



REPORTABLE

CASE NO: SA 26/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MINISTER OF SAFETY AND SECURITY

Appellant

and

GREGOREY GILBERT NAOMAB

Respondent

CORAM: SHIVUTE CJ, SMUTS JA and SCHIMMING-CHASE AJA

Heard on: 10 October 2023

Delivered on: 15 December 2023

Summary: This is an appeal against the judgment and order of the court a quo in an action for damages for unlawful arrest instituted by the respondent, the late Mr Gregorey Gilbert Naomab, against the appellant, the Minister of Safety and Security. The appellant admitted the arrest but denied that it was unlawful. The High Court awarded damages in favour of the respondent in the amount of N\$60 000 with interest thereon plus costs of suit. Appellant pleaded that the court a quo

incorrectly relied on the respondent's testimony without any additional evidence to corroborate it, and misdirected itself in law and on the facts by awarding damages in the amount of N\$30 000 per day. The appeal record, which is still incomplete, was filed late in violation of rule 8(2)(b) of the Rules of the Supreme Court, causing the appeal to lapse. Condonation was sought only for late filing of the appeal record and no explanation was provided for filing an incomplete record.

Held that, the exhibits absent from the record are essential for fully evaluating the merits of the appeal. Although the transcription company in this case contributed materially to the delay in filing the record, the appellant did not exercise the requisite degree of diligence either. This makes the explanation for their delay in filing the record weak and unconvincing. Further, failure to file a complete record without explanation demonstrates an admitted disregard for the Rules of this Court.

Held that, there needs to be an objectively reasonable suspicion on the part of the arresting officer that the person being arrested has committed an offence under Schedule 1 to the Criminal Procedure Act 51 of 1977. In this case, the arresting officer did not have a reasonable suspicion. The arrest was also unlawful because it was made for alleged malicious damage to property and trespassing, neither of which is part of Schedule 1.

Held that, courts have wide discretion while awarding damages but should clearly articulate the factors that inform their decision based on guidance from precedent applied to the relevant facts of the case. No mathematical formula can be followed but damages awarded for violations of personal liberty should reflect the importance of the right. The respondent's evidence for proving quantum of damages was not challenged in any meaningful way by the appellant despite being expressly invited to do so by the court a quo. Thus, there is no credible reason to doubt the findings of the court below, and the damages it awarded were not excessive.

Held that, the failure to apply for condonation in respect of the incomplete record as well as low prospects of success constitute insurmountable barriers to the reinstatement of the appeal.

Application for condonation and reinstatement is refused. Costs awarded to respondent except costs of preparing and filing the record to mark the court's displeasure with respondent's uncooperative conduct in ensuring that a timely meeting was held with a view to agreeing to the relevant portions of the record.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and SCHIMMING-CHASE AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the court a quo in an action for damages for unlawful arrest and detention instituted by the respondent, the late Mr Gregorey Gilbert Naomab, against the appellant, the Minister of Safety and Security. The appellant admitted the arrest but denied that it was unlawful. The High Court awarded damages in favour of the respondent in the amount of N\$60 000 with interest thereon plus costs of suit. The respondent, unfortunately, died shortly after the court a quo delivered the order in his favour and only a few days before the reasons for the judgment were released.

[2] The arrest occurred in Swakopmund against the following background. A certain Mr Haasbroek reported to the police that he had caught a suspect, the respondent, who he alleged had climbed over his fence the previous day and damaged his gate motor. Inspector Anton of the Namibian Police arrived at Mr.

Haasbroek's residence. Mr Haasbroek showed him the CCTV footage of the incident and Inspector Anton testified that he could 'clearly identify' the respondent from the footage.

[3] The respondent pleaded that he was arrested at Mr Haasbroek's house, taken to the Swakopmund Police Station, and detained for a duration of 50 hours in filthy conditions with hardened criminals and given inedible food. He also alleged that he was forced to wash motor vehicles by the police.

[4] The appellant pleaded that the respondent voluntarily accompanied the police to the station where he was arrested by Warrant Officer (W/O) Machado. The appellant further pleaded that the arrest was lawful and based on a reasonable suspicion and denied that the plaintiff suffered damages.

