

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-DEL-2021/04250

In the matter between:

**TUHAFENI SIMON**

**PLAINTIFF**

and

**THE MINISTER OF HOME AFFAIRS, IMMIGRATION,  
SAFETY AND SECURITY**

**DEFENDANT**

**Neutral citation:** *Simon v Minister of Home Affairs, Immigration, Safety and Security*  
(HC-MD-CIV-ACT-DEL-2021/02450) [2023] NAHCMD 298 (6 June  
2023)

**Coram:** UEITELE, J

**Heard:** 22 – 24 March 2023

**Delivered:** 6 June 2023

**Flynote:** Delict – Unlawful arrest and detention – Plaintiff arrested without a warrant in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 – The onus rests upon the arrestor to prove that the arrest was objectively lawful.

Unlawful and detention – Jurisdictional facts which must exist before power conferred by s 40(1)(b) of the Criminal Procedure Act may be exercised – Such facts are: arrestor must be a peace officer; he or she must entertain a suspicion; suspicion must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Criminal Procedure Act (except the offence of escaping from lawful custody in certain circumstances); and suspicion must rest on reasonable grounds.

**Summary:** The plaintiff is an adult male Namibian. The defendant is the Minister responsible for Home Affairs, Safety and Security, who is sued in his official capacity as the political head of the Namibian Police. The plaintiff came to this court alleging that on 16 August 2021 at around 12h30 he was arrested by members of the Namibian Police (Nampol) and consequently unlawfully detained in overcrowded and filthy police cells. He was denied prompt and proper medical care during the period of the arrest until released on bail on 18 August 2021. On 30 August 2021 at around 07h30 he was again arrested by members of the Namibian Police (Nampol) and was released on that same day at 15h00. He alleges that the arrests and detentions on both 16 and 30 August 2021 were unlawful and wrongful.

*Held* that the arresting officers in the present matter, objectively viewed, did not have or could not have formed the suspicion that the plaintiff committed an offence referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977. The arrest and consequent detention of the plaintiff was therefore unlawful.

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## ORDER

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1. The plaintiff's arrest on 16 August 2021 and detention from 16 – 18 August 2021 and again on 30 August 2021 was unlawful.
  2. The defendant is liable to the plaintiff for damages he suffered as a result of his unlawful arrest and detention in an amount of N\$142 229,15.
  3. The defendant must pay the plaintiff's cost of suit.
  4. The matter is removed from the roll and regarded as finalized.
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## JUDGMENT

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UEITELE, J

### Introduction and background

[1] The plaintiff is an adult male Namibian, who says that he is a prominent and publicly respected businessman, residing in Grootfontein, Republic of Namibia. The defendant is the Minister responsible for Home Affairs, Safety and Security, who is sued in his official capacity as the political head of the Namibian Police.

[2] The plaintiff came to this court alleging (in his particulars of claim) that:

(a) on 16 August 2021 at around 12h30, he was arrested by members of the Namibian Police (Nampol) while they were carrying out their work within the course and scope of their employment;

(b) he was consequently unlawfully detained in overcrowded and filthy police cells and was denied prompt and proper medical care during the period of arrest until released on bail on 18 August 2021;

(c) on 30 August 2021 at around 07h30, he was arrested by members of the Namibian Police (Nampol) while they were carrying out their work within the course and scope of their employment and was released on 30 August 2021 at 15h00;

(d) the arrests and detentions on both 16 and 30 August 2021 were unlawful and wrongful on the following basis:

(i) his arrests and detentions were incompatible and inconsistent with Articles 7 and 11 of the Namibian Constitution in that the arrest and detention were arbitrary, unfair, unnecessary, and not carried out in accordance with the law;

(ii) both the arrests and detentions were effected for an ulterior purpose;

(iii) his arrests and detentions were not necessary as the concerned members of NAMPOL in the circumstances were not entitled to resort to arrest as the most invasive method of securing attendance at court instead of other less invasive methods;

(iv) there was no warrant for his arrest; and

(v) there was no reasonable suspicion that he committed any offence.

[3] The plaintiff, as a consequence of the allegations I referred to in the preceding para, is seeking compensation in the amount of N\$162 229,15 from the defendant, made up as follows:

(a) N\$100 000 for unlawful arrest and detention for three days;

(b) N\$12 229,15 in respect of medical expenses incurred as a direct result of his detention; and

(c) N\$50 000 in respect of his legal practitioners' fees (i.e. travelling and consultation and taking instructions to seek plaintiff's release on bail).

