



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 739/2012

In the matter between:

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA
(MINISTER OF SAFETY AND SECURITY)**

PLAINTIFF

And

ISAI IPINGE

DEFENDANT

Neutral citation: The Government of the Republic of Namibia (Minister of Safety and Security) *v* *Ipinge* (I 739-2012) [2014] NAHCM 196 (23 June 2014)

Coram: UNENGU AJ

Delivered: 23 June 2014

Flynote: Enrichment – Defendant, a Police Officer discharged from the Police Force due to absenteeism received monthly remuneration after discharge – Plaintiff – managed to prove all elements for unjust enrichment – claim granted in favour of plaintiff.

Summary: The defendant, a Police Officer who has been discharged from the police force due to absenteeism in terms of section 9 of the Police Act 19 of 1990 received his monthly remuneration after the discharge. Plaintiff has instituted a claim for the payment of the remuneration so paid on the basis of unjust enrichment against the defendant. Plaintiff managed to prove all elements for unjust enrichment and was granted the relief claimed.

ORDER

1. Plaintiff's claim of unjust enrichment succeeds.
2. The defendant pays back to the plaintiff the amount of N\$61 124.02 (sixty one thousand, one hundred and twenty four Namibia dollars and two cents), being the remuneration paid to the defendant by the plaintiff from May 2009 until June 2010.
3. Interest of 20% per annum on the above amounts calculated from the date of judgment to the date of payment.
4. There is no order as to costs made.

JUDGMENT

UNENGU AJ:

[1] This is an action for unjust enrichment instituted by the plaintiff against the defendant, Mr Isai Ipinge who was appointed by the plaintiff as a member of the Namibian Police Force in terms of the Police Act¹.

[2] In the particulars of claim attached to the Combined Summons, the plaintiff amongst others, alleges that the defendant from on or about 20 December 2004,

¹ Act 19 of 1990 (The Police Act)

absented himself from work for a period of longer than 30 days. It is further alleged that despite that the defendant absented himself from work for a period exceeding 30 days and was subsequently (in terms of section 9 of the Police Act) deemed dismissed, plaintiff erroneously continued to pay the defendant his full monthly remuneration from January 2005 to June 2010.

[3] Furthermore, the plaintiff alleges that as the defendant was not engaged in any work for the plaintiff during the said period of January 2005 to June 2010, the defendant was not entitled to receive any remuneration. Therefore, the defendant was enriched by the amount of N\$48,196.82 (fourty eight thousand one hundred and ninety six Namibian dollars and eighty two cents) at the expense of the plaintiff, which, despite demand, the defendant fails and/or refuses to pay.

[4] After the requested further particulars were provided to him, the defendant filed his plea to the particulars of claim of the plaintiff. Even though, the defendant in his plea admits and denies certain allegations contained in the particulars of plaintiff's claim, the defendant never put in issue the allegation that he was deemed to have been discharged from the Force on account of misconduct in terms of section 9 of the Police Force for being absent from work for a continuous period of more than 30 days. That being so, the allegation that the defendant was discharged from the Police Force, remains undisputed. Therefore, if any remuneration was paid to him by the plaintiff, in the form of a monthly salary or otherwise after the discharge, has to be justified by the defendant.

[5] It has also to be pointed out that the plaintiff has amended its particulars of claim not less than three times, of which the last amendment was in respect of paragraph 8 of the particulars of claim to read: '8. The defendant was enriched by the amount of N\$61 124.02 (sixty one thousand one hundred and twenty four Namibian dollars and two cents), calculated from May 2009 to June 2010, at the expense of the plaintiff'.

[6] This amendment was necessary in order to leave out the claim for the period January 2005 to April 2009, as that claim has already prescribed at the time the

action was instituted. Therefore, the claim against the defendant is for the period May 2009 to June 2010 only.

[7] I must also mention also that in his plea filed on 4 July 2012, the defendant pleaded amongst others that: verbatim:

‘(a) his full monthly remuneration from January 2005 to June 2010 was justified;
(b) during the year 2005, he fell sick and, consequently, was booked off from time to time by Dr Martha Shamena and;
(c) he took his sick leave form to the Human Resources department at the Police Headquarters at Ausspannplatz. Accordingly, the employer was aware about his ill health.’ The defendant thus denied that he was liable to plaintiff for payment of the claimed amount he received during and including the period from May 2009 to June 2010.

