

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL- 2021/00879

In the matter between:

ERICKSON NANGOLO

PLAINTIFF

and

THE INSPECTOR GENERAL

OF THE NAMIBIAN POLICE FORCE

1ST DEFENDANT

THE MINISTRY OF SAFETY AND SECURITY

2ND DEFENDANT

Neutral citation: *Nangolo v The Inspector General of the Namibian Police Force*
(HC-MD-CIV-ACT-DEL-2021/00879) [2022] NAHCMD 98 (08
March 2023)

Coram: CHRISTIAAN AJ

Heard: 26,28,29 September 2022 and November 2022

Delivered: 08 March 2023

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

determination, whether the plaintiff was assaulted by members of the Kalaharians or not – Court invited to assess the applicability of the decision in *Silluvan v Government of the Republic of Namibia* – 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 defendants – Plaintiff's claim dismissed.

Summary: The plaintiff instituted the action against the defendants over an alleged assault executed on him by members of the Namibian Defence Force and Police Force. According to the plaintiff, the 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 members jumped in an Iveco bus and left the scene. The plaintiff sustained injuries, suffered pain. The defendants denied the plaintiff's claim and disputed the material parts which suggests that members of the Namibian Defence Force and Police Force assaulted the plaintiff.

Plaintiff led evidence, and 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 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 Namibian Defence Force and Police Force. It is found that the plaintiff failed to produce conclusive evidence that he was assaulted by members of the Namibian Defence Force and Police Force. 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.
 2. No order as to costs.
 3. The matter is removed from the roll and regarded as finalized.
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JUDGMENT

CHRISTIAAN AJ:

Introduction and background

[1] The plaintiff in this matter, Mr Erickson Nangolo instituted civil action against the Inspector General of the Namibian Police Force ("First Defendant") and the Minister of Safety and Security ("Second Defendant").

[2] He claims a total sum of N\$200 000.00 in respect of damages. The claim is based on bodily injuries, pain and suffering, emotional and psychological trauma emanating from an alleged wrongful and unlawful assault of the plaintiff at the behest of the defendants' employees, it being alleged that on 20 July 2020, plaintiff was wrongfully and unlawfully assaulted by members of the Namibian Police and Namibian Defence Force during a fire incident that occurred at the single Quarters – Katutura, Windhoek.¹

[3] The plaintiff alleges that at the at the Single Quarters – Katutura, Windhoek, during a fire incident and in full view of the members of the public, the plaintiff was wrongfully and unlawfully assaulted by members of the defendants', while in the

¹ See paragraph 5 of the plaintiff's particulars of claim

possession of assault rifles in their hands. By grabbing and choking his throat, obstructing his airways as he was pushed to the Namibian Defence Force Bus, where more Police as well as the Namibian Defence Force officials were standing. Subsequently, a group of police as well as the Namibian Police officials attacked him, by kicking him and punching him with closed fists, and as a result, he fell on the ground where they kept on kicking him until he lost consciousness.

[4] While the defendants admit the fire incident at the Single Quarters in Katutura on 20 July 2020, at the mobile police station, the defendants deny any assault on the plaintiff or that the plaintiff suffered any injuries due to the assault. In this regard, the defendant's pleaded that: -

- 4.1 No knowledge of an incident of assault having taken place at the fire incident and to that end; the members who attended the scene; left the scene of fire after the fire was under control and extinguished.
- 4.2 The plaintiff was not subjected to any physical harm/assault by the defendants unidentified members and the plaintiff was accordingly put to the strictest proof thereof.
- 4.3 The defendant further averred that there was simply no reason to lodge a full-blown assault, cause traumatization and/or humiliation on the plaintiff; who like the defendants' members attended to the scene of the fire with the intention and in an effort to extinguish the fire which broke out at the defendant's Police Substation.

Issues for determination

Pre-trial order

[5] The court was called upon to adjudicate the following issues, in terms of a joint pre-trial report dated 19th of July 2022 which was made an order of Court on 01 August 2022 listed the following issues for determination by the trial court as agreed by the parties:

- a) Whether the plaintiff was assaulted by the members of the First and Second Defendants;

- b) Whether such assault, if established was unlawful;
- c) Whether the plaintiff is entitled to claim for pain and suffering in the amount of N\$200 000.00;
- d) Whether the plaintiff sustained injuries;
- e) Whether the Plaintiff reported the assault to the Police.

[6] 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.

