REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1361/2004

In the matter between:

DANIEL JACOBUS GERHARDUS PRINS

PLAINTIFF

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **DEFENDANT**

Neutral citation: *Prins v The Government of the Republic of Namibia (I 1361/2004) [2013] NAHCMD 259 (2013)*

Coram: SMUTS, J

Heard: **4 – 8 FEBRUARY 2013, 14 FEBRUARY 2013, 4-5 APRIL 2013 AND 15 APRIL 2013**

Order: 18 September 2013

Flynote: Action for malicious prosecution, for damage to crops allegedly caused by police conducting search and seizure and a vindicatory action for the return of items seized by the police. Absolution granted in respect of the claim for damage to crops. Court found

that the requisites for an action for malicious prosecution not established by the plaintiff. Nor did the plaintiff establish his claim for the return of items claimed in his vindicatory action. Action dismissed with costs

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ORDER

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1) Claims one and two are dismissed with costs.
2) The above cost orders includes the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

[1] This matter has its origins in the arrest and incarceration of the plaintiff and seizure of items by members of the Namibian Police at a farm called Simonsvlei in the Omusati Region of Namibia in March 2001. The trial however proceeded in 2013, for reasons which soon became apparent. The witnesses testified to events which had happened some 12 years previously.

[2] The plaintiff instituted three claims against the Government of Namibia. The first claim is of a vindicatory nature for the return of items seized in March 2001 or their value, alleged to be in the sum of N$346 321, 23. The second claim was in respect of damages caused by flooding to the crops of the plaintiff in the sum of N$244 847. The third claim is for malicious prosecution and is in the total sum of N$459 505.

The pleadings

[3] In the amended particulars of claim, the plaintiff alleges that during or about the beginning of March 2001 and near Outapi a certain Constable Willem Haufiku wrongly, unlawfully and maliciously set the law in motion by laying and instigating a false charge of theft against the plaintiff. It is further alleged that when laying or instigating the charge and in the subsequent police investigation, Constable Haufiku had no reasonable probable cause for doing so. It is also alleged that he did not have any reasonable belief in the truth of the information given or received.

[4] It is alleged that as a result of his conduct, the plaintiff was unlawfully and maliciously arrested on 8 March 2001 at the Ruacana Police Station and held in custody for six days. It is also alleged that members of the Namibian Police including Constable Haufiku unlawfully and maliciously seized or removed a number of movable items being in the property of the plaintiff from the farm Simonsvlei and refused to return them. It is also alleged that the plaintiff's crops were flooded as a result of the removal of certain of the items by the police. It is also alleged that the plaintiff was released on bail and incurred travelling expenses to report to the relevant police station in terms of the bail conditions and also incurred legal costs to defend himself and sustained general damages as a result of his deprivation of freedom, defamation and discomfort (arising from the alleged malicious prosecution).

[5] The lists of items which the plaintiff contends were seized by the police are set out to an annexure to the particulars of claim. It is alleged that their value is in the sum of N$346 321, 23. The plaintiff accordingly seeks the return of the items or payment of that value in claim one in the form of vindication.

[6] In claim two, the plaintiff contends that members of the police knew or would have known that the items removed were not only utilised to irrigate the plaintiff's crops but also to prevent flooding. It is contended that despite this knowledge, the police had unlawfully, maliciously or negligently seized the items which then resulted in the plaintiff's crops being damaged due to flooding. In claim two, the sum of N$244 487 is claimed.

(g)

[8] In claim three for malicious prosecution, the total claim amount of N$459 505 is broken down into legal costs in the sum of N$150 000 to defend himself, travelling costs to report for bail and for postponements in the sum of N$109 050 and general damages in the sum of N$200 000.

[9] In the defendant's plea, it is admitted that Constable Haufiku laid a charge of theft or possession of stolen property against the plaintiff on 1 March 2001 at Outapi and that the plaintiff was arrested on 8 March 2001 and held in custody for the period alleged by the plaintiff. But the defendant denies that the arrest was unlawful or carried out maliciously.

(j)

[11] The defendant further denies that there was any wrongful or malicious seizure of items or that there was a malicious prosecution of the plaintiff. The defendant admits that certain items were seized and removed from the farm Simonsvlei by members of the Namibian police and admits that the defendant refused to return these items despite the demand to do so. The defendant however pleads that members of the police were entitled to remove the items because of a reasonable suspicion held that they were stolen. The defendant specifically denied the correctness of annexure "A" to the particulars of claim which sets out the items.

[12] As to the second claim, the defendant stated that it had no knowledge of the flooding but specifically denied that flooding would have been caused as a result of the removal or seizure of the items. The defendant further pleaded that the plaintiff could in any event have taken steps to prevent crops from being flooded.

[13] The issues were further narrowed in the course of case management, culminating in the proposed pre-trial conference order which came before court on 31 October 2012 when the matter was postponed for trial on 4-8 February 2013. The parties agreed that the evidence in chief of their respective witnesses would be provided in affidavit form prior to the trial. This occurred and served to shorten the proceedings. But they were not concluded by 8 February 2013 and the matter was postponed to 14 February 2013. It proceeded again on 4 and 5

April 2013 when the evidence was completed. It was subsequently postponed to 15 April 2013 for argument.

(n)

[15] The plaintiff, his wife and daughter Sonja Prins as well as Messrs Jerobeam Iileka and Olaf Marais gave evidence for the plaintiff.

(p)

[17] At the close of the plaintiff's case, the defendant applied for absolution in respect of all three claims. Absolution was however granted in respect of claim 2 only.

[18] After the matter had adjourned and resumed and during the defendant's case, Ms Visser, who appeared for the plaintiff, indicated that the plaintiff would apply for the reopening of his case because the plaintiff had omitted to lead evidence on the value of the items removed. The values were relevant for the alternative claim to claim one. The application to adduce further evidence was then heard at the end of the defendant's case. It was not opposed by the defendant. An expert summary had been provided and Mr Hinda SC, who appeared on behalf of the defendant, indicated that the defendant would not dispute the value for the items set out in the expert summary provided on behalf of Mr Swartz. The values of the items set out in annexure "A" to the particulars set out in the summary were then admitted.

(s)

[20] The defendant called six witnesses. They were Ms L.N. Antonio, Messrs M.A. Kautumbwa, Joel Tjapa, Lazarus Alfred, F.R. Da Cunha and Willem Haufiku. The evidence in respect of plaintiff's case is first referred to and short reasons will be provided for absolution in respect of the second claim. The evidence given on behalf of the defendant will then be summarised whereafter the requisites for the respective remaining claims will be set out and the evidence analysed.

The evidence

[21] The plaintiff testified that he is a South African national with permanent

residence in Namibia. He had acquired rights to farm an area in the Outapi district during the 1990. He debushed the farm and planted fruit and vegetables which he cultivated by using an irrigation system. He produced watermelons, sweet melons, pumpkins and butternuts on the farm which was called Simonsvlei.

[22] He first stated under oath that between 6-8 March 2001 he, accompanied by his wife and a certain Piet Fourie, travelled to Ondangwa to collect a plough. He said that when he established that the plough had not been delivered, he decided to proceed to Windhoek by air with Mr Fourie and his wife travelled back to the farm. He said that their daughter had sent his wife a text message and informed her that there were problems at the farm with several armed police officers and Namibia Defence Force (NDF) soldiers looking for Mr Fourie and himself. He stated that, as he and Mr Fourie were already on their way to Windhoek, he decided to consult a lawyer, Ms Sandra Miller, in Windhoek. He said that after he consulted with Ms Miller on 8 March 2001, he returned to northern Namibia with her and they proceeded straight to the Ruacana Police Station where he was arrested by Constable Haufiku without a warrant of arrest.

(w)

[24] This sequence leading to his arrest was contained in the original affidavit deposed to by him in January 2013. He deposed to a supplementary affidavit on the day before the trial in which he stated that he had in fact proceeded to Ondangwa on 2 March 2001 and that he and Mr Fourie decided to stay on in Ondangwa until 5 March 2001 to await the arrival of the plough and only then travelled to Windhoek and then consulted with their legal representative, Ms Miller. I return below to the importance of this deviation from the earlier affidavit made by the plaintiff.

[25] The plaintiff testified that an application for bail commenced on Friday 9 March 2001 and ended on 12 March 2001 when he (and Mr Fourie) were granted bail in the amount of N$30 000. Certain further conditions were attached to his bail including reporting twice a day at the Outapi Police Station. This condition was maintained for the following six months. He was also required to

surrender his travel documents and not permitted to leave the Outapi district without the permission of the prosecutor.

