

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-ACT-OTH-2020/05161

In the matter between:

SEBASTIAAN ELS

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

1ST DEFENDANT

THE INSPECTOR-GENERAL OF THE

2ND DEFENDANT

NAMIBIAN POLICE

THE PROSECUTOR-GENERAL OF NAMIBIA

3ND DEFENDANT

Neutral citation: *Els v The Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2020/05161) [2022] NAHCMD 557 (14 October 2022)

Coram: HANS-KAUMBI AJ

Heard: 15, 16 and 18 August 2022

Delivered: 14 October 2022

Flynote: Delict – Unlawful Arrest and Detention – Section 40 (1)(h) of the Criminal Procedure Act 51 of 1977– Reasonable suspicion must exist on reasonable

ground to effect an arrest without a warrant – No unlawful detention where an accused is brought within 48 hours before a court and granted bail thereafter – Section 50 (1) of the Criminal Procedure Act 51 of 1977.

Summary: A Criminal case was opened against the plaintiff by his former crew for shooting and killing seals at sea, discharging of a firearm in a public place and assault by threat. Part of the evidence the complainants submitted in opening their case was a picture allegedly depicting the plaintiff at sea with a gun.

Armed with evidence and statements under oath by the complainants, the police on the 19 December 2019 arrested the plaintiff at 02h00 upon his arrival from a fishing trip without a warrant and kept him in custody for about 15 hours before he was granted bail on the same day.

Plaintiff was tried and at the end of the state's case he applied for a discharge in terms of s 174 of the CPA. Consequent to the discharge, plaintiff is now suing the defendant for unlawful arrest and unlawful detention on the basis that he was arrested at 02h00 without a warrant of arrest and held in custody for 15 hours.

Held that, based on the evidence heard and the exhibits handed in, the police had a prima facie case against the plaintiff, which is not necessary for purposes of arrest as it is sufficient to have a reasonable suspicion on reasonable grounds to arrest a person without a warrant in terms of the Section 40(1) of the Criminal Procedure Act, 51 of 1977.

Held, that a reasonable suspicion existed on reasonable grounds in terms of s 40 (1) (h) of the Criminal Procedure Act 51 of 1977 to effect a lawful arrest.

Held Further, the plaintiff was not unlawfully detained as he was brought to a court of law on the very same day he was arrested, i.e., within a period of 48 hours, and released on bail. This was done in terms of section 50 of the Criminal Procedure Act 51 of 1977.

ORDER

1. The plaintiff's claim is dismissed with costs.
2. The matter is finalised and removed from the roll.

JUDGMENT

HANS-KAUMBI AJ:

Parties

- [1] The Plaintiff is Sebastian Els, an adult male Captain of the Endeavor and employed as such at Endeavour Fishing, Walvisbay.
- [2] The first defendant is The Minister of Safety and Security.
- [3] The second defendant is the Inspector-General of the Namibian Police.
- [4] The third defendant is Prosecutor General of Namibia.

Introduction

- [5] The plaintiff brought an action against the first and second defendants for unlawful arrest and detention whereby he claims an amount of N\$50 000 in respect of damages as a result of:
- a) Loss and/or deprivation of liberty;
 - b) Discomfort; and
 - c) Contumelia.
- [6] The plaintiff claims that the arrest and detention was unlawful on the basis that the arrest was effected without a warrant.

[7] The defendants contend that a reasonable suspicion existed at the time of the arrest, in that the plaintiff committed offences to wit, contravening s 54 (4)(e) of the Marine Resources Act 27 of 2000, discharging a fire arm in a public place and assault by threat. It was further averred that other charges were also levelled against the plaintiff to wit interference, obstruction, defeating the course of justice and possession of a firearm without a licence. It is admitted that the arrest was effected without a warrant and was lawful and properly executed in terms of s 40 (1) (h) of the Criminal Procedure Act 51 of 1977 (CPA) which authorises a police officer to arrest any person without a warrant on reasonable suspicion that he committed an offence under any law governing the possession or disposal of arms or ammunition. It is further pleaded by the Defendants that criminal cases were opened against the plaintiff upon his arrest under criminal case numbers CR 05/12/2019 and CR 08/12/2019 for the offences mentioned above.

