

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2019/02299

In the matter between:

TALENI PETRUS MANJA

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST DEFENDANT

CHIEF OF THE DEFENCE FORCE

2ND DEFENDANT

MINISTER OF DEFENCE

3RD DEFENDANT

Neutral citation: *Manja v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/02299) [2021] NAHCMD 571 (07 December 2021)

Coram: SIBEYA J

Heard: 10 –14 August 2020

Order: 19 November 2021

Reasons: 07 December 2021

Flynote: Delict – Action for damages – Based on bodily injuries, pain and suffering, emotional and psychological trauma –Emanating from an alleged assault perpetrated by members of the Namibian Defence Force (the NDF) – Question for

determination, whether the plaintiff was assaulted by members of the NDF or not – Court invited to assess the applicability of the decision in *Makhetha v Minister of Police* – Court finding that the plaintiff was assaulted – Identity of the assailants – Evidence not sufficient to prove on a balance of probabilities that plaintiff was assaulted by members of the NDF – Plaintiff's claim dismissed

Summary: The plaintiff instituted the action against the defendants over an alleged assault executed on him by members of the NDF. According to the plaintiff, the NDF members failed to protect him and assaulted him while they were in uniform and acting in the course and scope of their employment. After the assault, the NDF members jumped in NDF motor vehicles and left the scene. The plaintiff sustained injuries, suffered pain and suffering and was bedridden for several days. The defendants denied the plaintiff's claim and disputed the material parts which suggests that members of the NDF assaulted the plaintiff.

Plaintiff led evidence, at the end of which, the defendants applied for absolution from the instance. The application was dismissed with costs. Thereafter, the defendants reciprocated by leading evidence of their own. Evidence was analysed in order to determine whether the plaintiff proved his claim or not.

Held – It cannot be said that the failure to proffer a satisfactory explanation to the *prima facie* proof advanced by the plaintiff in support of his claim manifests into full proof of the claim. The failure to tender a satisfactory explanation to the plaintiff's *prima facie* proof may, bearing in mind the burden of proof required, amount to sufficient proof of the claim, but not necessarily full proof. The failure to render a satisfactory explanation therefore does exclude all possible explanations to the claim but may be sufficient to elevate the *prima facie* evidence into satisfactory evidence, the basis on which a court may find in favour of the plaintiff.

Held – It is settled law that where the evidence presented by the parties stands in total contrast, the court may consider the candour and demeanour of witness, self-contradiction, or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradict an established fact.

Held – The evidence led by the defendants tendered a satisfactory explanation against the claim that the plaintiff was assaulted by members of the NDF. It is found that the plaintiff failed to produce conclusive evidence that he was assaulted by members of the NDF. The court accepts the version of the defendants to be probably true and rejects that of the plaintiff as being highly improbable and unreliable and dismiss the claim.

ORDER

1. Plaintiff's claim is dismissed with costs.
 2. The matter is removed from the roll and regarded as finalized.
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JUDGMENT

SIBEYA J:

Introduction

[1] 31 December of each year is a memorable day where persons world over, reflect on the achievements in the year. Some, more fortunate than others, realize the major part of their resolutions while others hope to have a second bite of the apple in the subsequent year. Suffice to state that the 31st of December, particularly the evening thereof that leads to the 01st day of the new year is an evening that commands happiness and a wide range of celebrations. It is therefore the worst day on which one can be subjected to cruel treatment, pain and suffering through assault.

Background

[2] The plaintiff instituted action against the defendants for damages based on bodily injuries, pain and suffering, emotional and psychological trauma emanating from the alleged assault perpetrated by members of the Namibian Defence Force (the NDF). The members of the NDF are, duty bound, to protect the plaintiff and members of the public against any assault and violence. Plaintiff claims an amount of N\$1 000 000 made out of N\$600 000 for pain and suffering and N\$400 000 for loss of enjoyment of amenities of life. Plaintiff further claims that the said members of the NDF were acting in the course and scope of their employment under the Minister of Defence.

