

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: CHARLES PLAINTIFF and MINISTER OF SAFETY AND SECURITY 1 st DEFENDANT INSPECTOR- GENERAL OF THE NAMIBIAN POLICE FORCE 2 nd DEFENDANT THE (RETIRED) REGIONAL COMMANDER OF KHOMAS REGION, NAMIBIAN POLICE FORCE 3 rd DEFENDANT THE THEN STATION COMMANDER OF WINDHOEK POLICE STATION, KHOMAS REGION, NAMIBIAN POLICE FORCE 4 th DEFENDANT THE THEN REGIONAL CRIME INVESTIGATIONS COORDINATOR, NAMIBIAN POLICE FORCE, KHOMAS REGION, WINDHOEK 5 th DEFENDANT THE THEN UNIT COMMANDER OF CRIMINAL	Case No: HC-MD-CIV-ACT-OTH- 2019/04178 Division of Court: HIGH COURT (MAIN DIVISION)
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<p>INVESTIGATION UNIT/DIRECTORATE, KHOMAS REGION, WINDHOEK, NAMIBIAN POLICE FORCE</p> <p style="text-align: right;">6th</p> <p>DEFENDANT</p> <p>THE THEN UNIT COMMANDER OF SERIOUS CRIME UNIT/DIRECTORATE, NAMIBIAN POLICE FORCE, KHOMAS REGION, WINDHOEK</p> <p>7th DEFENDANT</p> <p>THE INVESTIGATING OFFICER OF THE ESCAPE MATTER, NAMIBIAN POLICE FORCE, KHOMAS REGION, WINDHOEK</p> <p>8th DEFENDANT</p>	
<p>Heard before:</p> <p>Honourable Lady Justice Rakow, J</p>	<p>Date of hearing:</p> <p>12 November 2020</p> <p>Date of order:</p> <p>7 December 2020</p>
<p>Neutral citation: <i>Namiseb v Minister of Safety and Security</i> (HC-MD-CIV-ACT-OTH-2019/04178) [2020] NAHCMD 572 (7 December 2020)</p>	
<p>Having read the record of proceedings as well as submissions made by counsels for the applicant and the respondents:</p> <p>IT IS HEREBY ORDERED THAT:</p> <ol style="list-style-type: none"> 1. The application by the defendants for absolution from the instance is hereby granted. 2. The plaintiff is ordered to pay the costs of suit of the defendants. 3. The matter is removed from the roll and regarded finalised. 	
<p>Reasons for orders:</p>	
<p><u>Introduction</u></p> <p>[1] Serving before me is an application by the applicants, who are the defendants in</p>	

the main action, in which they brought an application for absolution from the instance against the respondent, who is the plaintiff in the main action at the close of the plaintiff's case. (In this ruling, I will refer to the parties as they are cited in the main action.)

Plaintiff's case

[2] The plaintiff in this matter sued the defendants for damages he suffered as a result of being arrested in South Africa and extradited to Namibia on charges of escaping from lawful custody in the amount of twelve million Namibian Dollars in total. The plaintiff in 2010 was arrested for murder, rape and assault. He was tried and convicted on 29 February 2016. He was due for sentencing on 16 March 2016.

[3] The plaintiff testified on his own behalf. In a nutshell, his case is that he was lawfully released by a member of the Namibian Police known to him as Constable Shihepo who recorded his release and reasons thereof in the Occurrence Book also known as the POL 55 as well as in the Police Manual also known as Cell Register (POL 8). He testified that on 29 February 2016, the day of his conviction his legal representative and the interpreter were not present at Court and he did not understand what the Judge read out. He tried to get the police officers to explain the judgment to him however no one explained it to him. He further testified that during his subsequent escaping trial in the Magistrate Court, he asked that the Police Officer, Mr Shihepo be called to testify, but his request was not granted.

[4] Upon his release and with the assistance of his brother he went to South Africa to study, he travelled by bus and at the border he didn't see any notices indicating that the police were looking for him and he was allowed to proceed with his journey. He furthermore testified that a red notice was issued through Interpol allegedly informing the public that he was a fugitive and dangerous. As a result of the red notice, upon his arrest in South Africa, he was detained at a facility with dangerous criminals where he was exposed to torture and enslaved by other detainees, doing chores for them like washing their clothes. He further also had sleepless nights because he feared for his life which caused him emotional injury. When he was extradited to Namibia, a case of escape from lawful custody was opened against him and he was found not guilty on the charge of escape from lawful custody in terms of section 174 of the Criminal Procedure Act 51 of 1977 (hereinafter "the Act"). He continued to testify that as a result of the red notice his character was defamed, his article 8 Constitutional right was violated and that his family

members want nothing to do with him.