[8] The Defendants further aver that the plaintiff was not unlawfully detained as he appeared before a Magistrate within 48 hours of his arrest, as prescribed by s 50 (1) of the CPA.

Issues for determination

[9] The issues for determination are:

- (a) Whether the plaintiff was lawfully arrested by the police officers at approximately 02h00 on or about the 19th day of December 2019 at Walvis Bay?
- (b) Whether the plaintiff suffered damages as a result of the arrest in the amount of N\$50 000?

Plaintiff's Evidence

[9] Plaintiff testified that he is a Captain on a vessel called the Endeavour and that he left for a fishing trip on the 4th of December 2019 and was arrested on the 19th of December 2019 at about 02h00 upon arrival from the fishing trip. The two police officers introduced themselves and told him that a case for allegedly shooting seals at sea was opened against him. Sergeant Negumbo, the arresting officer, then asked

him if he had a rifle on the vessel and he indicated that his rifles are at home in his safe.

[10] Plaintiff was then asked by the police officers to take them to his home to collect the rifles in his safe. Plaintiff obliged and took them to his house where they searched the safe in his bedroom and retrieved two rifles, two rifle bags, all the ammunitions found in the safe and his South African passport.

[11] The plaintiff avers that at the time the police officer approached him at the vessel and when he subsequently took them to his house to search for the rifles, he was not presented with a warrant of arrest and a search warrant. The only information the police officer conveyed to him was that a case of shooting and killing seals at sea was opened against him.

[12] After the search of the vessel the plaintiff was informed that he was under arrest and was then detained. Later the plaintiff was taken to a room in the presence of police officers, including Sergeant Negumbo, who then informed the plaintiff about his rights to legal representation.

[13] After being informed about his rights, one of the police officer asked the plaintiff where the AK 47 was that he used to shoot and kill seals with. Plaintiff answered that he did not own any AK 47 and asked to speak to his lawyer, a request that was not catered for but instead met with the same question of where was the AK 47 over and over whilst he kept denying having an AK47.

[14] Later that day, Ms Koekemoer, a legal practitioner hired by the plaintiff's employer Glen Duncan (Mr. Duncan) came to consult with the plaintiff.

[15] The police officers were not satisfied with plaintiff's denial of ownership or possession of the AK 47 and they again hand cuffed the plaintiff and took him to his house to search for the AK 47 but failed to find it. When they failed to find it at his home they extended the search to the vessel.

[16] Plaintiff avers further that, at the vessel and in front of his crew, the police officer marched him up and down, an action which, according to the plaintiff, was embarrassing to him and he refused to get on the vessel during that search. The search at the vessel proved futile as they did not find the AK 47 they were looking for.

[17] After the search, the plaintiff was again locked up and formally charged. At about 17h00 on the same day the plaintiff was brought before a Magistrate Court for bail proceedings and he obtained bail in the amount of N\$15 000.

[18] On 12 February 2021 the case against the plaintiff was discharged in terms of s 174 of the Criminal Procedure Act in the Magistrates Court.

[19] During cross examination, the Plaintiff alleged that the arrest was unlawful because he was arrested at 02h00 in the morning and was treated like a criminal whilst he was not guilty. He further testified that his rights were not explained to him when he was arrested, however he did not say that the arrest was unlawful because of it.

[20] During cross examination, Counsel for the defence then asked the plaintiff whether he was aware that as part of the bundle of discovered documents, there were photos provided by his crew which indicated that he was the person who was shooting the seals. His answer to this question was in the affirmative.

[21] The plaintiff further confirmed that he knows that one can be arrested without a warrant and that one can be arrested for discharging a fire arm in a public place.

[22] The plaintiff called three other witnesses who could not shed any light on his arrest as they were not present and their evidence did not support the plaintiff's case on the basis that he was arrested unlawfully based on the fact that it was done without a warrant.

