

NOT REPORTABLE

CASE NO: SA 54/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

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

Appellant

and

BENHARDT LAZARUS

Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 24 June 2019

Delivered: 9 September 2021

Summary: In assessing an appropriate award for damages in respect of a claim for unlawful arrest, this court considered that the respondent was unlawfully arrested in circumstances which indisputably impaired his dignity; that he was repeatedly arrested (on three occasions) and unlawfully deprived of his liberty; was harassed, and his life was threatened. The arrests were malicious.

The same police officers who arrested the respondent seriously abused their powers and acted as if they were beyond any level of accountability. The highhanded conduct

of the police officers called for serious censure by this court. The damages awarded by the court *a quo* were appropriate in the circumstances and were confirmed.

In a claim for loss of profit, the plaintiff must prove the quantum of damages suffered. However, where damages are difficult to assess, a court may resort to an educated guess on material placed before it. The court was not bound to do so in instances where the plaintiff had failed to produce evidence which he or she could reasonably have produced in the circumstances but failed to do so.

The plaintiff presented evidence in respect of only the daily aggregate gross income of his business. No evidence in respect of any other expenses was produced. In these circumstances, the court *a quo* was not bound 'to resort to the rough and ready method of the proverbial educated guess.'

The appeal was dismissed in respect of the claim for damages for unlawful arrest as well as the claim for the disappearance of an amount of cash from the respondent's vehicle under the care and control of the appellant.

In respect of the third claim for loss of profit, absolution from the instance was ordered.

APPEAL JUDGMENT

HOFF JA (SHIVUTE CJ and FRANK AJA concurring):

[1] The respondent instituted action proceedings in the High Court (court *a quo*) in which he claimed *contumelia* for unlawful arrest and detention in the amount of N\$300 000 (claim 1), for monies which disappeared from his vehicle impounded by

the police in the amount of N\$27 000 (claim 2) and for loss of profit in the amount of N\$70 000 (claim 3).

[2] The appeal lies against the order of the court *a quo*, ordering the appellant to pay the following amounts:

Claim 1: the amount of N\$300 000;

Claim 2: the amount of N\$27 000;

Claim 3: the amount of N\$90 000;

The court *a quo* further ordered the payment of interest on the aforesaid amounts at the rate of 20 percent per annum from the date of judgment to the date of final payment.

The court *a quo* also made the following order:

'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 costs, 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.'

[3] I would at this stage wish to apologise to the litigants for the delay in the provision of this judgment.

Factual background

[4] The respondent called three witnesses during the trial, namely himself, one Abner Shipeta and Katrina Ndinelago David.

[5] The respondent is a self-employed male person who described his business as a 'bar', situated in Havana Katutura, Windhoek. His evidence was that on 29 October 2014 he received a phone call that his bar had been broken into and he proceeded to it. He discovered that a jackpot machine belonging to a client of his was missing and noticed that the lock of a jukebox was broken and money had been removed. A second jackpot machine was also broken. He decided to report the matter to his client, by the name of Sam. Thereafter he proceeded to the Wanaheda Police Station where he reported the incident. He was requested to provide proof of ownership of the machine and was unable to do so. As a result, the police officers on duty refused to assist him.

[6] He called Sam, reporting his inability to get assistance from the police officers. Sam gave him a telephone number of a police officer who was known to him and who could be of assistance. This police officer turned out to be Detective Sergeant Freddie Nghilinganye (Nghilinganye), who was attached to the Serious Crime Unit.

[7] Nghilinganye came to the respondent's bar in the company of Detective Sackey Kokule (Kokule). These police officers recorded the statement of the respondent and informed him to keep his cellular phone close to him. Later the same day the respondent received threatening calls from these police officers accusing him of having orchestrated the break-in and that he had a hand in the theft of the jackpot machine. This was denied by the respondent.

[8] During the evening of Friday 31 October 2014, the said police officers returned to the bar and arrested the respondent in full view of staff, friends, customers and neighbours on the pretext that he had extra keys to the lock of the bar. The arrest was effected without a warrant of arrest. The respondent was taken to Wanaheda Police Station and left in the police cells. The police officers returned on Sunday, 2 November 2014 and requested the respondent to accompany them to his house. There they ransacked respondent's property. The respondent was not informed of the reason for the search nor was a search warrant exhibited. After the search the respondent was taken back to the police station where he was released.

