REPORTABLE

CASE NO: SA 99/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PIETER HENDRIK GROENEWALD **Appellant**

and

MINISTER OF SAFETY AND SECURITY **First Respondent**

PROSECUTOR-GENERAL **Second Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: **3 April 2024**

Delivered: **1 October 2024**

Summary: The appellant was arrested and charged with offences of trafficking in persons in contravention of s 15 of the Prevention of Organised Crimes Act 29 of 2004 (POCA). At his trial in the Regional Court, witnesses recanted the allegations they made against the appellant in their police statements. Instead of repeating the

allegations of exploitation they made against him, they testified that their statements were recorded incorrectly and were not read back to them. They instead testified that they were well treated by the appellant. The appellant was later discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977.

After his discharge, the appellant instituted an action of unlawful arrest and malicious prosecution against the Minister of Safety and Security and the Prosecutor-General for damages occasioned by the arrest and prosecution. The High Court dismissed both claims, hence the appeal to this Court.

The background to the matter is that the appellant recruited men from the Khwe community, a sub-ethnic group of the San people of Namibia from the Omega area in the Zambezi region, on two separate occasions to work as farm rangers in South Africa. He promised them wages that would surpass the wages paid in Namibia to locals employed in similar positions. A group of ten men (the first group) recruited by the appellant travelled to and worked in South Africa for the appellant's corporation. He was stopped by the police and later arrested while transporting another group of 12 men (the second group) to Windhoek en route to South Africa. He was subsequently charged with a number of counts of trafficking in persons in the Regional Court held at Rundu. In respect of the second group of persons, he was charged with an attempt to traffic the men for the purpose of exploitation.

At the criminal trial, all the witnesses who had made allegations of exploitation against the appellant recanted their evidence and claimed that their statements were wrongly taken down by the police. They said that they told the person who consulted them in preparation for the trial that the statements implicating the appellant in the offence of trafficking in persons attributed to them were wrong. Some of the witnesses testified in the civil trial on the side of the appellant, stating that they informed the person who consulted them in preparation for the trial that the portions of their statements implicating the appellant in what amounts to their exploitation were wrong and insisting that they were well treated by him while in South Africa.

This Court had to decide the following issues: (a) whether the appellant complied with s 39 of the Police Act 19 of 1990 that requires that notice of the proceedings against the State brought in terms of that Act must be given to the defendant not less than one month before instituting an action against the defendant; (b) whether there was reasonable and probable cause to initiate the appellant's prosecution in respect of the men in both groups; (c) if it was so that the prosecutor who made the decision to prosecute the appellant was told by the witnesses during consultations that the allegations the witnesses had made against the appellant were wrong, whether the prosecutor was justified to have continued with the appellant's prosecution in the absence of evidence from another source implicating him; (d) if there was no reasonable and probable cause for the prosecutor to have continued with the appellant's prosecution, what is the quantum of damages suffered by the appellant.

Held that; as the cause of action in respect of an arrest starts from the date of arrest unlike in the case of malicious prosecution that commences from the date of discharge, the s 39 notice should have been given at least one month from the date of arrest and not from the date of the appellant's discharge. Therefore, the action against the Minister was properly dismissed.

Held that; as regards the first group of persons recruited by the appellant, the content of the docket at the disposal of the prosecutor who made the decision to prosecute shows that there was reasonable and probable cause for the appellant's prosecution as the statements in the docket disclosed the essential elements of the offence of trafficking in persons.

Held that; the appellant discharged the burden of establishing that the witnesses who recanted their evidence told the prosecutor during consultations that the allegations they made against the appellant were wrong.

Held that; once the witnesses had recanted their evidence, there was no evidence from another source implicating the appellant.

Held that; the only person who could have conceivably testified on behalf of the Prosecutor-General in an attempt to discharge the evidentiary burden to rebut the evidence that there was no subjective belief in the appellant's guilt once the witnesses recanted their evidence was Mr Haindobo, the prosecutor who made the decision to prosecute the appellant.

Held furthermore that; although available, Mr Haindobo was not subpoenaed to testify. Therefore, in the absence of an explanation of the basis upon which he decided to continue with the prosecution despite the emergence of new information, a strong inference can be drawn that he did not believe in the appellant's guilt, a finding that disproves the existence of reasonable and probable cause for the appellant's continued prosecution.

Held that; when facts come to a prosecutor's notice that the information on the basis of which the decision to prosecute was made is wrong and there is no other evidence implicating an accused, the prosecutor must close the State's case or at least approach his or her superiors for guidance on the way forward.

Held that; while the Court fully endorses the hallowed public policy of not encouraging malicious prosecution actions, the countervailing public interest not to encourage prosecutions without reasonable and probable cause should also be given effect to in appropriate cases.

Held that; as regards the second group of persons recruited by the appellant, there was reasonable and probable cause for the appellant's prosecution and the appeal against this finding cannot succeed.

Held that; as regards the continuation of the appellant's prosecution after the witnesses reneged on their statements, the appellant's claim succeeded and he was awarded special damages in the amount of N$100 000,65 and N$50 000, plus interest at the rate of 20 per cent per annum a *tempore morae* from the date of judgment until the date of payment as well as costs limited to 50 per cent.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ and SMUTS JA concurring):

Introduction

[1] This appeal is against the judgment and order of the High Court dismissing the appellant's claim for unlawful arrest and malicious prosecution. The appellant, a South African national who at the time of arrest was a businessman by trade, had travelled to Namibia for the ostensible purpose of recruiting Khwe men to work as game rangers in South Africa. The Khwe people are a sub-ethnic group of the San people of Namibia who are generally regarded as a vulnerable and marginalised community due to their poor educational background and historical exclusion from the social and economic mainstream of the country.

[2] According to the appellant, the Khwe men were targeted for recruitment for their skills as natural trackers. In his recruitment drive, the appellant worked closely with some of the affected community's traditional leaders who enthusiastically embraced the idea as they perceived it to have been a much-needed work opportunity for the unemployed youth in the community.

Background

[3] The respondents maintained that the initial verbal offer for employment was pitched as an opportunity for the men to work as game rangers at the appellant's

farm in South Africa, which promise allegedly did not reflect reality upon arrival as the men were invariably deployed to work at various places of the clients of a close corporation of which the appellant was the sole member. The appellant's modus operandi was to approach various village headmen and the Chief of the Khwe traditional community with offers of employment of men of working age to work in South Africa for an initial period of six months, after which the men would return to Namibia. The community leaders were provided with letters of offer of employment that set out the terms and conditions of the men's work in South Africa. The men were promised high wages and benefits that seemingly would surpass the wages offered in comparable positions locally.

[4] The offers of employment appeared to have been accepted with a high degree of alacrity in a community hard-hit by high levels of unemployment and the resultant poverty. It is not apparent from the record that the community leaders involved in the scheme knew that their conduct amounted to aiding and abetting an offence of trafficking in persons. It would also appear that the police authorities in the region were initially not aware that the appellant's conduct or action amounted to trafficking in persons. This unfamiliarity is not surprising because the offence was relatively new at the time.

[5] The local security services became aware of the appellant's presence in the community and his engagement in what they perceived to have been nefarious activities in the surrounding villages. It emerged during the civil trial that the initial intelligence report received by the police speculated that the appellant was engaged in the recruitment of young Namibian men for the purpose of military

training in South Africa. It was therefore not surprising that the police approached the matter with a heightened sense of security, albeit tinged with a dose of overzealousness.

[6] On the date of his arrest, the appellant was accompanied by his fiancé. On that day, seemingly with the traditional leadership's assistance, including that of the Chief of the Khwe traditional community, the appellant recruited twelve men – only those who possessed national identification documents – from the villages in the area of Omega in Zambezi Region. The ostensible plan was to transport the men to Windhoek, obtain passports for them and ultimately transport them to South Africa for work. This plan followed a well-trodden path; one where he had been.

