

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no.: HC-MD-CIV-ACT-DEL-2021/04033

In the matter between:

**NDELITOUDYA NALOOIWA NGHILALULWA**

**PLAINTIFF**

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION,  
SAFETY AND SECURITY**

**FIRST DEFENDANT**

**THE INSPECTOR GENERAL OF THE  
NAMIBIAN POLICE**

**SECOND DEFENDANT**

**THE PROSECUTOR GENERAL OF NAMIBIA**

**THIRD DEFENDANT**

**Neutral citation:** *Nghilalulwa v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-DEL-2021/04033) NAHCMD 481  
(7 August 2023)

**Coram:** Schimming-Chase J

**Heard:** 6 – 7 and 9 June 2023

**Delivered:** 7 August 2023

**Flynote:** Practice – Absolution from the instance – Test – Not whether the evidence led by the plaintiff establishes what would finally be required to be established – Whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.

Practice – Malicious prosecution – Requirements – Plaintiff must allege and prove the institution of the criminal proceedings – No reasonable and probable cause exists – Criminal proceedings instituted with malice – Criminal proceedings were terminated in favour of plaintiff – Loss and damages suffered by plaintiff.

Practice – Unlawful arrest and detention – Requirements – Allege and establish whether the arrest and detention took place – If so, was such arrest and detention lawful – Question of law and fact, intertwined.

**Summary:** This is an application for absolution from the instance brought by the defendants at the close of the plaintiff's case. The plaintiff instituted legal action against the defendants seeking payment in the amount of N\$800 000, for alleged unlawful arrest and detention and malicious prosecution.

The plaintiff testified on 31 October 2022, that she was arrested by members of the Namibian Police Force in the presence of two minor children and in full view of the public and her neighbours. It was her testimony that at the time of the arrest, she was informed that the charges preferred against her were for alleged assault on her biological father, a certain Mr Nghilalulwa.

The plaintiff testified further that she was held in police custody for a period of seven consecutive days without any justification for her arrest and upon being brought before court on 2 November 2020, the bail was initially denied, but on 6 November 2020, she was granted bail. It was testified by the plaintiff that on 9 February 2021, the case

against her was withdrawn by the State, but that she was served with fresh summons to appear in court on 20 April 2022, whereupon, she appeared in court on 19 May 2022.

Counsel for the defendants argued that the plaintiff is still being prosecuted and therefore not all elements for a successful malicious prosecution claim have been met, whereas, counsel for the plaintiff argued that the State does not have sufficient information at its disposal to substantiate and justify the plaintiff's criminal prosecution, and that the reinstatement of the criminal summons only occurred after the plaintiff instituted the present action, and that such reinstatement was only done to sustain a defence against the claim of malicious prosecution.

It was argued by counsel for the defendants that the defendants can only be held liable, if any, for the period of 31 October 2020 – date of arrest of the plaintiff – to 2 November 2020 – date of first court appearance – and not after 2 November 2020, as the presiding officer sanctioned the plaintiff's further detention.

*Held that*, the test to be applied for absolution from the instance is whether there is evidence adduced upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff, and not whether the plaintiff has led evidence which establishes what would finally be required to be established to succeed in its claim.

*Held further that*, to sustain a claim for malicious prosecution by the State, Ms Nghilalulwa has the burden to allege and prove that the Prosecutor General instituted the criminal proceedings without reasonable and probable cause, and with malice, which criminal proceedings were terminated in her favour, upon which, she suffered loss and damage.

*Held further that*, in order to succeed on a claim for malicious prosecution, every fact necessary in support of the plaintiff's claim must exist to enable this court to find in the plaintiff's favour.

*Held further that*, to sustain a claim for unlawful and wrongful arrest and detention, plaintiff must allege and establish that plaintiff was arrested and detained, which arrest and detention was unlawful.

*Held further that*, it is settled law that where the arrest and detention is not denied by the defendants, the onus shifts to the defendants to justify the lawfulness of the arrest and detention of the plaintiff.

The defendants are absolved from the instance as regards the plaintiff's claim for malicious prosecution.

Absolution from the instance as regards the plaintiff's claim for unlawful arrest and detention is refused.