[9] On Saturday 8 November 2014, the respondent received another call from aforesaid police officers enquiring about his whereabouts. He informed them that he was at the bar. The police officers arrived at the bar where they again arrested the respondent without providing any reason for the arrest and without a warrant of arrest. The respondent was taken to Wanaheda Police Station and placed in the holding cells without being charged with any offence. On 10 November 2014, the

respondent was taken to the police station in Windhoek where he was to be formally charged. No charges were preferred against him and he was later returned to the Wanaheda Police Station and released without being charged.

[10] On Friday 17 April 2015, whilst in Tsumeb, the respondent received a telephone call from a Detective Sergeant Likande (Likande) asking about his whereabouts. Likande told him that Kokule was 'in a bad state' and that the respondent must meet him (Likande) at a bar near Goreangab dam (in Windhoek). The respondent bluntly informed this officer that he (respondent) would not meet with neither Kokule nor his colleague since respondent had been harassed, tormented, threatened and gravely humiliated. According to the respondent, it became clear to him Likande was attempting to solicit a bribe from him or was in cahoots with the owner of the jackpot machine.

[11] The repercussion of his refusal to co-operate was that two days later on 19 April 2015, whilst the respondent was preparing to purchase stock for his bar and for this purpose, had allegedly placed an amount of N\$27 000 in cash in his vehicle, he was approached by Kokule and Likande. The respondent was then informed that he would be arrested because he did not respect them (the officers) and neither did he respect the law. Due to the extremely violent and aggressive conduct of the police officers who got hold of him, the respondent managed to free himself from their grasp. A scuffle ensued and the respondent succeeded to escape. He ran away. Whilst running, the respondent heard four gunshots and realised that the officers were

shooting at him. Fortunately, he was not hit. It was the evidence of the respondent that because of the shots fired at him, his fear for the police officers grew, realising at that juncture that they could have killed him.

[12] It is common cause that on the same day the police had impounded his vehicle, in which, according to the respondent he had placed the amount of N\$27 000.

[13] After this latest incident, the respondent decided to enlist the advice of his uncle Mr Reynold Renus who informed respondent to comply as if he was not guilty. The respondent's uncle subsequently asked respondent's brother, Thomas, to go to the Serious Crime Unit in order to make enquiries which charge had been preferred against the respondent and why they kept harassing the respondent. The result was that Thomas was arrested and spent the whole day in custody. Only the involvement of respondent's legal representative resulted in the release of his brother.

[14] On 21 April 2015, the respondent approached his legal representatives of record and it was agreed that the legal representative would approach Nghilinganye the next day. It was the respondent's evidence that he instructed his legal representative, Ms Shikale, to address a letter to the police regarding his previous arrests.

[15] In a letter dated 23 April 2015 and addressed to the Inspector-General of the Namibian Police Force as well as to the Serious Crime Unit (for the attention of Chief Inspector Amakali), Ms Shikale demanded compensation in respect of wrongful arrest and detention in terms of the provisions of the Police Act 19 of 1990.¹

[16] The respondent's testimony was that when he later went to retrieve the amount of N\$27 000 from behind the back of the driver's seat, the money was missing.

[17] It was the evidence of the respondent that as a result of the impoundment of his motor vehicle his business had made a loss of N\$105 000 as a direct result of the conduct of the police officers. His evidence was that as a result he was compelled to close his business and later let it out to someone else.

[18] Abner Shipeta, the respondent's neighbour, testified about two incidents on behalf of the respondent. The first incident occurred on 29 October 2014 during the night when he heard a loud noise coming from the direction of the respondent's bar. Shortly thereafter Katrina Ndinelago David, the employee of the respondent, informed him that the bar had been broken into. They went to investigate and found the main door had been broken, the lock on a jackpot machine was also broken and one jackpot machine had been removed. Ms David thereafter spoke to the respondent on her phone; notifying him of the incident.

¹ Section 39(1).

[19] The second incident occurred on 31 October 2014 when his attention was drawn to the noise of a speeding motor vehicle. He went to investigate and saw a 'blue Honda with a private registration number' plate. Two persons disembarked from the vehicle and proceeded to handcuff the respondent 'as if it was a joke'. The arrest was effected at the respondent's bar in full view of his staff, his friends, his customers and his neighbours. The two persons did not speak to the respondent. They just drove off with the respondent inside the vehicle.

