

**NOT REPORTABLE**

CASE NO: SA 13/2006

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between

**CHRISTOPHER RYAN TRETHERWEY**

**First Appellant**

**TYE BRETT TRETHERWEY**

**Second Appellant**

and

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**Respondent**

**Coram:** MARITZ JA, STRYDOM AJA and CHOMBA AJA

**Heard:** 14 November 2007

**Delivered:** 29 November 2016

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**APPEAL JUDGMENT**

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CHOMBA AJA (STRYDOM AJA concurring)

Introduction

[1] It is a matter of regret that delivery of judgment in this case has been inordinately delayed. The appeal was heard on 5 October 2006 by a bench consisting of Maritz JA, Strydom AJA and myself. The responsibility to prepare a draft judgment fell on me, which I discharged timeously. Later, however, it turned out that our brother Maritz JA, expressed a desire to prepare a separate

contribution to the judgment. Needless to state that because that desire had to be accommodated, delivery of the judgment was withheld. Regrettably, over the intervening period the health of our brother has been on the decline, and the situation now is that he has conveyed through the Chief Justice the message that he has been medically advised against undertaking strenuous mental concentration on matters such as the current one.

[2] The legal position in such an eventually is settled. Pursuant to the provisions of s 13(4) of the Supreme Court Act 15 of 1990, and as discussed by this court in earlier judgments, amongst others in *Wirtz v Orford & another* 2005 NR 175 (SC) my brother Strydom AJA and I can validly and properly finalise the matter, provided we agree on the outcome of the appeal. This we have done in this case.

#### The appeal

[3] This appeal emanated from the judgment of Mtambanengwe AJ, delivered on 15 March 2006, following a full trial of a civil matter in which the appellants, Christopher Ryan Trethewey and Tye Brett Trethewey, were respectively the first and second plaintiffs, and the Government of the Republic of Namibia, the defendant. The genesis of this matter was an action commenced by combined summons issued at the instance of the plaintiffs and by which they claimed from the defendant damages allegedly arising in circumstances to be outlined in due course. The action was dismissed with costs. Being aggrieved by the verdict, the appellants exercised their right of appeal leading to the proceedings from which this judgment has ensued.

[4] Solely for the purpose of convenience, in this judgment I shall refer to the parties by the designations they bore in the court below.

[5] In the notice of appeal launched by the plaintiffs' legal counsel, it was merely stated that the appeal was 'against the whole of the judgment delivered by His Lordship, Mr Justice Mtambanengwe, in the High Court on 15 March 2006'. No grounds of appeal were specified. However, in the heads of argument filed on behalf of the plaintiffs the following issues have emerged: the credibility of the defendant's witnesses is impeached; it is alleged that the plaintiffs were unlawfully arrested and detained; theft is ascribed to the alleged disappearance of certain goods which were in the possession of the plaintiffs at the time of their alleged unlawful arrest and detention, and a finger of accusation in this regard is levelled against the police; and violations of certain fundamental rights are asserted in connection with the alleged arrest and detention of the plaintiffs.

#### The undisputed facts in this case

[6] The following facts are common cause in this case, that is to say: On Sunday, 17 November 2002, at about 17h30, the plaintiffs, who are brothers, arrived at the Namibian side of Mohebo Border Post which is at the border between Namibia and Botswana. They were in an Isuzu double cab diesel motor vehicle, registration number CY 380746 (the Isuzu) driven by the first plaintiff. As both emerged from the Isuzu and entered the immigration area, they left the engine idling and music could be heard on the audio system of the vehicle. In the Immigration Hall they started completing immigration forms using red ink.

However, they were advised not to use that colour but to use black or blue. They were further advised to go outside the hall and complete fresh forms. Thereafter they were supposed to return to the immigration officer in attendance, but in the meantime a border police officer noticed that they omitted to indicate in the forms the engine and chassis numbers of the Isuzu. The officer drew the plaintiffs' attention to the omission and he requested them to produce the vehicle ownership documents as well as the international police clearance certificate relating thereto; they failed to do so. That officer then demanded to inspect the Isuzu, and therefore asked them to accompany him to the vehicle.

