



REPORTABLE

CASE NO: SA 35/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF SAFETY AND SECURITY

First appellant

PROSECUTOR-GENERAL

Second appellant

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Third appellant

and

ROSCO MATENGU MAKAPA

Respondent

Coram: SHIVUTE CJ, CHOMBA AJA and MOKGORO AJA

Heard: 5 November 2018

Delivered: 5 February 2020

Summary: The respondent, Mr Rosco Matengu Makapa, together with 125 co-accused persons were arrested and charged with several offences including high treason, murder, attempted murder, sedition and malicious damage to property for their alleged role in the event that took place in Katima Mulilo on 2 August 1999, where several State installations were attacked by a group of people. The purpose of

the attack was the apparent secession of the then-Caprivi (now Zambezi) region from the rest of Namibia. At the close of the State's case in the criminal proceedings, Mr Makapa was discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977.

Mr Makapa, following his discharge, instituted an action against the appellants (defendants in the High Court) for damages suffered as a result of alleged unlawful arrest and subsequent malicious prosecution respectively. Mr Makapa claimed N\$30 436 850,68 in damages from the appellants. The main claim was amended to introduce an alternative claim for the wrongful and malicious continuation of the prosecution. After hearing arguments on behalf of the parties, the High Court dismissed the main claim of malicious prosecution, but upheld the alternative claim arising from an alleged 'malicious continuation of the prosecution without reasonable and probable cause.' The court did not decide the constitutional claim for the reason that the claim based on maliciously continuing with the prosecution had succeeded.

Disgruntled by this decision, the appellants noted an appeal to the Supreme Court against that decision of the High Court. The appellants argued first that there was no need to develop the common law and secondly, that the High Court erred in finding that the prosecutorial team lacked reasonable and probable cause to continue with the prosecution of the respondent. The appellants further argued that the High Court was wrong to infer malice from the actions of the PG and Mr July, the lead prosecutor in the criminal case.

The Supreme Court agreed with the appellants' arguments and found that at all times during the prosecution, there was reasonable and probable cause to continue the proceedings against Mr Makapa. The Supreme Court also found that there was no need for the High Court to have developed the common law. This court further found that the High Court adopted the wrong standard in assessing the evidence to determine whether or not the appellants had a reasonable and probable cause to maintain the prosecution up to the discharge stage. The standard of evidence

required to establish reasonable and probable cause in a civil claim for malicious prosecution is not the same standard of evidence required to establish guilt in a criminal case. The Supreme Court evaluated the information available to the prosecutorial team at the time and concluded that they had reasonable and probable cause to maintain the prosecution and showed no evidence of malice. As to the alternative claim for constitutional damages, the Supreme Court declined to decide this issue as a court of first and final instance. It referred it back to the High Court for determination.

APPEAL JUDGMENT

SHIVUTE CJ (CHOMBA AJA and MOKGORO AJA concurring):

[1] This appeal emanates from the judgment and order of the High Court granting a claim for malicious continuation of a prosecution in favour of the respondent against the second appellant, the Prosecutor-General, and the third appellant, the Government of the Republic of Namibia (the Government). The basis for the successful claim against the Prosecutor-General (the PG) was that the PG or her prosecutorial team maintained the prosecution of the respondent maliciously and without reasonable and probable cause from September 2008 onwards. The claim against the Government was that it was vicariously liable for the conduct of the public prosecutors who represented the State in criminal proceedings initiated against the respondent originally in a Magistrate's Court and later in the High Court. The first respondent, the Minister of Safety and Security (the Minister), was sued on the basis that as the Minister responsible for the Namibian Police, he was vicariously liable for

the police's alleged malicious initiation of the prosecution of the respondent. The claim against the Minister was dismissed.

[2] The appeal raises three questions. First, whether the High Court was correct in holding that the common law needed development to include the delict based on malicious continuation of a prosecution. Second, whether the PG or her prosecutorial team acted without reasonable and probable cause and with malice in maintaining the prosecution of the respondent from September 2008 onwards. And lastly, whether or not a person who has been acquitted in a criminal trial long after the charge was first laid against him or her can, in appropriate circumstances, claim and be awarded constitutional damages for the alleged inordinate delay caused in the finalisation of his or her criminal trial.

The factual context

[3] The issues arise for determination against the following factual background: On 2 August 1999, a group of people who either belonged to or were sympathetic to an outfit called the Caprivi Liberation Army attacked several State installations at or around Katima Mulilo with the aim of furthering the secession of the then Caprivi (now Zambezi) Region from the Republic of Namibia. As a result of this violent attack, several people were killed, others injured and property damaged. In the wake of the attack, operations were launched by law enforcement agencies resulting in several people being arrested, detained and prosecuted. The respondent was among the persons so arrested, detained and prosecuted.

[4] The respondent and 125 co-accused persons were subsequently charged with a number of crimes and offences, of which the most serious are high treason, murder, attempted murder, sedition, robbery with aggravating circumstances, public violence, unlawful possession of firearms and ammunition, theft, and malicious damage to property. The respondent and his co-accused were charged on the basis of common purpose and conspiracy.

[5] The State led evidence in support of the respondent's prosecution, but at the close of the State case, the respondent was found not guilty and discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the Act). The respondent subsequently instituted an action for wrongful and malicious prosecution against the three appellants jointly and severally, claiming an amount of N\$30 436 850,68.

Summary of the pleadings

[6] The respondent filed amended particulars of claim containing three claims, the second and third being alternative to the first. The principal claim was for malicious prosecution and was directed against the Minister and the PG. The first alternative claim was for the alleged malicious continuation of his prosecution and was directed against the PG. The other was a claim based on constitutional damages in the event that the claim for malicious prosecution failed. As I understand it, this claim was directed against all the three appellants.

[7] It was alleged in the amended particulars of claim that the basis for the respondent's claim was that the appellants acted without reasonable and probable cause and with malice when they initiated the prosecution, being fully aware that they did not have sufficient evidence to convict the respondent. It was further alleged that the appellants, in particular the prosecutorial team, were malicious in persisting with the criminal trial whilst being aware that the witnesses who testified against the respondent failed to implicate him in the commission of the crimes and offences. The respondent, in support of the claim for constitutional damages, pleaded that the PG failed to comply with her constitutional mandate to conduct the criminal trial within a reasonable time.

[8] The appellants (defendants *a quo*) filed a plea in which they disputed the claims. The principal ground advanced by the appellants was that although they had set the law in motion, instituted, and maintained criminal proceedings against the respondent, the decision to initiate and maintain the prosecution against the respondent was based on reasonable grounds and was not actuated by malice. The appellants further pleaded that the respondent was also not entitled to constitutional damages as the remedy he sought was inappropriate. Appellants contended that the Namibian Constitution had its own remedy in that where a trial did not take place within a reasonable time, the accused person may apply for his or her release.

Pre-trial proceedings

[9] A pre-trial conference was held to consider the parties' joint proposed pre-trial order, and the managing judge issued a pre-trial conference order thereafter. The parties in the joint proposed pre-trial order agreed that the issue of the liability of the appellants should be determined first and that the quantum of damages should await the outcome of that determination. It was against this background that the matter proceeded to trial only on the merits.