[8] At the trial, the plaintiff called Sergeant Vasco Malumbano as the first witness to testify. Sergeant Malumbano testified that he is a sergeant in the Namibian Police Force appointed in 2004 and is attached to the department of the Special Field Force here in Windhoek. He said that the defendant worked under his supervision and that he (the defendant) was absent from work as from 20 December 2004 until 7 January 2005, which is 16 days in total. He said that because the defendant did not report for duties, he decided to go to the resident of the defendant to find out the reasons why he (the defendant) was not reporting for duty. However, when he arrived at the house of the defendant, the defendant told him to stay away from him. Sergeant Malumbano then left the defendant and informed his superiors about the attitude of the defendant. After cross-examination by Mr Ipumbu, counsel for the defendant, the plaintiff called, its second and last witness, Loise Ndesihafela Haikondja to testify.

[9] Ms Haikondja testified that during 2004 to 2005, she worked at the Wanaheda Police Station as a Commander of shift B at the Special Field Force division. She said that she knows the defendant because the defendant worked under her supervision in shift B. Ms Haikondja, with reference to entries made in the Occurrence Book in the charge office of the Wanaheda Police Station, told the Court that the defendant was absent from duty from December 2004 until the end of January 2005, while she was the B shift Commander. She further testified that she

visited the defendant's house to find out why the defendant was not reporting for duty but did not find him at home. She said that during her pregnancy, she shifted to a Mobile Station in Freedom land where she worked until she gave birth in April 2005. According to her testimony, the defendant was discharged from the Police Force on account of being absent from duty.

[10] Ms Haikondja was also cross-examined by Mr Ipumbu. In his cross examination, Mr Ipumbu concentrated more on the entries in the Occurrence Book for days his client did not report for duty. Mr Ipumbu's concern was that the entries in the Occurrence Book did not indicate that his client was absent from duty for a continuous period of 30 days. Counsel also put the defendant's defence to the witness that the defendant would testify that during 2005 he was booked off by doctor Martha Shaamena and took the leave form to the Human Resources department and also explained his illness to a Commissioner Ndokosho who told him to report to him. But the defendant failed to confirm this defence under oath as suggested to the witness by counsel. Constable Haikondja also refuted the allegation by counsel that defendant sometimes did not report for duty at the Police Station but joined other members during patrols.

[11] After cross-examination, the case for the plaintiff was closed. However, in view of the fact that Ms Fredericks, counsel for the plaintiff omitted to produce evidence of copies of the monthly salary payslips of the defendant, counsel applied for the re-opening of the plaintiff's case. The application was refused. Thereafter, Mr Ipumbu applied for an absolution from the instance which application was also dismissed with costs.

[12] When dismissing the application for the absolution from the instance, the Court considered the evidence presented by the plaintiff and those contained in the pleadings. Referring to an English case of *Miller v Minister of Pension*², Mr Ipumbu submitted that the standard of proof in civil matters, is of a reasonable degree of probability not so high as required in a criminal case. Counsel further argued that

² [1947] All ER at 374

the plaintiff has not discharged its *onus* of proof, therefore, absolution from the instance should be granted.

[13] I disagreed with counsel with regard the burden of proof he had applied at that stage of the case. The test he had referred to is only applicable after the defendant had closed his case.

[14] Mr Ipumbu also argued that as his client was not absent from duty for 30 days consecutively, his client was not supposed to be discharged in terms of section 9 of the Police Act³. Once again counsel is wrong. If counsel is not happy with the dismissal of his client, he must take this up with the Office of the Labour Commissioner, not in a trial of a civil matter for unjust enrichment against his client.

[15] On her part, Ms Fredericks, Counsel for the plaintiff, quoting from the matter of *Bidoli v Ellistron t/a Ellistron Truck & Plant*⁴, argued that when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established after the defendant's case has been closed, but whether there was evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.

[16] I agree with this argument. There is sufficient admissible evidence led by the plaintiff in the matter to prove that a reasonable Court might find for the plaintiff. Similarly, it is not a requirement at this stage of the proceedings for the Court to find, on the balance of probabilities, that the defendant was unduly enriched at the expense of the plaintiff. In the result and for the reasons and conclusion indicated above, I refused to grant absolution from the instance.

[17] After the dismissal of the application for the absolution from the instance, the defendant elected to close his case without leading evidence, and the matter was postponed for arguments.

³ Act 19 of 1990

⁴ 2002 NR 451 (HC)

[18] I must also mention that according to the amended particulars of plaintiff's claim dated 4 March 2013 filed on the same day, namely, 4 March 2013, the plaintiff made the following allegations in paragraphs 6-9: verbatim:

6. Despite the fact that the defendant absented himself from work for a period exceeding 30 days and was subsequently deemed dismissed, plaintiff erroneously continued to pay him his full monthly remuneration from January 2005 to June 2010.

7. During the period of January 2005 to June 2010, the defendant was not engaged in any work for the plaintiff and was therefore not entitled to receive any remuneration.

8. The defendant was enriched by the amount of N\$61 124.02 (sixty-one thousand one hundred and twenty-four Namibian dollars and two cents) at the expense of the plaintiff.

