

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 317/2012

In the matter between:

MUBITA VASCO MALUMBANO

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

FIRST DEFENDANT

DIRECTOR OF THE ANTI-CORRUPTION COMMISSION

SECOND DEFENDANT

PROSECUTOR-GENERAL

THIRD DEFENDANT

Neutral citation: *Malumbano v Government of the Republic of Namibia* (I 317-2012)
[2013] NAHCMD 113 (25 April 2013)

Coram: UNENGU, AJ

Heard: 6-7 and 14 February 2013

Delivered: 25 April 2013

Flynote: Delict – Plaintiff suing defendants for wrongful arrest; and wrongful detention and malicious prosecution – Plaintiff was arrested, detained and charged with an offence under the Anti-Corruption Act – but found not guilty by the Magistrate – Plaintiff not proving claim – Claim, therefore, dismissed.

Summary: Delict – Plaintiff sued defendants for wrongful arrest and detention and malicious prosecution – Plaintiff was arrested, detained and charged by the officials of the Anti-Corruption Commission with an offence under the Anti-Corruption Act for which the plaintiff was found not guilty in the Magistrate's Court – In this Court, the

plaintiff failed to prove his claim for the wrongful arrest, detention and malicious prosecution – therefore, the claim is dismissed.

ORDER

In the result, the plaintiff's claim is dismissed with costs.

JUDGMENT

UNENGU, AJ: [1] The plaintiff, who is a sergeant in the Namibian Police Force, has instituted a civil claim of wrongful arrest and detention and malicious prosecution against the first, second and third defendants jointly and severally, the one to pay the other to be absolved, for damages in the sum of N\$250 000.00.

[2] Plaintiff is also asking for costs on the scale between attorney and client, to be paid jointly and severally by the defendants.

[3] The claim is a consequence of the arrest and detention of the plaintiff by the officials of the Anti-Corruption Commission on 27 January 2010, on suspicion that he had contravened Section 43(1) of the Anti –Corruption Act¹.

[4] The plaintiff alleges further that on 10 May 2010 the third defendant wrongfully and maliciously set the law in motion and decided to prosecute him for contravening section 43(1) of the Anti-Corruption Act, alternatively use of a motor vehicle without the owner's consent, in contravention of section 83(2)² of which he was, on 20 October 2011, duly acquitted in court due to lack of evidence.

[5] With regard the allegation of wrongful arrest, the defendants' pleaded that the Anti-Corruption Commission had a reasonable and probable suspicion to effect the arrest on the plaintiff as he was driving the motor vehicle in circumstances contrary to the official trip authority and that there was a reasonable suspicion that he had

¹ Act 8 of 2003

² Act 22 of 1999

contravened section 43(1) of the Anti-Corruption Act – alternatively, that the plaintiff had contravened section 83(3) of the Road Traffic and Transport Act, i.e. driving a motor vehicle without owner's consent or a person lawfully in charge thereof.

[6] In both the joint case management report and the pre-trial order in terms of rule 37(12) of the Rules as amended, the plaintiff and the defendants identified the following issues as issues to be resolved during the trial, namely (i) whether the defendants are liable for malicious prosecution and (ii) the quantum in respect of the claim.

[7] To be successful in his claim for malicious prosecution, the plaintiff is required to prove both improper motive and absence of reasonable cause. Damaseb, JP, in the matter of *Engelhard Akuake and Jansen van Rensburg*³, quoting from the matter of *Lederman v Moharal Investments (Pty) Ltd*⁴ restated the requirements, the plaintiff must allege and prove to sustain a claim based on malicious prosecution as follows:

- (i) That the defendants actually instigated or instituted the criminal proceedings;
- (ii) Without reasonable and probable cause; and that
- (iii) It was actuated by an indirect or improper motive (malice)
- (iv) And that the proceedings were terminated in his favour; and
- (v) He suffered loss and damage.

See also *Beckenstrater v Rottcher and Theunissen*⁵

[8] In this matter, apart from the requirement in (iv), which is common cause between the parties, the plaintiff must prove all the remaining requirements to succeed in his claim. It is also not in dispute that the plaintiff was arrested by the members of the Anti-Corruption Commission on 27 January 2010 and detained and that a decision⁶ was taken to prosecute him in the Magistrate's Court of Windhoek (Mungunda Street) on the charge of contravening section 43 (1) of the Anti-Corruption Act – i.e. corruptly using office or position for gratification; alternatively

³ (Unreported) delivered on 9 February 2009

⁴ 1969 (1) SA 190 (A) 190-196 G-H

⁵ 1955 (1) SA 129 (Flynote)

⁶ Exhibit "E"

contravening 83(2) of the Road Traffic and Transport Act – driving a motor vehicle without owner’s consent or a person lawfully in charge thereof. That being the case, I can safely find in favour of the plaintiff that the requirement in paragraph (i) above has been proved.