[7] The recruited men were advised against packing any personal belongings as their necessities would be catered for by the appellant in South Africa. So, the men obliged and got into the appellant's Mahindra pickup – custom-built with benches on the sides to resemble what a police official referred to as 'a troop carrier' – with only their identification cards and the clothes on their bodies and headed for Windhoek.

[8] While driving on the high way between Divundu and Rundu, the group was stopped and ordered to drive under police escort to Rundu Police station where the appellant was interrogated and told to report to the police station the following day. After further interrogations the following day, he was taken into custody. The twelve Namibian men were also taken into custody and detained for five days. The men were subsequently involved in an out-of-court settlement with the

respondents, culminating in the payment of sums of money to them for damages arising from the incident.

[9] The appellant's fiancée – whom he later married – was also arrested and subsequently joined the appellant in instituting the action against the respondents. She succeeded in her claim. However, as the appeal concerns the appellant only the role, if any, his wife might have played in the recruitment saga and her treatment by the police and/or the prosecution authorities as well as what occurred in the legal proceedings between her and the respondents are issues entirely outside the scope of the present appeal and will therefore not feature in this judgment.

[10] The appellant was detained at Rundu Police cells for a period of 15 days before he was released from custody. Bail was initially refused. Subsequent to his release on bail, he was prevented from leaving the country for a period of approximately two months pending his trial. During interrogations, the appellant disclosed to the police that he was involved in a similar recruitment drive which successfully delivered a number of young Khwe men to South Africa whose contractual arrangement in South Africa was to end in September 2013. A representative of the police on her part insisted that the police had been aware all along of the Khwe men's recruitment drive but that the identity of the recruiter had hitherto been unknown and came to be known only after the appellant's arrest.

[11] The appellant was subsequently charged with offences in contravention of certain sections of the Employment Services Act 8 of 2011, which provisions had

not in fact come into operation at the time. The decision to charge the appellant with the contravention of the Employment Services Act was apparently made on advice obtained from either the police's Legal Department and/or the Office of the Labour Commissioner. It is common cause that the decision was not made by the Prosecutor-General. The charges were later substituted for trafficking in persons in contravention of a section in the Prevention of Organised Crime Act 29 of 2004 (POCA) as well as for a contravention of certain provisions in the Immigration Control Act 7 of 1993. This decision was made by Mr Haindobo, by then a Deputy Prosecutor-General based at Rundu Magistrate's Court, but who had left the employment of the State about four years prior to the commencement of the civil trial. By virtue of the position he occupied at the time, Mr Haindobo had the authority to make that kind of decision.

[12] Charges were laid against the appellant on the basis of allegations made in the statements subsequently taken from, among others, the men who had gone to South Africa, their relatives and/or partners and the 12 men found in the appellant's company upon his arrest. The groups of the men who went to South Africa and those who were found in the appellant's company will be referred to in this judgment as 'the first group' and 'the second group' respectively.

[13] In respect of the first group, the allegations were that the appellant had wrongfully, intentionally and unlawfully recruited, transported and harboured the men for the purpose of exploitation. In relation to the second group, it was alleged that the appellant had wrongfully and unlawfully participated in the trafficking of persons as contemplated in Annexure II of the United Nations Convention Against

Transnational Organized Crime and the Protocols Thereto, by recruiting the men and attempting to transport them to South Africa for the purpose of exploitation. Police statements were obtained from only seven of the ten men in the first group upon their return from South Africa in September 2013.

[14] Three of the men remained behind in South Africa. Although attempts were made by the Namibian authorities to ascertain their whereabouts in that country, the authorities were able to confirm the safety of only one man. The evidence is not clear as to the status of the remaining two, but not much turns on this for the purpose of the resolution of the appeal.

Criminal trial

[15] The appellant's full criminal trial, which was personally conducted by Mr Haindobo, ensued in the Regional Court, held at Rundu, culminating in the appellant's discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977. The 25 counts of trafficking in persons originally preferred against the appellant were reduced at the start of the trial to 19 counts. Additionally, the charge of conducting business contrary to the terms of the visitor's entry permit in contravention of the Immigration Control Act was also withdrawn 'due to the principle of duplication of charges', as explained by the prosecutor. During the trial, the State witnesses who worked for the appellant's corporation in South Africa retracted all the pertinent allegations made against the appellant in the statements recorded from them during the investigation of the case, leaving the State's case perilous and in a state of confusion.

[16] While in their prior statements some of the men alleged that they had been ill-treated and in effect exploited during their stay in South Africa, in court they painted a rosy picture of their stay and working conditions in that country, showering the appellant with praise of being a model employer who treated them with courtesy and consideration and repeatedly asserting that they would return to his employment should another opportunity present itself.

[17] They also testified about financial benefits the community allegedly derived from the income earned in South Africa. In the course of the trial, the prosecutor was placed in an unenviable position of desperately trying to salvage the near collapsed State case when there was not much left worth salvaging. The State's case had been dealt a fatal blow by the witnesses backtracking on their statements.

[18] The record paints a pitiful state of affairs on the part of the prosecutor who appeared flustered and distracted. Instead of making application for the court to declare hostile those witnesses who reneged on their statements, he rather clumsily embarked upon what amounted to cross-examining his own witnesses. In the fast faltering case for the prosecution and the attendant discomfiture that followed, it did not come as a complete surprise that in the end the appellant was discharged after the close of the State's case.

[19] It is apparent from the record that Mr Haindobo consulted the witnesses prior to them testifying but only on the day they were due to testify. Occasionally he requested for more time to consult his witnesses, which request was acceded

to. At times the trial started late because the prosecutor could not finalise the consultation process on time for the trial to commence.

[20] The key questions that arose during the civil trial were whether the witnesses who disavowed the allegations initially made against the appellant had told Mr Haindobo during consultations that the allegations of what would have amounted to trafficking of persons on the appellant's part made in their statements were not correct, and if so whether it was open to Mr Haindobo to have proceeded with the trial when it became apparent that the retraction of those allegations left no evidence aliunde incriminating the appellant. Furthermore, whether in so proceeding with the trial up to the stage of the close of the State's case, had Mr Haindobo entertained a bona fide belief in the appellant's guilt? These questions are fundamental to the consideration of the overall question of whether there was reasonable and probable cause for Mr Haindobo to have continued with the appellant's prosecution in light of the witnesses reneging on their statements. This aspect will be dealt with later when considering the issue of reasonable and probable cause in the context of the evidence presented at the civil trial.

Civil claim

[21] Following his discharge, the appellant instituted action for damages in the High Court based on the *actio iniuriarum* in respect of malicious prosecution in the sum of N$3 378 748,18 – as set out in his amended particulars of claim – made up as follows: N$337 500 for legal costs and professional fees; N$91 223,18 for accommodation, subsistence and travelling expenses; N$500 000 in respect of *contumelia*, deprivation of freedom, defamation, *iniuria* and discomfort, and N$2

450 025 for consequential loss of income for the duration of the trial and detention. The claim was also formulated in the alternative as having been brought ‘on the basis of wrongful legal proceedings, coupled with unlawful arrest and detention’.

[22] The action was brought against both the Minister of Safety and Security – the Minister responsible for policing – as well as the Prosecutor-General. In a protracted opposed civil trial that ensued – generating some 2275 pages contained in 19 volumes of the record – the appellant’s action was dismissed, hence the instant appeal. What follows in the next section of the judgment is the summary of the court a quo’s reasons for the dismissal of the appellant’s claim.

The High Court’s reasoning

[23] The Minister successfully took a point that the appellant did not comply with s 39 of the Police Act 19 of 1990. The section requires that any proceedings against the State or any person in respect of anything done pursuant to that Act must be instituted within 12 months after the cause of action arose.

