

**REPUBLIC OF NAMIBIA**



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

Case no: HC-MD-CIV-ACT-DEL-2018/00404

In the matter between:

**JOSPER CLOETE**

**PLAINTIFF**

and

**MINISTER OF SAFETY AND SECURITY**

**1<sup>st</sup> DEFENDANT**

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA** **2<sup>nd</sup> DEFENDANT**

**Neutral citation:** *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] NAHCMD 523 (12 November 2021)

**Coram:** Schimming-Chase J

**Heard:** 10 and 11 May 2021

**Delivered:** 12 November 2021

**Flynote:** Evidence – Mutually destructive versions – Proper approach restated – Where the onus rests on the plaintiff and there are two mutually destructive versions as aforesaid, the plaintiff can only succeed if the plaintiff satisfies the court on a preponderance of probabilities that the plaintiff's version is true and the defendant's version is false.

Damages — Quantum — Wrongful arrest, detention and assault — A plaintiff has to allege and prove the quantum of damages suffered as a result of the unlawful act of the

defendant. Where damages are difficult to assess, a court may resort to an educated guess on such material placed before it. Awards in other cases helpful — Court must take factual differences and circumstances into account — Factors such as period of detention, humiliation, impairment of dignity, violation of right to freedom and physical injuries to be taken into account in assessing quantum of damages.

**Summary:** The plaintiff, a major transgender woman, claims general damages from the first defendant, the Minister of Safety and Security for emotional and psychological shock, trauma, inconvenience and discomfort suffered by her as a result of an unlawful arrest and assault perpetrated upon her by a constable of the Namibian Police Force in the early hours of 6 July 2017.

The plaintiff alleged that on the day in question she was approached by a police officer in civilian clothing while patronising a fast food establishment in Windhoek. The officer unlawfully arrested the plaintiff and forced her into a police vehicle parked outside the establishment, whereafter the parties drove to a nearby police station. The plaintiff alleged that while inside the vehicle she was assaulted by the police officer, who punched her in her face, on her head and sides several times. The alleged assault continued once the parties exited the vehicle at the police station, when the officer eventually kicked the plaintiff in the abdomen. The plaintiff alleged that the assault was perpetrated on her because she is transgender. The plaintiff claimed damages in the amount of N\$200 000.

*Held that* the proper approach when the court is presented with mutually destructive versions, is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after applying its mind that the court would be justified in reaching a conclusion as to which opinion to accept and which to reject. Where the onus rests on the plaintiff, the plaintiff can only succeed if the plaintiff satisfies the court on a preponderance of probabilities that the plaintiff's version is true and the defendant's version is false.

*Held that* on the evidence presented, the plaintiff's version of events was reasonably probably true, whereas the evidence of the witness was on the whole, unreliable. Accordingly the court found that plaintiff had been wrongfully and unlawfully arrested

and assaulted by the police officer.

*Held that* members of the police force are clothed with authority, including powers of arrest and detention. That authority and position, requires them to act with more maturity and caution than an ordinary civilian. The type of behaviour emanating from those who have been appointed to serve, protect and maintain law and order in a dignified manner, shows a disappointing and egregious violation of the officer's professional duties, and a shocking invasion of a civilian's constitutional rights.

*Held that* 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.

In the assessment of damages for unlawful arrest and assault, it is important to bear in mind that the primary purpose of the award is not to enrich the aggrieved party but to offer him or her much needed solation for his or her injured feelings. It is accordingly crucial that serious attempts are made to ensure that damages awarded are commensurate with the injury inflicted.

Although the court accepted the plaintiff's version of events, her failure to provide any documentary or photographic evidence of her injuries or sufficient opinion evidence of the extent her psychological trauma and emotional shock made assessment difficult, and had an effect on the quantum of damages claimed.

The court awarded plaintiff damages in the amount of N\$50 000.

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### **ORDER**

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Having heard Ms Katjipuka-Sibolile for the plaintiff and Mr Ketjijere, assisted by Mr Kauari for the first and second defendants:

1. Judgment is granted in favour of the plaintiff against the first defendant in the amount of N\$50 000.
2. Interest to run on the aforementioned amount at the rate of 20% per annum from date of judgment to date of full and final payment.
3. There shall be no order as to costs.

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## JUDGMENT

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SCHIMMING-CHASE J

### Introduction

[1] The plaintiff, a major transgender<sup>1</sup> woman, claims general damages from the first and second defendants for emotional and psychological shock, trauma, inconvenience and discomfort suffered by her as a result of an unlawful arrest and assault perpetrated upon her by a constable of the Namibian Police Force on 6 July 2017. Damages claimed are set at N\$200,000.

[2] The first defendant, the Minister of Safety and Security, is the Minister responsible for policing in terms of section 1 of the Police Act 1990, Act 19 of 1990, and the relevant party to have been sued in this matter. First defendant will hereinafter be referred to as “the defendant”.

### The pleadings

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<sup>1</sup> The *Merriam-Webster* dictionary defines ‘transgender’ as a person whose gender identity differs from the sex the person has, or was identified as having at birth (definition available at <https://www.merriam-webster.com/dictionary/transgender>). Although the plaintiff was referred to in the masculine in the pleadings, it was agreed at the onset of the trial proceedings between the practitioners appearing for the parties that the plaintiff (who identifies as a transwoman) would be referred to by her chosen pronouns, being she/her. The court does so as well.

[3] The plaintiff alleged that on 6 July 2017 she was exiting from Kentucky Fried Chicken (KFC), a fast food establishment in central Windhoek, at around 02h45 with a friend, a certain Mr Geoffrey Hiuii (“Hiuii”), when she was approached by a group of men dressed in civilian clothing who identified themselves as police officers. The said police officers, without explaining anything to the plaintiff, grabbed and forced her into a police vehicle and drove off.

[4] Whilst in the police vehicle a certain police officer, referred to as ‘Kavari’ by the other officers, and later identified as Constable Kavari (“Kavari”), assaulted the plaintiff by beating her with his fists. He also hurled derogatory remarks at the plaintiff. The remarks included the word ‘moffie’, alleged in the particulars of claim to be a derogatory and degrading word used to insult ‘men of small stature and sometimes feminine trends’.

