



CASE NO: SA 47/2017

**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

**GEORGE LIFUMBELA MUTANIMIYE**

**Respondent**

**Coram:** SHIVUTE CJ, MOKGORO AJA and NKABINDE AJA

**Heard:** 3 October 2019

**Delivered:** 5 February 2020

**Summary:** The respondent was amongst the 125 people who were arrested following the violent and fatal attacks in Katima Mulilo in 1999. During these attacks, people were killed and properties were destroyed. The respondent was said to have been involved as an organiser and supporter of the United Democratic Party and was indicted together with approximately 122 accused persons on 278 high treason charges. He was prosecuted in what became known as the Caprivi Treason trial and later discharged in terms of s 174 of the Criminal Procedure Act.

Following the discharge, the respondent instituted a delictual action against the appellants claiming damages for malicious instigation of prosecution. Alternatively to that claim, the respondent sought damages for malicious continuation of the prosecution. He also sought constitutional damages for the alleged breach of certain constitutional rights.

Regarding the main claim, the High Court considered the evidence available to the State as constituting reasonable and probable cause and absolved the Minister. It also concluded that there was a probable and reasonable cause for the prosecution to initiate the proceedings. The court held that the prosecution did not act with malice. It did not decide the constitutional claim. Regarding the alternative claim the court, however, found for the respondent, hence this appeal.

On appeal this court *held* that, due to certain fundamental flaws *a quo*, it is entitled as a court of appeal, to interfere with the portion of the judgment of the High Court specifically with regard to whether that court misdirected itself on the facts and the law. Relying on this court's earlier decisions in *Minister of Safety and Security & others v Mahupelo* (SA 7/2017) [2019] NASC 2 (28 February 2019) (*Mahupelo*) and the applicable legal principles, the court *held* that the respondent failed to establish reasonable and probable cause regarding his alternative claim.

As to the further alternative claim for the alleged violations of various constitutional right, the court, on appeal, held that for the same reasons pronounced in *Mahupelo* the matter should be remitted to the High Court. Accordingly, the court upheld the appeal in part, referred the question regarding the constitutional claim back to the High Court and made no order as to costs.

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## APPEAL JUDGMENT

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NKABINDE AJA (SHIVUTE CJ and MOKGORO AJA concurring):

### Introduction

[1] This appeal bears certain indistinguishable features with the case decided by this court in *Mahupelo*,<sup>1</sup> per Shivute CJ, which was also about a delictual claim based on malicious instigation and continuation of prosecution and constitutional claim for damages. The case was, similarly, a sequel to the violent attack in 1999 in an attempt to secede the Caprivi (now Zambezi) region from Namibia. As a recent precedent on the law regarding malicious prosecution in this jurisdiction, reliance will be placed considerably on the legal principles well-articulated and re-affirmed by the Chief Justice in that case.

[2] The appeal is against the decision of the High Court regarding an action for malicious prosecution instituted *a quo* by the respondent against the appellants. The High Court dismissed the claims against the first and second appellants for malicious prosecution and instituting criminal proceedings against the respondent but upheld the respondent's alternative claim based on malicious continuation of prosecution without reasonable and probable cause with costs against the second and third appellants. The latter decision is the subject matter of this opposed appeal.

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<sup>1</sup> *Minister of Safety and Security & others v Mahupelo* (SA 7/2017) [2019] NASC (28 February 2019) (*Mahupelo*).

[3] The central issue for determination is whether the court *a quo* misdirected itself on the law and facts when it held in favour of the respondent, that the latter made out a case against the second and third appellants on the balance of probabilities on the alternative claim based upon the wrongful and malicious continuation of the prosecution.

#### Background facts and litigation history

[4] The respondent was one of the people who were arrested following the violent and fatal attacks in Katima Mulilo in 1999. The events that gave rise to the arrest and prosecution of those suspects including the respondent are, on the whole, similar to those set out in *Mahupelo*. It is not necessary to describe, fully, such events. It suffices to explain, briefly, that the events related to the attack by the armed rebels of the Caprivi Liberation Army (CLA) on various government installations at Katima Mulilo, in the Caprivi region (now Zambezi), and the alleged involvement of the respondent in certain happenings prior to the attack. It is common cause that people were killed and properties were destroyed during that violent attack.

[5] A state of emergency was declared by the President of the Republic of Namibia and instructions were issued for the arrest of prominent and executive members of the United Democratic Party (UDP) at Katima Mulilo. Police intelligence information revealed that UDP, which is alleged to have mobilised people to support the secession of the Caprivi from Namibia by violent means, was the political wing of the CLA. The respondent's arrest was based on information of his alleged role in the

affairs of the UDP and that he had influenced people to take up arms to secede Caprivi.

[6] There were about 379 witnesses who testified on behalf of the State during the criminal trial. More than 500 witness statements were obtained and the respondent was fingered in some of the statements. Specifically, the respondent was said to have been involved as an organiser and supporter of the UDP and was indicted together with approximately 122 accused persons on 278 charges including high treason, sedition, public violence, murder and attempted murder (collectively referred to as high treason charges). He was prosecuted in what became known as the Caprivi Treason trial.<sup>2</sup> The respondent was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 (CPA).

