Reportable

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-NLD-CIV-ACT-DEL-2020/00283

In the matter between:

HINAMWAAMI FRANS SHEEHAMA	**PLAINTIFF**
And	
THE MINISTER OF HOME AFFAIRS, IMMIGRATION SAFETY AND SECURITY	**1ST DEFENDANT**
THE INSEPCTOR-GENERAL OF THE POLICE	**2ND DEFENDANT**
THE PROSECUTOR-GENERAL	**3RD DEFENDANT**

Neutral citation: *Sheehama v The Minister of Home Affairs, Immigration Safety and Security* (HC-NLD-CIV-ACT-DEL-2020/00283) [2021] NAHCNLD 118 (4 November 2022)

CORAM: Ndauendapo J

Heard: **26 November 2021**

Delivered: **4 November 2022**

Flynote: Delict – Damages – Malicious prosecution – Whether established on evidence – Onus to allege and prove on plaintiff-Plaintiff to prove *animus injuriandi* – No *prima facie* case proven-Application for absolution from instance granted.

Summary: The plaintiff instituted an action for malicious prosecution and continuous prosecution against the PG claiming damages in the total amount of N$ 1 634.000 the cause of action arouse of the fact that he was charged with assault by threat. The allegations being that he threatened to kill his ex-wife. His ex-wife testified and there were also text messages sent to the wife in which he threatened to kill her. He was arrested and detained whilst his trial was ongoing. He was denied bail and was in custody for a period of 12 months. He was eventually discharged in terms of section 174 of the CPA. He then instituted the action before me.

He testified that there was no reasonable and probable cause to arrest him, detain him and to maliciously prosecute and continue to prosecute him. As a result of that he suffered damages in total amount of N$ 1 634. 000. At the end of the plaintiff's case, the defendants brought an application for absolution from the instance.

Held further that, as far as claim 2, based on malicious and continuous prosecution is concerned, the third defendant pleaded that, she had a reasonable and probable cause to prosecute and continue with the prosecution based on the evidence that was led by the complainant to the effect that the plaintiff threatened to kill her and the text messages in which the plaintiff threatened to kill the complainant.

Held that, in respect of claim 3 it is clear from the particulars of claim, that what was pleaded to have resulted in a loss of income and termination of his employment contract was the alleged unlawful arrest and detention and not the alleged malicious or continuous malicious prosecution as per the plaintiff's testimony (witness statement).

Held further that, the claim for unlawful arrest has prescribed and was not pursued. Therefore if that claim has prescribed, it follows that the claim for loss of income cannot prevail.

Held further that, on the issue of damages, the onus is on the plaintiff to lead evidence on how the damages were suffered and arrived. That evidence was not adduced before court and in the absence of that, the court cannot entertain the claim for damages.

Held further that plaintiff has not made out a prima facie case for the relief sought.

Held that the application for absolution from the instance is granted.

ORDER

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1. The application for absolution from the instance is granted.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

JUDGMENT

Ndauendapo J:

Introduction

[1] The plaintiff instituted action against the defendants claiming an amount of N$ 1 634.000 for malicious prosecution.

The parties

[2] Plaintiff is Frans Hinamwaami Sheehama an adult male person, 51 years of age with full legal capacity and residing at Omahonge Village, Outapi, Omusati Region, Republic of Namibia.

[3] First defendant is the Minister of Home Affairs, Immigratioin, Safetyy and Security, cited herein in his official capacity as the Head of the Namibian Police Force and duly appointed in terms of Article 32(3) (1)(*dd*) of the Namibian Constitution by the President of

the Republic of Namibia; whose address for service is under the care of the Governement Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[4] The Second defendant is the Inspector General of the Police, Duly appointed in terms of Article 32(4) (*c*)) (*bb*) of the Namibian Constitution; whose main offices are situated at the Namibian Police Headquarters; Lazerette Street, Windhoek.

[5] Third defendant is the Prosecutor-General cited in her official capacity as the Prosecutor-General of Namibia duly appointed in terms of article 32(4)(*a*)(*cc*) of the of the Namibian constitution the President of the Republic of Namibia, whose service is under the care of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

The pleadings

Ad claim 2

[6] In the particulars of claim, in respect of the third defendant; the plaintiff alleges that the said defendant and/or her employees wrongfully and maliciously set the law in motion. They instituted proceedings against the plaintiff and continued to do so by prosecuting the plaintiff for offence of assault by threat; without reasonable and probable cause, and:-

(a) Failed to consider that the plaintiff was not properly brought before court;

(b) Issued a warrant of arrest (herein a “J50”) against the plaintiff that was defective;

© Without having sufficient information at their disposal which substantiated such charges or justified the prosecution of the plaintiff on such charges;

(d) alternatively, without having any reasonable belief in the truth of any information given to them which could have implicated the plaintiff in the commission of assault by threatening;

(e) In the alternative to the above; that the third defendant and/or her employees wrongfully and maliciously continued to prosecute the plaintiff as from 27 September 2019 and for a crime set out in paragraph 10 herein above.

