

03/04

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PROGRESS KENYOKO MUNUMA

ACCUSED 1

SHINE SAMULANDELA SHINE

ACCUSE

D 2

MANEPELO MANUEL MAKENDANO

ACCUSED 3

VINCENT LISWANISO SILIYE

ACCUSED 4

VINCENT KASHU SINASI

ACCUSED 5

ALEX SINJABATA MUSHAKWA

ACCUSED 6

DIAMOND SAMUZULA SALUFU

ACCUSED 7

HOSTER SIMASIKU NTOMBO

ACCUSED 9

BOSTER MUBUYAETA SAMUELE

ACCUSED 10

JOHN MAZILA TEMBWE

ACCUSED

11

ALEX MAFWILA LISWANI

ACCUSED

12

and

**THE STATE
RESPONDENT**

CORAM: MANYARARA, A..J

Heard on: 19.09.2005; 20.09.2005; 21.09.2005,
22.09.2005; 26.09.2005; 27.09.2005;
28.09.2005; 29.09.2005;
30.09.2005; 03.10.2005; 04.10.2005;
05.10.2005;
06.10.2005; 11.10.2005; 12.10.2005

Delivered on: 25 OCTOBER 2005

JUDGMENT:

MANYARARA, A.J. The accused were indicted in this Court on charges of high treason, sedition, public violence and unauthorized importation, supply or possession of firearms and ammunition.

They have entered special pleas in terms of the Criminal Procedure Act [51 of 1977 section 106 (3)] that the court has no jurisdiction to try them.

1st to 7th Accused and 9th, 10th and 12th accused are represented by Mr. Ndauendapo and 11th accused by Mr. Grobler. Mr. Small with him Miss Lategan represent the State.

All but one of the accused testified. Accused No. 11 John Mazila Tembwe alone elected not to testify without abandoning his contention that the Court has no jurisdiction to try him.

The allegations made in the plea explanations are identical except in the dates given. They read as follows:

1. On or about (date given) I left Caprivi and crossed the border illegally into Botswana due to persistent harassment by the Namibian Police (slash) Namibian Defence Force.
2. I was granted political asylum in Botswana and based at Dukwe Refugee Camp.
3. During (month and year given) I was forcibly and unlawfully arrested by the Botswana authorities and handed over to the Namibia Police.
4. I submit that my apprehension and abduction from Botswana and transportation to the Republic of Namibia and purported arrest and detention pursuant thereto is in breach of international law and wrongful and unlawful.
5. Under the circumstances I have not properly and lawfully been arrested and properly and lawfully been arraigned before a court of competent jurisdiction for purposes of trying me on the indictment preferred against me and should be discharged forthwith.

It is evident that the main thrust of the plea explanations is two-prolonged, viz that the Court must decline jurisdiction because:

- (a) The accused, after they were granted asylum in Botswana, were unlawfully arrested by the Botswana Police and handed over to the Namibian Police; and
- (b) Consequently their subsequent arrest and detention by the Namibian police is also unlawful.

The *onus* rested on the State to prove that the court has jurisdiction to try the accused and the State went about the task of discharging the *onus* resting on it by calling witnesses to give evidence of the manner in which the accused find themselves before the Court.

The first such witness was Detective Sergeant Kavenaue Kombungu with 19 years experience of police duties. During the relevant period he was stationed at Katima Mulilo and his area of operation covered the Ngoma border with Botswana.

On 12 December 2003 he received copy of a letter dated 11 December 2003. The letter originated from the office of the Inspector General of NamPol in Windhoek. It was addressed to the Regional Police Commanders for Caprivi, Oshikoto and Omaheke regions and Chief Inspector Goraseb was the Regional Commander for Caprivi.

The witness read the letter, produced as exhibit B1 into the record as follows:

**“RE: DEPORTATION OF NAMIBIAN REFUGEES FROM
BOTSWANA: 12 DECEMBER 2003**

I am forwarding the hereto attached copy of the letter from the High Commission of the Republic of Namibia to Botswana dated today 11th December 2003 in connection with the above-mentioned subject for information and immediate attention.

You are therefore, directed to take note that some of them might be suspects of the High Treason case in the Caprivi Region. You are further directed to liaise with the CID and Special Branch members on the subject in your respective regions for any possible immediate arrest for the High Treason case suspects.

Yours sincerely,”

The letter was signed on behalf of the Inspector General by the Deputy Inspector General Admin, who was the Acting Inspector General at the time and copied to: Commanding Officer: CID
Commanding Officer: SB”.

The attached copy of the letter from the Namibian High Commission in Botswana (exhibit. B2) was also read into the record as follows:

“The Permanent Secretary
Ministry of Home Affairs
Windhoek
Namibia
Dear Colleague

Deportation of Namibian refugees from Botswana

The Namibian High Commission to Botswana has today received a Note Verbale (attached) from the Ministry of Foreign Affairs and International Co-operation of the Republic of Botswana, informing it about the Botswana Government’s decision to deport eight Namibian refugees by tomorrow, 12th December 2003.

