



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: I 1490/2013

In the matter between:

KASIKA RODWELL MUKENDWA

PLAINTIFF

and

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

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Neutral Citation: *Mukendwa v Minister of Safety and Security* (I 1490/2013) [2020] NAHCMD 342 (31 July 2020)

Coram: UEITELE J

Heard: 27, 28 & 29 April 2015, 07 May 2015, 29 July 2015, 28 January 2015, 10 February 2016, 07 June 2016, 03-08 August 2016, 22 May 2017, and 29-31 May 2017

Delivered: **31 July 2020**

Flynote: Delict — Malicious proceedings — Requirements restated – Whether plaintiff proved prosecution initiated without reasonable and probable cause and with

malice — Malicious prosecution — Elements of — *Animus injuriandi*, though not necessarily malice, an essential averment.

Summary: The plaintiff was arrested by the Namibian Police on 25 August 1999 based on information that the plaintiff transported suspect rebels to the attacks and to flee to Botswana. The plaintiff was prosecuted together with other 125 accused persons on 278 charges. The most serious charges, on which plaintiff was prosecuted, were high treason, sedition, public violence, murder and attempted murder (collectively referred to as “high treason”) in what has become known as the Caprivi Treason trial.

On 10 August 2012, the plaintiff was found not guilty of the charges proffered against him, he was consequently released after spending 4 733 days in detention. Upon his release, the plaintiff during November 2013 instituted proceedings against the first to third defendant namely; Minister of Safety and Security, Prosecutor General and Government of the Republic of Namibia.

The plaintiff's principle claim is against both the first and second defendants for malicious prosecution under the common law in respect of the period of 26 August 1999 to 10 August 2012. The alternative to the principal claim is only against the second defendant or her employees, for damages based upon the alleged wrongful and malicious continuation of the prosecution as from 26 August 1999 to 10 August 2012, for the crimes set out in the indictment. On both claims, the plaintiff seeks to recover damages in the amount of N\$ 36 759 200.

The plaintiff bases his alternative claim on the position that the testimony of all witnesses and all evidence which could have been present for the purpose of attempting to implicate the plaintiff regarding the commission of the crimes set out in the indictment was completed by 31 January 2008 and despite this fact, the second defendant continued to prosecute the plaintiff until 11 February 2013 without reasonable or probable cause. The plaintiff is of the opinion that the second defendant should reasonably have stopped such prosecution in terms of s 6(b) of the Criminal Procedure Act, Act 51 of 1977, by the aforesaid dates, or within a reasonable time thereafter.

The defendants pleaded that based on the available evidence which included witness statements and other evidence relating to the attack, second defendant had reasonable grounds to believe, on a *prima facie* basis, that the plaintiff committed the offences contained in the annexure to the combined summons, or that the responsibility could be attributed to the plaintiff, based on the doctrine of common purpose and conspiracy to commit the offences. They further pleaded that the second defendant and her employees were not in a position to know whether all the evidence that could implicate the plaintiff had been present and that all the witnesses that could implicate the plaintiff had completed their testimony.

The defendants admitted that the plaintiff remained in custody from 25 August 1999 to 10 August 2012 but contended that the plaintiff's detention prior to his first appearance in court was lawful on the basis of various court remand orders and lawful warrants for detention. The second defendant also pleaded that based on the available witness statements and the evidence presented during the trial, common purpose or a conspiracy to overthrow the Namibian Government was *prima facie* established and as such the second defendant or her employees believed that there was a possibility that the State's case could be strengthened during the case for the defence and therefore as such, stopping of prosecution would have been risky and prejudicial to the State's case.

The defendants pleaded that, if regard is to be had to the number of accused persons before the court at the time and the complexity and conduct of the case, it was humanly impossible to stop the prosecution against the plaintiff or to close the State's case against the plaintiff. The defendants further pleaded that the plaintiff had a remedy in terms of Article 12(1) (b) of the Constitution of Namibia to move for his release from prosecution and denied that a violation of Article 12(1)(b) is actionable in a delictual context and that the only constitutional remedy available to an accused person whose trial does not take place within a reasonable time is the right to be released.

Held that the concept of reasonable and probable cause is clearly the most onerous of the elements for a plaintiff to establish. The test contains both a subjective and

objective element, which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances.

Held further that without any shadow of doubt, Deputy Commissioner Evans Simasiku of the first defendant had reasonable and probable cause when he instigated the prosecution of the plaintiff and that second defendant had reasonable and probable cause due to the fact that five witnesses made allegations in their sworn statements placing the plaintiff in key events that, if those allegations were to be found to be true, would have made the plaintiff liable to prosecution for various offences, including high treason.

Held further that although the expression “malice” is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. 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.

Held further that both the first and second defendant had reasonable and probable cause when they instigated the prosecution of the plaintiff. That finding negates any imputation of any awareness on the part of the first and second defendants of the absence of reasonable grounds for the prosecution of the plaintiff. In other words, if the first and second defendants believed that there were justifiable grounds on which to instigate the prosecution and prosecuting the plaintiff, how can it be said that that conduct was wrongful?

Held further that the plaintiff has failed to discharge the *onus* resting on him to prove that the first and second defendants maliciously prosecuted him.

Held further that once the prosecution of the plaintiff is lawful, the plaintiff cannot recover constitutional damages based on the consequences of such lawful prosecution.

ORDER

- a) The plaintiff's claim is dismissed.
 - b) The matter is finalised and removed from the roll.
 - c) Each party must pay own costs.
-

JUDGMENT

UEITELE J:

Introduction and Background

[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, a few people were killed while others sustained serious injuries, motor vehicles, buildings and other properties were damaged in the attack.

