

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 57/2014

In the matter between:

**ROSCO MATENGU MAKAPA**

**PLAINTIFF**

and

**MINISTER OF SAFETY AND SECURITY**

**1<sup>ST</sup> DEFENDANT**

**PROSECUTOR GENERAL**

**2<sup>ND</sup> DEFENDANT**

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**3<sup>RD</sup> DEFENDANT**

**Neutral citation:** *Makapa v The Minister of Safety and Security* (I 57/2014) [2017]  
NAHCMD 130 (05 May 2017)

**Coram:** **CHRISTIAAN AJ**

**Heard:** 28, 29 NOVEMBER 2016 & 07 DECEMBER 2016  
09, 16, 24 FEBRUARY 2017

**Order released:** 28 April 2017

**Judgement released:** 05 May 2017

**FLYNOTE: DELICT** – Delict – Elements; Malicious prosecution; instigation or continuation of prosecution; whether the police or prosecutor acted without reasonable and probable cause – Plaintiff acquitted of offence charged – proof of

*animus iniuriandi*- Prosecutor had no personal knowledge of the facts underlying the charge – whether the prosecutor did not honestly form the view that there was a proper case for prosecution or whether the prosecutor formed that view on an insufficient basis.

**DELICT** – Development of the common law; malicious prosecution- maintaining prosecution without reasonable or probable cause or *animus iniuriandi* where prosecution is no longer justified – liability when the proceedings are maintained thereafter. Whether prosecutor acted maliciously – whether the sole or dominant purpose of the prosecutor was other than the proper invocation of the criminal law- Public rather than private prosecution.

**STATUTE** - Section 39 (1) of the Police Act 19 of 1999 - an amendment of the particulars of claim adding a new cause of action based on same facts does not warrant the issuance of a new notice in terms of the said Act.

**ETHICS** – Ethical duty of the Prosecuting counsel in criminal matters- prosecutors were under a constitutional duty to act fairly , independently and professionally in the performance of their duties -

**SUMMARY:** Plaintiff sued the defendants jointly and severally for damages for malicious prosecution – alternatively, constitutional damages based on same facts – Plaintiff was arrested, detained and charged with the offence of high treason, sedition, murder and other serious charges – but found not guilty and discharged at the close of the State's case..

*Held* – That in cases where a notice in terms of section 39 (1) of the Police Act has been issued in respect of certain facts alleged, an amendment of the particulars of claim adding a new cause of action based on same facts does not warrant the issuance of a new notice in terms of the said Act.

*Held* - that the first defendant did nothing more than place evidence and statements before the second defendant for the latter to make a decision whether or not to prosecute and therefore is not culpable regarding the claim of malicious prosecution.

*Held further* – there is a need to develop the common law regarding the delict of malicious prosecution by extending liability to cases where although the initiation of the proceedings was *bona fide*, it however becomes apparent in the course of the proceedings that no reasonable or probable cause still exists to continue the proceedings.

*Held further* – that although the initiation of criminal proceedings was *bona fide*, it became clear, at a certain point that, the evidence against the accused could not sustain a conviction and that the continuance of the criminal trial after that realisation was actionable and that malice could be inferred therefrom.

*Held* – prosecutors are under a constitutional duty to act fairly, independently and professionally in the performance of their duties and that they should be acutely aware that their decisions in criminal trials may have debilitating consequences on accused persons' rights to a fair trial and may affect the exercise of other human rights and freedoms.

## ORDER

---

1. The *point in limine* regarding the alleged non-compliance with Section 39(1) of the Police Act No. 19 of 1990 is dismissed.
2. The action against the first defendant for malicious prosecution is dismissed with costs.

3. The claim against the second defendant for instituting criminal proceedings against the plaintiff is dismissed.
4. The plaintiffs' alternative claim based on malicious continuation of the prosecution without reasonable and probable cause is upheld.
5. Costs are granted in favour of the plaintiff against the second defendant and the third defendant jointly and severally, the one paying the other to be absolved: consequent upon the employment of one instructing and two counsel
6. Reasons for judgment will be made available on Friday, 05 May 2017.
7. The matter in relation to the 2<sup>nd</sup> defendant is postponed to 28 May 2017 for a status hearing in chambers at 10H00 for direction regarding continuation and finalisation of the matter on the quantum.

---

## JUDGMENT

---

CHRISTIAAN AJ:

Nature of the case

[1] On 02 August 1999 various installations and government institutions were attacked with weapons of war. These included the Katima Mulilo Town Centre, the Katima Mulilo Police Station, the Wenela Border Post, the Kautonyana Special Field Force Police Base, the Mpacha military base and the Namibia Broadcasting Corporation building. As a result, various people were killed; some sustained serious injuries and motor vehicles and buildings were also damaged.

[2] Plaintiff and other accused persons were indicted on 18 May 2001, for their alleged role in the attack in what became known as the Caprivi Treason Trial. The

charges against the plaintiff included high treason, sedition, public violence, murder and robbery. The charges against the plaintiff were based on allegations of common purpose and conspiracy to commit the said offences. A State of Emergency was declared by the President in the Caprivi Region on 03 August 1999 and it ended towards the end of the same year.

[3] The Caprivi Treason trial was distinctive and unprecedented in the legal history of this country. This could be related from the fact that 126 accused persons were charged on 278 counts, based on the doctrine of common purpose and conspiracy. There were 379 witnesses who testified on behalf of the State and more than 900 witness statements had to be considered. The duration of the trial was estimated to be about 10 years.<sup>1</sup> During this period the accused were detained in custody and some of the accused and witnesses have died.

#### Introduction

[4] The matter in question is a consequence of the arrest and detention of the plaintiff by the officials of the Ministry of Safety and Security and the subsequent prosecution of the plaintiff by officials of the Prosecutor General's office, on suspicion that Plaintiff was guilty of High Treason, Sedition, Murder and other serious crimes.

[5] The principal claim is brought against both the first and second defendants for malicious prosecution under the common law in respect of the period of 29 August 1999 up to February 2010. The alternative to the principal claim is only against the second defendant and/or her employees, for damages based upon the alleged wrongful and malicious continuation of the prosecution as from 9 September 2008, for the crimes set out in the indictment.

[6] In addition, to this, the plaintiff brings an alternative claim for constitutional damages on the same facts, based upon the wrongful, unlawful and negligent violation or infringement of the constitutional rights by the defendants, or their employees, in arresting the plaintiff on 29 August 1999 and/ or prosecuting the plaintiff thereafter for high treason and the further charges in the indictment. The

---

<sup>1</sup> Pleadings bundle p. 97.

plaintiff's alternative claim is based on the violation of Art 7, 8, 11, 12,13,16,19 and 21 of the Namibian Constitution. He claims damages as contemplated in Art 25(3) or 25 (4) of the Namibian Constitution. The alternative claim based on constitutional damages is brought in the event that the claim based on malicious prosecution fails.

[7] The liability and quantum were separated by agreement between the parties. This trial concerns the liability only. At this point it is safe to mention that the total claim amounts to N\$ 30,436,850.68. In the event that liability is established, the court will proceed and hear evidence on the quantum.

[8] The particulars of claim were amended on two occasions by application, firstly, with regards to the alternative claim for constitutional damages and secondly, based on the alternative claim to the principal claim after evidence came up during cross-examination of the second defence witness, Mr July in the *Mahupelo*<sup>2</sup> matter. Both these applications were successful and the particulars of claim were duly amended.

[9] A pre-trial conference was held in which issues of fact and law to be addressed during the trial and in this judgment were identified and a draft pre-trial report was made, which was made an order of court. The trial commenced and four witnesses were called to testify.

#### Observation and approach

[10] I would like to point out that this case raised novel and complex issues, some of which have never been decided by our courts. This includes not only the proper interpretation to be given to the requirements for malicious prosecution, but also whether the continuation of a prosecution beyond a certain date when there is no longer a reasonable and probable cause, would also constitute malicious prosecution in terms of our common law.

---

<sup>2</sup>

*Mahupelo v The Minister of Safety and Security* (I 56/2014) [2017] NAHCMD 25 (2 February 2017).

[11] I will deal with the issues in sequence. First I will address the preliminary issues and legal contentions raised in the pleadings. Secondly, I will chronicle of the facts which gave rise to the dispute between the parties and deal with the legal principles regarding the delict of malicious prosecution. In respect of each of the issues above, I will apply the facts to the legal principles immediately after I have discussed such legal principles.

#### Preliminary issues and legal contentions

[12] Two preliminary points and legal contentions were raised during the pleading stage, but one of the legal contentions dealing with the aspect of prescription was abandoned by the defence counsel. I will therefore not continue to discuss the point on the aspect of prescription and I will say no more about it.

#### Point in limine

#### Section 39(1) notice of the Police Act<sup>3</sup>, No.19 of 1990

[13] The point taken by the defendant that gave rise to the legal contention is the alleged failure by the plaintiff to give the first and third defendants notice in terms of section 39(1) of the Police Act on the alternative claim for constitutional damages. This according to the defendants prevents the plaintiff from bring such a claim.

[14] It is expedient to set out the relevant provisions of s 39 (1) of the Police Act in order to address the point taken by the defendant. I suggest the issue taken *in limine* be set out before reference is made to the Police Act. Section 39 (1) of the Police Act reads:

‘Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within twelve months after the cause of action arose, and notice in writing of any such proceedings and the cause thereof shall be given to the defendant not less than one month before it is instituted: provided that the Minister may at any time waive compliance with the provisions of this subsection.’

---

<sup>3</sup> No. 19 of 1990.

[15] It is clear from the reading of s 39 of the Police Act that a proper and timeous notice of intention to bring proceedings is a pre- condition for the institution of a civil action under the Police Act. The question that would arise from the reading of this section would point to the purpose of this notice.

[16] The purpose of the notice in terms of s 39 of the Police Act was expounded in a number of judgments in the Namibian and as well as the South African jurisdictions. This is what the courts had to say in the case of *Minister van Polisie en Ander v Gamble en 'n Ander*<sup>4</sup>:

'The object of the notice required under s 32(1) is, as had been said often enough, to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter. The notice need not be as detailed as a pleading.'

[17] It has further been stated<sup>5</sup>:

'The purpose for which the notice is required to be given is of importance. That purpose is to ensure that the State, or the person to be sued, receives warning of the contemplated action and is given sufficient information so as to enable it or him to ascertain the facts and consider them.'

[18] The Section 32(1) notice referred to in the South African cases is the equivalent of our s 39 notice. There is thus no doubt that the same principles in South Africa would be applicable in our law. Counsel for the defendant in his arguments further stated that as a result of the plaintiff's non-compliance with the provisions of section 39 of the Police Act, the claim for constitutional damages can only be brought against the Prosecutor-General.

[19] It is clear that the defendants take issue with the fact that the s 39 notice sent to the Police did not include the alternative claim, thus the plaintiff does not have a basis on which to stand regarding this claim as there was no compliance with the provisions of s 39 of the Act.

---

<sup>4</sup> 1979 (4) SA 759 (A) at 769H.

<sup>5</sup> *Groepe v Minister of Police*, 1979 (4) SA 182 (E) at 184H.



