

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

I 2954/2015

In the matter between:

BENHARDT LAZARUS

PLAINTIFF

and

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

DEFENDANT

Neutral Citation: *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)* (I 2954/2015) [2017] NAHCMD 249 (30 August 2017)

CORAM : MASUKU J

Heard: 23 March; 18 April and 23 May 2017

Delivered: 30 August 2017

Flynote: **LAW OF DAMAGES** – Claim for unlawful arrest and detention – loss of profit. **CONSTITUTIONAL LAW** – violation of fundamental rights and freedom and their bearing on damages. **COSTS** – although the plaintiff applied for costs on the ordinary scale, the court called upon the officers involved to show cause why the court should not order such costs, on account of their depraved conduct, to be on the punitive scale - where officials behave in a depraved manner, they may be called upon to show cause why they should not be ordered to personally bear the costs instead of the tax-payers.

Summary : The Plaintiff sued the Defendant in its capacity as employer for N\$ 300 000 for unlawful arrest and detention. He also claimed N\$ 105 000 as damages he suffered as a result of unlawful impounding of his vehicle by the latter and loss of profit in his business. The plaintiff also claimed an amount of N\$ 27 000 that was in his vehicle at the time of the impoundment of his vehicle. The Defendant admitted liability for the above actions and the only issue which the court had to determine was the quantum to be awarded.

Held - that in assessing damages for the violation of right to liberty and human dignity, the court takes account of the nature of the arrest; its duration and all accompanying factors, including the conditions in the place of detention.

Held further – that in assessing the damages, the court should be wary that a message is not conveyed that such claims are designed to enable claimants to strike it rich.

Held – that the plaintiff was arrested on numerous times by the police without any warrant of arrest or explanation for the arrests and that his fundamental rights, including liberty, dignity and property had had been grossly violated by the defendant's employees, who acted callously.

Held further – that the plaintiff had been shot at by the police when there was no need to do so and that the protection to his right to life had been violated by the police. In all the circumstances, the court considered the violation of the plaintiff's constitutional rights as depraved and a serious abuse of power that should not be countenanced in a democratic State. The court awarded the defendant an amount of N\$300 000 as damages.

Held further – that on the balance, the evidence suggested that when the police attempted to arrest the plaintiff on the last but one occasion, he fled, leaving an amount of N\$27 000 in the vehicle that the police subsequently unlawfully impounded. In the light of the defendant's admission of liability, and the evidence adduced by the plaintiff, it was held that the defendant was liable to repay the said amount to the plaintiff.

Held – that due to the loss of the amount of N\$ 27 000 for purchase of stock and the impoundment of the plaintiff's vehicle, he was unable to continue running his business and that he suffered loss of earnings as a result of the defendant's employees actions. The defendant was found liable in the amount of N\$90 000.

Held further – that is not fair in such cases to expect the tax-payers to foot the bill when officers behave in such a depraved manner. The officers involved were ordered to show cause why they should not be ordered to pay costs on a punitive scale and why they should not personally pay the costs of the action as a sign of the court's disapproval of their conduct and as a deterrent to further would-be wrongdoers.

ORDER

1. CLAIM 1 – payment of the amount of N\$ 300 000;
2. CLAIM 2 – payment of the amount of N\$ 27 000;
3. CLAIM 3 – payment of the amount of N\$ 90 000;
4. Interest on the aforesaid amounts at the rate of 20% per annum from the date of judgment to the date of final payment; and
5. Messrs. Freddie Nghilinganye and Sackey Kokule be and are hereby called upon to show cause in person or by legal representatives of their own choice and at their own cost, on or before 27 September 2017, why:
 - (a) Costs of suit in this matter should not be ordered on the scale between attorney and client;
 - (b) Both Mr. Nghilinganye and Kokule should personally not pay such costs, jointly and severally, the one paying and the other being absolved.
6. A copy of this judgment and the order therein contained, is to be served in terms of the Rules of this Court on Officers Messrs. Nghilinganye and Kokule by the Office of the Government Attorney through the office of the Deputy-Sheriff within 10 days from the date hereof.
7. A copy of this judgment is to be delivered on the office of the Inspector-General by the Office of the Government Attorney.
8. The matter regarding the main claims is removed from the roll and is regarded as finalised.
9. The question of costs is hereby postponed to **4 October 2017 at 15:15 in G Court** for a status hearing, which the Officers cited must attend in person or by legal representative.

JUDGMENT

MASUKU J:

Introduction

[1] Mr. Patrick Henry, an American lawyer and legislator in the House of Burgess, Virginia, who was a proponent of a revolt by American colonies against England, is quoted as having made the above lapidary remarks:

'Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it Almighty God! I know not what course others may take, but as for me, give me liberty or give me death!'

It is, by all accounts, a very grave or intolerable situation or serious premium and value attached to liberty that would impel one to choose death, thereby forfeiting life, if liberty cannot be delivered to them.

[2] The above words accordingly exemplify the extremely high and precious value that Mr. Henry attached to liberty. Liberty, is an inalienable right that can only be encroached upon in very limited and circumscribed circumstances that our Constitution tabulates.¹ In my view and assessment, the right to liberty is very important and ranks very close after the right to life, which is one of the most primordial rights human beings enjoy.

