

REPORTABLE

CASE NO: SA 20/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF SAFETY AND SECURITY

First Appellant

PROSECUTOR-GENERAL

Second Appellant

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Third Appellant

and

AGGREY SIMASIKU MWAMBA

Respondent

Coram: SHIVUTE CJ, MOKGORO AJA and NKABINDE AJA

Heard: 2 October 2019

Delivered: 9 September 2021

Summary: The respondent Mr Aggrey Simasiku Mwamba, together with 125 accused persons were arrested and charged in the High Court of Namibia, with the crimes of high treason, murder, attempted murder and several other crimes and offences. The trial of the accused was a sequel to a violent attempt to secede the then Caprivi region, now the Zambezi, from the Republic of Namibia. As a result of this violent attack, property was destroyed, several people were killed and others injured.

After a protracted criminal trial, the respondent was found not guilty and discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977. Following his acquittal, the respondent sued the appellants for malicious prosecution and in the alternative, malicious continuation of his prosecution without reasonable and probable cause. The respondent also sued for constitutional damages in the event that the claim for malicious prosecution or the alternative failed.

The court *a quo* dismissed the respondent's main claim based on malicious prosecution but found in his favour against the second appellant (the Prosecutor-General) on the alternative claim based on malicious continuation of the prosecution without reasonable and probable cause. The court did not decide the constitutional damages claim as it already found in favour of the respondent on his alternative.

Aggrieved by this decision, the appellants appealed against the court's findings that the respondent on a balance of probabilities, proved the absence of reasonable and probable cause and the malicious continuation of his prosecution. The respondent, also dissatisfied with the court's decision dismissing his claim for malicious prosecution, noted a cross-appeal against that decision.

Held, that the High Court was correct in its findings that on a balance of probabilities the respondent failed to show that the Prosecutor-General lacked reasonable and probable cause and had acted with malice in initiating the prosecution against the respondent.

Held, that the evaluation of the evidence as a whole showed that the Prosecutor-General had a reasonable and probable cause to initiate the prosecution against the respondent. The cross-appeal is thus dismissed.

Held, further that the court *a quo* misdirected itself by conflating the test for successful claim based on malicious prosecution with that applied in criminal matters to establish the guilt or otherwise of an accused person.

Held, that upon evaluating the evidence and information at the disposal of the prosecution authority in its entirety, the Prosecutor-General had reasonable and probable cause to maintain the prosecution of the respondent until his discharge by the criminal court.

Held, that as to the constitutional damages claim, the court has declined to determine that issue as a court of first and last instance.

The appeal succeeds.

APPEAL JUDGMENT

MOKGORO AJA (SHIVUTE CJ and NKABINDE AJA concurring):

[1] This judgment is being delivered almost two years after the hearing in this matter. In the context of the principle that justice delayed is justice denied and out of respect for all parties in this matter, including the respondent, Mr Aggrey Simasiku Mwamba and colleagues who sat with me in this case, that I feel a sense of duty to apologise for the delay in the finalisation and delivery of this judgment. I do so with utmost humility. Just as the first draft judgment was in the process of finalisation, the devastating COVID-19 global pandemic, accompanied by the most restrictive government regulations, resulting in the rampant infection and unprecedented demise of family and close friends regrettably impacted one's productivity and progress in the research and writing processes, thus considerably slowing down the finalisation of the judgment. Nevertheless, to the extent that the said impact of the COVID-19 pandemic

could have been better managed at a personal level, one must take responsibility at that particular level.

Introduction

[2] This appeal is one of a number of similar matters, which have previously come before this court at various times since the judgment of this court in *Minister of Safety and Security & others v Mahupelo* 2019 (2) NR 308 (SC) (*Mahupelo*). Those matters, known as the ‘treason trial’ cases arose from the decision and order of the High Court discharging a number of persons who, like the respondent, had been charged with 278 serious charges including high treason, sedition, public violence, murder and attempted murder. The arrest and subsequent trial followed a violent attempt to secede the then Caprivi region, now the Zambezi, from the Republic of Namibia resulting in the death of a number of people. About 379 witnesses testified on behalf of the State during the criminal trial.

[3] Following his discharge, the respondent, like those persons who had been similarly affected proceeded to sue the Minister of Safety and Security (the Minister), the Prosecutor-General (the PG) and the Government of the Republic of Namibia (the Government), who together will be referred to as ‘the appellants’, for malicious prosecution and in the alternative, malicious continuation of his prosecution without reasonable and probable cause. He later withdrew the latter claim against the Minister. The respondent also sued for constitutional damages in the event that the claim for malicious prosecution failed.

[4] The High Court dismissed the main claim against the Minister and the PG but upheld the respondent's alternative claim based on malicious continuation of prosecution without reasonable and probable cause against the PG. The appellants now appeal against the judgment and orders granted in favour of the respondent. The respondent has also noted a cross-appeal against the decision of the court *a quo* dismissing his main claim for malicious prosecution against the Minister and the PG.

Factual Background

[5] *Mahupelo*, being the first of the treason trial cases, exposed fully the general background and facts applicable in all the treason trial cases that followed. As those general facts are equally applicable in this matter there is no need to fully traverse them here and I shall not do so. It would however be necessary to narrate the facts which form the context of the issues in this particular appeal, as they affect only the respondent.

[6] The respondent was arrested by the Namibian Police (the police) on 16 March 2000 following armed attacks on a number of government installations near Katima Mulilo in the Zambezi Region on 2 August 1999 by an entity called Caprivi Liberation Army (the CLA). A number of people were killed as a result of the violent attack and a national state of emergency was declared on the same day. The principal allegation against the respondent was that he was an organiser and/or supporter of the United Democratic Party (UDP), the political wing of the CLA which had mobilized support for the secession of the Caprivi region from the rest of Namibia by violent means.

Specifically, the respondent was alleged to have influenced people to take up arms, thereby participating in the planned secession.

[7] Having been prosecuted together with 125 other co-accused, the respondent was acquitted of all charges on 11 February 2013 in terms of s 174 of the Criminal Procedure Act 51 of 1977 as amended (CPA).

In the High Court

[8] Following his acquittal, the respondent instituted a civil claim against the Minister, the PG and the Government. Here, the parties had agreed that the questions of liability and quantum would be separated. The High Court thus proceeded to decide only the question of liability.

[9] In his particulars of claim, the respondent pleaded that he was arrested by the police on false charges and without a warrant. Based on these false charges, he contended, the police wrongfully and maliciously set in motion false legal proceedings against him, claiming that he was guilty of the serious crimes he had been charged with. He further claimed that so far as it concerns the charges, there is no reasonable and/or probable cause for his arrest.

[10] Similarly, he pleaded an absence of reasonable and probable cause for his prosecution, contending that the PG or her employees had no reasonable belief of his guilt on the charges he was being prosecuted for. For that reason, the initiation of the prosecution and its continuation, he contended, were malicious. A further claim

against the PG is that the continuation of the respondent's prosecution from 8 March 2006 or 18 October 2011 had no probable cause and should have been discontinued in accordance with s 6(b) of the CPA or within reasonable time thereafter. Alternatively, the PG should have reasonably closed the State's case and moved for his discharge and even caused his release from prosecution. Liability here is therefore imputed on both the Minister and the PG.

[11] Additionally, in the alternative, the respondent claimed that on the basis of the facts of his case, he suffered wrongful, unlawful and negligent violation of his constitutional rights to a trial within a reasonable time under Art 12(1)(b) of the Namibian Constitution as well as the infringement of his constitutional rights in terms of Arts 7, 8, 11, 13, 16, 18 and 21 of the Constitution.