[2] Following the attacks mentioned in the preceding paragraph, the President of the Republic of Namibia on 03 August 1999 declared, in terms of Article 26 of the Namibian Constitution, a State of Emergency in the Caprivi Region which ended towards the end of the same year. On 25 August 1999, the plaintiff was amongst a number of persons who were arrested in Katima Mulilo. The plaintiff was informed that he was under investigation for allegedly transporting people who were involved in the attacks at Katima Mulilo on 02 August 1999.

[3] On 18 May 2001, the plaintiff and other accused persons were indicted for their alleged role in the attack (on the government installations mentioned in

paragraph [1] of this judgement) 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.

[4] The Caprivi Treason trial is unprecedented in the legal history of this country in that 126 accused persons were charged with 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 just a little over 10 years. During this period (the trial period) the accused persons, which included the plaintiff, were detained in custody and some of the accused and witnesses died during the course of the trial.

[5] On 10 August 2012, the plaintiff was found not guilty of the charges proffered against him, he was consequently released after spending 4 733 days in detention. Upon his release, the plaintiff instituted proceedings against both the Minister of Safety and Security (as the head of the Namibian Police) as first defendant and the Prosecutor General, as the second defendant. The plaintiff's principle claim is against both the first and second defendants for malicious prosecution under the common law in respect of the period of 26 August 1999 to 10 August 2012. The alternative to the principal claim is only against the second defendant or her employees, for damages based upon the alleged wrongful and malicious continuation of the prosecution as from 26 August 1999 to 10 August 2012, 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 alleged wrongful, unlawful and negligent violation or infringement of the constitutional rights by the defendants, or their employees, in arresting the plaintiff on 26 August 1999 and prosecuting the plaintiff thereafter for high treason and the further charges in the indictment. The plaintiff's alternative claim is based on the alleged violation of Articles 7, 8, 11, 12,13,16,19 and 21 of the Namibian Constitution. He claims damages as contemplated in Article 25(3) or 25 (4) of the Namibian Constitution.

[7] At the commencement of the trial, the parties agreed to separate liability and quantum. This trial concerns the liability only. At this point, it is safe to mention that the total claim amounts to N\$ 36 759 200.

The pleaded case

The plaintiff's particulars of claim

[8] The plaintiff amended his particulars of claim on more than one occasion prior to the hearing of the matter to include the alleged malicious continuation of prosecution and ultimately to include a further alternative complaint that the prosecution and the continued prosecution of the plaintiff constituted a violation of the plaintiff's constitutional rights, in terms of Articles 7, 8, 11, 13, 16, 19 and 21 of the Namibian Constitution.

[9] The plaintiff, amongst other claims, claimed that on 26 August 1999, he was arrested in Katima Mulilo, in the Zambezi Region, by members of the Namibian Police and was so arrested without a warrant. The plaintiff claims that one or more members of the Namibian Police wrongfully and maliciously set the law in motion by laying false charges that he was guilty of high treason and various other serious crimes. He furthermore claims that at the time and place of his arrest by the members of the Namibia Police, these members unlawfully and wrongfully seized a motor vehicle which he owned, without a warrant.

[10] The plaintiff furthermore claimed that the members of the Namibian police didn't have any reasonable or probable cause for his arrest and prosecution, nor did they have any reasonable belief that he was guilty of the charges laid against him. He continued and claimed that the second defendant or her employees or both the second defendant and her employees who initiated or continued to maliciously prosecute him, equally did not have a reasonable or probable cause for doing so.

[11] The plaintiff continued and claimed that during the 26 August 1999 to 10 August 2012 he was detained at Katima Mulilo Police Station, thereafter at Grootfontein, and further detained at the Windhoek Central Prison, prosecuted and

tried (both in the Magistrates Court and the High Court of Namibia) for high treason in respect of the crimes referred to earlier in this judgment.

[12] Relating to the claim for malicious continuation of his prosecution, the plaintiff claimed that from 26 August 1999 to the end of 10 August 2012, his continued prosecution was without any reasonable or probable cause and the trial should have been stopped in terms of s 6 (b) of the Criminal Procedure Act, 1977 (the CPA) or within a reasonable time thereafter; alternatively the Prosecution ought reasonably to have closed the State's case against him and have moved for his discharge or caused his release from prosecution.

[13] In addition to what was set out above, the plaintiff brings an alternative claim on the same facts based upon the wrongful and unlawful negligent violation or infringement by the second defendant or her employees of the plaintiff's constitutional rights to a trial within a reasonable time as guaranteed by Article 12(1) (b) of the Namibian Constitution, as well as violation of his constitutional rights in terms of Articles 7, 8, 11, 13, 16, 19 and 21 of the Namibian Constitution.

[14] The matter before this court is a consequence of the arrest and detention of the plaintiff by the officials of the Ministry of Safety and Security (the first defendant) and the following prosecution of the plaintiff by officials of the Prosecutor-General's office, on suspicion that Plaintiff was guilty of high treason, sedition, public violence, murder and other serious crimes.

First and second defendant's plea

[15] The essence of the defendants' plea as set out in the pleadings are as follows: The first defendant pleaded that the plaintiff was arrested on 25 August 1999 by a member of the Namibian Police in terms of s 40(1) of the Criminal Procedure Act, 1977 on the basis of a reasonable suspicion that the plaintiff committed serious criminal offences under Schedule 1 of the CPA associated with the unlawful attacks on 2 August 1999 at Katima Mulilo and other parts of the Zambezi Region.

[16] The defendants further admitted that members of the Namibian Police seized the plaintiff's vehicle with registration number N 287 KM. The defendants pleaded that the plaintiff's vehicle was one of the motor vehicles suspected to have been used to transport persons who were suspected to have carried out unlawful attacks on 2 August 1999 at Katima Mulilo and other parts of the Zambezi Region.

[17] The defendants further pleaded that following the arrest of the plaintiff, members of the Namibian Police furnished the office of the Prosecutor General with the contents of the docket compiled by the investigators in the matter. The contents of the docket constituted *prima facie* evidence that the plaintiff had committed the criminal offences with which he has been charged.

