

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2018/04207

In the matter between:

TOBIAS IIMENE

PLAINTIFF

and

THE MINISTER: MINISTRY OF SAFETY AND SECURITY

DEFENDANT

Neutral citation: *Iimene v The Minister: Ministry of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/04207) [2020] NAHCMD 121 (26 March 2020)

Coram: MILLER AJ

Heard: 17 February 2020

Delivered: 26 March 2020

Flynote: Law of Delict – Damages claim – Return of fire-arm.

Summary: The plaintiff instituted action proceedings, wherein he sought damages plus interest, the return of his fire-arm and costs, consequent upon what he alleges to an unlawful arrest.

Held: The arrest of the plaintiff was unlawful.

Held: The court accepts the account of the plaintiff insofar as the conditions under which he alleges to have been detained.

Held: The plaintiff was detained for a short period and damages of N\$40 000, is sufficient in the circumstances.

Held: The issue in respect of the fire-arm is held in abeyance as there is a criminal matter in the Magistrates Court in respect of same.

ORDER

1. The judgment is in favour of the plaintiff in the sum of N\$40 000.
2. Interest in the amount of the rate of 20 percent per annum calculated from the date of judgment.
3. Costs of suit.
4. The matter is removed from the roll and is considered finalised.

JUDGMENT

MILLER AJ:

[1] The plaintiff instituted action against the defendant for the payment of damages in the sum of N\$250 000, the return of his fire-arm, together with costs and interest in the amount claimed.

[2] The defendant denies that it is liable to pay any damages to the plaintiff.

[3] The cause of action arises from the arrest of the plaintiff by a member of the defendant on 3 August 2018 at the Okongo Police Station. Following his arrest, which happened to be on a Friday evening, the plaintiff was detained in the police cells for the duration of the weekend. On the Monday following his arrest, the plaintiff was taken to the local magistrate's court. He was made to wait in the corridors of the building for the whole of the day and released from custody in the late afternoon. He

was not called upon to appear before the local magistrate because the prosecutor somehow decided not to place his case on the court roll for that day.

[4] The plaintiff alleges that his arrest was unlawful as was his subsequent detention. During the course of the trial, as foreshadowed in the pleadings and the pre-trial report, the lawfulness or otherwise, of his arrest and detention is the crisp issue to be reserved.

[5] The defendant correctly accepted that as far as that was concerned, it bears the onus.

[6] Save for minor differences, the facts are not in dispute. Those can be summarized in the following manner:

- 6.1 The plaintiff is the owner of a shotgun, for which he holds a valid licence.
- 6.2 At some point prior to his arrest, the plaintiff gave possession of the firearm to a certain Reinhold Nepala, who is a cattle herder employer by the plaintiff.
- 6.3 Chief Inspector Haludilu, who is stationed at the Ohangwena Police Headquarters proceeded to Okango village to investigate, inter alia, a case against Mr Nepala relating to the supply of fire-arms used the hunt game in Angola. He spoke to Mr Nepala on 1 August 2018. The latter informed him falsely that the fire-arm belonged to his father arrest was affected then.
- 6.4 On 3 August 2018, Chief Inspector Haludila found Mr Nepolo at the Okongo Police Station. Apparently Mr Nepala had been arrested by another police officer for being in possession of a fire-arm without a licence.
- 6.5 Chief Inspector Haludila again spoke to Ms Nepala and was then told the plaintiff had handed the fire-arm to him.

- 6.6 The plaintiff once had been informed of the arrest of Mr Nepala, proceeded to the Okongo Police Station where he presented the relevant fire-arm licence to the police. Thereupon, he was arrested and detained.
- 6.7 It is the plaintiff's evidence that he handed the fire-arm to Mr Nepalo in order for it to be used, if necessary, to protect the plaintiff's cattle.
- 6.8 It is the defendant's case that the plaintiff had committed an offence under the Arms and Ammunition Act, Act 7 of 1996, inasmuch as he had handed the fire-arm to Mr Nepala without the requisite written authorization. That issue is currently a subject of a case pending in the magistrate's courts.

[7] The plaintiff was arrested without a warrant of arrest in terms of s 40(1)(b) of the Criminal Procedure Act, 51 of 1977, which permits the police to arrest a person without a warrant if there is a reasonable suspicion that the person to be arrested had committed an offence mentioned in Schedule 1 of Act 51 of 1977. It is not disputed by the plaintiff that the offence with which he is charged is one mentioned in the schedule.

[8] Whether or not the arresting officer acted upon a reasonable suspicion requires an objective enquiry based on the available facts at the time as opposed to a mere hunch.

[9] In *Hailula v Director of the Anti-Corruption Commission and Others* 2014 (1) NR 62 (HC) the court held that in relation to a provision in the Anti-Corruption Act, similar to s 40(1)(b) of Act of 1977, consideration should be given to less drastic means than arrest in order to secure the attendance of a suspected person at court.

[10] In considering the facts relevant to this case it is apparent that Chief Inspector Haludila, arrested the plaintiff with little or no further enquiries as to the circumstances in which the plaintiff placed Mr Nepala in possession of the fire-arm. He should reasonably be expected to have to do so prior to the arrest of the plaintiff.

Moreover, no consideration was given to the fact that the plaintiff had presented himself to the police in an effort to provide some clarity on the matter. I have no doubt that the plaintiff would have attended any court hearing had he been called upon to do so. In those circumstances the arrest was in my view unlawful.

[11] As far as damages are concerned I bear in mind that the plaintiff was detained for a relatively short period prior to his release. I accept the evidence of the plaintiff as to the conditions under which he was detained. An award for damages falls in the discretion I must exercise. In my view an amount of N\$40 000 will be sufficient.

[12] As far as the return of the fire-arms is concerned, there is presently a criminal case pending in the magistrate's court concerning the fire-arm and it is best that the return or otherwise of the fire-arm be left in abeyance for now.

[13] In the result, I make the following order:

1. The judgment is in favour of the plaintiff in the sum of N\$40 000.
2. Interest on the amount of the rate of 20 percent per annum calculated from the date of judgment.
3. Costs of suit.
4. The matter is removed from the roll and is considered finalised.

P J Miller
Acting Judge

APPEARANCES:

PLAINTIFF: S NAMANDJE (with him T H I J IILEKA-AMUPANDA)
Of Sisa Namandje & Co. Inc., Windhoek

DEFENDANT: L N K IHALWA (with her A NDUNGULA)
Of Office of the Government Attorney, Windhoek