

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2016/04103

In the matter between:

ALICE MAKIWA

PLAINTIFF

and

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA
HEREIN REPRESENTED BY
THE MINISTER OF HOME AFFAIRS
AND IMMIGRATION**

DEFENDANT

Neutral Citation: *Makiwa vs Minister of Home Affairs and Immigration* (HC-MD-CIV-ACT-DEL-2016/04103) [2019] NAHCMD 54 (15 March 2019)

CORAM: UEITELE J

Heard: 17 - 20 September 2019 & 18 October 2018.

Delivered: 15 March 2019

Flynote: *Immigration* - Prohibited immigrant - Prohibited person as intended in s 39 of the Immigration Control Act, 1993 (Act No. 7 of 1993). Detention of persons in terms of s 42(1) - Section 42(1) applicable only to persons who are prohibited immigrants.

Immigration – Arrest of a person in terms of s 42(1) of the Immigration Control Act, 1993 must be based on reasonable suspicion that person is a prohibited immigrant. No reasonable grounds for the suspicion established - Detention unlawful.

Summary: The plaintiff was arrested by immigration officials on the grounds that they suspected that she contravened s 29(5), and s 30(1)(d), read with s 12 of the Immigration Control Act, 1993 (she was being suspected of being an illegal immigrant).

The plaintiff was detained and remanded in custody since her arrest on 30 October 2016 until 28 November 2016 when she was released on bail. Alleging that her arrest at the behest of the immigration officials was unlawful, the plaintiff instituted action against the defendant in which action she claimed damages for the interference with her rights.

Held that personal liberty is a right which every person has at common law and under our Constitution. It thus follows that where a person is wrongfully deprived of their liberty, such deprivation amounts to *injuria*.

Held further that to succeed in an action based on wrongful deprivation of liberty, the plaintiff must allege and prove that the defendant himself or herself or a person acting as his or her agent or servant, deprived her of her liberty.

Held further that all interferences with the liberty of a person are *prima facie* odious and it is for the person responsible for the deprivation of the liberty to establish why in the particular circumstances such interference is legally justified.

Held further that on a proper interpretation of s 42(1)(a) of Immigration Control Act, 1993, the grounds upon which an immigration officer may arrest and detain a person in question must exist at the time the immigration officer arrests and detains that person, not at a future date; and what is more, the immigration officer must be aware of the existence of such grounds in order for him or her to come to the conclusion that those grounds are reasonable.

Held further that at the time that the immigration officers arrested and detained the plaintiff, they could not have had 'reasonable grounds' within the meaning of s 42(1) of the Immigration Control, Act, 1993 to arrest and detain plaintiff, because on their own evidence, they were arresting and detaining her while they were investigating her presence in Namibia; that is, while they were fishing for 'reasonable grounds' to justify an arrest and detention that had already taken place.

Held furthermore that it could not have been the intention of the Parliament; that an immigration officer may arrest and detain a person while looking for 'reasonable grounds' to justify *ex post facto* such arrest and detention. The plaintiff's arrest was thus unlawful.

ORDER

- a) The plaintiff's arrest on 30 October 2016 and detention up to 28 November 2016 was unlawful.
- b) The defendant must pay to the plaintiff the amount of N\$ 100 000.
- c) The defendant must pay the plaintiff's costs of suit.

JUDGMENT

UEITELE J

Introduction

[1] History tells us that the right to liberty can be traced, some more than eight hundred years, back to the English *Magna Carta* of 1215 and also to the United States Declaration of the Rights of Man and Citizen (1789). Even though the *Magna Carta* only guaranteed rights to a limited group of people, namely feudal noblemen, it nevertheless required that arrest or detention be lawful, and protected the individual against the excesses of his or her ruler.

[2] History further tells us that the protection against arbitrary arrest and detention as one of the main dimensions of the right to the liberty of the person was further established in the 17th century English Bill of Rights (1689) and *Habeas Corpus Acts* (1640, 1679). The right was further developed and its scope of application widened after the French Revolution, which started in 1789, in the French ‘*Declaration of the Rights of Man and the Citizen of 1789*’ where the right to liberty was guaranteed to all nationals in the Constitutions of National States.

[3] In the words of Thomas Jefferson: ‘*The God who gave us life, gave us liberty at the same time.*’ Revolutions have been staged and wars fought in the name of freedom. This includes Namibia’s own long and bitter liberation struggle where ‘freedom, justice and liberty’ was one of the slogans of the struggle for independence.

[4] This court’s predecessor (the High Court of South West Africa) recognised the importance of the right to liberty in *Katofa v Administrator-General for South West Africa and Another*¹ where Levy J said:

¹ *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA) at 220.

'Illegal deprivation of liberty is a threat to the very foundation of a society based on law and order. Through the centuries the courts in democratic countries have jealously guarded and protected the rights of the individual to his liberty and their own jurisdiction in respect of such matters.'