Common Cause Facts

[7] The following facts are common cause between the parties:

- 7.1 The Plaintiff and the members of the Defendants were at Single Quarters, Katutura, on Monday, 20 July 2020 during a fire incident at the mobile police station.
- 7.2 At trial, in a preliminary submission to the court before evidence was presented, the Defendants no longer disputed whether the Plaintiff sustained injuries and also whether the Plaintiff reported the assault to the Police as there was a J88 and the CR number to collaborate those facts. Consequently, the Plaintiff abandoned the subpoenaed witnesses who was to testify specifically to those issues of fact.

[8] I consider it appropriate at this stage to consider the evidence led in order to determine whether the claim was proven or not.

Evidence led by the parties

The fire incident

[9] The facts of the alleged fire outbreak are to a certain extent largely common cause and can be summarized as follows:

- 9.1 On Monday, 20 July 2020 at approximately 19h00 – 20h00 and at Single Quarters Katutura, Windhoek a fire breakout, near to the mobile police station. The plaintiff was one of the people who was at the scene of fire and called the police and fire brigade.
- 9.2 The plaintiff assisted the people who tried to contain the fire with buckets of water while waiting for the firemen to arrive and wanted to help organize the crowd.
- 9.3 There was one city police official with the official city police vehicle which the plaintiff approached to ask for assistance to cordon off the crowd with the vehicle and he refused.
- 9.4 The fireman arrived at the scene and the city police official assisted and put on his sirens and blocked the entrance.
- 9.5 Members of the Namibian Police and Defence Force had a joint operation and the operation was called Kalahari and the members were jointly called Kalaharians.
- 9.6 The plaintiff being unhappy with the response by the city police official, decided to find out who his supervisor was in an attempt to report him for his behavior, approached the police officers who arrived to find out who the commander was, this attempt was also not fruitful.
- 9.7 The plaintiff approached a member of the Namibian Defence Force who the commander was, and was attacked by the member of the police force and assaulted.

The assault

Plaintiff's evidence

[10] The facts of the alleged assault can be summarized as follows:

Erickson Nangolo

[11] In his quest to prove his claim, the plaintiff testified and further led the evidence of four other witnesses, namely: (1) Asser Haitembu, a factual witness who was at the scene of the fire and who also witness the assault on the Plaintiff, (2) Timotheus H.

Shanyenga, as a factual witness who was at the scene of the fire and who also witness the assault on the Plaintiff. (3) Lester Brenley Goeiman, the emergency care practitioner who was in charge of the crew who picked the Plaintiff up with the ambulance. (4) Dr. Joab Mudzanapabwe, as an expert witness who he saw for psychological assessment of the trauma he suffered referred by his counsel for the purposes of this case.

[12] The plaintiff testified that he was playing cards with his friends at a house nearby the mobile police station, when they noticed that a tree next to the mobile police station caught fire and the fire had spread to the adjacent room of the mobile police station. The emergency services were called and he, with his friends tried to contain the fire while they were waiting for the fire brigade to arrive. He further testified that he tried to organize the crowd so that it is easy for the fire truck to get access to the burning fire.

[13] The plaintiff further testified that he saw a law enforcement officer, employed by the City of Windhoek and asked him to block the one entrance of the street where the fire was with his vehicle to minimize the foot traffic and in that way make it easy for the fire brigade team to access the fire without having to clear the way when they come. This city police official did not seem to be bothered and told him that it was the fire brigade business. The Plaintiff informed the court that he was not happy with the response of the city police officer but took it upon himself to report the behavior of the said city police officer.

[14] The plaintiff testified that he observed the arrival of the fire brigade and members of the defendants. The plaintiff approached the Nampol officer to ask who their commander was, with the aim of reporting the city police officer. The Nampol police officer who was not cooperative and then he proceeded and approached an NDF member with the same question and this was not received well by the NDF member. The first Nampol police officer he talked to jumped on it and before he knew he was under attack by the combination of law enforcement officers.

[15] The plaintiff testified that he could not pinpoint who his assailants were but they were easily recognizable because of the uniform they were wearing. There was kicking, punching, grabbing and choking involved. The plaintiff further testified that he fell at

some point and was picked up and carried to the NDF Iveco bus of the officers. The plaintiff testified that he did hear someone say during the scuffle that they should take him to the kombi and teach him a lesson; at which point he feared for his life and fought with all his might not get in the kombi.

