

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2016/02153

In the matter between:

PIETER GROENEWALD
ELMARIE GREEFF

1ST PLAINTIFF
2ND DEFENDANT

and

**THE MINISTER OF SAFETY AND
SECURITY**
**THE PROSECUTOR-GENERAL OF
NAMIBIA**

1ST DEFENDANT
2ND DEFENDANT

Neutral citation: *Groenewald v The Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2016/02153) [2021] NAHCMD 507 (29 October 2021)

Coram: OOSTHUIZEN J

Heard: 24 – 27 April 2018, 2 - 3 May 2018, 26 – 30 November 2018, 4 - 6
December 2018, 12 December 2018, 22 October 2019, 3 - 10, 17-19
March 2020, and 15 December 2020

Delivered: 29 October 2021

Flynote: Unlawful arrest and unlawful prosecution with *animus iniuriandi*.

Summary: The facts of the case appear from the judgment. Claims for Unlawful Arrest and Malicious Prosecution against the first defendant failed due to statutory prescription in terms of Section 39(1) of the Police Act of 1990.

Claim by first plaintiff for unlawful prosecution with *animo iniuriandi* against second defendant fails due thereto that reasonable and probable cause objectively existed in the criminal case docket and second defendant subjectively believed in the first plaintiff's guilt.

Claim by second plaintiff for unlawful prosecution with *animo iniuriandi* succeeds due thereto that no reasonable and probable cause for her prosecution could objectively be gleaned from the criminal case docket and in the absence of evidence by the prosecutor responsible for the decision to prosecute her, it was not possible to glean whether he subjectively believed in the guilt of the second plaintiff.

It was however possible to glean from the Deputy Prosecutor General's concessions after the State's case that he did not believe in the guilt of the second plaintiff on the evidence tendered during the criminal trial. In the case docket there was no stronger case made out against second plaintiff.

It was found that the prosecutor, duly authorised by the second defendant to make the decision to prosecute and who was involved in a directional role in the case since 23 April 2013, directed his will (intention) on 21 February 2014 to prosecute the second plaintiff in the awareness that reasonable grounds for the prosecution were possibly absent and his conduct possibly wrongful but reckless as to the consequences proceeded with her indictment and prosecution.

ORDER

Having heard **Mr. Strydom**, counsel for the plaintiffs and **Mr. Namandje**, counsel for the defendants:

1. First plaintiff's claim against defendants are dismissed with costs.
2. Second plaintiff's claim against the first defendant is dismissed.
3. Second plaintiff's claim against the second defendant succeeds with costs.
4. Second defendant shall pay the amount of N\$ 50 000.00 to second plaintiff as general damages, plus interest at 20% per annum a tempora morae from date of judgement to date of final payment.

JUDGMENT

OOSTHUIZEN J:

Introduction and relevant background from the pleadings

[1] First plaintiff is Pieter Hendrik Groenewald an adult male businessman resident at Carpe Diem Estate, Groblersdal, Republic of South Africa.

[2] Second plaintiff is Elmarie Greeff an adult female residing with first plaintiff in Groblersdal, Republic of South Africa.

[3] First defendant is the Minister of Safety and Security, the line minister responsible for the operation and administration of the Namibian Police care of the Government Attorney, Namibia.

[4] Second defendant is the Prosecutor-General of Namibia in terms of Article 88 of the Namibian Constitution care of the Government Attorney of Namibia.

[5] Members of the Namibian Police Force and officials of the Prosecutor-General at all times relevant acted within the course and scope of their employment

with the first and second defendant respectively, alternatively within the ambit of the risk created by such employment.

[6] Plaintiffs were arrested on 1 April 2013 without warrants of arrest by members of the Namibian Police on a public road, travelling from Divundu to Rundu and thereafter detained in Rundu.

[7] It is common cause that members from the San community accompanying the plaintiffs, were also arrested and thereafter detained at the Rundu Police Station for a few days before being released.

[8] The pleadings as well as the agreed facts not in dispute (as per the Pre-Trial agreement and order) make it clear that the members of the Namibian Police and the officials of the Prosecutor General of Namibia at all relevant times acted within the course and scope, alternative within the risk created by their employment, respectively.

[9] The pleadings of the plaintiffs endeavoured to conflate the actions and intent of the respective police members and official(s) of the Prosecutor-General. See paragraphs 7 to 9 of the Particulars of Claim together with paragraphs 5 and 6 of the Particulars of Claim.

[10] 'During March/April 2013 the first defendant and/or the second defendant wrongfully and maliciously set the law in motion by laying false charges of human trafficking against the first and second plaintiffs with the police within the Okavango region near or at Divundu and/or Rundu'.¹

[11] 'When laying these charges the first and/or second defendants had no reasonable and probable cause for doing so, nor did the first and second defendants have any reasonable belief in the truth of the information so given to them and/or those acting for and on their behalf.'²

¹ Particulars of claim, paragraph 5.