[5] In the early years of our independence, this court in *Hipandulwa v Kamupunya*² said:

'The liberty of the subject is the cornerstone of democracy and essential for a harmonious and orderly society. People who ignore that and misuse their authority, irrespective of whether they are in the executive of the government concerned or whether they are employers, threaten the democratic fabric and undermine society.'

[6] I have reviewed the brief history and the jurisprudence of the right to liberty to make the point that unlawful deprivation of the right to liberty is illegal at common law and also inconsistent with the promotion of human rights and the rule of law which find expression in the personal liberty of Ms. Lillian Alice Makiwa, who is the plaintiff in this matter (I will in this judgment refer to the plaintiff as Makiwa).

The factual background

[7] The factual background that I narrate in this part of this judgment is the background that I gathered from the pleadings and the undisputed evidence of the parties during the trial.

[8] On 6 September 2016 Makiwa, an adult female and national of Zimbabwe, arrived in Namibia. She entered Namibia at the Hosea Kutako International Airport on a Zimbabwean passport. On entering Namibia, she was issued with a visitor's permit which was valid for a period of 90 days (the visitor's permit was thus valid until 5 December 2016). The permit was endorsed or stamped in her passport.

² *Hipandulwa v Kamupunya* 1993 NR 254 (HC) at 259.

[9] Makiwa's passport was to expire on 26 October 2016, so she acted promptly and obtained an Emergency Travelling Document from the Zimbabwean Embassy in Namibia. The Emergency Travelling Document was issued to her on 25 October 2016. On 30 October 2016, Makiwa travelled from Windhoek to the Trans Kalahari Border Post and booked in at East-Gate Camp Site. She states that the purpose of her travelling to the Trans Kalahari Border Post was to attend to the clearance and collection of a motor vehicle that was to be delivered to her from the Republic of Botswana.

[10] On the evening of 30 October 2016, she walked over from the East-Gate Camp Site where she had reserved a place to overnight to a place called WAI kitchen with the intention to buy 'pap' for dinner. While she was at the WAI kitchen, she was arrested by two immigration officers whom she later came to know as Shihina and Mulembu. The immigration officer informed her that they are arresting her on the ground that they suspected that she contravened s 29(5), and s 30(1)(d), read with s 12 of the Immigration Control Act, 1993 (she was being suspected of being an illegal immigrant).

[11] Ms Makiwa was, since her arrest on the evening of 30 October 2016, detained and held at the police barracks at the Trans Kalahari Border Post. It was only on 12 November 2016 that Makiwa was charged with committing an offence and was arraigned before a court on 14 November 2016. The offence with which Makiwa was charged is that (I quote verbatim from the charge sheet to which Ms Makiwa had to plead):

'[She] ... contravened section 30(1) (D) read with sub Section (4) of the immigration control act 7 of 1993. Conducting a business or carrying on a profession or an occupation without a valid work permit or business permit (*sic*). Section 29(5) of the of the immigration control act 7 of 1993. Acting in conflict with the purpose for which, the permit was issued, or contravenes or fails to comply with any conditions subject to which it was issued.'

[12] Makiwa was released on bail from her detention on 28 November 2016. Her trial on the charges she faced commenced on 28 August 2017 and on 22 September

2017 she was, in terms of s 174 of the Criminal Procedure Act, 1977³ acquitted of the charges that she faced.

[13] Alleging that her arrest on 30 October 2016 and detention as from 30 October 2016 to 28 November 2016 at the behest of the immigration officials was unlawful, Makiwa, during December 2016, caused to be served on the Minister responsible for Home Affairs and Immigration (the defendant in this matter) a combined summons in terms of which she claimed from the defendant payment of damages for unlawful detention. The defendant entered an appearance to defend the case.

[14] Having set out the brief background to the plaintiff's claim, I will now proceed to set out her claim and the defendant's answer to her claim.

The pleadings

[15] The plaintiff's claim related to her unlawful arrest and detention. She alleged that on 30 October 2016, the defendant, acting through immigration officers, wrongfully and unlawfully detained her at Trans Kalahari Border Post, unlawfully depriving her of her liberty until 28 November 2016. The plaintiff pleads that the immigration officers who arrested her, had no reasonable suspicion that she was a prohibited immigrant. She further pleads that as a consequence, she sustained serious infringements of her right to personality and constitutional rights. By reason of the unlawful arrest and detention, she says, she has sustained general damages for which the defendant is liable in the sum of N\$100 000.

[16] I indicated above that the defendant opposed the plaintiff's claim. In its plea, the defendant admitted to, through the immigration officers, having arrested and detained the plaintiff at the Trans Kalahari Border Post from 30 October 2016 to 28 November 2016. The defendant, however, denies that the arrest and detention was unlawful. The defendant is of the view that the arrest was made in terms of Part VI, more specifically s 39 and 42, of the Immigration Control Act, 1993.