[26] Upon his release from custody he returned to his farm and found that his irrigation equipment had been uprooted and all irrigation pipes as well as pumps had been seized and removed. He also observed that his crops had been flooded. He said that as a result of flooding, the crops had perished. He also said that he had never been provided with a copy of the Pol 7 form used by the police in respect of items which were seized. He said that as a consequence of the experience, he suffered emotional stress and developed high blood pressure as well as diabetes. He also did not harvest for some six months afterwards. He thereafter resumed his farming enterprise.

[27] After some time, not specified, he said that the criminal case was transferred from Outapi to Oshakati and his passport was returned to him and the reporting conditions were scrapped. On 25 June 2003 the charges were withdrawn. He thereafter instituted his action against the defendant on 16 June 2004. Pleadings closed and it was set down for hearing on 26-27 June 2007. But before it could proceed, a new summons was issued against him to appear on criminal charges on 17 June 2007. It was agreed that the civil trial would be held in abeyance pending the finalisation of the criminal trial which was then postponed on several occasions. On 16 December 2010 the charges were put to the plaintiff and Mr Fourie and the State closed its case. They were then acquitted in terms of s 174 of the Criminal Procedure Act, 51 of 1977.

[28] The plaintiff then went to the Ruacana Police Station to collect the items which had been confiscated from the farm. He noticed that several items which, according to him had been removed, were missing. These included pipes, nozzles, galvanised pipes, non-return valves, sprinklers and the like. Certain machines which were there had, according to him, rusted. The plaintiff said that the John Deere and Lister engines had been built by Mr Fourie and himself from scrap and had been rebuilt by his neighbour, Mr Olaf Marais, who was at that stage working for Hoffmann Farm Implements in Otjiwarongo. He said it was thus impossible for him to produce a receipt for items which had been built from

scrap and items which had been purchased some 30 or 40 years before such as the irrigation pipes systems and machines which he had brought from South Africa.

(cc)

[30] He said that certain broken ploughs and a trailer referred to in the charge sheet were brought to him by Mr Iileka who was at the time employed at the Mahenene Government Research Station as an acting manager. The latter done so to request Mr Prins to repair them. He said that fertiliser which had been seized by the police had been purchased from the Outapi agricultural offices and that he had some receipts for these. He denied that the engines and pipes and other items which had been taking from his farm by the police had been stolen from the Government of Namibia.

(ee)

[32] In cross-examination, he ascribed the differences in his two affidavits as to dates to a misunderstanding to his lawyer and himself. It also emerged in his cross-examination that Mr Iileka was his business partner and that the purchase of the plough (which the plaintiff had gone to collect at Ondangwa) had been obtained as a result of a loan which had been secured through Mr Iileka from Agribank.

(gg)

[34] The plaintiff was evasive in explaining why he had stayed on in Ondangwa until 5 March after his wife had returned to the farm. After avoiding the question, he stated that he had awaited the arrival of the plough so that he could accompany the truck carrying it to the farm. He confirmed that he and Mr Fourie did not return to the farm but stayed instead at Ondangwa and later travelled by air from Ondangwa on 5 March 2001. He said that he did not have any telephone conversation with his wife or with the investigating officer, Mr Haufiku, about the events at the farm and as to the fact that the police were looking for Mr Fourie and himself until after 5 March and said he only heard this from her after he had arrived in Windhoek. He said that he did not have a cellphone and that he first spoke to his wife telephonically in Windhoek, after seeing his lawyer and requested her to fetch him so that they could return together to northern Namibia, in the company of his lawyer and then approach the investigating officer.

(ii)

[36] He confirmed that when he was arrested, his rights were read to him and that he was charged with theft of government equipment or being in possession of stolen property. He said he had offered a file of documents to the investigating officer which was rejected by him. He testified that he however declined to make a statement to the police when his warning statement was made at the time in the presence of his lawyer. He chose rather to exercise his right to remain silent.

(kk)

[38] In cross-examination, he conceded that his file did not contain reference to serial numbers of the pumps which had been seized by the police. It was put to him that his documentation could not demonstrate ownership of centrifugal pumps with the serial numbers. He also said that there were two pumps on the farm which belonged to somebody else. When asked about a certain disc plough with a specific serial number, he stated that it was not his property but it belonged to the Mahenene research station as well as another plough. He said that these had been brought to him for repair.

[39] It was also not clear as to whether the receipts for certain of the fertiliser bags were those which had been seized by the police. As far as the repair of the trailer and plough are concerned, he confirmed that these had been brought to him by Mr Iileka. He also confirmed that he had not been awarded a tender to do the repairs. Nor had he been given any quotation for those repairs. He also could not recall when those items had been brought to him by Mr Iileka. He confirmed that these items had been found by the police on his farm and that they constituted government property being that of the Mahenene research station.

(nn)

[41] The plaintiff also stated that whilst he was in custody there had been heavy rains in the area and that there had been flooding. It was put to him that the heavy rain could have also caused the flooding on his farm and he accepted that. The plaintiff also accepted that heavy rains could cause big losses and damage to crops.

[42] When the plaintiff was questioned concerning the discrepancies between

the Pol 7 form and annexure “A” to the particulars of claim, he stated that when his list, annexure “A”, had been compiled he did not have any idea what was on the Pol 7 as this had not been disclosed to him throughout the criminal proceedings. He had also prepared his list after he had been released from custody based upon his recollection and what had remained on the farm. Although he was not present when the police had conducted the search and seizure operation on the farm, he said that he compiled the list after being released from custody and had assumed that those items which were missing had been taken by the police. When asked about certain of the engines on the farm, he stated that these had been brought as scrap to the farm by Mr Fourie and himself. He said that they had accumulated scrap at different sales from time to time but could not provide proof of those. Nor could he remember when certain of the items had been brought to onto the farm, such as the John Deere tractor engine which he stated had been built from scrap.

[43] The plaintiff called Mr Olaf Marais. He testified that on 3 July 2000 Mr Prins and Mr Fourie brought an old Lister engine to him to repair. After he had performed the repairs, he painted the engine green and returned it to Mr Prins’ farm. He also testified that on 8 September 2000 he had worked upon a John Deere engine which had been at the plaintiff’s farm. He had transported the engine to Otjiwarongo and repaired it there. He worked at the time as a mechanic at Hoffman’s Farm Implements at Otjiwarongo.

(rr)

[45] During cross-examination, Mr Marais stated that he is a friend of Mr and Mrs Prins and had on 3 March 2001 advised Mrs Prins to request a warrant from a police officer who had attended at the Farm Simonsvlei on that day. He also said that the machines which were brought for repairs were not in working order. He was unable to shed any light upon the serial numbers of the machines and stated that this would not have been something he would have considered or noted at the time of the repairs. He also stated that he had no idea as to where Mr Prins or Mr Fourie had obtained the engines. He finally stated that the painting of the engine occurred as a matter of course upon the completion of repairs.

[46] The plaintiff then called Mr Jerobeam Iileka. He was employed at the Mahenene Research Station since 1984. He served as a manager from 1995 until 2001. He testified that he became acquainted with the plaintiff when the research station had provided the plaintiff with ploughing services. He further stated that he had, in his capacity as a manager of the research station, instructed the plaintiff to fix the trailer and ploughing discs which belonged to the research station. He had delivered these to the plaintiff for this purpose. It was while these items were in the plaintiff's possession for these repairs that the police had opened the case against them. He was also charged with the plaintiff. As far as he was aware, the case was in respect of the trailer, the two discs in question, some pipes and other machines.

(uu)

[48] In cross- examination, he confirmed that he was a business partner of the plaintiff and that this relationship had developed in 1997 to 1999. He confirmed he had, as part of the business relationship, acquired a plough together with the plaintiff in 2001 through a government funded scheme and that the plaintiff was to obtain the plough at Ondangwa or Oshakati and bring it to Mr Iileka in early March 2001.

[49] Mr Iileka further accepted that he had not been authorised to instruct the plaintiff to repair the trailer and the discs by his employer, the Ministry. But he said the implements in question were redundant and had become outdated and were not used because they were broken. He further confirmed that the plaintiff had not been paid for the repairs and said that this was because the repairs had not been completed. He was at first unable to answer the question as to who would pay the plaintiff for such unauthorised repairs of Government property but later stated that he would have requested a quotation which he would have submitted to his superior and would see if he could convince him to ensure that the Government would pay the plaintiff. Mr Iileka was referred to the plaintiff's testimony that he had in fact repaired the implements but had not been paid. He then accepted that they had been repaired but that he would have collected them at some stage had the case against them not have been made.

