

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3947/2013

In the matter between:

KENNEDY SIMASIKU CHUNGA

PLAINTIFF

and

**THE MINISTER OF SAFETY AND SECURITY
PROSECUTOR GENERAL
GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Neutral citation: *Chunga v The Minister of Safety & Security* (I 3947-2013)[2017]
NAHCMD 360 (05 December 2017)

Coram: PRINSLOO J

Heard: 05,06,19 and 24 April, 24 July 2017.

Delivered: 05 December 2017

Flynote: Civil Procedure – Delict – Malicious prosecution – requirements restated – whether plaintiff proved prosecution initiated without reasonable and probable cause and with malice – Continuation of prosecution – Malice – The question of malice only relevant when it becomes clear that prosecutor continued with the prosecution without reasonable grounds – Court to consider grounds for justification for continuation of trial against an accused where all evidence has been led – The role of a prosecutor and constitutional obligations thereto considered.

Summary: The plaintiff was arrested by the Namibian Police based on information that the plaintiff was an organizer and/or supporter of the UDP and influenced people to take up arms to secede Caprivi from Namibia. The plaintiff was prosecuted together with other 125 accused person on 278 charges. The most serious charges, on which plaintiff was prosecuted, were high treason, sedition, public violence, murder and attempted murder (collectively referred to as “high treason”) in what has become known as the Caprivi Treason trial.

On 11 February 2013, plaintiff was acquitted and discharged in terms of section 174 of the Criminal Procedure Act 1977 (“CPA”).

During 2013, the plaintiff instituted action against the 1st to 3rd Defendant namely; Minister of Safety and Security, Prosecutor General and Government of the Republic of Namibia. The alternative claim is based on alleged violation of various constitutional rights, which is set out in more detail hereunder, as a result of the prosecutions. On both claims the plaintiff seeks to recover damages in the amount of NAD 14 725 800.00. The principal claim as alleged by the plaintiff is thus brought against the first and second defendants based upon malicious prosecution under the common law in respect of the period 12 November 1999 to 11 February 2013.

The plaintiff bases his claim on the position that the testimony of all witnesses and all evidence which could have been present for the purpose of attempting to implicate the plaintiff regarding the commission of the crimes set out in the indictment was completed

by 31 January 2008 and despite this fact, the second defendant continued to prosecute the plaintiff until 11 February 2013 without reasonable or probable cause. The plaintiff is of the opinion that the second defendant should reasonably have stopped such prosecution in terms of Section 6(b) of the Criminal Procedure Act, Act 51 of 1977, by the aforesaid dates, or within a reasonable time thereafter.

The first defendant essentially based their defence denying that the first defendant or members of the first defendant set the law in motion or actively instigated for improper motive behind the prosecution against the plaintiff and further that the first defendant acted within their statutory and constitutional powers and their conduct was limited to the investigation of the offences which the plaintiff was reasonably suspected of committing.

The second defendant essentially also denies that she could have stopped the prosecution in terms of section 6(b) of the Criminal Procedure Act as such stopping of prosecution would have been risky and prejudicial to the State's case due to the fact that the plaintiff was charged with several other co-accused. The second defendant further averred that the prosecution was not in the position to know that all evidence that could implicate the plaintiff had been presented and that all witnesses that could implicate plaintiff had completed their testimonies. Further the second defendant or her employees could not, due to the magnitude and special circumstance of the case, continuously perform appraisals on the evidence provided by the various witnesses as such a continuous individual appraisal of evidence would be humanely impossible. The second defendant and her employees further believed that there was a possibility that the State case could be strengthened during the defence case.

The court then had to make a determination on whether the Namibian Police instigated or instituted the criminal proceedings and if so, whether it was by improper motives and without probable cause and lastly whether the Prosecutor-General acted with malice and without probable cause in prosecuting the plaintiff.

Held – It is clear that the Namibian Police gathered information from various sources and agencies where after they interviewed the witnesses and obtained the necessary statements in order to compile a docket. The docket in turn was submitted to the Office of the Prosecutor-General, the second defendant, who made the decision to institute prosecution, against whom the said prosecution would be instituted and on what charges.

Held – There is no evidence that the police officers did anything other than what would be expected of them as the investigators in this matter and further that there is no evidence that the first defendant instigated the prosecution of the plaintiff and the claim against the first defendant can thus not succeed.

Held – The concept of reasonable and probable cause is clearly the most onerous of the elements for a plaintiff to establish. The test contains both a subjective and objective element, which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances

Held further – To consider merely what the prosecutor knew or believed at the time the prosecution was instigated or maintained is not appropriate where the knowledge of a prosecutor is confined to the knowledge or belief of what others have said or done.

Held further that – In these cases, it is not whether the plaintiff proves that the state of mind of the prosecutor fell short of a positive persuasion of guilt, it is whether the plaintiff proves that the prosecutor *did not honestly from the view that there was a proper case for prosecution, or proves that the prosecutor formed the view on an insufficient basis*. Thus, determining what a proper case for prosecution is will require examination of the prosecutor's state of persuasion about the material considered by them.

Held further that – It is trite that a prosecutor has a duty to prosecute a matter if there is a prima facie case and if there is no compelling reason for refusal to prosecute. In this

context therefore, “*prima facie case*” means the following: the allegations, as supported by statements and where applicable combined with real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the state on the basis of admissible evidence the court should convict.

Held further that – The element of malice for the test for malicious prosecution considers a defendant prosecutor's mental state in respect of the prosecution at issue. Malice is a question of fact, requiring evidence that the prosecutor was impelled by an 'improper purpose'.

ORDER

1. The claim against the first defendant for malicious prosecution is dismissed.
2. The claim against the second defendant for instituting criminal proceedings against the plaintiff is dismissed.
3. The plaintiff's alternative claim based on malicious continuation of prosecution without reasonable and probable cause is upheld.
4. Cost is granted in favor of the plaintiff against the second and third defendant jointly and severally, the one paying the other to be absolved, consequent upon employment of one instructing and one instructed counsel.
5. The matter is postponed to 22 February 2018 at 15:00 for Status Hearing as the matter is returned to the judicial case management roll, to deal with the issue regarding quantum.

JUDGMENT

PRINSLOO J

Introduction

[1] The events giving rise to the plaintiff's claim in this instance, who is suing the Minister of Safety and Security, Prosecutor General and Government of the Republic of Namibia for damages, are sketched out by the defendants as follows:

[2] On 2 August 1999 armed rebels of the Caprivi Liberation Army ("CLA") attacked various government installations at Katima Mulilo in the Caprivi region now Zambezi. The attacks by the CLA commenced in the early hours of the morning at about 02h30 and continued until about 10h00.

[3] People were killed and property destroyed. The security forces (Namibian and Namibian Defence Force) launched full scale operations to subdue the attack, and to apprehend those responsible for the attacks.

[4] A state of Emergency in respect of the Caprivi Region was declared by the President on 2 August 1999.

[5] On 4 August 1999, instructions were given by the Regional Commander in the Caprivi Region to arrest prominent and executive members of the United Democratic Party ("UDP") at Katima Mulilo.

[6] According to intelligence information of the Police, the UDP was the political wing of the CLA. It had mobilized people to support the secession of the Caprivi from Namibia by violent means.