[7] The respondent then instituted an action against the first and second appellants based upon malicious prosecution under the common law in respect of the period spanning 4 August 1999 to 17 November 2005, alternatively 2 February 2006. In the alternative, the respondent claimed damages against the second appellant based on the wrongful and malicious continuation of the prosecution from 17 November 2005 or from 2 February 2006. He claimed that the appellants had no reasonable or probable cause for setting the law in motion by laying charges against him. He further claimed that the appellants did so devoid of reasonable belief in the truth of the information given to them.

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<sup>2</sup> *Mahupelo v Minister of Safety and Security* (I 56/2014) [2017] NAHCMD 25 in (2 February 2017) para 4 (*Mahupelo-High Court*).

[8] Damages were sought against the second appellant and/or her prosecutorial team for wrongfully and maliciously setting the law in motion against the respondent and for the continued prosecution without probable cause or without sufficient information at their disposal to implicate him in the commission of high treason or any of the indicted crimes. The respondent claimed that the second appellant ought to have stopped the prosecution in terms of s 6(b) of the CPA by the said dates or within a reasonable time after those dates and ought, reasonably, to have caused the respondent's release from prosecution and detention to safeguard his rights under Articles 7, 8, 11, 12, 13, 16, 19 and 21 of the Namibian Constitution (Constitution).

[9] The appellants pleaded that the arrest of the respondent was based on reasonable suspicion that the respondent committed the crime of high treason and other crimes set out in the indictment and the particulars of claim. They pleaded that the witness statements and information obtained in the course of the police investigation were submitted to the second appellant and that such information was sufficient for her to hold the belief that the respondent committed the offence. The second appellant pleaded that based on the available evidence and the witnesses' statements, made under oath, reasonable grounds existed to believe, on a *prima facie* basis, that the respondent committed the indicted crimes or that responsibility could be attributed to him based on the doctrine of common purpose and conspiracy to commit the said crimes.

[10] In relation to the alternative claim the second appellant further pleaded that by 2 February 2006 her prosecutorial team could not have known whether all the

evidence that could implicate the respondent had been presented. She stated that there was a possibility that the respondent could be implicated by witnesses called after that date and that based on common purpose or a conspiracy to overthrow the Namibian Government *prima facie* evidence was established and that there was a possibility of the State's case being strengthened during the case for the defence. It was pleaded further that the stopping of the prosecution or closing the case against the respondent would have been premature, risky and prejudicial to the State's case. Furthermore, the second appellant pleaded that the respondent had a remedy in terms of Article 12 (1)(b) of the Constitution to move for his release from prosecution and detention on 2 February 2006.

[11] At the trial certain witnesses, including Mr John Walters, testified. He acted as the Prosecutor-General of Namibia from December 2002 up to the end of December 2013 and was called to give evidence in support of the respondent's case. Mr Walters testified that he assembled a prosecution team to evaluate the evidence against the accused persons and to advise him on its sufficiency whether or not to proceed against them. According to him, he trusted the team's professional assessment and had no reason to doubt the correctness of the witness statements made available to them. He therefore signed the indictment against the accused persons, including the respondent.

[12] In his testimony the respondent referred to statements used to formulate a case against him. These statements were made by Mrs Elli Simasiku (the wife of the Mafwe Chief), Mr Daniel Sitali, Mr Kafuna, and Mr Christopher Lifasi Siboli. The

respondent was implicated, among other things, as having approached Mrs Simasiku during July 1999 and threatened that because they were not supporting the idea of Mr Mishake Muyongo<sup>3</sup> to liberate Caprivi from Namibia they would be caused to run to Owamboland and that the supporters were equipped with arms. The respondent was also fingered by Mr Sitali as having attended meetings and supported the idea of secession by violent means. Late in 1998 and while at his village, Mr Sitali said, the respondent approached him at night and asked him to recruit people from his branch who must flee to Botswana to join the struggle for the liberation of Caprivi. He stated that the respondent drove a bakkie with a GRN registration number. Mr Kafuna also implicated the respondent as having been involved in transporting people from Katima Mulilo to Botswana to further the aims of the secession of Caprivi.

[13] Mr Siboli made statements on 13 April 2000, 2 April 2001 and 15 February 2003. His testimony was concluded on 17 November 2005. He implicated the respondent in the 2001 and 2003 statements. The statement of 13 April 2000 was extensive and more incriminatory. In respect of the respondent, the following was stated therein:

'53. George was a driver at Caprivi College of Education. He was an organiser of the secession. During 1997 he was informing people at Lisikili and Neneze as to what is going to happen about the secession. He was informing people to believe as they are being told by Muyongo.

54. During 1997 I attended with him a private meeting at Linyanti. The meeting was to tell all of the Mafwe that we are going to cut Caprivi from the rest of Namibia.