The main submissions in the High Court

[10] The respondent contended that the basis for the claim against the Minister was that the arresting police officers wrongfully and maliciously set the law in motion, by providing false information to the PG that he was part of the group campaigning for the secession of the region from the rest of the country. The respondent thus claimed that by making the alleged false statement concerning his alleged role in the secession plot, the arresting police officers caused his unlawful arrest, detention and resultant malicious prosecution.

[11] As to the claim against the PG, the respondent contended that the PG or her prosecutorial team maliciously set the law in motion without reasonable or probable cause with the result that he was indicted, tried and acquitted. The respondent submitted that the prosecutorial team had no justification to instigate his prosecution as they did not have sufficient information substantiating the charges proffered against him or justifying his prosecution on such charges. He further argued that although the PG or her prosecutorial team did not have a reasonable belief in the

truthfulness of the information received, they nevertheless persisted with the prosecution to the end. That being the case, he claimed that his arrest, detention and resultant prosecution were instituted maliciously and without reasonable and probable cause.

[12] As to the first alternative claim, the respondent pleaded that in the event that the principal claim failed, the common law should be developed to include a claim for damages for maintaining the prosecution maliciously and without reasonable and probable cause. The respondent argued that a defendant in a civil case ought to be held liable for damages in instances where prosecutors lacked reasonable and probable cause for the prosecution, but they nevertheless maintained the prosecution to the end.

[13] The allegation underpinning the claim for the alleged malicious continuation of the prosecution was that the appellants, particularly the prosecutorial team, were malicious in persisting with the criminal trial whilst being aware that the witnesses who testified against the respondent failed to implicate him in the commission of the offences he had been charged with.

[14] The respondent submitted that even if the initiation of the prosecution was with reasonable and probable cause, the prosecutorial team had no objective ground to maintain the prosecution from September 2008 or within a reasonable time thereafter as there was no reasonable prospect of a successful prosecution. The respondent

argued that despite the team being aware at this stage that there was no evidence implicating him in the commission of the offences he was charged with, it still persisted with the prosecution. The respondent further contended that on the evidence, there was neither a subjective belief on the part of the PG or her prosecutorial team in the guilt of the respondent, nor was there any objective reasonable belief in the circumstances of the case to maintain the prosecution.

[15] The respondent also made two contentions in support of this claim. The first was that, had the prosecutorial authorities regularly carried out appraisals of the evidence collected against him, they could have established that there was no case against him and this could have led to his release at an earlier stage. The other was that if the trials of the accused persons were split into groups as identified by the prosecutorial team as the 'attackers', the 'leadership' and the 'support group', the duration of his trial would have been shortened and he would have been released earlier.

[16] The respondent in the further alternative submitted that in the event that his claim for malicious prosecution failed, the appellants through their conduct violated his rights contained in Arts 7, 8, 11, 12, 13, 16, 19 and 21 of the Namibian Constitution¹ and as such, were liable for constitutional damages. In support of this claim, the respondent argued that his arrest, detention and resultant prosecution were instituted maliciously and without reasonable or probable cause.

¹ These Articles concern the protection of liberty, respect for human dignity, prohibition of arbitrary arrest and detention, the right to privacy, the right to property, the right to practice a culture and the protection of fundamental freedoms respectively.

[17] The respondent further contended that the violation of his constitutional rights was caused by the failure of the PG to separate the trials into specific groups, the failure to release him from prosecution after the witnesses who testified against him failed to implicate him in the commission of the crimes and offences set out in the indictment, and the alleged unreasonable delay in finalising his criminal trial. The respondent argued that as a result of the aforesaid conduct, he suffered loss and damages and as such, he was entitled to an award of monetary compensation in terms of Art 25(3) and Art 25(4) of the Constitution.

[18] As stated above, the appellants disputed the respondent's claims and their bases. The appellants in the main contended that the proven facts did not establish a case for malicious prosecution or a case for malicious continuation of the prosecution. The appellants further argued that the respondent also failed to establish a case that entitled him to constitutional damages.

[19] As to the malicious prosecution claim, the appellants conceded that the arresting police officers set the law in motion by instigating the prosecution of the respondent. The appellants however submitted that all the arresting police officers did was to place witness statements before the PG, leaving the matter of a prosecution entirely to her discretion.

[20] The appellants argued that they could not be faulted with the arrest of the respondent as his arrest was based on a reasonable suspicion that he had committed the crime of high treason and the other crimes and offences set out in the indictment. The appellants further contended that the investigations carried out in 1999 revealed sufficient information of a *bona fide* and reasonable suspicion that the respondent committed the offences contained in the indictment.

[21] The appellants also contended that the decision to prosecute the respondent was properly and diligently exercised in terms of Art 88 of the Constitution after an objective consideration of the statements obtained during investigations on which the PG had reasonable grounds to believe, on a *prima facie* basis, that the respondent committed the offences or that liability could be attributed to the respondent on the doctrine of common purpose and that he was involved in a conspiracy.

[22] As to the claim for malicious continuation of the prosecution, the appellants firstly submitted that it was not necessary to have developed the common law in order to accommodate the element of malicious continuation of a prosecution as opposed to its initiation as this delict appears to have already been accepted at common law. The appellants in the alternative argued that in the event that the court finds that the common law did not provide for this delict, the common law may appropriately be developed, keeping up with our constitutional values.

[23] In so far as the merits of this claim were concerned, the appellants maintained that the proven facts do not establish a case for malicious continuation of the prosecution. The case for the appellants was that the PG could not stop the prosecution against the respondent nor close the State's case against the respondent from September 2008 onwards or any time thereafter as neither the PG nor her prosecutorial team could be certain that all the evidence that could implicate the respondent had been presented and that all witnesses that could implicate the respondent had completed their testimonies.

[24] The appellants submitted that the prosecution of the respondent could not be stopped at this stage because it would have been risky and prejudicial to the State's case as witnesses could implicate accused persons they did not refer to in their written statements. Appellants also submitted that the prosecution could not be terminated as proposed by the respondent because the prosecutorial team had an honest belief in the guilt of the respondent on the basis of the doctrine of common purpose and conspiracy, based on the witness statements procured and the evidence led during the trial.

[25] As regards the second alternative claim, the appellants argued that the remedy sought by the respondent was an inappropriate constitutional remedy and thus this claim should also be dismissed. The appellants contended that Art 12 of the Constitution specifies both a right and remedy for a breach. The appellants claimed that the remedy afforded to an accused by this Article is to be released from the trial

and as such, an award of damages does not constitute an 'appropriate relief' in terms of Art 12(1)(b) of the Constitution. The appellants thus argued that as the respondent failed to exercise his rights in terms of Art 12, his claim for constitutional damages should also fail.

The High Court's approach

[26] Regarding the principal claim, the court held that the respondent failed to prove that the arresting police officers did anything more than place the available information before the PG, leaving it to her to independently decide whether or not to prosecute. The court further held that based on the information contained in the police docket the PG had reasonable grounds to initiate the prosecution against the respondent and accordingly, the claim for malicious prosecution was dismissed.