[50] Mr Iileka however denied transporting a pump or pumping machine to

the plaintiff's farm. When asked about transporting irrigation pipes to the plaintiff's farm, he also denied this and pointed out that his pick-up was too short to convey the irrigation pipes. He then proceeded to question whether the witness who would say that he had transported some 30 irrigation pipes had actually counted them. He pointed out that certain old pipes from the research station had been sold to members of the public during 1986 to 1987 by way of public auction. But said that he did not know whether the plaintiff had purchased any of the pipes at that auction. His answers were evasive. He also said that he was unable to differentiate between aluminium and galvanised piping. When pressed on this issue, he stated that he was not an agricultural engineer. His answers to further questions on this issue were also evasive and unsatisfactory.
(yy)

[52] When asked whether the trailer, which he had said it was provided to the plaintiff for repairs, had been used by the plaintiff at his farm, he was once again evasive in his answers. He eventually stated that he was not aware of any usage, stating that the agreement was only to repair the trailer.
(aaa)

[54] Ms Sonja Prins, the plaintiff's daughter was also called by the plaintiff. She testified that on 3 March 2001 and for about four days thereafter that she and the other occupants on the farm were placed under virtual house arrest by members of Namibian Police. She also testified that the police who had attended at the farm house on 2 March 2001 together with members of the Namibia Defence Force were armed and were hostile to her and her sister. She stated that they had arrived at the farm in the morning hours between 8h30 and 9h30 and that they had asked for the whereabouts of her father.
(ccc)

[56] She further stated that she had requested one of the police officers permission to call her father. She stated that the landline telephone of the farm house was locked and asked to be taken to the nearest town to make a call. When she did so, she called Mrs Prins and then stated that this was because her father did not have a phone on him. She confirmed that her half sister, Natasha, had sent a text to her mother and was unable to answer the question as to why she had not sent a 'call me' request to her mother's cellphone. She further stated that when she reached Mrs Prins on her cellphone she was crying

and was hysterical and asked her to come home urgently. She stated that she did not ask Mrs Prins where she was at the time but only asked her to return forthwith because they were being detained at the farm against their will with the use of firearms by armed members of security forces. She stated that the security force members had pointed firearms at them. But when she was confronted in cross-examination as to why this had not been contained in her statement, she then said that this information had been conveyed to the plaintiff's legal representative and could not explain why it had not been contained in her affidavit.

[57] Ms Sonja Prins further stated that the security force members had removed farming implements on 2 March 2001 and that this had happened in the afternoon. When pressed for details about the presence of the trailer with pipes on it, she was unsure as to when the items had precisely been removed.

[58] The plaintiff's wife, Mrs J.D. Prins also testified on his behalf. Like the plaintiff, she had deposed to two affidavits. There were also similar discrepancies as to dates in her two affidavits. The first affidavit was vague as to dates and times but the second affidavit, deposed to on the eve of the trial, was aligned with the dates provided by the plaintiff in his second affidavit and in his testimony. Mrs Prins testified that she had accompanied the plaintiff and Mr Fourie to collect a plough at Ondangwa on 3 March 2001. She however returned on the same date to the farm because the plough had not arrived. She stated that she dropped her husband and Mr Fourie near the Ondangwa airport to catch a flight to Windhoek, apparently to make arrangements to secure the plough.

[59] Mrs Prins further testified that whilst travelling back to the farm, her daughter Natasha had sent her a text message informing her of the presence of police officers and NDF members at their farm house enquiring as to her husband's whereabouts. When she returned to the farm, she encountered members of the police and NDF and was confronted by Constable Haufiku. She stated that he had made racial marks to her referring to her and her family as 'skelm witboere' and 'kokkerotte' (translated as dishonest white boers and

cockroaches). Mrs Prins further stated that over the next two days, the police did not leave the farm and during that time had removed implements from the farm. She stated that on 3 March 2001 she offered Constable Haufiku a file of receipts in respect of implements but said that he had not been interested in receiving the file. She further stated that the police had seized some three hundred bags of fertiliser.

(hhh)

[61] In cross-examination and when confronted with differences between her statements and with her evidence, she was unable to explain these differences except to refer to stress that she had endured as a consequence of the incident. She also had difficulty in explaining quite why her husband and Mr Fourie had not returned to the farm with her on Friday 2 March 2001 when the plough had not arrived but had instead stayed over in Ondangwa for the weekend. She also stated that she had not spoken to her husband after leaving him at Ondangwa on 2 March until Monday, 5 March 2001 upon his arrival in Windhoek and stated that he would have been unaware of the events at the farm until then. This despite the magnitude of the events for the plaintiff and his family, as had been testified by them. She stated that he did not have a cellphone and that Mr Fourie also did not have one, and that the plaintiff in fact phoned her on the Monday morning on 5 March 2001 after he had arrived in Windhoek.

(jjj)

[63] Mrs Prins even stated in answer to a question posed to her by the court that, despite the experience having been stressful for her, she had not contacted her husband on the Friday and over that ensuing weekend. In answer to further questions by the court, she stated that she did not try to reach him and that she also did not know where he had stayed in Ondangwa over that weekend. She merely stated that Mr Fourie had family in Ondangwa or friends there and had assumed that they were staying there. When questioned further on this aspect, she stated that her husband made it clear to her that he would be proceeding to Windhoek if the plough did not arrive in Ondangwa by the end of the weekend. She also stated under cross-examination that neither Mr Fourie nor her husband had packed clothing for the purpose of travelling to Windhoek.

[64] As to the trailer and ploughs brought by Mr Iileka, Mrs Prins confirmed

that he had done so for repairs to be effected to them. Mrs Prins also confirmed that the plaintiff had repainted the trailer a different colour. Her explanation for painting the trailer was that she had been painting pots and that there was paint left over and had decided to paint the trailer. This aspect, like other aspects of her evidence, was unconvincing. She denied that the trailer had been used on their farm. When confronted with Mr Iileka's evidence that it had been repaired prior to the police attending at the farm, Mrs Prins denied this. But when it was put to her that her husband had stated that it was confiscated before it was repaired, she then replied that it had been partly repaired.

[65] At the close of the plaintiff's case, Mr Hinda on behalf of the defendant applied for absolution from the instance in respect of all three claims. As I have said, I granted absolution in respect of claim two. I did not provide reasons at the time for my ruling but said that reasons would be given if requested. No request for reasons has been made. My reasons for doing so are briefly these. The plaintiff had not established that the removal of implements from the farm was causally connected to damage sustained in respect of the crops. On the contrary, he had conceded that heavy rains which had occurred could have caused the flooding and had destroyed the crops. Furthermore, the plaintiff had not provided any evidence as to the quantum of that claim. I accordingly granted absolution from the instance in respect of the second claim.

[66] The defendant called Ms L.N. Antonio who testified that she had been employed by the plaintiff from 2000 until his arrest. She testified that when she started working for the plaintiff, he had one water pumping machine which was red in colour. It pumped water from the main dam to the farm. Thereafter at some point, she had observed the manager of the Mahenene research station, Mr J. Iileka, bringing a green water pump to the plaintiff's cultivated plantation. He had transported it in a white pick-up with a government registration number. It had been offloaded by Mr Fourie and another person she only knew as Johan. She could however not recall the date when this had occurred but it had been after she had commenced employment and prior to the plaintiff's arrest. Subsequently, she observed that a third pumping machine had appeared at the plaintiff's house but had not seen the circumstances under which it had been

brought there. She recalled that two of the pumping machines were taken to Otjiwarongo for service and when they returned, they had been freshly painted. (ooo)

[68] Ms Antonio also observed that Mr Iileka brought two drums of diesel to the plaintiff's plantation in a pick-up and that also seen that he had on a separate occasion brought a disc plough to the plaintiff's plantation. She further testified that she had observed that Mr Iileka brought thirty irrigation pipes to the plaintiff's plantation in a government pick-up truck. On another occasion she had noticed when she reported for work that there were several irrigation pipes on the trailer next to the plaintiff's house. She and other employees were instructed to offload these pipes at Mr Fourie's plot a short distance from the plaintiff's farm house. She testified that the trailer was pulled by a vehicle to the point where the pipes were offloaded. She had not seen where the pipes had come from but stated that they were not new and had been used. She testified that during April 2001 she was questioned by Constable Haufiku and Sergeant Matti Iiyungo concerning allegations of agricultural implements found at the plaintiff's and at Mr Fourie's plantations which were allegedly stolen from the Mahenene Research Station. The police at that stage then took a sworn statement from her.