² Particulars of claim, paragraph 6.

[12] It is common cause between the parties that plaintiffs' first appearance in court was on alleged contraventions under the Employment Services Act which was withdrawn and substituted by alleged contraventions under POCA during a further appearance on 13 May 2013.

[13] '... both the Namibian Police Force and the Office of the Prosecutor-General acted without reasonable cause, all of which culminated in a failed prosecution...'³

[14] The plaintiffs individually claimed for monetary damages.

[15] Plaintiffs pleaded compliance with the provisions of section 39 of the Police Act, Act 19 of 1990⁴.

[16] Section 39(1) of the Police Act of 1990 provides that any civil proceedings against the State or any person in respect of anything done in pursuance of the Police Act shall be instituted within 12 months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given not less than one month before it is instituted. It also provides that the Minister may waive compliance of the above requirements.

[17] Defendants have denied the pleaded compliance with the provisions of Section 39 of the Police Act⁵, and plaintiffs did in fact not comply therewith⁶. It was never part of plaintiffs' pleadings that members of the Police falsified statements of the San men to bolster the prosecution of the plaintiffs. The court was not requested by the compromise of the parties (their pre-trial report) to pronounce on falsification of witness statements in the criminal case docket.

³ Particulars of claim, paragraph 15

⁴ Particulars of claim, paragraph 18

⁵ Defendants Plea, paragraph 11.

⁶ The notice given to first defendant was on 17 May 2016 and no evidence was tendered that first defendant has waived compliance. Counsel for the plaintiffs has argued the falsification of witness statements by Police Officials as part of malicious prosecution by the first defendant.

[18] Defendants denied the wrongful and malicious institution of human trafficking charges, the falseness of the charges and that they had no reasonable and probable cause to institute the charges. They pleaded that they had a reasonable belief or probable cause in instituting the proceedings and/or arresting and/or detaining the plaintiffs. They pleaded a reasonable belief that plaintiffs were trafficking persons from the San community to South Africa under false pretences and without valid authorisation.⁷

[19] Despite the ostensible conflating of plaintiffs and defendants in their pleadings of the accountability of the Minister of Safety and Security and the Prosecutor-General, and in *innitio*, the Court finds that due to the plaintiffs' non compliance with Section 39 of the Police Act, no liability lies against the first defendant for unlawful arrest or anything allegedly done by members of the Police in the investigation of the case. All of the alleged unlawful actions of the Police happened before the docket was reviewed by the PG's Adv Haindobo on 23 April 2013. See paragraph [58] and footnote 35 *infra*. Going forward in this judgment the focus will be on the *lis* between plaintiffs and second defendant, the Prosecutor-General.

The law relating to malicious prosecution by a prosecutor general and its officers and the continuation thereof

[20] In *Minister of Safety and Security and Others v Mahupelo*⁸, the Namibian Supreme Court has summarised, restated and clarified the Namibian law in respect of malicious prosecution with reference to English and South African cases and writings on the subject.

[21] In *Mahupelo* the Supreme Court accepted the requirements to be alleged and proved in a claim for malicious prosecution⁹ as set out in *Akuake v Jansen van Rensburg*.¹⁰

⁷ Defendant's plea, paragraph 3.

⁸ 2019 (2) NR 308 SC.

⁹ *Op cit*, paragraph [38].

¹⁰ 2009 (1) NR 403 (HC).

[22] The requirements are that the defendant must have instituted or instigated the proceedings; the defendant must have acted without reasonable and probable cause; the defendant must have been actuated by an improper motive or malice (or *animus iniuriandi*); the proceedings must have terminated in the plaintiff's favour; and plaintiff must have suffered damage (financial loss or personality infringement).¹¹

Malice or animus iniuriandi

[23] Apparently the *Akuake* requirement that the defendant must have been actuated by an improper motive or malice is now restated to be that the plaintiff must allege and prove that the defendant has acted (when instituting the criminal proceedings) with *animus iniuriandi* (an intention to injure the plaintiff).¹²

[24] The Namibian Supreme Court in *Mahupelo* referred to and accepted a line of Supreme Court cases in South Africa where it was decided that plaintiff must allege and prove that defendant intended to injure either with direct or indirect intention; *animus iniuriandi* (and not malice) must be proved; the defendant must at least have foreseen the possibility that he or she was acting wrongfully but nevertheless continued to act (instituting proceedings), reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence or even gross negligence on the part of the defendant will not suffice.¹³

Reasonable and probable cause

[25] The concept of reasonable and probable cause involves both an objective and subjective element. Objectively the defendant must have sufficient facts from which a reasonable person could have concluded that plaintiff had committed the offence. Subjectively the defendant must have held an honest belief in the guilt of the accused (plaintiff).¹⁴

¹¹ *Mahupelo*, op cit, paragraph [38].