[3] This case presently serving before court is about an alleged infringement of the plaintiff's right to liberty by the defendant's charges as a result thereof and further

¹ Article 7 read with Article 11 of the Constitution of Namibia.

consequential damage occasioned to him flowing from the detention alleged. As every law-abiding citizen would be expected to do, the plaintiff approached this court, seeking damages allegedly occasioned to him by the alleged arrest, detention and assault perpetrated on him by the defendant's employees, who it is averred, did so in the course of their employment and in the within their scope of duty with the defendant. The plaintiff also sues for loss of profit and the return of money that was in his motor vehicle when the police impounded it in actions associated with the arrest and detention mentioned earlier.

Background

[4] The plaintiff is a Namibian adult male resident of Erf. 688 Zambezi Street, Wanaheda, Katutura, Windhoek in this Republic. It is common cause that in or about 2014, he ran a business, which was a house of merriment, namely, selling liquor and related products in what has become colloquially known in this part of the world as a 'shebeen'. I will use the said term interchangeably with the word 'bar' in reference to the plaintiff's business. He sued the defendant, being the Minister of Safety and Security, in respect of three separate claims, namely, payment of N\$ 300 000 for alleged unlawful arrest and assaults by the charges of the defendant, being police officers based at the Serious Crimes Unit in Windhoek; payment of N\$ 70 000, being in respect of loss of profit in his aforesaid business and lastly, payment of N\$ 27 000, which was an amount of money that was in his vehicle during an alleged wrongful impoundment of his vehicle by the police.

Admission of liability

[5] Happily, and to their credit, the defendants admitted liability to the plaintiff for the claims and what the court was in that event called upon to determine, was the issue of quantum in relation to the plaintiff's three claims stated above.

Common cause facts

[6] A cursory assessment of the case brings one to the conclusion that most of the facts giving rise to the claim are common cause and are not the subject serious disputation, if any. It may ultimately be in applying the relevant law to the common cause facts that may constitute the slippery slope. I intend, in order to bring the reader up to speed, to chronicle below what appear to be the common cause facts in this matter or those that are not seriously disputed. These shall appear when the court deals with the plaintiff's evidence.

The damages occasioned by the arrest and detention

[7] It is common cause in this matter that the plaintiff was unlawfully detained by the police on three different occasions, namely 31 October to 2 November; 8 November to 10 November 2014 and 24 April to 27 April 2015. The defendant's legal representative urged upon the court that in arriving at the appropriate quantum, it should take into account certain instructive principles that I will advert to shortly.

[8] The plaintiff's legal representative, for her part, urged the court to take into account and to apply the principles enunciated by Mr. Justice Parker in *Iyambo v The Minister of Safety and Security*.² These include –

- (a) the circumstances surrounding the arrest of the plaintiff;
- (b) the treatment meted out to the plaintiff by the arresting officials;
- (c) the period of unlawful detention;

² (I 312/2010) [2013] NAHCMD 38 (12 February 2013) at p.2.

(d) the plaintiff's loss of freedom of movement;

(e) the loss of esteem among members of the local community where the plaintiff worked;

(f) the quantum of damages recently awarded by the courts in case of unlawful arrest and detention.

These, in my considered view constitute stainless principles and only require proper and careful application to the present case, nuanced of course by the peculiar circumstances that may be found to be at play in the instant case.

[9] The defendant, as stated in the preceding paragraphs, urged the court to take into account that such cases must not be regarded as an opportunity for a plaintiff to strike it rich, as it were. In admonition regarding the proper approach to the issue, the court was referred to the following cases, namely *Minister of Safety and Security v Tyulu*³ and *Olgar v Minister of Safety and Security*.⁴

[10] In the *Tyulu* case, Mr. Justice Bosielo had the following remarks to make in this connection:

'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 much-needed solation for his or her injured feelings. It is therefore crucial that serious attempts should be made to ensure that 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 deprivation is viewed in our law. 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 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.'

³ 2009 (5) SA 85 (SCA) at 93 d-f).

⁴ Case No. 608/07 at para 16.

[11] On the other hand, in *Olgar*, Mr. Justice Jones stipulated the applicable principles in the following terms:

'In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature and extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tampered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the "horn of plenty", at the expense of the defendant.'

[12] In order to determine the amount of damages appropriate to award the plaintiff in this matter, it is preferable to first highlight the plaintiff's evidence, which he adduced during his sojourn in the witness box. This evidence acuminates to this: The plaintiff had a client who kept a jackpot machine placed in his bar called 'Havana Bar' in Katutura. They shared profits from the proceeds, with the plaintiff getting 40% and the client entitled to 60%.

The plaintiff's evidence – claim for N\$ 300 000

[13] On the morning of 29 October 2014, the plaintiff found that the bar had been broken into and the said machine was found missing. Furthermore, a lock to the jukebox was broken and the money from the same was found missing. He decided to report the matter to the client by the name of Sam to advise him of the break-in. He later proceeded to the Wanaheda police station where he reported the matter and he was asked to provide the serial number of the machine together with the supporting documents of ownership, in the absence of which he was informed, he could not be assisted by the police.

[14] Finding himself in this helpless position, he decided to call the client to inform him of the predicament he found himself in. The client then gave him a number of a police officer whom he knew and who could be of assistance. The number was of one Sergeant Freddy Nghilinganye, who was stationed at Windhoek in the Serious Crime Unit. The said officer then came to the plaintiff's bar in the company of another officer by the name of Detective Sackey Kokule. They recorded the plaintiff's statement and informed him to keep his cellular telephone close to him.