(f) As a result of the above unwarranted conduct; the plaintiff is claiming for damages suffered against the third defendant based upon malicious prosecution in respect of the period 02 September 2019 until 13 November 2019.

(g) In the alternative, the plaintiff claims damages based upon the wrongful and malicious continuation of prosecution only against the third defendant and/or her employees as from 30 September 2019 for the offense alleged herein above.

a. In respect of the above-mentioned; the plaintiff is claiming for damages against the third defendant in the amount of N$500, 000 for malicious prosecution; alternatively continued malicious prosecution.

Ad claim 3

[7] The plaintiff alleges that at the time of the arrest and detention; He was employed as a National Organiser at Metal and Allied Workers Union (herein MANWU) and as a result of the unlawful arrest and detention; his employment contract was terminated due to a lengthy absence from his employment.

[8] As a result thereof; He was unable to earn his gross income for a period of 12 months and plaintiff list his retirement package form the said employment as a result of the incarceration.

[9] As a consequence thereof; He suffered damages in the amount of N$1 134 in respect of past and future loss of earnings and/or loss of income made up as follows:

(a) Gross income (1 month)	N$10 500
(b) Annual Gross income (1 year) (time spent in custody)	N$126 000

Total Gross income for 9 years (being years left till retirement N$1 134 000

[10] As a result of the above; He is claiming for damages suffered in the amount of N$1 134 for past and future loss of earnings from the defendants.

[11] In pursuant of this action; on 05 December 2019 the plaintiff demanded for payment in the amount of N$2 000 000 from the second defendant in terms of a section 39 notice and h despite demand; defendant has failed and/or neglected and/or refused to pay the plaintiff an amount of N$2 000 000 or any part thereof.

The plea

[12] Third defendant pleads that when the decision to institute criminal proceeding against the plaintiff was taken, the third defendant had sufficient evidence relating to the plaintiff's threats to harm or to kill Aiyangala Eveline Ndeshiningwa ("the complainant") which threats constituted the commission of an offence of assault by threat.

[13] Third defendant pleads further that, based on the available evidence; third defendant had reasonable grounds to believe, on a prima facie basis, that the plaintiff committed an offence of assault by threat against the complainant.

[14] Accordingly, third defendant honestly believed that the institution of criminal proceedings against the plaintiff was justified.

The issues for determination

[15] The first issue is: (*a*) whether the prosecution of the plaintiff was done without reasonable and probable cause.

(b) The second issue is whether the claim for malicious prosecution was done without any reasonable or probable cause and that the trial should have been stopped in terms of s6 (*b*) of the CPA or alternatively, the prosecution ought to have closed the State's case against plaintiff and have moved for a discharge?

Plaintiff's case

[16] The plaintiff testified that on 7 November 2018 a group of police officers approached the table where he was seated and one police officer asked him whether his name is Frans.He responded in the affirmative. He then told his colleagues to arrest him without informing him about the charges against him and why he was being arrested. He also failed to present a warrant of arrest to him. In addition, his right to remain silent was not explained to him.

[17] Mr. Shipingana then tried putting him in handcuffs, of which he questioned him, why he was putting him in handcuffs. At the same time his colleagues started shouting that they will put me in handcuffs by force and that they do not have time to entertain my questions. They all appeared angry and ready to take me down.

[18] He testified that despite his protestation and demand for warrant of arrest. He testified that he was arrested without any lawful or probable cause and the members acted in conflict with section 40(1) (*b*) of the Criminal Procedure Act 51 of 1977.

[19] He was transported to Outapi police station by two police officers, Mr. Shipingana and an unidentified police officer. (*b*) The third defendant and/or her employees signed the warrant of arrest in dispute, however same was never authorized by a magistrate for the reasons only known by the defendants.

[20] He testified that during the completion of the warning statement he was only asked two questions, firstly whether he will give a statement, and he said no. Secondly whether he wanted to be represented legally and he said yes.

[21] On 09 November 2018, he made his first court appearance .The matter was then remanded to 23 January 2021. On 05 May 2019, he lodged a bail application on new facts. The bail was refused.

[22] On 02 September 2019, the trial commenced and the third defendant lead evidence of two witnesses, the Investigating Officer and the complainant. His wife.

[23] He testified that in light of the above, third defendant and/or her employees set the law in motion or continued with prosecution against him without reasonable or probable cause nor was there any reasonable belief that he was guilty of the offense alleged against him.

[24] He testified that in addition, the employees of the third defendant have done so without having sufficient information at their disposal, which substantiate the charge preferred against him, meaning that the trial should have been stopped in terms of section 6(b) of the CPA or within a reasonable time thereafter; alternatively the prosecution ought reasonably to have closed state's case against him and have moved for his discharge.

[25] He testified that during the trial, there were no text messages produced by the third defendant proving that the content contained was threatening to complainant; apart from one text that was read into the record stating that 'she will die and that revenge is only death'. There was no indication how this death from this revenge will come about.

