SUMMARY ***REPORTABLE***

CASE NO.: A 292/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EPHRAIM KAHORERE AND OTHERS v THE MINISTER OF HOME AFFAIRS AND OTHERS

PARKER J

2011 February 22

Delict - Arrest and detention – Where arrest and detention not in dispute – Onus on defendant to prove arrest and detention were lawful – Plaintiffs arrested on suspicion of theft of cattle – Court finding that on information received, which the second defendant (a police official) reasonably believed to be true, second defendant reasonably suspected plaintiffs to have committed a Schedule 1 offence in terms of s. 39, read with s. 40, of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA) – Consequently, Court finding that the second defendant has discharged onus cast on him to prove arrest and detention are lawful.

Delict - Arrest – Assistance offered by fifth defendant (non-police official) to the second defendant (a police official) at second defendant's request in arresting the plaintiffs – Court finding that fifth defendant had a statutory duty in terms of s. 47 of the CPA to give such assistance – Consequently, Court finding fifth defendant not liable.

Delict - Malicious prosecution – What plaintiff must prove – Court applying elements set out in *Akuake v Jansen van Rensburg* 2009 (1) NR 403 ('the *Akuake* elements') – Plaintiffs averring that because the charge of stock theft had been withdrawn in earlier proceedings and reinstated in subsequent proceedings that meant the latter was done as a result of the 'instance' of the fourth defendant and therefore the fourth defendant is liable – Court holding that consideration of averment ought to be subjected to the interpretation and application of Article 88 of the Namibian Constitution, dealing with the power of the Prosecutor-General's power as to whether to prosecute or not to prosecute in any individual case.

Evidence - Hearsay evidence – Court confirming what constitutes hearsay evidence – Court holding that statement made to the Police forming the basis of the Police reasonably suspecting the commission of the offence of stock theft by the plaintiffs not hearsay if information is placed before the Court.

Held, that where in a case it is averred that prosecution was carried on at the 'instance' of the defendant the Court must subject the consideration of the averment to the interpretation and application of Article 88 of the Namibian Constitution which concerns the power of the Prosecutor-General to whether to prosecute or not to prosecute in any individual case.

Held, further that evidence is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; and it is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made.

CASE NO.: A 292/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EPHRAIM KAHORERE	**First Plaintiff**
ISRAEL KAHORERE	**Second Plaintiff**
MANFRED TJIVAVA	**Third Plaintiff**

and

MINISTER OF HOME AFFAIRS	**First Defendant**
B JAN PETRUS BOOYSEN	**Second Defendant**
DETECTIVE SERGEANT VAN WYK	**Third Defendant**
AT VAN VUUREN	**Fourth Defendant**
JAN PIENAAR	**Fifth Defendant**

***CORAM*: PARKER J**

Heard on: 2009 July 6–16; 2010 January 18–27, 2010 June 21–2 July; 2010 December 1–9

Delivered on: 2011 February 22

JUDGMENT

PARKER J: [1] In June 2001 the first plaintiff, second plaintiff and third plaintiff were arrested on suspicion of having committed the offence of stock theft, involving 45 head of cattle, the property of the fourth defendant. In the course of their trial in the Gobabis Magistrates' court the charge against the plaintiffs was withdrawn in October the same year. Subsequent to that, in 2002 the plaintiffs were served with criminal summons to reappear for trial on the selfsame stock theft charge. In 2003 after the fourth defendant and a Rooinasie had testified the plaintiffs were

discharged in terms of s. 174 of the CPA. The plaintiffs instituted a civil action against the first defendant, second defendant, third defendant, fourth defendant and fifth defendant in which –

(1) the first plaintiff's claim is for:

    (a) unlawful arrest and detention, and

    (b) malicious prosecution

(2) the second plaintiff's claim is for:

    (a) unlawful arrest and detention, and

    (b) malicious prosecution

(3) the third plaintiff's claim is for:

    (a) unlawful arrest and detention,

    (b) malicious prosecution, and

    (c) assault

[2] The plaintiffs testified on their own behalf; no other witnesses were called to testify on behalf of any of the three plaintiffs. The second, third and fifth defendants testified. The second defendant was the arresting officer, and the third defendant was the investigating officer of the stock theft case. The fourth defendant was the complainant in the stock theft case, as aforesaid. The fifth defendant was the owner of Farm Masinde where all three plaintiffs were interviewed by the second defendant during the wee hours of 8 June 2001. Mr. Maherero, a police official, Mrs. Tuhadaleni, also a police official, and Mr. Podewiltz, who was the public prosecutor in the stock theft case against the plaintiffs in the Gobabis magistrates' court, testified for the defence.

[3] I shall consider the claim of unlawful arrest and detention first. Since the fact of arrest and detention is not disputed, the second defendant, who I find to have effected the arrest and detention, bears the onus of proving that the arrest and detention were lawful. (See *Lombo v African National Congress* 2002 (5) SA 668 (SCA); *Saviour Ndala Tutalife and Others v Minister of Home Affairs and Another* Case Nos. I588/2008 and I589/2008 (Unreported).)

[4] Under this claim, I find that each plaintiff was arrested and detained by the second defendant, a police official of the Namibia Police (NAMPOL), between the evening of 6 June 2001 and the early morning the following day. It cannot be disputed that since the arrest and detention were carried out by a NAMPOL official in the context of the commission of the crime of stock theft allegedly committed by the three plaintiffs, the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA) comes into play. The question I must answer is therefore this: did the second defendant have lawful reason to arrest and detain the plaintiffs within the meaning of s. 39, read with s. 40, of the CPA? (*Saviour Ndala Tutalife and Others v Minister of Home Affairs and Another* supra) In terms of s. 40 (1) (b) of the CPA the second defendant had the power to arrest the plaintiffs without a warrant so long as the second defendant reasonably suspected the plaintiffs to have committed the crime of stock theft which is a Schedule 1 offence in terms of the CPA.

[5] What was the basis of the second defendant's reasonably suspecting the plaintiffs to have committed the said offence? In this regard, I make the following factual findings. The second defendant requested, and

obtained, permission from his superior officer, Detective Inspector Isaacs, to assist in investigating the theft of 45 head of cattle, the property of the fourth defendant which theft the fourth defendant had reported to NAMPOL. From the aforementioned Johannes Rooinasie, the second defendant obtained what he considered to be useful information, which he believed to be reasonably true, that would assist him in his investigation. The second defendant prepared a statement based entirely on the information he had obtained from Rooinasie. According to that information, four persons were involved. Rooinasie identified two of them by name, i.e. the first and second plaintiffs, and a third whom he said he could identify if he saw him. The fourth suspect was unknown to Rooinasie; but Rooinasie said he knew where they all resided in Aroams.

[6] Following upon the information so received and which he reasonably believed to be true, as aforesaid, the second defendant proceeded to Aroams where Rooinasie pointed out to the second defendant the residences of the plaintiffs; the fourth suspect was not at home. Between the night of 6 June 2001 and early morning of 7 June 2001, as aforesaid, the second defendant arrested the plaintiffs at Aroams. Mr. Kasuto, counsel for the plaintiffs, sought to take issue with the fact that Rooinasie could not have pointed out the plaintiffs to the second defendant because according to Mr. Kasuto the plaintiffs did not see any such pointing out. This submission cannot take the plaintiffs' case anywhere further than where it is. For security reasons, Rooinasie was made to wear a balaclava at the material time to conceal his identity. I accept, as the second defendant testified, that this is standard police practice designed to protect persons who give such information to the

Police in an ongoing police investigation. It is my view therefore that the police practice *in casu* does not detract from the factual finding I have made that it was upon information received from Rooinasie that the second defendant proceeded not only to Aromas but also to the residence of each of plaintiff at Aroams; the fourth person was not at home, as I have already said.

