REPORTABLE

CASE NO: SA 27/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between

LAVINIA NGHIMWENA **Appellant**

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **Respondent**

CORAM: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: **8 March 2016**

Delivered: **22 August 2016**

APPEAL JUDGMENT

SHIVUTE CJ (MAINGA JA and SMUTS JA concurring):

[1] The appellant, Mrs Nghimwena, brought an action in the High Court in which she claimed from the government, the respondent in this matter, damages in the amount of N$200 000 for alleged unlawful arrest and detention and a sum of N$500 000 for alleged assault and torture. The High Court dismissed the two claims and obviously dissatisfied with this decision, she now seeks relief from this court.

Application for condonation and reinstatement

[2] Although the appeal was noted on time, the record of appeal was not lodged within a period of three months from the date of judgment or order appealed against as required by rule 5(5)*(b)* of the Rules of the Supreme Court. Instead, the record was filed some nine months late. Mrs Nghimwena has also neglected to enter into good and sufficient security for the respondent's costs in accordance with the procedure set out in rule 8(2) of the Rules of this court. The respondent has neither waived its right to security nor has Mrs Nghimwena been released from the obligation to enter into good and sufficient security by the court appealed from.

[3] Where a potential appellant has neglected to comply with the Rules of Court as described above, the legal position is that the appeal is deemed to have lapsed and may be revived only upon a successful application for condonation and reinstatement.[1] Mrs Nghimwena has accordingly lodged an application for condonation and reinstatement of the appeal. In an affidavit accompanying the application, Mrs Nghimwena gives the lack of money as the reason for not complying with the rules of court. She sets out time lines when she took certain steps in an attempt to prosecute the appeal and says that her relatives initially made funds available to instruct her lawyers to note the appeal, which was made on time as already mentioned.

[4] After the delivery of the judgment of the High Court, she immediately applied for legal aid. In anticipation of a favourable reply, her lawyers requested

[1] *Ondjava Construction CC & others v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) para 2.

the entity responsible for the transcription of court proceedings to prepare the record of appeal. The court file was misfiled and was found only two months after the first enquiry was made. In the meantime, Mrs Nghimwena had received sufficient funds from ‘family and friends’ to prosecute the appeal. Such amount included the deposit for the bond of security for the appeal in the amount determined by the registrar.

[5] Counsel for the respondent contends in his written heads of argument that Mrs Nghimwena’s affidavit does not set out a full and detailed explanation for the delay and that the application for condonation and reinstatement should be refused on this ground alone. In oral submissions, however, counsel submitted that if the explanation is found to be satisfactory the application for condonation may be granted.

[6] I may mention in passing that the appeal was initially set down for hearing on 14 November 2012, but material parts of the evidence were found to be missing from the record. As these could seemingly not be traced, the parties were directed to reconstruct those portions of the evidence. The record now constitutes what the parties have agreed is the best available evidence presented in the trial.

[7] Returning to the application for condonation and reinstatement, in an attempt to convince a court that such application should succeed, an applicant must not only give a full and satisfactory explanation for the failure to comply with the relevant rules of the court, but must also deal in the affidavit accompanying the application with the merits setting out the basis upon which it is contended that the

appeal enjoys reasonable prospects of success. In this case, Mrs Nghimwena asserts that she has reasonable prospects of success on appeal and has referred the court to pertinent evidence on the record. I am persuaded that despite the long delay to file the record of appeal, the explanation for such delay appears satisfactory. It is evident from Mrs Nghimwena's explanation that it was her intention throughout to appeal against the decision of the High Court and that money was an obstacle to achieving that objective. This is demonstrated by the fact that she applied for legal aid shortly after the judgment had been delivered. When the funds to pay for the compilation of the record were secured, the misfortune of a misfiled court file contributed to the delay. On the facts of this case, I would grant the application for condonation and reinstate the appeal. Accordingly the application for condonation is granted and the appeal is reinstated. I turn then to consider and decide the appeal on the merits.

