

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 105/2014

In the matter between:

AGGREY SIMASIKU MWAMBWA

PLAINTIFF

and

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

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

Neutral citation: *Mwambwa v The Minister of Safety & Security* (I105/2014) [2018]
NAHCMD 89 (12 April 2018)

Coram: PRINSLOO J

Heard: 27, 28 and 29 June 2017; 27, 29 November 2017; 1 December 2017;
26 February 2018; 16 March 2018 and 23 March 2018.

Delivered: 23 March 2018

Reason: 12 April 2018

Flynote: Civil Procedure – Delict – Malicious prosecution – Elements that need to be satisfied before successfully raising malicious prosecution – Onus – Rests on he who alleges to prove on a balance probabilities that prosecution was done without reasonable and probable cause and that members of the prosecuting authority acted with malice or *animo injuriandi*.

Summary: The plaintiff instituted proceedings against the Minister of Safety and Security, the Prosecutor-General and the Government of the Republic of Namibia for damages for alleged malicious prosecution, in the alternative, a claim for alleged violation of various constitutional rights. The plaintiff was one of many accused persons charged with 278 charges to which the most serious of the 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

On 11 February 2013, plaintiff was acquitted and discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 and after being so acquitted, the plaintiff filed a claim for malicious prosecution, pleading that from 08 March 2006, alternatively 18 October 2011, his continued prosecution was without any reasonable or probable cause and the trial should have been stopped in terms of s 6 (b) of the CPA or within a reasonable time thereafter; alternatively the Prosecution ought reasonably to have closed the

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 persons 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.’

State's case against him and have moved for his discharge or caused his release from prosecution.

The first and second defendants both denied liability in respect of the plaintiff's claim, alleging that the evidence collected against the plaintiff by the Namibian Police provided sufficient grounds to hold a reasonable belief that the plaintiff had committed the offences as contained in the annexure to the combined summons. Further the second defendant denied that she could have stopped the prosecution in terms of s 6(b) of the CPA on 08 March 2006 alternatively 18 October 2011 or any time thereafter other than when State closed its case on 02 February 2012 as the second defendant or her employees believed that the evidence presented against the plaintiff during the trial was sufficient to convict him on the charges preferred against him.

Held – that the defendants conceded that the members of the second defendant initiated and continued prosecution of the plaintiff until the latter was discharged, following an application in terms of s 174 of the CPA, further conceding that the prosecution of the plaintiff failed.

Held – As a result of the failed prosecution as conceded, the remaining issues the court had to determine were firstly, whether the prosecution of the plaintiff was done without reasonable and probable cause, and secondly, whether the members of the second defendant acted with malice or *animo injuriandi*.

Held further – 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

Held further that – 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.

Held further that – It however remains common cause that the prosecuting authority relied on the information received from the Namibian Police and the statements under oath from third persons and further that that there were no sound reasons advanced by the plaintiff as to why the prosecution team had to disbelieve the statements under oath at their disposal.

Held further that – 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.

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 17 May 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 plaintiff instituted proceedings against the Minister of Safety and Security, the Prosecutor-General and the Government of the Republic of Namibia for damages for alleged malicious prosecution, in the alternative, a claim for alleged violation of various constitutional rights.

Notorious facts

[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 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 of the 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.²

[9] On 11 February 2013, plaintiff was acquitted and discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 (“CPA”).

The pleaded case

[10] The particulars of claim was amended several times prior to the hearing of the matter to include the alleged malicious continuation of prosecution and ultimately to include a further alternative complaint that the prosecution ought to have separated the

² *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 persons 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.’

trials of the accused persons in to groups of 'attackers', 'leadership; and/or 'support groups.

[11] The plaintiff pleaded that on 16 March 2000 he was arrested in the Lianshulu Area near Katima Mulilo, in the Zambezi Region, by members of the Namibian Police and was so arrested without a warrant. The claim is that the members of the Namibian Police wrongfully and maliciously set the law in motion by laying false charges that he was guilty of high treason and various other serious crimes.

[12] The claim is that there was no reasonable or probable cause for his arrest and prosecution, nor was there any reasonable belief that he was guilty of the charges laid against him. The claim is also against the second defendant and/or her employees who initiated or continued to maliciously prosecute him, when there was no reasonable or probable cause for doing so.

