



**REPUBLIC OF NAMIBIA**

**CASE NO. I 1347/2001  
574/2008  
575/2008**

**IN THE HIGH COURT OF NAMIBIA  
MAIN DIVISION**

In the matter between:

**JOHN MPANSE LUBILO  
JOHN GENESE KABOTANA  
ENERST LIFASI LOLISA**

**1ST PLAINTIFF  
2ND PLAINTIFF  
3RD PLAINTIFF**

and

**MINISTER OF SAFETY & SECURITY**

**DEFENDANT**

***CORAM:*** DAMASEB, JP

Heard: 2 - 12 November 2009  
Delivered: 8 June 2012

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**JUDGMENT**

**DAMASEB, JP:** [1] The three cases before me were consolidated by agreement and by order of this court. In each case, the defendant is the Minister of Safety & Security, being sued in his official capacity as the Minister responsible for the Namibian Police (Nampol). It is alleged that members of Nampol, acting within the

scope and course of their employment, wrongfully and unlawfully arrested the plaintiffs; assaulted them, or unlawfully detained them in violation of their right to be brought before Court within 48 hours of arrest.

[2] The plaintiffs form part of a group arrested in the wake of a failed attempt to secede a part of Namibia's territory, the Caprivi region, in the latter half of 1999. Their guilt or innocence is at the moment the subject of the longest criminal trial ever to take place in this country. The plaintiffs - alleged traitors - have been behind bars since their arrests. The incidents which led to their arrests were violent: people died or were injured. The security arms of our State were apparently caught off-guard. Some of the murderous attacks happened at a police station - the very place the plaintiffs subsequently ended up being incarcerated after their arrests. Understandably, emotions are not detached from the case.

[3] In regard to the criminal trial, the presumption of innocence operates in favour of the plaintiffs. On the other hand, the empathy that comes naturally for a person who has endured a long period of incarceration without their case being finalised is no substitute for what is expected of them as plaintiffs in a civil trial: They bear the evidentiary *onus* to establish a *prima facie*

case for their claims. They are, however, limited in that endeavour by the fact of incarceration. Conversely, the defendant bears no onus to disprove the allegations against it unless there is *prima facie* evidence of liability. The fact that the implicated members of the force acted against the plaintiffs in the wake of the events I mentioned, is presumed by the law to be wrongful. That does not, in and of itself, turn the police into villains. The police invoking the procedures of the law to have the allegations against the plaintiffs determined in a criminal court, is a power enjoyed by the State under the law in a democratic state. However, that power is no warrant or license for violating the plaintiffs' constitutional rights to bodily integrity and freedom from arbitrary arrest and detention.<sup>1</sup> The latter is what this case is about.

[4] I make these remarks at the outset because either side, to a greater or lesser extent, relies on the atmosphere associated with the secession events to advance a theory of the case and to suggest a particular approach to the evidence based on that.

### **The claims in brief**

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<sup>1</sup>Du Toit et al, *Commentary on the Criminal Procedure Act*, Service 46, 2011 at 2-1.

[5] The plaintiffs come to this court saying they suffered physical assaults and other breaches of their constitutional rights such as to be brought to court within 48 hours of their arrest or being arrested without being told the reason for the arrests. They seek compensation.

## **THE LAW**

### **Unlawful arrest**

[6] An arrest or detention must be constitutionally and statutorily justified.<sup>2</sup> Wrongful arrest consists in the wrongful deprivation of a person's liberty. An arrest or detention is prima facie wrongful and the defendant must allege and prove the lawfulness of the arrest or detention.<sup>3</sup> An arrest without a warrant is lawful if at the time of arrest the arresting officer had reasonable belief that the plaintiff had committed a Schedule 1 offence. (which includes treason and murder) The defendant should show not only that the arresting officer suspected plaintiff of having committed an offence, but that he reasonably suspected him of having committed a Schedule 1 offence.<sup>4</sup> The plaintiff is not required to allege and prove on the defendant's part the intention to injure or awareness of unlawfulness

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<sup>2</sup>*Minister of Correctional Services v Kwakwa* [2002] (4) SA 455 (SCA); *Mistry v Interim National Medical and Dental Council* of SA 1998 (4) SA 1127 (CC).

<sup>3</sup>*Lombo v African National Congress* 2002 (5) SA 668 (SCA), para.32; *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk).

<sup>4</sup>Section 40 of the CPA; *Mhaga*, supra ; *Manqagasalaza V MEC for Safety & Security Eastern Cape* 2001 3 All SA 255 (Tk).

(*animus iniuriandi*). An honest belief in the legality of the arrest does not constitute a defence<sup>5</sup>. Article 11 of the Constitution enjoins that upon arrest a person being arrested must be informed of the reason for the arrest in the language that he or she understands.<sup>6</sup> Once arrested, he or she must be brought before court within 48 hours or soon thereafter as is reasonable.

[7] Article 11(2) of the Constitution states that “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.” In the South African case of *Naidenov v Minister of Home Affairs and others*<sup>7</sup>, interpreting a similar provision as our own, Spoelstra J held that the provision did not require that the arrestee should be informed in his native language, but merely that he be informed in a language which he understands.

### **Unlawful detention**

[8] Article 11(3) of the Constitution and s.50 of the Criminal Procedure Act (CPA),<sup>8</sup> deal with detention after arrest. The effect of these provisions was discussed by Hannah AJ (as he then was) when he stated the following in *S v Mbahapa*<sup>9</sup>:

<sup>5</sup>See Amlers Precedents of Pleadings, p 48

<sup>6</sup> See also s. 39 of the Criminal Procedure Act (CPA) 51 OF 1977.

<sup>7</sup> 1995(7) BCLR 891 (T)

<sup>8</sup> Act no 51 of 1977

<sup>9</sup>1991 NR 274 (HC) at 280E-H.

"The terms of art 11(3) are to my mind quite clear. The article provides in plain terms that an arrested person must be brought before a magistrate within 48 hours of his arrest or released. It is only if it is not reasonably possible to bring an arrested person before a magistrate within the 48- hour period that further detention in custody is permitted and even then the detained person must be taken before a magistrate 'as soon as possible'. In the context of art 13(3) the words 'as soon as possible' require little interpretation or explanation. There must, of course, be an element of reasonableness implied but once the circumstances are such that it is reasonably possible to take the arrested person before a magistrate that must be done. If it is not then the arrested person is deprived of his fundamental right to freedom as guaranteed by the Constitution. As I have indicated, what is possible or reasonably must be judged in the light of all the prevailing circumstances in any particular case. Account must be taken of such factors as the availability of a magistrate, police manpower, transport, distances and so on. But convenience is certainly not one such factor."

## **Assault**

[9] The cause of action is the action iniuriarum. An assault violates a person's bodily integrity.<sup>10</sup> Every infringement of the bodily integrity of another is prima facie unlawful. Once infringement is proved, the *onus* moves to the wrongdoer to prove some ground of justification.<sup>11</sup> But before that duty arises, the

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<sup>10</sup>*Bennet v Minister of Police and Another* [1980] (3) SA 24 at 35C.

<sup>11</sup>*Moghamat v Centre Guards CC* [2004] 1 ALL SA 221 (C.)

plaintiff must allege and prove the fact of physical interference.<sup>12</sup>

### **General comment**

[10] In applying the law stated above to the facts before me, I will take the following approach in analyzing the evidence that was led before me.

### ***Assault allegations***

(a) Is there evidence of assault on the plaintiffs?

(b) If assault is established, how is it justified?

(c) It must follow that in circumstances where assault is denied on the pleadings and I find there was assault, it was wrongful in the absence of justification.

### ***Unlawful arrest***

(a) Was there a failure to inform the arrestee of the reason for the arrest?

(b) If it was, is it sufficient that the reason was apparent from the surrounding circumstances?

### **Unlawful detention**

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<sup>12</sup>*Jackson v S.A. National Institute for Crime Prevention* 1976 (3) SA 1 (A).