[7] As they carried out an inspection at the Isuzu, the officer noticed a quad motor cycle the ownership documents for which could not be produced upon request by the officer. A search was also conducted inside the Isuzu and a pouch of cannabis, commonly known as dagga, was found. The first plaintiff readily admitted that it belonged to him. Also found in the Isuzu were several assorted articles including leathermans, knives and self-defence tools among other merchandise.

[8] At one stage during the search the police officer called a customs officer on duty to join him at the vehicle as it appeared to him that the aforementioned goods were liable to attract payment of customs duty. That customs officer, going by the name of Elias Penda, testified that he seized those articles pending customs clearance and payment of value added tax (VAT).

[9] In due course, the police had a scuffle with the first plaintiff as a result of which the latter was handcuffed. Later that evening the first plaintiff was conveyed to Mukwe Police Station where he spent the night in a police cell, while the second plaintiff, who had joined the team going to Mukwe Police Station, slept in the Isuzu. The next day, 18 November 2002, the first plaintiff, who was still under arrest, was taken to the magistrates' court on a charge of being in unlawful possession of dagga. The public prosecutor however, withdrew the charge and the first plaintiff was discharged, reportedly for lack of jurisdiction on the part of the court.

[10] The discharge having been ordered late in the day, both plaintiffs spent the ensuing night at Ngandu Safari Lodge within Namibia. On 19 November the plaintiffs drove in their Isuzu across the border into Botswana without let or hindrance.

#### Issues in dispute

[11] The first leg of the plaintiffs' grievance related to their assertion that they were both arrested and detained by the police. Associated with that grievance was the incidental allegation that the plaintiffs' fundamental freedom of movement was violated. A further extension to the same grievance was a claim of a delictual nature. All these will be considered separately in due time.

[12] In regard to the arrest and detention, it was stated in the heads of argument submitted on the plaintiffs' behalf, that both the arrest and detention were unlawful. That argument begs the question whether they were indeed unlawfully arrested

and detained. There is a consensus on the arrest of both plaintiffs, but there is disagreement as to whether that arrest was unlawful. As for the detention, it is common cause that the first plaintiff was indeed detained, but again there is a dispute as to whether the act of his detention was unlawful. Regarding the second plaintiff, the defendant's counsel's position was that he was never detained at all.

[13] The second leg of the grievance concerns the allegation touching on the goods which the plaintiffs allege were confiscated from them and were never returned. The plaintiffs' allegation touching on those goods was that the attendant police officers stole the same. As already indicated herein, the confiscation of the goods was admitted. However, the theft allegation was denied.

#### Consideration and determination of the issues

[14] There was a corollary to the arrest issue. The question was, for which offence were they apprehended: was it for theft of the Isuzu or for being in unlawful possession of cannabis? In my view, this was not a critical matter in this appeal. As I shall be elaborating later, the circumstances in which the plaintiffs came into confrontation with the police could have led to their arrest for either offence or for both initially. As I say, I shall be considering these matters in due course. In the meantime I will deal with the alleged unlawfulness of the arrest and detention.

[15] The fact that the dagga was found in the Isuzu is beyond peradventure: the discovery of the dagga in the vehicle was not denied. In fact the first plaintiff readily owned up and admitted that the dagga was his. The police witnesses

swore that they arrested the first plaintiff for unlawfully possessing the dagga, but the first plaintiff's version was that he was arrested for theft of the Isuzu, his own vehicle. The trial judge's finding on this point was that the first plaintiff was arrested for unlawful possession of the dagga and he has not been faulted in so doing. The Criminal Procedure Act 51 of 1977 (CPA) does as a matter of fact in s 40(1)(h) empower a peace officer to arrest without warrant any person found in possession of dependence-producing drugs. Dagga falls in the category of dependence-producing drugs. The trial judge's finding is therefore well fortified. I uphold it. Consequently, the arrest of the first plaintiff was, without doubt, lawful.

[16] In arguing about the first plaintiff's arrest being unlawful, his counsel did so *in extenso*, but his argument was premised on s 40(1)(b) of the CPA, which was not the relevant provision. Paragraph (b) of that sub-section has nothing to do with possession of dangerous drugs, but deals with felonies and other crimes listed in Schedule 1 to that Act. Therefore the plaintiffs' counsel's argument was completely off the mark and is rejected.