[27] Adopting the approach taken by the High Court in the *Mahupelo*² matter, the court *a quo* held that it was necessary to develop the common law to accommodate a delictual claim based on continuing or maintaining the prosecution without reasonable and probable cause as it was of the view that the element of continuing or maintaining criminal proceedings beyond a stage where it could not be said to have been reasonable and probable to do so was not recognised in our common law and had also not previously been dealt with by our courts.

² *Mahupelo v Minister of Safety and Security & others* 2017 (1) NR 275 (HC).

[28] As to the workable standards for the continuation of a malicious prosecution, the court was of the view that the five requirements the plaintiff must prove in a claim for malicious prosecution as laid down in *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC) were also applicable to a claim for malicious continuation of a prosecution, save that the word 'initiated' has to be substituted for the word 'maintained' in the applicable expressions.

[29] The court held that although the initiation of criminal proceedings was *bona fide*, at a certain point in the trial it became apparent that the evidence against the respondent could not reasonably sustain a conviction. The court found that the continuation of the criminal proceedings after that realization was actionable and that malice (for the purpose of the action of malicious prosecution) could thus be inferred from the conduct of the prosecutors.

[30] The court was persuaded that, on a balance of probabilities, the PG and/or her prosecutorial team lacked reasonable and probable cause to continue with the prosecution from September 2008 onwards, being fully aware that each of the four witnesses who testified against the respondent failed to identify him in court, and further that the PG failed to establish inculpatory evidence on the part of the respondent or anyone associated with him in the alleged commission of the offences.

[31] The court, in coming to the conclusion that the PG or her prosecutorial team lacked reasonable and probable cause to maintain the prosecution, stated that the

fact that the November 2010 review of the evidence prompted further investigations in the matter was an indication that there was an absence of a minimum of evidence upon which the respondent might be convicted, but nevertheless the prosecution was maintained. The court concluded that the PG or her prosecutorial team no longer at that stage had an honest belief in the case they maintained, but merely expected that at some stage the respondent might incriminate himself.

[32] Regarding the issue of malice, the court held that the existence of malice is generally a question to be resolved by the fact finder from all the circumstances of the case. Applying this standard, the court held that the evidence before it supported the conclusion that the PG or prosecutorial team acted with malice in maintaining the prosecution. The court firstly inferred malice from its finding that the PG lacked reasonable and probable cause to maintain the prosecution from September 2008 onwards.

[33] The court further inferred malice from the failure of the prosecutorial team to continuously appraise the evidence against the respondent and specifically their failure to review the evidence for a period of six to ten years after the respondent had been indicted. The court also reasoned that the State's failure to provide sufficient resources to avoid a violation of the respondent's rights also pointed to evidence of malice. The court thus interpreted the evidence in the light most favourable to the respondent and ultimately held that the prosecution had been maintained without reasonable and probable cause and with malice.

[34] As to the claim based on constitutional damages, the court did not decide this issue for the reason that the claim based on maliciously maintaining the prosecution succeeded. Before I proceed to consider whether the court *a quo* was correct in holding that the PG or her prosecutorial team acted without reasonable and probable cause and with malice when they maintained the prosecution from September 2008 onwards, it is worth mentioning at this stage that the respondent has not cross-appealed against that decision of the court *a quo* dismissing his claim of malicious prosecution for the initiation of the prosecution. This appeal is therefore confined to the alternative claims.

The law on malicious prosecution and the Prosecutor-General's constitutional obligations

[35] Malicious prosecution is a delictual claim designed to provide redress for the losses flowing from the prosecution of the plaintiff. Malicious prosecution, as the label implies, requires proof that the conduct in setting the criminal process in motion was without reasonable and probable cause and was fueled by malice (improper motive).

[36] In *Chopra v Eaton Co* (1999) 240 A R 201 (QB), the Court of Queen's Bench of Alberta adopted the following rationale for malicious prosecution actions:

'The underlying basis for actions founded on malicious prosecution is the allegation of the fact which, if believed, would establish abuse of the judicial process while acting out of malice and without reasonable and probable cause and which judicial process did not result in a finding of guilt of the party alleging the abuse'.

[37] Professor McQuoid-Mason,³ in the process of defining the conditions under which the action for malicious prosecution could be brought, defined malicious prosecution as 'an abuse of the process of the court by intentionally and unlawfully setting the law in motion on a criminal charge'. In his compelling and authoritative analysis of the action for malicious prosecution, the learned professor points out that generally actions for malicious prosecution are discouraged on the grounds of public policy.⁴ This is so because the exercise of prosecutorial discretion in the prosecution of cases is central to the criminal justice system. Underlying this important consideration is the general principle that prosecutors should not be constrained in exercising prosecutorial discretion because of the fear of attracting civil liability.

[38] In Namibia, to fully understand the importance of the office of the PG and the power that he or she wields, regard should be had to Art 88 of the Namibian Constitution. In terms of Art 88(2)(a) the PG has the power to institute criminal proceedings on behalf of the State and perform all functions incidental to the institution of the criminal proceedings, subject to the Constitution. As the prosecutorial authority is *dominus litis* and in control of the prosecution, the PG equally has powers to discontinue criminal proceedings. It is thus not surprising that due to the magnitude of the power to institute and terminate prosecution, which lies at the heart of the PG's role, he or she is required to conduct the trial of an accused person with appropriate recognition of the principles of justice and due process.

³ McQuoid-Mason 'Malicious Proceedings' in Joubert et al *The Law of South Africa* (LAWSA) (2 ed), (2008) Vol 15 Part 2, para 315

⁴ *Id.*, para 311.

[39] It is in this context that the prosecutorial discretion of the PG ultimately has to be construed. It hardly needs stating that these are remarkable powers and that it is central to the preservation of the rule of law that they be exercised with the utmost integrity. In a democratic setting based on the rule of law, the public prosecutor plays a vital role in ensuring due process as well as respect for the rights of all parties involved in the criminal justice system. The public prosecutor's duties are thus owed to both the public as a whole and those individuals caught up in the system.

[40] In *Minister of Safety and Security v Mahupelo*,⁵ this court stated that the decision to initiate and maintain the prosecution of an accused person forms a central part of the constitutional obligation of the prosecutorial authority. The court went on to state that while it is imperative that prosecutors were able to perform their functions without the fear of attracting civil liability, their constitutional mandate should nonetheless be executed in a manner that ensures a fair trial for the accused persons they are prosecuting. The 'necessary and natural consequence' of this consideration is that accused persons are accorded their full rights and are not subjected to unreasonable and baseless prosecutions.

