

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3883/2013

In the matter between:

**MOVEN KAWANA CHOMBO**

**PLAINTIFF**

and

**MINISTER OF SAFETY AND SECURITY**

**FIRST DEFENDANT**

**PROSECUTOR GENERAL**

**SECOND DEFENDANT**

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**THIRD DEFENDANT**

**Neutral citation:** *Chombo v Minister of Safety and Security* (I 3883/2013) [2018]  
NAHCMD 37 (20 February 2018)

**Coram:** PARKER AJ

**Heard:** 23 January 2018

**Delivered:** 20 February 2018

**Flynote:** Practice – Judgments and orders – Absolution from the instance – In order to survive absolution plaintiff must place before court evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff – Court held in that regard authorities and precedent cannot supply evidence – Court held further that at this stage of close of plaintiff's case it is inferred that all the evidence against the defendant are before the court.

**Summary:** Practice – Judgments and orders – Absolution from the instance – In order to survive absolution plaintiff must place before court evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff – Court held in that regard authorities and precedents cannot supply evidence – Court held further that at this stage of close of plaintiff’s case it is inferred that all the evidence against the defendant are before the court – Court found and held that at this stage there is no evidence upon which a court, applying its mind reasonably to such evidence, might find for plaintiff that in instigating or instituting proceedings or in continuation of the prosecution there was want of reasonable and probable cause on the part of defendants or that they were actuated by malice – In the result, court granted absolution from the instance with costs.

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### **ORDER**

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Absolution from the instance is granted with costs, including costs of one instructing counsel and one instructed counsel.

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### **JUDGMENT**

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PARKER AJ:

#### Introduction

[1] The plaintiff, represented by Mr Muluti, institutes a claim against first defendant, second defendant and third defendant as set out in plaintiff’s ‘further amended particulars of claim’ filed with the court on 14 September 2015 (‘the final POC’).

[2] Plaintiff’s claims in terms of the final POC, as Mr Muluti submitted, consists of:

- (a) a principal claim, which 'is brought against both the first and second respondents based on malicious prosecution under the common law in respect of the period 17 September 1999 to 11 February 2013'; and
- (b) an alternative claim 'only against the second defendant and/or her employees (delegates) damages based upon the wrongful and malicious continuation of prosecution as from 12 February 2008 and/or 08 February 2011 for crimes set out in the indictment'.

[3] At the close of the plaintiff's case, Mr Namandje, counsel for the defendants, applied for an order granting absolution from the instance. Mr Muluti moved to reject the application. Both Mr Namandje and Mr Muluti submitted useful written submissions and authorities, including an article: C Okpaluba, 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions', in *PER*, 2013 Vol. 16, No. 1. I am grateful for their industry. I have pored over them and distilled from them principles that are of assistance on the various points under consideration.

#### Certain general principles and approaches respecting trial of actions

[4] Claims in action proceedings involve two crucial requirements on the part of the plaintiff, that is, plaintiff -

- (a) alleging in the pleadings certain unlawful actionable act attributable to the defendant that has been prejudicial to, or violable of, plaintiff's rights (legal or constitutional) or interests ('requirement (a)'); and
- (b) proving in the trial that which plaintiff has alleged in the pleadings; for, he or she who asserts, must prove it ('requirement (b)').

[5] It follows that it is not enough merely to satisfy requirements (a) and not both requirements (a) and (b). Thus, if requirement (b) is not satisfied during the trial of the action, no court will find for the plaintiff; for, what is alleged and not proven remains a mere irrelevance. (*Klein v Caramed Pharmaceuticals (Pty) Ltd* 2015 (4))

NR 1016 (HC)) In that regard, it is important to mention that authorities and precedent cannot supply the required evidence. (*Mokomele v Katjiteo* (I 3148/2013) [2015] NAHCMD 153 (26 June 2015)) To bring the enquiry home; at the close of the plaintiff's case, if there is an application for absolution from the instance, wherein defendant prays the court to grant an order of absolution from the instance, the determinant in determining such application is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. See the next paragraph, ie para 6. Furthermore – and this is crucial – at that stage it is inferred that the court has heard all the evidence available against the defendant. (Erasmus, *Superior Court Practice* (1994): p B1-293.) That is the manner in which I approach the determination of the instant absolution application, which the defendant has brought at the close of the plaintiff's case.

#### Principles and approaches specific to absolution from the instance

[6] I shall rehearse here what I stated in *Erasmus v Wiechmann* (I 1084/2011) [2013] NAHCMD 214 (24 July 2013) on the test of absolution from the instance:

'[18] The test of absolution from the instance has been settled by the authorities in a line of cases. I refer particularly to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F; and it is this:

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

... [W]hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T))."

