

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2021/03736

In the matter between:

ALEXANDER DANIEL VAN SCHALKWYK

PLAINTIFF

and

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

FIRST DEFENDANT

**RAPHAEL HAMUNYELA OF THE NAMIBIAN
CORRECTIONAL SERVICE**

SECOND DEFENDANT

**SAM FRANZ OF THE NAMIBIAN CORRECTIONAL
SERVICE**

THIRD DEFENDANT

**KAHEKA OF THE NAMIBIAN CORRECTIONAL
SERVICE**

FOURTH DEFENDANT

**BASSON OF THE NAMIBIAN CORRECTIONAL
SERVICE**

FIFTH DEFENDANT

Neutral citation: *Van Schalkwyk v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-OTH-2021/03736) [2023]
NAHCMD 167 (5 April 2023)

Coram: PARKER AJ

Heard: 16 - 19 January 2023; 2 February 2023

Delivered: 5 April 2023

Flynote: Delict – Pure economic loss – Plaintiff, an inmate of Namibia Correctional Service facility suffering loss – Wooden items he crafted confiscated from the plaintiff by Correctional Service officials – Court found that the Correctional Service officials justified their action on the basis of provisions of the Correctional Service Act 9 of 2012, s 79(2) – Section 79(2) prohibited persons from keeping items in the cells – Court found that the provisions did not apply to inmates – Consequently, the action taken by the officials was not in accordance with law and, therefore, unlawful and invalid – Delictual claim succeeded.

Summary: The plaintiff, an inmate of a Namibia Correctional Services (NCS) facility had with him wooden items he had crafted with the permission of NCS authorities confiscated by Correctional Service officials. The defendants testified that they were entitled to confiscate the wooden items because the plaintiff did not have written authorization of the Commissioner General of the NCS to keep the wooden items in the cell. Upon the correct interpretation of s 79(2) of Act 9 of 2012, the court found that the prohibition in that section did not apply to inmates. The standing practice that the defendants said entitled them to confiscate the wooden items was unlawful and invalid as it sought to implement s 79(2) of Act 9 of 2012. The court found that the plaintiff was successful in the delictual claim but had failed to allege and prove the price of each item confiscated. Therefore, the court was at large to determine a reasonable price of the items.

Held, the prohibition in s 79(2) of the Correctional Service Act 9 of 2012 did not apply to inmates, and therefore, the standing practice issued in terms of the section was unlawful and invalid.

ORDER

1. Judgment for the plaintiff.
2. The defendants shall, one paying the other to be absolved, on or before 31 May 2023 pay to the plaintiff N\$1000 plus interest at the rate of 20 per cent

per annum calculated from the date of this judgment to date of full and final payment.

3. There is no order as to costs.
4. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The plaintiff is serving a term of imprisonment. At diverse times he was at the Windhoek Correctional Facility (WCF) and the Hardap Correctional Facility (HCF). He instituted action against the Minister of Home Affairs, Immigration, Safety and Security and some officials of the Namibia Correctional Service (NCS).

[2] The plaintiff's case is this. On 9 May 2021, at the HCF the NCS officials conducted a search of the cell where the plaintiff was kept. During the search, the officials confiscated and destroyed the plaintiff's three wooden clocks, a two-drawer cupboard and a wooden photo frame ('the wooden items'). And for that, the plaintiff has pursued a delictual claim and constitutional claim in the following terms:

Claim 1: common law damages for the destruction of his property being the wooden items; and

Claim 2: an alternative constitutional claim for the violation of his Article 8 rights.

[3] I should say this at the threshold. If I were to grant the relief under Claim 1, I shall not go on to consider Claim 2, which is an alternative claim. Mr Esau of the Directorate: Legal Aid of the Ministry of Justice represents the plaintiff and Ms Kastoor the defendants.

[4] In support of his claims, the plaintiff testified and called Mr Christo Niklaste, a fellow inmate, as plaintiff witness. And in their defence, the defendants called three defence witnesses, all of them NCS officials, namely, Mr Sam Franz, Mr Nicolas David Basson and Mr Kaheka.

