015]
NAHCMD 75 (30 March 2015)

Coram: UNENGU J

Heard: 09 February 2015; 11 – 12 February 2015; 27 February 2015

Delivered: 30 March 2015

Flynote: Practice – Action against the Minister of Safety and Security – Unlawful arrest and detention – Torture by members of the Police Force as cause of action – Plaintiff untrustworthy and unreliable – Claim dismissed.

Summary: Practice – The plaintiff in the matter is claiming N\$100 000 from the Minister of Safety and Security as compensation for damage suffered as a result of alleged unlawful arrest and detention, assault and torture – Court found the plaintiff untruthful, untrustworthy and unreliable witness, held that the plaintiff failed to prove his claim on the balance of probabilities and dismissed the claim.

ORDER

The plaintiff's claim is dismissed.

JUDGMENT

UNENGU, AJ:

[1] The plaintiff in the matter, issued a combined summons against the defendant (The Minister of Safety and Security) in his official capacity as head of the Namibian Police for acts of alleged assaults perpetrated on him (plaintiff) by members of the Namibian Police Force, claiming a payment of an amount of N\$100 000 with interest at a rate of 20% per annum calculated from date of judgment to date of payment, costs of suit and alternative and/or further relief.

[2] The cause of the claim against the Minister is set out more clearly in the particulars of claim paragraphs 3, 4 and 5, which read as follows:

'ANNEXURE

PLAINTIFF'S PARTICULARS OF CLAIM

3. At approximately 10h00, on 16 May 2012 at a Okahitanda Village, Okandjatu District Plaintiff was wrongfully and unlawfully arrested, deprived of his liberty and was assaulted from about 10h00 until about 13h00, when Plaintiff was released from detention without being formally charged, by 13 or more members of the Namibian Police, whose full names, ranks and further particulars are to the Plaintiff unknown (see particulars below);

4. On 18 May 2012 and from about 19h00 until about 22h00 and at Tjitambi shopping area in Okandjatu District Plaintiff was re-arrested by the Station Commander known to Plaintiff as Sergeant Shingweda of Okandjatu Police with other three members of the Namibian Police, whose full names, ranks and further particulars are to the Plaintiff unknown. Plaintiff was deprived of his liberty and was assaulted by the said members of the Namibian Police. From 22h00 on 18th May 2012 until 13h00 in the afternoon of 19th May 2012 Plaintiff while still handcuffed and detained at the back of a police van whose further details are unknown to Plaintiff. On 19th May 2012, at about 13h00 and at Okandjatu Police Station Plaintiff was further detained while still handcuffed in a room at the Police Station until 18h00 on 19th May 2012 when Plaintiff was released without being formally charged. More particularly:
 - 4.1 Plaintiff was handcuffed from behind;
 - 4.2 Plaintiff was repeatedly hit in the head with sticks and fists;
 - 4.3 Plaintiff was repeatedly kicked with boots on the legs and the back;
 - 4.4 Plaintiff was repeatedly hit on the stomach and chest with fists and sticks.

5. As a consequence of the foregoing conduct of the said members of the Namibian Police Plaintiff suffered serious bodily injuries, more particularly;
 - 5.1 Plaintiff's sustained severe injury in left hand side (LHS) ear;
 - 5.2 Plaintiff LHS leg was severely injured and swollen;
 - 5.3 Plaintiff backbone was severely injured;
 - 5.4 Plaintiff's wrists were severely injured and had open wounds;
 - 4.5 Plaintiff LHS arm was severely injured and swollen;
 - 4.6 Plaintiff suffered severe pain on his head, LHS ear, leg and hand, stomach and chest;
 - 4.7 Plaintiff suffered multiple lacerations;
 - 4.8 Plaintiff's rights under article 8 of the Namibian Constitution not to have Plaintiff's dignity violated and not to subject Plaintiff to torture or to cruel, inhuman and degrading treatment was violated in that the said Police members;
 - 4.8.1 Subjected Plaintiff to further and additional pain, suffering and discomfort by denying him medical treatment or failing to provide him with police report of assault to enable him to get medical treatment at Okandjatu Clinic;