[19] ... And it must be remembered that at this stage it is inferred that the court has heard all the evidence available against the defendant. (Erasmus, *Superior Court Practice* *ibid*, p B1-293).'

[7] I now proceed to consider the claims for our present purposes; and in that regard, I reiterate the point that plaintiff's principal claim and alternative claim in the instant proceedings, as Mr Namandje correctly submitted, concern indubitably malicious prosecution only.

## PART A

### **Principal claim**

#### *Requisites of malicious prosecution under the principal claim*

[8] In the recent case of *Rudolph and Others v Minister of Safety and Security and Others* 2009 (5) SA 94 (SCA), where the requisites of malicious prosecution were recently restated by South Africa's Supreme Court of Appeal, Mthiyane and van Heerden JJA (Farlam, Brand and Lewis JJA concurring), said:

'[16] We will now deal with the appellants' claim for damages for malicious prosecution (claim 2). The requirements for successful claims for malicious prosecution have most recently been discussed in *Minister of Justice & Constitutional Development v Moleko* ([2008] 3 All SA 47 (SCA) para 8) as follows:

"In order to succeed on the merits with a claim for malicious prosecution, a claimant must allege and prove –

1. that the defendants set the law in motion (instigated or instituted the proceedings);
2. that the defendants acted without reasonable and probable cause;
3. that the defendants acted with 'malice' (or *animo injuriandi*); and
4. that the prosecution has failed."

...

[18] The requirement of "malice" has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression "malice" is used, the claimant's remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved in this regard is *animus injuriandi*. See *Moaki v Reckitt & Colman (Africa) Ltd & Another* (1968 (3) SA 98 (A) at 103G-104E) and *Prinsloo &*

*Another v Newman* (1975 (1) SA 481 (A) at 492A-B). By way of further elaboration in *Moleko* it was said:

“The defendant must thus not only have been aware of what he or she was doing in institution or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice (Para 64).”

[9] The court (per Damaseb JP) applied the *Rudolph* requisites and an additional requisite of ‘(v) he suffered loss and damage’ in *Akuake v Van Rensburg* 2009 (1) NR 403. The additional *Akuake* requisite (‘v’) is of no real interest at this stage of the proceedings. What should now be at play are therefore the four *Rudolph* requisites, ie (i) to (iv) in *Akuake*.

[10] For ease of reference, I shall now refer to the *Rudolph* requisites as ‘Requisite 1’ for ‘1’; ‘Requisite 2’ (for ‘2’); ‘Requisite 3’ (for ‘c’); and ‘Requisite 4’ (for ‘4’).

### **Requisite 1**

[11] Requisite 1 consists of two elements, namely, (a): defendant actually instigated the proceedings; and (b): defendant prosecuted the plaintiff. I shall not subject Requisite 1 to any detailed analysis and discussion because there was no debate about its import and because it is not disputed that first and third defendants (‘the GRN defendants’) instigated the proceedings, and second defendant prosecuted.

[12] I now proceed to consider Requisite 1 together with Requisite 2, that is that in instigating the proceedings or in prosecuting, the defendants acted without reasonable and probable cause (Requisite 2); and Requisite 1 together with Requisite 3, that is, that in instigating the proceedings and in prosecuting the defendants acted with malice (Requisite 3).

### **Requisite 1 considered together with Requisite 2 – Lack of reasonable and probable cause**

[13] In *Herniman v Smith* [1938] AC 305 (H.L.) at 316, the House of Lords defined reasonable and probable cause as -

‘an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, *which, assuming them to be true*, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.’

[Italicized for emphasis]

[14] Thus, if there is an honest belief that the accusation is true, then even though the belief is mistaken, the charge may still be reasonable and probable. (*Hicks v Faulkner* (1978) 8 Q.B.D 130, at 135, per Evershed MR) It follows that the facts, ie the honest belief facts (‘Facts1’) upon which the instigation or institution of prosecution was founded need not be such facts (Facts 2) as would be admissible as evidence to establish the guilt of the accused. In this regard, it is important to signalize this crucial point: The distinction between facts required to establish bona fide belief (Facts 1) and facts admissible to establish actual guilt (Facts 2) should never be lost sight of when considering cases of malicious prosecution. (*Hicks v Faulkner* at 173)

[15] In words of one syllable, one should never conflate Facts (1) and Facts (2) in malicious prosecution cases. Thus, under the aforementioned Requisite 2 what is relevant and should be taken into account are facts to establish bona fide belief (ie Facts1). To bring the enquiry nearer home, the question is this. Did the police officials (under first defendant) have before them facts required to establish bona fide belief in the guilt of the plaintiff and did the second defendant have before him or her facts required to establish bona fide belief in the guilt of the plaintiff when second defendant instituted proceedings? That is not all. The court has to decide – even where there is the existence of such honest belief (on subjective basis) – whether there were reasonable grounds for the honest belief imputed to the police officials and the second defendant (on objective basis). It follows that the question of reasonable and probable cause must be determined objectively by the court on the evidence before it. The question, therefore, is not what, on the evidence known to

first defendant (ie the police officials) and second defendant, first defendant and second defendant thought, but what, as reasonable persons minded to act reasonably, first defendant and second defendant ought to have thought. (*Tims v John Lewis & Co Ltd* [1951] 2 KB 459 (H.L.) at 472, per Lord Goddard CJ)

[16] In all this, we must not lose sight of the crucial element: the burden of proving absence of reasonable and probable cause is on the plaintiff.