[20] Katrina Ndinelago David testified that she was employed by the respondent since January 2014 as a salesperson at his bar. On 29 October 2014 between 04h00 and 05h00 she was informed of a break-in at the bar. She confirmed the testimony of Shipeta of what was discovered upon inspection and confirmed that she informed the owner of the bar, the respondent, of the break-in. The respondent arrived at the scene a short while later.

[21] Between 11h00 and 12h00 two police officers, Detectives Freddy Nghilinganye and Sakkie Kapule arrived and took statements from witnesses. A few days later they spoke to the respondent about the break-in. On 31 October 2014 the detectives arrived at the bar and handcuffed the respondent. On 8 November 2014 the detectives came again to the bar; respondent was out of town at that stage. On his return, as was customary, she together with the respondent counted the money. There was an amount of N\$27 000. The respondent took the money to his motor vehicle and returned to the bar to load the beer crates without the money. The officers

arrived there and there ensued a scuffle between them and the respondent. The respondent managed to free himself and ran away.

[22] The detectives ran after the respondent and shots were fired at him. When the detectives returned they asked her to remove anything which might be important or valuable from the respondent's vehicle. She refused. One of the detectives phoned a breakdown service and the respondent's vehicle was towed away.

[23] On 24 April 2015, the detectives arrived at the bar and found the respondent there and handcuffed him.

[24] Ms David testified that on a good day the bar would generate between N\$4000 to N\$5000 and on 'not so good days' between N\$1000 and N\$2500. On Fridays the respondent used to purchase stock of between N\$6000 and N\$7000.

[25] During cross-examination, Ms David testified that the police officers arrived at the bar about five minutes subsequent to the respondent having entered the bar after returning from his motor vehicle. There were about 30 people outside the bar. She did not see the police officers removing money or a bag of money from the vehicle before it was towed away. She also did not see anyone else taking the money. The police officers were standing near the motor vehicle whilst waiting for the 'breakdown' vehicle to arrive.

[26] The appellant called no witnesses.

Conclusions by the court *a quo*

[27] In respect of the first count, the court *a quo* emphasised that the appellant admitted liability in respect of all three counts leaving only the issue of quantum for determination.

[28] The court *a quo* reminded itself with reference to case law² that in ‘the assessment of damages for unlawful arrest and detention, it is important to bear in mind 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’.

[29] The court *a quo* referred to a passage in *Olga v Minister of Safety and Security*³ where the following was said:

‘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

² *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93D-F.

³ Case No. 2008 JDRJ 582E para 6, an unreported case decided in the Eastern Cape Division, Republic of South Africa.

the victim, and the nature and extent and degree of the affront to his dignity and his sense of personal worth.'

[30] The court *a quo* surmised that from the facts of this case the only conclusion one could arrive at was that the police officers were seriously abusing the powers given to them by law and that they regarded the liberty and dignity of the respondent as trifling and that they acted as if they were above and beyond any level of accountability.

[31] The court *a quo* pointed out that the respondent was arrested on three different occasions as and when the police officers felt like it; that no warrant of arrest was produced at any time; that the respondent was not charged with any offence; that the respondent was never brought before any court of law during any of the periods of incarceration; that the police officers continuously 'breathed' threats to the respondent on his mobile phone; and that such conduct was totally inexcusable and must receive the harshest of censures.

[32] The court *a quo* considered that the rights of the respondent enshrined in the Constitution⁴ were violated by his captors at will and that an award that exhibits the high value and premium attached to these rights must, be handed down as an example, not only to the implicated police officers but also to other officers who may be like-minded.

⁴ Article 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 fair trial – particularly the presumption of innocence; Art 13 – Right to privacy; Art 16 – Right to property.

Submissions on appeal

[33] In respect of the second claim of N\$27 000, the legal practitioner for the appellant referred to the parties' proposed pre-trial order⁵ where the issues of fact to be resolved during the trial were *inter alia*:

- (a) whether the plaintiff had an amount of N\$27 000 and a bag containing his vital documents in his vehicle; and
- (b) whether or not plaintiff's vehicle contained an alleged amount of N\$27 000 which went missing during the time his vehicle was taken into police custody.

These were factual issues in dispute.