[5] During cross- examination, the plaintiff was asked as to how he quantified the amount of twelve million Namibian Dollars he is seeking against the defendants. He indicated that it was the reasonable amount which he calculated for what he endured as a result of the red notice which amount included the amount for selling his car to cover his legal practitioners fees in the case where he was found not guilty. He was further asked if he had known that the police were looking for him would he have returned, to which he answered in the affirmative, that he would have returned to serve his sentence. He was also asked if he had proof of his request for Mr Shihepo to testify in his trial to which he indicated that the request was verbal and he made it when the court was not in session and therefore not formally recorded. Counsel for the defendant asked the plaintiff if the crime he was convicted of and accordingly sentenced was not a very serious one which would justify the red notice referring to him as a dangerous person, plaintiff confirmed that the crimes are very serious. He was further asked if he had any proof of the wording of the red notice or proof of the torture i.e doctors report, to which the plaintiff answered in the negative.

Application for absolution from the instance

Submissions on behalf of defendants

[6] Mr Kashindi, counsel for the defendants, at the close of the plaintiff's case, applied for absolution from the instance and submitted that the plaintiff as dominus litis in the claim has failed to prove his claim as he has not produced an iota of evidence to substantiate his claim. He submitted that the plaintiff must have delivered evidence relating to all the essential elements of the claim and further demonstrate that his evidence is not incurably and inherently probable and unsatisfactory. He also submitted that the plaintiff has not provided any material fact allegation on papers as to how and exactly in which manner his constitutional rights have been violated by the defendants.

[7] Counsel submitted that in action proceedings two curial requirements on the part of the plaintiff are involved and are critical in deciphering the claim being:

'(a)Alleging in the pleading's certain unlawful actionable acts attribute to the defendants that has been prejudicial to, or violable of, the plaintiff's rights (legal or constitutional) or interest

(requirement (a)) and

(b) Proving in the trial that which plaintiff has alleged in the pleadings, for he who asserts must prove it (requirement (b)).

[8] He referred this Court to the case of *Chombo v Minister of Safety and Security and 2 Others*¹ wherein these principles were reiterated that apply in application for absolution from the instance.

[9] Counsel submitted that even if the public notice was issued by the Police the notice has not in any manner defamed the plaintiff nor did it violate any of the plaintiff's constitutional right as such the notice was not issued un-procedurally, or wrongful, or unlawful or without justification or excuse. The defendants assert that even if the notice was published, such notice was reasonable and in the public interest. It was therefore factual and objective in so far as the character of the plaintiff as a fugitive from justice is concerned and the danger he poses to the public in view of the seriousness of the offences which he has been convicted for. It was lawful and effective and based on the warrant of apprehension issued by the Court in ensuring that the plaintiff was apprehended and brought back to face justice and thereby having received sentence with a combination of 63 years. In this regard the Counsel referred this Court to the case of *Trustco Group International v Shikongo* ² where the following was held "that in order to raise a defence of reasonableness, the appellants must establish that the publication was in the public interest, and that, even though they cannot prove the truth of the facts in the publication, it was nevertheless in the public interest to publish".

[10] As such counsel maintained that applying the above principle and considering the plaintiff's own testimony that the publication described him as a dangerous fugitive, it can be confirmed that there was nothing untruth in the publication. The plaintiff was indeed a fugitive and was dangerous as he was found guilty, convicted and absconded at the time of his escape or unlawful release from custody. Counsel further submitted that the defendants maintain that the publication or notice was not only reasonable and justifiable and in public interest but was a lawful mean to secure the re-arrest of the plaintiff. The offences for which the plaintiff was convicted of are of a very serious nature of being

¹ (unknown-2013/3883) [2018] NAHCMD 37 (20 February 2018).

² 2010 (2) NR 377 (SC) at 391E.

rape, assault with intend to do grievous bodily harm and robbery in terms of our law and it only was correct to describe plaintiff as a dangerous fugitive, there can therefore be no better description of a person who committed such heinous offences, then describing him 'a dangerous fugitive'.