[17] I have said previously that in malicious prosecution, what is relevant and should be taken into account are facts (Facts 1) to establish bona fide belief in the guilt of the plaintiff (the accused) and not facts (Facts 2) to establish actual guilt (see para 14–15 above). That being the case, on the evidence, I reject plaintiff's contention that first and second defendants wrongfully and maliciously set the law in motion against the plaintiff without having sufficient information at their disposal that substantiated the preferred charges or justified the prosecution of the plaintiff.

[18] For instance, the information received by the police officials – it matters tuppence in the instant proceedings the source of the information, who reported plaintiff to the police officials, and who arrested plaintiff – that played a crucial role in charging the plaintiff and instituting proceedings against him falls under facts referred to in Facts (1) in para 14 above. Thus, the fact that during the trial, the plaintiff's father failed or was unable to identify his son the plaintiff is not relevant in determining lack of reasonable or probable cause in setting the law in motion in the first place against the plaintiff.

[19] It is worth noting that the fact that plaintiff was acquitted does not constitute want of reasonable and probable cause.

[20] I do not find at this stage, when it is inferred that the court has heard all the evidence available against the defendants, that plaintiff has established that first and second defendants did not have an honest belief that, upon the information before the defendants, the accusation against plaintiff was true. Having carefully considered all the evidence placed before the court, I am unable to say that plaintiff has



established at this stage that there were no reasonable grounds for the honest belief imputed to the defendants.

[21] Consequently, having carefully considered the totality of the evidence, I conclude that plaintiff has not established want of reasonable and probable cause under the present head. I now proceed to consider Requisite 1 together with Requisite 3.

### **Requisite 1 considered together with Requisite 3 – Existence of malice**

[22] As is with requirement of lack of reasonable and probable cause, the burden of proving malice lies on the plaintiff. Malice exists unless the predominant wish of the defendant is to vindicate the law. The predominant wish of the defendant will not be to vindicate the law where it is established that defendant acted *animo injuriandi*, with intention of wrongdoing. And *Rudolph and Others v Minister of Safety and Security and Others* tells us that the plaintiff must establish that the defendant must have been aware that what he or she was doing in instigating or instituting proceedings was wrong, or defendant must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act as such, reckless as to the consequence of his or her conduct (*dolus eventualis*). *Negligence on the part of the defendant, even gross negligence (crassa negligentia)* will not suffice. (Italicized for emphasis)

[23] Furthermore, it must be remembered; *dolus eventualis* exists where, *in execution of a plan to cause harm*, the defendant foresees a wrongful consequence that is not desired, but reconciles himself or herself with the possibility that it might arise and continues to execute the plan to cause harm. (Italicized for emphasis.) See M Loubser (ed.), *The Law of Delict in South Africa* (2012), pp 110–111. It follows reasonably that – and this is crucial – *dolus eventualis* or intention by acceptance of foreseen result does not exist where the defendant does not set out to execute a plan to cause harm in the first place. Moreover, if the alleged tortfeasor genuinely believes that he or she is acting in accordance with the law he or she does not act with malice (*Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A)), because he or she intended to act lawfully, not wrongfully (*The Law of Delict in*

*South Africa*, p 112) These propositions of law under the subjective nature of intention discussed previously when a court assess the knowledge of the defendant.

[24] 'The plaintiff bears the onus of proving the defendant's intention'. (*Dantex Investment Holdings (Pty) Ltd v Brenner* at 396) Naturally, it is more likely than not that it is only the defendant who would know what he subjectively thought at the material time of the action. Consequently, courts are wont to draw conclusions by means of inference, that is, by considering the nature of the delict in question and all the surrounding circumstances of the case at hand and hold that based on the facts, the only reasonable conclusion that one can reach is that the alleged tortfeasor must have had a reprehensible state of mind. See *The Law of Delict in South Africa*, p 114.

[25] I have kept in my mental spectacle the foregoing principles discussed in paras 16 to 26. In addition, I have applied those principles to the facts, particularly to the evidence of plaintiff witness Mr Walters (now the Honourable Ombudsman). Honourable Walters, is the *ipso homine*, qua the Prosecutor General (Acting) at all material times, who took the decision to prosecute. Having done all that, I come to the inexorable conclusion that plaintiff's evidence at this stage, when it is inferred that all the evidence against the defendants are before the court, does not establish malice to be imputable to the defendants when they set the law in motion against plaintiff.

