



REPORTABLE

CASE NO: SA 7/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

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

**First Appellant
Second Appellant
Third Appellant**

and

RICHWELL KULISESA MAHUPELO

Respondent

CORAM: SHIVUTE CJ, CHOMBA AJA and MOKGORO AJA

Heard: 4 July 2018

Delivered: 28 February 2019

Summary:

Mr Mahupelo (who has been referred to in this judgment as 'the respondent') was one of the accused persons in the protracted criminal trial involving some 126 accused persons who were charged in the High Court of Namibia, amongst others, with the crimes of high treason, murder, attempted murder and several other crimes and offences. The charges stemmed from activities leading to an armed attack in and around the town of Katima Mulilo in Zambezi Region with the apparent purpose of

achieving secession of the Caprivi Region (as Zambezi Region was then known) from the Republic of Namibia. At the end of the prosecution case in the criminal trial, Mr Mahupelo was discharged as the prosecution failed to establish a case against him. He later sued the Minister of Safety and Security, the Prosecutor-General and the Government of Namibia (the defendants) for wrongful and malicious institution of the prosecution, claiming N\$15 321 400 in damages from them. The main claim of the institution of the prosecution was amended to introduce an alternative claim for the wrongful and malicious continuation of the prosecution. The High Court dismissed the claim for the wrongful and malicious institution of the prosecution, but upheld the alternative claim for the 'malicious continuation of the prosecution without reasonable and probable cause.' The High Court held that as the delict of 'malicious continuation of a prosecution' was not known at common law, it had to develop the common law in line with the constitutional ethos to accommodate the delict. It accordingly developed the common law and held that the Prosecutor-General (the PG) was liable for maliciously maintaining the prosecution after 2011 when it became clear that the State had no evidence leading to the respondent's conviction.

The defendants - now appellants - have appealed to the Supreme Court against the decision of the High Court. The appellants argued, amongst other things, that the High Court was wrong to have found that the prosecutors who were delegated by the PG to prosecute Mr Mahupelo had no reasonable and probable cause to prosecute him and that the PG was therefore liable for damages. The appellants argued that there was ample evidence during the criminal trial implicating Mr Mahupelo in the commission of the crimes and offences and on the basis of which it could have been found that there was reasonable and probable cause to continue with his prosecution.

The Supreme Court agreed with the appellants' argument that there was reasonable and probable cause to have continued with the prosecution of Mr Mahupelo. The Supreme Court reasoned that the High Court had adopted a wrong approach to the consideration of the evidence against the respondent led during the civil claim, pointing out that the evidence and considerations necessary in establishing whether there was

reasonable and probable cause and the lack of malice (as the law requires) to continue with the prosecution were different from those necessary to prove the guilt of an accused person in a criminal trial. After evaluating the evidence as a whole, the Supreme Court held that there was evidence establishing reasonable and probable cause as well as the lack of malice in the prosecution of Mr Mahupelo.

In the High Court, Mr Mahupelo pleaded that if his claim for malicious continuation of the prosecution did not succeed, then the court should award him constitutional damages for the violation of his rights. This issue was, however, not decided by the High Court as that court found that the claim for malicious maintenance of the prosecution was well founded. The Supreme Court held that it was inappropriate for this alternative claim to be decided by it for the first and final time as a party who may be dissatisfied with its decision in this regard will not have a chance to appeal. It has accordingly declined to decide the issue and referred the matter back to the High Court for that court to decide it first.

APPEAL JUDGMENT

SHIVUTE CJ (CHOMBA AJA & MOKGORO AJA concurring):

[1] The decision to initiate and maintain the prosecution of an accused person forms a central part of the constitutional obligation of the prosecutorial authority. While it is imperative that prosecutors are able to perform their functions without the fear of attracting civil liability, their constitutional mandate should nonetheless be executed in a manner that ensures a fair trial for the accused persons they are prosecuting. Accused persons must be accorded their full rights and must not be subject to baseless prosecutions. At the heart of this appeal lies the intricate question of the extent to which

the prosecutorial authority may be held liable for a delictual claim for maintaining the prosecution allegedly without reasonable and probable cause after an identifiable event.

[2] The appeal is against the judgment and order of the High Court granting a claim of malicious maintaining of a prosecution in favour of the respondent against the second appellant, the Prosecutor-General. The claim against the second appellant is founded on the allegations that the Prosecutor-General (the PG) maintained the prosecution of the respondent maliciously and without reasonable and probable cause from November 2011 onwards.

Background

[3] This case has had a long history, with the events giving rise to it having occurred as far back as 1999. On 2 August 1999 a group of people who either belonged to or were sympathetic to an outfit called the Caprivi Liberation Army attacked several state installations at or around Katima Mulilo with the apparent purpose of furthering the campaign for the then Caprivi Region (now Zambezi Region) to secede from the Republic of Namibia. As a result of this violent attack, nine people were killed, others injured and property destroyed. In the aftermath of the attack, several people were arrested, detained and prosecuted. The respondent, in this appeal, was among the persons so arrested, detained and prosecuted.

[4] The respondent together with 125 co-accused persons, were then charged with various serious crimes and offences which included high treason, sedition, public violence, murder and robbery in the Grootfontein Magistrate's Court and were

subsequently arraigned on those charges in the High Court. The prosecution relied on the doctrine of common purpose and on conspiracy to commit the offences and crimes listed on the indictment.

[5] The State led evidence against the respondent and at the close of the State case, the respondent was found not guilty and discharged in terms of s 174 of the Criminal procedure Act 51 of 1977 (the Act). Subsequently, the respondent sued the Minister of Safety and Security, the PG and the Government of Namibia being the first, second and third appellants respectively herein for damages in the High Court in the sum of N\$15 321 400.

The pleadings

[6] The main claim in the action was for malicious prosecution and was directed against the first appellant and the PG. The respondent in the alternative sought damages against the PG for the alleged malicious continuation of his prosecution. In the further alternative, the respondent brought a claim based on constitutional damages in the event that the claim for malicious prosecution fails.

