



REPORTABLE

CASE NO: SA 56/2018

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

SIMON ELVIN KAUHANO

Respondent

Coram: SHIVUTE CJ, MOKGORO AJA and NKABINDE AJA

Heard: 4 October 2019

Delivered: 20 May 2020

Summary: This appeal is against a judgment and order granted by the High Court in favour of Mr Simon Elvin Kauhano (the respondent) against the second appellant, the Prosecutor-General (the PG) and the third appellant, the Government of the Republic of Namibia (the Government). The decision against these appellants followed on a claim for malicious continuation of prosecution without reasonable and probable cause.

The High Court held that the PG maintained the prosecution of the respondent maliciously and without reasonable and probable cause beyond November 2007. It also held that the Government was vicariously liable for the conduct of the public prosecutors who conducted the criminal proceedings against the respondent. The court then ordered that the two appellants were liable to the respondent for damages.

In this court, the appellants argued that the court *a quo* misdirected itself when it held that the PG and her team lacked reasonable and probable cause and acted with malice when the prosecution of the respondent was maintained beyond November 2007. It was also contended that on the evidence on record, the PG and her team had an honest belief in the guilt of the respondent. The information contained in the witness statements established reasonable and probable cause to maintain the prosecution of the respondent.

The respondent supported the judgment of the court *a quo* and submitted that the prosecution was aware that witnesses had failed to identify the respondent in court and that there was no inculpatory evidence against him. Despite this, the prosecution of the respondent was maintained until his discharge. This conduct showed that the PG and her team did not have an honest belief in the guilt of the respondent.

Held, that the submissions as well as contentions made on behalf of the respondent were based on the wrong approach to assessing evidence in a claim for malicious prosecution.

Held, that the test for determining the conviction of an accused person in a criminal trial was inherently distinct in nature from that employed in cases of malicious prosecution.

Held, that the criminal court focused on the question whether the evidence established the guilt of the accused beyond reasonable doubt whereas the civil court in a claim for malicious prosecution was pre-occupied with the question

whether on the facts and evidence on record, the prosecution had been instituted and/or maintained without reasonable and probable cause and actuated by malice.

Held, that the information contained in the witnesses' statements on the basis of which a decision to prosecute the respondent was taken, if found to be true, indeed established a reasonable and probable cause for the institution and maintenance of the prosecution. The appeal succeeded.

APPEAL JUDGMENT

SHIVUTE CJ (MOKGORO AJA and NKABINDE AJA concurring):

Introduction

[1] This matter is yet another one in a series of appeals by the governmental appellants against the judgments and orders of the High Court in favour of persons who were discharged in a protracted high treason trial in the High Court and who subsequently sued the said appellants for alleged malicious prosecution. In this appeal Mr Simon Elvin Kauhano (the respondent), instituted action against the Minister of Safety and Security (the Minister), the Prosecutor-General (the PG) and the Government of the Republic of Namibia (the Government) for the alleged malicious prosecution, alternatively malicious continuation of his prosecution. The main claim was dismissed by the trial court and no cross-appeal has been lodged against that part of the judgment. The alternative claim for 'malicious continuation of prosecution without reasonable and probable cause' succeeded only against the PG and the Government. In this judgment the Minister, the PG and the Government will be referred to collectively as 'the appellants.'

[2] The respondent also sought constitutional damages against the appellants in the event that the main claim and the first alternative claim for malicious prosecution failed. However, the constitutional claim was not dealt with as the case was disposed of by the grant of the first alternative claim for malicious continuation of the prosecution.

[3] The High Court found that the PG maintained the prosecution of the respondent maliciously and without reasonable and probable cause beyond November 2007. It also held that the Government was vicariously liable for the conduct of the public prosecutors who led the State's case during the criminal trial. The court proceeded to find that the two appellants were liable to the respondent in damages. As the merits were separated from the quantum, the quantum of damages was not decided. The present appeal is thus directed against the findings relating to liability.