[7] Plaintiff was arrested by the Namibian Police (“Police”) based on information that he was an organizer and/or supporter of the UDP and had influenced people to take up arms to secede Caprivi from Namibia.

[8] The plaintiff was prosecuted together with other 125 accused person on 278 charges. The most serious charges, on which plaintiff was prosecuted, were high treason, sedition, public violence, murder and attempted murder (collectively referred to as “high treason”) in what has become known as the Caprivi Treason trial.¹

[9] On 11 February 2013, plaintiff was acquitted and discharged in terms of section 174 of the Criminal Procedure Act 1977 (“CPA”).

Matter before the court:

[10] The matter before this court is a consequence of the arrest and detention of the plaintiff by the officials of the Ministry of Safety and Security and the following prosecution of the plaintiff by officials of the Prosecutor General’s office, on suspicion that Plaintiff was guilty of high treason, sedition, public violence, murder and other serious crimes.

¹ *Mahupelo v The Minister of Safety and Security* (I 56/2014) [2017] NAHCMD 25 (2 February 2017) at para [4] Christiaan AJ described it as: ‘The Caprivi Treason trial was distinctive and unprecedented in the legal history of this country. This could be related from the fact that 126 accused persons¹ were charged on 278 counts, based on the doctrine of common purpose and conspiracy. There were 379 witnesses who testified on behalf of the State and more than 900 witness statements had to be considered. The duration of the trial was estimated to be about 10 years. During this period the accused were detained in custody and some of the accused and witnesses have died.’

[11] During 2013, the plaintiff, Kennedy Simasiku instituted action against the 1st to 3rd Defendant namely; Minister of Safety and Security, Prosecutor General and Government of the Republic of Namibia. The alternative claim is based on alleged violation of various constitutional rights, which is set out in more detail hereunder, as a result of the prosecutions. On both claims the plaintiff seeks to recover damages in the amount of NAD 14 725 800.00.

[12] It is apposite to mention at this juncture that the liability and quantum were separated by agreement between the parties and the trial concerns liability only. This court will therefore for obvious reason not discuss the pleadings relating to the quantum.

Pleadings:

Plaintiff's claim:

[13] In the plaintiff's principal claim, he claims damages under common law against:

13.1. *In respect of the First Defendant:* On or about 12 November 1999 and at or near Katima Mulilo in the Zambezi Region one or more members of the Namibian Police arrested the Plaintiff without a warrant. That subsequent to Plaintiff's arrest one of more members of the Namibian Police wrongfully and maliciously set the law in motion by laying false charges with the Namibian Police by giving the Namibian Police as well as the second Defendant and her employees false information, i.e. that the plaintiff was guilty of high treason and other serious crimes as set out in the indictment² preferred against him.

13.2 That when laying the said charges and giving the disinformation the said members of the Namibian Police had no reasonable or probable cause for doing so, nor did the said members have any reasonable belief in the truth of the information given. Damage are thus sought on the basis of malicious prosecution.

² Pleadings record, Amended Particulars of Claim, page 102 paragraphs 7 to 9

13.3. *In respect of the Second Defendant:* Damages are sought against the second defendant on the basis that the second defendant or her employees wrongfully and maliciously set the law in motion against the plaintiff and continued to do so by prosecuting the plaintiff for the crimes set out in the indictments without probable cause, and

13.3.1 without having sufficient information at their disposal which substantiated such charges or justified the prosecution of the plaintiff on such charges;

13.3.2 alternatively, without having any reasonable belief in the truth of any information given to them which could have implicated the plaintiff in the commission of high treason or the commission of any of the serious crimes referred to in the indictment.

13.3.3. In the alternative that the second defendant and/or her employees wrongfully and maliciously continued to prosecute the plaintiff as from 30 June 2009 and for crimes as set out in the indictment and by virtue of the following circumstances:

a) to the knowledge of the second defendant and/or her employees, the testimony of all witnesses and all evidence which could have been presented for the purpose of attempting to implicate the plaintiff regarding the commission of any of the crimes as per indictment were completed by 31 January 2008.³

[14] The principal claim as alleged by the plaintiff is thus brought against the first and second defendants based upon malicious prosecution under the common law in respect of the period 12 November 1999 to 11 February 2013.

[15] In the alternative to the plaintiff's claim, the plaintiff further claims damages based upon the wrongful and malicious continuation of prosecution only against the second defendant and/or her employees as from 01 February 2008 for the crimes set out in the indictment.⁴

³ Date was amended by evidence of the plaintiff to read 31 January 2008 instead of 29 June 2009.

⁴ Additional pleadings record, para [10A].

[16] It is submitted by the plaintiff that these are the following facts upon which he relies on:

16.1. The knowledge the second defendant and/or her employees had in respect of the fact that the testimony of all witnesses and all evidence which could have been present for the purpose of attempting to implicate the plaintiff regarding the commission of the crimes set out in the indictment was completed by 31 January 2008;

16.2. Despite this fact, the second defendant continued to prosecute the plaintiff until 11 February 2013 without reasonable or probable cause whereas the second defendant should reasonably have stopped such prosecution in terms of Section 6(b) of the Criminal Procedure Act, Act 51 of 1977, by the aforesaid dates, or within a reasonable time thereafter;

16.3. Alternatively, the second defendant reasonably ought to have closed the State's case against the plaintiff and moved for or caused his discharge and release him from prosecution and detention by the aforesaid dates; and

16.4. Alternatively, the second defendant ought to have reasonably caused the plaintiff's release from prosecution and detention by the aforementioned dates in order to safeguard or prevent the violation of the plaintiff's rights under one or more or all Articles 7,8,11,12,13 and 21 of the Namibian Constitution, read with Article 5 thereof.

16.5 As a result of the conduct as set out above the plaintiff was detained during the period 12 November 1999 to 11 February 2013 in different facilities and prosecuted and tried for high treason and serious crimes as set out in the indictment annexed to the particulars of claim.

[17] In addition to what was set out above the plaintiff brings an alternative claim on the same facts based upon the wrongful and unlawful negligent violation or infringement by the second defendant or her employees of the plaintiff's constitutional rights to a trial within a reasonable time as guaranteed by Article 12(1)(b) of the Namibian Constitution, which violation is actionable in terms of a claim for damages as contemplated by Article 25(3) and 25(4) of the Namibian Constitution.

First and second defendant's plea:

[18] The essence of the defendants' plea as set out in the pleadings are as follows:

18.1 *In respect of the First Defendant:* It is denied that the first defendant or members of the first defendant set the law in motion or that they actively instigated for improper motive of the prosecution against the plaintiff.

18.2 That the members of the first defendant acted within their statutory and constitutional powers and their conduct was limited to the investigation of the offences which the plaintiff was reasonably suspected of committing.

18.3 *In respect of the Second Defendant:* That the plaintiff has not made out a case for malicious prosecution, particularly in that the second defendant had reasonable and probable cause to prosecute since the second defendant believed in the merits of the State's case and further believed that the evidence presented as may be supplemented by other evidence in due cause through ongoing investigation during the trial would have been sufficient basis to continue prosecuting the plaintiff;

18.4 That it was incumbent on the plaintiff to call upon the second defendant to exercise her powers in terms of section 6(b) of the Criminal Procedure Act, Act 51 of 1977, or to rely on the constitutional remedy for a permanent stay of prosecution in terms of Article 12(1) of the Constitution.