Summary of the evidence

[8] The evidence presented at the trial may be summarised as follows. Armed men attacked and robbed a crew of a security company at or near Brakwater, Windhoek, of cash in-transit in the amount of over N$5,7 million. The matter was reported to the police who immediately commenced with the investigation of the crime. In the course of their investigations, the police received information that one of the suspects in the armed robbery, a man known as Jason Awene but generally referred to in evidence by his alias 'Kilingi', was in the northern part of Namibia. A group of police officers under the command of Chief Inspector Sheehama travelled there to arrest Kilingi and recover part of the stolen money.

[9] The police team eventually arrived at Mrs Nghimwena's work place where she was found. She was asked to accompany the police officers to Oshakati Police Station and she agreed. At the police station Mrs Nghimwena was interrogated, amongst others, by Chief Inspector Sheehama. According to Sheehama, when Mrs Nghimwena went to the police station she was under arrest, having been arrested without a warrant, on his orders at her place of business. This account is disputed by Mrs Nghimwena and the question of the lawfulness of her arrest is a key issue to be decided on appeal. It was common cause that Mrs Nghimwena was later taken back to her place of business. While there, her husband turned up and the two were taken to the police station where they were kept overnight. It is not disputed that Mrs Nghimwena was released the following day at 12h00, having spent about 24 hours in detention. Chief Inspector Sheehama said that although Mrs Nghimwena was arrested with a view to being taken to court, there was not enough evidence to do so, a decision informed, amongst others, by what the police had established from the interrogation of her husband.

[10] The two principal issues that the High Court was called upon to decide and which this court must now decide are firstly, whether Mrs Nghimwena was arrested lawfully, which issue includes the question of whether the police officers involved in her arrest had a reasonable suspicion that she committed an offence referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977 (the Act), and lastly whether or not she had been assaulted. These issues will be dealt with in the sequence in which they have been identified.

Was Mrs Nghimwena lawfully arrested?

[11] As noted above, the question of whether Mrs Nghimwena was lawfully arrested and detained is a key issue in the appeal. It is trite that the respondent bore the onus of establishing on a balance of probabilities that the police officer who arrested Mrs Nghimwena had reasonable grounds for suspecting her of having committed an offence mentioned in Schedule 1 to the Act.[2] The respondent sought to discharge the burden by leading the evidence of Chief Inspector Sheehama and Warrant Officer Scott, the designated investigating officer of the case. I may immediately pause to observe that the respondent's case was presented in a most ineffective way; the cross-examination of Mrs Nghimwena was largely ineffectual as instead of being asked pertinent questions, she was mostly confronted with what the respondent's witnesses would say. But even then, certain of the propositions put to her as representing what the respondent's witnesses would testify were not ultimately testified about. I am, however, of the opinion that despite shortcomings in the way in which the respondent's case was presented, this court must consider the evidence as a whole and decide whether objectively viewed the respondent has discharged the burden of the lawfulness of Mrs Nghimwena's arrest. This is so, because whether or not the arrest is lawful is a matter to be ascertained objectively and not subjectively.[3]

[12] Before the evidence of the two main witnesses for the respondent is examined further, it is necessary to consider the pleadings on the issue of the lawfulness or otherwise of the arrest as they point at some of the issues that were

[2] See, for example, *McNab & others v Minister of Home Affairs NO & others* 2007 (2) NR 531 (HC) para 34.
[3] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD).

no longer in dispute at the commencement of the trial. On the issue of the arrest, in her particulars of claim Mrs Nghimwena averred that she was arrested in Oshakati on 12 January 2005. The respondent requested further particulars as to where in Oshakati Mrs Nghimwena had been arrested; how she was arrested, and whether she had been informed of the reasons of the arrest. Mrs Nghimwena replied respectively that she had been arrested at Oshakati Police Station; that she had been informed that she was under arrest, and that she had been told that she would be arrested for failing to disclose the whereabouts of Kilingi.

