

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2021/01244

In the matter between:

MAJOR-GENERAL (Rtd.)

THOMAS NGHILIFAVALI “NOPOUDJUU” HAMUNYELA **PLAINTIFF**

and

MINISTER OF HOME AFFAIRS,

IMMIGRATION, SAFETY AND SECURITY
DEFENDANT

Neutral citation: *Hamunyela v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-DEL-2021/01244) [2023] NAHCMD 459 (31 July 2023)

Coram: Schimming-Chase J

Heard: 07 – 08 March 2023

Delivered: 31 July 2023

Flynote: Delict — Damages — Quantum — Unlawful arrest and detention

— Awards in comparable cases — Court grants damages based on the best evidence presented.

Summary: The plaintiff instituted action against the defendant for alleged unlawful arrest and detention, including a claim for his subsequent detention, alleging that the investigating officer misrepresented the case to the Magistrate, on the strength of which misrepresentation, the Magistrate ordered his further incarceration.

The defendant opposed the action, averring it had lawful reason for the arrest and detention of the plaintiff. During pre-trial, the defendant admitted facts pleaded by the plaintiff, save that the defendant disputes the quantum sought by the plaintiff. The court heard evidence on quantum.

Held that, the court accepts the arrest and later detention of the plaintiff as unlawful, as pleaded by the plaintiff.

Held that, in the determination of the award, the court must bear in mind that the primary purpose of the award is not to enrich the aggrieved party, but offer to him or her, much-needed solation for his or her injured feelings; ensure the damages award is commensurate with the injury inflicted; the award for the infractions must reflect the importance of the right to personal liberty and dignity, and the seriousness of any arbitrary deprivation of personal liberty; have regard to awards made in previous decided cases, as a guide; have regard to the personal circumstances of the victim, the nature, extent and affront to his or her dignity and sense of self-worth; and in considering the appropriate award for damages, consider the effect of inflation on the value of money.

In the result, the court found the plaintiff proved entitlement to succeed in his claim for the unlawful arrest and subsequent detention, after appearance before a Magistrate, and a portion of his costs incurred expenses. The action of the plaintiff accordingly succeeds.

ORDER

1. In respect of claim one, the defendant must pay to the plaintiff the sum of N\$50 000 plus 20 percent interest *a temporae morae* from date of judgment to date of final payment, both days inclusive.
2. In respect of claim two, the defendant must pay to the plaintiff the sum of N\$40 000 plus 20 percent interest *a temporae morae* from date of judgment to date of final payment, both days inclusive.
3. In respect of the claim for special damages in the form of legal costs incurred, the defendant must pay to the plaintiff the sum of N\$129 630. Interest is awarded on the aforementioned amount at the rate of 20 percent *a tempore morae*, from date of judgment to date of final payment.
4. The defendant must pay the plaintiff's costs of suit.
5. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

(i) Once again, this court is seized with a matter involving breaches of constitutional rights of citizens by members of the Namibian police through, *inter alia*, unlawful arrest and detention. This time however it was no ordinary citizen, but a decorated member of the Namibian Defence Force. In this particular matter, liability has been conceded by the defendant and only quantum must be determined.

(ii) The plaintiff Major-General Thomas Nghilifavalii 'Nopoundjuu' Hamunyela, is a retired army officer, resident at Tsumeb, Namibia.

(iii) The defendant is the Minister of Home Affairs, Immigration, Safety and Security, sued in his capacity as head of the Namibian Police.

(iv) I will in this judgment, refer to the parties as cited, that is, I will refer to the Major-General (Rtd.) as the plaintiff, and to the Minister, as the defendant. Where I make reference to both the plaintiff and the defendant, I refer to them, as 'the parties'.

(v) Upon consideration of the pleadings, the plaintiff's action serving before court is premised on two claims.

(vi) In respect of claim 1, the plaintiff pleads that on 12 January 2021, at Rundu, Kavango-East, he was wrongfully and unlawfully detained by members of the Namibian Police. He was then kept in police custody until he was released on bail by a magistrate, on 15 January 2021.