[11] On the issue of escape, counsel, submitted that at the time of the plaintiff's escape or unlawful release with the aid of a police officer, the plaintiff was lawfully arrested and convicted. He was only waiting to receive sentencing and to be lodged immediately in a correctional facility.

[12] Counsel found it imperative to note that the plaintiff conceded certain facts under cross- examination and re-examination from his counsel in summary, being that:

- I. There is no occurrence book or the police manual known as the cell register (Pol 8);
- II. There is no red notice or any newspaper article circulated on social media to corroborate the defamation of character claim;
- III. There are no material facts or mention of what constitutional damages the plaintiff alleges to have suffered and how he arrived at the amount of two million;
- IV. There is no psychological report or social worker report or any expert to corroborate the emotional torture claimed;
- V. There is no invoice to confirm legal practitioner's fees; no single evidence (statement under oath) from any family member to corroborate the claim of his family ties being damaged or affected negatively;
- VI. He was sentenced for the serious offence for which he was lawfully arrested, prosecuted and convicted before he left the lawful custody and that he is currently serving his sentence in respect of the very serious offence and;
- VII. He was not granted bail'

[13] In conclusion, counsel, submitted that the poor evidence of the plaintiff and failure to place all elements before this court analysed is sufficient for the court to grant absolution from the instance as it is no the duty of the defendants to give evidence on behalf of the plaintiff and thus corroborate his version.

Submissions on behalf of plaintiff

[14] Ms Siyomunji, counsel for the plaintiff, submitted that the plaintiff left Namibia a free man, there was no police hunt for him and he was under the impression he can continue his life, as a result he went to further his studies in South Africa and that at no point in time was it the intention of the plaintiff to escape. The warrant of arrest and red notice were issued 13 months after the plaintiff had been released and that no other methods were used to try and secure the attendance of the accused person to receive his sentence. Counsel further submitted that, it would have been sufficient to label the plaintiff a wanted person for the charges and labelling the plaintiff a fugitive/ escapee was completely inaccurate and defamatory given the circumstances.

[15] Counsel submitted that the red notice which was issued was not in dispute as per the pre-trial report consequently there was no need to provide such notice. Counsel further submitted that the plaintiff is convicted and serving a sentence but the label of fugitive/escapee is what he is contesting. It was also brought to the courts attention that the plaintiff is currently in the process of appealing the sentence that he received for his alleged crimes and maintains his innocence. Counsel contends that at no time did the plaintiff concede that he was convicted and that he continuously indicated that he did not understand that he was convicted as at the time he had no interpreter.

[16] Counsel on the aspect of absolution from the instance referred this court to *Klein v Kaura*³ where Damaseb JP stated the considerations relevant to absolution “absolution at the end of the plaintiff’s case ought to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law”.

[17] Counsel continued to submit that the plaintiff does not fall within the ambit of section 51 of the Act and the averments by the Defendants are misleading and referred this Court to *S v Nangombe*.⁴ Counsel contended that the plaintiff has properly quantified the amount claimed and that one must not lose sight of the fact the plaintiff is in custody and asking and having access to certain facilities is limited such as physiological doctors. Further that the non-attendance of his family members at his court proceedings is a clear indication that the plaintiff has been written off by all his family members.

³ (I 4315 / 2013) [2017] NAHCMD 1 (15 January 2017).

⁴ (CR13/2017) [2017] NAHCNLD 79 (10 August 2017).

[18] In conclusion it was submitted on behalf of the plaintiff that the defendants have a case to answer and cannot hide behind absolution from the instance.

Legal Principles

Absolution from the instance

[19] Rule 100 (1) (a) of the High Court states that:

‘At the close of the case of the Plaintiff the Defendant may apply for absolution from the instance in which case the defendant or his legal practitioner may address the court...’

[20] The test for absolution from the instance is whether at the end of the plaintiff’s case, there is evidence upon which a court could or might find for the plaintiff. This implies that a plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim, without which no court could find for the plaintiff.

Defamation

[21] Defamation is adequately described in *Nettling’s Law of Property*⁵, where the esteemed authors stated that defamation is;

‘the intentional infringement of another’s right to his good name, or more comprehensively, the wrongful, intentional publication of words or behaviour which has the tendency to undermine his status, good name or reputation.’⁶

[22] The law defines a defamatory matter as words or conduct that tends to lower the person in the estimation of reasonable persons in the society generally.