The refugees in question are being deported for violating the conditions of their stay in Botswana, as well as the United Nations Convention governing the status of refugees. More detailed information is contained in the attached Note from the Botswana Government.

The Mission has not been afforded time or the opportunity to verify the information contained in the Note, on the identities of the purported deportees, as the information arrived only today, while the date of

deportation is tomorrow. The Mission will, in the meantime attempt to obtain additional information regarding the time and place (border post) of the planned deportation.”

Signed & Copied to: The Permanent Secretary, Ministry of
Foreign Affairs

Office of the Inspector General, NamPol

The witness also read the Note Verbale attached thereto (exhibits B4 – 5) into the record as follows:

“The Ministry of Foreign Affairs and International Co-Operation of the Republic of Botswana presents its compliments to the High Commission of the Republic of Namibia and has the honour to inform the latter of a decision by the Government of Botswana to deport the following eight (8) Namibian refugees by **Friday 12 December 2003:**

1. Vincent Liswaniso Siliye
2. Samulandela Shine Samulandela
3. Progress Kenyoka Munuma
4. Vincent Salishando Sinasi
5. Diamond Samuzala Salufu
6. Mosweu Matthews Tembwe
7. Alex Sinjabata Mushakwa

8. Manepelo
Makendano

Manuel

The eight are being deported for violating both the conditions of their stay in Botswana as well as the United Nations Convention governing the status of Refugees.

In terms of Article I(C)I of the 1951 United Nations Convention on the Status of Refugees, under which the individuals were granted refugee status, the Convention shall cease to apply if an individual “has voluntarily reavailed himself of the protection of the country of his origin”. The eight have admitted to crossing into Namibia during their stay as refugees in Botswana.

The Ministry wishes to request the esteemed High Commission to inform the appropriate authorities in Namibia to facilitate the deportation process”

We were told that a “Note Verbale” is an official communication from one government to another government.

All the persons mentioned in the document except one are before the Court. The exception is Matheous Tembwe who was released when the charges against him were withdrawn.

Before handing the above exhibits to Detective Sergeant Kombungu, Chief Inspector Goraseb, the Caprivi Regional Commander, endorsed on the first page thereof the following instruction:

**“Detective Sergeant Kombungu
and Detective Shinana,
Take Note, travel to Ngoma
and do the necessary.”**

Detective Sergeant Kombungu visited Ngoma as instructed, accompanied by Detective Sergeant Popyeinawa. Other police officers joined them there.

At about 8pm, the Botswana immigration officers arrived at the Ngoma border post with the 8 persons mentioned by the Note Verbale and handed them over to the Namibian immigration officers together with the acceptance warrants relating to each of them (exhibits C1 – C8). The Namibian immigration officers signed for these persons and handed them and their respective acceptance warrants to the waiting police officers.

Detective Sergeant Kombungu described the acceptance warrants as follows:

Each warrant was issued on a letter head of the Botswana Government bearing the coat of arms of the Republic of Botswana, and is addressed to the Namibian authorities at Ngoma as follows:

“The prospective deportee whose particulars are appended below has been given Special Orders, in accordance with the Immigration Law of the Republic of Botswana, to leave

Botswana on or before 12 December 2003 to: Namibia which he claims to be his Country of Origin; please accord him the right of re-entry into his Country of Birth for purposes of Permanent Residence. The duly completed Repatriation Form is attached to this Warrant.”

That introduction is followed by the particulars of the named deportee as follows:

Name in Full
Place of birth
Name of mother
Nationality of mother
Name of father
Nationality of father
Present nationality of deportee

On all of exhibits C1 – C8 the nationality of the parents of the deportee is described as "Namibian" and this detail has been confirmed by each accused as correct.

The warrant concludes with the following declaration:

“I (followed by the deportee’s name) declare that I am a citizen of Namibia.”

Each declaration bears the signature of and is dated by the deportee in front of a Botswana immigration officer, and the

accused confirmed that the signatures appearing on the exhibits are theirs. The immigration officer also signed each warrant as the officer instituting the removal of the deportee from Botswana and attached the official date stamp mark.

We were also told that when the deportee is handed over to a Namibian immigration officer, the Namibian immigration officer signed the warrant as the officer accepting the deportee into Namibia and also attached the official date stamp mark. Mr. Richard Masule, the head of immigration in Caprivi, confirmed that exhibits C1 – C8 were signed and dated by the Namibian immigration officer on duty.

Detective Sergeant Kombungu said that it was Mr. Richard Masule, who was present, who handed over the deportees and their respective acceptance warrants to him before the police team drove them to Ngoma police station.