[12] The plea of the Minister was essentially a denial that he or members of the police set the legal proceedings against the respondent in motion. In the alternative, the Minister pleaded, if the court finds that the police did instigate the proceedings against him, they will deny that they had laid false charges, had given false evidence and/or had acted maliciously. The Minister also pleaded that the actions of the police were limited in that their role was merely to investigate the attacks on 2 August 1999 and the decision to prosecute was solely that of the PG. Here, it is to be noted, the PG makes a conscious determination whether to prosecute or not, notwithstanding an arrest. The Minister also pleaded that the evidence the police placed before the PG was sufficient for them to hold a reasonable belief that the respondent had committed the said offences contained in the indictment.

[13] Concerning the PG and based on the available evidence, including that of the witnesses and other evidence on the attack, the plea was that there were reasonable grounds to believe that *prima facie*, the respondent had committed the said offences. Alternatively, the PG pleaded, based on the doctrine of common purpose and conspiracy to commit the particular offences, the respondent had carried responsibility for the commission of the said offences. The PG further pleaded that neither she nor her employees could have known whether all the evidence that could implicate the respondent had been presented and all the witnesses that could implicate the respondent had testified.

[14] For that reason, the PG also contended, she could not discontinue the prosecution under s 6(b) of the CPA on 8 March 2006 or 18 October 2011 or any time thereafter, other than at the close of the State's case on 2 February 2012. Besides, she or her employees could not discontinue as they had a belief that there was sufficient evidence for a conviction on the charges preferred. The evidence already presented, they believed, had *prima facie* established common purpose or conspiracy to overthrow the Government, thus creating the belief that there was a possibility that the State's case could still be strengthened during the course of the prosecution or the defence. Discontinuing posed a risk and could have prejudiced the State's case. Further, so went the contention, the complexity of the case itself, conducting it as well as the large number of accused persons at the time made the determination of stopping the prosecution or closing the State's case humanly impossible.

[15] As to the constitutional damages claim, the PG contended that the respondent had a remedy in terms of Art 12(1)(b) of the Constitution which he could have invoked and could himself have moved for his release from prosecution. That option, contended the PG, is not only actionable in a delictual context, but could also be a basis to argue for release from prosecution if a trial is not completed within a reasonable time. In view of all the above, argued the appellants, neither the Minister nor the PG acted wrongfully or unlawfully by continuing with the prosecution from 30 June 2009, as they could not have known that all the witnesses and all the evidence that could implicate the respondent had been heard.

[16] The respondent simply denies that he was, at the time of his arrest, involved in any of the secessionist activities the appellants accuse him of. He also denies going to Botswana between the years 1998 and 1999 as alleged. However, he admitted that on his arrest on 16 March 2000, he was employed as a taxi driver and indeed drove a white Citi Golf with registration number N26686W, owned by a certain Steve Masilani.

[17] On the day of his arrest, he testified, he had picked up a passenger, one Richwell Mahupelo at the taxi station in Katima Mulilo. On the way to drop him off he picked up another passenger, who he later came to know as Bennet Matuso and proceeded towards the Lianshulu turnoff. Matuso was carrying a bag, the contents of which he did not know. As the respondent turned onto Lianshulu Road, he was stopped by members of the Namibian Defence Force (NDF) and the Special Fields Force who ordered him and his passengers out of the car.

[18] The respondent further testified that he was tied with a rope around his legs and hands and blindfolded with the t-shirt he was wearing. Conversations between the members of the NDF and his passengers, which he could not follow as they were speaking in the Oshiwambo language, ensued. He was subsequently arrested, detained and indicted on 278 charges including high treason and sedition.

[19] The respondent was later informed of an AK-47 firearm that was recovered from his taxi, which he denied having had any knowledge of. He also denied any involvement or participation in the commission of any of the charges in his indictment. However, the respondent conceded that a number of witnesses, including those who did not testify during his criminal trial, had made reference to him with respect to one or other of his activities, especially those that did not implicate his participation in the insurrection.

[20] Although they did not testify at his criminal trial, the following witnesses mentioned him in their statements: Dominic Malosia Kandela who corroborated the evidence that the respondent had been a taxi driver at the time of his arrest, also confirming that he was his brother. Fenual Kandela Mwamba, the respondent's elder brother, testified that their brother, Dominic Mwamba, had told him that the respondent had gone missing in the year 2000 and they did not hear or see him attending any meeting with the objective of seceding Caprivi from the rest of Namibia.

[21] Then there was Nkunga Edina Chitimbo, the wife to Mr Masilani who testified that her husband had given the said vehicle to the respondent to drive as a taxi so he

could raise an income. She also confirmed that she did not hear of or see the respondent supporting the secessionist movement. Malilo Kenneth Tubakunge, the younger brother to Richwell Mahupelo, stated that the latter related to the respondent as family. However, Mushabati Christopher Nzeko, in his statement dated 18 January 2002 stated in relation to the respondent that he attended a meeting at Liselo, addressed by Mr Muyongo in 1998, the purpose of which was to secede Caprivi from Namibia. Mr Nzeko, in his earlier statements made no mention of the respondent's attendance at those meetings.

[22] Vincent Saini also made mention of the respondent, stating that when he was repatriated from Botswana he met with the respondent who accused him of being a spy for the Government, and threatened to kill him should he ever find him by himself. Then there was Joice Kakula, his former spouse who at the time of his arrest had been married to the respondent but had divorced him during his detention. She confirmed that the respondent had been approached by Steve Masilani to drive and use his vehicle as a taxi.

[23] Major General Shali mentioned that information had been received about West Caprivi movements and NDF members who were on patrol. They had stopped a white Citi Golf driven by the respondent carrying two passengers, Bennett Matuso and Richwell Mahupelo. On searching the vehicle, the NDF members found an AK-47 assault rifle which Matuso acknowledged belonged to him.

[24] The respondent had also been mentioned in evidence by witnesses who testified during his criminal trial. Steve Likutumusu Masilani confirmed that he had appointed the respondent as a taxi driver, and that he drove the said white Citi Golf with registration number N26686W. Another witness, Given Earthquake Tubaleye had made three statements. In his statement of 3 May 2002, he stated that he knew the respondent who had twice transported maize meal collected at Mahupelo's village to the rebels. He also stated that a girl with the surname 'Mikiti' tried to convince him to go with her to Botswana to join the movement for the secession of the Caprivi and that he would be transported by the respondent. Tubaleye also stated that he was aware that the respondent was transporting people to the border between Botswana and Namibia. When Tubaleye testified during the respondent's criminal trial, he repeated that testimony but could not identify the respondent.

[25] Finally, Sinjabata Hobby Habaini stated that he was approached by Richwell Mahupelo to assist in loading maize meal into a white Volkswagen Golf, recognizing the driver as the respondent. Subsequent to loading the maize meal the respondent gave him a lift to Itobo village. On their way there, Mahupelo and the respondent attempted to convince him to join the Caprivi secessionist movement. He testified that he was well acquainted with the respondent. However, when asked to identify the people he mentioned in his statements including the respondent, he was unable to do so.

[26] Concerning the prosecution process, Mr John Walters, who served as the Ombudsman for Namibia at the time of his testimony but was in private practice at the

time of the Caprivi attacks, had been appointed acting PG of Namibia from 1 December 2002 to the end of December 2003. He became the consultant to the prosecution team from 1 January 2004 to 30 June 2004. Upon his appointment, due to a number of resignations by members of the previous team, he assembled a new prosecutorial team which included the two remaining members of the original team.

[27] He had instructed the prosecution team to evaluate the evidence against the accused persons and advise him as to the sufficiency of the evidence to proceed against them. He therefore relied on their professional assessment which he trusted.