[13] Relating to the claim for malicious continuation of his prosecution, the plaintiff pleaded that from 08 March 2006, alternatively 18 October 2011, his continued prosecution was without any reasonable or probable cause and the trial should have been stopped in terms of s 6 (b) of the CPA or within a reasonable time thereafter; alternatively the Prosecution ought reasonably to have closed the State's case against him and have moved for his discharge or caused his release from prosecution.

[14] 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.

[15] 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, as well as violation of his constitutional rights in terms of articles 7, 8, 11, 13, 16, 19 and 21 of the Namibian Constitution.

[16] 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 reasons not discuss the pleadings relating to the quantum.

First and second defendant's plea

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

- (a) *In respect of the First Defendant:* It is denied that the first defendant or members of the first defendant set the law in motion, alternatively, if it is found that the members of the Namibian Police set the law in motion, it is denied that they laid false charges or gave false information or that they acted maliciously. It was further pleaded that the conduct of the Namibian Police was limited to the investigation of the 02 August 1999 attack and placing the witness statements and information that were obtained, in the course of such investigation before the second defendant to decide whether criminal proceedings should be instituted against the plaintiff.
- (b) That the evidence collected against the plaintiff provided sufficient grounds for the members of the Namibian Police to hold a reasonable belief that the plaintiff had committed the offences as contained in the annexure to the combined summons.
- (c) *In respect of the Second Defendant:* That based on the available evidence which included witness statements and other evidence relating to the attack, second defendant had reasonable grounds to belief, on a prima facie basis, that the

plaintiff committed the offences contained in the annexure to the combined summons, or that the responsibility could be attributed to the plaintiff, based on the doctrine of common purpose and conspiracy to commit the offences.

- (d) That the second defendant and her employees were not in a position to know whether all the evidence that could implicate the plaintiff had been present and that all the witnesses that could implicate the plaintiff had completed their testimony.
- (e) Second defendant denied that she could have stopped the prosecution in terms of s 6(b) of the CPA on 08 March 2006 alternatively 18 October 2011 or any time thereafter other than when State closed its case on 02 February 2012 as the second defendant or her employees believed that the evidence presented against the plaintiff during the trial was sufficient to convict him on the charges preferred against him.
- (f) Second defendant also pleaded that based on the available witness statements and the evidence presented during the trial, common purpose or a conspiracy to overthrow the Namibian Government was prima facie established and as such the second defendant and/or her employees believed that there was a possibility that the State's case could be strengthened during the case for the defence and therefore as such stopping of prosecution would have been risky and prejudicial to the State's case.
- (g) Second defendant further pleaded that stopping the prosecution against the plaintiff or closing the State's case against the plaintiff was humanly impossible if regard is to be had to the number of accused persons before the court at the time and the complexity and conduct of the case.

- (h) Second defendant further pleaded that the plaintiff had a remedy in terms of Article 12(1) (b) of the Constitution of Namibia to move for his release from prosecution.
- (i) Second defendant also denied that a violation of Article 12(1)(b) is 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.
- (j) In conclusion it is 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.

The evidence adduced

The Plaintiff's case:

[18] In support of his case, Mr. Agrey Simasiku Mwambwa (the plaintiff) and Advocate John Walters testified.

[19] The plaintiff, stated that he is currently 53 years of age, and was 38 years old at the time of his arrest. He denies that he was politically active at the time of his arrest and also denies that he went to Botswana between the years 1998 and 1999. He stated that on the 16th day of March 2000, he was arrested when he was busy working as a taxi driver. He was driving a white Volkswagen Citi Golf with registration number N26686W, being the property of Steve Masilani.

[20] On the fateful day the plaintiff was driving around picking up and dropping passengers at a fee. He picked up Richwell Mahupelo at the taxi station in Katima Mulilo.

[21] While on route to drop off said Richwell Mahupelo, he found another passenger between Kasheshe and Sikubu, whom he picked up and proceeded to Lianshulu turn off. Plaintiff later learned that the last passenger that boarded his taxi was Bennet Matuso but did not know the said passenger at the time when he picked him up. Matuso was carrying a bag with him when he boarded the taxi but the plaintiff had no knowledge of the contents of the said bag.