[16] The plaintiff testified that after the assault, he asked one of his friends to call an ambulance as he was having severe pains, and could not drive home himself; and also asked one of his friends to drive his vehicle home. The ambulance arrived, stabilized the plaintiff as per their procedures and took him to Katutura Hospital and handed him over to the state doctor who was on duty that night for further observation and diagnoses. At Katutura Hospital he was treated and sent for x-rays to whether anything was broken. He went home the next day and also went to see a private doctor as the pain was not going away.

[17] The plaintiff further testified that as a result of being assaulted, he suffered severe injuries, including swelling and conjunctivitis in his left eye, muscle trauma, bruises and immense chest pain, and headaches for several days and nose bleeding. He felt humiliated, traumatized and degraded. The plaintiff was further referred to a psychologist to treat him for the trauma, by the private doctor who was treating him for the pain. He needed more sessions but due to financial constraints abandoned the sessions.

[18] The plaintiff testified that he was attended to by a state doctor, who completed a J88 form and filled out his public health passport indicating his physical injuries and medication which were prescribed.

[19] The plaintiff testified that he reported the incident to Inspector Haiping, whom he knew personally, who informed him that he will report it to Commissioner Shikongo, the Regional Commander to take the matter up so that the members involved can be identified. The plaintiff testified that he opened a criminal case at the Katutura Police Station, after the assault, the next day with the CR no. 446/07/2020 for assault.

[20] The plaintiff further testified that he followed up on the progress of the criminal case he opened and he has not heard back from any of the offices or officers regarding his case.

[21] The plaintiff informed the court that opted to open a civil matter against the Defendants.

Asser Haitembu

[22] The plaintiff then called Mr. Haitembu who testified, *inter alia*, that the plaintiff is his friend and that they were together at the time of the incident. He testified that they were at the house next to the mobile police station playing cards when the fire broke out and it was between 18h35 to 20h00.

[23] It was his testimony further that he saw and heard the plaintiff communicating with a city police official at the scene of the fire and at that stage, there were no other law enforcement or emergency vehicles. Mr Haitembu testified that he observed that the city police official was uncooperative.

[24] Mr Haitembu further testified that he saw and Iveco bus arriving and a mix of between seven and eight Nampol and NDF members disembarking from the bus, twenty minutes after the fire breakout. It was his testimony further that he saw and heard an interaction between the plaintiff and the members of the defendants, and that the plaintiff asked the one Nampol officer who their chief commander was, he was asked why he wanted to know. He further testified that the plaintiff proceeded to ask the NDF member next to the Nampol officer he approached first and before he knew the Nampol he talked first slapped him. The plaintiff was then beaten and thrown in to an Iveco bus whilst he was resisting and they kicked him and left him lying on the ground and left.

[25] Mr Haitembu testified that he tried to help the plaintiff up but he was complaining about pain and he told them to call an ambulance. It was his further testimony that he could not do anything to help the plaintiff, because he was afraid that he too will be by

the police. He further testified that he knew it was the police as they were all wearing uniform.

Timotheus H. Shanyenga

[26] The plaintiff then called Mr. Timotheus H. Shanyenga who testified, *inter alia*, that the plaintiff is his friend and that they were together when the incident happened around 19h35 to 20h00. Mr. Shanyenga testified that he was playing cards with the plaintiff and Mr. Haitembu. He further also estimated the members of the defendants who disembarked from the Iveco bus to be about eight, although he conceded he did not count them. Also testified that the plaintiff was not unconscious when the police left and they went to pick him up, that he was just lying on the ground looking like he was sleeping.

[27] In clarification the witness explained that the plaintiff was between being pushed and carried in the attempt to get him in the Iveco bus. That the plaintiff was beaten, kicked and left on the ground by the members of the defendants for asking a question.

Lester Brenley Goeiman

[28] The plaintiff then called Mr. Lester Goeiman who testified, *inter alia*, who gave a brief summary of his experience of 12 years as a paramedic and his qualifications. Mr Goeiman testified that their ambulance was dispatched 20h37 to the scene of the fire incident, and arrived at the scene 20h52. Upon arrival he observed that plaintiff was sitting in his vehicle fully alert and conscious. They assisted the plaintiff to the ambulance.

[29] Mr Goeiman further testified that the plaintiff when asked what was wrong with him, informed him that he was assaulted by the police. The plaintiff complained of severe chest pain and discomfort. On initial assessment the plaintiff was complaining of difficulty in breathing, not being able to lay down and they told him to sit in a position he was comfortable with, whereby the plaintiff preferred an upright position, crouching

forward. The position the plaintiff preferred according to the witness, suggested that there may be a substantial degree of injury.