[28] Mr Walters testified that he had assembled a team of ethical and highly professional prosecutors who discharged their responsibilities with utmost care, diligence and skill. They were honest, objective and harboured no bias against the accused persons.

[29] A particular feature in this matter, the High Court had noted, is that there were no witnesses who gave evidence for the respondent before that court. The respondent's case essentially was that both the Minister and the PG subjected him to malicious prosecution without probable and reasonable cause from his arrest to the date of his discharge. He argued in the alternative that even if there had been reasonable cause, that reasonable cause did not exist beyond November 2011 for the PG to continue with the prosecution. The failure to terminate his prosecution at that stage in terms of s 6(b) of the CPA thus rendered the prosecution malicious. The contention that the respondent should have invoked s 174 of the CPA or Art 12(1)(b)

of the Constitution during his trial was met with the argument that as *dominus litis*, the prosecutor is the one who had the duty to submit to the trial court that there was no evidence implicating him and thus should have refrained from proceeding with the prosecution.

[30] Further argument the respondent advanced in taking this stance was that his arrest was unlawful because he had been arrested without a warrant and detained unlawfully from 16 March 2000 to 2 May 2000. He contended that at the end of March 2006 or October 2011, the PG should have known that there would be no further witnesses who could further implicate him. Despite that knowledge, the PG continued to prosecute him without a proper basis and did so beyond November 2011 when the last bit of evidence which could notionally have implicated him had already been tendered.

[31] The appellants argued that the allegation against the respondent was that he associated himself with the secessionists who went to Botswana. They maintained that on the assumption that the allegations were true the prosecution against the respondent was initiated and continued with a reasonable and probable cause. With reference to *Hicks v Faulkner*,¹ the court was urged to distinguish between two questions: whether there is probable and reasonable cause and whether there is actual guilt. Ultimately, what must be established is that, if the allegations were true they would give rise to a reasonable and *bona fide* belief that the respondent was guilty, thus justifying the prosecution. In order to decide to prosecute, argued the

1 [1878] 8 QBD 167.

appellants, the question was not whether the allegations were true. Thus, it was not essential to determine the truth of every allegation.

[32] The appellants conceded that, in terms of the common law where a prosecution is initiated and might be based on reasonable and probable cause, continuing with the prosecution when reasonable and probable cause no longer exists will give rise to malicious prosecution. The appellants nevertheless contended that the *onus* lies on the respondent to prove on a balance of probabilities that continuing with the prosecution was done with the intention to injure him. The appellants argued that an acquittal in the circumstances did not mean that there was a lack of reasonable and probable cause.

[33] The court held that there was no evidence that the police did more than simply investigate the matter as expected of them. So too was there no evidence that the Minister had instigated the prosecution. The court further held that the prosecuting authority, having relied on the evidence of witnesses in their sworn statements submitted by the police, had no reason to doubt the evidence. The court concluded that the respondent had not shown on a balance of probabilities that the PG was malicious in initiating the prosecution or had prosecuted the respondent with the intention to injure him. Accordingly, the principal claim against the Minister and the PG was dismissed.

[34] The court, however, upheld the respondent's alternative claim of malicious continuation of prosecution without reasonable and probable cause against the PG.

The respondent obtained a costs order against the Minister, the PG and the Government jointly and severally. Having separated the question of quantum from that of liability, the court referred the issue of quantum for case management.

[35] Aggrieved by the decision of the High Court, the Minister noted an appeal only against the costs order of the High Court in case no. I 105/2014 of 23 March 2018 and the whole judgment handed down by that court on 12 April 2018. The PG and Government appealed against only certain parts of the High Court orders in Case no. I 105/2014 of 23 March 2018. They however also appealed against the whole judgment handed down on 12 April 2018. The respondent also noted a cross-appeal against the court's decision dismissing his claim for malicious prosecution.

The appeal in this court

[36] Relying on the following grounds of appeal, the appellants contend as to the facts, that when the High Court found that there had been no inculpatory evidence led against the respondent at his criminal trial, it conflated the question whether inculpatory evidence had been led when the respondent was acquitted at the criminal trial with the issue whether there existed reasonable and probable cause for the prosecution to have continued with the prosecution in the civil action.

[37] The PG also challenged the court's findings that she lacked an honest belief in the guilt of the respondent and that there was no evidence that the written statements made under oath referred to the respondent. This was notwithstanding the fact that the court had already accepted that the reference was to the respondent when it

dismissed his earlier claim of malicious institution of criminal proceedings. Besides, it was contended, the respondent himself had conceded that those references in the statements of the various witnesses were to him.

[38] The PG furthermore contended that legally, the court should not have found that she was incorrect when she continued with the prosecution by relying on the possibility that the respondent's co-accused might still implicate him. The PG also contended that it was incorrect for the court below to have found that she maintained the prosecution without reasonable and probable cause and further opposing the discharging of the respondent in the hope that the defence case could supplement the State's case.

[39] The PG appealed the High Court's finding that on a balance of probabilities the respondent had made out a case on his alternative claim of malicious continuation of prosecution, thus holding the Government liable for the actions of the prosecutorial authority. The appellants sought an order setting aside the order of the High Court and replacing it with a dismissal of the respondent's alternative claim of malicious continuation of his prosecution.

The cross-appeal

The respondent's submissions

[40] In this cross-appeal, the respondent will for convenience also be referred to as the respondent. Other specific aspects to note here are that factual and legal issues in the respondent's opposition to the appellants' appeal and his cross-appeal are

interrelated. Further, a main feature, as mentioned by the High Court, is the absence of evidence challenging the main aspects of the respondent's case in the High Court. It follows, so the High Court reasoned, that those aspects of the respondent's case remain unchallenged by the appellants. For that reason, the High Court held that the unchallenged aspects of the respondent's case make common cause, a feature the respondent relies on heavily in his cross-appeal.

[41] The respondent had noted an appeal to this court against only certain parts of the judgment and orders of the High Court. However, on 15 May 2018 he filed an amended notice of cross-appeal. Specifically, he contends in his amended notice that he additionally appeals against the dismissal of his main claim of malicious initiation of criminal proceedings. He retained his appeal against the lack of clarity in paragraphs 95(B) and 95(C) read with 91 of the High Court judgment as to the date from which the continuation of the prosecution was wrongful and malicious. His argument was that the court should have specifically ordered that the continuation of the prosecution was malicious as from 8 March 2006. Alternatively, so he submitted, the court should have made clear the date from which the continuation of proceedings against him became malicious.

[42] The respondent also argued that by dismissing his claim for wrongful arrest and detention rather than upholding it and holding that the wrongful arrest and detention continued from 2 May 2000, the High Court indirectly dismissed his unlawful arrest claim against which he appeals. Finally, he appeals against the High Court's

costs order, contending that the court should have ordered costs in his favour for two instead of only one instructed counsel.

[43] The specific parts of the judgment and orders were appealed against on the basis that, in holding that he did not prove on a balance of probabilities that the PG acted with malice in the initiation of the prosecution against him or did so with the intention to injure him, the court did not give consideration to the undisputed or common cause evidence before it. That, contends the respondent, notwithstanding that the court recognized the common cause evidence as a particular feature in the matter. For that reason, he argues, his evidence remains uncontroverted and therefore undisputed.

[44] The respondent further contends that he had handed in and dealt with statements placed before the PG by the police and on which reliance was placed to initiate the lengthy criminal proceedings where the statements did not establish a *prima facie* case against him at all. In particular, the statements of Mr Habaini which did not implicate the respondent in transporting food to the rebels could not have been the basis for the High Court to conclude that the PG had a reasonable belief that the respondent was guilty of any of the charges laid against him. It is for that reason he contends that the High Court misdirected itself when deciding that the institution of his prosecution was without malice and that there was reasonable and probable cause in the initiation of criminal proceedings against him.

