

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case No: I 2642/2015

In the matter between:

HENOK UUGWANGA SADOK

PLAINTIFF

and

EAGLE NIGHT WATCH SECURITY CC

DEFENDANT

Neutral Citation: *Sadok v Eagle Night Watch Security CC* (I 2642/2015) [2018]

NAHCMD 18 (08 February 2018)

CORAM: PRINSLOO J

Heard: 06-10 November 2017

Delivered: 05 February 2018

Reasons: 08 February 2018

Flynote: Vicarious liability – Liability of employer for acts of employee – whether the employees of the defendant acted wrongfully and unlawfully when they assaulted plaintiff's person – Defendant established the physical interference was justified.

Evidence – mutual destructive evidence – where the evidence of the parties is mutually destructive court must decide as to which version to belief – Court found version of defendant more probable

Summary: Plaintiff instituted delictual claim for general damages for pain and suffering and loss of amenities of life against the defendant. The plaintiff instituted the action against the defendant based on vicarious liability. The plaintiff averred that the two employees of the defendant acted within the course and scope of their employment and that they unlawfully assaulted the plaintiff whom as a result of the assault sustained physical injuries. The defendant pleaded that the action of the defendant's two employees were justified.

Held, the court *held*, that the evidence of the plaintiff is improbable due inconsistencies witnesses testifying on behalf of the plaintiff.

Held, the court further *held*, that 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.

ORDER

1. The plaintiff's claim is dismissed with costs, costs consisting of one instructing and one instructed counsel.

JUDGMENT

PRINSLOO J:

[1] The plaintiff instituted a delictual claim for general damages for pain and suffering and loss of amenities of life against the defendant, being the employer of two security guards, namely Mr. Martin Nangolo (hereinafter referred to as 'Martin') and Mr. Thomas Grawie (hereinafter referred to as 'Grawie'). The claim arose as a result of an assault allegedly perpetrated against the plaintiff by the defendant's employees on 11 November 2013.

The parties

[2] The plaintiff is Henock Uuwanga Sadok, the owner of a homebased business, i.e. a shebeen.

[3] The defendant is Eagle Night Watch Security CC, a Close Corporation registered and incorporated in terms of the laws of the Republic of Namibia. The defendant at all material times employed the two security guards who are alleged to have assaulted and injured the plaintiff at NAMICA Bottle Store (hereinafter referred to as 'NAMICA'), Okuryangava, Windhoek, where the defendant was contracted to provide security guards.

The Pleadings:

[4] The plaintiff alleged in his particulars of claim that the guards, at the time acted within the course and scope of their employment with the defendant, alternatively within

the ambit of the risk created by such employment relationship, unlawfully injuring the plaintiff, as a result of which the plaintiff suffered:¹

- (a) a ruptured tendon of his middle finger;
- (b) damage to his nasal bridge,
- (c) a periorbital right eye hematoma;
- (d) damage to his gall bladder; and
- (e) bruising and swelling to his face.

[6] Plaintiff pleaded further that as a result of the assault he had to undergo medical treatment and was subsequently hospitalized and continues to endure pain and suffering. The plaintiff contends that the defendant is therefore liable to compensate him for damages in the sum of N\$ 68 325.33, constituted as follows:²

- (a) Medical expenses incurred in the treatment of the plaintiff's bodily injuries and their consequences in the amount of N\$ 8 325.33;
- (b) Damages for pain and suffering as a result of the injuries caused by the assault in the amount of N\$ 60 000.00.

[7] The defendant in turn admitted that the two security guards, Messrs. Grawie and Nangolo were in its employ but denied any wrongdoing on the part of the security guards.

[8] Defendant pleaded that the actions of the security guards were justified as they took reasonable measures to protect the premises and NAMICA Bottle Store's employees³. In doing so they used the necessary force to remove the plaintiff from the

¹ Particulars of Claim paragraph 5 on page 6 of the Pleadings Bundle.