[34] In the proposed pre-trial order the appellant conceded 'liability for the unlawful act of impounding Plaintiff's vehicle'. It was submitted by counsel on behalf of the appellant that in spite of this concession liability for any damage which resulted from the unlawful conduct of the police officers was not conceded, and that the respondent was left with the full onus to prove not only the quantum but also the causal nexus between the unlawful action of the police officers and the resultant damage of N\$27 000.

⁵ In terms of the provisions of rule 26(4) of the Rules of the High Court.

[35] In respect of the third claim, reference was again made to the proposed pre-trial order of the parties where one of the factual issues in dispute was whether or not the plaintiff suffered a loss of profit in the amount of N\$105 000 which amount was allegedly made up of N\$3500 per week to the business of the respondent as a result of his vehicle being taken into police custody. It was submitted that the respondent was left to prove that allegation, and that there was no admission of liability in respect of the damage alleged irrespective of the admission of the illegality of impounding the motor vehicle.

[36] It was submitted on behalf of the appellant that there arose a confusion in the court *a quo* when the legal representative for the respondent at the inception of the trial informed the court that the appellant had accepted liability in respect of the unlawful arrest and detention of the respondent and that the 'only issue in contention, (was) the issue with respect to quantum'. When asked by the court *a quo* whether the appellant's legal representative confirmed what was conveyed to the court by the respondent's legal representative, appellant's legal representative confirmed that to be correct.

[37] It was pointed out by the legal practitioner for the appellant that the court *a quo* made a 'patent' error in view of this exchange to assume that liability for any damage in respect of claim 2 or claim 3 was also admitted. The liability for damages admitted

by the appellant was only in respect of claim 1, disputing only quantum, it was submitted.

[38] The legal practitioner for the respondent submitted that in view of the concession by the appellant's legal representative in the court *a quo*, the case was only about the issue of quantum. The respondent was thus not called upon to prove the merits of his claims, but was simply required to present evidence on quantum.

[39] It was submitted that the causal nexus between the losses and the damage allegedly suffered by the respondent and the conduct of the members of the Namibian Police for which the appellant was sought to be vicariously held liable was clearly established. In any event, it was submitted, that there was no suggestion as per the pleadings and the agreed pre-trial minutes that the respondent was the author of his own losses.

[40] It was submitted that the appellant in para 3.20 of the proposed pre-trial order conceded liability for the unlawful act of impounding plaintiff's vehicle and that the respondent had, in any event, discharged whatever remaining onus which rested on him.

[41] In respect of the first claim, it was submitted that the appellant's complaint, in its heads of argument, that the court *a quo* had regard to matters which were not pleaded cannot be sustained because the material facts which are required for the

respondent to rely on the relevant constitutional provisions were in fact pleaded – these relate to the unlawful deprivation of liberty, the threat to the respondent's life, and the impairment of the respondent's dignity.

[42] It was submitted with reference to case law that the court *a quo* was justified in the circumstances to award the amount of N\$300 000 as damages in respect of the first claim.

[43] In respect of the claim of N\$27 000, which allegedly went missing from respondent's motor vehicle, it was submitted that two witnesses confirmed the amount in possession of the respondent on 19 April 2015, shortly before he was arrested by members of the Namibian Police. This amount was placed in the motor vehicle before it was impounded, no evidence was led on behalf of the appellant, and liability was admitted for unlawfully impounding respondent's motor vehicle.

[44] As for the award in respect of loss of income, it was submitted that the respondent's evidence was that he made a loss of N\$105 000 calculated at N\$3500 per day for 30 weeks and that this amount was corroborated by Ms David who was employed as the sales lady. It was further submitted that the court *a quo* was aware of the fact that the best evidence was not before court, and decided to evaluate the evidence as best as it could to arrive at what it considered to be the most fair assessment of the lost profit.