[5] The particulars of claim allege that at all relevant times, Kavari (and three other police officers who were present and failed to intervene during the alleged assault) was acting within the course and scope of his employment at the defendant, and had a duty – which he and the other police officers conversely failed to exercise - to:

- (a) protect the plaintiff against any threat or attack on her bodily integrity;
- (b) refrain from subjecting the plaintiff to unlawful arrest or detention;
- (c) protect the plaintiff against any insult or threats; and
- (d) refrain from subjecting the plaintiff to any physical or emotional harm.

[6] As a result of the assault, the plaintiff suffered emotional and psychological shock and trauma, inconvenience and discomfort for which she claims N\$200,000.

[7] In the alternative, the plaintiff alleged that as a consequence of the unlawful conduct of the defendant’s employees she suffered an infringement of her constitutional rights namely:

- (a) the right to liberty under Article 7 of the Namibian Constitution;
- (b) the right to freedom of movement under Article 21(1)(g); and
- (c) the right to dignity under Article 8.

[8] In the plea, the defendant admitted that Kavari was a member of the Namibian Police Force at the time of the incident, and that the plaintiff was taken to the police station in a police vehicle driven by Constable Shivera ("Shivera"). The defendant admitted that the persons referred to in the particulars of claim were also in the vehicle.

[9] The defendant however denied that the incident took place as alleged by the plaintiff and pleaded that the plaintiff initiated the attack on Kavari. In amplification it was pleaded that on 6 July 2017, Constables Shivera, Kavari and Mr Isaac, a civilian from the neighbourhood watch, stopped at KFC whilst on official duty in order to get some food. Kavari and Isaac entered the KFC establishment while Shivera, the driver of the vehicle, stayed behind waiting in the vehicle. Inside the KFC establishment, Kavari and Isaac found the plaintiff making noise. The plaintiff started exchanging words with Kavari and calling them (Kavari and Isaac) criminals as they were dressed in civilian clothing.

[10] The plaintiff was instructed to calm down but continued to act in a rowdy manner. She appeared very drunk and then wanted to spray the two with pepper spray before being escorted to the police vehicle by Kavari.

[11] According to the defendant, the plaintiff entered the police vehicle willingly, together with her friend, after being instructed to do so. The plaintiff and her friend were seated at the back of the police vehicle.<sup>2</sup>

[12] On the way to the police station the plaintiff continued to say things such as 'You don't know me and you are going to make me rich' and 'F### the police, they will see who I am'. The defendant further alleged that the plaintiff's friend tried to calm her down, 'however the plaintiff appeared so drunk that she overpowered her friend'.

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<sup>2</sup> A Toyota Quantum van with registration number POL9577.

[13] On arrival at the police station whilst the plaintiff was being removed from the vehicle, a struggle ensued. The plaintiff acted violently towards Kavari and he retaliated in self-defence by throwing punches back at the plaintiff who then went down gasping for air.

[14] The defendant pleaded that in the result, the plaintiff's emotional shock and trauma were self-inflicted and the defendant cannot be held liable for the plaintiff's reckless behaviour.

#### The pre-trial order

[15] It is not in dispute between the parties that on 6 July 2017, at about 02h00 the plaintiff was unlawfully<sup>3</sup> arrested at KFC, and taken to the police station. It is also agreed between the parties that the drive to the police station took approximately two minutes, whereafter 'an altercation took place between the plaintiff and Kavari'.

[16] At issue factually between the parties, and for the determination of this court, are:

- (a) the quantum of damages claimed and for purposes of the assessment; and
- (b) the facts leading up to the plaintiff's arrest and the altercation that took place at the police station.

[17] The legal issues for the court to determine are:

- (a) whether the plaintiff has proven the extent of the damages she suffered; and
- (b) whether the defendant has led sufficient evidence to mitigate the damages suffered by the plaintiff.

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<sup>3</sup> Prior to compiling the proposed pre-trial order, the defendant already expressly admitted the unlawfulness of the arrest in the joint case management report dated 26 February 2019.

### The evidence

[18] Three witnesses testified in this action. The plaintiff testified herself. Ms Laurika Williams testified for the plaintiff about events that transpired subsequent to 6 July 2017. Mr Reinhold Isaac (“Isaac”) a private citizen from the neighbourhood watch, who accompanied the two police officers (Kavari and Shivera) on the evening in question, testified for the defendant.

[19] The plaintiff advised the court that her friend Hiuii, who was present during the events in question, elected not to testify. He was also not subpoenaed to testify. According to the defendants, both Constables Kavari and Shivera could apparently also not be traced to testify.<sup>4</sup>

### The plaintiff’s evidence

[20] The plaintiff testified that on 6 July 2017, she and her friend Hiuii left a local entertainment outlet, “Chopsies Bar” at around 02h30 and headed on foot to the KFC establishment. After purchasing food, on their way out, and before they reached the door to exit, she handed over her food to Hiuii so that she could open the door. During this process, the plaintiff observed two men in civilian clothing approaching them. They informed the plaintiff that they were undercover police officers (although they never displayed their police badges or any other form of identification to the plaintiff), that they were looking for the plaintiff and that they were going to put her in jail. They grabbed the plaintiff and dragged her to a police van that was parked in front of KFC. The police officer identified as Kavari told her that he was going to lock her up. He specifically told her that:

‘I am going to teach you a lesson you f####ing moffie, I will put you in jail tonight.’

[21] Hiuii was still standing by the door of KFC when this happened. The plaintiff asked the gentlemen what they were doing. She initially assumed that the gentlemen were just trying to frisk them. At this point, Hiuii picked up the plaintiff’s purse and shoe that had fallen whilst the gentlemen were trying to force the plaintiff into the police

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<sup>4</sup> The witness list remained the same as set out in the proposed pre-trial order.

vehicle. The plaintiff however held the van door open and insisted that she would not leave without her friend.

[22] Hiuii was permitted to enter the vehicle, but he was ordered to sit at the back. Isaac also entered the vehicle and sat in the front (in the seat directly behind the driver's seat). Kavari entered in the back with Hiuii and the plaintiff. After closing the back of the vehicle, Kavari climbed on top of the plaintiff and began punching her with his fists on her head and on her sides. The plaintiff tried to curl into a ball in order to protect her ribs and her face, so Kavari continued to hit her on the head. One of the injuries she sustained was a black eye. According to the plaintiff, Kavari persisted in his assault, all the way to the police station.