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<sup>3</sup> Mr Muyongo is alleged to have been the protagonist in the secession plan.



On the same date we came to Katima and we had again a meeting at George Mutanimiye's place in Naweze. This meeting was to talk that the following date we had to go to the villages and spread the message of Chief Mamili that we are going to cut Caprivi from the rest of Namibia. The following date we did that.

55. During 1998, he mobilised people to go into the bush to liberate Caprivi. He had also donated money for the propagation of the attack. I did not know what the amount he donated was. I also saw his name on the list of the people who donated money. He was also a transporter for people who went to Dukwe with the purpose to liberate Caprivi. While we were in Dukwe, he used to phone us, and ask us when we are coming and [attack] in Caprivi. He was also one of the Kopano ya Tou member.'

[14] The respondent denied involvement in the secession and testified that the statements, especially with reference to that of Mr Siboli, were a fabrication by the police. He claimed that his continued prosecution after his discharge in terms of s 174 was done with an improper or ulterior motive. Under cross-examination the respondent accepted that the prosecution was in possession of the said sworn statements when it arraigned him. He conceded that the statements, if true, would implicate him in the commission of high treason and that the prosecution would have had no reason not to believe them.

[15] The evidence on behalf of the appellants was, essentially a repetition of the evidence contained in statements which, it was contended, established a *prima facie* case that the respondent was a member of the UDP and actively associated himself with the actions of those involved in the secession. The witnesses also testified about the delay in obtaining witnesses' statements and prosecuting the case but less needs to be said about these aspects for the purpose of this judgment.

[16] Generally, the evidence of Mr July at the criminal trial – about the respondent having formed common purpose with the rest of the accused persons – remained undisputed. Mr July testified that, on the issue of common purpose and conspiracy, they believed that the respondent had a common design with the rest of the accused persons based on the information in the witnesses' statements. His actions, he said, confirmed to them that he had made common cause with the rest as he participated in one shape or form to the furtherance of that objective. He explained the witnesses' failure to identify the respondents in court. His testimony which implicated the respondent also consisted of general background evidence that set out the general history of the organisation, mobilisation and recruitment of persons in preparation of the attack on 2 August 1999.

[17] Against the above factual matrix and certain legal principles regarding malicious prosecution the High Court absolved the first appellant, Minister of Safety and Security. The court considered the information and evidence available to the State when the decision to prosecute was taken. It concluded that on the facts:

'[9] There are no sound reasons advanced by the [respondent] as to why the prosecution team had to disbelieve *the statements under oath at their disposal*. Mr July comprehensively set in the facts on which the decision by the second [appellant] was based to prosecute [the respondent] and *there was a reasonable and probable cause for the prosecution*.<sup>14</sup> (Emphasis added.)

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<sup>4</sup> High Court judgment para 80.

[18] Regarding malice the High Court held that the respondent failed to prove, on a balance of probabilities, that the second appellant acted with malice in initiating the prosecution or that it instigated the proceedings with the aim to injure him.<sup>5</sup>

[19] As to the alternative claim of malicious continuation of the prosecution the High Court relied on *Mahupelo-High Court* and *Makapa*<sup>6</sup> which were on appeal at the time. The High Court held the view that, apart from the fact that the authorities referred to in these two High Court judgments have been applicable for decades, there was no reason why they should not be considered as they remain law until set aside by the Supreme Court. The court said that the facts upon which the findings were made in those cases were exactly the same as those *in casu*.<sup>7</sup> Thus, the High Court endorsed the approach and the decisions in the two cases.<sup>8</sup> Notably, as will be shown in a while, the decision in *Mahupelo* has since been reversed by the Supreme Court.

[20] In deciding the alternative claim the High Court questioned: if probable cause exists initially, but during the course of the criminal prosecution it becomes clear that there is no probable cause to continue such prosecution, is there any liability when a party maintains the action thereafter?<sup>9</sup> The court, having considered the legal principles set out in *State of New South Wales*<sup>10</sup> and delineated in *Mahupelo*, remarked:

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<sup>5</sup> *Id* para 84.

<sup>6</sup> (I 57/2014) [2017] NAHCMD 130 (05 May 2017).

<sup>7</sup> High Court judgment para 99.

<sup>8</sup> *Id* para 87.

<sup>9</sup> *Id* para 88.

<sup>10</sup> 2010 NSWCA at 118.

'What is of concern that even after appraisal of the matter in November 2010 when the realisation dawned on the prosecuting authority that there were gaps in the State's case and the court refused to allow further statements obtained to be used in evidence, they still persisted to oppose an application in terms of s 174 of the [the CPA]. This was apparently on the off chance that the [respondent] could be implicated by co-accused persons.'<sup>11</sup>

[21] The High Court also relied on *Zreika v State of New South Wales*<sup>12</sup> that when the police lacked a reasonable and probable cause from a certain date when, inter alia, the State witnesses failed to identify the plaintiff as the perpetrator of the offence in a photo array which included a photograph of the plaintiff, then the prosecutor knew at that stage that the case lacked reasonable and probable cause but continued prosecuting hoping that she would find enough evidence against the accused.