The purpose of a pre-trial order

[45] In terms of the provisions of rule 26(4), the parties must jointly submit to the managing judge a proposed pre-trial order before the pre-trial conference. In this proposed pre-trial order the parties must cover specific issues *inter alia*, the issues of fact to be resolved during the trial, the issues of law to be resolved, all relevant facts not in dispute, and any proposal expediting the trial or hearing. It was stated that the 'primary concern at the pre-trial conference stage is that the managing judge is very clear about what is going to trial. The parties would have made suggestions as to what they consider to be in dispute and what not. The judge must go behind what the parties say is in dispute in order to satisfy himself or herself that the court is going to decide only that which is really in dispute between the parties'.⁶

[46] The managing judge must after the completion of the pre-trial conference, issue a pre-trial order. Even before the advent of the judicial case management process in the High Court 'parties engaged in litigation [were] bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want[ed] to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown'.⁷

⁶ See P T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* at p 204 para 8-039.

⁷ *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) at 337 para 21; See also *Filta-Matix (Pty) Ltd v Freudenberg & others* 1998 (1) SA 606 (SCA) at 614B-D.

[47] In respect of the second claim of N\$27 000, the parties agreed that an issue of fact to be resolved during the trial was *inter alia* whether or not plaintiff's vehicle contained an alleged amount of N\$27 000 which went missing during the time that his vehicle was taken into police custody. In respect of the third claim of N\$105 000, the issue of fact to be resolved was whether or not the plaintiff suffered a loss of profit in the amount of N\$105 000 which amount is allegedly made up of N\$3500 per week as a result of his vehicle being taken into custody. This was repeated under the section of the proposed pre-trial order in respect of issues of law to be resolved during the trial.

[48] In respect of the section⁸ of relevant facts not in dispute (it was stated at paras 3.19 and 3.20) as follows:

'3.19 That Defendants concede liability for the unlawful arrests and detentions for the following time periods:

3.19.1 31 October 2014 to 2 November 2014;

3.19.2 8 November 2014 to 10 November 2014;

3.19.3 24 April 2015 to 27 April 2015.

3.20 Defendants further concede liability for the unlawful act of impounding Plaintiff's vehicle. (sic)

⁸ As required by rule 26(6)(c) of the Rules of the High Court.

[49] It is apparent from the proposed pre-trial order⁹ that there were issues of fact in dispute in respect of the second and third claims as well as issues of law.

[50] The legal representative of the respondent informed the court *a quo* that the matter before the court involved unlawful arrest and detention and that the only issue in contention was in respect of quantum. The legal representative of the appellant did not dispute this.

[51] In view of the factual and legal issues in dispute it would have been prudent of the trial judge to clarify what the appellant meant by stating, in the proposed pre-trial order, that the appellant 'concedes liability for the unlawful impounding of Plaintiff's vehicle'. This was necessary in view of the fact that the appellant in the proposed pre-trial order did not dispute the statement that impounding respondent's vehicle 'was not legally justified by s 20(a) and (b) of the Criminal Procedure Act 51 of 1977.'¹⁰ What did the concession 'liability for the unlawful act' mean? Did it mean liability for the *damage or loss* resulting from or *caused* by the unlawful act or not? I understood the legal practitioner for the appellant's submission to mean that there was no liability conceded in respect of the *damage* or loss caused by the unlawful act of impounding the respondent's vehicle.

[52] Nevertheless, irrespective of what is contained in the pre-trial order it appears that the legal representatives had agreed prior to the commencement of the trial to

⁹ A pre-trial order does not form part of the appeal record but it appears from the record of the proceedings in the High Court that a pre-trial order has been 'filed and accepted'.

¹⁰ Section 20(a) and (b) authorises the State to seize certain articles in particular circumstances.

limit the issues to the question of quantum only. I say this for the following reasons: firstly in addition to the concession contained in para 3.20 of the pre-trial order referred to above, the legal practitioner acting on behalf of the appellant at the inception of the trial confirmed that the only issue in dispute was that of quantum.

[53] Appellant's legal representative at no stage during the trial contended, as is now asserted on appeal, that the causal connection between the unlawful act of impounding respondent's vehicle and any resultant damages, was still in dispute. Secondly, it is clear from the record of the proceedings that the only issue in dispute was quantum, as is apparent from the following exchanges during the cross-examination:

'MR NGULA: Yes, Mr Lazarus, as stated yesterday, it was unfortunate that you were arrested, that part is admitted. My questions will focus on the quantum, the amounts of money that you are claiming, mainly just focus on that. Mr Lazarus, you stated in your statement that you owned a bar, is that correct? - - - Yes.'

Emphasis provided.

'MR NGULA: Yes, yes My Lord, from the liquor licence I will move on to other aspects, however I am just starting with this.