[7] The basic allegation in the respondent's claim is that the appellants had acted without reasonable and probable cause and with malice when they initiated the prosecution being fully aware that they did not have sufficient evidence to convict him. The respondent further alleged that the appellants were malicious in persisting with the criminal trial whilst being aware that the witnesses who testified against him failed to implicate him in the commission of the crimes and offences.

[8] The appellants defended the claims. In a nutshell, the appellants conceded that they set the law in motion, instigated and maintained the prosecution against the respondent but denied that it was without a reasonable and probable cause or that it was actuated by malice.

Pre-trial proceedings

[9] The matter became the subject of the usual judicial case management process in the High Court. The parties agreed to separate the merits from the quantum, with the matter proceeding only on the merits.

Principal submissions in the High Court

[10] The respondent in support of the main claim pleaded that the first appellant, through his employees, being the Namibian Police, had maliciously and without reasonable and probable cause placed false information before the PG with the object of having him prosecuted for high treason and other charges contained in the indictment. The respondent pleaded that in consequence of the false information; he was arrested and subsequently prosecuted on the charges.

[11] The respondent further pleaded that when the PG and/or her employees set the law in motion or continued with his prosecution, they had done so without having sufficient information at their disposal which could substantiate the charges preferred against him or justify his prosecution on such charges. The respondent claimed that the PG and/or her employees instigated his prosecution without having reasonable belief in

the veracity of the information before them. He thus contended that his arrest, detention and resultant prosecution were instituted maliciously and without a reasonable or probable cause.

[12] As to the first alternative claim, the respondent pleaded that in the event that the principal claim failed, the common law should be developed to include a claim for damages for maintaining the prosecution maliciously and without reasonable and probable cause. The respondent argued that a defendant in a civil case ought to be held liable for damages in instances where the defendant lacked reasonable and probable cause for the prosecution, but they nevertheless maintained the prosecution to the end.

[13] The respondent's case was that the appellants, in particular the PG or her employees lacked reasonable and probable cause to maintain the prosecution from March 2006, alternatively from November 2011 onwards, after all witnesses who testified against him completed their testimonies and all the evidence that could have implicated him was led at that stage. The respondent maintained that despite the knowledge of the lack of sufficient evidence to implicate him, the PG and or her employees failed to stop the prosecution.

[14] It was the respondent's further contention that had the PG and/or her employees continuously reviewed the evidence in support of the charges against him, they should at the very least from November 2011, have discontinued the proceedings against him.

[15] He also argued that the PG ought to have separated the trials of the accused

persons between the group of accused persons referred to by the PG and/or her employees as the 'attackers' and the further groups identified as the 'leadership group' and the 'support group'. The respondent claimed that if the trials had been split in accordance with the groups referred to above, the duration of his trial would have been shorter and he would have been released earlier than he was eventually released.

[16] As to the second alternative claim, the respondent contended that should the claim for malicious prosecution fail, the appellants through their conduct violated his rights contained in Arts 7, 8, 11, 12, 13, 16, 19 and 21 of the Namibian Constitution¹ and as such, were liable for constitutional damages. According to the respondent, as a result of his arrest, detention and subsequent prosecution and the unreasonable delay in finalising his criminal trial, he suffered loss and damage. As such, so it was alleged, he was entitled to an award of compensation in terms of Art 25(3) and Art 25(4) of the Constitution.

[17] The appellants, on the other hand, denied as regards the main claim that the arrest and subsequent detention of the respondent was wrongful and unlawful. They maintained that the arrest of the respondent was based on a reasonable suspicion that he had committed the crime of high treason and the other crimes and offences set out in the indictment. The appellants claimed that the evidence collected against the respondent provided sufficient grounds for the members of the Namibian Police to hold

¹ These Articles concern the protection of liberty, respect for human dignity, prohibition of arbitrary arrest and detention, the right to privacy, the right to property, the right to practise a culture and the protection of fundamental freedoms respectively.

a reasonable belief that the respondent had committed the crimes and offences contained in the indictment.

[18] The appellants further contended that the decision to prosecute the respondent was made in accordance with the prosecutorial powers afforded to the PG by Art 88 of the Namibian Constitution. They maintained that the employees of the PG had carried out an objective assessment of the evidence before instituting the prosecution and came to a reasonable conclusion that there was a case against the respondent.

[19] Regarding the issue of malicious continuation of the prosecution, the PG contended that the prosecution against the respondent could not be stopped as from March 2006 alternatively from November 2011 because neither the PG nor her employees knew that all the evidence that could implicate the respondent had been presented and that not all witnesses who could implicate the respondent had completed their testimonies.

[20] The PG further argued that she could not stop the prosecution at the stages as proposed by the respondent for the following reasons: (a) that it would have been prejudicial to the State's case as witnesses could implicate the accused persons they had not referred to in their written statements; (b) that the appellants believed that they had established common purpose and conspiracy from the evidence and witness statements, and (c) that there was a likelihood that the defence case could supplement the State's case.

[21] In response to the constitutional claim, the appellants countered that the remedy sought by the respondent was inappropriate as Art 12 of the Constitution had its own remedy in that where a trial does not take place within a reasonable time the accused person may apply for his or her release. The appellants argued that Art 12 (1)(b) of the Constitution provided for both a right and remedy for a breach, and the remedy in this instance was release from trial. The appellants thus contended that despite being vested with the remedy in terms of Art 12(1)(b), the respondent had failed to invoke such a remedy and accordingly, it would be inappropriate to award constitutional damages to him.

[22] As to the respondent's contention regarding the failure to separate the trials in specific groups, the appellants argued that the respondent was legally represented and the defence team ought to have asserted his corresponding right to apply for separation of trials in terms of s 157 (2) of the Act, but failed to do so. The appellants further maintained that it would have been difficult to separate the trial in circumstances where the prosecution's case was based on common purpose and conspiracy. They also contended that it was speculative on the respondent's part to state that his trial could have been concluded more speedily had the trial been separated according to the roles allegedly played by the accused persons in the attack.