[17] As regards detention, the defendant's position is that the consequence of a lawful arrest is that the person arrested is liable to be kept in custody until he/she is lawfully discharged. In the present case, after his lawful arrest for unlawful possession of dagga, the first plaintiff was lawfully kept in custody until his discharge by the magistrate's court the following day. Thereafter he was allowed to leave Namibia without let or hindrance, as conceded in the plaintiffs' heads of argument. There was no further detention of the first plaintiff subsequent to that

release. It must follow therefore, that the only detention he suffered was the one prior to his release, and it was lawful.

[18] The position with regard to the second plaintiff would appear to be as follows: he was at the outset arrested by members of the Namibian Police Force. The circumstances in which it was done, were that when both he and the first plaintiff were directed to accompany the police to inspect the Isuzu on account of the plaintiffs' failure to produce documents of ownership of the vehicle, the initial search for those documents proved unsuccessful; that the plaintiffs did not have an Interpol clearance certificate in respect of the Isuzu; that it was thereafter noticed that the engine of the Isuzu was idling but there was no key in the ignition hole; and additionally, the police discovered that the plaintiffs equally did not have documents of ownership of the quad motor cycle. The learned trial judge considered that those circumstances were, *per se*, enough to induce and justify a reasonable suspicion in the minds of the attendant police officers that the plaintiffs were possibly guilty of offences in respect of both the Isuzu and quad motor cycle. I would agree.

[19] Consequently, the arrest of the second plaintiff in those circumstances was, in my opinion, justifiable. However, the second plaintiff was not charged with any offence, and both attendant police officers, namely Sergeant Lucas George and Constable Johannes Amweele, testified that the second plaintiff was, unlike the first plaintiff, not detained. Their evidence to that end would appear to have been confirmed by the plaintiffs themselves when they testified that at one stage the second plaintiff left the Namibian side of the border and went to the Botswana side

to try and bring therefrom the documents for the Isuzu and also to inform the Botswana based friends of the plaintiffs regarding the ordeal the plaintiffs had fallen into on the Namibian side. In trying to additionally justify the argument that the second plaintiff was unlawfully detained, it was contended that the second plaintiff was not free when he was made to accompany the police to Mukwe Police Station that evening, and that his having spent that night in the Isuzu was an extension of that detention.

[20] My reading of the situation as portrayed by the evidence of the episode described in the preceding paragraph, is that the second plaintiff was a prisoner of circumstances. The only companion he had on that fateful trip was in police custody; the vehicle the two had travelled in was being held under a cloud of suspicion as narrated and so it was unlikely that it could be released to him to thereby facilitate his departure from the unpleasant surroundings. To crown it all, by the time the trip to Mukwe Police Station was undertaken, it was late in the evening. In the event, it was not surprising that he had no option but to remain in apparent confinement until the following day. Moreover, it is hereby emphasised that at Mukwe, while the first plaintiff spent the night in the police cell, the second plaintiff slept in the Isuzu. Therefore the second plaintiff cannot be heard to cry foul by treating as an unlawful detention the night he spent in the Isuzu. Hence, I am in agreement with the judge of the court below that the second plaintiff was not unlawfully detained.

[21] In para 3.2 of the plaintiffs' heads of argument, it is contended that '(A)ny arrest and detention constitute a very serious restriction of an individual's freedom

and that it invariably affects his/her dignity and privacy, and that it should be resorted to only in cases where a summons to appear in court, or a written notice to appear in court, would be ineffective'. To buttress that submission the following cases were cited: *S v Moore* 1993 (2) SACR 606 (W) at 608e-f; *Minister of Police v Haunawa* 1991 NR 28 (SC). It was further argued that the protection of a person's liberty is specifically enshrined in Art 7 of the Namibian Constitution, which provides that no person shall be deprived of personal liberty except according to procedures established by law.