(vii) The plaintiff pleads that his detention was unlawful, wrongful, arbitrary and unconstitutional, because:

(a) it was not effected in accordance with procedures established by law as required under Art 7 of the Namibian Constitution;

(b) it was arbitrary and was not preceded by an arrest as contemplated under s 38 of the Criminal Procedure Act 51 of 1977 as amended (hereinafter referred to as ('the CPA')); and not in accordance with fair and valid procedures at common law;

(c) there was no lawful, appropriate or necessary justification for the plaintiff's unlawful detention.

[8] In respect of claim 2, the plaintiff pleads that he was remanded in custody on 13 January 2021 by the Rundu Magistrates Court, and remained in custody until granted bail on 15 January 2021. Further that, had it not been for the alleged unlawful actions of the members of the Namibian Police involved and their misrepresentation of facts and malicious motivation to oppose his release, he would have been released when he first appeared in court on 13 January 2021, or earlier than 15 January 2021.

[9] The plaintiff pleaded that during his bail application, the investigating officer Warrant Officer Kanyetu, fabricated his version of events, in order to secure the plaintiff's further detention and remand in custody. This resulted in him only being released from custody on 15 January 2021, after a formal bail application.

[10] It is the case of the plaintiff that Warrant Officer Kanyetu in the course and scope of his employment with the Namibian Police, abused the law and processes of Court, to inappropriately secure a further remand and detention of the plaintiff.

[11] On the basis of unlawful detention, alternatively arrest and detention, the plaintiff seeks damages in the amount of N\$150 000. For his second claim, premised on the further detention between 13 and 15 January 2021, the plaintiff seeks damages in the amount of N\$100 000. The plaintiff also seeks an order for all resultant costs, including legal costs incurred in securing his release from detention, in the amount of N\$170 000 and interest thereon, at the legal rate of 20 percent from date of judgment to date of final payment, and costs of suit.

[12] After raising defences, including a special plea of non-joinder that was dismissed, the defendant admitted liability at pre-trial.¹

¹ *Hamunyela v Minister of Home Affairs, Immigration, Safety And Security* (HC-MD-CIV-ACT-DEL-2021/01244) [2022] NAHCMD 215 (26 April 2022).

[13] In terms of the pre-trial order of this court made on 3 October 2022, the following was recorded:

'7. Following admission of liability by the Defendant, whether or not the Plaintiff must be paid compensation (quantum) in the amounts sought in the Particulars of Claim as follows:

7.1. Unlawful detention N\$150,000.00;

7.2. Detention between 13 to 15 January 2021 N\$100,000.00

7.3. Resultant costs including legal costs N\$170,000.00

[14] The plaintiff was the only witness. It was the testimony of the plaintiff that he is a retired army general, and currently resident in Tsumeb, Republic of Namibia. He is a Namibian citizen by birth, born during the year 1957, at Olupandu in Omusati Region. He later went into exile in Angola where he was trained as a soldier at Okashapa base. During 1975, the plaintiff went to Zambia where he attended at Nyango Education Centre for a period of six months. Thereafter, he left for military training at Eastern Front in the Western Province of Zambia.

[15] From 1976 to 1979, the plaintiff was appointed as the Combat Engineer Detachment Commander. During 1979 to 1981, he was appointed as the Detachment Infantry Commander. During these years, he operated from Zambia to former Caprivi and Kavango Regions towards Gobabis-Windhoek. The plaintiff is combatant trained. His first battle was attacking the South African Defence Force (hereinafter 'SADF') military bases at Kigalamwe in 1976. In 1978, he attacked Katima Mulilo, as a retaliation to the Cassinga Massacre of 4 May 1978.

[16] During the year 1981 to 1984, he was sent to military school in former Yugoslavia (current Serbia), whereby he successfully completed the Military Science course within the period of two years. He, thereafter, remained in Yugoslavia for two years to do translation from Yugoslavia language to

English and then to Oshiwambo for the Namibians who were coming to attend military school.