[13] The respondent then pleaded that Mrs Nghimwena had been arrested on reasonable suspicion of having committed a Schedule 1 offence to the Act; that she was being investigated for involvement in a robbery with aggravated circumstances of N$5 760 000 and that the arrest was linked to the harbouring of a fugitive from justice, namely Kilingi, as well as for assisting the latter to evade justice. It was also respondent's plea that Mrs Nghimwena had been arrested for additional reason of being an accessory after the armed robbery with aggravated circumstances.

[14] Counsel for Mrs Nghimwena, argued that Mrs Nghimwena was not arrested lawfully because there is no evidence that she had been arrested in accordance with the provisions of s 39(1) of the Act. Section 39(1) requires that a person making an arrest whether with or without a warrant must touch or confine the person arrested, 'unless the person to be arrested submits to custody'. It is thus plain that where the person to be arrested submits to custody the requirement of

touching or confining is satisfied.[4] An arrest is completed where the person to be arrested submits to custody by word or action. Lansdown and Campbell[5] opine that 'the policy of the law in prescribing this form of procedure, as in the case of procedure by touching, is to avoid a breach of the peace. It is submitted that the submission to custody may be confirmed by the conduct on the part of the person making the arrest, conduct which makes it clear that the prisoner is no longer permitted to move freely'.

[15] At the trial, the respondent sought to establish the circumstances of Mrs Nghimwena's arrest through the evidence of Chief Inspector Sheehama and Warrant Officer Scott. As earlier observed, Chief Inspector Sheehama was adamant that the appellant was arrested at her place of business, on his orders. He was unable, however, to pinpoint the officer who made the arrest. He insisted that it was Warrant Officer Scott. The latter, on the other hand, said that he was not involved in Mrs Nghimwena's arrest as he had gone to Oshikango at the time and that he was simply ordered by Chief Inspector Sheehama to detain Mrs Nghimwena whom he had found at the police station under guard. The appellant, on the other hand, testified that she voluntarily accompanied police officers to the police station where she was subsequently arrested. She insisted that she was arrested by Chief Inspector Sheehama.

[16] Although the identity of the police officer who arrested Mrs Nghimwena has not been clearly established by the respondent as one would have expected in

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[4] See also *Theobald v Minister of Safety and Security & others* 2011 (1) SACR 379 (GSJ) para 292.
[5] (1982) *South African Criminal Law and Procedure* Vol V at 291.

cases of this nature and bearing in mind that the respondent bore the onus, it is evident that Mrs Nghimwena had admitted that she was arrested at the police station where she was subsequently detained. The factual question of whether or not she had been arrested having been admitted in the pleadings, that issue was no longer a live issue between the parties at the trial. Such admission is conclusive, 'rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it'.[6]

[17] What remained to be proved by the party bearing the onus of proof was whether such arrest was lawful. Moreover, it is also clear that Mrs Nghimwena had submitted to custody by agreeing to accompany the police to the police station. As Lansdown and Campbell rightly observe on p 290, 'the essence of an arrest is the deprivation of liberty, an element which the words "by forcibly confining his body" in s 39(1) clearly emphasise'. Where there has been a submission to custody the requirement of a deprivation of liberty is satisfied.[7] As was pointed out by the Appellate Division of the South African Supreme Court of Appeal in *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 153, 'once the arrest or imprisonment has been admitted or proved, it is for the defendant to allege and prove the existence of grounds in justification of the infraction'. The arrest in this case having been admitted, it is to this leg that the enquiry should proceed next.

Were there grounds justifying Mrs Nghimwena's arrest and detention?

[6] *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531. See also s 15 of the Civil Proceedings Evidence Act 25 of 1965 which provides that: 'It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings'.
[7] Lansdown and Campbell at 290.