[23] The vehicle arrived at the police station and after it came to a standstill it remained stationary for about one minute and twenty seconds. Thereafter Hiuii alighted, followed by the plaintiff.<sup>5</sup> She then asked Kavari (who was still in the vehicle) what she had done, and told him to put her in jail like he said he would. When Kavari exited the vehicle, the plaintiff repeated her question, as to what she had done. At this point, Kavari charged at the plaintiff, grabbed hold of her at the collar, and kicked the plaintiff in her abdomen, forcing her to stumble and fall towards the left rear wheel of the van, after which Kavari and Isaac got into the van and drove off.

[24] Hiuii then picked her up and they walked to the police station, where she approached a female officer on duty and reported that another police officer had assaulted her. At the time, however, she could not identify the name of the officer. The plaintiff was then instructed to return to the police station in the morning.

[25] The following Monday, the plaintiff visited the office of the Ombudsman and after the relaying the events that transpired, was informed that incidents of this nature would take time to get better and that if one looked at other countries, it takes some time before certain things are accepted and legalised. Another attempt was made by the Ombudsman's office to telephonically follow up on the charge at the central police

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<sup>5</sup> The plaintiff changed her evidence with regards to the order in which she, Isaac and Hiuii alighted the vehicle after viewing the video footage, which clearly showed that the plaintiff and Isaac exited the vehicle first, followed by Hiuii.

station. The response provided was that no case had been opened as yet. The plaintiff said that when she listened to the conversation she could hear the woman on the other side of the conversation ask, 'Ai, is it about that he-she? Just send her to the station commander'.

[26] The plaintiff then went to the police station to make an appointment with the station commander and was advised to return in the afternoon. The plaintiff called her friend, Ms Laurika Williams and asked her to accompany her (the plaintiff) to the appointment.

[27] In the afternoon, the plaintiff, with Ms Williams, met with the station commander and repeated her complaint. He responded that 'You people like to make small things big'.

[28] It then came to light that the security cameras outside the police station had recorded the events. The plaintiff was permitted to view the footage, after which the plaintiff was informed that the station commander would look into the matter. The station commander also said that it is just common assault and if she wanted, she could open a case based on that crime.

[29] The plaintiff informed the station commander that she was afraid to open a case because if the police officers knew of her whereabouts they might track her down and attack her again. The commander then informed her that she could simply register another case should that happen. Thereafter the plaintiff and Ms Williams went to the charge office. Statements were subsequently taken, and a criminal case was registered.

[30] The plaintiff testified that subsequent to this traumatic event, she started seeing a clinical psychologist who volunteered to assist her with therapy for a few sessions to help her deal with the traumatic events that had occurred. The plaintiff continued her sessions with the therapist once a week for four to six months. The plaintiff testified that she was really confused by the events, because she did not know what she had done to be assaulted in the manner that she was and especially because the assaults on her were perpetrated by a police officer in authority who had a responsibility to serve and protect.

[31] The plaintiff further testified that before the assault she was a well-known local personality, and that she had spent significant time in the public eye, hosting and planning local media events. After the assault, she ceased planning events and halted all work in the media. She started dressing down, and stifled her persona because she became afraid that she would be attacked again. She even stopped attending her usual entertainment spots, and became quieter and timid. She stated that this fear of being attacked persists, and that she struggles to make peace with what had transpired and how she had been treated. The plaintiff felt particularly aggrieved by “the system and the way things are designed”, because to her mind, she was targeted and attacked simply because she is transgender.

[32] The plaintiff testified that she had anxiety from childhood, as she had been consistently targeted because she was effeminate. However, despite this not being the first time that she was assaulted for being transgender, this last incident caused her anxiety to skyrocket because the police are people of authority, and if they could behave in the manner that they had, she could never trust those with a responsibility to protect her, especially if they could assault her at will without any consequences for their conduct.

[33] The plaintiff testified that she still remained afraid after the incident of 6 July 2017. She stated that she is always called a ‘he-she’ and because she is a transwoman, she had spoken extensively about her journey in the media. This is what made her quite well-known in the community because she spoke about discrimination against trans people and the LGBTQ community in general.

[34] The plaintiff testified that after the incident she left her job and moved out from where she had been residing. She tried to obtain assistance from the Legal Assistance Centre and continued therapy because she needed to try and make sense of the fact that despite people not knowing her, they judged her anyway. She felt sad and disappointed. She also experienced much pain after the incident, for which she sought medical attention. She was given some pain killers and was told to return if the pain did not subside.

[35] An important piece of evidence referred to by both parties and discovered by the

defendant, was the CCTV footage of the incident that was recorded via the security cameras at the Windhoek Central police station. This video was replayed a number of times during the trial and both witnesses were given the opportunity to testify, with reference to the CCTV footage.<sup>6</sup>

[36] As the witnesses' testimony about the footage is different, each witnesses' s evidence about the recorded events will be summarised below, followed by the court's own summary of the same footage.<sup>7</sup>

[37] The plaintiff's version of the recorded footage was as follows: Upon arrival at the police station, the police van was parked for roughly one minute and twenty seconds before the door opened. She stated that during this time, Kavari continued to assault her in the vehicle. It was Isaac who tried to stop the assault, and who told Kavari that 'it is enough'.

[38] Isaac was identified as having exited the vehicle first followed by her.<sup>8</sup> She testified that Isaac actually pulled Kavari off her, and then escorted her out of the van, followed by Hiuii. Kavari came out thereafter, and she asked him what did she do to warrant him threatening to lock her up. She told Kavari that now that they were at the station, he should lock her up like he said he would. Kavari then grabbed her by her collar, and shoved her against the vehicle, but Isaac tried to push her out of harm's way, and she stumbled back when Kavari released her.

[39] The plaintiff approached Kavari again. She asked 'why are you continuing to assault me, you said you are going to lock me up, go and lock me up right now, that is what you said, why do you have to hurt me'. The plaintiff testified that she then, in 'an imperfect moment' swung her handbag at Kavari and missed, this is when Kavari grabbed her and kicked the plaintiff in her abdomen.

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<sup>6</sup> Despite being in possession of the video recording, both parties failed to include their own observations of the events in their witness statements. This resulted in the video having to be replayed a number of times, and was an exercise that could have been undertaken in a less time consuming fashion. The provisions of rule 92(1) are clear. The witness statement must contain the oral evidence intended to be adduced by the witness at the trial.

<sup>7</sup> The video is 3 minutes and 28 seconds long.

<sup>8</sup> She corrected her earlier evidence that she and Hiuii alighted first.

