

**REPUBLIC OF NAMIBIA**



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

Case No: HC-MD-CIV-ACT-OTH-2021/02956

In the matter between:

**DENNY DESMOND DOESEB**

**PLAINTIFF**

and

**MINISTER OF HOME AFFAIRS, SAFETY &  
SECURITY: HON. ALBERT KAWANA**

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

**COMMISSIONER GENERAL OF THE NAMIBIAN  
CORRECTIONAL SERVICES: RAPHAEL HAMUNYELA  
INSPECTOR-GENERAL OF THE NAMIBIAN POLICE**

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

**SEBASTIAAN NDEITUNGA**

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

**PROSECUTOR-GENERAL MARTHA IMALWA**

**4<sup>TH</sup> DEFENDANT**

**THE PUBLIC PROSECUTOR AT THE MARIENTAL  
MAGISTRATE COURT MS LOIDE**

**5<sup>TH</sup> DEFENDANT**

**SERGEANT DIERSTAAN**

**6<sup>TH</sup> DEFENDANT**

**D/SERGEANT AMUKESHE**

**7<sup>TH</sup> DEFENDANT**

**Neutral Citation:** *Doeseb vs Minister of Home Affairs, Safety & Security* (HC-MD-CIV-  
ACT-OTH-2021/02956) [2021] NAHCMD 118 (10 March 2023)

**Coram:** Christiaan AJ  
**Heard:** 17, 19 October 2022 and 7 November 2022  
**Delivered:** 15 March 2023

**Flynote:** *Delict* — Malicious prosecution — Instigation of prosecution — Plaintiff was maliciously prosecuted without a *prima facie* case for assault with intent to do grievous bodily harm by defendants — Where information is given on the strength of which a prosecution is undertaken, is not instigating a prosecution.

*Practice* — Absolution from instance at close of plaintiff's case — Test — Whether Reasonable Court satisfied that plaintiff established a *prima facie* case.

**Summary:** The plaintiff instituted proceedings against the defendants for malicious prosecution and alternatively, plaintiff claims that his dignity was infringed upon and violated in that his common law rights and article 8 rights were violated by members of the Namibian police force and/or the Office of the Prosecutor General. He claimed that as a result of this wrongful and unlawful instigation of charges against him, he was maliciously prosecuted without a *prima facie* case for assault with intent to do grievous bodily harm. He claimed that due to the wrongful and unlawful instigation of charges and subsequent arrest and malicious prosecution his dignity was infringed upon and his common law rights and article 8 rights were violated. He furthermore alleged that he suffered loss in the amount of N\$ 700 000.00.

The defendants entered a notice to defend the action and admitted that the plaintiff was arrested but was already detained at the correctional facility, but denied that the plaintiff was arrested without a reasonable suspicion or probable cause as the plaintiff was suspected to have assaulted another person. The defendants further pleaded that the plaintiff was already in detention as a sentenced inmate and his detention would continue even in the absence of the aforementioned arrest. The defendants furthermore also pleaded that the criminal proceedings against the plaintiff were instituted by the seventh defendant and not the sixth defendant, and the plaintiff did not inform the sixth defendant that he did not perpetuate the criminal act. The defendants further pleaded that the matter against the plaintiff was not

withdrawn but the plaintiff was found not guilty and acquitted after the trial. At the end of the plaintiff's case the defendants applied for absolution from the instance.

*Held that* when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

*Held further that* the plaintiff bears the *onus* to place facts in the form of evidence of the nature of his wrongful and unlawful arrest and subsequent detention and maliciously prosecution by the Prosecutor General.

*Held further that* as regards the evidence which the plaintiff put before the Court, that was not evidence but conclusions of law, it is at best for the plaintiff an inference, a "secondary fact", with the primary facts on which it depends were omitted. The Court thus concluded that no Court acting carefully and reasonably will, in those circumstances, find for the plaintiff or require the defendants to adduce evidence in rebuttal.