18.5 Second defendant denied that she could have stopped the prosecution in terms of section 6(b) of the Criminal Procedure Act as such stopping of prosecution would have been risky and prejudicial to the State's case as the plaintiff was charged with several co-accused.

18.6 Second defendant further pleaded that violation of Article 12(1) (b) of the Constitution of Namibia is not actionable in a delictual context and that the only constitutional remedy available to an accused person whose trial does not take place within a reasonable time is the right to be released.

18.7 It is further denied that either second defendant or her employees acted wrongfully or unlawfully in continuing to prosecute the plaintiff as from 30 June 2009. The prosecution was not in the position to know that all evidence that could implicate the plaintiff had been presented and that all witnesses that could implicate plaintiff had completed their testimonies.

18.8 Further that the second defendant or her employees could not, due to the magnitude and special circumstance of the case, continuously perform appraisals on the evidence provided by the various witnesses as such a continuous individual appraisal of evidence would be humanely impossible.

18.9 The second defendant and her employees believed that there was a possibility that the State case could be strengthened during the defence case.

The evidence adduced:

The Plaintiff's case:

[19] In support of his case, Mr. Kenney Simasiku Chunga (the plaintiff) testified. The record of the evidence of Advocate John Walters, given in an earlier matter of George Lifumbela Mutanimiye,⁵ was admitted into evidence by agreement between the parties and in an effort to shorten the proceedings.

[20] The evidence of Adv. Walters as set out in the transcription in summation is as follows:

20.1 He is currently the Ombudsman of Namibia for the past 12 years.

20.2 He acted as the Prosecutor-General of Namibia from 01 December 2002 up to the end of December 2003. Hereafter he was employed as a consultant to the prosecution team from 1 January 2004 to 30 June 2004.

20.3 When the 02 August attacks took place he was still in private practice.

⁵ Mutanimiye v The Minister of Safety and Security (I3427/2013) [2017] NAHCMD 197 (23 June 2017)

Upon his appointment he assembled a new prosecution team due to resignations from the previous team with only two prosecutors of the original team remaining.

20.4 He instructed the prosecution team to evaluate the evidence against the accused persons and to advise him whether there was sufficient evidence to proceed against them. He relied on their professional assessments of the case, which he trusted. He had no reason to doubt the correctness of the witness statements and therefore signed the indictment against the plaintiff and the other accused persons. The accused persons were indicted together under the doctrine of common purpose.

20.5 Adv. Walters confirmed that the Prosecutor-General and her staff derive their powers from Article 88 of the Namibian Constitution, which also requires the Prosecutor-General and her staff to execute their prosecutorial functions independently and without fear, favour or prejudice. By virtue of the Constitution, the Prosecutor-General is empowered to delegate the power to prosecute to various prosecutors prosecuting in the courts of Namibia.

20.6 Adv. Walter stated that when considering prosecution in a matter, a prosecutor has the duty to carefully consider the evidence in the police docket and if there is a need due to insufficient evidence to withdraw the matter and refer the docket back to the police for further investigation. He also stated that there is a duty on the prosecutor to be aware of the constitutional provisions of a fair trial and that prosecutors should be mindful of arbitrary arrests and detentions. Adv. Walters emphasized the fact that the obligation on a prosecutor is not one of getting a conviction at all costs but to see to it that justice is done. A prosecutor must thus act in a manner that is fair and to ensure that all relevant information is before court to enable court to make a just decision.

20.7 According to Adv. Walters the team of prosecutors he had assembled were people of consummate professionalism who discharged their responsibilities with the utmost care, given their diligence and skill. He also testified that they were ethical, honest and objective and harboured no bias towards the accused persons.

[21] The plaintiff, Kennedy Simasiku Chunga, stated that he is currently 49 years of age, and he is divorced. He is the father of two children aged 23 and 21 years respectively. He stated that on the 12th day of November 1999 he was arrested at the house of his uncle at the Caprivi College of Education by several police officers accompanied by members of Namibian Special Task force.

[22] Plaintiff was handcuffed and after the premises was searched for fire-arms, he was taken to the police station together with his then wife and his aunt. The plaintiff's wife and aunt was left in the charge office whereas he was detained. On 15 November 1999 the plaintiff was interrogated by members of the Special Task Force regarding his knowledge of the whereabouts of the rebels and identity of the people who attacked the Katima Mulilo town. He was hereafter taken to the Magistrate's Court in Katima Mulilo to make an appearance. His case was postponed to January 2000.

[23] Early December 1999 the plaintiff was transferred to Grootfontein where he remained in detention until October 2005. Hereafter the plaintiff was transferred to Windhoek Central Prison where he remained in further detention until 11 February 2013 when released, subsequent to a discharge by the High Court of Namibia in terms of section 174 of the Criminal Procedure Act.

[24] Subsequent to plaintiff's arrest, he was indicted on charges of high treason, sedition and 273 other charges as set out in the indictment.⁶

[25] The plaintiff denied any participation in the commission of any of the offences or involvement in those charges preferred against him. He denied that he ever partook in any meeting which planned to secede the Caprivi from the rest of Namibia nor did he mobilize people to liberate Caprivi or donated money to the cause of the secessionist. The plaintiff referred to a number of witness statements provided by the Defendants as statements which were used to formulate a case against him.

⁶ Pleadings Bundle pages 19-81.

[26] The plaintiff referred to the witness statement wherein the name 'Kennedy Simasiku Chunga' appeared. Only two of these witnesses testified during the criminal trial. The witness statements referred to are as follows:

26.1 Bukando Sundano⁷

26.1.1 Ms. Sundano was the wife of the plaintiff. In her statement Ms. Sundano just briefly set out the circumstances prior to and at the time of the arrest of the plaintiff. The said statement contained no reference to the plaintiff's alleged involvement in the 1999 attack on Katima Mulilo.

26.1.2 Ms. Sundano did not testify during the criminal trial.

26.2. Helvi Monghenda Buiswalelo⁸

26.2.1. Mrs. Buiswalelo is the wife the plaintiff's uncle. She confirmed that she heard that plaintiff left Namibia during August 1999 and only saw him again on 12 November 1999 when he returned. Plaintiff requested to be accommodated for a short period of time as their lodging where they previously stayed was occupied by somebody else. She agreed to accommodate plaintiff and his wife and requested him to fetch their passports. As plaintiff was about to leave police arrived and arrested him. .

26.2.2 Mrs. Buiswalelo had no knowledge of any involvement with the rebel movement and did not testify during the criminal trial.

26.3 Aldrin Moya Siezize⁹

⁷ Pleadings Bundle page 149-151; Exhibit B

⁸ Pleadings Bundle page 152-154 ; Exhibit C

⁹ Pleadings Bundle page 155-156; Exhibits D

26.3.1. Mr. Siezize referred to Kennedy Chunga in his statement but it was with reference to a date in August 1999. They apparently spoke but does not disclose the nature of the conversation.

26.3.2. Mr. Siezize did not testify during the criminal trial.

26.4 Solvent Muinjo Chunga¹⁰

26.4.1. Mr. Chunga made a statement on 07 July 2000 and stated that on 01 August 1999 he was visited by one Danbar Mushwena, Mowa Kabo Devil and Kennedy Chunga when Danbar Muswena informed him that he was due to be the second in command of one Shadrack Chainda, who was the commander of the group which was tasked to attach Mpacha Military base. Kabo Devi was the one who organised the food and transport their food to Namibian/Zambian border and he was transporting the food with the vehicle of Henry Buiswalelo.