[20] In the case of *Moroka v Minister van Polisie en 'n Ander*<sup>6</sup>, the same issue was canvassed and the under mentioned was the response of the court to the argument raised by the defendant:

‘ . . . an amendment was allowed to the plaintiff’s particulars of claim changing certain detail concerning the assault which had been notified in the s 32 (1) notice. It had been contended on behalf of the defendant that the plaintiff was required to give full particulars of its claim in the s 32(1) notice in the same form as was now sought to be included in the amended pleading. The Court held that sufficient particularity had been given, as I understand it, to investigate the matter. There was no prejudice to the Minister in the proposed amendment, which in any event accorded with the evidence that had already been given and against which no objection had been raised’. (my emphasis)

[21] I now refer to paragraph 6 of this judgment in which I have stated that the alternative claim for constitutional damages was brought on the same facts as the principal claim. In paragraph 8 of this judgment, I have further stated that the alternative claim was brought by way of an amendment to the particulars of claim. The absence of the alternative claim in the s 39 notice, does not add anything to the investigation which would have had to be carried out, and there was no likelihood of prejudice and surprise.<sup>7</sup> There is no difference between the causes of action, as they are based on the same facts.

[22] The cause of action remained the same during the amendment, as the plaintiff only amplified legal issues applicable to the facts and the circumstances upon which the claim is based. It cannot be regarded as a new cause of action.

[23] Based on the abovementioned, I am of the opinion that the notice given to the Police served its purpose and was sufficient to enable the defendant to investigate the claim. The defendant’s argument that the alternative claim can only lie against the Prosecutor – General cannot stand and is dismissed.

---

<sup>6</sup> 1984 (2) SA 325 (W).

<sup>7</sup> *Minister of Justice, Police, and Prisons, Ciskei, and Another v Ntlizwana* 1989 (2) SA 549 (CKA).

[24] This brings me to the next assignment, which is to give a brief description of the facts which gave rise to the dispute between the parties. In doing this, I will rely on the pleadings and the evidence that was presented in court.

### The pleadings

#### Particulars of claim and the defendant's plea

[25] The plaintiff was arrested on 28 August 1999 by one or more members of the Namibian Police and detained for 4716 days without the granting of bail. In October 1999, the plaintiff applied for bail, which was denied by the Magistrate's court.

[26] The cause of action is framed in the particulars of claim as follows:

#### A. PLAINTIFF'S PRINCIPAL CLAIM

##### Date of arrest

[27] Plaintiff claims that he was arrested on 29<sup>th</sup> of August 1999 by members of the Namibian Police in the Hage Road in Katima Mulilo in the Zambezi Region.<sup>8</sup>

[28] The defendants plead that the arrest was based on reasonable suspicion that the plaintiff had committed the offence of high treason and other offences referred to in annexure 1 to the particulars of claim.<sup>9</sup>

##### Instigation or setting the law in motion

[29] The plaintiff claims that members of the Namibian police wrongfully and maliciously set the law on motion by laying false charges against him. He claims that the charges were based on false information given to the first and second defendant, in an attempt to implicate him of high treason and other serious charges. The plaintiff further claims that in doing this, the members of the Namibian Police had no reasonable belief in the truth of the information they relied on.<sup>10</sup>

<sup>8</sup> Pleadings bundle, p.3, para (7).

<sup>9</sup> Pleadings bundle p.270 para 5.

<sup>10</sup> Pleadings bundle, page 3, para 8 and 9.

[30] The defendants denied that the members of the Namibian police set the law in motion by instigating prosecution against the plaintiff for high treason and related charges. The defendants pleaded further that the members of the Namibian Police investigated the 2 August 1999 attack and placed the witness statements and information they had obtained in the course of the investigation, before the second defendant to decide whether criminal proceedings should be instituted against the plaintiff.<sup>11</sup>

#### Decision to prosecute

[31] In addition that plaintiff claims that the second defendant and or her employees wrongfully and maliciously set the law in motion against him and continued to do so by prosecuting him of high treason and other serious charges.<sup>12</sup>

[32] The defendants pleaded that the second defendant decided in accordance with the powers, in terms of Art 88 of the Namibian Constitution, after an objective consideration of the statements and other relevant evidence relating to the attack on 2 August 1999, to indict the plaintiff on high treason and the charges contained in **Annexure '1'**.

#### Information on which the decision to prosecute is based

[33] The plaintiff further claimed that when the second defendant and or her employees set the law in motion or continued with his prosecution, they have done so without having sufficient information at their disposal, which could substantiate the charges preferred against him. And that the second defendant have done so without having any reasonable belief in the truth of the information, which could implicate the plaintiff of high treason and the commission of other serious charges.<sup>13</sup>

[34] The defendants plead that the evidence collected against the plaintiff, provided sufficient grounds for the members of the first defendant to hold a

<sup>11</sup> Pleadings bundle, page140, para 6.4.

<sup>12</sup> Pleadings bundle, page3, para 10.

<sup>13</sup> Pleadings bundle, p.4.para 10.1 and 10.2.

reasonable belief that the plaintiff committed the offences contained in Annexure '1'. The second defendant pleads that, based on the available evidence which included witness statements and other evidence relating to the attack, second defendant had the reasonable grounds to believe, on a *prima facie* basis, that the plaintiff committed the offences contained in Annexure '1', or that responsibility could be attributed to the plaintiff on the doctrine of common purpose and conspiracy.<sup>14</sup>

[35] The under mentioned alternative claim of malicious prosecution set out under paragraph 10 has been introduced by way of an amendment to the plaintiff's particulars of claim.

#### Continuation of prosecution

[36] The plaintiff claims that the second defendant and or her employees wrongfully and maliciously continued to prosecute him from 9 September 2008 and or 11 February 2013 for high treason and other crimes as set out in the indictment.

[37] The plaintiff claims that when the second defendant and or her employee continued to prosecute him, the testimonies of all witnesses who testified against him and all the evidence that could have implicated him was led by 9 September 2008 and or within a reasonable time thereafter. He states that despite this fact, the second defendant or her employees continued to prosecute him.

[38] The alleged continuation of the prosecution, according to the plaintiff was without reasonable and probable cause and it continued in circumstances where:

38.1 The second defendant and or her employee could invoke the provisions of section 6 of the Criminal Procedure Act<sup>15</sup> and stopped the proceedings; or

38.2 could have closed the state's case and requested the court for the plaintiff to be discharged or the release from prosecution on or by 9 September 2008 and or within a reasonable time thereafter, in order to avoid

---

<sup>14</sup> Pleadings bundle. P152.para 10.

<sup>15</sup> 51 of 1977

violation of the plaintiff's constitutional rights.<sup>16</sup>

[39] The defendant pleaded that the alternative claim based on the conduct and the omission by second defendant has no foundation in law. The second defendant states that as from 9 September 2008, neither second defendant nor her employees knew that all the evidence that could implicate plaintiff had been presented and that all witnesses that could implicate the plaintiff had completed their testimony.

[40] Second defendant further pleads that she could not stop the prosecution against the plaintiff; neither could she close the state's case against the plaintiff on 09 September 2008 nor at any time thereafter other than 11 February 2013, for the reasons listed hereunder.

40.1 Second defendant was not in a position to know whether all the evidence which could implicate the plaintiff was led or whether all the witnesses have completed their testimony.

40.2 The employees of the second defendant did not do an appraisal of the evidence continuously during the course of the criminal trial. The reason for this was that it was humanely impossible, considering the number of witnesses that testified the number of accused persons before the court and the complexity of the matter.

40.3 The second defendant claim that it would have been prejudicial to the State's case, because of the fact that witnesses could implicate accused persons they did not refer to in their written statements. And also because there was a possibility that witnesses called after 9 September 2008 could implicate the plaintiff.

40.4 The second defendant was of the view that they have established common purpose and conspiracy from the available witness statements and the evidence presented in court. And also because there was a possibility that the state's case could be strengthened by the defence case.

---

<sup>16</sup> Pleadings bundle, p.4 and 5, par 10A.3 (a-c).

40.5 Second defendant's employees have done an appraisal of the evidence in November 2010 before the close of the State's case, during which the police was requested to carry out a further investigation with respect to all the accused persons. Further evidence was gathered by the Police and the defence objected to the new evidence and the court sustained the objection of the defence on 17 February 2011.<sup>17</sup>

[41] Further to the abovementioned the second defendant pleads that the plaintiff had a remedy in terms of Art 12(1) (b) of the Namibian Constitution, to move for his release from prosecution and detention by November 2007 or any time thereafter.

### Separation of trials

[42] I must immediately mention that after further evidence was elicited during the cross-examination of Mr Taswald July in the Mahupelo matter<sup>18</sup>; plaintiff filed an application for amendment of the particulars of claim to introduce new subparagraphs 10.3 and 10.3A.3 (d). The court exercising, its judicial discretion, granted the application and the amendment is noted hereunder:

#### '10.3

10A.3 (d) Further alternatively, reasonably ought to have separated the trials of the accused between the group of accused referred to by the second defendant and/or her employees as the "attackers" and the further group identified by the second defendant and/or her employees as the " leadership and/or support group", the plaintiff being in the latter group, which would have resulted in the closing of the State's case against the plaintiff at a much earlier date than February 2012 and the consequent discharge of the plaintiff under section 174 of the Criminal Procedure Act, No.51 of 1977 at a much earlier date'.<sup>19</sup>

[43] The defendants, in response to this new amendment, informed the court that the plaintiff was legally represented and had the right in law to apply for the separation of trials, if he had a basis for doing so. The defendants further contended

---

<sup>17</sup> Pleadings bundle, p.153-154, para 10.

<sup>18</sup> Supra.

<sup>19</sup> Plaintiffs Heads of Argument, p 50-54. Para130-142.

that the plaintiff did not give any evidence as to why he did not apply for such separation. The defendant further argued that it would have been difficult to separate the trial, where the offences were committed pursuant to common purpose and conspiracy as alleged by the state.

#### Continued detention and trial within a reasonable time

[44] I will now continue to refer to the remaining paragraphs of relevance in the particulars of claim:

[45] The plaintiff claimed that he was prosecuted and tried for high treason and other crimes in the Magistrate's Court and High Court of Namibia and as a result, detained at different Police stations and Prisons at different occasions<sup>20</sup>.

[46] The plaintiff remained in custody from 29 August 1999 until 11 February 2013, until he was found not guilty of the charges against him and released. The plaintiff alleged that he was detained for 4916 days in total.

[47] The plaintiff further claimed that as a result of the aforementioned, the second defendant or her employees violated the constitutional right to a fair trial within a reasonable time as provided for in Article 12 (1) (b) of the Namibian Constitution and that the alleged violation warrants a claim for damages as contemplated by Article 25(3) or Article 25(4) of the Namibian Constitution.<sup>21</sup>

[48] The defendants admit that the plaintiff was arrested on 29 August 1999 and that he was detained until 11 February 2013. The defendant further stated that the detention was on the authority of the court and was accordingly lawful. The plaintiff appeared and was tried in the Magistrate's Court and the High Court of Namibia.<sup>22</sup>

[49] The defendants plead that the plaintiff does not have a claim in law against the defendants in respect of the period it took to finalize the trial, in circumstances where the court exercised its discretion in terms of s 68 of the Criminal Procedure

---

<sup>20</sup> Pleadings bundle. 5 and 6, para 11.

<sup>21</sup> Pleadings bundle, p.5 and 6 para 11-13.

<sup>22</sup> Pleadings bundle p.275, para 16-17.

Act.

[50] Defendants further deny that the trial did not take place within a reasonable time, if regard is had to the number of accused persons before the court, the complexity of the case which resulted in numerous applications, necessary postponements, the uncooperative attitude of the plaintiff, logistical challenges relating to securing the attendance of witnesses at court and many other factors.