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### ORDER

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1. The defendants are absolved from the instance.
  2. No order as to costs.
  3. The matter is regarded as finalised and is removed from the roll.
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### JUDGEMENT

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Christiaan, AJ

Introduction and background

[1] The plaintiff in this matter is Denny Desmond Doeseb, an adult Namibian male, who is incarcerated at the Hardap Correctional Facility, Hardap, Namibia. I will for sake of convenience refer to the plaintiff as Mr Doeseb.

[2] The first defendant is the Minister of Home Affairs, Safety and Security (the Minister), the second defendant is the Commissioner General of the Namibian Correctional Facilities (the Commissioner General), the third defendant is the Inspector-General of the Namibian Police (the Inspector General), the fourth defendant is the Prosecutor-General of Namibia (the Prosecutor General) and the fifth defendant is the Public Prosecutor at the Mariental Magistrate Court a certain Ms Loide (the Prosecutor) and the sixth defendant is a certain Mr Dierstaan who was employed as a police officer in the Namibian Police (I will, in this judgement, refer to the police officer as Sergeant Dierstaan) and the seventh defendant is a certain Mr Amukeshe who was employed as a police officer in the Namibian Police (I will, in this judgment refer to the police officer as Detective Sergeant Amukeshe).

[3] On 20 September 2019 the Hardap Correctional Facility, held a sports day at the correctional facility. The plaintiff was participating in the sports day and returned to his room at the A -section of the correctional facility and upon return to his room he found offender Jan Kandetu and Offender Erens Tsei-Tseimub on his bed and he asked them to leave his cell and they did. The plaintiff was informed by offender Shaun Goliath that offender Erens Tsei-Tseimub was stabbed by offender Jan Kandetu. The Plaintiff was then summoned to the office of the head of security, to explain whether he has any knowledge of the stabbing incident, to which he replied that he had no knowledge and he returned to his cell.

[4] During 2019, criminal proceedings were instituted against him and he was subsequently charged with assault with intent to do grievous bodily harm as a co-accused in the matter under case number 1316/2019 with CR Number: 50/09/2019 in Mariental.

[5] The plaintiff pleaded not guilty and after evidence was presented, he was found not guilty on 09 June 2020 on the charge of assault with intent to do grievous bodily harm.

[6] Following his discharge, the plaintiff, during August 2021, approached this Court claiming (in his particulars of claim) that:

(a) During 2019, plaintiff was wrongly arrested and criminal proceedings were instituted against him and he was charged with assault with intent to do grievous bodily harm as a co - accused;

b) Criminal proceedings were instigated and or instituted by Sergeant Dierstaan, against the plaintiff and Mr Jan Kandetu, who at the time, was employed by the third defendant and was acting within the course and scope of his employment;

(c) During the time of the arrest, the plaintiff informed Sergeant Dierstaan that he did not commit the offence of assault with intent to do grievous bodily harm against anyone, but Sergeant Dierstaan persisted with the charges against the plaintiff;

(d) Sergeant Dierstaan opened a criminal case with case no: 1316/2019 under CR No: 50/09/2019. Criminal proceedings against the plaintiff lasted for 9 months, before the plaintiff was found not guilty;

(e) He was maliciously prosecuted by Ms Loide, who at the time, was employed by the fifth defendant and was acting within the course and scope of her employment, without a *prima facie* case for assault with intent to do grievous bodily harm. This, says the plaintiff, was evidenced by the fact that the plaintiff was cleared of any wrongdoing and acquitted on 10 June 2020; and

[7] The plaintiff, as a consequence of the allegations I referred to above in the preceding paragraph is seeking compensation in the amount of N\$ 700 000.00 from the defendants made up as follows:

(a) Physical, physiological and emotional pain and trauma in the amount of N\$ 600 000; and

(b) Loss of ordinary amenities of life and discomfort in the amount of N\$ 100 000.