[15] Later on the same date, he started getting threatening statements from the aforesaid police officers, which culminated in them asserting that it was the plaintiff who was responsible for the break-in as he had a set of spare keys to the bar and more importantly, that he had a hand in the break-in and the theft of the jackpot machine, which he vehemently denied. Worse was still in the pipeline!

[16] During the evening of 31 October 2014, the plaintiff got an unexpected visit from the said police officers. They came in the full view of the plaintiff's staff, neighbours and patrons and accused the plaintiff of complicity in the break-in and theft. They further threatened to arrest him therefor. True to their word, they produced handcuffs and effected the plaintiff's arrest in the presence and full view the aforesaid persons. It was his evidence that before the arrest, no warrant was produced or exhibited to him. He was driven to Wanaheda police station in a vehicle driven by the police and was left there in police cells. The officers returned on Sunday 2 November 2014 and requested him to accompany them to his house in Katutura, which he agreed to.

[17] On arrival at the plaintiff's house, they started ransacking the plaintiff's property, including his motor vehicle, which had been parked in the garage to his house. It was his evidence that in this further activity, no warrant of search was produced and no

reason for the search was proffered. The police demanded the key he had for the bar and he handed them the original key. It was his evidence that there was no incriminating information or evidence that lent any credence to their accusation of his complicity in the crime. After this search, the plaintiff was taken back to the police station where he was released and asked to furnish information appertaining to the break-in to the police.

[18] Concerned at the persistent allegations of his complicity in the break-in and theft, and why he was being continually humiliated by the police, the plaintiff posed questions to the said officers and they informed him that the allegations stemmed from his statement he had made and the key he had handed over to them. It was his evidence that from the answer given to him by the officers, he concluded that they police did not carry out any investigations into the crime and he got the distinct impression that he was being punished for reporting the crime.

[19] On 8 November 2014, he further testified, he received another call from the said police officers asking of his whereabouts. After learning that he was at the bar, they reported there and they again placed him under arrest. When making enquiries for the reasons for the new arrest, it was his evidence that he was informed by them that he would know the reasons when he reaches the police station. He again was dumped in police cells until 11 November 2014. On their return there, they informed him that they would take him to the police station in Windhoek town where they would formally charge him.

[20] On arrival at the police station aforesaid, they left him on the corridor of the Serious Crimes Unit and later took him back to Wanaheda police station where they released him without any further ceremony as it were. There was a parting shot

however, namely, him being called upon to volunteer information he had regarding the theft. There was more in the police storehouse! The worst was yet to come to the plaintiff.

[21] On Friday 17 April 2015, after a respite of a few months, the duet of police officers again called the plaintiff on his mobile telephone asking of his whereabouts. He informed Sergeant Nghilinganye that he was in Tsumeb, which allegation subjectively had no ring of truth to the ear of the said officer. He told the plaintiff that he knew that the latter was in Windhoek. He indicated to the plaintiff that he needed to see him. A few hours later, he received another call from a person who also introduced him as a police officer also asking of his whereabouts, which the plaintiff disclosed, alleging that he was approaching Okahandja. A few minutes later, he received a text message from the latter police officer asking the plaintiff to call him as he wanted to 'make me laugh', the plaintiff further stated in his evidence.

[22] Upon calling the said officer, it was the plaintiff's evidence that the said officer informed him that Officer Kokule was in trouble i.e. '*okulimo nayi*' and that he wanted to meet the plaintiff at a bar in Goreangab Dam. The plaintiff was blunt and told the said officer point blank that he would not go to meet the said Kokule nor his other colleague for the reason that they had been harassing him and tormenting him, breathing threats of arrest and that they had humiliated him gravely. It was the plaintiff's evidence that he deduced from this conversation that Officer Nghilinganye wanted to obtain money from him or was in cohorts with the owner of the jackpot machine. The plaintiff testified further that he asked Officer Nghilinganye if he had been paid to follow him around and further informed him that if that was the case, he will not co-operate with the said officer in that nefarious mission.

[23] The last but one installment of the treatment meted to the plaintiff by the said police officers was on 19 April 2015. As he was getting ready to drive his vehicle to go and purchase stock for the business, the twosome again approached the plaintiff at his business and informed him that they were going to arrest him, as he had no regard for them or the law. This prompted the plaintiff to enquire from the police officers as to why they had continued to harass and humiliate him and why it is that they really wanted from him. Their reaction to this line of questioning was for them to be aggressive towards the plaintiff. They became extremely violent and got hold of his person and as result of this aggression, it was the plaintiff's evidence that he attempted to free himself from their grip.

[24] As a result, a scuffle between him and the police ensued and he broke free from their grasp and he immediately took to his heels. As he ran away, he further testified, he heard the sound of gunshots behind him. On looking back, he realised that the officers were firing gunshots at him. It was his evidence that according to his recollection, he heard four shots that fortunately failed to hit him, the intended target. It was his evidence that he was completely petrified at the latest installment of police action. His fear and resentment of the duet grew in leaps and bounds. He began to harbour feelings that were not in all the circumstances unreasonable, that they could even send him to the celestial jurisdiction.