[5] During the investigation, the police failed to identify the respondent on the CCTV footage and so they subsequently released him. The respondent thereafter instituted the claim against the appellant. After a trial, the court a quo held that the arresting officer did not have a reasonable suspicion to effect the arrest, and therefore concluded that the respondent had been unlawfully arrested and detained.

Condonation application

[6] The judgment of the court a quo was delivered with reasons on 31 March 2022. An appeal against the judgment was noted on 20 April 2022. As required by rule 8(2)(b) of the Rules of Court, the appellant was expected to file the appeal

record within three months of the judgment, ie on 30 June 2022. The appeal record was filed on 8 July 2022. The appeal lapsed as a result of the failure to file the record timeously in accordance with rule 8(2)(b).

[7] The appellant filed an application for condonation for the late filing of the record and the reinstatement of the appeal on 10 August 2022. The application was opposed. The application for condonation and reinstatement was heard together with the merits of the appeal as part of determining the prospects of success of the appeal.

Principles governing condonation applications

[8] The general principles applied in the determination of applications for condonation are well-established. They have been comprehensively discussed in numerous judgments of this Court¹ and it is not required to restate them in any detail here. Suffice it to say that condonation for non-compliance with a rule of the Court Rules is by no means a mere formality. The applicant is required, firstly, to provide a reasonable and acceptable explanation for the non-compliance and secondly, to satisfy the Court that there are reasonable prospects of success on appeal.²

¹ In, for example, *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) paras 2-3 and *Namrights Inc v Government of Namibia & 18 others* (SA 87-2019) [2023] NASC (28 April 2023).

² *Alex Kamwi v LSN v The PG v LSN & Steinmann* (SA 56-2020 SA 43-2021 SA 44-2021) [2023] NASC (10 October 2023) para 19.

[9] Further, as was stated, amongst others, in *De Klerk v Penderis*,³ there is a strong interplay between the obligation to provide a reasonable explanation for non-compliance with the Rules of Court and the prospects of success on appeal.⁴

Incomplete appeal record

[10] Additional to the delay in filing the record and non-compliance with rule 8(2) (b), the appellant also failed to comply with rule 11(4)(b) which requires that the record must be correct, complete, and comprising all the relevant evidence, documents and exhibits in the case. Lodging a defective record amounts to non-compliance with rule 11(4)(b).

[11] The record filed is woefully inadequate for its exclusion of significant exhibits and inclusion of irrelevant material. The appellant's legal practitioner elected to argue the matter on the basis of the record 'as it exists and is filed before the court' in the absence of any explanation for the failure to file a complete record.

[12] The record does not contain the bundle of discovered documents, handed in as exhibit A in the trial comprising the original statements of the witness police officers, including Inspector Anton and W/O Machado, and the Occurrence Book

³ *De Klerk v Penderis & others* 2023 (1) NR 177 (SC) para 21.

⁴ *Id* para 49.

entry recording the time of arrest. The exhibits absent from the record are essential for fully evaluating the merits of the appeal. The omitted statements of the police officers are important for assessing the court a quo's findings of credibility as well as the lawfulness or otherwise of the arrest. The time of the arrest is crucial for assessing the duration of arrest, and consequently, the quantum of damages to be awarded.

[13] The incompleteness of the record without any satisfactory explanation is detrimental to the application for the reinstatement of the appeal. This Court in *Teek*⁵ admonished the appellants for their failure to comply with the Rules of Court despite having been alerted about it in the respondents' heads of argument two weeks prior to the hearing. The court criticised the appellants' absence of effort in addressing their non-compliance even on the date of the hearing of the matter.⁶ Similarly, in the present case, the respondent's heads of argument pointed out that the appellant had filed an incomplete record, which conveniently excluded the relevant exhibits relied on by the court a quo, and constituted non-compliance with rule 11(4)(b). However, despite this being pointed out to the appellant more than a week prior to the hearing, no attempt whatsoever was made to remedy the failure.