[8] The defendants entered a notice to defend the action and admitted that the plaintiff was arrested and was already detained at the Hardap Correctional Facility, but denied that he was arrested without a reasonable or probable cause. They pleaded that the plaintiff was suspected to have committed a schedule 1 offence. The defendants further pleaded that:

(a) at no point in time was the Plaintiff wrongfully arrested and criminal proceedings instituted, the arrest of the Plaintiff could not have been unlawful as same was based on a reasonable suspicion of having committed a schedule 1 offence;

(b) that the plaintiff was already in detention as a sentenced inmate and his detention would continue even in the absence of the aforementioned arrest;

(c) Mr Jan Kandetu was the co-accused of the plaintiff and that the criminal proceedings against the plaintiff were instituted by the investigating officer D/Sergeant Amukeshe and not Sergeant Dierstaan, and the plaintiff did not inform Sergeant Dierstaan that he did not perpetuate the criminal act;

(d) that Sergeant Dierstaan did not institute any action against the plaintiff and that the matter against the plaintiff was not withdrawn but the plaintiff was found not guilty and acquitted after the trial;

(e) the Sergeant Dierstaan did not have any information regarding who the actual perpetrator was and that no confession was made by Mr Jan Kandetu;

(f) that the plaintiff was not wrongfully arrested and no unlawful prosecution took place in the matter against him, and that the plaintiff did not suffer psychologically and/or emotionally as a result of this matter;

(g) that the plaintiff is required to set out his damages in such a way that the Defendants are reasonably able to assess the quantum;

(h) the notice attached to the plaintiffs particulars of claim is a notice in terms of section 4 of the Judicial Service Commission Act, 1995 read with section 25(2) of the Namibian Constitution, thus it cannot constitute as a notice in terms of section 39 (1) of the Police Act, Act No. 19 of 1990 or section 133(3) of the Correctional Service Act, Act No. 12 of 2012 and thus does not entail a proper notice which is required;

*The issue that the Court is required to resolve*

[9] At the commencement of this matter the plaintiff indicated that he is pursuing a claim with respect to malicious prosecution and alternatively that his dignity was infringed upon and violated in that his common law rights and article 8 rights were violated by members of the Namibian police force and or the Office of the Prosecutor General. From the allegations by the plaintiff and the counter allegations by the defendants, this Court is thus required to determine whether the plaintiff was, as he alleges, maliciously prosecuted and/or his dignity infringed upon and was his common law rights and article 8 rights violated by members of the Namibian Police force and/or the Office of the Prosecutor General.

[10] This matter proceeded to trial and at the close of the plaintiff's case the defendants applied to be absolved from the instance. I so proceeded by starting off with the testimony presented by the plaintiff.

*The plaintiff's evidence*

[11] In his quest to prove his claim, the plaintiff testified and further led the evidence of two other witnesses, namely: 1) Ernst Tsei-Tsei Mo a factual witness who was the inmate that was assaulted and laid the charges of assault against the plaintiff and Mr. Kandetu and (2) Shaun Goliath, a factual witness who was present and witnessed the assault on Ernst Tsei Tsei Mo (The evidence presented in Court was summarised as follows:

*Denny Desmond Doeseb- the Plaintiff*

[12] The Plaintiff testified that he was a major male offender who is detained at Oluno correctional facility and that on 20 of September 2019 at the A-section of

Hardap Correctional Facility he was participating in the sports day held at the correctional facility and that upon his return to his room he found offender Jan Kandetu and Offender Erens Tsei-Tseimub in his cell, on his bed and he then informed them to leave his cell and they did so.

[13] Plaintiff further testified that a few minutes later he was informed by offender Shawn Goliath that offender Tsei-Tseimub was stabbed by offender Jan Kandetu. The plaintiff further testified that on the next day he was summoned to the office of the Head of Security and was questioned by the officer in charge if he had knowledge of the stabbing incident to which he replied that he had no knowledge of the incident and returned to his cell.

[14] The plaintiff in his further testimony informed the court that during 2019, criminal proceedings were instituted against him and that he was subsequently charged with assault with intent to do grievous bodily harm as a co-accused in the matter under case number Mariental, 1316/2019 with CR number:50/09/2019. Plaintiff testified that at the trial proceedings, he pleaded not guilty and after evidence was adduced, he was found not guilty on 09 June 2020.

[15] The plaintiff argued that the continuation of his prosecution injured him in that he faced the danger of being convicted and sentenced for an offence he did not commit, and that he suffered emotional and psychological damage for nine months due to the continued prosecution. The plaintiff testified that he suffered loss of the ordinary amenities of life and discomfort.