The brief facts and proceedings in the High Court

[4] The relevant background facts and circumstances giving rise to the litigation between the parties are that on 2 August 1999, individuals who either belonged to or were sympathetic to a formation called the Caprivi Liberation Army (CLA) mounted a violent attack on several State installations at or around Katima Mulilo. That attack was aimed at advancing the plot to secede the then Caprivi region (now Zambezi) from the rest of Namibia. The attack resulted in the death of several people, injury to some and damage to property.

[5] The respondent together with other suspects numbering over a hundred were then arrested and in due course were arraigned on numerous charges arising out of the attack. The more serious crimes for which they were indicted included high treason, sedition and murder. The allegations against the respondent were that he provided money to the CLA, gave food and transport to the members of the CLA and facilitated the recruitment of people into joining the outfit. The respondent denied all the allegations against him, asserting that he did not participate in any of these alleged illegal activities nor did he associate himself with the secessionist plot in general. He was discharged in terms of section 174 of the Criminal procedure Act 51 of 1977 (the Act) after the end of the prosecution case.

[6] In respect of the claim for malicious prosecution, the respondent alleged that the Minister and the PG did not have reasonable and probable cause to initiate the prosecution against him. He asserted that arresting officers under the supervision and control of the Minister provided false statements concerning his alleged role in the secession plot, resulting in his unlawful arrest, detention and resultant prosecution. As against the PG, the respondent pleaded that the PG had no justification in instigating his prosecution as she did not have sufficient information substantiating the charges proffered against him.

[7] As regards the claim of malicious continuation of prosecution, the respondent pleaded that the PG was malicious in persisting with the criminal trial whilst being aware that the witnesses who testified against him failed to implicate him in the alleged commission of the offences. The respondent further pleaded

that neither the PG nor the team of prosecutors who conducted the actual prosecution had an objective ground to maintain the prosecution from November 2007 or within a reasonable time thereafter as there was no reasonable prospect of a successful prosecution.

[8] As to the constitutional damages claim, the respondent alleged that the appellants violated his constitutional rights, particularly Art 12 of the Namibian Constitution. The respondent claimed that his arrest, detention and resultant prosecution were instituted maliciously and without reasonable and probable cause.

[9] The appellants conceded that they laid the charges against the respondent, but denied that the initiation of the prosecution was done without reasonable and probable cause. They further denied that the prosecution was motivated by improper conduct. They pleaded that the initiation of the prosecution was founded upon a *bona fide* and reasonable suspicion that the respondent had committed the offences and crimes contained in the indictment.

[10] The appellants further averred that the respondent failed to establish facts for the alleged malicious continuation of his prosecution. In their defence, the appellants pleaded that on the strength of the facts and the evidence collected against the respondent, the PG had a reasonable and probable cause to maintain the prosecution up to the stage of the respondent's discharge. The appellants also pleaded that the PG had an honest belief in the guilt of the respondent on the

basis of the witness statements and other evidence procured prior to and during the criminal trial. They also contended that the basis of the prosecutors' belief in the respondent's guilt stemmed from the consideration that the respondent and the co-accused were indicted on the bases of the doctrine of common purpose and conspiracy.

[11] In opposing the constitutional damages claim, the appellants asserted that the remedy sought by the respondent was an inappropriate constitutional remedy. They pleaded that Art 12 of the Namibian Constitution specifies both a right and remedy for a breach. The remedy afforded to an accused by that Article was to be released from trial and as such, an award for damages did not constitute an 'appropriate relief' in the circumstances, so the appellants contended.

[12] In dismissing the claim for malicious prosecution, the High Court held that the respondent had not proved a lack of reasonable and probable cause on the part of the Minister and the PG in the initiation of the prosecution. The court reasoned that the evidence on record justified the initiation of the prosecution. The court further held that the respondent gave no evidence of alleged malice on the part of the appellants. As stated earlier, the judgment dismissing the main claim has not been appealed against.

[13] After evaluating the evidence, the High Court held that although the initiation of the criminal proceedings against the respondent 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 this 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.