³ Criminal Procedure Act No. 51 of 1977.

[17] The defendant further pleaded that the immigration officers who arrested the plaintiff had reasonable grounds to suspect that the plaintiff is a prohibited immigrant. That suspicion, pleaded the defendant, was premised on the grounds that the plaintiff violated the terms of the permit issued to her in terms of the Immigration Control Act, 1993 in that she was working and conducting business at a premises known as WAI Advancement Clearing Agency.

[18] From the defendant's admissions in the pleadings, it is evident that the issue that I am required to resolve is whether the plaintiff's arrest and detention was lawful.

Was the arrest and detention of the plaintiff lawful?

[19] Personal liberty is a right which every person has at common law under our Constitution.⁴ It thus follows that where a person is wrongfully deprived of their liberty, such deprivation amounts to *injuria*. To succeed in an action based on wrongful deprivation of liberty, the plaintiff must allege and prove that the defendant himself or herself or a person acting as his or her agent or servant, deprived her of her liberty.⁵ All interferences with the liberty of a person are *prima facie* odious and it is for the person responsible for the deprivation of the liberty to establish why in the

⁴ Article 11 of the Constitution of Namibia provides as follows:

'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 reasonable, 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.
- (4) Nothing contained in Sub-Article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigrations: provided that such persons shall not be deported from Namibia unless deportation is authorised by a Tribunal empowered by law to give such authority.
- (5) No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.'

⁵ *Minister of Police v Rabie* 1986 (1) SA 117.

particular circumstances such interference is legally justified.⁶ In *Minister of Justice v Hofmeyr*,⁷ Hoexter JA (who wrote the majority judgment) said:

'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.'

[20] In this case, as noted previously, the arrest and detention of the plaintiff is not in issue nor is the duration of plaintiff's detention an issue. Further that the immigration officers were agents or servants of the defendant is also not in issue. Furthermore, it is also not in dispute that at the time when the immigration officials arrested and detained the plaintiff, they were acting in the course and scope of their employment as servants of the defendant.

[21] The defendant argued that the arrest and detention of the plaintiff was justified. Ms Kahengombe, who appeared on behalf of the defendant, argued that the plaintiff's arrest and detention was lawful and in accordance with the procedures as provided for under the Immigration Control Act, 1993. She argued that s 42 of the Immigration Control Act⁸ empowers an immigration officer to arrest anyone whom he or she on reasonable grounds suspects to be a prohibited immigrant. She continued and argued that since the plaintiff was arrested on suspicion of being a prohibited immigrant, Article 11(3) of the Namibian Constitution was by virtue of Article 11(4) not applicable.

[22] I proceed now to consider the question as to whether the defendant has satisfied the court that the immigration officers, who were responsible for the arrest and further detention of the plaintiff, did so believing in good faith and on reasonable grounds that the plaintiff was a prohibited immigrant. This involves an examination of the evidence presented by the parties at the trial.

⁶ See *Theron v Steenkamp*, 1928 CPD 429 at p. 432.

⁷ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 153.

⁸ See s 42(1)(a)(i) of the Immigration Control Act No.7 of 1993.

[23] The plaintiff gave evidence and deposed that on the evening of Sunday, the 30th of October 2016, at approximately 20h00 she went to the WAI kitchen at the Trans-Kalahari Border Post, to buy herself 'pap' for dinner. As she approached the WAI kitchen, two immigration officers approached her and requested to see her passport. She deposed that she handed her expired Zimbabwean passport to the immigration officers (it will be remembered that the passport expired on 26 October 2016) wherein a visitor's permit valid for a period of 90 days (the 90 days would have expired on 05 December 2016) was stamped. In addition to the expired passport, she also handed over her temporary travel document.

[24] After paging through her expired passport and her temporary traveling document, the immigration officers (a certain Sihina and a certain Malembu) informed her that they were arresting her on the basis that they suspect that she is a prohibited immigrant. The immigration officers furthermore informed her that they were going to detain her at the Trans Kalahari Nampol Police Station whilst they were investigating her presence in Namibia.

[25] The plaintiff further deposed that the following day, being Monday the 31st October 2016, four immigration officials questioned her. Amongst the four was an immigration officer named Victor who indicated that he was taking over the investigation and that he would be the investigating officer in her case. She deposed that she handed all documents that she had in her possession to the immigration officers. The documents that she handed over to the immigration officers included; medical booking confirmation of appointments from doctors in South Africa, Durban, and an Air Namibia Return Ticket (to and from Durban).