[16] The plaintiff closed off his testimony by testifying that as a result of the instigation and continued prosecution he seeks compensation in the amount of N\$ 700 000.00 which is made up of N\$ 600 000 for physical, physiological and emotional pain and trauma and N\$ 100 000 for loss of ordinary amenities of life and discomfort. The plaintiff further testified that as a result of the instigation and continued prosecution he was labelled and defined as a maximum offender and lost the benefits afforded to minimum offenders and that he could not attend parole and remission lessons due to being defined as a maximum offender.



[17] A summary of the plaintiff's cross examination follows:

16.1 The plaintiff in cross examination admitted that he was arrested on 24 September 2019 on charges of assault with intent to do grievous bodily harm regarding an incident that happened on 20 September 2019 at the Hardap Correctional Facility.

16.2 The plaintiff in cross examination confirmed that he was arraigned before the Mariental magistrate court and the allegations levelled by the complainant coincided with the charges faced by plaintiff and his co-accused, and this is evident from the charge sheet in Case No 1316/2020 with CR No 50/9/20219<sup>1</sup>.

16.3 It was clear from the warning statement (Pol 17)<sup>2</sup> that the plaintiff understood his rights to legal representation as they were read out to him and he understood and informed the arresting officer that he did not need the services of a legal practitioner and that he will exercise his right to remain silent.

16.4 The plaintiff informed the court that the complainant in the assault matter, Ernst Tsei-Tseimub Mou lied when he had given a statement to the police identifying plaintiff and his co-accused as the perpetrators of the assault.

16.5 The plaintiff confirmed under cross examination that he could not join Erenst Tsei-Tseimub Mou as a defendant to the current proceedings, although he instigated and set the law in motion by laying the criminal charges against him and his co-accused, as the complainant did not have money and he had apologized and was willing to assist him in this case against the current defendants'.

16.6 The plaintiff denied that he was downgraded because of the incident that happened in November 2019 when he threw an offender

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<sup>1</sup> Page 157 to page 203 of the trial bundle.

<sup>2</sup> Page 149 of the record of the trial bundle.

with porridge and he pleaded guilty to the charges, which was the reason why he was downgraded from minimum to maximum security, and was adamant that he was allegedly downgraded because of his alleged prosecution in the assault case.

Ernst Tsei-Tseimub Mou

[18] The plaintiff then called Mr. Ernst Tsei-Tsei Mou who testified, *inter alia*, that he was an inmate at the Windhoek Correctional Facility and was an inmate at the Hardap Correctional Facility during 2019. He further testified that during September 2019, during his stay at the Hardap Correctional Facility, he had an altercation with a fellow inmate Jan Kandetu and Jan Kandetu stabbed him with a sharpened wire and the other offenders managed to stop the fight.

[19] Mr Tsei-Tseimub Mou testified that Jan Kandetu told fellow offenders that he stabbed him on instructions of Denny Doeseb and that that the officers interrogated and questioned Denny Doeseb regarding his involvement in the assault, and Denny Doeseb allegedly denied having any knowledge of the stabbing.

[20] Mr. Tsei-Tseimub Mou further testified that he opened a criminal case against Denny Doeseb on advice by the officers and he was assisted by the officers to the police station and a case was opened against Denny Doeseb.

[21] Mr. Tsei-Tseimub Mou concluded his testimony by informing the court that the criminal case was finalized against Denny Doeseb and Jan Kandetu and Jan Kandetu was convicted and sentenced for assault with intent to do grievous bodily harm. His further testimony was that the statement that he gave in court during the criminal proceedings against Denny Doeseb was not true, and he was allegedly influenced by the other offenders to give a false testimony.