[17] At the commencement of 1985, the plaintiff operated from Angola where he was appointed as the Northern Front Chief of Operation leading the front responsible for attacking colonial forces from Northern Namibia to Windhoek. During the year 1985, he was involved in a battle with SADF at the Namibian boarder with Angola, in the area between Ondibo and Eenhana, and was wounded on his right arm.

[18] On 31 October 1987, the plaintiff participated in one of the fierce battles between PLAN and colonial forces, and he sustained wounds during the battle.

[19] Immediately after Namibia's independence, the plaintiff was appointed as Chief of Staff for Operations, Intelligence and Communication with the rank of Lieutenant Colonel for the Namibia Defence Force (NDF). He was based in Grootfontein. During the year 1997, NDF was restructured and he was appointed as the Chief of Staff G2 - G3, responsible for Operation, Training and Intelligence, with the rank of full Colonel.

[20] In 1998, the plaintiff was appointed as the first SADC Chief of Staff of the SADC Force that assisted the Democratic Republic of Congo to fight against the rebel forces there. The plaintiff in that capacity, together with the Angolan Government, launched an operation that led to the death of Jonas Savimbi on 22 February 2002, at Lucusse, Angola.

[21] From 1999 to 2009, he was appointed as the Deputy Army Commander of the NDF, with the rank of a Brigadier General, to be a coordinator between the governments of Angola and Namibia. From 2009 to 2010, he was appointed as the Acting Army Commander of the NDF. From 2010 to 2014, he was appointed as the NDF Defense attaché at the Namibian High Commission in Harare, Zimbabwe, responsible for diplomatic and military functions.

[22] The plaintiff further testified that from the year 2015 to 2016 he was appointed as the Army Commander with the rank of Major-General. During 2017 he attained the age of 60 years and consequently retired. It was his testimony that he is a highly decorated general, with more than ten medals, including an Omungulugwombashe Medal.

[23] He further testified that he gave the above professional background not only to show that it was not necessary to detain him, but also to show that he physically fought for the attainment of constitutional democracy in this country, in which people's fundamental rights including the right to personal liberty must be respected. This, according to the plaintiff, also aggravated the damage to him, as set out below.

[24] On the events in question, the plaintiff testified that during or about the end of July 2020, his employee, a certain Mr Titus Neshila, approached him advising that a certain Mr Shoopala Ndere has five cattle for sale in the amount of N\$8000 each. He informed Mr Neshila to reject the offer, as he only intended to purchase cattle around September 2020, for a wedding.

[25] At the start of September, he instructed Mr Neshila to enquire from Mr Ndere whether the cattle were still available and once confirmed, made an offer to purchase three of the five, being the oxen, as the remaining two were cows. Mr Neshila made the necessary arrangements with Mr Ndere for collection of the cattle. This included Mr Ndere obtaining a letter from his headman confirming his ownership of the cattle as well as attending to the Veterinary Council in Rundu for transfer of ownership. It was the plaintiff's testimony that he did not have direct contact with Mr Ndere nor did he have sight of the cattle.

[26] On 5 September 2020, while Mr Neshila and the seller were loading the two oxen (three became two because the one was too small) for transport to the headman, certain unidentified police officers and the alleged owners of the cattle were at the loading point. He then instructed Mr Neshila to off-load

the oxen, if the seller was not the true owner of the cattle, which was done. The oxen were then handed to the alleged owners in the presence of the police officers. All other cattle were so returned. The plaintiff specifically stated that he never suspected that the seller of the cattle was not the owner.

[27] On the same day, both the plaintiff and Mr Neshila gave a written statement to the police officers regarding the incident. Mr Ndere (the seller) ran away when the police officers attempted to get details from him. According to his knowledge, the police made no attempt to chase, catch, and/or arrest Mr Ndere.