[26] He testified that the record clearly indicates that the evidence that was collected and/or in possession of the third defendant against him did not prove sufficient grounds for the employees of the third defendant to hold a reasonable belief that he had committed an offence of assault by threat.

[27] He testified that the third defendant after proceedings of the trial-within-a-trial were concluded, it closed its case without allowing my legal practitioner to cross-examine its second witness and this is contrary to section 166(1) of the CPA. Which conduct amounts to a gross irregularity. At that stage the third defendant should have stopped proceedings against him. The failure to do so showed that the third defendant acted with a motive to injure him and/or acted with motive.

[28] He testified that a trial-within-a-trial was held on 05 September 2019, where the admissibility of the warning statement was challenged. During a trial-within-a-trial, it was discovered that the warrant of arrest that was used to arrest him was defective since same was not signed by a magistrate. The court ruled that his arrest was effected in a different jurisdiction and as such a J50 was required to authorize the arrest. The court further ruled

that having an ineffective J50 before court means that the arrest was unlawful and everything flowing form the arrest was improperly obtained, including the warning statement.

[29] He testified that after it came to the third defendant or her employees' attention that the J50 was ruled ineffective, it was bound to stop prosecution against him. It was clear that the third defendant acted without probable cause to continue such prosecution and since it failed to do same, it must be held liable for damages.

[30] He testified that the third defendant and her employees wrongly and maliciously continued to prosecute him from 02 September 2019 to 13 November 2019 for assault by threat.

[31] He testified that the evidence led by the witnesses called by the third defendant could not on reasonable ground warrant a conviction against him by any competent court and same evidence adduced could not bring any court a prima facie basis to conclude that he committed the said offence, thus he was discharged in terms of section 174 of the CPA.

[32] He testified that he was detained in custody for a period of 12 months until his case was finalized and he was not granted bail at any stage during the proceedings.

[33] He testified that as a result of the above unwarranted conduct by the third defendant and/or her employees he is claiming for damages in the amount of N$500 000 for malicious prosecution alternatively continued prosecution.

[34] He testified that in respect of the third claim; at the time of his arrest and detention, he was employed as a National Organiser at Metal and Allied Namibia and as a result of the malicious and/or continued prosecution which warranted further detention, his employment was terminated due to the lengthy absence from his employment.

[35] As a result thereof; he was unable to earn a gross income for a period of 12 months and he lost his retirement package from the said employment.

[36] As a consequence thereof; he is claiming from defendants an amount of N$1 134 000 in respect of past and future loss of earnings and/or loss of income made up of the following:

Gross Income (1 month)	N$ 10 500
Annual Gross Income (1 year) (time spend in custody)	N$ 126 000
Total Gross Income for 9 years (being years left till retirement)	N$1 134 000

Application for absolution from the instance

[37] At the end of the plaintiff's case, the defendants brought an application for absolution from the instance.

Submissions by defendants

Loss of Income – Claim 3

[38] In respect of claim 3, counsel submitted that paragraph 18 of the particulars of claim reads as follows: *"In addition, at the time of the arrest and detention; the plaintiff was employed as a National Organiser at Metal and Allied Namibian Workers Union (herein MANWU) and as a result of the unlawful arrest and detention; the plaintiff's employment contract was terminated due to a lengthy absences from his employment."* (Own emphasis)

[39] Counsel contended that claim 3 (termination of employment and loss of income) cannot be sustained in the absence of a finding by this court that the plaintiff's arrest and detention by the first and second defendant was unlawful.

[40] *"In respect of the third claim; at the time of my arrest and detention, I was employed as a National Organiser at Metal and Allied Namibia and as a National Organiser at Metal and Allied Namibia and as a result of malicious and/or continued prosecution which warranted further detention, my employment was terminated due to the lengthy absence from my employment".* (Underlined for emphasis to show the change of stance by the plaintiff)

[41] Counsel submitted that it is clear from the particulars of claim, that what was pleaded to have resulted in loss of income and termination of employment contract was the alleged unlawful arrest and detention and not the alleged malicious or continuous malicious prosecution as per the plaintiff's witness statement.

[42] Counsel referred to *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018) at para 4, where the court stated that,

"[4] Claims in action proceedings involve two crucial requirements on the part of the plaintiff, that is, plaintiff-.

(a) alleging in the pleadings certain unlawful actionable act attributable to the defendant that has been prejudicial to, or violable of, plaintiff's rights (legal or constitutional) or interests ('requirement (a)); and
(b) providing in the trial that which plaintiff has alleged in the pleadings; for, he or she who asserts, must prove it ('requirement (b)').

[5] It follows that it is not enough merely to satisfy requirements (a) and not both requirements (a) and (b). Thus, if requirement (b) is not satisfied during the trial of the action, no court will find for the plaintiff; for, what is alleged and not proven remains a mere irrelevance. (Klein v Caramed Pharmaceuticals (Pty) Ltd 2015)4) NR 1016 (HC)) in that regard, it is important to mention that authorities and precedent cannot supply the required evidence. (Underlined for emphasis).