26.4.2 Mr Chunga did not testify during the criminal trial as he passed away prior to the commencement of the trial.

26.5 Robert Sinvula Chizabulyo¹¹

26.5.1. Mr. Chizabulyo made a statement on 29 September 2000. Mr. Chazabulyo was a police officer. In paragraph 1 of his statement Mr. Chizabulyo stated that he received reliable information about a suspected rebel who fled to Zambia after the attack of 02 August 1999. The suspected rebel was said to be Kennedy Simasiku Chunga.

26.5.2. Mr. Chizabulyo did not testify during the criminal trial as he passed on before the commencement of the trial. .

¹⁰ Pleadings Bundle page 157-159; Exhibit E

¹¹ Pleadings Bundle page 160-161; Exhibit F

26.6 Bonifatius Kanyetu¹²

26.6.1. Mr. Kanyetu made a statement dated 30 August 2000. Mr Kanyetu was a member of the investigating unit at Katima Mulilo. He stated that he received information from Chizabulyo about a suspect alleged to have participated in the attack on 02 August 1999. The said suspect was Kennedy Simasiku. As a result of the information obtained the plaintiff was arrested.

26.6.2. Mr. Kanyetu testified during the course of the criminal proceedings.

26.7 Christopher Masule Kalimbula¹³

26.7.1. Mr. Kalimbula is a police officer and made his statement on 02 November 2000. He stated that the High Treason Investigation team received information that a suspected rebel was deported to Namibia by the Zambian Authority and he was hiding at the house of one Henry Buiswalelo at Caprivi College of Education. They found Kennedy Simasiku Chunga at the said college where was allegedly hiding in a vehicle with tinted glasses and he was arrested. According to Mr. Kalimbula he had information at his disposal that Kennedy Chunga assisted the cause of the rebels by providing a vehicle or served as a driver.

26.7.2 Mr Kalimbula did not testify during the criminal trial.

26.8 Mushe Bevin Sinvula¹⁴

¹² Pleadings Bundle page 162-164- Exhibit G

¹³ Pleadings Bundle page 166-168; Exhibit H

¹⁴ Pleadings Bundle page 174-176; Exhibit J

26.8.1. Mr Sinvula made a statement on 10 March 2003. He stated that Kennedy Chunga informed him that he is qualified to be soldier who should liberate Caprivi and further that during January 1999 Kennedy Chunga dropped him at Masokotwani, at Gusper Machana, who was to inform him as to where to join the army.

26.8.2 Mr. Sinvula testified during the criminal trial but did not implicate the plaintiff and did not identify the plaintiff as the person referred to in his statement. During cross-examination in the criminal trial Mr. Sinvula testified that he was never told that there would be an attack and the actual attack came as a surprise to him. He stated that he was never told that the Caprivi would be liberated by way of an attack. The witness also conceded that he had no personal knowledge whether or not Kennedy Chunga was involved in the attack which took place on 02 August 1999.¹⁵ When given the opportunity Mr. Sinvula was unable to identify the person Kennedy Simasiku Chunga in court and stated that due to the lapse of time he was unable to do so.

26.8.3 Mr. Sinvula was the last witness who was called to testify in respect of the case that the plaintiff faced at the time. His evidence was completed on 31 January 2008.

[27] Plaintiff stated that in spite of the fact that the Prosecuting Authority was aware that after 31 January 2008 there were no other evidence to implicate him, yet the second defendant or her employees continued with the prosecution until 11 February 2013. Mr. Kanyetu did testify after 31 January 2008, i.e. on 29 June 2009 but the plaintiff submitted that he was not a material witness in proving any of the charges preferred against him.

¹⁵ Transcribed record in the matter of *Malumo v State* (CC 32/2001) [2012] NAHCMD 33 (11 February 2013) at page 56-57. Marked as exhibit A.

He further maintained that that the continued prosecution was occasioned by ulterior or improper motives and that this was done by the prosecution simply because he belonged to the Mafwe group.

[28] Plaintiff further averred that even after the decision was taken to prosecute him, the Namibian Police continued to instigate his prosecution by obtaining false statements from witnesses, with reference to Mushe Bevin Sinvula. He stated that he believed that the statements were fabricated against him by the police so as to justify his arrest and continued detention.

[29] In respect of the prosecuting authority, the plaintiff stated that if the Prosecutor-General applied his mind to the facts in the docket objectively and cautiously and in good faith, he would have declined to prosecute.

[30] This concluded the case for the Plaintiff.

The Defendant's Case:

[31] On behalf of the defendants three witnesses were called to testify, i.e. Christopher Masule Kalimbula and Advocate Taswald July. At this point it is appropriate to note that the record of the evidence of Advocate July that relates to the general background of the 02 August 1999 attack on Katima Mulilo, was given in an earlier matter of George Lifumbela Mutanimiye,¹⁶ and the said portion of the evidence was admitted into evidence by agreement between the parties, again in an effort to shorten the proceedings.

[32] Mr. Kalimbula is a member of the Namibian Police and currently holds the rank of Deputy Commissioner. At the time of the 02 August 1999 attack he was a member of the Complaints and Discipline Unit of the Namibian Police.

¹⁶ Mutanimiye v The Minister of Safety and Security (I3427/2013) [2017] NAHCMD 197 (23 June 2017) - admitted as Exhibit O pages 1-23.

[33] Information was received that the plaintiff was deported from Zambia to Namibia and that he was at “Old Musika”. Mr. Kalimbula accompanied the High Treason Investigation team for the sole purpose of identifying the plaintiff, whom he knew well and also knew where he resided. As the investigation team was informed that the plaintiff has gone to Caprivi College of Education, they proceeded there and went to the home of Henry Buiswalelo where they found the plaintiff seated in a vehicle ready to drive off. When Mr. Kalimbula opened the vehicle door he identified the plaintiff where after the plaintiff was arrested.

[34] Mr. Kalimbula was not part of the High Treason investigation team and the information that was at the disposal of the investigation team was apparently received from a reliable source of which the witness had no personal knowledge.

[36] The second witness called on behalf of the defendant was Adv. Taswald July who testified that he was the Deputy Prosecutor-General when the Caprivi Treason trial commenced, but since resigned from the Office of the Prosecutor-General.

[37] Adv. July testified that he joined the prosecuting team in January 2003 and the said team consisted of Advocate January (as he then was) and the late Advocate Barnard. Lead counsel on the prosecution team was Advocate January. The witness stated that he was not involved with the initial formulation of the charges (which was done in 2001). The prosecution team reviewed the charges after an application for further trial particulars was received. The new prosecution team considered the evidence against all the accused persons, including the plaintiff, based on the indictment signed in 2001, and was satisfied on a *prima facie* basis that the plaintiff committed the offences alleged. Adv. July referred in his evidence to the witness statement already referred to *supra* and stated that the evidence contained in these statements established a *prima facie* basis that the plaintiff **was** a member of the UDP and that the plaintiff actively associated himself with the actions of those who had the aim of seceding the Caprivi from the Republic of Namibia, by transporting people to

Botswana, influencing people to support the idea of seceding and supporting the cause by giving monetary contributions.