#### **Requisite 4, considered together with Requisite 2 and Requisite 3 – Prosecution has failed**

[26] Acquittal does not constitute a lack of reasonable and probable cause, as I have held previously. In any case, that plaintiff (the accused) was acquitted is not in dispute. That is all that I need to say about Requisite 4.

*Conclusion in respect of the principal claim*

[27] Based on the foregoing reasons, I find and hold that there is no evidence upon which a court, applying its mind reasonably to such evidence could or might find for the plaintiff as respects the principal claim.

[28] Probably having seen the writing on the wall, as it were, as respects the weakness of plaintiff's case with regard to the principal claim, Mr Muluti appears (I use 'appears' advisedly as will become apparent in due course) to have capitulated. Counsel submitted that even if defendants acted with reasonable and probable cause and without malice when they set the law in motion (the principal claim), there was lack of reasonable and probable cause in respect of continuation of prosecution after the critical dates (the alternative claim).

[29] Despite Mr Muluti's apparent capitulation, I have thoroughly and fully considered the principal claim all the same and rejected it for the reason that the aforementioned Requisites 2, 3, and 4 are also relevant to and must be applied to the determination of the alternative claim, too. The thorough and full consideration of the principal claim is also a safety net in case Mr Muluti might not after all have capitulated as respects the main claim. It is to the alternative claim that I now direct the enquiry.

## PART B

### **Alternative claim**

#### *Requisite 2 considered with continuation of prosecution by second defendant*

[30] Plaintiff's allegations under this head consist of the following contentions that Mr Muluti submitted:

'The plaintiff further claims only against the second defendant and/or her employees damages based upon the wrongful and malicious continuation of the prosecution as from 12 February 2008 or 08 February 2011 (ie the critical dates) for the crimes set out in the indictment.

The facts and circumstances upon which the plaintiff relies are:

“(a) 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 presented for the purpose of attempting to implicate the plaintiff regarding the commission of the crimes set out in the indictment was completed by 12 February 2008 or 08 February 2011.

(b) 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, 51 of 1977 (“the Act”) by the aforesaid dates, or within a reasonable time thereafter.

(c) 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 from prosecution and detention by the aforesaid dates.

(d) Alternatively, the second defendant ought reasonably to have cause 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 of Articles 7, 8, 11, 12, 13 and 21 of the Namibian Constitution, read with Article 5 thereof.” ’

[31] The long and short of the allegations under the alternative claim is that the second defendant acted without reasonable and probable cause when the second defendant continued with the prosecution after the critical dates. The reason, according to plaintiff, is that ‘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 the crimes set out in the indictment, was completed by 12 February 2008 or 08 February 2011’ (ie the critical dates), nevertheless -

‘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 s 6(b) of the Criminal Procedure Act 51 of 1977 by the aforesaid dates, or within a reasonable time thereafter.’

[32] The plaintiff has made the allegations set out in paras 30 and 31 above. But, has plaintiff placed evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff?

[33] Mr Namandje's response is as follows. Relying on the authority of *S v Fourie* 2014 (4) NR 966 (HC), Mr Namandje argued 'the legitimate and acceptable attitudes a prosecutor could lawfully adopt after an accused person has pleaded in a criminal trial'. The court in *Fourie* (per Miller AJ (Van Niekerk J and Ueitele J concurring)) stated:

'[17] In *S v Bopape* 1966 (1) SA 145 (C), Corbett J stated the position to be the following in a passage appearing at p 149:

"It seems to me that there are three possible attitudes a prosecutor may adopt towards a prosecution. He may press for a conviction, or he may stop the prosecution, or he may adopt an intermediate neutral attitude whereby he neither asks for a conviction nor stops the prosecution but leaves it to the Court to carry out the function of deciding the issues raised by the prosecution." '

[34] It is important to note that the *Fourie* options have not been set aside as unconstitutional; and so, they must be accepted as Constitution compliant. The significance of this observation will become apparent in due course.

[35] In the instant case, prosecutor X, who dealt with the matter, chose an option that the law offered him, as Mr Namandje submitted, after prosecutor X has considered that due to the nature of the criminal case there was a reasonable possibility of the defence's case supplementing the State's case. On that proposition, Mr Namandje referred the court to *S v Malumo and Others* 2013 (3) NR 868 (HC), which I accept as good law. It is equally important to note that the *Malumo* principle has not been set aside as unconstitutional; and so, it must be accepted as Constitution compliant. The significance of this observation, too, will become apparent in due course.