² Particulars of Claim paragraph 6 and 7 on page 6 of the Pleadings Bundle.

³ Defendant's plea paragraph 4.1 and 4.4-4.5 on page 10 of the Pleadings Bundle.

premises and defendant denies that the security guards assaulted the plaintiff either as alleged or at all.⁴

[9] Defendant pleaded that plaintiff grabbed a bottle from a shelf and wrongfully assaulted Martin by striking him over the head with the said bottle during the guard's attempted to remove the plaintiff from the premises.

Facts in dispute

[10] The issues of fact that need to be resolved during the trial are:

(a) whether the plaintiff was in fact assaulted by the aforementioned security guards and if so whether the plaintiff suffered damages as a result;

(b) the cause of the physical altercation that took place between the plaintiff and the defendant's security guards on 11 November 2013;

(c) the lawfulness and reasonableness of the actions of the aforementioned security guards during the altercation with the plaintiff;

(d) the nature and extent of the exact injuries suffered by the plaintiff, the nature and extent of the medical treatment required to treat the plaintiff's injuries and cost hereof and whether the defendant is liable to compensate the plaintiff for both medical expenses and damages for pain and suffering.

(e) whether the principle of vicarious liability is applicable in this matter.

Common cause facts

[11] The following issues appears to be common cause:

⁴ Defendant's plea paragraph 4.8 and 4.9 on page 10 and 11 of the Pleadings Bundle.

- a) The defendant was contracted by NAMICA Bottle Store to provide security guards.
- b) At all material times Messrs.Grawie and Martin were employed with the defendant as security guards and the guards were stationed at NAMICA on the date in question.
- c) On the morning of 11th of November 2013 at approximately 8:30 the plaintiff returned 20 cases of empty beer bottles and placed an order for a delivery of beer for which he made payment in the amount of N\$ 2,381.00 (Two thousand three hundred and eighty one Namibian Dollars).
- d) The order was not delivered and the plaintiff returned later the same day to NAMICA to query the non-delivery of his order after which a physical altercation ensued between the plaintiff and employee(s) of the defendant.
- e) Later on the same dated the plaintiff was issued with a receipt for a bottle 750 ml Red Heart Rum in the amount of N\$ 151.65 (One hundred and fifty one Namibian dollars and sixty five cents).
- f) The plaintiff was examined by one Dr. Beata Siteketa at the Katutura State Hospital and found that the plaintiff had a periorbital right eye hematoma and cut on the nasal bridge.
- g) On 13th of November the plaintiff returned to NAMICA Bottle Store accompanied by police officials and NAMICA Bottle Store refunded the plaintiff the amount of N\$ 2,381.00 (two thousand three hundred and eighty one Namibian Dollar) less the amount of N\$ 151.65 (one hundred and fifty one Namibian Dollars and sixty five cents).

Evidence adduced by the Plaintiff:

[12] The plaintiff testified and called two (2) witnesses, i.e. Dr Hagen Erenst Armi Förtsh and Raymond Kakona.

Henock Uuwanga Sadok

[13] The plaintiff, Henock Uuwanga Sadok, testified that he has been a customer at NAMICA for the past five (5) years and ordered alcohol twice weekly for his homebased shebeen. On the morning of 11th of November 2013 at approximately 8:30 he went to NAMICA to order his stock. He expected that the delivery of his stock would be around 10:00 as he ordered early morning but this did not happen on the day in question. He then returned to the bottle store between 13:00-14:00 after he fetched his children from school. The plaintiff was then accompanied by his three year old child when he went to enquire about the delivery of his order. Plaintiff approached the cashier, who previously assisted him in taking his order, with the aim of making said enquiry. The cashier did not give the plaintiff any explanation for the delay in the delivery of his order but directed him to the manager. Plaintiff informed the cashier that he was not prepared to go to the manager as he did not speak English and thus remained standing at the cashier, waiting for his order. Plaintiff stated that the cashier in turn also remain standing there, not saying anything.