[18] The defendants denied that they maliciously and without probable cause set the law in motion to prosecute the plaintiff; they furthermore denied that that any member of the Namibian police laid false charges or gave false information or that they acted maliciously. They pleaded that: 'Based on the evidence that they had received from members of the Namibian Police, they honestly and reasonably believed that the plaintiff had committed certain offences contained in annexure 1' to the plaintiff's particulars of claim.

[19] The defendants further pleaded that based on the available evidence which included witness statements and other evidence relating to the attack, second defendant had reasonable grounds to belief, on a *prima facie* basis, that the plaintiff committed the offences contained in the annexure to the combined summons, or that the responsibility could be attributed to the plaintiff, based on the doctrine of common purpose and conspiracy to commit the offences. They further pleaded that the second defendant and her employees were not in a position to know whether all the evidence that could implicate the plaintiff had been present and that all the witnesses that could implicate the plaintiff had completed their testimony.

[20] The defendants admitted that the plaintiff remained in custody from 25 August 1999 to 10 August 2012 but contended that the plaintiff's detention prior to his first appearance in court was lawful on the basis of various court remand orders and lawful warrants for detention. The second defendant also pleaded that based on the

available witness statements and the evidence presented during the trial, common purpose or a conspiracy to overthrow the Namibian Government was *prima facie* established and as such, the second defendant or her employees believed that there was a possibility that the State's case could be strengthened during the case for the defence and therefore as such, stopping of prosecution would have been risky and prejudicial to the State's case.

[21] The defendants pleaded that, if regard is to be had to the number of accused persons before the court at the time and the complexity and conduct of the case, it was humanly impossible to stop the prosecution against the plaintiff or to close the State's case against the plaintiff. The defendants further pleaded that the plaintiff had a remedy in terms of Article 12(1)(b) of the Constitution of Namibia to move for his release from prosecution and denied that a violation of Article 12(1)(b) is actionable in a delictual context and that the only constitutional remedy available to an accused person whose trial does not take place within a reasonable time is the right to be released.

[22] In conclusion, the defendants denied that either second defendant or her employees acted wrongfully or unlawfully in continuing to prosecute the plaintiff until 10 August 2012 when he was released in terms of s 174 of the CPA. The prosecution was not in the position to know that all evidence that could implicate the plaintiff had been presented and that all witnesses that could implicate plaintiff had completed their testimonies.

The evidence adduced

The evidence adduced on behalf of the plaintiff.

[23] The plaintiff called two witness in support of claim, namely himself and Advocate John Walters (the current honourable Ombudsman).

[24] The plaintiff stated that at the time of the trial, he was 73 years of age, and was 57 years old at the time of his arrest. He stated that on the morning of 26 August 1999, he was driving with his then 14 year old son (in his motor vehicle with

registration number N 287 KM) from his village in the Makolonga area to Katima Mulilo, when he came upon a police roadblock at Liselo area. At the roadblock, he was arrested without a warrant by a certain Richard Mukena Simushi on the instruction of one Evans Simasiku.

[25] He testified that at the road block, six heavily armed police officers jumped at the back of his car pointing firearms at him and one of the police officers hit him with the fire arm butt on his ear and was ordered to drive straight to the Katima Mulilo Police Station. When he arrived at the Katima Mulilo Police Station, the plaintiff's son was ordered to go back to the village and the plaintiff was taken to a police cell where he found many other people. Subsequent to plaintiff's arrest, he was detained and indicted on charges of high treason, sedition and 273 other charges as set out in the indictment.

[26] The plaintiff testified that during his arrest, he was never informed of the reasons for his arrest. In his testimony, the plaintiff referred to a number of witness statements provided by the defendants as statements which were used to formulate a case against him. During his evidence, the plaintiff referred to a number of witness statements wherein the name 'Rodwell Kasika' appeared. I do not intent to repeat the full contents of these witness statements but instead I will just give a brief overview thereof. The witness statements referred to are as follows:

a) *Christopher Lifasi Siboli*

The plaintiff testified that Siboli made his first statement during 23 March 1999 at Katima Mulilo which statement Siboli makes mention of the name Rodwell Kasika. The plaintiff testified that, on 13 April 2000, Mr Siboli gave a 62 page handwritten statement and at paragraph 20 of that statement, Mr Siboli states that Rodwell Kasika was amongst the people who attended a secret meeting where secession was discussed at Mosokotwane in the village of Alfred Tawana. The witness proceeded and testified that at paragraph 29, Siboli states further that Rodwell Kasika was working in eagle meal and staying in Newlook in Katima Mulilo. This Rodwell Kasika attended UDP meetings with Siboli during 1998 and also attended public meetings at Mosokotwane and was part of the delegation of Mishake

Muyongo. Still in 1998, the said Rodwell Kasika attended secret meetings in the house of Muyongo, the purpose of which was to secede Caprivi.

On 21 December 2000, Siboli made another statement but in this statement, he does not mention Rodwell Kasika. On 02 April 2001, Siboli made another statement but in this statement he does not mention Rodwell Kasika yet again. But on 15 February 2003, Siboli made another statement and in this statement he mentions that Rodwell Kasika attended two secret meetings (one meeting on 05 June 1998 and the other meeting on 05 July 1998 at the house of Muyongo).

b) *Christopher NZeko Mushabati*

The plaintiff testified that he became aware of witness statements made by a certain Christopher Nzeko Mushabati at Katima Mulilo. He alleges that Mushabati made six witness statements namely on 03 February 2000, 23 March 2000, 15 December 2000, 05 March 2001, 12 December 2001 and 18 January 2002. The witness testified that in his two first statements that is the statements of 03 February 2000 and 23 March 2000, Mushabati makes no mention of the name Rodwell Kasika, it is only in his 15 December 2000 statement that Mr Mushabati at paragraph 6 of his statement mentions the name of Rodwell Kasika and that there was a demonstration in Katima Mulilo where the said Rodwell Kasika and his vehicle was present. At paragraph 54 of his statement, Mushabati stated that Rodwell Kasika was present on 02 August 1999 driving his vehicle, a Toyota Hilux with registration number N 287 KM which vehicle was used to transport people who attacked on the aforesaid date.