[18] A consideration of the pleadings should again be the starting point in answering the above question. The pleadings establish that the respondent requested further particulars as to whether Mrs Nghimwena had been informed of the reasons for her arrest, and if so to furnish such reasons. Mrs Nghimwena responded that she was informed that she was being arrested for failing to disclose the whereabouts of her husband and Kilingi. The respondent then pleaded as stated in para [13] of this judgment.

[19] The respondent sought to establish the basis for Mrs Nghimwena's arrest by leading the evidence of Chief Inspector Sheehama, its main witness. He testified that upon arrival in Ondangwa, the police received information that Kilingi had stayed for about two days at a house in that town and that he was picked up by a car linked to a business entity belonging to Mrs Nghimwena's husband.

[20] At that time the investigating team was in possession of a call statement of Kilingi's cell phone records indicating that there had been contact between Kilingi's cell phone number and a certain landline number. It was common cause that the landline number in question belonged to the business of Mrs Nghimwena's husband in Oshakati, where Mrs Nghimwena was employed. The question of how the police had gained access to Kilingi's cell phone records is not an issue in the appeal. The police team proceeded to Mrs Nghimwena's place of business where she was found. She was asked where her husband was to which she replied that she did not know. At the time the police were in possession of information that Kilingi had left the country and it was their belief that Mrs Nghimwena's husband assisted Kilingi to cross the border and evade justice. Chief Inspector Sheehama

testified that the police had also listened to Kilingi's voice mail and found that there was a voice message in Oshiwambo language to the effect that:

> 'Grun and Kilingi, if you reach Grootfontein change clothes and do not leave Grootfontein before you call me.'

[21] It is not in dispute that Grun is one of the first names of Mrs Nghimwena's husband. According to Chief Inspector Sheehama, Mrs Nghimwena admitted having left the message in question on Kilingi's voice mail, but could not explain why she did so. He considered the message to be a warning and therefore perceived it in a serious light. He believed that Mrs Nghimwena must have known that the police were looking for Kilingi as the armed robbery case had received wide media coverage and the entity Mrs Nghimwena was working for was a distribution agent of a newspaper with wider national circulation. He knew that it was not Mrs Nghimwena's duty to assist the police in finding Kilingi, but emphasised that the police were justified in confronting her in light of the message left on his voice mail.

[22] Mrs Nghimwena told the trial court that Kilingi was a family friend and that she informed Chief Inspector Sheehama, on enquiry by the latter, that she had made a telephone call to Kilingi and that by the time she was being interrogated to her best knowledge Kilingi was in Windhoek and not in northern Namibia. She denied knowing anything about the message that was allegedly left on Kilingi's voice mail. It may be opportune to mention that there was a great deal of confusion of the account initially given by Chief Inspector Sheehama about where the alleged message to Kilingi was found. Sheehama initially insisted that the

voice mail was found on the cell phone in possession of Mrs Nghimwena. When pressed whether it was possible for someone to listen to a voice message on the sending cell phone, Sheehama conceded that it was not possible and then changed tack to say that the message was in fact found on Kilingi's voice message. The line of cross-examination then focused on the question of whether it was possible for the police to listen to someone's voice mail without their being in possession of the owner's hand set. In answer to that question, it was clarified by an official from the mobile telephone company that provided telephony services to Kilingi that that was indeed possible at the time, adding that the position had since changed.

[23] That the police listened to a voice message was confirmed by the Investigating Officer, Warrant Officer Scott, who added that as he could not understand the language in which the message was conveyed, he was not in a position to tell the court the nature of the message except what he had heard from colleagues. It was common cause that one such colleague was Chief Inspector Sheehama who said that he had listened to and understood the message.