(a) It being common cause that the second plaintiff Kabotana was not brought to court within 48 hours of arrest;

(b) Was it possible for the police to have complied with the requirement of the law?

(c) Is the reason the plaintiff was not brought to court within 48 hours after arrest because it was not reasonably possible to do so; and assuming that to be the case, was he brought to court as soon as possible?

#### **Common cause facts**

[11] The following is common cause between the parties:

(a) The arrests which are the subject of the present proceedings were preceded by violent attacks which took place in the Caprivi region during August 1999. Those attacks were perpetrated by a group of people who wanted to secede the Caprivi from the rest of Namibia. That amounts to treason. People were killed by the armed men who perpetrated the attacks.

(b) The plaintiffs have been in custody since August and September 1999 on suspicion of having been involved in the violent attacks against the State of Namibia and people.

(c) Except for one person (Zekia Oliver Kabotana) who is the biological brother of the second plaintiff, all of the



witness for the plaintiffs are co-accused in the treason trial and all have pending civil claims against the Government for the same delicts the present plaintiffs are pursuing through these actions. They all rely on each other as witnesses in their respective claims.

#### **THE CLAIMS OF THE PLAINTIFFS**

##### ***First plaintiff: John Mpanse Lubilo***

[12] This plaintiff's cause of action is for unlawful arrest, and assault.

##### ***Second plaintiff: John Genese Kabotana***

This plaintiff claims for unlawful arrest, unlawful detention and assault.

##### ***Third plaintiff: Ernest Lifasi Lolisa***

This plaintiff claims for unlawful arrest and assault.

#### **EACH PLAINTIFF'S CASE CONSIDERED**

##### **First plaintiff:**

###### *Unlawful arrest*

[13] The original particulars of claim in respect of his claim filed in July 2000 alleged the following: that first plaintiff was arrested on 30 August 1999 by a sergeant Simasiku. He was then detained unlawfully until 31 August 1999, the date on which

he appeared brought before a magistrate. His further detention was authorised by a magistrate on that date.

### *Assault*

[14] As for the alleged assault, the particulars alleged that the first plaintiff was allegedly assaulted by six Nampol officers, one of whom was Oupa on 30 August 1999 at Katima Mulilo ('KM'). During this assault he alleged he was beaten with rifle butts. Again, on 30 August, he was allegedly taken to the Zambezi River where he was tortured by six Nampol members and Oupa. The assaults resulted in him suffering an injury to his right-hand finger and multiple bruises over the body. He was treated for these injuries at Grootfontein from 10 September 1999 until July 2000. He also endured shock, pain and such like.

### **The evidence led at the trial in support of the assault allegation of Lubilo**

[15] The first plaintiff testified that he was born in 1952, and hails from Lusave village in the Caprivi. He attended school only up to Grade 2. He can write his name but can't write English. The bit of English he knows he picked up in prison. He testified that he was arrested at about noon on 30 August, 1999 while he was at home. He testified that he was arrested by a Simasiku, 'Oupa' and another officer he said was Ovambo-speaking. He testified that he

was in his courtyard when he saw 4 cars approach. The police officers jumped off and surrounded him. Simasiku told him that he was under arrest and asked him to board. He was blindfolded, assaulted and thrown onto the car. Simasiku did not tell him why he was being arrested and he said he also did not ask why he was being arrested. He testified that the police behaved like wild dogs in the process of arresting him. During the assault, he said, he was blindfolded, punched with fists, kicked in the face and on the chest and thrown onto a pick-up vehicle. He was bleeding in the mouth. When thrust onto the vehicle, he fell on people who were already arrested. He was taken to Ngwezi police station at KM. There he, with others, was off-loaded and had the blind folds removed. He recognized other arrestees: Josef Kaviana and Richard Mungulike. He had no communication with the fellow arrestees. At Ngwezi police station he was taken into an office and asked by Simasiku if he was a rebel. When he enquired what that meant, he testified, the Ovambo officer, Oupa, started assaulting him. Simasiku allegedly then told him that if he did not admit to being a rebel, he would be killed.

[16] Lubilo further testified that the assaults went on for a long time and consisted in him being kicked and being hit with rifle butts in the ribs. He stated that he sustained scratches to the head, stomach and legs. After being assaulted, he was taken

to a cell and remained locked up until 31st August 1999. According to him, nothing happened on the night of the 30th, but early morning of the 31st he was again taken to an office and assaulted and told to confess to being a rebel. He refused to confess and was then taken to the Zambezi River by Simasiku, Oupa and others he did not know. At the river Zambezi, he testified, Simasiku ordered him to sit on a bag filled with stones. He was told that if he did not confess he would be tied to that bag with stones and thrown in the river to drown. He testified that he had no choice but to agree to sign a confession, whereupon he was placed in a sack and returned to the police station. At the police station, he was told that if he did not sign the confession he would be killed. He told the interrogators to bring the papers. Simasiku then brought some papers which he signed. He testified that the statement that he signed was never read-back to him and that he signed it to save his life. The assaults stopped after he signed the confession. The witness testified that he sustained the following injuries as a result of the assaults: a cut to the head, the stomach and the left foot. He said that his left rib cage is paining to this day. He testified that he experienced pain from the injuries from August to November 1999. While detained at Katima Mulilo he did not receive medical treatment and was denied food. He was only given food on 6<sup>th</sup> November 1999 when he was taken to Grootfontein. He received

medical attention in Grootfontein for the first time in October 1999. Although he had asked for medical treatment at Grootfontein before that, it was refused him. The witness testified that whilst detained at Grootfontein no one asked him about the injuries and he was afraid to tell the police of his injuries as he thought he would be killed if he did so and that Simasiku had in fact threatened to kill him if he told anyone, including the Court, about the injuries. He testified that he only received treatment in October when an official came from the military base. He also testified that the people who treated him did not speak his language and that he did not understand them. He showed them his injuries using sign language. The witness testified that he had informed fellow inmates at KM about his injuries.

[17] Lubilo also testified that he had informed his fellow inmates while being held in Katima Mulilo about his injuries. As regards the claim that he was not brought before Court within 48 hours, Lubilo testified that when he was taken to Court, a magistrate was not present but that the case was postponed to 24 January 2000 by Simasiku.

[18] In cross-examination Lubilo testified that the criminal trial now underway relates to a series of attacks that took place in the Caprivi in August 1999 and that he was told as much by an

officer he called 'Ovambo Oupa' and that Simasiku acted as an interpreter for him. He denied that he participated in the attack at the Vinella border post, claiming that he was at his village far away from the border post. He stated that he heard about the attacks on the radio. He further stated that he was aware before his arrest that the police were looking for the perpetrators of the attacks.

[19] In support of the wrongful arrest Lubilo stated that the police did not identify themselves upon arresting him and that he was not told what he was being arrested for. He could not say who arrested him but stated that the officer who spoke to him was Simasiku. He accepted that during his arrest, in addition to Simasiku and 'Oupa', there was a white officer called Karstens, a fact he did not mention in his particulars or in chief. He stated that the police who arrested him were in uniform and were armed and that he knew they were the police. Lubilo denied that officer Karstens identified himself as a police officer and informed him of the reason for the arrest and that same was interpreted to him by Simasiku. Lubilo could not dispute that the police were led to him by a collaborator and that they had a reasonable suspicion he was involved in the attacks. He denied that upon being confronted by the police about the wound he had that he admitted he sustained it in the Vinella border post attack.

[20] Asked when he became aware for the first time about the reason for the arrest, Lubilo testified that it was at the police station when 'the Ovambo' called him a rebel and accused him of participating in the attack; and that it was on the same day that he was arrested. He testified that he was taken to the Magistrate's Court on 31 August 1999 and that Simasiku, not a magistrate, told him that the case was postponed. This contradicts his particulars of claim which quite accurately set out the true position. He maintained that in his instructions to his present practitioners of record he had informed them that he had not been brought before a magistrate. It was put to him that his original particulars of claim state that he appeared before a magistrate on the 31st. He testified that he stood by the version now given in Court and persists that he never appeared before a magistrate, and that it was Simasiku, not a magistrate, who postponed the case.