[25] It was his further evidence that he accordingly resolved never to place himself in a position where he could be arrested by the duet, as they had no plausible reason for the repeated arrests they had effected on him on previous occasions, particularly without having preferred any charge against him. It was his view that the said police officers were not only ill-treating him but that they were also violating his constitutional rights as well. On return to the bar later, he discovered that the police had taken his vehicle with them. In that vehicle, there was an amount of N\$ 27 000 with which he had

resolved to buy stock and it was proceeds from his businesses, including a transport business he ran.

[26] With the latest installment of harassment dished to him, he decided to enlist the advice of his uncle Mr. Reynold Renus, after informing him of the numerous incidents he had experienced at the hands of the two police officers. His uncle advised that he should not have run away as that act would serve to solidify the officers' position that he was unruly and thereafter build a case against him. The plaintiff, in view of his uncle's advice, then called the said officers to set up an appointment but they did not respond to his calls until Kokule responded to his short message service (sms) and stated that he, the plaintiff, was in big trouble as they had opened a case of fighting them. Kokule invited him to go and meet the former at Goreangab Dam at his friend's bar. He received this latest demand and viewed it with askance and suspicion. He, on reflection, decided not to honour the invitation therefor.

[27] His aforesaid uncle further advised that they should rather go to the said officers' place of work to find out what charge had been preferred against the plaintiff and to also enquire why the plaintiff had been dished so much ill-treatment by the two officers. The plaintiff's brother was mandated to go to make those enquiries. Unbelievably, the plaintiff's brother was given similar treatment! He was arrested and placed in hand cuffs by the said officers and was kept manacled for the whole day. Only the involvement of the plaintiff's present legal practitioner saved his brother's day. The plaintiff's brother was released. It was then that the plaintiff also decided to enlist the services of Mrs. Shikale to also deal with the police regarding his numerous arrests and harassment at the hands of the police. I should, at this juncture, mention that there was some evidence by the plaintiff regarding what Mrs. Shikale did and said to the police officers, which I considered, was hearsay and I will accordingly have no regard thereto.

[28] Having been enlisted by the plaintiff to assist him in this debacle, it was the plaintiff's evidence that he instructed Mrs. Shikale to write a letter in connection with his previous arrests. In this regard, a letter dated 23 April 2015 was addressed by Mrs. Shikale in terms of s. 39 (1) of the Police Act⁵ to the Inspector-General of the Namibian Police, claiming damages for wrongful arrest and detention. What was the police reaction? On the following day i.e. 24 April, the notorious two officers attended at the plaintiff's bar and again placed him under arrest and he was only released on 27 April 2015, and this was upon him being admitted to bail in the amount of N\$1000, he further testified.

[29] It was the plaintiff's further evidence that he also instructed his legal practitioner of record to follow up on the detention of his motor vehicle, which had been in police custody in the excess of 20 weeks at the time. The police were not, however, willing to release the vehicle for a further 10 weeks. It was established that the vehicle had not been booked in as an exhibit during its lengthy impoundment. When the plaintiff eventually collected the vehicle, on 12 November 2015, it was his evidence that he found that it had been exposed to the elements during the 30 weeks of impoundment, and which had a debilitating effect on its colour and general state.

[30] Mrs. Shikale asked the plaintiff about the effects of the detention on him and it was his evidence that during his incarceration, he was unable to take his child to school. He further testified that the conditions of his detention were deplorable. He slept on the floor, without any bed or even a mattress. It was his evidence that the place of his confinement was rowdy, with some inmates fighting and some of them were smoking with reckless abandon and this affected him adversely. It was also his evidence that he was ill-treated by the other inmates by being forced to drink lots of water and to also smoke, which is a habit he is not accustomed to. It was also his evidence that the food

⁵ Act No. 19 of 1990.

was not good and that although there were ablution facilities, the toilets were not functional as the flushing system was not in order.

[31] It is imperative to point out that the plaintiff's evidence in this regard was not in any way contested or shaken at all. The cross-examination of the plaintiff largely centred on the other claims and to which I will briefly refer at the appropriate juncture. For all intents and purposes, it means that the plaintiff's claim as regards to his multiple arrests and ill-treatment must stand and it is in relation to that evidence that I will assess the quantum of damages as I proceed to do below.

Analysis of the evidence and application of the law to the facts

[32] I have carefully analysed the evidence adduced by the plaintiff in this matter and I speak without fear of contradiction or any reservation that in both my legal and judicial careers, I have never dealt with or even read a case involving police and liberty of an individual that has been so depraved. The only conclusion that one can arrive at in this case is that the police were seriously abusing the powers otherwise given them by law in good faith. This was to the extent that they regarded the liberty and dignity of the plaintiff as trifling as they traveled on an ego trip to show that they were above and beyond any level of accountability and that the plaintiff was a pawn and they could do with him as they pleased.

[33] I am of the considered view that the liberty of an individual cannot be treated with such levity and disdain in a constitutional State such as Namibia. Police have a duty to restrain illegal activity and to subdue those they have a reasonable belief have committed or are about to commit an offence. Even in this domain, there are laws, rules and regulations which have been carefully drafted in a manner that does not serve to

render the liberty and dignity of an individual properly suspected of having committed an offence, trivial. This is so, regardless of how serious or depraved the conduct alleged against the suspect is.