[14] Where the appeal record has not been filed within the time periods prescribed by the Rules of Court or where the record is incomplete, an application seeking condonation for the non-compliance is necessary.⁷ In this case, the appeal record was filed late, and it is still incomplete. Condonation has been

⁵ *Teek & another v Walters & another* 2021 (3) NR 622 (SC) para 21.

⁶ *Id.*

⁷ *Solsquare Energy (Pty) Ltd v Lühl* 2022 (3) NR 899 (SC) para 61.

sought only with respect to the former and not the latter. This reflects a glaring disregard for the Rules of Court. The absence of the complete record also impedes the administration of justice by hindering the court's ability in some cases to determine the prospects of success on appeal as the relevant evidence or material is not placed before it.⁸

Respondent's attitude towards compliance with a court rule

[15] Rule 11(10)(a) obligates both parties to an appeal to meet within 20 days of noting the appeal with the view to eliminating portions of the record which are not relevant for the determination of issues on appeal. The 20-day period, from the date of the noting of the appeal, ie 20 April 2022, in terms of rule 11(10)(a) expired in this case on 19 May 2022. The rule makes it unequivocally clear that the meeting has to be held within 20 days of noting the appeal and not merely any time before the filing of the record.

[16] Admittedly, the appellant acted much later than this and even his legal practitioner's affidavit mentions 6 June 2022 as the earliest date on which he made an effort to schedule a meeting with the respondent's legal practitioners in order to fulfil the requirements of rule 11(10). However, the duty to comply with rule 11(10) is placed equally on both parties to an appeal. The respondent's legal practitioner seemed to be labouring under the misapprehension that only the appellant bore this duty.

⁸

Alex Kamwi para 24.

[17] The uncooperative conduct of the respondent's legal practitioner is evident from the pugnacious correspondence on the issue addressed to the appellant's legal practitioner, and especially in their lack of timely initiative to schedule or agree to a meeting for the reason that they were engaged in a trial at the time. Their engagement in another trial did not absolve the legal practitioner from meeting the duty imposed on them under rule 11(10).

[18] The insistence on being served with the discovery bundle as a precondition to holding the meeting contemplated under rule 11(10), was also misplaced and contributed to avoidable delays. As the legal practitioner had participated in the trial, they were undoubtedly aware of the content of the discovery bundle. The insistence on being provided with documents one already has in their possession is unhelpful as it has the effect of further delaying the filing of the record. The legal practitioner was under an obligation to cooperate with the appellant's legal practitioner to ensure that a meeting was held timeously to agree on the proper content of the record. An appropriate costs order should be made to mark the court's displeasure with this conduct that does not conduce to the letter and spirit of the relevant rule.

Applicable legal principles and consideration of explanation for delay

[19] The appellant explained that his non-compliance with rule 8(2)(b) of the Court Rules was not due to fault on his part. It was explained further that efforts to comply with the rule were made, but the delay was caused by the late transcription of the record by Tunga Holdings, an entity contracted to transcribe court records.

The appellant contended that the delay of eight days was a result of bona fide human error and not willful default.

[20] By his own admission, the appellant first approached Tunga Holdings to request a copy of the record as late as 7 June 2022. The respondent contended that this should have been done as early as 20 April 2022.

[21] Condonation must be sought as soon as it becomes evident that this is required. This Court in *Katjaimo*⁹ cited with approval O'Regan AJA's *dicta* in *Arangies t/a Auto Tech*,¹⁰ affirming the approach to condonation as set out in *Beukes & another v South West Africa Building Society & others*¹¹ as follows:

'The jurisprudence of both the Republic of Namibia and South Africa indicates that *a litigant is required to apply for condonation and to comply with the Rules as soon as he or she realises there has been a failure to comply.*' (Emphasis mine).

[22] In this case, the application for condonation for the delay was filed as late as 10 August 2023. The appellant's legal practitioner stated on affidavit that the process of preparing the condonation application only began on 27 July 2022, because of her personal circumstances that resulted in her being booked off from 12 – 20 June 2022 and again from 5 – 8 August 2022. Non-availability on the aforementioned dates, even if accepted at face value, does not justify the significant inactivity on other dates on which this application could have been prepared.