[21] Lubilo was adamant that he had not before 24 January 2000 appeared before a magistrate at Grootfontein, implying that any evidence that he indeed so appeared after his arrest, was a fabrication. He claimed that he was unlawfully detained from arrest to 24 January 2000. Lubilo disputed the truth of the warrant of further detention and removal and stated he had not

seen the document before. Lubilo also dismissed as untrue the version, as shown in the Grootfontein admission register of 5 September 1999, that he was referred by a magistrate at KM.

[22] This version is against the weight of the evidence and demonstrates that this is a man who is prepared to lie about a detail that in a verifiable way proves the opposite. It raises the question if he can be believed on matters that cannot be independently verified. In what clearly demonstrates the emotions involved in the case, Lubilo stated that everyone, including Simasiku and Mr Coleman acting as counsel for the defendant, are Ovambos because they are working for the government of Sam Nujoma.

[23] For the first time in cross-examination, Lubilo stated that in addition to Oupa and Simasiku, officer Karstens participated in the assault on him and that Karstens (a white officer) was the one who inflicted the wound to his head. His implausible explanation to the question why, if he referred to Oupa as a Wambo, he did not previously name Karsten by reference to his race, was that he only came to hear Karstens' name in Court. He also for the first time in cross-examination mentioned the assaults on him at Kahende village. It was put to him that the alleged assaults at the Kahende village are not mentioned in his



particulars of claim and he maintained that he had informed his practitioners of record about those assaults too. As for the suggestion made in cross-examination that he was assaulted on the head upon arrest with a pistol, it was put to Lubilo that same is not mentioned in the particulars of claim. Lubilo conceded he did not mention it to his practitioners of record but asserted that it was the pistol -assault to the head that caused the bleeding. He described this injury arising from this assault as 'serious' and covered his face, stomach and feet with blood. He added that the wound caused by the pistol-attack bled a lot. He added for good measure, that not only was his shirt still covered in blood when he was brought to the KM hospital, but that he had informed his practitioners of record that the most serious injuries he sustained in the assaults, were the ones to his head and to the left foot. He was emphatic that he had not sustained any injuries to his throat. When challenged in cross-examination that his complaint of 7 September had not mentioned any of the injuries now referred to in Court, Lubilo retorted that he did not mention them then as he was 'still afraid of being killed', if he did.

#### **First Plaintiff's witnesses**

[24] Mr Richard Mungulike, who is Lubilo's co-accused in the treason trial, testified on Lubilo's behalf. The two were acquaintances before their arrests. Mungulike was arrested on 30 August 1999 and saw Lubilo at the Katima Mulilo charge office of

Nampol. He also has a pending civil suit against the government arising from his arrest. According to this witness, when he saw Lubilo at KM charge office, Lubilo had blood on his head and his mouth was swollen. The two of them were, he said, again in the same cell on 31 August when Mungulike had just been assaulted too and Lubilo 'looked tired' and appeared like he had been assaulted.

[25] In cross-examination Mungulike stated that he, Lubilo and others were taken to the Magistrate's Court on 31 August 1999 but that he was at the time in a state of shock as to be unable to tell how Lubilo looked like. He was however able to see that Lubilo's clothes were covered in blood. Mungulike accepted in cross-examination that he and Lubilo do meet and talk regularly in prison since their arrest in 1999.

[26] The second witness for Lubilo was Josef Kabyana, a co-accused in the Caprivi treason trial; also with a pending civil claim against the State. Kabyana too was arrested on 30 August 1999 and is related to Lubilo. He testified that he saw Lubilo on 31 August after the arrest at the KM police station. Kabyana testified that Lubilo then had fresh injuries to his head, stomach and left foot. He testified that the injury to the head looked as if it had been caused by a knife or an axe. The injury

to the foot looked like a burn, he added. When asked in cross-examination if Lubilo would be a witness on his behalf in his pending claim against the State, Kabiana was very evasive but left open the possibility that it would be the case. Kabana's version of Simasiku's role at the Magistrate's Court and what happened or did not happen there is not the same as that of Lubilo.

## **Case for Second Plaintiff**

### **Kabotana**

#### *Unlawful arrest*

[27] The original particulars of claim relative to this plaintiff were also filed in July 2000. Therein he had alleged that he was unlawfully arrested on 1 September by an officer he knew only as 'Popyanawa'. Before trial, on 19 October 2009, the second plaintiff amended his particulars of claim in respect of the unlawful arrest allegation and alleged that the unlawful arrest was effected, in addition to Popyanawa, by Simasiku, Chisavulio, Oupa and Karstens.

#### *Unlawful detention*

[28] The particulars alleged that after his arrest on 1 September 1999, the second plaintiff was detained unlawfully until 6 September 1999, the date on which he was brought before a magistrate at Grootfontein.

## *Assault*

[29] The particulars alleged that the second plaintiff, upon arrest, was assaulted on 1 and 2 September 1999, by Oupa and Simasiku with a baton, kicks and punches. The assaults resulted in a laceration on his chest and above his left eye as well as multiple bruises all over his body. He received treatment for the injuries whilst in Grootfontein prison, from 6 September 1999 until about 12 September the same year.

## **EVIDENCE IN SUPPORT OF SECOND PLAINTIFF'S CLAIMS**

[30] The second plaintiff (John Kabotana Genese) testified that he, like the first plaintiff, hails from Kahende in Sivuyu village of the Caprivi Region. He was arrested on 1 September 1999 between 10-11 in the morning whilst at home. Kabotana testified that he was at a borehole with his brother and others when several police officers swooped on them. A police officer asked him for his name and led them back to their village and upon their arrival at the village; he was asked about the whereabouts of a Sambona, accused of being a rebel and was then assaulted. The assault was with fists and rifle butts. He was blind-folded, had his shirt removed and then thrown onto the loading box of a pick-up vehicle. He was neither told of the reason why he was being beaten nor for the arrest. He testified

that the officers involved were Simasiku, Mbinge and a lot of Ovambo speaking officers. Whilst being conveyed in the vehicle, he testified, the officers stepped on his back and dropped cigarette ash on him. He was taken to the Ngwezi police station, assaulted there at night and denied medical attention although in need of it. He identified the officers who removed him from the cells at night as Simasiku, Oupa, Karsten and an 'Ovambo'. The assaults were perpetrated, he said, with buttons, firearm butts and being thrown against the wall.

[31] He testified that he was assaulted on the day of arrest, the 2nd, 3rd and 4th of September, denied food for 4 days and was made to sign a confession against his will on 3 September. Kabotana testified the he appeared at the Magistrate's Court on 6 September 1999 and that no effort was made to take him to the Magistrate's Court at KM before that. Kabotana testified that as a result of the assaults following his unlawful arrest, he sustained a cut to the right side of his chest. The injury sustained caused him pain for a long time and he only received medical treatment after 2 weeks following his arrest - when he was given panado tablets at Grootfontein prison for the pain.

[32] In cross-examination, Kabotana accepted that he could not deny that Mungulike pointed him out as a rebel. He was aware of

the secessionist attacks from the wireless. He persisted that the police never told him of the reason for his arrest and that he became only aware on 6 September 1999 that he had been arrested. He said that when the police swooped on them they were in police uniform and that he was aware that they are police officers. He said he was accused of being a rebel while he was being arrested. The officers that arrested him were Chisavulio (since deceased) Mbinge, Simasiku, Oupa and Karstens.

[33] This plaintiff denied under cross-examination that he was informed by officer Chisavulio of the reason for the arrest at the time he was arrested. He also denied that he was brought to court within 48 hours on 3 September or within a reasonable time. He denied giving a warning statement on Friday 3 September 1999 intended to bring him before a magistrate. He vehemently denied signing his purported warning statement of 3 September 1999.

