

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2019/00458

In the matter between:

IMANUEL ENGELBREG

PLAINTIFF

and

MINISTRY OF SAFETY AND SECURITY

1ST DEFENDANT

CONSTABLE KASUTO

2ND DEFENDANT

CONSTABLE MUHONGO

3RD DEFENDANT

CONSTABLE PUTSCHE

4TH DEFENDANT

Neutral Citation: *Engelbreg v Ministry of Safety and Security* (HC-MD-CIV-ACT-DEL-2019/00458 [2023] NAHCMD 245 (9 May 2023))

CORAM: **PRINSLOO J**

Heard: 15-17 February 2022; 8 June 2022; 7 to 11 November 2022 and 15 February 2023

Delivered: 9 May 2023

Flynote: Action Proceedings – Delict – Plaintiff instituted summons against defendants – For the return and delivery of sheep confiscated by defendants.

Summary: The plaintiff by way of summons issued out of this court instituted action against the defendants, which action is defended by all the defendants in this matter. The plaintiff claims that in the period between 18 October 2017 to 24 October 2017 at or near Karibib, whilst the plaintiff was busy with his farming activities, the second and third defendants approached his plot, 57 Halbichbruhn Camp, Karibib, where he was conducting farming activities and confiscated 52 Van Rooyen breed sheep to the value of N\$52 000. The plaintiff claims that at the time when the second and third defendants seized the livestock, it was done on the premise that they were investigating stock-theft related charges and that the sheep of the plaintiff was the subject matter of the said investigation. The plaintiff further claims that on 26 February 2018, and whilst he was in Windhoek, the second, third and fourth defendants wrongfully, unlawfully and without just cause entered into his residence and seized a freezer containing a beef carcass, which they removed without his knowledge or permission. The plaintiff further claims that before his departure to Windhoek, he deposited N\$25 000 in his wardrobe in his bedroom for safekeeping. Upon returning from Windhoek to his residence, he discovered the money had been stolen.

Held that there is no evidence before the court of the number of expectant ewes and how many of those were seized by the police. The issue regarding the pregnant ewes was also not adequately pleaded. There is no evidence of any offspring, and if so, how many and how the value of the said offspring would be calculated?

Held that where monetary damages have been suffered, the court must assess the amount and make the best use of the evidence before it. The plaintiff had the means to produce the relevant evidence to substantiate his claim regarding claim 2 but failed to do so. Claim 2 can, therefore, not stand.

Held that the plaintiff's version was contradicted in all material respects by his witness and stands to be rejected by this court, and as a result, claim 3 cannot stand.

Held that the DNA testing and the results thereof were not denied in the pleadings as the plaintiff never replicated to the defendants' plea in this regard, nor was it identified or listed as an issue in dispute during the pre-trial conference. It is, therefore, not an issue open to the plaintiff at this point.

Held that the evidence regarding the outcome of the DNA testing stands undisputed and applies to the first seven sheep confiscated, which share the DNA with the flock of Farm Bethel.

Held further that the fact that the seven sheep share the same DNA as those of Farm Bethel is not conclusive evidence that the plaintiff was not the owner or lawful possessor of the sheep concerned. The only evidence placed before this court by the defendants was that there was an ongoing investigation of alleged stock theft from Farm Bethel and the outcome of the DNA tests. It is not an automatic given that the sheep found in the kraal of the plaintiff was stolen from Farm Bethel.

Held that the court is of the view that a disposal order in respect of the Van Rooyen sheep can only be done upon the conclusion of the criminal proceedings pertaining to these sheep. Therefore, for now, the animals should remain in safe custody, which is at Farm Bethel.

Held that the remaining 14 sheep collected on 20 October 2017, which were either mixed breeds or Damara sheep, there is no issue regarding ownership; they are clearly the plaintiff's property.

Held furthermore, there was no reason for the defendants to retain possession of these animals as they were not the subject of a criminal investigation.

ORDER

Judgment is granted in favour of the plaintiff in respect to claim 1, in the following terms:

1. The defendants are directed to return the ten sheep, delivered to Farm Bethel for safekeeping, which do not match the DNA of the Bethel flock, to the plaintiff within 30 days from the date of this order.

2. Alternatively, if the animals cannot be delivered to the plaintiff as set out in paragraph 1, this court orders payment in the amount of N\$ 1500 per sheep, which amounts to a total of N\$15 000 and interest calculated at 20% per annum from date of judgment until date of final payment.
3. No order as to costs.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff is Immanuel Engelbreg, an adult male residing in Karibib and endeavours to be a full-time farmer at Land 57, Halbichbruhn Camp, Karibib.