[22] After the plaintiff turned onto the Lianshulu road he was stopped by the members of the Defence Force and Special Field Forces. The plaintiff and the passengers were ordered out of the vehicle and he was tied with a rope around his hands and legs and was blindfolded with the t-shirt he was wearing at the time. The vehicle was searched but plaintiff cannot say if anything was recovered from the vehicle due to the blindfold. The plaintiff and the passengers were hereafter arrested. There were alleged conversations between the members of the National Defence force and the passengers, Mahupelo and Matusu, but the plaintiff could not follow the conversations as he does not understand the Oshiwambo Language.

[23] Subsequent to plaintiff's arrest, he was detained and indicted on charges of high treason, sedition and 273 other charges as set out in the indictment.³

[24] The plaintiff was informed of an AK 47 that was recovered from his vehicle but he denies any knowledge of the said fire-arm or participation in the commission of any of the offences or involvement in those charges preferred against him. The plaintiff referred to a number of witness statements provided by the defendants as statements which were used to formulate a case against him.

³ Pleadings Bundle pages 17-142.

[25] During his evidence, the plaintiff referred to a number of witness statements wherein the name 'Agrey Simasiku Mwambwa' appeared. I do not intent to repeat the full contents of these witness statements but instead I will just give a brief overview thereof. The witness statements referred to are as follows:

a) Steve Likutumusu Masilani⁴

- i. Mr. Masilani stated that he appointed the plaintiff as a taxi driver for his vehicle. He confirmed ownership of the white Citi Golf Registration number N 26686W.
- ii. Mr. Masilani testified during the criminal trial.

b) Dominic Malosia Kandela⁵

- i. Mr Kandela confirmed that the Plaintiff is his brother and that he was a taxi driver at the time of his arrest
- ii. Mr. Kandela did not testify during the criminal trial.

c) Fanuel Kandela Mwambwa⁶

- i. Mr. Mwambwa is the elder brother of the plaintiff. He stated that he was informed by their brother Dominic Kandela that the plaintiff went missing in the year 2000. He stated that he did not hear or see the plaintiff attending any meeting with the purpose to liberate Caprivi from the rest of Namibia.
- ii. Mr. Mwambwa did not testify during the criminal trial.

d) Nkunga Edina Chitimbo⁷

- i. Ms. Chitimbo is the wife of Mr. Masilani and she confirmed that the plaintiff was handed their vehicle to drive as a taxi in order to raise an income. She stated that

⁴ Plaintiff's Discovery Bundle page 20-23; Exhibit B.

⁵ Plaintiff's Discovery Bundle page 18-19; Exhibit F.

⁶ Plaintiff's Discovery Bundle page 9-12; Exhibit G.

⁷ Plaintiff's Discovery Bundle page 3-5; Exhibit H.

she did not hear or see the plaintiff supporting the issue of liberating Caprivi from the rest of Namibia.

ii. Ms. Chitimbo did not testify during the criminal trial.

e) Malilo Kenneth Tubakunge⁸

i. Mr. Tubakunge is the younger brother of Richwell Mahupelo and stated that he regarded the plaintiff as family and that Mahupelo used to be together with Agrey Mwambwa as family while he was driving the white Citi Golf.

ii. Tubakunge did not testify during the course of the criminal proceedings.

f) Mushabati Christopher Nzeko⁹

i. Mr. Nzeko made multiple statements which are quite extensive in nature which does not relate to the plaintiff however, in his statement dated 18th of January 2002 Mr. Nzeko stated that during 1998 Agrey Mwambwa attended a meeting at Liselo held by Mr. Muyongo, and the purpose of the meeting was to liberate Caprivi from the rest of Namibia. This was not mentioned in the earlier statements of Mr. Nzeko.

ii. Mr. Nzeko did not testified during the course of the criminal proceedings.

g) Vincent Saini¹⁰

i. Mr. Saini stated that when he was repatriated from Botswana, he met Agrey Mwambwa who accused him as being a spy for the Namibian Government and the plaintiff threatened him that if he gets him alone he will kill him because Mr. Saini was a spy.

ii. Mr. Saini did not testify during the criminal trial.

⁸ Plaintiff's Discovery Bundle page 1-2; Exhibit I and J.

⁹ Plaintiff's Discovery Bundle page 43-102; Exhibits K, L, M, N and O.