[4] The defendant entered a notice to defend the action instituted by the plaintiff. The defendant admitted that the plaintiff was, on 16 August 2021 and 30 August 2021 arrested and detained by members of Nampol but denied that the plaintiff's arrest and detention was unlawful.

[5] The defendant pleaded that the plaintiff's arrest and subsequent detention was done lawfully after a case of assault common, assault by threat and pointing of firearms was registered against the plaintiff. The defendant furthermore pleaded that the Nampol member that effected the plaintiff's arrest and detention did not require a warrant of arrest because the plaintiff was arrested in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977. To further amplify its denial, the defendant pleaded that all detainees are treated with human dignity and have access to medical care if so requested by a detainee.

#### The issue in dispute

[6] From the allegations by the plaintiff and the counter allegations by the defendant, this Court is required to determine whether the plaintiff's arrest and detention was in accordance with the law.

#### The evidence adduced

##### *Plaintiff's evidence*

[7] The plaintiff testified alone in support of his claim. The plaintiff testified that on 13 August 2021 at around 21h00, about seven armed police officers, entered and searched his private dwelling at Grootfontein. He testified that on 16 August 2021 at around 09h00, he received a telephone call from a certain Ms Lydia Kambungu who claimed to

be employed by the Ministry of Labour, Industrial Relations and Employment Creation. Ms Kambungu indicated that she wanted to meet him at the Grootfontein Police Station. She further indicated that she was in the company of the Grootfontein Police Station Commander, a certain Councilor and two unidentified Namibia Police Officers. He proceeded and testified that he agreed to meet Ms Kambungu at the Grootfontein Police Station at 12h30, the same day (that is, 16 August 2021).

[8] Upon voluntarily arriving at the police station, the plaintiff was immediately informed by the Station Commander that he was under arrest. He was accordingly arrested by members of Nampol whose names and ranks were unknown to him. He testified that during his arrest he was not informed why he was being arrested nor were his rights explained to him. He further testified that after his arrest, he was detained in an overcrowded and filthy police cell and was denied prompt and proper medical care during the period until released on bail on 18 August 2021. He further testified that during the evening of 16 August 2021, he was not given a bed, mattress or blankets to sleep on.

[9] The plaintiff continued and testified that on 17 August 2021, he experienced health issues that needed medical attention and requested to be taken to a local hospital. Despite the fact that he duly gave his request at around 09h00, he was only permitted to visit the hospital after 15h00 and incurred medical costs in the sum of N\$12 229,15. He testified that it is only on 18 August 2021 when he attended the Grootfontein Magistrates' Court that he discovered that the charges against him were, allegedly pointing of a firearm and stealing a machete/panga, which charges he disputed. He further testified that on 27 June 2022, the charges against him were withdrawn, because there were no witnesses against him.

[10] He proceeded and testified that on 19 August 2021, he received a phone call from a certain Mr Malan Sivoleka who introduced himself as an Immigration Officer. Mr Sivoleka informed the plaintiff that he was at the plaintiff's farm's gate (in the district of Grootfontein) and wanted access to the plaintiff's farm. Due to the fact that no prior

arrangements were made, he was not available at the farm on that date and could thus not grant Mr Sivoleka access to the farm. On 20 August 2021 and still without making any arrangements, Mr Sivoleka again called the plaintiff stating that he was at the plaintiff's farm's gate and demanded access to the farm. The plaintiff testified that he again informed Mr Sivoleka that he was not on the farm and he could therefore not open the gates for him. Despite being so informed, Mr Sivoleka proceeded to cut-off the padlocks and entered the farm without any authorization or search warrant.

[11] The plaintiff proceeded and testified that during the week of 23 to 27 August 2021, while he was in another town attending to business activities, various members of Nampol from Grootfontein Police Station and Mr Sivoleka continuously called him. They threatened to arrest him again. On 30 August 2021 at around 07h30 am he, went to the Grootfontein police station where he was again arrested by members of Nampol, whose names and ranks are unknown to him, and he was only released at 15h00 on 30 August 2021. On this occasion he was informed that he was being arrested for allegedly employing non-Namibian citizens without work permits. This charge too was withdrawn on 27 June 2022.