[22] The question whether a statement complained of is defamatory is determined objectively by the court by analysing the statement, its meaning, effect and whether it tends to lower the plaintiff in the estimation of right-thinking member of the society generally.⁷

⁵ Lexis Nexis, 2nd edition, 2004 at p131

⁶ *Amadhila v Amwaandangi* (I 16/2014) [2017] NAHCNLD 36 (08 May 2017).

⁷ *Ntinda v Hamutenya and Others* (I 1181/2012) [2013] NAHCMD 150 (06 June 2013).

Fugitive

[23] According to the Shorter Oxford Dictionary, the word fugitive means, one who ‘has taken flight, especially from duty, justice, an enemy, or a master’. It is clear that the definition given is general in nature and scope and may not help to resolve the quandary in the instant case.

[24] In *Escom v Rademeyer*⁸, Stegmann J dealt with the meaning of a fugitive from justice with reference to the *Mulligan* case. He said, ‘In that passage it appears that a “fugitive from justice” may be accepted as being one who is “wilfully avoiding the execution processes of the Court of the land” or as one who is avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the Court.’

[25] It would therefore appear that for a person to be declared a fugitive, it must be shown to the satisfaction of the court, on a balance of probabilities, that the said person has deliberately left the jurisdiction or is in hiding within the jurisdiction, and has thereby effectively placed him or herself beyond the court’s reach, in order to avoid or evade any legal action or proceedings that might be instituted, including using the State’s coercive powers, such as a warrant of arrest or criminal charges. There must thus, in my view, be a causal link between the flight or disappearance of the person and the legal action or criminal processes instituted or apprehended by the State.⁹

Article 8 violation

[26] Article 8 of the Namibia reads as follows:

‘(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. “

[27] I must mention that at the beginning of the trial, the plaintiff read his statement into record and indicated that he had no further issues to add to his statement. In what appeared to be an attempt to amplify his statement unfortunately became an introduction of new facts (which would ultimately lead to an amendment of the witness statement) that

⁸ 1985 (2) SA 654 (T), at p658.

⁹ *Penderis v De Klerk* (HC-MD-CIV-MOT-GEN-2020/00203 [2020] 392 NAHCMD (28 August 2020).

he had not made mention of in his particulars of claim or witness statement. The defendants objected to the 'amplification' of the witness statement and submitted that the plaintiff was not amplifying but rather amending his witness statement which would be unfair and unreasonable to the defendants as that would amount to the defendants not being afforded an opportunity to deal with new allegations and that such conduct constitutes trial by ambush. The defendants implored this court to ignore those new allegations. I concur with the defendants in this regard and consequently did not consider the amendments, even if I was to consider them, they unfortunately would not make a difference or carry any weight in persuading this court differently.

[28] Having considered the submissions made on behalf of the parties I am of the considered opinion that the plaintiff has not made out a prima facie case, in the sense that there is no evidence relating to all the elements of the claim, without which no court could find for the plaintiff. The plaintiff has failed to provide this court with any form of evidence be it the red notice that he so heavily relies on or any articles that were circulated on social media in corroboration of his defamation claim. Even if the issuance of the red notice is not in dispute as per the plaintiff's counsel submissions, the wording of the red notice is however in dispute and in order for the court to make a determination on whether the wording of the red notice amounted to defamation; same was supposed to have been placed before court. Based on the submissions before me I am not convinced that the plaintiff's Article 8 rights were violated as he claims.

[29] I am further in agreement with the defendant's submission in that when the red notice was issued whatever the wording may have been, in these circumstances was justifiable and lawful as the plaintiff was already convicted and therefore a fugitive. The notice, in my opinion, does not amount to defamation taking into consideration that the plaintiff conceded that he was charged with a very serious offence and was convicted of the offence and consequently sentenced upon his extradition to Namibia. I must mention that I am nowhere near convinced that the plaintiff did not understand what had transpired on 29 February 2016 when he was convicted. The plaintiff drafted his own particulars of claim, which I must say are very well crafted for a person who does not understand English.

[30] Regarding the issue of fugitive, I am fairly convinced that the plaintiff falls neatly in

the definition of fugitive as defined herein.

[31] For those reasons, I make the following orders:

1. The application by the defendants for absolution from the instance is hereby granted.
2. The plaintiff is ordered to pay the costs of suit of the defendants.
3. The matter is removed from the roll and regarded finalised.

Judge's Signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff/ Respondent	Defendants/ Applicants
Ms Siyomunji of Siyomunji Law Chambers Windhoek	Mr Kashindi of the Government Attorneys Windhoek