[24] The section also provides that notice of the proceedings and the cause of action must be given to the defendant not less than one month prior to instituting action against the defendant. In the instant matter, the notice was given, but only after the criminal proceedings terminated in the appellant’s favour and not before.

[25] In agreeing with the Minister’s contention that no proper notice was given, the High Court reasoned that the notice should have been given not less than one month from the date of arrest and not from the date of the appellant’s discharge as

contended for by the appellant. The crisp issue that can be disposed of at the outset is whether or not the court a quo was correct in that finding.

[26] Counsel for the appellant argued in this Court, correctly, that to complete a cause of action in a malicious prosecution claim, the plaintiff must allege and prove that the criminal proceedings were terminated in his favour. Counsel contended, also correctly, that it was common cause that the proceedings terminated in the appellant's favour with his discharge in the Regional Court. Counsel proceeded to argue that on or about 17 May 2016, the appellant gave a s 39 notice to the Minister, receipt of which was acknowledged in a letter dated 24 May 2016.

[27] Pursuant to the notice, so argued counsel, summons was issued on 28 June 2016. Counsel thus submitted that both the statutory notice and the issuing of the summons occurred within the periods prescribed in s 39 of the Police Act and that the court a quo was 'clearly' mistaken in holding otherwise. Counsel argued furthermore that the court a quo did not in any event raise the issue of the s 39 notice with the parties at all and thus went, in effect, on a frolic to have decided it without first putting the issue to them for argument.

[28] As I understand the appellant's pleadings, his action is not that of malicious arrest and detention where a prosecution arises from such arrest, but that of malicious prosecution, 'alternatively, on the basis of wrongful legal proceedings, coupled with unlawful arrest and detention'. In his written heads of argument, counsel for the appellant also argued the point as if there was one cause of action,

namely that of malicious prosecution. ‘Unlawful arrest and detention’ as a cause of action was pleaded in the alternative. The way the plea was formulated has given rise to confusion as the causes of action appear to have been conflated.

[29] It is trite that the cause of action in respect of an alleged unlawful or wrongful arrest arises as soon as the illegal arrest is made and for that reason, it is not necessary for the plaintiff to allege and prove malice or want of probable cause on the part of the defendant.[1] It is for this reason that it is irrelevant whether any prosecution ensues subsequent to the arrest. The injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made.[2] On the other hand, the right of action in the case of malicious prosecution only accrues once the prosecution has terminated in the plaintiff’s favour or where the Prosecutor-General has declined to prosecute.[3]

[30] As the alternative claim is based on unlawful arrest, to comply with s 39 of the Police Act, the notice should have been given within a period of at least one month from the date of arrest and not from the date of the appellant’s discharge in the Regional Court.

[31] It is correct as counsel for the appellant argued in oral argument, that a plaintiff may institute a claim for unlawful arrest and detention together with the claim for malicious prosecution, but it seems to me that in adopting that approach in a claim against the State where the provisions of s 39 are of application, the

---

[1] *Thompson & another v Minister of Police & another* 1971 (1) SA 371 (E) at 373E.
[2] Id. At 375F-G.
[3] Id. At 375B.

plaintiff takes a risk in the event that the proceedings giving rise to the malicious prosecution claim terminate in the plaintiff's favour much later after the period prescribed in s 39 for the giving of such notice, as has happened in this case. Such plaintiff may thus not be able to comply with the general requirement that where a plaintiff alleges two causes of action, each must comply with the relevant prescription period.[4]

[32] As to the argument that the issue of the s 39 notice was not raised with the parties at all, this argument is not borne out by the record. The record shows that the point was a live issue at the civil trial, with counsel for the respondents submitting as part of his opening statement that there was only one claim, that of malicious prosecution contrary to the appellant's argument that there were two distinct claims of unlawful arrest and malicious prosecution. Counsel for the respondents additionally argued that it had not been pleaded and proved that there was compliance with s 39 and that the fact that the respondents did not apply for absolution from the instance in respect of the unlawful arrest claim did not mean that there was an admission of compliance with the section in question. Counsel proceeded to argue that unlike the malicious prosecution claim, the unlawful arrest action did not have to wait for the finalisation of the criminal trial.

[33] It follows then that although the appellant's arrest may well raise questions about its lawfulness, the conflation of the causes of action meant that s 39 had not been complied with as both the notice given to the Minister and the issuance of the summons were done outside the periods prescribed by the section. The High

[4] *Mgube v Minister of Police* 1978 (4) SA 959 (W) at 960H-961A.

Court's finding to that effect and its dismissal of the action against the Minister can therefore not be faulted.

[34] The role the police played in the appellant's prosecution does not appear to me to have gone beyond more than what is expected from police officers, namely to give a fair and honest statement of facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.[5] Therefore, this Court is seized with the appeal concerning the malicious prosecution claim against the Prosecutor-General only. Where reference is made in the judgment to the 'respondents', it is done only in the historical context of how the respondents were cited. With the issue of the s 39 notice having been disposed of at this stage of the judgment, the focus will now shift onto the continued presentation of the summary of the High Court's reasoning on the remaining issue.

[35] The High Court next considered the issue of whether there was reasonable and probable cause to prosecute the appellant. It held that although Mr Haindobo, the prosecutor who decided to prosecute the appellant did not testify, having regard to the content of the docket, reasonable and probable cause for the appellant's prosecution on the seven charges of trafficking in persons had been established. The court held that the gap in respondents' case occasioned by Mr Haindobo's failure to testify was filled by Mrs Nyoni's evidence that she would have similarly decided to prosecute on the seven witness statements as they disclosed elements of trafficking in persons.

---

[5] Cf. *Prinsloo & another v Newman* 1975 (1) SA 481 (A) at 492D-E.

[36] Mrs Nyoni, it will be recalled, was a Deputy Prosecutor-General and head of a unit responsible for the prosecution of, among others, cases of trafficking in persons. The court held furthermore that there was no evidence that Mr Haindobo should have foreseen the possibility that he was acting wrongfully but nevertheless continued with the appellant's prosecution reckless as to the consequences of his conduct.

The applicable legal principles

[37] The delict of malicious prosecution is meant to provide relief to a plaintiff who suffered damages as a consequence of intentional and unlawful abuse of the judicial process. The underlying basis for the action is the factual allegation that the defendant abused the judicial process by setting the criminal law in motion against the plaintiff, out of malice and without reasonable and probable cause.[6] As explained in *Minister of Safety and Security v Makapa*,[7] it is generally recognised that the standard in a claim for malicious prosecution instituted against a prosecutorial authority is different from that applied in cases involving private parties.

[38] In the context of a claim against a prosecutorial authority, such action targets the decision to initiate or continue with a criminal prosecution, which constitutes an after-the-fact challenge of the decision.[8] Such challenge strikes at the very core of the constitutionally protected prosecutorial independence. As such, it has been held that, a stringent standard must be met before a finding of

[6] *Minister of Safety and Security & others v Makapa* 2020 (1) NR 187 (SC) (*Makapa*) paras 36 and 37 and the cases collected there.
[7] *Makapa* para 43.
[8] *Makapa* para 44.

liability on the part of a public prosecutor is made.[9] This onerous standard of proof places a heavy burden on the plaintiff to prove not only the absence of reasonable and probable cause, but also that there was no bona fide reason to bring or maintain the criminal proceedings.[10]

[39] It has been held that for the prosecutor's conduct to justify judicial intervention, such conduct must be of the egregious type referred to by the Canadian Supreme Court in *Miazga v Kvello Estate*.[11] Negligence or ineptitude is not sufficient to dislodge this requirement. Although the principle of prosecutorial independence is sacrosanct, it is not meant thereby that the discretion to prosecute is immune from judicial scrutiny or oversight. Where the discretion was improperly exercised, a court is under a duty to intervene and provide relief to a claimant where the claim has been established.