[22] Both of the foregoing arguments are unassailable. However, it is my view that their application to the present case was inappropriate. The trial judge held that the arrest of both plaintiffs was lawful considering the circumstances which prevailed as earlier outlined. I have already endorsed that view. As to the detention, its lawfulness in so far as it affects the first plaintiff, cannot be a matter of debate in as much as it is conceded on behalf of the plaintiffs that when an arrest is lawful, so must be the consequential detention of the arrested person. I have equally endorsed the trial judge's finding that the first plaintiff's arrest was lawful, so his detention could not possibly have been unlawful. I have also agreed with the judge below that the second plaintiff was not unlawfully detained. I do not have to recapitulate my reasons in that behalf. In the event, delving into the authorities cited to buttress the foregoing arguments is otiose. As to why arrest and not summons or notice to appear in court was resorted to, it is my opinion that since the plaintiffs were both foreigners with no fixed abode in Namibia, it is preposterous to expect the police to have considered either of those alternatives.

[23] The heads of argument for the plaintiffs reiterate the allegation in the particulars of claim that the plaintiffs were denied the rights entrenched in Art 21(g) and (i) of the Namibian Constitution. The fundamental rights with which that Article is concerned are the right to move freely throughout Namibia and the right to freely leave and return to Namibia.

[24] I appreciate that there was a complaint that the second plaintiff's passport was withheld overnight from the time of the events of the evening of 17 November 2002, until the next day. However, having regard to the circumstances surrounding the arrest and detention as considered in the preceding paragraphs, it is my view that the complaint in this regard is precocious. Before the stage when the immigration officials were to consider whether or not the plaintiffs were qualified to seek entry into Namibia, as permitted under the immigration control law, there was a cloud of suspicion surrounding the Isuzu, and the first plaintiff was found in possession of dagga. It was, therefore, to be expected that the appropriate public officials, in this case the police, should intervene to deal with the plaintiffs, as in fact they did. It is my considered opinion that at that stage the plaintiffs had not as yet reached a stage to assert their right to seek entry into Namibia. That right could, in the prevailing circumstances, only be asserted after the conclusion of police intervention. The opportunity to do so presented itself the following day after the first plaintiff's discharge by the magistrate's court. What transpired that day was that the plaintiffs spent the ensuing night at a lodge in Namibia; the following day they exited from Namibia and proceeded to Botswana. In other words, they did not seek entry into Namibia that latter day. That was understandable considering the ordeal through which they had gone. Therefore, I cannot find any

support for the complaint that in the treatment of the plaintiffs as highlighted hereinbefore, the named Namibian officials violated the plaintiffs' fundamental right of freedom of movement in Namibia or even the right to leave from and/or return into Namibia.

Whether or not the goods of the plaintiffs were stolen

[25] Adverting to the allegation of theft, it is undeniable that on the evidence before the trial court, the plaintiffs had a substantial quantity of merchandise when they arrived at Mohebo Border Post. It is equally true that the plaintiffs have not recovered possession of that merchandise. In para 2.8 of the plaintiffs' heads of argument (which falls under the heading 'Undisputed Facts') it is stated as follows:

'2.8 All items (eg leathersmans, knives, etc) confiscated by the Namibian Police and Customs on 17 November 2002 (ie N\$82 487,00 and N\$6 280,00 respectively) because of apparent failure to pay tax and VAT and a fine for non-declaration. Items indicated in Annexure "A" and "N" are still in possession of the respondent (lost or stolen).'

[26] I must observe at the outset that it was a misrepresentation to effectively argue that the reputed loss and/or theft of the merchandise was undisputed. The allegation of theft in particular was undoubtedly disputed, according to the evidence at the trial. In fact, the trial judge described the allegation as being based on mere suspicion.

[27] According to the version of the plaintiffs, the police and in particular Constable Amweele, pilfered the items during the time of the search of the Isuzu. It was argued on the plaintiffs' behalf that the plaintiffs were prevented from

witnessing the search. To the contrary, Constable Amweele as well as Sergeant George, testified that the plaintiffs were in attendance during the whole period when the search was going on. It is sought in the plaintiffs' heads of argument to show that the plaintiffs' evidence was more credible, while that of the police was discredited.