⁹ *Katjaimo v Katjaimo* 2015 (2) NR 340 (SC) para 25.

¹⁰ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 4.

¹¹ *Beukes & another v South West Africa Building Society & others* (SA 10-2006) [2010] NASC 14 (5 November 2010) para 12.

[23] It ought to have been obvious to the appellant when Tunga Holdings was delaying the transcription that an application for condonation will have to be filed at the earliest opportunity. On the appellant's own admission, a Mrs Ankama, a government employee was informed by one Ms Ipinge, an employee of Tunga Holdings, to email to Tunga Holdings the documents to be included in the record as late as 29 June 2022, a day before the filing of the record was due. Thereafter, on 30 June 2022 as well, Mrs Ankama followed up with Tunga Holdings and was informed that they were still in the process of preparing the record.

[24] The appellant should have acted swiftly thereafter in filing the application for condonation instead of waiting for the completion of the transcription at its own or Tunga's pace. Presumably as late as 30 June 2022 – the affidavit mentions 30 July 2022 – the appellant's legal practitioner sought an explanation from Tunga Holdings and was informed that they had only transcribed the last two days and had not even begun transcribing the rest of the days. This should have necessarily been more than enough to alert the legal practitioner that they would need to file the condonation application promptly.

[25] In *Solsquare*, it was acknowledged that the correct approach to follow would have involved requesting an extension of time before filing the incomplete record. The appellant's explanation therein attributing the delay to the transcription provider was deemed unsatisfactory for the lack of any supporting affidavit from the provider to confirm the state of affairs that the appellant alleged.¹² In contrast,

¹² Id para 92.

in the present matter, Tunga Holdings' employees have confirmed the state of affairs on affidavit supporting the appellant's application.

[26] An appellant's legal practitioner should not relieve themselves of the responsibility for preparing the complete appeal record in compliance with the Rules of this Court by leaving the compilation of the record 'entirely in the hands of the recording company'.¹³ Although Tunga Holdings contributed materially to the delay in filing the record, the appellant did not exercise the requisite degree of diligence in ensuring compliance with the Rules of Court either.

Analysis and determination

[27] The absence of diligence or attention to comply with the Court Rules makes the explanation for the delay in filing the court record weak and unconvincing. In this case, there is no explanation for the appellant's failure to file a complete record. There is no application for extension of the time period for the filing of the complete record. This demonstrates an admitted disregard for the Rules of this Court. Further, failure to satisfactorily explain the delay in filing the condonation application, more than a month after the appellant found out that it had failed to submit the record on time, renders the explanation offered weak and unpersuasive.

[28] The appellant also contends that the delay must be condoned because of the public importance of the case. It was argued that the court a quo's ruling would set a bad precedent for proving damages in unlawful detention cases. It also

¹³ *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) paras 47– 48.

argues that this precedent would incorrectly lead to legitimising reliance on the sole testimony of a plaintiff regarding prison conditions while assessing damages. We will consider these contentions below alongside the consideration of the merits of the appeal in order to determine its prospects of success as part of deciding the outcome of the application for condonation.

Prospects of success

Appellant's case

[29] The appellant's case is that the court a quo erred in concluding that the only basis for the respondent's arrest was Mr Haasbroek's contention regarding the identifiability of the respondent from the CCTV footage. It was submitted that the court a quo incorrectly regarded Inspector Anton's finding that the suspect was identifiable from the footage as untruthful.

[30] It was submitted that the court a quo's conclusion regarding the time and duration of detention was incorrect and that in coming to that conclusion, the court went beyond the particulars of claim and considered various aggravating factors not pleaded by the respondent. The appellant submitted that the arrest was effected by W/O Machado at Swakopmund Police Station, at 15h32, on 27 February 2019 and that Inspector Anton was not the arresting officer.