[40] To succeed in a claim for malicious prosecution, the plaintiff must allege and prove the following elements: (a) the defendant had instituted or instigated the proceedings giving rise to the claim; (b) the defendant acted without reasonable and probable cause; (c) the defendant had been actuated by an improper motive or *animus iniuriandi*; (d) the proceedings giving rise to the claim terminated in the plaintiff's favour, and (e) the plaintiff suffered damages.[12]

[41] The principle of reasonable and probable cause comprises both a subjective and objective element.[13] The objective element denotes that the

[9] *Makapa* para 45.
[10] *Ibid.*
[11] *Miazga v Kvello Estate* [2009] SCC 51.
[12] *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC).
[13] *Prinsloo & another v Newman* 1975 (1) SA 481 (A).

defendant must have had sufficient information on the basis of which a reasonable person could have inferred the commission by the defendant of the offence or crime charged. The subjective element requires that the defendant must have subjectively held an honest belief in the plaintiff's guilt.

[42] Delictual liability for malicious prosecution will not lie where there existed, objectively speaking, reasonable grounds for the prosecution and the defendant subjectively believed in the plaintiff's guilt.[14] When applying the objective and subjective tests, sight should not be lost of the distinction between facts required to establish the plaintiff's actual guilt and those necessary to establish a reasonable bona fide belief in the plaintiff's guilt. This is so because facts admissible to prove the bona fide belief in the plaintiff's guilt would not be admissible to prove his or her actual guilt.[15]

[43] Furthermore, the principles and considerations applicable to a criminal trial are different from those necessary to determine whether reasonable and probable cause existed in a malicious prosecution case.[16] Unlike in the criminal prosecution where the prosecutor bears the onus of proof, in a malicious prosecution claim the plaintiff bears the onus of proving on a balance of probabilities the absence of reasonable and probable cause and *animus inuriandi* on the part of the prosecutor.[17]

---

[14] *Minister of Safety and Security & others v Mahupelo* 2019 (2) NR 308 (SC) (*Mahupelo*) para 67.
[15] *Mahupelo* para 69 and the case cited therein.
[16] Id. Para 87.
[17] Id. Para 94

[44] With this summarised outline of the pertinent legal principles out of the way, it remains to consider next the information that served before Mr Haindobo when the decision to prosecute the appellant was made to facilitate the consideration and decision of the ultimate question of whether or not probable and reasonable cause for the appellant's prosecution existed at the initiation of the criminal proceedings as well as their continuation.

Basis for the appellant's prosecution

[45] The appellant was ultimately charged with trafficking in persons based on the statements recorded from diverse witnesses, including police officers, relatives and spouses of the ten men in the first group, the Khwe community traditional leaders who facilitated the recruitment, the seven men in the first group as well as the men who were in the appellant's company upon his arrest. The content of the entire docket was discovered in the civil trial.

[46] A close examination of the content of the docket reveals overall that the appellant recruited the men from their villages in apparent collaboration with some community leaders with the ostensible purpose of transporting the men to South Africa for work. As noted in the introductory parts of this judgment, the appellant delivered letters to the community leaders, which set out the terms and conditions of the men's employment.

[47] The similarly worded letters were delivered to the Chief of the Khwe community, known by the traditional title of *Khwe Ipaxa* Bennie Gombarra and to headman Paulus Kangombe of the Hambukushu Traditional Authority. It is

necessary to reproduce the self-explanatory letter to provide the factual context to the question of whether or not there was reasonable and probable cause to prosecute the appellant at the very least at the time the decision to prosecute was made.

[48] The letter is on the letterhead of the appellant's close corporation called Wildlife Investigation & Protection Services CC (WIPS). I reproduce the version of the letter sent to Mr Bennie Gombarra. The body of the letter is reproduced verbatim (with all its obvious imperfections) and it reads as follows:

> '1 April 2013
> Our ref: Nam1004/13
>
> Khwe Traditional Authority
> Bwabwata Western Caprivi
> PO Box 5026
> Divundu
> Kavangu Region
>
> For Attention: Paramount Khwe Bennie Gombarra
>
> **RECRUITMENT OF KHWE RANGERS FOR WIPS**
>
> Dear Paramount Chief Bennie Gombarra
>
> **Introduction**
> Wildlife Investigation and Protection Services (WIPS) is an independent private company that receives no government funding. The main aim of WIPS is the conservation and protection of game. Even though WIPS receives no support from the government it works closely and supports the SAPS (Animal Theft Unit) and Nature Conservation organisations, such as the Loskop Dam Nature Reserve,

where WIPS is involved in the protection of Rhino's. (They have approx. 70 Rhino's at present).

WIPS provides trained Khwe nature conservation rangers to commercial farmers, at present in the Stoffberg, Middelburg, Loskop Dam, Groblersdal, Marble Hall and Rus-de-Winter areas. Initially the Khwe operatives cleared farms of snares, followed the tracks of poachers, called for the assistance of the SAPS and Nature Conservation when poachers where apprehended and recorded breaches in the game and security fences. They conducted game counts and studied game for sick animals etc.

Due to the excellent tracking abilities of the Khwe rangers, the functions of WIPS was soon expanded to recovering stolen cattle, goats and sheep, assisting the SAPS in tracking criminals responsible for robberies and farm attacks.

Recruitment

We work closely with the Khwe tribal leaders in South Africa and Namibia and all arrangements are made through them. All recruitment are done under the supervision of the tribal leaders. The names of men recruited are all noted at the local tribal chief.

Transport

WIPS transports these Khwe rangers to South Africa and after they have completed their contract bring them back to Namibia. If a ranger have to return home unexpectedly, we will arrange transport for him from Plantfontein to Namibia with Khwe taxis.

Permits

A one-year work permit is arranged through our labour broker.

Salaries

There will be no discrimination between RSA or Namibian citizens. All receive equal salaries with the minimum wage being N$2300 plus weekends. Every four months rangers receive a R200 increase. Maximum wage being R3300.

Contracts and conditions of work

All contracts and conditions of work will be as stipulated by the RSA department of labour.

My sincere thanks and appreciation.

(signed)
Col. Piet Groenewald (Retired)
Managing Director'

[49] It was common cause at the trial in the High Court that at least in respect of the men in the first group, the appellant recruited and transported them to Windhoek where he provided lodging and food to them and facilitated the procurement of their passports. He then transported them to South Africa where he deployed them to work for the clients of a close corporation of which he is the sole member. It was also not disputed that the appellant gave N$200 each to the wives of the men he recruited. This amount was eventually deducted from the men's salaries while in South Africa. What was in dispute was principally the question of whether the men were recruited and transported for the purpose of exploitation.

[50] Specific allegations contradicting the terms upon which the men were recruited (as set out in the letters to the traditional leaders and allegedly given verbally to the men) and of mistreatment as well as what amounts to exploitation were made against the appellant by some of the men during the police investigations prior to their testimony in the criminal trial. As previously noted, the versions dramatically and diametrically changed when the witnesses started to testify.

[51] The pivotal questions in the appeal are whether the men informed Mr Haindobo that the pertinent statements implicating the appellant in the alleged exploitation were incorrect and if so, at what stage of the proceedings was the prosecutor so informed? These questions will be considered later in the judgment, but first it is necessary to give samples of the statements wherein allegations of exploitation were made before embarking on the consideration of these key questions.

[52] One of the men who made the initial incriminating statements is Mr Daniel Kambathi who alleged that he and others were deployed to look after the fields of 'one boss' whose name he did not know. The appellant promised to pay the Namibians R2300 per month each, which amount never materialised. Instead, Mr Kambathi was only paid R1000 per month to buy food. He stated that he and his colleagues were ill-treated by the appellant. He detailed that although the appellant's father wanted the workers to be treated well, the appellant did not take his father's advice. He kept all the Namibian workers' passports while in South Africa.