- 4.8.2 Degraded Plaintiff and violated his right to dignity by denying him medical treatment or failing to provide him with medical treatment;
 - 4.8.3 Failed to provide medical treatment without delay, or take Plaintiff to a medical facility and/or Doctor so that he could receive medical treatment there and/or;
 - 4.8.4 Failed to take proper care of Plaintiff who was a detainee in their custody, more particularly to provide Plaintiff with medical treatment.
5. As a result of the foregoing:
- 5.1 Plaintiff was treated by medical personnel at Katutura State Hospital on 26th June 2012 and from time to time which treatment constitute would dressing cream X-ray and medication for reduction of pain;
 - 5.2 Plaintiff endured shock, trauma, pain, suffering and discomfort which was initially severe but subsided gradually but not completely;
 - 5.3 Plaintiff suffered a loss of ordinary amnesties of life and discomfort in that Plaintiff still feels pains in his backbone, LHS leg, ear and arm.
 - 5.4 Plaintiff's psychological integrity, dignity and self-esteem were injured.'

[3] The defendant has defended the claim and the relief sought against him by denying the content of both paragraphs 3 and 4 of the particulars of claim, and put the plaintiff to the proof of the allegations therein.

[4] On 6 August 2014, the matter was referred to court-connected mediation but the mediation did not take place for reasons only known to the plaintiff, the defendant and their respective legal practitioners.

[5] After the failed court-connected mediation, on 15 December 2014, the matter was set down for trial on 9 – 13 February 2015 and the court ordered that the issues contained in the pre-trial conference are the issues to be determined. Those issues are contained in paragraphs 2 and 3 of the 'Parties' Proposed Pre-Trial Order: Rule 26(6) dated 22 July 2014 and filed on 25 July 2014.

Paragraphs 2 and 3, the contents thereof are as follows:

'ISSUES OF FACT TO BE RESOLVED DURING THE TRIAL

- 2.1 Whether the plaintiff was tortured by members of the Namibian Police Force;

- 2.2 Whether the plaintiff was subjected to cruel, inhuman and degrading treatment during the time that he was in police custody;
- 2.3 Whether the plaintiff was denied the opportunity to seek medical treatment while he was detained awaiting first appearance at the Magistrate's court.
- 2.4 Whether plaintiff was unlawfully arrested, detained and assaulted as alleged.

ISSUES OF LAW TO BE RESOLVED DURING THE TRIAL

- 3.1 Whether or not the defendants agents acting in the course and scope of their employment with defendant violated the plaintiff's constitutional rights thereby causing him to suffer bodily pain and injury which pain and suffering still persists to date;
- 3.2 The quantum of plaintiff's damages;
- 3.3 Whether or not defendants are liable to plaintiff in the amount claimed.'

[6] These are issues to be resolved during the trial proposed by the parties in the pre-trial order. These are factual and issues of law listed in paragraphs 2 and 3 of the pre-trial order.

[7] In paragraph 2 questions asked and issues to be resolved are whether the plaintiff was tortured by members of the Namibian Police Force; whether the plaintiff was subjected to cruel, inhuman and degrading treatment during the time that he was in police custody. Whether the plaintiff was denied the opportunity to seek medical attention while he was detained awaiting first appearance at the magistrate's court, and whether plaintiff was unlawfully arrested, detained and assaulted as alleged.

[8] In her written heads of argument, Ms Zenda, counsel for the plaintiff argues that plaintiff was taken into custody from 18th until 21st of May 2012 during which

period of time the plaintiff was tortured extensively by the police, interrogated without having his rights explained to him, denied food and sanitation, that he was released and rearrested on 24 May 2012.

[9] In evidence-in-chief, the plaintiff told the court that at 10h00 while at Abel's house he was assaulted by a police officer in light complexion by hitting him with a baton stick on the head. He did not tell the court how many times this police officer hit him with the baton stick. He was told not to go anywhere because, according to him, they will come back for him. From the evidence presented by the plaintiff about the assault on 16 May 2012, it is not clear how serious this assault was, and whether or not the plaintiff was arrested and detained by the police. The plaintiff did also not tell the court why he, perhaps thought that he was under arrest and detention.