[22] The court *a quo* concluded that the respondent made a case on the balance of probabilities on the alternative claim based on wrongful and malicious continuation of the prosecution as from 17 November 2005, or 2 February 2006 only against the second appellant's and/or her prosecutorial team<sup>13</sup> and in light of this conclusion it decided not to pronounce on the further alternative relating to the alleged infringement of the constitutional rights of the respondent.

### On appeal

#### *Parties' submissions*

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<sup>11</sup> High Court judgment para 92.

<sup>12</sup> 2011 NSWDC 67.

<sup>13</sup> *Id* para 100.

[23] The appellants agree with the court *a quo*'s decisions dismissing the respondent's claims against the first appellant for malicious prosecution and instituting criminal proceedings against the respondent. They support the findings that there were no 'sound reasons advanced by the [respondent] as to why the prosecution team had to disbelieve the statements under oath at their disposal'; that 'Mr July comprehensively [set out] the facts on which the decision by the [second appellant] was based to prosecute the [respondent] and that there was reasonable and probable cause for the prosecution'. The appellants also agreed with the High Court's finding that the respondent failed to prove, on a balance of probabilities, that the second appellant acted with malice when she initiated the prosecution. The appellants are, however, aggrieved by and appeal against the court *a quo*'s upholding of the respondent's alternative claim based on malicious continuation of prosecution without reasonable and probable cause and the costs award.

[24] It was argued on behalf of the appellants that the 'statements under oath' at the disposal of the prosecution team to which the excerpts of the High Court judgment refers are statements which established, on a *prima facie* basis, that the respondent, a member of the UDP actively associated himself with the actions of those who had, among other things, the aim of seceding Caprivi, by transporting people to Botswana, influencing people to support the idea of secession and supporting the cause by giving monetary contributions.

[25] The appellants argued that the allegations in the witnesses' statements, if true, imputed guilt on the respondent to be a party to a conspiracy to commit the crimes

cited in the indictment and, by way of his conduct, to associate himself with the criminal design of all other co-perpetrators of the attacks. They maintained that the conduct of the respondent would reasonably lead any ordinary prudent and cautious person, placed in the position of the prosecution, to believe that he was probably guilty of the crimes imputed to him and that once this belief is honestly held the respondent would fail in his claim to show that there was no reasonable and probable cause for his continued prosecution.

[26] In opposing the appeal the respondent remained steadfast that the continued prosecution was without any reasonable or probable cause. It was submitted that from the facts and save for the court *a quo*'s reliance on *Mahupelo-High Court*, no criticism could successfully be levelled at that court's analysis of the facts or its exercise of its discretionary power. The respondent submitted that because the facts in this case are distinguishable from those in *Mahupelo* the decision appealed against should not be interfered with. He argued that the decision *a quo* is in line with the appreciation of *Mahupelo*. It was submitted that the evidence against the respondent, on which the second appellant could form a reasonable and probable cause for his prosecution was not 'adequate'.

[27] Reference was made to the second appellant's alleged recklessness given its defence that, by 30 January 2006 or any period thereafter, the prosecution was not in a position to know that all the witnesses to implicate the respondent had completed their evidence. It was submitted that the appellants did not have evidence or sufficient evidence upon which they could convict the respondent on all the charges proffered

against him, that the prosecution failed to perform an appraisal of the evidence on a continual basis and that it had hoped that its case would be supplemented by the defence case. The hope, it was submitted, was not reasonable given that the respondent had pleaded not guilty.

[28] The respondent argued that at the time of his arrest he was not a rebel captured during the military engagement with the security forces nor was he pointed out by rebels and that his name did not appear in the deployment list nor was he involved in the attack. He submitted that none of the witnesses' statement implicated him in having been involved in the attack of 2 August 1999 and that there was no identification parade to identify him and link him to the offences. In fact, it is contended, Mr Siboli never mentioned the respondent's name when he testified nor did he identify him while in court.

[29] According to the respondent, the evidence presented did not provide enough information to establish culpatory evidence or reasonable belief – as such there was no reasonable and probable cause. The alleged honest belief by the second appellant and her prosecutorial team, so the argument went, lacked any basis. It was argued that the concession by Mr July was indicative of an intention to injure the respondent and of malice. Finally, the respondent contended that this court should invoke the principles in *Dhlumayo*<sup>14</sup> and not interfere with the decision *a quo*.

### Legal principles

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<sup>14</sup> *R v Dhlumayo* 1948 (2) SA 677 at 705 -706 (*Dhlumayo*).

[30] As it is apparent from a significant body of case law delineated by this court in *Mahupelo*, to succeed in a claim for the initiation and/or continuation of a malicious prosecution, a claimant must prove that the prosecution was (1) initiated by the defendant; (2) terminated in his/her favour; (3) undertaken without reasonable and probable cause and (4) motivated by malice or improper motive or carried out with a primary purpose other than that of carrying the law into effect, to injure the claimant.<sup>15</sup> The last two elements are at issue in this appeal.