[51] The second defendant further pleads that if it is found that the trial did not take place within a reasonable time, it is denied that the second defendant was solely responsible for any delays that occurred during the conduct of the criminal trial. The second defendant pleaded that the plaintiff was also responsible for such delays.

#### Violation of Article 12(1) (b) of the Namibian Constitution

[52] As stated earlier in the opening paragraphs of this judgment, the constitutional claim for damages will only be instituted in the event that the court finds that the plaintiff's claims are not adequately covered by the common law.

[53] The plaintiff claims that the violation of his constitutional rights guaranteed under Articles 7,8,11,12,13,16,19 and 21 of the Constitution was occasioned by the arrest of the plaintiff by the employees of the first defendant and subsequent detention and prosecution and undue delay of the trial by the employees of the second defendant. Plaintiff claims that as a result of this violation of his constitutional rights, he suffered loss and damages and that he is entitled of an award in terms of Art 25(3) and Article 25(4) of the Namibian Constitution.<sup>23</sup>

[54] The defendants deny that a violation of Art 12 (1) (b) is actionable in terms of Art 25(3) and 25(4) of the Constitution. They argued that Article 12 (1) (b) has its own remedy where a trial does not take place within a reasonable time, namely that it entitles the accused to apply for his release. The defendants argues that the plaintiff failed to apply for his release on that basis, and an award for damages would be inappropriate, even if the court would find that the trial had not taken place within

---

<sup>23</sup> Pleadings bundle.p9-11, para 17-23.



a reasonable time.<sup>24</sup>

### The Evidence

[55] The plaintiff, Mr Rosco Matengu Makapa testified on his own behalf at the trial. Advocate Walters, gave evidence after he was subpoenaed on behalf of the plaintiff. The defendants, for their part, called Constable Aupa Erastus, a member of the investigation team in the treason trial, to testify on their behalf. The defence closed their case and the plaintiff successfully applied for the re-opening of the plaintiff's case and called Mr. Taswald July based on his involvement as part of the prosecution team in the treason trial.

[56] A number of witness statements and exhibits were handed in at court during the course of the criminal trial. The witness statements that were referred to form part of the docket in respect of the charges brought against the plaintiff.

[57] Having accepted the onus to begin and prove his case, the plaintiff testified in support of his claim. Salient portions of his evidence are captured below.

### Evidence of Rosco Matengu Makapa

[58] The plaintiff stated that he was 49 years old when he testified, and 31 years of age at the time of his arrest on 29 August 1999. He was married at the time of the arrest and had seven children. When he was arrested, he was at the bus station in Katima Mulilo. He was arrested by two police officers and informed that he was being taken for an enquiry about his alleged involvement in the 2 August 1999 attack.

[59] At the time of his arrest, he was taken to the Katima Mulilo Police Station. The plaintiff testified that he was ordered to go to a room which the Police officer called an office.

---

<sup>24</sup> Pleadings bundle, p 272- 273, para11.

[60] In the room, he was with two persons whom he later came to know as Karstens and Evans Simasiku. Both of them started asking him questions about transportation, and the plaintiff denied. According to the plaintiff, the two police officers threatened him with assault, if he continues to deny his involvement in the attacks.

[61] Mr. Makapa was then informed by Mr. Karstens that he should put his finger on the floor and turn around with the finger pressed on the ground, until he became dizzy and fell down. Karstens and Simasiku started kicking him and beating the plaintiff. Sgt. Chizabulyo came into the room and also asked him a few questions.

[62] The plaintiff testified that he slept without food in Grootfontein and did not get any food or water.

[63] The plaintiff further testified that he remained in custody until 11 February 2013, when he was released following a successful application in terms of s 174 of the Criminal Procedure Act by His Lordship Mr. Justice Hoff. The Plaintiff testified that he applied for bail during his incarceration, but it was denied.

[64] The plaintiff further testified that he was married at the time of the arrest but his wife left while he was in prison. His two children did not finish school because there was no financial and material support at the time.

[65] He testified that he never took part in any meeting which planned to secede the Caprivi from the rest of Namibia. The plaintiff referred to a number of witness statements provided by the Defendants as statements which were used to formulate a case against him.

[66] These witness statements referred to were made by the following witnesses:

(a) Albert Lingesa Mutile<sup>25</sup>

---

<sup>25</sup> Exhibit B and C to the record of proceedings.

[67] He referred to the statement of Albert Lingesa Mutile made on 29 June 2000 in which the witness refers to a conversation he had with me. The plaintiff commented by saying that he denies that he asking for transport from Mutile. The plaintiff further denied involvement in the transporting of people for purposes of attacking government bases. He indicated that this statement could not be the basis of his arrest as it was made after he was arrested and that it does not disclose the commission of any offence.

(b) Constable Aupa Erastus<sup>26</sup>

[68] The plaintiff further referred to the statement of Constable Aupa Erastus. He the date of his arrest as 29 August 1999 as stated by Aupa Erastus. He indicated that this statement could not be the basis of his arrest as it was made after he was arrested and that it does not disclose the commission of any offence.

(c) Vasco Simambela<sup>27</sup>

[69] He further referred to the statement of Vasco Simambela which was made on 23 July 2000. The plaintiff indicated that this statement could also not form the basis of his arrest as it was made a few days after his arrest and also because this statement refers to Oscar Puteho as the person from whose house food was collected. Simambelo suggested that the plaintiff supported rebels after the August 1999 attacks. There is no factual basis to support Simambelo's finding.

(d) Kenneth Malumo Matengu<sup>28</sup>

[70] This statement according to the plaintiff's is incoherent, in that it is not clear whether he was narrating what he observed or information received from third parties. The plaintiff remarked further that he denies the allegations by the witness.

(e) Christopher Nzeko Mushabati<sup>29</sup>

---

<sup>26</sup> Exhibit D to the record of proceedings.

<sup>27</sup> Exhibit E to the record of proceedings.

<sup>28</sup> Exhibit F to the record of proceedings.

<sup>29</sup> Exhibit G to the record of proceedings.

[71] The plaintiff denies the allegations made in this statement, and states that he did not transported people to makanga for purposes of attacking and seceding Caprivi from Namibia by violent means.

(f) Smith Nkando Mikini<sup>30</sup>

[72] The plaintiff testified that Mikini made a statement against him on 7 March 2001 and said that he drove a blue Toyota Hilux belonging to the plaintiff, and this was denied by the plaintiff. He further testified that this statement could not be the basis for his arrest and subsequent trial on 277 charges.

(g) Bernard Bareke Kanzeke<sup>31</sup>

[73] The plaintiff referred to the statement of Bernard Bareke Kanzeke which was made on 16 March 2001, after his arrest. In this statement the plaintiff indicated that he was implicated for attending a DTA meeting whose object was the secession of Caprivi from the rest of Namibia. The plaintiff denied this allegation.

[74] The plaintiff further pointed out that only three people who gave statements to implicate him in the commission of the offence testified against him in the trial and all three of them could not identify him in court. The people who testified against him are Kennedy Malumo Matengu, Vasco Simambelo, Albert Mutile Lingesa.

[75] In concluding his testimony, the plaintiff made it clear that the members of the first and third defendant arrested him wrongfully without a warrant and detained him unlawfully from 29 August 1999. The plaintiff testified that this amounted to a gross violation of his constitutional rights.

[76] The plaintiff further added that the members of the first and third defendants assaulted him and subjected him to humiliating and degrading conduct in an attempt to extract a confession out of him.

---

<sup>30</sup> Exhibit H to the record of proceedings.

<sup>31</sup> Exhibit I to the record of proceedings.

[77] Regarding the conduct of the second defendant, the plaintiff concluded his testimony by saying that the office of the second defendant did not have sufficient information at its disposal, which substantiated the 277 charges and consequently justified his prosecution. He further stated that the second defendant ought to have known at the end of September 2008 that there would be no further witnesses available that could implicate him in the commission of the offences. Despite knowing this, he concluded, the second defendant prosecuted him beyond 9 September 2008, when the last evidence had been tendered which concerned him.

[78] The cross-examination<sup>32</sup> of the plaintiff by the defendants' counsel, centred on the general and specific evidence and this is a summary of the information:

'78.1 It was put to the plaintiff that the decision to prosecute was based on the available evidence in the police docket. The plaintiff clarified that the evidence contained in the police docket were the witness statements which were deposed during the period 29 June 2000 to 17 March 2001. The plaintiff further stated that it was a clear indication that the prosecution was in possession of all the evidence prior to the signing of the indictment by the Prosecutor-General and three years before the trial commenced.

78.2 The plaintiff was asked about the contents of the statements which implicated him in the commission of the offence. Plaintiff, under cross-examination denied the contents of witness statements that linked him to the commission of the offence

#### Evidence of Advocate John Walters

[79] As indicated above, Advocate Walters testified on behalf of the plaintiff on subpoena. His evidence can be summarised as follows:

'79.1 He testified that he is currently the Ombudsman of Namibia for the past 12 years. He also informed the court that he is aware of the Caprivi treason trial as he acted as the Prosecutor-General of Namibia from 01 December 2002 up to the end of December 2013. He indicated that he was a career prosecutor since January 1981 up to December 2002, and that he has 11 years' experience as a prosecutor.

---

<sup>32</sup> Transcribed record of proceedings. 102 -139

79.2 Asked about the Constitutional role of the Prosecutor-General and the staff, he answered by saying that they occupy an important position in a constitutional democracy like Namibia. He further testified that they derive their powers from Art 88 of the Namibian Constitution and more specifically Article 88 (1) and (2) thereof. Advocate Walters specifically referred to the delegation of power in which the Prosecutor-General is empowered to delegate the power to prosecute to various prosecutors prosecuting in the courts of Namibia.

79.3 Advocate Walters pointed out in his testimony that the power derived from the constitution, requires of the Prosecutor-General to execute their prosecutorial functions independently and without fear, favour or prejudice.

79.4 He was further asked to elaborate on the statement that the prosecution is *dominus litis*. He testified that in his view *dominus litis* means that the prosecution is to control the proceedings, but that control is subject to the constitution and the law and it also means that you should prosecute without fear or favour. He further stated that the prosecution would not be held in secrecy, as the prosecutor has the duty to reveal if there is any evidence which favours the accused. Prosecutors should be transparent and should exercise their powers lawfully and must not act arbitrarily, he added.

79.5 Various statements were put to Advocate Walters regarding the duties of a prosecutor and the under mentioned were his responses to the statements by the counsel for the plaintiff.

79.5.1 *The duty to pay attention to the police docket*- underlying this duty was to look carefully at the evidence as this was the source of information of evidence from which the indictment has to be drawn up. The dockets should be disclosed to the defence counsel to enable them to prepare. Contradictory statements should be pointed out because they render a prosecution impossible, and if there is a need, the matter should be withdrawn. If there is insufficient evidence against an accused before plea, the case should be withdrawn and sent back for further investigations. If you realise there is insufficient evidence after the plea, the proceedings have to be stopped.<sup>33</sup> The docket will be sent to the Prosecutor-General to ask for permission to stop the proceedings. He further added that the prosecutor dealing with the docket must be active in doing this. It would be expected of prosecutors in complex and lengthy trials to review the docket from time to time and to inform the

---

<sup>33</sup> Page 152- 153 of the record of proceedings.

Prosecutor General about changes that occur in the evidence, which will render the prosecution of an accused unnecessary.