Findings by the High Court

[23] As for the main claim, the court *a quo* held that in order to succeed in an action for malicious prosecution, the plaintiff must prove all five requirements² set out in *Akuake v Jansen van Rensburg*.³

[24] After evaluating the law and the facts, the High Court held that the respondent had failed to prove that the Namibian Police did anything more than place the available evidence before the PG, leaving it to the PG to independently decide whether or not to prosecute. Accordingly, the principal claim against the first appellant and the PG was dismissed.

[25] In dismissing the principal claim, the High Court held that the PG not only had sufficient facts and information at her disposal to make the decision to initiate the prosecution, but she also had a reasonable belief in the facts and information upon which she based her choice to prosecute the respondent. The court further held that there was no evidence pointing (a) to the PG having instigated the prosecution with an intention to injure the respondent or (b) to the proceedings having been instituted in bad faith. The remaining issue for decision was thus whether the PG and/or her employees had acted without reasonable and probable cause, and with malice in maintaining the prosecution beyond November 2011.

[26] As to the claim based on malicious continuation of the prosecution, after considering the requirements for the successful action for malicious prosecution, the High Court held that the element of continuing or maintaining criminal proceedings

² More about them later in this judgment.

³ 2009 (1) NR 403 HC

beyond a stage where it could not be said to have been reasonable and probable to do so was not recognised in our common law and had also not previously been dealt with by our courts. The court was thus of the view that the common law should be developed to introduce a delictual claim based on continuing or maintaining the prosecution without reasonable and probable cause.

[27] The court was of a further view that like in the case of malicious prosecution, the plaintiff seeking for damages for malicious continuation of the prosecution is also required to satisfy the requirements set out in *Akuake v Jansen van Rensburg*.

[28] The court held that although the initiation of criminal proceedings was *bona fide*, it became clear at a certain point that the evidence against the respondent could not sustain a conviction and that the continuation of the criminal trial after that realisation was actionable and that malice could be inferred from the conduct of the prosecutors. The court was persuaded that, on a balance of probabilities, the PG and or her employees lacked reasonable and probable cause to continue with the prosecution from November 2011 onwards, being fully aware that three of the four witnesses who testified against the respondent failed to identify him in court, and further that the PG failed to establish any inculpatory evidence on the part of the respondent or anyone associated with him in the alleged commission of the offences.

[29] The court was also of the opinion that the request by the PG and/or her employees to carry out further investigations after the review of the evidence during

November 2010 was an indication that the PG did not have sufficient evidence upon which the respondent could be convicted. In conclusion, the court held that the PG lacked reasonable and probable cause from November 2011 onwards.

[30] Regarding the issue of malice, the High Court held that during the course of the proceedings, there was evidence of malice on the part of the PG and/or her employees. The court inferred malice from its finding that the PG lacked reasonable and probable cause to maintain the prosecution from November 2011. It stated that the failure of the prosecution team to do appraisals of the evidence continually points to the evidence of malice on their part. The court further inferred malice from the failure of the PG and/or her employees to review the evidence against the respondent for a period of six to ten years after he was indicted.

[31] The High Court also reasoned that the State's failure to provide sufficient resources to avoid a violation of the respondent's rights, also points to evidence of malice. In light of the above findings, the court held that the respondent had established the requirements of malicious prosecution it was called upon to decide. The correctness of that decision has been challenged on a number of grounds before this court. It is thus opportune to deal with these legal challenges. But before doing so, it is necessary to set out briefly the law on malicious prosecution and the role the Prosecutor-General is expected to play in our constitutional set up.

The law on malicious prosecution and Prosecutor-General's constitutional obligations

[32] Professor McQuoid-Mason⁴ 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.⁵ 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 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*⁶ 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

⁴ McQuoid-Mason ‘Malicious Proceedings’ in Joubert et al *The Law of South Africa* (LAWSA) (2nd Ed), 2008) Vol 15 Part 2, at para 315.

⁵ Id. para 311

⁶ 2000 1 All ER 560 (HL)

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*⁷ 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.⁸ 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.’⁹

[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. At para 47 the court observed:

⁷ 2009 SCC 51

⁸ At para 42

⁹ At para 44

'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"'.¹⁰

[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.'¹⁰ 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.'¹¹

[37] I endorse this approach. 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*. Error of judgment in the exercise of the prosecutor's discretion, even negligent error is not sufficient.

[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*.¹² These requirements are:

¹⁰ At para 49

¹¹ Para 51

¹² Cited in footnote 3 above.

- 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 *animus 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).

Malice and/or *animus injuriandi*?

[39] There appears to be divergent views in the cases and in the leading text books as to whether in a claim for malicious prosecution in South African law the plaintiff must prove both *animus iniuriandi* and malice. As far as I was able to ascertain, this is a matter that has hitherto not been decided by our courts.

[40] Professor McQuoid-Mason in LAWSA points out that malice means that the defendant had either an absence of belief in the guilt of the accused (which may include recklessness), or an improper or indirect motive other than that of bringing the plaintiff to justice. He states that traditionally malice has been distinguished from *animus iniuriandi*. Malice is concerned with the question of lawfulness whereas *animus iniuriandi* refers to fault. *Animus injuriandi* (which will generally be presumed under the *actio iniuriarum*) is required as the fault element, and malice should still be required to establish

wrongfulness. The learned professor states that in practice courts ‘appear to pay mere lip service to the concept of *animus injuriandi* and only enquire into the motives of the defendant.’¹³

[41] The South African Supreme Court of Appeal has held that what has to be proved is *animus injuriandi*.¹⁴ The same court pointed out in *Relyant Trading (Pty) Ltd v Shongwe and another*¹⁵ that:

‘Although the expression “malice” is used, it means, in the context of the *actio iniuriarum*, *animus injuriandi*. 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*,¹⁶ means that *animus injuriandi*, and not malice must be proved before the defendant can be held liable for malicious prosecution as *injuria*.¹⁷ 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*:¹⁸

‘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

¹³ LAWSA para 328, 329

¹⁴ *Rudolph and others v Minister of Safety and Security and another* 2009 (5) SA 94 (SCA) para 18