[38] On the issue of undue delay in prosecuting the matter, Adv. July testified that trial was exceptional in nature and the magnitude in the legal history of Namibia. He stated that there were 126 accused persons who were charged with 278 counts involving high treason, treason, murder, attempted murder and so forth. He stated that during the trial, 379 witnesses were called to testify and there were more than 900 witness statements to consider.

[39] The case was also filled with delays due to applications for postponement at the behest of the State and the Defence for various reasons, withdrawal of counsel, difficulty in securing witnesses and extra-ordinary issues i.e. the challenge in respect of the jurisdiction of the High Court to hear the matter.

[40] Another reason for the delay was an unfortunate motor vehicle accident in which Adv. Barnard tragically passed away and both the witness and Adv. January were severely injured.

[41] Mr. July testified that there was no reason for the second defendant to maliciously prosecute the plaintiff as all decisions were taken in good faith and based on an honest belief that there was a *prima facie* case against the plaintiff. He stated that due to the magnitude of the matter it was not humanly possible to do a regular assessment of the matter. He submitted that it would have been prejudicial and very risky for the State to stop prosecution against the plaintiff as the State was not in the position to know whether all the evidence that could implicate the plaintiff had been presented and that all witnesses that could implicate the plaintiff had completed their evidence.

[42] During November 2010 prior to the close of the prosecution's case an appraisal was done by the prosecution team of the evidence given by the witnesses with respect

to all the accused persons. Instructions were given to the Namibian Police to carry out further investigation on certain issues. The application to allow this evidence was however not successful. Mr July confirmed that the plaintiff was ultimately discharged in terms of s174 of the Criminal Procedure Act on 11 February 2013.

[43] This concluded the case for the Defendants.

Argument advance on behalf of the plaintiff:

[44] I was urged to follow the judgments in the matters of Mahupelo¹⁷, Makapa¹⁸ or Mutanimiye.¹⁹

[45] On behalf of the plaintiff it was argued that both the first and second defendants instigated and prosecuted the plaintiff maliciously without probable and reasonable basis from date of his arrest to date of his discharge or in the alternative even if such reasonable cause existed said reasonable cause did not exist beyond 31 January 2008 for the second defendant to continue with the prosecution.

[46] Plaintiff argued that the proceedings should have been terminated by invoking section 6(b) of the Criminal Procedure Act, 51 of 1977 failing which caused the prosecution to become malicious.

[47] It was further argued that it was not incumbent on the plaintiff (as accused) to exercise his rights in terms of section 174 of the Criminal Procedure Act or Article 12(1) (b) of the Constitution during the criminal proceedings that were undertaken as the prosecution as *dominus litis* should have made the call once they realized that there was no evidence to implicate the plaintiff.

Argument advanced on behalf of the Defendants:

¹⁷ Mahupelo v The Minister of Safety and Security (I 56/2014) [2017] NAHCMD 25 (2 February 2017)

¹⁸ Makapa v The Minister of Safety and Security (I 57/2014) [2017] NAHCMD 130 (05 May 2017)

¹⁹ Mutanimiye v The Minister of Safety and Security (I3427/2013) [2017] NAHCMD 197 (23 June 2017)

[48] I am requested not to follow the judgments in Mahupelo, Makapa or Mutanimiye²⁰ as the courts applied the principles regarding continuation of prosecution, in that the court erred as *culpa lata* has no place in *actio iniuriarum*.

[49] Plaintiff must proof *dolus directus* or *indirectus* and not *culpa*. The plaintiff combined *dolus* and *culpa* which cannot be done. The injuries inflicted by the defendant on the plaintiff must have been done not accidentally or negligently but with deliberate intention.

[50] The defendant's case is that Adv. July say that he honestly believed that a prima facie case was made out and that the plaintiff would be implicated by co-accused and even if he was negligent or even grossly negligent it does not equate to maliciousness as malice is the intent to hurt.

[51] In respect of the continuous prosecution it was argued that to say that there was no reasonable cause to proceed with the prosecution is based on negligence (*culpa*) and negligence is not an element of the delict.

[52] The only way to show that improper motive is to disregard the evidence of Adv. July as improper or false and his evidence cannot be rejected as improper without reason.

The Relevant Law

Malicious Prosecution

[53] In *Akuake v Jansen van Rensburg*²¹ Damaseb JP states the following at p.404F:

'To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

²⁰ Supra footnote 17, 18 and 19.

²¹ 2009 (1) NR 403 (HC). Also see *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196G – H.

- (i) That the defendant actually instigated or instituted the criminal proceedings;
- (ii) Without reasonable and probable cause; and that
- (iii) It was actuated by an indirect or improper motive (malice) and;
- (iv) That the proceedings were terminated in his favour; and that
- (v) He suffered loss and damage.

[54] As in the case of preceding matters²² of similar nature, this court need to determine –

- a) whether the Namibian Police instigated or instituted the criminal proceedings;
- b) if so, instigated or instituted, was it actuated by improper motive and without probable cause;
- c) whether the Prosecutor-General acted with malice and without probable cause in prosecuting the plaintiff.

Instigated or instituted the criminal proceedings:

Ad First Defendant:

[55] The plaintiff must allege and prove that the first defendant instigated the proceedings, or that he or she set the law in motion.

[56] Instigation will only be established, if the plaintiff proves (as alleged) that the police knowingly placed false information before the Prosecutor-General, and that the plaintiff was prosecuted as a result of such false information.

[57] It is the case of the plaintiff that the first defendant subsequent to the plaintiff's arrest on 4 August 1999, wrongfully and maliciously set the law in motion by laying false charges and conveying false information to their members.

²²

Mahupelo v The Minister of Safety and Security (I 56/2014) [2017] NAHCMD 25 (2 February 2017);

Makapa v The Minister of Safety and Security (I 57/2014) [2017] NAHCMD 130 (05 May 2017)

[58] The initial enquiry is whether, on all the facts of the case, it can be said that the Namibian Police either instigated or instituted the prosecution. What is involved in such an enquiry was stated as follows by Gardiner, J in *Waterhouse v Shields*, 1924 C. P. D. 155 at p. 160:

'The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be held liable. 'The test', said BRISTOWE, J., in *Baker v Christiane*, 1920 W. L. D. 14, 'is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment!'"

This passage, as well as the following passage from the judgment of PRICE, J., in *Madnitsky v Rosenberg*, 1949 (1) P. H. J5, were quoted with approval by JANSEN, J. A., in the *Lederman* case, *supra* at p. 197:

"When an informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer 'instigates' a prosecution".'

[59] In light of the court's findings in the *Waterhouse* case *op cit.* it is necessary to consider whether Namibian Police did anything more than one would expect from a police officer under the circumstances. In the matter of *Minister of Justice and Others v Moleko*,²³ the court said the following with regard to the liability of the police:

'With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and

²³ 2008) 3 ALL SA 47(SCA), para11.

honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.' (Underlining, my emphasis)

[60] From the evidence before me, it is clear that the Namibian Police gathered information from various sources and agencies where after they interviewed the witnesses and obtained the necessary statements in order to compile a docket.

[61] The docket in turn was submitted to the Office of the Prosecutor-General, the second defendant, who made the decision to institute prosecution, against whom the said prosecution would be instituted and on what charges.

