REPORTABLE

CASE NO.: SA 35/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MINISTER OF SAFETY AND SECURITY	**Appellant**
and	
JOHN GENESE KABOTANA	**Respondent**

Coram:	SHIVUTE CJ, MTAMBANENGWE AJA and O'REGAN AJA
Heard:	**07 November 2013**
Delivered:	**26 March 2014**

APPEAL JUDGMENT

SHIVUTE CJ (MTAMBANENGWE AJA and O'REGAN AJA concurring):

[1] The respondent was arrested by the Namibian Police in the aftermath of an armed attack in and around the town of Katima Mulilo with the apparent purpose of achieving secession of the region of Caprivi (now called Zambezi Region) from the Republic of Namibia. Following the attack, a state of emergency was declared by the President of Namibia to contain the public emergency. The emergency regulations adopted by the President suspended, amongst others, Art 11(3) of the Namibian Constitution with the result that during the state of emergency, security forces could lawfully detain arrested persons for longer than the prescribed period

of 48 hours before they were brought to court. The state of emergency was lifted on 26 August 1999. The evidence establishes that after the state of emergency was lifted, the Namibian Police and other security services conducted what were referred to as 'mopping up' operations in the region. A number of suspects and potential witnesses were rounded up in those operations and processed through the Katima Mulilo police station. At that time, a small group of six detectives was responsible for the arrest, interrogation and processing of suspects at the Katima Mulilo police station. This was a woefully small group of detectives given the seriousness and the size of the task they had to perform. The evidence shows that the team worked under severe pressure.

[2] The respondent was arrested during the morning of Wednesday, 1 September 1999, and was detained at Katima Mulilo police station from 15h49. He was arrested together with five other suspects. In the early hours of the following morning, 2 September 1999, the group of detectives was called to an area outside Katima Mulilo where security forces had encountered suspected rebels and more arrests were made that day. Consequently, the detectives were able to attend to the administrative work of processing persons arrested on 1 and 2 September only on Friday 3 September 1999. They spent the whole day on Friday 'processing' the arrested persons.

[3] According to the evidence, the 'processing' of a suspect involved interviewing and taking a warning statement from him or her before he or she is taken to court. The police evidence establishes that the purpose of this process was to determine which of the suspects should be charged and which should be

released. Many suspects were released during the process and never taken to court. The respondent's warning statement was taken from him at around 15h10 on Friday, 3 September 1999.

[4] During the trial, the respondent maintained that contrary to the evidence of the appellant's witnesses, he was not taken to the magistrate's court at all on Friday, 3 September 1999 and counsel for the respondent in his written heads of argument appeared to persist with this contention. The High Court found that the respondent was taken to the magistrate's court on Friday afternoon. Counsel, very properly, conceded during oral argument that since there was no counter appeal against this finding by the court below, he could not persist with a contrary assertion. It is therefore accepted that the respondent was taken to the Katima Mulilo Magistrate's Court after a warning statement was taken from him on the afternoon of Friday, 3 September 1999. However, the record also shows that when the respondent and other suspects were taken to court there was no magistrate or prosecutor available. The prosecutor testified that he had left, on prior arrangements, at 14h00 that Friday. The magistrate sat in the morning but it is not apparent what time he had left the court. The respondent and about 15 other suspects were eventually transported to Grootfontein where they appeared before court on Monday, 6 September 1999.

[5] The appeal is a sequel to the action that the respondent instituted against the appellant in the High Court claiming, amongst others, unlawful detention and seeking compensation. In respect of the claim giving rise to the appeal, the respondent alleged in effect that he was not brought before a magistrate within 48

hours of his arrest as required by Art 11(3) of the Constitution and s 50 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act). His claim for unlawful detention was upheld by the High Court and he was awarded compensation in the amount of N$12 000,00 with interest at a rate of 20% per annum. The High Court made a specific finding that the respondent was detained unlawfully from the afternoon of 3 September 1999 until the morning of 6 September 1999. The appeal is against this finding and the award of damages.

Applicable law

[6] Article 11(3) of the Constitution provides as follows:

> 'All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.'

[7] Section 50 of the Criminal Procedure Act insofar as it is relevant to the issues that need determination reads:

> '(1) A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause for his arrest: Provided that if the period of forty-eight hours expires-

(a) on a day which is not a court day or on any court day after four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of the court day next succeeding;

(b) on any court day before four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of such court day;

(c) ...

(d)

(2) A court day for the purposes of this section means a day on which the court in question normally sits as a court.

(3) ...'