[69] Mr Martin Kautumbwa also testified for the defendant. He had also been a former employee of the plaintiff between 1998 and 1999. During that time he had noticed that one of his colleagues, a certain Herman, had left with the plaintiff to the Mahenene Research Station and subsequently returned with the plaintiff together with 14 irrigation pipes loaded on the pick-up. He said that these were old pipes which had some holes drilled in the sides. He further testified that he and the plaintiff's other workers were instructed to offload the pipes from the pick-up truck which they did.

[70] Mr Kautumbwa further testified that he would on occasion notice when reporting for work that there were drums of diesel which had not been at the plaintiff's premises when he had knocked off on the previous evening at 18h00. He and the plaintiff's other workers were then instructed to offload these drums of diesel from the plaintiff's pick-up truck. The diesel was used at the plaintiff's

premises. During the time he had worked for the plaintiff there was one water pump utilised there. It was red in colour. During 2000 he left the plaintiff's employ and returned in January 2001. He then saw that there were two further water pumping machines at the plaintiff's premises but did not know where these had been acquired. He was also questioned by the police in April 2001 and made a sworn statement to the effect of the evidence he had given.

[71] The defendant also called Mr Joel Tjapa. He said that he was employed by Namwater in 2001 as a water scheme supervisor and had been stationed at Namwater's Ruacana station. By virtue of his position, he was responsible for Namwater stations in the Alushandje, Eunda and Tsandi areas. He further testified that 18 April 2001 he was approached by Constable Haufiku and Sergeant Iiyungo concerning Namwater pumping engines and accessories which had been stored at Namwater's Eunda dam. The police officers had informed him that certain pumping machines and accessories had been recovered from farmers in the area and suspected to be stolen property. He was invited together with certain colleagues to proceed to the Ruacana Police Station to verify if these items were property of Namwater. He was accompanied by his colleagues, Messrs Kamati and Shiikwa.

(ttt)

[73] At the police station he was shown various agricultural items and was able to positively identify some of these as Namwater's property. These were a KSB water pump, blue in colour which had the letters DWA inscribed upon it. These letters stood for Department of Water Affairs which had been the government department administering water affairs prior to Namibia's independence and before the establishment of Namwater. There was also a foot valve with its index pipe. It was silver in colour but was lightly rusted. The flange mounted upon it was also of the same colour. He also positively identified a stop valve with an elbow as that of Namwater. These were also silver and he described their size. The valve was still in good working order and in an open position. He testified that these items had been installed at Namwater's Eunda pump station and had been unlawfully removed without any authorization of Namwater and thus stolen. He testified that the value of these items was N$19 000.

(vvv)

[75] The defendant also called Mr Lazarus Alfred who testified that he had been employed at the Mahenene Agricultural Research Station since 1978 as a general worker. He testified that there were at least seven pumps at the Mahenene station which used diesel. They had been used to pump water to irrigate the crops at the Mahenene research station. At some point, five of these pumps were rendered redundant because an electrical generator had been acquired to pump water from the dam to the fields. Four of these redundant pumps had been removed and one had remained at the research station.

[76] Two diesel machines had also remained in use at the research station. One was used to pump water from the big dam to the smaller dams and the other was kept in a store-room next to the dam. They were both green. He also testified that there was a large red tractor trailer at the research station and two smaller John Deere tractors which were green in colour.

[77] On about 20 March 2001 he had been approached by Constable Haufiku and Warrant Officer Kandombo to accompany them to the Ruacana Police Station to inspect items which were suspected to have been stolen from the research station. He identified the large tractor trailer but noticed that it had been painted a light green colour. He was able to observe at certain places that the red paint was still visible under the green paint. He was also able to identify the trailer because its side flap had been broken and the trailer at the police station had a similar breakage. He was able to recognise the welding work on one side of the trailer as he had in fact performed upon it. He thus identified the trailer and also identified a green water pump as one of the research station's pumping machines which had been used to pump water from the big dam to the small ones. He further identified a six disc and a 10 disc harrows. Mr Alfred was able to identify one of the disc harrows having a red bar placed upon it because the original had been broken. He stated that this had been thus placed on it at the research station and had facilitated his identification of it. He also observed several irrigation pipes at the police station which were similar to those at the research station because of the holes which had been drilled in their sides. These holes had wooden sticks which had been pushed into them by himself

and other workers at research station. He also identified a green water pump on an iron frame which had been a tractor engine which had been modified into a water pump from one of the small John Deere tractors at the research station. After the inspection he returned with the police officers to the Mahenene's garage where they noticed that the John Deere tractor was there without an engine. He does not know who removed this engine but suspected that the engine was the one he had seen at the Ruacana Police Station.

[78] The defendant also called Mr F.R. Da Cunha. During 2001, he was employed by the then Ministry of Agriculture, Water and Rural Development as a Chief Clerk; Stock Control at the ministry's northern central regional stores in Oshakati. He stated that on 29 March 2001 he received an enquiry from police officers investigating a theft case at Mahenene. He informed the police that he could assist them in certain respects but not as far as tractors were concerned as they did not resort under his control but under the ministry's plant and fleet department in Windhoek. He was then asked about a tractor at Mahenene with a missing engine and he informed the police that during his last visit to the research station in November 2000 he had noticed that the tractor in question's engine was missing.

(aaaa)

[80] On 2 April 2001 he had been summoned to Mahenene to assist with the handing over at the institute because the former manager Mr Lechner was leaving the institute and was replaced by Mr Eliaser Negumbo. Upon his arrival, he found that the Mr Lechner in the company of the police officers who were enquiring about equipment which was missing from the institute. He noted the tractor without its engine had been moved from its previous position. He also found that a centrifugal pump had been removed from the generator at the institute pump station in its plantation field. The police then asked him to accompany them to the Ruacana Police Station to identify certain agricultural equipment which had been recovered from certain farms in that area and was suspected to be stolen from the government. He was unable to travel on that date but went on the following day, 3 April 2001. At the police station he positively identified the following items which he stated belonged to the research station:

- A tractor trailer with the serial number WH17401/1970;
- A Lister engine, two cylinder with a serial number SNR352
- A six disc plough, serial number SN7.1180
- A ten disc harrow, serial number 92/102.

[81] He also noticed a John Deere tractor engine with engine number R555 and serial number 282898LD which had been converted into a water pump and set on a two wheel frame. He suspected that this was the engine which was missing from the John Deere tractor at the Mahenene institute. He also noted a number of irrigation pipes of different sizes and confirmed that the institute had similar pipes and suspected that they also belonged to the institute. He estimated that the total value of the property he had identified which belonged to the institute to be in the vicinity of N$300 000. The police also informed him that they suspected that diesel from the institute had been stolen and that approximately four drums had been stolen per month over a four year period. He estimated this to exceed N$500 000 over a four year period. At the police station he also noted a centrifugal pump (salweir) with a serial number VEG106 and a different make AKSB centrifugal pump marked WA3420. He knew that these were property of Namwater Corporation. He then made a statement to the police.

(dddd) During cross-examination, the testimony of these defence witnesses was not disturbed in material respects even though it was evident that the recollection of witnesses on detail was somewhat vague at times given the passage of time which had elapsed from those events until they gave evidence some 10 years later. Even though affidavits were provided in respect of the defendant's witnesses, there were aspects of their evidence which were not put the plaintiff's witnesses. This was particularly the case in respect of Mr Haufiku's evidence which I deal with hereafter. It remains a cross-examiner's duty to put material aspect of his or her client's case to witnesses even if affidavits or statements are provided in the course of case management.

(eeee)

(ffff) The defendant finally called Mr Willem Haufiku. He testified that he was currently employed by the City of Windhoek as a member of its City Police. He

was formerly a member of the Namibian Police and was the investigation officer who had instituted the criminal proceedings against the plaintiff in around March 2001, the subject matter of this action. He said that during 2001 he had been stationed in Windhoek as a detective.