Other legal principles applicable to the case

[24] As there are other less harsh methods of securing the attendance of a person reasonably suspected of having committed an offence or crime to court, the arrest of such person for this purpose must undoubtedly be the harshest method as it deprives the person of his or her personal liberty. As such, courts have repeatedly emphasised that where alternative methods of securing the attendance of a suspect to court may safely be resorted to, arrest should be

avoided.[8] This would be in conformity with constitutional provisions that protect the personal liberty of an individual. Article 7 of the Namibian Constitution provides that no person shall be deprived of personal liberty except according to procedures established by law. Furthermore, sub-art (1) of Art 11 of the Constitution dealing with arrest and detention states that 'no person shall be subject to arbitrary arrest and detention'. These are some of the key constitutional provisions that make it absolutely clear that the constitution places a high premium on personal liberty. Accordingly, a person may be deprived of his or her personal liberty strictly only in accordance with the provisions of the law.

[25] Section 40(1)*(b)* of the Act sets out parameters under which peace officers such as members of the Namibian Police Force may arrest suspects without a warrant of arrest. It provides in relevant parts as follows:

> 'Arrest by peace officer without warrant
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> (1) A peace officer may without warrant arrest any person-
>
> (a) . . . .
>
> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
>
> (c) . . . .

[8] See, for example, *Louw & another v Minister of Safety and Security & others* 2006 (2) SACR 178 (T).

[26] Schedule 1 includes common law offences as well as ‘any offence’ (except the offence of escaping from lawful custody in certain circumstances) the punishment for which may be a period of imprisonment exceeding six months without the option of a fine.

[27] Lansdown and Campbell rightly point out that ‘suspect’ and ‘suspicion’ are words that are vague and difficult to define. They point out that what these words suggest though is that ‘suspicion is apprehension without clear proof’ and that the words ‘reasonably suspects’ qualify the suspicion required by the section.[9] The learned authors set out the requirements of a reasonable suspicion as follows:

> ‘There must be an investigation into the essentials relevant to the particular offence before there can be a reasonable suspicion that it has been committed. Mere suspicion will not suffice for this purpose. For proof of reasonable grounds suspicion will have to be supported by circumstances sufficiently strong in themselves to induce in a cautious person the belief that the arrested person has committed a First Schedule offence.’[10]

[28] As was rightly observed by the Appellate Division of the South African Supreme Court of Appeal in the *Duncan* matter at 814D-E:

> ‘. . . [T]he question whether a peace officer "reasonably suspects" a person of having committed an offence within the ambit of s 40(1)(*b*) of the Act is objectively justiciable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion.’

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[9] At 276.
[10] Id.

[29] The above approach was followed in this jurisdiction in *Cabinet of the Interim Government of South West Africa v Bessinger & others* 1989 (1) SA 618 (SWA) at 628E-F (per Berker JP). In applying these principles to the facts of the case on the question of whether the police harboured a reasonable suspicion to arrest Mrs Nghimwena, the evidence appears to me to establish a reasonable suspicion for her involvement in a commission of a Schedule 1 offence such as being an accessory after the fact. Such an offence is covered by Schedule 1 under the rubric ‘any offence’. Indeed, as already noted, it was the respondent’s case that Mrs Nghimwena was arrested for her alleged involvement in robbery with aggravating circumstances, amongst other things, for being an accessory after the fact. Snyman[11] defines an accessory after the fact as follows:

> 'A person is an accessory after the fact to the commission of a crime if, after the completion of a crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime, or to facilitate such a person’s evasion of liability.'

[30] The evidence establishes that Mrs Nghimwena left what on its face value appears to be a statement alerting Kilingi and Mr Nghimwena to the fact that they were persons of interest to the police and therefore warning them to take precautions of changing clothing and of leaving the town of Grootfontein only after they had called Mrs Nghimwena. As it turned out Kilingi managed to evade justice. The extent to which the warning given to Kilingi may have played a role in his escape has not been established in evidence, but I do not consider it remotely

[11] C R Snyman *Criminal Law* 6ed (2014) at 271.