[14] The contention advanced by the respondent and upon which the court granted the claim for the alleged malicious continuation of the prosecution was broadly this: The crucial witnesses called on behalf of the State failed to identify the respondent in court during the criminal trial. The PG also failed to establish inculpatory evidence on the part of the respondent or anyone associated with him in the alleged commission of the offences. In reaching its conclusion, the court based its reasoning on the findings made in the judgment of the criminal court when that latter court was seized with an application in terms of s 174 of the Act, in which it concluded that there was 'no evidence which proves the commission of any crime by [the respondent].'

[15] In so far as the question of malice was concerned, the civil court held that there was evidence of malice on the part of the prosecutorial authority. The court inferred malice on the set of facts and circumstances, assuming them to be true, that the PG maintained the prosecution despite the lack of evidence implicating the respondent. It also inferred malice from the PG's opposition to the application for a discharge brought by the respondent pursuant to s 174 of the Act.

[16] Upon the trial court granting the respondent's claim for maliciously maintaining the prosecution without reasonable and probable cause, it elected not

to decide the constitutional claim. This, then, is the background to the appellants' case before us.

[17] With that background it is appropriate to now consider the grounds advanced against the findings of the court *a quo*. The parties' submissions on appeal are dealt with first. This is to be followed by the consideration of the principles relating to claims for malicious prosecution and the correct approach to evidence in those types of claims. The judgment will then conclude with the application of the law to the facts. We must, however, at the outset identify the legal issues that call for decision.

Issues for decision

[18] The first issue in this appeal is whether the PG or the prosecutors delegated by the PG maintained the prosecution of the respondent without reasonable and probable cause. The other issue is whether the appellants are liable to the respondent for constitutional damages, in the event that the claim for malicious continuation of the prosecution fails.

Submissions before this court

[19] Counsel for the appellants submitted that the court *a quo* misdirected itself when it held that the PG and her team lacked reasonable and probable cause and acted with malice when the prosecution of the respondent was maintained beyond November 2007. Counsel contended that on the evidence on record, the PG and her team had an honest belief in the guilt of the respondent. Counsel referred us to the information contained in the witness statements, which according to him

formed the firm foundation for the reasonable and probable cause to maintain the prosecution of the respondent.

[20] Counsel for the appellants argued that the respondent together with his co-accused persons were charged on the bases of conspiracy and common purpose. Further, the statements obtained from various witnesses implicated the respondent for the role he played in furthering the aims and objectives of the secessionist plot. On these bases, so counsel contended, the respondent had 'actively associated himself with the execution of the common purpose' and further had 'conspired with others' to commit the offences and crimes he was prosecuted for. Counsel thus submitted that a case based on the doctrine of common purpose and conspiracy had been made out against the respondent.

[21] Counsel further maintained that it was incorrect for the respondent to contend that the evidence against him ended on 23 November 2007. He submitted that as the prosecution relied on the doctrine of common purpose and conspiracy, the criminal conduct of the respondent's erstwhile co-accused was imputed to him if it can be shown that he had actively associated himself with the conduct of the other accused persons. It is for this reason that it could have been risky and prejudicial to the State's case to stop the prosecution at any of the stages proposed by the respondent. This, according to counsel, was because there were instances where witnesses implicated certain accused persons that they did not refer to in their written statements to the police.

[22] In turn counsel for the respondent countered that the appellants' above contentions were not borne out by evidence. In support of the judgment of the court *a quo*, counsel for the respondent submitted that the prosecution was fully aware that State witnesses had failed to identify the respondent in court and further that there was no inculpatory evidence against him either. Despite knowledge on the part of the prosecuting team, the prosecution of the respondent was maintained until his discharge. Counsel contended that this conduct showed that the PG and her team did not have an honest belief in the guilt of the respondent.

[23] In both his written and oral submissions, counsel for the respondent contended that the prerequisites laid down in authorities relating to the doctrine of common purpose were not satisfied for a finding that the PG had a reasonable cause and honest belief in maintaining the prosecution up to the discharge of the respondent to be made. Counsel referred us to *S v Mgedezi & others*¹ and argued that the invocation of the doctrine of common purpose was not supported by the available evidence, measured against the principles set out in that case.