[31] The applicable principles are well established and have recently been reaffirmed by the Chief Justice in *Mahupelo*. There the court dealt,<sup>16</sup> among other things, with the originality of the concept 'reasonable and probable cause' as was developed by the English Court in *Hicks*<sup>17</sup> and cited with approval by the South African court in *Waterhouse*.<sup>18</sup> The inquiry into what the concept entails, as reaffirmed,<sup>19</sup> comprises both the subjective and objective components, such that for grounds to exist there must be actual belief on the part of the prosecutor that the plaintiff had committed the crimes and that belief must be reasonable in the circumstances.

[32] The subjective belief of the defendant in the guilt of the plaintiff is a necessary element for the existence of reasonable and probable cause.<sup>20</sup> It needs to be

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<sup>15</sup> *Mahupelo* more specifically para 38.

<sup>16</sup> *Id* para 65.

<sup>17</sup> *Hicks v Faulkner* 1878 8 QBD 167 at 171.

<sup>18</sup> *Waterhouse v Shields* 1924 CPD 155 at 162.

<sup>19</sup> *Mahupelo* para 67 citing with approval the decision of the South African Appellate Division in *Prinsloo & another v Newman* 1975 (1) SA 481 (A).

<sup>20</sup> Neethling, Potgieter and Visser *Neethling's Law of Personality* 5 ed at 319. According to the learned authors, this means that even if the defendant clearly acted on reasonable grounds, but nonetheless did not honestly believe in the plaintiff's guilty, reasonable and probable cause will still be absent.



emphasised that the reasonable and probable cause inquiry is not concerned with the prosecutor's personal views as to the accused's guilt but with her or his professional assessment of the legal strength of the case.<sup>21</sup> This is so because the prosecutor cannot substitute her or his view for that of the judicial officer.<sup>22</sup>

[33] In *Beckenstrater*,<sup>23</sup> also quoted with approval in *Mahupelo*,<sup>24</sup> the South African Appellate Division formulated the principle as follows:

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'<sup>25</sup>

[34] As to the last element, concerning malice or improper motive, the defendant's knowledge or realisation of the plaintiff's innocence will, unavoidably, result in the conclusion that there were no grounds for prosecution and therefore that the instigation of and continued prosecution was solely on the ground of *animus iniuriandi* (intention to injure)<sup>26</sup> or an improper motive. In that instance the defendant's actions will therefore be unreasonable and consequently unlawful.

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<sup>21</sup> *Id.*

<sup>22</sup> See *Mahupelo* para 66.

<sup>23</sup> *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136.

<sup>24</sup> *Mahupelo* para 68.

<sup>25</sup> *Id* at p136.

<sup>26</sup> For the fourth element to succeed the defendant must have, under the influence of English Law, acted with malice but following the *dicta* of the South African case law *animus iniuriandi*, as opposed to malice, is required. See in this regard *Moaki v Reckitt and Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 103-6, *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196 and *Prinsloo v Newman* 1975 (1) SA 481 (A) at 492.

### Assessment

[35] The question whether reasonable grounds exist should be determined by reference to the facts of each particular case. Those facts must then reasonably indicate that the plaintiff probably committed the crime concerned.<sup>27</sup>

[36] The summary of the evidence in relation to the respondent, which was presented at the criminal trial, recites the information in the witnesses' statements referred to earlier. To recap, the information reveals that the respondent participated in the conspiracy by, among other things, attending meetings where the protagonist (Mr Muyongo) spoke about the withdrawal from the DTA, formation of the UDP and where the respondent himself spoke, urging people to get more firearms to secede Caprivi by military means; allegedly transporting people who fled to Botswana including Mr Muyongo's sons and threatening those who did not support the secession idea; encouraging people to join other rebels in Botswana; mobilising them to go into the bush and prepare for the military takeover of Caprivi; contributing money to support the agenda and acting in common purpose with a common objective with the other conspirators.

[37] The High Court, having accepted the witnesses' statements within the context of the planned secession and having accepted the evidence of Mr July, was correct that there were no sound reasons advanced by the respondent as to why the prosecution team had to disbelieve the statements under oath at their disposal. The court was also correct that Mr July comprehensively set out the facts on which the

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<sup>27</sup> See *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 467.

decision to prosecute the respondent was based. It was, therefore, correct that there was a reasonable and probable cause for initiating the prosecution of the respondent. The High Court was also right that the respondent failed to prove on a balance of probabilities that the second appellant acted with malice in initiating the prosecution or that the second appellant did so with the aim to injure him.