Defendant's evidence

Testimony of Sgt Negumbo

[23] Sgt Negumbo testified that, he was the investigating officer in the criminal case CR05/12/2019 in which the charges were as follows: (a) contravening of s 52(4)(e) and (f) of the Marine Resources Act No.27 of 2000; (b) assault by threatening; (c) discharging a firearm in a public place.

[24] He testified that according to the statements he obtained during December 2019, the alleged incident took place on the 27th of November 2019 at about 10h31 am at sea and the plaintiff allegedly unlawfully and intentionally shot and killed marine animals (seals) with a black fire-arm and that that was not the first incident. It was further alleged that the plaintiff used the same black fire-arm to threaten the employees on the vessel as well as discharging the fire-arm next to or nearby the employees, which made them uncomfortable.

[25] He further stated that one of the plaintiff's crew that reported the matter to the police took pictures of the plaintiff carrying out the shootings. The vessel was still at sea when the case was opened, so he proceeded to obtain a search warrant to carry out a search and seizure for the black firearm used in committing the alleged offences.

[26] He testified that, on 19 December 2019 at about 00h22 he received information that the vessel was back from sea and was about to dock and he requested Detective Warrant Officer Shikongo to accompany him to the vessel and assist him in the search and seizure of the fire-arm as well as arresting the plaintiff.

[27] When they arrived at the vessel, they approached him and introduced themselves and informed him of his legal rights and he was informed of the reasons why he was being arrested. He was then provided with a search warrant and he indicated that he was willing to cooperate and informed them that he has the rifle they are looking for at home and not on the vessel.

[28] The plaintiff took them to his house and opened his safe in his bedroom and they found 2 rifles and different boxes of ammunition. He further testified that, he took the two rifles and the boxes out of the safe and handed them over to Detective Warrant Officer Shikongo for safe keeping and record purposes as he continued searching.

[29] He testifies that he then took the plaintiff to the police station for detention and allowed him to contact his legal representative. The rifles that were confiscated were booked in and they did not include the black fire-arm they were looking for. The plaintiff's legal practitioner arrived at the police station before the plaintiff was detained and insisted that he be charged immediately, she further alleged that she can arrange for the fire arm that the police officers were looking for to be brought to the station.

[30] He testified further that in another attempt to recover the fire arm, they asked the plaintiff to go and search his house again and he agreed. Four police men, including the witness went and whilst there, he received a call from the plaintiff's legal practitioner, who stated that she took the fire arm that they were looking for to the police station. When they returned to the station they found a black magazine of a .22 rifle that was dropped off by the legal practitioner of the plaintiff.

[31] He testifies that the arrest was lawful and properly executed in terms of the provisions of section 40(1) (h) of the CPA which authorises a police officer to arrest any person without a warrant on reasonable suspicion that he was committing or having committed an offence under any law governing the possession or disposal of arms or ammunition.

[32] He stated that his reasonable suspicion arose from the statements he obtained from the crew of the plaintiff under oath and the fact that the plaintiff did not deny the allegations against him at any stage.

[33] He testified that the plaintiff was taken to court on the same day and granted bail of N\$15 000.

[34] Testimony by detective warrant officer Shikongo corroborated the evidence of Sergeant Negumbo.

The law and its application to the facts.

[35] Section 40(1)(h) of the Criminal Procedure Act 51 of 1977 provides that: '(1) A peace officer may without warrant arrest any person- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the possession or disposal of arms or ammunition;'

[36] Section 50(1) provides that: '(1) A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause for his arrest

[37] In the Supreme Court case of *Government of Republic of Namibia v Ndjembo* (SA 39 of 2017) [2020] NASC 56 (30 November 2020) Shivute CJ stated that:

[13] At the heart of the court's assessment of whether there were reasonable grounds to arrest a suspect lies a potential tension between two competing public interests. On the one hand, there is a need to guard against arbitrary arrest or detention that would make greater inroads into constitutional rights of arrested persons.¹ This consideration requires that the purpose of the arrest must be in fact to bring the arrested persons before a court of law to ensure that they are prosecuted and not to harass or punish them for an offence they have not been convicted of.² On the other, there is a greater need to ensure that crimes are effectively investigated and that those who commit them are brought to justice. It is in the interest of the rule of law that reported crimes are effectively investigated. Doubtless, effective investigation of crime serves the interests of victims of crime and of the

¹ Article 11(1) of the Namibian Constitution provides: 'No person shall be subject to arbitrary arrest or detention.'

