



REPORTABLE

CASE NO: SA 1/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

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

**First Appellant
Second Appellant
Third Appellant**

and

KENNEDY SIMASIKU CHUNGA

Respondent

Coram: SHIVUTE CJ, MOKGORO AJA and NKABINDE AJA

Heard: 1 October 2019

Delivered: 7 May 2020

Summary: The Minister of Safety and Security, the Prosecutor-General and the government appealed to the Supreme Court against the decision of the High Court giving judgment in favour of Mr Chunga for alleged malicious continuation of Mr Chunga's prosecution. Mr Chunga was one of the persons arrested and prosecuted for high treason, murder and other crimes arising from attacks in and around Katima Mulilo on 2 August 1999. Mr Chunga was discharged at the end of the State's case following a protracted criminal trial in the High Court. After his discharge, Mr Chunga sued the government and the Prosecutor-General for damages for malicious

prosecution, alternatively for the continuation of his prosecution. The High Court dismissed the claim for malicious prosecution, but allowed the alternative claim for malicious continuation of prosecution without reasonable and probable cause. The High Court found that the prosecution should not have continued to prosecute Mr Chunga as there was no evidence implicating him.

In the Supreme Court, the governmental appellants argued that the High Court erred in approaching the evidence in a civil trial as if it was evaluating evidence in criminal case. It was argued that the witness statements implicating Mr Chunga led the prosecution team to honestly and reasonably believe that Mr Chunga possessed and executed a common desire with other people he was jointly charged with.

Mr Chunga, on the other hand, submitted that the prosecutorial team lacked reasonable and probable cause and an honest belief in his guilt, especially after the prosecutorial team had assessed the witnesses' evidence in November 2010 and found it necessary to instruct the police to further investigate accused persons but no evidence was found against Mr Chunga. Therefore, there was no evidence to have had continued prosecuting him. He also argued that the prosecutors' opposition to his application in terms of s 174 of Criminal Procedure Act for a discharge at the conclusion of the State's case was evidence of malice on their part.

Held, the requirement of reasonable and probable cause has both an objective and subjective element. Objectively, the information available to the prosecution must be sufficient for a reasonable person to conclude that the plaintiff had committed the crime or offence charged.

Held, subjectively, the prosecutor must have had an honest belief in the plaintiff's guilt, but 'honest belief' is not the same as the belief on the part of a judge who sits in the judgment of an accused person in a criminal trial. The requirement is based on good faith and professional assessment by a prosecutor of the information at his or her disposal.

Held, the High Court and Mr Chunga conflated the civil and criminal standards which are different. Facts required to establish the actual guilt of the accused in the criminal case are different from those required to establish a reasonable *bona fide* belief in the guilt of the plaintiff in a civil case.

Held, the information at the disposal of the prosecution included also allegations in witness statements implicating Mr Chunga. Therefore the prosecution did not lack reasonable and probable cause to continue with his prosecution merely because Mr Chunga was not identified during the criminal trial. Appeal upheld.

APPEAL JUDGMENT

SHIVUTE CJ (MOKGORO AJA and NKABINDE AJA concurring):

Introduction

[1] This matter is part of a series of appeals beginning with *Minister of Safety and Security & others v Mahupelo* 2019 (2) NR 308 (SC), in which this court elucidated the principles of a claim for malicious initiation and continuation of a prosecution. This case, like the others preceding it, arises from the attacks in and around Katima Mulilo on 2 August 1999. On that date, individuals belonging or sympathetic to a group called Caprivi Liberation Army (CLA) attacked police stations and other State institutions around Katima Mulilo, apparently in an attempt to achieve secession of the then Caprivi region (now Zambezi) from the Republic of Namibia. This attack killed nine people, injured many others and destroyed property. Mr Chunga was one of the people arrested as a result of the attack. Together with 125 co-accused

persons, he was indicted for a range of crimes and offences. These included murder, high treason and sedition.