[3] The defendants took issue with the plaintiff's claim and disputed the material parts which avers that, members of the NDF assaulted the plaintiff.

[4] The trial commenced and the plaintiff led evidence of two witnesses. At the end of the plaintiff's case, the defendants applied for absolution from the instance, which was dismissed with costs. Thereafter, the defendants reciprocated by leading evidence of two witnesses of their own. This court is therefore seized with a task to analyze the evidence of all witnesses and determine whether the plaintiff proved his claim or not.

The parties and their representation

[5] The plaintiff is Taleni Petrus Manja, a major male person residing at Erf 1114, Gladiola Street, Khomasdal, Windhoek.

[6] The 1st defendant is the Government of Republic of Namibia, duly constituted as such in terms of the Namibian Constitution (the Constitution) whose address is the care of the Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[7] The 2nd defendant is the Chief of the Namibian Defence Force, duly appointed in terms of Article 32(4)(c)(aa) of the Constitution, whose primary function is to

supervise, administer and control the Namibian Defence Forces and whose address is the care of the Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[8] The 3rd defendant is the Minister of Defence, duly appointed as such in terms of Article 32(3)(i)(dd) of the Constitution as the Minister responsible for the conduct and affairs of the Namibian Defence Forces, whose address is the care of the Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[9] Where reference is made to the plaintiff and all the defendants jointly, they shall be referred to as the “the parties”.

[10] The plaintiff is represented by Ms. S. Zenda while the defendants are represented by Mr. F. Kadhila.

Pleadings

[11] In the particulars of claim, the plaintiff alleges that on 31 December 2018 at around 23h22 at Babylon at the four-way stop near Maxuilili Centre, he was aggressively pulled out of a motor vehicle by members of the NDF. Thereafter, they kicked him all over the body with booted feet and caused a laceration on his head. At the same time, six or more police officers interrogated him. The members of the NDF then instructed him to walk towards the riverbed, thus creating fear in the plaintiff that they would assault him further, away from the public eye. They instructed him to walk notwithstanding his state that he was in pain resulting from the assault. He walked until he lost consciousness and fell to the ground. The NDF members failed to take him to the nearest medical facility. Plaintiff claims.

[12] As a result of the assault, plaintiff alleges that he sustained bodily injuries, a laceration around his right eye, suffered and continues to suffer from extreme pain and suffering as well as emotional and psychological trauma. It is on this basis that he claims for damages.

[13] The defendants denied the claim. The basis for the denial as set out in the plea is that the plaintiff was not assaulted by members of the NDF. They further denied that members of the NDF were anywhere near the Maxuilili four-way stop on 31 December 2018. The defendants also denied that members of the NDF failed to protect the plaintiff. They disputed the damages claimed by the plaintiff.

Issues for determination

[14] A joint pre-trial report dated 27 January 2020 which was made an order of Court on 12 March 2020 listed the following issues for determination by the trial court as agreed by the parties:

- a) Whether the plaintiff was unlawfully assaulted on 31 December 2018 by members of the NDF;
- b) Whether the NDF members manned the roadblock at or near Babylon close to Maxuilili Centre at the four-way stop;
- c) Whether the plaintiff sustained injuries as a result of the unlawful assault;
- d) Whether the plaintiff suffered damages as a result of the unlawful assault and whether he is entitled to a claim for damages;
- e) Whether the defendants are vicariously liable for the actions of the unidentified persons.

[15] This court in *Mbaile v Shiindi*¹ in para [10] remarked as follows regarding the importance of listing issues in dispute between the parties:

‘The stage of the pre-trial hearing is arguably the most crucial procedural step leading to the trial. It requires of the parties or their legal representatives to analyse the pleadings and documents filed of record with an eagle eye and in order to unambiguously lay the factual issues in dispute before court. Inevitably, at this stage, the pleadings would have been closed and discovery occurred.² The parties are therefore duty bound to strip the pleadings and documents filed of record to their bare bones in order to identify the real issues for resolution by the court. Parties should further be mindful that they are bound to the issues which they bring to court for determination. It is not the responsibility of the court to navigate through various issues raised for determination in order to pinpoint what is relevant,

¹ (HC-NLD-CIV-ACT-DEL-2018/00316) [2020] NAHCNLD 152 (22 October 2020).