[41] In *Gregory v Portsmouth City Council* 2000 1 All ER 560 (HL) at 565a-b, the House of Lords considered and commented on the countervailing considerations - namely, the need to ensure that prosecutors are able to perform their functions

⁵ (SA 7-2017) [2019] NASC (28 February 2019) para 1.

without the fear of attracting civil liability and the concern that an accused must not be subjected to baseless prosecutions - as follows:

'A distinctive feature of the tort is that the defendant has abused the coercive powers of the state. The law recognises that an official or private individual, who without justification sets in motion the criminal law against a defendant, is likely to cause serious injury to the victim. It will typically involve suffering for the victim and his family as well as damage to the reputation and credit of the victim. On the other hand, in a democracy, which upholds the rule of law, it is a delicate matter to allow actions to be brought in respect of the regular processes of the law. . .'

[42] Professor John G Fleming in his book *The Law of Torts*,⁶ points out that the tort of malicious prosecution is dominated by the problem of balancing two countervailing interests of high social importance: safeguarding the individual from being harassed by unjustifiable litigation and encouraging citizens to aid in law enforcement. On one side, it needs no emphasis that the launching of scandalous charges is apt to expose the accused to serious injury, involving his honour and self-respect as well as his reputation and credit in the community. On the other side, however, is the competing interest of society in the efficient enforcement of the criminal law, which requires that private citizens who co-operate in bringing would-be offenders to justice, no less than prosecutors, should be adequately protected against the fallout which is likely to ensue from the termination of the prosecution in favour of the accused.

⁶ (1992) 8 ed, Sydney: Law Book Co.

[43] It has long been recognised that the standard in a claim for malicious prosecution brought against the prosecutorial authority is different from that adopted in cases involving private parties. In *Miazga v Kvello Estate*,⁷ the Supreme Court of Canada, after a detailed review of the historic case law, clarified that the principles established in suits between private parties cannot simply be transposed to cases involving Crown defendants without necessary modification. The court stated that while the accuser's personal belief in the probable guilt of the accused may be an appropriate standard in a private suit, it is not a suitable definition of the subjective element of reasonable and probable cause in an action for malicious prosecution against Crown defendants.

[44] The Canadian Supreme Court pointed out that in the context of a case against the Crown defendants, it is apparent from its constituent elements that a claim for malicious prosecution targets the decision to initiate or continue with a criminal prosecution. According to the court, such suit is an after-the-fact challenge of the decision which strikes at the constitutionally protected prosecutorial independence and discretion of the Crown.

[45] The court, with reference to the test established for Crown liability in *Nelles v Ontario* [1989] 2 SCR 170 and reiterated in *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9, held that a stringent standard must be met before a finding of liability on the part of a public prosecutor is made. The court emphasised that this test places

⁷ 2009 SCC 51.

a heavy burden on the claimant to discharge, particularly on the requirement to prove not only absence of reasonable and probable cause for the proceedings but also that there was no *bona fide* reason to bring or maintain the criminal proceedings.

[46] I remain convinced by this court's approach to these stringent requirements as set out in *Minister of Safety and Security v Mahupelo*. I see no good legal or factual reason for departing from such well-established principles and therefore I fully endorse the same approach in the present case. For the exercise of discretion by a prosecutor to justify judicial intervention, there must be egregious conduct of the type identified by the Canadian Supreme Court in *Miazga v Kvello Estate*. I reiterate that error of judgment in the exercise of the prosecutor's discretion, even negligent error, is not sufficient.

[47] Before moving into the next discussion, I should make one further short point regarding prosecutorial independence and that is, our courts are not overly eager to limit or interfere with the legitimate expectation of the prosecutorial authority. That does not of course mean that a prosecutorial authority's discretion to prosecute is immune from the scrutiny of a court. On the contrary, a court can and must intervene where such discretion was improperly exercised.

[48] It is not contested that the essential elements for a successful claim for malicious prosecution were correctly stated, amongst others, in *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC) para 3.

[49] In the present case I do not see that the first and fourth requirements set out in *Akuake v Van Rensburg*, namely that the criminal proceedings were instituted by the appellants and that they terminated in favour of the respondent should present any difficulty. Accordingly, it remains to determine whether the respondent has proven the second and third requirements, ie. the absence of reasonable and probable cause as well as malice. The respective roles of the employees of the Minister and the prosecutorial team in the investigation and initiation of the prosecution are *not* under scrutiny, given that the claim for initiating the prosecution has been dismissed by the High Court and the respondent has not cross-appealed against that decision. I thus find it appropriate at this stage to set out briefly the essential requirements of the issues that remain in dispute between the parties.

The reasonable and probable cause requirement

[50] Under this requirement, the plaintiff must prove that the initiation or continuation of the prosecution was without reasonable and probable cause. As a matter of sound legal reasoning, if reasonable and probable cause existed at the time the prosecutor commenced or maintained the criminal proceeding in question, the proceeding must be taken to have been properly instituted or maintained, regardless of the fact that it ultimately terminated in favour of the accused (plaintiff in a malicious prosecution case).

[51] In *Beckenstrater v Rottcher & another* 1955 (1) SA 129 (A) at 136A-B, Schreiner, JA set out the test for 'absence of reasonable and probable cause' as follows:

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'

[52] Moreover, of great assistance is the definition of reasonable and probable cause established by Hawkins J in *Hicks v Faulkner* [1878] 8 QBD 167 which is consistent with the objective test to be applied and the principle that the prosecutor is not required to test every possible relevant fact before taking action. In the course of the judgment Hawkins J defined reasonable and probable cause to mean 'an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to conclude that the person charged was probably guilty of the crime imputed'.

[53] The necessary deduction which the courts have for centuries made from that definition is that the accuser must first, hold an honest belief in the guilt of the accused; secondly, such belief must be based on an honest conviction of the

existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly- mentioned belief must be based upon reasonable grounds – meaning such grounds as would lead any fairly cautious person in the defendant's situation to so believe; fourthly, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable grounds for belief in the guilt of the accused.

[54] These general principles were confirmed by Muller JA in *Prinsloo & another v Newman* 1975 (1) SA 481 (A) at 495H, where the learned judge of appeal stated that reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of prosecution is justified. It has been shown that the concept involves both a subjective and an objective element. As an objective consideration, the defendant must have sufficient facts from which a reasonable person could have concluded that the plaintiff had committed the offence or crime charged. As to the subjective element, the defendant must have subjectively held an honest belief in the guilt of the plaintiff.

[55] The court in *Prinsloo v Newman* stated that not only must the defendant have subjectively had an 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. It accordingly follows that in a claim for malicious continuation of a prosecution on the facts and circumstances similar to those obtaining in this appeal, there has to be a finding as to the subjective state of

mind of the prosecutor as well as an objective consideration of the adequacy of the information available to him or her.

[56] The test as stated by Hawkins J was approved by Lord Denning in *Glinski v McIver* 1962 (1) All ER 696 (HL). However, the Law Lord cautioned that the use of the word 'guilt' in the definition given in the *Hicks v Faulkner* case might be misleading. Lord Denning observed that the police officer did not have to *believe* in the guilt of the accused. He or she only has to be satisfied that there is 'a proper case to lay' before the court. He or she cannot judge whether the witnesses are telling the truth. He or she cannot know what defences the accused may set up. Guilt or innocence is a matter to be decided by the court and not by the police officer or the prosecutor. Lord Denning further observed that the prosecutor does not have to believe in the probability of obtaining a conviction. He or she is only concerned with the question whether there is a case fit to be tried. As Lord Atkin said in *Herniman v Smith* [1938] AC 305 at 319, it is not required of any prosecutor that he or she must have tested every possible relevant fact before he or she takes action. Their duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.