[26] She further deposed that she explained to the four immigration officials that prior to her travelling to the Trans Kalahari Border Post, she attended to the head offices of the Ministry of Home Affairs and Immigration where she visited a senior immigration officer by the name of Mr. Erishi and requested him to transfer the visitor's permit from her expired passport into the temporary travel document. She said that Mr. Erishi told her that it was not necessary to transfer the visitor's permit

from the expired passport into the temporary travel document, as long as she at all times carried the expired passport and the temporary travel document on her person.

[27] The plaintiff further deposed that during her interrogation on 31 October 2016, the immigration officers accused her of having unfairly dismissed two ladies (one of whom was a certain Isabella) from a takeaway business called WAI's kitchen, situated at the Trans-Kalahari Border Post. Her explanations to the immigration officer did not assist her and the immigration officers left without charging or informing her as to when she would be brought before a court of law.

[28] The plaintiff furthermore deposed that on 3 November 2016, she addressed two letters to the immigration officers (particularly to Mr Sihina and Mr Victor). In one letter, she requested the return of some of the documents that she handed over to the immigration officer during her arrest. Amongst the documents she requested was her medical booking confirmations with doctors in South Africa and her temporary travelling document and she explained the reason for the request as being that she needed the temporary travelling document for her to obtain her medication. She also requested that she be allowed to attend to a doctor pending the hearing before the Immigration Tribunal on 4 November 2016.

[29] In the second letter, she requested that she be allowed, in terms of the Immigration Control Act, 1993, to pay a set amount as guarantee in return for her release while investigations were being conducted into her status in Namibia. She explained in the letter that the reason why she sought to be released is that she still had appointments with medical doctors in both Namibia and South Africa. The immigration officers ignored her request and kept her detained and as a result, she missed her medical appointments and also missed out on some of her medication.

[30] The plaintiff further deposed that on the 12th of November 2016, she was finally warned of contravening the provisions of her visa conditions by operating a business, being WAI's kitchen. Furthermore, on the 14th of November 2016, the plaintiff testified that she was taken to the Gobabis Magistrate Court for her first

appearance. The plaintiff alleges that during the hearing, she was refused bail on account of Victor's instruction to the prosecutor to oppose her bail application. Her bail application was then postponed for a formal hearing to 28 November 2016. On the 28th of November 2016, the plaintiff was granted bail with strict reporting conditions and further in the amount of N\$5000 as the prosecutor, the plaintiff testified, no longer had an objection to her release.

[31] Three persons (all being immigration officers employed by the Ministry of Home Affairs and Immigration as immigration officers and stationed at Trans Kalahari Border Post) testified on behalf of the defendant namely; Mwilima Victor Silangwa, Malembu Jocke Augustinus and Sihina Siswaniso Aldrin.

[32] The evidence of Malembu and Sihina can be summarised as follows. On the 30th of October 2016 at around 20h00, Malembu and his colleague, Sihina were on duty at the Trans-Kalahari Border. They decided to go to WAI's kitchen to buy something to eat. On their arrival at WAI's kitchen and upon entering the kitchen, they saw the plaintiff sitting alone at a table. As soon as she made eye contact with them, she looked down and attempted to hurriedly leave the kitchen. This behaviour of the plaintiff aroused suspicion in them and they approached the plaintiff and demanded her 'legal documents'.

[33] Both Malembu and Sihina deposed that the plaintiff produced a Zimbabwean passport. When they checked the passport, they noticed that the passport expired on the 26th of October 2016. Because the passport which was handed over to them had expired, they suspected that the plaintiff was an illegal/prohibited immigrant, despite the fact that a visitor's permit stamped in her passport showed that she was still having enough days to stay in Namibia until the 5th of December 2016.

[34] The immigration officers, after perusing the plaintiff's passport, informed her that her passport had expired, and that in terms of s 12(1) of the Immigration Control Act, 1993 she was required to be in possession of an unexpired passport to enter or remain in Namibia. She responded by saying that she was aware that the passport had expired. The immigration officers further informed the plaintiff that she is under

arrest on suspicion of being a prohibited immigrant and that she will be taken to the Trans Kalahari police station where she will spend the night pending investigations. The officer then issued a notice of detention for her and they explained her rights to her. They deposed that they detained the plaintiff in accordance with s 42 of the Immigration Control Act, 1993.

[35] These officers testified that they had to sit for examinations the following day (i.e. the 31st of October 2016) in Gobabis so they handed over the matter to their colleague, Victor Silangwa, to conduct further investigations.

[36] Silangwa also testified and deposed that on 31 October 2016, Sihina and Malembu asked him to take over the case of Alice Lilian Makiwa whom they had arrested on suspicion that she was an illegal/prohibited immigrant. He further testified that during his investigation at the Trans-Kalahari Police Station where he conducted his interrogation of the plaintiff, he found out that the plaintiff came to the Trans-Kalahari Border Post to do her routine check up on her businesses, identified as WAI-SADC Clearing Agency and WAI-SADC kitchen. He testified that he asked her to furnish him with an employment permit to that effect. He testified that she couldn't produce a valid work permit. All she gave him was a visitor's entry permit in an expired passport.