[24] Counsel for the respondent further submitted that the contention by the appellants that there was a possibility that the State's case could be strengthened during the defence case was not founded on reasonable grounds. He claimed that such a belief was entirely based upon speculation and thus could not have been reasonably held by the PG or her team. Counsel argued that had the prosecutorial team regularly appraised the evidence against the respondent, they could have

¹ 1989 (1) SA 687 (A).

established that there was no case at all to be supplemented. As such the prosecution could have been terminated on 23 November 2007 or soon thereafter.

Legal principles and their application to the facts

[25] The above and other similar submissions as well as contentions made on behalf of the respondent are clearly based on the wrong approach proffered by the respondent and upheld by the court *a quo*.² As was stated by this court in *Minister of Safety and Security & others v Mahupelo*³ and the subsequent judgments⁴ on the point, the test for determining the conviction of an accused person in a criminal trial is inherently distinct in nature from that employed in cases of malicious prosecution. The criminal court focuses on the question whether the evidence establishes the guilt of the accused beyond reasonable doubt whereas the civil court in a claim for malicious prosecution is eminently pre-occupied with the question whether on the facts and evidence on record, the prosecution was instituted and/or maintained without reasonable and probable cause and actuated by malice.

[26] Malice in malicious prosecution cases is some other motive other than a desire to bring to justice a person whom the prosecutor honestly believes to be guilty. It must be proved that the prosecutor had a desire different from that of

² As evident from its reasoning, the High Court persistently measured the evidence before it through the prisms of a criminal trial, thus adopting a wrong approach and applying an incorrect test.

³ 2019 (2) NR 308 (SC). It should be mentioned that counsel for the respondent accepted, at the outset, that he supported the decision of this court in *Mahupelo*.

⁴ Such as *Minister of Safety & Security v Mutanimiye* (SA47-2017) [2020] NASC (5 February 2020); *Minister of Safety & Security v Makapa* (SA35-2017) [2020] NASC (5 February 2020); *Minister of Safety and Security v Chunga* (SA1-2018) [2020] NASC (7 May 2020).

bringing an offender to justice. Although in appropriate cases, malice can be inferred from want of reasonable and probable cause, acquittal in the criminal trial is not synonymous with lack of reasonable and probable cause. A plaintiff in a malicious prosecution claim is required to prove that the prosecutor acted out of malice, as opposed to the desire to pursue justice.

[27] It will be recalled that in granting the respondent's claim, the court *a quo* held that on the strength of the facts and the evidence on record, the PG had no justification in continuing with the prosecution as the respondent was not identified by witnesses. The court also found that there was no direct evidence implicating the respondent and for those reasons the PG lacked reasonable and probable cause to maintain the prosecution of the respondent.

[28] In our view, and having regard to the information contained in the witnesses' statements, the failure by the witnesses to identify the respondent in court, was not the correct standard for determining whether there was reasonable and probable cause in a claim for malicious prosecution. The information contained in the witnesses' statements⁵ on the basis of which a decision to prosecute the respondent was taken, if found to be true, indeed established a reasonable and probable cause for the institution and maintenance of the prosecution.

[29] The information contained in the witness statements may be summed up in a single narrative. The respondent facilitated the recruitment of people in the

⁵ Made by Usheal Kabende, Mwabi Sydney Mutwaezi, Christopher Lifasi Siboli, Abigail Ponahazo Otela and Lungameni Stephanus Shilumbu.

region to join the CLA formation with an apparent purpose of achieving secession of the region from the rest of the country. He was further accused of providing food, money and transport to the outfit. The witness statements also recorded that the respondent would from time to time disappear from and return to the village with persons believed to be either rebels or sympathisers of the secessionist movement. The witness statements further recorded that the police received information from the public that a rebel camp had been set up in the bush. Following up on that information, law enforcement agencies raided the camp resulting in the arrest of the respondent. His footprints were allegedly traced from the rebel camp to his place of abode in the village. This is the information at the disposal of the prosecution prior to and during the criminal trial.