[31] The legal practitioner for the appellant also submitted that it was not in dispute that the crime in question was a crime under Schedule 1 to the Criminal Procedure Act 51 of 1977. However, in response to a question by the court, the legal practitioner conceded that the case was based only on allegations of

trespassing and malicious damage to property, neither of which constitutes a Schedule 1 offence for which a person could be arrested without a warrant on 'reasonable suspicion'.

[32] It was submitted that the respondent did not discharge the burden of proof on him to establish that he spent at least two nights in a filthy cell under terrible conditions or that he was given bad food and made to wash cars. It was argued that the court a quo incorrectly relied on the respondent's testimony without any additional evidence to corroborate it. It was also submitted that the court a quo misdirected itself in law and on the facts by incorrectly relying on *Lazarus*¹⁴ and awarding damages in the amount of N\$30 000 per day.

Respondent's case

[33] The respondent's case is that Inspector Anton gave conflicting evidence which he then failed to explain, revealing material contradictions in his testimony, thereby making his evidence unreliable. The respondent also challenged the appellant's assertion that the arresting officer who viewed the CCTV footage had identified the suspect initially and only later, on careful examination, realised that the footage did not depict the suspect. The respondent argued that this was in complete contradiction to the appellant's submission that the arresting officer was W/O Machado and not Inspector Anton, because W/O Machado's testimony categorically revealed that he never identified the suspect from the footage.

¹⁴*Government of the Republic of Namibia v Benhardt Lazarus* (SA 54 of 2017) [2022] NASC 11 (6 April 2022) paras 27-32.

[34] The respondent argued that the appellant's misstatement of facts would have been evident from the original police statements of Inspector Anton and W/O Machado shortly after the respondent's arrest, which were discovered and appropriately dealt with as relevant exhibits. Inspector Anton was unable to satisfactorily explain why in his original police statement as well as his witness statement he expressly admitted that he had arrested and handcuffed the suspect at Mr Haasbroek's house. Similarly, W/O Machado was unable to explain why in his original police statement as well as witness statement he said that he found the respondent 'already in the waiting cells'.

[35] The respondent highlighted the appellant's failure to include the statements of Inspector Anton and W/O Machado, and the entry in the Occurrence Book at Swakopmund Police Station dated 27 February 2019 at 08h33, mentioning the time of arrest, in the appeal record. It was submitted that the documents excluded from the record are relevant to the adjudication of the merits of the appeal and were relied upon by the court a quo in concluding that the arrest and detention were unlawful.

[36] The respondent emphasised that the award of damages by the court a quo was justified because a broad discretion vested in the court and the respondent himself furnished oral evidence regarding the conditions of his detention which was not gainsaid by the appellant despite the court a quo's specific invitation to do so. Therefore, so it was argued, the evidence stood uncontested.

Consideration of explanation

[37] The grounds of appeal consist of bald and vague assertions that do not set forth concisely and distinctly the grounds on which the appeal is predicated. Despite its contention that the court a quo erred in concluding that the CCTV footage was the only basis for the arrest, the appellant failed to provide credible evidence to establish any additional basis for the arrest. There is no gainsaying that once the arrest had been admitted, its lawfulness needed to be established by the appellant.

[38] The appellant failed to include in the record relevant documents necessary for the adjudication of the merits of the appeal. The appellant also mounted unjustifiable criticism of the court a quo's findings regarding the credibility of Inspector Anton. Although Inspector Anton's original police statement was excluded from the record, it forms part of the transcribed text, and a copy thereof was annexed to the respondent's heads of argument. We agree with the court a quo's conclusion that Inspector Anton's testimony seemed untruthful because it suffered from material contradictions.

[39] This court held in *Ndjembo*¹⁵ that for a peace officer to exercise the power granted by s 40(1)(b), he or she must, amongst others, entertain a 'suspicion', based on objectively reasonable grounds that the person being arrested has committed an offence under Schedule 1 to the Act. It was further held that the test for reasonable suspicion is not whether a peace officer believed that he or she had reason to suspect, but rather whether on an objective approach, the officer in fact had reasonable grounds for the suspicion.¹⁶

¹⁵ *Government of the Republic of Namibia v Ndjembo* 2020 (4) NR 1193 (SC) para 15.