[9] In this matter the evidence of the plaintiff and the evidence of witnesses who testified on behalf of the defendants is that both the second and the third defendants were actively instrumental in the actual instigation or institution of the criminal proceedings against the plaintiff. The next issues now to be proved by the plaintiff are whether the instigation or institution of the criminal proceedings was without reasonable and probable cause and that it was actuated by an indirect or improper motive (malice).

[10] The facts of the matter are briefly as follows: That the plaintiff is a sergeant in the Namibian Police Force and was stationed at the Katutura Police Station and his duties were amongst others, an operation commander – who was tasked to visit members at roadblocks, to visit members who were conducting patrols around Windhoek. To perform these duties and functions, a motor vehicle with registration number POL 68578 and a trip authority were allocated and issued to him respectively for use during the period 1 January 2010 until 31 January 2010. Further, the plaintiff stated that he was also the driver for the Station Commander as well as a transport officer for the Katutura Police Station. He said that on 27 January 2010, during the afternoon, he drove to Katutura Shoprite Complex with the said motor vehicle to conduct patrols and to visit members who were deployed at the complex. However, while still at the complex, he decided to buy some personal items for use at his office at Shoprite and Pep Stores. Exhibit “K” is listing the items bought as follows:

Bought at PEP Stores

Colouring Pe
Glue Stick
12 Pce Stati
Face Cloth
24 Pc Wax Cr
Cuddlesome

Bought at SHOPRITE

Handy Andy
Rainbow 200s
Salad Small Pack
Airoma F/Bouquet
Panado Tabs 24s
Davosol Blocks F

[11] After buying these items, the plaintiff wanted to drive back to the Katutura Police Station when he was stopped by a City of Windhoek Police Official and saw people with video cameras approaching – amongst them he recognised Mr Oelofse, Mr Olivier, Mr Kurtz and Mr Masule, all of whom were of the Anti-Corruption Commission. Mr Oelofse then told him that he was using a police vehicle for private shopping, whereupon he produced a trip authority and logbook of the vehicle and indicated to them that he was authorised to drive the vehicle. Mr Oelofse then phoned the Station Commander of Katutura and the Regional Commander who spoke to him. After the conversation between Mr Oelofse and the Regional Commander, the plaintiff was arrested by Mr Olivier on the instruction of Oelofse. The plaintiff was then taken to the Katutura Police Station where he was charged and detained while still in his full police uniform and in possession of his pistol.

[12] He said that after Mr Oelofse charged him, Mr Oelofse left the Charge Office and was left behind in the Charge Office with his colleagues. He spent most of the time in the Charge Office until night. He said that he could not sleep in the Charge Office while in his uniform but was told by his fellow police officers to go and sleep in a room where they normally keep members of the public who misbehaved. He complained that he was not taken to the Hosea Kutako Airport Police Station where police officers are detained after they have been arrested. The following day, he was taken to court where he was released on bail of one thousand Namibia dollars (N\$1000.00). Sergeant Malumbano testified that Mr Olivier recommended to the Prosecutor-General for him to be prosecuted with the offence of contravening section 43(1) of the Anti-Corruption Act – that is that he used his office or position to obtain gratification.

[13] He further mentioned that as a police official, holding a rank of sergeant, it was not necessary to be arrested for purposes of appearing in court; that he was humiliated by the conduct of members of the Anti-Corruption Commission as he was known to them. In conclusion, sergeant Malumbano testified that he suffered financial, psychologically and emotionally as a result of his arrest and prosecution. He was also denied promotions because his name was removed from the promotion list due to the case which was pending against him, and prayed for damages to be awarded in the amount of two hundred and fifty thousand (N\$250 000.00) Namibian

dollars if successful. In cross examination, he testified that he came from Black Chain Shopping Centre in Katutura after visiting members of the police who were deployed there – when he came to the Shoprite and Pep Stores Shopping Complex to buy the items in question. He agreed in cross examination that the arrest was carried out properly and that he was informed about the charge for which he was arrested by Mr Olivier for misusing a government motor vehicle.