¹⁵ 2007 1 All SA 375 (SCA) at para 5

¹⁶ [2008] 3 All SA 47 (SCA) at para 62

¹⁷ At para 62

¹⁸ *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 64

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.*' (Emphasis added)

[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 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.¹⁹

[45] The existence of malice may point to the existence of *animus iniuriandi*, as indicating an awareness of the wrongfulness of the action.²⁰ 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

¹⁹ LAWSA para 321

²⁰ LAWSA para 322

element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.²¹

[46] Returning to the requirements for successful claims for malicious prosecution, the High Court found correctly that in the present matter the first and last requirements set out in *Akuake v Jansen van Rensburg* above were common cause, in that the appellants had set the law into motion and the prosecution of the respondent terminated in his favour. It will be recalled that the parties had agreed that the fifth requirement, namely the quantum for damages, will be decided only once the court had determined the appellants' liability. It is against the backdrop of the above legal principles and considerations that the issues on appeal ought to be decided. I turn then to the consideration of those issues.

The issues on appeal

[47] The first issue that falls for determination is whether the High Court was justified in developing the common law to include a claim for malicious continuation of the prosecution. The second issue is whether the court *a quo* was correct in holding that the PG maintained the prosecution after November 2011 maliciously and without reasonable and probable cause. Also a matter for decision is the question whether the appellants are liable to the respondent for constitutional damages, in the event that the claim for malicious continuation of the prosecution fails.

²¹ Neethling's *Law of Personality* (2nd Ed) page 181.

Was the court *a quo* correct in holding that the common law needed development to include the delict based on malicious continuation of a prosecution?

[48] Mr Budlender, who appeared for the appellants together with Mr Marcus and Mr Namandje, firstly submitted that it was not necessary for the court *a quo* to have developed the common law in order to accommodate the element of malicious continuation of a prosecution as opposed to its initiation as this delict appears to have already been accepted at common law.

[49] In support of this proposition, counsel relied on a passage in the book by Maasdorp²² and argued that as regards the requirement of reasonable and probable cause, the common law establishes that this element must be present not only at the beginning of a prosecution, but throughout the course of the prosecution up to its very termination.

[50] Counsel also referred to *Van Noorden v Wiese*²³, in which De Villiers CJ remarked that he did not know of any case in which it was held that if a person believed an offence had been committed, and other facts were brought to his notice which showed that no offence was committed, he would still be justified in proceeding in his original intention. According to the learned Chief Justice, 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

²² Maasdorp, *The Institutes of Cape Law* (1909) Book III Part II Chapter X.

²³ (1883-18184) 2 SC 43

ought to be terminated as well and failure to do so should result in the person being held liable for malicious prosecution.²⁴

[51] Mr Budlender, in the alternative, submitted that in the event that this court finds that the common law does not provide for this delict, the common law may appropriately be developed, in light of the values contained in the Constitution. Building on the foregoing, counsel relied on *JS v LC* 2016 (4) NR 939 (SC) para 28 where this court, albeit in a different context, reaffirmed the approach followed in *RH v DE* 2014 (6) SA 436 (SCA) ([2014] ZASCA 133 to the effect that our courts are bound to develop the common law in line with the changing legal convictions of the community.²⁵ Counsel further submitted that to the extent the common law is developed, the requirements for a delict of malicious prosecution should *mutatis mutandis* apply to the delict of malicious continuation of the prosecution.

[52] Mr Corbett, who argued the appeal on behalf of the respondent together with Mr Hengari, submitted that the court *a quo* was correct in developing the common law to accommodate the element of continuation or maintenance of the prosecution. Counsel contended that the common law had to be developed to bring it in line with the constitutional obligations imposed upon the prosecuting authority by Art 12(1)(b) read with Art 88 of the Constitution. Counsel submitted that the prosecutorial authority is required to exercise its mandate subject to the constitution and the laws of the country.

²⁴ At 54

²⁵

[53] With reference to *Heyns v Venter* 2004 (3) SA 2000 (T), counsel submitted that courts were constitutionally obliged to develop the common law to bring it in line with the spirit, purport and objects of the Bill of Rights. Counsel further submitted that in view of the constitutional protection of human dignity, it was imperative to develop the ambit of the delict of malicious prosecution. After referring to cases dealing with the development of the common law,²⁶ counsel urged the court to develop this principle in order to bring our common law in line with the constitutional obligations imposed upon the prosecuting authority.

[54] Counsel also relied on decisions of Australian courts in *Zreika v State of New South Wales*²⁷ and *Hathaway v State of New South Wales*²⁸ for this approach. In the course of explaining the requirement of reasonable and probable cause, the courts held that the absence of a reasonable and probable cause at an identifiable event during the criminal proceedings and where the prosecution is not stopped, gives rise to a delictual claim based on malicious continuation of the prosecution.

[55] Although it may be the case that there are no explicit authorities within our jurisdiction on the issue, on a careful analysis of the old persuasive South African sources, I am unable to agree with the holding of the court *a quo* that it was necessary to develop the common law in this case.

²⁶ *JS v LC* 2016 (4) NR 939 (SC); *RH v DE* 2014 (6) SA 436 (SCA) ([2014] ZASCA 133

²⁷ 2011 NSWDC 67

²⁸ 2009 NSWSC 116

[56] As previously noted, in *Van Noorden v Wiese* De Villiers CJ stated that he did not know of any case in which it was held that if a person believed an offence had been committed, and other facts were brought to his notice which showed that no offence had been committed, he would still be justified in proceeding in his original intention. The Chief Justice pertinently observed that it was in the interest of the public that the offenders were punished but it was also a policy of the law that maintaining the prosecution without reasonable and probable cause must not be allowed and encouraged.

[57] The propositions put forth in the *Van Noorden* matter confirm the principle enunciated by Maasdorp (supra) where he, after a thorough consideration of the authorities on the common law and decided cases, stated that as regards the element of reasonable and probable cause, this element must be present not only at the beginning of a prosecution, but throughout the course of the prosecution up to its very termination. Maasdorp puts the position thus:

‘As regards reasonable and probable cause, it should be added that these elements must be present not only at the beginning of a prosecution, but throughout the prosecution up to its very termination. If, therefore, facts come to the knowledge of the complainant or person instituting the criminal proceedings at any time during their continuance, showing that no crime or offence has actually been committed by the accused person, he will be bound to give notice to the authorities, and to stop the prosecution, and if he fails to do so, he will be liable in damages.’