¹⁰ Plaintiff's Discovery Bundle page 24; Exhibit C.

h) Given Earthquake Tubaleye¹¹

- i. Mr Tubaleye made three statements and in the statement dated 03rd of May 2002 he stated that he knew the plaintiff and that food (mealie meal) was collected at the village of Mahupelo and that the plaintiff transported food twice to the rebels. He also stated that a girl by the surname of Mikiti tried to convince him to go with her to Botswana to join the liberation of Caprivi and that they would be transported by Agrey Mwambwa. He was also aware that Agrey Mwambwa was transporting people to the border of Botswana and Namibia.
- ii. Mr. Tubaleye testified during the criminal trial repeated what he said in his witness statement but when he was asked to identify the persons referred to in his witness statement he was unable to identify the plaintiff.

i) Joice Kakula¹²

- i. Ms. Kakula was married to the plaintiff at the time of his arrest but divorced him during his detention. She confirms that the plaintiff was approached by Mr. Steve Masilani to drive his vehicle as a taxi.
- ii. Ms Kakula did not testify during course of the criminal proceedings.

j) Major General Shali¹³

- i. The witness stated that information was received about movements in West Caprivi and NDF members on patrol stopped a white Citi Golf driven by Agrey Mwambwa and passengers by the names of Bennet Matuso and Richwell Mahupelo. The vehicle was searched and a bag was recovered containing an AK assault rifle, which Bennet Matuso acknowledged as being his fire-arm.

¹¹ Plaintiff's Discovery Bundle page 33-42; Exhibits S, T and R.

¹² Plaintiff's Discovery Bundle page 6-8; Exhibit U

¹³ Plaintiff's Discovery Bundle page 30-32; Exhibit D

k) Sinjabata Hobby Habaini¹⁴

- i. Mr Habaini stated that during March to April 2000 he was approached by Richwell Mahupelo to assist in loading maize meal into a white Volkswagen Golf and he recognized the driver as Agrey Mwambwa Simasiku. He was well acquainted with Simasiku and after he assisted in loading the maize meal, he was given a lift to Itobo village. On route Mahupelo and Simasiku tried to convince Habaini to join the Caprivi secession issue.
- ii. Mr. Habaini testified during the course of the criminal proceedings but appeared to have been unable to identify the persons referred to in his statement when given the opportunity to do so.

[26] Plaintiff submitted that the first and the third defendants arrested him wrongfully and without a warrant of arrest. He further stated the first and third defendant detained him unlawfully from 16 March 2000 up to the 2nd of May 2000.¹⁵

[27] He further stated that the second defendant ought to have known already at the end of March 2006, alternatively October 2011 that there will be no further witnesses available who could further implicate him in the commission of the offences that he was charged with. Despite knowing that, the second defendant continue to prosecute him without a proper basis. This conduct of the prosecuting authority continued even beyond November 2011, when the last evidence had been tendered which notionally could have referred to him.

[28] The evidence of Adv. Walters can be summarized as follows:

- a) He is currently the Ombudsman of Namibia for the past 12 years.
- b) He acted as the Prosecutor-General of Namibia from 01 December 2002 up to

¹⁴ Plaintiff's Discovery Bundle page 25-26 and 27-29; Exhibit V and W.

¹⁵ A claim for Plaintiff's arrest and detention for period 16 March 2000 to 02 May 2000 was settled on 23 November 2011.

the end of December 2003. Hereafter he was employed as a consultant to the prosecution team from 1 January 2004 to 30 June 2004.

- c) When the 02 August attacks took place, he was still in private practice. 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.
- d) 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.
- e) 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, favor 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.
- f) 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.

- g) 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 harbored no bias towards the accused persons.

[29] This concluded the case for the Plaintiff.

The Defendant's Case

[30] A principle feature of this case is that there is an absence of evidentiary challenge to a case that was put up by the plaintiff. The defendants' case were closed without calling any witnesses.

Arguments advanced

[31] Extensive and comprehensive heads of argument were filed on behalf of the plaintiff and the defendants and I would like to extend my gratitude for counsels' diligence herein.

[32] On behalf of the plaintiff it was argued in essence 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, the said reasonable cause did not exist beyond November 2011 for the second defendant to continue with the prosecution.

[33] Plaintiff argued that the proceedings should have been terminated by invoking s 6(b) of the CPA, failing which caused the prosecution to become malicious.