² Rule 26.

but that of the parties to bring forth their disputes and point out the issues for determination from their dispute.'

[16] In consistency with the above remarks, I will restrict myself to the issues for determination listed by the parties, which were referred for trial. In the premises, I find it opportune at this stage to consider the evidence led.

Plaintiff's evidence

[17] The plaintiff testified as the first witness in attempt to prove his claim. It was his testimony that during the night of 31 December 2018 at around 23h00, he boarded a taxi, with other passengers, in Shandumbala, Katutura destined for Khomasdal. The taxi driver then drove to Babylon to drop off other passengers. At the four-way stop near the Maxuilili Centre, a member of the NDF armed with an AK47 rifle approached the taxi driver and questioned him and the passengers about their movements. It was plaintiff's testimony that he greeted the NDF member who became aggressive and accused the plaintiff of being arrogant.

[18] Plaintiff further testified that the NDF member pulled him out of the taxi, cocked the firearm and instructed the taxi driver to drive away. The NDF member then pushed the plaintiff towards the place where about five NDF members stood. Plaintiff sounded a warning that he is aware of his rights. He was questioned by NDF members who acted within the course and scope of their employment, and when he provided no answers, he was slapped across the face by one member. Several NDF members assaulted him all over his body until such time that he fell to the ground. They continued to kick him on his body. He sustained injuries and suffered from severe pain. One member instructed him to walk towards the riverbed. He defied the instruction, and the NDF members later walked away towards their vehicles. He, at this time, removed his phone and wrote down the registration numbers of the NDF vehicles.

[19] He testified further that the NDF vehicles consisted of a white pick-up truck bearing registration number NDF 3690 and a camouflage painted vehicle bearing registration number NDF 5652. He then proceeded to the Wanaheda Police Station

where he reported the assault and registered a criminal case against members of the NDF.

[20] Plaintiff stated that he reported to the police that he did not know the identity of his assailants, but they were NDF members, and he wrote down the registration numbers of the vehicles used. He also laid a complaint on the defendants' social media Facebook page. Two days later, he was called to a meeting at the NDF offices by officer Shilumbu where he narrated his ordeal, but nothing of significance was achieved at the said meeting.

[21] He later made inquiries on the criminal case with Mr Alweendo of Wanaheda Police Station. Thereafter a meeting was convened by Mr. Alweendo where officers of the NDF were in attendance. At the said meeting, a certain Mr. Carlos allegedly admitted to having driven one of the NDF vehicles present at the scene.

[22] The plaintiff testified further that he later went to the hospital where he was examined by a medical doctor, Dr. Christian Ndambi. He was bedridden for several days due to the assault, so he claimed.

[23] Mr. Kadhila, counsel for the defendants, resolutely persisted in the denial that NDF members did not assault the plaintiff as claimed. During cross-examination by Mr. Kadhila on the identity of his assailants, the plaintiff testified that he recalled that he was removed from a taxi by a slim bodied NDF member but could not shed light on whether this officer also assaulted him or not. The plaintiff further stated under cross-examination that while he could not recall the number of NDF members who approached him before the assault, he recalled that while he was on the ground, he was assaulted by six to seven people. When pressed further by Mr. Kadhila on how he was able to count the assailants while on the ground, the plaintiff, by flip of a hand, stated that he could not count the number of NDF members.³

[24] The plaintiff further led the evidence of Dr. Christian Ndambi. Dr Ndambi testified that he examined the plaintiff on 01 January 2019 at Katutura State Hospital. The examination revealed that the plaintiff had a soft tissue injury. It was his finding that plaintiff had sub-conjunctive haemorrhage of the white part of the right eye

³ Record p. 83.

which resulted from damage to a vein in the right eye of the plaintiff. This caused blood to appear on the white part of the eye.⁴ The doctor disputed suggestions that the injuries observed could have been caused by bacteria and insisted that the injury resulted from blunt force trauma. Plaintiff complained of general body pain. The doctor wrapped up his testimony by stating that he did not observe any open wound, swollen eye, fracture, or dislocation on the plaintiff.