[2] Mr Chunga was ultimately discharged under s 174 of the Criminal Procedure Act 51 of 1977 (CPA). Following his discharge, he brought a civil claim for malicious prosecution. Alternatively, he claimed damages for malicious continuation of a prosecution after his prosecution continued although there was allegedly no evidence against him. The court *a quo* dismissed the claim for malicious prosecution but upheld Mr Chunga's alternative claim. The Minister of Safety and Security (the Minister), the Prosecutor-General (the PG) and the Government of the Republic of Namibia (the government) have lodged an appeal in this court. The thrust of their case is that the court below misdirected itself on the law in its reliance on the High Court judgment given in *Mahupelo v Minister of Safety and Security & others* 2017 (1) NR 275 (HC) (the first *Mahupelo*). It is also their contention that the court erred on the facts when it found that there was no evidence to prosecute Mr Chunga from 31 January 2008 up to his release on 11 February 2013.

Preliminary issues

[3] The hearing of the appeal was preceded by arguments relating to two interrelated applications for condonation brought on behalf of the Minister, the PG and the government. The first was an application for condonation and reinstatement of the appeal. The appeal lapsed due to the failure to lodge the record of the appeal within the time lines set in the rules of court. This application was not opposed. The second application for condonation was lodged following the neglect to address the

application for condonation and reinstatement of the appeal in the heads of argument. The instructing legal practitioner attributed the failure to address the application for condonation and reinstatement to oversight on her part. She neglected to forward the condonation application to instructed counsel together with the appeal record. When the counsel drafted the heads of argument, he was oblivious to the application for condonation and reinstatement. She pleaded that counsel be allowed to address the reinstatement application in oral argument.

[4] Counsel for the Minister, the PG and the government argued the applications by relying primarily on the twin prongs of public interest in the matter being heard and the lack of prejudice on the part of Mr Chunga. Counsel contended that there was an important public interest consideration in this matter being heard, given the complex and serious nature of the high treason trials. He submitted that the failure to file the record on time and to deal with the reinstatement application in the heads of argument has satisfactorily been explained and that condonation should be granted and the appeal reinstated and argued.

[5] Mr Chunga opposed the application for condonation for the failure to argue, the first condonation application in the heads of argument. Counsel for Mr Chunga contended that the failure to address the application for condonation and reinstatement in the heads of argument 'was fatal to the appeal' as such failure violates rule 17(1) of the rules of court. It made the appeal lapse in terms of rule 17(2). Therefore, the matter should be struck from the roll. Furthermore, the test for

condonation was not whether a respondent suffered prejudice. Counsel for Mr Chunga relied on *Somaeb v Standard Bank*¹ for the latter proposition.

[6] *Somaeb* is a decision of this court holding that where non-compliance with the Rules of this court was 'glaring, flagrant, and inexplicable,' the court will refuse to consider the merits of the case and it will be dismissed outright on this basis. In *Somaeb*, the appellant failed to file security for costs and a proper record. Further, he did not apply for the reinstatement of his appeal as required after the appeal had lapsed. In this case, unlike in *Somaeb*, there was non-compliance with one relevant rule of the court. In *Somaeb*, the entire application suffered from serious deficits due to the lack of proper filing, which is not the case here.

[7] The argument that the appeal lapsed for the failure to address the application for condonation and reinstatement is untenable. The appeal lapsed when the appeal record was filed late, hence the application for condonation and reinstatement. As a matter of sound reasoning, the appeal having lapsed at that stage, there was nothing remaining which can lapse again. Simply put, the matter cannot lapse twice. The failures to file the record in conformity with the relevant rule of the rules of court and to deal with the application for condonation in the heads of argument have satisfactorily been explained. As regards the condonation application for the failure to file the record, the interval was a mere one day delay and Mr Chunga has not demonstrated that he was prejudiced thereby. Moreover, the prospects of success on

¹ 2017 (1) NR 248 (SC).

appeal appear to be good. Therefore, the applications for condonation ought to be granted. The merits of the appeal will be considered next.