[14] While standing at the cashier's counter the plaintiff was approached by the security guards and confronted as he allegedly caused a disturbance inside the bottle store and was instructed to leave the premises. Plaintiff refused and stated that he would not leave without his stock that he ordered and paid for.

[15] The two security guards started beating and kicking the plaintiff, whereafter, according to the plaintiff he was thereafter dragged outside where the security guards intended to throw him on the hard surface but they were stopped by another person working at the bottle store. The two security guards then left him and went back inside the bottle store. No further assault happened outside the building. While lying outside he felt his three year old came and held onto his leg but stated he does not know what happened to his child during the assault.

[16] After being dragged outside plaintiff remained outside on the premises for a few minutes, still waiting for his order, but he was bleeding from his face at the time and when his friend arrived he was convinced to rather go to the hospital, so he left.

[17] Plaintiff stated that he was injured on his eye, nose, hand, leg and kidneys. When he arrived at the Katutura State Hospital he was examined by one Dr. Beata Siteketa, who completed a J88⁵. Dr. Siteketa recorded a periorbital right eye hematoma and a cut on the plaintiff's nasal bridge.

[18] Plaintiff stated that he went back to the hospital about a week later due to injuries that he sustained during the assault but he only found it to be painful afterwards. He apparently had difficulty in walking because his leg was injured and his left hand was injured to such an extent that he could not bend his ring finger. During these hospital visits the plaintiff was in addition diagnosed with tuberculosis and was apparently admitted to hospital for treatment in this regard.

[19] During cross-examination the plaintiff denied that he was inebriated on the date in question as was a teetotaler for the past 10 years. Plaintiff also denied that that he caused any disturbance in the bottle store or that he struck one of the security guards with a bottle of rum on the head. He maintained that he was standing quietly when he was assaulted for no apparent reason.

⁵ Exhibit C.

[20] On the 13th of November 2013, the plaintiff returned to NAMICA with policemen and the plaintiff was refunded the amount of N\$ 2381.00, less the amount of N\$ 151.65.

Dr. Hagen Erenst Armi Förtsch

[21] The second witness called to testify on behalf of the plaintiff was Dr Hagen Erenst Armi Förtsch, who is a specialist urologist, who has been 20 years in practice in Namibia and is also currently teaching at the Medical Faculty of University of Namibia.

[22] Dr. Förtsch was approached by the plaintiff at outpatients section of the Windhoek Central Hospital on 25 July 2014, but also attended the surgery of Dr. Förtsch on the same day. Dr. Förtsch examined the plaintiff regarding possible injuries to his kidneys sustained during the alleged assault. However, it would appear that plaintiff approached Dr. Förtsch more specifically with the aim of obtaining an expert medico-legal report from him.

[23] Plaintiff reported to Dr. Förtsch that after the assault he urinated blood for three months and had clots in his urine for a week. Plaintiff also reported that he was unable to have sexual intercourse until May 2014 and further complained of an injury to his left middle finger and leg.

[24] During the examination the witness observed a scar on the nose of the plaintiff and also a scar on the dorsum and the extensor tendon of the left ring finger appears to have ruptured.

[25] A scintigram was conducted on the plaintiff and the results of the scintigram showed a higher concentration of the radioactivity emitted by the tracer in the leg, the left-hand fingers and acromioclavicular joint of the plaintiff, which is concomitant with areas of inflammation.

[26] Dr. Förtsch could not detect any injuries to the kidneys of the plaintiff but stated that the kidneys have the ability to repair itself.

[27] The witness conceded that his field of expertise is not orthopaedics but stated that the rupture to the extensor tendon of the left ring finger would be caused by either blunt trauma or the bending forward of the finger. Dr. Förtsch stated that in the instance of such an injury the finger of the patient would be severely swollen with a pain threshold measurement of 9/10 (nine out of ten). Any doctor examining a patient would notice the injury and the patient would be well-aware of the injury.