[30] Mr Goeieman testified that he did a primary assessment with the aim of stabilizing the plaintiff and thereafter a secondary assessment was done, which was a detailed history and physical examination to help determine a possible diagnosis and treatment plan. It was his testimony further that he made the following discoveries during his assessment of the plaintiff. The airway was open and no compromise to the airway was observed; the breathing was with effort and this could be due to possible lung injury but there was no sign of air deprivation; the examination of the chest front and back indicated signs of bruising and blunt force trauma to the chest at the front; a deformity was felt on palpation of the breastbone (sternum); there was no broken or dislocated bones detected. The witness also testified that apart from the bruising on his chest he did not observe any other deformity on the plaintiff's body, except for the fact that the plaintiff was in immense pain.

[31] The witness closed his testimony by informing the court that as paramedics or emergency medical care practitioners, they do not diagnose patients, they query an injury until proven otherwise by a doctor, specialist and/or radiologist or whichever discipline the patient is assigned to. The query was therefore secondary blunt force trauma to the chest, at the time the plaintiff was handed over at the hospital so that nurse or doctor know where to look, and what to look for. He also testified that the plaintiff's situation was a clear emergency and the plaintiff have sustained injuries; and that he was in immense pain.

Dr. Joab Mudzanapabwe

[32] The plaintiff's final witness was Dr. Joab Mudzanapabwe, a registered clinical psychologist with his own private practice. He has been practicing psychology for over 22 years. Dr. Mudzanapabwe testified that he treated the plaintiff on the 20th, 23rd, 24th and 27th of May 2022 on his legal practitioner's request. According to the testimony of Dr Mudzanapabwe, he was tasked to do an assessment and give an expert opinion that will assist in determining whether the plaintiff is entitled to the damages of N\$200 000

he is claiming against the defendants'. Dr. Mudzanapabwe provided a comprehensive report which he extensively explained, however, it will not be repeated in detail for the purposes of the judgment.

[33] Dr. Mudzanapabwe testified further that he explained to the plaintiff the purpose of the sessions and that the evaluation or assessment included clinical interviews, collection of collateral information, a psychometric test and review of documents presented to him by the plaintiff.

[34] Dr. Mudzanapabwe testified that after considering all the evidence presented to him and methods used by him, he concluded that the plaintiff did not have any symptoms at the time of the evaluation. He further testified that after a holistic evaluation of the all the evidence presented to him in a whole, he diagnosed the plaintiff with Acute Stress Disorder, which he was treated for by another clinical psychologist, whose findings and notes were also made available to him in his assessment of the plaintiff.

[35] Dr. Mudzanapabwe in conclusion informed the court that in his expert opinion, he concluded that the compensatory cost of the traumatic experience the plaintiff suffered in this matter is N\$85 000.00. The witness said that the traumatic experience suffered by the plaintiff was being beaten by law enforcement officers while trying to save their offices from burning, the suffering from Acute Stress Disorder, the shame of facing other members of the community that knows that he was beaten by the police, the criminalized image of being beaten by the police.

Defendants Evidence

[36] The defendants' version of the alleged assault can be summarized as follows:

[37] The defendants called two witnesses, namely: Superintendent Kaarl Boois and Constable Gilbert Owoseb.

Superintendent Kaarl Boois

[38] The Defendants called Superintendent Boois as witness who testified, *inter alia*, he was present at Single Quarters, Katutura on the 20th of July 2020 at the fire scene. Superintendent Boois testified that he was employed by the second defendant and that he was a member of the Namib Dessert Operation, which was established with the purpose of curbing crime nationwide. He further testified that he was handed down to the first defendant to assist with the operation as a law enforcement officer.

[39] Superintendent Boois testified that the country wide Namib Dessert Operation combined all forces which includes the City Police, Namibian Police, the Namibian Defense Force and the Correctional Services; who operated under the command and umbrella of the Namibian Police Force. All the members who joined the operation were reporting to the respective commanding officers for the duration of the operation. Superintendent Boois testified that he was one of the commanding officers and that they were under the overall command of the Chief Inspector of the Namibian Police, who was in charge of the operation center.