¹² *Mahupelo*, op cit, paragraph [43]. See and credit also the judgement of Wessels JA in *Moaki vs Reckitt and Colman (Africa) Ltd* 1968 (3) SA 98 (AD) at 103 to 106.

¹³ *Mahupelo*, op cit, paragraphs [41] and [42].

¹⁴ *Mahupelo*, op cit, paragraph [67].

[26] In a claim for malicious prosecution and the continuation of malicious prosecution, there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration for the adequacy of the evidence available to him or her. A defendant will not be liable if there exist, objectively speaking, reasonable grounds for the prosecution and the prosecutor subjectively believed in the plaintiff's guilt.¹⁵

[27] Shivute CJ in Mahupelo noted that his approach was also followed by the South African Supreme Court of Appeal in *Relyant Trading (Pty) Ltd v Shongwe*.¹⁶

[28] When 'applying the objective and subjective test, sight should not be lost of the distinction drawn between the facts required to establish the actual guilt of the plaintiff and those required to establish a reasonable *bona fide* belief in the guilt of the plaintiff, as many facts admissible to prove the latter would be wholly inadmissible to prove the former'.¹⁷

[29] In other words, a prosecutor must have a reasonable *bona fide* belief in the guilt of the person prosecuted or to be prosecuted. This belief by the prosecutor is not equated to actual guilt as the latter is in the domain of the criminal court.

The Pre-trial report and order of 6 June 2017 and 12 June 2017 respectively, as narrowed down by the requested particulars for trial and answers filed on 15 November 2017 and 28 February 2018 respectively and the finding by this court in paragraph [19] supra

[30] Plaintiffs were charged with charges based on human trafficking for the first time on 13 May 2013, 6 weeks after plaintiff's arrest.

¹⁵ Mahupelo, op cit, paragraph [67].

¹⁶ Mahupelo, op cit, paragraph [67], last sentence referring to *Relyant Trading* [2007], All SA 375 (SCA), paragraph 14.

¹⁷ Mahupelo, op cit, paragraph [69].

[31] First plaintiff was granted bail on 15 April 2013 and second plaintiff on 5 April 2013.

[32] Plaintiffs were refused to leave Namibia until 20 May 2013 when their bail conditions were amended to that effect.

[33] Defendants admitted the authenticity of the complete police docket under case number CR 11/04/2013 and all statements contained therein as well as the transcribed record of proceedings under Rundu Regional Court proceedings case number CR 05/2013.

[34] The fact that the prosecution against first plaintiff failed on 1 July 2015 is not in dispute. On that date the Regional Court in Rundu discharged the first plaintiff after an application in terms of section 174 of the Criminal Procedure Act on 30 June 2015.

[35] The prosecution of second plaintiff was not halted until 30 June 2015. On that date and after the application in terms of section 174 of the Criminal Procedure Act and only at the end of Advocate Haindobo's answering submissions he conceded that "since there is no any evidence pointing out that she has also played a role except the role of giving food according to some of witness testimony, your Worship the State is of the view that there is no sufficient evidence for her to be put on her Defence and the State asked that only Accused person number one be put on his Defence and Accused person number two be discharged in terms of section 174 of Act 51 of 1977".¹⁸

[36] Thereafter and before the replying argument the Regional Court Found Accused 2 (2nd plaintiff) not guilty and discharged her.¹⁹

¹⁸ Transcript of Regional Court proceedings page 477.

¹⁹ Op cit, page 479.

[37] It was therefore completely wrong to have stated to the second plaintiff under cross examination that "it is not you that brought an application to be discharged, it was Mr Haindobo's own initiation, concession is that correct?"²⁰

[38] The remaining live issues to be determined subject to the law on malicious prosecution:

38.1. Whether the second defendant wrongfully and with the intention to injure the plaintiffs, prosecuted them on charges of human trafficking in that:

38.1.1. the case docket objectively viewed did or did not reveal reasonable and probable cause in respect of charges for human trafficking under section 1 and section 15 of the Prevention of Organised Crime Act, Act 29 of 2004 and whether

38.1.2. the second defendant subjectively did or did not believe in the guilt of the plaintiffs based on the case docket and information available to him/her.

38.2. Whether, if it is found that the second defendant did wrongfully and with the intention to injure the plaintiffs, prosecuted them on charges of human trafficking, they suffered damages as alleged.