[28] The witness stated that he based his report solely on the information received from the plaintiff and the scintigram as objective proof of an injury but could not pinpoint exact date of injury.

Raymond Kakona

[29] The last witness called to testify on behalf of the plaintiff was Mr Raymond Kakona (hereinafter referred to as 'Kakona'), who stated that he and the plaintiff have been friends in the excess of 20 years.

[30] On the date in question he was at the barbershop where he worked when he was approached by an unknown lady, informing him that his friend was being assaulted at NAMICA Bottle Store.

[31] Kakona immediately made his way to the bottle store and when he arrived there he found the plaintiff lying on the ground whilst being assaulted by two security guards, whom he recognised as the security guards working at the said bottle store.

[32] In his presence the assault proceeded for approximately 20 minutes. Kakona stated that he did not intervene but he stood there observing the assault. He apparently did not want intervene as he did not know the cause of the incident.

[33] When asked about the child of the plaintiff, Kakona stated that he did not take charge of the child. The child was standing by the door of the bottle store whilst his father was assaulted.

[34] After the security guards ceased their assault on the plaintiff, Kakona noticed that the plaintiff was bleeding from his nose and mouth and he advised the plaintiff to make his way to the hospital. Kakona did not ask the plaintiff as to the cause of the brutal assault nor did he accompany the plaintiff to the hospital. He only went to see him the next day.

[35] When questioned regarding the drinking habits of the plaintiff the witness stated that he never saw the plaintiff drunk but he did not commit himself to whether the plaintiff indeed consume alcohol or not.

[36] This concluded the case on behalf of the Plaintiff.

[37] On behalf of Defendant 3 witnesses were called i.e Thomas Grawie; Martin Nangolo and Ms Frieda Mukamwandi.

Grawie

[38] Grawie was employed by the defendant until 30 January 2015 and at the time of the incident he was stationed at NAMICA for approximately one year already. On the date in question he was stationed at exit door with his colleague Martin. He testified that he has seen plaintiff many times before. Plaintiff came to the bottle store that morning around 08h30 to purchase his stock. Later that day plaintiff returned to the bottle store but this time Plaintiff was loud and aggressive in the way he spoke to Selma, the cashier, and the plaintiff made a grab for Selma across the counter. According to Grawie the plaintiff appeared to be under influence of liquor at the time.

[39] Grawie stated that he and Martin stood about one and a half meters away from Selma's counter. They approached the plaintiff and the witness spoke to the plaintiff in Afrikaans in an attempt to pacify him but it was not clear if plaintiff understood what was said as he did not reply.

[40] Martin then spoke to the plaintiff in Oshiwambo, which also had no effect. However the Plaintiff said something in Oshiwambo to Martin and Grawie stated he could see Martin's face change, although he did not understand what was said he realised something was amiss.

[41] Grawie and Martin than took Plaintiff by the arm to physically move him towards the door. Plaintiff managed to grab Martin in front of chest and hit him in the chest repeatedly with the fist. Martin in turn grabbed the plaintiff on his chest and pushed him back. The plaintiff then responded and grabbed a bottle of rum from a nearby display and struck Martin over the head. After the plaintiff hit Martin with the bottle he drew his arm back and the bottle fell and broke. At this stage Martin and the plaintiff were fighting one another and Grawie stated that he made attempts to interfere in order to separate the fight between the plaintiff and Martin. Eventually Grawie and Martin managed to push Plaintiff out of the bottle store. Plaintiff fell against the trolleys and that is where they left him.

[42] Grawie stated that prior to the altercation both himself and Martin were armed with a baton and a fire-arm. However, they placed their fire-arms under the counter before the altercation started.