[34] In the instant case, the plaintiff was arrested on at least three different occasions as and when the said police officers felt like. No warrant for his arrest on any of those occasions was produced. Furthermore, he was not, at any time charged with any offence that could remotely warrant any of the egregious action that was perpetrated against him. The police felt an air of superiority and abused the plaintiff by calling him in as and when they wished and locking him up for as long as they wished or deemed appropriate. He was never brought before any court of law during any of the periods of his incarceration. Such conduct is totally inexcusable and must receive the harshest of censures. Furthermore, the continuously breathed threats to him on his mobile telephone, which must have brought fear and anxiety of mind and spirit to him.

[35] It also fitting to mention that the plaintiff was actually a complainant in this matter but the officers, decided without any rational basis, to change his role and regard him not only as a suspect, but an accused person in respect of whom investigations were conducted and could warrant an arrest at the end thereof. They decided to take the law into their own hands and 'issued' a certitude of guilt in terms of which the plaintiff was adjudged guilty of the crime and they put him in and out of prison at will and he had no reprieve.

[36] Furthermore, they descended on his property, turned his house upside down on no reasonable basis for suspicion except maybe a hunch, whose basis was not disclosed to the court. Even in this connection, no warrant of search was obtained and exhibited to the victim. The police officers were simply a law unto themselves; took the

plaintiff's vehicle without any lawful authorization or basis and kept it for 30 weeks on end and in the open, subject to the elements. Attempts to have the vehicle released earlier, i.e. after 20 weeks, were snubbed with nonchalance.

[37] That was not all. When the plaintiff decided he had had enough of the ill-treatment by the police officers in question, and decided to no longer subject himself to their illegal escapades, the police decided to open fire and shoot at him. This action was not only uncalled for but was also reckless and dangerous, not only to the plaintiff but to other persons as well, including children, who may have been going about their normal business. Such action was in any event unnecessary, as the police knew the plaintiff; where he lived and also had his contact details, including his mobile telephone number. Shooting at him in an open street was totally irresponsible and a violation of the plaintiff's right to life and safety.

[38] Another issue that cannot escape mention is the decision to arrest him, which was the last arrest in the catalogue, and this appears to have been triggered by the statutory notice that the plaintiff's lawyer was required to serve on the Inspector-General of the Police in terms of the section 39 of the Police Act regarding a claim intended to be issued for the plaintiff's illegal arrests and detentions. This, in my view, is the high watermark of impunity – when the police, because they simply can, arrest a person for exercising his constitutional and legal rights. The only reasonable inference to be drawn for this swift arrest, so soon after the letter of demand, is that it was hoped that the plaintiff would change his mind to withdraw the letter and intended legal action.

[39] This is despicable conduct that should not be associated with a professional police service in a constitutional State. Furthermore, this is irresponsible behaviour that borders on criminality, impunity and serious abuse of power. If police officers behave in

this manner, where are Namibians and other inhabitants of this great country expected to go for refuge? Should they take the law into their own hands and usher in an era of lawlessness and the survival of the fittest? My answer is an emphatic No! The police must be reined in and should not be allowed to behave like outlaws and sheriffs of doom in the Wild West.

[40] It is a historical fact that police officers under the apartheid system in Namibia visited a lot of suffering and brutality on Namibian citizens with impunity. One would have expected that such conduct would be consigned to the pre-independence era. It is quite unacceptable in this day and age, after the attainment of independence and the adoption of a Constitution that entrenches fundamental rights and freedoms, for Namibian citizens to be treated in this demeaning manner by police officers they regard as their own.

[41] It is also clear noonday that the conditions in which the plaintiff was held on all the occasions were deplorable and he was not given any protection from abuse by other inmates and had to sleep on the floor without functional toilet facilities. The stench in those cells was evidently unbearable, because bowels were emptied there and yet he was also expected to eat whatever food was offered in those inhumane and degrading conditions. Once you have held a person and taken their liberty, particularly in a case such as this where the deprivation of liberty is unlawful, you bear the brunt for any indignities that the subject is open to and this must be a factor taken into account in this matter.

[42] It must not be forgotten that suspects who have been correctly arrested are not less human by virtue of being suspected of having been on the wrong end of the law. Their dignity and self-worth has to continue being respected because they are not less

human by being accused of crime. The situation is more pronounced in a situation such as the present where the police, it would appear, knew that the plaintiff had committed no offence. It was their mission to tar him with a brush of criminality with no reasonable basis to do so and literally sent him to hell and back in the process.

[43] Last, but by no means least, although this does not directly bear on the quantum due to the plaintiff, when the plaintiff's family sent a representative to the police to try and determine what the cause of the bad blood between the plaintiff and the two officers was, the police decided to arrest the plaintiff's brother and he was kept in cuffs an entire day. This was not denied and must be accepted.

[44] The naked level of callousness and disregard for the right to other people's liberty displayed by the police officers in this case is worrying and a lesson that this is a constitutional State, where the rule of law and the fundamental rights and freedoms are upheld must be driven home very strongly and sternly too. It must be made plain to the relevant police officers that disregard for fundamental human rights, including the right to liberty and dignity are paramount and that a high price and value is attached to such rights by the courts of this land.