#### *Defendant's evidence*

[12] The defendant called two witnesses to testify in support of its defence. The first witness for the defendant was a certain, Theophilus Shiyukifeni Elifas (Mr Elifas). He testified that he is, since 1 December 2010, employed by the Ministry of Home Affairs, Immigration, Safety and Security: Namibian Police, in the rank of Detective Warrant Officer and that he is stationed at the Crime Investigation Unit, Nicky Iyambo Street in Grootfontein.

[13] Mr Elifas further testified that on 15 August 2021, he was the investigating officer of a docket (complaint) opened against the plaintiff, by an Angolan national who was allegedly employed by the plaintiff, in respect of charges of common assault, assault

by threat by pointing a firearm and two counts of theft, namely CR 30.08.2021, CR 24.08.2021, and CR 35.08.2021.

[14] The witness proceeded and testified that on 16 August 2021, he met the plaintiff at the Grootfontein Police Station in the station commander's office. He testified that he introduced himself as a police officer and explained the allegations against him. He testified that the plaintiff indicated that he understood the allegations against him. After explaining the allegations against the plaintiff he arrested the plaintiff.

[15] Mr Elifas proceeded and testified that after he arrested the plaintiff, he explained his (the plaintiff's) legal rights as a suspect in these matters. The rights that he explained to the plaintiff are: the right to remain silent, the right to legal representative of his own choice, and also the right to apply to be released on bail. He testified that he explained the plaintiff's rights in his home language, which is Oshiwambo. The witness further testified that the plaintiff acknowledged that he understood the rights explained to him and he thus took the plaintiff into custody at the Grootfontein Police Station.

[16] Mr Elifas furthermore testified that the plaintiff did not sustain any injuries during his arrest nor did he handcuff the plaintiff, as the plaintiff cooperated with his instructions. He continued and testified that later during that day, he removed the plaintiff from custody so that the plaintiff could accompany him to the plaintiff's property for further investigations. The witness testified that he enquired from the plaintiff whether the plaintiff was willing to hand in the pistol which he allegedly used as well as the pangas and axe alleged to have been stolen. He testified that the plaintiff willingly handed over those items to him. The witness further testified that on 17 August 2017, he formally charged the plaintiff. Later that day, the plaintiff was taken to the hospital where he spent the evening and on 18 August 2017 the plaintiff was taken to the Grootfontein Magistrate's Court where he was released on bail.

[17] In cross-examination, Mr Elifas was asked the following: where the alleged assault and pointing of the firearm took place, to explain how he conducted his investigation,



when he had taken the decision to arrest the plaintiff, and whether the offences for which he arrested the plaintiff for were listed in Schedule 1 to the Criminal Procedure Act. The witness's reply to these questions was equivocal. Furthermore, he could not provide the name of the alleged victim of the assault and the pointing of the firearm. He further contended that he arrested the plaintiff without a warrant but on the strength of s 40(1)(b) of the Criminal Procedure Act.

[18] The second witness to testify on behalf of the defendant was a certain, Malumo Obrain Mabuku (Mr Mabuku). He testified that he is, since 1 April 2009, employed by the Ministry of Home Affairs, Immigration, Safety and Security: Namibian Police, in the rank of Sergeant Class 1 and that he is stationed at the Crime Investigation Unit, Nicky Iyambo Street in Grootfontein.

[19] Mr Mabuku testified that on 27 August 2021, he received a complaint from the Immigration component of the Ministry of Home Affairs, Immigration, Safety and Security that the plaintiff contravened the Immigration Control Act 7 of 1993 and that a docket was opened which he investigated. He further testified that on 27 August 2021, he telephonically called the plaintiff but the plaintiff informed him that he (the plaintiff) was out of town for the weekend and that he would voluntarily come to the police station as soon as he was back in town.

[20] Mr Mabuku further testified that on Monday 30 August 2021, at around 08h30 he met the plaintiff at Grootfontein Police Station at the charge office and arrested the plaintiff on docket number: CR 59.8.2021. He further testified that he explained to the plaintiff the reason for his arrest and also explained his right to remain silent and to apply for Legal Aid assistance, whereby the plaintiff informed him that he has a private lawyer. Mr Mabuku further testified that the plaintiff did not sustain any injuries during his arrest and that he was not handcuffed and was released on court bail the same day at 12h55.