38.3. Whether the plaintiffs alleged and proved *animus injuriandi* on the part of the second defendant.

Analysis of the pleadings and evidence

[39] Plaintiffs were clear in paragraph 5 of their particulars of claim that second defendant wrongfully and maliciously set the law in motion by laying false charges of human trafficking against them.

²⁰ Court transcript, 4 March 2020, page 72.

[40] Taking into account my findings in paragraphs [17] and [19] herein, paragraph 6 of the particulars of claim in a redacted form alleges that the second defendant (Prosecutor General) had no reasonable and probable cause for prosecuting the plaintiffs for human trafficking, nor did the second defendant had any reasonable belief in the truth of the information contained in the criminal case docket.

[41] Taking into account the subsequent clear requirements by the Supreme Court in Mahupelo the above is enough to constitute allegations of *animus iniuriandi* and the absence of reasonable and probable cause on the part of the Prosecutor General (second defendant).

[42] The plaintiffs had the onus to prove their allegations.

Did plaintiffs prove the absence of reasonable and probable cause and the intention to injure?

[43] During evidence in chief the second plaintiff testified that she is not involved in the 1st plaintiff's company WIPS or any of his business ventures and came to Namibia at the end of March 2013 for a visit and sole purpose of accompanying her husband (1st plaintiff).²¹

[44] She testified that on 13 May 2013 the charges against her was changed by substituting it with human trafficking charges and Advocate Haindobo who was apparently in charge called for the detention of her and first plaintiff until the increased bail were paid.²²

[45] Second plaintiff further testified that when she and first plaintiff appeared on 19 September 2013 the matter was further postponed to 21 February 2014 for the Prosecutor General's decision. She testified that on 21 February 2014 when they appeared again at Rundu, the Prosecutor General's decision was not available and the Court stood down for Advocate Haindobo to make the decision. The decision was made and she and first plaintiff were to be arraigned in the Regional Court on

²¹ Page 11, transcribed record, 4 March 2020.

²² Page 34 and 35, transcribed record, 4 March 2020.

charges of human trafficking and for charges under the Immigration Control Act, Act 7 of 1993. The matter was transferred to the Regional Court, Rundu and their first appearance was set for Monday 17 March 2014.²³

[46] During cross examination of the second plaintiff it was put to her in various formulations that she did not reveal in her warning statement (A 18) that she was only a housewife with no involvement in the business of the first plaintiff and that her exculpatory version was only told to court. It was put to her that she was given the opportunity to place her exculpatory version that she was only a housewife and was not involved in her warning statement so that the prosecution could see it. Further put to her that her warning statement ended up in the docket and went to the Prosecutor General. The clear implication was that the Prosecutor General when taking the decision was not aware of her exculpatory version. Second defendant testified that if she was asked she would have said that²⁴. The facts emanating from her POL 17, (A18), warning statement, however are that it was recorded that she was a housewife²⁵ and "I don't have any interest in Mr Groenewald business or any involvement".²⁶

[47] Reverting to page 72 of the transcription of second plaintiff's cross examination it was put to Mrs Greeff that Mr Haindobo's concession was made after the state witnesses testified and that he was representing the Prosecutor General and that it is not the action of somebody who is acting maliciously. The second plaintiff responded by saying that Mr Haindobo withdrew the case only a few years after pushing for her arraignment on human trafficking.²⁷

[48] It was put to second plaintiff that her arraignment on human trafficking was due thereto that she did not reveal her non-involvement; that Mr Haindobo did not know it and only at the criminal trial her legal practitioner laid out her defence.

²³ Page 36, transcribed record, 4 March 2020.

²⁴ Page 66 to 71, transcribed record of 4 March 2020.

²⁵ Page 547, Police Docket.

²⁶ Page 550, Police Docket.

²⁷ Page 72, transcribed record, 4 March 2020, lines 23 to 25.

Further that the witnesses did not implicate her and after realising (her defence) Mr Haindobo immediately told the court to let her go.²⁸

[49] Her response was (correctly so) that Mr Haindobo was having all the witness statements and he would have seen that she had no involvement.²⁹ It is clear from the case docket that when Mr. Haindobo decided to charge her for human trafficking (May 2013) and to arraign her on charges of human trafficking (21 February 2014) in the Regional Court Rundu, he had no 'stronger' case on the docket.