[37] Silangwa further testified that the next day when he proceeded with his interrogations of the plaintiff, she allegedly provided him with a letter dated 31 July 2003 which stated that the Permanent Resident Permit application was approved. With this letter, he testified that he went to the Head Office in Windhoek to further consult and investigate. Whilst in Windhoek, he discussed the plaintiff's case with his supervisors and it was discovered that there was no record of the said letter in the plaintiff's file, and further that she had been convicted of violating the Immigration Control Act, 1993 on the 19th of September 2005 under case no. CR610/9/05; A2339/05.

[38] This discovery raised questions of the legitimacy of her letter dated 31 July 2003, testified Silangwa. Mr. Silangwa further testified that in addition, her

Zimbabwean national passport depicted that she had several medical visas (visitor's entry permit) and a business visa whereby a person with an approved Permanent Residence Permit does not require. On further investigations, Mr. Silangwa discovered that she is the owner of two businesses, being WAI-SADC Clearing Agency and WAI-SADC kitchen at the Trans-Kalahari Border Post.

[39] Mr. Silangwa further deposed that when she was found at the Trans-Kalahari Border Post at the premises of WAI-SADC Clearing Agency and WAI-SADC kitchen on the 30th of October 2016, she was inspecting her business and employees as the Secretary-General of WAI-SADC. It is on the strength of those findings of his investigations, Mr. Silangwa testified, that the Ministry of Home Affairs and Immigration '*charged the plaintiff for contravening s 29 (5), 30 (1)(d) read with subsec (4) (whatever this may mean) and s 12 of the Immigration Control Act*'.

[40] It is against the background of this evidence that I am required to consider the complaint made by the plaintiff that her arrest and detention was unlawful and that as a result of the unlawful treatment that she was subjected to, she has suffered damages.

[41] Section 42(1) of the Immigration Control act, 1993 reads as follows:

'42 Arrest and detention of prohibited immigrants found in Namibia

(1)(a) When a person who enters or has entered or is found within Namibia, on reasonable grounds is suspected of being a prohibited immigrant in terms of any provision of this Act, an immigration officer may-

- (i) if such person is not in custody, arrest such person or cause him or her to be arrested without a warrant; and
- (ii) pending the investigations to be made in terms of subsection (4) by such immigration officer, detain such person or cause him or her to be detained in the manner and at the place determined by the Minister, for such period, not exceeding 14 days, or for such longer period as the Minister may determine, not exceeding 14 days at a time.

(b) When any police officer or person or member of a category of persons authorized thereto in writing by the Minister on reasonable grounds suspects that a person is a prohibited immigrant and is not entitled to be in Namibia, such officer, person or member may require such person to produce to him or her proof that he or she is so entitled to be in Namibia and if such person fails to satisfy such officer, person or member that he or she is so entitled such officer, person or member may take him or her into custody without a warrant, and shall as soon as is practicable bring him or her before an immigration officer to be dealt with in terms of paragraph (a).'

[42] What is clear from s 42(1) is that an immigration officer may only exercise the powers conferred on him or her and arrest a person who enters or has entered or is found within Namibia, if the immigration officer on reasonable grounds suspect that the person is a prohibited immigrant. On a proper interpretation of s 42 (1) (a) of Immigration Control Act, 1993, I hold that the grounds upon which an immigration officer may arrest and detain a person in question must exist at the time the immigration officer arrests and detains that person, not at a future date; and what is more, the immigration officer must be aware of the existence of such grounds in order for him or her to come to the conclusion that those grounds are reasonable. The reason is that the deprivation of the arrested and detained person's liberty occurs at the time he or she is detained.

[43] From the evidence led at the trial, it is clear that at the time when the plaintiff was arrested by the immigration officers, those officers had knowledge of the fact that the plaintiff entered Namibia on 06 September 2016 on a valid Zimbabwean passport, they furthermore had knowledge that the plaintiff was granted permission (or was issued a visitors permit) which entitled her to be in Namibia until 5 December 2016 and they had knowledge that the plaintiff had medical appointments with doctors in Namibia and in South Africa. The immigration officers furthermore had knowledge of the fact that plaintiff was in possession of a temporary travelling document which entitled her to leave and return to Namibia.

[44] In the light of the knowledge that Malembu and Sihina had, can it be said that the defendant has established that Malembu and Sihina believed in good faith, and

on reasonable grounds, in terms of s 42 (1) read with s 39 of the Immigration Control Act, 1993 that the plaintiff was a prohibited immigrant? The defendant needed to establish that Malembu and Sihina's suspicion was based on reasonable grounds.