[40] When she was asked why she swung her bag at him, the plaintiff responded that she was angry because she was threatened to be locked up and then beaten for no reason, all the way from KFC to the police station. Only for her to be dropped off, with Kavari leaving like nothing had happened.

[41] During cross examination it was put to the plaintiff that her version of events was entirely false and that the plaintiff was the one making a nuisance and noise at KFC. If was further put to the plaintiff that the defendant's version was that she was taken into custody after a noise complaint from an employee in KFC who asked her to lower her voice, and after she refused, Kavari asked her to lower her voice, but because the plaintiff did not lower her voice and continued being unruly and a nuisance, she was taken into custody.

[42] It was also put to the plaintiff that she accused Kavari of trying to steal her cell phone, that she swore at them and threatened them with a pepper spray. The plaintiff denied this. She maintained that she did not make noise, and that Kavari and Isaac never even entered the KFC establishment. She reiterated that they met at the door as she and Hiuii were about to exit the establishment. The plaintiff denied ever threatening the two gentlemen. She reiterated the events contained in her evidence in chief.

[43] It was also put to her that she accused Kavari of being a thief and attempted to spray him with pepper spray after which she was arrested and handcuffed. She also denied that there was any pepper spray in her handbag.

[44] When asked whether she was under the influence of alcohol, she stated that she had two beers at Chopsie's and then consumed water shortly before midnight.

[45] According to the plaintiff, Kavari initially wanted to drive off with the plaintiff alone and she was afraid to go with him because she had no identification on her and because the gentlemen who said that they were undercover police had also not identified themselves, or even produced badges. This frightened her that much more, which is why she tried to resist getting into the vehicle until Hiuii could accompany her.

[46] It was further put to the plaintiff that she was not at all touched in the vehicle. The version put to her was that all Kavari had done was to try to loosen the handcuffs placed on the plaintiff on the way to the police station, because the plaintiff had complained that they were too tight. Whilst he tried to remove the handcuffs, the plaintiff resisted and started kicking Kavari. The plaintiff denied that she had been handcuffed. She testified that Kavari had her pinned down while he assaulted her and she recalled Isaac trying to get Kavari off of her.

[47] It was put to her that during the ride to the police station, the plaintiff informed the officers that they did not know her, and that they would make her rich. The plaintiff conceded that there was a verbal exchange and that she might have sworn at Kavari while he was assaulting her, but she denied that she told them that they would make her rich.

[48] She was also asked why she behaved in an aggressive manner towards Kavari after they arrived at the police station. She replied that she was very angry at the assault perpetrated on her for no reason, and she approached Kavari to ask him why he assaulted her, and why he was not taking her to jail like he said he would. She wanted to be answered. She wanted to know from him what she did to be treated in the manner in which she was treated, and she reiterated that this was an 'imperfect moment'.

[49] It was put to her that she was kicked by Kavari in self-defence as a result of her aggression and attempted attack<sup>9</sup> on Kavari. The plaintiff admitted that she swung her bag at Kavari (and missed) because she was angry at the unprovoked assault on her. Although she conceded that it was an imperfect moment, the plaintiff denied that the kick by Kavari in her abdomen was in self-defence. She stated that this was a continuation of the attack on her which commenced in the police van. She testified that there were three grown men that were able to subdue her and take her to the police station and that there was no way that any action by Kavari could have been undertaken in self-defence. Even Isaac tried to stop the assault on the plaintiff.

[50] As regards the plaintiff's damages claim, the plaintiff was questioned about the absence of any psychological report or other document speaking to the emotional trauma

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<sup>9</sup> The attempted attack being that she swung her handbag at him

that she allegedly suffered. She was also questioned about the fact that no opinion evidence was presented on her emotional and psychological state, despite the fact that she saw a psychologist. In response, the plaintiff testified that she left all her documents (including photographs depicting her injuries) with the Legal Assistance Centre, and that the psychologist was not prepared to be a witness. That in essence concluded the evidence of the plaintiff.

[51] Ms Laurika Williams (“Williams”) testified for the plaintiff. Williams has been employed as a broadcast journalist with the Namibian Broadcasting Corporation (NBC) for the past nine years.

[52] Williams confirmed that the plaintiff called her in tears after the ‘attack’ on Monday, 10 July 2017 and described the events to her. The plaintiff requested her assistance to go and make a case at the police. After they arrived at the police station she corroborated the plaintiff’s evidence relating to the plaintiff’s conversation with the station commander.

[53] Williams further testified that although she is not a close friend of the plaintiff and that they did not see each other regularly, she knew the plaintiff well enough and had observed that the plaintiff’s personality had undergone considerable change since the incident.

[54] Prior to the incident the plaintiff was very outgoing and social. The plaintiff was a well-known MC and a recognisable face in the entertainment industry in Windhoek, especially as an advocate of rights of trans people and the LGBTQ community in general. Williams observed a significant decline in the plaintiff’s self-confidence and social presence after the events of 6 July 2017. She also observed a substantial change in the plaintiff’s personality from an outgoing, confident and gregarious person, to a quiet, timid and insecure person.

[55] Apart from the above, most of the evidence presented by Williams was not of assistance to the court and accordingly irrelevant because her evidence related to events post the incident, including her opinion of the contents of the video. She was not meaningfully cross-examined on those aspects of her testimony that were relevant to a

determination of this matter.

### The defendant's evidence

[56] The only witness that testified on behalf of the defendant was Isaac.

[57] Isaac testified in chief that during July 2017 he was a member of the neighbourhood watch for Pionierspark volunteering with the Namibian Police, Community Affairs Subdivision. He assisted the neighbourhood watch with administration, which included typing schedules for meetings and being part of the planning committee.

[58] On Thursday, 6 July 2017 at an unknown time after sunset, Isaac accompanied Shivera and Kavari of the Namibian Police Force on their evening patrol around the City of Windhoek. They stopped off at KFC to collect something to eat. Isaac and Kavari entered KFC while Shivera remained behind in the police vehicle.

[59] They were standing in the queue when they heard an employee of KFC asking an unknown person to speak softer because there were other people there as well. They approached the unknown person<sup>10</sup> and Kavari informed her that he is a police officer and that she should talk softer because there are other people. The person then turned around and accused Isaac and Kavari of wanting to steal her phone and then Kavari repeated that he is a police officer.