[62] Although it is the case for the plaintiff that the statements made by the various witnesses were false, he presented no evidence to gainsay the case of the defendants. The issue raised by the plaintiff that the statements obtained by the first defendant was falsified was clearly laid to rest during cross-examination.

[63] There is no evidence that the police officers did anything other than what would be expected of them as the investigators in this matter. There is no evidence that the first defendant instigated the prosecution of the plaintiff and the claim against the first defendant can thus not succeed.

Ad second defendant:

[64] This court must now consider the liability of the second defendant, if any, with specific reference to (ii)²⁴ and (iii)²⁵ of the elements of malicious prosecution as set out in the *Akuake* matter *supra*. It will not be necessary to discuss the issue of (iv) termination of proceedings in favour of plaintiff as it is common cause between the parties nor is it necessary to discuss (v) loss and damage suffered as the matter of quantum is separated for purposes of these proceedings.

[65] The constitutional role of the prosecuting authority was discussed in detail by

²⁴ Without reasonable and probable cause.

²⁵ It was actuated by an indirect or improper motive (malice)

Christiaan AJ in the matters of *Mahupelo v The Minister of Safety and Security*²⁶ and in *Makapa v The Minister of Safety and Security*.²⁷ From said discussion it is clear that the prosecuting authority and accordingly also the prosecutors who was seized with the criminal matter, were clothed with the statutory power to institute and conduct criminal proceedings and matters incidental thereto on behalf of the State in terms of Article 88(2) of the Constitution.

[66] The court discussed the discretion of the prosecuting authority as follows:²⁸

'[126] It is a well-known fact that a prosecutor exercises discretion on the basis of the information before him or her. This would call upon a prosecutor to ensure that the general quality of decision- making and case preparation is of a high level, and that decisions are not susceptible to improper influence.

[127] Prosecutors should thus not initiate or continue proceedings when an impartial investigation shows the charge to be unfounded. When instituting or maintaining criminal proceedings, the Prosecutor should proceed and only when a case is well founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence. This is to be recognised by the common law principle that there should be "reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (or maintained) and the necessary constitutional protection afforded.

[128] I must note that courts are not eager to limit or interfere with the legitimate exercise of prosecutorial authority. However a prosecuting authorities' discretion to prosecute is not immune from the scrutiny of a court which can intervene where it is alleged that such discretion is improperly exercised.'

²⁶ (I 56/2014) [2017] NAHCMD 25 (2 February 2017);

²⁷ (I 57/2014) [2017] NAHCMD 130 (05 May 2017)

²⁸

Makapa v The Minister of Safety and Security supra at page 36.

Without reasonable and probable cause

[67] According to the court in *Beckenstrater v Rottcher and Theunissen*²⁹ there is an absence of reasonable and probable cause either (i) if there are from an objective viewpoint, no reasonable grounds for the prosecution (this mean that the facts, in the opinion of a reasonable man, indicate that the plaintiff did not probably commit the crime), or (ii) if, where such grounds are in fact present, the defendant does not belief subjectively in the plaintiff's guilt.³⁰

[68] The concept of reasonable and probable cause is clearly the most onerous of the elements for a plaintiff to establish. The test contains both a subjective and objective element, which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances.³¹

On the subjective element:

[69] According to Adv. July the prosecution relied on the information received from the Namibian Police and the statements under oath from third persons. The problem of the prosecutor's belief is compounded where they have to belief on the statements of third parties.

[70] To consider merely what the prosecutor knew or believed at the time the prosecution was instigated or maintained is not appropriate where the knowledge of a prosecutor is confined to the knowledge or belief of what others have said or done.³² In these cases, it is not whether the plaintiff proves that the state of mind of the prosecutor

²⁹ 1955 (1) SA 129 (A)

³⁰ J Neetling, Potgieter and Scott: Casebook on the Law of Delict, 4th Edition, at page 909.

³¹ J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2 ed, 2005) at 366-367: "*There is an absence of reasonable and probable cause for the prosecution either (i) if there are, from an objective viewpoint, no reasonable grounds for the prosecution, or (ii) if, where such grounds are in fact present, the defendant does not, viewed subjectively, believe in the plaintiff's guilt. The defendant will thus be acquitted if, on the one hand, there existed reasonable grounds for the prosecution and, on the other hand, he also believes in the plaintiff's guilt. The question of whether reasonable grounds exist may only be answered by reference to the facts of each particular case. The facts must then reasonably, or according to the reasonable person, indicate that the plaintiff probably committed the crime.*"

³² *A v State of New South Wales* [2007] HCA 10 21 March 2007 at page 33.

fell short of a positive persuasion of guilt, it is whether the plaintiff proves that the prosecutor *did not honestly form the view that there was a proper case for prosecution, or proves that the prosecutor formed the view on an insufficient basis*. Thus, determining what a proper case for prosecution is will require examination of the prosecutor's state of persuasion about the material considered by them. This formulation of the subjective question ensures that the role of institutional prosecutors is neither distorted nor hindered by imposing on prosecutors too high a threshold to bring cases to trial.³³

On the objective element:

[71] In the matter of *A v State of New South Wales*³⁴ the court refers to the matter of *Herniman v Smith*³⁵ when it discussed the subjective requirement where Lord Atkin said the following:

'It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution.'

The court proceeded to say the following:

'The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case.'

[72] The crucial issue is what information and evidence was available to the State when the decision to prosecute was taken and whether that, and any inferences to be drawn there from, were sufficient to at least *prima facie* point to the commission of an offence by the plaintiff.

³³ Norm Maamary, *Determining Where the Truth Lies: Institutional Prosecutors and the Tort of Malicious Prosecution*, p. 354.

³⁴ [2007] HCA 10 21 March 2007 at page 35.

³⁵ *Herniman v Smith* [1938] AC 305 at 317.

[73] The police docket and its contents was submitted to the Prosecuting Authority. The initial indictment was drafted in 2001 and reviewed in 2003 by the team lead by Adv. January. Some of the affidavits that formed part of the docket was referred to by Adv. July were allowed as exhibits. These statements were not admitted for the correctness of the contents thereof but for what the statements purported to be. Adv. July thus had evidence on oath of the allegations recorded in the said statement, although the correctness of the statement was not admitted by the plaintiff. Adv. July testified that he and the rest of the prosecution team had extensive consultation with the witnesses. The witnesses were divided amongst the three of them to enable prosecution counsel to properly consult and then lead the witness in court. He stated that he had satisfied himself as to the credibility of these witnesses during the consultations held with them. However his impressions as to their credibility and whether the allegations the various State witnesses deposed to may ultimately be proved, is not relevant to this trial.

[74] When applying the aforementioned to the facts of the current matter, I am satisfied that there are no sound reasons advanced by the plaintiff as to why the prosecution team had to disbelieve the statements under oath at their disposal. Adv. July comprehensively set in the facts on which the decision by second defendant was based to prosecute plaintiff and there was a reasonable and probable cause for the prosecution.

Actuated by an indirect or improper motive (malice)

[75] In *May v. Union Government*,³⁶ Broome, J.P. held that:

'It is well settled that malice in relation to malicious prosecution means any indirect or improper motive. It is the duty of the plaintiff to satisfy the Court, on a balance of probability, that the prosecutor set the criminal law in motion, not with the object of obtaining the conviction of the wrongdoer, but for some ulterior object.'