[43] Counsel argued that in view of the above principle, claim 3 on which the plaintiff led evidence, to suggest that the third defendant must be held liable for the plaintiff's loss of income was not pleaded, therefore requirement (a) is not met and on that basis alone claim three of the plaintiff must be dismissed with costs.

Pleadings relating to malicious prosecution

[44] The third defendant pleaded, on the main that she took the decision to institute criminal proceedings against the plaintiff on the basis of sufficient evidential material relating to the plaintiff's unlawful involvement in domestic violence on 18 November 2009.

[45] Counsel for the defendants submitted that the third defendant denied that her employees wrongfully and maliciously set the law in motion by instituting criminal proceedings on charges of assault by threat against plaintiff[1]. When she took the decision to institute criminal proceedings against the plaintiff, she had sufficient evidence relating to the plaintiff's threats to harm or kill the complainant which threats constituted the commission of an offence of assault by threat[2].

[46] Counsel argued that the third defendant pleaded further that, based on the available evidence (Exhibits E, F, and G and other witness statements from members of the Police under oath), she had reasonable grounds to believe, on *prima facie* basis, that the plaintiff committed an offence of assault by threat against the complainant and accordingly, third defendant honestly believed that the institution of the criminal proceedings against the plaintiff was justified[3].

[47] Counsel argued that the third defendant further denied liability for damages based upon wrongful and malicious continuation of prosecution based on the same reasons as per the paragraphs 10 and 11 above[4].

[48] Counsel submitted that the third defendant further denied that as a result of her employees conduct plaintiff was arrested and held in custody for 1915 days and duly acquitted on 31 March 2015. The defendant pleaded that the plaintiff was arrested whilst he was in custody on another case[5], which plea was admitted by the plaintiff[6].

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[1] Para. 12 of the defendants Plea.
[2] Para. 13 of the defendants Plea (Exhibits E, F, and G).
[3] Para. 14 and 15 of the defendant's Plea.
[4] Para. 16 of the defendants Plea.
[5] Para. 5 of the defendants Plea.
[6] Para. 3 of plaintiff's replication to 1st defendants Plea.

[49] Counsel submitted that the third defendant further denied that the plaintiff is entitled to the amount claimed or any other amount based on what is pleaded herein above and the plaintiff is put to the strictest proof.

[50] Counsel argued that the plaintiff was under an obligation to make out his case for malicious prosecution on all elements of the claim namely[7]. (a)That the defendants actually instigated or instituted the criminal proceeding ;(b) without reasonable and probable cause; (c) That it was actuated by an indirect or improper motive (malice) and (d) the proceeding were terminated in his favour; and that (e) He suffered losses and damages

[51] Counsel submitted that the plaintiff in respect of claim 2 (Malicious Prosecution-initiating and continuing) against the third defendant did not provide evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find the plaintiff, as the evidence he led fell short of the require standard at the end of the plaintiff's case.

[52] Counsel submitted that the detention of plaintiff was by Magistrate Court which refused his numerous formal bail applications brought under the criminal proceedings[8].

[53] Counsel argued that the plaintiff in his testimony and in his pleadings did not establish or prove that; the third defendant instituted proceedings without reasonable and probable cause without having sufficient information at their disposal which substantiated such charges or justified the prosecution of the plaintiff on such charges. Counsel contends that there at all relevant times was no probable and reasonable cause for prosecuting the plaintiff or continuing to prosecute him and that the third defendant did not have any reasonable belief in the truth of any information given to her which could have implicated the plaintiff in the commission of the offense of Assault by threat.

[54] Counsel submitted that the onus to prove these requirements rests on the plaintiff[9].

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[7] *Akauke v Jansen van Rensburg*, 2009 (1) NR 403 (HC).
[8] Para. 11 of the plaintiff's Witness Statement.
[9] *Akuake v Jansen Van Rensburg* 2009 (1) NR 403 HC para 3.

The third defendant in her plea admitted that the first requirement, that the defendants set the law in motion by instituting criminal proceedings and denied that such institution of proceeding was without reasonable and probable cause that that it was actuated by malice and that the plaintiff suffered losses and damages as alleged or is entitled to damages.

[55] Counsel submitted that the requirement of "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" issued, the claimant's remedy in a claim for malicious prosecution lies under the action *injurirum* and that what has to be proved in this regard is *animus injuriandi*[10].

'*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 (Para 64)'. '(Own underlining for emphasis)*

[56] Counsel submitted that the general principle on damages is that one that claims damages has the burden of proof. Each damages claim should be quantified.

[57] Counsel submitted that it is trite that, once an accused is brought before the court lawfully, in compliance with the 48-hour rule in terms of art. 11(3) of the Namibian Constitution[11], the authority to detain the accused further is then within the discretion of the court. No liability for the court's *liberum arbitrium* or the court's exercise of judicial discretion can be attributed to the defendants who are in the political or bureaucratic branches of the Executive organ of State.