[45] The respondent further contends that as for the statements the High Court relied upon, none established a *prima facie* case in any of the charges against him. In

particular, the court misdirected itself with regard to the statements of the witnesses it dealt with in its judgment and particularly those who confirmed the uncontested or common cause evidence that he was a taxi driver as per the evidence of Nkuna Edina Chitimbo, wife of Masilani, who confirmed that the respondent was handed their vehicle to use as a taxi in order to make an income.

[46] He further argues that the mere fact that he might have attended meetings whose purpose was to secede Caprivi region from the rest of Namibia could not have been a ground for a belief that *prima facie*, he was guilty of a crime. Further, his contention went, Vincent Saini's statement accusing him of threatening to kill him should he find him alone because he was a spy for the Government did not implicate him in the commission of any of the crimes for which he was indicted.

[47] He further argues that the High Court had misconstrued the context of Tubaleye's statement when he said he knew the respondent who had twice transported food collected at Mahupelo's village to the rebels. The same Tubaleye added that a girl who goes by the surname 'Mikiti' had attempted to persuade him to leave with her to Botswana to join others in furtherance of the secession of the region. The girl in question informed him that they would be transported by Mwamba. He himself was aware that Mwamba was transporting people to the Botswana/Namibian border. The respondent contended that the very Tubaleye who gave the same testimony at the criminal trial could not identify the persons he made reference to in his statement and was unable to identify the respondent. Thus, the respondent submitted, Tubaleye's statement does not show that the respondent transported food

to the rebels or that the respondent had the intention to do so or knew who the food was meant for. Likewise, Tubaleye's statement is no evidence that the respondent knew that any person he transported was a rebel or involved in illegal activity and as such, his statement was no basis for a reasonable belief that the respondent was *prima facie* guilty of any of the crimes he had been charged with.

[48] It was submitted that the statement by Major-General Shali was based on hearsay as it could in any event not have been the basis for any reasonable belief that the respondent in any way knew that the passenger he was transporting in the taxi had an AK-47 assault rifle in his bag. The respondent contended that the PG had no evidence attributing such knowledge to him as it was confirmed by the warning statement which was in possession of the PG. The warning statement, he further submitted, had been taken by peace officers who made written observations showing that respondent clearly had no knowledge that he had conveyed an alleged secessionist in the taxi he was driving. The respondent also contended that the statement of Mr Habaini which failed to implicate him could similarly not have constituted a reasonable belief that he was guilty of any of the crimes he was charged with.

[49] For the above reasons, contended the respondent, the High Court misdirected itself by concluding that the police had information that he had influenced people to take up arms to secede the Caprivi region from Namibia. The PG had no information to that effect, he submitted. Thus the trial court erred in its conclusions that there was *prima facie* evidence that the respondent had committed the crimes he had been

charged with. It was further argued that the court *a quo* misdirected itself in finding that the respondent knew Matuso. Matuso had been arrested with the respondent when the respondent transported him for a fee. The court, so the respondent further contended, was also wrong in concluding that there was reasonable and probable cause for the PG to institute or initiate prosecution proceedings against him.

[50] The trial court made a crucial finding that there was nothing before it to show that it was not possible to separate proceedings or to stop proceedings against him. The respondent contended that the court was in error by failing to take this finding into account when deciding the respondent's claim for constitutional damages in respect of his continued detention and prosecution which carried on for some 13 years.

[51] The respondent further argued that the court erred by not taking into account that his arrest was unlawful and that he was detained for over two months without appearing before a magistrate as required under Art 11(3) of the Constitution and that his previous claim for wrongful arrest which had been settled related only to the period up to 2 May 2000. His arrest thus remained unlawful beyond that date, evidence which remained unchallenged but which the High Court failed to take into account.

[52] The court, so the respondent furthermore contended, also misdirected itself by not considering the common cause facts that he was arrested on 16 March 2000; that he was unlawfully detained for a further period of almost 48 days without appearing

before a magistrate; that there was no inquiry into the lawfulness of his arrest at his first court appearance, and that he was further remanded in custody. The trite principle, according to the respondent, is that an arrest is *prima facie* wrongful and is not necessary to prove it in any pleadings. It was therefore for the appellants to allege and/or prove the lawfulness of his arrest and detention, which they failed to do. That the court did not address these aspects of the case, so the respondent contended, amounts to misdirection.

[53] The respondent further argued that it is misdirection on the part of the court *a quo* for not finding that his continued prosecution beyond 8 March 2006 was malicious. The order the court should have made, the respondent argued, is that the continuation of his prosecution became malicious as at 8 March 2006 which must be inferred from the available evidence.

[54] By not ordering costs on the basis of one instructing and two instructed legal practitioners, the respondent submitted, the court continued to misdirect itself. As earlier noted, the claim for constitutional damages was not decided by the High Court. As such that issue is not before this court and will therefore not be decided here.

The appellants' arguments in the cross-appeal

[55] For the respondent to succeed in his cross-appeal against the High Court findings of malicious initiation of his prosecution, the appellants contended that he must in addition, show that the prosecution was initiated with an intention to injure him, distinguishing that requirement from the requirement of the lack of reasonable

and probable cause. Citing *Rudolph & others v Minister of Safety and Security & another*,² the appellants argued that the intention to injure, includes the consciousness that the prosecution is wrongful and pursued with an improper motive. As was held in *Mahupelo*, they further contended, intention to injure must be shown by facts in each instance where malice or improper motive point towards such an intention.

[56] The intention to injure, submitted the appellants, means that the PG would have aimed at prosecuting the respondent well aware that reasonable grounds for the prosecution were even possibly non-existent, thus infringing his personality and making the prosecution possibly wrongful. In other words, there must have been awareness of the possible wrongfulness of the prosecution. However, where reasonable grounds for the prosecution are lacking, but the PG honestly believed that the respondent was guilty, the PG would be absolved. In that case, contended the appellants, the awareness of wrongfulness which is the second element of intention to injure will be absent. The appellants adopted this line of reasoning with reference to *Neethling's Law of Personality*.³ Thus, concluded the appellants, if the PG had mistakenly believed in the guilt of the respondent, she would lack the *animus iniuriandi*.

[57] The PG in opposing the cross-appeal further cited the judgment of *Minister of Justice and Correctional Development v Moleko*,⁴ where the court held that in a

2 2009 (5) SA 94 (SCA) para 18.

3 Neethling J *et al* . . . *Neethling's Law of Personality* (2 ed) at 181.

4 [2008] 3 All SA 47 (SCA).

malicious prosecution claim the prosecution must at least have the intention in the form of *dolus eventualis* in that the defendant must have foreseen the possibility that they were acting wrongfully, but even so, continued to initiate the prosecution, reckless as to the consequences of their action, the intention would have been shown. Negligence, even gross negligence for that matter, the PG contended, was not sufficient to establish the intention to injure, thus making the initiation of the prosecution malicious.

[58] In the final analysis, so the argument went, the burden of proof is on the respondent to show that the PG lacked reasonable and probable cause and that she was malicious in instituting the prosecution or that she had *animus iniuriandi* or the intention to injure the respondent in initiating the prosecution against him.

The applicable law and the application of the law to the facts

[59] As earlier indicated, in view of the similarities of the legal arguments made by the appellants in the appeal in this court and those made in the *Mahupelo* appeal, the relevant legal principles applied to the arguments in the latter matter shall be applied to the present matter in determining the issues raised in the cross-appeal as well as those raised by the appellants in the appeal.