Background facts and litigation history

[8] The facts giving rise to Mr Chunga's arrest are largely common cause. He was accused of participating in the violent and fatal attacks in Katima Mulilo under the auspices of the CLA. The attacks were planned and executed with the aim to achieve secession of the Zambezi region – as now known - from the rest of Namibia. The government ordered the arrest of members of the United Democratic Party (UDP), which was considered the political arm of the CLA. Mr Chunga was arrested and indicted for both planning the attacks and participating in them on that fateful day.

[9] The high treason trial that ensued was the largest criminal trial in the history of Namibia, with approximately 500 witness statements having been obtained. Of those, approximately 380 people testified on behalf of the State. About ten of the witness statements implicated Mr Chunga, in plotting and organising the attacks, including recruiting others to the cause. Mr Chunga was ultimately acquitted of the criminal charges and discharged in February 2013.

[10] In the High Court, Mr Chunga claimed damages against the Minister, the PG and the government for wrongfully setting the law in motion by arresting and laying charges against him in 1999. He argued that both the Minister and the PG lacked reasonable and probable cause to initiate the case against him. As against the PG, Mr Chunga claimed that the PG and her prosecutorial team lacked both reasonable

and probable cause, or alternatively, reasonable *belief* in the charges against him (my emphasis).

[11] Mr Chunga's alternative claim was for malicious continuation of the prosecution against the PG. He pleaded that the PG and her prosecutorial team should have stopped the prosecution from 1 February 2008, because they knew that all witnesses who should have testified against him had completed their testimonies by 31 January 2008. Finally, Mr Chunga claimed constitutional damages based on the alleged violation of his right to a trial within a reasonable time under Article 12(1) (b) of the Namibian Constitution.

[12] The Minister, the PG and the government pleaded that none of them had any improper motive in laying charges against Mr Chunga or in prosecuting him. It was further pleaded that the Namibian Police who resorted under the Minister had a reasonable suspicion to conduct their investigations and to arrest Mr Chunga. The PG pleaded that Mr Chunga could not prove the lack of reasonable and probable cause because the PG and her prosecutorial team believed in the strength of their case and the information at their disposal.

[13] Against Mr Chunga's argument that the PG should have secured his release under s 6(b) of the CPA, the PG pleaded that Mr Chunga, who was legally represented during the trial, should have brought proceedings for his release. Further, the PG pleaded that stopping the prosecution at that stage would have been 'risky and prejudicial' to the State's case.

[14] The Minister and the PG relied primarily on the evidence of Mr Taswald July, who was one of the lead prosecutors in the criminal trial. Mr July testified in the civil claim about the information available to the PG and her prosecutorial team as well as on the prosecution's strategy generally during the criminal trial. In this matter, the information at the disposal of the prosecutorial team at the time consisted of eight to ten witness statements mentioning and/or implicating Mr Chunga. When questioned during the trial, Mr July testified that Mr Chunga appeared to have had knowledge of the attack in Katima Mulilo, and actively recruited a witness, Mr Mushe Sinvula, to participate.

[15] The statements of Mr Solvent Muinjo Chunga and police officer, Commissioner Kalimbula, both implicated Mr Chunga in being part of a delegation that visited Mr Solvent Muinjo Chunga and assigning him to be the second in command for a planned attack at Mpacha Military Base. Mr Solvent Muinjo Chunga died before he could testify in the criminal trial. The statements of Mr Robert Sinvula Chizabulyo and Mr Chunga's aunt, Helvi Monghenda Buiswalelo, both pointed to Mr Chunga having fled to Zambia after the attacks. Although these witnesses did not testify at the criminal trial, their statements formed part of the materials available to the prosecution.

[16] During the civil trial, Mr Chunga's counsel questioned Mr July on when the prosecutorial team became aware of the death of witness Mr Solvent Muinjo Chunga as he was crucial to directly identifying and implicating the respondent. Mr July

testified that the evidence was assessed 'holistically' by the PG and her prosecutorial team. As a result, they did not rely solely or even primarily on Mr Solvent Muinjo Chunga's witness statement, and did not need his testimony to have a reasonable belief in Mr Chunga's guilt during the trial.