[58] That is the law in Namibia. It is based on our *democratic milieu* and constitutional governance that practicalize the doctrine of trials political of the notion of separation of powers[12].

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[10] 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). By way of further elaboration in Moleko it was said:
[11] see *Iyambo v Minister of Safety and Security* 2013(2) NR 562 (HC)).
[12] See *Maletzky v The President of the Republic of Namibia and Others* 2016 (2) NR 420 (HC); *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC).

[59] Counsel referred to *Shishiveni v Prosecutor General of the Republic of Namibia*[13]. Where Kangueehi AJ when dealing with damages suffered as a result of malicious prosecution held as follows:

> '[25] In analysing the evidence presented what stands out like a sore thumb is the absence of evidence upon which the court can assess the damages suffered and how the amount was arrive at. This omission is unfortunately fatal as damage is clearly an element of the plaintiff's case'.

[60] Counsel argued that, all his testimony had to do with what transpired at the criminal trial before the Magistrate Court. Apart from the mere allegations as stated above, no evidence was provided to court to proof the elements of malicious prosecution brought against the third defendant.

[61] Counsel submitted that the plaintiff failed to proof that the institution of the criminal proceedings by the third defendant, was without reasonable and probable cause, that it was actuated by the malice or animus injuria and that he suffered damages in the amount of N$500 000 as claimed as a result of the third defendant's conduct.

Submissions on behalf of Plaintiff

[62] Counsel submitted that the third defendant or rather the members of the third defendant set the law in motion whereby she signed the J50, which could not be signed by the Magistrate, on false allegation which could not implicate the plaintiff to the commissioning of the offence alleged.

[63] Counsel argued that evidence in the police docket that was provided to the third defendant was not sufficient to warrant a prima facie case against the plaintiff, thus plaintiff pleads that the defendant acted without reasonable and probable cause, thus defendant close it case contrary to section 166 of CPA, to wit; conduct amounts to malice because it

[13] (HC-MD-CIV-ACT-DEL-2018/00324) [2019] NAHCMD 254 (25 July 2019) at para 25.

was act of recklessness on the part of the defence after realising it does not have sufficient evidence[14].

[64] Counsel submitted that third defendant continue to prosecute the plaintiff by opposing plaintiff's application in terms of section 174 which was later granted[15]. It cannot be believed that the defendant still had a prima facie case when it opted to oppose the section 174 application brought by the plaintiff even after denying cross examination of its second witness. The need to bring a 174-application resulted in another postponement of the matter of which state continued to deny bail

[65] Counsel referred to *Mwambwa v Minister of Safety and Security*[16] where it was held that to successfully sustain a claim for malicious prosecuting the plaintiff is required to prove:

> '(a) That the defendant set the law in motion (instigated or instituted the proceedings by laying a charge for criminal prosecution)
> (b) That the defendant acted without reasonable and probable cause;
> (c) That that defendant acted with *malice or animo injuriandi;* and
> (d) That the prosecution has failed.
> (e) The plaintiff must have suffered damages (financial loss or personality infringement)'.

[66] Counsel submitted that in the present case as per the Pre-trial order dated 01 September 2021; the defendant conceded that the members of the third defendant initiated and continued prosecution of the plaintiff until the later was discharged, following an application in terms of section 174 of the CPA and having conceded that the prosecution of the plaintiff has failed, the only issues left open for determination are so highlighted in the aforesaid pre-trial.

[67] Counsel argued that having regard Mwambwa *case and Beckenstrater v Rottcher and Theunissen*[17] there is an absence of reasonable and probable cause either (I) if there are from an objective viewpoint, no reasonable man, indicated that the plaintiff did not probably

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[14] See page361 of the paginated bundle.
[15] See page 364 of paginated bundle.
[16] (I105/2014) [2018] NAHCMD 89 (12 April 2018).
[17] See para 59 supra.

commit the crime), or (ii) if, where such grounds are in fact present, the defendant does not believe subjectively in the plaintiff's guilt.

[68] Counsel submitted that the concept of reasonable and probable cause is clearly the most onerous of the elements for the plaintiff to establish. The test contains both subjective and objective elements, which means that there must be both actual belief on a part of the prosecutor and that belief must be reasonable in the circumstances.

[69] Counsel argued that on objective element; the crucial issue is what information and evidence was available to the state when the decision to prosecute was taken and whether that, and any inferences to be drawn there from, sufficient to at-least *prima facie* point to the commission of an offence by the plaintiff.

[70] Counsel submitted that in the present case; the warrant of arrest that (despite being ineffective) was used to execute plaintiff's arrest was signed by the third defendant. Meaning the arresting officer was instructed to arrest the plaintiff; hence it would be correct to add that the law was set in motion against the plaintiff on the date of arrest of the plaintiff by the third defendant.