79.5.2 *Duty to be aware of constitutional provisions* - Advocate Walters further testified that prosecutors should be aware of the constitutional provisions of a fair trial. Prosecutors should be mindful of arbitrary arrest and detention.<sup>34</sup>

79.5.3 *Duty not to obtain convictions, but to see to it that justice is done* - Advocate Walters said that there is no duty to win the match, but one must play a fair game. A prosecutor must act in a manner which is responsible and fair towards the accused.<sup>35</sup>

79.5.4 *Duty that all relevant information must be placed before the court* – Advocate Walters testified this that it is the ethical duty of both the prosecution and defence counsel. This duty, he agrees, is based on the ground that the prosecution has all the resources of the state including finances at its disposal.<sup>36</sup>

79.6 A further aspect on which Advocate Walters testified was his role in the Caprivi Treason trial. He pointed out that he was serving as the Acting Prosecutor General when the 2 August attacks took place. He testified that a state of emergency was declared. He also confirmed that an indictment was prepared by the Prosecution in 2001 and a further indictment with additional charges was signed by him.<sup>37</sup>

79.7 On the point of the indictment, Advocate Walters testified that it involved 278 charges of serious crimes of high treason, public violence, murder, unlawful possession of weapons, attempted murder, malicious damage to property and theft. The accused were arraigned on all those charges.<sup>38</sup>

79.8 Advocate Walters admitted that if he was given an opportunity he would have come up with another decision, realising it took ten years to finalize the matter. He also added that he would have dropped the less serious charges and only proceeded on the more serious once. He added further that a separation of trials, would have been one of the options to be considered.<sup>39</sup> To this he added that it was on after thought he had after the fact.

---

<sup>34</sup> Page 154-155 of the record of proceedings.

<sup>35</sup> Page 155- 156 of the record of proceedings.

<sup>36</sup> Page 156 of the record of proceedings.

<sup>37</sup> Page 161-162 of the record of proceedings.

<sup>38</sup> Page 162 of the record of proceedings.

<sup>39</sup> Page 163 of the record of proceedings.

79.10 Advocate Walters also indicated that he signed the indictment, and after he was appointed as Acting-Prosecutor General, the prosecution team that dealt with the matter resigned and he had to put together a new team, which consisted of two members, Advocate January, and Mr. Taswald July. He further added that it crossed his mind to increase the number of Prosecutors, but they did not have enough prosecutors at that time.

79.11 Advocate Walters further testified that he left the position as acting Prosecutor-General during the start of the trial and joined the prosecution team at a later stage as a consultant for a period of six months on the request of the Permanent Secretary at the Ministry of Justice. At that stage he worked closely with the prosecutors at their base in Grootfontein.

79.12 When asked by the plaintiff's counsel about the hierarchy of decision-making as far as prosecutorial decisions are concerned, he had the following to say; the docket was assigned to a particular prosecutor to peruse it to see whether there is sufficient evidence to proceed with the matter. That prosecutor would draft the indictment and indicate in which court the accused would be arraigned, but the ultimate decision to prosecute lay with the Prosecutor General.<sup>40</sup>

79.13 Advocate Walters further informed the court that the lead Prosecutor in the Caprivi Treason trial was Mr. July and that he was working with Mr. January and Mrs Barnard. He further admitted that it was impossible for him to personally peruse the volumes of statements in the Police docket, but that he read the indictment and he picked up that a Zambian National was indicted and he then informed the prosecution team to have a further look at the indictment and the evidence available. Advocate Walters indicated that he informed the prosecution team to peruse the evidence in the docket and if there was no evidence against any accused, that an instruction to withdraw the matter be made.<sup>41</sup>

79.14 When asked to elaborate on the control of the docket once the investigating officers have handed the docket over to the prosecutor, Advocate Walters testified that the docket remains the responsibility of the Prosecutor. If there is a need for further evidence to be obtained, the prosecutor would give further instructions to the investigating officer to obtain more evidence.<sup>42</sup>

---

<sup>40</sup> Page 166 of the record of proceedings.

<sup>41</sup> Page 166-167 of the record of proceedings.

<sup>42</sup> Page 171 of the record of proceedings.



79.15 Advocate Walters further testified about the responsibility of the prosecutor in the event that the prosecution does not have a reasonable belief in the truth of the information after consulting with witnesses. On this aspect he commented that if this is revealed during consultation, the witness would not be called but made available to the defence to call as a witness.<sup>43</sup>

79.16 On the aspect of Art 12, which provides that a trial should take place within a reasonable time, Advocate Walters said that if he is the, prosecutor he makes sure that a trial takes place within a reasonable time, by giving instructions to the investigating officer to respond to the request for further investigations within a specific period of time. He also acknowledged the fact that the circumstances may differ in the case of a long trial, as there are many factors which can influence the duration of the case. He specifically referred to the Caprivi Treason trial, where unforeseen things happened, that prompted the defence and prosecution to request for postponements.<sup>44</sup>

## Defence Case

### *Evidence of Detective Warrant Officer Aupa Erastus*

[80] Detective Warrant Officer Aupa Erastus was the only defence witness in the trial. He was a police officer employed by the Ministry of Safety and Security as a Detective Warrant Officer and was stationed at the High Treason and Counter Terrorism Unit in Windhoek.

The following is the evidence by Sergeant Simasiku:

'80.1 That he was one of the investigating officers appointed to the High Treason Unit. He also informed the court that he was one of 22 investigating officers appointed to investigate the matter in which the plaintiff appeared.

80.2 He indicated during his testimony that his engagement with the Caprivi Treason trial started on 02 August 1999, after the attack on government installations and other installations at Katima Mulilo in the Caprivi Region. At that stage, Detective Warrant officer

---

<sup>43</sup> Page 173- 174 of the record of proceedings.

<sup>44</sup> Page 175 of the record of proceedings.

Erastus was a member of the Criminal Investigation Unit in the Caprivi Region and held the rank of Constable.

80.3 After the attacks of 2 August, the investigation team launched an operation and came up with strategies to investigate the high treason matter in order to stabilize the security situation in the region. They reinforced their patrols through the region. During this time, they received information that Caprivi Liberation Army rebels were moving throughout the region. The informers were sent back to the villages to verify the information that was in the investigators' possession and to obtain new information.

80.4 During this process the investigators received information that after the said attacks, the plaintiff transported CLA rebels from the rebel camps to various places in Katima Mulilo in order for the CLA rebels to attack Government institutions.

80.5 The witness further informed the court, that he drove from Katima Mulilo to look for Makapa at the village and did not find him and that he was further informed that Makapa went to the Katima Mulilo town centre. The witness testified that on his way from Makapa village, he instructed security forces at the Kautunyana Roadblock to arrest Makapa should he pass through.

80.6 The witness informed the court that the plaintiff was arrested on 29 August 1999, by the security forces and brought to the Katima Mulilo police station and handed over to him. The plaintiff testified that he arrested the plaintiff and explained his right and detained him pending further investigations.'

[81] After the close of the defence case, the plaintiff successfully applied for the re-opening of its case and called Mr. Taswald July.

#### Evidence of Mr Taswald July

[82] Mr Taswald July testified and informed the court that he was the Deputy-Prosecutor-General when the Caprivi Treason trial commenced, but is no longer employed by the office of the Prosecutor-General.

[83] He testified regarding his contribution in the formulation of the decision to prosecute and informed the court that he was part of a team that consisted of Advocate January and Advocate Barnard and they formulated the charges.

[84] Mr July further testified that a request for further particulars by the accused persons on 6 May 2003 prompted a review of the charges against the plaintiff and the further particulars were given during September 2003.

[85] He pointed out that there was no objection by the plaintiff and his legal representative to the further particulars given by the prosecution team and the plaintiff also did not tender a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977.

[86] Mr July further added in his testimony, that the prosecution team considered the evidence against the plaintiff based on the indictment signed in 2001, and the prosecution was satisfied on a *prima facie* basis that the plaintiff committed the offences alleged.

[87] The grounds for prosecuting the plaintiff according to Mr July were based on the evidence in the police docket and the exhibits. He further added that the decision to prosecute was in line with the prosecutorial function in terms of Article 88 of the Constitution.

[88] According to Mr July, the following were the witness statements considered and they are stated in sequence as it was discussed in his testimony.

- a) Albert Lingesa Mutile – Exhibit B
- b) Constable Aupa Erastus - Exhibit D
- c) Vasco Simbobali – Exhibit E
- d) Kennedy Malumo Matengu – Exhibit F
- e) Christopher Nzeko Mushabati – Exhibit G
- f) Bernard Bareke Kanzeka – Exhibit I

[89] Mr July testified that the evidence contained in these statements established on a *prima facie* basis that the plaintiff supported the rebels by transporting them and by providing food to them. He further added that this conduct of the plaintiff showed how he associated himself with the actions of those who had the aim of seceding the Caprivi from the Republic of Namibia.

[90] The abovementioned according to Mr July was the basis for the decision to prosecute the plaintiff.

[91] Mr July also testified about the discharge of the plaintiff in terms of s 174 of the Criminal Procedure Act. He confirmed his evidence that the plaintiff was released in terms of s 174. This is what he had to say in his testimony:

'56. The case against plaintiff failed not because of a lack of reasonable and probable cause when the prosecution was instituted against him, but because the witnesses Albert Mutile Lingesa and Kennedy Malumo Matengu who in fact gave testimony that implicated the plaintiff in the crimes in annexure 1, failed to identify plaintiff.'

[92] Mr July testified that there was no reason for the second defendant to maliciously prosecute the plaintiff as all decisions were taken in good faith and based on an honest belief that there was a *prima facie* case against the plaintiff.

[93] On the issue of the undue delay in prosecuting the plaintiff, Mr July had the following to say in his testimony:

'58. The Caprivi treason trial was exceptional, and its magnitude unprecedented in the legal history of this country: 126 accused persons were charged on 278 counts, most of them being serious, based on the doctrine of common purpose/conspiracy, 379 witnesses testified on behalf of the State and more than 900 witness statements had to be considered. All this contributed to the length of the duration of the trial.'<sup>45</sup>

[94] He further testified that most of the time leading up to the commencement of the trial was taken up by pre-trial proceedings and bail and legal aid applications. A special court was established to deal with the case and it was scheduled to

<sup>45</sup> Pleadings bundle, p 97, par 58.

commence on 6 May 2003, and they could not continue as the plaintiff and his co-accused filed applications for further particulars and this was in respect of 122 accused persons. The response was only granted during September 2003. The trial was scheduled to start on 27 October 2003 and the plaintiff and his co-accused gave notice that some accused intended to challenge the jurisdiction of the High Court to hear the matter. The High Court's decision was delivered and the state appealed and the Supreme Court delivered judgment on 21 July 2004.

[95] There were numerous other reasons for the delay and they are quoted as follows:

'68. Delays were caused by request for postponements for various reasons at the instance of the State and the defence. Request for postponements were made to the Court and carefully considered by the court. Other delays were caused by witnesses who were collected from villages and transported from Katima Mulilo to Grootfontein and then later to Windhoek. At times witnesses were unavailable for various reasons; accused persons became sick and unable to attend proceedings; withdrawal of defence counsel and appointment of new counsel who had to study the court record caused further delays; appointment of counsel for undefended accused persons; court recess and the hearing of the section 174 applications.'

[96] Mr July further added on the abovementioned reasons and testified that there were numerous applications on questions of law which needed extensive research and the consideration by the court and some of these arguments raised by counsel could sometimes only be resolved by trial within a trial and it took time. High Court proceedings were stayed sometimes to wait for the outcome of appeals from the Supreme Court. Mr July further added upon that in an attempt to expedite the finalisation of the case, the state brought an application to extend the court hours, which was opposed by all defence counsel.