Mushabati did not testify during the course of the criminal proceedings because he passed on while the trial was still in progress.

c) *Evans Simasiku:*

The plaintiff testified that he became aware of two witnesses' statements which were not commissioned made by Evans Simasiku, on whose instruction the plaintiff was arrested. The plaintiff further stated that in one of the statements Simasiku said:

'3 Rodwell Kasika was arrested after I requested the roadblock people to arrest him. This information came from NDF members who interrogated captured rebels on 02 August 1999 that he transported suspected rebels'.

The plaintiff continued and testified that in his second statement Simasiku states that:

'2 Rodwell Kasika was arrested on the 25th August 1999 by myself and I warned him accordingly. Before his arrest I gave his names and particulars to W/O Mukena, who was in charge of the road blocks, W/O Mukena brought Rodwell Kasika to me on the given date and I arrested him. The information on the activities of Rodwell Kasika came from Mpacha Base and I cannot remember the NDF officer who brought this information. His motor vehicle also was confiscated by me on the same occasion.'

[27] The plaintiff thus testified that he found the statements by Simasiku disturbing because he was arrested not only on hearsay but on speculations because Simasiku does not even know who communicated the information to him. He thus concluded his evidence by stating that, when Simasiku on 29 August 1999 charged him for high treason, Simasiku did not have credible and reliable information.

[28] The second witness to testify on behalf of the plaintiff was Advocate John Walters, as I indicated earlier he is the current Ombudsman. He testified that he briefly acted as the Prosecutor-General of Namibia from 01 December 2002 up to the end of December 2003 and was retained as a consultant to the prosecution team (in respect of the High Treason Trial) from 1 January 2004 to 30 June 2004. He testified that when the 02 August 1999 attacks took place, he was still in private practice.

[29] He continued with his testimony and stated that upon his appointment as acting Prosecutor General during December 2002, he assembled a new prosecution team due to resignations from the previous team with only two prosecutors of the original team remaining. It was his testimony that he instructed the prosecution team to evaluate the evidence against the accused persons and to advise him whether there was sufficient evidence to proceed against them. He relied on their professional assessments of the case, which he trusted. He had no reason to doubt

the correctness of the witness statements and therefore signed the indictment against the plaintiff and the other accused persons. The accused persons were indicted together under the doctrine of common purpose.

[30] He continued and testified that the Prosecutor-General and her staff derive their powers from Article 88 of the Namibian Constitution, which also requires the Prosecutor-General and her staff to execute their prosecutorial functions independently and without fear, favor or prejudice. By virtue of the Constitution, the Prosecutor-General is empowered to delegate the power to prosecute to various prosecutors prosecuting in the courts of Namibia. He further stated that when considering prosecution in a matter, a prosecutor has the duty to carefully consider the evidence in the police docket and if there is a need due to insufficient evidence, to withdraw the matter and refer the docket back to the police for further investigation. He also stated that there is a duty on the prosecutor to be aware of the constitutional provisions of a fair trial and that prosecutors should be mindful of arbitrary arrests and detentions.

[31] Advocate Walters concluded his testimony by emphasizing that the obligation on a prosecutor is not one of getting a conviction at all costs but to see to it that justice is done. A prosecutor must thus act in a manner that is fair and to ensure that all relevant information is before court to enable court to make a just decision.

The evidence adduced on behalf of the defendants.

[32] The defendants called two witnesses in support of their defence, namely Advocate Taswald July and Deputy Commissioner Evans Simasiku. The first witness called on behalf of the defendant was Advocate Taswald July (July) who testified that he was the Deputy-Prosecutor-General when the Caprivi Treason trial commenced, but has, since resigned from the Office of the Prosecutor-General.

[33] July testified that he joined the prosecuting team (with respect to the treason trial) in January 2003 which consisted of Advocate January (as he then was) and the late Advocate Barnard. Lead counsel on the prosecution team was Advocate January. He stated that he was not involved with the initial formulation of the charges

(which was done in 2001). The prosecution team reviewed the charges after an application for further trial particulars was received on behalf of the accused persons. The new prosecution team considered the evidence against all the accused persons, including the plaintiff, based on the indictment signed in 2001, and was satisfied on a *prima facie* basis that the plaintiff committed the offences alleged and on that basis, the team decided to continue to prosecute the plaintiff.

[34] July furthermore testified that at the time of indicting the plaintiff and when deciding whether or not there was a reasonable and probable cause for the institution of criminal proceedings and the prosecution of the plaintiff, the second defendant had at her disposal statements from a number of persons, and honestly and reasonably believed that the witnesses at the time of the trial would not only be available but that they would be prepared to testify in accordance with their statements, and that such evidence would be sufficient to have the plaintiff convicted of the offences in respect of which he was indicted.

[35] The statements that the prosecution team had available were the statements from Christopher Lifasi Siboli (Statement A179 which was admitted into evidence as *Exhibit B1 t- B62 and C1 - C21'*), Dascan Nyoka (Statement A198 which was admitted into evidence as *Exhibit D*), Phillip Mapulanga Mutabelezi (Statement 566 which was admitted into evidence as *Exhibit Q1 - Q3*), Christopher Nzeko Mushabati (Statement A13 – deceased which was admitted into evidence as *Exhibit H and M*) Statement of Richard S Mukena (Statement BW5 which was admitted into evidence as *Exhibit L*) and statements of Evans Simasiku (Statement A134 which were admitted into evidence as *Exhibits N & O*). July continued to testify that in all these statements, the plaintiff was implicated as having rendered assistance to the suspected rebels or having supported and associated himself with the forceful removal of the Namibian government in the then Caprivi, now the Zambezi Region.