[7] Mr. Kasuto sought strenuously and with great zeal to impugn the admissibility of the information by Rooinasie on the basis that it constituted hearsay evidence. Mr. Kasuto is palpably wrong. It is trite law that evidence is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. 'It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made' (*Subramaniam Public Prosecutor* [1956] 1 WLR 965 (Privy Council) at 969, approved by the Supreme Court of Canada in *R v Abbey* (1982) 138 DLR (3d) 202) In the instant case, I accept as credible the second defendant's testimony that he reasonably suspected that a crime had been committed upon information he had received from the fourth defendant. On that basis, I will add that under those circumstances as a police official the second defendant had a duty to investigate the commission of the crime. By a parity of reasoning, I accept the second defendant's testimony that based on the information he had received from Rooinasie he reasonably suspected that the plaintiffs had committed the offence of stock theft of the fourth defendant's 45 head of cattle; hence his arresting plaintiffs.

[8] Thus, from the aforegoing, I find that the second defendant arrested the plaintiffs because he reasonably suspected them of having committed a Schedule 1 offence, to wit, theft of stock. In this regard it must be remembered that the word 'reasonable' and its derivations like 'reasonably' have in law the prima facie meaning of reasonableness in regard to those existing circumstances of which the actor, called upon to act reasonably, knows or ought to know. (*Re Solicitor* [1945] 1 All ER 445 (Court of Appeal)) It follows that on the facts and in the circumstances of the instant case, I find that that the second defendant reasonably suspected the plaintiffs to have committed the offence of stock theft of the fourth defendant's 45 head of cattle cannot be faulted. Additionally, I find that the second defendant informed each plaintiff in a language he understood the ground for arresting him in fulfillment of the requirement in Article 11 (2) of the Namibian Constitution. Consequently, I hold that the arrest of each plaintiff is lawful.

[9] What about the detention? After he had arrested the plaintiffs at Aroams with assistance of the fifth defendant, as treated *infra*, the second defendant, with the assistance of the fourth defendant in the form of providing private transport to the Police, transported the plaintiffs to the Farm Masinde where the second defendant questioned the plaintiffs before taking the plaintiffs to Gobabis Police Station. I accept as plausible and reasonable the second defendant's explanation that the Police made use of private transport because there was at the material time a scarcity of Police motor vehicles. I do not see anything unreasonable or unfair or wrong in that. I also accept as reasonable and plausible the second defendant's explanation as to why he decided to take the plaintiffs to

Farm Masinde to question the plaintiffs there instead of taking them straight away to the Gobabis Police station from Aroams. The second defendant's explanation is, *verbatim et literatim*, that –

> '... at that stage we believed that, we will get some more information from the suspects when we are questioning them for location of the stolen cattle and it is very convenient to move to this Masinde. It is very close to Aroams and it was having facilities which we can use. And if we receive any information about the whereabouts of the cattle we can operate from there, to try and get the cattle.'

I do not find anything untoward and sinister in what the Police did. In the end the plaintiffs were detained at the Gobabis Police station.

[10] I pass to consider the claim that the fifth defendant assisted in the arrest of the plaintiffs and therefore he is liable. I fail to see how the assistance given to the second defendant by the fifth defendant, at the request of the second defendant, in arresting the plaintiffs constitutes delictual liability on the part of the fifth defendant, as Mr. Kasuto argued. In terms of s. 47 of the CPA every private adult male of an age not below 16 years and not exceeding 60 years is obliged by law, when called upon to do so by a police official, to assist such police official in not only arresting a person but also in detaining a person so arrested; and such adult male fails to so assist a police official at the pain of penal sanctions, unless the adult male shows sufficient cause for failing to render such assistance. The evidence is sufficient that the second defendant asked the fifth defendant for such assistance and the fifth defendant obliged as he was under a statutory duty, as I said previously, to so do. Accordingly,

I come to the inevitable conclusion that Mr. Kasuto's argument on the claim is without any merit whatsoever.

[11] For all the aforegoing, I hold that the second respondent has discharged the onus cast on him to show that the arrest and detention of the plaintiffs are lawful. Consequently, the claims of unlawful arrest and detention of all plaintiffs fail.