[58] Another case instructive in this regard is the *Hathaway* matter on which counsel for the respondent relied for the proposition that the common law needed to be

developed to include a delict for maintaining a prosecution without reasonable and probable cause. In that case, it was held that if the prosecutor became aware during the criminal proceedings that the essential reasonable and probable cause that existed at the commencement of the case was no longer in existence, the prosecutor ought to terminate the prosecution, and if he or she fails to do so, he or she may be liable for damages. These sources appear to recognize the delict of malicious prosecution from its initiation to the end. This interpretation is consistent with the consideration that the requirements for the initiation and continuation of malicious prosecution are the same.

[59] In light of the above persuasive sources, the finding by the court *a quo* that it was necessary to develop our common law to include a delict based on malicious continuation or maintenance of a prosecution cannot be supported. While it may be necessary in appropriate cases to develop the common law to bring it in line with the values espoused in our constitution, on the facts of this case it was not necessary to develop the common law as the delict of malicious continuation of a prosecution has been recognized at common law.

[60] As to the workable standard for the continuation of a malicious prosecution, the court *a quo* was of the view that the five requirements the plaintiff must prove in a claim of malicious prosecution as laid down in *Akuake v Jansen van Rensburg* were also applicable to a claim for malicious continuation of a prosecution. In my considered view, that is indeed the proper approach to the issue (except that maintaining the prosecution replaces initiating the prosecution as a requirement).

[61] Insofar as the claim for maliciously maintaining the prosecution is concerned, requirements (a) and (d) identified in para [38] of this judgment are not disputed by the appellants. As regards requirement (e), it was noted earlier that the parties had agreed to separate the issue of liability from quantum, with the latter issue to be determined at a later stage. Consequently, we were only called upon to determine whether or not the PG had acted without reasonable and probable cause, and with malice in maintaining the prosecution beyond November 2011.

[62] It was held in the court below that viewed objectively, although the PG had reasonable and probable cause to institute the prosecution, she lacked reasonable and probable cause to maintain the prosecution from November 2011 onwards. In its reasoning for this finding the High Court stated that three of the four witnesses called by the State (including the respondent's ex-wife) failed to identify the respondent during the criminal trial. The court *a quo* went on to state that the appellants also failed to establish any inculpatory evidence against the respondent. The court also reasoned that the further investigations requested by the prosecution after the review of the evidence in November 2010 was an indication that the prosecution did not have sufficient evidence upon which the respondent could be convicted in the first place.

[63] The court *a quo* also found that the PG, in particular Mr July, one of the prosecutors who had the conduct of the case at the criminal trial and who testified on behalf of the appellants in the civil claim, had no sufficient basis for an honest belief in

the case his team maintained from November 2011. In this respect, the court stated that Mr July knew from November 2011 that he lacked reasonable grounds for continuing with the proceedings, but kept them going in the hope that some incriminating evidence would 'miraculously turn up'. Despite accepting that Mr July did not harbour any ill will or spite against the respondent, the court in the same vein held that there was evidence of malice on Mr July's part in maintaining the prosecution from November 2011 onwards. The court found that Mr July 'had no sufficient basis for any honest belief in the case he maintained at this stage.' In this respect, the court made an unfortunate finding of dishonesty on the part of Mr July. This finding is however not supported by counsel for the respondent.

[64] As previously observed, the court inferred malice from the following circumstances: (a) that the prosecutor failed to carry out continuous appraisals of the evidence against the respondent; (b) that despite being aware of the exceptional circumstances of the case such as the number of accused persons and witnesses to testify, the prosecutorial authority failed to comply with its constitutional mandate in mobilizing sufficient human resources in the form of more prosecutors to deal with the case within a reasonable period; and that, despite knowing that there was no case against the respondent, the prosecutorial authority continued with the prosecution.

The reasonable and probable cause requirement

[65] In *Waterhouse v Shields*²⁹, Gardiner J cited with approval the definition of 'reasonable and probable cause' originally developed by Hawkins J in *Hicks v Faulkner*,³⁰ 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.³¹

²⁹ 1924 CPD 155 at 162

³⁰ 1878 8 QBD 167 at 171

³¹ At 709I-710A

[67] In *Prinsloo and another v Newman*³² the South African Appellate Division held that the concept of reasonable and probable cause involves both a subjective and an objective element.³³ 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*.³⁴

[68] As explained by Schreiner JA in *Beckenstrater v Rottcher and another*,³⁵ 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

³² 1975 (1) SA 481 (A)

³³ At 495H

³⁴ At para 14

³⁵ 1955 (1) SA 129 (A) at 136A-B

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.

[69] Hawkins J pointed out in *Hicks v Faulkner* above, that the question of reasonable and probable cause depends not upon the actual existence, but upon the reasonable *bona fide* belief in the existence of such state of things as would amount to a justification of the course pursued in the making of the allegation complained of.³⁶ The learned judge was thus of the view that when applying the objective and subjective tests, sight should not be lost of the distinction drawn between the facts required to establish the *actual guilt* of the plaintiff and those required to establish a reasonable *bona fide belief in the guilt* of the plaintiff, as many facts admissible to prove the latter would be wholly inadmissible to prove the former.³⁷ This is an important distinction that the court *a quo* appears 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.

[70] Accordingly, the court *a quo* held that the PG and Mr July lacked reasonable and probable cause to continue with the prosecution from November 2011. The lack of reasonable and probable cause attributed to the PG and Mr July appears from the following passages in the judgment of the High Court:

[197] I am persuaded on the balance of probabilities that the defendant lacked reasonable and probable cause to continue with the prosecution from November 2010³⁸

³⁶ At 173

³⁷ *Id.*

³⁸ This should have read November 2011.