[34] It was further argued that it was not incumbent on the plaintiff (as accused) to exercise his rights in terms of s 174 of the CPA 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

[35] The Defendants argued that the burden of proof rests on the plaintiff to prove that assuming the allegations made in various witness statements to be true, no reasonable person would conclude that the plaintiff was not guilty of the crime imputed.

[36] The plaintiff was accused of having associated himself with the people who went to Botswana, in the context of secessionists.

[37] Assuming the allegations to be true, the initiation of the plaintiff's prosecution, objectively tested, would have released a reasonable and probable cause to subject him to prosecution.

[38] The court was referred to the matter of *Hick v Faulkner*¹⁶ where the court in essence cautioned that the determination of whether there is reasonable and probable cause should not be confused with an enquiry whether the allegations will establish 'actual guilt'. What is necessary to determine is whether if the allegation were true 'they would establish a reasonable bona fide belief in the guilt of the plaintiff.'

[39] Defendants are not expected to test the truth or the validity of every possible relevant fact or ground before he/she institute prosecution.

¹⁶ (1881) AER 1987 page 192 para B and C.

[40] The defendants argued that plaintiff had to do more than to state that there were no longer witnesses who could implicate him and that there was no reasonable and probable cause to continue with his prosecution. Plaintiff had to show that the sole or dominant purpose for his continued prosecution malicious.

[41] Defendants agreed that under the common law even where the initiation of a prosecution may be found to have been on the basis of reasonable and probable cause, its continuation when no such reasonable and probable cause exists will give rise to a claim of malicious prosecution, however the plaintiff had the burden to show, on a balance of probabilities that his continued prosecution was done with an intention to injure him (*animus iniuriandi*).

[42] Defendants further argued that the discharge or acquittal of the plaintiff in the criminal trial should not be seen as lack of reasonable and probable cause. Defendants maintain their position that there was reasonable and probable cause to prosecute the plaintiff.

The Relevant Law

Constitutional duties of the Prosecutor-General

[43] The Office of the Prosecutor-General is provided for in terms of Article 88 of the Namibian Constitution. Article 88 (2) set out the functions and powers of the Prosecutor-General which provides that the Prosecutor-General's powers and functions shall be-“ *to prosecute, subject to the provisions of this Constitution., in the name of Republic of Namibia in criminal proceedings.*”¹⁷

¹⁷ Article 88(2)(a) of Constitution

[44] The prosecutorial authority performs important functions as an organ of State and is a constitutional body with a public interest duty 'that behooves its officials to operate with transparency and accountability'.¹⁸

[45] A prosecutor therefor has an obligation to ensure that an accused's right to a fair trial is protected.

Malicious Prosecution

[46] To successfully sustain a claim for malicious prosecution the plaintiff is required to prove:¹⁹

- (a) that the defendants set the law in motion (instigated or instituted the proceedings by laying a charge for criminal prosecution;
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with 'malice or *animo injuriandi*'; and
- (d) that the prosecution has failed.

[47] This position was confirmed in the matter of *Akuake v Jansen van Rensburg*²⁰ Damaseb JP and relied on by this court in a number of cases.

[48] Defendants have conceded that the members of the second defendant initiated and continued prosecution of the plaintiff until the latter was discharged, following an application in terms of s 174 of the CPA; and having conceded that the prosecution of

¹⁸ *Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2013] 4 All SA 610 (GNP) at [40]

¹⁹ Mc Quoid-Mason "Malicious Proceedings" in Joubert (ed) *The Law of South Africa* 2nd Edition, 2008 Vol 15 Part 2 at paragraph 315.

²⁰ 2009 (1) NR 403 (HC). Also see *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196G – H.

the plaintiff failed, the only two issues left open for determination in these proceedings are:

- a) whether the prosecution of the plaintiff was done without reasonable and probable cause, and
- b) whether the members of the second defendant acted with malice or *animo injuriandi*.

[49] It is trite that the plaintiff bears the onus to prove, on a balance of probabilities, the two elements as mentioned above.

Instigated or instituted the criminal proceedings

Ad First Defendant

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

[51] 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.

[52] Having regard to the allegations made in the various witness statements (right or wrong) associating the conduct of the plaintiff with those who sought to secede the then Caprivi from Namibia through violent means.

[53] 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".'

[54] 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*,²¹ 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 honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.' (Underlining, my emphasis)

²¹ 2008) 3 ALL SA 47(SCA), para11.