[21] In cross-examination, Mr Mabuku was asked which section of the Immigration Control Act, the plaintiff contravened. His reply was that he did not know the section, but that the complaint against the plaintiff was that he was employing foreign Nationals. He was then probed on whether it was a criminal offence to employ a foreign national, to which he replied in the affirmative. The witness could neither provide the names of the foreign nationals when probed. He was furthermore asked as to where the foreign nationals were at the time that he arrested the plaintiff, who were allegedly employed by the plaintiff. His reply was that at the time that he arrested the plaintiff, the information at his disposal was that the foreign nationals were at the farm of their new employer at that time.

## Discussion

### *Preliminary remarks*

[22] During the trial of this matter, particularly during the testimony of detective warrant officer Elifas and sergeant Mabuku, it became apparent that these police officers who are entrusted with the duty and responsibility to ensure the safety and security of the citizens' of this Republic, despite numerous pronouncements by this court in matters of unlawful arrests and detention, have little comprehension of the fundamental laws that are supposed to guide them in the execution of their duties. It is for this reason that I will attempt to add my voice to the long line of decisions of this Court and restate the principles that govern the arrest and detention of persons suspected of having committed criminal offences.

[23] The Constitution of this Republic amongst other matters states, in the preamble, that the people of Namibia resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all its citizens justice, liberty, equality and fraternity. To concretize the right to liberty, the Constitution in Articles 7 and 11(1) provides that: (my emphasis)

**‘Article 7: Protection of Liberty**

No persons shall be deprived of personal liberty except according to procedures established by law’

And

**‘Article 11: Arrest and Detention**

- (1) No persons shall be subject to arbitrary arrest or detention.
- (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest...’

[24] It is therefore clear that the right to liberty is a fundamental principle of human rights. Law enforcement officers or any other person who exercises the power of arrest must thus realize and take cognizance of the fact that the power of arrest is a significant interference with the right to liberty. The Criminal Procedure Act does not define the term ‘arrest’. Despite the fact that the Act does not define the term, courts have held that the term ‘arrest’ is an ordinary English word and whether or not a person has been arrested depends not on the legality of the arrest but on whether they have been deprived of liberty of movement.

[25] It, therefore, follows that to deprive a person of his or her liberty, the deprivation must be lawful. At the hearing of this matter counsel for the defendant decried the position of law enforcement officers whom he said ‘find themselves between a rock and a hard place’ in that society expects them to arrest those who commit offences and disturb the public peace and yet they face challenges when they exercise the power of arrests. The courts have long recognized the tension that may arise between the need to combat crime and the right of the citizens not to be unlawfully deprived of their liberty. This was pointed out by the Supreme Court in *Government of the Republic of Namibia v Ndjembo*<sup>1</sup>. Shivute CJ stated that:

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<sup>1</sup> *Government of the Republic of Namibia v Ndjembo* 2020 (4) NR 1193 (SC).

[13] At the heart of the court's assessment of whether there were reasonable grounds to arrest a suspect lies a potential tension between two competing public interests. On the one hand, there is a need to guard against arbitrary arrest or detention that would make greater inroads into constitutional rights of arrested persons. This consideration requires that the purpose of the arrest must be in fact to bring the arrested persons before a court of law to ensure that they are prosecuted and not to harass or punish them for an offence they have not been convicted of. On the other, there is a greater need to ensure that crimes are effectively investigated and that those who commit them are brought to justice. It is in the interest of the rule of law that reported crimes are effectively investigated. Doubtless, effective investigation of crime serves the interests of victims of crime and of the public in general. What is required therefore is a balance to be struck between these two competing public interests.

[14] The Legislature sought to draw the required balance by providing firstly, in s 40(1)(b) of the Act, that a peace officer may arrest without a warrant any person 'whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody'. Secondly, by providing in s 50(1) of the Act that a person arrested, whether with or without a warrant must be brought to a police station or if arrested on a warrant, to any other place mentioned in the warrant and if not released by reason that no charge is to be brought against him, be detained for a period of 48 hours unless he or she is brought before a magistrate and the further detention is ordered by the court for trial or for the purpose of adjudicating upon the cause for the arrest.'