[28] There was a plethora of undisputed evidence that a number of items out of the merchandise brought in by the plaintiffs were dutiable under the value added tax law. Witness Elias Penda, the customs officer, who was on duty at the border on the material occasion, testified that those items were seized pending payment of VAT. It was also his evidence that the practice was that goods seized under such circumstances were retained by customs officials at the border post for three months, and if they are not during that period retrieved by paying the VAT, they are sent to Katima Mulilo Customs Office to be auctioned. He added that the goods he seized from the plaintiffs were those listed in exhibit 'N', and that, in keeping with the said practice, they were sent to be auctioned at Katima Mulilo. He could not, however, swear that they were auctioned for the obvious reason that he was not stationed at Katima Mulilo.

[29] As against the evidence proffered by the defendant's witnesses, counsel for the plaintiffs urged this court to hold that the plaintiffs' evidence should be preferred. The pith of the latter evidence was to the effect of pointing an accusing finger at Constable Amweele as the thief of the missing goods. The court below considered that incriminating allegation. The following is a quote from the determination of the learned trial judge on the point:

'The most serious allegation by the plaintiffs was that the police officers stole various items of property from the vehicle during the search. One of these officers accused of theft was Constable Amweele who is said to have urged Sergeant George to search the vehicle; it is further alleged that the sole purpose of the search was to enable the police officers to steal those items.

The plaintiffs' evidence reached the highest point of vagueness in this regard, when one looks at the evidence in this regard one easily sees that there was no concrete foundation for this serious allegation, the evidence is based on mere suspicion. There were items that the police said were seized by customs; the list compiled shows these items were retained by customs pending VAT clearance. Indeed the first plaintiff testified that subsequently he went to the border to claim the items but later he left it in the hands of his lawyers to pursue the issue. He gave no evidence of his lawyer's efforts or as to what they might have done in regard to their mandate . . . .'

[30] It is a trite rule of evidence that he who asserts the existence of a fact in issue shoulders the onus of proving such fact. The learned authors, W J Hosten *et al*, state that rule as follows in their work, *Introduction to South African Law and Legal Theory*, 2 ed, viz:

'Establishing the incidence of the burden of proof in a civil case is the task of the judge and in doing so various rules are applied of which the following are the most important: the basic rule is that he who avers must prove and not that he who denies must disprove; the burden of proof rests on the party relying on the alleged fact or the party for whose success the fact is essential; the burden rests on the party who would fail if the issue were to be deleted from the pleadings (*Tooth v Maingard and Mayer (Pty)* 1960 3 SA 127 (N) 135); the burden rests on the defendant in respect of a special defence. (*Cf Pillay v Krishna* 1946 AD 946).' (See para 4.8 p 1243-1244.)

[31] The issue of special defence was not pleaded in this case, nor has it been in contention by either side. Therefore, it is unnecessary to consider it. In the instant case, the general or basic rule applied and therefore the onus of proving the theft rested on the plaintiffs as they are the ones who alleged the affirmative. Unfortunately for them, they adduced evidence which the trial judge described as having reached the highest point of vagueness, adding that the allegation of theft was based on mere suspicion. An example of the vagueness and suspicion was given by the learned trial judge. He recorded that the first plaintiff testified that he went to the border post at Katima Mulilo to locate the items but was unsuccessful, and therefore left it in the hands of his lawyers to pursue the issue. He, however, failed to give evidence of the outcome of his lawyers' efforts at pursuing the issue or as to what they did to accomplish the mandate. The second plaintiff did not do any better on this score. It is thus left to speculation whether any meaningful effort was made to establish that the items were stolen. On the other hand, there was ample evidence that the items were seized purportedly pursuant to customs law as it applies to international travellers.

[32] Like the learned trial judge, I am satisfied and feel sure that the plaintiffs failed to discharge the onus which rested on them to establish on a balance of probabilities that the defendant's officers misappropriated or stole the items in dispute.

[33] Notwithstanding my determination that the plaintiffs failed to establish that their goods were stolen, I am of the view that by necessary implication it was, and on the totality of the evidence, established that the plaintiffs had a grievance that

their goods were improperly seized from them. The implied grievance begs the question of whether or not the admitted act of seizure was correctly done in pursuance of the law on collection of customs duty and/or the law under which value added tax is levied. To this end I propose to re-examine the evidence regarding the circumstances leading to the seizure.