[2] The defendants are:

- i) the Minister of Safety and Security, in his nominal capacity, as being responsible for the Namibian Police, with his offices situated in Windhoek;
- ii) Constable Kasuto, a police officer duly appointed by the first defendant in terms of the Police Act, 19 of 1990, and attached to the Stock Theft Unit of the Namibian Police and stationed in Karibib;
- iii) Constable Muhongo, a police officer duly appointed by the first defendant in terms of the Police Act, 19 of 1990, and attached to the Stock Theft Unit of the Namibian Police and stationed in Karibib;
- iv) Constable Putsche, a police officer duly appointed by the first defendant in terms of the Police Act, 19 of 1990, and attached to the Stock Theft Unit of the Namibian Police and stationed in Karibib.

[3] The plaintiff instituted action against the defendants on 30 January 2018, which was defended by all the defendants.

The pleadings

[4] The plaintiff's particulars of claim set out the claims levelled against the defendants in the following terms:

4.1 Claim 1: The plaintiff pleaded that in the period between 18 October 2017 to 24 October 2017 at or near Karibib, whilst the plaintiff was busy with his farming activities, the second and third defendants approached his plot, 57 Halbachbruhn Camp, Karibib, where he was conducting farming activities and confiscated 52 Van Rooyen breed sheep to the value of N\$52 000. The plaintiff pleads that when the second and third defendants seized the livestock, it was done on the premise that they were busy investigating stock-theft related charges and that the sheep of the plaintiff was the subject matter of the said investigation.

4.1.1 The plaintiff pleads that when the sheep were seized, the relevant defendants did not possess a duly authorised warrant to search the plaintiff's property, nor were they authorised to seize the plaintiff's livestock, which was highly expectant at the time. Alternatively, the second and third defendants did not produce such a warrant to either the plaintiff or any of his farm labourers before they entered the plaintiff's plot and/or seizure and confiscation of the plaintiff's sheep.

4.1.2 The plaintiff has never, to date, been arrested, formally charged, or even questioned in connection with the alleged stock-theft charges. The livestock has not been returned to him, and as a result, the plaintiff claims the return of the 52 Van Rooyen breed sheep, alternatively, to be compensated in the amount of N\$52 000 in respect of the said livestock.

4.1.3 The plaintiff is entitled to have the sheep returned to him, being the person from whom the sheep were seized, in terms of s 31(1)(a) of the Criminal Procedure Act 51 of 1977, as amended.

4.2 Claim 2: The plaintiff pleads that on 26 February 2018, and whilst he was in Windhoek at the time, the second, third and fourth defendants wrongfully, unlawfully and without just cause entered into his residence and seized a freezer containing a beef carcass, which they removed without his knowledge or permission.

4.2.1 In this instance, the defendants (second to fourth) also created the impression that they were investigating a stock-theft related matter and that the freezer and carcass were the subject matter of their investigation.

4.2.2 The plaintiff pleads that the defendants were again not in possession of a search warrant issued under the hand of the Magistrate, authorising them to conduct the search and seize the freezer and its contents.

4.2.3 The plaintiff pleads that he was never arrested and formally charged with any stock theft charges relating to the freezer's contents.

4.2.4 The plaintiff claims that the defendants have a legal and moral duty to return his freezer and beef carcass, alternatively to compensate him for the fair and reasonable market value thereof. In this regard, the plaintiff claims N\$15 000 for the freezer's reasonable market value and N\$15 000 for the beef carcass's fair and reasonable market value.

4.3 Claim 3: The plaintiff pleads that before his departure to Windhoek, he deposited N\$25 000 in his wardrobe in his bedroom for safekeeping. Upon returning from Windhoek to his residence, he discovered the money had been stolen.

4.3.1 The plaintiff pleads that the money went missing during the unlawful and unauthorised search by the second to fourth defendants. The plaintiff claims his house was adequately closed and secured before his departure to Windhoek. However, when he returned to his residence from Windhoek, he discovered that his house and wardrobe were ransacked. Some of his personal belongings were lying all over the bedroom on the floor, and his wardrobe door was wide open.

4.3.2 The plaintiff pleads that the second to the fourth defendants have a legal and moral duty to compensate him with the N\$25 000.

4.3.3 The plaintiff further pleads that the wrongful, unlawful and unauthorised entry into his residence constitutes an unjustifiable infringement of the plaintiff's constitutional right to own property as guaranteed under Article 16 of the Namibian Constitution. Further to that, the failure and/or neglect by the defendants to return the property of the plaintiff (as well as the prolonged detention thereof) in the absence of criminal charges are unlawful and in contravention of s 31(1)(a) of the Criminal Procedure Act. The plaintiff further pleaded that the wrongful, unlawful and unauthorised entry into and the subsequent ransacking of his house constitutes an unjustifiable infringement of the plaintiff's constitutional right to privacy as guaranteed under Article 13 of the Namibian Constitution.