[28] He further testified that despite the fact that the police officers were armed, no warning shots were even fired when Mr Ndere fled the scene. He also never transferred any money to Mr Ndere. This was only due after the cattle were cleared by the Veterinary Council in Rundu. Therefore, there was no sale transaction.

[29] Four months after the statements provided, namely on 12 January 2021, the plaintiff met a number of police officers, next to his residence, about 70km outside of Rundu. The plaintiff was on his way to Rundu at the time. When he greeted them, they informed him that they were looking for him in connection with the two oxen from September 2020. One of the officers who stopped him was a certain Warrant Officer Kanyetu. They requested another statement from him, not being able to explain the whereabouts of the first statement. They drove together to Mururani station in the plaintiff's vehicle, which was about 60km away. At the station, he was not requested to give a statement, instead, the officers took his fingerprints.

[30] The police officers then demanded they drive from Mururani Police Station to the Charge Office at Rundu Police Station, about 140km away. At this stage, he was still driving his private motor vehicle. When they arrived at the Police Station in Rundu, one of the officers offered to park his vehicle and demanded his cell phone and weapon. He complied and handed them to the officer. This occurred at about 21h00, and up until that stage, he was not

informed why he was treated that way. He was not told that he was under arrest, nor were his rights explained to him. Some moment later, one of the female officers shouted at him, and told him that he would be sleeping in the holding cells for the night. He was not provided with any blanket (bedding) or mattress or food.

[31] On 13 January 2021, the plaintiff appeared in the Rundu Magistrates Court, and during the sitting of the court, he was informed that he was arrested for stock theft. When he asked for bail, this was denied.

[32] He was only released on 15 January 2021, after a protracted and unnecessary bail application.

[33] In addition the plaintiff testified that Warrant Officer Kanyetu, who appeared to be the investigating officer was not honest and made material misrepresentations of facts resulting in him being remanded in custody.

[34] As a result, the plaintiff testified that his detention was unlawful, wrongful, arbitrary, and unconstitutional in that it was not effected in terms of any law, nor was it in accordance with the fair and valid procedures at common law. Further, that there was no lawful, appropriate and necessary justification for his detention.

[35] The plaintiff stated that there was no ground to suspect that if summoned, he would not appear in court, nor was there a reasonable suspicion that he had committed any offence. There was no warrant for his arrest. As such, his arrest and detention was motivated by malice and consideration of irrelevant factors by the Namibian Police officers, during the course and scope of their employment with the defendant. He testified that he suffered damages in the form of *contumelia*, violation of his dignity, denial of his right to liberty, and freedom of movement in the amount of N\$150 000.

[36] He, further, testified that since he was remanded in custody on 13 January 2021 by the Rundu Magistrates Court, and released on 15 January

2021, this would not have occurred had it not been for the unlawful and malicious actions of the Namibian Police and their misrepresentation of facts. This was exacerbated by the fabricated testimony of Warrant Officer Kanyetu, aimed at prolonging the plaintiff's unlawful and inappropriate detention.

[37] In respect of the claim for N\$170 000, the plaintiff testified that he had to instruct a senior legal practitioner to attend to Rundu, where his legal representative stayed for two days to secure his release, excluding the day he traveled. He testified that his legal representative had to make arrangements in Rundu as he was initially informed there was no Magistrate available to preside over the bail application. His legal representative did so and for the assistance of his legal practitioner, he had to pay an amount of N\$129 000.

[38] He further testified that because of his position in society and due to his security, he had to arrange that his family members attend court at every court appearance, and they had to make use of his vehicle, and that he incurred costs for their living expenses in and around Rundu during his detention. He testified that he does not have any supporting documents, but that he spent an amount of N\$40 000 incurred for legal costs, food, fuel, travelling, and accommodation.

[39] During cross-examination, the event leading up to the plaintiff's arrest were not disputed at all. Cross-examination was aimed at the unreasonableness of the amounts claimed and, also, at the absence of proof of the plaintiff military credentials. Moreover the absence of any documentation put forward to support his claim was pressed by counsel for the defendant in his cross-examination. In the absence of any denial of the events leading to the plaintiff's detention, the court finds that the plaintiff has proven, on a balance of probabilities, that he was unlawfully arrested and detained by the Mururani Police and that members of the police fabricated evidence to secure the further detention of the plaintiff.