[36] On the issue of undue delay in the prosecution of the matter, July testified that the trial was exceptional in nature and magnitude in the legal history of Namibia. He stated that there were 126 accused persons who were charged with 278 counts involving high treason, treason, murder, attempted murder and other offences

mentioned in the indictment. He stated that during the trial, 379 witnesses were called to testify and there were more than 900 witness statements to consider. He further stated that the case was also filled with delays due to applications for postponement at the behest of the State and the Defence for various reasons, withdrawal of counsel, difficulty in securing witnesses and extra-ordinary issues i.e. the challenge in respect of the jurisdiction of the High Court to hear the matter. Another reason for the delay was an unfortunate motor vehicle accident in which Adv. Barnard tragically passed away and both the witness and Adv. January were severely injured.

[37] 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. He stated that due to the magnitude of the matter it was not humanly possible to do a regular assessment of the matter. He submitted that it would have been prejudicial and very risky for the State to stop prosecution against the plaintiff as the State was not in the position to know whether all the evidence that could implicate the plaintiff had been presented and that all witnesses that could implicate the plaintiff had completed their evidence.

[38] July testified that during November 2010 prior to the close of the prosecution's case, an appraisal was done by the prosecution team of the evidence given by the witnesses with respect to all the accused persons. Instructions were given to the Namibian Police to carry out further investigation on certain issues. The application to allow this evidence was however not successful. July furthermore testified that the plaintiff was indicted to appear and to be put on trial by the Prosecutor-General as Accused 106, but was discharged by court on 10 August 2012. The discharge was the result of the concession made by the State, as represented by the second defendant, after it realised following certain events relating to witnesses that it will be difficult to successfully oppose an application in terms of s 174 brought by the plaintiff and others.

[39] The second witness to testify on behalf of the defendants was former Detective Chief Inspector Evans Simasiku (at the time of his testimony he was

promoted to the rank of Deputy Commissioner). Simasiku stated that he is employed by Ministry of Safety and Security and stationed at the High Treason and Counter Terrorism Office, Windhoek. He testified that in August 1999, he held the rank of Detective Sergeant and was attached to Criminal Investigation Unit in Zambezi area. Simasiku confirms that the plaintiff was arrested on 25 August 1999 on information that the plaintiff transported suspected 'rebels' to the venues of the attacks and to flee to Botswana.

[40] Simasiku testified that shortly after the attack, the security forces had to act quickly and to bring some normality to the Region by rounding up the suspects. The aim was also to prevent rebels from fleeing to Botswana or Zambia. The suspects, who included the plaintiff, were arrested under the state of emergency that was declared and without having obtained statements first. Information was obtained from different sources, which included the community and captured 'rebels'.

[41] He also explained the reason why statements were not obtained before the arrest and in some cases only after some time after the arrest. Once a suspect was arrested, the information against a suspect had to be verified by the security forces, made up of military intelligence personnel, the special branch of the Police and detectives.

[42] Based on what I have stated in the preceding paragraphs, I am required to determine whether the first or second defendant maliciously prosecuted the plaintiff and whether the second defendant alone maliciously continued to prosecute the defendant. I will commence the inquiry by setting out the requirements that a plaintiff will have to meet to successfully sustain a claim for malicious prosecution.

Requisites of malicious prosecution

[43] In *Akuake v Jansen Van Rensburg*,¹ Damaseb JP stated that, to sustain a claim based on malicious criminal proceedings the plaintiff must allege and prove:

a) that the defendant actually instigated or instituted the criminal proceedings;

¹ *Akuake v Jansen Van Rensburg* 2009 (1) NR 403 at p 404.

- b) without reasonable and probable cause; and that
- c) it was actuated by an indirect or improper motive (malice) and;
- d) that the proceedings were terminated in his favour; and that
- e) he suffered loss and damage.

[44] The learned Judge President quoting from the matter of *Waterhouse v Shields*² stated that as regards the requirement that the defendant actually instigated or instituted the criminal proceedings, it is trite that the mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient to found liability for malicious prosecution. He quoted Gardiner as saying:

'The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be liable. The test, said BRISTOWE J in *Baker v Christiane* 1920 WLR 14, is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment.'

[45] As regards the second requirement namely that the defendant actually instigated or instituted the criminal proceedings without reasonable and probable cause, Schreiner JA said:

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

² *Waterhouse v Shields* 1924 CPD 155 at 160 per Gardiner J.

[46] In the Laws of South Africa (LAWSA) at paragraph 323 the following is stated about “reasonable and probable cause”:

‘Reasonable and probable cause means an honest belief based on reasonable grounds that the institution of the proceedings complained of was justified. There must be sufficient facts known to the defendant from which a reasonable person could have concluded that the plaintiff had committed the offence in question, and a mere honest belief that the facts amount to an offence irrespective of the legal requirements is insufficient. The defendant is only expected to have taken reasonable measures to discover the facts upon which he or she bases a conclusion that the plaintiff was guilty of the offence: the defendant need not test all the relevant facts. Though the defendant had an honest belief in the charges where there were no reasonable grounds for that belief, there can be no reasonable and probable cause. Mere honest belief in the truth of the facts upon which the accusation is based is not conclusive of the presence of reasonable and probable cause. There may be absence of reasonable and probable cause irrespective of whether there was an honest belief in the guilt of the accused. If the defendant is found to have acted with reasonable and probable cause an action for malicious prosecution will fail, no matter what his or her motive is for instituting the prosecution. The test of reasonable and probable cause involves both subjective and objective elements. Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence’.