The next document shown to Detective Sergeant Kombungu he identified as the Occurrence Book kept at Ngoma Police Station, exhibit D1, wherein every event occurring in Ngoma is recorded. Entry 252 for Friday 12 December 2003 at 19h24 was made by him and he read it into the record as follows: (Quote):

“Detention: Detective Sergeant One, Kombungu for following suspect (s?) on CR 4 – 10/08/99 High Treason
One, Vincent Liswaniso Siliye
Two, Samulandela Shine Samulandela
Three, Progress Kenyoko Munuma
Four, Vincent Salindano Sinasi

Five, Diamond Samuzala Salufu
Six, Musheko Matheus Tembwe
Seven, Alex Sinjabata Mushakwa
Eight, Manepelo Manuel Makendano

Free from injuries, inspected by Detective Sergeant Kambungu.”(Unquote)”

Each name is followed by a reference number of the particulars of the individual concerned.

Detective Sergeant Kambungu explained that the CR (Crime Register) Number for the treason case is dated August 1999 because that is when Katima Mulilo was attacked. He also testified that the plea explanation of 1st accused creates the impression that he was in Dukwe and remained there as a political refugee from 27 October 1998 until December 2003 when he was deported to Namibia. However, according to information gathered by the investigating team, he and others were in fact in Namibia engaged in activities connected with high treason. The same applied to the rest of the accused before the court because the police have evidence implicating all the accused in the crimes of high treason committed during the period that they claim they were in Botswana.

The defence counsel put to Detective Sergeant Kambungu the accused's account of the events they allege occurred in Botswana with the aim of establishing the truth thereof. However, the witness had no knowledge thereof, nor could he be expected to have such knowledge as there was no evidence that he was present in Botswana at the time

to have witnessed the events described. His role, to which he testified and was cross-examined at very great length, was simply to receive the accused from the Namibian immigration officers and to treat them as suspects in the high treason case on account of the information gathered by the police team investigating the case.

Constable Fransina Nelumbu Kanime testified that she was on duty at the satellite police station on the Namibian side of Ngoma border post on 20 September 2002 when Botswana immigration officers arrived with two persons and handed them over to the Namibian immigration officers as illegal immigrants to Botswana. The Namibian immigration officers were going to hand them over to her but she decided to take the officials and the two deportees to Ngoma Police Station from where she telephoned the office of the Regional commander. She spoke to Inspector Serogwe and gathered that the police were expecting the deportees and she should hold them at the station and wait for him.

So she entered their names in the cell register and locked them up. They are accused No. 9 Hoster Ntombo and accused No. 11 John Tembwe. She did not record any CR number as she did not know the reason for their detention. In the remarks column she entered the words "Traveling prisoners from Botswana." That was the end of her involvement in this matter.

Detective Warrant Officer Theofellus Kamati was also at the relevant time stationed at Katima Mulilo attached to the treason trial investigation team. On 6 December 2002 he had accompanied Chief Inspector Goraseb to Ngoma on the understanding that they were to interview certain persons being deported from Botswana. They were

joined at Ngoma by Warrant Officer Nalisa. As they waited on the Namibian side of Ngoma, the Botswana authorities invited them to the Botswana side of Ngoma. They crossed into Botswana accompanied by Namibian immigration officers.

When they reached Botswana, they were led to a weighbridge where Chief Inspector Goraseb instructed Warrant Officer Nalisa to bring his vehicle alongside the Botswana vehicle which was parked there.

The Botswana officials opened the door of their vehicle and three deportees emerged from the vehicle in handcuffs. Kamati came to know them as Osbert Mweni Likanyi (who is currently an accused in the main treason trial at Grootfontein) and Boster Samuele Mubuyaeta Muketela (accused 10 before this Court) and Alex Liswani (accused 12 before this Court).

The Botswana officials removed the handcuffs from the three and they were loaded on the Namibian vehicle. The Namibian officials and the three deportees drove to the Namibian Ngoma border post where the usual immigration procedure was completed. Kamati was instructed to detain the three deportees in the Ngoma police cells in terms of the Immigration Act pending further investigations. The relevant entries were made in the cell register.

On 10 December 2002 the immigration charges were altered to high treason charges and the cell register entries were altered accordingly. Kamati made the relevant entry in the occurrence book as the arresting officer. He interviewed the accused Boster and Liswani for the purpose of taking a warning statement, after he introduced himself as a

police officer, produced his certificate of appointment and informed them of their rights. Both accused elected to remain silent.

Kamati agreed with Mr. Ndauendapo that the accused concerned were collected in Botswana territory. However, he maintained that their arrest and detention by the Namibian police were effected on Namibian soil and he adhered to that testimony. He had no knowledge whether any Namibian authorities had requested the Botswana authorities to deport the accused and, in my view, that put an end to the cross-examination.

Richard Kamwi Masule was at all relevant times the head of immigration for Caprivi and he broadly gave the same testimony of the collection of Likanyi and accused 10 and 12 as was given by the police witnesses.