relevant in determining the reasonableness of the suspicion on the part of the police. I am persuaded that the police had a reasonable suspicion of her involvement in the commission of a Schedule 1 offence at the very least as an accessory after the fact. Given the seriousness of the offence she was suspected of having been involved in and in light of the fact that substantial amounts of the stolen money had remained unrecovered at the time, it appears to me to have been reasonable for the police to have taken steps to further investigate the extent of her involvement before deciding whether to release her or to proceed with a prosecution as contemplated by s 50(1) of the Act. It seems to me therefore that despite the inept way in which the respondent's case was presented, looking at the evidence as a whole the grounds for the police's suspicion appears to be objectively reasonable. I am persuaded therefore that Mrs Nghimwena was lawfully arrested. As her arrest was lawful, the question of the unlawfulness of her detention does not arise and therefore need not be considered.

Was the claim for assault and torture proved?

[31] In her particulars of claim, Mrs Nghimwena averred in relation to the claim of assault and torture that Chief Inspector Sheehama and four other named police officers as well as three other unnamed police officers assaulted her and subjected her to torture. It was also alleged that the same police officers subjected her to cruel and inhuman treatment or punishment. In particular, it was alleged that she was repeatedly assaulted by being manhandled, pushed and hit in the face with open hands in an attempt to compel her to 'confess'. Additionally, she was insulted and shoved into and out of a vehicle which 'repeatedly' stopped on a public road.

[32] In her testimony, Mrs Nghimwena stated that at some point during interrogations, Sheehama became angry and in effect violent. He seized her by the hair and shook and touched her all over the body. She was called by another police officer a liar and a bitch. She was asked where her husband was and she agreed to take the police to her husband. On the public road from Oshakati to Ongwediva, Sheehama asked her to give him directions to the place where they could find her husband. Mrs Nghimwena answered that Sheehama should drive straight ahead and await further directions. This answer, according to Mrs Nghimwena, angered Sheehama so much that he stopped the vehicle, pulled Mrs Nghimwena out of it and instructed her to sit in the front passenger seat. He then drove up to her residence. They did not find the husband at home.

[33] Next they drove to Mrs Nghimwena's office where the husband was found. He too accompanied the police and his wife to the police station. There Mrs Nghimwena was kept overnight until her release, with the assistance of her lawyer, at about 12h00 the following day. Upon her release she went straight to work. She did not suffer any injury as a result of the assault. She did not tell her lawyer of the alleged assault nor did she lay charges against the alleged perpetrator. In his testimony, Chief Inspector Sheehama strongly denied that he had assaulted Mrs Nghimwena at all, describing such an assertion a lie.

[34] The High Court found that Mrs Nghimwena's claim for damages for alleged assault and torture lacked merit in that there were no physical or mental signs of injury on her. The court found the evidence of assault to be unconvincing;

reasoning that if Mrs Nghimwena had been seized by her hair as she testified, one would have found evidence of forceful removal of hair or some bruises on her. Moreover, she did not even tell the lawyer who assisted with her release about the assault. In my respectful view, the reasoning of the court below on the issue of assault is unassailable.

[35] The evidence of assault and torture consists entirely of Mrs Nghimwena's say so. No corroborative evidence was presented. Contrary to assertions made in the particulars of claim, apart from Chief Inspector Sheehama who allegedly assaulted her and one other officer who allegedly insulted her, no other police officer was implicated in her evidence. Moreover, her conduct upon release from custody is not consistent with a person who had been 'repeatedly' assaulted. Instead of going home to recuperate or to seek medical attention after her release from custody, she went straight to work. The allegations of assault and torture were not conveyed to her lawyer until after instructions were given to sue the respondent. I am not persuaded, for the reasons advanced by the trial court that the claim of assault and torture should have succeeded. The High Court was therefore entirely justified in rejecting it as meritless. The appeal ought therefore to be dismissed.

[36] It is accordingly ordered that:

The appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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SHIVUTE CJ

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MAINGA JA

_____
SMUTS JA

APPEARANCES

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	Instructed by Sisa Namandje & Co Inc
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