[17] Based on his testimony that evidence must be assessed holistically, Mr July also explained why the prosecution could not have been stopped earlier. According to him, by 31 January 2008, the PG and her prosecutorial team could not have known whether all potential witnesses implicating Mr Chunga had completed their testimonies, because there was a possibility that the co-accused could implicate him during the defence's case. Therefore, it could not be concluded that the singular lack of an identification of Mr Chunga in court meant that there was no further case against him by 31 January 2008.

[18] Mr Chunga maintained throughout that at least the statement of Mr Mushe Bevin Sinvula was fabricated. However, the High Court accepted the evidence of Mr July to the effect that the prosecutorial team had no reason to disbelieve Sinvula's statement implicating Mr Chunga. The High Court found in this respect that there were 'no sound reasons advanced by the plaintiff as to why the prosecution team had to disbelieve the statements under oath at their disposal. Mr July comprehensively set in (sic) the facts on which the decision by the second defendant was based to prosecute the plaintiff'.

[19] The High Court accepted Mr July's evidence that the PG and her prosecutorial team had made out a *prima facie* case against Mr Chunga. It defined a *prima facie* case with reference to *Freedom Under Law v National Director of Public Prosecutions & others*² as one where 'the allegations, as supported by statements and where applicable combined with real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the State on the basis of admissible evidence, the court should convict'.

[20] Therefore, the High Court concluded that Mr Chunga had not proved a lack of reasonable and probable cause on the part of the PG or her prosecutorial team in initiating the prosecution. Regarding malice, the High Court also found that Mr Chunga had failed to prove the relevant legal standard of *animus iniuriandi*.

[21] On the alternative claim, the High Court asked itself whether liability could be assigned to the prosecutor if 'during the course of the criminal prosecution it becomes clear that there is no probable cause to continue such prosecution'. The court referenced the finding in the first *Mahupelo* that the same standard for reasonable and probable cause set out in *Akuake v Jansen van Rensburg*³ applied in both initiation and continuation of a prosecution.

[22] On the facts, the High Court found that Mr Mushe Bevin Sinvula – a crucial witness – failed to identify Mr Chunga by 31 January 2008. Further, it held that there was 'no inculpatory evidence presented against the plaintiff during the criminal trial'

² 2014 (1) SA 254 (GNP) para 77.

³ 2009 (1) NR 403 (HC).

and that the statements of Mr Chunga's wife, Ms Bukandu Sundano, Ms Helvi Monghenda Buiswalelo and Mr Aldrin Moya Siezize – all of which were in possession of the prosecutorial team – did not implicate Mr Chunga. Further, the court found that the lack of witnesses who actually gave oral testimony implicating Mr Chunga was fatal to the prosecution's case. Therefore, the court *a quo* upheld Mr Chunga's alternative claim for malicious prosecution.

Arguments on appeal

[23] Counsel for the Minister, the PG and the government referred us to the evidence of Mr July where he said the prosecution relied, amongst others, on the doctrine of common purpose and that the prosecutorial team had at its disposal several witness statements implicating Mr Chunga. Mr July testified that the statements at their disposal led the prosecutorial team to honestly and reasonably believe that Mr Chunga possessed and executed a common desire with other members or supporters of the CLA to commit crimes.

[24] Counsel for Mr Chunga, on the other hand, argued that the evidence before the prosecutorial team did not meet the standard for common purpose, because the criminal law definition of 'common purpose' requires active association on the part of the co-perpetrators. As the only witnesses who testified against Mr Chunga did not place him in active association with the attacks in Katima Mulilo, he could not therefore be said to have acted in common purpose.

[25] Counsel for Mr Chunga acknowledged that the court *a quo* relied on the judgment of Christiaan AJ in the first *Mahupelo*, which judgment has since been reversed on appeal. However, counsel argued that the reversal of the first *Mahupelo* could not be a ground for reversing the High Court's decision in this matter on the alternative claim for malicious continuation of the prosecution.