He added that on that occasion the Botswana officials did not take with them the original copies of the acceptance warrants but left these with the Namibian immigration officers, saying that they would collect the originals after two days, which they did.

Masule testified that his signature does not appear on exhibits C1 – C8. These were signed in his presence by Anna Sitali, a senior immigration officer, and O.B. Luseho who had since passed away.

Under cross-examination by Mr. Ndauendapo, Masule stated that they had not received any deportation orders from the Botswana government relating to these accused. In any event, that was none of their business. Theirs is to accept deportees on the strength of the

acceptance warrants already described. On this occasion they waited on the Namibian side and only crossed over into Botswana when the Botswana authorities requested them to come and collect the deportees.

The cross-examination by Mr. Grobler did not take the matter any further.

Detective Sergeant Eino Popyeinawa was part of the police team investigating the high treason case. He accompanied Chief Inspector Putukeni and Detective Sergeant Kombungu to Ngoma border post to receive accused No. 9 and accused No. 11 on 20 September 2002. He informed the accused of their rights and arrested them on charges of high treason and recorded the arrest in the occurrence book exhibit E1 entries 81 and 82. The arrest took place on Namibian soil.

He was also present at Ngoma border post when 8 deportees arrived and were placed under arrest by Detective Sergeant Kombungu.

Cross-examination by the defence did not take the matter any further.

The Inspector General of the NamPol Sebastian Ndeitunga, also testified. It was he who signed the letter addressed to the regional commanders exhibit B1 as the acting Inspector General. He said that the purpose of the letter was to ensure that the 8 persons coming from Botswana were "properly processed" and checked against the list of persons wanted in connection with the high treason case.

He had not on any occasion requested the Botswana government to deport any persons, nor had the issue been discussed with Interpol or the Botswana Police. He just learnt when he received exhibits B2 – B5 that there were persons being deported from Botswana and he merely took precautionary measures to ascertain the “kind of people coming in.” He did not know where the decision to deport was made.

This was evidence of a formal nature and the cross-examination of the Inspector General on deportation and extradition procedures was of no assistance to anyone.

Mr. Nicky Panduleni Nashandi is the Deputy Permanent Secretary in the Ministry of Foreign Affairs. He testified that the bundle of documents produced as exhibits B2– B5 was received by his office from the Namibian High Commission in Botswana. As the contents were of no concern to his Ministry, he forwarded the bundle to the Ministry of Home Affairs.

As already mentioned, Chief Inspector Hieronymus Bartolomeus Goraseb was the Regional Commander for Caprivi during the relevant period. His testimony was broadly the same as the evidence already led from the other police officers who testified on the role that he played, that he endorsed the instruction to Detective Sergeant Kombungu on exhibit B1 to follow up the expected deportees and that he traveled to Ngoma with Warrant Officer Kamati and others to collect Likanyi and accused No. 10 and No. 12. He also asked no questions about the deportation procedure adopted as this was for the attention of the immigration authorities.

No new points arose from Mr. Ndauendapo's cross-examination of Chief Inspector Goraseb which concluded as follows:

“MR NDAUENDAPO: I have just the last question; you closed off your testimony by saying that you thanked the Botswana Government for their cooperation and assistance. Can you perhaps just elaborate on that, what do you mean by that? ---- My Lord the Caprivi region borders with FOUR (4) other countries and we have got bilateral relations with each of these countries on security and defence issues. And there exists I believe even today, a committee between the Caprivi region and the Tjobe district, which is meeting at least TWO (2) times in the year to discuss issues of common interest, such as crimes, cross-border crimes and so on, etcetera.

Is that relationship governed by any written agreement between the various countries? ---- There is in my knowledge, I may be right or wrong, there is an overall Commission on Defence and Security that exists between Botswana and Namibia, which is headed by our Ministers of Defence.

But is that governed by written agreement between the countries or it is just a verbal (intervention) ---- Well I wouldn't know, but what I know is that such a commission exists and it is because of that, that we have these meetings.”

The evidence ended on the following note:

“RE-EXAMINATION BY MR. SMALL: Just one aspect My Lord. For this cooperation; would you personally do something illegally in Namibia to assist your counterpart in the Tjobe district? ---- No My Lord. I can also state that the cooperation includes also joint operations on each other’s territory as well, such as we would have Botswana police officers come into Namibia and we would conduct raids on suspected places and then make searches and confiscate sometimes goods, etcetera. And the same would happen for example in Mavinga on the Botswana side. And those cases are on record.”

That concluded the State evidence which I have set out in some detail as the *onus* rests on the State of proving that the accused are properly and lawfully before this Court for trial.

As I have said, all the accused testified except accused No. 11 who elected to remain silent without abandoning his challenge of the Court’s jurisdiction on the grounds set out in his plea explanation. These are broadly similar to the plea explanations of the rest of the accused except that, unlike the rest, no dates are given when the events thus set out happened. As accused No. 11 elected not to testify, the date 20 September 2002 given by the police as the date of his deportation together with accused No. 9 Hoster Ntombo must be accepted as the correct date.