[30] As to the issue of the failure to identify the respondent in court, Mr Taswald July, one of the prosecutors who had the conduct of the criminal trial also testified on behalf of the appellants in the civil claim. Mr July stated and his evidence in this regard was not gainsaid, that it became a strategy for witnesses to say during consultations that they would be able to identify the particular accused person referred to in their statements. When asked to identify such person in court they would fail to do so. This, he believed, could be attributed to close familiar relations amongst some of the witnesses and accused persons or simply to fright on the part of the witnesses concerned.

[31] Although it is not in dispute that the respondent was not identified in court and further that the investigation carried out in 2011 did not yield any inculpatory evidence against the respondent, the information in the witness statements

assessed in its entirety, in our view, establishes that the PG had an honest belief in the guilt of the respondent. What the PG, however, failed to do as both the criminal court and the court *a quo* correctly reasoned was to establish sufficient evidence to secure the respondent's conviction for the purpose of criminal law. That, however, is not the concern of the civil court in a trial in an action for malicious prosecution or malicious continuation of a prosecution.

[32] Counsel for the respondent was asked, during oral submissions, to draw material factual differences in the present matter and those in this court's decision in *Mahupelo*. Counsel was at pains to locate material factual distinctions between these matters. The very least counsel could suggest was that the prosecutors failed to treat the respondent as an individual. Instead, he was treated as part of a wider network of people that were arrested and charged together on similar charges.

[33] This contention, however, is not borne out by evidence. Although the respondent was jointly charged with over a 100 co-accused persons - on the basis of the doctrine of common purpose and conspiracy - individual assessment of the evidence was conducted against each accused person. This much is apparent from the evidence of Mr July. He testified in this respect that the prosecutors reviewed the evidence and withdrew charges against some accused persons whose continued prosecution could not be maintained on the information at their disposal. Mr July's evidence on this score was again not at all contradicted and there is no basis to question its veracity. It must therefore be accepted.

[34] We have considered the evidence adduced and facts established in the civil trial and came to the conclusion that the information at the disposal of the prosecution established reasonable and probable cause to maintain the prosecution. Looking at the facts of this case, there is no evidence pointing to malice on the part of the prosecutors when they maintained the prosecution of the respondent up to the stage of his discharge.

[35] We thus conclude that the court *a quo* erred in finding that, on a balance of probabilities, the respondent had established that the PG lacked reasonable and probable cause and acted with malice to maintain the respondent's prosecution up to the discharge stage in the criminal trial. What remains to be considered is the issue of constitutional damages and it is to this matter that the focus of the enquiry should now turn.

Constitutional damages claim

[36] As it will undoubtedly be recalled, besides seeking a claim based on malicious prosecution, the respondent also sought constitutional damages against all the three appellants in the event that the main claim fails. However, the court *a quo* did not decide this issue for the reason that the respondent's claim based on maliciously maintaining the prosecution had succeeded.

[37] During oral submissions, both parties referred us to the decision of this court in *Mahupelo* and submitted that the constitutional damages claim should be remitted to the High Court for determination. We agree. For the good reasons

expounded in *Mahupelo*, the constitutional damages claim will be remitted to the High Court for determination.

Costs

[38] Having noted that a costs order was made in favour of the respondent in the court below, we drew counsel's attention to the provisions of s 18 of the Legal Aid Act 29 of 1990 and invited them to address us on the issue of costs in light of this provision. Counsel appearing for the respondent informed us that he argued the appeal on the instructions of the Director of Legal Aid and that in those circumstances the respondent had abandoned the prayer for costs in the event that the appeal is dismissed. In light of this development and on the basis of what was stated in *Mahupelo* in dealing with the issue of costs where a party was legally aided, no order as to costs can be made on appeal. It follows also that the court below ought not to have made a costs order in the proceedings before it.

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

- (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 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.’

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

(d) No order as to costs is made.

SHIVUTE CJ

MOKGORO AJA

NKABINDE AJA

APPEARANCES:

Appellants:

I A M Semanya SC (with him N
Marcus)

Instructed by Government Attorney

Respondent:

T C Phatela (with him G Joseph)

Instructed by Muluti & Partners