[53] When Mr Kambathi had a medical issue with his knee the appellant, who is not a medical practitioner, administered two injections to him. He then charged the worker R60 for the medication. When the witness was about to return to Namibia, the appellant told him he would deduct R300 which was paid for his treatment from his wages. On 16 September 2013 shortly before the group returned to Namibia, they asked the appellant to give them the rest of the money he said he was

keeping for them. His response was that the workers had spent the money already and nothing of it was left.

[54] At the end of his statement, Mr Kambathi lamented the appellant's failure to give them payslips during their employment by his close corporation. He used to tell them the payslips were with a lawyer. They only got payslips on 16 September 2013 before departure to Namibia.

[55] Another witness who did not have flattering words to say about their treatment by the appellant was Luckson Hunny Jamaya. He narrated that before the men were taken to South Africa, the appellant promised to pay them more than what the South Africans in similar position were paid. Instead, the Namibians ended up being paid less than their South African counterparts. The Namibians were promised R4000 per month, but they ended up being paid only R1000 per month.

[56] They were also told that the rest of the money would be saved for them. Their passports were taken from them upon arrival in South Africa. When the men became sick, they were not taken to hospital. Instead, the appellant would give them medication. The witness gave an example of one Robert who got sick but was not taken to hospital.

[57] Barries Mbeleko was also one of the men taken to South Africa. He said that before they departed Windhoek, the appellant promised to pay him R2500 per month. In the end he was paid only R1000 per month. The appellant told him he

deducted money for food, transport, uniform and that some of it had been saved for him. He undertook to give him his savings, but when he returned to Namibia he was only given R1200. Mr Mbeleko also repeated the assertion that when one of the men became sick, the appellant himself would administer injections to him and deduct the cost thereof from the worker's salary. Interestingly, Mr Mbeleko concluded his statement by remarking that despite the alleged bad treatment he received from the appellant, he was still prepared to return to South Africa, hoping, he said, to convince the appellant to pay him his full salary next time around.

[58] A statement was also taken from Julai Robert. He too had travelled to South Africa on the appellant's employment. When he arrived in South Africa, he was given a uniform and was promised a salary of R2500 per month. He worked as a security guard at several farms. He and his colleagues did not receive any training. They were only issued with machetes and pepper spray. He was paid R1000 per month. When he asked where the rest of the money was, he was told that the appellant was saving it for him. When he went to a private doctor, the appellant deducted R500 from his salary.

[59] Upon arrival in Namibia on 16 September 2013, the appellant did not give him the money he allegedly saved for him. He also stated that the men's passports were kept by the appellant and were given to them only upon arrival at the border. In contradistinction to Mr Mbeleko's attitude towards the continued relationship with the appellant, however, Mr Robert said he was not prepared to return to South Africa because of the bad treatment he received there.

[60] Joseph Komisare Muyambango was yet another witness who deposed to an affidavit. Before he left for South Africa, the appellant promised to pay him R2300 per month. He was told his salary would be raised to R2500 after three months of service and that it would eventually reach R3000 per month. As things turned out, however, he was not paid as promised. He lamented the treatment he received, adding that when he fell ill he was never taken to hospital. Instead, the appellant administered medicine on him despite not being a medical doctor.

[61] Devels Ndonga was yet another one of the Namibians on the recruitment scheme. He worked as a security guard and was paid R1000 per month. He was told the appellant was saving the rest of the money for him. He stayed in South Africa for eight months but did not receive a single cent of the supposedly saved money upon his return to Namibia.

[62] The appellant was confronted during the civil trial, with the allegations made by the deponents and he denied all of them. It also emerged that while the men were still in South Africa, the appellant caused statements to be recorded from them by the South African police, exalting the appellant for the alleged good treatment the men received from him. Having provided a summary of the allegations of the men's treatment by the appellant, it is now opportune to turn to the brief discussion of the origin of offence of trafficking in persons, its foundation in Namibian law and its essential elements.

Offence of trafficking in persons

[63] Trafficking in persons is a serious violation of human rights that involves the exploitation of individuals through coercion, deception or force for various purposes, including exploitation, forced labour and servitude. It undermines human dignity and perpetuates cycles of poverty and vulnerability. The United Nations Convention Against Transnational Organised Crime and the Protocols Thereto of 15 November 2000 (the Convention), along with its Annex II (Protocol to Prevent, Supress and Punish Trafficking in Persons, especially Women and Children) (Annex II) serves as a crucial international legal framework to combat this scourge.

[64] The Convention promotes cooperation among states, encourages the adoption of effective national legislation, and emphasises the protection of victims. By establishing a comprehensive approach that includes prevention, protection, and prosecution, the Convention aims to strengthen the global fight against trafficking in persons and ensure a coordinated response to dismantle trafficking networks and support victims in their recovery and reintegration into society.

[65] Article 3(a) of Annex II defines 'trafficking in persons' as follows:

> '"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of the prostitution of others or other forms of sexual

> exploitations, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

[66] Article 3(b) of the Convention provides that the consent of a victim of trafficking in persons to the intended exploitation 'shall be irrelevant'. Therefore, it is not a defence open to a person charged with trafficking in persons to contend that the victim had consented to the intended exploitation.

[67] Article 5(1) of Annex II enjoins State Parties to adopt 'such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of [the] Protocol, when committed intentionally'. Additionally, article 5(2) requires of each State Party to adopt legislative and other measures necessary to create offences 'subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article'.

[68] Namibia has ratified the Convention, which has become part of the law of Namibia in terms of Article 144 of the Namibian Constitution, and pursuant to article 5 of Annex II and the ethos espoused in the Convention, has introduced measures through the enactment of POCA, aimed at criminalising, among others, the trafficking of persons. Part 2 of POCA contains provisions relating to trafficking in persons and the smuggling of migrants. Section 15 establishes the offence of trafficking in persons and provides for severe penalties upon conviction. The section provides as follows:

> 'Any person who participates in or who aids and abets the trafficking in persons, as contemplated in Annex II of the Convention, in Namibia or across the border to and from foreign countries commits an offence and is liable to a fine not exceeding N$1 000 000 or to imprisonment for a period not exceeding 50 years.'

[69] The maximum penalty for the offence embodied in the provision demonstrates the seriousness with which the Namibian legislature views the scourge of trafficking in persons. As noted earlier, the appellant was charged with contravening s 15 read with s 1 of POCA and the Convention.

[70] Section 1 of POCA is the definition provision, which defines 'trafficking in persons' as follows:

> 'Trafficking in persons means the recruitment, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation *and includes any attempt, participation or organising of any of these actions*. Exploitation includes, at a minimum, the exploitation or prostitution of other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.' (Emphasis supplied).

[71] As is apparent from the definition above, trafficking in persons is an extremely wide offence. Furthermore, the definition of 'trafficking in persons' in POCA is almost identical to the definition of that phrase in article 3(a) of Annex II which inspires s 15 of POCA. The only differences are that the word 'transportation' is not in the definition in POCA and the expression 'and includes

any attempt, participation or organising of any of these actions' is not part of the definition in Annex II.

[72] The following elements of the offence of trafficking in persons can be gleaned from the definition: to recruit, transport or transfer a person, by means of the threat or use of force or other form of coercion or abduction or fraud or deception or abuse of power or a position of vulnerability or of the giving or receiving of payment or benefit to achieve the consent of a person having control over another; for the purpose of exploitation. An attempt to perpetrate any of the above actions also constitutes an offence.

[73] An important consideration in the malicious prosecution claim against a prosecutor is the content of the docket on the basis of which the decision to prosecute was made and the prosecutor's subjective belief in the accused's guilt. It is important to observe at the outset that a distinction should be drawn between the date of the appellant's arrest and the date the decision to prosecute him was made. Although the appellant was arrested on 1 April 2013, the decision to prosecute him with trafficking in persons was made only in 2014, in a letter dated 21 February 2014. The witness statements summarised in the preceding paragraphs of this judgment undoubtedly informed the decision to prosecute.