[47] The requirement of “malice” namely that the defendant when he or she instigated or instituted the criminal proceedings, he or she was ‘actuated by an indirect or improper motive (malice) has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression “malice” is used, the claimant’s remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved in this regard is *animus injuriandi*.³

[48] In *Prinsloo v Newman*,⁴ Mullier JA stated that in actions of malicious prosecution the plaintiff’s remedy is provided under the *actio injuriarum*, from which

³ See *Moaki v Reckitt & Colman (Africa) Ltd & Another* 1968 (3) SA 98 (A) at 103G-104E and *Prinsloo & Another v Newman* 1975 (1) SA 481 (A) at 492A-B.

⁴ *Prinsloo v Newman* 1975 2 All SA 889 (A); 1975 1 SA 481 (AD) 492.

it follows that what has to be alleged and established is *animus injuriandi*. In LAWSA paragraph 321 the following is stated.

‘An action for malicious prosecution lies under the *actio iniuriarum* and the element of *animus injuriandi* is therefore a requirement. Apart from the other elements, the plaintiff must prove that the defendant had the necessary *animus injuriandi*. *Animus injuriandi* includes not only the intention to injure but also consciousness of wrongfulness, and is distinguishable from improper motive or malice. Malice is the actuating impulse preceding intention. A person who lays a criminal complaint against another intends to injure him or her. The complaint’s act, however, is lawful, provided he or she had reasonable and probable cause for laying the charge and was not actuated by malice. Proof of *animus injuriandi* satisfies the fault element, but the defendant’s act will not be wrongful unless he or she abused the right to lay a complaint with the police by acting without reasonable and probable cause and out of malice’

[49] In *Relyant Trading (Pty) Ltd v Shongwe*,⁵ the South African Supreme Court of Appeal stated although the expression “malice” is used, it means, in the context of the *actio iniuriarum*, *animus injuriandi*. And in *Moaki v Reckitt & Colman (Africa) Ltd and Another*⁶ Wessels JA said:

‘Where relief is claimed by this *actio* [i.e. *actio iniuriarum*] 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.’

[50] *Animus injuriandi* 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 prosecution were lacking, but

⁵ *Relyant Trading (Pty) Ltd v Shongwe* 22 [2007] 1 All SA 375 (SCA) para 14.

⁶ *Moaki v Reckitt & Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A)

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*.’

[51] In *Minister of Justice & Constitutional Development v Moleko*,⁷ the Supreme Court of Appeal of South Africa (Per Van Heerden) said:

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

[52] The final requirement is that the prosecution must have terminated in favour of the plaintiff, in other words the plaintiff was acquitted of the charges against him.

Discussion

[53] In the present matter, it is admitted that the second defendants actually instigated or instituted the criminal proceedings against the plaintiff, it is equally admitted that the prosecution terminated in favour of the plaintiff. It thus follows that the only issues left open for determination in these proceedings are:

- a) whether the prosecution of the plaintiff was done without reasonable and probable cause, and
- b) whether the members of the second defendant acted with malice or *animus injuriandi*.
- c) If not, whether the judgment in the *Mahupelo v the Minister of Safety Security and Others* and that of *Makapa* are binding on the Court.

Did the defendants prosecute the plaintiff without a reasonable or probable cause?

⁷ *Minister of Justice & Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at para [64].

[54] It is an accepted legal principle that the plaintiff bears the *onus* to prove, on a balance of probabilities that the prosecution of the plaintiff was done without reasonable and probable cause and that the defendant acted with malice or *animo injuriandi*.⁸ The question thus is, has the plaintiff discharged that onus?

[55] The concept of reasonable and probable cause is clearly the most onerous of the elements for a plaintiff to establish. The test contains both a subjective and objective element, which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances. Deputy Commissioner Evans testified that his decision to charge the plaintiff was based on information that he received from a member of the Namibian Defence Force that some of the people (referred to by the Police and the prosecution team as rebels) who were captured after or during the attacks, informed the members of the Namibia Defence force that the plaintiff transported some of those persons to the scenes of attack during the attack and also transported some of them to assist them escape to Botswana or Zambia.

[56] The critical question, in my view is thus, 'Is the information, on which Deputy Commissioner Evans based his decision to charge the plaintiff with High Treason, information which would lead a reasonable person to conclude that the plaintiff is probably guilty of the offence of High Treason?'

[57] Counsel for the plaintiff criticised the information which the police, specifically Deputy Commissioner Evans, relied on at 29 August 1999 to charge the defendant with High Treason, as hearsay, speculative and incredible evidence. Counsel further argued that the statements by Deputy Commissioner Evans were only made 15 months after the plaintiff was charged with High Treason.

[58] When it is alleged that a defendant (in this case the police and the prosecuting team) had no reasonable cause for prosecuting a person, I understand this to mean that the defendant did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence

⁸ *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC). Also see *Minister of Justice & Constitutional Development v Moleko* ([2008] 3 All SA 47 (SCA)).

charged or that the police and the prosecution team did not believe in the plaintiff's guilt.⁹

[59] In *Hicks v Faulkner*,¹⁰ a case that was decided more than one hundred and thirty years ago, the English Court said:

'... the question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable *bona fide* belief in the existence of such state of things as would amount to a justification of the course pursued in making the accusation complained of... No matter whether the belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another... The distinction between facts necessary to establish actual guilt and those required to establish a reasonable *bona fide* belief in guilt should never be lost sight of in considering such case as I am discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former.'

[60] The authors of the book *Neethling's Law of Personality*¹¹ argue that it is important to note that a defendant is not expected to test the truth or validity of every possibly relevant fact or ground before him or her to institute the prosecution they say:

'All that is required is that 'the information available to the defendant' must reasonably justify the conclusion that the plaintiff probably committed the crime. Neither is there any duty on the defendant to determine whether the plaintiff has a possible defence."¹² They proceed and argue that it is also not the duty of the prosecutor "to ascertain whether there is a defence, but whether there is reasonable and probable cause for prosecution."¹³

[61] On the facts, of this case which, amongst other facts are that; Deputy Commission was informed by members of the Namibian Defence Forces that information obtained from persons (so called rebels) who were captured by the Namibian Defence Forces indicated that the plaintiff transported some person who carried out the attacks on 02 August 1999 to the installations that were attacked and

⁹ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 AD at 136 A-B.