[26] Counsel for Mr Chunga's principal submission was that the PG and her prosecutorial team, including Mr July, lacked reasonable and probable cause and an honest belief in Mr Chunga's guilt. Counsel relied on the fact that after the prosecutorial team had assessed the witnesses' testimonies in November 2010, it ordered the police to further investigate certain accused persons and no evidence was found against Mr Chunga. Therefore, so counsel argued, there was no evidence to have continued prosecuting him.

[27] Counsel for Mr Chunga also focused on the fact that the PG opposed Mr Chunga's application in terms of s 174 of Criminal Procedure Act for a discharge at the conclusion of the State's case. This, so counsel contended, was evidence of malice.

[28] Counsel for the Minister, the PG and the government argued that the prosecution could not have been stopped as of 31 January 2008, at the conclusion of the State's case, because it was possible for defence witnesses to implicate Mr Chunga. Given the unique nature of the trial, where 126 accused persons were tried

together, it was not unreasonable to believe that other co-accused could implicate Mr Chunga in the interconnected plot.

[29] Counsel for Mr Chunga countered that this belief was unreasonable in light of the consideration that the only two witnesses who could implicate Mr Chunga under the doctrine of common purpose – Mr Dunbar Mushwena and Mr Kabo Devil who both participated in the attack – were not co-accused. Further, counsel for Mr Chunga submitted that although there was a co-accused, Mr Samboma, who implicated Mr Chunga in his confession, that confession was ruled inadmissible. Therefore, so counsel concluded his submissions, it was unreasonable for the prosecutorial team to have believed that the case against the respondent could be strengthened during the defence's case.

Relevant legal principles

[30] It is at this point trite that a claim for malicious prosecution requires the plaintiff to prove the requirements outlined in *Akuake v Jansen van Rensburg*, that the prosecution was (a) initiated by the defendant; (b) without reasonable or probable cause; (c) with malice or an indirect and improper motive; (d) terminated in favour of the plaintiff; and (e) resulted in loss or damage to him or her. In this series of appeals, only the issues of the existence of reasonable and probable cause and malice are salient.

[31] This court has adopted Hawkins J's careful appraisal of the requirement of reasonable and probable cause in *Hicks v Faulkner*.⁴ The full definition requires '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'.

[32] Therefore, the requirement has both an objective and subjective element. Objectively, the information before the prosecutor must be sufficient for a reasonable person to conclude that the plaintiff had committed the crime or offence charged.

[33] Subjectively, the prosecutor must have had an honest belief in the plaintiff's guilt. However, as emphasised by Lord Denning, an honest belief is not the same as the belief of a judge or jury who sits in the criminal case. The requirement is one based on a notion of good faith and professional assessment, as the PG and/or her prosecutorial team must satisfy themselves that there is a 'proper case to lay before the court'.⁵

[34] Crucially for Mr Chunga's alternative claim, this court has specified that these standards do not change whether the claim is one for malicious initiation or continuation of a prosecution.⁶ The PG or her prosecutorial team must have

⁴ [1878] 8 QBD 167, in, for example, *Minister of Safety & Security v Makapa* (SA35-2017 [2020] NASC (5 February 2020) para 52.

⁵ *Minister of Safety & Security v Mahupelo* (SA 7-2017) [2019] NASC (28 February 2019) para 66.

⁶ *Id* para 58.

possessed reasonable and probable cause throughout the prosecution and at no point may they have been actuated by malice or an improper motive.

Assessment

[35] The High Court correctly found that the requirement of a lack of reasonable and probable cause on the part of the PG or her prosecutorial team is 'clearly . . . onerous . . . for a plaintiff to establish'. This is because, as this court explained, the PG exercises an independent, authoritative discretion in the decision to prosecute, which is central to the functioning of our criminal justice system.⁷ Therefore, this court will be slow to disturb it without being satisfied that the evidence was truly so deficient that the PG and her prosecutorial team lacked any reasonable grounds to believe it.