[34] In summary and effect, the evidence was that when Constable Amweele and Sergeant George noticed that the plaintiffs had omitted to fill in the engine and chassis numbers of the Isuzu, they directed the plaintiffs to accompany them to that vehicle to inspect it. In the course of the inspection and accompanying search, they noticed the merchandise already alluded to herein. One of the officers then went and invited customs officer Elias Penda to check on the goods as they believed that they might be dutiable. Penda testified that the goods included sunglasses, 3 caps, 6 hats, 11 cata (*sic*), 72 assorted knives, 2 self-defence gas, 1 skopskiet, among other things. He listed all items on paper and later confiscated them pending customs clearance and payment of VAT. They were kept at Mohebo Border Post pending payment of duty, which was not done. After three months they were sent to Katima Mulilo to be auctioned.

[35] It was also Penda's evidence that when a traveller enters the border post area, he or she first reports to the immigration section to complete immigration formalities. The traveller next reports to the customs officials and thereafter to the police. Witness Phillipus Romanus Hausiku was the senior immigration officer who attended to the plaintiffs when they arrived at the border post. The substance of his evidence was that when the plaintiffs presented themselves to him, he

requested them to complete the immigration forms. As they did so, he noticed that they were using red ink. He, however, advised them to go out of the building and complete fresh forms using blue or black ink. They obliged but they never came back so that he could clear them. This was because of the intervention of the police concerning the Isuzu as narrated in the preceding paragraphs.

[36] Section 14 of the Value-Added Tax Act 10 of 2000 provides as follows, quoting only those parts which are relevant:

'Import declaration and payment of tax

- (1) Where tax is payable on an import of goods –
  - (a) in the case of goods required to be entered for home consumption in terms of the Customs and Excise Act, the importer shall, upon such entry, furnish the Commissioner with an import declaration and pay tax in respect of that import in accordance with subsec (5) or any arrangements . . . ; or
  - (b) in the case of goods imported from Botswana, Lesotho, South Africa or Swaziland, the importer shall, upon such import, furnish the Commissioner with an import declaration and pay tax due in respect of that import in accordance with subsec (5) or arrangements;. . . .'

[37] The counterpart of the foregoing law, namely the Customs and Excise Act 20 of 1998, has the following relevant provisions:

'Section 11 Goods imported or exported overland

- (3)(a) The person in charge of any vehicle (other than aircraft or railway train), whether or not conveying any goods, and which vehicle arrives by land at any place in Namibia, shall report to the office of the Controller nearest to the point at which he or she crossed the border, or to the office of the Controller which is most conveniently situated in relation to such point, before unloading any goods, or in any manner disposing of such vehicle or goods, and make a full written report to such Controller concerning the vehicle or goods, the journey and destination of the goods, and shall, in the form determined by the Controller, make and sign a declaration as to the truth of such report.
- (b) A person referred to in paragraph (a) shall fully and truthfully answer all questions put to him or her, and produce any way-bills or other documents demanded of him or her by the Controller.

#### Section 14 Persons entering or leaving Namibia

- (1) Any person entering or leaving Namibia shall, to such officer and in such form and in accordance with the procedures prescribed by the Permanent Secretary, unreservedly declare –
- (a) at the time of such entering, all goods (including goods of or belonging to any other person) upon his or her person or in his or her possession and which he or she brought with him or her into Namibia, and which –
- (i) were purchased or otherwise acquired outside Namibia or on any ship or vehicle, or in any shop on which duty has not been paid;

[38] Quite apart from Penda's evidence on the point, I take judicial notice of the notorious practice that when an international traveller reaches a port of entry into the intended host country, he/she first reports to the immigration in order to seek entry into that country. In my considered opinion, only after such traveller has been cleared by the immigration section can he/she be said to have entered the host

country. At that stage, he/she would then be required to report to the customs department either at the very port of entry itself or at the nearest office of the controller of customs concerning any declarable goods in his/her possession at that point in time. Should it happen that, for whatever lawful reason, the immigration section disallows entry of the traveller into the country, then the traveller would have to take the earliest means of departure from the port. Needless to state, that in that event the traveller would not be required to comply with the dictates of the value added tax or customs and excise legislation mentioned hereinbefore. In other words, it is only at the stage after immigration clearance that the question of importing goods and making a declaration in respect thereof arises.