[40] In his further testimony, he explained his duties as the shift commander that will not be repeated for the purpose of the judgment. Superintendent Boois testified that he was on patrol when he received an alert that there was a fire breakout at Single Quarters Mobile Police Station at around 20h00. He was with another officer, who is deceased, on shift that night and went to attend to the scene of fire. It was his testimony further that when he arrived at the scene there were a lot of members from the public, an emergency response vehicle from Nampol, and he observed that the fire was already extinguished by the fire brigade people. He testified that the Iveco bus members arrived whilst he was on the scene of the fire and he only spent 15 minutes at the scene of the fire.

[41] Superintendent Boois testified that when the members of the Iveco bus arrived, they saw him do a walk-through of the scene and they did not all disembarked from the bus. It was his further testimony that he observed that about four to six members disembarked from the Iveco bus and he briefed them that there was nothing for them to

do at the scene and they left without any incident. He further testified that he did not observe any altercation of any nature, not just between the plaintiff and members under his command but anybody else. Superintendent Boois testified that he did not observe anyone being assaulted, not by the members of the defendants or anyone else.

[42] Superintendent Boois further testified that there was enough lighting to distinguish between uniforms and all members were wearing uniforms and the only city police vehicle that was at the scene was the one he arrived in, there was no other city police vehicle. He further testified that he was the only city police officer at the scene with the city police uniform and no one else. He further denied having any conversation with the plaintiff about helping out with organizing the crowd. He also denied being approached by a civilian asking who the commander was.

[43] Superintendent Boois in closing his testimony testified that Constable Owoseb was the only Nampol officer in the Iveco bus and the rest of the members were NDF. He also testified that he could see in the bus from where he was standing. So, he could tell how many members were in the bus. He also testified that no reports were made to him or his superiors about a civilian who was assaulted by the members on his shift.

Constable Gilbert Owoseb

[44] The Defendants' final witness was Constable Owoseb who testified, *inter alia*, that he was present at Single Quarters, Katutura on the 20th of July 2020 at the fire scene. He testified further that he was part of the Iveco bus members. Constable Owoseb testified that he was part of the shift of the Namib Desert Operation and whilst on duty they received a report around 20h00, that a tree and an adjacent room to the station caught fire at the Katutura Single Quarters mobile substation.

[45] Constable Owoseb corroborated the evidence of, Superintendent Boois, that when they arrived, the fire scene was already under control and that he did a walk-through of the scene and left on instruction of Superintendent Boois. He testified that he did not observe any scuffle, confrontation, fight or altercation between the members of the Defendants and plaintiff or anyone else for that matter. They left without any

incident. He further also testified that to this day he did not observe or hear about internal investigation of an alleged assault on a civilian. He also did not see an injured civilian at the scene.

[46] Constable Owoseb also further testified that they were ten or twelve in the Iveco bus and that he was the only Nampol officer in the Iveco bus, then two Correctional Service members and the rest was NDF. He also testified that there was sufficient lighting at some places only but there was light where the actual fire was. Constable Owoseb closed his testimony by informing the court that upon arrival of the scene all of them disembarked from the Iveco bus, closed the bus and went to Superintendent Boois.

Burden of proof

[47] The parties are ad idem, correctly so, that the plaintiff bears the burden to prove his claim on a balance of probabilities.

[48] Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC* 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.’

[49] The said established approach doubtlessly sets out the manner of analysis of evidence in this matter. It is further in keeping with the above, that the defendants must substantiate their defence or bring forth a satisfactory explanation to the plaintiff’s claim.

Mutually destructive versions

[50] 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 and the Namibian Police or not. Parties further led evidence which is mutually destructive and cannot co-exist on the identity of the assailants.

[51] The technique generally employed by courts in resolving two irreconcilable versions was described in *SFW Group Ltd & Another v Martell et Cie & Others*². To come to a conclusion on the disputed issues a court must make findings on It is settled law that where the evidence presented by the parties stands in total contrast, the court may consider the (a) creditability of the various factual witnesses, (b) their reliability; and (c) the probabilities.

[52] Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. This approach was discussed by Sibeya J in the matter of *Manja v Government of Namibia*³, relying on what Eksteen AJP said in the matter of *National Employers’ General Insurance v Jagers*⁴, 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.”

² *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA)

³ *Manja v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/02299) [2021] NAHCMD 571 (07 December 2021).

⁴ *National Employers’ General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-E.

[53] 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.

Analysis of evidence and submissions

[54] The versions of the plaintiff and his witnesses and that of the defendant and its witness are mutually destructive. The plaintiff and his witness state that the plaintiff was assaulted by members of the Namibian police and defence force. The defendant's witness denies that the plaintiff was assaulted by members of the Namibian police and defence force.