[8] As previously mentioned the respondent was arrested on Wednesday, 1 September 1999 and only appeared in court on 6 September. The 48-hour period from the time of his arrest ended on 3 September 1999. Since the respondent was brought before court only on 6 September 1999, the appellant bore the onus to prove, in the words of Art 11(3), that it was not 'reasonably possible' to bring him before a magistrate before the expiry of the 48-hour period.

[9] Damaseb JP, who presided over the trial, adopted the following approach in deciding whether the respondent was in fact unlawfully detained:

'It being common cause that the [respondent] was not brought to court within 48 hours of arrest;

Was it possible for the police to have complied with the requirement of law?

> Is the reason the plaintiff was not brought before court within 48 hours after arrest because it was not reasonably possible to do so; and assuming that to be the case, was he brought to court as soon as possible?'

[10] The Judge-President went on to find that it was not in dispute that there was no magistrate available when the respondent was taken to court on Friday, 3 September. He observed that the respondent's position was that the appellant who bore the onus did not give a satisfactory explanation as to why no prior arrangement was made with the court for the magistrate to be available on the afternoon of 3 September and that the evidence led on that score only demonstrated that the police were overstretched in the aftermath of the secession attack.

[11] Mr Coleman, who argued the appeal on behalf of the appellant, contended that the Judge-President did not use the correct approach in deciding whether it was 'reasonably possible' to bring the respondent before a magistrate within 48 hours of being arrested and argued that the correct test should be:

> 'Was it reasonable or not – under these extreme circumstances – for the police officers to assume that they could still bring the respondent and other detainees before court on the Friday afternoon.
>
> Intertwined in this enquiry should be the fact that [the respondent] was not the only one and that the detainees were taken to Grootfontein on Sunday, 5 September 1999 to appear before court on Monday morning, 6 September 1999.'

[12] Counsel argued furthermore that the term ‘reasonably possible’ as employed in Art 11(3) of the Constitution should be interpreted in relation to negligence, using the test of a reasonable person. In his submission, if on the evidence, the police officers did not act negligently and unreasonably the appellant could not be held liable for the failure to comply with the 48-hour rule. To adopt a different approach, so counsel contended, would be to place too heavy a burden on the police than is warranted. Counsel contended that this was an emergency situation in which convenience of the police officers played no role.

[13] For my part, the issue for decision is whether or not on the facts it was reasonably possible for the police officers to comply with the 48-hour rule. The appellant was required to prove that in the prevailing circumstances it was not reasonably possible for the police officers involved in the arrest and processing of the respondent to ensure that the respondent appeared before a magistrate within 48 hours of his arrest.

[14] Counsel for the appellant seemed to concede to this characterisation of the issue, yet he continued to argue that the issue should not be viewed as if it was a question of convenience as described in S v *Mbahapa* 1991 (4) SA 668 (NmHC). Counsel went on to argue that in the circumstances of the case the issue of ‘negligence’ should be considered otherwise the meaning of the word ‘reasonably’ would be undermined to the extent of rendering the concept meaningless.

[15] I cannot agree that the delictual standard of negligence should be employed. The issue of what may or may not be reasonable in the context that

word is used in Article 11(3) was discussed in the *Mbahapa*'s case and I shall advert to it in a moment. But before I do so, it is necessary to remind ourselves of the purpose of Article 11(3). The object of the Article was aptly stated by Parker J in *Sheehama v Minister of Safety and Security* 2011 (1) NR 294 (HC) at para 5 as follows:

> 'One must not lose sight of the fact that the object of Art 11(3) of the Namibian Constitution is to ensure the prompt exhibition of the person of an arrested and detained individual before a magistrate or other judicial officer so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights. It is also an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance, alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her; treatment that is outlawed by Art 8(2) of the Namibian Constitution. The 48-hour rule is therefore one of the most important reassuring avenues for the practical realisation of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution'.

[16] I respectfully agree with the learned judge's views. Article 11(3) is an aspect of the fundamental right to liberty guaranteed by Art 7 of the Constitution. The right to be brought before a court within 48 hours is undoubtedly an important constitutional right accorded to arrested persons, which in the light of our pre-Independence history of detention without trial and other related injustices , should be guarded jealously. This is particularly important in times of conflict and in the circumstances such as those described by Detective Inspector Simasiku (a police officer who was involved in the arrest of the respondent) who was at pains to

describe how thin on the ground the remaining investigating unit was resulting in it being severely overstretched.