[39] In the instant case, the plaintiffs were never cleared by immigration; ergo they had not legally reached the jurisdiction of the customs department at the time of customs officer Penda's intervention. This is because, in the eyes of the immigration law, they had not entered Namibia. It is consequently my conclusion of law that customs officer Elias Penda acted too hastily and incompetently in seizing the merchandise which the plaintiffs had in the Isuzu. In the event, although I have upheld the determination of the court below by which theft was ruled out, I hold, as a matter of law, that the State officials, in particular Elias Penda, did unlawfully dispossess the plaintiffs of their goods. However, that act of dispossession cannot be labelled as theft because it lacked the necessary elements which constitute the felony of theft. Penda seized the goods honestly, but erroneously and certainly incompetently, believing that he was empowered by law to seize them. I would consequently uphold the claim that the plaintiffs

suffered damage, namely the loss of their goods, which were unlawfully seized and were never restored to them.

[40] Adverting to the remainder of the contentious issues, I take note that it was argued on behalf of the plaintiffs that the evidence of the defendant's witnesses was unreliable, but that the plaintiffs were, on the other hand, credible, and therefore that their evidence should be believed.

[41] It is a settled rule of practice that the issue of credibility of witnesses is one which trial judges are better qualified and competent to deal with and determine than are appellate judges. This is so for the obvious reason that trial judges have the advantage of seeing and listening to the witnesses as they testify. They are, therefore, able to observe and assess their demeanour both as to how they articulate their testimony and as to their body language, which in some instances may implicitly be indicative of the reliability of their testimony. Appellate judges on the other hand do not enjoy that advantage; they have only the written word in the record of appeal to rely on. As a matter of practice therefore, a trial judge may be reversed on an issue of credibility of witnesses only if it appears to the appellate court that the determination the trial judge arrived at is so patently erroneous that it cannot be said that he/she properly used the advantage aforementioned.

[42] In the instant case, the trial judge, who saw and heard the witnesses of both sides, assessed the defendant's witnesses as having been creditworthy, and chose to disbelieve the plaintiffs on this particular issue of theft. He gave cogent reasons for doing so. Despite the spirited heads of argument and submissions by

the plaintiffs' counsel, the judge was not faulted as to how he believed the one side rather than the other.

[43] Having carefully considered all the evidence, the heads of argument as well as all the spirited oral submissions from both sides, I am convinced that the trial judge did properly use the advantage he had. In the result, I uphold his determination upon the credibility of the witnesses who testified before him

#### Recoverable damages

[44] The plaintiffs particularised their claims as appears in paras 13 and 14 of their particulars of claim, viz:

'13. In the premises the first plaintiff suffered damages in the amount of N\$683 087-00 calculated as follows:

13.1 Pain, suffering, distress and inconvenience N\$250 000-00

13.2 Contumelia, injury to the plaintiff's personality, injury to the plaintiff's dignity and reputation, humiliation, deprivation of the plaintiff's privacy, liberty, freedom of movement and deprivation of his constitutional rights as hereinbefore pleaded N\$350 000-00

13.3 Fair and reasonable value of the items/goods damaged and/or stolen during the search and seizure N\$82 487-00

13.4 Accommodation N\$ 600-00

14. In the premises the second plaintiff suffered damages in the amount of N\$606 880-00 as follows:

14.1	Pain, suffering, distress and inconvenience	N\$250 000-00
14.2	Contumelia, injury to the plaintiff's personality, injury to the plaintiff's dignity and reputation, humiliation, deprivation of plaintiff's privacy, liberty, freedom of movement and deprivation of his constitutional rights as hereinbefore pleaded	N\$350 000-00
14.3	Fair and reasonable value of the items/goods damaged and/or stolen during the search and seizure	N\$6 280-00
14.4	Accommodation	N\$ 600-00.'