[34] In support of the claim based on the assault, this plaintiff stated that upon arrest at his home, he was assaulted by Simasiku, Mbinge and an 'Ovambo' Oupa. He stated that officer Karstens was not present at the village. During the assault at his home in the village, this plaintiff testified that he was assaulted with a batton, resulting in swelling to his body and that he had a laceration above his left eye when he was brought

to the police station. He stated that he was not bleeding. He was again assaulted at the police station at night. After the assault on the 4th of September he was bleeding on the left eye.

[35] This plaintiff was emphatic (contrary to what is alleged in his particulars of claim) that he was always assaulted at night and that the assaults also happened on the 3rd and 4th September 1999. It was put to him that all that conflicted with his version in the pleadings, which he attributed to a possible misunderstanding with his practitioners of record. It was also put to the witness in cross-examination that his prison file showed that he received medical treatment. He said all that it could refer to was the panado tablets he received. It was also put to him that the file showed that he only complained of diarrhea on 15 October 1999. He was emphatic that when he arrived at Grootfontein he had an open wound above the eye (which was swollen) and another wound to the chest. He stated that any suggestion that upon arrival at Grootfontein the prison officials examined him and did not find the injuries he claims to have had, is a fabrication both by the police and the prison authorities.

[36] Three witnesses testified on behalf of the second plaintiff. The first was one Zekia Oliver Kabotana, a brother of the second plaintiff. This witness is not an accused in the treason trial.

He confirmed that he was present at the borehole when the second plaintiff was arrested. When they returned to the village with the police, the second plaintiff, whom the police were looking for when they arrived at the village, was taken into his hut. He later heard the plaintiff scream and concluded he was being assaulted. He testified that when the second plaintiff emerged he looked different and seemed to be in pain. According to this witness, upon entering second plaintiff's hut after the police had taken him away, he noticed that things were scattered and that a plastic chair had been broken.

[37] In cross-examination he conceded that he never actually saw Kabotana being assaulted.

[38] The second witness on behalf of Kabotana was Josef Mufuhi, also accused of treason and has a pending claim against the defendant. He testified that he was arrested on 1 September 1999 and saw Kabotana at the KM police station in the evening of 1 September. He did not notice any injury on Kabotana. Kabotana was then removed from the cell by the police the next day and upon being returned he had an injury to the right side of his chest and an injury on the eye.



[39] In cross-examination Mufuhi testified that when he first met Kabotana at the police station, he looked as if he had been assaulted although he had no visible injuries. The witness testified that he only saw the injuries on Kabotana on 3 September - being a cut on the forehead and that it was bleeding.

[40] The version that he had no see any injury on Kabotana is at odds with Kabotana's own version that at that point of arrest he was assaulted and had swelling to his body and a laceration above his left eye when he was brought at the police station.

[41] The third witness for Kabotana was Vasco Lionga a co-accused in the treason trial who said he was at the moment 'dying in prison' in Windhoek Central prison. He also has a pending claim against the State. He hails from the same village as the second plaintiff and was arrested on 1 September 1999. He testified that he first saw the second plaintiff on 3 September 1999 at the KM police station. Lionga testified that he saw Kabotana being removed from the cell in the evening and without injuries and that upon being returned, the second plaintiff suffered from injuries and that his shirt was covered in blood. Kabotana was again removed from the cell on 4th September and was bleeding upon being returned. According to the witness, the bleeding was

as a result of the plaintiff being assaulted on the old injury (left eye) which had caused the bleeding the previous day.

[42] In cross-examination, Lionga confirmed that he did not see any injury on Kabotana when they first met in prison at KM police station. He also confirmed that Mufuhi was also present in that cell. In answer to the question whether it was reasonable to assume that he and Mufuhi would have made the same observations about Kabotana, Lionga gave a rather evasive answer stating that he could not tell what Mufuki saw - a clear attempt to hide what differences there were between his version (that Kabotana had no injuries when he first saw him) and that of Mufuhi (that Kabotana had injuries).

As the record amply demonstrates, Mufuki was an unreliable witness who kept changing his story. I need to mention at this stage that the versions of Kabotana and his witnesses about how he looked physically after the assaults are radically different and do not corroborate each other.

### **Case for 3rd plaintiff: Ernest Lifasi Lolisa**

#### **The particulars of claim**

##### *Unlawful arrest*

[43] The third plaintiff (Lolisa) in his particulars of claim filed in July 2000 alleged that he was unlawfully arrested on 2

September 1999 at Makusi village by unknown police officers. He alleged that he only appeared before a magistrate in Grootfontein on 6 September 1999. Before trial, the third plaintiff amended his particulars of claim in respect of the unlawful arrest and named the arresting officers as Simasiku, Mbinge and Karstens.

### *Assault*

[44] As for the alleged assault, the particulars stated that he was assaulted by unknown police officers on the date of arrest at Makusi and during the night at Katima Mulilo police station. On arrest he was sjambokked, kicked and punched with fists while at the police station he was repeatedly sjambokked. He sustained multiple lacerations and bruises all over the body and sustained soft tissue injuries.

### **EVIDENCE IN SUPPORT OF THIRD PLAINTIFF'S CLAIMS**

[45] The third plaintiff (Lolisa) testified that he was arrested on 2 September 1999 - at about 8 am - at Makusi village at his grandmother's home. He said he was arrested by Robert Chisavulio, Mbinge, Evans Simasiku, Karstens and Henry Mwilima. When the police came to where he was, Mwilima had a list of names on which his name was too. Mwilima called out his name and when he responded to it, the assault on him started and he was tied, kicked and brought to the police car where the assault continued

- with firearm butts. The assault was perpetrated by Robert, Mbinge, Karsten, Henry and Simasiku. During the assaults he was, he said, accused of being a rebel. His hands having been tied, he was loaded onto a vehicle and taken to the police station and on the way assaulted with fists by Robert, Evans, Karstens and Henry. They arrived in the evening at the police station and during that time was not given food or blankets to cover himself. During the night he was taken to the charge office by Robert, had his hands and feet tied with wire and was assaulted. Robert was forcing him to sign a document as the assaults happened and he sustained an injury to his chest. He in the end caved in and signed a document the nature and content of which he did not know. The assaults ceased when he signed the document.

[46] According to Lolisa, the only visible injury he sustained was to the chest and he experienced pain as a result of it for a 'long time'. When he complained about his injuries at Grootfontein, he was told that it would be a waste of government money to take him to hospital and that he had been taken to Grootfontein to die. For fear of being victimised, he never complained of his injuries to the authorities. Lolisa maintained that he was never informed of the reason for his arrest and was only taken to a magistrate's court on 6 September 1999 at Grootfontein.

[47] In cross-examination, Lolisa stated that he was aware of the secessionist arrests based on radio reports but stated he was not aware of the operation being mounted by the army. He maintained that neither was he informed of the reason for his arrest, nor brought to court as required by the Constitution. He maintained that to this day he does not know the reason for his arrest, is being forced by arms to attend trial, and does not know why he is on trial.

[48] He denied that he was arrested near a school in the Kaliyangela area or that it was during an armed confrontation with the NDF during which Hansmeyer (whom he knows), was killed. He denied that he was captured by Mwilima following engagement with the NDF. He also denied that he was handed over to the police by the NDF's Mwilima after his capture. He denied that the arrest was then effected by Karsten after he had been handed over by the NDF to the police. He denied being informed by Karsten of the reason for the arrest. Lolisa stated that before his unlawful arrest he knew Henry, Simasiku and Robert and that he had said as much to his practitioners of record. It was put to him as incongruous that his particulars of claim (including the amended one) state that he was assaulted and arrested by people unknown to him.