[17] Turning now to the phrase 'reasonably possible', as already mentioned, its meaning was considered by the High Court in *Mbahapa's* case. Referring to Art 11(3) the court in that case stated at 674E-F as follows:

> 'The Article provides in plain terms that an arrested person must be brought before a magistrate within 48 hours of his arrest or released. It is only if it is not reasonably possible to bring an arrested person before a magistrate within the 48-hour period that further detention in custody is permitted and even then the detained person must be taken before a magistrate "as soon as possible". In the context of Art 11(3) the words "as soon as possible" require little interpretation or explanation. There must, of course, be an element of reasonableness implied but once the circumstances are such that it is reasonably possible to take the arrested person before a magistrate, that must be done. If it is not then the arrested person is deprived of his fundamental right to freedom as guaranteed by the Constitution.'

The Court continued to say:

> 'As I have indicated, what is possible or reasonably possible must be judged in the light of all the prevailing circumstances in any particular case. Account must be taken of such factors as the availability of a magistrate, police manpower, transport, distances and so on. But convenience is certainly not one such factor.'

[18] This, in my view, is the correct test and it is therefore not appropriate to apply the private law standard of negligence as counsel for the appellant urged us to do. The issue concerns an infringement of a fundamental right as opposed to a delictual wrong. Constitutional infringements are different from ordinary delicts.

(Cf. *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at para 23.) As was pointed out in *Garces v Fouche* 1997 NR 278 (HC) at 282B, albeit under a different set of facts, Art 11(3) finds its place in the Constitution solely for the benefit of arrested persons and not for the benefit of the State.

[19] The degree of diligence shown by the authorities in their attempts to comply with the 48-hour rule plays a particularly important role in ensuring that the fundamental rights of individuals are protected. It goes without saying that a high level of diligence must be exercised by the authorities as a commitment to ensuring the protection of constitutionally guaranteed human rights.

Pertinent evidence

[20] The main witness for the appellant was Detective Inspector Simasiku to whom reference was made above. His evidence relevant to the respondent was that the respondent as already mentioned, was arrested on Wednesday, 1 September 1999. He was arrested together with five other suspects. On Thursday, 2 September 1999 the police were called to the Kaliyangile area where the army made contact with suspected rebels. About 16 suspects were arrested on Thursday, bringing the total number of suspects arrested in the area on 1 and 2 September to 22. The whole of Thursday, 2 September, was spent on the operation in the Kaliyangile area with the result that the administrative work of processing suspects that was due to be done on that day could only be done on 3 September 1999. All the 22 suspects were processed on 3 September 1999. Some of these were released and ultimately only about 14 were taken to court. Detective Inspector Simasiku was aware that on Fridays, depending on the

number of cases, the court could adjourn before lunch, but that if there was a heavy workload the court could sit till after 17h00. The respondent and other suspects were taken to court on 3 September 1999 'towards 16h00 or past 16h00'.

[21] On being asked a pertinent question in cross-examination why no arrangements were made in advance to ensure that there was a magistrate available when the suspects were taken to court on Friday, 3 September 1999, Detective Inspector Simasiku answered in effect that this was due to the pressure of work and that the team knew that the court had sat that Friday. Being asked an equally crucial question why they could not have processed the people who were arrested on 1 September 1999 and taken them to court first, Simasiku effectively evaded the question by answering:

> 'Every suspect that was arrested whether 1st or 2nd they were all important in the sense that we had to interrogate them, or screen their involvement in this matter.'

[22] The former prosecutor at Katima Mulilo Magistrate's Court, Mr Christopher Stanley, testified on behalf of the appellant. He confirmed in cross-examination, and as previously stated, that on Friday, 3 September 1999, he had left office early on prior arrangement to spend a weekend with his family in Rundu, some 500 kilometers away. Mr Stanley confirmed that the court could sit in the afternoon on Fridays and that if arrangements had been made in advance to bring suspects to court a prosecutor and magistrate could have been made available to handle the respondent's case.

[23] Mr Coleman urged the court not to be an 'arm chair critic' and ignore the circumstances prevailing at the time. Counsel argued that the circumstances were such that the police officers were extremely busy and were dealing with what he termed a ‘war situation’. The police officers, he contended, took the respondent to court on 3 September 1999, only to find that no magistrate was present, and the Monday immediately following the Friday (3 September 1999) the police officers brought the respondent before a magistrate.

[24] Counsel for the appellant also argued that in terms of s 50(1) of the Criminal Procedure Act, the 48-hour period relevant to the respondent expired on Friday at 16h00 but if the respondent had been arrested on Wednesday 1 September 1999 at 16h05, the 48-hour period would have expired on Monday 6 September 1999 at 16h00. This, he submitted, is an extension of the 48-hour period and should be taken to be the legislature’s view of reasonable circumstances which justify the extension of the 48-hour rule.