[36] It follows reasonably, that even if prosecutor X was mistaken as to his view of the law, the conclusion cannot on any pan of legal scale be made, in the absence of

proven existence of malice, that for the lawful option, that prosecutor X chose want of reasonable and probable cause is proven against the second defendant.

[37] I have stated, supported by authority, previously that if the alleged tortfeasor genuinely believes that he or she is acting in accordance with the law, he or she does not act wrongfully intentionally for purposes of the law; he or she does not act with malice.

[38] Accordingly, on the evidence, I find and hold that there is no evidence tending to prove lack of reasonable and probable cause on the part of second defendant respecting continuation of the prosecution of the plaintiff after the aforementioned critical dates.

[39] I hasten to note that plaintiff, in all this, has not alleged, let alone, proved, malice as regards continuation of the prosecution. The reason appears to be couched in Mr Muluti's submission. Counsel says:

'My Lord, malice; if it is found that there is reasonable and probable cause to prosecute, an inference can be drawn to establish malice.'

[40] Mr Muluti does not say what those 'authorities' are. In any case, even if there were such authorities, they cannot assist the plaintiff in the instant case, because I have found and held that there is no evidence tending to prove want of reasonable and probable cause on the part of second defendant respecting continuation of the prosecution of the plaintiff after the aforementioned critical dates. Apart from that, with the greatest deference to Mr Muluti, I should say that there is not a modicum of merit in counsel's assertion. There is authority that, if the plaintiff does not prove want of reasonable and probable cause, as is in the instant proceedings, the defect is not supplied by evidence of malice (*Turner v Ambler* (1847) 10 Q.B.D. 252). This proposition of law shows clearly that the requirement of want of reasonable and probable cause and the requirement of actuation of malice are polar apart; and they are polar apart, if regard is also had to the approach the court has adopted concerning the requirement of malice and what the plaintiff must prove (see para 8 above).

[41] Accordingly, the conclusion is inescapable that the allegations made by the plaintiff against second defendant are not proven; they remain a mere irrelevance. (See *Klein v Caramed Pharmaceuticals (Pty) Ltd.*)

*Conclusion in respect of the alternative relief*

[42] As respects the alternative claim, I likewise conclude that the evidence at this stage when it is inferred that all the evidence against the defendants (second defendant in particular) are before the court does not prove want of reasonable and probable cause, neither does prove actuation of malice, attributable to second defendant for continuing with prosecution after the aforementioned critical dates.

[43] Based on the foregoing reasons, I am indubitably impelled to hold that as respects the alternative claim, too, there is no evidence upon which a court, applying its mind reasonably to such evidence could or might find for the plaintiff.

PART C

**Paras 10A.3 (a), 10A.3 (b) and 10A.3(c) and the alternative claim**

[44] The conclusions I have reached with regard to the alternative claim is dispositive of paras 10A.3 (a), 10A.3 (b) and 10A.3(c) of plaintiff's amended particulars of claim. I find Mr Namandje's submission to be of great force when he argued that if there was reasonable and probable cause to continue with the prosecution and malice is not proven, as I have found to be the case in these proceedings, a question of a claim for constitutional damages for such conduct does not arise. The reason is simple, as Mr Namandje submitted correctly: a reasonable and probable cause to prosecute or continue with the prosecution 'will never give birth to a claim based on constitutional grounds.' It is with firm confidence that I hold that the South African case of *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) is of no assistance on the point under consideration.

[45] As I see it, what the plaintiff complains of in those paras 10A.3(a), 10A.3(b) and 10A.3(c) and in the alternative claim are the direct consequence of the legal

option that second defendant took with reasonable and probable cause and without proven malice, as I have found to be the case, to continue to prosecute after the critical dates. A fortiori, in *our* law (and I emphasize 'our' for a good reason as will become apparent shortly), once an accused is brought before the court lawfully, that is, in compliance with the 48-hour rule in terms of art. 11(3) of the Namibian Constitution (see *Iyambo v Minister of Safety and Security* 2013 (2) NR 562 (HC)), the authority to detain the accused further is then within the discretion of the court. No liability for the court's *liberum arbitrium* or the court's exercise of judicial discretion can be attributed to the defendants who are in the political or bureaucratic branches of the Executive organ of State.

[46] That is the law in Namibia; and it is based on our democratic milieu and constitutional governance that practicalize the doctrine of *trias politica* of the notion of separation of powers. See *Maletzky v The President of the Republic of Namibia and Others* 2016 (2) NR 420 (HC); *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC).