[57] Hawkins J pointed out in *Hicks v Faulkner* that the question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable *bona fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. The

learned judge pertinently observed that sight should not be lost of the distinction drawn between facts necessary to establish actual guilt and those required to establish a reasonable *bona fide* belief in the guilt in cases of malicious prosecution. To that, he added that many facts admissible to prove the latter would be wholly inadmissible to prove the former.

[58] What emerges from the above cases is that the test applicable to malicious prosecution claims is different from that applied in criminal proceedings. This court pertinently observed this distinction in *Minister of Safety and Security v Mahupelo*. Regrettably, the court *a quo* appears to have overlooked this important difference in this matter as well. Consequently, the court below impermissibly adopted an approach analysing the information giving rise to the respondent's prosecution as if it was evaluating the evidence in a criminal trial.

The requirement of malice and/or *animo injuriandi*

[59] In an action of the kind under consideration, it was stated by this court in *Minister of Safety and Security v Mahupelo* that there were conflicting views expressed in leading textbooks and case law in South Africa as to whether the plaintiff (respondent in the present case) is solely required to prove malice or prove *animo injuriandi*, or both in order to set out a legally maintainable cause of action. The decided cases bearing on the subject have not yet wholly removed the confusion whether the plaintiff is required to prove only the existence of the requisite legal

intention to injure without requiring him to establish in addition the defendant's motive, ie. that he acted maliciously.

[60] Professor McQuoid-Mason in LAWSA points out that malice means that the defendant had either an absence of belief in the guilt of the accused (which may include recklessness), or an improper or indirect motive other than that of bringing the plaintiff to justice. He states that traditionally malice has been distinguished from *animus iniuriandi*. Malice is concerned with the question of lawfulness whereas *animus iniuriandi* refers to fault. *Animus injuriandi* (which will generally be presumed under the *actio iniuriarum*) is required as the fault element, and malice should still be required to establish wrongfulness. The learned professor states that in practice courts 'appear to pay mere lip service to the concept of *animus injuriandi* and only enquire into the motives of the defendant'.⁸

[61] As far back as 1968, it was held by Wessels JA in *Moaki v Reckitt and Colman (Africa) Ltd & another* 1968 (3) SA 98 at 104A-E, that despite the use of the terms 'malice' and 'maliciously' in an action for malicious prosecution, it was not intended to formulate any principle that the motive of the defendant, in acting as he was alleged to have acted, was in any way a determining element of legal liability. The defendant's state of mind in doing the act complained of, on the other hand, is a material factor in determining the element of liability. The learned judge was of the opinion that although it has become customary to allege 'malice' in pleadings of the type now

⁸ LAWSA paras 328 and 329.

under consideration, South African law has always required a plaintiff to prove only the existence of the requisite legal intention to injure, without requiring him or her to establish in addition the defendant's motive, ie. that he acted maliciously.

[62] In *Thompson & another v Minister of Police & another* 1971 (1) SA 371 (E), Eksteen J reiterated that the convenient statement of the law as it stood following *Moaki* above was to be found in the dictum by Innes CJ in *Burkett v Smith*, 1920 AD 106 at 108, where the learned Chief Justice indicated that in an action for malicious prosecution the plaintiff could only succeed by showing a want of real and probable cause, and the existence of *animus injuriandi*.

[63] The South African Supreme Court of Appeal in *Rudolph & others v Minister of Safety and Security & another* 2009 (5) SA 94 (SCA) para 18 held that the approach adopted by that court was that, although the expression 'malice' was used, the claimant's remedy in a claim for malicious prosecution lay under the *actio injuriarum* and that what had to be proved in this regard was *animus injuriandi*. By way of further elaboration in *Minister for Justice & Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 64 it was observed that:

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

[64] In *Minister of Safety and Security v Mahupelo*, this court stated that this approach reflects the position in Namibia. I accordingly reaffirm that the approach accords with our law and ought to be followed in the present matter as well.

[65] In determining whether there was malice or not, it will be worth re-stating what was said by Navsa ADP in *Minister of Police & another v Du Plessis* 2014 (1) SACR 217 (SCA) in respect to the duty of the prosecutor. At para 28 of that judgment, the learned judge said that a prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest. His paramount duty is not to procure a conviction but to assist the court in ascertaining the truth. Accordingly, the prosecutor is required to exercise his or her discretion on the basis of the information before him or her.

Issues for determination on appeal

[66] The issues that we are called upon to determine are therefore as follows:

- (a) Whether the the court *a quo* was correct in holding that the common law needed development to include the delict based on malicious continuation of a prosecution;
- (b) Whether the PG or her prosecutorial team maintained the prosecution of the respondent maliciously and without reasonable and probable cause from September 2008 onwards; and

- (c) Whether the appellants are liable to the respondent for constitutional damages, in the event that the claim for malicious continuation of the prosecution is not upheld.

[67] Before I proceed to determine the above issues, I wish to make the following brief observations in respect of the judgment of the High Court. The first is that the High Court correctly set out the law in respect of malicious prosecution as based on the test in *Akuake v Jansen van Rensburg*. The other is that the court *a quo* was correct in holding that on the main claim both the Minister and the PG had reasonable and probable cause and had not acted with malice in arresting, charging and the respondent on the offences contained in the indictment. Having made these remarks, it remains to deal with the issues that must be decided on appeal.

Was the court *a quo* correct in holding that the common law needed development to include the delict based on malicious continuation of a prosecution?

[68] It can be recalled that the court *a quo* held that the element of continuing or maintaining criminal proceedings beyond a stage where it could not be said to have been reasonable and probable to do so was not recognised in our common law and had also not previously been dealt with by our courts. The court was thus of the view that the common law should be developed to introduce a delictual claim based on continuing or maintaining the prosecution without reasonable and probable cause.

[69] In argument before us, the appellants contended that the court *a quo* was incorrect in its construction of the law and in its finding that it was necessary to develop the common law in order to accommodate the element of malicious continuation of a prosecution. The appellants submitted that there can be no basis in logic or principle for expanding the scope of the common law as it did because it has already been recognised that an action for malicious prosecution covers both the initiation and the continuation of the prosecution. The appellants' central argument was that the boundaries of an action for malicious prosecution are not fixed by reference to the institution of the prosecution, but extends throughout its continuation to its termination.

[70] In support of this point, Mr Semenya, who appeared for the appellants together with Mr Marcus, prayed aid on a passage in the book by Maasdorp⁹ and argued that a hallmark of the requirement of reasonable and probable cause under the common law recognises that this element must be present not only at the beginning of a prosecution, but throughout the course of the prosecution up to its very termination. Counsel argued that to confine the law as suggested by the respondent would indeed be inconsistent with any of the decided cases on this aspect.