[60] Adopting the approach taken by the High Court in *Akuake v Jansen van Rensburg*,⁵ this Court in *Mahupelo* held that in seeking to hold the defendant liable in damages for a claim for malicious prosecution, the onus was upon the plaintiff to

⁵ 2009 (1) NR 403 (HC).

establish that the prosecution was, (a) initiated by the defendant; (b) without reasonable or probable cause; (c) with malice or an indirect and improper motive; (d) terminated in favour of the plaintiff; and (e) resulted in loss or damage to him or her. This court further held that the requirements to succeed in a claim for the continuation of a malicious prosecution are those laid down in *Akuake* matter (except that maintaining the prosecution replaces initiating the prosecution as a requirement).

[61] In the present case, the jurisdictional facts in (a) and (d) as listed in the case of *Akuake* have been met. In light of that, what this court is called upon to decide is whether lack of reasonable and probable cause has been established and whether it has been proved that the prosecution was actuated by malice or improper motive.

[62] It would be convenient to sequentially deal first with the respondent's cross-appeal against the High Court's decision dismissing his claim of the lack of reasonable and probable cause in the initiation of the prosecution. That will be determined before considering the appellants' appeal against the High Court's decision that there was no reasonable and probable cause in the PG having continued with the prosecution, until the respondent's discharge in terms of s 174 of the CPA, which is the main ground of their appeal. Before I proceed to determine the above issues, I find it helpful to firstly set out the constitutional obligations of the PG in the context of the law of malicious prosecution.

[63] The PG derives the power to exercise the discretion whether to prosecute or not (and whether or not to sustain the prosecution) from Art 88(2) of the Constitution.

That discretion, held the court in *Mahupelo*, is central to the power of the PG but must be exercised subject to the Constitution, balancing it with the rights of citizens to be protected against baseless prosecutions. In Namibia, the court further held, the PG and her staff occupy an important position within our constitutional milieu and it is for that reason that Art 88(2) of the Constitution grants to the PG the power to prosecute. The prosecution is subject to the Constitution, protecting the right of an accused person to a fair trial in line with a prosecutor's constitutional obligation to perform the prosecutorial function in terms of the Constitution, a duty held by the court to be sacred.⁶

[64] The court also endorsed the Canadian Supreme Court's approach in *Miazga v Kvello Estate*⁷ where it was held that, based on the constitutional principles governing the office of the Attorney-General (in Namibia, the PG) a 'very high' threshold is set in cases of delictual claims for malicious prosecution against the public prosecutor as opposed to delictual actions against private litigants.⁸ The decision to prosecute or to continue with the prosecution is therefore fundamental to the exercise of the prosecutorial discretion, the court found.⁹ In exercising that discretion a PG fulfils a prosecutorial obligation which enjoys constitutional protection and must be fulfilled without political interference or a court of law second-guessing that decision. Important to note is that the prosecutorial discretion, as was decided in *Mahupelo*, shall be exercised, striking a reasonable balance between the public interests to

6 Mahupelo para 32.

7 [2009] 3 SCR 339.

8 Mahupelo para 34.

9 Mahupelo para 35.

address crime and protecting the rights of an accused person against prosecution notwithstanding the absence of reasonable and probable cause that they might be convicted. The prosecutorial authority in Namibia therefore has an important constitutional duty in terms of Art 88(2) of the Constitution to ensure that a trial is fair and is conducted in accordance with the applicable constitutional imperatives, thus protecting accused persons from baseless prosecutions.¹⁰

[65] Making reference to *Van Noorden v Wiese*, per De Villiers CJ¹¹ which confirmed the principle established in *Maasdorp*¹² that the element of reasonable and probable cause must be present not only at the initial stages of the prosecution but throughout the course of the criminal proceedings, up to the end, the court held that should any evidence or facts come to the knowledge of the prosecutor during the course of the proceedings, showing that the accused person has not committed the offence as charged, the *Maasdorp* principle would set in. The prosecutor would thus be bound to cease the prosecution. Failure to do so would render the prosecution malicious and the prosecutor liable for delictual damages.¹³

[66] Thus whether a prosecutor is liable for malicious prosecution or not is discerned from the facts and circumstances of each case determined after evaluating the evidence as a whole. In making that evaluation, the test applied in a civil claim is different from that in a criminal trial. In a criminal trial, the prosecutor must by

10 Mahupelo para 32.

11 Mahupelo para 50.

12 Mahupelo para 57.

13 Mahupelo para 57.

evidence establish the guilt of the accused person beyond reasonable doubt. In a civil claim for malicious prosecution however, the plaintiff need only establish that at the time the evidence was evaluated there was no probable cause to initiate or sustain the prosecution.¹⁴

[67] Therefore, what is required in a civil claim is for the claimant to show that, at the time the prosecutor in the criminal trial evaluated the evidence against the accused person there was no reasonable and probable cause that the accused might be convicted. Thus, where an accused person has been discharged, a prosecutor shall not be liable for malicious prosecution simply on the basis that the prosecution proceedings had been initiated and sustained until the discharge.¹⁵

[68] What the respondent in this matter must show however,¹⁶ is that the PG intentionally and unlawfully set the law in motion on criminal charges, well knowing that there is no evidence showing reasonable and probable cause that he might be convicted. Further, he must show that the prosecution was malicious in that criminal charges were instituted with the intention to injure him.

The determination of the cross-appeal

[69] In this cross-appeal, the respondent appeals against the finding of the High Court that there was reasonable and probable cause and therefore no malice on the part of the PG initiating the prosecution against him. The burden of proof thus lies

14 Mahupelo para 87 and *Minister of Safety and Security & others v Mutanimiye* 2020 (1) NR 214 (SC) para 56.

15 *Minister of Safety and Security & others v Makapa* 2020 (1) NR 187 (SC) para 50.

16 See Halsbury Law of England, p361 of Part 1. *Prinsloo & another v Newman* 1975 (1) SA 481 (A).

upon him to show that on a balance of probabilities the PG had no reasonable and probable cause for instituting the prosecution in the first place. He must also show that the initiation of the prosecution was malicious and had the intention to injure him.

[70] In *Beckenstrater v Rottcher and Theunissen*¹⁷ Schreiner JA said the following about the test to be applied in determining the jurisdictional fact of 'lack of reasoning grounds':

'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.'

[71] In *Prinsloo & another v Newman*¹⁸, the South African Appellate Division held that the concept of 'reasonable and probable cause' involves both a subjective and an objective element. As an objective consideration, the defendant must have sufficient facts from which a reasonable person could have concluded that the plaintiff had committed the offence or crime charged. As to the subjective element, the defendant must have subjectively held an honest belief in the guilt of the plaintiff.

[72] In summary, the respondent's submissions in support of his cross-appeal is that the court *a quo* ought to have upheld his claim in that the evidence he had

¹⁷ 1955 (1) SA 129 (A) at 136.

¹⁸ Cited in footnote 16 above.

tendered was common cause and remained uncontested. It was his further contention that he had handed in and dealt extensively with witness statements which were placed before the PG and on which she relied to initiate the criminal proceedings. He then argued that the witness statements relied on by the PG failed to establish that on a balance of probabilities there was a *prima facie* case against him. He further argued that as the evidence contained in the witness statements failed to implicate him similarly, they could also not have constituted a reasonable belief in the PG that he was guilty of any of the crimes he was charged with. The respondent also contended that the witnesses who named him in their witness statements failed to identify him during the criminal trial. He thus contended that his arrest, detention and resultant prosecution were instituted maliciously and without a reasonable or probable cause.