[60] Kavari showed her his police badge and the person took out a pepper spray. Kavari held her hand, turned her around and proceeded to the vehicle. He asked Isaac to help him take the person away from there. He then arrested the plaintiff at the door, pushed her into the van and put her in the back seat.

[61] Kavari then asked the plaintiff's friend<sup>11</sup> whether he wanted to accompany her and perhaps phone someone. Hiuii agreed, entered the vehicle and sat next to the arrested person. Isaac testified that he was seated behind the driver and that Kavari was in the row of seats behind him while the plaintiff and her friend sat immediately behind Kavari.

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<sup>10</sup> Identified at the trial as the plaintiff, and hereinafter referred to as the plaintiff.

<sup>11</sup> It is not in dispute that his person was Hiuii.

[62] Kavari and the plaintiff exchanged a lot of words and used a lot of profanity during the drive to the police station. At one stage she told Kavari that 'You police guys. You don't know who I am, I will sue you and you will make me rich'. The plaintiff phoned her father and told him that she was arrested for a reason unknown to her and was being assaulted, but this was however not true.

[63] The plaintiff also complained that the handcuffs were too tight and Hiuii asked Isaac if they were going to leave the handcuffs on. Kavari approached the plaintiff to remove the handcuffs but the plaintiff then proceeded to start kicking Kavari who immediately returned to his seat.

[64] On arrival at the police station, Isaac exited the vehicle first, and took out the bags and other items from the car while Kavari removed the plaintiff's handcuffs. The plaintiff then exited the vehicle and proceeded to argue and act violently towards Kavari by punching him. Kavari retaliated by kicking the individual and as a result the plaintiff went down gasping for air.

[65] Kavari was supposed to detain the individual for drunkenness to be released once sober, but Shivera (who was the driver of the vehicle), received a telephone call that required their immediate attention. Before leaving to attend to the emergency, Kavari instructed another officer who was present to take the people (the plaintiff and Hiuii) to the police station.

[66] That was the end of the witness statement. Isaac amplified<sup>12</sup> the contents of his witness statement. With regard to the events that transpired at KFC, he testified that after the employee at KFC asked the plaintiff to speak a bit softer. Hiuii told the plaintiff: 'Mercedes can you please lower your voice'.

[67] Isaac also denied that the plaintiff was assaulted by Kavari. His response to the question from the defendant's counsel on the issue was 'No, there was no such thing'. Isaac instead observed the plaintiff as resisting arrest, because she was informed twice by Kavari that he was an undercover police officer in civilian clothing.

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<sup>12</sup> No objections made to this amplification.

[68] The only assault that took place, according to Isaac, was the plaintiff's assault on Kavari which started when Kavari tried to loosen the handcuffs. The plaintiff apparently started kicking at Kavari to prevent him from approaching her. A lot of profanity was apparently also exchanged between the parties.

[69] Isaac also denied that he ever told Kavari to stop the assault on the plaintiff. He testified that the plaintiff was sitting at the back seat, Kavari was directly behind Isaac, and he (Isaac) was seated right behind the driver. Detainees, according to Isaac, were usually put in the back seat.

[70] When asked by the defendant's counsel why they took the plaintiff to the police station, Isaac testified that the reason they approached the plaintiff and her friend was that they were making noise and the plaintiff – in his opinion – was visibly drunk, in his opinion because they were rowdy. So they had to be taken to the police station to sober up.

[71] Isaac was given an opportunity to view the video footage. He was asked why it took a while before the door was opened after the van arrived at the police station. The witness responded that as they were approaching the police station Shivera received a phone call. Whilst Shivera was talking on the phone the car was still moving and there was still a 'back and forth' between Kavari and the plaintiff. When the vehicle came to a standstill, Kavari instructed Isaac to get the door. Kavari was struggling to get the handcuffs off the plaintiff in the vehicle. She was resisting any and all moves from Kavari. Because of this, he (Isaac) opened the door first, and Kavari asked him to call the other officer (who was walking towards the vehicle from the station) for assistance because Isaac was not permitted to 'handle' the plaintiff as he was not a police officer. So he was the first person to get out of the vehicle.

[72] After Isaac exited the vehicle, Hiuii lifted his chair from the front and alighted and the plaintiff then followed. It was a scuffle<sup>13</sup> to get her out of the vehicle because the plaintiff kept on asking 'Why are you arresting me, why are you doing this what, what, what'. Isaac then pushed her to his side and she waited there until Kavari got out. The

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<sup>13</sup> The word used was 'deurmekaar'.

insults between the two were still flying. Kavari said 'Ja jou f###ken dom, jy is 'n f###ken moffie.' and the plaintiff responded 'Dis net 'n ander moffie wat 'n ander moffie sien'. She said 'Julle polisiemanne sal my betaal' and 'You guys are going to make me rich; we are going to f###king sue you.'

[73] During this exchange, the plaintiff's friend (Hiuii) said 'Hou op Mercedes.' 'Please just stop it, is fine, now we are here at the police station, now why do you keep going back'. The plaintiff responded 'Nee, hy sal my wys hoekom het by my hier gebring ... I do not have to be here.' As the plaintiff tried to approach Kavari, Isaac continued to try to push the plaintiff behind him but she kept on coming for Kavari. The plaintiff then said to Kavari 'Why are you bringing me here?' She came past Isaac and swung her bag in an attempt to hit Kavari. This is when Kavari kicked the plaintiff in her abdomen.

[74] When asked why the plaintiff kicked Kavari, he responded that according to his observation Kavari wanted to stop the plaintiff from approaching him because she kept on coming back, and then he kicked her in the abdomen and the plaintiff went down gasping for air. The other officer was instructed then to take them in to dry out, and they moved to take care of another emergency.

[75] Isaac was asked why he thought that the plaintiff was under the influence of alcohol. Isaac responded that she was rowdy and 'In my opinion, the person was visibly drunk, my own personal opinion'.

[76] During cross-examination, Isaac was questioned about a previous statement made under oath three years earlier (on 31 May 2018, just under a year after the incident) to the police. Isaac initially did not remember making a statement, however the statement was discovered by the defendant and a copy was handed to him. After Isaac confirmed his signature and that he indeed made the statement, it was read into the record, as follows:

'... when we entered, I noticed an unknown person whom we found inside making noise, and as we got closer to the counter, a particular individual was making noise, started exchanging words with Constable Kavari and calling us criminals as we were dressed as civilian. Constable Kavari then requested that particular individual to calm down because it was a public place. The

unknown person suddenly took out pepper spray from the handbag which was in his possession and pointed to our direction, whereby Constable Kavari immediately said 'Let us detain this person' because he was clearly under the influence of alcohol. And we did so and put him in the official police vehicle and drove to the police station.