4.4 The written statutory notice in terms of s 39(1) of the Police Act was served on the first defendant on 5 November 2018.

4.5 In summary the plaintiff claims the following relief:

1. 'The return of the 52 Van Rooyen Sheep, alternatively;
2. Payment in the amount of N\$ 52 000, which is equal to the value of the said sheep;
3. Payment in the amount of N\$ 120 000, being the damages suffered by the plaintiff in respect of the lost production in the form of the offspring of the sheep seized by the defendants;
4. Payment in the amount of N\$ 15 000, being the value of the plaintiff's freezer;
5. Payment in the amount of N\$ 15 000, being the value of the carcass, which was seized and never returned;
6. Payment in the amount of N\$ 25 000, which disappeared from the plaintiff's house as a result of the second to fourth defendants' unlawful entry into the house;
7. Interest at a rate of 20% per annum from the date of judgment to the date of payment;
8. Cost of suit;
9. Further and/or alternative relief.'

4.6 In support of his claims, the plaintiff attached a letter written by his erstwhile legal practitioners, Mbudje & Brockerhoff Legal Practitioners, which served as a notice of intention to institute legal proceedings in terms of the Police Act, a stock card and a permit authorising one Hans Jamneck to transport one cattle carcass, dated 10 February 2018.

The defendants' plea

[5] The defendants admitted to confiscating the sheep and pleaded in amplification that on 19 October and 20 October 2017, the Namibian Police Officers from the Anti-Stock Theft Sub-Division received information regarding stolen sheep and visited the Karibib Municipal Camp where the plaintiff is farming. The officers confiscated 21 Sheep (7 on 19 October 2017 and 14 on 20 October 2017), with the plaintiff's permission for DNA testing. The defendants plead that the plaintiff refused their invitation to be present during the loading and off-loading of the sheep. He also declined to be present during the taking of the DNA samples of the sheep. The defendants plead that they returned 14 sheep on 28 October 2017 to the plaintiff. The plaintiff was not present then, but his shepherd was present.

[6] The defendants further plead that the DNA testing confirmed that the sheep seized were the offspring of the complainant in the stock-theft complaint. The investigation into this case is ongoing, and a docket was submitted to the Prosecutor-General for a decision regarding possible prosecution.

[7] Regarding claim 2, the defendants admit to confiscating the freezer and carcass but plead in amplification thereof that the police officers were searching for alleged poachers who fled toward the Municipal Camp where the plaintiff was farming. The police found skins, heads and hoofs buried in shallow holes and proceeded to the plaintiff's residence, where they found him and took him to the police station, where he was kept whilst the officers applied for a search warrant. Whilst applying for the search warrant, the plaintiff disappeared.

[8] The defendants plead that upon returning to the plaintiff's residence, the search warrant was presented to an adult male named Sebastian Kangameni and proceeded to

search the plaintiff's home in the presence of Mr Kangameni. During the search, they recovered a deep freezer loaded with meat, which was recovered and taken to the Karibib Police station pending the outcome of the investigation. As a result, a case of Possession of Stolen Stock Produce was opened under Karibib CR 26/02/2018, and the plaintiff was arrested on 5 March 2018 but was released on 7 March 2018. The plaintiff was informed to collect his freezer and meat, but he refused to do so and alleged that the meat was rotten, which fact is denied by the defendants.

[9] The defendants deny any knowledge of the N\$25 000 which the plaintiff alleges to be missing from his house and admit that they refused to compensate the plaintiff for the N\$25 000 as they are not liable for the loss of the alleged money.

[10] The defendants deny any liability regarding all three claims levelled against them.

[11] The plaintiff did not replicate to the defendants' plea.

Plaintiff's case

[12] The plaintiff and one Sebastiano Kangameni testified in support of the plaintiff's case. Their evidence can be summarised as follows:

Immanuel Engelbreg

[13] The plaintiff testified that during 18 to 24 October 2017 at or near Karibib, the second and third defendants trespassed on his farm, Land 57 Halbichbruhn Kamp and confiscated/seized 52 Van Rooyen sheep to the value of N\$ 52 000. He testified that they created the impression that they were busy investigating a case related to theft of sheep. The plaintiff testified that they did not possess a search warrant when the second and third defendants seized his sheep. The witness testified that most of the sheep were expectant ewes and were due to produce lambs any day.

[14] The witness testified that once the sheep were removed from the plot, they were never returned neither was he compensated for the loss of his sheep.

[15] The plaintiff further testified that on 26 February 2018, the second to the fourth defendants entered his residence and confiscated his freezer and the beef carcass contained therein. The plaintiff testified that when the defendants seized the freezer and the meat, it was under the guise of investigating stock-theft charges. However, they never formally charged him in connection with any stock-theft charges.