[74] A reading of the relevant statements in the docket makes it clear that at the time the decision to prosecute was made, there was sufficient information on the basis of which the appellant could be prosecuted. Stated differently, at the time the Prosecutor-General decided to prosecute the appellant, there was reasonable and probable cause for his prosecution. The statements disclosed the essential

elements of trafficking in persons, namely the recruitment of persons by means of deception or of a position of vulnerability for the purpose of exploitation.

[75] The allegations made in the witness statements demonstrate that the men were deceived as to the conditions they were to be employed under: they were promised attractive salaries, but allegedly ended up being paid lower wages than those paid to locals similarly situated. On their face value, the allegations of the payment of lower wages point to the consideration that the men were effectively employed to provide cheap labour, which if proved at the trial would have constituted exploitation.

[76] Mrs Nyoni testified on behalf of the respondents in the court below. Her Unit gives guidance to prosecutors in intricate prosecutions of the offence and crimes covered by it. Mrs Nyoni stated that the statements from the seven men in the first group disclosed the elements of trafficking in persons and that she would have decided to prosecute the appellant based on the allegations made in those witness statements. Mrs Nyoni's evidence was not contradicted.

[77] At the civil trial, counsel for the appellant forcefully contended that the men were paid wages well above those paid in Namibia to similarly situated workers. It was further argued that the payment of such wages therefore left no scope for exploitation. This contention cannot be accepted as correct. The consideration that the men may have been paid wages higher than those paid to similarly situated workers in Namibia did not change the position at all. Surely, the standard for determining whether their employment amounted to exploitation should be

measured against the standard applicable in the country where they were employed rather than the country of origin. The evidence at the civil trial was that the men were recruited and worked on terms and conditions lower than those prescribed in South Africa, which constitutes exploitation.

[78] Other instances of possible deception could be gleaned from the allegation that the men were misled into believing that they would be paid better salaries, which promise never materialised; they allegedly did not receive proper medical care when they fell sick; their passports were allegedly taken away from them upon arrival in South Africa, and they did not make decisions regarding their own salaries. The appellant unilaterally, it would appear, decided to supposedly save the money for them, which money was allegedly not paid to them in any event. Undoubtedly, the information disclosed a reasonable and probable cause to prosecute at least up until the time the prosecutor, Mr Haindobo, had consulted with them shortly before they gave evidence (and then proceeded to retract all portions of their statements incriminating the appellant).

[79] The persons in question confirmed in the court below that their police statements incriminating the appellant were incorrectly taken down and were not read back to them. They confirmed that they had all disavowed their police statements prior to testifying in the Regional Court. The precise dates of the consultations with the prosecutor are not referred to in evidence although Mr Haindobo confirmed to the regional magistrate that he had consulted with the witnesses in the trial. He at times sought more time to do so, although not specifying the names of witnesses and the sequence of consultations.

[80] It is apparent from the record of the trial in the regional court that Mr Haindobo led their evidence as from 22 June 2016. Two of them were to give evidence on the first day of the trial, 22 June 2016. Another two of the seven gave their evidence on 23 June 2016, one of them on 24 June 2016 and two on 25 June 2016. Submissions were made on 30 June 2016. The appellant was discharged by the regional magistrate on 1 July 2016.

[81] The key question is whether there was a reasonable and probable cause to continue with the prosecution after the witnesses recanted the pertinent portions incriminating the appellant. The answer to this pivotal question depends on the evidence tendered during the civil trial, an aspect to which the next section of the judgment turns.

Evidence at trial regarding retraction of statements

[82] At the civil trial, several of the men in the first group who disavowed the allegations made in the statements relied upon to prosecute the appellant testified on behalf of the appellant. However, not all the witnesses testified that they had recanted what was in their statements to Mr Haindobo. Some only said that they never said what was in their docket statements and did not refer specifically to being consulted before testifying. In at least three of their statements for the civil action, the witnesses referred to their police statements being read to them prior to testifying but did not refer to Mr Haindobo by name.

[83] First, there is the witness statement of Daniel Kambathi who said that the statement was read to him in Rundu before testifying in the Regional Court and that he told the person reading it to him that it was wrong in several respects and he then specified the respects in which the police statement was wrong. These included the assertion that he never told the police that his group was going to work specifically at the appellant's farm, but that he told the police the group was told that they would work at farms in South Africa; that he did not tell the police he would be paid R2300 but that instead he told them he was promised a salary of R2500 per month; he denied ever having complained about having received bad treatment from the appellant; he also denied that the appellant administered an injection to him when he got sick, stating that he was actually taken to a doctor. He also stated that he had received all the payments and savings due to him.

[84] In his evidence at the civil trial, Kambathi stated that his police statement was not read back to him and was merely presented for his signature. He confirmed that it was read back to him before he testified in the Regional Court but pointed out to the person reading it to him that it was wrong. In cross-examination, he tried to explain why he signed the statement and was accused of lying by counsel. However, the issue of pointing out that it was wrong at the Regional Court was not canvassed with him.

[85] Secondly, there is the witness statement of Museka David Ndumba, who said that the police statement was read back to him before testifying in the Rundu Regional Court and that he pointed out that it was 'wrong in several respects' and then pointed out those respects. This witness would appear to have been

functionally illiterate. At the civil trial he denied signing the statement but he said it was read back to him. In cross-examination, he reiterated that he did not sign it and that it was not read back to him, only to concede that it was read back to him before he testified in the Regional Court.

[86] Thirdly, witness Devels Ndonga said his police statement was not read back to him by the police and contained several errors and that there was no interpreter present when it was taken. He said that the statement was read back to him for the first time at the Regional Court and he told 'the person' reading it to him that it contained errors. At the civil trial, he confirmed his witness statement. His cross-examination was mostly directed at elements in the police statement and on the question why he signed it if it was wrong but does not seem to have taken issue with his version concerning it being read to him at the Regional Court.

[87] Another witness Robert Julai, who did not appear to have made a witness statement, did not deal with the issue of having pointed out to the prosecutor that his statement was wrong in his evidence-in-chief but when cross-examined about all the inaccuracies in his police statement, said that the police statement was read to him at Rundu and that he told 'those people' that it was wrong.

[88] Then there is Joseph Komisare Muyambango (whose middle name and surname appear to have been misspelt in the civil trial as 'Kumisadi Muwambanu'). A police statement was taken from him. His evidence reveals that the circumstances in which the statement was taken were not ideal. He stated that he was searched and physically inspected by the police on his shoulders to

determine if he had marks of someone who was trained as a soldier while in South Africa.

[89] Importantly, Mr Muyambango confirmed that his statement was read to him at Rundu and that the person who read it to him is the one who asked him questions in court. He told the person that portions of his statement were wrong. His evidence on this aspect was not challenged in the extensive cross-examination that ensued. Mr Muyambango, like all the men in the first group who testified in the civil trial, was adamant that he was well treated by the appellant while in South Africa contrary to what was alleged in his police statement.

[90] The issue of whether the witnesses during consultations told Mr Haindobo that the material allegations made against the appellant were wrong was raised with Mrs Nyoni, but in a rather superficial way without much specificity with reference to what was said by which witness. In the end, counsel for the appellant only referred to one of the witness statements. In response, Mrs Nyoni initially stated that had she been in Mr Haindobo's position she would have carried on with the prosecution in the face of discrepancies but the full import and context of the evidence on this aspect was not properly put to her.

[91] Her answer is understandable given how poorly the proposition was put to her. Counsel for the respondents objected to the factual basis upon which the proposition was put to Mrs Nyoni and in no time the objection and the response thereto descended into protracted legal argument on the issue. Counsel for appellant ultimately submitted that he would advance argument on the issue,

correctly in my view, as the issue was a legal argument on the facts and Mrs Nyoni was merely expressing an opinion on the rather imperfect state of affairs put to her. Counsel for the appellant then argued, correctly, that it was an aspect that Mr Haindobo would need to answer for.