[22] A summary of Mr. Tsei-Tseimub Mou's cross examination revealed the following information:

- 22.1 Mr. Tsei-Tsei Mou confirmed to the court that the statement that he gave to the police on 24 September 2019, he specifically and unequivocally stated that Plaintiff had clapped him and kicked him in the stomach, although he had informed this court in his evidence in chief, that he had lied in that statement as plaintiff was allegedly not at the scene when the stabbing took place and was outside playing soccer.<sup>3</sup>
- 22.2 Mr Tsei-Tseimub Mou under cross examination informed the court that he lied to the police when he gave the statement under oath, when he informed them that Mr. Kandetu and Mr Doeseb were the suspects who assaulted him, and he confirmed that both of them were his fellow inmates at the Hardap Correctional Facility.<sup>4</sup>
- 22.3 Mr Tsei-Tsei Mou failed to comment or respond when confronted by Mr Kauaria that his new testimony that plaintiff was not present when the alleged assault took place is a fabrication and a lie and that he was trying to cover up for the plaintiff before this Honourable court.
- 22.4 Mr Tsei Tsei Mou maintained that he had misinformed the Magistrates court and that he was influenced by other inmates to include the plaintiff as one of the inmates who assaulted him when in fact the plaintiff did not assault him, even when the content of the J88 and the statement he gave to the police confirmed stab wounds and abdominal pains by him.<sup>5</sup>
- 22.5 When asked what it meant that he was influenced by other inmates, Mr Tsei-Tsei Mu responded that four other inmates told him to identify and include the name of the plaintiff as one of the suspects when he opens the case of assault and that he was not threatened or hurt by the inmate's who influenced him. Mr Tsei-Tsei Mou testified that he did not inform the police officer, the prosecutor or the magistrate that he was influenced to bring the charges against the plaintiff.

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<sup>3</sup> Page 154 of the trial bundle which records' statement of Erens Tsei-Tseimo for case with CR 56/09/2019.

<sup>4</sup> Page 154 and 155 of the trial bundle.

<sup>5</sup> Page 237 of the trial bundle.

- 22.6 Mr Tsei-Tsei Mou failed to respond to Mr Kauaria when he was informed that the information in his statement he made to the police, and the injuries he had suffered, which was confirmed by the J88 medical record, was used by the prosecution to establish a prima facie case against the plaintiff and his co-accused on the charges they faced.
- 22.7 Mr Tsei- Tsei Mou failed to respond to Mr. Kauaria when he was informed that this new story that plaintiff was not present when he was assaulted is a fabrication and a lie since he did not have a reason to identify plaintiff and his co-accused in the assault if the assault did not happen.

### Shaun Goliath

[23] The plaintiff then called Shaun Goliath who testified, *inter alia*, that he was a major male offender detained at Windhoek Correctional Facility and that on 20 September 2019, when he was detained at the Hardap Correctional Facility at the A- section , a sports day was held for inmates and he did not go out of the cell and remained behind.

[24] It was his testimony further that offender Jan Kandetu informed him that he caught two offenders sodomising each other in cell 7, namely Hendrick Modise and Ernst Tsej-Tsei Mou. Mr Shaun Goliath testified that at the time Ernst Tsei-Tsei Mou was stabbed he was present with Jan Kandetu. Witness further amplified his testimony and stated that as the offenders discussed the sodomising, plaintiff went to shower and Jan Kandetu went to cell 7 with a 5 liter of water and stabbed Ernst Tsei-Tsei Mou. The inmates then stopped Jan Kandetu from stabbing Ernst Tsei-Tsei Mou.

[25] A summary of Mr Shaun Goliath's cross examination revealed the following information:

- 24.1 Mr Goliath informed the court under cross examination, that if Mr Tsei-Tsei Mou made a written statement to the police implicating the Plaintiff and his co-accused, then Mr Tsei-Tsei Mou would be lying as the plaintiff was not present when he was stabbed by Jan Kandetu.

[26] The plaintiff closed his case and the defendants applied for absolution from the instance. I will now proceed and discuss the legal principles applicable to an application for absolution from the instance at the close of the plaintiff's case.

*Legal principles applicable to application for absolution from the instance at the close of the plaintiff's case.*

[27] The well-established test applied in cases where absolution from the instance is sought at the close of the plaintiff's case was succinctly set out by the Supreme Court in the matter *Stier and Another v Henke*:<sup>6</sup> where the Court per Mtambanengwe AJA said:

'... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T).

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.' Underlined and italicised for emphasis.

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<sup>6</sup> *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373 D-I and the authorities approved there.