[73] The High Court in dismissing the main claim, found that there was no evidence that the police officers did anything other than what had been expected of them when investigating the allegations against him in this matter. That the PG relied on the evidence submitted by the police, together with statements from third parties made under oath, was common cause. With the aforesaid in mind, the court found that the respondent had failed to advance sound reasons why the PG's team should not have relied on the statements of witnesses made under oath. The High Court thus concluded that the respondent had failed to prove on a balance of probabilities that the PG was malicious in initiating the prosecution against him and prosecuted him with the intention to injure him. On that basis, the High Court dismissed his claim of malicious prosecution. In my view, the High Court was correct in that decision.

[74] The appellants conceded that they had set in motion the law, instituting or initiating criminal proceedings against the respondent (and sustaining the prosecution until he was discharged in terms of s 174 of the CPA). In initiating and sustaining the prosecution, the PG had relied on the evidence submitted by the police together with statements of witnesses deposed under oath, as the High Court had found. However, the PG refutes the claim that no reasonable and probable cause existed in initiating (and sustaining) the prosecution.

[75] In his effort to show the lack of reasonable and probable cause in the initiation of his prosecution, respondent had called Mr John Walters as his witness. His evidence was not particularly detailed so far as it related to the process of the respondent's prosecution. He however explained more fully how the respondent had been charged and how the prosecutorial team approached the criminal proceedings against him.

[76] Mr Walters explained that on 2 August 1999 when the attacks took place, he was still in private practice and was appointed as consultant to the prosecution team from 1 January 2004 - 30 June 2004. As soon as he had been appointed, he assembled a new team of prosecutors as only two prosecutors had remained of the previous team due to the resignation of prosecutors involved in the earlier high treason cases. He gave instructions to his team to first evaluate the evidence they had against all the accused persons who had been charged together with the respondent in terms of the doctrine of common purpose, including the evidence derived from the sworn statements of witnesses obtained from the police.

[77] He further testified that the evidence collected against the respondent provided sufficient grounds for his arrest and subsequent prosecution. Mr Walters also testified that he had no reason, to doubt the veracity of the information before them, which information formed the basis of the institution of the criminal proceedings against the respondent. There was also nothing in his evidence, describing the process of charging the respondent and how the prosecution was initiated pointing to any malice in the exercise of the prosecutorial discretion nor to a lack of reasonable and probable cause in initiating the prosecution, thus failing to discharge the burden of proof in that regard.

[78] In this case, various statements made under oath to the police by a number of witnesses had been handed to the PG who, as the High Court correctly held, had no reason not to rely thereon when initiating the prosecution. A number of those statements implicated the respondent, pointing to the common cause he had made with his co-accused in the charges against him. Also important is the respondent's concession that the 'Mwamba' implicated in sworn statements is reference to him. These include the statement of Ms Otela who was Mr Kauhano's girlfriend at the time, stating that the respondent knew about Mr Kauhano's involvement with the CLA and his possible participation in the attacks but failed to report it. If such information were found to be true, they would objectively justify his arrest and the initiation of the prosecution against him.

[79] Mr July who was then deputy PG having joined the prosecution team in the high treason trial confirmed under cross-examination that the statement of Mr Mutwaezi had shown that together with the respondent, they had conspired to commit the crime of high treason. Mr July further concluded that what the statement showed was that the respondent had associated himself with those responsible for the attacks even before the attacks had occurred. He further stated that it was for that reason that the charges were preferred against the respondent and his co-accused. Mr July also testified as to the importance of the statement of Mr Christopher Lifasi Siboli that respondent had accompanied Chief Mamili to the Chief of the Barotse in Zambia to discuss what he said were the problems he had with the Government, where the Chief told him that they could recruit people and if a war ensued in the Caprivi they could go to Zambia. This statement and other information at the disposal of the prosecution were important, concluded Mr July, as they demonstrated the lengths at which the conspirators, including the respondent went to garner support for the secession before the actual attacks took place.

[80] Mr July's statement that the prosecutorial team had been instructed to review the charges and actually withdrew some of them was supported by Mr Walters, who was a leading member of the team and was called by the respondent as his witness. The latter testified that he had placed his trust and reliance on prosecutorial advice that there was sufficient evidence against those indicted and had no reason to doubt the advice as the prosecutors were professional, honest and diligent. Besides, they showed no bias against the accused persons but were objective and acted independently.

[81] There was therefore no reason for the PG to doubt the evidence in the statements of the various witnesses given under oath and submitted to her by the police following their protracted investigations into the allegations – the basis upon which she initiated or instituted the prosecution – in particular those alleging the common cause actions of the respondent before the insurrection. After an objective and independent analysis of the evidence by experienced prosecutors who provided the prosecutorial team with professional expert advice, including that of reviewing, evaluating, and withdrawing some of the charges against the accused people, it was thus reasonable for the PG to have relied on the remaining evidence in the sworn statements and for the leading prosecutors to trust that the professional advice provided to them was unbiased, trustworthy and could therefore be a basis for initiating the prosecution against the respondent.

[82] Based on the above allegations contained in the witness statements made under oath, including the concessions made by the respondent himself, the PG was indeed entitled to assume that the evidence against the respondent was true. Thus the reliance on the statements of witnesses gave the PG reasonable and probable cause for initiating the prosecution against the respondent.

[83] In the circumstances of this case, and in the context of the information relied upon by the PG as shown above, the absence of evidence that the PG was not prudent and cautious in determining that the respondent was on a balance of probabilities guilty of the accusations levelled against him regarding the crimes he

had been charged with, the PG, I conclude, had reasonable and probable cause, initiating or instituting the prosecution against the respondent. Having come to this conclusion on this part of the requirement, I now proceed to determine the next question which is whether the initiation of the criminal proceedings was actuated by malice or improper motive.

Whether there was malice or improper motive

[84] In *Minister of Safety and Security & others v Kauhano*,¹⁹ this court held that the element of malice is some other motive other than a desire to bring to justice a person whom the prosecutor honestly believes to be guilty. It requires to be proved that the prosecutor had a desire different from that of bringing an offender to justice. A plaintiff in a malicious prosecution claim is required to prove that the prosecutor acted out of malice, as opposed to the desire to pursue justice. The court was also of the view that an absence of reasonable and probable cause to initiate or maintain the prosecution of an accused person, points to an inference that the prosecution was indeed actuated by malice or improper motive.

[85] It is worth noting at this stage that there is no rule that the PG shall at all times institute prosecutorial proceedings against an arrestee.²⁰ The PG exercises a discretion whether to prosecute or not, based on the evidence and also on the prospects of a successful prosecution.

¹⁹ (SA 56/2018) [2020] NASC (20 May 2020) para 26.

²⁰ *Ngcele v Minister of Safety & Security & another* (1365/14) [2019] ZAECMHC 43 (20 August 2019) paras 22 and 23.

[86] In *S v Lubaxa* 2001²¹, it was held that courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. The court held that a prosecuting authority's discretion to prosecute is however not immune from the scrutiny of a court which can intervene where such discretion is improperly exercised. Indeed a court should be obliged and therefore ought to, intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated or maintained.

[87] It thus follows that as in this case, where there exists objective information and/or evidence on which the PG relied upon to initiate the prosecution, and where in her subjective mind and based on the evidence and circumstances of the case, she has an honest belief as to the guilt of the respondent and has sufficient evidence to make a proper case to lay before the criminal court, the PG would have reasonable and probable cause for initiating the prosecution which would point to the absence of malice in that regard.