9. Despite demand the defendant fails and/or refuses to make payment of the amount of N\$61 124.02.' The defendant never objected to the proposed amendment, and did not disputed the allegations contained in the amended particulars of claim. That being so, I accept that these allegations are not in dispute and will be treated as common cause between the plaintiff and the defendant.

[19] The elements of unjust enrichment are:

- (a) the defendant must be enriched;
- (b) the plaintiff must be impoverished;
- (c) the defendant's enrichment must be at the expense of the plaintiff; and
- (d) the enrichment must be unjustified or *sine causa*⁵.

⁵ McCarthy Retail Ltd v Shortdistance Carriers cc [2001] 3 All SA 236 (A); 2001 (3) SA 482 (SCA); Golden Highway (Pty) Ltd v Patel and Another: SA Case No A 5038/07 (unreported)

[21] Like in the *Golden Highway v Patel and Another* case supra, the common cause facts in the instant matter are the following:

(a) The defendant was a Police Officer in the Namibian Police Force, attached to the Special Field Force division at the Wanaheda Police Station during the period 2004 to 2010;

(b) The defendant was discharged from the Force by the Inspector-General in terms of section 9 of the Police Act for being absent from official duty for the period 20 December 2004 until June 2010;

(c) Despite that defendant did not perform official duty from 20 December 2004 until June 2010 (as he was discharged from the Police Force by the Inspector-General), the defendant continued to receive his monthly remuneration for the said period from the plaintiff as if he was still a member of the Police Force, performing the functions of a Police Officer and therefore entitled to receive the monthly salary – whereas in reality not;

(d) The total amount of remuneration paid to him for the period January 2005 until June 2010 is N\$61 124.02 (sixty one thousand one hundred and twenty-four Namibian dollars and two cents).’ The common cause facts have not been refuted by the defendant under oath:

[21] Now, if regard is had to the evidence in the pleadings, the oral evidence of Sergeant Malumbano and Constable Haikondya and the common cause factors as pointed out above, no doubt, the evidence established that the defendant was enriched with N\$61 124.02, the money paid to him by the plaintiff at the latter’s expense; that the payment of the said money to the defendant impoverished the estate of the plaintiff which enrichment was unjustified.

[22] Ms Fredericks, counsel for the plaintiff submitted in her main heads and oral submissions that the defendant was deemed to have been discharged from the Police Force with effect from 20 December 2004 thus was not engaged in any work for the plaintiff, accordingly not entitled to the remuneration he received after the discharge. Counsel, further argued that the plaintiff proved that the defendant was enriched at the plaintiff’s expense which enrichment is unjustified.

[23] I totally agree with counsel. There was no legal or even natural obligation on the plaintiff to make the payments to the defendant. The payments were absolutely not due and owing to the defendant because he (defendant) did not work for the money.

[24] Meanwhile, it is the defendant's defence that he worked for the remuneration paid to him. He also alleges that he was on sick leave, booked off by Dr Martha Shaamena for the period the plaintiff alleges he (defendant) did not work, attempting to justify the remuneration he received from the plaintiff. If the defendant is relying on the defence of non-enrichment at the expense of the plaintiff, the onus is on him to establish that. The defendant closed his case without leading evidence to confirm his allegations in the plea and those made by his counsel during cross examination of the plaintiff's witnesses.

[25] Mr Ipumbu, was well aware, in view of the dismissal of the application for the absolution from the instance, that the plaintiff has placed evidence before Court upon which a Court, applying its mind reasonably to such evidence could or might find for the plaintiff, but that notwithstanding, counsel decided not to lead evidence. As already pointed out, the evidence placed before Court by the plaintiff, the common cause factors and the fact that the defendant was discharged from the Police Force in terms of the provisions of the Police Act for absenteeism with effect from December 2004, in my view, the plaintiff proved not only a *prima facie* case against the defendant but a strong *prima facie* case, which begged for a rebuttal from the defendant. The defendant decided not to do so. Therefore, in my view, the plaintiff managed on balance of probabilities to prove its claim for unjust enrichment as amended.

[29] In the result, the following order is made:

1. Plaintiff's claim of unjust enrichment succeeds.
2. The defendant pays back to the plaintiff the amount of N\$61 124.02 (sixty one thousand, one hundred and twenty four Namibia dollars and two cents), being the remuneration paid to the defendant by the plaintiff from May 2009 until June 2010.

3. Interest of 20% per annum on the above amounts calculated from the date of judgment to the date of payment.
4. There is no order as to costs made.

PE Unengu
Acting

APPEARANCE:

For plaintiff:

Ms L Fredericks

Office of the Government Attorney

For defendant:

Mr T Ipumbu

Titus Ipumbu Legal Practitioners