[38] Irrefutably, the delict for malicious prosecution extends from its initiation to the end and maintaining the proceedings is a continuing process.<sup>28</sup> Regard being had to all the circumstances of the case, the legal principles articulated in *Mahupelo* regarding the alleged wrongful and malicious continuation of the prosecution and the conclusions by the High Court above, it seems to me that the logical conclusion on the alternative claim (the subject matter of this appeal) should have been the same as that in relation to the initiation of the prosecution. This is so because, save for the issue of identification of the respondent at the trial, nothing changed during the criminal trial that led the High Court to conclude that there was insufficient evidence to incriminate the respondent and that as such the prosecution should have been terminated.<sup>29</sup>

[39] For the respondent to succeed in his opposition of this appeal he must, *inter alia*, persuade us that subsequent to the aforesaid findings *a quo* of the presence of reasonable and probable cause and lack of improper motive at the beginning of the prosecution, there were facts which came to his knowledge or to the attention of the prosecution during the proceedings showing that no crime had actually been

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<sup>28</sup> *Hathaway v State of New South Wales* 2009 NSWSC 116 (*Hathaway*).

<sup>29</sup> *Mahupelo* para 82.

committed by the respondent for the former to terminate the prosecution against the latter. Differently put, that there was a turning point.<sup>30</sup>

[40] In deciding the issue the court relied on the English authority in *Hathaway* and later concluded in favour of the respondent.

[41] In *Mahupelo*, this court had this to say when evaluating the evidence on the question raised by the High Court:

[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. . . .'

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<sup>30</sup> See in this regard *Van Noorden v Wiese* (1883-1884) 2 SC 43 as referred to with approval in *Mahupelo* paras 56-57 read with para 82 regarding the essential question of what changed in the State's case.

[42] The court then concluded that although the criminal court found that there was insufficient evidence to secure a conviction for the purpose of criminal law, there was evidence against Mr Mahupelo 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's case.<sup>31</sup>

[43] By the same token here, the respondent made much of the fact that the witnesses did not identify him at the criminal trial. That might well be the case. Even so, as clearly stated in *Mahupelo*, that does not have the automatic consequence that their evidence had to be summarily rejected and, clearly, that is not decisive of the issues at hand.<sup>32</sup> In any event, Mr July explained why that was so. Besides, this court's observations in *Mahupelo* regarding identification finds resonance also here.

[44] During oral argument, counsel for the respondent was at pains to pinpoint evidence demonstrating any disconnect. No explanation whatsoever was given, despite the repeated questions by this court with a view to understand the facts that might have turned up, showing that no crime had actually been committed by the respondent and why the appellants should be held liable for the alternative claim.

[45] Presumably, the disconnect might have been based on the concession by Mr July which, according to the respondent, was critical to his claim, that had the prosecution ticked off the evidence and names of witnesses on its list they could have known that there was no further witnesses to be called after the testimony of Mr Siboli which was completed in November 2005. The respondent submitted that Mr Siboli's

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<sup>31</sup> *Mahupelo* para 85.

<sup>32</sup> *Id* para 83.

evidence did not provide enough information to establish culpatory evidence or reasonable belief on the part of the prosecution. I am unable to find anything magical and decisive of the claim about Mr July's concession particularly in the circumstances of this case.

[46] In any event, Mr July's evidence was that the prosecution had before it witnesses' statements as well as the evidence against the respondent not only establishing that he was part of the conspiracy in the meetings regarding the secession of Caprivi from Namibia through violent means, but also by his conduct of recruiting people to join in that enterprise; and transporting them to Botswana for training and providing funding. He said that in that sense the common purpose doctrine was met at both conspiracy and individual conduct levels against the respondent. The belief on the part of the prosecution on the probable guilt of the respondent was thus plausible.

[47] Clearly, the respondent's argument regarding the concession disregards the information in the witnesses' statements (including that of Mr Siboli) which implicated him. Indeed, the fact that Mr Siboli never mentioned his name at the hearing does not itself 'train smash' the veracity of his entire statement and of the testimonies of other witnesses who implicated the respondent.<sup>33</sup> There is no reasonable basis for the contention that the witnesses' statements were fabricated or for drawing of any inference. The contention also disregards the fact that the respondent was charged,

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<sup>33</sup> See *Mahupelo* para 92.

together with other 122 accused persons, with common purpose or with conspiracy to commit high treason.

[48] Unquestionably, it is commonplace in criminal trials that, where accused persons are charged with common purpose or conspiracy, the evidence given against particular accused persons is imputable against the other accused.<sup>34</sup> Furthermore, as will be shown later, the approach adopted and standard applied by the court *a quo* and supported by the respondent in relation to the alternative claim are legally flawed.

[49] The respondent argued that the evidence did not provide enough information or was inadequate to establish culpatory evidence. He submitted that the alleged honest belief by the second appellant and the prosecutorial team lacked bases. It is not insignificant that the respondent did not appeal the High Court's decision regarding the main claims. The upshot of this, in my view, is that the respondent accepted as correct (a) the conclusion that on the facts there were no sound reasons advanced by him as to why the prosecution team had to disbelieve the statements under oath, (b) that there was a reasonable and probable cause for the prosecution and (c) that he failed to prove on a balance of probabilities that the second appellant acted with malice or improper motive in initiating the prosecution or that the second appellant instigated the proceedings with the aim to injure him. To this end, one wonders how the same facts giving rise to such findings could not have established a reasonable and probable cause for the continuation of the prosecution where many accused persons conspired to commit a serious crime of high treason. In my view, the

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<sup>34</sup> See *S v Lubaxa* 2001 (4) SA 1251 (SCA) (*Lubaxa*) and *State v Banda & others* 1990 (3) SA 466 quoted with approval in Namibian and South African case law.

appeal stands to succeed on the High Court's findings on the main claims alone to which there is no cross-appeal.