² Cf. *MacDonald v Kumalo* 1927 EDL 293 at 301; *Tsose v Minister of Justice & others* 1951 (3) SA 10 (A) at 17C-D (*Tsose*).

public in general. What is required therefore is a balance to be struck between these two competing public interests.

[14] The Legislature sought to draw the required balance by providing firstly, in s 40(1)(b) of the Act, that a peace officer may arrest without a warrant any person 'whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody'. Secondly, by providing in s 50(1) of the Act that a person arrested, whether with or without a warrant must be brought to a police station or if arrested on a warrant, to any other place mentioned in the warrant and if not released by reason that no charge is to be brought against him, be detained for a period of 48 hours unless he or she is brought before a magistrate and the further detention is ordered by the court for trial or for the purpose of adjudicating upon the cause for the arrest.

[15] It would appear that the 'jurisdictional facts' that must exist for peace officers to exercise the power conferred upon them by s 40(1)(b) are that the arrestor must be a peace officer; he or she must entertain a suspicion; suspicion that the arrestee has committed an offence referred to in schedule 1 to the Act, and that the suspicion must rest on reasonable grounds."

[38] In the present case, the arresting officer was a peace officer, the issue to be decided is whether he had a reasonable suspicion to arrest and whether that suspicion rested on reasonable grounds.

[39] In *Ndjembo*³, Chief Justice Shivute stated further that:

'[17] Whether a peace officer may arrest without a warrant a person whom he or she 'reasonably suspects' of having committed a schedule 1 offence appears to me to depend on what constitutes reasonable suspicion. This court in *Nghimwena v Government of the Republic of Namibia*⁴ – adopting the views of the authors Lansdown and Campbell – noted that 'suspect' and 'suspicion' are vague and difficult words to define. One of the enduring definitions of the word 'suspicion' was given by Lord Devlin in *Shaaban Bin Hussein & others v Chong Fook Kam & another*:⁵ Speaking for the Privy Council, the learned law lord has this to say on suspicion:

³ Supra.

⁴ (SA27-2011)[2016] NASC (22 August 2016).

⁵ *Hussein & others v Chong Fook Kam & another* [1969] 3 All ER 1627 (PC) at 1630C-D.

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.'(my emphasis)

[40] In this case, the arresting officer testified that he had a reasonable suspicion based on the evidence that was collected during his investigation, i.e. statements from witnesses and photographs allegedly pointing to the plaintiff as the suspect who committed the offences. This was enough for him to form the suspicion and as such he exercised his discretion to arrest the plaintiff whom he says at no stage denied any of the allegations against him. He further found ammunition in the plaintiff's possession which ammunition was confiscated and later returned to the plaintiff when the case was discharged in terms of s 174 of the CPA.

[41] In fact, I am of the opinion based on the evidence heard and the exhibit(s) handed in, that the police had a *prima facie* case against the plaintiff, which is not necessary for purposes of arrest as it is sufficient to have a reasonable suspicion on reasonable grounds. The defendants' version is highly probable as I am convinced that a reasonable suspicion existed on reasonable grounds in terms of s 40 (1)(h) of the Criminal Procedure Act and as such I come to the conclusion that the arrest of the plaintiff was lawful. The plaintiff was further not unlawfully detained as he was brought to a court of law on the very same day he was arrested, i.e. within a period of 48 hours, and released on bail.

[42] For these reasons, I make the following order:

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

AN HANS-KAUMBI

Acting Judge

APPEARANCES

PLAINTIFF: Mr TM Wylie

of Ellis Shilengudwa Inc.,
Windhoek

DEFENDANT:

Mr RH Katjijere
of Government Attorney,
Windhoek