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### **ORDER**

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1. The defendants are absolved from the instance in respect of the plaintiff's claim for malicious prosecution.
2. Absolution from the instance in respect of the plaintiff's claim for unlawful arrest and detention is refused.
3. The matter is postponed to 11 September 2023 at 15h30 for a Status hearing to determine a date for the continuation of trial.

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### **JUDGMENT**

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SCHIMMING-CHASE J:

[1] The current proceeding before court is an application by the defendants for absolution from the instance. The defendants argued that the plaintiff failed to discharge her onus in proving her case in respect of her claims of unlawful detention and malicious prosecution.

[2] The plaintiff is Ndelitoudya Nalooliwa Nghilalulwa, an adult female Namibian, residing at Erf 2121, Mika Kaiyamo Street – Shandumbala, Windhoek. For ease of reference, I will refer to the plaintiff as ‘Ms Nghilalulwa’.

[3] The first defendant is the Minister of Home Affairs, Immigration, Safety and Security, in his official capacity as appointed in terms of Art 32(3)(i)(bb) of the Namibian Constitution. The second defendant is the Inspector-General of the Namibian Police, in his official capacity as appointed in terms of Art 32(4)(c)(bb) of the Namibian Constitution. The third defendant is the Prosecutor General of Namibia, in her official capacity as appointed in terms of Art 32(4)(a)(cc) of the Namibian Constitution.

[4] For ease of reference, I will refer to the first defendant as ‘the Minister’, the second defendant as ‘the Inspector-General’, the third defendant as ‘the Prosecutor-General’. Where I make reference to the defendants, collectively, I will refer to them as such.

[5] On 22 October 2021, Ms Nghilalulwa instituted legal action against the defendants, seeking payment in the amount of N\$800 000 for her alleged unlawful arrest and detention and malicious prosecution.

[6] Ms Nghilalulwa alleged that on or about 31 October 2020, she was wrongfully and unlawfully arrested and thereafter detained on charges of theft and assault with intent to cause grievous bodily harm to her biological father, a certain Mr Nghilalulwa.

[7] It was further alleged by Ms Nghilalulwa that her arrest and detention was not founded on any reasonable ground to believe or suspect that she had committed any crime, and therefore, the arrest was wrongful, unlawful, and arbitrary. Ms Nghilalulwa further alleged that her detention in police custody, for a period of seven consecutive days, was without lawful and justifiable grounds.

[8] The defendants do not deny the arrest and detention of Ms Nghilalulwa, but plead that such arrest and detention was lawful on allegations of Ms Nghilalulwa's alleged conduct involving 'domestic violence', amongst other conduct. It was pleaded by the defendants that subsequent to her arrest, Ms Nghilalulwa was brought before a presiding officer within 48 hours, where after 'her continued detention was sanctioned by the Magistrates Court'.

[9] As regards to Ms Nghilalulwa's claim of malicious prosecution, the defendants pleaded that the prosecution of Ms Nghilalulwa was not malicious and that the criminal case was provisionally withdrawn as a result of the criminal docket not being available at court on the date that it appeared for.

[10] Ms Nghilalulwa testified in support of her case and called no other witness. She testified that she is an adult female Namibian citizen, who currently resides in Windhoek, Namibia.

[11] It was Ms Nghilalulwa's evidence that, on 31 October 2020, at approximately 18h00, she was arrested by approximately six members of the Namibian Police Force ('NAMPOL') whilst at home, being Erf 2121, Shandumbala, Windhoek, in the presence of two minor children and in full view of the public and her neighbours. She testified that this was 'very embarrassing and really made her feel undignified'.

[12] Ms Nghilalulwa testified, that she was informed of the charges preferred against her, being charges of theft, threatening, defamation of character, assault with intent to

do grievous bodily harm, abuse, and common assault that she had allegedly inflicted on Mr Nghilalulwa.

[13] Although having no knowledge of the full particulars of the NAMPOL officers, who arrested her, Ms Nghilalulwa testified that she was detained in police custody for seven consecutive days 'without any justification for her arrest'. It was Ms Nghilalulwa's testimony that on 2 November 2020, she appeared in court and bail was initially denied, but on 6 November 2020, she was granted bail.