Defendants' case

[25] As stated hereinabove, subsequent to the closure of the plaintiff's case, the defendants brought an application for absolution from the instance, which was dismissed, as the court opined that there was *prima facie* evidence on which a court acting reasonably could find in favour of the plaintiff. The defendants thereafter led the evidence of Mr. Christian Munyika and Mr. David Kasu.

[26] Mr. Munyika testified, *inter alia*, that he holds the position of a major in the NDF. On 31 December 2018, he was in Windhoek surveying possible areas for patrol to be conducted during the following week. At 22h00, he started off from Patrick Iyambo Police College in Olympia and drove alone in a vehicle bearing registration number NDF 5652. He patrolled together with Mr. Kasu who was equally the lone occupant in a police vehicle bearing registration number POL 7683. No other vehicle was in their company, so he testified. No roadblocks were conducted that evening. His route from 22h00 on 31 December 2018 to 01h00 on 01 January 2019 was Olympia to Otjomuise, and then Havana to Ombili, passed by Okuryangava and drove to town. From 01h00 to 05h00, he only patrolled in the areas of town.

[27] His testimony was further that on 05 January 2019, he was called by Sergeant Alweendo. Sgt Alweendo, in the company of the plaintiff who claimed to have been assaulted by NDF members, inquired on the movements of Mr. Munyika on 31 December 2018. Mr. Munyika explained his movements, denied the assault and stated that he never saw the plaintiff before. Plaintiff was questioned if he saw Mr. Munyika prior to the meeting and he responded that he does not know him, as testified by Mr. Munyika.

⁴ Exhibit "F" and "G".

[28] The defendants then led the evidence of Mr. David Kasu, a Chief Inspector in the Namibian Police. Mr. Kasu corroborated the evidence of Mr. Munyika, *inter alia*, that on 31 December 2018, they surveyed areas in Windhoek for future patrols. He drove a police vehicle bearing registration number POL 7863 as the sole occupant of the vehicle in the company of only Mr. Munyika, who was also the sole occupant of the vehicle bearing registration number NDF 5652. There were no other vehicles in their company. No roadblocks were conducted. He further corroborated the evidence of Mr. Munyika regarding the route taken and the time travelled.

Burden of proof

[29] The parties are *ad idem*, correctly so, that the plaintiff bears the burden to prove his claim on a balance of probabilities. Ms. Zenda went an extra mile and referred the court to the old passage from *Ex Parte Minister of Justice in Re R v Jacobson and Levy*,⁵ which reverberated in several judgments, where Stratford JA remarked that:

‘If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence “calls for an answer” then, in such a case, he has produced *prima facie* proof, and, in the absence of an answer from the other side it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof.’

[30] The above explanation of *prima facie* evidence or *prima facie* proof has been followed over time. The explanation is however in my view subject to criticism in as far as it provides that the absence of an answer or satisfactory answer from the opposing party entails that the plaintiff completely discharged his onus of proof. The word “completely” is synonymous to “fully” or “entirety”. It cannot, in my considered view be said that the failure to proffer a satisfactory explanation to the *prima facie* proof advanced by the plaintiff in support of his claim manifests into full proof of the claim. To the contrary, the failure to tender a satisfactory explanation to the plaintiff’s *prima facie* proof may, bearing in mind the burden of proof required, amount to sufficient proof of the claim. The failure to render a satisfactory explanation therefore

⁵ 1931 AD 466 at 478 – 9.

does close out all possible explanations to the claim but may be sufficient to elevate the *prima facie* evidence into satisfactory evidence, the basis on which a court may find in favour of the plaintiff.