[47] The irrefragable and inevitable conclusion that follows inexorably is that the defendants cannot be held accountable for the court's exercise of *liberum arbitrium*. (*Iyambo v Minister of Safety and Security*)

[48] I have discussed the principle in our Constitution to respectfully, but firmly, reject Mr Mului's zealous but misplaced reliance on the South African cases of *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC); and *Woji v Minister of Police* 2015 (1) SACR 409 (SCA), which counsel appears to be so much enamoured with. It is labour lost. Those three cases have no persuasive force – none at all – on the point under consideration. The South African courts did not have in their minds the interpretation and application of the Namibian Constitution when they decided *Zealand* and *Woji*. In that regard, we should remember the wise and authoritative counsel of the Supreme Court, per the high authority of Strydom CJ, in *Government of the Republic of Namibia v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 (2) NR 596 (SC); and per O'Linn AJA in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC).



[49] The judicial counsel in the judgment of Strydom CJ is contained in these lines:

'[69] A comparative study of the constitutional law of other countries is always helpful, and in matters concerning the interpretation of fundamental rights and freedoms, this has more or less become the norm, bearing in mind the almost universal application of those rights with more or less the same content. However, there are also clear differences among the various constitutional instruments and for such a comparative study to be of real value, due cognizance must be given to these differences when interpreting the Namibian Constitution.'

[50] O'Linn AJA counsels as follows in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd* at 18B-D:

'When considering the relevance and applicability of decisions of the Courts prior to the implementation of the Namibia Constitution in 1989, the Namibian court must always consider the impact, if any, of the Namibian Constitution on those decisions.

The same principle applies to decisions of South African Courts. Although the Namibian Courts are not bound by such decisions, their persuasive effect plays a part in the decisions of Namibian Courts.

Moreover, South African decisions based on the new South African Constitution which came into effect in 1996, must be considered in the light of the Namibian Constitution and differences if any between these constitutions.'

[51] The essence of those wise and authoritative words is this: When one is considering whether a decision from a foreign jurisdiction, particularly a decision that has a constitutional slant, is relevant to apply in Namibia, one 'must always consider the impact, if any, of the Namibia Constitution'. Put simply; in deciding whether a decision from a foreign jurisdiction, including South Africa, is relevant and persuasive, Namibian courts must always consider the impact, if any, of the Namibian Constitution on such decision. In the instant case, the impact of the Namibian Constitution on *Zealand* and *Woji* is that their application on the point under consideration will be offensive of the Namibian Constitution, which has 'incorporated (as I have said previously) the principle of the division of powers

between the Legislature, Executive and the Judiciary' (per O'Linn AJA in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd*).

[52] From the analysis I have made and conclusions I have reached thereupon, I reject *Zealand* and *Woji* as being of no real value on the point under consideration. Accordingly, I hold that *Zealand*; and *Woji* cannot negate the preponderance of the holdings and conclusion I have reached on plaintiff's alternative claim.

#### PART D

#### **Conclusions reached regarding the principal claim and the alternative claim considered together with absolution from the instance**

[53] With the foregoing conclusions respecting the principal claim and the alternative claim and the test for absolution from the instance discussed above kept in my mind's eye, I make the following irrefragable and inevitable conclusion. The allegations that the defendants set the law in motion without reasonable and probable cause and with malice is unproven at this stage, and the allegations that second defendant continued with the prosecution after the critical dates without reasonable and probable cause, which resulted in the plaintiff's unlawful continued detention, is also unproven. In addition, remembering further that at this stage it is inferred that the court has heard all the evidence available against the defendant (Erasmus, *Superior Court Practice*, p B1-293), I find and hold that the plaintiff has not placed before the court evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.

[54] I have said *ad nauseam* that at this stage, it is inferred that the court has heard all the evidence available against the defendant. That being the case, Mr Muluti's submission that Mr July should appear in court to tell the court the reason why he continued with prosecution after the critical dates cannot assist the plaintiff.

That submission has, with the greatest deference to Mr Muluti, no merit at all, as a matter of law. It cannot assist the plaintiff to escape absolute liability from the instance. It cannot persuade the court to refuse to grant an order of absolute liability from the instance.

[55] For all the foregoing reasoning and conclusions, I find that at the close of the plaintiff's case the plaintiff has not placed before the court evidence respecting the principal claim and the alternative claim upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.

[56] I am alive to the judicial caution that a court ought to be chary in granting an order of absolute liability from the instance at the close of the plaintiff's case unless the occasion arises. If the occasion has arisen, the court should order absolute liability from the instance in the interest of justice. In the instant case, taking into account all the foregoing reasoning and conclusions, I think the occasion has arisen: it is in the interest of due administration of justice that I grant an order granting absolute liability from the instance. That being the case, I exercise my discretion in favour of granting such an order that the defendants have prayed for in their application for absolute liability.

#### PART E

*Stare decisis and the judgments of my Honourable and learned sister Christian AJ and my Honourable and learned sister Prinsloo AJ*

[57] I should say that the preponderance of the foregoing analysis and conclusions and the decision made thereon are unaffected by certain decisions of the court, per Christian AJ; and per Prinsloo AJ on the relevant elements of the principal claim and the alternative claim.