[40] As far back as 1923, Watermeyer J in *Stoffberg v Elliot*² remarked:

² *Stoffberg v Elliot* 1923 CPD 148.

'Any bodily interference with or restraint of a man's person which is not justified in law, or excused by law, or consented to, is a wrong, and for that wrong the person whose body has been interred with has a right to claim damages as he can prove he has suffered owing to that interference.'

[41] The Namibian Constitution is crystal clear on the recognition of the inherent dignity and of equal and unalienable rights of all members of the human family. This constitutional provision was clearly disregarded by those mandated to uphold the provisions, and to serve and protect.

[42] Considering the acceptance of liability by the defendant, nothing more need be said. I now consider the issue of quantum. I start with assessment of the general damages claimed followed by the claim for special damages claimed for legal fees to secure the plaintiff's release from custody and his expenses claimed.

[43] The Supreme Court in *Minister of Safety and Security v Tyulu*³ stated the correct approach to the determination of an award of damages in the following manner:⁴

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

³ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93D-F.

⁴ See also: *Government of the Republic of Namibia (Ministry of Safety Security) v Lazarus* (SA 54-2017) [2021] NASC (9 September 2021); *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] NAHCMD 523 (12 November 2021), and *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).

[44] To summarise, in the determination of the award, the court must:

- a) bear in mind that the primary purpose of the award is not to enrich the aggrieved party, but offer to him or her, much needed solation for his or her injured feelings;
- b) ensure the damages award is commensurate with the injury inflicted;
- c) the award for the infractions must reflect the importance of the right to personal liberty and dignity, and the seriousness of any arbitrary deprivation of personal liberty;
- d) the court can have regard to awards made in previously decided cases as a guide;
- e) the court should also have regard to the personal circumstances of the victim, the nature, extent and affront to his or her dignity and sense of self-worth; and
- f) in considering the appropriate award for damages, consider the effect of inflation on the value of money.

[45] Having considered the guiding principles from our courts, I consider previous awards in comparative cases.

[46] In *Government of the Republic of Namibia (Ministry of Safety Security) v Lazarus*,⁵ the plaintiff was a self-employed male who reported a theft at his business. He later received calls from police officers who accused him of having orchestrated the theft. He was arrested without a warrant on three different occasions, and kept on each occasion for over 48 hours at the Wanaheda Police Station, and where such detention was without charge. He was threatened and humiliated. His house was also ransacked after the first

⁵ *Government of the Republic of Namibia (Ministry of Safety Security) v Lazarus*, supra fn 3.

arrest, without a search warrant, and he was also shot at on one occasion, but not hit. This court awarded general damages in the amount of N\$300 000 on 9 September 2019.

[47] In *Minister of Safety and Security v Tyulu*,⁶ the respondent, a magistrate, was wrongfully arrested and detained for a few hours. The court took into account his age, the circumstances of his arrest, its nature and short duration, his social and professional standing and that he was arrested for an improper motive. The court awarded damages in the amount of N\$15 000.

[48] In *Iyambo v Minister of Safety and Security*,⁷ the plaintiff was brought before a magistrate four days after his arrest and detention in violation of Art 11(3) of the Namibian Constitution. The court took into account inter alia the circumstances surrounding his arrest and his loss of esteem among members of the local community where the plaintiff worked as a primary school teacher. The plaintiff was awarded damages for 'loss of freedom and attendant psychological pain' in the amount of N\$12 000. This award was made in February 2013.

[49] In *Mlilo v Minister of Police & another*,⁸ the plaintiff was unlawfully arrested at a border post, detained for six nights, and was then released without ever appearing in court. In this case, the Minister of Police was ordered to pay the plaintiff N\$100 000 in damages and an amount of N\$200 000 was awarded against the first defendant and the second defendant, the Minister of Justice, jointly and severally. The total amount of damages awarded amounted to N\$300 000.