The gist of the evidence of the rest of the accused may be fairly summarized as follows:

1. They all left Namibia and crossed the border illegally into Botswana.

1st accused on 27 October 1998

2nd accused on the same date

3rd accused in July 2001

4th accused on 4 November 1998

5th accused on 12 January 1999

6th accused on 28 December 1998

7th accused on 5 November 1998

9th accused on 10 December 1998

10th accused on 6 November 1998 and

12th accused on 5 November 1998

2. Each of them was interviewed, granted asylum and accommodated at Dukwe refugee Camp in Botswana.

3. 1st – 7th accused testified that in September 2001 the Botswana authorities removed them from Dukwe under arrest and took them to the maximum security prison in Francistown.

They protested such treatment, the representatives of refugee and other human rights organizations came to their assistance and they were on 9 June 2003 removed from the prison and taken to the centre for illegal immigrants to await relocation to countries other than Namibia. To their surprise, during December 2003 the

Botswana police re-arrested them, drove them to Ngoma in handcuffs and leg irons and handed them over to the Namibian Police.

The accused gave lengthy and detailed accounts of the events to which they testified. This evidence was primarily of what they perceived as ill-treatment by the Botswana authorities.

4. 9th accused's plea explanation in its original form indicated that he had a similar experience. However, the typed date December 2003 was altered in ink to 20 September 2002, which he testified as the date when he was returned to Namibia. His testimony was that, he was removed from Dukwe on 20 August 2002 and taken to Kasana where he was incarcerated in a prison until 20 September 2002.

He was uncertain whether accused No. 11 Tembwe was also in Kasane prison during the same period. It is recalled that Tembwe elected not to testify. But they were handed over to Namibia together on 20 September 2002.

5. 10th accused Boster Samuele testified that he remained at Dukwe as a refugee from 6 November 1998 when he left Namibia until 7 November 2002 when he was arrested, taken to Kuzungula in Botswana and detained until 12 December 2002 when he was handed over to the Namibian police at Ngoma. However, his acceptance warrant shows that the Botswana immigration officials

handed him over to the Namibian immigration officials on 6 December 2002, the date to which his plea explanation had been altered.

The inference to be drawn is that accused Nos. 9, 10 and 11 have no knowledge of the maximum security prison in Francistown or the center for illegal refugees to which the rest of the accused testified.

Be that as it may, all the accused said that they regard the conduct of the Botswana and Namibian authorities as a violation of international law and human rights and the deportation and extradition laws of their own countries. They wanted the Botswana authorities to be called to deny these allegations.

The impression conveyed by the evidence of the accused and the inference I draw from the omission of dates from accused 11's plea explanation is that they were all untruthful on their whereabouts between the dates of their entry into Botswana and expulsion from Botswana. This lends credence to the evidence of the police that they had information of these accused's presence in Caprivi during the period that they allege they were in Botswana. Therefore, the balance of probability favours the State version as supported by the documentary evidence. It is also significant that none of the accused who testified gave evidence of the (quote) persistent harassment by the NamPol and NDF (unquote) alleged in all the plea

explanations. The inference to be drawn is that such harassment did not happen.

But as will be seen in due course, this evidence is irrelevant anyway.

Regarding their encounter with members of the Namibian Police, all the accused denied that any of them introduced himself or informed them of their rights before interviewing them for the purpose of taking warning statements. However, this is a procedural issue irrelevant to the question of the alleged abduction of the accused from Botswana by or with the connivance of the Namibian authorities.

Questions put by Mr. Small in cross-examination relating to the relevance of events in Botswana to the jurisdiction of this Court were either not answered or just evaded.

To illustrate this point, first accused Progress Munuma was content to deal with the question of the date when he arrived at Dukwe from Namibia as follows (quote):

*“--- I was supposed to answer that question my Lord,
but I don't see any need to answer it.*

Yes. So you are not prepared to answer that question during this, at this stage? ---- Yes I am unable to answer My Lord, because now we are dealing with the jurisdiction.

*So it's not a case of you not knowing when you arrived in Dukwe? It is just that you prefer not to answer it at this stage. --
- I am an elder person My Lord, so it is not that maybe I cannot answer the question. Now the, we are deal with the jurisdiction, so I cannot answer question, which was supposed to be answered or which will be answered in the near future. My Lord if you can ask me questions about the jurisdiction then I will be able to answer it.*

Yes. Let me perhaps put it this way Mr. then, Mr. Munuma, do you realize that if your Jurisdiction Application is successful there will be no hearing on the merits? --- My Lord it is better if you could ask me the questions on jurisdiction.”