(sic). As to the objective standpoint, the following circumstances were known to the second defendant and or her employees:

- a) The lack of witnesses identifying the plaintiff as the offender;

It was clear from the evidence before court that three of the four witnesses who testified against the plaintiff, failed to identify him in court. It is important to note that one of these witnesses was Ms. Highness Chikuchiya, the former wife of the plaintiff.

- b) The failure to establish any inculpatory evidence between the plaintiff and anyone associated with him in the commission of the offences;

According to the evidence of the defence witnesses, the plaintiff was seen in the company of the rebel leader, Mr. Bennet Mutuso and was also arrested in the same vehicle with Bennet Mutuso. The plaintiff was cross-examined on this aspect and denied any association with Bennet Mutuso and he informed the court that he did not know Bennet Mutuso before their arrest. Bennet Mutuso did not come to his house as alleged and the plaintiff denied being related to him. There was no evidence or finding that his denials were false or contrived.

- c) The fact that the November 2010 review of the evidence prompted a further investigation in this matter;

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

[71] Before us it was contended on behalf of the appellants that having regard to the pleadings and the evidence, the court *a quo* was not justified in holding that the PG lacked reasonable and probable cause to continue with the prosecution from November 2011.

[72] Counsel for the appellants argued that although it was the case that the witnesses who named the respondent in their witness statements failed to identify him during the trial, there was evidence *aliunde* incriminating the respondent. Counsel contended that it was established in the criminal trial that the respondent is the same person witnesses referred to in their sworn statements as Shine (sometimes spelt as 'Shain' or 'Shaini') Mahupelo. In this respect, counsel referred the court to pertinent parts of the testimonies of the witnesses who were called on behalf of the State, which I find necessary to briefly recount.

[73] Hamlet Muzwaki testified that 'Shine' Mahupelo bought food, which was taken to the rebels in the bush during the 'evening time'. The respondent's ex-wife, Highness Chakusiya Lubinda, testified that her husband, Richwell Mahupelo, personally brought food to their house, which was locked in a hut and later taken away by unknown persons at night. She further testified that when asked for whom the food was intended, her husband refused to reveal. Another witness, Given Earthquake Tubaleye, told the court that he saw Shine Mahupelo offload food which was then taken by Starline Tabakuza and Kennedy Tabakuza to Zambia where mealie meal was exchanged for meat. It was witness Sinjabaa Hobby Habaini's evidence that he saw Bennet Mutuso in the company of Richwell Mahupelo and the former was carrying a travel bag and an AK 47 rifle. One Agrey Mwaba was the driver of the motor vehicle in question.

[74] Counsel further rightly contended that during the criminal trial the respondent did not dispute that the witnesses who mentioned his name were referring to him. It was

further correctly contended that the respondent accepted during the trial that the witness statements in possession of the prosecution made allegations concerning him. The respondent further accepted that if the allegations were true, they would implicate him in the commission of the offences charged, but he maintained that the allegations were false. According to counsel, based on this evidence, the PG reasonably believed that the respondent had a case to answer beyond November 2011.

[75] It was also submitted that neither the PG nor those delegated by her were in a position to know that all the evidence that would implicate the respondent was presented and that all the witnesses that could implicate the respondent had completed their testimonies, because they did not perform regular appraisals of the evidence with respect to each accused person. Counsel argued that the contention made on behalf of the respondent that the criminal proceedings should have been terminated by March 2006 was misplaced as by this time not all witnesses that named the respondent had testified. Counsel submitted that the trial record reveals that the last witness testified only on 6 June 2011.

[76] Counsel further pointed out that it could have been risky and prejudicial to the State's case to stop the prosecution at any of the stages proposed by the respondent, because there were instances where witnesses implicated certain accused persons that they did not refer to in their written statements to the police. According to counsel, there was a possibility that witnesses called after November 2011 could implicate the respondent. It was also contended that based on the available witness statements and

the evidence during the trial, common purpose or a conspiracy to overthrow the Namibian government was *prima facie* established and as such, the second appellant believed that there was a possibility that the State's case could be strengthened during the defence case.

[77] Counsel for the respondent in support of the judgment *a quo* argued that had the PG and/or her employees carried out regular appraisals of the evidence at their disposal, the length of the trial against those accused persons not found guilty and discharged at the close of the State case could have been shortened. According to counsel, if regular assessments of the evidence were carried out, the PG and/or her employees would have realised that they did not have sufficient evidence to continue with the prosecution of the respondent beyond March 2006, alternatively November 2011.

[78] On behalf of the respondent, counsel also objected to the argument that it could have been risky and prejudicial to the State's case to stop the prosecution at any of the stages advanced in argument by the respondent. Counsel argued that such a belief is entirely based upon speculation and thus could not be reasonably held by the PG and/or her employees.

[79] Counsel further submitted that it was also speculative on the part of the PG and/or her employees to hold the belief that their case based on common purpose or conspiracy could be strengthened during the case of the defence. Counsel submitted

that the criminal trial against all the accused persons took ‘fifteen years’ to finalise. Counsel contended that when one has regard to the proposition advanced by the PG, it becomes apparent that the PG found it acceptable to put the respondent on trial for 15 years (should he not have been discharged) on account of ‘flimsy evidence’, in the hope that the respondent himself or his co-accused would build a case against him. Counsel contended that the continued prosecution of the respondent on this basis – even if there was a reasonable and probable cause to initiate the prosecution– rendered it malicious, in the sense of *dolus eventualis* on the part of the PG and/or her employees.

[80] He further submitted that a prior agreement or conspiracy to commit the crime is one of the core requirements of the doctrine of common purpose and that there was no evidence of a prior agreement in this case. Counsel relies for this proposition on the remarks by Friedman J in *S v Banda and others*³⁹ where the learned Judge at 501F observed:

‘In the absence of a prior agreement *or conspiracy*, the doctrine of common purpose may not be used as a method or technique to subsume the guilt of all the accused without anything more. It cannot operate as a dragnet operation systematically to draw all the accused. Association by way of participation, and the *mens rea* of each accused person involved, are necessary and essential prerequisites.’ (Emphasis is mine).