[50] Masuku J in *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)*⁹ (which decision was confirmed on appeal),

⁶ *Minister of Safety and Security v Tyulu* supra fn 5.

⁷ *Iyambo v Minister of Safety and Security* Unreported (I 3121/2010) [2013] NAHCMD 38 (12 February 2013).

⁸ *Mlilo v Minister of Police & another* [2018] 3 All SA 240 (GP) (29 March 2018).

⁹ *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)* (I 2954/2015) [2017] NAHCMD 249 (30 August 2017).

marked his displeasure with the ‘despicable conduct that should not be associated with a professional police service in a constitutional State.’

[51] In almost six years since the court’s decision in the above matter, our courts have not seen a decrease in cases where police misconduct is alleged. I restate the sentiments of Masuku J in *Lazarus v The Government of the Republic of Namibia*, with which I respectfully agree:

‘ [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.’

[52] Similarly, Coleman J, not less than a year ago, in *Owoses v Government of the Republic of Namibia*,¹⁰ remarked:

‘It is clear that [assaults] by the police – and defence force members – on members of the Namibian public are prevalent. This is intolerable. The awards of damages against the respective government entities are paid out of taxpayers’ money. For some reason the individual perpetrators are allowed to disappear into the undergrowth and are not held accountable. The second, third and fourth defendants

¹⁰ *Owoses v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2020/01723) [2022] NAHCMD 484 (15 September 2022) paras 26 and 27.

in this matter each have an obligation and duty to take steps to weed out members of their respective forces that assault people. Each of the members that assaulted the plaintiff or was complicit in it committed a crime and must face prosecution as well as disciplinary steps.'

[53] It is incumbent that heed be taken of the judgments of this court on the issue. As stated above, the courts are not inclined to enrich aggrieved parties in matters such as the one presently serving before court, but it is not out of reach of this court to consider meting out personal pecuniary sanctions against the responsible officers, who, in the execution of their functions and duties, aim to subject the people members of the public to their personal whim and punishment as they dictate at any moment.

[54] In *Esso Standard SA (Pty) Ltd v Katz*¹¹ Stratford J stated the following:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff, which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.'

[55] Having considered the above authority and the plaintiff's evidence as well as his position in society, I find it apposite in the circumstances to award the amount of N\$50 000 to the plaintiff in respect of claim one – the unlawful arrest and detention on 12 January 2021. This court has on numerous occasions marked its displeasure at the manner in which officers of the defendant arbitrarily exercise their authority to arrest and detain. It has become necessary that such displeasure and arbitrary action is meted out in the necessary sanction.

¹¹ *Esso Standard SA (Pty) Ltd v Katz* 1981(1) SA 964(A) approved in *Mwandingi v Mwetupunga* (HC-NLD-CIV-ACT-DEL 74 of 2018) [2022] NAHCNLD 21 (16 March 2022) para 27.

[56] In respect of claim two, the further unlawful detention of the plaintiff between 13 and 15 January 2021, I can do no better than referring to the infamous facts in *Mahlangu and Another v Minister of Police*.¹² The Constitutional Court of South Africa in *Mahlangu* was entrusted with determining whether the Supreme Court of Appeal was correct in not holding the Minister of Police accountable for the appellants' compensation for damages resulting from their wrongful arrest and subsequent incarceration.

[57] In *Mahlangu* supra, the relevant fact to consider is that the first appellant was detained upon being unlawfully arrested after which a false confession was obtained from him and through torture and coercion. This false confession led to the arrest of the second appellant. The investigating officer engineered the appellants' 'continued detention by misrepresenting the true state of affairs to the prosecutor'. In the result, the appellants' bail was refused on their first appearance in the Magistrates' Court. The Constitutional Court held that the investigating officer's concealment that the confession was obtained illegally formed the basis upon which the Minister could be held liable for the full detention period,¹³ as these facts were not presented to the presiding officer during the first court appearance.