And Mr. Small's gallant effort to get fourth accused Vincent Siliye to admit that he is a Namibian citizen floundered as follows (quote):

“MR SMALL: Yes. Thank you. On the 12th of December 2003, can you tell me what was your nationality? --- The question is not clear because I don't understand why only particular on that day? The question is not clear to me.

Were you at anytime in your life a national of any country? --- My Lord I was only in Caprivi.

And you stay in Caprivi for most of your life? --- That's correct My Lord until 4th of November when I went to seek political asylum in Botswana.

Would you agree with me that makes you a Namibian citizen? --- I didn't say I'm a Namibian citizen(ship) or not and I didn't mentioned that anywhere.

Let me rephrase, if I say that makes you Namibian would I be correct or incorrect? --- My Lord it is also very strange to emphasis on my citizenship. If I'm standing before this Court putting my Special Plea about the way I was deported from the country were I have been staying as a political refugee and handed over to the Namibian Government. I don't think it is, this has got something to do with my nationality.

So are you a Botswana citizen? --- My Lord I said I was granted political asylum to Botswana, in Botswana under the United Nation Conversion and no one stripped me off by any means at anytime by those status. So it means that I was supposed to be in Botswana now citizen or not.”

Counsel's addresses followed closely the written heads of argument filed in this matter. The Court is indebted to all counsel for their argument and the extensive learning contained in the authorities cited. However, at the end of the day the crisp issue to be decided is relatively by a narrow one.

Taking their cue from their respective client's version of their removal from Botswana and handing over to the Namibian authorities, Mr. Ndauendapo and Mr. Grobler, with the limitation that his client accused No. 11 did not testify, argued strenuously that the Court lacks jurisdiction because their respective clients were abducted from Botswana and transported to Namibia with the active participation of the Namibian Police. They argued at great length that this is breach of international law, and cited Botswana and Namibian legislation as well as decided cases relating to extradition and deportation and submitted that both the Botswana and Namibian governments acted in flagrant breach of their own domestic law and international law conventions. Therefore, this Court should decline jurisdiction on the ground that the State has not come with clean hands.

The Clean Hands Principle

The clean hands principle is enunciated in *S v Ebrahim* 1991 (2) SA 553 and explained in *S v Beahan* 1992 (1) SACR 307 (ZS). Both cases have been cited by Mr. Small but not by either Mr. Ndauendapo or Mr. Grobler.

The facts of the Ebrahim case are conveniently summarized in the Beahan case at 314 d – f as follows:

“In that case the appellant, a South African citizen by birth, fled to Swaziland in December 1980

whilst restricted to the magisterial district of Pinetown in Natal. In December 1986 he was abducted from his home in Mbabane (Swaziland) by persons acting as agents of the South African State and taken back to South Africa where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason, convicted and sentenced to 20 years' imprisonment with labour. Prior to pleading to the charge the appellant launched an application seeking an order that the Court lacked jurisdiction to try him inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed. An appeal against the ruling succeeded. After an exhaustive examination of the Roman and Roman-Dutch law, Steyn JA came to the conclusion that under both these systems the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area was considered as tantamount to abduction."

In the Beahan case, GUBBAY CJ (with whom the full court agreed) quoted with approval the following passage from the Ebrahim judgment at 582 C – E (in translation) which reads as follows:

“Several fundamental legal principles are implicit in those rules (of the Roman-Dutch law), namely, the preservation and promotion of human rights, good international relations and the sound administration of justice. The individual must be protected against unlawful detention and against abduction, the boundaries of jurisdiction must not be violated, State sovereignty must be respected, the legal process must be fair towards those who are affected by it and the misuse of the legal process avoided in order to protect and promote the dignity and integrity of the administration of justice. The State is also bound thereby. When the State itself is a party to a case, as for example in criminal cases, it must as it were come to court with “clean hands”. When the State is itself involved in an abduction over

territorial boundaries, as in the present case, its hands are not clean.

Rules such as those mentioned are evidence of sound legal development of high quality.”

The operative term is “abduction.” The evidence led by the State in the present matter is that Namibia played no part in the arrest and deportation to Namibia of the accused. This evidence is supported by the relevant acceptance warrants produced at this hearing whose authenticity the accused were quite unable to dispute.

In the Namibian case, Pineiro and Others v Minister of Justice and Others 1991 NR 283 (HC), it was held that the “clean hands principle” was not violated when Spanish vessels were arrested within South African waters and escorted to Luderitz by the South Africa navy.