[28] In the matter of *Dannecker v Leopard Tours Car & Camping Hire CC*,<sup>7</sup> Damaseb JP stated the considerations that are relevant to an application for absolution at the close of the plaintiff's case are as follows:

'Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law.

(a) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;

(b) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;

(c) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;

(d) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.' Underlined and Italicised for emphasis.

[29] In the matter of *Soltec CC v Swakopmund Super Spar*,<sup>8</sup> Masuku J held that it would be proper to jettison the evidence adduced by the plaintiff if 'the evidence led is poor, vacillating or of so romancing a character...' such that a court, properly directed, cannot place reliance on it. He said:

'... it does not make economic and legal sense to keep a defendant in harness in a trial and compel him to tender evidence, together with that of his or her witnesses, as the case may be, when it is apparent at the close of the other plaintiff's case that no reasonable court, acting carefully, may require the said defendant to adduce evidence in rebuttal, either because the evidence led is so poor, vacillating or of so romancing a character or fails to deal with the *essentiale* of the claim under consideration. The court should therefore avoid

<sup>7</sup>*Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 an unreported judgment of this Court delivered on 20 February 2015.

<sup>8</sup> *Soltec CC v Swakopmund Super Spar* (I 160/2015 [2016] NAHCMD 159 (3 June 2016) at para 14.

compelling a defendant at a great cost, to flog what is clearly a horse that kicked the bucket at the end of the plaintiff's case, so to speak.'

[30] From the authorities one can summarise the principles as follows. Whether the defendant's application for absolution from the instance must or must not be granted does not depend on whether the evidence adduced by the plaintiff requires an answer, but depend on whether the evidence adduced, holds the possibility of a finding for the plaintiff. In other words, if on the evidence adduced by the plaintiff, a Court, carefully considering that evidence, may find for the plaintiff, must not grant absolution.

[31] I will now proceed to assess the credibility of the plaintiff and his witnesses and then consider the plaintiff's evidence against the legal principles set out in the preceding paragraphs.

### *Discussion*

[32] The Supreme Court in the matter of *Minister of Safety and Security and Others v Mahupelo*<sup>9</sup> dealt with the concept of malicious prosecution and the approach that must be adopted when a claim of malicious prosecution is instituted against the Prosecutor General in the performance of her Constitutional duty. The Supreme Court said:

'Professor McQuoid-Mason defines malicious prosecution as 'an abuse of the process of the court by intentionally and unlawfully setting the law in motion on a criminal charge'. He points out that generally actions for malicious prosecution are discouraged on the grounds of public policy. This is so because the exercise of prosecutorial discretion in the prosecution of cases is central to the criminal justice system. It is essential that prosecutors perform this function without the fear of attracting civil liability. This imperative, of course, has to be balanced with the rights of citizens to be protected against baseless prosecutions. In Namibia, the Prosecutor-General and her staff occupy an important position within our constitutional milieu. It is for this consideration that art 88(2) of the Namibian Constitution grants to the Prosecutor-General the power to prosecute 'subject to the provisions of this Constitution'. It is thus a sacred duty of a prosecutor to ensure that the trial of an accused

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<sup>9</sup> *Minister of Safety and Security and Others v Mahupelo* 2019 (2) NR 308 (SC).

person is fair in line with his or her obligation to prosecute subject to the Constitution and the law.

(33) The House of Lords in *Gregory v Portsmouth City Council* [2000] 1 All ER 560 (HL) explained the tension between the two competing imperatives — the need to ensure that prosecutors are able to perform their functions without the fear of attracting civil liability and the necessity of protecting accused persons against baseless prosecutions — as follows:

“A distinctive feature of the tort is that the defendant has abused the coercive powers of the state. The law recognises that an official or private individual, who without justification sets in motion the criminal law against a defendant, is likely to cause serious injury to the victim. It will typically involve suffering for the victim and his family as well as damage to the reputation and credit of the victim. On the other hand, in a democracy, which upholds the rule of law, it is a delicate matter to allow actions to be brought in respect of the regular processes of the law ... The fear is that a widely drawn tort will discourage law enforcement ...’