³⁶ 1954 (3) SA 120 (N) at p. 129

[76] In the *Relyant* case,³⁷ this court³⁸ stated the following in regard to the third requirement:

‘Although the expression “malice” is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:

“Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.” ’

[77] It is trite that a prosecutor has a duty to prosecute a matter if there is a *prima facie* case and if there is no compelling reason for refusal to prosecute. In this context therefore, “*prima facie case*” means the following: the allegations, as supported by statements and where applicable combined with real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the state on the basis of admissible evidence the court should convict.³⁹

[78] Having considered the applicable legal principles and having applied same to the fact in this matter, I am of the view the plaintiff failed to prove on a balance of probabilities that the second defendant acted with malice in initiating the prosecution against the plaintiff or that second defendant instigated the proceedings did it with the aim to injure plaintiff.

Malicious continuation of the prosecution

³⁷ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) para 5.

³⁸ Referring to *Heyns v Venter* 2004 (3) SA 200 (T) para 12 at 208B; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 104A-B (see also 103F-104A); Neethling et al *op cit* 124-125 (see also 179-182).

³⁹ (*Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP); [2013] 4 All SA 657 (GNP)

[79] The alternative claim is that the second defendant and/or her employees wrongfully and maliciously continued the prosecution as from 30 June 2009, for the crimes set out in the indictment against the plaintiff.

[80] In the *Mahupelo case*,⁴⁰ Christiaan AJ explored the need for extending our common law to accommodate the element of continuation or maintenance of the prosecution and found the following:⁴¹

'[171] It is clear from these elements that the element of continuing or maintaining criminal proceedings beyond a stage where it could be said it is reasonable and probable, is not recognised in our common law and has also not been previously dealt with by our courts.

And at:

[175] It is clear that the matter before court raises this novel and complex issue, and one cannot be dissuaded to decide an important issue merely because it is not recognised. It is therefore safe to say that it is implicit in the plaintiff's case that the common law has to be developed beyond the existing precedent. The answer to the first leg would be in the affirmative regarding the plaintiff's case.

[176] This leads us to the second leg of this enquiry, and that is how such development is to take place. This requirement is calling upon the court to establish a workable standard for continuation of prosecution in circumstances where it appears it has degenerated to the realms of the malicious.

[177] In my view, a workable standard for continuation of malicious prosecution can easily be garnered from the elements that must be shown to prove the initiation of a malicious prosecution. Thus, the standard for continuing a malicious prosecution would be (*Akuake supra* at 404F) —

- '(i) that the defendant actually instigated or instituted or continued or maintained the criminal proceedings;
- (ii) without reasonable and probable cause; and that
- (iii) *the instigation or continuation of the criminal proceedings was actuated by an indirect or improper motive (malice) and;*
- (iv) that the proceedings were terminated in his favour; and that
- (v) he suffered loss and damage.' [Italicized words my addition.]

⁴⁰ *Supra*.

⁴¹ Page 321

Reasonable and probable cause in the context of continuation or maintenance of the prosecution.

[81] The enquiry is thus if probable cause exists initially, but during the course of the criminal prosecution it becomes clear that there is no probable cause to continue such prosecution, is there then any liability when a party maintains the action thereafter?

[82] This question has been addressed in the case of *Hathaway v State of New South Wales*⁴² and the court held that:

'Maintaining proceedings is a continuing process. It is conceivable that a prosecutor may act for proper reason (i.e. non-maliciously) or with reasonable and probable cause (or the plaintiff may be unable to prove malice, or the absence of reasonable or probable cause) at the time of institution of proceedings, but, at a later point in the proceedings, and while the proceedings are being maintained, the existence of malice or the absence of reasonable and probable cause may be shown. At any time at which the sole or dominant purpose of maintaining the proceeding becomes an improper (malicious) one, or the prosecutor becomes aware that reasonable and probable cause for the proceedings does not exist, or no longer exists, the proceedings ought to be terminated, or the prosecution is malicious.'⁴³

[83] In applying the aforementioned to the facts, the following circumstances were known to the second defendant and/or her employees:

(a) *The lack of witnesses identifying the plaintiff:*

Only two witnesses testified against the plaintiff. Mushe Bevin Sinvula who should have been a crucial witness in implicating the plaintiff was unable to identify the plaintiff in spite of making reference to Kennedy Simasiku Chunga in his written statement. His evidence was already completed by 31 January 2008.

(b) *Absence of inculpatory evidence against the plaintiff:*

⁴²2009 NSWSC at 116.

⁴³ *State of New South Wales v Hathaway* 2010 NSWCA 188 para 118.

The evidence of Bonifatius Kanyetu, police officer, was based on a report received from one Robert Sinvula Chizabulyo. Mr Chizabulyo passed away before the criminal trial commenced. The statements of Ms. Bukando Sundano and Helvi Buiswalelo and Aldrin Siezize did not implicate the plaintiff as to any involvement in the 1999 attack on Katima Mulilo. The late Solvent Chunga made reference to Kennedy Simasiku Chunga in his statement but alleged in his statement that one Kabo Devi was the one who organized the food and transport their food to Namibian/Zambian border and he was transporting the food with the vehicle of Henry Buiswalelo.

There were no inculpatory evidence presented against the plaintiff during the criminal trial and the statements which were in the possession of the Prosecuting Authority, specifically those of Ms Sundano, Ms Buiswalelo and Mr. Siezize did not implicate the plaintiff at all as being involved in the said attack.

[84] Mr. Kanyetu, the final witness who testified in respect of the plaintiff completed his evidence on 30 June 2009. Hereafter the plaintiff remained in detention until 13 February 2013 in spite of the fact that the State led all the witnesses at their disposal in respect of the plaintiff, which was not enough to make out a prima facie case which required plaintiff to answer to.

[85] Adv. July stated that during November 2010 a review of the evidence was done which prompted further investigation in this matter. It is however not clear if further investigation was required with regards to the case of the plaintiff. At that point the last witness in respect of the plaintiff already finished his testimony in June 2009 and which witness did not implicate the plaintiff at all.

[86] On the proposition by counsel for the plaintiff that the prosecuting authority should have stopped the prosecution in respect of the plaintiff, Adv. July indicated that the matter could not be stopped as there were multiple accused persons and that the matter was based on the doctrine of common purpose and conspiracy and in addition thereto it would have been prejudicial to the defendant's case. He also indicated that a

possibility existed that the plaintiff could be implicated by witnesses that did not make statements and/or co-accused persons.

[87] What is of concern is that even after appraisal of the matter in November 2010 and when the prosecuting authority noted that there were gaps in the State's case and the court refused to allow further statements obtained to be used in evidence, they still persisted to oppose an application in terms of section 174 of Act 51 of 1977 (Criminal Procedure Act). There is no indication before this court on what the prosecuting authority based their contentions and if it was not just based on the off chance that the plaintiff could be implicated by co-accused persons.

[88] Once the prosecution commenced and the last witness testified regarding the plaintiff, the prosecutors could not have reasonably have formulated and found any honest belief in the guilt of the plaintiff.

[89] Adv. July testified that the prosecution authorities did not have the human capacity to review the evidence before November 2010. He referred to it as humanly impossible to review the evidence.