[31] Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*⁶ discussed the burden of proof and plainly stated as follows:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

[32] The defendants do not appear to have qualms with the above-mentioned approach. The said established approach doubtlessly sets out the manner of analysis of evidence. It is further in keeping with the above, that upon dismissal of the application for absolution from the instance, the court called on the defendants to lead evidence in order to substantiate their defence or bring forth a satisfactory explanation to the plaintiff's claim.

Mutually destructive versions

⁶ *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

[33] It is clear as day in this matter that parties locked horns on the question whether the plaintiff was assaulted by members of the NDF or not. Parties further led evidence which is mutually destructive and cannot co-exist on the identity of the assailants.

[34] It is settled law that where the evidence presented by the parties stands in total contrast, the court may consider the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradict an established fact.

[35] In *National Employers' General Insurance v Jagers*,⁷ Eksteen AJP discussed the approach to mutually destructive evidence and stated the following:

'In a civil case ... where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

Analysis of evidence and submissions

[36] Ms. Zenda, in her quest to convince the court to find in favour of the plaintiff, placed heavy reliance on the South African High Court judgment of *Makhetha v Minister of Police*.⁸ The court found Ms. Makhetha to be honest and credible and found in her favour. The court further found that Ms. Makheta, whose injuries were consistent with her evidence, was a reliable witness and accepted her evidence as truthful that she was assaulted by unknown members of the police.

[37] The defendants, to rebut the plaintiff's evidence, led the evidence of the police officer who carried out the investigation of the plaintiff's complaint. The witness failed to consult with the officers who were on duty during the night of the alleged assault. The evidence of the defendants' witness was found by the court to be too general, cursory, and not impressive at all. It was the defendants' testimony further that,

⁷ 1984 (4) SA 437 (E) at 440D-E.

⁸ (59521/2012) [2015] ZAGPPHC 928 17 December 2015.

notwithstanding the lawfully prescribed manner in which the police should act, at times they deviate and make mistakes. The court in the *Makhetha* matter found the defendants' sole witness unreliable, whose evidence raised no defence to the plaintiff's claim and evidence.

[38] The court in *Makhetha* at para [52] referred to a passage by Lord Denning on what constitutes proof on a preponderance of probabilities where he stated that: "The evidence must carry a reasonable degree of probability but not so high as is required in a criminal case. If such evidence is such that a tribunal can say that 'we think it is more probable than not, the burden of proof is discharged, but if the probabilities are equal, it is not". It is on the backdrop of the *Makhetha* judgment that Ms. Zenda invited this court to disregard the bare denials of the defendants, so she argued.

[39] The *Makhetha* decision reveals a well-reasoned judgment. It is particularly apparent from the decision of the court that the plaintiff must, *prima facie*, prove his claim, against the defendants. In such instance, the defendants will assume the duty to lead evidence in attempt to rebut the plaintiff's claim and evidence. The defendants would therefore be required not only to proffer bare denials without substance but lead reliable evidence, this without losing sight of the legal foundation that the burden of proving a claim lies with the plaintiff. The relevancy or not of the *Makhetha* judgment to the present matter depends on the similarities or disparities with the matter to the one at hand. I will revert to this subject later as the judgment unfolds.

[40] In *casu*, the plaintiff led evidence which proved his claim on a *prima facie* basis, hence the dismissal of the defendants' application for absolution from the instance. The question that begs the answer at this stage is whether, after hearing the defendants' evidence, it can be concluded that the plaintiff proved his claim on a balance of probabilities.

[41] From the evidence led, it is established that:

a) The plaintiff was assaulted on 31 December 2018, where he sustained bodily injuries and pain;

b) After the assault, he reported the matter to the Namibian Police for investigation and prosecution;

c) He was examined by the medical doctor, where it was found that a vein in his right eye was damaged, causing the eye to be red and such injury could not have been caused by bacteria but by blunt force trauma;

[42] It follows from the above that the plaintiff was assaulted on 31 December 2018, as a result of which he sustained injuries to his eye and suffered body pains.

[43] The determinant question in this matter is therefore this: who assaulted the plaintiff?