(34) The Supreme Court of Canada in *Miazga v Kvello Estate* [2009] SCC 51 explained the approach to be adopted when claims of malicious prosecution against the Attorney-General as opposed to claims against private litigants are considered. The court did this against the backdrop of the historical origin of the claim for malicious prosecution. The court said that care should be taken to not simply transpose the principles established in civil suits between private parties to cases involving the prosecution without necessary modifications. Due regard had to be given to the constitutional principles governing the office of the Attorney-General. It is for this reason that the Supreme Court of Canada has adopted ‘a very high threshold for the tort of malicious prosecution in an action against a public prosecutor’.

(35) The court pointed out that an allegation of malicious prosecution constitutes ‘an after-the-fact attack’ on the propriety of the prosecutor’s decision to initiate or continue criminal proceedings against a plaintiff. It pointed out further that the decision to initiate or continue criminal proceedings lies at the core of prosecutorial discretion, which enjoys constitutional protection. In para 47 the court observed:

“In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in



fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as ministers of justice ...”

(36) The court pointed out that a stringent standard must be met before finding of liability on the part of a prosecutor is made. This ensures that courts 'do not simply engage in the second-guessing of decisions made pursuant to the Crown's prosecutorial discretion'. In para 51, the court observed that liability should lie where —

“a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified.” ...’

[33] Our Supreme Court endorsed the approach adopted by the Canadian Supreme Court and held that for the exercise of discretion by a prosecutor to justify judicial intervention, the discretion must be an egregious type of conduct. Error of judgment in the exercise of the prosecutor's discretion, even negligent error, is not sufficient.

[34] In the matter of *Akuake vs Jansen van Rensburg*<sup>10</sup> Damaseb, JP observed that to sustain a claim based on malicious prosecution the plaintiff must allege and prove:

- ‘(a) that the defendant actually instigated or instituted the criminal proceedings;
- (b) without reasonable and probable cause; and
- (c) that it was actuated by an indirect or improper motive (malice) and;
- (d) that the proceedings terminated in his favour; and
- (e) that he suffered loss and damage.’

[35] In this matter the plaintiff bears the *onus* to place facts in the form of evidence of the nature of his wrongful and unlawful arrest and malicious prosecution at the hands of the defendants.

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<sup>10</sup> *Akuake vs Jansen van Rensburg* 2009 (1) NR 403 (HC).

[36] As regards the evidence which the plaintiff put before the Court, (i.e. the evidence that on or about September 2019, plaintiff was wrongfully and unlawfully arrested by Police Officer Sergeant Dierstaan and subsequently detained on suspicion of assaulting an inmate certain Mr Erenst Tsei- Tsei Mou on 20 September 2019 at Cell A of the Hardap Correctional Facility in the district of Mariental and that as a result of this wrongful and unlawful instigation and or institution of charges and arrest, he was maliciously prosecuted by Prosecutor Mrs Loide) such evidence is not evidence at all but are conclusions of law, it is at best for the plaintiff an inference, a "secondary fact", with the primary facts on which it depends omitted<sup>11</sup>. It is clear from the evidence that was led during the trial of this matter that Erens Tsei-Tsei Mou had set the law in motion against the plaintiff, when he made a statement to the police and identified the plaintiff and his co-accused as the perpetrators of the assault against him.

[37] In the matter of *Mandume vs Minister of Safety & Security*<sup>12</sup>, Uietele J made reference to the matter of *Willcox and Others v Commissioner for Inland Revenue*<sup>13</sup> where Schreiner JA explained the concept of 'primary' and 'secondary' facts as follows:

'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[38] In the instant case the plaintiff had to place before the Court the facts on which he based his conclusion that his arrest was unlawful and that his prosecution was malicious. He needed to place facts before the Court that demonstrate that the Police officer Sergeant Dierstaan and Prosecutor Mrs Loide had either an absence of belief in his guilt (which may include recklessness), or an improper or indirect motive other than that of bringing him to justice. He did not do that, what he did is that he pleaded and testified to a legal result.

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<sup>11</sup> *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-G.

<sup>12</sup> *Mandume vs Minister of Safety & Security* (HC-MD-CIV-ACT-DEL-2019/02007) [2021] NAHCMD 118 (19 February 2021) at paragraph 24 and 25.

<sup>13</sup> *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602.