(gggg)

(hhhh) On 23 February 2001 he was assigned to investigate a case of theft in Ruacan area of northern Namibia after the police had received information of theft of government property from the Mahenene Research Station. He proceeded to that location and received information to the effect that government property had been stolen from that research station and sold to certain farmers in the area. He further testified that his investigation led him to an irrigation plantation known as Simonsvlei which was operated by the plaintiff and a certain Mr P. J. Fourie. He said that his investigation revealed that certain of the agricultural implements which were unaccounted for and missing from the government research station were at the plantation of the plaintiff and Fourie. He proceeded there on 2 March 2001 and saw some of the property which was suspected to be stolen was at the Simonsvlei plantation. The plaintiff and Mr Fourie were not there at the time. He said that he was able to telephonically speak to the plaintiff and he informed him that he was at the plantation and investigating a theft against him and Mr Fourie and said that they should return to the plantation. He said that the plaintiff undertook to do so.

(iiii) Mr Haufiku said that he and other police officers waited at the Simonsvlei plantation for some time but neither the plaintiff nor Mr Fourie returned to their respective homes at the plantation. Only Mrs Prins returned alone after some time. Given the absence of the plaintiff and Mr Fourie, Mr Haufiku decided to keep the plantation under surveillance to prevent interference with his investigation. He said that the team of police officers who accompanied him were all in uniform and remained at the plantation for some time.

(jjjj) Mr Haufiku stated that he later learned that the plaintiff and Mr Fourie had proceeded to Windhoek instead of returning to their residence and to the plantation. He further said that he had received information that the manager of the research station Mr Iileka was liaising with the plaintiff and Mr Fourie

concerning his investigation. As he regarded this as an interference with his investigation he caused Mr Iileka to be arrested on 3 March 2001. He then had also formed the view that Mr Iileka was involved in the theft which was the subject of his investigation. He was thus also arrested for that reason.

(kkkk) On 3 March 2001 he opened a police docket and continued his investigation. He testified that his further investigation revealed that some of the property in possession of the plaintiff and Mr Fourie belonged to Namwater. This had led to the arrest of the custodian of the Namwater property, a certain Mr Iipumbu on 8 March 2001 on the suspension that he was also involved in the theft of his employers property.

(llll) Mr Haufiku testified that on 7 March 2001 he met with Ms S Miller a legal practitioner at the Outapi prosecutor's office. She explained that she acted for the plaintiff and Mr Fourie and had been approached by them in Windhoek. He arranged with her that they be brought on the following day to the prosecutor's office at Outapi. They were however brought with her to Ruacana Police Station on the following day. Mr Haufiku said it was the first time he had met the plaintiff and Mr Fourie.

(mmmm) Mr Haufiku testified that he informed the plaintiff and Mr Fourie of the theft case being investigated against them and that he had a reasonable suspicion of their involvement in the theft or possession of substantial quantities of government property which had been stolen from the Mahenene Research Station. He did this in the presence of Ms Miller and also informed them of their rights in her presence and arrested them. They were placed on remand and joined Messrs Iileka and Ipumbu who had already been arrested.

(nnnn) The investigation of the charges continued and Mr Haufiku stated that he had obtained a search warrant from the Outapi Magistrate's Court to search the plantation and premises of the plaintiff and Mr Fourie. He said that he had seen certain of the property on 2 March 2001 at the premises. He said that he proceeded with his search and seizure at the premises after receiving the search warrant. He said the list of items which were recovered from the plaintiff's

property was as contained on exhibit “S”, the Pol 7 form, setting out those items. Items were also recovered from Mr Fourie’s portion of the plantation. These items were taken to the Ruacana Police Station and formerly booked as exhibits.

(oooo) Mr Haufiku confirmed that the plaintiff and Mr Fourie were granted bail on 13 March 2001 subject to the conditions referred to by the plaintiff. Mr Haufiku pointed out that the decision to impose the conditions was that of the presiding magistrate.

(pppp) Mr Haufiku further testified that he continued with his investigation on 15 March 2001, taking the following steps on that date:

- He interviewed certain senior staff members of the research station at the Mahenene in connection with the allegations including Mr Klaus Fleissner the senior agricultural research officer based there and Mr Eliaser Negumbo a senior agricultural search technician. He proceeded to record sworn statement from them which form part of the case docket.
- He also interviewed several workers at the research station including Samuel Andjele, a garage foreman, Paulus Shaambeni, Joel Ndjukuma, Lazarus Alfred, Sabinus Simon, a general worker and Matheus Mwafongwe, general workers. He stated that these witnesses provided him with relevant information concerning the theft case he was investigating and sworn statements were also taken from them and placed in the police docket.
- In addition to taking these statements, the witnesses also pointed out certain matters to him and Mr Haufiku took photographs.
- Mr Haufiku thereafter took certain of the witnesses to the Ruacana Police Station where they positively identified most of the implements and materials recovered from the plantation of the plaintiff and Mr Fourie as government property. The items which they were not able to identify as government property were subsequently positively identified as missing Namwater property.

(qqqq) On 16 March 2001, Mr Haufiku interviewed Mr W.R. Lechner the former manager of the research station. He also provided relevant and useful information to Mr Haufiku, who took him to the Ruacana Station where he also identified certain of the property recovered from the plaintiff and Mr Fourie as government property. A sworn statement was also taken from him which formed part of the police docket.

(rrrr) Mr Haufiku testified that on 26 March 2001 he was joined by Detective Sergeant Matti Iiyungo (his rank at the time) to conduct further investigation into the case against the plaintiff. On that date they proceeded to interview more witnesses including Mr F.R. Da Cunha, chief clerk at the Ministry's Central Store Offices for the northern region. On 2 April 2001 Mr Da Cunha accompanied him and Sergeant Iiyungo to the Ruacana Police Station where Mr Da Cunha positively identified certain of the property recovered from the plaintiff and Mr Fourie as belonging to the Mahenene Research Station with reference to the serial numbers. He also provided an estimate of the value of the recovered items, in the sum of approximately N$300 000. He also placed a value on diesel which had allegedly been stolen over a four year period. A sworn statement was taken from him and formed part of the police docket.

(ssss)

(tttt) Mr Haufiku further stated that he and Sergeant Iiyungo interviewed Mr J. W. Langenhoven a control agricultural research technician of the Ministry based in Tsumeb as the Mahenene Research Station fell under his control. His work included authorising requisitions for the repair and writing off of agricultural equipment. Mr Haufiku stated that the information he had obtained from Mr Langenhoven was relevant and a sworn statement was thus recorded from him which formed part of the police docket. After receiving information from Mr Lagenhoven he proceeded to Hoffman farm implements in Otjiwarongo where he obtained certain information from Mr Olaff Marais from whom a sworn statement was taken and also formed part of the police docket.

(uuuu) Mr Haufiku stated that he and Sergeant Iiyungo also conducted investigation into items not identified by the Mahenene workers which was suspected to be stolen from the Namwater installation in the same areas. He

arranged with Mr Kamati and another Namwater employee, Mr Joel Tjapa and a certain Mr Shiikwa attend at the Ruacana Police Station where they positively identified a water pump and certain water pipe accessories as Namwater property which was missing from the Namwater installation in the area. A sworn statement was taken from Mr Tjapa which also formed part of the police docket.

(vvvv) Mr Haufiku stated that by the end of April 2001 the police investigation was complete and his and Sergeant Iiyungo's sworn statements were also prepared and formed part of the docket. The case docket was then forwarded to the Prosecutor-General's office for the prosecution of the accused in the ordinary course. A decision to prosecute the plaintiff was made in May 2001 by the then Prosecutor-General, Mr J.L. Heyman and the trial date was set for 15 August 2001. The trial did not proceed on that date as one of the accused, Mr Iipumbu, did not have any legal representation and applied for legal aid. The trial was postponed to 28 September 2001. But on that date Mr Iipumbu's application for legal aid was not yet finalised and the matter was postponed to 26 October 2001. Several further postponements ensued. Mr Haufiku said that these were due to the problems arising at the instance of the accuseds legal representatives. A trial date was eventually set for 12 February 2003, when the State witnesses were in attendance on that date but the trial did not proceed because the state had not provided further particulars sought on behalf of the accused. The trial was then postponed to 25-27 June 2003 but on 25 June 2003, the prosecution had still not provided the further particulars sought by the defence. The prosecution applied for a postponement which was opposed by the accused. The court ruled in favour of the accused and the charges were then withdrawn before the accused had pleaded.