Upon our arrival at the police station Constable Kavari went to remove the individual from the vehicle and a struggle ensued. The individual was acting violently towards Kavari, whereby the individual starting throwing punches at Constable Kavari who retaliated and threw punches back at the individual. And as a result the individual went down gasping for air. Kavari was supposed to detain the individual for drunkenness and unfortunately Kavari received a call that needed to get immediate attention.'

[77] In cross-examination the inconsistencies between his earlier statement and the contents of the witness statement and evidence under oath were put to Isaac for comment, in particular on the following aspects:

(a) with regard to the events on entering KFC, the earlier statement made no mention of the fact that, as testified, Isaac and Kavari came to the assistance of an employee who asked the plaintiff to keep her voice down whilst they were in the queue. In his statement made in 2018 it was Isaac and Kavari who of their own accord found someone inside making noise as they got closer to the counter. Although the witness noted the differences, he was unable to add anything further to his viva voce evidence;

(b) it was also put to Isaac that his earlier statement made no mention of Kavari showing his badge. Also his statement referred to both parties throwing punches, which was not mentioned in his evidence, nor was it apparent from the video footage. Again the witness selected to stand by his evidence in chief but he did mention that he was not sure whether the pepper spray was confiscated or not;

(c) there was no mention in the statement made in 2018 of any handcuffs being placed on the person of the plaintiff or removed from the plaintiff at any time. It was put that this was an important feature of his testimony in that he testified that the plaintiff was placed in handcuffs, that the plaintiff specifically said that the handcuffs were too tight; and further that when Kavari approached the plaintiff to remove the handcuffs, she started kicking Kavari. Again, no explanation was provided for the discrepancy, and Isaac

stood by his testimony.

[78] It is also to be noted that in his evidence in chief, Isaac testified that during the drive to the police station, the plaintiff phoned her father and told him that she was being arrested for a reason that was unknown to her and was being assaulted. On questioning from the court as to how it was possible for the plaintiff, if she was in handcuffs, to phone her father, Isaac replied 'Maybe at that moment she and Kavari they were most probably busy with the stuff there behind. Maybe at that moment she said I'm going to call my father'.

[79] On questions from the court Isaac conceded that the aggressive behaviour of Kavari towards the plaintiff did not amount to proper conduct by a police officer. However he did testify that the plaintiff also brought it on herself because she was behaving aggressively towards, alternatively not moving away from Kavari, who on her own version was a clear and present danger and threat to her.

#### The video evidence

[80] The court had the opportunity to view the video footage.

[81] The video footage is not of the best quality. Due to the fact that it was dark and the street was not very well lit, it was difficult for the court to make out everything that happened. The following is however apparent from the court's observation of the recording.

[82] Firstly, the police van arrived with blue lights flashing and parked outside the police station. The vehicle remained stationary with a closed door for approximately one minute and twenty seconds, after which the sliding door of the vehicle was opened. At the same time a police officer with an orange and yellow vest approached the police vehicle from the station. The first person to alight from the vehicle was Isaac from the neighbourhood watch. He also identified himself as such. Immediately thereafter, the plaintiff stepped out of the vehicle and stood immediately to the left of Isaac. Isaac's hand can be seen pulling the plaintiff towards his left side, seemingly out of the way. The plaintiff's friend, Hiuii (who was wearing white trousers) alighted the vehicle immediately

after the plaintiff and went to stand about two steps to the right of Isaac. When the police officer in the orange and yellow vest reached the vehicle, a third person alighted from inside the vehicle who was identified by both plaintiff and Isaac as Kavari.

[83] The plaintiff then stepped forward, and it is clear that the plaintiff addressed Kavari. The plaintiff's evidence on this aspect was that she asked Kavari to accompany her to the police station and charge her like he had threatened to. She also asked him why he had assaulted her. From the footage it is clear that the plaintiff was aggravated and she confirmed that she was very angry and upset at the situation. As the plaintiff stepped forward and closer, she also pushed Isaac's hand out of her way and appeared to be approaching and conversing with the police officer in the orange and yellow vest, who at the time was standing next to the open vehicle door. While she was speaking to that officer, it is clear that Kavari stepped towards the plaintiff and grabbed her by the collar with his left hand. His right arm was at his side, slightly pulled back, as if he would punch the plaintiff. Kavari aggressively pushed and pulled the plaintiff backwards and forwards. Isaac and Hiuii then stepped in to attempt to separate them, together with the officer in the orange and yellow vest. This apparently did not work. Then the plaintiff also hit at Kavari, in an effort to release Kavari's hold on her, and then swung at Kavari with her handbag, but he continued to hold her by her collar and push and pull her in an aggressive manner. The plaintiff was then abruptly released and she stumbled backwards, but found her feet and got out of harm's way.

[84] Immediately thereafter, the plaintiff rushed forward towards Kavari again and swung her handbag at him. Kavari once again grabbed the plaintiff by her collar, this time with both hands, and another scuffle ensued with the officer in the orange and yellow vest attempting to separate the two again. This time Kavari drew his leg back and kicked her in the abdomen. The plaintiff stumbled back, towards the left rear of the vehicle, clearly doubled over in pain. The plaintiff's friend then came to pick her up and the two of them slowly walked in the direction of the police station.

[85] The recording ends with the plaintiff and Hiuii walking towards the police station and Isaac still standing outside the police vehicle with the police officer in the orange and yellow vest walking around the front of the vehicle towards the driver<sup>14</sup>. The entire

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<sup>14</sup> It is not in dispute that the vehicle drove off to attend to another official matter.

recording lasted about 3:28 minutes. From the time that the vehicle door opened up to and until the plaintiff was kicked in the abdomen lasted about one minute and twenty seconds.

### Evaluation of the evidence

[86] It is now trite that once the court is faced with two mutually destructive versions, the court is judicially guided as to the approach to evaluating the conflicting evidence. This guidance has been reiterated over a long time of judicial pronouncements on the relevant principles, which are as follows: The plaintiff can only succeed if she satisfies the court on a preponderance of probabilities that her version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court must weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept her version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes her and is satisfied that her evidence is true and that the defendant's version is false.