[45] The plaintiff was arrested on more than one occasion and in the presence of his employees, neighbours and patrons and there is nothing more demeaning than to be arrested in an undignified manner in the presence of other people, leaving the reason for the arrest open to endless speculation. This surely brings disdain and serves to lower one in the estimation of other members of the society. In this case, this is particularly so because the plaintiff was not charged for any offence but his repeated arrests sent a wrong signal that he may be some kind of recidivist, with no supporting evidence. The search of his house and the eventual impoundment of his vehicle would

have only served to cement the suspicions of his 'marriage', as it were to crime in the minds of the neighbours, members of staff and the patrons of his business.

[46] I am alive to the injunctions set out in the *Tyulu* and *Olgar* judgments that courts should not use such claims to enrich claimants. At the same time, where the occasion calls for it, the court must show its displeasure where the actions are gratuitous, depraved and repeated as in this case. The conduct of the police described above calls for serious censure and the admonition in case law regarding undue enrichment should, in my considered view, play second fiddle.

[47] I have read the judgment by Parker J in *Iyambo* and am of the view that the learned Judge did not purport to bring mathematical calculations to damages in matters of this nature, i.e. to say for instance if a person is arrested for X number of days, then the award must be Y amount. What is clear from my understanding of the judgment is that the court should determine the appropriate quantum in the light of all the relevant factors, including of course the duration of the unlawful arrest, together with the attendant conditions thereof. The approach of the learned Judge, correctly understood and applied, coincides with principle and cannot, in my considered view be faulted.

[48] An award that would seek to place a dogmatic monetary value to liberty in terms of which a denial of liberty per day could be translated to a particular amount in money, say N\$ 3 000 or N\$ 7 000 per day, would, in certain cases have the opposite effect i.e. of depreciating the value of liberty rather than enhancing it. I say so for the reason that liberty is priceless and to attempt to attach monetary value to it could possibly serve to diminish it, I say so for the reason that a person or entity with lots of money or power at their disposal, would violate it wantonly, knowing that he, she or it has enough money to

pay the 'value' attached to it by the court, thus sending wrong signals about the worth and value of this fundamental right.

[49] This approach was acknowledged in cases of defamation. For instance, in *Mbura v Katjiri and Another*⁶, this court cited with approval the sentiments expressed in *Dikoko v Mokhatla*,⁷ where the court reasoned as follows:

'There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock-Exchange. The true and lasting solace for the person wrongly injured, is vindication by the Court of his or her reputation in the community. The greatest prize is to walk away his or her head high, knowing that even the traducer has acknowledged the injustice of the slur.

There is something conceptually incongruous in attempting to establish a proportionate relationship between the vindication of reputation on the one hand and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or its is not. It cannot be more restored by a higher award and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount he or she ends up being able to deposit in the bank.'

[50] As will have been evident from the chronicle of the evidence led and the analysis thereof, there are a number of factors that remove the instant case from that which the court dealt with in *Iyambo*. In the latter case, the court found that the arrest and detention of the plaintiff was neither violent nor depraved and that before and during the arrest, he was treated in a manner that would not have suggested that he was a criminal, including the manner of his arrest.

⁶ (I 4382/2013) [2017] NAHCMD 103 (31 March 2017).

⁷ 2006 (6) SA 235 (CC) 110 at para 109 and 110.

[51] The instant case is different kettle of fish altogether. First, the defendant was arrested on three separate occasions by the same police officers. In each instance, there was no warrant of arrest; no explanation for the arrest and he was dealt with openly in the presence of customers, neighbours and his members of staff. He was treated like a miscreant. His position in this case, as a complainant did not warrant the treatment meted to him without any explanation, particularly a reasonable one.

[52] During each of these arrests, he was handcuffed and placed in smelly and filthy cells with no sleeping material. The food, he testified, was very bad and the other inmates abused him during his sojourn there. Furthermore, his house and property were subjected to an illegal search, without a warrant. This is a violation of Art. 13. There was no respect, it would seem for him and his family and property during the search as he testified that the place was left in disarray. Furthermore, his vehicle was also searched and later impounded illegally for a period of 30 weeks.

[53] As if that was not enough, the plaintiff was repeatedly shot at with a firearm on one occasion when he had had enough of the persistent illegal arrest by the police. This shooting was a clear disregard for his right to life which is protected in Art.6 of the Constitution. This must have been a very traumatic experience for a person who it turns out had committed no offence after all. His offence, if it was, was to report a break-in to his bar. To add salt to injury, when he decided to take legal action against the police for the abuse to which he was subjected, he was punished therefor by a further arrest. This is particularly reviling to a person of sober tastes and sensibilities, particularly when this is done by people who are expected to be the paragon of virtue and law abiding.

[54] Although the various periods of detention were not long in terms of days per arrest, it must be appreciated that an hour, let alone a day in a police cell, particularly where you have done nothing wrong and there is no reasonable basis for your arrest, must be very stressful and heart-rending. Add to this the ill-treatment and the distasteful

conditions of the police cells, then a serious and weighty case is made out for substantial damages to be awarded in the peculiar circumstances of this case.

[55] Taking all the above circumstances into account, including those mentioned earlier in the judgment but which may not have been specifically mentioned in the immediately preceding paragraphs, I am of the view that the plaintiff was given the short end of the stick and was abused by those who were designed and expected to assist and to protect him and his interests. There is nothing worse than where a shepherd turns out to be a wolf.