¹⁶ *Id* para 20.

[40] In the present case, the ground for reasonable suspicion pleaded was the respondent's alleged identification on the CCTV footage. On an objective assessment, the evidence of the alleged identification, based as it was on the say so of Inspector Anton, is false. At least three other police officers who viewed the footage concluded that the respondent was not visible thereon. Moreover, the arrest was unlawful because it was made for alleged malicious damage to property and trespassing, neither of which is part of Schedule 1. It is clear as daylight that the appellant failed to justify the lawfulness of the respondent's arrest in the present case.

[41] The appellant's legal practitioner submitted that the respondent voluntarily accompanied the police to the station. For this proposition, the appellant relied on *Isaacs*,¹⁷ which matter contrasted between two situations: (i) where a suspect voluntarily accompanies the police to the station and (ii) where a suspect is told to wait at a police station for a police officer to arrive and whose request that he be permitted to go home was refused.¹⁸ Only the latter amounts to arrest, because as per *R v Mazema*,¹⁹ quoted with approval by the South African Appellate Division in *Isaacs*,²⁰ '[A] person is under arrest as soon as the police assume control over his movements'. These observations highlight that the deprivation of personal liberty does not have to be absolute and if the person is not in control of his movements at will, he would be under arrest.

¹⁷ *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A).

¹⁸ At pages 16 - 17.

¹⁹ *R v Mazema* 1948 (2) SA 152 (E) at 154.

²⁰ At 321d.

[42] However, the difference between these situations does not assist the appellant. The element of the respondent's voluntariness in accompanying the police to the station is a mere assertion of the appellant, which when combined with their witnesses' contradictory versions on this aspect, simply does not add up.

[43] The respondent's version that he was arrested at Mr Haasbroek's house corresponds with the original witness statement and police statement of Inspector Anton, as well as W/O Machado's testimony that he found the respondent 'already in the waiting cells' at the Swakopmund Police Station. On a balance of probabilities, the court below was correct in accepting the respondent's version and rejecting that of the appellant.

Quantum of damages

[44] The court a quo took its 'main cue' from *Lazarus* and embraced its *dicta* at paras 27 to 32, which evidently demonstrates that no mathematical formula was adopted to determine the quantum of damages. Courts have a wide discretion in assessing the quantum of damages based on the relevant facts and circumstances of each case. As it stands, *Lazarus* is an authoritative pronouncement of this Court in the assessment of an appropriate award for damages in respect of a claim for unlawful arrest. It is binding on the court a quo, hence its reliance on the authority was entirely correct.

[45] The court below was not precluded by the differences of fact in *Lazarus* and the present case from relying on the principles enunciated in *Lazarus* in the assessment of damages. Further, the award of damages in *Lazarus* was made in

2017. We reiterate this court's holding in *Lazarus* that in arriving at the appropriate award, the effect of inflation on the value of money should also be factored in.²¹

[46] The appellant's counsel pleaded that the aggravating factors in *Lazarus* included threat to life and blatant misuse of power to a degree absent in the present case. We consider that an allowance should be made for the change in the value of money between 2017 and 2023 owing to inflation.

[47] Furthermore, an appeal is directed against the outcome of a case and not essentially against the court's reasoning. In this case, we do not consider that the award of damages by the court a quo is excessive. Therefore, it does not merit interference.

[48] However, in addressing the appellant's apprehensions that this judgment would have far-reaching consequences when it comes to assessing damages, we urge courts to clearly articulate the factors and principles that informed their award of damages for the sake of legal certainty and predictability. The fact-specific nature of the assessment can lend itself to arbitrariness if standards in accordance with existing case law are not applied to the particular facts of the case. Ultimately, an award of damages is discretionary. It is made on an overall assessment of the relevant legal principles and facts. As long as the sum arrived at is just and fair on the facts of the case, it cannot be assailed merely for non-compliance with some rule-based formula by distinguishing one minor fact from another. This is because the award in most cases is decided narrowly on the unique facts of the case, and

²¹ *Id* para 61.

can only be used as a guide in subsequent cases instead of a rule to be followed slavishly.