[50] The evidence of Mr July, which remained unchallenged, was revealing. He said that the decision to prosecute the respondent was based on the witnesses' statements implicating the respondent and made under oath. Also based on the available evidence, he testified, the prosecution believed that the respondent had committed the offence on which he was indicted by the State.

[51] The fact that the respondent was not a rebel captured during the military engagement with the security forces nor pointed out by the rebels and that his name did not appear on the deployment list, as submitted on his behalf, is immaterial. It is correct that the allegations in the statements implicated the respondent as a party to a conspiracy to commit the crimes cited in the indictment. By his conduct, if the statements are true, he associated himself with the criminal design of all the other co-perpetrators (about 122 accused persons arraigned on 278 charges) in the attacks on 2 August 1999. Even though there was no evidence directly placing the respondent at any of the scenes on the date of the attacks, his conduct would reasonably lead any ordinary prudent and cautious person in the position of the prosecution team to believe that he committed the indicted offence.

[52] The above sentiments are fortified by the evidence of Mr July who testified that the:



'Acts of the rebels who participated in the unlawful attacks could in our opinion be imputed to the [respondent] based on the common design and his contribution to the attempt to overthrow the [S]tate in Caprivi. [Respondent] participated in the conspiracy and played an active role. He was aware of the formation of CLA and associated himself with a common purpose to attack installations to government institutions in Katima Mulilo. The evidence against the [respondent] also shows that he failed when the conspiracy came to his knowledge to report the information to the authorities that there was a conspiracy underway to overthrow the State by violent means, by the Caprivi Liberation Army and failed to take steps to stop it from occurring. . . '

[53] The above testimony remained unchallenged and no competing evidence was tendered. Once this belief was held, as Mr July testified, the respondent ought to have failed even on the alternative claim.

[54] The approach adopted by the High Court in following a standard relevant in criminal trials, which approach was followed by the respondent in opposing this appeal as shown below, was demonstrably erroneous. A few examples are illustrative: The court said that the failure to regularly assess the evidence caused the respondent to be detained for a further five years after the last witness testified and that that failure caused a perversion of the process of the criminal justice system.<sup>35</sup> Despite the 'gaps in the State's case' and that when 'the court refused to allow further statements to be obtained, [the second appellant and her prosecutorial team] still persisted to oppose an application in term of s 174 of the CPA. . . apparently on the off chance that he (respondent) could be implicated by the co-accused persons'.<sup>36</sup> The court made the following observations:

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<sup>35</sup> High Court judgment para 97.

<sup>36</sup>*Id* para 92.

'Mr Siboli, the final witness who testified in respect of the [respondent] completed his evidence on 17 November 2005. Hereafter the [respondent] remained in detention for a further five years *before the evidence against all the accused was evaluated in November 2010 prior to the closing of the State's case*. This was in spite of the fact that the State led all the witnesses at their disposal in respect of the [respondent, which was *not enough* to make out a prima facie case which required the [respondent] to answer.'<sup>37</sup> (Emphasis added.)

[55] Following the same approach and wrong standard the respondent premised his case, to borrow his words, on the lack of 'adequate', 'sufficient', 'enough', 'culpatory' information and evidence 'to convict' the respondent on all the charges they had proffered against him'. Relying on *State v Mtshiza*<sup>38</sup> – a decision of the South African Appellate Division in a criminal appeal against the sentence – the respondent submitted that *dolus eventualis* was present because the prosecution was reckless of whether injury could ensue given that there was no sufficient evidence to convict him. He argued that the defects in the witnesses' statements– which could render their evidence improbable, inconclusive, and hearsay – could make it impossible for the prosecution to plead its case. Undoubtedly and at the risk of repetition, the approach adopted and the test followed are legally untenable for the purpose of establishing malicious continuation of the prosecution.

[56] In *Mahupelo* this court referred to trite principles and considerations applicable in a criminal trial to secure a conviction of an accused person which are different from those that are relevant in the consideration of the question of reasonable and probable cause in a malicious prosecution claim. It correctly said that the court in

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<sup>37</sup>*Id* para 94.

<sup>38</sup>1970 (3) SA 747 (A) at 752.

relation to the latter, is not concerned with the question of whether the respondent was guilty of the offence with which he stood charged because that is the concern of the criminal court. The legal question, this court held, in para 87 is:

‘. . . can it be said that the PG subjectively and objectively lacked reasonable and probable cause to continue with the prosecution and that notwithstanding the realisation the PG continued to act, reckless as to the consequence of her conduct? In my respectful view, that question should have been answered in the negative.’