[14] At the end of the plaintiff's case, Mr Chibwana, counsel for the defendants applied for an absolution from the instance in respect of 1st defendant – which I refused for lack of merits.

[15] Messrs Olivier and Oelofse, from the Anti-Corruption Commission testified on behalf of the defendants. Mr Olivier testified that he is employed by the Anti-Corruption Commission as a Senior Investigating Officer and has worked for the Commission now for a period of four (4) years and a few months. He said that on 27 January 2010, they conducted an operation at the Shoprite Shopping complex in Katutura to curb misuse of government vehicles. In attendance were the witness himself, Mr Oelofse, Mr Masule, Mr Kurz and a City of Windhoek Traffic Officer. He stated further that he saw a police vehicle driven by the plaintiff who disembarked from the said vehicle and went into Shoprite Supermarket and Pep Stores. After 30 minutes or so, the plaintiff returned to the motor vehicle carrying two shopping bags. The plaintiff got into the motor vehicle but was arrested because they suspected that the goods the plaintiff bought, were not for official use but for himself or for private use. The plaintiff was informed that he was being arrested because he used a police motor vehicle for private shopping. However, the plaintiff decided to remain silent. Thereafter, the plaintiff was taken to the Katutura Police Station where he was charged and detained until the following day morning when he was taken to court with other suspects. The court released the plaintiff on bail of one thousand (N\$1000.00) Namibia dollars.

[16] A few witness statements and other documents were handed into court as exhibits during the evidence of Mr Olivier. According to Mr Olivier, when asked what he was doing at the Shopping Complex, the plaintiff kept quiet. He did not tell them

that he was on patrol or was visiting other members of the police force who were placed there for patrol duties.

[17] The second and last witness to testify for the defendants, is Mr Oelofse, who also took part in the operation to curb the misuse of government motor vehicles with Mr Olivier and others at the shopping complex in Katutura on 27 January 2013. Mr Oelofse confirmed that he previously worked in the Namibian Police Force as Chief Inspector but currently employed by the Anti-Corruption Commission as Senior Investigating Officer. He confirmed further that he saw the plaintiff driving the police motor vehicle – that the plaintiff was arrested and charged with an offence under the Anti-Corruption Act. According to Mr Oelofse, he was aware that, during weekly meetings conducted by the Regional Commander at the time when he was still a police officer, members of the Police Force were informed to refrain from using police vehicles for unofficial purposes. Mr Oelofse was also cross examined by Mr Muluti; counsel for the plaintiff.

[18] On the evidence presented by the defendants, I have no doubt in finding that the defendants actually instigated or instituted the criminal proceedings with reasonable and probable cause.

[19] Mr Muluti referred the court to the case of *Nkosiyawo Henderson Kotwasna v The Minister of Safety and Security*⁷ where it was stated that the test of whether a suspicion is reasonable entertained within the meaning of section 40(1)(6), is objective. According to him a reasonable person in the position of Mr Olivier would not have acted in the manner Mr Olivier did when arresting and causing the detention of the plaintiff. He said that the plaintiff produced a trip authority which authorised him to drive the said police vehicle. The fact that the plaintiff has gone to Katutura Shoprite Complex and purchased small items, according to him, does not form a reasonable suspicion that he corruptly used his office for personal gratification. I disagree.

⁷ Case Number: 3587/2009 Unreported judgment of the High Court of South Africa, Eastern Cape, Grahamstown division: Delivered on 1 March 2012 at paragraph 15

[20] The plaintiff was arrested without a warrant of arrest and detained by Mr Olivier on the suspicion that he had committed an offence under section 43(1) of the Anti-Corruption Act, in that he used his office or position to obtain gratification by using a government vehicle POL 6578 to do shopping for private consumption.

[21] It is common cause that Mr Olivier is an authorised officer as contemplated by section 28(1) of the Anti-Corruption Act who had the powers to arrest the plaintiff without a warrant of arrest whom he reasonably suspected to have committed an offence under the Anti-Corruption Act. The evidence of Mr Olivier is clear on that aspect. The trip authority produced by the plaintiff only authorised him to use the motor vehicle for official purposes not for own or private purpose. The items bought by the plaintiff from the two shopping complex were for private consumption. There is no doubt about that. He used own money to buy the items.

[22] As already pointed out above, the test for the existence or otherwise of a reasonable ground for suspicion is determined by an objective test. Likewise, the onus to establish on a balance of probabilities that he had reasonable grounds for his suspicion that the plaintiff had committed an offence is on the defendants. See *McNab and others v Minister of Home Affairs NO and others*⁸.