[50] This was followed up by Mr Namandje making a statement to second plaintiff that "all those statements under oath by the Khoi people, indicate one thing. Indicate that two South Africans, a man and a woman, driving a car came to Namibia and used the economic status, social economic status of those people to take them to South Africa, I am putting it to you". That prompted Mr Strydom to object that it is not contained in one single statement and Mr Namandje to say he was saying on his "assessment of the statement".³⁰

[51] Defence counsel put to second plaintiff that none of the Police and the Prosecutor General had any interior (should have been typed as "ulterior") intention or malicious intention other than to put her before Court to stand charges; that they may have committed mistakes in terms of assessment but all with good intention. Second plaintiff answered that she did not think it was good intention, that she never experienced the whole thing as a good experience.³¹

[52] The altercation continued as follows:

"So I never, I do not think and the way the Police treat you, they treat you as a criminal.

Okay but (intervention) - - - That was never good intentions.

And the Prosecutors? - - - Also.

Because they did what? - - - Because he treated me as a criminal Mr Haindobo.

²⁸ Page 72 and 73, transcribed record, 4 March 2020, lines 26 to line 10 on page 73.

²⁹ Page 73, transcribed record, 4 March 2020, lines 11 to 13.

³⁰ Page 73, transcribed record, 4 March 2020, lines 16 to 28.

³¹ Page 104, transcribed record, 5 March 2020, lines 16 to 25.

By doing what? - - - By letting me stand trial for all these charges.

Everybody does that when you are accused. - - - And why did they not withdraw all the charges in the beginning, why did they still prosecute me for human trafficking?

Okay, but do you know anything about human trafficking, do you know the basic (intervention) - - -

No I just know that it is a very huge thing and the most awful criminals get (inaudible).

Let me just ask you, do you know that it is involved trafficking involved recruiting and transporting people? - - - I do not know the law Sir, I am not a lawyer."³²

[53] None of the witness statements in the case docket up to 13 May 2013 gave any active role to the second plaintiff other than accompanying the first plaintiff and being his wife. The same concerning her warning statement (A18).

[54] The same apply in respect of the first group of San people which was actually taken to South Africa and employed by the Close Corporation of which first plaintiff is the sole member to wit Wildlife Investigation and Protection Services CC (WIPS). Witness statements A32 to A38 in the Police docket were one taken in July 2013 and the others during September 2013 from the first group of San people who went to South Africa. Only four of the witnesses talk of second plaintiff, as the wife of first plaintiff. No role was allocated to her in respect of the business of first plaintiff or his negotiations with the headmen, chiefs and the San people recruited. She was always in first plaintiff's vehicle.

[55] I refer to paragraphs [33], [35] to [37] and [46] to [54] herein. No objective reading of the case docket as it was on 21 February 2014 disclosed second plaintiff's involvement in the offences of human trafficking which was preferred against her on 21 February 2014.

[56] Advocate Haindobo did not testify. The court was not placed in a first hand position to glean Advocate Haindobo's belief in the guilt of the second plaintiff. The cross examination of the second plaintiff by the defence squarely put the intention to injure and the subjective belief of Advocate Haindobo in the guilt of the second

³² Page 104, line 25 to page 105, line 13, transcribed record, 5 March 2020.

plaintiff when making the Prosecutor General decision to prosecute her on 21 February 2014, in issue.

[57] The glancing attempt of Advocate Nyoni for the defence to attribute concert with first plaintiff to the second plaintiff³³ was objectively not to be gleaned from the case docket of which Advocate Nyoni have mentioned only A32 to A38 as witness statements which revealed enough elements of human trafficking to warrant prosecution³⁴. Plaintiffs were not charged of acting in concert or with common purpose.

[58] Adv Haindobo was Deputy Prosecutor General for Rundu involved in the case from before 13 May 2013 (as apparent from the Investigation Diary from 23 April 2013) up to the very end on 1 July 2015. Adv Haindobo had the authority to make the decision to prosecute in cases of human trafficking. He made the decision to prosecute.³⁵

[59] Second plaintiff's allegation that second defendant wrongfully and maliciously set the law in motion by laying false charges of human trafficking against her and her cross examination (see paragraphs [47], [51] and [52]), called for a rebuttal by Adv Haindobo.

[60] The failure to call Adv Haindobo strengthened and proved the case of second plaintiff on two levels: first, the requirement as part of reasonable and probable cause that a finding should be made whether the prosecutor subjectively believed in the guilt of the second plaintiff, cannot be made, and secondly, the absence of rebuttal concerning the wrongful intention to injure the second plaintiff's personal rights to dignity, proved the required *animus iniuriandi*.

³³ Page 413, transcribed record, 18 March 2020 and the filed witness statement she read into the record, paragraphs 6 thereof. The written filed witness statement stated that the two plaintiffs were acting in concert at all times.

³⁴ Page 414 and 415, transcribed record, 18 March 2020.

³⁵ Page 441, line 31 over on Page 442 line 1, transcribed record, 18 March 2020, also page 405 lines 7 to 9; and page 454 lines 10 to 32. Refer also to the Investigation Diary, C2 to C5, pp 492 to 495 wherein it is requested that a copy of POCA be filed in the docket.