[97] Another reason which further enhanced the delay according to Mr July's testimony was the unforeseen motor vehicle accident in which one prosecutor lost her life and the two were critically injured, leaving the investigating officers incapacitated. Furthermore witness died before the case could be finalized and others fled to Botswana because of the fear of intimidation.

[98] Mr July concluded his testimony by denying that the State was guilty of wrongful delays on the basis of which plaintiff can claim.

### Law of Malicious Prosecution

[99] Much of the argument advanced by both sides centred on the claim for malicious prosecution. It is thus dealt with first. In *Akuake v Jansen van Rensburg*<sup>46</sup> Damaseb JP states the following at p.404F:

'To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

- (i) That the defendant actually instigated or instituted the criminal proceedings;
- (ii) Without reasonable and probable cause; and that
- (iii) It was actuated by an indirect or improper motive (malice) and;
- (iv) That the proceedings were terminated in his favour; and that
- (v) He suffered loss and damage.'

[100] The onus to prove these requirements rests on the plaintiff.<sup>47</sup> The fourth and the fifth requirements quoted above are common cause; the fifth requirement will be dealt with should the matter proceed to the determination of quantum. The following requirements are in issue:

100.1 Whether the Namibian Police instigated or instituted the criminal proceedings;

100.2 If it is found that the Namibian Police instigated or instituted the criminal proceedings, the question is whether they were actuated by an indirect or improper motive and without reasonable and probable cause;

100.3 Whether the Prosecutor General acted with malice and without reasonable and probable cause in prosecuting the plaintiff?

---

<sup>46</sup> 2009 (1) NR 403 (HC).

<sup>47</sup> *Akuake v Jansen Van Rensburg* 2009 (1) NR 403 HC para 3.

[101] The principal claim is thus brought against both the first and second defendants based on malicious prosecution under the common law in respect of the period 16 March 2000 to the end of March 2006, alternatively to the end of November 2011.<sup>48</sup>

#### Instigation or Institution of Proceedings

[102] The plaintiff must allege and prove that the first defendant instigated the proceedings, or that he or she set the law in motion. That is, the first defendant actually instigated or instituted them.

[103] In the matter of *Minister of Justice and Others v Moleko*<sup>49</sup>, this is what the court had to say with regard to the liability of the police:

'With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.' (my emphasis)

[104] The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient.<sup>50</sup> On the other hand, an informer who makes a statement to the police to found the claim which is willfully false in a material respect instigated a prosecution may be held personally liable.<sup>51</sup>

[105] Instigation will only be established, if the plaintiff proves (as alleged) that the police knowingly placed false information before the Prosecutor-General, and that the plaintiff was prosecuted as a result of such false information.<sup>52</sup>

[106] The defendants in their amended plea admitted that the Namibian Police set the law in motion by instigating the prosecution of the plaintiff. The defendants pleaded that the Namibian Police placed witness statements before the second

<sup>48</sup> Page 2 of Plaintiff's heads of arguments, para 5.

<sup>49</sup> 2008) 3 ALL SA 47(SCA), para11.

<sup>50</sup> *Akuake v Jansen Van Rensburg* para 4.

<sup>51</sup> *Akuake supra*.

<sup>52</sup> *Akuake supra*

defendant, who decided to prosecute the plaintiff.<sup>53</sup>

[107] It is clear from the evidence of Detective Chief Inspector Simasiku that the Police acted on information they had received from informers that the plaintiff supported the CLA rebels with food. Informers were instructed to follow up this information to see whether by supporting them it holds truth. He further testified that a roadblock was manned and the plaintiff was arrested in a car with Bennet Mutuso and Agri Mwamba and food together with an AK 47 rifle were found.

[108] He further testified that after the plaintiff was arrested, statements were obtained as part of the on-going Police investigations in the case. According to him, these statements were handed to the Prosecutor- General in order to make a decision whether criminal proceedings should be instituted against the plaintiff or not.

[109] Detective Inspector Simasiku testified that he had nothing to do with the decision to prosecute Mr Mahupelo – he merely conducted the investigation and collected evidence. As far as he was concerned, the decision to prosecute was ‘the prerogative of the Prosecutor General’.

[110] The Plaintiff, during cross-examination, could not give an explanation for the allegations that the Police had falsified statements. He informed the court that he knew nothing about it as he was not present when the statements were taken.<sup>54</sup>

[111] Based on the evaluation of the abovementioned law and facts, it is clear that the plaintiff failed to prove that the Police did anything more than place the available evidence before the Prosecutor-General, leaving it to the Prosecutor –General to independently decide whether or not to prosecute or not.

[112] The claim for malicious prosecution against the Police thus falters at the first hurdle and is thus dismissed.

---

<sup>53</sup> Pleadings record p.151, para 6

<sup>54</sup> Transcribed record, p 133.



[113] It follows that the remaining requirements are only relevant insofar as they concern the potential liability of the Prosecutor-General. Before I go into a discussion of the remaining requirements regarding the liability of the Prosecutor-General, I deem it necessary in the context of the matter that the court is faced with, to give a brief overview of the role of the Prosecutor- General.

#### Constitutional Role of the Prosecutor- General

[114] In the case of *Minister of Safety and Security and Another v Carmichele*<sup>55</sup> Harms JA held:

‘In determining the accountability of an official or member of government towards a plaintiff, it is necessary to have regard to his or her specific statutory duties and to the nature of the function involved. It will seldom be that the merely incorrect exercise of discretion will be considered wrongful.’

[115] The office of the Prosecutor General in Namibia is a constitutional establishment in terms of Art 88 of the Namibian Constitution, which provides:

‘[t]here shall be a Prosecutor- General appointed by the President on the recommendation of the Judicial Service Commission’.

[116] Under Art 88(2), the Prosecutor- General has the powers:

- (a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;( my emphasis)
- (b) to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;
- (c) to perform all functions relating to the exercise of such powers;
- (d) to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;( my emphasis)
- (e) to perform all such other functions as may be assigned to him or her in terms of any other law

---

<sup>55</sup> 2004 (3) SA 305 (SCA) (2004) (2) BCLR 133 ;( 2003) 4 All SA 565.

[117] It is thus clear that the Prosecutor General derives his/her powers and legitimacy from the above constitutional provisions, which are complemented by the Criminal Procedure Act.

[118] Section 2(1) of the Criminal Procedure Act<sup>56</sup> gives the Prosecutor General the prerogative to institute criminal prosecutions over all offences that fall within the jurisdiction of Namibian courts. All such prosecutions are to be instituted in the name of the state, save for private prosecutions as provided for in s 13 (1) of the Act.

[119] From the reading of s 6 of the Criminal Procedure Act<sup>57</sup>, it is clear that the Prosecutor General has powers to withdraw charges before the accused has pleaded, and to stop proceedings thereafter. A prosecution can only be stopped with the written consent of the Prosecutor General or any other person authorised to do so.

[120] The above provisions clearly indicate that the Prosecutor General is supposed to be independent in every sense of the word and not subject to outside influence. However, the provisions fall short of setting out what the role of the Prosecutor General entails, and how its mandate should be performed.

[121] In the case of *S v Mashinini and Another*<sup>58</sup> Mhlantla JA said:

'It is well-known fact that the state is *dominus litus*. After the Police have concluded their investigations, the docket is given to the prosecutor. He or she gains access to all documents and statements in the docket. Based on this, he/she decides on which charge(s) to prefer against an accused person. The latter plays no role in this critical choice by the prosecutor.

When a prosecutor drafts the charge sheet or indictment of the charges that the accused must face in Court - . . . he is performing an important public and administrative task which can have very important consequences for the public at large and especially for an accused'.

---

<sup>56</sup> 51 of 1977.

<sup>57</sup> *Supra*.

<sup>58</sup> (502/11) [2012] ZASCA 1; 2012 (1) SACR 604 (SCA) (21 February 2012).

[122] There is clear support for above the statements in the evidence presented by Advocate Walters and Mr July. Both these witnesses showed to the court throughout their testimonies that they fully understand the constitutional role of the Prosecutor General as outlined by the Namibian Constitution.

[123] In my view the Constitutional role of the Prosecutor- General in the process of making decisions to prosecute a person, is one of its' core responsibilities. The decision to prosecute or not to prosecute can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

[124] Prosecutorial discretion is a term of art. It does not simply refer to any discretionary decision made by a prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Prosecutor- General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. It is therefore essential that the prosecution decision receives careful consideration. But, despite its important consequences for the individuals concerned, the decision is one which the prosecutor must make as objectively as possible.

[125] I am mindful of the fact that in performing their duties, prosecutors will deal with a large number of legal and administrative aspects of their work and can be either routine, or complex and unusual. Despite the variety of arrangements in prosecutor's offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as the respect for the rights of all parties involved in the criminal justice system.

[126] It is a well-known fact that a prosecutor exercises discretion on the basis of the information before him or her. This would call upon a prosecutor to ensure that the

general quality of decision- making and case preparation is of a high level, and that decisions are not susceptible to improper influence.

[127] Prosecutors should thus not initiate or continue proceedings when an impartial investigation shows the charge to be unfounded. When instituting or maintaining criminal proceedings, the Prosecutor should proceed and only when a case is well founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence. This is to be recognised by the common law principle that there should be “reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (or maintained) and the necessary constitutional protection afforded.

[128] I must note that courts are not eager to limit or interfere with the legitimate exercise of prosecutorial authority. However a prosecuting authorities’ discretion to prosecute is not immune from the scrutiny of a court which can intervene where it is alleged that such discretion is improperly exercised.

[129] I would now proceed and discuss the remaining requirements regarding the liability of the Prosecutor General.

#### Reasonable and probable cause

[130] The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable and probable cause. Reasonable and probable cause means:

‘an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed’.<sup>59</sup>

[131] The concept involves both subjective and objective elements. There must be both actual belief on the part of the prosecutor and the belief must be reasonable in

---

<sup>59</sup> *Hicks v Faulkner* 1878 8 QBD 167 at 171; *Waterhouse v Shield* 1924 CPD 155 at 162.

the circumstances. A combination of these two tests means that the defendant must have subjectively had an honest belief in the guilt of the plaintiff and such belief must also have been objectively reasonable.<sup>60</sup>

[132] In determining whether or not the decision by the Prosecutor General to prosecute Mr Makapa amounted to malicious prosecution, it must also be remembered that, in the relevant charge sheet,<sup>61</sup> the State alleged that Mr Makapa acted with common purpose and was involved in a conspiracy.

[133] As far as the liability of the second defendant, the General-Prosecutor is concerned, Mr. July, the Deputy Prosecutor-General in the office of the Prosecutor General in Windhoek, who took the ultimate decision to prosecute Mr Makapa, stated that he acted independently in line with his prosecutorial function set out in Art 88 of the Constitution.

[134] It is an undisputed fact that the plaintiff was arrested in Katima Mulilo and advised that he was being investigated for allegedly transporting people who were involved in the attacks at Katima Mulilo on 2 August 1999.

[135] Plaintiff argued, in his written statement and during his testimony, that there was no reasonable basis for the employees of the second defendant to initiate proceedings against him. He further argued that the office of the second defendant did not have sufficient information at its disposal which substantiated such charges or justified the prosecution of the plaintiff on such charges. And that the second defendant did not have any reasonable belief in the truth of any information given to them which could implicate the plaintiff in the commission of high treason and other serious crimes referred to in Annexure '1'.