[25] Mr Tjombe, who appeared for the respondent together with Ms Hancox, argued in response to the contention that the aftermath of the attack could not be ignored, that it is precisely in those 'chaotic' circumstances that collaboration is required amongst different Government Ministries to ensure that the fundamental rights of individuals affected by the police operations are respected and protected. Counsel contended further that the highest standard of compliance must be imposed in respect of constitutional rights and duties especially when armed forces are involved. The police officers, he continued, should have made arrangements with the magistrate’s court officials to ensure that the magistrate or

an assistant magistrate would be present when the arrested persons were taken to court after their warning statements had been taken.

[26] Counsel based this argument on the concession made by Detective Inspector Simasiku that he was aware that the magistrate in the Katima Mulio district could sit beyond 17h00 if necessary. Additionally, so counsel argued, the police officers being aware that the magistrate's court had on occasion adjourned before lunch on Fridays, should have made an effort to ensure that a magistrate would be available when the suspects were taken to court. He argued that a simple phone call or sending an officer to court to make arrangements would have sufficed. Mr Tjombe contended that the appellant did not fully discharge the onus of proving that it was absolutely impossible to secure the presence of a magistrate or an assistant magistrate on the day the respondent was taken to court.

[27] My own view is that one cannot but be sympathetic to the plight of the small team of detectives that was faced with the enormous responsibility of processing large numbers of arrested persons and operating under exacting circumstances. That they worked under severe constraints was not disputed on the evidence. However, in the circumstances where the team knew that the state of emergency was lifted and thus constitutional rights were in force and had to be respected, the 48-hour rule should have been a flashing red light in their minds. In relation to the 16 suspects who were arrested on Thursday, 2 September 1999, the 48-hour rule required them to be taken to court only by Monday, 6 September 1999. If the officers had regarded the 48-hour rule as a flashing red light, as they should have, then they could have well processed the 6 suspects who were required to appear

in court by Friday and dealt with the other 16 later. In the circumstances where police officers are working under severe constraints such as the picture painted by Detective Inspector Simasiku, law enforcement and other officials ought to combine the State's resources to ensure that there is mutual co-operation in the enforcement of constitutional rights and freedoms. This requires coordination and planning.

[28] On the facts of this case, given the importance of the constitutional right in question, the police team processing the suspects could easily have made prior arrangements with court officials to ensure that there was a presiding officer available to postpone the cases in the late afternoon when they took the suspects to court.

[29] We must guard against laxity and aspire to setting very high standards for compliance with constitutional rights, especially those having a bearing on the liberty of individuals. I cannot agree with counsel for the appellant's submission that to require the police to have made arrangements in advance so as to ensure that there was a presiding officer available would amount to punishing them for not making one phone call. It is indeed merely one phone call or a visit to the court that on the evidence is a stone's throw from the police station that may well have ensured that the respondent was taken to court within the prescribed period.

[30] It is therefore my considered opinion that although the police officers constituting the investigating team worked under severe and testing conditions, it was reasonably possible for them to have complied with the provisions of Art

11(3). As already stated, there were two courses of action available to them which would have brought about this result. First, they could have made prior arrangements with court officials to ensure that a magistrate and prosecutor were available in the late afternoon of Friday 3 September 1999. Alternatively, the detectives could have arranged their work by processing first the six suspects who, in terms of Art 11(3) of the Constitution, had a constitutional right to be brought before court on Friday, 3 September. Both of these courses of action were available to the police officers in the admittedly exigent circumstances in which they were working, but neither course was adopted.

[31] I emphasise that the 48-hour requirement must act as a flashing red light in the minds of the officers processing suspects for onward transmission to court. This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested unless it is not reasonably practical to do so. The Judge-President cannot be faulted for making the findings he has made and the appeal ought therefore to be dismissed. I would order accordingly. As the respondent who is represented by the Legal Assistance Centre has not asked for an order of costs, I do not propose to make an order as to costs.

[32] The following order is accordingly made:

1. The appeal is dismissed.
2. No order as to costs is made.

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SHIVUTE CJ

MTAMBANENGWE AJA

O'REGAN AJA

APPEARANCES

APPELLANT:	G Coleman
	Instructed by the Government Attorney
RESPONDENT:	N Tjombe (with him T Hancox)
	Instructed by Legal Assistance Centre