Levy J. (as he then was) said at 295 I – 296 A:

“The essential and fundamental point in Ebrahim’s case was that the accused had been wrongfully and unlawfully abducted without the cooperation of the Swazi Authorities from Swaziland by the South African Police or its agents and brought against his will within the jurisdiction of South Africa Courts”

Beahan’s case is directly in point. There, a fugitive from Zimbabwe entered Botswana illegally, he was apprehended by members of the Botswana Defence Force and handed over to the Botswana Police. The subsequent events are set out eloquently in the passage at 317h – 318b, quoted by A.J.A Mtambanengwe at p18 of his typed judgment in the case of The State v Moses Limbo Mushwena and 12 Others Supreme Court Case No. 6/2004(not yet reported). The passage proceeds as follows:

“Upon it being ascertained that the authorities in Zimbabwe were anxious that he (Beahan) be returned to stand trial, he was conveyed in the

custody of the Botswana Police to the border between the two countries and voluntarily surrendered to the Zimbabwe Republic Police, who promptly arrested him. That conduct did not constitute a violation of international law for it involved no affront to the sovereignty of a foreign State.”

As I have said, this is the evidence led in casu (in this matter) which the accused tried in vain to discredit by refusing to answer questions which were directly in point or evading such questions by saying that the Botswana authorities should be called to deny their allegations that they were abducted.

GUBBAY CJ continued as follows:

“Even if it were assumed that a member of the Zimbabwe Republic Police had interrogated the appellant at the main police station in Gaborone and

thereafter requested that he be returned, such action does not avail the appellant. It is irrelevant to the issue.

The immutable fact is that the appellant was recovered from Botswana without any form of force or deception being practiced by the agents of this country. The decision to convey him to Zimbabwe was made, and could only have been made, by the Botswana Police in whose custody he was.

Where agents of the State of refuge, without resort to extradition or deportation proceedings, surrender the fugitive for prosecution to another State, that receiving State, since it has not exercised any force upon the territory of the refuge State and has in no way violated its territorial sovereignty, is not abreach of International law. The learned C.J. cited See Morgenstein 1952 The British Year Book of International Law 262 at 270-1: Oppenheim

*International Law 8th ed vol. 1 at 703 and In
O'Connell International Law 2nd ed vol 2 at 834.*

The Mushwena Case

The facts of the matter before me are indistinguishable from the facts of the application dealt with in the Mushwena case to which I have already referred.

In that case as in the present matter, the accused (all Namibian citizens) were charged with among other offences, high treason, public violence and unauthorized possession of firearms and ammunition.

The accused all alleged that they left Namibia and entered Botswana illegally, where they were granted political asylum and accommodated in refugee camps in Botswana.

On various dates during 1999, all but one of them left the refugee camps. They were apprehended and detained by the Zambian authorities at various locations on different dates. The Zambian authorities subsequently handed over the accused to the Namibian authorities who received them and promptly charged them as already mentioned.

As in the present matter, the accused in the Mushwena case challenged the Jurisdiction of the Namibian High Court to try them on the ground that they were abducted in Zambia and unlawfully handed over to the Namibian authorities. It was further alleged that the Namibian authorities connived with the Zambian authorities in the alleged abductions.

The Judge in the Court of first instance allowed the application. He held that the Court had no jurisdiction to try the accused and ordered that they should be released.

The State appealed to the Supreme Court and the appeal was heard by a full court of five Judges (Acting C.J. Strydom and Acting Judges of Appeal O'Linn, Chomba, Mtambanengwe and Gibson).

By a majority of 3 to 2 (Acting C.J. Strydom and A.J.A O'Linn dissenting) the Supreme Court allowed the appeal. It set aside the decision of the Judge in the Court below, and remitted the matter to him to proceed with the trial.

Essentially, the crisp issue was whether the State had come to court with clean hands. The crucial evidence was given by Major-General Shali of the NDF and Colonel Henry Kaleji of the Zambia Defence Force.

A.J.A Mtambanengwe referred to that evidence as follows:

“Asked what authority in law the Namibian authorities had to cross the border and arrest Nationals in Zambia, he (Shali) said:

“We did not cross the borders, even if it was few meters, to arrest these people. We were not in pursuit, it was not an operation. The Zambians were simply saying: “We are here, we have the people you’re looking for, come and collect them”, and that’s what we did. Now what law have we broken? What law? What act according to the Namibian Constitution or indeed that of Zambia, have we broken?”

and again:

“Let me try to clarify this once more, to say that the purpose, there are two things here, these are terrorists who are wanted here in Namibia for crimes

they have committed. Now they were in the hands of the Zambian authorities who wanted to deport them as illegal immigrants and the Zambian authorities asked us to go and collect them and they were only arrested after they were on the Namibia territory.”

And further, asked if the police collected them before they were deported, he stated:

“Nowhere in the law does it state that a person have to be deported only on the borders. He could be deported right from international airports in the centre of that particular territory.”

Lastly he clarified:

“Yes, please. --- Okay. I said I do not know how much you know of deportation processes. Before you deport any person or a group of them, you communicate a list. It was when we got the list that we realized that on that list indeed were this group of people we’re looking for and mind you, these were not the only people on the deportation list, there were a lot more, but these were the only ones that were on our terrorist list.”

In the course of that cross-examination Shali also denies that he and his “counterpart” (in Zambia) had planned and prepared that the respondents “must be arrested as illegal immigrants and deported back to Namibia.”