### *The Legal Principles*

[26] The onus rests upon the arrestor to prove that the arrest was objectively lawful. In *Zealand v Minister for Justice and Constitutional Development*<sup>2</sup> the Constitutional Court of South Africa, per Langa CJ opined that:

'It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again

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<sup>2</sup> *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC) para 25.

affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that Court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reason applies with equal, if not greater, force under the Constitution.'

[27] It is by now well established in our constitutional jurisprudence that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivations. This was articulated by O'Regan J when she said:

'In my view, freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.'<sup>3</sup>

And that:

'... our Constitution recognises that both aspects [substantive and procedural] are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the State wishes to deprive a person of his or her freedom is

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<sup>3</sup> In *S v Coetzee and Others* 1997 (3) SA 527 (CC) (1997 (1) SACR 379; 1997 (4) BCLR 437).

acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair.<sup>4</sup>

[28] It follows that the substantive powers to arrest a person are principally governed by the legal rules applicable at any given time, whereas the procedural powers to arrest are principally governed by the Criminal Procedure Act. To be lawful, an arrest must be necessary by reference to the legal rules applicable in that society and the procedural statutory powers set out in the Criminal Procedure Act.

[29] In the present matter, the defendant admits that his officers deprived the plaintiff his freedom, but contends that the officers did so lawfully as contemplated in s 40(1)(b) & (h) of the Criminal Procedure Act. Chapter 5 of the Criminal Procedure Act deal with arrests. Section 40(1)(b) on which the police officers relied to arrest the plaintiff provides as follows:

**'Arrest by peace officer without warrant**

40. (1) A peace officer may without warrant arrest any person –

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule I, other than the offence of escaping from lawful custody; ...

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition; ...'

[30] In *Duncan v Minister of Law and Order*<sup>5</sup>, the court held that the jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the Criminal Procedure Act may be exercised are as follows: the arrestor must be a peace officer; he or she must entertain a suspicion; the suspicion must be a suspicion that the arrestee

<sup>4</sup> In *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449) paras 145 – 147.

<sup>5</sup> *Duncan v Minister of Law and Order for the Republic of South Africa* (38/1985) [1986] ZASCA 24; [1986] 2 All SA 241 (A) (24 March 1986).

committed an offence referred to in Schedule 1 to the Act (except the offence of escaping from lawful custody in certain circumstances); and the suspicion must rest on reasonable grounds.

[31] In *Government of the Republic of Namibia v Ndjembo*<sup>6</sup>, the Chief Justice writing for the Court remarked that:

‘... As a general proposition, it is desirable that the police should first investigate before they arrest, even where they have to arrest without a warrant someone suspected of having committed a sch 1 offence. However, an outright prohibition of the arrest for the purposes of conducting further investigation could seriously hamper the work of the police in their important obligation to investigate crime and protect society from criminal elements. This is particularly true in serious and fast-moving crimes such as robbery and similar offences.

The law gives the police the power to arrest without a warrant provided that the prerequisites set out in s 40(1)(b) are satisfied. It does not, however, mean that such power has to be exercised as a matter of course in all situations and everywhere. What it means is that the peace officer has a discretion that has to be exercised properly. Such discretion is not unfettered as it is subject to judicial oversight. There are many instances in which this discretion may be exercised, which include but are not limited to the possibility of the suspect fleeing; the situation where the evidence may be dissipated or the need to prevent the further commission of crime. However, a peace officer who overreaches and abuses his or her discretion by arresting a suspect arbitrarily, but under the guise of conducting further investigations runs the risk of a successful action for malicious prosecution or unlawful arrest and detention being instituted against him or her.’

[32] In *Nghimwena v Government of Republic of Namibia*<sup>7</sup>, the Supreme Court, quoting with approval from *Mabona and another v Minister of Defence and other*<sup>8</sup>, held that:

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<sup>6</sup> *Government of the Republic of Namibia v Ndjembo* 2020 (4) NR 1193 (SC) para 29 – 30.

<sup>7</sup> In *Nghimwena v Government of Republic of Namibia (1)* (2782 of 2005) [2011] NAHC 105 (8 April 2011).

<sup>8</sup> *Mabona and another v Minister of Defence and other*, 1982 SA 654(SE) at 658 F-H.