[45] I propose to deal with particulars in 13.1, 13.2, 14.1 and 14.2 together as item (i). These will be followed by particulars in 13.4 and 14.4, also to be disposed of together, as item (ii). Finally particulars in 13.3 and 14.3 will similarly be considered jointly as item (iii).

[46] I shall start with item (i). I have already determined that the first plaintiff was lawfully arrested and have given my reasons for that finding of fact. The reasons for him having been kept in custody for one night, although not articulated, were implicit. They arose from the fact that he was a foreigner in Namibia with no place of abode. Therefore, the question of being summoned to appear later before the police was not a feasible alternative. Granted that it was inconveniencing to be kept in custody overnight, however there was no evidence of ill-treatment. He was taken before a court of law at the earliest opportunity the following day and was later freed. Furthermore, and as I have already resolved, his constitutional rights

as enshrined in Arts 7 and 21 were never violated. Therefore his claim for damages in this regard cannot be granted. It is dismissed.

[47] I have earlier also held that the arrest of the second plaintiff was lawful and have explained why that was so. In his case, his release was virtually spontaneous so that by the time the first plaintiff was being driven in captivity, so to speak, to Mukwe Police Station, he was a free man. I have earlier found, and I so reiterate, that when he escorted the team which proceeded to Mukwe, he was only a prisoner of circumstances. There was no evidence to show that he was compelled by the police to go there except for the fact that there was a cloud of suspicion regarding the ownership of the Isuzu as already alluded to. In the circumstances his claim on this leg also fails.

[48] Moving on to item (ii), that is the claim in respect of accommodation at Ngandu Safari Lodge, the plaintiffs were to have spent at least a night in Namibia any way despite the ordeal through which they went. This is because they arrived at the border post late in the day on 17 November 2002. The fact that that night happened to be the night after the first plaintiff's release is neither here nor there. So none of them can be heard to complain that he was constrained to incur an extra expense on accommodation. This is enough reason for dismissing this claim too in respect of both of them.

[49] I now move on to item (iii), namely the claim for a fair and reasonable value of the items/goods allegedly damaged and/or stolen during the search and seizure. The aspect of damage or theft is no longer tenable in the light of my

earlier determination. These were goods in the nature of merchandise which a customs official incompetently seized and which were, according to the evidence, eventually conveyed to Katima Mulilo Customs Office to be auctioned.

[50] In the light of the clear and unambiguous admission of wrongdoing by the defence witnesses, it is superfluous to debate this issue any further. In the event, judgment is hereby entered for the plaintiffs for the value of those items.

[51] However, before determining the quantum of the damages, the following observations need to be made. As already indicated, each plaintiff gave his own value of the goods said to have been taken away from him. The first plaintiff asserted that value of goods taken away from him was N\$82 487, while the second set it at N\$6280. In verifying their claims however, they produced exhibit 'N' which contained three categories of goods. Those in category 1 were mainly motor vehicle parts; in category 2 were listed goods described as having disappeared during search and then in the third category were goods said to have been seized by Customs officials.

[52] I have already determined that the plaintiffs' evidence of theft was deficient. That evidence would appear to cover goods in categories 1 and 2. It follows, that the claims in respect of those cannot possibly succeed and they are dismissed. As regards those in the third category, it is opportune to stress that the first and second plaintiffs made separate claims and these were for N\$82 487 and N\$6280 respectively. However, in proof of these claims as evidenced in exhibit 'N', there was only one amount of the value of goods seized by Customs. The amount proved

was N\$60 016. Judgment is accordingly entered for both plaintiffs in the sum of N\$60 016.

[53] In the final analysis, my determinations and conclusions in the appeal are the following:

1. The appeal is substantially dismissed, except in relation to goods seized by the customs officer.
2. Judgment is entered in favour of the plaintiffs jointly, in the sum of N\$60 016, with interest *a tempore morae* thereon from the date of this judgment till the date of payment.
3. I make no order as to costs.
4. The order of the court below is set aside.

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**CHOMBA AJA**

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**STRYDOM AJA**

APPEARANCES

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Instructed by Chris Brandt Attorneys

RESPONDENT:

L P Hamutenya

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