[49] In cross-examination, Lolisa said the injury he suffered during the assaults was to the chest and that it was sustained at the KM police station. The only cut sustained, he said, was to the right of the upper torso, leaving a scar. He had not suffered any broken bone. The cut, he said, was sustained at the KM police station and not during armed contact with the NDF. He said he was alone when he was assaulted at the KM police station. He denied that he had any scar on his back sustained in the bush as he was hiding. Lolisa vehemently denied that he knew the meaning of the word 'rebel' that he was being accused of, although he asserted that he was denied food and medical treatment because he was regarded as a rebel. It reached the absurd point where he would say that he was called a rebel and therefore denied food and medical treatment, but that because he does not understand English, he does not know the meaning of the word 'rebel'.

[50] Lolisa called one Chiko Moses Kajoka a as a witness, also a treason co-accused with a pending civil claim against the State. He too was arrested on 2 September 1999. He testified that he witnessed the assault on the third plaintiff at the latter's grandmother's house. He said he saw the arresting officers tear off Lolisa's shirt and blindfolding him. The two of them were transported in the same car and detained in the same cell 6. At

the KM police station he saw an injury to the left part of Lolisa's chest. He only witnessed Lolisa being taken out of the cell at night and visibly changed when he was returned to the cell, showing the appearance of having experienced an assault. Kayoha said he was arrested at Chivundu in Kaliyangela whereas Lolisa was arrested at his grandmother's house.

[51] In cross-examination, Kajoka denied that he and Lolisa were captured in combat after one Tungulu had been shot.

### **The defence case**

#### *Introduction*

[52] The witnesses in opposition to the claims of all three plaintiffs are the same group of officers. Each denies the factual averments made by the plaintiffs against the defendant. In broad outline, the defendant denies that the plaintiffs' arrests were unlawful and it is common cause that the arrests are admitted. The defendant's case is that each plaintiff was properly informed of the reason for the arrest and that, in any event, the reason for the arrest was obvious to each plaintiff from the surrounding circumstances. The defendant denies the allegations of assault (i) alleged by each plaintiff and relies on the denials by the officers to whom the plaintiffs attribute the assaults, (ii) the absence of any report of such allegation or evidence of visible injuries in official police or prison

records and (iii) the failure by the plaintiffs to report alleged assaults or injuries resulting therefrom to persons in authority.

[53] In respect of the first and third plaintiffs, the defendant denies that they were not brought to court within 48 hours of their arrest; and in respect of the second defendant the defendant's case is that although on the face of it he was only brought to court outside the 48 hours, the failure was not unreasonable as the magistrate, unknown to the defendant's officers, was not available and that the second plaintiff was brought to court as soon as possible after arrest in keeping with article 11(3) of the Constitution. In respect of this latter denial, it bears mention that in the original plea the defendant had alleged that second plaintiff could not be taken to court due to security reasons. That has, just before trial, been amended and it is now alleged that unknown to the officers a magistrate was not available when the second plaintiff was taken to court on 3 September 1999.

*The defence witnesses*

[54] The first witness called for the defence was inspector John Makani Lifasi who at the material time (August/September 1999), was the station commander of the KM police station. He testified that he became aware of armed attacks in the Caprivi Region on 2



September 1999 at about 1-3 in the morning. He made contact with the charge office and got no response. He took his riffle and drove to the police station. He was then informed by a superior officer that the Caprivi Liberation Army had launched an armed attack. He then saw gunfire coming from the direction of the Katima Mulilo Hospital and took cover where he was joined by the regional commander of Nampol. They eventually reached the police station and there found a wounded officer, and another officer (Kamati), who was fatally wounded. There was blood in the charge office and wounded officers had gone in hiding inside the police station. There was widespread gunfire around town and several people were either injured or killed.

[55] In the wake of the armed attack, the President of the Republic of Namibia had declared a state of emergency in terms of which people could be detained longer than usual. Lifasi testified that to deal with the aftermath of the armed attack, several police officers from other parts of the country were assigned to assist the Caprivi police with the maintenance of law and order, investigations, arrests of suspects and mopping up. This resulted in his station becoming very busy. Some prisoners were therefore transferred to Grootfontein.

[56] Lifasi also detailed his responsibilities as station commander and explained the workings of the shift system, the procedures for the treatment, and the processing and handling of inmates. Lifasi testified that the procedure operated in the force and at his station is that all inmates requiring medical attention are taken to hospital; if an inmate is injured the officers will ascertain the nature and circumstances thereof and if serious, it will be brought to the attention of the station commander and in all circumstances entries will be made in the Occurrence Book (OB). He was unable to recall if in the aftermath of the armed secessionist attack injured suspects were brought to the station and that if they were, the procedures he outlined would apply. Lifasi also testified that standing instructions are that where an investigating officer wants to see a suspect detained at the police station, the permission of the shift commander is required. He denied the allegation that the plaintiffs or other secession suspects were denied food, but stressed that in the aftermath of the attacks, many people were detained - and preparing food for many people took rather long.

[57] Lifasi led into the evidenced the OB of the KM police station for the relevant period to demonstrate that the suspects arrested in the aftermath of the secession attacks were fed

regularly; and that no reports of injuries and assaults were recorded.

[58] Under cross-examination Lifasi testified that he could not tell how many suspects altogether were kept at his station in the aftermath of the attacks. He conceded that if an officer investigating the armed attacks wished to see any of the implicated suspects, they could see them at any time, day or night and that the shift commander could not refuse such access. He stated that if an investigating officer had access to a suspect without the permission of a shift commander it would be contrary to standing procedures but that no such incident as brought to his attention. He conceded that the OB would reflect any contact between an inmate and a suspect and that the booking-out of a suspect by an investigating officer ought to be reflected in the OB.

[59] In cross-examination, Lifasi conceded that the OB of his station, as respects the time the plaintiffs were taken into custody and subsequently transferred to Grootfontein, does not show any entries about the feeding, booking-out of the suspect plaintiffs for interrogation and by whom, and specifically the booking-out of Kabotana (second plaintiff) for the taking down of a warning statement and the booking-out of Lubilo on 1 September

for pointing-out. He stated that it must be due to an omission on the part of his subordinates at the station.

[60] It was suggested to Lifasi that the fact that their colleagues were wounded or killed might have induced anger towards the plaintiffs amongst the officers who guarded over or interrogated the suspects. Lifasi asserted that he felt no anger but did not suggest that others might have.

[61] In re-examination, Lifasi asserted that the omission in the OB was not proof that the procedures to be followed in respect of the inmates were not followed. He also stated that during the material time he was short-staffed as one of his officers had been killed, one injured and he had to surrender some of his officers to assist in the mopping-up operation then going on in the region in the aftermath of the secession attacks. He asserted that the OB showed that many routine entries had not been made and attributed that to the work overload and confusion which prevailed in the aftermath of the secessionist attacks.

[62] The next witness for the defendant was Evans Simasiku, an inspector in the detective unit of Nampol based in KM in August-November 1999. He had personal experience of the events that unfolded in KM following the secession attacks.

[63] Simasiku disputed the version by Mungulike that the second plaintiff was assaulted. Simasiku testified that in the wake of the secession attacks the officers of the KM police station had a heavy administrative burden shared amongst only six officers. These officers had to process a large number of suspects, decide who to charge and who to release. As regards Lolisa, Simasiku testified that this plaintiff was arrested on 2 September at Kaliyangela village, together with Tungulu and Moses Kayoka, after he was handed over to Nampol by Mwilima of the NDF. According to Simasiku, Karsten of Nampol effected the arrest in English and Lolisa was able to understand English. In respect of plaintiff's witness Kayoka, Simasiku testified that led by the NDF, the police investigating unit went to a suspected base of the secessionists where Kayoka was in the custody of the NDF. At *that* base the party found injured and dead secessionist combatants. Lolisa and Kayoka who had accompanied the police and the NDF identified the dead amongst the secessionists and told the police the identities of the armed combatants that had run away.

[64] Simasiku denied that Lolisa was assaulted. He maintained that after the arrest the suspects were locked up in a van behind the car and that there were no police with them and therefore no

assault could have taken place on the way to the police station. Simasiku also testified that the investigating team only begun to interrogate the suspects on the 3rd of September and that there were no interrogations on the 2nd as alleged.