[43] As Martin was not seriously injured he did not file a complaint with the police but Grawie stated that on 13 November 2013 the plaintiff returned to the bottle store with

the police who said they will come back and arrest them. Grawie and Martin decided to go to the Police Station on their accord in order to lay charges against plaintiff. The police refused to open a case and instead arrested the 2 gentlemen. They were detained for approximately 24 hours and then released without having been charged. They never made a court appearance in connection with the incident on the 11th of November 2013.

[44] Grawie denied that he was part of the altercation. He also denied that the plaintiff's hand got injured during the altercation and stated that when the plaintiff came to place his order his left hand was already bandaged. He however confirmed that plaintiff sustained an injury and stated that the plaintiff had blood in his face but was adamant it was because of the fight between himself and Martin.

[46] Grawie denied any wrongfulness in the manner in which they dealt with the situation. He stated that plaintiff was a danger or a threat to staff members of NAMICA, more specifically he posed a danger to Selma, the cashier.

Martin Nangolo

[47] Martin stated that at the time of the incident he was employed with Defendant for 4 years during which time he was stationed at NAMICA. He stated that he was well acquainted with the plaintiff, as he regularly came into the bottle store to purchase alcohol. In November 2013 the plaintiff came in early morning to place his order and pay for it. Later on the same day Plaintiff returned to the bottle store but when he returned he appeared to be upset. He returned to the cashier where he placed his order and spoke to her in Oshiwambo and during a heated conversation the plaintiff insulted the cashier. He stated that he saw the plaintiff reaching across the counter wanted to assault the cashier, Selma.

[48] Martin stated that he then approached the plaintiff and told him in Oshiwambo '*My Pa go to the manager and ask about the order*'. The plaintiff apparently turned and told the witness that he did not want to talk to him and the witness was a small boy. Hereafter the plaintiff insulted the witness with his mother and grabbed him by the chest and punched him on the chest repeatedly. Martin stated that he responded by pushing the plaintiff back. Plaintiff, whilst the two of them were in some sort of grip, managed to grab a bottle from a display and strike Martin on the left side of the head. While the two were fighting, Grawie, who was not part of the scuffle, tried to separate them. Martin stated that although he was not bleeding from his head that he developed a substantial bump on his head.

[49] Martin and Grawie manage to remove the plaintiff from the bottle store and left him outside of the store.

[50] Martin confirmed that the plaintiff was bleeding from the face and nose and stated that it was probably caused by the fact that they were beating each other. The witness however denied that the plaintiff's hand was injured during the altercation and stated that the plaintiff's hand was bandaged when he came in earlier that day to place his order.

[51] After the plaintiff was removed from the building he remain on the premises outside walking around speaking on his cell phone. The witness denied that the plaintiff was assaulted outside the building. He was adamant that the whole incident took place inside the building and by the time Kakona arrived at NAMICA everything was over already.

[52] The witness stated that he went to the hospital after work where he was treated after a new health passport was issued to him. He confirmed that the said health passport was not before court.

[53] Martin confirmed that two days later the plaintiff came with the police to fetch his money and that the police informed him and Grawie they will return to arrest them and therefore they proceeded to go the police station themselves and were detained for approximately 24 hours.

Frieda Nakamwandi

[54] The last witness to testify on behalf of the defendant was Frieda Nakamwandi (hereinafter referred to as Frieda).

[55] Frieda testified that she was a cashier at NAMICA and held this position until 2015 when she resigned.

[56] She was on duty on the date in question and saw the plaintiff when he came in to place his order with her colleague, Selma, on the morning in question. She did not follow the conversation between plaintiff and Selma at the time as he came in good naturedly and placed his order. Selma's counter was approximately 2 meters from where the witness sat.

[57] Around 13h00 on the same date the plaintiff returned to NAMICA and he confronted Selma as to why his order was not delivered yet. Selma then explained to the plaintiff that it was 'first come first serve' and that his delivery will still come but if he wanted his order, he could go to the manager and enquire about his order. The plaintiff stated that he could not speak English.

