

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2021/03176

In the matter between:

**SELMA FIMANEKENI MBOME**

**PLAINTIFF**

and

**DIRECTOR GENERAL OF THE ANTI-CORRUPTION  
COMMISSION**

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

**THE PROSECUTOR GENERAL OF THE  
REPUBLIC OF NAMIBIA**

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

**DEFENDANT**

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

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

**Neutral citation:** *Mbome v Director General of the Anti-Corruption Commission*  
(HC-MD-CIV-ACT-DEL-2021/03176) [2023] NAHCMD 545 (4  
September 2023)

**Coram:** MILLER AJ

**Heard:** 5-9 June 2023 & 14 July 2023

**Delivered:** 4 September 2023

**Flynote:** Delict – Malicious prosecution – The Court not satisfied that the defendants acted with malice. The plaintiff's claim is dismissed.

**Summary:** The plaintiff instituted action against the defendants for unlawful arrest and malicious prosecution. The defendants defended the action and deny any unlawful arrest and that the plaintiff was maliciously prosecuted. The defendants pleaded that there was a reasonable suspicion which led to the arrest and that sufficient evidence was presented for the prosecution to proceed with trial. The Court is of the view that the evidence presented by the prosecution indicated a prima facie case and that a reasonable suspicion existed to continue with the prosecution against the plaintiff.

The Court cannot find that the defendants acted with malice and dismisses the claim.

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### ORDER

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The plaintiff's claim is dismissed with costs.

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### JUDGMENT

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MILLER AJ:

Introduction and background from pleadings

[1] The plaintiff is Selma Fimanekeni Mbome, an adult female pensioner, residing at Onekwaya- West, in the Ohangwena Region, Republic of Namibia.

[2] The first defendant is the Director General of the Anti Corruption Commission duly appointed as such in terms of section 4 of the Anti Corruption Act 8 of 2003.

The second defendant is the Prosecutor General of Namibia appointed in terms of Article 32(4)(a)(cc) read with Article 8 of the Namibian Constitution. The third defendant is the Government of the Republic of Namibia, care of the Government Attorney of Namibia.

[3] The plaintiff instituted action against the defendants for damages arising out of an alleged wrongful and malicious arrest and institution and continuation of the prosecution without a reasonable and probable cause.

[4] The plaintiff claims an amount of N\$1 695 454 for the following damages she suffered as a result of the alleged wrongful, negligent and malicious prosecution against her;

(a)	Past medical and hospital expenses	N\$200 000
(b)	Future medical expenses	N\$300 000
(c)	Transportation costs (transporting plaintiff from Onekwaya-West to Windhoek for Court appearances)	N\$75 000
(d)	Transport costs (transporting the plaintiff from Onekwaya-West to Windhoek for purposes of consulting with legal counsel)	N\$20 454
(e)	Legal costs	N\$100 000
(f)	General damages (pain and suffering)	N\$1 000 000

[5] The plaintiff alleges that she was arbitrarily arrested on 27 February 2017 at Windhoek by sergeant Nantinda who acted within the course and scope of the employment of the first defendant. Further, she alleges that she was wrongfully charged with three counts of allegedly corruptly using her office or position for gratification, corruptly accepting gratification and corruptly accepting gratification whilst in the employment of the Ministry of Home Affairs and Immigration where she was employed as an administrative officer.

[6] The plaintiff alleges that the first defendant had no reasonable and probable cause for arresting and charging her and that no proper investigation was conducted. Further, that the second defendant and her employees who were delegated to prosecute the plaintiff acted without a reasonable and probable cause and with

malice when they initiated and continued with the prosecution for more than three years while being aware that they did not have sufficient evidence to convict the plaintiff.

[7] The defendants defended the action and deny that the plaintiff was wrongfully charged and that there was insufficient evidence against the plaintiff. Further, the defendants plead that there were extensive investigations done which led to her and her co-accused's arrest.

[8] The defendants further pleaded that there was a reasonable suspicion to arrest, charge, investigate and prosecute the plaintiff for the alleged offences.

[9] The defendants deny that they acted with malice in initiating the prosecution against the plaintiff and the finalisation of the said prosecution cannot be blamed on the prosecution only as the accused's legal practitioner also played a role in the delay.

#### Plaintiff's evidence

[10] The plaintiff testified that she was arrested on 27 February 2017, while she was at work for corruptly using office of position for gratification, corruptly accepting gratification and corruptly accepting gratification of N\$6000 whilst in the employment of the Ministry of Home Affairs and Immigration.

[11] She testified that she was employed by the Ministry of Home Affairs as a senior administrative officer at which she was responsible for issuing birth certificates.

[12] She further testified that on the 6 February 2017, her taxi driver Leo Ndalipo, brought her grapes and upon his arrival he told her that he was with someone who wants to apply for a birth certificate and that he was not familiar with Windhoek. She then advised him that this person must just join the queue like everyone else.

[13] She testified that she wrote out two birth certificates in the name of Hailonga N Mateus as she had made a mistake on the initial one, but had no intention to issue a document corruptly and to receive money for it. She further testified that she only

saw the face of this Hailongo the day of the first appearance at the Magistrate's Court.