[88] It was the contention of the respondent that the PG had not only initiated the prosecution against him without reasonable and probable cause, she was also malicious in doing so and thus had the intention to injure him. Although the respondent had called Mr Walters as his witness to expose the inadequacies of the prosecutorial process that he relied upon in his claim, the evidence of Mr Walters was indeed of no assistance to his case as he instead attested to the professionalism, objectivity, efficiency and the absence of bias in the decision taken by the PG and the

21 2001 (2) SACR 703 (SCA). Also reported as 2001 (4) SA 1251 (SCA).

prosecutorial team when they decided to initiate the prosecution, refuting the respondent's claim that the prosecution against him was initiated with malice and with the intention to injure him.

[89] With the evidence of the various witnesses in the statements made under oath, implicating him in the common purpose activities and conduct with those he had been interacting with before the insurrection, the concessions he made that reference to 'Mwamba' in those statements were to him and if the evidence of the AK-47 rifle said to be found in the boot of the car he was driving on his arrest was found to be truthful, that would be sufficient to justify his arrest. To my mind, the material placed before the PG, there being no question of its admissibility, nor any reason for the PG not to rely on it, was indeed sufficient for the PG to believe that the respondent was guilty of the charges in the indictment and to initiate the prosecution against him. He could not and did not show on a balance of probabilities that there was no reasonable and probable cause for initiating the prosecution against him, thus showing malice or an improper motive.

[90] As was held in *Mahupelo* and other cases including *Rudolph & others*, it is the facts or evidence that must show, on a balance of probabilities, that there existed no reasonable and probable cause on the part of the PG to have initiated or instituted the prosecution and that it was initiated maliciously and with the intention to injure an accused person. The burden to prove lies on the respondent. In this matter, as shown above, the evidence in the sworn statements of witnesses implicating the respondent in the common cause activities with those he was charged with and on which the PG

relied upon, the admissions and concessions made by the respondent together formed a reasonable basis for the PG to believe in the guilt of the respondent, thus pointing to the presence of reasonable and probable cause for the PG to have instituted the prosecution against the respondent.

[91] The High Court was therefore correct in its finding that the respondent failed to show why the PG should not have relied on the statements of witnesses made under oath. The court was also correct, finding that on a balance of probabilities the respondent had failed to show that the PG having initiated the prosecution against him, lacked reasonable and probable cause to initiate the prosecution and was malicious. I thus agree that the respondent has failed to discharge the burden of proof on a balance of probabilities. For that reason, his cross-appeal must fail.

Whether the continuation of the prosecution was malicious

[92] The High Court having dismissed the respondent's main claim for malicious initiation of the prosecution but upholding his alternative claim of malicious continuation of the prosecution, declined to consider and decide the respondent's constitutional rights violations claim, considering that the court had found in his favour on the alternative claim of malicious continuation of the prosecution.

[93] As was earlier noted in this judgment, the court *a quo* found that the respondent failed to show why the PG should not have relied on the statements of witnesses made under oath and which had shown that on a balance of probabilities, when initiating the prosecution against him, the PG had reasonable and probable

cause and did not act maliciously. The appellants are satisfied with that part of the findings of the High Court. The appellants however appeal against the judgment insofar as it upheld the respondent's alternative claim of malicious continuation of his prosecution. In that regard, the appellants submitted that the High Court was wrong in finding that the PG did not have reasonable and probable cause to continue with the prosecution after 18 October 2011, which is the date on which the last witness, Tubaleye, concluded his evidence.

[94] Because the High Court used the respondent's criminal court acquittal as the measure for determining whether there was reasonable and probable cause to continue the prosecution, the court erroneously concluded that there was no inculcating evidence against the respondent at his criminal trial. Regrettably, I must add, the court conflated two issues: the question whether evidence implicating the respondent in the crimes he had been charged with was led at the criminal trial with the question whether on the pleadings and evidence before it, the PG lacked reasonable and probable cause and had acted maliciously in maintaining the prosecution beyond a certain determinable event.

[95] The appellants further appealed against the High Court's findings that the PG did not have an honest belief that the respondent was guilty; that there was no evidence that the person who was referred to in the written statements was the respondent despite the fact that the court had accepted that reference therein was to the respondent when it dismissed the respondent's claim of malicious initiation of the

prosecution against him, and despite the respondent conceding that reference in the statements to 'Aggrey Simasiku Mwamba' was to him.

[96] The PG also appeals against the finding by the court *a quo* that in law it was not correct for the PG to maintain the prosecution merely on the expectation that at some stage during the criminal proceedings other co-accused persons may implicate the respondent in their evidence. The PG contended that on the entire information before her, the criminal trial could not have been discontinued at the stage suggested by the respondent, ie after the testimony of the last witness on 18 October 2011.

[97] The PG contended that the High Court also inferred malice on the basis of erroneous findings that there was nothing before it motivating the further prosecution of the respondent despite the fact that no *prima facie* case was made out against him; that the prosecution was maintained without reasonable and probable cause and that the sole purpose to oppose the respondent's discharge was the hope that the respondent would be implicated by his co-accused persons; that on a balance of probabilities the respondent had made out a case on his alternative claim of malicious continuation of the respondent's prosecution. The PG further argued that the High Court also erred in holding the Government liable for the respondent's continued prosecution by the PG and/or her employees without giving any reasons for the finding.

[98] The PG indeed initiated and continued with the prosecution until the close of the State's case. She however contends that the High Court had erred in its finding

that she and/or her employees had been malicious in doing so, well knowing that there was insufficient evidence to secure a conviction.

[99] The remaining questions in this appeal are whether the continued prosecution of the respondent was malicious, and as the respondent contended in this court, whether the PG and/or her staff had the intention to injure him there having been a lack of reasonable and probable cause when they continued with the prosecution until the close of the State's case.

[100] In *Mahupelo*, the court endorsed the *Maasdorp* principle adopted in *Van Noorden*²² that the elements of reasonable and probable cause must be present not only at the beginning of the prosecution, but throughout the course of the prosecution. Thus, when facts come to the knowledge of the prosecuting authority at any time during the course of the prosecution, showing that no crime or offence has actually been committed by the accused person, the authority shall be bound to stop the prosecution. Failure to do so renders the prosecutorial authority liable in damages.

[101] The information and evidence relating to the respondent's conduct prior to the insurrection and allegations of his common cause involvement with those he had been charged with have been fully traversed and articulated in this judgment.

[102] With regards to the lack of reasonable and probable cause in the continuation of his prosecution, the respondent contended that the High Court was correct in its

22 (1883–1884) 2 SC 43.

finding that the PG's insistence in continuing with the prosecution, relying on the possibility that those charged with the respondent on the basis of common purpose, might still implicate him was incorrect. He also submitted that the PG should not have continued with the prosecution beyond 8 March 2006, alternatively beyond 18 October 2011, after the evidence of Tubaleye whose statement showed no basis for any reasonable belief that *prima facie*, the respondent had any case to answer. At that stage, he contended, it became clear that there was no case against him. Therefore, he further contended, there was no need for the PG to have led the evidence of all her remaining witnesses before closing the State's case. The evidence of Major-General Shali, he argued, was hearsay and was no proof that the respondent knew that the passenger he was conveying in his taxi was a secessionist and had an AK-47 rifle in his bag.

[103] Further, it was contended that the PG had no evidence that the respondent had such knowledge. The witness statements, including that of Mr Habaini, argued the respondent, could not be the basis for a reasonable belief that he was guilty of the charges in the indictment. Thus, so he concluded, the High Court was correct to have found that the PG lacked reasonable and probable cause to continue with the prosecution until the end of the State's case and was thus malicious.