Colonel Henry Kaleji of the Zambian Defence Force was asked about connivance between Zambia and Namibian authorities. He answered Mr. Kauta as follows:

“All the actions which I took were not influenced by any external authorities. We arrested them because they were a threat on our side and that was one of my functions as Regional Commander to protect the security of the country.”

The view of A.J.A. Mtambanengwe was that the evidence shows clearly that it was the Zambian and Botswana authorities who took the initiative to deport the accused. As for the Namibian authorities, they welcomed the handing over.

A.J.A Gibson concurred as follows:

“-----the evidence showed that Zambians initiated the process of deportation independently of Namibia; that they only advised the Namibian authorities after rounding up the parcel of people they wished to expel”

And-

“With regard to the Botswana fugitives, there is not a single piece of evidence that Botswana’s actions were influenced or caused by any action on the part of Namibia. In any event if the surrender of the fugitives was the result of a cooperation between the three foreign States in combating lawlessness within their territories, there is good authority that such eventuality could not avail the Respondents.” See Beahan’s Case and S v Rosslee 1994 (2) SACR 441 (c).

It was also the evidence of Chief Inspector Goraseb that cooperation on issues of security existed between Namibia and her neighbours.

The irrefutable evidence in the present case is that in all instances it is the Botswana authorities who informed the Namibian authorities that they had decided to deport certain Namibians. I refer to the evidence of the Inspector General of the NamPol and the evidence of the Namibian immigration officers

stationed at Ngoma border post as well as the police officers who waited at Ngoma for the deportees.

All the present accused were handed over by the Botswana immigration officers to the Namibian immigration officers at Ngoma border post. The acceptance warrants signed and dated by the Botswana immigration officers support this evidence. There was no point in calling the Botswana immigration officers to come and tell us the same thing. The acceptance warrants speak for themselves. Also implicit in the Inspector General's letter exhibit B1 is an acknowledgement that the arrest of the accused by NamPol could only take place on Namibian soil.

Detective Sergeant Kombungu testified that it was after the Namibian immigration officers received the accused and signed and dated the acceptance warrants that the accused were handed over to the waiting police officers who arrested them and charged them with high treason.

Detective Sergeant Kombungu is a credible witness and his evidence is corroborated in all material respects by the documentary evidence and all the other State witnesses who testified, whose testimony is also credible. The suggestion by the accused that the State witnesses are bound to cling together and support each other's testimony because they are employed by the same institution - the State - is fanciful and must be rejected. It is credibility and quality of evidence which matter in a court of law. The facts which I find proved in this matter bring it squarely within the principles enunciated in the Mushwena case.

In that case, all the relevant authorities were cited and exhaustively considered by practically every learned member of the Court. I need not attempt to go over the same ground.

I am satisfied that each and everyone of the accused was handed over to the Namibian authorities by the Botswana authorities without any intervention by or connivance of the Namibian authorities. The reasons for the action taken by the Botswana authorities is contained in the Note Verbale and the acceptance warrants, delivered to and produced by the State

witnesses in whose custody they have been. But the truth or otherwise of these exhibits is no concern of the State witnesses or this Court. They are not hearsay as suggested by counsel for the accused. The point is effectively buried by the principle enunciated in the case cited by Mr. Small Rex v Miller and Another 1939 AD 106 at 119 as follows:

“A further objection was taken to these writings on the ground that they were hearsay. But statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e., as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are

admissible if what they are tendered to prove is relevant to the enquiry.”

The present enquiry is whether the Republic of Namibia played any part or connived in the decision of the Republic of Botswana to deport the accused. The evidence shows conclusively that it did not. The decision was entirely that of Botswana in the legitimate exercise of its powers as a sovereign State. Botswana merely informed Namibia of the decision and provided Namibia with lists of the persons to be deported as appears from the documentary evidence produced in this matter.

The accused happened to be on the lists and the Namibian immigration officers duly handed them over to the police who arrested them on Namibian soil and charged them with high treason.

I find that the State has satisfactorily discharged the onus of proving that all the accused have been properly and lawfully brought before the Court.

Therefore the Court has jurisdiction to try the accused and the special pleas are all dismissed.

MANYARARA, AJ

**ON BEHALF OF THE APPLICANTS: MR. N.
NDAUENDAPO**

(ACCUSED 1 - 7, 9,10

& 12)

ADV. Z.J. GROBLER

(ACCUSED 11)

Instructed by:

Directorate of Legal

Aid

ON BEHALF OF THE RESPONDENT: ADV. D. SMALL &

ADV. A. LATEGAN

Instructed by:

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ON BEHALF OF THE STATE

Mr Small

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**ON BEHALF OF ACCUSED NO. 1-7,
9, 10 & 12**

Instructed by:

Mr Ndauendapo

ON BEHALF OF ACCUSED NO. 11

Instructed by:

Mr Grobler