[58] Plaintiff then angrily started insulting Selma in Oshiwambo, which the witness understood. Frieda stated that at this point the plaintiff reached over Selma's counter to punch her but Selma moved out of the way.

[59] Martin then came past Frieda's counter and took off his gun and placed it under her counter and proceeded to approach the plaintiff. He asked the plaintiff in a polite manner to go outside saying: 'My Pa let us go outside'. The plaintiff then retorted saying that Martin is a small boy and grabbed him by the chest and hit him. Martin and the plaintiff grabbed one another and while having Martin in a head lock the plaintiff managed to grab a bottle of rum from the display on her counter and struck Martin on the head with the bottle.

[60] Grawie came to assist and the two security guards manage to push the plaintiff out of the bottle store.

[61] Frieda denied that plaintiff was assaulted outside the building and stated that she could see outside. According to her the plaintiff was walking around outside talking on his cell phone. Whilst outside the witness however noted that the plaintiff was bleeding from his nose. She denied that his hand was injured in the altercation and stated that his hand was already bandaged when he came into the bottle store earlier that day to place his order.

[62] After the incident was over Kakona arrived and spoke to Frieda. He enquired from her why his uncle was beaten, apparently referring to the plaintiff, and she told him that the plaintiff started beating the security guards and the security beat him back.

[63] When asked about the state of sobriety of the plaintiff Frieda stated that she could not comment on it as the plaintiff was approximately two meters away from her and she could not say if he smelled of alcohol and he wore a cap at the time so she could not see his eyes.

[64] Frieda also denied that she ever saw a child in the company of the plaintiff during the incident.

[65] This concluded the case for the defendant.

Legal principles applicable

[66] The cause of action is the *actio iniuriarum*. In the unreported judgment of *Lubilo and Others v Minister of Safety and Security*⁶ this Court⁷ stated that an assault violates a person's bodily integrity.⁸ 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.⁹ But before that duty arises, the plaintiff must allege and prove the fact of physical interference.¹⁰

[67] The defendant admitted the act of physical interference but placed the wrongfulness and fault in dispute. The question is therefore, if physical interference is established, how is it justified?

⁶ (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

⁷ *ibid* para 9.

⁸ *Bennet v Minister of Police and Another* 1980 (3) SA 24 at 35C.

⁹ *Moghamat v Centre Guards* CC [2004 1 ALL SA 221](#).

¹⁰ *Jackson v S.A. National Institute for Crime Prevention* 1976 (3) SA 1(A).

Mutually destructive version

[68] The evidence led at the trial by the plaintiff and his witness on the one hand, and the defendant's witnesses on the other, gave rise to mutually destructive versions of the incident.

[69] 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 probabilities¹¹; 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.¹²

[70] What is important is that the versions advanced must not only be probable but must also accord with common sense and logic.

[68] It is with those principles in mind that I now have to decide whether the alleged assault likely happened in the way asserted by plaintiff or in the way described by the defendant.

[69] Mr Bangamwabo, who represented the plaintiff, urged the court to accept the evidence of the plaintiff and his witness, Raymond Kakona on the basis that the probabilities in the case favour the version of the plaintiff. It was also argued that the fact that Selma did not testify is fatal for the defendant's case.

¹¹ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E.

¹² *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 39 - 17 para 51).

[70] On the other hand, Mr Jacobs, who appeared for the defendant submitted in his heads of argument that:

- (a) the plaintiff attempted to assault Selma and in fact assault Martin by hitting him in the chest and the head.
- (b) Grawie and Martin acted reasonably and protected Selma and themselves and that the defence of a private defence must succeed.
- (c) plaintiff has failed to prove his claim and as a result it should be dismissed;

Evaluation

[71] The plaintiff was a single witness in respect of the actual assault. The plaintiff vehemently denied any form of aggression or wrongdoing on his part.

[72] On the other hand, according to the testimony of the defendant's witnesses the plaintiff was aggressive to the extent that he physically assaulted Martin.