[71] Counsel argued that had the third defendant not instructed the arresting officer, plaintiff would have not been arrested. As per the record; there is no testimony and/or instructions placed before plaintiff by defence counsel to indicate when defendant received the "print-out" text messages in order to infer whether she indeed had sufficient information which constituted a "*prima facie case"* in order to have reasonable and/or probable cause to set the law in motion.

[72] Counsel submitted that the plaintiff indicated in his witness statement[18] and in his particulars of claim under paragraph 14.5; that the conduct of the third defendant was of malicious nature or that to injure him since they closed their case without allowing him and/or his legal practitioner to cross examine the witness in terms of section 166(1) of the Criminal Procedure Act. The third defendant conceded that they closed their case without allowing plaintiff to cross examine the witness. Plaintiff sufficiently indicated that he was advised by

[18] See para 28 of the witness statement.

his legal practitioner of the ambits of the aforesaid provisions that the conduct was that of a reckless nature by third defendant.

[73] Counsel submitted that the conduct of the third defendant was that of reckless nature whilst prosecuting the plaintiff to wit; defendant's application cannot stand since third defendant need to answer to the allegation of the plaintiff why it decided to act contrary to the same provision.

[74] Counsel argued that it is trite that a prosecutor has a duty to prosecute a matter if there is a *prima face* case and if there is no compelling reason for refusal to prosecute. In this context therefore, "*prima facie case"* means the following: the allegations, as supported by statements and where applicable combined with real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the state on the basis of admissible evidence the court should convict.

[75] Counsel submitted that the honest belief that the prosecutor had sufficient evidence to prosecute, is without basis. If there was supporting evidence that was sufficient to prove a *prima face* case against the plaintiff the defendant would have not closed its case. The supporting evidence in possession of the defendant was indeed false as alleged by the witness statement of the plaintiff since the statement of the witness who was stating under Oath was immediately stopped thereafter closed.

[76] Counsel argued that, after the defendant realized that it did not have sufficient evidenced and was acting contrary to section 166(1), it should have stopped proceedings in terms of section 6(*b*) of the CPA Act which provides for the power of the third defendant to withdraw and stop proceedings:

> 'An Attorney-General or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may –
>
> (a) ……..
> (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect

of that charge: Provided that where a prosecution is conducted by a person other than an Attorney General or a body or person referred to in section 8, the prosecution shall not be stopped unless the Attorney General or any person authorized thereto by the Attorney General, whether in general or in any particular case, has consented thereto'.

[77] The power to stop proceedings is granted to the defendant and not plaintiff. Plaintiff in the present matter had to only apply for a discharge as guided by section 174 of the CPA and this was the only remedy at the time available to plaintiff to obtain a discharge against what was alleged.

[78] Counsel submitted that the evidence in chief of the complainant given in the criminal trial was given after the plaintiff was already arrested[19], as per the J50 signed by Prosecution; the warning statement was obtained on 8 November 2018; the "print-out" of the screen-shoot have no date and does not indicate where they were obtained from and from what phone they were obtained from.

[79] Counsel argued that the third defendant should have at first instance perused the documents specifically the print-out of the text messages allegedly incriminating the accused and realized that they did not comply with the necessary principles to render them admissible. That is why the documents were ruled inadmissible at trial. No efforts where even made until date to try and authenticate this print-out and trace the origin of this text messages.

[80] In the alternative, counsel submitted that should the court find that plaintiff did not prove the elements of malicious prosecution; the plaintiff has led sufficient evidence on continued prosecution on the basis that defendant closed its case without allowing plaintiff to cross examine which amounted to an act of irregularity on its part. Inferences can be drawn that circumstances changed during prosecution (trial-within-a-trial) in that; there was no sufficient evidence against plaintiff and the prosecution still continued to oppose plaintiff's application in terms of section 166(1) of the CPA.

[81] The plaintiff's alternative claim is based on an alleged continuation of prosecution from 02 September 2019 until 13 November 2021 without reasonable and probable cause.

[19] See page 114 of the paginated index bundle.

[82] As far as damages in respect of the second claim are concerned, counsel referred to *Groenewald v The Minister of Safety and Security,* [20]where the court held that:

> 'In a claim for damages under malicious prosecution, satisfaction is claimed for infringement of personality rights which are the fama (or good name) and dignity of the second plaintiff in casu[21].'

[83] Counsel argued that it was not disputed that the plaintiff was dismissed from his employment whilst in custody at MANWU as National Organiser. It was not disputed that the plaintiff earns a gross income of N$10 500. That he is a father and has 12 children. It was further not disputed that he has been in custody for a period of 12 months whilst he was being prosecuted. The plaintiff's benefits and/or policies earned were not disputed. It was further not disputed that he was a loving father who was married at the time and he used to pay for his children at UNAM and he played an active role in his children's lives. The plaintiff that he is unemployed. It was not disputed that both immovable properties are in the plaintiff's wife's name.