[55] It is clear that the Namibian Police gathered information from various sources and agencies and obtained the necessary statements in order to compile a docket.

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

[57] 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

[58] It was conceded that the members of the second defendant initiated and continued prosecution of the plaintiff until the latter was discharged following the application in terms of s 174 of the CPA. It was further conceded that the prosecution of the plaintiff failed. The only two issues for determination is as set out in paragraph [45]²² herein.

Without reasonable and probable cause

[59] According to the court in *Beckenstrater v Rottcher and Theunissen*²³ 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.²⁴

²² Whether the prosecution of the plaintiff was done without any reasonable and probable cause, and whether the members of the second defendant acted with malice or *animus iniuriandi*.

²³ 1955 (1) SA 129 (A)

²⁴ J Neetling, Potgieter and Scott: Casebook on the Law of Delict, 4th Edition, at page 909.

[60] 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.²⁵

[61] Although the court did not have the benefit of the evidence of the defendant's witnesses in this matter, it however remains common cause that the prosecuting authority relied on the information received from the Namibian Police and the statements under oath from third persons.

[62] The plaintiff had to prove that the state of mind of the prosecutor fell short of a positive persuasion of guilt, i.e. whether the plaintiff has proven that the prosecutor *did not honestly from the view that there was a proper case for prosecution, or prove that the prosecutor formed the view on an insufficient basis.*

On the objective element

[63] In the matter of *A v State of New South Wales*²⁶ the court refers to the matter of *Herniman v Smith*²⁷ when it discussed the subjective requirement where Lord Atkin said the following:

²⁵ 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."

²⁶ [2007] HCA 10 21 March 2007 at page 35.

²⁷ *Herniman v Smith* [1938] AC 305 at 317.

'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.'

[64] 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.

[65] 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.

Actuated by an indirect or improper motive (malice)

[66] In *May v. Union Government*,²⁸ 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.'

[67] In the *Relyant* case,²⁹ this court³⁰ stated the following in regard to the third requirement:

²⁸ 1954 (3) SA 120 (N) at p. 129

²⁹ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) para 5.

³⁰ 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).

'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." '

[68] 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.³¹

[69] 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

[70] The plaintiff's alternative claim is based on an alleged continuation of prosecution from 18 October 2011 without reasonable and probable cause.

[71] The pleaded case is that on 08 March 2006 alternatively 18 October 2011, the prosecuting authority knew that all the witnesses and all evidence implicating the

³¹ (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)

plaintiff in respect of the commission of the offence were completed and that there was no reasonable or probable cause to continue with the prosecution.

[72] This claim of continued prosecution is based on the dicta of the Australian Court of Appeal in *State of New South Wales v Hathaway* 2010 NSWCA 188³² where the court said:

‘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.’

[73] In *Mahupelo v The Minister of Safety and Security*³³, Christiaan AJ extended our common law to accommodate the element of continuation or maintenance of the prosecution.

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

[74] The court was referred to Maasdorp: The Institute of Cape Law (1909) Book III Part II Chapter X where the learned authors said the following on page 83:

‘As regards reasonable and probable cause, it should be added, that these elements must be present *not only at the beginning of the prosecution, but throughout the prosecution up to its very termination*. If therefore, facts come to the knowledge of the complainant or person instituting criminal proceedings at any time during their continuance, showing that no crime or

³² Paragraph 155

³³ I 56/2014) [2017] NAHCMD 25 (2 February 2017)

offence has actually been committed by the accused person, he will be bound to give notice of such facts to the authorities, and to stop the prosecution, and, if he fails to do so, he will be liable in damages.' (My emphasis)

[75] It is thus clear that if probable cause exits initially, but during the course of the criminal prosecution it becomes clear that there is no probable cause to continue such prosecution, then liability will follow when a party maintains the action thereafter.

[76] It is to be understood that the prosecution authority should not only have had the subjective and honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.³⁴

[77] In applying the aforementioned to the facts, the following circumstances were known to the second defendant and/or her employees, the question therefor arises whether given the facts the conduct of the second defendant and/or her employees conformed to that standard:

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

Three witnesses testified against the plaintiff. Mr Sinyabata and Mr Tubuleye were the key witnesses in respect of the plaintiff but was unable to identify the plaintiff when given the opportunity.