[58] Having considered the quantum of damages previously ordered in this court, I find apt in the circumstances to award the plaintiff N\$40 000 in respect of claim two.

[59] In respect of the plaintiff's claim for his legal costs and expenses incurred in the amount of N\$170 000, I refer to *Lopez v Minister of Health and Social Services*,¹⁴ where Parker AJ stated:

¹² *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

¹³ *Ibid* para 45.

¹⁴ *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) para 40.

'...the general principle is that a successful plaintiff, as is the case in the instant proceedings, is entitled to be compensated for the loss suffered but is not entitled to profit from the loss.'

[60] In his supplementary witness statement, accepted as exhibit A1 at trial, the plaintiff attached annexures A and B, marked as 'Tax Invoice – State // Major-General Thomas Nahilifiavali Nadilifwe Hamunyela' and 'Receipt – H878 – Hamutenya T (Thomas) – D/Deposit', wherein the plaintiff evinces a claim for costs in the amount of N\$129 630.

[61] Argument, on behalf of the defendant, went that the cost is not reasonable as the plaintiff could have engaged counsel other than senior counsel to attend to his bail application. The plaintiff has a constitutional right to legal representation of his choice. The plaintiff produced an invoice and gave the best available evidence on the issue. Having accepted the version of the plaintiff and considering exhibit A1, I find the plaintiff was out of pocket in the amount of N\$129 630, and would not have been so had it not been for the unlawful actions of members of the police force.

[62] As regard the expenses claim of N\$40 000, the plaintiff's counsel argued that the amount was entirely reasonable. Consideration should be had of the plaintiff's position in society and his security, and that he had to incur further costs in the amount of N\$40 000 to ensure his family was present at court during every appearance. They had to use his vehicle, and he had to pay for living expenses. Counsel for the defendant refuted the argument, arguing the plaintiff not be entitled to the averred costs as it has not been proven. The plaintiff did not advance a single piece of evidence in support of his claim. His evidence as to the expenses incurred was also vague. Accordingly, I accept the argument advanced by counsel for the defendant. The plaintiff has not proven the incurrence of the N\$40 000, as such, the portion of such claim must fail.

[63] The only question remaining for this court to determine is the question of costs. Mr Namandje, during the trial, was assisted by Mr Arnols, arguing that

a majority of the work was being done by juniors. Mr Namandje aided and assisted where necessary, and in conducting the trial. The plaintiff thus seeks an order of costs for the employment of two legal practitioners. I do not understand the rules of court to permit the taxation of the fees of one instructing and one instructed counsel, both employed at the same firm. Counsel also did not point me to any authority that states otherwise. In fact, rule 124(6) provides that the rule does not apply to the employment of one legal practitioner by another legal practitioner, where the last mentioned legal practitioner so employed is an employee or a partner or a member of the same law firm as the first named legal practitioner who employed him or her.

[64] In the result, I make the following order:

1. In respect of claim one, the defendant must pay to the plaintiff the sum of N\$50 000 plus 20 percent interest *a temporae morae* from date of judgment to date of final payment, both days inclusive.
2. In respect of claim two, the defendant must pay to the plaintiff the sum of N\$40 000 plus 20 percent interest *a temporae morae* from date of judgment to date of final payment, both days inclusive.
3. In respect of the claim for special damages in the form of legal costs incurred, the defendant must pay to the plaintiff the sum of N\$129 630. Interest is awarded on the aforementioned amount at the rate of 20 percent *a tempore morae*, from date of judgment to date of final payment, both days inclusive.
4. The defendant must pay the plaintiff's costs of suit.
5. The matter is regarded as finalised and removed from the roll.

E M SCHIMMING-CHASE
Judge

APPEARANCES

PLAINTIFF:

S Namandje with him, J Arnols
Of Sisa Namandje & Co. Inc.,
Windhoek

DEFENDANT:

J Ncube
Of Office of the Government Attorney,
Windhoek