[16] The plaintiff testified that, to date, the freezer and the carcass had not been returned to him, nor was he compensated for the loss of the freezer and the carcass.

[17] In conclusion, the plaintiff testified that he left a cash amount of N\$ 25 000 at his residence before it was ransacked by the second to fourth defendants and to date he has not been compensated for the loss of the money.

Cross-examination of Mr Engelbreg

[18] During cross-examination, the plaintiff testified as follows:

a) The 52 sheep seized by the defendants did not only consist of Van Rooyen breed sheep as some of them were also Damara breed sheep. However, the plaintiff could not say the exact numbers of the respective breeds. Nevertheless, the plaintiff estimated that the Damara breed was 15 to 16 sheep. When Ms Hinda pointed out the contradiction with his evidence-in-chief, the plaintiff testified that because the Damara sheep was less than the Van Rooyen sheep, his erstwhile legal practitioner advised him to say that all the sheep seized were the Van Rooyen breed.

b) The plaintiff testified that the sheep were removed over two days. On 20 October 2017, the second defendant seized seven sheep and on 21 October 2017, the police collected the remainder of the sheep. He testified that he was present on the first day when the sheep were gathered but was not informed as to the reason why the sheep were confiscated. The next day when the remainder of the sheep were collected, he was absent and was only informed by his shepherd, who is not a witness.

- c) The plaintiff denied that only 21 sheep were collected and rejected the allegation that the sheep did not belong to him.
- d) Regarding the stock card, which indicates that 52 sheep were registered against the plaintiff's name, with the last entry dated 20 August 2017. He conceded that it does not distinguish between different breeds of sheep, and he submitted that the stock card was introduced to the court to prove how many sheep were seized.
- e) The plaintiff could not say how many of the sheep were pregnant ewes and how the amount of N\$120 000 was calculated regarding the offspring of the confiscated sheep.
- f) The plaintiff could further not say how the value of the sheep was determined in the amount of N\$52 000.
- g) Regarding the search at his residence, the plaintiff testified that he could not deny that the police officials had a search warrant at the time of the search as he was not present. However, upon return to his home, he found the N\$25 000 hidden in the drawer of the headboard of his bed was missing, as well as his freezer containing the carcass of a cow.
- h) The plaintiff received the cash sum of N\$25 000 from one Gerson Noabeb as payment for a gearbox and engine of a Nissan 1400 bakkie. The plaintiff testified that he has no proof in writing of the agreement with Mr Noabeb and that Mr Noabeb passed away in 2018.
- i) On the day the plaintiff received the money, he travelled to Windhoek for a funeral after he deposited the money in the drawer. This was also the date on which the search was conducted at his home.
- j) The police officials seized his fridge containing the cow carcass, and when told to collect the fridge and contents, the plaintiff refused to do so as the meat was rotten. The amount claimed for the freezer and the carcass was an estimation of the value calculated by the plaintiff's erstwhile legal practitioner.

Sebastiano Junior Kangameni

[19] Mr Kangameni is approximately 18 years old, residing with his uncle at Erf no 8, Bethuel //Gamxamub Street, Usakos Location, Karibib. Mr Kangameni's uncle is the plaintiff's landlord, and they reside on the same premises as the plaintiff.

[20] On the day in question, Mr Kangameni, who is still a scholar, decided to, instead of going to school, rather stay home and watch television.

[21] At around 07h00, Mr Kangameni heard voices outside and was able to identify the voices as that of the plaintiff and Sergeant Kasuto, the second defendant. During this conversation, Mr Kangameni heard the official asking the plaintiff for the key to his house, to which the plaintiff responded that the keys were with his wife.

[22] The plaintiff hereafter left with the police. However, the witness testified that a short while later, the police returned to the house and were looking for the plaintiff, who had absconded from the police station. An unidentified police official told Mr Kangameni to stay put, and another official was left at the premises to keep an eye on the plaintiff's dwelling.

[23] At approximately 12h00 that same day, the police returned to the house and enquired if there was an alternative way of getting into the plaintiff's house. Mr Kangameni directed the police to the inside of his residence as there is a panel of corrugated iron that partitions the plaintiff's home and that of his uncle.

[24] The corrugated iron was bent away to enable the police to enter the plaintiff's house, where after the police searched the plaintiff's home. The witness testified that the police also handed him a search warrant, which he subsequently gave to the sister-in-law of the plaintiff, who resides on the adjacent property.

[25] Mr Kangameni testified that the police called him into the house to show him where they searched, and he observed that the police recovered meat in the plaintiff's freezer. However, because it was frozen solid and could not be removed from the

freezer, the police decided to remove it and to transport its contents to the police station.

[26] After the search, Mr Kangameni secured the corrugated iron back in place and exited the plaintiff's dwelling through a window.