[92] Mrs Nyoni emphasised the prosecutor's duty, as an officer of the court, to disclose to the court if a witness markedly deviated from his or her statement. This is done through the mechanism of declaring the witness hostile, something that was not done in this case as noted earlier.

[93] The questions that arise in respect of the issue are: in the absence of the evidence by the witnesses who disavowed their statements, was there any other evidence on which the prosecution could rely to continue with the appellant's prosecution? Did the prosecutor still subjectively believe in the appellant's guilt? If so, on what basis was that belief held? The only person who could answer the last two questions is Mr Haindobo who made the decision.

[94] I note that counsel for the respondents argued that the witnesses did not specifically mention Mr Haindobo by name and that the 'person' they told about the errors in their statements might as well have been the interpreter or a police officer and not necessarily the prosecutor.

[95] This suggestion cannot be correct for the following reasons: (a) Mr Haindobo was the prosecutor in charge of the case, including the docket embodying the witness statements; (b) he interviewed the witnesses through an

interpreter in preparation for the trial; (c) the interpreter or the police on their own had no business or interest interviewing witnesses in preparation for the trial, and (d) there is no evidence, in any event, that they consulted the witnesses separately and independently of the prosecutor outside the scope of consultation prior to testifying. Therefore, although not mentioned by name, the only reasonable inference that can be drawn in the context is that the person in question is Mr Haindobo.

[96] The appellant pleaded that the statements on which the Prosecutor-General relied to prosecute him were wrong and he ultimately discharged the onus of establishing that the prosecutor who decided to prosecute was so informed during consultations prior to witnesses testifying. The Prosecutor-General bore the evidentiary burden to rebut the evidence presented on behalf of the appellant.

[97] Mr Haindobo is the only witness who could conceivably assist the Prosecutor-General to rebut the appellant's evidence that the witnesses informed the prosecutor that the statements recorded from them were wrong and did not reflect the correct position regarding the appellant's treatment of the witnesses.

[98] However, we know now that Mr Haindobo did not testify. No cogent explanation was given why he could not be subpoenaed given that despite the fact that he was by then no longer working for the State, there was no evidence that he was not available.

[99] It is apparent from the record that once the witnesses had recanted their statements and told Mr Haindobo that the material allegations of exploitation they made against the appellant were wrong, there was no evidence aliunde implicating the appellant. There was no indication or allegation, for example, that the defence's case may supplement the State's case or that additional evidence would emerge to strengthen the State's case. Worse still, the complete absence of an explanation from the person who decided to continue with the appellant's prosecution after new information was brought to his notice has considerably undermined the respondents' case.

[100] In the absence of an explanation of the basis on which Mr Haindobo decided to continue with the prosecution despite the emergence of new information which was brought to his notice, a strong inference can be drawn that he did not believe in the appellant's guilt or at any rate exhibited *animus iniuriandi* by deciding to proceed with the trial with the awareness that reasonable grounds for the prosecution were possibly absent reckless as to the consequences of his conduct, a finding that disproves the existence of reasonable and probable cause. The appellant's continued prosecution was, on the facts of this case, malicious and an improper exercise of a prosecutorial discretion.

[101] I would like to emphasise this point. When facts come to a prosecutor's notice subsequent to the initiation of the prosecution that the information on the basis of which the decision to prosecute was made is wrong and all indications are that no offence or crime has been committed and there is no other evidence on the basis of which to continue with the prosecution, the prosecutor is under a duty to

give notice to the prosecution authorities to stop the prosecution; otherwise he or she is liable. This should certainly be the norm in novel cases such as this one where the lack of skills on the part of the prosecutor on how to handle the case was self-evident, a circumstance possibly exacerbated by the novelty of the offence at the time but which cannot be an excuse when dealing with the liberty of an individual.

[102] In an intricate case such as this one, the prosecutor could have done well to consult the witnesses in advance. Had he done so, he would have realised that it would be foolhardy to continue with the prosecution. He would then have plotted strategy going forward and/or approached the head office of the Prosecutor-General where expertise in the subject matter could be found, as testified about by Mrs Nyoni, for guidance. Instead, the prosecutor interviewed witnesses on the day of the trial and when the witnesses recanted pertinent portions of the allegations made in their police statements, he resorted to flogging a dead horse by seeking to have the witnesses stick to their statements through what amounted to cross-examining them. In doing so, he unnecessarily prolonged the appellant's agony; not to talk about exposing him to further unnecessary expense.

[103] It would not be justifiable for a person who had reasonable and probable cause to prosecute but is subsequently informed that no offence was committed, to continue with the prosecution in the absence of evidence to the contrary or an explanation for such course of action.

[104] While I fully endorse the hallowed public policy of not encouraging malicious prosecution actions to give full recognition to the sanctity of the prosecutorial discretion in our criminal justice system, the countervailing public interest not to encourage prosecutions without reasonable and probable cause is also paramount and effect should be given to it in appropriate cases.

[105] Moreover, in circumstances such as those obtaining in this case, where the plaintiff pleaded and led evidence of the lack of reasonable and probable cause to prosecute and the defendant elected not to lead evidence in rebuttal, especially when the essential witness to its case was available, can only lead to one inference to be drawn, namely that the failure to call the witness in question may be a deliberate stratagem to avoid the witness damaging the respondents' case. In the circumstances, I have concluded that in the absence of an explanation, the decision to continue with the appellant's prosecution in respect of the first group is prima facie malicious. It is malicious and bereft of reasonable and probable cause. It remains to consider what the position is with regard to the second group.

Was there reasonable and probable cause to prosecute in respect of the second group?

[106] It will be remembered that in respect of the second group, the appellant was charged with attempted trafficking in persons. The allegation was that on or about 1 April 2013 at or near Chetto, in the district of Rundu, the accused wrongfully and unlawfully participated in the trafficking in persons as contemplated in Annex II of the Convention by recruiting the victims as farmworkers and attempting to transport them to South Africa for the purpose of exploitation. It will also be

recalled that an attempt to recruit and/or transport for the purpose of exploitation also constitutes the offence of trafficking in persons.

[107] In the civil trial, Mrs Nyoni was asked to express an opinion on whether there was reasonable and probable cause to prosecute the appellant in respect of this group. She stated that although she was able to discern recruitment and transportation elements in the allegations made in the police statements, she would not have charged the appellant as the State would have been unable to prove the elements of deception and whether the men were recruited for the purpose of exploitation. Mrs Nyoni's answer and views are understandable as they were given in the context of the main charge of trafficking in persons. Her attention was not drawn to the fact that in respect of the second group, the appellant was charged with attempted trafficking in persons which is in any event a competent verdict to the main charge.

[108] The prosecutor in the Regional Court did also not draw this distinction when he argued at the close of the State's case that a prima facie case had been established on the main count in respect of all the charges as far as the appellant was concerned.

[109] It is worth recapping the circumstances in which the appellant was arrested as background to deciding whether there was reasonable and probable cause for his prosecution in respect of the second group. The appellant was stopped by the police while on route to Windhoek to obtain passports for the 12 men he had recruited with the assistance of certain community leaders. It was common cause

that he had recruited the men after promising them terms and conditions similar to those made to the men in the first group. Indeed, some of those terms and conditions are to be found in the letters addressed to community leaders who assisted him to recruit the men. The unorthodox manner in which the appellant's malicious prosecution action was pleaded gave rise to a finding of non-compliance with the provisions of s 39 of the Police Act and his claim against the Minister was correctly dismissed. Had the claim been properly pleaded, the outcome may well have been different.