[65] As regards the visible scars on Lolisa, Simasiku testified that these more likely were sustained in the thick thorny bush that the armed combatants were operating in at the time. Simasiku testified that at the time the warning statement of Lolisa was taken, he was not present but that he had been present and participated in his interrogation. He also testified that Lolisa had after being arrested pointed out a firearm to the investigating team. Simasiku testified that Richard Mungulike was also arrested on the same day as Lubilo and Josef Kabotana and that the trio was kept in separate cells and that Mungulike could not have met Lolisa.

[66] In cross-examination, Simasiku stated that by the time of the arrest of the suspect plaintiffs they had a fairly good idea about who was involved in the armed attacks and who the leaders were. He stated that he regularly visited the lock-up cells where the inmates were kept to see how they were doing. He said he paid such visits with the permission of the charge office sergeant. He stated that when Lubilo pointed out a firearm he had been taken

from the cells and that Karstens would have made notes of the pointing out. He stated that any firearm pointed out would have been kept in a register.

[67] Simasiku conceded that the KM OB does not show the dates and times he removed the suspect plaintiffs from the cells for interrogation and suggested that there was a lot of tension at the time and that the investigating team was exhausted. He denied the suggestion that suspects were taken out at night for interrogation saying that there was no urgency to do the interrogations on the night of 2 September. Simasiku testified further under cross-examination that when the suspects were arrested he carried a pistol and an AK 47 assault rifle and his colleagues were also armed. He denied that they had batons and sjamboks. He stated that it was not necessary for them to torture the suspects to obtain information. He denied coercing the suspects to make admissions or confessions and stated that the suspects cooperated.

[68] As for the failure to bring Kabotana before court on 2 September, Simasiku testified that they could not make arrangements on 2 September because of the extensive nature of the mopping-up operation the police were engaged in and the limited human resources at their disposal.

[69] Simasiku asserted that he had translated for Lubilo upon arrest by Karsten. He also maintained that the case was postponed on 31 August by the clerk of court, Mrs Theron and that the prosecutor was present.

[70] The next defence witness was a registered nurse, Ms Maria Yambeka Nahole, a lieutenant in the NDF. She was based at the Grootfontein military hospital. Nahole testified that in August 1999 she attended on some inmates arrested in the wake of the secessionist attacks. She testified that as required by procedure they kept records relating to the attendances on the inmates. Such records reflect the medical complaint by a patient and the observations made by the medical officer.

[71] Nahole proceeded to testify about the medical records of the plaintiffs. Relying on the file, she testified that she attended on John Lubilo on 7 September 1999 at 11H00. He complained of headache and chest pain and she prescribed for him panado and multi-vitamin. She stated that the patient did not complain to her about any injury and that she would have recorded the same if the patient reported it to her.



[72] In cross-examination, Nahole conceded that she does not speak or understand Silosi, the language spoken by the inmates. She maintained that she was assisted by an interpreter. She stated that as a nurse she was authorised to make nursing diagnosis but that in serious cases she would refer the patient to a doctor. She also stated in re-examination that if there was a referral to a doctor, it would be shown by her on the medical file of the patient.

[73] The next witness for the defence was Jacobus Hendrik Karsten stationed at KM at the time of the events giving rise to the present claims. He held the rank of detective inspector. He described in general terms the mayhem that arose in the wake of the rebel attacks: several people were injured; scores had been killed; schools and businesses were closed and the president had declared a state of emergency. On the police's side, six officers were committed to the mopping-up operation and had their hands full. They had to effect arrests following tip-offs and had to screen the suspects, a process that involved determining who should be further detained and who should be released.

[74] In regard to Lubilo, Karsten confirmed that he was part of the group of officers that arrested Lubilo, and two other suspects, at Kahende village following information received.

Karsten testified that in effecting the arrest he identified himself and told the arrestees of the reason for the arrests. He maintained that when they effected the arrests they had enough information about the suspects and that they had no need to act violently towards the suspects. He denied the allegations of assault and was emphatic in his denial that they took anyone to the Zambezi River for interrogation.

[75] Karsten testified that Lubilo was taken from the cells for a pointing-out according to the applicable procedures. He maintained that the pointing-out was voluntary and that Lubilo took him to a village where he dug out of the ground the firearm and a magazine covered in white plastic.

[76] Karsten testified that Richard Mungulike was arrested together with the first plaintiff and upon arrest informed the officers that he did not act alone and was prepared to go and point out others and ended up pointing out 5-6 individuals whom the police then arrested, including second plaintiff, John Kabotana. Kabotana was then arrested by Karsten with the help of Chisavulio who interpreted for Kabotana. Kabotana too was told of the reason for the arrest.

[77] Karsten denied the assault allegations made against the investigating team and stated that they were very busy during the day and were tired at night and did not go to interrogate the suspects at night. He testified that even after the state of emergency was lifted by the president, there was still sporadic fire and they preferred not to work at night in any event. Karsten denied the general allegation about the mistreatment of the arrestees.

[78] Karsten testified that he had on the morning of 3 September given instruction that the suspects be taken to court but later received the report from the officers he had detailed for the assignment, that the magistrate was not present.

[79] As regards Lolisa, Karsten testified that this plaintiff was arrested on 2 September after they received report of a gunfight at Kaliyangela village. According to Karsten, when they came to that village Lolisa was in the custody of the NDF and the special field force officers. Karsten then arrested Lolisa who not only identified the body of an accomplice ostensibly killed in combat, but proceeded to point out the spot where a suspect rebel Hansmeier Tungulu was killed. Karsten testified that he saw no physical evidence of an assault on Lolisa.

[80] As for Lubilo, Karsten testified that he had a wound on the left foot which started healing and that it was not necessary to take the suspect to hospital.

[81] Karsten testified that the suspects were put in a van and that it was a safety risk to put them in an open pick-up. No officers sat with the suspects in the van.

[82] In cross-examination, Karsten conceded that in the aftermath of the attacks emotions ran high in the force as some of the people killed or injured were police officers. He stated that the arrests were based on intelligence received and that a lot of people were released after interrogation - presumably because there was no evidence implicating them.

[83] Karsten stated that Lubilo was able to understand when spoken to in English and that it is possible that Simasiku also interpreted for him in Silosi. Karsten testified that the pointing-out made by Lubilo is recorded in the witness statement of Karsten. Mbinge had brought Lubilo to Karsten and photos were also taken of the pointings-out made by Lubilo. Karsten testified that he never visited the cells where the suspects were detained at KM and was emphatic that he never took out any suspect from the cells at night for interrogation.

[84] The next witness for the defence was Sem Mbinge who, at the material time, was based at Okakarara and was drafted in to assist with the police operation in the aftermath of the secessionist attacks. During the operation he worked under the command of Karsten. He also testified about the circumstances surrounding the arrest of the suspect plaintiffs. According to Mbinge, a suspected rebel combatant, Hobby Habani Sinjabata, during interrogation implicated several individuals, including Lubilo whom they then proceeded to arrest at the Kahende village after he was identified by his wife. Mbinge said it was in his presence that Karsten arrested Lubilo having informed him of the reason therefor. Mbinge also confirmed that by the time the investigating team went to arrest the suspects; they had already had significant intelligence on them. He denied any assaults on the suspects.

[85] Mbinge also testified that it was on 1 September that Mungulike informed the investigating team that he was not alone in the attack on KM and he implicated several others. According to Mbinge, Mungulike was asked to put on police uniform and a balaclava and in that disguise identified potential suspects, two of whom were released after questioning. Mbinge also testified that Kabotana was implicated by Mungulike. He denied any assault

on Kabotana by the arresting officers and said it was he who took the warning statement from Kabotana.

[86] Mbinge confirmed that he was part of the group that on 2 September undertook an operation at Kaliyangela and that because of that he was only able to take a warning statement from Kabotana on 3 September as a precursor to his appearance at court. He stated that on that date the suspect was taken to court but that the magistrate was not available.