An issue was raised by the plaintiff that no identity parade was held during which the plaintiff was identified. The defendants argued that the Messrs. Habaini and Saini, in their witness statements stated that they knew Agrey Mwambwa well and an identity parade would serve no purpose. However, neither of these witnesses were called to testify and as indicated Messrs. Sinyabata and Tubuleye who did testify could not identify the plaintiff when given the opportunity to do so. The prosecuting authority

³⁴ *Van Noorden v Wiese* (1882) SC 43 54; *Maasdorp*. (1909). *The Institute of Cape Law Book III Part II Chapter X* (supra) at page 85,

therefor only had a name of a person which they relied on but same was never confirmed under oath that the person referred to in their statements is the plaintiff.

(b) Absence of inculpatory evidence against the plaintiff

Messrs. Sinyabata and Tubuleye repeated their witness statements during the criminal trial with reference to on Agrey Mwambwa, however as indicated above, when they were given the opportunity neither one of them could identify the plaintiff as the one referred to in their testimony.

During his judgment on the s.174 application the Honorable Hoff J made the following finding:

'There is also no evidence of any overt act whatsoever, no evidence of any hostile intention, no evidence of common purpose, no evidence that the accused had been aware of what was inside the travel bag. There was no evidence that the accused had any knowledge to treasonous activities and that he was because of such knowledge under a duty to report to the authorities. The application for discharged is granted in respect of all the charges." (my underlining)

[78] This finding is very significant. From judgment is clear there was **no** inculpatory evidence presented against the plaintiff during the criminal trial. This much should have been clear to the prosecuting authority at the time when the last witness who testified with regards to the plaintiff.

[79] Mr. Tubuleye, the final witness who testified in respect of the plaintiff completed his evidence on 18 October 2011. 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 the plaintiff to answer to.

[80] The second defendant pleaded in reply to the plaintiff's claim that the proceedings could not be separated or stopped against the plaintiff as it was impossible

and it was also pleaded that there was possibility that the State's case could be strengthened during the case for the defence and therefore as such stopping of prosecution would have been risky and prejudicial to the State's case.

[81] There is nothing before this court to show that this was indeed impossible to separate proceedings or stop proceedings against the plaintiff except for what was advanced in the plea.

[82] The issue of the possibility that the State's case could be strengthened during defence case is based on the fact that the plaintiff was arrested with Bennet Matuso, who was in possession of an AK 47 (and later convicted), and that same cannot be disregarded and that there was a possibility that Matuso could implicate the plaintiff. Second defendant argued that plaintiff must show that there was no reasonable possibility that Matuso was likely to implicate him.

[83] The plaintiff clearly stated in his evidence that he did not know Matuso at all when he transported him for a fare and only later learned the identity of this passenger. There was apparently nothing to the contrary before the court during the criminal trial then, nor is there anything to the contrary before me now. The second defendant therefor appears to be clutching at straws with this argument.

Malice in the context of continuation or maintenance of the prosecution

[84] 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?

[85] The prosecuting authority should have realized that there are no longer any witnesses to implicate the plaintiff in the commission of the offences and incorrectly relied on the possibility of co-accused persons to implicate the plaintiff.³⁵

[86] 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.

[87] There is nothing before this court motivating the further prosecution of the plaintiff in spite of the fact that no prima facie case was made out against him, as is clear from the ruling of the Honorable Court during the s174 proceedings.

[88] 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'.³⁶

[89] In *A v State of New South Wales*³⁷, 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.' (my underlining)

[90] 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.

³⁵ See paragraph 17(6) above.

³⁶ *Miazga v Kvello Estate* 2009 SCC 51 ([2009] 3 SCR 339).

³⁷ [2007] HCA 10.

[91] 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 08 March 2006, in the alternative 18 October 2011 for the crimes set out in the indictment, only against the second defendant and/or her employees.

[92] 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.

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

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

[95] I therefore make the following order:

- (a) The claim against the first defendant for malicious prosecution is dismissed.
- (b) The claim against the second defendant for instituting criminal proceedings against the plaintiff is dismissed.
- (c) The plaintiff's alternative claim based on malicious continuation of prosecution without reasonable and probable cause is upheld.
- (d) 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.

- (e) The matter is postponed to 17 May 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: R Totemeyer
instructed by Kangueehi & Kavendjii Inc., Windhoek

FOR THE DEFENDANT: Semenya (with him N Marcus)
instructed by Government Attorneys, Windhoek