COURT: Yes, but let us deal with it, is it a fair issue to raise at this stage, because nowhere, I mean liability is admitted.

MR NGULA: Yes, yes.

COURT: Was there at any stage where he was called upon to produce or even the defendant saying that the premises are operating illegally.

MR NGULA: My Lord, we did not raise it as an issue at that stage. My Lord, what I am trying to establish is whether there are any, he is in possession or whether he can provide apart from his word that he makes this amount of money, whether there are

other financial documents or documents that support that his bar does indeed operate and it does indeed make this amount of money, My Lord. That is where I am getting to.'

Emphasis provided.

[54] During cross-examination the respondent was questioned whether he mitigated his loss, due to the fact that he had no use of his motor vehicle, but there was no cross-examination about the remoteness of damages, ie about legal causation.

[55] It is trite law that the purpose of legal causation is to ensure that any liability on the part of a wrongdoer does not extend indefinitely without limitation and that remoteness operates as a limitation on liability – but this as is apparent from para 3.20 of the pre-trial order and the exchanges in court – was not an issue in dispute during the court proceedings. The court *a quo* was in my view thus perfectly entitled to state in its judgment that the only issue in dispute was that of quantum and to approach its judgment from that premise.

[56] I shall now consider the three claims on the basis the High Court did, namely, that quantum is the only issue called for consideration.

The first claim

[57] Most of the facts giving rise to the claims are common cause and were not disputed; the police officers did not testify in rebuttal of the evidence presented by the respondent.

[58] The legal practitioner for the appellant submitted in respect of the first claim that the court *a quo* misdirected itself when it considered various aggravating features not pleaded and other supposedly irrelevant factors. It was submitted that the court *a quo* impermissibly relied on the right to privacy where the house of the respondent was searched without a search warrant. It was submitted that the amount awarded by the court *a quo* was not commensurate with other amounts awarded by courts in Namibia and South Africa and that this court may 'relook' into the facts and make its own assessment. It was conceded on behalf of the appellant that in view of the particular circumstances of this case, the court *a quo* was justified in awarding 'an amount out of the normal', but it was suggested that an amount less than the amount awarded by the court *a quo* would be more appropriate.

[59] The legal practitioner for the respondent submitted that the amount of N\$300 000 was not excessive at all, considering that the respondent was wrongfully and unlawfully arrested on three different occasions, and invariably over weekends, which evinces malicious intent. This court was referred to comparative case law in support of the submission that the award granted by the court *a quo* was not unusual at all.

Evaluation on appeal

[60] In *Minister of Safety and Security v Tyulu*¹¹ the correct approach in respect of the determination of an award for damages, and which I endorse was aptly stated as follows:

'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.'

[61] In addition a court should keep in mind, in considering the appropriate award for damages, the effect inflation has on the value of money.

[62] I shall now briefly look at awards for damages made in previous comparative cases.

[63] In *Tyulu supra* 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.

¹¹ At 93D-F.

[64] In *Iyambo v Minister of Safety and Security*¹² 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 plaintiff worked as a primary school teacher and awarded damages in the amount of N\$12 000.

[65] In *Mlilo v Minister of Police & another*¹³ the plaintiff was unlawfully arrested at a border post, was detained for six nights, and she was released without ever appearing in court. The first defendant, 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 being N\$300 000.

[66] Returning to the present matter, I agree with the court *a quo* that the police officers were callous. They seriously abused their powers and acted as if they were beyond any level of accountability. To treat the respondent, who as a complainant sought the assistance of the police, in such a highhanded manner is inexcusable. The police officers acted as if they were 'a law unto themselves'. The legal practitioner for the appellant conceded that the police officers in this case acted with malice. An

¹² Unreported High Court judgment: (I 3121/2010) [2013] NAHCMD 38 (12 February 2013).

¹³ [2018] 3 All SA 240 (GP) (29 March 2018).

arrest is malicious when the defendant makes improper use of the legal process to deprive the plaintiff of his or her liberty, as happened in this case.

[67] The arrest of the respondent in the circumstances described above, clearly impaired the respondent's dignity, followed by the unlawful deprivation of his liberty and at one stage the respondent's life was threatened. The conduct of the police officers calls for serious censure and this court must show its displeasure with their depraved and repeated unlawful conduct.