[14] Ms Nghilalulwa led testimony to the effect that on 9 February 2021, the case was withdrawn against her by the State, but on 20 April 2022, fresh summons was served on her, which reflected that she must appear in court for that case on 19 May 2022.

[15] Much of the cross examination of Ms Nghilalulwa centered around the events leading to her arrest, and the rejection of liability in respect of the additional time spent in custody, which, for purposes of this judgment, will not be delved into at this stage.

[16] At the close of Ms Nghilalulwa's case, the defendants moved an application for absolution from the instance on the basis that Ms Nghilalulwa failed to prove her claims for unlawful detention and malicious prosecution. It is this application that I consider now.

[17] Mr Amukoto appearing on behalf of the defendants, in his written arguments, submitted to the court that the defendants cannot be held liable for Ms Nghilalulwa's detention in custody after 2 November 2020, as such detention was sanctioned by the presiding officer, who is a member of the Judiciary, and who does not form part of the defendants.

[18] Mr Amukoto argued that the Minister and Inspector-General cannot be held liable for the conduct of the presiding officer, who acts independently, as a matter of law.

Therefore, Mr Amukoto submitted that, at best and if at all, the defendant can only be held liable for Ms Nghilalulwa's detention for the period of 31 October 2020, being the date of Ms Nghilalulwa's arrest, to 2 November 2020, when Ms Nghilalulwa made her first court appearance.

[19] As regards the claim for malicious prosecution, Mr Amukoto submitted that, Ms Nghilalulwa is required to meet the following factors, namely, that; (a) the Prosecutor-General (or her assigned delegate) must have instituted or instigated the proceedings; (b) the Prosecutor General (or her assigned delegate) must have acted without reasonable and probable cause; (c) the Prosecutor General (or her assigned delegate) must have been actuated by an improper motive or malice; (d) the proceedings must have terminated in Ms Nghilalulwa's favour; and (e) Ms Nghilalulwa must have suffered damages. Reliance was placed on the fourth requirement, namely that the proceedings were not yet terminated in her favour. This is because she was summoned for appearance on the same charge. In the result, Ms Nghilalulwa's cause of action was not complete for a claim of malicious prosecution.

[20] Mr Kanyemba appearing on behalf of the plaintiff submitted that the plaintiff has met the requirements for a claim of malicious prosecution. In amplification of this submission, he argued that the law was wrongfully and maliciously set in motion by the arrest and institution of criminal proceedings against Ms Nghilalulwa. The Prosecutor General therefore was liable because the proceedings were instituted without reasonable and probable cause, and without having sufficient information at her disposal to substantiate and justify Ms Nghilalulwa's prosecution.

[21] It is not disputed that that the prosecution against Ms Nghilalulwa has not terminated due to the summons issued for her appearance on the charges for which she was arrested. She appeared on the summons and the matter was postponed to 12 July 2023 for purposes of plea and trial.



[22] In his arguments, Mr Kanyemba submitted that during cross-examination, it was put to Ms Nghilalulwa that the Prosecutor-General (or her assigned delegate) relied on the information and recommendation obtained from the investigating officer as well as the complainant's statement. Mr Kanyemba argued that the complainant's statement failed to support the two charges preferred against Ms Nghilalulwa leading to her arrest, and to her later detention.

[23] It is settled law that the test to be applied for absolution from the instance is whether there is evidence adduced upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff, and not whether the plaintiff has led evidence which establishes what would finally be required to be established.<sup>1</sup> The factors to consider when adjudicating an application for absolution from the instance factors are:

- a) Absolution at the end of the plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;
- b) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;
- c) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;
- d) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;

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<sup>1</sup> *Stier and Another v Henke* (SA 53 of 2008) [2012] NASC 2 (3 April 2012) para 4.

- e) Perhaps most importantly, in adjudicating an application for absolution at the end of the plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.<sup>2</sup> (Emphasis supplied.)