[55] Ms. Garises, in her quest to convince the court to find in favour of the plaintiff, placed heavy reliance on the judgment of *Sullivan v Government of the Republic of Namibia*⁵. The court found that the version of the plaintiff was corroborated by the evidence of his three witnesses. All three were satisfactory witnesses. They were all consistent that the persons who assaulted, arrested and detained the plaintiff were members of the police and defence force, based on the fact that they were recognized on the uniform they were wearing, although they could not individually identify them.

[56] The defendants, to rebut the plaintiff's evidence, led the evidence of a police officer who was not present at the scene, and could not testify as to who assaulted the plaintiff. She was found that she did not carry out any investigation to establish the identity of the assailants. The court in the *Sullivan* matter found the defendants' sole witness unreliable, whose evidence raised no defence to the plaintiff's claim and evidence.

⁵ *Sullivan v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2020/01020) [2021] NAHCMD 439 (31 August 2021)

[57] From the evidence given by and on behalf of the plaintiff, the court found that the balance of probabilities support the conclusion that the plaintiff was assaulted and detained by members of the police and defence force and that the latter were acting within the course and scope of their employment with the defendant. It was further found from the evidence that the assault and detention was wrongful and unlawful. It therefore follows that the defendant is liable to compensate the plaintiff for the damages which the plaintiff suffered.

[58] It is on the backdrop of the *Sullivan* judgment that Ms. Garises invited this court to disregard the bare denials of the defendants, so she argued. The relevancy or not of the *Sullivan* 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.

[59] The question that begs the answer at this stage is whether, after hearing the plaintiff and defendants' evidence, it can be concluded that the plaintiff proved his claim on a balance of probabilities.

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

60.1 The plaintiff was assaulted on 20 July 2020, where he sustained bodily injuries and pain;

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

60.3 He was examined by a state medical practitioner, where it was found he suffered severe injuries, swelling and conjuvitis in his left eye, muscle trauma, immense chest pain and head aches, which lasted for several days, this remained unconfirmed as the medical practitioner did not testify;

60.4 He was further examined by an Emergency Medical Official (Paramedic) who confirmed an abrasion on the plaintiff's sternum; which according to him indicated a sign of blunt force trauma;

62.5 He was also examined by a clinical psychologist who confirmed that the plaintiff suffered acute stress disorder, as gathered from information that was provided to him.

[61] It follows from the above that the plaintiff was assaulted on 20 July 2020, as a result of which he sustained injuries to his eye and suffered body pains and acute stress disorder.

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

[63] Mrs. Matzi-Filipe remained steadfast in her attack on the evidence of the plaintiff that the assault was not occasioned by members of the defendants'. There was simply no reason for the members of the defendants' to lodge a full blown assault, causing trauma and humiliation on the plaintiff. The members of the defendants' who attended the scene of the fire with the intention and in an effort to extinguish the fire which broke out at the defendants' police substation. Mrs. Matzi-Filipe went all out to dispute every fact suggesting that the members of the defendants' assaulted the plaintiff.

[64] Mrs. Garises was not to be outmuscled. She submitted with vigor that the members of the defendants' perpetrated the assault on the plaintiff. It was her argument that the defendants' would be required not only to proffer bare denials without substance but lead reliable evidence, without losing sight of the legal foundation that the burden of proving a claim lies with the plaintiff. This, she submitted, is premised on the decision of the *Manja* matter, where *Sibeya J* stated that the plaintiff must prima facie proof his claim, against the defendants, but that the defendants will assume a duty to lead evidence in an attempt to rebut the plaintiff claim and evidence.

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

[66] There were a few weaknesses, improbabilities and untruthful parts on the following key aspects of the plaintiff's evidence. Firstly, the plaintiff provides in his particulars of claim that he was physically assaulted with closed fists and booted feet by unknown predominantly police officers in full view of members of the public and the Fire brigade personnel, who were not called to testify, and give an independent account of what transpired and confirm that he was assaulted. The plaintiff instead called Asser Haitembu and Timoteus Shanyengange who were his friends that played cards with him at a house near the mobile police station.

[67] The plaintiff further testified that the assault on him was carried out by approximately ten men, most of whom were Namibian Police force members, however the defendants explained that there was only one Nampol officer on the concerned shift on that Iveco minibus, which arrived at the scene which was Constable Owoseb, in the company of predominantly NDF members and two correctional officers. This evidence was never disputed.