[110] Although there are question marks over the lawfulness of his arrest, when it comes to his prosecution after investigations had been carried out and based on the allegations made in the statements obtained from the men in the first group pertaining to the pattern of their treatment in South Africa, there was reasonable and probable cause for his prosecution on attempted trafficking in persons. Statements were taken from the relatives of the men in this group from 15 to 19 May 2013. Together with those taken from the alleged victims in September 2013, they formed the basis for the decision to prosecute the appellant in respect of trafficking in persons of this group of persons. Those statements have been found to be sufficient to justify the prosecution of the appellant in respect of the first group until each of the persons in that group informed Mr Haindobo that all the incriminating portions of their police statements were incorrect.

[111] The disavowal of the pertinent allegations made against the appellant only pertains to the men in first group and did not in my view affect the sufficiency of the information in the docket in relation to the second group as it concerns the

attempted trafficking in persons. There was thus sufficient information on the basis of which the commission by the appellant of the offence charged and an honest belief in the plaintiff's guilt could reasonably be inferred.

[112] It should be emphasised in this connection and as noted while dealing with the legal principles relating to malicious prosecution claims, that the facts required to establish the actual guilt of the plaintiff as the accused in the criminal trial is not the same as those necessary to establish a bona fide belief in the plaintiff's guilt in the malicious prosecution case. This broad approach should always be borne in mind so that one does not fall into the pitfall of adopting an approach that analyses the evidence led at the civil trial as if the exercise was an analysis of evidence in a criminal trial. In the result, the appeal against the dismissal of the claim in respect of the second group cannot succeed.

[113] It remains to consider the quantum of damages to be awarded to the appellant in respect of the first group. The starting point for this determination is that the appellant only achieved partial success.

Special damages

[114] In the course of his oral submissions, counsel for the appellant was requested by the court to address the court on the implications of damages in the event that this Court finds that the appellant was maliciously prosecuted in respect of the charges relating to the first group of persons. This would be from the time the prosecutor had consulted with them shortly before they gave evidence (and then proceeded to retract all portions of their statements incriminating the

appellant) until the end of the trial. Counsel was also requested to formulate a draft order incorporating that scenario.

[115] The draft order supplied by counsel for the appellant did not however specify the full implications of this eventuality upon the respective damages the appellant would have sustained in this prospect. The court was constrained to assess the impact of this possibility upon the duration of the trial and to consider the appellant's evidence in support of his claims for special damages in respect of the period in question. It also had to consider supporting documentation provided in the course of his testimony and thereafter make the necessary calculations.

[116] The investigation in relation to the charges involving the first group commenced shortly after the original charges were substituted for the trafficking in persons charges in May 2013. Statements were taken by the police from the men's relatives or partners from 15 to 19 May 2013 in the vicinity of Omega in the Zambezi region where those relatives resided. It has been found that there was reasonable and probable cause in respect of the charges relating to the second group.

[117] For the period from mid-May until Mr Haindobo's consultation with those persons on around 22 June 2016 when they were called at the trial, the appellant's prosecution would be justified in the sense that the appellant had not established a lack of reasonable and probable cause in respect of trafficking in persons in respect of those persons until they so consulted Mr Haindobo at the

commencement of the trial and informed him that their police statements were incorrectly taken down.

[118] Once the institution of proceedings became justified (in respect of the charges relating to this and the other group of persons), the appellant was obliged to travel for the proceedings and engage a legal representative to defend those proceedings. The appellant's travel and accommodation expenses prior to 22 June 2016 were necessitated by standing trial on the counts relating to this and the other group of persons.

[119] This Court has found that to proceed with the charges against the appellant in relation to the first group of persons after they disavowed the incriminating portions of their statements immediately prior to giving their evidence amounted to a malicious prosecution of the appellant.

[120] The question arises as to the impact of this finding upon the proceedings and the quantification of that impact for the purpose of awarding damages. As a practical matter, it is difficult to quantify the impact in terms of time spent on those charges with precision. A practical and pragmatic approach is thus called for.

[121] Assessing the evidence as a whole in the context of the proceedings, it would appear that a rough assessment can be made that the evidence of those witnesses in respect of those charges and the preparation of argument addressing them, would have taken about 50 per cent of the time spent in the criminal

proceedings in the Rundu Regional Court. This would include the preparation of argument prior to the conclusion of those proceedings.

[122] A 50 per cent allocation of legal costs and disbursements in relation to the criminal proceedings up to the ruling would in my view constitute a fair and reasonable award of special damages as a consequence of the appellant's malicious prosecution in those proceedings. The trial would have been approximately 50 per cent of the duration and approximately 50 per cent of counsel's time would have been involved in preparing and delivering argument on those charges.

[123] The trial ran over four court days (22, 23, 24 and 25 June 2016), submissions were made on 30 June 2016 and the ruling was given on 1 July 2016. I consider that the appellant should be awarded 50 per cent of the legal costs and disbursements for those days.

[124] A sum of N$24 000 was paid in respect of accommodation for this period to Ngandu Hotel and Casino CC. The evidence was that the actual charges in respect of accommodation were higher but the proprietor rounded the amount off down to N$24 000. These amounts were not disputed in cross-examination.

[125] The appellant would not be entitled to claim traveling and accommodation and legal costs prior to 22 June 2016, but he should be entitled to 50 per cent of his legal expenses and accommodation costs from 22 June 2016 to 1 July 2016 inclusively. These amount to N$115 000 in respect of two instructed counsel who

attended to the trial and N$24 796,30 in respect of his instructing legal practitioner. These charges are inclusive of VAT. Disbursements in respect of accommodation for the instructed legal practitioners for the period amounted to N$32 486 and N$3719 in respect of that period. The total expenses for which supporting documentation was found for this phase amounted to N$200 001,30. Fifty per cent (50%) of this amount would come to N$100 000,65. The total special damages thus amount to N$100 000,65. This is the amount of damages to be paid to him. It will be so ordered.

General damages

[126] There remains the question of general damages. As with special damages, the parties accepted that this Court would fix amounts in respect of damages rather than having the case remitted to the court below in the event that we were to find that a malicious prosecution had been established in respect of some of the counts.

[127] It has been found that a malicious prosecution only arose in respect of the charges relating to members of the first group in the course of the trial itself. Up to that point, the prosecution had been viable in respect of the counts concerning the second group. General damages would relate to the appellant's arrest and incarceration and the ensuing period of time until the trial and also take into account that the trial itself would continue in respect of the counts concerning members of the second group.

[128] Taking into account the particular circumstances of this matter and the stage of proceedings when the prosecution of certain of the counts was rendered malicious whilst others could continue, I consider that an award of N$50 000 for general damages would be appropriate.

Costs

[129] The general rule is that costs follow the event and are in the discretion of the court, which discretion must be exercised judicially in fairness to both sides. As the appellant is only partially successful, he cannot recover all his costs. I consider that he is entitled to 50 per cent of the costs both in the High Court and in this Court.

Order

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

(a) The appeal partially succeeds.

(b) The order of the High Court is set aside and substituted for the following order:

‘(i) The plaintiff’s claim against the second defendant partially succeeds.

(ii) Second defendant is to pay damages to the plaintiff in the amounts of N$100 000,65 and N$50 000, plus interest at the rate of 20 per cent

per annum a tempore morae from the date of judgment until the date of payment.

(iii) Second defendant is to pay 50 per cent of the plaintiff's costs, such costs to include the costs consequent upon the employment of one instructing legal practitioner and one instructed legal practitioner.'

(c) Second respondent is to pay 50 per cent of the appellant's costs in this Court, such costs to include the costs consequent upon the employment of one instructing legal practitioner and one instructed legal practitioner.

_____
SHIVUTE CJ

_____
DAMASEB DCJ

_____
SMUTS JA

APPEARANCES

APPELLANT:	J A N Strydom Instructed by Theunissen, Louw & Partners
RESPONDENTS:	S Namandje Instructed by Government Attorney