[45] When one comes to consider whether Malembu and Sihina had reasonable grounds to suspect that the plaintiff was a prohibited immigrant, one must bear in mind that, in exercising the powers conferred on them by s 42 of the Immigration Control Act, 1993, they must, as was said by Jones, A.J.P.⁹ "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 as was said in *R v van Heerden*.¹⁰

'It is not sufficient for him to show that he did in fact have a suspicion. 'Suspect' and 'suspicion' are words which are vague and difficult to define ... it seems to me that the words 'reasonable grounds' qualify the suspicion required by the section. These words must be interpreted objectively, and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion.'

[46] Now it seems to me that an ordinarily prudent person, who had the knowledge (that I have set out in paragraph [42] of this judgment) that Malembu and Sihina had, would have doubts as to whether the plaintiff was a prohibited immigrant. An ordinarily prudent person would have noticed that the plaintiff had entered Namibia on a valid permit and had a visitor's permit authorising her to enter and remain in Namibia until 5 December 2016. The reasonable person would have immediately had a doubt that the plaintiff is a prohibited immigrant.

[47] The immigration officers had to enquire and investigate whether the plaintiff was a person who is mentioned in s 39 of the Immigration Act, 1993. On their own evidence, Malembu's and Sihina's suspicion was allegedly aroused by the demeanour of the plaintiff (when she allegedly made eye contact with them and looked down and attempted to hurriedly leave the WAI kitchen). From the evidence placed before me, the immigration officers did not even enquire from the plaintiff

⁹ *Rosseau v Boshoff* 1945 CPD 135, at p. 137.

¹⁰ *R v van Heerden*, 1958 (3) SA 150 (T) at p. 152E:

whether she fits into the category of persons mentioned in s 39 of the Immigration Control Act, 1993. That was not the behaviour of a reasonable person.

[48] Indeed, the defendant's case suffers a great knock because in the instant case. I accept the evidence that the immigration officers, who arrested and detained plaintiff, told her that they were detaining her at the Trans Kalahari Nampol police station while they were investigating her presence in Namibia. It follows inevitably that at the time that the immigration officers arrested and detained plaintiff on 30 October 2016, they could not have had 'reasonable grounds' within the meaning of s 42(1) of the Immigration Control Act to arrest and detain the plaintiff, because on their own evidence, they were arresting and detaining her while they were investigating her presence in Namibia; that is, while they were fishing for 'reasonable grounds' to justify an arrest and detention that had already taken place. That could not have been the intention of Parliament; that an immigration officer may arrest and detain a person while looking for 'reasonable grounds' to justify *ex post facto* such arrest and detention.

[49] Malembu and Sihina sought refuge in s 12 of the Immigration Control Act, 1993.¹¹ Unfortunately s 12 cannot provide that sanctuary for them because that

¹¹ Section 12 of the Act reads as follows:

'12 Passports and visas:

(1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

(2) (a) The Minister may exempt any person or category of persons from the provisions of subsection (1) in respect of a visa, endorsement or document referred to therein for a specified or unspecified period and either unconditionally or subject to such conditions as the Minister may impose.

(b) The Minister may exclude from any exemption granted to a category of persons under paragraph (a) any person belonging to that category.

(c) The Minister may-

(i) withdraw any exemption granted under paragraph(a) to any category of persons or to any person, whether as an individual or as a member of a category of persons; or

(ii) cancel and declare *null and void* any visa, endorsement or document referred to in the said subsection (1).

(3) Any person under the age of 16 years shall on entering Namibia deemed to be in possession of a valid passport if such person is accompanied by his or her parent in possession

section speaks to a person who is seeking to enter Namibia. The plaintiff was not seeking to enter Namibia, she had already entered Namibia on 6 September 2016 and at the time that she sought to enter Namibia, she had a valid passport and had a valid visitor's permit endorsed in that passport.

[50] Mr. Silangwa made a somewhat puerile attempt to show that he investigated the plaintiff's status in Namibia which investigations revealed that the plaintiff was conducting business in Namibia in contravention of the visitor's permit that was issued to her. Mr Silangwa's attempt was not only puerile, it was also disingenuous. His evidence that his investigations revealed that when the plaintiff was found at the Trans-Kalahari Border Post at the premises of WAI-SADC Clearing Agency and WAI-SADC kitchen on the 30th of October 2016, she was inspecting her business and employees as the Secretary-General of WAI-SADC was clearly insincere because there was no such evidence.

[51] I have accordingly come to the conclusion that the defendant has failed to establish that Lillian Alice Makiwa was a prohibited immigrant and that it has failed to establish that the immigration officers had reasonable grounds to arrest and detain the plaintiff. Accordingly, the arrest, detention and continued detention until 28 November 2016 of the plaintiff was unlawful. This court must now assess the *quantum* of damages she has sustained by virtue her unlawful arrest and detention.