'In evaluating his information a reasonable man would bear in mind that the section authorizes a drastic police action. It authorizes an arrest on the strength of suspicion without the need to swear out a warrant, that is something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly. But this is not to say that the information at his disposal must be of sufficient quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires that the suspicion must be based upon solid ground.'

[33] *In Nghimwena v Government of Republic of Namibia (2)*<sup>9</sup> Chief Justice Shivute, speaking for the Supreme Court, opined that:

[27] Lansdown and Campbell rightly point out that 'suspect' and 'suspicion' are words that are vague and difficult to define. They point out that what these words suggest though is that 'suspicion is apprehension without clear proof' and that the words 'reasonably suspects' qualify the suspicion required by the section. The learned authors set out the requirements of a reasonable suspicion as follows:

"There must be an investigation into the essentials relevant to the particular offence before there can be a reasonable suspicion that it has been committed. Mere suspicion will not suffice for this purpose. For proof of reasonable grounds suspicion will have to be supported by circumstances sufficiently strong in themselves to induce in a cautious person the belief that the arrested person has committed a First Schedule offence."

[34] In *Duncan v Minister of Law and Order*<sup>10</sup> the then Appellate Division of the Supreme Court of South Africa held that:

'... The question whether a peace officer "reasonably suspects" a person of having committed an offence within the ambit of s 40(1)(b) of the Act is objectively justiciable. And seems clear that the test for whether or not the suspicion is reasonable is not subjective; it is not whether the police officer believes that he has a good reason to suspect, rather, that the

<sup>9</sup> *Nghimwena v Government of Republic of Namibia (2)* (27 of 2011) [2016] NASC 20 (22 August 2016).

<sup>10</sup> *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H. Also see *Cabinet for the Interim Government of South West Africa v Bessinger and Others* 1989 (1) SA 618 (SWA).



suspicion, when look at objectively, one can say that the police officer as a reasonable man has reasonable grounds for harbouring such suspicion.<sup>11</sup>

[35] Once these jurisdictional requirements are met, a discretion on whether or not to arrest arises. In other words, the officer is not obliged to effect an arrest.<sup>12</sup> He has a discretion whether or not to effect the arrest and that discretion must be exercised ***properly***. In general, the power to arrest must be exercised within the limits of s 40(1) (b) read in the light of the Bill of Rights. It is necessary to emphasize that the decision to arrest must be based on the intention to bring the arrested person to justice. In the *Ndjembo* matter<sup>13</sup>, the Chief Justice stated that:

[25] If the intention of the arresting officer is to bring a suspect before court, then there can be no question of the arrest being unlawful. It would of course be unlawful to arrest the suspect with the professed intention to bring him or her to justice, while the real intention is to frighten or harass him or her as an inducement 'to act in a way desired by the arrestor, without his appearing in court'.

*Was the arrest of the plaintiff lawful?*

[36] In the present matter, there is no dispute that the plaintiff's liberty was curtailed for a period of three days. There is also no dispute that the persons who curtailed his freedom are peace officers. The first jurisdictional facts are therefore present and satisfied. The second and third jurisdictional facts are that the arrestor must entertain a suspicion and the suspicion must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence). In its plea, the defendant pleaded that the plaintiff was arrested after a complaint of assault common, assault by threats and pointing of a firearm was laid against him.

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<sup>11</sup> *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579 H and also see *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) para 17.

<sup>12</sup> *Duncan supra* footnote 6, also see *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para 6.

<sup>13</sup> *Supra* footnote 2.

[37] Schedule 1 of the Criminal Procedure Act lists the following offences: treason, sedition, murder, culpable homicide, rape, indecent assault, sodomy, bestiality, robbery, assault, when a dangerous wound is inflicted, arson, breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence, theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, offences relating to the coinage, any offence, except the offence of escaping from lawful custody in circumstances the punishment whereof may be a period of imprisonment exceeding six months without the option of a fine, escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody, any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1 to the Act.

[38] The offences of assault common and assault by threats are not offences referred to in Schedule 1 to the Act. It, therefore, follows that the police officers who arrested the plaintiff in this matter, objectively viewed, did not have or could not have formed the suspicion that the plaintiff committed an offence referred to in Schedule 1 to the Act. The third and fourth jurisdictional facts are thus absent.