[87] The proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. Where the onus rests on the plaintiff and there are two mutually destructive versions as aforesaid, the plaintiff can only succeed if the plaintiff satisfies the court on a preponderance of probabilities that the plaintiff's version is true and the defendant's version is false.<sup>15</sup>

[88] It is not in dispute that the arrest was unlawful. It is also not in dispute that the ride from the KFC establishment took approximately two minutes, and that the vehicle

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<sup>15</sup> *National Employers Insurance Company v Jagers* 1984 (4) SA 437 (E) at 440D-G; *Afrikaner v Frederick* (I 2043/2004) Maritz J (18 November 2004) at 10.

remained stationary for about one minute and twenty seconds before the door opened and Isaac stepped out.

[89] The contents of the video recording are not in dispute. However, the witnesses' interpretation of the events contained in the video footage is in dispute, insofar as it relates to who was the aggressor.

[90] The plaintiff's evidence in chief was not really successfully tested in cross-examination. Her recollection of events as amplified by her testimony on what happened with reference to the video evidence was not meaningfully disturbed. To the court she remained a credible witness, and she conceded that although she could have walked away when the vehicle came to a standstill, she was too angry, and too triggered by the events that had unfolded to do so. She had been arrested without cause, and then after being assaulted, the officer simply wanted to drive off instead of charging her as promised. She also admitted swinging her handbag after Kavari attacked her. She however denied that she did so as an aggressor, and pleaded that her actions were in defence to a continued attack on her. She also admitted to exchanging insults with Kavari in the vehicle. The nature of the insults are clear from her evidence in chief.

[91] Mr Isaac, on the other hand, was not as forthcoming in his testimony, and some of his evidence simply did not make sense. For example, much of his evidence centred on the plaintiff being drunk and rowdy, and then being placed in handcuffs in the vehicle. Also, he was clear in his evidence that the plaintiff started kicking Kavari when he tried to loosen her handcuffs. Isaac was adamant in his testimony that the plaintiff phoned her father during the ride to the police station and informed him that she was being arrested for no reason, and was being assaulted. However, when questioned as to how the plaintiff (who denied that she was even handcuffed) would manage to phone her father whilst in handcuffs, he was constrained to eventually admit that he could not for certain state that she called her father '... I could not be sure, but with me saying she phoned her father, that was one hearing "I call my father; I will sue them"'.

[92] This testimony also makes it apparent that he did not see everything that happened behind him. Although it cannot be said that the witness was dishonest, his evidence lacked credibility in the sense that he embellished it to suit the case that the

defence sought to meet, namely that the plaintiff was the aggressor. It needs to be noted that the defendant did not call any of the police officers involved. Counsel for the defendant simply stated that the witnesses could not be traced.

[93] The video evidence also makes it clear that from the time Kavari stepped out of the vehicle after the plaintiff, that he was the aggressor at all times.<sup>16</sup> He reached out to grab the plaintiff, but Isaac pulled her behind him. When the plaintiff approached and tried to speak to the officer in the orange and yellow vest, Kavari grabbed her again at her collar and pushed and pulled her around, and it appeared as though he intended to punch her, forcing all three gentlemen as well as the plaintiff, to remove his hand from her collar. It is true that the plaintiff came back at Kavari after she was abruptly released – this is apparent from the video. This resulted in Kavari grabbing her again and kicking her in the abdomen. The impact of the kick caused the plaintiff to double over in pain.

[94] Mr Isaac's interpretation of the video footage was also not credible. The picture spoke for itself.

[95] Therefore the court accepts the version of the plaintiff as reasonably possibly true in the circumstances. In particular the plaintiff's version of how she came to be placed in the police vehicle against her will, together with Kavari's assault on her in the vehicle is accepted on the balance of probabilities.

[96] The plaintiff was clearly wrongfully and unlawfully arrested and assaulted by Constable Kavari..

### Damages

[97] The Supreme Court has recently approved the established approach in the determination of a general damages award.<sup>17</sup>

[98] In general, a plaintiff has to allege and prove the quantum of damages suffered as

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<sup>16</sup> This was vehemently denied by Isaac who was an eye witness

<sup>17</sup> *Government of the Republic of Namibia v Benhardt Lazarus* (unreported) SA54/2017 delivered on 9 September 2021.

a result of the unlawful act of the defendant. Where however damages are difficult to assess,<sup>18</sup> a court may in the circumstances resort to an educated guess on such material placed before it.<sup>19</sup>

'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.'<sup>20</sup>

[99] In the assessment of damages for unlawful arrest, it is important to bear in mind that the primary purpose of the award is not to enrich the aggrieved party but to offer him or her much needed solation for his or her injured feelings. It is accordingly crucial that serious attempts are made to ensure that damages awarded are commensurate with the injury inflicted. The court must also be astute to ensure that the awards made for such infractions reflect the importance of the right to personal liberty and the seriousness with which any deprivation is viewed in our law. The constitutional right to individual freedom and dignity is a paramount consideration, and the personal circumstances of the victim, the nature, extent and affront to his or her dignity and sense of self-worth accordingly play an important role in the overall assessment.<sup>21</sup>

[100] It is to be noted that determining an award of damages with any mathematical accuracy for this kind of *iniuria* will be an impossible task. Therefore the court will as part

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<sup>18</sup> In this instance the difficulty is amplified by the failure of the plaintiff to provide a single picture of her injuries or provide a medical report showing that she sustained the injuries complained of as well as the extent of those injuries. Additionally, the plaintiff's failure to assist the court with sufficient opinion evidence to enable it to properly assess the emotional shock, especially her condition post the assault has affected the quantum of her damages.

<sup>19</sup> *Government of the Republic of Namibia v Benhardt Lazarus* (supra) SA54/2017 at [85]

<sup>20</sup> Per Stratford J in *Hersman v Shapiro & Co* 1926 TPD 367 at 379 approved *Government of the Republic of Namibia v Benhardt Lazarus* (supra) para 86.