¹⁰ *Hicks v Faulkner* (1881) AER 198 7 page 192 para. B and C.

¹¹ Neethling J, Potgieter JM, and Visser PJ: *Neethling's Law of Personality*, second ed, LexisNexis, Durban at p176.

¹² *Neethling's Law of Personality*, p. 176.

¹³ *Landman and Others v Minister of Police* 1975 (2) SA 155 (E).

also transported those persons (suspected 'rebels') who were fleeing from Namibia. The police conducted their investigation and compiled a police docket. In the police docket, there was information placing the plaintiff at events related to the planning of the removal by force of the Namibian Government in the then Caprivi (now the Zambezi) Region. The docket and its contents was submitted to the prosecuting authority. The initial indictment was drafted in 2001 and reviewed in 2003 by the team lead by Advocate January. Some of the affidavits that formed part of the docket was referred to by July and were admitted into evidence as exhibits.¹⁴

[62] I am therefore satisfied that July thus had information given under oath of the allegations recorded in the said statements, (the accuracy or correctness of the statement was not admitted by the plaintiff but this is in my view immaterial because July was not to judge the accuracy or otherwise of the contents of the statements). July testified that he and the rest of the prosecution team had extensive consultation with the witnesses. The witnesses were divided amongst the three of them to enable prosecution counsel to properly consult and then lead the witness in court. He stated that he had satisfied himself as to the credibility of these witnesses during the consultations held with them.

[63] I am, without any shadow of doubt, therefore satisfied that Deputy Commissioner Evans Simasiku of the first defendant had reasonable and probable cause when he instigated the prosecution of the plaintiff and that second defendant had reasonable and probable cause due to the fact that five witnesses made allegations in their sworn statements, placing the plaintiff in key events that if those allegations were to be found to be true, would have made the plaintiff liable to prosecution for various offences, including high treason.

[64] The next requirement that we need to deal with is the requirement relating to malice. I indicated earlier in the judgment that in a suit for malicious prosecution, the plaintiff's claim lies under the *actio iniuriarum* and the plaintiff must prove that the

¹⁴ I need to add that when the statement were admitted into evidence they were not admitted for the purposes of proving the accuracy or correctness of their contents but simply to demonstrate that they were made and that the contents is what he police and prosecution relied on to formulate the charge and to prosecute the plaintiff.

defendant acted with *animus iniuriandi*.¹⁵ “*Animus iniuriandi* includes not only the intention to injure but also consciousness of wrongfulness, and is distinguishable from improper motive or malice. Malice is the actuating impulse preceding intention”.¹⁶ The existence of malice may point to the existence of *animus iniuriandi*, as indicating an awareness of the wrongfulness of the action.¹⁷ *Animus iniuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality).

[65] I found that both the first and second defendant had reasonable and probable cause when they instigated the prosecution of the plaintiff. That finding in my view negates any imputation of any awareness on the part of the first and second defendants of the absence of reasonable grounds for the prosecution of the plaintiff. In other words, if the first and second defendants believe that there were justifiable grounds on which to instigate the prosecution and prosecuting the plaintiff, how can it be said that that conduct was wrongful? In my view, the plaintiff has failed to discharge the *onus* resting on him to prove that the first and second defendants maliciously prosecuted him.

Alternative Claim

[66] The plaintiff had an alternative claim only against the second defendant or her employees or both the second defendant and her employees, damages based upon the wrongful and malicious continuation of the prosecution as from 17 November 2005 or 6 March 2006 for the crimes set out in the indictment.

[67] The facts and circumstances upon which the plaintiff relies are:

(a) The knowledge the second defendant and/or her employees had in respect of the fact that the testimony of all witnesses and all evidence which could have been presented for the purpose of attempting to implicate the plaintiff regarding the commission of the crimes set out in the indictment was completed by 17 November 2005 or 6 March 2006.

¹⁵ *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) para. 18

¹⁶ LAWSA 2nd ed. p. 198 para. 321.

¹⁷ LAWSA para. 322.

(b) Despite this fact, the second defendant continued to prosecute the plaintiff until 10 August 2012 without reasonable or probable cause whereas the second defendant should reasonably have stopped such prosecution in terms of Section 6(b) of the Criminal Procedure Act, 51 of 1977 (“the Act”) by the aforesaid dates, or within a reasonable time thereafter.

(c) Alternatively, the second defendant reasonably ought to have closed the State’s case against the plaintiff and moved for or caused his discharge and release from prosecution and detention by the aforesaid dates.

(d) Alternatively, the second defendant ought reasonably to have caused the plaintiff’s release from prosecution and detention by 17 November 2005 or 6 March 2006 in order to safeguard or prevent the violation of the plaintiff’s rights under one or more or all of Articles 7, 8, 11, 12, 13 and 21 of the Namibian Constitution, read with Article 5 thereof.’

[68] A central complaint underlying the allegations under the alternative claim is that the second defendant unreasonably delayed the prosecution of the plaintiff and that the second defendant acted without reasonable and probable cause when she continued with the prosecution after 17 November 2005 or 6 March 2006. I will briefly evaluate these complaints.

Did the second defendant unreasonably delay the prosecution?