[84] Counsel contended that the plaintiff successfully proved that his constitutional rights were infringed due to the fact that the warrant of arrest duly signed by the defendant was defective which meant that when the law was set in motion; it was done on a defective warrant of arrest which was in possession of the defendant at all instances. Which further meant that the accused was not properly before the court when plaintiff was faced with a wrath of prosecution alternatively continued prosecution. There was no *prima facie* evidence complying with rules of admissibility which could support either element that the defendant had reasonable or probable cause to institute such proceedings.

[85] In respect of the third claim; paragraph 19 of the particulars of claim alleged that as a result of the 12 months in custody the plaintiff lost his retirement package from the said employment as a result of incarceration.

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[20] (HC-MD-CIV-ACT-DEL-2016/02153) [2021] NAHMD 507 (29 October 2021).
[21] See (2007). Book title. 2nd edition. Pg.152 – 183 Nethling's Law of Personality, Second Edition 2005, Reprinted 2007, page 182 under 'Damage" and the authority in footnotes 554 and 556 over on page 183.

Discussion

The applicable legal principles

Malicious prosecution

[86] In *Minister of Safety and Security & 2 Others vs Mahupelo 2019(2) NR 308 at 317* the Supreme Court said that:

'[38] The elements that must be alleged and proved in a claim for malicious prosecution (on the merits and quantum) were set out by Damaseb JP in *Akuake v Jansen van Rensburg* 2009(1) NR 403(HC) These requirements are:

a) The defendant must have instituted or instigated the proceedings;
b) The defendant must have acted without reasonable and probable cause;
c) The defendant must have been actuated by an improper motive or malice (or animo injuriandi);
d) The proceedings must have terminated in the plaintiff's favour, and
e) The plaintiff must have suffered damage (financial loss or personality infringement)."

'[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.'

Further at 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.'

[37] For the exercise of discretion by a prosecutor to justify judicial intervention must be an egregious type of conduct identified by the Canadian Supreme Court in Miazga v Kvello Estate [2009] SCC 51. Error of judgment in the exercise of the prosecutor's discretion, even negligent error is not sufficient.

[87] As to the element of *malice or improper motive*, the Supreme court in *Mahupelo,supra,* said the following:

'[41] The South African Supreme Court of Appeal [*Rudolph and others v Minister of Safety and Security and another* 2009 (5) SA 94(SCA [2009] 3 AII SA323 para 18 has held that what has to be proved is *animus injuriandi*. The same court pointed out in *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1AII SA375(SCA) para 5 that:

'Although the expression "malice" is used, it means, in the context of the *actio iniuriarum, animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd* and another, Wessels JA said:

"Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either dolus directus or indirectus). . ."'

[42] This dictum, so says Van Heerden JA in *Minister for Justice & Constitutional Development v Moleko*, [2008]3 AII SA47 (SCA) para 62 means that animus injuriandi, and not malice must be proved before the defendant can be held liable for malicious prosecution as injuria. In Rudolph and others v Minister of Safety and Security and another, the court explained what is required by reference to its judgment in Moleko at para 64.

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

[43] This is a salutary practice that in my view should be followed by our courts. It follows that in Namibia, animus iniuriandi is one of the requirements that must be proved before the defendant can be held liable for malicious prosecution. I note that counsel on both sides support this approach.

[44] Professor McQuoid-Mason [McQuoid-Mason 'Malicious Proceedings' in Joubert et al 15 Lawsa part 2 (2 ed) para 321 distinguishes *animus iniuriandi* from malice in the following terms:

'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.'

[45] The existence of malice may point to the existence of animus iniuriandi, as indicating an awareness of the wrongfulness of the action. The position is explained in Neethling's Law of Personality as follows:

'Animus iniuriandi (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 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.' '[My emphasis.]

[88] As to the element of *reasonable and probable cause*, the Supreme Court in *Mahupelo,supra,* said the following:

'[65] In *Waterhouse v Shields* [1924 155 at 162CPD], Gardiner J cited with approval the definition of 'reasonable and probable cause' originally developed by Hawkins J in Hicks v Faulkner, which is usually followed in English law and has been accepted by courts in South Africa. The phrase has been understood to mean:

"[A]n honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

[66] In *Glinski v McIver* 1962 (1) All ER 696 (HL), in the course of explaining what 'belief in the person's guilt' entailed, Lord Denning cautioned that the use of the word 'guilty' in the above definition might be misleading. In the Law Lord's view, 'belief in the person's guilt' implies that in order to have a reasonable and probable cause, the person who brings a prosecution, must at his peril, be sure of the guilt of the accused, as a jury (in the English system) or a trial judge (in our system) must before they convict. Whereas in truth what the person who brings the prosecution must do is satisfy himself or herself that 'there is a proper case to lay before' the court. After all, he or she can neither judge whether the witnesses are

telling the truth nor can he know what defences the accused may set up. According to Lord Denning, the determination of the guilt or innocence of the accused remains the duty of the trial court.

