

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-ACT-OTH-2021/01758

**ALFEUS HAFENI**

**PLAINTIFF**

and

**MINISTER OF HOME AFFAIRS AND IMMIGRATION,  
SAFETY AND SECURITY**

**FIRST DEFENDANT**

**RAPHAEL HAMUNYELA OF NAMIBIAN  
CORRECTIONAL SERVICE**

**SECOND DEFENDANT**

**THE OFFICER IN CHARGE WINDHOEK  
CORRECTIONAL FACILITY**

**THIRD DEFENDANT**

**DOCTOR ZIMUDZI WINDHOEK CORRECTIONAL  
FACILITY**

**FOURTH DEFENDANT**

**Neutral citation:** *Hafeni v Minister of Home Affairs and Immigration, Safety and Security* (HC-MD-CIV-ACT-OTH-2021/01758) [2023] NAHCMD 148 (28 March 2023)

**Coram:** MILLER AJ

**Heard:** 13, 14 & 24 February 2023

**Delivered:** 28 March 2023

**Flynote:** Trial – Mutually destructive versions – Plaintiff avers that he was denied medical attention or treatment by the correctional facility and in doing so the defendants breached the duty of care owed to plaintiff – Duty of care – To take such care which is reasonable and prudent in the circumstances.

**Summary:** The plaintiff instituted action against the defendants for N\$1 038 000 for damages suffered as a result of breach of duty by the defendants, alternatively an award in terms of Article 25 of the Constitution of the Republic of Namibia for the violation of his rights to health and bodily integrity. The plaintiff alleges that he was diagnosed with constipation by his private doctor whereafter certain medicine was prescribed to him as well as a high fibre diet. Plaintiff further alleged that he was never provided with the medicine or the high fibre diet by the correctional facility, which worsened his condition and resulted in the development of hemorrhoids and anal fissures.

The defendants defended the action and their defence, in short is, that the plaintiff was treated for his medical condition, a diet high in fibre was already provided by the kitchen in the Windhoek central prison, he was always taken to the hospital for surgery and therefore his rights were not violated in any way. As such he is not entitled to the relief he seeks.

*Held that*, in a civil case where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive versions, 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.

*Held that*, the duty of care owed to the plaintiff is a duty to take such steps as are reasonably prudent or necessary in the circumstances.

*Held that*, as can be ascertained from the entries in plaintiff's passport and the occurrence book the plaintiff was provided with medicine and taken to the Katutura hospital on multiple occasions. Moreover, as testified by the witnesses for the defendants, the correctional facility's approved diet already contains food high in fibre.

*Held that*, on the evidence as a whole and the probabilities of the case, the defendants provided such care as was reasonably necessary and prudent.

---

### **ORDER**

---

1. The plaintiff's claim is dismissed.
  2. There shall be no order as to costs.
- 

### **JUDGMENT**

---

MILLER AJ:

#### Introduction

[1] The plaintiff instituted action against the defendants in the amount of N\$1 038 000 for damages suffered as a result of breach of duty by the defendants, alternatively an award in terms of Article 25 of the Constitution of the Republic of Namibia for the violation of his rights to health and bodily integrity.

[2] The defendants defended the action and their defence is shortly that the plaintiff was treated for his medical condition, a diet high in fibre was already provided by the kitchen in the Windhoek central prison, he was always taken to the hospital for surgery and therefore his rights were not violated in any way. As such he is not entitled to the relief he seeks.

#### Factual issues in dispute

[3] The following issues fall for determination by this court as per the pre-trial order:

3.1 Whether the Plaintiff informed the 4<sup>th</sup> Defendant of his condition of chronic constipation as well as his consultation with Dr Chizoba?

3.2 Whether the Defendants particularly the 4<sup>th</sup> Defendant failed to prescribe medication or to treat the Plaintiff's condition?

3.3 Whether Plaintiff was prescribed or recommended a high fibre diet by his private doctor?

3.4. Whether the 4<sup>th</sup> Defendant undertook to provide the said prescription to the Windhoek Correctional Clinic whereby the nurses will forward it to the kitchen?

3.5. Whether at all material times and when necessary, the Plaintiff was referred to the Katutura Intermediate Hospital for the surgery of his Hemorrhoids by the 4<sup>th</sup> Defendant?

3.6. Whether at all material times after the referral of the Plaintiff by the 4<sup>th</sup> Defendant to the hospital for the surgery of his Hemorrhoids the Plaintiff was every time taken to the aforementioned hospital by the Correctional Facility Officer at Windhoek Correctional Facility?

3.7. Whether the Plaintiff was provided with a high fibre diet as prescribed or recommended by his private medical Doctor as well as the doctors at Katutura State hospital?

3.8 Whether the Defendants have a legal duty of care towards the Plaintiff?

3.9 Whether the Defendants violated the said duty of care towards the Plaintiff?

3.10 Whether Plaintiff's rights to health and bodily integrity were violated by the Defendants?

3.11 Whether Plaintiff suffered the damages he claims?

3.12 Whether Plaintiff is entitled to an award in terms of Article 25 of the Constitution of the Republic of Namibia?

3.13 If the court finds that Plaintiff is entitled to an award in terms of Article 25, the quantum thereof?

#### Plaintiff`s case

[4] Plaintiff testified that he was diagnosed with constipation during June 2017 by his private doctor and then by the 4<sup>th</sup> defendant. He was prescribed certain medicines by his private doctor together with a high fibre diet. On 27 June 2017 he saw the 4<sup>th</sup> defendant and gave him the prescription from his private doctor and at that stage the 4<sup>th</sup> defendant undertook to give the prescription to the kitchen. He also informed the 4<sup>th</sup> defendant that he could not buy the medication prescribed by his private doctor as he did not have money, therefore 4<sup>th</sup> defendant should assist him so that he is able to obtain them from the state.