[68] The plaintiff moreover solely testified that the whole group of ten men kicked him all over the body with booted feet, assaulted him), grabbed and choked him on the throat, punched him with closed fists and at some point, he fell and hit his head on the ground and still while being kicked while on the ground. He suffered severe injuries, swelling and conjuvitis in his left eye, muscle trauma, immense chest pain and head aches, which lasted for several days. However, the only confirmed and visible injury as testified to by the paramedic Mr. Goeieman was an abrasion on the plaintiff's sternum, which according to him indicated a sign of blunt force trauma, but which was still unconfirmed by a medical practitioner. This witness did not witness the assault on the plaintiff, as he arrived at the scene of crime, only after the assault was committed. His evidence corroborates the evidence of Mr Haitembu and Mr Shanyengange in so far as it relates to the ambulance that was called and that arrived at the scene and took the plaintiff to the hospital.

[69] 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 identity of the person who carried out the assault, the manner in which the assault was carried out and the injuries sustained. The evidence is sketchy on what exactly transpired during the assault. Did the group of police as well as the Namibian Defence Force officials attack the plaintiff and push him into the Defence Force Bus. Did the members of the defendants attacked the plaintiff by kicking, punching him with closed fists, and did he fall on the ground while they were kicking the plaintiff until he lost consciousness. 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 identified the members of the defendants and their numbers, his recollection could be a serious issue and could called into question.

[70] The plaintiff further did not call Inspector Haiping or Warrant officer Muvangua to testify. No explanation was proffered by the plaintiff for such failure, considering that the plaintiff alleged that he knew Haiping and spoke to him before the fire incident and Muvangua who investigated the matter.

[71] The two witnesses of the plaintiff, Mr Haitembu and Mr Shanyengange did not impress the court as reliable witnesses. Their evidence regarding the incident was not credible and free from contradictions. There are inconsistencies between their evidence and plaintiff. They testified that there were many (Nampol) police officers, whom they swear carried out the assault on the plaintiff, but could not positively identify one of the officers or call them by name. Asser Haitembu testified that and unknown police officer slapped the plaintiff and the other six to seven police officers joined in to beat the plaintiff until he fell to the ground in an effort to later force the plaintiff into the bus. Mr. Timoteus Shanyenga, to the contrary testified that eight Nampol police officers came off the bus and started kicking the plaintiff with boots on the ground, until plaintiff fell unconscious.

[72] The aforementioned testimony is in contrast to what the plaintiff testified, saying that the members of the defendants, did not slap him but that one Nampol officer first "jumped on him" and when he fell to the ground, the others joined in and kicked him with booted feet and subsequently picked him up (in the process and whilst in the air) still continued to launch their assault on the plaintiff while carrying him to their bus.

[73] These two witnesses could identify one of the officers who carried out the attack or positively identify the members of the defendants who assaulted the plaintiff by the description of their uniforms. The high probability is that Timoteus Shanyengange and Asser Haitembu, who were present with plaintiff at all relevant times and in each other's presence should have seen it, and identified the members of the defendants who attacked the plaintiff. Moreover, it is pertinent to note that these two plaintiff's witnesses had their individual disparities and / or contradictions between their testimonies, as well as in comparison to the plaintiff's evidence given. The testimony of Asser Haitembu and Timoteus Shanyengange stands to be disregarded as untruthful, selective and bias clearly their motive was to assist their friend (the plaintiff in his case).

[74] Mr Goeieman made a favorable impression on the court as an expert witness whose account was truthful and reliable. He gave a thorough account of the incident in a straight forward manner. Under cross examination he was able to logically substantiate his evidence thereby reinforcing it. His version is also reconcilable with the probabilities and objective facts in this matter. Mr Goeieman testified that he observed an abrasion on the plaintiff's sternum, which according to him indicated a sign of blunt force trauma, but which was still unconfirmed by medical practitioner according to him, thus reducing the probative value of the conclusions made in evidence, as far as it relates to the injuries sustained by the plaintiff. The plaintiff did not call any of the medical practitioners who examined him, the private doctor and the state medical doctor to testify about the injuries.

[75] Dr Muzanapabwe the clinical psychologist was found to be a knowledgeable witness on the subject matter at hand and his evidence was reliable. Dr.