[24] To sustain a claim for malicious prosecution by the State, Ms Nghilalulwa has the burden to allege and prove that the Prosecutor-General instituted the criminal proceedings without reasonable and probable cause, with malice, and that the criminal proceedings were terminated in her favour resulting in loss and damage.<sup>3</sup>

[25] The court cannot interfere with the Prosecutor- General's constitutional mandate to initiate or to continue criminal proceedings. This is at the core of her discretion. A summons was issued for her appearance on the charges, and the proceedings are ongoing in the Magistrate's Court. Shivute CJ writing for Supreme Court in *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa*<sup>4</sup> described the position thus:

'The decision to initiate and maintain the prosecution of an accused person forms a central part of the constitutional obligation of the prosecutorial authority. While it is imperative that prosecutors are able to perform their functions without the fear of attracting civil liability, their constitutional mandate should nonetheless be executed in a manner that ensures a fair trial for the accused persons they are prosecuting. Accused persons must be accorded their full rights and must not be subject to baseless prosecutions.'

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<sup>2</sup> *Dannecker v Leopard Tours Car and Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015) para 26; *Goabab v Minister of Safety and Security* (I 3808/2015) [2020] NAHCMD 558 (20 November 2020) para 23.

<sup>3</sup> *Akuake v Van Rensburg* (I 2619/2006) [2009] NAHC 12 (09 February 2009) para 3.

<sup>4</sup> *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa* (SA 7 of 2017) [2019] NASC 2 (28 February 2019) para 1.

[26] The Supreme Court approved a decision of the Supreme Court in *Miazga v Kvello Estate*<sup>5</sup> of Canada setting out the principle and rationale behind such a discretion

[35] The Court pointed out that an allegation of malicious prosecution constitutes “an after-the-fact attack” on the propriety of the prosecutor’s decision to initiate or continue criminal proceedings against a plaintiff. It pointed out further that the decision to initiate or continue criminal proceedings lies at the core of prosecutorial discretion, which enjoys constitutional protection. At para 47 the court observed:

“In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as “ministers of justice”.’

[27] Section 6(a) of the Criminal Procedure Act 51 of 1977 (as amended)<sup>6</sup> prescribes that the State, may, before an accused pleads to a charge, withdraw that charge, and whereupon the accused shall not be entitled to a verdict of acquittal in respect of that charge. This entails that the accused person can be charged, again, with fresh charges, alternatively with identical charges as those withdrawn.<sup>7</sup>

[28] To succeed on her claim for malicious prosecution, every fact necessary in support of Ms Nghilalulwa’s claim must exist to enable this court to find in her favour.<sup>8</sup>

[29] In view of the requirements to be met for a claim of malicious prosecution, Ms Nghilalulwa must satisfy the court that the criminal prosecution against her was

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<sup>5</sup> *Miazga v Kvello Estate* 2009 SCC 51 at par 47

<sup>6</sup> Criminal Procedure Act 51 of 1977, as amended.

<sup>7</sup> *Prosecutor-General of Namibia v Namoloh and others* [2020] NASC 18 (19 August 2020).

<sup>8</sup> *Umgeni Water v Mushengu* [2010] 2 All SA 505 (SCA) paras 5 - 6 endorsed in *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SA) para 23.

terminated in her favour. Given that the criminal prosecution of Ms Nghilalulwa is still ongoing, I am of the considered view that the claim for malicious prosecution is premature as not all requirements to enjoy a claim of malicious prosecution have been met by Ms Nghilalulwa.

[30] To all intents and purposes therefore, the claim for malicious prosecution cannot be sustained on any interpretation of Ms Nghilalulwa's testimony. Therefore, I cannot find that, at the close of the defendants' case, Ms Nghilalulwa would succeed in her claim of malicious prosecution, and 'it makes no economic and legal sense to compel the defendants to tender evidence when it is apparent that no reasonable court, acting carefully, may require the defendants to adduce evidence in rebuttal because the evidence already adduced fails to meet the requirements of the claim for malicious prosecution.'<sup>9</sup>

[31] I now turn to the question of the unlawful arrest. This claim remains squarely before the court for determination.

[32] For Ms Nghilalulwa to sustain a claim for wrongful and unlawful arrest and detention, she must thus allege and establish, for purposes for consideration of the absolution application, that she was arrested and detained, which arrest and detention was unlawful – the former is a question of fact, whereas the latter is a question of law.<sup>10</sup>

[33] It is common cause between the parties that although the charges were 'provisionally' withdrawn against Ms Nghilalulwa by the Prosecutor-General (or her assigned delegate) on 9 February 2021, the charges were reinstated, upon Ms Nghilalulwa being served with summons to appear in court. It is furthermore undisputed that the criminal prosecution is still ongoing, with trial having been set for commencement on 12 July 2023.