[10] It is further Ms Zenda's submission that the plaintiff was taken into police custody from 18th until 21st May 2012 during which time the plaintiff was tortured extensively by the police, interrogated without having his rights explained to him, denied him food and sanitation until he was released. This submission is not supported by the evidence of the plaintiff. Nowhere in his evidence-in-chief did the plaintiff testify that he was tortured extensively by the police, denied food, sanitation and that he was interrogated without having his rights explained for four days starting on 18 to 21 May 2012. The plaintiff testified that on Friday 18 May 2012 at Okandjatu village and at Wilbert Kayeruka's house he was picked up by Sergeant Shiweda in a Nissan pick-up truck with private number and took him to Okandjatu Police Station where he was allegedly assaulted, and handcuffed – but did not tell the court for how many days these orgy of assaults took place. There is also a confusion in his evidence about the dates. He said that he went to the Okakarara Police Station on Thursday 24 May 2012 to get the J88 report when he already on Monday 25 May 2012 visited a clinic for treatment of the injuries after his release on Sunday afternoon. Surely, if plaintiff went to the clinic on Monday 25 May 2012, then it is impossible that he went to the Okakarara Police Station on Thursday 24 May 2012 to get a J88 form. This confusion, unfortunately was not clarified by counsel, therefore, it is not clear how many days the plaintiff was in the care of the police and the day

when he collected the J88 from the Okakarara Police Station. With regard food, it is the evidence that the police officers also did not eat during the time they conducted the interrogation.

[11] I cross-examination, the plaintiff testified, among others, that someone told him not to go anywhere because the police will come back for him. When the police did not come, he went to Okandjatu for medical attention as he was assaulted by people. He did not elaborate on which people assaulted him and why and when he was assaulted by these people. He went to the house of Hilda Yarukwa where he sat, who saw him but not called as a witness to come and tell the court how she observed the plaintiff, in which condition he was when she saw him – and to support his version that he was picked up by Sergeant Shiweda, who took him to the police station for further questioning.

[12] The plaintiff could also not explain the contradictions in his evidence-in-chief and his version in cross-examination about who assaulted him. He said in his evidence-in-chief that Joseph Kanguoiko, a light in complexion police officer hit him with a baton stick on the head while others were watching doing nothing to stop Joseph Kanguoiko from assaulting him – whereas in cross-examination he testified that he was assaulted by all the police officers who were in the company of Joseph Kanguoiko.

[13] It is incomprehensible that, despite the fact that the plaintiff on 16 May 2012 was brutally assaulted by the police at Okandjatu Police Station before releasing him to go home, that the plaintiff did not report, discuss or informed his relatives or even a friend about this ordeal meted out on him by the same police officers who went to collect him again on 18 May 2015 for further questioning and possible further agony. Further it would seem also that the plaintiff did not complain to anybody about the alleged beatings perpetrated on him by the police on 16, 18, 19 and 20 May 2012.

[14] To complicate matters further, Dr Thomas Muza, who examined the plaintiff on 21 June 2012, a month after the plaintiff was allegedly assaulted, could only observe healed scars on the wrists joints. He did not find any other signs of injuries on the

body of the plaintiff, healed or fresh. No scars were noted. Dr Muza found no physical damage to the left ear of the plaintiff on examination even though plaintiff complained about pain in the ear – did also not notice an injured or swollen neck from the plaintiff. Similarly, the doctor examined the plaintiff, where he was told pain, but did not note any specific technicality tenderness. The x-rays of the back also did not show any damage to the bones. During cross-examination Dr Muza expressed the view that the healed scars on the joints of the wrists could have been caused by the cuffs if the cuffs were too tight or if the plaintiff tried to remove them.