[71] Counsel further argued that this proposition was also founded on the passage in the judgment of De Villiers CJ in *Van Noorden v Wiese* (1883-1884) 2 SC 43 in which he commented that he did not know of any case in which it was held that if a

⁹ Maasdorp, *The Institutes of Cape Law* (1909) Book III Part II Chapter X.

person believed an offence had been committed, and other facts were brought to his notice which showed that no offence was committed, he would still be justified in proceeding in his original intention. By reason of the foregoing, the learned Chief Justice concluded that if a person had a reasonable and probable cause at the initiation stage, but because of any subsequent information received by such person the reasonable and probable cause ceases, the prosecution ought to be terminated as well and failure to do so should result in the person being held liable for malicious prosecution.¹⁰

[72] Mr Semenya in the alternative argued that if the appellants' proposition is rejected and it is found that the common law does not provide for this delict, then the common law should be developed in the light of the spirit, purpose and objects of the Constitution. Counsel submitted with reference to *JS v LC* 2016 (4) NR 939 (SC) para 28, where it was held, albeit in a different context, that courts were bound to develop the common law when it falls short of the spirit, purport and objects of the Constitution. Counsel further submitted that to the extent the common law is developed, the requirements for a delict of malicious prosecution should *mutatis mutandis* apply to the delict of malicious continuation of the prosecution.

[73] On the other hand, Mr Corbett together with Mr Hengari, who argued the case for the respondent, supported the judgment of the court *a quo*. We were referred to the first *Mahupelo* matter where the High Court held that the element of maintaining

¹⁰ At 54.

criminal proceedings beyond a stage where it could not be said to have been reasonable and probable to do so was not recognised in our common law and had also not previously been dealt with by our courts and as such, the common law had to be developed in order to accommodate the element of malicious continuation of a prosecution.

[74] Counsel submitted that the common law had to be developed to bring it in line with the constitutional obligations imposed upon the prosecutorial authority by Art 12(1)(b) read with Art 88 of the Constitution. Counsel submitted that the prosecutorial authority was required to exercise its mandate subject to the constitution and the laws of the country.

[75] Counsel further submitted that the Constitution enjoins and permits courts to develop the common law in line with the objects of the Bill of Rights. Referring to *RH v DE* 2014 (6) SA 436 (SCA) [2014] ZASCA 133 as well as to the judgment of this court in *JS v LC* above, counsel contended that it was well within the place of courts to shape the common law in a way that advances constitutional values. Also referring to *Heyns v Venter* 2004 (3) SA 2000 (T), counsel submitted that where the common law as it stands is deficient in the protection of human rights, it is imperative that it is developed to promote the spirit, purport and objects of the Bill of Rights.

[76] Counsel also cited two other foreign cases¹¹ to support the argument that other common law jurisdictions have extended the common law to accommodate a delictual claim based on malicious continuation of the prosecution for want of reasonable and probable cause in maintaining the prosecution beyond an identifiable event during the criminal proceedings. Counsel urged this court to follow the approach adopted in those two decisions.

[77] This court in *Minister of Safety and Security v Mahupelo* held that it was incorrect for the court *a quo* to have found that it was necessary to develop our common law to include a delict based on malicious continuation or maintenance of a prosecution. The court in reaching that conclusion noted that old authoritative sources on the issue reached an opposite conclusion than that proposed by the respondent. The court concluded that although it may be necessary in appropriate cases to develop the common law to bring it in line with the values espoused in our constitution, on the facts of that case it was not necessary to develop the common law as the delict of malicious continuation of a prosecution had been recognised at common law.

[78] I am persuaded that this remains the correct approach that must also be followed in this matter. I find no basis upon which to adjust the court's reasoning in *Minister of Safety and Security v Mahupelo*. In fact the arguments that were advanced in the present matter are by far similar to those advanced in the *Mahupelo* matter in

¹¹ *Zreika v State of New South Wales* 2011 NSWDC 67; *Hathaway v State of New South Wales* 2009 NSWSC 116

the High Court. Accordingly, I endorse this approach and set aside the decision of the court *a quo* on this point.

[79] As previously noted, it is common cause between the parties that the prosecution was instituted by the appellants and further terminated in favour of the respondent. It is also common cause that the parties had agreed to separate the issue of liability from that of the quantum, with the latter issue to be determined at a later stage. Accordingly, what remains for determination is whether the PG or her prosecutorial team maintained the prosecution maliciously and without reasonable and probable cause from September 2008 onwards.

Did the PG or her prosecutorial team maintain the prosecution maliciously and without reasonable and probable cause beyond September 2008?

[80] The court *a quo* held that although the initiation of criminal proceedings was *bona fide*, at a certain point in the trial it became apparent that the evidence against the respondent could not reasonably sustain a conviction. The court found that the continuation of the criminal proceedings after that realisation was actionable and that malice (for the purpose of the action for malicious prosecution) could thus be inferred from the conduct of the prosecutors.

[81] In holding the PG liable for the claim of malicious continuation of the prosecution the court *a quo* accepted that on a balance of probabilities, the PG and or her prosecutorial team lacked reasonable and probable cause to continue with the prosecution from September 2008 onwards, being fully aware that each of the four witnesses who testified against the respondent failed to identify him in court, and further that the PG failed to establish inculpatory evidence on the part of the respondent or anyone associated with him in the alleged commission of the offences.

[82] The court was also of the view that the fact that the November 2010 review of the evidence prompted further investigations in the matter was an indication that there was an absence of a minimum of evidence upon which the respondent might be convicted, but nevertheless the prosecution was maintained. The court concluded that the prosecutorial team no longer at this stage had an honest belief in the case they maintained, but merely expected that at some stage the respondent might incriminate himself.

[83] Regarding the issue of malice, the court held that the existence of malice is generally a question to be resolved by the fact finder from all the circumstances in a case. Applying this standard, the court held the evidence before it supported the conclusion that the PG or her prosecutorial team acted with malice in maintaining the prosecution. The court firstly inferred malice from its finding that the PG lacked reasonable and probable cause to maintain the prosecution from September 2008 onwards.

[84] The court also inferred malice from the failure of the PG or her prosecutorial team to continuously appraise the evidence against the respondent and from the failure to review the evidence against the respondent for a period of six to ten years after he was indicted. The court further reasoned that the State's failure to provide sufficient resources to avoid a violation of the respondent's rights also points to evidence of malice. The court thus interpreted the evidence in the light most favourable to the respondent and ultimately held that the prosecution had been maintained without reasonable and probable cause and with malice.

[85] The court also found that the PG and her prosecutorial team, in particular Mr July, one of the public prosecutors who led the conduct of the case at the criminal trial and who testified for the appellants in the civil claim, had no sufficient basis for an honest belief in the case his team maintained from September 2008. Mr July's evidence concerning his belief in maintaining the prosecution was criticised by the court *a quo* and finally, the court remarked that 'although he did not harbour any ill will or spite against the respondent', his state of mind in maintaining the prosecution at that stage was material in determining and inferring malice on his part.