[36] Further, both Mr Chunga and the Minister as well as the PG correctly agreed that, given this court's decision in *Mahupelo*, Mr Chunga's only path forward is to draw factual distinctions between how his case and that against Mr Mahupelo were prosecuted. The high treason trial was a joint prosecution against 126 accused persons, making it difficult for Mr Chunga to successfully draw such distinctions to the standard required by law.

[37] On the facts, Mr Chunga sought to persuade us that when the prosecutorial team assessed the witness testimonies in November 2010, there was no material or information implicating him. This was based primarily on two considerations: first, that no witness positively identified Mr Chunga in court, and second that the confession of

⁷ Id para 32.

the only person who could tie him to the plot – should he have testified in accordance with the content of his confession - was held to be inadmissible. Counsel for Mr Chunga argued that the ruling on inadmissibility of the confession was crucial to judging the prosecution's actions as the prosecutorial team could no longer believe in any admissible evidence against Mr Chunga after 1 March 2010. Therefore, when the further investigation also turned up no new evidence, counsel contended, he should have been discharged under both the objective and subjective elements of the requirement of reasonable and probable cause.⁸

[38] Counsel's above argument found favour with the court *a quo* which, as noted in para [22] above, found that continuing with Mr Chunga's prosecution in the absence of evidence of identification and the lack of inculcating evidence generally against him at the criminal trial constituted malice on the part of the prosecution. The above approach and test applied by the court *a quo* are wrong. The distinction between civil and criminal standards that Lord Denning cautioned about bears repetition here, especially also in relation to the parties' arguments on admissibility and common purpose. Mr Chunga and the High Court both conflated the civil and criminal standards on this point. This court has adopted the approach of Hawkins J in *Hicks v Faulkner* that facts required to establish the actual guilt of the plaintiff/accused in the criminal case and those required to establish a reasonable *bona fide belief in the guilt of the plaintiff* in the civil case are different.⁹ In light of the conclusion reached on this aspect of the appeal, it is not necessary for this court to restate the principles of the doctrine of common purpose. It is sufficient to state that the information at the

⁸ See *Minister of Safety and Security v Makapa* para 52.

⁹ *Id* para 57.

disposal of the PG and her prosecutorial team was such that they could have had a reasonable and *bona fide* belief in Mr Chunga's guilt.

[39] The information before the prosecutorial team was not merely the evidence given in court during the criminal trial. It was also the information contained in the numerous witness statements attesting to Mr Chunga's activities prior and subsequent to the attack, especially allegations that he had recruited or tried to recruit others to join the attack in and/or around Katima Mulilo, his alleged escape to Zambia shortly after the attack, and his alleged interactions with his aunt after he was deported from Zambia. Therefore, the High Court misdirected itself to have found that the prosecutorial team lacked reasonable and probable cause to continue prosecuting Mr Chunga merely because of the absence of evidence of his identification during the criminal trial. In any event, Mr Chunga readily admitted in the civil trial that persons who mentioned his name in witness statements in relation to his alleged involvement in the attack were referring to him, adding though that the allegations made against him were false.

[40] Mr July also testified that the alleged inability to identify accused persons became a strategy on the part of multiple witnesses to undermine the State's case. Witnesses would claim in their statements that they could identify the relevant accused but would suddenly be unable to do so in open court. Mr July's testimony to this effect was not seriously questioned or undermined in the civil trial.

[41] Regarding malice, this court has established that the law requires the PG and her prosecutorial team to act with *dolus eventualis*, meaning that they were reckless to the consequences of their conduct towards Mr Chunga. Mr Chunga contended that continuing with the prosecution after 31 January 2008 demonstrated exactly such recklessness. However, as outlined above, not meeting the criminal standard to the satisfaction of the judge in the criminal case does not necessarily imply recklessness. Mr July's approach that the case and the evidence must be assessed holistically is undoubtedly correct. The High Court rejected Mr July's evidence why the prosecution against Mr Chunga was not stopped.