[15] On his part, the defendant called Joseph Kanguo as the only witness to testify on his behalf. He testified that he and other police officers drove to Okahitanga settlement to investigate theft of cattle from farm Kalidona. Upon their arrival at the settlement, he requested the plaintiff and his friend to go back with him in the camp wherefrom they were coming. Plaintiff refused to go back. The witness and Ketefa Mungandjera, the friend of plaintiff went back in the camp and found the heifer in the bush. According to him, the heifer was brought to the settlement by car – by Abel Tjjuera. Mr Kanguo further testified that the same day, 16 May 2012, he took plaintiff to the Okandjatu Police Station for questioning but released him around 21h00. The plaintiff was told to come back to the Police Station the following day but did not show up. He denied assaulting the plaintiff on 16 May 2012. He said that on 17 May 2012, the heifer was identified by Mr Godley as his heifer whereafter a case of theft of stock and trespass was opened against the plaintiff. He further testified that they searched for the plaintiff as from 17 May 2012 until 24 May 2012 when they arrested him in Okakarara after receiving information from an informer. The plaintiff was thereafter detained at the Hochveld Police Station by a Constable Ashipala under CR 7/05/2012. Sergeant Kanguo was also cross-examined by Ms Zenda, counsel for the plaintiff.

[16] I found Sergeant Kanguo a truthful, honest and credible witness compared to the plaintiff. The manner how he testified and answered questions put to him by Ms Zenda was an indication of a person who was telling the truth. He did not play for time in order to think for an answer. He answered questions timeously without

hesitancy, tremble or uncertainty but was determined. I accept his evidence as the truth.

[17] The plaintiff was uncertain about what happened to him – he spoke softly in court as if he was still in pain of one or the other illness. At one stage during evidence –in-chief, he told the court that he felt weak and could not stand longer. The court has to permit him to sit down despite the testimony from the medical doctor who examined him on 21 June 2012 (almost three years ago) who, apart from healed scars on joints of wrists, found no signs or proof of the alleged assault on him. The plaintiff was a poor, unreliable, untrustworthy and non-credible witness who does not know the truth even though he took the oath and promise to speak the truth. His evidence about the injuries he sustained in the alleged assault by members of the police is inconsistent with the evidence of his own witness, the medical doctor who examined him. Therefore, I agree with Mr Mutorwa that it is difficult for the court to determine whether or not the plaintiff was assaulted or tortured and as result, sustained the injuries he alleges he had sustained. I also agree with counsel that it is highly improbable, that the plaintiff was arrested on 16 May 2012, questioned him, then released. Arrested again on 17 May 2012, thereafter released him and re-arrested on 24 May 2012. Why taking that route? Sergeant Kanguoiko told the court that they suspected the plaintiff to be involved in the theft of the heifer. That is not possible in my view.

[18] The plaintiff also accused the magistrate for not listening to his complaint against the police, which I find strange that a magistrate will turn a blind eye to a complaint brought to his or her attention by an accused person appearing before him or her alleging assaults perpetrated or being perpetrated by the police on him.

[19] Be that as it may, I found the plaintiff untruthful who exaggerated the treatment meted out by members of the police on him during the questioning sessions. No evidence was led to show that the plaintiff was placed under arrest and detained by the police at any stage before 24 May 2012. Certainly, his arrest and detention on 24 May 2012 cannot be said to be unlawful and wrongful as it was done

lawfully to secure his attendance before court¹, on a charge of theft of stock. The facts of this matter is distinguishable from those in *Gabriel v Minister of Safety and Security*², and *Iyambo v Minister of Safety and Security*³.

[20] In both the matters of *Gabriel* and *Iyambo* supra, the plaintiff's, after they were arrested and detained by the police, were not brought or taken to court within 48 hours from the day of their arrest for the magistrates to extent their further detention, which is why the instant matter is distinguishable from these two matters. Similarly, the cases of *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) and *The State v Sem Shafuoshuna Haufiku* (CC 16/2012) [2013] NAHCNLD 49 (24 September 2013) referred to by counsel for the plaintiff are also distinguishable from the present case. Accordingly, I do not accept the plaintiff's version as a whole.

[21] That being the case and in view of the conclusion arrived at as well as the reasons advance above, it is my further view that the plaintiff, on the evidence presented as a whole, failed to prove his claim on a balance of probabilities. It is, therefore unnecessary in the circumstances for me to consider the *quantum*.

[22] Accordingly, I make the following order:

The plaintiff's claim is dismissed.

E P UNENGU

¹S 38 of the Criminal Procedure Act 51 of 1977.

² 2010 (2) NR 648.

³ 2013 (2) NR 562.

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Acting Judge

APPEARANCES

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DEFENDANT:

N Mutorwa

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