The *quantum* of damages

[52] In *Iyambo v Minister of Safety and Security*,¹² Parker AJ remarked that the amount of damages that a court grants must be related to the unlawful arrest and the period of days during which the detention is unlawful. The plaintiff was arrested on

of such a passport in which the name of that person was inserted on behalf of the Government of Namibia or on behalf of any government of any other state recognized by the Government of Namibia.

(4) If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

¹² *Iyambo v Minister of Safety and Security* 2013 (2) NR562 (HC).

30 October 2016 and was only brought before a court of law on 14 November 2016 when she was charged with the offence of contravening s 30(1)(d) of the Immigration Control Act, 1993. She was brought before a court of law on 14 November 2016 and remanded in custody until 28 November 2016 when she was released on bail.

[53] Article 11(4) of the Namibian Constitution, which makes Article 11(3) inapplicable to illegal/prohibited immigrants, is thus not applicable in this instance because the plaintiff was not arraigned before court on the basis that she is a prohibited immigrant. It thus follows that the plaintiff had to be brought before court within 48 hours as set out in Article 11(2) of the Namibia Constitution. The detention of the plaintiff beyond the 48 hours as prescribed in the Constitution thus makes the detention of the plaintiff invalid from 30 October 2016. The magistrate could therefore not validate the arrest on 14 November 2016.¹³ The detention of the plaintiff was thus unlawful until her release on 28 November 2016. On my calculation, the plaintiff was unlawfully detained for a period of thirty days.

[54] The arrest of the plaintiff was not only an unlawful detention and deprivation of the basic right of liberty: the manner in which it was perpetrated was a continuing assault and an invasion of her right to bodily integrity and a violation of her right to mental and intellectual well-being.¹⁴ For the purposes of calculating damages, I take cognizance of what Parker AJ said in *Iyambo v Ministry of Home Affairs*¹⁵ relying on the Supreme Court case of *Trustco Group International Ltd and Others v Shikongo*.¹⁶ He took the view that, regard being had to factual differences and circumstances of the commission of the wrongful act complained of, the court ought to take a comparative look at awards made by the court in similar cases.

[55] The circumstances of the commission of the wrongful act complained of in the instant case are these. In her evidence, the plaintiff suggested that the immigration officer may have been motivated by malice when they arrested her. She testified that on Monday 31 October 2016 when she was interrogated by the immigration officer,

¹³ *Supra* at para [4] a-b.

¹⁴ See *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

¹⁵ *Supra* footnote 13.

¹⁶ *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) at 403H – 404G.

she was questioned about allegations that she allegedly dismissed two ladies by the names of Saraphine and Isabell from WAI kitchen. She further testified that the Isabella lady approached her and informed her that Victor Silangwa is her (Isabella's) boyfriend and she will be arrested and will rot in jail.

[56] The plaintiff further testified that on 08 November 2016 she was interrogated by a certain Vosloo, who was police officer stationed at the Trans Kalahari police station, a certain Ms De Wee from the Ministry of Finance in Windhoek, and Victor Silangwa, the immigration officer. On that day she refused to answer questions that were posed to her. She testified that the grounds on which she refused to answer the questions were that she was not feeling well, she had not been granted an opportunity to consult with her medical practitioners and she was detained on grounds of being suspected to be an illegal immigrant, so she did not see why she had to answer to questions from the Ministry of Finance. She further testified that on that day, Ms De Wee had a copy of a letter which suspended Ms Saraphine and Isabella.

[57] Mr Silangwa in his evidence denied that he was involved in a romantic relationship with Isabella. Mr Silangwa, however, failed to explain to court where he obtained the letter that conveyed the suspension of Saraphine and Isabella to them. He could also not explain why Isabella was never called to come and controvert the evidence of the plaintiff. Having found that part of Mr Silangwa's evidence not credible, I have doubts whether his denial of his relationship with Isabella is genuine.

[58] The malice of the immigration officers can also be inferred from the fact that when they arrested the plaintiff, they informed her that she was being detained on suspicion that she is a prohibited immigrant, but when they charged her and arraigned her before the Gobabis Magistrates Court and in this matter in this court, the immigration officers attempted to show that the plaintiff was conducting business in Namibia in contravention of her visitor's permit.

[59] What fortifies the inference of malice on the part of the immigration officers is the coldhearted manner in which the plaintiff was treated whilst she was in detention.

The immigration officers were aware that the plaintiff was in Namibia on a medical visa for medical treatment yet they denied her the opportunity to visit or to be attended to by her medical practitioner. The plaintiff, in writing, requested to be treated in the manner contemplated in s 42(3) of the Immigration Control Act, 1993.¹⁷ The immigration officers, although under the obligation to respond to the request and to give reason for their decision, ignored the plaintiff (this in my view is a gross abuse of power). I am therefore of the opinion that the plaintiff is justified in concluding that her arrest was motivated by malice on the part of the immigration officers, they for reasons known only to them wanted to punish the plaintiff.