[56] The plaintiff's rights enshrined in Arts. 6 (protection of the right to life); Art. 7 (protection of liberty), Art. 8 – (respect for human dignity); Art. 11 – (arbitrary arrest and detention); Art.12 (right to a fair trial, particularly the presumption of innocence); Art. 13 – (right to privacy) and Art. 16 (the right to property), were violated by his captors at will. An award that exhibits the high value and premium attached to these rights must, in my view be handed down as an example, not only to the implicated police officers but also to other officers who may be like-minded. The message must be driven home emphatically that this type of criminal behaviour has no place in a democratic State.

[57] I am of the view that an award in the amount of N\$ 300 000 is in the circumstances condign and a pointer to the value the court attaches to the plaintiff's rights which were violated as mentioned above and also to send an unequivocal message to officers in the security sphere that such conduct shall not be tolerated or countenanced by the courts of this Republic. Others may, legitimately argue that such an award, regard had to all the facts, is not enough. I have done my best, exercising a value judgment, as to what award the present case merits.

Claim for N\$ 27 000

[58] The relevant evidence regarding this claim has been referred to above. The plaintiff stated that on the day he was shot at by the police, he was preparing to drive in his vehicle to purchase stock for his business. The vehicle, he testified, was being loaded with crates in readiness for the trip and it was when he had placed an amount of N\$ 27 000 in the back of the driver's seat that the police came, quarreled with him and attempted to arrest him which he successfully avoided. When he later went to collect his vehicle, the amount in question was no longer there.

[59] There are a few issues that need to be taken into account in this connection. First, liability for this claim was admitted by the defendants. Second, no evidence was led on behalf of the defendants on this score, seeking to challenge or positively influence the plaintiff's story in favour of the police. I am of the view that the plaintiff's evidence as to the facts and the amount of cash in question cannot be jettisoned. The police never came up to deny that they took the money and the plaintiff's evidence that he ran away, leaving the vehicle in their care and which it is common cause they took, leaves the accusing finger pointed inexorably in the direction of the two police officers.

[60] Furthermore, police practice normally requires that when an item like a motor vehicle is seized, an inventory should be taken e.g. of the items in the vehicle; whether it has any bodily damage and if so, where and of what nature. Items in the vehicle e.g. a radio; cd player and such other valuable items should be recorded. The police should have taken the trouble to follow this exercise to avoid such denials at this stage. Even if the plaintiff was not there when they took the vehicle, they should have called for

instance the plaintiff's members of staff to witness the entire exercise and also invite independent members of the community to verify what was found in the vehicle. This they did not do.

[61] It must be mentioned also that the plaintiff's employee Katarina Ndinelago David also confirmed that on 8 November 2014, she counted the money and handed over N\$ 27 000 to the plaintiff who had been away for a few days preceding that day. It was her evidence that he went out with the money to the vehicle.

[62] In cross-examination, Ms. David testified that after returning from chasing and shooting at the plaintiff, the policemen asked her to remove all valuables from the vehicle and she refused to do so and told them that they had chased away the owner and she would not intervene and remove anything from the vehicle. It was her further evidence that the police stood around the vehicle, waiting for a vehicle to tow the plaintiff's vehicle away. It was her evidence that she did not see the police taking the money from the vehicle. She was an impressive witness and whose evidence was not in any material way dislodged. There is no basis apparent or suggested that would have caused the court to view her evidence with suspicion.

[63] In the premises, I am of the view that in the light of the admission of liability by the defendant and the defendant's failure to call any evidence, I am satisfied that the plaintiff has shown on the balance of probabilities that he left money in the vehicle. Ms. David, who handed the money to the plaintiff, supports his evidence and there is also no gainsaying that the vehicle had been loaded with crates to buy new stock for the business in line with the plaintiff's evidence. The admission of liability in this matter, in my view placed the defendant in an awkward situation and I find that the plaintiff proved

his case in relation to this amount on a balance of probabilities. I accordingly find that the defendants are liable to the plaintiff in the amount of N\$27 000.

Loss of profit

[64] In this part of the case, the plaintiff claims that as a result of his vehicle being unlawfully impounded by the police, he did not have alternative transport to collect stock for his business. In this regard, it was his evidence that as a result of the impoundment of the vehicle, his business suffered between April and November 2015. It was his evidence in this regard that he made a loss of N\$105 000 as a direct result of the defendant's officers' unlawful actions in impounding the vehicle.

[65] As indicated earlier, liability in this regard was not denied. I say so cognisant of the fact that the cross-examination of the plaintiff was however, in some instances, couched in a manner that seemed oblivious to the admission of liability. Mr. Ngula's main contention, as put in cross-examination to both the plaintiff and his witness, Ms. David, was that there was no documentary proof of the daily takings in the business and that the claim had not therefor been proved.

[66] According to the plaintiff, the business normally generated an amount of approximately N\$ 3 500 per day before the intervention of the police. The money normally received, he testified, was affected both by the taking of the N\$27 000 for stock and the absence of transport as a result of the impoundment of his vehicle. It was his evidence that as a result of the foregoing factors, he was compelled to close the business and to later let it out to somebody else.

[67] The evidence of Ms. David was that she was the sales person and was responsible for the collections made at the business on a daily basis. She would count the amount raised and keep it in a safe place and if the plaintiff was in town, she would hand over the cash to him the following day. It was also her uncontested evidence that on a good day, the business would make between N\$4 000 and N\$ 5 000. On bad days, she further testified, the business would make between N\$ 1 500 and N\$ 2 500. It was also her evidence that the plaintiff normally made stock purchases of N\$ 6 000 to N\$ 7 000 per week.