<sup>21</sup> *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).

of its assessment exercise, consider comparative awards in previous cases, with the caveat that regard must be had of all the facts of each particular case.<sup>22</sup>

[101] As regards the assault on the plaintiff, Watermeyer J in *Stoffberg v Elliott*<sup>23</sup> said the following in relation to an assault:

‘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 interfered with has a right to claim such damages as he can prove he has suffered owing to that interference.’<sup>24</sup>

[102] Psychological or mental harm is usually brought about by an assault through the causing of fear and emotional shock.<sup>25</sup>

[103] Finally, in considering the appropriate award for damages, the effect of inflation on the value of money is also to be borne in mind.<sup>26</sup>

[104] A consideration of awards made for damages in previous comparative cases, starting with the *Lazarus* case, is now undertaken. In *Lazarus*, 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 warrant on three occasions and kept on each occasion for over 48 hours at the Wanaheda Police station<sup>27</sup> without charge. He was threatened and humiliated. His house

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<sup>22</sup> *Government of the Republic of Namibia v Benhardt Lazarus* (supra) para 60 and the authorities collected there.

<sup>23</sup> *Stoffberg v Elliott* 1923 CPD 148.

<sup>24</sup> *Stoffberg* at 148. See also *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).

<sup>25</sup> Visser & Potgieter, the Law of Damages 3<sup>rd</sup> Edition, Juta.

<sup>26</sup> *Minister of Safety and Security v Lazarus* (supra) para 61.

<sup>27</sup> The conditions of the cells was described by Masuku J in the judgment of this court as deplorable. ‘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’.

was also ransacked after the first 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\$300,000.00 on 9 September 2019.

[105] In *Minister of Safety and Security v Tyulu*,<sup>28</sup> 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.

[106] In *Iyambo v Minister of Safety and Security*<sup>29</sup> 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. 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.

[107] In *Mlilo v Minister of Police & another*<sup>30</sup> the plaintiff was unlawfully arrested at a border post, was 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.

[108] In *Naholo v the Government of the Republic of Namibia*<sup>31</sup> the court awarded N\$10 000 to the plaintiff for an assault perpetrated on her by police officials whilst in custody<sup>32</sup>. The facts established were that she was slapped a number of times by a police officer

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<sup>28</sup> *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93 d-f.

<sup>29</sup> *Iyambo v Minister of Safety and Security* Unreported (I 3121/2010) [2013] NAHCMD 38 (12 February 2013).

<sup>30</sup> *Mlilo v Minister of Police & another* [2018] 3 All SA 240 (GP) (29 March 2018).

<sup>31</sup> *Naholo v the Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/00505) [2020] NAHCMD 553 (2 December 2020).

<sup>32</sup> An unlawful arrest was not proved.

whilst in custody.<sup>33</sup> The award was made in December 2020.

[109] In *Sheefeni v Council of the Municipality of Windhoek*<sup>34</sup> the plaintiff, a taxi driver, was unlawfully arrested and detained following a traffic violation. In the course of the arrest plaintiff sustained injuries when his head hit a curb after he was pulled from the taxi he had been driving at the time. The plaintiff was then detained for six hours and suffered damages as a result of the injuries sustained. For the unlawful arrest and detention, the court awarded the amount of N\$50 000.<sup>35</sup>

[110] Members of the police force are clothed with authority, including powers of arrest and detention. That authority and position, requires them to act with more maturity and caution than an ordinary civilian. In this regard it is worth mentioning that Kavari was never, according to the video footage, in a position that warranted his mistreatment of and discrimination against a private individual, and this behaviour is aggravated by the fact that the arrest was unlawful. This type of behaviour emanating from those who have been appointed to serve, protect and maintain lawfulness in a dignified manner, shows, on the part of Kavari, a disappointing and egregious violation of his professional duties to the public. In fact, that he was not even present to testify remained an elephant in the room.

[111] I am also mindful of and record my respectful agreement with the statements made by Masuku J in this court (the decision having been confirmed on appeal) in *Lazarus v Ministry of Safety and Security*,<sup>36</sup> to the effect that

‘ [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

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<sup>33</sup> *Naholo* para 26.

<sup>34</sup> *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

<sup>35</sup> *Sheefeni* para 26.

<sup>36</sup> *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)* (I 2954/2015) [2017] NAHCMD 249 (30 August 2017).

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.<sup>137</sup>

[112] Therefore, and in its assessment, the evidence of the plaintiff relating to why she reacted the way that she did is accepted. Her actions were not of the type expressed in *Sheefeni*<sup>38</sup> In fact, one can only imagine the effect on the psyche of being picked up by plainclothes police, threatened to be arrested, unlawfully arrested, then beaten and insulted and thereafter dropped off for the police officer to then continue on his merry way as if nothing serious had occurred. It is also to be remembered that upon arrival, the plaintiff was assaulted again. It is understandable that in those circumstances, she acted out, or tried to retaliate or defend herself by swinging her handbag.

[113] In any event, the police officer had the responsibility to act in a trained and professional manner. Instead, he assaulted a member of the public like it was a right. The Constitution directly prohibits this. Citizens have after all given their lives so that citizens could be treated with dignity by people in power today.

[114] It stands to reason that the plaintiff suffered emotional shock<sup>39</sup> and would as a result live in fear and retreat from society. It would also stand to reason that she would attend counselling to help her come to terms with what happened to her and empower her to move forward.

[115] Despite the unjustified, unacceptable and shameful conduct of the police, and the

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<sup>37</sup> *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)* (I 2954/2015) [2017] NAHCMD 249 (30 August 2017).

<sup>38</sup> *Sheefeni* supra para 26.

<sup>39</sup> See *Sheefeni* supra.

courts' adoption of a stricter approach to cases of this kind to mark its dissatisfaction with the behaviour of those tasked to protect our community and maintain law and order, the court must also consider the duration of the arrest, and assault. The court accepts that the plaintiff was beaten but the extent of the beating and the physical damage to the plaintiff is difficult to assess. No photographs or other documentary proof was provided.

[116] The plaintiff testified that she sustained a black eye and experienced some pain. The emotional and psychological shock, though also accepted and considered in the assessment of damages, is equally difficult to assess, given the absence of any opinion to assess the evidence. This had an effect on the quantum as the court was simply not assisted in this exercise.

[117] The insult to the plaintiff who was humiliated and discriminated against because she is a transwoman was considered as aggravating. As stated above, police officers are obligated by law to protect all members of Namibian society, regardless of their gender.

[118] Taking all the above circumstances into consideration the court awards the plaintiff N\$50 000 damages for pain and suffering.

[119] The parties agreed that no costs order shall be made as plaintiff is represented pro bono in this matter. There shall accordingly be no order as to costs.

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EM Schimming-Chase

Judge

APPEARANCES

PLAINTIFF

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FIRST AND SECOND DEFENDANTS

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