[68] The legal practitioner for the appellant submitted that without the aggravating features of the respondent's arrest and detention having been pertinently pleaded, the court *a quo* appears to have used various such features as a basis to award the full amount claimed. It was submitted that the court *a quo* relied on the alleged violation of various constitutional rights, eg the right to privacy where the house of respondent was searched without a search warrant, whilst the respondent did not pertinently rely on those violations in his claim but simply claimed damages under the heading *contumelia*, ie insult or injury to self-esteem.

[69] Wrongful arrest consisting of the wrongful deprivation of a person's liberty, also may involve other aspects of a litigant's personality in particular his or her dignity.¹⁴

¹⁴ *Reylant Trading (Pty) Ltd v Shongwe & another* [2007] 1 All SA 375 (SCA) para 4.

[70] In *Sentrachmn Bpk v Wenhold*¹⁵ it was held that where a court of appeal had all the relevant evidence before it, it should not place undue emphasis on the pleadings, but should rather decide the case on the real issues canvassed during the course of the trial in the court *a quo*.

[71] I shall nevertheless approach the assessment of damages on the undisputed allegations in the particulars of claim and on the testimonies of witnesses called on behalf of the respondent. It is apparent from the particulars of claim and the evidence presented that the respondent was arrested in circumstances which indisputably impaired his dignity. He was repeatedly and unlawfully deprived of his liberty, harassed, and his life was threatened. Even though it was not pertinently stated in the particulars of claim that the arrests were malicious, this may be inferred from the particulars of claim. That the arrests were malicious was conceded by counsel acting on behalf of the appellant.

[72] Even if the court *a quo* had impermissibly relied on the violations of certain constitutional values (without so finding), this court is of the view that considering the factors mentioned in the previous paragraph, the eventual award by the court *a quo* was appropriate in aforementioned circumstances and should not be disturbed.

[73] I am of the view that the award for damages by the court *a quo* where the defendant had been deprived of his liberty for about ten days was not unusually

¹⁵ 1995 (4) SA 312 (A) at 320A-B; See also *Brink NO & another v Erongo All Sure Insurance CC & others* 2018 (3) NR 641 (SC) para 53.

excessive in the circumstances. In my view it was appropriate and should be confirmed.

Claim 2

[74] The respondent testified that an amount of N\$27 000 was placed by himself inside his motor vehicle shortly before the arrival of the police officers. This was confirmed by the witness Ms David. Ms David's testimony was further that whilst the vehicle was at the respondent's bar, after the respondent had fled the scene she saw no-one removing the money from the vehicle, prior to the vehicle being towed away. It is not clear from the evidence who towed the vehicle from the scene. What is however not disputed is that the vehicle was towed to the police station where it stood until such time when the respondent eventually received it from the police officers.

[75] The legal practitioner for the appellant submitted that the appellant never admitted liability for the loss of N\$27 000, and that the respondent himself appeared to suggest that the amount of N\$27 000 could have included an amount from a transport business which the respondent co-owned with somebody else. I am of the view that the origin of the money is irrelevant. The uncontested testimony was that Ms David and the respondent counted the money together and the amount was N\$27 000. There was no evidence gainsaying the testimony of the respondent that he placed this amount inside his motor vehicle. In my view it would amount to speculation that someone could have removed the money from the vehicle at the stage the respondent was chased by the police officers – there was simply no

evidence to infer such a finding. There is similarly no evidence that someone unknown could, during the process of removing the vehicle to the police office have stolen the money left by the respondent in his vehicle. This again would amount to speculation.

[76] I am of the view that the respondent proved the loss of N\$27 000.

In respect of the third claim

[77] The third claim was in respect of a loss of profit in the amount of N\$105 000 as a result of the unlawful impoundment of the respondent's vehicle. The court *a quo* awarded damages in the amount of N\$90 000. The original claim was in the amount of N\$70 000 but at the time of the trial had escalated to the amount of N\$105 000. The legal practitioner for the appellant took no issue with this increased amount.

[78] He instead submitted that the evidence presented did not support a claim of loss of profit, since the respondent in the particulars of claim pleaded loss of profit, respondent's evidence related to a claim of gross income.

[79] On behalf of the respondent, it was submitted that the court *a quo* decided the issue of damages on the evidence before it. It was conceded that the respondent did not produce any documentary evidence in support of his claim. The respondent in his discovery affidavit stated also that he had no relevant documents to support his claim.