[5] I accept the following pieces of evidence by the plaintiff. The plaintiff was allowed to learn how to craft woodworks and he did craft woodworks at the WCF from wood purchased with his money. The relevant authorities allowed the plaintiff to carry with him his wood crafted items (the wooden items) and tools to the HCF when he was transferred there from the WCF.

[6] Similarly, I accept the defence evidence that the plaintiff could carry on with his woodwork at the HCF, but that he was to leave any wooden items and tools in a storeroom where the woodworks were carried out.

[7] The defence witnesses were at one with each other that the plaintiff's wooden items were confiscated and not returned to him, because the plaintiff did not have a written authorization given by the Commissioner General of the NCS to keep the wooden items in his cell. They testified that the authorization was required in terms of s 79(2)(b) of the Correctional Services Act 9 of 2012. Thus, the defendants do not deny what the plaintiff alleged in that respect, namely that the officials confiscated his wooden items.

[8] The next level of the enquiry calls for the interpretation and application of the statutory provisions, which, the defendants say, gave them the power to confiscate and keep the plaintiff's wooden items. In that regard, it should be remembered that in our law, 'administrative bodies and administrative officials may only act in accordance with powers conferred on them by law – either by the Constitution itself or by any other law'.¹

[9] Therefore, it turns on nothing the defence witnesses' testimony that the authorization was required in terms of a standing practice. The issuing of such standing practice is an administrative act by an administrative official. And, as I have

¹ *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC) para 48.

held previously, the NCS official who issued it could only do so in accordance with powers conferred on him or her by law. It would seem this piece of legal reality was lost on Ms Kastoor.

[10] I accept Mr Esau's submission that s 79 of the Correctional Services Act does not apply to inmates like the plaintiff. That being the case, the issuance of the standing practice was not done in accordance with law; and so, it is unlawful and invalid. It follows indubitably that the seizure and keeping of the plaintiff's wooden items were unlawful and invalid.

[11] On the evidence and the law, I conclude that the plaintiff's action succeeds; and he is entitled to judgment in respect of common law delictual damages in Claim 1. It follows, as I intimated previously, that being the case, I shall not go on to consider any constitutional damages in Claim 2, which is an alternative claim.

[12] The plaintiff pleaded that he 'suffered general damages in the amount of N\$300 000'. The plaintiff testified he sold one large clock for N\$1 200, albeit that was not pleaded. The price of the two-drawer cupboard and of the photo frame were not pleaded, and no evidence was led to establish the prices thereof. What the plaintiff alleged as regards the price of a large wooden clock was not established; 'it becomes a mere irrelevance'.² There is no proof of quantum. As I say, the prices of the other two items were not even alleged. Furthermore, the plaintiff did not even allege and prove the cost of the materials used to make the wooden items; and yet these matters are important in claims such as that pleaded by the plaintiff.

[13] Be that as it may, I think the court is at large to determine the price of those items. I should attempt to grant the plaintiff some relief, since he has been successful in proving delictual damages, though not the quantum thereof.

[14] The court is, therefore, at large, as I have said, to decide what amount is reasonable. I am prepared to peg the price of one large clock at N\$200, the two-drawer cupboard at N\$300, and the wooden photo frame at N\$100.

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

² *Klein v Caremed Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC) para 13.

1. Judgment for the plaintiff.
2. The defendants shall, one paying the other to be absolved, on or before 31 May 2023 pay to the plaintiff N\$1000, plus interest at the rate of 20 per cent per annum calculated from the date of this judgment to date of full and final payment.
3. There is no order as to costs.
4. The matter is finalized and removed from the roll.

C Parker
Acting Judge

APPEARANCES:

PLAINTIFF:

D V ESAU

Of Ministry of Justice: Legal Aid, Windhoek

DEFENDANTS:

M KASTOOR

Of Office of the Government Attorney,
Windhoek