[136] Mr July further testified that at the time he took this decision, he had before him the following documents:

---

<sup>60</sup> Joubert v Nedbank Ltd 2011 ZAECPECH 28 para 11.

<sup>61</sup> Annexure "1".

- (a) Evidence contained in the police docket and exhibits that were supplied to the prosecution by the Namibian Police;
- (b) Witness statements made under oath by the plaintiff, Albert Lingesa Mutile, Constable Aupa Erastus's, Vasco Simbobali, Kennedy Malumo Matengu's, Christopher Nzeko Mushabati, Bernard Bareke Kanzeke.'

[137] Mr July testified that the evidence contained in these statements established on a *prima facie* basis that:

'51.1 The plaintiff crossed the Namibian Border into Botswana illegally;

51.2 The plaintiff conspired to overthrow the Namibian government by violent means.

51.3 The plaintiff supported the rebels by providing them with food and donating money to the rebels and availing his motor vehicle for the transportation of rebels;

51.4 Plaintiff participated in the attack on 2 August 1999 by transporting the rebels to Makanga rebel base and transporting them to the different point of attack;

51.5 The plaintiff held secessionist views;

51.6 The plaintiff failed, when the conspiracy to overthrow the government of Namibia came to his knowledge, to report it to the authorities and to provide any information that he had as his disposal concerning the events at Makanga Rebel base on 01 August 1999 and the attack on 02 August 1999.'

[147] According to Mr. July, he further indicated that the decision to prosecute was based on the individual conduct of each accused and how it contributed either overtly or as part of a common purpose or conspiracy. The evidence available against the plaintiff was the only yardstick used in deciding whether or not to prosecute the plaintiff. Mr July further testified that the numerous charges brought against the plaintiff related to his alleged involvement in the supply of food, donating money and availing his motor vehicle to the rebels by transporting them to different point of attack on 1 August 1999 and the attack on 2 August 1999.

[138] Under the probable cause requirement, as noted before, the first question is whether the second defendant subjectively believed that he had probable cause to initiate the prosecution. This is unequivocally established through Mr. July's evidence, which states that the only reason plaintiff and the other accused were indicted was because the allegations made in the statements filed in the Police docket obtained through further investigations supported the information received from informers that the plaintiff was probably guilty of the charges.

[139] The second question, then, is whether Mr. July's belief was reasonable in the circumstances. Mr. July must have both reasonably believed in the existence of facts upon which [his] claim [was] based and correctly or reasonably believed that under the circumstances outlined in the witness statements and other evidence that the plaintiff was involved in the commission of the offences stated in the indictment (**Annexure '1'**). Since the reasonable belief had to exist in the mind of Mr. July; the witness statements, exhibits that form part of the docket were relevant to determining whether initiating prosecution was the appropriate action against the plaintiff.

[140] Consequently, Mr July demonstrated that he subjectively believed in the facts upon which the decision to prosecute was based. Further, his belief in the existence of these facts was reasonable inasmuch as the facts were the result of a decision to prosecute.

[141] Finally, for the reasons stated before, the evidence in the docket reasonably supported Mr July's belief that it was appropriate to make a decision to prosecute the Plaintiff for, among other things, High treason, murder, sedition and other charges. Therefore, the court rules in favour of the defendant on the issue of whether the second defendant had probable cause to make a decision to prosecute the plaintiff and finds that on the facts and information at the disposal of the second defendant the decision to initiate the prosecution of the plaintiff cannot be faulted.

#### Malice/Animus Iniuriandi

[142] Malice means *animus iniuriandi*. That is, intention to injure. Such intention

might be inferred from facts of each case. The plaintiff must allege and prove that the proceedings were terminated in his or her favour.<sup>6</sup>

[143] In the case of *Relyant Trading (Pty) Ltd v Shongwe*,<sup>62</sup> this court stated the following in regard to the third requirement:

‘Although the expression “malice” is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*.’<sup>63</sup>

[144] In *Moaki v Reckitt & Colman (Africa) Ltd and Another*<sup>64</sup> Wessels JA said:

‘Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.’

[145] *Animus iniuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

‘In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecutions were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.’<sup>65</sup>

[146] The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the

<sup>62</sup> 2007 1 All SA 375 (SCA).

<sup>63</sup> Referring to *Heyns v Venter* 2004 (3) SA 200 (T) para 12 at 208B; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 104A-B (see also 103F-104A); Neethling et al *op cit* 124-125 (see also 179-182).

<sup>64</sup> 1968 (3) SA 98 (A) at 104A-B

<sup>65</sup> Neethling et al p 181.



possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*).<sup>66</sup> Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.<sup>67</sup>

[147] In this case, after a thorough examination of the facts placed before court and the legal principles dealing with malice, I am of the view that the plaintiff did not prove *animus injuriandi* on the part of the second defendant. Plaintiff failed to show that the defendant directed his will to prosecuting the plaintiff. There is also no evidence that points to the fact that the defendant instigated the proceedings with an intention to injure the plaintiff and in bad faith.

[148] This brings us to the determination of the alternative claim of the plaintiff against the second defendant and or her employees for damages based upon the wrongful and malicious continuation of the prosecution.

#### Alternative Claim: Continuation of the Prosecution

[149] The plaintiff claims damages based upon the wrongful and malicious continuation of the prosecution as from 9 September 2008, for the crimes set out in the indictment.<sup>68</sup> The facts and the circumstances upon which the plaintiff relies are:

149.1 The second defendant knew by 9 September 2008 that all the witnesses testified and evidence which could implicate the plaintiff, regarding the commission of the offence was led, but continued to prosecute the plaintiff.

149.2 The plaintiff further alleged that the continuation of the prosecution after the above-mentioned dates was without reasonable and probable cause. The plaintiff further stated that the second defendant could have stopped the proceedings or closed the State's case and requested for the release of the

---

<sup>66</sup> See *Heyns v Venter* paras 13-14.

<sup>67</sup> See *Relyant Trading* para 5; but cf *Heyns v Venter* para 14 at 209C-H.

<sup>68</sup> Pleadings record, p. 4 para (10A).

plaintiff from detention and prosecution. This according to the plaintiff would have prevented the violation of the Plaintiff's rights under the Constitution.<sup>69</sup>

[150] During the cross- examination of Mr July in the *Mahupelo* matter, further evidence was elicited and it gave rise to the amendment of the particulars of claim to paragraph 10 and 10A, and this amendment also has a bearing on the issue under discussion. The plaintiff further state that the action the second defendant could have taken would be to separate the trial of the accused between the groups of accused the attackers, leadership and the support group. This according to the plaintiff would have resulted in closing of the state's case against the plaintiff at a much earlier date than February 2013.

[151] This element of the delict of malicious prosecution focuses on whether the second defendant allegedly had probable cause at the time he or she maintained or continued the prosecution of the criminal action against the plaintiff. The question that needs to be answered is: what if probable cause exists initially, but during the course of the criminal prosecution it becomes clear that there is no longer any probable cause to continue the action. Is there any liability when a party maintains the action thereafter?

[152] This cause of action raised by the counsel for the plaintiff, deals with a complex issue which has not been dealt with by our courts and requires the development of the common law, not on a constitutional basis, but in the light of the unusual nature of the plaintiff's cause of action.

Recognition of The Element of Continuation or Maintaining Proceedings in our Common Law on The Part of The Prosecutor in imposing Liability Based on Malicious Prosecution

[153] The recognition of the element of continuation or maintaining proceedings in our common law on the part of the prosecutor in imposing liability based on

---

<sup>69</sup> Pleadings record, page 4-5, para (10A).

malicious prosecution ,was discussed extensively in the *Mahupelo*<sup>70</sup> matter and the court came embraced such development by saying the following:

*[165] The abovementioned has a direct bearing on the matter before court. To extent this principle to the current circumstances, my addition would be: Public and legal policy embodying the legal convictions of the community ,determined with reference to the values and norms embodied in the Namibian Constitution, require the recognition of continuation or maintaining prosecution on the part of a prosecutor in imposing liability based on malicious prosecution. The Prosecutor- General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Prosecutor -General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. (emphasis added)*

*Thus, the public good is clearly served by the maintenance of a sphere of unfettered discretion within which prosecutors can properly pursue their professional goals.*

*[166] The Namibian Constitution does not include a provision such as s 39 (2) of the South African Constitution which requires the courts to develop the common law as to promote the spirit, purport of the Bill of Rights in the Constitution. This lacuna does not however preclude the court from developing the common law in appropriate of deserving cases.'*

[154] In the Canadian case of *R v Salituro*<sup>71</sup>,Lacobucci J said the following about developing the common law.

*'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.' (my emphasis)*

---

<sup>70</sup> Supra

<sup>71</sup> (1992) 8 CRR (2<sup>nd</sup>) 173, also (1991) 3 SCR 654.

[156] In the case of *Carmachile v Minister of Safety and Security*<sup>72</sup>, the court had to determine the approach to be taken when the common law had to be developed beyond the then existing precedent. This is what was stated:

'In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry required a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.' (my emphasis)

[157] It is clear from the abovementioned passage that it is important to consider whether the existing common law requires development and if the answer to this question is in the affirmative, the court must address how such development should take place.

[158] The elements to be proven to be successful in a claim based on malicious prosecution in Namibia has been laid down in the case of *Akuake*<sup>73</sup>, which has been referred to earlier.

[159] It is clear from these elements that the element of continuing or maintaining criminal proceedings beyond a stage where it could be said it is reasonable and probable, is not recognized in our common law and has also not been previously dealt with by our courts.

[160] In an era where prosecutions are set in train by large bureaucratic organisations, such as the Namibian Police and the Prosecutor- General, rather than private individuals, the utility of the delict whose framework was designed prior to the establishment of these agencies, required fundamental reassessment.<sup>74</sup> The courts

---

<sup>72</sup> 2004 (3) SA 305 (SCA) (2004) BCLR 133.

<sup>73</sup> Page 39 of the record supra.

<sup>74</sup> *Norm Maamary, Determining Where the Truth Lies: Institutional Prosecutors and the Tort of Malicious Prosecutio*, p. 357

are charged with the burden of clarifying the continuing function and the elements of the delict in the context of our modern prosecutorial arrangements.

[161] In my opinion, recognizing the claim of maintaining a malicious prosecution would not allow any additional recovery, but would provide a remedy to those persons who may have initially been brought into court on the basis of good faith, but who were maliciously kept there during the course of the criminal proceedings.

[162] Furthermore, somewhere along the line, the rights of the accused to be free from costly and harassing prosecution must be considered. So too must the time and energies of our courts and the rights of citizens awaiting their turns to have their matters resolved.

[163] It is clear that the matter before court raises this novel and complex issue, and one cannot be dissuaded to decide an important issue merely because it is not recognized. It is therefore safe to say that it is implicit in the plaintiff's case that the common law has to be developed beyond the existing precedent. The answer to the first leg would be in the affirmative regarding the plaintiff's case.

[164] This leads us to the second leg of this enquiry, and that is how such development is to take place. This requirement is calling upon the court to establish a workable standard for continuation of prosecution in circumstances where it appears it has degenerated to the realms of the malicious.