[61] Given the Constitutional responsibility of the Prosecutor-General in Article 88 of the Namibian Constitution together with Article 8 thereof, the decision making and actions of Adv Haindobo was outstandingly bad in respect of the second plaintiff on 21 February 2014. He must have foreseen the possibility that he was acting wrongfully in instituting the proceedings against the second defendant, but continued reckless as to the consequences.

[62] It is clear that already from June 2017 when the pre-trial report was submitted as the compromise between plaintiffs and defendants and the subsequent pre-trial order was made, that the defence did not intend to call Advocate Haindobo, but instead Advocate Nyoni, who did not make the decision to prosecute and could not assist the court concerning Adv Haindobo's subjective mindset.

[63] Advocate Nyoni testified that if Advocate Haindobo was still part of the Office of the Prosecutor General he would have testified, but he left the Office maybe 4 years ago and she did not know whether he is still in Namibia.³⁶ Apart from what Advocate Nyoni informed the court concerning the reason why Advocate Haindobo was not called as a witness, the defence has never provided a reason for not calling Advocate Haindobo. See also paragraph [72] hereafter.

[64] First plaintiff's case was on a different level than the second plaintiff's case.

[65] It is common cause that first plaintiff, Groenewald, is the sole member of WIPS, that he came to Namibia on two occasions to recruit San people to go and work for WIPS in South Africa due to their skills as natural trackers. He recruited the first group of ten people and transported them to South Africa during February 2013 where they were employed by WIPS. They worked and were paid. He at all material times acted with the knowledge and consent of their headmen and chiefs. The second group of twelve San people never reached South Africa because plaintiffs and the twelve men were arrested between Divundu and Rundu and taken to Rundu.

[66] First plaintiff's main concerns are the way and manner of their arrest; the treatment they received from the members of the police; the manner of the criminal

³⁶ Page 557 lines 14 to 24, transcribed record, 19 March 2020.

investigations; the changing of charges; the fact that they were arrested for alleged offences under an Employment Act that was inoperative; the increase of their bail during May 2013; the manner in which witness statements were taken down which ended up in the criminal docket; the changing of the charges by Advocate Haindobo to charges on human trafficking on 13 May 2013 (in view thereof that Groenewald believed the consent and knowledge of the tribal leaders were sought and obtained).

[67] During cross examination of Groenewald it was clarified with him that he alleges that the prosecutor and members of the police maliciously instigated "and the Prosecutor General instituted or decided maliciously to prosecute him" without reasonable and probable cause.³⁷

[68] Concerning the first group of San it was put to Groenewald that there was evidence in the docket that he exploited them, which Groenewald denied.³⁸

[69] The common cause fact that Groenewald was acquitted on 1 July 2015 on all charges of human trafficking preferred against him seems to be an important consideration for first plaintiff in bringing his action for malicious prosecution, coupled with the way and manner he was treated by members of the Namibian Police.³⁹

[70] Advocate Nyoni testified that she also is a Deputy Prosecutor General stationed in Windhoek heading the Sexual Offence, Domestic Violence and Maintenance Unit and that offences for human trafficking also fall under her supervision as part of her department. She has successfully prosecuted two cases in trafficking persons in the High Court and was trained by the United Nations Office in drugs and crime. She also train stake holders around the country on human trafficking. She did not make the decision to prosecute the Groenewald matter and did not prosecute.⁴⁰

³⁷ Page 137, transcribed record, 24 April 2018, lines 10 to 23.

³⁸ Pages 140 and 141, transcribed record, 24 April 2018.

³⁹ P143, lines 10 to 31, transcribed record, 24 April 2018; pages 278 to 280, transcribed record, 10 March 2020.

⁴⁰ Pages 403 and 404, transcribed record, 18 March 2020.

[71] When the Groenewald docket was perused by her before the decision to prosecute and after 19 September 2013, she was able to see elements of human trafficking, the recruitment, transfer, means, deceit, abuse of position of vulnerability and purpose to exploit in terms of the statements from the first group of people.⁴¹

[72] Under cross examination of Advocate Nyoni she made it very clear that Advocate Haindobo was the Deputy Prosecutor of Rundu and had the authority to make the decision to prosecute in cases of human trafficking. Due to the nature and novelty of human trafficking cases in Namibia the dockets thereon would come to Head Office in Windhoek for guidance as did the Groenewald docket. Mr Haindobo however made the decision.⁴²