[12] I now proceed to deal with the plaintiffs' claim for malicious prosecution. In virtue of the rule in *Hollington v F Hewthorn and Co Ltd* [1943] 2 All ER 35 (Court of Appeal) and *Land Securities plc v Westminster City Council* [1993] 4 All ER 124 (Chancery Division, both cited with approval by this Court in *Martha Cecilia Van Wyk v Tshoopala Martin Ambata* Case No. I 1769/2004 (Unreported), any evidence adduced in the plaintiffs' criminal trial as proof of certain facts tending to establish the liability of the defendants in the present civil proceedings is irrelevant. The only aspect of the said criminal trial that has relevance in the present proceedings is whether there has been a termination of the criminal trial in relation to the claim of malicious prosecution (i.e. element (d) in the lettering presentation in the next paragraph).

[13] As respects the claim of malicious prosecution, each plaintiff must according to *Akuake v Jansen van Rensburg* 2009 (1) NR 403, *per* Damaseb JP, prove in relation to him that –

> '(i) that the defendant actually instigated or instituted the criminal proceedings;
> (ii) without reasonable and probable cause; and that

(iii) it was actuated by an indirect or improper motive (malice); and
(iv) that the proceedings were terminated in his favour; and that
(v) he suffered loss and damage.'

Relying on the authorities Damaseb JP stated at 404H:

> '... it is trite that the mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient to found liability for malicious prosecution.'

Damaseb JP went on to cite with approval at 405B *Madnitsky v Rosenberg* 1949 1 PH J5 to the effect that, on the other hand,

> 'When an informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer "instigates" prosecution.'

[14] I respectfully apply the law as proposed by Damaseb JP in *Akuake v Jansen van Rensburg* supra; it is good law, and so I adopt the elements set out therein ('the *Akuake* elements'). It follows that in order to succeed, the plaintiff must prove all the above-mentioned elements; that is to say, all the elements must exist together. The facts as I have found them to exist *in casu* are that in October 2001 the stock theft charge was temporarily withdrawn by the public prosecutor against the plaintiffs. Subsequent to that, in 2002, the plaintiffs were served with criminal summons to reappear for trial on the selfsame stock theft charge. In 2003 after the fourth defendant and Rooinasie had testified the plaintiffs were discharged in terms of s. 174 of the CPA. I shall return to this event in due course.

[15] In the instant case, I have no doubt in my mind that from the evidence, it is clear that the fourth defendant merely placed information before Namibia Police. When he did that he had no idea who the thief or thieves were. This view is buttressed in no small measure by the fact that the fourth defendant, by word of mouth and in Exh. XX (the 21 July 2001 issue of the *Windhoek Observer* newspaper) offered a reward to anyone who would give information that would lead *not only to the arrest and conviction* of the person or persons who had stolen his cattle *but also to the recovery* of his 45 head of cattle. (Italicized for emphasis) There is nothing malicious about a member of the public who has suffered a huge loss of his property at the hands of thieves – as was the situation of the fourth defendant – to place information of the fact of the theft with the Police and also offer a reward for information that in his or her view – which I find to be good and bona fide – would assist the Police in their investigation and, above all, would lead to the recovery of the lost item. Upon the authorities, I conclude that in the instant case the mere placing of information before the police as a result of which proceedings were instituted is insufficient to found liability for malicious prosecution.

[16] It was the plaintiffs' averment – indeed, a major plank the plaintiffs' case, as argued with great verve by Mr Kasuto – that the trial of the plaintiffs on the selfsame stock theft charge that resumed in 2003, after its temporary withdrawal in October 2001, was as a result of the fourth's defendant's 'insistence'; and so, therefore, according to the plaintiffs, the fourth defendant is liable. It behoves me to subject the consideration of the plaintiffs' averment to the interpretation and application of Article 88 of the Namibian Constitution in terms of which in the exercise of the

power as to whether to prosecute or not to prosecute in any individual case, the Prosecutor-General is not subject to the control of any other person or authority (*Ex parte A-G, In re Constitutional Relationship* 1998 NR 282 (SC)). Having done that, I hold that the plaintiffs' contention is groundless.