[165] In my view, a workable standard for continuation of malicious prosecution can easily be garnered from the elements that must be shown to prove the initiation of a malicious prosecution. Thus, the standard for continuing a malicious prosecution would be:

(i) That the defendant actually instigated/ instituted or continued / maintained the criminal proceedings; ( my addition)

(ii) Without reasonable and probable cause; and that

(iii) the instigation or continuation of the criminal proceedings was actuated by an indirect or improper motive (malice) and; ( my addition)

- (iv) That the proceedings were terminated in his favour; and that
- (v) He suffered loss and damage.'

[166] The enquiry is thus if probable cause exists initially, but during the course of the criminal prosecution it becomes clear that there is no probable cause to continue the action. Is there any liability when a party maintains the action thereafter? This question is one of the issues raised in the pleadings and the evidence of the plaintiff and cannot be left unresolved.

[167] This question has been addressed in the case of *Hathaway v State of New South Wales*<sup>75</sup> and the court held that:

'Maintaining proceedings is a continuing process. It is conceivable that a prosecutor may act for proper reason (i.e. non-maliciously) or with reasonable and probable cause (or the plaintiff may be unable to prove malice, or the absence of reasonable or probable cause) at the time of institution of proceedings, but, at a later point in the proceedings, and while the proceedings are being maintained, the existence of malice or the absence of reasonable and probable cause may be shown. At any time at which the sole or dominant purpose of maintaining the proceeding becomes an improper (malicious) one, or the prosecutor becomes aware that reasonable and probable cause for the proceedings does not exist, or no longer exists, the proceedings ought to be terminated, or the prosecution is malicious.'<sup>76</sup>

[168] It is important at this stage to highlight the defences pleaded by the second defendant regarding the claim of continuing or maintaining the prosecution against the plaintiff:

168.1 the second defendant and or her employee informed the court that they were not in a position to know that all the evidence that would implicate the plaintiff was presented ,because they did not perform regular appraisals of the evidence with respect to each accused. According to the second defendant, performing appraisals with respect to each accused was humanely impossible, if one have regard to the number of accused and the witnesses

<sup>75</sup> 2009 NSWSC at 116.

<sup>76</sup> *State of New South Wales v Hathaway* 2010 NSWCA 188 para 118.

that testified.

168.2 the second defendant and/ or her employees further informed the court that the plaintiff's proposed action of stopping the prosecution, the separation of trial and the discharge in terms of section 174, would have been prejudicial to the state's case, as other witnesses could conceivably implicate the plaintiff.

168.3 The Second defendant further supported their explanation by adding that the evidence presented during the trial established common purpose and conspiracy to overthrow the Namibian Government. This made the second defendant believe that the plaintiff's case in his defence could strengthen the case of the state. Therefore, stopping the prosecution would have been premature and risky.<sup>77</sup> A *St Q Skeen*<sup>78</sup>, in his article titled: *The Decision to Discharge an Accused at the Conclusion of the State Case: A Critical Analysis*<sup>79</sup>, had the following to say:

'Where the only evidence of the defence is likely to come from the accused himself, the idea that the accused should convict himself out of his own mouth is contrary to the tenets of our system of criminal procedure, as it violates the sentiments expressed in the maxim *nemo tenetur se ipsum prodere*. Why should a person be put on his defence merely in the hope that the defence evidence may strengthen the State case where he would otherwise be discharged for want of evidence?'

He continued and said:

'The suggestion that the State evidence may be strengthened by evidence given by a co-accused is also fraught with dangers. A co-accused is in the position of an accomplice, and the cautionary rule of practice should be applied by the court in considering his evidence.'

168.4 This shows that the argument of the second defendant that other witnesses, his co-accused and the accused himself could incriminate him is not an acceptable

---

<sup>77</sup> Pleadings bundle, p. para

<sup>78</sup> BA (Hons) (Rhodes) BL LLB (Rhodesia), Legal Practitioner, Zimbabwe, Senior Lecturer in Law, University of the Witwatersrand, Johannesburg.

<sup>79</sup> Citation: 102 S. African L.J. 286 1985

standard in the law of criminal procedure. The Prosecutors should thus refrain from following the practice.

[169] If the prosecution fails to terminate a prosecution when it knows it would be appropriate to do so, then the same harm that would be inflicted on the plaintiff's quality of life that would have been suffered if the defendant knew that the prosecution was unjustified in the first instance is extant. In order to properly guard against the harm associated with protracted prosecution, the tort of continuing or maintaining malicious prosecution should in my considered view, be recognized.

[170] Further, as in bringing a claim for initiating malicious prosecution, a complainant would have to premise his or her claim for maintaining a malicious prosecution on narrowly construed elements. As with the tort of initiating malicious prosecution, the tort of maintaining malicious prosecution would not chill zealous advocacy, because liability would only attach when the defendant maliciously maintains an unreasonable claim. (reiterating that malice is an essential element that the complainant must demonstrate in order to maintain an action for malicious prosecution).

#### Reasonable and probable cause

[171] I will now consider the malicious prosecution count in the context of the evidence and the recognition of the element of continuation or maintenance of the prosecution.

[172] In the Canadian case of *Miazgi v Kvello Estate*<sup>80</sup>, the tort of malicious prosecution was recently reviewed in 2009 by the Supreme Court of Canada, and specifically how it applied to public prosecutors in Canada.

[173] The court outlined the four required elements for the tort of malicious prosecution: (i) The prosecution must be initiated by the defendant; (ii) The prosecution must be terminated in the plaintiff's favour. (iii) There was a lack of reasonable and probable grounds to commence or continue the prosecution; and (iv)

---

<sup>80</sup> 2009 SCC 51, [2009] 3 S.C.R. 339



The defendant was motivated to commence or continue to the prosecution due to malice.

[174] The Supreme Court of Canada made the following remarks with regard to the element of lack of reasonable and probable grounds to commence or continue the prosecution:

‘the reasonable and probable cause inquiry comprises both a subjective and an objective component, so that for such grounds to exist there must be actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. However, principles established in suits between private parties cannot simply be transposed to cases involving Crown defendants without necessary modification. While the accuser’s personal belief in the probable guilt of the accused may be an appropriate standard in a private suit, it is not a suitable definition of the subjective element of reasonable and probable cause in an action for malicious prosecution against Crown counsel. The reasonable and probable cause inquiry is not concerned with a prosecutor’s personal views as to the guilt of the accused, but with his or her professional assessment of the legal strength of the case’.<sup>81</sup>  
(emphasis added)

[175] It was further stated that the prosecution has the burden of proof in a criminal trial, and to have a belief in the probable guilt of an accused, would mean that the prosecutor believed, based on the existing state of affairs, that proof beyond reasonable doubt could be made out in a court of law.<sup>82</sup>

[176] What was important to note from this case was that the prosecutors were reminded that the public interest is engaged in a public prosecution, and the prosecutor is duty-bound to act solely in the public interest in making a decision to initiate or continue a prosecution. Further attention was drawn to the fact that public prosecutors must take care not to substitute their own views for that of the judge.<sup>83</sup>

[177] More importantly, the court came to the conclusion that when an action for malicious prosecution is taken against a prosecutor, the inquiry into the prosecutor’s

---

<sup>81</sup> Supra

<sup>82</sup> Miazga 2 para 73

<sup>83</sup> Miazga 2 paras 76,77

subjective state of belief should not be considered in a discussion of a lack of reasonable or probable cause, but an objective assessment of the existence of sufficient cause should be made.

[178] The court further added that if a court concludes from an objective standpoint, by looking at the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause exist to commence or continue with the prosecution, one could come to the conclusion that the criminal process was properly employed. The enquiry would then come to an end. If the court finds that no objective grounds for the prosecution existed at the relevant time (at the time of commencing or continuing), the court must proceed and address the fourth element of the test of malicious prosecution and that is malice.<sup>84</sup>

[179] I would adopt the decision taken in the case of *Miazga* and would make use of the same principles to determine whether the defendant had reasonable and probable cause to maintain the proceedings in the instant case.

[180] I shall begin with analysis of the circumstances known to the prosecutor at the time of continuing with the prosecution against the plaintiff.

[181] Counsel for the plaintiff put a number of alternative propositions concerning when second defendant and or her employee should have stopped the prosecution. His fall-back position was: assuming there was a time when police had reasonable and probable cause, that time was finite: as police obtained more and more exculpatory evidence, they should at each stage have discontinued the proceedings<sup>85</sup>.

[182] Mr July testified that the continued incarceration of the plaintiff was not solely as a result of a fault on his part, but that the presiding judge made the detention orders with each postponement.

---

<sup>84</sup> supra

<sup>85</sup> *Zreika v Sate of New South Wales* 2011 NSWDC 67

[183] The second defendant indicated that the matter could not be stopped as there were multiple accused and that the matter was based on the doctrine of common purpose and conspiracy and also that it would have been prejudicial to the defendant's case. Mr. July contended in his testimony, that stopping the charges in terms of s 6 of the Criminal Procedure Act would require the permission of the Prosecutor General and that they did not obtain that.

[184] In the pleadings as well as during oral submissions, Counsel for the plaintiff highlighted that there were three distinct stages to consider when the prosecution of the plaintiff should have been stopped:

- a) When all four witnesses who testified against the plaintiff failed to identify the plaintiff;
- b) When the last witness who testified against the plaintiff had done so in July 2008;
- c) After an appraisal was done in November 2010 and the defendant requested for further evidence and this was objected successfully by the legal practitioners that represented the plaintiffs in the criminal trial.

Did the second defendant ever have reasonable and probable cause for maintaining the prosecution?

[185] I am persuaded on the balance of probabilities that the defendant lacked reasonable and probable cause to continue with the prosecution from November 2010. As to the objective standpoint, the following circumstances were known to the second defendant and or her employees:

- a) The lack of witnesses identifying the plaintiff as the offender;  
It was clear from the evidence before court that all four witnesses who testified against the plaintiff, failed to identify him in court.
- b) The failure to establish any inculpatory evidence between the plaintiff and anyone associated with him in the commission of the offences;

According to the evidence of the defence witnesses, the plaintiff was seen in assisting the rebels with transport to different venues of the attack on 1 August 1999 and the attack on 2 August 1999. Further that the plaintiff supplied the rebels with food and money. The plaintiff was cross-examined on this aspect and denied involvement neither in supporting the secessionist movement, nor in transporting or supplying food and money to the CLA rebels. There was no evidence or finding that his denials were false or contrived.

- c) The fact that the November 2010 review of the evidence prompted a further investigation in this matter. The second defendant informed the court that it was humanly impossible to have appraisals of the evidence of individual accused persons throughout the trial. They have managed to do so during November 2010, and that they asked the first defendant to do a further investigation and that investigations were done, and the defence lawyers for the plaintiff successfully objected to the admission of this new evidence.

[186] The continued incarceration of the plaintiff, the lack of identification of the plaintiff by the witnesses, the failure to establish inculpatory evidence, the further investigation of the matter after 9 September 2008, without reasonable and probable cause, points to an interference with the plaintiff's constitutional rights. The second defendant and /or her employees had the constitutional duty not to violate the rights of the plaintiff in their exercise of their discretion. In the matter of *Laurie v Muir*<sup>86</sup>, the court said the following:

'It is incumbent on a prosecutor to think and be focused on what the role is in discharging public duties. The law must strive to reconcile two highly important interests which are liable to come into conflict: (a) the interest of the citizen to be protected from illegal or irregular invasion of their liberties by authorities; (b) interest of the state to secure that the evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily

---

<sup>86</sup> 1950 SC (J) 19 @26

protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages.'

I fully support the above statement and am of the view that the effect of the abovementioned actions is a violation of the constitutional rights and it calls for an action for damages against the second defendant and/or her employees.