(wwww) Mr Haufiku stated that the prosecution did not proceed for some time thereafter and in 2004 the plaintiff and Mr Fourie instituted a civil action against the defendant. When preparing for the trial of the civil claim, set down for 26-27 June 2007, Mr Haufiku was informed that the prosecution had decided to reinstitute the stalled criminal charges against the plaintiff and the other accused. He said that he was shocked when he established that, at the designated trial in 2011, the plaintiff and the other accused were found not guilty

and acquitted in the Outapi regional court after the State had closed its case without presenting any evidence against the plaintiff and the other accused. Mr Haufiku stated that he was completely unaware as to why the prosecution had not secured the attendance of state witnesses for the trial.

(xxxx) Mr Haufiku stated that he had no reason to lay any false charge against the plaintiff and the other accused persons. He did not know the plaintiff or the other accused before he was tasked to investigate the charges against them. He had no basis for any malice against them. He had no motive to forcely incriminate them. Mr Haufiku said that, when laying the charges against the plaintiff and the other accused, he had a reasonable basis for doing so. He said that he received information relating to the theft allegations which had been substantiated by preliminary investigation which had resulted in him forming a reasonable suspicion of the commission of the theft offences. He stated that several of the witnesses whom he had interviewed in the area had provided evidence of theft of government property. These also included several employees of the plaintiff and Mr Fourie. These included Onesmus Mukumo Alfeus, Isak Hembili, Loini Nandjila Antonio, Gabriel Nghifindwako and Martin Albinus Kautumbwa. He had recorded sworn statements from these witnesses which form part of the police docket. The information he received from informers and witnesses was confirmed when the agricultural implements recovered at the plantation of the plaintiff and Mr Fourie were positively identified by Mahenene Research Station workers and ministry employees as belonging to the government (and that research stations).

(yyyy) Mr Haufiku also referred to the fact that the plaintiff and Mr Fourie chose to not provide an explanation for the possession of the alleged stolen property at the time of their arrest. He pointed out that they were represented at the time. After explaining their rights to them, they rather elected to remain silent.

(zzzz) Mr Haufiku denied that the arrest of the plaintiff was malicious and unlawful as contended and stated that he had a lawful basis for both the arrest and for seizing the suspected stolen property which was in the possession of the plaintiff and Mr Fourie. He stated that the seizure was in terms of s20 of the

Criminal Procedure Act, 51 of 1977 (the Act).

(aaaaa) Mr Haufiku denied that the seizure was conducted in a high handed manner or negligently as alleged by the plaintiff. He stated that the items which had been seized were reflected in the entries on the Pol 7 form. He was entirely unaware of any damage to crops and denied that he or members of his team which had attended at the plaintiff's plantation had deliberately or negligently caused damage.

(bbbbb) In cross-examination, Mr Haufiku said that the attendance by the police at the plaintiff's plantation on 2 March 2001 had followed information from an informer to whom he had spoken on 27 February 2001. He stated that on the same day he had also spoke to employees of the plaintiff. He said that he had spoken to 'a lot of employees' but was not able to specify them by name. He subsequently explained that he had spoken to four employees and would have indicated their names in his note book. He further stated that the information received from the employees was to the same effect as that he has received from his informant.

(ccccc) Mr Haufiku was cross-examined at some length concerning the date of the search and seizure of the implements. He stated that the search and seizure had been after the arrest of the plaintiff and that he had applied for the warrant on 7 March 2001. He was unable to explain where the warrant was. It had not been discovered. He could not state whether he had made the affidavit in support of the warrant on 7 or 8 March 2001. He said that the warrant should have been at the Ruacana Police Station and could not explain why it had not been discovered. It was put to him that the search and seizure had occurred already on 2 March 2001 and not subsequent to the plaintiff arrest as was testified by him. He denied that. Inexplicably, the plaintiff had not given notice under Rule 35(3) to the defendant concerning the warrant or taken any further steps under Rule 35 with regard to it.

(ddddd) As to the information he had at the time of his presence at the plaintiff's plantation on 2 March 2001, he stated that he believed the information

he had obtained from an informant was truthful. He said the information was subsequently confirmed by employees at the Mahenene Research Station and referred to in the affidavits which was taken from them to that effect. He further explained the nature of the information received from the informant and identified three of the four employees who had provided information which corroborated that of his informant. He said that he had spoken to the plaintiff's workers on 28 February 2001.

(eeeee) Mr Haufiku denied that members of the police had been abusive towards Mrs Prins and the plaintiff's daughters. He insisted that he had spoken to them by telephone on 2 March 2001 despite the version of the plaintiff and his family to the contrary. He stated that the police had remained at the premises for some time whilst awaiting the plaintiff. He noted that Mr Iileka had approached the plaintiff's premises but when he had observed the police presence, he had moved away. He regarded this as suspicious and an interference in the investigation. He said that all police in attendance were in uniform although some wore camouflage attire. He denied that they had automatic rifles such as AK47 in their possession. He said there was no reason to carry such arms as there been no threat to them. He also denied that any automatic rifle or firearm had been pointed at the plaintiff's daughter and denied that he or other members of the police under his control at the time had rummaged the farm house. He stated that there was no reason to do so as the plaintiff's daughters had been cooperative. He denied Mrs Prins' evidence that they were called the names as testified by her. He regarded it as suspicious that the plaintiff failed to return to his home on 2 March 2001 and over the next few days, given the fact that he would have been aware that the police were looking for him.

(fffff) Mr Haufiku was somewhat vague about dates and the times upon which the search of both the plaintiff's premises and that of Mr Fourie had been completed. He insisted that the search and seizure had occurred after the plaintiff's arrest and had been preceded the warrant which he had obtained on 7 or 8 March 2001. He could not explain the absence of the warrant and merely stated that it was either at the Ruacana or Outapi Police Stations.

(ggggg) Mr Haufiku also denied that he had requested the plaintiff to make a statement incriminating the other accused whilst he was incarcerated, as had been testified by the plaintiff. He stated that the police presence at the plaintiff's premises had been maintained for some days until the items had been seized.

Counsels' submissions

(hhhhh) After the hearing of the evidence was complete, the matter was postponed for some ten days to enable counsel to prepare their submissions. Both counsel provided written submissions.

(iiiii) Ms Visser for the plaintiff referred in detail to the provisions of Articles 11 and 12 of the constitution which deal with the arrest and detention and the right to a fair trial. She also referred to Article 13 protecting the right to privacy. Ms Visser then proceeded to referred to several sections in the Act concerning search, seizure, and arrest. She submitted that any justification for a limitation of any basic rights rested upon the party relying upon legislation to establish that justification on the balance of probabilities. She submitted that the requirement of reasonable grounds for the belief that items concerned in an offence was an objective test and further submitted that the terms of a warrant are to be strictly adhered to. Ms Visser seemed to approach the claim as if it were for an unlawful arrest and search. But those were of course not the claims raised in the pleadings.

(jjjjj)

(kkkkk) Ms Visser referred to the differing versions concerning the date of the search and seizure. She submitted that the evidence on behalf of the plaintiff should be preferred that the search and seizure occurred on 2 March 2001 and that Mr Haufiku's evidence of search and seizure on about 8-10 March 2001 should be rejected. She referred to the failure on the part of counsel for the defendant to put it to the plaintiff's witnesses that the search and seizure had not occurred on 2 March 2001 but rather on the date stated by Mr Haufiku. She submitted that the reason why Mr Haufiku had taken between 10 and 20 members of the Namibian police with on 2 March 2001 had been to conduct the search and to seize items and that the search and the subsequent seizure was

unlawful and that the items should be returned to the plaintiff or value which had been accepted by the defendant.

(llll) Ms Visser submitted that Haufiku also did not have any reasonable basis to effect an arrest of the plaintiff and submitted there were numerous inconsistencies in his testimony which she submitted should be rejected as 'a total fabrication.' Ms Visser accordingly submitted that the plaintiff had succeeded in establishing the claim for malicious prosecution and arrest and for the return of the items of their value. Ms Visser surprisingly did not refer to the requisites for a claim of malicious prosecution or any authority concerning claims of that nature.

(mmmmm) Mr Hinda submitted that the plaintiff had not established the requisites for the claim for malicious prosecution. He submitted that the plaintiff had failed to prove that the defendant was actuated by malice and that the proceedings had been instituted on a charge which was false. He submitted the plaintiff had failed to establish a lack of real and probable cause and the existence of *animus injuriandi*. These submissions were made with reference to applicable authority. He submitted that the plaintiff's approach had failed to take into account the referral of the matter to the Prosecutor-General who had made the decision to prosecute. He accordingly submitted that the claim for malicious prosecution should be dismissed with costs.