[80] The salesperson, Ms David, testified in respect of the income at the bar on 'not so good days' that they would sell liquor in an amount of N\$1500 to N\$2500, and on 'good days' an amount of N\$4000 to N\$5000. The weekly or monthly income would depend on the month of the year. She testified that the respondent would on most occasions purchase stock in the amount of N\$7000 and would normally provide her with a receipt.

[81] The onus was on the respondent to prove that he made a loss of profit and this he had to prove on a preponderance of probabilities what the daily or weekly profit was. There was no evidence presented about normally expected expenses, eg salaries and other overhead expenses. In my view, even in the absence of any supporting documents, it would be pure conjecture to estimate any profits made. In any event the lack of any documentary proof must further count against the respondent. This must be so because the respondent testified that he was the holder of a liquor licence and in possession of a tax certificate, though this certificate was not tendered as evidence during the trial. Furthermore, from the evidence of Ms David it appears that there was some form of bookkeeping although the exact extent was also not disclosed during the trial. In my view, one could reasonably have expected in view of the testimonies, there to have been supporting financial documents reflecting the activities of the business (bar).

[82] The court *a quo* in its judgment, at para 68, admitted that Mr Ngula had 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’.

[83] The court *a quo* reasoned that the absence of any documentary evidence did not result in the respondent having to be non-suited particularly in the light of admission of liability by the appellant. The court *a quo* then surmised that if regard was had to the income on the bad days and the income on the good days an amount of N\$3000 per day would be considered ‘condign’ in the absence of documentary evidence.

[84] In my view this is a misdirection since there was no evidence presented by the respondent in respect of any daily *profit*. The court *a quo* calculated the alleged loss of profit based on the gross daily income.

[85] In general, a plaintiff has to allege and prove the quantum of damages suffered as a result of the unlawful act of the defendant. Where however damages are difficult to assess, a court may in the circumstances resort to an educated guess on such material placed before it.

[86] In *Esso Standard SA (Pty) Ltd v Katz*¹⁶ Diemont JA referred with approval to *Hersman v Shapiro & Co* 1926 TPD 367 at 379 where Stratford J is reported to have said 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.'¹⁷

[87] The important question therefore is whether the respondent, as plaintiff, has proved on a balance of probabilities that he has suffered loss of profit due to damage caused by the appellant, and that all the evidence reasonably available was presented during the trial?

[88] The legal practitioner for the respondent submitted that there are many people in Namibia who trade on an informal basis and rhetorically asked when they would then get justice in similar claims? The facts of this case however paint a different picture and it appears that the respondent in this matter was part of a more 'formal economy' than an informal one.

¹⁶ 1981 (1) SA 964 (A) at 970E-G.

¹⁷ See also *Caxton Ltd & others v Reeve Forman (Pty) Ltd & another* 1990 (3) SA 547 (A) at 573H-J; *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd & others* 1997 (4) SA 399 (SCA) at 412G-H.

[89] In view of the approach in *Esso (supra)* the answer to the question posed in para [87] above should be answered in the negative. There was documentary evidence available to the respondent which he reasonably could have produced but failed to do so. In these circumstances the court *a quo* was not bound, in my view, 'to resort to the rough and ready method of the proverbial educated guess'.¹⁸

[90] In my view the respondent should not have succeeded in respect of the third claim in the court *a quo*.

[91] In the result the following orders are made:

- (a) The appeal in respect of the first two counts is dismissed and the award for damages by the court *a quo* is confirmed.

- (b) The order of the court *a quo* in respect of the third claim is set aside and substituted with the following order:

'Absolution of the instance is ordered.'

¹⁸ *Hushon* at 412H.

- (c) The appellant pays the legal costs of respondent to include the costs of one instructing and one instructed legal practitioner, subject to the following *proviso*:

‘that the police officers Nghilinganye and Kokule succeed in persuading the court *a quo* not to order that costs should personally be paid, jointly and severally in the event that they appear before the court *a quo* as ordered’.

HOFF JA

SHIVUTE CJ

FRANK AJA

APPEARANCES

APPELLANT:

S Namandje

Instructed by Government Attorney

RESPONDENT:

G Narib

Instructed by Shikale & Associates