[58] 'The law of tort,' wrote T. Ellis Lewis in the Preface to T. Ellis Lewis, *Winfield on Tort*, 6<sup>th</sup> edn. (1954), p. 754, 'is anything but static....' In virtue of this wise and authoritative proposition, I respectfully accept Christian AJ's development of the delict of malicious prosecution by extending malicious prosecution to include 'the element of continuation or maintenance of the prosecution'. It is, in my opinion, good

law. Accordingly, as I say, I have accepted the extension in the instant proceedings; and that is why I have considered the alternative claim.

[59] That is the only material aspect of the judgment of my Honourable and learned sister Christian AJ in *Mahupelo* and the other similar judgments of hers concerning extension of malicious prosecution to include continuation and maintenance of an ongoing prosecution that I feel bound to follow. It is good law, as I say. The court there gave reasons for such development of the law; and so I am convinced that that decision, ie the *ratio decidendi*, should be followed by this court; and, I have followed it, as I have said previously. That court gave reasons for the development of the law; and, more important, the law so developed is just (see Rt Hon Lord Denning MR, *The Discipline of the Law* (1979) p 293) and it conduces to the due administration of justice, which every court strives to attain and promote. However, it will not be just to follow a previous decision of the court when that decision is, with respect, irrational and perverse, in the sense that on the evidence and on the application of the law and the authorities no reasonable court minded to act judicially and reasonably could make. With these considerations in my mental spectacle, I proceed to look at the judgments of my Honourable and learned sister Christian AJ ('the Christian AJ judgments'), and the judgments of my Honourable and learned sister Prinsloo AJ ('the Prinsloo AJ judgments').

[60] 'The constitutional principles of the rule of law and justice for all,' so stated O'Regan AJA in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554, para 42, 'require at the very least a dispute resolution system that eschews arbitrary, irrational or perverse decision-making....' The Supreme Court enunciated the principle with regard to arbitral tribunals, but I see no good reason why the principle should not apply with equal force to courts and other tribunals.

[61] The *stare decisis* rule by which this court is bound requires this court to follow an earlier decision unless the earlier decision is wrong. On that score, I accept Mr Muluti's submission, wherein he urges the court to follow the decisions in the Christian AJ judgments and the Prinsloo AJ judgments, because, according to counsel, the law must be made certain.

[62] 'The law must be made certain. Yes, as certain as may be. But it must be just, too'. (*The Discipline of the Law*, loc. cit.) That is the manner in which I approach the question of *stare decisis*, which Mr Muluti raised with the court regarding the Christian AJ judgments and the Prinsloo AJ judgments.

[63] Take, for instance, the *Mahupelo* judgment, which is by my Honourable and learned sister Christian AJ and which is the talisman on which Mr Muluti hangs the success of the plaintiff's case (among others); but, I should say, like all talismans, this talisman, too, is an illusion.

[64] The decision of my Honourable and learned sister Christian AJ in *Mahupelo* on a finding that there was established lack of reasonable and probable cause regarding the continuation of the prosecution is set out in paras 197 to 199 of that judgment. With the greatest deference to my Honourable and learned sister Christian AJ, I make the following observations thereon, which I have discussed in detail previously, to make a point:

- (1) That court, misinterpreted s 6(1)(b) of the CPA. The court overlooked the authorities as to the legal options (the *Fourie* options) (see para 33 above) that were lawfully open to the prosecutor in the course of ongoing proceedings.
- (2) That court overlooked the authorities on the law that once an accused X has been brought to court in conformity with art. 11(3) of the Namibian Constitution, X's further detention may be ordered by the court in question in the exercise of the court's *liberum arbitrium*. Therefore, with respect, pace Christian AJ, in the instant case, defendants cannot be held responsible for the exercise of the court's judicial discretion; they cannot be held accountable for the court's exercise of judicial discretion. I should add, in that regard, that Mr July was correct in his submission on the point, which the court rejected.
- (3) That court found that Mr July (the public prosecutor in question) committed errors and that was proof of want of reasonable and probable cause in continuing with the proceedings. I underline the point that the errors on their

own, without more, cannot establish want of reasonable and probable cause. That court concluded that the errors were proof of want of reasonable and probable cause without any analysis and reasoning based on the law and the authorities. Those errors (as that court found them to exist) cannot by any stretch of legal imagination establish lack of reasonable and probable cause, even if the errors amounted to negligence, even *crassa negligentia* (*Rudolph and Others v Minister of Safety and Security*), as Mr Namandje submitted.