(nnnnn)

(ooooo) As to the first claim, Mr Hinda submitted that the plaintiff had failed to prove that the items in annexure "A" in the particulars of claim had been seized and has also failed to establish what had been seized had constituted his property.

(ppppp)

(qqqqq) Mr Hinda pointed out that theft is a Schedule 1 offence[1] and submitted that Mr Haufiku, being a peace officer as contemplated in s40 of the Act would be authorised to arrest without a warrant when he reasonably suspected that an offence had been committed. He accordingly submitted that the plaintiff's claims should be dismissed with costs.

[1]To the Criminal Procedure Act, 1977 (the Act).

Malicious prosecution

(rrrrr) Much of the argument advanced by both sides centred on the claim for malicious prosecution, even though Ms Visser did not refer to the requisites for such claims, and would rather seem to have approached the matter as if it were a claim for unlawful arrest. This is not however how the claim is pleaded. It is thus dealt with first. The requirements for a claim for malicious prosecution are well settled and were recently summarised by the Supreme Court of Appeal in South Africa in the following way[2]:

'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

(a) *that the defendants set the law in motion (instigated or instituted the proceedings);*

(b) *that the defendants acted without reasonable and probable cause;*

(c) *that the defendants acted with 'malice' (or animo injuriandi);*[3] *and*

(d) *that the prosecution has failed. (In this case, of course, Mr Moleko was acquitted at the end of his criminal trial and requirement (d) need detain us no further).'*

(sssss) The last requirement has been established in this matter. The plaintiff was acquitted after entering a plea, even though no evidence had been led. It is thus clear that the prosecution had failed. I turn to the other three requirements. All three were placed in issue by Mr Hinda on behalf of the defendant.

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[2]Minister for Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA) at par 8, p50. See also *Rudolph v Minster of Safety and Security* 2009 (5) SA 94 (SCA) at 99-100, par [16].

[3] See *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) para 5, referring to *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196G–H; *Thompson v Minister of Police* 1971 (1) SA 371 (E) at 373F-H and J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) pp 124-125 (see also pp172-173 and the authorities there cited). Cf 15 *Lawsa* (*sv* 'Malicious Proceedings' by DJ McQuoid-Mason) (reissue, 1999 para 441; François du Bois (General Editor) *Wille's Principles of South African Law* 9 ed (2007) pp 1192-1193; LTC Harms *Amler's Precedents of Pleadings* 6 ed (2003) p 238-239.

Instigation of proceedings

(ttttt) Mr Haufiku accepted that he had investigated the case against the plaintiff and had decided to arrest him. The thrust of the plaintiff's case was that his testimony should be rejected and that he had instigated and instituted the charge against the plaintiff without any basis and that it amounted to a false charge. The thrust of the plaintiff's case was thus based upon Mr Haufiku's conduct.

(uuuuu)

(vvvvv) It has been held in establishing whether a party had set the law in motion in instigating criminal proceedings, the so called 'but-for test' will be applied in order to establish whether the conduct complained of can be identified as *causa sine qua non* of the prosecution.

(wwwww) This in turn will in entail an enquiry as to what probably would have happened but for the wrongful conduct complained of, as was set out in *International Shipping Co. (Pty) Ltd v Bently*[4] where the test was thus explained:

> 'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued.'

(xxxxx) This test was recently applied by the Supreme Court of Appeal in a claim for malicious prosecution.[5]

(yyyyy) Applying this test to the instant matter, it is clear from the undisputed evidence that the then Prosecutor-General had decided in May 2001

[4]1990(1) SA 680 A at 700 E-G per Corbett JA, as he then was.

[5]Minister van Polisie v Van der Vyver [2013] ZASCA (28 March 2013) at Par 24-25.

to prosecute the plaintiff. There is no allegation that the Prosecutor-General had acted maliciously in the sense required for claims of this nature. Nor was there any evidence to that effect.

(zzzzz)

(aaaaaa) It would seem to me that causality in the institution or instigation of the charges in the sense of setting the process in motion has thus not been established by the plaintiff in respect of the prosecution. It would follow in my view that the claim for malicious prosecution must fail for this reason alone. But the particulars of claim are couched in such a way that there is reference not only to malicious prosecution but also a malicious arrest on the part of Constable Haufiku as a component of his malicious prosecution.

(bbbbbb) In the amended particulars of claim, the plaintiff squarely bases his case against the defendant on the basis of Constable Willem Haufiku 'wrongfully unlawfully and maliciously setting the law in motion by laying an instigating a false charge of the theft' against the plaintiff. The particulars of claim further plead that when instituting or instigating the charge Mr Haufiku had no reasonable probable cause for doing so or no reasonable belief in the truth of information which had been given or received by him. It is further pleaded that as a consequence of this conduct the plaintiff was then unlawfully and maliciously arrested and held in custody and items were unlawfully and maliciously seized or removed and the plaintiff incurred travelling expenses pursuant to bail conditions and incurred legal costs to defend himself against the charges. Although there is thus a reference to the plaintiff being maliciously arrested, this is stated in the amended particulars of claim as a consequence of Mr Haufiku wrongfully and maliciously setting the law in motion against the plaintiff. The cause of action thus pleaded in particulars of claim is that of malicious prosecution and not of an unlawful arrest. As it is pleaded in the particulars of claim, the arrest was the consequence of the malicious conduct of Mr Haufiku in setting the law in motion against the plaintiff. Whilst there is thus no claim for unlawful arrest as a cause of action itself by reason of the malice contended for. Despite my view that a cause of action for an unlawful arrest is not what the defendants have been called upon to meet, I nevertheless consider the question as to whether the plaintiff has established malice upon the part of

Mr Haufiku in the arresting of the plaintiff.

(cccccc)

(dddddd) It would follow that two further elements of the claim should thus be considered even though the plaintiff would plainly not be entitled to the bulk of the damages claimed as these arise from the prosecution and not the arrest, if he could succeed in establishing a malicious arrest and in so far as this may be considered as a separate cause of action on the pleadings, which I doubt.

Absence of reasonable and probable cause

(eeeeee) Whilst Mr Haufiku's evidence may be criticised in respect of the differences between the dates asserted by him and the witnesses of the plaintiff in respect the search and seizure of the items, it should also be taken into account that the plaintiff and his wife each contradicted their earlier affidavits as to dates of the events. I also take into account that the evidence on the events was given some 12 years later. But of relevance to this requirement for the claim for malicious arrest and prosecution, is Mr Haufiku's evidence which was largely unshaken concerning the information he had received from an informant on 27 February 2001 which was confirmed and corroborated in material respects by 3 to 4 employees of the plaintiff. Not only was his testimony unshaken in those respects, but it was in view also reliable and was furthermore borne out by his further investigation and affidavits which he subsequently obtained after the plaintiff's arrest. Quite how Ms Visser could contend that his testimony was a 'total fabrication' escapes me. There is simply no basis for this submission. At best his evidence concerning the date of the search and seizure was vague but in material respects concerning the events, I did not find him to be untruthful or unreliable. The evidence of the plaintiff and his wife concerning when he was informed of the fact that the police were looking for him and their presence at the plantation is in my view not credible. I can not accept that the plaintiff was not informed by his family and especially his wife until he had contacted them 3 days later from Windhoek. I suspect that their versions on this issue were given so as not to give the appearance of the plaintiff seeking to avoid the police and arrest – and attracting some suspicion as a consequence. I was also able to observe both the plaintiff and Mrs Prins in the witness box. Neither impressed

me as a witness
(ffffff)
(gggggg) The plaintiff in my view not only failed to establish a lack of reasonable and probable cause on the part of Mr Haufiku, but it would seem to me that the defendant had established, that there was in fact reasonable and probably cause for the plaintiff's arrest. This was not required of it given the fact the plaintiff had the onus to do so.

(hhhhhh) I also took into account the failure on the part of the plaintiff to have provided any statement to the police at time of his arrest and at a time when he was legally represented.

(iiiiii) It would follow in my view that the plaintiff has thus not established this requirement for a malicious arrest and prosecution and that the claim for malicious arrest would fall to be dismissed for this reason whilst the claim for malicious prosecution will be dismissed for this reason as well.

Defendant's acting with malice or *animus injuriandi*

(jjjjjj) Even though it is not necessary to consider this requirement in view of the fact that the plaintiff has in my view clearly not established the two previous requirements, it is in any event clear to me that the plaintiff has also failed to establish malice or *animus injuriandi*[6] on the part of the defendant.

(kkkkkk) It would follow that the plaintiff's claim for malicious arrest and prosecution (including a possible claim for malicious arrest) falls to be dismissed with costs.