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<sup>9</sup> *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2016] NAHCMD 159 (3 June 2016).

<sup>10</sup> *Shaalukeni v Minister of Safety and Security and Others* (HC-MD-CIV-ACT-OTH-2019/05140) [2021] NAHCMD 401 (8 September 2021) para 4.

[34] The defendant's case is that there was a reasonable suspicion that an offence was being committed based on a complaint made by her father. It was also put to her that in any event, the defendants cannot be held liable for Ms Nghilalulwa's further detention after 2 November 2020, as her detention was sanctioned by the presiding officer, who is independent, and not by the defendants. Therefore, it was Mr Amukoto's submission that the defendants can only, if at all, be held liable for the detention of Ms Nghilalulwa for the period of 31 October 2020 to 2 November 2020.

[35] Having dealt with the detention of an accused person as sanctioned by the Judiciary, Parker AJ in *Shaalukeni v Minister of Safety and Security and Others*<sup>11</sup> held that:

'[11] The law is very clear. The defendants, who are members of the Executive branch of Government, cannot, upon the *trias politica* of Montesquieu's principle of separation of powers (see *Mostert v Minister of Justice* 2002 NR 76 (HC) at 79E-G; *Iyambo v Minister of Safety and Security* 2013 (2) NR 562 (HC); *Sheehama v Minister of Safety and Security* 2011 (1) NR 294), be held accountable for the actions of the Judiciary, that is, the decisions of the learned magistrate in the instant proceeding. Doubtless, upon being brought before the magistrates court on 11 December 2018, plaintiff was no longer under the sway of the defendants. It follows as a matter of law and logic that the unlawful detention for which the defendants can be held liable commenced on Monday, 3 December 2018 and ended on 11 December 2018; that is a period of eight days.'

[36] In *Iyambo v Minister of Safety and Security*<sup>12</sup> Parker AJ held as follows:

'[4] It is ironic that the counsel who made a similar argument and was rejected by the court in the earlier case of *Gabriel v Minister of Safety and Security* 2010 (2) NR 648 practises from the same law firm as Mr Ntinda. In *Gabriel*, after reviewing the authorities Muller J held,

<sup>11</sup> *Shaalukeni v Minister of Safety and Security and Others* supra footnote 8.

<sup>12</sup> *Iyambo v Minister of Safety and Security* (I 3121/2010) [2013] NAHCMD 38 (12 February 2013) para 4-5.

'When the plaintiff was brought before the magistrate and his detention was further ordered, the lawfulness, or not, of his arrest and previous detention became irrelevant'. I think this dictum, with respect, must be qualified. In my view the arrest and the original detention will be irrelevant only if the plaintiff was brought before a magistrate within 48 hours of his or her arrest within the meaning of Article 11(3) of the Namibian Constitution and the magistrate then extended the original detention beyond 48 hours, as happened in the instant case. (See *Sheehama v Minister of Safety and Security and Others* 2011 (1) NR 294.)

[5] In the instant case, it is common cause between the parties that the defendant complied with the 48-hour rule, and in the exercise of his judicial authority given to him by Article 11(3) of the Namibian Constitution, the learned magistrate extended the detention in custody of the plaintiff beyond 48 hours. It cannot, therefore, by any stretch of legal imagination be argued that the defendant (a member of the Executive) is liable for the learned magistrate's judicial exercise of authority given to him by the Namibian Constitution. It follows that Mr Ntinda's argument that if the learned magistrate had been informed by the Prosecutor that the arrest was unlawful, the learned magistrate might not have extended the detention of the plaintiff beyond 48 hours is neither here nor there. It must be remembered that it is not the defendant's police officials who prosecuted the case in the proceedings in the magistrates' court. The prosecution was conducted by the Prosecutor under delegated authority of the Prosecutor-General (see Article 88(2) of the Namibian Constitution), and since the prosecuting authority is an independent authority, the defendant's officials cannot be held accountable for what the Prosecutor did or did not do during the judicial proceedings or, what is more, what the learned magistrate did in the exercise of his judicial function. It must be remembered that when the plaintiff appeared before the learned magistrate, he put up his hand to indicate that he wanted to address the court, and he was allowed to address the court. He then informed the court that he wanted to be admitted to bail. The learned magistrate informed him that he could seek legal representation and also bring a formal application for bail. These exchanges between the plaintiff and the learned magistrate were in the course of judicial proceedings and over which the defendant had no control. (Emphasis supplied.)