#### Conclusion on reasonable and probable cause

[187] In conclusion on this issue, I find second defendant lacked reasonable and probable cause from 9 September 2008 onward. Further, I find second defendant, in particular, Mr July, had no sufficient basis for any honest belief in the case he maintained at this stage.

[188] I consider below under the element of malice what he made of the case from November 2010 onward. There I have come to the view that he knew from that day that he lacked reasonable grounds for continuing the proceedings, but kept them going in the hope some incriminating evidence would miraculously turn up. In other words, relevant to the reasonable and probable cause issue, I find he also appreciated from that day that there was no reasonable and probable cause.

[189] My reasons for that finding are the reasons I have made for the finding on the malice issue that he knew from 9 September 2008 onward the case lacked reasonable and probable cause. It follows that even if I accepted his evidence (which I do not) that he honestly had the view there was reasonable and probable cause, I consider he did so on an insufficient basis.

#### Malice

[190] The malice element of the test for malicious prosecution considers a defendant prosecutor's mental state in respect of the prosecution at issue. Malice is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose"<sup>87</sup>.

---

<sup>87</sup> Miazgi, supra

[191] The meaning of improper motive was explained in the case of *Nelles* by Lamer J. in this context:<sup>88</sup>

‘To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of “minister of justice”. In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct.’

[192] In order to prove malice, a plaintiff must, in accordance with *Nelles*, bring evidence that the defendant (prosecutor) was acting pursuant to an improper purpose inconsistent with the office of the Prosecutor- General. As we have seen, in deciding whether to initiate prosecution, the prosecutor must assess the legal strength of the case against the accused. It is thus expected of a prosecutor to invoke the criminal process only where he or she believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law.

[193] I propose now on the question of malice, to deal with the same particulars alleged in the plaintiff’s pleading. I shall set out each of them in full, and comment on them one by one.

*(a) Failure of the prosecution to review the evidence for six to ten years.*

[194] Mr. July testified that the dockets, were reviewed before the charges against the accused were formulated against the accused and again after the request for further particulars from the defence. This was confirmed by the testimony of Advocate Walters. Mr. July further informed the court that due to the number of accused, the number of witnesses to be led as part of the State’s case, it was humanly impossible to review the evidence which had been led against the accused.

---

<sup>88</sup> (at pp. 193-94):

He further stated that in November 2010, an appraisal was done of the testimony led in the State's case and there was a further request for investigations, which the defence objected to successfully.

[195] In my view the role of the prosecutor in charging suspects is an important one. The plaintiff who was in Katima Mulilo, after his arrest was in the hands of the authorities, he was reliant upon them (second defendant and or employees) to assess the evidence against him objectively and competently. The plaintiff's liberty was at stake. The plaintiff was reliant on Mr. July and the prosecution team to conscientiously apply their collective mind to the docket. But Mr. July and the prosecution team did not do this and his decision, to continue with the prosecution especially in the light of his weak explanations disclosed a dereliction of duty. The failure of the prosecutor to do appraisals continuously, in my case would amount to evidence of malice. The inconvenience or difficulty associated with reviewing the evidence from time to time when it has the deleterious consequence of affecting the accused's right cannot be accepted or countenanced.

*(b) Lack of human capacity*

[196] Advocate Walters and Mr. July testified that the reason why the docket could not be reviewed was because of a lack of human capacity. Only three prosecutors were assigned to deal with this matter. Advocate Walters and Advocate July admitted that the trial would have been completed in a shorter period if there were more prosecutors.

[197] This is an unacceptable explanation from the prosecution for their failure to adhere to their constitutional duty. This fact was known to them and a request for more human capacity to my mind would have been the most probable answer to solve the problem. I am of the opinion that the state should have made available all the resources at their disposal to avoid a violation of the accused rights. This type of approach is clear evidence of malice.

*(e) Maintaining the allegation that the plaintiff was guilty of a serious offence on the balance of probabilities until 11 February 2013.*

[198] Until 11 February 2013 the defendant maintained that the plaintiff was guilty of the offences charged and failed to advise the court on the issue of bail.

In my view, there is a constitutional duty on the public prosecutor (s) handling a case to ascertain the reasons for any further detention of a suspect and the prosecutor has to place such reasons or lack thereof before court. Persisting in the prosecution of the plaintiff and failing to advise the court on the issue of bail when the defendant knew that there was no case against the plaintiff, can be particularised above constituted ill-will and spite towards the plaintiff.

#### Consideration and conclusion on malice

[199] It is an extraordinary proposition that a prosecutor who has sworn to uphold the law would knowingly maintain a prosecution to win a conviction. I would fail in my duties if I accept the explanation advanced by Mr July for continuing the prosecution of the plaintiff beyond 9 September 2008. The element of malice focuses on the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law. Beyond 9 September 2008, as I have found, the prosecution of the case lacked against the accused reasonable and probable cause.

[200] But has the plaintiff discharged his onus of proving malice on the balance of probabilities?

[201] I acknowledge that it would be rare and exceptional for a court to find that a prosecutor maintained a prosecution for an improper purpose.

[202] I have no doubt Mr July considered that the plaintiff was *prime facie* guilty of the offence as soon as he received the docket from the police to make a decision to prosecute. As I have found, however, by 09 September 2008, the Prosecutor-General lacked reasonable grounds to suspect the plaintiff was guilty. In making the findings I am about to make, I take account *inter alia* of my own assessment of Mr. July's personality from my observations of him over a lengthy examination in chief and a very lengthy cross examination. To my observation, he is knowledgeable



about the duties of a prosecutor. In giving his evidence he was not reluctant to admit he had made some errors. These errors included the acknowledgment under cross-examination that the trial could have been separated amongst the group of leaders, supporters and attackers. By the separation of trials, the case against the plaintiff could have been finalised earlier. Another error he admitted was the duplication of the charges, in which all the accused were charged with 22 charges. Adv. July also admitted that they have failed to review the charges for six to ten years, which is an extraordinarily long period of time, particularly in circumstances as the present where an accused person's liberty is in jeopardy during the operation of the presumption of innocence.

[203] Unfortunately, the treatment of the evidence shows a poor understanding of the constitutional obligations of a prosecutor to be objective, and to take care of peoples' liberty.

[204] In the case of *A v New South Wales*, malice was held often to be a matter of inference. The court said that:

'Malice requires evidence from which the court can infer that the prosecution wished to pursue some illegitimate motive other than to bring an offender to justice. Motives include: spite and ill will, an irrational obsession with the guilt of the plaintiff, pressure to bring a conviction for the crime'.

[205] But as the authorities show, malice covers any motive other than a desire to bring a criminal to justice: (see also: *Glinski v McIver* [1962] AC 726,766; *Rapley v Rapley* (1930) 30 SR (NSW) 94, 99. I accept Mr July's evidence that he did not know the plaintiff before the offence occurred. I accept he did not bear him any particular spite or ill will before or after the arrest, but during the course of the proceedings, there was evidence of malice in the respects I alluded to earlier.

Summary of my findings and relevant facts follows:

[206] I find that the second defendant and/or her employees knew from 9 September 2008 that her office had erred in and lacked reasonable cause for the

prosecution but maintained the case thereafter with that knowledge, hoping they would find enough evidence against him as the trial progressed further.

[207] I find that if Mr. July had recommended it to the Prosecutor-General at any time past that date and before it was in the hands of the court, they would have accepted his recommendation to have the proceedings against the plaintiff stopped in terms of s 6 of the Criminal Procedure Act, against the plaintiff. He did not do so and that decision returns to haunt the 2<sup>nd</sup> defendant.

[208] I find further that no reasonable person could have believed in the plaintiff's guilt beyond 9 September 2008. The last witness who testified against the plaintiff has done so. The second defendant and/or her employees knew that all four witnesses who testified against the plaintiff could not identify the plaintiff. Second defendant thus knew that there was no further evidence that could implicate the plaintiff at that stage but that knowledge withstanding, maintained the prosecution.

[210] It follows that the plaintiff has, in my considered view established both of the elements of the tort of malicious prosecution which were in issue. The judgment is in favour of the plaintiff on this claim.

[211] It is incumbent on a prosecutor to think and be focused on what the role is in discharging public duties. In the performance of a public function it would therefore be important for prosecutors to:

211.1 perform their duties fairly, consistently and expeditiously, and to respect, and protect human dignity and uphold human rights;

211.2 to ensure that the general quality of decision making and case preparation is of a high level, and that decisions are not susceptible to improper influence;.

211.3 Prosecutors should be seen to be independent from the police and should conduct cases vigorously and without delay;

211.4 to undertake prosecution work effectively, efficiently and economically;

[212] If the abovementioned is not considered in the exercise of the constitutional mandate, I am of the view that the Prosecutor- General will fail in her mandate and that failure will call for an intervention by the courts.

#### Liability of the third defendant

[213] A question to be addressed is: 'Did the third defendant owe a duty to the plaintiff?

[214] In answering this question I would like to rely on what was said in the case of *Lapane v Minister of Police*<sup>89</sup>

*'The answer lies in the recognition of the general norm of accountability: the state is liable for the failure to perform the duties imposed upon it by the constitution unless it can be shown that there is compelling reason to deviate from that norm.'*

[215] I find that the employees of the second defendants did not exercise their powers in a *bona fide* manner. They left the plaintiff to be incarcerated for no *bona fide* reason. In my view no prosecutor acting objectively and properly could have continually sought a postponement of the matter for over two years and objected to bail on the evidence it had. The employees of the second defendant did not exercise any discretion. The prosecutors failed to apply an independent mind to the facts of the case. .

[216] In this case it is important that the traditional requirements for immunity be measured against the constitutional imperatives. I find that the plaintiff has no other effective remedy against the third defendant. The third defendant is liable for failure to perform the duties imposed upon it by the Constitution and there is no compelling reason to deviate from that norm.

#### Constitutional claim for damages

---

<sup>89</sup> 2015 (2) SACR 138.

[217] As it was stated earlier above, the constitutional claim for damages would only be considered if the claim for malicious prosecution does not succeed. From the discussion and the decision of the court made above, the court will not deal with the constitutional claim for damages, because the plaintiff made out a sustainable case for damages regarding the unlawful continuation of the criminal proceeding against the plaintiff.

### Order

Having regard to all the foregoing issues and findings, the following order is made:

1. The *point in limine* regarding the alleged non-compliance with Section 39(1) of the Police Act No. 19 of 1990 is dismissed.
  2. The action against the first defendant for malicious prosecution is dismissed with costs.
  3. The claim against the second defendant for instituting criminal proceedings against the plaintiff is dismissed.
  4. The plaintiffs' alternative claim based on malicious continuation of the prosecution without reasonable and probable cause is upheld.
  5. Costs are granted in favour of the plaintiff against the second defendant and the third defendant jointly and severally, the one paying the other to be absolved: consequent upon the employment of one instructing and two counsel
  6. Reasons for judgment will be made available on Friday, 05 May 2017.
  7. The matter in relation to the 2<sup>nd</sup> defendant is postponed to 28 May 2017 for a status hearing in chambers at 10H00 for direction regarding continuation and finalisation of the matter on the quantum.
-

AJ CHRISTIAAN

## APPEARANCES:

PLAINTIFF: A. Corbett

Instructed by: Kangueehi &amp; Kavendji, Windhoek

DEFENDANTS: I Semanya SC (with him N. Marcus)

Instructed by: Government Attorneys, Windhoek