[39] In oral argument, Mr Khupe for the defendant, argued that the arrest was furthermore effected on the strength of s 40(1)(h) and also relied on the matter of *Els v Minister of Safety and Security*.<sup>14</sup> I have earlier quoted s 40(1)(h) of the Act, that section empowers a peace officer to arrest without warrant a person whom he or she reasonably suspects of having committed an offence under any law governing the possession or disposal of arms or ammunition.

[40] The statute that deals with the possession or disposal of firearms or ammunition in Namibia is the Arms and Ammunition Act 7 of 1996. In this matter, the plaintiff was not charged with possessing a firearm or possessing or dealing with a firearm or

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<sup>14</sup> *Els v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH- 5161 of 2020) [2022] NAHCMD 557 (14 October 2022).

ammunition, s 40(1)(h) is therefore not applicable. The statutory provision which I find applicable is the General Law Amendment Ordinance 13 of 1962. Section 8 of this Ordinance makes pointing a firearm, air gun or air pistol a criminal offence. It reads as follows:

'8. Any person who knowingly and without lawful cause points a firearm or an air gun or air pistol at any other person shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months or to a fine not exceeding one hundred rand.'

[41] Schedule 1 of the Act includes common law offences as well as 'any offence' (except the offence of escaping from lawful custody in certain circumstances) the punishment for which may be a period of imprisonment exceeding six months without the option of a fine. As it is apparent from s 8 of the General Law Amendment Ordinance 13 of 1962 the punishment for pointing of a firearm is imprisonment for a period not exceeding six months or a fine not exceeding one hundred rand (now one hundred Namibia Dollars). The offence for the pointing of a firearm is therefore not a Schedule 1 offence. It, therefore, follows that the police officers who arrested the plaintiff in this matter, objectively viewed, did not have or could not have formed the suspicion that the plaintiff committed an offence referred to in Schedule 1 to the Act. The third and fourth jurisdictional facts are thus absent.

[42] The matter of *Els v Minister of Safety and Security*<sup>15</sup> is distinguishable on its facts because in that matter the plaintiff was arrested for shooting at whales at sea with an unlicensed firearm and for being in possession of an unlicensed firearm. It follows that the arresting officers in the present matter, objectively viewed, did not have or could not have formed the suspicion that the plaintiff committed an offence referred to in Schedule 1 of the Act. The arrest and consequent detention of the plaintiff was therefore unlawful.

*The general approach in the assessment of damages for unlawful arrest and detention*

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<sup>15</sup> *Supra* footnote 14.

[43] In this matter, the plaintiff suffered an arbitrary deprivation of personal liberty and was humiliated and traumatized by virtue of his unlawful arrest and detention. He has furthermore suffered patrimonial loss in the form of medical expenses and payment of legal expenses. In deprivation of liberty, the amount of damages is in the discretion of the Court. P. J. Visser and J. M. Potgieter list the following as factors which a court may take into account in determining the quantum of damages to award, namely: the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or *malice* on the part of the defendant; the harsh conduct of the defendant; the duration and nature of the deprivation of liberty; the status; standing; age; health and disability of the plaintiff; the extent of the publicity given to the deprivation of the liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; and awards in previous comparable cases.<sup>16</sup>

[44] The purpose of an award of damages in the context of wrongful arrest is a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant humiliation. In the South African case of *Masisi v Minister of Safety and Security*,<sup>17</sup> it was held that the right to liberty is an individual's most cherished right, and one of the fundamental values giving inspiration to ethos premised on freedom, dignity, honour, and security. That unlawful invasion, therefore, struck at the very fundamentals of such ethos.

[45] The Supreme Court in *Government of the Republic of Namibia v Lazarus*<sup>18</sup> quoting with approval from *Minister of Safety and Security v Tyulu*<sup>19</sup> held that:

'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed *solatium* for his or her injured feelings. It is therefore crucial that serious attempts

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<sup>16</sup> Visser & Potgieter *Law of Damages* 3ed at 545 – 548.

<sup>17</sup> *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP).

<sup>18</sup> *Government of Republic of Namibia (Ministry of Safety and Security) v Lazarus* (SA 54 of 2017) [2021] NASC 26 (9 September 2021).