[37] In view of the authorities as per Parker AJ and which authorities I respectfully agree with, where a presiding officer orders an accused person's further detention after being brought before court, the Minister and Inspector General cannot be held liable, unless the State – on the advice of the police – fails to lay bare all facts necessary for

the presiding officer to make a determination, or misrepresents the facts to the magistrate. After all it is the information supplied to the magistrate that informs the ultimate decision.

[38] The Constitutional Court of South Africa, in a unanimous judgment, in *Mahlangu and Another v Minister of Police*<sup>13</sup> was tasked to determine whether the Supreme Court of Appeal was correct in refusing to hold the Minister of Police liable for compensation of the appellants therein for damages flowing from the appellants' detention following their unlawful arrest.

[39] In *Mahlangu supra*, the relevant fact to consider is that the first appellant therein was detained upon being unlawfully arrested after which a false confession was obtained from him and through torture and coercion. This false confession led to the arrest of the second appellant. The investigating officer engineered the appellants' 'continued detention by misrepresenting the true state of affairs to the prosecutor', and in the result, the appellants' bail was refused on their first appearance in the Magistrate's Court. The Constitutional Court held that the investigating officer's concealment that the confession was obtained illegally formed the basis upon which the Minister could be held liable for the full detention period,<sup>14</sup> as these facts were not presented to the presiding officer during the first court appearance.

[40] Mr Kanyemba argued that at the time of Ms Nghilalulwa's arrest, the arresting officer acted without having 'sufficient information at his disposal' to substantiate the charges proffered against Ms Nghilalulwa. This is apparent to me when regard is had to the charge sheet, which was annexed – as Annexure 'A' – to Ms Nghilalulwa's particulars of claim filed on 22 October 2021.

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<sup>13</sup>*Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

<sup>14</sup>*Ibid* para 45.

[41] In consideration of the *Mahlangu* matter, I am of the considered prima facie view that, Ms Nghilalulwa's evidence suggests prima facie that the defendant must be called upon to answer, especially when regard is had to the charge sheet, which the presiding officer must have had when Ms Nghilalulwa made her first court appearance.

[42] In this regard, I cannot find Mr Amukoto's argument to stand that the defendants do not have a case to answer for Ms Nghilalulwa's detention after 2 November 2020. The presiding officer's discretion was exercised based on what was placed before court and by virtue of defendants' collective presentation of apparent facts to the presiding officer which may have led to Ms Nghilalulwa's further detention. In view of the *Mahlangu* matter, I respectfully find that Mr Amukoto's argument cannot stand.

[43] It is settled law that where the arrest and detention is not denied by the defendants, onus shifts to the defendants to justify the lawfulness of the arrest and detention of the plaintiff. It is undisputed that the arrest and detention is not denied by the defendants, in the present matter, and therefore, the defendants have the burden to prove that such arrest and detention was lawful.

[44] I am of the view that the defendants have a case to answer in respect of Ms Nghilalulwa's claim for unlawful detention, and therefore, I cannot find that the defendants must be absolved from the instance in respect of Ms Nghilalulwa's claim for unlawful arrest and detention.

[45] In considering the facts placed before court and the authorities highlighted herein above, I make the following order:

1. The defendants are absolved from the instance in respect of the plaintiff's claim for malicious prosecution.
2. Absolution from the instance in respect of the plaintiff's claim for unlawful arrest and detention is refused.



3. The matter is postponed to 11 September 2023 at 15h30 for a Status hearing to determine a date for the continuation of trial.

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E M SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

S Kanyemba

Of Salomon Kanyemba Inc.,  
Windhoek

DEFENDANTS:

W Amukoto  
Of Office of the Government Attorney,  
Windhoek