[73] Advocate Nyoni remained adamant throughout that she was not the ultimate decision maker to prosecute; that she saw all the elements for human trafficking in the seven statements in the docket from the first group contrary to the statements of the second group where the purpose of exploitation was lacking; that she would have prosecuted in respect of the first group on human trafficking and in respect of the second group only under the Immigration Control Act.⁴³

[74] Obviously the court had regard to the case docket itself and find that there was reasonable and probable cause, objectively, to arraign and prosecute the first plaintiff in respect of at least the seven charges of human trafficking for the first group. Subjectively speaking, whether Advocate Haindobo believed in the guilt of Groenewald, is problematic in the sense that Advocate Haindobo did not testify. In my considered view however the evidence of Advocate Nyoni concerning her belief and attitude in respect of Counts 1 to 7 go a long way to resolve the subjective issue if account is taken thereof that in those seven instances she would have prosecuted on human trafficking for the reasons that she believed that there was strong case against the first plaintiff based on the statements.

⁴¹ Pages 405 to 408, 411 to 417, 441 and 459, transcribed record, 18 March 2020.

⁴² Page 454, transcribed record, 18 March 2020, lines 13 to 32.

⁴³ Pages 461, 463, 464, 467 lines 23, page 477 lines 8 to page 478 line 12 and page 502 lines 11 to 19.

[75] Due to the factual decision this court have already made concerning the first defendant and members of the police in paragraphs [17] and [19], the actions of the members of the police are irrelevant to this case due to section 39 of the Police Act. Their actions throw no light on the actions of Advocate Haindobo in deciding to change charges and to arraign first plaintiff on human trafficking. I repeat that the allegation of falsification of witness statements by members of first defendant was never properly in issue before this court. Vide paragraph [17] and footnote 6.

[76] In determining then the question of whether Advocate Haindobo had the intent to injure the person of first plaintiff, directly or indirectly and due to first plaintiff's almost exclusive focus on the actions of members of the police, the court is unable to find that Advocate Haindobo at least should have foreseen the possibility that he was acting wrongfully, but nevertheless continued to institute proceedings reckless as to the consequences of his conduct (*dolus eventualis*). On the evidence of first plaintiff and Adv Nyoni the need for rebuttal did not arise. I also concur with counsel for the defendants that there is a clear distinction to be drawn between the investigative phase (which was prior to 21 February 2014) and the actual decision to prosecute which was on 21 February 2014.

[77] First plaintiff was lawfully prosecuted for at least the seven counts of human trafficking concerning the first group of San taken to South Africa during February 2013.

[78] The complaint by first plaintiff that Advocate Haindobo at least should have stopped prosecuting him when in consultations with the San witnesses it appeared that they will renege on their docket statements, may sound good to him but is actually not an issue. The day before the criminal trial started and during the running of the criminal trial when it became apparent they will renege (during consultation on a statement by statement basis, ongoing), Advocate Haindobo could not be faulted for deciding to allow the court to decide. Therefore no *aminus inuiriandi* in respect of first plaintiff could or can flow from Adv Haindobo's decision to continue calling witnesses for the Regional Court's decision. The situation may have been different if he requested a postponement at that stage and the matter stood over for months or a year. But that was not the case.

Damages in respect of second plaintiff

[79] In my view the focus by the plaintiffs on the alleged unlawful arrests, temporary detention and treatment received from members of the Namibian Police Force and their election to conflate it with malicious prosecution, adversely impacted on second plaintiff's quantum under general damages against the second defendant, the Prosecutor-General, in general.

[80] In a claim for damages under malicious prosecution, satisfaction is claimed for infringement of personality rights which are the *fama* (or good name) and dignity of the second plaintiff in *casu*.⁴⁴

[81] Second plaintiff testified that she came from a wealthy family where she is loved; that she is a housewife and mother; she was never confronted with contravening the law; she was exposed to the world as one of the biggest criminals; she was exposed to the media as a human trafficker and as a criminal; she felt she was thrown to the wolves; she was hospitalised in a psychological hospital for approximately two weeks; she felt humiliated; she got panic attacks; her relationship with first plaintiff and her family was impacted and she is suffering from these effects still at the time she testified on 4 March 2020.⁴⁵

[82] Under cross examination she confirmed that she claims for reputational damages but she was at a loss to explain why the media publications she referred to were not discovered as she has provided it to her legal practitioners. She specifically mentioned the Informanté, New Era and the Republikein wherein she was referred to as a criminal but changed that to as an accused person.⁴⁶

⁴⁴ See Neethling's Law of Personality, Second Edition 2005, Reprinted 2007, page 182 under "Damage" and the authority in footnotes 554 and 556 over on page 183.

⁴⁵ Pp. 45 and 45, transcribed record, 4 March 2020.

⁴⁶ Pp. 116 to 118, transcribed record, 5 march 2020.