[81] Counsel argued that the remarks quoted above apply with equal force to the present matter. Counsel was of course correct in pointing out that three out of the four witnesses who testified against the respondent failed to identify him during the criminal

³⁹ 1990 (3) SA 466 (BG)

trial. The remaining witness did not give cogent evidence of the respondent's association with the commission of the offences charged. That led him to conclude his argument on this aspect that there could be no suggestion that the prosecutorial authority had any evidence to implicate the respondent in the commission of the offences and crimes in the indictment, whether by way of direct involvement or an act of association sufficient to satisfy the above requirements in regard to common purpose and/or conspiracy. I pause to observe that by relying on the passage in *Banda* quoted above, counsel appears to have overlooked the fact that in this case the prosecution relied on conspiracy as a basis for the prosecution of the respondent and that conspiracy is one of the exceptions Friedman J referred to.

Analysis of the evidence

[82] It seems to me nevertheless that the fundamental question to be addressed at this stage is this: If the initiation of the prosecution was lawful and permissible, what changed during the criminal trial that led the court *a quo* to conclude that there was insufficient evidence to incriminate the respondent and that as such, the prosecution should have been terminated by November 2011?

[83] On the analysis of the evidence placed before the High Court, it is evident that the only thing that appears to have changed was the inability of the three witnesses, including the respondent's ex-wife, to identify the respondent in court. It is not surprising that both the respondent and the trial court were puzzled that the respondent's ex-wife could not recognise and identify the respondent in court. It is indeed an extraordinary

and astonishing occurrence. However, the witnesses' inability to identify the respondent in the dock does not have the automatic consequence that their evidence had to be summarily rejected. To my mind the failure by the ex-wife to identify her ex-husband smacked of a contrived stratagem on her part and that of other witnesses to deliberately not identify the respondent. This finding is in line with Mr July's evidence that it became a strategy of witnesses during consultations to say that they would be able to identify the accused person referred to in their statements, but when asked to identify such accused person in court they would fail to do so. One aspect that is crystal clear on the court record is that the person variously referred to by the witnesses as 'Shine Mahupelo' or 'Shaini Mahupelo' or Richwell Mahupelo is the respondent. In fact, the respondent conceded that the name 'Shaini' mentioned by some witnesses in their statements at the criminal trial was his nickname and that the allegations made by the witnesses concerned him. He maintained, however, that the allegations were false.

[84] Mr. July explained that the most reasonable justification for their failure to identify the respondent in court was due to close family relations between the witnesses and the accused persons, or fear of harassment. I agree with Mr. July's evidence that an inescapable conclusion that may be made of this state of affairs is that the identity of the respondent was not disputed, and further that the main evidence against the respondent was that he had been providing foodstuff to rebels and this is precisely what is contained in the witnesses' statements. That is also what the witnesses testified about.

[85] I thus agree with the appellants in their submission that although the criminal court found that there was insufficient evidence to secure a conviction for the purposes of the criminal law, there was evidence against the respondent establishing reasonable and probable cause on the part of the prosecution not only to initiate the prosecution, but also to continue with it right up to the end of the State case.

[86] Additional objective evidence was that the respondent was arrested together with Bennet Mutuso, who was a well-known rebel leader, while travelling in a car at night. The evidence from the respondent's wife that the respondent used to take food in the bush is significant when considered against the backdrop of the 2 August 1999 attack. According to Mr July, the prosecution had information that the rebels were being supplied with food by other people and that the fact that the respondent was in the company of Mutuso after the 2 August 1999 attack meant that he had intimate connection to Mutuso.

[87] It is trite that the principles and considerations applicable in a criminal trial to secure a conviction of an accused person are different from those relevant in the consideration of the question of reasonable and probable cause in a malicious prosecution claim. Thus, the court in a claim for malicious prosecution is not concerned with the question of whether the respondent was guilty of the offences with which he stood charged. That was the concern of the criminal court. The legal question the court *a quo* was called upon to determine is rather whether, given the pleadings and evidence before it, can it be said that the PG subjectively and objectively lacked reasonable and

probable cause to continue with the prosecution and that notwithstanding that realization the PG continued to act, reckless as to the consequences of her conduct? In my respectful view, that question should have been answered in the negative.

[88] As to *animus iniuriandi*, Mr July gave evidence that he honestly believed in the case he maintained against the respondent from November 2011. It was not put to him that he was not telling the truth in that regard or in any other respect. His evidence was neither gainsaid nor was there a basis for it to be rejected. In my respectful view, his undisputed evidence should have been accepted by the High Court. As to an attempt to obtain additional evidence to bolster the State's case, this step in itself does not appear to demonstrate that the prosecution concluded that it did not have a case against the respondent and should therefore have concluded its case then. First, the evidence sought was not in respect of the respondent only, but in respect of all accused persons. Secondly, although the evidence was ultimately not admitted, some accused persons were nevertheless convicted, which demonstrates that the search for additional evidence was not entirely motivated by the lack of evidence in respect of all accused persons.

[89] As regards the doctrine of common purpose, I find the statements on this aspect of the law by Moseneke J in *S v Thebus and another*⁴⁰ worthy of adoption. At para 19 of the judgment the learned Justice said the following:

'The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common

⁴⁰ 2003 (2) SACR 319 (CC)

offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.'

[90] An overt act of association may also be in the form of an omission, especially in the crime of high treason. In this regard Friedman J in *S v Banda* matter at 512A-B stated as follows:

'According to the authorities that I have cited the crime of treason provides an exception to the rule as to mere non-disclosure. It seems clear that anyone who, knowing of the commission of this crime, refrains from giving information to the authorities must by reason of this mere non-disclosure be regarded as having taken part in treasonable conduct. Even bare knowledge of its attempt or commencement without disclosure of the same to the authorities may render a person liable, even though the person has in no way taken part in the plans of the principal offender.'