[73] It seems to me that, having regard to all of the evidence presented, the probabilities do not favour the plaintiff. This is demonstrated by the following:

- (a) According to the plaintiff he quietly enquired about the delay in delivering his stock when he was told that he need to speak to the manager. Plaintiff stated that he just stood at Selma's counter waiting to be told about his delivery when out of nowhere confronted by the two security guards and accused of causing a disturbance in the bottle store. This evidence of the plaintiff in this regard is not convincing at all. On the one hand it is put to the witnesses that plaintiff would have reason to be upset for not receiving his stock whereas the plaintiff stated he was just standing quietly. It is

improbable the security guards in plain sight of the bottle store personnel and possibly other customers for no reason what so ever start to assault the plaintiff.

(b) After having been severely assaulted the plaintiff does not immediately make his way to the police station to report the incident or to the hospital for treatment. Plaintiff remained on the premises where he allegedly continued waiting for his stock until his friend Kakona arrived who told him to go and get medical treatment. I find it improbable that a person in the condition of the plaintiff would still wait for stock and need to be told by a friend to go to hospital.

(c) The J88 completed by Dr. Shiteketa and handed in as exhibit C recorded two injuries only, namely the periorbital right eye hematoma and cut on the nasal bridge. This was in spite of the fact that the plaintiff was examined by Dr. Shiteketa. Approximately a week later the plaintiff went to the hospital for treatment for an injury to his hand, his leg and his kidneys. According to Dr. Förtsch an injury to the finger of the patient which would cause extensor tendon to rupture would not only cause severe swelling but would also cause extreme pain. Therefore plaintiff would have been well aware of the injury and Dr. Shiteketa would have notice the injury during the examination.

(d) On the issue of the injuries sustained there is also the evidence of Raymond Kakona that alleged that the assault continued for 20 minutes after he arrived at NAMICA whereas the plaintiff stated that once he was dragged outside the bottle store no further assault occurred. Mr. Kakona's evidence therefore stands in direct contradiction to that of the plaintiff.

(e) The evidence of Dr. Förtsch also cannot be said to support the version of the plaintiff. Apart from the fact that the report was drafted eight months after the fact, the information contained in the report was obtained from the plaintiff, for eg. that the plaintiff urinated blood for three months after the incident. Dr. Förtsch could not from his

own examination determine that there were injuries sustained to the kidneys of the plaintiff. Even the scintigram done cannot exclude the possibility of injuries sustained prior or after the incident on 11 November 2013. Dr. Förtsch conceded that the injury to the hand of the plaintiff could have occurred prior to the date of the incidence.

(f) Dr. Förtsch is an expert in the field of urology but not orthopaedics and based his opinion regarding orthopaedic related injuries on his basic medical training. He therefore did not testify in this regard as an expert.

(g) On the issue of the state of sobriety of the plaintiff Kakona was extremely evasive regarding the plaintiff's drinking habits even though the two of them have been friends for more than 20 years. Without this issue even being raised Mr Kakona replied to a question whether they would have dinner together or have a barbecue as friends in saying the following: 'Yes, we would have a good time together but he does not consume alcohol.' Mr. Kakona clearly tried to pre-empt the issue of the plaintiff's drinking habits. This is important as two of the witnesses for defendant stated that plaintiff appeared to be under the influence of alcohol.

(h) The plaintiff stated that his three year old son was with him in the bottle store. The witnesses for the defendant denied ever seeing the child. Kakona apparently saw the child at the time when the plaintiff was assaulted but strangely did not go and fetch the child, keeping him secure. He rather preferred watching this brutal assault on his friend. I find this to be highly improbable.

[74] Unfortunately neither the plaintiff nor Kakona impressed as witnesses. Dr. Förtsch was an extremely competent witness but was unable to take the matter regarding the alleged injuries sustained by the plaintiff any further. It is not clear when and if the further injuries as alleged by the plaintiff was sustained. One should also not lose sight of the fact that the plaintiff was diagnosed as suffering from tuberculosis shortly after the incident which can give rise to secondary health issues.