[27] On questions of the court, the witness indicated that after the plaintiff left with the police, neither he nor his wife returned home for approximately two weeks. Mr Kangameni further testified that if the plaintiff or his wife returned home on the day of the search, he would have heard them as the front door of the plaintiff's house sticks and makes a noise when opened.

[28] This concluded the case for the plaintiff.

Absolution from the instance application

[29] At this point, it is necessary to interpose and note that Ms Hinda, on behalf of the defendants, brought an application for absolution from the instance at the close of the plaintiff's case.

[30] The application was refused because the primary relief sought by the plaintiff was one of specific delivery of the sheep seized by the Namibian Police. It is common cause that the police confiscated sheep from the plaintiff's kraal.

[31] I will shortly return to whether the plaintiff succeeded in making out a case for damages claimed.

Defendants' case

[32] Four witnesses testified on behalf of the defendants, i.e. John Mahongo, J Urib, Norbert Walter Kühne and Anthony Chalvin Shibaku. All the witnesses are police officials, except for Mr Kühne, the owner of K-SAPU Security. I will proceed to summarise the evidence of the witnesses mentioned above briefly.

Mr John Mahongo

[33] Mr Mahongo is a sergeant in the Namibian Police with 16 years of experience, of which six years were with the Stock Theft Division and in 2017 he was attached to the Stock Theft Division in Omaruru. On 19 October 2017, the witness received information regarding a stock theft matter under investigation. As a result of the report, the witness, D/Sgt Kasuto, Mr Kühne, Mr Lang and the plaintiff proceeded to the plaintiff's plot just outside Karibib.

[34] In the kraal of the plaintiff, they found seven sheep of the Van Rooyen breed amongst the herd of the plaintiff, which was a similar breed to those stolen from Farm Bethel. As a result, the sheep from the plaintiff's kraal was removed to a safe place for DNA testing. On the next day, the police officials returned to the farm of the plaintiff and collected the remaining 14 sheep, which they held for safekeeping as the person who tended the flock of the plaintiff did not want to stay on the farm when he found out that the plaintiff was in detention. The 14 sheep were, however, returned to the plaintiff's care.

[35] Sgt Mahongo testified that the animals were removed with the plaintiff's consent and in his presence. Additionally, Sgt Mahongo testified that there were no rams of the Van Rooyen breed in the kraal of the plaintiff, which further raised his suspicions as there were lambs in the plaintiff's kraal of the said breed.

[36] On 24 October 2017, a veterinarian was arranged to obtain samples from the plaintiff's herd and that of the Van Rooyen sheep from Farm Bethel, where sheep of a similar breed were stolen. The veterinarian took samples from the sheep removed from the plaintiff's kraal and from two rams and two ewes from Farm Bethel. The samples were sent to the University of Pretoria in South Africa for analyses, and the results confirmed that the sheep confiscated from the kraal of the plaintiff and those of the flock at Farm Bethel from where the sheep were stolen were a match.

[37] The docket was hereafter referred to the Prosecutor-General for her decision. However, the docket was returned subsequently without a decision from the Prosecutor-General.

[38] When confronted on the issue of whether the police had a search warrant when the seven sheep were confiscated, Sgt Mahongo testified that there were search warrants, but such search warrants it did not relate to a search of the plot of the plaintiff. However, the witness testified that a search warrant was not required as the plaintiff consented to the search and removal.

[39] The witness was also asked if he could express an opinion, as a stock theft investigator, as to what the current value of the sheep confiscated by the police would be in today's market. Sgt Mahongo testified that, in his view, the value in today's market would be approximately N\$ 1 500 per head.

[40] When confronted with the fact that the plaintiff has not been prosecuted to date for the alleged offence of stock theft, Sgt Mahongo testified that, to his knowledge, the plaintiff has now been charged on the instructions of the Prosecutor-General.

Jeffrey Urib

[41] Mr Urib is an officer in the Namibian Police, holding the rank of Chief Inspector and is employed as the Head Stock Theft Investigator: Stock Theft Investigation subdivision and is stationed at the Regional Office in Walvis Bay.

[42] Chief Inspector Urib testified that on 24 October 2017, he received a phone call from Sgt Kasuto informing him that they would like to proceed to obtain DNA samples from the sheep removed from the plaintiff's farm, for comparison purposes but that the plaintiff refused to attend the sample-taking process. He referred Sgt Kasuto to RCIC Deputy Commissioner Likuyu for further directions.

[43] The witness confirms that he read the report and the outcome that the sheep seized from the plaintiff was a match with those stolen from Farm Bethel.