Submissions on appeal

[86] Counsel for the appellants submitted that the court *a quo* erred in its finding that the PG or her prosecutorial team lacked reasonable and probable cause to continue with the prosecution from September 2008 onwards. Counsel further argued

that the High Court erred in finding malice on the part of the PG or her prosecutorial team, in particular Mr July.

[87] Counsel in his submission criticised the manner in which the court *a quo* assessed and treated the evidence regarding the lack of identification. He argued that it was common cause that all the four witnesses who testified against the respondent failed to identify him in court. He however contended that, the failure by the witnesses to identify the respondent in the dock does not in itself establish that there was no evidence against the respondent on record although this was found to be insufficient to have resulted in a conviction in the criminal trial. He thus argued that the lack of identification in court does not mean that there was a lack of reasonable and probable cause. Quite to the contrary, there was evidence *aliunde* incriminating the respondent, so counsel submitted. Counsel argued that it was not sufficient for the court *a quo* to simply refer to the judgment in the criminal court to the effect that there was lack of identification, and conclude that reasonable and probable cause was also absent as of September 2008.

[88] Counsel submitted that the identity of the respondent was not in question during the criminal proceedings because during the civil trial, the respondent did not dispute that the witnesses who mentioned his name in sworn statements were referring to him. Counsel further argued that the prosecution possessed witness statements which all made allegations concerning the respondent. The respondent maintained that these allegations were false, but he conceded that if true, they would

implicate him. Counsel submitted that this evidence taken together shows that the PG reasonably believed in the case against the respondent beyond September 2008.

[89] Counsel further submitted two reasons why the prosecution could not have been stopped in September 2008. First, witnesses could implicate the accused persons they did not refer to in their statements. So, it was possible for witnesses called after September 2008 to implicate the respondent. Therefore, stopping the prosecution at that stage would have been risky and prejudicial to the State's case. Secondly, the PG had an honest belief in the respondent's guilt based on the doctrine of common purpose and conspiracy up to the discharge of the respondent. This belief was based on the witness statements procured and the evidence led during the criminal trial.

[90] Counsel for the respondent adopted a different approach, contending that although the prosecution may have been initiated with reasonable and probable cause at a certain point in the trial it became apparent that the evidence against the respondent could not reasonably sustain a conviction. According to counsel, this certain point was reached by September 2008 with the inability of the key prosecution witnesses to identify the respondent in court. Counsel thus contended that had the evidence against the respondent been regularly reviewed, the PG or her prosecutorial team would have realised that there was insufficient evidence to convict the respondent and as a result, the length of the trial against the respondent could have been significantly shortened.

[91] A point was also taken on behalf of the respondent to the argument that it could have been risky and prejudicial to the State's case to stop the prosecution at any of the stages advanced in argument by the respondent. Counsel for the respondent contended that any belief that witnesses would implicate persons not mentioned in their witness statements is purely based on speculation. Thus, neither the PG nor her prosecutorial team could have reasonably held such a belief, particularly given the lapse in time between when the last witness testified against the respondent and when the respondent was discharged.

[92] Counsel further submitted that it was also speculative on the part of the PG or her prosecutorial team to hold a view, given common purpose doctrine, that other witnesses or some of the accused persons might implicate the respondent at some later stage. In developing this contention, counsel pointed out that the argument is not an acceptable standard of our law on criminal procedure. Counsel submitted that a person ought not to be prosecuted in the absence of minimum evidence upon which the accused might be convicted, merely in the expectation that at some stage he might incriminate himself or herself. According to counsel, it then ought to follow that if a prosecution is not to be commenced without that minimum evidence, so too it should cease when the evidence finally falls below that threshold.

[93] Counsel furthermore argued with reference to decided cases that prior agreement or an act of association and of course the necessary *mens rea* were

material in determining liability based on common purpose. He contended that each of the four witnesses who testified against the respondent failed to identify him in court, and there was no further evidence implicating the respondent or anyone associated with him.

Information at the disposal of the prosecution at the trial

[94] Before I proceed to analyse the information at the disposal of the prosecutorial authorities at the time, I find it illustrative to briefly recount the salient parts of the evidence led by the State during the criminal trial. A number of witnesses were called by the State and their testimonies may be summarised as follows:

Bernard Bareke Kanzeke

[95] Mr Kanzeke testified that during 1998 he was a member of the Democratic Turnhalle Alliance (DTA), a registered political party in Namibia, (now known as the Popular Democratic Movement). The witness testified that during 1998, he attended a meeting called at the DTA offices in Katima Mulilo. He said that the subject of the meeting was to discuss plans of seceding Caprivi Region from the Republic of Namibia. The witness testified that among those in attendance was Mr Rosco Makapa.

Albert Lingesa Mutile

[96] He stated that on his way from Katima Mulilo to Masida, he met Rosco Makapa whom he knew as a teacher at Sachona. The witness testified that Rosco Makapa

enquired from him whether he could assist to transport people from Sachona to Makanga. When he enquired from Rosco Makapa who these people were, Makapa replied that they were 'special people with fire-arms' and that they had to be transported in the night. After realising that Makapa was referring to the rebels, the witness declined the request. The witness further testified that a certain Aggrey Makendano during July 1999 requested for transport to be taken to Makanga. During this engagement, Aggrey Makendano informed him that they were waiting for Rosco Makapa. He testified that he also refused to transport Aggrey Makendano, whom he thought was not alone.

Vasco Simambela

[97] The witness informed the court that during August 1999, Rosco Makapa transported a certain Oscar Puteho Muyuka to his village where he, Oscar Puteho Muyuka, collected maize meal bags from Judith Puteho and loaded them onto a vehicle belonging to Rosco Makapa. The witness testified that Muyuka was armed with a pistol during the visit to the village and that was when he realised that Makapa was also supporting the secessionist plot.

Kenneth Malumo Matengu

[98] He testified that while visiting the house of a certain John Shando, they were joined by Rosco Makapa. At that house, Oscar Puteho Muyuka, John Shando and Rosco Makapa narrated a story of how they fled from the country to Botswana and how they survived in Dukwe. He also testified that the three at this meeting also

discussed plans of seceding Caprivi Region from the rest of Namibia. After the meeting, the respondent transported some of the participants to their base.

[99] As previously noted, each of the four witnesses who testified against the respondent failed to identify him in court.

Analysis of the evidence

[100] After analysing the evidence, the court *a quo* held that the continuation of the criminal trial as of September 2008 was without reasonable and probable cause as at this stage all witnesses who testified against the respondent failed to identify him in court and further that they also failed to give direct or inculpatory evidence against him or anyone associated with him in the alleged commission of the offences. Accordingly, the court held that the PG was liable for malicious continuation of the prosecution.

[101] The key question thus arises: if the initiation of the prosecution was lawful and permissible as the court *a quo* found, what changed during the criminal trial that led the court to conclude that there was insufficient evidence to incriminate the respondent and that as such the prosecution should have been terminated by September 2008?