[67] In *Prinsloo and another v Newman* [1975 (1) SA 481 (A) the South African Appellate Division held that the concept of reasonable and probable cause involves both a subjective and an objective element. As an objective consideration, the defendant must have sufficient facts from which a reasonable person could have concluded that the plaintiff had committed the offence or crime charged. As to the subjective element, the defendant must have subjectively held an honest belief in the guilt of the plaintiff. It accordingly follows that in a claim for malicious continuation of a prosecution on the facts and circumstances similar to those obtaining in this appeal, there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration of the adequacy of the evidence available to him or her. The court in Prinsloo v Newman also held that a defendant will not be liable if there exist, objectively speaking, reasonable grounds for the prosecution and he or she, subjectively believed in the plaintiff's guilt. This approach was followed by the South African Supreme Court of Appeal in *Relyant Trading (Pty) Ltd v Shongwe*. [para14]

[68] As explained by Schreiner JA in *Beckenstrater v Rottcher* and another [1955 (1) SA 129 (A) at 136 A-B, when it is alleged that a defendant had no reasonable and probable cause for prosecuting, it means that he or she did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged; if, despite being in possession of such information, the defendant is shown to not have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence of a reasonable and probable cause on the part of the defendant.

to have overlooked. As a consequence of this error, the court below impermissibly adopted an approach of conducting an analysis of the evidence proffered against the respondent as if it was evaluating the evidence in a criminal trial.'

[89] In *Mandume vs Minister of Safety & Security* (HC-MD-CIV-ACT-DEL-2019/02007) [2021] NAHCMD 118 (19 February 2021) the court held that:

"[26] 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 wrongful and that his prosecution was malicious. He needed to place facts before the Court that demonstrate that the Prosecutor

General 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.

The application for absolution from the instance

[90] *In Stier and Another v Henk 2012(1)NR 370(SC) para 4 which cites Harms JA in Gordon LIoyd Page & Associates v Rivera and Another 2001(1) SA 88(SCA)[2000]4 All SA 241(AP v EP and Others 2017(1) NR112-113 [16] the SC set out the test as follows:*

'(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 Hunter1917TPD 170 at 173;)

Harms JA went on to explain at 92H-93A:

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 plaintiff(Marine & Trade Insurance Co Ltd v Van der Schyff 1972(1)SA 26 (A) at 37 G-38A) 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.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'-a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury.Such a formulation tends to cloud the issue. The court ought not to be concerned with what somene 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.'

The law to the facts.

[91] The plaintiff abandoned claim 1 as it has prescribed.

[92] As far as claim 2 based on malicious and continuous prosecution is concerned, the third defendant pleaded that, she had a reasonable and probable cause to prosecute and continue with the prosecution based on the evidence that was led by the complainant to the effect that the plaintiff threatened to kill her and the text messages in which the plaintiff threatened to kill the complainant. In my respectful view the third defendant was justified to prosecute and continue with the prosecution based on the evidence that was before her, including the statement of the complainant in which she stated that the plaintiff threatened to kill her. On the objective consideration, she had sufficient facts from which a reasonable person could have concluded that the plaintiff had committed the crime he was charged with. On the subjective element, the third defendant pleaded that she had an honest belief in the guilt of the plaintiff. Based on that, claim 3 cannot prevail.

[93] In respect of claim 3, it is clear from the particulars of claim, that what was pleaded to have resulted in loss of income and termination of employment contract was the alleged unlawful arrest and detention and not the alleged malicious or continuous malicious prosecution as per the plaintiff's testimony (witness statement). The claim for unlawful arrest had prescribed and was not pursued. Therefore, if that claim has prescribed, it follows that the claim for loss of income cannot prevail.

[94] On the issue of damages, the onus was on the plaintiff to lead evidence on how the damages were suffered and arrived at. That evidence was not adduced before court and in the absence of that, the court cannot entertain the claim for damages. In *Herman Pule Diamonds v Alexander Forbes Insurance company, Namibia Limited* (HC-MD-CIV-ACT-CON2018/01274[2021] NAHCCMD382 (30 August 2021) Usiku J held that:

'[13] I am satisfied that the plaintiff did not prove that he suffered damages as a result of the defendant's alleged breach of the insurance contract. In my opinion, without such evidence, no court, reasonably applying its mind to the available evidence, could or might find for the plaintiff. Therefore, I am of the view that the application for absolution from the instance stands to be upheld.'

I fully associate myself with the above dictum by Usiku J as a correct exposition of the law. The onus was on the plaintiff to prove his damages and without such evidence the claim of the plaintiff stands to be rejected.

[95] For all those reasons, the plaintiff failed to present evidence to support a *prima facie* case.

In the result, I make the following order

Order

1. The application for absolution from the instance is granted.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

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G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF:	Gottlieb Japhet Kangumu Attorneys, Outapi, Omusati Region
FOR THE DEFENDANTS:	Himeekua Ronald Ketjijere Government Attorneys Oshakati