[14] She testified that she followed the procedure when she issued the document and that she could not have known that the documents provided by the Hailongo were not correct documents.

[15] She further testified that when she was arrested she was not charged and had to sleep with inmates in a cell which was in a very poor condition.

[16] She testified further that her health deteriorated after the arrest and she developed hypertension and has been using medication for it. She further testified that she had a stroke which affected her eyes. She also felt humiliated as this incident happened while she was at the peak at her workplace and going into retirement. She lost confidence and developed a low-esteem and a lack of motivation as a result of the arrest. She testified that she has spent more than N\$200 000 in medical and hospital expenses as a result of her arrest and prosecution and anticipates spending more than N\$300 000 on future medical expenses.

[17] The plaintiff called Dr Kumire who testified that he received a referral from Dr Nghipandulwa and that the referral was in respect of the complaint of double vision. He testified that he did some examinations on her whereby he placed her under medical treatment and monitored her condition. She recovered after a month but after three months he observed that her diabetes was poorly controlled and that she is hypertensive and was at the time under work related stress as he was informed.

#### Defendants' evidence

[18] The defendants called two witnesses Mr Nantinda, the investigator for Anti Corruption Commission and Ms Mabuku, the prosecutor.

[19] Mr Nantinda testified that proper investigations were done and that plaintiff was implicated by her co-accused and the fact that she was placed on the scene as the one who issued the falsified birth certificate even though no evidence could be found that the plaintiff received money.

[20] Ms Mabuku testified that in this matter more than one inference could be drawn. Even though the State could not prove that the plaintiff received money, that was the reason the State's case could not stand and the charge sheet was also the issue, but procedurally the issuance of the birth certificate was fraudulent. Further, she testified that there were MTC records that the plaintiff was in communication with the middle man the day the birth certificate was issued. There was a prima facie case which surpassed the section 174 test. Further, there is no dispute that the plaintiff issued the documents. The prosecution was satisfied that the matter could proceed to trial after having sight of the docket and the prosecution believed that the evidence against the plaintiff was sufficient to convict the plaintiff.

#### Analysis of evidence

[21] *Groenewald v The Minister of Safety and Security*,<sup>1</sup> deals with the requirements of malicious prosecution as follows;

[22] The requirements in order to succeed with a claim for malicious prosecution are that the defendant must have instituted or instigated the proceedings; the defendant must have acted without reasonable and probable cause; the defendant must have been actuated by an improper motive or malice (or *animus iniuriandi*); the proceedings must have terminated in the plaintiff's favour; and plaintiff must have suffered damage (financial loss or personality infringement).'

[22] *Groenewald*, further deals with the concepts of malice and reasonable and probable cause as follows;

#### *'Malice or animus iniuriandi*

[24] Plaintiff must allege and prove that defendant intended to injure either with direct or indirect intention; *animus iniuriandi* (and not malice) must be proved; the defendant must at least have foreseen the possibility that he or she was acting wrongfully but nevertheless continued to act (instituting proceedings), reckless as to the consequences of his or her

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<sup>1</sup> *Groenewald v The Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2016/02153) [2021] NAHCMD 507 (29 October 2021).

conduct (*dolus eventualis*). Negligence or even gross negligence on the part of the defendant will not suffice.

*Reasonable and probable cause*

[25] The concept of reasonable and probable cause involves both an objective and subjective element. Objectively the defendant must have sufficient facts from which a reasonable person could have concluded that plaintiff had committed the offence. Subjectively the defendant must have held an honest belief in the guilt of the accused (plaintiff).

[26] In a claim for malicious prosecution and the continuation of malicious prosecution, there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration for the adequacy of the evidence available to him or her. A defendant will not be liable if there exist, objectively speaking, reasonable grounds for the prosecution and the prosecutor subjectively believed in the plaintiff's guilt.'

[23] The evidence that was presented to the prosecution indicated a *prima facie* case and that a reasonable suspicion existed to continue with the prosecution against the plaintiff. Further, as testified by Ms Mabuku, a suspicion and belief in having a probable cause to prosecute the plaintiff was confirmed by the court, during trial, when the State survived the test in terms of section 174 of the Criminal Procedure Act 51 of 1977. This Court cannot find that the defendants acted with malice and therefore, the plaintiff's claim of malicious prosecution cannot be allowed to stand and is dismissed.

[24] I now turn to the issue of costs. There is a general rule, namely that costs follow the event. This principle entails that the successful party is awarded his or her costs. This general rule applies unless there are special circumstances present. I could not find any reason nor was I provided with any as to why I must deviate from the general principle that costs follow the result.

[25] In the result, I make the following order;

The plaintiff's claim is dismissed with costs.

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P J MILLER  
Acting Judge



APPEARANCES:

PLAINTIFF:

L Shikale  
Of Shikale & Associates,  
Windhoek.

DEFENDANTS:

F Matsi  
Of the Office of the Government Attorney,  
Windhoek.