[60] I have indicated above that in assessing the appropriate award of damages, the court must have regard to previous awards made by courts in similar matters. The court must, however, tread cautiously and be hesitant to slavishly follow other courts' previous awards. I find it appropriate to briefly refer to one or two important judicial pronouncements on the proper approach on award of damages. In *Minister of Safety and Security v Seymour*,¹⁸ Nugent JA enunciated the proper approach that must be adopted by the court when dealing with awards made in comparable previous cases as follows:

'The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.'

[61] In *Pitt v Economic Insurance Co. Ltd*,¹⁹ Holmes J (as he then was) stated the following:

¹⁷ Section 42(3) of the Immigration Control Act, 1993 reads as follows:

'(3)(a) An immigration officer may require from any person referred to in subsection (1), to deposit with such immigration officer, in *lieu* of being detained as contemplated in that subsection, an amount to be fixed by the immigration officer, not exceeding an amount determined by the Minister by notice in the *Gazette* in general, or to lodge with the immigration officer, to his or her satisfaction, a guarantee in the prescribed form for the amount concerned, as a surety that such person, if not so detained, shall comply with such conditions as the immigration officer may impose in writing.'

¹⁸ *Minister of Safety and Security v Seymour* 2006 (6) SA 320.

¹⁹ *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (D) at 387 E-F.

'However, no better system for assessing damages has yet been evolved, and the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense.'

[62] In light of the above remarks, I now consider previous awards made by courts in similar matters. In *Iyambo v Ministry of Home Affairs*,²⁰ the court ordered the Minister of Safety and Security to pay N\$12 000 to a teacher to compensate him for being unlawfully arrested and detained by the police for four days. In *Government of the Republic of Namibia v Getachew*,²¹ the government was ordered to pay to Mr Getachew an amount of N\$ 10 000. But unlike the present case, in that case, Mr Getachew's arrest was found to be lawful in terms of s 42 of the Immigration Control Act, 1993 but the immigration officials failed to comply with Article 18 of the Namibian Constitution and also flouted Article 8 of the Namibian Constitution when they exposed the plaintiff to indignity during parts of his detention.

[63] In South Africa, in *Risenga v Minister of Safety and Security*,²² the plaintiff who had been unlawfully arrested and detained for two days, was awarded an amount of R60 000. However, in my view, the facts of the *Risenga* case are vastly distinguishable from the facts of the present matter. In *Risenga*, the plaintiff was arrested on suspicion that he had committed a Schedule 1 offence of rape. Significantly, the plaintiff was arrested after the complainant had pointed him out as the man who had raped her. Accordingly in that matter, the arresting officer had based his suspicion on the pointing out of the plaintiff by the complainant.

[64] In *Richard Moses v Minister of Safety and Security*²³ the court awarded an amount of R100 000 for unlawful detention which lasted for two days. There are features of the *Moses* case which are worth highlighting. In that matter, the plaintiff had been arrested by a police officer who had deliberately fabricated false charges (of

²⁰ Supra footnote 13.

²¹ 2008(1) NR 1 (SC).

²² *Risenga v Minister of Safety and Security* [2016] ZAGPPHC 948 (18 November 2016).

²³ Unreported decision of the Gauteng Local Division under case No 6983/2013, delivered on 20 February 2015.

housebreaking with intent to steal and theft) against him. It was common cause that the plaintiff had previously laid criminal charges of assault against the police officer who arrested him. The implicated police officer then contrived a scheme that resulted in the arrest of the plaintiff on the strength of false and fabricated statements. It later emerged that the arrest and detention of the plaintiff had been hatched by the police officer because he harboured a personal grievance against the plaintiff. In any event, the court in *Moses* had the benefit of evidence concerning the circumstances of the arrest and the degrading conditions of his detention.

[65] I have, in the introduction part of this judgment, observed that our common law and the Constitution recognizes the right of every person to liberty and to human dignity. The defendant's conduct was not only a deprivation of the plaintiff's liberty but the manner in which it was done was such as to aggravate the *injuria* and to increase the plaintiff's damages. I repeat that, the liberty of the subject is the cornerstone of democracy and essential for a harmonious and orderly society and it is a price for which thousands of Namibians paid with their blood. People who ignore that and misuse their authority, threaten the democratic fabric and undermine society.

[66] Having taken into consideration the evidence placed before court and after analysing the circumstances of this case, I come to a conclusion that an amount of N\$ 100 000 as claimed by the plaintiff is a fair and reasonable compensation.

[67] For the reasons that I have set out in this judgment I make the following order:

- a) The plaintiff's arrest on 30 October 2016 and detention up to 28 November 2016 was unlawful.
- b) The defendant must pay to the plaintiff the amount of N\$ 100 000.
- c) The defendant must pay the plaintiff's cost of suit.

S F I Ueitele
Judge

APPEARANCES

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