<sup>19</sup> *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26 at 93 D - E:

be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our Courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.'

[46] In *Minister of Safety and Security v Seymour*<sup>20</sup> Nugent JA who authored the court's judgment stated that:

'The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other Courts have considered to be appropriate but they have no higher value than that.'

#### *Damages for unlawful arrest and detention*

[47] The plaintiff in the present case was arrested and detained on the mere say so of persons, by police officers (detective warrant officer Elifas and sergeant Mabuku) who testified at the trial and could not identify nor state how they investigated the alleged offences committed by the plaintiff. The police officers themselves testified that the plaintiff was a well-known business man in Grootfontein and that they had no doubt that if he was summoned to appear in court he would attend court. The defendant also did not dispute the plaintiff's testimony that four days prior to his arrest his house and farm were subjected to searches without warrant.

[48] The defendant also did not dispute the evidence by the plaintiff that the weekend before he handed himself over to the police for his second arrest, the police officers

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<sup>20</sup> *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 17.

constantly phoned him and threatened him with arrest. In cross-examination, the police officers were asked as to why they simply did not summon the plaintiff for him to appear in court if they knew him so well. They were also asked why in the second instance they were looking for him on a Friday and whether they would have arrested him on that Friday if he was in town. Warrant Mabuku was further asked 'what crime or offence' the plaintiff had committed to be arrested on a Friday. Warrant Mabuku's reply was that the plaintiff employed Angolan Nationals and he would definitely have arrested the plaintiff on the Friday if he had gotten hold of him.

[49] The evidence presented on behalf of the defendant leaves one with a distasteful taste that the plaintiff's arrest was carried out for other reasons than to harass him. The plaintiff's testimony that he was detained in a filthy and overcrowded police cell and that the first night he was made to sleep on a hard desk without a blanket or mattress was not denied by the defendant. That he was also not promptly given medical attention was also not denied. I, therefore, have come to the conclusion that the plaintiff's arrest was humiliating and degrading. The conduct of the police in effecting the arrest of the plaintiff in the circumstances of this matter amounts to interference with the plaintiff's rights to liberty and dignity.

[50] I have considered the awards by the courts in matters of deprivation in cases such as *Iiyambo v Minister of Safety and Security*<sup>21</sup>, *Government of the Republic of Namibia (Ministry of Safety and Security) (2) v Lazarus*<sup>22</sup>, *Sullivan v Government of the Republic of Namibia*<sup>23</sup>, *Shaalukeni v Minister of Safety and Security and Others*<sup>24</sup>, and *Government of Republic of Namibia (Ministry of Safety and Security) v Lazarus* and have come to the conclusion that a fair amount of damages for the unlawful detention of the plaintiff will be the amount of N\$80 000. As regards the plaintiff's patrimonial losses, counsel on behalf of the defendant conceded that those losses were actually suffered

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<sup>21</sup> *Iiyambo v Minister of Safety and Security* 2013 (2) NR 562 (HC).

<sup>22</sup> *Government of the Republic of Namibia (Ministry of Safety and Security) (2) v Lazarus* 2018 (1) NR 56 (HC).

<sup>23</sup> *Sullivan v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2020/01020) [2021] NAHCMD 439 (31 August 2021).

<sup>24</sup> *Shaalukeni v Minister of Safety and Security and Others* (HC-MD-CIV-ACT-OTH-2019/05140) [2021] NAHCMD 401 (8 September 2021).

by the plaintiff. The defendant must therefore compensate the plaintiff in the amount of N\$12 229,15 in respect of medical expenses which he incurred whilst in detention and N\$50 000 in respect of his legal practitioners' fees to secure his release on bail.

### Costs

[51] The plaintiff seeks the costs of the action. He is successful on both liability and quantum. I find no reason why the costs must not follow the event.

### Order

[52] I accordingly make the following order:

1. The plaintiff's arrest on 16 August 2021 and detention from 16 – 18 August 2021 and again on 30 August 2021 was unlawful.
2. The defendant is liable to the plaintiff for damages he suffered as a result of his unlawful arrest and detention in an amount of N\$142 229,15.
3. The defendant must pay the plaintiff's cost of suit.
4. The matter is removed from the roll and regarded as finalized.

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S F I UEITELE  
JUDGE