[69] Counsel for the defendants argued that the complaint of unreasonable delay is meritless because it is not supported by the evidence on the record. July who testified for the second defendant testified that the prosecution team approached the defence counsel to try and shorten the trial by encouraging the accused persons to offer plea explanations which approaches were rebuffed. He further testified that the prosecution agreed to disclose witness statements three days before the hearing and once a witness had been secured by the Prosecution. He furthermore testified that the prosecution team suggested to continue with the trial beyond the normal working hours but those suggestions were also rejected. July furthermore testified that the delays and postponements of the matter cannot be attributed to the prosecution team alone because some of the postponements were at the instance of

the defense, some by the non-cooperation attitude of some accused persons and the challenges to the jurisdiction of the High Court to try some accused persons.

[70] July further continued and testified that in November 2008, the prosecution team *mero moto* decided to disclose the entire docket to the accused persons' legal team. These steps were taken by the Prosecution although the High Court had made an order authorising the Prosecution not to discover the docket due to the security situation prevailing at the time in Caprivi (now the Zambezi Region). The Prosecution disclosed the content of the docket because the security situation had changed and also considering the accused right to a fair trial. The witness continued and stated that it was impossible to get more prosecutors to work on the case for various reasons. These included: fear of witchcraft, unwillingness to relocate to Grootfontein and family relations between prosecutors and accused persons.

[71] Mr July also testified that the prosecution approached the case with a sense of urgency and professional dedication and did the best within the available resources to bring the trial to a speedy conclusion. He testified that the prosecution did its best to reduce the length of the trial. The evidence by July was not contradicted by the plaintiff, I accordingly accept it as correct and find that complaint of unreasonable delay has no merits.

Did the second defendant continue to prosecute the plaintiff without a reasonable or probable cause?

[72] The claim that the second defendant acted without reasonable and probable cause, when she continued with the prosecution of the plaintiff after 17 November 2005 or 6 March 2006, is based on the *dicta* of the Australian Court of Appeal in the matter of *State of New South Wales v Hathaway*¹⁸ where the Court said:

'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 the institution of proceedings, but, at a later point in the proceedings, and while

¹⁸ *New South Wales v Hathaway* 2010 NSWCA 188.

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 proceedings 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.'

[73] I have no qualms with the above quoted statement as general proposition of the law, but the question whether reasonable and probable grounds for the prosecution or continuation exists, may be answered only by reference to the facts of a particular case. What are the facts of this case? In this case, the prosecution of the plaintiff is done by the second defendant pursuant to the powers vested by Article 88 of the Constitution of Namibia in the second defendant and also in terms of the Criminal Procedure Act, 1977. In this matter, it is also common cause that the plaintiff was detained on either 25 or 26 August 1999 and was brought before a Magistrate on 29 August 1999 who authorised his continued detention. It is common cause that the plaintiff unsuccessfully applied on more than one occasion to be released on bail.

[74] Other facts that are relevant in this matter are that, the plaintiff was charged jointly with other 125 accused and that there were more than 300 witnesses to testify. It is also a fact to take into account that the charges against the plaintiff were based on the doctrine of common purpose and conspiracy.

[75] In *S v Fourie*¹⁹ this Court approved the statement by Corbett J in the case of *S v Bopape*²⁰ where he said:

'It seems to me that there are three possible attitudes a prosecutor may adopt towards a prosecution. He may press for a conviction, or he may stop the prosecution, or he may adopt an intermediate neutral attitude whereby he neither asks for a conviction nor stops the prosecution but leaves it to the Court to carry out the function of deciding the issues raised by the prosecution.'

¹⁹ *S v Fourie* 2014 (4) NR 966 (HC).

²⁰ *S v Bopape* 1966 (1) SA 145 (C).

[76] In the present case, the prosecution team, chose one of three options lawfully available to it, can it be said that the continuation of the prosecution is without reasonable and probable cause? In my view, the answer is in the negative and I say so for the reason that if the alleged tortfeasor genuinely believes that he or she is acting in accordance with the law, he or she does not act wrongfully for purposes of the law; he or she does not act with malice.

[77] Accordingly, on the evidence, and the legal principle set out in this judgement, I find and hold that there is no evidence tending to prove lack of reasonable and probable cause on the part of second defendant with respect to the continuation of the prosecution of the plaintiff prosecution after 17 November 2005 or 6 March 2006. I furthermore agree with Counsel for the defendants that once the prosecution of the plaintiff is lawful, the plaintiff cannot recover constitutional damages based on the consequences of such lawful prosecution.

[78] The third question which I was required to determine is the question whether or not I was bound by the decision of this Court in the matters of *Mahupelo v the Minister of Safety Security and Others*²¹ and that of *Makapa v The Minister of Safety and Security*,²² but that question has been overtaken by events and has been answered by the Supreme Court.²³

[79] The general rule is that costs follow the course and that cost are in the discretion of the court. The plaintiff in this matter is a legally aided person in terms of the Legal Aid Act, 1990. I have taken into consideration s 18 of the Legal Aid Act , 1990 which states that '(n)o order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings'.

[80] I am of the further view that this is not an appropriate case to mulct the plaintiff in cost when the issue that he brought before court is of great public and

²¹ *Mahupelo v The Minister of Safety and Security* (I 56/2014) [2017] NAHCMD 25 (2 February 2017).

²² *Makapa v The Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130 (05 May 2017).

²³ See the cases of *Minister of Safety and Security and Others v Mahupelo* 2019 (2) NR 308 (SC) and *Minister of Safety and Security and Others v Makapa* 2020 (1) NR 187 (SC).

constitutional importance.

[81] In the result I make the following order:

- a) The plaintiff's claim is dismissed.
- b) The matter is finalised and removed from the roll.
- c) Each party must pay own costs.

S F I UEITELE
Judge

APPEARANCES:**PLAINTIFF:**

BHANA (WITH PHATELA) later
CORBERT (WITH PHATELA)
Instructed by Muluti & Partners,
Windhoek

DEFENDANTS:

CASSIM (WITH NAMANDJE) later
SEMENYA (WITH NAMANDJE)
Instructed by Government Attorneys,
Windhoek