Norbert Walter Kühne

[44] Mr Kühne is the owner of K-SAPU Security in Karibib. Mr Kühne testified that on 19 October 2017, he, together with police officials, were busy investigating a case of poaching of Oryx under Karibib CR 11/10/2017 at the farm of the plaintiff. Whilst there, he observed sheep in the plaintiff's kraal, similar to those stolen from Farm Bethel in June 2017. Mr Kühne informed Sgt Kasuto accordingly, who in turn informed the Stock Theft Unit in Omaruru.

[45] On the same day, Mr Kühne and the police returned to the kraal, and the police loaded seven sheep from the kraal of the plaintiff and delivered the animals to the Solar Park in Karibib. They then drove to Farm Bethel and collected four sheep from the flock from where sheep were stolen. These animals were also delivered to the Solar Park to obtain samples for DNA testing to determine if the DNA matches those in the plaintiff's kraal.

[46] On 20 October 2017, they returned to the plaintiff's farm, collected 14 sheep from the plaintiff's kraal, and placed them at Solar Park as well. According to the witness, these 14 resembled Van Rooyen sheep but could be a mixed breed of Van Rooyen/Damara sheep.

[47] On 24 October 2017, the police scheduled DNA tests to be done on the animals, and although the plaintiff was invited to attend the retrieval of the samples, he refused.

[48] On 28 October 2017, Mr Kühne noted that the grazing was inadequate and buying extra feed was impossible. He then informed the police accordingly. As a result, the police granted him permission to move the sheep from the Solar Park to Farm Bethel and those sheep that did not match in appearance to be returned back to the plaintiff's farm. The latter were placed back in the kraal of the plaintiff.

[49] On 22 November 2017, with Cst Tsuseb, he loaded 17 sheep at Solar Park as there was no grazing left and delivered them to Farm Bethel, where the animals would be safe.

Anthony Chalvin Shibaku

[50] The last witness was Mr Shibaku, a police officer stationed at the time at Karibib Police station and holds the rank of Constable.

[51] The witness testified that on 20 October 2017, Mr Kühne came to the police station and called Sgt Mahongo, who telephonically instructed that they must remove the 14 sheep from the plaintiff's farm for safekeeping. Accordingly, Cst Shibaku, with Mr Kühne, went to the plaintiff's plot and removed the 14 sheep. The purpose of the removal of the sheep was for DNA testing. The 14 sheep were transported by police vehicle to the Karibib Solar Plant.

[52] Cst Shibaku testified that he booked the plaintiff out from the cells, and the plaintiff was taken with them to go and load the sheep. Cst Shibaku further testified that he explained to the plaintiff why the sheep had to be removed, and the plaintiff agreed to the removal of the sheep and to accompany them to the plot. The plaintiff was returned to the police cells and booked back in after the sheep were delivered to the Karibib Solar Plant.

[53] Cst Shibaku testified that entries were made in the Occurrence Book regarding the removal of the sheep and when the plaintiff was booked out and taken to the plot/farm.

[54] This witness could not say if the DNA testing were done or if the animals were returned to the plaintiff's kraal.

[55] This concluded the defendants' case.

Evaluation of the evidence

Absolution from the instance

[56] At the time when the plaintiff testified he was unrepresented. However, the plaintiff's case was fully prepared by his erstwhile legal practitioner, which included the witness statements and pre-trial report.

[57] Unfortunately, the plaintiff's case was poorly prepared and poorly presented. As a result, when Ms Mombeyarara came on record after the closing of the plaintiff's case, the plaintiff's claims were largely beyond repair.

[58] I already ruled on the application from the instance application but did not give comprehensive reasons as it was not necessary at the time. Therefore, although I intend to revisit only some of the evidence relating to the monetary claims, I must point out a few determinative facts that were considered for ruling on absolution.

[59] The amounts claimed by the plaintiff appear to be estimations at best. It is my understanding that it is not even the plaintiff's estimation but that of his erstwhile legal practitioner. The estimates were made regarding the value of the sheep per head, the alleged offspring produced by the pregnant ewes, and the value of the freezer and its contents. There is no evidence before the court of the number of expectant ewes and how many of those were seized by the police. The issue regarding pregnant ewes was also not adequately pleaded. There is no evidence of any offspring, and if so, how many and how the value of said offspring would be calculated?

[60] In the second claim (which relates to the seizure of the freezer and its contents), the plaintiff claims N\$15 000 for the freezer and N\$15 000 for its contents. It is not clear how any of these amounts were arrived at. The evidence on behalf of the defendants is that the plaintiff refused to receive the freezer and the contents thereof and alleged that the meat inside the freezer was rotten. The plaintiff insists that a health inspector should

have inspected the freezer and contents, but no such evidence was presented to this court.