[57] More aptly and instructive this court remarked:

‘[69] Hawkins J pointed out in *Hicks v Faulkner* . . . 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. 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. 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 against the respondent as if it was evaluating the evidence in a criminal trial.’

These remarks, which evidently find application *in casu*, are endorsed.

[58] The fact that the respondent had been discharged is, for the purpose of determining whether the second appellant and her team subjectively and objectively lacked reasonable and probable cause to continue with the prosecution, beside the

point. The South African Supreme Court of Appeal held, in *Lubaxa*,<sup>39</sup> that the discharge is not a consideration necessarily arising where the prosecution case against one accused might be supplemented by evidence of a co-accused. The respondent's argument that there was no sufficient evidence available in the docket to sustain a conviction and that the police and/or prosecutors could thus not have formulated and formed any honest belief in the guilt of the respondent is, in the circumstances, therefore legally and factually flawed.

[59] The malice element or that the prosecution of the claim was actuated by an improper motive requires proof of an improper purpose so as to differentiate between prosecutorial conduct that is not actionable and that which is. The High Court held that there was no malice on the part of the second appellant when initiating the prosecution. In spite of this conclusion, the court decided otherwise in relation to the alternative claim for continuation with the prosecution. This *volte-face* is startling, to say the least, given the information in the sworn statements coupled with the evidence tendered in court. As I understand the court's reasoning, it based this conclusion on the fact that the respondent was not identified at the trial; that the last witness, Mr Siboli, completed his testimony on 17 November 2005; that there was failure on the part of the prosecution to do an assessment of the case on a regular basis and on the concession by Mr July regarding gaps in the State's case. The court opined that the said 'failure caused a perversion of the process of criminal justice which satisfied the element of malice'.<sup>40</sup>

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<sup>39</sup> *Lubaxa* paras 15 and 20.

<sup>40</sup> High Court judgment para 98.

[60] The respondent supported the High Court's reasoning. He submitted that the concession by Mr July was indicative of an intention to injure him or of malice. He implored us to draw an inference that, given the said absence of enough, sufficient and culpatory evidence to continue with the prosecution it was motivated by malice or improper motive.

[61] It needs to be stressed that when the respondent was discharged in terms of s 174 the criminal trial was in progress because the other accused persons who had been indicted together with the respondent had not testified. The appellants acquiesced with the court *a quo*'s findings that the prosecution did not act with malice in the initiation of the prosecution. I am unable to find any convincing reason indicative of malice on the part of the second appellant and her prosecutorial team that could have unequivocally tilted the balance in favour of the respondent on this aspect. At the very least the court *a quo* should, in the circumstances, have found that the said failure to evaluate the evidence regularly and identify the respondent constituted only indications of simple bad judgment and was not indicative of malice. Consequently, neither the court *a quo* nor the respondent have, in my view, pointed to an improper motive to injure the respondent or malice on the part of the prosecution.

[62] In light of the fundamental flaws *a quo* this court is entitled, on the principles of *Dhlumayo*, to interfere with the portion of the decision *a quo* which is the subject of this appeal. Needless to say, the appeal should be upheld also on the decision *a quo* regarding the issue of costs as there was clearly no basis for same because the respondent was legally represented on instructions of the Director of Legal Aid. This

court, in *Mahupelo*,<sup>41</sup> correctly explained why the High Court in that matter ought not to have awarded costs against the appellants. Likewise, there should be no order as to costs against the respondent in this case.

### Constitutional claim

[63] The respondent's claims included also a further alternative claim for the alleged violations of various constitutional rights and sought to recover constitutional damages in the sum of N\$22 057 520 based, among others, on the infringement of the respondent's freedom of movement in terms of Art 21 of the Constitution. In the written submissions the respondent argued that the prosecutors had constitutional obligations in terms of the Constitution. In light of its findings regarding the alternative claim for malicious continuation of the prosecution the High Court considered it unnecessary to pronounce on the further claim involving the alleged infringement of the respondent's constitutional rights.<sup>42</sup> For the same reasons pronounced in *Mahupelo*,<sup>43</sup> regarding the determination of the constitutional claim, I would remit the matter to the High Court.

### Order

[64] In the event, the following order is made:

- (a) The appeal is upheld in part.

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<sup>41</sup> Para 100.

<sup>42</sup> High Court judgment para 101.

<sup>43</sup> Paras 96-99.

- (b) The portions of the order of the court *a quo* upholding the respondent's alternative claim with costs based on malicious continuation of the prosecution without reasonable and probable cause are set aside and substituted with the following order:
- (i) The plaintiff's alternative claim based on malicious continuation of prosecution without reasonable and probable cause is dismissed.'
- (c) The question regarding the constitutional claim is referred back to the High Court for determination in accordance with case management rules before any Judge in the event that the Judge who presided over the matter in the High Court is no longer available.
- (d) There is no order as to costs.

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**NKABINDE AJA**

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**SHIVUTE CJ**

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**MOKGORO AJA**



## APPEARANCES

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