[90] I appreciate the fact that the treason case was unique and exceptional in nature and magnitude and 'after the fact attack' on the propriety of the public prosecutor's decision to initiate or continue proceedings against the plaintiff should be avoided. I agree that the decision to initiate or continue criminal prosecution lies at the core of prosecutorial discretion which enjoys constitutional protection. However, how far should the constitutional protection that the prosecution authority enjoys be taken?

[91] Is it an acceptable explanation to say that due to lack of human capacity the prosecution authority failed to review the evidence for six to ten years? Should the plaintiff/accused pay this price for the failure of the prosecutor to do appraisals continuously? I think not. The inconvenience or difficulty associated with reviewing the evidence from time to time when it has the deleterious consequence of affecting the

accused's rights cannot be accepted or countenanced.⁴⁴ Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made. Failing to do so would amount to gross negligence.

[92] I have a problem in finding that objective and reasonable grounds for the continued prosecution existed after the evidence of Mr Sinvula was concluded on 31 January 2008. The argument was advanced on behalf of the defendants that even if the prosecutorial team was grossly negligent in continuing with the prosecution against the plaintiff, it does not equate to malice. The second defendant and/or her employees knew that the remaining witness who testified against the plaintiff could not take the case any further as his evidence was limited to hearsay evidence and his presence at the time of the arrest of the plaintiff. Notwithstanding, second defendant maintained the prosecution.

Malice in the context of continuation or maintenance of the prosecution:

[93] The question of malice would only become relevant when it becomes clear that the defendant in this instance continued with the prosecution without reasonable grounds.

[94] The *actio legis Aquiliae*, or *Aquilian* action, which the court was referred to in argument on behalf of the defendants relates to patrimonial loss whereas the action *iniuriarum* relates to injuries to personality or *iniuria* the action for pain and suffering, which relates to pain and suffering and psychiatric injury. The 'legal intention to injure' is a well-known requirement for *animus iniuriandi* or malice.⁴⁵

[95] In this regard *animus iniuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality) in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words that his

⁴⁴ *Mahupelo* at par[207]

⁴⁵ In the case of *Relyant Trading (Pty) Ltd v Shongwe and Another* (supra) 'Although the expression malice is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*.'

conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free if the defendant honestly belief that the plaintiff was guilty. In such a case the element of *dolus*, namely of consciousness of wrongfulness, and therefor animus iniuriandi, will be lacking.⁴⁶ Although the acceptance of animus iniuriandi as a requirement for malicious prosecution means that negligence, even gross negligence (or recklessness) is not sufficient to establish the liability of the defendant – except in so far as the reckless behavior amounts to *dolus eventualis*.

[96] However, the matter of *Heyns v Venter*⁴⁷ introduced the negligence liability, albeit limited to gross negligence for malicious prosecution. This is in line with older cases which base liability for malicious prosecution on malice in the sense of recklessness or gross negligence.⁴⁸ The court held that within the context of the *actio iniuriarum*, 'malice' meant animus iniuriandi or intent. The existence of a malicious motive could, however, show intent and whether the person in question had acted unlawfully.⁴⁹ The court held further that the requirement of knowledge of unlawfulness, the courts were constitutionally obliged to develop the common law in order to bring it in line with the spirit, purport and objects of the Bill of Rights. The dignity of a person could be unreasonably impaired if defendants were permitted to raise a defence of absence of knowledge of unlawfulness in cases of malicious prosecution. In view of the constitutional protection of human dignity, the ambit of the delict of malicious prosecution had to be extended: if it was clear that a defendant had as a result of gross negligence thought that an act constituted a crime and had instigated a charge, he should not be allowed to raise as a defence that he was unaware that it was not a crime. To ensure that this development did not go too far, gross negligence had to be required.⁵⁰ (my underlining)

⁴⁶ J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2 ed, 2005) at 181

⁴⁷ 2004 (3) SA p203

⁴⁸ Kaplan v Abrahamson (1894) 9 EDC 96 99. In *Waterhouses v Shields* 1924CPD 155 168, to reference was made with approval to the following dictum in *Spiegel v Miller* (1881) 1 SC 264 274: " If a man acts in a grossly negligent and reckless way, acting in furtherance of his own interest without due regard to the rights of others, and careless as to whether he interfered with the liberty of another person or not, I infer that he has be actuated by an improper motive.

⁴⁹ *Heyns v Venter* supra at paragraph [12] at 208F.

⁵⁰ *Heyns v Venter* supra at paragraph [14] at 209C - D and G – H.

[97] It is clear that gross negligence would suffice in the context of *actio iniuriarum*.

[98] The element of malice for the test for malicious prosecution considers a defendant prosecutor's mental state in respect of the prosecution at issue. Malice is a question of fact, requiring evidence that the prosecutor was impelled by an 'improper purpose'.⁵¹

[99] In the case of *A v State of New South Wales*⁵², malice was held often to be a matter of inference. The court said that:

'Malice requires evidence from which the court can infer that the prosecution wished to pursue some illegitimate motive other than to bring an offender to justice. Motives include: spite and ill will, an irrational obsession with the guilt of the plaintiff, pressure to bring a conviction for the crime.'

[100] Persisting with prosecution notwithstanding that there was no case against the plaintiff and then oppose application for discharge at the closing of the State's case in a hope that the plaintiff (accused) would be implicated by co-accused clearly falls in the latter category as set out in the *New South Wales* matter.

[101] I fully agree with the remark of Christiaan AJ in *Mahupelo* matter that the treatment of the evidence shows a poor understanding of the constitutional obligations of a prosecutor to be objective, and to take care of people's liberty.

[102] Having considered all the facts in this matter I find that the plaintiff made out a case on the balance of probabilities on the alternative claim, i.e. the claim based upon the wrongful and malicious continuation of the prosecution as 31 January 2008, in the alternative 30 June 2009 for the crimes set out in the indictment, only against the second defendant and/or her employees.

⁵¹ *Miazga v Kvello Estate* 2009 SCC 51 ([2009] 3 SCR 339).

⁵² [2007] HCA 10.

[103] In light of the aforesaid findings, I do not find it necessary to pronounce myself on the further alternative relating to the infringement of the constitutional rights of the plaintiff.

[104] The only remaining issue is the position of the third defendant in this matter.

[105] This issue was addressed as follows all the matters preceding the matter *in casu* and I have no compelling reason to deviate from the previous findings in this regard.

[106] I therefore make the following order:

1. The claim against the first defendant for malicious prosecution is dismissed.
2. The claim against the second defendant for instituting criminal proceedings against the plaintiff is dismissed.
3. The plaintiff's alternative claim based on malicious continuation of prosecution without reasonable and probable cause is upheld.
4. Cost is granted in favor of the plaintiff against the second and third defendant jointly and severally, the one paying the other to be absolved, consequent upon employment of one instructing and one instructed counsel.
5. The matter is postponed to 22 February 2018 at 15:00 for Status Hearing as the matter is returned to the judicial case management roll, to deal with the issue regarding quantum.

JS Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF:

Mr. P. Muluti

INSTRUCTED BY:

Muluti & Partners, Windhoek

FOR THE DEFENDANT:

Adv. Semenya (with him N. Marcus)

INSTRUCTED BY:

Government Attorneys, Windhoek