[75] In respect of the case for the defendant I can make the following observations: It is indeed so that there were some contradictions between the witnesses who testified on behalf the defendant, however the contradictions were not of material. The defendant's witnesses made a favourable impression on the court and there appear to be no bad blood between the witnesses and plaintiff from previous incidences. The crux of all the witnesses were that the plaintiff was aggressive towards Selma, the cashier and he attempted to punch her when he reached over the counter. Messrs. Grawie and Nangolo both admitted to having a baton and a fire-arm in their possession prior to the incident but none of these weapons were used in their effort to get the plaintiff under control and remove him from the premises of the bottle store.

[76] Frieda can be regarded as an independent witness in this matter. She was employed with NAMICA, who is not a party to these proceedings. She had a clear view of what happened on the day in question and also had the benefit of understanding the Oshiwambo vernacular and was, therefore, privy to the harsh words directed to Selma and Martin. Frieda was an extremely competent witness and was able to relate to the court exactly how the incident occurred. She stated plaintiff had Martin Nangolo in a headlock and took a bottle from a display on her counter and hit the Martin over the head.

[77] It is clear from Frieda's testimony that there was no kicking and punching by the two security guards. She confirmed the evidence of Mr Grawie that he was not involved in the altercation and that the two security guards attempted to remove the plaintiff from the store and did so with reasonable force. It was argued that the evidence of Frieda would amount to hearsay and that the absence of Selma's evidence is fatal for the defendant's case. However, Frieda was an eye witness to the incident and was present to overhear everything that was said and is therefore competent to testify in this regard.

[78] The witnesses Messrs. Grawie and Martin's evidence corroborate one another in all material respect and as already indicated, so does the evidence of Frieda.

Defendant's reliance on private defence

[79] The defendant also had the onus in respect of the reliance on self-defence as the reason for the physical interference with the plaintiff. In *Mabaso v Felix*,¹³ the court stated:

'We also think that, if the excuse or justification pleaded is self-defence, the onus is generally on the defendant too to plead and prove that the force used by him in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression, again unless the pleadings place the onus on the plaintiff.'¹⁴

and further

'the onus of proving that the force used in self-defence was reasonable and legitimate would also be on the defendant.'¹⁵

[80] Having considered the conspectus of evidence, I am satisfied that the plaintiff's evidence lies to be rejected as false and fraught with improbabilities, while the testimony of Messrs. Grawie and Nangolo and Frieda were credible and consistent with the probabilities of the prevailing circumstances under which the plaintiff was removed from the bottle store.

[81] I am satisfied that the defendant has therefore proved on a balance of probabilities that the plaintiff attempted to assault Selma and indeed assaulted Martin Nangolo without any provocation. Given the behaviour of the plaintiff and the duty of the security guards to ensure the safety of the staff members and the premises of NAMICA

¹³ 1981 (3) SA 865 (A).

¹⁴¹⁰ *ibid* at 874 B-C.

¹⁵ at 875 H.

Bottle Store , I am also satisfied that their actions were justified in order to avoid the possibility of anyone else being injured. I am unable to find that their conduct was unreasonable or unjustified in the circumstances.

Vicarious liability

[82] The question of vicarious liability need not be addressed in light of my findings on the issue of private defence.

Quantum

[83] Although reference were made to invoices emanating from Dr. Förtsch's surgery the plaintiff failed to discharge the onus of establishing the quantum of his damages.

[84] In conclusion my order is therefore the following:

1. The plaintiff's claim is dismissed with costs, costs consisting of one instructing and one instructed counsel.

JS PRINSLOO
JUDGE

APPEARANCES:

PLAINTIFF: F Bangamwabo
of Clement Daniels Attorneys, Windhoek

DEFENDANT: S J Jacobs
Instructed by Van der Merwe-Greeff Andima Inc, Windhoek