[39] Uitele J continued in the *Mandume*<sup>14</sup> matter and concluded the following:

‘In the absence of the facts that demonstrate that the Prosecutor General had either an absence of belief in his guilt or an improper or indirect motive other than that of bringing the plaintiff to justice, the plaintiff has failed establish the second and third requirements that are necessary to sustain a claim based on malicious prosecution. In my view no Court acting carefully and reasonably will, in those circumstances, find for the plaintiff or require the defendants to adduce evidence in rebuttal.’

[40] And further,

‘I repeat what Justice Masuku said<sup>15</sup>, ‘it does not make economic and legal sense to keep a defendant in harness in a trial and compel him to tender evidence, together with that of his or her witnesses, as the case may be, when it is apparent at the close of the other plaintiff’s case that no reasonable court, acting carefully, may require the said defendant to adduce evidence in rebuttal because the evidence led is so poor and fails to deal with the *essentiale* of the claim under consideration.’

[41] I fully agree with the above conclusions of my brothers, as it finds application in the current matter. The plaintiff in this matter failed to place facts on which he based his conclusion that his arrest was unlawful and that his prosecution was malicious. He did not do that, what he did is that he pleaded and testified to a legal result.

[42] In the *Mahupelo*<sup>16</sup> matter the Supreme Court also considered the common law delict of malicious continuation of a prosecution as opposed to its initiation and found that that delict appears to have already been accepted at common law. The Court quoting from the case of *Van Noorden v Wiese*<sup>17</sup> where it was held that if a person had a reasonable and probable cause at the initiation stage, but because of any subsequent information received by such person the reasonable and probable cause ceases, the prosecution ought to be terminated as well and failure to do so should result in the person being held liable for malicious prosecution.

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<sup>14</sup> *Mandume vs Minister of Safety & Security* (HC-MD-CIV-ACT-DEL-2019/02007) [2021] NAHCMD 5.

<sup>15</sup> In the matter of *Soltec CC v Swakopmund Super Spar*, (supra footnote 3).

<sup>16</sup> *Supra* footnote No. 9.

<sup>17</sup> *Van Noorden v Wiese* [1882] SC 43.

[43] In this matter, the prosecution was initiated by the witness Ernst Tsei Tsei Mou when he opened a case against the plaintiff and his co-accused as perpetrators who committed an assault on him. He proceeded and submitted a J88 medical certificate, which confirmed the injuries of Ernst Tsei Tsei Mou as written in the police statement. The Prosecutor based on the information received from the police, formed a reasonable suspicion that the plaintiff committed a schedule 1 offence, charged the plaintiff and the plaintiff was found not guilty and acquitted after the trial.

[44] In this matter the plaintiff did not testify to any subsequent information which was received by the prosecution indicating that the reasonable and probable cause which the prosecution initially had has ceased. For this reason and the reasons stated earlier I will not compel the defendants to, at a great cost, 'flog what is clearly a horse that kicked the bucket at the end of the plaintiff's case.' I will accordingly absolve the defendants from the instance.

### Costs

[45] I now turn to the issue of costs. The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the Court<sup>18</sup>. It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The Court's discretion is a wide, unfettered and an equitable one<sup>19</sup>. There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present.

[46] Mr Doeseb informed the court at the start of the trial that he will represent himself as a lay litigant and is currently and inmate at the Oluno Correctional Facility. Counsel for the defendants did not address the court on the aspect of costs and thus, the court will exercise its discretion in this regard.

[47] It is so that the discretion must be exercised judicially with due regard to all relevant considerations, and the case before court is a case which represents

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<sup>18</sup>*Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC), Also *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery* CC 2007(2) NR 674.

<sup>19</sup> See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

special circumstances, which allows the court to deviate from the application of the general rule.

[48] In the result, I make the following order:

1. The defendants are absolved from the instance.
2. No order as to costs.
3. The matter is regarded as finalised and is removed from the roll.

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**Christiaan**  
**Acting Judge**

APPEARANCES

PLAINTIFF:

In person

FIRST TO SEVENTH DEFENDANTS:

Ndirirato Kauari  
Of Government Attorney  
Windhoek, Namibia