[17] It follows from the aforegoing reasoning and conclusions that the fourth defendant's conduct was not actuated by an indirect or improper motive (malice). The fourth defendant's reasonable and probable cause in placing the information before the police is that he had suffered a terrible loss, at the hands of unknown thief or thieves, of his property, the right to which is guaranteed to him by Article 16 of the Namibian Constitution. His conduct was good and bona fide and lawful; and so it cannot attract liability for malicious prosecution. I therefore I hold that the plaintiffs have failed to sustain the claim of malicious prosecution; and so this claim also fails.

[18] I now proceed to consider the claim of assault which is laid by the third plaintiff only. Under this claim, the Court is faced with two mutually destructive versions on either side of the suit. That being the case I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the Court to apply its mind not only to the merits an demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the Court would be justified in reaching the conclusions as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at

559D.) Additionally, from the authorities it also emerges that where the onus rests on the plaintiff and there are two mutually destructive versions, as aforesaid, the plaintiff can only succeed if the plaintiff satisfied the Court on a preponderance of probabilities that the plaintiff's version is true and accurate and therefore acceptable, and that the version on the opposite side is false or mistaken and should, therefore, be rejected. (See *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E); *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); *Shakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524; *U v Minister of Education, Sports and Culture* 2006 (1) NR 168.) Jones J put it succinctly this way in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 662 C-F:

> 'The upshot is that I am faced with two conflicting versions, only one of which can be correct. The *onus* is on each plaintiff to prove on a preponderance of probability that her version is the truth. This *onus* is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demeanour and impression are measure against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety (*National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E)).'

That is the manner in which I approach the determination of the third plaintiff's claim of assault.

[19] In his particulars of claim, the third plaintiff alleges that on 7 June 2001 at Farm Masinde the second defendant hit him with his right fist twice on his face and head, knocking him down more than once and also burned him with a prodder. The third plaintiff alleges further that the fifth defendant kicked him and threw him into a reservoir, full of water, and also burned him with a prodder. The second defendant and the fifth defendant deny that they assaulted the third defendant.

[20] I have carefully subjected the evidence on the claim of assault to the sort of scrutiny referred to above in the authorities cited previously. At the outset I must say that I find from the demeanour of the second defendant and the fifth defendant that they created a very good impression. They did not equivocate or prevaricate: they gave their answers to questions readily and without mental reserve in an attempt to hide the truth. The same cannot be said for the third plaintiff and indeed the first plaintiff who testified on behalf of the third plaintiff. For instance, the third plaintiff gave an improbable account of how he alleges the fifth defendant pulled him and carried him away and mounted some structure of steps while he carried the third plaintiff and threw the third plaintiff into a reservoir that was full of water. What is even more improbable is the way the third plaintiff described how the fifth defendant pushed the third plaintiff's head under the reservoir's water – not once, but several times – until after some time later when the fifth defendant pulled him out of the water and the fifth defendant, while he carried the

third plaintiff, descended the steps from the rim of the concrete structure of the reservoir. The third plaintiff does not say whether he struggled to free himself from the fifth defendant when the fifth defendant carried him up and down the steps of the reservoir.

[21] There is also no credible evidence that the fourth defendant burnt the third plaintiff with a prodder. It is also improbable that the second defendant gave the third plaintiff a blow with his fist on the third plaintiff's left eye, felling the third plaintiff. There is no evidence *aliuende* from, for instance, physical injuries or a medical report to support the third plaintiff's version. In this regard, I find that the medical report that was produced cannot assist the Court. The report simply refers to 'a redness of the right eyeball' of the third plaintiff; there is no mention of any other aspect, e.g. the medical cause of the 'redness'. On the contrary, the third defendant (the investigating officer) and Mr. T. Maherero (of the Gobabis Police Station) who took down a warning statement of the third plaintiff on 7 June 2001 did not observe any injuries on the third plaintiff. Mr. Maherero was not cross-examined on his testimony, and so his evidence remained unchallenged at the close of the defendants' case. Furthermore, Sgt Tuhadaleni, who was the charge office sergeant on duty on 7 June 2001 when the third plaintiff was brought to the Gobabis Police Station, observed no injuries on the third plaintiff. *A fortiori*, Sgt Tuhadaleni questioned all the three plaintiffs to ascertain from them if they had any complaints which she would have noted in the Charge Office Occurrence Book. The third plaintiff did not report any injuries or any other complaints to her.