[44] *Mr. Kadhila* remained steadfast in his attack on the evidence of the plaintiff that the assault was not occasioned by members of the NDF. To say that the defendants simply disputed the evidence that members of the NDF assaulted the plaintiff is an understatement. *Mr. Kadhila* went all out to dispute every fact suggesting that the NDF members assaulted the plaintiff.

[45] *Ms. Zenda* was not to be outmuscled. She submitted with vigor that the defendants perpetrated the assault on the plaintiff. It was her argument that the defendants' witnesses fabricated their testimonies. This, she submitted, is premised on the basis that from the onset of the matter, they were hellbent on frustrating the investigation and mislead the court.

[46] The court thus must determine as to who of the two protagonists is on the correct side of the law.

[47] There were a few contradictions in the evidence of the plaintiff. Firstly, the plaintiff provides in the particulars of claim that after being assaulted, he was instructed by members of the NDF to walk towards the riverbed while in pain, he walked until he lost consciousness and collapsed to the ground. In evidence, plaintiff testified that one of the members of the NDF instructed him to stand up from the ground and walk towards the riverbed. He refused to go to the riverbed and informed the NDF member that if such member intended to kill him, he could do so. Thereafter, all NDF members walked to their vehicles. It was at this stage that the

plaintiff testified further that he took out his cellular phone device and recorded the registration numbers of the NDF vehicles. The cellular phone device where the registration numbers were alleged to have been recorded was not submitted into evidence. In the witness statement made to the police on 31 December 2018,⁹ the plaintiff stated the following:

‘When I got up from the ground, they said I should go. I told them I will not go anywhere but will stand there and look for another taxi. They were insisting for me to go and they left me alone and drove away’

[48] The plaintiff further stated in his particulars of claim that he was subjected to torture, inhuman and degrading treatment by six or more police officers.¹⁰ In evidence, the plaintiff makes no reference to police officers but testified to members of the NDF. It is a point of note that the action is brought against the NDF and not the police.

[49] It was further the evidence of the plaintiff that an NDF member, a certain Mr. Carlos, admitted to having driven one of the NDF vehicles at the scene. This version was disputed by Mr. Munyika. Plaintiff further testified about a telephone call between a certain Mr. Shilumbu and Mr. Mbaisako, both of whom were not called to testify, thus reducing the content of their alleged conversation to being inadmissible hearsay evidence.

[50] For the defendants, Mr. Munyika and Mr. Kasu corroborated each other to a larger extent on relevant aspects of their evidence but contradicted themselves on the registration number of the vehicle driven by Mr. Kasu. It was the testimony of Mr. Munyika that Mr. Kasu drove a vehicle bearing registration number POL 7683, while Mr. Kasu testified that the registration of the vehicle which he drove was POL 7863. This contradiction is minor and is of no moment in my considered view.

[51] The evidence of the defendants’ witnesses distances the NDF members away from the scene. Ms. Zenda submitted that notwithstanding the fact that the defendants’ witnesses did not change their statements, they nevertheless fabricated their version in order to shield the NDF.

⁹ Exhibit “D”.

¹⁰ Para 8.3 of particulars of claim.

[52] The plaintiff has a vested interest in the success of his claim against the NDF. It follows therefore that where, as in *casu*, the defendants deny the averment that their members were present at the scene, the court should carefully analyse the totality of the evidence led with a view to determine whether the plaintiff has proven his claim or not.

[53] This court has found that the plaintiff was assaulted. The plaintiff's claim stands or falls on the identity of the assailants, particularly in view of the defendants' assertion that the plaintiff may have randomly mentioned the registration numbers of the NDF vehicles or may have noticed the NDF vehicles on the street on any given day and then just record the numbers.