- (4) The court in *Mahupelo* says (in para 199): ‘Further, I find second defendant (ie the Prosecutor General) in particular Mr July, had no sufficient basis for any honest belief in the case he maintained at this stage’. That conclusion is wrong in law, considering the reasons Mr July gave for continuing with the prosecution ‘at this stage’, coupled with Mr July’s peroration that ‘stopping the prosecution would have been premature and risky’. The court there overlooked the authorities, particularly *S v Malumo and Others*; and *S v Fourie*.
- (5) Relying on a passage in an article by A St Q Skeen, that court concluded that ‘the argument of the second defendant that other witnesses, his co-accused and the accused himself could incriminate him, is not an acceptable standard in the law of criminal procedure’. That conclusion is clearly wrong and cannot support a charge of lack of reasonable and probable cause. That conclusion overlooks *Malumo* and *Fourie*. Besides, there was no evidence before the court tending to show that the view Mr July held was a view that a reasonable prosecutor, faced with the facts that were before Mr July and in the circumstances, would not hold. In that regard, even if Mr July was mistaken as to the law, he acts with reasonable and probable cause if his view was borne out of an honest belief that his understanding of the law was correct. There was no evidence that Mr July’s belief was not honest or could not have been held by a reasonable prosecutor or that he was actuated by malice.

[65] In that regard, I should say that the fact that Mr Muluti submitted, ‘the prosecution is a constitutional office which functions within the parameters and confines of the Constitution’ could not negate the conclusions I have reached on –

- (a) the honest belief of Mr July unactuated by proven malice;
- (b) the failure of the plaintiff to discharge the onus cast on him to prove want of reasonable and probable cause on the part of Mr July and that he was actuated by malice when he continued the proceedings after the critical dates;
- (c) the application of the *Malumo* principle, which is Constitution compliant; and
- (d) the acceptance of the legal *Fourie* options, which is Constitution compliant, from which Mr July made a lawful choice.

[66] I am aware that this court has co-ordinate jurisdiction with the court presided over by my Honourable and learned sister Christian AJ and by the court presided over by my Honourable and learned sister Prinsloo AJ, and that I should not reject a decision of the court presided over by either of them, unless convinced that the earlier decisions there are wrong. (Lord Lloyd of Hampstead, *Introduction to Jurisprudence* (1972), p 705; GE Devenish, *Interpretation of Statutes* (1992), pp 273-274) I have demonstrated in para 65 *et passim* that the decision in *Mahupelo*, inasmuch it concerns the requisite of reasonable and probable cause and actuation of malice with regard to continuation of the prosecution of the accused (ie the plaintiff) is clearly wrong. As I have demonstrated previously, the said decision is, with respect, untethered to reason and the facts and analysis and the law. I am therefore convinced that the decision on the aspects relevant to the instant proceedings is wrong. It will therefore not be 'just' (see *The Discipline of the Law*, loc. cit.) for this court to regard itself bound by the relevant decisions of the court presided over by my Honourable and learned sister Christian AJ.

[67] I have concentrated on *Mahupelo* mainly for these reasons. It seems to me that the *Mahupelo* judgment is dominant and the touch bearer in Mr Muluti's submission that I am bound by the decisions in those cases decided by the court presided over by my Honourable and learned sister Christian AJ and the court presided over by my Honourable and learned sister Prinsloo AJ. In any case, the

relevant aspects in the rest of the judgments of Christian AJ are not treated differently from *Mahupelo*.

[68] Moreover, I do not, with respect, think the decisions in the judgments of my Honourable and learned sister Prinsloo AJ on aspects that are relevant in these proceedings do fair any better. The relevant decisions there stand in the same boat as the decisions in *Mahupelo* and the rest of the similar cases that Mr Muluti referred to this court.

[69] I have said this previously. The conclusions I have reached and the decision I have taken thereon that I should exercise my discretion in favour of granting the application of absolution from the instance are unaffected by the aforementioned Christian AJ judgments and Prinsloo AJ judgments: after all – and this is extremely crucial – *authorities and precedent cannot supply evidence (Mokomelo v Katjiteo)* (Italicized for emphasis). In sum, I hold that each of the decisions in the judgments of my Honourable and learned sister Christian AJ and of my Honourable and learned sister Prinsloo AJ cannot supply evidence in support of plaintiff's case in the instant matter. This is apart from my holding previously that, in my opinion, with the greatest deference to my Honourable and learned sisters Christian AJ and of Prinsloo AJ, those decisions in the aforementioned judgments on the aforementioned aspects relevant to the instant proceedings regarding the principal claim and the alternative claim are wrong.

## PART F

### **Overall conclusion**

[70] Based on all the foregoing reasons, borne out of the law and the evidence placed before the court, I find and hold that there is no evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff. In my judgment, therefore, the defendants have made out a case for the relief sought, and plaintiff cannot survive absolution from the instance; whereupon, I make an order granting absolution from the instance with costs, including costs of one instructing counsel and one instructed counsel.



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C Parker  
Acting Judge

APPEARANCES

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