[61] In the third claim (which relates to the N\$25 000), the plaintiff testified that on the day of receipt of the money, he deposited the money in his room before he left for Windhoek for a funeral. This was the day of the search by the police. However, the uncontested evidence is that the plaintiff absconded from custody on the said date and never returned to the house. Mr Kangameni, whom the plaintiff called to testify regarding the search and the search warrant, testified that if the plaintiff came home on that day, he would have heard it as the plaintiff's front door sticks and made a noise when it was opened. According to Mr Kangameni, the plaintiff did not return home for at least two weeks. Neither did his wife.

[62] The plaintiff's version was contradicted in all material respects by his witness and stands to be rejected by this court, and as a result, claim 3 cannot stand.

[63] The onus was on the plaintiff to prove that he suffered damages and the quantum thereof.¹ In *Shishiveni v Prosecutor General of the Republic of Namibia*,² Kanguuehi AJ referred to *Abner v K L Construction and Another*³ where the Court referred to *Lazarus v Rand Steam Laundries (Pty) Ltd*⁴ wherein De Villiers J quoted with approval the following passage from *Hersman v Shapiro & Co*⁵ as follows:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but, even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those

¹ *Erasmus v Davis* 1969 2 SA 1 (A) 9E.

² *Shishiveni v Prosecutor General of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2018/00324) [2019] NAHCMD 254 (25 July 2019) at para 27.

³ *Abner v K L Construction and Another* (I 1676-2011) [2013] NAHCMD 139 (27 May 2013).

⁴ *Lazarus v Rand Steam Laundries* (1946) (Pty) Ltd 1952 (3) SA 49 (T) at 51.

⁵ *Hersman v Shapiro & Co* 1926 TPD 367 at 379.

circumstances the Court is justified in giving, and does give, absolution from the instance.'
(Emphasis added)

[64] Where monetary damages have been suffered, the court must assess the amount and make the best use of the evidence before it. The plaintiff had the means to produce the relevant evidence to substantiate his claim regarding claim 2 but failed to do so. Claim 2 can, therefore, also not stand.

Claim for return of goods

[65] The only remaining dispute between the parties is the sheep seized by the police.

[66] The plaintiff's claim for the return of the livestock is based upon the lack of a search warrant and the fact that he has not been prosecuted for the alleged stock theft charges to date. The plaintiff relies on s 31(1)(a) of the Criminal Procedure Act, which reads as follows:

'Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

31. (1) (a) If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.'

[67] The plaintiff's case is that the police seized 52 sheep. The plaintiff further pleaded that the sheep were all Van Rooyen breed sheep. However, that appears to be untrue. According to the plaintiff, he was told by his previous legal practitioner to say that all the sheep were Van Rooyen sheep because the Damara breed sheep were less than the Van Rooyen breed sheep.

[68] The plaintiff relies on a stock card supporting the number of sheep he owns. The stock card, however, is of little assistance. For example, it does not specify the breed of sheep, nor is it clear who completed the stock card and who signed. In addition, it is noticeable that the last time the stock card was signed was in 2016.

[69] It is common cause that the police removed sheep from the farm or plot of the plaintiff on two different occasions. According to the plaintiff, the police seized 52 sheep. First, on 19 October 2017, the police removed seven sheep, returned the next day, and removed the remainder. The plaintiff alleges that 14 sheep were removed the next day in his presence and that a white gentleman removed the remaining sheep. During cross-examination, the plaintiff was asked who was present when the sheep was taken away, to which the plaintiff responded that it was the shepherd. Unfortunately, the court did not benefit from the evidence of the shepherd, who seemed to have been present when the sheep were removed.

[70] The defendants presented the entries into the Occurrence Book recording the removal of seven sheep on 19 October 2017 by Sgt Mahongo and a further 14 sheep collected by Cst Shibaku. During the trial, it became clear that the plaintiff did not persist with the allegation that the police seized 52 sheep.

[71] On behalf of the plaintiff, it was argued that the sheep collected on 20 October 2017 were not subject to a stock theft investigation but indeed for safekeeping and must thus be returned to the plaintiff. Ms Mombeyarara argued that the defendants did not place it in issue that the plaintiff is the owner or bona fide possessor of the 14 sheep collected on 20 October 2017.

[72] Ms Mombeyarara further submitted that regarding the seven sheep confiscated on 19 October 2017, the process and chain of DNA were challenged and that the defendants could not satisfy the court through their evidence that proper samples were extracted and sent for testing to South Africa.

[73] The DNA testing and the results thereof were not denied in the pleadings as the plaintiff never replicated to the defendants' plea in this regard, nor was it identified or listed as an issue in dispute during the pre-trial conference. It is, therefore, not an issue open to the plaintiff at this point.

[74] In this regard, I will refer to *Stuurman v Mutual Federal Insurance Company of Namibia Ltd*⁶ wherein the Supreme Court expressed itself with regard to agreements made by parties on how they want to conduct their matters:

[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) ([1998] 1 All F SA 239) at 614B-D:

“To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding.”[Footnote omitted].