#### **GENERAL FACTUAL FINDINGS**

##### ***Against the defendant***

[87] I am satisfied that the concessions by the defendant's witnesses (especially Lifasi, Simasiku and Karstens) that the OB at KM police station (as presented in evidence) is not as accurate as it ought to have been. That corroborates the version of the plaintiffs who say they were removed at night from their cells by certain Nampol officers. Whether that was for the purpose of being assaulted is another question, and will depend on what physical evidence there is of assault.

##### ***Failure to bring Kabotana before a magistrate within 48 hours***

[88] As I understand it, the second plaintiff's position is that the non-availability of a magistrate on 3 September is not denied, but that the defendant, who bears the *onus*, did not provide a satisfactory explanation why no prior arrangement was made with the court to ensure that someone would be available on 3 September for Kabotana to be taken to court. The evidence led by the defendant on that score only demonstrates that the police were overstretched in the aftermath of the secession attacks. Karstens testified that he had given instructions the morning of 3 September that Kabotana be taken to court and later established that he did not appear because a magistrate was not present. Public prosecutor Christopher Stanley who testified on behalf of the defendant had testified that the court was not too busy the morning of 3 September and that if arrangements were made a prosecutor would have been available to deal with the matter. He had himself to travel to Rundu the afternoon of 3 September (with prior approval) to be with his family and was therefore not available to convene court. It is clear from his evidence, firstly that no one contacted him to make arrangements for the court to be available the afternoon of 3 September and, secondly, had arrangements been made, court officials would have been available for Kabotana to be brought before court. The defendant has not led any evidence to show why no arrangement was made for a magistrate to be available on 3 September 1999, which is the

date on which he ought to have been brought before a magistrate to comply with the 48-hour requirement in article 11 of the Constitution. It follows therefore that the second plaintiff was unlawfully detained beyond the 48-hour period after his arrest- which is from the afternoon of 3 September 1999 until the morning of 6 September when he appeared before a magistrate in Grootfontein.

[89] Mr Coleman for the defendant has argued that Kabotana is not entitled to damages because when he appeared on 6 September 1999, he was refused bail and that it follows that he was not going to get bail on 3 September any way. I cannot agree with this line of reasoning. Being admitted to bail is not the only reason a person must be brought before a judicial officer after arrest. An arrested person must be brought before court as a safeguard of their rights. It is before a judicial officer that they can demand to be given access to a lawyer as early as possible and to bring to the court's attention any untoward conduct from law enforcement officials. It is a right the court must therefore enforce without fail, subject to the exceptions that are contained in art 11(3) and s.50 of the CPA as referred to in the *Mbahapa* judgment. Kabotana is therefore entitled to his damages for the period that he was unlawfully detained.



## **Against plaintiffs generally**

### *Alleged failure to be informed of reason for arrest*

[90] All of the defendant's witnesses were adamant that the plaintiffs were all, upon arrest, informed of the reason for their arrest. The plaintiffs in my view knew the reason why they were being arrested from the surrounding circumstances. Each one of them in cross-examination conceded that they knew about the attacks that had happened in the Caprivi before their arrests. From radio broadcasts they knew that there was a state of emergency declared by the president.

[91] Each one of the plaintiffs conceded, either in evidence in-chief or under cross examination that they were accused of being rebels by the officers that arrested them. As I have already stated, the defendant's implicated witnesses have denied failing to inform Lubilo about the reason for the arrest. Simasiku was present at the arrest of all three plaintiffs and maintained that they were informed of the reason for the arrest. Karstens denied that the plaintiffs were unlawfully arrested. Mbinge was also present when all three plaintiffs were arrested and he maintained that they were all informed of the reason for the arrests. Aupa also testified that he was present when all three plaintiffs were arrested and he was adamant they were all informed of the reason for their arrests. The evidence of the witnesses on the manner in

which the plaintiffs were arrested was not shaken in cross-examination.

[92] The plaintiffs knew, at the very least from the surrounding circumstances of their arrests, that they were being arrested because of a suspicion of their involvement in the secessionist attacks that were perpetrated by some people in the Caprivi region before their arrests. Information about the reason for an arrest need not have the same particularity of a charge sheet as long as the arrestee is made aware of the nature of the allegation and that it constitutes a criminal offence. I am satisfied that the defendant discharged the onus of establishing that the arrests were lawfully executed as required by article 11(2) and s 39 of the CPA. In view of the information the arresting officers had, the defendant has also discharged the onus that all plaintiffs' arrests were justified. I am satisfied, upon a preponderance of the evidence, that the police officers that arrested all three plaintiffs informed them of the reason for the arrest and that they had a reasonable suspicion that they had committed a schedule 1 offence based on information received from informants. None of the plaintiffs could dispute the evidence given by the witnesses for the defendant that they had credible information about the plaintiffs' alleged involvement in the secessionist attacks.

[93] The defendant was able to establish that before setting out to arrest the plaintiffs, the Nampol officers concerned and who testified in this trial, had intelligence from persons suspected of being involved in the attacks that the plaintiffs were also implicated in the attacks. They were not going about aimlessly and were looking for specific individuals, clear evidence that they had reasonable grounds for believing that the plaintiffs were probably guilty of treason or other serious offence.

[94] All claims of the plaintiffs founded on unlawful arrest therefore stand to be dismissed.

*Discussion: first plaintiff Lubilo*

[95] A brief word only needs to be said about Lubilo as regards his case and whether or not his testimony is credible. I am in doing so also guided by the conclusions to which I have already come in summarizing the evidence. In Lubilo's particulars of claim it is alleged that he was brought before a magistrate on 31 August. He denies that he appeared before a magistrate and states that at the court where he was taken, Simasiku, not the court, postponed his case. He maintained that he for the first time appeared before a magistrate in Grootfontein on 24 January 2000.

He incredulously denied that he was detained after 31 August in terms of a valid warrant of detention. This posture by Simasiku demonstrates that he is not a credible witness. He is prepared to lied on a matter that can be objectively verified.

[96] Lubilo in cross-examination, for the first time, stated that Karstens had participated in the assaults on him and was actually responsible for the most serious assault to his head. That allegation against Karstens (and the injury to the head) was not made in the particulars of claim and was also not mentioned in his evidence in chief and came as a complete surprise. Lubilo also for the first time in cross-examination alleged that he had been assaulted at Kahende where he was arrested. Such assaults are not mentioned in his particulars of claim, original or amended and an independent witness, Nahole, a registered nurse who treated him at the Grootfontein prison on 7 September 199 at 11H)) stated that she saw no injuries such as Lubilo alleges he did. Lubilo had complained of headache and chest pain and for that she prescribed panado and multivitamin.

[97] Understandably, Lubilo could not remember the number and identities of all the officers who arrested him or allegedly assaulted him. He has, however, not offered any satisfactory explanation why he could not at the outset attribute, by the

obvious characteristic of race, to officer Karsten what he said was the most serious assault on him that caused severe bleeding in the terms that he described before me. Lubilo also failed to explain satisfactorily why the assaults allegedly perpetrated at the Kahende village were not mentioned in his particulars of claim. To these factors must be added the fact that the plaintiff's injuries were not reported to or noticed by all the persons in authority with whom he had contact during the relevant period. True, he attributes that to the assertion he makes that he was told not to, on pain being harmed. But it must be borne in mind that the defendants' witnesses have all denied the alleged assaults and attributed whatever injury they observed on him to an admission allegedly made by him that he was injured during an armed confrontation with Namibia security agencies.

[98] Lubilo's assertion in cross-examination that everyone arrested in the wake of the armed insurrection in the Caprivi had been assaulted by the police raises the real possibility that the allegation that he had been assaulted is an afterthought. His version of events is even less plausible if regard is had to the fact that either important aspects of his case were not conveyed to his practitioners of record, or stand in direct conflict with verifiable evidence such as that he appeared before Court on the date that he says none of those things happened; and that

official records that his further detention was authorised by a magistrate is not true.