Claim for return of goods or their value

(llllll) The plaintiff's claim for the return of goods or their value is not based upon the lack of a search warrant. It is premised and based upon vindication and upon a plaintiff's ownership of the items set out in annexure "A" to the

[6]As discussed in *Rudolph v Minister of Safety and Security*, supra at par 18.

particulars of claim.

(mmmmmm)

(nnnnnn) Although Mr Haufiku was cross-examined at some length concerning the timing of the search and seizure as well as when the search warrant had been obtained, the plaintiff's cause of action was not based upon an invalid search warrant or that the search and seizure been without a warrant. It is rather pleaded as a vindicatory claim although it is contended that the seizure of the items was a consequence of the malicious setting in motion of the law by Mr Haufiku.

(oooooo) I have already found that the plaintiff has clearly not established that the conduct of Mr Haufiku was activated by malice or was *animus iniuriandi*.

(pppppp) It was accordingly incumbent upon the plaintiff to establish the items in annexure "A" were in the possession of the police as well as his ownership of those various items.[7]

(qqqqqq)

(rrrrrr) In the defendant's plea it was specifically denied that the items were the property of the plaintiff. It was furthermore denied that annexure "A" was correct. Both the plaintiff's ownership as well as the defendant's possession of items listed in annexure "A" were thus placed in issue. These denials attracted no onus upon the defendant. It was thus incumbent upon the plaintiff to establish both his ownership of the items and that the items listed in annexure "A" were in possession of the Namibian police.

(ssssss)

(tttttt) In the course of the trial, the defendant had admitted possession of items which were entered in the Pol 7 register, exhibit "S" at the trial.

(uuuuuu) It was common cause that the Namibian police had seized those items at the plaintiff's plantation. But the defendant specifically put in issue that the items set out in annexure "A" reflected those seized by the Namibian police. In the plaintiff's evidence, he could merely state that when he had returned to

[7] *Goudini Chrome (Pty) Ltd v MCC Contract (Pty) Ltd* 1993 (1) SA 77 (A) at 82, *Chetty v Naidoo* 1974 (3) SA 13 (A); *Jeena v Minister of Lands* 1955 (2) SA 380 (A).

the plantation, he had noticed that certain items were missing and stated that the missing items were those contained in annexure “A”. He was not however present when items were seized.

(vvvvvv)

(wwwwww) It was also common cause that several of the items listed in annexure “A” were not in possession of the defendant. Given the vindicatory nature of the claim, the plaintiff would not be entitled to the return or to the value of items not set out in the Pol 7 form, being thus unable to establish the defendant’s possession of those items unless he could establish that the police had been in possession of such items and thus claim their value. This is quite apart from the difficulty the plaintiff would face in respect of establishing ownership of those items. At best for the plaintiff, in the event of the entries in the Pol 7 register being incomplete, Mr Haufiku in his evidence stated that the following items were recovered from the plaintiff’s side of the plantation:

- Lister pumping machine, serial No. R352;
- John Deere tractor engine, serial No. 282898 CD;
- Trailer, serial No. 17401/1970;
- 10x90 mm aluminium irrigation pipes;
- 66x75 mm aluminium irrigation pipes
- 2x centrifugal pumps, serial No. VEG 106 and W.A. 3420;
- 6 disc plough, serial number. 7-1180;
- 10 disc harrow, serial number. 92-102;
- 1x suction valve with pipe;
- 31 fertiliser bags.

(xxxxxx) Of these items it was common cause that the trailer and the six disc plough were property of the Mahenene Research Station and thus of the Government. As I understood the evidence, the ten disc harrow referred to also fell within this category, as was also accepted by the plaintiff. As far as the other items are concerned, the plaintiff did not in my view establish ownership of the John Deere tractor engine. On the contrary, it would seem that this engine was also government property and had been taken from the tractor at the Mahenene (Government) Research Station and was identified as such by Mr Alfred on

behalf of the defendant. The plaintiff also acknowledged that he did not own a tractor and said that the engine was built from parts acquired over several years but could not provide any proof or details concerning the purchase of any such part. As far as the Lister pump is concerned, it would seem that this item was the property of the research station and that the plaintiff would likewise not establish his ownership thereof.

(yyyyyy)

(zzzzzz) As for the two centrifugal pumps, the plaintiff's evidence concerning them was confusing. He could not provide proof of ownership. On the other hand, there was evidence that these belonged to Namwater.

(aaaaaaa)

(bbbbbbb) There remains the two different sizes of irrigation pipes and the bags of fertiliser. The evidence before me was that the fertiliser bags had insignia upon them which would indicate that they form part of some exchange between the government and an external aid giver. While the plaintiff stated that he had cquired the fertiliser in the normal course, he did not explain how he came into possession of those items with the insignia on them even though he was not cross-examined at any length concerning them. But he did provide receipts from agricultural offices for the acquisition of fertiliser bags. It would seem that he established on a balance of probabilities ownership of the fertiliser. But the 31 bags of fertiliser seized by the police do not from part of the plaintiff's claim. They are not listed in annexure "A". The claim is made with reference to items on annexure "A".

(ccccccc) In the request for further particulars to the particulars of claim, the defendant enquired as to the precise details of the items removed. The plaintiff in response referred to the items set out in annexure "A" but went on to state:

> 'apart from these items the police officers also unlawfully removed several bags of fertiliser, seeds and weed killers (poison).'

(ddddddd)

(eeeeeee) The particulars of claim were not however amended to claim the return of the fertiliser, seeds and weed killer and no value was provided for such items. Nor did the expert evidence on values include any reference to the fertiliser. Even though it was claimed that the fertiliser had been unlawfully

removed, it did not form part of the claim. But it would seem to me that the plaintiff established that he was entitled to it and should be entitled to its return as the defendant had pleaded a denial of unlawfulness in seizing items from the farm and admitted its refusal to return the seized items to the plaintiff.

(fffffff)

(ggggggg) As for the pipes, there was evidence that pipes had been offloaded at different stages by means of research station vehicles by certain of the defendant's witnesses on the one hand and the evidence of the plaintiff on the other that he had brought the pipes from South Africa from the farming operation belonging to his family there and had no proof as to his acquisition of the pipes.

(hhhhhhh)

(iiiiiii) The plaintiff did not explain why there had been no application under s34 of the Act to the regional magistrate for an order that items be returned to him. Had such an application been made, the plaintiff would only have needed to establish an entitlement to possess the items and not ownership. No explanation was given as to why an application of that nature had not been made.

(jjjjjjj) The plaintiff asserted his ownership of pipes but without reference as to that was in the possession of the police. He was not able to provide any receipts or other proof of acquisition of the pipes. He said they emanated from his family's farming business in South Africa and that the pipes were old. Even though he was not subjected to much cross-examination on this, there was the contrary evidence that pipes were offloaded at his premises from a government registered pick-up or trailer. The plaintiff did not explain the differences between the pipes referred to in annexure "A" and those in possession of the police. There are differences in size and quantities. I also take into account that items were seized from Mr Fouri's farming area. The plaintiff did not in my judgment establish his ownership or even entitlement to possess the pipes in the possession of the police.

(kkkkkkk) It would follow that the plaintiff has only established ownership of the fertiliser and not other the items which were seized. The plaintiff did not establish the elements of indication in respect of the further items set out in

annexure “A” which were not listed in the Pol 7. This would result in the plaintiff not succeeding in his claim for the return of the items set out in annexure “A” or their value. Even though he would have been entitled to an order for the return of the 31 bags of fertiliser, he had not claimed their return or their value. He was thus not successful with that claim. As I have indicated, the Criminal Procedure Act provides a specific mechanism in s34 for an order for return of the items upon establishing the entitlement to possess those items. I take this into account in respect of the question of costs and whether the plaintiff should be awarded any costs for the return of the fertiliser which had had not even been claimed. In the exercise of my discretion, I do consider that the plaintiff should be awarded any costs in respect of claim one, given the fact that it should be dismissed. As far as costs are concerned, both parties sought orders to include the costs of instructed counsel, having engaged them. Those costs were in my view justified.

Conclusion

(lllllll) The following order is made:

1) Claims one and two are dismissed with costs.
2) The above cost orders includes the costs of one instructed and one instructing counsel.

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SMUTS, J

Judge

APPEARANCES

PLAINTIFF:	I. Visser Instructed by Dr Weder, Kauta & Hoveka Inc.

DEFENDANT:	G. Hinda SC Government Attorney