In *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) ([1998] 4 All SA 480) at 524F-H this principle was reiterated. The judgment is in Afrikaans and the headnote to the judgment will suffice (at 519D):

“. . . a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the appellants should be released from their agreement.”

⁶ *Stuurman v Mutual Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) at 337 para 21.

[75] The evidence regarding the outcome of the DNA testing stands undisputed and applies to the first seven sheep confiscated, which share the DNA with the flock of Farm Bethel.

[76] However, the fact that the seven sheep share the same DNA as those of Farm Bethel is not conclusive that the plaintiff was not the owner or lawful possessor of the sheep concerned. The only evidence placed before this court by the defendants was that there was an ongoing investigation of alleged stock theft from Farm Bethel and the outcome of the DNA tests. It is not an automatic given that the sheep found in the kraal of the plaintiff was stolen from Farm Bethel. However, if the plaintiff purchased sheep from the owner of Farm Bethel, I would have expected the plaintiff to disclose such a fact to the court, as it would explain matching DNA with the flock from Farm Bethel.

[77] The Van Rooyen sheep were specifically the subject matter of Sgt Mahongo's investigation and were returned to Farm Bethel for safekeeping pending the decision of the Prosecutor-General and the prosecution of the plaintiff on the relevant charges. According to Sgt Mahongo, the plaintiff has now been charged regarding these sheep. The plaintiff insists on the return of the Van Rooyen sheep as well. However, I am of the view that a disposal order in respect of the Van Rooyen sheep can only be done upon the conclusion of the criminal proceedings pertaining to these sheep. Therefore, for now, the animals should remain in safe custody, which is at Farm Bethel.

[78] Therefore, I believe that s 31(1)(a) of the Criminal Procedure Act would not apply to the 7 Van Rooyen sheep at this point in time.

[79] As for the remaining 14 sheep collected on 20 October 2017, which were either mixed breeds or Damara sheep, there is no issue regarding ownership; they are clearly the plaintiff's property. Furthermore, there was no reason for the defendants to retain possession of these animals as they were not the subject of a criminal investigation.

[80] The evidence of the defendants in respect of these 14 sheep is that the sheep were returned to the kraal of the plaintiff.

[81] However, I must point out that there is a contradiction between the defendants' witnesses in this regard. For example, Sgt Mahongo testified that the sheep were taken back to the kraal of the plaintiff. In contrast, Mr Kühne testified that four sheep were returned to the kraal of the plaintiff, and 17 were taken to Farm Bethel for safekeeping.

[82] Sgt Mahongo and Mr Kühne disagreed about the breed of sheep or the purpose for retrieving the 14 sheep collected on 20 October 2017. According to Mr Kühne, the 14 sheep were also collected for DNA testing. Sgt Mahongo testified that the latter were collected for safekeeping only and that the DNA samples were done for the first seven sheep collected. His evidence was also that the seven were all ewes and looked similar, and the samples were only taken from the adult female sheep, not the lambs, as logic dictates their DNA would match.

[83] Sgt Mahongo's evidence, as the investigating officer who arranged the DNA sample-taking process, in my view, is the more acceptable evidence in this regard. Sgt Mahongo was not involved in delivering the animals back to the plaintiff's care.

[84] Therefore, ten of the 17 sheep delivered to Farm Bethel, which did not share the DNA of the Bethel flock, must be returned to the plaintiff. If there are allegations that those sheep were stolen, then that matter must be resolved during the relevant criminal proceedings.

[85] A potential problem that immediately springs to mind is that the confiscation of the 14 animals occurred six-odd years ago, and it is not clear if those animals are still alive. In the event that some of those animals are no longer alive, the defendants must compensate the plaintiff for such losses suffered. Sgt Mahongo estimated the market value per sheep to be N\$ 1 500 per head. In the absence of expert evidence presented by the plaintiff in this regard, this estimation appears to be sound.

Order

[86] My order is, therefore, as follows:

Judgment is granted in favour of the plaintiff in respect to claim 1 in the following terms:

1. The defendants are directed to return the ten sheep, delivered to Farm Bethel for safekeeping, which do not match the DNA of the Bethel flock, to the plaintiff within 30 days from the date of this order.
2. Alternatively, if the animals cannot be delivered to the plaintiff as set out in paragraph 1 above, this court orders payment in the amount of N\$ 1500 per sheep, which amounts to a total of N\$15 000 and interest calculated at 20% per annum from date of judgment until date of final payment.
3. No order as to costs.

JS Prinsloo

Judge

For the plaintiff:

M Mombeyarara
Instructed by the Directorate of Legal
Aid
Windhoek

For the defendants:

J Hinda
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Windhoek