[23] In my opinion Mr Olivier, at the time of the arrest, had a reasonable ground to suspect that the plaintiff had committed an offence in view of the fact that the plaintiff failed to explain what he was doing at the shops with a government vehicle.

[24] The law protects the plaintiff against self-incrimination but to give an exculpatory statement to an arresting officer, does not, in my view, amount to self-incrimination. The plaintiff could have just told Mr Olivier that he was visiting junior officials from the Police whom he had deployed there for patrol purposes and left it for Mr Olivier to accept or not to accept his explanation. By failing to speak, the plaintiff gave Mr Olivier a reason for suspicion.

⁸ 2007 (2) NR 531 (HC) at 542 D-E

[25] In *Mebana and Another v Minister of Law and Order and Others*⁹, Jones, J when referring to section 40(1) (b) of the Criminal Procedure Act¹⁰, which is almost identical to section 28(1) of the Anti-Corruption Act, stated that the section requires suspicion not certainty. Similarly, an arrest can take place even if the arrester realises that he or she at the time of the arrest does not have sufficient proof for a conviction. The Court in *Sangono v Minister of Law and Order*¹¹ held that a suspicion arises at or near the starting point of an investigation and has, in its ordinary meaning, a state of conjecture or surmise and not actual proof.

[26] That being the case, there is no doubt in my mind that the arrest effected on the plaintiff by Mr Olivier, was lawful; reasonable in the circumstances that prevailed at the time of the arrest and that any other police officer in the position of Mr Olivier, would have done the same.

[27] Consequently, the allegation that when effecting and/or causing the arrest of plaintiff, members of the Anti-Corruption Commission had no reasonable or probable cause for so doing, nor did they have any reasonable suspicion that plaintiff committed the alleged offence is hollow – does not hold water and is rejected.

[28] That brings me to the issue of detention. Mr Chibwana, counsel for the defendants made a concession in favour of the plaintiff in his submission that, as the plaintiff was known to the arresting officers, he should not have been detained. He submits that the arresting officer must have taken into consideration the individual circumstances of the accused, before deciding which mechanism to utilize to bring him to Court. According to him, the detention of the plaintiff was wrongful. However, Mr Chibwana defends and justifies the arrest of the plaintiff to be lawful, which, in my view is in stark contrast with the concession he made. The question may be asked then, why was the plaintiff arrested in the first place? The plaintiff was known to the arresting officers, he could have just been charged with the offence and warned to appear before Court the following day, if that is the argument of counsel.

⁹ 1988(2) 8A 654 at 658 H

¹⁰ 51 of 1977

¹¹ 1996 (4) SA 384 (ECD) at 386-H-I

[29] With due respect to counsel, I differ from him on the aspect of detention, but we agree on the arrest. The fact that they knew the person of the plaintiff, being a sergeant in the police, does not, in my view, make his detention unlawful. There is nothing on record or in the evidence placed before Court indicating that the detention of the plaintiff in the police cells at Katutura was against a rule of either common law or statutory law. His (the plaintiff) complaint is that he slept in the cells at Katutura Charge Office while in his Police uniform instead of being taken to the Hosea Kutako International Airport Police Station where police officers are usually detained. That omission cannot make the detention unlawful. In any event, the failure to take the plaintiff to the Airport was on the part of the police, not on the defendants. Therefore, I find the concession made by Counsel, incorrect and is not accepted.

[30] With regard to the requirement of malice or improper motive, the plaintiff did not manage to discharge the onus resting on him on a balance of probabilities that the criminal proceedings against him were instigated or initiated without reasonable and probable cause and out of malice. The evidence is clear that he was charged with the offence because he used a police motor vehicle to go to the Shoprite and Pep store Shopping centres where he bought private items, for his personal use at home. The fact that the plaintiff was not convicted of the offences charged with, does not necessarily mean that the defendants were malicious in prosecuting him. Acquittals do happen in our courts on regular basis for various reasons. That requirement, the plaintiff had failed to prove, and therefore, should also fail in his claim.

[31] In the result, the plaintiff's claim is dismissed with costs.

E P Unengu
Acting Judge

APPEARANCES

PLAINTIFF:

P MULUTI

Of Muluti & Partners, Windhoek

DEFENDANTS:

T CHIBWANA

Of Government Attorney, Windhoek