[5] Plaintiff testified that he did not receive the high fibre diet as a result of which his condition worsened and developed into hemorrhoids and anal fissures which require surgical removal.

[6] He testified that with respect to the issue of whether he suffered the damages, he claims that he indicated in his particulars of claim how he calculated the damages, but most importantly, the quantum is in the discretion of the court. Plaintiff testified further that he handed a letter of complaint on 26 August 2017 to the officer in charge explaining his problems and requesting for intervention. Upon noticing that his plea was unanswered he reminded the officer in charge when he encountered him in the corridor on a later date and that officer informed him to wait as he was working out a plan for him.

#### Defendants` case

[7] Defendants called 3 witnesses.

[8] The first witness who testified on behalf of the Defendants is Mr Manfred Jatamuua, who was the officer in charge at Windhoek Correctional facility from 1 February 2018 to 1 April 2021. He testified that the kitchen at the prison provides food already high in fibre and therefore no need existed for the 4<sup>th</sup> Defendant to prescribe such diet to the Plaintiff.

[9] Mr Manfred Jatamuua further testified that when an inmate makes a complaint it is recorded in the occurrence book. When he looked at the occurrence book, there was no record of the Plaintiff's letter of complaint to the officer in charge. The witness testified that each time that the Plaintiff needed to go to the hospital he made sure that his officers took the Plaintiff to the hospital.

[10] The second witness who testified for the defendants is the 4<sup>th</sup> Defendant Dr Dzimudzi, who was the doctor at Windhoek Correctional facility from June 2017 to February 2019. He testified that he saw the Plaintiff on 27 June 2017 and the Plaintiff had medicine on him that was prescribed by Dr Chidzoba. The witness indicated that he prescribed Anusol for the Plaintiff but cancelled it because he did not want to repeat the same prescription. He denied that he undertook to provide the prescription from Dr Chidzoba to the kitchen. He testified further that the Plaintiff was not prescribed a high fibre diet but it was just a recommendation. He testified that a prescription specifically states what the patient must get in terms of the type of product, quantities and number of times per day. He testified that he referred the Plaintiff to the state hospital surgery department for definitive management of his condition. He testified that Plaintiff's surgery was not prioritized at the hospital possibly because it was not serious or urgent.

[11] The witness testified in cross examination that in the event that the patient/inmate does not get the recommended surgery, the doctors at the prison sends the patient back with another letter. It is not disputed, as in plaintiff's testimony, that this type of follow-up from the 4<sup>th</sup> Defendant was not done in his case.

[12] The last witness to testify for the Defendants was Mr Victor Eichab, who was the officer in charge from 1 October 2014 until 31 January 2018. He testified that, the kitchen provides a diet already high in fibre, therefore there was no need for the 4<sup>th</sup> Defendant to prescribe a high fibre diet for the plaintiff. In cross- examination the

witness testified that he cannot confirm whether the food that was provided to the Plaintiff was high in fibre or not.

[13] He testified that he did not receive any letter of complaint from the Plaintiff and that he never told the Plaintiff that he will make a plan for him. He testified that he made sure that the Plaintiff was taken to the hospital when he needed to. When questioned in cross-examination whether he followed up on whether the Plaintiff received the surgery. He testified that the Plaintiff's medical record shows that he was seen by doctors outside and he cannot deny the stamps of the specific hospitals or the signatures of those who treated the Plaintiff.

### Discussion

[14] It is evident that there are two mutually destructive versions before court. The plaintiff maintained that he did not receive the medicine as prescribed and the high fibre diet, and the defendants' in not providing the plaintiff with the prescribed medicine and high fibre diet, breached their legal duty of care, whilst the defendants allude that the plaintiff did in fact receive the prescribed medicine as indicated in his medical passport, that he was taken to the Katutura hospital for treatment on several occasions and that the diet prescribed in prison already contains food high in fibre.

[15] In *National Employers' General Insurance v Jagers*,<sup>1</sup> Eksteen AJP while discussing the approach to mutually destructive evidence remarked that:

'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.'

[16] Plaintiff relied on a prescription by a certain Dr Chidzoba (his private doctor) who diagnosed the plaintiff with constipation and prescribed certain medicine and recommended a change of diet in order to cure the problem. Plaintiff claims that the prescribed medicines were never provided to him and that the defendants similarly failed to provide a high fibre diet to him as prescribed by his private doctor.

<sup>1</sup> *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 E-F.

[17] However, as can be ascertained from the entries in plaintiff's passport and the occurrence book the plaintiff was provided with medicine and taken to the Katutura hospital on multiple occasions. Moreover, as testified by the witnesses for the defendants, the correctional facility's approved diet already contains food high in fibre.

[18] The duty of care owed to the plaintiff is a duty to take such steps as are reasonably prudent or necessary in the circumstances.

[19] Considering all evidence provided, I accept the evidence tendered on behalf of the defendants.

#### Conclusion

[20] On the evidence as a whole and the probabilities of the case, I conclude that the defendants provided such care to the plaintiff as was reasonably necessary and prudent.

[21] In the premise, the following orders are made:

1. The plaintiff's claim is dismissed.
2. There shall be no order as to costs.
3. The matter is finalized and removed from the roll.

-----  
K MILLER  
Acting Judge

APPEARANCES



PLAINTIFF:

H NTELAMO-MATSWETU

Ntelamo- Matswetu & Associates, Windhoek

DEFENDANTS:

J LUDWIG

Office of the Government Attorney,

Windhoek