The witness called by him, Mungulike, being his co-accused with similar claims against the government, did not really add much to the evidence of the first plaintiff.

[99] To the extent that I find that Lubilo lied about the injuries allegedly suffered, Mungulike lied about noticing any injuries on Lubilo. Witness Kabiana, also a co-accused with claims against the government, testified that he saw a wound on Lubilo that looked like it had been caused by a knife or an axe. This is clearly an exaggeration in the light of what we know the medical records of Lubilo show. This witness's bias and motive to exaggerate and to place the defendant in bad light is all too apparent. His evidence too is false as regards Lubilo's alleged injuries and stands to be rejected.

[100] For all of the above reasons I find not only that Lubilo is not a credible witness but that he lied in material respects as I have shown.

### **Kabotana**

[101] Similarly, in considering this plaintiff's version, I also rely on the conclusions to which I came in summarizing his

evidence. In cross-examination Kabotana conceded that it was possible that Mungulike pointed him out to the Nampol officers as an accomplice in the attacks. The brother of Kabotana, Zekia Oliver Kabotana, could only say that he heard the plaintiff scream after the defendant's officers took him into the hut. He stated that he then later saw items scattered in second plaintiff's hut and notices a broken chair. The screams he allegedly heard are consistent with a physical assault on second plaintiff but do not tell us what kind of physical harm was inflicted on the second plaintiff. The scream allegedly heard by Zekia does not suggest that it led to the injuries which second plaintiff claims to have sustained and which I will deal with presently. I reiterate the observations I previously make about the inconsistencies in Kabotana's testimony and that of his other witnesses.

[102] The evidence of Joseph Mufuhi is even more suspect. This witness, the record amply demonstrates, changed his evidence as the questioning continued. I found him a very unreliable witness. I was compelled to bring to his attention the fact that his evidence was not helpful to the Court.

[103] Kabotana's allegations about the assaults allegedly perpetrated on him whilst detained are not consistent with those

alleged in the particulars of claim. He implausibly attributed that to a misunderstanding with his legal practitioners of record. Kabotana's alleged open wound above his eye sustained during the alleged assaults was not recorded in the medical records, as shown by the evidence of nurse Nahole. It is clear therefore that he has lied about the wounds allegedly caused by him by police officers.

[104] To the extent that Mufuhi testified to seeing injuries on Kabotana which are demonstrably false, his testimony too cannot be relied upon. There was clearly a contradiction too between Mufuhi and Vasco Lionga, another of the second plaintiff's witnesses. Lionga too is a treason trialist with pending claims against the government. Lioyisa said that when Kabotana was removed from the cell, he had no injury, but when he was returned, he noticed injuries on him. This is inconsistent with Mufuhi's testimony that he saw visible injuries on Kabotana.

I am therefore satisfied that Kabotana had not adduced any credible evidence that he was assaulted and that his claim based on assault, stands to be rejected.

**Lolisa**



[105] In respect of this plaintiff too, I reiterate all the conclusions about the untrustworthiness of his testimony in crucial respects, and the contradictions evident between his testimony and that of his witness. Lolisa is one plaintiff who demonstrated at the trial that he has an axe to grind. Rather inexplicably, he maintained under oath that since his arrest he had not been informed of the reason for his arrest; until now: i.e. even after he had been arraigned in this Court (on his own admission) of amongst others, high treason. He testified that he is being forced by arms to attend the treason trial and that he does not know why he is on trial. There does appear to be rather incriminating evidence implicating Lolisa in the attacks. The defendant's witnesses testified that he was the one person who was with a Tungulu Hamsmeyer killed in action. Lolisa admitted he knew Hansmeyer. His circumstances are also different from the first two plaintiffs in that he was, on the unchallenged evidence of the defendant's witnesses, handed over by the NDF officers who had captured him in action. He therefore has the motive to present events in a way that is most damaging to the defendant.

[106] I had previously shown that Lolisa had not in his particulars of claim stated the names of the officers who had allegedly assaulted him. This even after the amended particulars of claim had been filed before trial. Yet, when he came to

testify he was rather confident about the identities of the people he said assaulted him.

[107] Another significant detail is that according to the defence witnesses, Mwilima was the NDF officer who handed over Lolisa to the police. In the amended particulars of claim, Lolisa does not mention Mwilima amongst the officers who arrested him, but in his evidence in chief he stated that when the police came to arrest him, Mwilima was present and was the one who read out his name from a list. It was then that the assaults on him were perpetrated by Robert, Mbinge, Karsten, Henry and Simasiku. How he could not have conveyed such an important detail to his legal practitioner of record at the first opportunity he had and soon after the alleged incident, is not satisfactorily explained and points to the alleged assaults being false. After all, he said he had known Henry, Simasiku and Robert before his arrest. To associate people he knew with what was a violent assault on him should not have been difficult.

[108] Chiko Moses Kajoka testified that he was present when Lolisa was arrested and saw the officers tear off Lolisa's shirt and blindfolding Lolisa with it. He said he saw Lolisa being assaulted along the way after the arrest but could not satisfactorily explain how he could see any assault on Lolisa if in his(Kayoha's) particulars of claim he alleged that he was

blindfolded all the time after arrest. He also testified that he saw a wound at the KM police station on Lolisa's chest.

[109] Chiko Moses Kayoka who testified on behalf of Lolisa has the obvious bias that he too has a pending claim against the government and is alleged by the defence witnesses to be one of the people captured in combat together with Lolisa. In view of that potential for bias and the inconsistency that he was blindfolded but was able to see assaults on Lolisa, I reject his evidence.

[110] Lolisa was adamant that the only injury he suffered from the assaults was to his chest and that he did not suffer multiple lacerations over his body as alleged in his particulars of claim which were drafted soon after the incident and presumably based on what was noticed on him by those that drafted his particulars of claim. Simasiku testified that Lolisa had what seemed like scratches on his body and stated that these were more likely sustained in the thick thorny bush where the armed combatants were operating at the time. Simasku also testified that Lolisa had pointed out a firearm to the officers which was in the bush. He also testified that Lolisa had identified other armed combatants at Kaliyangela. Simasiku therefore points to evidence that corroborates the version that the scratches seen on Lolisa might have been sustained while operating in thorny bush.

[111] The denial by Lolisa in his evidence of the multiple lacerations alleged in the particulars of claim corroborates the defence case that he had been operating in thorny bush where he sustained such lacerations and clearly undermines his version of assaults by officers of the defendant. I find therefore that it is more probable than not that Lolisa had scratches on his body and that these were sustained by him while operating in thorny bush and not as a result of assaults perpetrated on him by police officers.

[112] I am satisfied that the third plaintiff too has not on a balance of probabilities established that he was assaulted by officers of the defendant. His claim based on assault must therefore fail.

[113] **THE ORDER:**

1. **First plaintiff: John Mpanse Lubilo**  
**Claims A and B** are dismissed with costs.
  
2. **Second plaintiff: John Genese Kabotana**  
**Claims A** is dismissed with costs.  
**Claim B:** unlawful arrest: Dismissed with costs.

**Claim B:** claim for unlawful detention: Succeeds with costs. In respect of his unlawful detention from the afternoon of 3 September (starting at 16H00) until the morning of 6 September 1999 when the court convened and his continued detention authorised: he is awarded N\$12 000 with interest at the rate of 20% per annum, with costs from the date of judgment to date of payment.

**3. Third plaintiff: Enerst Lifasi Lolisa**

**Claims A and B** are dismissed with costs.

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**DAMASEB, JP**

ON BEHALF OF THE PLAINTIFFS:

Ms L Conradie

**Instructed By:**

**LEGAL ASSISTANCE CENTRE**

ON BEHALF OF THE DEFENDANT:

Mr G Coleman

**Instructed By:**

**GOVERNMENT-ATTORNEY**