Mudzanapabwe's testimony made it clear that after a consideration of all the evidence that was presented to him, he concluded that the plaintiff did not have any symptoms at the time of the evaluation. The plaintiff was only examined by him some time after the incident occurred on referral by his legal practitioner. He diagnosed the plaintiff with Acute Stress Disorder, which he was treated for by another clinical psychologist, whose findings and notes were also made available to him in his assessment of the plaintiff. Dr. Muzanapabwe referred in his evidence about a recount of the plaintiff's wife of how the plaintiff carried himself after the assault that pointed out that the plaintiff's reaction could be compared to a person who has experienced trauma. However, the wife of the plaintiff was not called to confirm this and this remains as hearsay evidence.

[76] Superintendent Boois and Constable Owoseb testified for the defendants and gave their versions in a clear, concise and cogent manner. The version of Superintendent Boois and Constable Owoseb aligned and corroborated each other. Their evidence was credible and free from contradictions and discrepancies concerning the details. These witnesses impressed the court as good witnesses and there was nothing to cast doubt on their veracity concerning the events. They gave their evidence in a logical fashion which corroborated each other's versions.

[77] This was a summary of their evidence:

77.1 Both Superintendent Boois and Constable Owoseb testified that they had been on duty and patrolling on the night of 20th July 2020, which was the aim of crime prevention operation.

77.2 Both witnesses accounted their arrival at the scene of the fire at different time slots and that the Fire Brigade Department was in control of the scene of the fire.

77.3 Superintendent Boois arrived first and upon the shift member's arrival, a procedural brief and walk-through the scene was made and the members were asked to withdraw as there had been no injury to life or property.

77.4 Both witnesses testified there was only Constable Owoseb himself as Nampol officer present in the IVECO, wearing his standard issued Nampol

Operational blue uniform in the company of NDF members and some Correctional Officers. Superintendent Boois identified that there were no other City Police officials in attendance at the scene, and only his marked vehicle.

77.5 They both testified that they were at all times in the cordoned-off area, where they had no civilian contact and no confrontation with any members of the public. Their attendance to the scene was very brief and left the scene with no complaints/incidents known of. And especially with no unconscious civilian left behind at the scene.

77.6 Constable Owoseb clarified and maintained what he was the only Nampol official in the Iveco bus and he had no contact with the plaintiff or any other civilian at the point or shortly thereafter at the NDF Iveco bus.

77.7 It is the evidence of the defendants that there was no fight or altercation or scuffle or any incident besides the fire and by the time they arrive, everything was under control and they have left within 15 minutes latest and the earliest being three minutes.

[78] Superintendent Boois' and Constable Owoseb's testimony was persuasive, satisfactory, truthful and forthright, during his evidence in-chief and forthcoming with his answers in his cross-examination.

[79] It is clear that the plaintiff has a vested interest in the success of his claim against the defendants'. It follows therefore that where, as in casu, the defendants deny the averment that their members who were present at the scene assaulted the plaintiff, 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.

[80] 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 they deny any assault to n the plaintiff by the members of the defendants'.

[81] The evidence of Superintendent Boois and Constable struck me as credible and stood unshaken in cross-examination. I therefore do not agree with the submission by Mrs. Garises 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 members at the scene during the time the fire was burning. It consequentially follows that the facts of this matter are miles apart from those in the *Silluvan* judgment and the reliance thereon by Ms Garises to argue that the claim should succeed because the defendants tendered bare denials is misplaced.

[82] 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.

Quantum

[83] It is the courts considered view, that the plaintiff failure, as alluded to in this judgment, merit that the court need not even deal with the quantum of damages and should accordingly reject the plaintiff's claim in totality.

Conclusion

[84] 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 defendants'. I further find that the plaintiff failed to produce conclusive evidence that he was assaulted by members of the defendants'.

[85] 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

[86] I now turn to the issue of costs. The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the Court. It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The Court's discretion is a wide, unfettered and an equitable one. There is also, of course, the general rule, namely that costs follow the event, that

is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale.

[87] Mrs Garises informed me that the plaintiff is legally aided under the Legal Aid Act, 1990 and I must therefore not make an order of Costs.

[88] It is so that the discretion must be exercised judicially with due regard to all relevant considerations, and the case before court is a case which represents special circumstances, which allows the court to deviate from the application of the general rule.

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

1. Plaintiff's claim is dismissed.
2. No order as to costs.
3. The matter is removed from the roll and regarded as finalized.

CHRISTIAAN
ACTING JUDGE

APPEARANCES

For the Plaintiff:

D Garises

Of The Directorate of Legal Aid, Windhoek

For the Defendant:

F Matsi-Filipe

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