[42] Mr July stated that the prosecution adopted their strategy based on the multiple accused persons – the common purpose and conspiracy principles – and that it would have been prejudicial to the prosecution's case to stop the prosecution in the circumstances where Mr Chunga could be implicated by other accused persons. It was an error of law for the High Court to have rejected that evidence without it being refuted. It would appear that the High Court second-guessed the decision of the prosecution when Mr July's evidence was not contradicted.

[43] Mr Chunga's argument in response to the question of 'what had changed' in the State's case after 31 January 2008¹⁰ to persuade us to uphold his alternative claim is based largely on the legally insufficient evidence at the criminal trial. Given the distinction between civil and criminal standards and the issue of identification, we find that Mr Chunga has not persuasively addressed this question.

¹⁰ See *Mahupelo* para 82.

[44] The fact that the trial was of such a large and unique nature is also relevant to the malice inquiry. It was not as simple for the PG and her prosecutorial team to attempt to divide the trial after 31 January 2008 to discharge only Mr Chunga, when the initial indictment had been levied against all 126 co-accused acting in a conspiracy. While the prosecutor, of course, has a duty to individually assess the evidence against each particular accused, on the facts of this case it cannot be said that the prosecutorial team acted recklessly in refusing to sever Mr Chunga from the rest of the accused persons at the close of the State's case in January 2008.

[45] There is a further basis, aside from our own analysis of the facts, to reverse the High Court's ruling on the alternative claim. That is, its reliance on the High Court judgment in the first *Mahupelo*. That decision was reversed based largely on the issue of the development of the common law and the application of the wrong standards for the delict of malicious prosecution. Although Mr Chunga argued that the High Court in this case did not 'materially' rely on the first *Mahupelo*, the argument does not appear to be sound.

[46] The High Court explicitly adopted the finding in the first *Mahupelo* on the expansion of the common law. Further, the High Court judgment in this case endorsed the learned judge's criticism in the first *Mahupelo* of the conduct of the prosecutors as showing a 'poor understanding' of their constitutional duties. Having assessed the information at the disposal of the prosecutors against the relevant legal

standards, it cannot be accepted that reliance on the first *Mahupelo* did not materially affect the High Court's judgment.

Constitutional claim

[47] As earlier noted, Mr Chunga instituted a second alternative claim with regard to alleged violations of his constitutional rights, particularly under Arts 7 and 12. As can be observed from other civil matters arising from the high treason trial, the High Court in this matter also did not address the constitutional claim. We reiterate that it is important for the issue to be addressed by the High Court and for it to enjoy the benefit of being well-ventilated there before this court makes a final judgment. For these reasons, the constitutional issue will be remitted to the High Court.

Costs

[48] The High Court ordered the PG and the government to pay costs jointly and severally, in favour of Mr Chunga. This is wrong in law. We were informed from the Bar that counsel for Mr Chunga acted on instructions of the Director of Legal Aid. In *Mahupelo*, costs were similarly awarded against the governmental defendants. This court in *Mahupelo* explained why the High Court in that matter ought not to have awarded costs against the defendants (appellants in this court) in circumstances where the plaintiff (respondent in this court) was legally aided. Here too, for the reasons stated in *Mahupelo*, there can be no order as to costs against the respondent.

Order

[49] In the event, the following order is made:

(a) The application for condonation for the late filing of the record is granted and the appeal is reinstated.

(b) The application for condonation for the failure to address the application for condonation in the heads of argument is granted.

(c) The portions of the order of the court *a quo* upholding with costs Mr Chunga's alternative claim based on malicious continuation of the prosecution without reasonable and probable cause are set aside and substituted for the following order:

'(i) The plaintiff's alternative claim based on malicious continuation of prosecution without reasonable and probable cause is also dismissed.

(ii) No order as to costs is made.'

(d) The question regarding the constitutional claim is referred back to the High Court for determination in accordance with case management rules.

(e) No order as to costs is made.

SHIVUTE CJ

MOKGORO AJA

NKABINDE AJA

APPEARANCES

APPELLANTS:

I A M Semenya, SC (with him
N Marcus)

Instructed by Government Attorney

RESPONDENT:

P S Muluti (With him G Joseph)

Of Muluti & Partners