[91] At the hearing of this matter, counsel for the appellants was at pains to argue that the findings of the court *a quo* were, on the facts and evidence, wrong. Counsel submitted that the evidence tendered during the criminal trial established that the respondent had actively associated himself with the crimes for which he stood charged. Counsel argued that the evidence in possession of the prosecutorial authority at the initiation of the prosecution established that the respondent actively advocated for the secession of the region from the rest of the country. The respondent had prior knowledge of the plan for the region to secede the region from the rest of the country, but despite this knowledge, he failed to give such information to the authorities of the planned attack or the actual commission of the crimes contained in the indictment. In addition, he supplied food to the people who were preparing to attack the installations in

and around Katima Mulilo. He was arrested while in the company of a rebel leader who was armed with an AK 47 rifle. Counsel argued that when all these facts and evidence are wholly considered, the appellants were justified in holding a firm belief that they had *prima facie* established the requirement of the doctrine of common purpose or conspiracy.

[92] I agree with the argument advanced by the appellants that when the pleadings and evidence are assessed in their entirety, the fact that certain witnesses who had named the respondent in their sworn statements failed to identify him during the trial does not mean that there was no inculpatory evidence against the respondent. The failure to identify the respondent does not in itself train smash the veracity of the testimonies of the witnesses as to what they alleged the respondent had done. I am therefore of the considered opinion that based on the case pleaded by the appellants, the PG and her delegates had an honest belief founded on reasonable grounds that the continuation of the prosecution was justified. Consequently, that part of the judgment *a quo* dealing with this aspect ought to be corrected.

[93] As to the requirements of reasonable and probable cause, and malice, it is absolutely indispensable for the purpose of this action that the respondent must prove that the prosecution was maintained maliciously and without reasonable and probable cause.

[94] Whereas the PG bore the onus of proving the guilt of the respondent in the criminal trial, in the claim for malicious prosecution the respondent bore the onus to prove the absence of reasonable and probable cause and *animus injuria* on the part of the PG. If one or other of these elements is lacking, then a defendant will not be held liable. It is thus improbable to find that a defendant acted maliciously where there is reasonable and probable cause to prosecute or to find that the defendant who was motivated by malice had reasonable and probable cause to prosecute. The finding that there was reasonable and probable cause to prosecute invariably neutralises the existence of malice in the circumstances as the latter is contingent on the former. It is my considered opinion that viewed objectively, there existed reasonable grounds for the prosecution of the respondent and viewed subjectively, the prosecuting team believed in the respondent's guilt.

[95] In light of the above findings, I am in agreement with counsel for the appellants that the respondent's claim based on the malicious continuation of his prosecution falls to be dismissed on this ground alone. The remaining aspect of the case is only that part of the appeal pertaining to the claim for constitutional damages. The respondent's pleaded grounds of the failure to separate the trial; the failure to stop the prosecution and the alleged inordinate length of the criminal trial appear to me to relate more to the constitutional question and as such it is best that they are dealt with under the claim for constitutional damages.

[96] As to the claim based on constitutional damages, it will be recalled that the court *a quo* did not decide this issue for the reason that the claim based on maliciously maintaining the prosecution succeeded. In this manner, the court *a quo* disposed of the matter without considering the merits and demerits of the constitutional question. The question that now arises is whether this court should decide this alternative claim as a court of first and last instance.

[97] This court has had occasions to consider the implications of an apex court sitting as a court of first and last instance on important constitutional questions. In *Teek v President of the Republic of Namibia and others*,⁴¹ for example, Ngcobo AJA at para 41 with reference to cases of the Constitutional Court of South African, stated that it was undesirable for an apex court to sit as a court of first and last instance, where matters are decided finally without the possibility of appealing against the decision given.

[98] The learned judge further stated that experience had shown that decisions were more likely to be correct if more than one court had been required to consider and decide the issues raised. In such circumstances, the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment. I respectfully endorse such a wise and pragmatic approach.

[99] Accepting the sentiments expressed by Ngcobo AJA, I am convinced that the benefits that may be derived from the views of the judges of the High Court on such a

⁴¹ 2015 (1) 58 (SC)

novel point of law and an issue of immense constitutional importance by far outweigh the election of departing from the approach so carefully considered and admirably articulated by Ngcobo AJA. This approach will not only afford the losing party an opportunity to participate in appeal proceedings, if dissatisfied with the decision of the High Court but it will also grant the apex court an occasion to fully consider and decide a matter of great public and constitutional importance. I should, however, not be understood to suggest that this is the approach to be followed in each and every case. Where compelling reasons exist in a particular case, this court may deviate from this approach. In my respectful view, however, there are compelling reasons on the facts of this case for this court to not decide the matter as a court of first and last instance. For all these reasons, I am of the view that, the constitutional question should first be decided by the court below.

Costs

[100] In their notice of appeal, the appellants asked for a costs order in this court, including the costs of one instructing and two instructed counsel. The respondent on his part also asked for costs should the appeal be dismissed. However, it came to light during oral submissions that counsel for the respondent argued the appeal on instructions of the Director of Legal Aid. Section 18 of the Legal Aid Act 29 of 1990 states that 'no order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings.' If I understand this provision correctly, ordering the respondent to pay costs in the circumstances of this case would

amount to ordering the State to pay the costs of the appeal. In any event, this is not an appropriate case to make a costs order as the respondent sought to ventilate legal principles of great public and constitutional importance, some of which have not hitherto been traversed by our courts. In those circumstances, I propose that no order as to costs should be made.

Order

[101] Accordingly, the following order is made:

- (a) The appeal is upheld in part.
- (b) The portion of the order of the court *a quo* upholding the respondent's alternative claim based on malicious continuation of the prosecution without reasonable and probable cause is set aside.
- (c) The question of whether or not the respondent should be awarded constitutional damages is referred back to the High Court for determination in accordance with case management rules before any judge in the event that the learned judge who presided over the matter in the High Court is no longer available.
- (d) No order as to costs is made.

CHOMBA AJA

MOKGORO AJA

APPEARANCES:

APPELLANTS:

G Budlender SC (with him N Marcus
and S Namandje)

Instructed by Government Attorney

RESPONDENT:

AW Corbett (with him U Hengari)

Instructed by Legal Aid Namibia