[49] We reiterate the holding in *Lazarus*,²² that (a) there can be no mathematical accuracy in determining damages for infringements of personal liberty and (b) awards of damages for such violations should reflect the importance of the right and the serious legal consequences of any arbitrary interference with it.

[50] The court *a quo* expressly noted that it used *Lazarus* as a 'guideline' and had the 'importance of liberty in mind, [considering] the conditions plaintiff had to endure' while assessing its award of damages. This approach appropriately takes guidance from existing case law and considers the specific facts of the present case while reflecting the premium placed on the constitutional right to personal liberty.

[51] In *Tyulu*, the South African Supreme Court of Appeal considered various factors in determining damages which included: age, circumstances of arrest, its nature and duration, the suspect's social and professional standing and the improper motive for arrest. Similarly, in *Iyambo*,²³ also cited in *Lazarus*, the court considered inter alia the circumstances surrounding the plaintiff's arrest and his loss of esteem among members of the local community where he worked as a primary school teacher.

²² Citing *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA).

²³ *Iyambo v Minister of Safety and Security* (I 3121/2010) [2013] NAHCMD 38 (12 February 2013).

[52] In the present case, relevant factors include the circumstances and conditions of the respondent's arrest as well as the unnecessarily arbitrary interference with his personal liberty when he was not even alleged to have committed a Schedule 1 offence. Furthermore, he testified that he was detained in a filthy cell with hardened criminals, given inedible food and made to wash vehicles. The respondent stated that the quality of the food given to him was so bad that he did not eat until after his release from custody. The appellant sought to argue that the respondent could not testify about the quality of the food as he did not taste it. It is trite that supplying inedible food is as good as not supplying food at all and the appellant's attempt to present the situation the respondent found himself in as some contradiction in his testimony is evidently misguided.

[53] As to the criticism that the court a quo had assessed the damages on the basis of uncorroborated evidence, the short answer is that the respondent's evidence was not challenged in any meaningful way. The appellant declined to lead evidence on the quantum of damages, despite being expressly invited to do so by the court a quo. Therefore, we find no reason to doubt either the credibility of the respondent's testimony on a balance of probabilities or the court a quo's decision to rely on it in arriving at its assessment of the quantum of damages.

Conclusion

[54] The failure to apply for condonation in respect of the incomplete record as well as low prospects of success constitute insurmountable barriers to the appellant's attempt to have the appeal reinstated. Moreover, the appeal does not raise issues of public importance which could 'tilt the balance in favour of

condonation'.²⁴ It follows that as there are low prospects of success on appeal, the application for condonation and reinstatement should be refused.

²⁴ *Solsquare* para 101.

Costs

[55] The general rule is that costs follow the event. The costs order in this case reflects the rationale of rule 11(11) which awards costs against a party that does not comply with rule 11(10). In this case, the respondent's legal practitioner was part of the trial proceedings and neglected his duty under rule 11(10) to ensure that a timely meeting was held with a view to agreeing to the relevant portions of the record.

[56] Under rule 11(6), the costs of attendances relating to the record form part of the costs of appeal. Thus, although costs are awarded to the respondent, such costs should exclude the costs relating to the record as a mark of this Court's disapproval of the conduct of the respondent's legal practitioner in failing to cooperate with the appellant's legal practitioner to timeously hold the meeting contemplated by rule 11(10).

Order

[57] In the result, the following order is made:

- (a) The application for condonation and reinstatement is refused.
- (b) The matter is struck from the roll.
- (c) The appellant is to pay the respondent's costs, both in the court a quo and in this Court, such costs to include the costs of one instructed and one instructing legal practitioner, but such costs to exclude the costs of attendances relating to the record of appeal in this Court.

SHIVUTE CJ

SMUTS JA

SCHIMMING-CHASE AJA

APPEARANCES

APPELLANT: J Ncube (with him J S Hinda)
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