[22] It is only the second plaintiff who testified that he saw the third plaintiff being assaulted with a fist at Farm Masinde. That is highly improbable; he does not say with any conviction how he could see that since he was not in the room where the second defendant interviewed the third plaintiff. His evidence is too improbable and it will be unsafe to rely on it, particularly if the second plaintiff's testimony is viewed against the third plaintiff's changing-the-post versions of the alleged assault. In the third plaintiff's statement to the police on 7 June 2001, around the day of the alleged assault, the third plaintiff does not state that he was assaulted at Aroams. And at Farm Masinde; the third plaintiff says that he was beaten several times with fists on his chest and stomach. Furthermore, having weighed the second plaintiff's evidence against the unassailable and credible evidence of police officials Maherero and Tuhadaleni, I feel confident to reject as false the second plaintiff's evidence on the point.

[23] Thus, having applied my mind not only to the merits and demerits of the two mutually destructive versions respecting the claim of assault, and furthermore having taken into account the credibility of the witnesses and the probability or improbability of what they say, I find that the version of the defence witnesses is more probable and so I accept it and the version of the plaintiff witnesses is false and so I reject it. It follows that in my judgment; I find that the third plaintiff has failed to discharge the onus of proving that the third plaintiff's version is the truth. Consequently, I hold that the third plaintiff's claim of assault fails.

[24] On the issue of costs, it was Mr. Van Vuuren's submission that the plaintiffs' claim should be dismissed with costs on the scale as between attorney and client. It would appear Mr Kasuto simply prayed for costs. As respects Mr Van Vuuren's submission; I do not think the conduct of the plaintiffs did reach the mark set by the authorities, albeit it is my opinion that the plaintiffs were misguided in instituting this action. In *Willem Adrian van Rhyn NO v Namibia Motor Sports Federation and Others* Case No. A 36/2006 (Unreported) at pp. 21-2, I cited with approval the principle of law that was applied in *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) where the respondents had applied for costs on a scale as between attorney and client. There, at 592B-D, Patel J had the following to say concerning the Court's discretion to award costs on the scale as between attorney and client:

> 'Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation shows total disregard for the opponent's rights (*Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (II)* 1046 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (*In re Alluvial Creek Ltd* 1929 CPD 532 at 535); *Mahomed Adam (Pty) Ltd v Barren* 1958 (4) SA 507 (T) at 509B-C; *Lemore v African Mutual Credit Association and another* 1961 (1) SA 195 (C) at 199; *Floridar Construction Co (SWA) (Pty) Ltd v Kries (supra* at 878); *ABSA Bank Ltd (Voklskas Bank Division) v SJ Due Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268D-E); that the application is foredoomed to failure since it is fatally defective (*Bodemer v Hechter* (*supra* at 245D-F)); or that the litigant's conduct is objectionable, unreasonable, unjustifiable or oppressive.'

[25] In the result I make the following orders:

(1) The first plaintiff's claim is dismissed with costs on the party and party scale; such costs to include costs occasioned by the employment of two instructing counsel and one instructed counsel.

(2) The second plaintiff's claim is dismissed with costs on the party and party scale; such costs to include costs occasioned by the employment of two instructing counsel and one instructed counsel.

(3) The third plaintiff's claim is dismissed with costs on the party and party scale; such costs to include costs occasioned by the employment of two instructing counsel and one instructed counsel.

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PARKER J

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