[54] The contradictions referred to above in the evidence of the plaintiff and the averments in the particulars of claim puts a dent in the plaintiff's evidence. One of the crucial aspects of the evidence of the plaintiff is the time of recording the registration numbers of the NDF vehicles. The evidence is sketchy on the event that preceded the recording of the registration numbers. Did the plaintiff walk until such time that he became unconscious and fell to the ground before the recording, or did he refuse the instruction to walk and was left standing when the NDF members left the scene just before he recorded the registration numbers on his cellular phone device. The importance of these questions lies in the contradiction in the particulars of claim, the plaintiff's police witness statement and his evidence in court. If the plaintiff was resurrecting from unconsciousness when he recorded the numbers, his recollection could be a serious issue and could be called into question.

[55] The plaintiff further did not call police officer Mbaisako to testify. No explanation was proffered by the plaintiff for such failure, considering that the plaintiff alleged that Mbaisako investigated the claim and questioned the NDF member Shilumbu who is alleged to have been at the scene.

[56] Ms. Zenda submitted that Mr. Munyika was present at the scene and his evidence where he distances himself away from the scene amounted to a fabrication. As alluded to before, the evidence of Mr. Munyika was corroborated on all material parts by Mr. Kasu.

[57] Mr. Kasu is a member in the employ of the Namibian Police. He is not a party to these proceedings neither is his commander, the Inspector-General of the Police, nor his employer, the Minister of Safety and Security. There is further no evidence (except for the averment in the particulars of claim) to suggest that the members of the police were involved in the assault of the plaintiff. The outcome of this matter, therefore, bears no effect on Mr. Kasu and the Namibian Police. I find that Mr. Kasu and the Namibian Police have nothing to gain or lose in this matter and therefore have no interest. I therefore find that Mr. Kasu is an independent witness herein.

[58] The evidence of Mr. Kasu struck me as credible and stood unshaken in cross-examination. He was forthright in cross-examination that he was not at the scene nor was Mr. Munyika and further that they were at all material times in each other's company while occupying two different vehicles. He testified that he witnessed no confrontation with members of the public during the night of 31 December 2018. He was persistent in cross-examination on the route that he drove together with Mr. Munyika during the night in question. I therefore do not agree with the submission by Ms. Zenda that the defendants' witnesses offered bare denials to the claim. To the contrary, on the aspect in dispute, the identity of the assailants, the defendants led detailed evidence that denied the presence of the NDF members at the scene. It consequentially follows that the facts of this matter are miles apart from those in the *Makhetha* judgment and the reliance thereon by Ms. Zenda to argue that the claim should succeed because the defendants tendered bare denials is misplaced.

[59] From all the witnesses that testified on the merits of the matter, Mr. Kasu stood out as a very impressive witness whose evidence I found to be reliable. The credibility of Mr. Kasu as a witness towered over that of the plaintiff by far.

[60] I have carefully analysed the evidence adduced by the parties and I have found that the evidence led by the plaintiff is satisfactorily answered by the defendants. I also find that the evidence of Mr. Munyika was not only consistent and rational, but it was also, more importantly, corroborated by the evidence of an independent witness, Mr. Kasu, who had nothing to gain from the dispute.

Conclusion

[61] I find that the evidence led by the defendants tendered a satisfactory explanation to the claim that the plaintiff was assaulted by members of the NDF. I further find that the plaintiff failed to produce conclusive evidence that he was assaulted by members of the NDF.

[62] In the premises of the above conclusions and findings, this court accepts the version of the defendants to be probably true and rejects that of the plaintiff as being highly improbable and unreliable.

Costs

[63] It is well established in our law that costs follow the event. No compelling reasons were placed before this court why this matter should depart from the settled norm of costs following the result. No persuasive reasons could also be deduced from the evidence, nor was it convincingly argued that the court should depart from the said established principle on costs. Consequently, the defendants are awarded costs.

[64] In the result, I order as follows:

1. Plaintiff's claim is dismissed with costs.
2. The matter is removed from the roll and regarded as finalized.

O S SIBEYA
JUDGE

APPEARANCES:

PLAINTIFF: S Zenda
Of Legal Assistance Centre,
Windhoek.

DEFENDANT: F Kadhila
Of the Office of the Government Attorney,
Windhoek