[102] Weighing the evidence as a whole, it would appear that the only thing that changed was the inability of the witnesses to identify the respondent in court. It is

evident on the record that the allegations contained in the witness statements that formed part of the material placed before the PG on the basis of which a decision to prosecute was taken, were in material respects corroborated by the testimonies of the State witness during the criminal proceedings.

[103] Mr July in his evidence explained that although it was a routine procedure for witnesses to point out an accused person in open court by way of identification, the witnesses did not do so in this case as it became a strategy of witnesses during consultations to say that they would be able to identify the accused person referred to in their statements, but when asked to identify such accused person in court they would fail to do so. He suggested that the failure to identify the respondent in open court was attributable to various factors, including close family relations between the witnesses and the accused persons or fear of harassment.

[104] Notably, the respondent did not deny that he is the person referred to in the witness statements. In all fairness he could not so deny. He was well-known by the witnesses as he was a teacher at a local school. He merely proffered that he was not identified in open court by the witnesses and further that the PG failed to establish evidence inculpatory on his part or anyone associated with him in the alleged commission of the offences. This is a patent acknowledgment of the identity of the Rosco Makapa on trial whom the witnesses chose not to identify in pursuit of a strategy.

[105] It will also be convenient to mention one other aspect of the identification evidence. The respondent under cross-examination testified that he did not know the State witnesses, save Bernard Bareke Kanzeke. In his testimony, the witness explained that he knew Kanzeke because the latter worked at a Shell Service Station as a petrol attendant where the respondent used to fill up petrol. When questioned whether he believed witness Kanzeke when he said he could not recognize the respondent in court, the respondent answered in the negative.

[106] I have come to the conclusion that the information at the disposal of the prosecutors assessed in its entirety leaves no doubt as to the identity of the respondent as the same individual mentioned in the witness statements and described by the witnesses during the criminal trial. In any event, what emerged from the appellants' evidence before this court, and what was not disputed in the court *a quo*, is that the person mentioned in the witness statements is the same person the State witnesses testified about during the criminal trial.

[107] It is common cause that the test for determining the conviction of an accused person in criminal trial is inherently distinct in nature from that employed in cases of malicious prosecution. The principles and considerations in the former are focused on establishing beyond reasonable doubt that the accused had committed an offence with which he or she was charged, whereas the latter focuses on the absence of the reasonable and probable cause to institute the prosecution and whether, despite such absence, the prosecution nevertheless persisted with the prosecution of an accused.

In other words, the test in a malicious prosecution claim is not whether the prosecutor possessed evidence to secure a conviction. That is a matter to be decided by the criminal court after the conclusion of evidence; but rather the honest belief on the part of the prosecutor that, having carefully collected and objectively assessed the available information, the plaintiff was probably guilty of the crime. Applying these considerations to the pleadings and evidence, has the respondent in the present case proved absence of reasonable and probable cause for the PG to maintain the prosecution beyond September 2008? In my respectful view, the answer is 'No'.

[108] The court *a quo* in its judgment also made adverse findings in respect of Mr July's evidence that he did not have an honest belief founded on reasonable grounds in the case he maintained. There was no evidence showing that Mr July did not have an honest belief in the respondent's guilt. In fact, Mr July stated in cross-examination that he had an honest belief in the respondent's guilt up until the s 174 discharge. It was not put to him that he was not being truthful nor was his evidence in this regard challenged in any way. In my view, there can be no basis for questioning the evidence of Mr July and I find, in all the circumstances that the probabilities are that Mr July had an honest belief in the case the prosecution maintained up to the s 174 discharge and the court *a quo* should therefore have accepted his uncontested evidence in this respect.

[109] In examination-in-chief, Mr July testified that he could not recall if a request was also made to gather further evidence against the respondent. He also stated that

the decision to carry out further investigations was intended to collect more evidence to supplement the gap in the identification evidence and that the exercise was not undertaken simply because the prosecution did not have sufficient evidence against accused persons.

[110] The onus of proof in an action for malicious prosecution lies on the plaintiff. As such, the respondent, as the then-plaintiff, must have proved that the prosecution was maintained maliciously and without reasonable and probable cause. If one of these elements is lacking, then the plaintiff in an action for malicious prosecution cannot succeed. As was observed by this court in *Minister of Safety and Security v Mahupelo*, it is improbable to find that a defendant acted maliciously where there is reasonable and probable cause to prosecute or to find that the defendant who was motivated by malice had reasonable and probable cause to prosecute. The finding that there was reasonable and probable cause to prosecute invariably neutralises the existence of malice in the circumstances as the latter is contingent on the former.

[111] In light of my findings that viewed objectively, there existed reasonable grounds for the prosecution of the respondent and viewed subjectively, the prosecutorial team believed in the respondent's guilt, and further that reasonable and probable cause to prosecute invariably neutralises the existence of malice, the findings by the court *a quo* on malice also stand to be corrected. Having reached the above conclusion, all that remains for determination is the question of the appellants' liability for constitutional damages.

Constitutional damages claim

[112] As to the claim based on constitutional damages, it will be recalled that the High Court did not decide this issue for the reason that the claim based on malicious continuation of the prosecution succeeded. In this manner, the court *a quo* disposed of the matter without considering the merits and demerits of the constitutional question. The question that now arises is whether this court should decide this alternative claim as a court of first and final instance.

[113] In *Minister of Safety and Security v Mahupelo* para 97, this court referred with approval to a dictum in *Teek v President of the Republic of Namibia & others* 2015 (1) NR 58 (SC) that it is not ordinarily in the interests of justice for an apex court to sit as a court of first and final instance in which matters are decided without there being any possibility of appealing against the decision. The court was persuaded that the benefits that may be derived from the judgment *a quo* outweigh the election of departing from such an approach. As the court stated in para 99 of *Minister of Safety and Security v Mahupelo*, however, where compelling reasons exist in a particular case, there is nothing preventing this court from deviating from this approach. In this case, and correctly so in my opinion, no compelling reasons were advanced by the parties warranting a departure from the established principle. Consequently, the constitutional issue must be referred back to the court *a quo* for determination.

Costs

[114] Counsel on both sides asked for a costs order in this court, such order to include costs of one instructing legal practitioner and two instructed legal practitioners. The general rule on the issue of costs is that costs follow the suit. However, for the reason that the respondent has sought to ventilate issues of great public importance which have not been decided in this jurisdiction by the time the appeal was lodged, I am of the considered opinion that no order as to costs should be made. Such an approach is also justified in light of the consideration that the constitutional issue has been referred back to the High Court for decision.

[115] I would therefore make the following order:

- (a) The appeal is upheld.
- (b) The portion of the order of the court *a quo* upholding the respondent's alternative claim based on malicious continuation of the prosecution without reasonable and probable cause is set aside.
- (c) The question of constitutional damages is referred back to the High Court for determination.
- (d) No order as to costs is made.

SHIVUTE CJ

MOKGORO AJA

CHOMBA AJA

APPEARANCES:

APPELLANTS:

I A M Semanya SC (with him N
Marcus)

Instructed by Government Attorney

RESPONDENT:

A W Corbett (with him U Hengari)

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