[104] The PG on the contrary submitted that the court had erred in that finding. She had persisted with the prosecution and opposed the respondent's discharge prior to the close of the State's case, relying as she did on the same witness statements submitted to her by the police when she had initiated the prosecution. A number of

those statements made reference to the respondent where he conceded that the reference was to him. He further conceded that many of the witnesses accused him of associating with the CLA rebels and gave evidence of an AK-47 rifle found in the boot of the car he was driving when he was arrested. The respondent himself agreed that should those allegations and accusations be found to be true, objectively, they would be justification first, for his arrest and second, for the initiation of the prosecution against him. In my view, it was reasonable for the PG to have persisted with the respondent's prosecution in pursuit of establishing the truth of these statements and/or allegations

[105] The respondent may indeed not have gone to Botswana as he submitted. There were witnesses who however gave evidence that he made common cause with and associated himself with the Botswana exiles with whom he had been charged. There was the evidence of Sinjabata Habaini, that the respondent had been seen with Richwell Mahupelo who was collecting food for the secessionists and requested assistance to load bags of maize meal meant for the secessionists, into the white Volkswagen Golf motor vehicle driven by the respondent, which was the same car he was driving at the time of his arrest. It was on that occasion, Habaini further testified, that the respondent and Mahupelo tried to recruit him to join the secessionist movement and where they both emphasised to him the need to sustain the idea of an independent Caprivi.

[106] As already indicated, there was further evidence in statements made under oath that respondent not only transported food to those he had been charged with,

but had also been transporting exiles to cross into Botswana, but claiming in his defence that he was ferrying them as a taxi driver. On his arrest, the respondent was in the company of Ritchwell Mahupelo and Bennett Matuso with whom, it was claimed, he had been well acquainted before the insurrection. Matuso had been found in possession of the AK-47 assault rifle and both he and Mahupelo had also been arrested and charged with high treason.

[107] In the context of the above evidence and circumstances, it was not unreasonable for the PG to have believed that those who made common cause with the respondent and were yet to testify, might still implicate him. The PG's decision to continue with the respondent's prosecution was informed by the evidence and information collected by the police implicating the respondent. To this, should be added the concessions made by the respondent, the objectivity and lack of bias, the skill and professionalism with which the prosecutorial team conducted the proceedings and themselves, as testified by the respondent's own witness, Mr Walters. Having had no reason to doubt the veracity of the evidence submitted by the police, it was reasonable for the PG to believe in the guilt of the respondent, notwithstanding his discharge by the criminal court at the end of the State's case.

[108] The allegations against the respondent and the charges against him are of a serious nature. The respondent himself conceded that if the allegations were found to be true they would justify a charge of high treason. Thus, in terms of Art 88 of the Constitution, believing in the guilt of the respondent, the PG was in my view, obligated to pursue the respondent's prosecution traversing all the material she relied on with the objective of establishing the respondent's guilt beyond reasonable doubt. In those

circumstances, it was not unreasonable to oppose the discharge of the respondent, with a view that those he made common cause with could still implicate him.²³

[109] In the context of the legal principle of innocent until proven guilty, the PG, justified in believing that the respondent was guilty owed the public a constitutional duty under Art 88 to fulfil her prosecutorial role, conscientiously mounting evidence she believed would be sufficient with the aim of proving the guilt of the respondent beyond reasonable doubt for a reasonable court to convict. It was therefore reasonable for a dutiful PG, based on the seriousness of the charges in this matter, to go the full length, sustaining the prosecution with the aim of exhausting the available evidence in order to prove the case against the respondent beyond reasonable doubt. In relation to a charge based on the principle of common purpose, it might be a useful strategy for the prosecution to rely on the likelihood or possibility that a person charged together with others might be implicated in the evidence of her or his co-accused.

[110] In my view and in the first place, although the PG owes a constitutional duty to the respondent not to pursue a prosecution at all cost and in particular at the cost of a fair trial,²⁴ the Constitution also places a duty upon her to ensure that the respondent accounts to the public for his own actions. In particular, Art 88 of the Constitution obliges the PG to perform her powers and functions lawfully and subject to the provisions of the Constitution which, under Art 88(1)(b) requires her and her staff to

²³ Cf. *S v Lubaxa* paras 20 and 21.

²⁴ Art 12 of the Constitution.

perform the prosecutorial role and function conscientiously and with integrity. Failure to do so may render her and her staff liable for misconduct.²⁵ Thus while the PG has a constitutional obligation to the respondent and the public to perform her role and functions in terms of Art 88 of the Constitution, she also has an ethical duty as a professional to perform her duties with integrity which is binding on her conscience and must do so at all material times.

[111] Indeed, as Mr Walters testified, the prosecutorial team in this matter conducted the prosecution with utmost professionalism, honesty, skill and integrity among others. They mounted the available evidence with a view to prove the case against the respondent beyond reasonable doubt. There is no evidence to the contrary shown by the respondent pointing to the presence of malice in prosecuting the case beyond the dates claimed by the respondent.

[112] Therefore, the PG had reasonable and probable cause to proceed with the prosecution beyond 18 October 2011, until the end of the State's case and when the respondent was discharged in terms of s 174 of the CPA. The *onus* being on the respondent to show, he has failed to present any evidence showing that the continuation of the prosecution was malicious.

25 Should the misconduct be found to be gross, the PG could, on the recommendation of the Judicial Service Commission, be liable for removal, an issue which is by no means taken lightly the world over. See, for example, *Guidelines on the Role of Prosecutors*. Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, 17 August to 7 September 1990.

[113] In *Mahupelo*, this court held that in order to attract liability for damages based on malicious continuation of the prosecution, it is not sufficient for the respondent to show malice on the part of the PG. The respondent must in addition and separately, also prove that the PG sustained the prosecution with *animus iniuriandi* or the intention to injure him. That too, as *Mahupelo* held, must be based on the facts and circumstances of the case.

[114] In this case, it has been found that the PG had reasonable and probable cause, and was not malicious in continuing and sustaining the prosecution until the respondent was discharged by the court under s 174 of the CPA. Not only did the respondent claim that the PG had no reasonable and probable cause to sustain the prosecution, he also contended that the prosecution had been sustained with the intention to injure him.

[115] The *animus iniuriandi* in a claim of malicious prosecution with intention to injure has now clearly been established as an element to be separately proved. In this matter, having found that the continuation of the respondent's prosecution until his discharge in terms of s 174 of the CPA was not malicious, it is not necessary to determine whether the prosecution was sustained with the intention to injure the respondent.

Costs

[116] Concerning the costs in their appeal, the appellants pray that this court grant them costs. They also ask that this court dismiss the respondent's alternative claim of

malicious continuation of his prosecution with costs on the basis of one instructing and two instructed legal practitioners. The respondent on his part seeks an order setting aside the costs order granted by the High Court and replacing it with an order granting him costs on the scale of one instructing and two instructed legal practitioners.

[117] The respondent had in this court and in the court below been legally assisted through legal aid. The High Court has, inadvertently it would appear, made an order of costs against the appellants. That is contrary to s 18 of the Legal Aid Act 29 of 1990. The cost order of the High Court must therefore be corrected.

Order

[118] In the result, the following order is made:

- (a) The appeal is upheld.
- (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 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.

- (ii) There is no order as to costs.'
- (c) The cross-appeal is dismissed.
- (d) The question whether or not the respondent should be awarded constitutional damages is referred back to the High Court for determination, if the respondent is so advised or minded, in accordance with the applicable case management rules.
- (e) There is no order as to costs.

MOKGORO AJA

SHIVUTE CJ

NKABINDE AJA

APPEARANCES:

APPELLANTS:

I A M Semanya SC (with him N Marcus)

Instructed by Government Attorney

RESPONDENT:

R Töttemeyer (with him U Hengari)

Instructed by Kanguuehi & Kavendjii

Incorporated