[68] I am the first to admit that Mr. Ngula does have a valid point regarding the best evidence, namely that the plaintiff could have done much better by producing documentary evidence in proof of the assertions regarding the amounts generated by the business during the time in question. This was not done. This does not, however, result in the plaintiff having to be non-suited, particularly in the light of admission of liability by the defendants in this case. That the plaintiff would have lost income as a result of the defendant's employees' action is clear and incontrovertible.

[69] Ms. David, in my view, was a very good witness and who was not in any way dislodged or unhinged by the cross-examination. Her evidence was adduced matter-of-factly and I cannot for any reason disbelieve her, neither did Mr. Ngula, in fairness to him, contend otherwise, nor could he legitimately do so.

[70] What cannot be wished away is that the plaintiff did lose business and eventually closed the business as a result of the unlawful actions of the defendants' charges in two ways, *viz* taking the money for stock and secondly, by unlawfully impounding the

plaintiff's vehicle. It was his evidence that these twin factors rendered him unable to continue doing the business because he did not have the money to hire alternative transport and also his power to buy sufficient stock was impaired and eventually hamstrung. This cannot be doubted on the evidence.

[71] Doing the best I can in the circumstances, I am of the considered view that the evidence of Ms. David can be relied on for establishing what would be fair to award to the plaintiff in the circumstances. I am of the view that due to the market forces and the unpredictable nature of the business, an award between the best and worst days would be a fair amount to grant in the circumstances. As earlier stated, on good days, the best amount was N\$ 6000 and on bad days, it was N\$ 1500. An amount of N\$ 3 000 per day would, in my considered opinion be condign, in the absence of documentary evidence as previously stated.

[72] In the premises, I am of the considered view that it was established in evidence and not denied that the vehicle was impounded for a period of 30 weeks. For this reason, I am of the view that calculation of the collections made at N\$ 3 000 per week would amount to N\$ 90 000 and this is the amount in respect of which I find for the plaintiff in respect of this claim.

Conclusion

[73] In the premises, I am of the view that having regard to all the evidence, the plaintiff has made out a case for the defendant's liability in respect of all the three claims on a balance of probability. I do so particularly considering, as has been repeatedly mentioned, that the defendants admitted liability, it would seem unreservedly.

Additional observations

[74] I should mention that on a proper conspectus of this matter, this would undoubtedly been a fitting case in which the court could have granted costs on a punitive scale in order to drive home the unacceptable and iniquitous actions of the police officers in this matter. Sadly, the plaintiff did not apply for costs on this scale. That is not, however, the end of the matter.

[75] I am of the considered view that it would be irresponsible on the part of the court to allow the officers in question to go home scot free, particularly in the light of their iniquitous actions. In this regard, it would appear to me, considering their depraved conduct, that it is proper and called for on the part of the court call upon the officers to show cause (i) why costs on the punitive scale should not be ordered in this case, considering that the issue of costs is one within the discretion of the court; and (ii) why the said officers should not personally bear the costs' order. It would be unconscionable, in my view, to allow tax-payers to foot the entire bill of the officers' ego trip.

[76] I am also of the view that persons who are in the employ of the Government must from now on know that if they act in a manner that is despicable and contrary to what they were employed to do, the message will be sent home that officers who behave in such a fashion will have to pay a personal price and will not have the public purse pay a reward for their indiscretions. In view of the order I will issue against the said officers, it important to note that the question of costs, to be addressed below, is without prejudice to the Inspector-General acting in terms of Regulation 27 of the Police Act, as he may deem fit. The application of Regulation 27 should also be seriously considered by the Inspector-General in relation to the claim for N\$ 27 000 as this money remains unaccounted for and the finding that the officers appropriated it is unmistakable.

Order

[77] In the premises, I issue the following order in favour of the plaintiff: –

1. CLAIM 1 – payment of the amount of N\$ 300 000;
2. CLAIM 2 – payment of the amount of N\$ 27 000;
3. CLAIM 3 – payment of the amount of N\$ 90 000;
4. Interest on the aforesaid amounts at the rate of 20% per annum from the date of judgment to the date of final payment; and
5. Messrs. Freddie Nghilinganye and Sackey Kokule be and are hereby called upon to show cause in person or by legal representatives of their own choice and at their own cost, on or before 27 September 2017, why:
 - (a) Costs of suit in this matter should not be ordered on the scale between attorney and client;
 - (b) Both Mr. Nghilinganye and Kokule should personally not pay such costs, jointly and severally, the one paying and the other being absolved.
6. A copy of this judgment and the order therein contained, is to be served in terms of the Rules of this Court on Officers Messrs. Nghilinganye and Kokule by the Office of the Government Attorney through the office of the Deputy-Sheriff within 10 days from the date hereof.
7. A copy of this judgment is to be delivered on the office of the Inspector-General by the Office of the Government Attorney.
8. The matter regarding the main claims is removed from the roll and is regarded as finalised.

9. The question of costs is hereby postponed to **4 October 2017 at 15:15 in G Court** for a status hearing, which the Officers cited must attend in person or by legal representative.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: L. Shikale

Instructed by: Shikale & Associates

DEFENDANT: N. Ngula

Instructed by: Government Attorney