[83] Second plaintiff under cross examination qualified that it was a police officer who referred to her as a criminal and that it was only in the presence of the first plaintiff, herself, the police officer and a labour official.

[84] Mr. Evan Lianda de Klerk, a psychologist, testified in respect of the second plaintiff. He however focussed on the treatment the second plaintiff received from the Namibian Police and in the premises of my findings in paragraphs [17] and [19] his opinion was not of appreciable value or assistance.

[85] Second plaintiff testified that she only paid for her medical costs. First plaintiff paid all other expenses like legal, accommodation, travel. The arrangement was that she would repay half of the expenses when she could afford it. This arrangement was confirmed during her cross examination. Her medical and psychological treatment costs originate from the actions of Police Officers. In consequence of my finding in paragraphs [17] and [19], those alleged losses are irrelevant to second plaintiff's claim.

[86] It is common cause that the seven counts of human trafficking and twelve counts of attempted human trafficking levelled against the second plaintiff were very serious alleged criminal offences carrying onerous possible penalties.

[87] Dignity infringement and the lesser injury to *fama* or good name (if at all) are what remains for consideration of general damages concerning second plaintiff.

[88] The quantum of general damages (satisfaction) is in the discretion of the Court and is to be calculated *ex aequo et bono*. Factors playing a role in establishing the satisfaction or *solatium* is the seriousness of the crimes levelled against the second plaintiff, the period of time she was subjected to prosecution, her standing in the community, whether she had an unblemished criminal record, her age, her health and comparable *solatia* in the past by the Courts. Her constitutional right to dignity and right not to be subjected to arbitrary degrading treatment should also play a role. Another factor to be taken into account of is the satisfaction of being discharged and found not guilty of the charges on which she went to trial; her absolvment by a Court of law.

[89] I shall treat the impairment to her dignity she felt and the alleged impairment of her good name separately in awarding damages (satisfaction).

[90] It was not contested that second plaintiff came from a wealthy family where she was loved; that she had an unblemished criminal record; that she was a housewife and mother; that she was alleged to be a human trafficker; that she felt she was thrown to wolves; that she felt humiliated; that she suffered from panic attacks; that her personal relationship with first plaintiff and her family was impacted upon and that it endured to the time she was testifying. She however did not tell the Court to what extent her relationships were impacted. The Court was not availed with the newspaper reports. The Court was also not availed the comparable awards in case law akin to what is sought in *solatium*, neither could the Court find any relevant to the circumstances before it. No argument was advanced that each count she stood trial for should carry a distinct amount in general damages. Due to the conflated case for malicious prosecution it appears from the pleadings and the evidence that focus was more on the alleged misbehaviour of members of the Police Force (which is ignored in the quantification) than on the misbehaviour of Adv Haindobo in prosecuting the second plaintiff.

[91] In the absence of the an explanation of Adv Haindobo's egregious conduct to prosecute the second plaintiff and mindful thereof that he acted under the authority of the Prosecutor-General (second defendant) and the risk created thereby; the period of 16 months which second plaintiff was subjected to awaiting trial on very serious offences with onerous prescribed penalties (1 million and/or 50 years imprisonment) and the contents of paragraphs [85] and [87], general damages of only N\$ 50 000.00 is awarded to second plaintiff for satisfaction of infringement on her dignitas as a result of humiliation and degradation. Whatever defamation the second plaintiff endured was compensated by her acquittal on all charges of human trafficking..

[92] Costs in the failed prosecution of the first plaintiff's case for malicious prosecution is awarded to the second defendant.

[93] Second plaintiff is awarded costs against the second defendant.

[94] No costs is awarded in favour of first defendant which was neither at risk after denying proper statutory notice and in any event represented by the Government Attorney who represented the second defendant.

[95] The cost order in favour of the second plaintiff shall include the costs of one instructing and one instructed counsel.

[96] The cost order in favour of the second defendant shall include the costs of one instructing and one instructed counsel.

[97] In the premises the following orders are made:

97.1. First plaintiff's claim against defendants are dismissed with costs.

97.2. Second plaintiff's claim against the first defendant is dismissed.

97.3. Second plaintiff's claim against the second defendant succeeds with costs.

97.4. Second defendant shall pay the amount of N\$ 50 000.00 to second plaintiff as general damages, plus interest at 20% per annum a tempora morae from date of judgement to date of final payment.

GH Oosthuizen
Judge

APPEARANCES

For the 1st and 2nd plaintiff(s):

Mr Strydom

Instructed by Mr Strauss of

Theunissen, Louw & Partners, Windhoek

For the 1st and 2nd defendant(s):

Mr Namandje

Instructed by Ms Harker of

Government Attorneys, Windhoek